

NORTH CAROLINA

IN THIS ISSUE



REGISTER

Volume 17, Issue 9
Pages 842 - 932

November 1, 2002

This issue contains documents officially filed through October 11, 2002.

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North Carolina Register is published semi-monthly for \$195 per year by the Office of Administrative Hearings, 424 North Blount Street, Raleigh, NC 27601. *North Carolina Register* (ISSN 15200604) to mail at Periodicals Rates is paid at Raleigh, NC. POSTMASTER: Send Address changes to the *North Carolina Register*, 6714 Mail Service Center, Raleigh, NC 27699-6714.

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
3	Auditor	Athletic Trainer Examiners	3
4	Commerce	Auctioneers	4
5	Correction	Barber Examiners	6
6	Council of State	Certified Public Accountant Examiners	8
7	Cultural Resources	Chiropractic Examiners	10
8	Elections	Employee Assistance Professionals	11
9	Governor	General Contractors	12
10	Health and Human Services	Cosmetic Art Examiners	14
11	Insurance	Dental Examiners	16
12	Justice	Dietetics/Nutrition	17
13	Labor	Electrical Contractors	18
14A	Crime Control & Public Safety	Electrolysis	19
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NORTH CAROLINA REGISTER
Publication Schedule for January 2002 – December 2002

Filing Deadlines			Notice of Rule-Making Proceedings	Notice of Text							Temporary Rule
volume & 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	
16:13	01/02/02	12/06/01	03/15/02	01/17/02	02/01/02	02/20/02	05/28/02	03/04/02	03/20/02	05/28/02	09/29/02
16:14	01/15/02	12/19/01	04/01/02	01/30/02	02/14/02	02/20/02	05/28/02	03/18/02	03/20/02	05/28/02	10/12/02
16:15	02/01/02	01/10/02	04/15/02	02/16/02	03/04/02	03/20/02	05/28/02	04/02/02	04/22/02	01/29/03	10/29/02
16:16	02/15/02	01/25/02	05/01/02	03/02/02	03/18/02	03/20/02	05/28/02	04/16/02	04/22/02	01/29/03	11/12/02
16:17	03/01/02	02/08/02	05/01/02	03/16/02	04/01/02	04/22/02	01/29/03	04/30/02	05/20/02	01/29/03	11/26/02
16:18	03/15/02	02/22/02	05/15/02	03/30/02	04/15/02	04/22/02	01/29/03	05/14/02	05/20/02	01/29/03	12/10/02
16:19	04/01/02	03/08/02	06/03/02	04/16/02	05/01/02	05/20/02	01/29/03	05/31/02	06/20/02	01/29/03	12/27/02
16:20	04/15/02	03/22/02	06/17/02	04/30/02	05/15/02	05/20/02	01/29/03	06/14/02	06/20/02	01/29/03	01/10/03
16:21	05/01/02	04/10/02	07/01/02	05/16/02	05/31/02	06/20/02	01/29/03	07/01/02	07/22/02	01/29/03	01/26/03
16:22	05/15/02	04/24/02	07/15/02	05/30/02	06/14/02	06/20/02	01/29/03	07/15/02	07/22/02	01/29/03	02/09/03
16:23	06/03/02	05/10/02	08/15/02	06/18/02	07/03/02	07/22/02	01/29/03	08/02/02	08/20/02	01/29/03	02/28/03
16:24	06/17/02	05/24/02	09/03/02	07/02/02	07/17/02	07/22/02	01/29/03	08/16/02	08/20/02	01/29/03	03/14/03
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17:02	07/15/02	06/21/02	09/16/02	07/30/02	08/14/02	08/20/02	01/29/03	09/13/02	09/20/02	01/29/03	04/11/03
17:03	08/01/02	07/11/02	10/01/02	08/16/02	09/03/02	09/20/02	01/29/03	09/30/02	10/21/02	01/29/03	04/28/03
17:04	08/15/02	07/25/02	10/15/02	08/30/02	09/16/02	09/20/02	01/29/03	10/14/02	10/21/02	01/29/03	05/12/03
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17:10	11/15/02	10/25/02	01/15/03	11/30/02	12/16/02	12/20/02	05/00/04	01/14/03	01/21/03	05/00/04	08/12/03
17:11	12/02/02	11/06/02	02/03/03	12/17/02	01/02/03	01/21/03	05/00/04	01/31/03	02/20/03	05/00/04	08/29/03
17:12	12/16/02	11/21/02	02/17/03	12/31/02	01/15/03	01/21/03	05/00/04	02/14/03	02/20/03	05/00/04	09/12/03

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 after the first or fifteenth 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.

**EXECUTIVE ORDER 30
AMENDING EXECUTIVE ORDER NO. 113
ISSUED BY GOVERNOR JAMES B. HUNT, JR.
CONCERNING MERIT-BASED HIRING PROCESS**

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

Executive Order No. 113, issued by Governor James B. Hunt, Jr., on June 12, 1997, is hereby amended as follows:

WHEREAS, the State of North Carolina has a responsibility to provide efficient and effective services to its citizens with a productive and professional state workforce; and,

WHEREAS, the citizens and the state government workforce deserve strong assurances that skills, knowledge and merit are the basis for state government hiring decisions, not political patronage; and,

WHEREAS, there is a continuing need for a merit-based hiring system designed to bring only the most qualified people into state government;

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

Section 1. Policy.

Each State cabinet agency shall maintain a process for the recruitment and selection of the most qualified candidates for employment based upon specific job related knowledge, skills and abilities.

Section 2. Administration.

The process shall ensure that candidates selected best meet the needs of the agency. The selection process shall be administered without regard to political affiliation or influence.

The process designed by the agencies shall be submitted to the Office of State Personnel for review and to the State Personnel Commission for approval. All agency recruitment and selection processes shall:

- a. Comply with all existing state and federal laws, policies and rules governing personnel actions;
- b. Ensure full and fair consideration of all citizens without regard to race, religion, color, creed, national origin, sex, age, disability or political affiliation/influence; and,
- c. Comply with contemporary human resource practices and with any procedural guidelines designed by the Office of State Personnel.

Section 3. Agency Plan.

The plan shall include standard elements of a recruitment and selection process including but not limited to:

- a. Pre-recruitment and recruitment activities:
 - (1) assess need for position;

- (2) assess responsibilities and level of position;
- (3) identify the specific knowledge, skills and abilities required;
- (4) determine recruitment method, time frame and locations; and,
- (5) develop and implement the recruitment plan.

- b. Evaluating and categorizing applications:
 - (1) applications evaluated and categorized based on the specific knowledge, skills and abilities;
 - (2) identify the most qualified applicants; and
 - (3) where tests are used to evaluate and categorize candidates, such tests shall comply with all requirements of state and federal law.
- c. Selection process based solely upon merit:
 - (1) consultation between the selection supervisor or manager and personnel professionals in utilizing a final selection process that is objective and based upon job related knowledge, skills and abilities;
 - (2) the successful applicant must be selected from the pool of most qualified applicants; and,
 - (3) the selection process shall appropriately consider all existing state and federal laws and rules applicable to the selection.

Section 4. Duties of Office of State Personnel.

The Office of State Personnel shall provide guidelines to agencies in designing a recruitment and selection process that selects employees based upon the process outlined in this Order. The Office of State Personnel shall monitor agency compliance with this Order.

Section 5. Duties of the State Personnel Commission.

The State Personnel Commission shall review for approval all recruitment and selection processes that comply with:

- a. Provisions of this Order; Existing federal and state laws and rules;
- b. Any procedural guidelines designed by the Office of State Personnel; and
- c. Contemporary human resource practices.

This Executive Order is effective immediately.

Done in the Capital City of Raleigh, North Carolina this the 24th day of September, 2002.

Michael F. Easley
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

**EXECUTIVE ORDER NO. 31
EXTENDING EXECUTIVE NO. 27**

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

Executive Order No. 27, Proclamation of State Disaster for the City of Cherryville, City of Shelby and the Cleveland County Sanitary District, Excluding the City of Kings Mountain, is hereby extended until October 30th, 2002.

This order is effective 12:01 a.m. October 1st 2002.

Done in the Capital City of Raleigh, North Carolina, this the 30th day of September 2002.

MICHAEL F. EASLEY
GOVERNOR

ATTEST:

ELAINE F. MARSHALL
SECRETARY OF STATE

**EXECUTIVE ORDER NO. 32
NC COMMISSION ON BUSINESS LAWS AND
THE ECONOMY**

WHEREAS, the State of North Carolina is committed to developing a strong economy for the people of the State, to increasing the ability of North Carolina's people, communities, and enterprises to compete successfully in an increasingly competitive marketplace, and to ensuring the long-term economic prosperity and quality of life for the citizens of the State; and

WHEREAS, there is no other state government organization, board or commission dedicated exclusively to a comprehensive study of state statutes, court opinions, and agency rules and regulations affecting the operation of business for the purposes of.

- (1) ensuring that existing statutes, rulings, rules and regulations are supportive of sound and ethical purposes, are meaningful in the light of changing business and legal environments, and are necessary and relevant, and
- (2) determining whether new statutes, rules and regulations may be needed to help assure that North Carolina maintains a legal environment which provides the flexibility and support to allow businesses to operate ethically and successfully in the State and to attract them to locate here; and

WHEREAS, building the long-term economic security and capacity for the people, communities, and enterprises of North Carolina requires concerted, coordinated and cooperative effort by those who determine state laws, rules and regulations and those who work in private enterprise and bear the responsibility of operating businesses in the State consistent with said laws, rules and regulations;

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

Section 1. Establishment and Composition.

The North Carolina Commission on Business Laws and the Economy is hereby established. The Commission shall be composed of thirty-three members, appointed by the Governor as follows:

- (1) Twelve members representing public and private corporations.
- (2) Eleven practicing attorneys in the State of North Carolina who, as the primary focus of their practice, represent public and private corporations, and one of whom shall serve as Reporter for the Commission.
- (3) One member of the North Carolina House of Representatives.
- (4) One member of the North Carolina State Senate.
- (5) The Attorney General, or his or her designee.
- (6) The Secretary of the Department of Commerce, or his or her designee.
- (7) The Secretary of State, or his or her designee.
- (8) The Lieutenant Governor, or his or her designee.
- (9) The chair of the North Carolina Economic Development Board, or his or her designee.
- (10) The chair of the Business Section of the North Carolina Bar Association, or his or her designee.
- (11) The Chair of North Carolina Citizens for Business and Industry, or his or her designee.
- (12) The Governor's Legal Counsel. Members shall serve at the pleasure of the Governor. The Attorney General shall serve as Chair of the Commission.

Section 2. Purposes and Duties.

The purposes of the Commission are to recommend to the North Carolina General Assembly any needed changes in existing statutes and regulations which affect the operation of businesses in North Carolina, particularly Chapter 55 of the North Carolina General Statutes entitled "The North Carolina Business Corporation Act," and to recommend any needed new statutes, rules and regulations designed to assure that North Carolina offers a legal environment which protects and promotes economic stability for the people of the State, and which provides the flexibility and support to allow businesses to operate ethically and successfully in the State and which will attract them to locate and incorporate here.

EXECUTIVE ORDERS

The Commission shall, in the performance of its duties:

- (1) Gather and study such data and information as may be necessary and useful for accomplishing the purposes of this Commission.
- (2) Work cooperatively with other boards, commissions, and entities and take maximum advantage of their resources and activities that can provide useful information and insight to the purposes of this Commission.
- (3) Prepare an annual report on its findings and recommendations for presentation to the Governor and the General Assembly.

Section 3. Meetings.

The Commission shall meet at least once each quarter and may hold special meetings at anytime at the call of the Chair.

Section 4. Support.

Administrative and other support for the Commission shall be provided by the North Carolina Attorney General. Also, each state agency cooperating in the work of the Commission may provide additional funds from its own budget to support the Commission.

This Executive Order shall be effective immediately.

Done in the Capital City of Raleigh, North Carolina, this the 4th day of October, 2002.

Michael F. Easley
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

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

TITLE 2 - DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

CHAPTER 09 - FOOD AND DRUG PROTECTION DIVISION

SUBCHAPTER 09L - PESTICIDE SECTION

SECTION .1000 - AERIAL APPLICATION OF PESTICIDES

NOTICE OF TEXT CORRECTION

In the October 1, 2002 *Register* (Volume 17, Issue 7, pages 580-584) the Pesticide Board published a Notice of Text of proposed amendments to 02 NCAC 09L, Section .1000 – Aerial Application of Pesticides. The Notice stated that comments would be received through October 31, 2002. Comments will continue to be received until the date of a public hearing on November 12, 2002. Please refer to the October 1 Notice for further information.

U.S. Department of Justice

Civil Rights Division

JDR:RPL:ALP:jdh
DJ 166-012-3
2002-2407

*Voting Section - NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530*

September 19, 2002

Michael Crowell, Esq.
Deborah R. Stagner, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, North Carolina 27602-1151

Dear Mr. Crowell and Ms. Stagner:

This refers to the 2002 redistricting plan for the Beaufort County School District in Beaufort County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our June 17, 2002, request for additional information through August 16, 2002.

The Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

Joseph D. Rich
Chief, Voting Section

HOUSING FINANCE AGENCY

The 2003 Low-Income Housing Tax Credit Qualified Allocation Plan
For the State of North Carolina

I. INTRODUCTION

The Qualified Allocation Plan (the Plan) has been developed by the North Carolina Housing Finance Agency (the Agency) as administrative agent for the North Carolina Federal Tax Reform Allocation Committee (the Committee) in compliance with Section 42 of the Internal Revenue Code of 1986, as amended (the Code). For purposes of the Plan, the term "Agency" shall mean the Agency acting on behalf of the Committee, unless otherwise provided.

The Plan was reviewed in one public hearing and met the other requirements under statutory law, prior to final adoption by the Committee. The staff of the Agency was present at the hearing to take comments and answer questions.

The Agency will only allocate low-income housing tax credits in compliance with the Plan. The Code requires that the Plan contain certain elements. These elements, and others added by the Committee, are listed below.

- A. Selection criteria to be used in determining the allocation of federal low-income housing tax credits:
 - 1. Project location and site suitability
 - 2. Market demand and local housing needs
 - 3. Serving the lowest income tenants
 - 4. Serving qualified tenants for the longest periods
 - 5. Design and quality of construction
 - 6. Financial structure and long-term viability
 - 7. Use of federal project-based rental assistance
 - 8. Use of mortgage subsidies
 - 9. Experience of development team and management agent(s)
 - 10. Serving tenant populations with special housing needs
 - 11. Willingness to solicit referrals from public housing waiting lists
 - 12. Tenant populations of individuals with children
 - 13. Projects intended for eventual tenant ownership
 - 14. Projects that include the use of existing housing as part of a Community Revitalization Plan
 - 15. Projects located in a Qualified Census Tract, the development of which contribute to a concerted Community Revitalization Plan
- B. Threshold, underwriting and process requirements for project applications and tax credit awards.
- C. Description of the Agency's compliance monitoring program, including procedures to notify the Internal Revenue Service of noncompliance with the requirements of the program.

An allocation of tax credits does not constitute a representation or warranty that the ownership entity or its owners will qualify for or be able to use the tax credits. The Agency's interpretation of the Code is not binding on the Internal Revenue Service, and the Agency neither represents nor warrants to any owner, equity investor, Principal or other program participant how the Internal Revenue Service will interpret or apply any provision of the Code. Each owner and its agents should consult its own legal and tax advisors.

In the process of administering the low-income housing tax credit and Rental Production Program (RPP), the Agency will make decisions and interpretations regarding project applications and the Plan. Unless otherwise stated, the Agency is entitled to the full discretion allowed by law in making all such decisions and interpretations.

II. SET-ASIDES AND COUNTY DESIGNATIONS

No county or project will be awarded tax credits for new construction exceeding \$1,500,000 unless doing so is necessary to meet another set-aside requirement of this Plan or to completely fund a project request. No county will be awarded more than one project under the rehabilitation set-aside. The Agency may waive these limits for proposals utilizing HOPE VI financing or for other large scale revitalization efforts characterized by a high degree of committed public subsidies or in order to implement a disaster relief plan. RPP loans cannot exceed \$1 million per project.

Any Principal will be limited to an award of a) not more than fifteen percent (15%) of the total tax credits available for new construction and b) one project under the rehabilitation set-aside. (A Principal may have one rehabilitation project and fifteen percent

IN ADDITION

(15%) of the new construction credits.) All persons and entities meeting the definition of Principal will be certified by the applicant on the application, at carryover allocation and at final cost certification. Any project that qualifies for an allocation of credits but that would result in a Principal exceeding this limit will be disqualified and ineligible for a credit allocation in the current year.

The Agency may allocate 2003 tax credits outside of the normal process to projects that either: 1) address the loss of housing due to the effects of a natural disaster and were submitted in the last two years, or 2) allow the Agency to comply with HUD regulations regarding timely commitment of funds. The total amount of such allocation(s) shall not exceed \$750,000. The Agency may also make a forward commitment of the next year's tax credits in an amount necessary to fully fund projects with a partial award or to any project application that was submitted in a prior year if such application meets all the minimum requirements of the Plan in the year credits are to be allocated.

A. Geographic Set-Asides

The Agency has established geographic set asides for the ranking and selection of new construction projects. The Agency reserves the right to revise the available credits in each set-aside. Tax credits and RPP funds available for new construction projects will be distributed as follows:

WEST: 15%	CENTRAL: 25%	METRO: 30%	EAST: 30%
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WEST	CENTRAL	METRO	EAST
Alexander	Alamance Lincoln	Durham	Beaufort Johnston
Alleghany Jackson	Anson Montgomery	Forsyth	Bertie Jones
Ashe	Cabarrus Moore	Guilford	Bladen Lenoir
Avery Macon	Caswell Orange	Mecklenburg	Brunswick Martin
Buncombe Madison	Chatham Person	Wake	Camden Nash
Burke McDowell	Cumberland Randolph		Carteret New Hanover
Caldwell Mitchell	Davidson Richmond		Chowan Northampton
Catawba Polk	Davie Rockingham		Columbus Onslow
Cherokee Rutherford	Franklin Rowan		Craven Pamlico
Clay Surry	Gaston Scotland		Currituck Pasquotank
Cleveland Swain	Granville Stanly		Dare Pender
	Harnett Stokes		Duplin Perquimans
Graham Watauga	Hoke Union		Edgecombe Pitt
Haywood Wilkes	Iredell Vance		Gates Robeson
Henderson Yadkin	Lee Warren		Greene Sampson
			Halifax Tyrrell
			Hertford Washington
			Hyde Wayne
			Wilson

Applications are allocated credits starting with those earning the highest scoring totals within each geographic set-aside and continuing in descending score order through the last project that can be fully funded. The remaining credits from all four geographic set-asides are then added together and allocated to the next highest scoring application(s) statewide, unless (in the Agency's discretion) such amount should be carried forward and applied the next year's credit ceiling.

B. Rehabilitation Set-Aside

The Agency will award the lesser of the following amounts to projects proposing rehabilitation of existing housing: 1) ten percent (10%) of the state's total tax credit ceiling (plus any amount necessary to fully fund a partial award), or 2) the amount required for five projects. Rehabilitation projects will not be eligible for credits other than in this set-aside. These awards will be based on the criteria listed in Section IV(H) and are not subject to the geographic set-asides. Adaptive re-use projects and entirely vacant residential buildings will be considered new construction.

C. Nonprofit and CHDO Set-Asides

If necessary, the Agency will adjust the awards under the Plan to ensure that the overall allocation results in 1) ten percent (10%) of the state's federal tax credit ceiling being awarded to projects involving non-profits and 2) fifteen percent (15%) of RPP funds being awarded to projects involving Community Housing Development Organizations certified by the Agency

(CHDOs). Specifically, credits that would have been awarded to the lowest ranking project(s) that do(es) not fall into one of these categories will be awarded to the next highest ranking project(s) that do(es) until the overall allocation(s) reach(es) the necessary percentage(s). In order to qualify for the first category, an application must either not involve any for-profit Principals or comply with the material participation requirements of the Code, applicable federal regulations and Section VI(A)(2). In order to qualify for the second category, an application must meet the requirements of 24 CFR 92.300(a)(1) and any other HUD regulation regarding the CHDO set-aside.

D. County Income Designations

Pursuant to N.C.G.S. § 105-129.42(c) the Agency is responsible for designating each county as High, Moderate or Low Income. Five criteria were used for making this determination:

1. County median income
2. Poverty rate
3. Percent of population in rural areas
4. Regional growth patterns
5. Enterprise area tier (one through five)

Each county was considered as a whole and evaluated relative to others in the state. Based on this process, the Agency designates counties as follows:

HIGH	MODERATE		LOW		
Alamance	Alexander	Lee	Alleghany	Graham	Pamlico
Cabarrus	Brunswick	Lincoln	Anson	Greene	Pasquotank
Chatham	Buncombe	Moore	Ashe	Halifax	Pender
Davidson	Burke	Nash	Avery	Haywood	Perquimans
Durham	Caldwell	New Hanover	Beaufort	Hertford	Richmond
Forsyth	Carteret	Onslow	Bertie	Hoke	Robeson
Guilford	Catawba	Person	Bladen	Hyde	Rockingham
Iredell	Cleveland	Pitt	Camden	Jackson	Rutherford
Johnston	Craven	Polk	Caswell	Jones	Sampson
Mecklenburg	Cumberland	Randolph	Cherokee	Lenoir	Scotland
Orange	Dare	Stanly	Chowan	Macon	Surry
Rowan	Davie	Stokes	Clay	Madison	Swain
Union	Franklin	Transylvania	Columbus	Martin	Tyrrell
Wake	Gaston	Watauga	Currituck	McDowell	Vance
	Granville	Wayne	Duplin	Mitchell	Warren
	Harnett	Wilson	Edgecombe	Montgomery	Washington
	Henderson	Yadkin	Gates	Northampton	Wilkes
					Yancey

III. DEADLINES AND FEES

A. The following schedule will apply to the application process for 9% tax credits for 2003. Applicants seeking a tax exempt bond allocation and 4% tax credits should refer to the application schedule found in **Appendix G**.

January 10	Deadline for electronic submission of preliminary applications
January 17	Deadline for paper version preliminary applications and exhibits (12:00 noon, no exceptions)
February 28	Market analysts will mail studies to the Agency and applicants
March 14	Deadline for market-related project revisions
March 21	Preliminary site scores announced; market analysts will mail comments on revisions to the Agency and applicants
April 4	Deadline for site score review requests
April 18	Notification of final site and market scores and preliminary evaluation of rehabilitation projects
May 9	Deadline for new construction full applications (12:00 noon, no exceptions)
May 23	Deadline for rehabilitation full applications (12:00 noon, no exceptions)

IN ADDITION

August 15	Notification of final reservations (actual date will be no earlier than three weeks after announcement of AHP awards)
November 14	Deadline for 10% cost certifications

The Agency reserves the right to change the schedule as necessary.

B. Processing, application and allocation fees are as follows:

1. All applicants are required to pay a nonrefundable fee of \$5,020 at the submission of the preliminary application. This fee covers the cost of the market study or physical needs assessment and a \$1,020 preliminary application processing fee (which will be assessed for every electronic application submitted as of January 10, 2002).
2. All applicants are required to pay a nonrefundable processing fee of \$1,020 upon submission of the full application.
3. Entities receiving credit awards are required to pay an allocation fee equal to five and one half percent (5.5%) of a single year's tax credits, calculated using the full 9% and/or 4% AFR. The allocation fee must be paid to the Agency upon return of the allocation letter. Failure to submit this allocation fee within 30 days of the date of the allocation letter will result in the withdrawal of the tax credit reservation.
4. If expenses for legal services are incurred by the Committee or Agency to correct mistakes of the Owner which jeopardize use of the tax credits, such legal costs will be paid by the Owner in the amount charged to the Agency or the Committee.
5. The Agency will not process applications or other documentation relating to any Principal who has an outstanding balance of fees owed.

NOTE: The nonrefundable processing fee will be increased by two percent (2%) each year after 2002. The allocation fee will increase by 0.25% each year up to six percent (6%) in 2005.

C. Monitoring fees as listed below must be paid prior to the issuance of a federal form 8609:

Project Type	Federal Credits Only	Federal and State Tax Credits
Tax credit projects without an Agency loan, including projects using tax-exempt bond financing and 4% credits	\$425 per unit	\$525 per unit
Projects using RD financing without RPP funding	\$250 per unit	\$350 per unit
Projects receiving an Agency loan, regardless of RD financing.	\$500 per unit	\$600 per unit

The monitoring fee is applied to **all units in a project** including all market rate units and units reserved for managers or other personnel.

IV. SELECTION CRITERIA AND THRESHOLD REQUIREMENTS

Each new construction project will be ranked using the points described in Sections IV(A), IV(B), IV(C), IV(D), IV(E), IV(F) and IV(G) below. The Agency will not accept a full application where the preliminary application does not meet all site and market threshold requirements.

Applications must meet all threshold requirements and receive 175 points to be considered for award and funding. Rehabilitation projects will not receive point scores but instead will be evaluated using the criteria listed in Section IV(H) (thus all references to receipt of points only apply to new construction projects). All threshold requirements also apply to rehabilitation projects unless otherwise noted.

A. SITE AND MARKET EVALUATION (MAXIMUM 170 POINTS)

1. SITE EVALUATION (MAXIMUM 140 POINTS)

- (a) Site scores will be based on the following factors. Each will also serve as a threshold requirement: the Agency may remove an application from consideration if the site is sufficiently inadequate in one of the categories. Evaluation of sites will involve a relative comparison with other applications in the same geographic set-aside, with an emphasis on those the Agency considers to be within the same market area. Criteria involving consideration of land uses will focus on the area within approximately one-half mile. The Agency will consider

revitalization plans and other proposed development based on certainty, extent and timing. Where appropriate, the score for a particular category will reflect the project's tenant type (family/elderly/special needs).

NEIGHBORHOOD CHARACTERISTICS (MAXIMUM 80 POINTS)

- Trend and direction of real estate development and area economic health
- Physical condition of buildings and improvements
- Suitability of surrounding development
- Land use pattern is primarily residential (single and multifamily housing) with a balance of other uses (particularly retail and amenities)
- Availability, quality and proximity of essential services: grocery store; mall/strip center; gas/convenience; basic health care; pharmacy; schools/athletic fields; day care/after school; supportive services
- Availability, quality and proximity of important amenities and features: public park, library, hospital, community/senior center, basketball/tennis courts, fitness/nature trails, public swimming pool, restaurants, bank/credit union, medical offices, professional services, movie theater, video rental, public safety (fire/police)

SITE SUITABILITY (MAXIMUM 60 POINTS)

- Effect of industrial, large-scale institutional or other incompatible uses: wastewater treatment facilities, high traffic corridors, junkyards, prisons, landfills, large swamps, distribution facilities, frequently used railroad tracks, power transmission lines and towers, factories or similar operations, sources of excessive noise, and sites with environmental concerns (such as odors or pollution)
- Amount and character of vacant, undeveloped land
- Adequate traffic controls (stop light, turn lanes, ect.)
- Burden on public facilities (particularly roads)
- Access to mass transit (if applicable)
- Degree of on-site negative features and physical barriers that will impede project construction or adversely affect future tenants; for example: power transmission lines and towers, flood hazards, steep slopes, large boulders, ravines, year-round streams, wetlands, and other similar features (for adaptive re-use projects-suitability for residential use and difficulties posed by the building(s), such as limited parking, environmental problems or the need for excessive demolition)
- Similarity of scale and aesthetics/architecture between project and surroundings
- Concentration of affordable housing

(b) General Site Requirements

- Sites must be sized to accommodate the number and type of units proposed. Required zoning must be in place by the full application submission date, including any special use permits, traffic studies, conditional use permits and other land use requirements.
- The applicant or a Principal must have site control by the preliminary application deadline, which may be evidenced by a valid option, contract or warranty deed.
- Utilities (water, sewer and electricity) must be available with adequate capacity to serve the site. Sites should be accessed directly by existing paved, publicly maintained roads. If not, it will be the applicant's responsibility to extend utilities and roads to the site. In such cases, the applicant must explain and budget for such plans at the preliminary application stage, as well as document the applicant's right to perform such work through, for example, language in the real estate option/contract, separate contract or consent by the city or town.
- Proposed construction must not be located within a 100-year floodplain. Proposed construction includes driveways, parking areas, playgrounds, community building/office, residential buildings, maintenance buildings, refuse collection areas, laundry rooms, mail collection areas, or any other permanent structure or fixture. The Agency may waive this restriction in certain counties in the East Region where viable alternatives do not exist and where sound measures to mitigate flood hazards are proposed.

2. MARKET ANALYSIS (MAXIMUM 30 POINTS)

The Agency will contract directly with market analysts to perform studies for new construction projects. Applicants will have a structured opportunity to interact with market analysts in order to make appropriate project design and targeting adjustments that best fit their markets.

A project will not receive tax credits or RPP funding if it is in the same market area as previously funded tax credit or RPP projects (including earlier phases of the same overall development) which have a) not reached stabilized occupancy or b) a recent history of high vacancy rates. The Agency may waive these limitations if the market study indicates a

strong demand for all units involved. The Agency will limit the number of projects awarded in the same application round to those that it determines can be supported in the market.

Applications for new construction projects will be evaluated using four criteria, each of which will serve both as a threshold requirement and to determine points.

- (a) The project's required market share, or the percent of income qualified households seeking housing that the project would need to capture to achieve stabilized occupancy.
- (b) The number of months between project completion and either stabilized occupancy or qualification of the tax credit units (whichever is later).
- (c) The vacancy rate at comparable properties.
- (d) The project's affect on existing low-income housing tax credit properties.

The Agency is not bound by the conclusions or recommendations of the market analyst(s), and will use its discretion in evaluating the criteria listed in this Section. For rehabilitation and 100% special needs projects, the applicant must submit a market study that meets the requirements of Section 42(m)(1)(A)(iii) of the Code prior to issuance of a carryover allocation (unless the Agency, in its discretion, requires an earlier submission date).

B. RENT AFFORDABILITY (MAXIMUM 65 POINTS)

1. FEDERAL RENTAL ASSISTANCE (MAXIMUM 20 POINTS)

- (a) A maximum of 20 points will be awarded for a firm commitment that provides federal project-based rental subsidies for at least 95% of the tax credit units; committed federal subsidies of at least 20% but less than 95% will be awarded 10 points. To receive points for HUD Section 8 project-based rental subsidies, applicants must submit a letter from the issuing authority (i) supporting the proposed development, (ii) representing that it has the proposed number of certificates available to convert to project based assistance, (iii) committing it to request HUD approval for the conversion, (iv) setting forth a timetable for the advertisement and approval process, and (v) committing it to seek renewal of the subsidy contract for as long as possible subject to Congressional funding.
- (b) Applicants must include a written agreement between the owner and a public housing authority (PHA). The agreement must commit (i) the PHA to include the development in any listing of housing opportunities where households with tenant-based subsidies are welcome, and (ii) the project's management agent to actively seek referrals from the PHA to apply for units at the proposed development. If the PHA refuses to cooperate for any reason, an explanation must be submitted as well as a statement of commitment by the applicant to seek referrals from the PHA.

2. MORTGAGE SUBSIDIES AND LEVERAGING (MAXIMUM 30 POINTS)

- (a) Only loans from established below-market, multifamily lenders will be considered; sources of mortgage subsidies include the following: Federal Home Loan Bank (FHLB) Affordable Housing Program (AHP), PHAs, local Community Development Block Grant (CDBG) funds (for on-site improvements only; includes Small Cites program), HUD Section 108, other local development funds and RD. Other sources of public funding may qualify **PROVIDED THEY ARE APPROVED IN WRITING IN ADVANCE** by the Agency. (Approval of a particular source in prior years does not meet this requirement.) In order to qualify, loans must be listed as a source in the application, have a term of at least 20 years and an interest rate less than or equal to two percent (2%).
- (b) Adjustments to the purchase price of the land by the seller, uncommitted RPP funds, state credits and bond financing are not considered sources of mortgage subsidy.
- (c) Applications will be awarded five (5) points for having a commitment of at least \$100,000 in qualifying mortgage subsidy funds. Projects will earn a greater amount of points based on the total amount of funds per unit, as described below:

Funds/Unit	Points	\$10,000	20
\$5,000	10	\$11,000	22
\$6,000	12	\$12,000	24
\$7,000	14	\$13,000	26
\$8,000	16	\$14,000	28
\$9,000	18	\$15,000	30

The calculation includes all units and amounts will not be rounded up. The funds-to-unit ratio initially approved by the lending source determines the score, unless a subsequent change results in fewer points. The amount of subsidy provided by a local government will be reduced by the amount that the project budget includes the following: any impact, tap or related fees charged by that local government and/or the cost of land sold by that local government in excess of the market value determined under Section VI(A)(4). For example, a project involving the following:

- 48 tax credit units and 16 market rate units,
 - a commitment of \$925,000 in qualifying funds, \$150,000 of which are from the city, and
 - tap fees of \$100,000 charged by the same city to the project will receive 24 points $[(925,000 - 100,000) / 64 = \$12,891 \text{ per unit}]$.
- (d) Projects funded entirely with equity and state tax credits (no debt sources other than deferred developer fees) will be awarded 15 points. Any deferred fee must comply with Section IV(B)(5).
- (e) In order to be eligible for points under this Section, applications for new construction tax exempt bond projects must meet one of the following requirements:
- twenty percent (20%) of qualified units will be affordable to and occupied by households with incomes at or below 50% of county median income, or
 - ten percent (10%) of qualified units will be affordable to and occupied by households with incomes at or below 40% of county median income.

3. TENANT RENT LEVELS (MAXIMUM 15 POINTS)

(PROJECTS WILL BE MONITORED FOR RENT AND OCCUPANCY RESTRICTIONS FOR THE PERIOD INDICATED IN THE EXTENDED USE AGREEMENT.)

Applicants should understand that electing to meet the requirements of this Section will reduce the number of potential tenants for certain units, which may be reflected in the market score. The applicant may earn points under one of the following scenarios:

- (a) If the project is in a High Income county:
- Ten (10) points will be awarded if at least 25% of qualified units will be affordable to and occupied by households with incomes at or below 30% of county median income.
 - Five (5) points will be awarded if at least 50% of qualified units will be affordable to and occupied by households with incomes at or below 40% of county median income.
- (b) If the project is in a Moderate Income county:
- Fifteen (15) points will be awarded if at least 25% of qualified units will be affordable to and occupied by households with incomes at or below 40% of county median income.
 - Ten (10) points will be awarded if at least 50% of qualified units will be affordable to and occupied by households with incomes at or below 50% of county median income.
- (c) If the project is in a Low Income county, fifteen (15) points will be awarded for projects in which at least 40% of qualified units will be affordable to and occupied by households with incomes at or below 50% of county median income.
- (d) In order to be eligible for tax credits, applications for new construction tax exempt bond projects must meet one of the following requirements:
- at least ten percent (10%) of qualified units will be affordable to and occupied by households with incomes at or below 50% of county median income, or
 - at least five percent (5%) of qualified units will be affordable to and occupied by households with incomes at or below 40% of county median income.

4. COMMITMENT TO EXTEND LOW-INCOME OCCUPANCY

Applicants must agree to record a 30-year Declaration of Land Use Restrictive Covenants for Low-Income Housing Tax Credits (Extended Use Agreement).

C. PROJECT DEVELOPMENT COSTS

The Agency will assess negative points to applications using either the following "per unit" or "per net square foot" standards (total project costs less land and reserves) outlined in **Chart A** below, whichever is less. The point structure in **Chart B** will

IN ADDITION

apply to the following: 1) detached single family developments, 2) duplex developments with less than 25 units, 3) 100% special needs housing, 4) HOPE VI projects 5) unique downtown circumstances and 6) projects utilizing historic tax credits. RPP loan funds will be limited by HOME Per-Unit Subsidy Limits and HOME Per-Unit Cost Limits. Copies of all executed change orders must be submitted to the Agency.

The equity raised from historic preservation tax credits will be subtracted from the total development cost before this calculation is made. Water and sewer tap fees and impact fees will also be subtracted from total development cost for this calculation provided that the applicant has included documentation from the local government to verifying the amount of fees required.

Per Unit	OR	Per Net Sq. Ft.	Points
\$74,000		\$74	(-2)
\$77,000		\$77	(-4)
\$80,000		\$80	(-6)
\$83,000		\$83	(-8)
\$86,000		\$86	(-10)
\$89,000		\$89	(-15)
\$92,000		\$92	(-20)
\$95,000		\$95	(-30)
\$98,000		\$98	(-40)
\$101,000		\$101	(-50)
\$104,000		\$104	(-60)
\$107,000		\$107	(-70)
\$110,000		\$110	(-80)
\$113,000		\$113	(-90)
\$116,000		\$116	(-100)

Per Unit	OR	Per Net Sq. Ft.	Points
\$87,000		\$87	(-2)
\$90,000		\$90	(-4)
\$93,000		\$93	(-6)
\$96,000		\$96	(-8)
\$99,000		\$99	(-10)
\$102,000		\$102	(-15)
\$105,000		\$105	(-20)
\$108,000		\$108	(-30)
\$111,000		\$111	(-40)
\$114,000		\$114	(-50)
\$117,000		\$117	(-60)
\$120,000		\$120	(-70)
\$123,000		\$123	(-80)
\$126,000		\$126	(-90)
\$129,000		\$129	(-100)

To receive an RPP loan, projects 1) must have costs per unit of less than \$90,000 and 2) must not request RPP loan funds in excess of the following amounts per unit: \$15,000 in High Income counties; \$20,000 in Moderate Income counties; \$25,000 in Low Income counties. The latter restriction does not apply to projects with funds committed by RD prior to October 1, 2003.

D. CAPABILITY OF THE PROJECT TEAM

1. DEVELOPMENT EXPERIENCE

At least one Principal must have successfully developed, operated and maintained in compliance one North Carolina low-income housing tax credit development that was placed in service between December 1, 1996 and January 1, 2003. Such Principal must become a general partner or managing member of the ownership entity and remain responsible for overseeing the development and operation of the project for a period of two (2) years after placed in service. This requirement will not apply to HOPE VI developments. The Agency will determine what qualifies as successful and who can be considered as involved in a particular project.

All owners and Principals **must** disclose all previous participation in the low-income housing tax credit program. Additionally, all owners and Principals that have participated in an out of state tax credit allocation must complete the Authorization for Release of Information form and send it to each state identified.

The Agency will require executed agreements that clearly specify division of duties, rights, and obligations, including compensation, among owners and Principals in a project.

The Agency reserves the right to determine that a particular development team does not meet the threshold requirement of this Section due to differences between its prior work and the proposed project. Particularly important in this evaluation is the type of subsidy program used in the previous experience (such as tax-exempt bonds, RD).

2. MANAGEMENT EXPERIENCE

The management agent must have at least a) one similar tax credit project in their current portfolio and b) one staff person serving in a supervisory capacity with regard to the project who has been certified as a tax credit compliance specialist. Such certification must be from an organization accepted by the Agency (such as HCCP). None of the persons or entities serving as management agent may have in their portfolio a project with material or uncorrected non-compliance beyond the cure period. The management agent listed on the application must be retained by the ownership entity for at least two (2) years after project completion, unless the agent is guilty of specific nonperformance of duties.

3. PROJECT TEAM NEGATIVE ASSESSMENTS AND RESTRICTIONS

The Agency may disqualify any owner, Principal or management agent that has been debarred or received a limited denial of participation in the past 10 years by any federal or state agency from participating in any Agency multifamily development program.

The Agency may disqualify any project with an owner, Principal or management agent who is found to be directly or indirectly responsible for any other projects in which there is uncorrected noncompliance more than six months from the date of notification by the Agency.

- (a) Up to negative forty (-40) points may be assessed against a project with an owner, Principal or management agent who within the past ten years has been in a bankruptcy, an adverse fair housing settlement, an adverse civil rights settlement, or an adverse federal or state government proceeding and settlement.
- (b) Up to negative forty (-40) points may be assessed against a project with an owner or Principal who has been in a mortgage default or arrearage of three months or more within the last five years on an FHA-insured project, an RD funded rental project, a tax-exempt bond funded mortgage, a tax credit project or any other publicly subsidized project. Resolution of all outstanding Agency concerns regarding the default or arrearage may be considered in assessing negative points.
- (c) Up to negative forty (-40) points may be assessed against a project with an owner Principal or management agent who has been involved within the past ten years in a project which previously received an allocation of tax credits but failed to meet standards or requirements of the tax credit allocation and/or failed to fulfill one of the representations contained in an application for tax credits. This includes returning an allocation of tax credits to the Agency after the carryover agreement has been signed.
- (d) Up to negative forty (-40) points may be assessed against a project where the management agent is found to be directly or indirectly responsible for any other project in which there is uncorrected noncompliance more than three months from the date of notification by the Agency or any other state allocating agency.

E. UNIT CREATION AND PROJECT SIZE

- 1. Applications must either create new affordable units or rehabilitate existing units.
- 2. Twenty (-20) points will be subtracted from any new construction project with more than 80 units but less than 101 units. Forty (-40) points will be subtracted from any new construction project with 101 or more units.
- 3. For new construction bond financed projects, twenty (-20) points will be subtracted from any project with more than 120 units but less than 151 units. Forty (-40) points will be subtracted from any project with 151 or more units.

The Agency reserves the right to waive the penalties in this Section for proposals that reduce low-income and minority concentration.

F. BONUS POINTS AND TIEBREAKERS (MAXIMUM 50 POINTS)

- 1. Fifteen (15) points will be awarded to projects that have an obligation of funds from the U.S. Department of Agriculture, Rural Development (RD). Ten (10) points will be awarded to projects that have an obligation of funds under either the U.S. Department of Housing and Urban Development (HUD) 202 or 811 programs, including project based rental assistance appropriate for the project.
- 2. Ten (10) points will be awarded to projects that are (a) located within a Qualified Census Tract and can demonstrate that they contribute to a Community Revitalization Plan according to the parties responsible for the plan; and/or (b) involve the use of existing housing (that is not necessarily located within a Qualified Census Tract), the improvement of which has been designated as part of the Community Revitalization Plan. In both cases, the project site must be clearly within the geographic confines of the Community Revitalization Plan. The plan also must clearly indicate that revitalization activities are underway or will take place in the neighborhood surrounding the proposed project (a one-half mile radius surrounding the site) no more than two years from the time the project would be funded.
- 3. Five (5) points will be awarded to projects designed to increase the stock of housing accessible to those with mobility impairments. To receive bonus points, five percent (5%) of all project units must:

- (a) be fully accessible according to the standards set forth in Volume 1-C (1999) of the North Carolina State Building Code, (Chapter 30, Multi-Family Dwellings),
- (b) have at least one bathroom with a toilet located in a five foot by five foot clear floor space (may overlap with the five foot turning diameter described in Chapter 30), with no overlapping elements or fixtures; the toilet must be positioned in a corner with the centerline of the toilet bowl 18 inches from the sidewall, and
- (c) have at least one bathroom with a 36 inch by 60 inch (minimum size) curbless, roll-in shower. Such showers must also meet the requirements for accessible controls as required by Volume 1-C.

At least one unit in each class of fully accessible units must meet the above requirements. Unit classes are measured by the number of bedrooms, pursuant to Volume 1-C (1999) of the North Carolina State Building Code (Chapter 30, Section 30.3.2.) These units are in addition to mobility impaired units required by federal law. The application also must include a letter describing the need for such units from a local agency or non-profit that works with mobility impaired populations.

4. Twenty (20) points will be award to projects targeting the greater of five (5) units or ten percent (10%) of the total units to persons with disabilities or homeless populations. Projects that are targeting units under this Section are not required to provide onsite supportive services or a service coordinator. To receive bonus points, the application must demonstrate a partnership with a local lead agency and submit a Targeting Plan for review and certification by the N.C. Department of Health and Human Services (DHHS).

At a minimum, Targeting Plans must include:

- (a) A local housing needs assessment for the targeted population developed in partnership with the local lead agency.
- (b) A description of how the development will meet the needs of the targeted tenants including how the units will be made affordable to persons with extremely low incomes, unit size, access to supportive services, transportation, proximity to community amenities, etc.
- (c) A description of the experience of the local lead agency, their capacity to assure access to supportive services, and to maintain the relationship with the relevant tenants for the duration of the compliance period.
- (d) A Memorandum of Understanding (MOU) between the developer(s), management agent and the lead local agency. The MOU will include a description of the tenant referral process and how the local lead agency will remain linked to the project for the entire compliance period.
- (e) Certification that participation in supportive services will not be a condition of tenancy (not required for projects where all of the units are providing transitional housing for the homeless).
- (f) Agreement that for a period of ninety days after the initial rent-up period begins, establishing a preferential leasing opportunity for the number of units specified in the application for persons with disabilities.
- (g) Agreement to maintain a separate waiting list for persons with disabilities and prioritizing these individuals for any units that may become vacant after the initial rent-up period, based upon the minimum number of units specified in your application.
- (h) Agreement to affirmatively market to persons with disabilities.
- (i) Agreement to include a section on reasonable accommodation in property management's application for tenancy.
- (j) Agreement to accept Section 8 vouchers or certificates (or other rental assistance) as allowable income as part of property management income requirement guidelines for eligible tenants and not require total income beyond that which is reasonably available to persons with disabilities currently receiving SSI and SSD benefits.

All materials required under this Section must be submitted to DHHS by the full application due date. A detailed description of the elements to be addressed in the Targeting Plan is included in **Appendix D**.

5. Tiebreaker Criteria: The following will be used to award credits in the event that the final scores of more than one project are identical.
- (a) First Tiebreaker - The project requesting the least amount of federal tax credits per unit based on the Agency's equity needs analysis.
 - (b) Second Tiebreaker - Tenants with Children: Projects that can serve tenant populations with children. Developments will qualify for this designation if at least 25% of the units are three or four bedrooms. This tiebreaker will only apply where the market study shows a clear demand for this population (as determined by the Agency).
 - (c) Third Tiebreaker - Tenant Ownership: Projects that are intended for eventual tenant ownership. Such developments must utilize a detached single family site plan and building design and have a business plan describing how the project will convert to tenant ownership at the end of the 30-year compliance period.

In the event that a tie remains after considering the above tiebreakers, the project requesting the least amount of federal tax credits will be awarded the credits.

G. DESIGN STANDARDS (MAXIMUM 80 POINTS)

All proposed measures must be shown on the plans or in specifications in the application in order to receive points.

A maximum of 80 points will be awarded for new construction projects based on evaluation of the site plan design and layout, building and floor plan design and construction characteristics as they relate to the development cost per unit. Design standards are found in **Appendix B** and must be used for all projects receiving low-income housing tax credits and/or RPP funding or points may be deducted for non-compliance.

1. Site plan considerations: A maximum of 20 points will be given for projects which
 - Propose an attractive, scattered building layout focusing on visual appeal and privacy;
 - Propose site amenities, including playgrounds, gazebos, garden spots, walking trails, picnic areas, ball fields, basketball/tennis courts and exercise rooms, have natural areas with trees between buildings (for new construction); create accessible walks linking buildings to each other, to common areas and to parking; have large open spaces for recreational activities, have a well-designed entry to the site with attractive signage, lighting and landscaping.

In order to receive points, the items listed above must be clearly indicated on the site drawings.
2. Building and floor plan design: A maximum of 35 points will be given for project which
 - Propose creative and versatile architectural designs. Examples of exterior building designs include broken roof lines, front gables, dormers or front extended facades, wide banding and vertical and horizontal siding applications, some brick veneer, front porches and attractive deck rail patterns.
 - Propose open, flowing floor plans. Examples include spacious kitchens, bathrooms, living rooms and dining rooms, dwelling units that exceed minimum square footages, bedrooms that exceed minimum square footages, bathrooms that are large with vanities and open floor spaces, kitchens that provides an abundance of counter top working space and cabinets, availability of storage space other than bedroom closets, and the adequacy of closet space, including large walk-in closets.
3. Construction characteristics: A maximum of 25 points will be given to projects which
 - Propose low maintenance, high durability, energy efficient products, and quality components. Examples include: High-grade vinyl or VC tile in kitchens, bathrooms, entryways, and laundry areas.
 - Propose energy efficient components that exceed Agency and/or building code minimum standards.
 - Propose measures to provide good attic and roof ventilation, use vinyl or aluminum windows and steel insulated exterior doors.
 - Propose to use quality exterior siding, such as vinyl, hardiplank, or brick veneer and have pre-finished aluminum exterior trim, including fascia, soffit, and porch posts.
4. Completion of previously approved projects: Negative points will be assessed for projects with owners, or Principals of prior project(s) that were not built in accordance with the plans and specifications on which such prior project(s)' Design Standards score was based, if deviation from such plans and specifications results in conditions that would justify a reduction in that prior project(s)' original Design Standards score(s). The number of negative points assessed to the project in the current year will be equal to the cumulative number of points by which each such prior project's original Design Standards score would have been so reduced to reflect the deviation, adjusted to reflect any change in the scale of the Design Standards scoring. For example, if the reduction in the prior project's Design Standards score as a result of the deviation from its plans and specifications is determined to be 10 points based on a scale of 50 maximum Design Standards points at the time such prior project was awarded credits, if there is a current scale of 100 maximum Design Standards points, the negative points assessed to the current project based on that prior project's deviation from its plans and specifications would be 20 points. Design and construction changes approved in writing by the Agency will not result in any negative points assessed under this Section.

H. CRITERIA FOR SELECTION OF REHABILITATION PROJECTS

In order to be eligible for funding, a project must a) have committed mortgage subsidies from a local government in excess of \$5,000 per unit or federal project-based rental assistance, b) have been placed in service on or before December 31, 1984 and c) require rehabilitation expenses in excess of \$15,000 per unit (as supported by a physical needs assessment approved by the Agency). The assessment must be performed by a licensed architect or engineer and involve the physical inspection of the site, amenities, dwelling units and any common areas. Rehabilitation expenses include hard construction costs directly attributable to the project, excluding costs for a new community building, as calculated using lines 2 through 7 (less line 6) in the Project Development Cost Description.

The Agency will evaluate applications based on the following ten criteria, which are listed in order of importance. Each will serve both to determine allocations and as a threshold requirement: the Agency may remove an application from consideration if the proposal is sufficiently inadequate in any of the categories.

1. The Agency will give the highest priority to applications proposing to rehabilitate the state's most distressed existing housing. However, buildings that are deteriorated to the point of requiring demolition will not be eligible for credits under this Section.

2. The Agency will give priority to applications that propose a scope of work appropriate to the building(s), as reflected in the Physical Needs Assessment. (Proposals should not involve unnecessary work.) Specifically, proposals should involve the following:
 - Making "common areas" handicap accessible, creating or improving sidewalks, installing new roof shingles, adding gutters, sealing brick veneers, applying exterior paint, and resurfacing or re-paving parking areas.
 - Improving site and exterior dwelling lighting, landscaping/fencing, and installing high-quality vinyl or hardiplank siding.
 - Adding gables, porches, dormers or roof sheds.
 - Use energy-efficient related products to replace inferior ones, including insulated windows and doors, and adding additional insulation.
 - Improving heating and cooling units, plumbing fixtures, water heaters, toilets, sinks, faucets and tub/shower units.
 - Improving quality of interior conditions and fixtures, including carpet, vinyl, interior doors, painting, drywall repairs, cabinets, appliances, light fixtures and mini-blinds.
 - Where possible, upgrading bathrooms pursuant to Section IV(F)(3).
 3. Applications will have a reduced likelihood of being awarded credits to the extent that the purpose is to subsidize an ownership transfer.
 4. Shortcomings in the above three criteria will be mitigated to the extent that a tax credit allocation is necessary to prevent a) conversion of units to market rate rents or b) loss of government resources (including past, present and future investments).
 5. The Agency will give priority to applications that have certified Targeting Plans under Section IV(F)(4) and/or mortgage subsidy resources committed as part of the application.
 6. Applications will have priority to the extent that the rehabilitation improvements are a part of a community revitalization plan and/or will benefit the surrounding community. However, projects in severely distressed areas will have a reduced likelihood of being awarded credits.
 7. Applications will have a reduced likelihood of being awarded credits based on the number of tenants that would be permanently relocated (including market-rate).
 8. The Agency will give preference to applications based on the quality of and degree of effort proposed in the temporary and permanent relocation plans.
 9. While allocation of rehabilitation tax credits is not subject to any regional set-aside, the Agency will consider the geographic distribution of this resource and will attempt to avoid a concentration of awards in any one area of the state.
- Projects that are feasible using tax exempt bonds (as determined by the Agency) or involve total development costs in excess of \$5 million or \$100,000 per unit will not be eligible for an award of 9% credits.

I. PRIORITY FOR ALLOCATION OF BOND CAP

Applicants proposing to use tax-exempt bonds with 4% tax credits must meet all of the requirements of the Plan and **Appendix G** (incorporated herein by reference) to claim such credits. The Committee will allocate the multifamily portion state's tax-exempt bond authority in the following order of priority:

1. Projects that serve as a component of an overall HOPE VI revitalization effort.
2. Rehabilitation projects.
3. Adaptive re-use projects.
4. Other new construction projects.

Applications will only be allocated bond authority if there is enough remaining after awarding all eligible applications in higher priority levels. Within each category, allocation priority will be based on the relevant scoring and threshold requirements of Section IV.

V. APPLICATION PROCEDURES AND REQUIREMENTS

A. GENERAL

1. The Agency may require applicants to submit any information, letter or representation relating to Plan requirements or point scoring as part of the application process. Unless otherwise noted, the Agency may elect to not consider information submitted after the relevant deadline.
2. Any misrepresentation, false information or omission in any application document may result in disqualification of that application and any other involving the same owner(s), Principal(s), consultant(s) and/or application preparer(s). Any misrepresentation, false information or omission in the application document may result in a revocation of a credit allocation.
3. The Agency may elect to treat applications involving more than one site or population type (family/elderly) as separate for purposes of the Agency's preliminary application process. Each application would require a separate initial application fee. Projects may be considered one application in the full application submission if all sites are secured by one permanent mortgage and are not intended for separation and sale after receipt of the tax credit allocation.
4. Applications, correspondence and supporting materials may be submitted to the Agency as follows:
Deliver to: _____ Mail to: _____

IN ADDITION

North Carolina Housing Finance Agency
Rental Investment
3508 Bush Street
Raleigh, NC 27609

North Carolina Housing Finance Agency
Rental Investment
P.O. Box 28066
Raleigh, NC 27611-8066

5. The Agency will notify the appropriate unit of government about the project after submission of the preliminary application. The Agency reserves the right to reject applications opposed in writing by the chief elected official (supported by the council or board), but is not obligated to do so.
6. Applicants may be assessed a \$500 fee for each instance of failure to comply with a written requirement of the tax credit application process (whether or not such requirement is in the Plan).

B. APPLICATION PROCESS

1. The Agency will send site score information to each applicant (upon request) after publication of the preliminary scores. The market analyst will send studies to the Agency and applicant.
2. Applicants may request a factual review of their project's preliminary site score. Review requests (and any supporting materials) must be submitted to the Agency and include a processing fee of \$500. The review will be limited to errors of fact, not of analysis.
3. The market score will not be subject to review or appeal. However, applicants will have an opportunity to revise their project (unit mix, targeting) based on the market analyst's recommendations; such revisions may increase the market score. Any revisions must be submitted in writing to both the market analyst and to the Agency.
4. Applicants for rehabilitation projects will receive a preliminary evaluation and recommendations from the Agency.
5. The deadlines for this Section are listed in Section III(A).

VI. GENERAL REQUIREMENTS

A. GENERAL THRESHOLD REQUIREMENTS FOR PROJECT PROPOSALS

1. Projects with Historic Tax Credits: Buildings either must be on the National Register of Historic Places or approved for the State Housing Preservation Office's study list at the time of the full application. Evidence of meeting this requirement should be provided.
2. Nonprofit Set-Aside:
For purposes of being considered as a nonprofit sponsored application under Section II(C), each nonprofit entity involved in a project must: (a) be qualified under Section 501(c)(3) or (4) of the Code, (b) be domesticated in North Carolina for at least 12 months prior to submitting an application, (c) have local community involvement on the board of directors, (d) materially participate (or a qualified corporation must materially participate), as defined under federal law, in the acquisition, development, ownership, and ongoing operation of the property for the entire compliance period, (e) have as one of its exempt purposes the fostering of low-income housing (f) own (or its qualified corporation own), directly or indirectly, an equity interest in the applicant, (g) be (or its qualified corporation be) a managing member or general partner of the applicant, and (h) must submit a narrative statement, certified by a resolution of the nonprofit's Board of Directors, with the full application describing the nonprofit's plan for material participation during the development of the project and compliance period.

The Agency reserves the right to make a determination that the nonprofit owner is not affiliated with or controlled by a for-profit entity or entities other than a qualified corporation. There can be no identity of interest between any nonprofit owner and for-profit entity, other than a qualified corporation.

3. Environmental Hazards: All projects involving use of existing structures must submit a hazardous material report which provides the results of testing for asbestos containing materials, lead based paint, Polychlorinated Biphenyls (PCBs), underground storage tanks, petroleum bulk storage tanks, Chlorofluorocarbons (CFCs), and other hazardous materials. The testing must be performed by professionals licensed to do hazardous materials testing. A report written by an architect or building contractor or developer will not suffice. A plan and projected costs for removal of hazardous materials must also be included.
4. Appraisals: The Agency will not allow the project budget to include more for land costs than its appraised market value. Any project budgeting more than \$5,000 per acre toward land costs must submit with the full application a real estate "as is" appraisal prepared by an independent, state certified appraiser in compliance with the Uniform Standards of Professional Appraisal Practice. The Agency may require appraisals in its discretion where cost per acre is below this amount. Appraisals for rehabilitation and adaptive re-use projects must break out the land and building values from the total value.
5. Concentration: Projects cannot be in areas of minority and low-income concentration (measured by comparing the percentage of minority and low-income households in the site's census tract with the community overall). The Agency may make an exception for projects in economically distressed areas which have Community Revitalization Plans with public funds committed to support the effort.

6. Displacement: In every instance of tenant displacement, the applicant must supply with the full application a plan describing how displaced persons will be relocated, including a description of the costs of relocation. The applicant is responsible for all relocation expenses, which must be included in the project's development budget. Applicants must also comply with either the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 if using RPP or federal funds, or **Appendix F** if not.
7. Tax Information Authorization: IRS Revenue Ruling 9-98 establishes a process for the Agency to obtain tax credit background information of applicants. The Agency has signed a Memorandum of Understanding with the Internal Revenue Service in order to implement this process. Applicants must submit an executed IRS Form 8821 with their full applications; every owner should submit a separate form. The IRS will provide the Agency with all federal tax information pertaining to low-income housing tax credits, including audit findings and assessments for all tax periods specified on Form 8821, Tax Information Authorization.
8. Feasibility: The Agency will not allocate tax credits or RPP funding to an application that will have difficulty being completed and/or operated for the compliance period. Examples include projects that may not secure an equity investment or maintain adequate cash flow.

B. UNDERWRITING THRESHOLD REQUIREMENTS

The following minimum financial underwriting requirements apply to all projects. Projects that cannot meet these minimum requirements, as determined by the Agency, will not receive credits or RPP funding.

1. Loan Underwriting Standards:

Projects applying for tax credits only will be underwritten with rents escalating at three percent (3%) and operating expenses escalating at four percent (4%).

All projects will be underwritten assuming a constant seven percent (7%) vacancy and must reflect at least a 1.15 Debt Coverage Ratio (DCR) for the term of any debt financing on the project. Projects with no debt service (100% equity projects) must demonstrate a minimum net cash flow equal to three percent (3%) of the total operating expenses.

RPP loans will be underwritten using a 20 year term and a two percent (2%) interest rate. The Agency may, in its discretion, alter these terms to ensure project feasibility. Rents for projects utilizing HOME funds will not exceed the Fair Market Rents established by HUD. Underwriting of applications with a commitment from RD will incorporate the requirements of that program, and any RPP loan will have a 30 year term (fully amortizing) and zero percent (0%) interest.

2. Operating Expenses:

Assumptions for projects over 16 units:

- New construction (excluding adaptive re-use): \$2,300 per unit per year not including taxes, reserves and resident support services
- Renovation (includes rehabilitation and adaptive re-use): \$2,500 per unit per year not including taxes, reserves and resident support services.

Owner projected operating expenses will be used if they are higher than Agency minimums. The proposed management agent (or management staff if there is an identity of interest) must sign a statement (to be submitted with the full application) agreeing that the operating expense projections are reasonable.

3. Equity Pricing:

The Agency will conduct a survey of tax credit equity investors to determine appropriate pricing assumptions. Projects will be underwritten using the greater of this amount and the applicant's projection.

Equity should be calculated net of any syndication fees. Bridge loan interest typically incurred by the syndicator to enable an up front payment of equity should not be charged to the project directly, but be reflected in the net payment of equity. Equity should be based on tax credits to be used by the investor(s), excluding those allocated to the Principals unless these entities are making an equity contribution in exchange for the tax credits.

Applicants should use no more than the April 2003 AFR in preparing equity estimates.

4. Reserves:

- (a) Rent-up Reserve: Required for all except bond financed projects. A reasonable amount should be established based on the projected rent-up time considering the market and target population, but in no event shall be less than \$300 per unit. These funds should be available to the management agent to pay rent-up expenses incurred in excess of rent-up expenses budgeted for in the project development costs. The funds are to be deposited in a separate bank account and evidence of such transaction provided to the Agency 90 days prior to the expected placed in service. All funds remaining in the rent-up reserve at the time the project reaches 93% occupancy must be transferred to the project operating reserve account.

For those projects receiving loan funds from RD, the 2% initial operating and maintenance capital established by RD will be considered the required rent-up reserve deposit.

- (b) Operating Reserve: Required for all projects except those receiving loan funds from RD. The operating reserve will be based on six month's debt service and operating expenses, and must be maintained the duration of the low-income use period.

Projects receiving RPP funds must capitalize the operating reserve account prior to the RPP loan closing. The Agency must approve any withdrawals from the operating account to meet project's operating deficits.

The operating reserve can be funded by deferring the developer's fees of the project. If this method is utilized, the deferred amounts owed to the developer can only be repaid from cash flow if all required replacement reserve deposits have been made. For tax credit projects where no RPP loan applies, the operating reserve can be capitalized by an equity pay in up to one year after certificate of occupancy is received. This will be monitored by the Agency.

For applicants seeking 4% housing credits with tax-exempt bond financing, the operating reserve will be based on four month's debt service and operating expenses. The period for which this reserve must be maintained can be established by the bond issuer.

- (c) Replacement Reserve: All new construction projects must budget replacement reserves of \$250 per unit per year. Rehabilitation and adaptive re-use projects must budget replacement reserves of \$350 per unit per year. The replacement reserve must be capitalized from the project's operations, escalating by four percent (4%) annually. Projects with an RPP loan must have Agency approval of withdrawals for capital improvements throughout the term of the loan.

In both types of renovation projects mentioned above, the Agency reserves the right to increase the required amount of annual replacement reserves if the Agency determines such an increase is warranted after a detailed review of the project's physical needs assessment.

For those projects receiving RD loan funds, the required funding of the replacement reserve will be established, administered and approved by RD, and the replacement reserve will not escalate annually.

Funds remaining in the operating and replacement reserve accounts at the end of the RPP loan term must be used for project maintenance costs approved by the Agency or applied against the loan.

5. Deferred Developer Fees:

Developer fees can be deferred to cover a gap in funding sources as long as the entire amount will be paid within 10 years, pursuant to the standards required by the IRS to stay in basis. Payment projections must not negatively impact the operation of the project, using Agency underwriting standards. Nonprofit organizations must include a resolution from the Board of Directors allowing such a deferred payment obligation to the project. The developer may not charge interest on the deferred amount in excess of the long term AFR.

6. Financing Commitment:

For all projects proposing **private** permanent financing, a letter of intent is required. This letter should clearly state the term of the loan is at least 18 years, how the interest rate will be indexed and the current rate at the time of the letter, the amortization period, any prepayment penalties, anticipated security interest in the property and lien position. The interest rate must be fixed and no balloon payments may be due for 18 years. The bank must complete a cover letter using the format approved by the Agency, and submit it with the letter of intent. Applicants must submit a letter of commitment for financing within 90 days of receiving an award of tax credits.

For all projects proposing **public** permanent financing, binding commitments are required to be submitted by the full application due date. All loans must have a fixed interest rate and no balloon payments for at least 18 years after project completion. A binding commitment is defined as a letter, resolution or binding contract from a unit of government. The same terms described for the letter of intent (using the format approved by the Agency) from a private lender must be included in the commitment.

Applications may only include one set of proposed funding sources; the Agency will not consider multiple financial scenarios. A project will be ineligible for allocation if any of the listed funding sources will not be available in an amount or under the terms described in the application. The Agency may, in its discretion, waive this limitation if the project otherwise demonstrates financial feasibility.

It is not necessary to have AHP or NC Division of Community Assistance (DCA) CDBG subsidy commitments in place at the time of the application. All projects applying for tax credits and the CDBG subsidy must submit the application to DCA at the same time as the Agency's application deadline. However, the Agency will only consider AHP financing that has been submitted in the FHLB's first offering round of the calendar year. AHP and CDBG financing must be committed by August 1, 2003. (The deadline for consideration of AHP and CDBG funding in the 2004 cycle will be the full application date.) Public lenders must submit a cover letter using the format approved by the Agency.

7. Developer/Builder Fees:

- (a) Developer's fees shall be a maximum of fifteen percent (15%), or a lesser percentage adjusted for project size as described below. The Agency calculates developer's fees by adding lines 2-36 less lines 8 and 9 from the Project Development Cost Description in the application and multiplying by the applicable percentage to determine the maximum allowable developer fee.

up to 64 units	15%
65-112 units	12.5%
113 units plus	10%

In addition to the fees described above, a maximum developer's fee of four percent (4%) is allowed on the acquisition cost of buildings (not including land value/cost).

- (b) Builder's general requirements shall be limited to six percent (6%) of hard costs.
- (c) Builder's profit and overhead shall be limited to ten percent (10%) (8% profit, 2% overhead) OF TOTAL HARD COSTS including general requirements.
- (d) Where an identity of interest exists between the owner and builder, the builder's profit and overhead shall be limited to eight percent (8%) (6% profit, 2% overhead).

8. Consulting Fees: Consulting fees for a project must be paid out of developer fees, so that the aggregate of any consulting fees and developer fees is no more than the maximum developer fee allowed to that project.

9. Architects' Fees: For new construction projects, the architects' fees, including design and inspection fees, shall be limited to six percent (6%) of the total hard costs plus general requirements, overhead, profit and construction contingency (total of lines 2 through 10 on the Project Development Cost Description).

10. Investor Services Fees: Investor services fees must be paid from net cash flow and not be calculated into the minimum debt coverage ratio.

11. Project Contingency Funding: All new construction projects shall have a hard cost contingency line item of NO LESS OR NO MORE THAN three percent (3%) of total hard costs, including general requirements, builder profit and overhead. Rehabilitation and adaptive re-use projects shall include a hard cost contingency line item of NO LESS OR NO MORE THAN six percent (6%) of total hard costs.

12. Project Ownership: There must be common ownership between all units and buildings within a single project for the duration of the compliance period.

13. Section 8 Project-Based Rental Assistance: For all projects that propose to utilize Section 8 project-based rental assistance, the Agency will underwrite the rents according to the tax credit and HOME limits. These limits are based on data published annually by HUD. If the Section 8 contract administrator is willing to allow rents above these limits, the project

may receive the additional revenue in practice, but Agency underwriting will use the lower revenue projections regardless of the length of the Section 8 contract.

Given the uncertainty of long-term federal commitment to Section 8 rental assistance, the Agency considers underwriting to the more conservative revenue levels to best serve the project's long-term financial viability.

VII. POST-AWARD PROCESSES AND REQUIREMENTS

A. GENERAL REQUIREMENTS

1. The tax credit reservation amount will be the total anticipated qualified basis amount multiplied by eight and one half percent (8.5%). The actual tax credits allocated will be the lesser of the tax credits reserved, the applicable federal rate multiplied by qualified basis (as approved by the Agency), or the amount determined by the Agency pursuant to its evaluation as required under Section 42(m)(2) of the Code.
2. Ownership entities must expend ten percent (10%) of the project's reasonably expected basis and submit to the Agency a cost certification by November 14, 2003. (This requirement also applies to projects with partial allocations.) Projects will be required to elect a project-based allocation.
3. Once approved, the ownership entity will proceed to acquire, construct or rehabilitate the project. The ownership entity is required to update the Agency on the progress of development by submitting a Project Status Report. Sixty days prior to occupancy, the Agency must be notified in writing of the targeted project completion date. Upon completion for occupancy, the ownership entity must notify the Agency and furnish a completed Final Cost Certification form. The cost certification must include all project costs along with a certification for any subsidies the project will receive. Final IRS Section 1.42-17 Regulations effective January 1, 2001 require that the taxpayer of all projects in excess of ten units, which are placed in service after January 1, 2001, regardless of the year of credit allocation, submit a schedule of project costs accompanied by a Certified Public Accountant's (CPA) audit report that details the project's total costs as well as those that may qualify for inclusion in eligible basis under Section 42(d) of the Code. A third party CPA verification is required for cost certification on two or more units. The Agency may require an independent cost analysis.
4. Projects must meet all applicable federal, state and local laws and ordinances, including the Code and Fair Housing Act; the Agency may treat any failure to do so as a violation of the Plan.
5. Allocated credits may also be returned to the Agency under the following conditions as further described in Treasury Regulation Section 1.42-14: (a) credits have been allocated to a project building that is not a qualified building within the time period required by the Code, for example, because it is not placed in service within the period required under the Code, (b) credits have been allocated to a building that does not comply with the terms of its allocation agreement, (c) credits have been allocated to a project that are not necessary for the financial feasibility of the project, or (d) by mutual written agreement between the allocation recipient and the Agency. Returned credits may include credits previously allocated to project that fails to meet the 10% test under Section 42(b)(1)(E)(ii) of the Code after close of calendar year in which allocation was made. Credits that are returned before October 1 in any calendar year are treated as credits returned in that calendar year, and all or a portion of such credits will be reallocated to the next highest ranked project(s) without a full allocation in that region and in that calendar year, pursuant to the terms of the Plan or, in the Agency's discretion, when appropriate and possible, carried over for allocation in the next calendar year. With respect to credits that are returned after September 30 in any calendar year, all or a portion of such credits may also be reallocated to the next ranked project(s) without a full allocation in that calendar year pursuant to the terms of the Plan, or all or a portion of such credits may be treated by the Agency, in its discretion, where appropriate and possible, as credits that are returned on January 1 of the succeeding calendar year to be allocated in that year.

By the time of the earlier of the date the project is placed in service, in the case of a carryover allocation, or by the 10% cost certification, (a) the ownership entity must have been legally formed, and (b) qualifying expenditures must have been incurred in the ownership entity's name or incurred by the ownership entity pursuant to a reimbursement agreement with a third party and such third party has incurred such expenditures by the time of 10% cost certification, and (3) the ownership entity must have a tax identification number.

6. The Agency may conduct construction inspections for adherence to approved final plans and specifications.
7. The owner of the project must sign and record the Extended Use Agreement in the county in which the project is located by the end of the first taxable year in which the credits allocated to the project are taken. The owner must have good and marketable title at that time, and must obtain the consent of any lienholder on the project property recorded prior to the Extended Use Agreement (other than a lienholder relative to the financing of the construction of the project that by its

terms will be cancelled within one year of the last building in the project being placed in service) to be bound by the terms of this Extended Use Agreement.

8. The Agency may revoke credits after the project has been placed in service in accordance with the Code if the Agency determines that the owner has failed to implement all representations in the application to the Agency's satisfaction.
9. Federal form 8609 will not be issued until the owner and/or management company produces evidence of attending a low-income housing tax credit compliance seminar sponsored either by the Agency or a sponsor acceptable to the Agency within the last 12 months. In addition, 8609s will not be issued until the Agency confirms that the monitoring fees have been paid and that the project has adhered to all representations made in the application (including design elements). The Agency may require evidence of escrowed funds to complete landscaping.
10. In making application for tax credits, the applicant agrees that the Committee, the Agency, and their designees will have access to any information pertaining to the project. This includes having physical access to the project, all financial records and tenant information for any monitoring that may be deemed necessary to determine compliance with the Code. Applicants are advised that the Agency, on behalf of the Committee, is required to do compliance monitoring and to notify the IRS and the owner of any discovered noncompliance with tax credit laws and regulations, whether corrected or uncorrected. The Agency intends to conduct desk audits and monitoring visits of projects for the purpose of evaluating continuing compliance with tax credit regulations, selection criteria used to award bonus points, ensuring that the project continues to provide decent, safe and sanitary housing. The Agency will periodically modify monitoring procedures to ensure compliance with the requirements set forth in the Code and from time to time amended.

NOTE: Applicants are advised that some portion or all of a project's application may be subject to disclosure to the public under the North Carolina Public Records Act.

B. STATE TAX CREDITS

As the administrative agent for state credit refunds issued under N.C.G.S. § 105-129.42, the Agency has a responsibility to ensure that ownership entities do not receive resources ahead of corresponding value being created in the project. Therefore the following restrictions will apply to the state tax credit refund program.

1. Loan Option: Loans made by the Agency pursuant to N.C.G.S. § 105-129.42(d) will be under terms designed to have an effect similar to the equity generated under the previous state tax credit statute. Such loans will not be closed until the outstanding balance on the first-tier construction financing exceeds the total state credit amount. In other words, the entire loan must be used to pay down a portion of the then existing construction debt.
2. Direct Refund Option: The Agency and ownership entity will enter into an escrow agreement with regard to the refund dollars. The agreement will state, among other reasonable limitations, that issuance of the funds under N.C.G.S. § 105-129.42(g)(1) will not occur until all of the following requirements have been met:
 - (a) at least fifty percent (50%) of the activities included in the project's eligible basis have been completed;
 - (b) the Agency and local government inspector have conducted their framing inspections and approved all buildings (including community facilities); and
 - (c) the outstanding balance on the first-tier construction financing exceeds the total state credit amount (the entire refund must be used to pay down a portion of the then existing construction debt).

Ownership entities will have to fully comply with Section VII(A)(2) of the Plan to be eligible for participation in the state tax credit program. The Agency may adopt other policies regarding the state tax credit after adoption of the Plan.

C. COMPLIANCE MONITORING

Applicants will be required to utilize the TCR Online Internet reporting system (or other system as designated by the Agency) to update the Agency database on project and building information and unit activity. The database should be updated within 30 days of any change in information. Applicants will also be required to submit to the Agency a copy of the IRS form 8609 and Schedule A filed with the IRS for the first year credits are claimed.

The Agency will conduct on-site inspections and desk audits of at least 33% of the projects under its jurisdiction. If projects are determined to be in noncompliance, monitoring may occur more often. The desk audit and inspection will include a project review of 20% of the units for the following:

- Tenant eligibility certifications
- Supporting eligibility documentation
- Leases
- Rent record (including utility documentation)
- Compliance with supportive services commitments
- Compliance with special populations targeting requirements (if applicable)
- Compliance with other commitments made in the application
- Inspection for compliance with HUD Uniform Physical Condition Standards

All projects, at a minimum, are expected to meet HUD's Section 8 Uniform Physical Condition Standards and comply with local and state health and building codes throughout the compliance period. A Memorandum of Understanding (MOU) has been executed with RD to accept their physical inspections in lieu of performing the inspection. The Agency will determine when to utilize the MOU. In any event, the Agency will continue to monitor compliance documentation.

The Agency monitor rent levels relative to current median income levels. The Agency may require a window of affordability in calculating rents; owners should refer to the relevant Qualified Allocation Plan.

The county designation will be reviewed on an annual basis and published each year in the Plan. Tenant rents can not exceed the initial window of affordability from the original underwriting for the property without written permission of the Agency. In the event the county designation changes from low to high or high to low, requiring a change in the window of affordability, the Agency will not require a reduction in the existing rent structure. However, rent increases can only be implemented to the extent that they comply with the current required calculation. The Agency may waive this restriction if the ownership entity submits a written request and documentation demonstrating that the property will be financially jeopardized, and that it is unable to pay its operating expenses and debt service requirements while maintaining at least a 1.15 debt coverage ratio.

In mixed-use properties, 100% of the units may be monitored in any building receiving an allocation of tax credits.

The Agency will be monitoring projects to ensure the required monthly deposits to reserve for replacement accounts are made in accordance with the General Requirements.

During the compliance period the Committee and Agency reserve the right to perform an audit of any project that has received an allocation of tax credits. This audit may include an inspection of all buildings, and a review of all tenant records and any document relating to an application for an allocation of credits

The ownership entity of a low-income housing project must keep records (as defined below) for each building within a particular development. These records must be retained by the owner for a minimum of six (6) years beyond the owner's income tax filing date (plus any extensions) for that year. However, first year project records must be maintained for six (6) years beyond the tax filing date of the final year of the project's compliance period(21 years). The ownership entity must annually report to the Agency and maintain records for each qualified low-income building in the project showing:

- Total number of residential rental units in the building (including the number of bedrooms and the size in square feet of each such unit)
- Percentage of residential rental units in the building that are low-income units
- Rent charged on each residential rental unit in the building (including utility allowances)
- The size of each low-income household
- Low-income unit vacancies in the building and documentation of when and to whom, the next available units were rented
- Income certification and student status of each low-income tenant
- Documentation to support each low-income tenant's income certification
- Character and use of the nonresidential portion of each building included in the building's eligible basis (this includes separate facilities such as clubhouses or swimming pools whose eligible basis is allocated to each building)

Failure to report annually to the Agency is deemed as noncompliance and is reportable to the IRS.

It is the responsibility of the ownership entity to certify annually to the Agency that the project meets the requirements of whichever set-aside of the Code is applicable to the project. Failure to certify is deemed as noncompliance and reportable to the IRS. This annual certification requires that the ownership entity certify that:

- The project meets the minimum requirements of the 20/50% or 40/60% test under the Code

- There has been no change in the applicable fraction as defined in the Code for any building in the project
- The applicant has received an annual Tenant Income Certification from each low-income resident and documentation to support that certification; or in the case of a tenant receiving Section 8 housing assistance payments, a statement from the PHA certifying the household's size and amount of gross income; or the owner has a recertification waiver letter from the IRS in good standing that waives the requirement to obtain third party verifications at recertification and has received an annual Tenant Income Certification from each low-income household, and documentation to support the certification at their initial occupancy
- Each low-income unit was rent restricted in accordance with the Code.
- All units in the project are and have been for use by the general public and used on a non-transient basis (except for transitional housing for the homeless)
- No finding of discrimination under the Fair Housing Act has occurred for the Project (a finding of discrimination includes an adverse final decision by HUD, an adverse final decision by a substantially equivalent state or local fair housing agency, or an adverse judgment from a federal court).
- Each building in the project is and has been suitable for occupancy, taking into account local health, safety, and building codes, and the state or local government unit responsible for making building code inspections did not issue a report of a violation for any building or unit in the project
- There has been no change in the eligible basis (as defined in the Code) of any building in the project since last certification
- All tenant facilities included in the eligible basis, such as swimming pools, other recreational facilities, parking areas, washer/dryer hookups, and appliances were provided on a comparable basis without charge to all tenants in the buildings
- If a low-income unit in the project has been vacant during the year, reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units were or will be rented to tenants not having a qualifying income
- If the income of tenants of a low-income unit in the project increased above the limit allowed in Section 42(g)(2)(D)(ii) of the Code, the next available unit of comparable or smaller size was or will be rented to residents having a qualifying income
- An extended low-income housing commitment was in effect, including the requirement that an ownership entity cannot refuse to lease a unit because the applicant holds a Section 8 voucher or certificate of eligibility; neither the ownership entity nor the management agent has refused to lease a unit to an applicant based solely on their status as a holder of a Section 8 voucher and the project otherwise meets the provisions, including any special provisions, as outlined in the extended low-income housing commitment
- If the applicant received its credit allocation from the portion of the state ceiling set-aside for a project involving "qualified nonprofit organizations" under Section 42(h)(5) of the Code and its nonprofit entity materially participated in the operation of the development within the meaning of Section 469(h) of the Code
- There has been no change in the ownership or management of the project

The ownership entity of any exempted project must certify to the Agency on an annual basis that the project is in compliance with the requirements of the Code, Rural Development assistance or the tax-exempt bond financing guidelines, as applicable. The ownership entity must inform the Agency of any noncompliance or if the owner is unable to make one or more of the required certifications.

The Agency may elect to subcontract the compliance monitoring procedure to other agents.

In the event that any noncompliance with the Code is identified, a discrepancy letter detailing the noncompliance will be forwarded to the ownership entity and management company of the project.

The ownership entity must then respond in writing to the Agency within thirty (30) days after receipt of the discrepancy letter. The response must address all discrepancies individually and must indicate the manner in which corrections will be made. The owner will then have a cure period of sixty (60) days from the date of the discrepancy letter to correct the noncompliance and to provide the Agency with any required documentation or certification. The cure period may be extended for periods of up to six (6) months. Extensions will be based on a determination by the Agency that there is good cause for granting the extension.

The Agency will notify the Internal Revenue Service of any noncompliance within forty-five (45) days after the expiration of the cure period. All corrections made by the ownership entity within the cure period will be acknowledged within this notice. A copy of the applicant's response to the noncompliance will accompany the notice to the IRS.

If a potential noncompliance is discovered during a compliance monitoring review, the ownership entity will be required to have its managing agent attend a compliance training session within two months following the compliance monitoring review.

VIII. DEFINITIONS

The terms listed below will be defined in the Plan as indicated below regardless of capitalization, unless the context clearly indicates otherwise. Terms used in the Plan but not defined below will have the same meaning as under the Code and IRS regulations.

Affiliate: As to any person or entity (i) any entity of which a majority of the voting interest is owned by such person or entity, (ii) any person or entity directly or indirectly controlling (10% or more) such person or entity, (iii) any person or entity under direct or indirect common control with any such person or entity, or (iv) any officer, director, employee, manager, stockholder (10% or more), partner or member of any such person or entity or of any person or entity referred to in the preceding clauses (i), (ii) or (iii).

Applicant: The entity that is applying for the tax credits and/or any RPP loan funds, as applicable.

Allowable Development Cost: Cost upon which the Agency calculates allowable developer fees. Includes lines 2- 36 less lines 8, 9 and 10 in the Project Development Cost Description in the application.

Community Revitalization Plan: A plan that has been adopted and with specific funding commitments by one or more unit(s) of government prior to the date of preliminary application to the Agency and includes the following: a clearly delineated geographic target area that includes the project; detailed policy goals (one of which must be safe, decent and affordable housing) and implementation measures along with specific timeframes for the achievement of such policies; housing activities that will occur within at least one-half mile of the project; and at least one community revitalization action that has been initiated and indicates measurable progress.

Community Service Facility: Any facility designed to serve primarily individuals whose income is 60% or less of area median income.

Developer: Any individual or entity responsible for initiating and controlling the development process and ensuring that all, or any material portion of all, phases of the development process are accomplished. Furthermore, the developer is the individual or entity identified as such in the Ownership Entity Agreement and any and all Development Fee Agreements.

Displacement: The moving of a person and/or such person's personal property from their current residence.

Efficiency Apartment: A dwelling unit with a minimum of 450 net square footage (assuming new construction) in which the bedroom and living area are contained in the same room. Each unit has a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, full size refrigerator) which is located in a separate room.

Elderly Housing: Owners may choose one of the established definitions recognized under federal Fair Housing Law. Owners should read the law and obtain legal guidance to determine compliance.

Entity: Without limitation, any general partnership, limited partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative, association, public agency or other entity, other than a human being.

Gross Square Footage or Floor Area: Space measured from outside walls to include all building footprints and covered spaces.

HOME Program Rents: Generally, projects using RPP loan funds must set rents below the lesser of the rent calculated as affordable for households at 50% of median income or the Fair Market Rent (FMR) . Users should contact the Agency concerning this calculation if they are unfamiliar with HOME Program rules.

Homeless Populations: People who are living in places not meant for habitation (such as streets, cars, parks), emergency shelters, or in transitional or supportive housing but originally came from places not meant for habitation or emergency shelters.

Housing Quality Standards: Minimum physical standards established by HUD.

Management Agent: Individual(s) or Entity responsible for the day to day operations of the development, which may or may not be related to the Owner(s) or ownership entity.

Material Participation: Involvement in the development and operation of the project on a basis which is regular, continuous and substantial throughout the compliance period as defined in Code Sections 42 and 469(h) and the regulations promulgated thereunder.

Maximum Housing Expense: The maximum rent, utilities and any other required charges paid by the tenant calculated on a monthly basis as permitted under the Code.

Net Square Footage: The outside to outside measurements of all finished areas that are heated and cooled (conditioned). Examples include hallways, community and office buildings, dwelling units, meeting rooms, sitting areas, recreation rooms, game rooms, etc. Breezeways, stairwells, gazebos and picnic shelters are examples of unconditioned outside structures that may not be used as net square footage.

Noncompliance (for purposes of deducting points from an application): An event occurring after June 30, 1993 that results in the issuance of an 8823 for any of the following: 1) Failure to maintain accurate records for each unit, 2) Failure to rent to a Section 8 voucher or certificate holder, 3) Rents for the development are not properly restricted, 4) The development has transient occupancy, 5) Any unit for which low-income housing tax credits were allocated is not available to the general public, 6) There are ineligible tenants found to be occupying qualifying units, 7) Failure of the development to maintain minimum housing quality standards, or 8) Failure to re-certify low-income tenants on an annual basis.

One Bedroom Apartment: A dwelling unit of at least 600 net square feet (assuming new construction), meeting state and local building code requirements, containing at least four separate rooms including a living/dining room, full kitchen, a bedroom and full bathroom.

Owner(s): Person(s) or entity(ies) that own an equity interest in the Ownership Entity.

Ownership Entity: The ownership entity to which tax credits and/or any RPP loan funds will be awarded.

Ownership Entity Agreement: A written, legally binding agreement describing the rights, duties and obligations of owners in the ownership entity.

Paint to Paint Square Footage: Interior heated rental dwelling space (does not include community room space).

Person: Any individual or Entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so requires.

Person with a Disability: An adult who has a permanent physical or mental impairment which substantially limits one or more major life activities as further defined in North Carolina's Persons with Disabilities Protection Act (N.C.G.S. § 168A-3 (7a))

Principal: Principal includes (1) all such persons or entities who directly or indirectly earn a portion of the development fee for development services with respect to a project and/or earn any compensation for development services rendered to such project, which compensation is funded directly or indirectly from the development fee of such project, and such amount earned exceeds the **lesser of 25%** of the development fee for such project or **\$100,000**, and (2) all affiliates of such persons or entities in clause (1) who directly or indirectly earn a portion of the development fee for development services with respect to any project in the current year and/or earn any compensation for development services rendered to any project in the current year, which compensation is funded directly or indirectly from the development fee of any such project, and such amount earned exceeds the **lesser of 25%** of the development fee for such project or **\$100,000**.

Qualified Census Tract: Any census tract which is so designated by HUD.

Qualified Corporation: Any corporation if, at all times such corporation is in existence, 100% of the stock of such corporation is held by a nonprofit organization that meets the requirements under Code Section 42(h)(5).

Rehabilitation: Replacement of one or more major building components in one or more residential buildings. Major building components include roof structures, wall or floor structures, foundation, plumbing system, electrical system, central heating and cooling systems. Hard construction costs must exceed \$10,000 per unit, calculated using lines 2 through 7 in the Project Development Cost Description in Part A of the application and certified at final cost certification.

Rental Production Program (RPP): Agency loan program for multifamily affordable rental housing administered and serviced by the Agency.

Single Room Occupancy (SRO) Unit: A single room dwelling unit with a minimum of 250 net square feet (assuming new construction) that is the primary residence of its occupant(s). The unit must contain either food preparation or sanitary facilities. At least one component of either a full bathroom (shower, water closet, lavatory) and/or a full kitchen (refrigerator, stove top and oven, sink) is missing. A SRO may serve a special population and may also have targeted supportive services on site or at an appropriately

IN ADDITION

convenient location. There are shared common areas in each building which contain elements of food preparation and/or sanitary facilities that are missing in the individual units.

Stabilized Occupancy: Maintenance of at least 93% occupancy for six consecutive months.

Studio Apartment: A dwelling unit with a minimum of 375 net square feet (assuming new construction) in which the bedroom, living area and kitchenette are contained in the same room. Each unit has components of a full bathroom (shower/bath, lavatory and water closet) and full kitchen (stove top/oven, sink, refrigerator).

Three Bedroom Apartment: A dwelling unit with a minimum of 1,000 net square feet (assuming new construction), meeting state and local building code requirements containing at least seven separate rooms including a living/dining room, full kitchen, three bedrooms and 1.75 bathrooms, with each unit including a minimum of one bath with a full tub and one bath with an upright shower stall.

Two Bedroom Apartment: A dwelling unit with a minimum of 800 net square feet (assuming new construction), meeting state and local building code requirements containing at least five separate rooms including a living/dining room, full kitchen, two bedrooms and full bathroom.

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY**

Dabney Exchange, LLC

Pursuant to N.C.G.S. 130A-310.34, Dabney Exchange, LLC has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Henderson, Vance County, North Carolina. The Property consists of approximately 21 acres and is located at 1703 Dabney Drive. The Property is bounded on the north by U.S. Highway 158 Bypass, on the southeast by U.S. Interstate 85, and on the southwest by Dabney Drive, beyond which is property in commercial retail use. Environmental contamination exists on the Property in soil and groundwater. Dabney Exchange, LLC has committed itself to redevelopment of the Property for office, retail, hotel/motel and warehouse use. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Dabney Exchange, LLC, which in turn includes (a) a legal description of the Property, (b) a map showing the location of the Property, (c) a description of the contaminants involved and their concentrations in the media of the Property, (d) the above-stated description of the intended future use of the Property, and (e) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the front desk of the offices of the City of Henderson located at 180 South Beckford Drive, Henderson, NC 27536, or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Scott Ross at that address, at scott.ross@ncmail.net, or at (919)733-2801, ext. 328. Written public comments may be submitted to DENR within 60 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Head, Special Remediation Branch
Superfund Section
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

A Notice of Rule-making Proceedings is a statement of subject matter of the agency's proposed rule making. The agency must publish a notice of the subject matter for public comment at least 60 days prior to publishing the proposed text of a rule. Publication of a temporary rule serves as a Notice of Rule-making Proceedings and can be found in the Register under the section heading of Temporary Rules. A Rule-making Agenda published by an agency serves as Rule-making Proceedings and can be found in the Register under the section heading of Rule-making Agendas. Statutory reference: G.S. 150B-21.2.

TITLE 10 – DEPARTMENT OF HEALTH AND HUMAN SERVICES

CHAPTER 03 – FACILITY SERVICES

Notice of Rule-making Proceedings is hereby given by the NC Medical Care Commission in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: 10 NCAC 03L .1302 - Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 131E-140

Statement of the Subject Matter: This Rule pertains to home care agencies and the amount of time they have to obtain a physician counter signature on verbal orders.

Reason for Proposed Action: Home & Hospice Care of North Carolina submitted a petition to the NC Medical Care Commission during its quarterly meeting in September 2002, to amend this Rule. The Commission agreed to initiate permanent rule-making proceedings to amend this Rule.

Comment Procedures: Comments from the public shall be directed to Mark Benton, NCDHHS-DFS, 2701 Mail Service Center, Raleigh, NC 27699-2701, phone (919) 855-3751, fax (919) 733-2757, and email mark.Benton@ncmail.net.

CHAPTER 14 - MENTAL HEALTH: GENERAL

Notice of Rule-making Proceedings is hereby given by the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: 10 NCAC 14V .5300 - Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 122C-26; 143B-147

Statement of the Subject Matter: Rules governing Therapeutic Homes for Children and Adolescents.

Reason for Proposed Action: The Commission for MH/DD/SAS proposes to repeal these Rules governing therapeutic homes for children and adolescents. This action is needed to coordinate with recent changes made in 10 NCAC 41F pertaining to family foster homes. As a result of these changes, DFS is no longer licensing new therapeutic homes for children and adolescents. Providers are being directed to private licensed child placing agencies and the Division of Social Services to become licensed as family foster homes. The family foster home rules contain additional requirements for homes providing therapeutic care. Therefore, these Rules are now duplicative and need to be repealed.

Comment Procedures: Comments from the public shall be directed to Cindy Kornegay, 3012 Mail Service Center, Raleigh, NC 27699-3012, phone (919) 881-2446, fax (919) 881-2451, and email cindy.kornegay@ncmail.net.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 26 - LICENSING BOARD OF LANDSCAPE ARCHITECTS

Notice of Rule-making Proceedings is hereby given by the NC Board of Landscape Architects in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: 21 NCAC 26 .0105 - Other rules may be proposed in the course of the rule-making process.

Authority for the Rule-making: G.S. 89A-6

Statement of the Subject Matter: The rule sets forth the fees for those practicing in the profession of Landscape Architecture.

Reason for Proposed Action: The Board has determined that it should consider an increase in fees.

Comment Procedures: Comments from the public shall be directed to J. Richard Lee, PO Box 41225, Raleigh, NC 27629.

CHAPTER 36 – BOARD OF NURSING

Notice of Rule-making Proceedings is hereby given by North Carolina Board of Nursing in accordance with G.S. 150B-21.2. The agency shall subsequently publish in the Register the text of

RULE-MAKING PROCEEDINGS

the rule(s) it proposes to adopt as a result of this notice of rule-making proceedings and any comments received on this notice.

Citation to Existing Rule Affected by this Rule-making: *21 NCAC 36 .0227 - Other rules may be proposed in the course of the rule-making process.*

Authority for the Rule-making: *G.S. 90-6; 90-18(c)(13), (14); 90-18.2; 90-171.20(4); 90-171.20(7); 90-171.23(b); 90-171.36; 90-171.37; 90-171.42; 90-171.83*

Statement of the Subject Matter: *Describes the nurse practitioner qualifications for approval to practice and the practice requirements.*

Reason for Proposed Action: *The Board of Nursing and the North Carolina Medical Board are recommending that changes be made in the current rule to allow for registration as a nurse practitioner prior to approval to practice; tighten the educational requirements and revisions to the rules for clarity.*

Comment Procedures: *Comments from the public shall be directed to Jean H. Stanley, APA Coordinator, NC Board of Nursing, PO Box 2129, Raleigh, NC 27602-2129, phone (919) 782-3211, ext. 252, fax (919) 781-9461, and email jeans@ncbon.com.*

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 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 adopt the rule cited as 15A NCAC 02P .0408. Notice of Rule-making Proceedings was published in the Register on March 15, 2002 and July 1, 2002.

Proposed Effective Date: July 1, 2004

Public Hearing:

Date: November 18, 2002

Time: 9 am – 12 p.m.

Location: Groundwater Conference Room, Parker Lincoln Building, 2728 Capital Blvd., Raleigh, NC

Reason for Proposed Action: *In House Bill 1063 (S.L. 2001, c. 442, s. 1 and s. 2), the General Assembly mandated that the Environmental Management Commission shall adopt rules governing the competitive bidding process for performance-based cleanups of leaking petroleum underground storage tank sites that are eligible for reimbursement from the Commercial and Noncommercial Trust Funds. The General Assembly further stipulated that these rules shall establish the qualifications for environmental services firms and for individuals and firms that provide engineering services as part of a contract to satisfactorily complete work associated with the cleanup. In Section 6(b) of House Bill 1063, the General Assembly authorized that the Commission may adopt temporary rules to implement this act until 1 July 2002. The Commission adopted the temporary rule on May 14, 2002 and the Division published the adopted temporary rule in the NC Register for 30 days without comment. The Commission then approved the Department's request to proceed with permanent rulemaking and publication of these proceedings in the NC Register.*

Comment Procedures: *Comments from the public shall be directed to George C. Mattis, Jr., DENR, DWM, UST Section, 1637 Mail Service Center, Raleigh, NC 27699-1637, phone (919) 733-1332, fax (919) 733-9413, and email George.Matthis@ncmail.net. Comments shall be received through December 2, 2002.*

Fiscal Impact

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

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02P - LEAKING PETROLEUM UNDERGROUND STORAGE TANK CLEANUP FUNDS

SECTION .0400 - REIMBURSEMENT PROCEDURE

15A NCAC 02P .0408 PERFORMANCE-BASED CLEANUPS

(a) The Division shall solicit competitive bids and award contracts for performance-based cleanups in accordance with G.S. 143, Article 3 and 01 NCAC 05B.

(b) To be considered by the Division for performance-based cleanups, an environmental services firm shall provide documentation of proof that the firm and any subcontracted individuals and firms it utilizes can perform the necessary services described in the solicitation documents. Any professional engineering firm selected by an environmental services firm to perform engineering services for a performance-based cleanup must comply with G.S. 89C.

Authority G.S. 143-215.94B(f); 143-215.94D(f); S.L. 2001, c. 442, s. 6b.

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 02C .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 12 - DEPARTMENT OF JUSTICE

Rule-making Agency: *NC Private Protective Services Board*

Rule Citation: *12 NCAC 07D .0907-.0908*

Effective Date: *October 2, 2002*

Findings Reviewed and Approved by: *Julian Mann*

Authority for the rulemaking: *74C-5; 74C-13*

Reason for Proposed Action: *Recently, several industry members have informed the Board that many Certified Firearms Trainers are not following the armed security officer training curriculum as set forth in the Board's rules and the Board's training manual. Presently, the Board has no means of monitoring on-site training as there is no notification of training being given nor any follow-up report of training being provided to the Board.*

Comment Procedures: *Comments should be submitted to W. Wayne Woodard, 1631 Midtown Place, #104, Raleigh, NC 27609.*

CHAPTER 07 - PRIVATE PROTECTIVE SERVICES

SUBCHAPTER 07D - PRIVATE PROTECTIVE SERVICES BOARD

SECTION .0900 - FIREARMS TRAINER CERTIFICATE

12 NCAC 07D .0907 PRE-DELIVERY REPORT FOR FIREARMS TRAINING COURSES

Firearms Trainers shall submit to the Board, a pre-delivery report for all firearms training courses required by 12 NCAC 07D .0807 not less than five days prior to commencing any firearms training course. This report shall be submitted on a Board approved form and shall contain the following information:

- (1) Certified Firearms Trainer's name, address, and contact telephone number;
- (2) Date, time, and location of classroom training;
- (3) Date, time, and location of range qualification;
- (4) Classroom and range telephone number(s);
- (5) Number of students anticipated; and
- (6) Certified Firearms Trainer's signature.

History Note: Authority G.S. 74C-5; 74C-13; Temporary Adoption Eff. October 2, 2002.

12 NCAC 07D .0908 POST-DELIVERY REPORT FOR FIREARMS TRAINING COURSES

Firearms Trainers shall submit to the Board a post-delivery report for all firearms training courses required by 12 NCAC

07D .0807 not less than 20 days after completion of the firearms training. The report shall be submitted on a Board approved form and shall contain the following information:

- (1) Certified Firearms Trainer's name;
- (2) Date, time, and location of classroom training;
- (3) Date, time, and location of range qualification;
- (4) Full name of the students who completed the firearms training course;
- (5) Classroom exam score for each student completing the firearms training course;
- (6) Range score for each student completing the firearms training course and;
- (7) Certified Firearms Trainer's signature.

History Note: Authority G.S. 74C-5; 74C-13; Temporary Adoption Eff. October 2, 2002.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: *NC Wildlife Resources Commission*

Rule Citation: *15A NCAC 10B .0101; 10H .0301-.0303*

Effective Date: *October 8, 2002*

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

Authority for the rulemaking: *G.S. 19A-11; 113-134; 113-174; 113-272.5; 113-274; 113-291.3; 113-292*

Reason for Proposed Action: Chronic Wasting Disease [CWD] is a fatal neurological disease of deer, elk and related animals characterized by microscopic empty spaces in the brain matter, creating a “spongy” appearance. Afflicted animals exhibit unusual behavior (isolation from other herd members, listlessness, lack of coordination, frequent lowering of the head, repetitive walking in patterns, drooling and grinding teeth, extreme low weight) and eventually die. The source of the disease appears to be an abnormal protein, called a prion, in the nervous system. Transmission is from animal to animal, but the pathway is unknown. Animals may be infected five years or more before showing symptoms. This lengthy incubation period compounds the problem of diagnoses in live animals. No live test yet exists.

CWD has been found in several states, including Wisconsin, which is a major source for importation of deer into North Carolina. The disease is not known to have crossed into North Carolina yet, though given the incubation period and the known sources of some animals already imported into North Carolina, it is possible that the disease is already in our borders.

The above-cited rules will alter the complete ban on transportation enacted by the current versions of 10B .0101 and

TEMPORARY RULES

10H .0301, which were adopted on an emergency basis on May 17th, 2002. The limited purposes for which transportation will be permitted under these amendments will permit desirable captive herd management strategies such as transportation for purposes of slaughter and for veterinary treatment. Individuals holding cervids in captivity will also be allowed to transport out of state (provided the destination state issues an importation permit). The provisions for exportation and slaughter will incidentally ease some of the economic hardship being imposed on cervid farmers as a result of the current freeze on any movement of these animals.

In addition to the notice served by virtue of the publication of the emergency rules adopted May 17, 2002, and by Notice of Rulemaking in Volume 17, Issue 7 of the North Carolina Register (October 1, 2002 publication), staff from WRC has conferred regularly over the past several months with the chosen representative for the parties who have expressed interest and who are directly affected by these rules. In response to concerns raised by these parties, the Wildlife Resources Commission has made multiple changes to the proposed rules. Staff of WRC has also conferred regularly with complementary personnel of the North Carolina Department of Agriculture, and is a participant in a task force comprising representatives of NCDA and members of the Deer and Elk Farmers Association in North Carolina.

Given the potentially devastating impact of Chronic Wasting Disease on free-ranging populations of cervid, the Wildlife Resources Commission believes it is imperative that these rules be implemented immediately, rather than after formal public hearing and rather than awaiting the 2004 convening of the General Assembly, as would be required under the regular permanent rule-making process.

* Justification for Temporary Rule *

These amendments lay the basis for a monitoring program that is key to detecting and isolating the disease. The program establishes a starting point for determining that an animal has been free of disease for five years, provides a means of accounting for a given animal's movements and health record, implements requirements to minimize the potential for commingling of wild and captive cervids, and reduces the risk of the disease being spread by cervids within North Carolina that may already be infected – all of which are measures urgently needed for protection of the wildlife resource. The establishment of the program will also position North Carolina to cooperate with other states toward the same purpose and to coordinate with a program currently under development by the United States Department of Agriculture.

Comment Procedures: *Written comments should be submitted to Joan Troy, 1701 Mail Service Center, Raleigh, NC 27699-1701. Email: troyjb@mail.wildlife.state.nc.us*

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10B - HUNTING AND TRAPPING

SECTION .0100 - GENERAL REGULATIONS

15A NCAC 10B .0101 and 10H .0301 were temporarily amended on May 17, 2002. Changes adopted for that amendment are shown in bold. Formatting and language revisions in these temporary rules have altered some of the May 17th changes.

15A NCAC 10B .0101 IMPORTATION OF WILD ANIMALS

(a) Before any live wild bird or wild animal is imported into North Carolina for any purpose, a permit shall be obtained from the Executive Director of the North Carolina Wildlife Resources Commission authorizing the importation, using application forms ~~prescribed provided~~ by the ~~Commission~~ commission.

(b) No deer, elk, or other species in the family Cervidae may be imported into the state of North Carolina for any purpose until the U.S. Department of Agriculture (USDA) establishes a Chronic Wasting Disease (CWD) program that includes a test to detect Chronic Wasting Disease, along with requirements for monitoring cervids that shall establish a basis for determining whether a cervid and any cervid herd or farm on which the tested animal has resided has been free of CWD for five years, provided that the program, test and monitoring requirements are recommended for application to wild animals by the Southeastern Cooperative on Wildlife Disease Study.

(c) Cervids imported into North Carolina must be individually identified by tags provided by the Wildlife Resources Commission that shall be affixed by the licensee to each cervid as set forth in these Rules.

History Note: Authority G.S. 113-134; 113-274; 113-291.3; 113-292; 106.549-97(b); Eff. February 1, 1976;

Temporary Amendment Eff. October 8, 2002; May 17, 2002.

SUBCHAPTER 10H – REGULATED ACTIVITIES

SECTION .0300 - HOLDING WILDLIFE IN CAPTIVITY

15A NCAC 10H .0301 GENERAL REQUIREMENTS

(a) Captivity Permit or License Required:

(1) Requirement. The possession of any species of wild animal ~~which that~~ is or once was native to this State or any species of wild bird, native or migratory, which that naturally occurs or historically occurred in this ~~State, State being native or migratory, or any member of the family cervidae~~ is unlawful unless the institution or individual in possession ~~thereof has first obtained~~ obtains from the Wildlife Resources Commission a captivity permit or a captivity license ~~except~~ as provided by this Rule.

~~(2) Injured, Crippled or Orphaned Wildlife. Notwithstanding the preceding Subparagraph (1), a crippled, injured or orphaned wild animal or wild bird, except deer or black bear may be taken and kept in possession for no longer than five days, provided that during such five day period the individual in possession thereof shall apply to the Wildlife Resources Commission, or a wildlife~~

~~enforcement officer of the Commission, for a captivity permit.~~

~~Deer and Black Bear. Captivity permits will not be issued for crippled, injured or orphaned bear. No person shall keep a crippled injured or orphaned bear in possession for longer than a 24 hour period. Captivity permits for crippled injured or orphaned deer will only be issued to certain rehabilitators pre-designated by the Commission to provide temporary care for fawn deer.~~

~~(2) Injured, Crippled or Orphaned Wildlife. When an individual has taken possession of an injured, crippled or orphaned wild animal or wild bird, that individual shall apply to the Wildlife Resources Commission or a wildlife enforcement officer of the Commission for a captivity permit within 24 hours of taking possession, provided, however, that under no circumstances shall an individual take possession of an injured, crippled or orphaned wild turkey, black bear, deer, elk or any other member of the family Cervidae.~~

~~(b) Captivity Permit: (3) Application and Term. A captivity permit will be issued without charge and may be issued upon informal request shall be requested by mail, telephone, phone, facsimile or electronic transmission, or other means of communication; but such A captivity permit shall authorize possession of the animal or bird only for such period of time as may be required for the rehabilitation and release of the animal or bird to the wild; or to obtain a captivity license as provided by Paragraph (b)(c) of this Rule, if such a license is authorized; or to make a proper disposition of the animal or bird, as determined by the Executive Director, if the application for such license is denied, or when an existing captivity license is not renewed or is terminated. Captivity permits shall not be issued for wild turkey, black bear, deer, elk or any other member of the family Cervidae.~~

~~(c)(b) Captivity License:~~

~~(1) Requirement. Except as provided in Paragraph (a) of this Rule, no person shall keep any member of the family Cervidae; or any coyote, wolf, or other non-indigenous member of the family Canidae; or any species of wild bird which naturally occurs or historically occurred in this State, either resident or migratory, without first having obtained from the Wildlife Resources Commission a license to hold the particular species of animal or bird in captivity. No wildlife captivity license will be issued for exotic wild animals, non-indigenous wild animals, or native big game species when the reason for holding such wild animals is release for hunting. No captivity license will be issued for holding wild turkeys.~~

~~Acquisition of Wildlife. Notwithstanding the provisions of Subparagraph (a)(2) of this Rule, captivity licenses may not be issued if the wild animal or wild bird was acquired unlawfully or merely as a pet.~~

~~(1) Denial of captivity license: Circumstances or purposes for which a captivity license shall not~~

~~be issued include but are not limited to the following:~~

~~(A) For the purpose of holding a wild animal or wild bird that was acquired unlawfully;~~

~~(B) For the purpose of holding the wild animal or wild bird as a pet. For purposes of this rule, the term "pet" shall not be construed to include cervids held in captivity for breeding for sale to another licensed operator;~~

~~(C) For the purpose of holding wild animals or wild birds for hunting in North Carolina;~~

~~(D) For the purpose of holding wild turkey;~~

~~(E) For the purpose of holding deer, elk or any other member of the family Cervidae on a facility licensed after May 17, 2002, until the U.S. Department of Agriculture (USDA) establishes a Chronic Wasting Disease (CWD) program that includes a test to detect Chronic Wasting disease along with requirements for monitoring cervids that shall establish a basis for determining whether a cervid and any cervid herd or farm with which the tested cervid has resided has been free of CWD for five years, provided that the program, test and monitoring requirements are recommended for application to wild animals by the Southeastern Cooperative Wildlife Disease Study.~~

~~(2) Required Facilities: No captivity license shall be issued until the applicant has constructed or acquired a facility for keeping the animal or bird in captivity which that shall comply with the minimum standards set forth in Rule .0302 of this Section, Section and the adequacy of such facility has been verified on inspection by a representative of the Commission.~~

~~(3) Term of License~~

~~(A) Dependent Wildlife: If the wild animal or wild bird has been permanently rendered incapable of subsisting in the wild, the license authorizing its retention in captivity shall be an annual license terminating on December 31 of the year for which issued.~~

~~(B) Rehabilitable Wildlife: When the wild animal or wild bird is temporarily incapacitated, and may be rehabilitated for release to the wild, any captivity license which that is issued shall be for a period less than one year as rehabilitation may~~

require. ~~Captivity licenses will not be issued for rehabilitation of deer, turkey, and black bear.~~

(C) Concurrent Federal Permit: No State captivity license for an endangered or threatened species or a migratory ~~bird~~ bird, regardless of the term specified, shall ~~be operative~~ operate to authorize retention thereof for a longer period than is allowed by any concurrent federal permit that may be required for ~~its retention~~ retention of the bird or animal.

(4) Holders of Captivity License for Cervids:

(A) Inspection of records: The licensee shall make all records pertaining to tags, licenses or permits issued by the Wildlife Resources Commission available for inspection by the Commission at any time during normal business hours, or at any time an outbreak of CWD is suspected or confirmed within five miles of the facility or within the facility itself.

(B) Tagging Required: Effective upon receipt of tags from the Commission, each licensee shall implement the tagging requirement using only the tags provided by the Commission as follows:

(i) All cervids newborn within a facility, with the exception of Muntjac and Axis deer, shall be tagged by October 1 following the birthing season each year. Newborn Muntjac and Axis deer shall be tagged within four months of birth.

(ii) All cervids transferred to a facility shall be tagged within five days of the cervid's arrival at the licensee's facility. However, no cervids shall be transported from one facility to another until restrictions on importation (10B .0101) and transportation (subparagraph (f) of this Rule) no longer apply.

(iii) All cervids in the possession of a licensee as of October 8, 2002 shall be tagged within six months of the licensee's receipt of the tags.

(C) Application for Tags:

(i) Application for tags for newborn cervid: Application for tags for cervids born at the facility

site shall be made by the licensee by August 1 following the birthing season of each year, except that application for tags for Muntjac and Axis newborns shall be made within six weeks of birth. The licensee shall provide the following information, along with a statement and licensee's signature verifying that the information is accurate:

(I) Owner name, mailing address, phone number;

(II) Facility name and site address;

(III) QBSP [Quad Block Square Point] facility number listed on licensee's captivity license;

(IV) Species;

(V) Sex

(VI) Date of cervid birth;

(ii) Application for tags for cervids that were not born at the facility site shall be made by written request for the appropriate number of tags, along with the licensee's application for transportation of the cervid, along with a statement and licensee's signature verifying that the information is accurate. These tag applications shall not be processed unless accompanied by a completed application for transportation. However, no transportation permits shall be issued nor shall cervids be transported from one facility to another until restrictions on importation (15A NCAC 10B .0101) and transportation [Subparagraph (f) of this Rule] no longer apply.

(D) Placement of Tags:

(i) A single button ear tag provided by the Commission shall be permanently affixed by the licensee onto either the right or left ear of each cervid, provided that the ear chosen to bear the button tag shall not also bear a bangle

- tag, so that each ear of the cervid bears only one tag.
- (ii) A single bangle ear tag provided by the Commission shall be permanently affixed by the licensee onto the right or left ear of each cervid, provided that the ear bearing the bangle tag does not also bear the button tag, so that each ear of the cervid bears only one tag.
- (iii) Once a tag is affixed in the manner required by this Rule, it shall not be removed.
- (E) Reporting Tags Requirement: For all cervids not in the possession of a licensee as of October 8, 2002, the licensee shall submit a Cervidae Tagging Report within thirty (30) days receipt of the tags. With regard to all cervids in the possession of a licensee as of October 8, 2002, the licensee shall submit a Cervidae Tagging report to the Wildlife Resources Commission within seven months of the licensee's receipt of the tags. A Cervidae Tagging Report shall provide the following information and be accompanied by a statement and licensee's signature verifying that the information is accurate:
- (i) Owner's name, address and telephone number;
- (ii) Facility name and site address, including the County in which the site is located;
- (iii) QBSP [Quad Block Square Point] facility number listed on licensee's captivity license;
- (iv) Button tag number;
- (v) Bangle tag number;
- (vi) Species;
- (vii) Sex;
- (viii) Birth year of cervid;
- (F) Replacement of Tags: The Wildlife Resources Commission shall replace tags that are lost or unusable and may extend the time within which a licensee shall tag cervids consistent with time required to issue a replacement.
- (i) Lost Tags. The loss of a tag shall be reported to the Wildlife Resources Commission and application shall be made for a replacement upon discovery of the loss. Application for a replacement shall include the information required by Subparagraph (c)(4)(C) of this Rule along with a statement and applicant's signature verifying that the information is accurate.
- (ii) Unusable Tags. Tags that cannot be properly affixed to the ear of a cervid or that cannot be read because of malformation or damage to the tags or obscurement of the tag numbers shall immediately be returned to the Wildlife Resources Commission along with an application for a replacement tag with a statement and applicant's signature verifying that the information in the application is accurate.
- (5) Renewal of captivity license for cervids. Existing captivity licenses for the possession of cervids at existing facilities may be renewed as long as the applicant for renewal continues to meet the requirements of this Section for the license, provided however, no renewal of an existing license shall permit the expansion of pen size or number of pens on the licensed facility to increase the holding capacity of that facility. No renewals shall be issued for a previously issued license that has been allowed to lapse by the former licensee.
- ~~(d)(e) Nontransferability~~Nontransferable: No license or permit or tag issued pursuant to this Rule shall be transferable, either as to the holder or the site of a holding facility.
- ~~(e)(d) Sale or Transfer~~Sale, Transfer or Release of Captive Wildlife:
- (1) It is unlawful for any person to transfer or receive any wild animal or wild bird ~~which~~ that is being held under a captivity permit issued under Paragraph (a) of this Rule, except that any such animal or bird may be surrendered to an agent of the Wildlife Resources Commission.
- (2) It is unlawful for any person holding a captivity license issued under Paragraph (b) of this Rule to sell or transfer the animal or bird held under such license, except that such animal or bird may be surrendered to an agent of the Commission, and any such licensee may sell or transfer the animal or bird to another person who has obtained a license to hold it in captivity. Upon such a sale or transfer, the seller or transferor shall obtain a receipt for the animal or bird showing the name, address, and license number of the buyer or transferee, a

copy of which shall be ~~transmitted~~ provided to the Wildlife Resources Commission.

- (3) It is unlawful for any person to release into the wild for any purpose or allow to range free any species of deer, elk or other members of the family Cervidae or any wolf, coyote, or other ~~nonindigenous~~ non-indigenous member of the family Canidae.

~~(e) Applicability of Section. The following licenses include authority for incidental transportation and possession of wildlife covered under the license:~~

- ~~(1) Wildlife and fish collection licenses (G.S. 113-272.4; 15A NCAC 10B .0119; 15A NCAC 10C .0214);~~
- ~~(2) Controlled hunting preserve license [G.S. 113-273(g); 15A NCAC 10H .0100];~~
- ~~(3) Commercial trout pond license [G.S. 113-273(e); 15A NCAC 10H .0400];~~
- ~~(4) Fish propagation license [G.S. 113-273(e); 15A NCAC 10H .0700];~~
- ~~(5) Falconry permit and license [G.S. 113-270.3(b)(5); 15A NCAC 10H .0800];~~
- ~~(6) Game bird propagation license [G.S. 113-273(h); 15A NCAC 10H .0900].~~
- ~~(7) Furbearer propagation license [G.S. 113-273(i); 15A NCAC 10H .1100].~~

~~(f) Transportation Permit:~~

- ~~(1) Except as otherwise provided herein, no transportation permit shall be required to move any lawfully held wild animal or wild bird within the State.~~
- ~~(2) No person shall transport black bear or Cervidae for any purpose without first obtaining a transportation permit from the North Carolina Wildlife Resources Commission.~~
- ~~(3) Except as provided in Subparagraph (f)(4) of this Rule, no transportation permits shall be issued for deer, elk, or other species in the family Cervidae until the U.S. Department of Agriculture (USDA) establishes a Chronic Wasting Disease (CWD) program that includes a test to detect Chronic Wasting Disease, along with requirements for monitoring cervids that shall establish a basis for determining whether a cervid and any cervid herd or farm with which the tested animal has resided has been free of CWD for five years, provided that the program, test and monitoring requirements are recommended for application to wild animals by the Southeastern Cooperative Wildlife Disease Study.~~
- ~~(4) Cervid Transportation. A permit to transport deer, elk, or other species in the family Cervidae may be issued by the Commission to an applicant for the purpose of transporting the animal or animals for export out of state, to a slaughterhouse for slaughter or to a veterinary medical facility for treatment provided that the animal for which the permit is issued does not~~

exhibit clinical symptoms of chronic wasting disease. No person shall transport a cervid to slaughter or export out of state without bearing a copy of the transportation permit issued by the Wildlife Resources Commission authorizing that transportation. No person shall transport a cervid for veterinary treatment without having obtained approval from the Commission as provided by Subparagraph (f)(4)(iii) of this Rule. Any person transporting a cervid shall present the transportation permit to any law enforcement officer or any representative of the Wildlife Resources Commission upon request, except that a person transporting a cervid by verbal authorization for veterinary treatment shall provide the name of the person who issued the approval to any law enforcement officer or any representative of the Wildlife Resources Commission upon request.

- (i) Slaughter: Application for a transportation permit for purpose of slaughter shall be submitted in writing to the North Carolina Wildlife Resources Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:
 - (I) Owner's name, address and telephone number;
 - (II) Facility site address;
 - (III) OBSP [Quad Block Square Point] facility number listed on applicant's captivity license;
 - (IV) Name, address, county and phone number of the slaughter house to which the cervid will be transported;
 - (V) Vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;
 - (VI) Name and location of the North Carolina Department of Agriculture Diagnostic lab where the head of

- the cervid is to be submitted for CWD testing;
- (VII) Date of transportation;
- (VIII) Species and sex;
- (IX) Bangle and button tag numbers for the cervid;
- (ii) Exportation: Application for a transportation permit for purpose of exportation out of state shall be submitted in writing to the North Carolina Wildlife Resources Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:
 - (I) Owner's name, address and telephone number;
 - (II) Facility site address;
 - (III) QBSP [Quad Block Square Point] facility number listed on applicant's captivity license;
 - (IV) Vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;
 - (V) Name, site address, county, state and phone number of the destination facility to which the cervid is exported;
 - (VI) A copy of the importation permit from the state of the destination facility that names the destination facility to which the animal is to be exported;
 - (VII) Date of departure;
 - (VIII) Species and sex;
 - (IX) Bangle and button tag numbers for the cervid;
- (iii) Veterinary treatment: No approval shall be issued for transportation of a cervid to a veterinary clinic out of the

state of North Carolina, or for transportation from a facility out of the state of North Carolina to a veterinary clinic in North Carolina. An applicant from a North Carolina facility seeking to transport a cervid for veterinary treatment to a facility within North Carolina shall contact the Wildlife Telecommunications Center or the Wildlife Management Division of the Wildlife Resources Commission to obtain verbal authorization to transport the cervid to a specified veterinary clinic and to return the cervid to the facility. Verbal approval to transport a cervid to a veterinary clinic shall authorize transport only to the specified veterinary clinic and directly back to the facility, and shall not be construed to permit intervening destinations. To obtain verbal authorization to transport, the applicant shall provide staff of the Wildlife Resources Commission the applicant's name and phone number, applicant's facility name, site address and phone number, the cervid species, sex and tag numbers, and the name, address and phone number of the veterinary facility to which the cervid shall be transported. Within five days of transporting the cervid to the veterinary facility for treatment, the licensee shall provide the following information in writing to the Wildlife Resources Commission, along with a statement and applicant's signature verifying that the information is correct:

- (I) Cervid owner's name, address and telephone number;
- (II) Facility name and site address;

- (III) QBSP facility number on captivity license;
- (IV) Vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;
- (V) Date of transportation;
- (VI) Species and sex;
- (VII) Bangle and button tag numbers for the cervid;
- (VIII) Name, address and phone number of the veterinarian and clinic who treated the cervid;
- (IX) Symptoms for which cervid received treatment;
- (X) Diagnosis of veterinarian who treated the cervid.

(g) No provision within this Rule other than those that permit transport for export, slaughter or veterinary treatment shall be construed to permit transportation of cervids until restrictions on transportation provided within this rule, 10B .0101 or anywhere else within these rules no longer apply.

History Note: Authority G.S. 113-134; 113-272.5; 113-274; Eff. February 1, 1976; Amended Eff. April 1, 1991; September 1, 1990; June 1, 1990; July 1, 1988; Temporary Amendment Eff. October 8, 2002; May 17, 2002; July 1, 2001.

15A NCAC 10H .0302 MINIMUM STANDARDS

(a) Exemptions. Publicly financed zoos, scientific and biological research facilities, and institutions of higher education are exempt from the minimum standards put forth in this Rule for all birds and animals except the black bear.

(b) The following are deemed the minimum standards for holding the species indicated in captivity by all other licensees. All holders of captivity licenses other than those named in Paragraph (a) of this Rule shall comply with the following requirements for the species indicated:

(b)(1) Deer, Elk and other species of the family Cervidae:

(A) Enclosure:

- (i) Description: The enclosure shall be on a well-drained site containing trees or brush for shade. The minimum size of the enclosure shall be not less than one-half acre for the first three animals and an additional one-fourth

acre for each additional animal held. The enclosure shall be surrounded by a sturdy fence at least 10 feet high, dog-proof to a height of at least six feet. No exposed barbed wire or protruding nails shall be permitted within the enclosure. A roofed building large enough to provide shelter in both a standing ~~or~~ and a lying position for each deer ~~must~~ shall be provided. This building shall be closed on three sides and provided with a wooden floor. It shall be constructed at least 10 feet from the fence.

(ii) Inspection: The licensee shall make all enclosures at each licensed facility and the record-book documenting required monitoring of the outer fence of the enclosure(s) available for inspection by the Commission at any time during normal business hours, or at any time an outbreak of CWD is suspected or confirmed within five miles of the facility or within the facility itself.

(iii) Fence Monitoring Requirement:

(I) The fence surrounding the enclosure shall be inspected by the licensee or licensee's agent once a week during normal weather conditions to verify its stability and to detect the existence of any conditions or activities that threaten its stability. In the event of severe weather or any other condition that presents potential for damage to the fence, inspection shall occur every three hours until

cessation of the threatening condition, except that no inspection shall be required under circumstances that threaten the safety of the person conducting the inspection.

(II) A record-book shall be maintained to record the time and date of the inspection, the name of the person who performed the inspection, and the condition of the fence at time of inspection. The person who performs the inspection shall enter the date and time of detection and the location of any damage threatening the stability of the fence. If damage has caused the fence to be breachable, the licensee shall enter a description of measures taken to prevent ingress or egress by cervids. Each record-book entry shall bear the signature or initials of the licensee attesting to the veracity of the entry. The record-book shall be made available to inspection by a representative of the Wildlife Resources Commission upon request during normal business operating hours.

(iv) Maintenance. Any opening or passage through the enclosure fence resulting from damage shall be sealed

or otherwise secured from ingress or egress by a cervid within one hour of detection. Any damage to the enclosure fence that threatens its stability shall be repaired within one week of detection.

(2)(B) Sanitation and Care: Permittees Licensees shall provide an ample supply of clear water and salt at all times. Food shall be placed in the enclosure as needed, but ~~in any case,~~ not less than three times weekly. Straw and leaf ~~litter, replenished every week~~litter shall be used as a floor covering in the ~~shelter, shelter~~ and shall be replenished every week. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained. The animal ~~must~~shall be protected against fright. Domestic livestock and dogs shall be excluded from the enclosure.

(C) Chronic Wasting Disease (CWD):

(i) Detection: Each Licensee shall immediately notify the Commission if any cervid within the facility exhibits clinical symptoms of CWD or if a quarantine is placed on the facility by the State Veterinarian. All captive cervids that exhibit symptoms of CWD shall be tested for CWD.

(ii) Cervid death: The carcass of any captive cervid that was six months or older at time of death shall be transported and submitted by the licensee to a North Carolina Department of Agriculture diagnostic lab for CWD evaluation within 48 hours of the cervid's death.

(iii) The Commission may require testing or forfeiture of cervids from a facility holding cervids in this state should the following circumstances or conditions occur:

(I) The facility has transferred a cervid that is received by a facility in which CWD is confirmed within five years of

the cervid's transport date.

(II) The facility has received a cervid that originated from a facility in which CWD has been confirmed within five years of the cervid's transport date.

~~(e)~~(2) Wild Boars:

~~(1)~~(A) Enclosure: The enclosure shall be on a site containing trees or brush for shade. The minimum size of the enclosure shall be not less than one-half acre for the first three animals and an additional one-fourth acre for each additional animal held. The enclosure shall be surrounded by a sturdy fence at least five feet high. No exposed barbed wire or protruding nails shall be permitted within the enclosure. A roofed building large enough to provide shelter in both a standing or a lying position for each boar must be provided. This building shall be closed on three sides and provided with a wooden or concrete floor. A pool of water for wallowing or a sprinkler system shall be provided on hot days.

~~(2)~~(B) Sanitation and Care: Permittees Licensees shall provide an ample supply of clear water at all times. Food shall be placed in the enclosure as needed, but in any case, not less than three times weekly. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained.

~~(4)~~(3) Wild Birds:

~~(1)~~(A) Enclosure: The enclosure shall be large enough for the bird or birds to assume all natural postures. The enclosure shall be designed in such a way that the birds cannot injure themselves and are able to maintain a natural plumage. Protection from excessive sun, weather, and predation shall also be provided.

~~(2)~~(B) Sanitation and Care: The cage shall be kept clean, dry, and free from molded or damp feed. Ample food and clean water shall be available at all times.

~~(e)~~(4) Alligators:

~~(1)~~(A) Enclosure: The enclosure shall be surrounded by a sturdy fence so as to prevent contact between the observer

and alligator. The enclosure shall contain a pool of water large enough for the animal to completely submerge itself. If more than one animal is kept, the pool must be large enough for all animals to be able to submerge themselves at the same time. A land area with both horizontal dimensions at least as long as the animal shall also be provided. In case of more than one animal, the land area shall have both horizontal dimensions at least as long as the longest animals to occupy the land area at the same time without overlap. Sanitation and Care: The water area ~~must~~ shall be kept clean and adequate food provided. Protection shall be provided at all times from extremes in temperature.

~~(2)~~(B)

~~(4)~~(5) Black Bear:

~~(1)~~(A) Educational Institutions and Zoos Operated or Established by Governmental Agencies:

~~(A)~~(i) Enclosure: A permanent, stationary metal cage, at least eight feet wide by 12 feet long by six feet high and located in the shade or where shaded during the afternoon hours of summer, is required. The cage shall have a concrete floor in which a drainable pool one and one-half feet deep and not less than four by five feet has been constructed. The bars of the cage shall be of iron or steel at least one-fourth inch in diameter, or heavy gauge steel chain link fencing may be used. The gate shall be equipped with a lock or safety catch, and guard rails shall be placed outside the cage so as to prevent contact between the observer and the caged animal. The cage must contain a den at least five feet long by five feet wide by four feet high and so constructed as to be easily cleaned. A "scratch log" shall be placed inside the cage. The cage shall be equipped with a removable food trough. Running water shall be provided for flushing the floor and changing the pool.

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~~(B)~~(ii) Sanitation and Care: Adequate food shall be provided daily; and clean, clear drinking water shall be available at all times. In hot weather, the floor of the cage and the food trough shall be flushed with water and the water in the pool changed daily. The den shall be flushed and cleaned at least once each week in hot weather. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained. Brush, canvas, or other suitable material shall be placed over the cage to provide additional shade when necessary. The use of collars, tethers or stakes to restrain the bear is prohibited, except as a temporary safety device.

~~(B)~~ Conditions Simulating Natural Habitat: Black bears held in captivity by other than educational institutions or governmental zoos ~~must shall~~ be held without caging under conditions simulating a natural ~~habitat habitat approved by the Wildlife Resources Commission. For a holding facility to be deemed in simulation of a natural habitat, the~~ All of the following conditions must exist to simulate a natural habitat in a holding facility:

~~(A)~~(i) The method of confinement is by chain link fence, wall, moat, or a combination of such, without the use of chains or tethers.

~~(B)~~(ii) The area of confinement is at least one acre in extent for one or two bears and an additional one-eighth acre for each additional bear.

(iii) Bears are free, under normal conditions, to move throughout such area.

~~(C)~~(iv) At least one-half of the area of confinement is wooded with living trees, shrubs and other perennial vegetation capable of providing shelter from sun and wind.

~~(D)~~(v) The area of confinement contains a pool not less than one and one-half feet deep

and not less than four by five feet in size.

~~(E)~~(vi) Provision is made for a den for each bear to which the bear may retire for rest, shelter from the elements, or respite from public observation.

~~(F)~~(vii) The area of confinement presents an overall appearance of a natural habitat and affords the bears protection from harassment or annoyance.

~~(G)~~(viii) Provisions are made for adequate food and water and for maintenance of sanitation.

~~(H)~~(ix) No circumstance exists which is calculated to avoid, circumvent, defeat or subvert the purpose of the law or these regulations.

~~(I)~~(x) The applicant demonstrates by satisfactory evidence that he owns or has long term control of real property upon which the holding facility is located.

~~(g)~~(6) Cougar:

~~(+)~~(A) Educational or Scientific Research Institutions and Bona Fide Publicly Supported Zoos:

~~(A)~~(i) Enclosure: A permanent, stationary metal cage, at least nine feet wide by 18 feet long by nine feet high and located in the shade or where shaded during the afternoon hours of summer, is required. The cage shall have a concrete floor. The bars of the cage shall be of iron or steel at least one-fourth inch in diameter, or heavy gauge steel chain link fencing may be used. The gate shall be equipped with a lock or safety catch, and guard rails shall be placed outside the cage so as to prevent contact between the observer and the caged animal. The cage ~~must shall~~ contain a den at least five feet long by five feet wide by four feet high and so constructed as to be easily cleaned. A "scratch log" shall be placed inside the cage. The cage shall be

equipped with a removable food trough. Running water shall be provided for flushing the floor and changing the pool.

~~(B)~~(ii) Sanitation and Care: Adequate food shall be provided daily; and clean, clear drinking water shall be available at all times. In hot weather, the floor of the cage and the food trough shall be flushed with water and the water in the pool changed daily. The den shall be flushed and cleaned at least once each week in hot weather. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained. Brush, canvas, or other suitable material shall be placed over the cage to provide additional shade when necessary. The use of collars, tethers or stakes to restrain the cougar is prohibited, except as a temporary safety device.

~~(B)~~ Application: The following specifications are required for the development of plans for holding cougars in captivity as prescribed by G.S. 113-272.5(e)(4). Applicants for a Wildlife Captivity License for cougar must apply on forms supplied by the Commission and include copies of proposed plans for confining cougars in conditions simulating natural habitats. Cougars held in captivity by other than educational or scientific institutions or bona fide publicly supported zoos ~~must~~ shall be held without caging under conditions simulating a natural habitat approved by the Wildlife Resources Commission. For a holding facility to be deemed in simulation of a natural habitat, the following conditions must be satisfied:

- (i) The method of confinement is by chain link fence, without the use of chains or ~~tethers.~~ tethers, provided that:
 - (I) Nine gauge chain link fencing shall be at least 12 feet in

height with a four foot fence overhang at a 45 degree angle on the inside of the pen to prevent escape from climbing and jumping.

(II) Fence posts and at least six inches of the fence skirt shall be permanently imbedded in a six inch wide by one foot deep concrete footer to prevent escape by digging.

(ii) The area of confinement shall be at least one acre for two cougars with an additional one-eighth acre for each additional cougar, except that smaller areas containing terrain and topographical features ~~which~~ that offer adequate escape cover and refuge and meeting all other specifications are allowed under special approval by the Wildlife Resources Commission.

~~(C)~~ Cougars shall be free under normal conditions to move throughout such area.

~~(C)~~(D) At least one-half of the area of confinement shall be wooded with living trees, shrubs and other perennial vegetation capable of providing shelter from sun and wind; and a 20 foot wide strip along the inside of the fence shall be maintained free of trees, shrubs and any other obstructions which could provide a base from which escape through leaping could occur.

~~(D)~~(E) The area of confinement shall contain a pool not less than one and one-half feet deep and not less than four by five feet in size.

~~(E)~~(F) Each cougar shall be provided a den to which the cougar may retire for rest, shelter from the elements, or respite from public observation. Each den shall be four feet wide by four feet high by four feet deep. Each den shall be enclosed entirely within at least an eight feet wide by ten feet deep by 12 feet high security cage. The security cage shall be completely within the confines of the facility,

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cement-floored, shall have nine gauge fencing on all sides and the top, and shall have a four foot, 45 degree fence overhang around the outside top edge to prevent cougar access to the top of the security cage.

~~(F)~~(G) The area of confinement shall present an overall appearance of a natural habitat and afford the cougars protection from harrassment or annoyance..

~~(G)~~(H) Provisions shall be made for adequate food and water and for maintenance of sanitation.

~~(H)~~(I) No circumstance shall exist which is calculated to avoid, circumvent, defeat or subvert the purpose of the law or these recommendations.

~~(I)~~(J) The applicant demonstrates by satisfactory evidence that he owns or has some other long-term legal interest in the real property upon which the holding facility is located.

~~(7)~~ Other Wild Animals:

(A) Enclosure. The enclosure ~~must~~ shall provide protection from excessive sun, weather and free-ranging animals. A den area in which the animal can escape from view and large enough for the animal to turn around and lie down must be provided for each animal within the enclosure. No tethers or chains ~~will~~ shall be used to restrain the animal. Either a tree limb, exercise device, or shelf large enough to accommodate the animal ~~must~~ shall be provided to allow for exercise and climbing. The single-animal enclosure for the animals listed in this Subparagraph shall be a cage with the following minimum dimensions and horizontal areas:

Animal	Dimensions in Feet			Height	Sq. Ft. Per Animal
	Length	Width	Width		
Bobcat, Otter	10	5	5	5	50
Raccoon, Fox, Woodchuck	8	4	4	4	32
Opossum, Skunk, Rabbit	6	3	3	3	18
Squirrel	4	2	2	2	8

For animals not listed in Subparagraph (7)(A) or mentioned elsewhere in this Rule, single animal enclosures shall be a cage with one horizontal dimension being at least four times the nose-rump length of the animal and the other horizontal dimension being at least twice the nose-rump length of the animal. The vertical dimensions shall be at least twice the nose-rump length of the animal. Under no circumstances shall a cage be less than four feet by two feet by two feet.

For multiple animal enclosures, the minimum area of horizontal space shall be determined by multiplying the required square footage for a single animal by a factor of 1.5 for one additional animal and the result by the same factor, successively, for each additional animal. The vertical dimension for multiple animal enclosures shall remain the same as for single animal enclosures.

The young of any animal may be kept with the parent in a single-animal enclosure only until weaning. After weaning, if the animals are kept together, the requirements for

(B) multiple-animal enclosures ~~must be met~~ shall apply. Sanitation and Care. Fresh food shall be provided daily, and clean water shall be available at all times. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained.

History Note: Authority G.S. 19A-11; 113-134; 113-272.5; Eff. February 1, 1976; Amended Eff. December 1, 1990; June 1, 1990; July 1, 1988; November 9, 1980; Temporary Amendment Eff. October 8, 2003.

15A NCAC 10H .0303 FORFEITURE

~~Upon failure to meet any of the requirements set forth in this Section failure to maintain the animal in good physical health, the holder of a permit to keep wildlife in captivity shall lose custody of the animals concerned, shall forfeit the right to keep them, and shall turn them over to a representative of the Wildlife Resources Commission upon request. Any of the following may be considered evidence of poor physical health: obvious undernourishment or weakness, bare spots in fur or feather covering, persistent diarrhea, unusual nasal discharges, sores or open wounds on the skin, broken bones or other physical injuries. The Commission may revoke the holder's permit or license and a holder of a permit or license to keep wildlife in captivity may lose custody of that wildlife, forfeit the right to~~

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keep that wildlife and be required to turn that wildlife over to a representative of the Wildlife Resources Commission upon request of the Commission under any of the following circumstances or conditions:

- (1) The licensee or permittee fails to maintain the captive animal or bird in good health. Any of the following may be considered evidence of poor physical health:
 - (a) weakness or instability in balance;
 - (b) bare spots in fur or feather covering;
 - (c) persistent diarrhea;
 - (d) abnormally low weight;
 - (e) unusual nasal discharges;
 - (f) sores or open wounds; or
 - (g) injury to muscles or bones.
- (2) The permittee or licensee fails to provide accurate information on records or permit or license applications submitted to the Wildlife Resources Commission.
- (3) The permittee or licensee fails to keep in captivity the wildlife for which the facility is licensed.
- (4) The licensee of a facility holding captive cervid(s) fails to permit the Wildlife Resources Commission to inspect the licensed facility or records as provided by rules in this Section.
- (5) The licensee of a facility holding captive cervid(s) fails to comply with tagging requirements for cervids as provided by rules in this Section.
- (6) The licensee of a facility holding captive cervid(s) fails to report symptoms of chronic wasting disease in a cervid to the Wildlife Resources Commission as provided by rule(s) in this Section.
- (7) The licensee of a facility holding captive cervid(s) fails to transport and submit a cervid carcass to a North Carolina Department of Agriculture diagnostic lab for CWD evaluation within 48 hours of that cervid's death as provided by rule(s) in this Section.
- (8) The licensee of a facility holding captive cervid(s) fails to comply with requirements for maintaining the enclosure fence as provided by rules in this Section.
- (9) The licensee fails to comply with monitoring or record-keeping requirements as provided by rules in this Section.
- (10) A cervid in possession of the licensee has been transported without a permit.

History Note: G.S. 113-134; 113-272.5; 113-292;
Eff. February 1, 1976;
Amended Eff. February 7, 1979;
Temporary Amendment Eff. October 8, 2002.

TITLE 18 – SECRETARY OF STATE

Rule-making Agency: North Carolina Department of the Secretary of State

Rule Citation: 18 NCAC 06 .1205, .1208, .1211, .1401, -.1402, .1417

Effective Date: November 1, 2002

Findings Reviewed and Approved by: Julian Mann, III

Authority for the rulemaking: S.L. 2002-126, ss. 29A.22, 29A.23, 29A.24

Reason for Proposed Action: S.L. 2002-126, s. 29A.21-38 amended several Secretary of State fee provisions found in the General Statutes. The statutory amendments (that become effective November 1, 2002) will make several rules found in 18 NCAC 06 inconsistent with the statutes. Consequently, the public would find inconsistent fee information depending on whether they were looking at the statutes or the administrative code rules. It is in the public interest for the State to provide information to the public that is clear, concise and consistent. The amendments to the rules that are hereby proposed do not establish or increase any fees as the fees have been established by statute and the rule will merely reference the public to the appropriate statutory language.

Comment Procedures: Comments from the public shall be directed to David S. Massey, Deputy Securities Administrator, NC Secretary of State, Securities Division, 300 N. Salisbury St., Raleigh, NC 27603-5909, phone (919) 733-3924, fax (919) 821-0818, and email dmassey@sosnc.com

CHAPTER 06 - SECURITIES DIVISION

SECTION .1200 – EXEMPTIONS

18 NCAC 06 .1205 LIMITED OFFERINGS PURSUANT TO G.S. 78A-17(9)

(a) Any issuer relying upon the exemption provided by G.S. 78A-17(9) in connection with an offering of a security made in reliance upon Rule 505 of Regulation D promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended, 17 C.F.R. 230.505 (1982) (and as subsequently amended) shall comply with the provisions of Rules .1206, .1207 and .1208 of this Section; provided that such compliance shall not be required if the security is offered and sold only to persons who will be actively engaged, on a regular basis, in the management of the issuer's business; and provided further, that compliance with provisions of Paragraphs (a), (b), and (c) of Rule .1208 of this Section shall not be required, except in the case of the offer and sale of a viatical settlement contract, if the security is offered to not more than five individuals who reside in this State.

(b) Any issuer relying upon the exemption provided by G.S. 78A-17(9) in connection with an offering of a direct participation program security made solely in reliance upon an exemption from registration contained in Section 4(2) or Section 3(a)(11) of the Securities Act of 1933, as amended, or made solely in reliance upon Rule 504 of Regulation D promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended, 17 C.F.R. 230.504 (1982), (and as subsequently amended), or any person relying upon the

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exemption provided by G.S. 78A-17(9) in connection with an offering of a viatical settlement contract, shall comply with the following conditions and limitations:

- (1) No commission, discount, finder's fee or other similar remuneration or compensation shall be paid, directly or indirectly, to any person for soliciting any prospective purchaser of the security sold to a resident of this State unless such person is either registered pursuant to G.S. 78A-36 or exempt from registration thereunder or the issuer reasonably believes that such person is so registered or exempt therefrom.
- (2) In all sales of direct participation program securities, the provisions of Rule .1313 of this Chapter regarding registered offerings of direct participation program securities shall be applicable. In all sales of viatical settlement contracts, the provisions of Rule .1320 of this Chapter shall be applicable.
- (3) Any prospectus or disclosure document used in offering the securities in this state shall disclose conspicuously the legend(s) required by the provisions of Rule .1316 of this Chapter.
- (4) Not less than 10 business days prior to any sale of the securities to a resident of this State which shall include but not be limited to the receipt by the issuer, or any person acting on the issuer's behalf of a signed subscription agreement of, or the receipt of consideration from, a purchaser, the issuer shall file with the administrator, or cause to be so filed:
 - (A) A statement signed by the issuer and acknowledged before a notary public or other similar officer:
 - (i) identifying the issuer (including name, form of organization, address and telephone number);
 - (ii) identifying the person(s) who will be selling the securities in this State (and in the case of such persons other than the issuer and its officers, partners and employees, describing their relationship with the issuer in connection with the transaction and the basis of their compliance with or exemption from the requirements of G.S. 78A-36) and describing any commissions, discounts, fees or other remuneration or compensation to be paid to such persons;
 - (iii) containing a summary of the proposed offering including:

- (I) a description of the securities to be sold;
 - (II) the name(s) of all general partners of an issuer which is a partnership and, with respect to a corporate issuer or any corporate general partner(s) of any issuer which is a partnership, the date and place of incorporation and the names of the directors and executive officers of such corporation(s);
 - (III) the anticipated aggregate dollar amount of the offering;
 - (IV) the anticipated required minimum investment, if any, by each purchaser of the securities to be offered;
 - (V) a brief description of the issuer's business and the anticipated use of the proceeds of the offering; and
 - (VI) a list of the states in which the securities are proposed to be sold;
- (iv) containing an undertaking to furnish to the administrator, upon written request, evidence of compliance with Subparagraphs (1), (2), and (3) of this Paragraph (b);
 - (v) in the case of a direct participation program security, containing an undertaking to furnish to the administrator, upon written request, a copy of any written document or materials used or proposed to be used in connection with the offer and sale of the securities; and
 - (vi) in the case of a viatical settlement contract, the filing shall include a copy of all written documents or

materials, including advertising, used or proposed to be used in connection with the offer and sale of the securities.

(B) A consent to service of process naming the North Carolina Secretary of State as service agent using the Uniform Consent to Service of Process (Form U-2) signed by the issuer and acknowledged before a notary public or other similar officer; and accompanied by a properly executed Corporate Resolution (Form U-2A), if applicable;

(C) A non-refundable filing fee ~~in the amount of twenty five dollars (\$25.00), as established by G.S. 78A-17(9)~~, payable to the North Carolina Secretary of State.

(5) In the case of offers of viatical settlement contracts, the persons offering the security shall deliver to the offeree written materials complying with G.S. 78A-13. Additionally, any materials used in the offering of the security shall comply with G.S. 78A-14 and shall provide each offeree written notice of his or her rights under G.S. 78A-56 and under Rule .1501 of this Chapter.

(6) Compliance with the provisions of Subparagraph (4) of this Rule shall not be required if the security is offered to not more than five individuals who reside in this State, except in the case of the offer and sale of a viatical settlement contract.

(c) Neither the issuer nor any person acting on the issuer's behalf shall offer, offer to sell, offer for sale or sell the securities claimed to be exempt under GS. 78A-17(9) by any means or any form of general solicitation or general advertising.

(d) The administrator may, by order, waive any condition of or limitation upon the availability of the exemption provided by G.S. 78A-17(9).

History Note: Authority G.S. 78A-17(9); 78A-49(a); S.L. 2001, c. 436, s. 7, 10, 11; Eff. January 1, 1984; Temporary Rule Eff. October 1, 1983, for a period of 120 days to expire on January 29, 1984; Amended Eff. October 1, 1988; Temporary Amendment Eff. October 1, 1997; Amended Eff. August 1, 1998; Temporary Amendment Eff. November 1, 2002; April 1, 2002.

18 NCAC 06 .1208 TRANSACTIONS EXEMPT UNDER RULE .1206: FILING REQUIREMENTS

(a) Not less than 10 business days prior to any sale of a security sold in reliance upon the exemption provided by Rule .1206 of this Section which shall include but not be limited to the receipt by the issuer, or any person acting on the issuer's behalf of a signed subscription agreement of, or the receipt of consideration

from, a purchaser, the issuer shall file with the administrator, or cause to be so filed, the following:

(1) A Form D (Notice of Sales of Securities Pursuant to Regulation D...and/or Uniform Limited Offering Exemption). All parts of this form, including the Appendix, shall be completed. The Form D is to be signed by a person duly authorized to do so by the issuer, and shall be attached to a statement containing the supplemental information required by Paragraph (c) of this Rule .1208.

(2) A copy of any written document or materials proposed to be used in connection with the offer and sale of the securities to be sold; provided, however, if any such documents or materials are not available to be filed 10 business days prior to any sale of the securities to a person who resides in this State, they shall be filed when available, but, in any event, no later than 5 business days before any such sale. Supplements or amendments to any such written document or materials shall be filed within 5 business days after delivery to any prospective purchaser of the securities. Notwithstanding the foregoing, any written materials, disclosures required by G.S. 78A-13, and advertising subject to G.S. 78A-14 proposed to be used in connection with the offer and sale of viatical settlement contracts shall be filed with the Administrator not later than 10 days before the first sale of such securities in this State, and any supplements to such materials shall be filed with the Administrator not later than 5 days prior to their delivery to any prospective purchaser.

(3) A consent to service of process naming the North Carolina Secretary of State as service agent using the Uniform Consent to Service of Process (Form U-2) signed by the issuer and acknowledged before a notary public or similar officer; and accompanied by a properly executed Corporate Resolution (Form U2A), if applicable.

(4) A non-refundable filing fee ~~in the amount of seventy five dollars (\$75.00), as established by G.S. 78 A-17(17)~~, payable to the North Carolina Secretary of State.

(b) The issuer shall promptly file or caused to be filed with the administrator any amended Form D filed with the U.S. Securities and Exchange Commission in connection with the transaction.

(c) To comply with Subparagraph (a)(1) of this Rule .1208, the issuer shall file with the administrator a statement signed by a person duly authorized to execute such statement on its behalf containing the following representations:

(1) that the securities will be sold in reliance upon an exemption from the registration requirements of Section 5 of the Securities Act of 1933, as amended;

(2) that, to the best of the issuer's knowledge, the issuer is not disqualified by the provisions of Rule .1207 of this Section from relying upon

the exemption provided by Rule .1206 of this Section;

- (3) that the issuer will furnish to the administrator, upon written request, evidence of compliance with Rule .1206 of this Section;
- (4) that all persons who will be selling the securities in this state are in compliance with or exempt from the requirements of G.S. 78A-36; and
- (5) that the issuer will notify the administrator in writing of the names and titles of all officers, directors, partners, or employees of the issuer who will be engaged in the offer or sale of the securities in this state. Such notice to the administrator shall be made prior to any offer of securities in this state.

(d) Any filing pursuant to this Rule .1208 shall be amended by filing with the administrator such information and changes as may be necessary to correct any material misstatement or omission in the filing.

(e) The provisions of this Rule .1208 shall not apply to offers or sales of a security made pursuant to Rule .1206 of this Section if the security is offered to not more than five individuals who reside in this State, except for offers or sales of viatical settlement contracts.

History Note: Authority G. S. 78A-17(17); 78A-49(a); S.L. 2001, c. 436, s. 10; Eff. January 1, 1984; Temporary Rule Eff. October 1, 1983, for a Period of 120 Days to Expire on January 29, 1984; Amended Eff. September 1, 1990; October 1, 1988; Temporary Amendment Eff. November 1, 2002; April 1, 2002.

18 NCAC 06 .1211 NOTICE FILING PROCEDURES FOR RULE 506 OFFERINGS

An issuer offering a security that is a "covered security" under Section 18(b)(4)(D) of the Securities Act of 1933 shall file a notice on SEC Form D, a consent to service of process on a form prescribed by the Administrator, and pay a fee ~~of seventy-five dollars (\$75.00)~~ as established by G.S. 78A-31(b) no later than 15 days after the first sale in this State of such security covered under federal law. An issuer is not required to file any amendments to a Form D unless the amendment reflects a change in the offering in this State.

History Note: Authority G.S. 78A-31(b); 78A-49(a); Temporary Adoption Eff. October 1, 1997; Eff. August 1, 1998; Temporary Amendment Eff. November 1, 2002.

SECTION .1400 - REGISTRATION OF DEALERS AND SALESMEN

18 NCAC 06 .1401 APPLICATION FOR REGISTRATION OF DEALERS

(a) The application for registration as a dealer shall contain the following:

- (1) an executed Uniform Application for Registration as a Dealer (Form BD) and the

appropriate schedules thereto or the appropriate successor form;

- (2) a fee ~~in the amount of two hundred dollars (\$200.00)~~ as required by G. S. 78A-37(b);
- (3) evidence of current registration as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934;
- (4) evidence of compliance with Rule .1410 of this Section; and
- (5) any other information the administrator may from time to time require which is relevant to the applicant's qualifications to engage in the business of acting as a dealer in securities.

(b) The application for registration as a dealer shall be filed as follows:

- (1) NASD member dealers shall file applications for initial registration in the State of North Carolina with the NASAA/NASD Central Registration Depository, P.O. Box 37441, Washington, D.C. 20013 and shall file a manually executed Form BD directly with the Securities Division. Applications for renewal of registration shall be filed only with the Central Registration Depository (see Rule .1406 of this Section);
- (2) Non-NASD member dealers shall file all applications for registration in the State of North Carolina directly with the Securities Division.

(c) The dealer shall file with the administrator, as soon as practicable but in no event later than 30 days following such event, notice of any disciplinary action taken against the dealer by any exchange of which the dealer is a member; the Securities and Exchange Commission; the Commodity Futures Trading Commission; any national securities association registered with the Securities and Exchange Commission pursuant to Section 15A of the Securities Exchange Act of 1934 or any state securities commission and of any civil suit filed against the dealer alleging violation of any federal or state securities laws. If the information contained in any document filed with the administrator is or becomes inaccurate or incomplete in any material respect, the dealer shall file a correcting amendment as soon as practicable but in no event later than 30 days following the date on which such information becomes inaccurate or incomplete.

(d) Registration becomes effective at noon of the 30th day after a completed application is filed or such earlier time upon issuance of a license or written notice of effective registration, unless proceedings are instituted pursuant to G.S. 78A-39. The administrator may by order defer the effective date after the filing of any amendment but no later than noon of the 30th day after the filing of the amendment.

(e) Every dealer shall notify the administrator of any change of address, the opening or closing of any office (including the office of any salesman operating apart from the dealer's premises) or any material change thereto, in writing as soon as practicable or by filing concurrently upon filing with NASD an appropriate amendment or schedule to Form BD or any successor form.

History Note: Authority G.S. 78A-36(a); 78A-37(a);

78A-37(b); 78A-37(d); 78A-38(c); 78A-49(a);

Eff. April 1, 1981;

Amended Eff. September 1, 1990; October 1, 1988; January 1, 1984; November 1, 1982;

Temporary Amendment Eff. October 1, 1997;

Amended Eff. August 1, 1998;

Temporary Amendment Eff. November 1, 2002.

18 NCAC 06 .1402 APPLICATION FOR REGISTRATION OF SALESMEN

(a) The application for registration as a salesman shall contain the following:

- (1) an executed Uniform Application for Securities and Commodities Industry Representative and/or Agent (Form U-4) or the appropriate successor form;
- (2) a fee ~~in the amount of fifty five dollars (\$55.00);~~ as required by G.S. 78A-37(b); and
- (3) evidence of a passing grade of seventy percent on either:
 - (A) the Uniform Securities Agent State Law Examination (USASLE - Series 63); or
 - (B) both the Uniform Combined State Law Examination (Series 66 Exam) and the General Securities Representative Examination (Series 7 Exam) as well as the appropriate NASD examination as required by Rule .1413 of this Section.

(b) The application for registration as a salesman shall be filed as follows:

- (1) NASD member dealers shall file all salesman applications for registration in the State of North Carolina with the NASAA/NASD Central Registration Depository, P.O. Box 9401, Gaithersburg, MD 28898-9401.
- (2) Non-NASD member dealers shall file all salesman applications for registration in the State of North Carolina directly with the Securities Division.

(c) The salesman or the dealer for which the salesman is registered shall file with the administrator, as soon as practicable but in no event later than 30 days, notice of any disciplinary action taken against a salesman by any exchange of which the dealer is a member; the Securities and Exchange Commission; the Commodity Futures Trading Commission; any national securities association registered with the Securities and Exchange Commission pursuant to Section 15A of the Securities Exchange Act of 1934 or any state securities commission and of any civil suit, warrant, criminal warrant, or criminal indictment filed against the salesman alleging violation of any federal or state securities laws. If the information contained in any document filed with the administrator is or becomes inaccurate or incomplete in any material respect, the salesman or the dealer for which the salesman is registered shall file a correcting amendment as soon as practicable but in no event later than thirty days. Such filing is to be made by NASD member dealers and their salesmen to the NASAA/NASD Central Registration Depository and non-NASD member dealers and their salesmen shall make such filing directly with the Securities Division.

(d) Registration becomes effective at noon of the 30th day after a completed application is filed or such earlier time upon approval of the application by the administrator, unless proceedings are instituted pursuant to G.S. 78A-39. The administrator may by order defer the effective date after the filing of any amendment but no later than noon of the 30th day after the filing of the amendment.

(e) A salesman shall only be registered in this State with one dealer.

History Note: Authority G.S. 78A-37(a); 78A-37(b); 78A-38(c); 78A-39(b)(4); 78A-49(a);

Eff. April 1, 1981;

Amended Eff. April 1, 2001; September 1, 1995; October 1, 1988; January 1, 1984; November 1, 1982;

Temporary Amendment Eff. November 1, 2002.

18 NCAC 06 .1417 APPLICATION FOR LIMITED REGISTRATION OF CANADIAN SECURITIES DEALERS AND SALESMEN

(a) An applicant for limited registration as a dealer pursuant to G.S. 78A-36.1 (the "Dealer") shall file the following with the Administrator:

- (1) a representation that the Dealer does not have an office or physical presence in this state;
- (2) a representation that the Dealer is a resident of Canada;
- (3) a representation that the Dealer will engage only in the activities described in G.S. 78A-36.1(j) in this state;
- (4) a completed application for registration as a securities dealer in the form required by the jurisdiction in Canada in which the Dealer has its head office;
- (5) an originally executed copy of a Form U-2 or similar consent to service of process whereby the Dealer names the North Carolina Secretary of State as an agent duly authorized to accept service of process on behalf of the Dealer;
- (6) either:
 - (A) a certification by the securities regulatory agency of each jurisdiction in Canada from which the Dealer will be effecting transactions into this state stating that the Dealer is both registered and in good standing as a securities dealer in that ~~jurisdiction;~~ jurisdiction; or
 - (B) a certification by the Investment Dealers Association of Canada confirming that the applicant maintains a membership in good standing with the Investment Dealers Association of Canada;
- (7) evidence that the Dealer is a member of a Canadian self-regulatory organization ("SRO"), the Bureau des services financiers, or a Canadian stock exchange; and
- (8) a filing fee ~~in the amount of two hundred dollars (\$200.00);~~ as required by G.S. 78A-36.1(i) and G.S. 78A-37(b).

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(b) An applicant for limited registration as a salesman (the "Salesman") intending to effect securities transactions in this state on behalf of a Canadian dealer registered under this section shall file the following with the Administrator:

- (1) a completed application for registration as a securities salesman in the form required by the jurisdiction in which the dealer has its head office;
- (2) an originally executed copy of a Form U-2 or similar consent to service of process whereby the Salesman names the North Carolina Secretary of State as an agent duly authorized to accept service of process on behalf of the Salesman;
- (3) a certification by the securities regulatory agency of the jurisdiction in Canada from which the Salesman will be effecting transactions into this state stating that the

Salesman is both registered and in good standing as a securities salesman in that jurisdiction; and

- (4) a filing fee ~~in the amount of fifty five dollars (\$55.00)~~ as required by G.S. 78A-36.1(i) and G.S. 78A-37(b).

(c) If any information contained in any document filed with the Administrator by any dealer or salesman who has registered pursuant to G.S. 78A-36.1 is or becomes inaccurate or incomplete in any material respect, the dealer or salesman shall file a correcting amendment as soon as practicable, but in no event later than 30 days following the date on which such information becomes inaccurate or incomplete.

History Note: Authority G.S. 78A-36.1; 78A-49; 78A-37(b); Temporary Adoption Eff. November 1, 2002; January 15, 2002;

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on Thursday, November 21, 2002, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments by Friday, November 15, 2002 to the RRC staff, the agency, and the individual Commissioners. 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

Thomas Hilliard, III
Robert Saunders
Laura Devan
Jim Funderburke
David Twiddy

Appointed by House

Paul Powell - Chairman
Jennie J. Hayman Vice - Chairman
Dr. Walter Futch
Jeffrey P. Gray
Dr. John Tart

RULES REVIEW COMMISSION MEETING DATES

November 21, 2002
December 19, 2002

RULES REVIEW COMMISSION October 17, 2002 MINUTES

The Rules Review Commission met on Thursday morning, September 19, 2002, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present: Vice Chairman Jennie Hayman, Laura Devan, Walter Futch, Jeffrey Gray, Thomas Hilliard, Robert Saunders, John Tart, and David Twiddy.

Staff members present were: Joseph DeLuca, Staff Director; Bobby Bryan, Rules Review Specialist; and Lisa Johnson.

The following people attended:

Emily Lee	Department of Transportation
Lisa Glover	Attorney General's Office/Department of Transportation
Dennis Rowland	Department of Corrections
Bill Finlay	Banking Commission
Lonnie Christopher	Banking Commission
Mark Benton	DHHS/DFS
Lee Hoffman	DHHS/DFS
Ed Browning	DHHS/DFS/EMS
Drexdal Pratt	DHHS/DFS/EMS
Susan Collins	DHHS/DMH/DD/SAS
Cindy Kornegay	DHHS/DMH/DD/SAS
Nadine Pfeiffer	DHHS/DFS
Ben Massey	NC Board of Physical Therapy Examiners
Dedra Alston	DENR
Allan Russ	Secretary of State
Janice Fain	DHHS/Division of Child Development
Ron Ferrell	DENR
Jeff Manning	DENR/DWQ
Hope Hunt	DHHS/DSS
Kris Horton	DHHS/DSS
John Silverstein	NC Board of Physical Therapy Examiners

APPROVAL OF MINUTES

RULES REVIEW COMMISSION

The meeting was called to order at 10:21 a.m. with Vice-Chairman Hayman presiding. Vice-Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the September 19, 2002, meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

15A NCAC 2H .0106: DENR/Environmental Management Commission – The Commission approved the rewritten rule submitted by the agency.

23 NCAC 2C .0305: State Board of Community Colleges – No action taken.

23 NCAC 2D .0319: State Board of Community Colleges – No action taken.

23 NCAC 2E .0402: State Board of Community Colleges – No action taken.

23 NCAC 2E .0403: State Board of Community Colleges – No action taken.

LOG OF FILINGS

Chairman Hayman presided over the review of the log and all rules were approved unanimously with the following exceptions:

5 NCAC 2B .0109; .0110; .0111; .0112; .0113; .0114: Department of Corrections – These rules will be sent to the Office of Administrative Hearings without Commission action. The rules are being repealed as subject to G.S. 150B-1(d)(6) which exempts from Article 2A of G.S. Chapter 150B the Department of Corrections with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees. Because Rules Review Commission review is an Article 2A function, the rules are not appropriately before the Commission and no action should be taken.

10 NCAC 3C .3102: DHHS/Medical Care Commission - This rule was approved contingent upon receiving a technical change by the end of the day. The technical change was subsequently received.

10 NCAC 3D Rules: DHHS/Medical Care Commission – The Commission approved all repeals and continued the rest of these rules at the agency's request until the next meeting.

10 NCAC 3R .1415: DHHS/Division of Facility Services – A motion to object to the rule due to ambiguity failed with Commissioners Futch and Tart voting in favor of the motion. This rule was then approved contingent upon receiving a technical change by the end of the day. The technical change was subsequently received.

10 NCAC 3U .0102: DHHS/Division of Child Development – The Commission approved this rule conditioned upon receiving technical changes by the end of the day. The technical changes were not received. The rule was retained for subsequent action.

10 NCAC 3U .0302: DHHS/Division of Child Development – The Commission approved this rule conditioned upon receiving technical changes by the end of the day. The technical changes were not received. The rule was retained for subsequent action.

10 NCAC 3U .1701: DHHS/Division of Child Development - The Commission objected to this rule based on lack of authority. Paragraph (b) is an internal matter related solely to how the division will decide to make inspections. [G.S. 143B-10(j)] As such it is not to be adopted as a rule. It also appears to be within G.S. 150B-2(8a)g "...statements that set forth criteria... in performing... investigations or inspections...." Thus, in this case it is not a rule and does not need to be adopted as one. The technical changes previously requested were not completed at this time.

10 NCAC 3U .1702: DHHS/Division of Child Development – The Commission objected to this rule based on ambiguity. In (f), page 2 line 27, it is unclear what constitutes "emergency situations." (The agency has no authority to set standards for this decision outside rulemaking.) An additional Request for Technical Change for this rule has been noted as well as the original uncompleted request.

10 NCAC 3U .1720: DHHS/Division of Child Development - The Commission objected to this rule based on possible ambiguity when read together with 3U .2404 and with 3U .0804.

10 NCAC 3U .2404: DHHS/Division of Child Development - The Commission objected to this rule based on possible ambiguity when read together with the previous rule 3U .1720 and with 3U .0804. It is not clear in (a)(1)(A) and (B) and (a)(2)(B) what the precise temperature is that these centers may use and accept mildly ill children. It is also not clear whether a center may use a rectal temperature.

10 NCAC 3U .2409: DHHS/Division of Child Development - The Commission objected to this rule based on ambiguity. It is unclear whether the record keeping requirements in this rule apply to all children or only those who are mildly ill. The technical change previously requested for this rule has not been completed.

10 NCAC 3U .2702: DHHS/Division of Child Development – The Commission objected to .2702 based on lack of authority and clarity. Paragraph (f) purports to require only a local county criminal history check for those child care workers who change employers less than one year after going through departmental qualification. It then requires the new employer to comply with paragraph (c) of the rule. However paragraph (c) requires submission to the department of information additional to the local record check. It also requires submission to the department of fingerprint cards and release forms and retention of a declaration form pertaining to criminal convictions. These would not be required by (f) except for the reference in (f) to “complete the steps defined in (c).” It is unclear what is required. A separate problem in (f) is that there are no standards set out for the Division to use in deciding whether to require a fingerprint record check as set out in lines 5 and 6 where the employee changes employment in less than a year. There would be no authority to set these standards outside rulemaking. The technical change previously requested for this rule has not been completed.

10 NCAC 3U .2808: DHHS/Division of Child Development - The Commission objected to this rule based on ambiguity. It is unclear if the points set out in all the categories are minimums, maximums, or both. On page 2, lines 5 and 6 of the rule, it states that the “point value of each demerit shall be based on potential detriment” to children’s health or safety. That suggests variability for all of the categories. However some of the categories in (f) have only a single demerit figure while others show a range. It is unclear how this works. If there is a range (for either the single figure or multiple figure demerit categories) then it is unclear whether the lower number is the minimum demerits that can be given for a violation in that category. That seems to be implied, especially since in some the lower figure is more than (the number) one and more than in other categories. But it is not stated. If there is a possible range for the categories where multiple numbers are expressed, then is that also the case where there is only one figure? The existence of a range for some leads one to believe that maybe the agency intends that in the cases where a category with only one number has a violation, then that is the number of demerits to be given. But again, that is not clear. It is also unclear how the “total demerits possible” in (f), page 2 line 7, is computed. If it is simply the sum of the demerits listed, then specify the number. If there is a formula, that needs to be set out.

The Commission took a short break at 11:12 a.m. to allow Vice Chairman Hayman to leave and Mr. Jeffrey Gray to take over as Chair. The meeting reconvened at 11:16.

10 NCAC 14G .0102: DHHS/CMH,DD,SAS - The Commission objected to the rule based on ambiguity. The definition of “complaint” in (b)(9) presents a problem. The lodging of a “complaint” may trigger a requirement that the facility make some sort of formal response. This necessitates discerning the difference between an observation of a negative condition and a complaint. Do all jokes about hospital food constitute a complaint? Does a wish or an observation, constitute a complaint? e.g., “I wish the room were bigger,” or “I wish I could smoke in here,” or “I don’t know why the doctor hasn’t come.” If further action is going to hinge on whether or not a “complaint” is lodged, then the definition of complaint is insufficiently clear. In (b)(16), page 3, it is unclear whether the elements of “exploitation” are two separate and distinct elements that each constitute exploitation whether the other is there or not. In other words does the “borrowing, taking, or using” of client’s property have to result in another person’s profit, etc. It is also unclear whether that “other person” needs to be the exploiter (or person related to the exploiter) or could be anyone, even someone related to the client. In (b)(18), page 3, it is unclear what constitutes a “circumstance.” This is different from the “situation within the jurisdiction of the state facility” found in (b)(9) “complaint.”

10 NCAC 14V .0202: DHHS/CMH,DD, SAS - The Commission objected to this rule based on ambiguity. It is unclear what would constitute an acceptable training program as required by (g). It appears that additional training is required under the amended rule over what is now required. Arguably almost anything could satisfy the requirement. There is an appearance that the agency is implying, if not actually expecting, that the facilities are going to exhibit and document more thorough staff training. Perhaps the agency actually expects that to happen. However, according to their fiscal note, these are “administrative changes ... [and] does not represent change that requires facilities to incur additional operational costs. The ... changes provide more specificity regarding requirements or practices that are currently in place.” Staff does not see the requirements set out in new (g)(1)– (3) in the existing rules. This appears to add requirements and thus costs. These costs may not be substantial, but any training costs are likely going to be more than nominal. The concern about ambiguity arises because of the agency’s position that the change has no cost. That could only be if the rule did not actually expect or require any additional training from the facility. That is not the way the rule is written. In (h) line 35, there is a requirement that is substantially the same as one in the rule that is referenced, 14V .5602(b). However there is no exception in .5602(b) as called for in this rule, although one may have been intended. It is unclear what the agency intends to require by this rule.

10 NCAC 14V .0203: DHHS/CMH,DD, SAS - The Commission objected to this rule based on ambiguity and lack of authority. It is unclear whether the “competency-based employment system in the State Plan ...” in (b) lines 13 - 14, is developed and under the rulemaking authority of another agency. If they are not and are under the control of this Commission then they need to be set out in these rules. There is no authority to set “competency” requirements outside rulemaking. This is just setting another staff qualification, i.e., competent to meet all the other qualifications. They have the authority to do that. But it must be clear how to meet the qualification and that must be done in rulemaking.

RULES REVIEW COMMISSION

10 NCAC 14V .0204: DHHS/CMH,DD,SAS - The Commission objected to this rule based on ambiguity and lack of authority. It is unclear whether the "competency-based employment system in the State Plan ..." in (c) lines 11 - 12, is developed and under the rulemaking authority of another agency. If they are not and are under the control of this Commission then they need to be set out in these rules. There is no authority to set "competency" requirements outside rulemaking. This is just setting another staff qualification, i.e., competent to meet all the other qualifications. They have the authority to do that. But it must be clear how to meet the qualification and that must be done in rulemaking.

10 NCAC 14V .5602: DHHS/CMH,DD,SAS - The Commission objected to this rule based on ambiguity and lack of authority. In (a) it is unclear who is to determine the staff-client ratio. It could be that it is determined by the remainder of this rule. If so that is unclear; but if so, then this sentence is probably unnecessary. It could also be the agency determines it outside rulemaking. Either way there is no authority cited for it to impose the requirements in this rule. Even if they have the authority, there are no standards set out for making the determination unless it is simply the standards within the rule. But that is not clear.

10 NCAC 14V .5603: DHHS/CMH,DD,SAS - The Commission objected to this rule based on ambiguity. Paragraph (d) line 27, does not appear to offer much guidance to the facility operator. It is unclear what could constitute acceptable "activity opportunities based on her or his needs and choices" in the event of an enforcement action against the licensee.

15 NCAC 18A .2117: DENR/Commission for Health Services - The Commission objected to the rule based on ambiguity. The rule in (b) lines 5-8 requires water sampling and analysis prior to occupancy of migrant housing. In line 9 the rule requires that the sample be negative before the department shall approve the water supply. The rule then goes on in lines 10-11 to permit continued sampling after occupancy. However the rule makes no provision and thus is unclear for what is to happen if and when a sample is returned as positive for coliform organisms.

18A NCAC 6 .1501: NC Secretary of State - The Commission objected to this rule based on ambiguity. In (b), lines 13-18 the rule states in different forms in two different places that an offer expires in 30 days and must be accepted within 30 days of its receipt. However in lines 15-16 the rule states that the offer cannot expire in less than 30 days. It is unclear what is meant, required, or allowed under this rule.

18A NCAC 6 .1715: NC Secretary of State- The Commission objected to this rule based on lack of authority and ambiguity. In (a)(1) at line 19 the rule states that submission of a filing in a certain form and manner constitutes "irrefutable" evidence of a "legal signature". Whether it is "irrefutable" is a legal conclusion that seems to be beyond the secretary's authority to promulgate. It certainly is beyond any authority cited. There is no authority for the provision in (c)(1)(C), page 2 lines 2-3, for the administrator to disallow multiple exemption requests unless the standards for disallowing the request are established in the rule. In (c)(1)(B) the standards for requesting a temporary exemption are set out. There is nothing in that portion to suggest that multiple exemptions may not be granted or what the standards might be. In (c)(2)(A), page 2 lines 6-7, it is unclear what constitutes the standard "prohibitively burdensome."

19A NCAC 2D .0643: Department of Transportation - The Commission objected to this rule based on lack of authority and lack of necessity. There are no standards in (a), either set out or referenced, to determine when the department will or will not exercise its discretion and require escort vehicles for oversize-overweight vehicles. There is no authority for the department to make this determination in an arbitrary manner, which this rule would allow. It also appears that the substance of (a) is set out, with standards, in another rule. So (a) is probably unnecessary.

19A NCAC 2D .0644: Department of Transportation - The Commission objected to this rule based on lack of authority and ambiguity. There is no authority cited for the agency to set the age requirement found in (d)(3)(A) at page 1 line 24. They do have authority to require the training cited in the rule. There is no authority cited in this rule for the agency to deny or revoke the certification for certain motor vehicle offenses that do not result in loss of license. Those provisions are found in (d)(3)(B), at page 1 line 34, and (e)(2) and (3), page 2 lines 10 and 11. It is unclear in (e)(4), page 2 line 12, what would constitute "unsatisfactory performance while performing the duties of escort." There are no standards set out to make that determination. In (f) page 2 line 18, there are no standards for determining when or whether the Secretary "may set aside the revocation" of the vehicle operator certification.

Commissioner Gray recused himself from the Auctioneer's Board rules.

21 NCAC 4B .0603: NC Auctioneer Licensing Board - The Commission objected to this rule based on ambiguity. In (g) it is not clear that "all records and accounts" kept by an auctioneer and that a seller may request (in lines 27-29) do not include any more information than the information that is in lines 25-26. This is specifically, and limited to, the names of the buyers and amount of purchase and payment from each.

COMMISSION PROCEDURES AND OTHER BUSINESS

RULES REVIEW COMMISSION

The next meeting of the Commission is Thursday, November 21, 2002 at 10:15 a.m.

The meeting adjourned 12:33 p.m.

Respectfully submitted,
Lisa Johnson

Commission Review/Administrative Rules
Log of Filings (Log #190)
September 21, 2002 through October 21, 2002

AGRICULTURE, DEPARTMENT OF

Collection and Sale of Ginseng 2 NCAC 48F .0305 Amend

DEPARTMENT OF CORRECTION

Application 5 NCAC 06 .0101 Adopt
Purpose 5 NCAC 06 .0102 Adopt
Hiring Standards 5 NCAC 06 .0201 Adopt
Training Standards 5 NCAC 06 .0301 Adopt
Review of Compliance 5 NCAC 06 .0401 Adopt

DEPARTMENT OF JUVENILE JUSTICE

Definition of Detention 9 NCAC 05B .0101 Repeal
Objectives of Detention Care 9 NCAC 05B .0103 Repeal
Design Development and Approval 9 NCAC 05B .0201 Repeal
Design Intent 9 NCAC 05B .0202 Repeal
Construction Materials 9 NCAC 05B .0203 Repeal
Structural Arrangement and Accommodations 9 NCAC 05B .0204 Repeal
Staff Qualifications 9 NCAC 05B .0301 Repeal
Job Descriptions 9 NCAC 05B .0302 Repeal
Training and Staff Development of Detention Person 9 NCAC 05B .0303 Repeal
Applicants for Detention Personnel with Court Rec. 9 NCAC 05B .0304 Repeal
Staff Juvenile Ratio 9 NCAC 05B .0305 Repeal
Continuous Supervision of Children 9 NCAC 05B .0306 Repeal
Admission Control 9 NCAC 05B .0401 Repeal
Admission Procedures 9 NCAC 05B .0402 Repeal
Personal Hygiene 9 NCAC 05B .0501 Repeal
Food Services 9 NCAC 05B .0502 Repeal
Sleep and Rest Periods 9 NCAC 05B .0503 Repeal
Medical Care 9 NCAC 05B .0504 Repeal
Discipline 9 NCAC 05B .0505 Repeal
Room Restriction or Confinement 9 NCAC 05B .0506 Repeal
Use of Defensive and Restraining Force 9 NCAC 05B .0507 Repeal
Runaways 9 NCAC 05B .0508 Repeal
Accidents Serious Illnesses and Injuries 9 NCAC 05B .0509 Repeal
Visitation and Communication 9 NCAC 05B .0510 Repeal
Housekeeping Chores 9 NCAC 05B .0511 Repeal
Education 9 NCAC 05B .0512 Repeal
Library Facilities 9 NCAC 05B .0513 Repeal
Arts and Crafts 9 NCAC 05B .0514 Repeal
Recreation 9 NCAC 05B .0515 Repeal
Counseling Services 9 NCAC 05B .0516 Repeal
Religious Counseling 9 NCAC 05B .0517 Repeal
Clinical Evaluation 9 NCAC 05B .0518 Repeal
Records and Reports 9 NCAC 05B .0519 Repeal
Twelve Month Eligibility Re-determination 9 NCAC 05B .0601 Repeal
Youth Services 9 NCAC 05B .0602 Repeal
Definition of Terms 9 NCAC 05C .0102 Repeal
Right to Appropriate Care and Treatment 9 NCAC 05C .0201 Repeal
Behavior Management and Discipline 9 NCAC 05C .0202 Repeal

RULES REVIEW COMMISSION

Discipline Policy for Specialized Foster Care	9 NCAC 05C	.0203	Repeal
Solicitation of Funds	9 NCAC 05C	.0301	Repeal
Permission Required Before Publicity	9 NCAC 05C	.0302	Repeal
No Acknowledgment	9 NCAC 05C	.0303	Repeal
Registration of Firearms	9 NCAC 05C	.0401	Repeal
Care and Storage of Firearms	9 NCAC 05C	.0402	Repeal
Storage of Ammunition	9 NCAC 05C	.0403	Repeal
Staff Use of Firearms	9 NCAC 05C	.0404	Repeal
Possession of Firearms Prohibited	9 NCAC 05C	.0405	Repeal
Authority to Establish More Restrictive Policies	9 NCAC 05C	.0406	Repeal
No Use While Participating with Clients	9 NCAC 05C	.0501	Repeal
Group Home Staff Who Maintain a Separate Residence	9 NCAC 05C	.0502	Repeal
Staff Who Live in Group Home	9 NCAC 05C	.0503	Repeal
Opportunities Shall be Provided	9 NCAC 05C	.0601	Repeal
Orientation for Staff and Volunteers	9 NCAC 05C	.0701	Repeal
Training Required for Adventure Activities	9 NCAC 05C	.0702	Repeal
Wilderness Adventure Program Committee	9 NCAC 05C	.0703	Repeal
Staff Requirements for High Risk Activities	9 NCAC 05C	.0704	Repeal
Counseling Skills Training	9 NCAC 05C	.0705	Repeal
Certification for Nypum Directions	9 NCAC 05C	.0706	Repeal
Other Nypum Staff and Adult Volunteers	9 NCAC 05C	.0707	Repeal
Skills Training for Adventure Activities Staff	9 NCAC 05C	.0708	Repeal
Training for Specialized Foster Care Parents	9 NCAC 05C	.0709	Repeal
Continuing Training for Specialized Foster Care	9 NCAC 05C	.0710	Repeal
Staff Requirements for Counseling Programs	9 NCAC 05C	.0711	Repeal
Required Training for counseling Program Staff	9 NCAC 05C	.0712	Repeal
After Hours Backup To Specialized Foster Care Par	9 NCAC 05C	.0801	Repeal
Incentive Payments	9 NCAC 05C	.0802	Repeal
Incentive Pay for Children in Care	9 NCAC 05C	.0803	Repeal
Recruiting Specialized Foster Parents	9 NCAC 05C	.0804	Repeal
Emergency Plan for Volunteers	9 NCAC 05C	.0805	Repeal
Determining Appropriateness of Foster Care Referral	9 NCAC 05C	.0901	Repeal
Priority of Admission to Specialized Foster Care	9 NCAC 05C	.0902	Repeal
Line Item Budget for All Programs	9 NCAC 05C	.1001	Repeal
Financial Plan for all Programs	9 NCAC 05C	.1002	Repeal
Final Accounting Form for all Programs Except Gov	9 NCAC 05C	.1003	Repeal
Startup Funds Required for all Programs	9 NCAC 05C	.1004	Repeal
Employment Policies Required for all Programs	9 NCAC 05C	.1006	Repeal
Adventure Activities of Wilderness Adventure Prog	9 NCAC 05C	.1101	Repeal
Riding Activities of Nypum	9 NCAC 05C	.1102	Repeal
Professional to Volunteer Ratio	9 NCAC 05C	.1103	Repeal
Children in Specialized Foster Care	9 NCAC 05C	.1104	Repeal
Client Contact Time in Counseling Programs	9 NCAC 05C	.1105	Repeal
Monthly Contact in Counseling Programs	9 NCAC 05C	.1106	Repeal
Case Load in counseling Programs	9 NCAC 05C	.1107	Repeal
Residential Programs	9 NCAC 05C	.1201	Repeal
Non-Residential Programs	9 NCAC 05C	.1202	Repeal
Record of Client Counseling Contacts Required	9 NCAC 05C	.1203	Repeal
Individual Treatment Plan Required for Counseling	9 NCAC 05C	.1204	Repeal
Client Age Requirements	9 NCAC 05C	.1301	Repeal
Requirement for Juvenile Justice Involvement	9 NCAC 05C	.1302	Repeal
Emergency Placement Policy for Emergency Shelter	9 NCAC 05C	.1305	Repeal
Requirements for High-Risk Neighborhood Programs	9 NCAC 05C	.1306	Repeal
Required Reduction in Court Referrals	9 NCAC 05C	.1401	Repeal
Required Reduction in Runaways	9 NCAC 05C	.1402	Repeal
Required Reduction in School Suspensions and Expul	9 NCAC 05C	.1403	Repeal
Training School Commitments	9 NCAC 05C	.1404	Repeal
Required Progress with the Court	9 NCAC 05C	.1405	Repeal
Required Progress in School	9 NCAC 05C	.1406	Repeal
Required Progress at Home	9 NCAC 05C	.1407	Repeal
Evaluation of Impact of High-Risk Community Progra	9 NCAC 05C	.1408	Repeal

RULES REVIEW COMMISSION

Service Referrals From Emergency Shelter Programs	9 NCAC 05C	.1409	Repeal
Proportional Compliance to Minimum Standards	9 NCAC 05C	.1410	Repeal
Severity Level of CBA Programs	9 NCAC 05C	.1411	Repeal
Division Policy for Non-Compliance with Standards	9 NCAC 05C	.1501	Repeal
Critical Program Standards	9 NCAC 05C	.1502	Repeal
Monitoring of Program Standards	9 NCAC 05C	.1503	Repeal
Performance Standards	9 NCAC 05C	.1504	Repeal
Performance Standards for School Programs	9 NCAC 05C	.1505	Repeal
Staffing	9 NCAC 05C	.1601	Repeal
Admission Criteria	9 NCAC 05C	.1602	Repeal
Evaluation and Performance Standards	9 NCAC 05C	.1603	Repeal
Orientation and Reporting Requirements	9 NCAC 05C	.1604	Repeal
Purpose of the Fund	9 NCAC 05D	.0101	Repeal
Process for County Eligibility	9 NCAC 05D	.0102	Repeal
Funding Formula	9 NCAC 05D	.0103	Repeal
Local Match	9 NCAC 05D	.0104	Repeal
Forms Definitions	9 NCAC 05D	.0105	Repeal
Budget and Budget Amendments	9 NCAC 05D	.0106	Repeal
Discretionary Funds	9 NCAC 05D	.0107	Repeal
Disbursements Reversions Final Accounting	9 NCAC 05D	.0108	Repeal
Responsibilities of Division and/or Department	9 NCAC 05D	.0201	Repeal
County's Responsibilities	9 NCAC 05D	.0202	Repeal
County Task Force's Responsibilities	9 NCAC 05D	.0203	Repeal
County Task Forces Certification	9 NCAC 05D	.0204	Repeal
Program Manager's Responsibilities	9 NCAC 05D	.0205	Repeal
CBA Policy and Capital Expenditures	9 NCAC 05D	.0206	Repeal
Grievance Resolution	9 NCAC 05D	.0207	Repeal
Scope	9 NCAC 05E	.0101	Repeal
Admission	9 NCAC 05E	.0102	Repeal
Records and Reports	9 NCAC 05E	.0103	Repeal
Client Treatment and Development	9 NCAC 05E	.0104	Repeal
Monitoring and Evaluation	9 NCAC 05E	.0105	Repeal
Personnel	9 NCAC 05E	.0106	Repeal
Staffing	9 NCAC 05E	.0107	Repeal
Training	9 NCAC 05E	.0108	Repeal
Organization and Administration	9 NCAC 05E	.0109	Repeal
Building Grounds and Equipment	9 NCAC 05E	.0110	Repeal
State and Local Agencies	9 NCAC 05F	.0201	Repeal
Research	9 NCAC 05F	.0202	Repeal
Community Involvement	9 NCAC 05F	.0203	Repeal
Tours	9 NCAC 05F	.0204	Repeal
Admissions	9 NCAC 05F	.0301	Repeal
Transfer of Students	9 NCAC 05F	.0302	Repeal
Orientation	9 NCAC 05F	.0303	Repeal
General Provisions	9 NCAC 05F	.0401	Repeal
Assessments	9 NCAC 05F	.0402	Repeal
Services	9 NCAC 05F	.0403	Repeal
General Provisions	9 NCAC 05F	.0501	Repeal
Supervision	9 NCAC 05F	.0502	Repeal
Staff and Student Relations	9 NCAC 05F	.0503	Repeal
Discipline	9 NCAC 05F	.0504	Repeal
General Provisions	9 NCAC 05F	.0601	Repeal
Rights of All Students	9 NCAC 05F	.0602	Repeal
Rights to Communication	9 NCAC 05F	.0603	Repeal
Religious Policies	9 NCAC 05F	.0604	Repeal
Confidentiality Rights	9 NCAC 05F	.0605	Repeal
Student Money Management	9 NCAC 05F	.0606	Repeal
Role of Staff Student Advocates and Representative	9 NCAC 05F	.0607	Repeal
Student Grievance Procedure	9 NCAC 05F	.0608	Repeal
Corporal Punishment and Child Abuse	9 NCAC 05F	.0609	Repeal
General Provision	9 NCAC 05F	.0701	Repeal

RULES REVIEW COMMISSION

Student Attire	9 NCAC 05F	.0702	Repeal
Physical Health	9 NCAC 05F	.0703	Repeal
General Provisions	9 NCAC 05F	.0801	Repeal
Inter-School Recreational Activities	9 NCAC 05F	.0802	Repeal
Minimum Standards for Camping Activities	9 NCAC 05F	.0803	Repeal
General Provisions	9 NCAC 05F	.0901	Repeal
Maintenance Work	9 NCAC 05F	.0902	Repeal
Medical Security	9 NCAC 05F	.1001	Repeal
Routine Visits and Sick Calls	9 NCAC 05F	.1002	Repeal
Health Education	9 NCAC 05F	.1003	Repeal
Administration of Medications	9 NCAC 05F	.1004	Repeal
Chemotherapeutic Drug Monitoring	9 NCAC 05F	.1005	Repeal
Medication Side Effects	9 NCAC 05F	.1006	Repeal
Drug Usage	9 NCAC 05F	.1007	Repeal
Verbal and Telephone Orders	9 NCAC 05F	.1008	Repeal
Stop Orders for Medication	9 NCAC 05F	.1009	Repeal
Suicidal and Homicidal Management	9 NCAC 05F	.1101	Repeal
Deaf or Blind Students	9 NCAC 05F	.1102	Repeal
Confidentiality of Medical Records	9 NCAC 05F	.1103	Repeal
Surgery Performed on Students	9 NCAC 05F	.1104	Repeal
General Provisions	9 NCAC 05F	.1201	Repeal
Assignment to Wing and Intensive Development Progr	9 NCAC 05F	.1202	Repeal
Campus Detention	9 NCAC 05F	.1203	Repeal
Rights/Students in Alternative Therapeutic Interve	9 NCAC 05F	.1204	Repeal
Hearing Rights	9 NCAC 05F	.1205	Repeal
Referral of Students for Criminal Prosecution	9 NCAC 05F	.1206	Repeal
Appropriate Use of Force	9 NCAC 05F	.1207	Repeal
Restraint of Aggressive/Uncontrollable Students	9 NCAC 05F	.1208	Repeal
Definition of Unusual Incidents	9 NCAC 05F	.1301	Repeal
Reporting Unusual Incidents	9 NCAC 05F	.1302	Repeal
Notification of Serious Injury of a Student	9 NCAC 05F	.1303	Repeal
Death of a Student	9 NCAC 05F	.1304	Repeal
Child Abuse	9 NCAC 05F	.1305	Repeal
Sexual Acting out and Intercourse	9 NCAC 05F	.1306	Repeal
Runaways	9 NCAC 05F	.1307	Repeal
Communicable Disease Control	9 NCAC 05F	.1308	Repeal
Responsibilities of Transportation Officers	9 NCAC 05F	.1401	Repeal
Use of Restraints in Transporting Students	9 NCAC 05F	.1402	Repeal
Reporting on the Road Emergencies	9 NCAC 05F	.1403	Repeal
Campus Security	9 NCAC 05F	.1501	Repeal
School Safety and Emergency Preparedness Committee	9 NCAC 05F	.1502	Repeal
Contraband	9 NCAC 05F	.1503	Repeal
Law Enforcement Use of Students	9 NCAC 05F	.1504	Repeal
Dangerous Weapons Devices and Substances	9 NCAC 05F	.1505	Repeal
Swimming and Water Safety	9 NCAC 05F	.1506	Repeal
Bomb Threats	9 NCAC 05F	.1507	Repeal
Severe Weather Conditions	9 NCAC 05F	.1508	Repeal
Fire Safety	9 NCAC 05F	.1509	Repeal
On Campus Visits	9 NCAC 05F	.1601	Repeal
Off Campus Visits	9 NCAC 05F	.1602	Repeal
Home Visits	9 NCAC 05F	.1603	Repeal
Campus Detention Visits	9 NCAC 05F	.1604	Repeal
Definitions Applicable to This Section	9 NCAC 05F	.1701	Repeal
Policy	9 NCAC 05F	.1702	Repeal
Two Month Evaluation	9 NCAC 05F	.1703	Repeal
Pre Release Planning Conference	9 NCAC 05F	.1704	Repeal
Maximum Sentences Definite Commitments	9 NCAC 05F	.1705	Repeal
Indefinite Commitments	9 NCAC 05F	.1706	Repeal
Hard to Place Students	9 NCAC 05F	.1707	Repeal

DHHS/MEDICAL CARE COMMISSION

General Requirements	10 NCAC 03C	.3101	Amend
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RULES REVIEW COMMISSION

Temporary Change in Bed Capacity	10 NCAC 03C	.3111	Adopt
Definitions	10 NCAC 03Q	.0103	Amend
Requirements for Issuance of License	10 NCAC 03Q	.0202	Amend
Surgical Services	10 NCAC 03Q	.0402	Amend
Preventive Maintenance	10 NCAC 03Q	.1202	Amend
Disaster Preparedness	10 NCAC 03Q	.1203	Repeal
Supporting Elements	10 NCAC 03Q	.1403	Amend
Mechanical Requirements	10 NCAC 03Q	.1405	Amend
Plumbing and Other Piping Systems	10 NCAC 03Q	.1406	Amend
Electrical Requirements	10 NCAC 03Q	.1407	Amend
General	10 NCAC 03Q	.1408	Adopt
List of Referenced Codes and Standards	10 NCAC 03Q	.1409	Adopt
Application of Physical Plant Requirements	10 NCAC 03Q	.1410	Adopt
Access and Safety	10 NCAC 03Q	.1411	Adopt
Replacement Equipment	10 NCAC 03R	.0214	Amend
Information Required of Applicant	10 NCAC 03R	.1125	Amend
Required Performance Standards	10 NCAC 03R	.1126	Amend
Required Performance Standards	10 NCAC 03R	.1615	Amend
Required Support Services	10 NCAC 03R	.1616	Amend
Required Performance Standards	10 NCAC 03R	.1715	Amend
Definitions	10 NCAC 03R	.1912	Amend
Required Performance Standards	10 NCAC 03R	.1914	Amend
Performance Standards	10 NCAC 03R	.2013	Amend
Definitions	10 NCAC 03R	.2113	Amend
Information Required of Applicant	10 NCAC 03R	.2114	Amend
Need for New Services	10 NCAC 03R	.2115	Amend
Facility	10 NCAC 03R	.2116	Amend
Staffing	10 NCAC 03R	.2118	Amend
Relationship to Support and Ancillary Services	10 NCAC 03R	.2119	Amend
Performance Standards	10 NCAC 03R	.2217	Amend
Performance Standards	10 NCAC 03R	.2511	Amend
Definitions	10 NCAC 03R	.2713	Amend
Information Required of Applicant	10 NCAC 03R	.2714	Amend
Required Performance Standards	10 NCAC 03R	.2715	Amend
Required Staffing and Staff Training	10 NCAC 03R	.2717	Amend
Definitions	10 NCAC 03R	.3701	Amend
Information Required of Applicant	10 NCAC 03R	.3702	Amend
Required Performance Standards	10 NCAC 03R	.3703	Amend
Required Support Services	10 NCAC 03R	.3704	Amend
Required Staffing and Staff Training	10 NCAC 03R	.3705	Amend
Applicability of Rules Related to the 2002 State	10 NCAC 03R	.6351	Adopt
Certificate of Need Review Schedule	10 NCAC 03R	.6352	Adopt
Multi-County Groupings	10 NCAC 03R	.6353	Adopt
Service Areas and Planning Areas	10 NCAC 03R	.6354	Adopt
Reallocations and Adjustments	10 NCAC 03R	.6355	Adopt
Acute Care Bed Need Determination (Review Category	10 NCAC 03R	.6356	Adopt
Inpatient Rehabilitation Bed Need Determination	10 NCAC 03R	.6357	Adopt
Operating Room Need Determination (Review Category	10 NCAC 03R	.6358	Adopt
Open Heart Surgery Services Need Determination	10 NCAC 03R	.6359	Adopt
Heart-Lung Bypass Machines Need Determination	10 NCAC 03R	.6360	Adopt
Fixed Cardiac Catheterization/Angioplasty EQ Need	10 NCAC 03R	.6361	Adopt
Shared Fixed Cardiac Catheterization/Angio EQ Need	10 NCAC 03R	.6362	Adopt
Burn Intensive Care Services Need Determination	10 NCAC 03R	.6363	Adopt
Bone Marrow Transplantation Services Need Determin	10 NCAC 03R	.6364	Adopt
Solid Organ Transplantation Services Need Determine	10 NCAC 03R	.6365	Adopt
Gamma Knife Need Determination (Review Category H)	10 NCAC 03R	.6366	Adopt
Lithotripter Need Determination (Review Category H	10 NCAC 03R	.6367	Adopt
Radiation Oncology Treatment Centers Need Determin	10 NCAC 03R	.6368	Adopt
Positron Emission Tomography Scanners Need Determi	10 NCAC 03R	.6369	Adopt
Fixed MRI Scanners Need Determination Based on Fix	10 NCAC 03R	.6370	Adopt
MRI Scanners Need Determination For A Fixed Breast	10 NCAC 03R	.6371	Adopt

RULES REVIEW COMMISSION

Fixed MRI Scanners Need Determination Based on Mob	10 NCAC 03R	.6372	Adopt
Nursing Care Bed Need Determination (Review	10 NCAC 03R	.6373	Adopt
Adult Care Home Bed Need Determination (Review Cat	10 NCAC 03R	.6374	Adopt
Medicare-Medicaid Home Health Agency Office Need	10 NCAC 03R	.6375	Adopt
Dialysis Station Need Determination Methodology	10 NCAC 03R	.6376	Adopt
Dialysis Station Need Determination Methodology	10 NCAC 03R	.6377	Adopt
Hospice Home Care Need Determination (Review Categ	10 NCAC 03R	.6378	Adopt
Single County Hospice Inpatient Bed Need Determin	10 NCAC 03R	.6379	Adopt
Contiguous County Hospice Inpatient Bed Need Deter	10 NCAC 03R	.6380	Adopt
Psychiatric Bed Need Determination (Review Categor	10 NCAC 03R	.6381	Adopt
Chemical Dependency (SA) Treatment Bed Need Determ	10 NCAC 03R	.6382	Adopt
Chemical Dependency (SA) Adult Detox-Only Bed Need	10 NCAC 03R	.6383	Adopt
Intermediate Care Beds for the Mentally Ret Need	10 NCAC 03R	.6384	Adopt
Policies for General Acute Care Hospitals	10 NCAC 03R	.6385	Adopt
Policies for Nursing Care Facilities	10 NCAC 03R	.6389	Adopt
Policies for Medicare-Certified Home Health Service	10 NCAC 03R	.6391	Adopt
Policy for Relocation of Dialysis Stations	10 NCAC 03R	.6392	Adopt
Policies for Psychiatric Inpatient Facilities	10 NCAC 03R	.6393	Adopt
Policy for Chemical Dependency Treatment Facilities	10 NCAC 03R	.6394	Adopt
Policies for Intermediate Care Facilities for Men	10 NCAC 03R	.6395	Adopt

DENR

Statement of Purpose Policy and Scope	15A NCAC 01C	.0101	Amend
Agency Compliance	15A NCAC 01C	.0102	Repeal
Definitions	15A NCAC 01C	.0103	Adopt
Agency Compliance	15A NCAC 01C	.0104	Adopt
Lead and Cooperating Agency	15A NCAC 01C	.0105	Adopt
Scoping and Hearings	15A NCAC 01C	.0106	Adopt
Limitation on Actions During NCEPA Process	15A NCAC 01C	.0107	Adopt
Emergencies	15A NCAC 01C	.0108	Adopt
Non-State Involvement and Consultants	15A NCAC 01C	.0109	Adopt
Early Application of The NCEPA	15A NCAC 01C	.0201	Repeal
When to Prepare Environmental Documents	15A NCAC 01C	.0202	Repeal
Lead and Cooperating Agency Responsibility	15A NCAC 01C	.0203	Repeal
Scoping and Hearings	15A NCAC 01C	.0204	Repeal
Implementation	15A NCAC 01C	.0205	Adopt
When to Prepare Environmental Documents	15A NCAC 01C	.0206	Adopt
Incorporation by Reference	15A NCAC 01C	.0207	Adopt
Incomplete or Unavailable	15A NCAC 01C	.0208	Adopt
Implementation	15A NCAC 01C	.0301	Repeal
Incorporation by Reference	15A NCAC 01C	.0302	Repeal
Incomplete or Unavailable Information	15A NCAC 01C	.0303	Repeal
Activities Above the Minimum Criteria	15A NCAC 01C	.0304	Adopt
Types of Activities Requiring	15A NCAC 01C	.0305	Adopt
Activities of a Special Nature	15A NCAC 01C	.0306	Adopt
Agency Decision Making Procedures	15A NCAC 01C	.0401	Repeal
Limitation on Actions During NCEPA Process	15A NCAC 01C	.0402	Repeal
Emergencies	15A NCAC 01C	.0403	Repeal
Non-State Involvement and Contractors	15A NCAC 01C	.0404	Repeal
Purpose of the Minimum Criteria Thresholds	15A NCAC 01C	.0405	Adopt
Sampling Survey Monitoring and Related Research Ac	15A NCAC 01C	.0406	Adopt
Standard Maintenance or Repair Activities	15A NCAC 01C	.0407	Adopt
Minor Construction Activities	15A NCAC 01C	.0408	Adopt
Management Activities	15A NCAC 01C	.0409	Adopt
Private Use of Public Lands	15A NCAC 01C	.0410	Adopt
Remediation Activities	15A NCAC 01C	.0411	Adopt
Purpose	15A NCAC 01C	.0501	Repeal
Major Activities	15A NCAC 01C	.0502	Repeal
Exceptions to Minimum Criteria	15A NCAC 01C	.0503	Repeal
Non-Major Activity	15A NCAC 01C	.0504	Repeal
Non-Major Hurricane Relief Activity	15A NCAC 01C	.0505	Repeal

RULES REVIEW COMMISSION

DENR/ENVIRONMENTAL MANAGEMENT COMMISSION

Standards for Toxic Substances and Temperature	15A NCAC 02B .0208	Amend
Fresh Surface Water Quality Standards for Class C	15A NCAC 02B .0211	Amend
Fresh Surface Water Quality Standards for Class WS	15A NCAC 02B .0212	Amend
Fresh Surface Water Quality Standards for Class WS	15A NCAC 02B .0214	Amend
Fresh Surface Water Quality Standards for Class WS	15A NCAC 02B .0215	Amend
Fresh Surface Water Quality Standards for Class WS	15A NCAC 02B .0216	Amend
Fresh Surface Water Quality Standards for Class WS	15A NCAC 02B .0218	Amend
Neuse River Basin Nutrient Sensitive Waters Manage Mailing List	15A NCAC 02B .0234	Amend
	15A NCAC 02D .0105	Amend
Particulates from Hot Mix Asphalt Plants	15A NCAC 02D .0506	Amend
Particulates from Chemical Fertilizer Manufacturing	15A NCAC 02D .0507	Amend
Particulates from Mica or Feldspar	15A NCAC 02D .0509	Amend
Particulates from Miscellaneous Industrial Process	15A NCAC 02D .0515	Amend
Sulfur Dioxide Emissions from Combustion Sources	15A NCAC 02D .0516	Amend
Control of Visible Emissions	15A NCAC 02D .0521	Amend
Sources Covered by Appendix P of 40 CFR Part 61	15A NCAC 02D .0606	Amend
Other Large Coal or Residual Oil Burners	15A NCAC 02D .0608	Amend
General Provisions on Test Methods and Procedures	15A NCAC 02D .0912	Amend
Bulk Gasoline Terminals	15A NCAC 02D .0927	Amend
Gasoline Truck Tanks and Vapor Collection Systems	15A NCAC 02D .0932	Amend
Petition for Alternative Controls for RACT	15A NCAC 02D .0952	Amend
Stage II Vapor Recovery	15A NCAC 02D .0954	Amend
Petition for Superior Alternative Controls	15A NCAC 02D .0959	Adopt
Certification of Leak Tightness Tester	15A NCAC 02D .0960	Adopt

DENR/DIVISION OF FOREST RESOURCES

Purpose	15A NCAC 09C .1201	Adopt
Definitions of Terms	15A NCAC 09C .1202	Adopt
Permits	15A NCAC 09C .1203	Adopt
Rock or Cliff Climbing and Rappelling	15A NCAC 09C .1204	Adopt
Bathing or Swimming	15A NCAC 09C .1205	Adopt
Hunting	15A NCAC 09C .1206	Adopt
Fishing	15A NCAC 09C .1207	Adopt
Animals At Large	15A NCAC 09C .1208	Adopt
Boating	15A NCAC 09C .1209	Adopt
Camping	15A NCAC 09C .1210	Adopt
Sports and Games	15A NCAC 09C .1211	Adopt
Horses	15A NCAC 09C .1212	Adopt
Bicycles	15A NCAC 09C .1213	Adopt
Explosives	15A NCAC 09C .1214	Adopt
Firearms	15A NCAC 09C .1215	Adopt
Fires	15A NCAC 09C .1216	Adopt
Disorderly Conduct	15A NCAC 09C .1217	Adopt
Intoxicating Beverages and Drugs	15A NCAC 09C .1218	Adopt
Commercial Enterprises	15A NCAC 09C .1219	Adopt
Noise Regulation	15A NCAC 09C .1220	Adopt
Meetings and Exhibitions Regulation	15A NCAC 09C .1221	Adopt
Alms and Contributions	15A NCAC 09C .1222	Adopt
Aviation	15A NCAC 09C .1223	Adopt
Expulsion	15A NCAC 09C .1224	Adopt
Motorized Vehicles Where Prohibited	15A NCAC 09C .1225	Adopt
Flowers Plants Minerals Etc.	15A NCAC 09C .1226	Adopt
Fees and Charges	15A NCAC 09C .1227	Adopt

DENR/WILDLIFE RESOURCES COMMISSION

Application for Tags	15A NCAC 10B .0403	Amend
Montgomery County	15A NCAC 10F .0327	Amend
Town of Nag's Head (Dare County)	15A NCAC 10F .0368	Adopt
Protection of Endangered/Threatened/Special	15A NCAC 10I .0102	Amend
Course Requirements	15A NCAC 10K .0001	Amend
Issuance of Certificate of Competency	15A NCAC 10K .0002	Amend

RULES REVIEW COMMISSION

Instructor Certification Requirements	15A NCAC 10K .0003	Amend
DENR/COMMISSION FOR HEALTH SERVICES		
Maximum Contaminant Levels for Inorganic Chemicals	15A NCAC 18C .1510	Amend
DENR/DHHS		
Reportable Diseases and Conditions	15A NCAC 19A .0101	Amend
Method of Reporting	15A NCAC 19A .0102	Amend
Duties of Local Health Director Report Comm	15A NCAC 19A .0103	Amend
Control Measures General	15A NCAC 19A .0201	Amend
Control Measures HIV	15A NCAC 19A .0202	Amend
Control Measures Hepatitis B	15A NCAC 19A .0203	Amend
Control Measures Sexually Transmitted Diseases	15A NCAC 19A .0204	Amend
Control Measures Tuberculosis	15A NCAC 19A .0205	Amend
HIV and Hepatitis B Infected Health Care Workers	15A NCAC 19A .0207	Amend
Laboratory Testing	15A NCAC 19A .0209	Amend
Dosage and Age Requirements for Immunization	15A NCAC 19A .0401	Amend
Communicable Disease Financial Grants and Contract	15A NCAC 19A .0801	Amend
Eligibility for Tuberculosis Hospitalization Services	15A NCAC 19A .0802	Repeal
Eligibility for Tuberculosis Nursing Home Services	15A NCAC 19A .0803	Repeal
General	15A NCAC 19A .0901	Adopt
Biological Agents to be Reported	15A NCAC 19A .0902	Adopt
When to Report	15A NCAC 19A .0903	Adopt
Exemption From Reporting	15A NCAC 19A .0905	Adopt
Security	15A NCAC 19A .0906	Adopt
Release of Information	15A NCAC 19A .0907	Adopt
General	15A NCAC 19C .0801	Amend
DENR/DHHS/COMMISSION FOR HEALTH SERVICES		
General	15A NCAC 21A .0815	Amend
Definitions	15A NCAC 21A .0816	Amend
Grant Applications	15A NCAC 21A .0817	Amend
Maximum Funding Level	15A NCAC 21A .0818	Amend
Operating Standards	15A NCAC 21A .0819	Amend
Evaluation and Monitoring	15A NCAC 21A .0820	Amend
Renewal of Grant Funds	15A NCAC 21A .0821	Amend
Criteria for Project Selection	15A NCAC 21A .0822	Amend
Medical Services Provided	15A NCAC 21H .0111	Amend
REVENUE, DEPARTMENT OF		
Operation of Vehicles Excluded from Reports	17 NCAC 12A .0101	Amend
Retail Fuel Purchases Invoices	17 NCAC 12A .0201	Amend
Refunds	17 NCAC 12A .0301	Amend
Revocation of Registration	17 NCAC 12A .0502	Adopt
Exporter's License	17 NCAC 12B .0102	Amend
Types of Acceptable Bonds	17 NCAC 12B .0106	Amend
Racing Fuel	17 NCAC 12B .0201	Amend
Reporting Information in the Proper Reporting Period	17 NCAC 12B .0301	Amend
Documenting Sales to the United States Government	17 NCAC 12B .0401	Amend
Sales to U.S. Government Refund Form Gas 1206	17 NCAC 12B .0402	Amend
Off-Highway Refund Invoice Requirements	17 NCAC 12B .0404	Amend
Off-Highway Users with Common Storage Facilities	17 NCAC 12B .0405	Amend
Stationary Engine Mounted on a Licensed Motor Vehicle	17 NCAC 12B .0406	Amend
Municipal Corporation and City Transit System	17 NCAC 12B .0411	Amend
Proportional Refunds	17 NCAC 12B .0412	Amend
Off-Highway City/county and Taxicab Refunds	17 NCAC 12B .0413	Amend
Eligibility for Refunds	17 NCAC 12B .0414	Amend
Licensed Vehicles Using Dyed Diesel Fuel	17 NCAC 12B .0503	Amend
Amount of Bond Required	17 NCAC 12D .0102	Amend
Types of Acceptable Bonds	17 NCAC 12D .0103	Amend
TRANSPORTATION, DEPARTMENT OF/DIVISION OF MOTOR VEHICLES		
Issuing of Original Certificate	19 NCAC 03G .0205	Amend
STATE BOARDS/N C STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS		

RULES REVIEW COMMISSION

Election of Officers	21 NCAC 08A	.0201	Amend
Definitions	21 NCAC 08A	.0301	Amend
New CPA Firm Ongoing CPA Firm	21 NCAC 08A	.0315	Repeal
Time and Place of CPA Examinations	21 NCAC 08F	.0101	Amend
Filing of Examination Applications and Fees	21 NCAC 08F	.0103	Amend
Conditioning Requirements	21 NCAC 08F	.0105	Amend
Proctoring Other Jurisdictions' Candidates	21 NCAC 08F	.0110	Amend
Ineligibility Due to Violation of Accountancy Act	21 NCAC 08F	.0111	Amend
Candidate's Request to Review CPA Examination	21 NCAC 08F	.0113	Amend
Candidates' Accountancy Law Course Requirement	21 NCAC 08F	.0504	Amend
CPE Requirements for CPAs	21 NCAC 08G	.0401	Amend
Qualification of CPE Sponsors	21 NCAC 08G	.0403	Amend
Requirements for CPE Credit	21 NCAC 8G	.0404	Amend
Compliance with CPE Requirements	21 NCAC 08G	.0406	Amend
Computation of CPE Credits	21 NCAC 08G	.0409	Amend
Reciprocal Certificates	21 NCAC 08H	.0101	Amend
Non-Resident Notification	21 NCAC 08H	.0106	Adopt
CPA Firm Registration	21 NCAC 08J	.0108	Amend
Registration Fees	21 NCAC 08J	.0110	Amend
Compliance with CPA Firm Registration	21 NCAC 08J	.0111	Amend
Purpose	21 NCAC 08M	.0101	Repeal
Registration Requirements	21 NCAC 08M	.0102	Repeal
Prohibition of Abuse	21 NCAC 08M	.0103	Repeal
CPA Firms Deeded in Compliance	21 NCAC 08M	.0104	Repeal
Peer Review Requirements	21 NCAC 08M	.0105	Adopt
Compliance	21 NCAC 08M	.0106	Adopt
Ethical Duties of Reviewer	21 NCAC 08M	.0107	Adopt
Selection of Engagements to be Reviewed	21 NCAC 08M	.0201	Repeal
Notice to Clients	21 NCAC 08M	.0202	Repeal
Certain Offices Excused	21 NCAC 08M	.0204	Repeal
Selection of a Review Team	21 NCAC 08M	.0206	Repeal
Duty to Respond to Questions	21 NCAC 08M	.0207	Repeal
Qualifications of Reviewers and Team Captains	21 NCAC 08M	.0301	Repeal
Independence From a Reviewed CAP Firm	21 NCAC 08M	.0302	Repeal
Conflict of Interest	21 NCAC 08M	.0303	Repeal
Performing the Review Reviewer's Duties	21 NCAC 08M	.0304	Repeal
Confidentiality	21 NCAC 08M	.0305	Repeal
Reporting Requirements	21 NCAC 08M	.0306	Repeal
SQR Advisory Committee Members and Duties	21 NCAC 08M	.0401	Repeal
Objections to SQR Advisory Committee	21 NCAC 08M	.0402	Repeal
Review of Protest	21 NCAC 08M	.0403	Repeal
Deceptive Conduct Prohibited	21 NCAC 08N	.0202	Amend
Discreditable Conduct Prohibited	21 NCAC 08N	.0203	Amend
Confidentiality	21 NCAC 08N	.0205	Amend
Reporting Convictions Judgments and Disciplinary	21 NCAC 08N	.0208	Amend
Responsibilities in Tax Practice	21 NCAC 08N	.0211	Amend
Forms of Practice	21 NCAC 08N	.0302	Amend
Retention of Client Records	21 NCAC 08N	.0305	Amend
Independence	21 NCAC 08N	.0402	Amend
STATE BOARDS/N C LICENSING BOARD FOR GENERAL CONTRACTORS			
Classification	21 NCAC 12	.0202	Amend
Renewal of License	21 NCAC 12	.0503	Amend
Improper Practice	21 NCAC 12	.0701	Amend
Fee for Submittal of Bad Check	21 NCAC 12	.0703	Amend
STATE BOARDS/BOARD OF DENTAL EXAMINERS			
Other Requirements	21 NCAC 16B	.0304	Amend
Time for Filing	21 NCAC 16B	.0305	Amend
Reexamination	21 NCAC 16B	.0315	Amend
Transcripts Required	21 NCAC 16C	.0203	Amend
Time for Filing	21 NCAC 16C	.0305	Amend
Eligibility Requirements	21 NCAC 16E	.0101	Amend

RULES REVIEW COMMISSION

Applications	21 NCAC 16I	.0101	Amend
Fee for Late Filing	21 NCAC 16I	.0106	Amend
License Void Upon Failure to Renew	21 NCAC 16I	.0107	Amend
Solicitations for Votes	21 NCAC 16L	.0104	Amend
Dentists	21 NCAC 16M	.0101	Amend
Dental Hygienists	21 NCAC 16M	.0102	Amend
Advertising as a Specialist	21 NCAC 16P	.0105	Amend
Applications	21 NCAC 16R	.0101	Adopt
Fee for Late Filing	21 NCAC 16R	.0102	Adopt
Approved Courses and Sponsors	21 NCAC 16R	.0104	Amend
Reporting of Continuing Education	21 NCAC 16R	.0105	Amend
Exemption from a Credit for Continuing Education	21 NCAC 16R	.0106	Amend
Penalty/Noncompliance/Continuing Education	21 NCAC 16R	.0107	Amend
STATE BOARDS/N C BOARD FOR LICENSING OF GEOLOGISTS			
Duties of Officers	21 NCAC 21	.0104	Amend
Fees	21 NCAC 21	.0107	Amend
Requirements for Licensing	21 NCAC 21	.0301	Amend
Application Procedure	21 NCAC 21	.0302	Amend
Filing of Charges and Disciplinary Actions	21 NCAC 21	.0501	Amend
Reprimand	21 NCAC 21	.0502	Amend
Applicable Hearing Rules	21 NCAC 21	.0503	Repeal
Caution	21 NCAC 21	.0504	Repeal
Investigation	21 NCAC 21	.0514	Amend
Disciplinary Procedure	21 NCAC 21	.0515	Amend
Subpoenas	21 NCAC 21	.0603	Amend
Final Decisions in Administrative Hearings	21 NCAC 21	.0604	Amend
Proposals for Decisions Exceptions and Proposed	21 NCAC 21	.0605	Amend
Oral Argument	21 NCAC 21	.0606	Adopt
Extension of Time Notification of Final Decision	21 NCAC 21	.0607	Adopt
Copies of Rules Inspection	21 NCAC 21	.0802	Amend
Petition for Rulemaking Hearings	21 NCAC 21	.0803	Amend
Disposition of Petitions	21 NCAC 21	.0804	Amend
Submission of Request for Declaratory Ruling	21 NCAC 21	.0902	Amend
Disposition of Requests	21 NCAC 21	.0903	Amend
Corporate Practice of Geology by Corporations and	21 NCAC 21	.1001	Amend
Foreign Corporations and Limited Liability Company	21 NCAC 21	.1002	Amend
STATE BOARDS/N C BOARD OF NURSING			
Definitions	21 NCAC 36	.0120	Adopt
License Required	21 NCAC 36	.0221	Amend
Clinical Nurse Specialist Practice	21 NCAC 36	.0228	Amend
Approval of Nurse Aide Education Programs	21 NCAC 36	.0405	Amend
STATE BOARDS/N C BOARD OF PHARMACY			
Drug Distribution and Control	21 NCAC 46	.1414	Amend
Examination	21 NCAC 46	.1505	Amend
Pharmacy Permits	21 NCAC 46	.1601	Amend
License by Reciprocity	21 NCAC 46	.1602	Amend
Requirement of Personal Appearance	21 NCAC 46	.1606	Amend
Right to Refuse a Prescription	21 NCAC 46	.1801	Amend
Changes in Prescription Orders	21 NCAC 46	.1812	Amend
Ballots Casting and Counting	21 NCAC 46	.2107	Amend
Device and Medical Equipment Committee	21 NCAC 46	.2109	Amend
Responsibilities of Pharmacist Manager	21 NCAC 46	.2502	Amend
Patient Counseling	21 NCAC 46	.2504	Amend
Administration of Immunizations by Pharmacists	21 NCAC 46	.2507	Adopt
Scope and Purpose	21 NCAC 46	.2801	Amend
Req/Pharmacies Dispensing Sterile Pharmaceuticals	21 NCAC 46	.2803	Amend
Responsibilities of Pharmacist Manager	21 NCAC 46	.2804	Amend
Labeling	21 NCAC 46	.2805	Amend
Quality Assurance	21 NCAC 46	.2808	Amend
Registration	21 NCAC 46	.3301	Adopt

RULES REVIEW COMMISSION

STATE BOARDS/NC PSYCHOLOGY BOARD

Scope	21 NCAC 54	.2801	Adopt
Titles	21 NCAC 54	.2802	Adopt
Employment and Supervision of Unlicensed Individual	21 NCAC 54	.2803	Adopt
Qualifications and Training	21 NCAC 54	.2804	Adopt
Services Appropriate for Ancillary Services Person	21 NCAC 54	.2805	Adopt
Services Not Appropriate for Unlicensed Individual	21 NCAC 54	.2806	Adopt

STATE BOARDS/APPRaisal BOARD

Continuing Education	21 NCAC 57A	.0204	Amend
Temporary Practice	21 NCAC 57A	.0210	Amend
Use of Titles	21 NCAC 57A	.0401	Amend
Advertising	21 NCAC 57A	.0403	Amend
Appraisal Reports	21 NCAC 57A	.0405	Amend
Registered Trainee Licensed Residential Real Estate	21 NCAC 57B	.0101	Amend
Certified Residential Real Estate Appraiser Course	21 NCAC 57B	.0102	Amend
Certified General Real Estate Appraiser Course	21 NCAC 57B	.0103	Amend
Course Records	21 NCAC 57B	.0210	Amend
Instructor Requirements	21 NCAC 57B	.0306	Amend
Criteria for Course Approval	21 NCAC 57B	.0603	Amend
Certification of Course Completion	21 NCAC 57B	.0607	Amend
Form of Complaints and Other Pleadings	21 NCAC 57C	.0101	Amend
Presiding Officer	21 NCAC 57C	.0102	Amend

STATE BOARDS/REAL ESTATE COMMISSION

Handling and Accounting of Funds	21 NCAC 58A	.0107	Amend
Reporting Criminal Convictions	21 NCAC 58A	.0113	Amend
Filing and Fees	21 NCAC 58A	.0302	Amend
Character	21 NCAC 58A	.0501	Repeal
Business Entities	21 NCAC 58A	.0502	Amend
Application and Criteria for Original Approval	21 NCAC 58E	.0203	Amend

STATE BOARDS/NC SUBSTANCE ABUSE PROFESSIONAL CERTIFICATION BOARD

Definitions	21 NCAC 68	.0101	Amend
Registration Process for Board Certification	21 NCAC 68	.0202	Amend
Continuing Education Required for Counselor and	21 NCAC 68	.0208	Amend
Background Investigation	21 NCAC 68	.0216	Adopt
Renewal of Individual Certification as Clinical	21 NCAC 68	.0306	Amend
Procedures for Approval of Self-Study Courses	21 NCAC 68	.0406	Amend
Responsibility of Supervisor to Supervisee	21 NCAC 68	.0512	Amend
Effect of Actions of Court of Other Professional	21 NCAC 68	.0606	Amend

OFFICE OF ADMINISTRATIVE HEARINGS

Citation to Authorities	26 NCAC 2C	.0109	Amend
Scope and Availability	26 NCAC 2C	.0401	Amend

DEPARTMENT OF JUVENILE JUSTICE

Scope	28 NCAC 01A	.0101	Adopt
Petitions	28 NCAC 01A	.0201	Adopt
Hearings	28 NCAC 01A	.0202	Adopt
Fees	28 NCAC 01A	.0203	Adopt
Declaratory Rulings	28 NCAC 01A	.0204	Adopt
Agencies Authorized to Share Information	28 NCAC 01A	.0301	Adopt

DEPARTMENT OF JUVENILE JUSTICE

Scope	28 NCAC 02A	.0101	Adopt
Definitions	28 NCAC 02A	.0102	Adopt
County Eligibility	28 NCAC 02A	.0103	Adopt
Funding	28 NCAC 02A	.0104	Adopt
Local Match	28 NCAC 02A	.0105	Adopt
Budget and Budget Amendments	28 NCAC 02A	.0106	Adopt
Discretionary Funds	28 NCAC 02A	.0107	Adopt
Disbursement Reversions and Final Accounting	28 NCAC 02A	.0108	Adopt
Third Party Payments	28 NCAC 02A	.0109	Adopt
Capital Expenditures	28 NCAC 02A	.0110	Adopt

RULES REVIEW COMMISSION

Forms	28 NCAC 02A	.0111	Adopt
Responsibilities of County	28 NCAC 02A	.0201	Adopt
Juvenile Crime Prevention Council	28 NCAC 02A	.0202	Adopt
Juvenile Crime Prevention Council Certification	28 NCAC 02A	.0203	Adopt
Juvenile Crime Prevention Council	28 NCAC 02A	.0204	Adopt
Information Sharing Among Agencies	28 NCAC 02A	.0302	Adopt
DEPARTMENT OF JUVENILE JUSTICE			
Scope	28 NCAC 03A	.0101	Adopt
Definitions	28 NCAC 03A	.0102	Adopt
Funding Requirements	28 NCAC 03A	.0201	Adopt
Employment Policies	28 NCAC 03A	.0301	Adopt
Appropriate Care and Treatment	28 NCAC 03A	.0302	Adopt
Behavior Management and Discipline	28 NCAC 03A	.0303	Adopt
Solicitation of Funds and Juvenile Publicity	28 NCAC 03A	.0304	Adopt
Alcohol and Other Drug Possession and Use	28 NCAC 03A	.0305	Adopt
Firearms and other Weapons	28 NCAC 03A	.0306	Adopt
Opportunities for Religion Provided	28 NCAC 03A	.0307	Adopt
Insurance Required	28 NCAC 03A	.0308	Adopt
Safety Concerns	28 NCAC 03A	.0309	Adopt
Staff Orientation and Training	28 NCAC 03A	.0401	Adopt
Emergency Plan	28 NCAC 03A	.0402	Adopt
Admission Guideline Requirements	28 NCAC 03A	.0403	Adopt
Record of Client Contracts and Individual Plan of	28 NCAC 03A	.0404	Adopt
Requirement of Release Policy	28 NCAC 03A	.0405	Adopt
Program Evaluation	28 NCAC 03A	.0406	Adopt
Compliance Monitoring	28 NCAC 03A	.0501	Adopt
Corrective Action and Penalties	28 NCAC 03A	.0502	Adopt
DEPARTMENT OF JUVENILE JUSTICE			
Definitions	28 NCAC 04A	.0101	Adopt
Intake	28 NCAC 04A	.0102	Adopt
Services to the Court	28 NCAC 04A	.0103	Adopt
Commitment to the Department	28 NCAC 04A	.0104	Adopt
Commitment to the Department	28 NCAC 04A	.0104	Adopt
Post Release Supervision	28 NCAC 04A	.0105	Adopt
Substance Abuse Testing	28 NCAC 04A	.0106	Adopt
NC BUILDING CODE COUNCIL			
Revise Section NC Residential Code	R202		Adopt
Add Section in its Entirety to NC Residential Code	R301.2.1.2		Adopt
Add Table in its Entirety to NC Residential Code	R301.2.1.2		Adopt
Exception 2 of the NC Building Code	302.3.3		Adopt
Revise Section of NC Plumbing Code	419.1		Adopt
Revise Section of NC Plumbing Code	425		Adopt
Revise Section of the NC Building Code & Fire Code	902.2.1.3		Adopt
Add Section in its Entirety to NC Building Code	1609.1.4		Adopt
Add Table in its Entirety to NC Building Code	1609.1.4		Adopt
Add Section Definition for Windborne Debris	1609.2		Adopt

AGENDA
RULES REVIEW COMMISSION
November 21, 2002

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow Up Matters
 - A. DHHS/Medical Care Commission – 10 NCAC 3D Rules Continued 10/17/02 (Bryan)
 - B. DHHS/Child Care Commission – 10 NCAC 3U .0102; .0302; .1701; .1702; .1720; .2404; .2409; .2702; .2808
Objection 10/17/02 (DeLuca)
 - C. DHHS/CMH, DD, SAS – 10 NCAC 14G .0102 Objection 10/17/02 (DeLuca)
 - D. DHHS/CMH, DD, SAS – 10 NCAC 14V .0202; .0203; .0204; .5602; .5603 Objection 10/17/02 (DeLuca)
 - E. DENR/Commission for Health Services – 15A NCAC 18A .2117 Objection 10/17/02 (DeLuca)

RULES REVIEW COMMISSION

- F. Secretary of State - 18 NCAC 6 .1501; .1715 Objection 10/17/02 (DeLuca)
- G. Department of Transportation – 19A NCAC 2D .0643; .0644 Objection 10/17/02 (DeLuca)
- H. NC Auctioneers Commission – 21 NCAC 4B .0603 Objection 10/17/02 (DeLuca)
- I. State Board of Community Colleges – 23 NCAC 2C .0305 Objection 08/15/02 (Bryan)
- J. State Board of Community Colleges – 23 NCAC 2D .0319 Objection 08/15/02 (Bryan)
- K. State Board of Community Colleges – 23 NCAC 2E .0402; .0403 Objection 08/15/02 (Bryan)
- IV. Commission Business
- V. Next meeting: December 19, 2002

CONTESTED CASE DECISIONS

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.ncoah.com/hearings>.

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

Beryl E. Wade

A. B. Elkins II

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL BEVERAGE CONTROL COMMISSION</u>				
NC ABC Commission v. Acme Retail, Inc. T/A Handy Pantry	01 ABC 1325	Chess	05/21/02	
Randall Ralph Casey T/A Maynards Entertainment v. NC ABC Comm.	01 ABC 1396	Wade	06/26/02	
NC ABC Commission v. Headlights, Inc. T/A Headlights	01 ABC 1473	Wade	06/28/02	
Edward L. Mumford v. NC Alcoholic Control Commission	02 ABC 0264	Conner	08/29/02	
NC ABC Commission v. WDB, Inc. T/A Twin Peeks	02 ABC 0517	Conner	07/15/02	
<u>APPRAISAL BOARD</u>				
NC Appraisal Board v. Thomas G. Hildebrandt, Jr.	02 APB 0130	Chess	08/20/02	17:06 NCR 563
<u>CEMETARY COMMISSION</u>				
Lee Memory Gardens, Inc. v. NC Cemetary Commission	02 COM 0126	Gray	09/19/02	
<u>UTILITIES COMMISSION</u>				
Tracy Woody v. State of NC Utilities Commission	02 COM 1004	Morrison	08/26/02	
<u>CRIME CONTROL AND PUBLIC SAFETY</u>				
Hattie Holt v. NC Crime Victims Compensation Commission	00 CPS 1067	Conner	05/30/02	
Linda Hawley v. NC Crime Victims Compensation Commission	02 CPS 0121	Conner	06/14/02	
Lial McKoy v. NC Crime Victims Compensation Commission	02 CPS 0394	Chess	07/26/02	
Brenda S. DuBois on behalf of victim Priscilla Bryant v. NC Dept. of Crime Control & Public Safety, Div. of Victim Comp. Services	02 CPS 1332	Lassiter	09/20/02	
<u>HEALTH AND HUMAN SERVICES</u>				
A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions .				
Thelma Street v. NC DHHS	01 DHR 0303	Reilly	09/17/02	
Emilia E Edgar v. DHHS, Div. of Facility Services	01 DHR 1356	Hunter	09/09/02	
Evelia Williams v. NC DHHS	01 DHR 1750	Conner	07/15/02	
Jacob Jones v. NC DHHS, Div. of Medical Assistance	01 DHR 2169	Wade	10/04/02	
Kathy Mumford v. DHHS, Div. of Facility Services	01 DHR 2253	Chess	07/26/02	
James Bell v. NC DHHS, Div. of Facility Services	01 DHR 2340	Elkins	06/27/02	
Adam Syare v. NCDHHS, Div. of MH/DD/SAS, Southeastern Regional Mental Health Center	01 DHR 2352	Conner	06/21/02	
Ramiro Ramos v. NC DHHS and Chris Hoke, State Registrar	01 DHR 2366	Conner	09/11/02	
Effie M. Williams v. NC Department of Health and Human Services	02 DHR 0001	Gray	08/08/02	
Kathy Denise Urban v. NC DHHS, Div. of Facility Services	02 DHR 0055	Hunter	09/10/02	
Betty Carr v. DHHS, Div. of Facility Services	02 DHR 0070	Mann	09/10/02	
Sarah D. Freeman & Tony J. Freeman v. Guilford Co. Mental Health, The Guilford Center	02 DHR 0083	Chess	06/07/02	
Albemarle Home Care & Ginger Parrish, PhD v. NC DHHS, Div. of Medical Assistance	02 DHR 0142	Conner	07/22/02	
Birgit James v. NC Dept. of Health & Human Services	02 DHR 0255	Connor	07/01/02	
Geraldine Rountree Cooper v. DHHS, Div. of Facility Services	02 DHR 0267	Elkins	07/15/02	
Unieca Richardson v. NC DHHS, Division of Facility Services	02 DHR 0286	Chess	06/17/02	
Greg McKinney & Virgie Elaine McKinney v. DHHS	02 DHR 0301	Mann	08/01/02	
Jerry Dean Webber v. NC DHHS, Broughton Hospital	02 DHR 0306	Conner	08/28/02	

CONTESTED CASE DECISIONS

Donna R Anderson v. NC DHHS, Broughton Hospital	02 DHR 0340	Gray	08/01/02
Notisha Utley v. NC DHHS, Division of Facility Services	02 DHR 0379	Conner	07/26/02
Isa Spaine v. NC Department of Health & Human Services	02 DHR 0403	Chess	06/24/02
Debra A. Browner v. NC DHHS, Broughton Hospital	02 DHR 0405	Conner	08/28/02
Mooresville Hospital Management Associates, Inc. d/b/a Lake Norman Regional Medical Center v. DHHS, Div. of Facility Services, Cert. of Need Section	02 DHR 0541	Chess	08/07/02
Eli Maxwell v. NC DHHS, Div. of Facility Services, Health Care Registry	02 DHR 0556	Lassiter	08/08/02
Robin Lee Arnold v. DHHS, Div. of Facility Services	02 DHR 0558	Conner	08/15/02
Evelyn Denise Humphrey v. NC DHHS, Div. of Facility Services	02 DHR 0624	Morrison	08/08/02
James Parks v. NC Dept. of Health and Human Services	02 DHR 0680	Morrison	08/07/02
Lisa Murphy v. DHHS< Division of Facility Services	02 DHR 0694	Mann	07/26/02
Mary's Family Care #2, Beulah Spivey v. OAH	02 DHR 0735	Morrison	08/27/02
Hazel Chea v. Department of Health & Human Services	02 DHR 0795	Mann	06/11/02
Tracy Woody v. NC Coop Ex. Svc, Coll of Ag & Life Sc Family & Consumer Svcs, In-Home Breastfeeding Support Program & Nash Co. Dept. of Social Svcs, Child Protective Svcs & State WIC Program for Nash County	02 DHR 0944	Morrison	09/25/02
Carmelita T. England v. Ms. Lisa Moor, Chief Advocate, Black Mtn Ctr.	02 DHR 1033	Chess	08/15/02
Gloria Dean Gaston v. Office of Administrative Hearings	02 DHR 1081	Morrison	07/26/02
Maria Goretti Obialor v. DHHS, Div. of Facility Services	02 DHR 1187	Mann	09/11/02
Lashanda Skinner v. DHHS	02 DHR 1190	Lassiter	09/09/02
Robert A. Thomas v. DHHS, Div. of Facility Services	02 DHR 1254	Lassiter	09/13/02
Shirley's Development Center, Shirley Campbell v. State of NC DHHR, Div. of Child Development	02 DHR 1309	Morrison	10/08/02

ADMINISTRATION

San Antoni Equipment Co. v. NC Department of Administration	02 DOA 0430	Chess	06/26/02
James J. Lewis v. DOA, Gov. Advocacy Council for Persons w/Disabilities	02 DOA 0545	Chess	08/26/02

JUSTICE

Sara E Parker v. Consumer Protection [sic] & Rosemary D. Revis	02 DOJ 1038	Gray	08/08/02
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Alarm Systems Licensing Board

Seth Paul Barham v. Alarm System Licensing Board	02 DOJ 0552	Gray	06/12/02
Christopher Michael McVicker v. Alarm Systems Licensing Board	02 DOJ 0731	Gray	06/07/02
Jeffery Lee Garrett v. Alarm Systems Licensing Board	02 DOJ 0908	Morrison	08/06/02

Private Protective Services Board

Anthony Davon Webster v. Private Protective Services Board	01 DOJ 1857	Gray	06/07/02
Benita Lee Luckey v. Private Protective Services Board	02 DOJ 0530	Elkins	07/12/02
Orlando Carmichael Wall v. Private Protective Services Board	02 DOJ 0729	Gray	06/18/02
Randall G. Bryson v. Private Protective Services Board	02 DOJ 0730	Gray	06/07/02
Barry Snadon, Sr. v. Private Protective Services Board	02 DOJ 0907	Elkins	07/12/02
Gregory Darnell Martin v. Private Protective Services Board	02 DOJ 0916	Morrison	08/06/02
Marvin Ray Johnson v. Private Protective Services Board	02 DOJ 0945	Morrison	08/06/02
Quincey Adam Morning v. Private Protective Services Board	02 DOJ 1084	Morrison	08/06/02
Philip Garland Cameron v. Private Protective Services Board	02 DOJ 1258	Morrison	09/06/02
Desantis Lamarr Everett v. Private Protective Services Board	02 DOJ 1259	Morrison	09/06/02
John Curtis Howell v. Private Protective Services Board	02 DOJ 1562	Lassiter	10/04/02

Sheriffs' Education & Training Standards Commission

Kevin Warren Jackson v. Sheriffs' Education & Training Stds. Comm.	01 DOJ 1587	Chess	07/16/02
Jonathan P. Steppe v. Sheriffs' Education & Training Stds. Comm.	02 DOJ 0004	Mann	06/28/02
Jeffrey Beckwith v. Criminal Justice & Training Stds. Comm.	02 DOJ 0057	Gray	07/15/02
Thomas B. Jernigan v. Sheriffs' Education & Training Stds. Comm.	02 DOJ 0089	Conner	06/25/02
Clarence Raymond Adcock v. Criminal Justice Ed. & Trng. Stds. Comm.	02 DOJ 0104	Chess	09/09/02
Katrina L. Moore v. Sheriffs' Education & Training Stds. Comm.	02 DOJ 0304	Reilly	07/17/02
Wallace A. Hough, Jr. v. Criminal Justice & Training Stds. Comm.	02 DOJ 0474	Morrison	08/08/02
Sharon L. Joyner v. Sheriffs' Educ. & Training Stds. Commission	02 DOJ 0604	Morrison	09/05/02
Keith E. Kilby, Sr. v. Sheriffs' Education & Training Stds. Comm.	02 DOJ 0609	Lassiter	08/07/02
John R. Tucker v. Sheriffs' Education & Training Stds. Comm.	02 DOJ 0632	Morrison	06/26/02
Eddie Kurt Newkirk v. Sheriffs' Education & Training Stds. Comm.	02 DOJ 0870	Gray	08/28/02
Joseph Ray Johnson v. Criminal Justice & Training Stds. Comm.	02 DOJ 1420	Wade	06/27/02
Joseph Garth Keller v. Criminal Justice & Trng. Stds. Comm.	02 DOJ 0170	Gray	09/11/02
Frances Sherene Hayes v. Criminal Justice & Training Stds. Comm.	02 DOJ 0171	Mann	06/04/02
Michael A Carrion v. Criminal Justice Educ & Trng Stds. Comm.	02 DOJ 0416	Conner	09/25/02
Jerome Martrice Johnson v. Criminal Justice Educ. & Trng. Stds. Comm.	02 DOJ 0484	Elkins	09/23/02
Antonio Fitzgerald McNeil v. Criminal Justice Educ. & Trng. Stds. Comm.	02 DOJ 0526	Wade	09/25/02

ENVIRONMENT AND NATURAL RESOURCES

Town of Belville v. NC DENR, Div. of Coastal Management	96 EHR 0598	Gray	07/29/02
Squires Enterprises, Inc. v. NC DENR (LQS00-091)	01 EHR 0300	Mann	09/23/02
Stoneville Furniture Co., Inc. v. NC DENR, Div. of Air Quality	01 EHR 0976	Chess	07/16/02
SRF Dev. Corp. v. NC DENR, Div. of Land Resources	01 EHR 1040 ¹	Gray	10/02/02
SRF Dev. Corp. v. NC DENR, Div. of Land Resources	01 EHR 1402 ³	Gray	10/02/02
Rhett & Julie Taber, Robert W. Sawyer, John T. Talbert, Stephen Bastian,	01 EHR 1512	Conner	09/11/02

3 Combined Cases

CONTESTED CASE DECISIONS

Dr. Ernest Brown, Thomas Read, Keith Brown, Fred Johnston, James L. Dickens, James T. Coin, Eleanor Coin & James Vaughn v. NC DENR, Div. of Coastal Management					
Town of Ocean Isle Beach v. NC DENR	01 EHR 1885	Chess	07/31/02	17:06 NCR	557
Helen Smith v. NC DENR	02 EHR 0152	Morrison	08/09/02		
Helen R. Bass v. County of Durham	02 EHR 0191	Gray	06/26/02		
Bipin B Patel Rajan, Inc. v. NC DENR, Div. of Waste Management	02 EHR 0244	Gray	06/05/02		
J.B. Hooper v. NC DENR	02 EHR 0285	Conner	08/21/02		
Elwood Montgomery v. NC DENR, Div. of Waste Management	02 EHR 0329	Wade	09/26/02		
J.L. Hope & wife, Ruth B. Hope v. NC DENR	02 EHR 0395	Mann	06/10/02		
Linda L. Hamrick v. NC DENR	02 EHR 0600	Conner	07/23/02		
Mitchell Oil Company Larry Furr v. DENR	02 EHR 0676	Lassiter	08/07/02		
County of Hertford Producer's Gin, Inc. v. NC DENR, Div. of Air Quality	02 EHR 0690	Chess	06/17/02		
Michael John Barri v. New Hanover Co. Health Dept./Env. Health	02 EHR 0742	Conner	09/03/02		
Christopher L. Baker v. City of Asheville	02 EHR 0763	Gray	09/11/02		
Olivia Freeman POA for Bobby C. Freeman v. Trng. Stds. Comm.	02 EHR 0777	Wade	07/11/02		
Ronald E. Petty v. Office of Administrative Hearings	02 EHR 1183	Gray	09/20/02		

ENGINEERS AND LAND SURVEYORS

NC Bd. of Examiners for Engineers & Surveyors v. C Phil Wagoner	01 ELS 0078	Lewis	06/05/02		
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TEACHERS & ST. EMP. COMP MAJOR MEDICAL PLAN

Sandra Halperin v. Teachers' & St. Emp. Comp. Major Medical Plan	02 INS 0337	Elkins	10/02/02		
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NURSING HOME ADMINISTRATORS

State Bd. of Examiners for Nursing Home Administrators v. Yvonne Washburn	02 NHA 0915	Morrison	09/25/02		
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OFFICE OF STATE PERSONNEL

Robin Heavner Franklin v. Lincoln Co. Dept. of Social Services	98 OSP 1239	Conner	08/28/02		
Laura C. Seamons v. NC DHS/Murdoch Center	00 OSP 0522	Wade	06/28/02		
James Edward Robinson v. Off. of Juvenile Justice, 7 th Jud. Dist.	00 OSP 0722	Wade	06/28/02		
Andre Foster v. Winston-Salem State University	00 OSP 1216 ¹	Mann	06/03/02	17:01 NCR	93
Berry Eugene Porter v. NC Department of Transportation	01 OSP 0019	Gray	07/03/02		
Linda R. Walker v. Craven County Health Department	01 OSP 0309	Gray	07/12/02		
J Louise Roseborough v. Wm F. Scarlett, Dir. of Cumberland County Department of Social Services	01 OSP 0734	Morgan	06/06/02		
Dennis Covington v. NC Ag. & Tech. State University	01 OSP 1045	Wade	06/28/02		
Reginald Ross v. NC Department of Correction	01 OSP 1122/23	Wade	06/28/02		
Bob R Napier v. NC Department of Correction	01 OSP 1379	Lassiter	09/26/02	17:09 NCR	914
Andre Foster v. Winston-Salem State University	01 OSP 1388 ¹	Mann	06/03/02	17:01 NCR	93
Andrew W. Gholson v. Lake Wheeler Rd. Field Lab, NCSU Unit #2	01 OSP 1405	Wade	06/28/02		
Demetrius J. Trahan v. EEO/Title VII, Dir. Cheryl C. Fellers, DOC	01 OSP 1559	Gray	08/13/02		
Wade Elms v. NC Department of Correction	01 OSP 1594	Gray	06/27/02		
Wayne G. Whisemant v. Foothills Area Authority	01 OSP 1612	Elkins	05/30/02	17:01 NCR	103
Linwood Dunn v. NC Emergency Management	01 OSP 1691	Lassiter	08/21/02		
Gladys Faye Walden v. NC Department of Correction	01 OSP 1741	Mann	07/12/02		
Barbara A. Harrington v. Harnett Correctional Institution	02 OSP 2178	Conner	09/03/02		
Joy Reep Shuford v. NC Department of Correction	01 OSP 2179	Overby	06/25/02		
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Mark Wayne Faircloth v. NC Forest Service	01 OSP 2374	Conner	06/20/02		
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James Donoghue v. NC Department of Correction	02 OSP 0011	Mann	08/26/02		
Lashaundon Smith v. Neuse Correctional Institution	02 OSP 0064	Elkins	07/03/02	17:03 NCR	329
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Cathy L. White v. NC Department of Corrections	02 OSP 0246	Elkins	05/31/02		
Doris J. Bery v. NC Department of Transportation	02 OSP 0247	Elkins	06/17/02		
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Michael Forrect Peeler v. NC Department of Transportation	02 OSP 0478	Conner	07/01/02		
Shirley J. Davis v. NC Department of Correction	02 OSP 0486	Elkins	07/11/02		
Alber L. Scott v. UNC General Administration	02 OSP 0498	Elkins	06/10/02		
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JoAnn A Sexton v. City of Wilson	02 OSP 1041	Morrison	07/25/02
Alex Craig Fish v. Town of Smithfield (Smithfield Police Dept.)	02 OSP 1060	Morrison	08/09/02
Donald B. Smith v. NC DOC, Div. of Community Corrections	02 OSP 1117	Chess	10/03/02
Carolyn Pickett v. Nash-Rocky Mt. School Systems, Nash-Rocky Mt. Board of Education	02 OSP 1136	Morrison	07/29/02
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SUBSTANCE ABUSE PROFESSIONAL BOARD

NC Substance Abuse Professional Certification Board v. Lynn Cameron Gladden	00 SAP 1573	Chess	05/10/02
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UNIVERSITY OF NORTH CAROLINA

Patsy R. Hill v. UNC Hospitals	02 UNC 0458	Conner	08/21/02	17:06 NCR 571
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STATE OF NORTH CAROLINA

COUNTY OF ANSON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
01 OSP 1379

BOB R. NAPIER,
Petitioner,

vs.

N.C. DEPARTMENT OF CORRECTION,
Respondent.

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DECISION

On February 6, 7, and 12, 13, 2002, Administrative Law Judge Melissa Owens Lassiter heard this contested case in High Point, North Carolina. On May 1, 2002, pursuant to an Order from the undersigned, the parties submitted proposed Decisions. Along with its proposed Decision, Respondent requested the undersigned reconsider her ruling on Respondent's Exhibits 51-53. On September 9, 2002, the undersigned heard arguments on Respondent's Motion to Reconsider the admissibility of Respondent's Exhibits 51-53. For reasons stated in the decision below, Respondent's Motion to Reconsider is hereby DENIED.

APPEARANCES

Petitioner: David P. Ferrell
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1305 Navaho Dr., Suite 302
Raleigh, North Carolina 27609-7444

Respondent: Buren R. Shields, III
Assistant Attorney General
N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

EXHIBITS

Respondent's Exhibits: 1-50, 54-56, 64-66

Offer of Proof: Respondent's Exhibits 51-53

WITNESSES

Petitioner: Don Bullock, Darryl Burr, Darrell Martin, Steve Swearingin, William Hanna, Petitioner

Respondent: Mike Baldwin, George Lipscomb, Jim Godwin, Charles Cummings, Steve Turner, and Gail Harrington

ISSUE

Did Respondent have just cause to dismiss Petitioner from employment as an Assistant Plant Manager for unacceptable personal conduct?

FINDINGS OF FACT

A. Background facts

1. On May 16, 2001, Respondent dismissed Petitioner from his position as a Prison Industries Supervisor V position (informally called "Assistant Plant Manager") at the Corrections Enterprise Division (CED) Metal Products Plant at Brown Creek Correctional Institution (hereinafter "BCMPP") in Polkton, North Carolina. Respondent dismissed Petitioner for unacceptable personal conduct for failing to stop the "False Alcohol Test" joke from taking place, and for failing to take disciplinary or corrective actions against various

BCMPP employees for playing the “Dictionary Stupid” joke, the “Truck Driver of the Year” joke, and the “Indian Princess” joke on BCMPP employee Charles Cummings. In the termination letter, Respondent dismissed Petitioner because:

. . . as a supervisor you took no action to stop other staff from participation in this unprofessional behavior and your failure to take corrective action allowed this type of environment to continue. As a supervisor, you are expected to provide guidance and leadership to coordinate staff and not engage in unacceptable personal conduct that demeans and degrades those, which you supervise. **Your failure to take corrective actions to stop the unacceptable behavior of subordinate staff is grounds for disciplinary actions.** Your conduct is unacceptable personal conduct and sufficient to warrant your dismissal.

(Emphasis added) (Resp Exh 1)

2. On May 16, 2001, under the Respondent’s internal grievance system, Petitioner appealed his dismissal to a NCDOC Employee Relations Committee (“ERC”). (Resp Exh 37) By letter dated July 23, 2001, the ERC recommended that Respondent’s Secretary Theodis Beck uphold Petitioner’s dismissal for unacceptable personal conduct. Among other things, the ERC concluded that:

In his position as Assistant Plant Manager, Mr. Napier had a duty and responsibility to provide leadership to ensure a safe and professional work environment for all staff. He did not do this. . . . Mr. Napier had an obligation to prevent the falsified memo incident and could have taken action to do so. In addition, Mr. Napier should have taken other steps to stop the very inappropriate joking directed toward Mr. Cummings. (Resp Exhs 36 p 5, 37).

3. On July 25, 2001, Deputy Secretary Fred Aikens, on behalf of Secretary Beck, upheld Petitioner’s dismissal and notified Petitioner of such decision on July 26, 2001. (Resp Exh 36)

4. On August 24, 2001, Petitioner appealed the Secretary’s decision by filing a Petition for a Contested Case Hearing with the Office of Administrative Hearings.

5. As of the date of his dismissal, Petitioner had approximately 116 months of continuous State employment and was paid at a pay grade 69. Prior to coming to the BCMPP, Petitioner had served as a certified correctional officer at Anson Correctional Institution for three years. (Resp Exhs 5-6; Resp Exh 45; Resp Exh 48; Resp Exh 56, ¶ 8; Resp Exh 66; T pp. 37 - 39, 43 - 48, 64 - 65, 170 - 172, 374, 474, 476, 479, 619, 680.)

6. Don Bullock was the Corrections Enterprise Manager V or Plant Manager at BCMPP, and was Petitioner’s immediate supervisor. Petitioner served under Mr. Bullock for approximately six and one half years at the BCMPP.

7. Mike Baldwin, Director II, Furniture and Metal Projects Operations, CED, was Mr. Bullock’s immediate supervisor and Petitioner’s second line supervisor.

8. As the Assistant Plant Manager, Petitioner’s primary duties were to supervise three (3) subordinate employees and up to forty-five (45) medium custody inmates engaged in the manufacture of fabricated metal items from beginning to completion. Specifically, Petitioner’s position was responsible for the actual layout of raw materials for the items to be fabricated. (Resp Exh 46)

9. Petitioner directly supervised DOC supervisors Bill Hanna, Steve Swearingin, and Charles Cummings. Bill Hanna supervised Darrell Martin. Other than Petitioner, Mr. Bullock directly supervised Steve Turner and Darryl Burr.

10. When Bullock was absent from the BCMPP, Petitioner served as the “officer in charge” of the BCMPP until Bullock returned. During Bullock’s absence, Petitioner supervised all the BCMPP’s employees, including Turner and Burr. (Resp Exh 46, 48) Petitioner served in this role, and supervised the entire BCMPP approximately 1-2 times a month.

11. DOC supervisors Hanna, Swearingin, Cummings, Martin, and Burr supervised inmates and their work at the BCMPP.

12. BCMPP provides a wide variety of fabricated stainless steel and black iron products for use by the Respondent and other state agencies. BCMPP operates more like a private sector metal plant than it does a traditional prison. Petitioner, along with the other supervisors, supervises the inmates in the fabrication of these products. Respondent’s employees work side by side with inmates in this process. The inmates working at BCMPP are not in handcuffs, are not restrained, and are free to move about the BCMPP. Inmates assigned to work at BCMPP work with machinery, operate computers, and perform other tasks incident to the production of metal products.

Inmates also provide support services to BCMPP correctional officers, including filing, using the BCMPP copier, and other clerical services. Inmates are allowed in the BCMPP office area, and are allowed to use the equipment in the office area, including

computers, copiers, etc.

13. Respondent's Exhibit 50 contains an accurate diagram of the physical layout of the BCMPP office area. The BCMPP office area is approximately 24 feet long and 28 feet wide. In this diagram, the BCMPP supervisors' desks are designated by their names written on their desks. The locations of the copier and water fountain are also designated. The desks of Cummings, Swearengin, Hanna, and Martin are located along the walls creating the left corner of the BCMPP office. (Resp Exh 49) Petitioner and Burr's desks are located on the wall at the bottom of the diagram. Petitioner's desk is located approximately 5 feet from Cummings' desk. There is approximately 13 feet of open space between Petitioner's desk and Martin's desk. Bullock's office is self-enclosed and located in the upper right corner of the office area. The copier is located in the general office area, to the right of Bullock's office door and the bulletin board area.

14. On January 30, 2001, Charles Cummings left a message on Mike Baldwin's voice mail. In such message, Cummings questioned the authenticity of a memorandum allegedly from Correction Enterprise Director James G. Godwin to Don Bullock, that directed Cummings to take a "reasonable suspicion" alcohol consumption (drug) test. The memorandum was typed on official NCDOC stationery, and purported to be authored by Director Godwin. The memorandum stated:

Due to reports received [by] this office January 4, 2001, it is requested that Charles Cummings be given a Q.E.D. Saliva Alcohol Test when he reports to work January 29, 2001.

If Mr. Cummings refuses the Q.E.D. Saliva Alcohol Test, it is then requested that he provide a sample for urinalysis.

If there are any questions please contact this office immediately.

(Resp Exh. 1 - 3; Resp Exh 6; Resp Exh 44; Resp Exh 56; T p 50).

15. Mr. Baldwin conducted a preliminary investigation and determined that this alcohol testing directive was falsified, had not been authored by Director Godwin, and there was no evidence at CED headquarters justifying a drug test of Cummings.

16. After learning of this falsified directive, Director Godwin appointed Baldwin and Ms. Gail Harrington, CED Personnel Technician, to conduct a formal NCDOC/CED investigation into this misconduct. (Resp Exhs 6, 54, 56; T pp 189 - 190 (Godwin); T pp 49 - 51 (Baldwin); T pp. 230 (Harrington)).

17. During the investigation, Baldwin and Harrington initially gathered written statements from each of the BCMPP employees and from selected inmates. Subsequently, they conducted more detailed sworn interviews of several plant employees. Such interviews were tape recorded and transcribed verbatim by George Lipscomb, Respondent's Business Operations Manager, and Administrative Personnel Officer at the CED Raleigh office.

18. Following the conclusion of the investigation, on March 23, 2001, Baldwin and Harrington submitted to Director Godwin an Investigative Summary, together with documents and interview records. Director Godwin was the official who decided what disciplinary action, if any, was appropriate for all the BCMPP employees involved in the internal investigation. (Resp Exhs. 6 - 30; Resp Exh 54, ¶ 7; Resp Exh 55, ¶¶ 5 - 6; Resp Exh 56, ¶ 5; T pp. 51 - 61 (Baldwin); T pp. 168 - 170 (Lipscomb); T pp. 190 - 191 (Godwin); T pp. 229 - 255 (Harrington)).

19. The investigation exposed four main incidents of harassment against Cummings. In order of chronological occurrence they were: (a) the "Dictionary Stupid;" (b) the "Indian Princess;" (c) the "Truck Driver of the Year;" and (d) the "Falsified Alcohol Test" jokes. BCMPP employees Hanna, Swearengin, Martin and Burr, perpetrated these pranks. (Resp Exh 5, pp. 1, 4, 7 - 8, 15 (Cummings); 83 (Burr); 97 - 102, 112, 123 (Hanna); 136, 141 (Petitioner)); Resp Exhs 6 - 30; Resp Exh 54, ¶ 7; Resp Exh 56, ¶¶ 7 - 8; T pp. 36 - 40, 62 - 65 (Baldwin), pp. 170 - 172 (Lipscomb)).

B. Dictionary Stupid Prank

20. The internal investigation revealed that the "Dictionary Stupid" joke occurred approximately 2-4 years before the Falsified Alcohol Test prank occurred (ie. on or before January 1999). Mr. Swearengin directed Inmate Mitchell Gilliam to copy and superimpose Cummings' photograph onto a page from a dictionary, next to the definition of the word "stupid". Inmate Gilliam made such a copy using the office copy machine and State paper supplies. Inmate Gilliam, who was supervised by Martin, approached Cummings and said words to the effect of "You are stupid and I can prove it." He then produced the modified dictionary page, and everyone, including Gilliam, laughed at Cummings. (Resp Exhs. 1 - 3; Resp Exh 5, pp. 149, 163 - 164 (Petitioner); Resp Exh 56, ¶ 10; T pp 66, 69, 87 - 89, 217 - 218, 261 - 265, 342 - 343.)

21. A preponderance of the substantial evidence proved that Inmate Gilliam played the “Dictionary Stupid” prank on Cummings in the BCMPP’s conference room during lunch. BCMPP employees Swearengin, Hanna, Burr, and Cummings were all present in the conference room when Gilliam played this joke.

22. The BCMPP employees have a specific seating order in the conference room for lunch. Petitioner usually sat between Hanna and Burr. On the day the “Dictionary Stupid” prank was played, Cummings was sitting between Hanna and Burr.

23. Petitioner’s internal interview statement and his hearing testimony differed on whether Petitioner was actually present when this joke was played on Cummings. During the investigation, Petitioner described the “Dictionary Stupid” joke, how it was carried out by Inmate Gilliam, and exactly how Cummings reacted. Petitioner stated “I remember Mitchell [Gilliam] coming in and saying something . . . I can’t remember the exact conversation. He said I can prove it and he opens up the dictionary . . .” (Resp Ex 5, pp 163 – 164). Yet, at the hearing, Petitioner testified that he was not present when the joke was executed, and had no personal knowledge of how it was presented. (T pp 669 – 677).

However, a preponderance of the evidence presented through the testimony of the other DOC supervisors (ie. the 4 supervisors/pranksters) proved that Petitioner was not in the conference room when the “Dictionary Stupid” joke was played on Cummings, and did not witness the joke being played on Cummings. Only after the joke had been played, did Steve Swearengin tell Petitioner about the joke.

24. After Petitioner heard about the “Dictionary Stupid” joke, he reported it to Don Bullock. Petitioner conveyed all the details he knew about the “Dictionary Stupid” joke at that time to Bullock.

25. Bullock thanked Petitioner for reporting the “Dictionary Stupid” joke to him, and advised Petitioner that he would handle the matter. Bullock did not ask Petitioner to write a TAP (appraisal) report, or take any disciplinary or further action against Swearengin or any other BCMPP employee for their involvement in this joke. Pursuant to Bullock’s instruction, Petitioner did not take any performance appraisal action, or initiate any disciplinary action against any of the perpetrators of this joke.

26. Cummings did not report the “Dictionary Stupid” joke to anyone in management because “Swearengin is bad to play jokes” and that prior to this incident, no posters had appeared with his picture superimposed on them. (Resp Exh 6, p 5)

C. Truck Driver of the Year Prank

27. During the internal investigation, Cummings produced a “poster” making fun of him as “Truck Driver of the Year.” The poster contained superimposed pictures of Cummings and his immediate supervisor, Petitioner. In the poster, Petitioner is pointing to a forklift slipping off the back of a truck, and is warning Cummings to “chock wheels before loading and unloading.” Below the picture is printed “His [Cummings] opinion on how to get the job done: I was going to let you do it.”

28. A copy of this poster had been placed on Cummings’ desk, on Petitioner’s desk, on other desks in the BCMPP office area, and in the Plant area. When Cummings came into the office, he saw the poster on his desk, stated out loud he was tired of such posters, and balled up the poster to throw it away. Cummings advised “[E]verybody in the office heard me.” After this incident, he complained to the Petitioner about the others harassing him. (Resp Exhs 5, pp. 4 - 8; Resp Exh 50; Resp Exh 56 ¶¶ 7, 11).

29. A preponderance of the evidence showed that this prank occurred sometime during the latter part of the year 2000, but before the “Indian Princess” joke occurred.

30. Mr. Burr and Mr. Swearengin admitted they had constructed the “Truck Driver of the Year” posters. The photograph used in the poster came from Swearengin. Burr and Swearengin used the office copy machine and State paper supplies to create these posters.

31. Upon seeing the “Truck Driver of the Year” poster, Petitioner’s first reaction was to snicker at the joke. His photograph was also used in the poster. After snickering, Petitioner realized that the BCMPP supervisors should not have played this joke. Petitioner shredded copies of the poster he found on his desk and on other desks in the BCMPP office area. Petitioner made a general comment to those employees sitting in the office area that the “supervisors need to cut out the joke playing.”

32. After learning about the “Truck Driver of the Year” joke, Petitioner reported the joke to Mr. Bullock, and described the details of the poster/joke to Bullock. Bullock told Petitioner that he would handle the matter. Bullock did not ask Petitioner to take any disciplinary action against, write a TAP report on, or otherwise take any action against any BCMPP employees for their involvement in this joke. Pursuant to Bullock’s instruction, Petitioner did not take any performance appraisal action or attempt to initiate discipline against any of the perpetrators of this joke. (Resp Ex 5, pp. 150, 153, 156 – 159)

33. During the internal investigation, Petitioner admitted that he knew about the “Truck Driver of the Year” poster, knew that a picture of him had been used in that poster, and thought that the poster had been constructed, in part, from a picture of him that he had

given to Swearingin. He believed that the rest of the poster had come from copying a magazine article he had given to Martin. He also believed that Martin had made the "Truck Driver of the Year" poster.

34. Petitioner admitted that: he "saw several of [these posters] in the office;" but did not take them down or direct anyone to do so. (Resp Exh 5, pp. 150, 153, 156 – 159; Resp Exh 6; Resp Exh 33; Resp Exh 56, ¶ 12; T pp. 70 - 71, 78 - 80, 83 - 84, 89 - 90 (Baldwin), 214 - 216 (Godwin), pp. 259 - 261 (Cummings)). Petitioner told investigators that the poster was "embarrassing" and "demeaning" to Cummings, and that Cummings told him the poster was "taped up around the shop." Petitioner did not search the plant to determine where or if any posters were posted throughout the plant.

35. Respondent presented evidence that Burr had told DOC investigators that Petitioner was in the BCMPP office area when the "Truck Driver of the Year" poster was created, and therefore, Petitioner knew about this joke before it was played on Cummings. (Resp Exh 5, p 82). However, reading such statement in the context of the rest of Burr's interview, Burr's statement was not convincing or credible. In making this statement, Burr merely implied that just because Petitioner was in the office when Burr created this poster, Petitioner then knew about or saw the "Truck Driver of the Year" joke before it was played on Cummings. As such, Burr's statement was only an insinuation and did not prove that Petitioner actually knew about or saw the "Truck Driver of the Year" poster when it was being made, or before the joke was played on Cummings. In addition, at the administrative hearing, Burr contradicted his earlier statement and indicated that he had no firsthand knowledge about Petitioner's knowledge of any of the subject jokes before they were played. For these reasons, Burr's statements were not probative or convincing.

36. In fact, a preponderance of the substantial evidence at hearing in fact proved that Petitioner did not know about the "Truck Driver of the Year" joke before it was played on Cummings.

D. Indian Princess Prank

37. The "Indian Princess" joke occurred sometime after the "Truck Driver of the Year" joke, but before the "False Alcohol Test" prank.

38. The "Indian Princess" poster involved a photocopied page from a magazine advertising a Native American Bride who could be purchased for two (2) payments of \$19.99. The words "An Exotic Indian Princess" and "Yes! Please enter my reservation for Swirling Waters" were highlighted on the poster. A photograph of Cummings' head and neck had been cut out and pasted over the face of the Indian princess. The basic page came out of a magazine that Cummings remembered seeing in the possession of Inmate Michael Davis.

This poster was posted throughout BCMPP, including on the inmate bulletin board, and in at least one inmate's work area. During the time that the poster was posted on the inmate bulletin board, Cummings saw a group of inmates gathered around the poster laughing. When Cummings reached to remove the poster, at least one inmate called out "Hey squaw." (Resp Exh 5, pp. 8 - 11, 13, 16; Resp Exh 6; Resp Exh 56, ¶ 14; T pp. 66, 69 - 71, 82 - 84, 90 - 92 (Baldwin); T pp. 210 - 214 (Godwin); T pp. 254 - 259 (Cummings)).

39. A preponderance of the evidence at hearing demonstrated that Petitioner did not know about the "Indian Princess" joke until he discovered the poster posted on the bulletin board over the copier in the BCMPP office area. When Petitioner first saw the poster, he snickered. As he examined the poster, Petitioner realized the joke was inappropriate.

40. Cummings removed six copies from various locations throughout the BCMPP plant area and his own desk. He then advised Petitioner that this poster was all around the BCMPP so the inmates could see and laugh at it. Cummings told Petitioner that he was tired of the BCMPP supervisors' jokes and informed Petitioner that he was going to report the matter directly to Mr. Bullock.

41. When Petitioner learned that this poster had been posted all over the plant, he knew it was wrong and became angry about what his subordinates had done. Petitioner did not go locate the posters or see if any posters were still displayed.

42. Petitioner immediately reported the "Indian Princess" joke to Mr. Bullock. Petitioner described the joke to Bullock, and advised Bullock of the location of the poster he had seen. Bullock advised Petitioner that he would handle the matter and did not ask Petitioner to remove the poster, initiate a TAP report, or otherwise take any disciplinary or other action against any BCMPP employee for perpetrating the joke. Pursuant to Bullock's instructions, Petitioner did not "speak to" the perpetrators, take any performance appraisal action, or initiate discipline against any of the perpetrators for their involvement with this joke.

43. After talking with Petitioner, Cummings reported the "Indian Princess" joke directly to Bullock. During that conversation, Cummings also showed Bullock a copy of the "Truck Driver of the Year" poster. Bullock advised Cummings that he would handle the matter.

44. Don Bullock did not conduct a formal investigation into the “Indian Princess” joke, or attempt to identify the perpetrators of the joke. Bullock did not think that this joke rose to the level of racial discrimination or racial harassment. However, Bullock spoke to the DOC supervisors as a group, telling them the “Indian Princess” joke was not a good joke to play, and to “cease and desist” this type of activity. (T p 444)

45. Three BCMPP employees, (Martin, Burr and Hanna) admitted to investigators that inmate William Linker, had been involved in the preparation and/or distribution of the “Indian Princess” poster throughout the BCMPP. (Resp Exh 5, pp. 42 - 43 (Martin), p. 85 (Burr), p. 116 (Hanna); Resp Exh 6; T p 796 (Martin); T p 876 (Burr)).

46. The office copy machine and State paper supplies were used to create these posters. This was obvious not only from the face of the posters, but since these posters were created at the workplace during normal working hours.

47. During his March 8, 2001 interview, Petitioner admitted to investigators that he saw one of the “Indian Princess” posters hanging on the employee bulletin board in the BCMPP office; that inmates routinely came in and out of the office area; and that he did not take this poster down, or direct anyone to do so. Petitioner acknowledged that the poster remained on the bulletin board in the office for “several days.” Petitioner believed that Swearingin and Martin had been involved in making the poster, and that the photograph of Cummings that had been used in constructing the poster, had come from a picture belonging to Swearingin. Petitioner knew that all the BCMPP employees were “laughing” and “giggling” about the poster, and he (Petitioner) “may have been laughing also.”

48. Petitioner also told investigators: “I don’t know if Mr. Bullock was aware of that Indian Maiden picture or not, but it was up there for several days.” When asked by investigators why he did not take down the poster he saw, Petitioner replied: “I can’t answer that because I don’t know why I didn’t do it. I should have.” Petitioner knew that Cummings was a Native American. (Resp Exh. 5, pp. 141, 149 - 153, 160 (Petitioner), pp. 242 - 246 (Bullock); Resp Exh 6; Resp Exh 56, ¶ 15).

49. At the administrative hearing, Petitioner’s testimony contradicted his interview statement to DOC investigators. First, Petitioner explained that the statement regarding why he did not remove the poster was wrong. Instead, he claimed that he did not remove the “Indian Princess” poster from the office bulletin board because he intentionally left it up for Bullock to see. (T pp 649 – 650). He further claimed that the poster was only on the bulletin board “a couple of hours” as opposed to his earlier statement that it was posted for “several days.” (T pp 650 – 651).

E. False Alcohol Test joke

50. On Friday, January 26, 2001, Don Bullock gave Bill Hanna and Darrell Martin several expired alcohol urinalysis tests. Martin made the comment “this would be a good joke to play on Cummings.” Bullock shrugged and walked back to his office. Bullock did not respond to Martin’s comments, or tell Hanna or Martin not to use the tests to play a joke on Cummings. No one made any further comment about the matter that day.

51. Petitioner heard Martin’s statement about playing a joke on Cummings. However, he did not respond to Martin’s statement, or say anything to any BCMPP supervisor. Petitioner knew that Bullock had heard Martin’s comment, and did not warn the supervisors not to play a joke on Cummings using the expired urinalysis tests. Petitioner did not know if the supervisors would ultimately use the expired tests to play a joke on Cummings.

52. On the morning of Monday, January 29, 2001, Petitioner was working at his desk in the BCMPP office area, with his back to the supervisors. Several BCMPP supervisors were sitting at their desks, discussing how they were going to play a joke on Cumming using the expired alcohol tests. (Resp Exh 5, pp. 17 - 22 (Cummings); pp. 37 - 40 (Martin); pp. 60 - 67 (Burr); pp. 97 - 103 (Hanna); Resp Exhs 6 - 8; Resp Exhs 10 - 12; Resp Exhs 14 - 15; Resp Exhs 17 - 18; Resp Exhs 20 - 21; Resp Exhs 26 - 27; Resp Exhs 29 - 30; Resp Exh 44; Resp Exh 56, ¶ 16; T pp. 84 - 86, 92 - 94, 133, 721)

53. Inmate Davis typed the “False Alcohol Test” joke in an office adjacent to the general office. The supervisors and inmate Michael Davis reviewed the “Alcohol Test” memorandum, and discussed ways to make the memorandum appear more authentic before it was finalized and presented to Mr. Cummings. The supervisors and Inmate Davis used an office computer and State paper supplies to create this memorandum.

54. As noted in Finding of Fact 14 above, the “False Alcohol Test” prank was a memorandum prepared on official Department of Correction Memorandum letterhead. The memorandum directed Cummings to take a Saliva Alcohol Test when he reported to work on January 29, 2001. If Cummings refused to do so, then he was required to provide a sample for urinalysis.

55. Petitioner heard these supervisors discussing this matter with Inmate Davis and amongst themselves. He would “tune them in” every once in a while, but did not pay attention to the details of their conversations. Petitioner heard one supervisor instruct Inmate Davis to type some sort of memorandum as part of the joke they were going to play on Cummings. Petitioner did not hear or

see what type of memorandum the supervisors were preparing, what text would be used in the memorandum, or any other details about the memorandum. He thought they were just playing another one of their jokes, similar to the “Dictionary Stupid”, “Truck Driver of the Year”, and “Indian Princess” jokes.

56. Petitioner does not hear very well due to tinnitus in his ears.

57. Around 10:00 a.m. on January 29, 2001, Cummings arrived at work. He left the office area for a while. After returning to the office, Cummings found and opened a sealed envelope that was lying on his desk. The envelope contained the falsified memorandum and the expired alcohol test. Cummings asked the other supervisors about the test to determine if the directive was “fake.”

Cummings asked Petitioner if he had to take the alcohol test. Petitioner initially responded that it was a joke, and he should “play along.” Petitioner had not yet seen the memorandum. When Cummings showed Petitioner the falsified alcohol memorandum, Petitioner told Cummings that it was a joke, and that the supervisors had gone too far. Cummings became extremely angry and told Petitioner that he was tired of this “crap” and he was going to call Mike [Baldwin]. Petitioner attempted to persuade Cummings to call Mr. Bullock instead. Cummings indicated that he was going to call Baldwin because, historically, Bullock had shown that he would not do anything. Petitioner said to Cummings: “I can’t stop you” and “do what you got to do,” or words to that effect. Petitioner then gave Mike Baldwin’s pager number to Cummings.

58. Around Noon that day, Cummings called Baldwin and left a voice mail message that he needed to talk with Baldwin. Cummings left the BCMPP and did not return to work that day.

59. Around 8:15 p.m. that night, Petitioner called Bullock at home. Petitioner informed Bullock that Cummings’ coworkers had played the falsified alcohol test joke on Cummings, and that Cummings had attempted to call Baldwin. Petitioner described the joke to Bullock in “fairly specific” detail, telling Bullock what he knew about the joke. (T p 562) Bullock asked Petitioner to call a staff meeting the next morning to begin investigating the matter.

60. On the morning of Tuesday, January 30, 2001, Petitioner began collecting statements from the various BCMPP supervisors involved in the “False Alcohol Test” joke.

61. During the March 8, 2001 investigative interview, Petitioner admitted to investigators that, on Friday, January 26, 2001, he saw Bullock give Hanna, Martin and Burr some alcohol test kits, and that he heard Martin reply this “would be a good joke to play on Cummings.” Petitioner acknowledged that he did not ask those supervisors what they were going to do with the expired tests, and that he did not take any action to stop the joke.

Petitioner also admitted that, before Cummings arrived at work on Monday, January 29, 2001, he heard his subordinates discussing how they were going to try to convince Cummings that he had to take a drug test; and saw Martin ask Inmate Michael Davis, the BCMPP office clerk, to type up a document requiring Cummings to take a urine test. Petitioner then saw Inmate Davis go into an office, where he was “typing up the letter.” A short time later, Petitioner saw Inmate Davis bring the document back to the pranksters, and “could hear him talking about it” with them. (Resp Exh 5, pp. 137 - 139; Resp Exhs 6 – 8, 14 – 15, 56 (¶ 17); T pp. 92 - 94, 133 (Baldwin); T pp. 197 - 199 (Godwin), T pp. 551 - 559, 594 - 595, 623 - 630 (Petitioner)).

62. During the investigative interview, Petitioner admitted that he knew he was in charge of the BCMPP on Monday January 29, 2001, and “should have said something.” He conceded that Cummings had previously complained to him about the harassment, and that he had previously told the pranksters to stop playing jokes on Cummings. Petitioner was aware that Bullock had previously warned the pranksters to “lay off” Cummings. He knew that Inmate Davis should have known that the prank was “probably against some type of policy.”

Despite this knowledge, Petitioner did not stop the prank, or attempt to determine what his subordinates and Inmate Davis were falsifying. Petitioner told investigators that he recognized “he should have stopped” the prank. (Resp Exh 5, p. 21 (Cummings), pp. 137 - 139, 141 - 144, 146 (Petitioner), pp. 239 - 240, 243 (Bullock); Resp Exhs 6, 7 – 8, 14 – 15, 56 (¶¶ 17 – 18); T pp. 93, 126 (Baldwin); T pp. 197 - 199 (Godwin); 632 - 634, 638 - 639 (Petitioner)).

63. A preponderance of the substantial evidence proved there existed a long time practice, over several years, of BCMPP employees playing pranks on each other at the BCMPP. After employees would play pranks on each other, they retold the jokes to each other and to inmates repeatedly. The four jokes at issue here were repeated numerous times. Some jokes, such as the “Dictionary Stupid” joke, were repeated so many times, the employees often just mentioned one or two words, such as “you’re stupid” to retell the joke.

64. Within that joking atmosphere, a pattern of harassment and misconduct at the BCMPP was directed toward Cummings, a Native American, with Cummings often being the victim of these pranks. As a result of such pranks, Cummings stayed away from the other employees and avoided the office area.

65. During the internal investigation, Petitioner advised the investigators that the atmosphere at the BCMPP had deteriorated to the point where “anything goes,” including “in front of” and “involving” inmates. Mr. Bullock told investigators that this conduct had “escalated within the last year” and “absolutely” was “out of hand.” (Resp Exhs 5, pp. 173, 137 - 178 (Napier), pp. 261 (Bullock); Resp Exh 6, Resp Exh 56; T pp 61 - 65 (Baldwin); T pp 265 - 268 (Cummings); 679 (Petitioner)).

66. A preponderance of the substantial evidence proved that Petitioner was not involved in, and did not participate in, or help perpetrate the “Dictionary Stupid” joke, the “Truck Driver of the Year” joke, the “Indian Princess” joke, or the “False Alcohol Test” joke. The testimony of Bullock, Cummings, Hanna, Martin, Swearengin, Turner, Martin, Burr, and Petitioner all proved that Petitioner was not involved in, and did not participate in playing the four subject jokes on Mr. Cummings. In fact, their testimony proved that Petitioner did not know about the “Indian Princess” joke, the “Truck Driver of the Year” joke, or the “Dictionary Stupid” joke until after each joke had been played on Cummings. While Petitioner did overhear the BCMPP supervisors planning the “False Alcohol Test” joke, he did not know the supervisors were creating a joke based upon a falsified memorandum on DOC letterhead using DOC officials’ names.

67. A preponderance of the substantial evidence also proved that Don Bullock was in charge of handling all disciplinary matters at the BCMPP. In a meeting with all BCMPP supervisors regarding disciplinary action and investigations at BCMPP, Bullock advised the supervisors that “anything, before it goes to Raleigh, must come through me.” Bullock did not like involving upper management in matters that occurred at the BCMPP. He preferred to handle matters informally, with the BCMPP employees working out their own differences, and without upper management’s involvement. Several supervisors heard Bullock express “don’t go to Raleigh, let’s solve our problems, and keep our problems here at the plant.” At the contested case hearing, Petitioner explained that this was to keep the “bureaucrats” from getting involved. (T pp 598-602)

68. Mr. Bullock made it clear to Petitioner and the other BCMPP supervisors that Bullock had not given Petitioner any authority to institute any type of disciplinary or corrective action against a BCMPP employee without Bullock’s direction or permission, regardless of what was written in Petitioner’s official job description. This fact was supported at the contested hearing by the testimony of all the BCMPP supervisors, particularly Bullock, Petitioner, and Darrell Martin.

First, Bullock specifically told Darrell Martin that Petitioner did not have the authority to discipline BCMPP employees. Second, Bullock always advised Petitioner to report disciplinary matters to him. On one occasion, Petitioner approached Bullock about a negative TAP entry for a subordinate (Mr. Burr) who had ordered too many supplies. Bullock “vetoed” Petitioner giving the negative TAP to the subordinate.

Third, on another occasion, Bullock failed to timely submit travel expense reimbursement for the BCMPP supervisors to the appropriate Division employees in Raleigh. After hearing complaints from those supervisors, Petitioner “went over Bullock’s head”, and reported the matter to upper management in Raleigh. Bullock advised Petitioner that he did not appreciate Petitioner reporting to management in that manner. From that point on, Petitioner thought Bullock did not want him to go “over” Bullock’s head to upper management with plant matters. (T p 597)

Fourth, since Petitioner arrived at the BCMPP in 1994, he experienced problems getting support and respect from Bullock. During those early years, Petitioner continuously complained to Bullock about a former employee harassing him. However, Bullock never took any action concerning the matter.

Fifth, even when Bullock was absent from the BCMPP and Petitioner served as the “officer in charge,” Bullock still expected Petitioner to report any disciplinary or other matters to him, and did not allow Petitioner to take disciplinary action. Petitioner understood from Bullock that in Bullock’s absence, Petitioner was to contact Mike Baldwin or other upper management only when there was an emergency at the BCMPP, or where life or property was in peril or subject to possible destruction.

69. Bullock’s treatment of Petitioner undermined Petitioner’s authority at the BCMPP. As a result, Petitioner was not respected by the BCMPP supervisors as someone with authority to discipline them. A preponderance of the substantial evidence showed that on several occasions, Petitioner informally advised several of the BCMPP supervisors to stop playing jokes on Cummings. However, when Petitioner actually spoke to his subordinates about harassing Cummings he was, in his own words, “blown off” or “ignored” by them.

70. As a correctional officer, Petitioner was taught to report matters “up the chain of command” to his immediate supervisor, and not to “go over” his supervisor’s head unless it was an emergency. The immediate supervisor would decide whether a matter was worthy of reporting any further “up the chain of command.” Petitioner acknowledged that he did not always agree with Bullock’s approach, but Bullock was the boss and he (Petitioner) did what he was told. (T pp. 493, 546 – 551). In essence, Petitioner “always

tried to obey Mr. Bullock's orders whether [he] agreed with them or not." (Resp Exhs 36 - 37; T pp. 94 - 97 (Baldwin); T pp. 598 - 599 (Petitioner))

Based upon his correctional officer training, and Bullock's instruction and treatment of him, Petitioner believed that he had no authority to take corrective action or initiate any disciplinary actions against BCMPP employees or his subordinates regardless of what his written job description required of him. (T pp. 493, 613). Pursuant to Bullock's instructions and treatment of him, Petitioner believed the only action he could take regarding BCMPP matters and employees, was to report matters to his immediate supervisor, Don Bullock. Therefore, as a routine practice and procedure, Petitioner reported any misconduct to Bullock, and Bullock advised Petitioner that he would handle the matter. Bullock did not instruct Petitioner to ignore Respondent's work rules.

71. A preponderance of the substantial evidence demonstrated that Petitioner, in accordance with Bullock's instructions, reported the details and occurrence of each subject joke to Bullock, within a reasonable time after Petitioner learned that each joke had been played on Cummings. The fact that Petitioner waited until the evening of January 29, 2001 to contact Mr. Bullock regarding the "False Alcohol Test" joke, and that Cummings had already reported the joke to Mr. Baldwin before that time, did not alter the effect the "False Alcohol Test" joke had on Cummings, or the accuracy of the investigation into this joke.

72. Based upon Bullock's instructions and treatment of him, Petitioner did not use the TAP system or initiate disciplinary action on any of his subordinate employees for their actions in playing jokes on Cummings. Given Bullock's instructions, and Petitioner's training in following the chain of command, Petitioner believed that he lacked the authority to initiate disciplinary action on his subordinate employees for playing jokes on Cummings.

73. In addition, Petitioner never expressed any concern to CED management that Bullock would not support his use of the TAP system or initiation of discipline as required under Petitioner's job description.

74. Petitioner's written job description stated that the primary purpose of his position as Assistant Plant Manager was "to supervise subordinate employees and up to 45 medium custody inmates engaged in the manufacture of fabricated metal items." Specifically, it directed that this position trained and supervised such employees and inmates:

in all phases of stainless steel and black iron fabrication from initial measurements to completion. . . . Additionally, this position is responsible for planning, developing, maintaining, and completing employee appraisals (TAP) documents on assigned subordinate employees. This includes monthly notations, interim reviews and annual fiscal analysis. This position is responsible for initiating disciplinary action when necessary on subordinate employees. (Resp Exh 46, pp 2, 5)

75. The position description also expressly required Petitioner to adhere to all NCDOC policies and work rules. (Resp Exh 46, p 3; Resp Exh 56, ¶ 8)

76. On January 5, 2000, both Petitioner and his immediate supervisor, Don Bullock, signed this job description, and certified to Baldwin and CED upper management that it was a complete and accurate description of Petitioner's responsibilities and duties. (Resp Exh 46; Resp Exh 56, ¶ 8; T pp. 39 - 43 (Baldwin); T pp. 172 - 178 (Lipscomb); T pp. 414 - 415, 470 - 471 (Bullock); T pp. 610 - 615 (Petitioner)).

77. Nevertheless, Bullock's understanding of Petitioner's job description was that Petitioner could not initiate disciplinary action against BCMPP employees without getting direction from Bullock. At the administrative hearing, Bullock acknowledged that he did not have the authority to change an employee's job description. However, Bullock's treatment of Petitioner, statements to other BCMPP employees, and his common practice of handling disciplinary or corrective action at the BCMPP became the standard or routine manner in which disciplinary matters were handled at the BCMPP. Such practice and procedure was common knowledge to all BCMPP employees. Therefore, in reality, and for all practical purposes, Bullock did not allow Petitioner to exercise the authority given to him in his job description to take corrective or disciplinary against the BCMPP subordinate employees. This was the routine and accepted method of how disciplinary matters were handled at the BCMPP.

78. It was also common knowledge at the BCMPP that whenever an employee reported a matter of concern to Bullock, Bullock answered, "I'll take care of it." However, Bullock usually failed to take any action to handle the matter reported to him. Bullock did not like to formally discipline employees because he wanted the plant to operate smoothly.

79. Around November or December 2000, Mike Baldwin visited the BCMPP. The evidence at hearing proved that some of the BCMPP supervisors and Baldwin gathered in the office area. Some of the BCMPP supervisors described to Baldwin, jokes that were played by employees on other employees. However, the evidence proving what specific jokes were told to Baldwin that day was inconsistent and not convincing.

During the administrative hearing, Baldwin admitted that during various trips to the BCMPP, he heard about jokes being played by employees on each other at the BCMPP. In particular, Baldwin heard about the “metal lightener” joke that was played on Cummings, and the “metal stretcher” joke. There was no evidence that Baldwin instructed the employees to stop playing the jokes or that Baldwin initiated disciplinary action against the employees who perpetrated those jokes. (T p 1005)

80. During the internal investigation, Petitioner advised Mike Baldwin that he had reported all the jokes at issue to Bullock. He also advised Baldwin that he did not have Bullock’s support to discipline other employees in the plant. Before the internal investigation, neither Baldwin, Godwin, Lipscomb, nor anyone else in “upper management” had personal knowledge about how Bullock had “altered” Petitioner’s job description and in essence, removed from Petitioner, the authority to discipline BCMPP employees.

After Petitioner’s internal interview, Baldwin did not investigate Petitioner’s claims. Instead, Baldwin did not give any weight to Petitioner’s statements because he thought Petitioner’s job description authorized and obligated Petitioner to initiate disciplinary actions on subordinates when necessary. He thought this pattern of joking necessitated Petitioner taking disciplinary action against subordinate employees, and reporting these actions to upper management regardless of (1) what Bullock had told Petitioner, (2) how Bullock treated Petitioner, or (3) if Bullock failed to take any disciplinary action himself.

81. On April 19, 2001, Director Godwin conducted a Pre-Dismissal (“Pre-D”) Conference. George Lipscomb, Correction Enterprises’ Personnel Director, and Petitioner attended. Director Godwin reviewed the investigative report, the verbatim transcripts of the employee interviews, and employee statements. He also considered the role and responsibilities of CED employees in supervising and managing inmates; and the need to emphasize that CED had zero tolerance for racial harassment, co-worker intimidation/harassment, inappropriate familiarity with inmates, or use of State assets for other than State business purposes. (Resp Exhs. 1; 6 - 35; 38 - 50; 65; Resp Exh 54, ¶¶ 15 - 20; Resp Exh 56, ¶ 19; T pp. 59 - 61 (Baldwin); T pp. 188 - 221, 225 - 228, 1014 - 1020 (Godwin)).

After such consideration, he determined that the BCMPP employees intentionally created these posters and executed these pranks to harass and intimidate Cummings. He determined that these pranks had the effect of subjecting Cummings to ridicule, and loss of respect, by the very inmates he was charged with supervising in the BCMPP. He concluded that the “Indian Princess” poster was derogatory to, and discriminatory against, Native Americans, i.e., racial harassment.

82. Because of their roles in these incidents, pranksters, Messrs. Hanna, Swearingen, Martin and Burr were dismissed from State employment. Mr. Bullock, the BCMPP manager and Petitioner’s immediate supervisor, resigned in lieu of disciplinary action following his Pre-D conference hearing. (T pp. 407 - 408 (Bullock); T p. 745 (Martin); T p. 819 (Swearingen); T p. 889 (Burr); T p. 948 (Hanna)).

83. As a result of their involvement in these events and other matters disclosed during the NCDOC/CED internal investigation, Inmates Michael Davis, William Linker, and Johnny Lowery were fired from their inmate jobs in the BCMPP. (Resp Exh 5, p. 29; Resp Exh 56, ¶ 20; T pp. 86 - 87 (Baldwin)).

84. Regarding Petitioner’s involvement with these pranks, Godwin found that Petitioner laughed at these pranks performed by his subordinates, failed to stop the pranks from being played, and failed to take corrective action against any of the participants. In explaining his reasoning, Godwin opined:

he appeared to be an active participant in some of these and knowingly let them take place . . . he [Petitioner] was snickering at the jokes. He was aware of them before they were taking place. . . . he was knowing of the planning of the jokes, so he’s just as guilty as they are by not stopping it. (T pp 191, 220) Well, obviously, he’s a participant. He knew it was going on. He let it go on. He was laughing at it. (T pp 220, 1019)

85. Godwin concluded that by laughing at some of the jokes, and failing to stop the jokes, Petitioner not only aided, encouraged and abetted with the subject jokes, but caused the harassment of Cummings, and the misuse of inmates and State property to continue and expand. Godwin determined that Petitioner’s action/inaction constituted unacceptable personal conduct. He determined that important CED needs could only be met if Petitioner was dismissed from State employment for his misconduct; any lesser, “progressive” disciplinary response was not appropriate. (Resp Exh 54, ¶¶ 16 - 20; T pp. 188 - 221, 225 - 228, 1014 - 1020 (Godwin)).

86. During the predismittal conference, Petitioner admitted that he was aware of the falsified alcohol test memorandum before it was presented to Cummings, although he was not aware of the falsification of the “official” nature of such memorandum. Petitioner admitted that he saw the “Indian Princess” poster on the bulletin board and did not remove it. He also admitted that he had not taken any corrective action against any of the perpetrators of the pranks against Cummings. He stated that he had not done so because he felt that he had no support from Mr. Bullock to exercise his authority as Assistant Plant Manager. Petitioner did not offer any evidence at the conference that he had attempted to notify upper NCDOC/CED management that Mr. Bullock was blocking such

efforts or his fulfillment of his job responsibilities. (Resp Exh 1-4; T pp. 97 - 101 (Baldwin); 1014 - 1018 (Godwin); 1026 - 1028 (Lipscomb))

87. Neither Director Godwin nor Mr. Lipscomb investigated Petitioner’s claim that he did not have the authority to take corrective or disciplinary action against BCMPP employees for playing jokes on Cummings. (T pp 1016, 1017, 1018) At the administrative hearing, Godwin explained that he did not investigate Petitioner’s claim that he did not have any such authority because “there was no need to investigate the fact that that was his contention, his defense. . . . Obviously, it had to be bogus.” (T pp 1017, 1018) Godwin further explained, “that’s not a defense at all. Sure, he has the authority” based upon “[h]is job description. Any employee has got the authority that – in a supervisory role.” (T p 1018)

88. Throughout the contested case hearing, Respondent strenuously stressed that under NCDOC/CED personnel practice and policy, supervisors, like Petitioner, have the authority and the responsibility to stop violations of work rules and to respond to harassment by their subordinate employees with appropriate corrective action. Respondent argued that when supervisors consistently fail to take corrective action, but instead laugh at the harassment being perpetrated by their subordinates, it has the potential to encourage such misconduct. Therefore, under NCDOC/CED policy and practice, such supervisors are accountable for their subordinates’ resultant misconduct and any work rule violations involved therein. In other words, a supervisor’s inaction in failing to stop his subordinates’ misconduct would make that supervisor equally guilty of the resultant work rules as the subordinates who actually violated those work rules.

89. In supporting its decision to dismiss Petitioner, Respondent relied heavily on this theory to contend that Petitioner’s responsibility for his subordinates’ conduct arose from (1) his position as the supervisor of the victim and the harassers, and (2) independently from the express terms of Petitioner’s official job description. In fact, a reading of the termination letter, in conjunction with Godwin’s affidavit and hearing testimony, Lipscomb’s testimony, and Baldwin’s affidavit and testimony, clearly demonstrated that Respondent believed that Petitioner had failed to perform his job as a supervisor, and thus violated DOC/CED written work rules.

First of all, in Petitioner’s termination letter, Respondent used the following terminology to advise Petitioner that he was being terminated from employment:

as a supervisor you took no action to stop other staff from participation in this unprofessional behavior and your failure to take corrective action allowed this type of environment to continue. As a supervisor, you are expected to provide guidance and leadership to coordinate staff and not engage in unacceptable personal conduct that demeans and degrades those, which you supervise. **Your failure to take corrective actions to stop the unacceptable behavior of subordinate staff is grounds for disciplinary actions.** Your conduct is unacceptable personal conduct and sufficient to warrant your dismissal.

(Emphasis added) (Resp Exh 1)

Second, in his affidavit, Godwin explicitly explained that the basis of his decision was that Petitioner’s position of supervisor of these pranksters made him ultimately responsible for the pranksters’ actions. He stated:

6. CED supervisor, like Petitioner have the authority and responsibility to stop violations of work rules and to respond to what has the potential to be continuing misconduct with formal corrective action. When, as in this case, such supervisors make neither of these responses, but, as Petitioner did, laugh at the harassment being perpetrated by their subordinates, they (like Petitioner) encourage and abet such misconduct. There, under CED policy, they (like Petitioner) are responsible/accountable for the conduct and the resultant work rule violations.

. . . .

17. . . . [a]s in this case with Petitioner, a CED supervisor’s inaction may also directly violate these written reporting work rules, irrespective of whether he laughed at, or otherwise encouraged, the underlying harassment.

18. Petitioner’s responsibility as a CED employee to halt this harassment, and to take appropriate corrective actions as to each separate incident of harassment, **arises from his position as the supervisor of the victim and the harassers, as well as from the terms of his job description.** His responsibility to report the inappropriate interaction with inmates and the misuse of State assets that occurred as part of this harassment also is imposed directly by applicable written work rules. (Emphasis added)

(Resp Exh 54, pp 6-7)

Third, at the administrative hearing, Godwin emphasized that Petitioner was given responsibility in his written job description to take appropriate corrective actions and to initiate disciplinary action, when appropriate, on his subordinates. (T p 1015) In Godwin’s opinion, Petitioner failed to exercise that supervisory responsibility.

Godwin opined that Petitioner's failure to stop the jokes played on Cummings, and his failure to report the use of State property and inmates utilized during the jokes, allowed violations of the DOC written work rules that prohibited use of state property and inmate labor for private purposes, and prohibited violence in the workplace. (T pp 198-222 (Godwin)) Therefore, by allowing such misconduct to occur, Petitioner himself, as the supervisor, was then guilty of these same written work rules. Lastly, Godwin explained that even after Petitioner reported the subject incidents to Mr. Bullock, and Bullock did not take any action, Petitioner had a continuing responsibility to "go over" Bullock's head and report the subject incidents to upper management. (T p 227)

Fourth, Mr. Lipscomb, in his affidavit, also indicated that the way work rules are applied in the CED, a supervisor does not have to actually participate in the perpetration of a harassment incident to himself be guilty of the resultant violation of a work rule. (T p 181)

While Respondent claimed that Petitioner's conduct was what was unacceptable, Respondent was actually dissatisfied that Petitioner did not execute his responsibilities as a supervisor and control his subordinates' behaviors and actions. Thus, Respondent actually dismissed Petitioner for "unsatisfactory job performance." In this case, however, Respondent could not have dismissed Petitioner for "unsatisfactory job performance" because it had not issued Petitioner a Final warning required by 25 NCAC 01J .0605.

90. As noted in the Findings of Fact above, some of Petitioner's testimony at the hearing was inconsistent with Petitioner's explanations given during the internal investigation. For example, Petitioner's statements regarding the (1) timeframe that the "Indian Princess" poster was posted, (2) why Petitioner did not remove the "Indian Princess" poster, (3) whether Petitioner personally witnessed the "Dictionary Stupid" joke being played on Cummings, and (4) whether Petitioner snickered or laughed when he first saw some of the subject jokes, were inconsistent.

However, a preponderance of the evidence clarified some of these inconsistencies by proving that (1) the "Indian Princess" poster was not posted in the office area for several days, and (2) Petitioner did not witness the "Dictionary Stupid" joke being played on Cummings. Most importantly, taking these inconsistencies in context of the entire evidence of this case, these inconsistencies are minimal discrepancies that have no effect on the outcome of this case. There was no evidence that by changing his statements at hearing, Petitioner was either lying or trying to disguise the truth. In addition, the inconsistencies in Petitioner's statements about these matters do not change the fact that Petitioner reported these jokes to his supervisor, Don Bullock.

91. There was no evidence that Petitioner or any other BCMPP employee reported inmate involvement, or use of State equipment and supplies in any of these pranks to any management outside the BCMPP before the 2001 NCDOC investigation. (Resp Exh 5, pp 1 - 3; (Cummings), 53 (Martin), 149, 163 - 164 (Petitioner); Resp Exh 6; Resp Exh 56, ¶¶ 10, 18; T pp. 65 - 66, 70 - 72, 87 - 89, 981 - 984 (Baldwin); T pp. 216 - 218, 1010 (Godwin); T pp. 342 - 343 (Cummings)).

However, given that the jokes played on Cummings were created at the workplace, during work hours, and given the physical characteristics of the posters/documents used in the jokes, it was obvious to anyone who examined the posters/documents and knew these facts, that the documents were prepared using state supplies, the office copier, and office computer.

92. Respondent asserted that Petitioner violated N.C. Gen. Stat. § 114-15.1 which requires any State employee who becomes aware of misuse of State equipment or supplies to immediately report that to his or her supervisor. Similarly, Respondent argued Petitioner violated certain written DOC work rules such as failing to report inmate involvement in these pranks, and failing to report and investigate possible racial harassment of employees. To support this contention, Respondent relied upon evidence that: (1) Mr. Bullock could not remember if Petitioner reported to him that State property, or inmate involvement were used during any of the pranks, and (2) Bullock did not report the misuse of State property or inmate involvement to Mr. Baldwin.

Respondent's argument fails for several reasons. First and most importantly, Respondent dismissed Petitioner for failing to take "corrective action to stop the unacceptable behavior of subordinate staff" and because he had not taken "any formal disciplinary action against any employee to stop this behavior." Respondent did not dismiss Petitioner for violating N.C. Gen. Stat. § 114-15.1 or for failing to report violations of any written work rules. In such letter, Respondent did not explicitly or implicitly indicate that "failing to report" the misuse of State property, inmate involvement, or racial harassment of Cummings constituted "failing to take corrective or disciplinary action." As Respondent did not explicitly or implicitly dismiss Petitioner for "failing to report these facts", it cannot change its reasons for Petitioner's dismissal at this stage or bolster its case by adding an alleged violation of N.C. Gen. Stat. § 114-15.1 and "failing to report" these work rules as additional reasons for dismissing Petitioner.

Second, Respondent's Personnel Manual refers to "corrective action" in only two places in the manual. It refers to "corrective action" discussing implementing Employee Action Plans, (DOC Personnel Manual, Section 4, p 9), and in generally describing that Respondent's Disciplinary Policy and Procedures were developed to supply employers with a useful tool for "correcting" and improving performance problems. While N.C. Gen. Stat. § 114-15.1 appears in this Manual's Disciplinary Policy and Procedure section, reference to this statute does not define or imply that violating this statute constitutes "failing to take

corrective” or disciplinary action. (DOC Personnel Manual, Section 6, p 24) Similarly, nowhere in Respondent's Personnel Manual is corrective or disciplinary action defined as “failing to report” violation of written work rules.

Third, the evidence presented at hearing was too inconclusive to prove that Petitioner failed to report the misuse of State property or inmate involvement in these jokes to Mr. Bullock. Substantial evidence at hearing merely proved that neither Bullock nor Petitioner could recall if Petitioner reported to Bullock that State property was used or inmates were involved during these jokes. Both Bullock’s and Petitioner’s lack of memory at hearing in recalling these facts does not automatically prove that Petitioner did not report these facts to Bullock. It merely proved Bullock and Petitioner could not remember at the hearing if Petitioner did so. Similarly, Bullock’s failure to report the misuse of State property and inmate involvement to Mike Baldwin does not itself prove that Petitioner did not report such facts to Bullock. This is especially true given Bullock’s own internal policy that BCMPP matters should be kept at the BCMPP, and not reported to upper management in Raleigh. Finally, a preponderance of the evidence proved that Petitioner reported what he knew about each joke to Mr. Bullock within a reasonable time after learning of each prank.

93. The undersigned hereby notes that it is a generally accepted and known practice in state government that management follows the policy of requiring matters within an agency or division be reported and handled through the chain-of-command. The Respondent’s Personnel Manual, including its Disciplinary Policy and Practice, and its Grievance Policy, reflects that Respondent DOC also requires its management to follow the chain-of-command practice to “maintain consistency within the division and agency.” (DOC Personnel Manual, Sec 6, p 4)

94. During the internal investigation, various witnesses made statements about matters and incidents which were unrelated and irrelevant to the issues involved in this case. Such interviews were included in this record as Respondent’s Exhibit 5, as verbatim transcripts of these statements. Given the voluminous details included in these statements, and the physical unfeasibility of redacting those irrelevant portions, the undersigned hereby declares that those irrelevant and immaterial portions of Respondent’s Exhibit 5 were not considered in this decision and should not be considered in the final determination of this case.

95. Respondent’s Motion to Reconsider Respondent’s Exhibits 51-53 is denied. Those exhibits involve Baldwin’s prior actions on (1) incidents involving work rules unrelated to the rules at issue in this case, and (2) a prior unsatisfactory job performance incident. Baldwin’s prior actions are irrelevant and immaterial to the unacceptable personal conduct question here, and the specific work rule violations at issue in this case. Comparing Baldwin’s actions on incidents and issues unrelated and dissimilar serves no purpose in this proceeding.

CONCLUSIONS OF LAW

1. Pursuant to Chapters 126 and 150 of the North Carolina General Statutes, the Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case.

2. N.C. Gen. Stat. § 126-35 provides in pertinent part:

no career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. In cases of such disciplinary actions, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employees’ appeal rights.

3. At the time of his dismissal, Petitioner was a “career state employee” within the meaning of N.C. Gen. Stat. § 126-1.1 and, pursuant to N.C. Gen. Stat. § 126-5, was subject to and governed by the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1, *et seq.*

4. As this contested case petition was filed after January 1, 2001, Respondent has the burden of proving by a preponderance of the evidence that it had just cause to terminate Petitioner from employment. N.C. Gen. Stat. §§ 126-35(d) and 150B-29(a).

5. N.C. Gen. Stat. § 126-35 does not define “just cause.” According to 25 NCAC 1J .0604 of the State Personnel Manual, unsatisfactory job performance, and unacceptable personal conduct are the two bases for the discipline or dismissal of employees for just cause. The distinction between the categories of “just cause” provides an applicable test for determining whether a dismissal is for a ‘good or adequate reason having a basis in fact under particular circumstances.’” Amanini v. N.C. Dept. of Human Resources, 114 N.C. App. 668, 679, 443 S.E.2d 114, 121 (1994)

6. 25 NCAC 1J .0614(j) defines “unsatisfactory job performance” as:

work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency.

CONTESTED CASE DECISIONS

7. Before an employee can be dismissed for unsatisfactory job performance, he "must first receive at least two prior disciplinary actions: First, one or more written warnings, followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal." 25 NCAC 01J .0605.

8. 25 NCAC 1J .0608(a) provides that employees may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action.

9. 25 NCAC 1J .0614(i) defines "unacceptable personal conduct" as including:

- (1) conduct for which no reasonable person should expect to receive a written warning; or . . .
- (2) job-related conduct which constitutes a violation of state or federal law; or . . .
- (4) the willful violation of known or written work rules; or . . .
- (5) conduct unbecoming a state employee that is detrimental to state service;

10. 25 NCAC 1J .0614(i), definition (4) requires that the work rule be either "known" or "written," not both. A willful violation occurs when the employee willfully does, or fails to do, the acts at issue. It does not require that the employee also willfully violate a known work rule. N.C. Dept. of Correction v. McNeely, 135 N.C. App. 587, 592-93, 521 S.E.2d 730, 734 (1999).

11. The DOC Personnel Manual repeats the definition of unacceptable personal conduct promulgated in 25 N.C.A.C. 11.2304(b) and states:

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:

1. Conduct for which no reasonable person should expect prior warning; or
2. Job-related conduct that constitutes a violation of state or federal law; or
4. The willful violation of known or written work rules; or
5. Conduct unbecoming a state employee that is detrimental to state service; or

(DOC Personnel Manual, Sect 6, Appendix C, "Personal Conduct," Page 38, Subparagraph A, "Policy")

12. DOC Personnel Manual, Sect. 6, Appendix C, pp 38-41, Paragraph B. "Examples" states:

The following causes are examples of [unacceptable] personal conduct. Each situation/incident will be considered on a case-by-case basis. This is by no means an all-inclusive list:

4. Participating in any action that would in any way seriously disrupt or disturb the normal operation of . . . any subunit of the Department of Correction
16. Discriminatory practices . . . or intimidation of fellow employees. . . .
21. Failure to report known or possible undue familiarity of an employee with inmates
27. Disorderly conduct; . . . engaging in horseplay. . . .
31. Use of state property and equipment for personal use.

13. At the time of the events in question, the Respondent and DOP had several written and published work rules prohibiting:

- (a) racial harassment and "intimidation" of employees;
- (b) inappropriate familiarity/interaction with inmates; and
- (c) use of State property by employees for other than official State business purposes.

Other written work rules also required reporting inappropriate interaction with inmates and misuse of State assets.

14. Specifically, in its Personnel Manual, Respondent's written work rule prohibits employees from engaging in "Violence In The Workplace." "Workplace Violence" is defined as "Includes, but is not limited to intimidation . . . "Intimidation" is defined as: "Includes, but is not limited to . . . engaging in actions intended to . . . induce stress."

In the "Responsibilities of Management" section of this rule, supervisors are required to maintain a workplace free of violations of this policy and promptly to investigate any reports of even possible violations of the rule that come to their attention. In

the "Responsibilities of Employee" section, all employees, not just supervisors, are required to report signs of even potential violations of the rule. "Violations of this policy shall be considered unacceptable personal conduct and shall result in discipline up to and including dismissal." (DOC Personnel Manual Sect 3, pp 22-30; Resp Exh 39)

15. In its Personnel Manual, Respondent's written work rule entitled "Personal Dealings With Offenders," does the following:

(1) defines and prohibits employees from engaging in inappropriate interaction with inmates including "3. Accept any . . . personal service from an offender;" and

(2) requires employees to report such interaction, including that by other NCDOC/CED employees. This work rule states in part:

PREFACE

The [NCDOC] is entrusted with the responsibility of supervising inmates Employees may find themselves in compromising situations Employees need to understand that such relationships are inappropriate, are a reflection of poor judgement (sic) and may be considered a breach of security. Therefore, this policy has been developed . . . to provide procedures for reporting situations/relationships that may be considered inappropriate. . . .

GENERAL PROVISIONS

Correction Enterprise is responsible for supervising inmates while assigned to a Correction Enterprise operation. . . .

CONTACTS WITH OFFENDER'S FAMILY AND CLOSE ASSOCIATES

Employees shall be responsible for bringing the above-cited situations or any other situation that could be considered personal to the attention of their supervisor and when in doubt about a particular situation, . . . responsible for . . . seek[ing] clarification of their obligations under policy. . . . Violations of this policy may result in disciplinary action up to and including dismissal

(DOC Personnel Manual, Section 8, pp 60-63; Resp Exh 40)

16. Respondent's written work rule entitled "Reporting of Theft or Misuse of State Property" requires the reporting of any misuse of State property or assets. In pertinent part, this rules states:

N.C. Gen. Stat. § 114-15.1 requires:

Any person employed by the State of North Carolina who receives any information or evidence of . . . misuse of any State-owned . . . property, shall report such information to the immediate supervisor. . . . Failure to comply with these procedures . . . shall be considered [UPC] and may result in . . . dismissal. (Resp Exh 41)

17. Because they supervise inmates, and because their operations are often located within Division of Prisons ("DOP") correctional facilities, CED employees are subject to DOP written work rules governing the use of inmates and the State property and supplies with which they work. (Resp Exh 54)

18. The DOP has a written work rule that further explains and implements the NCDOC general work rules on (a) the misuse of inmates and State property and supplies; and (b) the obligation to report violations of those work rules. This written work rule, A.0200, "Conduct of Employees" provides in pertinent part:

(e) Use of Inmate Labor, State Owned Supplies and Equipment.

(1) No work will be done in any shop or by any inmate for the private purposes of any employee or any other person, except as specifically authorized by law or regulation. . . .

(2) No employee will consume or use equipment, facilities, or supplies . . . except as he may be legally entitled to do. . . .

(g) Personal Dealings with Inmates.

(1) Employees will maintain a quiet but firm demeanor in their dealings with inmates and will not indulge in undue familiarity with them. . . .

(2) Employees will not . . . accept . . . personal services from . . . any inmate, except as specifically authorized by law, regulations or directive. . . . Any employee involved in such . . . dealings with inmates will be subject to dismissal

19. A preponderance of the substantial evidence showed a practice existed over several years where BCMPP employees played pranks or practical jokes on each other. Specifically, the evidence established that BCMPP supervisors intentionally intimidated and harassed employee Cummings by creating and executing the subject pranks on Cummings. The effect of such pranks subjected Cummings to ridicule, and loss of respect by the inmates he was charged with supervising at the BCMPP.

20. In this case, Respondent argued two theories explaining why it had just cause to dismiss Petitioner for unacceptable personal conduct. These theories were (1) supervisor liability, and (2) failure to report.

Supervisor Liability Argument

21. Under this theory, Respondent contended that as a supervisor and pursuant to his official job description, Petitioner had the authority and responsibility not only to stop the joke playing by the BCMPP supervisors, but to take corrective action or initiate disciplinary action against the perpetrators of these subject pranks. Specifically, Respondent argued that when supervisors consistently fail to take corrective action, but instead laugh at the harassment being perpetrated by their subordinates, it has the potential to encourage such misconduct. Therefore, under NCDOC/CED policy and practice, such supervisors are accountable for their subordinates' resultant misconduct and any work rule violations involved therein. In other words, Petitioner's inaction in failing to stop his subordinates' misconduct made him, as supervisor, equally guilty of the resultant work rules as the subordinates who actually violated those work rules.

22. Respondent primarily relied upon the "supervisor liability" theory defined in Shaw v. Stroud, 13 F.3d 791 (4th Circuit 1994), to support its case. It contended that it should be allowed to apply supervisor liability in this case because of the necessity of maintaining a harassment free environment, and maintaining supervisor responsibility in a workplace of inmates where order, respect, and discipline are essential key components.

Under Shaw, the 4th Circuit Court found that the continued inaction and "deliberate indifference" of a supervisor (of a trooper who killed a decedent during an arrest) provided an "independent basis for finding he [the supervisor] either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates." Shaw, 13 F.3d 791. Specifically, the supervisor continually failed to either investigate or address the pervasive violent propensities of his subordinate officer, when there were documented widespread abuses by such officer. The supervisor's continuous failure to act made him liable for his subordinate's offensive actions. To show supervisor liability under that § 1983 case, the Court required one to show:

- (1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like plaintiff;
- (2) supervisor's response to that knowledge was so inadequate to show deliberate indifference to or tacit authorization of the alleged offensive practices; and
- (3) there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

The plaintiff assumes a heavy burden of proof in establishing deliberate indifference. Shaw, 13 F.3d 791.

23. Ultimately, supervisory liability "is determined 'by pinpointing the persons in the decision making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked.'" Shaw, 13 F.3d 791 (citing Slakan v. Porter, 737 F.3d 368, 376 (4th Cir. 1984))

24. In this case, Petitioner cannot be held liable for the BCMPP supervisors' joke playing on Cummings under the supervisory liability as Petitioner's response to the joke playing did not show "deliberate indifference to or tacit authorization of the alleged offensive practices" of the joke playing on Cummings. A preponderance of the evidence clearly proved that Petitioner reported the details and occurrence of each joke to his immediate supervisor, Don Bullock, after he learned that each joke had been played on Cummings. The evidence also showed that Petitioner informally advised several of the BCMPP supervisors to stop playing jokes on Cummings.

A preponderance of the substantial evidence established that throughout the years that BCMPP employees played jokes on each other, Mr. Bullock did not allow Petitioner to exercise the authority given to him in his job description to take corrective action or initiate disciplinary action his subordinate employees for their misconduct. Bullock's treatment of Petitioner, and his practice of handling disciplinary matters at the BCMPP were common knowledge to all BCMPP employees. It became the routine and accepted manner in which disciplinary matters were handled at the BCMPP. Ultimately, Bullock's treatment undermined Petitioner's authority at the BCMPP so that when Petitioner did tell BCMPP supervisors to stop playing jokes, they ignored his orders.

Given Bullock's practices, and this working environment, Petitioner did what any reasonable man should have done in response to the joke playing by reporting the matters to his immediate supervisor. Petitioner's actions in reporting the jokes to his supervisor, but not initiating corrective or disciplinary action himself, did not rise to the level of "deliberate indifference or tacit authorization" required to make him liable for his subordinates' actions under the supervisory liability theory. As such, Petitioner cannot be held liable for his subordinates' violations of any DOC written work rules. Ultimately, it appears from the evidence of Bullock's management and disciplinary practices, that Bullock, not Petitioner, was the person in the decision making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked. For these reasons, Respondent has failed to prove that it had just cause to dismiss Petitioner for unacceptable personal conduct under the supervisory liability theory.

Lastly, during the internal investigation and the predissmissal conference, there was reasonably sufficient evidence before the Respondent that Respondent should have further investigated Petitioner's claim that Bullock did not give him the authority to take corrective or disciplinary action against BCMPP employees for playing jokes on Cummings. Respondent's failure to conduct such investigation impaired Petitioner's right to a fair opportunity to be heard and defend his actions regarding these matters at the BCMPP.

25. In Wilkie V. N.C. Wildlife Resources Commission, 118 N.C. App. 475, 455 S.R.2d 871 (1995), the Court held that a supervisor could not be dismissed for unacceptable personal conduct if he was performing his duties in a manner that his supervisor had allowed to become an accepted standard, even though the standard was not "strictly by the book," and violated established work rules. The Court further ruled that "disciplinary action by his [Wilkie's] supervisors to halt these accepted standards would have propelled the behavior into the 'unsatisfactory job performance' category rather than the 'unacceptable personal conduct category.'" Wilkie, 455 S.E.2d at 877.

Petitioner, like Wilkie, performed the duties of his job, in the manner his supervisor, Mr. Bullock, had not only allowed, but created. Petitioner did so, even though Petitioner's performance of those duties did not comply with Petitioner's official job requirements of taking corrective action or initiating disciplinary actions on his subordinates when necessary. By Bullock's own instructions, it became a routine practice for Petitioner to report disciplinary matters to Bullock, but not initiate them himself. Petitioner and the other BCMPP supervisors accepted that Bullock's method of handling disciplinary matters himself, and not allowing Petitioner to handle such, as the standard at the BCMPP. Under this reasoning, when Respondent dismissed Petitioner for failure to take corrective or disciplinary action, it actually dismissed him for not performing the duties of his job, that is, for "unsatisfactory job performance."

26. A further review of the evidence proves that the underlying reason Respondent dismissed Petitioner was for unsatisfactory job performance, not unacceptable personal conduct. First, Petitioner's official job description required him to supervise BCMPP employees, complete appraisals (TAP), and initiate disciplinary action on subordinate employees when necessary. Respondent clearly recognized that these duties were essential requirements of Petitioner's job. Second, a reading of Petitioner's dismissal letter, Godwin's affidavit and hearing testimony, and Lipscomb's testimony, noticeably showed that Respondent dismissed Petitioner for failing to perform these essential job requirements or duties.

For example, in Petitioner's termination letter, Respondent used the following terminology:

as a supervisor you took no action to stop other staff from participation in this unprofessional behavior and your failure to take corrective action allowed this type of environment to continue. As a supervisor, you are expected to provide guidance and leadership to coordinate staff and not engage in unacceptable personal conduct that demeans and degrades those, which you supervise. **Your failure to take corrective actions to stop the unacceptable behavior of subordinate staff is grounds for disciplinary actions.** Your conduct is unacceptable personal conduct and sufficient to warrant your dismissal.

(Emphasis added) (Resp Exh 1) In his affidavit, Godwin admitted:

18. Petitioner's responsibility as a CED employee to halt this harassment, and to take appropriate corrective actions as to each separate incident of harassment, **arises from his position as the supervisor of the victim and the harassers, as well as from the terms of his job description.** (Emphasis added)

(Resp Exh 54, pp 6-7) Through this evidence, Respondent acknowledged that it dismissed Petitioner for unsatisfactory job performance for failing to perform his essential job duties of taking corrective action or initiating disciplinary action against his

subordinate employees. In this case, however, Respondent could not have dismissed Petitioner for “unsatisfactory job performance” because it had not issued Petitioner a Final warning required by 25 NCAC 01J .0605. In addition, based upon the evidence, Respondent’s disciplinary action was not a case where the action was simply labeled incorrectly.

27. Respondent also argued that Petitioner committed unacceptable personal conduct by directly violating DOC written work rules on violence in the workplace/harassment, misuse of state property and inappropriate interaction with inmates. It contended that by laughing at and failing to stop some of the jokes, Petitioner was an “active participant” in these jokes and thus, committed the unacceptable personal conduct such as discriminatory practice, disorderly conduct, and participating in an action that seriously disrupted the normal operation of the DOC/CED. (See Resp Exh 38, DOC Personnel Manual, Sect 6, App C, “Examples” of unacceptable personal conduct.)

However, a preponderance of the substantial evidence proved that Petitioner was not involved in, did not participate in, or help perpetrate the “Dictionary Stupid” joke, the “Truck Driver of the Year” joke, the “Indian Princess” joke, or the “False Alcohol Test” joke. There was no evidence that Petitioner himself improperly interacted with inmates in perpetrating or continuing any of these jokes, engaged in disorderly conduct, or used State property to perpetrate any of these jokes. In fact, testimony proved that Petitioner did not know about the “Indian Princess” joke, the “Truck Driver of the Year” joke, or the “Dictionary Stupid” joke until after each joke had been played on Cummings. While Petitioner did overhear the BCMPP supervisors planning the “False Alcohol Test” joke, he did not know the supervisors were creating a joke based upon a falsified memorandum on DOC letterhead using DOC officials’ names. He thought they were planning a joke similar to those allowed by Bullock in the past.

In addition, the evidence at hearing was inconclusive to prove that Petitioner failed to report that inmates were used to carry out the jokes. Instead, the evidence showed that Petitioner reported what he knew about the jokes to Bullock. Given the evidence, it is more likely than not that if Petitioner knew of inmate involvement in a joke, he reported such to Bullock.

Furthermore, as concluded above, Petitioner’s reporting these jokes to his supervisor was a reasonable action to take given the working environment at the BCMPP. Petitioner’s response to the joke playing did not amount to a “deliberate indifference or tacit authorization” of the joke playing by the BCMPP supervisors to subject Petitioner to supervisor liability. For these reasons, Respondent has failed to carry its burden in proving that Petitioner was an active participant in carrying out or in condoning these jokes on Cummings.

Failure to Report Argument

28. Respondent claimed that Petitioner engaged in unacceptable personal conduct by specifically “failing to report” (1) the misuse of State property, (2) the BCMPP supervisors’ inappropriate interaction with inmates, and (2) any harassment or discrimination against Cummings caused by those supervisors’ joke playing. Respondent’s argument primarily fails because it did not dismiss Petitioner for “failing to report” any violations of its written work rules. A preponderance of the substantial evidence proved that Respondent specifically dismissed Petitioner for his “failure to take corrective actions to stop the unacceptable behavior of subordinate staff.” (Resp Exh 1, Dismissal letter)

It is clear that Baldwin and Godwin’s affidavits (Resp Exhs 54 and 56) indicate that they admonished Petitioner for failing to report the subject jokes, misuse of State property, and inmate involvement in the jokes. However, nowhere in the dismissal letter does Respondent explicitly or implicitly dismiss Petitioner for failing to report violations of DOC work rules, or indicate that “failure to take corrective actions” included failing to report violations to any supervisor or to upper management. Similarly, nowhere in the DOC Personnel Manual, including the Disciplinary Policy and Procedure Section, is corrective action or disciplinary action defined as “failing to report” violations of written work rules. (DOC Personnel Manual, Sect 6) Because Respondent failed to dismiss Petitioner for “failing to report,” Respondent cannot now rewrite Petitioner’s dismissal letter or bolster its case by arguing it had additional reasons to dismiss Petitioner because he allegedly violated N.C. Gen. Stat. § 114-15.1 and other DOC written work rules by failing to report violations of those rules.

29. Respondent also asserted that Petitioner engaged in unacceptable personal conduct by “failing to report” the subject jokes and any work rule violations to upper management, (ie. Baldwin or Godwin) when Petitioner knew Mr. Bullock would not take any disciplinary action for those matters. It contended that simply reporting these jokes to Bullock did not relieve Petitioner from his duty to report these jokes and any violations of work rules to upper management. However, this argument lacks merit for the same reason stated in Conclusion of Law 28. Furthermore, not only expecting, but demanding (under threat of dismissal) an employee not to follow the chain-of-command in his division/agency and thereby bypass his immediate supervisor, not only erodes the working environment within that division/agency, and the working relationships of supervisors and their subordinates, but is disrespectful of, and compromises the chain- of-command policy that is widely accepted in state government.

30. For the foregoing reasons, Respondent lacked just cause to dismiss Petitioner for unacceptable personal conduct. A preponderance of the evidence proved that Petitioner did not engage in “job-related conduct constituting a violation of State or federal law,” did not engage in “conduct unbecoming a State employee that was detrimental to State service,” and did not “willfully violate

known or written work rules.” Assuming arguendo that Petitioner did violate any known or written work rules, the evidence failed to show that Petitioner “willfully” violated any of the Respondent’s written work rules on racial harassment/intimidation, misuse of State property, or inappropriate familiarity/interaction with inmates. In addition, Petitioner did not commit conduct equivalent to the examples of unacceptable personal conduct listed in the Respondent’s Personnel Manual.

31. Given the longstanding BCMPP work environment where jokes were allowed by the plant manager, Don Bullock, and where Bullock did not allow Petitioner to exercise the authority to take corrective or disciplinary action on subordinate employees, Petitioner acted as any reasonable employee could have in such an environment. He followed the chain of command training he had received as a correctional officer, and reported the subject jokes and any detail he knew about these jokes to his supervisor, Don Bullock. Even though Petitioner believed he had no authority to take disciplinary action against subordinate employees, he still advised the BCMPP supervisors who perpetrated these jokes to stop playing the jokes on Cummings. Under this scenario, Petitioner did not engage in “conduct unbecoming a State employee that was detrimental to State service,” or “conduct for which no reasonable person should expect to receive a prior warning” before being dismissed from employment. In fact, any reasonable person should have expected to receive a prior warning before being dismissed for these reasons.

32. For the foregoing reasons, Respondent lacked just cause to dismiss Petitioner for unacceptable personal conduct for the reasons stated in its May 16, 2001 termination letter.

33. Petitioner is entitled to back pay based upon his salary when he was terminated, including (1) appropriate adjustment of such salary for any across the board legislative salary increases, (2) all other benefits of continuous State employment, (3) attorney’s fees and costs, deposition and transcript costs.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that the State Personnel Commission should **REVERSE** Respondent’s dismissal of Petitioner from State employment for unacceptable personal conduct. Petitioner should be reinstated to the position of Prison Industries Supervisor V position (“Assistant Plant Manager”) or a substantially similar position with full back pay accruing from May 16, 2001, the date of Petitioner’s termination, including (1) appropriate adjustment of such salary for any across the board legislative salary increases, (2) all other benefits of continuous State employment, (3) attorney’s fees and costs, deposition and transcript costs.

Petitioner’s personnel file should be appropriately rectified to reflect that he was terminated without just cause. If Respondent places Petitioner in a substantially similar position, instead of reinstating him to his former position, Respondent should appropriately train Petitioner for that position.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party’s attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 26th day of September, 2002.

Melissa Owens Lassiter
Administrative Law Judge