

The **NORTH CAROLINA REGISTER**

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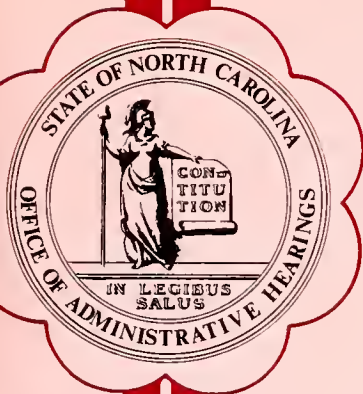
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INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

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

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

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

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

ADOPTION AMENDMENT, AND REPEAL OF RULES

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

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

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

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

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

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

TEMPORARY RULES

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

NORTH CAROLINA ADMINISTRATIVE CODE

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

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

The NCAC is available in two formats.

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

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

CITATION TO THE NORTH CAROLINA REGISTER

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

FOR INFORMATION CONTACT: Office of
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Drawer 27447, Raleigh, North Carolina 27611-7447, (919)
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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 Elec- tronic 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
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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 13
AMENDING EXECUTIVE ORDER
NUMBER 10, CONCERNING THE
QUALITY LEADERSHIP
AWARDS COUNCIL**

By the authority vested in me as Governor by the laws and constitution of North Carolina, **IT IS ORDERED:**

Sections 2 and 3 of Executive Order Number 10 are hereby amended to read:

Section 2. Membership.

1. The Council shall consist of not more than thirty members, including:

• • •

J. No more than eleven ranking officials of organizations receiving a Quality Leadership Award ("Award") from the State;

• • •

N. A member recommended by the President Pro Tempore of the Senate.

Section 3. Chair, Terms, and Vacancies.

Those members under subsection (J) above shall serve three-year terms, which shall start in the year after winning the Award. The members under subsections (E), (F), and (N) above shall serve at the pleasure of the Governor. The Governor shall fill all vacancies. However, should a vacancy occur in a seat held by a member recommended by the Lieutenant Governor, the Speaker of the House, or the President Pro Tempore of the Senate, the Governor shall fill that vacancy only after recommendation by the appropriate official. The Council shall elect its Chair from among its members.

This Executive Order shall be effective immediately.

Done in the Capitol City of Raleigh, North Carolina, this the 20th day of May, 1993.

**EXECUTIVE ORDER NUMBER 14
AMENDING EXECUTIVE ORDER 1
CONCERNING THE BOARD OF ETHICS**

By the authority vested in me as Governor by the laws and Constitution of this State, **IT IS ORDERED:**

Section 5 of Executive Order 1, is hereby amended to delete subsection (b) (which prohibits a full-time State employee subject to the Order from holding any other public employment for compensation). Subsection (c) shall be redesignated (b), but shall otherwise remain the same.

This Order is effective immediately.

Done in Raleigh, North Carolina, this 20th day of May, 1993.

**EXECUTIVE ORDER NUMBER 15
COORDINATING COMMITTEE ON THE
AMERICANS WITH DISABILITIES ACT**

WHEREAS, the Americans with Disabilities Act ("ADA") was enacted by the United States Congress on July 26, 1990, to expand the civil rights of individuals with disabilities in the areas of employment, transportation, public accommodations and communications; and

WHEREAS, the primary objective of the ADA is to require employers and public service providers to eliminate barriers, practices, or policies that may deprive individuals with disabilities of the full use and enjoyment of public buildings, employment, transportation, accommodations, and communications; and

WHEREAS, a process for informing state agencies of their responsibilities under the ADA and alternatives for fulfilling those responsibilities, and for resolving disputes about those responsibilities, would assist the State in implementing the ADA;

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

Section 1. Establishment

There is hereby established the Coordinating Committee on the ADA.

Section 2. Purpose

The Committee shall bring representatives from every state agency together to coordinate each agency's self-evaluation and compliance planning under the ADA.

Each agency shall develop and implement forthwith its ADA Compliance Plan. Individuals with disabilities must have full access to public buildings, employment, transportation, accommodations, and communications as soon as possible.

Section 3. Duties

The Committee shall be responsible for the following:

- (a) coordinating agency compliance with the ADA as it relates to other federal and state laws and regulations affecting individuals with disabilities;
- (b) informing and advising state agencies about their obligations and means for meeting obligations under the ADA such as self evaluations, job task analyses, procedures to handle requests for accommodations, facility and communications accessibility, transportation, and deadlines for action;
- (c) facilitating the adoption and publication of formal and informal grievance procedures within each agency to promptly and equitably resolve complaints of agency noncompliance with the ADA; with particular emphasis on the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, hearings, and arbitration, as appropriate and authorized by law;
- (d) supervising the implementation and periodic revision of an ADA Transition Plan for each agency regarding the removal of environmental and communication barriers in state facilities, whether owned or leased;
- (e) providing a forum for speakers to inform the Committee and others in state government about developments concerning acceptable accommodations, cost effectiveness data for equipment and transportation alternatives, hiring practices and case law; and
- (f) ensuring that its decisions and those of its member agencies in creating their ADA Compliance Plans are made with the input of employees with disabilities or representatives of organizations which serve disabled persons.

Section 4. Membership

The following individuals or their designees shall serve as members of the Committee:

- (1) Lieutenant Governor
- (2) Secretary of State
- (3) Attorney General
- (4) State Treasurer
- (5) Superintendent of Public Instruction
- (6) Commissioner of Insurance
- (7) Commissioner of Agriculture
- (8) Commissioner of Labor
- (9) State Auditor
- (10) President Pro Tempore of the Senate
- (11) Speaker of the House of Representatives
- (12) Chief Justice of the Supreme Court of North Carolina
- (13) President of the University of North Carolina System
- (14) President of the System of Community Colleges
- (15) Secretary of Commerce
- (16) Secretary of Environment, Health, and Natural Resources
- (17) Secretary of Crime Control and Public Safety
- (18) Secretary of Cultural Resources
- (19) Secretary of Human Resources
- (20) Secretary of Transportation
- (21) Secretary of Correction
- (22) Secretary of Administration
- (23) Secretary of Revenue
- (24) Director of the Office of State Personnel

Section 5. Chairperson

The Chairperson shall be the Secretary of Administration or her designee, who shall serve at the Governor's pleasure. The Chairperson may designate smaller subcommittees, divided according to expertise, to work on pertinent topics and report to the full Committee.

Section 6. Meetings

The Committee shall meet not less than quarterly at the call of the chairperson.

Section 7. Quorum

A simple majority of the members shall constitute a quorum for the purpose of conducting business.

A vote will require a simple majority of the members of the Committee present.

Section 8. Reports

(a) The Committee shall prepare a report to the Governor on or before October 1, 1993, and annually thereafter.

(b) The Committee shall report quarterly to the Joint Legislative Commission on Governmental

Operations.

Section 9. Administration

Members of the Coordinating Committee shall receive necessary travel and subsistence expenses in accordance with the provisions of N.C.G.S. 120-3.1 or 138.5.

The Department of Administration shall provide administrative and staff support services required by the Coordinating Committee. While no one from the Governor's Advocacy Council for Persons with Disabilities (GACPD) shall be a member of the Committee, GACPD shall provide the Committee with technical assistance on behalf of people with disabilities and serve as an information clearinghouse.

Section 10. Effect on Other Executive Orders

Executive Order Number 179 of the Martin Administration is hereby rescinded. All other Executive Orders or portions of Executive Orders inconsistent herewith are hereby rescinded.

Section 11. Effective Date

This executive order shall be effective immediately.

Done in the Capital City of Raleigh, North Carolina, this the 20th day of May, 1993.

EXECUTIVE ORDER NUMBER 16 THE GEOGRAPHIC INFORMATION COORDINATING COUNCIL AND THE CENTER FOR GEOGRAPHIC INFORMATION AND ANALYSIS

WHEREAS, geographic information is an important strategic resource for the State of North Carolina;

WHEREAS, increasingly complex decisions, overlapping governmental responsibilities, and limited financial resources demand that agencies work together to develop and utilize geographic information;

WHEREAS, North Carolina has a history of effective utilization of geographic information and geographic information systems ("GIS") technology both at the State and Local level;

WHEREAS, geographic information and GIS technology are now being developed and used by many agencies and organizations in North Carolina;

WHEREAS, geographic information and GIS technology can only be fully and practically utilized with a statewide focus and cooperative effort;

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

Section 1. Establishment.

With the concurrence of the Information Resource Management Commission ("IRMC"), there is hereby reestablished the Geographic Information Coordinating Council ("Council").

Section 2. Duties.

The Council shall guide the Center for Geographic Information and Analysis ("CGIA") and establish the State's direction in the utilization of geographic information, GIS systems, and other related technologies. The Council is responsible for (a) strategic planning, (b) resolution of policy and technology issues, (c) coordination, direction and oversight, and (d) advising the Governor, the Legislature, and the IRMC as to needed directions, responsibilities, and funding regarding geographic information. This statewide geographic information coordination effort seeks to further cooperation among State, Federal and Local government agencies; academic institutions; and the private sector to improve the quality, access, cost-effectiveness and utility of North Carolina's geographic information and to promote geographic information as a strategic resource for the State.

Section 3. Center for Geographic Information and Analysis.

Coordination of geographic information is the responsibility of the CGIA. This responsibility includes GIS production and consulting services; technical support including assistance in planning, installing, and using GIS systems; a wide variety of GIS-related training services and education programs; a clearinghouse for the exchange of geographic information and services; and staff support for the Council and its committees. CGIA reports to the Office of State Planning.

Section 4. Membership.

The Council shall consist of 17 members, or their designees, as follows:

- a) The Secretary of the Department of Environment, Health, and Natural Resources;
- b) The Secretary of Transportation;
- c) The Secretary of Administration;

- d) The Secretary of Commerce;
- e) The Secretary of State;
- f) The Commissioner of Agriculture;
- g) The Superintendent of Public Instruction;
- h) The head of an at-large State agency to be appointed by the Governor;
- i) The State Budget Officer;
- j) The State Planning Officer;
- k) One representative elected annually from the State Government User Committee;
- l) One representative elected annually from the Affiliated User Group Committee;
- m) One representative employee of a County Government to be appointed by the Governor;
- n) One representative employee of a Municipal Government to be appointed by the Governor;
- o) One representative employee of the Federal Government, who is stationed in North Carolina, to be appointed by the Governor;
- p) One representative from the Lead Regional Organizations, to be appointed by the Governor; and
- q) One non-government representative in North Carolina, to be appointed by the Governor.

The Deputy State Controller for Information Resource Management shall serve as a non-voting, ex officio member. The Governor shall appoint a Chair from among the membership to serve for a one-year period. Except for members "a-g" and "i-l" above, each member shall serve three-year terms.

Section 5. Administration and Expenses.

The Director of CGIA shall be secretary of the Council and provide staff support as it requires. Members of the Council shall receive necessary travel and subsistence expenses as allowed by North Carolina law.

Section 6. Committees.

The Council may establish work groups as needed, and shall oversee the following standing committees:

- a) State Government GIS User Committee: Membership shall consist of representatives from all interested State government departments. The committee shall elect its Chair and advise the Council on issues, problems, and opportunities relating to GIS.

- b) State Mapping Advisory Committee ("SMAC"): The Council shall select the Chair of SMAC, which shall be organized and operated in a manner acceptable to the United States Geological Survey's ("USGS") National Mapping Division. Membership shall not be limited. Members from Federal agencies may not vote, but the Council, upon recommendation by the SMAC Chair, may permit other members to vote.

The SMAC shall consolidate statewide mapping requirements into a single annual report to the USGS; inform the users of geographic information about the status of mapping programs and the availability of map materials from USGS; and attempt to gain statewide support for financing cooperative programs with USGS. The Committee shall also advise the Council on issues, problems, and opportunities relating to USGS programs and information.

- c) Affiliated GIS User Group Committee: Membership shall consist of representatives from Local and Federal government, private industry, universities, and the General Assembly. The committee shall elect its Chair and advise the Council on issues, problems, and opportunities relating to the use of GIS systems.

Section 7. Rescission.

Executive Order 147 of the Martin Administration is hereby rescinded.

This Order is effective immediately.

Done in the Capital City of Raleigh, this 21st day of May, 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

93-1099

May 17, 1993

DeWitt F. McCarley, Esq.

City Attorney

P. O. Box 7207

Greenville, North Carolina 27835-7207

Dear Mr. McCarley:

This refers to five annexations (Ordinance Nos. 2558 and 2559 (1992) and 2561, 2562, and 2563 (1993)) and the designation of the annexed areas to election districts for the City of 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 March 19, 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 4 - DEPARTMENT OF
COMMERCE**

Notice is hereby given in accordance with G.S. 150B-21.2 that the Savings Institutions Division intends to amend rule cited as 4 NCAC 16G .0312.

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

The public hearing will be conducted at 10:00 a.m. on July 16, 1993 at the 3rd Floor Hearing Room, 1110 Navaho Drive, Raleigh, NC 27609.

Reason for Proposed Action: To define acceptable alternative provisions in Plans of Conversion.

Comment Procedures: Anyone may present comments at the hearing. Written comments, or Notice of Intent to make oral comments, shall be received by the Savings Institutions Division, 1110 Navaho Drive, Suite 301, Raleigh, NC 27609, at least 24 hours prior to the hearing.

**CHAPTER 16 - SAVINGS INSTITUTIONS
DIVISION: SAVINGS INSTITUTIONS
COMMISSION**

**SUBCHAPTER 16G - MUTUAL TO STOCK
CONVERSIONS**

**SECTION .0300 - GENERAL PRINCIPLES
FOR CONVERSIONS**

**.0312 OPTIONAL PROVISIONS IN PLAN
OF CONVERSION**

The plan of conversion may provide any or all of the following:

- (1) That the applicant may commence the direct community offering or the public offering, or both, concurrently with or at any time during the subscription offering. The subscription offering may be commenced concurrently with or at any time after the mailing to members pursuant to Rule .0607 of this Subchapter of the proxy statement authorized for use by the administrator. The subscription offering may be closed before the meeting of the

members held to vote on the plan of conversion, provided that the offer and sale of capital stock shall be conditioned upon the approval of the plan of conversion by the members as provided in Section .0600 of this Subchapter.

- (2) That directors, executive officers, and employees of the converting savings bank shall receive, without payment, nontransferable subscription rights to purchase shares of capital stock, to the extent that shares are available after satisfying the subscriptions of eligible account holders, supplemental eligible account holders, and voting members provided for under Paragraphs (2), (4) and (5) of Rule .0311 of this Section. The shares shall be allocated among directors, officers, and employees on an equitable basis such as by giving weight to length of service, compensation, and position, subject to the limitation in Paragraph (7) of Rule .0311 of this Section on the amount of shares which may be purchased by any person, associate thereof, or group of affiliated persons or group of persons otherwise acting in concert.
- (3) That any account holder receiving rights to purchase stock in the subscription offering shall also receive, without payment, nontransferable subscription rights to purchase up to one percent of the total offering of shares of capital stock, to the extent that such shares are available after satisfying the subscriptions provided for under Paragraphs (2), (4), and (5) of Rule .0311 of this Section, subject to such conditions as may be provided in the plan of conversion. In the event of an oversubscription for such additional shares, the shares available shall be allocated among the subscribing eligible account holders, supplemental eligible account holders, and voting members on such equitable basis, related to the amounts of their respective subscriptions, as may be provided in the plan of conversion.
- (4) That the applicant may require members to return by a reasonable date certain a postage-paid written communication provided by the applicant requesting receipt of a subscription offering circular, or a preliminary or final offering circular

in an offering pursuant to Paragraph (10) of this Rule, in order to be entitled to receive an offering circular from the applicant; provided, that the subscription offering or the offering pursuant to Paragraph (10) of this Rule shall not be closed until 30 days after the mailing by the applicant to members of the postage-paid written communication. If the subscription offering or the offering pursuant to Paragraph (10) of this Rule is not commenced within 45 days after the meeting of members, any converting savings bank adopting this optional provision shall transmit not more than 30 days prior to the commencement of the subscription offering or the offering pursuant to Paragraph (10) of this Rule to each member who had been furnished with proxy solicitation materials, written notice of the commencement of the offering which notice shall state that the converting savings bank is not required to furnish an offering circular to a member unless the member returns by a reasonable date certain the postage-paid written communication provided by the converting savings bank requesting receipt of an offering circular.

- (5) That the applicant may require eligible account holders and supplemental eligible account holders who are not voting members pursuant to Rule .0608 of this Subchapter to return by a reasonable date certain a postage-paid written communication in accordance with the procedure established in Paragraph (4) of this Rule.
- (6) That any insignificant residue of shares of the converting savings bank not sold in the subscription offering or in a public offering or direct community offering may be sold in such other manner as provided in the plan of conversion with the written consent of the administrator.
- (7) That the number of shares which any person or group of persons affiliated with each other or otherwise acting in concert may subscribe for in the subscription offering may be made subject to a limit of not less than one percent of the total offering of the shares.
- (8) That any person exercising subscription rights to purchase capital stock shall be required to purchase a minimum number

of shares but the aggregate price for any minimum share purchase shall not exceed five hundred dollars (\$500.00).

- (9) That the converted savings bank shall issue and sell, in lieu of shares of its capital stock, units of securities consisting of capital stock and long-term warrants or other equity securities, in which event any reference in the provisions of this Subchapter to capital stock shall apply to such units of equity securities unless the context otherwise requires.
- (10) That, instead of a separate subscription offering, all subscription rights issued in connection with the conversion shall be exercisable by delivery of properly completed and executed order forms to the underwriters or selling group for the public offering or pursuant to any other procedure, subject to the applicant demonstrating to the administrator the feasibility of the method of exercising such right and to such conditions as shall be provided in the plan of conversion.
- (11) That the administrator may approve such other equitable provisions as necessary to avert imminent injury to the converting savings bank.
- (12) That the proxy statement required by Rule .0607 of this Subchapter may be in summary form, provided:
 - (a) A statement is made in bold-faced type on the summary proxy statement that a more detailed description of the proposed transaction may be obtained by returning an attached postage-paid postcard or other written communication requesting a supplemental information statement which, together with the summary proxy statement, complies with the requirements of Form PS contained in the Application for Conversion.
 - (b) The date on which the summary proxy statement is mailed to members will be deemed the date on which notice is given for purposes of Rule .0607 of this Subchapter. Without the prior written consent of the administrator, the meeting of members shall not be held less than 20 days after the date on which the supplemental information statement is mailed to requesting members.
 - (c) The supplemental information statement

required to be furnished to members pursuant to Subparagraph (a) of this Paragraph may be combined with Form OC, if the subscription offering is commenced concurrently with or during the proxy solicitation period pursuant to Paragraph (1) of this Rule.

- (d) The form of the summary proxy statement has been approved by the administrator.
- (13) That, in the event that the converting institution is establishing a tax-qualified employee stock ownership plan (ESOP) for the benefit of its employees, then notwithstanding the priorities established under Subparagraphs (2), (4), and (5) of Rule .0311 of this Section, the plan of conversion may provide that such ESOP may purchase up to 10 percent of the aggregate shares offered in the conversion prior to offering any shares to eligible account holders, supplemental eligible account holders or other voting members.
- (14) That eligible accountholders shall be divided into two subcategories for purposes of determining the aggregate number of shares of conversion stock allocated to be purchased by such accountholders in each subcategory: those whose permanent residence is within the market area of the converting institution and those whose permanent residence is outside the market area of the converting institution. The plan of conversion shall provide:
 - (a) That each eligible accountholder who resides within the applicant's market area shall receive nontransferable subscription rights to purchase a number of shares based on such accountholder's qualifying deposit balance up to the maximum purchase limitation established pursuant to Rule .0311(7) of this Section; provided that the aggregate number of shares of conversion stock to be allocated for purchase by eligible accountholders within the converting institution's market area shall equal that number of shares (rounded to the nearest whole number) determined by multiplying the total number of shares of stock to be sold in the offering times a fraction the numerator of which is the sum of

qualifying deposits held by eligible accountholders residing inside the market area and the denominator of which is the sum of all qualifying deposits.

- (b) That each eligible accountholder who resides outside the applicant's market area shall receive nontransferable subscription rights to purchase a number of shares based on such accountholder's qualifying deposit balance up to the maximum purchase limitations established pursuant to Rule .0311(7) of this Section; provided that the aggregate number of shares of conversion stock to be allocated for purchase by eligible accountholders outside the converting institution's market area shall equal that number of shares (rounded to the nearest whole number) determined by multiplying the total number of shares to be sold in the offering times a fraction the numerator of which is the sum of qualifying deposits held by eligible accountholders residing outside the converting institution's market area and the denominator of which is the sum of all qualifying deposits.
- (c) Within each subcategory, a formula to be used in the event of an oversubscription for the equitable allocation of shares of stock within such subcategory which relates to an eligible accountholder's qualifying deposit balance.
- (d) For the purposes of this Paragraph, a converting institution shall define its "market area" to include each county in which it has an office and may include such additional counties contiguous to those counties in which it maintains an office (regardless of whether such counties are in the State of North Carolina) as it may designate to be part of its "market area" in its plan of conversion.

Statutory Authority G.S. 54C-33; 54C-53.

TITLE 11 - DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S.

150B-21.2 that the N.C. Medical Database Commission intends to adopt rule cited as 11 NCAC 15 .0011.

The proposed effective date of this action is September 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 made in writing, addressed to Ellen K. Sprenkel, N.C. Department of Insurance, P.O. Box 26387, Raleigh, N.C. 27611. This request must be received within 15 days of this notice.

Reason for Proposed Action: To establish fees for the distribution of data as required by statute.

Comment Procedures: Written comments may be sent to Jim Hazelrigs, Medical Database Commission, 112 Cox Avenue, Raleigh, N.C. 27605. Anyone having questions should call Jim Hazelrigs at (919) 733-7141, or Ellen Sprenkel at (919) 733-4529.

CHAPTER 15 - MEDICAL DATABASE COMMISSION

.0011 FEES AND CHARGES FOR DATA

(a) The fees for the following reports generated by the Commission are as follows:

\$ 15	State and County Profiles of Hospital Inpatient Utilization
\$ 30	DRG Utilization and Charges by Hospital: A Reference Book
\$ 15	A Summary Guide to Hospital Utilization and Charges
\$ 10	Primary Payer Summary Statistics by Hospital
\$ 20	Patient Origin Report
\$ 20	Hospital Inpatient Surgical Procedures Report
\$100	Complete set of the six reports named in this Paragraph

(b) The fees for the following personal computer (PC) products generated by the Commission are as follows:

\$375	PC1A: Diskette File of DRG Utilization and Charges by Hospi-
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	tal
\$750	PC1B: Diskette File of DRG Utilization and Charges by Hospital by Payer Category
\$375	PC2: Diskette File of Zip Code Patient Origin by Hospital

(c) Special data requests may be performed by commission staff based upon specifications developed for each project. The charges for special data requests are as follows:

- (1) The full costs charged to the Commission by others involved in completing the request:
 - (A) data processing contractor or the State Data Center;
 - (B) any consultant or other contractor involved in the process.
- (2) Twenty-five dollars (\$25.00) per hour time of a research analyst or other member of the Commission staff working on the project.
- (3) A charge for the use of the medium on which the product will be delivered, paper at ten cents (\$0.10) per page, diskettes at two dollars (\$2.00) each, and tape at the current cost to the Commission.
- (4) A charge for the cost of delivering the product to the requestor:
 - (A) Business envelopes at ten cents (\$0.10) each, 8" x 11" envelopes at seventy-five cents (\$0.75) each, and boxes for mail of bulk materials at two dollars (\$2.00) each.
 - (B) U.S. Postal Service actual postage charges.
 - (C) Express type mail services may be used, provided the Commission obtains the account number of the requestor and charges the special delivery to the requestor's account. The Commission will not include this as part of the invoice for the product.

(d) Materials may be transmitted via facsimile for one dollar (\$1.00) per page for faxing with a minimum fax charge of ten dollars (\$10.00). This includes faxing to a long distance number in the continental United States. Faxing to Alaska, Hawaii, U.S. territories, and foreign countries shall not be done by the Commission. The Commission will not fax more than 30 pages of data.

(e) The Commission shall charge twenty-five dollars (\$25.00) for the standard mailing list and

thirty dollars (\$30.00) if the mailing list is formatted to other than standard format at the request of the purchaser of the list.

(f) The Commission shall charge the proper sales tax on all materials sold under this Rule.

Statutory Authority G.S. 131E-211(k); 131E-212(b)(7).

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment, Health, and Natural Resources intends to amend rule cited as 15A NCAC 1K .0402.

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

The public hearing will be conducted at 7:00 p.m. on July 7, 1993 at the Ground Floor Conference Room, Archdale Building, 512 N. Salisbury Street, Raleigh, NC.

Reason for Proposed Action: The Groundwater Section has found that less financially capable owners of commercial underground storage tanks are having great difficulty obtaining loans to upgrade and replace tanks under the existing rules. These commercial tank owners are unable to afford loans under the current interest and term requirements of 15A NCAC 1K .0402. Underground storage tanks owned by these individuals account for a large percentage of the groundwater contamination in the State. These upgrades/replacements of tanks are required under Federal and State technical standards found in 15A NCAC 2N. To improve access to the Groundwater Protection Loan Fund for less financially capable owners, the proposed amendment to 15A NCAC 1K .0402 reduces the fixed interest rate from the New York Prime Interest Rate plus three to the New York Prime Interest Rate on the day of application. The term of loans is also extended from 120 months to 180 months.

Comment Procedures: Submit written comments by July 16, 1993 to: Mr. Gary Shaver, DEM-Groundwater Section, 441 N. Harrington Street,

Raleigh, NC 27603. Oral comments may be made at the public hearing.

Editor's Note: This Rule was filed as a temporary rule effective June 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

CHAPTER 1 - DEPARTMENTAL RULES

SUBCHAPTER 1K - GROUNDWATER PROTECTION LOAN FUND

SECTION .0400 - LOAN CONDITIONS

.0402 INTEREST AND TERM

(a) All loans made in accordance with this Subchapter shall use a ~~variable~~ fixed interest rate. The interest rate shall be the New York Prime Rate, as reported in the Wall Street Journal, ~~plus three percent~~, on the day of application. This rate includes the loan fees specified in Paragraphs (d) and (e) of Rule .0401 of this Subchapter.

(b) The term of each loan shall not exceed ~~120~~ 180 months.

Statutory Authority G.S. 143-215.94P.

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rules cited as 15A NCAC 19B .0301, .0304, .0309 and repeal rules cited as 15A NCAC 19B .0316 - .0317.

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

The public hearing will be conducted at 1:30 p.m. on July 14, 1993 at the Highway Building, First Floor Auditorium, 1 South Wilmington Street, Raleigh, North Carolina.

Reason for Proposed Action: 15A NCAC 19B .0301, .0304 and .0309 - to change the name of the Chemical Tests for Alcohol Branch to the Forensic Tests for Alcohol Branch. This change is due to the new infrared technology being used rather than chemicals used with the breathalyzer.

15A NCAC 19B .0316 and .0317 - to update approved instruments. The Breathalyzer, Model 2000 is no longer in use or being manufactured.

Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to John P. Barkley, Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629. Persons who wish to speak at the hearing should contact John P. Barkley at (919) 733-4618. Persons who call in advance of the hearing will be given priority depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

IT IS VERY IMPORTANT THAT ALL INTERESTED AND POTENTIALLY AFFECTED PERSONS, GROUPS, BUSINESSES, ASSOCIATIONS, INSTITUTIONS OR AGENCIES MAKE THEIR VIEWS AND OPINIONS KNOWN TO THE Commission FOR HEALTH SERVICES THROUGH THE PUBLIC HEARING AND COMMENT PROCESS, WHETHER THEY SUPPORT OR OPPOSE ANY OR ALL PROVISIONS OF THE PROPOSED RULES. The Commission MAY MAKE CHANGES TO THE RULES AT THE Commission MEETING IF THE CHANGES COMPLY WITH G.S. 150B-21.2(f).

CHAPTER 19 - HEALTH: EPIDEMIOLOGY

SUBCHAPTER 19B - INJURY CONTROL

SECTION .0300 - BREATH ALCOHOL TEST REGULATIONS

.0301 APPLICATION FOR INITIAL PERMIT

(a) Application for an initial permit to perform chemical analysis of a person's breath to determine his alcohol concentration shall be made in writing to the Director. The applicant shall have the endorsement of his appropriate supervising law enforcement officer, or his designated representative, unless an exception is granted by the Director. The Director shall issue, deny, terminate, and revoke permits for individuals to perform chemical analyses.

(b) Permits shall be granted to individuals who:

- (1) demonstrate the ability to perform chemical analyses accurately and reliably in accordance with a method or methods approved by the Commission;
- (2) can satisfactorily explain the method of operation of the breath-testing instrument for which he is applying for a permit to operate;
- (3) offer satisfactory proof of good character to the Director; and
- (4) are employed by a law enforcement agency, the Injury Control Section or members of its instructional staff, or by some other federal, state, county or municipal agency with the responsibility of administering chemical analyses to drivers charged with implied consent offenses.

(c) Individuals successfully completing a minimum number of course hours on chemical forensic tests for alcohol conducted by the Injury Control Section shall be deemed to have met the requirements of (b) (1) and (2) of this Rule.

Statutory Authority G.S. 20-139.1(b).

.0304 CONDITIONS FOR RENEWAL OF PERMIT

(a) Permits shall be subject to renewal at expiration, or at such time prior to expiration as is convenient for the Director, upon demonstration by the permittee of:

- (1) continuing ability to perform accurate and reliable chemical analyses;
- (2) ability to satisfactorily explain the method of operation of the breath-testing instrument for which he is applying for a renewal permit to operate;
- (3) continued employment by a law enforcement agency, the Injury Control Section or a member of its instructional staff, or by some other federal, state, county or municipal agency with the responsibility of administering chemical analyses to drivers charged with implied consent offenses; and
- (4) proof of good character, if desired by the Director.

(b) Individuals successfully completing a chemical forensic test for alcohol recertification course conducted by the Injury Control Section shall be deemed to have met the requirements of (a) (1) and (2) of this Rule for the first and subsequent renewal of permits.

(c) Individuals desiring first and subsequent renewal permits, after expiration of their permits, shall successfully complete the following Injury Control Section course requirements prior to the granting of renewal permits, unless an exception is granted by the Director:

- (1) ~~Chemical Forensic~~ Tests for Alcohol Recertification Course if the permit has been expired less than six months;
- (2) ~~Chemical Forensic~~ Tests for Alcohol Operators Course if the permit has been expired six months or longer.

Statutory Authority G.S. 20-139.1(b).

.0309 QUALIFICATIONS OF MAINTENANCE PERSONNEL

(a) Preventive maintenance on all breath-testing instruments shall be performed by a chemical analyst who has successfully completed the ~~chemical forensic~~ tests for alcohol technical supervisor's school or a maintenance course for a specific instrument, as conducted by the Injury Control Section, unless an exception is granted by the Director.

(b) Chemical analysts qualifying under this Rule shall be granted certificates by the Director authorizing the performance of preventive maintenance on specific models of breath-testing instruments.

- (1) Certificates shall be granted for an indefinite period but shall be valid only during the period that the chemical analyst possesses a current valid permit to perform chemical analyses of the breath on the specific models of breath-testing instruments for which preventive maintenance is being performed.
- (2) Certificates shall be subject to revocation under the same provisions specified under Rule .0308 of this Section for revocation of permits to perform chemical analyses.
- (3) The Director shall have the same evaluation authority over holders of certificates as he possesses over permittees under Rule .0307 of this Section.

Statutory Authority G.S. 20-139.1(b).

.0316 BREATHALYZER: MODEL 2000

The ~~operational procedures to be followed in using the Breathalyzer, Model 2000 are:~~

- (1) ~~Insure observation period requirements have been met;~~
- (2) ~~When "INSERT TICKET" appears, insert test record;~~
- (3) ~~When "READY" appears, push "START/TEST";~~
- (4) ~~Insure alcoholic breath simulator thermometer shows proper operating temperature;~~
- (5) ~~When "BLOW SAMPLE" appears, connect alcoholic breath simulator and push "START/TEST";~~
- (6) ~~When "ANALYZING" appears, disconnect alcoholic breath simulator;~~
- (7) ~~When "ANALYSIS COMPLETE" appears, insure instrument displays expected results;~~
- (8) ~~When "BLOW SAMPLE" appears, collect breath sample;~~
- (9) ~~When "BLOW SAMPLE" appears, collect breath sample;~~
- (10) ~~When "ANALYSIS COMPLETE" appears, remove test record and record times and results.~~

~~If the alcohol concentrations differ by more than 0.02, a third or subsequent test shall be administered as soon as feasible by repeating steps (1) through (10).~~

Statutory Authority G.S. 20-139.1(b).

.0317 PREVENTIVE MAINTENANCE: BREATHALYZER: MODEL 2000

~~The preventive maintenance procedures for the Breathalyzer, Model 2000 to be followed at least once during every 30 days are:~~

- (1) ~~When instrument displays "INSERT TICKET", insert test record;~~
- (2) ~~Verify alcoholic breath simulator thermometer shows proper operating temperature;~~
- (3) ~~When "READY" appears, press "START/TEST";~~
- (4) ~~When "BLOW SAMPLE" appears, collect breath sample;~~
- (5) ~~When "BLOW SAMPLE" appears, connect alcoholic breath simulator and push "START/TEST", disconnect when "ANALYZE" appears;~~
- (6) ~~When "BLOW SAMPLE" appears, connect alcoholic breath simulator and push "START/TEST", disconnect when "ANALYZE" appears;~~
- (7) ~~When "ANALYSIS COMPLETE" appears, remove test record and record~~

simulator results;

- (8) ~~Verify alcoholic breath simulator solution is being changed every 15 days or after 25 tests, whichever occurs first.~~

~~A signed original of the preventive maintenance checklist shall be kept on file for at least three years.~~

Statutory Authority G.S. 20-139.1(b).

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rule cited as 15A NCAC 21D .0401.

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

The public hearing will be conducted at 1:30 p.m. on July 14, 1993 at the Highway Building, First Floor Auditorium, 1 South Wilmington Street, Raleigh, North Carolina.

Reason for Proposed Action: To allow the WIC Program to serve more of the eligible WIC population. This change will require all local WIC agencies to use the full federal income eligibility limit.

Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to John P. Barkley, Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629. Persons who wish to speak at the hearing should contact John P. Barkley at (919) 733-4618. Persons who call in advance of the hearing will be given priority depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

IT IS VERY IMPORTANT THAT ALL

INTERESTED AND POTENTIALLY AFFECTED PERSONS, GROUPS, BUSINESSES, ASSOCIATIONS, INSTITUTIONS OR AGENCIES MAKE THEIR VIEWS AND OPINIONS KNOWN TO THE COMMISSION FOR HEALTH SERVICES THROUGH THE PUBLIC HEARING AND COMMENT PROCESS, WHETHER THEY SUPPORT OR OPPOSE ANY OR ALL PROVISIONS OF THE PROPOSED RULES. THE COMMISSION MAY MAKE CHANGES TO THE RULES AT THE COMMISSION MEETING IF THE CHANGES COMPLY WITH G.S. 150B-21.2(f).

CHAPTER 21 - HEALTH: PERSONAL HEALTH

SUBCHAPTER 21D - WIC/NUTRITION

SECTION .0400 - ELIGIBILITY FOR WIC PROGRAM PARTICIPATION

.0401 ELIGIBILITY

(a) In order to be eligible for WIC program benefits, a person must be:

- (1) a pregnant, postpartum or breastfeeding woman, an infant, or a child up to his ~~her~~ fifth birthday;
- (2) a resident of the health service delivery area of the local WIC agency;
- (3) income eligible ~~as provided in the local WIC program plan, that is, her gross family income shall be equal to or less than 185% of the poverty income guidelines issued annually by the U.S. Department of Health and Human Services;~~
- (4) certified at nutritional risk according to the certification criteria referenced in Rule .0404 of this Section.

(b) An individual shall be certified as eligible to receive WIC program benefits when ~~their~~ her eligibility has been determined and documented by the local WIC agency.

(c) The certification of nutritional risk shall be made through a medical and nutritional assessment, as provided in Rule .0403 of this Section made by a competent health professional employed or designated by the local WIC agency.

Authority G.S. 130A-361; 7 C.F.R. 246.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Commission for Health Services intends to amend rule cited as 15A NCAC 21F .0102.

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

The public hearing will be conducted at 1:30 p.m. on July 14, 1993 at the Highway Building, First Floor Auditorium, 1 South Wilmington Street, Raleigh, North Carolina.

Reason for Proposed Action: To include a definition of low income in the Children's Special Health Services Program.

Comment Procedures: All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to John P. Barkley, Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629. Persons who wish to speak at the hearing should contact John P. Barkley at (919) 733-4618. Persons who call in advance of the hearing will be given priority depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

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CHAPTER 21 - HEALTH: PERSONAL HEALTH

SUBCHAPTER 21F - CHILDREN'S SPECIAL HEALTH SERVICES: CHILDREN AND YOUTH SECTION

SECTION .0100 - GENERAL PROVISIONS

.0102 DEFINITIONS

The following definitions shall apply throughout this Subchapter:

- (1) "Appliances and equipment" means wheelchairs, braces, hearing aids, prostheses, respiratory aids, and similar items authorized for program patients.
- (2) "Augmentative communication aids" are individually prescribed devices designed to facilitate communication for non-verbal individuals. These include, but are not limited to communication boards, scanning devices, strip printers, etc.
- (3) "Authorization or authorized service" means a request for service which has been approved by Children's Special Health Services. Authorization is indicated by the signature of the program director or his designee on an application for cost service.
- (4) "Cost service" means any service which requires submission of an application for approval and payment. These services include:
 - (a) medical or surgical care in a hospital or clinic;
 - (b) consultation;
 - (c) appliances and equipment;
 - (d) medication (see Rule .0408 of this Subchapter);
 - (e) physical therapy;
 - (f) occupational therapy;
 - (g) speech-language pathology and audiology services;
 - (h) dental care limited to that specified in Rule .0406 of this Subchapter;
 - (i) physicians' fees;
 - (j) x-rays and laboratory tests;
 - (k) psychological services.
- (5) "Date of service" is the date that the approved authorization is to become effective.
- (6) "Encumbrance or encumbered money" is the money obligated to pay for services authorized by the Children's Special Health Services.
- (7) "Expendable supplies" designates those appliances and equipment that are not

- recyclable, such as disposable gauze sponges, bandages, detergents and similar items.
- (8) "Extension of hospital stay" is an approved additional number of days of hospitalization beyond those initially authorized.
- (9) "Extension of validity" is an approved change of the period of validity during which an authorization for hospitalization or outpatient surgery is in effect.
- (10) "Inpatient" is a person who is admitted to the hospital as a bed patient on a hospital ward.
- (11) "Low Income" means an individual or family with an income determined to be below the nonfarm income official poverty line defined by the Office of Management and Budget and revised annually in accordance with Section 624 of the Economic Opportunity Act of 1964.
- (12) "Medical or surgical emergency" is a situation arising from any disease, defect or condition normally supported by Children's Special Health Services which may be life-threatening, or in which delay of prompt remedial medical care would be detrimental to the future health and well-being of the child.
- (13) "Non-sponsored clinic" is a clinic which serves individuals with Children's Special Health Services supported medical conditions but which is not recognized, supported and listed as an official Children's Special Health Services clinic.
- (14) "Outpatient" is an individual who receives care without inpatient hospital admission. This includes care provided in emergency rooms, clinics, and physicians' offices, or in other hospital settings, including outpatient surgery.
- (15) "Period of validity" is the 30 days following the date approved for admission during which hospitalization for inpatient care or outpatient surgery may begin.
- (16) "Rostered orthodontist and prosthodontist" are specialists who meet the stipulations set forth in Section .0700 of this Subchapter and who have made application to and been approved by Children's Special Health Services to request authorizations and provide services for eligible children.

- (17) "Rostered physician" is a medical specialist who meets the stipulations set forth in Section .0700 of this Subchapter and who has made application to and been approved by Children's Special Health Services to request authorizations and provide services for eligible children.
- (18) "Rostered speech and language pathologist" is a specialist who meets the stipulations set forth in Section .0700 of this Subchapter and has made application to and been approved by Children's Special Health Services to request authorizations and provide services for eligible children.
- (19) "Rostered audiologist" is a specialist who meets the stipulations set forth in Section .0700 of this Subchapter and has made application to and been approved by Children's Special Health Services to request authorizations and provide services for eligible children.
- (20) "Sponsored clinic" is a clinic that is recognized, supported, and listed as an official Children's Special Health Services.

Statutory Authority G.S. 130A-124.

TITLE 16 - DEPARTMENT OF PUBLIC EDUCATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Board of Education intends to amend rules cited as 16 NCAC 6C .0312 and .0401 - .0403.

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

The public hearing for 16 NCAC 6C .0312 will be conducted at 9:30 a.m. and 16 NCAC 6C .0401 - .0403 will be conducted at 10:30 a.m. on July 2, 1993 at the State Board Room, 7th Floor, Education Bldg., 301 N. Wilmington Street, Raleigh, NC 27601-2825.

Reason for Proposed Action:

16 NCAC 6C .0312 - Amendment requires school administrators to report sexual or physical abuse of children by teachers to the State Board.
16 NCAC 6C .0401 - .0403 - Amendments provide

greater flexibility in earning and use of leave and make technical corrections.

Comment Procedures: Any interested person may submit views either in writing by July 15, 1993 or orally at the hearing.

CHAPTER 6 - ELEMENTARY AND SECONDARY EDUCATION

SUBCHAPTER 6C - PERSONNEL

SECTION .0300 - CERTIFICATION

.0312 CERTIFICATE SUSPENSION AND REVOCATION

(a) The SBE may deny an application for certification or may suspend or revoke a certificate issued by the Department only for the following reasons:

- (1) fraud, material misrepresentation or concealment in the application for certification;
- (2) changes in or corrections of the certificate documentation which makes the individual ineligible to hold a certificate;
- (3) conviction or entry of a plea of no contest, as an adult, of a crime if there is a reasonable and adverse relationship between the underlying crime and the continuing ability of the person to perform any of his/her professional functions in an effective manner;
- (4) final dismissal of a person by a local board pursuant to G.S. 115C-325(e)(1)b., if there is a reasonable and adverse relationship between the underlying misconduct and the continuing ability of the person to perform any of his/her professional functions effectively;
- (5) final dismissal of a person by a LEA under G.S. 115C-325(e)(1)e.;
- (6) resignation from employment with a LEA without 30 work days' notice, except with the prior consent of the local superintendent;
- (7) revocation of a certificate by another state; and
- (8) any other illegal or immoral conduct by a person, if there is a reasonable and adverse relationship between the underlying conduct and the continuing

ability of the person to perform any of his/her professional functions in an effective manner; and

- (9) Failure to report revocable conduct as required under Paragraph (b) of this Rule.

(b) Any superintendent, assistant superintendent, associate superintendent, personnel administrator or principal who knows or has substantial reason to believe that a certified employee of the LEA has engaged in behavior that would justify revocation of the employee's certificate under Subparagraphs (3), (4) or (8) of Paragraph (a) of this Rule and which behavior involves physical or sexual abuse of a child shall report that information to the Superintendent of Public Instruction. For purposes of this Section, the term "physical abuse" means the infliction of serious physical injury other than by accidental means and other than in self-defense. The term "sexual abuse" means the commission of any sexual act upon a student or causing a student to commit a sexual act, regardless of the age of the student and regardless of the presence or absence of consent.

(c) ~~(b)~~ Upon the receipt of a written request and substantiating information from any LEA, local superintendent or other person in a position to present information as a basis for the suspension or revocation of a person's certificate, the Superintendent of Public Instruction will conduct an investigation sufficient to determine whether reasonable cause exists to believe that the person's certificate should be suspended or revoked.

- (1) If the Superintendent determines that reasonable cause exists to believe that the person's certificate should be suspended or revoked on one or more of the grounds specified in Paragraph (a) of this Rule, the Superintendent shall prepare and file written charges with the SBE.
- (2) The SBE will review the written charges and determine whether the person's certificate should be suspended or revoked based on the information contained in the written charges. If the SBE determines that the written charges constitute grounds for suspension or revocation, it shall provide the person with a copy of the written charges, and notify the person that it will revoke the person's certificate unless the person, within 60 days of receipt of notice, initiates administrative proceedings under Article 3, Chapter 150B of the

General Statutes. The notice will be sent certified mail, return receipt requested.

- (3) If the person initiates administrative proceedings the SBE will defer final action on the matter until receipt of a proposed decision as provided for in G.S. 150B-34. If the person does not initiate administrative proceedings within 30 days of receipt of notice, the SBE may suspend or revoke the person's certificate at its next meeting.

(d) ~~(e)~~ The SBE may suspend an individual's certificate for a stated period of time or may permanently revoke the certificate, except as limited by G.S. 115C-325(o).

(e) ~~(d)~~ The SBE may reinstate a suspended or revoked certificate or may grant a new certificate upon application and a showing of good cause by the individual. The burden of proving good cause is on the applicant.

(f) ~~(e)~~ The SBE will notify all other states of all actions which involve the suspension, revocation or reinstatement of a certificate.

(g) ~~(f)~~ The SBE will consider requests for reinstatement of revoked certificates. The SBE will not grant any request for reinstatement unless it finds as facts that:

- (1) the action that resulted in revocation did not involve abuse of minors; possession, sale or use of controlled substances; moral turpitude or grounds listed in G.S. 115C-325(e)(1)b. or e.;
- (2) the person has no record of subsequent behavior that could have resulted in certificate revocation;
- (3) there is no court order or judicial determination that would prohibit the person from returning to a certificated position; and
- (4) there has been a sufficient lapse of time since revocation for the person to appreciate the value of certification.

Authority G.S. 115C-12(9)a.; N.C. Constitution, Article IX, Sec. 5.

SECTION .0400 - LEAVE

.0401 VACATION LEAVE

(a) All full-time or part-time permanent public school employees who are working or on paid leave for at least one-half of the calendar days in a month earn vacation leave, based on length of state service in North Carolina.

(b) A part-time permanent employee in a budgeted position earns vacation leave on a pro rata basis.

(c) Local boards of education may choose to record leave earned in hours. If leave is recorded in hours, the leave earned as indicated in this Paragraph will be multiplied times the regular number of hours worked per day. Employees earn vacation leave as follows:

<u>Years of State Service</u>	<u>Days Per Month of Employment</u>
Less than 2 yrs.	1.00
2 but less than 5 yrs.	1.15
5 but less than 10 yrs.	1.40
10 but less than 15 yrs.	1.65
15 but less than 20 yrs.	1.90
20 yrs. or more	2.15

(d) LEAs credit state service for full-time or part-time permanent employment figured on the same basis as for longevity pay. The LEA must establish the anniversary date for each employee on the basis of the employee's state service.

(e) The LEA may advance vacation leave to an employee.

(f) The LEA transfers unused vacation leave when an employee transfers between LEAs. An employee may have leave transferred to or from a state agency or institution, community college or technical institute, a position subject to the State Personnel Act in a local mental health, public health, social services or emergency management agency, if the receiving agency is willing to accept the leave; otherwise, the employee will be paid in a lump sum for accumulated leave not to exceed 30 workdays or 240 hours, according to the earning rate.

(g) Leave payment at separation is subject to the following:

- (1) An employee who is overdrawn on leave when he or she separates will have the excess leave corrected through a deduction from the final salary check.
- (2) Payment for leave may be made on the regular payroll or on a supplemental payroll. The LEA makes payment from the same source of funds and in the same proportion as the employee's salary is paid.
- (3) Terminal leave payment is subject to the same deductions as salary, including retirement.
- (4) The receipt of lump sum leave payment and retirement benefit is not dual compensation.
- (5) The LEA makes payment for unpaid salary, terminal leave and travel of a deceased employee to the personal representative of the deceased employee, or if there is no personal representative, to the Clerk of Superior Court of the county in which the employee resided.

(h) Each LEA shall maintain leave records for all employees. LEAs must inform employees of their leave balances at least once a year. LEAs must retain leave records for separated employees for at least five years from the date of separation.

(i) Leave must be taken in one-half days, whole days, or hours as determined for earning purposes by the local board ~~minimum units of one-half or whole days.~~

(j) Instructional personnel and school bus drivers may not take vacation leave on days when students are scheduled to be in attendance. These persons may take vacation leave instead of sick leave on days when students are not scheduled to attend. LEAs may designate specific scheduled workdays for required attendance as long as employees have an opportunity to take annual leave earned during the school year. Employees may charge leave taken only to scheduled teacher workdays and the ten vacation leave days scheduled in the school calendar.

(k) Other employees may take vacation leave instead of sick leave. These employees must have an opportunity to take annual leave earned in the school year.

Statutory Authority G.S. 115C-272; 115C-285; 115C-302; 115C-316.

.0402 SICK LEAVE

(a) Public school employees who earn vacation leave also earn sick leave. Full-time employees earn one day per month or the number of hours

worked daily by a full-time employee in that class of work. Part-time employees earn and may use sick leave in proportion to the part of the day for which they are employed.

(b) The LEA may allow sick leave to be used for temporary disability which prevents an employee from performing his or her usual duties, illness in the employee's immediate family and attendant medical appointments which require the employee's attendance, death in the immediate family and medical appointments for the employee. The immediate family includes spouse, children, parents (including the step relationship) and dependents living in the household, except that in the case of death, the term does not include dependents but does include siblings, grandparents, grandchildren, and the step, half and in-law relationships.

(c) Employees must take leave in one-half days, whole days, or hours as determined for earning purposes by the local board ~~minimum units one-half or whole workdays.~~

(d) Employees may accumulate sick leave indefinitely and may transfer sick leave as in the case of vacation leave.

(e) LEAs may advance sick leave not to exceed the amount which would be earned within the school year.

(f) An employee who is overdrawn on sick leave when the employee separates from service will have the excess leave corrected through a deduction from the final salary check.

(g) If the period of sick leave taken is less than 30 days, the employee will return to his or her position with the LEA. If the period of temporary disability exceeds 30 days, the superintendent shall determine when the employee is to be reinstated. The superintendent makes this decision based on the welfare of the students and the need for continuity of instruction.

(h) The LEA shall credit an employee who separates from service and returns within 60 months with all sick leave accumulated to the time of separation.

(i) Permanent full or part-time instructional personnel, excluding teacher assistants, who are absent due to their personal illness or injury in excess of their accumulated sick leave, shall be allowed extended sick leave of up to 20 work days throughout the regular term of employment. These days do not have to be consecutive. A new employee must have reported to work to be eligible for extended sick leave. The superintendent may require a doctor's certificate or other acceptable proof of the reason for the absence. Upon exhaustion of sick leave, including the extended 20 days or optionally used vacation leave, as permissible, the employee shall be placed on leave without pay for a period of up to one

~~year or the end of the contracted period of employment, whichever is shorter. This may be extended beyond these times limits as approved by the local board.~~

Statutory Authority G.S. 115C-12(8); 115C-336.

.0403 SUBSTITUTES

(a) LEAs shall employ all substitutes deemed necessary for the efficient operation of the unit. The superintendent determines the need to employ a substitute for a non-teaching assistant principal, principal or supervisor.

~~(b) The period of substitution is short term if it includes 5 or less consecutive days in the same position. Periods in excess of five days are long term.~~

~~(b) (e) LEAs employ substitute teachers in units of half or whole days. The LEA treats responsibilities which require less than half a day as a half day of employment.~~

~~(c) (d)~~ The LEA pays substitutes as follows:

(1) A person who substitutes for a non-teaching assistant principal, principal or supervisor is paid from local funds.

(2) Unless required to be otherwise, a substitute for the regular teacher is paid from the same source of funds as the regular teacher is paid.

~~(d) (e)~~ Absences not covered in Rule .0404 require the appropriate amount of substitute teacher pay to be deducted from the regular teacher's salary. These absences include extended sick leave as explained in Paragraph (f) of this Rule, personal leave and in-state meetings of no longer than 3 days or out-of-state meetings of no longer than 5 days, and not to exceed a total of 10 days within the school year, for professional responsibilities and attendance at professional meetings. The superintendent must approve these absences. The time limitations of this Rule do not apply to a person who is the local or district president or president-elect or a state or national officer of an educational professional organization, or to a person selected as National Teacher of the Year from this state.

~~(f) A teacher may be absent due to personal illness for up to 20 teaching days in excess of accumulated sick leave. The superintendent may require a doctor's certificate or other acceptable proof of the reason for the absence.~~

~~(e) (g)~~ Teachers earn personal leave at the rate of one-half day for every two and one-half months .20 days for full month of employment and may

accumulate five personal leave days. Teachers may transfer these days between LEAs. A teacher who requests personal leave at least five days in advance of the date desired is not required to give a reason for the leave. No teacher may take personal leave on the first day teachers are required to report for the school year, required teacher workdays, the day before or the day after holidays or scheduled vacation days, except as approved by the principal. The LEA shall credit a teacher who has separated from service and is re-employed within 60 months from the date of separation with all personal leave, up to the five-day maximum, accumulated at the time of separation. The LEA may not advance personal leave beyond that which a teacher earns. Teachers may take personal leave in units of one-half or whole days.

(f) ~~(h)~~ If the regular teacher vacates a teaching position during the school year, that teacher receives the regular compensation for the actual days employed during the current month, adjusted for overdrawn leave or unpaid longevity pay. If the LEA employs an interim teacher to fill the vacancy until a regular teacher is available, the LEA pays the interim teacher as follows:

- (1) For service of no more than 10 teaching days, the person is paid as a substitute.
- (2) For service in excess of 10 teaching days, the person is paid on the basis of the person's certified salary rating. The person may elect to be paid as a substitute.

Statutory Authority G.S. 115C-12(8).

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).

ADMINISTRATION**Environmental Policy Act**

<i>1 NCAC 25 .0213 - Environmental Policy Act Advisory Committee</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>1 NCAC 25 .0401 - Method of Compliance</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>1 NCAC 25 .0506 - Review Process</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>1 NCAC 25 .0603 - Format and Content</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>

AGRICULTURE**Plant Industry**

<i>2 NCAC 48A .0206 - The Transportation of Bees</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>
<i>2 NCAC 48A .0207 - Requirements for Issuance of Permit</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>

COMMERCE**Cemetery Commission**

<i>4 NCAC 5B .0103 - Hearings</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>4 NCAC 5D .0101 - Report</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>4 NCAC 5D .0201 - Report</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>
<i>4 NCAC 5D .0202 - Delivery</i>	<i>RRC Objection</i>	<i>04/15/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>04/15/93</i>

Community Assistance

<i>4 NCAC 19L .0913 - Grant Closeouts</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>
<i>4 NCAC 19L .1101 - Reporting</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>
<i>4 NCAC 19L .1505 - Preliminary Awards</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>
<i>4 NCAC 19L .1604 - Preliminary Awards</i>	<i>RRC Objection</i>	<i>05/19/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>05/19/93</i>

Savings Institutions Division: Savings Institutions Commission

<i>4 NCAC 16G .0311 - Required Provisions in Plan of Conversion</i>	<i>RRC Objection</i>	<i>03/18/93</i>
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Agency Revised Rule
Agency Revised Rule

RRC Objection 03/18/93
Obj. Removed 04/15/93

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Coastal Management

15A NCAC 7H .1205 - Specific Conditions
Rule Returned to Agency

RRC Objection 03/18/93
04/15/93

Environmental Management

15A NCAC 2H .1110 - Implementation
Agency Responded
Agency Responded

RRC Objection 02/18/93
Obj. Cont'd 03/18/93
Obj. Cont'd 05/19/93

Laboratory Services

15A NCAC 20D .0234 - Criteria & Procedures: Decert./Denial/Downgrading
Agency Revised Rule

RRC Objection 03/18/93
Obj. Removed 04/15/93

Radiation Protection

15A NCAC 11 .0108 - Additional Requirements
Agency Revised Rule
15A NCAC 11 .0207 - Issuance of Notice of Registration
Agency Revised Rule
15A NCAC 11 .0212 - Modifications: Revocation: Termination of Registrants
Agency Revised Rule
15A NCAC 11 .0214 - Training/Educational Requirements for Equipment Svcs
Agency Revised Rule
15A NCAC 11 .0337 - Issuance of Specific Licenses
Agency Revised Rule
15A NCAC 11 .0507 - Leak Testing and Source Tagging
Agency Revised Rule
15A NCAC 11 .1215 - Conditions of License
Agency Revised Rule

RRC Objection 05/19/93
Obj. Removed 05/19/93
RRC Objection 05/19/93
Obj. Removed 05/19/93
RRC Objection 05/19/93
Obj. Removed 05/19/93
RRC Objection 05/19/93
Obj. Removed 05/19/93
RRC Objection 05/19/93
Obj. Removed 05/19/93
RRC Objection 05/19/93
Obj. Removed 05/19/93
RRC Objection 05/19/93
Obj. Removed 05/19/93

HUMAN RESOURCES

Children's Services

10 NCAC 41E .0514 - Child Care & Development: Health
Agency Revised Rule
10 NCAC 41G .0705 - Medical Program
Agency Revised Rule
10 NCAC 41Q .0201 - Personnel
Agency Responded

RRC Objection 04/15/93
Obj. Removed 05/19/93
RRC Objection 04/15/93
Obj. Removed 04/15/93
RRC Objection 04/15/93
Obj. Cont'd 05/19/93

Departmental Rules

10 NCAC 1M .0002 - Complaints
Agency Revised Rule
10 NCAC 1M .0003 - Investigation
Agency Revised Rule

RRC Objection 04/15/93
Obj. Removed 04/15/93
RRC Objection 04/15/93
Obj. Removed 04/15/93

Facility Services

10 NCAC 3C .2020 - Definitions	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 3C .2021 - Physician Reqs/Inpatient Rehabilitation Facilities or Units	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 3C .2030 - Physical Facility Reqs/Inpatient Rehab Facilities or Units	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 3C .2033 - Deemed Status/Inpatient Rehabilitation Facilities or Units	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 3H .1150 - Definitions	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 3H .1151 - Physician Reqs/Inpatient Rehabilitation Facilities or Units	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 3H .1160 - Physical Facility Reqs/Inpatient Rehab Facilities or Units	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93
10 NCAC 3H .1163 - Deemed Status/Inpatient Rehabilitation Facilities or Units	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93

INSURANCE**Actuarial Services**

11 NCAC 16 .0303 - Annual Filing	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	04/15/93

Consumer Services

11 NCAC 4 .0428 - Enforcement	RRC Objection	03/18/93
Agency Revised Rule	RRC Objection	03/18/93
Agency Repealed Rule	Obj. Removed	04/15/93

Financial Evaluation Division

11 NCAC 11B .0607 - Application - Employers	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	04/15/93
11 NCAC 11B .0610 - Application - Groups	RRC Objection	03/18/93
Agency Revised Rule	Obj. Removed	04/15/93
11 NCAC 11H .0001 - Definitions	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93

JUSTICE**Private Protective Services**

12 NCAC 7D .0809 - Authorized Firearms	RRC Objection	04/15/93
Agency Revised Rule	Obj. Removed	05/19/93

LICENSING BOARDS AND COMMISSIONS**Electrolysis Examiners**

21 NCAC 19 .0401 - Infection Control Standards	RRC Objection	05/19/93
Agency Revised Rule	Obj. Removed	05/19/93

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).

10 NCAC 3H .0315(b) - NURSING HOME PATIENT OR RESIDENT RIGHTS

Dolores O. Nesnow, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 10 NCAC 3H .0315(b) void as applied in *Barbara Jones, Petitioner v. North Carolina Department of Human Resources, Division of Facility Services, Licensure Section, Respondent* (92 DHR 1192).

15A NCAC 3O .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 3O .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>
ADMINISTRATION				
McLaurin Parking Co. v. Administration	92 DOA 1662	Morrison	04/02/93	8:3 NCR 320
ALCOHOLIC BEVERAGE CONTROL COMMISSION				
Alcoholic Beverage Control Comm. v. Ann Oldham McDowell	92 ABC 0260	Morgan	04/01/93	
Curtis Ray Lynch v. Alcoholic Beverage Control Comm.	92 ABC 0288	Gray	05/18/93	
Alcoholic Beverage Control Comm. v. Gary Morgan Neugent	92 ABC 1086	Becton	03/22/93	
Alcoholic Beverage Control Comm. v. Kirby Ronald Eldridge	92 ABC 1153	Chess	04/26/93	
Alcoholic Beverage Control Comm. v. Gloria Black McDuffie	92 ABC 1476	West	05/26/93	
Alcoholic Beverage Control Comm. v. Larry Isacc Hailstock	92 ABC 1483	Reilly	04/07/93	
Johnnie L. Baker v. Alcoholic Beverage Control Commission	92 ABC 1735	Chess	05/07/93	
Alcoholic Beverage Control Comm. v. Homer Patrick Godwin Jr.	93 ABC 0125	Reilly	05/13/93	
Alcoholic Bev. Control Comm. v. Mild & Wild, Inc., Sheila Scholz	93 ABC 1475	Nesnow	03/23/93	
COMMERCE				
Lester Moore v. Weatherization Assistance Program	93 COM 0105	Gray	03/08/93	
CRIME CONTROL AND PUBLIC SAFETY				
George W. Paylor v. Crime Victims Compensation Comm.	91 CPS 1286	Morgan	04/27/93	
Anthony L. Hart v. Victims Compensation Comm.	92 CPS 0937	Chess	03/01/93	
Jennifer Ayers v. Crime Victims Compensation Comm.	92 CPS 1195	Reilly	03/19/93	
Janie L. Howard v. Crime Victims Compensation Comm.	92 CPS 1787	Reilly	03/26/93	
Isabelle Hyman v. Crime Victims Compensation Comm.	92 CPS 1807	Morrison	05/24/93	
James G. Pellom v. Crime Control & Public Safety	93 CPS 0034	Gray	05/05/93	
Moses H. Cone Mem Hosp v. Victims Compensation Comm.	93 CPS 0152	Nesnow	04/02/93	8:3 NCR 327
Phillip Edward Moore v. Crime Control & Public Safety	93 CPS 0169	Nesnow	05/20/93	
John Willie Leach v. Crime Victims Compensation Comm.	93 CPS 0263	Morrison	05/20/93	
Constance Brown v. Crime Victims Compensation Comm.	93 CPS 0351	Reilly	05/24/93	
ENVIRONMENT, HEALTH, AND NATURAL RESOURCES				
Charles L. Wilson v. Environment, Health, & Natural Resources	91 EHR 0664	Morgan	03/23/93	
Utleigh C. Stallings v. Environment, Health, & Natural Resources	92 EHR 0062	Gray	03/15/93	
Safeway Removal, Inc. v. Environment, Health, & Natural Res.	92 EHR 0826	West	03/12/93	8:1 NCR 83
Elizabeth City/Pasquotank Cty Mun Airport Auth v. EHNH	92 EHR 1140	Gray	04/13/93	
Service Oil Company v. Environment, Health, & Natural Resources	92 EHR 1205	Reilly	05/27/93	
City of Salisbury v. Environment, Health, & Natural Resources	92 EHR 1472	Morrison	04/22/93	
Willie M. Watford v. Hertford Gates District Health Department	92 EHR 1600	Chess	03/24/93	
Standard Speciality Contractors, Inc. v. EHNH	92 EHR 1660	Reilly	05/21/93	
Angela Power, Albert Power v. Children's Special Health Svcs.	93 EHR 0008	Becton	03/24/93	
Mustafa E. Essa v. Environment, Health, & Natural Resources	93 EHR 0146	Gray	03/29/93	
Rosetta Brimage, Vanessa Pack v. Env. Health of Craven County	93 EHR 0206	Nesnow	05/20/93	
Shell Bros. Dist., Inc. v. Environment, Health, & Natural Resources	93 EHR 0308	Becton	05/18/93	
HUMAN RESOURCES				
O.C. Williams v. Human Resources	91 CSE 0036*2	Morgan	03/30/93	
Ronald Terry Brown v. Human Resources	91 CSE 0249	Morgan	05/17/93	
O.C. Williams v. Human Resources	91 CSE 1158*2	Morgan	03/30/93	

* Consolidated cases.

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
Michael L. Ray v. Human Resources	91 CSE 1173	Morgan	05/17/93	
Randy Chambliss v. Human Resources	91 CSE 1187	Morgan	04/28/93	
Melvin White v. Human Resources	91 CSE 1192	Morgan	05/17/93	
Jefferson D. Boylen v. Human Resources	91 CSE 1217	Morgan	05/17/93	
Jeffery D. Williams v. Human Resources	91 CSE 1231	Morgan	04/28/93	
Samuel E. Massenberg Jr. v. Human Resources	91 CSE 1249	Morgan	05/17/93	
William A. Dixon v. Human Resources	91 CSE 1277	Morrison	03/04/93	
Gregory L. Washington v. Human Resources	92 CSE 0075	Morgan	04/01/93	
Edwin Clarke v. Human Resources	92 CSE 0129	Morgan	05/17/93	
Dwayne Allen v. Human Resources	92 CSE 0196	Morgan	03/31/93	
Edwin Ivester v. Human Resources	92 CSE 0268	Nesnow	03/30/93	
Edward E. Brandon v. Human Resources	92 CSE 1237	Gray	04/16/93	
Darrell W. Russell v. Human Resources	92 CSE 1249	Becton	04/20/93	
Michelle D. Mobley v. Human Resources	92 CSE 1256	Nesnow	04/15/93	
Robert E. Watson v. Human Resources	92 CSE 1265	Reilly	05/06/93	
Byron Christopher Williams v. Human Resources	92 CSE 1270	Nesnow	04/26/93	
James W. Bell v. Human Resources	92 CSE 1311	Nesnow	05/10/93	
Eric Stanley Stokes v. Human Resources	92 CSE 1316*	Reilly	03/25/93	
David Rollins v. Human Resources	92 CSE 1334	Morrison	05/06/93	
Lyndell Greene v. Human Resources	92 CSE 1346	Nesnow	04/16/93	
Leroy Snuggs v. Human Resources	92 CSE 1360	Morrison	04/15/93	
James P. Miller III v. Human Resources	92 CSE 1361	Gray	04/16/93	
Larry L. Crowder v. Human Resources	92 CSE 1396	Reilly	04/15/93	
Carlos Bernard Davis v. Human Resources	92 CSE 1404	Reilly	04/15/93	
Timothy Brian Eller v. Human Resources	92 CSE 1414	Reilly	04/20/93	
Charles S. Ferrer v. Human Resources	92 CSE 1416	Mann	04/15/93	
Ronald H. Lockley v. Human Resources	92 CSE 1418	Nesnow	04/20/93	
Rene Thomas Rittenhouse v. Human Resources	92 CSE 1421	Nesnow	04/20/93	
Thomas Edward Williamson v. Human Resources	92 CSE 1422	Reilly	04/20/93	
Roy Chester Robinson v. Human Resources	92 CSE 1423	Reilly	04/15/93	
William E. Ingram v. Human Resources	92 CSE 1450	Reilly	04/15/93	
Harold R. Pledger v. Human Resources	92 CSE 1455	Morrison	05/20/93	
Dale Robert Stuhre v. Human Resources	92 CSE 1516	Reilly	05/11/93	
Tommy Malone v. Human Resources	92 CSE 1520	Mann	05/07/93	
James C. Dixon Jr. v. Human Resources	92 CSE 1522	Becton	05/11/93	
Wallace M. Cooper v. Human Resources	92 CSE 1527	Reilly	05/11/93	
Jarvis N. Price v. Human Resources	92 CSE 1531	Morrison	05/12/93	
Thomas L. Yates v. Human Resources	92 CSE 1535	Gray	05/10/93	
Robert E. Tarlton Sr. v. Human Resources	92 CSE 1536	Gray	05/17/93	
Rodney Devard Clemons v. Human Resources	92 CSE 1539	Gray	05/10/93	
James A. Coleman v. Human Resources	92 CSE 1540	Reilly	05/11/93	
Romeo F. Skapple v. Human Resources	92 CSE 1545	Gray	04/26/93	
Jeffrey L. Garrett v. Human Resources	92 CSE 1557	Gray	04/22/93	
William C. Hubbard v. Human Resources	92 CSE 1562	Mann	05/12/93	
Edward Fitch v. Human Resources	92 CSE 1572	Reilly	05/11/93	
Brian C. Gilmore v. Human Resources	92 CSE 1576	Gray	04/26/93	
Johnny W. Cooke v. Human Resources	92 CSE 1585	Becton	05/11/93	
Isaac Maxwell v. Human Resources	92 CSE 1589	Reilly	04/26/93	
Donald J. Ray v. Human Resources	92 CSE 1592	Mann	05/19/93	
McKinley Clyburn v. Human Resources	92 CSE 1623	Morrison	05/20/93	
Jeffery D. Williams v. Human Resources	92 CSE 1626	Mann	05/19/93	
Billy Smith v. Human Resources	92 CSE 1629	Reilly	03/25/93	
Anthony Curry v. Human Resources	92 CSE 1631	Reilly	03/25/93	
Larry W. Golden v. Human Resources	92 CSE 1633	Reilly	03/25/93	
William J. Carter v. Human Resources	92 CSE 1637	Nesnow	05/19/93	
Eric Stanley Stokes v. Human Resources	92 CSE 1652*	Reilly	03/25/93	
Patrick Floyd v. Human Resources	92 CSE 1663	Reilly	05/20/93	
James E. Blakney v. Human Resources	92 CSE 1779	Nesnow	05/13/93	
Barbara W. Catlett v. Human Resources	92 DCS 0577	West	03/15/93	
Laurel Langford v. Human Resources	92 DCS 1181	Gray	05/04/93	8:5 NCR 441
Ida Diane Davis v. Human Resources	92 DCS 1200	Gray	03/29/93	
Hatsuko Klein v. Human Resources	92 DCS 1271	Reilly	05/05/93	
Leon Barbee v. Human Resources	92 DHR 0658	Morrison	04/30/93	8:4 NCR 392
James H. Hunt Jr. v. Div. of Medical Assistance	92 DHR 1145	Becton	05/13/93	8:5 NCR 443
Barbara Jones v. Human Resources	92 DHR 1192	Nesnow	04/02/93	8:3 NCR 313
Joyce P. Williams v. Human Resources	92 DHR 1275	Gray	03/15/93	
Snoopy Day Care, Diane Hamby v. Child Day Care Licensing	92 DHR 1320	Morgan	05/21/93	

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
Cynthia Reed v. Human Resources	92 DHR 1329	Chess	05/10/93	
Helm's Rest Home, Ron J. Schimpf/Edith H. Wilson v. Human Resources	92 DHR 1604	Reilly	05/10/93	
Jo Ann Kinsey v. NC Memorial Hospital Betty Hutton, Volunteer Svc.	92 DHR 1612	Chess	03/08/93	
Amy Clara Williamson v. NC Mem Hosp Betty Hutton, Volunteer Svc.	92 DHR 1613	Chess	03/08/93	
Betty Butler v. Human Resources	92 DHR 1614	Chess	03/09/93	
Samuel Benson v. Office of Admin. Hearings for Medicaid	93 DHR 0010	Becton	03/11/93	
INSURANCE				
Carolyn M. Hair v. St Employees Comprehensive Major Medical	92 INS 1464	Chess	03/10/93	
JUSTICE				
Colin Carlisle Mayers v. Sheriffs' Ed. & Training Stds. Comm.	92 DOJ 0761	Morrison	05/10/93	
Marilyn Jean Britt v. Criminal Justice Ed. & Training Stds. Comm.	92 DOJ 1088	Morrison	03/16/93	
Tim McCoy Deck v. Criminal Justice Ed. & Training Stds. Comm.	92 DOJ 1367	Chess	04/01/93	
Sherri Ferguson Revis v. Sheriffs' Ed. & Training Stds. Comm.	92 DOJ 1756	Gray	03/23/93	
Mark Thomas v. Sheriffs' Ed. & Training Standards Commission	93 DOJ 0151	West	04/21/93	
N.C. Alarm Systems Licensing Bd. v. Vivian Darlene Gaither	93 DOJ 0202	Chess	05/10/93	
LABOR				
Greensboro Golf Center, Inc. v. Labor	92 DOL 0204	Nesnow	04/15/93	
MORTUARY SCIENCE				
Board of Mortuary Science v. Triangle Funeral Chapel, Inc.	92 BMS 1169	Reilly	04/29/93	8:4 NCR 396
STATE PERSONNEL				
Frances K. Pate v. Transportation	88 OSP 0340	Morrison	05/03/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1064* ⁴	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1065* ⁴	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1066* ⁴	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1067* ⁴	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1068* ⁴	Mann	05/04/93	
Bernie B. Kelly v. Correction	91 OSP 0344	Morrison	05/27/93	
Brenda G. Mitchell v. Correction	91 OSP 0625	West	03/08/93	8:1 NCR 75
Clayton Brewer v. North Carolina State University	91 OSP 0941	West	04/02/93	8:3 NCR 306
Sherman Daye v. Transportation	91 OSP 0951	West	05/07/93	
Donnie M. White v. Correction	91 OSP 1236	Morgan	04/05/93	
Gregory Samuel Parker v. Environment, Health, & Natural Resources	91 OSP 1344* ⁵	Chess	05/20/93	
Renee E. Shepherd v. Winston-Salem State University	91 OSP 1391	Morgan	04/28/93	
Eva Dockery v. Human Resources	92 OSP 0010	Chess	05/03/93	
Gregory Samuel Parker v. Environment, Health, & Natural Resources	92 OSP 0188* ⁵	Chess	05/20/93	
Willie Granville Bailey v. Winston-Salem State University	92 OSP 0285	Morrison	03/10/93	
Julia Spinks v. Environment, Health, & Natural Resources	92 OSP 0313	Becton	04/12/93	8:4 NCR 382
James B. Price v. Transportation	92 OSP 0375	Gray	04/13/93	
I. Cary Nailling v. UNC-CH	92 OSP 0394	Becton	04/20/93	
Deborah Barber v. Correction	92 OSP 0396	Chess	03/04/93	
Laverne B. Hill v. Transportation	92 OSP 0431* ⁴	West	03/08/93	
Jimmy D. Wilkins v. Transportation	92 OSP 0432* ⁴	West	03/08/93	
Sarah W. Britt v. Human Resources, C.A. Dillon School, CPS	92 OSP 0455	West	05/26/93	8:6 NCR 484
Herman James Goldstein v. UNC-Chapel Hill et al.	92 OSP 0634	Morrison	05/04/93	
Glinda C. Smith v. Wildlife Resources Commission	92 OSP 0653	Morrison	03/12/93	
William Kenneth Smith Jr. v. Broughton Hospital (Human Resources)	92 OSP 0684	Becton	05/10/93	
Larry O. Nobles v. Human Resources	92 OSP 0732	Mann	04/23/93	
Willie Thomas Hope v. Transportation	92 OSP 0947	Morgan	03/23/93	
Suzanne Ransley Hill v. Environment, Health, & Nat. Res.	92 OSP 0992	Reilly	03/18/93	8:2 NCR 224
Herman James Goldstein v. UNC-Chapel Hill et al.	92 OSP 1047	Morrison	05/04/93	
John B. Sauls v. Wake County Health Department	92 OSP 1142	Reilly	03/08/93	8:1 NCR 88
Gilbert Jaeger v. Wake County Alcoholism Treatment Center	92 OSP 1204	Reilly	05/10/93	
Joseph Henry Bishop v. Environment, Health, & Natural Res.	92 OSP 1243	Reilly	03/05/93	

CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
Willie L. Hudson v. Correction	92 OSP 1468	Becton	05/26/93	
Brenda K. Campbell v. Employment Security Commission	92 OSP 1505	Morrison	03/17/93	
James B. Price v. Transportation	92 OSP 1657	Mann	03/19/93	
Betty Bradsher v. UNC-CH	92 OSP 1733	Becton	03/30/93	
Jamal Al Bakkat-Morris v. Glenn Sexton (DSS)	92 OSP 1741	Becton	03/24/93	
Brenda Kay Barnes v. Human Resources	92 OSP 1768	Morrison	03/17/93	
Larry G. Riddle v. Correction, Division of Prisons	92 OSP 1774	Gray	04/26/93	
Stevie E. Dunn v. Polk Youth Center	92 OSP 1789	Becton	04/19/93	
Buford D. Vieregge Jr. v. N.C. State University, University Dining	92 OSP 1796	Morrison	05/27/93	
Barbara A. Johnson v. Human Resources	93 OSP 0103	Morrison	03/17/93	
Carrie P. Smith v. County of Stanly	93 OSP 0109	Becton	04/01/93	
George W. Allen v. Human Resources, Correction, Agri & EHNR	93 OSP 0111	Reilly	04/16/93	
William G. Fisher v. St Bd of Ed, Albermarle City Schools & Bd of Ed	93 OSP 0134	Becton	04/20/93	
Clifton E. Simmons v. Correction	93 OSP 0159	Morrison	04/21/93	
Willie L. James v. Caswell Center	93 OSP 0171	Morgan	05/27/93	
Irving S. Rodgers v. C.A. Dillon, Division of Youth Services	93 OSP 0177	West	04/21/93	
Jerry D. Doss Sr. v. Correction	93 OSP 0287	Gray	05/17/93	

STATE TREASURER

Herman D. Brooks v. Bd of Trustees /Teachers' & St Emp Ret Sys	91 DST 0566	Gray	04/13/93
Henrietta Sandlin v. Teachers' & State Emp Comp Major Medical Plan	92 DST 0305	Morgan	04/12/93
Mary Alyce Carmichael v. Bd/Trustees/Teachers' & St Emp Ret Sys	92 DST 1506	Chess	04/08/93

TRANSPORTATION

Yates Construction Co., Inc. v. Transportation	92 DOT 1800	Morgan	03/25/93
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- i. Volunteer Services Program Consultant (Grade 70 DHR); See Ex. 1, #20;
- ii. Staff Development Specialist III (Grade 70 DHR); See Ex. 1, #15;
- iii. Rehabilitation Therapy Supervisor (Grade 68 DHR); See Ex. 1, #24;
- iv. Community Development Specialist I (Grade 70 CC&PS); See Ex. 1, #25.

Britt was at a pay Grade 66 when RIFed and has no right to priority re-employment in positions graded higher than 66.

- c. Britt was ordered to file a more definite statement of the positions for which she claimed relief.

These Orders were stated on the record and can be found in Volume I of the transcript of this contested case.

II.

On January 11, 1993, DHR filed a "Second Motion to Dismiss or, in the Alternative, Motion for Summary Judgment." Britt responded on January 19, 1993. The motion was heard at 2:00 p.m. on January 20, 1993, and the judge announced his ruling at the conclusion of the hearing. The specific motions and rulings are as follows:

JURISDICTION - The motions were DENIED. G.S. 126-36 empowers the Personnel Commission to grant relief to former state employees for claims of political discrimination. Petitioner became a former state employee when her position was RIFed.

FAILURE TO TIMELY FILE A PETITION - DHR moved to dismiss claims relating to the following positions listed in Petitioner's Exhibit 1 for failure of the Petitioner to file a petition within the time limit set forth in G.S. 126-38:

- 1. DHR Rehab. Therapeutic Activity Coordinator;
- 2. DHR Advocate II;
- 9. DHR Facility Services Admin. I;
- 20. DHR Volunteer Service Program Consultant;
- 21. DHR Staff Development.

The Administrative Law Judge DENIED the motions ruling that the time limit for filing a petition had not begun to run since there is no evidence that Britt received the notice of appeal rights required by G.S. 150B-23.

POLITICAL DISCRIMINATION, LACK OF MINIMUM QUALIFICATIONS - Motions relating to these two issues were DENIED. Issues of material fact existed.

III.

At the close of Britt's case, her counsel made a motion for a directed verdict (Rule 50). The motion was DENIED.

CC&PS made a motion on the record, pursuant to Rule 41 to dismiss Britt's claim relating to the

Community Services District Coordinator position #09209 (Ex. 1, #8). The motion was GRANTED. The evidence, when considered in the appropriate light, shows that the person who filled that position was a transfer from within CC&PS so that Britt had no priority RIF rights to the position. CC&PS made a motion pursuant to Rule 41 to dismiss Britt's claim relating to the positions described in Ex. 1, #25, #31, and #40. The motions were DENIED.

DHR made a motion on the record, pursuant to Rule 41 to dismiss Britt's claims relating to those positions described in Ex. 1 numbers 1, 2, 3, 23, 24, 56, 15, 19, 20, 21, 68, 33, and 46. The motions were DENIED.

At the close of her case, Britt withdrew any claim relating to the DHR Vocational Rehab. Advocate Specialist I position. See Ex. 1, #56.

Britt's claim of age discrimination is limited to CC&PS and to only one position - position #31 on Ex. 1, Community Development Specialist I.

Britt's claim of political discrimination extends to twelve (12) positions. The positions are listed on Ex. 1 as numbers:

1, 2, 3, 15, 19, 20, 21, 23, 24, 25, 33, and 46. Britt argues that she was discriminated against for political reasons when she was not hired for these positions because:

- a. She met the stated qualifications;
- b. She had priority re-employment rights which could have been satisfied by being offered a position graded higher than 66;
- c. The positions at issue are not exempt;
- d. She is an active Democrat;
- e. Only people recommended by the Governor or department secretary were hired.

Britt's priority re-employment claim is two-fold. Britt argues she is entitled to relief because of Respondents' procedural violations and because she was denied priority re-employment in two (2) positions at Grade 66 or below for which she met the qualifications.

A chart outlining Britt's claims follows:

	<u>Violation of RIF</u>	<u>Political</u>	<u>Age</u>
DHR	1	1	
DHR		2	
DHR		3	
DHR		15	
DHR		19	
DHR		20	
DHR		21	
DHR	23	23	
DHR		24	
CC&PS		25	
CC&PS			31
DHR		33	
CC&PS	40		
DHR		46	

WITNESSES

Petitioner Britt called the following witnesses:

1. Sarah W. Britt - Petitioner.
2. Gwendolyn C. Chunn - Director, Division of Youth Services (DYS), DHR.
3. Joyce Weathersby - Personnel Analyst I, Office of State Personnel.
4. Bruce Marshburn - Deputy Director of the Governor's Crime Commission.
5. Susan Hutchins - Personnel Director, DHR.
6. Grady Stephenson - Personnel Director, DYS, DHR.
7. Robert M. Sumpter - Personnel Officer, Murdoch Center, DHR.

Respondent DHR called the following witnesses:

1. Sandy Brock - Director of Personnel, John Umstead Hospital, DHR.
2. Kathy Watson - Personnel Manager, Office of the Secretary, DHR.

Respondent CC&PS called the following witness:

1. Arthur C. Zeidman - Director of Victim and Justice Services Division, CC&PS.

EXHIBITS

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

OFFICIAL NOTICE

Official notice is taken of:

1. Chapter 126 of the General Statutes of North Carolina.
2. Title 25 of the North Carolina Administrative Code.
3. PERSONNEL MANUAL - Office of State Personnel.

BURDEN OF PROOF

Britt has the burden of proving by the greater weight of the substantial evidence that she is entitled to the relief requested in her petition.

Based upon the exhibits and the testimony of the witnesses, including an analysis of their credibility, based partially upon personal observation, the undersigned finds the following to be the facts:

FINDINGS OF FACT

1. Petitioner Sarah W. Britt (Britt) is a white female older than forty (40) years of age. Britt is approximately sixty (60) years old.
2. Britt began work at the C.A. Dillon School in August, 1979 as an Administrative Officer I. In June,

1980, she became the Volunteer Services Coordinator II for the school. In 1985 or 1986, Britt moved to a Volunteer Services Coordinator I position, Grade 66.

3. The C. A. Dillon School is an institution within the Division of Youth Services, Department of Human Resources.

4. On June 30, 1991, Britt lost her job at C. A. Dillon School as the result of a Reduction in Force (RIF). Britt was earning Thirty Thousand, Six Hundred Fifty-one (\$30,651.00) Dollars.

Britt was a permanent state employee entitled to the protections of Chapter 126 of the General Statutes of North Carolina.

5. As a matter of law, Britt was entitled to priority consideration for re-employment for one year following her dismissal (RIF), subject to certain conditions.

6. The following conditions applied to Britt's right to priority consideration for re-employment:

- a. DHR was required to offer Britt any available vacant position of a salary Grade 66 or below from and after the time she was notified of her RIF, provided Britt met the qualifications for the position and could perform the job in a reasonable length of time, including normal orientation and training given any new employee;
- b. All other agencies were required to interview Britt for any vacant position for which she had priority status and was qualified prior to employing anyone who is not a permanent state employee;
- c. Britt's right to priority re-employment status terminated after she had received twelve (12) months priority re-employment consideration.

7. In addition to the priority rights Britt enjoyed as a matter of law due to her status as a permanent state employee, Britt was granted additional rights as a matter of policy by DHR:

- a. Prior to the actual separation, DYS and the Dillon School were required to attempt to place Britt in another position within the division or institution that was vacant and for which she met the minimum qualifications;
- b. When Britt was not placed in a position in DYS or Dillon sixty (60) days before her scheduled separation (June 30, 1991), she was entitled to priority placement status for vacancies in other divisions and institutions in DHR.

8. Pursuant to law and policy DHR had certain responsibilities to Britt:

- a. DHR was required to give notice to Britt of her impending RIF as soon as possible and preferably at least forty-five (45) calendar days prior to the scheduled separation;
- b. Simultaneously with notifying Britt of her RIF rights, DHR was required to apply to the Office of State Personnel (OSP) that Britt wished to be advantaged by the automated priority referral system operated by OSP;
- c. The personnel manager at Dillon or DYS was required to inform Britt of the location of the combined DHR vacancy report. If Britt made the personnel manager aware of vacancies in which she was interested, the manager was responsible for forwarding a completed, current application to the personnel manager of the division or institution with the vacant position, certifying priority placement status and that the individual meets minimum general qualifications for the position.

9. Pursuant to policy set forth in OSP's PERSONNEL MANUAL, DHR and CC&PS were required to refer to the current Priority Re-employment Inventory when a vacancy occurred. When priority applicants are indicated for the vacancy, the agencies must request a Priority Re-employment Certificate from OSP.

10. Britt was RIFed effective June 30, 1991 at a salary Grade 66, earning Thirty Thousand Six Hundred Fifty-one Dollars (\$30,651.00). On June 15, 1992, DHR re-hired Britt as the Volunteer Services Coordinator at Dorothea Dix Hospital in a salary Grade 63 at a salary of Twenty-nine Thousand Eight Hundred Fifty-two (\$29,852.00) Dollars. The salary is the maximum for Grade 63. Eight Thousand Nine Hundred Forty Dollars (\$8,940) was transferred from DYS to Dix in order to place Britt as close to her former salary as possible.

11. In interrogatories served on DHR, Britt asked DHR to identify all persons within DHR and OSP who contacted Britt about vacancies within state government for which she was eligible in accordance with the policy described above in Finding of Fact 8(c). DHR failed to name any employee of DHR who informed Britt of the locations of the combined departmental vacancy report which DHR policy required be made available to Britt. DHR answered that it had no knowledge of any person from OSP who contacted Britt.

12. DHR gave notice to Britt on June 10, 1991 that her employment would be terminated effective June 30, 1991. Susan Hutchins, Personnel Director of DHR testified that the reduction in force was due to budget shortfalls, that it began developing a RIF plan in February, 1991, that the General Assembly mandated cuts as of June 30, 1991, that DHR was not even aware of until late May 1991 and that the decision to RIF Volunteer Service Directors at DYS was not approved until June 7, 1991.

Gwen Chunn, Director of DYS testified that she began work on the June 1991 RIF in August 1990.

Although all five (5) Volunteer Service Director positions were RIFed in June 1991, only four (4) people were displaced because a person holding one of the positions had taken another position in the Fall of 1990 because of her awareness of the impending RIF.

Chunn testified that she would be surprised if June 10, 1991 was the first that Britt knew of the impending RIF of her position because of talk among DYS employees and publications in the newsletter about impending cuts stating that direct care positions would be the last to be cut.

13. Britt first learned of the existence of a "RIF Register" in January 1992 as the result of a conversation with employees of OSP.

14. On June 19, 1991, Britt applied for the position Rehabilitation Therapeutic Activity Coordinator (Grade 66) at the John Umstead Hospital. (P1, #1) Umstead is an institution within DHR.

Britt was told of the vacancy by Susan Fortner, who was Personnel Manager for DYS. Fortner told Britt she had discussed the vacancy with Gail Harvey in the personnel department at Umstead and that they felt Britt was qualified for the vacancy.

15. On July 16 or 19, 1991, Britt went to see Secretary Flaherty, Secretary of DHR on a matter unrelated to this contested case. Secretary Flaherty asked Britt how she liked her job at Umstead. Britt told the Secretary she was not working there, and that she had not interviewed. Secretary Flaherty asked Britt if she were interested. Britt responded that she was, and Flaherty told her he would see she got an interview. At the end of the meeting, Flaherty called Hutchins into his office, introduced her to Britt, told Hutchins a little about Britt's work history and told Hutchins that he wanted her to do what she could to help Britt find a job.

In 1985, Secretary Flaherty had made the comment to Britt one time that if she wanted to get ahead at DHR, she knew what she needed to do. Britt interpreted the remark to mean that she needed to change her registration from Democrat to Republican.

16. Britt called and arranged for an interview. She interviewed on August 19, 1991 and on August 20, 1991 was rejected for the job for the reason that she lacked the minimum qualifications for the position.

17. The specification for the position of Rehabilitation Therapy Coordinator provides that the minimum education and experience is graduation from a four (4) year college with a degree in recreation, physical education, or a human services field and two years of experience in therapeutic programming which involves program/goal planning.

18. Britt received a B.S. degree from Wake Forest University in 1953. Her major areas of course work were health, physical education and recreation. From September 1953 to June 1956, Britt taught junior high school girls health and P.E. and coached basketball and tennis.

From 1958 to 1959, Britt taught math, health and P.E. to seventh graders. In 1979, Britt taught all subjects to eighth (8th) graders in the Robeson County Schools, and in 1978 and 1979 was a tutor for reading, math, geography, and typing at Robeson Community College.

From August 1979 to June 1980, Britt was the Business Administrator at the C. A. Dillon School. In June, 1980, Britt became the Director of Volunteer Services at Dillon. In March, 1991, she assumed the additional responsibility of Staff Training Coordinator.

At the meeting in March 1991 at which this additional duty was assigned, Chunn stated to the four Volunteer Services Directors in attendance that they knew how they had gotten their jobs, and knew how they could lose them. Britt had originally received her job by appointment of the Governor. Britt thought the remark was unusual, and now believes it to be a comment about the impending RIF of her position.

19. After being rejected for the position, Britt talked with Flaherty and asked for reconsideration because a lot of her work in recreation had been in unpaid positions and had not been on her application. The Secretary encouraged Britt to write a letter asking for reconsideration listing everything she had done in the field of recreation. Britt did so.

20. On September 9, 1991, Umstead again rejected Britt's application for the reason that she lacked the minimum qualifications.

21. Britt believes she met the qualifications for the Rehabilitation Therapeutic Activity Coordinator position because of her experience teaching health and P.E., her work with adolescents, her college degree in teaching, and her recreational work.

22. No evidence was presented by DHR during the contested case hearing regarding why Umstead concluded Britt was not qualified for position #1.

23. Position #1 was frozen at the time Britt applied for it. The position was filled in June 1992, after Britt became employed at Dix by Ms. Toni Rankin. Rankin received her B.A. in Psychology from East Carolina University in 1984 and is well qualified for the position. DHR did not describe Rankin as a permanent state employee in its answers to interrogatories. Rankin was not recommended by the Governor or Secretary Flaherty.

24. In July 1991, Britt began working with Joyce Weathersby, a Personnel Analyst at OSP. Weathersby works with people who have been RIFed.

Part of Weathersby's duties are to evaluate RIFed employee's qualifications to determine if that person meets the minimum qualifications for a position. It is then the responsibility of the interviewing agency to determine if the applicant is qualified for the vacancy. Weathersby does not refer RIFed employees for interviews for vacancies unless she is satisfied they have the minimum qualifications described for the position.

Weathersby suggested Britt apply for the following positions listed in Ex. 1:

1	9	31
2	20	
3	23	
8	27	

25. On October 3, 1991, Britt applied for two positions at Murdoch Center, DHR Advocate I and DHR Advocate II. (Ex. 1, #2, 3). On October 3, 1991, Robert Sumpter, Personnel Manager of Murdoch wrote Britt a letter rejecting her application on the basis that "... the educational and experience qualifications of the Advocate I and II positions do not match up to [Britt's] very rich background...."

The Advocate I position was pay Grade 68. The Advocate II position was pay Grade 69. There is no evidence that the positions were filled by someone recommended by the Secretary of DHR or the Office of the Governor.

DHR filled the positions of Advocate I and Advocate II with state employees employed at Murdoch who were qualified for the positions.

26. On November 7, 1991, Britt applied for the position of Community Services District Coordinator for Wake County. The position is with CC&PS and is a salary Grade 64. Britt was not interviewed. The position was eventually filled by a Community Services District Coordinator for Wilson County who commuted daily from Raleigh to Wilson. The state employee transferred into the position requested the transfer because of a degenerative eye condition which made it dangerous for her to drive after dark.

27. On November 13, 1991, Britt applied for the position of Facility Services Administrator I with DHR (Ex.1, #9). The position is at salary Grade 67. On November 13, 1991, Britt interviewed for the position. Britt met the minimum requirements for the position.

On February 3, 1992, Jacquelyn A. Norris, Head of the Health Care Facilities Branch wrote Britt that she had not been chosen, and that the position had been offered to Wayne Denning. Denning accepted the position. Denning was a permanent state employee employed as the manager of the Courier Service. Denning was recommended for the position by the Governor's office.

28. When an applicant was recommended to Respondents by the Governor's office or the office of the Department Secretary, the applicant went on a "must interview" list.

29. On December 20, 1991, Britt applied for the position of Staff Development Specialist III with DYS (Ex. 1, #15). The position is a salary Grade 70. Britt met the minimum requirements for the position. Britt was not hired to fill the position.

30. The Staff Development Specialist III position was filled by Kim Davis-Gore at a salary of around Thirty Thousand Dollars (\$30,000). Gore was not recommended by either the office of the Governor or the DHR Secretary but was recommended by George Jones, an Assistant Secretary of DHR.

31. Chunn testified that Davis-Gore was the most qualified person who applied for the position. Chunn testified that traditionally the person who holds the Staff Development Specialist III position has had a Master's Degree. The client base the position serves is seventy percent (70%) black and eighty-five percent (85%) male. Chunn testified that DYS had an affirmative action plan, and that in addition to being most qualified for the position, Davis-Gore, who is a black female, was hired pursuant to the plan.

32. The Staff Development Specialist III position was not part of DYS' affirmative action plan in 1991. On Davis-Gore's application, an "x" appears next to the word "yes" in the column "Grad?" indicating she had a Master's Degree in Criminal Justice from the University of South Carolina. In answers to interrogatories

propounded by Britt, DHR answered that Davis-Gore had thirty-six (36) hours toward her M.A. in Criminal Justice.

33. Britt was interviewed for the job filled by Davis-Gore because she met the minimum qualifications for the position, but not hired because she had no priority right to the job. If Britt had been offered the job and turned it down, her RIF rights would have terminated.

34. Before moving to the Staff Development Specialist position, Davis-Gore was a Unit Administrator at the Dillon School. As such, she oversaw programming in a unit housing thirty-three (33) male youths, and counseled students and staff as needed.

35. When the decision to hire Davis-Gore was made, Chunn had no knowledge that Britt had teaching experience. At the time of the hearing of this case, Chunn was aware that Britt is a professional teacher, but that awareness was irrelevant to Chunn because she would have wanted to have observed Britt's teaching. Chunn believes that Britt had no experience in stand up design and delivery of training.

36. Davis-Gore is well qualified for the position of Staff Development Specialist III.

37. On January 14, 1992, Britt applied for the position of Personnel Analyst in the Office of the Secretary of DHR. (Ex. 1, #19) The position is at salary Grade 70. Britt met the minimum requirements for the position. Britt was not interviewed for the position. The evidence suggests that no such position actually existed.

38. On January 21, 1992, Britt applied for the position of Volunteer Service Program Consultant in the Office of the Secretary of DHR (Ex. 1, #20). The position is at salary Grade 70.

In response to interrogatories propounded by Britt asking DHR to identify those positions for which Britt did not meet the minimum requirements, DHR did not list position #20.

Britt met the minimum qualifications for the position. Britt was not interviewed, because in Hutchins' words, she was not qualified and had no RIF priority for the job. Kathy Watson, the Personnel Manager in the Office of the Secretary of DHR testified that the supervisor of the position, Will Lindsey, determined that Britt did not have the background they needed in that particular role. Lindsey was looking for someone who had some training and experience in managing training workshops. Britt received no letter stating why she was not selected for the position.

39. Dot Ling, a permanent state employee, filled the position. Ling was recommended by Secretary Flaherty.

40. Ling was interested in the position because she was in an exempt position and interested in transferring to a position subject to the Personnel Act. Position #20 is subject to the Personnel Act. Before moving to position #20, Ling served as Special Assistant to the Secretary of Correction for six (6) years and eight (8) months.

41. The "Minimum Education and Experience" required for the position of Volunteer Services Program Consultant I are, ["g]raduation from a four (4) year college or university and three years of experience in human service programs or community development work including at least eighteen (18) months of experience in a volunteer services program in a hospital, institution, or community program, one of which should have been in coordinating or directing the program, or an equivalent combination of education and experience."

42. Ling does not have a degree from a four-year college.

43. Ling's application for position #20 is dated August 6, 1991 and was received in the DHR Secretary's office on September 30, 1991. The last (2) two pages of Ling's application were received by the Secretary's

office on January 31, 1992, but were not used in the analysis that Ling qualified for the position.

44. Kathy Watson analyzed Ling's application and determined that she met the minimum qualifications for position #20. Watson determined that Ling's one (1) year of Business College experience, four (4) years as Associate Director of the Mental Health Association in North Carolina, three and a half (3 1/2) years as Regional Administrator of the Patient Advocate Program at Dorothea Dix Hospital, and one (1) year of part time work as a Community Education Coordinator of Drug Action of Wake County met the equivalency requirement for the job.

45. Ling meets the minimum qualifications for position #20.

46. Britt has known Secretary Flaherty for approximately twenty-five (25) years since Mr. Flaherty and Mrs. Britt's deceased husband served in the General Assembly together. Secretary Flaherty knew Britt to be an active Democrat.

During the race between Lt. Governor Jordan and Governor Martin, Britt served on Mr. Jordan's steering committee. This was known to officials at DYS.

Britt believes that if anybody in DHR helped her in the process of finding a job after she was RIFed, it was Secretary Flaherty. Britt testified that about two (2) weeks after she became re-employed in June 1992, she had lunch with Secretary Flaherty. He asked her how she was getting along in her new job, and told Britt he had worked very hard to get Faye McArthur promoted to the Director II position and to get Britt placed in the Volunteer Coordinator position that McArthur vacated.

Britt feels that Secretary Flaherty discriminated against her when Dot Ling was hired for the position of Volunteer Service Program Consultant (Ex. 1, #20) because Ling was a Republican, had not been RIFed, and was moved from an exempt position to one subject to the Personnel Act, and when McArthur, who she believes to be a Republican was promoted to the position of Volunteer Service Director II.

47. On January 28, 1992, Britt applied for a Staff Development position in the DHR Secretary's office (Grade 72). In response to interrogatories propounded by Britt, DHR did not identify this position (Ex. 1, #21) as a position for which Britt did not meet the minimum qualifications. Britt met the minimum qualifications for position #21.

48. Britt was not interviewed for position #21.

49. Position #21 was filled by Barbara Kunz. Kunz was not recommended by either the Governor or a department secretary.

50. Kunz was referred to Susan Hutchins by G. C. Davis, Jr. Assistant Director of the Office of State Personnel. Davis told Hutchins that Kunz had been in a training position at OSP, and was a prospective RIF because of cuts mandated by the General Assembly. Davis told Hutchins that Kunz had been informally notified that her position would be RIFed, that Kunz had not been given official RIF notification, and that if he needed to go ahead and give Kunz a RIF notice so she would have formal RIF status that he was willing to do that. Davis asked Hutchins to consider Kunz and Hutchins said she would be happy to do so because of Kunz's credentials, and employment in a higher level position at OSP than position #21.

51. The evidence is contradictory as to Kunz's status as a permanent state employee. In answer to interrogatories propounded by Britt, DHR identifies Kunz as a permanent employee. Yet, Hutchins testified that Kunz was described as a "trainee" and that one of the reasons she considered Kunz was that she was in a higher position at OSP than position #21, which was at pay Grade 72.

Kunz's application indicates that she was employed by OSP for one year and two months from November 15, 1990 at an annual salary of \$30,000.00. The application appears to indicate in handwriting within the box marked "Starting Salary" that Kunz was employed at a salary grade of 70.

It is permissible to infer from the evidence that Kunz was not employed at OSP at a salary grade 60 or lower and was not a permanent State employee.

52. DHR acknowledges in the answers to interrogatories propounded by Britt that Kunz had no RIF rights under Chapter 126 of the General Statutes of North Carolina.

53. Kunz was qualified for position #21.

54. On February 5, 1992, Britt applied for the position of Personnel Technician at DYS (Ex. 1, #23). The position is set at salary Grade 66, the same salary Grade in which Britt was employed when RIFed from Dillon School within DYS. Britt was not interviewed for the position. Britt was notified by letter dated March 26, 1992 signed by Grady Stephenson that he had determined she did not qualify for the position because she did not have enough personnel-related experience in order to qualify for the position.

55. The minimum education and experience for position #23 is , " [g]raduation from high school and (5) five years of progressively responsible clerical-administrative or administrative work, preferably with two (2) years of experience in a personnel office; or graduation from a four (4) year college or university and six (6) months of personnel related experience; or equivalent experience demonstrating the required knowledge and abilities."

56. The contact person for position #23 was Grady Stephenson, Personnel Director of DYS.

57. Stephenson did not select Britt because, as he wrote in a memo dated November 23, 1992, Britt "...did not have any personnel-related experience. [Stephenson] did not feel she would qualify."

58. Weathersby of OSP felt Britt met the minimum qualifications for position #23, and recommended she apply.

59. In determining that Britt was not qualified for position #23, Stephenson consulted with Susan Hutchins and her subordinate, Candace Slate.

60. Stephenson was familiar with Britt's work as an Administrative Officer for ten (10) months in 1979 and 1980. Stephenson prorated the time Britt would have spent on personnel matters in that position as twenty percent (20%). Stephenson made this determination without interviewing Britt. As a result, of the pro-ration, Stephenson determined that Britt had the equivalent of two (2) months of experience in personnel matters.

61. In order to meet the minimum qualifications as an Administrative Officer I, an applicant must have graduated from a four (4) year college and have one (1) year of experience in personnel, budgeting, research, or administrative management. Britt qualified for and held this position in 1979.

62. Jesselyn Bickham filled position #23. Bickham has a B.A. in Political Science from Fayetteville State University, and a Master's in Public Administration from North Carolina Central University awarded in 1987. Prior to filling position #23, Bickham had worked at Murdoch Center for two years and seven (7) months as an Employee Relations Officer and for ten and a half (10 1/2) months as a Personnel Manager in the Division of Health Services, DHR.

DHR answered in response to Britt's interrogatories that Bickham was recommended by the offices of the Governor and the Secretary of DHR, that Bickham had no RIF rights, and that she had been a state employee for three (3) years and five (5) months. DHR does not characterize Bickham in its answers as a permanent state employee.

63. Stephenson acknowledged in his testimony that if Britt were determined to have met the minimum qualifications for position #23, she would have had priority over Bickham.

64. Bickham is well qualified for position #23. Bickham is better qualified than Britt for position #23.

Britt meets the minimum qualifications for position #23.

65. On February 5, 1992, Britt applied for the position of Rehabilitation Therapeutic Supervisor with DYS (Ex. 1, #24). The position is graded at salary Grade 68. In answers to interrogatories propounded by Britt, DHR did not identify the position as one for which Britt failed to meet the minimum qualifications. Britt is qualified for the position.

Britt was interviewed on March 15, 1992 and rejected for the position on June 10, 1992, after she was hired at Dix.

66. Stephenson, the Personnel Director of DYS, wrote on November 23, 1992, in a memo to Candace Slate, that Britt was not selected because she did not have any firsthand knowledge of cottage life or therapeutic recreation programs.

67. Ricky Bunch, a black male thirty-three (33) years of age, was chosen for the position. Chunn testified that Bunch was hired pursuant to the Affirmative Action Plan. Seventy percent of the students served are black, eighty-five percent (85%) are male, and Chunn felt the central office needed a black male that could relate to black males.

68. The kinds of positions covered by the 1991 Affirmative Action plan were teachers, administrative support, and clerical.

69. Bunch had no RIF priority for position #24. Prior to assuming the position, he was not an employee of DYS.

70. On February 6, 1992, Britt applied for the position of Community Development Specialist I (position 01259) with the Governor's Crime Commission (Ex. 1, #25). The position is at Grade 70. Ms. Beth Crews was chosen to fill the position. Crews was a permanent state employee and was recommended for the position by the Secretary of Crime Control. Crews had no RIF priority rights.

71. Britt applied for the position of Community Development Specialist I (position 01240) on February 19, 1992 (Ex. 1, #31). The position is at Grade 70. Mr. Jim Butler was chosen to fill the position. Butler was a permanent state employee and was not recommended by a cabinet Secretary or the Office of the Governor. Butler had no RIF priority rights. Butler is forty-five (45) years old.

72. Britt met the minimum qualifications for all positions applied for with CC&PS.

73. Britt interviewed for position #25 and position #31 on March 3, 1992 with Dr. Dwight Jarvis. Jarvis supervised the two (2) positions. Jarvis interviewed twenty-two (22) people, and after the interviews, forwarded (8) eight applications to Marshburn for consideration. Britt's application was among the eight (8).

Britt was rejected for the positions by letter dated March 27, 1992, signed by Bruce Marshburn, Executive Director of the Governor's Crime Commission.

74. Britt spoke by telephone on March 31, 1992 with Marshburn. Britt's testimony and Marshburn's testimony is somewhat conflicting:

- a. Britt testified that Marshburn said there was no criticism from her interview, but that at Britt's age, she was too old to do the travel. Then Marshburn related to Britt they had some females in the department who had to do some traveling and one of them was coming back very late at night and the state car broke down, and he was concerned about having to put a female out on the road. Marshburn told Britt at her age he did not feel like she could do the travel;
- b. Marshburn testified that he remembered speaking with Britt, but not the date of the

conversation. Marshburn does not recall Britt asking for any constructive criticism because he would not have been in a position to give her any since he did not interview her. Britt explained that she had called Dr. Jarvis and that he had suggested that Britt call Marshburn.

Marshburn testified that he wanted to talk with Britt about travel, because on her application she had not checked the block indicating she would accept work involving travel. Britt told him she would not object to traveling. Marshburn recalls discussing with Britt problems of female employees that have traveled. Marshburn is concerned about people traveling in general, especially those who travel late at night.

Marshburn testified that he is fifty-two (52) years old, and told Britt that being fifty-two (52) he did not enjoy traveling as much as he used to; that he had always enjoyed traveling, but the older he got the more concerned he is about traveling and the more of a burden it is.

Marshburn denied that he had told Britt that at her age she was too old to travel, saying, "I would not have made a statement like that."

75. At one point during cross examination by Britt's counsel, Marshburn acknowledged that he did discuss with Britt the problems of female employees that have traveled. Later, during that cross examination, Marshburn said that the problem of two (2) female employees being stranded late at night was in his mind when he was talking with Britt. At the close of the cross examination, the judge asked Marshburn to clarify his testimony. Marshburn replied, "I was concerned about that in my own mind. I wanted to relay to her the experience that we had just gone through in our office. And I think that I did relay that about the two (2) female employees who had broken down on the highway."

76. Notes taken by Britt and introduced by Britt as Ex. 4A and by CC&PS as CC&PS 5 indicate that on March 3, Dr. Jarvis asked Britt if she realized positions #25 and #31 were appointed and approved by the Governor, and that on March 31 Mr. Marshburn told Britt she had been rejected due to age and travel.

77. Beth Crews' husband was, at one time during the Martin Administration, the Deputy Secretary of the Department of Corrections, and prior to that Assistant Secretary of CC&PS. Secretary Dean of CC&PS asked Marshburn if he had an objection to hiring Crews for position #25. Marshburn was familiar with Crews through Dr. Jarvis with whom she had worked, and who was complimentary of her work performance. Marshburn responded that he had no objection to hiring Crews. Crews is qualified for the position.

78. Jim Butler, who was hired for position #31 had been an employee with the Department of Corrections for over twenty years. Butler is forty-five (45) years old. Butler was not recommended by either the office of the Governor or a cabinet secretary.

79. Britt applied for the position of Community Development Specialist in the Office of the Secretary of DHR on March 2, 1992 (Ex. 1, #33). The position is graded at Grade 70. Britt was not interviewed. Britt met the minimum qualifications for the job.

80. The job was posted for internal DHR applicants only. Barbara Jordan was hired for the position. Jordan was a permanent employee with no RIF priority rights and was recommended by the Office of the Secretary of DHR. Jordan is qualified for the position.

81. Britt applied for the position of Medical Assistant at DHR on April 2, 1992 (Ex. 1, #37). The position is graded at Grade 67. Britt met the minimum qualifications for the job.

82. Angela Haikonen was hired for the position. Haikonen was a permanent state employee, with no RIF priority rights. Haikonen was not recommended by the Governor or Secretary of DHR.

83. On April 14, 1992, Britt applied for the position of Community Service District Coordinator for Wake County (position #09048) at CC&PS. (Ex. 1, #40). The position is graded at salary Grade 64. Britt met the

minimum qualifications for the position.

84. Britt interviewed for the position on May 7 or 8, 1992. The position was offered to Sherry Goad. Goad was not a state employee and had no priority rights for the position. Goad began work in the position on June 10, 1992, at an annual salary of Twenty-two Thousand One Hundred Nine (\$22,109) Dollars.

85. Britt was rejected for the Wake County District Coordinator position on May 27, 1992. Ziedman testified that Chief District Court Judge Bullock actively participates in the selection of coordinators in his judicial district, in an apparent attempt to show why Britt was not hired. There is no evidence that Britt's application was placed before Judge Bullock, that he rejected Britt, or would have rejected Britt.

86. Art Zeidman was the Director of Victim and Justice Services Division with CC&PS, and supervised the Community Service District Coordinator positions. On May 27, 1992, Zeidman telephoned Britt and offered her a Community Service District Coordinator position in Charlotte. The position is the same position and at the same salary Grade as the position #40. Britt lives in Durham, so the position was well outside a thirty-five (35) mile radius of her home. Britt turned the position down, but did not forfeit her RIF rights.

87. On April 24, 1992, Britt applied for the position of Director of Volunteer Services III at Dorothea Dix Hospital, a position within DHR. (Ex. 1, #45). The position would be graded at salary Grade 70.

88. Also on April 24, 1992, Britt applied for the position of Director of Volunteer Services II at Dorothea Dix Hospital, a position within DHR. (Ex. 1, #46). The position is graded at salary Grade 68. Britt met the minimum qualifications for the position.

89. Britt interviewed for both jobs on May 15, 1992, and learned that the Director III job did not exist. (Ex. 1, #45).

90. Faye McArthur was hired for the Director II position. McArthur had been serving in the position of Volunteer Services Coordinator at Dorothea Dix, a position supervised by the Director II position.

91. McArthur was not a permanent state employee and was recommended by Secretary Flaherty for the promotion. McArthur is qualified for the position and vacancy.

92. On June 9, 1992, McArthur interviewed Britt for the position she had just vacated, Volunteer Services Coordinator at Dix (Ex. 1, #63). McArthur offered the job to Britt on June 15, 1992, and Britt accepted the position.

93. Secretary Flaherty played an active role in getting McArthur promoted and Britt hired in the Volunteer Services Coordinator position (salary Grade 63).

94. When McArthur vacated the Coordinator position she was earning Twenty Thousand Five Hundred Twenty-one Dollars (\$20,521.00). Secretary Flaherty had stated the position when the RIF took place in June 1991, that should employees be re-instated, it should be as close as possible to the salary they left. Britt was employed in the Coordinator position at an annual salary of Twenty-nine Thousand Eight Hundred Fifty-two Dollars (\$29,852.00), the maximum salary for a grade 63 position. The salary represented a cut of Seven Hundred Ninety-nine Dollars (\$799.00) and a drop of three (3) grades.

Based on the foregoing, the undersigned makes the following:

CONCLUSIONS OF LAW

1. DHR failed to follow procedures applicable in RIF cases. The evidence is insufficient to conclude that CC&PS failed to follow procedures mandated by law.

2. DHR denied RIF priority rights to Britt when it failed to hire her for the following positions listed

on Petitioner's Ex. 1:

- a. #1
- b. #23

3. CC&PS denied RIF priority rights to Britt when it failed to hire her for position #40 on Petitioner's Exhibit #1.

4. Secretary Flaherty has no personal animus towards Britt. Secretary Flaherty has been Britt's patron. The conclusion of law that DHR discriminated against Britt because of political affiliation could not be based on the personal actions or intent of Secretary Flaherty.

5. Rather, the conclusion that DHR or CC&PS discriminated against Britt because of political affiliation is based on a systemic priority being given to applicants who are recommended by the Governor or cabinet secretary over a qualified applicant who had RIF status and who was not recommended by the Governor or cabinet secretary.

6. Assuming, for the purposes of this conclusion of law only, that Mr. Marshburn's version of his conversation with Mrs. Britt is correct, Britt established a prima facie case of age discrimination with regard to position #31.

7. CC&PS rebutted the prima facie case by showing that it hired a qualified person who, as a permanent state employee, had priority consideration.

8. Britt's evidence does not show that the legitimate non-discriminatory reason offered by CC&PS for hiring Butler rather than Britt is pretextual.

9. Britt established a prima facie case of political discrimination against DHR with regard to six (6) positions listed on Petitioner's Exhibit #1:

- | | | |
|--------|--------|--------|
| a. #9 | c. #20 | e. #33 |
| b. #15 | d. #23 | f. #46 |

10. DHR was able to show a legitimate, non-discriminatory reason for its action in six (6) positions.

11. Britt's evidence does not show that the reasons given by DHR were pretextual.

12. Britt established a prima facie case of political discrimination against CC&PS with regard to position #25 on Petitioner's Exhibit #1.

13. CC&PS was able to show a legitimate non-discriminatory reason for hiring Crews.

14. Britt's evidence does not show that the reasons given by CC&PS are pretextual.

Based on the foregoing, the undersigned makes the following recommendation to the Personnel Commission:

RECOMMENDED DECISION

It is recommended that Britt be compensated as if she had been placed in position #1 by DHR.

Accordingly, Britt should be paid by DHR the salary she was receiving when she was RIFed, together with any legislative raises, from and after September 20, 1991. Since position #1 is a Grade 66, this relief

will necessarily result in a raise beyond the maximum salary for a Grade 63 position, from September 20, 1991 until Britt retires.

DHR should reimburse Britt for health benefits, vacation, and sick leave lost between September 20, 1991 and June 6, 1992.

With regard to Britt's probationary status, the time between September 20, 1991 and June 6, 1992 should, at the least, be credited towards Britt's status as a permanent employee. The fact that Britt was placed in a probationary status, rather than permanent, after long years of service with no evidence of any discipline is shocking, and it is further recommended that Britt be returned to her pre-RIF status as a permanent employee.

Reasonable attorneys fees should be re-couped from DHR and CC&PS.

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 agency decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

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

This the 26th day of May, 1993.

Thomas R. West
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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5	Correction	Chiropractic Examiners	10
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