

# *The* **NORTH CAROLINA REGISTER**

**IN THIS ISSUE . . . . .**

**EXECUTIVE ORDERS**

**IN ADDITION**  
**Voting Rights Act**

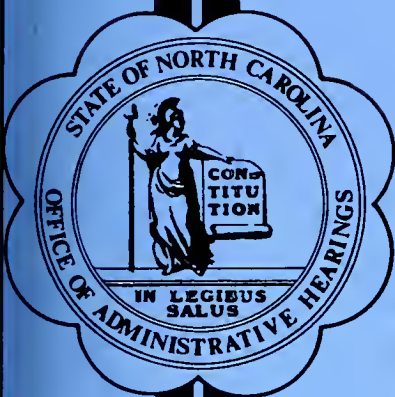
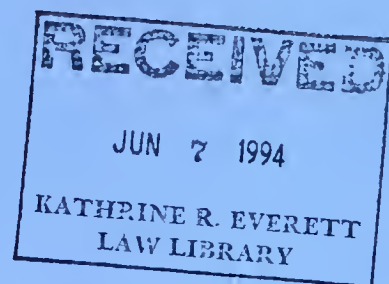
**PROPOSED RULES**  
**Environment, Health, and Natural Resources**  
**Human Resources**

**RRC OBJECTIONS**

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**ISSUE DATE: June 1, 1994**

**Volume 9 • Issue 5 • Pages 306 - 348**



## **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% 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 (\$.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* issue on April 1, 1986.

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

# NORTH CAROLINA REGISTER



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# NORTH CAROLINA REGISTER

## Publication Schedule

(April 1994 - January 1995)

Volume and Issue Number	Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing 15 days from notice	* End of Required Comment Period 30 days from notice	Last Day to Submit to RRC	** Earliest Effective Date
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
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9:6	06/15/94	05/24/94	06/01/94	06/30/94	07/15/94	07/20/94	09/01/94
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9:18	12/15/94	11/22/94	12/01/94	12/30/94	01/17/95	01/20/95	03/01/95
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9:20	01/17/95	12/21/94	12/30/94	02/01/95	02/16/95	02/20/95	04/01/95

*This table is published as a public service, and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2B .0103 and 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.*

**EXECUTIVE ORDER NO. 46  
COMMISSION ON SUBSTANCE ABUSE  
TREATMENT AND PREVENTION**

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

**Section 1. Establishment and Membership.**

(a) There is hereby established a Commission on Substance Abuse Treatment and Prevention ("Commission") and an Office of Substance Abuse Policy ("Office").

(b) The Commission shall consist of twenty persons appointed by the Governor. The Governor shall designate the Chair of the Commission. All Commission members shall serve at the pleasure of the Governor.

(c) Members shall be citizens, government officials and representatives of nonprofit organizations who have demonstrated interest, involvement, or expertise in issues related to prevention, intervention, and treatment of alcohol and other drug abuse.

(d) For the initial appointment period, ten of the members shall serve two-year terms and ten members shall serve four-year terms. At the expiration of these terms, subsequent member appointments shall be for four-year terms.

(e) The Commission shall meet regularly at the call of the Chair.

**Section 2. Functions.**

In fulfilling its responsibilities, the Commission shall have the following duties:

- (a) Engender cooperation and collaboration among agencies, public and private, involved in drug and alcohol abuse programs;
- (b) Review the North Carolina laws regarding substance abuse, including criminal and service-delivery statutes, and make recommendations concerning needed changes;
- (c) Review and recommend mechanisms for the coordination of state and local resources for addressing identified needs;
- (d) Conduct public hearings and advise the Governor and other appropriate state government departments and agency heads of the result and recommendations of the Commission;
- (e) Encourage local boards, councils, or commissions to mobilize resources to address substance abuse problems;

- (f) Encourage local boards, councils, or commissions to develop an implementation plan to meet identified needs;
- (g) Assist local boards, councils, or commissions in identifying model prevention, intervention, and treatment efforts;
- (h) Encourage program activities that increase public awareness of substance abuse and strategies to decrease the problem; and
- (i) Other duties as assigned by the Governor and/or Secretary of the Department of Administration.

**Section 3. Administration.**

(a) The heads of all State departments and agencies shall, to the extent permitted by law, provide the Commission and the Office with information they require to achieve the purposes of this Order.

(b) The Office shall hire such staff as may be necessary to help the Commission accomplish its goals, contingent upon the availability of funds.

(c) Members of the Commission shall serve without compensation, but may receive reimbursement contingent on the availability of funds for travel and subsistence expenses in accordance with state guidelines and procedures.

(d) The Commission and the Office shall be funded by the Governor's discretionary funds and from agencies who have primary responsibility for involvement in program issues affecting drugs and alcohol. For administrative purposes, the Commission and the Office shall be housed in the Department of Administration. Oversight shall be with the Governor's Policy Office.

**Section 4. Reports.**

(a) Every department, agency, institution, and organization subject to the Executive Budget Act (Chapter 143 of the General Statutes), and a direct or indirect recipient of state or federal substance abuse funding, shall report specific program and fiscal information semi-annually to the Office, in a report format approved by that office and the Office of State Budget and Management.

(b) These reports shall, at least, include a report of all revenues and expenditures for the period. In addition, each report shall contain expenditure activity against explicit substance abuse program performance measures determined by the department, agency, institution, or organization consistent with nomenclature and procedures for performance-based budgeting established by the Office of State Budget and Management.

(c) The Commission and the Office shall report their findings and recommendations to the Governor.

**Section 5. Rescission.**

Executive Orders 23, 64, and 132 of the Martin Administration are hereby rescinded.

This Executive Order is effective this the 27th day of April, 1994.

**EXECUTIVE ORDER NO. 47  
BOARD OF EDUCATION FOR  
THE SCHOOLS FOR THE DEAF**

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

**Section 1. Establishment and Purpose.**

There is hereby created the Board of Education for the Schools for the Deaf ("Board"). Its purpose shall be to provide direction and guidance to the North Carolina Schools for the Deaf ("Schools") and the Department of Human Resources ("DHR").

**Section 2. Membership and Terms.**

The Board shall consist of 12 voting members appointed by the Governor as follows:

- (A) Three members shall be parents of students that have attended the North Carolina Schools for the Deaf, with each of the three Schools represented;
- (B) Three members shall be at-large representatives;
- (C) Three members shall be educators with training in deaf education and awareness of current deaf issues and needs;
- (D) Two members of the business community who have vocational placement expertise; and
- (E) One member who is a past attendee of one of the Schools or a member of the North Carolina Association of the Deaf.
- (F) In addition, three students, one from each of the Schools, shall serve as non-voting advisors.

Three members shall be designated to serve initial terms of four years, three to serve initial terms of three years, three to serve initial terms of two years and three members to serve initial terms of one year. After the initial appointees' terms have expired, all members shall be appointed for a term of four years. No member appointed by

the Governor shall serve more than two successive terms.

To the extent possible, each member should have a background or interest in deaf children and their educational needs. Any appointment to fill a vacancy on the Board created by the resignation, dismissal, death, or disability of a member shall be for the balance of the unexpired term.

The Chair of the Board shall be designated by the Secretary of the DHR from among the Board members and shall hold this office for a two-year term. The Chair may be reappointed for additional terms.

**Section 3. Meetings and Administration.**

(A) The Board shall meet quarterly and at other times at the call of the Chair. A simple majority of the Board shall constitute a quorum. An affirmative vote of a majority of the Board shall be required to take action.

(B) Board members shall be reimbursed by DHR for subsistence and travel expenses in accordance with N.C.G.S. 138-5 or 138-6.

(C) DHR shall provide clerical and other administrative assistance to the Board.

(D) The Chair shall mail a copy of each Board meeting agenda to the Chair of the Council for the Deaf and Hard of Hearing (set up in N.C.G.S. 143B-216.31) ten days prior to the meeting.

**Section 4. Duties.**

(A) Evaluate and recommend changes to the Secretary of DHR on academic, curriculum, facility and budgetary matters in the Schools.

(B) Work to ensure equal access to a free, appropriate public education for all deaf children at the Schools.

(C) Review program development and consistency toward the goal of 24-hour quality educational, vocational, and residential programs at the Schools.

(D) Formulate and recommend to the Secretary of DHR policies, procedures, and quality assurance methods to achieve that goal.

(E) Interface with the Council for the Deaf and Hard of Hearing on issues of mutual interest.

This Order is effective immediately and shall terminate in four years, unless extended by further executive order.

Done in the Capital City of Raleigh, North Carolina, this the 10th day of May, 1994.



**EXECUTIVE ORDER NO. 48  
CONCERNING THE STATE  
COMMISSION ON NATIONAL AND  
COMMUNITY SERVICE**

WHEREAS, the increasing realization of the importance of volunteerism and civic participation, the growing recognition of community service as a means of community and state problem-solving, and the revival of national service as an avenue for addressing many of the country's unmet social, environmental, educational, and public safety needs have revealed new options for enhancing the quality of life for North Carolinians; and

WHEREAS, promoting the capability of North Carolina's people, communities, and enterprises to work collaboratively is vital to the long-term prosperity of this state; and

WHEREAS, building and encouraging community service as an integral part of the formula to our growth as a state and as a nation requires cooperative efforts by the public sector, the private sector, the nonprofit sector, and partnerships among these sectors; and

WHEREAS, a State Commission is necessary to advise and assist in the development of a comprehensive, statewide service plan for promoting volunteer involvement and citizen participation in North Carolina;

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

**Section 1. Establishment.**

The State Commission on National and Community Service ("Commission") is hereby established to encourage community service and volunteer participation as a means of community and state problem-solving; to promote and support voluntary citizen involvement in government and private programs throughout the state; to develop a long-term, comprehensive vision and plan of action for community service initiatives in North Carolina; and to serve as the state's liaison to national and state organizations which support its mission.

**Section 2. Membership.**

A. All members of the Commission shall be appointed by the Governor. It shall consist of no fewer than 15 and no more than 25 members. The Governor shall appoint four of the Commission

members from the Standing Committee on Youth Voice. Not more than 50 percent of the Commission plus one member may be from the same political party. To the extent possible, it shall be diverse in race, ethnicity, age, disability, and gender. Terms shall be for three years and shall be staggered.

B. The Commission shall include:

- (1) An individual with expertise in the educational, training, and developmental needs of youth, particularly disadvantaged youth.
- (2) An individual with experience in promoting the involvement of older adults in service and volunteerism.
- (3) A representative of community-based agencies or community-based organizations within the State.
- (4) The Superintendent of the Department of Public Instruction, or his designee.
- (5) A representative of local governments in the State.
- (6) A representative of local labor organizations in the State.
- (7) A representative of business.
- (8) At least four individuals between the ages of 12 and 25 who are service providers or recipients in a volunteer or service program.
- (9) A representative of the Corporation for National and Community Service described in Section 122(a) of the United States Public Law 103-82 ("P.L."), as a non-voting, ex officio member.

C. The Commission may include:

- (1) Members selected from among local educators.
- (2) Members selected from among experts in the delivery of human, educational, environmental, or public safety services to communities and persons.
- (3) Representatives of Native American tribes.
- (4) Members selected from among out-of-school youth or other "at-risk" youth.
- (5) Representatives of entities that receive assistance under the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4950 et seq.).

D. Not more than 25 percent of the Commission members may be employees of state government, though additional state agency representatives may sit on the Commission as non-voting, ex officio members.

E. Vacancies among the members shall be filled

by the Governor to serve for the remainder of the unexpired term.

### **Section 3. Officers.**

The Officers of the Commission shall be Chair and Vice-Chair. All officers shall be elected by the voting Commission members from among their ranks and shall serve for a term of one year. Vacancies in any offices shall be filled with an election by the Commission for the remainder of the unexpired term.

- a. **Chair:** It shall be the responsibility of the Chair to preside at all meetings of the Commission; to appoint all committee chairs; to assist all committee chairs in the planning of committee activities; to supervise all chairs as to the management of committee plans; to authorize and execute the wishes of the board; and to be an ex officio member of all committees.
- b. **Vice- Chair:** The Vice-Chair shall assist the Chair, and, in the absence of the Chair, perform those duties. The Vice-Chair shall accept special assignments from the Chair and perform other duties as delegated by the Commission.

### **Section 4. Effect On Other Executive Orders.**

The Commission is the successor group to the Governor's Voluntary Advisory Council, formed by Martin Administration Executive Order 139 and amended by Executive Order 185. That Council was disbanded by Executive Order 31, dated October 1, 1993. This Executive Order replaces and rescinds Executive Order 31.

### **Section 5. Standing Committees.**

The Standing Committees shall advise and assist the Commission in carrying out its duties and responsibilities. Committee chairs shall be appointed by the Commission Chair from among Commission members, but the committees' members need not be limited to Commission members. With the exception of the Standing Committee on Youth Voice, the Commission Chair, in consultation with the Committee Chairs, shall name the committees' members. Standing Committees of the Commission shall include:

- a. **Youth Voice:** The Standing Committee on Youth Voice shall consist of 24 members between the ages of 12 and 25. Members shall come from 12 regions of the state and be diverse in gender, race and ethnicity, geographic location,

physical ability, and economic and educational background. Its responsibilities shall include out-reach to youth statewide, developing and recommending policies and programs to the Commission, training other young people in the skills necessary to strengthen community service programs as well as bringing the perspective of young people to all Commission discussions and decisions. For the initial term, members of the Standing Committee on Youth Voice will be named by peer selection. Following the initial term, 12 Regional Councils (to be designated by the Commission) will each name two representatives to the Standing Committee. The Standing Committee on Youth Voice shall recommend to the Governor four members to serve on the Commission.

- b. **Volunteer Recognition:** The Standing Committee on Volunteer Recognition shall assist with the implementation of Governor's awards relating to exemplary volunteer service in the State; work with individual communities to develop local recognition programs; and explore additional opportunities to recognize individuals and organizations addressing community needs through volunteer service.
- c. **Evaluation:** The Standing Committee on Evaluation shall evaluate each program funded by the Corporation for National and Community Service (described in the P.L. 103-82) and state organizations which support the purpose of the Commission to assure their on-going quality.
- d. **Community Collaboration:** The Standing Committee on Community Collaboration shall promote communication and information sharing between state and local private and public initiatives to meet community needs.
- e. **Resource Development:** The Standing Committee on Resource Development shall develop and implement strategies to secure local, state, and federal resources to reinforce, expand, and initiate quality community programs across the state.
- f. **Training:** The Standing Committee on Training will develop and implement strategies for training and technical



assistance to community service programs, potential grant applicants and State Commission-funded programs, as well as work towards building service program partnerships statewide.

- g. Service Learning: The Standing Committee on Service Learning will act as a liaison between the State Commission, private and public institutions of higher education and the Department of Public Instruction to shape the service learning state plan and promote service learning in community-based and school-based programs and partnerships across the state.

#### **Section 6. Meetings.**

The Commission shall meet at least quarterly. Failure to attend at least 75 percent of called meetings in any calendar year shall result in removal from the Commission. A quorum shall consist of a simple majority of voting members.

#### **Section 7. Duties.**

The Commission shall, in the performance of its tasks and functions:

- a. Ensure that its funding decisions meet all federal and state statutory requirements.
- b. Recommend innovative, creative, statewide service programs to increase volunteer participation in all age groups and community-based problem-solving among diverse participants.
- c. Develop and implement a centralized, organized system of obtaining information and technical support concerning volunteerism and community service recruitment, projects, training methods, materials, and activities throughout North Carolina. Share such information and support upon request.
- d. Promote strong interagency collaboration as an avenue for maximizing resources and provide that model on the State level.
- e. Provide public recognition and support of individual volunteer efforts and successful or promising private sector initiatives and public/private partnerships of which address community needs.
- f. Stimulate increased community awareness of the impact of volunteer services in North Carolina.
- g. Utilize local, state, and federal resources to reinforce, expand, and initiate quality service programs.

- h. Assist the Governor's Office of Citizen Affairs in the planning and implementation of volunteer programs.
- i. Serve as the state's liaison and voice to appropriate national and state organizations which support its mission.
- j. Prepare a national three-year service plan for the State which follows state and federal guidelines.
- k. Prepare the financial assistance applications of the State under Sections 117B and 1301 of the P.L. 103-82.
- l. Assist in the preparation of the application of the North Carolina Department of Public Instruction for assistance under Section 113 of the P.L. 103-82.
- m. Prepare the State's application under Section 130 for the approval of service positions such as the national service educational award described in Subtitle D of the P.L. 103-82.
- n. Make technical assistance available to enable applicants for assistance under Section 121 to plan and implement service programs; and to apply for assistance under the federal service laws such as the P.L. 103-82.
- o. Assist in the provision of health care and child care benefits under Section 140 to participants in national service programs that receive assistance under Section 121 of the P.L. 103-82.
- p. Develop a state system for the recruitment and placement of participants in programs that receive assistance under the national service laws and disseminate information concerning national service programs that receive such assistance or approved national service positions.
- q. Administer the State's grant program in support of national service programs (using assistance provided to the State under Section 121 of the P.L. 103-82) including selection, oversight, and evaluation of grant recipients.
- r. Coordinate its functions (including recruitment, public awareness, and training activities) with any division of the federal ACTION program or the Corporation for National and Community Services outlined in the P.L. 103-82.

#### **Section 8. Administration and Expenses.**

The Governor's Office of Citizen Affairs shall provide necessary administrative and staff support

services to the Commission. The Commission is authorized to accept funds and in-kind services from other state and federal entities, as authorized by the North Carolina Executive Budget Act. No per diem allowance shall be paid to members of the Commission. Members of the Commission and staff may receive necessary travel and subsistence expenses in accordance with state law. These expenses shall be paid from federal funds where possible. If federal funds are not available, these expenses may be paid only if the Governor's Office has sufficient funds.

This Order is effective immediately.

Done in Raleigh, North Carolina, this the 12th day of May, 1994.

*This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.*

U.S. Department of Justice

Civil Rights Division

DLP:MAP:MJP:emr  
DJ 166-012-3  
94-0856

Voting Section  
P.O. Box 66128  
Washington, D.C. 20035-6128

April 26, 1994

Robert C. Cogswell, Jr., Esq.  
City Attorney  
P. O. Box 1513  
Fayetteville, North Carolina 28302-1513

Dear Mr. Cogswell:

This refers to the procedures for conducting the May 3, 1994, special bond election for the City of Fayetteville in Cumberland County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on February 28, 1994.

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

Sincerely,

Deval L. Patrick  
Assistant Attorney General  
Civil Rights Division

By:

Steven H. Rosenbaum  
Chief, Voting Section



**TITLE 10 - DEPARTMENT OF  
HUMAN RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to amend rules cited as 10 NCAC 18F .0312 - .0313, .0318 - .0319; and adopt rules cited as 10 NCAC 18F .0321 - .0322, with changes from the proposed text noticed in the Register, Volume 9, Issue 1, pages 13 - 23.*

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

*Reason for Proposed Action: To provide public notice of substantive changes made at the May 10, 1994 public hearing regarding conducting and reporting DWI assessments.*

*Comment Procedures: Written comments may be submitted to Charlotte Tucker, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, Albemarle Building, 325 N. Salisbury Street, Raleigh, N.C. 27603. These comments will be accepted from June 1, 1994 through July 1, 1994.*

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

**CHAPTER 18 - MENTAL HEALTH:  
OTHER PROGRAMS**

**SUBCHAPTER 18F - PROGRAM SUPPORT  
STANDARDS**

**SECTION .0300 - SUBSTANCE ABUSE  
ASSESSMENTS FOR INDIVIDUALS  
CHARGED WITH OR CONVICTED OF  
DRIVING WHILE IMPAIRED (DWI)**

**.0312 PURPOSE AND SCOPE**

~~The purpose of the rules of this Section is to establish specific procedures for conducting and reporting DWI substance abuse assessments. Such assessments may be sought either voluntarily on a~~

~~pre-trial basis or by order of the presiding judge. These rules apply to any facility licensed by the State as an alcoholism and substance abuse treatment facility or a facility which provides substance abuse services and is excluded from licensure under G.S. 122C-22 which wishes to perform DWI substance abuse assessments.~~

(a) The purpose of the rules of this Section is to establish specific procedures for conducting and reporting DWI substance abuse assessments, Alcohol and Drug Education Traffic Schools (ADETS), and treatment of DWI offenders.

(b) Assessments may be sought either voluntarily on a pre-trial basis or by order of the presiding judge.

(c) These Rules apply to any facility that conducts DWI assessments.

(d) In order for a facility to perform DWI assessments, it shall:

- (1) be licensed by the State as an alcoholism and substance abuse treatment facility; or
- (2) provide substance abuse services, and be excluded from licensure under G.S. 122C-22.

Statutory Authority G.S. 20-179(e)(6) and (m).

**.0313 DEFINITIONS**

For the purpose of the rules in this Section, the following terms shall have the meanings indicated:

(1) ~~"Alcohol and Drug Education Traffic School (ADETS)" means a prevention and intervention service which provides an educational program primarily for first offenders convicted of driving while impaired. This service is designed to reduce the recidivism rate for the offense of driving while impaired.~~

(1) "American Society of Addiction Medicine (ASAM) Placement Criteria" means the Patient Placement Criteria for the Treatment of Psychoactive Substance Abuse Disorders, copyright 1991 by the National Association of Addiction Treatment Providers and the American Society of Addiction Medicine. For these Rules, the ASAM Level I, Outpatient Treatment, has been divided into I.A., Short-term and I.B., Longer-term Outpatient Treatment.

(2) "Certified ADETS Instructor" means an individual who is certified by the Division in accordance with 10 NCAC 18M .0906 Instructor Certification, contained

- in Division publication, Standards for Area Programs and Their Contract Agencies, APSM 35-1, and available at the current printing cost.
- (2) (3) "Clinical Interview" means the face-to-face interview with a substance abuse professional intended to gather information on the client, including, but not limited to the following: demographics, medical history, past and present driving offense record, alcohol concentration of current offense, social and family history, substance abuse history, vocational background and mental status.
- (4) "Continuing Care" means an outpatient service designed to maximize the recovery experience begun in more intensive treatment; outpatient or inpatient. As a continuation of the treatment experience this service is expected to begin immediately upon the client's discharge from intensive treatment:
- (a) When the continuing care follows an inpatient treatment experience, it shall:
- (i) include a minimum of 20 contact hours of service scheduled no less than weekly, during a 30-day period; and
- (ii) continue for a minimum period of 90 days.
- (b) The services shall be provided according to a written continuing care plan which shall:
- (i) address the needs of the client; and
- (ii) utilize individual, family and group counseling as required to meet the needs of the client.
- (5) "Division" means the same as defined in G.S. 122C-3; and is hereafter referred to as DMH/DD/SAS.
- (3) (6) "DMH Form 508 (DWI Services Certificate of Completion)" means the four-part form which is used in documenting the offenders completion of the DWI substance abuse assessment; and treatment or ADETS and compliance or non-compliance of ADETS as appropriate.
- (7) "Driving record" means a person's complete North Carolina driving history, as maintained by the North Carolina Driver's License Division's history file.
- (8) "DSM" means the current edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association.
- (4) (9) "DWI" means impaired driving as described in G.S. 20-138.1.
- (10) "DWI categories of service" mean:
- (a) "Alcohol and Drug Education Traffic School (ADETS)" means an approved curriculum which shall:
- (i) include 10 to 13 contact hours in a classroom setting;
- (ii) be provided by area programs or their designated agencies with certified ADETS instructors; and
- (iii) be designed for persons:
- (A) who have only one DWI conviction (lifetime);
- (B) whose assessment did not identify a "Substance Abuse Handicap"; and
- (C) whose alcohol concentration was .14 or less.
- (b) "Day treatment" means a structured, outpatient service. It may also be called intensive outpatient treatment, as defined in 10 NCAC 14N .0900 and applicable portions of 10 NCAC 14K .0300, which include ASAM Level II treatment criteria.
- (c) "Inpatient residential treatment services" means an array of services which may include detoxification and rehabilitation in a structured environment, as set forth in 10 NCAC 14O .0300, and contained in Licensure Rules as defined in Item (14) of this Rule. Such services will correspond with ASAM Level III and Level IV treatment criteria.
- (d) "Longer-term outpatient treatment" means a structured program meeting the ASAM definition of Level I, Outpatient Treatment, and requiring a minimum of 40 contact hours scheduled to maintain the client in active treatment for a minimum period of 60 days, providing counseling and learning experiences which include the "Minimal Subject Content," as defined in this Rule. The facility must operate in compliance with Licensure Rules, 10 NCAC 14N .0700 and applicable portions of 10 NCAC 14K .0300.
- (e) "Short-term outpatient treatment" means a structured program meeting the broad definition of "ASAM Level I, Outpatient Treatment," and requiring a



minimum of 20 contact hours over a period of at least 30 days, including counseling and didactic experiences which include the minimal subject content. Facilities which are approved to provide this shall operate in compliance with Licensure Rules contained in 10 NCAC 14N .0700 and applicable portions of 10 NCAC 14K .0300.

- (5) (11) "DWI Substance Abuse Assessment" means a service provided to persons charged with or convicted of DWI to determine the presence or absence of a substance abuse handicap. The assessment involves a clinical interview as well as the use of a standardized test.
- (6) (12) "Facility" means the term as defined in G.S. 122C-3(14).
- (13) "Licensure rules" mean the rules contained in 10 NCAC 14K through 14O of the North Carolina Administrative Code and published in Division publication, Licensure Rules for MH/DD/SA Facilities, APSM 40-2.
- (14) "Minimal subject content" means the following list of subjects which shall be addressed in the educational portion of any treatment program serving DWI offenders:
- (a) Effects of Alcohol and Drugs on the Body/Brain;
  - (b) The Nature of Denial;
  - (c) Disease Concept of Chemical Dependency;
  - (d) Progression of Disease and Recovery (Jellinek Chart);
  - (e) Chemical Dependency and the Family;
  - (f) Introduction to Self-Help Groups/12 Step Recovery Programs;
  - (g) Relapse Prevention and Strategies for Recovery; and
  - (h) Safe Roads Act Penalties.
- (15) "Special service plan" means a plan for persons who exhibit unusual circumstances, such as severe hearing impairment, other physical disabilities, concurrent psychiatric illness, language and communication problems, intractable problems of distance, transportation and scheduling, and chronic offenders with multiple unsuccessful treatment experiences.
- (7) (16) "Standardized Test" means an instrument ~~a written test~~ approved by the

Department of Human Resources, with documented reliability and validity, which serves to assist the assessment agency or individual in determining if the client has a substance abuse handicap. A current listing of the approved standardized tests may be obtained by writing the DWI/Criminal Justice Branch, Division of ~~Mental Health, Mental Retardation and Substance Abuse Services~~ MH/DD/SAS, 325 N. Salisbury Street, Raleigh, NC 27603 27611.

- (8) (17) "Substance Abuse Handicap" means a degree of dysfunction directly related to the recurring use/abuse of an impairing substance.

Statutory Authority G.S. 20-138.1; 20-179; 122C-3.

### **.0318 RESPONSIBILITIES OF TREATMENT OR ADETS PROVIDERS**

(a) An individual shall be provided with documentation that outlines their obligation, resulting from the assessment recommendations. A written plan shall be developed by the facility providing the recommended treatment or ADETS to insure that the individual understands the requirements of the particular treatment or education service in which they are enrolled.

(b) Individuals shall not be denied the opportunity to complete the service recommended by the assessing agency. An individual who does not begin services within nine months of the date of the initial assessment shall be re-evaluated utilizing the results of the initial assessment.

(c) The facility providing the recommended treatment or ADETS shall have the individual execute the appropriate release of information giving that facility permission to report the client's progress to the: ~~Division of Mental Health, Mental Retardation, and Substance Abuse Services, the Division of Motor Vehicles, the Court and the Department of Correction.~~

- (1) DMH/DD/SAS;
- (2) Division of Motor Vehicles;
- (3) Court;
- (4) Department of Correction; and
- (5) assessing and treatment agencies, as appropriate.

(d) Identification of a substance abuse handicap shall be considered indicative of the need for treatment, when diagnostic criteria apply. In such instances, educationally-oriented and/or support group services shall only be provided as a supple-



ment to a more extensive treatment plan.

(e) If treatment is recommended and required per the court's judgement, such treatment shall be provided by a facility licensed by the state for the provision of such services. In addition, a client record shall be opened ~~on~~ for each client receiving treatment.

*Statutory Authority G.S. 20-179(m); 122C-26; 143B-147.*

### .0319 REPORTING REQUIREMENTS

(a) The assessment portion of the DMH Form 508 shall be completed ~~on~~ for each client who receives a DWI substance abuse assessment. An initial supply of this form may be obtained from the DWI/Criminal Justice Branch of the Division of ~~DMH/DD/SAS Mental Health, Mental Retardation, and Substance Abuse Services~~, 325 N. Salisbury Street, Raleigh, N.C. 27603 ~~27611~~.

(b) The assessment portion of DMH Form 508 shall be signed by a certified ~~alcoholism, drug abuse or~~ substance abuse counselor. The date of expiration of that professional's certification shall be indicated on the client's Certificate of Completion and no assessment shall be signed after the expiration date.

(c) The facility providing the recommended treatment or education shall have the client sign the appropriate release of information, and progress reports shall be filed with the court or the Department of Correction at intervals not to exceed six months. If treatment, education or both is recommended, all four pages of the DMH Form 508 shall be forwarded to the facility providing the recommended treatment or education.

(d) ~~In the event that no substance abuse handicap is identified and no treatment or education recommendations are made, the assessing agency shall forward the copies of DMH Form 508 as specified in part (g) of this Rule. Upon completion of the recommended treatment or ADETS service, the agency shall:~~

- (1) forward the top page of the completed DMH Form 508 to the DWI/Criminal Justice Branch, DMH/DD/SAS; and
- (2) retain, for a period of at least five years, the appropriate page of the form, and distribute the remaining pages to the offender and the court as specified on the bottom of the form.

(e) In the event that an assessment or treatment agency ceases to provide DWI-related services, the agency shall notify, in writing, the DWI Criminal Justice Branch to assure that all DMH Form 508s

and other related documents specified in G.S. 20-179(m) are properly processed. ~~The facility providing the recommended treatment or education shall have the client sign the appropriate release of information, and progress reports shall be filed with the court or the Department of Correction at intervals not to exceed six months.~~

(f) ~~If treatment and ADETS have been court ordered, and the individual does not successfully complete the requirements of the ADETS, a copy of the top sheet of DMH Form 508 showing non-compliance shall be forwarded to the DWI/Criminal Justice Branch, Division of Mental Health, Mental Retardation, and Substance Abuse Services. All four pages of the DMH Form 508 shall be retained by the facility providing the recommended treatment service until such service are completed. By February 15 of each year, all assessing agencies shall forward, in writing, to the DWI/Criminal Justice Branch of the Division the following information on the previous year's activities, which shall include but need not be limited to the number of:~~

- (1) pre-trial assessments conducted;
- (2) post trial assessments conducted;
- (3) individuals referred to ADETS; and
- (4) substance abuse handicaps identified and the recommended levels of treatment.

(g) ~~Upon completion of the recommended treatment or education service, the top page of the completed DMH Form 508 shall be forwarded to the DWI/Criminal Justice Branch, the Division of Mental Health, Mental Retardation, and Substance Abuse Services. The agency shall also retain the appropriate page of the form and distribute the remaining pages to the offender and the court as specified on the bottom of the form. The agency providing the service(s) shall retain its copy of this form for a period of not less than five years.~~

(h) ~~In the event that an assessment or treatment agency ceases providing DWI-related services, it shall be the responsibility of that agency to notify the DWI Criminal Justice Branch in writing to assure that all DMH Form 508 forms and other related documents specified in G.S. 20-179(m) are properly processed.~~

*Statutory Authority G.S. 20-179(m).*

### .0321 PLACEMENT CRITERIA FOR ASSESSED DWI CLIENTS

(a) Clients who have undergone a DWI substance abuse assessment shall be placed in the appropriate DWI category of service.

(b) Placement of clients in a specific category shall be based on the assessment outcome, diagnosis, and level of care determined to be necessary for treatment.

(c) In addition to the terms defined in Rule .0313(10) of this Section for each of the following progressive categories, determination for placement shall be based on the criteria specified in this Paragraph.

(1) ADETS:

- (A) the assessment did not identify a "Substance Abuse Handicap;
- (B) the person has no previous DWI conviction; and
- (C) the person had an alcohol concentration of 0.14% or less at the time of arrest.

(2) Short-term Outpatient Treatment:

- (A) the assessment outcome suggests diagnosis of psychoactive substance abuse only;
- (B) the client does not fit all aspects of the diagnosis, but, under certain circumstances, the clinical picture provides reason to conclude that a treatment setting would be more appropriate than ADETS. Some of these circumstances include, but are not limited to:

- (i) alcohol concentration is .15 or higher;
- (ii) refusal of breath test at time of arrest;
- (iii) problems relating to family history;
- (iv) other problems which seem to be a contributing factor to DWI behavior; such as grief, loss, etc.; and
- (v) the client meets the criteria for Level I of the ASAM Placement Criteria.

- (C) the person had an alcohol concentration of 0.14% or less at the time of arrest.

(3) Longer-term Outpatient Treatment:

- (A) when a client meets minimal conditions for the diagnosis of "psychoactive substance dependence," and
- (B) the criteria for Level I of the ASAM placement is met.

(4) Day Treatment:

- (A) the assessment confirms a diagnosis of psychoactive substance dependence,

moderate or severe;

- (B) the ASAM placement criteria for Level II Outpatient Treatment is met;

(C) program:

- (i) includes an educational component which addresses at least the minimal subject content, as defined in Rule .0313 of this Section;
- (ii) offers additional continuing care, urging voluntary participation of the client and significant others; and
- (iii) requires a minimum of 90 contact hours and participation of the client over a period of at least 90 days, for any client referred under G.S. 20-179(m) or (e)(6).

- (D) program may be preceded by a brief inpatient stay for detoxification or stabilization of a medical or psychiatric condition.

(5) Inpatient Residential Treatment Services:

- (A) the level of care requires that the client meets the same diagnostic criteria as Intensive Outpatient (dependence is moderate or severe);
- (B) outpatient treatment of other associated problems has not been successful;
- (C) the client meets the placement criteria for Levels III or IV (Inpatient) of the ASAM Placement Criteria with regard to the following six "patient problems areas" as set forth in ASAM Patient Placement Criteria, Adult Crosswalk; and the client exhibits:

- (i) withdrawal risk;
- (ii) need for medical monitoring;
- (iii) emotional and behavioral problems requiring a structured setting;
- (iv) high resistance to treatment;
- (v) inability to abstain; and
- (vi) lives in a negative and destructive environment.

- (D) in order for the client to meet the required 90-day time frame for treatment, the client, upon discharge, shall enroll in an approved continuing care or other outpatient program.

(6) Special Service Plan:

- (A) documented need for a special program to correspond with the



recommendations of the DWI assessment, which shall include documentation:

- (i) of the special circumstances which prove that the client is unable to participate in or benefit from the recommended basic structured program; and
- (ii) that the participation would be detrimental to the client.
- (B) Some of the conditions under which a Special Service Plan is implemented may include, but need not be limited to, the following:
  - (i) severe hearing impairment;
  - (ii) other physical disabilities;
  - (iii) concurrent psychiatric illness;
  - (iv) language and communication problems;
  - (v) intractable problems of distance, transportation and scheduling; and
  - (vi) chronic offenders with multiple unsuccessful treatment experiences.

Statutory Authority G.S. 20-179(e)(6) and (m).

#### **.0322 DOCUMENTATION REQUIREMENTS**

(a) When conducting the assessment for an individual charged with, or convicted of, offenses related to Driving While Impaired (DWI), DMH Form 508 shall be completed.

(b) If treatment is recommended, client record documentation shall include, but not be limited to, the following minimum requirements for each "DWI category of service" defined in Rule .0313 of this Section, except for the ADETS category:

- (1) all items specified in the "clinical interview," as defined in Rule .0313 of this Section;
- (2) results of the administration of an approved "standardized test," as defined in Rule .0313 of this Section;
- (3) release of information as set forth in Rules .0315 and .0318 of this Section; and
- (4) release of information covering any collateral contacts, and documentation of the collateral information.

(c) Substance abuse treatment records shall comply with the requirements in 10 NCAC 14K .0315(a) through (g), (i), (k), and in 10 NCAC 14K .0317.

Statutory Authority G.S. 20-179(e)(6) and (m).

\*\*\*\*\*

*Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Division of Medical Assistance intends to amend rules cited as 10 NCAC 50B .0313, .0407 and adopt 50B .0314.*

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

*The public hearing will be conducted at 1:30 p.m. on July 1, 1994 at the North Carolina Division of Medical Assistance, 1985 Umstead Drive, Room 132, Raleigh, NC 27603.*

*Reason for Proposed Action: Amendment necessary to apply the same methodology and restrictions on amount of guardianship fees as applied by Social Security.*

*Comment Procedures: Written comments concerning these Rules must be submitted by July 1, 1994, to: Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27603 ATTN: Clarence Ervin, APA Coordinator. Oral comments may be presented at the hearing. In addition, a fiscal impact statement is available upon written request from the same address.*

## **CHAPTER 50 - MEDICAL ASSISTANCE**

### **SUBCHAPTER 50B - ELIGIBILITY DETERMINATION**

#### **SECTION .0300 - CONDITIONS FOR ELIGIBILITY**

#### **.0313 INCOME**

(a) Income from the following sources shall be counted in the calculation of financial eligibility:

- (1) Unearned.
  - (A) RSDI,
  - (B) Veteran's Administration,
  - (C) Railroad Retirement,
  - (D) Pensions or retirement benefits,
  - (E) Workmen's Compensation,
  - (F) Unemployment Compensation,
  - (G) Support Payments,
  - (H) Contributions,
  - (I) Dividends or interest from stocks, bonds, and other investments,



- (J) Trust fund income,
  - (K) Private disability or employment compensation,
  - (L) That portion of educational loans, grants, and scholarships for maintenance,
  - (M) Work release,
  - (N) Lump sum payments,
  - (O) Military allotments,
  - (P) Brown Lung Benefits,
  - (Q) Black Lung Benefits,
  - (R) Trade Adjustment benefits,
  - (S) SSI when the client is in long term care,
  - (T) VA Aid and Attendance when the client is in long term care,
  - (U) Foster Care Board payments in excess of state maximum rates for M-AF clients who serve as foster parents,
  - (V) Income allocated from an institutionalized spouse to the client who is the community spouse as stated in 42 U.S.C. 1396r-5(d),
  - (W) Income allowed from an institutionalized spouse to the client who is a dependent family member as stated in 42 U.S.C. 1396r-5(d),
  - (X) Sheltered Workshop Income,
  - (Y) Loans if repayment of a loan and not counted in reserve,
  - (Z) Income deemed to Family and Children's clients.
- (2) Earned Income.
- (A) Income from wages, salaries, and commissions,
  - (B) Farm Income,
  - (C) Small business income including self-employment,
  - (D) Rental income,
  - (E) Income from roomers and boarders,
  - (F) Earned income of a child client who is a part-time student and a full-time employee,
  - (G) Supplemental payments in excess of state maximum rates for Foster Care Board payments paid by the county to Family and Children's clients who serve as foster parents,
  - (H) Earned income tax credits for the Aged, Blind or Disabled only,
  - (I) VA Aid and Attendance paid to a budget unit member who provides the aid and attendance.
- (3) Additional sources of income not listed in (1) or (2) of this Rule will be considered available unless specifically excluded by (b) of this Rule, or by regulation or law.
- (b) Income from the following sources shall not be counted in the calculation of financial eligibility:
- (1) Earned income of a child who is a part-time student but is not a full-time employee;
  - (2) Earned income of a child who is a full-time student;
  - (3) Incentive payments and training allowances made to WIN training participants;
  - (4) Payments for supportive services or reimbursement of out-of-pocket expenses made to volunteers serving as VISTA volunteers, foster grandparents, senior health aides, senior companions, Service Corps of Retired Executives, Active Corps of Executives, Retired Senior Volunteer Programs, Action Cooperative Volunteer Program, University Year for Action Program, and other programs under Titles I, II, and III of Public Law 93-113;
  - (5) Foster Care Board payments equal to or below the state maximum rates for Family and Children's clients who serve as foster parents;
  - (6) Earnings of M-AABD clients who are participating in ADAP (Adult Developmental Activity Program) training programs for a specified period;
  - (7) Income that is unpredictable, i.e., unplanned and arising only from time to time. Examples include occasional yard work, sporadic babysitting, etc.;
  - (8) Relocation payments;
  - (9) Value of the coupon allotment under the Food Stamp Program;
  - (10) Food (vegetables, dairy products, and meat) grown by or given to a member of the household. If home grown produce is sold, count as earned income;
  - (11) Benefits received from the Nutrition Program for the Elderly;
  - (12) Food Assistance under the Child Nutrition Act and National School Lunch Act;
  - (13) Assistance provided in cash or in kind under any governmental, civic, or charitable organization whose purpose

- is to provide social services or vocational rehabilitation. This includes V.R. incentive payments for training, education and allowance for dependents, grants for tuition, chore services under Title XX of the Social Security Act, VA aid and attendance or aid to the home bound if the individual is in a private living arrangement;
- (14) Loans or grants such as the GI Bill, civic, honorary and fraternal club scholarships, loans, or scholarships granted from private donations to the college, etc., except for any portion used or designated for maintenance;
  - (15) Loans, grants, or scholarships to undergraduates for educational purposes made or insured under any program administered by the U.S. Department of Education;
  - (16) Benefits received under Title VII of the Older Americans Act of 1965;
  - (17) Payments received under the Experimental Housing Allowance Program (EHAP);
  - (18) In-kind shelter and utility contributions paid directly to the supplier. For Family and Children's cases, shelter, utilities, or household furnishings made available to the client at no cost;
  - (19) Food/clothing contributions in Family and Children's cases (except for food allowance for persons temporarily absent in medical facilities up to 12 months);
  - (20) Income of a child under 21 in the budget unit who is participating in JTPA and is receiving as a child;
  - (21) Housing Improvement Grants approved by the N.C. Commission of Indian Affairs or funds distributed per capital or held in trust for Indian tribe members under P.L. 92-254, P.L. 93-134 or P.L. 94-540;
  - (22) Payments to Indian tribe members as permitted under P.L. 94-114;
  - (23) Payments made by Medicare to a home renal dialysis patient as medical benefits;
  - (24) SSI except for individuals in long term care;
  - (25) HUD Section 8 benefits when paid directly to the supplier or jointly to the supplier and client;
  - (26) Benefits received by a client who is a representative payee for another individual who is incompetent or incapable of handling his affairs. Such benefits must be accounted for separate from the payee's own income and resources;
  - (27) Special one time payments such as energy, weatherization assistance, or disaster assistance that is not designated as medical;
  - (28) The value of the U.S. Department of Agriculture donated foods (surplus commodities);
  - (29) Payments under the Alaska Native Claims Settlement Act, Public Law 92-203;
  - (30) Any payment received under Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970;
  - (31) HUD Community Development Block Grant funds received to finance the renovation of a privately owned residence;
  - (32) Reimbursement for transportation expenses incurred as a result of participation in the Community Work Experience Program or for use of client's own vehicle to obtain medical care or treatment;
  - (33) Adoption assistance;
  - (34) Incentive payments made to a client participating in a vocational rehabilitation program;
  - (35) Title XX funds received to pay for services rendered by another individual or agency;
  - (36) Any amount received as a refund of taxes paid;
  - (37) Any Cost of Living Allowance (COLA) increase in the RSDI benefit for a disabled widow or widower resulting from the 1983 Actuarial Reduction Formula (ARF) which caused the loss of SSI effective January, 1984, for an M-AA, M-AB, or M-AD client:
    - (A) Who received a disabled widow or widower's benefit and SSI simultaneously in 1983 as identified by the Social Security Administration, and
    - (B) Who lost SSI because of the elimination of the ARF, and
    - (C) Who is not now eligible for SSI, and
    - (D) Who was between 50 and 59 years of

- age in 1983, and
- (E) Who applied for Medicaid no later than June 30, 1988, and
  - (F) Who is classified as Categorically Needy;
- (38) Any Cost of Living Allowance (COLA) increase in the RSDI benefit for a client or his financially responsible spouse or parent(s), who:
- (A) Is classified as Categorically Needy for the M-AA, M-AB, or M-AD programs, and
  - (B) Lost SSI or State/County Special Assistance (S/C-SA) for any reason, and
  - (C) Would currently be eligible for SSI or S/C-SA if all COLA's since he was last eligible for and received RSDI and SSI or S/C-SA concurrently were disregarded;
- (39) The RSDI benefit for a client who:
- (A) Is a disabled widow or widower or surviving divorced spouse, and
  - (B) Received SSI for the month prior to the month he began receiving RSDI, and
  - (C) Would continue to be eligible for SSI if the RSDI benefit were not counted, and
  - (D) Is not entitled to a Medicare Part A.
- (40) Earnings of aged, blind and disabled individuals who have a plan for achieving self-support (PASS) that is approved by the Social Security Administration.

(c) Income levels for ~~purpose~~ purposes of establishing ~~financial~~ eligibility are those ~~amount~~ amounts approved by the N.C. General Assembly and stated in the Appropriations Act for categorically needy and medically needy classifications, except for the following:

- (1) The income level shall be reduced by one-third when an aged, blind or disabled individual lives in the household of another person and does not pay his proportionate share of household expenses. The one-third reduction shall not apply to children under nineteen years of age who live in the home of their parents;
- (2) An individual living in a long term care facility or other medical institution shall be allowed a ~~thirty dollar (\$30.00)~~ income level, and a couple in the same room in a long term care facility shall

~~be allowed a sixty dollar (\$60.00) as income level a deduction for personal needs described under Rule .0314 (Personal Needs Allowance) of this Subchapter.~~

- (3) ~~Individuals who are in a long term care facility for a temporary period of six months or less shall be allowed the income level provided by statute in addition to the thirty dollar (\$30.00) level.~~

*Authority G.S. 108A-25(b); 108A-61; 42 C.F.R. 435.135; 42 C.F.R. 435.731; 42 C.F.R. 435.732; 42 C.F.R. 435.733; 42 C.F.R. 435.811; 42 C.F.R. 435.812; 42 C.F.R. 435.831; 42 C.F.R. 435.832; 42 C.F.R. 435.1007; 42 U.S.C. 1383c(b); 42 U.S.C. 1383c(d); 45 C.F.R. 233.20; P.L. 99-272; Section 12202; Alexander v. Flaherty Consent Order filed February 14, 1992.*

#### **.0314 PERSONAL NEEDS ALLOWANCE**

An individual living in a long term care facility or other medical institution shall be allowed an amount for personal needs. The personal needs allowance is the sum of the following, but not to exceed the income maintenance level provided by statute for a single individual (or a couple, if in the same LTC room) in a private living arrangement.

- (1) Standard Personal Needs Amount:
  - (a) A thirty dollar (\$30.00) deduction for one individual; or
  - (b) Sixty dollar (\$60.00) deduction for a married couple in the same long term care facility; or
  - (c) Ninety dollar (\$90.00) deduction for a veteran (or the surviving spouse of a veteran) with no living dependents whose pension has been reduced to ninety dollars (\$90.00) by the Veterans Administration;
- (2) Individuals With Greater Need:
  - (a) Work Incentive Allowance: Individuals who reside in an ICF or ICF-MR facility and who are regularly engaged in work activities as part of their developmental plan for which they receive otherwise countable wages shall be allowed an incentive deduction in the following amounts:



Monthly Net Wages

Incentive Allowance

<u>\$ 1 to \$100</u>	<u>Up to \$50</u>
<u>\$101 to \$200</u>	<u>\$ 80</u>
<u>\$201 to \$300</u>	<u>\$130</u>
<u>\$301 and greater</u>	<u>\$212</u>

(b) Guardianship fees: Individuals, for whom a guardian of the estate has been named by the court, shall be allowed, for payment of guardianship fees, whichever of the following amounts is less:

- (i) 10% of total monthly income from all sources, both earned and unearned; or
- (ii) Twenty-five dollars (\$25.00) per month.

*Authority G.S. 108A-25(b); 42 C.F.R. 435.135; 42 C.F.R. 435.731; 42 C.F.R. 435.732; 42 C.F.R. 435.733; 42 C.F.R. 435.831; 42 U.S.C. 1383c(b); 42 U.S.C. 1383c(d).*

**SECTION .0400 - BUDGETING  
PRINCIPALS**

**.0407 PATIENT LIABILITY**

(a) Patient liability shall apply to clients who live in facilities for skilled nursing, intermediate nursing, intermediate nursing for mental retardation or other medical institutions.

(b) The client's patient liability for cost of care shall be computed as a monthly amount after deducting the following from his total income:

- (1) An amount for his personal needs as established under Rule ~~.0313~~ .0314 of this Subchapter;
- (2) Income given to the community spouse to provide him a total monthly income from all sources, equal to the "minimum monthly maintenance needs allowance" as defined in 42 U.S.C. 1396r-5(d)(3) (A)(i);
- (3) Income given to family members described in 42 U.S.C. 1396r-5(d)(1), to provide each, from all sources of income, a total monthly income equal to:
  - (A) One-third ~~one-third~~ of the amount established under 42 U.S.C. 1396r-5(d)(3)(A)(i); or
  - (B) Where there is no community spouse, an amount for the number of dependents, based on the income level for the corresponding budget unit

number, as approved by the NC General Assembly and stated in the Appropriations Act for categorically and medically needy classifications;

(4) The income maintenance level provided by statute for a single individual in a private living arrangement with no spouse or dependents at home, for whom the physician of record has provided a written statement that the required treatment is such that the patient is expected to return home within six months, shall be allowed;

(5) (4) An amount for unmet medical needs as determined under Paragraph (f) of this Rule.

(c) Patient liability shall apply to institutional charges incurred from the date of admission or the first day of the month as appropriate and shall not be prorated by days if the client lives in more than one institution during the month.

(d) The county department of social services shall notify the client, the institution and the state of the amount of the monthly liability and any changes or adjustments.

(e) When the patient liability as calculated in Paragraph (b) of this Rule exceeds the Medicaid reimbursement rate for the institution for a 31 day month:

- (1) The patient liability shall be the institution's Medicaid reimbursement rate for a 31 day month;
- (2) The client shall be placed on a deductible determined in accordance with Federal regulations and Rules .0404, .0405 and .0406 of this Subchapter.

(f) The amount deducted from income for unmet medical needs shall be determined as follows:

- (1) Unmet medical needs shall be the costs of:
  - (A) Medical care covered by the program but that exceeds limits on coverage of that care and that is not subject to payment by a third party;
  - (B) Medical care recognized under State and Federal tax law that is not covered by the program and that is not subject to payment by a third party; and
  - (C) Medicare and other health insurance premiums, deductibles, or coinsurance charges that are not subject to payment by a third party.
- (2) The amount of unmet medical needs

deducted from the patient's monthly income shall be limited to monthly charges for Medicare and other health insurance premiums.

- (3) The actual amount of incurred costs which are the patient's responsibility shall be deducted when reported from the patient's liability for one or more months.
- (4) Incurred costs shall be reported by the end of the six month Medicaid certification period following the certification period in which they were incurred.

*Authority* G.S. 108A-54; 42 C.F.R. 435.732; 42 C.F.R. 435.733; 42 C.F.R. 435.831; 42 C.F.R. 435.832; 42 U.S.C. 1396r-5.

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

*Notice* is hereby given in accordance with G.S. 150B-21.2 that EHNR - Commission for Health Services intends to amend rule cited as 15A NCAC 18A .2508; and adopt rule cited as 15A NCAC 18A .2539.

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

*The* public hearing will be conducted at 1:30 p.m. on July 21, 1994 at the Archdale Building, Ground Floor Hearing Room, 512 North Salisbury Street, Raleigh, N. C.

### *Reason for Proposed Action:*

15A NCAC 18A .2508 - NC General Statute 130A-282 allows for pools constructed prior to May 1993 not to comply with certain design and construction standards; however, if these pools are remodeled they must meet all current design and construction requirements. The proposed change in the definition of "remodeled" would allow for changes to be made in pool designs in order to eliminate the potential for suction hazards created by single drains without having to comply with all other design at construction requirements.

This change will greatly reduce the cost of compliance and should encourage owners of wading pools with single drains to make the necessary

changes needed to eliminate the potential suction hazards.

15A NCAC 18A .2539 - This Rule is necessary to reduce the risk of suction injury at public wading pools.

**Comment Procedures:** All persons interested in these matters are invited to attend the public hearing. Written comments may be presented at the public hearing or submitted to Grady L. Balentine, Department of Justice, PO Box 629, Raleigh, NC 27602-0629. All written comments must be received by August 1, 1994. Persons who wish to speak at the hearing should contact Mr. Balentine at (919) 733-4618. Persons who call in advance of the hearing will be given priority on the speaker's list. Oral presentation lengths may be limited depending on the number of people that wish to speak at the public hearing. Only persons who have made comments at a public hearing or who have submitted written comments will be allowed to speak at the Commission meeting. Comments made at the Commission meeting must either clarify previous comments or proposed changes from staff pursuant to comments made during the public hearing process.

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

**Editor's Note:** These Rules were filed as temporary rules effective June 1, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner.

## CHAPTER 18 - ENVIRONMENTAL HEALTH

### SUBCHAPTER 18A - SANITATION

#### SECTION .2500 - PUBLIC SWIMMING POOLS

**.2508 DEFINITIONS**

The following definitions shall apply throughout this Section:

- (1) Equipment replacement means replacement of individual components of the hydraulic and disinfection systems such as pumps, filters, and automatic chemical feeders.
- (2) Public swimming pool means public swimming pool as defined in G.S. 130A-280. Public swimming pools are divided into three types:
  - (a) Swimming pools are all public swimming pools except spas and wading pools.
  - (b) Spas are special facilities designed for recreational and therapeutic use which are not drained, cleaned, or refilled after each individual use. Spas may include, but not be limited to, units designed for hydrojet circulation, hot water, cold water mineral bath, air induction bubbles, or any combination thereof. Common terminology for spas includes "therapeutic pool", "hydrotherapy pool", "whirlpool", "hot spa", and "hot tub".
  - (c) Wading pools are small, shallow swimming pools not more than 18 inches deep designed for use by children.
- (3) Remodeled means renovations requiring disruption of major portions of the pool shell or deck, changes in the pool profile, or redesign of the pool hydraulic system. Remodeled does not include equipment replacement or repair or addition of outlets for the purpose of reducing suction hazards.
- (4) Repair means repair of existing equipment, replastering or repainting of the pool interior, replacement of tiles or coping and similar maintenance activities.

(b) Operators of all public wading pools shall inspect pools daily to ensure the drain covers are in good condition and securely attached.

*Statutory Authority G.S. 130A-282.*

*Statutory Authority G.S. 130A-282.*

**.2539 SUCTION HAZARD REDUCTION**

(a) At all public wading pools which use a single main drain for circulation of water, signs shall be posted stating: "WARNING To prevent serious injury do not allow children in wading pool if drain cover is broken or missing". Signs shall be in letters at least one-half inch in height and shall be posted where they are visible to people entering the wading pool.



*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).*

## **HUMAN RESOURCES**

### **Children's Services**

<i>10 NCAC 41F .0704 - Physical Facility</i>	<i>RRC Objection 04/21/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 04/21/94</i>

### **Facility Services**

<i>10 NCAC 3L .0906 - Compliance with Laws</i>	
<i>Rule Withdrawn by Agency</i>	<i>04/21/94</i>

### **Medical Assistance**

<i>10 NCAC 26I .0304 - Hearing Procedures</i>	<i>RRC Objection 03/17/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 03/17/94</i>

## **INSURANCE**

### **Financial Evaluation Division**

<i>11 NCAC 11C .0308 - Foreign HMO: Successful Operation</i>	<i>RRC Objection 03/17/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 03/17/94</i>
<i>11 NCAC 11F .0207 - Specific Standards for Morbidity, Interest and Mortality</i>	<i>RRC Objection 03/17/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 03/17/94</i>
<i>11 NCAC 11F .0208 - Reserves for Waiver of Premium</i>	<i>RRC Objection 03/17/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 03/17/94</i>

## **LABOR**

### **OSHA**

<i>13 NCAC 7A .0707 - Variances and Other Relief Under Section 95-132(a)</i>	<i>RRC Objection 04/21/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 04/21/94</i>
<i>13 NCAC 7A .0708 - Variances and Other Relief Under Section 95-132(b)</i>	<i>RRC Objection 04/21/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 04/21/94</i>
<i>13 NCAC 7A .0709 - Modification: Revocation: and Renewal of Rules or Orders</i>	<i>RRC Objection 04/21/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 04/21/94</i>
<i>13 NCAC 7A .0710 - Action on Applications</i>	<i>RRC Objection 04/21/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 04/21/94</i>
<i>13 NCAC 7A .0711 - Request for Hearings on Applications</i>	<i>RRC Objection 04/21/94</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 04/21/94</i>

**LICENSING BOARDS AND COMMISSIONS**

**Certified Public Accountant Examiners**

21 NCAC 8A .0105 - Purposes and Responsibilities	RRC Objection	03/17/94
Agency Repealed Rule	Obj. Removed	03/17/94
21 NCAC 8F .0103 - Filing of Examination Applications and Fees	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 8F .0112 - Candidate's Request to Sit in Another Jurisdiction	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 8G .0409 - Computation of CPE Credits	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 8J .0008 - Firm Registration	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 8N .0103 - CPAs Outside North Carolina		
Agency Withdrew Rule		03/17/94

**Dental Examiners**

21 NCAC 16I .0003 - License Void Upon Failure to Renew	RRC Objection	04/21/94
Agency Revised Rule	Obj. Removed	04/21/94
21 NCAC 16R .0002 - Approved Courses and Sponsors	RRC Objection	04/21/94
Agency Revised Rule	Obj. Removed	04/21/94

**Medical Examiners**

21 NCAC 32B .0402 - Fee	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 32B .0706 - Fee	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94

**Real Estate Appraisal Board**

21 NCAC 57A .0210 - Temporary Practice	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 57B .0207 - Administration	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 57B .0306 - Instructor Requirements	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 57B .0603 - Criteria For Course Approval	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94
21 NCAC 57C .0104 - Petition to Reopen Proceeding	RRC Objection	03/17/94
Agency Revised Rule	Obj. Removed	03/17/94

**PUBLIC EDUCATION**

**Elementary and Secondary Education**

16 NCAC 6C .0307 - Certificate Renewal	RRC Objection	04/21/94
Agency Revised Rule	RRC Objection	04/21/94
16 NCAC 6E .0202 - Interscholastic Athletics	RRC Objection	04/21/94

**REVENUE**

**Individual Income Tax Division**

*17 NCAC 6B .0612 - Tax Credit for Qualified Business Investments  
Agency Revised Rule*

*RRC Objection 03/17/94  
Obj. Removed 03/17/94*

**STATE TREASURER**

**Collateralization of Deposits**

*20 NCAC 7 .0202 - Amount of Collateral Required to be Pledged  
Agency Revised Rule*

*RRC Objection 03/17/94  
Obj. Removed 03/17/94*

*20 NCAC 7 .0603 - Acceleration of Maturities  
Agency Revised Rule*

*RRC Objection 03/17/94  
Obj. Removed 03/17/94*



*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.*

**AGENCY**

**CASE  
NUMBER**

**ALJ**

**DATE OF  
DECISION**

**PUBLISHED DECISION  
REGISTER CITATION**

**ADMINISTRATION**

*North Carolina Council for Women*

Family Violence Prevention Services v. N.C. Council for Women	94 DOA 0242	West	04/13/94	
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**ALCOHOLIC BEVERAGE CONTROL COMMISSION**

Alcoholic Beverage Control Comm. v. Entertainment Group, Inc.	93 ABC 0719	Gray	03/02/94	
Rayvon Stewart v. Alcoholic Beverage Control Commission	93 ABC 0793	Nesnow	04/11/94	
Alcoholic Beverage Control Comm. v. Peggy Sutton Walters	93 ABC 0906	Mann	03/18/94	
Russell Bernard Speller d/b/a Cat's Disco v. Alcoholic Bev Ctl Comm.	93 ABC 0937	Morrison	03/07/94	
Edward Ogunjobi, Club Piccadilli v. Alcoholic Beverage Control Comm.	93 ABC 1024	West	03/03/94	
Robert Kovalaske, Nick Pikoulas, Joseph Marshburn, Evangelos Pikoulas, d/b/a Our Mom's BBQ v. Alcoholic Beverage Control Commission	93 ABC 1029	Gray	03/04/94	
Christine George Williams v. Alcoholic Beverage Control Comm.	93 ABC 1057	Becton	04/21/94	
Alcoholic Beverage Control Comm. v. Raleigh Limits, Inc.	93 ABC 1485	Mann	03/11/94	

**COMMERCE**

*Savings Institutions Division*

James E. Byers, et al v. Savings Institutions	93 COM 1622	Chess	03/01/94	
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**CORRECTION**

*Division of Prisons*

Gene Strader v. Department of Correction	94 DOC 0252	Morrison	03/21/94	
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**CRIME CONTROL AND PUBLIC SAFETY**

*Crime Victims Compensation Commission*

James Hugh Baynes v. Crime Victims Compensation Commission	93 CPS 0801	West	03/28/94	9:2 NCR 114
Ross T. Bond v. Victims Compensation Commission	93 CPS 1104	West	04/21/94	
James A. Canady v. Crime Victims Compensation Commission	93 CPS 1108	Gray	03/28/94	
Virginia Roof v. Department of Crime Control & Public Safety	93 CPS 1347	Nesnow	03/24/94	
Percy Clark v. Crime Victims Compensation Commission	94 CPS 0127	Reilly	04/19/94	
Barbara Henderson v. Crime Victims Compensation Commission	94 CPS 0259	Morrison	04/07/94	
Shirley Handsome v. Crime Victims Compensation Commission	94 CPS 0286	Gray	04/28/94	
Georgeann Young v. Crime Victims Compensation Commission	94 CPS 0292	Reilly	04/18/94	
Lawrence L. Tyson v. Crime Victims Compensation Commission	94 CPS 0368	Gray	04/26/94	
Mary E. Haskins v. Crime Victims Compensation Commission	94 CPS 1406	Gray	03/17/94	

**ENVIRONMENT, HEALTH, AND NATURAL RESOURCES**

*Coastal Management*

Roger Fuller v. EHNHR, Divs. of Coastal Mgmt & Environmental Mgmt	89 EHR 1378*	Gray	04/07/94	
Roger Fuller v. EHNHR, Divs. of Coastal Mgmt & Environmental Mgmt	90 EHR 0017*	Gray	04/07/94	
Gary E. Montalbino v. Division of Coastal Management	93 EHR 1792	Nesnow	03/21/94	

\* Consolidated Cases.

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALL</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<i>Environmental Health</i>				
Jane C. O'Malley, Melvin L. Cartwright v. EHNR & District Hlth Dept Pasquotank-Perquimans-Camden-Chowan	91 EHR 0838	Becton	04/06/94	
Environment, Health, & Natural Res. v. Clark Harris & Jessie Lee Harris	93 EHR 0924	Becton	03/03/94	
Scotland Water Co., Laurin Lakes v. Environment, Health, & Nat. Res.	94 EHR 0200	Nesnow	04/27/94	
<i>Environmental Management</i>				
Petroleum Installation Equipment Co., Inc. v. Env., Health & Nat. Res.	93 EHR 0531	Chess	03/21/94	
Jack Griffin v. Dept. of Environment, Health, and Natural Resources	93 EHR 1030	Becton	03/21/94	
<i>Marine Fisheries</i>				
Robert I. Swinson, Virginia S. Swinson v. EHNR, Div/Marine Fisheries	93 EHR 0394	Gray	04/11/94	
<i>Solid Waste Management</i>				
Roger Sessoms v. EHNR/Asbestos Hazard Management Branch	93 EHR 0951	Gray	03/28/94	
Bertie Citizens Action Coalition, Inc.; Willard J. Oliver, Reginald Early, Herbert Jenkins, Jr., Lindwood Earl Tripp, Willie Warren Tripp, Mary Alice Cherry, and Kathy Burden v. EHNR, Solid Waste Management Division, and East Carolina Environmental, Inc., Addington Environmental, Inc., et al.	93 EHR 1045	Morrison	04/06/94	9:3 NCR 214
<b>HUMAN RESOURCES</b>				
<i>Division of Child Development</i>				
Judith Fridley v. Div. of Child Development/Abuse/Neglect Unit	93 DHR 0973	Morrison	03/08/94	
DHR, Division of Child Development v. Joyce Gale	93 DHR 1344	Gray	04/28/94	
Gloria C. Haith v. Department of Human Resources	93 DHR 1707	Nesnow	03/22/94	
Gloria C. Haith v. Daycare Consultant	93 DHR 1787	Nesnow	03/14/94	
Charles E. Smith v. Department of Human Resources	93 DHR 1797	Nesnow	03/21/94	
Living Word Day Care, Jonathan Lankford v. Dept. of Human Resources	94 DHR 0168	Nesnow	03/23/94	
<i>Facility Services</i>				
Charles E. Hunter, Jr., M.D. & Coastal Perfusion Svcs, Inc. v. Cert of Need Section, Div of Facility Svcs, DHR, and Wilmington Perfusion Corp. and Howard F. Marks, Jr., M.D.	93 DHR 0746	Morgan	04/11/94	
Presbyterian-Orthopaedic Hospital v. Department of Human Resources	93 DHR 0805	Reilly	03/11/94	
Lowell Stafford v. Department of Human Resources	93 DHR 1381	Gray	04/15/94	
<i>Division of Medical Assistance</i>				
J.R., by and through her agent & Personal Rep., Hank Neal v. DHR	93 DHR 0528	Gray	04/27/94	
David Yott v. Department of Human Resources	93 DHR 1113	Gray	04/05/94	
Division of Medical Assistance v. Catawba Cty Dept. of Social Services	93 DHR 1778	West	03/04/94	
<i>Division of Social Services</i>				
Evelyn Moore v. Department of Human Resources	94 DHR 0293	Reilly	04/15/94	
<i>Child Support Enforcement Section</i>				
William Heckstall v. Department of Human Resources	93 CSE 1077	Reilly	03/14/94	
Bryan Jeffrey Cole v. Department of Human Resources	93 CSE 1091	Becton	03/30/94	
Dexter L. Chambers v. Department of Human Resources	93 CSE 1124	West	03/28/94	
Ronald E. Johnson v. Department of Human Resources	93 CSE 1125	Becton	03/30/94	
Roger Moore v. Department of Human Resources	93 CSE 1127	Becton	04/14/94	
Alvin Lee Martin v. Department of Human Resources	93 CSE 1128	Nesnow	04/04/94	
Robert Young v. Department of Human Resources	93 CSE 1133	Reilly	04/18/94	
Antonio Townsend v. Department of Human Resources	93 CSE 1139	Becton	03/30/94	
Troy E. Pinkney v. Department of Human Resources	93 CSE 1148	Mann	03/29/94	
Anthony A. Macon v. Department of Human Resources	93 CSE 1149	Gray	04/26/94	
Walter Lee Corbett v. Department of Human Resources	93 CSE 1150	Reilly	03/30/94	
Joe Louis Mayo v. Department of Human Resources	93 CSE 1161	West	04/19/94	

# CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
Nash Andrew Newsome v. Department of Human Resources	93 CSE 1170	Mann	03/17/94	
James E. Watson v. Department of Human Resources	93 CSE 1171	Gray	04/26/94	
Robert Lee Barrett v. Department of Human Resources	93 CSE 1172	Morrison	04/20/94	
Betty A. Williams, Fred E. Jones v. Department of Human Resources	93 CSE 1178	Nesnow	04/20/94	
Eric G. Sykes v. Department of Human Resources	93 CSE 1181	Becton	04/20/94	
Willie C. Hollis v. Department of Human Resources	93 CSE 1191	Becton	05/09/94	
Bernadette Cook v. Department of Human Resources	93 CSE 1202	Gray	04/27/94	
Dennis W. Nolan v. Department of Human Resources	93 CSE 1254	Morrison	04/27/94	
Robert Calvin Connor v. Department of Human Resources	93 CSE 1258	West	04/19/94	
James D. Williams v. Department of Human Resources	93 CSE 1259	West	04/19/94	
Vaughn D. Pearsall v. Department of Human Resources	93 CSE 1267	Becton	04/20/94	
Sidney Ray Tuggle Jr. v. Department of Human Resources	93 CSE 1307	West	04/25/94	
George Aaron Collins v. Department of Human Resources	93 CSE 1331	West	04/25/94	
Samuel L. Dodd v. Department of Human Resources	93 CSE 1357	Gray	03/31/94	
William A. Sellers v. Department of Human Resources	93 CSE 1359	Morrison	04/20/94	
Kenneth W. Cooper v. Department of Human Resources	93 CSE 1364	West	04/27/94	
Steven A. Elmquist v. Department of Human Resources	93 CSE 1392	Reilly	04/29/94	
Mark E. Rogers v. Department of Human Resources	93 CSE 1415	Mann	05/03/94	
Daniel Thomas Hefele v. Department of Human Resources	93 CSE 1432	Morrison	04/28/94	
Gilbert J. Gutierrez v. Department of Human Resources	93 CSE 1433	Morrison	05/13/94	
Alton D. Johnson v. Department of Human Resources	93 CSE 1434	Reilly	04/29/94	
Chester Sanders v. Department of Human Resources	93 CSE 1437	West	04/19/94	
Rodney Guyton v. Department of Human Resources	93 CSE 1439	West	04/21/94	
Donald W. Clark v. Department of Human Resources	93 CSE 1441	Nesnow	05/13/94	
William E. David Jr. v. Department of Human Resources	93 CSE 1442	Nesnow	05/02/94	
Timothy D. Evans v. Department of Human Resources	93 CSE 1460	Reilly	04/28/94	
Billy Edward Smith v. Department of Human Resources	93 CSE 1461	West	04/19/94	
Allen D. Terrell v. Department of Human Resources	93 CSE 1463	Nesnow	05/02/94	
Ray C. Moses v. Department of Human Resources	93 CSE 1464	Nesnow	04/28/94	
Bart Ransom v. Department of Human Resources	93 CSE 1495	Morrison	04/29/94	
William H. Simpson Sr. v. Department of Human Resources	93 CSE 1497	West	04/19/94	
James D. McClure Jr. v. Department of Human Resources	93 CSE 1500	Becton	05/13/94	
Douglas L. Cherrix v. Department of Human Resources	93 CSE 1512	Gray	05/13/94	
Dwayne Lamont Thompson v. Department of Human Resources	93 CSE 1515	Morrison	04/21/94	
Horace Lee Bass v. Department of Human Resources	93 CSE 1520	Morrison	05/13/94	
Michael Wilder v. Department of Human Resources	93 CSE 1521	Reilly	04/28/94	
James A. Cephas v. Department of Human Resources	93 CSE 1523	Reilly	05/13/94	
Wade A. Burgess v. Department of Human Resources	93 CSE 1568	Morrison	04/28/94	
Billy Dale Beaney v. Department of Human Resources	93 CSE 1569	Morrison	05/13/94	
James E. Wiggins Sr. v. Department of Human Resources	93 CSE 1571	Morrison	05/13/94	
Timothy J. Jones v. Department of Human Resources	93 CSE 1576	West	04/19/94	
Randall E. Hunter v. Department of Human Resources	93 CSE 1579	West	04/19/94	
Alton E. Simpson Jr. v. Department of Human Resources	93 CSE 1591	Becton	04/20/94	
John William Vance Jr. v. Department of Human Resources	93 CSE 1597	Becton	05/13/94	
Royston D. Blandford III v. Department of Human Resources	94 CSE 0095	West	04/19/94	

## JUSTICE

### *Alarm Systems Licensing Board*

Alarm Systems Licensing Board v. George P. Baker	93 DOJ 0457	Nesnow	03/10/94
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### *Private Protective Services Board*

Larry C. Hopkins v. Private Protective Services Board	93 DOJ 1618	Morrison	03/07/94
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### *Training and Standards Division*

Curtiss Lance Poteat v. Criminal Justice Ed. & Training Sds. Comm.	93 DOJ 0231	Chess	03/28/94	
Willie David Moore v. Criminal Justice Ed. & Training Sds. Comm.	93 DOJ 1071	Nesnow	04/11/94	9:3 NCR 218
Glenn Travis Stout v. Criminal Justice Ed. & Training Sds. Comm.	93 DOJ 1409	Gray	03/03/94	
Gregory Blake Manning v. Criminal Justice Ed. & Training Sds. Comm.	94 DOJ 0048	Gray	03/29/94	

## MORTUARY SCIENCE

Mortuary Science v. Perry J. Brown, & Brown's Funeral Directors	93 BMS 0532	Chess	03/28/94
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# CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b>PUBLIC EDUCATION</b>				
Nancy Watson v. Board of Education	93 EDC 0234	Chess	02/28/94	9:2 NCR 108
Janet L. Wilcox v. Carteret County Board of Education	93 EDC 0451	Mann	02/21/94	
<b>STATE HEALTH BENEFITS OFFICE</b>				
Linda C. Campbell v. Teachers & St Emp Major Medical Plan	93 INS 0410	Becton	04/22/94	
Timothy L. Coggins v. Teachers' & St Emp Comp Major Med Plan	93 INS 0929	Morrison	03/04/94	
<b>STATE PERSONNEL</b>				
<i>Agricultural and Technical State University</i>				
Linda D. Williams v. Agricultural and Technical State University	93 OSP 0089	Chess	03/23/94	
Juanita D. Murphy v. Agricultural and Technical State University	93 OSP 0708	Morrison	03/16/94	
Thomas M. Simpson v. Agricultural and Technical State University	93 OSP 1393	Gray	03/24/94	
<i>Catawba County</i>				
Sandra J. Cunningham v. Catawba County	93 OSP 1097	Reilly	04/29/94	9:4 NCR 292
<i>North Carolina Central University</i>				
Ha-Yilyah Ha-She'B v. NCCU	93 OSP 0875	Becton	04/13/94	9:3 NCR 211
<i>Department of Commerce</i>				
Ruth Daniel-Perry v. Department of Commerce	93 OSP 0725	Chess	03/04/94	9:1 NCR 63
<i>Department of Correction</i>				
Leland K. Williams v. Department of Correction	91 OSP 1287	Chess	02/22/94	
Bert Esworthy v. Department of Correction	93 OSP 0711	Chess	04/21/94	
Alfred B. Hunt v. Department of Correction	94 OSP 0243	Reilly	04/20/94	
Adrian E. Graham v. Intensive Probation/Parole	94 OSP 0261	Morrison	04/26/94	
<i>Department of Crime Control and Public Safety</i>				
Fred L. Kearney v. Department of Crime Control & Public Safety	91 OSP 0401	West	03/18/94	
Sylvia Nance v. Department of Crime Control & Public Safety	92 OSP 1463	Reilly	03/21/94	
<i>Employment Security Commission of North Carolina</i>				
Rejeanne B. LeFrancois v. Employment Security Commission of N.C.	93 OSP 1069	West	04/08/94	
<i>Department of Environment, Health, and Natural Resources</i>				
<i>Division of Marine Fisheries</i>				
William D. Nicely v. Environment, Health, & Natural Resources	92 OSP 1454	Becton	05/04/94	9:5 NCR 333
<i>Department of Human Resources</i>				
Inez Latta v. Department of Human Resources	93 OSP 0830	Becton	03/28/94	
Charla S. Davis v. Department of Human Resources	93 OSP 1762	Gray	03/03/94	
Rose Mary Taylor v. Department of Human Resources, Murdoch Center	93 OSP 0047	Gray	05/06/94	
David R. Rodgers v. Jimmy Summerville, Stonewall Jackson School	94 OSP 0087	Chess	03/16/94	
<i>Durham County Department of Social Services</i>				
Belinda F. Jones v. Daniel Hudgins, Durham Cty Dept of Social Svcs	93 OSP 0728	Chess	04/11/94	
<i>Mental Health/Mental Retardation</i>				
Yvonne G. Johnson v. Blue Ridge Mental Health	93 OSP 1604	Becton	03/18/94	

# CONTESTED CASE DECISIONS

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<i>Wake County Mental Health, Developmental Disabilities, and Substance Abuse Services</i>				
Julia Morgan Brannon v. Wake County MD/DD/SAS	94 OSP 0214	Reilly	04/14/94	
<i>Department of Transportation</i>				
Glenn I. Hodge Jr. v. Samuel Hunt, Sec'y Dept of Transportation	93 OSP 0297*	Morrison	03/10/94	9:1 NCR 60
Glenn I. Hodge Jr. v. Samuel Hunt, Sec'y Dept of Transportation	93 OSP 0500*	Morrison	03/10/94	9:1 NCR 60
Betsy Johnston Powell v. Department of Transportation	93 OSP 0550	Morrison	03/28/94	
Clyde Lem Hairston v. Department of Transportation	93 OSP 0944	Chess	02/28/94	
<i>University of North Carolina at Chapel Hill</i>				
Eric W. Browning v. UNC-Chapel Hill	93 OSP 0925	Morrison	05/03/94	9:5 NCR 342
<b>STATE TREASURER</b>				
<i>Retirement Systems Division</i>				
John C. Russell v. Bd./Trustees/Teachers' & State Employees' Ret. Sys.	93 DST 0164	West	03/07/94	
Robert A. Slade v. Bd./Trustees/N.C. Local Govtl. Emp. Ret. System	93 DST 0785	Becton	03/18/94	9:1 NCR 68
Elizabeth M. Dudley v. Bd./Trustees/Teachers' & State Employees' Retirement System	93 DST 1474	Nesnow	03/28/94	

**STATE OF NORTH CAROLINA**  
**COUNTY OF CARTERET**

**IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
92 OSP 1454**

**WILLIAM D. NICELY,**  
**Petitioner,**

**v.**

**NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT, HEALTH, AND NATURAL  
RESOURCES, DIVISION OF MARINE  
FISHERIES,**  
**Respondent.**

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**RECOMMENDED DECISION**

This matter was heard before Brenda B. Becton, Administrative Law Judge, on September 7-8, 1993 and on December 13, 1993 in Raleigh, North Carolina. At the conclusion of the hearing, the parties were afforded an opportunity to file post-hearing submissions. The record in this matter was closed on February 18, 1994.

**APPEARANCES**

**Petitioner:** SCHILLER LAW OFFICES, Raleigh, North Carolina, Marvin Schiller appearing.

**Respondent:** Robin W. Smith, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina.

**ISSUES**

1. Was the Petitioner terminated with just cause?
2. Whether the termination letter lacks the requisite specificity required by North Carolina General Statutes §126-35.
3. Whether, prior to the dismissal, the Petitioner was furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reason for his termination.
4. Whether the Petitioner was afforded a meaningful pre-termination hearing.

**EXHIBITS**

Petitioner's exhibits 1 - 21 were offered and received in evidence.

Respondent's exhibits 1 - 27 were offered and received in evidence.

**STATUTES INVOLVED**

N.C. Gen. Stat. §§126-35 and 126-37



STIPULATIONS

1. "All parties are properly before the Administrative Law Judge of the Office of Administrative Hearings, the Office of Administrative Hearings has jurisdiction of the parties and the subject matter, and jurisdiction is conferred by N.C. Gen. Stat. §126-37."
2. "The Petitioner, Mr. William D. Nicely, was a permanent state employee within the meaning of N.C. Gen. Stat. §126-39 at the time of his discharge from employment from the Respondent by letter dated July 31, 1992."
3. "The Petitioner's final salary with the Respondent was \$2,769.25 a month."

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. At the time of his discharge, the Petitioner had been employed with the Respondent for approximately eighteen (18) years and eleven (11) months.
2. At all times during the period between January 1, 1992, and July 31, 1992, the Petitioner was an Enforcement Officer II whose job functions included enforcing the laws of the State of North Carolina and the regulations of the Division of Marine Fisheries regarding fishing, patrolling the sound areas for violations, and assisting fishermen.
3. Prior to the Petitioner's discharge from employment with the Respondent, the Petitioner was suspended without pay effective July 21, 1992.
4. The discharge letter dated July 31, 1992 states that the reasons for the Petitioner's dismissal were:

Defraudment of the Division of Marine Fisheries by signing contract, requesting payment, and being issued check for contracted services rendered from another government agency while receiving payment from the Division of Marine Fisheries for services during the same time period (June 30, 1992). Failure to follow written and verbal instructions from your immediate supervisor (July 18, 1992) and failure to follow written instructions from the Deputy Director of Operations (July 21, 1992).

The Defraudment Issue

5. The Petitioner taught classes in firearms safety, firearms qualification, and cardio-pulmonary resuscitation in the Spring 1992 Division of Marine Fisheries In-Service Training Program at the Justice Academy in Salemburg, North Carolina on March 10-11 and March 31-April 1, 1992.
6. The Spring 1992 In-Service Training Program was offered in conjunction with Sampson Community College ("SCC") which employed the instructors for the program.
7. Prior to teaching in the first session of the In-Service Training Program on March 10, 1992, the Petitioner advised the Director of Extension Services in the Small Business Center at SCC, Mr. J.W. Simmons, that the Petitioner's employment as a part-time instructor by SCC would not conflict with his employment by the Respondent because he had adequate compensatory time available to him from the Division of Marine Fisheries ("DMF") to allow him to take leave from DMF for the time that he was scheduled to teach.

8. On March 9, 1992, the Petitioner signed two part-time instructor contracts with SCC to teach in the In-Service Training Program on March 10 and 11, 1992.
9. A DMF employee is required by DMF policy to obtain a supervisor's approval before taking leave, including compensatory time.
10. The Petitioner did not obtain approval from DMF to engage in secondary employment as a part-time instructor at SCC.
11. The Petitioner told his supervisor, Mike Hardison, the Assistant Supervisor for the Central District, that he intended to take compensatory leave for the time that he was scheduled to teach in the In-Service Training Program. At that time, Mr. Hardison indicated that he would have to talk with his supervisor regarding the Petitioner's taking compensatory leave to teach.
12. On Monday, March 16, 1992, the Petitioner submitted his weekly activity report for the week of March 9-13, showing that he had taken leave on March 10 and 11, 1992.
13. On Tuesday, March 17, 1992, the Central District Supervisor, Woody Hancock, following further discussion of the matter with Assistant Deputy Director Fentress H. Munden, notified the Petitioner that it had been determined that it would be inappropriate for the Petitioner to use compensatory time in order to be reimbursed by SCC to teach in a DMF In-Service Training Program, and therefore, the Petitioner was not authorized to use compensatory time for March 10-11.
14. The Petitioner was requested to submit a revised activity report for the week of March 9-13, 1992. The Petitioner complied and submitted another activity report indicating that he had worked eight hours on the days in question.
15. In that same meeting with Mr. Hancock on March 17, 1992, the Petitioner's request to use compensatory time to teach in the second session of the DMF In-Service Training Program on March 31, 1992 and April 1, 1992 was denied.
16. After changing his activity report as requested, the Petitioner's weekly activity reports for the weeks of March 7-14 and March 28-April 3, 1992 indicate work hours for DMF on March 10-11 and March 31-April 1, 1992.
17. The Petitioner's monthly Record of Hours Worked and Leave Taken for the months of March and April, 1992 indicate that the Petitioner worked for DMF on March 10-11 and March 31-April 1, 1992.
18. The Petitioner had no compensatory time available to him in the months of March and April of 1992 because DMF enforcement officers were paid at the end of February for unused compensatory time that had accumulated during the previous calendar year. However, on March 2, 1992, when his February, 1992, record of hours worked and leave taken report was prepared, he did have 16 hours of compensatory time available.
19. The Petitioner signed two additional part-time instructor contracts with SCC to teach in the March 31 and April 1, 1992 DMF In-Service Training Program.
20. The testimony regarding the date the contracts for the March 31 and April 1, 1992 In-Service Training Program were signed was contradictory. The Petitioner contends that he signed two blank contracts when he signed the contracts for the March 10-11, 1992 training session. The Respondent contends that the contracts for the second training session were signed after the Petitioner had been told that he could not take compensatory time off to teach.

21. It is clear that the two contracts were not signed on March 31, 1992, the date that appears next to the Petitioner's signature, since the Petitioner was teaching in Salemburg on that date and he did not have any means of transporting himself to SCC to sign any contracts. There is not sufficient evidence to make a finding regarding when the contracts were signed.
22. On or around June 5, 1992, a SCC employee contacted the Petitioner by telephone to remind him that the College needed a copy of his social security card before checks could be issued to pay the Petitioner for his services as a part-time instructor on March 10-11 and March 31-April 1, 1992.
23. The Petitioner sent SCC a copy of his social security card between June 5, 1992 and June 30, 1992.
24. The Petitioner did not inform officials at SCC that he could not accept payment from the College for teaching in the DMF program when he spoke with them on June 5, 1992 or when he sent them a copy of his social security card.
25. SCC issued a check, No. 2019678, on June 30, 1992 to the Petitioner in payment for his services as a Part-time instructor on March 10-11 and March 31-April 1, 1992.
26. The check issued to the Petitioner by SCC was mailed to the address the Petitioner provided the College at the time the contracts were signed.
27. The Petitioner never advised SCC of his change of address.
28. Although the Petitioner testified that he intended to turn the check from SCC over to DMF when he received it just as one would payment of jury duty, he never informed any of his supervisors that he expected to receive a check from SCC and never discussed with them the possibility of turning over any check that he might receive from SCC to DMF.
29. The Petitioner did not receive the check from SCC until after his dismissal on July 31, 1992.
30. Petitioner never deposited or cashed the check obliquely referred to in the termination letter, but, rather, he personally delivered the check to Ms. Debbie Beaty, a personnel officer of the Respondent, during his Step III departmental appeal hearing on August 14, 1992.
31. The check the Petitioner presented to Ms. Beaty at his Step III grievance hearing was in an envelope with a change of address sticker attached to it.

**The Failure to Follow Instructions Issue**

32. On July 1, 1992, Central District Supervisor Woody Hancock issued a memorandum to all Central District enforcement officers directing them to work from 10:00 a.m. to 6:00 p.m. on the Saturdays and Sundays that they were assigned to work unless they obtained a supervisor's approval to work different hours.
33. DMF enforcement officers are sworn law enforcement officers with the primary responsibility of enforcing state fisheries rules regulating such matters as seasons for taking specific types of fish, size of catch, type of fishing equipment, and fishing in polluted waters.
34. DMF does not have a sufficient number of officers to provide twenty-four hour coverage of the North Carolina coast; the agency can provide approximately eight hours of coverage each day.



35. The Standard Operating Procedures of the Law Enforcement branch of the N.C. Division of Marine Fisheries (which are applicable to Petitioner) state, in pertinent part, as follows:
- "[O]fficers are normally expected to schedule their own work hours within a 40 hour week. Such hours shall be scheduled around peak fishing activity for the officer's area and will include day and/or night patrol by vehicle or boat or serving as an observer aboard aircraft."
36. DMF supervisors are responsible for setting work schedules for the officers under their supervision and setting priorities for enforcement work as necessary.
37. The Petitioner was present at a July 16, 1992 meeting of Central District enforcement officers during which then Acting Supervisor Michael Hardison reiterated the directive regarding weekend work hours set out in the Hancock memorandum of July 1, 1992.
39. Mr. Hardison testified that he did not give Petitioner permission to work a "split shift" on July 18, 1992.
40. During the July 16th meeting, the Petitioner mentioned that he was receiving complaints during the early morning and late afternoons. The Petitioner took Mr. Hardison's response that the Petitioner was to "Cover your complaints but keep in touch" to mean that he had permission to work a split shift.
41. On Saturday, July 18, 1992, the Petitioner reported to work at 5:00 a.m. and worked until 8:00 a.m. He notified the dispatcher that he would be out of service at 8:00 a.m. until 3:00 p.m. that afternoon.
42. On Saturday, July 18, 1992, the Petitioner taught a Basic Law Enforcement Training course at Carteret Community College.
43. Between 8:00 a.m. and 1:30 p.m., the Petitioner called the DMF dispatcher on an hourly basis to check to see if there were any complaints or other activity that he needed to respond to.
44. The Petitioner did not leave a phone number with the dispatcher regarding where he could be reached at Carteret Community College because changes in the College's phone system had temporarily blocked incoming calls.
45. Acting Supervisor Hardison contacted the DMF dispatcher on duty on July 18, 1992 and learned that the Petitioner had checked out of service from 8:00 a.m. until 3:00 p.m.
46. Mr. Hardison went looking for the Petitioner and found him at Carteret Community College. He noted that the Petitioner's DMF vehicle and radio were at the Petitioner's home and the DMF dispatcher could not reach the Petitioner by telephone at Carteret Community College.
47. Mr. Hardison told the Petitioner that he did not need him if he could not be trusted to work the hours scheduled. He instructed the Petitioner to take vacation for the remainder of the day and to not report to work until Tuesday, July 21, 1992.

48. On July 21, 1992, Hancock, Hardison, Central District Manager David Taylor, and Deputy Director Munden met with the Petitioner. In that meeting, Deputy Director Munden hand-delivered a memorandum notifying the Petitioner that he had been placed on investigative suspension based on the Petitioner's failure to comply with a supervisory directive to work from 10:00 a.m. to 6:00 p.m. on Saturdays and Sundays and had, instead, engaged in secondary employment during hours that he was scheduled to be on duty for DMF. The memorandum specifically referred to the Petitioner's teaching activities at Carteret Community College on July 18, 1992. In the same memorandum, Munden directed the Petitioner not to have any contact with DMF employees during the period of his suspension.

**The Dismissal**

49. On July 30, 1992, DMF Director William Hogarth and Deputy Director Munden met with the Petitioner to conduct a pre-dismissal conference. In that meeting, Director Hogarth asked the Petitioner to respond to allegations concerning: 1) unlawfully obtaining double reimbursement from another state agency, Sampson Community College, to teach in the Spring 1992 DMF In-Service Training program; 2) engaging in secondary employment with Carteret Community College on July 18, 1992 during hours the Petitioner was scheduled to be on duty for DMF and in violation of a specific supervisory directive concerning weekend duty hours; 3) engaging in secondary employment with Carteret Community College while scheduled to be on-duty on other dates; 4) contacting DMF employees during the period of the Petitioner's investigatory suspension in violation of a specific order from Munden set out in the investigatory suspension memorandum of July 21, 1992.
50. Director Hogarth recessed the July 30, 1992 conference with the Petitioner from approximately 2:20 p.m. until 4:00 p.m. to allow the Petitioner to obtain class schedules and other documents that the Petitioner requested that he be allowed to consult in order to try to respond to questions about his secondary employment by Carteret Community College.
51. In the July 30, 1992 conference with the Petitioner, Director Hogarth asked the Petitioner about the check from SCC. The Petitioner responded by informing Director Hogarth that he had not received a check from SCC and indicated that some of his mail was not being forwarded to his new address.
52. On July 31, 1992, Director Hogarth called the Petitioner and delivered a notice of dismissal.
53. The Petitioner received compensation from DMF for the period of time that he was placed on investigative suspension between July 21, 1992 and July 31, 1992.

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

**CONCLUSIONS OF LAW**

1. The Petitioner, William D. Nicely, was a permanent State employee at the time of his dismissal on July 31, 1992. Because he has alleged that the Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a recommendation to the State Personnel Commission which shall make the final decision in this matter. N.C. Gen. Stat. §§126-35, -37, -39 and §§150B-23, -36.
2. At the time the Petitioner was discharged, North Carolina General Statutes section 126-35 provided, in pertinent part, that no permanent State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.
3. A just cause issue presents both substantive and procedural questions.

4. Where just cause is an issue, the Respondent bears the ultimate burden of persuasion.
5. A permanent state employee may be dismissed for inadequate performance of duties or for personal conduct that is detrimental to State service. Leiphart v. N.C. School of Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986).
6. Prior to dismissal, an employee is entitled to a meaning opportunity to respond to the charges that are the basis for the proposed dismissal. Bishop v. N.C. Dept. of Human Resources, O'Berry Center, 100 N.C. App. 175, 394 S.E.2d 702 (1990). The Petitioner's July 30, 1992 conference with DMF Director Hogarth and Deputy Director Munden provided the Petitioner with an adequate opportunity to respond to the allegations presented to him at that time.
7. Prior to dismissal for cause related to job performance, a permanent state employee is entitled to three separate warnings that his/her performance is unsatisfactory. Jones v. Department of Human Resources, 300 N.C. 687, 268 S.E.2d 500 (1980).
8. An employee discharged for personal misconduct is not entitled to prior progressive warnings because personal misconduct discipline is imposed for actions for which no reasonable person should expect to receive prior warning. Office of State Personnel, Personnel Manual, pp. 9-3, 9-8.3.
9. When an employee is subjected to disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.
10. North Carolina General Statutes section 126-35 requires that the alleged acts or omissions of misconduct by a permanent or career state employee be described in the termination letter with sufficient particularity so that the discharged employee will know precisely what act or acts were the basis of his discharge. Leiphart v. North Carolina School of Arts, 80 N.C. App. 339, 342 S.E. 2d 914 (1986).
11. The Respondent's termination letter did not fulfill the specificity requirements of North Carolina General Statutes section 126-35.
12. The first allegation was that the Petitioner was guilty of "[d]efraudment of the Division of Marine Fisheries by signing contract, requesting payment, and being issued check for contracted services rendered from another government agency while receiving payment from the Division of Marine Fisheries for services during the same time period (June 30, 1992)." Based upon this allegation, it appears that the Petitioner is being accused of performing all of the alleged acts on June 30, 1992.
13. There is no evidence that the Petitioner signed a contract, requested payment, or performed any services for another government agency on June 30, 1992. There is evidence that SCC issued the Petitioner a check on June 30, 1992. But there is no evidence that the check was issued for services rendered to SCC on June 30, 1992 while the Petitioner was receiving payment from the DMF during the same time period.
14. Regarding the issue of defraudment, the termination letter lacks the requisite specificity in that the evidence does not support any allegation that the acts alleged occurred on June 30, 1992.
15. Furthermore, if one assumes that the gist of the Respondent's complaint is that the Petitioner was defrauding the State by arranging to receive double payment for the same duties, it would be necessary for the Respondent to prove that the Petitioner actually benefited monetarily. The Respondent, however, terminated the Petitioner's employment before he ever received the check which represented payment by SCC for the courses the Petitioner taught during the Respondent's Spring In-Service Training. The Petitioner testified that he intended to turn the check over to the Respondent, as one would do with jury duty pay, when he received it. The Respondent did not offer



any evidence that refutes the Petitioner's contention other than the fact that the Petitioner never informed the Respondent of his intention to turn the check over to it even when he informed Director Hogarth that he had not received the check.

16. An act of defraudment essentially involves depriving a person of property by deceit or artifice. Black's Law Dictionary, 381 (5th ed. 1979).
17. The acts of signing a contract, requesting payment and being issued a check do not, by themselves, either individually or collectively constitute an act or acts of fraud since none of those acts either individually or collectively necessarily result in a person being deprived of property by deceit or artifice.
18. The defraudment alleged in the discharge letter states that the defraudment occurred on "June 30, 1992".
19. No defraudment of Respondent by Petitioner occurred on June 30, 1992.
20. The second allegation presumably refers to whether Petitioner could legitimately work a "split shift" on July 18, 1992.
21. Even if the second allegation in the termination letter were, arguendo, sufficiently precise to meet the specificity requirements of North Carolina General Statutes section 126-35, the second allegation (concerning the alleged failure to follow written and verbal instructions from Petitioner's immediate supervisor, Mr. Hardison, on July 18, 1992) is not a sufficient basis to dismiss a permanent or career state employee for just cause on the basis of personal misconduct.
22. Petitioner testified that his working a "split shift" (which meant working the tides early morning and late afternoon) as he deemed appropriate had, he thought, been verbally approved by Mr. Hardison, acting supervisor, on July 16, 1992.
23. Mr. Hardison testified that he did not give Petitioner permission to work a "split shift" on July 18, 1992. The words spoken by Mr. Hardison could, however, reasonably have been interpreted to grant the Petitioner permission to work whatever hours were necessary to cover his complaints. That could have meant working from 10:00 a.m. until 6:00 p.m. plus additional overtime hours to cover the early morning complaints or it could have meant working a "split shift" to cover the complaints.
24. Confusion, in retrospect, about what the Petitioner was authorized to do, is not insubordination and does not constitute the type of conduct that would justify a dismissal without prior warning.
25. Respondent did not have just cause to dismiss Petitioner for the second allegation in the termination letter even if the second allegation had met the specificity requirement of North Carolina General Statutes section 126-35.
26. The third allegation presumably refers to a directive issued from Mr. Fentress H. Munden, Deputy Director of the Division of Marine Fisheries, dated July 21, 1992 to Petitioner which places Petitioner under investigatory suspension and instructs Petitioner, among other things, not to "have any conversations with any other employees outside of [his] chain of command in this Division regarding this matter."
27. Even if the third allegation of misconduct in the termination letter were sufficiently precise to meet the specificity requirements of North Carolina General Statutes section 126-35, the third allegation (even if proven true) could not be a sufficient basis for a just cause dismissal of a permanent or career state employee. An employee who is under investigatory suspension is entitled to gather whatever legitimate evidence he can gather in his defense during a period of suspension when the agency is itself gathering evidence regarding the suspension. A delay in gathering evidence can result in the

evidence being lost, dissipated or evaporated with the passage of time blunting an otherwise sharp memory into a stale memory. Elementary due process requires a level playing field.

28. Respondent failed to meet its burden of proving it terminated Petitioner for just cause within the meaning of the State Personnel Act.
29. The Petitioner is entitled to reinstatement, backpay from the date of his suspension without pay, including all legislative pay increases, minus any pay from other employment he received during the period of his suspension and discharge from the Respondent's employ, all attendant benefits of continuous state employment and attorneys fees.

**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 rule that the Petitioner is entitled to be reinstated with full back pay and all attendant benefits of continuous employment with the State of North Carolina from the date of his termination until the date of his reinstatement. Attorney fees and costs should also be awarded to the Petitioner. In addition, his personnel file should be appropriately rectified so as to reflect that he was discharged without substantive just cause. Any and all documents in his personnel file which indicate to any degree a contrary fact should be removed. Any pay which Petitioner received during the period of his suspension and discharge should be deducted from his backpay award.

**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 4th day of May, 1994.

---

Brenda B. Becton  
Administrative Law Judge

**ERIC W. BROWNING,**  
**Petitioner.**

**v.**

**UNC-CHAPEL HILL,  
Respondent.**

## RECOMMENDED DECISION

## APPEARANCES

**FOR THE PETITIONER:** Attorney Alan McSurely

**FOR THE RESPONDENT:** Assistant Attorney General David Parker

1. Did Respondent discriminate against Petitioner because of his race when it discharged him?
2. Did Respondent retaliate against Petitioner when it discharged him, because he had protested alleged racial discrimination involving promotional and training opportunities, failure to give him written notice as to why he was denied certain promotions and training opportunities, and failure to provide him with adequate and accurate information about training opportunities?
3. Did Respondent have just cause, procedurally and substantively, to terminate Petitioner's employment?

## OPINION OF THE ADMINISTRATIVE LAW JUDGE

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

## **FINDINGS OF FACT**

1. Mr. Eric Wayne Browning, Petitioner, was employed by Respondent at the Carolina Inn making salads and desserts on February 8, 1989, as a Food Service Assistant 1; on May 8, 1989, he transferred to a Housekeeper position, Pay Grade 50, in the Physical Plant Department where he worked, with no grade increase, until he was dismissed, effective May 7, 1993. Petitioner has appealed this dismissal.
2. Petitioner is a Black male, married, and the father of five young children. He graduated from high school and attended Johnson C. Smith University for two years.



3. His working hours with Respondent were from 3:50 AM until 11:50 AM with two short breaks. Since his hourly pay with Respondent (about \$6.00) was not sufficient to meet family needs, Petitioner worked a second job at a local restaurant.
4. During his exactly four years as a Housekeeper, Petitioner applied for thirteen promotions and many training opportunities. He was not given any promotions and only attended one training program given to all Housekeepers.
5. Respondent did not always follow its policy of notifying applicants such as Petitioner of promotional decisions with reasons. This was very frustrating to Petitioner in his efforts to better himself.
6. During his four years as a Housekeeper, Petitioner did a good job, received positive evaluations, and was encouraged to seek promotions.
7. Petitioner had attempted for 1 1/2 years to enroll in a Supervisory Resources training course with the hope that this would enable him to get a promotion.
8. Respondent frustrated Petitioner in this training quest by means of conflicting information, misinformation, and lack of substantive communication.
9. During his employment, Petitioner was actively involved with about 300 other Housekeepers in seeking better pay, supervision, training and promotional opportunities. Rev. Jesse Jackson visited Chapel Hill in early 1993 to promote their efforts. Petitioner and others appeared with Rev. Jackson in a news photograph following this visit.
10. In the fall of 1992, Petitioner filed a grievance concerning not being interviewed for a position he applied for. A pre-hearing conference on this matter was scheduled for April 28, 1993, at 2:00 PM, before Professor Robert Joyce of the Institute of Government. Housekeeping Superintendent Hardy White, Black male, was management's representative for this conference.
11. William Burston, Black male, served as Respondent's Training Manager. He had attempted to get Petitioner admitted to the Supervisory Resources training course, but Hardy White had decided that a preparatory course for all housekeepers was a pre-requisite. This was a new requirement added by White after Petitioner had been seeking admission for more than a year.
12. Petitioner had successfully grieved an oral warning which Respondent failed to remove from his file. White had stated to Petitioner's supervisor that he was going to transfer Petitioner following this grievance.
13. Petitioner decided to grieve White's denial of his training request. He called Gwen Gardner at Counseling and went to her office for forms on April 28, 1993, around 8:30 AM.
14. While at Counseling, Petitioner talked with Karen Boulding about the training request. Ms. Boulding called Mr. Burston who told her that Mr. White would not approve this training until the general course was completed. He had recently talked with Petitioner.
15. Hearing this conversation, Petitioner lost his temper. He stormed away, but returned shortly. He called White a bastard, said White made him sick, and stated "I ought to get my gun and kill the son-of-a-bitch." Petitioner had no gun with him at this time.

16. Petitioner proceeded to Gwen Gardner's office and continued his tirade before her. While speaking derogatorily and vociferously about the university, Petitioner was waving his hands in her face. He seemed to her to be speaking to someone else. While he did not threaten Ms. Gardner, his unusual behavior did frighten her somewhat. Petitioner threw his notebook and papers against the wall and left. Ms. Gardner called the campus police.
17. Ms. Boulding called Mr. Burston who came to the offices and found Petitioner weeping and complaining about the denial of his training request. Mr. Burston succeeded in calming Petitioner down.
18. The campus police arrived after Petitioner had left the scene. They investigated the matter and got written statements from Boulding, Gardner and Burston. No criminal charges have been filed in this matter.
19. The Petitioner attended the pre-hearing conference before Professor Joyce at 2:00 PM on this same day (April 28). He had a very calm and pleasant demeanor. He related very well with Hardy White who also attended. He apologized for the statements he had made that morning to Boulding and Gardner.
20. Professor Joyce agreed to consolidate the Petitioner's grievance about being denied training with the one pending. The Petitioner filed this second grievance on the morning of April 29, 1993.
21. After receiving and reviewing the police reports concerning the April 28th altercation, Respondent's Director of Physical Plant, Herbert Paul, had Petitioner suspended effective April 30, 1993. A pre-dismissal conference was conducted on May 3rd following which Petitioner was notified by letter that his employment was terminated effective May 7th because of his personal conduct before Ms. Gardner and Ms. Boulding on April 28th.
22. Paul is White. Gardner, Boulding, White and Burston are Black. Paul testified that Petitioner was not fired because of his race or in retaliation for protesting discriminatory actions. Ms. Boulding is trained in working with emotionally disturbed people and Gardner is licensed to practice law.
23. Following the dismissal of Petitioner, Ms. Boulding's superior contacted Professor Joyce to inform him of the firing and offer his opinion that Petitioner's two pending grievances were mooted. Mr. Maynard was to check with Respondent's counsel and get back to Joyce. There were no written communications from counsel to Maynard regarding these matters. Professor Joyce was not on the panel hearing Petitioner's grievance concerning dismissal.

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

#### CONCLUSIONS OF LAW

1. Mr. Eric W. Browning, Petitioner, was a permanent State employee with the Respondent at the time of his being dismissed. Because Petitioner has alleged lack of just cause, illegal discrimination and retaliation because of his race and protests as the basis for his dismissal, the Office of Administrative Hearings has jurisdiction to hear the matter and submit a recommendation to the State Personnel Commission which shall make a final decision in the matter. North Carolina General Statutes 126-16, 126-35, 126-36, 126-37, 126-39 and 150B-23 et seq.
2. Where illegal discrimination or retaliation is an issue, Petitioner bears the ultimate burden of proof and must establish a prima facie case of discrimination by providing sufficient facts in order to raise an inference of discrimination. The Petitioner has not established a prima facie case of discrimination or retaliation because of his race.

3. While Respondent has shown just cause to discipline Petitioner, it is concluded that fair administering of discipline includes mitigating the treatment in this case because of Petitioner's good work record as well as the Respondent's actions which contributed to his frustrations and ventilation of same. Furthermore, it was not fair to treat Petitioner's pending grievances as moot since they were part of his frustrations. Fairness would have been to let Professor Joyce hear all three combined. Under 25 NCAC 1B .0413 it is provided that "the State Personnel Commission will weigh all relevant factors and circumstances in employee grievance appeals, including factors of mitigation and justification, in making a determination of whether disciplinary action was imposed for just cause." Weighing and balancing the equities in this case leads me to the conclusion that a less severe sanction was warranted. This is not to excuse Petitioner's diatribe, but is an empathetic way to deal with the plight of one of the lowest paid state employees who lost his temper during a stressful period. UNC policy also allows such mitigation.

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

**RECOMMENDED DECISION**

That the Respondent's decision be reversed and the Petitioner be reinstated with attorney's fees, and a final written warning for improper personal conduct.

**ORDER**

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

**NOTICE**

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

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

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

This the 3rd day of May, 1994.

---

Fred G. Morrison Jr.  
Senior 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.*

**TITLE/MAJOR DIVISIONS OF THE NORTH CAROLINA ADMINISTRATIVE CODE**

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1	Administration	Acupuncture	1
2	Agriculture	Architecture	2
3	Auditor	Auctioneers	4
4	Commerce	Barber Examiners	6
5	Correction	Certified Public Accountant Examiners	8
6	Council of State	Chiropractic Examiners	10
7	Cultural Resources	General Contractors	12
8	Elections	Cosmetic Art Examiners	14
9	Governor	Dental Examiners	16
10	Human Resources	Dietetics/Nutrition	17
11	Insurance	Electrical Contractors	18
12	Justice	Electrolysis	19
13	Labor	Foresters	20
14A	Crime Control & Public Safety	Geologists	21
15A	Environment, Health, and Natural Resources	Hearing Aid Dealers and Fitters	22
16	Public Education	Landscape Architects	26
17	Revenue	Landscape Contractors	28
18	Secretary of State	Marital and Family Therapy	31
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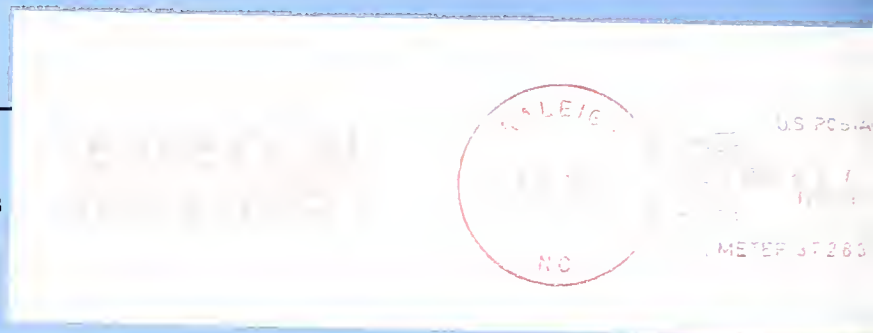
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