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The **NORTH CAROLINA REGISTER**

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Environment, Health, and Natural Resources
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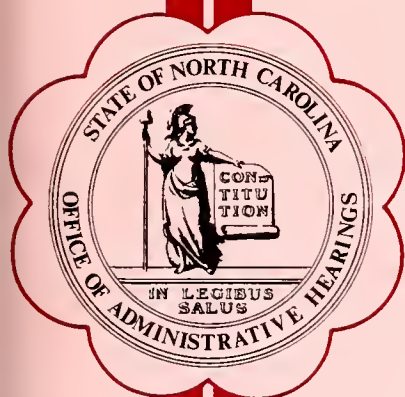
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ISSUE DATE: October 15, 1993

Volume 8 • Issue 14 • Pages 1308 - 1367



INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

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

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

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

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

ADOPTION AMENDMENT, AND REPEAL OF RULES

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

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

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

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

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

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

TEMPORARY RULES

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

NORTH CAROLINA ADMINISTRATIVE CODE

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

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

The NCAC is available in two formats.

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

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

CITATION TO THE NORTH CAROLINA REGISTER

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

FOR INFORMATION CONTACT: Office of
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Drawer 27447, Raleigh, North Carolina 27611-7447, (919)
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NORTH CAROLINA REGISTER



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NORTH CAROLINA REGISTER

Publication Schedule

(July 1993 - May 1994)

Volume and Issue Number	Issue Date	Last Day for Filing	Last Day for Elec- tronic Filing	Earliest Date for Public Hearing <i>15 days from notice</i>	* End of Required Comment Period <i>30 days from notice</i>	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
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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 business day of the next calendar month.

Revised 07/93

**EXECUTIVE ORDER NUMBER 28
AGRICULTURE, FORESTRY, AND
SEAFOOD INDUSTRY ADVISORY
COMMITTEE**

WHEREAS, the harvest of North Carolina's fields, forests and waters is a principal element in the economy of our State; and

WHEREAS, State policy on agriculture, forestry, and the seafood industry as set by the Governor should be developed with the advice of representatives from those industries.

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

Section 1. COMMITTEE AND MEMBERSHIP

(a) There is hereby established the Advisory Committee on Agriculture, Forestry, and the Seafood Industry ("Committee").

(b) The Committee shall consist of at least 15 members who shall be appointed by the Governor. The Governor shall appoint a Chair and Vice-Chair of the Committee.

(c) Initially, one half of the members shall serve for two-year terms, and one half shall serve one-year terms. Thereafter, each member shall serve a two-year term.

(d) Meetings may be called by the Governor or the Chair, and shall be held at least quarterly.

Section 2. DUTIES

The Committee shall have the following functions and duties:

- (a) to advise the Governor concerning his policies related to the harvest of fields, forests, and waters;
- (b) to afford citizens the opportunity to voice their views, suggestions, and ideas regarding these matters;
- (c) to advise the Governor about matters revealed by its inquiries and presented to it by the citizens of North Carolina; which relate to fields, forests, and waters; and
- (d) to undertake such other functions and duties as may be assigned by the Governor.

Section 3. ADMINISTRATION

(a) The Governor's Office shall provide such clerical and other support services as may be required by the Committee.

(b) Members of the Committee shall serve on a voluntary basis without compensation of any sort, including travel or subsistence allowable under state law.

This Executive Order shall be effective immediately.

Done in Raleigh, North Carolina, this the 28th day of September, 1993.

**EXECUTIVE ORDER NUMBER 29
TEACHER ADVISORY COMMITTEE**

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

Section 1. Establishment.

There is hereby established A Teacher Advisory Committee ("Committee"). The Committee shall be composed of fifteen members appointed by the Governor. The appointed members shall serve two year terms. The Governor shall also appoint the Chair.

Section 2. Meetings.

(a) The Committee shall meet at least once each quarter and may hold special meetings at any time at the call of the Chair or the Governor.

(b) The Committee must meet as a quorum. A quorum, for the purposes of this Order, is defined as a simple majority.

Section 3. Expenses and Administration.

(a) Committee members shall receive necessary travel and subsistence expenses, in accordance with North Carolina law. If they are not otherwise reimbursed for their out-of-pocket expenditure of \$52.00/day substitute teacher pay, members may request that amount as well.

(b) The Office of the Governor shall provide staff and administrative support services for the Committee.

Section 4. Duties

(a) Advise the Governor concerning the experiences and reactions of teachers in the classrooms of North Carolina and assist the Governor in his efforts to improve teaching conditions.

(b) Recommend ways to end intellectual isolation among teachers and to increase meaningful school-based decision making.

(c) Examine factors that encourage excellent students to seek a career in teaching and highly

professional teachers to remain in the classroom. Recommend ways to replicate those factors.

(d) Identify, recognize, and celebrate entrepreneurial schools and school systems in North Carolina, i.e. those that take risks to improve educational outcomes for children.

(e) Propose methods of rewarding teachers achieving certification from the National Board for Professional Teaching Standards.

(f) Serve as an advisory committee to the North Carolina Standards and Accountability Commission.

This Order shall be effective immediately.

Done in Raleigh, North Carolina, this the 28th day of September, 1993.

EXECUTIVE ORDER NUMBER 30 HIGHWAY BEAUTIFICATION COUNCIL

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

Section 1. Establishment.

There is hereby established the Highway Beautification Council ("Council").

Section 2. Membership.

The Council shall consist of 20 members to be appointed by the Governor. Ten members shall serve two-year initial terms and ten members shall serve four-year initial terms. Thereafter, all appointments shall be for four-year terms. Each one of the transportation divisions shall be represented by one member. Six members shall represent the State at-large.

Section 3. Chair.

The Chair shall be chosen from among the membership of the Council by the Governor and shall serve as such at the pleasure of the Governor. The Chair shall coordinate the activities of the Council.

Section 4. Purpose.

The purpose of the Council is to:

- (1) provide for citizens' input to the Department of Transportation on new and existing highway beautification programs;
- (2) make recommendations to the Department of Transportation regarding expenditures for the planting of wildflowers and/or other flora along State highways;

- (3) promote citizens' participation in the department's volunteer beautification programs;
- (4) provide information to the citizens of North Carolina concerning highway beautification issues;
- (5) promote anti-litter activities of the Department of Transportation; and
- (6) recommend measures to reduce solid waste by 25% in 1993 and by 40% by the year 2001.

Section 5. Administrative Support and Expenses.

Administrative and other support services for the Council shall be provided by the Department of Transportation. Council members shall receive reasonable travel and subsistence expenses in accordance with state law. Expenses shall be paid out of the Department of Transportation's budget.

Section 6. Rescission.

Martin Administration Executive Order 126, as amended, is hereby rescinded. The Council created herein shall be the successor to that Highway Beautification Council.

This Order shall be effective immediately.

Done in Raleigh, North Carolina, this the 28th day of September, 1993.

**TITLE 4 - DEPARTMENT OF
COMMERCE**

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina ABC Commission intends to amend rule cited as 4 NCAC 2S .0612; and adopt rules cited as 4 NCAC 2S .0613 - .0616.

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

The public hearing will be conducted at 9:30 a.m. on November 19, 1993 at the Hearing Room, North Carolina ABC Commission, 3322 Garner Road, Raleigh, NC 27610.

Reason for Proposed Action: The proposed rules are necessary due to recent changes made by the General Assembly to the alcoholic beverage control laws.

Comment Procedures: Comments should be filed by November 18, 1993 and addressed to:

*Ann S. Fulton, Commission Counsel
North Carolina ABC Commission
P.O. Box 26687
Raleigh, NC 27611*

Editor's Note: These Rules were filed as temporary rules effective September 24, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

**CHAPTER 2 - BOARD OF ALCOHOLIC
CONTROL**

**SUBCHAPTER 2S - RETAIL BEER: WINE:
MIXED BEVERAGES: BROWNBAGGING:
ADVERTISING: SPECIAL PERMITS**

**SECTION .0600 - SPECIAL
REQUIREMENTS FOR CONVENTION
CENTERS, COMMUNITY THEATRES,
SPORTS CLUBS, AND NONPROFIT AND
POLITICAL ORGANIZATIONS**

.0612 RECORD KEEPING

(a) Convention centers, community theatres, ~~sports clubs~~, nonprofit and political organizations holding Mixed Beverages permits shall maintain

full and accurate monthly records of their finances, separately indicating each of the following:

- (1) amounts expended for the purchase of spirituous liquor from ABC stores and the quantity of spirituous liquor purchased;
- (2) amounts collected from the sale of mixed beverages and, by brand and container size, the quantity of spirituous liquor sold;
- (3) the quantity of spirituous liquor, by brand and container size, that was not sold but is no longer on the premises due to stated reasons, such as breakage or theft.

(b) Segregation of Records. Records of purchases of spirituous liquor and sales of alcoholic beverages shall be filed separate and apart from all other records maintained on the premises.

(c) Retention and Inspection of Records. Records, including original invoices related to alcoholic beverages and mixed beverages, shall be maintained on the premises for three years and shall be open for inspection or audit pursuant to G.S. 18B-502.

(d) Submission of Financial Records. A permittee holding a Mixed Beverages permit under this Rule shall submit to the Commission for its review, on forms provided by the Commission, regular reports summarizing the information required to be maintained by the rule. These reports shall be submitted on a quarterly basis during the first year of operation as a licensed premises, and thereafter, on an annual basis or on a schedule set by the Commission.

Statutory Authority G.S. 18B-207; 18B-1007.

.0613 SPORTS CLUB: DEFINITIONS

In interpreting the term sports club as contained in G.S. 18B-1000(8), the following definitions shall apply:

- (1) "Equipment" means golf clubs, tennis rackets, golf and tennis balls, golf and tennis shoes, golf and tennis gloves, golf tees, golf and tennis clothing, and other items worn or utilized by the golfer or tennis player while engaged in the activities of golf or tennis.
- (2) "Golf course" means an 18 hole course designed and maintained for the play of the game of golf with a total tee to green length of at least 4,000 yards.
- (3) "Gross receipts for alcoholic beverages" means all sales of beer, wine and spiritu-

ous liquor including any mixers sold in mixed beverages.

- (4) "Receipts for food" means that portion of the establishment's sales which can be attributed to the sale of food and non-alcoholic beverages, which portion is to be determined in accordance with the provisions of 4 NCAC 2S .0519(b) and (c).
- (5) "Restaurant" means restaurant as defined in G.S. 18B-1000(6) and 4 NCAC 2S .0105.
- (6) "Tennis court" means a 60 foot by 120 foot surface composed of asphalt, concrete, composite, grass or other similar material which is constructed and maintained so as to permit the play of tennis on a regular basis and which is completely enclosed by a chain link, particle board or other comparable fence.

Statutory Authority G.S. 18B-207; 18B-1000(5a); 18B-1008.

.0614 SPORTS CLUB: REQUIREMENTS FOR RECEIVING AND HOLDING PERMITS

To be eligible to receive and to hold ABC permits as a sports club, in addition to the requirements imposed by G.S. 18B-1000(8), an establishment shall:

- (1) operate a golf course or a tennis court or both on its premises, and
- (2) derive at least 15% of its club activity fees on an annual basis from sources other than receipts for food.

Statutory Authority G.S. 18B-207; 18B-1000(5a); 18B-1008.

.0615 SPORTS CLUB: CLUB ACTIVITY FEES

Club activity fees may only include revenues from the following:

- (1) membership dues;
- (2) court or greens fees paid by patrons for the privilege of using the golf course or the tennis court located on the sports club's premises;
- (3) receipts for food if the establishment operates a restaurant on its licensed premises;
- (4) equipment sales on the sports club's licensed premises;
- (5) golf cart rental fees;

- (6) teaching fees paid to golf or tennis professionals for lessons given on the sports club's premises;
- (7) equipment rental fees, if the equipment is rented for use on the sports club's golf course or tennis court;
- (8) entry fees for golf or tennis tournaments held on the sports club's premises;
- (9) revenue generated by the sale of tickets to golf or tennis tournaments held on the sports club's premises.

Statutory Authority G.S. 18B-207; 18B-1000(5a); 18B-1008.

.0616 SPORTS CLUB: RECORD KEEPING REQUIREMENTS

(a) Monthly Records. A sports club holding ABC permits issued by the Commission shall maintain full and accurate monthly records of the following:

- (1) amounts expended for the purchase of spirituous liquor from ABC stores and the quantity of spirituous liquor purchased;
- (2) amounts collected from the sale of mixed beverages and, by brand and container size, the quantity of spirituous liquor sold;
- (3) the quantity of spirituous liquor, by brand and container size, that was not sold but is no longer on the premises due to stated reasons, such as breakage or theft;
- (4) amounts collected from the sale of malt beverages, fortified wine, and unfortified wine;
- (5) amounts collected from club activity fees, excluding receipts for food;
- (6) receipts for food.

(b) The records required to be kept by this Rule shall be kept separate and apart from all other records maintained on the premises.

(c) Records, including original invoices related to alcoholic beverages and mixed beverages, shall be maintained on the premises for three years and shall be open to inspection or audit pursuant to G.S. 18B-502.

(d) A sports club holding ABC permits shall submit to the Commission for its review, on forms provided by the Commission, regular reports summarizing the information required by this Rule. These reports shall be submitted on a quarterly basis during the first year of operation with sports club ABC permits, and thereafter, on

an annual basis or on a schedule set by the Commission.

Statutory Authority G.S. 18B-207; 18B-1000(5a); 18B-1008.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Banking Commission intends to adopt rule cited as 4 NCAC 3F .0202.

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

The public hearing will be conducted at 8:30 a.m. on November 1, 1993 at the North Carolina Banking Commission, 430 N. Salisbury Street, Dobbs Bldg., Room 6227, 6th Floor, Raleigh, North Carolina 27626.

Reason for Proposed Action: To implement the provisions of Article 16, Chapter 53 of the North Carolina General Statutes.

Comment Procedures: Comments may be made orally or in writing and must be submitted no later than November 15, 1993. Please direct comments to T. Mercedes Oglukian, Special Counsel, 430 N. Salisbury Street, Dobbs Bldg., Box 29512, Raleigh, NC 27626-0512, Tel. (919) 733-3016, Fax (919) 733-6919.

CHAPTER 3 - BANKING COMMISSION

SUBCHAPTER 3F - LICENSEES UNDER MONEY TRANSMITTERS ACT

SECTION .0200 - ADMINISTRATIVE

.0202 PERMISSIBLE INVESTMENTS

For the purposes of G.S. 53-193(4)(e), investments that are approved by the Commissioner shall include the following:

- (1) Certificates of deposit or other debt instruments of financial depository institutions organized under the laws of the United States or any state of the United States.
- (2) Bills of exchange or time drafts drawn upon and accepted by a financial depository

institution organized under the laws of the United States or any state of the United States, otherwise known as bankers' acceptances, which are eligible for purchase by member banks of the Federal Reserve System.

- (3) Commercial Paper bearing a rating of one of the three highest grades by a nationally recognized organization which rates such securities and has been engaged regularly in the business of rating such securities for a period of not less than five years.
- (4) Interest-bearing bills, notes, bonds, debentures, or preferred stock traded on any national securities exchange or on a national over-the-counter market bearing a rating of one of the three highest grades by a nationally recognized investment service organization that has been engaged regularly in the business of rating corporate debt and equity issues for a period of not less than five years.

Statutory Authority G.S. 53-193; 53-206.1.

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Division of Facility Services (Medical Care Commission) intends to adopt rules cited as 10 NCAC 3C .2101 - .2105; amend 3C .0201 and 3D .1301 - .1302.

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

The public hearing will be conducted at 9:30 a.m. on December 3, 1993 at the Nations Bank Markets, Inc., 100 North Tryon Street, 6th Floor Assembly Room, Charlotte, NC 28255-0001.

Reason for Proposed Action:

10 NCAC 3C .0201, .2101 - .2105 - To incorporate recent legislative changes in hospital licensure rules that enable rural hospitals to participate in new federal programs.

10 NCAC 3D .1301 - .1302 - To make the length of certification for Ambulance Attendants and Emergency Medical Technicians consistent with the certification period in HB 508 which was ratified

effective June 8, 1993.

Comment Procedures: In order to allow Commission members sufficient time to review and evaluate your written comments, submit your comments to Jackie Sheppard, APA Coordinator, DFS, P.O. Box 29530, Raleigh, NC 27626-0530, telephone (919) 733-2342 by November 15, 1993 but in no case, later than December 3, 1993.

CHAPTER 3 - FACILITY SERVICES

SUBCHAPTER 3C - LICENSING OF HOSPITALS

SECTION .0200 - GENERAL

.0201 CLASSIFICATION OF MEDICAL FACILITIES

(a) The classification of "hospital" shall be restricted to facilities that provide as their primary functions diagnostic services and intensive medical and nursing care in the treatment of acute stages of illness. On the basis of specialized facilities and services available, each such hospital will be licensed as to the following medical types:

- (1) general acute care hospital;
- (2) ~~tuberculosis;~~
- (2) (3) rehabilitation including orthopedies; hospital;
- (4) ~~pediatric;~~
- (5) ~~eye, ear, nose and throat;~~
- (6) ~~physician's clinic hospital;~~
- (3) designated primary care hospital;
- (4) federally certified primary care hospital.

~~Extenuating circumstances will be considered in continuing the license classification of a facility licensed as a hospital prior to September 1, 1960.~~

(b) All other inpatient medical facilities accepting patients requiring skilled nursing services but which are not operated as a part of any hospital within the above meaning shall be considered to operating as a nursing home and therefore are not subject to hospital licensure.

(c) Each hospital applying for licensure will be classified in accordance with the determination of the Division of Facility Services.

Statutory Authority G.S. 131E-76; 131E-79.

SECTION .2100 - SUPPLEMENTAL RULES FOR THE LICENSURE OF DESIGNATED PRIMARY CARE

HOSPITALS AND FEDERALLY CERTIFIED PRIMARY CARE HOSPITALS

.2101 SUPPLEMENTAL RULES

The Rules of this Section pertain only to formally designated Primary Care Hospitals or Federally Certified Primary Care Hospitals. The general requirements of this Subchapter shall apply to such hospitals except where they are specifically waived or modified by the rules of this Section.

Statutory Authority G.S. 131E-76; 131E-79.

.2102 DEFINITIONS

The following definitions shall apply throughout this Section, unless text otherwise clearly indicates to the contrary:

- (1) "Available" means provided directly by the Hospital or by written agreement with a qualified provider of the service within one hour.
- (2) "Designated Primary Care Hospital" means a hospital designated by the North Carolina Office of Rural Health and Resource Development in accordance with N.C.G.S. 131E-76(6).
- (3) "Federally Certified Primary Care Hospital" means a hospital which has been designated and certified as a Federally Certified Rural Primary Care Hospital under the Essential Access Community Hospital Program administered through the North Carolina Office of Rural Health and Resource Development in accordance with P.L. 101-239 and P.L. 101-508.
- (4) "Primary Care Inpatient Services" means that the hospital provides acute care inpatient services appropriate to the level of service at the facility up to a maximum annual average daily census of 15 patients per day. In addition, the hospital may also provide long term care in "swing bed" or distinct part status and psychiatric distinct part beds.

Statutory Authority G.S. 131E-76; 131E-79.

.2103 LICENSURE APPLICATION

An application from a hospital seeking to be licensed under the rules of this Section must be accompanied by written certification from the North Carolina Office of Rural Health and Resource Development that the hospital is a Designated Primary Care Hospital or a Federally Certified

Primary Care Hospital.

Statutory Authority G.S. 131E-76; 131E-79.

.2104 FEDERALLY CERTIFIED PRIMARY CARE HOSPITAL

(a) The requirements of 10 NCAC 3C .0300 through .2100 shall be waived for a hospital which the North Carolina Office of Rural Health and Resource Development certifies as a designated Federally Certified primary Care Hospital.

(b) The Division reserves the right to conduct any validation survey or investigation of a specific complaint in hospitals which choose to be licensed as a Federally Certified Primary Care Hospital.

Statutory Authority G.S. 131E-76; 131E-79.

.2105 DESIGNATED PRIMARY CARE HOSPITALS

The requirements of 10 NCAC 3C shall apply to Designated Primary Care Hospitals with the following modifications:

- (1) Autopsy facilities required in Rule .0704 of this Subchapter are not required for a Designated Primary Care Hospital, provided that the hospital has in effect a written agreement with another licensed hospital meeting Rule .0704 of this Subchapter for providing autopsy services.
- (2) Radiological services required in Section .0800 of this Subchapter are not required for Designated Primary Care Hospitals provided that the hospital has in effect a written agreement which makes radiological service available.
- (3) Emergency services required in Section .1000 of this Subchapter are not required for Designated Primary Care Hospitals. Medical staff of a Designated Primary Care Hospital shall assure that hospital personnel are capable of initiating life-saving measures at a first-aid level of response for any patient or person in need of such services. This shall include:
 - (a) Establishing protocols or agreements with any hospital providing emergency services;
 - (b) Initiating basic cardio-respiratory resuscitation according to the American Red Cross or American Heart Association standards;
 - (c) Availability of inter-veinous fluids and supplies required to establish inter-

- (d) veinous access; and
- (d) Availability of first-line emergency drugs as specified by the medical staff.
- (4) Anesthesia services required in Section .1200 of this Subchapter are not required in Designated Primary Care Hospitals not offering outpatient surgery services.
- (5) Food services required in Section .1600 of this Subchapter must be provided for inpatients of Designated Primary Care Hospitals either directly or made available through contractual arrangements.

Statutory Authority G.S. 131E-76; 131E-79.

SUBCHAPTER 3D - RULES AND REGULATIONS GOVERNING AMBULANCE SERVICE

SECTION .1300 - CERTIFICATION REQUIREMENTS FOR BASIC LIFE SUPPORT PERSONNEL

.1301 CERTIFICATION REQUIREMENTS: AMBULANCE ATTENDANT

(a) To become certified as an Ambulance Attendant, a person must successfully complete either of the following options:

OPTION I

- (1) Be at least 18 years of age;
- (2) Pass a physical examination performed by a physician documenting the ability to function as an Ambulance Attendant;
- (3) Successfully complete, within one year prior to application, an Ambulance Attendant training course approved by the Office of Emergency Medical Services, following guidelines established by the Commission. When training was completed over one year prior to application, a person must submit evidence of completion of pertinent refresher training in emergency medicine taken in the past year for approval by the Office of Emergency Medical Services;
- (4) Pass a basic life support practical examination administered by the Office of Emergency Medical Services; and
- (5) Pass either an Ambulance Attendant written examination, or an oral examination at the option of the applicant, administered by the Office of Emergency Medical Services; or

OPTION II

- (1) Be at least 18 years of age;
- (2) Pass a physical examination performed by a physician documenting the ability to function as an Ambulance Attendant;
- (3) Successfully complete, within one year prior to application, an Emergency Medical Technician training course approved by the Office of Emergency Medical Services, following guidelines established by the Commission. When training was completed over one year prior to application, a person must submit evidence of completion of pertinent refresher training in emergency medicine taken in the past year for approval by the Office of Emergency Medical Services;
- (4) Pass a basic life support practical examination administered by the Office of Emergency Medical Services; and
- (5) Complete an Emergency Medical Technician written examination administered by the Office of Emergency Medical Services and achieve a minimum score of 55%.

(b) Persons holding current certification equivalent to an Ambulance Attendant with another state where the training and certification requirements have been approved for reciprocity by the Office of Emergency Medical Services may become certified by:

- (1) Presenting evidence of such certification for verification by the Office of Emergency Medical Services; and
- (2) Meeting the criteria specified in Subparagraphs (a)(1) and (a)(2), of this Rule.

(c) Certification obtained through reciprocity shall be valid for a period not to exceed the length of the current certification or a period not to exceed ~~two~~ four years whichever is shorter. No certification shall be valid for a period exceeding ~~two~~ four years. Persons who live in a state that borders North Carolina and are currently affiliated with an ambulance provider in North Carolina may continue to obtain a North Carolina certification through reciprocity if they continue to meet the recertification requirements in the state in which they reside. Persons who live in North Carolina and are currently certified in another state that borders North Carolina may continue to obtain a North Carolina certification through reciprocity if they continue to meet the recertification requirements in the state in which they are certified.

Persons who were previously certified in North Carolina and are currently certified in another state or with the National Registry of Emergency Medical Technicians, must present evidence of pertinent refresher training and skill evaluation prior to becoming certified through reciprocity.

(d) To become recertified as an Ambulance Attendant a person must successfully complete either of the following options:

OPTION I

- (1) A physical examination performed by a physician documenting the ability to function as an Ambulance Attendant;
- (2) An Ambulance Attendant refresher training program, approved by the Office of Emergency Medical Services, following guidelines established by the Commission;
- (3) A basic life support practical examination administered by the Office of Emergency Medical Services; or

OPTION II

- (1) A physical examination performed by a physician documenting the ability to function as an Ambulance Attendant;
- (2) A continuing education program taught or coordinated by an approved EMT Instructor, following guidelines established by the Commission; and
- (3) A basic life support skill evaluation(s) conducted under the direction of the approved EMT Instructor assessing the ability to perform the skills of an Ambulance Attendant, approved by the Office of Emergency Medical Services, following guidelines established by the Commission.

Statutory Authority G.S. 131E-159(b); 1984 S.L., c. 1034.

**.1302 CERTIFICATION REQUIREMENTS:
EMERGENCY MEDICAL
TECHNICIAN**

(a) To become certified as an Emergency Medical Technician, a person shall meet the following criteria:

- (1) Be at least 18 years of age;
- (2) Pass a physical examination performed by a physician documenting the ability to function as an Emergency Medical Technician;
- (3) Successfully complete, within one year prior to application, an Emergency Medical Technician training course

approved by the Office of Emergency Medical Services, following guidelines established by the Commission. When training was completed over one year prior to application, a person must submit evidence of completion of pertinent refresher training in emergency medicine taken in the past year for approval by the Office of Emergency Medical Services;

- (4) Pass a basic life support practical examination administered by the Office of Emergency Medical Services; and
- (5) Pass an Emergency Medical Technician written examination administered by the Office of Emergency Medical Services.

(b) Persons holding current certification equivalent to an Emergency Medical Technician with the National Registry of Emergency Medical Technicians or in another state where the training and certification requirements have been approved for reciprocity by the Office of Emergency Medical Services may become certified by:

- (1) Presenting evidence of such certification for verification by the Office of Emergency Medical Services; and,
- (2) Meeting the criteria specified in Subparagraphs (a)(1) and (a)(2) of this Rule.

(c) Certification obtained through reciprocity shall be valid for a period not to exceed the length of the current certification or a period not to exceed ~~two~~ four years whichever is shorter. No certification shall be valid for a period exceeding ~~two~~ four years. Persons who live in a state that borders North Carolina and are currently affiliated with an ambulance provider in North Carolina may continue to obtain a North Carolina certification through reciprocity if they continue to meet the recertification requirements in the state in which they reside. Persons who live in North Carolina and are currently certified in another state that borders North Carolina may continue to obtain a North Carolina certification through reciprocity if they continue to meet the recertification requirements in the state in which they are certified. Persons who were previously certified in North Carolina and are currently certified in another state or with the National Registry of Emergency Medical Technicians, must present evidence of pertinent refresher training and skill evaluation prior to becoming certified through reciprocity.

- (d) To become recertified as an Emergency

Medical Technician a person must successfully complete either of the following options:

OPTION I

- (1) A physical examination performed by a physician documenting the ability to function as an Emergency Medical Technician;
- (2) An Emergency Medical Technician refresher training program approved by the Office of Emergency Medical Services, following guidelines established by the Commission;
- (3) A basic life support practical examination administered by the Office of Emergency Medical Services; or

OPTION II

- (1) A physical examination performed by a physician documenting the ability to function as an Emergency Medical Technician;
- (2) A continuing education program taught or coordinated by an approved EMT Instructor, following guidelines established by the Commission; and
- (3) A basic life support skill evaluation(s) conducted under the direction of the approved EMT Instructor assessing the ability to perform the skills of an Emergency Medical Technician, approved by the Office of Emergency Medical Services, following guidelines established by the Commission.

Statutory Authority G.S. 131E-159(b); 1984 S.L., c. 1034.

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Division of Medical Assistance intends to adopt rule cited as 10 NCAC 26H .0509. The existing Rule 10 NCAC 26H .0509 will be recodified as 10 NCAC 26H .0510.

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

The public hearing will be conducted at 1:30 p.m. on November 16, 1993 at the North Carolina Division of Medical Assistance, 1985 Umstead Drive, Room 132, Raleigh, NC 27626.

Reason for Proposed Action: Rule necessary to establish reimbursement for Private Duty Nursing and Private Duty Nursing - Medical Supplies.

Comment Procedures: Written comments concerning this adoption must be submitted by November 16, 1993, to: Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27626 ATTN: Clarence Ervin, APA Coordinator. Oral comments may be presented at the hearing. In addition, a fiscal impact statement is available upon written request from the same address.

CHAPTER 26 - MEDICAL ASSISTANCE

SUBCHAPTER 26H - REIMBURSEMENT PLANS

SECTION .0500 - REIMBURSEMENT FOR SERVICES

.0509 PRIVATE DUTY NURSING

(a) Private duty nursing services are reimbursed at the lower of billed customary charges or an established hourly rate. The rate is derived from the average billed charges per hour in the base year and, beginning July 1, 1990, is adjusted annually by the percentage change in the rate for a skilled nursing visit by a home health agency.

(b) Effective October 1, 1993, payment for Private Duty Nursing Medical Supplies, except those related to provision and use of DME, shall be reimbursed at the lower of a provider's billed customary charges or the maximum fee established for certified home health agencies. The maximum amount for each item is determined by multiplying the prevailing Medicare Part B allowable amount by 145 percent to account for the allocation of overhead costs and by 80 percent to encourage maximum efficiency. Fees will be established based on average, reasonable charges if a Medicare allowable amount cannot be obtained for a particular supply item. The Medicare allowable amounts will be those amounts available to the Division of Medical Assistance as of July 1 of each year. This reimbursement limitation shall become effective in accordance with the provisions of G.S. 108-A-55(c).

Authority G.S. 108A-25(b); 108A-54; 42 C.F.R. 440.80.

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 11B .0611.

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: To update and clarify the requirements for deposits and excess insurance for groups of employees that self-insure their workers' compensation liabilities.

Comment Procedures: Written comments may be sent to Ray Martinez at P.O. Box 26387, Raleigh, N.C. 27611. Oral presentations may be made at the public hearing. Anyone having questions should call Ray Martinez at (919) 733-5633 or Ellen Sprenkel at (919) 733-4529.

CHAPTER 11 - FINANCIAL EVALUATION DIVISION

SUBCHAPTER 11B - SPECIAL PROGRAMS

SECTION .0600 - WORKERS' COMPENSATION SELF-INSURANCE

.0611 DEPOSITS: BONDS: EXCESS INSURANCE - GROUPS

(a) Each group shall deposit with the Commissioner, not later than the effective date of coverage, cash or acceptable securities, or post a surety bond issued by a corporate surety, in an amount equal to ten percent of the group's total annual premium, but not less than ~~three~~ six hundred thousand dollars ~~(\$300,000) (\$600,000) nor to exceed six hundred thousand dollars (\$600,000).~~ For good cause shown If it is actuarially required, the Commissioner ~~may~~ shall require a surety bond or security deposit in excess of ~~five~~ six hundred thousand dollars ~~(\$500,000) (\$600,000),~~ actuarially commensurate with the risk of the group.

(b) The amount of the security deposit or bond required shall be determined at least annually by

the Commissioner based on data submitted by the group to the Commissioner.

(c) Each group shall maintain specific excess insurance with a limit of at least ~~one~~ five million dollars (~~\$1,000,000~~) (\$5,000,000). Groups comprising businesses with high risks of multiple injuries from single occurrences ~~may be required by the Commissioner to~~ shall maintain higher limits, actuarially commensurate with the risks involved. With respect to specific excess insurance, a group's retention shall be the lowest retention generally available for groups with similar exposures and annual premium; but the Commissioner ~~may, in his discretion,~~ shall require higher retention levels consistent with the group's claims experience and financial condition.

Statutory Authority G.S. 58-2-40; 97-93.

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 12 .0712 - .0714, .1401 - .1404.

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 12 .0712 - .0714 - Prescribe disclosure language for new coverages that go into effect January 1, 1994.

11 NCAC 12 .1401 - .1404 - To comply with G.S. 58-67-35(a)(6)d, which requires the Commissioner to adopt rules for HMO point-of-service plans.

Comment Procedures: Written comments may be sent to Rodney Finger at P.O. Box 26387, Raleigh, N.C. 27611. Oral presentations may be made at the public hearing. Anyone having questions should call Rodney Finger (919) 733-5060 or Ellen Sprenkel at (919) 733-4529.

CHAPTER 12 - LIFE AND HEALTH DIVISION

SECTION .0700 - CREDIT INSURANCE AND CREDIT LIFE: ACCIDENT AND HEALTH INSURANCE

.0712 TRUNCATED COVERAGE NOTICE

The following notice must appear in bold print on the face of the individual policy or certificate of truncated credit insurance:

NOTICE: **The death benefit in this policy may not completely pay off your loan. If the term of your loan is longer than the term of this insurance, the death benefit is only payable if death occurs during the term of the insurance. Total disability benefits will not be paid for any period of**

total disability continuing after the termination date shown in the schedule.

Statutory Authority G.S. 58-2-40; 58-57-20; 58-57-70.

.0713 REVOLVING OR OPEN-END CREDIT INSURANCE

The following notice must appear in bold print on the face of an individual policy or certificate of credit insurance written under G.S. 58-57-105 to address the effective date and termination date of coverage:

NOTICE: Coverage will begin when your account has an open balance and will continue, subject to other provisions in this policy, as long as your account has an open balance. Coverage will end when your account does not have an open balance. Coverage will automatically resume when your account has another open balance, subject to the termination provisions in this policy.

Statutory Authority G.S. 58-2-40; 58-57-70; 58-57-105.

.0714 AMOUNT OF CREDIT LIFE INSURANCE

The phrase, "an amount equal to three monthly installments or the equivalent thereof", as used in G.S. 58-57-15(a)(1), means an amount that, when added to the scheduled amount of unpaid indebtedness less any unearned interest or finance charges, does not exceed the initial total amount payable under the contract of indebtedness.

Statutory Authority G.S. 58-2-40; 58-57-15(a)(1); 58-57-70.

SECTION .1400 - HMO: POINT-OF-SERVICE

.1401 APPLICABILITY AND SCOPE

This Section applies to any HMO that, under G.S. 58-67-35(a)(6)d, offers coverage to its enrollees for health care services that are received, other than in an emergency, from:

- (1) Providers who are not employed by, under contract with, or otherwise affiliated with the HMO; or
- (2) Providers who are employed by, under contract with, or otherwise affiliated with the HMO in instances when such services are not received in compliance with the HMO's health care plan requirements.

Statutory Authority G.S. 58-2-40; 58-67-35; 58-67-150.

.1402 DEFINITIONS

In this Section, unless the context clearly indicates otherwise:

- (1) "Coinsurance" means the percentage of an allowed charge or expense for a covered health care service that an enrollee must pay.
- (2) "Copayment" means a fixed dollar amount that an enrollee must pay each time a covered health care service is provided.
- (3) "Deductible" means a specified amount of covered health care services, expressed in dollars, that must be incurred by an enrollee before the HMO will assume any financial liability for all or part of covered health care services.
- (4) "In-plan covered services" means covered health care services that are received according to the rules of the health care plan from providers employed by, under contract with, or approved in advance by the HMO; and means emergency health care services.
- (5) "Out-of-plan covered services" means non-emergency, medically necessary covered health care services that are not received according to the rules of the health care plan, including services from affiliated providers that are received without the approval of the HMO.
- (6) "Out-of-pocket expense" means a specified dollar amount of coinsurance incurred and payable by an enrollee for covered health care services in a specified period; but does not include deductible amounts, copayment amounts, charges in excess of the amount allowed by the HMO, amounts exceeding the

maximum benefits, nor any disallowed or noncovered expenses under the rules of the health care plan.

- (7) "Point-of-service product" means a feature in a health care plan that provides benefits for both in-plan covered services and out-of-plan covered services.
- (8) The definitions contained in G.S. 58-67-5 are incorporated into this Section by reference.

Statutory Authority G.S. 58-2-40; 58-67-35; 58-67-150.

.1403 GENERAL REQUIREMENTS

No HMO shall provide any point-of-service product unless it complies with the following requirements and with G.S. 58-67-10(d)(1):

- (1) Where the covered benefits of a point-of-service product include coinsurance, the difference in coinsurance rates between in-plan covered services and out-of-plan covered services shall not exceed 30 percentage points.
- (2) If the schedule of benefits for a point-of-service product imposes a deductible for in-plan covered services, the amount of any annual deductible per enrollee or per family for out-of-plan covered services may not exceed five times the amount of the corresponding annual deductible applied to in-plan covered services.
- (3) If the schedule of benefits for a point-of-service product does not include an annual deductible for in-plan covered services, the annual deductibles for out-of-plan covered services shall not exceed two thousand dollars (\$2000) per enrollee and the family deductible may not exceed three times the amount of the corresponding annual deductible for the enrollee.
- (4) The portion of any charge for out-of-plan covered services to be applied to an annual deductible may be based on the amount the HMO would have recognized as an allowable charge had the service been rendered as an in-plan covered service.
- (5) If there is a lifetime maximum benefit for in-plan covered services, the amount of any annual and lifetime maximum limits for out-of-plan covered services shall not be less than one-half of the amount of

any annual and lifetime maximum limits for in-plan covered services.

- (6) If a point-of-service product includes copayments for both in-plan covered services and out-of-plan covered services, the amount of the copayment for an out-of-plan covered service shall not exceed the copayment for an in-plan covered service by more than fifty dollars (\$50.00) or 100%, whichever is greater.
- (7) A point-of-service product shall make all mandated benefits available in the form of in-plan covered services.
- (8) Point-of-service products shall provide incentives, including financial incentives, for enrollees to use in-plan covered services.
- (9) Any offered out-of-plan covered service must be available on an in-plan covered service basis.
- (10) A HMO offering a point-of-service product may exclude coverage for preventive health care services provided on an out-of-plan basis.
- (11) Point-of-service products shall give enrollees the option to choose in-plan covered services or out-of-plan covered services each time such covered services are authorized, obtained, or rendered.

Statutory Authority G.S. 58-2-40; 58-67-35; 58-67-150.

.1404 DISCLOSURE REQUIREMENTS

(a) Every explanation of benefits shall contain an explanation of coverage for out-of-plan covered services that allows each enrollee to determine his or her obligations with respect to such services.

(b) All marketing materials, evidences of coverage, enrollee handbooks, and other materials given to enrollees by an HMO that offers a point-of-service product shall contain an explanation of the point-of-service product. The explanation shall include:

- (1) the method of reimbursement;
- (2) applicable copayment and deductible amounts;
- (3) any other uncovered costs or charges;
- (4) the covered health care services that an enrollee may receive on an out-of-plan basis; and
- (5) instructions for submittal of claims for out-of-plan covered services.

Statutory Authority G.S. 58-2-40; 58-67-35;

58-67-150.

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 16 .0302.

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: To conform to statute changes made during the 1993 session of the General Assembly.

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 (919) 733-3284 or Ellen Sprenkel at (919) 733-4529.

CHAPTER 16 - ACTUARIAL SERVICES DIVISION

SECTION .0300 - SMALL EMPLOYER GROUP HEALTH INSURANCE

.0302 RESTRICTIONS ON PREMIUM RATES

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

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

(b) The requirement in G.S. 58-50-130(b)(2) that within a class the premium rates charged during a rating period to small employers shall not vary from the index rate by more than ~~35 percent~~ 25% shall be met as follows:

- (1) The carrier shall calculate for each class of business, using the rate manual for that class, an index rate for each plan of benefits and for each small

employer census within that class of business.

- (2) For each small employer within a given class of business, the carrier shall calculate the ratio of the premium rate charged the small employer during the rating period to the index rate for the census, plan of benefits, and class of business of that small employer calculated in Subparagraph (1) of this Paragraph.
- (3) The ratio calculated in Subparagraph (2) of this Paragraph shall be between ~~.65 and 1.35~~ .75 and 1.25, inclusive.

Other methods may be used if the results, using the method in this Paragraph, meet the requirements of this Rule.

(c) The requirement in G.S. 58-50-130(b)(1) that the index rate for a rating period for any class of business shall not exceed the index rate for any other class of business by more than ~~25 percent~~ 12.5% shall be met as follows:

- (1) The carrier shall define a representative census of its business and a representative actuarially equivalent plan of benefits.
- (2) The carrier shall calculate an index rate based upon Subparagraph (1) of this Paragraph for each class of business.
- (3) The carrier shall identify the class of business with the lowest index rate.
- (4) The ratio of the index rate calculated for each class of business in Subparagraph (2) of this Paragraph to the lowest index rate identified in Subparagraph (3) of this Paragraph shall be between 1.00 and ~~1.25~~ 1.125, inclusive.

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

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

- (1) Calculate a new business premium rate for the new rating period using the rate

manual, the actual census and plan of benefits for the small employer at the beginning of the new rating period.

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

The maximum renewal gross premium is Subparagraph (5) of this Paragraph if Paragraph (b) of this Rule is satisfied. If the resulting maximum renewal gross premium calculated in Subparagraph (5) of this Paragraph does not satisfy Paragraph (b) of this Rule, then the maximum renewal gross premium shall be adjusted until Paragraph (b) of this Rule is satisfied. Other methods may be used if the results, using the method in this Paragraph, meet the requirements of this Rule.

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

- (1) Calculate a new business premium rate for the new rating period using the rate manual, the actual census and plan of benefits for the small employer at the beginning of the new rating period.
- (2) Calculate a new business premium rate for the prior rating period using the rate manual, the actual census and plan of benefits for the small employer at the beginning of the prior rating period.
- (3) Divide Subparagraph (1) of this Paragraph by Subparagraph (2) of this Paragraph and multiply this quotient by the gross premium in effect at the

beginning of the prior rating period. This product is the maximum renewal premium for the new rating period associated with G.S. 58-50-130(b)(7)a and G.S. 58-50-130(b)(7)b.

The maximum renewal gross premium in Subparagraph (3) of this Paragraph is not subject to Paragraphs (b) and (c) of this Rule during a three-year transition period ending January 1, 1995. After January 1, 1995, the acceptability of a proposed rate increase for a small employer shall be based only on Paragraph (d) of this Rule. Other methods may be used if the results, using the method in this Paragraph, meet the requirements of this Rule.

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

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment, Health, and Natural Resources, Division of Soil and Water Conservation intends to adopt rules cited as 15A NCAC 6F .0001 - .0005.

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

The public hearings will be conducted on the following dates and locations:

7:00 pm
Nov. 8, 1993
Vernon James Center
Plymouth, NC

7:00 pm
Nov. 15, 1993
Clinton Civic Center
414 Warsaw Road
Clinton, NC 28328

7:00 pm
Nov. 17, 1993
Mitchell Community College
Shearer Hall
Statesville, NC

7:00 pm
Nov. 22, 1993
Asheville Middle School
Auditorium

Asheville, NC

Reason for Proposed Action: The NC Soil and Water Conservation Commission (SWCC) has prepared procedures and guidelines for two activities associated with the Environmental Management Commission's (EMC) 1993 amendments to the Nondischarge Rule (15A NCAC 2H .0200). The two activities in the procedures are:

1. Establish the process by which an individual may become designated as a "Technical Specialist" and sign the certification forms that must be submitted to the Division of Environmental Management by owners of confined animal operations.
2. Establish the process that an owner of a confined animal operation must complete to receive a "certification" that the operation meets the requirements previously established by the EMC.

The Soil and Water Conservation Commission and the Local Soil and Water Conservation Districts are cooperating with the EMC by providing assistance to owners of confined animal operations in securing certification in order to be "deemed permitted". The SWCC procedure will not redefine any requirements established by the EMC for buffers, set-backs, size of operation, etc.

Comment Procedures: All persons interested in these matters are invited to attend the public hearings. Oral presentation time allowance may be limited at the discretion of the hearing officer and comments must also be submitted in writing when longer than three minutes. Written comments are encouraged and may be presented at the public hearings or submitted to James Cummings, Division of Soil and Water Conservation, P.O. Box 27687, Raleigh, NC 27611-7687. To request further information call (919) 733-2302. Mailed written comments must be postmarked by November 22, 1993.

IT IS VERY IMPORTANT THAT ALL INTERESTED AND POTENTIALLY AFFECTED PERSONS, GROUPS, BUSINESSES, ASSOCIATIONS, INSTITUTIONS OR AGENCIES MAKE THEIR VIEWS AND OPINIONS KNOWN TO THE SOIL AND WATER CONSERVATION COMMISSION THROUGH THE PUBLIC HEARING AND COMMENT PROCESS, WHETHER THEY SUPPORT OR OPPOSE ANY OR ALL PROVISIONS OF THE PROPOSED RULES. THE COMMISSION MAY

MAKE CHANGES TO THE RULES AT THE COMMISSION MEETING IF THE CHANGES COMPLY WITH G.S. 150B-21.2(f).

CHAPTER 6 - SOIL AND WATER CONSERVATION COMMISSION

SUBCHAPTER 6F - PROCEDURES AND GUIDELINES TO IMPLEMENT THE NONDISCHARGE RULE FOR ANIMAL WASTE MANAGEMENT SYSTEMS

.0001 PURPOSE

This Subchapter describes the operating procedures and guidelines to implement the provisions of 15A NCAC 2H .0200 - Waste Not Discharged To Surface Waters - for those provisions charged to the Soil and Water Conservation Commission in 15A NCAC 2H .0217, hereinafter called the Nondischarge Rule for Animal Waste Management Systems. As the lead State agency for agricultural nonpoint source pollution control, the Soil and Water Conservation Commission, through these procedures and guidelines, will coordinate the efforts of the Soil and Water Conservation Districts to further the proper conservation and utilization of farm generated by-products (nutrients, wastes, compost, water) in connection with animal waste management systems and coordinate the Districts' efforts with those of the Environmental Management Commission and the Division of Environmental Management.

Statutory Authority G.S. 139-2; 139-4; 143B-294.

.0002 DEFINITIONS OF TERMS

The terms used in this Subchapter shall be as defined in G.S. 139-4; 143-215.74; 143B-294; 15A NCAC 2H .0203; 15A NCAC 6E .0002; and as follows:

- (1) "Agronomic Rates" means those amounts of animal waste or compost to be applied to lands as contained in the nutrient management standard of the USDA Soil Conservation Service Technical Guide Section IV or as recommended by the North Carolina Department of Agriculture and the North Carolina Cooperative Extension Service at the time of certification by the Technical Specialist for the animal waste management plan.
- (2) "Certification" means the certification required in the Nondischarge Rule for Animal Waste Management Systems (15A NCAC 2H .0217).

- (3) "DEM" means the Division of Environmental Management, Department of Environment, Health and Natural Resources, and the agency to receive the certification forms and responsible for enforcement of 15A NCAC 2H .0200.
- (4) "Design Approval Authority" means that authority granted by the Commission to an individual to certify that a BMP or the system of BMPs for waste management has been designed to meet the standards and specifications of practices adopted by the Commission.
- (5) "Installation Approval Authority" means that authority granted by the Commission to an individual to certify a BMP or system of BMPs for waste management has been installed to meet the standard of practices adopted by the Commission.
- (6) "Technical Specialist" means an individual designated by the Commission to certify an entire or portion of an animal waste management plan.

Statutory Authority G.S. 139-4; 143B-294.

.0003 REQUIREMENTS FOR CERTIFICATION OF WASTE MANAGEMENT PLANS

(a) Owners of Animal waste management systems are required in 15A NCAC 2H .0217(a)(1) to obtain certification that the system will properly collect, treat, store, or apply animal waste to the land such that no discharge of pollutants occurs to surface waters of the state by any means except as a result of a storm event more severe than the 25-year, 24-hour storm as required in 15A NCAC 2H .0203(3).

(b) The certification is to be made by a Technical Specialist designated pursuant to this Subchapter, and will confirm that the best management practices (BMPs) contained in the animal waste management plan meet applicable minimum standards and specifications. BMPs in an existing system are not required to meet current standards and specifications as established by the Commission as long as the system is certified to be non-discharging as required in 15A NCAC 2H .0203(3).

(c) More than one Technical Specialist may be consulted for the design of BMPs and installation of BMPs. A Technical Specialist must certify the entire animal waste management plan as installed.

(d) Upon receiving a certification from a Technical Specialist, the owner must submit a copy

of the certification to DEM and a copy of both the certification and the waste management plan to the District in which the system is or is to be located.

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

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

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

(h) An owner not receiving concurrence from the District may request that the Commission mediate a dispute over concurrence.

(i) The review process of the District does not abrogate the responsibilities of the owner to obtain a certification and of DEM requirements for an individual nondischarge permit.

(j) An owner who does not obtain a certification is not deemed permitted pursuant to G.S. 143-215.19(d) and must apply for an individual permit from the Division of Environmental Management. Nothing in these Rules prohibits permit appeal rights pursuant to the rules of the Environmental Management Commission.

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

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

(m) A change in the cropping pattern as a result of weather-caused delays after application of

animal waste shall not require the owner to obtain a new certification as long as the owner followed the certified waste management plan application rates and no discharge occurs to surface waters.

(n) The certifying Technical Specialist and the District are not required to spot check or otherwise assure proper maintenance and operation of an animal waste management system installed to meet the DEM certification requirements. Enforcement of the Nondischarge Rule for Animal Waste Management Systems (15A NCAC 2H .0217) shall remain the responsibility of DEM.

Statutory Authority G.S. 139-4; 143B-294.

**.0004 APPROVED BEST
MANAGEMENT PRACTICES
(BMPs)**

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

(b) As required by DEM in 15A NCAC 2H .0217, a BMP or system of BMPs designed and installed for an animal waste management plan must either:

- (1) meet the minimum standards and specifications of the US Department of Agriculture Soil Conservation Service Technical Guide, Section IV or minimum standards and specifications as otherwise determined by the Commission; or
- (2) receive an approved individual nondischarge permit as required for the animal waste management system. BMPs approved for use in the Agriculture Cost Share Program for Nonpoint Source Pollution Control are hereby approved for these purposes.

(c) Land application BMPs following the nutrient management standard contained in the Section IV of the SCS Technical Guide or as recommended by the North Carolina Department of Agriculture and the Cooperative Extension Service are acceptable. In cases where agronomic rates are not specified in the Nutrient Management Standard for a specific crop or vegetative type, application rates may be determined using the best judgement of the certifying Technical Specialist after consultation with NCDA or CES.

(d) Exemptions from the minimum buffer requirements for animal waste storage and treatment facilities and animal concentration areas

are acceptable if no practical alternative exists and the BMP installed as an equivalent control meets the requirements for Nondischarge except as a result of a storm event more severe than the 25-year, 24-hour storm.

Statutory Authority G.S. 139-4; 143B-294.

**.0005 TECHNICAL SPECIALIST
DESIGNATION PROCEDURE**

(a) The Commission may designate individuals or groups of individuals as Technical Specialists, to assist owners in animal waste management plan development and certification. No rights are afforded to Technical Specialists by this designation.

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

(c) The following persons are Technical Specialists:

- (1) Individuals who have been assigned Design and Installation approval authority by the USDA, Soil Conservation Service, the NC Cooperative Extension Service or the NC Department of Agriculture;
- (2) Professional engineers subject to "The North Carolina Engineering and Land Surveying Act" as rewritten by Session Laws 1975, c.681, s.1, and recodified; and
- (3) Individuals designated by the Commission.

(d) Those individuals not designated in Subparagraph (c)(1) or (2) of this Rule must apply and receive recommendation by two-thirds vote of the members present at a scheduled meeting of the Commission, or of a committee established for this purpose, based on the minimum qualifications as established by the Commission. A copy of the minimum requirements for skill and experience will be available at the District field office. The NPS Section of the Division will keep on file all application forms and provide a list of these Technical Specialists approved by the Commission, or its committee to all Districts. The list will designate the BMPs or system of BMPs for which the Technical Specialist has received design or installation certification approval.

(e) The Commission, or a committee established for this purpose, shall meet quarterly as long as there are Technical Specialist applications to

review. An individual must provide to the NPS Section of the Division an application (provided by the NPS Section) and supporting documentation by the second Wednesday of the first month of a quarter in order to have an application reviewed for designation that quarter.

(f) The Commission or its committee, may rescind the authority of a Technical Specialist for a specific BMP or all BMPs upon receipt of a written complaint and a vote of two-thirds of the members in attendance at a scheduled meeting.

Statutory Authority G.S. 139-4; 143B-294.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Pharmacy intends to adopt rules cited as 21 NCAC 46 .1606 - 1607 and .2306.

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

The public hearing will be conducted at 2:00 p.m. on November 30, 1993 at the Institute of Pharmacy, 109 Church Street, Chapel Hill, North Carolina.

Reason for Proposed Action:

21 NCAC 46 .1606 - To require a personal appearance at the Board office prior to issuance of any original pharmacy permit or device-dispensing permit, or prior to approval for dispensing by a nurse or physician's assistant.

21 NCAC 46 .1607 - To set out requirements for all out-of-state pharmacies that ship, mail, or deliver in any manner a dispensed legend drug into this State.

21 NCAC 46 .2306 - To prohibit the selling, use for commercial purposes, or transfer of information in patient pharmacy records, except as permitted under 21 NCAC 46 .1806 and .2502(h).

Comment Procedures: Persons wishing to present oral data, views or arguments on a proposed rule or rule change, may file a Notice with the Board at least 10 days prior to the public hearing at which the person wishes to speak. Comments should be limited to 10 minutes. The Board's address is P.O. Box 459, Carrboro, NC 27510-

0459. Any person may file written submission of comments or argument at any time up to and including December 2, 1993.

CHAPTER 46 - BOARD OF PHARMACY

SECTION .1600 - LICENSES AND PERMITS

.1606 REQUIREMENT OF PERSONAL APPEARANCE

Prior to issuance of any original permit or device dispensing permit, or prior to approval for dispensing by a nurse or physician's assistant, the following persons must appear personally at the Board office on the first Monday of the month, the Monday before the monthly Board meeting, or such other time as scheduled with the Board's staff:

- (1) the pharmacist-manager for the applicant pharmacy;
- (2) the person in charge of the device-dispensing permit;
- (3) the nurse applying for approval for dispensing and the supervising pharmacist; and
- (4) the physician's assistant applying for approval for dispensing and the supervising pharmacist.

Statutory Authority G.S. 90-18.1; 90-18.2; 90-85.3(a),(r); 90-85.6; 90-85.21; 90-85.22.

.1607 OUT-OF-STATE PHARMACIES

(a) In addition to the requirements of 21 NCAC 46 .1601 and .1603 - .1605, out-of-state pharmacies that ship, mail, or deliver in any manner a dispensed legend drug into this State must comply with the following:

- (1) Pay a fee of Two Hundred Fifty Dollars (\$250.00) for original registration and thereafter pay a fee of one hundred twenty-five dollars (\$125.00) for annual renewal of registration;
- (2) Maintain, in readily retrievable form, records of prescription drugs dispensed to North Carolina residents;
- (3) Supply all information requested by the Board in carrying out the Board's responsibilities under the statutes and regulations pertaining to out-of-state pharmacies;
- (4) Comply with all statutory and regulatory requirements of the State of North

- Carolina for dispensing prescriptions, including labeling, record keeping, and drug product selection;
- (5) Develop and provide the Board with a policy and procedure manual that sets forth:
- (A) normal delivery protocols and times;
 - (B) the procedure to be followed if the patient's medication is not available at the out-of-state pharmacy, or if delivery will be delayed beyond the normal delivery time;
 - (C) the procedure to be followed upon receipt of a prescription for an acute illness, which policy shall include a procedure for delivery of the medication to the patient from the out-of-state pharmacy at the earliest possible time (such as courier delivery), or an alternative that assures the patient the opportunity to obtain the medication at the earliest possible time; and
 - (D) the procedure to be followed when the out-of-state pharmacy is advised that the patient's medication has not been received within the normal delivery time and that the patient is out of medication and requires interim dosage until mail prescription drugs become available;
- (6) Maintain a pharmacist-manager who has a valid license to practice pharmacy in North Carolina. The pharmacist-manager must comply with all statutory and regulatory requirements of the State of North Carolina, including 21 NCAC 46 .2502. If at any time the pharmacist-manager so designated shall leave the employment of the pharmacy, the pharmacy shall promptly notify the Board and designate another pharmacist currently licensed in North Carolina as pharmacist-manager;
- (7) Disclose the location, names, and titles, of all principle corporate officers, partners, or owners of the pharmacy. Disclose the names and license numbers of all pharmacists and, if available, the names and license or registration numbers of all supportive personnel employed by the out-of-state pharmacy who deliver, dispense, or distribute, by any method, prescription legend drugs to an ultimate user in this State. A report containing this information shall
- be made on an annual basis and within thirty days after each change of office, corporate officer, partnership, owner, or pharmacist;
- (8) Submit evidence of possession of a valid license, permit, or registration as a pharmacy in compliance with the laws of the state in which the pharmacy is located. Such evidence shall consist of one of the following:
- (A) a copy of the current license, permit, or registration certificate issued by the regulatory or licensing agency of the state in which the pharmacy is located; or
 - (B) a letter from the regulatory or licensing agency of the state in which the pharmacy is located certifying the pharmacy's compliance with the pharmacy laws of that state;
- (9) Designate a resident agent in North Carolina for service of process. Any such out-of-state pharmacy that does not so designate a registered agent shall be deemed to have appointed the Secretary of State of the State of North Carolina to be its true and lawful attorney upon whom process may be served. All legal process in any action or proceeding against such pharmacy arising from shipping, mailing or delivering prescription drugs in North Carolina shall be served on the resident agent. In addition, a copy of such service of process shall be mailed to the out-of-state pharmacy by certified mail, return receipt requested, at the address of the out-of-state pharmacy as designated on the application for a permit filed with the Board. Any such out-of-state pharmacy which does not obtain a permit in this State, shall be deemed to have consented to service of process on the Secretary of State as sufficient service;
- (b) The facilities and records of such out-of-state pharmacy shall be subject to inspection by the Board; provided however, the Board may accept in lieu thereof satisfactory inspection reports by the licensing entity of the state in which the pharmacy is located.
 - (c) When there is a conflict between statutes or rules of North Carolina and those of the state in which the pharmacy is located, the more stringent of the two shall apply.
 - (d) Any person who ships, mails or delivers

prescription drugs to North Carolina residents from more than one out-of-state pharmacy shall obtain a separate North Carolina out-of-state pharmacy license for each pharmacy.

(e) An out-of-state pharmacy license shall expire on December 31 of each year.

Statutory Authority G.S. 90-85.6; 90-85.21A; 90-85.26; 90-85.28; 90-85.29; 90-85.30; 90-85.32.

SECTION .2300 - PRESCRIPTION INFORMATION AND RECORDS

.2306 CONFIDENTIALITY OF PATIENT PHARMACY RECORDS

Information in patient pharmacy records shall not be sold, used for commercial purposes or transferred, except as permitted under 21 NCAC 46 .1806 and .2502(h).

Statutory Authority G.S. 90-85.6; 90-85.36.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Therapeutic Recreation Certification Board intends to adopt rules cited as 21 NCAC 65 .0001 - .0013.

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

The public hearing will be conducted at 10:00 a.m. on November 17, 1993 at the Durham Regional Hospital, Public Auditorium, 3643 N. Roxboro St., Durham, N.C. 27704.

Reason for Proposed Action: For enactment of Chapter 90C Therapeutic Recreation Personnel Certification Act and the establishment of the TRC Board.

Comment Procedures: All written comments must be submitted to Becky Garrett, CTRS/TRS, Executive Director TRCB, P.O. Box 67, Saxapahaw, NC 27340, up to and including November 17, 1993. Written comments submitted after the deadline will not be considered.

CHAPTER 65 - THERAPEUTIC RECREATION CERTIFICATION BOARD

.0001 NAME - SHORT TITLE

The North Carolina State Board of Therapeutic Recreation Certification shall be recognized as the Therapeutic Recreation Certification Board (TRCB).

Statutory Authority G.S. 90C-4(a).

.0002 EXECUTIVE DIRECTOR QUALIFICATIONS

The Executive Director, an Independent Contractor hired by TRCB, shall not be a member of the Board, will be certified by TRCB as a Therapeutic Recreation Specialist, hold a Master's degree or higher in Therapeutic Recreation, and have two to four years of progressive and responsible experience in the field of Therapeutic Recreation.

Statutory Authority G.S. 90C-5(j); 90C-6(4); 90C-7.

.0003 OFFICERS, EXECUTIVE COMMITTEE

The officers of TRCB, (Chair, Vice-Chair, Secretary) and the Executive Director (ex-officio) shall be considered the Executive Committee and shall be given the authority to carry out business deemed necessary between regularly scheduled meetings of TRCB.

Statutory Authority G.S. 90C-5(h).

.0004 PROFESSIONAL CONDUCT COMMITTEE

A Professional Conduct Committee consisting of a minimum of three certified practitioners (minimum two TRS's), will be appointed by TRCB for the purpose of TRCB investigating any suspected violations of G.S. 90C. Upon verbal or written notification of suspected violations of any provisions of G.S. 90C, TRCB will refer the same to the Professional Conduct Committee for investigation, fact finding and recommendations. Upon completion of the investigation the Professional Conduct Committee will report the findings of the investigation and any recommendations for disciplinary action to the TRCB for decision and enforcement.

Statutory Authority G.S. 90C-6(8).

.0005 MEETINGS

(a) The Board shall conduct two annual reviews of applicants for certification within one month of application deadline.

(b) The Board may hold additional announced business meetings each year, to conduct business of the TRCB.

(c) TRCB members will be sent written notice 30 days prior to meetings.

(d) A request for an excused absence should be made to the Executive Director a minimum of two weeks or 14 days in advance of the meeting. If a member of TRCB has more than one unexcused absence in a calendar year their resignation and a replacement by appointment will be requested.

Statutory Authority G.S. 90C-5(i).

.0006 EXEMPTIONS (EXPIRED MARCH 1, 1991)

It is the interpretation of the Board under G.S. 90C-9 that other options, TRS, G.S. 90C-9(b)(2)(3) for TRS certification and TRA certification, G.S. 90C-9(c)(2)(3)(4)(5) expired as exemptions on March 1, 1991.

Statutory Authority G.S. 90C-9; 90C-16.

.0007 RECIPROCITY

(a) TRCB will certify without examination any person currently certified as a CTRS or a CTRA by the National Council for Therapeutic Recreation Certification (NCTRC) when written evidence, with current expiration date, is provided to support a TRCB application presented.

(b) Anyone who is currently registered, certified or licensed by another state may apply for certification by TRCB by the reciprocity procedure with evidence that they meet current standards of G.S. 90C.

Statutory Authority G.S. 90C-15.

.0008 ACADEMIC - TRS EXAMINATION

(a) TRCB shall provide to all applicants for certification as a Therapeutic Recreation Specialist, (TRS), a written examination at least once a year.

(b) A national examination for Therapeutic Recreation Specialists administered by Educational Testing Service (ETS) will be used to evaluate the qualifications of applicants for certification. The exam shall be given in a central geographic area within the state.

(1) Qualifications: In order to qualify to take the examination candidates must meet the following requirements:

(A) Candidates must present evidence (Official Transcripts) of a baccalaureate degree or higher from

an accredited college or university with a major in therapeutic recreation or a major in recreation and an option/emphasis in therapeutic recreation.

(B) Coursework must reflect a minimum of three courses that the title, course description and course outline reflect recreation content.

(C) Coursework must reflect a minimum of three courses that the title, course description and course outline reflect therapeutic recreation content.

(D) Supportive course work is to include a minimum of 18 semester or 27 quarter hours from three of the following six areas: psychology, sociology, physical/biological science, special education, human services, and/or adapted physical education. Effective January 1995, Supportive coursework, must include a minimum of three semester/quarter hours of anatomy, three semester/quarter of physiology, three semester/quarter of abnormal psychology and three semester/quarter hours in human growth and development.

(E) Candidates must have completed a 360-hour, 10-week internship or field placement experience in a clinical, residential, or community-based therapeutic recreation program under an agency supervisor who is currently certified by TRCB and NCTRC.

(2) Passing requirements, reporting of scores, retaking the exam, cancellations and review of the exam by unsuccessful applicants will be conducted according to the rules established by ETS.

Statutory Authority G.S. 90C-9b(1)(2)(4); 90C-9c(4).

.0009 PROVISIONAL TRS

Upon receipt of an application demonstrating compliance with the academic requirements each candidate will receive a letter allowing the use of the Title, Provisional Therapeutic Recreation Specialist (P-TRS) until the results of the exam are known. If the candidate does not pass the examination the use of Provisional TRS is no longer permitted.

Statutory Authority G.S. 90C-9d.

.0010 CERTIFICATION FEES

(a) An additional fee will be charged by the Educational Testing Service based on the cost of administration of the examination; the fee will be payable to ETS.

(b) A biannual Communications fee of fifteen dollars (\$15.00) will be charged by TRCB to cover expenses for an annual report, newsletters, and directory to be sent to all those certified. The fee will be collected in the year that certification renewal is due.

Statutory Authority G.S. 90C-10.

.0011 CERTIFICATE RENEWALS (EFFECTIVE JULY 1, 1995)

(a) Continuing Professional Education/Experience Requirements: During the two year certification period, Continuing Education and Continuing Professional Experience will be required for certification renewal. Candidates for Certification Renewal as a TRS have a choice from two of three options to earn a minimum of 40 points to renew their certification. Candidates for Certification as a TRA must accrue their points from Professional Experience and Continuing Education options. The options, their definitions and their point values are listed in this Paragraph.

Option #1: Professional Experience (20 points)

Option #2: Continuing Education (20 points)

Option #3: Examination (TRS Only) (40 points)

<u>Component</u>	<u>Description</u>	<u>Point Value</u>
<u>Professional Experience</u>	<u>a minimum of 144 hours (72 hours per year)</u>	<u>20 points (10 per year)</u>
<u>Continuing Education</u>	<u>4 CEU's (2 CEU's, 20 contact hours annually)</u>	<u>20 points (10 per year)</u>
<u>Examination (TRS Only)</u>	<u>passing score on TRS certification exam</u>	<u>40 points</u>

(b) Professional Experience Component: If this component is selected to complete for renewal requirements, a minimum of 144 hours of therapeutic recreation experience must be earned within the two year certification period. The hours can be accumulated through the performance of the following professional roles.

- (1) Direct service deliverer - delivers service directly to clients or groups of clients as a therapeutic recreation specialist or a therapeutic recreation assistant by performing assessments, developing individual programs and treatment plans, documenting the assessments and interventions, working on an interdisciplinary team, performing outreach activities, etc.
- (2) Supervisor - supervises therapeutic recreation personnel in the direct delivery of service to clients.
- (3) Administrator - administers a department or a division which includes therapeutic recreation.
- (4) Educator - teaches courses or a program in therapeutic recreation.
- (5) Consultant - performs consulting services in therapeutic recreation for organizations, educational institutions, agencies or corporations.
- (6) Volunteer - volunteers services performed in any of the various roles described in Subparagraphs (b)(1) through (b)(5) of this Rule.
- (7) Professional Service/Paid or Volunteer - includes professional boards, councils, legislative work,

standards development, curriculum development, etc., as this service relates to therapeutic recreation.

(8) Student - participates in internships or supervised in-service education and training.

(c) Continuing Education Component: The continuing education component includes a wide range of continuing education activities that are typically available to Therapeutic Recreation Specialists and Therapeutic Recreation Assistants. Continuing Education Points (CEP's) are measured according to the equivalency of an educational contact hour (50 minutes of actual classroom/instructional time, excluding registration time and breaks). Continuing Education Units (CEU's) will also be recognized and will be translated into CEP's as follows:

(1) 1 CEP = 1 contact hour = 0.1 CEU

(2) 10 CEP's = 10 contact hours = 1.0 CEU

(d) CEP's can be accumulated in one or several of three categories:

(1) continuing education courses and experiences, or

(2) academic courses, or

(3) professional publications and presentations.

Each of these three is explained in this Rule.

(e) Continuing Education Courses and Experiences such as symposia, seminars, etc. are accepted if they are approved by a professional therapeutic recreation organization at the local, state, or national level, that uses the National or International Council on Continuing Education Standards or through a therapeutic recreation-related group (such as a hospital or other agency) or through a college/university that uses national continuing education standards.

The content of the continuing education experiences must be linked directly to the knowledge areas of therapeutic recreation specialist from the National Job Analysis Study conducted by National Council For Therapeutic Recreation Certification (NCTRC). The major categories of therapeutic recreation knowledge areas are:

(1) Background Information

(2) Diagnostic Groupings and Populations served

(3) Assessment

(4) Planning the Program

(5) Implementing the Program/Treatment

(6) Documentation and Evaluation

(7) Organizing and Managing Services

(8) Advancement of the Profession

Only study via self-study courses that are credited by an acceptable continuing education granting agency as described in this Paragraph will be accepted.

(f) Academic Courses

(1) Credit equivalents for completing academic coursework are:

1 semester = 15 Contact hours = 15 CEP's

1 trimester = 14 Contact hours = 14 CEP's

1 quarter = 10 Contact hours = 10 CEU's

(2) Credit equivalents for audited academic coursework are:

1 semester = 8 Contact hours = 8 CEP's

1 trimester = 7 Contact hours = 7 CEP's

1 quarter = 5 Contact hours = 5 CEU's

The content of academic courses should also be linked to the knowledge areas of the National Job Analysis Study conducted by NCTRC.

(g) Professional Publications and Presentations: Credit for the following professional publications and presentations may be requested:

<u>Editorials</u>	<u>5 CEP's</u>
<u>Articles on original research</u>	<u>15 CEP's</u>
<u>Newsletter article</u>	<u>2 CEP's</u>
<u>Editing a textbook</u>	<u>15 CEP's</u>
<u>Authoring a textbook chapter</u>	<u>15 CEP's</u>
<u>Journal Articles</u>	<u>10 CEP's</u>
<u>Journal reviews or book review</u>	<u>5 CEP's</u>

<u>Research abstract</u>	<u>2 CEP's</u>
<u>Textbook</u>	<u>20 CEP's</u>
<u>Unpublished masters or doctoral thesis</u>	<u>10 CEP's</u>
<u>Presentations at professional meetings</u>	<u>2 CEP's per 50 minutes of lecture.</u>

Credit will not be given for repeat or multiple presentations of the same seminar, in-service, conference, original papers or poster presentation.

No more than 10 CEP's can be earned in the area of presentations and publications.

(h) Examination: If the examination component is chosen, Therapeutic Recreation Specialists will be required to take the current examination for professional level certification. The examination must be taken and passed within the two years of current certification. For example, a TRS certified in November of 1993 can take the exam as early as November of 1994 but no later than November of 1995 to count this component toward renewal requirements.

Statutory Authority G.S. 90C-9c(4).

.0012 REINSTATEMENT

A person who has allowed his or her certification to lapse shall complete a new application for certification which recognizes the standards in effect at the time. If the Board determines that the certification should be reinstated, it shall issue a certificate renewal to the applicant.

Statutory Authority G.S. 90C-12.

.0013 REVOCATION

(a) When it is reported to TRCB in writing that a certified person has been convicted of a crime that indicates the person is unfit or incompetent to practice Therapeutic Recreation; an investigation will be conducted by TRCB or by the Professional Conduct Committee appointed by TRCB. TRCB will then take necessary action in response to the findings of the Committee.

(b) Revocation of certification will also occur for any of the following reasons:

- (1) Obtaining or attempting to obtain certification by fraud or deception.
- (2) Knowingly assisting another to obtain or attempt to obtain credentialing by fraud or deception.
- (3) Unauthorized use of certification or falsification of credentials.
- (4) Unauthorized possession or distribution of certifying agency testing or exam materials, including copying and reproducing exam questions and problems.
- (5) Misstatement of material fact or failure to make statement of material fact in application or statement or representation to any certifying board.
- (6) Falsifying information required for admission to exam, impersonating another examinee, or falsifying education or credentials on application.

(7) Copying answers, permitting another to copy answers or providing or receiving unauthorized advice about the exam content during the examination.

(8) Failure to pay certification fees.

(c) The Board will remain in compliance with the American Disabilities Act when conducting investigation of a person who has a mental or physical disability or uses any drugs to a degree that would endanger the public.

Statutory Authority G.S. 90C-14(2)(3).

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>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</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>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>

AGRICULTURE

North Carolina State Fair

<i>2 NCAC 20B .0102 - Traffic Regulations</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<i>2 NCAC 20B .0106 - General</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>2 NCAC 20B .0204 - Forfeiture</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>

Plant Industry

<i>2 NCAC 48C .0023 - Analysis for Farmers or Seedmen</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>

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 .0610 - Permit Requirements for Toxic Air Pollutants</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<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>Agency Responded</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<i>15A NCAC 2L .0103 - Policy</i>	<i>RRC Objection</i>	<i>09/17/93</i>

<i>Agency Revised Rule</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>15A NCAC 2L .0104 - RS Designation</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<i>15A NCAC 2L .0113 - Variance</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<i>15A NCAC 2L .0201 - Groundwater Classifications</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>

Health: Epidemiology

<i>15A NCAC 19B .0301 - Application for Initial Permit</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<i>15A NCAC 19B .0304 - Conditions for Renewal of Permit</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<i>15A NCAC 19B .0309 - Qualification of Maintenance Personnel</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>

Health: Personal Health

<i>15A NCAC 21D .0501 - Allowable Foods</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<i>15A NCAC 21D .1204 - Client Eligibility</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</i>
<i>15A NCAC 21D .1207 - Payment for Reimbursable Services</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</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>
<i>Rule Returned to Agency</i>	<i>Obj. Cont'd</i>	<i>09/17/93</i>
<i>Agency Filed Rule for Codification Over RRC Objection</i>	<i>Eff.</i>	<i>10/01/93</i>

Medical Assistance

<i>10 NCAC 26B .0112 - North Carolina Specialty Hospital Services</i>	<i>RRC Objection</i>	<i>09/17/93</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>09/17/93</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

<i>21 NCAC 26 .0205 - Forms of Practice</i>	<i>RRC Objection</i>	<i>06/17/93</i>
<i>Rule Returned to Agency</i>		<i>07/15/93</i>
<i>Agency Filed Rule for Codification Over RRC Objection</i>	<i>Eff.</i>	<i>08/01/93</i>
<i>21 NCAC 26 .0207 - Application of Professional Seal</i>	<i>RRC Objection</i>	<i>06/17/93</i>
<i>Rule Returned to Agency</i>		<i>07/15/93</i>

<i>Agency Filed Rule for Codification Over RRC Objection</i>	<i>Eff.</i>	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>	<i>Eff.</i>	08/01/93

Social Work

21 NCAC 63 .0210 - <i>Provisional Certificates</i>	RRC Objection	08/20/93
<i>Agency Revised Rule</i>	RRC Objection	08/20/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93

PUBLIC EDUCATION

Elementary and Secondary Education

16 NCAC 6C .0312 - <i>Certificate Suspension and Revocation</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93

REVENUE

Departmental Rules

17 NCAC 1C .0502 - <i>Method of Payment</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93
17 NCAC 1C .0503 - <i>EFT Definitions</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93

Sales and Use Tax

17 NCAC 7B .1907 - <i>Scrap Tire Disposal Tax</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93

TRANSPORTATION

Division of Highways

19A NCAC 2B .0162 - <i>Delegation to Manager of Program and Policy</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93
19A NCAC 2B .0164 - <i>Use of Right of Way Consultants</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93
19A NCAC 2B .0208 - <i>Uniform Traffic Control Devices</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93
19A NCAC 2B .0225 - <i>Blue Star Memorial Highway Signs</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93
19A NCAC 2B .0602 - <i>Obtaining a Driveway Construction Permit</i>		
<i>Agency Withdrew Rule</i>		09/17/93
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 .0815 - <i>Rejection of Bids</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93
19A NCAC 2D .0821 - <i>Return of Bid Bond or Bid Deposit</i>	RRC Objection	09/17/93
19A NCAC 2D .0825 - <i>Confidentiality of Cost Estimates and Bidding Lists</i>	RRC Objection	09/17/93
<i>Agency Revised Rule</i>	Obj. Removed	09/17/93
19A NCAC 2E .0217 - <i>Specific Information Program Definitions</i>	RRC Objection	09/17/93

RRC OBJECTIONS

Agency Revised Rule
19A NCAC 2E .0220 - Composition of Signs
Agency Revised Rule
19A NCAC 2E .0222 - Contracts with the Department
Agency Revised Rule

Obj. Removed 09/17/93
RRC Objection 09/17/93
Obj. Removed 09/17/93
RRC Objection 09/17/93
Obj. Removed 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 30 .0201(a)(1)(A) - STDS FOR SHELLFISH BOTTOM & WATER COLUMN LEASES

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

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

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

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698.

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
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 Riggsbee	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 Isacc 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	
Jean Hoggard Askew v. Alcoholic Beverage Control Commission	93 ABC 0255	West	09/10/93	
ABC Comm. v. Partnership/T/A Corrothers Comty Ctr & Private Club	93 ABC 0318	Reilly	07/22/93	
Alcoholic Beverage Control Comm. v. James Elwood Alphin	93 ABC 0326	Gray	08/26/93	
Alcoholic Beverage Control Comm. v. James William Campbell	93 ABC 0327	Gray	08/09/93	
Barbara Locklear v. Alcoholic Beverage Control Commission	93 ABC 0395	West	09/14/93	
Zachary Andre Jones v. Alcoholic Beverage Control Commission	93 ABC 0421	West	09/13/93	
Alcoholic Beverage Control Comm. v. Richard Donald James Jr.	93 ABC 0431	Nesnow	09/01/93	
William Vernon Franklin & Gene Carroll Daniels v. ABC Commission	93 ABC 0570	Reilly	09/17/93	
Charles Edward Hare, Club Paradise v. Alcoholic Beverage Ctl. Comm.	93 ABC 0644	Gray	08/10/93	
Alcoholic Beverage Control Comm. v. Partnership t/a RJ's Store	93 ABC 0860	Mann	09/29/93	
Alcoholic Bev. Control Comm. v. Mild & Wild, Inc., Sheila Scholz	93 ABC 1475	Nesnow	03/23/93	
COMMERCE				
Lester Moore v. Weatherization Assistance Program	93 COM 0105	Gray	03/08/93	
CRIME CONTROL AND PUBLIC SAFETY				
George W. Paylor v. Crime Victims Compensation Comm.	91 CPS 1286	Morgan	04/27/93	
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	

CONTESTED CASE DECISIONS

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
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
Phillip Edward Moore v. Crime Control & Public Safety	93 CPS 0169	Nesnow	05/20/93	
Norma Jean Purkett v. Crime Victims Compensation Comm.	93 CPS 0205	West	08/27/93	8:12 NCR 1171
Sheila Carter v. Crime Control and Public Safety	93 CPS 0249	Morgan	08/25/93	
John Willie Leach v. Crime Victims Compensation Comm.	93 CPS 0263	Morrison	05/20/93	
Nellie R. Mangum v. Crime Victims Compensation Comm.	93 CPS 0303	Morrison	06/08/93	
Constance Brown v. Crime Victims Compensation Comm.	93 CPS 0351	Reilly	05/24/93	
Susan Coy v. Crime Victims Compensation Commission	93 CPS 0623	Reilly	09/22/93	

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Charles L. Wilson v. Environment, Health, & Natural Resources	91 EHR 0664	Morgan	03/23/93	
J. Bruce Mulligan v. Environment, Health, & Natrual Resources	91 EHR 0773	West	07/13/93	
Michael D. Barnes v. Onslow Cty Hlth & Environment and EHR	91 EHR 0825	Morgan	06/21/93	
William E. Finck v. Environment, Health, & Natural Resources	92 EHR 0040	Gray	06/14/93	
Utley C. Stallings v. Environment, Health, & Natural Resources	92 EHR 0062	Gray	03/15/93	
A.J. Ballard Jr., Tire & Oil Co., Inc. v. Env., Health, & Nat. Res.	92 EHR 0754	Nesnow	08/30/93	
Safeway Removal, Inc. v. Environment, Health, & Natural Res.	92 EHR 0826	West	03/12/93	8:1 NCR 83
White Oak Chapter of the Izaak Walton League, Inc., and National Parks and Conservation Association, Inc. v. Division of Solid Waste Management, EHR and Haywood County Elizabeth City/Pasquotank Cty Mun Airport Auth v. EHNHR	92 EHR 0881	West	09/14/93	
Interstate Brands Corp & Donald Leffew v. Env., Health, & Nat. Res.	92 EHR 1140	Gray	04/13/93	
Service Oil Company v. Environment, Health, & Natural Resources	92 EHR 1201 ^{*1}	Reilly	08/12/93	
Interstate Brands Corp & Donald Leffew v. Env., Health, & Nat. Res.	92 EHR 1205	Reilly	05/27/93	
Residents of Camm & Shell v. Health Environmental - Septic Tank Div.	92 EHR 1224 ^{*1}	Reilly	08/12/93	
City of Salisbury v. Environment, Health, & Natural Resources	92 EHR 1462	Morrison	08/25/93	
Willie M. Watford v. Hertford Gates District Health Department	92 EHR 1472	Morrison	04/22/93	
Standard Speciality Contractors, Inc. v. EHNHR	92 EHR 1600	Chess	03/24/93	
Shawqi A. Jaber v. Environment, Health, & Natural Resources	92 EHR 1660	Reilly	05/21/93	
Angela Power, Albert Power v. Children's Special Health Svcs.	92 EHR 1784	Becton	07/07/93	
Rayco Utilities, Inc. v. Environment, Health, & Natural Resources	93 EHR 0008	Becton	03/24/93	
Erby Lamar Grainger v. Environment, Health, & Natural Resources	93 EHR 0063	Morrison	09/17/93	
Mustafa E. Essa v. Environment, Health, & Natural Resources	93 EHR 0071	Reilly	06/21/93	
Charlie Garfield McPherson Swine Farm v. Env., Health, & Nat. Res.	93 EHR 0146	Gray	03/29/93	
Rosetta Brimage, Vanessa Pack v. Env. Health of Craven County	93 EHR 0181	Reilly	07/23/93	8:10 NCR 870
R.L. Stowe Mills, Inc. v. Environment, Health, & Natural Resources	93 EHR 0206	Nesnow	05/20/93	
O.C. Stafford/Larry Hancy v. Montgomery Cty. Health Dept.	93 EHR 0219	Morrison	08/11/93	8:11 NCR 996
Fred M. Grooms v. Environment, Health, & Natural Resources	93 EHR 0224	Gray	06/07/93	
Bobby Anderson v. Environment, Health, & Natural Resources	93 EHR 0276	West	08/27/93	8:12 NCR 1176
Shell Bros. Dist., Inc. v. Environment, Health, & Natural Resources	93 EHR 0299	Reilly	06/07/93	
Fred C. Gosnell & wife, Patricia T. Gosnell v. Env., Health, & Nat. Res.	93 EHR 0308	Becton	05/18/93	
Holding Bros., Inc. v. Environment, Health, & Natural Resources	93 EHR 0340	Becton	08/11/93	
Hamilton Beach/Proctor-Silex, Inc. v. Environment, Health, & Natrl Res	93 EHR 0380	Nesnow	08/03/93	8:11 NCR 1001
	93 EHR 0477	Reilly	06/29/93	

HUMAN RELATIONS COMMISSION

Human Relations Comm. on behalf of Tyrone Clark v. Myrtle Wilson	92 HRC 0560	Becton	09/07/93	8:13 NCR 1287
Human Relations Comm. on behalf of Marsha Crisco v. Hayden Morrison	93 HRC 0167	Reilly	08/18/93	8:12 NCR 1168

HUMAN RESOURCES

O.C. Williams v. Human Resources	91 CSE 0036 ^{*2}	Morgan	03/30/93	
Ronald Terry Brown v. Human Resources	91 CSE 0249	Morgan	05/17/93	
Dennis K. King v. Human Resources	91 CSE 1122	Morgan	07/28/93	
Cathy Harris, A/K/A Cathy D. Grubb v. Human Resources	91 CSE 1131	Morgan	08/24/93	
Raymond L. Griffin v. Human Resources	91 CSE 1148	Morgan	08/24/93	
O.C. Williams v. Human Resources	91 CSE 1158 ^{*2}	Morgan	03/30/93	
Michael L. Ray v. Human Resources	91 CSE 1173	Morgan	05/17/93	
Randy Chambliss v. Human Resources	91 CSE 1187	Morgan	04/28/93	
Melvin White v. Human Resources	91 CSE 1192	Morgan	05/17/93	
Joseph R. Kavaliauskas Jr. v. Human Resources	91 CSE 1204	Morgan	07/29/93	
Larry D. Boyd v. Human Resources	91 CSE 1214	Morgan	08/24/93	

* Consolidated cases.

CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
Jefferson D. Boylen v. Human Resources	91 CSE 1217	Morgan	05/17/93	
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Everett M. Eaton v. Human Resources	92 CSE 1221	Reilly	07/27/93	
Edward E. Brandon v. Human Resources	92 CSE 1237	Gray	04/16/93	
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John Henry Byrd v. Human Resources	92 CSE 1250	Reilly	06/04/93	
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Michael Anthony Dean v. Human Resources	92 CSE 1356	Morrison	08/13/93	
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James P. Miller III v. Human Resources	92 CSE 1361	Gray	04/16/93	
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Jack Dulq v. Human Resources	92 CSE 1374	Gray	07/16/93	
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Carlos Bernard Davis v. Human Resources	92 CSE 1404	Reilly	04/15/93	
Ocie C. Williams v. Human Resources	92 CSE 1405	Mann	06/25/93	
Terrance Freeman v. Human Resources	92 CSE 1411	Mann	06/07/93	
Floyd Excell Stafford v. Human Resources	92 CSE 1412	Reilly	08/31/93	
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Ronald H. Lockley v. Human Resources	92 CSE 1418	Nesnow	04/20/93	
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Roy Chester Robinson v. Human Resources	92 CSE 1423	Reilly	04/15/93	
Lynwood McClinton v. Human Resources	92 CSE 1424	Reilly	09/15/93	
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David W. Williams v. Human Resources	92 CSE 1448	Nesnow	07/19/93	
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Michael W. Bentley v. Human Resources	92 CSE 1512	Nesnow	06/09/93	
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Tony Thorpe v. Human Resources	92 CSE 1625	Chess	07/15/93	
Jeffery D. Williams v. Human Resources	92 CSE 1626	Mann	05/19/93	
Ronald Sowell v. Human Resources	92 CSE 1627	Reilly	07/19/93	
Billy Smith v. Human Resources	92 CSE 1629	Reilly	03/25/93	
Anthony Curry v. Human Resources	92 CSE 1631	Reilly	03/25/93	
John G. Williams v. Human Resources	92 CSE 1632	Mann	08/10/93	
Larry W. Golden v. Human Resources	92 CSE 1633	Reilly	03/25/93	
William J. Carter v. Human Resources	92 CSE 1637	Nesnow	05/19/93	
Mark W. Dean v. Human Resources	92 CSE 1638	Reilly	07/15/93	
Tyrone Thomas v. Human Resources	92 CSE 1640	Mann	07/22/93	
Rilton E. May v. Human Resources	92 CSE 1642	Morgan	07/29/93	
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Larry Thompson v. Human Resources	92 CSE 1655	Reilly	07/22/93	
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Eric L. Garland v. Human Resources	92 CSE 1671	Mann	07/22/93	
Ira Alston Jr. v. Human Resources	92 CSE 1703	Becton	06/16/93	
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Ronald G. Bolden v. Human Resources	92 CSE 1706	Mann	06/25/93	
Marvin Holley v. Human Resources	92 CSE 1713	Mann	06/08/93	
Eddie Short v. Human Resources	92 CSE 1714	West	07/15/93	
Michael Tywan Marsh v. Human Resources	92 CSE 1716	Gray	06/17/93	
Leroy Jones v. Human Resources	92 CSE 1718	Gray	06/17/93	
Antonio M. Townsend v. Human Resources	92 CSE 1721	Chess	08/30/93	
Kevin J. Close v. Human Resources	92 CSE 1727	Chess	08/30/93	
Thadus Bonapart v. Human Resources	92 CSE 1740	Chess	09/21/93	
Joseph Eric Lewis v. Human Resources	92 CSE 1748	Becton	08/02/93	
Ronald Dean Lowery v. Human Resources	92 CSE 1771	West	07/15/93	
Tamera S. Hatfield v. Human Resources	92 CSE 1772	Chess	08/30/93	
James E. Blakely v. Human Resources	92 CSE 1779	Nesnow	05/13/93	
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Kelvin D. Jackson v. Human Resources	93 CSE 0221	West	08/04/93	
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Anthony Watson v. Human Resources	93 CSE 0396	Nesnow	08/04/93	
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Laurel Langford v. Human Resources	92 DCS 1181	Gray	05/04/93	8:5 NCR 441
Ida Diane Davis v. Human Resources	92 DCS 1200	Gray	03/29/93	
Hatsuko Klein v. Human Resources	92 DCS 1271	Reilly	05/05/93	
Karen Mullins Martin v. Human Resources	92 DCS 1783	West	08/04/93	
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Carrolton of Dunn, Inc. v. Human Resources	92 DHR 1101	Morgan	07/26/93	
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-Lohmrichan-Melton Rentals, Bio-Medical Applications	92 DHR 1109*	Morgan	06/22/93	8:8 NCR 687

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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-Lohavichan-Melton Rentals, Bio-Medical Applications of North Carolina, Inc., d/b/a BMA of Raeford and Webb-Lohavichan Rentals	92 DHR 1110*	Morgan	06/22/93	8:8 NCR 687
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
James H. Hunt Jr. v. Division of Medical Assistance	92 DHR 1145	Becton	05/13/93	8:5 NCR 443
Barbara Jones v. Human Resources	92 DHR 1192	Nesnow	04/02/93	8:3 NCR 313
Joyce P. Williams v. Human Resources	92 DHR 1275	Gray	03/15/93	
Snoopy Day Care, Diane Hamby v. Child Day Care Licensing	92 DHR 1320	Morgan	05/21/93	
Cynthia Reed v. Human Resources	92 DHR 1329	Chess	05/10/93	
The Neighborhood Center v. Human Resources	92 DHR 1375	Chess	08/02/93	
Helm's Rest Home, Ron J. Schimpf/Edith H. Wilson v. Human Resources	92 DHR 1604	Reilly	05/10/93	
Jo Ann Kinsey v. NC Memorial Hospital Betty Hutton, Volunteer Svc.	92 DHR 1612	Chess	03/08/93	
Amy Clara Williamson v. NC Mem Hosp Betty Hutton, Volunteer Svc.	92 DHR 1613	Chess	03/08/93	
Betty Butler v. Human Resources	92 DHR 1614	Chess	03/09/93	
Wayne Sanders and Brenda Sanders v. Human Resources	92 DHR 1699	Reilly	06/07/93	8:7 NCR 632
Brithawen, Inc. v. Human Resources & Valdece Nursing Home, Inc.	92 DHR 1785	Gray	09/17/93	
Samuel Benson v. Office of Admin. Hearings for Medicaid	93 DHR 0010	Becton	03/11/93	
Vernice Whisnant v. Human Resources	93 DHR 0332	Morgan	09/23/93	
Cabarrus Cty Dept. of Social Svcs. v. Human Resources	93 DHR 0373	Morgan	07/20/93	
Hannah F. Tonkel v. Human Resources	93 DHR 0378	Nesnow	09/10/93	
Fannie Lewis v. Human Resources	93 DHR 0379	Gray	06/28/93	
Human Resources, Div. of Child Development v. Susan Amato	93 DHR 0418	Morgan	08/26/93	
Katie Kelly v. Human Resources	93 DHR 0441	Chess	07/26/93	
Christopher Durrer, Wilson Memorial Hospital v. Human Resources	93 DHR 0566	Chess	09/17/93	
Darryl A. Richardson v. Human Resources	93 DHR 0679	Becton	09/30/93	
Home Health Prof., Barbara P. Bradsher, Admin v. Human Resources	93 DHR 0737	Chess	09/23/93	
Sandra Gail Wilson v. Child Abuse/Neglect, Div. of Child Development	93 DHR 0782	Nesnow	09/09/93	
INSURANCE				
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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Philip B. Cates v. Justice, Attorney General's Office	90 DOJ 0353	Morgan	08/30/93	8:13 NCR 1281
Jennings Michael Bostic v. Sheriffs' Ed. & Traning Sids. Comm.	92 DOJ 0656*7	West	06/22/93	
Colin Carlisle Mayers v. Sheriffs' Ed. & Training Sids. Comm.	92 DOJ 0761	Morrison	05/10/93	
Jennings Michael Bostic v. Sheriffs' Ed. & Traning Sids. Comm.	92 DOJ 0829*7	West	06/22/93	
Michael Charles Kershner v. Criminal Justice Ed & Training Sids Comm	92 DOJ 0869	Morgan	08/11/93	
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Marilyn Jean Britt v. Criminal Justice Ed. & Training Sids. Comm.	92 DOJ 1088	Morrison	03/16/93	
Tim McCoy Deck v. Criminal Justice Ed. & Training Sids. Comm.	92 DOJ 1367	Chess	04/01/93	
Richard Zander Frink v. Criminal Justice Ed. & Traning Sids. Comm.	92 DOJ 1465	Nesnow	05/28/93	
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William B. Lipscomb v. Private Protective Services Board	93 DOJ 0458	Morrison	06/01/93	
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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	
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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	
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Gregory Samuel Parker v. Environment, Health, & Natural Resources	92 OSP 0188*	Chess	05/20/93	
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Julia Spinks v. Environment, Health, & Natural Resources	92 OSP 0313	Becton	04/12/93	8:4 NCR 382
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I. Cary Nailling v. UNC-CH	92 OSP 0394	Becton	04/20/93	
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Jimmy D. Wilkins v. Transportation	92 OSP 0432*	West	03/08/93	
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Anna L. Spencer v. Mecklenburg County Area Mental Health	92 OSP 0584	Becton	08/16/93	
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Glinda C. Smith v. Wildlife Resources Commission	92 OSP 0653	Morrison	03/12/93	
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Tracey Hall v. N.C. Central U., Off. of Scholarship & Student Aid	92 OSP 0815	Morgan	09/16/93	
Sondra Williams v. Winston-Salem State University	92 OSP 0847	Morrison	08/06/93	
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Nancy McAllister v. Camden County Department of Social Services	92 OSP 1185	Chess	09/07/93	
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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	
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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	
Rebecca Beauchesne v. University of North Carolina at Chapel Hill	92 OSP 1767	Becton	10/01/93	
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	
Dorothy Ann Harris v. Correction	93 OSP 0013	Morrison	09/15/93	
Brenda B. Miles v. University of North Carolina Chapel Hill	93 OSP 0033	Morrison	09/10/93	
Deborah J. Whitfield v. Caswell Center	93 OSP 0064	West	09/20/93	
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 & EHN	93 OSP 0111	Reilly	04/16/93	
William G. Fisher v. St Bd of Ed, Albemarle 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 ^{*8}	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	
Linda R. Wharton v. N.C. A & T University	93 OSP 0456	Chess	09/22/93	
Michael L. Pegram v. Correction	93 OSP 0472 ^{*8}	Reilly	06/28/93	
Hubert L. Holmes v. Transportation	93 OSP 0572	Reilly	08/17/93	
Timothy E. Blevins v. UNC A/K/A Western Carolina University	93 OSP 0604	Morgan	09/29/93	
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, Kye Lee Wheeler v. Caldwell County Department of Social Services	93 OSP 0752	Nesnow	09/16/93	
Kathleen E. Conran v. New Bern Police Dept., City of New Bern; and City of New Bern Police Civil Service Board	93 OSP 0797	Morrison	09/21/93	
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
Frances Billingsley v. Bd/Trustees/Teachers' & St. Emp. Ret. Sys.	92 DST 0996	West	09/20/93

CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
Dennis Willoughby v. Bd./Trustees/Teachers' & St. Emp. Ret. Sys.	92 DST 1439	West	09/20/93	8:14 NCR 1356
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
Rory Dale Swiggett v. Bd./Trustees/N.C. Local Govtl. Emp. Ret. Sys.	93 DST 0198	West	09/28/93	8:14 NCR 1360
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	

1991.

6. Although the Petitioner was interviewed for the position, Kelly Winkler, a white male, was awarded the position.
7. Of the 72 County Maintenance Engineers employed by the Respondent, none is female.
8. The position requires a four-year degree in Civil Engineering and three years of progressive experience; or a four-year degree in Engineering Technology and four years of progressive experience; or an equivalent combination of education and directly related experience.
9. Kelly Winkler received his Bachelor of Science in Civil Engineering from N.C.S.U. in December, 1989.
10. Since February, 1991, only two women, one of whom is the Petitioner, have applied for the County Maintenance Engineer position.
11. The Petitioner has a two year degree in Civil Engineering Technology.

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 was first employed by the Respondent as an Engineering Aide in the Construction Department in 1976. She was promoted to Engineering Technician I in the Construction Department in 1978, to Highway Inspector I in 1979, to Construction Technician II in 1984, and to Construction Technician III in 1988. Several months later, the Petitioner laterally transferred to Engineering Technician III in Traffic Services. As a result of the 1991 Engineering Study, her position was upgraded to Traffic Technician IV, the position which she currently holds.
2. On December 7, 1991, the Petitioner applied for the position of County Maintenance Engineer (Position No. 1105) in Caldwell County.
3. The Petitioner was interviewed for the position on December 10, 1991.
4. On March 7, 1992, the Respondent advised the Petitioner that the position she sought had been filled.
5. The position was filled by Kelly Winkler, a white male.

PETITIONER'S QUALIFICATIONS

7. The Petitioner has a two-year Associate in Applied Science in Civil Engineering Technology degree from Guilford Technical Community College (hereinafter "GTCC"). She graduated from GTCC with a grade point average of 3.81 out of a possible 4.00. All of the Petitioner's courses at GTCC were related to her engineering degree.
8. The Petitioner became a Certified Concrete Technician in July, 1979.
9. The Petitioner received a Certificate in Surveying from GTCC in August, 1986.
10. The Petitioner completed the Respondent's 16 week Highway Engineering Concepts course. Satisfactory completion of this course demonstrates an ability to understand and analyze complex engineering situations that might be encountered in the field. The Petitioner completed this course with a grade of 86.4.

11. Petitioner completed two courses in electricity at Forsyth Technical Community College.
12. The Petitioner has completed numerous training courses and workshops offered by the Respondent, including the following: Construction Mathematics, Highway Plan Reading, Multimedia First Aid Training, Basic Concrete, Nuclear Density Training, Fleet Safety Training, Asphalt Construction and Inspection, Radiological Monitors, Basic Cardiac Life Support, Basic Highway Engineering, Basic Construction Surveying, Basic Inspection, Structure Inspection, Supervisory Course 1, Asphalt Certification, and Computer and Data Security.
13. As reflected in her performance reviews, the Petitioner's work performance has been outstanding, requiring little supervision and her work experience has been versatile, including opportunities to develop a good knowledge of engineering.
14. The Petitioner possesses extensive knowledge of different material types; knowledge of and skills necessary for civil engineering relative to construction; knowledge of mathematics relevant to field surveying and engineering; knowledge of the use of surveying instruments; ability to formulate, interpret, and explain complex instructions, including plans and specifications and obtain adherence to them; and knowledge of contract administration. As early as 1980, she assumed responsibilities as senior inspector on a project.
15. The Petitioner has applied to take the Engineer in Training exam, which is a prerequisite to becoming a licensed Professional Engineer. She will be eligible to take the exam next spring.
16. The Petitioner has established good relationships with contractors and Department of Transportation ("DOT") employees and has successfully negotiated contract changes with contractors when necessary. She administered the logo signing program which required her to confer with representatives of local businesses, explain the program to them, prepare contracts, collect fees, supervise the bidding of construction contracts, and supervise the performance of contracts.
17. Robert Stone, a Resident Engineer, supervised the Petitioner when she worked as a project inspector. At that time, she worked independently and her work was generally of a high standard.
18. Mr. Stone testified that drainage work, pipe culvert installation work, seeding and reforestation work, guard rail repair, and bridge guard rail work were all maintenance jobs. He testified that the Petitioner did these jobs as a highway inspector under his supervision. He also testified that they also did concrete pavement slab removal and replacement, shoulder construction, asphalt resurfacing, thermoplastic pavement markings, catch basin and drop inlet installation, curb and gutter installation, and construction of traffic controls and that these jobs were also maintenance jobs. Both the Respondent's Maintenance and the Construction departments perform these kinds of operations. The Petitioner performed these operations under Mr. Stone's supervision.
19. Mr. Stone testified that during one period when his office was swamped with work, purchase order contracts were assigned to the Petitioner and she handled purchase orders normally handled by a resident engineer, without supervision by him.
20. Larry Young is a Transportation Engineer I and the Petitioner's supervisor. Mr. Young testified that the Petitioner administers construction contracts and works with the technician assigned to work with her on the project.
21. Mr. Young testified that the Petitioner works with engineers, doing traffic studies, administering contracts, and working on the logo program. He further testified that she communicates very well with the people she comes in contact with. She has provided training to engineers in the training program, instructing them on doing traffic studies, administering the logo program, and administering purchase order contracts.

22. When the Petitioner was interviewed by Roger Cates, she discussed her experience with him, answered questions about her knowledge of surveying and familiarity with construction machinery. During the interview, Mr. Cates did not indicate that the Petitioner lacked any qualifications necessary for the County Maintenance Engineer ("CME") position.
23. The Petitioner was subsequently interviewed for other CME positions and was judged qualified by the interviewer; however, after she was interviewed by Steven Ivey, the District Engineer for Respondent's Division 7, he wrote to her to advise her that the Respondent's Personnel Department did not consider her to have met the minimum qualifications requirements for the CME position.

WINKLER'S QUALIFICATIONS

24. Kelly Winkler graduated magna cum laude from North Carolina State University in December, 1989, with a four-year Bachelor of Science degree in Civil Engineering.
25. Mr. Winkler graduated with a 3.80 grade point average (out of possible 4.00) in civil engineering and a 3.6 grade point average overall.
26. Mr. Winkler was hired by the Respondent on January 20, 1990, as an Engineering Associate.
27. Mr. Winkler completed the Respondent's Highway Engineer Associate Program, Advanced Management Course, and Highway Engineering Concepts Course.
28. Mr. Winkler spent four and a half months in the Maintenance Department during his Engineering Training program, working with Roger Cates, his present supervisor.
29. In the Engineering Training Program, Mr. Winkler spent four and a half months working in the field and with various engineers in the Maintenance Department, four and a half months in the Construction Department, including 10 weeks in surveying and some time working with a survey party, working with the computer planning the initial roadway survey; ten weeks in the Structural Design department in Raleigh; ten weeks in Roadway Design as a draftsman and working on the computer, looking up standards and applying them to the design of new roadways; did a lot of estimating, then spent some time in Traffic working with signals and geometrics, traffic control, traffic engineering in general, traffic studies, and railroad crossings studies.
30. As a staff engineer, Mr. Winkler spent six months (at the time of his application for the CME position) working on roadway encroachment contracts and Adopt A Highway agreements. He administered cleaning contracts, handled subcontract agreements, helped do estimates for contracting services and new additions to the system, and gathered any kind of information that the division engineer, division maintenance engineer, or division construction engineer needed.
31. Mr. Winkler has some experience with purchase order contracts, but none involving road activities. As a staff engineer, he handled purchase order contracts for building eight service stations.
32. Mr. Winkler had no experience with scheduling, organizing and assigning work to accomplish maintenance plans and establish schedules. He had no experience with departmental budgeting, training others, setting work standards for other employees, reviewing other people's work, counseling and disciplining employees regarding work habits and the quantity and quality of work.
33. Mr. Winkler was familiar with the policies and procedures and the federal and state laws regarding highway maintenance.
34. At the time he applied for the Caldwell County Maintenance Engineer position, Mr. Winkler had never been responsible for federal contract compliance.

- 35. Mr. Winkler has taken and passed the Engineer in Training examination.
- 36. Mr. Winkler was promoted to Transportation Engineer I on July 20, 1991.
- 37. Except for his Engineering Associate training program, Mr. Winkler had no training in personnel matters and little experience supervising work crews.

WEIGHING OF QUALIFICATIONS

- 38. Guidelines developed by the Office of State Personnel (hereinafter "OSP") provide that when the primary base level education requirement is graduation from a four-year college or university, the equivalency in experience will be two years of directly related experience for every one year of formal education required. (Respondent's Exhibit Book II, exhibit I1, p.2). These OSP guidelines have not been promulgated as rules or regulations codified in the North Carolina Administrative Code.
- 39. The Petitioner's two-year degree in Civil Engineering Technology was two years short of the four year degree which was the primary base level educational requirement for County Maintenance Engineer position.
- 40. Applying the OSP guidelines, the Respondent determined that the Petitioner needed two years of "directly related experience" for every year of formal education she lacked.
- 41. According to the OSP equivalency guidelines, in order to meet the posted requirements, the Petitioner needed seven (7) years of progressive transportation engineering experience: four years of directly related experience to meet the educational requirement plus the three years of work experience required by the job posting.
- 42. For the purposes of a position at the Engineering I level, the Respondent and OSP deem "progressive transportation engineering experience" to mean experience at the Technician III level or above.
- 43. Applying the equivalency formula, the Respondent determined that the Petitioner's four (4) years of progressive transportation experience at the Technician III level or above, was three (3) years short of the seven years of experience required by the posting for an applicant with an associate engineering degree.
- 44. Mr. Winkler met the primary base level education requirement for the County Maintenance Engineer position.
- 45. Mr. Winkler's two years of progressive transportation engineering experience left him one year short of the three years of work experience required by the job posting.
- 46. Notwithstanding his failure to meet the posted job qualifications, the Respondent allowed Mr. Winkler to work against the position of County Maintenance Engineer at a reduced salary.
- 47. Other OSP guidelines provided to the Respondent suggest that "should a posting for a County Maintenance Engineer position yield no qualified applicants, DOT may work individuals against the County Maintenance Engineer class as a County Maintenance Supervisor (SC 71) until the employee has demonstrated that he/she is actually performing II level engineering work and has completed the necessary training as measured by DOT. In those instances where the employee is serving in a work-against capacity, has completed the DOT training program and still is not performing up to expectations, the position would be reallocated to the County Maintenance Supervisor class." (Respondent's Exhibit Book II, exhibits 12 & 14).
- 48. Although there was testimony offered that OSP does not permit persons to be placed in a training

progression for more than two years, no rule or regulation to this effect was identified by the Respondent.

OTHER CONSIDERATIONS

49. None of the 72 County Maintenance Engineers employed by the Respondent is a female.
50. As a result of an engineering study implemented in February, 1991, the County Maintenance Engineer position was upgraded two steps. One of the goals of the upgrading was to attract professional level people with bachelor of science degrees in civil engineering.
51. Twenty County Maintenance Engineer positions have been filled since February, 1991.
52. Of the approximately 156 applicants for the twenty positions, only five applications were from females.
53. Four of the five applications submitted by females were submitted by the Petitioner.
54. Of the twenty successful applicants for the County Maintenance Engineer positions filled since February, 1991, all twenty were working for the Respondent as either Engineers, Engineering Associates, or Road Maintenance Supervisors.
55. None of the twenty successful applicants for the County Maintenance Engineering positions were Technicians at the time they were promoted.
56. Fourteen of the twenty successful applicants held a bachelor's or master's degree in Engineering or Engineering Technology.
57. The five successful applicants who did not have a four-year engineering degree had at least eighteen or more years with the Respondent or the Virginia Department of Transportation.
58. John C. Jarrell, a high school graduate with two years of college towards a degree in business administration, was made a County Maintenance Supervisor in Alexander County at salary grade 71, with progression to County Maintenance Engineer outlined.
59. The County Maintenance Supervisor is a lower level position than County Maintenance Engineer.
60. Mr. Jarrell applied for a County Maintenance Engineer position in Alexander County. He was given a County Maintenance Supervisor position by means of an agreement between OSP and the Respondent allowing a downgrading of a position when there are no qualified applicants.
61. Kelly Winkler, the successful applicant for the position which is the subject matter of this grievance, also applied for the County Maintenance Engineer position in Alexander County.
62. In addition to Mr. Winkler, Billy Trivette applied for the Alexander County Maintenance Engineer position; Mr. Trivette had a B.S.C.E. and two years with the Respondent. Another applicant for the position also had a 4 year engineering degree and five years DOT work experience.
63. At the time Mr. Jarrell applied for the County Maintenance Engineer position, he was a Road Maintenance Supervisor which is comparable in pay to a technician position, and he had 24 years of DOT work experience.
64. Joseph K. Wilson was made County Maintenance Engineer on June 22, 1991. Mr. Wilson had 1 year, 9 months experience, a B.S.C.E. and was an Assistant District Engineer at the time of his promotion.

65. Darrick Sheffield Lee was made County Maintenance Engineer in Martin County on January 5, 1991. Mr. Lee had approximately 7 months experience with the Respondent, and approximately 2 years of experience with a private firm performing engineering work. He held a B.S.C.E. and was a Highway Engineer I at the time of his promotion.

66. William Henry Adkins was made County Maintenance Engineer in Wilson County on August 1, 1992. At the time of his promotion, Mr. Adkins was a Road Maintenance Supervisor. Mr. Adkins is a high school graduate with 25 years of experience at the Virginia Department of Transportation. Much of Mr. Adkins' experience at Virginia Department of Transportation was in the area of maintenance.

67. Although Division 11 ranks second among the Respondent's fourteen Highway Divisions in terms of female utilization, there are no female engineers at any level in Division 11.

68. The nontraditional positions held by females in Division 11 include a Technician IV, a Machine Operator IV, a truck driver position or highway maintenance position, and technicians in the Construction Department.

69. Eleven percent of Division 11's employees are female.

70. The highest ranking position held by a female in Division 11 is a Technician IV position.

71. Mr. Wade Hoke, the Division Engineer for Division 11 has hired 26 engineers in his division, all of whom were male. He has had two female applicants for engineering positions, one of them the Petitioner, and the other a graduate engineer whom Mr. Hoke judged to be qualified.

72. The Respondent's Affirmative Action Plan is subject to audit and approval by the Federal Highway Administration ("FHWA") and OSP. An annual audit begins in October of each year. One measure of the program's success is statistical. With respect to promotions, the FHWA auditor's benchmark is a promotion rate equal to the minority's representation in the Respondent's work force. On September 3, 1992, females represented approximately 18% of the Respondent's work force. For the audit period of October 1, 1991 through September 30, 1992, the promotion rate for females was approximately 19%. The FHWA auditor found this rate acceptable.

73. The Respondent has fallen short of its parity goals for females. The Respondent attributes its failure to meet its goal to the difficulty it has had recruiting females to work as heavy equipment operators, dump truck drivers, and the failure of the technical and engineering educational process to attract sufficient females to meet EEO requirements where technician and engineering jobs are concerned.

74. The Respondent recruits for minority and female B.S.C.E. graduates from the Washington, D.C. area, and all over the southeast, as far south as Louisiana. After completing the Respondent's Training Program, B.S.C.E. graduates apply for or are placed in Engineer I level positions. Female engineers, by preference and interest, go into Roadway Design, Bridge Design, Traffic Engineering and Planning. They do not generally apply for jobs in the Divisions, although several female engineers have become Resident Construction Engineers.

75. Division 11 has not actively recruited females for engineering positions.

76. As of June, 1992, Division 11 had 597 employees, 65 of whom were female. None of the females are employed in engineering positions.

77. There was no evidence of the Respondent attempting to correct the deficiency in meeting its parity goals by allowing women occupying technician positions such as the Petitioner's to work against engineering positions as has been done in the past with male employees.

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

following:

CONCLUSIONS OF LAW

1. Discrimination on the basis of gender is an unlawful employment practice. N.C. Gen. Stat. <<126-16, -17, -36 and <143-422.2
2. In order to prove a claim of sex discrimination, the Petitioner must establish a prima facie case by proving by the preponderance of the evidence that some adverse employment action was taken against her on account of her gender. To rebut the presumption of discrimination, the employer must clearly articulate the non-discriminatory reason for the adverse employment action. Once the employer has offered non-discriminatory reasons for its action, the employee must prove that the employer's stated reasons are, in fact, only a pretext for intentional discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).
3. Once an employee shows that gender was a motivating factor in an employment decision, the employer may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).
4. In promotion cases, the Petitioner creates an initial inference of illegal motivation by establishing the following: (i) the Petitioner was within a class protected by the law; (ii) the Petitioner applied for a promotion; (iii) the Respondent had a vacancy for which it was seeking applicants; (iv) the Petitioner was qualified; and (v) the Petitioner was denied the position and the Respondent continued to seek applicants or filled the position with a person from a different class.
5. The Respondent contends that since the Petitioner allegedly did not meet the posted qualifications for the County Maintenance Engineer position, she cannot establish a prima facie case of sex discrimination.
6. The Petitioner, on the other hand, contends that the only reason she was found by the Respondent to be unqualified is that it used standards which had not been promulgated pursuant to the procedures required by the North Carolina Administrative Procedures Act, Chapter 150B of the North Carolina General Statutes ("APA") to determine whether she was qualified or not.
7. The Petitioner further contends that as between herself and Mr. Winkler who did not meet the posted qualifications, she was the more qualified of the two.
8. Pursuant to the provisions of the Administrative Procedure Act, a "'Rule' means any agency regulation, standard or statement of general applicability that implements or interprets laws enacted by the General Assembly" N.C. Gen. Stat. §150B-2(8a).
9. The OSP guideline regarding equivalency determinations, which mandates two years of directly related experience for every one year of formal education in those instances when a job applicant does not meet the posted base level educational requirement, meets the APA's definition of a "Rule." The OSP guideline establishes a standard that is of general applicability and implements or interprets the provisions of the State Personnel Act found at North Carolina General Statutes section 126-4(3).
10. Since the OSP equivalency guideline has never been promulgated as a rule or regulation under the procedures provided for in the APA, it is an invalid rule which cannot be utilized to determine the Petitioner's qualifications.
11. Since Mr. Cates and other subsequent interviewers considered the Petitioner qualified, but for the application of the invalid rule regarding equivalency, the Petitioner would have been considered qualified for the County Maintenance Engineer position.

Sex Discrimination

12. The Petitioner has met her burden of producing evidence to establish a prima facie case of sex discrimination.
13. The Petitioner having established a prima facie case, the Respondent has the burden of producing evidence of legitimate reasons for selecting Mr. Winkler.
14. Among the non-discriminatory reason articulated by the Respondent were the following:
 - A. Winkler met the primary base level educational requirement for the position and the Petitioner did not. The Respondent had made a decision to value a B.S.C.E. degree more highly than any other combination of education and experience.
 - B. Winkler had experience at the engineering level. The Petitioner allegedly did not.
 - C. Winkler had experience in maintenance. The Petitioner had no experience in the maintenance branch. All of the Petitioner's experience was in construction and traffic services.
 - D. Because he had worked in Division 11 as an Engineering Associate and as a Staff Engineer, Winkler was a known commodity.
15. In making individual employment decisions the employer is free to weigh each person's particular talents and performance. So long as the judgment of individual merit is made in good faith and is not corrupted by stereotypical assumptions about the abilities of certain classes of people, the judgment of the employer can be sustained as a "legitimate reason." Causey v. Ford Motor Co., 516 F.2d 416, 423 (5th Cir. 1975).
16. The Petitioner's evidence regarding the pretextual nature the Respondent's reasons including among other things, the following:
 - A. Despite failing to meet its parity goals, Division 11 made no special efforts to recruit women or promote women to engineering level positions.
 - B. The Petitioner had performed duties normally handled by a resident engineer when she handled purchase order contracts.
 - C. The Petitioner performed maintenance jobs and functions while she was a highway inspector even though the work was performed by the Construction branch rather than the Maintenance branch.
17. When Mr. Winkler applied for the County Maintenance Engineer position in Alexander County, the position went to John C. Jarrell, a high school graduate with two years of college towards a degree in business administration and twenty-four years of employment with the Respondent, under an agreement with OSP which allowed the Respondent to down grade the position to that of County Maintenance Supervisor. Mr. Jarrell's Road Maintenance Supervisor position was comparable in pay to the Petitioner's Technician IV position. The only significant differences between Mr. Jarrell and the Petitioner are that the Petitioner is a female, the Petitioner possesses a more relevant educational background, Mr. Jarrell had more years of DOT experience, and Mr. Jarrell worked in the Maintenance Division. The fact that Mr. Winkler was considered the more qualified applicant when he went up against the Petitioner, but was not considered as such when he went up against a male with qualifications similar to the Petitioner's, leads one to the inescapable conclusion that the Petitioner's sex must have played a significant role in the Respondent's determination of who was the better qualified applicant.

18. The evidence indicates that the Respondent had an established practice of allowing its long time male employees to advance up the career ladder by either downgrading positions until the employee gained the necessary credentials to move up or by allowing the male employee to work against a job position. The Petitioner was not offered the same opportunity that has been offered to her male counterparts in the past even though she had similar educational background and work experience. Again, the only explanation for this difference in treatment appears to be the Petitioner's gender.
19. Gender having been a motivating factor in the Respondent's decision not to promote the Petitioner, the question arises whether or not the Respondent would have made the same decision even if it had not considered the Petitioner's gender in making the promotion decision.
20. Even though the Respondent had made a decision to value the B.S.C.E. degree above other degrees and combinations of education and experience, there were still five instances where applicants who lacked the preferred degree were promoted to the CME position after February, 1991.
21. Even though the Respondent had made a decision to value the B.S.C.E. degree above other degrees and combinations of education and experience, there were two instances where the Respondent down graded the CME position to allow long term male employees who did not meet the posted qualifications to acquire the necessary experience for promotion to the CME position.
22. Thus one concludes that had the Petitioner been a male, it is more probable than not that she would have been given an opportunity to work against the CME position.
23. The Respondent discriminated against the Petitioner on the basis of her gender when it failed to promote her to the County Maintenance Engineer position in Caldwell County.

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 the Petitioner be awarded the County Maintenance Engineer position in Caldwell County, or a comparable position, the differential in pay between the CME position and the Technician IV position since March 28, 1992, and reasonable attorney fees.

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 State Personnel 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 22nd day of September, 1993.

Brenda B. Becton
Administrative Law Judge

Petitioner.

Y.

Respondent.

RECOMMENDED DECISION

APPEARANCES

Respondent was represented by Assistant Attorney General Alexander M. Peters.

ISSUE

Under G.S. § 135-106(b), is the amount of the offset which reduces long-term disability benefits because of the receipt of social security disability benefits the gross amount of the social security disability benefits or the net amount after deduction of attorney fees and costs associated with obtaining the social security disability benefits?

FINDINGS OF FACT

The parties stipulated at the hearing to the following facts which the Administrative Law Judge finds to be the relevant facts of the case:

1. The Petitioner is a former employee of the State of North Carolina who was forced to retire because of illness.
2. As a result of his employment with the State of North Carolina and his disability, the Petitioner applied for long-term disability benefits under the Disability Income Plan administered by the Respondent. G.S. § 135-106. This application was approved and the Petitioner is receiving these long-term disability benefits.
3. Long-term disability benefits under the Disability Income Plan are subject to reduction by the amount of the primary disability benefits that a retiree receives from the Social Security Administration. G.S. § 135-106(b). This reduction shall hereinafter be referred to as the "offset."
4. The Petitioner also applied for disability insurance benefits under the Social Security Act. 42

U.S.C. § 423.

5. The Petitioner's claim for disability insurance benefits was denied by the Social Security Administration at the initial level. The Petitioner requested reconsideration of the denial of his claim for disability insurance benefits but was again denied. The Petitioner then requested an administrative hearing concerning his claim for disability insurance benefits.
6. The Petitioner retained Kathleen Shannon Glancy, Attorney at Law, to represent him at the administrative hearing on his claim for social security disability insurance benefits. The Petitioner and the attorney signed an agreement by which the attorney would receive no fee if the Petitioner's claim for disability insurance benefits were denied, but a fee of one-quarter of the back disability insurance benefits paid the Petitioner if the claim were approved. The Petitioner was also required to reimburse the attorney for any costs associated with the case.
7. After a hearing, social security's Administrative Law Judge approved the Petitioner's claim for disability insurance benefits under the Social Security Act.
8. Under the provisions of the Social Security Act, 42 U.S.C. § 406, one-quarter of the Petitioner's back disability insurance benefits, \$3,445.25, was withheld by the Social Security Administration and not paid to the Petitioner.
9. The Petitioner's attorney filed a petition on her own behalf with the Social Security Administration seeking approval of an attorney fee of one-quarter of the Petitioner's back disability insurance benefits, \$3,445.25. The attorney's petition was approved and the Social Security Administration paid \$3,445.25 directly to the attorney. In addition, the Petitioner reimbursed the attorney \$219.00 for costs that the attorney incurred in representing the Petitioner.
10. Upon learning that the Social Security Administration had approved the Petitioner's claim for disability insurance benefits, the Retirement Systems Division of the Department of the State Treasurer which acts as the Respondent's agent and administers the Disability Income Plan on a day to day basis made a computation of the offset that should be applied because the Petitioner had now received disability insurance benefits from the Social Security Administration for the same period of time that he had received long-term disability benefits from the Disability Income Plan. In computing the offset the Retirement Systems Division used the gross amount of disability insurance benefits for the Petitioner, rather than the net amount after attorney fees had been withheld by the Social Security Administration and paid to the Petitioner's attorney and after payment by the Petitioner of costs associated with presenting his case to the Social Security Administration.
11. The only issue presented in this case is whether under G.S. § 135-106(b) the amount of the offset should be the gross amount of disability insurance benefits under the Social Security Act or the net amount of those benefits after deduction of attorney fees and costs associated with obtaining the disability insurance benefits from the Social Security Administration.

ANALYSIS AND CONCLUSIONS OF LAW

State employees who become disabled by illness may obtain benefits under the Disability Income Plan of North Carolina. G.S. § 135-100 et seq. Long-term disability benefits under the Disability Income Plan are ". . . reduced by any primary Social Security disability benefits and by monthly payments for workers' compensation to which the participant or beneficiary may be entitled . . ." G.S. § 135-106(b). This case presents the question of how the language of G.S. § 135-106(b) should be interpreted when a recipient of long-term disability benefits has to pay attorney fees and costs associated with obtaining social security disability benefits.

The Respondent asserts that the key to understanding the offset is the reference to "primary Social

Security benefit" in the statute, arguing that the "primary" benefits are the benefits before any adjustment for attorney fees or costs. The Respondent's own interpretation of the offset is inconsistent with this argument. In cases where an individual is entitled to both workers' compensation benefits and social security disability benefits, the social security disability benefits are reduced because of the workers' compensation benefits. 42 U.S.C. § 424a(a). Since the Disability Income Plan also contains an offset for workers' compensation benefits, there is the potential for a double offset in cases in which an individual is eligible for workers' compensation, social security disability benefits and long-term disability benefits. This situation would be present whenever a State employee suffers a disabling injury on the job. If the Respondent were to offset the social security disability benefits before they had been reduced because of the workers' compensation there would be a double offset. The Respondent has wisely avoided such an irrational result by offsetting only the net social security disability benefits after they are reduced because of the workers' compensation offset. In so doing the Respondent effectively concedes that the word "primary" in the statute is not an absolute.

Seen in context, the word "primary" in G.S. § 135-106(b) has a rather different meaning than the Respondent proposes. Under the Social Security Act, benefits are payable not only to the disabled individual, but also to the minor children and often the spouse of the disabled person. 42 U.S.C. § 402(b), (c), and (d). The word "primary" in G.S. § 135-106(b) speaks to the obvious question, "Does the amount offset include the benefits going to the dependents?" The statute answers the question in the negative by referring to the "primary" benefits. The only benefits to be off set are the "primary" benefits going to the disabled individual, not the benefits going to the dependents.

The crucial word in G.S. § 135-106(b) is not "primary", but "entitled." The statute provides for an offset for the social security disability benefits for which the beneficiary "may be entitled." The entitlement to which the statute refers can only be the Petitioner's entitlement to benefits under the Social Security Act. We must, therefore, look to the terms of the Social Security Act to determine the amount to which the Petitioner is entitled. The Social Security Act provides a method by which attorneys who represent social security claimants are compensated. A claimant for social security benefits who is represented by counsel and who is successful in obtaining those benefits receives only three-quarters of the back benefits to which he or she would otherwise be entitled. 42 U.S.C. § 406. Social Security is required to "certify for payment" to the attorney the other one-quarter of the social security claimant's back benefits. The social security claimant never sees this money, because it is paid directly to the attorney. Legal fees paid by a social security claimant are an intrinsic part of the Social Security Act. A social security claimant may not be said to be entitled to benefits under the Social Security Act when the Social Security Act specifies that those benefits are to be paid not to the claimant, but to the claimant's attorney. Therefore, it must be held that the Petitioner was not entitled to the attorney fees paid to his attorney.

This interpretation of the statute is bolstered by the fact that it is not merely the Petitioner who benefitted by the legal counsel he retained. The offset gives the State of North Carolina an obvious interest in the outcome of the Petitioner's social security disability claim. In retaining counsel and pursuing administrative appeals of the denial of his social security disability claims, the Petitioner was acting in effect as a "Private Attorney General", pursuing the State's interests. It would be unjust enrichment for the State to receive a greater sum from the Petitioner than he actually received in back benefits, when the rest of the back benefits went to an attorney that the Petitioner retained to protect not only his interests, but those of the State. To do otherwise would be a tremendous disincentive to other beneficiaries of the Disability Income Plan to pursue their social security disability claims aggressively. *St. Vincent's Hospital v. Alires*, 778 P.2d 277 (Colo. App. 1989). Seen in this light it is only appropriate to reduce the amount of the offset not only by the fees paid directly by the Social Security Administration to the attorney, but also by the costs paid by the Petitioner to his attorney.

RECOMMENDED DECISION

The Petitioner's long-term disability benefits under the Disability Income Plan shall only be reduced by the net social security disability benefits that he received after deduction of attorney fees and costs associated with obtaining those social security disability benefits.

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 G.S. § 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and proposed Findings of Fact and to present written arguments to the agency. G.S. § 150B-36.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. G.S. § 150B-36.

The agency that will make the final administrative decision in this contested case is the Respondent, the Board of Trustees of the Teachers and State Employees Retirement System.

This 20th day of September, 1993.

Thomas R. West
Administrative Law Judge

service credits for employment omitted from the System through error.

4. The parties stipulate that Swiggett is entitled by law to purchase omitted service and service credits back to the date he was employed by the Town of Chapel Hill, April 20, 1976. See G.S. 128-26(m).

5. G.S. 128-27(d3) establishes the formula for calculating the allowance upon disability retirement of persons retiring on or after July 1, 1971 but prior to July 1, 1982. Under the formula established by this statute, the allowance is calculated on the basis of the member's average final compensation prior to his disability retirement and the creditable service he would have had at the age of 65 if the member had continued in service.

6. G.S. 128-27(d4) establishes the formula for calculating the allowance upon disability retirement of persons retiring on or after July 1, 1982. Under the formula established by this statute, the allowance is calculated in one of two ways. As relevant to this case, the disability allowance is equal to a service allowance calculated based on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

7. G.S. 128-27(d3) details the formula for computation of the disability allowance that was in force from July 1, 1971 through June 30, 1982. On October 9, 1981, Chapter 128 was amended by adding G.S. 128-27(d4) effective July 1, 1982.

8. If Swiggett's disability allowance is determined pursuant to G.S. 128-27(d3), the allowance is significantly greater than if determined pursuant to G.S. 128-27(d4) as a result of the method of calculation above. In addition, if the disability allowance is determined under G.S. 128-27(d3) rather than G.S. 128-27(d4), Swiggett's effort to re-purchase benefits back to the date he was hired becomes relevant to determining his disability allowance.

9. Swiggett contends that his disability allowance must be computed pursuant to G.S. 128-27(d3) because, but for the mistake of the Town of Chapel Hill, he would have had five(5) years of creditable service in the System in May 1981. Swiggett contends that a failure to compute his disability allowance pursuant to G.S.128-27(d3) would be an unnecessary impairment of his contract with the System and violate Article I, Section 19 of the Constitution of North Carolina and the Fifth and Fourteenth Amendments of the Constitution of the United States.

10. The System contends that Swiggett's disability allowance must be calculated pursuant to G.S. 127-28(d4) because the purchase of omitted service pursuant to G.S. 128-26(m) cannot retroactively change the date upon which a member completes five (5) years of creditable service.

11. In 1985, the case of Jesse R. Simpson, Richard D. Moore, on behalf of themselves and all other similarly situated v. North Carolina local Governmental Employees' Retirement System, et.al., 83 CVS 4461 was filed in Superior Court. The question presented in the case was whether the pension rights of vested members of the System may be made subject to adverse legislative modification without violating Article 1, Sec. 10 of the Constitution of the United States.

12. The Superior Court granted the System's motion for summary judgment in 1986. The case was appealed to the Court of Appeals.

13. On December 22, 1987, the Court of Appeals held that the relationship between the vested members of the System and the System is one of contract. The Court held that members of the System " ... had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested." Simpson v. N.C. Local Government Employees' Retirement System, 88 NC App. 218, 224 (1987).

The Court went on to hold an impairment of the contract could be constitutional if the impairment

was reasonable and necessary to serve an important public purpose. The Court reversed the summary judgement for the System and remanded the case for trial on, among other things, the issue of whether the impairment was reasonable and necessary.

14. On or about November 1, 1990, the Simpson case was certified as a class action. Three (3) classes were defined, among them Class C. Class C consisted of all current members of the System who had five (5) or more years of creditable service in the System prior to July 1, 1982 and who, if they became disabled and retired on disability on or after January 1, 1991 and on or before July 1, 2005, would be paid an allowance in accordance with G.S. 128-27(d3).

15. A Notice of the Class Action was issued on November 1, 1990. Swiggett did not receive a copy of the Notice from the Superior Court or at his workplace at the Town of Chapel Hill.

16. The Simpson case was settled in 1990 by the parties pursuant to the Settlement Agreement received as R2 in this contested case. The settlement provides that all Class C members who become disabled and retire on disability retirement on or after January 1, 1991 and on or before July 1, 2005 will be paid a disability allowance by the System in accordance with G.S. 128-27(d3).

17. Swiggett meets the definition of a member of Class C.

18. When members of the System have purchased service credits as allowed by G.S. 128-26, they have been treated with respect to the method of calculation of retirement benefits like all other members of the System with the same or similar creditable service.

Based on the foregoing, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The System's contention that Swiggett's purchase of omitted service pursuant to G.S. 128-26(m) cannot retroactively change the date upon which he completes five (5) years of creditable service is patently contrary to the System's policy of treating members of the System who have purchased service credits as allowed by G.S. 128-26 the same as all other members of the System with the same or similar creditable service.

As a result, I conclude as a matter of law that the System acted arbitrarily and capriciously in taking the position that Swiggett did not vest in the System prior to July 1, 1982, and calculating his disability allowance pursuant to G.S. 128-27(d3).

2. The System's treatment of Swiggett, in addition to being contrary to its stated policy and thus arbitrary and capricious, is not supported by any authority or argument that could allow a conclusion that there is a rational basis for treating members who purchase omitted service differently from members who do not have to purchase omitted service. Indeed, it is clear from G.S. 128-27(m)(3) that members who purchase omitted service pay at least the same as members who do not have to meet that burden and may indeed have to pay twice as much if the employer fails to contribute.

To not allow Swiggett to vest retroactively would not only be arbitrary and capricious, it would be State action denying Swiggett the equal protection of the law in violation of Article 1, Section 19 of the constitution of North Carolina and the Fifth and Fourteenth Amendments of the Constitution of the United States.

Based on the foregoing, the undersigned makes the following:

RECOMMENDED DECISION

The Board of Trustees of the North Carolina Local Governmental Employees' Retirement System should direct the Retirement Systems Division to calculate Swiggett's disability retirement benefit pursuant to G.S. 128-27(d3).

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 Board of Trustees of the North Carolina Local Governmental Employees' Retirement System.

This the 28th day of September, 1993.

Thomas R. West
Administrative Law Judge

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

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