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The **NORTH CAROLINA REGISTER**

IN THIS ISSUE

EXECUTIVE ORDER

IN ADDITION

Final Decision Letter

PROPOSED RULES

Administration

Architecture, Board of

Environment, Health, and Natural Resources

Human Resources

Justice

Mortuary Science, Board of

Pharmacy, Board of

Physical Therapy Examiners

Real Estate Commission

RECEIVED

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LIST OF RULES CODIFIED

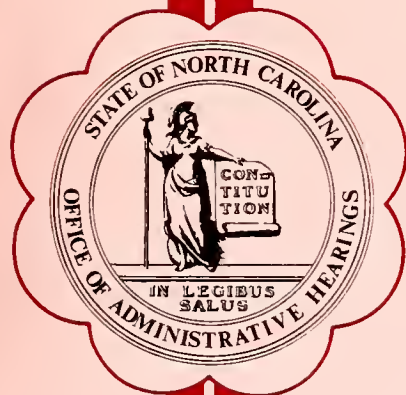
RRC OBJECTIONS

RULES INVALIDATED BY JUDICIAL DECISION

CONTESTED CASE DECISIONS

ISSUE DATE: April 1, 1993

Volume 8 • Issue 1 • Pages 1 - 92



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

(January 1993 - 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
*****	*****	*****	*****	*****	*****	*****
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
02/01/93	01/08/93	01/15/93	02/16/93	03/03/93	03/20/93	05/03/93
02/15/93	01/25/93	02/01/93	03/02/93	03/17/93	03/20/93	05/03/93
03/01/93	02/08/93	02/15/93	03/16/93	03/31/93	04/20/93	06/01/93
03/15/93	02/22/93	03/01/93	03/30/93	04/14/93	04/20/93	06/01/93
04/01/93	03/11/93	03/18/93	04/16/93	05/01/93	05/20/93	07/01/93
04/15/93	03/24/93	03/31/93	04/30/93	05/15/93	05/20/93	07/01/93
05/03/93	04/12/93	04/19/93	05/18/93	06/02/93	06/20/93	08/02/93
05/14/93	04/23/93	04/30/93	05/29/93	06/13/93	06/20/93	08/02/93
06/01/93	05/10/93	05/17/93	06/16/93	07/01/93	07/20/93	09/01/93
06/15/93	05/24/93	06/01/93	06/30/93	07/15/93	07/20/93	09/01/93
07/01/93	06/10/93	06/17/93	07/16/93	07/31/93	08/20/93	10/01/93
07/15/93	06/23/93	06/30/93	07/30/93	08/14/93	08/20/93	10/01/93
08/02/93	07/12/93	07/19/93	08/17/93	09/01/93	09/20/93	11/01/93
08/16/93	07/26/93	08/02/93	08/31/93	09/15/93	09/20/93	11/01/93
09/01/93	08/11/93	08/18/93	09/16/93	10/01/93	10/20/93	12/01/93
09/15/93	08/24/93	08/31/93	09/30/93	10/15/93	10/20/93	12/01/93
10/01/93	09/10/93	09/17/93	10/16/93	10/31/93	11/20/93	01/04/94
10/15/93	09/24/93	10/01/93	10/30/93	11/14/93	11/20/93	01/04/94
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 4
COMMISSION ON WORKFORCE
PREPAREDNESS AND ITS
INTER-AGENCY COORDINATING
COUNCIL**

WHEREAS, the United States Congress has granted each State, in accordance with the Job Training Partnership Act Amendments of 1992 (Title VII), the option to establish a single State human resource investment council; and

WHEREAS, the Governor and heads of State agencies responsible for the administration of Federal human resource programs jointly agree to include these programs under the jurisdiction of a single State human resource investment council; and

WHEREAS, the Governor and the North Carolina Advisory Council on Vocational and Applied Technology Education jointly agree to the establishment of a single State human resource investment council;

NOW THEREFORE, by the authority vested in me as Governor by the constitutions and laws of North Carolina and the United States, it is **ORDERED**:

Section 1. ESTABLISHMENT

A. The Commission on Workforce Preparedness ("Commission") is hereby established as the human resource investment council for North Carolina, as permitted by title VII of the federal Job Training Reform Amendments of 1992.

B. An Inter-Agency Coordinating Council ("ICC") is also hereby established.

Section 2. MEMBERSHIP

A. The Commission shall consist of up to 40 members appointed by the Governor as prescribed by title VII, section 702 of the federal Job Training Reform Amendments of 1992. Their terms shall begin on July 1, 1993 and shall be staggered in the following manner for the first three years: 15 members serving two years, and 15 members serving three years. After the first two years, each appointment shall be for a term of three years.

B. The ICC shall consist of senior-level management representatives from each state agency administering a workforce preparedness program. The members shall be appointed by the

head of the agencies involved and may include a representative from a program under the federal Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

Section 3. CHAIRPERSONS

A. The Governor shall appoint a chairperson for the Commission, who shall serve at his pleasure.

B. In turn, the Commission Chairperson shall appoint the Chairperson of the ICC, who shall serve at her pleasure.

Section 4. MEETINGS

A. The Commission shall meet quarterly and at other times at the call of its Chairperson.

B. ICC shall meet as necessary to effect its purposes at the call of its Chairperson.

Section 5. PURPOSE

A. The sole purpose of the ICC is to provide technical advice to the Commission. It shall have no voting nor any other powers within the Commission.

B. The Commission shall have the following duties and responsibilities:

1. Advise the Governor, General Assembly, state agencies, and private businesses about policies and programs which enhance the skill and expertise of the State's workforce;
2. Coordinate the activities of the Preparedness Programs;
3. Create a comprehensive Workforce Preparedness System ("System") that is market-driven and customer-focused. The System shall include:
 - a. common definitions and assessment criteria so that clients can conveniently enter the System at any point;
 - b. a program to link Preparedness Programs' data collection systems for easier, more consistent evaluation of and reporting on clients throughout the System; and
 - c. evaluation methods and procedures to assess the result of the System's various Preparedness Programs.
4. Submit to the Governor and General Assembly a biennial strategic plan for Workforce Preparedness to include:
 - a. a statement of goals and objectives for the coming biennium;

- b. an inventory and assessment of all Preparedness Programs;
 - c. an assessment of the vocational education, basic and remedial education, employment, and job training needs of the State's labor market;
 - d. an evaluation of the ability of each of the System's programs to:
 - (i) meet State goals and objectives,
 - (ii) reach the outcomes necessary to both employers and individual citizens who need System services, and
 - (iii) coordinate with other System programs;
 - e. recommendations for policy changes and funding for effective implementation of the System; and
 - f. recommendations for effecting cost savings and filling gaps in existing Workforce Preparedness policies and programs.
5. Develop and promote strategies for:
- a. cooperation between the academic, governmental, and private business sectors; and
 - b. acquisition of private resources to develop the System.
6. Perform all other duties and responsibilities prescribed:
- a. by title VII, section 701, of the federal Job Training Reform Amendments of 1992, and subsequent legislation; and
 - b. for existing state councils under the laws relating to federal human resource programs.

Section 6. WORKFORCE PREPAREDNESS PROGRAMS

A. The federal resource programs created by the following statutes are hereby designated as North Carolina's Workforce Preparedness Programs:

- 1. Adult Education Act (20 U.S.C. 1201 et seq.);
- 2. Carl D. Perkins Vocational and Applied Technology Education Act (20 U.S.C. 2301 et seq.) ("Perkins Act");
- 3. Wagner-Peyser Act (29 U.S.C. 49 et seq.);

- 4. National and Community Service Act of 1990 (42 U.S.C. 12501 et seq.);
- 5. Part F of title IV of the Social Security Act (42 U.S.C. 681 et seq.);
- 6. Job Training Partnership Act (29 U.S.C. 1501 et seq.);
- 7. Employment program, section (6)(d)(4), Food Stamp Act of 1977 (7 U.S.C. 2015 (d)(4)); and
- 8. all other applicable federal human resource programs, with the exception of any programs under the federal Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.).

B. In addition, all State resource programs which involve vocational education, basic and remedial education, or job training are designated as Workforce Preparedness Programs.

Section 7. COOPERATION OF STATE AGENCIES

All State agencies shall cooperate with the Commission and the ICC as they implement their duties and responsibilities.

Section 8. ADMINISTRATION AND EXPENSES

A. With the exception of reviews by the State Auditor, the Commission shall be independent of programmatic, fiscal, or administrative control by any other state agencies, boards, commissions, councils, or individuals.

B. The Commission is authorized to retain such professional, technical, and administrative support services as may be necessary for itself and the ICC.

C. The operating budget for the Commission and the ICC shall derive from such funds as the Preparedness Programs may designate from federal resources available for state councils, such as under section 123 (a)(2)(D) of the Job Training Reform Amendments of 1992 and section 112 (g) of the Perkins Act. Also, each State agency participating in the System may provide additional funds to support the Commission and ICC from its own budget.

D. Members of the Commission and its staff shall receive necessary travel and subsistence expenses in accordance with State law.

Section 9. RECESSIO OF PRIOR ORDERS

Executive Orders Numbered 143, and 159 by Governor James G. Martin are rescinded effective June 30, 1993. Order 143 had set up the

Advisory Council on Vocational and Applied Technology Education, and Order 159 had set up the current Commission on Workforce Preparedness.

This Executive Order is effective July 1, 1993 and shall remain effective until terminated. As mandated by section 703(c) of the Act, Certification of the establishment and membership of the Commission shall be sent to the U.S. Department of Labor at least 90 days before the beginning of each period of two program years for which a plan is submitted.

Done in the Capitol City of Raleigh, North Carolina this 10 day of March, 1993.

G.S. 120-30.9H, effective July 16, 1986, requires that all letters and other documents issued by the Attorney General of the United States in which a final decision is made concerning a "change affecting voting" under Section 5 of the Voting Rights Act of 1965 be published in the North Carolina Register.

U.S. Department of Justice

Civil Rights Division

Voting Section

P.O. Box 66128

Washington, D.C. 20035-6128

JPT:LLT:TGL:tlb

DJ 166-012-3

93-0157

March 9, 1993

DeWitt F. McCarley, Esq.
City Attorney
P. O. Box 7207
Greenville, North Carolina 27835-7207

Dear Mr. McCarley:

This refers to the annexation [Ordinance No. 2537 (1992)] and the designation of the annexed area to an election district for the City Greenville in Pitt County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on January 21, 1993.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

By:

Steven H. Rosenbaum
Chief, Voting Section

**TITLE 1 - DEPARTMENT OF
ADMINISTRATION**

**SECTION .0200 - NON-MAJOR
ACTIVITIES**

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration intends to adopt rules cited as 1 NCAC 39 .0101, .0201, .0301.

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

The public hearing was conducted at 10:00 a.m. on February 23, 1993 at the Administration Building, Commission Room 5034, 116 West Jones Street, Raleigh, NC 27603-8003.

Reason for Proposed Action: To allow the Department of Administration to regulate exceptions to the Environmental Policy Act pursuant to G.S. 113A-11.

Comment Procedures: The time for submitting comments on these proposed rules has been extended until April 16, 1993. Comments may be submitted in writing to Chrys Baggett, State Clearinghouse, 116 West Jones Street, Raleigh, North Carolina 27603-8003.

**CHAPTER 39 - DEPARTMENT OF
ADMINISTRATION'S MINIMUM
CRITERIA**

SECTION .0100 - PURPOSE

.0101 PURPOSE

The purpose of these minimum criteria is to establish criteria levels for minor operations or small routine facility projects below which no filing of environmental documents under G.S. 113A shall be required. The primary emphases of these minimum criteria are to:

- (1) insure that adequate protection is provided to the environment in the State Government Center and at other properties under the control of the Department of Administration throughout the state; and
- (2) permit the implementation of the routine operations, maintenance, repair, or construction tasks which the state is required to undertake without undue delay or expense.

.0201 NON-MAJOR ACTIVITIES

The following list of criteria shall be considered as descriptive of routine operations, small construction projects, and routine maintenance projects which do not require the filing of an Environmental Impact Statement, Environmental Assessment, or a Finding of No Significant Impact:

- (1) Any single action which involves relocation of staff members into a site using existing State buildings or leased buildings for which the building occupancy classification is not changed.
- (2) Routine disposal operations of hazardous chemicals, asbestos, or other environmentally sensitive operations for which a written procedure has been established, reviewed by appropriate authority, and determined to be in keeping with state or federal law.
- (3) Routine repairs and housekeeping projects which maintain a facility's original condition and physical features, including re-roofing and minor alterations where in-kind materials and techniques are used. This also encompasses structures 50 years of age and older and for which no separate law, rule, or regulation dictates a formal review and approval process.
- (4) Demolition of or additions, rehabilitation and/or renovations to a structure not listed in the National Register of Historic Places or less than 50 years of age.
- (5) Purchase by the Department of Administration using Department of Administration's sponsored funding of real estate for which the use of the real estate does not vary from its intended purpose or function at the time of purchase.
- (6) The use of chemicals for boiler feedwater treatment, cooling tower water treatment, pesticides, herbicides, cleaning solvents, and other chemical products which may be considered environmentally sensitive, provided the materials are stored and utilized in keeping with the applicable Material Safety Data Sheet (MSDS).
- (7) The handling of asbestos incident to a repair, maintenance, or minor

construction project provided that the asbestos material is removed, stored, disposed of, and handled in accordance with published Department of Administration's procedures for processing asbestos.

(8) New construction involving all of the following:

- (a) Less than 10,000 square feet;
- (b) Less than two hundred thousand dollars (\$200,000) cost;
- (c) Less than one acre of previously undisturbed ground unless the site is a National Register archaeological site; and
- (d) The use of the structure does not involve the handling and/or the storage of hazardous materials.

(9) Routine grounds maintenance and landscaping.

(10) Routine paving or repair of existing parking lots shall fall within the minimum criteria.

(11) Installation of outdoor sculpture(s) or exhibits.

(12) Acquisition or enlargement of a state-owned historic site or museum to be managed in accordance with plans for which environmental documents have been approved.

(13) Granting of leases, easements, or permits authorizing private use of public land for any of the following:

- (a) Installation of aerial and sub-aqueous pipes or pipelines for the transportation of potable water, and any cable line or line for the transmission of electrical energy, telephone or telegraph messages, and radio and television communications.
- (b) Communication towers not located on wetlands, park lands, or areas of recognized natural, scenic, recreation, archaeological, or historic value.
- (c) Construction of a road in accordance with accepted design practices and in compliance with North Carolina Department of Transportation standards and specifications, involving less than 25 cumulative acres of ground surface.
- (d) Filling below the mean high water mark when such filling has been approved by the U.S. Army Corps of Engineers or the North Carolina Division of Coastal Management.
- (e) Sewer line installations with less than

three miles of new lines and a design volume not exceeding 1,000,000 gallons per day or individual pump stations not exceeding 1,000,000 gallons per day.

(f) Ground water withdrawals of less than 1,000,000 gallons per day where such withdrawals are not expected to cause a significant alteration in the established land use patterns, or degradation of ground water or surface water quality.

(g) Where the proposed private use of the public land does not exceed the minimum criteria established by the agency recommending the lease, easement, or permit.

(14) Exchange or purchase of land where no agreement exists for the private land to be developed for use in any way that results in a change in the natural cover or topography prior to the exchange or purchase.

(15) Timber harvest in accordance with the National Forest Service or the North Carolina Division of Forest Resources Management's Plans.

Statutory Authority G.S. 113A-11.

SECTION .0300 - EXCEPTIONS

.0301 EXCEPTIONS TO MINIMUM CRITERIA

The Secretary of the Department of Administration may determine that environmental documents under the North Carolina Environmental Policy Act are required in any case where one of the following findings applies to a proposed activity:

(1) The proposed activity may have a potential for significant adverse effects on wetlands, park lands, prime or unique agricultural lands, or areas of recognized natural, scenic, recreational, archaeological, or historical value including indirect effects, or would threaten a habitat identified on the U.S. Department of Interior or state of North Carolina threatened and endangered species lists.

(2) The proposed activity could cause significant changes in industrial, commercial, residential, agricultural, or silvicultural land use concentrations or distributions which would be expected to create adverse water quality, air quality, or ground water impacts, or affect long-term

- recreational benefits, shellfish, wildlife, or their natural habitats.
- (3) The proposed activity has indirect impacts, or is part of cumulative effects, not generally covered in the approval process for the state action, and that may result in a potential risk to human health or the environment.
- (4) The proposed activity is of such an unusual nature or has such widespread implications that an uncommon concern for its environmental effects has been expressed to the agency.

Statutory Authority G.S. 113A-11.

TITLE 10 DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Director of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services and the commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to adopt rules cited as 10 NCAC 14B .0509, amend rules cited as 10 NCAC 14B .0501 - .0503, .0505 - .0508; 14K .0103, .0315; 14L .0602; 18D .0208; 18H .0109 - .0112, .0114, .0116; 18L .1515; and repealed rules cited as 10 NCAC 14B .0504; 18H .0115; 18M .1404.

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

The public hearing will be conducted at 1:00 p.m. on May 5, 1993 at the Sheraton Inn, 4504 Creedmoor Road at Crabtree Valley Mall, Raleigh, NC.

Reason for Proposed Action:

10 NCAC 14B .0501 - .0503 and .0505 - .0508 - To clarify waiver procedures and to incorporate new language based on revised APA requirements.

10 NCAC 14B .0504 - To repeal this Rule since the Division no longer has an "agency legal specialist" position.

10 NCAC 14B .0509 - To allow the Commission for MH/DD/SAS or the Division Director to approve special waiver requests.

10 NCAC 14K .0103, .0315 and 10 NCAC 18L .1515 - Are proposed to be changed to be consis-

tent with federal Early Intervention regulations, which allows the State to receive federal funds.

10 NCAC 14L .0602 - This Rule is proposed for amendment to clarify that a facility shall serve no more than a total of nine children and adolescents at one time.

10 NCAC 18D .0208 - Proposed for amendment to be consistent with federal requirements and other agencies by deleting the requirement of the signature of an individual who witnesses the consent.

10 NCAC 18H .0109 - .0112 and .0114 - .0116 - Proposed changes are to be consistent with federal requirements.

10 NCAC 18M .1404 - Proposed to repeal to delete the requirement for an annual medical statement, which is felt to be inappropriate for staff working with individual children in their own homes on an intermittent basis.

Comment Procedures: Any interested person may present his comments by oral presentation or by submitting a written statement. Persons wishing to make oral presentations should contact Charlotte Tucker, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 325 N. Salisbury St., Raleigh, N.C. 27603, 919-733-4774, before May 5, 1993. Comments submitted as a written statement must be sent to the above address no later than May 3, 1993, and must state the Rules to which the comments are addressed. Time limits for oral remarks may be imposed by the Commission Chairman. Fiscal information regarding these Rules is available from this Division, upon request.

Editor's Note: 10 NCAC 14L .0602 was filed as a temporary rule effective June 24, 1993 for a period of Seven days to expire on July 1, 1993.

CHAPTER 14 MENTAL HEALTH: GENERAL

SUBCHAPTER 14B - RULES OF PROCEDURE

SECTION .0500 - WAIVER OF COMMISSION AND DIVISION DIRECTOR RULES

.0501 PURPOSE, SCOPE AND DEFINITIONS

~~The purpose of the rules in this Section is to specify the procedures for requesting and ruling on requests for waiver of rules adopted by the Com-~~

mission for Mental Health, Mental Retardation and Substance Abuse Services and the Director of the Division of Mental Health, Mental Retardation and Substance Abuse Services, except for waivers from licensure rules which are granted by the Division of Facility Services.

(a) Purpose. The purpose of the Rules in this Section is to specify the procedures for requesting and acting on requests for waiver of Rules adopted by the Commission or the Division Director, except for requests for waiver of licensure Rules adopted pursuant to G.S. 122C which are subject to review and action by the Division of Facility Services, in accordance with the provisions of 10 NCAC 14K .0216.

(b) Scope. These Rules apply to any person subject to Rules of the Commission or the Division Director.

(c) Definitions.

- (1) "Commission" means the term as defined in G.S. 122C-3.
- (2) "Division" means the term as defined in G.S. 122C-3.
- (3) "Division Director" means the Director of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services.
- (4) "Special waiver request" means a proposed alternative system of policy and procedures to be used in place of specified Rules.

Statutory Authority G.S. 122C-112(a)(8); 143B-147(a)(8).

.0502 SUBMISSION OF REQUESTS FOR WAIVERS

Requests for waivers shall be sent to the Agency Legal-Specialist Division Director, Division of Mental Health, Mental Retardation Developmental Disabilities, and Substance Abuse Services, 325 North Salisbury Street, Raleigh, North Carolina 2764403.

Statutory Authority G.S. 122C-112(a)(8); 143B-147(a)(8).

.0503 CONTENTS OF WAIVER REQUESTS

Except as provided in Rule .0508 of this Section, Waiver requests shall be in writing and shall contain:

- (1) the name, address and telephone number of the requester person making the request;
- (2) the name, address and telephone number

- (3) of the facility, program, agency or other entity for which the waiver is requested;
- (4) the rule number and title of any rule for which the waiver is being sought requested;
- (5) a statement of facts including: showing why the waiver has been requested with supporting documents as appropriate; and
 - (a) the reason for the request;
 - (b) the nature and extent of the request; and
 - (c) documentation that the health, safety or welfare of clients will not be threatened.
- (5) the time frame for which the waiver is requested; and
- (6) authorization for the waiver request and the date of such authorization when:
 - (a) if from a facility operated by an area program, area board authorization;
- (5) proof of approval and recommendation for the waiver request and the date of such approval and recommendation as follows:
 - (a) area program requests: proof of area board approval;
 - (b) contract agency (of area programs) requests: proof of recommendation by area board and proof of contract agency governing body approval; and
 - (c) from a private facility, authorization by the governing body; and
 - (d) from the Department of Correction, Division of Prisons, authorization by the Director of the Division of Prisons.
 - (e) requests from private or public facilities not contracting with an area program: proof of governing body approval.

Statutory Authority G.S. 122C-112(a)(8); 143B-147(a)(8).

.0504 AUTHORITY TO GRANT WAIVER

Upon receipt of a waiver request as described in Rule .0503 of this Section, the agency legal specialist or his designee shall determine whether authority to grant waiver of any rule lies with the Commission or with the Division Director and shall direct the waiver request to the Commission or Division Director within 10 days of receiving it.

Statutory Authority G.S. 122C-112(a)(8); 143B-147(a)(8).

.0505 PROCEDURE FOR WAIVERS BY

COMMISSION

If any rule for which waiver is requested was adopted pursuant to the rule-making authority of the Commission, the procedures set forth in this Rule shall be followed:

- (1) ~~The Chair of the Commission shall refer the waiver request to the appropriate committee of the Commission for the purpose of making a recommendation to the Commission regarding whether the waiver request should be granted, granted subject to certain conditions, or denied. Additional information, including consultation with division staff and other parties as necessary, may be requested by the Chair of the Commission and by the designated committee members. Except as provided in (2) of this Rule and except for good cause, the Commission shall vote on the waiver request at the second regularly scheduled commission meeting following the date the waiver request is received by the agency legal specialist.~~
- (2) ~~Except for good cause and upon approval by the Chair of the Commission, if the agency legal specialist receives the waiver request more than 75 days before the next regularly scheduled commission meeting, the Commission shall vote on the waiver request at the next regularly scheduled commission meeting following the date the waiver request is received by the agency legal specialist.~~
- (1) (3) The person requesting the waiver shall be notified in writing regarding the time and place of the Commission meeting at which the Commission will vote upon the waiver request. At the discretion of the Chairman of the Commission, the person requesting the waiver and any other interested person may be given the opportunity to speak regarding the waiver request.
- (2) Decisions regarding waiver requests shall be based upon, but not limited to, the following:
 - (a) the nature and extent of the request; and
 - (b) safeguards to ensure that the health, safety or welfare of clients will not be threatened.
- (3) (4) The Commission's decision shall be issued in writing by the Chairman of the Commission and shall state: the factual situation giving rise to the waiver request

~~and the reason why the waiver request was granted, granted subject to certain conditions, or denied.~~

- (a) the factual situation giving rise to the waiver request;
- (b) the decision that the waiver request was granted, or granted subject to certain conditions;
- (c) the time frame, if the waiver is granted; and
- (d) the reason, if the waiver request was denied.
- (4) (5) The waiver may be granted: ~~retroactively to the date of governing body approval as described in Rule .0503(5) of this Section.~~
 - (a) retroactively to the date of the authorization as described in Item (6) of Rule .0503 of this Section; or
 - (b) to the time frame requested by the Division Director if the waiver is submitted in accordance with Rule .0508 of this Section.

Statutory Authority G.S. 143B-147(a)(8).

.0506 WAIVERS REQUESTED BY COMMISSION

~~Any member of the Commission may initiate a request for waiver of any rule adopted pursuant to the rule-making authority of the Commission. Except in cases where the Chair of the Commission initiates such request, the procedures described in Rule .0505 of this Section shall be followed. In cases where the Chair of the Commission initiates such request, the procedures described in Rule .0505 of this Section shall be followed, except that the Vice Chair of the Commission shall act in place of the Chair of the Commission. Any member of the Commission may also initiate a request for waiver of rules adopted pursuant to the rule-making authority delegated to the Division Director by the Secretary as described in this Section.~~

- (a) Any member of the Commission may initiate a request for waiver of any rule adopted pursuant to the rule-making authority of the Commission, or the rule-making authority delegated to the Division Director by the Secretary as described in this Section.
- (b) In requesting a waiver under Paragraph (a) of this Rule, and on behalf of one or more agencies or services, the Commission member is subject to Subitems (2)(a) and (b) of Rule .0508 of this Section.

Statutory Authority G.S. 143B-147(a)(8).

.0507 PROCEDURE FOR WAIVERS BY DIVISION DIRECTOR

If the rule for which waiver is requested was adopted pursuant to the rule-making authority delegated to the Division Director by the Secretary, the procedures set forth in this Rule shall be followed:

- (1) ~~Prior to issuing a decision on the waiver request, the Division Director may request additional information, and consult with appropriate division staff and other parties as necessary. Decisions regarding waiver requests shall be based upon, but not limited to, the criteria as referenced in Item (2) of Rule .0505 of this Section.~~
- (2) A decision regarding the waiver request shall be issued in writing by the Division Director within 60 days from the date of receipt of the waiver request ~~by the agency legal specialist and shall state: the factual situation giving rise to the waiver request and the reasons why the request was granted, granted subject to certain conditions, or denied.~~
 - (a) the factual situation giving rise to the waiver request;
 - (b) the reasons why the request was granted, granted subject to certain conditions, or denied; and
 - (c) if granted, the time frame for which the waiver is granted.
- (3) The waiver may be granted retroactively to the date of the authorization of the governing body approval as described in Rule .0503(5) Item (6) of Rule .0503 of this Section or to the time frame requested by the Division Director if the waiver is submitted in accordance with Rule .0508 of this Section.

Statutory Authority G.S. 122C-112(a)(8).

.0508 WAIVERS REQUESTED BY DIVISION DIRECTOR

~~The Division Director may initiate and grant a waiver of any rule adopted pursuant to the rule-making authority delegated to him by the Secretary. Prior to issuing a decision on the waiver request, the Division Director shall consult with appropriate division staff and other parties as necessary. The Division Director shall document in writing the factual situation giving rise to the~~

~~waiver request and the reason for granting the waiver. The Division Director may also initiate a request for waiver of rules adopted pursuant to the rule-making authority of the Commission as described in this Section.~~

The Division Director:

- (1) may grant a request for waiver of rules adopted pursuant to the rule-making authority delegated to him by the Secretary as described in this Section; and
- (2) may initiate a request for waiver of rules adopted pursuant to the rule-making authority of the Commission as described in this Section:
 - (a) except when requesting a waiver on behalf of one or more agencies or services, the Division Director is exempt from the provisions of Items (2) and (6) of Rule .0503 of this Section; and
 - (b) instead, the Division Director shall list the types of agencies or services for which the waiver is requested.

Statutory Authority G.S. 122C-112(a)(8).

.0509 SPECIAL REQUESTS

(a) The Commission or Division Director may approve one or more lists of conditions under which an agency may make a special waiver request.

(b) In addition to all Rules of this Section, any agency making a special request for waiver of specified Rules shall:

- (1) address the relevant list of conditions; and
- (2) obtain Division approval of the proposed alternative system of policy and procedures prior to action by either the Commission or Division Director.

(c) The Commission or Division Director may grant or deny waiver of specified Rules upon receipt of an agency's special request submitted in accordance with the Rules of this Section.

Statutory Authority G.S. 143B-147(a)(8).

SUBCHAPTER 14K - CORE LICENSURE RULES FOR MENTAL HEALTH: MENTAL RETARDATION AND OTHER DEVELOPMENTAL DISABILITIES: AND SUBSTANCE ABUSE FACILITIES

SECTION .0100 - GENERAL

INFORMATION

.0103 DEFINITIONS

(a) This Rule contains the definitions that apply to all the rules in this Subchapter and Subchapters 14L through 14O of this Chapter.

(b) In addition to the definitions contained in this Rule, the terms defined in G.S. 122C-3 also apply to all the rules in this Subchapter and Subchapters 14L through 14O of this Chapter.

(c) The following terms shall have the meanings specified:

- (1) "Administering medication" means direct application of a drug to the body of a client by injection, inhalation, ingestion, or any other means.
- (2) "Adolescent" means a minor from 13 through 17 years of age.
- (3) "Adult" means a person 18 years of age or older or a person under 18 years of age who has been married or who has been emancipated by a court of competent jurisdiction or is a member of the armed forces.
- (4) "Aftercare" means those services provided to substance abuse clients after discharge from a service which facilitates the client's integration or reintegration into society. Activities may include self-help groups, supportive work programs and staff follow-up contacts and interventions.
- (5) "Alcohol abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.
- (6) "Alcohol dependence" means psychoactive substance dependence which is a cluster of cognitive, behavioral, and physiologic symptoms that indicate that a person has impaired

control of psychoactive substance use and continues use of the substance despite adverse consequences (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.

- (7) "Applicant" means any person who intends to establish, maintain or operate a licensable facility and who applies to the Department for a license to operate a facility under the provisions of G.S. 122C, Article 2.
- (8) "Approved supported employment conversion plan" means a planned approach to changing the type of services delivered from ADAP facility-based to supported employment. Approval of the conversion plan is the responsibility of the Regional Director of the Division and the Area Director or his designee if the facility is operated by a contract agency of the area program or other service provider. The Division shall request appropriate personnel from the Division of Vocational Rehabilitation to participate in the review process. The request for approval of the supported employment conversion plan shall include specific written information in the following areas:
 - (A) number of clients to be moved into supported employment placements;
 - (B) types of supported employment models to be used;
 - (C) timeframe for the conversion period;
 - (D) interim proposed facility staffing patterns and responsibilities; and
 - (E) proposed budget for conversion plan.
- (9) "Area program" means a legally constituted public agency providing mental health, mental retardation and substance abuse services for a catchment area designated by the Commission. For purposes of these Rules, the term "area program" means

the same as "area authority" as defined in G.S. 122C-3.

(10) "Assessment" means a procedure for determining the nature and extent of the problem for which the individual is seeking service.

~~(11) "Atypical development" in children means those from birth to 60 months of age who demonstrate significantly atypical behavioral, socioemotional, motor, or sensory development as manifested by:~~

~~(A) Diagnosed hyperactivity, attention deficit disorder or other behavioral disorders; or~~

~~(B) Identified emotional or behavioral disorders such as:~~

~~(i) delay or abnormality in achieving expected emotional milestones, such as pleasurable interest in adults and peers; ability to communicate emotional needs; and ability to tolerate frustrations.~~

~~(ii) persistent failure to initiate or respond to most social interactions.~~

~~(iii) fearfulness or other distress that does not respond to comforting by caregivers.~~

~~(iv) indiscriminate sociability, e.g. excessive familiarity with relative strangers.~~

~~(v) self injurious or unusually aggressive behavior, or~~

~~(C) Substantiated physical abuse, sexual abuse, or other environmental situations that raise significant concern regarding the child's emotional well-being.~~

(11) "Atypical development" in children means those from birth to 60 months of age who:

(A) have autism;

(B) are diagnosed hyperactive;

(C) have an attention deficit disorder or other behavioral disorders; or

(D) exhibit evidence of, or are at risk for, atypical patterns of behavior and social-emotional development in one or more of the following areas:

(i) delays or abnormalities in achieving emotional milestones;

(ii) difficulties with:

(1) attachment and interactions with parents, other adults,

peers, materials and objects;

(II) ability to communicate emotional needs;

(III) motor or sensory development;

(IV) ability to tolerate frustration and control behavior; or

(V) ability to inhibit aggression;

(iii) fearfulness, withdrawal, or other distress that does not respond to the comforting of caregivers;

(iv) indiscriminate sociability; for example, excessive familiarity with relative strangers;

(v) self-injurious or other aggressive behavior;

(vi) substantiated evidence that raises concern for the child's emotional well-being regarding:

(I) physical abuse;

(II) sexual abuse; or

(III) other environmental situations; as defined in G.S. 7A-517(1) and (21).

(12) "Certified counselor" means an alcoholism, drug abuse or substance abuse counselor who is certified by the North Carolina Substance Abuse Professional Certification Board.

(13) "Child" means a minor from birth through 12 years of age.

(14) "Chronically mentally ill adult" means an individual 18 years of age or older who, as a result of a mental disorder, exhibits emotional or behavioral functioning which is so impaired as to interfere substantially with his capacity to remain in the community without supportive treatment or services of a long-term or indefinite duration. In these persons, mental disability is severe and persistent, resulting in long-term limitation of their functional capacities for primary activities of daily living such as interpersonal relations, homemaking, self-care, employment and recreation.

(15) "Client record" means a written account of all services provided a client from the time of admission of the client by the facility until discharge from the facility.

(16) "Clinical" means having to do with the active direct treatment/habilitation of a client.

(17) "Clinical staff member" means a

professional who provides active direct treatment/habilitation to a client.

- (18) "Clinical/professional supervision" means regularly scheduled assistance by a qualified mental health professional, a qualified substance abuse professional or a qualified developmental disabilities professional to a staff member who is providing direct, therapeutic intervention to a client or clients. ~~The purpose of clinical supervision is to ensure that each client receives appropriate treatment or habilitation which is consistent with accepted standards of practice and the needs of the client.~~
- (19) "Contested case" means an administrative proceeding under G.S. 150B, Article 3, in which the rights, privileges, or duties of a party are required by law to be determined.
- (20) "Contract agency" means a legally constituted entity with which the area program contracts for a service exclusive of intermittent purchase of service for an individually identified client.
- (21) "Day/night service" means a service provided on a regular basis, in a structured environment that is offered to the same individual for a period of three or more hours within a 24-hour period.
- (22) "Declaratory ruling" means a formal and binding interpretation as to:
- (A) the validity of a rule; or
 - (B) the applicability to a given state of facts of a statute administered by the Department of Human Resources, or a rule or order of the Department of Human Resources.
- (23) "Detoxification" means the physical withdrawal of an individual from alcohol or other drugs in order that the individual can participate in rehabilitation activities.
- (24) "Developmentally delayed children" means those whose development is delayed in one or more of the following areas: cognitive development; physical development, including vision and hearing; communication, social and emotional; and adaptive skills. The specific level of delay must be:
- (A) for children from birth to 36 months

of age, documented by scores $1\frac{1}{2}$ standard deviations below the mean on standardized tests in at least one of the above areas of development. Or, it may be documented by a 20 percent delay on assessment instruments that yield scores in months; and

- (B) for children from 36 to 60 months of age, documented by test performance two standardized deviations below the mean on standardized tests in one area of development or by performance that is one standard deviation below the norm in two areas of development. Or, it may be documented by a 25 percent delay in two areas on assessment instruments that yield scores in months.
- (25) "DFS" means the Division of Facility Services, 701 Barbour Drive, Raleigh, N.C. 27603.
- (26) "Direct care staff" means an individual who provides active direct care, treatment, or rehabilitation or habilitation services to clients.
- (27) "Dispensing medication" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by state and federal law. Filling or refilling drug containers with prescription drugs for subsequent use by a client is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".
- (28) "DMH/DD/SAS" means the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, 325 N. Salisbury Street, Raleigh, N.C. 27603.
- (29) "Documentation" means provision of written, dated and authenticated evidence of the delivery of client services or compliance with statutes or rules, e.g., entries in the client record, policies and procedures, minutes of meetings, memoranda, reports, schedules, notices and announcements.
- (30) "Drug abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance

(criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.

- (31) "Drug dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of twenty-nine dollars and ninety-five cents (\$29.95) for the soft cover edition and thirty-nine dollars and ninety-five cents (\$39.95) for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.
- (32) "DWI" means driving while impaired, as defined in G.S. 20-138.1.
- (33) "DWI substance abuse assessment" means a service provided to persons charged with or convicted of DWI to determine the presence of chemical dependency. The "assessment" involves a face-to-face interview with a substance abuse professional.
- (34) "Early Intervention Services" means those services provided for infants and toddlers specified in Section 303.12 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations, published 1/1/92 6/22/89. For the purposes of these services, however, transportation means assistance in the travel to and from the multi-disciplinary evaluation, specified early intervention services provided by certified developmental day centers or other center-based services designed specifically for children with or at risk for disabilities; and speech, physical or occupational therapy, or

other early intervention services if provided in a specialized setting away from the child's residence. Transportation assistance may be provided by staff, existing public or private services or by the family, who shall be reimbursed for their expenses, in accordance with applicable fee provisions. This adoption by reference does not include subsequent amendments and editions of the referenced material.

- (35) "Evaluation" means an assessment service which identifies the nature and extent of an individual's problem through a systematic appraisal for the purposes of diagnosis and determination of the disability of the individual and the most appropriate plan, if any, for services.
- (36) "First aid" means emergency treatment for injury or sudden illness before regular medical care is available. First aid includes artificial respiration, the Heimlich maneuver, or other Red Cross first aid techniques for relieving airway obstruction, care of wounds and burns, and temporary administering of splints.
- (37) "Governing body" means, in the case of a corporation, the board of directors; in the case of an area authority, the area board; and in all other cases, the owner of the facility.
- (38) "Health Services" means those services provided for infants and toddlers specified in Section 303.13 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations, published 6/22/89. This adoption by reference does not include subsequent amendments and editions of the referenced material.
- (39) "Hearing" means, unless otherwise specified, a contested case hearing under G.S. 150B, Article 3.
- (40) "High risk children" means those from birth to 36 months of age for whom there is clinical evidence of conditions which have a high probability of resulting in developmental delay or atypical development and for whom there is clinical evidence that developmental or therapeutic intervention may be necessary. There are two categories of high risk children.

These are:

- (A) **High Risk-Established:** Diagnosed or documented physical or mental conditions which are known to result in developmental delay or atypical development as the child matures. Such conditions include ~~are limited to~~ the following:

- (i) chromosomal anomaly or genetic disorders associated with developmental deficits;
- (ii) metabolic disorders associated with developmental deficits;
- (iii) infectious diseases associated with developmental deficits;
- (iv) neurologic disorders;
- (v) congenital malformations;
- (vi) sensory disorders; ~~or~~
- (vii) toxic exposure; or
- (viii) severe attachment disorders.

- (B) **High Risk-Potential:** Documented presence of indicators which are associated with patterns of development and which have a high probability of meeting the criteria for developmental delay or atypical development as the child matures. There shall be documentation of at least three of the parental or family, neonatal, or postneonatal risk conditions as defined on page 12 in the 1990 publication, "NORTH CAROLINA CHILD SERVICE COORDINATION PROGRAM" available from the Division of Maternal and Child Health, Department of Environment, Health, and Natural Resources, PO Box 27687, Raleigh, NC 27611-7687. This adoption by reference does not include subsequent amendments and editions of the referenced material.

These conditions are as follows:

- (i) maternal age less than 15 years;
- (ii) maternal PKU;
- (iii) mother HIV positive;
- (iv) maternal use of anticonvulsant, antineoplastic or anticoagulant drugs;
- (v) parental blindness;
- (vi) parental substance abuse;
- (vii) parental mental retardation;
- (viii) parental mental illness;
- (ix) difficulty in bonding between parent and infant;

- (x) difficulty in providing basic parenting;
 - (xi) lack of stable housing;
 - (xii) lack of familial and social support;
 - (xiii) family history of childhood deafness;
 - (xiv) maternal hepatitis B;
 - (xv) birth weight less than 1500 grams;
 - (xvi) gestational age less than 32 weeks;
 - (xvii) respiratory distress (mechanical ventilator greater than six hours);
 - (xviii) asphyxia;
 - (xix) hypoglycemia (less than 25 mg/dl);
 - (xx) hyperbilirubinemia (greater than 20 mg/dl);
 - (xxi) intracranial hemorrhage;
 - (xxii) neonatal seizures;
 - (xxiii) major congenital anomalies;
 - (xxiv) CNS infection or trauma;
 - (xxv) congenitally acquired infection;
 - (xxvi) suspected visual impairment;
 - (xxvii) suspected hearing impairment;
 - (xxviii) no well child care by age six months;
 - (xxix) failure on standard developmental or sensory screening test;
 - (xxx) significant parental concern; and
 - (xxxi) suspected abuse or neglect. who:
- (41) "Hours of operation" means an indication of the minimum operational hours that a service is expected to be available to clients, but not prohibiting the typical closing of a service to accommodate holidays, vacations, staff development activities and weather and facility-related conditions but taking into consideration the type of service being provided.
- (42) "ICF/MR" (Intermediate Care Facility/Mentally Retarded) means a facility certified as having met federal ICF/MR requirements and which provides 24-hour personal care, habilitation, developmental and supportive services to persons with mental retardation or related conditions.
- (43) "Incident" means any happening which is not consistent with the routine operation of the facility or the routine care of a client and that is likely to lead to adverse effects upon a client.
- (44) "Infant" means an individual from birth

to one year of age through two years of age.

- (45) "Legend drug" means a drug that cannot be dispensed without a prescription.
- (46) "License" means a permit to operate a facility which is issued by DFS under G.S. 122C, Article 2.
- (47) "Medication" means a substance recognized in the official "United States Pharmacopoeia" or "National Formulary" intended for use in the diagnosis, mitigation, treatment or prevention of disease.
- (48) "Minor client" means a person under 18 years of age who has not been married or who has not been emancipated by a decree issued by a court of competent jurisdiction or is not a member of the armed forces.
- (49) "Neighborhood" - See "residential setting".
- (50) "Nurse" means a person licensed to practice in the State of North Carolina either as a registered nurse or as a licensed practical nurse.
- (51) "Operator" means the designated agent of the governing body who is responsible for the management of a licensable facility.
- (52) "Outpatient" or "Outpatient service" means the same as periodic service.
- (53) "Parent" means the legally responsible person unless otherwise clear from the context.
- (54) "Periodic service" means a service provided through short, recurring visits for persons who are mentally ill, developmentally disabled or substance abusers.
- (55) "Physical examination" means the procedures used by a physician or physician extender on behalf of a physician to determine the physiological and anatomical condition of the client. Physical examination also means medical examination.
- (56) "Physician extender" means a nurse practitioner or a physician assistant approved to perform medical acts by the Board of Medical Examiners of the State of North Carolina.
- (57) "Preschool age child" means a child from three through five years of age.
- (58) "Private facility" means a facility not

operated by or under contract with an area program.

- (59) "Program evaluation" means the systematic documented assessment of program activity to determine the effectiveness, efficiency and scope of the system under investigation, to define its strengths and weaknesses and thereby to provide a basis for informed decision-making.
- (60) "Provider" means an individual, agency or organization that provides mental health, mental retardation or substance abuse services.
- (61) "Psychiatric nurse" means an individual who is licensed to practice as a registered nurse in the State of North Carolina by the North Carolina Board of Nursing and who is a graduate of an accredited master's level program in psychiatric mental health nursing with two years of experience, or has a master's degree in behavioral science with two years of supervised clinical experience, or has four years of experience in psychiatric mental health nursing.
- (62) "Psychiatric social worker" means an individual who holds a master's degree in social work from an accredited school of social work and has two years of clinical social work experience.
- (63) "Psychiatrist" means an individual who is licensed to practice medicine in the State of North Carolina and who has completed an accredited training program in psychiatry.
- (64) "Psychotherapy" means a form of treatment of mental illness or emotional disorders which is based primarily upon verbal or non-verbal communication with the patient. Treatment is provided by a trained professional for the purpose of removing or modifying existing symptoms, of attenuating or reversing disturbed patterns of behavior, and of promoting positive personality growth and development.
- (65) "Psychotropic medication" means medication with the primary function of treating mental illness or personality or behavior disorders. These medications include, but are not limited to, antipsychotics, antidepressants, neuroleptics, lithium and minor

tranquilizers.

- (66) "Qualified alcoholism professional" means an individual who is certified by the North Carolina Substance Abuse Professional Certification Board or who is a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of alcoholism counseling.
- (67) "Qualified developmental disabilities professional" means an individual holding at least a baccalaureate degree in a discipline related to developmental disabilities, and at least two years of supervised habilitative experience in working with the mentally retarded or otherwise developmentally disabled or holding a baccalaureate degree in a field other than one related to developmental disabilities and having three years of supervised experience in working with the mentally retarded or otherwise developmentally disabled.
- (68) "Qualified drug abuse professional" means an individual who is certified by the North Carolina Substance Abuse Professional Certification Board or who is a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of drug abuse counseling.
- (69) "Qualified mental health professional" means any one of the following: psychiatrist, psychiatric nurse, practicing psychologist, psychiatric social worker, an individual with at least a master's degree in a related human service field and two years of supervised clinical experience in mental health services or an individual with a baccalaureate degree in a related human service field and four years of supervised clinical experience in mental health services.
- (70) "Qualified nutritionist" means an individual who has a Master's degree in nutrition, nutrition education or public health nutrition and who may or may not be a registered dietitian.
- (71) "Qualified substance abuse professional" means an individual who

is:

- (A) certified by the North Carolina Substance Abuse Professional Certification Board; or
- (B) a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of alcoholism and drug abuse counseling.
- (72) "Registered dietitian" means an individual who has successfully completed a national examination for the Commission on Dietetic Registration and maintains registration with that commission through approved continuing education activities and events.
- (73) "Rehabilitation" means training, care and specialized therapies undertaken to assist a client to reacquire or maximize any or all lost skills or functional abilities.
- (74) "Research" means inquiry involving a trial or special observation made under conditions determined by the investigator to confirm or disprove a hypothesis, or to explicate some principle or effect. The term "research" as used in this document means research which is not standard or conventional; involves a trial or special observation which would place the subject at risk for injury (physical, psychological or social injury), or increase the chance of disclosure of treatment; utilizes elements or steps not ordinarily employed by qualified professionals treating similar disorders of this population; or is a type of procedure that serves the purpose of the research only and does not include treatment designed primarily to benefit the individual.
- (75) "Residential setting" means a living area or zone in which the primary purpose is family residential living and which may be located in an area zoned either urban residential or rural.
- (76) "Respite discharge" means that point in time when no additional incidents of respite services are anticipated.
- (77) "Respite episode" means an uninterrupted period of time during

- which a client receives respite services.
- (78) "Screening" means an assessment service which provides for a brief appraisal of each individual who presents himself for services, in order to determine the nature of the individual's problem and his need for services. Screening may also include referral to other appropriate community resources.
- (79) "Secretary" means the Secretary of the Department as defined in G.S. 122C-3.
- (80) "Service" means an activity or interaction intended to benefit another, with, or in behalf of, an individual who is in need of assistance, care, habilitation, intervention, rehabilitation or treatment.
- (81) "Severely physically disabled person" means for the purpose of ADAP (Adult Developmental Activity Program) a person:
- (A) who has a severe physical disability which seriously limits his functional capabilities (mobility, communication, self-care, self-direction, work tolerance or work skills);
 - (B) who has one or more physical disabilities resulting from amputation, arthritis, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, multiple sclerosis, muscular dystrophy, musculoskeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell anemia and end stage renal disease; and
 - (C) whose habilitation or rehabilitation can be expected to require multiple habilitation or rehabilitation services over an extended period of time.
- (82) "Sheltered employment" means a facility's provision of work and work training by:
- (A) subcontracting from industries in the community and bringing work to the facility to be performed; or
 - (B) manufacturing its own products in the facility. Clients served in a sheltered employment model are those who consistently achieve earning levels exceeding one-half of the minimum wage but who are not ready for independent employment activities.
- (83) "Staff member" means any individual who is employed by the facility.
- (84) "Substantially mentally retarded person" means for the purpose of ADAP a person who is mentally retarded to the degree of seriously limiting his functional capabilities, whose habilitation or rehabilitation can be expected to extend over a period of time, and including:
- (A) moderately mentally retarded persons;
 - (B) severely mentally retarded persons;
 - (C) profoundly mentally retarded persons; or
 - (D) mentally retarded persons with a handicapping condition so severe as to lack the potential for employment at this time, either in a sheltered or competitive setting. In addition, such individuals must have a deficit in self-help, communication, socialization or occupational skills and be recommended by the vocational rehabilitation counselor for consideration of placement in an ADAP.
- (85) "Support services" means services provided to enhance an individual's progress in his primary treatment/habilitation program.
- (86) "Supported employment" means a day/night service which involves paid work in a job which would otherwise be done by a non-disabled worker. Supported employment is carried out in an integrated work site where a small number of people with disabilities work together and where the work site is not immediately adjacent to another program serving persons with disabilities. It includes intensive involvement of staff working with the individuals in these integrated settings.
- (87) "Toddler" means an individual from one through two ~~three~~ years of age.
- (88) "Treatment" means the process of providing for the physical, emotional, psychological and social needs of clients through services.
- (89) "Treatment/habilitation plan" means a plan in which one or more professionals, privileged in accordance with 10 NCAC 14K .0319, working

with the client and, in some cases, family members or other service providers, document which interventions will be provided and the goals, objectives and strategies that will be followed in providing services to the client.

(90) "Twenty-four hour facility in which medical care is an integral component" means a facility in which:

- (A) the medication needs of clients may be evaluated, medication prescribed and laboratory tests ordered to assist in the diagnosis, treatment and monitoring of problems associated with the mental health, mental retardation or other developmental disabilities or substance abuse disorder of clients; and
- (B) proper referral of the client is made to medical specialists when needed.

(91) "Twenty-four hour service" means a service which is provided to a client on a 24-hour continuous basis.

Statutory Authority G.S. 122C-3; 122C-26; 143B-147.

SECTION .0300 - FACILITY AND PROGRAM MANAGEMENT

.0315 TREATMENT/HABILITATION PLANNING AND DOCUMENTATION

(a) The governing body shall develop and implement written policies regarding individual treatment/habilitation plans and the qualifications of staff, based on education and experience, who will be responsible for implementation of such plans.

(b) A treatment/habilitation plan shall be based upon an assessment of the client's condition, assets and needs, and the resources to meet these needs, and shall be developed in partnership with the client.

(c) The parent or the legally responsible person of a minor shall have the opportunity to participate in the development and implementation of the minor client's individual treatment/ habilitation plan.

(d) The parent, with client consent, or the legally responsible person of an adult shall have the opportunity to participate in the development and implementation of the adult client's individual treatment/habilitation plan.

(e) Clinical responsibility for the development

and implementation of the treatment/habilitation plan shall be designated.

(f) Initial treatment/habilitation objectives shall be documented, if services are to be provided, prior to the establishment and implementation of the comprehensive treatment/habilitation plan.

(g) Except as provided in Paragraphs (h) through (j) of this Rule, a comprehensive plan shall be developed and initiated within 30 days of admission for clients who are expected to receive services from the facility beyond 30 days. The plan shall include, as appropriate to the client's needs:

- (1) documentation of the established diagnosis;
- (2) time-specific, measurable goals for treatment/habilitation;
- (3) general strategies or procedures to be undertaken in order to meet goals and the direct care staff responsible for implementation;
- (4) time-specific, measurable education or treatment goals for family or significant others, if applicable; and
- (5) a schedule for time-specific planned reviews, which may be set, in addition to those required in Paragraph (k) of this Rule.

(h) For all facilities serving infants and toddlers with or at risk for developmental disabilities, delays or atypical development, except for respite:

- (1) there shall be a habilitation plan which is referred to as the Individualized Family Service Plan (IFSP) which shall include:
 - (A) a description of the child's present health status and levels of physical (including vision and hearing), communication, cognitive, social and emotional, and adaptive development;
 - (B) with the concurrence of the family, a description of the resources, priorities and concerns of the family and the supports and services necessary to enhance the family's capacity to meet the developmental needs of their infant and toddler with or at risk for a disability;
 - (C) goals for the child, and, if requested, goals for the child's family;
 - (D) criteria and time frames to be used to determine progress towards goals;
 - (E) planned habilitation procedures related to the goals;
 - (F) a statement of the specific early

intervention services to be provided to meet the identified child and family needs, the initiation dates, frequency and method, duration, intensity and location (including the most natural environment) of service delivery, and the persons or agencies responsible;

- (G) ~~the designation of the staff member responsible for service coordination; the name of the service coordinator from the profession most immediately relevant to the needs of the child or family; and who is otherwise qualified to carry out all applicable responsibilities for coordinating with other agencies and individuals the implementation of the IFSP.~~

- (H) the plans for transition into services which are the responsibility of the N.C. Department of Public Instruction, or other available services, when applicable;

- (I) the payment arrangements for the specific services delineated in Subparagraph (h)(1)(F) of this Rule;

- (J) a description of medical and other services needed by the child, but which are not required under P.L. 99-457, and the strategies to be pursued to secure those services through public or private resources. The requirement regarding medical services does not apply to routine medical services, such as immunization and well-baby care, unless the child needs these services and they are not otherwise available.

- (2) The IFSP shall be:

- (A) reviewed on at least a semi-annual basis or more frequently upon the family's request; and

- (B) revised as appropriate, but at least annually.

- (3) The initial development and annual revision process for the IFSP for infants and toddlers shall include participation by:

- (A) the parent or parents of the child;

- (B) other family members, as requested by the parent;

- (C) an advocate or person outside of the family if the parent requests that the person participate;

- (D) the provider of the early intervention services;

- (E) the service coordinator designated for the family, if different from the provider of the early intervention services; and

- (F) the provider of the assessment service, if different from the provider of the early intervention services.

- (4) The IFSP review shall be arranged and written notice provided to families early enough to promote maximum opportunities for attendance. The semi-annual review process shall include participation by persons identified in Subparagraphs (h)(3)(A) through (E) of this Rule. If any of these individuals are unable to attend one of the development or review meetings, arrangements shall be made for the person's involvement through other means such as participation in a telephone conference call, having a knowledgeable authorized representative attend the meeting or making pertinent records available at the meeting.

- (5) The IFSP for infants and toddlers is based upon the results of the assessment referenced in 10 NCAC 14K .0314(e). However, early intervention services may commence before completion of this assessment if: ~~parental consent is obtained, the assessment is completed within the time period referenced in 10 NCAC 14K .0314(e), and an interim IFSP is developed.~~

- (A) parental consent is obtained; and

- (B) the assessment is completed within the 45-day time period referenced in 10 NCAC 14K .0314(e).

- (6) In the event that exceptional circumstances make it impossible to complete the assessment within the 45-day time period referenced in 10 NCAC 14K .0314(e), the circumstances shall be documented and an interim IFSP developed. The interim IFSP shall include:

- (A) the name of the service coordinator who will be responsible for the implementation of the IFSP and coordination with other agencies and individuals;

- (B) goals for the child and family when recommended;

- (C) those early intervention services that are needed immediately; and

(D) suggested activities that may be carried out by the family members.

(7) ~~(6)~~ Each facility or individual who has a direct role in the provision of early intervention services specified in the IFSP is responsible for making a good faith effort to assist each eligible child in achieving the goals set forth in the IFS.

(8) ~~(7)~~ The IFSP shall be developed within 45 days of referral for those children determined to be eligible. The referral shall be as defined in 10 NCAC 14K .0314(e)~~(4)~~ 10).

(9) ~~(8)~~ The contents of the IFSP must be fully explained to the parents, and informed written consent from the parents must be obtained prior to the provision of early intervention services described in the plan. If the parents do not provide consent with respect to a particular early intervention service, that service may not be provided. The early intervention services ~~for~~ to which parental consent is obtained must be provided.

(10) IFSP meetings shall be conducted in settings convenient to and in the natural language of the family, unless this is not feasible.

(i) The goals for a client who receives services from facilities providing day activity or alternative family living, half-way house, therapeutic camp or group home services in which the supervision and therapeutic intervention are limited to sleeping time, home living skills and leisure time activities, may be limited to life-skill, social or recreational goals.

(j) The goals for a client who receives services from a community respite facility may be limited to the special needs of the client, including medications to be administered, dietary considerations and expectations regarding other services.

(k) A full review of each client's treatment/habilitation plan shall be conducted at least annually by the responsible professional in accordance with the facility's quality assurance plan, as determined by 10 NCAC 14K .0319. The review shall include:

- (1) the client's continuing need for service; and
- (2) a continuation or update of the client's treatment/habilitation plan as defined in Paragraph (g) of this Rule.

Statutory Authority G.S. 122C-26; 143B-147.

SUBCHAPTER 14L - LICENSURE RULES FOR MENTAL HEALTH FACILITIES

SECTION .0600 - RESIDENTIAL TREATMENT FOR CHILDREN AND ADOLESCENTS WHO ARE MENTALLY ILL

.0602 CAPACITY

Each facility shall serve no more than nine children and adolescents at any one time.

Statutory Authority G.S. 122C-26; 143B-147.

CHAPTER 18 MENTAL HEALTH: OTHER PROGRAMS

SUBCHAPTER 18D - CONFIDENTIALITY RULES

SECTION .0200 - RELEASE OF CONFIDENTIAL INFORMATION WITH CONSENT

.0208 CONSENT FOR RELEASE

(a) When consent for release of information is obtained by an area or state facility covered by the rules in this Subchapter, a Consent for Release form containing the information set out in this Paragraph shall be utilized. The consent form shall contain the following information:

- (1) client's name;
- (2) name of facility releasing the information;
- (3) name of individual or individuals, agency or agencies to whom information is being released;
- (4) information to be released;
- (5) purpose for the release;
- (6) length of time consent is valid;
- (7) a statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance on the consent;
- (8) signature of the client or the client's legally responsible person; and
- ~~(9) signature of individual witnessing consent; and~~
- ~~(9)~~ ~~(10)~~ date consent is signed.

(b) Unless revoked sooner by the client or the client's legally responsible person, a consent for release of information shall be valid for a period not to exceed one year except under the following

conditions:

- (1) a consent to continue established financial benefits shall be considered valid until cessation of benefits; or
- (2) a consent for release of information to the Division, Division of Motor Vehicles, the Court and the Department of Correction for information needed in order to reinstate a client's driving privilege shall be considered valid until reinstatement of the client's driving privilege.
- (c) A consent for release of information received from an individual or agency not covered by the rules in this Subchapter does not have to be on the form utilized by area or state facilities; however, the receiving area or state facility shall determine that the content of the consent form substantially conforms to the requirements set forth in this Rule.
- (d) A clear and legible photocopy of a consent for release of information shall be considered to be as valid as the original.
- (e) Confidential information relative to a client with HIV infection, AIDS or AIDS related conditions shall only be released in accordance with G.S. 130A-143. Whenever authorization is required for the release of this information, the consent shall specify that the information to be released includes information relative to HIV infection, AIDS or AIDS related conditions.

Statutory Authority G.S. 122C-52; 122C-53; 130A-143; 131E-67; 143B-147.

SUBCHAPTER 18H - HEPATITIS B

SECTION .0100 - HEPATITIS B SCREENING AND VACCINATION OF RESIDENTS AND VACCINATION OF DIRECT CARE EMPLOYEES IN GROUP HOMES FOR MENTALLY RETARDED ADULTS

.0109 CURRENT RESIDENTS AND EMPLOYEES

All current group home employees (including part-time and temporary employees) who provide direct care to clients shall be offered hepatitis B vaccine, at employer expense, in accordance with the OSHA Bloodborne Pathogens Standard 29 CFR 1910.1030 even if no residents test positive for hepatitis B. All residents shall be screened for the presence of the hepatitis B virus. If the screening indicates one or more residents is a hepatitis B carrier, the following procedures shall be fol-

lowed: Each group home in operation as of November 1, 1985 shall screen all current residents and direct care employees by December 31, 1985. Each group home beginning operation after November 1, 1985 shall follow the procedures described in Rule .0110 of this Section. If the screening indicates one or more residents or employees are hepatitis B carriers, the following procedures shall be followed:

- (1) Current residents ~~and direct care employees~~ without antibodies (who are not immune) shall be offered hepatitis B vaccine.
- (2) Written informed consent or refusal to be vaccinated shall be obtained from the resident (or guardian) and documented in the resident's record.
- ~~(3) Written informed consent or refusal to be vaccinated shall be obtained from the employee and shall be documented in the employee's personnel record.~~
- (3) ~~(4)~~ The hepatitis B vaccination series shall be started within 10 working days following receipt of the screening results for non-immune current residents and immediately for direct care employees who consent to be vaccinated. During the three-dose, six-month immunization process, if a non-immune resident or employee is exposed to the blood or other potentially infectious body fluids secretions of a hepatitis B carrier, a single dose of hepatitis B immune globulin shall be given within 24 hours of the exposure. the procedure as outlined in 15A NCAC 19A .0203 CONTROL MEASURES-HEPATITIS B shall be followed.
- ~~(5) If vaccinated the resident or direct care employee shall be rescreened one month following the third dose to determine the presence or absence of hepatitis B antibodies. If antibodies are absent, two additional doses of vaccine shall be administered at one month intervals. If antibodies are still absent after the two additional doses are administered, the resident or employee shall be advised of his status and the risks involved in remaining in the group home.~~

Statutory Authority G.S. 143B-147.

.0110 PROSPECTIVE RESIDENTS AND EMPLOYEES

(a) Prospective residents and employees of the group home shall be informed that a hepatitis B carrier is or may at a future time be residing in the home.

(b) The group home shall screen prospective residents, who have been accepted for admission, for hepatitis B infection prior to admission and offer hepatitis B vaccine to all persons accepted for employment within the first 10 days of prior to admission or employment.

(c) An applicant for admission to a group home shall not be admitted during the period of time that the applicant is a hepatitis B carrier; who is a hepatitis B carrier, and

(1) and currently exhibits behaviors, such as biting, scratching or gouging, which may cause breaks in the skin of self or others; or who currently exhibits behaviors, such as biting, scratching or gouging, which may cause breaks in the skin of self or others; or

(2) has special medical problems, such as eczema or other dermatological conditions that increase the risk of others being exposed to the blood or potentially infectious body fluids, who has special medical problems, such as eczema or other dermatological conditions, that increase the risk of others being exposed to his blood or serous secretions shall not be admitted to a group home while exhibiting such behaviors or medical problems.

(d) If a new resident ~~or a new employee~~ is determined to be a hepatitis B carrier and no hepatitis B carriers have previously been placed in the group home, the procedures in (1) through (5) of Rule .0109 of this Section shall be followed.

(e) If a current resident ~~or employee~~ is a hepatitis B carrier, new residents ~~and new employees~~ without antibodies (who are not immune) shall be offered hepatitis B vaccine before entering the home. The procedures in (2) through (5) of Rule .0109 of this Section for current residents and employees shall be followed for new residents and employees.

Statutory Authority G.S. 143B-147.

.0111 COST FOR HEPATITIS B PROTECTION

The screening, ~~and vaccination, and rescreening~~ described in Rules .0109 and .0110 of this Section shall be provided by the employer at no cost to the resident or direct care employee.

Statutory Authority G.S. 143B-147.

.0112 RECORDS

Records of all residents and direct care employees shall be up-to-date regarding hepatitis B immunologic status. The record shall also contain information regarding screening, consent or refusal to be vaccinated, vaccination, ~~rescreening,~~ and booster shots (if indicated).

Statutory Authority G.S. 143B-147.

.0114 GENERAL PERSONAL HYGIENE AND ENVIRONMENTAL PRECAUTIONS; SELF TRAINING

~~A group home in which a hepatitis B carrier is located shall follow the procedures and precautions outlined in "Personal Hygiene and Environmental Precautions for Reducing Risk of Transmission of Hepatitis B from Antigen Positive Persons (Carrier) to Susceptible Persons (Non-immune)" (division publication APSR 50-6, publication date 10/07/85), adopted pursuant to G.S. 150B-14(e). This publication may be obtained at no cost upon written request to: Publications Officer, Division of Mental Health, Mental Retardation and Substance Abuse Services, 325 N. Salisbury Street, Raleigh, North Carolina 27611.~~

(a) A group home for mentally retarded persons must provide a safe living environment for residents, as well as a safe working environment for all employees.

(b) Policy and procedures shall be developed in accordance with federal OSHA Bloodborne Pathogens Standard 29 CFR 1910.1030, and shall include, but not be limited to:

- (1) safe work practices;
- (2) engineering controls which decrease the chance of occupational exposure to hepatitis B and other bloodborne pathogens; and
- (3) employee training, which shall include but not be limited to:
 - (A) causes and symptoms;
 - (B) methods of prevention;
 - (C) personal hygiene (including the monitoring and training of the resident in safe personal hygiene); and
 - (D) environmental precautions necessary to assure a safe home.

(c) The policy and procedures shall be incorporated in an "Exposure Control Plan" and maintained by the home.

Statutory Authority G.S. 143B-147.

.0115 STAFF TRAINING

~~Each group home staff person shall receive training about hepatitis B, its causes and symptoms, methods of prevention, and personal hygiene and environmental precautions necessary to assure a safe home including the monitoring and training of the resident in safe personal hygiene. Participation in training shall be documented in the employee's personnel folder including, but not limited to, date(s) of training and provider of training. It shall be the responsibility of the group home to provide training for each new employee within one month of the date of employment.~~

Statutory Authority G.S. 143B-147.

.0116 DOCUMENTATION OF COMPLIANCE

~~The area program shall monitor group homes for mentally retarded adults operated by its contract agencies for compliance with Rules .0107 through .0115 of this Section. To assure that the contract agency's group homes qualify for the exception regarding admissions specified in 10 NCAC 42C .2401(b)(5) of the licensure rules for group homes for developmentally disabled adults of the Commission for Social Services, the area program shall furnish documentation of compliance to the appropriate county department of social services. Documentation of compliance with 10 NCAC 18H .0109 and .0110 shall indicate that screening has been performed and that other requirements for vaccination and re-screening either have been met or are scheduled to meet the time frames specified in the rules. The documentation shall be submitted to the county department of social services at least 45 days prior to the expected initial licensure date or 45 days prior to the licensure renewal date.~~

(a) The area program shall monitor group homes for mentally retarded adults operated by its contract agencies for compliance with Rules .0107 through .0114 of this Section.

(b) To assure that the contract agency's group homes qualify for the exception regarding admissions specified in 10 NCAC 42C .2401(b)(5) of the licensure rules for group homes for developmentally disabled adults of the Commission for Social Services, the area program shall furnish documentation of compliance to the appropriate county department of social services.

(c) Documentation of compliance with 10 NCAC 18H .0109 and .0110 shall indicate that screening for residents has been performed and that other requirements for vaccination either have been met or are scheduled to meet the time frames

specified in the rules.

(d) The documentation shall be submitted to the county department of social services at least 45 days prior to the expected initial licensure date or 45 days prior to the licensure renewal date.

Statutory Authority G.S. 143B-147.

SUBCHAPTER 18L - PROGRAM COMPONENT OPERATIONAL STANDARDS

SECTION .1500 - EARLY INTERVENTION SERVICES PROCEDURE SAFEGUARDS

.1515 AUTHORITY AND RESPONSIBILITIES OF IMPARTIAL PERSON

(a) The hearing officer shall have the powers listed in G.S. 150B-33, and in addition shall have the following authority:

- (1) to establish reasonable time limitations on the parties' presentations;
- (2) to disallow irrelevant, immaterial or repetitive evidence;
- (3) to direct that additional evaluations of the child be performed;
- (4) to make findings of fact and conclusions of law relevant to the issues involved in the hearing;
- (5) to issue subpoenas for the attendance of witnesses or the production of documents; and
- (6) to specify the type and scope of the early intervention services to be offered the child, where the proposed services are found to be inappropriate.

This adoption by reference of G.S. 150B-33 shall be in accordance with G.S. 150B-14(c).

(b) The hearing officer does not have the authority to:

- (1) determine that only a specific program, specific early intervention staff person or specific service provider is appropriate for the pupil; or
- (2) determine noncompliance of state law and regulations.

(c) The decision of the hearing officer shall be in writing and shall contain findings of fact, conclusions of law and the reasons for the decision. The hearing officer shall mail a copy of the decision to each party by certified mail, return receipt requested.

(d) The hearing officer shall inform the parent that the parent may obtain a transcript of the

hearing at no cost by paying the cost for a copy. If the hearing officer determines that the parent is indigent, a transcript shall be provided without cost.

Authority G.S. 143B-147; 150B-1(d); 20 U.S.C. Sections 1401 et. seq., 1471 et. seq.

SUBCHAPTER 18M - REQUIRED SERVICES

SECTION .1400 - EARLY CHILDHOOD INTERVENTION SERVICES (ECIS) FOR CHILDREN WITH MENTAL RETARDATION OR AT HIGH RISK FOR MENTAL RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES OR DELAYS

.1404 MEDICAL STATEMENT

(a) ~~Each staff member, student intern, regular volunteer, substitute staff or other individual who works directly and on a continuous basis with children shall submit to the program at the time of initial approval and annually thereafter a medical statement from a licensed physician.~~

(b) ~~The medical statement may be in any written form but shall be signed by the physician and indicate the general good physical health of the individual and the lack of evidence of active tuberculosis and communicable diseases.~~

(c) ~~The program shall keep the most recent medical statement on file.~~

Statutory Authority G.S. 122C-51; 143B-147; 20 USC 1471.

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Division of Medical Assistance intends to amend rule cited as 10 NCAC 26H .0204.

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

The public hearing will be conducted at 1:30 p.m. on July 2, 1993 at the North Carolina Division of Medical Assistance, 1985 Umstead Drive, Room 132, Raleigh, NC 27603.

Reason for Proposed Action: Rule establishes Psychiatric Hospitals operated by the North Carolina Department of Human Resources, Division of Mental Health, Developmental Disabilities, Substance Abuse Services (DMH/DD/SAS) as Disproportionate Share Hospitals and permits additional payments to them based upon each Hospital ratio of low income patient days.

Comment Procedures: Written comments concerning this amendment must be submitted by July 2, 1993 to: Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27603 ATTN: Clarence Ervin, APA Coordinator. Oral comments may be presented at the hearing. In addition, a fiscal impact statement is available upon written request from the same address.

Editor's Note: This Rule was filed as a temporary amendment effective March 19, 1993, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

CHAPTER 26 - MEDICAL ASSISTANCE

SUBCHAPTER 26H - REIMBURSEMENT PLANS

SECTION .0200 - HOSPITAL INPATIENT REIMBURSEMENT PLAN

.0204 ADMINISTRATIVE RECONSIDERATION REVIEWS

(a) Reconsideration reviews of rate determinations will be processed in accordance with the provisions of 10 NCAC 26K. Requests for reconsideration reviews must be submitted to the Division of Medical Assistance within 60 days after rate notification, unless unexpected conditions causing intense financial hardship arise, in which case a reconsideration review may be considered at any time.

(b) Operating rate reconsideration reviews are considered only on the basis of the actual additional cost of essential new services or patient mix changes incurred since the base year.

(c) Capital rate reconsideration reviews are considered only for the additional cost of new construction, renovations and equipment, consistent with the Certificate of Need approval if required.

(d) A hospital's adjusted rate for one or more of

the factors cited in the Paragraphs (a) - (c) of this Rule cannot exceed a rate limit computed by applying the methods described in Rule .0202(b) and (c) of this Subchapter to the hospital's allowable Medicaid cost in the most recent annual cost report available.

(e) Hospitals that serve a disproportionate share of low-income patients are eligible to receive rate adjustments. The cost report data and financial information that is required in order to qualify as a disproportionate share hospital effective April 1, 1991 is based on the fiscal year ending in 1989 for each hospital, as submitted to the Division of Medical Assistance on or before April 1, 1991. The cost report data and financial information to qualify as a disproportionate share hospital effective July 1, 1991 is based on the fiscal year ending in 1990 for each hospital, as submitted to the Division of Medical Assistance on or before September 1, 1991. In subsequent years, qualifications effective July 1 of any particular year are based on each hospital's fiscal year ending in the preceding calendar year. The patient days, costs, revenues, or charges related to nursing facility services, swing-bed services, home health services, outpatient services, or any other service that is not a hospital inpatient service, cannot be used to qualify for disproportionate share status. A hospital is deemed to be a disproportionate share hospital if the hospital has at least 2 obstetricians with staff privileges at the hospital who have agreed to provide obstetric services to individuals eligible for Medicaid. In the case of a hospital located in a rural area, the term obstetrician includes any physician with staff privileges at the hospital to perform non-emergency obstetric procedures. This requirement does not apply to a hospital which did not offer non-emergency obstetric services as of December 21, 1987 or to a hospital that predominantly serves individuals under 18 years of age; and

- (1) the hospital's Medicaid inpatient utilization rate, defined as the percentage resulting from dividing Medicaid patient days by total patient days, is at least one standard deviation above the mean Medicaid inpatient utilization rate for all hospitals that receive Medicaid payments in the state; or
- (2) the hospital's low-income utilization rate exceeds 25 percent. The low-income utilization rate is the sum of:
 - (A) the ratio of the sum of Medicaid inpatient revenues plus cash subsidies received from the State and local

governments, divided by the hospital's total patient revenues; and

- (B) the ratio of the hospital's gross inpatient charges for charity care less the cash subsidies for inpatient care received from the State and local governments, divided by the hospital's total inpatient charges; or
- (3) the sum of the hospital's Medicaid revenues, bad debts allowance net of recoveries, and charity care exceeds 20 percent of gross patient revenues; or
- (4) The hospital, in a ranking of hospitals in the State, from most to least in number of Medicaid patient days provided, is among the top group that accounts for 50% of the total Medicaid patient days provided by all hospitals in the State.
- (5) Psychiatric Hospitals operated by the North Carolina Department of Human Resources, Division of Mental Health, Developmental Disabilities, Substance Abuse Services (DMH/DD/SAS).

(f) The rate adjustment for a disproportionate share hospital is 2.5 percent plus one-fourth of one percent for each percentage point that a hospital's Medicaid inpatient utilization rate exceeds one standard deviation of the mean Medicaid inpatient utilization rate in the State. The rate adjustment is applied to a hospital's payment rate exclusive of any previous disproportionate share adjustments.

(g) For hospitals eligible under Paragraph (e) of this Rule, an additional payment adjustment may be made to each hospital for services provided in the months of April, May, and June, 1991 equal to the product of the ratio of each hospital's total Medicaid inpatient days divided by the total Medicaid inpatient days provided by all disproportionate share hospitals in the state during their fiscal years ending in 1989 multiplied by an amount of funds to be determined by the Director of the Division of Medical Assistance, but not to exceed one hundred forty million dollars (\$140,000,000). Each hospital's payment adjustment will be paid retrospectively in up to three installments. An additional payment adjustment by this methodology may be made for services provided in the months of July, August, September, October, November and December, 1991 based on the Medicaid and total inpatient days as filed in the hospital cost reports for fiscal years ending in 1990. The amount of funds to be determined by the Director shall not exceed one

hundred sixty million dollars (\$160,000,000).

(h) For hospitals eligible under Paragraph (e) of this rule, an additional payment adjustment may be made after the effective date of this rule to each hospital for services provided in the months of January, February, March, April, May and June 1992 based on the Medicaid and total inpatient days as filed in hospital cost reports for fiscal years ending in 1990, by use of the methodology described Paragraph (g) of this Rule. The amount of funds to be determined by the Director shall not exceed \$160,000,000. Each hospital payment adjustment will be paid retrospectively in up to three installments. An additional payment adjustment by this methodology will be made for services provided in the months of July, August, and September 1992 based on the Medicaid and total inpatient days as filed in hospital cost reports for fiscal years ending in 1991. The amount of funds to be determined by the director shall not exceed \$80,000,000.

(i) Effective October 1, 1992, hospital eligible under Subparagraph (e)(5) of this Rule will be eligible for disproportionate share payments, in addition to other payments made under the North Carolina Medicaid Hospital reimbursement methodology, from a disproportionate share pool under the circumstance specified below:

- (1) A DMH/DD/SAS operated psychiatric hospital will receive a monthly disproportionate share payment based on the monthly bed days of service to low income persons of each DMH/DD/SAS hospital divided by the total monthly bed days of service to low income persons of all DMH/DD/SAS hospitals times allocated funds.
- (2) This payment shall be in addition to the disproportionate share payments made in accordance with (f) (g) and (i) under Administrative Appeals of this plan. However, DHR operated psychiatric hospitals are not required to qualify under the requirement of Paragraph (e) 1 through 4 of this Rule.
- (3) The amount of allocated funds shall be determined by the Director of the Division of Medical Assistance, but not to exceed the quarterly federal allotment of funds (plus appropriate non-federal match) earmarked for disproportionate share hospital payments less payments made under (e) 1 through 4 and (i) under administrative

appeals divided by three (3). In the above formula, bed days of services to low income persons is defined as the number of bed days provided to individuals that have been determined by the hospital as patients that do not possess the financial resources to pay portions or all charges associated with care provided. Low income persons include a person that has been determined eligible for Medical Assistance. The count of bed days used to determine payment is based upon the month immediately prior to the month that payments are made.

This reimbursement limitation will become effective on the date: The Health Care Financing Administration, U.S. Department of Health and Human Services, approves amendment submitted to HCFA by the Director of the Division of Medical Assistance on or about December 3, 1992 as #MA 92-34, where-in the Director proposes amendment of the State Plan to establish Psychiatric Hospitals operated by the North Carolina Department of Human Resources, Division of Mental Health, Developmental Disabilities, Substance Abuse Services (DMH/DD/SAS) as Disproportionate Share Hospitals and method to determine payment.

(j) Except as otherwise specified in this Rule, rate adjustments are considered based on the most recent annual cost report, audited financial statements when necessary and other required information as submitted by a hospital provider. An adjustment cannot be made if the necessary information is not submitted or if the information is incomplete or incorrect. A rate adjustment can be applied retroactively to the most recent July 1 effective date, but cannot be applied to previous fiscal years.

(k) For hospitals eligible under Paragraph (e), a payment adjustment is available for services involving exceptionally high costs or exceptionally long lengths of stay for patients under six years of age. A payment adjustment is available for all the other hospitals for such services provided to patients under one year of age. A five percent increase above the normal payment amount (as described in paragraph (f) of this Rule) will be provided for the inpatient claims with billed charges in excess of fifty-five thousand dollars (\$55,000) or with stays in excess of 65 days. The fifty-five thousand dollars (\$55,000) threshold will be increased annually by the inflation factor described under Paragraph (c) of this Rule. This

provision is effective for dates of service beginning July 1, 1991.

(k) (l) The disproportionate share payments and payment adjustments described in Paragraphs (f), (g), (h) and (j) are made in addition to the payments described in 10 NCAC 26H .0202 (a)-(f).

Authority G.S. 108A-25(b); 108A-54; 108A-55; 150B-11; S.L. 1985, c. 479, s. 86; 42 C.F.R. 447, Subpart C.

TITLE 12 - DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Justice - Attorney General's Office intends to amend rule cited as 12 NCAC 2A .0203.

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

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): A request for a public hearing must be in writing and must be submitted to Melissa L. Trippe, P.O. Box 629, Raleigh, NC 27602-0629 by April 16, 1993.

Reason for Proposed Action: To delegate the Attorney General's power to enter into consent agreements.

Comment Procedures: Interested persons may present their views in writing from April 1, 1993 through May 1, 1993. Such written comments must be delivered or mailed to the N.C. Department of Justice, c/o Melissa L. Trippe, Assistant Attorney General, P.O. Box 629, Raleigh, NC 27602-0629.

CHAPTER 2 - OFFICE OF THE ATTORNEY GENERAL

SUBCHAPTER 2A - OFFICE RULES

SECTION .0200 - DUTIES

.0203 CONSENT JUDGMENTS

To the limited extent specified in this Rule, the The Attorney General's power to sign consent

judgments entered into by the state, a state department, state agency, state institution, or a state officer who is a party in his official capacity in litigation in which the state is interested or is a party is hereby delegated as follows:

- (1) to any attorney assigned to the Tort Claims Section in all consent judgments arising under Article 31 of G.S. Chapter 143 (Tort Claims Act) and G.S. Chapter 97 (Worker's Compensation Act);
- (2) to any attorney assigned to in the Highway Section or Administrative Section for all consent judgments in condemnation or eminent domain actions brought under the provisions of G.S. Chapter 40A or G.S. Chapter 136 involving the Department of Transportation; and
- (3) to any attorney in the Property Control Section in all cases assigned to such attorney for consent judgments in condemnation or eminent domain actions brought on behalf of the State at the request of the Secretary of the North Carolina Department of Administration.

Statutory Authority G.S. 114-2.2.

TITLE 15A - DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Marine Fisheries Commission intends to amend rule cited as 15A NCAC 31 .0001.

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

The public hearings will be begin at 7:00 p.m. except the hearing scheduled April 3, 1993, in Manteo which will begin at 10:00 a.m. The hearing on April 5, 1993, at the Archdale Building, Raleigh, will begin as a joint hearing with the Wildlife Resources Commission on Rules 15A NCAC 3Q .0107 and 3Q .0202 only. After public comments on these two rules have ceased, the Marine Fisheries Commission will continue the hearing on the remainder of the rules. The dates and locations of all hearings are as follows:

March 30, 1993

Duke University Marine Lab

*Pivers Island
Beaufort, NC*

March 31, 1993
Craven County Courthouse
Superior Court Room
Corner of Craven and Broad Street
New Bern, NC

April 1, 1993
Hyde County Courthouse
Swan Quarter, NC

April 2, 1993
Pasquotank County Courthouse
Court Room A
206 E. Main Street
Elizabeth City, NC

April 3, 1993
NC Aquarium
Airport Road
Manteo, NC

April 5, 1993
Archdale Building
512 North Salisbury St.
Raleigh, NC

April 6, 1993
Government Center
600 E. 4th St.
Charlotte, NC

April 7, 1993
Government Complex
Brunswick County
Highway 17
Bolivia, NC

April 8, 1993
New Hanover County Courthouse
Court Room 317
4th and Princess St.
Wilmington, NC

The Marine Fisheries Commission will conduct a Business Session on May 5th, 1993, starting at 9:00 a.m. to decide on these proposed rules. This meeting will be conducted in Raleigh, NC; the exact location will be determined and announced at a later date.

Reasons for Proposed Action:

15A NCAC 31 .0001 - DEFINITIONS - To define gill nets, seines and critical habitat areas. These terms are referred to throughout rules but not defined.

Comment Procedures: Comments and statements, both written and oral, may be presented at the hearings. Written comments are encouraged and may be submitted to the Marine Fisheries Commission, P.O. Box 769, Morehead City, NC 28557. These written and oral comments must be received no later than 8:30 a.m., April 16, 1993. Oral presentation lengths may be limited depending on the number of people that wish to speak at the public hearings.

Editor's Note: This rule was previously published in Volume 7, Issue 24, pages 2683 through 2687 of the North Carolina Register published on March 15, 1993. The rule is being republished to include the text that is double underlined in Subparagraph (20)(A) which was omitted.

CHAPTER 3 MARINE FISHERIES

SUBCHAPTER 3I - GENERAL RULES

.0001 DEFINITIONS

(a) All definitions set out in Subchapter IV of Chapter 113 of the General Statutes apply in these Rules.

(b) The following additional terms are hereby defined:

- (1) Commercial Fishing Equipment. All fishing equipment used in coastal fishing waters except:
 - (A) Seines less than 12 feet in length;
 - (B) Spears;
 - (C) A dip net having a handle not more than eight feet in length and a hoop or frame to which the net is attached not exceeding 60 inches along the perimeter;
 - (D) Hook-and-line and bait-and-line equipment other than multiple-hook or multiple-bait trotline;
 - (E) A landing net used to assist in taking fish when the initial and primary method of taking is by the use of hook and line; and

(F) Cast Nets.

- (2) Fixed or stationary net. A net anchored or staked to the bottom, or some structure attached to the bottom, at both ends of the net;
- (3) Mesh Length. The diagonal distance from the inside of one knot to the outside of the other knot, when the net is stretched hand-tight;
- (4) Possess. Any actual or constructive holding whether under claim of ownership or not;
- (5) Transport. Ship, carry, or cause to be carried or moved by public or private carrier by land, sea, or air;
- (6) Use. Employ, set, operate, or permit to be operated or employed;
- (7) Purse Gill Nets. Any gill net used to encircle fish when the net is closed by the use of a purse line through rings located along the top or bottom line or elsewhere on such net;
- (8) Gill Net. A net set vertically in the water for which the primary purpose is to capture fish by entanglement by the gills in its mesh as a result of net design, construction, mesh size, webbing diameter or method in which it is used.
- (9) Seine. A net set vertically in the water and pulled by hand or power for which the primary purpose is to capture fish by encirclement and confining fish within itself or against another net, the shore or bank as a result of net design, construction, mesh size, webbing diameter, or method in which it is used.
- (10) ~~(8)~~ Internal Coastal Waters or Internal Waters. All coastal fishing waters except the Atlantic Ocean;
- (11) ~~(9)~~ Channel Net. A net used to take shrimp which is anchored or attached to the bottom at both ends or with one end anchored or attached to the bottom and the other end attached to a boat;
- (12) ~~(10)~~ Dredge. A device towed by engine power consisting of a frame, tooth bar or smooth bar, and catchbag used in the harvest of oysters, clams, crabs, scallops, or conchs;
- (13) ~~(11)~~ Mechanical methods for clamming. Includes, but not limited to, dredges, hydraulic clam dredges, stick rakes and other rakes when towed by engine power, patent tongs, kicking with

propellers and/or deflector plates with or without trawls, and any other method that utilizes mechanical means to harvest clams;

- (14) ~~(12)~~ Mechanical methods for oystering. Includes, but not limited to, dredges, patent tongs, stick rakes and other rakes when towed by engine power and any other method that utilizes mechanical means to harvest oysters;
- (15) ~~(13)~~ Depuration. Purification or the removal of adulteration from live oysters, clams, and mussels by any natural or artificially controlled means;
- (16) ~~(14)~~ Peeler Crab. A blue crab that has a soft shell developing under a hard shell and having a definite pink, white, or red line or rim on the outer edge of the back fin or flipper;
- (17) ~~(15)~~ Length of finfish. Determined by measuring along a straight line the distance from the tip of the snout with the mouth closed to the tip of the compressed caudal (tail) fin;
- (18) ~~(16)~~ Licensee. Any person holding a valid license from the Department to take or deal in marine fisheries resources.
- (19) ~~(17)~~ Aquaculture operation. An operation that produces artificially propagated stocks of marine or estuarine resources or obtains such stocks from authorized sources for the purpose of rearing in a controlled environment. A controlled environment provides and maintains throughout the rearing process one or more of the following: predator protection, food, water circulation, salinity, and/or temperature controls utilizing proven technology not found in the natural environment.
- (20) Critical habitat areas are those fragile estuarine and marine areas that support juvenile and adult populations of economically important seafood species, as well as forage species important in the food chain. Critical habitats include but are not limited to nursery areas, beds of submerged aquatic vegetation, shellfish producing areas, anadromous fish spawning and anadromous fish nursery areas, in all coastal fishing waters as determined through extensive marine and estuarine survey sampling.

Critical habitats are vital for portions, or the entire life cycle, including the early growth and development of important seafood species.

- (A) Beds of submerged aquatic vegetation are those habitats in public trust and estuarine waters vegetated with one or more species of submerged vegetation such as eelgrass (*Zostera marina*), shoalgrass (*Halodule wrightii*) and widgeongrass (*Ruppia maritima*). These vegetation beds occur in both subtidal and intertidal zones and may occur in isolated patches or cover extensive areas. In either case, the bed is defined by the presence of above-ground leaves or the below-ground rhizomes and propagules together with the sediment on which the plants grow. In defining beds of submerged aquatic vegetation, the Marine Fisheries Commission recognizes the Aquatic Weed Control Act of 1991 (G.S. 113A-220 et. seq.) and does not intend the submerged aquatic vegetation definition and its implementing rules to apply to or conflict with the non-development control activities authorized by that Act.
- (B) Shellfish producing habitats are those areas in which economically important shellfish, such as, but not limited to clams, oysters, scallops, mussels, and whelks, whether historically or currently, reproduce and survive because of such favorable conditions as bottom type, salinity, currents, cover, and cultch. Included are those shellfish producing areas closed to shellfish harvest due to pollution.
- (C) Anadromous fish spawning areas are defined as those areas where evidence of spawning of anadromous fish has been documented by direct observation of spawning, capture of running ripe females, or capture of eggs and/or early larvae.
- (D) Anadromous fish nursery areas are defined as those areas in the riverine and estuarine systems utilized by post-larval and later juvenile anadromous fish.

Statutory Authority G.S. 113-134; 143B-289.4.

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Wildlife Resources Commission intends to amend rule cited as 15A NCAC 10B .0203, with changes from the proposed text noticed in the Register, Volume 7, Issue 17, pages 1736 - 1773.

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

Reason for Proposed Action: To set seasons for and bag limits on the harvesting of deer.

Comment Procedures: Interested persons may present their views in writing from April 1, 1993 to May 1, 1993. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 North Salisbury Street, Raleigh, NC 27604-1188.

Editor's Note: An agency may not adopt a rule that differs substantially from the text of a proposed rule published in the Register, unless the agency publishes the text of the proposed different rule and accepts comments on the new text for at least 30 days after the publication of the new text.

CHAPTER 10 WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10B - HUNTING AND TRAPPING

SECTION .0200 - HUNTING

.0203 DEER (WHITE-TAILED)

(a) Closed Season. All counties and parts of counties not listed under the open seasons in Paragraph (b) in this Rule are closed to deer hunting.

(b) Open Seasons (All Lawful Weapons)

(1) Male Deer With Visible Antlers. Male deer with antlers or spikes protruding through the skin, as distinguished from knobs or buttons covered by skin or velvet, may be taken during the following seasons:

(A) Monday on or nearest October 15 to January 1 in the following counties and parts of counties:

Beaufort	Duplin	Lenoir	Pitt
Bertie	Edgecombe	Martin	Richmond**
Bladen	Franklin	Nash	Robeson
Brunswick	Gates	New Hanover	Sampson
Camden	Greene	Northampton	Scotland
Carteret	Halifax	Onslow	Tyrrell
Chowan	Hertford	Pamlico	Vance
Columbus*	Hoke	Pasquotank	Warren
Craven	Hyde	Pender	Washington
Currituck	Jones	Perquimans	Wayne
Dare			Wilson

Cumberland: That part south of NC 24 or east of I-95.

Harnett: That part west of NC 87.

Johnston: All of the county except that part south of US 70 and west of I-95.

Moore**: All of the county except that part north of NC 211 and west of US 1.

Wake: That part north of I-40.

*Unlawful to hunt or kill deer in Lake Waccamaw or within 50 yards of its shoreline.

**See 15A NCAC 10D .0003(e)(2) for seasons on Sandhills Game Land.

- (B) Monday of Thanksgiving week to third Saturday after Thanksgiving Day in the following counties and parts of counties:

Alexander	Davie	Lincoln	Wilkes
Alleghany	Forsyth	Stokes	Yadkin
Ashe	Gaston	Surry	
Catawba	Iredell	Watauga	

- (C) Monday of Thanksgiving week to third Saturday after Thanksgiving Day in the following counties and parts of counties:

Avery	Clay	Jackson	Polk
Buncombe	Cleveland	Macon	Rutherford
Burke	Graham	Madison	Swain
Caldwell	Haywood	McDowell	Transylvania
Cherokee	Henderson	Mitchell	Yancey

- (D) Monday before Thanksgiving week to January 1 in the following counties and parts of counties:

Alamance	Davidson	Mecklenburg	Rockingham
Anson	Durham	Montgomery	Rowan
Cabarrus	Granville	Orange	Stanly
Caswell	Guilford	Person	Union
Chatham	Lee	Randolph	

Cumberland: That part north of NC 24 and west of I-95.

Harnett: That part east of NC 87.

Johnston: That part south of US 70 and west of I-95.

Moore: That part north of NC 211 and west of US 1.

Wake: That part south of I-40.

- (2) Deer of Either Sex. Deer of either sex may be taken during the open seasons and in the counties and portions of counties listed in this Subparagraph:

- (A) The open either-sex deer hunting dates established by the U.S. Fish and Wildlife Service during the period from the first Saturday in October to January 1 in those parts of Hyde, Tyrrell and Washington Counties known as the Pocosin Lakes National Wildlife Refuge, in those parts of Camden, Gates and Pasquotank Counties known as the Dismal Swamp National Wildlife Refuge, and in that part of Currituck County known as the Mackay Island National Wildlife Refuge and those parts of Anson and Richmond Counties known as Pee Dee National Wildlife Refuge.
- (B) The open either-sex deer hunting dates established by the appropriate military commands during the period from Monday on or nearest October 15 to January 1 in that part of Brunswick County known as the Sunny Point Military Ocean Terminal, in that part of Craven County known and marked as Cherry Point Marine Base, in that part of Onslow County known and marked as the Camp Lejeune Marine Base, on Fort Bragg Military Reservation, and on Camp Mackall Military Reservation.
- (C) Second Saturday in October for youth either sex deer hunting by permit only on a designated portion of Belews Creek Steam Station in Stokes County.
- (D) The second Saturday in December in all of Buncombe, Catawba, Gaston, Haywood, Henderson, Lincoln, Madison, Mitchell, Polk, Transylvania, and Yancey Counties and the following parts of counties:

Avery: That part south of the Blue Ridge Parkway.

- (E) Friday and Saturday of the week following Thanksgiving in all of Dare County and in the following parts of counties:

Cabarrus: That part west of US 52 and south of a line formed by NC 49 from the Mecklenburg

County line to Mount Pleasant and east of SR 1006 from Mount Pleasant to the Rowan County line.

Davidson: That part north of I-85, except game lands.

Mecklenburg: That part north of US 74.

Rowan: That part west of US 52, except game lands.

Scotland: That part north of US 74, except game lands.

Union: That part south of US 74 and NC 75.

(F) Wednesday to Saturday of the week following Thanksgiving in all of ~~Camden~~, Cumberland, Greene, ~~Pasquotank~~, Wake, Tyrrell, and Wilson Counties and in the following parts of counties:

Currituck: ~~That part north and west of the Intracoastal Waterway.~~

Johnston: That part north of US 70 or west of I-95.

Moore: All of the county, except on game lands.

~~Nash: That part south of US 64.~~

~~Perquimans: That part south of US 17 and east of Perquimans River.~~

Richmond: That part east of a line formed by US 220 from the Montgomery County line to Rockingham and US 1 from Rockingham to the South Carolina line, except on game lands.

Stanly: That part west of US 52.

~~Tyrrell: That part south of US 64.~~

~~Washington: That part east of NC 32 and south of US 64.~~

Wayne: That part north of US 70.

(G) Wednesday of the week following Thanksgiving to Saturday of next succeeding week in all of Alamance, Caswell, Camden, Chatham, Franklin, Guilford, Lee, Orange, Pasquotank, Person, Randolph, Rockingham, ~~and Vance~~, and Washington Counties and in the following parts of counties:

~~Anson: All of the county except game lands.~~

Cabarrus: That part east of US 52.

Carteret: All of the county except game lands.

Chowan: That part north of US 17 and west of NC 32.

Columbus: That part west of US 74, SR 1005, and SR 1125.

Currituck: ~~That part south and east of the Intracoastal Waterway,~~ All of the county except the Outer Banks.

Davidson: That part south of I-85, except on game lands.

Durham: All of the county except Butner-Falls of Neuse Game Land.

~~Edgecombe: That part south of US 64.~~

Granville: All of the county except Butner-Falls of Neuse Game Land.

~~Johnston: That part south of US 70 and east of I-95.~~

Lenoir: That part west of NC 11.

Montgomery: All of the county except on game lands.

Nash: That part ~~north~~ south of US 64.

Richmond: That part west of a line formed by US 220 from the Montgomery County line to Rockingham and US 1 from Rockingham to the South Carolina line.

Robeson: That part east of I-95.

Rowan: That part east of US 52, except on game lands.

Stanly: That part east of US 52, except game lands.

Wake: All of the county except Butner-Falls of Neuse Game Land.

~~Washington: That part west of NC 32 and south of US 64.~~

Wayne: That part south of US 70.

(H) Monday of Thanksgiving week to the third Saturday after Thanksgiving Day in that part of Buncombe County east of NC 191, south of the French Broad and Swannanoa Rivers, west of US 25, and north of SR 3503, NC 280 and SR 3501.

(I) Wednesday of the week following Thanksgiving to January 1 in all of Brunswick, Edgecombe, Gates, Hertford, ~~Gates~~, Northampton, Perquimans, Pitt, and Warren Counties, and in the following parts of counties:

Anson: All of the county except game lands.

Beaufort: All of the county except game lands.

Bertie: All of the county except Roanoke River Wetlands and Roanoke River National Wildlife Refuge.

Bladen: All of the county except game lands.

Chowan: That part south of US 17 or east of NC 32.

Columbus: That part east of a line formed by US 74, SR 1005, and SR 1125.

Craven: All of the county except game lands.

Duplin: All of the county except game lands.

~~Edgecombe: That part north of US 64.~~

Halifax: All of the county except Roanoke River Wetlands.

Hyde: All of the county except game lands.

Johnston: That part south of US 70 and east of I-95.

Jones: All of the county except game lands.

Lenoir: That part east of NC 11.

Martin: All of the county except Roanoke River Wetlands.

Nash: That part north of US 64.

New Hanover: That part north of US 74.

Onslow: All of the county except game lands.

Pamlico: All of the county except game lands.

Pender: All of the county except game lands.

~~Perquimans: All of the county except that part that lies both south of US 17 and east of the Perquimans River.~~

Sampson: That part south of NC 24.

- (J) The second Wednesday after Thanksgiving to the third Saturday after Thanksgiving in all of Alexander, Davie, Iredell, Rutherford, Stokes, Surry, and Wilkes Counties.
- (K) The third Friday after Thanksgiving to the third Saturday after Thanksgiving in all of Alleghany, Ashe, Burke, Caldwell, Cleveland, Forsyth, McDowell, ~~Rutherford~~, Watauga, and Yadkin Counties.
- (L) In those counties or parts of counties listed in Paragraph (b) (2) (I), except on game lands, ~~one~~ two antlerless deer may be taken during that part of the regular gun season in which no other either sex season is open and must be tagged with the Antlerless ~~only~~ deer tag or the Bonus Antlerless deer tag.
- (M) In those counties or parts of counties listed in Part (b)(2)(G), except on game lands, one antlerless deer may be taken during that part of the regular gun season in which no other either-sex season is open and must be tagged with the Antlerless deer tag.
- (3) Game Lands Either-Sex Hunts. On the hunt dates indicated, deer of either sex may be taken by permittees engaged in managed hunts conducted on game lands in accordance with 15A NCAC 10D .0003(e)(4) and (5).
 - (c) Open Seasons (Bow and Arrow)
 - (1) Authorization. Subject to the restrictions set out in Subparagraph (2) of this Paragraph and the bag limits set out in Paragraph (e) of this Rule, deer of either sex may be taken with bow and arrow during the following seasons:
 - (A) Monday on or nearest September 10 to the fourth Saturday thereafter in the counties and parts of counties having the open season for male deer specified by Part (A) of Subparagraph (b)(1) of this Rule, except on the Sandhills Game Land.
 - (B) Monday on or nearest September 10 to the second Saturday before Thanksgiving in the counties and parts of counties having the open seasons for male deer specified by Part (B) of Subparagraph (b)(1) of this Rule.
 - (C) Monday on or nearest September 10 to the fourth Saturday thereafter, and Monday on or nearest October 15 to the Saturday before Thanksgiving in the counties and parts of counties having the open seasons for male deer specified by Part (C) of Subparagraph (b)(1) of this Rule.
 - (D) Monday on or nearest September 10 to the third Saturday before Thanksgiving in the counties and parts of counties having the open season for male deer specified by Part (D) of Subparagraph (b)(1) of this Rule, and on Sandhills Game Land.
 - (2) Restrictions
 - (A) Dogs may not be used for hunting deer during the bow and arrow season.
 - (B) It is unlawful to carry any type of firearm while hunting with a bow during the bow and arrow deer hunting season.

- (C) Only bows and arrows of the types authorized in 15A NCAC 10B .0116 for taking deer may be used during the bow and arrow deer hunting season.
- (d) Open Seasons (Muzzle-Loading Rifles and Shotguns)
- (1) Authorization. Subject to the restrictions set out in Subparagraph (2) of this Paragraph, deer may be taken only with muzzle-loading firearms during the following seasons:
- (A) Monday on or nearest October 8 to the following Saturday in the counties and parts of counties having the open seasons for male deer specified by Items (A) and (C) of Subparagraph (b)(1) of this Rule, except on Sandhills Game Land.
- (B) Monday to Saturday of the week preceding Thanksgiving week in the counties and parts of counties having the open seasons for male deer specified by Item (B) of Subparagraph (b)(1) of this Rule.
- (C) Monday to Saturday of the second week before Thanksgiving week in the counties and parts of counties having the open season for male deer specified by Part (D) of Subparagraph (b)(1) of this Rule, and on Sandhills Game Land.
- (2) Restrictions
- (A) Deer of either sex may be taken during muzzle-loading firearms season in those counties or parts of counties listed in Parts (A) and (D) of Subparagraph (b) (1) of this Rule and deer of either sex may be taken on the last day of muzzle-loading firearms season in those counties or parts of counties listed in Part (B) and (C) of Subparagraph (b) (1) of this Rule.
- (B) Dogs may not be used for hunting deer during the muzzle-loading firearms seasons.
- (C) Pistols may not be carried while hunting deer during the muzzle-loading firearms seasons.
- (e) Bag Limits: Daily, two; possession, five; one of which must be antlerless; season, five; one of which must be antlerless. In those areas listed in Part (b)(2)(I) one additional antlerless deer may be taken provided it is tagged with the Bonus Antlerless deer tag. Antlerless deer include males with knobs or buttons covered by skin or velvet as distinguished from spikes protruding through the skin.
- (f) Kill Reports. The carcass of each deer shall be tagged and the kill reported as provided by 15A NCAC 10B .0113.

Statutory Authority G.S. 113-134; 113-270.3; 113-276.1; 113-291.1; 113-291.2.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend rule cited as 15A NCAC 10B .0113.

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

The public hearing will be conducted at 9:30 a.m. on April 21, 1993 at the Archdale Building, Room 332, 512 North Salisbury Street, Raleigh, NC 27604-1188.

Reason for Proposed Action: To allow reporting of big game kill by telephone.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing

will be open for receipt of written comments from April 1, 1993 to May 1, 1993. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 North Salisbury Street, Raleigh, NC 27604-1188.

CHAPTER 10 WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10B - HUNTING AND TRAPPING

SECTION .0100 - GENERAL REGULATIONS

.0113 BIG GAME KILL REPORTS

The carcass of each bear, wild turkey, deer and wild boar shall be tagged at the site of the kill with the appropriate big game tag which has been validated by cutting out the month and day of the kill. All harvested big game animals must be registered at a wildlife cooperator agent or reported through the toll free Big Game Telephone Reporting System, before they are skinned or

dressed or dismembered for consumption except in those cases where the kill occurs in a remote area which prevents the animal from being transported as an entire carcass. In these cases, the carcass may be tagged, skinned, quartered, and transported to the wildlife cooperator agent for reporting or reported within 24 hours through the Big Game Telephone Reporting System. A wildlife cooperator agent located within the immediate area of open season will supply a big game kill report card in duplicate or an authorization number may be obtained through the Big Game Telephone Reporting System. The report card must be completed to show the information called for thereon. The tag shall be affixed to the carcass at a location and in such manner as to be visible upon inspection from the outside, and it is unlawful to affix the tag at any location or in any manner so as to conceal it from visibility upon ordinary inspection. It is unlawful to remove the tag from the carcass prior to completion of the report card the kill being properly reported either through completion of the report card or through the Big Game Telephone Reporting System or at any time thereafter until the carcass is finally skinned or dressed for consumption. The authorization number given through the Big Game Telephone Reporting System or the duplicate copy of the big game kill report card must be retained by the hunter and shall thereafter constitute his permit to continue in possession of the carcass. Otherwise, the continued possession of the bear, wild turkey, deer or wild boar shall be unlawful.

Persons who are by law exempt from the big game hunting license are not required to tag the carcass but shall report each kill as above required, and, in lieu of the tag, the word "exempt" together with the reason therefor (parent's license, landowner, agricultural lessee) shall be written on the original of the big game kill report card.

Any big game tag which has been detached from the tag card issued with the big game license prior to the killing and tagging of the big game animal shall be seized by a wildlife enforcement officer.

Statutory Authority G.S. 113-134; 113-270.3; 113-276.1.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend rule cited as

15A NCAC 10B .0202.

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

The public hearing will be conducted at 7:30 p.m. on April 19, 1993 at the Swain Auditorium, Edenton, NC.

Reason for Proposed Action: To change the season for the harvest of bear.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from April 1, 1993 to May 1, 1993. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 North Salisbury Street, Raleigh, NC 27604-1188.

CHAPTER 10 WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10B - HUNTING AND TRAPPING

SECTION .0200 - HUNTING

.0202 BEAR

(a) Open Seasons

- (1) Monday on or nearest October 15 to the Saturday before Thanksgiving and the third Monday after Thanksgiving to January 1 in and west of the boundary formed by NC 16 from the Virginia State line to Wilkesboro and NC 18 from Wilkesboro to the South Carolina State line.
- (2) Second Monday in November to the following Saturday in Beaufort, ~~Camden,~~ Craven, ~~Dare,~~ Gates, ~~Hyde,~~ Jones, ~~and~~ Pamlico, ~~Pasquotank,~~ Tyrrell, ~~and~~ Washington Counties; ~~and in that part of Bertie County southeast of US 17, and that part of Chowan County north of a line formed by SR 1002, SR 1222 and SR 1224.~~
- (3) Second Monday in November to January 1 in Bladen, Carteret, Duplin, New Hanover, Onslow and Pender Counties;

in that part of Cumberland County south of NC 24 and east of the Cape Fear River; and in that part of Sampson county south of NC 24.

- (4) Second Monday in December to January 1 in Brunswick and Columbus Counties.

- (5) Friday immediately preceding the second Monday in November to the second Saturday after the opening date in Camden, Dare, Gates, Hyde, Pasquotank, Tyrrell, and Washington Counties; and in that part of Bertie County southeast of US 17, and that part of Chowan County north of a line formed by SR 1002, SR 1222 and SR 1221.

(b) No Open Season. There is no open season in any area not included in Paragraph (a) of this Rule or in those parts of counties included in the following posted bear sanctuaries:

Avery, Burke and Caldwell Counties--Daniel Boone bear sanctuary

Beaufort, Bertie and Washington Counties--Bachelor Bay bear sanctuary

Beaufort and Pamlico Counties--Gum Swamp bear sanctuary

Bladen County--Suggs Mill Pond bear sanctuary

Brunswick County--Green Swamp bear sanctuary

Buncombe, Haywood, Henderson and Transylvania Counties--Pisgah bear sanctuary

Carteret, Craven and Jones Counties--Croatan bear sanctuary

Clay County--Fires Creek bear sanctuary

Currituck County--North River bear sanctuary

Dare County--Bombing Range bear sanctuary

Haywood County--Harmon Den bear sanctuary

Haywood County--Sherwood bear sanctuary

Hyde County--Gull Rock bear sanctuary

Hyde County--Pungo River bear sanctuary

Jackson County--Panthertown-Bonas Defeat bear sanctuary

Jones and Onslow Counties--Hofmann bear sanctuary

Macon County--Standing Indian bear sanctuary

Macon County--Wayah bear sanctuary

Madison County--Rich Mountain bear sanctuary

McDowell and Yancey Counties--Mt. Mitchell bear sanctuary

Mitchell and Yancey Counties--Flat Top bear sanctuary

Wilkes County--Thurmond Chatham bear

sanctuary

(c) Bag limits: daily, one; possession, one; season, one.

(d) Kill Reports. The carcass of each bear shall be tagged and the kill reported as provided by 15A NCAC 10B .0113.

Statutory Authority G.S. 113-134; 113-291.2; 113-291.7; 113-305.

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Wildlife Resources Commission intends to amend rules cited as 15A NCAC 10C .0206, .0208, .0305, .0401, with changes from the proposed text noticed in the Register, Volume 7, Issue 17, pages 1736 - 1773.

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

Reason for Proposed Action:

15A NCAC 10C .0206 & .0401 - To allow trotlines or set-hooks during a specified season on Lake Waccamaw.

15A NCAC 10C .0208 - Changes the spawning area in which fishing is prohibited.

15A NCAC 10C .0305 - To change the seasons and/or creel limit of particular species of fish in particular bodies of water around the state.

Comment Procedures: Interested persons may present their views in writing from April 1, 1993 to May 1, 1993. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 N. Salisbury Street, Raleigh, NC 27604-1188.

Editor's Note: An agency may not adopt a rule that differs substantially from the text of a proposed rule published in the Register, unless the agency publishes the text of the proposed different rule and accepts comments on the new text for at least 30 days after the publication of the new text.

**CHAPTER 10 - WILDLIFE RESOURCES
AND WATER SAFETY**

**SUBCHAPTER 10C - INLAND
FISHING REGULATIONS**

**SECTION .0200 - GENERAL
REGULATIONS**

.0206 TROTTLINES AND SET-HOOKS

Trotlines and set-hooks may be set in the inland waters of North Carolina, provided no live bait is used; except that no trotlines or set-hooks may be set in designated public mountain trout waters, ~~Lake Waccamaw,~~ or in any of the impounded waters on the Sandhills Game Land, and in Lake Waccamaw, trotlines or set-hooks may be set only from October 1 through April 30. For the purposes of this Regulation, a set-hook is defined as any hook and line which is attached at one end only to a stationary or floating object and which is not under immediate control and attendance of the person using such device. Each trotline shall have attached the name and address of the user legibly and indelibly inscribed. Each trotline shall be conspicuously marked at each end with a flag, float, or other prominent object so that its location is readily discernable by boat operators and swimmers. Trotlines must be set parallel to the nearest shore in ponds, lakes, and reservoirs. All trotlines and throwlines must be fished at least once daily and all fish removed at that time. Untended trotlines, as evidenced by the absence of bait, may be removed from the water by wildlife enforcement officers when located in areas of multiple water use.

Recognizing the safety hazards to swimmers, boaters and water skiers which are created by floating metal cans and glass jugs, it is unlawful to use metal cans or glass jugs as floats. This shall not be construed to prohibit the use of plastic jugs, cork, styrofoam, or similar materials as floats.

Statutory Authority G.S. 113-134; 113-272; 113-292.

.0208 SPAWNING AREAS

The following waters are designated as spawning areas in which fishing is prohibited or restricted as indicated:

- (1) No person shall fish by any method or at any time in, or within 50 feet of, the fish ladder at Quaker Neck Dam on Neuse River in Wayne County.
- (2) No person shall fish by any method from February 15 to April 15, both inclusive, in Linville River from the NC 126 bridge downstream to the ~~backwater of Lake James in Burke County~~ mouth of the Linville River as delineated by the appropriate markers.
- (3) No person shall fish by netting in that portion of the Dan River lying within the State downstream from the Brantly Steam Plant at Danville, or in the Roanoke River between the US 258 bridge and the dam of Roanoke Rapids Lake, or while in or on said rivers within said areas, have in possession any bow net, dip net or any landing net having a handle exceeding eight feet in length or a hoop or frame to which the net is attached exceeding 60 inches along its outside perimeter.

Statutory Authority G.S. 113-134; 113-292.

SECTION .0300 - GAME FISH

.0305 OPEN SEASONS: CREEL AND SIZE LIMITS

(a) Generally. Subject to the exceptions listed in Paragraph (b) of this Rule, the open seasons and creel and size limits are as indicated in the following table:

DAILY CREEL GAME FISHES LIMITS SIZE LIMITS OPEN SEASON			
Mountain Trout:			
Wild Trout Waters	4	7 in. (exc. 15)	ALL YEAR (exc. 2)
Hatchery Supported Trout Waters and undesignated waters	7	None	All year, except March 1 to 7:00 a.m. on first Saturday in April (excs. 2 & 3)
Muskellunge and Tiger Musky	2	30 in.	ALL YEAR
Chain Pickerel (Jack)	None	None	ALL YEAR
Walleye	8 (excs. 9 & 10)	None (exc. 9)	ALL YEAR
Sauger	8	15 in.	ALL YEAR
Black Bass:			
Largemouth	5 (exc. 10)	14 in. (excs. 4, 8 & 11)	ALL YEAR (exc. 13)
Smallmouth and Spotted	5 (exc. 10)	12 in. (excs. 4, 8 & 11)	ALL YEAR
White Bass	25	None	ALL YEAR

PROPOSED RULES

Sea Trout (Spotted or Speckled)	None	12 in.	ALL YEAR
Flounder	None	13 in.	ALL YEAR
Red drum (channel bass, red fish, puppy drum)	5	18 in.	ALL YEAR
Striped Bass and their hybrids (Morone Hybrids)	8 aggregate (excs. 1 & 6)	16 in. (excs. 1, 6 & 12)	ALL YEAR (excs. 6, 16, & 18)
Kokanee Salmon	7	None	ALL YEAR
Panfishes	None (excs. 5 & 14)	None (exc. 14)	ALL YEAR (exc. 5)
NONGAME FISHES	None (exc. 17)	None (exc. 17)	ALL YEAR (exc. 7)

(b) Exceptions

- (1) In the Dan River upstream from its confluence with Bannister River to the Brantly Steam Plant Dam, and in John H. Kerr, Gaston, and Roanoke Rapids Reservoirs, and Lake Norman, the creel limit on striped bass and Morone hybrids is four in the aggregate and the minimum size limit is 20 inches.
- (2) In designated public mountain trout waters the season for taking all species of fish is the same as the trout fishing season. There is no closed season on taking trout from Nantahala River and all tributaries (excluding impoundments) upstream from Nantahala Lake, and the impounded waters of power reservoirs and municipally-owned water supply reservoirs open to the public for fishing.
- (3) Under an agreement with Tennessee, the minimum size limit on trout in Calderwood Reservoir is seven inches.
- (4) Bass taken from ~~streams designated as public mountain trout waters or from~~ Calderwood Reservoir may be retained without restriction as to size limit.
- (5) On Mattamuskeet Lake, special federal regulations apply.
- (6) In the inland fishing waters of Cape Fear, Neuse, Pee-Dee, Pungo and Tar-Pamlico ~~Rivers~~ rivers and their tributaries and the Roanoke River and its tributaries, including the Cashie, Middle, and Eastmost rivers, extending upstream to the first impoundment, the daily creel limit for striped bass and their hybrids is ~~one~~ three fish and the minimum length limit is 18 inches. In the Roanoke River and its tributaries, including the Cashie, Middle, and Eastmost rivers - from April 1 to May 31 up to the first impoundment, from July 1 through March 31 and June 1 through June 30 the daily creel limit for striped bass is one fish and the minimum length limit is 18 inches; from April 1 to May 31 the daily creel limit is three fish; no fish between the lengths of 22 inches and 27 inches may be retained, and the minimum length limit is 16 inches, except no fish may be retained in Roanoke River and its tributaries including Cashie, Middle and Eastmost rivers from May 1 to December 31, 1991.
- (7) See 15A NCAC 10C .0407 for open seasons for taking nongame fishes by special devices.
- (8) The maximum combined number of black bass of all species that may be retained per day is five fish, no more than two of which may be smaller than the applicable minimum size limit. The minimum size limit for all species of black bass is 14 inches, with no exception in Lake Luke Marion in Moore County, in Reedy Creek Park lakes in Mecklenburg County, and in Currituck Sound and tributaries north of Wright Memorial Bridge; in North River and tributaries in Currituck and Camden Counties north of a line between Camden Point and the end of SR 1124. In and west of Madison, Buncombe, Henderson and Polk Counties and in designated public mountain trout waters the minimum size limit is 12 inches. In B. Everett Jordan Reservoir a minimum size limit

of 16 inches, with no exception, applies to largemouth bass. In Falls of Neuse Reservoir, east of SR 1004, Sutton Lake and Tuckertown Lake no black bass between the lengths of 12 inches and 16 inches may be retained, and the minimum size limit for black bass is 16 inches, except that the daily creel may contain two black bass of less than 12 inches in length. In W. Kerr Scott Reservoir there is no minimum size limit for spotted bass.

- (9) A minimum size limit of 15 inches applies to walleye taken from Lake James and its tributaries, and the daily creel limit for walleye is four fish in Linville River upstream from the NC 126 bridge above Lake James.
- (10) The creel limit for black bass and walleye taken from Calderwood Reservoir is 10.
- (11) The minimum size limit for all black bass, with no exception, is 18 inches in the following trophy bass lakes:
 - (A) Cane Creek Lake in Union County; and
 - (B) Lake Thom-A-Lex in Davidson County.
- (12) In all impounded inland waters and their tributaries, except those waters described in Exceptions (1), the daily creel limit of striped bass and their hybrids may include not more than two fish of smaller size than the minimum size limit.
- (13) In Cane Creek Reservoir (Orange County) the season for taking largemouth bass is closed.
- (14) In Lake Tillery, Falls Lake, High Rock Lake, Badin Lake, and Tuckertown Lake a daily creel limit of 20 fish and a minimum size limit of 8 inches apply to crappie.
- (15) In Slick Rock Creek the minimum size is 7 inches for brook trout and 10 inches for brown and rainbow trout.
- (16) In designated inland fishing waters of Roanoke Sound, Croatan Sound, Albemarle Sound, Chowan River, Currituck Sound, Alligator River, Scuppernong River, and their tributaries (excluding the Roanoke River and Cashie River and their tributaries), striped bass fishing season, size limits and creel limits shall be the same as those established by duly adopted rules or proclamations of the Marine Fisheries Commission in adjacent joint or coastal fishing waters.
- (17) The daily creel and length limits for channel, white, and blue catfish in designated urban lakes are provided for in 15A NCAC 10C .0401(d).
- (18) The Executive Director may, by proclamation, suspend or extend the hook-and-line season for striped bass in the inland and joint waters of coastal rivers and their tributaries. It is unlawful to violate the provisions of any proclamation issued under this authority.

Statutory Authority G.S. 113-134; 113-292; 113-304; 113-305.

SECTION .0400 - NONGAME FISH

.0401 MANNER OF TAKING NONGAME FISHES: PURCHASE AND SALE

(a) Except as permitted by the rules in this Section, it is unlawful to take nongame fishes from the inland fishing waters of North Carolina in any manner other than with hook and line, rod and reel, trotline or set-hook. Nongame fishes may be taken by such hook and line methods at any time without restriction as to size limits or creel limits, except that no trotlines or set-hooks may be used ~~in Lake Waccamaw~~, in the impounded waters located on the Sandhills Game Land or in designated public mountain trout waters, and in Lake Waccamaw, trotlines or set-hooks may be used only from October 1 through April 30. The season for taking nongame fishes by other hook and line methods in designated public mountain trout waters shall be the same as the trout fishing season.

(b) Nongame fishes taken by hook and line methods or by licensed special devices may be sold.

(c) Freshwater mussels may only be taken from impounded waters, except mussels shall not be taken in Lake Waccamaw and in University Lake in Orange County.

(d) In the Urban Lakes listed below it is unlawful to take channel, white or blue catfish (forked tail catfish) by means other than hook and line; the daily creel limit for forked tail catfish is six fish in aggregate and the minimum length limit is 12 inches:

- Oka T. Hester Pond, Guilford County
- Lake Luke Marion, Moore County
- Lake Crabtree, Wake County

Shelley Lake, Wake County
Freedom Park Pond, Mecklenburg County
Hornet's Nest Ponds, Mecklenburg County
Campus Hills Pond, Durham County
Twin Lake Ponds, Durham County
Rocky Mount City Lake, Nash County

Statutory Authority G.S. 113-134; 113-272; 113-292.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Architecture intends to amend rules cited as 21 NCAC 2 .0206, .0214 and .0215.

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

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): Any request for a public hearing on these rules must be submitted, in writing, to Cynthia Skidmore, North Carolina Board of Architecture, 501 N. Blount Street, Raleigh, N. C. 27604 by 4:00 p.m. on April 16, 1993.

Reason for Proposed Action:

21 NCAC 2 .0206 - Clarifies the requirements for use of the professional seal.

21 NCAC 2 .0214 - Removes duplicative information regarding the corporate seal.

21 NCAC 2 .0215 - Requires foreign corporations to provide documentation to the Board regarding compliance with NCGS 55-B.

Comment Procedures: Written comments must be submitted to the Board office by 4:00 p.m. on May 1, 1993.

CHAPTER 2 - BOARD OF ARCHITECTURE

SECTION .0200 - PRACTICE OF ARCHITECTURE

.0206 REQUIREMENT FOR AND USE OF PROFESSIONAL SEAL

(a) Individual Seal Design. Every licensed architect shall have an individual seal containing the name of the architect, his place of business,

~~registration number and the words "Registered Architect", "North Carolina". The architect shall stamp all drawings and specifications issued from the architect's office with an impression of said seal. The original signature of the individual named on the seal shall appear across the face of each original seal, imprint or stamp. which shall be composed of two concentric circles with outer and inner circle diameters of approximately 1 1/2 inches and 1 inch respectively. The architect's name and place of business shall be between the inner and outer circles. The words "Registered Architect, North Carolina" shall be along the inside perimeter of the inner circle. The architect's North Carolina registration number shall be in the center of the inner circle.~~

(b) Corporate Seal Design. Every corporation which shall have obtained from the Board a certificate for corporate practice shall have a corporate seal, which ~~must contain the name of the corporation, its place of business, the words, "North Carolina Registered Architectural (or Architectural Engineering) Corporation" and its registration certificate number. shall be composed of two concentric circles with outer and inner circle diameters of approximately 1 1/2 inches and 1 inch respectively. The Architectural Corporation's approved North Carolina name and place of business shall be between the inner and outer circles. The words "Registered Architectural Corporation, North Carolina" shall be along the inside perimeter of the inner circle. The corporation's North Carolina registration number shall be in the center of the inner circle.~~

(c) Seals Required. Use of the corporate seal does not replace the statutory requirement for an architect's individual seal on all drawings and specifications issued from the corporation. Seal Types. The seal required for use on opaque original contract documents not intended for duplication shall be of a type which will produce an impression facsimile of the seal, or a rubber stamp which will produce an ink facsimile of the seal. The seal required for use on transparent original contract documents intended for duplication shall be of a type which will produce an ink facsimile of the seal such as a rubber

stamp, decal, or computer generated type. The use of pre-printed documents bearing a pre-printed facsimile of the seal is prohibited.

(d) Individual Seal, Signature and Date Required. Architects shall affix their seal, actual signature, and date of affixation to all original contract documents, including index sheets identifying all drawings covered specification cover and index pages identifying all specification pages covered and supplemental drawings which are developed and issued under the direct supervision or authorship of the architect as contract documents.

(e) Presentation Documents. Presentation documents (renderings, drawings used to communicate conceptual information only) are not required to be sealed or signed.

(f) Incomplete Documents. Documents considered incomplete by the architect may be released for interim review without the architect's seal or signature affixed, but shall be dated, bear the architect's name and be conspicuously marked to clearly indicate the documents are for interim review and not intended for bidding, permit, or construction purposes.

(g) Sheets or Pages Prepared By Licensed Professional Consultants. Those sheets or pages prepared by licensed professional consultants (such as, for example, structural, mechanical or electrical engineers) retained by the architect shall bear the seal and registration number of the consultant responsible therefore.

(h) Direct Supervision. No architect shall affix his seal and signature to contract documents developed by others not under his direct supervision. Direct supervision includes:

- (1) Dissemination of programmatic requirements.
- (2) Ongoing coordination and correlation of consultant's work with other aspects of the total design of the project.
- (3) Verification with consultant that owner's requirements are being met.
- (4) Authority over the work of who assisted in the preparation of the documents.
- (5) Assumption of responsibility for those consultant's work, and
- (6) Incorporation of consultant's work into design documents to be issued for permitting purposes.

(i) Original Signature. The use of signature reproductions such as rubber stamps or computer generated or other facsimiles shall not be permitted in lieu of actual signatures.

(j) Security of Seal. Authorized use of the prescribed seal is an individual act whereby the architect must personally sign over the imprint of the seal. The architect is responsible for security of the seal when not in use.

(k) Use of Corporate Seal. The use of the corporate seal does not replace the statutory requirement for an architect's individual seal as required in Paragraph (d). The corporate seal must be affixed in addition to the individual seal on the cover sheet and each page of the table of contents of specifications and drawings.

Statutory Authority G.S. 83A-6; 83A-12.

.0214 CORPORATE PRACTICE OF ARCHITECTURE

(a) Application Forms. Application for a corporate certificate of registration for the practice of architecture within the State of North Carolina shall be made upon forms provided by the Board. Completed applications must be accompanied by the corporate application fee. Certificates for corporate practice may be issued only under the provisions of the Professional Corporation Act, G.S. 55B, except as provided in Subsection (b) of this Rule.

(b) Architectural Corporations Under G.S. 55, the Business Corporation Act. Applications for certificate of registration as exempt from the Professional Corporation Act under the provisions of G.S. 55B-15 shall be made upon forms provided by the Board. Completed applications must be accompanied by the corporate application fee. To be eligible as an exempt corporation under the provisions of G.S. 55B-15, the following conditions must exist:

- (1) The corporation must have been incorporated prior to June 5, 1969 as a business corporation;
- (2) Prior to and since June 5, 1969, the corporation must have been a bona fide architectural or architectural-engineering firm with services limited to the practice of architecture or architecture-engineering and such services as may be ancillary thereto within the State of North Carolina; and
- (3) The corporation must have applied to be an exempt corporation before October 1, 1979.

(c) Renewal of Certificate. The renewal of corporate certificates of registration shall follow the same requirements as set out in Rule .0213 of this Section for individual licensees except that the

corporate renewal shall expire on December 31st of each year.

(d) Failure to Renew and Reinstatement. If the corporation fails to renew its corporate certificate of registration, it shall be subject to the same requirements for its failure to renew and reinstatement as apply to individual licensees under Rule .0213 of this Section.

(e) Seal. Each registered corporation shall adopt a seal ~~approved by the Board. Such seal shall contain the name of the corporation, its place of business, its North Carolina registration number and the words "registered architectural corporation".~~ pursuant to 21 NCAC 2 .0206(b).

(f) Approval of Name. In addition to the requirements and limitations of Chapter 55 and 55B of the General Statutes, the corporate name used by an architectural corporation shall conform with Rule .0205 and be approved by the Board before being used. Provided, however, that this Rule shall not prohibit the continued use of any corporate name duly adopted in conformity with the General Statutes of North Carolina and Board Rules in effect at the date of such adoption.

Statutory Authority G.S. 55B-5; 55B-10; 55B-15; 83A-6; 83A-8.

.0215 FOREIGN CORPORATIONS

(a) Incorporation in Other States. Architectural corporations of other states may be granted corporate certificates for practice in this State on the receipt by the Board of a completed application-the submission of a certified copy of their corporate charter, amended as may be necessary to insure full compliance with all requirements of Chapter 55B, the Professional Corporation Act of the State of North Carolina, and the payment of the corporate application fee. In addition to the other requirements as set out in G.S. 83A-8, foreign corporations must, prior to registration, receive from the Secretary of State of North Carolina a certificate of authority to do business within the state.

(b) Designated Individuals. Foreign corporations shall be permitted to practice architecture within the State of North Carolina provided that at least two-thirds of the issued and outstanding shares of the foreign corporations are owned by licensed architects or engineers who are licensed to practice their profession in a jurisdiction of the United States. However, the corporation must designate at least one architect who is licensed in the State of North Carolina to be in responsible charge for the corporate practice of architecture

within the State of North Carolina.

Statutory Authority G.S. 55B-6; 83A-6; 83A-8.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Mortuary Science intends to adopt rules cited as 21 NCAC 34D .0101 and .0202.

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

Reason for Proposed Action:

21 NCAC 34D .0101 - G.S. 90-210.62(b) directs Board to approve preneed contract forms. Proposed Rule sets requirements for forms.

21 NCAC 34D .0202 - G.S. 90-210.67(a) requires Board to establish qualifications for and activities permitted under preneed sales license. Applicants need to know application requirements.

Comment Procedures: Interested person may present statements in writing by mail addressed to Mr. Donald H. Carpenter, NC Board of Mortuary Science, Box 27368, Raleigh, NC 27611-7368.

Editor's Note: An agency may not adopt a rule that differs substantially from the text of a proposed rule published in the Register, unless the agency publishes the text of the proposed different rule and accepts comments on the new text for at least 30 days after the publication of the new text. These Rules were published in Volume 7, Issue 18, January 4, 1993.

CHAPTER 34 - BOARD OF MORTUARY SCIENCE

SUBCHAPTER 34D - PRENEED FUNERAL CONTRACTS

SECTION .0100 - GENERAL PROVISIONS

.0101 APPROVAL OF CONTRACT FORMS

No preneed funeral contract form shall be approved by the Board unless it, with any attachments, meets the following requirements, insofar as they are applicable to the lawful, intended sales transaction:

(1) Is written in clear, understandable lan-

- guage and is printed in easy-to-read type, size and style.
- (2) States or provides space for inserting the name, address and preneed funeral establishment license number of the contracting funeral establishment.
 - (3) Provides space for inserting the names, addresses and Social Security numbers of the purchaser and contract beneficiary.
 - (4) Provides space for a description of the merchandise and services purchased.
 - (5) Discloses any penalties or restrictions, including geographical restrictions, on the delivery of merchandise and services.
 - (6) States whether it is a standard or inflation-proof contract and summarizes, consistent with North Carolina law, the incidents of such type of contract.
 - (7) Provides space for inserting the financial transaction.
 - (8) Provides space for the purchaser to indicate, by the purchaser's signature or initials, the following:
 - (a) The purchaser's choice of trust-funded or insurance-funded contract.
 - (b) That the purchaser acknowledges that the funeral establishment will retain, and not deposit in trust, a stated percentage (not more than 10%) of the purchaser's payments.
 - (c) The purchaser's choice of revocable or irrevocable contract.
 - (d) That the purchaser acknowledges that the sale was made at the funeral establishment's place of business, so as to negate the cancellation rights connected with an off-premises sale.
 - (9) Contains notice, in bold type, of the purchaser's right to cancel an off-premises sale.
 - (10) Contains notice, in bold type, that if the purchaser does not receive notification from the Board, within 30 days, that it has received a copy of the contract, the purchaser should notify the Board at its current, stated address and telephone number.
 - (11) Explains the parties' rights and obligations, consistent with North Carolina law, with respect to contract revocation, default, the funeral establishment's retention of a portion of the purchase price free of the trust, and the substitution of funeral homes to perform the contract.

- (12) Contains a notice of the existence of the Board's preneed recovery fund.
- (13) Contains, or refers to an attachment containing, all funeral sales disclosures to consumers as required by federal and North Carolina law.
- (14) Provides spaces for the signature and license number of the preneed sales licensee who sold the preneed funeral contract and the signature and license number of a person licensed as a funeral director or funeral service licensee pursuant to G.S. 90, Article 13A. On forms used on and after January 1, 1994, the following shall appear, in bold type, beneath the signature of the preneed sales licensee: "Signed and preneed sales license number affixed in presence of Purchaser at time of sale."

Statutory Authority G.S. 90-210.69(a); 90-210.62(b).

SECTION .0200 - LICENSING

.0202 PRENEED SALES LICENSE

(a) Subject to G.S. 90-210.69(c), holding a funeral director's license, issued by the Board, or a funeral service license, issued by the Board, is the qualification to be eligible for a preneed sales license.

(b) The preneed sales licensee may engage, under the preneed sales license, in the following preneed funeral planning activities, pursuant to the definition of "preneed funeral planning" in G.S. 90-210.60(8): show and explain written materials, including price lists and photographs, descriptive of the funeral services and merchandise and the preneed funeral plan or contract being offered; explain the various types of funeral ceremonies and services and the qualities and characteristics of various kinds of funeral merchandise; sell, on a preneed basis, funeral services and merchandise; record, on any form or otherwise, specific items of funeral services and merchandise selected on a preneed basis; make funeral arrangements on a preneed basis; and sign preneed contracts. No preneed funeral planning activities shall be engaged in by anyone other than a preneed sales licensee; provided, however, no preneed sales license is required for solely the sale of an insurance policy, and in connection with such a sale, the salesperson shall not be deemed to have engaged in preneed funeral planning if, for the sole purpose of permitting a prospective purchaser

to make an informed decision as to the amount of insurance desired, the salesperson shows only price lists of funeral services and merchandise.

(c) A licensed funeral director or funeral service licensee wishing to apply for a preneed sales license shall submit to the Board the applicant's name, address, telephone number, funeral director's or funeral service license number, name and address of the preneed funeral establishment licensee or licensees on whose behalf the applicant will sell preneed funeral contracts, and the applicant's employment or agency relationship with the licensee or licensees. If the applicant proposes to sell on behalf of more than one preneed funeral establishment licensee, the applicant shall disclose information to satisfy the requirement of G.S. 90-210.67(a) that the preneed funeral establishment licensees be related by ownership or contract.

(d) The Board shall issue to each preneed sales licensee a pocket card as certification of the preneed sales license. The preneed sales licensee shall carry the card while engaging in preneed funeral planning. The card shall indicate the names of the preneed funeral establishment licensees on whose behalf the preneed sales licensee is authorized to sell preneed funeral contracts, and if there is any change in the list of establishments on whose behalf the preneed sales licensee is authorized to sell, the preneed sales licensee shall make a new application for a preneed sales license and shall pay the application fee.

(e) The preneed sales licensee shall sign and affix his or her preneed sales license number to each preneed funeral contract, which he or she sells, in the presence of the purchaser of the contract at the time of sale.

Statutory Authority G.S. 90-210.69(a); 90-210.67(a), (c).

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Pharmacy intends to amend rules cited as 21 NCAC 46 .1317, .1503, .1601, .1802, .2201, .2501; and adopt rules cited as 21 NCAC 46 .1605, .1809, .3001.

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

The public hearing will be conducted at 2:00 p.m. on April 20, 1993 at the Institute of Pharmacy, 109 Church Street, Chapel Hill, North Carolina.

Reason for Proposed Action:

21 NCAC 46 .1317 - to allow a pharmacy intern working under a pharmacist preceptor or supervising pharmacist to perform all acts constituting the practice of pharmacy.

21 NCAC 46 .1503 - to prohibit a pharmacist who has been found in violation or pled guilty or no contest or been found guilty by a court of competent jurisdiction of a violation of laws, rules, or regulations governing the practice of pharmacy and the distribution of drugs from serving as a preceptor without approval by the Board.

21 NCAC 46 .1601 - to require all pharmacists-managers or their staff to complete a self-inspection form when applying for renewal of pharmacy permits.

21 NCAC 46 .1605 - to authorize the Board to charge persons requesting verification for reinstatement of a pharmacy license or permit a fee of \$15.00 per verification.

21 NCAC 46 .1802 - to allow a pharmacist to dispense drug quantities in excess of the face amount of a prescription for a non-controlled substance, up to the total amount authorized.

21 NCAC 46 .1809 - to permit a pharmacist, who receives a request for a prescription refill and is unable to obtain readily refill authorization from the prescriber, to dispense a one-time emergency refill of up to a 72-hour supply of a prescribed medication, provided certain conditions are met.

21 NCAC 46 .2201 - to define contact programs and to require the content of continuing education courses to have the purpose of increasing the participant's professional competence and proficiency as a pharmacist.

21 NCAC 46 .2501 - to allow the Board to approve an alternative supervision arrangement of unlicensed personnel if the public health, safety, and welfare will not be adversely affected.

21 NCAC 46 .3001 - to provide a process by which permit holders can properly dispose of outdated, improperly labeled, adulterated, damaged or unwanted drugs or drug containers.

Comment Procedures: Persons wishing to present oral data, views or arguments on a proposed rule or rule change, may file a notice with the Board at least 10 days prior to the public hearing at which

the person wishes to speak. Comments should be limited to 10 minutes. The Board's address is P.O. Box 459, Carrboro, NC 27510. Any person may file written submission of comments or argument at any time up to and including May 1, 1993.

CHAPTER 46 - BOARD OF PHARMACY

SECTION .1300 - GENERAL DEFINITIONS

.1317 DEFINITIONS

The definitions of various terms used in these rules are found in Article 4A of Chapter 90 of the General Statutes, or are as follows:

- (1) Approved School or College of Pharmacy. A school or college of pharmacy accredited by the American Council on Pharmaceutical Education, or a foreign school with a professional pharmacy degree program of at least five years approved by the Board.
- (2) Auxiliary Drug Inventory. A secure, segregated, supplementary source for drugs to be used solely for the purpose of providing adequate drug availability when the pharmacy is closed or the pharmacist is unavailable.
- (3) Board. The North Carolina Board of Pharmacy.
- (4) Emergency Drugs. Those drugs whose prompt use and immediate availability are generally regarded by physicians as essential in the proper treatment of unforeseen adverse changes in a patient's health or well-being.
- (5) Executive Director. The Secretary-Treasurer and Executive Director of the Board.
- (6) Graduate of an Approved School or College of Pharmacy. A person who has received an undergraduate professional degree in pharmacy from an approved school or college of pharmacy, or a person who has graduated from a foreign professional school of pharmacy and has successfully completed the Foreign Pharmacy Graduate Equivalency Examination offered by the National Association of Boards of Pharmacy and the Test of English As A Foreign Language.
- (7) Indulgence in the Use of Drugs. The use of narcotic drugs or other drugs affecting the central nervous system or the use of intoxicating beverages to an extent as to

deprive the user of reasonable self-control or the ability to exercise such judgment as might reasonably be expected of an average prudent person.

- (8) Institutional Pharmacy. A pharmacy maintained in a hospital, clinic, nursing home, rest home, sanatorium, non-federal governmental institution, industrial health facility, or other like health service under the supervision of a pharmacist; or the central area in a hospital, clinic, or other health care facility where drugs are procured, stored, processed, or issued, or where pharmaceutical services are performed.
- (9) Limited Service Pharmacy Permit. A pharmacy permit issued by the Board to an applicant that wishes to render in an institutional setting pharmaceutical services not limited to scope and kind but to time and conditions under which such services are rendered.
- (10) Pharmacist. Any person within the definition set forth in G.S. § 90-85.3(p), including any druggist.
- (11) Pharmacist-Manager. The person who accepts responsibility for the operation of a pharmacy in conformance with all statutes and regulations pertinent to the practice of pharmacy and distribution of drugs by signing the permit application, its renewal or addenda thereto.
- (12) Pharmacy. Any place within the definition set forth in G.S. § 90-85.3(g), including any apothecary or drugstore.
- (13) Pharmacy Intern. Any person who is duly registered with the Board under the internship program of the Board to acquire pharmacy experience. ~~The term does not include~~ but not including those students enrolled in approved academic internship programs. A pharmacy intern working under a pharmacist preceptor or supervising pharmacist may perform all acts constituting the practice of pharmacy.
- (14) President. The President of the Board.
- (15) Two Years College Work. Attendance at a college accredited by a recognized accreditation agency for two academic years of not less than eight and one-half months each and the completion of work for credit leading to a baccalaureate degree or its equivalent and that would permit the student to advance to the next

- class.
- (16) Undergraduate Professional Degree in Pharmacy. A B.S. or Pharm. D. degree.
- (17) Vice-President. The Vice-President of the Board.

Statutory Authority G.S. 90-85.3; 90-85.6; 90-85.8; 90-85.13; 90-85.14; 90-85.15; 90-85.21; 90-85.38; 90-85.40.

SECTION .1500 - ADMISSION REQUIREMENTS: EXAMINATIONS

.1503 EXPERIENCE IN PHARMACY

(a) An applicant for license must show that he has received 1500 hours of practical experience under the supervision of a licensed pharmacist which has been acquired after the satisfactory completion of two years of college work. At least 1000 hours of this experience must be acquired in a community or hospital pharmacy or other place approved by the Board in the manner prescribed in (b) of this Rule. No period of experience of less than two consecutive weeks of not less than 30 hours per week, or more than 50 hours per week of actual hours worked with a maximum of ten hours per day, will be credited toward this requirement. Hours acquired concurrent with pharmacy college attendance with no period of experience of less than two consecutive weeks of not less than 10 hours per week or more than 20 hours per week of actual hours worked will be credited toward this requirement. Experience obtained in clinical programs through schools, or in Board approved demonstration projects concurrent with pharmacy school attendance, is acceptable only for actual hours certified by the school up to a maximum of 50 hours per week. Any experience obtained in government, the pharmaceutical industry, or other non-traditional pharmacy-related locations while under the preceptorship of a licensed pharmacist is acceptable up to a maximum of 500 hours. Non-traditional internship experience would be any pharmacy related practical experience that is not primarily associated with pharmaceutical care activities in community and hospital pharmacy practice.

(b) All practical pharmacy experience to be acceptable must be acquired under the general conditions approved by the Board as follows:

- (1) All practical pharmacy experience must be validated through registration in the internship program administered by the Board.

- (2) Persons working under the supervision of registered pharmacists and expecting to qualify for the registered pharmacist examination must notify the Board within five days of the beginning and the ending of such employment.
- (3) The Board shall not allow credit for claims of practical experience required under the pharmacy laws, unless such claims can be corroborated by records on file in the Board's office showing the beginning and ending of the practical experience claimed as supplied by the applicant during this training period.
- (4) Practical experience shall be credited only when it has been obtained in a location holding a pharmacy permit, or a location approved by the Board for that purpose.

(c) The pharmacist intern, or student, and the pharmacist preceptor, or supervising pharmacist, shall at all times comply with the Board's rules and the laws governing the practice of pharmacy and the distribution of drugs. Failure of the pharmacist intern to do so is grounds to disqualify the period of experience from counting toward the minimum requirements. A pharmacist preceptor who causes or permits a pharmacist intern to violate the Board's rules or the laws governing the practice of pharmacy and the distribution of drugs forfeits his right to supervise such experience for a period of time determined by the Board. A pharmacist who has been found in violation or pled guilty or no contest or been found guilty by a court of competent jurisdiction of a violation of laws, rules, or regulations governing the practice of pharmacy and the distribution of drugs cannot serve as a preceptor without approval by the Board.

(d) The Board may accept training in pharmacy gained in another state pursuant to internship registration in this or another state if the Board is satisfied that such training is equivalent.

Statutory Authority G.S. 90-85.6; 90-85.14; 90-85.15; 90-85.38.

SECTION .1600 - LICENSES AND PERMITS

.1601 PHARMACY PERMITS

(a) Applications for pharmacy permits, whether original or renewal, shall be made upon forms provided by the Board. The Board shall not issue any original or annual renewal pharmacy permit

until the Board is satisfied that:

- (1) Adequate qualified personnel has been secured by the management of the store to properly render pharmaceutical service in the manner prescribed by law.
- (2) Such personnel shall be maintained during that period for which the permit is issued.
- (3) Any and all unlicensed clerks have been instructed that they may render pharmaceutical service only as an aid to and under the immediate supervision of a registered pharmacist.
- (4) The following minimum technical equipment is maintained:
 - (A) Graduates. Capable of accurately measuring volumes from 1 ml to at least 500 ml;
 - (B) Mortars and pestles:
 - (i) one -- glass;
 - (ii) one -- "Wedgwood";
 - (C) Stirring Rods. Two -- assorted sizes, glass or rubber;
 - (D) Ointment slab or suitable substitute;
 - (E) Class A prescription balances and appropriate weights, suitable for all required weighings, at least one of which must be sensitive to six mg;
 - (F) Suitable facilities for recording and filing prescriptions as required by G.S. 90-85.26;
 - (G) Spatulas:
 - (i) stainless steel, at least three assorted sizes;
 - (ii) non-metallic, one of suitable size;
 - (H) Useable Supplies. Adequate quantity of each and equipped with safety closures where required:
 - (i) prescription bottles, 1 to 32 fluid ounces;
 - (ii) dropper bottles, 1/2 to 2 fluid ounces;
 - (iii) assorted pill and tablet containers;
 - (iv) empty capsules, No. 00 to No. 3;
 - (v) powder papers;
 - (vi) ointment jars, assorted;
 - (vii) prescription labels;
 - (viii) all appropriate auxiliary labels;
 - (I) Suitable heating apparatus;
 - (J) Refrigerator;
 - (K) Reference library, as follows:
 - (i) the latest edition of the United States Pharmacopoeia (USP) and National Formulary and

supplements thereto or a standard commentary thereon;

- (ii) a copy of the pharmacy laws of North Carolina, including the North Carolina Controlled Substances Act and the rules adopted pursuant thereto, and the North Carolina Pharmacy Practice Act and the rules of the Board;
- (iii) a copy of the Federal Controlled Substances Act and the regulations adopted pursuant thereto;
- (iv) a Schedule V controlled substances register (where these preparations are sold other than on prescriptions);
- (v) a medical dictionary;
- (vi) current editions of generally accepted reference books on the following subjects:
 - (I) drug interactions,
 - (II) clinical pharmacology, and
 - (III) USP Dispensing Information or its equivalent,
 - (IV) if IV admixture services are provided, a reference on Parenteral Incompatibilities.
- (5) The pharmacy is equipped with proper sanitary appliances including lavatory facilities with hot and cold running water, is adequately lighted, and is kept in a clean, orderly, and sanitary condition.
- (6) All prescription medications are labeled in accordance with G.S. 106-134 and 106-134.1.
 - (b) In addition to the requirements for issuance and renewal of a pharmacy permit imposed by a statute and by other rules of the Board, a permit shall not be issued or renewed to any person to operate a pharmacy wherein the prescriptions of medical practitioners are compounded or dispensed and distributed when such distribution is effected by mail and the practitioner-pharmacist-patient relationship does not exist, until the Board is satisfied that:
 - (1) The pharmacy maintains records of prescriptions compounded or dispensed and distributed in manner that is readily retrievable;
 - (2) During the pharmacy's regular hours of operation but not less than six days per week, for a minimum of forty hours per week, a toll-free telephone service is

provided to facilitate communication between patients and a pharmacist at the pharmacy who has access to the patient's records. This toll-free number must be disclosed on the label affixed to each container of dispensed drugs;

- (3) The pharmacy complies with all lawful orders, directions, and requests for information from the Boards of pharmacy of all states in which it is licensed and all states into which it distributes prescription drugs;
- (4) The pharmacy complies with all USP and FDA requirements regarding the storage, packaging, and shipping of prescription medications.

The pharmacist-manager and all other pharmacists employed in the pharmacies permitted pursuant to this Paragraph shall be subject to all Federal and State statutes and regulations concerning the dispensing of prescription medications including, but not limited to, 21 NCAC 46 .1801 and .1805 and 21 CFR 1306.01, 1306.05, and 1306.21. Provided, however, that this Rule shall not apply to the occasional mailing of prescription drugs to bona fide customers of any pharmacy when the practitioner-pharmacist-patient relationship is present.

(c) The Board shall not issue an original or renewal permit to any person to operate a drugstore or pharmacy as a department in or a part of any other business serving the general public (except hospitals, nursing homes, and similar institutions subject to the provisions of .0300 of this Chapter) unless such pharmacy facility:

- (1) is physically separated from such other business;
- (2) is separately identified to the public both as to name and any advertising;
- (3) completes all transactions relative to such pharmacy within the registered facility; and
- (4) meets the same requirements for registration as all other pharmacies.

(d) Permits to operate pharmacies, whether original or renewal, shall be issued to the pharmacist-manager of such pharmacy pursuant to a joint application of the owner and pharmacist-manager for the conduct and management of said pharmacy. The issuance of said permit shall not be complete and the permit shall not be valid until it has been countersigned by the pharmacist-manager as represented in the application. The permit so issued is valid only so long as the pharmacist-manager to whom it was

issued assumes the duties and responsibilities of pharmacist-manager. Permits may be reissued at any time to a successor pharmacist-manager pursuant to the proper amendment of the application for the permit.

(e) The Board shall provide a self-inspection form on the back of the annual pharmacy permit renewal application form. The self-inspection form shall be completed by the pharmacist-manager or by pharmacist staff responsible to the pharmacist-manager and shall be returned to the Board office. The self-inspection form shall contain a certification that the self-inspection has been completed and shall contain space to indicate when any deficiencies will be corrected. Making false representations in connection with the self-inspection shall be grounds for disciplinary action.

Statutory Authority G.S. 90-85.6; 90-85.21.

.1605 CHARGE FOR VERIFICATION FOR REINSTATEMENT

The Board shall charge persons requesting verification for reinstatement of a pharmacy license or permit a fee of fifteen dollars (\$15.00) per verification.

Statutory Authority G.S. 90-85.6; 90-85.17; 90-85.21; 150B-19(5)(e).

SECTION .1800 - PRESCRIPTIONS

.1802 PRESCRIPTION REFILLS

(a) Authorization for prescription refills is presumed to be within the prescribed dosage or normal therapeutic use. Refilling prescriptions more frequently than the prescribed dosage would require, or refilling prescriptions in significant excess of normal therapeutic use, may be considered as negligence under G.S. 90-85.38(a)(9).

(b) If deemed appropriate in the pharmacist's professional judgment, a patient may receive upon request drug quantities in excess of the face amount of a prescription for a non-controlled substance, up to the total amount authorized. The pharmacist shall not dispense in excess of the face amount of a prescription for a controlled substance or psychotherapeutic drug without authorization from the prescriber.

Statutory Authority G.S. 90-85.6; 90-85.32.

.1809 EMERGENCY PRESCRIPTION

REFILLS

In the event a pharmacist receives a request for a prescription refill and the pharmacist is unable to obtain readily refill authorization from the prescriber, the pharmacist may dispense a one-time emergency refill of up to a 72-hour supply of the prescribed medication, provided that:

- (1) The prescription is not for a Schedule II controlled substance;
- (2) The medication is essential to the maintenance of life or to the continuation of therapy in a chronic condition;
- (3) In the pharmacist's professional judgment, the interruption of therapy might reasonably produce undesirable health consequences or may cause physical or mental discomfort;
- (4) The dispensing pharmacist creates a written order containing all of the prescription information required by Section .2300 of these Rules and signs that order;
- (5) The dispensing pharmacist notifies the prescriber of the emergency dispensing within a reasonable time after such dispensing.

Statutory Authority G.S. 90-85.6; 90-85.32.

SECTION .2200 - CONTINUING EDUCATION

.2201 HOURS: RECORDS: PROVIDERS: CORRESPONDENCE: RECIPROCITY

(a) As a condition of license renewal, each practicing pharmacist holding an active license shall report on renewal forms the hours of continuing education obtained during the preceding year. Annual accumulation of ten hours is considered satisfactory to meet the quantitative requirement of this Rule.

(b) All records, reports of accredited hours and certificates of credit shall be kept at the pharmacist's regular place of practice for verification by inspectors during regular or other visits. The Board reserves the right to require submission of such documentation on a random basis. Pharmacists who do not practice regularly at one location shall produce such records within 24 hours of a request from Board authorized personnel. All records of hours and certificates of credit shall be preserved for at least three years.

(c) All continuing education shall be obtained from a provider approved by the Board. ~~Not more than 50 percent of the continuing education credits~~

~~can be obtained through correspondence, self study or other non-contact programs in any calendar year. In order to receive credit, continuing education courses should have the purpose of increasing the participant's professional competence and proficiency as a pharmacist. At least five hours of the continuing education credits must be obtained through contact programs in any calendar year. Contact programs are those programs in which there is an opportunity for live two-way communication between the presenter and attendee.~~

(d) Continuing education shall not serve as a barrier to reciprocity; however all licensees by reciprocity must observe the continuing education standards specified in (a), (b) and (c) of this Rule within the first renewal period after licensure in this state.

Statutory Authority G.S. 90-85.6; 90-85.17; 90-85.18.

SECTION .2500 - MISCELLANEOUS PROVISIONS

.2501 SUPERVISION

~~In~~ Except as provided herein, in order to properly exercise the supervision of unlicensed personnel required by these Rules, the responsible pharmacist must physically review the prescription order and the dispensed product before the product is delivered to the patient or person acting on the patient's behalf. If the public health, safety, and welfare will not be adversely affected, the Board may approve an alternative supervision arrangement under such terms and conditions as it deems appropriate.

Statutory Authority G.S. 90-85.6; 90-85.40(a).

SECTION .3000 - DISPOSAL OF UNWANTED DRUGS

.3001 PROCEDURE FOR DISPOSING OF DRUGS

(a) All registrants under G.S. 90-85.21 shall develop and implement policies and procedures to insure that all out-dated, improperly labeled, adulterated, damaged or unwanted drugs or drug containers with worn, illegible or missing labels are destroyed or disposed of so as to render them unusable.

(b) Any permit holder in possession of outdated, adulterated or unwanted drugs other than controlled substances may destroy such drugs by

introduction to the sewer system, incineration at an Environmental Protection Agency-approved facility or by any other means approved by the Board which will assure protection against unauthorized possession or use. Destructions under this Section taking place at the permit holder's premises shall be jointly witnessed by at least two licensed pharmacists and documented. Destructions under this Section at an approved facility or by any other Board-approved means shall be witnessed and documented as set forth in Paragraph (c) of this Rule.

(c) Any permit holder in possession of any controlled substance and desiring or required to dispose of such substance may file a written request on a form provided by the Board for authority and instructions to dispose of such substance. Not more than twice a year, destructions under this Section may take place at the permit holder's premises and may be jointly witnessed by at least two licensed pharmacists approved by the Board. All destructions of controlled substances shall be documented and the document shall be retained by the permit holder for a period of at least three years. Copies of the document shall be sent to the Drug Enforcement Administration.

Statutory Authority G.S. 90-85.6; 90-85.21.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Physical Therapy Examiners intends to amend rule cited as 21 NCAC 48D .0005.

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

The public hearing will be conducted at 2:00 p.m. on April 23, 1993 at the N.C. Board of Physical Therapy Examiners, 18 West Colony Place, Suite 120, Durham, North Carolina 27705.

Reason for Proposed Action: To change basis for scoring the examination from norm-referenced to criterion-referenced.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing

will be open for receipt of written comments from April 1, 1993, to 5:00 p.m. on April 30, 1993. Such written comments must be delivered or mailed to Constance W. Peake, NC Board of Physical Therapy Examiners, 18 West Colony Place, Suite 120, Durham, NC 27705.

CHAPTER 48 - BOARD OF PHYSICAL THERAPY EXAMINERS

SUBCHAPTER 48D - EXAMINATIONS

.0005 EXAMINATION SCORES

(a) Passing Level. The For examinations administered by the Professional Examination Service or Assessment Systems, Inc. prior to July 1, 1993, the passing level for the PT exam and the PTA exam shall be 1.5 standard deviations below the national average for the raw score of the examination. Thereafter, the criterion-referenced passing point shall be equal to a scaled score of 600 based on a score range of 200 - 800 as adopted by the Federation of State Boards of Physical Therapy on February 2, 1993.

(b) Transfer of Scores. Scores will be released as follows:

- (1) To an individual who took the examination in North Carolina at his request and with no charge;
- (2) To licensing Boards in other states upon the request of the individual and the payment of the fee; licensure information may be included with the score release;
- (3) To other persons or institutions upon the request of the individual.

(c) Scores Related to Passing Level. Scores released to the individual will include the North Carolina passing level for the examination.

Statutory Authority G.S. 90-270.26; 90-270.33.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Real Estate Commission intends to adopt rules cited as 21 NCAC 58A .0304; 58C .0219 and amend rules cited as 21 NCAC 58A .0104, .0107, .0110, .0506; 58C .0207, .0305, .0403; 58D .0203, .0204 and .0210.

The proposed effective date of this action is July

1, 1993.

The public hearing will be conducted at 1:00 p.m. on May 12, 1993 at the Office of the North Carolina Real Estate Commission, 1313 Navaho Drive, Raleigh, NC 27609.

Reason for Proposed Action: To clarify by amendment ten previously adopted rules and to adopt new rules regarding qualifying experience for broker applicants and private real estate schools' accommodations for persons with disabilities..

Comment Procedures: Comments regarding the rules may be made orally or submitted in writing at the public hearing. Written comments not submitted at the hearing may be delivered to the North Carolina Real Estate Commission, Post Office Box 17100, Raleigh, North Carolina 27619, so as to be received by the hearing date.

CHAPTER 58 - REAL ESTATE COMMISSION

SUBCHAPTER 58A - REAL ESTATE BROKERS AND SALESMEN

SECTION .0100 - GENERAL BROKERAGE

.0104 LISTING AND BUYER BROKERAGE CONTRACTS

(a) Every written listing and buyer brokerage contract shall provide for its existence for a definite period of time and for its termination without prior notice at the expiration of that period. It shall not require an owner to notify a broker of ~~his the~~ owner's intention to terminate the listing nor shall it require a buyer to notify a broker of the buyer's intention to terminate the brokerage agreement.

(b) Every written listing and buyer brokerage contract shall contain a the following provision: ~~requiring that the listed property be offered to all buyers, without respect to their race, color, religion, sex, national origin, handicap or familial status.~~ The broker shall conduct all his brokerage activities in regard to this agreement without respect to the race, color, religion, sex, national origin, handicap or familial status of any buyer, prospective buyer, seller or prospective seller. ~~Such~~ The provision shall be set forth in a clear and conspicuous manner which shall distinguish it from other provisions of the contract.

Statutory Authority G.S. 93A-3(c).

.0107 HANDLING AND ACCOUNTING OF FUNDS

(a) All monies received by a broker acting in his fiduciary capacity shall be deposited in a trust or escrow account not later than three banking days following receipt of such monies except that earnest money deposits received on offers to purchase real estate and tenant security deposits received in connection with real estate leases shall be deposited in a trust or escrow account not later than three banking days following acceptance of such offer to purchase or lease; the date of acceptance of such offer to purchase or lease shall be set forth in the purchase or lease agreement. All monies received by a salesman shall be delivered immediately to the broker by whom he is employed.

(b) In the event monies received by a broker while acting in a fiduciary capacity are deposited in a trust or escrow account which bears interest, such broker shall first secure from all parties having an interest in the monies written authorization for the deposit of such monies in an interest-bearing account. Such authorization shall specify how and to whom the interest will be disbursed, and, if contained in an offer, contract, lease, or other transaction instrument, such authorization shall be set forth in a clear and conspicuous manner which shall distinguish it from other provisions of the instrument.

(c) Closing statements shall be furnished to the buyer and the seller in the transaction at the closing or not more than five days after closing.

(d) Trust or escrow accounts shall be so designated by the bank or savings and loan association in which the account is located, and all deposit tickets and checks drawn on said account as well as the monthly bank statement for the account shall bear the words "Trust Account" or "Escrow Account".

(e) A broker shall maintain and retain records sufficient to verify the accuracy and proper use of his trust or escrow accounts, including, but not limited to:

- (1) bank statements;
- (2) canceled checks which shall be referenced to the corresponding transaction or owner ledger sheet;
- (3) deposit tickets and, if necessary, a supplemental worksheet for each deposit ticket identifying the property and the parties to each transaction for which funds are deposited;

- (4) a separate ledger sheet for each sales transaction and for each owner of property managed by the broker identifying the property, the parties to the transaction, the amount, date, and purpose of the deposits and from whom received, the amount, date, check number, and purpose of disbursements and to whom paid, and the running balance of funds on deposit for the particular transaction or owner property;
- (5) a journal or check stubs identifying each transaction and showing a running balance for all funds in the account;
- (6) copies of contracts, leases and management agreements;
- (7) closing statements and property management statements; and
- (8) any other documents necessary and sufficient to verify and explain record entries.

A broker shall maintain records of all receipts and disbursements of trust or escrow monies in such a manner as to create a clear audit trail from deposit tickets and canceled checks to check stubs or journals and to the ledger sheets. A broker must reconcile ledger sheets and his journals or check stubs to the trust or escrow account bank statements on a monthly basis. A broker shall create a worksheet for each such monthly reconciliation and retain it as part of his records.

(f) All trust or escrow account records shall be made available for inspection by the Commission or its authorized representatives in accordance with Rule 58A .0108.

(g) In the event of a dispute between the seller and buyer or landlord and tenant over the return or forfeiture of any deposit other than a residential tenant security deposit held by a broker, the broker shall retain said deposit in his trust or escrow account until he has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction.

(h) A broker may transfer earnest money deposits in his possession collected in connection with a sales transaction to the closing attorney or other settlement agent not more than ten days prior to the anticipated settlement date. A broker or salesman shall not disburse prior to settlement any earnest money in his possession for any other purpose without the written consent of the parties.

Statutory Authority G.S. 93A-3(c).

.0110 BROKER-IN-CHARGE

(a) There shall be designated for each firm and branch office thereof one broker who shall assume responsibility at such office for:

- (1) the proper display of license certificates of the brokers and salesmen associated with or engaged on behalf of the firm at such office, ascertaining whether each licensee employed at the office has complied with Rules .0503 and .0506 of this Subchapter;
- (2) the proper notification to the Commission of any change of business address or trade name of the firm and the registration of any assumed business name adopted by the firm for its use;
- (3) the proper conduct of advertising by or in the name of the firm at such office;
- (4) the proper maintenance at such office of the trust or escrow account of the firm and the records pertaining thereto;
- (5) the proper retention and maintenance of records relating to transactions conducted by or on behalf of the firm at such office; and
- (6) the proper supervision of salesmen associated with or engaged on behalf of the firm at such office in accordance with the requirements of Rule .0506 of this Subchapter.
- (7) The verification to the Commission of the experience of any salesman at such office who may be applying for license as a broker.

No broker shall be broker-in-charge of more than one office or branch office.

(b) When used in this Rule, the term:

- (1) "Branch Office" means any office in addition to the principal office of a broker which is operated in connection with the broker's real estate business; and
- (2) "Office" means any place of business where acts are performed for which a real estate license is required.

(c) Each broker-in-charge shall notify the Commission in writing of any change in his status as broker-in-charge within ten days following the change. Within ten days following termination of his supervisory responsibilities over any salesman, the broker-in-charge shall provide the salesman an accurate statement of the salesman's experience on a form prescribed by the Commission.

Statutory Authority G.S. 93A-3(c).

SECTION .0300 - APPLICATION FOR LICENSE

.0304 EXPERIENCE QUALIFICATIONS FOR APPLICANTS

(a) A broker applicant applying on the basis of two years' full-time experience as a licensed salesman must demonstrate that his qualifying experience consisted of activities commonly performed by licensed salesmen when listing, selling, buying, leasing, or renting properties for others and that such experience was obtained while the salesman was properly licensed and under the active supervision of a broker-in-charge. The number and type of properties listed, sold, bought, leased or rented for others by the applicant during the period for which experience as a salesman is claimed must be reasonably consistent with the amount of experience claimed. The applicant has the burden of providing documentation of his qualifying experience as may be required by the Commission.

(b) Experience obtained by a salesman or broker applicant in violation of law or rule may not be recognized by the Commission as fulfilling the requirements for licensure.

Statutory Authority G.S. 93A-3(c); 93A-4.

SECTION .0500 - LICENSING

.0506 SALESMAN TO BE SUPERVISED BY BROKER

(a) A salesman's license is valid only while he is supervised by the broker-in-charge of the firm or office where the salesman is engaged in the business of a salesman. A salesman shall not act as or hold himself out to be a broker, nor shall he act as a salesman outside the supervision of the broker-in-charge of the firm or office where the salesman is employed.

(b) Upon a salesman's association with a real estate broker or brokerage firm, the broker-in-charge of the office where the salesman will be engaged in the business of a real estate salesman shall immediately file with the Commission a form prescribed by the Commission containing the salesman's name and residence address, the name of the broker-in-charge, the name of the firm and the address of the office with which the broker-in-charge is associated, a statement from the broker-in-charge certifying that he will supervise the salesman in the performance of all acts for which a license is required, the date that the broker-in-charge assumes responsibility for such supervision,

and the signatures of the salesman and broker-in-charge. Upon mailing or delivering the properly completed form to the Commission by the broker-in-charge, the salesman named in the form may engage in the business of a salesman under the supervision of the broker-in-charge pending acknowledgement from the Commission of receipt of such form; however, in the event such written acknowledgement from the Commission is not received by the broker-in-charge within thirty calendar days following the date shown in the form, the broker-in-charge shall cause the salesman to immediately cease any further activity for which a real estate license is required pending receipt of the written acknowledgement from the Commission.

(c) A broker-in-charge who certifies to the Commission that he will supervise a licensed salesman shall actively and personally supervise the salesman in a manner which would reasonable assure that the salesman performs all acts for which a real estate license is required in accordance with the real estate license law and ~~commission~~ Commission rules. A supervising broker who fails to supervise a salesman as prescribed in this Rule may be subject to disciplinary action by the Commission.

(d) ~~A broker-in-charge shall, upon~~ Upon termination of his supervision of a salesman, a broker shall immediately:

- (1) notify the Commission in writing setting forth the date of termination; and
- (2) give the salesman an accurate written statement on a form prescribed by the Commission documenting the salesman's experience under the broker's supervision.

Statutory Authority G.S. 93A-2(b).

SUBCHAPTER 58C - REAL ESTATE AND APPRAISAL EDUCATION

SECTION .0200 - PRIVATE REAL ESTATE SCHOOLS

.0207 FACILITIES AND EQUIPMENT

(a) The applicant for a license to operate a private real estate school shall either own the school facilities or possess a lease or other agreement for the use of facilities for school purposes which will assure the availability of adequate facilities until the next June 30 following license issuance or renewal. If facilities are to be leased or rented, the applicant need not execute

such lease or other agreement until notification is received that the school application has been approved; however, such lease or agreement must be executed and a copy provided to the Commission prior to issuance of a license.

(b) All school facilities and equipment shall have been found by appropriate local building, health and fire inspectors to be in compliance with all applicable local, state and federal laws and regulations regarding safety and sanitation.

(c) Classrooms shall be of sufficient size to accommodate comfortably all students enrolled in a course, shall have adequate light, heat, cooling and ventilation and shall be free of distractions which would disrupt class sessions.

(d) Classrooms shall contain, at a minimum, a chalkboard and student desks or worktables sufficient to accommodate all students enrolled in a course.

~~(e) The applicant must either utilize school facilities that are designed and equipped in such a manner as will assure full and free access to and use of the facilities by handicapped persons as required by G.S. 168-2 or must certify to the Commission that school personnel will be available before, during and after scheduled classes to assist any handicapped person as may be necessary.~~

Statutory Authority G.S. 93A-4(a),(d); 93A-33.

.0219 ACCOMMODATIONS FOR PERSONS WITH DISABILITIES

The Commission may suspend, revoke or deny renewal of a private real estate school license upon finding that any court of competent jurisdiction has found the licensee, or any school official or instructor in the employ of the licensee, to be in violation of any applicable federal or state law or regulation prohibiting discrimination on the basis of disability, requiring places of public accommodation to be in compliance with prescribed accessibility standards, or requiring that courses related to licensing or certification for professional or trade purposes be offered in a place and manner accessible to persons with disabilities.

Statutory Authority G.S. 93A-3(c); 93A-33.

SECTION .0300 - PRE-LICENSING AND PRE-CERTIFICATION COURSES

.0305 COURSE SCHEDULING

(a) All courses Courses must have fixed beginning and ending dates and must not be conducted on an open-entry/open-exit basis.

~~(1)(b) Real estate pre-licensing courses may not have class meetings that are limited to exceed a maximum of six classroom hours in any given day and 18 classroom hours in any given seven-day period; and.~~

~~(2) have fixed beginning and ending dates and not be conducted on an open entry/open exit basis.~~

(c) Appraisal pre-licensing and pre-certification courses may not have class meetings that exceed eight classroom hours in any given day and 30 classroom hours in any given seven-day period.

~~(b)(d)~~ A classroom hour consists of 50 minutes of classroom instruction and ten minutes of break time. For any class meeting that exceeds 50 minutes in duration, breaks at the rate of ten minutes per hour must be scheduled and taken at reasonable times.

Statutory Authority G.S. 93A-4(a),(d); 93A-75(a).

SECTION .0400 - APPRAISAL TRADE ORGANIZATION COURSES

.0403 CRITERIA FOR COURSE RECOGNITION

(a) Appraisal trade organization courses must be found by the Commission to be substantially equivalent to the appraisal pre-licensing and pre-certification courses prescribed in Rule .0302(b) and (c) of this Subchapter. Such courses must be conducted in accordance with the minimum course standards prescribed in Section .0300 of this Subchapter, provided that the following exceptions to those standards shall apply:

- (1) Appraisal trade organization education programs may be structured differently from the program structure prescribed in Rule .0302(b) and (c) of this Subchapter; however, the programs must provide for appropriate prerequisites for advanced courses and each appraisal trade organization course for which commission recognition is sought must consist of a minimum of 15 classroom hours.
- (2) Appraisal trade organization courses may be scheduled in a manner that provides for class meetings of up to ~~seven eight~~ classroom hours in any given day and ~~42 40~~ classroom hours in any given seven-day period; however, equivalent credit for courses scheduled for more than 30 classroom hours per seven-day period will be limited to 30

- classroom hours per seven-day period.
- (3) Instructor qualifications will generally not be approved by the Commission on an individual basis; however, the appraisal trade organization must have and enforce written instructor qualification requirements that are equivalent to those prescribed in Rule .0308 of this Subchapter.
 - (4) Appraisal trade organizations are not subject to the 90-day limit for allowing students to make up a missed course examination or to retake a failed course examination without repeating the course; however, the appraisal trade organization must have an appropriate written policy regarding this matter.

(b) The appraisal trade organization must have and enforce written policies which require their courses to be conducted in classroom facilities that provide an appropriate learning environment.

(c) The appraisal trade organization must have written policies with regard to course cancellation and the refund of tuition and other course fees. Such policies must be provided to prospective students prior to acceptance of any fees from such prospective students and the organization must enforce such policies in a fair and reasonable manner.

(d) Various combinations of appraisal trade organization courses may be recognized as equivalent to single North Carolina appraisal pre-licensing or pre-certification courses or to the North Carolina appraisal pre-licensing (residential appraiser) or appraisal pre-certification (general appraiser) education programs; however, equivalent credit will be granted only in increments of 30 classroom hours.

Statutory Authority G.S. 93A-75(a).

SUBCHAPTER 58D - REAL ESTATE APPRAISERS

SECTION .0200 - APPRAISER LICENSING AND CERTIFICATION

.0203 LICENSE AND CERTIFICATE RENEWAL

(a) A holder of an appraiser license or certificate desiring the renewal of such license or certificate shall, during the month of June, apply for same in writing upon a form approved by the Commission and shall forward the required fee of one hundred dollars (\$100.00). Forms are available upon

request to the Commission.

(b) As a condition of renewal, all licensees and certificate holders, either active or inactive, resident or non-resident, shall be required to satisfy the continuing education requirements set forth in Rule .0204 of this Section.

(c) An applicant applying for renewal of a license or certificate obtained by reciprocity must submit with the renewal application a current license history from the appraiser regulatory authority of the state upon whose qualification requirements the reciprocal license or certificate was granted showing that the applicant is currently licensed or certified in good standing. Submission of false or misleading information to the Board in connection with license or certificate renewal shall constitute grounds for disciplinary action.

(d) Any persons who acts or holds himself out as a state-licensed or state-certified real estate appraiser while his appraiser license or certificate is expired will be subject to disciplinary action and penalties as prescribed in Chapter 93A of the North Carolina General Statutes.

Statutory Authority G.S. 93A-74(a),(b); 93A-77.

.0204 CONTINUING EDUCATION

(a) All real estate appraiser licensees and certificate holders shall, upon the second renewal of their license or certificate following their initial licensure or certification by the Commission, and upon each subsequent renewal, present evidence satisfactory to the Commission of having obtained, during within the immediately preceding licensing/certification period (July 1 - June 30) education consisting of at least ten classroom hours of instruction. Except as provided in Paragraphs (f) and (g) of this Rule, such education must have been obtained by taking courses approved by the Commission for continuing education purposes. Such education must relate to real estate appraisal and must contribute to the goal of improving the knowledge, skill and competence of state-licensed and state-certified real estate appraisers. There is no exemption from the continuing education requirement for appraisers whose licensed or certified status has been upgraded to the level of certified residential or certified general appraiser since the issuance or most recent renewal of their license or certificate, and courses taken to satisfy the requirements of a higher level of certification may not be applied toward the annual continuing education requirement.

(b) Each appraisal continuing education course must involve a minimum of three and one-half

classroom hours of instruction on real estate appraisal or related topics such as the application of appraisal concepts and methodology to the appraisal of various types of property; specialized appraisal techniques; laws, rules, or guidelines relating to appraisal; standards of practice and ethics; building construction; financial or investment analysis, land use planning or controls; feasibility analysis; statistics; accounting; and similar topics. The license or certificate holder must have attended at least 90 percent of the scheduled classroom hours for the course in order to receive credit for the course.

(c) No carry-over to a future year of excess continuing education credit hours obtained in a previous year is permitted. A minimum of ten hours of continuing education must be obtained during each year.

(d) Course sponsors must provide a prescribed certificate of course completion to each licensee and certificate holder satisfactorily completing the course. The licensee or certificate holder should submit the original of this certificate to the Commission as soon as possible after completing the course and must submit such certificate not later than the next June 30 following course completion. In order to renew a license or certificate in a timely manner, the Commission must have received from the licensee or certificate holder proper proof of his having fully satisfied the continuing education requirement prior to processing his license or certificate renewal application. If a licensee or certificate holder fails to provide by June 30 of any year proper proof of having fully satisfied the continuing education requirement, his license or certificate will expire as of that date and he will be subject to the provisions of Rules .0203(e)(d) and .0206 of this Section.

(e) A course may be taken only once for continuing education credit within a three-year period.

(f) A current or former licensee or certificate holder may request that the Commission grant continuing education credit for a course taken by the licensee or certificate holder that is not approved by the Commission, or for appraisal education activity equivalent to a Commission-approved course, by making such request on a form prescribed by the Commission and submitting a non-refundable fee of fifty dollars (\$50.00) for each course or type of appraisal education activity to be evaluated. Continuing education credit for a non-approved course will be granted only if the licensee or certificate holder provides satisfactory

proof of course completion and the Commission finds that the course satisfies the requirements for approval of appraisal continuing education courses with regard to subject matter, course length, instructor qualifications, and student attendance. Appraisal education activities for which credit may be awarded include, but are not limited to, teaching appraisal courses, authorship of appraisal textbooks, and development of instructional materials on appraisal subjects. The awarding of credit for such activities is wholly discretionary on the part of the Commission. Licensed or certified appraisers who between July 1 and June 30 of the period for which continuing education credit is requested have taught an appraisal course or courses approved by the Commission for continuing education credit will be deemed to have taken an equivalent course and will not be subject to the fifty dollar fee (\$50.00), provided they submit verification satisfactory to the Commission of having taught the course(s).

(g) A state-licensed or state-certified residential real estate appraiser may fully satisfy the continuing education requirement by taking the Applied Residential Property Valuation (R-3) pre-licensing and pre-certification course, provided that he has not taken such course within the previous three years. A state-certified general real estate appraiser may fully satisfy the continuing education requirement by taking either the Applied Residential Valuation (R-3) pre-licensing and pre-certification course or the Applied Income Property Valuation (G-3) pre-certification course, provided that he has not taken either of these courses within the previous three years.

(h) A licensee or certificate holder may request in writing and be granted an extension of time to satisfy the continuing education requirements if he provides evidence satisfactory to the Commission that he was unable to obtain the necessary education due to an incapacitating illness, military assignment outside the 50 states, or similar condition. If an extension of time is granted, the licensee or certificate holder will be permitted to renew or reinstate, as appropriate, his license or certificate for that period of time for which the extension was granted. The granting of such request and the length of any extension of time granted are wholly discretionary on the part of the Commission.

Statutory Authority G.S. 93A-74(a),(b); 93A-75(d); 93A-77.

.0210 TEMPORARY PRACTICE

(a) A real estate appraiser from another state who is licensed or certified by the appraiser licensing or certifying agency in such state may apply for registration to receive temporary appraiser licensing or certification privileges in this State by filing with the Commission a notarized application on a form prescribed by the Commission for such purpose which shall set forth and include:

- (1) the applicant's name, address, social security number and such other information as may be necessary to identify the applicant;
- (2) ~~a an original statement under seal issued~~ by the appraiser licensing or certifying agency in the applicant's resident state issued under seal no more than thirty days prior to the application date setting forth:
 - (A) the applicant's name, business name and address;
 - (B) the type license or certificate held by the applicant and the license or certificate number;
 - (C) the dates of licensure or certification and the expiration date of the applicant's current license or certificate;
 - (D) whether or not the license or certificate was issued as a result of passing a licensure/certification examination, by reciprocity, or by some other means; and
 - (E) a complete record of any disciplinary actions taken or disciplinary proceedings pending against the applicant;
- (3) an irrevocable consent that service of process in any action against the applicant arising out of the applicant's appraisal activities in this State may be made by delivery of the process on the Executive Director of the Commission;
- (4) a statement that the applicant has read and agrees to abide by all appraiser laws and rules in this State and agrees to cooperate with any investigation initiated by the Commission at the direction of the Appraisal Board including supplying relevant documents and personally appearing before the Board or the Commission's investigators;
- (5) information sufficient to identify the appraisal assignment to be performed

under the temporary practice permit, including the projected beginning and ending dates for performing such appraisal assignment, but shall not require the applicant to divulge any information concerning the appraisal assignment which would breach the applicant's duty of confidentiality to his client under the provisions of the Uniform Standards of Professional Appraisal Practice; and

- (6) such other information as may be necessary to determine the applicant's eligibility for temporary appraiser licensing or certification privileges in this State.

(b) Upon filing a properly completed application ~~accompanied by the required fee~~, and otherwise satisfying the Appraisal Board as to his qualifications, eligibility and moral fitness for temporary licensing or certification privileges, an applicant shall be granted a temporary practice permit by the Commission authorizing the applicant to perform in this State the appraisal assignment described in such application, provided that the length of time projected by the applicant for completion of the assignment is reasonable given the scope and complexity of the assignment.

(c) Licensing and certification privileges granted under the provisions of this Rule shall expire upon the completion of the appraisal assignment described in the application for temporary licensing or certification privileges or on the expiration date set forth in the temporary practice permit, whichever shall come first. However, upon a showing by the permittee satisfactory to the Appraisal Board that, notwithstanding the permittee's diligent attention to the appraisal assignment, additional time is needed to complete the assignment, the Commission shall extend the licensing or certification privileges granted under the permittee's temporary practice permit to afford him additional time to complete the appraisal assignment.

(d) Persons granted temporary licensing or certification privileges under this Rule shall not advertise or otherwise hold themselves out as being a North Carolina state-licensed or state-certified appraiser.

Authority G.S. 93A-77; Title XI, Section 1122(a); 12 U.S.C. 3351(a).

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

JANUARY & FEBRUARY 93

TITLE	DEPARTMENT	TITLE	DEPARTMENT
2	Agriculture	17	Revenue
4	Economic and Community Development	19A	Transportation
10	Human Resources	21	Occupational Licensing Boards
11	Insurance	10	Chiropractic Examiners
12	Justice	12	General Contractors
13	Labor	21	Geologists
15A	Environment, Health and Natural Resources	40	Opticians
16	Education	42	Optometry
		24	Independent Agencies
		1	Housing Finance
		25	Personnel

Citation	AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
2 NCAC 9L .0701		✓		✓	03/01/93	
4 NCAC 3F .0001 - .0003			✓		02/01/93	
.0201	✓			✓	02/01/93	
.0301	✓			✓	02/01/93	
.0302	✓				02/01/93	
.0303	✓			✓	02/01/93	
.0304	✓				02/01/93	
.0401	✓				02/01/93	
.0403	✓				02/01/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
			.0501 - .0502	✓				02/01/93	
4	NCAC	3F	.0503	✓			✓	02/01/93	
			.0504	✓				02/01/93	
			.0505 - .0509	✓			✓	02/01/93	
			.0601	✓				02/01/93	
			.0602	✓			✓	02/01/93	
			.0701	✓				02/01/93	
10	NCAC	3C	.1902		✓		✓	02/01/93	
			.1927 - .1928		✓		✓	02/01/93	
			.1929		✓			02/01/93	
			.2001	✓			✓	02/01/93	
			.2002 - .2008	✓				02/01/93	
	3H		.0108		✓			02/01/93	
			.0311		✓			02/01/93	
			.0313 - .0314		✓			02/01/93	
			.0316		✓		✓	02/01/93	
			.0505		✓			02/01/93	
			.0711		✓		✓	02/01/93	
			.1108		✓		✓	02/01/93	
			.1109		✓			02/01/93	
			.1130	✓			✓	02/01/93	
			.1131 - .1136	✓				02/01/93	
	3R		.2113		✓			03/01/93	
			.2115		✓			03/01/93	
			.2801		✓		✓	02/01/93	
	14L		.0602		✓			02/08/93	136 DAYS
			.0602		✓			06/24/93	7 DAYS
	26B		.0104		✓			03/01/93	
			.0110		✓			03/01/93	
			.0120		✓			03/01/93	
			.0123	✓				03/01/93	
			.0124	✓			✓	03/01/93	
	26H		.0102		✓		✓	02/01/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
			.0202		✓			02/01/93	
10	NCAC	26H	.0204		✓			03/19/93	180 DAYS
		41E	.0514		✓		✓	03/01/93	
		41G	.0602		✓		✓	03/01/93	
			.1102		✓		✓	03/01/93	
		41R	.0003		✓		✓	03/01/93	
		42C	.2401		✓			02/01/93	
		42E	.1207		✓		✓	03/01/93	
		42V	.0806	✓				03/01/93	
		42Z	.0901		✓		✓	03/01/93	
		46G	.0101			✓		02/01/93	
			.0103 - .0106			✓		02/01/93	
			.0108			✓		02/01/93	
			.0109 - .0111	✓				02/01/93	
			.0112	✓			✓	02/01/93	
			.0113 - .0116	✓				02/01/93	
			.0201			✓		02/01/93	
			.0213 - .0215	✓			✓	02/01/93	
		50B	.0101		✓			03/01/93	
			.0311		✓			03/01/93	
			.0313		✓			03/01/93	
			.0403		✓			03/01/93	
			.0405		✓			03/01/93	
11	NCAC	4	.0120 - .0121	✓				02/01/93	
			.0122	✓			✓	02/01/93	
			.0415		✓		✓	02/01/93	
			.0429 - .0430	✓				02/01/93	
		5A	.0301 - .0302		✓		✓	02/01/93	
			.0303		✓			02/01/93	
			.0403 - .0404			✓		02/01/93	
			.0601 - .0602	✓				02/01/93	
			.0603	✓			✓	02/01/93	
			.0604	✓				02/01/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
.0701 - .0702				✓				02/01/93	
11	NCAC	5A	.0703	✓			✓	02/01/93	
.0704				✓				02/01/93	
.0705				✓			✓	02/01/93	
10			.1506 - .1508			✓		03/01/93	
	11C		.0105		✓		✓	03/01/93	
	11E		.0106			✓		03/01/93	
15			.0002		✓		✓	02/01/93	
.0004 - .0006					✓			02/01/93	
.0010					✓			02/01/93	
16			.0301 - .0303	✓				01/25/93	180 DAYS
19			.0001 - .0002	✓				03/01/93	
.0003 - .0005				✓			✓	03/01/93	
.0006				✓				03/01/93	
.0007				✓			✓	03/01/93	
12	NCAC	4E	.0204	✓				02/01/93	
	11		.0201		✓		✓	03/01/93	
.0202 - .0203					✓			03/01/93	
.0204					✓		✓	03/01/93	
.0206					✓			03/01/93	
.0208				✓				03/01/93	
.0301					✓		✓	03/01/93	
.0302 - .0303					✓			03/01/93	
.0306					✓		✓	03/01/93	
13	NCAC	7C	.0101		✓			02/05/93	
15A	NCAC	1C	.0504		✓			03/01/93	
	2A		.0005		✓		✓	03/01/93	
	2B		.0101		✓		✓	02/01/93	
.0103					✓		✓	02/01/93	
.0201 - .0202					✓		✓	02/01/93	
.0206					✓			02/01/93	
.0208					✓			02/01/93	
.0211 - .0212					✓		✓	02/01/93	

LIST OF RULES CODIFIED

Citation	AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
.0216		✓		✓	02/01/93	
15A NCAC 2B .0303		✓		✓	02/01/93	
.0305		✓		✓	02/01/93	
.0307		✓		✓	02/01/93	
2H .0102 - .0103		✓		✓	03/01/93	
.0105 - .0109		✓		✓	03/01/93	
.0111 - .0112		✓		✓	03/01/93	
.0114		✓		✓	03/01/93	
.0115		✓			03/01/93	
.0117		✓		✓	03/01/93	
.0118		✓			03/01/93	
.0120		✓		✓	03/01/93	
.0122		✓		✓	03/01/93	
.0123		✓			03/01/93	
.0124		✓		✓	03/01/93	
.0127		✓		✓	03/01/93	
.0138		✓		✓	03/01/93	
.0201 - .0203		✓		✓	02/01/93	
.0205 - .0206		✓		✓	02/01/93	
.0208 - .0209		✓		✓	02/01/93	
.0211		✓			02/01/93	
.0213		✓			02/01/93	
.0215		✓			02/01/93	
.0217 - .0219		✓		✓	02/01/93	
.0220		✓			02/01/93	
.0222		✓			02/01/93	
.0223 - .0224	✓			✓	02/01/93	
.1101		✓			03/01/93	
.1106 - .1109		✓			03/01/93	
2P .0101 - .0103	✓			✓	02/01/93	
.0201 - .0202	✓			✓	02/01/93	
.0301 - .0302	✓			✓	02/01/93	
.0401 - .0407	✓			✓	02/01/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
	7H		.0208		✓		✓	02/01/93	
15A	NCAC	7H	.0306		✓			02/01/93	
			.0308		✓		✓	03/01/93	
			.0309		✓			02/01/93	
	10B		.0115		✓			03/01/93	
	10F		.0310		✓		✓	03/01/93	
			.0313		✓			03/01/93	
			.0336		✓			03/01/93	
	19G		.0103		✓			03/17/93	180 DAYS
	21E		.0501					02/10/93	
	transferred and recodified to 21H .0314								
16	NCAC	6G	.0101 - .0102			✓		03/01/93	
			.0301		✓		✓	03/01/93	
			.0302		✓			03/01/93	
17	NCAC	7B	.0206		✓			03/01/93	
			.1602		✓			03/01/93	
			.2903		✓			03/01/93	
			.3013	✓				03/01/93	
			.4611		✓			03/01/93	
			.5102		✓			03/01/93	
			.5433		✓			03/01/93	
19A	NCAC	2B	.0309		✓		✓	03/01/93	
			.0312		✓		✓	03/01/93	
	2E		.0201		✓		✓	03/01/93	
			.0210		✓		✓	03/01/93	
21	NCAC	10	.0206	✓				02/01/93	
		12	.0910	✓			✓	03/01/93	
		14H	.0019	✓				03/01/93	
		21	.0107		✓			03/01/93	
	40		.0214	✓				03/01/93	
	42K		.0102		✓			03/01/93	
			.0204		✓			03/01/93	
			.0401		✓			03/01/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Eff. Date	Temp. Expires
24	NCAC	1M	.0202		✓		✓	02/01/93	
24	NCAC	1M	.0204		✓		✓	02/01/93	
			.0205			✓		02/01/93	
			.0301 - .0303	✓			✓	02/01/93	
			.0306	✓			✓	02/01/93	
			.0401 - .0405	✓			✓	02/01/93	
25	NCAC	1B	.0107	✓				02/01/93	
		1N	.0001			✓		02/01/93	
			.0004		✓			02/01/93	
			.0005 - .0007	✓				02/01/93	

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
Obj. Cont'd 02/18/93

Savings Institutions Division: Savings Institutions Commission

4 NCAC 16A .0105 - Restrictions: Payment of Dividends & Repurchase of Stock RRC Objection 03/18/93
Agency Revised Rule Obj. Removed 03/18/93
4 NCAC 16G .0311 - Required Provisions in Plan of Conversion RRC Objection 03/18/93
Agency Revised Rule RRC Objection 03/18/93

EDUCATION

Elementary and Secondary

16 NCAC 6G .0301 - Local School Improvement Plans RRC Objection 02/18/93
Agency Revised Rule Obj. Removed 02/18/93

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Adult Health

15A NCAC 16A .1208 - Use of Program Funds RRC Objection 03/18/93
Agency Revised Rule Obj. Removed 03/18/93

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
Rule Returned to Agency 02/18/93
Agency Filed Rule for Codification Over RRC Objection Eff. 03/01/93
15A NCAC 7H .1205 - Specific Conditions RRC Objection 03/18/93

Environmental Health

15A NCAC 18A .1948 - Site Classification RRC Objection 03/18/93
Agency Revised Rule Obj. Removed 03/18/93

Environmental Management

15A NCAC 2H .0108 - Fact Sheets RRC Objection 02/18/93
Agency Revised Rule Obj. Removed 02/18/93
15A NCAC 2H .0111 - Meetings and Hearings RRC Objection 02/18/93
Agency Revised Rule Obj. Removed 02/18/93

RRC OBJECTIONS

15A NCAC 2H .0114 - Modification and Revocation of Permits	RRC Objection	02/18/93
Agency Revised Rule	Obj. Removed	02/18/93
15A NCAC 2H .1103 - Definitions	RRC Objection	02/18/93
Agency Revised Rule	Obj. Removed	03/18/93
15A NCAC 2H .1110 - Implementation	RRC Objection	02/18/93
	Obj. Cont'd	03/18/93

Laboratory Services

15A NCAC 20D .0234 - Criteria & Procedures: Decert./Denial/Downgrading	RRC Objection	03/18/93
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Solid Waste Management

15A NCAC 13A .0013 - The Hazardous Waste Permit Program - Part 270	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93

Wildlife Resources and Water Safety

15A NCAC 10I .0001 - Definitions	RRC Objection	10/15/92
Agency Responded	Obj. Cont'd	11/19/92
Agency Responded	Obj. Cont'd	12/17/92

HUMAN RESOURCES

Medical Assistance

10 NCAC 26D .0012 - Time Limitation	RRC Objection	12/17/92
Agency Withdrew Rule		12/17/92
10 NCAC 26N .0201 - Offer to Counsel	RRC Objection	12/17/92
Agency Withdrew Rule		12/17/92
10 NCAC 50B .0203 - Application Processing Standards	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93

INDEPENDENT AGENCIES

N.C. Housing Finance Agency

24 NCAC 1M .0202 - Eligibility	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0204 - Selection Procedures	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0205 - Administration	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0206 - Program Fees	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0301 - Goal and Objectives	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0302 - Eligibility Requirements	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92

24 NCAC 1M .0303 - Threshold Review Criteria	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0306 - Funding Commitment	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0401 - Goals and Objectives	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0402 - Eligibility Requirements	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0403 - Threshold Review Criteria	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0404 - Ranking Criteria	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92
24 NCAC 1M .0405 - Agency Board Approval	RRC Objection	10/15/92
No Response from Agency	Obj. Cont'd	11/19/92
No Response from Agency	Obj. Cont'd	12/17/92

INSURANCE

Consumer Services

11 NCAC 4 .0428 - Enforcement	RRC Objection	03/18/93
Agency Revised Rule	RRC Objection	03/18/93

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
11 NCAC 11B .0508 - Foreign Company Securities: Verifiable Capital/Surplus	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93
11 NCAC 11B .0607 - Application - Employers	RRC Objection	03/18/93
11 NCAC 11B .0608 - Deposits: Bonds: Excess Insurance - Employers	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93
11 NCAC 11B .0610 - Application - Groups	RRC Objection	03/18/93
11 NCAC 11H .0002 - License - Steps	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93

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 - SHIP Inquiries to Insurers and Agents	RRC Objection	06/18/92
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JUSTICE

Private Protective Services

12 NCAC 7D .0205 - Corporate Business License
Agency Revised Rule

RRC Objection 02/18/93
Obj. Removed 03/18/93

LICENSING BOARDS AND COMMISSIONS

Electrical Contractors

21 NCAC 18B .0703 - Reciprocity: Virginia
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

General Contractors

21 NCAC 12 .0910 - Limitations; Pro Rata Distribution
Agency Revised Rule

RRC Objection 12/17/92
Obj. Removed 02/18/93

Medical Examiners

21 NCAC 32A .0001 - Location
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0101 - Definitions
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0209 - Fee
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0210 - Deadline
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0211 - Passing Score
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0212 - Time and Location
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0213 - Graduate Medical Ed & Training for Licensure
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0214 - Personal Interview
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0215 - Examination Combinations
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0305 - Examination Basis for Endorsement
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0309 - Personal Interview
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0314 - Passing Flex Score
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32B .0315 - Ten Year Qualification
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32C .0003 - Prerequisites for Incorporation
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32C .0006 - Charter Amendments and Stock Transfers
Rule Returned to Agency - Improper Notice

RRC Objection 02/18/93
Obj. Cont'd 02/18/93

21 NCAC 32H .0102 - Definitions
Agency Revised Rule

RRC Objection 03/18/93
Obj. Removed 03/18/93

21 NCAC 32H .0901 - Conditions
Agency Revised Rule

RRC Objection 03/18/93
Obj. Removed 03/18/93

Optometry

21 NCAC 42B .0302 - Continuing Education	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93
21 NCAC 42E .0203 - Consultant: Advisor, Staff Optometrist/Ind Contractor	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93
21 NCAC 42L .0005 - Written Answers to the Notice of Hearing	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93
21 NCAC 42M .0006 - Termination	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93

REVENUE

Individual Income, Inheritance and Gift Tax Division

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

STATE PERSONNEL

Office of State Personnel

25 NCAC 1D .0511 - Reduction in Force Priority Consideration	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	03/18/93

TRANSPORTATION

Highways

19A NCAC 2B .0309 - Source & Purpose-PL (Metropolitan Planning) Funds	RRC Objection	02/18/93
Agency Revised Rule	Obj. Removed	02/18/93
19A NCAC 2B .0312 - Matching-PL (Metropolitan Planning) Funds	RRC Objection	02/18/93
Agency Revised Rule	Obj. Removed	02/18/93
19A NCAC 2E .0201 - Definitions for Outdoor Advertising Control	RRC Objection	02/18/93
Agency Revised Rule	RRC Objection	02/18/93
Agency Revised Rule	Obj. Removed	02/18/93

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.

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
COMMERCE				
Lester Moore v. Weatherization Assistance Program	93 COM 0105	Gray	03/08/93	
CRIME CONTROL AND PUBLIC SAFETY				
Anthony L. Hart v. Victims Compensation Comm.	92 CPS 0937	Chess	03/01/93	
ENVIRONMENT, HEALTH, AND NATURAL RESOURCES				
Safeway Removal, Inc. v. Environment, Health, & Natural Res.	92 EHR 0826	West	03/12/93	8:1 NCR 83
HUMAN RESOURCES				
William A. Dixon v. Human Resources	91 CSE 1277	Morrison	03/04/93	
Samuel Benson v. Office of Admin. Hearings for Medicaid	93 DHR 0010	Becton	03/11/93	
STATE PERSONNEL				
Brenda G. Mitchell v. Correction	91 OSP 0625	West	03/08/93	8:1 NCR 75
Willie Granville Bailey v. Winston-Salem State University	92 OSP 0285	Morrison	03/10/93	
Laverne B. Hill v. Transportation	92 OSP 0431	West	03/08/93	
Jimmy D. Wilkins v. Transportation	92 OSP 0432	West	03/08/93	
Glinda C. Smith v. Wildlife Resources Commission	92 OSP 0653	Morrison	03/12/93	
John B. Sauls v. Wake County Health Department	92 OSP 1142	Reilly	03/08/93	8:1 NCR 88
Joseph Henry Bishop v. Environment, Health, & Natural Res.	92 OSP 1243	Reilly	03/05/93	

V.

DEPARTMENT OF CORRECTION
Respondent.

RECOMMENDED DECISION

BACKGROUND

Mitchell denies the charges. Mitchell exhausted all internal grievance procedures before filing this contested case. The parties have stipulated that the Department of Correction's Employee Relations Committee (Step Two) recommended that Mitchell be reinstated to the Correctional Case Analyst position and that the final written warning be retracted. Secretary Johnson rejected the Committee's recommendation and upheld the final written warning and demotion.

APPEARANCES

Petitioner: Abraham Penn Jones, Esq.
Post Office Box 326
Raleigh, North Carolina 27601-0326

Respondent: Deborah L. McSwain
Associate Attorney General

LaVee H. Jackson
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

SUMMARY OF THE DECISION

Petitioner's demotion and final written warning should be upheld. Petitioner engaged in personal conduct of such a nature that Respondent had "just cause" to issue a final written warning and demote Petitioner from Correctional Case Analyst to Program Assistant I.

ISSUES

1. Did the Petitioner engage in the alleged conduct?
2. If so, does such conduct constitute "personal misconduct" within the meaning of G.S. 126-35 and the rules of the Office of State Personnel and the Respondent?
3. Did the Respondent have "just cause" to demote the Petitioner?

OFFICIAL NOTICE

Official notice is taken of the following:

G.S. 126-35
25 NCAC 1J .0604
25 NCAC 1J .0608(a)

WITNESSES

The **Petitioner** presented the following witnesses:

1. Brenda Mitchell
2. D. V. Carver
3. Norma Thompson
4. John Williams
5. J. C. Harris
6. Jeff Becker

The **Respondent** presented the following witnesses:

1. Brenda Mitchell
2. Sid Harkleroad
3. D. V. Carver

4. Norma Thompson
5. Wilford Shields
6. John Williams

EXHIBITS

Exhibits listing has been omitted from this publication. It can be obtained by contacting this Office.

Based on a preponderance of the substantial evidence admitted into the record of this case, the Administrative Law Judge finds the following to be the facts:

FINDINGS OF FACT

1. Petitioner was, at all times relevant to this case, a permanent employee of the N.C. Department of Correction. In June 1985, Mitchell applied for a promotion from Program Assistant I to Correctional Case Analyst. The Position Description (Form PD 102R) states that "Graduation from a four-year college or university with a degree in a human services field and one year of experience in testing, interviewing, counseling; or an equivalent combination of education and experience" is the experience required for the position. Mitchell wrote on her application that she attended Pembroke State University between 1974 and 1985 and indicated that she had graduated from that university.

2. On June 11, 1985, J.C. Harris, the Acting Area Administrator for the South Central Area, recommended to the Manager of the Eastern Geographic Command of DOC that Mitchell receive the promotion. Harris wrote that Mitchell had a B.A. degree from Pembroke State University with a major in Sociology and a minor in Criminal Justice. Mitchell received the promotion on July 1, 1985. By the time she received the promotion, Harris and DOC were aware that Mitchell did not have a college degree. Mitchell was placed in her new job in trainee status with the understanding that she would complete her college degree by December, 1985. Mitchell was aware of the condition.

3. DOC granted Mitchell educational leave so that she could attend Pembroke to complete the course work necessary to receive her degree from that university. As of the date of the hearing of this case, Mitchell had not completed the courses required to receive a degree from Pembroke.

4. Mitchell replaced Ms. D.V. Carver in the Correctional Case Analyst position. Carver was promoted and became Mitchell's supervisor. Carver does not have a college degree and is the only Case Analyst supervisor employed by DOC who does not. Approximately 98% of the Case Analysts employed by DOC have college degrees. During the entire time Mitchell worked as a Correctional Case Analyst, she performed her duties well and to the satisfaction of all supervisors.

5. On November 19, 1986, Area Administrator Harris wrote a memorandum to Mitchell in which he stated, among other things, that Mitchell would " ... be granted one last extension to June 1, 1987" to receive her four year degree. Harris wrote to Mitchell that if she were unable to meet the deadline it would be necessary to demote her to her former classification of Correctional Program Assistant I.

6. Mitchell responded to Harris' memo of November 19, 1986 by memo dated January 12, 1987. Attached to Mitchell's memo was a letter dated January 12, 1987 from Dean Norma Thompson of Pembroke State University. Thompson is the Dean of Records and Special Programs. The memo from Mitchell and the letter from Dean Thompson explained that Mitchell had returned to Pembroke in 1986 after being out for a while and, as a result, she returned under the 1985-86 catalogue. The change in catalogues resulted in Mitchell needing more hours for her degree than were necessary when she began attending Pembroke. Dean Thompson wrote that if Mitchell successfully completed the nine (9) hours she was taking that semester, she would need twenty (20) more hours to graduate with a B.S. degree in Sociology.

7. On March 11, 1987, the Personnel Director of DOC, Gerald Hodnett, wrote a memo to Harris acknowledging receipt of Mitchell's memo of January 12, 1987 and stating the following:

a. DOC understood that Mitchell would complete nine (9) semester hours in May 1987 leaving twenty (20) hours for a Sociology degree;

b. DOC extended Mitchell's salary adjustment date to September 1, 1988 to give her an opportunity to complete her degree;

c. DOC would not extend her trainee status beyond that date unless there were substantial reasons which prevented her from completing her degree;

d. DOC would consider adjusting Mitchell's salary upwards from the trainee status if she completed her degree before September 1988.

Harris forwarded Hodnett's memo to Mitchell on March 18, 1987. DOC, by this memo, extended Mitchell's trainee status by fifteen (15) months.

8. Two years later, on May 30, 1989 in a memo to Hodnett, Harris recommended Mitchell for permanent status. Harris wrote that Mitchell had seventeen (17) semester hours to be completed. By June 14, 1989, Jeff Becker had become Director of Personnel Services at DOC. Becker responded to Harris' memo by memo dated June 14, 1989. Becker wrote that Mitchell should complete her degree prior to receiving permanent status and recommended that Mitchell complete an educational plan which would enable her to meet her educational obligations. Becker's decision was based on three reasons:

a. Mitchell probably would not have been promoted had DOC not been assured she would complete her degree;

b. DOC believed strongly that a four (4) year degree is a necessary prerequisite for the Correctional Case Analyst position;

c. The absence of a four (4) year college degree had been consistently used as a reason to disqualify applicants with significant experience.

9. Carver asked Mitchell for an education plan in August 1989. Carver received the plan on January 9, 1990. The plan projected graduation from Pembroke in December 1990.

10. In October 1990, Mitchell told Carver that she would not graduate in December 1990 because Pembroke had made a mistake about courses needed to obtain her degree. Carver told Mitchell that she believed Mitchell would be granted another extension of her trainee status if Mitchell would get a letter from Pembroke explaining the mistake and how it affected Mitchell. Carver told Mitchell again in December 1990 that she needed the letter in December 1990 to attach to a request for education leave. Requests for educational leave are due thirty (30) days before the beginning of the period for which the leave is sought. This policy was honored in the breach by DOC during most of the times relevant.

11. John M. Williams was, at the times relevant to this case, Assistant Superintendent for Custody and Operations at Hoke Correctional Institution. Williams supervised Carver. On January 2, 1991, Carver wrote Williams a memo documenting the following:

a. Mitchell was to have completed her four (4) year degree by the end of December 1990;

b. Carver had told Williams in October 1990 that Mitchell had reported that Pembroke had made a mistake in her records and that Mitchell would need additional credits to graduate;

c. Williams had directed Carver to tell Mitchell to get a letter from Pembroke prior to December 31, 1990 stating that the mix-up was the University's mistake.

The memo reports that Carver had not yet received the memo and concludes that since Mitchell had

not met her educational requirements, had been in a trainee status for five and a half (5 1/2) years, and had not submitted the letter as requested that " ...appropriate action be taken."

12. On January 3, 1991, Williams wrote a memo to the Superintendent of Hoke Correctional Institution, Wilford Shields, recommending that Mitchell be demoted to her previous position of Correctional Programs Assistant 1. The basis for Williams' recommendation was that Mitchell had been a trainee for five and one-half years (5 1/2) and had not completed the educational requirement necessary to be placed in the position on a permanent basis. Williams gave the memo to Shields on January 3, 1991.

13. January 4, 1991 was a Friday. Mitchell was out of the office that day. Shields was planning to be away from the unit for the next two (2) weeks in Denver, Colorado at a seminar, so he telephoned Mitchell at home.

14. During the telephone conversation, Mitchell told Shields that she had gotten a letter that day from Pembroke. Shields told Mitchell to take the letter to Carver and Williams on Monday, January 7, 1991. Shields did not approve any educational leave for Mitchell.

15. Shields then telephoned Williams that same afternoon and told him that he had spoken with Mitchell, that Mitchell had the letter that Hoke needed from Pembroke, and that Shields had told Mitchell to give it to Carver on Monday, January 7, 1991. Williams told Carver not to approve any educational leave for Mitchell and to bring the letter to him.

16. On Sunday evening, January 6, 1991, Mitchell telephoned Carver to tell her that Mitchell's child was sick and that, depending on her husband's work schedule, she might not be in on Monday, January 7. Mitchell told Carver she had picked up the letter from Pembroke on Friday. Carver testified at the hearing of this case that Mitchell also told her that Shields had told Mitchell she could go to school. Mitchell testified that she never made this statement and testified that Shields did not tell her on January 4 that she could go to school on January 7. Shields testified that he did not tell Mitchell on Friday that she could go to school on Monday.

17. Carver telephoned Williams on Sunday evening January 6, 1991 to report her conversation with Mitchell. Williams testified at the hearing of this case that Carver told him that Mitchell had stated that Shields had said she could start school on Monday.

18. On Monday, January 7, 1991, Mitchell went to Pembroke prior to going to work at Hoke that morning. Between 11:00 a.m. and Noon, Williams asked Carver if she had the letter. Carver replied that she did not, but that she would get it from Mitchell. Mitchell gave the letter to Carver, along with a cover memo and a form requesting educational leave (PD-136).

19. The letter is dated December 7, 1990 and is signed by Norma J. Thompson, Dean Records and Special Programs. The letter states:

"This is to certify that Ms. Brenda Mitchell is enrolled as a part-time student at Pembroke State University. She is within six (6) semester hours of completing her course requirements for a B.A. degree in Sociology. However, she needs to repeat twelve (12) semester hours with a 3.2 average in addition to completing the six (6) above with a 3.0 average to meet all degree requirements."

20. The cover memo is addressed to Williams and dated January 7, 1991 and states, among other things,

"There has been an apparent lack of communication from my supervisor regarding the deadlines for submission of OSDT applications. It is my current understanding that PD-136 forms are to be submitted to OSDT in Raleigh, 30 days prior to the commencement of each semester. The PD-136 for the current semester was not submitted within this time frame as I was told by my supervisor that a letter addressing the issue of my current requirement status had to accompany the PD-136 prior to submission. Upon being advised of this requirement, I requested such a letter and received same on January 4, 1991."

It is my intent to comply with all requirements by the Department regarding the completion of my school work. I sincerely hope that this breakdown in communication will cause no undue hardship. Thank you for your cooperation in this matter."

21. Later, on Monday January 7, Carver telephoned Dean Thompson. Carver used a speakerphone in Williams' office. Present during the conversation was Sidney Harkleroad, a DOC employee who was scheduled to move into Williams' position at Hoke and was in training at the unit. Carver asked Thompson for a more detailed letter explaining Mitchell's academic status and why Mitchell needed so many hours to graduate. Carver also asked Thompson when Mitchell had picked up the letter dated December 7, 1990 that had been delivered to Carver that day. Thompson stated that the letter had been given to Mitchell before Christmas. Thompson testified, at the hearing of this case, that it was possible for Mitchell to come to her office to pick up a copy of the December 7, 1990 letter in January 1991 without her knowing because no record is kept of how many times the letter might be issued.

22. Dean Thompson complied with Carver's request for an additional letter by sending to Williams a letter dated January 7, 1991. The letter adds nothing factual to the letter dated December 7, 1990. The letter makes the additional statement that,

"It is possible that we [Pembroke] could have failed to advise her [Mitchell] of her academic deficiencies prior to December 1990."

As a result of the January 7 telephone call to Thompson, and the two (2) letters, Carver concluded that the reason that Mitchell had so many hours left to obtain her degree was because her low grade point average in certain courses required that she repeat them and that the requirements for graduation had increased.

23. Superintendent Shields and Williams spoke by telephone the next day, January 8, 1991. Shields denied that he had told Mitchell she could go to school. Both Shields and Mitchell testified at the hearing of this case that Shields never told Mitchell she could go to school on Monday.

24. On January 9, 1991, Williams met with Mitchell pursuant to her request. Williams testified at the hearing of this case that Mitchell told him that Carver gave her permission January 6 to go to school on January 7. Williams testified Mitchell told him that Thompson must have back-dated the December 7, 1990 letter because she received it on January 4, 1991. Mitchell testified that she does not recall saying this to Williams.

25. At the hearing of this case, Mitchell testified, in response to questions by counsel for DOC, that the only time she had received the letter signed by Thompson and dated December 7, 1990 was on January 4, 1991. In a sworn deposition given during discovery in this case, Mitchell testified that she picked up the December 7 letter within a few days of when it was written, misplaced it, and went back and got a copy on January 4, 1991. On cross-examination in the hearing of this case, Mitchell testified that she had not meant, either on her deposition or during the hearing to testify that she had not received the letter earlier and then later picked it up again because she had lost it. At no time prior to the time she was suspended or demoted did Mitchell state that she had first picked up the letter in December, lost it, and then picked it up again on January 4, 1991.

26. Carver telephoned Dean Thompson again after Superintendent Shields returned to Hoke. Carver asked Thompson to write a letter regarding when Mitchell picked up the December 7, 1990 letter. Dean Thompson declined because she did not want to become further involved in the dispute between Mitchell and her employers. Thompson told Carver that the date of the letter stands.

27. On January 24, 1991, Shields and Harkleroad held a pre-suspension conference with Mitchell. During the conference, Shields told Mitchell the purpose of the conference, read the allegations to Mitchell, gave her an opportunity to read the allegations, and gave Mitchell an opportunity to respond to the allegations.

28. On January 24, 1991, at 4:40 p.m. Mitchell was suspended pending an investigation of unacceptable personal conduct relating to erroneous and, or false information that DOC believed she had presented to her supervisors at Hoke. Specifically, Shields, writing for DOC, charged Mitchell with telling Williams that she had received the letter dated December 7 on January 4, 1991 when in fact she had received it on December 7 or 8, 1990. Shields also charged Mitchell with telling Carver that he had granted Mitchell approval on January 4, 1991 to begin the spring semester on January 7, 1991 when in fact he had not, and with telling Williams that Carver had given Mitchell permission to attend class when she had not.

29. On February 26, 1991, Shields and Harkleroad held a pre-disciplinary conference with Mitchell. Shields read a letter dated February 25, 1991 containing the allegations against Mitchell and gave Mitchell an opportunity to respond. Mitchell disagreed with the allegations.

30. Mitchell was demoted and issued a final written warning for unacceptable personal conduct, effective March 1, 1991. Specifically, Mitchell was issued the warning and demoted for purposely providing inaccurate/misleading information to her supervisor concerning Shields having approved educational leave beginning January 7, 1991 and intentionally misrepresenting facts pertaining to the date she received a letter from Pembroke State University officials documenting her educational standing with the university.

31. At no time during the pre-suspension conference, during the month between that conference and the pre-disciplinary conference, or during the pre-disciplinary conference did Mitchell tell her supervisors that she had picked up the letter from Pembroke in December, lost it, and then picked up another one on January 4, 1991. Mitchell gave that explanation of events for the first time to the Employee Relations Committee on April 29, 1991 (Step 2 of internal dispute resolution procedures).

32. Mitchell's testimony under oath is mutually contradictory about the date she first picked up the letter. At her deposition, Mitchell testified she picked up the letter in December, lost it, and picked up a copy on January 4, 1991. On direct examination, Mitchell testified she picked it up for the first time on January 4, 1991. On cross-examination by her counsel, Mitchell testified she did not mean to testify that she picked up the letter for the first time on January 4, 1991. The Administrative Law Judge, after weighing all the evidence and considering the credibility of the witnesses, finds that Mitchell picked up the December 7, 1990 letter for the first time in December 1990 and deliberately created the impression with her supervisors that she picked it up for the first time on January 4, 1991.

33. The Administrative Law Judge, after weighing all the evidence and considering the credibility of the witnesses, finds that Mitchell told Carver that Shields had approved her going to school on January 7, 1991. Mitchell knew at the time she told Carver this information that Shields had not given her such permission.

Based on the foregoing, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Respondent has shown by the greater weight of the substantial evidence that Mitchell intentionally provided inaccurate and misleading information to her supervisor, Carver, concerning Shields having approved educational leave beginning January 7, 1991, and the date she received a letter from Pembroke State University documenting her educational standing with the university.

2. The inaccurate and misleading statements constitute "personal misconduct" as that term is defined by duly promulgated administrative rule.

3. Respondent had "just cause" to demote Mitchell from Correctional Case Analyst to Program Assistant I and issue Mitchell a final written warning.

RECOMMENDED DECISION

The State Personnel Commission should affirm Respondent's decision to demote Mitchell and issue

to her a final written warning.

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 oral and 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). It is requested that the agency furnish a copy 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 8th day of March, 1993.

Thomas R. West
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF LINCOLN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 EHR 0826

SAFEWAY REMOVAL, INC.

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT, HEALTH, AND
NATURAL RESOURCES

Respondent.

RECOMMENDED DECISION

This contested case was heard on February 4, 1993 in Charlotte by Administrative Law Judge Thomas R. West.

APPEARANCES

Petitioner: Alan B. Edmonds, Esq.
Norwood, Burke, McIntosh & Edmonds
901 Elizabeth Avenue, Suite 201
Charlotte, N.C. 28204

Respondent: Belinda A. Smith
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602-0629

ISSUES

1. Did Safeway fail to adequately wet friable asbestos-containing material prior to removing it from a project and fail to seal the material in leak-tight containers or leak-tight wrapping while wet, in violation of 15A NCAC 2D .0525(a)(1) and 40 CFR 61.150(a)(1)(iii)?
2. Did Safeway fail to label friable asbestos-containing material properly with warning labels specified by OSHA in violation of 15A NCAC 2D .0525(a)(1) and 40 CFR 61.150(a)(1)(iv)?
3. Did Safeway fail to label friable asbestos-containing material properly with generator identification labels in violation of 15A NCAC 2D .0525(a)(1) and 40 CFR 61.150(a)(1)(v)?
4. For what amount, if any, is Safeway liable for investigative costs?

OFFICIAL NOTICE

Official notice is taken of the following:

G.S. 143-212(4)
G.S. 143-215.3(a)(9)

G.S. 143-215.107
G.S. 143-215.109
G.S. 143-215.114A(a)(1)
15A NCAC 2D .0525(a)(1)
40 CFR, Subchapter C, Part 61, Subpart M

WITNESSES

Respondent presented the following witnesses:

1. John J. "Pat" Curran - Branch Manager, Asbestos Hazard Management Branch (AHMB)
2. Gregg McLawhorn - Industrial Hygiene Inspector, AHMB

Petitioner presented the following witnesses:

1. John Neal - Chemist, Laboratory Services, Department of Environment, Health, and Natural Resources
2. Jeff Nolan - Project Manager, Safeway Removal, Inc. (Safeway)
3. Linda Nolan - President, Safeway

EXHIBITS

Exhibits listing has been omitted from this publication. It can be obtained by contacting this Office.

BURDEN OF PROOF

Respondent AHMB has the burden of proving by the greater weight of the substantial evidence that Safeway violated the laws of North Carolina in the manner alleged in the Notice of Violation.

Based on a preponderance of the substantial evidence admitted into the record of this case, the Administrative Law Judge finds the following to be the facts:

FINDINGS OF FACT

1. On June 12, 1991, Gregg McLawhorn, an Industrial Hygienist employed by AHMB received a complaint concerning the storage of asbestos containing materials (ACM) at Safeway. As a result of the complaint, McLawhorn inspected Safeway's premises on June 20, 1991. The purpose of the visit was to investigate the complaint and to determine whether the storage of ACM at the site was in compliance with applicable laws.
2. Safeway is in the business of managing asbestos hazards. In that business, Safeway performs inspections of facilities to determine if asbestos hazards are present, develops management plans and, when appropriate, removes ACM. Safeway performs renovation and demolition projects in North Carolina which are regulated by the National Emission Standards for Hazardous Air Pollutants (NESHAP). NESHAP regulations applicable to Safeway are found in the federal register at 40 CFR, Part 61, Subpart M. The federal regulations are incorporated by reference in Title 15A, Chapter 2D of the North Carolina Administrative Code.
3. Before entering the premises, McLawhorn observed two large dumpsters on Safeway's premises. Approximately thirty large plastic bags were stacked beside the dumpsters as well as approximately 300 feet of pipe wrapped in polyurethane sheeting. Exhibit P1 is representative of the bags observed by McLawhorn.
4. Upon entering Safeway's premises McLawhorn identified himself to Norman Nolan, Vice President of Safeway. McLawhorn stated the reason for his inspection and said he wanted to inspect the

dumpsters and material stored beside them. Norman Nolan and one other person went with McLawhorn to examine the materials.

5. The bags observed by McLawhorn contained on them the statement:

"DANGER
Contains Asbestos Fibers
Avoid Creating Dust
Breathing Asbestos May
Cause Serious Bodily Harm
Cancer and
Lung Disease Hazard"

Some of the bags had tags on them known as "generator labels" and some did not. The sections of pipe had red, black, and white colored "Danger" labels on them. McLawhorn is not sure whether all the sections of pipe were labeled.

6. McLawhorn selected two bags from the pile and took bulk samples from them. The bags contained pipe insulation. The insulation was composed of 50% asbestos and was dry and flaky. When McLawhorn shook the insulation (inside a sealed glove bag used to obtain the samples), particulates were emitted. The insulation was clean and white. Insulation containing asbestos that had been adequately wetted would retain moisture after being sealed in a plastic bag and would be gray or off-white in color. The insulation would not be flaky (friable) if it had been adequately wetted.
7. The bags and the pipe insulation wrapped in polyurethane contained regulated asbestos-containing material which had been removed by Safeway from either commercial or public structures.
8. 40 CFR 61.141 contains definitions applicable to Safeway. The definitions are incorporated by reference by 15A NCAC 2D .0525. Among the terms defined is "adequately wet." Asbestos-containing material is "adequately wet" when it is sufficiently mixed or penetrated with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted.
9. 40 CFR 61.150(a)(1)(iv) is incorporated into the North Carolina Administrative Code at 15A NCAC 2D .0525. The regulations require that the bags and pipes stored on Safeway's premises be labeled with labels specified by OSHA.
10. 40 CFR 61.150(a)(1)(v) is incorporated into the North Carolina Administrative Code at 15A NCAC 2D .0525. The regulations require that the bags stored on Safeway's premises be labeled with the name of the place where the ACM contained in the bags was generated and the person who generated the waste.
11. Examination of the pictures taken by McLawhorn show that the "Danger" labels used by Safeway on the pipe insulation contained the same words as appear on the plastic bags used to bag asbestos.
12. Pursuant to G.S. 143-215.3(a)(9), AHMB is empowered to assess the reasonable costs of any investigation, inspection or monitoring survey against Safeway if a violation of duly promulgated administrative rules is found. AHMB assessed costs of \$778.72 against Safeway.
- a. \$75.16 of the costs relate to supplies and lab costs used during the investigation process;
 - b. \$70.80 of the costs relate to mileage from AHMB to Safeway's premises and back at \$.20 per mile;
 - c. \$146.10 of the costs relate to McLawhorn's time travelling to Safeway and the time spent on Safeway's premises (7.5 hours);
 - d. \$301.94 of the costs relate to the 16.5 hours McLawhorn spent writing his report, meeting

- with his supervisor, and preparing the enforcement package; and
- e. \$184.72 of the costs relate to the 8 hours McLawhorn's supervisor spent reviewing the enforcement package.

Based on the foregoing, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Safeway is governed by the NESHAP regulations promulgated by the federal government and incorporated by the North Carolina Administrative Code.
2. The bags of material stored at Safeway observed by McLawhorn contained regulated asbestos-containing material removed from a facility. As such, the material is regulated by the NESHAP regulations and the North Carolina Administrative Code.
3. The pipes stored at Safeway observed by McLawhorn were covered by regulated asbestos-containing material removed from a facility. As such, the material is regulated by the NESHAP regulations and the North Carolina Administrative Code.
4. The regulated asbestos-containing material sampled by McLawhorn was not adequately wet prior to its removal from a facility.
5. Not all of the bags containing asbestos-containing material were labeled with "generator labels" as required by NESHAP and the North Carolina Administrative Code.
6. The warning labels attached to the poly-wrapped pipe stored at Safeway were those required by NESHAP and the North Carolina Administrative Code.
7. The investigation of Safeway by AHMB revealed violations of duly adopted administrative rules. However, a portion of the costs relating to McLawhorn's preparation of the report of the investigation, his meeting with his supervisor and preparing the enforcement package are not reasonable and should be adjusted. The time spent preparing the report, enforcement package, and reviewing the package with Pat Wylie represent a learning curve and to a degree a double billing. Costs associated with McLawhorn's preparation of the report, enforcement package and reviewing the package with Wylie should be reduced by half.

Based on the foregoing, the undersigned makes the following:

RECOMMENDED DECISION

The administrative penalty assessed against Safeway should be reduced by \$1,150.97. The reduction relates to a reduction in the investigation costs and AHMB's own evidence tending to show that the "Danger" labels used by Safeway are those required by rule and statements by McLawhorn in his report that he is not sure if all pipes were labeled with danger labels. Conversely, McLawhorn is not sure that they were not.

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 Environmental Management Commission.

This the 12th day of March, 1993.

Thomas R. West
Administrative Law Judge

4. On August 27, 1992, a pre-suspension conference was held. The matter had been investigated by the deputy health director. The deputy health director had met with the health director on August 24, 1992, and both had signed a suspension letter. However, the deputy health director retained the authority not to suspend the petitioner after hearing his position. The petitioner was given the opportunity to state his position at the conference. The deputy health director considered the petitioner's statement, made the decision to suspend the petitioner, and then gave him the prepared suspension letter. The letter stated in part:

(O)n August 19, 1992, you removed an Australian Shepherd dog from the Animal Shelter without permission and without paying the fees associated with adopting an animal.

This letter is to inform you that due to this personal conduct violation, you are suspended without pay for a period of three days.

You may appeal the above action within 30 days to the North Carolina Office of Administrative Hearings.

CONCLUSIONS OF LAW

1. As an employee of a public health department, the petitioner is subject the State Personnel Act (GS Chapter 126) and may be suspended only for just cause. The respondent has the burden of proof to establish just cause.
2. The petitioner's intentional removal of the Australian Shepherd dog from the Animal Shelter without permission and without paying the fees associated with adopting an animal violated established rules of the Animal Shelter and constituted insubordination. This was personal misconduct and constituted just cause to suspend the petitioner.
3. The respondent conducted a pre-suspension conference in accordance with 25 NCAC 11 .2305(5).
4. The pre-suspension conference was held in accordance with 25 NCAC 11 .2303. The deputy health director discussed the suspension recommendation with the health director before the conference. At the conference, the petitioner was given the opportunity to respond to the recommendation of suspension. Although it is advised that the decision to suspend should not be communicated to an employee until the day after the conference, this is not required. The deputy health director reached his decision only after listening to the petitioner. It is permissible to present the suspension letter at the end of the conference.

RECOMMENDED DECISION

It is recommended to the State Personnel Commission that it advise the local appointing authority to affirm the suspension of the petitioner.

ORDER

It is hereby ORDERED that the agency serve a copy of the 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 advisory decision in this contested case shall be made by the State Personnel Commission. 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 GS 150B-36(b) to serve a copy of the Decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

This the 8th day of March, 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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3	Auditor	Barber Examiners	6
4	Economic & Community Development	Certified Public Accountant Examiners	8
5	Correction	Chiropractic Examiners	10
6	Council of State	General Contractors	12
7	Cultural Resources	Cosmetic Art Examiners	14
8	Elections	Dental Examiners	16
9	Governor	Dietetics/Nutrition	17
10	Human Resources	Electrical Contractors	18
11	Insurance	Electrolysis	19
12	Justice	Foresters	20
13	Labor	Geologists	21
14A	Crime Control & Public Safety	Hearing Aid Dealers and Fitters	22
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