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The **NORTH CAROLINA REGISTER**

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ISSUE DATE: October 1, 1993

Volume 8 • Issue 13 • Pages 1185 - 1307



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.

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NORTH CAROLINA REGISTER



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NORTH CAROLINA REGISTER
Publication Schedule
(July 1993 - May 1994)

Volume and Issue Number	Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing 15 days from notice	* End of Required Comment Period 30 days from notice	Last Day to Submit to RRC	** Earliest Effective Date
8:7	07/01/93	06/10/93	06/17/93	07/16/93	08/02/93	08/20/93	10/01/93
8:8	07/15/93	06/23/93	06/30/93	07/30/93	08/16/93	08/20/93	10/01/93
8:9	08/02/93	07/12/93	07/19/93	08/17/93	09/01/93	09/20/93	11/01/93
8:10	08/16/93	07/26/93	08/02/93	08/31/93	09/15/93	09/20/93	11/01/93
8:11	09/01/93	08/11/93	08/18/93	09/16/93	10/01/93	10/20/93	12/01/93
8:12	09/15/93	08/24/93	08/31/93	09/30/93	10/15/93	10/20/93	12/01/93
8:13	10/01/93	09/10/93	09/17/93	10/18/93	11/01/93	11/22/93	01/01/94
8:14	10/15/93	09/24/93	10/01/93	11/01/93	11/15/93	11/22/93	01/01/94
8:15	11/01/93	10/11/93	10/18/93	11/16/93	12/01/93	12/20/93	02/01/94
8:16	11/15/93	10/22/93	10/29/93	11/30/93	12/15/93	12/20/93	02/01/94
8:17	12/01/93	11/05/93	11/15/93	12/16/93	01/03/94	01/20/94	03/01/94
8:18	12/15/93	11/24/93	12/01/93	12/30/93	01/14/94	01/20/94	03/01/94
8:19	01/03/94	12/08/93	12/15/93	01/18/94	02/02/94	02/21/94	04/01/94
8:20	01/14/94	12/21/93	12/30/93	01/31/94	02/14/94	02/21/94	04/01/94
8:21	02/01/94	01/10/94	01/18/94	02/16/94	03/03/94	03/21/94	05/01/94
8:22	02/15/94	01/25/94	02/10/94	03/02/94	03/17/94	03/21/94	05/01/94
8:23	03/01/94	02/08/94	02/15/94	03/16/94	03/31/94	04/20/94	06/01/94
8:24	03/15/94	02/22/94	03/10/94	03/30/94	04/14/94	04/20/94	06/01/94
9:1	04/04/94	03/11/94	03/18/94	04/19/94	05/04/94	05/20/94	07/01/94
9:2	04/15/94	03/24/94	03/31/94	05/02/94	05/16/94	05/20/94	07/01/94
9:3	05/02/94	04/11/94	04/18/94	05/17/94	06/01/94	06/20/94	08/01/94
9:4	05/16/94	04/25/94	05/02/94	05/31/94	06/15/94	06/20/94	08/01/94

Note: Time is computed according to the Rules of Civil Procedure, Rule 6.

* An agency must accept comments for at least 30 days after the proposed text is published or until the date of any public hearing, whichever is longer. See G.S. 150B-21.2(f) for adoption procedures.

** 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 day of the next calendar month.

Revised 07/93

CHAPTER 7A, SUBCHAPTER XII, ARTICLE 60

OFFICE OF ADMINISTRATIVE HEARINGS

[The following excerpt contains the statutory provisions that govern the Office of Administrative Hearings as amended October 1, 1993.]

§ 7A-750. Creation; status; purpose. -- There is created an Office of Administrative Hearings. The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it is created. The Office of Administrative Hearings is established to provide a source of independent hearing officers to preside in administrative cases and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process. It shall also maintain dockets and records of contested cases and shall codify and publish all administrative rules.

§ 7A-751. Agency head; powers and duties. -- The head of the Office of Administrative Hearings is the Chief Administrative Law Judge. He shall serve as Director and have the powers and duties conferred on him by this Chapter and the Constitution and laws of this State. His salary shall be fixed by the General Assembly in the Current Operations Appropriations Act. In lieu of merit and other increment raises, the Chief Administrative Law Judge shall receive longevity pay on the same basis as is provided to employees of the State who are subject to the State Personnel Act.

§ 7A-752. Chief Administrative Law Judge appointments; vacancy. -- The Chief Administrative Law Judge of the Office of Administrative Hearings shall be appointed by the Chief Justice for a term of office of four years. The first Chief Administrative Law Judge shall be appointed as soon as practicable for a term to begin on the day of his appointment and to end on June 30, 1989. Successors to the first Chief Administrative Law Judge shall be appointed for a term to begin on July 1 of the year the preceding term ends and to end on June 30 four years later. A Chief Administrative Law Judge may continue to serve beyond his term until his successor is duly appointed and sworn, but any holdover shall not affect the expiration date of the succeeding term.

The Chief Administrative Law Judge shall designate one administrative law judge as senior administrative law judge. The senior administrative law

judge may perform the duties of Chief Administrative Law Judge if the Chief Administrative Law Judge is absent or unable to serve temporarily for any reason.

§ 7A-753. Additional Administrative Law Judges; appointment; specialization. -- The Chief Administrative Law Judge shall appoint additional administrative law judges to serve in the Office of Administrative Hearings in such numbers as the General Assembly provides. No person shall be appointed or designated an administrative law judge except as provided in this Article.

The Chief Administrative Law Judge may designate certain administrative law judges as having the experience and expertise to preside at specific types of contested cases and assign only these designated administrative law judges to preside at those cases.

§ 7A-754. Qualifications; standards of conduct; removal. -- Only persons duly authorized to practice law in the General Court of Justice shall be eligible for appointment as the Director and chief administrative law judge or as an administrative law judge in the Office of Administrative Hearings. Neither the chief administrative law judge nor any administrative law judge may engage in the private practice of law as defined in G.S. 84-2.1 while in office; violation of this provision shall be grounds for removal. Each administrative law judge shall take the oaths required by Chapter 11 of the General Statutes. An administrative law judge may be removed from office by the Director of the Office of Administrative Hearings for just cause, as that term is used in G.S. 126-35.

§ 7A-755. Expenses reimbursed. -- The Chief Administrative Law Judge of the Office of Administrative Hearings and all administrative law judges shall be reimbursed for travel and subsistence expenses at the rates allowed to State officers and employees by G.S. 138-6(a).

§ 7A-756. Power to administer oaths and issue subpoenas. -- The chief administrative law judge and all administrative law judges in the Office of Administrative Hearings may, in connection with any pending or potential contested case under Chapter 150B:

(1) Administer oaths and affirmations;

(2) Sign and issue subpoenas in the name of the Office of Administrative Hearings requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence; and

(3) Apply to the General Court of Justice, Superior Court Division, for any order necessary to enforce the powers conferred in this Article.

§ 7A-757. Temporary administrative law judges; appointments; powers and standards; fees. -- When regularly appointed administrative law judges are unavailable, the Chief Administrative Law Judge of the Office of Administrative Hearings may contract with qualified individuals to serve as administrative law judges for specific assignments. A temporary administrative law judge shall have the same powers and adhere to the same standards as a regular administrative law judge in the conduct of a hearing. A temporary administrative law judge shall not be considered a State employee by virtue of this assignment, and shall be remunerated for his service at a rate not to exceed three hundred dollars (\$300.00) per day and shall be reimbursed for travel and subsistence expenses at the rate allowed to State officers and employees by G.S. 138-6(a). The Chief Administrative Law Judge may also designate a full-time State employee to serve as a temporary administrative law judge with the consent of the employee and his supervisor; however, the employee is not entitled to any additional pay for this service.

§ 7A-758. Availability of administrative law judge to exempt agencies. -- The Chief Administrative Law Judge of the Office of Administrative Hearings may, upon request of the head of the agency, provide an administrative law judge to preside at hearings of public bodies not otherwise authorized or required by statute to utilize an administrative law judge from the Office of Administrative Hearings including, but not limited to, State agencies exempt from the provisions of Chapter 150B, municipal corporations or other subdivisions of the State, and agencies of such subdivisions.

§ 7A-759. Role as deferral agency. -- (a) The Office of Administrative Hearings is designated to serve as the State's deferral agency for cases deferred by the Equal Employment Opportunity Commission to the Office of Administrative Hearings as provided in Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, or the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* for charges filed by State or local government employees covered

under Chapter 126 of the General Statutes and shall have all of the powers and authority necessary to function as a deferral agency.

(b) The Chief Administrative Law Judge is authorized and directed to contract with the Equal Employment Opportunity Commission for the Office of Administrative Hearings to serve as a deferral agency and to establish and maintain a Civil Rights Division in the Office of Administrative Hearings to carry out the functions of a deferral agency.

(c) In investigating charges an employee of the Civil Rights Division of the Office of Administrative Hearings specifically designated by an order of the Chief Administrative Law Judge filed in the pending case may administer oaths and affirmations.

(d) Any charge not resolved by informal methods of conference, conciliation or persuasion shall be heard as a contested case as provided in Article 3 of Chapter 150B of the General Statutes.

(e) Notwithstanding G.S. 150B-34 and G.S. 150B-36, an order entered by an administrative law judge after a contested case hearing on the merits of a deferred charge is a final agency decision and is binding on the parties. The administrative law judge may order whatever remedial action is appropriate to give full relief consistent with the requirements of federal statutes or regulations.

(f) In addition to the authority vested in G.S. 7A-756 and G.S. 150B-33, an administrative law judge may monitor compliance with any negotiated settlement, conciliation agreement or order entered in a deferred case.

(g) The standards of confidentiality established by federal statute or regulation for discrimination charges shall apply to deferred cases investigated or heard by the Office of Administrative Hearings.

(h) Nothing in this section shall be construed as limiting the authority or right of any federal agency to act under any federal statute or regulation.

CHAPTER 150B

THE ADMINISTRATIVE PROCEDURE ACT

[The following excerpt contains the statutory provisions of the Administrative Procedure Act as amended by the 1993 General Assembly, effective July 23, 1993 and October 1, 1993.]

Article 1.

General Provisions.

§ 150B-1. Policy and scope.

(a) Purpose. -- This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b) Rights. -- This Chapter confers procedural rights.

(c) Full Exemptions. -- This Chapter applies to every agency except:

- (1) The North Carolina National Guard in exercising its court-martial jurisdiction.
- (2) The Department of Human Resources in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes.
- (3) The Utilities Commission.
- (4) The Industrial Commission.
- (5) The Employment Security Commission.

(d) Exemptions From Rule Making. -- Article 2A of this Chapter does not apply to the following:

- (1) The Commission.
- (2) The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-10 and G.S. 104G-11.
- (3) The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-13 and G.S. 130B-14.
- (4) The Department of Revenue, except that Parts 3 and 4 of Article 2A apply to the Department.
- (5) The North Carolina Air Cargo Airport Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.

(e) Exemptions From Contested Case Provisions. -- The contested case provisions of this Chapter apply to all agencies and all proceedings

not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:

- (1) The Department of Human Resources and the Department of Environment, Health, and Natural Resources in complying with the procedural safeguards mandated by Section 680 of Part H of Public Law 99-457 as amended (Education of the Handicapped Act Amendments of 1986).
- (2) ~~The Governor's Waste Management Board in administering the provisions of G.S. 104E-6.2 and G.S. 130A-293.~~
- (3) The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-9, 104G-10, and 104G-11.
- (4) The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-11, 130B-13, and 130B-14.
- (5) Hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated thereunder. G.S. 150B-51(a) is considered a contested case hearing provision that does not apply to these hearings.
- (6) The Department of Revenue.
- (7) The Department of Correction.
- (8) The Department of Transportation, except as provided in G.S. 136-29.
- (9) The Occupational Safety and Health Review Board in all actions that do not involve agricultural employers.
- (10) The North Carolina Air Cargo Airport Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.

(f) Exemption From All But Judicial Review. -- No Article in this Chapter except Article 4 applies to the University of North Carolina.

§ 150B-2. Definitions. -- As used in this Chapter,

- (01) "Administrative law judge" means a person appointed under G.S. 7A-752, 7A-753, or 7A-757.
- (1) "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1a) "Adopt" means to take final action to create, amend, or repeal a rule.
- (1b) "Codifier of Rules" means the Chief Administrative Law Judge of the Office of Administrative Hearings or a designated representative of the Chief Administrative Law Judge.
- (1c) "Commission" means the Rules Review Commission.
- (2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship or grant.
- (2a) Repealed.
- (2b) "Hearing officer" means a person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.
- (4) "Licensing" means any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. "Licensing" does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) "Occupational license" means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) "Occupational licensing agency" means any board, commission, committee or other agency of the State of North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within a particular profession, occupation or field of endeavor, and which is authorized to issue and revoke licenses. "Occupational licensing agency" does not include State agencies or departments which may as only a part of their regular function issue permits or licenses.
- (5) "Party" means any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate. This subdivision does not permit an agency that makes a final decision, or an officer or employee of the agency, to petition for initial judicial review of that decision.
- (6) "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.
- (7) "Person" means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.
- (8) "Residence" means domicile or principal place of business.
- (8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department.

- ment enumerated in G.S. 143-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
- b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, by an occupational licensing board, as defined by G.S. 93B-1, or by the State Board of Elections.
 - c. Nonbinding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:
 - 1. Declaratory rulings under G.S. 150B-4.
 - 2. Orders establishing or fixing rates or tariffs.
 - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.

- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-434.

(8b) "Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.

(9) Repealed.

§ 150B-3. Special provisions on licensing.

(a) When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending a license or occupational license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license.

§ 150B-4. Declaratory rulings.

(a) On request of a person aggrieved, an agency

shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

(b) This section does not apply to the Department of Correction.

Article 2.
Rule Making.
Repealed.

Article 2A.
Rules.

Part 1. General Provisions.

§ 150B-18. Scope and effect.

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article.

§ 150B-19. Restrictions on what can be adopted as a rule.

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

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation.
- (5) Establishes a reasonable fee or other

reasonable charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:

- a. A service to a State, federal, or local governmental unit.
- b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
- c. A transcript of a public hearing.
- d. A conference, workshop, or course.
- e. Data processing services.
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.

§ 150B-20. Petitioning an agency to adopt a rule.

(a) Petition. -- A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) Time. -- An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) Action. -- If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition requesting the creation or amendment of a rule, the notice of rule making it publishes in the North Carolina Register may state that the agency is initiating rule-making proceedings as the result of a rule-making petition, state the name of the person who submitted the rule-making petition, set out the text of the requested rule change submitted

with the rule-making petition, and state whether the agency endorses the proposed rule change.

(d) Review. -- Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Exception. -- This section does not apply to the Department of Correction.

§ 150B-21. Agency must designate rule-making coordinator.

Each agency must designate one or more rule-making coordinators to oversee the agency's rule-making functions. The coordinator must prepare notices of public hearings, coordinate access to the agency's rules, and serve as the liaison between the agency, other agencies, and the public in the rule-making process.

Part 2. Adoption of Rules.

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. -- An agency may adopt a temporary rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A federal regulation.
- (5) A court order.
- (6) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

An agency must prepare a written statement of its findings of need for a temporary rule. The statement must be signed by the head of the agency adopting the rule.

An agency must begin rule-making proceedings for a permanent rule by the day it adopts a temporary rule. An agency begins rule-making proceedings for a permanent rule by submitting to the codifier written notice of its intent to adopt a permanent rule.

(b) Review. -- When an agency adopts a temporary rule it must submit the rule, the agency's written statement of its findings of need for the rule, and the notice of intent to adopt a permanent rule to the Codifier of Rules. Within one business day after an agency submits a temporary rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria listed in subsection (a). In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code.

If the Codifier of Rules finds that the statement does not meet the criteria, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria listed in subsection (a), the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision.

(c) Standing. -- A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) and whether the rule meets the standards in G.S. 150B-21.9 that apply to review of a permanent rule. The court may not grant an *ex parte* temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection

tion must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(d) **Effective Date and Expiration.** -- A temporary rule becomes effective on the date specified in G.S. 150B-21.3. A temporary rule expires on the date specified in the rule or 180 days from the date the rule becomes effective, whichever comes first.

§ 150B-21.2. Procedure for adopting a permanent rule.

(a) **Notice.** -- Before an agency adopts a permanent rule, it must publish notice of its intent to adopt a permanent rule in the North Carolina Register and as required by any other law. The notice published in the North Carolina Register must include all of the following:

- (1) Either the text of the proposed rule or a statement of the subject matter of the proposed rule making.
- (2) A short explanation of the reason for the proposed action.
- (3) A citation to the law that gives the agency the authority to adopt the proposed rule, if the notice includes the text of the proposed rule, or a citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making, if the notice includes only a statement of the subject matter of the proposed rule making.
- (4) The proposed effective date of the proposed rule, if the notice includes the text of the proposed rule, or the proposed effective date of a rule adopted on the subject matter of the proposed rule making, if the notice includes only a statement of the subject matter of the proposed rule making.
- (5) The date, time, and place of any public hearing scheduled on the proposed rule or subject matter of the proposed rule making.
- (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (c) requires the agency to hold a public hearing on the proposed rule when requested to do so.
- (7) The period of time during which and the person to whom written comments may be submitted on the proposed rule or subject matter of the proposed rule making.

- (8) If a fiscal note has been prepared for the proposed rule or will be prepared when a rule is proposed on the subject matter of the proposed rule making, a statement that a copy of the fiscal note can be obtained from the agency.

(b) **Mailing List.** -- An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes a rule-making notice in the North Carolina Register, it must mail a copy of the notice to each person on the mailing list who has requested notice of rule-making proceedings on the rule or the subject matter for rule making described in the notice. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.

(c) **Hearing.** -- An agency must hold a public hearing on a rule it proposes to adopt in two circumstances and may hold a public hearing in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published.

An agency must hold a public hearing on a rule it proposes to adopt in the following two circumstances:

- (1) The agency publishes a statement of the subject matter of the proposed rule making in the notice in the North Carolina Register.
- (2) The agency publishes the text of the proposed rule in the notice in the North Carolina Register and all the following apply:
 - a. The notice does not schedule a public hearing on the proposed rule.
 - b. Within 15 days after the notice is published, the agency receives a written request for a public hearing on the proposed rule.
 - c. The proposed rule is not part of a rule-making proceeding the agency initiated by publishing a statement of the subject matter of proposed rule making.
 - d. The proposed text is not a changed version of proposed text the agency previously published in the course of

rule-making proceedings but did not adopt.

(d) Text After Subject-Matter Notice. -- When an agency publishes notice of the subject matter of proposed rule making in the North Carolina Register, it must subsequently publish in the North Carolina Register the text of the rule it proposes to adopt as a result of the public hearing and of any comments received on the subject matter. An agency may not publish the proposed text of a rule for which it published a subject-matter notice before the public hearing on the subject matter.

(e) Comments. -- An agency must accept comments on the text of a proposed rule published in the North Carolina Register for at least 30 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must accept comments on a statement of the subject matter of proposed rule making until the public hearing on the subject matter. An agency must consider fully all written and oral comments received.

(f) Adoption. -- An agency may not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and may not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. An agency may not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (e).

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the notice published in the North Carolina Register or the proposed text of the rule, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it may not take subsequent action on the rule without following the procedures in this Part.

(g) Explanation. -- An agency must issue a concise written statement explaining why the agency adopted a rule if, within 30 days after the

agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule.

(h) Record. -- An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, and any written explanation made by the agency for adopting the rule.

§ 150B-21.3. Effective date of rules.

(a) Temporary Rule. -- A temporary rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.

(b) Permanent Rule. -- A permanent rule approved by the Commission becomes effective five business days after the Commission delivers the rule to the Codifier of Rules, unless the agency adopting the rule specifies a later effective date. If the agency specifies a later effective date, the rule becomes effective on that date.

A permanent rule that is not approved by the Commission becomes effective five business days after the agency adopting the rule delivers the rule to the Codifier of Rules, unless the agency adopting the rule specifies a later effective date. If the agency specifies a later effective date, the rule becomes effective on that date.

(c) OSHA Standard. -- A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

§ 150B-21.4. Fiscal notes on rules.

(a) State Funds. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the Executive Budget Act, Article 1 of Chapter 143, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Director of the Budget and obtain certification from the Director that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the

proposed rule change and explain how the amount was computed. The Director of the Budget must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(b) Local Funds. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Fiscal Research Division of the General Assembly, the Office of State Budget and Management, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(c) Errors. -- An erroneous fiscal note prepared in good faith does not affect the validity of a rule.

§ 150B-21.5. Circumstances when notice and rule-making hearing not required.

(a) Amendment. -- An agency is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to amend a rule, without changing the substance of the rule, to do one of the following:

- (1) Reletter or renumber the rule or subparts of the rule.
- (2) Substitute one name for another when an organization or position is renamed.
- (3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- (4) Change information that is readily available to the public, such as an address or a telephone number.
- (5) Correct a typographical error made in entering the rule in the North Carolina Administrative Code.
- (6) Change a rule in response to a request or an objection by the Commission.

(b) Repeal. -- An agency is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

- (1) The law under which the rule was adopted is repealed.
- (2) The law under which the rule was adopted or the rule itself is declared

unconstitutional.

- (3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. -- The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of rule making in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

§ 150B-21.6. Incorporating material in a rule by reference.

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

- (1) Another rule or part of a rule adopted by the agency.
- (2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.
- (3) Material adopted to meet a requirement of the federal government.

In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material.

§ 150B-21.7. Effect of transfer of duties or termination of agency on rules.

When a law that authorizes an agency to adopt a rule is repealed and another law gives the same or another agency substantially the same authority to adopt a rule, the rule remains in effect until the agency amends or repeals the rule. When a law

that authorizes an agency to adopt a rule is repealed and another law does not give the same or another agency substantially the same authority to adopt a rule, a rule adopted under the repealed law is repealed as of the date the law is repealed.

When an executive order abolishes part or all of an agency and transfers a function of that agency to another agency, a rule concerning the transferred function remains in effect until the agency to which the function is transferred amends or repeals the rule. When an executive order abolishes part or all of an agency and does not transfer a function of that agency to another agency, a rule concerning a function abolished by the executive order is repealed as of the effective date of the executive order.

The Director of Fiscal Research of the General Assembly must notify the Codifier of Rules when a rule is repealed under this section. When notified of a rule repealed under this section, the Codifier of Rules must enter the repeal of the rule in the North Carolina Administrative Code.

Part 3. Review by Commission.

§ 150B-21.8. Review of rule by Commission.

(a) Temporary Rule. -- The Commission does not review a temporary rule.

(b) Permanent Rule. -- An agency must submit a permanent rule adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a permanent rule in accordance with the standards in G.S. 150B-21.9 and follows the procedure in this Part in its review of a permanent rule.

(c) Scope. -- When the Commission reviews an amendment to a rule, it may review the entire rule that is being amended. The procedure in G.S. 150B-21.12 applies when the Commission objects to a part of a rule that is within its scope of review but is not changed by a rule amendment.

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. -- The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly.

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 of this Article. The Commission must notify the agency that adopted the rule if it determines that a

rule was not adopted in accordance with Part 2 of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. -- The Commission must review a rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month.

§ 150B-21.10. Commission action on permanent rule.

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

§ 150B-21.11. Procedure when Commission approves permanent rule.

When the Commission approves a permanent rule, it must notify the agency that adopted the rule of the Commission's approval and must deliver the approved rule to the Codifier of Rules. The Commission must deliver an approved rule by the end of the month in which the Commission approved the rule, unless the agency asks the Commission to delay the delivery of the rule.

§ 150B-21.12. Procedure when Commission objects to a permanent rule.

(a) Action. -- When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Com-

mission indicating that the agency has decided not to change the rule.

An agency that is not a board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection.

A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it may send to the President of the Senate and each member of the General Assembly a report of its objection to the rule.

(b) Entry in Code. -- When the Commission returns a rule to which it has objected to the agency that adopted the rule, the Commission must notify the Codifier of Rules of its action and of the basis of the Commission's objection. An agency whose rule is returned may file the rule with the Codifier of Rules. When the Codifier of Rules enters in the North Carolina Administrative Code a rule to which the Commission objected, the entry must reflect the Commission's objection and must state the standard on which the Commission based its objection.

§ 150B-21.13. Procedure when Commission extends period for review of permanent rule.

When the Commission extends the period for review of a permanent rule, it must notify the agency that adopted the rule of the extension and the reason for the extension. After the Commission extends the period for review of a rule, it may call a public hearing on the rule. Within 70 days after extending the period for review of a rule, the Commission must decide whether to approve the rule, object to the rule, or call a public hearing on the rule.

§ 150B-21.14. Public hearing on a rule.

The Commission may call a public hearing on a rule when it extends the period for review of the rule. At the request of an agency, the Commission

may call a public hearing on a rule that is not before it for review. Calling a public hearing on a rule not already before the Commission for review places the rule before the Commission for review. When the Commission decides to call a public hearing on a rule, it must publish notice of the public hearing in the North Carolina Register.

After a public hearing on a rule, the Commission must approve the rule or object to the rule in accordance with the standards and procedures in this Part. The Commission must make its decision of whether to approve or object to the rule within 70 days after the public hearing.

§ 150B-21.15. Declaratory judgment action authorized when Commission objects to a permanent rule.

(a) Standing. -- A person aggrieved by a permanent rule entered in the North Carolina Administrative Code with an objection by the Commission based on a lack of statutory authority may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency exceeded its authority in adopting the rule.

A declaratory judgment action under this section must be filed within 90 days after the rule that is the subject of the action is entered in the Code. Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this section. A person who files an action for declaratory judgment under this section must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

(b) Record. -- Within 10 days after a declaratory judgment action is filed under this section, the agency that adopted the rule that is the subject of the action must send to the court the original or a certified copy of the record in the Commission's review of the rule. The record consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

(c) Effect. -- A rule remains in effect during the pendency of an action for declaratory judgment under this section unless the court suspends the rule after finding that the agency that adopted the rule has no substantial likelihood of prevailing in the action.

(d) Changes. -- While a rule is the subject of a declaratory judgment action under this section, the

agency that adopted the rule may submit to the Commission changes in the rule to satisfy the Commission's objection. If the Commission determines that changes submitted to it satisfy its objection, the Commission must accept the changes and file the revised rule with the Codifier of Rules. The Codifier must then enter the rule in the North Carolina Administrative Code. When the Commission determines that changes submitted to it satisfy its objection, the agency that submitted the changes must notify the court of the changes and of the Commission's action.

Part 4. Publication of Code and Register.

§ 150B-21.17. North Carolina Register.

(a) Content. -- The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:

- (1) Notices of proposed adoptions of rules.
- (2) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.
- (3) Executive orders of the Governor.
- (4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to § 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H.
- (5) Orders of the Tax Review Board issued under G.S. 105-241.2.
- (6) Other information the Codifier determines helpful to the public.

(b) Form. -- When an agency publishes notice in the North Carolina Register of the proposed text of a new rule, the Codifier of Rules must publish the complete text of the proposed new rule. In publishing the text of a proposed new rule, the Codifier must indicate the rule is new by underlining the proposed text of the rule.

When an agency publishes notice in the North Carolina Register of the proposed text of an amendment to an existing rule, the Codifier must publish the complete text of the rule that is being amended unless the Codifier determines that publication of the complete text of the rule being amended is not necessary to enable the reader to understand the proposed amendment. In publishing the text of a proposed amendment to a rule, the Codifier must indicate deleted text with overstrikes and added text with underlines.

When an agency publishes notice in the North Carolina Register of the proposed repeal of an existing rule, the Codifier must publish the complete text of the rule the agency proposes to repeal

unless the Codifier determines that publication of the complete text is impractical. In publishing the text of a rule the agency proposes to repeal, the Codifier must indicate the rule is to be repealed.

§ 150B-21.18. North Carolina Administrative Code.

The Codifier of Rules must compile all rules into a Code known as the North Carolina Administrative Code. The format and indexing of the Code must conform as nearly as practical to the format and indexing of the North Carolina General Statutes. The Codifier must publish printed copies of the Code and may publish the Code in other forms. The Codifier must keep the Code current by publishing the Code in a loose-leaf format and periodically providing new pages to be substituted for outdated pages, by publishing the Code in volumes and periodically publishing cumulative supplements, or by another means. The Codifier must keep superseded rules.

§ 150B-21.19. Requirements for including rule in Code.

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

- (1) Cite the law under which the rule is adopted.
- (2) Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.
- (3) Be in the physical form specified by the Codifier of Rules.
- (4) Have been reviewed by the Commission, if the rule is a permanent rule.

§ 150B-21.20. Codifier's authority to revise form of rules.

(a) Authority. -- After consulting with the agency that adopted the rule, the Codifier of Rules may revise the form of a rule submitted for inclusion in the North Carolina Administrative Code within 10 business days after the rule is submitted to do one or more of the following:

- (1) Rearrange the order of the rule in the Code or the order of the subsections, subdivisions, or other subparts of the rule.
- (2) Provide a catch line or heading for the rule or revise the catch line or heading of the rule.
- (3) Reletter or renumber the rule or the subparts of the rule in accordance with a uniform system.
- (4) Rearrange definitions and lists.
- (5) Make other changes in arrangement or in form that do not change the substance of the rule and are necessary or

desirable for a clear and orderly arrangement of the rule.

(b) Effect. -- Revision of a rule by the Codifier of Rules under this section does not affect the effective date of the rule or require the agency to readopt or resubmit the rule. When the Codifier of Rules revises the form of a rule, the Codifier of Rules must send the agency that adopted the rule a copy of the revised rule. The revised rule is the official rule.

§ 150B-21.21. Publication of rules of North Carolina State Bar and exempt agencies.

(a) State Bar. -- The North Carolina State Bar must submit a rule adopted or approved by it and entered in the minutes of the North Carolina Supreme Court to the Codifier of Rules for inclusion in the North Carolina Administrative Code. The State Bar must submit a rule within 15 days after it is entered in the minutes of the Supreme Court. The Codifier of Rules must compile, make available for public inspection, and publish a rule included in the North Carolina Administrative Code under this subsection in the same manner as other rules in the Code.

(b) Exempt Agencies. -- Notwithstanding G.S. 150B-1, the North Carolina Utilities Commission must submit to the Codifier of Rules those rules of the Utilities Commission that are published from time to time in the publication titled "North Carolina Utilities Laws and Regulations." The Utilities Commission must submit a rule required to be included in the Code within 15 days after it is adopted. The Codifier of Rules must publish the rules submitted by the Utilities Commission in the North Carolina Administrative Code in the same format as they are submitted.

Notwithstanding G.S. 150B-1, an agency other than the Utilities Commission that is exempted from this Article by that statute must submit a temporary or permanent rule adopted by it to the Codifier of Rules for inclusion in the North Carolina Administrative Code. One of these exempt agencies must submit a rule to the Codifier of Rules within 15 days after it adopts the rule. The Codifier of Rules must compile, make available for public inspection, and publish a rule of one of these agencies in the North Carolina Administrative Code in the same manner as other rules in the Code.

§ 150B-21.22. Effect of inclusion in Code.

Official or judicial notice can be taken of a rule in the North Carolina Administrative Code and shall be taken when appropriate. Codification of a rule in the North Carolina Administrative Code is *prima facie* evidence of compliance with this

Article.

§ 150B-21.23. Rule publication manual.

The Codifier of Rules must publish a manual that sets out the form and method for publishing a notice of rule making in the North Carolina Register and for filing a rule in the North Carolina Administrative Code.

§ 150B-21.24. Free copies of Register and Code.

(a) Register. -- The Codifier of Rules must distribute copies of the North Carolina Register as soon after publication as practical, without charge, to the following:

- (1) A person who receives a free copy of the North Carolina Administrative Code.
- (2) Upon request, one copy to each member of the General Assembly.

(b) Code. -- The Codifier of Rules must distribute copies of the North Carolina Administrative Code as soon after publication as practical, without charge, to the following:

- (1) One copy to the board of commissioners of each county, to be placed at the county clerk of court's office or at another place selected by the board of commissioners.
- (2) One copy to the Commission.
- (3) One copy to the Clerk of the Supreme Court and to the Clerk of the Court of Appeals of North Carolina.
- (4) One copy to the Supreme Court Library and one copy to the library of the Court of Appeals.
- (5) One copy to the Administrative Office of the Courts.
- (6) One copy to the Governor.
- (7) Five copies to the Legislative Services Commission for the use of the General Assembly.
- (8) Upon request, one copy to each State official or department to whom or to which copies of the appellate division reports are furnished under G.S. 7A-343.1.
- (9) Five copies to the Division of State Library of the Department of Cultural Resources pursuant to G.S. 125-11.7.

§ 150B-21.25. Paid copies of Register and Code.

A person who is not entitled to a free copy of the North Carolina Administrative Code or North Carolina Register may obtain a copy by paying a fee set by the Codifier of Rules. The Codifier must set separate fees for the North Carolina

Register and the North Carolina Administrative Code in amounts that cover publication, copying, and mailing costs. All monies received under this section must be credited to the General Fund.

Article 3.

Administrative Hearings.

§ 150B-22. Settlement; contested case.

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.

(a) A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the

same manner as any other petitioner. The case shall be conducted in the Office of Administrative Hearings in the same manner as other contested cases under this Article, except that the decision of the State Personnel Commission shall be advisory only and not binding on the local appointing authority, unless (1) the employee, applicant, or former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or (2) applicable federal standards require a binding decision. In these two cases, the State Personnel Commission's decision shall be binding.

(a1) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9).

(a2) An administrative law judge assigned to a contested case may require a party to the case to file a prehearing statement. A party's prehearing statement must be served on all other parties to the contested case.

(b) The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

(c) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) Any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

(e) All hearings under this Chapter shall be open to the public. Hearings shall be conducted in an impartial manner. Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that specific hearing procedures and time standards are governed by another statute.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified

agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

§ 150B-23.1. Mediated settlement conferences.

(a) Purpose. -- This section authorizes a mediation program in the Office of Administrative Hearings in which the chief administrative law judge may require the parties in a contested case to attend a prehearing settlement conference conducted by a mediator. The purpose of the program is to determine whether a system of mediated settlement conferences may make the operation of the Office of Administrative Hearings more efficient, less costly, and more satisfying to the parties.

(b) Definitions. -- The following definitions apply in this section:

- (1) Mediated settlement conference. -- A conference ordered by the chief administrative law judge involving the parties to a contested case and conducted by a mediator prior to a contested case hearing.
- (2) Mediator. -- A neutral person who acts to encourage and facilitate a resolution of a contested case but who does not make a decision on the merits of the contested case.

(c) Conference. -- The chief administrative law judge may order a mediated settlement conference for all or any part of a contested case to which an administrative law judge is assigned to preside. All aspects of the mediated settlement conference shall be conducted in so far as possible in accordance with the rules adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(d) Attendance. -- The parties to a contested

case in which a mediated settlement conference is ordered, their attorneys, and other persons having authority to settle the parties' claims shall attend the settlement conference unless excused by the presiding administrative law judge.

(e) Mediator. -- The parties shall have the right to stipulate to a mediator. Upon the failure of the parties to agree within a time limit established by the presiding administrative law judge, a mediator shall be appointed by the presiding administrative law judge.

(f) Sanctions. -- Upon failure of a party or a party's attorney to attend a mediated settlement conference ordered under this section, the presiding administrative law judge may impose any sanction authorized by G.S. 150B-33(b)(8) or (10).

(g) Standards. -- Mediators authorized to conduct mediated settlement conferences under this section shall comply with the standards adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(h) Immunity. -- A mediator acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice.

(i) Costs. -- Costs of a mediated settlement conference shall be paid one share by the petitioner, one share by the respondent, and an equal share by any intervenor, unless otherwise apportioned by the administrative law judge.

(j) Inadmissibility of Negotiations. -- All conduct or communications made during a mediated settlement conference are presumed to be made in compromise negotiations and shall be governed by Rule 408 of the North Carolina Rules of Evidence.

(k) Right to Hearing. -- Nothing in this section restricts the right to a contested case hearing.

§ 150B-24. Venue of hearing.

(a) The hearing of a contested case shall be conducted:

- (1) In the county in this State in which any person whose property or rights are the subject matter of the hearing maintains his residence;
- (2) In the county where the agency maintains its principal office if the property or rights that are the subject matter of the hearing do not affect any person or if the subject matter of the hearing is the property or rights of residents of more than one county; or
- (3) In any county determined by the administrative law judge in his discretion to promote the ends of justice or better

serve the convenience of witnesses.

(b) Any person whose property or rights are the subject matter of the hearing waives his objection to venue by proceeding in the hearing.

§ 150B-25. Conduct of hearing; answer.

(a) If a party fails to appear in a contested case after proper service of notice, and if no adjournment or continuance is granted, the administrative law judge may proceed with the hearing in the absence of the party.

(b) Repealed.

(c) The parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact.

(d) A party may cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. Any party may submit rebuttal evidence.

§ 150B-26. Consolidation.

When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending, the Director of the Office of Administrative Hearings may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

§ 150B-27. Subpoena.

After the commencement of a contested case, subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. In addition to the methods of service in G.S. 1A-1, Rule 45, a State law enforcement officer may serve a subpoena on behalf of an agency that is a party to the contested case by any method by which a sheriff may serve a subpoena under that Rule. Upon a motion, the administrative law judge may quash a subpoena if, upon a hearing, the administrative law judge finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

§ 150B-28. Depositions and discovery.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in contested cases may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) On a request for identifiable agency records, with respect to material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall promptly make the records available to a party.

§ 150B-29. Rules of evidence.

(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted. On the judge's own motion, an administrative law judge may exclude evidence that is inadmissible under this section. It shall not be necessary for a party or his attorney to object at the hearing to evidence in order to preserve the right to object to its consideration by the administrative law judge in making a recommended decision, by the agency in making a final decision, or by the court on judicial review.

(b) Evidence in a contested case, including records and documents, shall be offered and made a part of the record. Factual information or evidence not made a part of the record shall not be considered in the determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

§ 150B-30. Official notice.

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument.

§ 150B-31. Stipulations.

(a) The parties in a contested case may, by a

stipulation in writing filed with the administrative law judge, agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable.

(b) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

§ 150B-32. Designation of administrative law judge.

(a) The Director of the Office of Administrative Hearings shall assign himself or another administrative law judge to preside over a contested case.

(a1) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1 (15), effective July 15, 1986.

(b) On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of an administrative law judge, the administrative law judge shall determine the matter as a part of the record in the case, and this determination shall be subject to judicial review at the conclusion of the proceeding.

(c) When an administrative law judge is disqualified or it is impracticable for him to continue the hearing, the Director shall assign another administrative law judge to continue with the case unless it is shown that substantial prejudice to any party will result, in which event a new hearing shall be held or the case dismissed without prejudice.

§ 150B-33. Powers of administrative law judge.

(a) An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

(b) An administrative law judge may:

- (1) Administer oaths and affirmations;
- (2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;
- (3) Provide for the taking of testimony by deposition and rule on all objections to

discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;

- (3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;
- (4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;
- (6) Stay the contested action by the agency pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;
- (7) Determine whether the hearing shall be recorded by a stenographer or by an electronic device; and
- (8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.
- (9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.
- (10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.

§ 150B-34. Recommended decision or order of administrative law judge.

(a) Except as provided in G.S. 150B-36(c), in each contested case the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law.

(b) Repealed.

§ 150B-35. No ex parte communication; exceptions.

Unless required for disposition of an ex parte matter authorized by law, neither the administra-

tive law judge assigned to a contested case nor a member or employee of the agency making a final decision in the case may communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate.

§ 150B-36. Final decision.

(a) Before the agency makes a final decision, it shall give each party an opportunity to file exceptions to the decision recommended by the administrative law judge, and to present written arguments to those in the agency who will make the final decision or order. If a party files in good faith a timely and sufficient affidavit of personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record in the case, and the determination is subject to judicial review at the conclusion of the case.

(b) A final decision or order in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. If the agency does not adopt the administrative law judge's recommended decision as its final decision, the agency shall state in its decision or order the specific reasons why it did not adopt the administrative law judge's recommended decision. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision or order, and the final decision or order shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. A copy of the decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency, and a copy shall be furnished to his attorney of record and the Office of Administrative Hearings.

(c) The following decisions made by administrative law judges in contested cases are final decisions:

- (1) A determination that the Office of Administrative Hearings lacks jurisdiction.
- (2) An order entered pursuant to the authority in G.S. 7A-759(e).
- (3) An order entered pursuant to a written prehearing motion that either dismisses the contested case for failure of the petitioner to prosecute or grants the relief requested when a party does not comply with procedural requirements.

- (4) An order entered pursuant to a prehearing motion to dismiss the contested case in accordance with G.S. 1A-1, Rule 12(b) when the order disposes of all issues in the contested case.

§ 150B-37. Official record.

(a) In a contested case, the Office of Administrative Hearings shall prepare an official record of the case that includes:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and
- (5) Repealed by Session Laws 1987, c. 878, s. 25, effective August 14, 1987.
- (6) The administrative law judge's recommended decision or order.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests, and said transcript or part thereof shall be added to the official record as an exhibit.

(c) The Office of Administrative Hearings shall forward a copy of the official record to the agency making the final decision and shall forward a copy of the recommended decision to each party.

Article 3A.

Other Administrative Hearings.

§ 150B-38. Scope; hearing required; notice; venue.

(a) The provisions of this Article shall apply to the following agencies:

- (1) Occupational licensing agencies;
- (2) The State Banking Commission, the Commissioner of Banks, the Savings Institutions Division of the Department of Commerce, and the Credit Union Division of the Department of Commerce; and
- (3) The Department of Insurance and the Commissioner of Insurance.

(b) Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

- (1) A statement of the date, hour, place, and nature of the hearing;

- (2) A reference to the particular sections of the statutes and rules involved; and
- (3) A short and plain statement of the facts alleged.

(c) Notice shall be given personally or by certified mail. If given by certified mail, notice shall be deemed to have been given on the delivery date appearing on the return receipt. If notice cannot be given personally or by certified mail, then notice shall be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) A party who has been served with a notice of hearing may file a written response with the agency. If a written response is filed, a copy of the response must be mailed to all other parties not less than 10 days before the date set for the hearing.

(e) All hearings conducted under this Article shall be open to the public. A hearing conducted by the agency shall be held in the county where the agency maintains its principal office. A hearing conducted for the agency by an administrative law judge requested under G.S. 150B-40 shall be held in a county in this State where any person whose property or rights are the subject matter of the hearing resides. If a different venue would promote the ends of justice or better serve the convenience of witnesses, the agency or the administrative law judge may designate another county. A person whose property or rights are the subject matter of the hearing waives his objection to venue if he proceeds in the hearing.

(f) Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case under this Article may intervene and participate to the extent deemed appropriate by the agency hearing officer.

(g) When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending before an agency, the agency may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

(h) Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.

§ 150B-39. Depositions; discovery; subpoenas.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in a contested case may engage in discovery pursuant

to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) Upon a request for an identifiable agency record involving a material fact in a contested case, the agency shall promptly provide the record to a party, unless the record relates solely to the agency's internal procedures or is exempt from disclosure by law.

(c) In preparation for, or in the conduct of, a contested case subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the agency may quash a subpoena if, upon a hearing, the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to any witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

§ 150B-40. Conduct of hearing; presiding officer; ex parte communication.

(a) Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

If a party fails to appear in a contested case after he has been given proper notice, the agency may continue the hearing or proceed with the hearing and make its decision in the absence of the party.

(b) Except as provided under subsection (e) of this section, hearings under this Article shall be conducted by a majority of the agency. An agency shall designate one or more of its members to preside at the hearing. If a party files in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. If a presiding officer is disqualified or it is impracticable for him

to continue the hearing, another presiding officer shall be assigned to continue with the case, except that if assignment of a new presiding officer will cause substantial prejudice to any party, a new hearing shall be held or the case dismissed without prejudice.

(c) The presiding officer may:

- (1) Administer oaths and affirmations;
- (2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;
- (3) Provide for the taking of testimony by deposition;
- (4) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and
- (6) Apply to any judge of the superior court resident in the district or presiding at a term of court in the county where a hearing is pending for an order to show cause why any person should not be held in contempt of the agency and its processes, and the court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

(d) Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually-related case. This section does not apply to an agency employee or party representative with professional training in accounting, actuarial science, economics or financial analysis insofar as the case involves financial practices or conditions.

(e) When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article. Upon receipt of the application, the Director shall, without undue delay, assign an administrative law judge to hear the case.

The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.

The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

The agency may make its final decision only after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency.

§ 150B-41. Evidence; stipulations; official notice.

(a) In all contested cases, irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available. It shall not be necessary for a party or his attorney to object to evidence at the hearing in order to preserve the right to object to its consideration by the agency in reaching its decision, or by

the court of judicial review.

(b) Evidence in a contested case, including records and documents shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

(c) The parties in a contested case under this Article by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable. Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

(d) Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

§ 150B-42. Final agency decision; official record.

(a) After compliance with the provisions of G.S. 150B-40(e), if applicable, and review of the official record, as defined in subsection (b) of this section, an agency shall make a written final decision or order in a contested case. The decision or order shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and shall be supported by substantial evidence admissible under G.S. 150B-41. A copy of the decision or

order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record.

(b) An agency shall prepare an official record of a hearing that shall include:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
- (5) Proposed findings and exceptions; and
- (6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(c) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests.

Article 4.

Judicial Review.

§ 150B-43. Right to judicial review.

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

§ 150B-44. Right to judicial intervention when decision unreasonably delayed.

Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. An agency that is subject to Article 3 of this Chapter and is not a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. An agency that

is subject to Article 3 of this Chapter and is a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 90 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision. Failure of an agency subject to Article 3A of this Chapter to make a final decision within 180 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or, if the case was heard by an administrative law judge, by the administrative law judge.

§ 150B-45. Procedure for seeking review; waiver.

To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.

The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. A person who fails to file a petition within the required time waives the right to judicial review under this Article. For good cause shown, however, the superior court may accept an untimely petition.

§ 150B-46. Contents of petition; copies served on all parties; intervention.

The petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request. Any party to the administrative proceeding is a party to the review proceedings unless the party withdraws by notifying the court of the withdrawal and serving the other parties with notice of the withdrawal. Other parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or

procedure and what relief is sought in the response.

Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

§ 150B-47. Records filed with clerk of superior court; contents of records; costs.

Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the agency that made the final decision in the contested case shall transmit to the reviewing court the original or a certified copy of the official record in the contested case under review together with: (i) any exceptions, proposed findings of fact, or written arguments submitted to the agency in accordance with G.S. 150B-36(a); and (ii) the agency's final decision or order. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

§ 150B-48. Stay of decision.

At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65.

§ 150B-49. New evidence.

An aggrieved person who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a recommended decision in the case, the court shall remand the case to the agency that conducted the administrative hearing. After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. If an administrative law judge made a recommended decision in the case, the court shall remand the case to the administrative law judge. After hearing the evidence, the administrative law judge may affirm or modify his previous findings of fact and recommended decision. The administra-

tive law judge shall forward a copy of his decision to the agency that made the final decision, which in turn may affirm or modify its previous findings of fact and final decision. The additional evidence and any affirmation or modification of a recommended decision or final decision shall be made part of the official record.

§ 150B-50. Review by superior court without jury.

The review by a superior court of agency decisions under this Chapter shall be conducted by the court without a jury.

§ 150B-51. Scope of review.

(a) Initial Determination in Certain Cases. In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision, the court shall make two initial determinations. First, the court shall determine whether the agency heard new evidence after receiving the recommended decision. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. Second, if the agency did not adopt the recommended decision, the court shall determine whether the agency's decision states the specific reasons why the agency did not adopt the recommended decision. If the court determines that the agency did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the agency to enter the specific reasons.

(b) Standard of Review. After making the determinations, if any, required by subsection (a), the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

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

§ 150B-52. Appeal; stay of court's decision.

A party to a review proceeding in a superior court may appeal to the appellate division from the

final judgment of the superior court as provided in G.S. 7A-27. Pending the outcome of an appeal, an appealing party may apply to the court that issued the judgment under appeal for a stay of that judgment or a stay of the administrative decision that is the subject of the appeal, as appropriate.

Article 5.

Publication of Administrative Rules.

Repealed.

**EXECUTIVE ORDER NUMBER 24
EMERGENCY RELIEF FOR DAMAGE
CAUSED BY HURRICANE EMILY**

WHEREAS, the United States Department of Transportation, in conjunction with the North Carolina Department of Transportation, has declared a regional emergency justifying an exemption from 49 C.F.R. 390-399 (Federal Motor Carrier Safety Regulations); and

WHEREAS, under the provisions of N.C.G.S. 166A-4(3) and 166A-6(c)(3), the Governor, with the concurrence of the Council of State, may waive the penalties for exceeding the weight limits imposed by said statutes in the event of an imminent threat of widespread damage from certain causes; and

WHEREAS, with the concurrence of the Council of State, I have found that if vehicles bearing food, equipment, and supplies to relieve our hurricane-stricken counties must adhere to the weight restrictions of N.C.G.S. 20-88, 20-96 and 20-118, citizens in those counties likely will suffer losses and, therefore, there is an imminent threat of widespread damage within the meaning of N.C.G.S. 166A-4(3);

THEREFORE, pursuant to the authority vested in me by the Constitution and laws of this State and with the concurrence of the Council of State, **IT IS ORDERED:**

Section 1. The Division of Motor Vehicles shall waive penalties arising under N.C.G.S. 20-88, 20-96, and 20-118 that otherwise would be assessed against vehicles transporting food, equipment, and supplies along our highways to North Carolina's hurricane-stricken counties.

Section 2. Notwithstanding the waivers set forth above, penalties shall not be waived under the following conditions:

- (A) When the vehicle weight exceeds the maximum gross vehicle weight criteria established by the manufacturer (GVWR) or 90,000 pounds gross vehicle weight, whichever is less.
- (B) When tandem axle weights exceed 42,000 pounds and single axle weights exceed 22,000 pounds.

Section 3.

- (A) Upon entering North Carolina, the

vehicles will stop at the first available vehicle weight station and produce identification sufficient to establish that its load will be used for the Hurricane Emily relief effort. All other safety restrictions apply. If returning vehicles are loaded with some other backhaul, all normal weight and permit restrictions apply.

- (B) The \$50.00 fee listed in N.C.G.S. 105-449.49 for a temporary trip permit is waived for the vehicles described above. The penalties described in N.C.G.S. 20-382 concerning insurance registration are waived also. Finally, no quarterly fuel tax is required because the exception in N.C.G.S. 105-449.45(a)(1) applies.
- (C) The vehicles will be allowed only on primary and interstate routes designated by the North Carolina Department of Transportation.

Section 4. This Order shall not be in effect on bridges posted pursuant to N.C.G.S. 136-72.

This order shall be effective immediately and shall remain in effect for 30 days.

Done in the Capital City of Raleigh, North Carolina, this the 7th day of September, 1993.

**EXECUTIVE ORDER NUMBER 25
RECISSION OF EXECUTIVE ORDERS**

WHEREAS, the 1993 North Carolina General Assembly has enacted H. 1260, creating the Martin Luther King Commission; and

WHEREAS, the 1993 General Assembly has also enacted S. 64, creating the Rail Council;

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.

Executive Order 55 (The Martin Luther King, Jr. Holiday Commission), dated September 30, 1987, as extended by Executive Orders 101 and 161, is hereby rescinded.

Section 2.

Executive Order 71 (The Governor's Task Force on Rail Passenger Service), dated March 11, 1988, as extended by Executive Order 94, and amended by Executive Order 125, is hereby rescinded.

This Order is effective immediately.

Done in Raleigh, North Carolina, this the 7th day of September, 1993.

**EXECUTIVE ORDER NUMBER 26
BOARD OF TRUSTEES OF THE
NORTH CAROLINA PUBLIC EMPLOYEE
DEFERRED COMPENSATION PLAN**

WHEREAS, the Deferred Compensation Program is an important part of the financial planning and security of the public employees of the State of North Carolina.

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

Section 1. Establishment.

Pursuant to N.C.G.S. 143B-426.24, there is hereby established a Board of Trustees of the North Carolina Public Employee Deferred Compensation Plan, which shall assume all authority, responsibilities and functions of the Board established on March 16, 1987, by Executive Order Number 39 of the Martin Administration.

Section 2. Membership and Functions.

The membership of the Board and its duties shall be as provided in N.C.G.S. 143B-426.24. The terms of the members shall be provided in N.C.G.S. 143B-426.24. The Secretary of Administration shall supply the Board with all administrative, legal, financial and personnel services that may be required by the Board. Guidelines for the funding for these services will be supplied by the Secretary of Administration as provided in N.C.G.S. 143B-426.24(l) and (m).

Section 3. Effect on Other Executive Orders.

Executive Order Number 39, as extended by Executive Order 185, of the Martin Administration is hereby rescinded.

This Executive Order shall be effective immediately.

Done in the Capital City of Raleigh, North Carolina, this the 7th day of September, 1993.

**EXECUTIVE ORDER NUMBER 27
GOVERNOR'S COMMISSION FOR
RECOGNITION OF STATE EMPLOYEES**

WHEREAS, the State of North Carolina has long been noted for loyal, efficient, and dedicated employees; and

WHEREAS, dedicated employees provide valuable services in all areas of state government; and

WHEREAS, the services rendered by the employees of the State of North Carolina are in accordance with the highest traditions of service to the citizens of this state; and

WHEREAS, the State of North Carolina is proud to recognize contributions made by the employees of this state;

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

Section 1. Establishment.

The Governor's Commission for Recognition of State Employees (hereafter, "the Commission") is hereby established. All previous Executive Orders which conflict with this Order are hereby rescinded.

Section 2. Composition.

The Commission shall be composed of five members. Four members shall be appointed by the Governor, and one member shall be appointed by the State Personnel Commission. The terms of the Governor's appointees shall be staggered so that two appointees shall serve two-year terms, and two shall serve four-year terms. Thereafter, all appointees shall serve four-year terms. Two of the appointees shall be active or retired state employees and two shall be from private enterprise. The State Personnel Commission's appointee shall serve at the pleasure of the State Personnel Commission, and shall serve as the Commission's chair. Members are eligible to be reappointed.

Section 3. Duties

The duties of the Commission are:

- (a) to recommend each year to the Governor the week to be proclaimed "North Carolina State Employee Appreciation Week."
- (b) to make annual selections of those State employees to receive the "Governor's Award for Excellence."

Section 4. Standards.

The State Personnel Commission shall advise standards concerning the number and frequency of

awards, and the selection process for recipients of employee awards.

Section 5. Administrative Support.

The Department of Administration shall be responsible for providing the necessary funds, administrative assistance, and support services needed by the Commission to perform its duties.

This order shall be effective immediately.

Done in the Capital City of Raleigh, North Carolina, this the 7th day of September, 1993.

TITLE 2 - DEPARTMENT OF AGRICULTURE

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Board of Agriculture intends to amend rules cited as 2 NCAC 38 .0701; 48A .1005; 52B .0210 and adopt 53 .0001.

The proposed effective date of this action is January 1, 1994.

The public hearing will be conducted at 10:00 a.m. on November 4, 1993 at the Vernon G. James Research and Extension Center, at the Tidewater Research Station, Plymouth (5 miles east of Plymouth, NC on Highway 64).

Reason for Proposed Action:

2 NCAC 38 .0701 - To require LP gas storage facilities to have automatic shutoff of emergency valves in the event of pull away accidents.

2 NCAC 48A .1005 - To prevent importation of seed potatoes infected with the PVYN virus.

2 NCAC 52B .0210 - To prevent importation of ratites infected with avian influenza.

2 NCAC 53 .0001 - To provide for licensing of aquaculture facilities.

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

Editor's Note: *2 NCAC 52B .0210 was filed as a temporary amendment effective August 13, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.*

CHAPTER 38 - STANDARDS DIVISION

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

.0701 ADOPTION BY REFERENCE

The following are incorporated by reference, including subsequent amendments, as standards for

storage, handling and installation of liquefied petroleum gas:

- (1) National Fire Protection Association, Pamphlet No. 58, "Storage and Handling of Liquefied Petroleum Gases," with the following additions and exceptions:
 - (a) When two or more containers are manifolded to a single service, each container shall be considered independent of the other and all rules and regulations relating to a single container shall apply;
 - (b) All cut-off valves and regulating equipment exposed to rain, sleet, or snow shall be protected against such elements either by design or by a hood;
 - (c) "Firm Foundation" as used in Chapter 3 of Pamphlet 58 means that the foundation material has a level top surface, rests on solid ground, is constructed of a masonry material or wood treated to prevent decay by moisture rot and will not settle, careen or deteriorate;
 - (d) No person shall use liquefied petroleum gas as a source of pressure in lieu of compressed air in spray guns or other pressure operated equipment;
 - (e) Piping, tubing or regulators shall be considered well supported when they are rigidly fastened in their intended position; and
 - (f) At bulk storage installations, the bulkhead and the plant piping on the hose side of the bulkhead shall be designed and constructed so that an application of force from the hose side will not result in damage to the plant piping on the tank side of the bulkhead. In addition, the bulkhead shall incorporate a mechanical means to automatically close emergency valves in the event of a pull away.
- (2) National Fire Protection Association, Pamphlet No. 54, "National Fuel Gas Code," with the addition that underground service piping shall rise above ground immediately before entering a building.

Copies of Pamphlet No. 54 and Pamphlet No. 58 are available for inspection in the Office of the Director of the Standards Division and may be obtained at a cost of twenty-four dollars and fifty cents (\$24.50) each by contacting National Fire Protection Association, Inc., Batterymarch Park, Quincy, Massachusetts 02269.

Statutory Authority G.S. 119-55; 150B-21.6.

CHAPTER 48 - PLANT INDUSTRY

SUBCHAPTER 48A - PLANT PROTECTION

SECTION .1000 - VEGETABLE PLANT CERTIFICATION

.1005 STANDARDS

(a) All vegetable plants shall meet the requirements of all applicable state and federal plant pest quarantines.

(b) With the exception of asparagus, onion sets and white seed potatoes, all vegetable plants shall be field inspected within three days of their being placed for sale or being shipped into North Carolina.

(c) With respect to the indicated plants, the following shall apply:

Plant	Tolerances
Tomato	
Bacterial canker	0
Bacterial spot	0
Wilt diseases	0
Other injurious diseases and viruses	apparently free
Root knot and other injurious nematodes	0
Insects	no apparent injury or infestation
Pepper	
Bacterial spot	0
Other injurious diseases and viruses	apparently free
Root knot and other injurious nematodes	0
Insects	no apparent injury or infestation
Flowers and/or pods	apparently free
Pepper Weevil	0
Sweet Potato	
Scurf	0
Black rot	0
Soil rot or pox	0
Internal cork	0
Fusarium wilt	0
Other injurious diseases and viruses	apparently free
Root knot and other injurious nematodes	0
Insects	no apparent injury or infestation
Cabbage and other cole crops	
Black rot	0
Black leg	0
Clubroot	0
Yellows	0
Other injurious diseases and viruses	apparently free
Root knot and other injurious nematodes	0
Insects	no apparent injury or infestation
Eggplant	
Wilt diseases	0

PROPOSED RULES

Other injurious diseases and viruses	apparently free
Root knot and other injurious nematodes	0
Insects	no apparent injury or infestation
Onion plants and sets	
White rot	0
Other injurious diseases and viruses	apparently free
Root knot and other injurious nematodes	0
Insects	no apparent injury or infestation
Asparagus Crowns	
Fusarium wilt and crown rot	0
Other injurious diseases and viruses	apparently free
Root knot and other injurious nematodes	0
Insects	no apparent injury or infestation
White seed potatoes	
Field inspection:	
Leafroll	2 Percent
Mosaic	2 Percent
Spindle tuber	2 Percent
PVYN	.75 Percent
Total viruses	3 Percent
Black leg and wilts	1 Percent
Bacterial ring rot	0 Percent
Varietal mixture	.5 Percent
<u>White seed potatoes must be grown in a certified seed program utilizing a flush through system for PVYN when this virus disease has been reported in a state or province.</u>	
Tuber inspection:	
Not more than a total of five percent by weight shall be allowed for excessive damage resulting in the following defects:	
Flea beetle injury	
Rhizoctonia	
Pitted scab	
Russet scab	
Surface scab	
Wireworm damage	
Insects or worms inside potato	
dirt	
Provided, that included in this five percent tolerance not more than the percentages by weight shall be allowed for the defects listed below:	
Defect	
Bacterial ring rot	0 Percent
Damage caused by dry or moist type	
Fusarium tuber rot	2 Percent
Late blight tuber rot	1 Percent
Nematode or tuber moth injury	0 Percent
Varietal mixture	.5 Percent
Frozen soft rot or web breakdown	1 Percent

Statutory Authority G.S. 106-65.45; 106-65.46; 106-284.18; 106-420.

SECTION .0200 - ADMISSION OF LIVESTOCK TO NORTH CAROLINA

.0210 IMPORTATION REQUIREMENTS: AVIAN SPECIES

Members of the avian species, other than chickens, turkeys, or other domestic poultry, entering into North Carolina shall be accompanied by a permit from the State Veterinarian of North Carolina or his authorized representative and be accompanied by an official interstate health certificate issued within five days of shipment. Ratites (ostriches, rheas, emus, cassowaries and kiwis) must have a negative test for Avian Influenza (AI) within 30 days prior to entry.

Note: For chickens, turkeys or other domestic poultry, see 2 NCAC 52B .0600.

Statutory Authority G.S. 106-539; 106-540; 106-543.

CHAPTER 53 - AQUACULTURE

.0001 AQUACULTURE LICENSES

(a) A person who owns or operates an aquaculture facility for the purpose of possession, production, transportation, sale or commercial catchout of the species listed in G.S. 106-761, shall obtain a license from the Department of Agriculture.

(b) Applications for licenses may be obtained from the Department of Agriculture, Division of Aquaculture and Natural Resources, P.O. Box 27647, Raleigh, NC 27611. Completed applications should be returned to the same address.

(c) The application shall include:

- (1) License(s) being requested:
 - (A) Aquatic Propagation and Production Facility License;
 - (B) Commercial Catchout License;
 - (C) Holding Pond/Tank Permit;
- (2) Name of facility;
- (3) County of facility;
- (4) Address and telephone number of facility;
- (5) Name of responsible agent for the facility;
- (6) Address and telephone number of responsible agent;
- (7) Description of primary activities at the facility (hatchery, gamefish production, catchout, food fish production, etc.);
- (8) Primary species to be possessed on the facility.

(d) An Aquaculture Propagation and Production Facility License must be obtained for all freshwater aquaculture facilities as defined in G.S. 106-758(2) except for Commercial Catchout and Holding Pond/Tank operations. The license shall be issued without charge and shall be valid for five years.

(e) A Commercial Catchout Facility License must be obtained for a privately owned pond, lake, raceway, manmade stream or other water holding facility where fish are stocked for the purpose of harvest by hook and line. Such facilities sell the fish on a fee per unit time basis or fee per unit weight basis. This does not include privately owned ponds where fish populations naturally regenerate.

(1) Receipts shall be provided to the purchasers of fish from Commercial Catchout Facilities. The receipt shall include the name of the facility, the date and the number, species and weight of the fish sold.

(2) No fish taken from a Commercial Catchout Facility may be resold by the purchasing angler for any reason.

(3) The license shall be issued without charge and shall be valid for five years.

(f) A Holding Pond/Tank Permit shall be obtained for all facilities holding live food or bait species for sale, except those facilities which are licensed as Aquaculture Propagation and Production Facilities. This permit shall be valid for two years and shall be issued without charge.

Statutory Authority G.S. 106-761.

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Division of Facility Services intends to amend rule cited as 10 NCAC 3R .0320.

The proposed effective date of this action is January 4, 1994

The public hearing will be conducted at 10:00 a.m. on October 29, 1993 at the Council Building, Room 201, 701 Barbour Drive, Raleigh, NC 27603.

Reason for Proposed Action: Agency is initiating rule-making proceedings as the result of the rule-making petition submitted by Hospital Resource Home Health Agency.

Comment Procedures: All written comments must be submitted to Jackie Sheppard, APA Coordinator, Division of Facility Services, PO Box 29530, Raleigh, NC 27626-0530, telephone (919) 733-2342, up to and including November 1, 1993. Written comments submitted after the deadline will not be considered.

CHAPTER 3 - FACILITY SERVICES

SUBCHAPTER 3R - CERTIFICATE OF NEED REGULATIONS

SECTION .0300 - APPLICATION AND REVIEW PROCESS

.0320 HOME HEALTH AGENCIES

(a) For those home health agencies for which no certificate of need was issued, the home health agency's geographic service area shall be only those counties in which patients were served as shown on the existing home health agency's licensure renewal form on file with the Licensure Section of the Division of Facility Services as of January 1, 1991.

(b) For those home health agencies for which a certificate of need was issued, the home health agency's geographic service area shall be as follows:

(1) Where the service area is identified on the certificate of need issued to the home health agency, the agency's geographic service area shall be the service area identified on the certificate of need, with the following exceptions:

(A) If the home health agency has an agreement with a health service facility to provide services to its patients, the home health agency may provide services to those patients outside the service area identified on the certificate of need;

(B) the home health agency may provide services to patients outside the identified service area who are referred by physicians who practice in the county where the home health agency has its office; and

(C) the home health agency may provide services to patients in counties contiguous to its service area who initiate contact with the home health agency and request its services.

(2) Where the service area is not identified on the certificate of need issued to the home health agency, the agency's geographic service area shall be the proposed geographic service area which was identified in the application for a certificate of need and approved by Certificate of Need Section, with the exceptions set forth in Subparagraph (b)(1) of this Rule.

Statutory Authority G.S. 131E-177(1); 131E-181; 131E-185.

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/ Division of Facility Services intends to amend rule cited as 10 NCAC 42C .3503.

The proposed effective date of this action is January 4, 1994.

The public hearing will be conducted at 1:00 p.m. on November 17, 1993 at the Council Building, Room 201, 701 Barbour Drive, Raleigh, NC 27603.

Reason for Proposed Action: To remove the provision which allows a suspension of admission to be stayed automatically when a facility files a petition for a contested case hearing.

Comment Procedures: All written comments must be submitted to Mr. Jackie R. Sheppard, APA Coordinator, P.O. Box 29530, Raleigh, NC 27626-0530, up to and including November 17, 1993. Written comments submitted after the deadline will not be considered.

CHAPTER 42 - INDIVIDUAL AND FAMILY SUPPORT

SUBCHAPTER 42C - LICENSING OF FAMILY CARE HOMES

**SECTION .3500 - SUSPENSION
OF ADMISSIONS**

.3503 PROCEDURE FOR APPEAL

A domiciliary home may appeal the decision of the Secretary or his designee to suspend new admissions by making such an appeal in accordance with 10 NCAC 1B .0200. ~~If a hearing is requested, the suspension will not be effective until the matter is resolved.~~

Statutory Authority G.S. 130-9.7(e).

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to adopt rules cited as 10 NCAC 14O .0701 - .0710; 18N .0601 - .0605, .0701 - .0709; amend rules cited as 14K .0103, .0201, .0342, .0402 - .0403; 14M .0709, .0715 - .0716; 14Q .0305; 18D .0209; 18Q .0520, .0540 - .0541; 45G .0104; and repeal rules cited as 10 NCAC 14L .0501 - .0508; 14M .0201 - .0210, .0301 - .0304, .0401 - .0410; 14N .0601 - .0607; 14O .0101 - .0109, .0201 - .0212; 18Q .0709 - .0715, .0801 - .0805, .0807 - .0813.

The proposed effective date of this action is January 1, 1994.

The public hearing will be conducted at 1:00 p.m. on November 9, 1993 at the Holiday Inn - Crabtree, 4100 Glenwood Avenue, Tulleries/-Covenant Gardens Room, Raleigh, N. C. 27612.

Reason for Proposed Action:

The following Rules are being proposed for adoption, amendment or repeal, and are part of a package referred to as "Supervised Living."

It has been several years since the Division has undertaken a major review of Licensure Rules and Standards regarding "Residential Services" for clients served by the mental health, developmental disabilities and substance abuse services system. Since that time, significant trends in the fields of mental health and developmental disabilities, in particular, have occurred which refocus philosophies and purposes of working with clients to assist them in maximizing their choices regarding both their treatment and where they live. In addition to

new attitudes regarding client choice there continues to be emerging understanding of the capacities and strengths of clients and orientations toward independence, autonomy and dignity.

The adoption of the N.C. State Medicaid Plan to cover area program services under the Rehabilitation Option has encouraged the delivery of services in a variety of locations, including clients' homes. The "unbundling" of costs of services from the costs of the facility in which they are provided further reinforces this paradigm shift.

The proposed adoption, amendment, or repeal of the following Rules are designed to 1) eliminate several existing categories of licensure rules and standards; 2) define a single new broad category in which the primary purpose is either supervision, habilitation or rehabilitation; and 3) establish through a new standard, expectations regarding the delivery of support services to clients in their homes whether their home is owned by the client, the client's family, the area program, a contract agency, or an independent landlord.

Subject of Rules: SUPERVISED LIVING

Licensure Rules:

10 NCAC 14K .0103, .0201, .0402 - .0403

10 NCAC 14L .0501 - .0508

10 NCAC 14M .0201 - .0210

10 NCAC 14M .0301 - .0304

10 NCAC 14M .0401 - .0410

10 NCAC 14N .0601 - .0607

10 NCAC 14O .0101 - .0109

10 NCAC 14O .0201 - .0212

10 NCAC 14O .0701 - .0710

Standards for Area Programs and Their Contract Agencies:

Standards:

10 NCAC 18N .0601 - .0605

10 NCAC 18N .0701 - .0709

10 NCAC 18Q .0709 - .0715

10 NCAC 18Q .0801 - .0805

10 NCAC 18Q .0807 - .0813

Subject of Rules: RESPIRE SERVICES (including Center-based, Private Home, and Companion Models)

The following Rules are contained in Licensure and Standards and are proposed for amendment to: 1) provide clarification; 2) avoid duplication of administrative requirements; 3) more accurately describe services by using the term "support services"; and 4) describe services in a more normalizing manner.

Licensure Rules:

10 NCAC 14K .0342

10 NCAC 14M .0709
10 NCAC 14M .0715 - .0716
Standards:
10 NCAC 18Q .0520
10 NCAC 18Q .0540 - .0541

Subject of Rule: Client Rights in Community Mental Health, Developmental Disabilities and Substance Abuse Services

The following Rule is proposed for amendment to qualify what constitutes grounds for dismissal of an employee, and to be specific in providing information to employees and clients regarding further protection for clients from harm, abuse, neglect or exploitation.

Client Rights Rule:
10 NCAC 14Q .0305

Subject of Rule: Confidentiality Rules
The following Rule is proposed for amendment to clarify the content to be consistent with the intent of G.S. 122C-53(i) regarding release of information by an adult client who has been adjudicated incompetent. The Rule, as it currently exists, conflicts with statute.

Confidentiality Rule:
10 NCAC 18D .0209

Subject of Rule: Controlled Substances
The following Rule is proposed for amendment to incorporate a registration fee, based on the requirement set forth in Senate Bill 621 of Session 1993 of the General Assembly of North Carolina.

Controlled Substance Rule:
10 NCAC 45G .0104

Comment Procedures: Any interested person may present comments by oral presentation or submitting a written statement. Persons wishing to make oral presentations should contact Charlotte Tucker, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 325 N. Salisbury St., Raleigh, N.C. 27603, 919-733-4774. Comments submitted as a written statement must be sent to the above address no later than November 9, 1993, and must state the Rules to which the comments are addressed. Time limits for oral remarks may be imposed. Fiscal information regarding these Rules is available from the Division, upon request.

CHAPTER 14 - MENTAL HEALTH: GENERAL

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

SECTION .0100 - GENERAL INFORMATION

.0103 DEFINITIONS

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

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

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

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

- material.
- (6) "Alcohol dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of \$29.95 for the soft cover edition and \$39.95 for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.
 - (7) "Applicant" means any person who intends to establish, maintain or operate a licensable facility and who applies to the department for a license to operate a facility under the provisions of G.S. 122C, Article 2.
 - (8) "Approved supported employment conversion plan" means a planned approach to changing the type of services delivered from ADAP facility-based to supported employment. Approval of the conversion plan is the responsibility of the Regional Director of the Division and the Area Director or his designee if the facility is operated by a contract agency of the area program or other service provider. The Division shall request appropriate personnel from the Division of Vocational Rehabilitation to participate in the review process. The request for approval of the supported employment conversion plan shall include specific written information in the following areas:
 - (A) number of clients to be moved into supported employment placements;
 - (B) types of supported employment models to be used;
 - (C) time frame for the conversion period;
 - (D) interim proposed facility staffing patterns and responsibilities; and
 - (E) proposed budget for conversion plan.
 - (9) "Area program" means a legally constituted public agency providing mental health, mental retardation and substance abuse services for a catchment area designated by the commission. For purposes of these Rules, the term "area program" means the same as "area authority" as defined in G.S. 122C-3.
 - (10) "Assessment" means a procedure for determining the nature and extent of the problem for which the individual is seeking service.
 - (11) "Atypical development" in children means those from birth to 60 months of age who:
 - (A) have autism;
 - (B) are diagnosed hyperactive;
 - (C) have an attention deficit disorder or other behavioral disorders; or
 - (D) exhibit evidence of, or are at risk for, atypical patterns of behavior and social-emotional development in one or more of the following areas:
 - (i) delays or abnormalities in achieving emotional milestones;
 - (ii) difficulties with:
 - (I) attachment and interactions with parents, other adults, peers, materials and objects;
 - (II) ability to communicate emotional needs;
 - (III) motor or sensory development;
 - (IV) ability to tolerate frustration and control behavior; or
 - (V) ability to inhibit aggression;
 - (iii) fearfulness, withdrawal, or other distress that does not respond to the comforting of caregivers;
 - (iv) indiscriminate sociability; for example, excessive familiarity with relative strangers;
 - (v) self-injurious or other aggressive behavior;
 - (vi) substantiated evidence that raises concern for the child's emotional well-being regarding:
 - (I) physical abuse;
 - (II) sexual abuse; or
 - (III) other environmental situations; as defined in G.S. 7A-517(1) and (21).
 - (12) "Certified counselor" means an alcoholism, drug abuse or substance abuse counselor who is certified by the North Carolina Substance Abuse Professional Certification Board.
 - (13) "Child" means a minor from birth through 12 years of age.
 - (14) "Chronically mentally ill adult" means an individual 18 years of age or older

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

- (15) "Client record" means a written account of all services provided a client from the time of admission of the client by the facility until discharge from the facility.
- (16) "Clinical" means having to do with the active direct treatment/habilitation of a client.
- (17) "Clinical staff member" means a professional who provides active direct treatment/habilitation to a client.
- (18) "Clinical/professional supervision" means regularly scheduled assistance by a qualified mental health professional, a qualified substance abuse professional or a qualified developmental disabilities professional to a staff member who is providing direct, therapeutic intervention to a client or clients. The purpose of clinical supervision is to ensure that each client receives appropriate treatment or habilitation which is consistent with accepted standards of practice and the needs of the client.
- (19) "Contested case" means an administrative proceeding under G.S. 150B, Article 3, in which the rights, privileges, or duties of a party are required by law to be determined.
- (20) "Contract agency" means a legally constituted entity with which the area program contracts for a service exclusive of intermittent purchase of service for an individually identified client.
- (21) "Day/night service" means a service provided on a regular basis, in a structured environment that is offered to the same individual for a period of three or more hours within a 24-hour period.
- (22) "Declaratory ruling" means a formal and binding interpretation as to:

- (A) the validity of a rule; or
 - (B) the applicability to a given state of facts of a statute administered by the Department of Human Resources, or a rule or order of the Department of Human Resources.
- (23) "Detoxification" means the physical withdrawal of an individual from alcohol or other drugs in order that the individual can participate in rehabilitation activities.
 - (24) "Developmentally delayed children" means those whose development is delayed in one or more of the following areas: cognitive development; physical development, including vision and hearing; communication, social and emotional; and adaptive skills. The specific level of delay must be:
 - (A) for children from birth to 36 months of age, documented by scores one and one-half standard deviations below the mean on standardized tests in at least one of the above areas of development. Or, it may be documented by a 20 percent delay on assessment instruments that yield scores in months; and
 - (B) for children from 36 to 60 months of age, documented by test performance two standard deviations below the mean on standardized tests in one area of development or by performance that is one standard deviation below the norm in two areas of development. Or, it may be documented by a 25 percent delay in two areas on assessment instruments that yield scores in months.
 - (25) "DFS" means the Division of Facility Services, 701 Barbour Drive, Raleigh, N.C. 27603.
 - (26) "Direct care staff" means an individual who provides active direct care, treatment, rehabilitation or habilitation services to clients.
 - (27) "Dispensing medication" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by state and federal law. Filling or refilling drug containers with prescription drugs for subsequent use by a client is "dispensing." Providing quantities of unit dose prescription drugs for subse-

- quent administration is "dispensing."
- (28) "DMH/DD/SAS" means the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, 325 N. Salisbury Street, Raleigh, N.C. 27603.
- (29) "Documentation" means provision of written, dated and authenticated evidence of the delivery of client services or compliance with statutes or rules, e.g., entries in the client record, policies and procedures, minutes of meetings, memoranda, reports, schedules, notices and announcements.
- (30) "Drug abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of \$29.95 for the soft cover edition and \$39.95 for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.
- (31) "Drug dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences (criteria delineated in the 1987 edition of DSM-III-R published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of \$29.95 for the soft cover edition and \$39.95 for the hard cover edition.) This adoption by reference does not include subsequent amendments and editions of the referenced material.
- (32) "DWI" means driving while impaired, as defined in G.S. 20-138.1.
- (33) "DWI substance abuse assessment" means a service provided to persons charged with or convicted of DWI to determine the presence of chemical dependency. The "assessment" involves a face-to-face interview with a substance abuse professional.
- (34) "Early Intervention Services" means those services provided for infants and toddlers specified in Section 303.12 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations, published 1/1/92 6/22/89. For the purposes of these services, however, transportation means assistance in the travel to and from the multidisciplinary evaluation, specified early intervention services provided by certified developmental day centers or other center-based services designed specifically for children with or at risk for disabilities; and speech, physical or occupational therapy, or other early intervention services if provided in a specialized setting away from the child's residence. Transportation assistance may be provided by staff, existing public or private services or by the family, who shall be reimbursed for their expenses, in accordance with applicable fee provisions. This adoption by reference does not include subsequent amendments and editions of the referenced material.
- (35) "Evaluation" means an assessment service which identifies the nature and extent of an individual's problem through a systematic appraisal, for the purposes of diagnosis and determination of the disability of the individual and the most appropriate plan, if any, for services.
- (36) "First aid" means emergency treatment for injury or sudden illness before regular medical care is available. First aid includes artificial respiration, the Heimlich maneuver, or other Red Cross first aid techniques for relieving airway obstruction, care of wounds and burns, and temporary administering of splints.
- (37) "Governing body" means, in the case of a corporation, the board of directors; in the case of an area authority, the area board; and in all other cases, the owner of the facility.
- (38) "Health Services" means those services provided for infants and toddlers specified in Section 303.13 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations, published 6/22/89. This adoption by reference

does not include subsequent amendments and editions of the referenced material.

(39) "Hearing" means, unless otherwise specified, a contested case hearing under G.S. 150B, Article 3.

(40) "High risk children" means those from birth to 36 months of age for whom there is clinical evidence of conditions which have a high probability of resulting in developmental delay or atypical development and for whom there is clinical evidence that developmental or therapeutic intervention may be necessary. There are two categories of high risk children. These are:

(A) High Risk-Established: Diagnosed or documented physical or mental conditions which are known to result in developmental delay or atypical development as the child matures. Such conditions include, but need not be limited to are limited to the following:

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

(B) High Risk-Potential: Documented presence of indicators which are associated with patterns of development and which have a high probability of meeting the criteria for developmental delay or atypical development as the child matures. There shall be documentation of at least three of the parental or family, neonatal, or postneonatal risk conditions as defined on page 12 in the 1990 publication, "NORTH CAROLINA CHILD SERVICE COORDINATION PROGRAM" available from the Division of Maternal and Child Health, Department of Environment, Health and Natural Resources, PO Box

27687, Raleigh, NC 27611-7687.

This adoption by reference does not include subsequent amendments and editions of the referenced material.

These conditions are as follows:

- (i) maternal age less than 15 years;
- (ii) maternal PKU;
- (iii) mother HIV positive;
- (iv) maternal use of anticonvulsant, antineoplastic or anticoagulant drugs;
- (v) parental blindness;
- (vi) parental substance abuse;
- (vii) parental mental retardation;
- (viii) parental mental illness;
- (ix) difficulty in parental or infant bonding;
- (x) difficulty in providing basic parenting;
- (xi) lack of stable housing;
- (xii) lack of familial and social support;
- (xiii) family history of childhood deafness;
- (xiv) maternal hepatitis B;
- (xv) birth weight less than 1500 grams;
- (xvi) gestational age less than 32 weeks;
- (xvii) respiratory distress (mechanical ventilator greater than six hours);
- (xviii) asphyxia;
- (xix) hypoglycemia (less than 25 mg/dl);
- (xx) hyperbilirubinemia (greater than 20 mg/dl);
- (xxi) intracranial hemorrhage;
- (xxii) neonatal seizures;
- (xxiii) major congenital anomalies;
- (xxiv) CNS infection or trauma;
- (xxv) congenitally acquired infection;
- (xxvi) suspected visual impairment;
- (xxvii) suspected hearing impairment;
- (xxviii) no well child care by age six months;
- (xxix) failure on standard developmental or sensory screening test;
- (xxx) significant parental concern; and
- (xxxi) suspected abuse or neglect.

(41) "Hours of operation" means an indication of the minimum operational hours that a service is expected to be available to clients, but not prohibiting the typical closing of a service to accommodate holidays, vacations, staff development activities and weather and

- facility-related conditions but taking into consideration the type of service being provided.
- (42) "ICF/MR" (Intermediate Care Facility/Mentally Retarded) means a facility certified as having met federal ICF/MR requirements and which provides 24-hour personal care, habilitation, developmental and supportive services to persons with mental retardation or related conditions.
- (43) "Incident" means any happening which is not consistent with the routine operation of the facility or the routine care of a client and that is likely to lead to adverse effects upon a client.
- (44) "Infant" means an individual from birth to one year of age through two years of age.
- (45) "Legend drug" means a drug that cannot be dispensed without a prescription.
- (46) "License" means a permit to operate a facility which is issued by DFS under G.S. 122C, Article 2.
- (47) "Medication" means a substance recognized in the official "United States Pharmacopoeia" or "National Formulary" intended for use in the diagnosis, mitigation, treatment or prevention of disease.
- (48) "Minor client" means a person under 18 years of age who has not been married or who has not been emancipated by a decree issued by a court of competent jurisdiction or is not a member of the armed forces.
- (49) "Neighborhood" - See "residential setting".
- (50) "Nurse" means a person licensed to practice in the State of North Carolina either as a registered nurse or as a licensed practical nurse.
- (51) "Operator" means the designated agent of the governing body who is responsible for the management of a licensable facility.
- (52) "Outpatient" or "Outpatient service" means the same as periodic service.
- (53) "Parent" means the legally responsible person unless otherwise clear from the context.
- (54) "Periodic service" means a service provided through short, recurring visits for persons who are mentally ill, developmentally disabled or substance abusers.

- (55) "Personal assistance" means providing assistance to a client who is mentally ill, has a developmental disability or disabilities, or is a substance abuser, in order that the client can engage in activities and interactions from which the client would otherwise be limited or excluded because of the disability or disabilities. The assistance shall include, but need not be limited to:
- (A) assistance in personal or regular living activities in the client's home;
- (B) support in skill development; or
- (C) support and accompaniment of the client in regular community activities or in specialized treatment, habilitation or rehabilitation service programs.
- (56) "Physical examination" means the procedures used by a physician or physician extender on behalf of a physician to determine the physiological and anatomical condition of the client. Physical examination also means medical examination.
- (57) "Physician extender" means a nurse practitioner or a physician assistant approved to perform medical acts by the Board of Medical Examiners of the State of North Carolina.
- (58) "Preschool age child" means a child from three through five years of age.
- (59) "Private facility" means a facility not operated by or under contract with an area program.
- (60) "Program evaluation" means the systematic documented assessment of program activity to determine the effectiveness, efficiency and scope of the system under investigation, to define its strengths and weaknesses and thereby to provide a basis for informed decision-making.
- (61) "Provider" means an individual, agency or organization that provides mental health, mental retardation or substance abuse services.
- (62) "Psychiatric nurse" means an individual who is licensed to practice as a registered nurse in the State of North Carolina by the North Carolina Board of Nursing and who is a graduate of an accredited master's level program in psychiatric mental health nursing with

two years of experience, or has a master's degree in behavioral science with two years of supervised clinical experience, or has four years of experience in psychiatric mental health nursing.

- (632) "Psychiatric social worker" means an individual who holds a master's degree in social work from an accredited school of social work and has two years of clinical social work experience.
- (643) "Psychiatrist" means an individual who is licensed to practice medicine in the State of North Carolina and who has completed an accredited training program in psychiatry.
- (654) "Psychotherapy" means a form of treatment of mental illness or emotional disorders which is based primarily upon verbal or non-verbal communication with the patient. Treatment is provided by a trained professional for the purpose of removing or modifying existing symptoms, of attenuating or reversing disturbed patterns of behavior, and of promoting positive personality growth and development.
- (665) "Psychotropic medication" means medication with the primary function of treating mental illness, personality or behavior disorders. These medications include, but are not limited to, antipsychotics, antidepressants, neuroleptics, lithium and minor tranquilizers.
- (676) "Qualified alcoholism professional" means an individual who is certified by the North Carolina Substance Abuse Professional Certification Board or who is a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of alcoholism counseling.
- (687) "Qualified developmental disabilities professional" means an individual holding at least a baccalaureate degree in a discipline related to developmental disabilities, and at least two years of supervised habilitative experience in working with the mentally retarded or otherwise developmentally disabled or holding a baccalaureate degree in a field other than one related to

developmental disabilities and having three years of supervised experience in working with the mentally retarded or otherwise developmentally disabled.

- (698) "Qualified drug abuse professional" means an individual who is certified by the North Carolina Substance Abuse Professional Certification Board or who is a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of drug abuse counseling.
- (7069) "Qualified mental health professional" means any one of the following: psychiatrist, psychiatric nurse, practicing psychologist, psychiatric social worker, an individual with at least a master's degree in a related human service field and two years of supervised clinical experience in mental health services or an individual with a baccalaureate degree in a related human service field and four years of supervised clinical experience in mental health services.
- (719) "Qualified nutritionist" means an individual who has a Master's degree in nutrition, nutrition education or public health nutrition and who may or may not be a registered dietitian.
- (724) "Qualified substance abuse professional" means an individual who is:
 - (A) certified by the North Carolina Substance Abuse Professional Certification Board; or
 - (B) a graduate of a college or university with a baccalaureate or advanced degree in a human service related field with documentation of at least two years of supervised experience in the profession of alcoholism and drug abuse counseling.
- (732) "Registered dietitian" means an individual who has successfully completed a national examination for the Commission on Dietetic Registration and maintains registration with that commission through approved continuing education activities and events.
- (743) "Rehabilitation" means training, care and specialized therapies undertaken to

assist a client to reacquire or maximize any or all lost skills or functional abilities.

- (754) "Research" means inquiry involving a trial or special observation made under conditions determined by the investigator to confirm or disprove a hypothesis, or to explicate some principle or effect. The term "research" as used in this document means research which is not standard or conventional; involves a trial or special observation which would place the subject at risk for injury (physical, psychological or social injury), or increase the chance of disclosure of treatment; utilizes elements or steps not ordinarily employed by qualified professionals treating similar disorders of this population; or is a type of procedure that serves the purpose of the research only and does not include treatment designed primarily to benefit the individual.
- (765) "Residential setting" means a living area or zone in which the primary purpose is family residential living and which may be located in an area zoned either urban residential or rural.
- (776) "Respite discharge" means that point in time when no additional incidents of respite services are anticipated.
- (787) "Respite episode" means an uninterrupted period of time during which a client receives respite services.
- (798) "Screening" means an assessment service which provides for a brief appraisal of each individual who presents himself for services, in order to determine the nature of the individual's problem and his need for services. Screening may also include referral to other appropriate community resources.
- (8079) "Secretary" means the Secretary of the Department of Human Resources or designee.
- (810) "Service" means an activity or interaction intended to benefit another, with, or in behalf of, an individual who is in need of assistance, care, habilitation, intervention, rehabilitation or treatment.
- (824) "Severely physically disabled person"

means for the purpose of ADAP (Adult Developmental Activity Program) a person:

- (A) who has a severe physical disability which seriously limits his functional capabilities (mobility, communication, self-care, self-direction, work tolerance or work skills);
- (B) who has one or more physical disabilities resulting from amputation, arthritis, blindness, cancer, cerebral palsy, cystic fibrosis, deafness, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, multiple sclerosis, muscular dystrophy, musculoskeletal disorders, neurological disorders (including stroke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell anemia and end stage renal disease; and
- (C) whose habilitation or rehabilitation can be expected to require multiple habilitation or rehabilitation services over an extended period of time.
- (832) "Sheltered employment" means a facility's provision of work and work training by:
- (A) subcontracting from industries in the community and bringing work to the facility to be performed; or
- (B) manufacturing its own products in the facility. Clients served in a sheltered employment model are those who consistently achieve earning levels exceeding one-half of the minimum wage but who are not ready for independent employment activities.
- (843) "Staff member" means any individual who is employed by the facility.
- (854) "Substantially mentally retarded person" means for the purpose of ADAP a person who is mentally retarded to the degree of seriously limiting his functional capabilities, whose habilitation or rehabilitation can be expected to extend over a period of time, and including:
- (A) moderately mentally retarded persons;
- (B) severely mentally retarded persons;
- (C) profoundly mentally retarded persons; or
- (D) mentally retarded persons with a handicapping condition so severe as to lack the potential for employment at

this time, either in a sheltered or competitive setting. In addition, such individuals must have a deficit in self-help, communication, socialization or occupational skills and be recommended by the vocational rehabilitation counselor for consideration of placement in an ADAP.

- (865) "Support services" means services provided to enhance an individual's progress in his primary treatment/habilitation program.
- (876) "Supported employment" means a day/night service which involves paid work in a job which would otherwise be done by a non-disabled worker. Supported employment is carried out in an integrated work site where a small number of people with disabilities work together and where the work site is not immediately adjacent to another program serving persons with disabilities. It includes intensive involvement of staff working with the individuals in these integrated settings.
- (887) "Toddler" means an individual from one through two three years of age.
- (898) "Treatment" means the process of providing for the physical, emotional, psychological and social needs of clients through services.
- (9089) "Treatment/habilitation plan" means a plan in which one or more professionals, privileged in accordance with 10 NCAC 14K .0319, working with the client and, in some cases, family members or other service providers, document which interventions will be provided and the goals, objectives and strategies that will be followed in providing services to the client.
- (910) "Twenty-four hour facility in which medical care is an integral component" means a facility in which:
 - (A) the medication needs of clients may be evaluated, medication prescribed and laboratory tests ordered to assist in the diagnosis, treatment and monitoring of problems associated with the mental health, mental retardation or other developmental disabilities or substance abuse disorder of clients; and

- (B) proper referral of the client is made to medical specialists when needed.

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

Statutory Authority G.S. 122C-3; 133C-26; 143B-147.

SECTION .0200 - LICENSURE

.0201 LICENSE REQUIRED

(a) No person shall establish, maintain or operate a licensable facility for the mentally ill, mentally retarded or otherwise developmentally disabled or substance abusers without first obtaining a license from the Division of Facility Services, 701 Barbour Drive, Raleigh, N.C. 27603.

(b) In accordance with G.S. 122C-3(14) a facility shall be licensed if the primary purpose of the facility is to provide services for the care, treatment, habilitation or rehabilitation for one or more minors, or for two or more adults who are mentally ill, developmentally disabled or are substance abusers as follows:

(1) When the primary purpose of a 24-hour facility is to provide treatment, the facility shall be licensed in accordance with rules specific to the type of treatment provided or the population served; or

(2) When the primary purpose of a 24-hour facility is to provide habilitation, rehabilitation, or care; thereby necessitating the presence of an employee who will act in the client's behalf when necessary, the facility shall be licensed under the provisions of 10 NCAC 14O .0700 - Supervised Living.

(c) Living arrangements that may be coordinated, organized or provided for or in conjunction with adult clients by the provision of case management or personal assistance shall not be considered residential facilities that require licensing under G.S. 122C.

Material adopted by reference shall include subsequent amendments and editions.

Statutory Authority G.S. 122C-3; 1122C-23; 122C-26; 143B-174.

SECTION .0300 - FACILITY AND PROGRAM MANAGEMENT

**.0342 EDUCATIONAL REQUIREMENTS
FOR CHILDREN/ADOLESCENTS**

~~(a) Each facility serving children and adolescents shall ensure that the public education requirements of the N.C. Department of Public Instruction are met for each client.~~

~~(b) Each facility serving children and adolescents shall develop and implement written policies regarding transition of educational services between the lead education agency (LEA) and the facility.~~

~~(c) Each facility serving children and adolescents shall be responsible for coordinating each child's or adolescents's individual treatment plan with this individualized education program.~~

Except for community respite services, each facility serving children and adolescents shall:

- (1) ensure that the public education requirements of the N.C. Department of Public Instruction are met for each client;
- (2) develop and implement written policies regarding transition of educational services between the lead education agency (LEA) and the facility; and
- (3) be responsible for coordinating each child's or adolescents's individual treatment plan with this individualized education program.

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

SECTION .0400 - PHYSICAL PLANT

**.0402 FACILITY CONSTRUCTION/
ALTERATIONS/ADDITIONS**

(a) When construction or use of a new facility is planned or when alterations or additions are planned for an existing facility, work shall begin only after consultation with the DFS Construction Section, the local building official having jurisdiction, and the local fire official having jurisdiction.

(b) All required permits and approvals shall be obtained from the governing authorities having jurisdiction.

(c) Each facility shall be responsible for compliance with the Americans with Disabilities Act.

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

**.0403 COMPLIANCE WITH BUILDING
CODE REQUIREMENTS**

(a) As used in this Rule the term "new facility" refers to a any facility which has not been licensed

previously as a mental health facility, and for which an initial license under G.S. 122C, Article 2 is being sought. The term does not refer only to a "new" building but will apply to an "old" building if the building houses a facility for which an initial license is being sought.

(b) Each new facility shall be in compliance with the current North Carolina State Building Code as applicable to the specific service type and facility type. Copies of these Building Code Volumes may be purchased from the Department of Insurance Engineering Division located at 410 N. Boylan Avenue, Raleigh, N.C. 27603. The North Carolina State Building Code is adopted by reference to include any subsequent amendments and editions of the referenced material.

~~Each new facility specified in (d), (e), (f), (g), (h) and (i) of this Rule, with the exception of private home respite, alternative family living and apartment models, and supervised independent living, shall be in compliance with the current edition of Section 11X of Volume I of the N.C. State Building Code.~~

~~(e) Each new facility specified in (d), (e), (f), (g), (h) and (i) of this Rule, with the exception of private home respite, alternative family living and apartment models shall be in compliance with the current edition of Volume II, III and IV of the N.C. State Building Code.~~

~~(d) In addition to Building Code requirements specified in (b) of this Rule, new facilities specified in (1), (2), and (3) and (4) of this Paragraph shall meet the requirements of the current edition of Volume I-B of the N.C. State Building Code as follows:~~

~~(1) Developmental Disability group home facilities; Mental retardation or other developmental disability facilities:~~

~~(A) group homes for adults with mental retardation or other developmental disabilities serving six or fewer clients who are ambulatory and able to respond on their own and evacuate the facility without assistance; and~~

~~(B) group homes for children with mental retardation or other developmental disabilities serving six or fewer clients who are ambulatory and able to respond on their own and evacuate the facility without assistance; and~~

~~(C) group homes for individuals with mental retardation or other developmental disabilities and with behavior disorders serving six or fewer clients who are ambulatory and~~

able to respond on their own and evacuate the facility without assistance; and

(2) ~~Developmental Disability respite facilities:~~

~~small community center-based respite for individuals with developmental disabilities, developmental delays or at risk for these conditions serving three or fewer clients of whom one, two or three are non-ambulatory or unable to respond on their own to emergency conditions;~~

(A) ~~Building requirements of 512.2 FAMILY DAY CARE HOMES, Vol. 1, N.C. Building Code shall be met.~~

(B) ~~Mobile homes shall not be permitted.~~

(3) ~~Mental health facilities:~~

(A) ~~group homes and residential acute treatment for adult and elderly individuals who are mentally ill serving six or fewer clients who are ambulatory and able to respond on their own and evacuate the facility without assistance; and~~

(B) ~~residential treatment for children and adolescents serving six or fewer clients who are ambulatory and able to respond on their own and evacuate the facility without assistance.~~

(4) ~~Substance abuse facilities:~~

(A) ~~nonhospital medical detoxification for individuals who are substance abusers serving six or fewer clients who are ambulatory and able to respond on their own and evacuate the facility without assistance;~~

(B) ~~social setting detoxification for individuals who are alcoholics serving six or fewer clients who are ambulatory and able to respond on their own and evacuate the facility without assistance; and~~

(C) ~~halfway houses for individuals who are substance abusers serving six or fewer clients who are ambulatory and able to respond on their own and evacuate the facility without assistance.~~

(e) In addition to Building Code requirements specified in (b) and (c) of this Rule, new facilities specified in (1) and (2) of this Paragraph shall meet the requirements of the current edition of Volume I, Section 513 of the N.C. State Building Code as follows:

(1) ~~Developmental disability facilities:~~

(A) ~~group homes for adults with mental retardation or other developmental disabilities serving five or fewer clients all of whom are non-ambulatory or unable to respond and evacuate without assistance, certifiable for Medicaid reimbursement and staffed 24 hours per day with at least two (2) staff awake at all times;~~

(B) ~~group homes for adults with mental retardation or other developmental disabilities serving more than six clients and fewer than ten clients who are ambulatory and able to respond on their own to emergency conditions;~~

(C) ~~group homes for adults with mental retardation or other developmental disabilities serving six or fewer clients of whom one, two or three are non-ambulatory or unable to respond on their own to emergency conditions;~~

(D) ~~group homes for children with mental retardation or other developmental disabilities serving five or fewer clients all of whom are non-ambulatory or unable to respond and evacuate without assistance, certifiable for Medicaid reimbursement, and staffed 24 hours per day with at least two (2) staff awake at all times;~~

(E) ~~group homes for children with mental retardation or other developmental disabilities serving six or fewer clients of whom one, two or three are non-ambulatory or unable to respond on their own to emergency conditions;~~

(F) ~~group homes for individuals with mental retardation or other developmental disabilities and behavior disorders serving five or fewer clients all of whom are non-ambulatory or unable to respond and evacuate without assistance, certifiable for Medicaid reimbursement, and staffed 24 hours per day with at least two (2) staff awake at all times;~~

(G) ~~group homes for individuals with mental retardation or other developmental disabilities and with behavior disorders serving six or fewer of whom one, two or three are non-ambulatory or unable to respond on their own to emergency conditions;~~

(H) ~~supervised independent living~~

~~boarding homes for adults with mental retardation or other developmental disabilities serving more than six clients and fewer than ten clients who are ambulatory and able to respond on their own to emergency conditions; and~~

~~(I) community center based respite for individuals with mental retardation, other developmental disabilities, developmental delays or at risk for these conditions serving six or fewer clients of whom one, two or three are non-ambulatory or unable to respond on their own to emergency conditions.~~

~~(2) Mental health facilities: residential treatment for individuals serving seven to nine clients who are ambulatory and able to respond on their own and evacuate the facility without assistance.~~

~~(f) In addition to Building Code requirements specified in (b) and (c) of this Rule, new facilities specified in (1), (2) and (3) of this Paragraph shall meet the requirements of the current edition of Volume I, Section 409, Institutional Occupancy (I) of the N.C. State Building Code as follows:~~

~~(1) Developmental disability facilities:~~

~~(A) specialized community residential services for individuals with mental retardation or other developmental disabilities;~~

~~(B) group homes for adults with mental retardation or other developmental disabilities serving six or fewer clients of whom more than three are non-ambulatory or unable to respond on their own to emergency conditions;~~

~~(C) group homes for individuals with mental retardation or other developmental disabilities and with behavior disorders serving six or fewer clients of whom more than three are non-ambulatory or unable to respond on their own to emergency conditions;~~

~~(D) group homes for children with mental retardation or other developmental disabilities serving six or fewer clients of whom more than three are non-ambulatory or unable to respond on their own to emergency conditions; and~~

~~(E) community center based respite for individuals with mental retardation, other developmental disabilities,~~

~~developmental delays or at risk for these conditions serving five or fewer clients of whom more than three are non-ambulatory or unable to respond on their own to emergency conditions.~~

~~(2) Mental health facilities:~~

~~(A) inpatient psychiatric facilities for individuals who are mentally ill;~~

~~(B) residential acute treatment for adult and elderly individuals who are mentally ill; and~~

~~(C) residential treatment for children and adolescents serving ten or more clients.~~

~~(3) Substance abuse facilities:~~

~~(A) inpatient hospital treatment for individuals who are substance abusers; and~~

~~(B) nonhospital medical detoxification for individuals who are substance abusers.~~

~~(g) In addition to Building Code requirements specified in (b) and (c) of this Rule, new facilities specified in (1), (2), (3) and (4) of this Paragraph shall meet the requirements of the current edition of Volume I, Section 405, Business Occupancy (B) of the N.C. State Building Code as follows:~~

~~(1) Mental retardation or other Developmental disability facilities: adult developmental activity programs for individuals with substantial developmental disabilities or mental retardation, severe physical disabilities or other substantial developmental disabilities;~~

~~(2) Mental health facilities:~~

~~(A) psychosocial rehabilitation programs for individuals who are chronically mentally ill;~~

~~(B) day treatment for children and adolescents who are emotionally disturbed; and~~

~~(C) partial hospitalization programs (PHP) for adult and elderly individuals who are acutely mentally ill;~~

~~(3) Substance abuse facilities:~~

~~(A) outpatient treatment for individuals who are substance abusers;~~

~~(B) outpatient detoxification for individuals who are substance abusers; and~~

~~(C) outpatient methadone services for individuals who are narcotic abusers;~~

~~(4) Facilities serving one or more disability:~~

~~(A) sheltered workshops; and~~

~~(B) day activity facilities for adult and elderly individuals who are mentally ill or substance abusers.~~

~~(h) In addition to Building Code requirements specified in (b) and (c) of this Rule, new facilities specified in (1) and (2) of this Paragraph shall meet the requirements of the current edition of Volume I, Section 406, Educational Occupancy (E) of the N.C. State Building Code as follows:~~

~~(1) Mental retardation or other Developmental disability facilities: before/after school and summer developmental day services for children with mental retardation or other developmental disabilities; and~~

~~(2) Mental health facilities: day treatment for children and adolescents who are emotionally disturbed.~~

~~(i) In addition to Building Code requirements specified in (b) and (c) of this Rule, new facilities specified in (1) and (2) of this Paragraph shall meet the requirements of the current edition of Volume I, General Construction, Section 411, Residential Occupancy (R) of the N.C. State Building Code as follows:~~

~~(1) Substance abuse facilities:~~

~~(A) social setting detoxification for more than six individuals who are alcoholics;~~

~~(B) residential treatment or rehabilitation for more than six individuals who are substance abusers; and~~

~~(C) halfway houses for more than six individuals who are substance abusers.~~

~~(2) Facilities serving one or more disability: residential therapeutic (habilitative) camps for children and adolescents.~~

~~(j) Volume I (General Construction) is available at a cost of ten dollars (\$10.00); Volume I-B (Uniform Residential Building Code) at a cost of two dollars (\$2.00); Volume II (Plumbing) at a cost of three dollars (\$3.00); Volume III (Heating and Air Conditioning) at a cost of four dollars and fifty cents (\$4.50); and Volume IV (Electrical) at a cost of fifteen dollars (\$15.00) from the N.C. Department of Insurance, P.O. Box 26387, Raleigh, N.C. 27611.~~

~~(k) The material which is adopted by reference in this Rule is adopted in accordance with the provisions of G.S. 150B-14(e).~~

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

SUBCHAPTER 14L - LICENSURE RULES FOR MENTAL HEALTH FACILITIES

SECTION .0500 - GROUP HOMES FOR ADULT AND ELDERLY INDIVIDUALS WHO ARE MENTALLY ILL

.0501 SCOPE

~~(a) Group homes for individuals who are mentally ill is a residential service designed to provide a home within which staff assistance is available to develop community living skills, appropriate social behavior, vocational functioning, leisure time activities and use of community resources. These group homes may be provided by the following models:~~

~~(1) transitional residence programs providing limited to moderate levels of supervision; and~~

~~(2) supervised group homes which provide moderate to intensive supervision for individuals who need assistance with activities of daily living or to develop community living skills.~~

~~(b) This service is designed to assist individuals to progress toward specific sub goals related to their individual treatment plan and is designed primarily to serve mentally ill persons who are 18 or older.~~

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

.0502 CAPACITY

~~Each facility shall have a capacity of nine or fewer individuals.~~

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

.0503 HOURS OF OPERATION

~~Each facility shall operate 24 hours per day, seven days per week, 12 months per year.~~

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

.0504 STAFF REQUIRED

~~(a) Supervised group homes shall have at least one staff member on site at all times when clients are present.~~

~~(b) In transitional residence facilities, staff shall not be required to be present at all times.~~

~~(c) The governing body shall ensure that additional staff is present if needed to meet temporary needs of individual clients and to protect the health and safety of all clients.~~

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

.0505 TREATMENT COORDINATION

~~(a) Coordination shall be maintained between the facility operator and the qualified mental health professional who is responsible for treatment or case management.~~

~~(b) Each facility shall have a written agreement documenting:~~

- ~~(1) access to psychiatric, medical and clinical consultation and emergency psychiatric services; and~~
- ~~(2) the responsibility of the facility staff to implement specific portions of each individual client's treatment plan.~~

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

.0506 PROGRAM ACTIVITIES

~~(a) Each client shall participate in the overall operation of the residence including participation in routine activities such as maintenance and meal preparation.~~

~~(b) Each facility shall establish a resident council that meets on a regularly scheduled basis to discuss the client's responsibilities and issues related to facility activities.~~

~~(c) Each client shall be involved in treatment, rehabilitation, vocational, educational, or employment activities outside the facility on a regular basis as specified in the client's individual treatment plan.~~

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

.0507 LEVELS OF CLIENT SUPERVISION

~~(a) Each client of a transitional residence facility shall have a treatment plan developed by a mental health professional which contains documentation that the individual needs a residential service with fewer than 24 hour per day supervision and that the intensity of supervision provided by the facility is consistent with the needs identified in the individual's treatment plan.~~

~~(b) Each client of a supervised group home shall have a treatment plan developed by a qualified mental health professional which documents that the intensity of supervision provided by the facility is consistent with the needs identified in the individual's treatment plan.~~

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

.0508 CLIENT TRAINING IN HEALTH AND SAFETY

~~(a) Each client shall receive training concerning safe and proper methods of using kitchen and housekeeping equipment such as knives, range, exhaust fan and other electrical appliances.~~

~~(b) Each client shall have access to first aid supplies located in each facility and shall receive training in the use of these supplies.~~

~~(c) Each client shall receive instruction in obtaining services in emergency situations.~~

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

SUBCHAPTER 14M - LICENSURE RULES FOR MENTAL RETARDATION\ DEVELOPMENTAL DISABILITIES FACILITIES

SECTION .0200 - GROUP HOMES FOR INDIVIDUALS WITH MENTAL RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES AND WITH BEHAVIOR DISORDERS

.0201 SCOPE

~~A group home for individuals with mental retardation or other developmental disabilities and behavior disorders is a residential facility which provides intensive behavioral treatment in a home-like environment. This facility is designed to ameliorate the specific behavior problem which is preventing the individual's integration into habilitative programs in the individual's home community. This service may be certified for Medicaid as an Intermediate Care Facility for the mentally retarded (ICF/MR).~~

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

.0202 CAPACITY

~~(a) The facility shall serve no more than six individuals at any one time.~~

~~(b) No facility shall designate any bed for the continuous provision of respite services.~~

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

.0203 HOURS OF OPERATION

~~Each facility shall operate 24 hours per day, seven days per week, 12 months per year.~~

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

.0204 STAFF REQUIRED

~~(a) The facility shall have a designated program director.~~

(b) ~~At least one staff member, in addition to the director, shall have received training in the area of behavior modification through educational preparation in special education, psychology or a closely related field.~~

(c) ~~Written policies and procedures for utilization of relief staff shall be developed and implemented.~~

(d) ~~Staff shall be employed to implement habilitative programming, including provisions for accompanying clients on visits to their home communities, and to conduct routine cooking, cleaning and maintenance of the facility.~~

(e) ~~The facility shall provide or secure support services of professionals as documented in each individual goal plan.~~

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

.0205 CLIENT/STAFF RATIOS

(a) ~~When there are two or more clients in the facility, a minimum of two staff members shall be on duty at all times.~~

(b) ~~On occasions when only one client is in the facility, a minimum of one staff member shall be on duty.~~

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

.0206 DAY SERVICES

~~Day services outside the facility, such as educational and vocational training, shall be secured for each client as specified in the individual goal plan.~~

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

.0207 MEDICAL STATEMENT

(a) ~~Each staff member who works directly and on a regularly scheduled basis with clients shall submit a medical statement from a licensed physician or an authorized health professional under the supervision of a physician to the facility at the time of initial approval and annually thereafter.~~

(b) ~~The medical statement shall be in any written form and shall indicate the general physical and mental health of the individual and any restrictions required by G.S. 130A-144 to prevent the transmission within the facility of tuberculosis or any other communicable disease or condition that represents a significant risk of transmission within the facility.~~

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

Statutory Authority G.S. 122C-26; 130A-144;

143B-147.

.0208 BEHAVIORAL PROGRAMMING

~~The primary emphasis in goal planning shall be on the elimination of the specific problem behaviors which precipitated the admission to the facility. Other developmental and habilitative goals shall also be addressed during the client's stay at the facility.~~

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

.0209 COMMUNITY RESOURCES

~~In accordance with each client's individual program plan, community resources shall be utilized for each client including recreational, medical, dental and religious resources.~~

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

.0210 PARTICIPATION OF THE FAMILY OR LEGALLY RESPONSIBLE PERSON

~~Each facility shall make efforts to involve the family or the legally responsible person of each client in the planning and implementation of his individual goal plan.~~

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

SECTION .0300 - GROUP HOMES FOR ADULTS WITH MENTAL RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES

.0301 SCOPE

~~A group home for adults with mental retardation or other developmental disabilities is a residential facility which provides a normalized home environment in which to incorporate developmental training and habilitative programming. This facility is designed to promote independence of the residents in order for them to live in a community-based setting. Although residents may possess basic self help, socialization and other community living skills, they have not achieved the degree of independence in these skill areas required for the supervised independent living models such as a boarding home or apartment living. Therefore, this facility is a more restrictive type of service than an apartment living program. This facility may be certified for Medicaid as an Intermediate Care Facility for the Mentally Retarded (ICF/MR).~~

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

.0302 CAPACITY

~~The facility shall have a capacity of nine or fewer clients.~~

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

.0303 COMPLIANCE WITH GROUP HOME STANDARDS

~~(a) The standards for group homes for developmentally disabled adults which are licensed under G.S. 131 D and described in the manual titled "Minimum and Desired Standards and Regulations for Group Homes for Developmentally Disabled Adults" (10 NCAC 42B .0900 .2300) published by the N.C. Department of Human Resources shall also apply to all private non profit, private for profit or area operated group homes for developmentally disabled adults licensed under G.S. 122 C. These standards shall not apply to any group home certified as an Intermediate Care Facility for the Mentally Retarded or any group home holding a current certificate of need to be developed as an Intermediate Care Facility for the Mentally Retarded. Sections .1000, .2200 and .2300 of Subchapter 10 NCAC 42B shall not apply to area operated group homes. This publication is available free of charge from the N.C. Department of Human Resources, Division of Social Services, 325 N. Salisbury Street, Raleigh, North Carolina 27611.~~

~~(b) The provision in 10 NCAC 42C .2401 (which is cross referenced in 10 NCAC 42B .1701) that prohibits the admission of people "with disease in a communicable stage or carrier state" shall not prohibit the admission of residents who are hepatitis B carriers to a home operated by a public agency if the home is in compliance with the rules codified in 10 NCAC 18H .0107 through .0115; HEPATITIS B SCREENING AND VACCINATION OF RESIDENTS AND DIRECT CARE EMPLOYEES IN GROUP HOMES FOR MENTALLY RETARDED ADULTS.~~

~~(c) The Rules which are adopted by reference in this Rule are adopted in accordance with the provisions of G.S. 150B-14(e).~~

Statutory Authority G.S. 122C-26; 143B-147; 150B-14(c).

.0304 MEDICAL STATEMENT

~~(a) Each staff member who works directly and on a regularly scheduled basis with clients shall submit a medical statement from a licensed physician or an authorized health professional~~

~~under the supervision of a physician to the facility at the time of initial approval and annually thereafter.~~

~~(b) The medical statement shall be in any written form and shall indicate the general physical and mental health of the individual and any restrictions required by G.S. 130A-144 to prevent the transmission within the facility of tuberculosis or any other communicable disease or condition that represents a significant risk of transmission within the facility.~~

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

Statutory Authority G.S. 122C-26; 130A-144; 143B-147.

SECTION .0400 - GROUP HOMES FOR CHILDREN WITH MENTAL RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES

.0401 SCOPE

~~A group home for children with mental retardation or other developmental disabilities is a residential facility which provides a normalized home environment for children who are not living with their families. This facility is designed to assist each child in residence to attain his highest level of independent living skills through developmental training integrated with family and community activities to prepare the child for residence with his own family or other less restrictive environment. This facility may be certified as an Intermediate Care Facility for the Mentally Retarded (ICF/MR).~~

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

.0402 CAPACITY

~~(a) The facility shall serve no more than six children at any one time.~~

~~(b) No facility shall designate any bed for the continuous provision of respite services.~~

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

.0403 HOURS OF OPERATION

~~(a) Each facility shall operate 24 hours per day, seven days per week, 12 months per year.~~

~~(b) Waking and sleeping hours of the facility shall be designated and posted by the program director. The program director shall designate when the hours are in effect.~~

Statutory Authority G.S. 122C-26; 143B-47.

.0404 STAFF REQUIRED

(a) ~~The facility shall have a designated program director.~~

(b) ~~A minimum of one staff member shall have educational preparation in at least one of the following areas: special education, social work, psychology, child development, nursing, recreational therapy, occupational therapy, or language and communication therapy.~~

(c) ~~Written policies and procedures for utilization of relief staff shall be developed and implemented.~~

(d) ~~The facility shall provide or secure the services of support professionals as needed including a psychologist, social worker, physician, dentist, physical therapist and language and communication specialist.~~

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

.0405 CHILD/STAFF RATIOS

(a) ~~During waking hours when children are in the facility, a minimum of two staff members shall be on duty.~~

(b) ~~During sleeping hours, a minimum of two staff members shall be in the immediate area unless emergency backup procedures are sufficient to allow only one staff member on duty. In such instances, minimum acceptable emergency procedures shall include the following:~~

- (1) ~~written agreements with emergency medical transport services;~~
- (2) ~~availability of on-call emergency backup that can arrive at the facility within 20 minutes; and~~
- (3) ~~notification to the parent or the legally responsible person that one staff member may be on duty during sleeping hours.~~

(e) ~~On occasion when only one child is in the facility, a minimum of one staff member shall be on duty during waking and sleeping hours.~~

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

.0406 PERSONAL CARE

(a) ~~Each child's personal hygiene needs shall be met daily.~~

(b) ~~Toilet articles shall be made available to each child.~~

(c) ~~Each child shall have a complete change of personal clothing at least daily.~~

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

.0407 DAILY TRAINING ACTIVITIES

(a) ~~Staff shall provide daily training activities in the facility which are designed to meet the developmental needs of each child.~~

- (1) ~~Activities shall take into consideration the length of time each child needs rest periods, his need for individual attention, and special limitations of activities and diets.~~
- (2) ~~Both free play and organized recreational activities shall be provided.~~
- (3) ~~Field trips and community experiences shall be provided.~~
- (4) ~~Daily routines common to non-handicapped children shall be followed.~~

(b) ~~The staff shall provide or secure day programming for children whose educational programming does not extend through the summer months.~~

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

.0408 MEDICAL STATEMENT

(a) ~~Each staff member who works directly and on a regularly scheduled basis with clients shall submit a medical statement from a licensed physician or an authorized health professional under the supervision of a physician to the facility at the time of initial approval and annually thereafter.~~

(b) ~~The medical statement shall be in any written form and shall indicate the general good physical and mental health of the individual and any restrictions required by G.S. 130A-144 to prevent the transmission within the facility of tuberculosis or any other communicable disease or condition that represents a significant risk of transmission within the facility.~~

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

Statutory Authority G.S. 122C-26; 130A-144; 143B-147.

.0409 COMMUNITY RESOURCES

~~In accordance with each child's individual program plan, community resources shall be utilized for each child including educational, recreational, medical, dental and religious resources.~~

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

.0410 PARTICIPATION OF THE FAMILY OR LEGALLY RESPONSIBLE PERSON

~~(a) Staff shall help the family in understanding mental retardation and other developmental disabilities, the child's development, and the extent of the child's handicap.~~

~~(b) Individual goal plans shall be developed jointly between the staff and the client's parent or the legally responsible person when feasible.~~

~~(c) Family members shall be provided the opportunity to participate in training seminars.~~

~~(d) Each family shall be encouraged to maintain an ongoing relationship with their child through such means as family visits to the facility, and the child's visits with the parent or the legally responsible person outside the facility.~~

~~(e) Reports to the parent or the legally responsible person shall be submitted in writing at least quarterly, when feasible, with the opportunity extended to the parent or the legally responsible person for participation in at least one conference annually.~~

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

SECTION .0700 - COMMUNITY RESPITE SERVICES FOR INDIVIDUALS WITH MENTAL RETARDATION; OTHER DEVELOPMENTAL DISABILITIES; DEVELOPMENTAL DELAYS OR AT RISK FOR THESE CONDITIONS

.0709 RESPITE ACTIVITIES

(a) Activities shall emphasize maturation of each child and independence of adults, supplementing the services being provided by other programs and by parents or the legally responsible person.

(b) Activities shall be planned daily and shall take into consideration the length of time each child should be scheduled for needed rest periods, the need for individual attention, and special limitations of activities and diet.

(c) Activities shall be designed to provide each child client with learning opportunities, recreation, reinforcement of self-help skills, language skills, socialization, motor coordination and methods which have been successful in other settings or are associated with the client's family life.

(d) ~~Toys and leisure materials shall be accessible to clients~~ Age-appropriate recreational and learning materials shall be accessible to clients.

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

.0715 PRIVATE HOME RESPITE: AGREEMENT WITH PROVIDERS

(a) Unless outlined in a written job description for providers or in written policies and procedures, Each governing body shall have a written agreement signed by each provider of private home respite care.

(b) The provisions of the agreement shall include specify the responsibilities of the governing body and the provider including:

- ~~(1) the responsibilities of the governing body and the provider(s) of respite care;~~
- ~~(21) confidentiality requirements;~~
- ~~(32) procedures for securing emergency services;~~
- ~~(43) program activities to be implemented;~~
- ~~(54) responsibilities for supervising the respite client;~~
- ~~(65) procedures related to administration of medications;~~
- ~~(76) participation in respite training programs; and~~
- ~~(87) terms of compensation;~~
- ~~(8) client rights; and~~
- ~~(9) adherence to agency policies and procedures.~~

(c) A signed copy of the agreement shall be maintained by the governing body, and a signed copy shall be given to the provider.

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

.0716 PRIVATE HOME RESPITE: RESPONSIBILITIES OF GOVERNING BODY

(a) Each governing body shall: ~~document efforts to match the provider's ability to provide respite care with the client's physical and developmental needs.~~

~~(b) A written statement of duties and responsibilities during each episode of respite care shall be provided to the respite provider. This statement shall include length of service to be provided, medications to be administered, and special dietary considerations.~~

- (1) document efforts to match the provider's ability to provide respite care with the client's physical and developmental needs;
- (2) make available to the provider instructions regarding duties and responsibilities which shall include, but need not be limited to:

(A) period of time for service to be

provided;

(B) medications to be administered, and

(C) special dietary considerations; and

(d3) The governing body shall provide each respite provider with a form for recording illness, accident, or medical concern, including administration of medication. Following each respite episode, this form shall be maintained by the governing body in the client's record.

(eb) If the respite client is involved in a developmental or occupational program, the respite provider shall be provided written information regarding responsibilities for assuring that the client attends the program, and for structuring activities at the respite facility to enhance objectives established by the developmental or occupational program.

(ec) At least one approved respite provider shall supervise the respite client at all times.

(fd) The respite program director shall review with the provider the plan for emergency evacuation of the home prior to accepting respite clients

(ge) Only the respite program director or his designee shall arrange respite care between the client's family and the respite provider.

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

SUBCHAPTER 14N - LICENSURE RULES FOR SUBSTANCE ABUSE FACILITIES

SECTION .0600 - HALFWAY HOUSES FOR INDIVIDUALS WHO ARE SUBSTANCE ABUSERS

.0601 SCOPE

~~A halfway house is a residential facility which provides a structured living environment in a group facility for individuals who are alcoholics or other drug abusers. The facility is designed to enhance the client's return to independent living within a specific time. Individuals must have been detoxified prior to entering the facility. Treatment and rehabilitation services are provided outside the facility. Services provided by the facility are coordinated with the individual's treatment plan.~~

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

.0602 HOURS OF OPERATION

~~The facility shall provide services 24 hours per day, seven days per week, 12 months per year.~~

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

.0603 STAFF REQUIRED

~~(a) A minimum of one staff member shall be present in the facility when clients are present in the facility.~~

~~(b) The services of a certified alcoholism counselor, a certified drug abuse counselor or a certified substance abuse counselor shall be available on an as needed basis to each client.~~

~~(c) In facilities that serve minors, a minimum of one staff member for each five or fewer minor clients shall be on duty during waking hours when minor clients are present.~~

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

.0604 STAFF TRAINING

~~(a) Each facility shall have at least one staff member on duty trained in the following areas:~~

~~(1) cardio pulmonary resuscitation;~~

~~(2) seizure management;~~

~~(3) the Heimlich maneuver or other Red Cross first aid techniques for relieving airway obstructions;~~

~~(4) basic first aid;~~

~~(5) alcohol and other drug withdrawal symptoms;~~

~~(6) medication education; and~~

~~(7) symptoms of secondary complications to alcohol and other drug addiction.~~

~~(b) Each direct care staff member shall receive continuing education to include understanding of the nature of addiction, the withdrawal syndrome, group therapy, family therapy and other treatment methodologies.~~

~~(c) Each direct care staff member in a facility that serves minors shall receive specialized training in youth development and therapeutic techniques in working with youth.~~

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

.0605 EMERGENCY MEDICAL SERVICES

~~Each facility shall have and implement written procedures for handling medical emergencies. These procedures shall include provision for the following:~~

~~(1) immediate access to a physician;~~

~~(2) acute care hospital services; and~~

~~(3) assistance from a local ambulance service, rescue squad or other trained medical personnel within 20 minutes of the facility.~~

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

.0606 SCHEDULE OF ACTIVITIES

(a) ~~The facility shall have a written schedule for daily routine activities.~~

(b) ~~The facility shall maintain a written schedule of support activities provided for clients.~~

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

.0607 POSTING OF HOUSE RULES

~~House rules shall be conspicuously posted in the facility.~~

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

SUBCHAPTER 140 - LICENSURE RULES FOR FACILITIES SERVING MORE THAN ONE DISABILITY

SECTION .0100 - ALTERNATIVE FAMILY LIVING

.0101 SCOPE

~~(a) Alternative family living is a residential facility which provides room and board and "family style" supervision and monitoring of the client's daily activities. Individuals live with a family who act as providers of supportive services. The service providers are supported by professional staff with ongoing consultation and education to the service providers in their own homes.~~

~~(b) Alternative family living may include the host home model which is a residential facility that provides for placement of an individual in a private home on a contracted short term basis with continuous supervision supplemented by treatment provided by professional staff.~~

~~(c) Each facility shall be designed primarily to serve persons with mental illness, mental retardation or other developmental disability, or substance abuse in need of a supervised living environment within a community setting.~~

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

.0102 CAPACITY

~~Each alternative family living facility shall serve a maximum of two clients at the same time.~~

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

.0103 PHYSICAL PLANT REQUIREMENTS

~~(a) A minimum of one ionized smoke detector~~

~~wired into the house current shall be installed and centrally located. Additional smoke detectors that are not wired into the house current shall be checked at least monthly by the provider.~~

~~(b) A dry powder or CO(2) type fire extinguisher shall be located in the kitchen and shall be checked at least annually by the local fire department. Each client and provider shall receive instruction in its use on his first day of residence.~~

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

.0104 DESIGNATED QUALIFIED PROFESSIONAL

~~Each client admitted to a facility shall be receiving services from a qualified mental health professional, qualified develop mental disabilities professional, or qualified substance abuse professional, as appropriate, who has responsibility for the client's treatment, program or case management plan.~~

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

.0105 CLIENT SUPERVISION

~~At least one facility staff member shall be present in the facility during hours in which a client is in the facility unless the qualified professional who has designated responsibility for the client's treatment program or case management plan has documented in the individual client plan that the client may remain in the facility without supervision in certain clearly delineated instances.~~

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

.0106 SERVICE RESPONSIBILITIES

~~(a) When the governing body is not the provider of services, it shall attempt to match the client's needs with the provider.~~

~~(b) Each governing body shall maintain an application on each provider which includes the following:~~

- ~~(1) full name of each person living in the facility;~~
- ~~(2) place, telephone number and hours of employment for those family members who will be providing alternative family living services;~~
- ~~(3) address, directions to and telephone number of residence; and~~
- ~~(4) descriptions of sleeping arrangements for the client.~~

~~(c) Each governing body shall have a written agreement with each provider which includes but~~

is not limited to the following:

- (1) description of the client's behavior;
- (2) the responsibilities of the provider;
- (3) confidentiality requirements;
- (4) responsibility and procedures for securing emergency services;
- (5) responsibilities for supervising the client;
- (6) special dietary considerations;
- (7) participation in appropriate training programs;
- (8) responsibilities of both parties as to provision of client medical, dental, developmental or treatment services as deemed necessary;
- (9) responsibilities for insuring that the client participates in appropriate treatment/habilitation services;
- (10) responsibilities for client transportation;
- (11) termination clause; and
- (12) terms of compensation.

(d) The governing body shall maintain a signed copy of the agreement in the files, and a signed copy shall be given to the provider.

(e) Each governing body shall furnish each provider with a form for recording illness, accident or medical concerns, including administration of medication. This form shall be maintained by the governing body in the client's record.

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

.0107 PROVIDER TRAINING

(a) Each provider shall participate in a training program prior to the placement of a client in his home.

(b) The content of the training program shall include but not be limited to the following:

- (1) general overview of mental illness, mental retardation or other developmental disability, or substance abuse, as appropriate;
- (2) administration of medication;
- (3) development of the individual treatment/habilitation plan;
- (4) confidentiality;
- (5) client rights; and
- (6) principles of behavior management, if appropriate.

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

.0108 HOUSEKEEPING ACTIVITIES

Each facility may assign clients to routine

housekeeping activities normative for his age and development or psychiatric status as specified in the individual client plan for services in the facility.

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

.0109 TRANSPORTATION

Each facility shall arrange or provide transportation for the client as specified in the individual client plan and in emergency situations.

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

SECTION .0200 - SUPERVISED INDEPENDENT LIVING

.0201 SCOPE

Supervised independent living is a residential facility which may provide room, board, and care to one or more individuals who do not need 24-hour supervision. Training, counseling, and various levels of supervision are provided as needed. Supervised independent living includes apartment living and boarding homes and shall be designed primarily to serve persons 18 years of age or older with mental illness, mental retardation or other developmental disability, or for substance abusers between 16 and 21 years of age. Supervised independent living includes apartment living and boarding homes as follows:

- (1) Apartment living is a residential facility providing a supervised living environment for individuals who are preparing for independent living. Counseling and technical assistance are provided as needed. Service models may include co-resident apartments, apartment clusters and single resident apartments.
 - (a) Co-resident apartment is a residential facility that features one staff person, commonly called a counselor, living with one or two adults in a single apartment.
 - (b) Apartment cluster is a residential facility that involves residents living in several apartments in the same building or scattered sites within an apartment complex and is commonly staffed with a counselor or manager who resides within the same apartment complex.
 - (c) Single resident apartment is a residential facility that involves almost total independent living for adults who may reside in a variety of settings dis-

~~persed throughout the community.~~

- (2) ~~Boarding home is a residential facility provided for individuals with mental illness, mental retardation or other developmental disability, or for substance abusers which provides an alternative living environment for those individuals not yet ready for successful independent living. Training may be provided in the areas of health and safety, medication administration, use of community services, management of personal funds, acquisition and refinement of self help skills, acquisition and refinement of individualized leisure activities, and personalized counseling services. This service is generally less restrictive than group homes but more restrictive than apartment living.~~

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

.0202 CAPACITY OF BOARDING HOME

~~Each boarding home shall have a capacity of nine or fewer clients.~~

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

.0203 PHYSICAL PLANT REQUIREMENTS

(a) ~~A minimum of one ionized smoke detector wired into the house current shall be installed and centrally located. Additional smoke detectors that are not wired into the house current shall be checked at least monthly by the provider.~~

(b) ~~A dry powder or CO(2) type fire extinguisher shall be located in the kitchen and shall be checked at least annually by the local fire department. Each client and provider shall receive instruction in its use on his first day of residence.~~

(c) ~~A minimum of two means of exit shall be included for each boarding home.~~

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

.0204 PROGRAM DIRECTOR/ COORDINATOR

~~Each facility shall have a designated program director.~~

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

.0205 DESIGNATED QUALIFIED PROFESSIONAL

~~Each client admitted to a facility shall be receiving services from a qualified mental health~~

~~professional, qualified developmental disabilities professional, or qualified substance abuse professional, as appropriate, who has responsibility for the client treatment, program or case management plan.~~

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

.0206 SUPPORT SERVICES

~~Support services shall be made available to each client to assist in meeting individual medical, habilitation, treatment, vocational, social and other needs.~~

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

.0207 TREATMENT/HABILITATION PLAN

~~With the exception of clients served in the co-resident apartment, each individual client plan shall contain documentation that the individual needs a residential service with fewer than 24 hour per day supervision, and that the intensity of supervision provided by the facility is consistent with needs identified in the individual's treatment/habilitation plan.~~

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

.0208 AGREEMENT: CLIENT/ SUPERVISED INDEPENDENT LIVING FACILITY

(a) ~~A written agreement shall be negotiated between each client and the service provider in a supervised independent living facility which specifies the responsibilities of the client and the provider.~~

(b) ~~One copy of the agreement shall be given to the client and one copy included in the client's record.~~

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

.0209 CLIENT TRAINING IN HEALTH AND SAFETY

(a) ~~Each client shall receive training concerning safe and proper methods of using kitchen and housekeeping equipment such as knives, range, exhaust fans, and other electrical appliances.~~

(b) ~~Each client shall have access to first aid supplies and shall receive training in the use of these supplies.~~

(c) ~~Each client shall receive instruction in obtaining services in emergency situations.~~

(d) ~~Information on obtaining emergency services, including access to available telephones,~~

shall be posted.

~~(e) Each client who cannot self-medicate shall be provided a training program to assist him to be less reliant on drug administration by staff and more self-reliant regarding drug administration.~~

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

.0210 STAFF REQUIRED: APARTMENT LIVING FOR MR/DD CLIENTS

~~(a) The program director for apartment living facilities serving mentally retarded or otherwise developmentally disabled clients shall be a high school graduate or equivalent with three years of experience in mental retardation programming or a baccalaureate graduate degree with one year of experience in mental retardation or other developmental disability programming.~~

~~(b) The staffing patterns of the apartment living facility, including the staff to client ratio and the use of volunteers, advocates and other support individuals, shall be developed in response to the degree of independence of residents and the geographical dispersal of apartment living units.~~

~~(c) The staff to client ratio shall be as follows:~~

- ~~(1) co-resident apartment at least one staff member to each two clients;~~
- ~~(2) apartment cluster at least one staff member to each 12 or fewer clients; and~~
- ~~(3) independent living at least one staff member to each 15 or fewer clients.~~

~~(d) When the program director is not available, another person shall be designated to serve in that capacity.~~

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

.0211 STAFF REQUIRED: APARTMENT LIVING PROGRAMS FOR MI/SA

~~(a) Sufficient staff members shall be available to the apartment living facilities serving mentally ill and substance abuse clients to assist clients in the development of necessary skills.~~

~~(b) Live-in staff shall not be required except in co-resident apartments.~~

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

.0212 STAFF REQUIRED: BOARDING HOMES

~~(a) Sufficient staff members shall be available to the boarding home to assist clients in the development of necessary skills.~~

~~(b) Live-in staff shall not be required.~~

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

SECTION .0700 - SUPERVISED LIVING

.0701 SCOPE

(a) Supervised living is a residential facility designed to serve individuals who require supervision when in the residence.

(b) The primary purpose is to provide services in a home environment for the habilitation and rehabilitation to individuals who are mentally ill, have a developmental disability or disabilities, or who are substance abusers.

(c) A supervised living facility shall be licensed if the facility serves:

- (1) one or more clients under the age of 18; or
- (2) two or more adult clients.

Statutory Authority G.S. 143B-147.

.0702 HOURS OF OPERATION

Each facility shall be available to meet the needs of the clients 24 hours per day, 365 days per year.

Statutory Authority G.S. 143B-147.

.0703 CAPACITY

(a) A facility shall serve no more than three clients when:

- (1) the client lives with a family; and
- (2) the family provides the service.

(b) With the exception of Paragraph (a) of this Rule, a facility shall serve no more than six clients when the clients have mental illness or developmental disabilities.

(c) Any facility currently licensed on the effective date of this Rule, and providing services to more than six clients, may continue to provide services at no more than the facility's license capacity as of the effective date of this Rule. The currently licensed facilities serving more than six clients are:

- (1) 10 NCAC 14L .0500, Group Homes for Adult and Elderly Individuals Who are Mentally Ill; and
- (2) 10 NCAC 14M .0300, Group Homes for Adults with Mental Retardation or Other Developmental Disabilities.

Statutory Authority G.S. 143B-147.

.0704 STAFF REQUIREMENTS

(a) A minimum of one staff member shall be

present at all times when any client is on the premises.

(b) Staff-client ratios shall be designed to provide staff to respond to individualized client needs.

(c) Staff shall be present in a facility when more than one client is present in the following client-staff ratios:

- (1) children or adolescents with mental illness or emotional disturbance shall be served with one staff present for each four or fewer clients present;
- (2) children or adolescents with substance abuse shall be served with a minimum of one staff present for each five or fewer minor clients present during waking hours; or
- (3) children or adolescents with developmental disabilities shall be served with one staff present for each one to three clients present and two staff for each four or more clients present. However, only one staff member need be present during sleeping hours if emergency back-up procedures are sufficient to allow only one staff member on duty.

Statutory Authority G.S. 143B-147.

.0705 SPECIAL STAFFING REQUIREMENTS

(a) In facilities which serve clients who are substance abusers:

- (1) at least one staff member who is on duty shall be trained in alcohol and other drug withdrawal symptoms and symptoms of secondary complications to alcohol and other drug addiction;
- (2) when the clients are minors, staff shall be trained in youth development and therapeutic techniques in working with youth; and
- (3) the services of a certified alcoholism counselor, a certified drug abuse counselor or a certified substance abuse counselor shall be available on an as-needed basis for each client.

(b) In facilities which serve individuals with behavior disorders, in addition to developmental disabilities, the staff shall include at least one staff member who has received training in the area of behavior management through educational preparation in special education, psychology or a closely related field.

Statutory Authority G.S. 143B-147.

.0706 MEDICAL STATEMENT

(a) Each staff member who works directly with clients shall submit to the facility a medical statement that has been completed within 30 days of employment, from a licensed physician or an authorized health professional under the supervision of a physician and annually thereafter.

(b) The medical statement shall be in writing and shall indicate the general health of the individual and any restrictions required by G.S. 130A-144 to prevent the transmission, within the facility, of tuberculosis or any other communicable disease or condition that represents a significant risk of transmission within the facility.

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

Statutory Authority G.S. 143B-147.

.0707 SERVICE COORDINATION

Coordination shall be maintained between the facility operator and the qualified professional who is responsible for treatment/ habilitation or case management.

Statutory Authority G.S. 143B-147.

.0708 PROGRAM ACTIVITIES

(a) Each client shall have the opportunity to participate in the overall operation of the facility including participation in routine activities such as maintenance and meal preparation.

(b) Each client shall be involved in treatment, rehabilitation, vocational, educational, employment, social and community activities on a regular basis in accordance with the needs of the client.

(c) For each client with a developmental disability, staff shall provide daily training activities in accordance with the client's needs.

Statutory Authority G.S. 143B-147.

.0709 CLIENT TRAINING IN HEALTH AND SAFETY

(a) Each adolescent and adult client shall receive training concerning safe and proper methods of using kitchen and housekeeping equipment such as knives, range, exhaust fan and other electrical appliances.

(b) Each client shall receive instructions in obtaining services in emergency situations.

Statutory Authority G.S. 143B-147.

**.0710 PARTICIPATION OF THE FAMILY
OR LEGALLY RESPONSIBLE
PERSON**

(a) Each client's family shall be provided the opportunity to maintain an ongoing relationship with their relative through such means as family visits to the facility and visits with the family outside the facility.

(b) Reports to the parent of a minor resident, or the legally responsible person of an adult resident, shall be submitted at least annually. Reports may be in writing or take the form of a conference and shall focus on the client's progress toward meeting individual goals.

Statutory Authority G.S. 143B-147.

SUBCHAPTER 14Q - GENERAL RIGHTS

**SECTION .0300 - GENERAL CIVIL,
LEGAL AND HUMAN RIGHTS**

**.0305 PROTECTION FROM HARM, ABUSE,
NEGLECT OR EXPLOITATION**

(a) Employees shall protect clients from harm, abuse, neglect and exploitation in accordance with G.S. 122C-66.

(b) Employees shall not subject a client to any sort of neglect or indignity, or inflict abuse upon any client.

(c) Goods or services shall not be sold to or purchased from a client except through established governing body policy.

(d) Employees shall use only that degree of force necessary to repel or secure a violent and aggressive client and which is permitted by governing body policy. The degree of force that is necessary depends upon the individual characteristics of the client (such as age, size and physical and mental health) and the degree of aggressiveness displayed by the client. Use of intervention procedures shall be compliance with Subchapter 14R of this Chapter.

(e) Any violation by an employee of Paragraphs (a) through (d) of this Rule, which has been substantiated by duly constituted administrative proceedings, shall be grounds for dismissal of the employee regardless of whether the employee is ultimately convicted of related criminal charges.

Statutory Authority G.S. 122C-59; 122C-65; 122C-66; 143B-147.

**CHAPTER 18 - MENTAL HEALTH:
OTHER PROGRAMS**

**SUBCHAPTER 18D - CONFIDENTIALITY
RULES**

**SECTION .0200 - RELEASE OF
CONFIDENTIAL INFORMATION
WITH CONSENT**

**.0209 PERSONS WHO MAY SIGN
CONSENT FOR RELEASE**

The following persons may sign a consent for release of confidential information:

- (1) a competent adult clients ~~who have not been adjudicated incompetent;~~
- (2) an adult client who has been adjudicated incompetent, when consenting for release of information to an attorney;
- (23) the client's legally responsible person;
- (34) a minor clients under the following conditions:
 - (a) when seeking services for venereal disease and other diseases reportable under G.S. 130A-134, pregnancy, abuse of controlled substances or alcohol, or emotional disturbances under G.S. 90-21.5;
 - (b) when married or divorced;
 - (c) when emancipated by a decree issued by a court of competent jurisdiction;
 - (d) when a member of the armed forces; or
 - (e) when consenting for release of information to ~~his~~ an ~~own~~ attorney; and
- (45) personal representative of a deceased client if the estate is being settled or next of kin of a deceased client if the estate is not being settled.

Statutory Authority G.S. 28A-13.3; 90-21.5; 122C-52; 122C-53; 131E-67; 143B-147.

**SUBCHAPTER 18N - OPTIONAL SERVICES
FOR INDIVIDUALS OF ALL
DISABILITY GROUPS**

SECTION .0600 - PERSONAL ASSISTANCE

.0601 SCOPE

(a) Personal assistance is a service which provides aid to a client who has mental illness, developmental disabilities or substance abuse so that the client can engage in activities and interactions from which the client would otherwise be limited or excluded because of his disability or

disabilities. The assistance includes:

- (1) assistance in personal or regular living activities in the client's home;
- (2) support in skill development; or
- (3) support and accompaniment of the client in regular community activities or in specialized treatment, habilitation or rehabilitation service programs.

(b) If these Rules are in conflict with Medicaid rules regarding Personal Care, and Medicaid is to be billed, then the Medicaid rules shall prevail.

Statutory Authority G.S. 143B-147.

.0602 HOUSING REVIEW

(a) When personal assistance for a client includes service to the client in his or her home, one of the purposes of the service is to assist the client in an assessment of the safety and sanitation of the home.

(b) If the safety or sanitation is in question, it shall be brought to the attention of the client and the professional responsible for the treatment/habilitation or case management of the client, so that the situation can be discussed as a part of the regular treatment/habilitation or case management planning process.

Statutory Authority G.S. 143B-147.

.0603 STAFF TRAINING

Individuals who are employed to provide personal assistance shall have:

- (1) at least a high-school diploma; and
- (2) special training regarding the needs of the specific client for whom assistance will be provided.

Statutory Authority G.S. 143B-147.

.0604 SUPERVISION OF STAFF

(a) Personal assistance shall be provided under the direction of a supervisor who is a qualified professional as defined in 10 NCAC 14K .0103(66) through (71).

(b) When a specific client's disability is different from that for which the supervisor is trained, the personal assistance employee shall have access to consultation from a qualified professional who is trained in a discipline related to the client's needs. The rule which is adopted by reference includes subsequent amendments and editions of the referenced material.

Statutory Authority G.S. 143B-147.

.0605 EMERGENCY PRECAUTIONS

Instead of the instructions set forth in 10 NCAC 18L .0805, individuals employed to provide personal assistance shall be specifically informed in each personal assistance arrangement regarding safety precautions and 24-hour emergency procedures.

Statutory Authority G.S. 143B-147.

SECTION .0700 - SUPERVISED LIVING

.0701 SCOPE

Supervised living is a residential service as defined in 10 NCAC 140 .0701, other than the service is provided to one adult client. Any Rule which is adopted by reference in this Section shall include subsequent amendments and editions of the referenced material.

Statutory Authority G.S. 143B-147.

.0702 CROSS-REFERENCE TO HOURS OF OPERATION

Each supervised living service shall comply with the hours of operation delineated in 10 NCAC 140 .0702.

Statutory Authority G.S. 143B-147.

.0703 CROSS-REFERENCE TO STAFF REQUIREMENTS

Each supervised living service shall comply with the staff requirements delineated in 10 NCAC 140 .0704(a) and (b).

Statutory Authority G.S. 143B-147.

.0704 SPECIAL STAFFING REQUIREMENTS

Individuals who provide services to a client in a supervised living arrangement shall receive special training relevant to the needs of the client served.

Statutory Authority G.S. 143B-147.

.0705 CROSS-REFERENCE TO MEDICAL STATEMENT

Each supervised living service shall comply with the medical statement requirements delineated in 10 NCAC 140 .0706.

Statutory Authority G.S. 143B-147.

.0706 CROSS-REFERENCE TO SERVICE COORDINATION

Each supervised living service shall comply with the service coordination requirements delineated in 10 NCAC 14O .0707.

Statutory Authority G.S. 143B-147.

.0707 CROSS-REFERENCE TO PROGRAM ACTIVITIES

Each supervised living service shall comply with the program activities requirements delineated in 10 NCAC 14O .0708.

Statutory Authority G.S. 143B-147.

.0708 CROSS-REFERENCE TO CLIENT TRAINING IN HEALTH AND SAFETY

Each supervised living service shall comply with the program activities requirements delineated in 10 NCAC 14O .0709.

Statutory Authority G.S. 143B-147.

.0709 CROSS-REFERENCE TO PARTICIPATION OF FAMILY OR OTHERS

Each supervised living service shall comply with NCAC 14O .0710 regarding participation of family or the legally responsible person.

Statutory Authority G.S. 143B-147.

SUBCHAPTER 18Q - OPTIONAL SERVICES FOR INDIVIDUALS WHO ARE DEVELOPMENTAL DISABLED

SECTION .0500 - COMMUNITY RESPITE SERVICES FOR INDIVIDUALS WITH MENTAL RETARDATION, OTHER DEVELOPMENTAL DISABILITIES, DEVELOPMENTAL DELAYS OR AT RISK FOR THESE CONDITIONS

.0520 SCOPE

(a) Community respite is a ~~residential~~ support service which provides periodic relief for a family or family substitute on a temporary basis. While overnight service is available, community respite may be provided to individuals for periods of less than 24 hours on a day or evening basis.

(b) Attention to the client's everyday nutritional, recreational, emotional developmental and physical needs are elements of respite care. The service is primarily a family support service rather than an

habilitative service; however, such activities as training, therapy and medical treatment, if provided, are ancillary to the provision of respite care.

(c) The following three models are examples of respite services:

- (1) center-based respite is a ~~residential~~ support service in which the individual is served at a designated facility which has potential for overnight care. While an overnight capacity is always a part of this service, a respite center may, in addition, provide respite services to individuals for periods of less than twenty-four hours on a day or evening basis;
- (2) private home respite is a ~~residential~~ support service in which the area program or its contract agency contracts with community citizens to serve individuals in their own home on an overnight basis; or
- (3) companion respite is a support service in which a trained respite provider is scheduled to care for the individual in a variety of settings, including the individual's own home or other location not subject to licensure.

Statutory Authority G.S. 143B-147.

.0540 COMPANION RESPITE: AGREEMENT WITH PROVIDERS

(a) Unless outlined in a written job description for providers or in written policies and procedures, Each governing body shall have a written agreement signed by each provider of private home respite care.

(b) The provisions of the agreement shall ~~include~~ specify the responsibilities of the governing body and the provider including:

- ~~(1) the responsibilities of the governing body and the provider(s) of respite care;~~
- (21) confidentiality requirements;
- (32) procedures for securing emergency services;
- (43) program activities to be implemented;
- (54) responsibilities for supervising the respite client;
- (65) procedures related to administration of medications;
- (76) participation in respite training programs; ~~and~~
- (87) terms of compensation;

- (8) client rights; and
- (9) adherence to agency policies and procedures.

(c) A signed copy of the agreement shall be maintained by the governing body, and a signed copy shall be given to the provider.

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

**.0541 COMPANION RESPITE:
RESPONSIBILITIES OF
GOVERNING BODY**

(a) ~~Each governing body shall attempt to match the client's needs with the provider's ability to provide respite services.~~

(b) ~~Each governing body shall make available to the provider a written statement of duties and responsibilities.~~

(1) ~~This statement shall include length of service to be provided, medications to be administered and special dietary considerations.~~

(2) ~~If the client is involved in a developmental or occupational program, the provider shall be provided written information regarding his responsibilities for assuring that the client attends the program and for structuring activities to enhance objectives established by the developmental or occupational program.~~

Each governing body shall:

(1) attempt to match the client's needs with the provider's ability to provide respite services;

(2) make available to the provider instructions regarding duties and responsibilities which shall include, but need not be limited to:

(a) length of time for which service will be provided;

(b) medications to be administered; and

(c) special dietary considerations; and

(3) furnish written information to the provider, if the client is involved in a developmental or occupational program, regarding his responsibilities for assuring that the client attends the program and for structuring activities to enhance objectives established by the developmental or occupational program.

Statutory Authority G.S. 143B-147.

SECTION .0700 - GROUP HOMES FOR

**ADULTS WITH MENTAL RETARDATION
OR OTHER DEVELOPMENTAL
DISABILITIES**

**.0709 CROSS-REFERENCE TO
INTRODUCTION**

~~Each group home which is not subject to licensure under G.S. 122C, Article 2 shall comply with the requirements set forth in 10 NCAC 14M .0301.~~

Statutory Authority G.S. 143B-147.

.0710 POPULATION SERVED

(a) ~~Each group home shall be designed primarily to serve mentally retarded or otherwise developmentally disabled individuals who are at least 18 years of age and who are in need of a supervised living environment within a community setting.~~

(b) ~~No group home shall designate any bed for the continuous provision of respite services.~~

Statutory Authority G.S. 143B-147.

.0711 HOURS OF OPERATION

~~Each group home shall operate 24 hours per day, seven days per week, 12 months per year. Staff shall be on call when all clients are out of the home.~~

Statutory Authority G.S. 143B-147.

**.0712 ADMISSION DECISION OF
CLIENT/LEGALLY
RESPONSIBLE PERSON**

~~The client or his legally responsible person shall make the final decision as to whether to accept the group home placement should the client be accepted for admission.~~

Statutory Authority G.S. 143B-147.

**.0713 CROSS-REFERENCE TO
MANAGING CLIENTS' FUNDS**

(a) ~~Each group home which is not subject to licensure under G.S. 122C, Article 2 shall comply with the requirements set forth in 10 NCAC 14K .0311.~~

(b) ~~Each client, when necessary, shall be provided training in money management.~~

Statutory Authority G.S. 143B-147.

.0714 ANNUAL INTERNAL ASSESSMENT

~~The group home program staff shall conduct an annual internal assessment of the program, including the degree of its compliance with the standards, and shall develop a written plan of action that addresses the correction of each identified deficiency.~~

Statutory Authority G.S. 143B-147.

.0715 CROSS-REFERENCE TO COMPLIANCE WITH GROUP HOME STANDARDS

~~Each group home which is not subject to licensure under G.S. 122C, Article 2 shall comply with the requirements set forth in 10 NCAC 14M .0303.~~

Statutory Authority G.S. 143B-147.

SECTION .0800 - APARTMENT LIVING PROGRAMS FOR ADULTS WITH MENTAL RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES

.0801 SCOPE

~~(a) Apartment living is a residential service which provides a supervised living environment for individuals who are preparing for independent living. Counseling and technical assistance are provided as needed. Service models may include co-resident apartments, apartment clusters and independent apartment living.~~

~~(b) Depending on the model of service, ancillary services shall be provided as indicated in the client's individual program plan. Apartment living programs may include, but need not be limited to, the following three models:~~

- ~~(1) Co-resident apartment. This level of residential service requires one staff person, commonly called a benefactor, living with one or two adults in a single apartment.~~
- ~~(2) Apartment cluster. This level of residential service involves residents living in several apartments in the same building or scattered sites within an apartment complex and is staffed with a counselor or manager who resides within the same apartment complex.~~
- ~~(3) Single Resident Apartment. This level of residential service provides semi-independent living for individuals who reside in a variety of apartment settings disbursed throughout the community. An apartment living counselor or~~

~~coordinator provides periodic counseling and technical assistance as needed, but at least once a month.~~

Statutory Authority G.S. 143B-147.

.0802 POPULATION SERVED

~~Each apartment living program shall be designed primarily to serve individuals with mental retardation or other developmental disabilities who are at least 18 years of age and in need of residential support services within a community setting.~~

Statutory Authority G.S. 143B-147.

.0803 CROSS-REFERENCE TO PROGRAM DIRECTOR

~~Each apartment living program not subject to licensure under G.S. 122C, Article 2 shall comply with the staffing requirements for program director delineated in 10 NCAC 14O .0204.~~

Statutory Authority G.S. 143B-147.

.0804 CROSS-REFERENCE TO STAFF REQUIRED FOR MR/DD CLIENTS

~~Each apartment living program not subject to licensure under G.S. 122C, Article 2 shall comply with the staff/client ratios delineated in 10 NCAC 14O .0210.~~

Statutory Authority G.S. 143B-147.

.0805 COUNSELING SERVICES

~~At least one staff member shall be designated to provide counseling to each resident which includes provision of information on the availability of community services to meet his medical, educational, vocational and social needs.~~

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

.0807 ADMISSION DECISION OF RESIDENT

~~(a) Each potential client shall be provided the opportunity for a personal interview.~~

~~(b) Each client shall have the final decision as to his participation in the program should he be accepted for admission.~~

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

.0808 CROSS-REFERENCE TO TREATMENT/HABILITATION

PLAN

~~Each apartment living program not subject to licensure under G.S. 122C, Article 2 shall comply with the requirements regarding the treatment/habilitation plan delineated in 10 NCAC 14O .0207.~~

Statutory Authority G.S. 143B-147.

.0809 AGREEMENT BETWEEN RESIDENT AND PROGRAM

~~(a) A written agreement shall be negotiated between each resident and the apartment living program which specifies the responsibilities of the program and the resident.~~

~~(b) One copy shall be given to the resident and one copy included in the resident's record.~~

~~(c) The agreement shall be renegotiated as appropriate but at least annually.~~

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

.0810 CROSS-REFERENCE TO CLIENT TRAINING IN HEALTH AND SAFETY

~~Each apartment living program not subject to licensure under G.S. 122C, Article 2 shall comply with the requirements regarding client training in health and safety delineated in 10 NCAC 14O .0209.~~

Statutory Authority G.S. 143B-147.

.0811 MEDICAL AND DENTAL SERVICES

~~(a) Each resident shall have a dental and physical examination within 30 days prior to admission and shall be encouraged to participate in a program of medical supervision. If the resident is transferring from another component within the residential service system of the governing body, the 30 day requirement shall not apply.~~

~~(b) Staff shall be required to encourage each resident to participate in a program of medical and dental supervision.~~

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

.0812 CROSS-REFERENCE TO MANAGING CLIENTS' FUNDS

~~Each apartment living program not subject to licensure under G.S. 122C, Article 2 shall comply with the requirements regarding managing clients' funds delineated in 10 NCAC 14K .0311.~~

Statutory Authority G.S. 143B-147.

.0813 ANNUAL INTERNAL ASSESSMENT

~~The apartment living program staff shall conduct an annual internal assessment of the program, including the degree of its compliance with the standards, and shall develop a written plan of action that addresses the correction of each identified deficiency.~~

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

CHAPTER 45 - COMMISSION FOR MENTAL HEALTH, DEVELOPMENTAL
DISABILITIES AND SUBSTANCE ABUSE SERVICES

SUBCHAPTER 45G - MANUFACTURERS: DISTRIBUTORS: DISPENSERS AND
DISPENSERS OF CONTROLLED SUBSTANCES

SECTION .0100 - REGISTRATION OF MANUFACTURERS: DISTRIBUTORS
AND DISPENSERS OF CONTROLLED SUBSTANCES

.0104 PERSONS REQUIRED TO REGISTER

~~Every person who manufactures, distributes or dispenses any controlled substance or who proposed to engage in the manufacture, distribution or dispensing of any controlled substance in this state shall obtain annually a registration unless exempted by law or pursuant to .0107 through .0109 of this Section. Only persons actually engaged in such activities are required to obtain a registration; related or affiliated persons who are not engaged in such activities are not required to be registered. (For example, a stockholder or parent corporation of a corporation manufacturing controlled substances is not required to obtain a registration).~~

(a) Every person who manufactures, distributes or dispenses any controlled substance or who proposes to engage in the manufacture, distribution or dispensing of any controlled substance in this state shall obtain annually a registration unless exempted by law or pursuant to Rules .0107 through .0109 of this Section.

(b) Only persons actually engaged in such activities are required to obtain a registration; related or affiliated persons who are not engaged in such activities are not required to be registered. (For example, a stockholder or parent corporation of a corporation manufacturing controlled substances is not required to obtain a registration).

(c) Any person applying for registration or re-registration shall file, annually, an application for registration with the Department of Human Resources and submit the required nonrefundable fee with the application. Categories of applicants and the annual fee for each category are as follows:

CATEGORY FEE

(1) Clinic	\$125.00
(2) Hospital	300.00
(3) Nursing Home	100.00
(4) Teaching Institution	100.00
(5) Researcher	125.00
(6) Analytical Laboratory	100.00
(7) Distributor	500.00
(8) Manufacturer	600.00

For any person who applies for registration or re-registration at least six months or less prior to the end of the fiscal year, the required annual fee submitted with the application should be reduced by one-half of the above listed fee for each category.

Statutory Authority G.S. 90-100; 90-101; 143B-210(9).

TITLE 11 - DEPARTMENT
OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Insurance intends to amend rule cited as 11 NCAC 8 .0905.

The proposed effective date of this action is January 1, 1994.

The public hearing will be conducted at 9:00

a.m. on October 28, 1993 at the Engineering Division, 410 N. Boylan Avenue, Raleigh, N.C. 27603.

Reason for Proposed Action: To conform to the statute.

Comment Procedures: Written comments may be sent to Owen Tharrington at P.O. Box 26387, Raleigh, N.C. 27611. Oral presentations may be made at the public hearing. Anyone having ques-

tions should call Owen Tharrington at (919) 733-3901 or Ellen Sprengel at (919) 733-4529.

**CHAPTER 8 - ENGINEERING AND
BUILDING CODES DIVISION**

**SECTION .0900 - MANUFACTURED
HOUSING BOARD**

.0905 LICENSING

(a) Any person employed by a dealer whose occupational activity is that of selling on behalf of the retail dealership shall be licensed as a salesperson. Each salesperson's license shall be conspicuously displayed at all times by the dealership employing the salesperson.

~~(b) A manufactured housing salesperson may be allowed to engage in business during the time period after making application for a license but before such license is granted.~~

~~(b)~~ (e) The following shall not be required to be licensed as a manufactured housing dealer:

- (1) Receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court;
- (2) Public officials while performing their official duties;
- (3) Persons disposing of manufactured homes acquired for their own use, provided that said home is not used for the purpose of avoiding the provisions of G.S. 143-143.11;
- (4) Licensed real estate salesmen or brokers who negotiate or sell a manufactured home for any individual who is the owner of not more than three manufactured homes;
- (5) Banks and finance companies who sell repossessed manufactured homes who do not maintain a sales lot or building with one or more employed retail salespersons.

(c) ~~(d)~~ Licenses shall be issued by the Board whenever the application is in compliance with the applicable laws and regulations. Such license shall entitle the licensee to conduct the specified business for a period of one year from date of issuance or the first day of July, whichever is earlier. The Board may, if it deems necessary, cause an investigation to be made to ascertain if all the requirements set forth in the application are true and shall not issue a license to the applicant until it is satisfied as to the accuracy of the application.

(d) ~~(e)~~ Manufactured housing manufacturers,

dealers, and set-up contractors shall conspicuously display their licenses at all times at their place of business.

(e) ~~(f)~~ Whenever a bond is required by G.S. 143-143.12, before any license shall be issued by the Board, the applicant shall deliver to the Board a corporate surety bond, cash bond or fixed value equivalent. The bond shall be to the Board and in favor of any person who shall suffer any loss as a result of any violation of the law or administrative rules governing manufactured housing. The bond shall be for the license period and a new bond or proper continuation certificate shall be delivered to the Board at the beginning of each license period. The bond for one type of license may not be considered as the bond for another type of license.

(f) ~~(g)~~ License fees are as follows:

- (1) three hundred dollars (\$300.00) per Certificate of Origin plant for manufactured housing manufacturers;
- (2) two hundred fifty dollars (\$250.00) per county of operation for manufactured housing dealers;
- (3) one hundred dollars (\$100.00) per county for supplemental manufactured housing dealer locations;
- (4) twenty-five dollars (\$25.00) for retail manufactured housing salesperson; and
- (5) two hundred fifty dollars (\$250.00) per business location for set-up contractors.

Statutory Authority G.S. 143-143.10; 143-143.11.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Insurance intends to adopt rules cited as 11 NCAC 16 .0401 - .0403, .0501 - .0504.

The proposed effective date of this action is January 1, 1994.

The public hearing will be conducted at 10:00 a.m. on November 9, 1993 at the Dobbs Building, 3rd Floor Hearing Room, 430 N. Salisbury Street, Raleigh, N.C. 27611.

Reason for Proposed Action:

11 NCAC 16 .0401 - .0403 - Because of legislation enacted during the 1993 session of the N.C. General Assembly, the Commissioner of Insurance

is required to set credit rate deviation standards.
11 NCAC 16 .0501 - .0504 - Because of legislation enacted during the 1993 session of the N.C. General Assembly, the Commissioner of Insurance is required to set minimum loss ratios.

Comment Procedures: Written comments may be sent to Walter James at P.O. Box 26387, Raleigh, N.C. 27611. Oral presentations may be made at the public hearing. Anyone having questions should call Walter James at (919) 733-3284 or Ellen Sprenkel at (919) 733-4529.

CHAPTER 16 - ACTUARIAL SERVICES DIVISION

SECTION .0400 - CREDIT LIFE ACCIDENT AND HEALTH RATE DEVIATION

.0401 DEFINITIONS

As used in this Section:

- (1) "Class of Business" means one of the following determined by the source of the business:
 - (a) Credit Unions;
 - (b) Commercial Banks and Savings and Loan Associations;
 - (c) Finance Companies;
 - (d) Motor Vehicle Dealers;
 - (e) Other Sales Finance;
 - (f) All Others.
- (2) "Account" means the aggregate credit life insurance, credit accident and health insurance or credit unemployment insurance coverage for a single plan of insurance and for a single class of business written through a single creditor whether coverage is written on a group or individual basis.
- (3) "Case" means either a "Single Account Case" or a "Multiple Account Case" as follows:
 - (a) "Single Account Case" means an account that is at least 25% credible or, at the option of the insurer, any higher percentage as determined by the Credibility Formula as defined in Item (6) of this Rule; and
 - (b) "Multiple Account Case" means two or more accounts of the same plan of insurance and class of business having similar underwriting characteristics, excluding single account cases defined in Sub-item (3)(a) of this Rule, and

which, when combined, are at least as credible as the minimum level of credibility elected in Sub-item (3)(a) of this Rule.

- (4) "Plan of Insurance" means:
 - (a) Decreasing term credit life insurance on single or joint lives;
 - (b) Level term credit life insurance on single or joint lives;
 - (c) Credit accident and health insurance on single or joint lives, with single premiums which vary by waiting period and retroactive or nonretroactive benefits; and
 - (d) Credit Unemployment insurance on single or joint lives.
- (5) "Credibility Factor" means the degree to which the past experience of a case can be expected to occur in the future.
- (6) "Credibility Formula" means the following process used to calculate the credibility factor:
 - (a) Determine the incurred claim count during the experience period;
 - (b) Divide Sub-item (6)(a) of this Rule by 1082;
 - (c) Take the square root of Sub-item (6)(b) of this Rule; and
 - (d) The credibility factor is the lesser of the number one and the results of Sub-item (6)(c) of this Rule.
- (7) "Earned Premium at Current Prima Facie Rate" means North Carolina earned premium, during the experience period, restated as though the current prima facie rate had been charged.
- (8) "Incurred Claims" means North Carolina incurred claims during the experience period including the increase in provision for incurred (whether reported or not) claims from the beginning to the end of the period.
- (9) "Expense Loss Ratio" means the lesser of 40% and the ratio of the insurer's operating expenses for a class of business and plan of insurance to its earned premium for that class of business and plan of insurance.
- (10) "Operating Expenses" means any combination of the following expenses:
 - (a) Commissions;
 - (b) Other acquisition;
 - (c) General Administration;
 - (d) Taxes, licenses, and fees; and
 - (e) Profit and contingency margin.

- (11) "Benchmark Loss Ratio" means the percentage of premium that is expected to be used to pay losses. It is calculated by subtracting the expense loss ratio from the number one; however, in no event shall the benchmark loss ratio be less than 60%.
- (12) "Prima Facie Rate Adjustment Factor" means the result of the calculations in Item (15) of this Rule.
- (13) "Experience Period" means the period of time for which experience is reported, but not for a period longer than the most recent three years.
- (14) "Incurred Claim Count" means the number of North Carolina claims incurred for the case during the experience period. This means the total number of claims reported during the experience period (whether paid or in the process of payment) plus any incurred but not reported at the end of the experience period less the number of claims incurred but not reported at the beginning of the experience period. If a debtor has been issued more than one certificate for the same plan of insurance, then only one claim is counted. If a debtor receives credit disability or credit unemployment benefits, then only the initial claim payment for that period of disability or period of unemployment is counted.
- (15) "Incurred Loss Ratio at Current Prima Facie Rate" means the ratio of incurred claims, as defined in Item (8) of this Rule, to earned premium at current prima facie rate, as defined in Item (7) of this Rule, for the case.
- (16) "Class of Business Incurred Loss Ratio at Current Prima Facie Rate" means the ratio of incurred claims, as defined in Item (8) of this Rule, to earned premium at current prima facie rate, as defined in Item (7) of this Rule, for the class of business and plan of insurance associated with the case.
- (17) "Qualified Actuary" means an individual who is a member of the American Academy of Actuaries or an Associate or Fellow of the Society of Actuaries.
- (18) "Maximum Prima Facie Rate" means the current prima facie rate for the case multiplied by the prima facie rate adjustment factor as defined in Item (12) of this Rule.

Statutory Authority G.S. 58-2-40; 58-57-35(a).

.0402 GENERAL SUBMISSION REQUIREMENTS

(a) All rate deviation requests, including the data required by Rule .0403 of this Section, shall be submitted to and stamped received by the Life and Health Division. All rate deviation requests shall be submitted at least 90 days prior to the end of a calendar year, to become effective on the first day of the succeeding calendar year, with the exception of rate deviations submitted for use in calendar year 1994.

(b) All experience used in the calculation of the rate deviation shall only be North Carolina experience.

(c) All deviated rates shall be submitted, in accordance with this Rule, to the Life and Health Division each succeeding year for reevaluation.

(d) All rate deviation calculations shall be performed by a qualified actuary.

(e) The following information shall be submitted in regards to the qualified actuary:

- (1) Name of the qualified actuary;
- (2) Professional designations of the qualified actuary, e.g. A.S.A., F.S.A., or M.A.A.A.;
- (3) Name and address of the company or actuarial consulting firm employing the qualified actuary; and
- (4) Telephone number (including extension) of the qualified actuary.

(f) The qualified actuary shall include in the credit rate deviation request a written statement certifying the following:

- (1) That the qualified actuary (Name of qualified actuary) has reviewed Rules .0401 through .0403 of this Section;
- (2) That the qualified actuary certifies that all submitted calculations and data preparation are in conformity with Rules .0401 through .0403 of this Section; and
- (3) That all data submitted are accurate and in conformity with the Rule .0401 of this Section.

Statutory Authority G.S. 58-2-40; 58-57-35(a).

.0403 CALCULATION PROCEDURE & DATA REQUIREMENTS FOR RATE DEVIATIONS

The results of each calculation and the corresponding data required to perform each calculation shall be submitted in accordance with this Rule

and clearly identified for each case for which the insurer is requesting a rate deviation:

- (1) Identification of the class of business and plan of insurance associated with the case.
- (2) Identification of the single or multiple account case. For a multiple account case, identification of each case.
- (3) For the case, calculate the incurred loss ratio at the current prima facie rate as defined in Rule .0401(15) of this Section.
- (4) For the case, calculate the credibility factor using the credibility formula as defined in Rule .0401(6) of this Section.
- (5) Multiply Item (3) of this Rule by Item (4) of this Rule.
- (6) For the class of business, calculate the class of business incurred loss ratio at current prima facie rate as defined in Rule .0401(16) of this Section.
- (7) For the class of business, calculate the credibility factor using the credibility formula as defined in Rule .0401(6) of this Section.
- (8) Multiply Item (7) of this Rule by the quantity one minus Item (4) of this Rule, e.g. Item (7) of this Rule x [1 - Item (4) of this Rule].
- (9) Multiply Item (6) of this Rule by Item (8) of this Rule.
- (10) Multiply the quantity one minus Item (4) of this Rule by the quantity one minus Item (7) of this Rule, e.g. [1 - Item (4) of this Rule] x [1 - Item (7) of this Rule].
- (11) Multiply .60 by Item (10) of this Rule.
- (12) Add Items (5), (9) and (11) of this Rule.
- (13) Calculate the expense loss ratio as defined in Rule .0401(9) of this Section.
- (14) Calculate the benchmark loss ratio as defined in Rule .0401(11) of this Section.
- (15) The prima facie rate adjustment factor is equal to Item (12) of this Rule divided by Item (14) of this Rule; however, if the prima facie rate adjustment factor is less than or equal to 1.05, then the prima facie rate adjustment factor shall be set equal to the number one.
- (16) The maximum prima facie rate in effect for a period of twelve months is equal to the current prima facie rate for the case multiplied by Item (15) of this Rule.

Statutory Authority G.S. 58-2-40; 58-57-35(a).

SECTION .0500 - CREDIT

UNEMPLOYMENT MINIMUM LOSS RATIO STANDARD

.0501 MINIMUM INCURRED LOSS RATIO

The premium rates charged for credit unemployment insurance shall be reasonable in relation to the benefits provided as indicated by a minimum annual incurred loss ratio of 60%.

Statutory Authority G.S. 58-2-40; 58-57-110(a).

.0502 DEFINITIONS

As used in this Section:

- (1) "Earned Premium" means North Carolina credit unemployment earned premium, during the experience period, restated as though the current North Carolina credit unemployment rate had been charged.
- (2) "Incurred Claims" means North Carolina credit unemployment incurred claims during the experience period.
- (3) "Experience Period" means the period of time for which experience is reported, but not for a period longer than the most recent three years.
- (4) "Incurred Claim Count" means the number of North Carolina credit unemployment claims incurred during the experience period. This means the total number of claims reported during the experience period (whether paid or in the process of payment) plus any incurred but not reported at the end of the experience period less the number of claims incurred but not reported at the beginning of the experience period. Only the initial claim payment for that period of unemployment is counted.
- (5) "Credibility Factor" means the degree to which the past experience can be expected to occur in the future.
- (6) "Credibility Formula" means the following process used to calculate the credibility factor:
 - (a) Determine the incurred claim count during the experience period;
 - (b) Divide Sub-item (6)(a) of this Rule by 1082;
 - (c) Take the square root of Sub-item (6)(b) of this Rule; and
 - (d) The credibility factor is the lesser of the number one and the results of Sub-item (6)(c) of this Rule.
- (7) "Qualified Actuary" means an individual who is a member of the American Acade-

my of Actuaries or an Associate or Fellow of the Society of Actuaries.

- (8) "Incurred Loss Ratio at Current Credit Unemployment Rate" means the ratio of incurred claims, as defined in Item (2) of this Rule, to earned premium, as defined in Item (1) of this Rule.

Statutory Authority G.S. 58-2-40; 58-57-110(a).

.0503 GENERAL SUBMISSION REQUIREMENTS

(a) All credit unemployment minimum incurred loss ratio compliance demonstrations shall be submitted to and stamped received by the Life and Health Division. All submitted demonstrations shall be submitted at least 90 days prior to the end of a calendar year, to become effective on the first day of the succeeding calendar year, with the exception of submitted demonstrations for use in calendar year 1994.

(b) All experience used in the demonstration of compliance shall only be North Carolina experience.

(c) All compliance demonstrations shall be submitted, in accordance with this Rule, to the Life and Health Division each succeeding year for reevaluation.

(d) Demonstration of compliance, as specified in this Rule, shall not be effective until January 1, 1995. Compliance with this Rule for calendar year 1994 shall be satisfied by the submission of an actuarial memorandum, by a qualified actuary, demonstrating that the submitted credit unemployment insurance rates for calendar year 1994 are expected to produce at least a 60% incurred loss ratio.

(e) The following information shall be submitted in regards to the qualified actuary:

- (1) Name of the qualified actuary;
- (2) Professional designations of the qualified actuary, e.g. A.S.A., F.S.A., or M.A.A.A.;
- (3) Name and address of the company or actuarial consulting firm employing the qualified actuary; and
- (4) Telephone number (including extension) of the qualified actuary.

(f) The qualified actuary shall include in the credit rate deviation request a written statement certifying the following:

- (1) That the qualified actuary (Name of qualified actuary) has reviewed Rules .0501 through .0504 of this Section;
- (2) That the qualified actuary certifies that

all submitted calculations and data preparation are in conformity with Rules .0501 through .0504 of this Section; and

- (3) All data submitted are accurate and in conformity with Rule .0502 of this Section.

Statutory Authority G.S. 58-2-40; 58-57-110(a).

.0504 CALCULATION PROCEDURE AND DEMONSTRATION OF COMPLIANCE

The results of each calculation and the corresponding data required to perform each calculation shall be submitted in accordance with this Rule by each insurer as follows:

- (1) Calculate the incurred loss ratio at current credit unemployment rate as defined in Rule .0502(8) of this Section;
- (2) Calculate the credibility factor using the credibility formula as defined in Rule .0502(6) of this Section;
- (3) Multiply Item (1) of this Rule by Item (2) of this Rule;
- (4) Multiply .60 by the quantity one minus Item (2) of this Rule;
- (5) Add Items (3) and (4) of this Rule; and
- (6) Divide Item (5) of this Rule by .60. Compliance with Rule .0501 of this Section is satisfied if this quotient is equal to or greater than one. If this quotient is less than one, then in order to satisfy Rule .0501 of this Section the insurer shall decrease the current credit unemployment rate until the quotient is equal to or greater than one.

Statutory Authority G.S. 58-2-40; 58-57-110(a).

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

Notice is hereby given in accordance with G.S. 150B-21.2 that EHNR - Environmental Management Commission intends to amend rule cited as 15A NCAC 2H .0223.

The proposed effective date of this action is February 1, 1994.

The public hearing will be conducted at 2:00 p.m. on November 1, 1993 at the Ground Floor Hearing Room, Archdale Building, 512 N. Salisbury St., Raleigh, N.C.

Reason for Proposed Action: To modify an existing rule which requires publicly-owned wastewater facilities (and public utilities) to take certain actions when flows approach the hydraulic capacity of the system. The rule changes proposed would clarify when facilities are required to take action to comply with the rule and the type of action needed.

Comment Procedures: All persons interested in these matters are invited to attend. Comments, statements, data and other information may be submitted in writing prior to, during or within 10 days after the hearing or may be presented verbally at the hearing. All written comments must be received by November 11 in order to be included in the hearing record. Verbal statements at the hearing may be limited at the discretion of the hearing officer. Please contact Mr. Dennis Ramsey for additional information at (919) 733-5083. Written comments should also be directed to him at the Division of Environmental Management, Water Quality Section, P.O. Box 29535, Raleigh, North Carolina 27626-0535.

Editor's Note: This Rule was filed as a temporary rule effective September 13, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

Fiscal Note: This Rule affects the expenditures or revenues of local funds. A fiscal note was submitted to the Fiscal Research Division on

September 10, 1993, OSBM on September 10, 1993, N.C. League of Municipalities on September 10, 1993, and N.C. Association of County Commissioners on September 10, 1993.

**CHAPTER 2 - ENVIRONMENTAL
MANAGEMENT**

**SUBCHAPTER 2H - PROCEDURES FOR
PERMITS: APPROVALS**

**.0223 DEMONSTRATION OF FUTURE
WASTEWATER TREATMENT
CAPACITIES**

In order to insure that treatment systems do not exceed their hydraulic treatment capacities, no permits for sewer line extensions will be issued to wastewater treatment systems owned or operated by municipalities, counties, sanitary districts or public utilities after January 1, 1994 unless they meet the following requirements:

- (1) Prior to exceeding 80 percent of the wastewater treatment system's permitted hydraulic capacity (based on the average ~~of the previous three months flow of~~ calendar year 1993 or any subsequent calendar year), the permittee must submit an approvable engineering evaluation of their future wastewater treatment needs. This evaluation must outline specific plans for ~~system expansion including meeting future wastewater treatment needs by either expansion of the existing system, elimination or reduction of extraneous flows, or water conservation and~~ must include the source(s) of funding for the expansion improvements. If expansion is not proposed, a detailed justification must be made based on past growth records and future growth projections ~~and/or on~~ and, as appropriate, shall include conservation plans or other specific plans for the removal of infiltration/inflow measures to achieve waste flow reductions.
- (2) Prior to exceeding 90 percent of the wastewater treatment systems permitted hydraulic capacity, (based on the average ~~of the previous three months flow of~~ calendar year 1993 or any subsequent calendar year), the permittee must obtain all permits needed for the expansion of the wastewater treatment system and, if construction is needed, submit approvable final plans and specifications for expan-

sion of the wastewater treatment system including a construction schedule. If expansion is still not proposed, a detailed justification must be made based on past growth records and future growth projections and/or on and, as appropriate, shall include conservation plans or other specific plans for the removal of infiltration/inflow measures to achieve waste flow reductions.

(3) ~~The Director may on a case by case basis, until December 31, 1993, allow permits to be issued to facilities that are exceeding the 80 percent or 90 percent loading rates if the additional flow is not projected to result in the facility exceeding its permitted hydraulic capacity and it is demonstrated to his satisfaction that adequate progress is being made in developing the needed engineering evaluations or plans and specifications.~~

Statutory Authority G.S. 143-215.3.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend rules cited as 15A NCAC 10E .0004 and 10F .0360.

The proposed effective date of this action is January 1, 1994.

The public hearing will be conducted at 10:00 a.m. on October 18, 1993 at the Archdale Building, 512 N. Salisbury Street, Room 332, Raleigh, NC 27604-1188.

Reason for Proposed Action:

15A NCAC 10E .0004 - To restrict activities on fishing areas.

15A NCAC 10F .0360 - To establish a no wake zone in the vicinity of the Thomas Boat Dock.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from October 1, 1993 to November 1, 1993. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 N.

Salisbury Street, Raleigh, NC 27604-1188.

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

**SUBCHAPTER 10E - FISHING AND
BOATING ACCESS AREAS**

.0004 USE OF AREAS REGULATED

(a) No person shall leave any vehicle, boat trailer or other obstruction on any access area in such a location, position or condition that it will prevent, impede, or inconvenience the use by other persons of any ramp or other facility constructed for the purpose of launching or landing boats. No person shall leave parked any vehicle, boat, boat trailer or other object at any place on any access area other than on such place or zone as is designated as an authorized parking zone and posted or marked as such.

(b) No person shall possess a loaded firearm on any boat access area. No person shall operate a vehicle on any boat access area in a manner so as to endanger life or property.

(c) No person, when using any access area, shall deposit any debris or refuse anywhere on the grounds of the area. No person, when using any access area, shall do any act which is prohibited or neglect to do any act which is required by signs or markings placed on such area under authority of this Regulation for the purpose of regulating the use of the area. At any time when all designated parking zones on any access area are fully occupied, any person may enter and use such facilities, provided such person makes other arrangements for parking and violates none of the provisions of this Regulation or the signs or markings made or posted pursuant hereto.

(d) No person shall operate a motorboat in the public waters of North Carolina within 50 yards of a Commission-owned or managed boat launching ramp at greater than "no wake" speed. For the purpose of this Regulation, "no wake" speed shall mean idling speed or a slow speed creating no appreciable wake.

(e) Except where facilities are provided, it is unlawful to use any boating access area for purposes other than the launching of boats and parking vehicles and boat trailers. All other uses--including swimming, skiing, camping, building fires, operating concessions or other activities not directly involved with launching of boats--are expressly prohibited.

(f) Except where facilities are provided and approved uses are posted, it is unlawful to use any

public fishing area for purposes other than fishing. All prohibited uses and activities shall be posted including possession of loaded firearms, swimming, ~~discharging firearms~~, launching or mooring jet skis or boats, skiing, building fires, operating concessions, or other activities not directly associated with fishing.

Statutory Authority G.S. 113-134; 113-264; 75A-14.

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

.0360 GRAHAM COUNTY

(a) Regulated Area. This Rule applies to the waters and portions of waters described as follows:

- (1) Lake Santeetlah Boat Dock on Lake Santeetlah in Graham County.
- (2) Entrance of Fontana Boat Dock in Fontana Lake in Graham County.
- (3) Thomas Boat Dock on Fontana Lake in Graham County.

(b) Speed Limit. No person shall operate a vessel at greater than no-wake speed within 50 yards of the regulated areas as described in Paragraph (a) of this Rule.

(c) Placement and Maintenance of Markers. The Graham County Board of Commissioners is designated as a suitable agency for the placement and maintenance of markers implementing this Rule.

Statutory Authority G.S. 75A-3; 75A-15.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Landscape Architects intends to amend rules cited as 21 NCAC 26 .0206 - .0207, .0209 - .0211 and repeal .0205 and .0208.

The proposed effective date of this action is January 1, 1994.

The public hearing will be conducted at 10:00 a.m. on October 21, 1994 at the North Carolina Board of Landscape Architects, 3733 Benson

Drive, Raleigh, NC 27609.

Reason for Proposed Action: To satisfy recommendations and remove objections made by the Rules Review Commission to rules previously filed.

Comment Procedures: Written comments must be submitted to Robert Upton, APA Coordinator, 3733 Benson Drive, Raleigh, NC 27609, up to and including November 1, 1993.

CHAPTER 26 - LICENSING BOARD OF LANDSCAPE ARCHITECTS

SECTION .0200 - PRACTICE OF REGISTERED LANDSCAPE ARCHITECTS

.0205 FORMS OF PRACTICE

~~(a) General. The practice of landscape architecture may be carried on by sole practitioners, partnerships, or within professional corporations registered with the Board to perform landscape architectural services, provided all those who practice are duly licensed, and the firm is properly described and defined by its name and title.~~

~~(b) Partnership Practice. Whenever the practice of landscape architecture is carried on by partnership, at least one partner shall be a landscape architect.~~

~~(c) An application for corporate practice shall be made upon forms provided by the Board accompanied by the required corporate application fee.~~

~~(d) Corporate certificates of registration shall remain effective from date of issue until June 30 following date of such registration. The renewal of annual corporate certificates will be made upon written application of the holder accompanied by the required renewal fee.~~

~~(e) Failure to apply for renewal of corporate certificate requires automatic revocation of the certificate. Such revoked certificate may be reinstated within 12 months from the date of revocation upon payment of the required renewal fee plus the required late payment penalties if the Board finds such corporation is then otherwise qualified and entitled to renewal of certificate of registration.~~

~~(f) All rules of the Board applicable to individual landscape architects shall apply equally to corporate practice and to the practice of licensees as officers or employees of such corporation. All~~

~~corporations, whether organized under the Business Corporation Act, Chapter 55, or the Professional Corporation Act, Chapter 55B, shall be required to obtain a certificate for corporate practice prior to using the designation "Landscape Architect", "Landscape Architecture" or "Landscape Architectural".~~

~~(g) A foreign landscape architectural corporation may qualify and receive a corporate certificate for corporate practice in North Carolina upon a showing satisfactory to the Board that it conforms with the General Statutes of North Carolina and the rules of this Board. The same application and certificate fee and renewal fees shall be applicable to firms incorporated in other states as are required for North Carolina corporations.~~

~~(h) All landscape architectural firms incorporated after April 15, 1971 must be incorporated under the Professional Corporation Act, G.S. 55B. Firms incorporated for landscape architectural practice before April 15, 1971 may apply for certificate under the Business Corporation Act, G.S. 55, accompanied by the required corporate application fee.~~

~~(i) Public Agency Practice. A landscape architect employed by a public agency, including an educational institution, shall be considered to be an individual practitioner with the public as the client.~~

~~(j) Combined Design and Construction (Design-Build) Practice. Because of this inherent conflict of interest with construction services, the landscape architect who also provides contracting services shall do the following:~~

~~(1) Use the term "limited landscape architectural services" in all representations to the public and the client.~~

~~(2) Affix a notation on each construction drawing and the cover of technical specifications stating "These construction drawings and technical specifications represent the full extent of the limited landscape architectural services provided for this project".~~

~~(k) Supervision of Practice. Each office maintained for the preparation of drawings, specifications, reports or other professional work shall have a registered landscape architect present and regularly employed in that office who shall have direct knowledge and supervisory control of such work, except field offices maintained only for the purpose of project construction administration shall have at least one qualified employee present with the supervising landscape architect maintaining control and making periodic visits.~~

Statutory Authority G.S. 89A-3(c).

.0206 NAME OF FIRM

(a) Exclusion of Non-Licensed Individuals. The name of a landscape architectural firm shall not include the proper name of any officer or employee who is not a licensed landscape architect, architect, geologist, land surveyor or professional engineer.

(b) Associate. The word "associate" may be used only with reference to a licensee who is a principal or regular employee of the firm. The plural form may be used only when justified by the number of licensees in addition to those licensees whose proper names are included in the firm name.

(c) Example: Proper Name and (&) Associates shall refer to a principal landscape architect and at least two licensed landscape architectural employees.

(d) Example: Proper Name Associates shall refer to at least one principal landscape architect and at least one licensed landscape architectural employee.

(e) Example: Assumed Name Associates shall refer to at least one principal landscape architect and at least one licensed landscape architectural employee, or two or more principal landscape architects.

(f) Names Previously in Effect. This Rule shall not be construed to require any firm to seek approval of, or to change, any name duly adopted in conformity with board rules in effect at the date of such adoption.

Statutory Authority G.S. 55B-5; 89A-3(c).

.0207 APPLICATION OF PROFESSIONAL SEAL

(a) Use of Seal. The seal(s) of the landscape architect(s) responsible for the work and the landscape architectural corporation seal, if appropriate, shall be applied to the following documents:

- (1) Drawings and specifications prepared for public agency approval.
- (2) Drawings and specifications issued for the purpose of bidding, negotiation or construction.
- (3) Reports of technical nature.
- (4) Letters and certificates of professional opinion.

(b) Standard Design Documents are defined as drawings and specifications prepared by another and obtained by the Landscape Architect for

~~review and certification by the Landscape Architect. Drawings and specifications which utilize in whole or part "standard design documents" prepared by a public agency or another landscape architect registered in this state or another state or country. Such drawings may be sealed by the succeeding landscape architect registered in North Carolina provided:~~

- (1) the origin of the "standard design documents" appears on each drawing or sheet of the documents prepared sealed by the public agency or the original landscape architect;
- (2) the succeeding North Carolina landscape architect clearly identifies all modifications of the standard design documents;

(c) The seal of the succeeding North Carolina landscape architect shall be placed on each sheet identified as containing "standard design documents" is prima facie evidence that the landscape architect whose seal is affixed assumes responsibility for the adequacy of the standard design for its specific application in North Carolina, including conformance with applicable codes and ordinances.

(d) The seal(s) shall be applied only to documents prepared personally or under the immediate supervision of the landscape architect whose seal is affixed.

(e) Signature and Date. The individual's seal or facsimile thereof shall have the landscape architect's original signature across its face and the effective date shall be indicated below or elsewhere on the document.

(f) Co-authorship. When a document requiring seals has been co-authored and by the landscape architect and another licensed design professional of another discipline, the landscape architect shall indicate by notation each portion for which he or she is responsible.

(g) Failure to use the professional seal according to this Rule shall be deemed by the Board to be "unprofessional conduct" within the meaning of G.S. 89A-7.

Statutory Authority G.S. 89A-3(c); 89A-7.

.0208 IMPROPER CONDUCT

~~(a) The following will constitute improper conduct: violation of board rules, dishonest practice, unprofessional conduct, incompetence, conviction of a felony, or addiction habits of such character as to render the landscape architect unfit to continue professional practice.~~

~~(b) Definition. "The appearance of improper~~

~~conduct" is defined as "a circumstance which calls into question a landscape architect's professional conduct, motives or work performance."~~

~~(c) Duty of the Board. When the Board is notified in writing of a "an appearance of improper conduct" it shall send a "letter of inquiry" to the landscape architect allegedly involved. After receiving and considering the response from the landscape architect it may send additional "letters of inquiry" to the landscape architect and all other persons allegedly involved.~~

~~(d) Findings of the Board. Upon consideration of responses to the inquiries the Board shall determine what action shall be taken.~~

~~(e) If board determines that no disciplinary action is necessary, all parties previously contacted shall be informed by letter.~~

~~(f) If the Board determines that there is "an appearance of improper conduct" but no formal hearing is warranted, the landscape architect shall be sent a "letter of warning" stipulating the Board's cause for concern and recommending corrective action by the landscape architect. Other persons previously contacted shall be informed that the Board has acted upon the matter. The "letter of warning" and related documents shall remain in the landscape architect's permanent file.~~

~~(g) If the Board determines that a formal hearing should be held, the landscape architect and others allegedly involved shall be notified according to the statute on hearings.~~

~~(h) If the Board determines that another person allegedly involved is an architect, geologist, land surveyor or professional engineer, relevant information shall be sent by letter to that person's professional board.~~

Statutory Authority G.S. 89A-3(c).

.0209 UNPROFESSIONAL CONDUCT

(a) The following representations or acts, among others, constitute "unprofessional conduct" within the meaning of G.S. 89A-7:

- (1) to allow one's name to be associated with an undertaking in any professional capacity without having served specifically in that capacity;
- (2) to accept compensation in whole or in part from fees, commissions, earnings, commercial or speculative profit emanating from sales of materials or services provided to a Landscape Architect's client by others;
- (3) to make exaggerated or misleading statements or claims about any personal

qualifications, experience or performance;

- (4) to fail to disclose to a client or employer the existence of any financial interest which even remotely bears upon the Landscape Architectural services or project;
- (5) to fail to respond within 30 calendar days to any inquiry from this Board;
- (6) to fail to properly supervise his or her practice. Each office maintained for the preparation of drawings, specifications, reports or other professional work shall have a registered landscape architect employed in that office who shall have direct knowledge and supervisory control of such work, except field offices maintained only for the purpose of project construction administration shall have at least one employee present with the supervising landscape architect maintaining control and making periodic visits.

(b) Duty of the Board. When the Board becomes aware of alleged unprofessional conduct, it shall send a "letter of inquiry" to the Landscape Architect allegedly involved and to the complainant. The Landscape Architect shall reply to this and any other inquiry of the Board within 30 calendar days. After receiving and considering the response from the Landscape Architect, the Board may send additional letters of inquiry to the Landscape Architect and other persons allegedly involved.

(c) Findings of the Board. Upon consideration of responses to inquiries, the Board shall determine what action shall be taken:

- (1) if this Board determines that no disciplinary action is necessary, all parties previously contacted shall be so informed;
- (2) if this Board determines there is an appearance of "unprofessional conduct", but no formal hearing is warranted, the Landscape Architect shall be sent a "letter of warning" stipulating the Board's cause for concern and recommending corrective action by the Landscape Architect. Other persons previously contacted shall be informed that the Board has acted upon the matter;
- (3) if this Board determines that a formal hearing should be held, G.S. 150B is

applicable;

(4) if this Board determines that another person allegedly involved is an Architect, Geologist, Land Surveyor, or Professional Engineer relevant information shall be sent by letter to the respective professional board.

~~(d) Consequences of "unprofessional conduct" are set forth in G.S. 89A-7.~~

Statutory Authority G.S. 89A-3(c); 89A-7.

.0210 DISHONEST PRACTICE

(a) The following practices, among others, constitute "dishonest practice" within the meaning of G.S. 89A-7:

- (1) to knowingly make any deceptive or false statement about another's professional work or to maliciously injure or attempt to injure the prospects, practice or employment position of those so engaged;
- (2) to knowingly make any deceptive or false statements in an application for examination or in any other statements or representations to this Board, to any public agency, to a prospective or actual client, or to another Landscape Architect;
- (3) to fail to notify this Board, if registered as a Landscape Architect in North Carolina, of disciplinary action by a Landscape Architectural Board in another jurisdiction.

(b) Because of the inherent conflict of interest with construction services, the landscape architect who also provides contracting services [Combined Design and Construction (Design-Build) Practice] shall be deemed by the Board to be engaged in "dishonest practice" unless he does the following:

- (1) Uses the term "limited landscape architectural services" in all representations to the public and the client.
- (2) Affixes a notation on each construction drawing and the cover of technical specifications stating "These construction drawings and technical specifications represent the full extent of the limited landscape architectural services provided for this project".

(bc) Duty of the Board. When the Board becomes aware of alleged dishonest practice, it shall send a "letter of inquiry" to the Landscape Architect allegedly involved and to the

complainant. The Landscape Architect shall reply to this and any other inquiry of the Board within 30 calendar days. After receiving and considering the response from the Landscape Architect, the Board may send additional letters of inquiry to the Landscape Architect and other persons allegedly involved.

(ed) Findings of the Board. Upon consideration of responses to inquiries, the Board shall determine what action shall be taken:

- (1) if this Board determines that no disciplinary action is necessary, all parties previously contacted shall be so informed;
- (2) if this Board determines there is an appearance of "dishonest practice", but no formal hearing is warranted, the Landscape Architect shall be sent a "letter of warning" stipulating the Board's cause for concern and recommending corrective action by the Landscape Architect. Other persons previously contacted shall be informed that the Board has acted upon the matter;
- (3) if this Board determines that a formal hearing should be held, G.S. 150B is applicable;
- (4) if this Board determines that another person allegedly involved is an Architect, Geologist, Land Surveyor, or Professional Engineer relevant information shall be sent by letter to the respective professional board.

~~(d) Consequences of "dishonest practice" are set forth in G.S. 89A-7.~~

Statutory Authority G.S. 89A-3(c); 89A-7.

.0211 INCOMPETENCE

(a) The following acts or omissions, among others, are deemed to be "incompetence" within the meaning of G.S. 89A-7:

- (1) to attempt to perform professional services which are beyond the qualifications which the landscape architect and those who are engaged as consultants are qualified by education, training and experience in the specific technical areas involved;
- (2) to fail to use diligence in planning, designing, supervising, managing or inspecting landscape architectural projects directly resulting in improper and unprofessional practices and results;

- (3) to plan, perform, or supervise work for clients in such a manner and with such results as to be below the level of professional competency exercised and expected of other landscape architects of good standing who are practicing in the area;

- (4) to be guilty of such acts or omissions as to demonstrate to the satisfaction of the Board that the holder of the certificate is physically or mentally incompetent or habitually addicted to habits of such character as to render the licensee unfit to continue practice.

(b) Duty of the Board. When the Board becomes aware of alleged incompetence, it shall send a "letter of inquiry" to the Landscape Architect allegedly involved and to the complainant. The Landscape Architect shall reply to this and any other inquiry of the Board within 30 calendar days. After receiving and considering the response from the Landscape Architect, the Board may send additional letters of inquiry to the Landscape Architect and other persons allegedly involved.

(c) Findings of the Board. Upon consideration of responses to inquiries, the Board shall determine what action shall be taken:

- (1) if this Board determines that no disciplinary action is necessary, all parties previously contacted shall be so informed;
- (2) if this Board determines there is an appearance of "incompetence", but no formal hearing is warranted, the Landscape Architect shall be sent a "letter of warning" stipulating the Board's cause for concern and recommending corrective action by the Landscape Architect. Other persons previously contacted shall be informed that the Board has acted upon the matter;
- (3) if this Board determines that a formal hearing should be held, G.S. 150B is applicable;
- (4) if this Board determines that another person allegedly involved is an Architect, Geologist, Land Surveyor, or Professional Engineer relevant information shall be sent by letter to the respective professional board.

~~(d) Consequences of "incompetence" are set forth in G.S. 89A-7.~~

Statutory Authority G.S. 89A-3(c); G.S. 89A-7.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Board of Opticians intends to amend rules cited as 21 NCAC 40 .0112, .0202, .0314.

The proposed effective date of this action is January 1, 1994.

The public hearing will be conducted at 9:00 a.m. on November 1, 1993 at the Auditorium of NC Medical Society Bldg., 222 North Person Street, Raleigh, NC 27601.

Reason for Proposed Action:

21 NCAC 40 .0112 - To better describe Board forms.

21 NCAC 40 .0202 - To prescribe minimum equipment and to establish date of expiration of annual registration for optical place of business.

21 NCAC 40 .0314 - To establish date of expiration of annual registration for apprentice; to clarify number of trainees who can be trained simultaneously under one person; and to provide for Board-approved training courses.

Comment Procedures: Interested persons may present statements, orally and in writing, at the public hearing or in writing prior to the hearing by mail or hand delivery addressed to NC State Board of Opticians, 222 N. Person St., Suite 102, P.O. Box 25336, Raleigh, NC 27611-5336.

CHAPTER 40 - BOARD OF OPTICIANS

SECTION .0100 - LOCATION

.0112 FORMS

(a) Applications:

- (1) for admission to sit for examination,
- (2) to register place of business,
- (3) to register apprentices,
- (4) to register interns,
- (5) to register as training establishment, and
- (6) for out of state applicants.

(b) Certificates:

- (1) of registration of business,

- (2) of apprenticeship,
- (3) of internship, and
- ~~(4) of completion of apprenticeship,~~
- ~~(5) of completion of internship, and~~
- ~~(4)~~ ~~(6)~~ of licensure.

(c) Statements:

- (1) for licensure renewal,
- (2) for annual ~~apprentice continuation of training~~ renewal of registration of apprenticeship, and
- (3) for annual business registration.

(d) Other forms:

- (1) completion of apprenticeship, and
- (2) completion of internship.

Statutory Authority G.S. 90-249.

SECTION .0200 - CONDUCT OF REGISTRANTS

.0202 REGISTRATION OF PLACE OF BUSINESS; MINIMUM EQUIPMENT

(a) As used in this Rule, "optical place of business" means the principal office as well as each branch office of such a business.

(b) Every optical place of business shall have a licensed optician in charge, who shall serve as the registered licensee in charge of only one optical place of business.

(c) Every optical place of business shall maintain on its premises the following, minimum equipment in working condition:

- (1) a lensmeter, for verifying that lenses being dispensed are of the correct power,
- (2) a measuring device for measuring and verifying pupillary distances and segment placement in multifocal lenses, and
- (3) sufficient optical hand tools for the adjustment of frames to the proper alignment on the patient's face.

(d) ~~(e)~~ Every optical place of business shall be registered with the Board within ten days following its opening for business and thereafter annually and in the event of relocation, change of ownership or change of licensed optician in charge. The registration fee shall be paid for each registration.

(e) Registration of an optical place of business automatically expires on the first day of July of each year, and it shall not engage in business until it is registered for the next annual period.

(f) ~~(d)~~ Registration is the responsibility of both the licensed optician in charge and the owner. Any licensed optician in charge of an optical place

of business which violates the registration requirements of this Rule shall be subject to the Board's disciplinary authority under G.S. 90-249(b). An injunction closing an unregistered optical place of business may also be obtained.

(g) (e) An optical place of business registered in compliance with this Rule is eligible to be a training establishment when the requirements of Rules .0304, .0314 and .0321 of this Chapter are met.

Statutory Authority G.S. 90-243; 90-249; 90-252; 90-253.

SECTION .0300 - QUALIFICATIONS: APPLICATIONS: AND LICENSING

.0314 APPRENTICESHIP AND INTERNSHIP REQUIREMENTS: REGISTRATION

(a) Each apprentice or intern entering the apprenticeship or internship shall register with the Board and be issued a certificate of registration. Registration of the apprenticeship automatically expires on the first day of July of each year, and, in order for the apprenticeship to continue, registration must be renewed each succeeding July 1 until the apprenticeship is completed. If the apprenticeship or internship is to be supervised by an ophthalmologist or optometrist, the supervisor will provide a statement in which he agrees to abide by the same requirements as would an optician providing the same training.

(b) Part-time work or work as an optical salesman or consultant shall not apply toward completion of apprenticeship or internship.

(c) An applicant, through apprenticeship or internship, shall have received his training by working full time, defined as a minimum of 35 hours per week, under the supervision of a licensed optician, ophthalmologist, or optometrist following a curriculum approved by the Board.

(d) No more than two persons, whether apprentices or interns or a combination, may be trained by ~~a single~~ an optician, ophthalmologist, or optometrist at ~~any~~ the same time.

(e) An apprentice or intern shall be credited with training time only from the date of registration with the Board as an apprentice or intern. Except as provided by the Board for good cause shown, the apprenticeship or internship may not be interrupted for more than 12 months at the time.

(f) When registering to serve a six month internship, the applicant must have completed the three and one-half years of apprenticeship as required by G.S. 90-240(a)(2) and (3) or have completed the

course of training required by G.S. 90-240(a)(1).

(g) The Board shall make available to apprentices a list of Board-approved training courses which the Board recommends that apprentices take as being of assistance to them in preparation for the examination for licensure.

Statutory Authority G.S. 90-249.

TITLE 25 - OFFICE OF STATE PERSONNEL

Notice is hereby given in accordance with G.S. 150B-21.2 that the Office of State Personnel/State Personnel Commission intends to adopt rules cited as 25 NCAC 1E .1501 - .1506.

The proposed effective date of this action is January 1, 1994.

The public hearing will be conducted at 9:00 a.m. on October 19, 1993 at the Administration Building, Third Floor Conference Room, 116 W. Jones Street, Raleigh, N.C. 27603.

Reason for Proposed Action: These rules are proposed to be adopted in order to provide guidance in implementing rules on child involvement leave which will promote employees' involvement in the education of youth and promote employees' assistance to schools.

Comment Procedures: Interested persons may present statements either orally or in writing at the Public Hearing or in writing prior to the hearing by mail addressed to: Barbara A. Coward, Office of State Personnel, 116 W. Jones Street, Raleigh, N.C. 27603.

CHAPTER 1 - OFFICE OF STATE PERSONNEL

SUBCHAPTER 1E - EMPLOYEE BENEFITS

SECTION .1500 - CHILD INVOLVEMENT LEAVE

.1501 PURPOSE AND USES

The purpose of child involvement leave is to promote employees' involvement in the education of youth and to promote employees' assistance to

schools. Employees may take leave under this Section to:

- (1) Meet with a teacher or administrator of any elementary school, middle school, high school or child care program authorized to operate under the laws of the State of North Carolina concerning the employee's children, step-children, or children over whom the employee has custody.
- (2) Attend any function sponsored by the school or child care program as defined in Item (1) of this Rule in which the children, step-children, or children over whom the employee has custody are participating.
- (3) To perform school-approved volunteer work approved by the teacher, school administrator, or program administrator.

Statutory Authority G.S. 126-4(5).

.1502 AMOUNT OF LEAVE

(a) Full-time permanent, probationary, and trainee employees may take up to eight hours of paid leave each calendar year regardless of the number of children. The eight hours of leave will be credited to employees on January 1 of each year. The eight hours of leave for part-time employees will be prorated based on the proportion they work of full-time.

(b) New employees will be credited with the full eight hours of leave immediately upon their employment.

Statutory Authority G.S. 126-4(5).

.1503 APPROVAL OF LEAVE

(a) Employees must receive approval from their supervisor to use this leave.

(b) Leave, not to exceed eight hours, should be granted for the period of time requested by the employee. An agency, however, may require that the leave be taken at a different time, based on the needs of the agency.

Statutory Authority G.S. 126-4(5).

.1504 INTER-AGENCY TRANSFER

If any employee transfers to another State agency, any balance of the eight hours not used shall be transferred to the new agency.

Statutory Authority G.S. 126-4(5).

.1505 NON-CUMULATIVE

Leave not taken in a calendar year will be forfeited; it will not be carried over into the next calendar year.

Statutory Authority G.S. 126-4(5).

.1506 SEPARATION

Employees will not be entitled to payment for this leave upon separation from State government.

Statutory Authority G.S. 126-4(5).

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

Key:

<i>Citation</i>	=	<i>Title, Chapter, Subchapter and Rule(s)</i>
<i>AD</i>	=	<i>Adopt</i>
<i>AM</i>	=	<i>Amend</i>
<i>RP</i>	=	<i>Repeal</i>
<i>With Chgs</i>	=	<i>Final text differs from proposed text</i>
<i>Corr</i>	=	<i>Typographical errors or changes that requires no rulemaking</i>
<i>Eff. Date</i>	=	<i>Date rule becomes effective</i>
<i>Temp. Expires</i>	=	<i>Rule was filed as a temporary rule and expires on this date or 180 days</i>

NORTH CAROLINA ADMINISTRATIVE CODE

AUGUST 93

TITLE	DEPARTMENT	TITLE	DEPARTMENT
1	Administration	17	Revenue
2	Agriculture	19A	Transportation
4	Commerce	21	Occupational Licensing Boards
10	Human Resources		26 - Landscape Architects
11	Insurance		46 - Pharmacy
12	Justice		63 - Social Work
13	Labor	23	Community Colleges
15A	Environment, Health, and Natural Resources		

Citation				AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
1	NCAC	37	.0306		✓		✓		08/30/93	
2	NCAC	52B	.0210		✓				08/13/93	180 DAYS
4	NCAC	2R	.1903		✓				09/01/93	
		3J	.0101	✓					09/01/93	
			.0201 - .0203	✓					09/01/93	
			.0204	✓			✓		09/01/93	
			.0205	✓					09/01/93	
			.0301	✓					09/01/93	
			.0302	✓			✓		09/01/93	
			.0303 - .0304	✓					09/01/93	
4	NCAC	3J	.0305	✓			✓		09/01/93	
			.0306	✓					09/01/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
.0401 - .0402				✓					09/01/93	
16G .0312					✓				09/01/93	
10	NCAC	3R	.0214	✓					09/01/93	180 DAYS
.0304					✓				09/01/93	180 DAYS
.0305					✓				08/11/93	180 DAYS
.0309					✓				09/01/93	180 DAYS
.0321					✓				09/01/93	180 DAYS
.1402						✓			09/01/93	180 DAYS
.1404 - .1409						✓			09/01/93	180 DAYS
.1413 - .1419				✓					09/01/93	180 DAYS
.1613 - .1616					✓				09/01/93	180 DAYS
.1713 - .1715					✓				09/01/93	180 DAYS
.1716						✓			09/01/93	180 DAYS
.1717 - .1719					✓				09/01/93	180 DAYS
.1902						✓			09/01/93	180 DAYS
.1904 - .1908						✓			09/01/93	180 DAYS
.1912 - .1918				✓					09/01/93	180 DAYS
.2113 - .2119					✓				09/01/93	180 DAYS
.2314 - .2320				✓					09/01/93	180 DAYS
.2702 - .2707						✓			09/01/93	180 DAYS
.2710 - .2711						✓			09/01/93	180 DAYS
.2713 - .2719				✓					09/01/93	180 DAYS
.3101 - .3108				✓					09/01/93	180 DAYS
.3201 - .3207				✓					09/01/93	180 DAYS
.3301 - .3306				✓					09/01/93	180 DAYS
.3401 - .3407				✓					09/01/93	180 DAYS
.3501 - .3507				✓					09/01/93	180 DAYS
.3601 - .3607				✓					09/01/93	180 DAYS
.3701 - .3707				✓					09/01/93	180 DAYS
.3801 - .3807				✓					09/01/93	180 DAYS
.3901 - .3908				✓					09/01/93	180 DAYS
10	NCAC	3R	.4001 - .4012	✓					09/01/93	180 DAYS
26H .0202					✓				08/06/93	180 DAYS

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
.0204					✓		✓		09/01/93	
42W .0001 - .0002					✓				08/13/93	180 DAYS
50B .0311					✓				09/01/93	
.0313					✓				09/01/93	
.0403					✓				09/01/93	
.0406					✓				09/01/93	
11	NCAC	11C	.0105		✓				09/01/93	
12	NCAC	11	.0106		✓				09/01/93	
13	NCAC	7	SOC					✓		
7A .0707								✓		
7F .0101					✓				08/16/93	180 DAYS
.0201					✓				10/04/93	
15A	NCAC	2B	.0304		✓				10/01/93	
2P .0101					✓				09/01/93	
.0202					✓				09/01/93	
.0401					✓		✓		09/01/93	
.0402					✓				09/01/93	
.0404 - .0405					✓				09/01/93	
.0407					✓				09/01/93	
3I .0001								✓		
3J .0103								✓		
8A .0202								✓		
.0302								✓		
8C .0002								✓		
13B .0201									10/09/93	Temp. Expired
.0501					✓				10/09/93	
.1601 - .1604				✓			✓		10/09/93	
.1617 - .1637				✓					10/09/93	
.1680				✓					10/09/93	
13C .0201 - .0202								✓		
15A	NCAC	18A	.1720					✓		
.1723								✓		

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
.2618								✓		
19A .0204								✓		
.0406				✓					08/09/93	180 DAYS
20A .0006					✓				08/09/93	180 DAYS
24A .0202					✓				08/09/93	180 DAYS
25 .0213								✓		
17	NCAC	8	.0101 - .0103			✓			09/01/93	
		9F	.0001 - .0003			✓			01/01/94	
		9G	.0101			✓			01/01/94	
.0105								✓		
.0304								✓		
.0501						✓			01/01/94	
.0510						✓			01/01/94	
.0513						✓			01/01/94	
9H .0201						✓			01/01/94	
.0301						✓			01/01/94	
.0304						✓			01/01/94	
.0401 - .0403						✓			01/01/94	
.0405 - .0408						✓			01/01/94	
9I .0403								✓		
9J .0101 - .0102						✓			01/01/94	
.0201						✓			01/01/94	
19A	NCAC	2B	.0119						10/01/93	
transferred to										
19A	NCAC	2B	.0315							
19A	NCAC	2B	.0124						10/01/93	
transferred to										
19A	NCAC	2B	.0316							
.0151								✓		
19A	NCAC	2B	.0161						10/01/93	
transferred to										
19A	NCAC	2E	.0427							
19A	NCAC	2B	.0163						10/01/93	
transferred to										
19A	NCAC	2B	.0317							
.0216								✓		

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
			.0221					✓		
	2D		.0402					✓		
			.0408					✓		
			.0804					✓		
			.0806					✓		
			.0808 - .0812					✓		
			.0816 - .0817					✓		
			.0819 - .0823					✓		
			.0828					✓		
	2E		.0202					✓		
			.0217					✓		
			.0404 - .0405					✓		
			.0418					✓		
21	NCAC	26	.0204			✓			08/30/93	
			.0301					✓		
	46		.1317		✓		✓		09/01/93	
			.1503		✓		✓		09/01/93	
			.1605	✓					09/01/93	
			.1802		✓				09/01/93	
			.1809	✓			✓		09/01/93	
			.2201		✓				09/01/93	
	63		.0104		✓		✓		09/01/93	
			.0201		✓		✓		09/01/93	
			.0306		✓				09/01/93	
			.0401		✓		✓		09/01/93	
23	NCAC	1A	.0001	✓			✓		09/01/93	
			.0003	✓					09/01/93	
			.0005	✓			✓		09/01/93	
		1B	.0001	✓			✓		09/01/93	
			.0003	✓					09/01/93	
23	NCAC	1B	.0004	✓			✓		09/01/93	
			.0005	✓					09/01/93	
			.0006 - .0008	✓			✓		09/01/93	

LIST OF RULES CODIFIED

Citation			AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
2A	.0001 - .0005				✓			09/01/93	
2B	.0101 - .0103				✓			09/01/93	
	.0104	✓						09/01/93	
	.0204				✓			09/01/93	
	.0205			✓				09/01/93	
	.0301 - .0302			✓				09/01/93	
	.0303				✓			09/01/93	
2C	.0101 - .0102			✓		✓		09/01/93	
	.0103				✓			09/01/93	
	.0105 - .0106			✓		✓		09/01/93	
	.0107			✓				09/01/93	
	.0202			✓		✓		09/01/93	
	.0204			✓				09/01/93	
	.0205 - .0206				✓			09/01/93	
	.0208			✓				09/01/93	
	.0209 - .0210	✓						09/01/93	
	.0301			✓		✓		09/01/93	
	.0302 - .0303				✓			09/01/93	
	.0305			✓		✓		09/01/93	
	.0401 - .0402				✓			09/01/93	
	.0501 - .0502			✓				09/01/93	
	.0603			✓		✓		09/01/93	
	.0604			✓				09/01/93	
	.0701 - .0703			✓		✓		09/01/93	
	.0704 - .0705				✓			09/01/93	
2D	.0101			✓		✓		09/01/93	
	.0103 - .0104			✓		✓		09/01/93	
	.0105				✓			09/01/93	
	.0201 - .0205			✓		✓		09/01/93	
	.0301			✓		✓		09/01/93	
23	NCAC 2D .0302				✓			09/01/93	
	.0303			✓				09/01/93	
	.0305			✓		✓		09/01/93	

LIST OF RULES CODIFIED

Citation				AD	AM	RP	With Chgs	Corr	Eff. Date	Temp. Expires
.0306						✓			09/01/93	
.0310					✓		✓		09/01/93	
.0312					✓		✓		09/01/93	
.0314					✓		✓		09/01/93	
.0317						✓			09/01/93	
.0318					✓		✓		09/01/93	
.0320					✓		✓		09/01/93	
.0323 - .0326					✓		✓		09/01/93	
.0328						✓			09/01/93	
.0601 - .0602					✓		✓		09/01/93	
.0603 - .0604						✓			09/01/93	
2E	.0101 - .0102				✓		✓		09/01/93	
	.0103 - .0104					✓			09/01/93	
	.0201				✓		✓		09/01/93	
	.0202					✓			09/01/93	
	.0301 - .0304					✓			09/01/93	
	.0305				✓		✓		09/01/93	
	.0401 - .0403				✓		✓		09/01/93	
	.0501				✓		✓		09/01/93	
	.0502					✓			09/01/93	
	.0602				✓		✓		09/01/93	
	.0603					✓			09/01/93	
3A	.0101 - .0102			✓			✓		09/01/93	
	.0103			✓					09/01/93	
	.0104 - .0112			✓			✓		09/01/93	
	.0114			✓			✓		09/01/93	
	.0201 - .0204			✓			✓		09/01/93	
	.0205			✓					09/01/93	
	.0206 - .0208			✓			✓		09/01/93	
	.0209 - .0210			✓					09/01/93	
23	NCAC	3A	.0211 - .0214	✓			✓		09/01/93	

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

ADMINISTRATION**Department of Administration's Minimum Criteria**

<i>1 NCAC 39 .0101 - Purpose</i>	<i>RRC Objection</i>	<i>06/17/93</i>
<i>No Response from Agency</i>	<i>Obj. Cont'd</i>	<i>07/15/93</i>
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	<i>08/20/93</i>
<i>1 NCAC 39 .0301 - Exceptions to Minimum Criteria</i>	<i>RRC Objection</i>	<i>06/17/93</i>
<i>No Response from Agency</i>	<i>Obj. Cont'd</i>	<i>07/15/93</i>
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	<i>08/20/93</i>

AGRICULTURE**North Carolina State Fair**

<i>2 NCAC 20B .0106 - General</i>	<i>RRC Objection</i>	<i>09/17/93</i>
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ENVIRONMENT, HEALTH, AND NATURAL RESOURCES**Coastal Management**

<i>15A NCAC 7H .2002 - Approval Procedures</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>15A NCAC 7H .2004 - General Conditions</i>	<i>RRC Objection</i>	<i>09/17/93</i>

Environmental Management

<i>15A NCAC 2H .1110 - Implementation</i>	<i>RRC Objection</i>	<i>02/18/93</i>
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	<i>03/18/93</i>
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	<i>05/19/93</i>
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	<i>06/17/93</i>
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	<i>07/15/93</i>
<i>No Response from Agency</i>	<i>Obj. Cont'd</i>	<i>08/20/93</i>
<i>15A NCAC 2L .0103 - Policy</i>	<i>RRC Objection</i>	<i>09/17/93</i>

HUMAN RESOURCES**Children's Services**

<i>10 NCAC 41R .0002 - Administration and Organization</i>	<i>RRC Objection</i>	<i>07/15/93</i>
<i>Agency Responded</i>	<i>Obj. Cont'd</i>	<i>08/20/93</i>

LICENSING BOARDS AND COMMISSIONS**Foresters**

<i>21 NCAC 20 .0020 - Certification of Consulting Foresters</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>21 NCAC 20 .0021 - Rejection of Consultant Affidavit</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>21 NCAC 20 .0022 - Handling of Complaints</i>	<i>RRC Objection</i>	<i>09/17/93</i>

Landscape Architects

21 NCAC 26 .0205 - <i>Forms of Practice</i>	RRC Objection	06/17/93
<i>Rule Returned to Agency</i>		07/15/93
<i>Agency Filed Rule for Codification Over RRC Objection</i>	Eff.	08/01/93
21 NCAC 26 .0207 - <i>Application of Professional Seal</i>	RRC Objection	06/17/93
<i>Rule Returned to Agency</i>		07/15/93
<i>Agency Filed Rule for Codification Over RRC Objection</i>	Eff.	08/01/93
21 NCAC 26 .0208 - <i>Improper Conduct</i>	RRC Objection	06/17/93
<i>Rule Returned to Agency</i>		07/15/93
<i>Agency Filed Rule for Codification Over RRC Objection</i>	Eff.	08/01/93

TRANSPORTATION**Division of Highways**

19A NCAC 2D .0801 - <i>Pre-Qualifying to Bid: Requalification</i>	RRC Objection	09/17/93
19A NCAC 2D .0802 - <i>Invitation to Bid</i>	RRC Objection	09/17/93
19A NCAC 2D .0803 - <i>Advertisement and Invitations for Bids</i>	RRC Objection	09/17/93
19A NCAC 2D .0821 - <i>Return of Bid Bond or Bid Deposit</i>	RRC Objection	09/17/93

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).

10 NCAC 3R .1124(f) - ACCESSIBILITY TO SERVICES

Beecher R. Gray, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 10 NCAC 3R .1124(f) void as applied in *Britthaven, Inc. d/b/a Britthaven of Morganton, Petitioner v. N.C. Department of Human Resources, Division of Facility Services, Certificate of Need Section, Respondent and Valdese Nursing Home, Inc., Respondent-Intervenor* (92 DHR 1785).

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				
LMS Express, Inc. v. Administration, Div of Purchase & Contract	92 DOA 0735	Morgan	06/04/93	
Stauffer Information Systems v. Community Colleges & Administration	92 DOA 0803	West	06/10/93	8:7 NCR 613
McLaurin Parking Co. v. Administration	92 DOA 1662	Morrison	04/02/93	8:3 NCR 320
Warren H. Arrington Jr. v. Division of Purchase & Contract	93 DOA 0132	West	07/21/93	
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. Ezra Everett Rigsbee	92 ABC 0702	West	07/30/93	
Alcoholic Beverage Control Comm. v. Partnership, Phillip Owen Edward	92 ABC 0978	Gray	05/28/93	
Alcoholic Beverage Control Comm. v. Gary Morgan Neugent	92 ABC 1086	Becton	03/22/93	
Alcoholic Beverage Control Comm. v. Azzat Aly Amer	92 ABC 1149	Reilly	09/01/93	
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 Isaac Hailstock	92 ABC 1483	Reilly	04/07/93	
Alcoholic Beverage Control Comm. v. Anthony Ralph Cecchini Jr.	92 ABC 1690	Morgan	06/29/93	
Johnnie L. Baker v. Alcoholic Beverage Control Commission	92 ABC 1735	Chess	05/07/93	
RAMSAC Enterprises, Inc. v. Alcoholic Beverage Control Comm.	93 ABC 0002	Morrison	07/02/93	
Alcoholic Beverage Control Comm. v. Aubrey Rudolph Wallace	93 ABC 0047	Gray	05/28/93	
Alcoholic Beverage Control Comm. v. Mermaid, Inc.	93 ABC 0076	Gray	08/04/93	
Alcoholic Beverage Control Comm. v. Majdi Khalid Wahdan	93 ABC 0087	Becton	07/06/93	8:9 NCR 785
Cornelius Hines T/A Ebony Lounge v. Alcoholic Beverage Ctl. Comm.	93 ABC 0118	Morrison	08/04/93	
Alcoholic Beverage Control Comm. v. Homer Patrick Godwin Jr.	93 ABC 0125	Reilly	05/13/93	
Alcoholic Beverage Control Comm. v. Wanda Lou Ball	93 ABC 0182	Nesnow	07/29/93	
Charles Anthonious Morant v. Alcoholic Beverage Control Comm.	93 ABC 0232	Chess	07/20/93	
Alcoholic Beverage Control Comm. v. Billy Fincher McSwain Jr.	93 ABC 0239	Gray	08/26/93	
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Zachary Andre Jones v. Alcoholic Beverage Control Commission	93 ABC 0421	West	09/13/93	
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Steven A. Barner v. Crime Victims Compensation Comm.	92 CPS 0453	Nesnow	06/01/93	
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	
Norman E. Brown v. Victims Compensation Commission	93 CPS 0141	West	07/07/93	
Moses H. Cone Mem Hosp v. Victims Compensation Comm.	93 CPS 0152	Nesnow	04/02/93	8:3 NCR 327
David & Jane Spano v. Crime Control & Public Safety	93 CPS 0160	Nesnow	07/30/93	8:10 NCR 862
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A.J. Ballard Jr., Tire & Oil Co., Inc. v. Env., Health, & Nat. Res.	92 EHR 0754	Nesnow	08/30/93	8:10 NCR 870
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Angela Power, Albert Power v. Children's Special Health Svcs.	93 EHR 0008	Becton	03/24/93	
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William A. Dixon v. Human Resources	91 CSE 1277	Morrison	03/04/93

* Consolidated cases.

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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	
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Dale Robert Stuhre v. Human Resources	92 CSE 1516	Reilly	05/11/93	
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Patrick Floyd v. Human Resources	92 CSE 1663	Reilly	05/20/93	
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Ira Alston Jr. v. Human Resources	92 CSE 1703	Becton	06/16/93	
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Kevin J. Close v. Human Resources	92 CSE 1727	Chess	08/30/93	
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Dialysis Care of North Carolina, Inc., d/b/a Dialysis Care of Cumberland County v. Human Resources, Division of Facility Services, Certificate of Need Section, and Bio-Medical Applications of Fayetteville d/b/a Fayetteville Kidney Center, Webb-Lohachan-Melton Rentals, Bio-Medical Applications	92 DHR 1110 ^{*6}	Morgan	06/22/93	8:8 NCR 687

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of North Carolina, Inc., d/b/a BMA of Raeford and Webb-Lohavichan Rentals				
Bio-Medical Applications of North Carolina, Inc., d/b/a BMA of Raeford, Webb-Lohavichan-Melton Rentals, Bio-Medical Applications of North Carolina, Inc., d/b/a BMA of Fayetteville d/b/a Fayetteville Kidney Center and Webb-Lohavichan Rentals v. Human Resources, Division of Facility Services, Certificate of Need Section and Dialysis Care of North Carolina, Inc., d/b/a Dialysis Care of Hoke County	92 DHR 1116*	Morgan	06/22/93	8:8 NCR 687
Renal Care of Rocky Mount, Inc. v. Human Resources, Division of Facility Services, Certificate of Need Section, and Bio-Medical Applications of North Carolina, Inc., d/b/a BMA of Tarboro, Rocky Mount Nephrology Associates, Inc., Bio-Medical Applications of North Carolina, Inc., d/b/a BMA of Rocky Mount d/b/a Rocky Mount Kidney Center, and Rocky Mount Kidney Center Associates	92 DHR 1120	Gray	06/18/93	8:8 NCR 687
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Katie Kelly v. Human Resources	93 DHR 0441	Chess	07/26/93	
Sandra Gail Wilson v. Child Abuse/Neglect, Div. of Child Development	93 DHR 0782	Nesnow	09/09/93	
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Carolyn M. Hair v. St Employees Comprehensive Major Medical	92 INS 1464	Chess	03/10/93	
Scotland Memorial Hospital, Mary Horne Odom v. Bd./Trustees//	92 INS 1791	Reilly	08/19/93	
St. of N.C. Teachers' & St. Emp. Comp. Major Medical Plan, and David G. Devries, as Exec. Admin. of the N.C. Teachers' & St. Emp. Comp. Major Medical Plan				
Phyllis C. Harris v. Teachers' & St. Emp. Comp. Major Med. Plan	93 INS 0197	Nesnow	07/29/93	
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Jennings Michael Bostic v. Sheriffs' Ed. & Training Sds. Comm.	92 DOJ 0829*	West	06/22/93	
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Marilyn Jean Britt v. Criminal Justice Ed. & Training Sds. Comm.	92 DOJ 1088	Morrison	03/16/93	
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Private Protective Svcs. Bd. v. Fred D. Rector	93 DOJ 0479	Mann	08/19/93	
Private Protective Svcs. Bd. v. Alan D. Simpson	93 DOJ 0480	West	07/21/93	
Carl Michael O'Byrne v. Alarm Systems Licensing Board	93 DOJ 0844	Nesnow	09/08/93	8:13 NCR 1300

CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
LABOR				
Greensboro Golf Center, Inc. v. Labor	92 DOL 0204	Nesnow	04/15/93	
Ronald Dennis Hunt v. Labor	92 DOL 1319	Morgan	06/17/93	
Jeffrey M. McKinney v. Labor	92 DOL 1333	Morrison	06/21/93	
MORTUARY SCIENCE				
Board of Mortuary Science v. Triangle Funeral Chapel, Inc.	92 BMS 1169	Reilly	04/29/93	8:4 NCR 396
PUBLIC INSTRUCTION				
Frances F. Davis, Parent of Joseph E. Davis v. Public Instruction	93 EDC 0628	Mann	07/29/93	
Donna Marie Snyder v. Public Instruction	93 EDC 0731	Nesnow	09/16/93	
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*	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1065*	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1066*	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1067*	Mann	05/04/93	
Lawrence D. Wilkie, Jerry R. Evans, Jules R. Hancart, James H. Johnson, James D. Fishel v. Justice	90 OSP 1068*	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
Adolph Alexander Justice Jr. v. Motor Vehicles, Transportation	91 OSP 0860	Chess	07/19/93	
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*	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	
Lee P. Crosby v. Michael Kelly, William Meyer and EHR	92 OSP 0056	Gray	06/07/93	
William Marshall Boyd Jr. v. County Commissioners of Hyde & Certain Board of Health Members	92 OSP 0090	Gray	08/25/93	
Gregory Samuel Parker v. Environment, Health, & Natural Resources	92 OSP 0188*	Chess	05/20/93	
Willie Granville Bailey v. Winston-Salem State University	92 OSP 0285	Morrison	03/10/93	
Mattie W. Smith v. State Agricultural and Technical University	92 OSP 0298*12	Reilly	09/14/93	
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*	West	03/08/93	
Jimmy D. Wilkins v. Transportation	92 OSP 0432*	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
Charles Robinson v. Revenue	92 OSP 0553	Morgan	07/21/93	
Anna L. Spencer v. Mecklenburg County Area Mental Health	92 OSP 0584	Becton	08/16/93	
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	
Cindy G. Bartlett v. Correction	92 OSP 0671	Morgan	06/08/93	
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	
Beatrice Wheless v. Lise M. Miller, University Payroll Off., NC St. Univ.	92 OSP 0744*10	Morgan	07/16/93	
Sondra Williams v. Winston-Salem State University	92 OSP 0847	Morrison	08/06/93	
Willie Thomas Hope v. Transportation	92 OSP 0947	Morgan	03/23/93	
David Scales v. Correction	92 OSP 0989	Chess	06/24/93	
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	
Beatrice Wheless v. Lise M. Miller, University Payroll Off., NC St. Univ.	92 OSP 1124*10	Morgan	07/16/93	
John B. Sauls v. Wake County Health Department	92 OSP 1142	Reilly	03/08/93	8:1 NCR 88
Nancy McAllister v. Camden County Department of Social Services	92 OSP 1185	Chess	09/07/93	
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

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
Glenn D. Fuqua v. Rockingham County Board of Social Services	92 OSP 1318	Morrison	08/03/93	
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	
Christie L. Guthrie v. Environment, Health, & Natural Resources	92 OSP 1555	Becton	05/31/93	
Sharon Reavis v. Crime Control & Public Safety	92 OSP 1606	Morrison	08/19/93	8:12 NCR 1163
James B. Price v. Transportation	92 OSP 1657	Mann	03/19/93	
Jerry L. Jones v. N.C.S.U. Physical Plant	92 OSP 1661	Chess	07/06/93	
Mattie W. Smith v. State Agricultural and Technical University	92 OSP 1691*12	Reilly	09/14/93	
Roland W. Holden v. University of North Carolina at Chapel Hill	92 OSP 1715	Becton	08/30/93	8:13 NCR 1292
Betty Bradsher v. UNC-CH	92 OSP 1733	Becton	03/30/93	
Anthony M. Little v. Human Resources, John Umstead Hospital	92 OSP 1734	Becton	09/01/93	
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	
Brenda B. Miles v. University of North Carolina Chapel Hill	93 OSP 0033	Morrison	09/10/93	
Karen Canter v. Appalachian State University	93 OSP 0079	Reilly	06/15/93	
Terry Steve Brown v. Iredell County Health Department	93 OSP 0101	Morgan	08/06/93	
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	
Grace Jean Washington v. Caswell Center	93 OSP 0153	Morgan	06/03/93	
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	
Richard E. Howell v. Correction, Wayne Correctional Center	93 OSP 0245	Gray	08/25/93	
Brian Dale Barnhardt v. State Highway Patrol	93 OSP 0251	Reilly	07/27/93	
F.R. "Don" Bowen v. Human Resources	93 OSP 0253	Morgan	08/06/93	
Michael L. Pegram v. Correction	93 OSP 0275*	Reilly	06/28/93	
Jerry D. Doss Sr. v. Correction	93 OSP 0287	Gray	05/17/93	
Debbie Renee Robinson v. Correction	93 OSP 0383	Nesnow	06/07/93	
Michael L. Pegram v. Correction	93 OSP 0472*	Reilly	06/28/93	
Hubert L. Holmes v. Transportation	93 OSP 0572	Reilly	08/17/93	
Xantippe Blackwell v. Human Resources, Murdoch Center	93 OSP 0632	Reilly	09/01/93	
Harold Kovolenko v. Lynn C. Phillips, Director of Prisons	93 OSP 0697	Nesnow	09/08/93	
Daniel Thomas Wheeler, Kyle Lee Wheeler v. Caldwell County Department of Social Services	93 OSP 0752	Nesnow	09/16/93	
Dana Phillips v. Administrative Office of the Courts	93 OSP 0822	West	09/09/93	
STATE TREASURER				
Juanita M. Braxton v. Bd. of Trustees/Teachers' & St Emp Ret Sys	91 DST 0017	West	09/07/93	
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	
W. Rex Perry v. Bd/Trustees/Teachers' & St Emp Ret Sys	93 DST 0133	West	08/12/93	8:11 NCR 992
TRANSPORTATION				
Yates Construction Co., Inc. v. Transportation	92 DOT 1800	Morgan	03/25/93	
UNIVERSITY OF NORTH CAROLINA HOSPITALS				
Constance V. Graham v. UNC Hospital	93 UNC 0269	Morgan	07/20/93	
Jacqueline Florence v. UNC Hospitals	93 UNC 0355	Becton	06/16/93	

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
90 DOJ 0353

PHILIP B. CATES
Petitioner,

v.

N.C. DEPARTMENT OF JUSTICE
ATTORNEY GENERAL'S OFFICE
Respondent.

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RECOMMENDED DECISION:
ENTRY OF SUMMARY
JUDGMENT FOR PETITIONER

The Petitioner filed a document titled "Petition for Administrative Review" on March 30, 1990, alleging that the Respondent erroneously determined that it would not provide legal defense for the Petitioner or authorize the Petitioner to obtain legal defense in a legal action which was initiated against the Petitioner's employer Durham County and the Petitioner, in his capacity as a Registered Sanitarian employed by the Environmental Health Division of the Durham County Health Department. On May 7, 1992 the Respondent's Motion for Summary Judgment was filed, in which the Respondent contended that there is no genuine issue as to any material fact and the Respondent is entitled to a judgment as a matter of law because the statutory provision which authorizes the Respondent to provide legal defense for local health department sanitarians was not in effect at the time of the Petitioner's actions in his employment which prompted the legal action against him and the Petitioner's actions in his employment were not within the scope and course of enforcing the rules of the state agency Commission for Health Services. The Petitioner filed the Petitioner's Response to Respondent's Motion for Summary Judgment and Petitioner's Cross-Motion for Summary Judgment on May 20, 1992, asserting that his motion for summary judgment should be granted and the Respondent's motion for summary judgment should be denied because statutory law required the Respondent to defend the Petitioner since he was sued in court based upon his enforcement of the rules of the Commission for Health Services. On May 29, 1992 the Respondent's Response to Petitioner's Reply to Respondent's Motion for Summary Judgment was filed.

ISSUE

Whether the Respondent correctly determined that it should deny the Petitioner's request for legal representation by the Respondent in a legal action initiated against the Petitioner in his capacity as a local health department sanitarian.

FINDINGS OF FACT

Based upon the pleadings and affidavits of the contested case, the undersigned administrative law judge finds the following facts:

1. The Petitioner is employed as a Sanitarian with the Environmental Health Division of the Durham County Health Department in Durham, North Carolina.
2. The Petitioner's work duties as a Sanitarian, after being supervised during his training period by a District Supervisor from the North Carolina Department of Environment, Health, and Natural Resources, included the performance of preliminary soil evaluations, the interpretation of sewage treatment and disposal system rules of the State of North Carolina and the issuance of improvement

permits.

3. A preliminary soils evaluation is the first step in the approval process for a septic tank system.
4. In performing preliminary soil evaluations in 1986, sanitarians employed with the Durham County Health Department enforced the rules of the Commission for Health Services under the authorization and supervision of the North Carolina Department of Natural Resources and Community Development.
5. In Durham County, an applicant for a preliminary soil evaluation had a right of appeal to the Durham County Soil Scientist in the event that the applicant was not satisfied with the results of the evaluation.
6. In Durham County, an applicant for a preliminary soil evaluation could appeal the results of a preliminary soil evaluation from the Durham County Soil Scientist to the District and to the State of North Carolina Sanitarian.
7. Richard K. Rowe is the Director of the Environmental Health Section of the North Carolina Department of Environment, Health, and Natural Resources.**
8. Rowe does not recommend that North Carolina counties conduct preliminary soil evaluations for sites, due to a county health department's exposure to liability when it issues assurances of the approvability of a site for an improvement permit.
9. Preliminary soil evaluations conducted by North Carolina counties are not a part of any program of the State of North Carolina concerning evaluations of subdivision property sites.
10. The Petitioner performed a site and soil evaluation on July 17 and 18, 1986 for a ground absorption sewage disposal system upon the submission of an application for an improvement permit by H & W Developers, Incorporated.
11. On July 13, 1989, H & W Developers, Incorporated initiated a legal action against Durham County and the Petitioner in Durham County Superior Court, alleging that H & W Developers, Incorporated relied on the Petitioner's evaluation map and report after he had conducted a preliminary soil evaluation to determine the suitability of proposed property lots for septic tank systems, that the Petitioner's evaluation map and report indicated that 49 of 50 proposed property lots were suitable for septic tank systems, that the Durham County Health Department determined that the Petitioner's preliminary soil evaluation was incorrect in that many of the property lots which the Petitioner had identified as suitable for septic tank systems were not suitable for them and that H & W Developers suffered monetary damages as a result of the Petitioner's negligence.
12. In a letter dated October 17, 1989 and addressed to North Carolina Department of Human Resources Secretary David T. Flaherty, Carole S. Gailor of the law firm Womble, Carlyle, Sandridge and Rice requested that the Department of Human Resources forward the Petitioner's request to the North Carolina Attorney General's Office for legal representation from the Respondent in the legal action initiated on July 13, 1989.
13. In a letter dated February 9, 1990 and addressed to Gailor, Assistant Attorney General Gayle M. Mathei stated that the legal action initiated on July 13, 1989 was not one in which representation of the Petitioner by the Respondent was appropriate, because the Petitioner's actions in his employment which were the subject of the legal complaint predated the statutory law which provided for the

** The North Carolina Department of Environment, Health, and Natural Resources was formerly the North Carolina Department of Natural Resources and Community Development.

representation of local health department sanitarians by the Respondent and the Petitioner was not enforcing the rules of the Commission for Health Services when he was conducting preliminary soil evaluations.

CONCLUSIONS OF LAW

1. North Carolina General Statutes Section 130A-336(a) states, in pertinent part, that no person shall commence or assist in the construction, location or relocation of a residence, place of business or place of public assembly in an area not served by an approved wastewater system unless an improvement permit is obtained from the local health department.
2. N.C.G.S. §130A-336(b) states, in pertinent part, that the local health department shall issue an improvement permit authorizing work to proceed and the installation of a wastewater system when it has determined after a filed investigation that the system can be installed and operated in compliance with Article 11 of Chapter 130A of the North Carolina General Statutes and rules adopted pursuant to this Article.
3. Title 15A, Chapter 18A, Section .1937 (a) and (b) of the North Carolina Administrative Code states, in pertinent part, that an improvement permit shall be required in accordance with N.C.G.S. 130A-336, with the local health department issuing an improvement permit "only after it has determined that the system is designed and can be installed so as to meet the provisions of these Rules". (EMPHASIS ADDED)
4. 15A NCAC 18A .1939 states, in pertinent part, that the local health department "shall investigate each proposed site" for a sanitary sewage system and that the "[s]ite evaluations shall be made in accordance with Rules .1940 through .1948 of this Section [.1900 of the North Carolina Administrative Code]". (EMPHASIS ADDED)
5. 15A NCAC 18A .1937(i) states, in pertinent part, that "[t]he local health department shall prepare a written report with reference to the site and soil conditions required to be evaluated pursuant to this Section [.1900 of the North Carolina Administrative Code]" and "[t]he report shall be signed and dated by the local (authorized) sanitarian."
6. In conducting preliminary soil evaluations of sites upon the application for an improvement permit by H & W Developers, Incorporated for a ground absorption sewage disposal system, pursuant to which the Petitioner issued a written report regarding the site and soil conditions which he signed and dated as the local authorized sanitarian determining for his employer Durham County Health Department that the property lots were suitable for septic tank systems after investigating each proposed site as mandated by rules of the North Carolina Administrative Code, the Petitioner was enforcing rules of the state agency Commission for Health Services.
7. N.C.G.S. §143-300.8, titled "Defense of local sanitarians," states in pertinent part:

"Any local health department sanitarian enforcing rules of the Commission for Health Services under the supervision of the Department of Environment, Health, and Natural Resources pursuant to G.S. 130A-4(b) shall be defended by the Attorney General subject to the provisions of G.S. 143-300.4, and shall be protected from liability in accordance with the provisions of this Article [31A of Chapter 143 of the General Statutes] in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of enforcing the rules of the Commission for Health Services. The Department of Environment, Health, and Natural Resources shall pay any judgment against the sanitarian, or any settlement made on his behalf..."
8. N.C.G.S. §130A-4(b) states, in pertinent part:

"When requested by the Secretary [of Environment, Health, and Natural Resources], a local health department shall enforce the rules of the Commission [for Health Services] under the supervision of the Department [of Environment, Health, and Natural Resources]. The local health department shall utilize local staff authorized by the Department to enforce the specific rules..."

9. In EEE-ZZZ Lay Drain Company v. North Carolina Department of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992), the North Carolina Court of Appeals held that local health departments are agents of the State of North Carolina, opining:

"...Under the statutory scheme in place for the regulation of sanitary sewage systems, the local health departments are invested with a great deal of authority...The rules promulgated pursuant to Chapter 130A, Article 11 of the General Statutes and found in Title 15A of the North Carolina Administrative Code specify with particularity the duties and powers of the local health departments as concerns sewage treatment and disposal systems.

"After careful examination of the authority and duties imposed statutorily by the General Assembly upon the local health departments, we hold that they are agents of the State..." (108 N.C. App. at 28, 422 S.E.2d at 341)

10. The Petitioner is a local health department sanitarian employed by the Durham County Health Department, an agency of the State of North Carolina under EEE-ZZZ Lay Drain Company, supra, who was enforcing rules of the state agency Commission for Health Services under the supervision of the Department of Environment, Health, and Natural Resources when the Petitioner allegedly acted or failed to act in the scope and course of enforcing the rules of the Commission when he performed the preliminary soil evaluations concerning which H & W Developers, Incorporated brought a civil action against the Petitioner in his official and individual capacity.
11. N.C.G.S. §143-300.4(a)(1) states that the State shall refuse to provide for the defense of a civil or criminal action or proceeding brought against an employee or former employee if the State determines that the act or omission was not within the scope and course of his employment as a State employee.
12. While the Petitioner is not a State employee, the Petitioner served as an agent of the State, in his job capacity as a local health department sanitarian employed by the Durham County Health Department, when he acted or failed to act in the scope and course of his employment with the State agent Durham County Health Department when he performed the preliminary soil evaluations concerning which H & W Developers, Incorporated brought a civil action against the Petitioner.
13. N.C.G.S. §143-300.4(a)(4) states that the State shall refuse to provide for the defense of a civil or criminal action or proceeding brought against an employee or former employee if the State determines that defense of the action or proceeding would not be in the best interests of the State.
14. The Respondent did not have sufficient grounds upon which to refuse to provide for the legal defense of the Petitioner in the civil action brought against him on the basis that defense of the action was not in the best interests of the State.
15. The Respondent did not have sufficient grounds under N.C.G.S. §143-300.4(a)(1) and (4) upon which to refuse to provide for the legal defense of the Petitioner in the civil action brought against him.
16. N.C.G.S. §143-300.8, which establishes that the Attorney General shall defend any local health department sanitarian enforcing rules of the Commission for Health Services under the supervision of the Department of Environment, Health, and Natural Resources in any civil or criminal action or proceeding brought against the sanitarian in his official or individual capacity on account of an act

done or omission made in the scope and course of enforcing the rules of the Commission for Health Services, became effective in 1987.

17. The Petitioner's alleged acts and omissions concerning his performance of preliminary soil evaluations in his capacity as a Sanitarian, which were the subject of the legal action initiated against him by H & W Developers, Incorporated, occurred in 1986, prior to the effective date of N.C.G.S. §143-300.8.
18. The legal action against the Petitioner based upon his alleged acts and omissions concerning his performance of preliminary soil evaluations in 1986 in his capacity as a Sanitarian was initiated by H & W Developers, Incorporated in 1989, after the effective date of N.C.G.S. §143-300.8.
19. In applying the effective date of N.C.G.S. §143-300.8 to the sequence of events addressed in the statute, the focus is on the date that the action or proceeding is brought against the sanitarian rather than on the date that the acts were done or the omissions were made by the sanitarian, as evidenced by the subject of N.C.G.S. §143-300.8, "Defense of local sanitarians." (EMPHASIS ADDED)
20. When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction. State ex rel. Utilities Commission v. Edmisten, 291 N.C. 451, 232 S.E.2d 184 (1977).
21. The language of N.C.G.S. §143-300.8, which became effective in 1987, is clear and unambiguous that the Petitioner, a local health department sanitarian who was enforcing rules of the Commission for Health Services under the supervision of the Department of Environment, Health, and Natural Resources when he conducted a preliminary soil evaluation pursuant to a submitted application for an improvement permit, was to be defended by the Respondent and protected from liability in the civil action initiated against him in 1989 in his official and individual capacity on account of acts done or omissions made in the scope and course of enforcing the rules of the Commission for Health Services in his performance of the preliminary soil evaluations.
22. N.C.G.S. §1A-1, Rule 56(c) establishes that summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file in a case, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.
23. There is no genuine issue as to any material fact and the Petitioner is entitled to a judgment as a matter of law, because the Respondent incorrectly determined that it should deny the Petitioner's request for legal representation by the Respondent in a legal action brought against the Petitioner in his capacity as a local health department sanitarian.

RECOMMENDATION

It is recommended that the Respondent provide legal representation to the Petitioner in the legal action initiated against him. In the event that this recommendation cannot be implemented due to the completion or cessation of proceedings in the legal action initiated against the Petitioner, then it is recommended that the Respondent reimburse the Petitioner for any costs of legal representation which were incurred by the Petitioner as a direct result of the Respondent's determination to deny the Petitioner's request for legal representation.

ORDER

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

NOTICE

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

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

The agency that will make the final decision in this contested case is the North Carolina Department of Justice.

This the 30th day of August, 1993.

Michael Rivers Morgan
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 HRC 0560

NORTH CAROLINA HUMAN RELATIONS
COMMISSION

on behalf of
TYRONE CLARK,
Petitioner,

v.

MYRTLE WILSON,
Respondent.

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PROPOSAL FOR DECISION

This matter was heard before Brenda B. Becton, Administrative Law Judge, on April 13, 1993, in High Point, North Carolina. At the conclusion of the hearing, the parties were afforded an opportunity to submit written post-hearing submissions. The record was closed on July 23, 1993.

APPEARANCES

Petitioner: Daniel D. Addison, Attorney, North Carolina Human Relations Commission, Raleigh, North Carolina.

Respondent: HAWORTH, RIGGS, KUHN AND HAWORTH, Attorneys at Law, High Point, North Carolina; William B. Haworth appearing.

ISSUES

1. Whether the Respondent refused to engage in a real estate transaction with the Complainant because of his race.
2. Whether the Respondent made a statement indicating an intent to discriminate, because of race, with respect to a real estate transaction.
3. Whether the Complainant is entitled to an award of compensatory damages, and if so, the amount of such damages.
4. Whether to assess a civil penalty against the Respondent, and if so, the amount of such civil penalty.

STATUTES INVOLVED

N.C. Gen. Stat. §41A-4(a)(1)
N.C. Gen. Stat. §41A-4(a)(6)
N.C. Gen. Stat. §41A-7(1)

FINDINGS OF FACT

From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as a fact that:

1. Prior to and during the incidents of this case, the Respondent, Myrtle Wilson, owned and managed the rental of two houses, at 2001 and 2004 Rotary Drive, High Point (Guilford County), North Carolina.
2. In February, 1991, the Respondent's rental house at 2001 Rotary Drive was vacant.
3. On February 5, 1991, the Respondent advertised the house for rent in the High Point Enterprise newspaper.
4. The Complainant, Tyrone Clark, is black.
5. On February 5, 1991, the Complainant was looking for housing for himself and his family when he saw the Respondent's advertisement for her rental house.
6. The Complainant telephoned the Respondent and inquired about the rental house. The Respondent directed the Complainant to view the house and to call her back if he was still interested in renting the house after he had seen it.
7. The Complainant and his family went to see the house. He called the Respondent back and told her he was interested in the house.
8. The Respondent asked the Complainant some preliminary questions about his family and his work. The Respondent then asked the Complainant if he was "colored." When the Complainant responded that he was black, the Respondent told him that she did not rent to "coloreds." The Respondent told the Complainant that the neighbors would not like him there. Then the Respondent refused to rent her house to the Complainant.
9. After the Respondent refused to rent the house to the Complainant, he contacted the High Point Human Relations Commission to complain about housing discrimination.
10. William Evans, a fair housing specialist with the High Point Human Relations Commission, telephoned the Respondent to discuss the matter with her. The Respondent told Mr. Evans that she did not rent to "coloreds"; that they would ruin the property and would not pay their rent. The Respondent also told Mr. Evans that she did not want to rent to "coloreds" in that neighborhood because the neighbors would be displeased with her. The Respondent told Mr. Evans that she did not like an outside source interfering in her affairs and her business. She also told Mr. Evans that she understood the fair housing law, but she did not care what it said - she was not going to rent her house to "colored" people.
11. After Mr. Evans' conversations with the Respondent, the Complainant filed a housing discrimination complaint against the Respondent with the North Carolina Human Relations Commission (hereinafter "Commission").
12. The Commission's investigator, Carl Ross, interviewed the Respondent on several occasions. The Respondent told Mr. Ross that it would have been a disaster if she had rented her house to a black person in that neighborhood. The Respondent said that she considered the people who lived in that neighborhood to be her friends, and she would have betrayed their trust if she had rented to a "colored" person there.
13. The Respondent told Mr. Ross that she had rented her other house to a black family before, and that they had too many people living in the house and they did not pay their rent. The Respondent told Mr. Ross that she would not rent to black tenants again. The Respondent told Mr. Ross that she understood the fair housing act.
14. After the Complainant filed his complaint with the state Commission, the Respondent called him twice

at home and told him that he would not have wanted to live in the 2001 Rotary Drive neighborhood because the neighbors would not have wanted him there. The Respondent tried to convince the Complainant to withdraw his complaint.

15. The Complainant experienced humiliation, embarrassment, emotional distress, and loss of civil rights as a consequence of the Respondent's actions.
16. The Complainant testified that the Respondent's statements made him feel cheated and degraded, and that he was upset by the incidents. He was ashamed that as his family's breadwinner, he was not able to provide them with desirable housing.
16. The Complainant and his family were disappointed by not getting the Rotary Drive house, which had several features they considered particularly desirable (including close proximity to work, a place to park the Complainant's bus, a large backyard where the Complainant's daughter could play, and a location away from areas with drug traffic.)
17. The Complainant was embarrassed about having to tell his young daughter the reason why the family was not able to live in the Respondent's rental house because he felt that the truth might cause her to experience racial stigma.
18. The experience has made the Complainant concerned that he may be discriminated against in similar situations in the future. The Complainant testified that he is still upset by this experience, and that he will never forget it.
19. The Respondent is not currently in good physical health. Her poor physical health has resulted in some diminished mental capacity. She has suffered several strokes which have resulted in dementia.
20. Dementia was described by Dr. Richard Orr, Jr. as a "loss of cognitive function - that is, the ability of being able to reason, loss of judgment, sometimes difficulty with calculation."
21. Dr. Orr was not the Respondent's physician in February, 1991. Dr. Orr admitted that he was not aware of the Respondent's daily routines, her personal affairs, or her business affairs either now or in February, 1991. Dr. Orr was not able to give any examples of things the Respondent has done that show that she has any impaired judgment.
22. The Respondent was first seen by Dr. Chester C. Haworth, a neurologist, in November, 1992. Although Dr. Haworth was of the opinion that the Respondent's judgment was impaired, his opinion in this regard is contradicted by tests he administered. Dr. Haworth acknowledged that the tests he administered indicated that the Respondent's judgment is normal and that her orientation is also normal.
23. Despite her dementia, the Respondent was managing her rental properties, including collecting rent, seeing to repairs, and selecting tenants, at the time the Complainant expressed his desire to rent the Rotary Drive house.
24. The Respondent has now voluntarily executed a durable power of attorney to her daughter, Dixie Wilson Klemme.

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

CONCLUSIONS OF LAW

1. Pursuant to the provisions of North Carolina General Statutes section 41A-4(a)(1), it is illegal for a person to refuse to engage in a real estate transaction on the account of the person's race.

2. The Respondent refused to rent her house to the Complainant, stating that she did not rent to "coloreds."
3. The Respondent's refusal to rent to the Complainant because of his race was a violation of North Carolina General Statutes section 41A-4(a)(1).
3. North Carolina General Statutes section 41A-4(a)(6) prohibits a person from making a statement which indicates directly or indirectly an intent to discriminate on the basis of race in a real estate transaction.
4. The Respondent told the complainant that she did not rent to "coloreds" and that the neighbors in the vicinity of her rental house would not want the complainant living there. These statements directly indicated the Respondent's intent to discriminate in a real estate transaction, and they constituted violations of North Carolina General Statutes section 41A-4(a)(6).
5. North Carolina General Statutes section 41A-7(1)(3) provides that the North Carolina Human Relations Commission may order a respondent to pay compensatory damages to a complainant. Compensatory damages in a State Fair Housing Act case may include compensation for humiliation, embarrassment, emotional distress, or loss of civil rights suffered by a complainant as a result of the unlawful discriminatory housing act.
6. In this case, the evidence shows that the Complainant suffered significant humiliation, embarrassment, and emotional distress as a result of the Respondent's blatant refusal to rent the house on Rotary Drive to him because of his race.
7. North Carolina General Statutes section 41A-7(1)(3) also provides for the assessment of a civil penalty of up to \$10,000 against a respondent for a first violation of the Fair Housing Act.
8. Among the factors that the Commission may consider in deciding whether, and how much, to assess as a civil penalty are the respondent's intent to discriminate, whether the respondent acted with callous disregard for the complainant's rights, whether the respondent acted with knowledge that her actions violated the law, the deterrent effect of a civil penalty, the extent to which a civil penalty will adequately serve to punish the respondent, and the extent to which the civil penalty will vindicate the public's interest in assuring fair housing.
9. In this case, the Respondent's refusal to rent to the Complainant because of race was blatant. The Respondent did so knowing that her actions violated the law. Her racial statements directly to the Complainant were made with callous disregard for his rights and feelings. The Respondent demonstrated her disregard and contempt for the State Fair Housing Act in her statements to the investigators.
10. It is unclear, however, from the record whether, due to her dementia, the Respondent currently has the capacity to understand that any civil penalty imposed in this matter would be in the nature of punishment to her for actions taken in this case.
11. Furthermore, since the Respondent's affairs are now being handled by her daughter, any penalty imposed to deter future conduct by the Respondent would be a vain and useless act.
12. The Petitioner has failed to establish how the imposition of a substantial civil penalty in this case will serve as a deterrent to either the Respondent or other similarly situated property owners.
13. There is no record of previous violations, so the Respondent is subject to a maximum penalty of \$10,000.
14. The Respondent has the financial resources to pay a civil penalty.

CONTESTED CASE DECISIONS

PROPOSAL FOR DECISION

The North Carolina Human Relations Commission will make the Final Decision in this contested case. It is recommended that the Commission adopt the Findings of Fact and Conclusions of Law set forth above and:

1. Order the Respondent to pay the Complainant the sum of \$2000 in compensatory damages;
2. Assess a civil penalty against the Respondent in the amount of \$1000.

ORDER

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

NOTICE

Before the Commission makes the FINAL DECISION, it is required by North Carolina General Statutes section 150B-36(a) to give each party an opportunity to file exceptions to this PROPOSAL FOR DECISION, and to present written arguments to those in the agency who will make the final decision.

The agency is required by North Carolina General Statutes section 150B-36(b) to serve a copy of the Final Decision on all parties and to furnish a copy to the Parties' attorney of record.

This the 7th day of September, 1993.

Brenda B. Becton
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 OSP 1715

ROLAND W. HOLDEN,
Petitioner,

v.

UNIVERSITY OF NORTH CAROLINA AT
CHAPEL HILL,
Respondent.

RECOMMENDED DECISION

The Petitioner initiated this contested case on December 1, 1992, in order to appeal the August 6, 1992 decision of the Respondent University to separate him from employment as a Painter with the Physical Plant at the University of North Carolina at Chapel Hill (UNC-CH).

The Petitioner contends that the University lacked just cause for dismissal and discriminated against him on the basis of his handicapping condition.

The Respondent contends that the Petitioner was separated for personal misconduct, not being truthful about the reasons for his absence from work on July 6 & 7, 1992.

This matter was heard before Brenda B. Becton, Administrative Law Judge, on April 29, 1993, in Raleigh, North Carolina. At the conclusion of the hearing, the parties were afforded an opportunity to submit written submissions which were filed on July 15, 1993.

APPEARANCES

Petitioner: J. Kirk Osborn, Attorney, Chapel Hill, North Carolina.

Respondent: Anne J. Brown, Associate Attorney General, N.C. Department of Justice, Raleigh, North Carolina.

ISSUES

1. Whether the Respondent had just cause to dismiss the Petitioner on the basis of personal misconduct.
2. Whether the Respondent discriminated against the Petitioner on the basis of his handicap.

EXHIBITS

The exhibits listing was omitted from this publication. If you would like a copy of the exhibits listing, please contact the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, NC 27611-7447, (919) 733-2678.

FINDINGS OF FACT

From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as a fact that:

1. The Petitioner, Roland Whitfield Holden, Jr., was first employed by the Respondent in September, 1978.
2. The Petitioner is fifty-eight years old, born September 21, 1934.
3. The Petitioner started work for the Respondent as a painter in 1978 in Shop 513. He was there for five years under the supervision Mr. Bernice Clemments. Then the Petitioner was transferred to the Department of Housing under Mr. James Neal and stayed there for several years. He transferred back to Shop 513 and was supervised by Mr. Blaine Custer for five years. Mr. Malcolm Seldon then supervised him for eight or nine months. Mr. Fred Mitchell became his supervisor after Mr. Seldon.
4. The Petitioner was employed as a painter in the Respondent's Small Jobs Shop under the supervision of Mr. Mitchell from March, 1992 through the date of his discharge on August 6, 1992.
5. The Petitioner was dismissed from employment as a painter on August 6, 1992, for alleged personal misconduct.
6. The Petitioner is an alcoholic and when he begins to drink, he cannot control his drinking or stop drinking without help.
7. If the Petitioner went to work while under the influence of alcohol, he would be subject to dismissal for misconduct.
8. On Sunday, July 5, 1992, the Petitioner went to the Emergency Room, suffering from symptoms of alcoholism. Before he went, he called his supervisor, Mr. Mitchell, to get permission to be absent from work on July 6, 1992.
9. When the Petitioner spoke with Mr. Mitchell on July 5, 1992, the reason he gave for wanting time off was so that he could make arrangements to get his ailing 86 year old mother into a rest home.
10. The Petitioner was drinking when he called Mr. Mitchell, but he did not make Mr. Mitchell aware of this fact.
11. After the Petitioner arrived at the Durham County General Regional Hospital emergency room, his treatment was monitored by Tom Giduz, M.D.
12. Dr. Giduz offered the Petitioner admission to Oakleigh while he was at the hospital, but the Petitioner elected to go home and take the medications that had been prescribed for him that night, as an outpatient.
11. The Petitioner telephoned Mr. Mitchell again on Monday morning, July 6, 1992, to request leave in order to take his mother to the doctor.
12. Mr. Mitchell telephoned the Petitioner at his home on Monday afternoon, July 6, 1992. At that time the Petitioner informed Mr. Mitchell that he had not taken his mother to a rest home nor to a doctor; he had not even seen his mother. Mr. Mitchell asked him why he needed to be off from work and the Petitioner stated that he was just worried about his mother. Mr. Mitchell informed the Petitioner that he was not satisfied with the reasons the Petitioner gave him for his absence and scheduled a meeting with the Petitioner for Tuesday morning, July 7, 1992, at 9:00 A.M. to discuss the Petitioner's reason for being absent.
13. The Petitioner telephoned Mr. Mitchell at the shop on Tuesday morning, July 7, 1992, and told Mr. Mitchell that he was not feeling good and was unable to come to the meeting. Mr. Mitchell asked him what was wrong and the Petitioner told Mr. Mitchell that he still had a drinking problem.

14. Mr. Mitchell testified that he considered the Petitioner's not telling him that he was drinking when he called on July 5 and 6 to request leave to be deceitful and such actions were considered to be misconduct. As a result, Mr. Mitchell decided to recommend that the Petitioner be separated from employment with the Respondent.
15. Mr. Mitchell consulted with his supervisor, Bruce Jones, prior to proceeding with the Petitioner's termination.
16. Mr. Jones testified that the Petitioner telephoned him on July 6, 1992 and said that he was in trouble, that he had not been honest with his supervisor in stating the reasons for being away from work, and that he was drinking again. The Petitioner wanted Mr. Jones to advise him what to do.
17. Mr. Herbert Paul is the Director of the Physical Plant at UNC-CH and he approved Mr. Mitchell's recommendation that the Petitioner be separated because, in his opinion, the Petitioner had engaged in personal misconduct.
18. Mr. Paul testified that he did not recommend or approve any adverse personnel action against the Petitioner based upon his handicap.
19. Mr. Paul instigated a pilot employee assistance program in the Physical Plant in 1987 in response to a supervisor's approaching him and stating that he has a problem in the workplace with some drinking.
20. At the end of 1989, Mr. Paul personally talked with the Petitioner about him getting help with his drinking problem. Mr. Paul telephoned Terry Hall, an alcoholic counsellor with the Employee Assistance Program, to get assistance for the Petitioner.
21. Mr. James MacFarquhar was employed at the Respondent's Physical Plant as the Associate Director for Building and Grounds.
22. Mr. MacFarquhar approved the action of dismissing the Petitioner.
23. Mr. MacFarquhar testified that he did not approve any adverse personnel action against the Petitioner because of his handicap.
24. Mr. Mitchell set up a pre-dismissal conference with the Petitioner for July 9, 1992, and called the Petitioner at home during the afternoon of July 7, 1992 in order to inform the Petitioner of the pre-dismissal conference. However, when the Petitioner told Mr. Mitchell that he was seeking treatment for his drinking at Oakleigh, an alcohol treatment center, Mr. Mitchell did not mention the pre-dismissal conference.
25. The Petitioner presented himself at Oakleigh for admission on July 7, 1992 and was admitted under Dr. Giduz's service.
26. Mr. Mitchell telephoned Oakleigh to see if the Petitioner had been admitted. The Petitioner's doctor, pursuant to authorization from the Petitioner, called Mr. Mitchell to confirm that the Petitioner had been admitted for treatment.
27. On Saturday, July 11, 1992, the Petitioner called Mr. Mitchell at home and informed him that he could return to work on Tuesday, July 14, 1992, and that the Petitioner wanted to bring a doctor's excuse to Mr. Mitchell on Monday, July 13, 1992. Mr. Mitchell told the Petitioner that it would be fine to bring his excuse on Monday.
28. The Petitioner took his doctor's excuse to Mr. Mitchell on Monday and returned to work on Tuesday, July 14, 1992.

29. As of July 5, 1992, the Petitioner had accrued approximately 57 hours of sick leave and 225 hours of vacation leave which was sufficient to cover the time he missed from work.
30. The Petitioner worked continuously for the Respondent from July 14, 1992 to August 5, 1992, without ever being informed that Mr. Mitchell had recommended that he be terminated as a result of his conduct in obtaining time off from work in July.
31. Mr. Mitchell notified the Petitioner of his pre-dismissal conference by handing him a hand-written note sometime between 9:00 A.M. and 11:00 A.M. on August 5, 1992. The note informed the Petitioner that the conference was scheduled for the same day at 3:30 P.M. because of the Petitioner's alleged "misconduct on reason to be absent from work on July 6 and 7, 1992."
32. The Petitioner's pre-dismissal conference was conducted at the Kenan Center with Mr. Drake Maynard, the Director of Human Resources Administration for the Respondent, and Mr. Mitchell.
33. Mr. Mitchell testified that during the pre-dismissal conference, the Petitioner admitted that he had been drinking, that he had not been truthful about the reasons he had asked to be off, and he said he was sorry that he had been untruthful.
34. The Petitioner also told Mr. Mitchell and Mr. Maynard that he was ashamed or embarrassed about his drinking and that is why he did not disclose to Mr. Mitchell that he had been drinking.
35. The Petitioner went home after the pre-dismissal conference which lasted approximately one hour.
36. Mr. Mitchell testified that he considered the remarks that the Petitioner made during the pre-dismissal conference, but nothing the Petitioner said was sufficient to make him change his mind regarding his decision to recommend dismissal.
37. On August 6, 1992, Mr. Mitchell notified the Petitioner at work that he was being discharged for personal misconduct on the basis that he had intentionally deceived Mr. Mitchell as to his reasons for wanting to be excused from work on July 6 and 7, 1992.
38. Mr. Mitchell considered it significant that the Petitioner had received a final written warning for misconduct on December 9, 1991 for conduct very similar to that which occurred on July 5 and 6, 1992. Mr. Mitchell felt that as a result of his previous warning, the Petitioner should have been aware of the seriousness of deceiving his supervisor about the reasons he needed to be off from work.
39. Mr. Mitchell testified that he did not discriminate against the Petitioner or recommend any adverse personnel action against the Petitioner on the grounds that the Petitioner may be an alcoholic.
40. The Petitioner appealed his dismissal by filing for a Step 1 Grievance Hearing on August 14, 1992. Pursuant to this filing, Mr. Mitchell was requested to explain why the Petitioner was being terminated in August, 1992, for conduct which had occurred in July.
41. Mr. Mitchell responded to the request for an explanation on August 20, 1992, stating that the delay was caused by the Department of Human Resources needing sufficient time to determine if the American Disabilities Act applied to this matter.
42. Mr. Maynard testified that the delay in scheduling the Petitioner's pre-dismissal conference was caused by the Respondent's inability to get approval for the dismissal from all the required persons during the summer when many employees are on vacation.
43. On August 25, 1992, the Petitioner was notified of Mr. Mitchell's response and was given ten days within which to either accept his dismissal or request a Step 2 Hearing.

44. The Petitioner requested a Step 2 Grievance Hearing.
45. The Petitioner's Step 2 review was conducted by Mr. Jones who determined that the Petitioner had misinformed his supervisor about the reasons for his unscheduled absences from work and he was unable to offer any legitimate excuse other than he had been drinking.
46. Mr. Jones upheld the Petitioner's termination.
47. Mr. Jones testified that he did not advocate any adverse employment action against the Petitioner because of his handicap.
48. By letter dated September 18, 1992, Mr. Jones notified the Petitioner that he had found no basis for the Petitioner's claim of unjust discharge. The Petitioner was informed that he had 15 calendar days to file for a Step 3 Grievance Hearing.
49. The Petitioner requested a Step 3 hearing.
50. In a letter dated September 29, 1992, Mr. William A. Campbell, Chairman of the Staff Grievance Committee, informed the Petitioner that his Step 3 Grievance was being dismissed because the Petitioner had indicated his intention to abandon the grievance process by filing a complaint with the Equal Employment Opportunity Commission on August 20, 1992.
51. Performance reviews for the Petitioner contained in his personnel file show the following: Annual Performance Rating for period ending June 24, 1992--Very Good; Performance rating for period from July 1, 1991 through November 15, 1991--Very Good; Annual performance rating for period ending June 11, 1991--Exceeds Expectations; Annual Performance rating for period ending July 31, 1990--Meets Expectations; Annual Performance rating for period ending February, 1989--Meets expectations; Annual Performance rating for period ending November 7, 1989--Exceeds Expectations; Annual Performance rating for period ending February, 1988--Fully Adequate; Annual Performance rating for period ending February 28, 1981--Fully Adequate; and Annual Performance rating for period ending February, 1980--Fully Adequate.
52. Mr. William Browning worked at the Respondent's Physical Plant for approximately five years. Mr. Browning worked with the Petitioner during that time and rated him a good worker, especially in the area of mixing and matching paints.
53. Alcoholism is commonly associated with depression and the Petitioner suffers from depression.
54. Dr. Giduz expressed the opinion that it is common for an alcoholic to make statement of his intentions to do a future act but be unable to do so because of later drinking. It is also typical for an alcoholic to feel ashamed of his drinking problem.
55. When Dr. Giduz saw the Petitioner on July 22, 1992, the Petitioner did not appear to be intoxicated.
56. Ms. Mary Healy, a counselor in the Respondent's Human Resources Counselling Service, had some concerns about whether the Petitioner's actions in this case could be classified as job performance rather than misconduct as well as whether the Americans with Disabilities Act ("ADA") applied.
57. Mr. Maynard is familiar with the ADA and it is his understanding that a person who is a recovering alcoholic who has begun to abstain and is continuing to try to abstain from using alcohol is considered to be handicapped under the ADA.
58. Mr. Maynard did not explore the issue of the Petitioner's alcoholism with the Petitioner during his pre-dismissal conference.

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

CONCLUSIONS OF LAW

1. The Petitioner was a permanent State employee at the time of his dismissal.
2. North Carolina General Statutes section 126-35 provides, in pertinent part, that no permanent employee subject to the State Personnel Act shall be discharged, suspended or reduced in pay or position, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.
3. Where just cause is an issue, the Respondent bears the ultimate burden of persuasion.
4. A permanent state employee may be dismissed for inadequate performance of duties or for personal conduct that is detrimental to State service. Leiphart v. N.C. School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986). Prior to dismissal for cause related to job performance, a permanent state employee is entitled to three separate warnings that his/her performance is unsatisfactory. Jones v. Dept. of Human Resources, 300 N.C. 687, 268 S.E.2d 500 (1980). However, an employee discharged for personal misconduct is not entitled to prior progressive warnings because personal misconduct discipline is imposed for actions for which no reasonable person should expect to receive prior warning. Office of State Personnel, Personnel Manual, pp. 9-3, 9-8.3.
5. The Petitioner suffers from alcoholism.
6. The Petitioner was otherwise qualified for his employment with the Respondent.
7. Alcoholism is a disease, a disability and a handicap and, therefore, protected under the Rehabilitation Act of 1973, the American Disabilities Act of 1990, and North Carolina General Statutes. 29 U.S.C. §§701 et seq.; 42 U.S.C. §§12101 et seq.; N.C. Gen. Stat. §§126-36, 143-422.2, 168A-1 et seq. (1985).
8. To the extent that the provisions under North Carolina law provide less protection to handicapped individuals than does the American Disabilities Act of 1990, those provisions provide no defense to an employer who fails to meet the higher standard required by the ADA. 29 CFR pt 1630, app, 56 Fed Reg 35726, 35740 (July 26, 1991); HR Rep No. 485, pt 2, 101st Cong, 2d Sess 135 (1990); HR Rep No. 485, pt 3, 101st Cong, 2d Sess 31 (1990).
9. The Respondent denies that the Petitioner was dismissed because he is an alcoholic. Instead, the Respondent contends that the Petitioner was dismissed because he allegedly lied about his reason for wanting leave, that is, he said he needed time off to arrange care for his ailing mother rather than informing his supervisor that he was unable to report to work because he was drunk.
10. The Respondent contends that the Petitioner's allegedly lying about the reason he wanted leave is personal misconduct of the type that justifies termination from employment.
11. Generally speaking, personal conduct of the type that would subject one to dismissal is conduct that is so egregious that no reasonable person would expect to receive a warning about such conduct prior to being subjected to disciplinary action. Not being truthful about one's reason for wanting leave when one has adequate leave time available does not fall within the same category of conduct as falsifying time sheets by claiming to have worked when one has not done so, or even claiming sick leave when one is not ill or attending to someone else who is ill. It is not clear under the circumstances of this case that even if the Petitioner had intentionally lied about his reason for wanting leave, that his actions were so egregious that they would warrant dismissal without prior

warnings.

12. It is not clear whether the Petitioner actually intended to try to deal with his ailing mother's situation and could not carry out that intention because of his drinking, or lied about his reason for wanting leave because he was too embarrassed to admit that he was drinking. Either scenario was the result of conduct that is directly related to his alcoholism. Therefore, although the Respondent contends that it did not dismiss the Petitioner because of his alcoholism, dismissing him on the basis of conduct caused by his alcoholism is the same thing. Ham v. State of Nevada, 58 FEP Cases 837 (D.Nev. 1992).
13. The Respondent further contends that active alcoholism is not covered by either North Carolina's handicapped laws or the ADA. However, at the time the Petitioner was actually dismissed, there is no evidence that his alcoholism was active. He had recently undergone treatment. He was performing his job satisfactorily. He had not been absent since his return back to work. If the Respondent had dismissed the Petitioner on July 5, 1992, then he might not have been subject to the protections provided by the ADA. But his dismissal did not occur until almost a month later, at which time there is no evidence that his alcoholism was active.
14. Since the Respondent denies discharging the Petitioner because of his handicap, the analysis developed in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 712, 36 L.Ed.2d 668 (1978) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) is applicable. Respondent has the burden of articulating a legitimate reason for the termination and the Petitioner must prove that the articulated reason is merely a pretext for illegal discrimination.
15. The Petitioner has met his burden of proving pretext by showing that the Respondent's articulated reason, that is, Petitioner's allegedly lying, is in actuality another way of imposing disciplinary action for conduct that is caused by the Petitioner's handicap.
16. The Petitioner was not discharged for just cause.
17. The Petitioner was denied his right to a step-by-step review of his discharge in an arbitrary and capricious manner and without any basis in reason when the Respondent denied the Petitioner his Step 3 Grievance Hearing because the Petitioner filed a complaint with the Equal Employment Opportunity Commission.

RECOMMENDED DECISION

The State Personnel Commission will make the Final Decision in this contested case. It is recommended that the Commission adopt the Findings of Fact and Conclusions of Law set forth above and that:

1. The Petitioner be reinstated to a comparable job, paygrade and benefits, retroactive to date of discharge and that backpay be awarded to him for this period.
2. The Petitioner be awarded reasonable attorney's fees, to the extent such fees are consistent with the provisions of North Carolina General Statutes section 126-4(11) and 25 NCAC 1B .0414.

ORDER

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

NOTICE

Before the Commission makes the FINAL DECISION, it is required by North Carolina General Statutes section 150B-36(a) 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.

The agency is required by North Carolina General Statutes section 150B-36(b) to serve a copy of the Final Decision on all parties and to furnish a copy to the Parties' attorney of record.

This the 30th day of August, 1993.

Brenda B. Becton
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
93 DOJ 0844

CARL MICHAEL O'BYRNE)	
Petitioner,)	
)	
v.)	PROPOSAL FOR DECISION
)	
NORTH CAROLINA ALARM SYSTEMS)	
LICENSING BOARD)	
Respondent.)	

The above captioned case was heard before Administrative Law Judge Dolores Nesnow on August 24, 1993, in Raleigh, North Carolina.

APPEARANCES

For Petitioner:	Edmond W. Caldwell Jr. Hafer, McNamara, Caldwell, Carraway, Layton & McElroy, P.A. Post Office Box 30518 Raleigh, North Carolina 27622
For Respondent:	Charles F. McDarris Attorney at Law Post Office Drawer 2916 Raleigh, North Carolina 27602

ISSUE

Did Respondent, North Carolina Alarm Systems Licensing Board (hereinafter "Board") properly deny Petitioner's application for an alarm systems business license?

FINDINGS OF FACT

1. The North Carolina Alarm Systems Licensing Board is established pursuant to G.S. 74D to administer the licensing for persons engaged in the alarm systems business.
2. The North Carolina Alarm Systems Licensing Board is governed by Article 3A of Chapter 150B of the General Statutes. As a matter of policy, the Alarm Systems Licensing Board has elected not to hear contested cases. Accordingly, pursuant to G.S. 150B-40(e), the Board applied to the Chief Administrative Law Judge for the designation of an administrative law judge to preside at the hearing of this contested case. The undersigned was designated.
3. Petitioner has been "registered" with the Alarm Systems Licensing Board and has over six years experience as an employee of alarm companies.
4. On April 2, 1993, Petitioner delivered a properly completed application for an alarm systems license to the offices of the Board in Raleigh.

5. Petitioner had obtained his electrical contractor's low-voltage license as required and was not aware of any deficiencies in his application, or his qualifications for licensure by the Board.

6. Petitioner was advised, by the salesperson for the local telephone directory Yellow Pages advertisement, that the deadline for Petitioner to submit information for an ad to appear in the upcoming issue of the telephone directory was April 21, 1993. Petitioner was advised by the telephone book salesperson that the telephone books would be distributed between July 1 and July 15 of 1993. On the last day that Petitioner could submit an advertisement to the Yellow Pages (April 21, 1993), Petitioner did submit an ad to the Yellow Pages.

7. Petitioner had selected the name of Topline Security Systems, Inc. as the name for his proposed business. He was required to select a name for his proposed business when he received his low-voltage license from the Electrical Contractors Board because that Board required their license to be issued in the name of a company rather than in the name of an individual. Petitioner needed this license to qualify for the alarm license.

8. At the time Petitioner submitted his information to the Yellow Pages directory, he was required to provide the address and telephone number that he wanted to have included in the advertisement for his proposed business.

9. A distant relative of Petitioner knew that he was considering opening a new business, and informed Petitioner of available office space adjacent to the relative's beauty shop in a small shopping center. Petitioner rented that office space for his proposed new business; however, the office space was rented in Petitioner's individual name and not in the name of any business.

10. After Petitioner obtained a telephone number for use in the Yellow Pages advertisement, the telephone was activated by the telephone company and Petitioner installed an answering machine on that telephone line. On or about the middle of April, and before Petitioner met with Board Investigator Janice Moser, Petitioner and Investigator Moser were exchanging telephone calls attempting to set up a mutually convenient time for a meeting. During one of these telephone calls, Investigator Moser advised Petitioner that he should remove the message from his answering machine that referred to "Topline Security Systems, Inc." Immediately upon being advised to do so by Ms. Moser, Petitioner removed the message from the answering machine and replaced it with a message that made no reference whatsoever to any alarm business. Since that time, Petitioner has had the telephone line disconnected. During the time that the telephone was connected, Petitioner did not receive any calls from potential customers of an alarm systems business.

11. Petitioner bought some limited alarm equipment for the sole purpose of installing an alarm upon his own premises as allowed by law. Petitioner purchased no alarm equipment for the purpose of resale or installation of alarm systems governed by G.S. Chapter 74D.

12. During his interview with Board Investigator Janice Moser on April 23rd, and at all times since, Petitioner has been open, straightforward and honest and has willingly provided all information requested.

13. Petitioner has:

- (a) Done no advertising other than the ad in the Yellow Pages;
- (b) Sold no alarm equipment or systems;
- (c) Installed no alarm systems;
- (d) Not employed any personnel to work for his proposed business; and
- (e) Not solicited any potential customers for his proposed new business.

14. On May 15, 1993, Petitioner's application for an alarm systems business license was considered by the Board at its meeting in Nags Head, North Carolina. Petitioner attended the meeting in Nags Head which was approximately a seven hour drive from his residence, one-way. At the Board meeting on May 15th, Petitioner was advised that the "Screening Committee" had met the day before and decided to defer his application until their next meeting in July. When Petitioner asked for the reason for the action of the Board, he was advised that the reason was confidential but that the application was delayed for "further investigation."

15. On July 15, 1993, the Board met in Wrightsville Beach, North Carolina. Petitioner and his wife attended this meeting which was an approximately five hour drive, one-way, from his residence. At this meeting, the Board denied Petitioner's application for an alarm systems business license.

16. It is clear that the Petitioner understands the importance of the Alarm Systems Licensing Act and that the Petitioner will continue to comply with the Act in all respects in the future.

17. Petitioner did not intend in any way whatsoever to violate G.S. Chapter 74D by any of his actions.

18. Petitioner had no intent whatsoever to operate an alarm systems business prior to the issuance to him of a license.

19. During times prior to Petitioner's application being submitted to the Board, Petitioner was a former employee of two current Board members, both of whom attended the May 15th and July 15th meetings of the Board.

20. One of the board members was a member of and attended the Screening Committee meetings on May 14 and July 14 where Petitioner's application was considered.

21. Both board members attended the Board's review of Petitioner's application in closed executive session.

22. Both board members were present and one board member participated in the Board's review of Petitioner's application in an open Board meeting.

23. Immediately prior to the final public vote on Petitioner's application, it was announced that those two board members would not be voting on Petitioner's application.

24. The Board consists of seven members, five of whom were present at the July 15th meeting.

25. At the July 15, 1993 Board meeting at the time of the final Board vote on Petitioner's application, of the five board members who were initially present, two had excused themselves from voting, one had departed the meeting and the remaining two voted to deny Petitioner's application.

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

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings.

2. Pursuant to General Statute Section 74D-6, the Board may, after compliance with Chapter 150B of the General Statutes, deny, suspend or revoke a license, registration or permit issued under this Chapter if it is determined that the applicant, licensee, registrant or permit holder has violated any provision of this Chapter.

3. G.S. Chapter 74D provides that no person, firm, association or corporation shall engage in

or hold itself out as engaging in an alarm systems business without first being licensed in accordance with the Act.

4. The Petitioner met the experience and other requirements contained in G.S. Chapter 74D to be issued an alarm systems business license.

5. The actions and activities of the Petitioner, as contained in the Findings of Fact above, were activities in preparation for starting up a business while the Petitioner was applying for an alarm systems business license.

6. The activities of Petitioner, as contained in the Findings of Fact above, do not constitute "engaging in or holding itself out as engaging in" an alarm systems business.

7. The Board has not presented sufficient evidence to support the denial of Petitioner's application on the grounds that Petitioner was holding himself out as engaging in an alarm systems business without a license as required by G.S. 74D-2.

Based upon the foregoing Conclusions of Law, the undersigned makes the following:

PROPOSAL FOR DECISION

1. The North Carolina Alarm Systems Licensing Board will make the final decision in this contested case.

2. It is proposed that the Board approve Petitioner's application and issue an alarm systems business license to Petitioner.

ORDER

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

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. G.S. 150B-40(e). At the Administrative Hearing in this matter on August 24, 1993, attorneys for the Petitioner and the Respondent agreed to waive the opportunity to file exceptions and proposed findings of fact and to waive any notice required prior to the hearing of this matter by the Alarm Systems Licensing Board on September 9, 1993 at its regularly scheduled meeting. Neither Petitioner nor Respondent waived their right to present written or oral argument.

A copy of the final agency decision shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to the party's attorney of record. G.S. 150B-42(a).

The agency that will make the final decision in this contested case is the North Carolina Alarm Systems Licensing Board.

This the 8th day of September, 1993.

Dolores O. Nesnow
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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6	Council of State	Chiropractic Examiners	10
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8	Elections	Cosmetic Art Examiners	14
9	Governor	Dental Examiners	16
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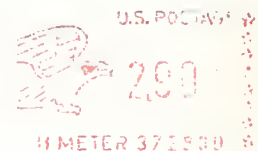
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