

NORTH CAROLINA REGISTER

IN THIS ISSUE



Volume 15, Issue 7
Pages 701 - 790

October 2, 2000

This issue contains documents officially filed
through September 11, 2000.

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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

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

TITLE	DEPARTMENT	LICENSING BOARDS	CHAPTER
1	Administration	Acupuncture	1
2	Agriculture	Architecture	2
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4	Commerce	Auctioneers	4
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6	Council of State	Certified Public Accountant Examiners	8
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NORTH CAROLINA REGISTER
Publication Schedule For January 2000 - December 2000

FILING DEADLINES			NOTICE OF RULE- MAKING PROCEEDIN GS	NOTICE OF TEXT							TEMPORARY RULE
volume and issue number	issue date	last day for filing	earliest register issue for publication of text	earliest date for public hearing	non-substantial economic impact			substantial economic impact			270 th day from issue date
					end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	
14:13	01/04/00	12/09/99	03/15/00	01/19/00	02/03/00	02/21/00	05/09/00	03/06/00	03/20/00	05/09/00	09/30/00
14:14	01/14/00	12/21/99	03/15/00	01/31/00	02/14/00	02/21/00	05/09/00	03/14/00	03/20/00	05/09/00	10/10/00
14:15	02/01/00	01/10/00	04/03/00	02/16/00	03/02/00	03/20/00	05/09/00	04/03/00	04/20/00	01/26/01	10/28/00
14:16	02/15/00	01/25/00	04/17/00	03/01/00	03/16/00	03/20/00	05/09/00	04/17/00	04/20/00	01/26/01	11/11/00
14:17	03/01/00	02/09/00	05/01/00	03/16/00	03/31/00	04/20/00	01/26/01	05/01/00	05/22/00	01/26/01	11/26/00
14:18	03/15/00	02/23/00	05/15/00	03/30/00	04/14/00	04/20/00	01/26/01	05/15/00	05/22/00	01/26/01	12/10/00
14:19	04/03/00	03/13/00	06/15/00	04/18/00	05/03/00	05/22/00	01/26/01	06/02/00	06/20/00	01/26/01	12/29/00
14:20	04/17/00	03/27/00	07/03/00	05/02/00	05/17/00	05/22/00	01/26/01	06/16/00	06/20/00	01/26/01	01/12/01
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14:22	05/15/00	04/24/00	07/17/00	05/30/00	06/14/00	06/20/00	01/26/01	07/14/00	07/20/00	01/26/01	02/09/01
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15:03	08/01/00	07/11/00	10/02/00	08/16/00	08/31/00	09/20/00	01/26/01	10/02/00	10/20/00	01/26/01	04/28/01
15:04	08/15/00	07/25/00	10/16/00	08/30/00	09/14/00	09/20/00	01/26/01	10/16/00	10/20/00	01/26/01	05/12/01
15:05	09/01/00	08/11/00	11/01/00	09/18/00	10/02/00	10/20/00	01/26/01	10/31/00	11/20/00	01/26/01	05/29/01
15:06	09/15/00	08/24/00	11/15/00	10/02/00	10/16/00	10/20/00	01/26/01	11/14/00	11/20/00	01/26/01	06/12/01
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15:09	11/01/00	10/11/00	01/02/01	11/16/00	12/01/00	12/20/00	05/2002	01/02/01	01/22/01	05/2002	07/29/01
15:10	11/15/00	10/24/00	01/16/01	11/30/00	12/15/00	12/20/00	05/2002	01/16/01	01/22/01	05/2002	08/12/01
15:11	12/01/00	11/07/00	02/01/01	12/18/00	01/02/01	01/22/01	05/2002	01/30/01	02/20/01	05/2002	08/28/01
15:12	12/15/00	11/22/00	02/15/01	01/02/01	01/16/01	01/22/01	05/2002	02/13/01	02/20/01	05/2002	09/11/01

EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings 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 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month closest to (either before or after) the first or fifteenth respectively that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF RULE-MAKING PROCEEDINGS

END OF COMMENT PERIOD TO A NOTICE OF RULE-MAKING PROCEEDINGS: This date is 60 days from the issue date. An agency shall accept comments on the notice of rule-making proceeding until the text of the proposed rules is published, and the text of the proposed rule shall not be published until at least 60 days after the notice of rule-making proceedings was published.

EARLIEST REGISTER ISSUE FOR PUBLICATION OF TEXT: The date of the next issue following the end of the comment period.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD
(1) **RULE WITH NON-SUBSTANTIAL ECONOMIC IMPACT:** An agency shall accept comments on the text of a proposed rule for at least 30 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

(2) **RULE WITH SUBSTANTIAL ECONOMIC IMPACT:** An agency shall accept comments on the text of a proposed rule published in the Register and that has a substantial economic impact requiring a fiscal note under G.S. 150B-21.4(b1) for at least 60 days after publication or until the date of any public hearing held on the rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

This Section contains the text of proposed rules. At least 60 days prior to the publication of text, the agency published a Notice of Rule-making Proceedings. The agency must accept comments on the proposed rule for at least 30 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. The required comment period is 60 days for a rule that has a substantial economic impact of at least five million dollars (\$5,000,000). Statutory reference: G.S. 150B-21.2.

TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to amend the rules cited as 10 NCAC 24A .0302-.0303. Notice of Rule-making Proceedings was published in the Register on September 15, 1999.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 9, 2000

Time: 10:00 a.m.

Location: Albemarle Building, Room 1112, 325 North Salisbury Street, Raleigh, North Carolina 27603

Reason for Proposed Action: *The proposed amendment to 10 NCAC 24A .0302 is to clearly express the intent of the Social Services Commission regarding relative appointments. The proposed change in 10 NCAC 24A .0303 is to clarify the role of the Local Support Manager as it relates to nominations to county boards of social services and to change the position title.*

Comment Procedures: *Anyone wishing to comment should contact Sharnese Ransome, APA Coordinator, Social Services Commission, NC Division of Social Services, 325 N. Salisbury Street, 2401 Mail Service Center, Raleigh, NC 27699-2401, phone 919/733-3055. Verbal comments will be heard during the public hearing. Written comments must be received by Ms. Ransome no later than 10:00 a.m., November 9, 2000.*

Fiscal Impact

- ☐ State
☐ Local
☐ Substantive (>\$5,000,000)
☒ None

CHAPTER 24 – SOCIAL SERVICES

SUBCHAPTER 24A – GENERAL

SECTION .0300 - COMMISSION

10 NCAC 24A .0302 PROHIBITION OF EMPLOYMENT OF RELATIVES OF COUNTY BOARD MEMBERS

(a) No person shall be hired in a county department of social services during the time a member of his immediate family is

serving on the county board of social services or the board of county commissioners in the same county.

(b) No person shall be appointed to the county board of social services during the time a member of his immediate family is employed by the county department of social services in the same county.

(c) "Immediate family member," is for purposes of this Regulation defined as a spouse, parent, sibling, child, grandparent, grandchild, stepparent, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, aunt, uncle, niece, or nephew.

Authority G.S. 108A-1; 108A-2; 108A-3; 108A-4; 108A-5; 108A-6; 108A-7; 108A-8; 108A-9; 108A-10; 108A-11; 108A-12; 108A-13; 108A-14; 108A-15; 108A-16; 108A-17; 108A-18; 143B-153.

10 NCAC 24A .0303 SELECTION OF COUNTY BOARD MEMBERS BY SOCIAL SERVICES COMMISSION

Local Support Managers may assist county departments of social services in securing a name for consideration for county board membership from organizations, interested groups, or individuals within the county. The Commission may, however, appoint persons who are recommended through other sources.

Authority G.S. 108A-1; 108A-3; 108A-6; 143B-153.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to amend the rules cited as 10 NCAC 29C .0102-.0103. Notice of Rule-making Proceedings was published in the Register on April 3, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 9, 2000

Time: 10:00 a.m.

Location: Albemarle Building, Room 1112, 325 North Salisbury Street, Raleigh, North Carolina 27603

Reason for Proposed Action: *Due to increases in the cost of fuel and electricity over the years and to ensure low income families have adequate access to funds to assist with payment of heating and cooling bills, the Division of Social Services proposes to permanently amend 10 NCAC 29C .0102-.0103. The change to 10 NCAC 29C .0102 allows the county*

PROPOSED RULES

departments of social services to serve households up to 150% of the federal poverty income guidelines, which is the maximum federal income limit as allowed by federal law. With the increase in fuel prices and electricity, this higher income limit will allow more households who are affected apply for and receive assistance. The amendment to 10 NCAC 29C .0103 established the increased payment amount which will allow counties to purchase an adequate supply of fuel oil, gas and electricity for households effected by the price increases. The maximum payment per household will be \$300.00 in a state fiscal year unless emergency contingency funds are released, then an additional payment up to \$300.00 can be made.

Comment Procedures: Anyone wishing to comment should contact Sharnese Ransome, APA Coordinator, Social Services Commission, NC Division of Social Services, 325 N. Salisbury Street, 2401 Mail Service Center, Raleigh, NC 27699-2401, phone 919/733-3055. Verbal comments will be heard during the public hearing. Written comments must be received by Ms. Ransome no later than 10:00 a.m., November 9, 2000.

Fiscal Impact

- ☐ State
☐ Local
☐ Substantive (>\$5,000,000)
☒ None

CHAPTER 29 – INCOME MAINTENANCE: GENERAL

SUBCHAPTER 29C – CRISIS INTERVENTION PROGRAM

10 NCAC 29C .0102 ELIGIBILITY REQUIREMENTS

A household must meet the following requirements to be eligible for the Crisis Intervention Program:

- (1) Income: A household must have income at or below 150 percent of the federal poverty income guidelines. The rules in 10 NCAC 29B .0003 will govern for the definition and computation of income.
- (2) Crisis: A household must be in a heating or cooling related crisis. A household is in a crisis if it is experiencing or is in danger of experiencing a life threatening or health-related emergency and sufficient, timely and appropriate assistance is not available from any other source.
- (3) Citizenship: Individuals who are illegal aliens are not eligible for the Crisis intervention Program.

Authority G.S. 108A-25; 143B-153; 150B-13;
42 U.S.C. 82621(a); 8622(2); 8624(b); P.L. 93-66; P.L. 93-233;
P.L. 96265.

10 NCAC 29C .0103 BENEFIT LEVELS

The maximum payment to a household is three hundred dollars (\$300.00) in a state fiscal year. Except, when the federal government releases emergency contingency funds for severe weather conditions an additional payment up to three hundred dollars (\$300.00) may be authorized. Payments may vary based upon the severity of the crisis and the services needed.

Authority G.S. 108A-25; 143B-153.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to adopt the rules cited as 10 NCAC 30 .0401-.0402. Notice of Rule-making Proceedings was published in the Register on August 1, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: November 9, 2000

Time: 10:00 a.m.

Location: Albemarle Building, Room 1112, 325 North Salisbury Street, Raleigh, North Carolina 27603

Reason for Proposed Action: Federal law and regulations allow states to assess a fee for replacement of a household's Food Stamp EBT card. At the time this law was effective, North Carolina like other states was phasing in the EBT process for issuing Food Stamp benefits. During contract renewal negotiations, North Carolina like other states deemed it critical to the Program to assess a fee for replacement EBT cards. North Carolina law and federal laws stress the importance of personal responsibility and we believe households will be more responsible in keeping track of their cards if they know a fee will be assessed for replacement cards. County departments of social services pay 50% and the USDA pays the other 50% for the replacement of EBT cards. There are approximately 205,000 food stamp households receiving food stamp benefits each month. All Food Stamp households will receive their initial EBT card at no cost. Based on current data, approximately 102,500 cards are replaced each year. This is costing the counties more than \$128,125 a year. In order to offset some of the cost of replacing the EBT cards, households will be assessed a \$2.50 fee for each replacement EBT card.

Comment Procedures: Anyone wishing to comment should contact Sharnese Ransome, APA Coordinator, Social Services Commission, NC Division of Social Services, 325 N. Salisbury Street, 2401 Mail Service Center, Raleigh, NC 27699-2401, phone 919/733-3055. Verbal comments will be heard during the public hearing. Written comments must be received by Ms. Ransome no later than 10:00 a.m., November 9, 2000.

Fiscal Impact

- ☐ State
☒ Local 10 NCAC 30 .0401
☐ Substantive (>\$5,000,000)
☒ None 10 NCAC 30 .0402

CHAPTER 30 – FOOD ASSISTANCE

SECTION .0400 – ELECTRIC BENEFIT TRANSFER (EBT) CARD

10 NCAC 30 .0401 ELECTRONIC BENEFIT

PROPOSED RULES

TRANSFER (EBT) CARD REPLACEMENT FEE

- (a) Food Stamp households shall receive the first EBT card at no cost.
- (b) Food Stamp households that request a replacement EBT card shall be assessed a two dollars fifty cent (\$2.50) fee:
- (c) The fee shall be deducted from the account of the Food Stamp household.
- (d) The fee shall be refunded if the EBT card:
 - (1) was lost in the mail or damaged by the vendor prior to receipt by the Food Stamp household.
 - (2) is being replaced due to a name change on card.
 - (3) was lost due to a natural disaster such as a fire, flood, tornado or hurricane.
 - (4) was damaged by a retailer or vendor.

Authority G.S. 108A-25; 143B-153; 7 U.S.C. 2016 (i)(8); 7 C.F.R. 274.12 (f)(5)(v).

10 NCAC 30 .0402 FAIR HEARINGS

The rules of 10 NCAC 30 .0208 will govern for hearings.

Authority G.S. 108A-25; 143B-153; 7 U.S.C. 2016 (i)(8); 7 C.F.R. 274.12 (f)(5)(v).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rule cited as 15A NCAC 2L .0202. Notice of Rule-making Proceedings was published in the Register on November 15, 1999.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: October 18, 2000

Time: 7:00 p.m.

Location: Ground Floor Hearing Room, Archdale Building, 512 N. Salisbury St., Raleigh, NC 27604

Reason for Proposed Action: This rulemaking proposes thirty-eight new Groundwater Quality Standards that are incorporated into an amendment to 15A NCAC 2L .0202. The Director of the Division of Water Quality has approved interim maximum allowable concentrations for each of these substances as authorized by 15A NCAC 2L .0202(c). These substances are Alkane Carbon Fraction Class C5-C8, Alkane Carbon Fraction Class C9-C18, Alkane Carbon Fraction Class C19-C32, Aromatics Carbon Fraction Class C9-C32, Benzo(b)fluoranthene, Benzo(k)fluoranthene, Benzo(a)pyrene, sec-Butylbenzene, tert-Butylbenzene, n-Butylbenzene, Chloromethane, 2-Chlorotoluene, Dibenz(a,h)anthracene, p,p-Dichlorodiphenyl Dichloroethane (DDD), p,p-Dichlorodiphenyltrichloroethane (DDT), Dieldrin, 2,4-Dimethylphenol (m-xenol), Disulfoton, Endosulfan II (beta-endosulfan), Endrin (Total Endrin: includes endrin, endrin aldehyde, and endrin ketone), Hexachlorocyclohexane (Total

Hexachlorocyclohexane: includes alpha, beta, delta, gamma, and epsilon isomers), Indeno(1,2,3-cd)pyrene, Isophorone, Isopropylbenzene, 2-Methylnaphthalene, 3-Methylphenol (m-cresol), 4-Methylphenol (p-cresol), N-Nitrosodimethylamine, Petroleum Aliphatic Carbon Fraction Class C5-C8, Petroleum Aliphatic Carbon Fraction Class C9-C18, Petroleum Aliphatic Carbon Fraction Class C19-C36, Phorate, n-Propylbenzene, 2,3,4,6-Tetrachlorophenol, 1,2,3-Trichloropropane, 1,1,2-Trichloro-1,2,2-trifluoroethane (CFC-113), 1,2,4-Trimethylbenzene, and 1,3,5-Trimethylbenzene.

In addition, this rulemaking specifies a change to biennial review requirements under 15A NCAC 2L .0202 (f). This rulemaking will change this requirement from a biennial review (i.e. two years) to a triennial review (i.e. three years). This change is being made due to amendments to the rulemaking process contained in North Carolina General Statute (NCGS) 150B enacted by the North Carolina General Assembly in 1995. This legislation revised the rulemaking process and specified legislative approval of rules. Pursuant to the requirements of North Carolina General Statute 150B-21.3(b), a permanent rule becomes effective "... on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission (Rules Review Commission) approved the rule,....".

In general, if a substance is not naturally occurring, and if no 15A NCAC 2L .0202 groundwater standard has been established, then the substance is not allowed in detectable concentrations in Class GSA and GA groundwaters. Responsible parties often request interim maximum allowable concentrations when substances without standards are found at their contaminant cleanup sites. On May 15, 1995 the Director of the Division of Water Quality approved interim maximum allowable concentrations for the eighteen substances proposed for this rulemaking. Once established, an interim maximum allowable concentration remains in effect until a Groundwater Quality Standard is adopted pursuant to NCGS 150B. The 15A NCAC 2L .0202 rules require that action be initiated to establish groundwater standards within three months of establishing an interim concentration.

Of the seven carbon fraction classes that appear in the proposed amendment, it is proposed that the three carbon fraction labeled as "alkane carbon fraction classes" be deleted from the text of the rule. Interim maximum allowable concentrations for these substances went into effect on January 26, 1998 pursuant to the requirements of 15A NCAC 2L .0202. The three alkane carbon fraction classes were established as interim maximum allowable concentrations under 15A NCAC 2L .0202 in order to implement risk based corrective action for petroleum underground storage tanks. On February 5, 1998, the Division of Public Health recommended three interim maximum allowable concentrations for "petroleum aliphatic carbon fraction classes". This recommendation was made based on updated risk based guidance from the USEPA. Interim maximum allowable concentrations went into effect April 15, 1998. In making this recommendation the Division of Public Health requested that the three petroleum aliphatic carbon fraction classes replace the alkane carbon fraction classes. The only means available to the agency to make this change is through rulemaking under NCGS 150B. The Division of Water Quality anticipates that the alkane

PROPOSED RULES

carbon fraction classes will no longer appear in the text of the rule after public hearing is held. Pursuant to 15A NCAC 2L .0202, interim maximum allowable concentrations for the alkane carbon fraction classes will remain in place until final rules are adopted pursuant to North Carolina General Statute 150B. The final text of the rule will either show that the alkane carbon fraction classes have either been adopted or deleted from the amendment.

In addition, a change is recommended for "Aromatics Carbon Fraction Class C9-C32" in the proposed rule. An interim maximum allowable concentration for this carbon fraction also went into effect on January 26, 1998 pursuant to the requirements of 15A NCAC 2L .0202. This carbon fraction class was established as an interim maximum allowable concentration under 15A NCAC 2L .0202 in order to implement risk based corrective action for petroleum underground storage tanks. On February 5, 1998, the Division of Public Health recommended an interim maximum allowable concentration for "Petroleum Aromatics Carbon Fraction Class C9-C22" was based on updated risk based guidance from the USEPA. This recommendation was made because the aromatics carbon fractions above C22 are not generally associated with petroleum releases. The Division of Public Health and the Division of Waste Management-Underground Storage Tank Section has informed us that the current interim maximum allowable concentration for the Aromatics Carbon Fraction Class C9-C32 was of a class and carbon range inclusive of the proposed Petroleum Aromatics Carbon Fraction Class C9-C22. Based on discussions with the Division of Public Health and a recommendation by the North Carolina Attorney General's Office, the Division Water Quality did not establish an interim Substance

Current Proposed
Standard in the Rule in
Units of milligrams per liter

Benzo(a)pyrene	4.7×10^{-6}
Benzo(b)fluoranthene	4.7×10^{-5}
Benzo(k)fluoranthene	4.7×10^{-4}
Indeno(1,23-cd)pyrene	4.7×10^{-5}
2-Methylnaphthalene	0.0280

It is important to note that of the five changes proposed by the Division of Public Health in the June 19, 2000 recommendation, only 2-Methylnaphthalene is recommended at concentration level that is lower (i.e. more restrictive) than the proposed Groundwater Quality Standard that appears in the rule. These changes were suggested after the Environmental Management Commission gave approval to proceed public notice and hearing on the proposed rules. These recommended changes have been deemed important enough by Groundwater Section staff to discuss at the public hearings. A more detailed discussion of the proposed Groundwater Quality Standards for the thirty-eight substances, including the seven carbon fraction classes, is found in a Notice of Rulemaking Proceedings that was published in the North Carolina Register on November 15, 1999 (Volume 14, Issue 10). In addition, a minor editorial change is made to the name of 1,1-Dichloroethane. Another editorial change is being made to remove an unnecessary parenthesis from 1,2-dibromo-

maximum allowable concentration for the Petroleum Aromatics Carbon Fraction Class C9-C22. The amendment to the Groundwater Quality Standards in 15A NCAC 2L .0202 specifies the Aromatics Carbon Fraction Class C9-C32. It is anticipated that the Aromatics Carbon Fraction Class C9-C32 will be deleted and replaced by Petroleum Aromatics Carbon Fraction Class C9-C22 in the text of the rule after the hearing has been held. The proposed concentration level for the Petroleum Aromatics Carbon Fraction Class C9-C22 will be 0.210 milligrams per liter. This concentration is the same as the interim maximum allowable concentration for the Aromatics Carbon Fraction Class C9-C32. Pursuant to 15A NCAC 2L .0202, interim maximum allowable concentrations for the Aromatics Carbon Fraction Class C9-C32 will remain in place until final rules are adopted pursuant to North Carolina General Statute 150B. The final text of the rule will show the Aromatics Carbon Fraction Class C9-C32, the Petroleum Aromatics Carbon Fraction Class C9-C22, or both the Aromatics Carbon Fraction Class C9-C32 and the Petroleum Aromatics Carbon Fraction Class C9-C22 with the appropriate concentration level. On June 19, 2000, the Division of Public Health conducted a biennial review as required under 15A NCAC 2L .0202(f). Except for five of the thirty-eight substances that are proposed for revision by the Division of Public Health, the concentrations shown in the proposed amendment to title 15A NCAC 2L .0202 are the recommended Groundwater Quality Standards for these substances. Based on more recent toxicological and health information, it is proposed that the final standards for these five chemicals be changed in accordance with the following listing:

Change Recommended on
June 19, 2000 in Units
Units of milligrams per liter

4.79×10^{-6}
4.79×10^{-5}
4.79×10^{-4}
4.79×10^{-5}
0.0140

3-chloropropane. The Groundwater Quality Standards for these substances are unchanged in the text of the rule.

Comment Procedures: Interested persons may contact David Hance at (919) 715-6189 for more information. Oral comments may be made during the hearings. All written comments must be submitted by November 1, 2000. Written copies of oral statements exceeding 3 minutes are requested. Oral statements may be limited at the discretion of the hearing officers. Mail comments to David Hance, DENR-DWQ-Groundwater Section, 1636 Mail Service Center, Raleigh, NC 27699-1636, phone (919) 715 6189, fax (919) 715-0588, email David.Hance@ncmail.net.

Fiscal Impact

- ☐ State
☐ Local
☐ Substantive (>\$5,000,000)

☒ **None**

CHAPTER 2 – ENVIRONMENTAL MANAGEMENT

**SUBCHAPTER 2L – GROUNDWATER
CLASSIFICATIONS AND STANDARDS**

**SECTION .0200 – CLASSIFICATIONS AND
GROUNDWATER QUALITY STANDARDS**

**15A NCAC 02L .0202 GROUNDWATER QUALITY
STANDARDS**

(a) The groundwater quality standards for the protection of the groundwaters of the state are those specified in this Rule. They are the maximum allowable concentrations resulting from any discharge of contaminants to the land or waters of the state, which may be tolerated without creating a threat to human health or which would otherwise render the groundwater unsuitable for its intended best usage.

(b) The groundwater quality standards for contaminants specified in Paragraphs (g) and (h) of this Rule shall be as listed, except that:

- (1) Where the standard for a substance is less than the practical quantitation limit, the detection of that substance at or above the practical quantitation limit shall constitute a violation of the standard.
- (2) Where two or more substances exist in combination, the Director shall consider the effects of chemical interactions as determined by the Division of Epidemiology and may establish maximum concentrations at values less than those established in accordance with Paragraphs (c) and (g) of this Rule. In the absence of information to the contrary, the carcinogenic risks associated with carcinogens present shall be considered additive and the toxic effects associated with non-carcinogens present shall also be considered additive.
- (3) Where naturally occurring substances exceed the established standard, the standard will be the naturally occurring concentration as determined by the Director.

(c) Except for tracers used in concentrations which have been determined by the Division of Epidemiology to be protective of human health, and the use of which has been permitted by the Division, substances which are not naturally occurring and for which no standard is specified shall not be permitted in detectable concentrations in Class GA or Class GSA groundwaters. Any person may petition the Director to establish an interim maximum allowable concentration for an unspecified substance, however, the burden of demonstrating those concentrations of the substance which correspond to the levels described in Paragraph (d) of this Rule rests with the petitioner. The petitioner shall submit relevant toxicological and epidemiological data, study results, and calculations necessary to establish a standard in accordance with the procedure prescribed in Paragraph (d) of this Rule. Within three months after the establishment of an interim maximum allowable concentration for a substance by the Director, the Director shall initiate action to consider adoption of a standard for that substance.

(d) Groundwater quality standards for substances in Class GA and Class GSA groundwaters are established as the lesser of:

- (1) Systemic threshold concentration calculated as follows:
[Reference Dose (mg/kg/day) x 70 kg (adult body weight) x Relative Source Contribution (.10 for inorganics; .20 for organics)] / [2 liters/day (avg. water consumption)];
- (2) Concentration which corresponds to an incremental lifetime cancer risk of 1×10^{-6} ;
- (3) Taste threshold limit value;
- (4) Odor threshold limit value;
- (5) Maximum contaminant level; or
- (6) National secondary drinking water standard.

(e) The following references, in order of preference, shall be used in establishing concentrations of substances which correspond to levels described in Paragraph (d) of this Rule.

- (1) Integrated Risk Information System (U.S. EPA).
- (2) Health Advisories (U.S. EPA Office of Drinking Water).
- (3) Other health risk assessment data published by U.S. EPA.
- (4) Other appropriate, published health risk assessment data, and scientifically valid peer-reviewed published toxicological data.

(f) Groundwater quality standards specified in Paragraphs (g) and (h) of this Rule and interim maximum allowable concentrations established pursuant to Paragraph (c) of this Rule shall be reviewed on a triennial basis. Appropriate modifications to established standards will be made in accordance with the procedure prescribed in Paragraph (d) of this Rule where modifications are considered appropriate based on data published subsequent to the previous review.

(g) Class GA Standards. Where not otherwise indicated, the standard refers to the total concentration in milligrams per liter of any constituent in a dissolved, colloidal or particulate form which is mobile in groundwater. This does not apply to sediment or other particulate matter which is preserved in a groundwater sample as a result of well construction or sampling procedures.

- (1) acetone: 0.7
- (2) acrylamide (propenamide): 0.00001
- (3) alkane carbon fraction class C-5 - C8: 0.42
- (4) alkane carbon fraction class C-9 - C19: 4.20
- (5) alkane carbon fraction class C-19 - C32: 42.0
- (6) aromatics carbon fraction class C9 - C32: 0.210
- (7) arsenic: 0.05
- (8) barium: 2.0
- (9) benzene: 0.001
- (10) benzo(b)fluoranthene: 4.7×10^{-5}
- (11) benzo(k)fluoranthene: 4.7×10^{-4}
- (12) benzo(a)pyrene: 4.7×10^{-6}
- (13) boron: 0.32
- (14) bromoform (tribromomethane): 0.00019
- (15) n-butylbenzene: 0.07
- (16) sec-butylbenzene: 0.07
- (17) tert-butylbenzene: 0.07
- (18) butylbenzyl phthalate: 0.10
- (19) cadmium: 0.005
- (20) carbofuran: 0.036

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- (21) carbon tetrachloride: 0.0003
 - (22) chlordane: 2.7×10^{-5}
 - (23) chloride: 250.0
 - (24) chlorobenzene: 0.05
 - (25) chloroform (trichloromethane): 0.00019
 - (26) chloromethane (methyl chloride): 2.6×10^{-3}
 - (27) 2-chlorophenol: 0.0001
 - (28) 2-chlorotoluene: 0.14
 - (29) chromium: 0.05
 - (30) cis-1,2-dichloroethene: 0.07
 - (31) coliform organisms (total): 1 per 100 milliliters
 - (32) color: 15 color units
 - (33) copper: 1.0
 - (34) cyanide: 0.154
 - (35) 2, 4-D (2,4-dichlorophenoxy acetic acid): 0.07
 - (36) dibenz(a,h)anthracene: 4.7×10^{-6}
 - (37) 1,2-dibromo-3-chloropropane: 2.5×10^{-5}
 - (38) dichlorodifluoromethane (Freon-12; Halon): 1.4
 - (39) p,p'-dichlorodiphenyl dichloroethane (DDD): 1.4×10^{-4}
 - (40) p,p'-dichlorodiphenyltrichloroethane (DDT): 1.0×10^{-4}
 - (41) 1,1-dichloroethane: 0.7
 - (42) 1,2-dichloroethane (ethylene dichloride): 0.00038
 - (43) 1,1-dichloroethylene (vinylidene chloride): 0.007
 - (44) 1,2-dichloropropane: 0.00056
 - (45) dieldrin: 2.2×10^{-6}
 - (46) di-n-butyl (or dibutyl) phthalate (DBP): 0.7
 - (47) diethylphthalate (DEP): 5.0
 - (48) di(2-ethylhexyl) phthalate (DEHP): 0.003
 - (49) 2-dimethylphenol (m-xyleneol): 0.14
 - (50) di-n-octyl phthalate: 0.14
 - (51) p-dioxane (1,4-diethylene dioxide): 0.007
 - (52) dioxin: 2.2×10^{-10}
 - (53) dissolved solids (total): 500
 - (54) disulfoton: 2.8×10^{-4}
 - (55) diundecyl phthalate (Santicizer 711): 0.14
 - (56) endosulfan II (beta-endosulfan): 0.0420
 - (57) endrin: 0.002
 - (58) endrin (total endrin: includes endrin, endrin aldehyde, and endrin ketone): 2.1×10^{-3}
 - (59) epichlorohydrin (1-chloro-2,3-epoxypropane): 0.00354
 - (60) ethylbenzene: 0.029
 - (61) ethylene dibromide (EDB; 1,2-dibromoethane): 4.0×10^{-7}
 - (62) ethylene glycol: 7.0
 - (63) fluorene: 0.28
 - (64) fluoride: 2.0
 - (65) foaming agents: 0.5
 - (66) gross alpha (adjusted) particle activity excluding radium-226 and uranium: 15 pCi/l
 - (67) heptachlor: 8.0×10^{-6}
 - (68) heptachlor epoxide: 4.0×10^{-6}
 - (69) heptane: 2.1
 - (70) hexachlorobenzene (perchlorobenzene): 0.00002
 - (71) hexachlorocyclohexane isomers (total hexachlorocyclohexane: includes alpha, beta, delta, gamma, and epsilon isomers): 1.9×10^{-5}
 - (72) n-hexane: 0.42
 - (73) indeno(1,2,3-cd)pyrene: 4.7×10^{-5}
 - (74) iron: 0.3
 - (75) isophorone: 0.0368
 - (76) isopropylbenzene: 0.070
 - (77) lead: 0.015
 - (78) lindane: 2.0×10^{-4}
 - (79) manganese: 0.05
 - (80) mercury: 0.0011
 - (81) metadichlorobenzene (1,3-dichlorobenzene): 0.62
 - (82) methoxychlor: 0.035
 - (83) methylene chloride (dichloromethane): 0.005
 - (84) methyl ethyl ketone (MEK; 2-butanone): 0.17
 - (85) 2-methylnaphthalene: 0.0280
 - (86) 3-methylphenol (m-cresol): 0.0350
 - (87) 4-methylphenol (p-cresol): 3.5×10^{-3}
 - (88) methyl tert-butyl ether (MTBE): 0.2
 - (89) naphthalene: 0.021
 - (90) nickel: 0.1
 - (91) nitrate: (as N) 10.0
 - (92) nitrite: (as N) 1.0
 - (93) N-nitrosodimethylamine: 7.0×10^{-7}
 - (94) orthodichlorobenzene (1,2-dichlorobenzene): 0.62
 - (95) oxamyl: 0.175
 - (96) paradichlorobenzene (1,4-dichlorobenzene): 0.075
 - (97) pentachlorophenol: 0.0003
 - (98) petroleum aliphatic carbon fraction class C5 - C8: 0.42
 - (99) petroleum aliphatic carbon fraction class C9 - C18: 4.20
 - (100) petroleum aliphatic carbon fraction class C19 - C36: 42.0
 - (101) pH: 6.5 - 8.5
 - (102) phenanthrene: 0.21
 - (103) phenol: 0.30
 - (104) phorate: 1.4×10^{-3}
 - (105) n-propylbenzene: 0.070
 - (106) radium-226 and radium-228 (combined): 5 pCi/l
 - (107) selenium: 0.05
 - (108) silver: 0.018
 - (109) styrene (ethenylbenzene): 0.1
 - (110) sulfate: 250.0
 - (111) tetrachloroethylene (perchloroethylene; PCE): 0.0007
 - (112) 2,3,4,6-tetrachlorophenol: 0.210
 - (113) toluene (methylbenzene): 1.0
 - (114) toxaphene: 3.1×10^{-5}
 - (115) 2, 4, 5,-TP (Silvex): 0.05
 - (116) trans-1,2-dichloroethene: 0.07
 - (117) 1,1,1-trichloroethane (methyl chloroform): 0.2
 - (118) trichloroethylene (TCE): 0.0028
 - (119) trichlorofluoromethane: 2.1
 - (120) 1,1,2-trichloro-1,2,2-trifluoroethane (CFC-113): 210.0
 - (121) 1,2,3- trichloropropane: 5.0×10^{-6}
 - (122) 1,2,4-trimethylbenzene: 0.350
 - (123) 1,3,5-trimethylbenzene: 0.350
 - (124) vinyl chloride (chloroethylene): 1.5×10^{-5}
 - (125) xylenes (o-, m-, and p-): 0.53
 - (126) zinc: 2.1
- (h) Class GSA Standards. The standards for this class shall be the same as those for Class GA except as follows:
- (1) chloride: allowable increase not to exceed 100 percent of the natural quality concentration.

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(2) total dissolved solids: 1000 mg/l.

(i) Class GC Waters.

- (1) The concentrations of substances which, at the time of classification exceed the standards applicable to Class GA or GSA groundwaters shall not be caused to increase, nor shall the concentrations of other substances be caused to exceed the GA or GSA standards as a result of further disposal of contaminants to or beneath the surface of the land within the boundary of the area classified GC.
- (2) The concentrations of substances which, at the time of classification, exceed the standards applicable to GA or GSA groundwaters shall not be caused to migrate as a result of activities within the boundary of the GC classification, so as to violate the groundwater or surface water quality standards in adjoining waters of a different class.
- (3) Concentrations of specific substances, which exceed the established standard at the time of classification, shall be listed in Section .0300 of this Subchapter.

Authority G.S. 143-214.1; 143B-282(a)(2).

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rules cited as 15A NCAC 13A .0107, .0109, .0113, .0119. Notice of Rule-making Proceedings was published in the Register on August 1, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: October 26, 2000

Time: 9:00 a.m.

Location: Archdale Building, Ground Floor Hearing Room, 512 N. Salisbury St., Raleigh, NC 27611

Reason for Proposed Action:

15A NCAC 13A .0107 STDS Applicable to Generators of Hazardous Waste – Part 262 – Eliminated requirements to use the North Carolina Hazardous Waste Manifest form. Instead the Federal Hazardous Waste Manifest form shall be used.

15A NCAC 13A .0109 Standards for Owners/Operators of HWTSD Facilities – Part 264 – The proposed amendment adds 40 CFR 264.554 "Staging Piles" to Paragraph (s) (Subpart S), "Corrective Action for Solid Waste Management Units".

15A NCAC 13A .0113 The Hazardous Waste Permit Program – Part 270 – The proposed amendment incorporates by reference all of Subpart F "Special Forms of Permits", and excludes 40 CFR 270.68 which is not incorporated by reference. Paragraph (i) has been revised to properly exclude those Federal Regulations that North Carolina is not adopting. Section 270.68 "Remedial Action Plans (RAPs)" allows less stringent provision in remediation at North Carolina hazardous waste sites.

15A NCAC 13A .0119 Standards for Universal Waste Management – Part 273 – The proposed amendment adds 40 CFR 273.7 which is reserved, Section 273.8 "Applicability-

household and conditionally exempt small quantity generator waste", and 273.9 "Definitions" to Paragraph (a), (Subpart A), "General", North Carolina had previously adopted the "Definitions" as 40 CFR 273.6. EPA renumbered the "Definitions" from 273.6 to 273.9 and added 273.8 to describe the applicability of this regulation.

Comment Procedures: Comments will be accepted through November 1, 2000. Written comments may be submitted to Jill Burton, Acting Chief, Hazardous Waste Section, Division of Waste Management, 1646 Mail Service Center, Raleigh, NC 27699-1646.

Fiscal Impact

- ☐ State
☐ Local
☐ Substantive (>\$5,000,000)
☒ None

CHAPTER 13 – SOLID WASTE MANAGEMENT

SUBCHAPTER 13A – HAZARDOUS WASTE MANAGEMENT

SECTION .0100 – HAZARDOUS WASTE

15A NCAC 13A .0107 STDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE - PART 262

(a) 40 CFR 262.10 through 262.12 (Subpart A), "General", are incorporated by reference including subsequent amendments and editions.

(b) 40 CFR 262.20 through 262.23 (Subpart B), "The Manifest", are incorporated by reference including subsequent amendments and editions.

(c) 40 CFR 262.30 through 262.34 (Subpart C), "Pre-Transport Requirements", are incorporated by reference including subsequent amendments and editions.

(d) 40 CFR 262.40 through 262.44 (Subpart D), "Recordkeeping and Reporting", are incorporated by reference including subsequent amendments and editions. In addition, a generator shall keep records of inspections and results of inspections required by Section 262.34 for at least three years from the date of the inspection.

(e) 40 CFR 262.50 through 262.58 (Subpart E), "Exports of Hazardous Waste", are incorporated by reference including subsequent amendments and editions.

(f) 40 CFR 262.60 (Subpart F), "Imports of Hazardous Waste", is incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 262.70 (Subpart G), "Farmers" is incorporated by reference including subsequent amendments and editions.

(h) 40 CFR 262.80 through 262.89 (Subpart H), "Transfrontier Shipments of Hazardous Waste for Recovery within the OECD", are incorporated by reference including subsequent amendments and editions, except that 40 CFR 262.89(e) is not incorporated by reference.

(i) The appendix to 40 CFR Part 262 is incorporated by reference including subsequent amendments and editions; however, a contact telephone number for each transporter and

the destination facility is required on the manifest. All applicable EPA Hazardous Waste Codes shall also be included on the manifest.

Authority G.S. 130A-294(c); 150B-21.6.

15A NCAC 13A .0109 STANDARDS FOR OWNERS/OPERATORS OF HWTSD FACILITIES – PART 264

(a) Any person who treats, stores or disposes of hazardous waste shall comply with the requirements set forth in this Section. The treatment, storage or disposal of hazardous waste is prohibited except as provided in this Section.

(b) 40 CFR 264.1 through 264.4 (Subpart A), "General", are incorporated by reference including subsequent amendments and editions.

(c) 40 CFR 264.10 through 264.19 (Subpart B), "General Facility Standards", are incorporated by reference including subsequent amendments and editions.

(d) 40 CFR 264.30 through 264.37 (Subpart C), "Preparedness and Prevention", are incorporated by reference including subsequent amendments and editions.

(e) 40 CFR 264.50 through 264.56 (Subpart D), "Contingency Plan and Emergency Procedures", are incorporated by reference including subsequent amendments and editions.

(f) 40 CFR 264.70 through 264.77 (Subpart E), "Manifest System, Recordkeeping, and Reporting", are incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 264.90 through 264.101 (Subpart F), "Releases From Solid Waste Management Units", are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 26, 1983" shall be substituted for "July 26, 1982" contained in 40 CFR 264.90(a)(2).

(h) 40 CFR 264.110 through 264.120 (Subpart G), "Closure and Post-Closure", are incorporated by reference including subsequent amendments and editions.

(i) 40 CFR 264.140 through 264.151 (Subpart H), "Financial Requirements", are incorporated by reference including subsequent amendments and editions, except that 40 CFR 264.143(a)(3), (a)(4), (a)(5), (a)(6), 40 CFR 264.145(a)(3), (a)(4), (a)(5), and 40 CFR 264.151(a)(1), Section 15 are not incorporated by reference.

- (1) The following shall be substituted for the provisions of 40 CFR 264.143(a)(3) which were not incorporated by reference:

The owner or operator shall deposit the full amount of the closure cost estimate at the time the fund is established. Within 1 year of the effective date of these Rules, an owner or operator using a closure trust fund established prior to the effective date of these Rules shall deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or shall obtain other financial assurance as specified in this Section.

- (2) The following shall be substituted for the provisions of 40 CFR 264.143(a)(6) which were not incorporated by reference:

After the trust fund is established, whenever the current closure cost estimate changes, the owner or operator shall compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator within 60 days after the change in the cost estimate, shall either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

- (3) The following shall be substituted for the provisions of 40 CFR 264.145(a)(3) which were not incorporated by reference:

(A) Except as otherwise provided in Part (i)(3)(B) of this Rule, the owner or operator shall deposit the full amount of the post-closure cost estimate at the time the fund is established.

(B) If the Department finds that the owner or operator of an inactive hazardous waste disposal unit cannot provide financial assurance for post-closure through any other option (e.g. surety bond, letter of credit, or corporate guarantee), a plan for annual payments to the trust fund over the term of the RCRA post-closure permit may be established by the Department as a permit condition.

- (4) The following additional requirement shall apply:

The trustee shall notify the Department of payment to the trust fund, by certified mail within 10 days following said payment to the trust fund. The notice shall contain the name of the Grantor, the date of payment, the amount of payment, and the current value of the trust fund.

(j) 40 CFR 264.170 through 264.179 (Subpart I), "Use and Management of Containers", are incorporated by reference including subsequent amendments and editions.

(k) 40 CFR 264.190 through 264.200 (Subpart J), "Tank Systems", are incorporated by reference including subsequent amendments and editions.

- (l) The following are requirements for Surface Impoundments:

(1) 40 CFR 264.220 through 264.232 (Subpart K), "Surface Impoundments", are incorporated by reference including subsequent amendments and editions.

- (2) The following are additional standards for surface impoundments:

(A) The liner system shall consist of at least two liners;

(B) Artificial liners shall be equal to or greater than 30 mils in thickness;

(C) Clayey liners shall be equal to or greater than five feet in thickness and have a maximum permeability of 1.0×10^{-7} cm/sec;

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- (D) Clayey liner soils shall have the same characteristics as described in Subparts (r)(4)(B)(ii), (iii), (iv), (vi) and (vii) of this Rule;
 - (E) A leachate collection system shall be constructed between the upper liner and the bottom liner;
 - (F) A leachate detection system shall be constructed below the bottom liner; and
 - (G) Surface impoundments shall be constructed in such a manner to prevent landsliding, slippage or slumping.
- (m) 40 CFR 264.250 through 264.259 (Subpart L), "Waste Piles", are incorporated by reference including subsequent amendments and editions.
- (n) 40 CFR 264.270 through 264.283 (Subpart M), "Land Treatment", are incorporated by reference including subsequent amendments and editions.
- (o) 40 CFR 264.300 through 264.317 (Subpart N), "Landfills", are incorporated by reference including subsequent amendments and editions.
- (p) A long-term storage facility shall meet groundwater protection, closure and post-closure, and financial requirements for disposal facilities as specified in Paragraphs (g), (h), and (i) of this Rule.
- (q) 40 CFR 264.340 through 264.351 (Subpart O), "Incinerators", are incorporated by reference including subsequent amendments and editions.
- (r) The following are additional location standards for facilities:
- (1) In addition to the location standards set forth in 15A NCAC 13A .0109(c), the Department, in determining whether to issue a permit for a hazardous waste management facility, shall consider the risks posed by the proximity of the facility to water table levels, flood plains, water supplies, public water supply watersheds, mines, natural resources such as wetlands, endangered species habitats, parks, forests, wilderness areas, and historical sites, and population centers and shall consider whether provision has been made for adequate buffer zones. The Department shall also consider ground water travel time, soil pH, soil cation exchange capacity, soil composition and permeability, slope, climate, local land use, transportation factors such as proximity to waste generators, route, route safety, and method of transportation, aesthetic factors such as the visibility, appearance, and noise level of the facility; potential impact on air quality, existence of seismic activity and cavernous bedrock.
 - (2) The following minimum separation distances shall be required of all hazardous waste management facilities except that existing facilities shall be required to meet these minimum separation distances to the maximum extent feasible:
 - (A) All hazardous waste management facilities shall be located at least 0.25 miles from institutions including but not limited to schools, health care facilities and prisons, unless the owner or operator can demonstrate that no unreasonable risks shall be posed by the proximity of the facility.
 - (B) All hazardous waste treatment and storage facilities shall comply with the following separation distances: all hazardous waste shall be treated and stored a minimum of 50 feet from the property line of the facility; except that all hazardous waste with ignitable, incompatible or reactive characteristics shall be treated and stored a minimum of 200 feet from the property line of the facility if the area adjacent to the facility is zoned for any use other than industrial or is not zoned.
- (C) All hazardous waste landfills, long-term storage facilities, land treatment facilities and surface impoundments, shall comply with the following separation distances:
- (i) All hazardous waste shall be located a minimum of 200 feet from the property line of the facility.
 - (ii) Each hazardous waste landfill, long-term storage or surface impoundment facility shall be constructed so that the bottom of the facility is 10 feet or more above the historical high ground water level. The historical high ground water level shall be determined by measuring the seasonal high ground water levels and predicting the long-term maximum high ground water level from published data on similar North Carolina topographic positions, elevations, geology, and climate; and
 - (iii) All hazardous waste shall be located a minimum of 1,000 feet from the zone of influence of any existing off-site ground water well used for drinking water, and outside the zone of influence of any existing or planned on-site drinking water well.
- (D) Hazardous waste storage and treatment facilities for liquid waste that is classified as TC toxic, toxic, or acutely toxic and is stored or treated in tanks or containers shall not be located:
- (i) in the recharge area of an aquifer which is designated as an existing sole drinking water source as defined in the Safe Drinking Water Act, Section .1424(e) [42 U.S.C. 300h-3(e)] unless an adequate secondary containment system is constructed, and after consideration of applicable factors in Subparagraph (r)(3) of this Rule, the owner or operator can demonstrate no unreasonable risk to public health;
 - (ii) within 200 feet of surface water impoundments or surface water stream with continuous flow as defined by the United States Geological Survey;
 - (iii) in an area that will allow direct surface or subsurface discharge to WS-I, WS-II or SA waters or a Class III Reservoir as defined in 15A NCAC 2B .0200 and 15A NCAC 18C .0102;

- (iv) in an area that will allow direct surface or subsurface discharge to the watershed for a Class I or II Reservoir as defined in 15A NCAC 18C .0102;
 - (v) within 200 feet horizontally of a 100-year floodplain elevation;
 - (vi) within 200 feet of a seismically active area as defined in Paragraph (c) of this Rule; and
 - (vii) within 200 feet of a mine, cave, or cavernous bedrock.
- (3) The Department may require any hazardous waste management facility to comply with greater separation distances or other protective measures necessary to avoid unreasonable risks posed by the proximity of the facility to water table levels, flood plains, water supplies, public water supply watersheds, mines, natural resources such as wetlands, endangered species habitats, parks, forests, wilderness areas, and historical sites, and population centers or to provide an adequate buffer zone. The Department may also require protective measures necessary to avoid unreasonable risks posed by the soil pH, soil cation exchange capacity, soil composition and permeability, climate, transportation factors such as proximity to waste generators, route, route safety, and method of transportation, aesthetic factors such as the visibility, appearance, and noise level of the facility, potential impact on air quality, and the existence of seismic activity and cavernous bedrock. In determining whether to require greater separation distances or other protective measures, the Department shall consider the following factors:
 - (A) All proposed hazardous waste activities and procedures to be associated with the transfer, storage, treatment or disposal of hazardous waste at the facility;
 - (B) The type of hazardous waste to be treated, stored, or disposed of at the facility;
 - (C) The volume of waste to be treated, stored, or disposed of at the facility;
 - (D) Land use issues including the number of permanent residents in proximity to the facility and their distance from the facility;
 - (E) The adequacy of facility design and plans for containment and control of sudden and non-sudden accidental events in combination with adequate off-site evacuation of potentially adversely impacted populations;
 - (F) Other land use issues including the number of institutional and commercial structures such as airports and schools in proximity to the facility, their distance from the facility, and the particular nature of the activities that take place in those structures;
 - (G) The lateral distance and slope from the facility to surface water supplies or to watersheds draining directly into surface water supplies;
 - (H) The vertical distance, and type of soils and geologic conditions separating the facility from the water table;
 - (I) The direction and rate of flow of ground water from the sites and the extent and reliability of on-site and nearby data concerning seasonal and long-term groundwater level fluctuations;
 - (J) Potential air emissions including rate, direction of movement, dispersion and exposure, whether from planned or accidental, uncontrolled releases; and
 - (K) Any other relevant factors.
- (4) The following are additional location standards for landfills, long-term storage facilities and hazardous waste surface impoundments:
 - (A) A hazardous waste landfill, long-term storage, or a surface impoundment facility shall not be located:
 - (i) In the recharge area of an aquifer which is an existing sole drinking water source;
 - (ii) Within 200 feet of a surface water stream with continuous flow as defined by the United States Geological Survey;
 - (iii) In an area that will allow direct surface or subsurface discharge to WS-I, WS-II or SA waters or a Class III Reservoir as defined in 15A NCAC 2B .0200 and 15A NCAC 18C .0102;
 - (iv) In an area that will allow direct surface or subsurface discharge to a watershed for a Class I or II Reservoir as defined in 15A NCAC 18C .0102;
 - (v) Within 200 feet horizontally of a 100-year flood hazard elevation;
 - (vi) Within 200 feet of a seismically active area as defined in Paragraph (c) of this Rule; and
 - (vii) Within 200 feet of a mine, cave or cavernous bedrock.
 - (B) A hazardous waste landfill or long-term storage facility shall be located in highly weathered, relatively impermeable clayey formations with the following soil characteristics:
 - (i) The depth of the unconsolidated soil materials shall be equal to or greater than 20 feet;
 - (ii) The percentage of fine-grained soil material shall be equal to or greater than 30 percent passing through a number 200 sieve;
 - (iii) Soil liquid limit shall be equal to or greater than 30;
 - (iv) Soil plasticity index shall be equal to or greater than 15;
 - (v) Soil compacted hydraulic conductivity shall be a maximum of 1.0×10^{-7} cm/sec;
 - (vi) Soil Cation Exchange Capacity shall be equal to or greater than 5 milliequivalents per 100 grams;
 - (vii) Soil Potential Volume Change Index shall be equal to or less than 4; and

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- (viii) Soils shall be underlain by a competent geologic formation having a rock quality designation equal to or greater than 75 percent unless other geological conditions afford adequate protection of public health and the environment.
- (C) A hazardous waste landfill or long-term storage facility shall be located in areas of low to moderate relief to the extent necessary to prevent landsliding or slippage and slumping. The site may be graded to comply with this standard.
- (5) All new hazardous waste impoundments that close with hazardous waste residues left in place shall comply with the standards for hazardous waste landfills in Subparagraph (r)(4) of this Rule unless the applicant can demonstrate that equivalent protection of public health and environment is afforded by some other standard.
- (6) The owners and operators of all new hazardous waste management facilities shall construct and maintain a minimum of two observation wells, one upgradient and one downgradient of the proposed facility; and shall establish background groundwater concentrations and monitor annually for all hazardous wastes that the owner or operator proposes to store, treat, or dispose at the facility.
- (7) The owners and operators of all new hazardous waste facilities shall demonstrate that the community has had an opportunity to participate in the siting process by complying with the following:
 - (A) The owners and operators shall hold at least one public meeting in the county in which the facility is to be located to inform the community of all hazardous waste management activities including but not limited to: the hazardous properties of the waste to be managed; the type of management proposed for the wastes; the mass and volume of the wastes; and the source of the wastes; and to allow the community to identify specific health, safety and environmental concerns or problems expressed by the community related to the hazardous waste activities associated with the facility. The owners and operators shall provide a public notice of this meeting at least 30 days prior to the meeting. Public notice shall be documented in the facility permit application. The owners and operators shall submit as part of the permit application a complete written transcript of the meeting, all written material submitted that represents community concerns, and all other relevant written material distributed or used at the meeting. The written transcript and other written material submitted or used at the meeting shall be submitted to the local public library closest to and in the county of the proposed site with a request that the information be made available to the public.
 - (B) For the purposes of this Rule, public notice shall include: notification of the boards of county commissioners of the county where the proposed site is to be located and all contiguous counties in North Carolina; a legal advertisement placed in a newspaper or newspapers serving those counties; and provision of a news release to at least one newspaper, one radio station, and one TV station serving these counties. Public notice shall include the time, place, and purpose of the meetings required by this Rule.
 - (C) No less than 30 days after the first public meeting transcript is available at the local public library, the owners and operators shall hold at least one additional public meeting in order to attempt to resolve community concerns. The owners and operators shall provide public notice of this meeting at least 30 days prior to the meeting. Public notice shall be documented in the facility permit application. The owners and operators shall submit as part of the permit application a complete written transcript of the meeting, all written material submitted that represents community concerns, and all other relevant written material distributed or used at the meeting.
 - (D) The application, written transcripts of all public meetings and any additional material submitted or used at the meetings, and any additions or corrections to the application, including any responses to notices of deficiencies shall be submitted to the local library closest to and in the county of the proposed site, with a request that the information be made available to the public until the permit decision is made.
 - (E) The Department shall consider unresolved community concerns in the permit review process and impose final permit conditions based on sound scientific, health, safety, and environmental principles as authorized by applicable laws or rules.
- (s) 40 CFR 264.552 through 264.554 (Subpart S), "Corrective Action for Solid Waste Management Units", are incorporated by reference including subsequent amendments and editions.
- (t) 40 CFR 264.570 through 264.575 (Subpart W), "Drip Pads", are incorporated by reference including subsequent amendments and editions.
- (u) 40 CFR 264.600 through 264.603 (Subpart X), "Miscellaneous Units", are incorporated by reference including subsequent amendments and editions.
- (v) 40 CFR 264.1030 through 264.1049 (Subpart AA), "Air Emission Standards for Process Vents", are incorporated by reference including subsequent amendments and editions.
- (w) 40 CFR 264.1050 through 264.1079 (Subpart BB), "Air Emission Standards for Equipment Leaks", are incorporated by reference including subsequent amendments and editions.
- (x) 40 CFR 264.1080 through 264.1091 (Subpart CC), "Air Emission Standards for Tanks, Surface Impoundments, and Containers", are incorporated by reference including subsequent amendments and editions.

(y) 40 CFR 264.1100 through 264.1102 (Subpart DD), "Containment Buildings", are incorporated by reference including subsequent amendments and editions.

(z) 40 CFR 264.1200 through 264.1202 (Subpart EE), "Hazardous Waste Munitions and Explosives Storage", are incorporated by reference including subsequent amendments and editions.

(aa) Appendices to 40 CFR Part 264 are incorporated by reference including subsequent amendments and editions.

Authority G.S. 130A-294(c); 150B-21.6.

15A NCAC 13A .0113 THE HAZARDOUS WASTE PERMIT PROGRAM - PART 270

(a) 40 CFR 270.1 through 270.6 (Subpart A), "General Information", are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 26, 1983" shall be substituted for "July 26, 1982" contained in 40 CFR 270.1(c).

(b) 40 CFR 270.10 through 270.29 (Subpart B), "Permit Application", are incorporated by reference including subsequent amendments and editions.

(c) The following are additional Part B information requirements for all hazardous waste facilities:

- (1) Description and documentation of the public meetings as required in 15A NCAC 13A .0109(r)(7);
- (2) A description of the hydrological and geological properties of the site including, at a minimum, flood plains, depth to water table, ground water travel time, seasonal and long-term groundwater level fluctuations, proximity to public water supply watersheds, consolidated rock, soil pH, soil cation exchange capacity, soil characteristics and composition and permeability, existence of cavernous bedrock and seismic activity, slope, mines, climate, location and withdrawal rates of surface water users within the immediate drainage basin and well water users within a one mile radius of the facility; water quality information of both surface and groundwater within 1000 ft. of the facility, and a description of the local air quality;
- (3) A description of the facility's proximity to and potential impact on wetlands, endangered species habitats, parks, forests, wilderness areas, historical sites, mines, and air quality;
- (4) A description of local land use including residential, industrial, commercial, recreational, agricultural and the proximity to schools and airports;
- (5) A description of the proximity of the facility to waste generators and population centers; a description of the method of waste transportation; the comments of the local community and state transportation authority on the proposed route, and route safety. Comments shall include proposed alternative routes and restrictions necessary to protect the public health;
- (6) A description of facility aesthetic factors including visibility, appearance, and noise level; and
- (7) A description of any other objective factors that the Department determines are reasonably related and

relevant to the proper siting and operation of the facility.

(d) In addition to the specific Part B information requirements for hazardous waste disposal facilities, owners and operators of hazardous waste landfills or longterm storage facilities shall provide the following information:

- (1) Design drawings and specifications of the leachate collection and removal system;
- (2) Design drawings and specifications of the artificial impervious liner;
- (3) Design drawings and specifications of the clay or clay-like liner below the artificial liner, and a description of the permeability of the clay or clay-like liner; and
- (4) A description of how hazardous wastes will be treated prior to placement in the facility.

(e) In addition to the specific Part B information requirements for surface impoundments, owners and operators of surface impoundments shall provide the following information:

- (1) Design drawings and specifications of the leachate collection and removal system;
- (2) Design drawings and specifications of all artificial impervious liners;
- (3) Design drawings and specifications of all clay or clay-like liners and a description of the clay or clay-like liner; and
- (4) Design drawings and specifications that show that the facility has been constructed in a manner that will prevent landsliding, slippage, or slumping.

(f) 40 CFR 270.30 through 270.33 (Subpart C), "Permit Conditions", are incorporated by reference including subsequent amendments and editions.

(g) 40 CFR 270.40 through 270.43 (Subpart D), "Changes to Permit", are incorporated by reference including subsequent amendments and editions.

(h) 40 CFR 270.50 through 270.51 (Subpart E), "Expiration and Continuation of Permits", are incorporated by reference including subsequent amendments and editions.

(i) 40 CFR 270.60 through 270.68 (Subpart F), "Special Forms of Permits", are incorporated by reference including subsequent amendments and editions, except that 40 CFR 270.68 is not incorporated by reference.

(j) 40 CFR 270.70 through 270.73 (Subpart G), "Interim Status", are incorporated by reference including subsequent amendments and editions. For the purpose of this incorporation by reference, "January 1, 1986" shall be substituted for "November 8, 1985" contained in 40 CFR 270.73(c).

(k) The following are additional permitting requirements concerning operating record of other facilities.

- (1) An applicant applying for a permit for a hazardous waste facility shall submit a disclosure statement to the Department as a part of the application for a permit or any time thereafter specified by the Department. The disclosure statement shall be supported by an affidavit attesting to the truth and completeness of the facts asserted in the statement and shall include:

(A) A brief description of the form of the business (e.g. partnership, sole proprietorship, corporation, association, or other);

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- (B) The name and address of any hazardous waste facility constructed or operated after October 21, 1976 by the applicant or any parent or subsidiary corporation if the applicant is a corporation; and
 - (C) A list identifying any legal action taken against any facility identified in Part (k)(1)(B) of this Rule involving:
 - (i) any administrative ruling or order issued by any state, federal or local authority relating to revocation of any environmental or waste management permit or license, or to a violation of any state or federal statute or local ordinance relating to waste management or environmental protection;
 - (ii) any judicial determination of liability or conviction under any state or federal law or local ordinance relating to waste management or environmental protection; and
 - (iii) any pending administrative or judicial proceeding of the type described in this Part.
 - (D) The identification of each action described in Part (k)(1)(C) of this Rule shall include the name and location of the facility that the action concerns, the agency or court that heard or is hearing the matter, the title, docket or case number, and the status of the proceeding.
- (2) In addition to the information set forth in Subparagraph (k)(1) of this Rule, the Department may require from any applicant such additional information as it deems necessary to satisfy the requirements of G.S. 130A-295. Such information may include, but shall not be limited to:
- (A) The names, addresses, and titles of all officers, directors, or partners of the applicant and of any parent or subsidiary corporation if the applicant is a corporation;
 - (B) The name and address of any company in the field of hazardous waste management in which the applicant business or any of its officers, directors, or partners, hold an equity interest and the name of the officer, director, or partner holding such interest; and
 - (C) A copy of any administrative ruling or order and of any judicial determination of liability or conviction described in Part (k)(1)(C) of this Rule, and a description of any pending administrative or judicial proceeding in that item.
- (3) If the Department finds that any part or parts of the disclosure statement is not necessary to satisfy the requirements of G.S. 130A-295, such information shall not be required.
- (l) An applicant for a new, or modification to an existing, commercial facility permit, shall provide a description and justification of the need for the facility.
- (m) Requirements for Off-site Recycling Facilities.
- (1) The permit requirements of this Rule apply to owners and operators of off-site recycling facilities.
 - (2) The following provisions of 40 CFR Part 264, as incorporated by reference, shall apply to owners and operators of off-site recycling facilities:
 - (A) Subpart B - General Facility Standards;
 - (B) Subpart C - Preparedness and Prevention;
 - (C) Subpart D - Contingency Plan and Emergency Procedures;
 - (D) Subpart E - Manifest System, Recordkeeping and Reporting;
 - (E) Subpart G - Closure and Post-closure;
 - (F) Subpart H - Financial Requirements;
 - (G) Subpart I - Use and Management of Containers;
 - (H) Subpart J - Tank Systems;
 - (I) 264.101 - Corrective Action for Solid Waste Management Units;
 - (J) Subpart X - Miscellaneous Units; and
 - (K) Subpart DD - Containment Buildings.
 - (3) The requirements listed in Subparagraph (m)(2) of this Rule apply to the entire off-site recycling facility, including all recycling units, staging and process areas, and permanent and temporary storage areas for wastes.
 - (4) The following provisions of 15A NCAC 13A .0109 shall apply to owners and operators of off-site recycling facilities:
 - (A) The substitute financial requirements of Rule .0109(i)(1), (2) and (4); and
 - (B) The additional standards of Rule .0109(r)(1), (2), (3), (6) and (7).
 - (5) The owner or operator of an off-site recycling facility shall keep a written operating record at his facility.
 - (6) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:
 - (A) A description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or recycling at the facility;
 - (B) The location of all hazardous waste within the facility and the quantity at each location. This information must include cross-references to specific manifest document numbers if the waste was accompanied by a manifest; and
 - (C) Documentation of the fate of all hazardous wastes received from off-site or generated on-site. This shall include records of the sale, reuse, off-site transfer, or disposal of all waste materials.
- (n) Permit Fees for Commercial Hazardous Waste Facilities.
- (1) An applicant for a permit modification for a commercial hazardous waste facility shall pay an application fee as follows:
 - (A) Class 1 permit modification \$100;
 - (B) Class 2 permit modification \$1,000; or
 - (C) Class 3 permit modification \$5,000.

Note: Class 1 permit modifications which do not require prior approval of the Division Director are excluded from the fee requirement.
 - (2) The application fee for a new permit, permit renewal, or permit modification must accompany the application,

and is non-refundable. The application shall be considered incomplete until the fee is paid. Checks shall be made payable to: Division of Waste Management.

Authority G.S. 130A-294(c); 150B-21.6.

Authority G.S. 130A-294(c); 130A-294.1; 130A-295(a)(1),(2), (c); 150B-21.6.

15A NCAC 13A .0119 STANDARDS FOR UNIVERSAL WASTE MANAGEMENT - PART 273

- (a) 40 CFR 273.1 through 273.9 (Subpart A), "General" are incorporated by reference including subsequent amendments and editions.
- (b) 40 CFR 273.10 through 273.20 (Subpart B), "Standards for Small Quantity Handlers of Universal Waste" are incorporated by reference including subsequent amendments and editions.
- (c) 40 CFR 273.30 through 273.40 (Subpart C), "Standards for Large Quantity Handlers of Universal Waste" are incorporated by reference including subsequent amendments and editions.
- (d) 40 CFR 273.50 through 273.56 (Subpart D), "Standards for Universal Waste Transporters" are incorporated by reference including subsequent amendments and editions.
- (e) 40 CFR 273.60 through 273.62 (Subpart E), "Standards for Destination Facilities" are incorporated by reference including subsequent amendments and editions.
- (f) 40 CFR 273.70 (Subpart F), "Import Requirements" is incorporated by reference including subsequent amendments and editions.
- (g) 40 CFR 273.80 through 273.81 (Subpart G), "Petitions to include Other Wastes Under 40 CFR Part 273" are incorporated by reference including subsequent amendments and editions, except that 40 CFR 273.80(a) and (b), are not incorporated by reference.

- (1) The following shall be substituted for the provisions of 40 CFR 273.80(a) which were not incorporated by reference:

Any person seeking to add a hazardous waste or a category of hazardous waste to this Part may petition for a regulatory amendment under this Subpart and 15A NCAC 24B .0001 and 40 CFR 260.23.

- (2) The following shall be substituted for the provisions of 40 CFR 273.80(b) which were not incorporated by reference:

To be successful, the petitioner must demonstrate to the satisfaction of the Administrator that regulation under the universal waste regulations of 40 CFR Part 273 is:

- (A) appropriate for the waste or category of waste; will improve management practices for the waste or category of waste; and will improve implementation of the hazardous waste program;
- (B) the petition must include the information required by 15A NCAC 24B .0001; and
- (C) the petition shall also address as many of the factors listed in 40 CFR 273.81 as are appropriate for the waste or waste category addressed in the petition.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rules cited as 15A NCAC 21D .0202, .0701-.0706, .0802, and repeal the rules cited as 15A NCAC 21D .0803. Notice of Rule-making Proceedings was published in the Register on February 1, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

Date: October 26, 2000

Time: 9:00 a.m.

Location: Ground Floor Hearing Room, Archdale Building, 512 N. Salisbury St., Raleigh, NC 27604

Reason for Proposed Action: *New federal regulations relating to the food delivery system of the Special Nutrition Program for Women, Infants, and Children (WIC) have established uniform sanctions across State agencies for the most serious vendor violations. The implementation of these mandatory sanctions is intended to curb vendor-related fraud and abuse in the WIC Program. It will also promote WIC and Food Stamp Program coordination in the disqualification of vendors who violate program rules. These sanctions were adopted as temporary rules on May 17 and June 23, 2000 and are now proposed as permanent rules. In addition, these proposed rules reflect updates in the organizational structure within the Department of Health and Human Services as well as policy updates within the vendor management area of the WIC Program.*

Comment Procedures: *Comments, statements, data and other information may be submitted in writing within 30 days of publication on this issue in the NC Register. Copies of the proposed rules and information packages may be obtained by contacting the Nutrition Services Branch at 919-715-0647. Written comments may be sent to Mr. Cory Menees at 1914 Mail Service Center, Raleigh, NC 27699-1914. All comments must be received by November 1, 2000.*

Fiscal Impact

- ☐ State
- ☐ Local
- ☐ Substantive (≥\$5,000,000)
- ☒ None

CHAPTER 21 – HEALTH: PERSONAL HEALTH

SUBCHAPTER 21D – WIC/NUTRITION

SECTION .0200 – WIC PROGRAM GENERAL INFORMATION

15A NCAC 21D .0202 DEFINITIONS

For the purposes of this Subchapter, all definitions set forth in 7 C.F.R. Part 246.2 are hereby incorporated by reference,

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including subsequent amendments and additions, with the following additions and modifications:

- (1) An "administrative appeal" is a procedure to be followed when a local WIC agency, potential local WIC agency, or vendor wishes to appeal an action by the local WIC agency or the state agency which affects participation in the WIC program by the agency or vendor. An administrative appeal may also be called a fair hearing.
- (2) An authorized store representative includes an owner, manager, assistant manager, head cashier, or chief fiscal officer.
- (2)(3) An "authorized WIC vendor" is a food vendor or pharmacy that has executed a currently effective North Carolina WIC Vendor Agreement ~~DENHR~~ DHHS Form 2768.
- (3)(4) A "competent health professional" is a physician, registered nurse, nutritionist, registered dietitian, or nutrition trainee or home economist (who is under the supervision of a nutritionist), or other qualified individuals approved by the ~~nutrition and dietary services branch~~ Nutrition Services Branch. These individuals must be on the staff of the local WIC agency or designated by the local WIC agency in order to certify and prescribe the food package.
- (4)(5) A "fair hearing" is the procedure to be followed when a person or his/her parent or guardian wishes to appeal a decision made by a local WIC agency or the state agency which affects the individual's participation in the program.
- (5)(6) A "food instrument" ~~is a non-negotiable document provided by the state agency, issued by the local agency and used by a participant to obtain supplemental foods.~~ means a voucher, check, electronic benefits transfer card (EBT), coupon or other document which is used to obtain supplemental foods.
- (6)(7) "FNS" means the Food and Nutrition Service of the U.S. Department of Agriculture.
- (7)(8) The "local WIC agency" is the local agency which enters into an agreement with the Division of ~~Public Health Services~~ Public Health to operate the Special Supplemental ~~Food~~ Nutrition Program for Women, Infants and Children.
- (8)(9) A "local WIC program plan" is a written compilation of information on the local WIC agency policies concerning program operation, including administration, nutrition education, personnel functions, costs and other information prepared by the local WIC agency and submitted to the ~~nutrition and dietary services branch~~ Nutrition Services Branch in accordance with instructions issued by the ~~branch~~ Branch.
- (9)(10) The "state agency" is the Nutrition Services ~~Section~~ Branch, Women's and Children's Health Section, Division of Maternal and Child Health Public Health, Department of Environment Health and Natural Resources Health and Human Services.

(11) "Supplemental food" or "WIC supplemental food" is a food which satisfies the requirements of 15A NCAC 21D .0501 and is included in the WIC Vendor Manual.

(40)(12) "Support costs" are clinic costs, administrative costs, and nutrition education costs;

(44)(13) "WIC program" means the special supplemental ~~food~~ nutrition program for women, infants and children authorized by 42 U.S.C. ~~4771-4785~~ 1786 of the Child Nutrition Act of 1966 as amended.

A copy of 7 C.F.R. Part 246.1 through 246.28 is available for inspection at the Department of ~~Environment, Health and Natural Resources~~ Health and Human Services, Division of ~~Maternal and Child Health~~ Public Health, Women's and Children's Health Section, Nutrition Services Branch, 1330 St. Mary's Street, Raleigh, North Carolina. Copies are available at no cost from the Supplemental ~~Food~~ Nutrition Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 540, Alexandria, Virginia 22302 ~~or by, by~~ calling (703) ~~756-3730~~ 305-2730 or access <http://www.access.gpo.gov/nara/cfr/index.html>.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

SECTION .0700 – WIC PROGRAM FOOD DISTRIBUTION SYSTEM

15A NCAC 21D .0701 THE NORTH CAROLINA AUTOMATED WIC SYSTEM

The WIC program shall provide supplemental foods through a uniform retail distribution system, as described in the North Carolina State WIC Program ~~Plan, Plan of Operations~~, the North Carolina WIC Program Manual, the North Carolina ~~Automated~~ WIC ADP System Manual and the North Carolina WIC Vendor's Manual, in accordance with 7 C.F.R. ~~246.10 (1979)~~ 246.12. An automated data processing system called the "North Carolina Automated WIC System" shall be utilized to promote the provision of and accounting for food instruments issued for participants and to assist in fulfilling other program requirements.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

15A NCAC 21D .0702 ISSUANCE OF FOOD INSTRUMENTS

(a) Local WIC agencies shall issue WIC program food instruments to program participants in a manner which ensures that participants can receive the appropriate supplemental foods that have been prescribed for them.

(b) Local WIC agencies shall issue food instruments in a manner which ensures maintenance of adequate security and retention of adequate documentation of the disposition of the food instruments. The documentation of issuance shall include the dated signature of the authorized individual receiving the food instruments unless the food instruments are mailed.

(c) The authorized individual receiving the food instrument shall sign it on the "signature" line. The person who so signs the food instrument is the only individual who can redeem it.

(d) Participants shall be given appointments to receive food instruments in a manner which promotes coordination with WIC

program certification, nutrition education, other health services and the services being received by other family members without placing an undue burden on the participant.

(e) Food instruments shall be issued only to the participant, the participant's parent, the participant's ~~caretaker~~ guardian, or an authorized ~~proxy~~ proxy, or a compliance investigator. The North Carolina WIC Program Manual shall contain guidelines for the authorization of proxies.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

15A NCAC 21D .0703 USE OF FOOD INSTRUMENTS

(a) Participants may redeem food instruments on any day on or between the "date of issue" and "participant must use by" dates assigned to the food instrument.

(b) North Carolina WIC program food instruments shall be redeemed only at authorized WIC vendors in accordance with the terms of the signed WIC ~~Program~~ Vendor Agreement (~~DEHHS~~ DHHS Form 2768). Neither an agency of the United States government, the State of North Carolina, the local WIC agency nor a past or present WIC ~~participant~~ participant, parent, guardian, or proxy is under any obligation to pay for food instruments accepted by a vendor who was not an authorized WIC vendor on the date of redemption of the food instrument.

(c) Only the individual who has received the food instrument at the local or state agency or through the mail and has signed the signature line may countersign the food instrument. Vendors shall assume full responsibility for food instruments not properly countersigned.

(d) North Carolina WIC food instruments shall be ~~presented for collection by deposited at the vendor~~ presented for collection by deposited at the vendor's bank. ~~To the North Carolina State Treasurer through a state or national bank having an office in the State of North Carolina.~~ These food instruments shall not be assigned, transferred, sold or otherwise negotiated.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

15A NCAC 21D .0704 VALIDITY OF WIC FOOD INSTRUMENTS

(a) North Carolina WIC food instruments shall not be valid if:

(1) ~~the instrument has not been imprinted with a WIC agency authorizing stamp by a local WIC agency;~~

(2) (1) the instrument has not been legibly imprinted with an authorized WIC vendor stamp;

(3) (2) the instrument has been forged counterfeited and/or the signature forged;

(4) ~~the instrument has been improperly completed (e.g., it specifies more food than called for by the participant's food prescription distribution);~~

(5) (3) the instrument has been mutilated, defaced or otherwise tampered with or altered;

(6) (4) the instrument is ~~not presented~~ deposited in to the North Carolina State Treasurer vendor's bank within 60 days of the "date of issue" assigned to the instrument;

(7) (5) the "pay exactly" amount exceeds the "void if exceeds amount"; ~~or exceeds the total amount of the shelf prices on the date redeemed for the eligible food~~

~~items called for on and provided in consideration of the instrument~~

(8) (6) the signature and countersignature do not match or the countersignature is missing;

(9) (7) the "date redeemed" ~~or date of deposit of entered on~~ the instrument is not on or between the "date of issue" and "participant must use by" dates assigned to the instrument;

(10) (8) the instrument is not completed in indelible ink.

(b) A local WIC agency may revalidate invalid food instruments or may replace the instruments in accordance with the guidelines contained in the North Carolina WIC Program Manual if ~~its~~ the authorized WIC vendor produces documentation that the vendor's claim is valid and that the vendor has operated as an authorized WIC vendor in good faith.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

15A NCAC 21D .0705 PAYMENT OF WIC FOOD INSTRUMENTS

The State of North Carolina shall:

(1) accept North Carolina WIC food instruments ~~from state and national banks with an office in North Carolina as well as from through~~ the Federal Reserve System;

(2) ~~verify the ensure that~~ WIC food instruments received ~~by declaring certain WIC food instruments invalid according to~~ are valid through procedures established by procedures in the ~~Department of State Treasurer~~ Nutrition Services Branch;

(3) provide payment to ~~banks and~~ the Federal Reserve for all valid or revalidated WIC food instruments received. To the extent that sufficient funds are available in the WIC disbursing account, payment shall be provided according to established procedures for payment of state warrants;

(4) ensure that ~~stamp the face of~~ every invalid WIC food instrument ~~returned prior to payment, such stamp~~ is stamped to indicate the reason for invalidity;

(5) ensure that ~~return all unpaid~~ invalid WIC food instruments are returned through the Federal Reserve System to the banks ~~or Federal Reserve~~ from which they were received, according to established banking procedures.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7b C.F.R. 246.

15A NCAC 21D .0706 AUTHORIZED WIC VENDORS

(a) An applicant to become authorized as a WIC vendor shall comply with the following:

(1) Accurately complete a WIC Vendor Application, a WIC ~~Vendor~~ Price List, and a WIC Vendor ~~Contract~~ Agreement;

(2) Submit all completed forms to the local WIC program, except that a corporate WIC Vendor with 20 or more WIC stores shall submit one completed WIC Vendor ~~Contract Agreement and WIC Price List~~ to the state agency and a separate WIC Vendor Application ~~and WIC Vendor Price List~~ for each store to the local WIC agency;

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- (3) Pass a monitoring review by the local WIC program to determine whether the store has minimum inventory of WIC approved supplemental foods as specified in Subparagraph (b) ~~(16)~~(15) of this Rule; an applicant who fails this review shall be allowed a second opportunity for an unannounced monitoring review within 14 days; if the applicant fails both reviews, ~~he~~ the applicant shall wait 90 days from the date of ~~his previous application~~ the second monitoring review before submitting a new application;
- (4) Attend, or cause ~~an employee~~ a manager or other authorized store representative to attend, WIC Vendor Training provided by the local WIC Program prior to authorization and ensure that applicant's employees receive instruction in WIC program procedures and requirements;
- (5) The applicant's vendor site shall be located at a permanent and fixed location within the State of North Carolina. The vendor site shall be the address indicated on the WIC vendor application and shall be the site at which ~~WIC participants, proxies, or compliance investigators shall select~~ WIC approved supplemental foods are selected by the WIC participant, parent, guardian or proxy;
- (6) The applicant's vendor site shall be open throughout the year for business with the public at least five days a week for a minimum of four hours per day between 8:00 a.m. and 5:00 11:00 p.m.; ~~during weekdays~~;
- (7) An applicant shall not submit false, erroneous, or misleading information in an application to become ~~a~~ an authorized WIC vendor or in subsequent documents submitted to the state or local agency;
- (8) A vendor site for which the ~~An~~ applicant is applying shall not have an owner with 25 percent or more financial interest who has committed a misdemeanor involving fraud, misuse or theft of state or federal funds or any felony.
- (9) An applicant shall not be employed, or have a spouse, child, or parent who is employed by the state WIC program or the local WIC program, program serving the county in which the applicant conducts business. ~~and~~ An applicant shall not have an employee who handles, redeems, deposits, stores or processes WIC food instruments who is employed, or has a spouse, child, or parent who is employed by the state WIC program or the local WIC program serving the county in which the applicant conducts business. For purposes of ~~the preceding sentence~~ this Subparagraph, the term "applicant" means a sole proprietorship, partnership, corporation, other legal entity, and any person who owns or controls more than a 10 percent interest in the partnership, corporation, or other legal entity;
- (10) An applicant shall not hold 25 percent or more financial interest in any of the following:
- (A) any Food Stamp vendor which is disqualified from participation in the Food Stamp Program or has been assessed a civil money penalty in lieu of disqualification and the time period during which the disqualification would have run, had a penalty not been paid, is continuing; or
- (B) another WIC vendor which is disqualified from participation in the WIC Program or which has been assessed an administrative penalty pursuant to ~~G.S. 130A-22(c1) and Subparagraph (k)(2) or Paragraph (j) and Subparagraph (k)(1)~~ G.S. 130A-22(c1), Paragraph (j), or Paragraph (k) of this Rule as the result of violation of ~~Paragraph (f)(1)(C)(i), (f)(1)(D), or (f)(1)(E)~~ Paragraphs (f), (g)(1)(A), (g)(1)(B), (g)(1)(C) or (g)(2)(D) of this Rule, and if assessed a penalty, the time during which the disqualification would have run, had a penalty not been assessed, is continuing.
- The requirement of this provision shall not be met by the transfer or conveyance of financial interest during the period of disqualification.
- (11) An applicant shall not become authorized as a WIC vendor if the vendor site for which the applicant is applying has been disqualified from participation in the WIC Program and the disqualification period has not expired.
- (b) By signing the WIC Vendor Agreement, the applicant agrees to:
- (1) Process WIC program food instruments in accordance with the terms of this agreement, state and federal WIC program rules, and applicable law;
- (2) Accept WIC program food instruments in consideration for the purchase of eligible WIC supplemental food items. Eligible Supplemental food items are those food items which satisfy the requirements of 15A NCAC 21D .0501. The food items, specifications and product identification are described in the WIC Vendor Manual;
- (3) Provide ~~all-eligible~~ supplemental food items as specified on the food instrument ~~to WIC program participants~~, accurately determine the charges to the WIC program, and clearly complete the "Pay Exactly" box on the food instrument prior to obtaining the ~~counter signature~~ countersignature by the participant, parent, ~~guardian or proxy~~; guardian, proxy or compliance investigator;
- (4) Enter in the "Pay Exactly" box on the food instrument only the total amount of the current prices, or less than the current prices, for the eligible supplemental food items provided and shall not charge or collect sales taxes for the eligible supplemental food items provided;
- (5) Accept WIC program food instruments only on or between a date between the "Date of Issue" and the "Participant Must Use By" ~~date~~ dates;
- (6) Prior to obtaining the countersignature, enter in the "Date Redeemed" box the month, day and year the WIC food instrument is accepted in consideration for the purchase of eligible supplemental food items;
- ~~(7) Accept WIC program food instruments only if they have been validated with a "WIC Agency Authorizing Stamp";~~
- ~~(8)~~(7) Refuse acceptance of any food instrument on which quantities, signatures or dates have been altered;

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- ~~(9)~~(8) Not redeem food instruments in whole or in part for cash, credit, unauthorized foods, or other items of value to participants or a credit for past accounts non-food items;
- ~~(10)~~(9) Clearly imprint the ~~Authorized~~ authorized WIC ~~Vendor Stamp~~ vendor stamp in the "Pay the Authorized WIC Vendor Stamped Here" box on the face of the food instrument;
- ~~(11)~~(10) Clearly imprint the vendor's bank deposit stamp or the vendor's name, address and bank account number in the "Authorized WIC Vendor Stamp" box in the endorsement;
- ~~(12)~~(11) Promptly deposit WIC program food instruments in ~~a state or national bank having an office in the State of North Carolina~~ the vendor's bank. All North Carolina WIC program food instruments must be ~~received by the North Carolina State Treasurer~~ deposited in the vendor's bank within 60 days of the "Date of Issue" on the food instrument;

- ~~(13)~~(12) ~~Insure~~ Ensure that the authorized WIC vendor stamp is used only for the purpose and in the manner authorized by this agreement and assume full responsibility for the unauthorized use of the ~~Authorized~~ authorized WIC ~~Vendor~~ vendor ~~Stamp~~ stamp;
- ~~(14)~~(13) Maintain secure storage for the authorized WIC vendor stamp and immediately report loss of this stamp to the local agency;
- ~~(15)~~(14) Notify the local agency of misuse (attempted or actual) of the WIC program food instrument(s);
- ~~(16)~~(15) Maintain a minimum inventory of eligible supplemental food items in the store for purchase ~~by WIC Program participants~~. ~~All such foods shall be within the manufacturer's expiration date.~~ The following items and sizes constitute the minimum inventory of eligible supplemental food items for stores classified 1 - 4:

Food Item	Type of Inventory	Quantities Required
Milk	Whole fluid: gallon and half gallon -and- Skim/lowfat fluid: gallon or half gallon Nonfat dry: quart package -or- Evaporated: 12 oz. can	Total of 6 gallons fluid milk Total of 5 quarts when reconstituted 5 cans
Cheese	2 types <u>varieties</u> in 8 or 16 oz. <u>package</u>	Total of 6 pounds
Cereals	4 types (minimum box <u>package</u> size 12 oz.)	Total of 12 boxes <u>packages</u>
Eggs	Grade A, large or extra-large: white or brown: <u>one dozen size carton</u>	6 dozen
Juices	Orange juice must be available in 2 types. A second flavor must be available in 1 type. The types are: 12 oz. frozen, and 46 oz. Canned Frozen: <u>11.5-12 oz. container</u> <u>Single strength: 46oz container</u> <u>Orange juice must be available in frozen and single strength. A second flavor must be available in frozen or single strength.</u>	10-12 oz. Frozen 10-46 oz. canned <u>10 containers</u> <u>10 containers</u>
Dried Peas and Beans	2 types <u>varieties</u> : <u>one pound package</u>	3 one pound bags <u>packages</u>
or Peanut Butter	<u>Plain (smooth,</u>	3 jars <u>containers</u>

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Infant Cereal	crunchy, or whipped; No reduced fat); 18 oz. Jars container	6 boxes
	Plain-no fruit added; 2 cereal grains grains; (one must be rice); 8-oz. boxes boxes (one must be rice); brand specified in Vendor Agreement	
Infant Formula	milk and soy-based as specified in Vendor Agreement; 13 oz. concentrate	62 cans combination
Tuna	Chunk light in water: 6-6.5 oz. can	4 cans
Carrots	Raw, canned or frozen 14.5-16 oz. size	29-oz. 2 packages/cans

~~For store classification 5, the following applies: Supply within 48 hours of verbal request by local WIC agency staff any of the following products: Nutramigen, Portagen, Pregestimil, Similac Special Care 24, Similac 60/40, Ensure, Ensure Plus, Osmolite, Sustacal HC, Sustacal, Isocal, Enrich, Enfamil Premature, PediaSure, Polycose and MCT Oil. All vendors (classifications 1 through 5) shall supply milk or milk, soy based, or lactose-free infant formula in 32 oz. ready-to-feed or powder powdered infant formula upon request of the state or local agency.~~

- ~~(16) Ensure that all supplemental food items in the store for purchase are within the manufacturer's expiration date;~~
- ~~(17) Permit WIC program participant to the purchase of eligible supplemental food items without making requiring other purchases;~~
- ~~(18) Attend, or cause an employee a manager or other authorized store representative to attend, annual vendor training class upon notification of class by the local agency;~~
- ~~(19) Inform and train vendor's employees in WIC procedures and regulations;~~
- ~~(20) Be accountable for actions of vendor's employees in utilization the processing of WIC food instruments and the provision of WIC authorized supplemental food items;~~
- ~~(21) Allow reasonable monitoring and inspection of the store premises and procedures to ensure compliance with this agreement and state and federal WIC Program rules, regulations and policies. This includes, but shall not be limited to, allowance of access to all WIC food instruments negotiated the day of the monitoring at the store and vendor records pertinent to the purchase of WIC supplemental food items; items, vendor records of all deductions and exemptions allowed by law or claimed in filing sales and use tax returns, and vendor records of all WIC supplemental food items purchased~~

by the vendor, including invoices and copies of purchase orders;

- ~~(22) Submit a current accurately completed copy of the WIC Program Approved Food Items Price List to the local agency when signing this agreement, and by January 1 and July 1 of each year. The applicant also agrees to submit a WIC Price List six months thereafter, or on January 1, whichever is earlier, and within one week of any written request by the state or local agency;~~
- ~~(23) Reimburse the state agency within 30 days of written notification for amounts paid by the state agency on WIC Program food instruments processed by the vendor which did not satisfy the conditions set forth in the WIC Vendor Agreement and for amounts paid by the state agency on WIC food instruments as the result of the unauthorized use of the Authorized authorized WIC Vendor vendor Stamp stamp;~~
- ~~(24) Not seek restitution from the participant participant, parent, guardian or proxy for reimbursements paid to the state agency or for WIC food instruments not paid by the state agency;~~
- ~~(25) Not contact a participant, parent, guardian, or proxy outside the store regarding the redemption of WIC food instruments;~~
- ~~(25)(26) Notify the local agency and return the authorized WIC vendor stamp to the local agency when the vendor ceases operations or the ownership changes. Change of ownership, ceasing vendor operations, withdrawal from the WIC Program or nonrenewal of the WIC Vendor Agreement shall not terminate a disqualification period applicable to the vendor site;~~
- ~~(26)(27) Return the Authorized authorized WIC Vendor vendor Stamp stamp to the local agency upon termination of this agreement or suspension or termination disqualification from the WIC Program;~~
- ~~(27)(28) Offer WIC participants the same courtesies as offered to other customers; and~~
- ~~(28)(29) Comply with all the requirements for applicants of Subparagraphs (a)(5) through (9) of this Rule throughout the term of authorization.~~

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(c) By signing the WIC Vendor Agreement, the local agency agrees to the following:

- (1) Provide at a minimum annual vendor training classes on WIC procedures and regulations;
- (2) Monitor the vendor's performance under this agreement in a reasonable manner to ensure compliance with the agreement, state and federal WIC program rules, regulations and policies, and applicable law. A minimum of 50 percent of all authorized vendors shall be monitored at least once a year, within a state fiscal year (July 1 through June 30) and all vendors shall be monitored at least once within two consecutive state fiscal years. Any vendor shall be monitored within one week of written request by the state agency;
- (3) Provide vendors with the North Carolina WIC Vendor Vendor's Manual, all Vendor Vendor's Manual amendments, blank WIC Program Approved Food Items Price Lists, and the Authorized authorized WIC Vendor vendor Stamp stamp indicated on the signature page of this agreement the WIC Vendor Agreement;
- (4) Assist the vendor with ~~problems or~~ questions which may arise under this agreement or the vendor's participation in the WIC Program; and
- (5) Keep records of the transactions between the parties under this agreement pursuant to 15A NCAC 21D .0206.

(d) ~~The WIC Vendor Agreement shall outline the responsibilities of the vendor to the WIC Program, and the local WIC agency's and state agency's responsibilities towards the authorized WIC vendor. In order for a food retailer or pharmacy to participate in the WIC Program and be entitled to the rights and responsibilities of an authorized WIC vendor, a current WIC Vendor Agreement must have been signed by the vendor, the local WIC agency, and the state agency.~~

(e) If an application for status as an authorized WIC vendor is denied, the applicant is entitled to an administrative appeal as described in Section .0800 of this Subchapter.

(f) ~~An authorized WIC vendor may be disqualified from the WIC program for violation of 15A NCAC 21D .0706 or violation of any other state and federal WIC program rules for a period not to exceed three years in accordance with the following:~~

- (1) ~~When a vendor commits a violation of the WIC program rules, he shall be assessed sanction points as set forth below:~~

(A) ~~2.5 points for stocking WIC approved foods outside of manufacturer's expiration date;~~

(B) ~~5 points for:~~

- (i) ~~failure to attend annual vendor training;~~
- (ii) ~~failure to submit price reports twice a year or within seven days of request by agency;~~
- (iii) ~~requiring participants to purchase specific brands when more than one WIC approved brand is available;~~
- (iv) ~~providing unauthorized foods (as listed in the vendor agreement);~~
- (v) ~~allowing substitutions for foods listed on WIC food instrument(s);~~
- (vi) ~~failure to stock minimum inventory.~~

(C) ~~7.5 points for:~~

- (i) ~~failure to properly redeem (e.g., not completing date and purchase price on WIC food instrument(s) before obtaining participant's signature);~~
- (ii) ~~discrimination (separate WIC lines, denying trading stamps, etc.);~~
- (iii) ~~issuing rainchecks;~~
- (iv) ~~requiring cash purchases to redeem WIC food instrument(s);~~
- (v) ~~contacting WIC participants in an attempt to recoup funds for food instrument(s).~~

(D) ~~15 points for:~~

- (i) ~~charging more than current shelf price for WIC approved foods on two different days; for example, a vendor would be assessed 15 points for overcharging on two different days; 15 points for overcharging on three different days, and 30 points for overcharging on four different days;~~
- (ii) ~~charging for foods in excess of those listed on WIC food instrument(s);~~
- (iii) ~~failure to allow monitoring of a store by WIC staff when required;~~
- (iv) ~~failure to provide WIC food instrument(s) for review when requested;~~
- (v) ~~failure to provide store inventory records when requested by WIC staff;~~
- (vi) ~~nonpayment of a claim made by the state agency;~~
- (vii) ~~tendering for payment any food instrument(s) accepted by any other store;~~
- (viii) ~~intentionally providing false information on vendor records (application, price list, WIC food instrument(s), monitoring forms);~~

(E) ~~20 points for:~~

- (i) ~~providing cash or credit for WIC food instrument(s);~~
- (ii) ~~providing non food items or alcoholic beverages for WIC food instrument(s);~~
- (iii) ~~charging for food not received by the WIC participant.~~

(2) ~~All earned points are retained on the vendor file for a period of one year or until the vendor is disqualified as a result of those points. If a vendor commits a violation within six months of reauthorization after a disqualification period, 10 points in addition to those earned from the violation shall be assigned; if a vendor commits a violation after six months, but within one year of the reauthorization date after a disqualification period, five points in addition to those earned from the violation shall be assigned.~~

(3) ~~If a vendor accumulates 15 or more points, he shall be disqualified. The nature of the violation(s), the number of violations and past disqualifications, as represented by the points assigned in Subparagraphs (c)(1) and (2), are used to calculate the period of disqualification. The~~

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formula used to calculate the disqualification period is: the number of points of the worst offense multiplied by 18 days. Eighteen days shall be added to the disqualification period for each point over 15 points.

- (4) ~~Notwithstanding disqualification pursuant to accumulated points, an authorized WIC vendor shall also be disqualified from the WIC program upon disqualification or imposition of a civil money penalty from another USDA, FCS Program for the same period as the other disqualification, not to exceed three years, or for the same period as the original disqualification period determined by the USDA, FCS Program before imposition of the civil money penalty.~~

(f) Title 7 C.F.R. 246.12(k)(1)(i) through (vi) and (xii) are incorporated by reference with all subsequent amendments and editions.

- (1) In accordance with 7 CFR 246.12(k)(1)(i), the State agency shall not allow imposition of a civil money penalty in lieu of disqualification for a vendor permanently disqualified.

- (2) A pattern, as referenced in 7 C.F.R. 246.12(k)(1)(iii)(B) through (F) and (iv), shall be established as follows:

(A) ~~three~~ two occurrences of claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item within a 12-month period;

(B) ~~three~~ two occurrences of charging participants more for supplemental food than non-WIC customers or charging participants more than the current shelf or contract price within a 12-month period;

(C) two occurrences of receiving, transacting and/or redeeming food instruments outside of authorized channels, including the use of an authorized vendor and/or an unauthorized person within a 12-month period;

(D) ~~three~~ two occurrences of charging for supplemental food not received by the participant within a 12-month period;

(E) ~~three~~ two occurrences of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments within a 12-month period; or

(F) ~~four~~ three occurrences of providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument within a 12-month period.

(g) Title 7 C.F.R. Section 246.12(k)(2)(i) is incorporated by reference with all subsequent amendments and editions. Except as provided in 7 C.F.R. 246.12 (k)(1)(xii), a vendor shall be disqualified from the WIC Program for the following state-established violations in accordance with the sanction system below. The total period of disqualification shall not exceed one year for state-established violations investigated as part of a single investigation, as defined in Paragraph (h):

- (1) When a vendor commits any of the following violations, the state-established disqualification period shall be:

(A) 90 days for each occurrence of failure to properly redeem a WIC food instrument by ~~(e.g., not completing the date and purchase price on the WIC food instrument(s) instrument before obtaining participant's signature the countersignature or by accepting a WIC food instrument prior to the "Date of Issue" or after the "Participant Must Use By" dates on the food instrument) instrument;~~

(B) 60 days for each occurrence of requiring a cash purchases to redeem a WIC food instrument(s) instrument;

(C) 30 days for each occurrence of requiring participants to the purchase of a specific brands brand when more than one WIC -approved supplemental food brand is available.

- (2) When a vendor commits any of the following violations, the vendor shall be assessed sanction points as follows:

(A) 2.5 points for stocking WIC -approved supplemental foods outside of the manufacturer's expiration date;

(B) 5 points for:

(i) failure to attend annual vendor training;

(ii) failure to submit price reports twice a year a current and accurately completed WIC Price List by January 1 and July 1 of each year or within seven days of request by the state or local agency;

(iii) failure to stock minimum inventory.

(C) 7.5 points for:

(i) discrimination on the basis of WIC participation (separate WIC lines, denying trading stamps, etc.);

(ii) contacting a WIC participants participant, parent, guardian, or proxy in an attempt to recoup funds for food instrument(s) or contacting a WIC participant, parent, guardian, or proxy outside the store regarding the redemption of WIC food instruments.

(D) 15 points for:

(i) failure to allow monitoring of a store by WIC staff when required;

(ii) failure to provide WIC food instrument(s) for review when requested;

(iii) failure to provide store inventory records when requested by WIC staff;

(iv) nonpayment of a claim made by the State agency;

(v) ~~intentionally~~ providing false information on vendor records (application, vendor agreement, price list, WIC food instrument(s), monitoring forms).

- (3) For the violations listed in Subparagraph (g)(2) of this Rule, all sanction points assessed against a vendor remain on the vendor's record for 12 months or until the

vendor is disqualified as a result of those points. If a vendor accumulates 15 or more points, the vendor shall be disqualified. The nature of the violation(s) and the number of violations, as represented by the points assigned in Subparagraph (g)(2), are used to calculate the period of disqualification. The formula used to calculate the disqualification period is: the number of points of the worst offense multiplied by 18 days. Eighteen days shall be added to the disqualification period for each point over 15 points.

- (4) ~~If a vendor commits a violation in Subparagraph(g)(2) within six months of reauthorization after a disqualification period, 10 points in addition to those earned from the violation shall be assigned; if a vendor commits a violation in Subparagraph(g)(2) after six months, but within one year of the reauthorization date after a disqualification period, five points in addition to those earned from the violation shall be assigned.~~

(h) For investigations pursuant to this Section, a single investigation is:

- (1) Compliance buy(s) conducted by undercover investigators within a 12-month period to detect the following violations:
 - (A) buying or selling food instruments for cash (trafficking);
 - (B) selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments;
 - (C) selling alcohol or alcoholic beverages or tobacco products in exchange for food instruments;
 - (D) charging participants more for supplemental food than non-WIC customers or charging participants more than the current shelf or contract price;
 - (E) receiving, transacting, and/or redeeming food instruments outside of authorized channels, including the use of an unauthorized vendor and/or an unauthorized person;
 - (F) charging for supplemental food not received by the participant;
 - (G) providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments;
 - (H) providing unauthorized food items in exchange for food instruments, including charging for supplemental food provided in excess of those listed on the food instrument;
 - (I) failure to properly redeem a WIC food instrument;
 - (J) requiring a cash purchases to redeem a WIC food instrument(s) instrument;
 - (K) requiring participants to the purchase of a specific brands when more than one WIC-approved supplemental food brand is available; or
- (2) Monitoring reviews of a vendor conducted by WIC staff within a 12-month period which detect the following violations:
 - (A) failure to stock minimum inventory;

- (B) stocking WIC-approved supplemental food outside of the manufacturer's expiration date;
- (C) failure to allow monitoring of a store by WIC staff when required;
- (D) failure to provide WIC food instrument(s) for review when requested;
- (E) failure to provide store inventory records when requested by WIC staff;
- (F) claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time; or

- (3) Any other method used by the State or local agency to detect the following violations by a vendor within a 12-month period:

- (A) failure to attend annual vendor training;
- (B) failure to submit price reports twice a year a current and accurately completed WIC Price List by January 1 and July 1 of each year or within seven days of request by the state or local agency;
- (C) discrimination on the basis of WIC participation (separate WIC lines, denying trading stamps, etc.);
- (D) contacting a WIC participants participant, parent, guardian, or proxy in an attempt to recoup funds or food instrument(s) or contacting a WIC participant, parent, guardian, or proxy outside the store regarding the redemption of WIC food instruments;
- (E) nonpayment of a claim made by the State agency;
- (F) intentionally providing false information on vendor records (application, vendor agreement, price list, WIC food instrument(s), monitoring forms).

(i) The Food Stamp Program disqualification provisions in 7 C.F.R. 246.12(k)(1)(vii) are incorporated by reference with all subsequent amendments and editions.

(j) The participant access provisions of 7 C.F.R. 246.12(k)(1)(ix) and (k)(8) are incorporated by reference with all subsequent amendments and editions.

(k) The following provisions apply to civil money penalties assessed in lieu of disqualification of a vendor:

- (1) The civil money penalty formula in 7 C.F.R. 246.12(k)(1)(x) is incorporated by reference with all subsequent amendments and editions, provided that the vendor's average monthly redemptions shall be calculated by using the six-month period ending with the month immediately preceding the month during which the notice of administrative action is dated.
- (2) The State agency may also impose civil money penalties in accordance with G.S. 130A-22(c1) in lieu of disqualification of a vendor for the state-established violations listed in Paragraph (g) when the State agency determines that disqualification of a vendor would result in undue participant hardship in accordance with Subparagraph (k)(3) of this Rule.
- (3) In determining whether to disqualify a WIC vendor for the state-established violations listed in Paragraph (g), the agency shall not consider other indicators of hardship if any of the following factors, which

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conclusively show lack of undue hardship, are found to exist:

(A) the noncomplying vendor is located outside of the limits of a city, as defined in G.S. 160A-2, and another WIC vendor is located within seven miles of the noncomplying vendor;

(B) the noncomplying vendor is located within the limits of a city, as defined in G.S. 160A-2, and another WIC vendor is located within three miles of the noncomplying vendor;

(C) a WIC vendor, other than the noncomplying vendor, is located within one mile of the local agency at which WIC participants pick up their food instruments.

(4) The provisions for failure to pay a civil money penalty in 7 C.F.R. 246.12(k)(6) are incorporated by reference with all subsequent amendments and editions.

(l) The provisions of 7 C.F.R. 246.12(k)(1)(viii) prohibiting voluntary withdrawal from the WIC Program or nonrenewal of the WIC Vendor Agreement as an alternative to disqualification are incorporated by reference with all subsequent amendments and editions.

(m) The provision in 7 C.F.R. 246.12(k)(3) regarding prior warning to vendors is incorporated by reference with all subsequent amendments and editions.

(g)(n) The state agency reserves the right to set off payments to an authorized vendor if the vendor fails to reimburse the state agency in accordance with Subparagraph (b)(23) of this Rule.

(h)(o) In accordance with 7 C.F.R. 246.12(k)(7) and (k)(10), North Carolina's procedures for dealing with abuse of the WIC program by authorized WIC vendors do not exclude or replace any criminal or civil sanctions or other remedies that may be applicable under any federal and state law. Neither the vendor nor the state is under any obligation to renew this contract. Nonrenewal of a vendor contract is not an appealable action. If a contract is not renewed, the person may reapply and if denied, may appeal the denial.

(i)(p) Notwithstanding other provisions of this Rule, for the purpose of providing a one-time payment for WIC food instruments accepted by a non-authorized WIC vendor, a current WIC vendor agreement need only be signed by the vendor and the state agency. The vendor may request such one-time payment directly from the state agency. The vendor shall sign a statement indicating that he has provided foods as prescribed on the food instrument, charged current shelf prices and verified the identity of the participant. For the purposes of effecting such a WIC vendor agreement, the vendor is exempt from the inventory requirement and the requirement for an on-site visit by the local WIC agency. Any WIC vendor agreement entered into in this manner shall automatically terminate upon payment of the food instrument in question.

(q) Except as provided in 7 C.F.R. 246.18(a)(3), an authorized WIC vendor shall be given at least 15 days advance written notice of any adverse action which affects his the vendor's participation in the WIC Program. The vendor appeals procedure shall be in accordance with 15A NCAC 21D .0800.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

SECTION .0800 – WIC PROGRAM ADMINISTRATIVE APPEALS

15A NCAC 21D .0802 APPEALS

~~(a) Each local WIC agency, potential local WIC agency, authorized WIC vendor and potential authorized WIC vendor shall be entitle to an administrative appeal in accordance with this Section when the agency or vendor wishes to appeal an action by the local WIC agency or the state agency affecting participation or future participation in the WIC program. Nonrenewal of a contract is not an appealable action. If a contract is not renewed, the person may reapply and if denied, may appeal the denial. The appeal provisions for vendors and local agencies found in 7 C.F.R. 246.18(a)(1), (a)(1)(i), (a)(1)(ii), (a)(3)(b), and (b)(1) are incorporated by reference with all subsequent amendments and editions.~~

~~(b) All administrative appeals under this Section shall be made in accordance with G.S. 150B and G.S. 130A-24. Appeals shall be conducted in accordance with 7 C.F.R. 246.22. The appeal must be made:~~

- ~~(1) within 30 days after the date of receipt of the decision being contested for an appeal by a local WIC agency or potential local WIC agency; or~~
- ~~(2) within 10 days after the date of receipt of the decision being contested for an appeal by an authorized WIC vendor or potential authorized WIC vendor.~~

Authority G.S. 130A-361; 7 C.F.R. 246.18; 42 USC 1786.

15A NCAC 21D .0803 NOTIFICATION OF THE RIGHT TO AN ADMINISTRATIVE APPEAL

~~(a) Each local WIC agency, potential local WIC agency, authorized vendor or potential authorized WIC vendor shall be informed in writing of their right to an administrative appeal and the method by which this appeal may be accomplished upon notification of any adverse action which affect participation.~~

~~(b) A local WIC agency or potential local WIC agency shall be given 60 days notice of any adverse action which affects its participation in the WIC program.~~

~~(c) An authorized WIC vendor or a potential authorized AIC vendor shall be given 15 days notice of any adverse action which affects participation.~~

Authority G.S. 130A-361; 150B-23; 7 C.F.R. 246.18.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 63 – SOCIAL WORK CERTIFICATION AND LICENSURE BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Social Work Certification and Licensure Board intends to amend the rules cited as 21 NCAC 63 .0504, .0506-.0507. Notice of Rule-making Proceedings was published in the Register on July 17, 2000.

Proposed Effective Date: April 1, 2001

Public Hearing:

PROPOSED RULES

Date: October 18, 2000

Time: 10:00 a.m.

Location: Room 403, Old Education Building, 114 W. Edenton St., Raleigh, NC 27602

Reason for Proposed Action: *The North Carolina Social Work Certification and Licensure Board is clarifying the requirements contained in its Ethical Guidelines and is attempting to make its Guidelines consistent with national models utilized by other state licensing boards and national clinical societies.*

Comment Procedures: *Any interested person may submit written comments on the proposed rules by mailing the comments to Grady L. Balentine, Jr., Assistant Attorney General, Health and Public Assistance, North Carolina Department of Justice, PO Box 629, Raleigh, NC 27602-0629 by November 1, 2000.*

Fiscal Impact

- ☐ State
☐ Local
☐ Substantive ($\geq \$5,000,000$)
☒ None

SECTION .0500 – ETHICAL GUIDELINES

21 NCAC 63 .0504 RESPONSIBILITIES IN PROFESSIONAL RELATIONSHIPS

- (a) Social workers shall not misuse their professional relationships sexually, financially or for any other personal advantage. They shall maintain this standard of conduct toward all who are professionally associated with them such as clients, colleagues, supervisees, employees, students and research participants.
- (b) Social workers shall inform clients of the extent and nature of services available to them as well as the limits, ~~right~~ rights, opportunities and obligations associated with service which might affect the client's decision to enter into or continue the relationship.
- (c) Social workers shall obtain consent (agreement to participate in social work intervention) from all clients or their legally authorized representative except when laws require intervention to insure client's and community's safety and protection.
- (d) Social workers shall ~~not~~ terminate a professional relationship with a client when, after careful evaluation and assessment, it is determined that the client is not likely to benefit from continued services or the services are no longer needed, except under extraordinary circumstances, giving careful consideration to factors affecting the situation and taking care to minimize possible adverse effects. The social worker who anticipates the ~~interruption or termination or interruption~~ of services to clients shall give reasonable ~~notification and provide appropriate referral for continued service.~~ notice to the client. The social worker shall provide referrals as needed or upon the request of the client. A social worker shall not terminate a professional relationship for the purpose of beginning a personal or business relationship with a client.
- (e) Social workers shall respect the integrity, protect the welfare, and maximize self-determination of clients they serve.

They shall avoid entering treatment relationships in which their professional judgment will be compromised by the prior association with or knowledge of a client. Examples include treatment of one's family members; close friends; associates; employees; or others whose welfare could be jeopardized by such a dual relationship.

- (f) Social workers shall not initiate, and shall avoid when possible, personal relationships or dual roles with current clients, or with any former clients whose feelings toward them may still be derived from or influenced by the former professional relationship. When a social worker may not avoid a personal relationship with a client, the social worker shall take appropriate precautions, such as documented discussion with the client about the relationship, consultation or supervision to ensure that the social worker's objectivity and professional judgment are not impaired. In instances when dual or multiple relationships are unavoidable, social workers shall set clear, appropriate and culturally sensitive boundaries.
- (g) Social workers shall not engage in sexual activities with ~~clients, clients or former clients.~~
- (h) Social workers shall be solely responsible for acting appropriately in regard to relationships with clients or former clients. A client's or former client's initiation of a personal, sexual or business relationship shall not be a defense by the social worker for acting inappropriately in regard to the relationship with a client or a former client.

Authority G.S. 90B-6; 90B-11.

21 NCAC 63 .0506 REMUNERATION

- (a) Financial arrangements shall be explicitly established and agreed upon by the social worker and the client in the initial stage of intervention.
- (b) Social workers shall not give or receive any fee or other consideration to or from a third party for referrals. Clinical social workers may, however, participate in contractual arrangements in which they agree to discount their fees.
- (c) Social workers employed by an agency or clinic and also engaged in private practice shall conform to agency regulations regarding private practice, their dual role.
- (d) Legal measures to collect fees may be taken if a client does not pay for services as agreed, provided reasonable notice of such action is given beforehand.

Authority G.S. 90B-6; 90B-11.

21 NCAC 63 .0507 CONFIDENTIALITY AND RECORD KEEPING

- (a) Social workers shall have a primary obligation to protect the client's right to confidentiality as established by law and professional standards of practice.
- (b) ~~(1)~~ Social workers shall reveal confidential information to others only with the informed consent of the client, except in those circumstances in which not to do so would violate other laws or would result in clear and imminent danger to the client or others. Unless specifically contraindicated by such situations, clients shall be informed and written consent shall be obtained from ~~the client~~ clients, or their legally authorized representative, before confidential information is revealed.

PROPOSED RULES

(c) (2) When confidential information is used for the purpose of professional education, research, consultation, etc., the identity of the client shall be concealed. Presentations shall be limited to material necessary for the professional purpose.

(d) (3) Social workers shall maintain records adequate to provide proper diagnosis and treatment and to fulfill other professional responsibilities.

(e) Social workers shall take precautions to protect the confidentiality of material stored or transmitted through computers, electronic mail, facsimile machines, telephones, telephone answering machines, and all other electronic or computer technology. When using these technologies, disclosure of identifying and confidential information regarding current client(s) or former client(s) shall be avoided whenever possible.

Authority G.S. 90B-6; 90B-11.

This Section includes temporary rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code and includes, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 2C .0500 for adoption and filing requirements. Pursuant to G.S. 150B-21.1(e), publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings unless this notice has been previously published by the agency.

TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: DHHS – Division of Medical Assistance

Rule Citation: 10 NCAC 26D .0101

Effective Date: September 25, 2000

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 108A-25(b); 42 CFR 440.230(d); 447.253; 456.1

Reason for Proposed Action: *The program was determined to be ineffective and discontinued effective April 1, 1999. The contract with Medical Review of North Carolina for pre-admission screening was not renewed, thus, saving Medicaid dollars for the program.*

Comment Procedures: *Written comments concerning this rule-making action must be submitted to Portia W. Rochelle, Rule-making Coordinator, Division of Medical Assistance, 1985 Umstead Dr., 2504 Mail Service Center, Raleigh, NC 27699-2504.*

CHAPTER 26 – MEDICAL ASSISTANCE

**SUBCHAPTER 26D – LIMITATIONS ON AMOUNT:
DURATION: AND SCOPE**

SECTION .0100 – INPATIENT HOSPITAL SERVICES

10 NCAC 26D .0101 INPATIENT HOSPITAL SERVICES

- (a) Private and semi-private rooms shall be reimbursed only when medically necessary (or when a census makes it necessary). Claims must be supported by a physician's statement.
- (b) Medical necessity for acute hospital level-of-care and length of stay will initially be determined by a hospital's Utilization Review Committee; however this need will be subject to post-payment review by the state agency. All claims will be subject to prepayment review for Medicaid coverage.
- (c) The State agency may grant a maximum of three administrative days to arrange for discharge of a patient to a lower level-of-care. With prior approval by the State Medicaid agency, the hospital may be reimbursed for days in excess of the three administrative days at the statewide average rate for the particular level of care needed in the event a lower level-of-care bed in a Medicaid approved health care institution is not available. The hospital must, however, make every effort to

place the recipient in an appropriate institution within the three-day administrative time allowance.

(d) Preadmission Authorization

- ~~(1) Preadmission authorization to admit a Medicaid patient for elective acute hospital level of care is required by the State Agency in accordance with physician developed criteria except under the following conditions:~~
 - ~~(A) Medicare is a primary payor; or~~
 - ~~(B) The admission is for a delivery; or~~
 - ~~(C) The patient is determined Medicaid eligible after admission has occurred.~~
 - ~~(2) The admitting physician is responsible for securing the authorization. A denial to authorize the admission may be appealed by the physician, or hospital. Failure to secure authorization shall result in denial or recoupment for any inappropriate or unnecessary admission.~~
 - ~~(3) The State Agency will establish Administrative mechanisms to evaluate requests for retroactive approvals to consider cases where either events occurred that were outside the provider's control or technical processing errors prevented obtaining an authorization prior to the patient's being admitted to the hospital.~~
 - ~~(4) In all cases involving a denial or recoupment, neither the hospital nor practitioner may bill the patient.~~
- ~~(e)(d)~~ Coverage for selected elective surgical procedures is contingent upon the rendering of a second opinion by another qualified practitioner when Medicaid is the primary payor. Categories of surgery which may be subject to a second surgical opinion requirement include hysterectomy, cholecystectomy, hemorrhoidectomy, knee surgery, coronary bypass, foot surgery, laminectomy, prostatectomy, tonsillectomy and adenoidectomy, inguinal hernia repair, varicose vein stripping and cataract surgery. This requirement may be waived by the state agency under the following conditions:

- (1) Subsequent to the performance of the procedure the recipient is determined to be retroactively eligible;
- (2) Unanticipated circumstances precluded performance of a second surgical opinion;
- (3) Physician developed criteria precludes a second opinion.

In all cases the final decision to perform the surgery rests with the recipient. A third opinion is covered but not required.

History Note: Authority G.S. 108A-25(b); S.L. 1985, c. 479, s. 86; 42 C.F.R. 440.230(d); 42 C.F.R.447.253; 42 C.F.R. 456.1; Eff. February 1, 1976; Readopted Eff. October 31, 1977; Amended Eff. October 1, 1986; August 1, 1986; October 1, 1982;

TEMPORARY RULES

Temporary Amendment Eff. October 15, 1999;
Temporary Amendment Expired July 28, 2000;
Temporary Amendment Eff. September 25, 2000.

Rule-making Agency: DHHS – Division of Medical Assistance

Rule Citation: 10 NCAC 50B .0101, .0311, .0403, .0408

Effective Date: September 12, 2000

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 108A-54; 42 U.S.C. 1396(a)(10); 42; 42 U.S.C. 1396a(e)(4); 42 U.S.C. 1396a(f); 42 CFR 435; 42 CFR 435.2; 42 C.F.R. 435.110; 42 CFR 435.112; 42 CFR 435.113; 42 CFR 435.114; 42 CFR 435.115; 42 CFR 435.116; 42 CFR 435.117; 42 CFR 435.118; 42 CFR 435.121; 42 CFR 435.131; 42 CFR 435.132; 42 CFR 435.133

Reason for Proposed Action:

10 NCAC 50B .0101, .0408 – Federal welfare reform legislation changed the definition of mandatory coverage groups for Family and children's related cases. AFDC/Work First recipients are no longer required to be automatically eligible for Medicaid. Coverage is mandatory for individuals who would have been eligible under rules in place July 16, 1996.

10 NCAC 50B .0311, .0403 – Methodologies for determining countable resources for both categorically and medically needy family and children's related cases are changed. The new methodologies conform to Work First to maintain the link between Work First and Medicaid.

Comment Procedures: Written comments concerning this rule-making action must be submitted to Portia W. Rochelle, Rule-making Coordinator, Division of Medical Assistance, 1985 Umstead Dr., 2504 Mail Service Center, Raleigh, NC 27699-2504.

CHAPTER 50 – MEDICAL ASSISTANCE

SUBCHAPTER 50B – ELIGIBILITY DETERMINATION

SECITON .0100 – COVERAGE GROUPS

10 NCAC 50B .0101 MANDATORY

The following groups required by 42 U.S.C. 1396a (a)(10) or 1396u-1 shall be eligible for Medicaid:

- (1) Recipients receiving AFDC. Individuals who meet the requirements under 42 U.S.C. 1396u-1.
- (2) Deemed recipients of AFDC including: The following individuals who meet the requirements in Item (1) of this Rule but who do not receive a cash payment:
 - (a) Individuals denied AFDC solely because the payment amount would be less than ten dollars (\$10.00).
 - (b) ~~Participants in AFDC work supplementation programs approved in the AFDC State Plan,~~

~~(b)(e) Individuals deemed to be AFDC recipients for receiving four months following termination of AFDC due continued Medicaid when eligibility under 42 U.S.C. 1396u-1 is lost due to collection or increased collection of child support,~~

~~(c)(d) Individuals receiving transitional Medicaid as described in 42 U.S.C. 1396s when AFDC eligibility under 42 U.S.C. 1396u-1 is lost due to increased earnings,~~

~~(d)(e) Individuals for whom an adoption assistance agreement is in effect or foster care maintenance payments are being made under Title IV E of the Social Security Act as described at 42 U.S.C. 673 (b).~~

- (3) Qualified pregnant women as defined at 42 U.S.C. 1396d(n)(1).
- (4) Qualified children as defined at 42 U.S.C. 1396d(n)(2).
- (5) Pregnant women, during a 60 day period following termination of the pregnancy, for pregnancy related and post partum services if they applied for Medicaid prior to termination of the pregnancy and were eligible on the date pregnancy is terminated.
- (6) Children, born to a woman who was eligible for and receiving Medicaid on the date of the child's birth, for up to one year from the date of birth; as described at 42 U.S.C. 1396a(e)(4).
- (7) Individuals receiving SSI under Title XVI of the Social Security Act.
- (8) Individuals who meet the requirements under 42 U.S.C. 1382h(a) or (b)(1).
- (9) Blind or disabled individuals who were eligible in December 1973 as blind or disabled and who for each consecutive month since December 1973 continue to meet December 1973 eligibility criteria.
- (10) Individuals who were eligible in December 1973 as aged, or blind, or disabled with an essential spouse and who, for each consecutive month since December 1973, continue to live with the essential spouse and meet December 1973 eligibility criteria.
- (11) Individuals who in December 1973 were eligible as the essential spouse of an aged, or blind, or disabled individual and who for each consecutive month since December 1973, have continued to live with that individual who has met December 1973 eligibility criteria.
- (12) Qualified Medicare Beneficiaries described at 42 U.S.C. 1396d(p).
- (13) Pregnant women whose countable income does not exceed the percent of the income official poverty line, established at 42 U.S.C. 1396a(1)(2), for pregnancy related services including labor and delivery.
- (14) Children born after September 30, 1983 and who are under age 19 who are described at 42 U.S.C. 1396a(1).
- (15) Qualified Disabled and Working Individuals described at 42 U.S.C. 1396d(s).
- (16) Individuals as described at 42 U.S.C. 1396a(a)(10)(E)(iii).

- (17) Individuals who would continue to be eligible for SSI except for specific Title II benefits or cost-of-living adjustments as described at 42 U.S.C. 1383c.

History Note: Authority G.S. 108A-54; 42 U.S.C. 1396a(a)(10); 42 U.S.C. 1396a(e)(4); 42 U.S.C. 1396a(f); 42 C.F.R. 435.110; 42 C.F.R. 435.112; 42 C.F.R. 435.113; 42 C.F.R. 435.114; 42 C.F.R. 435.115; 42 C.F.R. 435.116; 42 C.F.R. 435.117; 42 C.F.R. 435.118; 42 C.F.R. 435.121; 42 C.F.R. 435.131; 42 C.F.R. 435.132; 42 C.F.R. 435.133; Eff. September 1, 1984; Amended Eff. January 1, 1995; March 1, 1993; January 4, 1993; April 1, 1992; Temporary Amendment September 13, 1999; Temporary Amendment Expired June 27, 2000; Temporary Amendment September 12, 2000.

SECTION .0300 – CONDITIONS FOR ELIGIBILITY

Text shown in bold was published in 15:3 NCR 235-237 as a proposed change and is not a part of this temporary amendment.

10 NCAC 50B .0311 RESERVE

North Carolina has contracted with the Social Security Administration under Section 1634 of the Social Security Act to provide Medicaid to all SSI recipients. Resource eligibility for individuals under any Aged, Blind, and Disabled coverage group is determined based on standards and methodologies in Title XVI of the Social Security Act except as specified in Items (4) and (5) of this Rule. Applicants for and recipients of Medicaid shall use their own resources to meet their needs for living costs and medical care to the extent that such resources can be made available. Certain resources shall be protected to meet specific needs such as burial and transportation and a limited amount of resources shall be protected for emergencies.

- (1) The value of resources currently available to any budget unit member shall be considered in determining financial eligibility. A resource shall be considered available when it is actually available and when the budget unit member has a legal interest in the resource and he, or someone acting in his behalf, can take any necessary action to make it available.
 - (a) Resources shall be excluded in determining financial eligibility when the budget unit member having a legal interest in the resources is incompetent unless:
 - (i) A guardian of the estate, a general guardian or an interim guardian has been lawfully appointed and is able to act on behalf of his ward in North Carolina and in any state in which such resources are located; or
 - (ii) A durable power of attorney, valid in North Carolina and in any state in which such resource is located, has been granted to a person who is authorized and able to exercise such power.
 - (b) When there is a guardian, an interim guardian, or a person holding a valid, durable power of attorney

for a budget unit member, but such person is unable, fails, or refuses to act promptly to make the resources actually available to meet the needs of the budget unit member, a referral shall be made to the county department of social services for a determination of whether the guardian or attorney in fact is acting in the best interests of the member and if not, the county department of social services shall contact the clerk of court for intervention. The resources shall be excluded in determining financial eligibility pending action by the clerk of court.

- (c) When a Medicaid application is filed on behalf of an individual who:
 - (i) is alleged to be mentally incompetent,
 - (ii) has or may have a legal interest in a resource that affects the individual's eligibility, and
 - (iii) does not have a representative with legal authority to use or dispose of the individual's resources, the individual's representative or family member shall be instructed to file within 30 calendar days a judicial proceeding under Chapter 35A of the North Carolina General Statutes to declare the individual incompetent and appoint a guardian. ~~If the representative or family member either fails to file such a proceeding within 30 calendar days or fails to timely conclude the proceeding, a referral shall be made to the services unit of the county department of social services for guardianship services. If the allegation of incompetence is supported by a physician's certification or other competent evidence from sources including but not limited to physicians, nurses, social workers, psychologists, relatives, friends or others with knowledge of the condition of the individual, the resources shall be excluded except as provided in Sub-items (1)(d) or (e) of this Rule. If the individual is found by the court to be incompetent, the resources shall be excluded, beginning with the date that competent evidence, as specified in Sub-item (1)(f) of this Rule, indicates that he became incompetent, except as provided for in Sub-items (1)(d) or (1)(e) of this Rule.~~
- (d) The budget unit member's resources shall be counted in determining his eligibility for Medicaid beginning the first day of the month following the month a guardian of the estate, general guardian or interim guardian is appointed, provided that after the appointment, property which cannot be disposed of or used except by order of the court shall continue to be excluded until completion of the applicable procedures for disposition specified in Chapters 1 or 35A of the North Carolina General Statutes.

- (e) When the court rules that the budget unit member is competent or no ruling is made because of the death or recovery of the member, his resources shall be counted except for periods of time **of at least 30 consecutive calendar days** for which it can be established by competent evidence ~~from sources including but not limited to physicians, nurses, social workers, psychologists, relatives, friends or others with knowledge of the condition of the individual, specified in Sub-item (1)(f) of this Rule~~, that the member was in fact incompetent. Any such showing of incompetence is subject to rebuttal by competent evidence as specified herein and in Sub-item ~~(1)(e)~~ **(1)(f)** of this Rule.
- (f) For purposes of this Rule, competent evidence is limited to the written statement of a physician or psychiatrist with knowledge of the individual, stating the basis of that knowledge, the beginning date of incompetence, the reason the individual is incompetent, and if no longer incompetent, when the individual recovered competence.**
- (2) The limitation of resources held for reserve for the budget unit shall be as follows:
- (a) For Family and Children's related categorically and medically **needy cases, three thousand dollars (\$3,000) per budget unit;**
- ~~(b) For Family and Children's related medically needy cases, one thousand five hundred dollars (\$1,500) for a budget unit of one person, two thousand two hundred fifty dollars (\$2,250) for a budget unit of two persons and increases of one hundred dollars (\$100.00) for each additional person in the budget unit over two, not to exceed a total of three thousand, fifty dollars (\$3,050);~~
- ~~(e)(b)~~ For aged, blind, and disabled cases, two thousand dollars (\$2000) for a budget unit of one and three thousand dollars (\$3000) for a budget unit of two.
- (3) If the value of countable resources of the budget unit exceeds the reserve allowance for the unit, the case shall be ineligible:
- (a) For Family and Children's related cases and aged, blind or disabled cases protected by grandfathered provisions, and medically needy cases not protected by grandfathered provision, eligibility shall begin on the day countable resources are reduced to allowable limits or excess income is spent down, whichever occurs later;
- (b) For categorically needy aged, blind or disabled cases not protected by grandfathered provisions, eligibility shall begin no earlier than the month countable resources are reduced to allowable limits as of the first moment of the first day of the month.
- (4) Resources counted in the determination of financial eligibility for categorically needy aged, blind and disabled cases is based on resource standards and methodologies in Title XVI of the Social Security Act except for the following methodologies:
- (a) The value of personal effects and household goods are not counted.
- (b) Value of tenancy in common interest in real property is not counted.
- (c) Value of life estate interest in real property is not counted.
- (5) Resources counted in the determination of financial eligibility for medically needy aged, blind and disabled cases is based on resource standards and methodologies in Title XVI of the Social Security Act except for the following methodologies:
- (a) The value of personal effects and household goods are not counted.
- (b) Personal property is not a countable resource if it:
- (i) is used in a trade or a business; or
- (ii) is used to produce goods and services for personal use; or
- (iii) produces a net annual income.
- (c) Real property not exempted under homesite rules is not a countable resource if it:
- (i) is used in a trade or business; or
- (ii) is used to produce goods and services for personal use; or
- (iii) is non-business income producing property that produces net annual income after operational expenses of at least six percent of equity value per methodologies under Title XVI of the Social Security Act. For purposes of this Sub-item equity of agricultural land, horticultural land, and forestland is the present use value of the land, as defined by G.S. 105-277.1A., et seq., less the amount of debts, liens or other encumbrances.
- (d) Value of tenancy in common interest in real property is not counted.
- (e) Value of life estate interest in real property is not counted.
- (f) Individuals with resources in excess of the resource limit at the first moment of the month may become eligible at the point that resources are reduced to the allowable limit.
- (6) Resources counted in the determination of financial eligibility for categorically needy Family and Children's related cases are:
- (a) Cash on hand;
- (b) The balance of savings accounts, including savings of a student saving his earnings for school expenses;
- (c) The balance of checking accounts less the current monthly income which had been deposited to meet the budget unit's monthly needs when reserve was verified;
- (d) The portion of lump sum payments remaining after the month of receipt;
- (e) Cash value of life insurance policies owned by the budget unit;

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- ~~(f)~~ ~~Revocable trust funds;~~
- ~~(g)(f)~~ Stocks, bonds, mutual fund shares, certificates of deposit and other liquid assets;
- ~~(h)~~ ~~Negotiable and salable promissory notes and loans;~~
- ~~(i)~~ ~~Revocable pre-paid burial contracts;~~
- ~~(j)(g)~~ Patient accounts in long term care facilities;
- ~~(k)~~ ~~Individual Retirement Accounts or other retirement accounts or plans;~~
- ~~(4)(h)~~ Equity in non-essential personal property limited to:
 - (i) Mobile homes not used as home,
 - (ii) Boats, boat trailers and boat motors,
 - (iii) Campers,
 - (iv) Farm and business equipment;
 - (v) Equity in vehicles in excess of one ~~thousand five hundred dollars (\$1,500)~~ in one motor vehicle per adult; ~~determined to be essential under Rule .0403 of this Subchapter;~~
 - ~~(vi)~~ ~~Equity in motor vehicles determined to be non-essential under Rule .0403 of this Subchapter;~~
- ~~(m)~~ ~~Equity in real property is limited to interest in real estate other than that used as the budget unit's homesite and is limited to:~~
 - ~~(i)~~ ~~Fee simple interest;~~
 - ~~(ii)~~ ~~Tenancy by the entireties interest only;~~
 - ~~(iii)~~ ~~Salable remainder interest;~~
 - ~~(iv)~~ ~~Value of burial plots;~~
- (7) Resources counted in the determination of financial eligibility for medically needy Family and Children's related cases are:
 - (a) Cash on hand;
 - (b) The balance of savings accounts, including savings of a student saving his earnings for school expenses;
 - (c) The balance of checking accounts less the ~~currently~~ current monthly income which had been deposited to meet the budget unit's monthly needs when reserve was verified or lump sum income from self-employment deposited to pay annual expenses;
 - (d) Cash value of life insurance policies when the total face value of all policies that accrue cash value exceeds one thousand five hundred dollars (\$1,500);
 - ~~(e)~~ ~~Trust funds;~~
 - ~~(f)(e)~~ Stocks, bonds, mutual fund shares, certificates of deposit and other liquid assets;
 - ~~(g)~~ ~~Negotiable and salable promissory notes and loans;~~
 - ~~(h)~~ ~~Revocable prepaid burial contracts;~~
 - ~~(i)(f)~~ Patient accounts in long term care facilities;
 - ~~(j)~~ ~~Individual Retirement Accounts or other retirement accounts or plans;~~
 - ~~(k)(g)~~ Equity in non-essential, non-income producing personal property limited to:
 - (i) Mobile home not used as home,
 - (ii) Boats, boat trailers and boat motors,
 - (iii) Campers,
 - (iv) Farm and business equipment,

- ~~(v)~~ ~~Equity in motor vehicles determined to be non-essential under Rule .0403 of this Subchapter; in excess of one vehicle per adult if not income-producing.~~
- ~~(4)~~ ~~Equity in real property is limited to interest in real estate other than that used as the budget unit's homesite and is limited to:~~
 - ~~(i)~~ ~~Fee simple interest;~~
 - ~~(ii)~~ ~~Tenancy by the entireties interest only;~~
 - ~~(iii)~~ ~~Salable remainder interest;~~
 - ~~(iv)~~ ~~Value of burial plots.~~

History Note: Authority G.S. 108A-54; 108A-55; 108A-58; 42 U.S.C. 703, 704 1396; 42 C.F.R. 435.121; 42 C.F.R. 435.210; 42 C.F.R. 435.711; 42 C.F.R. 435.712; 42 C.F.R. 435.734; 42 C.F.R. 435.823; 42 C.F.R. 435.840; 42 C.F.R. 435.841; 42 C.F.R. 435-845; 42 C.F.R. 445.850; 42 C.F.R. 435.851; 45 C.F.R. 233.20; 45 C.F.R. 233.51;

Eff. September 1, 1984;

Filed as a Temporary Amendment Eff. September 1, 1985, for a period of 92 days to expire on December 1, 1985;

Amended Eff. January 1, 1995; November 1, 1994; September 1, 1993; March 1, 1993;

Temporary Amendment Eff. September 13, 1999;

Temporary Amendment Expired June 27, 2000;

Temporary Amendment Eff. September 12, 2000;

10 NCAC 50B .0403 RESERVE

(a) The value of resources held by the client or by a financially responsible person shall be considered available to the client in determining countable reserve for the budget unit.

(b) Jointly owned resources shall be counted as follows:

- (1) The value of resources owned jointly with a non-financially responsible person who is a recipient of another public assistance budget unit shall be divided equally between the budget units;
- (2) The value of liquid assets and personal property owned jointly with a non-financially responsible person who is not a client of another public assistance budget unit shall be available to the budget unit member if he can dispose of the resource without the consent and participation of the other owner or the other owner consents to and, if necessary, participates in the disposal of the resource;
- (3) The client's share of the value of real property owned jointly with a non-financially responsible person who is not a member of another public assistance budget unit shall be available to the budget unit member if he can dispose of his share of the resource without the consent and participation of the other owner or the other owner consents to and, if necessary, participates in the disposal of the resource.
- (c) The terms of a separation agreement, divorce decree, will, deed or other legally binding agreement or legally binding order shall take precedence over ownership of resources as stated in (a) and (b) of this Rule, except as provided in Paragraph (n) of this Rule.
- (d) For all aged, blind, and disabled cases, the resource limit, financial responsibility, and countable and non-countable assets

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are based on standards and methodology in Title XVI of the Social Security Act except as specified in Items (4) and (5) in Rule .0311 of this Subchapter.

(e) Countable resources for Family and Children's related cases shall be determined as follows:

- (1) The resources of a spouse, who is not a stepparent, shall be counted in the budget unit's reserve allowance if the spouses live together or one spouse is temporarily absent in long term care and the spouse is not a member of another public assistance budget unit;
- (2) The resources of a client and a financially responsible parent or parents shall be counted in the budget unit's reserve limit if the parents live together or one parent is temporarily absent in long term care and the parent is not a member of another public assistance budget unit;
- (3) The resources of the parent or parents shall not be considered if a child under age 21 requires care and treatment in a medical institution and his physician certifies that the care and treatment are expected to exceed 12 months.

(f) ~~The homesite Real property~~ shall be excluded from countable resources for Family and Children's related ~~cases~~ cases, as follows:

- (1) ~~The homesite is the client's principal place of residence, which includes the house and in the city the lot on which the house sits and all the buildings on the lot, or in a rural area the land on which the house sits, up to one acre, and all buildings on the acre, and, the homesite also includes up to twelve thousand dollars (\$12,000) tax value in real property contiguous to the principal place of residence, regardless of whether the principal place of residence is owned by the client.~~
- (2) ~~Additional value in real property contiguous to the principal place of residence shall be a countable resource.~~

~~(g) For medically needy Families and Children cases if the client or any member of the budget unit has ownership in a probated estate, the value of the individual's proportionate share of the countable property shall be a countable resource unless the property can be excluded as the homesite or as income producing property, as stated in Paragraphs (e) and (f) of this Rule.~~

~~(h) For family and children's related cases the equity in non-excluded real property shall be counted toward the reserve level of the budget unit.~~

~~(i)(g) A One motor vehicle per adult shall be determined an essential vehicle excluded for medically needy Family and Children's related cases, when it must be specially equipped for use by a handicapped individual, used to obtain regular medical treatment, or used to retain employment.~~

~~(h) For medically needy family and children's related cases, income producing vehicles and personal property shall be excluded from countable resources.~~

~~(i)(i) For family and children's related cases the value of non-excluded motor vehicles is the Current Market Value, less encumbrances. If the applicant/recipient disagrees with the assigned value, he has the right to rebut the value.~~

~~(k) For family and children's related cases the current market value of a remainder interest in life estate shall be determined by~~

~~applying the remainder interest percentage from G.S. 8-46 and 8-47 to the tax value of the property. A lower current market value for remainder interest may be established by offering the interest for sale and the highest offer received, if any, is less than the value determined by application of the values chart to the tax value.~~

~~(j)~~ For a married individual:

- (1) Resources available to the individual are available to his or her spouse who is a noninstitutionalized applicant or recipient and who is either living with the individual or temporarily absent from the home, irrespective of the terms of any will, deed, contract, antenuptial agreement, or other agreement, and irrespective of whether or not the individual actually contributed the resources to the applicant or recipient. All resources available to an applicant or recipient under this Section must be considered when determining his or her countable reserve.

- (2) For an institutionalized spouse as defined in 42 U.S.C. 1396r-5(h), available resources shall be determined in accordance with 42 U.S.C. 1396r-5(c), except as specified in Paragraph (m) of this Rule.

~~(m)~~(k) For an institutionalized individual, the availability of resources are determined in accordance with 42 U.S.C. 1396r-5. Resources of the community spouse are not counted for the institutionalized spouse when:

- (1) Resources of the community spouse cannot be determined or cannot be made available to the institutionalized spouse because the community spouse cannot be located; or
- (2) The couple has been continuously separated for 12 months at the time the institutionalized spouse enters the institution.

History Note: Authority G.S. 108A-54; 108A-55; S.L. 1983, c. 1116; 42 U.S.C. 1396r-5; 42 U.S.C. 1396a(a)(17); 42 U.S.C. 1396a(a)(51); 42 C.F.R. 435.602; 42 C.F.R. 435.711; 42 C.F.R. 435.712; 42 C.F.R. 435.723; 42 C.F.R. 435.734; 42 C.F.R. 435.821; 42 C.F.R. 435.822; 42 C.F.R. 435.823; 42 C.F.R. 435.845; 45 C.F.R. 233.20; 45 C.F.R. 233.51; Deficit Reduction Act of 1984 (P.L. 98-369), Section 2373; Correll v. DSS/DMA/DHR, No. 406PA91 (North Carolina Supreme Court); Schweiker v. Gray Panthers, 453 U.S. 34, 101 S.Ct. 2633, 69 L. Ed.2d 460 (1981); Eff. September 1, 1984; Amended Eff. January 1, 1995; November 1, 1994; September 1, 1993; April 1, 1993; Temporary Amendment Eff. September 13, 1999; Temporary Amendment Expired June 27, 2000; Temporary Amendment Eff. September 12, 2000.

10 NCAC 50B .0408 CLASSIFICATION

(a) The following individuals shall be classified as categorically needy:

- (1) Individuals ~~who receive cash payments under programs of public assistance; described in Item (1) of Rule .0101 of this Subchapter.~~
- (2) Deemed recipients of SSI described in Item (17) of Rule .0101 of this Subchapter; and individuals who are

eligible for public assistance cash payments but who choose not to apply for cash payments;

- (3) ~~Individuals Deemed recipients of AFDC~~ described in Sub-item (2)(b) of Rule .0101 of this Subchapter;
- (4) Pregnant women described in:
 - (A) Item (3) or (13) of Rule .0101 of this Subchapter; or
 - (B) Sub-item (1)(d) of Rule .0102 of this Subchapter;
- (5) Individuals under 21 described in:
 - (A) Item (4) or (14) of Rule .0101 of this Subchapter; or
 - (B) Sub-item (1)(a) of Rule .0102 of this Subchapter; or
 - (C) Sub-item (1)(d) of Rule .0102 of this Subchapter who meet the eligibility requirements for categorically needy in this Subchapter;
- (6) Qualified Medicare Beneficiaries described in Item (1) of Rule .0101 of this Subchapter;
- (7) Individuals described in Item (9), (10) or (11) of Rule .0101 of this Subchapter who were receiving cash assistance payments in December 1973;
- (8) Individuals described in Item (5) of Rule .0101 of this Subchapter who were classified categorically needy when pregnancy terminated;
- (9) Individuals described in Item (6) of Rule .0101 of this Subchapter whose mother is classified as categorically needy;
- (10) Individuals described in Sub-item (1)(c) of Rule .0102 of this Subchapter; or
- (11) Individuals described in Sub-item (1)(d) of Rule .0102 of this Subchapter.

(b) The following individuals who are not eligible as categorically needy and meet the requirements for medically needy set forth in this Subchapter shall be classified medically needy:

- (1) Pregnant women described in:
 - (A) Item (5) of Rule .0101 of this Subchapter who were classified medically needy when their pregnancy terminated; or
 - (B) Sub-item (4)(b) of Rule .0102 of this Subchapter;
- (2) Individuals under age 21;
- (3) Caretaker relatives of eligible dependent children; or
- (4) Aged, blind or disabled individuals not eligible for a public assistance cash payment.

History Note: Filed as a Temporary Amendment Eff. October 1, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Filed as a Temporary Amendment Eff. September 12, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Authority G.S. 108A-54; 42 C.F.R. 435.2; 42 C.F.R. 435.4; Eff. September 1, 1984;

Amended Eff. January 1, 1995; August 1, 1990;

Temporary Amendment Eff. September 13, 1999;

Temporary Amendment Expired June 27, 2000;

Temporary Amendment Eff. September 12, 2000.

TITLE 11 – DEPARTMENT OF INSURANCE

Rule-making Agency: *N.C. Department of Insurance*

Rule Citation: *11 NCAC 11A .0514-.0515*

Effective Date: *October 1, 2000*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 58-2-205; 150B-21.1(a3)*

Reason for Proposed Action: *The purpose of these rules is to incorporate provisions from the NAIC Model Regulation into the NC Administrative Code as provided by G.S. 58-2-205.*

Comment Procedures: *Written comments may be sent to the attention of Raymond Martinez, N.C. Department of Insurance, P.O. Box 26387, Raleigh, NC 27611.*

CHAPTER 11 – FINANCIAL EVALUATION DIVISION

SUBCHAPTER 11A – GENERAL PROVISION

SECTION .0500 – CPA AUDITS

11 NCAC 11A .0514 SEASONING REQUIREMENTS

No partner or other person responsible for rendering a report may act in that capacity for more than seven consecutive years. Following that period of service the person shall be disqualified from acting in that or a similar capacity for the same company or its insurance subsidiaries or affiliates for a period of two years. An insurer may make application to the Commissioner for relief from the above rotation requirement on the basis of unusual circumstances. The Commissioner shall consider the following factors in determining if the relief should be granted:

- (1) Number of partners, expertise of the partners, or the number of insurance clients in the currently registered firm;
- (2) Premium volume of the insurer; or
- (3) Number of jurisdictions in which the insurer transacts business.

History Note: Authority G.S. 58-2-40; 58-2-205;

Temporary Adoption Eff. October 1, 2000.

11 NCAC 11A .0515 NOTES TO FINANCIAL STATEMENTS

The notes to financial statements required 11 NCAC 11A .0504(b)(6)(A) shall be those required by the appropriate NAIC Annual Statement Instructions and NAIC Accounting Practices and Procedures Manual, including subsequent amendments and editions. These publications are available for inspection in the Financial Evaluation Division of the Department and may be purchased from the National Association of Insurance Commissioners for a cost of two hundred fifteen dollars (\$215.00) and two hundred twenty-five dollars (\$225.00) respectively. The address and telephone number of the NAIC

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are: NAIC Executive Headquarters, 2301 McGee, Suite 800, Kansas City, MO 64108-2604, (816) 842-3600.

*History Note: Authority G.S. 58-2-40; 58-2-205;
Temporary Adoption Eff. October 1, 2000.*

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: *NC Marine Fisheries Commission*

Rule Citation: *15A NCAC 03M .0506*

Effective Date: *August 29, 2000*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 113-34; 113-182; 113-221; 143B-289.52*

Reason for Proposed Action: *Changes to the harvest and possession limit for red porgy made effective by the National Marine Fisheries Service on August 29, 2000, lifted the moratorium on the red porgy in the EEZ. The Marine Fisheries Commission adopted a temporary rule implementing the limits required for compliance contingent upon the National Marine Fisheries Services adoption of 50 CFR Part 66 which implements Amendment 12 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region. Unless this temporary rule is adopted, the prohibition remains for red porgy for North Carolina fishermen.*

Comment Procedures: *Written comments are encouraged and may be submitted to the MFC, Juanita Gaskill, PO Box 769, Morehead City, NC 28557.*

CHAPTER 3 – MARINE FISHERIES

SUBCHAPTER 3M – FINFISH

SECTION .0500 – OTHER FINFISH

15A NCAC 03M .0506 SNAPPER-GROUPER

(a) The Fisheries Director may, by proclamation, impose any or all of the following restrictions in the fisheries for species of the snapper-grouper complex and black sea bass in order to comply with the management requirements incorporated in the Fishery Management Plans for Snapper-Grouper and Sea Bass developed by the South Atlantic Fishery Management Council or Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission:

- (1) Specify size;
- (2) Specify seasons;
- (3) Specify areas;
- (4) Specify quantity;
- (5) Specify means/methods; and
- (6) Require submission of statistical and biological data.

The species of the snapper-grouper complex listed in the South Atlantic Fishery Management Council Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region are hereby incorporated by reference and copies are available via the Federal Register posted on the Internet at www.access.gpo.gov and at the Division of Marine Fisheries, P.O. Box 769, Morehead City, North Carolina 28557 at no cost.

(b) Black sea bass:

- (1) It is unlawful to possess black sea bass less than ten inches total length.
- (2) It is unlawful to take or possess more than 20 black sea bass per person per day south of Cape Hatteras without a valid Federal Commercial Snapper-Grouper permit.

(c) Gag grouper:

- (1) It is unlawful to possess gag grouper (gray grouper) less than 24 inches total length.
- (2) It is unlawful to possess more than two gag grouper (gray grouper) per person per day without a valid Federal Commercial Snapper-Grouper Permit.
- (3) It is unlawful to possess more than two gag grouper (gray grouper) per person per day during the months of March and April.
- (4) It is unlawful to sell or purchase gag grouper (gray grouper) taken from waters under the jurisdiction of North Carolina or the South Atlantic Fishery Management Council during the months of March and April.

(d) Black grouper:

- (1) It is unlawful to possess black grouper less than 24 inches total length.
- (2) It is unlawful to possess more than two black grouper per person per day without a valid Federal Commercial Snapper-Grouper Permit.
- (3) It is unlawful to take or possess more than two black grouper per person per day during the months of March and April.
- (4) It is unlawful to sell or purchase black grouper taken from waters under the jurisdiction of North Carolina or the South Atlantic Fishery Management Council during the months of March and April.

(e) It is unlawful to possess red grouper less than 20 inches total length.

(f) It is unlawful to possess yellowfin grouper (fireback grouper) less than 20 inches total length.

(g) It is unlawful to possess scamp less than 20 inches total length.

(h) It is unlawful to possess yellowmouth grouper less than 20 inches total length.

(i) Speckled hind (kitty mitchell) and warsaw grouper:

- (1) It is unlawful to sell or purchase speckled hind or warsaw grouper.
- (2) It is unlawful to possess more than one speckled hind or one warsaw grouper per vessel per trip.

(j) Greater amberjack:

- (1) For recreational purposes:
 - (A) It is unlawful to possess greater amberjack less than 28 inches fork length.
 - (B) It is unlawful to possess more than one greater amberjack per person per day.

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- (2) It is unlawful to sell or purchase greater amberjack less than 36 inches fork length.
- (3) It is unlawful to possess more than one greater amberjack per person per day without a valid Federal Commercial Snapper-Grouper Permit.
- (4) It is unlawful to possess more than one greater amberjack per person per day during the month of April.
- (5) It is unlawful to sell or purchase greater amberjack during any closed season.
- (k) Red Snapper:
 - (1) It is unlawful to possess red snapper less than 20 inches total length.
 - (2) It is unlawful to possess more than two red snapper per person per day without a valid Federal Commercial Snapper-Grouper permit.
- (l) Vermilion Snapper:
 - (1) For recreational purposes:
 - (A) It is unlawful to possess vermillion snapper (beeliner) less than 11 inches total length.
 - (B) It is unlawful to possess more than 10 vermillion snapper per person per day.
 - (2) It is unlawful to possess or sell vermillion snapper (beeliner) less than 12 inches total length with a valid Federal Commercial Snapper-Grouper permit.
- (m) It is unlawful to possess silk snapper (yelloweye snapper) less than 12 inches total length.
- (n) It is unlawful to possess blackfin snapper (hambone snapper) less than 12 inches total length.
- (o) ~~It is unlawful to possess red porgy (*Pagrus pagrus*): (*Pagrus pagrus*) in North Carolina.~~
 - (1) It is unlawful to possess red porgy less than 14 inches total length.
 - (2) It is unlawful to possess more than one red porgy per person per day without a valid Federal Commercial Snapper-Grouper Permit.
 - (3) It is unlawful to sell or offer for sale red porgy from January 1 through April 30.
 - (4) It is unlawful to land more than 50 pounds of red porgy from May 1 through December 31 in a commercial fishing operation.
- (t) It is unlawful for persons in possession of a valid National Marine Fisheries Service Snapper-Grouper Permit for Charter Vessels to exceed the creel restrictions established in Paragraphs (b), (j), (o), and (p) of this Rule when fishing with more than three persons (including the captain and mate) on board.
- (u) In the Atlantic Ocean, it is unlawful for an individual fishing under a Recreational Commercial Gear License with seines, shrimp trawls, pots, trotlines or gill nets to take any species of the Snapper-Grouper complex.

History Note: Authority G.S. 113-134; 113-182; 113-221; 143B-289.52;

Eff. January 1, 1991;

Amended Eff. April 1, 1997; March 1, 1996; September 1, 1991;

Temporary Amendment Eff. December 23, 1996;

Amended Eff. August 1, 1998; April 1, 1997;

Temporary Amendment Eff. August 29, 2000; January 1, 2000; May 24, 1999.

TITLE 25 – OFFICE OF STATE PERSONNEL

Rule-making Agency: *State Personnel Commission*

Rule Citation: *25 NCAC 01B .0437*

Effective Date: *January 1, 2001*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 126-4*

Reason for Proposed Action: *HB 968 reduced the commission's time in which it may exercise jurisdiction over recommended decisions made by administrative law judges from 90 days to 60 days. This compressed time period will require the commission to hear every case in which the Office of Administrative Hearings delivers a record to the Office of State Personnel at any time prior to a commission meeting. In order for the commissioners to have adequate time to review the parties' written arguments in each case, it will be important for the parties' to submit those as soon as possible after the recommended decision in a matter is issued.*

Comment Procedures: *Written comments may be submitted to Delores A. Joyner, Office of State Personnel, 1331 Mail service center; Raleigh, North Carolina 27699-1331*

CHAPTER 1 – OFFICE OF STATE PERSONNEL

SUBCHAPTER 1B – STATE PERSONNEL COMMISSION

SECTION .0400 – APPEAL TO COMMISSION

25 NCAC 1B .0437 STATE PERSONNEL COMMISSION: PROCEDURES

- (a) The State Personnel Commission Administrator, on behalf of the State Personnel Commission, shall receive the record in the contested cases forwarded by the Office of Administrative Hearings and the State Personnel Commission shall make a final administrative decision in the case. Any record received by the Administrator on the day of a Commission meeting shall be deemed to have been received after the Commission meeting and the time in which the Commission has to review and decide the case shall run from the Commission meeting. The Office of State Personnel shall be responsible for the administrative management of contested cases coming before the Commission for its review and decision.
- (b) Oral Argument. Either party to a contested case may request the opportunity to appear before the State Personnel Commission and make oral argument in all cases, ~~cases except those arising under G.S. 126-14.4.~~ Such arguments shall be based solely on the information contained in the record submitted by the OAH. Oral arguments shall be requested or waived in writing no more than 10 calendar days after the filing date of the recommended decision of the Administrative Law Judge and the parties shall attach a copy of the Administrative

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~~Law Judge's recommended decision to the request or waiver.~~ notice by the Commission has been sent to the parties that the Commission has received the official record from the OAH in the contested case. After 30 calendar days have passed since the notice to the parties that the official record has been received by the Commission, ~~the Commission shall send~~ After the Commission has received either a request or waiver of oral argument from the parties, the Commission shall send a notice of review which shall contain the date, time and place of the Commission meeting at which the case shall may be reviewed. If a party fails has failed to request or waive oral argument in a timely fashion, that party may not be allowed to present oral argument. argument or file legal briefs or memoranda to the Commission. Each party requesting oral argument shall be allotted a maximum of 10 minutes for the presentation, unless the time period is extended by a vote of the Commission. Time may be extended by the Commission for good cause shown as defined in 25 NCAC 1B .0439. All requests to speak for more than 10 minutes shall be made in writing in the same document which requests the opportunity to make oral argument. The party which did not prevail before the Administrative Law Judge is entitled to make the first oral argument and to present a rebuttal. If both parties are seeking changes in the Administrative Law Judge's recommended decision, both parties may present a rebuttal and the party with the burden of proof in the contested case is entitled to the last rebuttal.

(c) Briefs, Legal Memoranda, Attorney's Fees Requests. All briefs and legal memoranda in cases other than those arising under G.S. 14.4 shall be received by the Office of State Personnel no later than 30 calendar days after ~~the date of the notice sent by the Commission notifying the parties of the Commission's receipt of the official record from the OAH.~~ the filing date of the recommended decision of the Administrative Law Judge. Such document shall also be served upon the opposing party. party and a copy of the recommended decision of the Administrative Law Judge shall be attached to the document. Such a document received after the deadline shall be presented to the Commission only after the party has shown that the opposing party was served with the document no later than 30 calendar days after the ~~date of the notice sent by the Commission notifying the parties of the Commission's receipt of the official record from the OAH.~~ filing date of the recommended decision of the Administrative Law Judge. Attorney's fees requests must be presented to the Commission by the prevailing party to a Commission Decision and Order at least one month before the meeting at which the matter is to be considered. Such requests must also be served upon the opposing party. The Commission shall notify the parties upon receipt of a request for attorneys fees and provide an opportunity for the opposing party to file objections to the fees requested. If the parties wish to make oral argument on an attorney's fees request, a request for oral argument must be received by the Office of State Personnel within two weeks after the filing of the attorney's fees request and at least one month prior to the meeting at which such oral argument is requested. Parties shall submit 25 copies of each pleading (with three holes in the left margin) filed with the Commission. An extension of time to file documents with the Commission may be granted by the

Administrator for good cause shown as defined in 25 NCAC 1B .0439.

(d) Written Exceptions. Proposed Alternative Findings, Conclusions and Recommendations. Each party shall submit written exceptions to the recommended decision of the Administrative Law Judge, unless the party accepts the recommended decision in its entirety. Any party may choose to submit proposed alternative findings of fact and conclusion of law. Exceptions and alternative findings of fact and conclusions shall be received by the Office of State Personnel no later than 30 calendar days after the ~~date of the notice sent by the Commission notifying the parties of the Commission's receipt of the official record from the OAH.~~ filing date of the recommended decision of the Administrative Law Judge. Written exceptions shall be specifically drawn. Each exception and proposed alternative finding or conclusion shall specifically, separately, and in detail, set forth how the finding or conclusion is clearly contrary to the preponderance of the admissible evidence, the specific reason(s) the Commission should not adopt the Administrative Law Judge's recommended finding of fact or conclusion of law and the specific evidence in the record which supports the rejection of the Administrative Law Judge's recommended finding of fact or conclusion of law, including but not limited to references to the testimony of witnesses, any evidentiary exhibits, and any exercise of discretion by the agency to which deference should be accorded. Any new findings of fact proposed to the Commission must be supported by a preponderance of the evidence which shall be set forth in support of the new finding of fact. Any new decision proposed to the Commission must be supported by a preponderance of the admissible evidence in the record and the reason that the Administrative Law Judge's decision is clearly contrary to the preponderance of the admissible evidence in the record must be set forth in detail. If the Administrative Law Judge has recommended granting summary judgment or judgment on the pleadings and a party proposes that the Commission reject the Administrative Law Judge's decision, the party shall set forth the basis for rejecting the Administrative Law Judge's decision in detail. Reference must be made to the transcript (and volumes, where applicable), if the transcript of the hearing was made and is available. Where a party excepts to a finding, conclusion, or recommendation and requests its deletion or amendment, an alternative finding, conclusion, or recommendation shall be made. Such a document received after the deadline shall be presented to the Commission only after the party has shown that the opposing party was served with the document no later than 30 calendar days after ~~the date of the notice sent by the Commission notifying the parties of the Commission's receipt of the official record from the OAH.~~ the filing date of the Administrative Law Judge's recommended decision. The Commission may adopt the findings of fact and conclusions of law of the Administrative Law Judge, or to amend the same, or to adopt alternative findings of fact and conclusion of law, either from those submitted by the parties or drawn from its own review of the whole record. Parties shall submit 20 25 copies of each pleading (with three holes in the left margin) filed with the Commission. An extension of time to file documents with the Commission may be granted by the Administrator for good cause shown as defined in 25 NCAC 1B .0439.

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(e) Proposed Decision and Order. Each party to a contested case shall submit a proposed Decision and Order for consideration by the Commission in that case. The proposed Decision and Order shall be received by the Office of State Personnel no later than 30 calendar days after the ~~date of the notice sent by the Commission notifying the parties of the Commission's receipt of the official record from OAH.~~ filing date of the recommended decision of the Administrative Law Judge. The Commission may delay decision in a case until all parties have submitted a proposed Decision and Order. The Proposed Decision and Order shall indicate which findings, conclusions, and recommendations of the Administrative Law Judge are being deleted or amended and why, ~~and what new findings, and conclusions are being adopted.~~ and specifically, separately, and in detail, set forth how the finding or conclusion is clearly contrary to the preponderance of the admissible evidence. The Proposed Decision and Order must include the specific reason(s) the Commission should not adopt the Administrative Law Judge's recommended finding of fact or conclusion of law and the specific evidence in the record which supports the rejection of the Administrative Law Judge's recommended finding of fact or conclusion of law, including but not limited to references to the testimony of witnesses, any evidentiary exhibits, and any exercise of discretion by the agency to which deference should be accorded. Any new findings of fact proposed to the Commission must be supported by a preponderance of the evidence which shall be set forth in support of the new finding of fact in the Proposed Decision and Order. Any new conclusions of law or decision proposed to the Commission must be supported by a preponderance of the admissible evidence in the record and the reason that the Administrative Law Judge's decision is clearly contrary to the preponderance of the admissible evidence in the record must be set forth in detail in the Proposed Decision and Order. If the Administrative Law Judge has recommended granting summary judgment or judgment on the pleadings and a party proposes that the Commission reject the Administrative Law Judge's decision, the party shall set forth the basis for rejecting the Administrative Law Judge's decision in detail in the Proposed Decision and Order. The proposed Decision and Order shall contain an order in the case for the signature of the Administrator to the Commission, consistent with and supported by the findings and conclusions. Parties shall submit 20 25 copies of each pleading (with three holes in the left margin) filed with the Commission. An extension of time to file documents with the Commission may be granted by the Administrator for good cause shown as defined in 25 NCAC 1B .0439.

(f) Service on Opposing Parties. Copies of all documents permitted or required by this Rule shall be served on the opposing party, but no later than 30 calendar days after ~~the date of the notice sent by the Commission notifying the parties of the Commission's receipt of the official record from the OAH.~~ the filing date of the recommended decision of the Administrative Law Judge. If a document is filed electronically with the Commission as permitted in 25 NCAC 1B .0437(i), the document must also be served electronically on the opposing party if the opposing party has an electronic address. Electronic service must be followed by service of printed copies of any

document filed electronically within 24 hours of electronic filing.

(g) Notification. The parties or when applicable, the legal representative of record for a party, shall be notified by certified mail, return receipt requested, of the Commission's decision. The Commission's decision shall be prepared and sent out by the Office of State Personnel. Copies or the content of a specific decision and order shall not be released to non-parties until the Office of State Personnel has knowledge that all parties have received a copy of the Decision and Order.

~~(h) Cases arising under G.S. 126-14.4. In contested cases arising under G.S. 126-14.4, where the Commission is required to make a decision within 60 days of receipt of the official record, the parties shall not be entitled to appear in person before the Commission and make oral argument. Instead, either party may request an opportunity to make oral argument to the Commission in a teleconference (or by other video or audio electronic conferencing means) within 10 calendar days of notice by the Commission that it has received the official record from the Office of Administrative Hearings. If a party requests the opportunity to present an oral argument in a teleconference, a teleconference shall be scheduled by the Office of State Personnel and a Notice of Review via Teleconference shall be sent to the parties which shall contain the date and time the teleconference will take place and the telephone numbers at which the parties will be called. No delays in scheduling the teleconference shall be permitted which would prejudice the Commission's ability to render its written decision in compliance with the statutory 60 day deadline. Any briefs or legal memoranda which the parties wish to submit must be received by the Office of State Personnel no later than 14 calendar days after notice that the Commission has received the official record from the Office of Administrative Hearings. An extension of time to file documents with the Commission may be granted by the Administrator for good cause shown as defined in 25 NCAC 1B .0439. Each party requesting oral argument shall be allotted a maximum of 10 minutes for the presentation, unless the time period is extended by a vote of the Commission for good cause shown as defined in 25 NCAC 1B .0439. All requests to speak for more than 10 minutes shall be made in writing in the same document which requests the opportunity to make oral argument. The party which did not prevail before the Administrative Law Judge is entitled to make the first oral argument and to present a rebuttal. If both parties are seeking changes in the Administrative Law Judge's recommended decision, both parties may present a rebuttal and the party with the burden of proof in the contested case is entitled to the last rebuttal.~~

~~(i) (h) Electronic Filing. Any documents which are required or permitted to be filed under 25 NCAC 1B .0437, may be filed electronically by midnight of the filing date with the State Personnel Commission Administrator in a format readable by the Administrator. Printed copies of any documents filed electronically must also be filed with the Administrator in accordance with 25 NCAC 1B .0437(c), (d) and (e) within 24 hours of the electronic filing.~~

*History Note: Authority G.S. 126-4.
Eff. September 1, 1991;
Amended Eff. August 1, 2000; March 1, 1996;*

TEMPORARY RULES

Temporary Amendment Eff. January 1, 2001.

APPROVED RULES

*This Section includes the Register Notice citation to Rules approved by the Rules Review Commission (RRC) at its meeting of July 20, 2000 pursuant to G.S. 150B-21.17(a)(1) and reported to the Joint Legislative Administrative Procedure Oversight Committee pursuant to G.S. 150B-21.16. The full text of rules is published below when the rules have been approved by RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register. The rules published in full text are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

These rules, unless otherwise noted, will become effective on the 31st legislative day of the 2001 Session of the General Assembly or a later date if specified by the agency unless a bill is introduced before the 31st legislative day that specifically disapproves the rule. If a bill to disapprove a rule is not ratified, the rule will become effective either on the day the bill receives an unfavorable final action or the day the General Assembly adjourns. Statutory reference: G.S. 150B-21.3.

APPROVED RULE CITATION			REGISTER CITATION TO THE NOTICE OF TEXT
10	NCAC 26B	.0113*	14:17 NCR
10	NCAC 26H	.0401*	14:18 NCR
10	NCAC 42C	.2506*	14:13 NCR
15A	NCAC 18A	.1809	14:10 NCR
15A	NCAC 18A	.1811*	14:10 NCR
15A	NCAC 18A	.1812	14:10 NCR
15A	NCAC 18A	.2802	14:19 NCR
15A	NCAC 18A	.2810	14:19 NCR
15A	NCAC 18A	.2815	14:19 NCR
15A	NCAC 18A	.2825	14:19 NCR
15A	NCAC 19A	.0406	14:20 NCR
15A	NCAC 19B	.0101*	14:20 NCR
15A	NCAC 19B	.0322*	14:20 NCR
15A	NCAC 19B	.0503*	14:20 NCR
15A	NCAC 26B	.0101-.0103*	14:20 NCR
15A	NCAC 26B	.0105-.0106*	14:20 NCR
15A	NCAC 26B	.0107-.0109	14:20 NCR
18	NCAC 02	.0201-.0204*	not required G.S. 150B-21.5(b)(1) Eff. August 1, 2000
18	NCAC 07	.0101*	not required G.S. 150B-21.5(a)(2)(4) Eff. August 1, 2000
18	NCAC 07	.0204*	not required G.S. 150B-21.5(a)(2)(6) Eff. August 1, 2000
18	NCAC 07	.0206-.0207*	not required G.S. 150B-21.5(a)(2) Eff. August 1, 2000
18	NCAC 07	.0301-.0302*	not required G.S. 150B-21.5(a)(2)(3)(6) Eff. August 1, 2000
18	NCAC 10	.0201*	14:12 NCR
18	NCAC 10	.0303-.0307*	14:12 NCR
18	NCAC 10	.0701*	14:12 NCR
18	NCAC 10	.0801*	14:12 NCR
18	NCAC 10	.0901*	14:12 NCR
19A	NCAC 02E	.0225*	not required G.S. 150B-21.5(a)(5) Eff. August 1, 2000
21	NCAC 16M	.0102*	14:19 NCR
21	NCAC 16S	.0101-.0102*	14:19 NCR
21	NCAC 16S	.0201*	14:19 NCR
21	NCAC 16S	.0203*	14:19 NCR
21	NCAC 16S	.0205	14:19 NCR
21	NCAC 16W	.0101-.0102	14:19 NCR
21	NCAC 56	.0503*	14:13 NCR
21	NCAC 56	.0603*	14:13 NCR
21	NCAC 56	.0804	14:13 NCR
21	NCAC 56	.0901	14:13 NCR

TITLE 10 - DEPARTMENT OF HEALTH AND HUMAN SERVICES

10 NCAC 26B .0113 NC MEDICAID CRITERIA FOR CONTINUED ACUTE STAY IN AN INPATIENT PSYCHIATRIC FACILITY

The following criteria apply to individuals under the age of 21 in a psychiatric hospital or in a psychiatric unit of a general hospital, and to individuals aged 21 through 64 receiving treatment in a psychiatric unit of a general hospital. These criteria shall be applied after the initial admission period of up to three days. To qualify for Medicaid coverage for a continuation of an acute stay in an inpatient psychiatric facility a patient must meet each of the conditions specified in Items (1) through (4) of this Rule. To qualify for Medicaid coverage for continued post-acute stay in an inpatient psychiatric facility a patient must meet all of the conditions specified in Item (5) of this Rule.

- (1) The patient has one of the following:
 - (a) A current DSM-IV, Axis I diagnosis; or
 - (b) A current DSM-IV, Axis II diagnosis and current symptoms/behaviors which are characterized by all of the following:
 - (i) Symptoms/behaviors are likely to respond positively to acute inpatient treatment; and
 - (ii) Symptoms/behaviors are not characteristic of patient's baseline functioning; and
 - (iii) Presenting problems are an acute exacerbation of dysfunctional behavior patterns which are recurring and resistive to change.
- (2) Symptoms are not due solely to mental retardation.
- (3) The symptoms of the patient are characterized by:
 - (a) At least one of the following:
 - (i) Endangerment of self or others; or
 - (ii) Behaviors which are grossly bizarre, disruptive, and provocative (e.g. feces smearing, disrobing, pulling out hair); or
 - (iii) Related to repetitive behavior disorders which present at least five times in a 24-hour period; or
 - (iv) Directly result in an inability to maintain age appropriate roles; and
 - (b) The symptoms of the patient are characterized by a degree of intensity sufficient to require continual medical/nursing response, management, and monitoring.
- (4) The services provided in the facility can reasonably be expected to improve the patient's condition or prevent further regression so that treatment can be continued on a less intensive level of care, and proper treatment of the patient's psychiatric condition requires services on an inpatient basis under the direction of a physician.
- (5) In the event that not all of the requirements specified in Items (1) through (4) of this Rule are met, reimbursement may be provided for patients through the age of 17 for continued stay in an inpatient psychiatric facility at a post-acute level of care to be paid at the High Risk Intervention Residential High (HRI-R High) rate if the facility and program services are appropriate for the patient's treatment needs and provided that all of the following conditions are met:
 - (a) The psychiatric facility has made a referral for case management and after care services to the area Mental Health, Developmental Disabilities, Substance Abuse (MH/DD/SA) program which serves the patient's county of eligibility.
 - (b) The area MH/DD/SA program has found that no appropriate services exist or are accessible within a

clinically acceptable waiting time to treat the patient in a community setting.

- (c) The area MH/DD/SA program has agreed that the patient has a history of sudden decompensation or measurable regression and experiences weakness in his or her environmental support system which are likely to trigger a decompensation or regression. This history must be documented by the patient's attending physician.
- (d) The inpatient facility must have a contract to provide HRI-R, High with the area MH/DD/SA program which serves the patient's county of eligibility, or the area program's agent. Psychiatric hospitals or psychiatric units in general hospitals are eligible to establish contract relationships with all non-Carolina Alternatives area MH/DD/SA programs or their agents in accordance with statutory procedures as defined in G.S. 122C-142.
- (e) The Child and Family Services Section of the Division of Mental Health, Developmental Disabilities, Substance Abuse Services shall approve the use of extended HRI-R, High, based on criteria in Sub-items (a)-(c) of this Item.
- (f) The area MH/DD/SA program shall approve the psychiatric facility for the provision of extended HRI-R High, receive claims from the inpatient facility, and provide reimbursement to the facility in accordance with the terms of its contract.

History Note: Authority G.S. 108A-25(b); 108A-54; 42 C.F.R. 441, Subpart D; Eff. January 1, 1998; Temporary Amendment Eff. August 20, 1999; Amended Eff. April 1, 2001.

10 NCAC 26H .0401 PHYSICIAN'S FEE SCHEDULE

(a) Effective January 1, 2000, physicians' services whether furnished in the office, the patient's home, a hospital, a nursing facility or elsewhere shall be reimbursed based on the North Carolina Medicaid Fee Schedule shall be based on the Medicare Fee Schedule Resource Based Relative Value System (RBRVS), except for payments to the various Medical Faculty Practice Plans of the University of North Carolina - Chapel Hill and East Carolina University which shall be reimbursed at cost and cost settled at year end; but with the following clarifications and modifications:

- (1) A maximum fee is established for each service and is applicable to all specialties and settings in which the service is rendered. Payment is equal to the lower of the maximum fee or the providers customary charge to the general public for the particular service rendered.
- (2) Fees for services deemed to be associated with adequacy of access to health care services may be increased based on administrative review. The service must be essential to the health needs of the Medicaid recipients, no other comparable treatment available and a fee adjustment must be necessary to maintain physician participation at a level adequate to meet the needs of Medicaid recipients.
- (3) Fees for new services are established based on this Rule, utilizing the most recent RBRVS, if applicable. If there is no relative value unit (RVU) available from

Medicare, fees shall be established based on the fees for similar services. If there is no RVU or similar service, the fee shall be set at 75 percent of the provider's customary charge to the general public. For codes not covered by Medicare that Medicaid covers, annual changes in the Medicaid payments shall be applied each January 1 and fee increases shall be applied based on the forecasted Gross National Product (GNP) Implicit Price Deflator. Said manual changes in the Medicaid payments shall not exceed the percentage increase granted by the North Carolina State Legislature.

- (4) For codes not covered by Medicare that Medicaid covers, a code may also be decreased, based on administrative review, if it is determined that the fee may exceed the Medicare allowable amount for similar services, or if the fee is higher than Medicaid fees for similar services, or if the fee is too high in relation to the skills, time, and other resources required to provide the particular service.

The Resource Based Relative Value System (RBRVS), published annually in the Federal Register, is hereby incorporated by reference including any subsequent amendments and editions. A copy is available for inspection at the Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC. Copies may be obtained from Superintendent of Documents, PO Box 371954, Pittsburgh, PA 15250-7954 at a cost of nine dollars (\$9.00) for the issue containing the RBRVS values. Purchasing instructions may be received by calling 202/512-1800.

(b) This reimbursement limitation shall become effective in accordance with the provisions of G.S. 108A-55(c). These changes to the Physician's Fee Schedule allowables shall become effective when the Health Care Financing Administration, U.S. Department of Health and Human Services, approves amendment to HCFA by the Director of the Division of Medical Assistance on or about January 1, 2000 as #MA 99-12, wherein the Director proposes amendments of the State Plan to amend the Physician's Fee Schedule.

History Note: Authority G.S. 108A-25(b);

Eff. October 1, 1982;

Amended Eff. July 1, 1997; July 1, 1995; January 4, 1993; June 1, 1990; December 1, 1988;

Temporary Amendment Eff. July 22, 1998; January 22, 1998;

Amended Eff. April 1, 1999;

Temporary Amendment Eff. January 1, 2000 (This temporary amendment amends and replaces a permanent rulemaking originally proposed to be effective August 2000);

Amended Eff. April 1, 2001.

10 NCAC 42C .2506 DISCHARGE OR TRANSFER OF RESIDENTS

(a) A facility shall not initiate and carry out the discharge or transfer of residents except under conditions specified in this Rule. Discharge or transfer involves termination of residency in a facility and taking action to have the resident moved from the facility. The discharge or transfer of a resident by a facility shall meet one of the following conditions:

- (1) he discharge or transfer is necessary for the resident's welfare because the resident's needs cannot be met in the facility;
- (2) the discharge or transfer is appropriate because the resident's health has improved sufficiently so the

resident no longer needs the services provided by the facility;

- (3) the resident's condition is such that he is a danger to himself or poses a direct threat to his own health or safety;
- (4) the safety of individuals in the facility would otherwise be endangered;
- (5) the health of individuals in the facility would otherwise be endangered;
- (6) the welfare of individuals in the facility would otherwise be endangered;
- (7) the resident or responsible person has failed to pay the costs of services and accommodations according to the resident contract;
- (8) the transfer or discharge is mandated under state law; or
- (9) the facility ceases to operate.

(b) If a facility discharges or transfers a resident, the reason for discharge or transfer shall be documented in the resident's record. Documentation shall include, documentation by the resident's physician if discharge or transfer is necessary under conditions specified in Subparagraph (a) Parts (1) and (2) of this Rule or a physician if discharge or transfer is necessary under the condition specified in Paragraph (a), Parts (3) and (5) of this Rule.

(c) At least thirty days before discharging or transferring a resident, the following steps shall be taken:

- (1) The facility shall notify the resident verbally and in writing and the responsible person or contact person in writing of the facility's decision to discharge or transfer the resident. The Adult Care Home Notice of Transfer/Discharge form shall serve as the written notice of discharge or transfer and be completed by the facility and given to the resident on the same day it is dated. A copy of this notice shall be mailed or sent by facsimile to the responsible person or contact person on the same day it is dated. Failure to use and complete this specific form shall invalidate the notice of discharge or transfer. This form may be obtained at no cost from the Division of Medical Assistance, 2505 Mail Service Center, Raleigh, NC 27699-2505. Failure to use the latest version of this form does not invalidate the transfer or discharge unless the facility has been previously notified of change in the form and been provided a copy of the latest form.
- (2) The facility shall notify the resident verbally and in writing and the responsible person or contact person in writing of the resident's right to appeal the facility's action of discharge or transfer to the Division of Medical Assistance. The Adult Care Home Hearing Request Form shall be given to the resident and a copy mailed or sent by facsimile to the responsible person or contact person simultaneously with the Adult Care Home Notice of Transfer/Discharge form as written notice of the right to appeal the facility's action. Failure to include this specific form with the Adult Care Home Notice of Transfer/Discharge form shall invalidate the notice of discharge or transfer. The Hearing Request Form may be obtained at no cost from the Division of Medical Assistance, P.O. Box 29529, Raleigh, NC 27626-0529. Failure to use the latest version of the Hearing Request Form does not invalidate the request

for a hearing unless the facility has been previously notified of a change in the form and been provided a copy of the latest form.

- (3) In cases where the resident has been adjudicated incompetent, the Adult Care Home Notice of Transfer/Discharge form and the Adult Care Home Hearing Request Form shall be mailed or sent by facsimile to the resident's legal representative on the same day they are dated.
- (4) The facility shall maintain a copy of the completed Adult Care Home Notice of Transfer/Discharge form in the resident's record.
- (d) Exceptions to the 30-day notice of discharge or transfer required in Paragraph (c) of this Rule are cases in which a resident is being discharged under conditions specified in Parts (1), (3), (4) and (5) of Paragraph (a) of this Rule.
- (e) The facility shall assist residents in the discharge or transfer process to ensure safe and orderly discharge or transfer from the facility.
- (f) The resident or the resident's responsible person may initiate an appeal of a facility's intent to discharge or transfer the resident by submitting a written request for a hearing to the Hearing Unit which is the Chief Hearing Officer and the Chief Hearing Officer's staff in the Division of Medical Assistance of the Department of Health and Human Services. The request for a hearing shall be submitted by mail, facsimile or hand delivery and must be received by the Hearing Unit within 11 calendar days from the date of the facility's notice of discharge or transfer. If the eleventh day falls on a Saturday, Sunday or legal holiday, the period during which an appeal may be requested shall run until the end of the next day which is not a Saturday, Sunday or legal holiday. Except in cases specified in Paragraph (d) of this Rule, the resident shall not be discharged or transferred before the final decision resulting from the appeal has been rendered.
- (g) If an appeal hearing is requested, the following shall apply:
 - (1) Upon timely receipt of a request for a hearing according to Paragraph (f) of this Rule, the Hearing Unit shall promptly notify the facility in writing of the request.
 - (2) The facility, the resident and the resident's responsible person or contact person shall be notified by the Hearing Unit of the date, time and place of the hearing. The hearing shall be held within 30 calendar days of the Hearing Unit's receipt of a request for a hearing. If the 30th day falls on a Saturday, Sunday or legal holiday, the period during which a hearing may be held shall run until the end of the next day which is not a Saturday, Sunday or legal holiday. If the hearing is to be conducted in person, it shall be held in Raleigh, North Carolina. The hearing may also be conducted by telephone as indicated on the Hearing Request Form.
 - (3) Each party to an appeal hearing shall provide to all other parties to the hearing and to the Hearing Unit copies of all documents and records that the party intends to use at the hearing at least five working days prior to the scheduled hearing.
 - (4) The Hearing Officer, who is the person designated to preside over hearings between residents and adult care home providers regarding discharges and transfers, may:
 - (A) grant continuances;

- (B) dismiss a request for a hearing if the resident or the resident's responsible person or whoever the resident has designated to represent him fails to appear at a scheduled hearing; or
- (C) proceed to conduct a scheduled hearing if a facility representative fails to appear at a scheduled hearing.

- (5) The Rules of Civil Procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall not apply in any hearings held by a Division hearing officer unless another specific statute or rule provides otherwise. Division hearings are not hearings within the meaning of G.S. 150B and shall not be governed by the provisions of that Chapter unless otherwise stated in these rules. Parties may be represented by counsel or other representative at the hearing.
- (6) The Hearing Officer's final decision shall uphold or reverse the facility's decision. Copies of the final decision shall be mailed by certified mail to the facility and the resident and the resident's responsible person.
- (h) If a discharge or transfer is initiated by the resident or responsible person, the administrator may require up to a 14-day written notice from the resident or responsible person prior to the resident leaving the facility. Exceptions to the required notice are cases in which a delay in discharge or transfer would jeopardize the health or safety of the resident or others in the facility. The facility's requirement for a notice from the resident or responsible person shall be established in the facility's resident contract or house rules provided to the resident or responsible person according to Rule .2405 of this Subchapter.

History Note: Authority G.S. 131D-2; 143D-4.5; 143B-165; S.L. 99-0334; Temporary Adoption Eff. December 1, 1999; Eff. April 1, 2001.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 18A .1811 DRINKING WATER FACILITIES

- (a) Facilities for the dispensing of drinking water shall be of sanitary design. If drinking fountains are provided, they shall be of angle-jet type.
- (b) Multi-use utensils such as glasses, cups, ice buckets, or ice bucket lids when used, shall be washed, rinsed and subjected to an approved sanitizing treatment, and stored and handled in a manner to prevent contamination. For the washing, sanitizing treatment, and storage of multi-use utensils, equipment and methods meeting the requirements of the "Rules Governing the Sanitation of Restaurants and Other Foodhandling Establishments" 15A NCAC 18A .2600 shall be provided; except, when properly fitting disposable food grade liners are provided, ice buckets shall be treated as non-food contact surfaces and shall be washed, using an all purpose cleaner suitable for food contact surfaces, and rinsed. The lid used with the lined ice bucket shall be washed, rinsed and subjected to an approved sanitizing treatment in place. The lavatory shall be cleaned and treated with an approved sanitizer prior to using the

water from the lavatory to clean. Submersion of ice buckets and lids during in-place cleaning procedures is not required. Clean glasses shall be individually wrapped or fitted with a single-service cap that covers the edge of the glass.

(c) Ice used for room service shall be manufactured from an approved water supply and shall be stored and handled in a sanitary manner. Ice storage bins shall not be used for any other purpose and shall be kept clean and in good repair. Where ice is made on the premises, the machines shall be located in a protected place. Scoops shall be provided so guests or employees can dispense ice in a sanitary manner. Machines, equipment, utensils, and the room or area in which the machines are located shall be kept clean and in good repair. All ice machines for use by guests installed after January 1, 1996, shall dispense ice without exposing stored ice to guests.

(d) Employees cleaning ice buckets, ice bucket lids, coffee or tea makers, shall wash their hands immediately prior to cleaning these items.

(e) Single service glasses, cups, ice buckets, ice bucket lids, or food grade ice bucket liners may be used, if discarded after each use. Single service items, including clean disposable towels, shall be stored and handled in a manner to prevent contamination.

History Note: Authority G.S. 130A-248;

Eff. February 1, 1976;

Readopted Eff. December 5, 1977;

Amended Eff. January 1, 1996; September 1, 1990;

Temporary Amendment Eff. January 31, 2000;

Amended Eff. April 1, 2001.

15A NCAC 19B .0101 DEFINITIONS

The definitions in G.S. 18B-101, G.S. 20-4.01, G.S. 130A-3 and the following shall apply throughout this Subchapter:

- (1) "Alcoholic Breath Simulator" shall mean a specially designed constant temperature water-alcohol solution bath instrument devised for the purpose of providing a standard alcohol-air mixture;
- (2) "Breath-testing Instrument" shall mean an instrument for making a chemical analysis of breath and giving the resultant alcohol concentration in grams of alcohol per 210 liters of breath;
- (3) "Controlled Drinking Program" shall mean a bona fide scientific, experimental, educational, or demonstration program in which tests of a person's breath or blood are made for the purpose of determining his alcohol concentration when such person has consumed controlled amounts of alcohol;
- (4) "Director" shall mean the Director of the Division of Public Health of the Department;
- (5) "Handling Alcoholic Beverages" shall mean the acquisition, transportation, keeping in possession or custody, storage, administration, and disposition of alcoholic beverages done in connection with a controlled-drinking program;
- (6) "Observation Period" means a period during which a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen; the chemical

analyst may observe while conducting the operational procedures in using a breath-testing instrument;

- (7) "Permittee" shall mean a chemical analyst currently possessing a valid permit from the Department to perform chemical analyses, of the type set forth within the permit;
- (8) "Simulator Solution" shall mean a water-alcohol solution made by preparing a stock solution of distilled or American Society for Testing and Materials Type I water and 48.4 grams of alcohol per liter of solution. Each 10 ml. of this stock solution is further diluted to 500 ml. by adding distilled or American Society for Testing and Materials Type I water. The resulting simulator solution corresponds to the equivalent alcohol concentration of 0.08.
- (9) "Verify Instrument Calibration" shall mean verification of instrumental accuracy of an approved breath testing instrument or approved alcohol screening test device by employment of a control sample from an alcoholic breath simulator using simulator solution and obtaining the expected result or 0.01 less than the expected result as specified in Item (8) of this Rule; or by employment of a control sample as specified in Item (10) of this Rule. When the procedures set forth for approved breath testing instruments in Section .0300 of this Subchapter and for approved alcohol screening test devices in Section .0500 of this Subchapter are followed and the result specified herein is obtained, the instrument shall be deemed properly calibrated.
- (10) "Ethanol Gas Canister" shall mean a dry gas calibrator producing an alcohol-in-inert gas sample at an accurately known concentration from a compressed gas cylinder. The resulting alcohol-in-inert gas sample corresponds to the equivalent concentration of 0.08.
- (11) "Intoxilyzer 5000" is an automated instrument which tests the breath of a person to determine the person's alcohol concentration and prints the results of the analysis on a Test Record Ticket.

History Note: Authority G.S. 20-139.1(b); 20-139.1(g);

Eff. February 1, 1976;

Readopted Eff. December 5, 1977;

Amended Eff. April 1, 2001; January 1, 1995; January 4, 1994; October 1, 1990.

15A NCAC 19B .0322 REPORTING OF ALCOHOL CONCENTRATIONS

History Note: Authority G.S. 20-139.1(b);

Eff. February 1, 1987;

October 1, 1990;

Repeal Eff. April 1, 2001.

15A NCAC 19B .0503 APPROVED ALCOHOL SCREENING TEST DEVICES: CALIBRATION

(a) The following breath alcohol screening test devices are approved as to type and make:

- (1) ALCO-SENSOR (with two-digit display), made by Intoximeters, Inc.
- (2) ALCO-SENSOR III (with three-digit display), made by Intoximeters, Inc.

(3) ALCO-SENSOR IV, manufactured by Intoximeters, Inc.

(4) SD-2, manufactured by CMI, Inc.

(b) The agency or operator shall verify instrument calibration of each alcohol screening test device at least once during each 30 day period of use. The verification shall be performed by employment of an alcoholic breath simulator using simulator solution in accordance with these Rules or an ethanol gas canister.

(1) Alcoholic breath simulators used exclusively to verify instrument calibration of alcohol screening test devices shall have the solution changed every 30 days or after 25 calibration tests, whichever occurs first.

(2) Ethanol gas canisters used exclusively to verify instrument calibration of alcohol screening test devices shall not be utilized beyond the expiration date on the canister.

(3) Requirements of Paragraph (b) and Subparagraph (b)(1) and (b)(2) of this Rule shall be recorded on an alcoholic breath simulator log or an ethanol gas canister log designed by the Forensic Tests for Alcohol Branch and maintained by the user agency.

History Note: Authority G.S. 20-16.3;

Eff. February 1, 1976;

Readopted Eff. December 5, 1977.

Amended Eff. April 1, 2001; January 1, 1995; January 4, 1994; April 1, 1993.

15A NCAC 26B .0101 GENERAL

(a) The purpose of the central cancer registry is to receive and to compile, tabulate, and preserve statistical, clinical, and other reports and records relating to the incidence, treatment and cure of cancer, and to provide assistance and consultation for public health work. The statistical reports and records, and the assistance rendered to health care facilities, health planning agencies and research facilities are intended to improve cancer treatment, extend the life of the cancer patient, identify high risk groups or areas of the state and attempt to lower the morbidity and mortality of cancer in North Carolina.

(b) The central cancer registry is administered by State Center for Health Statistics, Division of Public Health, North Carolina Department of Health and Human Services, 1908 Mail Service Center, Raleigh, North Carolina 27699-1908.

History Note: Authority G.S. 130A-205; 130A-208 through 130A-213;

Eff. January 1, 1982;

Amended Eff. July 1, 1985;

Transferred and Recodified from 10 NCAC 8A .0801 Eff. April 4, 1990;

Amended Eff. April 1, 2001; December 1, 1990.

15A NCAC 26B .0102 DEFINITIONS

The following definitions shall apply throughout this Section:

(1) "Abstract" refers to a document or documents, including electronic documents and files, containing information drawn from a cancer patient's medical record.

(2) "Cancer registrar" is a registrar who abstracts information from the medical records of cancer patients.

(3) "Death match" refers to the procedure of comparing registry cases with death certificate information, for confirmation of the reported death of any cancer patient, to determine if the cancer constituted the cause of death, and for identification of cases missed in routine reporting procedures.

(4) "Definitive treatment" refers to all methods of treatment intended to modify or control the cancer including no treatment, palliative care, and follow-up care.

(5) "Follow-up information" is information on the post-treatment status of a cancer patient whose abstract was submitted to the registry previously.

(6) "Identifying information" is any portion of any abstract that might reveal the personal identity of a cancer patient.

(7) "Morphologic information" refers to pathology, cytology, tumor markers, or laboratory tests that identify cell types of malignant neoplasms.

(8) "Palliative treatment" refers to treatment that is not intended to effect a cure, but the treatment procedure is expected to improve "quality of life" by temporarily relieving distressing symptoms.

(9) "Participating facility" is a health care facility that submits abstracts to the registry.

(10) "Pathology report" is the written report generated by a pathologist, stating the diagnostic interpretation of tissue samples or cellular material examined by the pathologist.

(11) "Personnel" means persons who are employees of the Department of Health and Human Services, or who are persons who provide services to the central cancer registry through a written contract.

(12) "Positive pathology report" is a pathology report confirming the presence of cancer.

(13) "Registrar" is an employee of a health care facility who prepares abstracts of medical records.

(14) "Registry" is the central cancer registry. The registry is administratively assigned to the State Center for Health Statistics, Department of Health and Human Services.

(15) "Statistical report" refers to a report generated by the registry for informational or educational purposes. A statistical report contains aggregated data and does not contain identifying information.

History Note: Authority G.S. 130A-205; 130A-208 through 130A-213;

Eff. January 1, 1982;

Amended Eff. October 1, 1983;

Transferred and Recodified from 10 NCAC 8A .0802 Eff. April 4, 1990;

Amended Eff. April 1, 2001; December 1, 1990.

15A NCAC 26B .0103 CONFIDENTIALITY

(a) The clinical records of individual patients submitted to the registry shall be confidential and shall not be public records open to inspection. Only personnel authorized by the director of the State Center for Health Statistics and other individuals authorized by the director of the State Center for Health Statistics or his/her designee pursuant to Paragraph (c) of this Rule shall have access to the records.

(b) The information contained in the clinical records of individual patients submitted to the registry may be transferred

to computer-compatible means of data entry. Only personnel authorized by the director of the State Center for Health Statistics to use computers, terminals, programs, data files, and other computer hardware or software involved in maintaining patient information shall have access to them.

(c) Clinical information in possession of the registry may be disclosed in the following circumstances when authorized by the director of the State Center for Health Statistics or his/her designee:

- (1) A patient shall have access to review or obtain copies of his/her records;
- (2) Information may be disclosed in response to a valid court order;
- (3) Information may be disclosed as provided in Rule .0106 of this Section;
- (4) Information contained in death certificates on file with the division (but not actual copies of death certificates) may be released to a participating facility when the facility requests a death match for confirmation of the reported or suspected deaths of cancer patients treated at that facility. Death match information released by the registry shall include only that information contained in the death certificates.

(d) The State Center for Health Statistics may release statistical information and data based on client information so long as no information identifying individual patients is released.

(e) Photocopying or other reproduction of any clinical records or reports containing identifying information, except as may be required in the conduct of the official business of the registry, is prohibited.

(f) Any legible documents other than the original abstracts, such as computer printouts or photocopies of any documents containing identifying information, shall also be considered confidential material while in active use, and shall be destroyed immediately upon termination of their use by the registry.

(g) Original copies of reports and abstracts, and follow-up information received thereunto, shall be retained for 5 years by the registry.

(h) The director of the State Center for Health Statistics shall make known to all individuals with access to patient information submitted to the registry the privileged and confidential nature of such information.

History Note: Authority G.S. 130A-205; 130A-208 through 130A-213;

Eff. January 1, 1982;

Amended Eff. October 1, 1982;

Transferred and Recodified from 10 NCAC 8A .0803 Eff. April 4, 1990;

Amended Eff. April 1, 2001; December 1, 1990.

15A NCAC 26B .0105 COOPERATION OF THE CENTRAL CANCER REGISTRY WITH HEALTH FACILITIES

(a) Any health care facility that is staffed and equipped for the diagnosis, treatment or follow-up care of cancer patients may participate with the registry in the exchange of information regarding the referral, treatment, maintenance or cure of cancer.

(b) The registry shall cooperate and consult with participating health care facilities and providers to the end that cancer registries in such facilities may provide the most accurate data

available and may otherwise operate in the best interest of the cancer patients being treated therein. The registry will provide:

- (1) Quality control reports to assure that computerized data utilized for statistical information and data compilation are correct;
- (2) The most accurate and effective treatment, survival and comparative information available;
- (3) Educational information available from registry, morbidity and mortality statistics upon request of a professional staff;
- (4) Assistance to health care facilities by providing appropriate data and consultation to help the facilities meet the requirements for accreditation as a cancer treatment center, and to assist in the maintenance of such accreditation;
- (5) Confirmation of the reported or presumed deaths (including such causes of deaths) of cancer patients to assist health care facilities to more accurately assess patient survival and to conduct more efficient long-term follow-up of cancer patients.
- (6) Other information for the purpose of follow-up of a patient. This information is limited to the name of another facility or physician providing services to the patient, the date of last contact with the patient, and the vital status.

History Note: Authority G.S. 130A-205; 130A-208 through 130A-213;

Eff. January 1, 1982;

Amended Eff. October 1, 1983; October 1, 1982;

Transferred and Recodified from 10 NCAC 8A .0805 Eff. April 4, 1990;

Amended Eff. April 1, 2001; December 1, 1990.

15A NCAC 26B .0106 RELEASE OF CENTRAL CANCER REGISTRY DATA FOR RESEARCH

(a) The registry may release statistical data to any person or agency for the following purposes:

- (1) medical research or education;
- (2) epidemiological studies;
- (3) health education;
- (4) health planning or administration;
- (5) required statistical reports; and
- (6) other statistical reports by written request for research, information or education.

(b) A researcher may request the release of medical records from the registry by the submission of a written research proposal. This request must adhere to the requirements pertaining to release of medical records by the State Center for Health Statistics as defined by NCAC 26A .0002.

(c) The medical records or reports of the individual patients may be disclosed to research staff for the purpose of medical research, provided that the registry has determined that:

- (1) disclosure of this information is deemed necessary to accomplish the purposes of the research;
- (2) the research warrants the risk to individual patients of the potential disclosure of their medical records; and
- (3) adequate safeguards to protect the medical records or identifying information are established or maintained.

(d) The registry shall provide regular reports of research activity and data released to the cancer committee of the North Carolina Medical Society. Where there exists the potential for direct

patient contact, the registry shall consult with the chairman of the Committee on Cancer of the North Carolina Medical Society before determining to release information for research as provided in Paragraphs (b) and (c) of this Rule. The registry shall forward the research proposal to the chairman for review. The chairman may forward the proposal to any or all members of the committee for comment.

History Note: Authority G.S. 130A-205; 130A-208 through 130A-213.
Eff. January 1, 1982;
Amended Eff. October 1, 1983;
Transferred and Recodified from 10 NCAC 8A .0806 Eff. April 4, 1990;
Amended Eff. April 1, 2001.

TITLE 18 – SECRETARY OF STATE

18 NCAC 02 .0201 REGISTRATION OF 18 NCAC 02 .0202 LEGISLATIVE AGENTS 18 NCAC 02 .0203 WRITTEN AUTHORIZATION 18 NCAC 02 .0204 REPORTS OF EXPENDITURES OPINION OR LEGISLATION INFLUENCING PUBLIC

History Note: Authority G.S. 120-47.2; 120-47.3; 120-47.4; 120-47.6; 120-47.7; 120-49; 120-50;
Eff. February 1, 1976;
Amended Eff. September 1, 1988; January 1, 1977;
Repealed Eff. August 1, 2000.

18 NCAC 07 .0101 LOCATION AND HOURS
 The address for the Notary Public Section of the Department of the Secretary of State is the Old Revenue Building, 2 S. Salisbury Street, P.O. Box 29622, Raleigh, North Carolina 27626-0622. Office hours for the public are 8:00 a.m. to 4:00 p.m. Monday through Friday with the exception of state holidays.

History Note: Authority G.S. 143A-23;
Eff. February 1, 1976;
Amended Eff. August 1, 2000; January 1, 1995; September 1, 1986.

**18 NCAC 07 .0204 DISPOSITION OF
 COMMISSIONS**
 After notary public commissions have been issued, they shall be sent directly to the register of deeds in the county in which the applicant lives or, if the applicant does not reside in North Carolina, in the county in which the applicant works. The commission shall not be delivered to the applicant. The Department shall send the applicant a transmittal letter of notice to appear before the register of deeds to take the oath of office.

History Note: Authority G.S. 10A-8;
Eff. February 1, 1976;
Amended Eff. August 1, 2000; January 1, 1995.

18 NCAC 07 .0206 REQUIREMENTS FOR REAPPOINTMENT

(a) For reappointment as a notary public, the applicant must complete a current "Application for Reappointment as Notary Public" and must submit it to the Notary Public Section with the statutory fee.
 (b) Commissions reappointing a notary may not be issued more than two weeks prior to expiration of the current commission.
 (c) Commissions will not be back-dated.

History Note: Authority G.S. 10A-6;
Eff. February 1, 1976;
Amended Eff. August 1, 2000; January 1, 1995; September 1, 1976.

18 NCAC 07 .0207 REVOCATION OF COMMISSIONS

(a) Any fee payable to the Notary Public Section that is not paid within 10 days following notice from the Section will be cause for immediate revocation of the commission of the notary public owing that fee.
 (b) When a commission is revoked, the register of deeds for the county in which the notary was appointed and the notary public shall be notified in writing by the Secretary of State and the date of revocation shall be given.

History Note: Authority G.S. 10A-13(d);
Eff. February 1, 1976;
Amended Eff. August 1, 2000; January 1, 1995.

18 NCAC 07 .0301 APPROVED COURSE OF STUDY
 In order to be approved by the Secretary of State, a course of study for applicants for appointment as a notary public must be:

- (1) based on the Notary Public Education Instructor's Manual developed by the Department of Community Colleges and the Department of the Secretary of State;
- (2) taught by an instructor certified by the Secretary of State.

History Note: Authority G.S. 10A-4(b)(3); 10A-7;
Eff. September 1, 1986;
Amended Eff. August 1, 2000.

18 NCAC 07 .0302 INSTRUCTORS

(a) In order to be certified to teach a course of study for notaries public, an instructor must comply with the requirements set out in G.S. 10A-7(1)-(5) and the following:

- (1) transmit a written request for certification as a notary public instructor to the Notary Public Section, together with evidence of six months of active experience as a notary public;
- (2) pay a fee to the Notary Public Section for participation as a student in the notary public instructor course taught pursuant to G.S. 10A-7(a)(1), which fee shall reflect the cost of materials, facilities, and meals, if any, related to the giving of that course of instruction; and
- (3) achieve a passing grade of at least 80 per cent correct responses on a test administered in conjunction with the notary public instructor course.

(b) Persons who fail to achieve a passing grade on the final test administered in conjunction with the notary public instructor course may reapply to take the test one additional time.

(c) Persons seeking recertification as a notary public instructor must apply to the Notary Public Section for recertification and

must again satisfy the requirements of G.S. 10A-7 and Paragraph (a) of this Rule.

*History Note: Authority G.S. 10A-7;
Eff. September 1, 1986;
Amended Eff. August 1, 2000; March 1, 1996.*

18 NCAC 10 .0201 APPLICABLE DEFINITIONS

In addition to the definitions in the Electronic Commerce Act, Article 11A of Chapter 66 (G.S. 66-58.1 et seq.), the following apply to the rules in this Chapter:

- (1) **Affiliated Individual.** An "affiliated individual" means the subject of a certificate that is associated with a sponsor approved by the Certification Authority (such as an employee affiliated with an employer). Certificates issued to affiliated individuals are intended to be associated with the sponsor and the responsibility for authentication lies with the sponsor.
- (2) **Asymmetric Cryptosystem.** "Asymmetric cryptosystem" means a computer-based system that employs two different but mathematically related keys. The keys are computer-generated codes having the following characteristics:
 - (a) either key can be used to electronically sign or encrypt data, such that only the other key in that key pair is capable of verifying the electronic signature or decrypting the signed data; and
 - (b) the keys have the property that, knowing one key, it is computationally infeasible to discover the other key.
- (3) **Authorized Certification Authority.** "Authorized Certification Authority" means a Certification Authority that has been issued a Certification Authority license by the North Carolina Department of the Secretary of State to issue certificates that reference the Rules in this Chapter.
- (4) **Certification Authority Revocation List.** "Certification Authority Revocation List" means a time-stamped list of revoked Certification Authorities digitally signed by a Certification Authority or the Electronic Commerce Section.
- (5) **Certificate.** "Certificate" means a record which:
 - (a) identifies the certification authority issuing it;
 - (b) names or identifies its subscriber;
 - (c) contains a public key that corresponds to a private key under the control of the subscriber;
 - (d) identifies its operational period or period of validity;
 - (e) contains a certificate serial number and is digitally signed by the Certification Authority issuing it; and
 - (f) conforms to the ITU/ISO X.509 Version 3 standards or other standards accepted under the Rules in this Chapter. As used in the Rules in this Chapter the term "Certificate" refers to certificates that expressly reference the Rules in this Chapter in the "Certificates Policy" filed for an X.509 v.3 certificate.
- (6) **Certificate Manufacturing Authority.** "Certificate Manufacturing Authority" means an entity that is responsible for the manufacturing and delivery of certificates signed by a Certification Authority, but is not responsible for identification and authentication of

certificate subjects (i.e., a Certificate Manufacturing Authority is delegated the certificate manufacturing task by a Certification Authority).

- (7) **Certificate Revocation List.** "Certificate Revocation List" means a Certification Authority digitally signed, time-stamped list of revoked certificates.
- (8) **Certification Authority.** "Certification Authority" means an entity authorized by the Secretary of State to facilitate electronic commerce. A Certification Authority is responsible for authorizing and causing certificate issuance. A Certification Authority may perform the functions of a Registration Authority and a Certificate Manufacturing Authority, or it may delegate or outsource either of these functions. A Certification Authority vouches for the connection between an entity and that entity's electronic signature. A Certification Authority performs two essential functions:
 - (a) First, it is responsible for identifying and authenticating the intended subscriber named in a certificate, and verifying the subscriber possesses the private key corresponding to the public key listed in the certificate; and
 - (b) Second, the Certification Authority actually creates (or manufactures) and digitally signs the certificate. The certificate issued by the Certification Authority represents the Certification Authority's statement as to the identity of the person named in the certificate and the binding of that person to a particular public-private key pair.
- (9) **Certification Practice Statement.** "Certification Practice Statement" means documentation of the practices, procedures, and controls employed by a Certification Authority issuing, suspending, or revoking certificates and providing access to same. A Certification Practice Statement shall contain, at a minimum, detailed discussions of the following topics:
 - (a) technical security controls, including cryptographic modules and management;
 - (b) physical security controls;
 - (c) procedural security controls;
 - (d) personnel security controls;
 - (e) repository obligations, including registration management, subscriber information protection, and certificate revocation management; and
 - (f) financial responsibility.
- (10) **Electronic Commerce Act.** The term "Electronic Commerce Act" means The North Carolina Electronic Commerce Act, N.C.G.S. Chapter 66, Article 11A.
- (11) **Electronic Commerce Section.** "Electronic Commerce Section" means the component of the North Carolina Department of the Secretary of State responsible for reviewing Certification Authority license applications and administering the Electronic Commerce Act in North Carolina.
- (12) **Electronic signature.** "Electronic signature" means any identifier or authentication technique attached to or logically associated with an electronic record intended by the party using it to have the same force and effect as the party's manual signature.
- (13) **Federal Information Processing Standards.** The term "Federal Information Processing Standards" means Federal standards prescribing specific performance

- requirements, practices, formats, communications protocols for hardware, software, data, and telecommunications operation.
- (14) Internet Engineering Task Force. "Internet Engineering Task Force" means a large, open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet.
- (15) ITS Security Director. "ITS Security Director" means the ITS Security Director of North Carolina State government as designated by the Chief Information Officer for North Carolina State Government.
- (16) ITU/ISO X.509 Version 3 standards. "ITU/ISO X.509 Version 3 standards" means Version three of the X.509 standards promulgated by the International Telecommunications Union and the International Organization for Standardization.
- (17) Key pair. The term "key pair" means two mathematically related keys, having the properties that one key can be used to encrypt a message that can only be decrypted using the other key, and even knowing one key, it is computationally infeasible to discover the other key.
- (18) Object Identifier. An "object identifier" means an unambiguous identifying specially formatted number assigned in the United States by the American National Standards Institute (ANSI).
- (19) Operational Period of a Certificate. The "operational period of a certificate" means the period of its validity. It begins on the date the certificate is issued (or such later date as specified in the certificate), and ends on the date and time it expires as noted in the certificate or as earlier revoked or suspended.
- (20) PKIX. The term "PKIX" means an Internet Engineering Task Force Working Group developing technical specifications for a public key infrastructure components based on X.509 Version 3 certificates.
- (21) Private Key. "Private key" means the key of a key pair used to create a digital signature. This key must be kept a secret. It is also known as the confidential key or secret key.
- (22) Public Key. "Public key" means the key of a key pair used to verify a digital signature. The public key is made available to anyone who will receive digitally signed messages from the holder of the key pair. The public key is usually provided in a Certification Authority issued certificate and is often obtained by accessing a repository. A public key is used to verify the digital signature of a message purportedly sent by the holder of the corresponding private key. It is also known as the published key.
- (23) Public Key Cryptography. "Public Key Cryptography" means a type of cryptographic technology employing an asymmetric cryptosystem.
- (24) Registration Authority. The term "Registration Authority" means an entity responsible for identification and authentication of certificate subjects, but that does not sign or issue certificates (i.e., a Registration Authority is delegated certain tasks on behalf of a Certification Authority).
- (25) Relying Party. "Relying party" means a recipient of a digitally signed message who relies on a certificate to verify the digital signature on the message.
- (26) Repository. "Repository" means a trustworthy system for storing and retrieving certificates and other information relating to those certificates.
- (27) Repository Services Provider. "Repository Services Provider" means an entity that maintains a repository accessible to the public, or at least to relying parties, for purposes of obtaining copies of certificates or verifying the status of such certificates.
- (28) Responsible Individual. "Responsible Individual" means a person designated by a sponsor to authenticate individual applicants seeking certificates on the basis of their affiliation with the sponsor.
- (29) Revoke A Certificate. "Revoke a certificate" means to prematurely end the operational period of a certificate from a specified time forward.
- (30) Secretary. "Secretary" means the North Carolina Secretary of State.
- (31) Sponsor. "Sponsor" means an organization with which a subscriber is affiliated (e.g., as an employee, user of a service, business partner, or customer).
- (32) Subscriber. A "subscriber" means the person to whom a certificate is issued. A subscriber means a person who:
- (a) is the subject named or identified in a certificate issued to such person;
 - (b) holds a private key that corresponds to a public key listed in that certificate; and
 - (c) to whom digitally signed messages verified by reference to such certificate are to be attributed.
- (33) Suspend a certificate. "Suspend a certificate" means to temporarily suspend the operational period of a certificate for a specified time period or from a specified time forward.
- (34) Transaction. "Transaction" means an electronic transmission of data between an entity and a public agency, or between two public agencies, including, but not limited to contracts, filings, and other legally operative documents not specifically prohibited in the Electronic Commerce Act.
- (35) Trustworthy System. "Trustworthy system" means computer hardware, software, and procedures that:
- (a) are secure from intrusion and misuse;
 - (b) provide a level of availability, reliability, and correct operation;
 - (c) are suited to performing their intended functions; and
 - (d) adhere to Federal Information Processing Standards.
- (36) Valid Certificate. A "valid certificate" means one that:
- (a) a Certification Authority has issued;
 - (b) the subscriber listed in it has accepted;
 - (c) has not expired; and
 - (d) has not been suspended or revoked.
- A certificate is not valid until it is both issued by a Certification Authority and accepted by the subscriber.
- (37) X.500. "X.500" means a directory standard / protocol for connecting local directory services to form one distributed global directory. X.500 is an OSI (Open

System Interconnection) protocol, named after the number of the ITU (International Telecommunications Union - a United Nations Specialized Agency) CCITT (International Telegraph and Telephone Consultative Committee) Recommendation document containing its specification. This document is known as "Recommendation X.500 (03/00) - Information technology - Open systems interconnection - The Directory: public-key and attribute frameworks," and is available from International Telecommunication Union on the World Wide Web, www.itu.int, 183 Swiss Francs, price subject to change.

- (38) X.509. "X.509" means a standard / protocol adopted by the International Telecommunication Union (formerly known as the International Telegraphy and Telephone Consultation Committee). For purposes of the Rules in this Chapter, all references to X.509 shall be construed as referring to version 3. Compliance with X.509 versions 1 or 2 shall not be construed as compliance with X.509. This document is known as "Recommendation X.509 (03/00) - Information technology - Open systems interconnection - The Directory: public-key and attribute frameworks," and is available from International Telecommunication Union on the World Wide Web, www.itu.int, 183 Swiss Francs, price subject to change.

History Note: Authority G.S. 66-58.10(a)(1); Temporary Adoption Eff. February 23, 1999; Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule; Temporary Adoption Eff. December 3, 1999; Eff. March 26, 2001.

18 NCAC 10 .0303 PUBLIC KEY TECHNOLOGY: CERTIFICATE POLICY GENERAL PROVISIONS

(a) Certification Authority Obligations. The Certification Authority is responsible for all aspects of certificate issuance and management, including control over:

- (1) the application / enrollment process;
- (2) the identification and authentication process;
- (3) the actual certificate manufacturing process;
- (4) certificate publication;
- (5) certificate suspension and revocation, publication of the Certificate Revocation List and Certification Authority Revocation Lists, as pertinent;
- (6) certificate renewal;
- (7) ensuring that all aspects of the Certification Authority services and Certification Authority operations and infrastructure related to certificates issued under the Rules in this Chapter are performed in accordance with the requirements, representations, and warranties of the Rules in this Chapter; and
- (8) Delivering certificate updates and revocation transactions to the NC ITS directory, where pertinent.

(b) Representations by Certification Authority. By issuing a certificate referencing the Rules in this Chapter, a Certification Authority certifies to subscriber and all Qualified Relying Parties (who reasonably and in good faith rely on a certificate's information during its operational period in accordance with the Rules in this Chapter) that:

- (1) the Certification Authority has verified certificate information unless otherwise noted in its Certification Practice Statement;
- (2) the Certification Authority has issued, and will manage, the certificate in accordance with the Rules in this Chapter;
- (3) the Certification Authority has complied with the requirements of the Rules in this Chapter and its applicable Certification Practice Statement when authenticating the subscriber and issuing the certificate;
- (4) there are no misrepresentations of fact in the certificate known to the Certification Authority, and the Certification Authority has verified additional information in the certificate unless otherwise noted in its Certification Practice Statement;
- (5) subscriber-provided information in the certificate application has been accurately transcribed to the certificate; and
- (6) the certificate meets all material requirements of the Rules in this Chapter and the Certification Authority's certification practice statement.

(c) Registration Authority and Certificate Manufacturing Authority Obligations: The Certification Authority shall be responsible for performing all identification and authentication functions and all certificate manufacturing and issuing functions. However, the Certification Authority may delegate performance of these obligations to an identified Registration Authority or Certificate Manufacturing Authority, provided the Certification Authority remains primarily responsible for performance of those services by such third parties in a manner consistent with requirements of the Rules in this Chapter.

(d) Repository Obligations: The Certification Authority shall be responsible for providing a repository, performing / providing certificate updates as required and performing all associated functions. However, the Certification Authority may delegate performance of this obligation to an identified Repository Services Provider, provided the Certification Authority remains primarily responsible for performance of those services by such third party in a manner consistent with the requirements of the Rules in this Chapter.

(e) Subscriber Obligations. In all cases, the Certification Authority shall require the subscriber to enter an enforceable contractual commitment for the benefit of Qualified Relying Parties obligating the subscriber to:

- (1) take precautions to prevent any loss, disclosure, or unauthorized use of the private key;
- (2) acknowledge that by accepting the certificate the subscriber is warranting all information and representations made by the subscriber included in the certificate are true;
- (3) use the certificate exclusively for authorized and legal purposes, consistent with the Rules in this Chapter; and
- (4) immediately contact the Certification Authority and instruct the Certification Authority to revoke the certificate promptly upon any actual or suspected loss, disclosure, or other subscriber private key compromise.

(f) Relying Party Obligations. A Qualified Relying Party may rely on a certificate referencing this Item only if the certificate was used and relied upon for lawful purposes and under circumstances where:

- (1) the reliance was reasonable and in good faith in light of all circumstances known to the relying party at the time of reliance;
 - (2) the purpose for which the certificate was used was appropriate under the Rules in this Chapter; and
 - (3) the relying party checked the certificate status certificate prior to reliance, or a check of the certificate's status would have indicated the certificate was valid.
- (g) Interpretation & Enforcement.
- (1) Governing Law. The laws of the State of North Carolina shall govern the enforceability, construction, interpretation, and validity of the Rules in this Chapter.
 - (2) The holders of North Carolina Certification Authority licenses are not guaranteed any business by public agencies in North Carolina. All other state laws required to engage in business with public agencies in North Carolina must be complied with by the Certification Authority and public agencies.
- (h) Fees. A Certification Authority shall not impose any fees for reading the Rules in this Chapter or its Certification Practice Statement. A Certification Authority may charge access fees on certificates, certificate status information, or certificate revocation lists, subject to agreement between the Certification Authority and subscriber, and in accordance with a fee schedule published by the Certification Authority in its Certification Practice Statement or otherwise.
- (i) Publication and Repositories:
- (1) Publication of Certification Authority Information. Each authorized Certification Authority shall operate a secure online repository available to Qualified Relying Parties. The repository shall contain:
 - (A) issued certificates that reference the Rules in this Chapter;
 - (B) a Certificate Revocation List or on-line certificate status database;
 - (C) the Certification Authority's certificate for its signing key;
 - (D) past and current versions of the Certification Authority's Certification Practice Statement; and
 - (E) a copy of the Rules in this Chapter.
 - (2) Frequency of Publication. All information to be published in the repository shall be published promptly after such information is available to the Certification Authority. In no case shall more than 24 hours pass between certification authority awareness of a change and the Certification Authority publishing of the change. Certificates issued by the Certification Authority referencing the Rules in this Chapter shall be published promptly upon acceptance of such certificate by the subscriber. Certificate revocations and suspensions shall be published contemporaneously with the act of revocation or suspension. Information relating to revocation or suspension of a certificate shall be published in accordance with 18 NCAC 10 .0305(f)(2) and 18 NCAC 10.0305(h).
- (j) Access Controls. The repository shall be available to Qualified Relying Parties and subscribers 24 hours per day, 7 days per week, subject to published, scheduled maintenance and the Certification Authority's then-current terms of access. A Certification Authority shall not impose any access controls on the Rules in this Chapter, the Certification Authority's certificate for its signing key, and past and current versions of the Certification Authority's Certification Practice Statement. A Certification Authority may impose access controls on certificates, certificate status information, or Certificate Revocation Lists at its discretion, subject to agreement between the Certification Authority and subscriber, in accordance with provisions published in its Certification Practice Statement or otherwise.
- (k) Required Compliance Audits:
- (1) The Certification Authority must submit to audit to determine its stability, prospects for longevity and adequacy of its security practices and conditions. The audits must result in unqualified compliance reports. When a Certification Authority is licensed in North Carolina based on a reciprocity agreement between North Carolina and another state, the Certification Authority may submit certified copies of audit reports required by the other jurisdiction. After review by the Electronic Commerce Section, audit reports may be determined to meet North Carolina Certification Authority audit requirements.
 - (2) A Certification Authority shall adhere to its Certification Practice Statement. If a Certification Authority modifies its Certification Practice Statement, it shall provide an updated copy of the Certification Practice Statement to the Electronic Commerce Section as soon as practicable and no later than the date the updated Certification Practice Statement is put into operation. At the discretion of the Electronic Commerce Section, the Certification Authority may be required to undergo additional / other audits for license renewal.
 - (3) Stability and Longevity Prospects Audit:
 - (A) Before initial approval as a licensed Certification Authority, the Certification Authority (and each Registration Authority, Certificate Manufacturing Authority, and Repository Services Provider, as applicable) shall submit to audit by an independent Certified Public Accounting firm. The audit must address the American Institute of Certified Public Accountants (AICPA) Section 341, "The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern".
 - (B) The audit must produce an unqualified report from the CPA firm to the Certification Authority. A certified copy of the audit report must be attached by the Certification Authority to the application for a new Certification Authority license or renewal license, and submitted to the Electronic Commerce Section.
 - (C) As a condition of continued licensure, the Electronic Commerce Section may require the Certification Authority to undergo audit to document compliance with expectations for secure operations, an updated Certification Practice Statement, or to document continuing compliance with the ITU/ISO X.509 Version 3 standards and the Rules in this Chapter.
 - (D) A Certification Authority operated by an Agency of the State of North Carolina is exempt from this requirement.
 - (4) Security Audit. The purpose of a security audit is to verify:

- (A) The Certification Authority has in place a secure system assuring quality of Certification Authority Services provided; and
- (B) the Certification Authority's system complies with all security requirements of the Rules in this Chapter, the Certification Authority's Certification Practice Statement and ITU/ISO X.509 Version 3 standards.

Before initial approval as a licensed Certification Authority, and thereafter at least once every year, the Certification Authority shall submit to a security compliance audit by a security firm. The audit must evidence compliance with Federal Information Processing Standards 140-1 "Security: Cryptographic Modules" Level 2 and TSEC (The Orange Book) C2 criteria or comply with contemporary Certification Authority security criteria as expressed in terms of the "Common Criteria" – ISO 15408-1:1999. In order for an audit firm to be approved by the Electronic Commerce Section, it must engage or employ at least one Certified Information Systems Auditor (CISA) certified by the Information Systems Audit and Control Association (CISACA), 3701 Algonquin Road, Rolling Meadows, Illinois, 60008, www.ISACA.org. A certified copy of the current unqualified security audit report must be attached to an application for a new certification authority license or renewal license, and submitted to the NC Department of Secretary of State, Electronic Commerce Section.

(l) Confidentiality Policy. Subscriber consent must be obtained for each incident of disclosure and for each item of information unless required otherwise by law. The Certification Authority may not sell or exchange information in any circumstance that is not specifically allowed by the Rules in this Chapter or otherwise required by law.

- (1) A Certification Authority may not use data gathered in fulfilling its Certification Authority role for any other purpose. A Certification Authority shall not gather information beyond that necessary to authenticate a subscriber nor shall it use information gathered in its Certification Authority role to assemble further information about subscribers; and
- (2) Under no circumstance shall a Certification Authority (or any Registration Authority, Repository Services Provider, or Certificate Manufacturing Authority) have access to the signing private key(s) (versus encryption key(s)) of any subscriber to whom it issues a certificate referencing the Rules in this Chapter, except for initial creation of the signing/secret key where the key is not accessed and no enduring record is made of the key.

(m) Information Not Considered Confidential.

- (1) Information appearing on certificates is not confidential.
- (2) Disclosure of Certificate Revocation / Suspension Information. Information regarding the revocation or suspension status of a certificate is not confidential and is disclosed in the normal course of public key infrastructure activity.
- (3) Any information may be disclosed upon owner's request.

*History Note: Authority G.S. 66-58.10;
Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule;
Temporary Adoption Eff. December 3, 1999;*

Eff. March 26, 2001.

18 NCAC 10 .0304 PUBLIC KEY TECHNOLOGY; IDENTIFICATION AND AUTHENTICATION

(a) Initial Registration:

- (1) Subject to the requirements of this Rule, certificate applications may be communicated from the applicant to Certification Authority or Registration Authority, and authorizations to issue certificates may be communicated from a Registration Authority to the Certification Authority, electronically, via E-mail or a web site, provided all communication is secured by SSL or a similar security protocol, by first class U.S. Mail or similar service.

- (2) North Carolina deploys two levels / classes of authentication certificate:

(A) North Carolina Basic Authentication Certificate: A North Carolina Basic Authentication Certificate is a digital certificate manufactured by a licensed Certificate Authority intended to be used to sign routine internal North Carolina government business documents (e.g. personnel leave documents, travel reimbursement requests and similar documents) and to gain access to State systems when deemed appropriate by information technology security policy.

(B) North Carolina Strong Authentication Certificate: A North Carolina Strong Authentication Certificate is a digital certificate manufactured by a North Carolina licensed Certificate Authority intended to be used with a high degree of confidence to sign any document.

(b) Types of Names. The subject name used for certificate applicants shall be the X.509 Distinguished Name. The name shall be unique for each entity certified by a Certification Authority. A Certification Authority may issue more than one certificate with the same subject name for the same subject entity.

(c) Name Meanings. The subject name listed in a certificate must have a reasonable association with the authenticated name of the subscriber. In the case of an individual, this shall be a combination of first name or initials and surname. In the case of an organization, the name shall reflect the legal name of the organization or unit.

(d) Name Uniqueness. The subject name listed in a certificate shall be unambiguous and unique for all certificates issued by the Certification Authority and shall conform to X.500 standards for name uniqueness. If necessary, additional numbers or letters may be appended to the real name to ensure the name's uniqueness within the domain of certificates issued by the Certification Authority and detailed in the Certification Practice Statement.

(e) Verification of Key Pair. The Certification Authority shall establish that the applicant is in possession of the private key corresponding to the public key submitted with the application.

(f) Authentication of an Organization. An organization may be issued a North Carolina Strong Authentication Certificate. An organization shall not be issued a North Carolina Basic Authentication Certificate.

- (1) Identification. A Certification Authority shall be presumed to have confirmed that the prospective subscriber organization is the organization to be listed

in a certificate where the Certification Authority has assured by investigation:

- (A) The organization exists and conducts business at the address listed in the certificate application;
- (B) A duly authorized representative of the applicant organization signed the certificate application;
- (C) The information contained in the certificate application is correct; and
- (D) If required by State law, the organization is authorized to transact business by the Corporations Division of the North Carolina Department of the Secretary of State.

(2) A Certificate Authority or Registration Authority, when authenticating an applicant who is an organization, shall require the following information on a notarized affidavit:

- (A) Organization Name;
- (B) Street address and mailing address, if different;
- (C) City;
- (D) State;
- (E) Zip;
- (F) Tax Payer Identification Number / Employer Identification Number (EIN);
- (G) Corporate Identification Number (Issued by Secretary of State);
- (H) Date of incorporation or creation;
- (I) State or country of incorporation or creation;
- (J) Telephone number (optional);
- (K) E-mail address (optional);
- (L) Post data element (e.g. password) to be a secret shared with the Certification Authority / Registration Authority and used later for authentication in the absence of the digital signature. This element may be used along with additional information to authenticate a request for certificate revocations; and
- (M) Name of officially authorized agent, if applicable.

(3) Authentication and Confirmation Procedure. In conducting its review and investigation, the Certification Authority shall review official government records or engage the services of a third party vendor of business information to do so. The Certification Authority or third party review shall provide validation information concerning each organization applying for a certificate, including legal company name, type of entity, year of formation, names of directors and officers, address, telephone number, and good standing in the jurisdiction where the applicant was incorporated or otherwise organized.

(g) Authentication of Individual -- No Affiliation: An unaffiliated individual may be issued a North Carolina Strong Authentication Certificate, North Carolina Basic Authentication Certificate, or both. In determining the type of certificate required, agencies shall evaluate the application's risk of loss involved and nature of business with which the certificate holder shall be associated. Based on the evaluation, a NC Basic Authentication Certificate may be appropriate. In other cases, it may be appropriate to require a North Carolina Strong Authentication Certificate may be appropriate. In other cases, it may be appropriate to require a North Carolina Strong Authentication Certificate.

(1) Identification: North Carolina Strong Authentication Certificate. A Certification Authority shall be presumed to have confirmed that the prospective subscriber is the person to be listed in a certificate where the Certification Authority has been presented with at least two identification documents. At least one piece of identification shall be a current federal or state government-issued picture-type identification such as a military or government identification card, driver's license, or similar identification document issued under authority of another country, or passport. The Certification Authority or Registration Authority shall initial, date and archive copies of identification used to establish the subscriber's identity.

(2) Authentication for a North Carolina Strong Authentication Certificate. Authenticating an unaffiliated individual applicant, the Certification Authority or Registration Authority shall require the following elements of information from the applicant on a notarized affidavit:

- (A) Last name (family name);
- (B) First name (given name);
- (C) Middle Name(s);
- (D) Street address and mailing address, if different;
- (E) City;
- (F) State;
- (G) Zip;
- (H) Social Security Number (SSN), national identification number or passport number;
- (I) Driver's license number, or state identification card number;
- (J) Date of birth;
- (K) Place of birth;
- (L) Telephone number (optional);
- (M) E-mail address (optional);
- (N) Post data element (e.g. mother's maiden name, password) to be used later for authenticating an individual in the absence of their digital signature. This element may be used along with additional information to authenticate a request for certificate revocations; and
- (O) Name of officially authorized agent, if applicable.

(3) Authentication for a North Carolina Basic Authentication Certificate. Certification Authorities or Registration Authorities shall require a notarized affidavit from the applicant's personnel officer, signed by the applicant including:

- (A) Last name (family name);
- (B) First name (given name);
- (C) Middle name(s);
- (D) Street address and mailing address, if different;
- (E) City;
- (F) State;
- (G) Zip;
- (H) Social Security Number (SSN), national identification number or passport number;
- (I) Driver's license number, or state identification card number;
- (J) Date of birth;
- (K) Place of birth;

- (L) Business Telephone number (optional);
- (M) Business E-mail address (optional) as assigned by agency;
- (N) Post data element (e.g. mother's maiden name, password) to be used later for authenticating an individual in the absence of their digital signature. This element may be used along with additional information to authenticate a request for certificate revocations;
- (O) Name of officially authorized agent, if applicable;
- (P) Beginning date of employment; and
- (Q) Ending date of employment (if known).
- (4) Investigation and Confirmation. Verification of the name and SSN and the Name and Driver's License (or ID Number) data elements may be accomplished via checks with the Social Security Administration and the appropriate state motor vehicle administration. Verification of the name and address data elements may be accomplished through access to either a commercial or governmental data source (e.g. Department of Motor Vehicles, personnel office, etc.). The address confirmation data sources may consist of either online databases or local business records (e.g., a bank's customer records, the U.S. Postal Service, state motor vehicle department records, state personnel office).
- (5) Personal Presence. Authentication of an unaffiliated individual requires the applicant must either:
 - (A) personally present himself or herself to a Registration Authority to be authenticated prior to certificate issuance. An individual may meet expectations for personal presence by an attorney-in-fact, trustee or other court appointed fiduciary; or
 - (B) securely deliver signed and notarized copies of the requisite identification to the Certification Authority [in which case, once notarized copies are delivered parties may communicate electronically]. Where the applicant delivers notarized copies of identification to the Certification Authority, authentication of such identification shall be confirmed through the use of a shared secret [such as a personal identification number]. The shared secret is separately communicated to the applicant in a manner that assures its confidentiality and included with the documents delivered as part of the certificate application process.
- (h) Authentication of Individual – Affiliated Certificate.
 - (1) Identification.
 - (A) The Certification Authority may establish a trustworthy procedure whereby a sponsoring organization that has been authenticated by the Certification Authority and issued a certificate may designate one or more Responsible Individuals, and authorize them to represent the sponsoring organization concerning the issuance and revocation of certificates for affiliated individuals. The Certification Authority may rely on a designated Responsible Individual appointed by the sponsor to properly authenticate the individual applicant, if the Certification Authority has previously authenticated the sponsor as an organization and the Responsible Individual as an unaffiliated individual, in accordance with the Rules in this Chapter.
 - (B) In the absence of a trustworthy procedure, If the requirements of 18 NCAC 10 .0304(h)(1)(A) cannot be met, then affiliated individuals shall be authenticated in the same manner as unaffiliated individuals.
- (2) Authentication Confirmation Procedure. Authentication of the individual shall be confirmed through the use of a shared secret [such as a Personal Identification Number]. The shared secret is distributed by an out of band communication to the applicant (either directly or via the sponsor) and included in the application process as part of the certificate enrollment process.
- (3) Personal Presence.
 - (A) Applicants affiliated with an approved sponsor may be authenticated through an electronically submitted application, based on an agreement with the sponsor, the approval of a designated Responsible Individual, and the distribution of Personal Identification Numbers or a similar security device.
 - (B) If a Certification Authority elected to use an online commercial database, the application may be filled out and submitted via the Internet from a home or business computer. In the case where a Certification Authority elects to use a local record check, the application process may take place over the Internet, or alternatively, the Certification Authority may require the applicant personally appear at a designated business site in order to enter required information at a local terminal.
- (4) Duties of Responsible Individual. The Responsible Individual represents the sponsoring organization with respect to the issuance and management of certificates. In that capacity he or she is responsible for properly indicating which subscribers are to receive certificates.
- (i) Renewal Applications (Routine Re-key). A subscriber may request issuance of a new certificate for a new key pair from the Certification Authority issuing the original certificate. The request may be made electronically by a digitally signed message based on the old key pair in the original certificate under these conditions:
 - (1) The request must occur during the period two months prior to normal scheduled certificate expiration;
 - (2) The subscriber must be authenticated following the principles of the rules in this Chapter; and
 - (3) The original certificate has not been suspended or revoked.
- (j) Re-key after Revocation. Revoked or expired certificates shall not be renewed under any conditions. Applicants without a

valid certificate from the Certification Authority that references the rules in this Chapter shall be re-authenticated by the Certification or Registration Authority on certificate application, just as with a first-time application.

(k) Revocation Request.

(1) Electronic Revocation Request.

- (A) A revocation request submitted electronically may be authenticated by digital signature using the "old" key pair.
- (B) Electronic revocation requests authenticated on the basis of the old (compromised) key pair shall always be accepted as valid. Other revocation request authentication mechanisms are acceptable. These authentication mechanisms balance the need to prevent unauthorized revocation requests against the need to quickly revoke certificates.

(2) Non-Electronic Revocation Request.

- (A) Organization initiated revocation of affiliated certificate(s) shall be authenticated by communication from a known person or official authorized to initiate revocations on behalf of an organization.
- (B) Subscriber initiated requests for revocation of certificate(s) shall be authenticated by presentation of a signed and notarized request for revocation.
- (C) Subscriber initiated requests for revocation of certificates via an attorney-in-fact shall be authenticated by presentation of
 - (i) a notarized request for revocation by the attorney-in-fact; and
 - (ii) a certified copy of the power of attorney.
- (D) Revocation by a court of competent jurisdiction may be made by presentation of a certified court order.

History Note: Authority G.S. 66-58.10;

Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule;

Temporary Adoption Eff. December 3, 1999;

Eff. March 26, 2001.

18 NCAC 10 .0305 PUBLIC KEY TECHNOLOGY: OPERATIONAL REQUIREMENTS

(a) Certificate Application. A certificate applicant shall complete a certificate application in a form prescribed by the Certification Authority Certificate Policy and enter into a subscriber agreement with the Certification Authority. All applications are subject to Certification Authority review, approval, and acceptance. A Certificate Policy shall define the minimum content to be used for a certificate application. The Certificate Policy shall also specify that all applications are subject to review, approval, and acceptance by the Policy Authority in addition to the Issuer.

(b) Certificate Issuance. Upon successful completion of the subscriber identification and authentication process in accordance with the Rules in this Chapter and complete and final approval of the certificate application, the Certification Authority shall:

- (1) issue the requested certificate;
- (2) notify the applicant thereof; and
- (3) make the certificate available to the applicant using a procedure that:

(A) assures the certificate is only delivered to or available for subscriber pickup; and

(B) provides adequate proof of subscriber identification in accordance with the Rules in this Chapter.

A Certification Authority shall not issue a certificate without the consent of the applicant and, if applicable, the applicant's sponsor.

(c) Certificate Acceptance. Following certificate issuance, the Certification Authority shall continually require the subscriber to expressly indicate certificate acceptance or rejection to the Certification Authority, in accordance with established Certification Authority Certification Practice Statement procedures.

(d) Circumstances for Revocation of Certificate.

- (1) Permissive Revocation. A subscriber may request revocation of his, her, or its certificate at any time for any reason. A sponsoring organization, where applicable, may request certificate revocation of any affiliated individual at any time for any reason. The issuing Certification Authority may also revoke a certificate upon failure of the subscriber, or where applicable, sponsoring organization failure to meet its obligations under the Rules in this Chapter, the applicable Certification Practice Statement, or any other agreement, regulation, or law applicable to the certificate that may be in force.
- (2) Required Revocation. A subscriber or sponsoring organization, where applicable, shall promptly request revocation of a certificate when:

- (A) any information on the certificate changes or becomes obsolete;
- (B) the private key, or the media holding the private key associated with the certificate is, or is suspected of having been compromised; or
- (C) an affiliated individual is no longer affiliated with the sponsor.

(3) The issuing Certificate Authority shall revoke a certificate:

- (A) upon request of the subscriber or sponsoring organization;
- (B) upon failure of the subscriber (or the sponsoring organization, where applicable) to meet its material obligations under the Rules in this Chapter, any applicable Certification Practice Statement, or any other agreement, regulation, or law applicable to the certificate that may be in force;
- (C) if knowledge or reasonable suspicion of compromise is obtained; or
- (D) if the Certification Authority determines that the certificate was not properly issued in accordance with the Rules in this Chapter and any applicable Certification Practice Statement.

(4) Notice of the Certification Authority ceasing operation shall be posted to the Certification Authority Revocation List maintained by the Electronic Commerce Section of the Department of the Secretary of State.

(e) Who Can Request Revocation. The only persons permitted to request revocation of a certificate issued pursuant to the Rules in this Chapter are:

- (1) the subscriber;
- (2) the sponsoring organization (where applicable); and

- (3) the issuing Certification Authority.
- (f) Procedure for Revocation Request.
 - (1) A certificate revocation request shall be promptly communicated to the issuing Certification Authority, either directly or through a Registration Authority. A certificate revocation request may be communicated electronically if it is digitally signed with the private key of the subscriber, or where applicable, the sponsoring organization. Requests digitally signed by the subscriber, or by the sponsoring organization, are considered authenticated when received by the Certification Authority or Registration Authority. Alternatively, the subscriber, or where applicable, the sponsoring organization, may request revocation by contacting the Certification Authority or an authorized Registration Authority in person and providing adequate proof of identification to authenticate the request in accordance with 18 NCAC 10 .0304(f)(1) or (g)(1). Copies of the digitally signed request must be archived by the Certification Authority or Registration Authority. Other identification used to establish the subscriber's identity shall be photocopied and initialed by an authorized representative of the Certification Authority or Registration Authority and archived.
 - (2) Repository/Certificate Revocation List Update. Promptly, within less than 2 hours of revocation, the Certificate Revocation List, or certificate status database in the repository, as applicable, shall be updated. All revocation requests and the resulting actions taken by the Certification Authority shall be archived.
 - (g) Revocation Request Grace Period. Certificate revocation requests shall be authenticated and processed within 2 hours of receipt by the Certification Authority.
 - (h) Certificate Suspension. The procedures and requirements stated for certificate revocation must also be followed for certificate suspension, where implemented.
 - (i) Certificate Revocation List Issuance Frequency. When Certificate Revocation Lists are used, an up-to-date Certificate Revocation List shall be issued to the repository at least every 2 hours. If no change has been made to the Certificate Revocation List, an update to the Certificate Revocation List in the repository is not necessary.
 - (j) Online Revocation / Status Checking Availability. Whenever an online certificate status database is used as an alternative to a Certificate Revocation List, such database shall be updated no later than 2 hours after certificate revocation.
 - (k) Computer Security Audit Procedures. All security events, including but not limited to (1) corruption of computing resources, software or data, (2) revocation of the entity public key, (3) compromise of the entity key, or (4) the invocation of a disaster recovery plan, on the Certification Authority system shall be automatically recorded in audit trail files. The audit log shall be processed and archived at least once a week. Such files shall be retained for at least 6 months onsite, and thereafter shall be securely archived.
 - (l) Records, Archival.
 - (1) Types of Records Archived. The following data and files must be archived by (or on behalf of) the Certification Authority:
 - (A) All computer security audit data;
 - (B) All certificate application data;
 - (C) All certificates, and all Certificate Revocation Lists or certificate status records generated;
 - (D) Key histories; and
 - (E) All correspondence between the Certification Authority and Registration Authority, Certificate Manufacturing Authority, Repository Services Provider, and subscriber.
 - (2) Retention Period for Archive. Key and certificate information and archives of audit trail files must be retained for at least 30 years.
 - (3) Protection of Archive. The archive media must be protected either by physical security alone, or a combination of physical security and cryptographic protection. The archive must be protected from environmental threats such as temperature, humidity, and magnetism. The Certification Practice Statement must address the procedure for transferring and preserving the archive media in the case of the Certification Authority ceasing operation in this State.
 - (4) Archive Backup Procedures. Adequate backup procedures must be in place. In event of loss or destruction of primary archives, a complete set of backup copies shall be readily available within no more than 24 hours. Back up procedures must be tested regularly.
 - (m) Procedures to Obtain and Verify Archive Information. During the compliance audit required by the Rules in this Chapter, the auditor shall verify integrity of the archives. Either copy of the archive media determined corrupted or damaged in any way, shall be replaced with the backup copy held in the separate location and noted in the compliance audit report.
 - (n) Compromise and Disaster Recovery.
 - (1) Disaster Recovery Plan:
 - (A) The Certification Authority must have a disaster recovery/business resumption plan in place. The Certification Authority must set up and render operational a facility located in a geographic area not affected or disrupted by the disaster. The facility must provide Certification Authority Services in accordance with the Rules in this Chapter. The alternate facility must be operational within 24 hours of an unanticipated emergency. Disaster recovery planning shall include a complete and periodic test of facility readiness. Such plan shall be identified and referenced within the Certification Practice Statement available to Qualified Relying Parties.
 - (B) The disaster recovery plan shall have been reviewed during Certification Authority initial and subsequent third party audits.
 - (2) Key Compromise Plan. The Certification Authority must have a key compromise plan in place. The plan must address procedures to be followed in the event the Certification Authority's private signing key used to issue certificates is compromised or in the event the private signing key of any Certification Authority higher in the chain of trust is compromised. Such plan shall include procedures for revoking all affected certificates and promptly notifying all subscribers and all Qualified Relying Parties.
 - (o) Certification Authority Termination. In the event that the Certification Authority ceases operation, the North Carolina

Department of the Secretary of State Electronic Commerce Section, North Carolina Information Technology Services, all subscribers, sponsoring organizations, Registration Authorities, Certificate Manufacturing Authorities, Repository Service Providers, and Qualified Relying Parties shall be promptly notified of the termination. In addition, all Certification Authorities with which cross-certification authority agreements are current at the time of cessation must be promptly informed of the termination. All certificates issued by the Certification Authority referencing the Rules in this Chapter shall be revoked no later than the time of termination.

*History Note: Authority G.S. 66-58.10;
Recodified to Rule .0701 Eff. December 3, 1999;
Temporary Adoption Eff. February 23, 1999;
Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule;
Temporary Adoption Eff. December 3, 1999;
Eff. March 26, 2001.*

**18 NCAC 10 .0306 PUBLIC KEY TECHNOLOGY:
PHYSICAL, PROCEDURAL, AND PERSONNEL
SECURITY CONTROLS**

- (a) Physical Security -- Access Controls.
 - (1) The Certification Authorities, and all Registration Authorities, Certificate Manufacturing Authorities and Repository Services Providers, shall implement physical security controls to restrict access to hardware and software (including the server, workstations, and any external cryptographic hardware modules or tokens) used in connection with providing Certification Authority Services. Access to such hardware and software shall be limited to personnel performing in a Trusted Role as described in this Rule. Access shall be controlled through the use of electronic access controls, mechanical combination lock sets, or deadbolts. Such access controls must be manually or electronically monitored for unauthorized intrusion at all times.
 - (2) Breach of physical security or access control expectations may result in revocation of the Certification Authority's license.
- (b) Procedural Controls.
 - (1) Trusted Roles. All employees, contractors, and consultants of a Certification Authority (collectively "personnel") having access to or control over cryptographic operations that may materially affect the Certification Authority's issuance, use, suspension, or revocation of certificates shall, for purposes of the Rules in this Chapter, be considered as serving in a trusted role. This includes access to restricted operations of the Certificate Authority's repository. Such personnel include, but are not limited to, system administration personnel, operators, engineering personnel, and executives who are designated to oversee the Certification Authority's operations.
 - (2) Multiple Roles (Number of Persons Required Per Task). To ensure that one person acting alone cannot circumvent safeguards, multiple roles and individuals shall share Certification Authority server responsibilities. Each account on the Certification Authority server shall have limited capabilities commensurate with the role of the account holder.

- (c) Personnel Security Controls.
 - (1) Background and Qualifications. Certification Authorities, Registration Authorities, Certificate Manufacturing Authorities and Repository Service Providers shall formulate and follow personnel and management policies sufficient to provide assurance of the trustworthiness and competence of their employees and of the satisfactory performance of their duties in manner consistent with the Rules in this Chapter.
 - (2) Background Investigation.
 - (A) Certification Authorities shall conduct a background investigation of all personnel who serve in trusted roles (prior to their employment and at least every five years thereafter) to verify their trustworthiness and competence in accordance with the requirements of the Rules in this Chapter and the Certification Authority's personnel Practice Statements or their equivalent. All personnel who fail an initial or periodic investigation shall not serve or continue to serve in a trusted role.
 - (B) Operative personnel shall not ever have been convicted of a felony or a crime involving fraud, false statement or deception.
 - (C) Any civil or administrative findings involving fraud, false statement or deception involving operative personnel must be disclosed.
 - (3) Training Requirements. All Certification Authority, Registration Authority, Certificate Manufacturing Authority and Repository Services Provider personnel must receive training in order to perform their duties, and update briefings thereafter as necessary to remain current.
 - (4) Documentation Supplied to Personnel. All Certification Authority, Registration Authority, Certificate Manufacturing Authority, and Repository Services Provider personnel must receive comprehensive user manuals detailing the procedures for certificate creation, update, renewal, suspension, revocation, and software functionality.

*History Note: Authority G.S. 66-58.10;
Temporary Adoption Eff. February 23, 1999;
Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule;
Temporary Adoption Eff. December 3, 1999;
Eff. March 26, 2001.*

**18 NCAC 10 .0307 PUBLIC KEY TECHNOLOGY:
TECHNICAL SECURITY CONTROLS**

- (a) Key Pair Generation and Installation.
 - (1) Key Pair Generation. Key pairs for Certification Authorities, Registration Authorities, Certificate Manufacturing Authorities, Repository Services Providers, and subscribers must be generated in such a way that the private key is not known by other than the authorized user of the key pair. Acceptable methods include:
 - (A) Having all users (Certification Authorities, Certificate Manufacturing Authorities, Registration Authorities, Repository Services Providers and subscribers) generate their own keys on a

- trustworthy system, and not reveal the private keys to anyone else; or
- (B) Having keys generated in hardware tokens from which the private key cannot be extracted.
- (2) Certification Authority, Registration Authority, and Certificate Manufacturing Authority keys must be generated in hardware tokens. Key pairs for Repository Services Providers, and end-entities may be generated in either hardware or software as detailed in the Certification Practice Statement.
- (b) Private Key Delivery to Entity. The private (secret) key shall be delivered to the subscriber in an "out of band" transaction. The secret key may be delivered to the subscriber in a tamper-proof hardware or software container. The secret key may be delivered to the subscriber embedded in a hardware token protected by encryption and password protected.
- (c) Subscriber Public Key Delivery to Certification Authority. The subscriber's public key must be transferred to the Registration Authority or Certification Authority in a way that ensures:
- (1) it has not been changed during transit;
 - (2) the sender possesses the private key that corresponds to the transferred public key; and
 - (3) the sender of the public key is the legitimate user claimed in the certificate application.
- (d) Certification Authority Public Key Delivery to Users. The public key of the Certification Authority signing key pair may be delivered to subscribers in an on-line transaction in accordance with Internet Engineering Task Force Public Key Infrastructure Part 3, or by another mechanism which assures the Certification Authority public key is delivered in a manner that assures the key originates with the Certification Authority and that assures the Certification Authority public key has not been altered in transit.
- (e) Key Sizes – Asymmetric Cryptographic Applications.
- (1) Minimum key length for other than elliptic curve based algorithms is 1024 bits;
 - (2) Minimum key length for elliptic curve group algorithms is 170 bits.
- (f) Acceptable algorithms for public key cryptography applications include, but are not limited to:
- (1) RSA (Rivest, Shamir, Adelman) -- digital signature and information security;
 - (2) ElGamal -- digital signature and information security;
 - (3) Diffie – Hellman -- digital signature and information security; and
 - (4) DSA /DSS (Digital Signature Algorithm) -- digital signature applications.
- (g) Certification Authority Private Key Protection. The Certification Authority (and the Registration Authority, Certificate Manufacturing Authority and Repository Services Provider) shall each protect its private key(s) in accordance with the provisions of the Rules in this Chapter.
- (1) Standards for Cryptographic Module. Certification Authority signing key generation, storage and signing operations shall be on a hardware crypto module rated at Federal Information Processing Standards 140-1 Level 2 (or higher). Subscribers shall use Federal Information Processing Standards 140-1 Level 1 approved cryptographic modules (or higher) and related pertinent cryptographic module security requirements

of the Common Criteria – ISO 15408-1 "Evaluation Criteria".

- (2) Private Key Escrow:
 - (A) Certification Authority signing private keys shall not be escrowed;
 - (B) Keys used solely for encryption purposes within and by employees of the State of North Carolina shall be escrowed, unless otherwise provided by law.
- (3) Private Key Backup. An entity may back up its own private key.
- (4) Private Key Archival. An entity may archive its own private key.
- (5) Other Aspects of Key Pair Management. Key Replacement. Certification Authority key pairs must be replaced at least every three years. Registration Authority and subscriber key pairs must be replaced not less than every two years and a new certificate issued.
- (6) Restrictions on Certification Authority's Private Key Use.
 - (A) The Certification Authority's signing key used for issuing certificates conforming to the Rules in this Chapter shall be used only for signing certificates and, optionally, Certificate Revocation Lists.
 - (B) A private key used by a Registration Authority or Repository Services Provider for purposes associated with its Registration or Repository Services Provider function shall not be used for any other purpose without the express written permission of the Certification Authority.
 - (C) A private key held by a Certificate Manufacturing Authority and used for purposes of manufacturing certificates for the Certification Authority:
 - (i) is considered the Certification Authority's signing key;
 - (ii) is held by the Certificate Manufacturing Authority as a fiduciary for the Certification Authority; and
 - (iii) shall not be used for any reason without the express written permission of the Certification Authority.
 - (D) Any other private key used by a Certificate Manufacturing Authority for purposes associated with its Certificate Manufacturing Authority function shall not be used for any other purpose without the express written permission of the Certification Authority.
- (h) Computer Security Controls. All Certification Authority servers must include the functionality satisfying Federal Information Processing Standards 140-1 Level 2 (or higher) and pertinent cryptographic module security requirements of the Common Criteria – ISO 15408-1 "Evaluation Criteria" for IT Security either through the operating system, or combination of operating system, public key infrastructure application, and physical safeguards.
 - (i) Life Cycle Technical Controls - System Development Controls. System design and development shall be conducted using an industrial standard methodology, e.g. systems development life cycle approach (SDLC);

*History Note: Authority G.S. 66-58.10;
Temporary Adoption Eff. February 23, 1999;*

*Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule;
Temporary Adoption Eff. December 3, 1999;
Eff. March 26, 2001.*

**18 NCAC 10 .0701 ALTERNATE TECHNOLOGIES
AND PROVISIONAL LICENSING**

Alternate Technologies: Any person may petition the Electronic Commerce Section to initiate rulemaking to recognize a technology not currently recognized under the rules in this Chapter. The petition shall be made pursuant to G.S. 150B-20. G.S. 150B-20 and other statutes may be viewed at the North Carolina General Assembly's Internet site at <http://www.ncga.state.nc.us/>. In addition to the requirements of G.S. 150B-20, in order to enable the Electronic Commerce Section to best consider the petition, the petitioner shall also provide a detailed explanation of the proposed technology, and a discussion of how the technology complies with the substantive intent of the Electronic Commerce Act.

*History Note: Authority G.S. 66-58.10;
Temporary Adoption Eff. February 23, 1999;
Recodified from 18 NCAC 10 .0305 Eff. December 3, 1999;
Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule;
Temporary Adoption Eff. December 3, 1999;
Eff. March 26, 2001.*

18 NCAC 10 .0801 CIVIL SANCTIONS

(a) If, upon investigation, the Electronic Commerce Section finds that a Certification Authority has violated any provision of the Electronic Commerce Act or the rules in this Chapter, or finds that the Certification Authority has had a license revoked or suspended in any other jurisdiction, the Electronic Commerce Section may revoke or suspend any license issued under the Electronic Commerce Act and the Rules in this Chapter. The revocation or suspension may be in addition to any civil monetary penalty issued against the Certification Authority. As a condition of license reinstatement following a period of suspension, the Electronic Commerce Section may require that the Certification Authority submit updated or additional documentation or assurances regarding its operations.

(b) If, upon investigation, the Electronic Commerce Section finds that a Certification Authority has violated any provision of the Electronic Commerce Act or the Rules in this Chapter, the Electronic Commerce Section may assess a civil monetary penalty of not more than five thousand dollars (\$5,000 US) for each violation. The civil monetary penalty may be in addition to any revocation or suspension of the Certification Authority's license. As a condition of continued licensure following assessment of a civil monetary penalty, the Electronic Commerce Section may require that the Certification Authority submit updated or additional documentation or assurances regarding its operations.

(c) Adjustment factors. In determining the length of any suspension or amount of any civil monetary penalty, the Electronic Commerce Section shall consider:

- (1) The organizational size of the Certification Authority cited for violating the provisions of the Electronic Commerce Act;
- (2) The good faith of the Certification Authority cited, including but not limited to any procedures or processes

implemented by the violator to prevent the violation from recurring;

- (3) The gravity of the violation;
- (4) The prior record of the violator in complying or failing to comply with the Electronic Commerce Act or the Rules in this Chapter; and
- (5) The risk of harm cause by the violation.

(d) Continuing Violations. After the receipt of notice of a violation, if any Certification Authority willfully continues to violate by action or inaction the Electronic Commerce Act or the rules in this Chapter, each day or transaction the violation continues or is repeated may be considered a separate violation.

(e) Civil Sanction Notification. When the Electronic Commerce Section determines that a civil sanction shall be assessed, the Electronic Commerce Section shall notify the Certification Authority of the following information by electronic mail, if possible, and by any means permitted under Rule 4 of the North Carolina Rules of Civil Procedure:

- (1) The nature of the violation;
- (2) The proposed civil sanction;
- (3) That the proposed civil sanction will become final unless within 60 days after receiving notice of the proposed sanction the Certification Authority either:
 - (A) takes exception to the proposed sanction by filing a contested case petition with the Office of Administrative Hearings; or
 - (B) submits a written request for the reduction of the proposed sanction; and
- (4) The procedure for taking exception to the violation or seeking the reduction of the proposed sanction.

(f) Civil Sanction Finality. The Certification Authority must file a contested case petition pursuant to G.S. 150B-23 or submit a written request for the reduction of the proposed sanction within 60 days of receipt of the notice of the proposed civil sanction or the proposed sanction shall become the sanction imposed. Notice shall be deemed received at the time of service by any method permitted under Rule 4 of the North Carolina Rules of Civil Procedure.

(g) Request for Reduction of Proposed Civil Sanction. A Certification Authority that admits a cited violation but wishes to seek reduction of the length of a proposed suspension or the amount of a proposed civil monetary penalty may request reduction of the proposed civil sanction.

- (1) Any request for reduction of a proposed civil sanction shall be submitted to the Electronic Commerce Section in writing and must include a written statement supporting the reduction request. Requests for reduction of a proposed sanction are solely for the purpose of allowing the Certification Authority to contest the reasonableness of the proposed civil sanction arising under this Rule. The Certification Authority shall not attempt to contest the existence of a violation or raise questions of law in the request for reduction of the proposed sanction.
- (2) The Electronic Commerce Section shall determine if the proposed sanction is to be reduced pursuant to a reduction request and shall notify the Certification Authority of its decision in writing.
- (3) If the Electronic Commerce Section determines that the reduction request raises issues of fact or questions of law, the Electronic Commerce Section may decline to

consider the reduction request, and shall notify the Certification Authority by certified or registered mail that it must file a contested case petition with the Office of Administrative Hearings in order to preserve its claim and legal rights. The Certification Authority must file a contested case petition with the Office of Administrative Hearings within 60 days of receipt of notice or the sanction assessed shall be final.

- (4) If the reduction request does not raise issues of fact or questions of law, the Electronic Commerce Section shall determine if the proposed sanction is to be reduced, and shall notify the Certification Authority of its decision in writing by electronic mail, if possible, and by any other means permitted under Rule 4 of the North Carolina Rules of Civil Procedure. In the event the Electronic Commerce Section denies the reduction request, or grants the reduction request in an amount unacceptable to the Certification Authority, the Certification Authority must file a contested case petition with the Office of Administrative Hearings within 60 days of receipt of notice of the Electronic Commerce Section's decision, or the decision shall become the final decision. Notice shall be deemed received at the time of service by any method permitted under Rule 4 of the North Carolina Rules of Civil Procedure.

(h) Payment. Any civil monetary penalty shall be due within 60 days of the date of the initial assessment of the penalty, except that if the Certification Authority files a contested case petition pursuant to G.S. 150B-23 or submits a written request for reduction of the penalty, the penalty shall be due within 60 days of the date of the final decision. The penalty shall be paid with cash or certified funds by personal delivery or certified mail to the Electronic Commerce Section. In the event the Certification Authority fails to pay the penalty assessed within the time periods set forth in this Rule, the Electronic Commerce Section may collect the amount of the penalty from the bond required by the Rules in this Chapter.

History Note: Authority G.S. 66-58.6; 66-58.10; Temporary Adoption Eff. February 23, 1999; Recodified from 18 NCAC 10 .0401 Eff. December 3, 1999; Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule; Temporary Adoption Eff. December 3, 1999; Eff. March 26, 2001.

18 NCAC 10 .0901 RECIPROCAL AGREEMENTS AND LICENSURE BY RECIPROCITY

- (a) Certification Authorities licensed by other jurisdictions may request North Carolina licensure by the North Carolina Electronic Commerce Section. The applicant must be currently licensed in good standing with another jurisdiction.
- (b) To seek reciprocal licensure in North Carolina, Certification Authorities licensed by other jurisdictions shall do the following:
 - (1) Pay the licensing fee as described in the Rules in this Chapter and comply with 18 NCAC 10 .0301(1), (3), (4), (5), (6), (7) and (8);
 - (2) Provide the Electronic Commerce Section with evidence of licensure in good standing from the other licensing jurisdiction;

- (3) Provide the Electronic Commerce Section with a complete copy of the licensing application that led to the Certification Authority becoming licensed in the other jurisdiction, including any amendments thereto;
- (4) Provide full disclosure of any former, current or proposed disciplinary action or criminal proceeding arising from or related to the Certification Authority's license or activities as a Certification Authority;
- (5) Provide a complete history of licensure in all other jurisdictions, whether continuous or disrupted, and if disrupted the length of the disruption and basis therefore; and
- (6) Provide any additional information necessary to substantiate compliance with the audit requirements identified in 18 NCAC 10 .0303(13), as may be required by the Electronic Commerce Section.

(c) The Electronic Commerce Section may impose civil sanctions against a reciprocal licensee on the same basis that the Electronic Commerce Section can impose civil sanction against a Certification Authority license otherwise issued, or upon finding that the Certification Authority has had a license revoked or suspended in another jurisdiction.

(d) Any Certification Authority that obtains a reciprocal license under the rules in this Chapter shall inform the Electronic Commerce Section in writing of any civil or criminal proceeding that arises from or relates to the Certification Authority's license or any disciplinary action commenced against the Certification Authority in any other jurisdiction within ten days of notice of the proceeding or action.

History Note: Authority G.S. 66-58.3; 66-58.6; 66-58.7; 66-58.8; 66-58.10; 66-58.11; Temporary Adoption Eff. February 23, 1999; Recodified from 18 NCAC 10 .0501 Eff. December 3, 1999; Codifier determined on November 23, 1999, agency findings did not meet criteria for temporary rule; Temporary Adoption Eff. December 3, 1999; Eff. March 26, 2001.

TITLE 19A – DEPARTMENT OF TRANSPORTATION

19A NCAC 02E .0225 REPAIR/ MAINTENANCE/ALTERATION OF SIGNS

- (a) Signs may not be serviced from or across the right of way of freeways or from or across controlled access barriers or fences of controlled routes.
- (b) Conforming signs may be altered within the limits of the rules in this Section.
 - (1) A conforming sign that has been destroyed or significantly damaged may be reconstructed within the limits of the rules in this Section by notifying the district engineer in writing of any substantial changes that would affect the original dimensions of the initial permit application.
 - (2) Conforming sign structures may be reconstructed so long as the reconstruction does not conflict with any applicable state, federal or local rules, regulations or ordinances.
- (c) Alteration to a nonconforming sign or sign conforming by virtue of the grandfather clause is prohibited. Reasonable repair and maintenance are permitted including changing the

advertising message or copy. The following activities are considered to be reasonable repair and maintenance:

- (1) Change of advertising message or copy on the sign face;
 - (2) Replacement of border and trim;
 - (3) Repair and replacement of a structural member, including a pole, stringer, or panel, with like material;
 - (4) Alterations of the dimensions of painted bulletins incidental to copy change; and
 - (5) Any net decrease in the outside dimensions of the advertising copy portion of the sign; but if the sign face or faces are reduced they may not thereafter be increased beyond the size of the sign on the date it became nonconforming.
- (d) The addition of lighting or illumination to existing nonconforming signs or signs conforming by virtue of the grandfather clause is specifically prohibited as reasonable maintenance; however, such lighting may be permanently removed from such sign structure.
- (e) A nonconforming sign or sign conforming by virtue of the grandfather clause may continue as long as it is not abandoned, destroyed, discontinued, or significantly damaged.
- (f) When the combined damage to the face and support poles appears to be significant, as defined in 19A NCAC 02E .0201(29), the sign owner may request the Department to review the damaged sign, including salvageable sign components, prior to repairs being made. Should the sign owner perform repairs without notification to the Department, and the Department later determines the damage is greater than 50% of the combination of the sign face and support pole(s), the permit may be revoked. To determine the percent of damage to the sign structure, the only components to be used to calculate this value are the sign face and support pole(s). The percent damage shall be calculated by dividing the unsalvageable sign components by the original sign structure component quantities, using the following criteria:
- (1) Outdoor Advertising on Wooden Poles: The percentage of damage attributable to poles shall be 50% and the percentage of damage attributable to sign face shall be 50%;
 - (2) Outdoor Advertising on Steel Poles or Beams: The percentage of damage attributable to poles shall be 80% and the percentage of damage attributable to sign face shall be 20%; and
 - (3) Outdoor Advertising on Monopoles: The percentage of damage attributable to poles shall be 80% and the percentage of damage attributable to sign face shall be 20%.

History Note: Authority G.S. 136-130; 136-89.58;
Eff. August 1, 2000;
Amended Eff. August 1, 2000.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

21 NCAC 16M .0102 DENTAL HYGIENISTS

- (a) The following fees shall be payable to the Board:
- (1) Application for examination \$125.00
 - (2) Reinstatement of license after retirement from practice in this State \$ 60.00
 - (3) Application for provisional licensure \$ 60.00

- (4) Certificate to a resident dental hygienist desiring to change to another state or territory \$ 25.00
- (b) Each dental hygienist renewing his or her license to practice dental hygiene in North Carolina shall be assessed a fee of fifteen dollars (\$15.00), in addition to the annual renewal fee, to be contributed to the operation of the North Carolina Caring Dental Professionals.

History Note: Authority G.S. 90-232;
Eff. September 3, 1976;
Readopted Eff. September 26, 1977;
Amended Eff. May 1, 1989; March 1, 1988; May 1, 1987;
Temporary Amendment Eff. August 20, 1999;
Amended Eff. April 1, 2001.

21 NCAC 16S .0101 DEFINITIONS

The following definitions are applicable to impaired dentist programs established in accordance with G.S. 90-48.2:

- (1) "Board" means the North Carolina State Board of Dental Examiners;
- (2) "Impairment" means chemical dependency or mental illness;
- (3) "Board of Directors" means individuals comprising the oversight panel consisting of representatives from the North Carolina Dental Society, the Board, licensed dental hygienists, and the UNC School of Dentistry established to function as a supervisory body to the North Carolina Caring Dental Professionals;
- (4) "Director" means the person designated by the Board of Directors to organize and coordinate the activities of the North Carolina Caring Dental Professionals;
- (5) "North Carolina Caring Dental Professionals" means the program established through agreements between the Board and special impaired dentist peer review organizations formed by the North Carolina Dental Society made up of Dental Society members designated by the Society, the Board, a licensed dental hygienist upon recommendation of the dental hygienist member of the Board, and the UNC School of Dentistry to conduct peer review activities as provided in G.S. 90-48.2(a).
- (6) "North Carolina Caring Dental Professionals members" means volunteer Dental Society members selected by the Board of Directors from peer review organizations to serve as parties to interventions, to direct impaired dentists into treatment, and as monitors of those individuals receiving treatment. Peer liaisons and volunteers participating in programs for impaired dental hygienists shall be dental hygienists.

History Note: Authority G.S. 90-48; 90-48.2; 90-48.3;
Eff. April 1, 1994.
Temporary Amendment Eff. August 20, 1999;
Amended Eff. April 1, 2001.

21 NCAC 16S .0102 BOARD AGREEMENTS WITH PEER REVIEW ORGANIZATIONS

The Board shall enter into agreements with special impaired dentist peer review organizations, pursuant to G.S. 90-48.2, to establish the North Carolina Caring Dental Professionals to be supervised by the Board of Directors. Such agreements shall provide for:

- (1) investigation, review and evaluation of records, reports, complaints, litigation, and other information about the practice and practice patterns of licensed dentists and dental hygienists as may relate to impaired dentists and dental hygienists;
- (2) identification, intervention, treatment, referral, and follow up care of impaired dentists and dental hygienists; and
- (3) due process rights for any subject dentist or dental hygienist.

History Note: Authority G. S. 90-48; 90-48.2; 90-48.3;
Eff. April 1, 1994.
Temporary Amendment Eff. August 20, 1999;
Amended Eff. April 1, 2001.

21 NCAC 16S .0201 RECEIPT AND USE OF INFORMATION OF SUSPECTED IMPAIRMENT

- (a) Information concerning suspected impairment may be received by the North Carolina Caring Dental Professionals through any of the following sources:
- (1) reports of physicians, psychologists or counselors;
 - (2) reports from family members, staff or other individuals;
 - (3) self-referral; or
 - (4) referral by the Board.
- (b) When information of suspected impairment is received, the Program shall conduct an investigation and routine inquiries to determine the validity of the report.
- (c) Dentists and dental hygienists suspected of impairment may be required to submit to personal interviews if the investigation and inquiries indicate the report of impairment may be valid.

History Note: Authority G.S. 90-48; 90-48.2; 90-48.3;
Eff. April 1, 1994.
Temporary Amendment Eff. August 20, 1999;
Amended Eff. April 1, 2001.

21 NCAC 16S .0203 INTERVENTION AND REFERRAL

- (a) Following an investigation, if an impairment is determined to exist and confirmed, an intervention shall be conducted using specialized techniques designed to assist the dentist or dental hygienist in acknowledging responsibility for dealing with the impairment. The dentist or dental hygienist shall be referred to an appropriate treatment source.
- (b) Following an investigation, intervention, treatment, or upon receipt of a complaint or other information, a peer review organization participating in the North Carolina Caring Dental Professionals shall report to the Board detailed information about any dentist or dental hygienist licensed by the Board, if it is determined that:
- (1) the dentist or dental hygienist constitutes an imminent danger to the public or himself or herself;
 - (2) the dentist or dental hygienist refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence; or
 - (3) it reasonably appears that there are other grounds for disciplinary action.
- (c) Program members may consult with medical professionals and treatment sources as necessary in carrying out the Program's directives.

- (d) Interventions shall be arranged and conducted as expeditiously as possible. When interventions are conducted as a direct result of a Board-initiated referral, a Board representative may be present.
- (e) Treatment sources shall be evaluated and determined applicable before an individual is referred for treatment, and any treatment contracts or aftercare agreements shall be documented and recorded by the Program.

History Note: Authority G.S. 90-48; 90-48.2; 90-48.3;
Eff. April 1, 1994.
Temporary Amendment Eff. August 20, 1999;
Amended Eff. April 1, 2001.

21 NCAC 56 .0503 EXAMINATIONS

- (a) Fundamentals of Engineering. This eight-hour written examination is designed primarily to test the applicant's proficiency and knowledge of the fundamentals of engineering.
- (b) Principles and Practice of Engineering. This eight-hour written examination is designed to test the applicant's proficiency and knowledge of engineering principles and practices.
- (c) Examination Aids. Examinees may utilize examination aids as specified by the exam preparer.
- (d) Preparation of Examination. The examinations in the fundamentals of engineering and in the principles and practice of engineering are national examinations promulgated by the National Council of Examiners for Engineering and Surveying (NCEES) of which the Board is a member.
- (e) Examination Sequence. Before the applicant is permitted to be examined on the principles and practice of engineering, the applicant must pass the examination on the fundamentals of engineering, unless the applicant can evidence 20 years of progressive engineering experience and receives a waiver from the fundamentals of engineering exam by the Board. In no event is an applicant allowed to take both examinations at the same time or at the same scheduled examination date.
- (f) Examination Filing Deadline. The applicant who wishes to take an examination must have the completed application (which includes all necessary references, transcripts, and verifications) in the Board office prior to August 1 for Fall examinations and January 2 for Spring examinations.
- (g) Seating Notice. After approval of an application to take either the examination on the fundamentals of engineering or principles and practice, the applicant shall be sent a seating notice by the Board. This notice shall inform the applicant of the date, time and location of the examination and the seat number assigned.
- (h) Unexcused Absences. After a seating notice has been issued for a scheduled examination by the Board, and the applicant fails to appear, that applicant's record will reflect "unexcused absence" unless the absence was for official jury duty or the applicant was not physically able to be present, as indicated by a doctor's certificate. The examination fee is forfeited.
- (i) Re-Examination. A person who has failed an examination may apply to take the examination again at the next regularly scheduled examination period by making written request and submitting the required exam fee. A person having a combined record of three failures or unexcused absences shall only be eligible after submitting a new application with appropriate application fee, and be considered by the Board for reexamination at the end of 12 months. After the end of the 12-

month period, the applicant may take the examination no more than once every calendar year. The applicant must demonstrate to the Board that actions have been taken to improve the applicant's chances for passing the exam.

(j) Special Accommodation. An applicant with a diagnosed disability may make a written request, before the application deadline, for special accommodation for the exam. Reasonable accommodation will be granted.

(k) Exam Results. Exam results shall be supplied in writing as pass or fail. No results will be given in any other manner.

(l) Review of Failed Exams. An applicant who fails to make a passing score on an exam may request in writing within thirty days of receiving the result to have an opportunity to review the exam. The review shall be done in the Board office under supervision of staff and is limited to one hour.

History Note: Authority G.S. 89C-10; 89C-13; 89C-14; 89C-15;

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. April 1, 2001; August 1, 1998; November 2, 1992; April 1, 1989; January 1, 1982.

SECTION .0600 – PROFESSIONAL LAND SURVEYOR

21 NCAC 56 .0603 EXAMINATIONS

(a) Fundamentals of Land Surveying. This eight-hour written examination is designed primarily to test the applicant's proficiency and knowledge of the fundamentals of land surveying.

(b) Principles and Practice of Land Surveying. This eight-hour written examination is designed to test the applicant's proficiency and knowledge of land surveying practices and procedures generally and specifically within North Carolina.

(c) Examination Aids. Examinees may utilize examination aids as specified by the national exam preparer.

(d) Preparation of Examination. The examination in the fundamentals of land surveying and six hours of the examination in the principles and practice of land surveying are national examinations promulgated by the National Council of Examiners for Engineering and Surveying (NCEES) of which the Board is a member. The two-hour North Carolina portion of the principles and practice of land surveying examination is prepared and graded by the Board.

(e) Examination Filing Deadline. The applicant who wishes to take an examination must have the completed application (which includes all necessary references, transcripts, and verifications) in the Board office prior to August 1 for Fall examinations and January 2 for Spring examinations.

(f) Seating Notice. After approval of an application the Board will send the applicant a seating notice. This notice will inform the applicant of the date, time and location of the examination and the seat number assigned.

(g) Unexcused Absences. After a seating notice for a scheduled examination has been issued by the Board, and the applicant fails to appear, the applicant's record will reflect "unexcused absence" unless the absence was for official jury duty or the applicant was not physically able to be present, as indicated by a doctor's certificate. The examination fee is forfeited.

(h) Re-Examination. A person who has failed an examination is allowed to apply to take the examination again at the next regularly scheduled examination period. A person having a

combined record of three failures or unexcused absences shall only be eligible after submitting a new application with appropriate application fee, and be considered by the Board for reexamination at the end of 12 months. After the end of the 12-month period, the applicant may take the examination no more than once every calendar year. The applicant must demonstrate to the Board that actions have been taken to improve the applicant's chances for passing the exam.

(i) Special Accommodation. An applicant with a diagnosed disability may make a written request, before the application deadline, for special accommodation for the exam. Reasonable accommodation will be granted.

(j) Exam Results. Exam results shall be supplied in writing as pass or fail. No results will be given in any other manner.

(k) Review of Failed Exams. An applicant who fails to make a passing score on an exam may request in writing within thirty days of receiving the result to have an opportunity to review the exam. The review shall be done in the Board office under supervision of staff and is limited to one hour.

History Note: Authority G.S. 89C-10; 89C-15;

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. April 1, 2001; August 1, 1998; November 2, 1992; April 1, 1989; January 1, 1982.

RULES REVIEW COMMISSION

This Section contains the agenda for the next meeting of the Rules Review Commission on Thursday, September 21, 2000, 10:00 a.m., at 1307 Glenwood Ave., Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners by Friday, September 15, 2000, at 5:00 p.m. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Teresa L. Smallwood, Chairman
John Arrowood
Laura Devan
Jim Funderburke
David Twiddy

Appointed by House

R. Palmer Sugg, 1st Vice Chairman
Jennie J. Hayman, 2nd Vice Chairman
Walter Futch
Paul Powell
George Robinson

RULES REVIEW COMMISSION MEETING DATES

October 19, 2000

LOG OF FILINGS

RULES SUBMITTED: August 20, 2000 through September 20, 2000

AGENCY/DIVISION	RULE NAME	RULE CITATION	ACTION
AGRICULTURE, DEPARTMENT OF/STRUCTURAL PEST CONTROL COMMITTEE			
	Subterranean Termite Prevention	2 NCAC 34 .0505	Amend
	Minimum Requirements/Subterranean Termite Prev	2 NCAC 34 .0506	Amend
AGRICULTURE, DEPARTMENT OF/STATE MARKETING AUTHORITY			
	Horse Facility	2 NCAC 43L .0304	Repeal
	Livestock Facility	2 NCAC 43L .0305	Repeal
DEPARTMENT OF COMMERCE/BANKING COMMISSION			
	Customer Bank Communications Terminals	4 NCAC 3C .1501	Repeal
	Limitations	4 NCAC 3C .1502	Repeal
DHHS/DIVISION OF FACILITY SERVICES			
	Health Maintenance Organizations	10 NCAC 3R .0213	Amend
	Determination of Review	10 NCAC 3R .0304	Amend
	Filing Applications	10 NCAC 3R .0305	Amend
	Definitions	10 NCAC 3R .1613	Amend
	Required Performance Standards	10 NCAC 3R.1615	Amend
	Information Required of Applicant	10 NCAC 3R .1714	Amend
	Definitions	10 NCAC 3R .1912	Amend
	Information Required of Applicant	10 NCAC 3R .1913	Amend
	Required Performance Standards	10 NCAC 3R .1914	Amend
	Definitions	10 NCAC 3R .2113	Amend
	Definitions	10 NCAC 3R .2713	Amend
	Required Performance Standards	10 NCAC 3R .2715	Amend
	Con Review Categories	10 NCAC 3R .3001	Repeal
	Applicability of Rules	10 NCAC 3R .3002	Repeal
	Multi-County Groupings	10 NCAC 3R .3010	Repeal
	CON Review Schedule	10 NCAC 3R .3020	Repeal
	Facility and Service Need Determinations	10 NCAC 3R .3030	Repeal
	Dialysis Station Need Determination	10 NCAC 3R .3032	Repeal
	Reallocations and Adjustments	10 NCAC 3R .3040	Repeal
	Policies	10 NCAC 3R .3050	Repeal
	Applicability of Rules	10 NCAC 3R .3051	Repeal
	CON Review Categories	10 NCAC 3R .3052	Repeal
	CON Review Schedule	10 NCAC 3R .3053	Repeal
	Multi-County Groupings	10 NCAC 3R .3054	Repeal

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Reallocations and Adjustments	10 NCAC 3R .3055	Repeal
Dialysis Station Need Determination	10 NCAC 3R .3056	Repeal
Acute Care Bed Need Determination	10 NCAC 3R .3057	Repeal
Rehabilitation Bed Need Determination	10 NCAC 3R .3058	Repeal
Ambulatory Surgical Facilities Need Determination	10 NCAC 3R .3059	Repeal
Open Heart Surgery Services	10 NCAC 3R .3060	Repeal
Heart-Lung Bypass Machines	10 NCAC 3R .3061	Repeal
Heart-Lung Bypass Machines	10 NCAC 3R .3062	Repeal
Cardiac Catheterization Equipment	10 NCAC 3R .3063	Repeal
Cardiac Catheterization Equipment	10 NCAC 3R .3064	Repeal
Cardiac Angioplasty Equipment	10 NCAC 3R .3065	Repeal
Cardiac Angioplasty Equipment	10 NCAC 3R .3066	Repeal
Burn Intensive Care Services	10 NCAC 3R .3067	Repeal
Positron Emission Tomography Scanners	10 NCAC 3R .3068	Repeal
Bone Marrow Transplantation Services	10 NCAC 3R .3069	Repeal
Solid Organ Transplantation Services Need	10 NCAC 3R .3070	Repeal
Gamma Knife Need Determination	10 NCAC 3R .3071	Repeal
Nursing Care Bed Need Determination	10 NCAC 3R .3072	Repeal
Demonstration Project	10 NCAC 3R .3073	Repeal
Home Health Agency Office	10 NCAC 3R .3074	Repeal
Hospice Need Determination	10 NCAC 3R .3075	Repeal
Hospice Inpatient Facility Bed Need	10 NCAC 3R .3076	Repeal
Psychiatric Bed Need Determination	10 NCAC 3R .3077	Repeal
Chemical Dependency Treatment Bed	10 NCAC 3R .3078	Repeal
Intermediate Care Beds	10 NCAC 3R .3079	Repeal
Policies for General Acute Care Hospitals	10 NCAC 3R .3080	Repeal
Policies for Inpatient Rehabilitation Services	10 NCAC 3R .3081	Repeal
Policies for Ambulatory Surgical Facilities	10 NCAC 3R .3082	Repeal
Policies for Nursing Care Facilities	10 NCAC 3R .3083	Repeal
Policies for Home Health Services	10 NCAC 3R .3084	Repeal
Policies for End-Stage Renal Disease	10 NCAC 3R .3085	Repeal
Policies for Psychiatric Inpatient Facilities	10 NCAC 3R .3086	Repeal
Policies for chemical Dependency Treatment	10 NCAC 3R .3087	Repeal
Policies for Intermediate Care Facilities	10 NCAC 3R .3088	Repeal
Required Performance Standards	10 NCAC 3R .4203	Amend
Applicability of Rules	10 NCAC 3R .6101	Repeal
Certificate of Need	10 NCAC 3R .6102	Repeal
Certificate of Need Review Schedule	10 NCAC 3R .6103	Repeal
Multi-County Groupings	10 NCAC 3R .6104	Repeal
Service Areas	10 NCAC 3R .6105	Repeal
Reallocations and Adjustments	10 NCAC 3R .6106	Repeal
Acute Care Bed Need Determination	10 NCAC 3R .6107	Repeal
Rehabilitation Bed Need Determination	10 NCAC 3R .6108	Repeal
Ambulatory Surgical Facilities	10 NCAC 3R .6109	Repeal
Open Heart Surgery Services Need	10 NCAC 3R .6110	Repeal
Heart-Lung Bypass Machines	10 NCAC 3R .6111	Repeal
Fixed Cardiac Catheterization	10 NCAC 3R .6112	Repeal
Mobile Cardiac Catheterization	10 NCAC 3R .6113	Repeal
Burn Intensive Care Services Need	10 NCAC 3R .6114	Repeal
Positron Emission Tomography Scanners	10 NCAC 3R .6115	Repeal
Bone Marrow Transplantation	10 NCAC 3R .6116	Repeal
Solid Organ Transplantation Services	10 NCAC 3R .6117	Repeal
Gamma Knife Need Determination	10 NCAC 3R .6118	Repeal
Lithotripter Need Determination	10 NCAC 3R .6119	Repeal
Radiation Oncology Need Determination	10 NCAC 3R .6120	Repeal
Nursing Care Bed Need	10 NCAC 3R .6121	Repeal
Demonstration Project	10 NCAC 3R .6122	Repeal
Home Health Agency Office	10 NCAC 3R .6123	Repeal
Dialysis Station Need	10 NCAC 3R .6124	Repeal
Hospice Need Determination	10 NCAC 3R .6125	Repeal
Hospice Inpatient Facility Bed Need	10 NCAC 3R .6126	Repeal
Psychiatric Bed Need	10 NCAC 3R .6127	Repeal

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Chemical Dependency Treatment	10 NCAC 3R .6128	Repeal
Intermediate Care Beds	10 NCAC 3R .6129	Repeal
Policies for General Acute Care	10 NCAC 3R .6130	Repeal
Policies for Inpatient Rehabilitation	10 NCAC 3R .6131	Repeal
Policy for Ambulatory Surgical Facilities	10 NCAC 3R .6132	Repeal
Policy for Provision of Hospital	10 NCAC 3R .6133	Repeal
Policy for Nursing Care Beds	10 NCAC 3R .6134	Repeal
Policy for Determination of Need	10 NCAC 3R .6135	Repeal
Policy for Relocation	10 NCAC 3R .6136	Repeal
Policy for Home Health Services	10 NCAC 3R .6137	Repeal
Policy for End-Stage Renal Disease	10 NCAC 3R .6138	Repeal
Policies for Psychiatric Inpatients	10 NCAC 3R .6139	Repeal
Policy of Chemical Dependency	10 NCAC 3R .6140	Repeal
Policies for Intermediate Care	10 NCAC 3R .6141	Repeal
Applicability of Rules Related to 2000 Plan	10 NCAC 3R .6250	Adopt
Certificate of Need Review Schedule	10 NCAC 3R .6252	Adopt
Multi-County Groupings	10 NCAC 3R .6253	Adopt
Service Areas	10 NCAC 3R .6254	Adopt
Reallocations and Adjustments	10 NCAC 3R .6255	Adopt
Acute Care Bed Need Determination	10 NCAC 3R .6256	Adopt
Rehabilitation Bed Need Determination	10 NCAC 3R .6257	Adopt
Ambulatory Surgical Facilities Need Determination	10 NCAC 3R .6258	Adopt
Heart-Lung Bypass Machines	10 NCAC 3R .6260	Adopt
Fixed Cardiac Catheterization Equipment	10 NCAC 3R .6261	Adopt
Burn Intensive Care Services Need	10 NCAC 3R .6263	Adopt
Positron Emission Tomography	10 NCAC 3R .6264	Adopt
Bone Marrow Transplantation Services	10 NCAC 3R .6265	Adopt
Solid Organ Transplantation Services	10 NCAC 3R .6266	Adopt
Gamma Knife Need Determination	10 NCAC 3R .6267	Adopt
Lithotripter Need Determination	10 NCAC 3R .6268	Adopt
Radiation Oncology Treatment Centers	10 NCAC 3R .6269	Adopt
Magnetic Resonance Imaging Scanners	10 NCAC 3R .6270	Adopt
Magnetic Resonance Imaging Scanners	10 NCAC 3R .6271	Adopt
Nursing Care Bed Need Determination	10 NCAC 3R .6272	Adopt
Demonstration Project	10 NCAC 3R .6273	Adopt
Home Health Agency Office Need	10 NCAC 3R .6274	Adopt
Dialysis Station Need Determination	10 NCAC 3R .6275	Adopt
Dialysis Station Adjusted Need Determination	10 NCAC 3R .6276	Adopt
Hospice Need Determination	10 NCAC 3R .6277	Adopt
Hospice Inpatient Facility Bed Need	10 NCAC 3R .6278	Adopt
Psychiatric Bed Need Determination	10 NCAC 3R .6279	Adopt
Chemical Dependency	10 NCAC 3R .6280	Adopt
Intermediate Care Beds for the Mentally Retarded	10 NCAC 3R .6281	Adopt
Policies for General Acute Care Hospitals	10 NCAC 3R .6282	Adopt
Policies for Inpatient Rehabilitation Services	10 NCAC 3R .6283	Adopt
Policy for Ambulatory Surgical Facilities	10 NCAC 3R .6284	Adopt
Policy for Provision of Hospital Long Term Care	10 NCAC 3R .6285	Adopt
Policy for Plan Exemption	10 NCAC 3R .6286	Adopt
Policy for Determination of Need	10 NCAC 3R .6287	Adopt
Policy for Relocation of Certain Nursing Facility	10 NCAC 3R .6288	Adopt
Policies for Home Health Services	10 NCAC 3R .6289	Adopt
Policy for Relocation of Dialysis Stations	10 NCAC 3R .6290	Adopt
Policies for Psychiatric Inpatient Facilities	10 NCAC 3R .6291	Adopt
Policy for Chemical Dependency Treatment Facility	10 NCAC 3R .6292	Adopt
Policies for Intermediate Care Facilities	10 NCAC 3R .6293	Adopt
Application for a License for a Child Care Center	10 NCAC 3U .0302	Amend
General Safety Requirements	10 NCAC 3U .0604	Amend
Administering Medication	10 NCAC 3U .0803	Amend
Requirements for Child Care Centers	10 NCAC 3U .1304	Amend
Administrative Policies Required	10 NCAC 3U .1601	Amend
Space Requirements	10 NCAC 3U .1604	Amend
Staff/Child Ratios	10 NCAC 3U .1606	Amend

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Application for a License for A Family Child Care	10 NCAC 3U .1702	Amend
Requirements for a Safe Indoor/Outdoor Envir	10 NCAC 3U .1719	Amend
Safety and Sanitation Requirements	10 NCAC 3U .1720	Amend
Requirements for Records	10 NCAC 3U .1721	Amend
Discipline Policy	10 NCAC 3U .1722	Amend
Discipline Policy	10 NCAC 3U .1801	Amend
Notification to County Department of SS	10 NCAC 3U .1901	Amend
Investigation Procedures	10 NCAC 3U .1903	Amend
Administrative Sanctions	10 NCAC 3U .1904	Amend
Administrative Penalties	10 NCAC 3U .2006	Amend
Written Warnings	10 NCAC 3U .2007	Amend
Written Reprimands	10 NCAC 3U .2008	Amend
Probationary Status	10 NCAC 3U .2009	Amend
Suspension	10 NCAC 3U .2010	Amend
Revocation	10 NCAC 3U .2011	Amend
Summary Suspension	10 NCAC 3U .2012	Amend
Centers Operating Under G.S. 110-106	10 NCAC 3U .2101	Amend
Scope and Purpose	10 NCAC 3U .2201	Amend
Schedule of Civil Penalties for Child Care Centers	10 NCAC 3U .2206	Amend
Definitions	10 NCAC 14V .0802	Amend
General Information for Infants	10 NCAC 14V .0803	Amend
Surrogate Parents	10 NCAC 14V .0804	Amend
Procedural Requirements	10 NCAC 14V .0805	Amend
Definitions	10 NCAC 14V .3602	Amend
Purpose and Scope	10 NCAC 14V .3804	Adopt
Definitions	10 NCAC 14V .3805	Adopt
Authorization	10 NCAC 14V .3806	Adopt
DWI Substance Abuse Assessment	10 NCAC 14V .3807	Adopt
Qualifications of Individuals Performing Assess	10 NCAC 14V .3808	Adopt
Responsibilities of Assessing Agency	10 NCAC 14V .3809	Adopt
Responsibilities of Treatment for ADETS Providers	10 NCAC 14V .3810	Adopt
Reporting Requirements	10 NCAC 14V .3811	Adopt
Pre-Trial Assessments	10 NCAC 14V .3812	Adopt
Placement Criteria for Assessed DWI Clients	10 NCAC 14V .3813	Adopt
Documentation Requirements	10 NCAC 14V .3814	Adopt
Authorization to Provide DWI Substance Abuse	10 NCAC 14V .3815	Adopt
Minimal Program Content	10 NCAC 14V .3817	Adopt
Special Controlled Substances Emergency Kit	10 NCAC 45G .0410	Amend
Special Controlled Substances	10 NCAC 45G .0410	Amend
Scope	10 NCAC 46A .0101	Amend
Definitions	10 NCAC 46A .0105	Amend
Applicability	10 NCAC 46C .0102	Amend
Payment Fees	10 NCAC 46C .0106	Amend
Rates for Subsidized Care	10 NCAC 46C .0107	Amend
Definition of Fund	10 NCAC 46D .0101	Amend
Definition of Services	10 NCAC 46D .0102	Amend
Eligibility	10 NCAC 46D .0103	Amend
Fees	10 NCAC 46D .0104	Amend
Program Policies and Standards	10 NCAC 46D .0105	Amend
Allocation	10 NCAC 46D .0106	Amend
Reimbursement	10 NCAC 46D .0107	Amend
Sanctions and Appeals for Fraudulent Misrepresent	10 NCAC 46D .0108	Adopt
Correction of Overpayments	10 NCAC 46D .0109	Adopt
Requirements for Administration of Child Care Prog	10 NCAC 46D .0110	Adopt
Definition of Start-Up Funds	10 NCAC 46D .0201	Amend
Review Criteria for Start-Up Funds	10 NCAC 46D .0202	Amend
Scope	10 NCAC 46D .0301	Amend
Approval	10 NCAC 46D .0302	Amend
Length of Contract	10 NCAC 46D .0303	Amend
Administration of Funds	10 NCAC 46D .0304	Amend
Administration of Program	10 NCAC 46D .0305	Amend
Records	10 NCAC 46D .0306	Amend

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Standards for Centers	10 NCAC 46E .0108	Amend
Application	10 NCAC 46E .0109	Repeal
Approval and Continued Participation	10 NCAC 46E .0111	Amend
Appeals	10 NCAC 46E .0112	Amend
Approval for Participation	10 NCAC 46F .0107	Amend
Purchase of Care	10 NCAC 46F .0108	Amend
Continued Participation	10 NCAC 46F .0110	Amend
Appeals	10 NCAC 46F .0111	Amend
Definition	10 NCAC 46G .0109	Amend
Division Responsibility	10 NCAC 46G .0110	Amend
Local Purchasing Agency Responsibility	10 NCAC 46G .0111	Amend
Initial Approval	10 NCAC 46G .0112	Amend
Maintaining Approval	10 NCAC 46G .0113	Amend
Payment Requirements	10 NCAC 46G .0114	Amend
Appeals	10 NCAC 46G .0115	Amend
Applicability of Rules	10 NCAC 46G .0116	Amend
Parent-Provider Checklist	10 NCAC 46G .0213	Amend
Health and Safety Standards	10 NCAC 46G .0214	Amend
Provider Requirements	10 NCAC 46G .0215	Amend
Scope	10 NCAC 46H .0101	Amend
Methods of Service Provision	10 NCAC 46H .0102	Amend
Definition of Service	10 NCAC 46H .0103	Amend
Optional Provision of Services	10 NCAC 46H .0104	Amend
Support to Employment	10 NCAC 46H .0105	Amend
Support for Protective Services	10 NCAC 46H .0106	Amend
Promote Child's Development	10 NCAC 46H .0107	Amend
Limitations	10 NCAC 46H .0108	Amend
Parental Freedom of Choice	10 NCAC 46H .0109	Amend
Definition of Special Needs Child	10 NCAC 46H .0110	Amend
Basic Eligibility Criteria	10 NCAC 46H .0201	Amend
Income Eligible Status	10 NCAC 46H .0203	Amend
Income Eligibility Levels	10 NCAC 46H .0204	Amend
Responsibility for Eligibility Determination	10 NCAC 46H .0207	Amend
Determination of Income Eligibility	10 NCAC 46H .0208	Amend
Requirements for Determination and Redetermination	10 NCAC 46H .0209	Amend
Amount and Collection of Client Fees	10 NCAC 46H .0302	Amend
Adjustments in Fees	10 NCAC 46H .0304	Amend
Minimum Fee Charges	10 NCAC 46H .0305	Repeal
Collection of Fees	10 NCAC 46H .0306	Repeal
DEPARTMENT OF INSURANCE		
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Surplus Licensee Report	11 NCAC 10 .0717	Adopt
Form F Affidavit	11 NCAC 10 .0718	Adopt
Definitions and Scope	11 NCAC 16 .0301	Repeal
Restrictions on Premium Rates	11 NCAC 16 .0302	Repeal
Annual Filing	11 NCAC 16 .0303	Repeal
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Definitions	12 NCAC 9A .0103	Amend
DEPARTMENT OF LABOR		
Vacation Pay	13 NCAC 12 .0306	Amend
Bonuses, Commissions and Other Forms of Cal	13 NCAC 12 .0307	Amend
Certification of Youths	13 NCAC 12 .0401	Amend
Application for Youth Employment Certificate	13 NCAC 12 .0402	Amend
Review: Issuance and Maintenance	13 NCAC 12 .0403	Amend
Detrimental Occupations	13 NCAC 12 .0406	Amend
Designation of Youth Employment	13 NCAC 12 .0407	Adopt
Definitions Relative to ABC Restrictions	13 NCAC 12 .0408	Adopt
Parental Exemption	13 NCAC 12 .0409	Adopt
Exemptions	13 NCAC 12 .0501	Amend
Records to be Maintained	13 NCAC 12 .0801	Amend
Definitions	13 NCAC 20 .0101	Adopt

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Computing Time Periods	13 NCAC 20 .0201	Adopt
Applicability	13 NCAC 20 .0202	Adopt
Confirmation of Samples	13 NCAC 20 .0203	Adopt
Examiner Options	13 NCAC 20 .0301	Adopt
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Contractor Procedures	13 NCAC 20 .0304	Adopt
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Initial Notice to Examinees	13 NCAC 20 .0401	Adopt
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Examples	13 NCAC 20 .0502	Adopt
Release of Confidential Information	13 NCAC 20 .0503	Adopt
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Reasonable Expenses	13 NCAC 20 .0602	Adopt
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Control of Visible Emissions	15 NCAC 2D .0521	Amend
Excess Emissions Reporting and Malfunctions	15 NCAC 2D .0535	Amend
Systemwide Collection System Permitting	15 NCAC 2H .0227	Adopt
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Stations	19 NCAC 3D .0519	Amend
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Approved Courses and Sponsors	21 NCAC 16I .0103	Amend
Reporting Continuing Education	21 NCAC 16I .0104	Amend
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Exemption from and Credit for Continuing Education	21 NCAC 16R .0104	Amend
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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. Also, the Contested Case Decisions are available on the Internet at the following address: <http://www.state.nc.us/OAH/hearings/decision/caseindex.htm>.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Sammie Chess Jr.
Beecher R. Gray
Melissa Owens Lassiter

James L. Conner, II
Robert Roosevelt Reilly Jr.
Beryl E. Wade

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
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STATE OF NORTH CAROLINA

COUNTY OF BURKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
99 OSP 0627

MACK REID MERRILL

Petitioner,

v.

N.C. DEPARTMENT OF CORRECTION

Respondent.

RECOMMENDED DECISION

This contested case was heard before Administrative Law Judge Beryl E. Wade on April 4 and 12-13, 2000, in Newton, North Carolina.

APPEARANCES

For Petitioner: Phyllis A. Palmieri, Esq.
Steven M. Cheuvront, Esq.
207 Queen Street
Morganton, N.C. 28655

For Respondent: John P. Scherer II
State Bar # 19259
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629

WITNESSES

For Petitioner: Mack Reid Merrill, petitioner
Kandle Lowman Dotson, Correctional Officer
Harold Dean Ellington, Correctional Officer
Jean Hawkins, Correctional Officer

For Respondent: Wade J. Dahlberg, self employed, former Correctional Officer
Ricky Anderson, Asst. Supt., Marion Correctional Institution
Jeffrey Baker, Sergeant, Marion Correctional Institution
Keith Whitener, Supt. Caldwell Correctional Institution
Wayne Creson, Lt. Avery-Mitchell Correctional Institution
Joe Brown, Cpt, Avery-Mitchell Correctional Institution
Thomas Lancaster, Cpt, Marion Correctional Institution
Dean Walker, Supt., Marion Correctional Institution

EXHIBITS

The following exhibits offered by the Petitioner were received into evidence:

Exhibits 1-21 in a burgundy binder. Respondent objected to the inclusion of Exhibits 11-C, 11-D, 11-E, 11-F, and 11-I on the grounds of hearsay. The Court overruled the objection and admitted these exhibits for the purpose of corroboration.

The following exhibits offered by the Respondent were received into evidence:

Exhibits 1-5, 8-9, 11-16, and 28-33 in a black binder. Petitioner objected to the inclusion of exhibits 6, 7, and 10 on the grounds of hearsay. The Court sustained the objection and did not allow their inclusion. Petitioner objected to Exhibits 17-27 on the grounds that they involved personal conduct which occurred at other Department of Correction facilities prior to Petitioner's employment at Marion Correctional Institution. The Court sustained the objection and excluded these exhibits. Respondent's counsel made offers of proof for the excluded exhibits. The Court allowed Exhibits 6,7,10, and 26 to be submitted as part of the offer of proof. The Court, however, did not allow Exhibits 17-19, 20-25 and 27 to be included in the offer of proof.

ISSUES

1. Whether the Petitioner has proven that he was dismissed without just cause by the Department of Correction for unacceptable personal conduct?
2. Whether the Petitioner has proven that the Respondent retaliated against him by terminating him due to his filing complaints with the U.S. and N.C. Departments of Labor?

STATEMENT OF THE CASE

The parties agreed that pursuant to *Peace v. Employment Security Commission*, 349 N.C. 315, 507 S.E.2d 272 (1998), the Petitioner bears the burden of proving by a preponderance of the evidence that the agency decision to dismiss him was without just cause. Regarding Petitioner's claim of retaliation for engaging in the protected activity of filing complaints with the U.S. and N.C. Departments of Labor, he must first prove that (1) he engaged in protected activity, (2) followed by an adverse employment action and, (3) that the protected conduct was a substantial motivating factor in the adverse action. See *Kennedy v. Guilford Tech. Comm. College*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994). Once the Respondent presents evidence of a legitimate non-retaliatory motive, the burden shifts to the Petitioner to demonstrate that the reason(s) are pretextual. *Id.*

FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. At the time of his discharge, Petitioner was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina (the State Personnel Act) and is a citizen and resident of Morganton, Burke County, North Carolina.
3. Respondent Department of Correction is an agency of the State of North Carolina subject to Chapter 126 and was the Petitioner's employer.
4. Petitioner became employed with Respondent on April 17, 1983 as a Correctional Officer. On July 1, 1995, he transferred to Marion Correctional Institution. (hereinafter Marion)
5. On January 26, 1999 the Petitioner was discharged from Marion.
6. Petitioner's discharge was as a result of Respondent's allegations against Petitioner for acts which constituted unacceptable personal conduct. The unacceptable personal conduct consisted of violating the N.C. Department of Correction Violence in the Workplace policy by making threatening comments in the workplace. Respondent (R) Exh. 2.
7. Petitioner had been employed by Respondent for approximately sixteen (16) years and since his transfer to Marion in 1995 had been subject to disciplinary proceedings on two (2) occasions. For each disciplinary proceeding, he received a written warning for personal misconduct. R Exhs 14 and 16.
8. The Department of Correction Personnel Manual provides for dismissal of employees for unacceptable personal misconduct. The policy provides in pertinent part:

All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action including dismissal without prior warning.

In general, unacceptable personal conduct includes among other things:

conduct for which no reasonable person should expect to receive a prior warning; or; the willful violation of known or written work rules; or
conduct unbecoming a state employee that is detrimental to state service.

The policy further provides the following example as one of personal misconduct:

Disorderly conduct; fighting; threatening or attempting to inflict bodily injury to another; R Exh. 28.

9. The Department of Correction's Personal Manual, Section 3 page 22 prohibits violence in the workplace. According to the Definitions section, which is taken from the State Personnel Manual, workplace violence includes, but is not limited to, intimidation, threats, physical attack or property damage. A threat is defined as follows:

The expression of an intent to cause physical or mental harm. An expression constitutes a threat without regard to whether the party communicating the threat has the present ability to carry it out and without regard to whether the expression is contingent, conditional, or future. Examples of threats include, "You better be careful when checking your mail" or "I know where you park."

R Exh. 29, p. 1.

Managers shall promptly initiate an internal investigation into reports of workplace violence, including reports of threats. The options available to the manager following his/her initial internal investigation include, but are not limited to: take no action, discipline in accordance with the Department's Disciplinary Policy and Procedures, Employee Assistance Program Referral, refer for fitness-for-duty evaluation, remove perpetrator from work site, either through administrative assignment or placement in investigation status, notify law enforcement, request that the Crisis Management Advisory Team be activated. R Exh. 29, pp. 4-5.

10. Petitioner acknowledged receiving some training in the Department of Correction's Violence in the Workplace policy. Transcript (T) Vol. I, p. 56.

11. Marion Correctional Institution is a close custody prison, and has a population of approximately 1,000 inmates with 450 employees.

12. On November 7, 1998, Wade J. Dahlberg, a former correctional officer at Marion and currently a pharmaceutical representative, was working visitation in the D unit at the facility. Specifically, Mr. Dahlberg was working in the intake section where inmates check in prior to attending visitation. At approximately 9:00 a.m. Petitioner came into the room. Mr. Dahlberg knew the Petitioner and had talked about hobbies and other various items with him on a handful of occasions. He considered Petitioner an acquaintance or even a friend, even though he did not socialize with Petitioner outside of work. T, Vol. I, pp. 100-102, R Exh. 11.

13. Mr. Dahlberg related that Petitioner was visibly upset, and he began furiously talking about a string of items. Petitioner talked about his evaluations, the below goods he was receiving, and a written warning. Petitioner continued saying that all these stemmed from him turning in Marion to the feds over the question mark system. Further, the Petitioner stated that his blood pressure was high 160 over 110. Then, Petitioner asserted that "he felt like coming in here and shooting someone and that I wouldn't mind taking that sawed off bastard Ricky Anderson and kicking his ass." Finally, Petitioner said that he was called into Mr. Walker's office, and Mr. Walker had told him that he was not a team player. At that point, Petitioner received a radio call to come to the F yard, and he proceeded to leave. Mr. Dahlberg said nothing at the end of Petitioner's comments. But as Petitioner walked away, Mr. Dahlberg asked him if he would be okay. Petitioner replied, "No." T, Vol. I, pp. 103-104, R Exh. 11.

14. At that time, Mr. Dahlberg testified that he was stunned and that the threat of shooting threw up a "red flag". Approximately one hour later, Mr. Dahlberg met the Petitioner in the visitation room, told him that he was not comfortable with the comments, and that he felt like Petitioner was not thinking rationally. Petitioner replied, "I'm not rational." Then, Mr. Dahlberg left and went to his supervisor, Sergeant Jeffrey Baker, to report the Petitioner's comments. Mr. Dahlberg testified that he reported the statements because they were serious. In his words, shooting has a strict connotation, and he did not know what the Petitioner would do. He did know, moreover, that Petitioner had served in the military. T, Vol. I, pp. 104, 106, 112, 120-121, R Exh. 11.

15. Sergeant Jeffrey Baker, Mr. Dahlberg's supervisor and the Assistant Unit Manager, was in the office in D unit that day. He testified that Officer Dahlberg knocked on the door and entered with a real look of concern on his face. Mr. Dahlberg said that he really needed to talk to him. Sergeant Baker had supervised Mr. Dahlberg for awhile, and considered him a good officer and a friend. Sergeant Baker also related that Mr. Dahlberg did not often bring concerns to him, but when he did, they merited serious attention. Mr. Dahlberg related to him the comments that the Petitioner had made. Sergeant Baker, who had received Violence in the Workplace training, immediately stopped Mr. Dahlberg, and took the officer to his supervisor, Lieutenant Chapman. Lieutenant Chapman then took Mr. Dahlberg to Assistant Superintendent Ricky Anderson's office to report the comments. T, Vol. I, pp. 107-108, Vol. II, pp. 62-64, R. Exhs. 11 and 12.

16. Ricky Anderson was working in his office on November 7, 1998. Captain Lewis and Lieutenant Chapman informed him about alleged threatening comments that the Petitioner had made. Assistant Superintendent Anderson brought Mr. Dahlberg into his office and noticed the serious and concerned look on the officer's face. After Mr. Dahlberg orally related Petitioner's comments to the Assistant Superintendent, Mr. Anderson asked the officer to write a statement. Officer Dahlberg went alone into the lieutenant's office to write his statement. While he was in the room, the Petitioner, who was summoned to Mr. Anderson's office, stopped by enroute and stated, "You said something." Mr. Dahlberg replied, "I had no choice." After completing his statement, Mr. Dahlberg later reviewed and confirmed it with Captain Keith Whitener, the appointed investigatory officer, on November 16, 1998. T, Vol. I, p. 109, Vol. II, pp. 14-15. R Exhs. 8 and 11.

17. Mr. Anderson summoned the Petitioner to his office after speaking to Mr. Dahlberg. He described Petitioner's appearance as nervous, fidgety, and his face as flush. Mr. Anderson asked Petitioner if he had spoken with Mr. Dahlberg, and had he made threatening comments to him. Petitioner said that he had not made the comments. Yet, Mr. Anderson also asked Petitioner that in his state of mind did he remember everything that he said. Petitioner replied that he did probably did not remember. During the conversation, Petitioner raced back and forth in the conversation about his blood pressure and about a recent written warning. Then, Mr. Anderson contacted Superintendent Dean Walker at home. Based on their conversation, the two men decided to immediately send Petitioner home on vacation leave until Monday morning November 9, 1998. After hearing the remarks and his conversation with Petitioner, Mr. Anderson was concerned for his life and took some precautions. T, Vol. II, pp. 14-16, 28-29, R Exh, 8.

18. Mr. Walker described receiving the call at his home. Upon hearing the alleged comments from Mr. Anderson, he concurred in sending the Petitioner home. Prior to Monday morning, Mr. Walker talked to his supervisor, Steve Bailey, by telephone. Since the Petitioner had only made threatening comments toward staff at Marion, Mr. Walker convinced Mr. Bailey to agree to Petitioner's transfer to Foothills Correctional Institution pending further investigation. Mr. Walker also notified staff at the gatehouse that Petitioner was not allowed into the facility without the express approval of Mr. Anderson or himself. On Monday, November 9, 1998, Mr. Walker gave Petitioner a letter transferring him to Foothills. T, Vol. III, pp. 57-61, R Exh 32.

19. Another member of management, Captain Thomas Lancaster, had played a role in the decisions to issue the below goods and written warnings mentioned during Petitioner's comments to Mr. Dahlberg. When informed of the Petitioner's comments about feeling like shooting someone, Captain Lancaster felt threatened and took the comments seriously. He changed his normal behavior by quitting running alone at the facility and obtaining a permit for a concealed weapon. T, Vol. III, p. 44.

20. After the transfer, Mr. Walker appointed Captain Keith Whitener, the special affairs captain, to investigate the threat allegations against Petitioner. Captain Whitener interviewed several individuals including Mr. Dahlberg and the Petitioner. When he talked to the Petitioner, Captain Whitener described him as nervous, constantly moving in his chair, and unable to make steady eye contact. Captain Whitener asked Petitioner if he had made the threatening statements. Petitioner replied, "Not to my knowledge," to that and every other question. Petitioner then executed a written statement for the investigation. After taking statements from all parties, Captain Whitener prepared an investigative report and submitted it to Mr. Walker. He made findings and recommendations that Officer Dahlberg's version was credible and that Petitioner had made the threatening remarks. T, Vol. II, pp. 70, 77-80, R Exhs 5, 9, 11.

21. Early in his hearing testimony, Petitioner testified that he had a conversation with Mr. Dahlberg on the 7th of November and told him about being under stress, having high blood pressure, wanting a transfer, and about Mr. Walker commenting about him not being a team player. He denied making the statements attributed to him in the letter of dismissal. Later, in rebuttal testimony, Petitioner stated that he "can't recall any time that I ever made any kind of threatening remarks or anything." He reiterated that he had talked about his stressful situation. T, Vol. I, pp. 11-14, Vol. III, pp. 106-107.

22. Petitioner's slight variances in his responses to Mr. Anderson, Captain Whitener, Mr. Walker, and in his hearing testimony demonstrate a lack of credibility. Mr. Dahlberg's lack of a motive to fabricate and his consistent testimony of the Petitioner's actual threatening words show him to be a more credible witness.

23. During the rating period September 1, 1996 to August 31, 1997, Petitioner received a "Good" overall rating on his performance appraisal, more commonly known as The Appraisal Process (TAP). His supervisor, Sergeant (now Lieutenant) Wayne Creson, commented that Petitioner was "experienced and knowledgeable in all job assignments . . . He performs his job assignments at an average level." Sergeant Creson explained that Petitioner met expectations, but did not "go the extra mile." His manager, or second level supervisor, Lieutenant (now Captain) Joe Brown commented that Petitioner met his job functions at a "good level." On May 15, 1997, a TAP entry indicated that Captain Thomas Lancaster had discussed unscheduled absences with the Petitioner, and had informed him that his presence was expected when scheduled to work. Petitioner's (P) Exhibit 4. T, Vol. II, p. 97.

24. During the rating period September 1, 1997 to August 31, 1998, Petitioner received a "Below Good--BG" overall rating on his TAP. Sergeant Creson gave Petitioner a "good--G" TAP entry in September and October 1997. On November 18, 1997, Sergeant Creson gave Petitioner a "BG" TAP entry for failing to follow a supervisor's instructions and insubordinate attitude. In December 1997, Petitioner received a "very good--VG" TAP entry and "G" TAP entries in January and February 1998. The next month, March 1998, Petitioner received a "VG" TAP entry for winning a military rifle competition. On April 28, 1998, Sergeant Creson gave Petitioner a "BG" TAP entry because Petitioner failed to notify his supervisors of scheduled military orders until the day before duty. Less than two weeks later, on May 4, 1998, Sergeant Creson entered another "BG" TAP entry for Petitioner's undermining or impeding work by making sarcastic comments through the pass box in Master Control. In June and July 1998, Petitioner received a "G" and "VG" TAP entry for those months. On August 5, 1998, Petitioner received a "BG" TAP entry for leaving his yard post without the proper relief. On August 17, 1998, Petitioner received a "VG" TAP entry for professionally handling a confidential information situation. R Exh. 15.

25. At Marion, the policy required correctional officers to stay at their yard post until properly relieved. If relief had not arrived, the officer would contact or radio Master Control and wait instructions from them. Officers would not leave the post until either relief

arrived or a supervisor advised them to come to master control and turn in equipment. Two of Petitioner's witnesses, Harold Ellington and Jean Hawkins, were correctional officers who worked the yard. Both testified that officers were not to leave the yard until they had contacted master control and received approval to turn in equipment. Captain Thomas Lancaster investigated the report by Captain Robert Benfield, the second shift captain, that Petitioner had left the yard before relief from second shift officers without authority. He found that Petitioner knew the policy in effect, had left the yard after a few minutes without relief, and turned in his equipment. Master Control had not informed Petitioner to leave. Since at least one officer was present on the yard, the yard was not unattended and did not indicate a security breach. For this reason, Captain Lancaster did not recommend stronger disciplinary action beyond a TAP entry. Petitioner's version is less than credible. While he admits that he left the post without approval of master control, he asserts that Sergeant Creson approved of such an action. None of the witnesses agree that an officer could leave his post without approval. T, Vol II, pp. 49, 56, Vol III, pp. 5-11.

26. Prior to Captain Lancaster's investigation, he had originally asked Lieutenant Joe Brown to investigate the report of Petitioner leaving his post. Lieutenant Brown brought Petitioner into the lieutenant's office on or about July 9, 1998, and explained to him the allegations. He explained to the Petitioner what relief consisted of and reviewed the policy. Then, he asked Petitioner to make a statement. Petitioner became belligerent, stood up, and said that he was not going to write a statement. Lieutenants Brown and Chapman attempted to calm Petitioner down and told him that it was merely an accusation at that point. Petitioner continued to refuse to make a statement and demanded to speak to Assistant Superintendent Anderson. Lieutenant Brown was unable to provide any statement forms to Petitioner since he refused to make any statement. In his rebuttal testimony Petitioner claimed that Brown initiated the conversation about a failure by Petitioner to stay by the phone on call. I do not find this version credible since Petitioner did not mention any of this information in his written statements and the written statement of the only other witness to this meeting, Lieutenant Chapman, supports Lieutenant Brown's version of events. T, Vol. III, pp. 6, 115-116, Vol. II, pp.130-134, P, Exhs. 11-B, 11-I.

27. After Petitioner's refusal, Mr. Anderson met with him in his office. Petitioner complained that the supervisors were picking on him. Mr. Anderson assured him that they were not. Petitioner later submitted a statement to Captain Lancaster on July 10, 1998. While there is no specific time or twenty four hour period to write a statement, officers are expected to immediately provide a statement when asked by an investigating officer. T, Vol. II, pp. 5-9.

28. At some point in July 1998, Petitioner made Mr. Anderson aware that he had filed a complaint with Raleigh about the question mark system. Petitioner had made a complaint to the U.S. Department of Labor about not being paid under the system. The question mark system was a system to notify an employee in advance if he or she might be called first at approximately 5:45 a.m. in the unexpected absence of a staff member. There was no requirement to stand by the phone, and if a staff member was not present, the caller proceeded to the next name on the list. Outside of a BG TAP entry erroneously given to Ms. Kandle Lowman Dotson for not being by the phone, no one received any discipline or TAP entry for not being present. Once he found out about this entry, Captain Lancaster promptly removed Ms. Dotson's BG. Once Petitioner notified Mr. Anderson of the question mark system, Mr. Anderson immediately stopped the practice. T, Vol. II, pp. 4-5, 106-109, 134-136, Vol. III, pp. 12-15., R Exh 13.

29. On August 5, 1998, Respondent issued a written warning to Petitioner for inappropriate personal conduct as a result of his initial failure to cooperate in the investigation conducted by Lieutenant Brown. Until Mr. Anderson intervened, Petitioner refused to provide a statement. On that same date, Petitioner requested to speak to Superintendent. Dean Walker about the written warning. Mr. Walker testified that he reviewed and approved all written warnings. In this case, he approved because an employee must give a statement when asked by an investigator. Here, Mr. Walker could have given stronger discipline, but decided on a written warning due to Petitioner's number of years of service and his lack of disciplinary measures at Marion except for coaching sessions. T, Vol. III, pp. 49-50, R, Exh. 16.

30. In the meeting held on August 5, 1998 in Mr. Walker's office, Petitioner told Mr. Walker and Mr. Anderson that the written warning was unfair and that management was picking on him. When Mr. Walker told Petitioner that he supported the decision for the written warning, Petitioner stated that back in March I reported y'all to the Labor Board and that is why this is happening. Mr. Walker then asked why he reported them. Petitioner replied that management was making officers stand by the phone without pay. Mr. Anderson informed Mr. Walker that he had ended the practice. Mr. Walker then asked why Petitioner did not let the chain of command know first before he went to the Labor Board. He then stated that this was another example of Petitioner not being a team player. Mr. Walker testified that on prior occasions Petitioner had been talked to about not being a team player and had a propensity to point fingers at others rather than himself. This oral complaint by Petitioner was the first time that Mr. Walker had heard about the question mark system. Mr. Walker was not angry, spoke in a firm voice, and did not come over the desk at Petitioner. T, Vol II, pp 9-10, Vol. III, pp. 51-53.

31. In late August or early September, Captain Lancaster received a report from Captain Whitener that Petitioner had missed three out of four safety committee meetings. Petitioner was a member of the committee. If an employee had to miss a meeting, he was responsible to get a replacement himself or go to a supervisor. Captain Lancaster investigated and found out that Petitioner did indeed miss the meetings. He gave the Petitioner a BG TAP entry for missing the meetings. When he discussed the matter with Petitioner, Petitioner claimed that he did not know that he was supposed to attend or find a replacement. Captain Lancaster took Petitioner with him to ask Captain Whitener about it, and Captain Whitener informed them that Petitioner was aware of the policy. Whitener related

that non-supervisory personnel could go to their supervisor for a replacement. Based on the conversation with Captain Whitener, Captain Lancaster informed Petitioner that the BG would stand. Petitioner replied that he was stressed, and "you know what postal employees do when stressed." Captain Lancaster immediately stopped Petitioner and asked if he was making a threat. Petitioner replied that he just wanted the Captain to know that he was upset. Captain Lancaster informed Mr. Anderson of the comment, but decided to do nothing further because he believed that Petitioner had not really meant the comment. T, Vol. III, pp. 15-18.

32. On October 21, 1998, Petitioner received a written warning for unacceptable personal conduct. After receiving the BG TAP entry for missing safety meetings, Petitioner requested a meeting with Mr. Anderson on September 30, 1998. Captain Lancaster and Lieutenant Brown were also present. Petitioner at first stated that the BG was not justified. When Mr. Anderson explained his position on the subject, Petitioner became belligerent and agitated. He stated that others had missed the meetings, that he wanted a transfer, and that he felt his supervisors were picking on him. Petitioner also stated that he had been an excellent employee and his troubles began in the last little while. Finally, he remarked that he was going to contact Raleigh and his congressman. In a firm and fair tone of voice Mr. Anderson tried to calm the Petitioner and then told him to return to his post. Mr. Anderson believed that Petitioner had indeed calmed. As the Petitioner exited the room, however, he slammed the wooden door hard enough that the air shook the pictures on the wall. Captain Whitener, whose office was down the hall, heard the door slammed and proceeded to investigate because he thought it might be an inmate disturbance. He witnessed Lieutenant Brown proceeding to stop Petitioner. Mr. Anderson, who had been shocked by the noise, had sent Brown to retrieve Petitioner. When Lieutenant Brown brought Petitioner back into the office, Petitioner was crying and upset. He apologized for slamming the door. Since Petitioner appeared unstable, Mr. Anderson allowed him to go home early that day. At no time did Mr. Anderson raise his voice or make fun of the Petitioner. T, Vol. II, pp. 70-71, 137-138, 153, Vol. III, pp. 19-23. R Exh 14.

33. After the meeting and the submission of statements, Mr. Walker decided to issue the October 21, 1998 written warning. He testified that he would have recommended this action for anyone. His responsibilities included controlling the employees and inmates in the institution. Allowing an employee to slam a door when leaving a supervisor's office would be countenancing insubordinate conduct. Mr. Walker discussed the situation with his supervisor and decided to attempt to save the Petitioner rather than terminate him. He thought that another written warning and a recommendation for the Employee Assistance Program for anger management counseling may halt the disciplinary problems. Although the Petitioner had mentioned complaining to Raleigh about the question mark system, Mr. Walker thought the problem was taken care of and was only an oral complaint. As a twelve-year administrator he had received numerous complaints from agencies and legislators brought by employees and inmates, this complaint from Petitioner had no impact on his decision making process. It was a common situation and he did not get upset about it. T, Vol. III, pp.54-57.

34. After the November 7, 1998, incident, Marion received a letter and a complaint form on November 24, 1998, from the N.C. Department of Labor notifying them of a retaliatory employment discrimination complaint. The gravamen of the complaint involved the question mark system. Mr. Walker received the complaint and appointed Mr. Wayne True, the Chief Administrative Officer, to investigate and provide a response to the agency. Mr. Walker reviewed the response and concurred with Mr. True's position. Prior to this written complaint, Mr. Walker had received no written complaint about the question mark system and had only heard Petitioner's oral complaint on August 5, 1998. Mr. Walker indicated that the complaint had no impact on his decision making process regarding any discipline against the Petitioner. He noted that on numerous occasions as an administrator, he had to respond to complaints. While he notified his supervisors of the written complaint, they had no further contact with him, nor did any upper manager pressure or influence Mr. Walker. On October 26, 1999, Marion received a copy of a letter from the N.C. Department of Labor to Petitioner notifying him that their investigation found insufficient evidence to substantiate a violation of law. T, Vol. III, pp. 61-64, R Exhs. 13 and 31.

35. Mr. Walker made a recommendation for dismissal on December 21, 1998. He recommended dismissal due to the nature of Petitioner's remarks. Under the personnel policy, Mr. Walker found these statements constituted a threat. He believed that the potential safety and welfare of the staff at Marion was at risk. Petitioner had two written warnings for insubordination within the past few months. Either of those actions could have led to dismissal, but Mr. Walker tried to correct the problem with progressive discipline. Societal concerns about violence in the workplace also dictated to Mr. Walker the inadvisability of taking the risk by keeping the Petitioner an employee. Mr. Walker found Mr. Dahlberg a credible witness and a good employee with nothing to gain by lying about the statements. Mr. Dahlberg's background working with troubled youth indicated that he was mature and not a nervy employee. Mr. Walker's supervisor agreed with his assessment of the discipline. Although Mr. Walker included Petitioner's June 6, 1987 written warning for making threats toward employees in the dismissal recommendation letter, he testified that he would have taken the same action even without knowledge of that prior discipline. T, Vol. III, pp 69-70, R. Exh. 4.

36. On December 15, 1999 Petitioner was notified by certified mail that a Pre-Dismissal conference was scheduled for December 21, 1998 at 9:30 a.m. R Exh. 4.

37. A Pre-Dismissal conference was held at 9:30 a.m. on December 21, 1998, where the results of the investigation and the recommendation for dismissal were discussed with Petitioner. Petitioner was given an opportunity to respond. He merely denied making the threatening statements and denied using such language as "bastard." Petitioner did not complain about retaliation at this meeting. Superintendent Walker further informed Petitioner that he had reviewed the information Petitioner presented, but that this

information did not change his mind regarding his decision to recommend dismissal. Petitioner received a letter recommending that he be dismissed for unacceptable personal conduct based upon the findings of the investigation.

38. The recommendation to dismiss Petitioner for unacceptable personal conduct was approved by the Respondent and Petitioner was dismissed effective February 5, 1999.

39. Petitioner was notified in the dismissal letter dated January 25, 1999 of his appeal rights regarding the dismissal.

40. Petitioner appealed the Respondent's decision to discharge him to the Secretary of the Department of Correction. The Secretary upheld Petitioner's discharge.

Based upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapter 126 and 150B of the North Carolina General Statutes.

2. At the time of his dismissal, Petitioner was a permanent state employee subject to the State Personnel Act and thus could be dismissed only for just cause.

3. Petitioner has the burden of showing by the greater weight of the evidence that Respondent did not have just cause to dismiss him.

4. The term unacceptable personal conduct is defined as conduct for which no reasonable person should accept to receive prior warnings or conduct unbecoming a State employee that is detrimental to State service. 25 NCAC 1J. 0604(b) and (c) (effective 1 March 1994). 25 NCAC 1J. 0604(i). Employees may be dismissed, demoted, suspended or warned on the basis of unacceptable personal conduct. Discipline may be imposed as a result of unacceptable personal conduct, up to and including dismissal without any prior warning to the employee. 25 NCAC 1J. 0608 (effective 1 March 1994).

5. By making the statement that "he felt like coming in here and shooting someone and that I wouldn't minds taking that sawed off bastard Ricky Anderson and kicking his ass," Petitioner expressed an intent to cause physical or mental harm in violation of the Respondent's Violence in the Workplace policy. The policy considers such a statement a threat "without regard to whether the party communicating the threat has the present ability to carry it out . . ." Petitioner's comments constituted a threat in violation of the policy, and by themselves amounted to unacceptable personal conduct. The two previous written warnings issued on August 5, 1998, and October 21, 1998 for insubordinate conduct also constituted unacceptable personal conduct.

6. At the hearing Petitioner denied making the comments related by Mr. Dahlberg. He cited the statement of Jeffrey Higgins as evidence supporting his version of events. Yet, Mr. Higgins did not appear to testify on Petitioner's behalf, and his statement merely related the lack of any threatening remarks in his presence. Petitioner did not spend the entire day with Mr. Higgins, and did not testify that Mr. Higgins was present during any conversation with Mr. Dahlberg. In addition, in his first meeting with Mr. Anderson, he denied making any threats, but admitted that in his state of mind he did not remember everything said. Witnesses described his demeanor in that meeting as nervous, fidgety, and red faced. When interviewed by Captain Whitener in his investigation, Petitioner slightly altered his answers to questions about whether he made such comments. He stated, "Not to my knowledge." Again, Petitioner appeared nervous, he failed to make consistent eye contact, and he shifted in his chair. All these indicators demonstrate that Petitioner's denials are less than credible.

7. Mr. Dahlberg is a more credible witness. He received no promotion, and left Respondent to enter the private sector of his own accord. He no longer worked for the Department of Correction and took time from his job to come testify in the case. He had no personal animosity toward Petitioner. According to his supervisor, Sergeant Baker, Mr. Dahlberg was a good employee who did not bring problems to the attention of management unless they were serious. His testimony mirrored his handwritten statement which he provided the day the comments were made. Finally, Mr. Dahlberg did not immediately report the comments and sought Petitioner out to give him the opportunity to explain or modify his remarks. Petitioner failed to do so, and commented that he was not rational.

8. The surrounding circumstances give weight to the finding that Petitioner's comments expressed an intent to cause harm. When he made the comments to Mr. Dahlberg, Petitioner was very angry. He had had a continuing problem with management, and had two prior incidents of insubordination within a few months. His refusal to render a statement to Lieutenant Brown in July and the insubordinate door slamming in September indicated a problem with anger management. Petitioner further demonstrated his intent by stopping by the lieutenant's office and stating to him, "You said something." This action demonstrated that he knew the import of his remarks, and hoped that Mr. Dahlberg would not relate them to a third party.

9. In addition, the seriousness of Mr. Dahlberg's and management's reaction to the remarks indicated that Petitioner's comments were not idle threats. Mr. Dahlberg, who worked with troubled kids, thought the remarks were serious enough to warrant an immediate report. Mr. Walker in consultation with his supervisor immediately transferred Petitioner from the facility. He instructed the gatehouse staff to bar Petitioner from the facility unless specifically approved by Mr. Anderson or himself. Mr. Anderson, the subject of part of the remark, stated that he was concerned for his life and took precautions. Captain Thomas Lancaster, who had heard a previous comment about postal workers from the Petitioner, took the remarks to Mr. Dahlberg as threats. He immediately altered his habit of running at the facility and obtained a concealed weapon permit. In sum, the promptness of management's reaction and the concerns voiced by these individuals demonstrated that Petitioner's comments expressed a serious intent.

10. The Petitioner's November 7, 1998 threats constituted unacceptable personal conduct and alone just cause for dismissal. Combined with the two previous written warnings, there was more than enough just cause for dismissal. Based on the foregoing Findings of Fact and Conclusions of Law, I find that the Petitioner has failed to meet his burden of proof of showing that the Respondent lacked just cause for his dismissal.

11. Petitioner has alleged that the Respondent retaliated against him by terminating him due to his filing complaints with the U.S. and N.C. Departments of Labor. He has alleged that in early July 1998, he called Raleigh about the question mark system, and that after that date he received retaliation.

12. Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed. 2d 668 (1973), Petitioner is required to demonstrate proof of facts sufficient to prove a prima facie case of retaliation by the preponderance of the evidence. If so, Respondent is required to state a legitimate non-retaliatory reason for the personnel action at issue. Once Respondent states such a reason, any inference raised by Petitioner's prima facie case is rebutted. Petitioner then must prove by a preponderance of the evidence "pretext plus," ie, that Respondent's stated reason is not the real reason that Respondent took the action, and that the real motive was "retaliation." *Tinsley v. First Union National Bank*, 155 F.3d 435, 443 (4th Cir. 1998); *See Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994).

13. Assuming that Petitioner's phone contacts with Raleigh or the U.S. Department of Labor constituted protected activity. He must show that this protected activity was followed by an adverse employment action. Petitioner catalogued several incidents as adverse and retaliatory. First, he claimed that he informed Lieutenant Brown in early July about his calls to Raleigh, and Lieutenant Brown berated him and set in motion the Below Good for leaving his assigned post. In addition, the written warning issued on August 5, 1998, for failing to provide a statement in Lieutenant Brown's investigation of the yard incident, stemmed from Petitioner's refusal to give a statement without speaking first to Mr. Anderson.

14. Yet, for both the BG for leaving the post and the written warning for refusing to write a statement, the Respondent has presented a legitimate non-retaliatory motive for the agency's actions. Petitioner admitted that he left his post on the yard without approval from master control. He claimed that Sergeant Creson had okayed this practice. Yet, all the witnesses stated that either relief had to arrive or the officer had to obtain approval from master control before leaving the post. Petitioner took the silence as approval, which was wrong. Captain Lancaster's investigation found no security breach, thus no stronger discipline was taken. As for the refusal to provide a statement to Lieutenant Brown, Petitioner claimed that Lieutenant Brown brought up his failure to be by the phone in the meeting and became belligerent. Yet, Petitioner never put this in any written statement, and no witness supported his contention that Brown was belligerent. It was Petitioner who was belligerent. Regarding the rights warning forms, Lieutenant Brown never got the opportunity to provide them, due to the Petitioner's belligerent refusal to provide a statement. Finally, Petitioner's claim of twenty -four hours to provide a statement rings hollow. He could not cite a specific policy, and all the other witnesses said such a policy does not exist. In sum, the agency has presented legitimate non-retaliatory reasons for these actions.

15. Next, Petitioner has claimed retaliation was evidenced during his meetings with Mr. Anderson and Mr. Walker on August 5, 1998. He claimed that Mr. Anderson stated that Petitioner had "covered all his bases", and Mr. Anderson had in advance filled out the written statement regarding Petitioner's failure to write a statement for Lieutenant Brown. Petitioner's testimony at hearing did not comport with any prior written statement. In addition, Petitioner admitted that the handwriting on the form and signature was his alone. Petitioner, moreover, stated that Mr. Walker made the "not a team player" comment in his meeting about the written warning on that date and pointed across his desk. Mr. Walker indicated that prior to August 5, 1998, he had approved this first written warning for failure to write the statement. He testified that Petitioner's comment about calling Raleigh was the first he had heard of any complaint to the Department of Labor. Based on this information, Mr. Walker had no knowledge of the complaint during his approval of the written warning and his assertion that it had no influence on his decision making regarding this issue is credible.

16. Then, Petitioner claimed retaliation for the Below Good TAP entry for missing safety meetings, which led to his meeting with Mr. Anderson on September 30, 1998. Captains Lancaster and Whitener supported the fact that Petitioner had missed multiple meetings. Petitioner claimed that he had talked with Lieutenant Chapman about finding a replacement. Yet, Captain Lancaster testified that Petitioner only complained about how others had missed meetings when initially asked about his absences. He did not provide the Chapman information to Captain Lancaster. The Respondent has presented a legitimate non-retaliatory reason for a TAP entry.

17. Regarding the October 21, 1998, written warning for insubordination in slamming Mr. Anderson's door, Petitioner's own statement admitted that he pulled the door too hard and it slammed. Mr. Anderson, Captain Lancaster, and Lieutenant Brown were all consistent in their testimony about Petitioner's behavior in that meeting and his slamming the door upon leaving. Even a non-participant, Captain Whitener testified that he heard the door slam down the hall. No witness supported the Petitioner's assertion that gliders were on the door, and would have prevented any slamming. The agency has presented a legitimate non-discriminatory reason for issuing the written warning for insubordination to Petitioner.

18. Based on the evidence from Mr. Dahlberg, Petitioner's lack of credibility, and the surrounding circumstances, the Respondent presented legitimate non-discriminatory reasons for the dismissal action after the November 7, 1998 incident. Mr. Walker testified that he did not have any written complaint about the question mark system until November 24, 1998 after the occurrence of the incident. Due to his constant dealing with complaints from state and federal agencies and his attempts to rehabilitate Petitioner through lesser disciplinary measure, his testimony about the complaint having no impact on his decision rings true. Besides these facts, Mr. Walker only made a recommendation to higher authorities within Respondent concerning the dismissal. There is no evidence that any higher approving authority had any knowledge of Petitioner's complaints to the Departments of Labor. The Respondent has presented multiple legitimate non-retaliatory reasons for the dismissal.

19. Petitioner has failed to demonstrate that the Respondent's reasons for dismissal and all the adverse employment actions were pretextual. According to Petitioner everyone was lying in their testimony when they differed from his version of events. Particularly revealing is the Petitioner's work history. It indicates that he did not suddenly become a pariah after his report to the Department of Labor. In his 1996-1997 performance appraisal, the same supervisors who purportedly retaliated against Petitioner gave him an average rating. In that period he received at least one Below Good TAP entry for performance problems. Even during the 1997-1998 rating period and prior to any reporting to the Department of Labor, Petitioner received Below Good TAP entries for performance problems. His performance problems did not begin once he made a report. If one assumes the accuracy of a July reporting date, Petitioner even managed to receive a Very Good TAP entry in August 1998. In this case, Respondent gradually moved against Petitioner's demonstrated problems by shifting from TAP entries to written warnings. Finally, progressive discipline led to dismissal. Petitioner has failed to demonstrate that retaliation was a substantial motivating factor in this decision.

20. Based on the foregoing Findings of Fact and Conclusions of Law, I find that the Petitioner has failed to meet his burden of proof to show that the Respondent retaliated against him due to his filing of complaints with the U.S. and N.C. Departments of Labor.

RECOMMENDED DECISION

That the State Personnel Commission AFFIRM the Respondent's Employment Decision in this Contested Case in that Petitioner's dismissal fully complies with law and agency procedure.

ORDER

It is hereby ordered that the Agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. GEN. STAT. § 150B-36(b).

NOTICE

Before the agency makes the FINAL DECISION, it is required by N.C. GEN. STAT. § 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 decision.

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

The agency is required by N.C. GEN. STAT. §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.

This is the 23rd day of August, 2000.

Beryl E. Wade
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF CARTERET

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
99 OSP 0853

GLENN ROGER FORREST,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION
Respondent.

RECOMMENDED DECISION

On April 25-26, 2000, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Morehead City, North Carolina. Both parties gave closing oral arguments and submitted proposed written decisions.

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PROCEDURAL BACKGROUND

On July 6, 1999, Petitioner filed a contested case with the Office of Administrative Hearings ("OAH"). The case was scheduled to be heard the week beginning November 15, 1999 before Administrative Law Judge Beryl E. Wade. On September 29, 1999, Petitioner submitted a motion to continue the case. On October 1, 1999, Chief Administrative Law Judge Julian Mann, III entered an Order reassigning the case to Administrative Law Judge Melissa Owens Lassiter.

ISSUES

- (1) Did Respondent demote Petitioner when it removed Petitioner from his Operations Manager position and placed him in another position? If Respondent's actions constituted a demotion, then did Respondent have just cause to demote Petitioner?
- (2) Did Respondent discriminate against Petitioner based on his age?
- (3) Did Respondent discriminate against Petitioner based on a qualified handicapping condition?

WITNESSES

Petitioner presented testimony from the following witnesses: Jerry W. Gaskill, Petitioner, Brenda Respass Jones Forrest, Benjamin Wilkins, and Phillip Marvin Hardison.

Respondent presented testimony from the following witnesses: Constance ("Connie") Noe, Ralph W. Lawrence, Billy Moore, and Charles Herty Piner.

EXHIBITS

Petitioner's Exhibits 1-14 and 19-23 were offered and received into evidence.

Respondent's Exhibits 1-7 and 9-20, including all subparts, were offered and received into evidence.

FINDINGS OF FACT**Stipulated Facts**

1. Petitioner has been employed with the Department of Transportation ("DOT"), Ferry Division as follows:

<u>Date</u>	<u>Position</u>	<u>Pay Grade</u>
05/26/93	Clerk IV (temporary position)	59
12/04/93	Ferry Operations Supervisor (promotion)	63
11/05/94	Ferry Operations Manager II (reallocation)	67T
02/21/98	present Operations Manager II (reallocation)	67

2. Petitioner's present salary is \$33,849.00/year.

Adjudicated Facts

Based upon the official documents in the file, the sworn testimony of the witnesses, and the other competent evidence as admitted at the hearing, the undersigned finds the following facts:

Demotion Claim

3. When Petitioner filed a petition for this contested case, he had been employed by the Ferry Division of DOT for 66 continuous months.

4. On May 26, 1993, Petitioner was hired in a temporary position as Clerk IV (pay grade 59) in the Respondent DOT, Ferry Division. On December 4, 1993, Petitioner was promoted into a permanent position as Ferry Operations Supervisor (pay grade 63). Petitioner's position was then reallocated upward to Ferry Operations Manager II (pay grade 67T) on November 5, 1994. On February 21, 1998, Petitioner's position was reallocated to a pay grade 67 and his title became Operations Manager II. (Stipulated Facts).

5. Jerry Gaskill, Director of the Ferry Division since 1993, has known Petitioner for approximately ten to twelve years. Mr. Gaskill has the ultimate authority in the Ferry Division to hire and fire Ferry Division personnel.

6. Mr. Gaskill was involved in initially hiring Petitioner as a temporary employee. He also interviewed Petitioner for the Ferry Operations Supervisor position and recommended promoting Petitioner into that position. The position, now called "Operations Manager," is essentially an administrative and supervisory position which manages the shore operations at a small DOT ferry terminal located at Pamlico River.

7. The Operations Manager position that Petitioner held in 1999, is responsible for all vessel and shore personnel (approximately 21 people), and oversees shore and support facilities. (T pp 3-5; 86). There are four members on the vessel at Pamlico River with the chain of command beginning with: Captain or Master (pay grade 69), a Chief Engineer (pay grade 68), and two Seamen—Ferry Crew Member II (pay grade 59) and Ferry Crew Member I (pay grade 55) as the lowest in the chain of command. (T pp 8, 14, 46).

8. On January 22, 1999, Mr. Gaskill held a meeting with Petitioner at the Ferry Division Office in Morehead City. The purpose of this meeting was to address with Petitioner, the problems or concerns about Petitioner that Pamlico River employees had discussed with Mr. Gaskill earlier in January 1999. These problems concerned preparation of pay records, spreading of rumors at the Pamlico River Operations, and various other controversies which had arisen at the Pamlico River Operation.

Captain Ralph Lawrence, the Assistant Director at the time, and James Piner, the Superintendent who immediately followed Captain Lawrence in the chain of command, also attended the meeting. (T pp 12, 16-18, 335-36).

9. During this meeting, Captain Lawrence advised Petitioner that Petitioner had lost the faith and trust of the people at the Pamlico River Operation, and that Petitioner's actions at that operation were not what the Captain expected of an operations manager. While discussing these problems, Captain Lawrence, Mr. Gaskill, and Mr. Piner made it very clear to Petitioner that they thought Petitioner was not doing his job at the Pamlico River operation, there were some serious problems at Pamlico River, and they thought Petitioner was the focal point or cause of those problems. (T pp 344 - 346).

10. According to Captain Lawrence the atmosphere at this meeting was not "conducive to make somebody happy . . . it was a meeting to wake him [Petitioner] up to the problems over there and do [sic] make him cease and desist and get things back on the right track." (T p 346).

11. Captain Lawrence has a strong, imposing, and intimidating presence about his person. He is an opinionated individual who will not hesitate to tell you his opinion. While testifying at the administrative hearing, Captain Lawrence used a very stern, and authoritative tone in expressing his opinion about Petitioner and Petitioner's performance as an Operations Manager at the Pamlico River operation. He acknowledged that he used the same tone during the January 22, 1999 meeting with Petitioner, that he used in expressing his opinions about Petitioner at the administrative hearing.

12. During the January 22, 1999 meeting, Petitioner indicated that he was considering retiring from the Ferry Division. In response to Petitioner's statement, Mr. Gaskill asked Connie Noe, Personnel Technician II, whether Petitioner was eligible to retire. Ms. Noe checked Petitioner's records and indicated that Petitioner did indeed meet the eligibility requirements. Ms. Noe additionally determined what Petitioner's estimated retirement benefit would be per month by retrieving the information from her computer. She then brought the information into Mr. Gaskill's office and explained it to Petitioner.

13. Mr. Gaskill encouraged Petitioner to resign. Mr. Gaskill advised Petitioner that he needed (1) to report to work on Monday, January 25, 1999 at his regularly-scheduled time of 6:45 a.m. and (2) to also appear at the Ferry Office in Morehead City on that same day, to complete and submit his retirement papers. Petitioner wanted to discuss the matter with his wife. He left the room to make a phone call.

14. When Petitioner left the meeting, he walked past Ms. Noe's desk and told her it would be a long time before she ever saw him again. (T pp 297-302, 337-38; Respondent's Exh. 3). Petitioner planned to take annual leave on January 23 and 24, 1999, and report to work on Monday, January 25, 1999 at his regular time of 6:45 a.m.

15. Petitioner reported to work around midnight on January 24, 1999 and began working on the payroll information. The following morning of January 25, 1999, Mr. Piner went to Pamlico River to collect the time sheets and/or payroll information to take back to Morehead City. Mr. Piner told Phillip Hardison, a temporary onshore employee, to collect the operation keys from Petitioner while he went to get a haircut. Petitioner located Mr. Piner at the local barber shop. Mr. Piner told Petitioner to return to the office.

16. When Mr. Piner returned to the office, he refused to discuss Petitioner's situation with the Petitioner. Mr. Piner asked Petitioner for his operation/office keys and told him to go home.

17. Petitioner gave Mr. Piner his keys, and told Mr. Piner he was not going to resign. Petitioner called the Morehead City Ferry Division office, and made a statement, to Connie Noe, to the effect that he was fired. Petitioner left the office.

18. Petitioner failed to appear at the Morehead City Ferry Division Office on Monday, January 25, 1999.

19. On Tuesday, January 26, 1999, Mr. Gaskill sent Petitioner a certified letter stating that Petitioner had not fulfilled his pledge to complete his retirement forms at the Morehead City office. (Respondent's Exh. 3)

20. On the morning of Thursday, January 28, 1999, Petitioner called the Ferry Division Office and left a message that he was not going to retire from the Ferry Division and was going to take three days of annual leave from February 3rd through February 5th. On that same day, Petitioner mailed a letter to Becky Keith, Human Resources Director, requesting a hearing "concerning my position as Operations Manager." (Petitioner's Exh. 22). Petitioner was never granted a hearing at that time because Ms. Keith determined that Petitioner had not been separated from employment. On January 28, 1999, Petitioner also telephoned Patricia Hawkins, Employee Relations Manager, and told her that he had changed his mind and was not going to retire. (T p 21).

21. At some point, Mr. Gaskill learned that Petitioner had advised his office that he had changed his mind and was not going to retire. After learning this, Mr. Gaskill and Captain Lawrence discussed Petitioner and what options they could take to alleviate the problems at the Pamlico River operation. Both Mr. Gaskill and Captain Lawrence thought Petitioner was the "root cause" of the problems at the Pamlico River operation and thought Petitioner needed to be removed from that location. Specifically, Lawrence

thought Petitioner had shown “very extreme poor leadership” (T p 353), and possessed some shortcomings in his performance as the operations manager. (T p 354)

22. Gaskill and Lawrence discussed removing Petitioner from the Pamlico River operation by transferring him to another operation’s location. However, they did not specifically use the word “demotion” in having this discussion. Captain Lawrence knew that Mr. Gaskill was going to conduct a pre-disciplinary conference with Petitioner and knew the purpose of such conference.

23. By memorandum dated Friday, January 29, 1999, Mr. Gaskill informed Petitioner that he was being placed on investigatory leave with pay until Monday, February 8, 1999. The memo also notified Petitioner that a pre-disciplinary conference was to be held on February 8, 1999, to allow Petitioner the opportunity to respond to the previously-discussed allegations of “unsatisfactory job performance” involving the alleged falsification of employee time sheets and failure to provide credit for actual hours worked by employees; and “unacceptable personal conduct” for alleged disruption of work by generating and spreading false and inflammatory statements about fellow employees and supervisors, and failure to comply with direct orders from Mr. Jerry Gaskill.

The memo stated in part, “[t]he type of disciplinary action being considered is demotion to Ferry Crew Member I or other appropriate action.” The memo also advised Petitioner that if he failed to appear at the pre-disciplinary conference, disciplinary action would be taken without Petitioner’s input (Respondent’s Exh. 4).

24. By letter dated February 1, 1999, Petitioner’s attorney, Mr. David P. Voerman, requested more specific details regarding the allegations against Petitioner which were to be discussed at the pre-disciplinary conference. (Petitioner’s Exh. 2).

25. By memorandum dated February 5, 1999, Mr. Gaskill replied to Mr. Voerman’s request, detailing the allegations against Petitioner as spreading false and/or inflammatory statements, failure to comply with direct orders, and unauthorized alteration of employee time sheets. (Petitioner’s Exh. 3). These allegations were the same allegations Mr. Gaskill had already discussed with Petitioner in January 1999.

26. On February 8, 1999, Mr. Gaskill conducted a pre-disciplinary conference with Petitioner, and Mr. James Piner. Mr. Gaskill reviewed the allegations against Petitioner again, and gave Petitioner the opportunity to respond to each allegation again.

27. Mr. Gaskill had already investigated these allegations. Based upon his interviews with some Pamlico River employees, Mr. Gaskill felt Petitioner lacked the ability to lead the Pamlico River operation as operations manager given what had happened there, and given the total distrust of Petitioner by those at that operation. (T pp 78-79, 115)

28. After his interviews with Pamlico River employees, Gaskill decided that Petitioner’s “performance on some things were not up to par as they should have been . . . his performance, distrust, he caused disruption in the workplace.” (T pp 79-80) He considered Petitioner’s removal “as Operations Manager as something we had to do for the better of that operation.” (T p 80) and something that “was completely necessary for him to do that, for the transfer.” (T p 115)

29. The February 8, 1999 meeting lasted approximately 1½ – 2 hours. Mr. Gaskill, Petitioner and Mr. James Piner discussed at length, Gaskill’s findings in talking with the Pamlico River employees. They also examined the time cards at issue. During the conference, Petitioner stated that all he wanted was a job working for the state, he would “go anywhere” and “do anything”, and asked Mr. Gaskill to find him another job. Petitioner indicated he would transfer to another job or another state agency.

According to Mr. Gaskill, Petitioner “seemed very upset and anxious, he said he’d be willing to quit, go home, because he was tired, if he could draw unemployment.” (T pp 96-97) Mr. Gaskill concluded the meeting by informing Petitioner that he would be in touch with him in the next couple of days.

30. From February 8, 1999 through March 8, 1999, Petitioner remained on investigatory leave with pay while Mr. Gaskill continued to gather information about the allegations against Petitioner. (T p 127)

31. On March 8, 1999, Mr. Gaskill met with Petitioner again about his work status and about releasing Petitioner from investigatory placement with pay. Ms. Connie Noe was also present during this meeting. After reviewing all the facts and listening to all the evidence, Mr. Gaskill thought “that there was some action that had to be taken.” (T p 129) Mr. Gaskill advised Petitioner that it was in the best interest of the Ferry Division to “transfer” Petitioner to some other position within the Ferry Division effectively immediately. Petitioner again said that he’d go anywhere as long as he could stay with the state. (T p 309-310)

After some discussion, Mr. Gaskill and Petitioner talked about the possibility of Petitioner being assigned to the dredge at Cherry Branch. Mr. Gaskill explained that he could transfer Petitioner to the dredge, but he would still retain his current classification, pay grade, and salary. As a result of their discussion, Mr. Gaskill told Petitioner that he would be transferred to the Dredge Carolina effective Wednesday, March 10, 1999.

32. By letter dated March 8, 1999, Mr. Gaskill confirmed Petitioner's "transfer" to the Dredge Carolina and advised Petitioner that he would be working a rotating shift of seven days on and seven days off, 11.5 hours each day. (Petitioner's Exh. 4)
33. By letter dated March 17, 1999, Petitioner's attorney notified Mr. Gaskill that Petitioner was appealing his transfer to the Dredge Carolina. Petitioner stated that he had not agreed to the transfer and that the transfer was actually a demotion. (Petitioner's Exh. 5).
34. On April 19, 1999, Petitioner met with Bill Moore, Assistant Director of Field Maintenance and Dredge, about his work assignment. Mr. Moore and Petitioner discussed Petitioner's experience and what duties he could perform on the dredge. Moore decided that Petitioner's duties would be cooking, cleaning, chipping, and painting. They also discussed Petitioner's work schedule. Petitioner was to begin his assignment to the dredge on April 21, 1999. Mr. Moore memorialized all this information in a memorandum to Petitioner and Petitioner signed his signature on this memorandum. (Respondent's Exh. 6; T pp 355-361)
35. On or about April 21, 1999, the day that Petitioner began working on the dredge, Mr. Gaskill conducted a meeting with the dredge's crew. Present at this meeting were "Captain O'Neill, "Thomas", Doug Bateman, Bill Moore, Petitioner, and other crew members". Mr. Gaskill told the crew "you all have a new crew member. His name is Forrest. He's not a nice person. He's liable to have a tape recorder or videotape. He's a liar. And if you have trouble with him, I'll put him off the boat." (T 156-157) Petitioner responded to Mr. Gaskill that he was not that kind of person.
36. At the administrative hearing, Mr. Gaskill "did not deny that I did not say (to the dredge crew on April 21st) that Roger has lied". (T p 122)
37. After Petitioner was transferred to work on the Dredge Carolina, an emergency situation caused the dredge to be moved to Hatteras Inlet. Hatteras Inlet was located more than 35 miles from Petitioner's original workstation at Pamlico River. (T p 102).
38. Once the Dredge Carolina was moved to Hatteras Inlet, Petitioner worked primarily as a deckhand. As a Ferry crew member/deckhand, Petitioner cleaned the dredge and worked on the small boats with other deckhands, hooking up the pipeline. His primary assignment was at the spoil site, where the discharge pipe actually pumped material into the containing area. Petitioner was in charge of watching the discharge pipe to insure the system did not leak. He carried a radio so he could communicate with the crew and had a pickup truck nearby. (T p 368) Petitioner did not have any administrative or supervisory duties as a Ferry Crew Member I/deckhand.
39. Between March 10, 1999 when he was assigned to the dredge, and June 30, 1999 when he was transferred back to Pamlico River, Petitioner worked approximately "twenty something days" on the dredge. (T pp 310, 362)
40. On May 25, 1999, an Employee Relations Committee ("ERC") conducted a hearing concerning Petitioner's transfer to the dredge, pursuant to DOT's internal grievance policy, section 1.1(B). That section provides, "Lateral transfers made by management are not grievable, unless the grievant is transferred more than 35 miles from his/her workstation." The ERC submitted a recommendation to the Secretary of Transportation, which included in part that Petitioner not be returned to his former position as Operations Manager at Pamlico River.
41. By letter dated June 7, 1999, Deputy Secretary Daniel H. DeVane notified Petitioner that: (1) his grievance was considered as being based on a lateral transfer more than 35 miles from his original workstation; (2) his grievance was not considered as a disciplinary demotion because the transfer did not result in his receiving a reduction in salary and/or pay grade; (3) Petitioner nevertheless would be transferred back to Pamlico River at his present classification, salary, and pay grade, however his job assignments might not include all duties previously assigned to him; and (4) the transfer back to Pamlico River was effective June 26, 1999. (Respondent's Exh. 7; T p 41).
42. By letter dated June 21, 1999, Mr. Gaskill notified Petitioner that he was transferred back to Pamlico River effective June 30, 1999 to work as a Ferry Crew Member I. Mr. Gaskill placed Petitioner back in the Operation Manager position at Pamlico River because his "findings had proved to me that Mr. Forrest could not handle that operations, or any operation in a managerial position. His actions had proved it to me that he was not responsible enough at that time to do to that." (T p 46) Neither did Petitioner agree to go back to Pamlico River operation as a Ferry Crew Member I.
43. Around June 22 or 23rd, 1999, before Petitioner was scheduled to begin work at Pamlico River operation on June 30, 1999, Mr. Gaskill held a "Captains" meeting at the Pamlico River operation. Also in attendance were Captain Ralph Lawrence, Mr. Jimmy Piner, Operations Manager Charlie Piner, Captains Jim Paul and Seth Sawyer, Captain Ben Wilkins, and Mates Bob Moore and Roger Credle. Mr. Gaskill told all those present that "he would rather have his balls cut out rather than tell us that Roger Forrest was returning to Pamlico River." (T p 265, 390)
44. After being transferred back to the Pamlico River operation in June 30, 1999, Petitioner worked as a deckhand for Captain Ben Wilkins for approximately 10 months. The crew deckhands' primary responsibilities were to load and unload traffic in a safe

manner, provide courteous and friendly service to the traveling public, and clean the entire dredge vessel. (T p 270) Petitioner performed these duties while working as a deckhand. At the time of this administrative hearing, Petitioner reported to Captain Seth Sawyer.

45. When Petitioner began working as a ferry crew member/deckhand at Pamlico River, his uniform changed from the one he wore as an Operations Manager. As an Operations Manager, Petitioner wore bars on his shoulders and wore a Captain's hat with star designs. However, in June 1999, Charlie Piner made Petitioner remove the bars from his shoulders and wear a different hat; that is, Petitioner was required to wear a ferry crew member's uniform. (T p 268) Mr. Piner had Petitioner make this change to prevent any confusion between crew members and/or the public as to what was Petitioner's assignment or job.

46. In comparison to his Ferry Crew Member I position, Petitioner was the sole Operations Manager at the Pamlico River operation for 4 ½ years. The Operations Manager position was a managerial and supervisory position whose duties were primarily clerical and administrative in nature. Petitioner's duties included scheduling crew members, preparing time sheet information for payroll for all Pamlico River employees, and supervising, disciplining and assigning duties for all shore and support employees. Petitioner performed his duties solely onshore or land. As Operations Manager, Petitioner only reported to Mr. Gaskill.

47. Through Captains Lawrence and Charlie Piner, Respondent presented evidence that numerous ferry division employees often perform duties outside their assigned positions. The employees perform duties outside their assigned job "depending on the need and necessity". (T p 378) During Captain Lawrence's tenure with the Ferry Division, he has chocked cars, painted, etc. (T pp 340-41). According to Captain Lawrence, "If I wanted a man to do work outside of a job description, he'd better damn well do it, because it's a reasonable assumption for him to do it, I mean, a reasonable thing to ask." (T p 341-342)

Similarly, since March 1999, Captain Charlie Piner has executed the duties of the lower pay grade position of Operations Manager at Pamlico River. He indicated that most employees at Pamlico River have performed duties outside of their job classifications "to make sure the ferries are crewed properly, that we have qualified personnel on the vessel, and . . . to try to save expenses for the state. (T p 379) Captain Piner has helped load the vessel, chocked cars, performed deckhand duties, washed the buildings, cut grass, and painted. In fact, he performed deckhand duties as his sole job for four months in the wintertime. (T pp 375-79, 388).

48. The difference in Captain Charlie Piner and Captain Lawrence's situations versus Petitioner's situation is that the Captains retained their assigned job titles, positions, and authority as Captains. Neither Lawrence nor Piner were permanently moved into the lower grade positions. Most importantly, they agreed to temporarily perform duties outside their assigned positions to ensure the overall ferry operations ran smoothly. (T p 379)

On the other hand, Petitioner was permanently moved into another position of a lower grade, and permanently performed duties of Ferry Crew Member I or deckhand. Petitioner no longer retained any supervisory authority over any personnel, and thus did not assign duties or schedules to any personnel. He was permanently moved from a position at the top of the command chain to a position at the bottom of the command chain. Petitioner had no choice if he wanted to perform any duties different than his assigned duties.

49. Both times Petitioner was transferred and/or moved back into the Ferry Crew Member I position, Petitioner's classification as Operations Manager, salary, and pay grade remained the same. No standard PO-500 form, that is completed when any official personnel action is taken, was completed to change Petitioner's title. (T pp 46, 79-80, 109-15, 207). Respondent did not send Petitioner an official "dismissal" letter when he was transferred to be a Ferry Crew Member on the Dredge Carolina.

50. It is irrelevant that Petitioner did not possess an ordinary seaman's license or a special United States Coast Guard certification. Those facts played no part in Mr. Gaskill's decision to remove Petitioner from his Operations Manager and into the Ferry Crew Member I position.

51. At the administrative hearing, Mr. Gaskill maintained his same opinion why he transferred Petitioner to be a Ferry Crew Member I on the Dredge Carolina, and kept Petitioner as a Ferry Crew Member I when he was transferred back to the Pamlico River operations pursuant to his internal grievance hearing. Gaskill acknowledged that his:

position stays the same as when this took place. Mr. Forrest could not lead that operations with the things that happened there, with the distrust that there was at that operations, . . . when I found things going wrong and when I finally uncovered it, is when I had to take the necessary action. . . I was hoping he could come back to work in the job we put him in, work his way back up, build the trust, and then we could work something out better for him. (T p 79-80)

Age & Handicapping Condition Claims

52. Petitioner's application for employment for the Ferry Operations Supervisor position indicates that he was 54 years old when he applied for the job. (Respondent's Exh. 1). He was subsequently hired for the position two days before his 55th birthday. (Stipulated Fact).

53. On March 9, 1999, the day before Petitioner was to report to the dredge, his attorney faxed a note from Pamlico Internal Medicine Associates, Inc. ("Pamlico Internal Medicine") to the Ferry Division. The note indicated that Petitioner needed to be off until March 23, 1999 for "secondary back pain," and that he would be re-evaluated at that time. (Respondent's Exh. 10A-10B). Petitioner was placed on sick leave. (Respondent's Exh. 10C).

54. On March 22, 1999, the Ferry Division received another faxed note from Pamlico Internal Medicine dated March 19, 1999. This note indicated that Petitioner needed to be at home until April 6, 1999, when he could be re-evaluated. (Respondent's Exh. 11A).

55. On April 9, 1999, Mr. Gaskill sent Petitioner a letter indicating that because he had not received any further information from Petitioner's physician, Petitioner was expected to return to work on April 15, 1999. (Respondent's Exh. 11B).

56. On April 14, 1999, Petitioner's attorney faxed another written note from Petitioner's physician to the Ferry Division. The note stated that Petitioner needed to be off until April 19, 1999, when he would be re-evaluated. (Respondent's Exh. 12A-12C). By note from Pamlico Internal Medicine dated April 18, 1999, Petitioner was released to work as of April 21, 1999. (Respondent's Exh. 12D).

57. On April 19, 1999, Petitioner met with Bill Moore, and discussed his work assignment, specific duties and schedule. (Respondent's Exh. 6; T pp 355-361).

58. Petitioner never advised Bill Moore that he had any health problems. (T p 358).

59. The average age of dredge employees is in the upper forties. There is one employee who is 62 years old, and another who is "right at 60 years old," and a third who is probably around 56 or 57 years old. (T p 360).

60. On April 27, 1999, the Ferry Division received a fax from Pamlico Internal Medicine stating that Petitioner was under a physician's care for lower back pain and should not be doing any vigorous physical work. The note further stated that Petitioner needed to rest at home for several days and that he would be re-evaluated. (Respondent's Exh. 13A-13B).

61. On May 4, 1999, Petitioner reported to Mr. Moore's office to pick up the van to proceed to work on the dredge. Mr. Moore asked for a return to work statement from his doctor. Petitioner called his physician, and he faxed a note from Pamlico Internal Medicine stating, "Mr. Forrest may return to work. Limited to light duty with no heavy lifting." (Respondent's Exh. 14A-14B).

Mr. Moore informed Petitioner that he needed more specific information about how much weight Petitioner could lift. Petitioner's attorney then faxed another note from Petitioner's physician to Mr. Moore stating that Petitioner "can return to work but no lifting over 40 pounds." (Respondent's Exh. 14C; T p 363). Because there were no job duties in maintenance or on the dredge in which Petitioner would not have to lift more than 40 pounds, Mr. Moore and Petitioner agreed that Petitioner would remain on sick leave until he could work without restriction. (Respondent's Exh. 14D).

62. On May 10, 1999, Petitioner advised Mr. Moore that he wanted to get back to work and would be returning on May 11, 1999. (Respondent's Exh. 15; T p 364).

63. On June 12, 1999, Petitioner called Mr. Moore at home. Petitioner told Moore that he left the dredge the day before because of anxiety, and had taken a nitroglycerin pill for of his anxiety. (Respondent's Exh. 16). Mr. Moore asked Petitioner to fax a note to him from Petitioner's doctor explaining his condition.

64. On June 21, 1999, a note dated June 17, 1999 was faxed from Pamlico Internal Medicine to the Ferry Division stating, "This patient is released for return to work on 6/21/99 for normal duties without restrictions." (Respondent's Exh. 17; T p 365).

65. Mr. Gaskill was not aware of Petitioner having any medical conditions other than his back problems. Mr. Gaskill never even knew that Petitioner took a nitroglycerin tablet at work, until after the internal grievance hearing. (T pp 39, 68, 108).

66. Petitioner admitted that he has no handicapping condition, but was merely assigned duties that were so tough that it put stress on him.

67. Petitioner claims that he has high blood pressure and takes medication for it. However, Petitioner never provided any medical documentation supporting that claim.

68. Petitioner admitted he never informed Mr. Gaskill that he had a heart attack in the past.

(T pp 173-76).

69. Petitioner failed to present sufficient credible evidence that his high blood pressure and past heart attack was a handicapping condition and that Respondent and its Ferry Division employees discriminated against him because of his high blood pressure or past heart attack.

70. Petitioner has no prior written warnings concerning job performance related matters and has no prior disciplinary actions taken against him as recognized under the North Carolina Administrative Code.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and received notice of the hearing in this matter.
2. Petitioner is a "career state employee" because she has been continuously employed by the State in a position subject to the State Personnel Act for the immediate twenty-four preceding months. N.C. Gen. Stat. § 126-1.1 and -5.
3. Because Petitioner is a career state employee, the State Personnel Commission (SPC) and the Office of Administrative Hearings (OAH) have jurisdiction over Petitioner's claims that (1) Respondent demoted Petitioner, (2) Respondent discriminated against Petitioner based on his age, and (3) Respondent discriminated against Petitioner based on a qualified handicapping condition.
4. N.C. Gen. Stat. § 126-35 provides:
 - (a) No career state employee subject to the State Personnel Act, shall be . . . demoted for disciplinary reasons, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting for the in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. . . .
 - (b) Notwithstanding any other provision of this Chapter, a reduction in pay of position which is not imposed for disciplinary reasons shall not be considered a disciplinary action within the meaning of this Article. Disciplinary actions, for the purposes of this Article, are those actions taken in accordance with the disciplinary procedures adopted by the State Personnel Commission and specifically based on unsatisfactory job performance, unacceptable personal conduct or a combination of the two.
5. The State Personnel Act does not define the word "demotion." However, Title 25 of the North Carolina Administrative Code defines "demotion" as follows:

Demotion or reassignment is a change in status downward resulting from assignment to a position at a lower salary grade. If the change results from inefficiency in performance or as a disciplinary action, the action is considered a demotion. If the change results from a mutual agreement between the employee and employer, the action is considered a reassignment.

25 N.C. Admin. Code 1D .0401 (1999).

6. In addition, 25 N.C. Admin. Code 1D .0611(e) addresses reallocation and compensation of a position, including the following provision:
 When an employee's position is assigned to a lower grade, one of the following options will be implemented:
 - (1) When reduction in the level of position results from management's removal of duties and responsibilities from the employee because of change in demonstrated motivation, capability, acceptance of responsibility, or lack of performance, the effect is the same as a demotion and the salary must be reduced at least to the maximum as required by the policy on demotion.

7. In *Gibbs v. Dep't of Human Resources*, 77 N.C. App. 606, 611, 335 S.E.2d 924 (1985), the Court of Appeals determined that a demotion does not occur where there is no change downward in a position to a lower pay grade or salary. In stressing this point, the Court reasoned that they did not believe the General Assembly, in writing N.C. Gen. Stat. § 126-35, intended a person who had fewer responsibilities after a reorganization could claim a reduction in position under N.C. Gen. Stat. § 126-35 when that person had not also received a lower pay grade.

8. This case differs from *Gibbs* in two respects. First, the language in N.C. Gen. Stat. § 126-35 has slightly changed since the *Gibbs* ruling in that N.C. Gen. Stat. § 126-35 now uses the words "demoted for disciplinary reasons," instead of "reduced in pay or position." Secondly, and most importantly, the circumstances in this case do not involve a department's reorganization. Instead, this

case is about transferring one person to intentionally discipline that person for his own unsatisfactory job performance, and as part of Mr. Gaskill's own personal dislike for the Petitioner.

9. Mr. Gaskill claimed that he transferred Petitioner to a Ferry Crew Member I position on the Dredge Carolina and later placed Petitioner in the same position back at Pamlico River for "the better of the operation" and because Petitioner had caused "disruption" in the Pamlico River operation. However, the real reasons Petitioner was placed in the Ferry Crew Member I position originally, and subsequently, were the same reasons Mr. Gaskill held a pre-disciplinary conference on February 8, 1999---- to discipline Petitioner for his unsatisfactory job performance as an operations manager.

10. Respondent's transfer of Petitioner from an Operation Manager position to a Ferry Crew Member I position, and subsequent placement in that same position at Pamlico River, occurred as a direct result of the proposed disciplinary action set forth against Petitioner in the January 29, 1999 pre-disciplinary letter. Mr. Gaskill confronted and discussed with Petitioner, his job performance as operations manager in January 1999, at the February 8, 1999 pre-disciplinary conference, and again on March 8, 1999. In the predisciplinary letter, Gaskill notified Petitioner that the "type of disciplinary action being considered was demotion to Ferry Crew Member I or other appropriate action," and that "disciplinary action will be taken without your input" if Petitioner failed to appear at the pre-disciplinary conference.

11. Mr. Gaskill later admitted that the "action" taken (meaning the transfer to the dredge) was necessary, because Petitioner was not doing his job at the Pamlico River operation, and Petitioner was the focal point or cause of the problems there. Mr. Gaskill discussed what action to take against Petitioner with numerous people including Petitioner's immediate supervisor Mr. Jimmy Piner and the Assistant Director Captain Lawrence. In the end, the reasons Petitioner was transferred for, were the exact same reasons set forth in the pre-disciplinary conference letter and discussed with Petitioner at the pre-disciplinary conference. The preponderance of the evidence clearly shows that Mr. Gaskill transferred Petitioner to the Ferry Crew Member I position, a position of a lower salary grade, to discipline Petitioner for his unsatisfactory and inefficient job performance.

12. An inquiry into Respondent's motive or intent with respect is "an unavoidable part of the process" of determining whether her was in fact demoted. See Corum v. University Of North Carolina, 330 N.C. 761, 777, 413 S.E.2d 276, 286 (1992) The preponderance of the substantial evidence demonstrates that Mr. Gaskill intentionally placed Petitioner in the Ferry Crew Member I position to discipline Petitioner and because Gaskill personally disliked Petitioner. The language and tone Gaskill used when he spoke about the Petitioner at the Captains meetings, and to the dredge crew particularly demonstrated Gaskill's intention in transferring Petitioner, and Gaskill's dislike for Petitioner. Gaskill wanted Petitioner to have to "work his way back up" and rebuild others' trust, thus, intentionally disciplining Petitioner for his prior unsatisfactory performance and actions.

13. Petitioner's transfer to Ferry Crew Member I at the Dredge Carolina and subsequently back at Pamlico River, constituted a "change in status downward resulting from a position at a lower salary grade." While Petitioner's position title, pay and salary remained the same, Petitioner's duties changed completely. He moved from a supervisory position at the top of the command chain to the lowest position in the chain of command. Instead of supervising personnel and only having to report to the Director of the entire Ferry Division, Petitioner performed deckhand duties such as cleaning and parking, whatever duties his Captain assigned him, and reported to those he used to report to him. Mr. Charlie Piner made Petitioner change his uniform so the public and Petitioner's coworkers would know what position of command, and ultimately, of authority Petitioner was acting in.

14. The preponderance of the evidence shows that Respondent forced Petitioner to agree to a transfer to anywhere as long as he remained a state employee. First, Mr. Gaskill and Captain Lawrence confronted Petitioner in a tense and stressful atmosphere and manner, and strongly encouraged Petitioner to resign. Next, Mr. Gaskill and his employees again confronted Petitioner. They coerced Petitioner into agreeing to "go anywhere" as long as he remained a state employee and kept his job. Then they sent Petitioner the pre-disciplinary letter that suggested possible "action was demotion or other appropriate action," and "disciplinary action will be taken without your input" even if Petitioner didn't attend the pre-disciplinary conference. Lastly, Jimmy Piner told Petitioner "give me your keys and go home." All these statements taken together coerced Petitioner and forced him to agree to a transfer to the dredge, and subsequently replacement at Pamlico River in a the Ferry Crew Member I position.

15. Based upon all the foregoing, and ultimately, Petitioner's transfer to the Dredge Carolina, and subsequent placement at Pamlico River, constituted a "demotion" of Petitioner for disciplinary reasons for Petitioner's unsatisfactory job performance as an Operations Manager. Such demotion was accomplished without just cause.

16. Respondent demoted Petitioner without following the proper procedures required under the State Personnel Manual.

17. There was no competent evidence presented at the hearing addressing any issue relating to age discrimination. Quite to the contrary, Petitioner had been hired by the DOT when he was more than 40 years old and was thereafter subject to promotions. Therefore, Petitioner has not met his burden of showing any age discrimination.

18. Petitioner has not met his burden of showing that he was transferred or that his job duties were reassigned because of any kind of handicapping condition or disability. In fact, Petitioner admitted during the hearing that he does not have any kind of

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handicapping condition or disability under the law. Petitioner's only evidence at the hearing relating to health problems was as follows: (1) the doctor's notes provided to the DOT Ferry Division concerning back pain (which were subsequent to his transfer to the dredge and the condition was cured because he was released to work by his treating physician); and (2) Petitioner's testimony that he sometimes has to take nitroglycerin tablets for heart problems.

19. Respondent did not discriminate against Petitioner because of his age or a handicapping condition in violation of the State Personnel Act.

RECOMMENDED DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby recommends that:

1. The State Personnel Commission **REVERSE** Respondent's decision to demote Petitioner, and reinstate Petitioner to his previous position, or some equivalent position with all the benefits of continued state employment since March 10, 1999.
2. Petitioner be granted all attorney's fees and costs in respect to this matter.
3. Petitioner be provided any other relief to which he is entitled under the State Personnel act for his improper demotion.

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 N.C. Gen. Stat. § 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. N.C. Gen. Stat. § 150B-36(a).

The agency is required by N.C. Gen. Stat. § 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 24th day of August, 2000.

Melissa Owens Lassiter
Administrative Law Judge