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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major classifications of rules. Three of these, titles, chapters, and sections are mandatory. The major classification 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. Subchapters are optional classifications to be used by agencies when appropriate.

NCAC TITLES		TITLE 21 LICENSING BOARDS		TITLE 24 INDEPENDENT AGENCIES	
1	ADMINISTRATION	1	Acupuncture	1	Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2	Architecture	2	Agricultural Finance Authority
3	AUDITOR	3	Athletic Trainer Examiners	3	Safety & Health Review Board
4	COMMERCE	4	Auctioneers	4	Reserved
5	CORRECTION	6	Barber Examiners	5	State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8	Certified Public Accountant Examiners		
7	CULTURAL RESOURCES	10	Chiropractic Examiners		
8	ELECTIONS	11	Employee Assistance Professionals		
9	GOVERNOR	12	General Contractors		
10A	HEALTH AND HUMAN SERVICES	14	Cosmetic Art Examiners		
11	INSURANCE	16	Dental Examiners		
12	JUSTICE	17	Dietetics/Nutrition		
13	LABOR	18	Electrical Contractors		
14A	CRIME CONTROL & PUBLIC SAFETY	19	Electrolysis		
15A	ENVIRONMENT &NATURAL RESOURCES	20	Foresters		
16	PUBLIC EDUCATION	21	Geologists		
17	REVENUE	22	Hearing Aid Dealers and Fitters		
18	SECRETARY OF STATE	25	Interpreter/Transliterator (Reserved)		
19A	TRANSPORTATION	26	Landscape Architects		
20	TREASURER	28	Landscape Contractors		
21*	OCCUPATIONAL LICENSING BOARDS	29	Locksmith Licensing		
22	ADMINISTRATIVE PROCEDURES (REPEALED)	30	Massage & Bodywork Therapy		
		31	Marital and Family Therapy		
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24*	INDEPENDENT AGENCIES	33	Midwifery Joint Committee		
25	STATE PERSONNEL	34	Funeral Service		
26	ADMINISTRATIVE HEARINGS	36	Nursing		
27	NC STATE BAR	37	Nursing Home Administrators		
28	JUVENILE JUSTICE AND DELINQUENCY PREVENTION	38	Occupational Therapists		
		40	Opticians		
		42	Optometry		
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		46	Pharmacy		
		48	Physical Therapy Examiners		
		50	Plumbing, Heating & Fire Sprinkler Contractors		
		52	Podiatry Examiners		
		53	Professional Counselors		
		54	Psychology		
		56	Professional Engineers & Land Surveyors		
		57	Real Estate Appraisal		
		58	Real Estate Commission		
		60	Refrigeration Examiners		
		61	Respiratory Care		
		62	Sanitarian Examiners		
		63	Social Work Certification		
		64	Speech & Language Pathologists & Audiologists		
		65	Therapeutic Recreation Certification		
		66	Veterinary Medical		
		68	Substance Abuse Professionals		
		69	Soil Scientists		

Note: Title 21 contains the chapters of the various occupational licensing boards and Title 24 contains the chapters of independent agencies.

NORTH CAROLINA REGISTER

Publication Schedule for January 2004 – December 2004

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule (first legislative day of the next regular session)	270th day from publication in the Register
18:13	01/02/04	12/08/03	01/17/04	03/02/04	03/22/04	05/01/04	05/10/04	09/28/04
18:14	01/15/04	12/19/03	01/30/04	03/15/04	03/22/04	05/01/04	05/10/04	10/11/04
18:15	02/02/04	01/09/04	02/17/04	04/02/04	04/20/04	06/01/04	01/26/05	10/29/04
18:16	02/16/04	01/26/04	03/02/04	04/16/04	04/20/04	06/01/04	01/26/05	11/12/04
18:17	03/01/04	02/09/04	03/16/04	04/30/04	05/20/04	07/01/04	01/26/05	11/26/04
18:18	03/15/04	02/23/04	03/30/04	05/14/04	05/20/04	07/01/04	01/26/05	12/10/04
18:19	04/01/04	03/11/04	04/16/04	06/01/04	06/21/04	08/01/04	01/26/05	12/27/04
18:20	04/15/04	03/24/04	04/30/04	06/14/04	06/21/04	08/01/04	01/26/05	01/10/05
18:21	05/03/04	04/12/04	05/18/04	07/02/04	07/20/04	09/01/04	01/26/05	01/28/05
18:22	05/17/04	04/26/04	06/01/04	07/16/04	07/20/04	09/01/04	01/26/05	02/11/05
18:23	06/01/04	05/10/04	06/16/04	08/02/04	08/20/04	10/01/04	01/26/05	02/26/05
18:24	06/15/04	05/24/04	06/30/04	08/16/04	08/20/04	10/01/04	01/26/05	03/12/05
19:01	07/01/04	06/10/04	07/16/04	08/30/04	09/20/04	11/01/04	01/26/05	03/28/05
19:02	07/15/04	06/23/04	07/30/04	09/13/04	09/20/04	11/01/04	01/26/05	04/11/05
19:03	08/02/04	07/12/04	08/17/04	10/01/04	10/20/04	12/01/04	01/26/05	04/29/05
19:04	08/16/04	07/26/04	08/31/04	10/15/04	10/20/04	12/01/04	01/26/05	05/13/05
19:05	09/01/04	08/11/04	09/16/04	11/01/04	11/22/04	01/01/05	01/26/05	05/29/05
19:06	09/15/04	08/24/04	09/30/04	11/15/04	11/22/04	01/01/05	01/26/05	06/12/05
19:07	10/01/04	09/10/24	10/16/04	11/30/04	12/20/04	02/01/05	05/00/06	06/28/05
19:08	10/15/04	09/24/04	10/30/04	12/14/04	12/20/04	02/01/05	05/00/06	07/12/05
19:09	11/01/04	10/11/04	11/16/04	12/31/04	01/20/05	03/01/05	05/00/06	07/29/05
19:10	11/15/04	10/22//04	11/30/04	01/14/05	01/20/05	03/01/05	05/00/06	08/12/05
19:11	12/01/04	11/05/04	12/16/04	01/31/05	02/21/05	04/01/05	05/00/06	08/28/05
19:12	12/15/04	11/22/04	12/30/04	02/14/05	02/21/05	04/01/05	05/00/06	09/11/05

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 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 An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed 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.

Note from the Codifier: *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.*

PUBLIC NOTICE NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES
HAZARDOUS WASTE SECTION 1646 MAIL SERVICE
CENTER RALEIGH, NORTH CAROLINA 27699-1646
(919) 733-2178

Notice of proposed issuance of and public comment period for delisting petition under the Federal Resource Conservation and Recovery Act as amended by the Hazardous and Solid Waste Amendments of 1984 (PL-98-616) and the North Carolina Hazardous Waste Management Rules (15A NCAC 13A) for GlaxoSmithKline (GSK), Research Triangle Park, Durham County, North Carolina.

The public comment period will begin on the date of this notice and extend for thirty (30) days thereafter. Comments regarding the delisting petition should be sent to the following address:

Elizabeth W. Cannon
North Carolina Hazardous Waste Section
1646 Mail Service Center
Raleigh, North Carolina 27699-1646

All data submitted by the applicant is available as part of the administrative record. NC DENR will provide auxiliary aids and services for disabled persons who wish to review the GSK's delisting petition to comply with the Americans with Disabilities Act. To receive special services, please contact Rita Umozurike at the address and phone number below as early as possible, so arrangements can be made. A copy is available for review from 9 a.m. to 4 p.m., Monday through Friday at the:

Hazardous Waste Section
401 Oberlin Road, Room 150
Raleigh, North Carolina 27605
Call (919) 733-2178 ext. 311 for an appointment.

Here is a summary of the delisting petition.

> The Hazardous Waste Section is preparing to approve GSK's delisting petition for ash from the incinerator's air pollution control equipment. The ash is currently considered hazardous, but analysis has shown that the ash generated at this specific facility does not contain constituents at a level that causes it to be considered hazardous waste. Data was collected over several weeks, under conditions that indicate worst-case levels of the chemical constituents. If the delisting is approved, GSK may be allowed to send this waste to a North Carolina lined municipal landfill for disposal.

All comments received during the public comment will be considered in the decision-making process regarding the delisting petition.

SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY

St. Ives 220 Commercial, LLC

Pursuant to N.C.G.S. § 130A-310.34, St. Ives 220 Commercial, 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 Wake Forest, Wake County, North Carolina. The Property consists of approximately 33 acres and is located at 12415 Capitol Boulevard. Environmental contamination exists on the Property in soil and groundwater. St. Ives 220 Commercial, LLC has committed itself to redevelop the Property for mixed commercial, retail, conference/convention/events center/flex space/warehousing and office space uses. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and St. Ives 220 Commercial, LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) 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 Wake Forest Town Manager's Office, 401 Elm Street, Wake Forest, NC 27587 by contacting Joyce Wilson, Town Clerk at 919.554.6190; or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 733-2801, ext. 336, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents. 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
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

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 2 – DEPARTMENT OF AGRICULTURE & CONSUMER SERVICES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Agriculture intends to amend the rule cited as 02 NCAC 52B .0406.*

Proposed Effective Date: *August 1, 2004*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *Any person may request a public hearing on the proposed rule by submitting a request in writing no later than April 30, 2004, to David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

Reason for Proposed Action: *This rule establishes requirements for testing horses and other equine for equine infectious anemia (EIA). Proposed changes would clarify responsibilities for checking EIA test papers of equine in public places such as horse shows, and make technical changes.*

Procedure by which a person can object to the agency on a proposed rule: *Any person may object to the proposed rule by submitting a written statement of objection(s) to David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

Written comments may be submitted to: *David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001, Phone (919)733-7125 ext. 249, Fax (919) 716-0105, email david.mcleod@ncmail.net.*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

SECTION .0400 - EQUINE INFECTIOUS ANEMIA (EIA)

02 NCAC 52B .0406 EIA TEST REQUIRED

(a) All equine more than six months of age entering North Carolina for any purpose other than for immediate slaughter shall be accompanied by a copy of the certificate of test from a laboratory approved by the USDA showing the animal to be negative to an approved test for equine infectious anemia (EIA) within the past 12 months, except as provided in 02 NCAC 52B .0410. (See 02 NCAC 52B .0206 for other importation requirements.)

(b) No equine more than six months of age shall be sold, offered for sale, traded, given away, or moved for the purpose of change of ownership unless accompanied by the original official negative test for EIA administered within 12 months prior to sale or movement, except that equine which are offered for sale at auction markets or sales may have a blood sample drawn at the market by the market's veterinarian at the seller's expense. In such cases, the equine may be sold and transferred contingent upon receipt of an official negative EIA test. Until receipt of an official negative EIA test, the equine must be isolated in accordance with standards for isolation of positive reactors, pursuant to 02 NCAC 52B .0408(c)(2).

(c) All equine brought to or kept at any ~~public stables or other~~ public place for exhibition, recreation or assembly shall be accompanied by either the original or a copy of an official negative test for EIA administered within the previous 12 months. The ~~owner, operator or~~ person in charge of any ~~public stables or other~~ public place where equine are brought or kept for exhibition, recreation or assembly shall not permit an equine to remain on the premises without the test required by this Rule.

(d) A person in possession or control of an equine in a public place shall, upon the request of an authorized person, present the original or a copy of the test required by this Rule and shall assist in identifying the equine. A person in possession or control of an equine who does not have an original or a copy of the test required by this Rule shall remove the equine from the premises within two hours of receiving written notification to leave from an authorized person. As used in this Rule, "authorized person" means the person in charge of the premises, or the State Veterinarian or his representative.

Authority G.S. 106-405.17; S.L. 1999-237, s. 13.6.

* *

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Agriculture intends to adopt the rule cited as 02*

NCAC 52J .0104 and amend the rules cited as 02 NCAC 52J .0101-0103, .0201-.0207, .0209-.0210, .0302.

Proposed Effective Date: *January 1, 2005*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *Any person may request a public hearing on the proposed rule by submitting a request in writing no later than April 30, 2004, to David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

Reason for Proposed Action: *Proposed changes would clarify existing rules by making requirements more specific, add requirements for drainage of facilities, acceptable impervious surfaces for sanitation, fencing of outdoors areas, and other changes to improve quality of facilities and care provided by licensees.*

Procedure by which a person can object to the agency on a proposed rule: *Any person may object to the proposed rule by submitting a written statement of objection(s) to David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

Written comments may be submitted to: *David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001, Phone (919)733-7125 ext. 249, Fax (919) 716-0105, email david.mcleod@ncmail.net.*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 52 - VETERINARY DIVISION

SUBCHAPTER 52J - ANIMAL WELFARE SECTION

SECTION .0100 - RECORD KEEPING AND LICENSING

02 NCAC 52J .0101 RECORDS; ANIMAL SHELTERS, ETC.

Operators of all animal shelters, pet shops, public auctions, and dealers shall maintain records on all dogs and cats showing the following:

(1) origin of animals (including names and addresses of consignors) and date animals were received;
(2) description of animals including species, age, sex, breed, and color markings;
(3) location of animal if not kept at the licensed or registered facility;
~~(3)~~(4) disposition of animals including name and address of person to whom animal is sold, traded or ~~adopted;~~ adopted and the date of such transaction; in the event of death, the record shall show the date, signs of illness, or cause of death if identified; if euthanized, the record ~~will~~ shall show date and type of euthanasia; and
~~(4)~~(5) record of veterinary care including ~~treatments~~ treatments, immunization and ~~immunization;~~ date, time, description of medication (including name and dosage), and initials of person administering any product or procedure.
~~(5) maintain records on file for a period of one calendar year.~~

Authority G.S. 19A-24.

02 NCAC 52J .0102 RECORDS; BOARDING KENNELS

Operators of boarding kennels shall maintain records of all dogs and cats showing the following:

(1) name and address of owner or person responsible for animal, the date of entry and signature and address of individual to whom animal is ~~released;~~ released and the date of release;
(2) description of animal including breed, sex, age and color marking; and
(3) ~~record of~~ veterinary care ~~including treatment~~ provided while boarded, which shall include date, times, description of medication (including name and dosage) and ~~immunization;~~ initials of person administering product or procedure.
~~(4) records on file must be maintained for a period of one calendar year.~~

Authority G.S. 19A-24.

02 NCAC 52J .0103 INSPECTION OF RECORDS

All operators of animal shelters, pet shops, boarding kennels, public auctions, and persons operating as dealers ~~will~~ shall make all required records available to the director or his authorized representative on ~~request.~~ request, during the business and

cleaning hours listed on the license application. The operator must be able to match each animal to its record upon request. Records shall be maintained for a period of one year after the animal is released.

Authority G.S. 19A-24; 19A-25.

02 NCAC 52J .0104 DEFINITIONS

As used in this Subchapter:

(1) "Accessories" means any objects used in cleaning and sanitizing primary enclosures, exercise areas, or objects to which an animal may have access, including, but not limited to toys, blankets, food and water utensils, and bedding.

(2) "Adequate" means a condition which, when met, does not jeopardize an animal's comfort, safety or health.

(3) "Cage" means a primary enclosure which is enclosed on all sides and also on the top and bottom.

(4) "Husbandry" means the practice of daily care administered to animals.

(5) "Isolation" means the setting apart of an animal from all other animals, food, and equipment in the facility for the sole purpose of preventing the spread of disease.

(6) "License period" means July 1 through June 30.

(7) "Long term care" means the housing of an animal for a period of more than 30 consecutive days.

(8) "Properly cleaned" means the removal of carcasses, debris, food waste, excrement, or other organic material with adequate frequency.

(9) "Social interaction" means friendly physical contact or play between animals of the same species or with a person.

(10) "Suitable method of drainage" means drainage that allows for the elimination of water and waste products, prevents contamination of animals, allows animals to remain dry, and complies with applicable building codes and local ordinances.

(11) "Supervision of animals" means one person (at least 16 years of age) present, at all times, able to directly view each enclosure or common area.

Authority G.S. 19A-24.

SECTION .0200 - FACILITIES AND OPERATING STANDARDS

02 NCAC 52J .0201 GENERAL

(a) Housing facilities for dogs and cats shall be structurally sound and maintained in good repair to protect the animals from injury, contain the animals and restrict the entrance of other animals and people.

(b) All light fixtures and electrical outlets in animal areas shall be in compliance with the State Building Code.

~~(b)~~ (c) Reliable and ~~adequate~~ safe electric ~~power, if required,~~ power is required to comply with other provisions of the Animal Welfare ~~Act and adequate potable water shall be available.~~ Act.

~~(c)~~ (d) Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against infestation or contamination by ~~vermin.~~ vermin and insects. All open bags of food shall be stored in airtight containers with lids. Refrigeration shall be provided for supplies of perishable food.

~~(d)~~ (e) Provisions shall be made for the daily removal and disposal of animal and food waste, bedding and ~~debris,~~ debris from the housing facility in accordance with local ordinances, to assure facility will be maintained in a clean and sanitary manner.

~~(e)~~ (f) Hot and cold running, potable water must be available. Facilities such as washroom, basin or sink shall be provided to maintain cleanliness among animal ~~caretakers~~ caretakers, animals, and animal food and water receptacles.

~~(f)~~ (g) ~~Ambient temperature shall be measured and read outside the primary enclosure at a distance not to exceed three feet from any one of the external walls and on a level parallel to the bottom of the primary enclosure at a point approximately half the distance between the top and bottom of such enclosure.~~ Facility shall have ability to confirm ambient temperature.

(h) A separate five-foot perimeter fence is required if any animals have access to an outdoor enclosure, including unsupervised exercise areas.

(i) An adequate drainage system must be provided for the housing facility.

(j) All areas of a facility are subject to review or inspection by North Carolina Department of Agriculture and Consumer Services employees during normal business hours (8:00 a.m. through 5:30 p.m. Monday through Friday).

(k) All animals in a facility are subject to these standards, regardless of ownership.

(l) A licensee or registrant shall comply with all federal, state and local laws, rules and ordinances relating to or affecting the welfare of dogs and cats in its facility.

(m) No dog or cat shall be in a window display except during business hours and then only in compliance with standards set forth in this Section.

Authority G.S. 19A-24.

02 NCAC 52J .0202 INDOOR FACILITIES

(a) Indoor housing facilities for dogs and cats shall be ~~sufficiently~~ adequately heated and cooled when necessary to protect the dogs and cats from cold and excessive heat and provide for their health and comfort. The ambient temperature shall not be allowed to fall below 50 degrees F. ~~for dogs and cats not acclimated to lower temperatures.~~ or exceed 85 degrees F.

(b) Indoor housing facilities for dogs and cats shall be adequately ventilated to provide for the health and comfort of the animals at all times. ~~Such~~ The facilities shall be provided with fresh air either by means of windows, doors, vents or air conditioning and shall be ventilated so as to minimize ~~drafts,~~ drafts. Air flow shall be adequate to minimize odors and moisture condensation. ~~Ventilation shall be provided when~~

~~ambient temperature is 85 degrees F. or higher.~~
(c) Indoor housing facilities for dogs and cats shall have ~~ample light by natural or artificial means or both, of good quality and well distributed. Such light shall provide uniformly distributed illumination of sufficient light intensity to permit routine inspection and cleaning during the entire working period. Primary enclosures shall be so placed as to protect the dogs and cats from excessive illumination.~~ adequate illumination to permit routine inspections, maintenance, cleaning and housekeeping of the facility and observation of the animals. Illumination shall provide regular diurnal lighting cycles of either natural or artificial light, uniformly diffused throughout the animal facilities.
(d) Interior building surfaces of indoor facilities with which animals come in contact shall be constructed and maintained so that they are ~~substantially~~ impervious to moisture, ~~so that it may~~ and can be readily sanitized.
(e) A suitable method of drainage shall be provided to rapidly eliminate excess water from an indoor housing facility. If closed drain systems are used, they shall be equipped with traps and installed to prevent odors and backup of sewage. The drainage system shall be constructed to prevent cross-contamination among animals.

Authority G.S. 19A-24.

02 NCAC 52J .0203 OUTDOOR FACILITIES
(a) ~~When sunlight is likely to cause overheating and discomfort, sufficient shade shall be provided to allow all dogs and cats kept outdoors to protect themselves from the direct rays of the sun.~~ Primary enclosures and walkways with which an animal comes in contact shall be constructed of sealed concrete or other surfaces impervious to moisture. Gravel may be used if maintained at a minimum depth of six inches and kept in a sanitary manner.
(b) Dogs and cats kept outdoors shall be provided ~~with access to shelter~~ housing to allow them to remain dry and comfortable during inclement weather. Housing shall be constructed of material which is impervious to moisture, and which can be disinfected. One house shall be available for each animal within each enclosure.
(c) In addition to housing, the enclosure shall provide protection from excessive sun and inclement weather.
(d) Animal owners shall be advised at the time of reservation and admission if the animal will be kept in outside facilities.
~~(c)~~ (e) A suitable method of drainage shall be provided to rapidly eliminate excess water. The drainage system shall be constructed to prevent cross-contamination among animals.

Authority G.S. 19A-24.

02 NCAC 52J .0204 PRIMARY ENCLOSURES
(a) Primary enclosures shall be constructed so as to prevent contamination from waste and wastewater from animals in other enclosures. All surfaces with which an animal comes in contact shall be impervious to moisture. For primary enclosures placed into service on or after January 1, 2005, no wood can be within the animal's reach. For primary enclosures in use in a licensed or registered facility prior to January 1, 2005, any damaged wood must be replaced in a manner that does not permit contact with wood by the animal.
~~(a)~~ (b) Primary enclosures for dogs and cats shall be structurally sound and maintained in good repair and in a manner to prevent injury to animals and keep other animals out. Primary enclosures shall be constructed so as to provide ~~sufficient~~ space to allow each dog or cat to walk, turn about ~~freely~~ freely, and to easily stand, sit, or lie in a ~~comfortable, normal~~ natural position. The height of a primary enclosure other than a cage shall be no less than five feet. All enclosures shall be constructed to prevent the escape of animals.
(c) Each primary enclosure shall be provided with a solid resting surface or surfaces adequate to comfortably hold all occupants of the primary enclosure at the same time. All resting surfaces must be of a non-porous or easily sanitized material, such as a towel, or a disposable material such as newspaper. The resting surface or surfaces shall be elevated in primary enclosures housing two or more cats.
~~(b)~~ (d) In addition to Paragraph ~~(a)~~ (b) of this ~~Regulation,~~ Rule, each dog shall be provided a minimum square footage of floor space equal to the mathematical square of the sum of the length of the dog in inches, as measured from the tip of its nose to the base of its tail, plus six ~~inches.~~ inches, then divide the product by 144. The calculation is: (length of dog in inches + 6) x (length of dog in inches + 6) = required floor space in square inches. Required floor space in square inches ÷ 144 = required floor space in square feet. The calculation shall be expressed in square feet. Not more than ~~12~~ four adult dogs shall be housed in the same primary ~~enclosure.~~ enclosure without supervision.

~~(length of dog in inches + 6") (length of dog in inches + 6") required area inches =required square feet144~~

(e) If more than four dogs are housed in a common area or enclosure, then there must be at least one supervisor for each 12 dogs housed within each enclosure or common area. No more than 36 dogs may be housed in any enclosure or common area at any time.
~~(c)~~ (f) In addition to Paragraph ~~(a)~~ (b) of this ~~Regulation,~~ Rule, each adult cat housed in any primary enclosure shall be provided a minimum of ~~two and one-half~~ four square feet of floor ~~space.~~ space which may include elevated resting surfaces. Each kitten shall be provided 1.5 square feet. Not more than 12 adult cats shall be housed in the same primary enclosure.
~~(d) In all enclosures having a solid floor, a receptacle containing sufficient clean litter shall be provided for excreta. Each primary enclosure shall be provided with a solid resting surface or surfaces adequate to comfortably hold all occupants of the primary enclosures at the same time. Such resting surface or surfaces shall be elevated in primary enclosures housing two or more cats.~~
(g) In all cat enclosures, a receptacle containing sufficient clean litter shall be provided for waste. A minimum of one receptacle per three cats is required.

Authority G.S. 19A-24.

02 NCAC 52J .0205 FEEDING
(a) Dogs and cats shall be fed at least once each ~~day~~ 24-hour

period except as otherwise might be required to provide adequate veterinary care. Food shall be commercially prepared food which complies with laws applicable to animal feed or the food shall be provided by the owner. The food shall be free from contamination, wholesome, palatable, and of ~~sufficient~~ adequate quality and quantity appropriate for the given size, age, and ~~nutritive value~~ condition of an animal to meet the ~~normal~~ daily requirements for ~~the condition and size of the dog or cat.~~ nutritional value. Puppies and kittens less than six months of age shall be fed at least twice in each ~~24 hour~~ 24-hour period. An ~~eight hour~~ eight-hour interval between feedings is required if only two feedings are offered in a ~~24 hour~~ 24-hour period.

(b) Food receptacles shall be accessible to all dogs or cats and shall be located so as to minimize contamination by ~~excreta. Feeding pans~~ waste. For every adult animal, there must be at least one food receptacle offered. Food receptacles shall be durable and shall be kept clean and sanitized. Damaged receptacles shall be replaced. Disposable food receptacles may be used but must be discarded after each feeding. ~~Self feeders may be used for the feeding of dry food, and they shall be sanitized regularly to prevent molding, deterioration or caking of feed.~~

(c) Food and water receptacles in outdoor facilities shall be protected from the elements.

Authority G.S. 19A-24.

02 NCAC 52J .0206 WATERING

~~If potable water is not accessible to the dogs and cats at all times, potable water shall be offered to such animals at least twice daily for periods of not less than one hour,~~ Animals shall have continuous access to fresh water, except as might otherwise be required to provide adequate veterinary care. Watering receptacles shall be durable and kept clean and sanitized. Damaged receptacles shall be replaced.

Authority G.S. 19A-24.

02 NCAC 52J .0207 SANITATION

(a) ~~Excreta~~ Waste shall be removed from primary enclosures ~~as often as necessary~~ and exercise areas to prevent contamination of the dogs or cats contained therein and to reduce disease hazards and odors. Enclosures and exercise areas for dogs and cats must be properly cleaned a minimum of two times per day. The animal must be able to walk or lie down without coming in contact with any waste or debris. When a hosing or flushing method is used for cleaning ~~a primary enclosure commonly known as a cage, any dog~~ an enclosure, dogs or ~~cat~~ cats contained therein shall be removed ~~from such enclosure~~ during the cleaning process, and adequate measures shall be taken to protect the animals in other such enclosures from being contaminated with water and other wastes.

(b) ~~Sanitization of primary enclosures~~ Sanitation shall be as follows:

(1) Prior to the introduction of dogs or cats into empty primary enclosures previously occupied, ~~such~~ enclosures and accessories shall be sanitized in the manner provided in Subparagraph (3) of this Paragraph.

(2) ~~Primary~~ In addition to primary enclosures ~~for dogs or cats shall be sanitized often enough to prevent an accumulation~~ being properly cleaned a minimum of ~~debris or excreta, or a disease hazard, provided, however, that such~~ two times per day, enclosures and accessories shall be sanitized ~~at least~~ a minimum of once every ~~two weeks~~ seven days in the manner provided in Subparagraph (3) of this ~~Paragraph.~~ Paragraph if the same animal is housed in the same enclosure more than seven days.

(3) Cages, rooms and hard-surfaced pens or runs shall be sanitized by:

(A) washing them with hot water (180 degrees F.) and soap or detergent as in a mechanical cage washer; or

(B) washing all soiled surfaces with a detergent solution to remove all organic matter followed by ~~or in conjunction with~~ application of a safe and effective ~~disinfectant approved by the director;~~ disinfectant; or

(C) cleaning all soiled surfaces with live steam.

(4) Food and water receptacles shall be sanitized daily with hot water, detergent, and approved disinfectant.

(5) Soiled linens and cloth products shall be mechanically washed with detergent and sanitized.

(6) Any area accessible to multiple animals shall be kept clean and sanitary.

(c) Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this Rule. Premises shall remain free of accumulations of ~~trash.~~ trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and to improve pest control, and to protect the health and well-being of the animals.

(d) An effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

~~(e) No dog or cat shall be in a window display except during business hours and then only in compliance with standards set forth in 2 NCAC 52J .0200.~~

Authority G.S. 19A-24.

02 NCAC 52J .0209 CLASSIFICATION AND SEPARATION

Animals housed in the same primary enclosure shall be maintained in compatible groups, with the following additional restrictions:

(1) Females in season (estrus) shall not be housed in the same primary enclosure with males, except for planned breeding purposes. Breeding shall not be allowed in animal

shelters.

(2) In boarding kennels, animals of different owners shall not have contact with other animals, unless written permission is obtained from the animal's owner. Any dog or cat exhibiting ~~a vicious~~ an aggressive disposition shall be housed individually in a primary enclosure.

(3) Puppies or kittens less than ~~six~~ four months of age shall not be housed in the same primary enclosure with adult dogs or cats other than their dams, except when permanently maintained in breeding ~~colonies.~~ colonies, or if requested in writing, by the animals' owner, as in a boarding kennel. Puppies or kittens between 4 and 16 weeks of age shall have daily access to human social interaction, excluding animals which pose a danger to humans or other animals.

(4) Dogs shall not be housed in the same primary enclosure with cats, nor shall dogs or cats be housed in the same primary enclosure with any other species of animals. Exceptions will be allowed at boarding kennels, if requested in writing by the animals' owner.

(5) All facilities shall designate an isolation area for animals being treated or observed for communicable diseases. Dogs or cats ~~under quarantine or treatment~~ in isolation that are being treated for a communicable disease shall be separated from other dogs or cats and other ~~suspectable~~ susceptible species of animals in such a manner as to minimize dissemination of such disease. A sign shall be posted at the cage or isolation area when in use, giving notice of a communicable disease.

(6) Animals in long term care which are intended for adoption or sale must be provided the following:

(a) Daily access to both human and same species social interaction.

(b) Daily access to space other than the primary enclosure.

(c) A species and size-appropriate toy, unless it poses a health threat.

(7) All animals shall be confined in primary enclosures or exercise areas.

Authority G.S. 19A-24.

02 NCAC 52J .0210 VETERINARY CARE

(a) ~~Programs~~ A written program of veterinary care to include disease control and prevention, vaccination, euthanasia, and adequate veterinary care shall be established ~~and maintained under~~ with the ~~supervision and~~ assistance of a licensed veterinarian.

(b) If there is a severe or persistent disease problem at the facility, the facility operator shall obtain a veterinarian's written recommendations for correcting the problem.

~~(b)~~ (c) Each dog and cat shall be observed daily by the animal caretaker in charge, or by someone under his direct supervision. Sick or diseased, injured, lame, or blind dogs or cats shall be provided with veterinary care or be humanely ~~disposed of unless such action is inconsistent with the research purposes for which such animal was obtained and is being held, provided, however,~~ euthanized, provided that ~~the provision~~ this shall not ~~effect~~ affect compliance with any state or local law requiring the holding, for a specified period, of animals suspected of being diseased. ~~Obviously sick, diseased, or deformed animals will not be offered for sale or adoption.~~ If euthanasia is performed at a facility, a list of personnel approved to perform euthanasia shall be maintained on a Letter of Euthanasia Certification form and kept on file at the facility. Diseased or deformed animals shall be sold or adopted only under the policy set forth in the "Program of Veterinary Care." Full written disclosure of the medical condition of the animal shall be provided to the new owner.

(d) All animals in a licensed or registered facility shall be in compliance with the North Carolina rabies law, G.S. 130A, Article 6, Part 6.

Authority G.S. 19A-24.

02 NCAC 52J .0302 PRIMARY ENCLOSURES USED IN TRANSPORTING DOGS AND CATS

(a) Primary enclosures such as compartments or transport cages, cartons, or crates used to transport cats and dogs shall be well constructed, well ventilated and designed to protect the health and insure the safety of the animals. Such enclosures shall be constructed or positioned in the vehicle in such a manner that:

(1) Each animal in the vehicle has sufficient fresh air for normal breathing.

(2) The openings of such enclosures are easily accessible for emergency removals at all times.

(3) The animals are adequately protected from the elements.

The ambient temperature shall ~~not~~ be ~~allowed to exceed 95~~ maintained between 50 degrees ~~F.~~ F ~~at any time nor to exceed 85 degrees F. for a period of more than four hours. The ambient temperature will not be allowed to fall below 50~~ and 85 degrees F. ~~unless animals are acclimated to lower temperatures.~~

(b) Animals transported in the same primary enclosure shall be of the same species. Puppies or kittens less than ~~six~~ four months of age shall not be transported in the same primary enclosure with adult dogs and cats other than their dams.

(c) Primary enclosures used to transport dogs and cats shall be large enough for each animal to ~~stand erect,~~ turn about ~~freely~~ freely, and to easily stand, sit, or lie down in a ~~normal~~ natural position.

(d) Animals shall not be placed in primary enclosures over other animals in transit unless such enclosure is constructed so as to prevent animal excreta from entering lower enclosures.

(e) All primary enclosures used to transport dogs and cats shall be sanitized between use for shipments.

Authority G.S. 19A-24.

TITLE 04 – DEPARTMENT OF COMMERCE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the State Banking Commission, Commissioner of Banks intends to adopt the rules cited as 04 NCAC 03B .0219-.0228, .0301-.0304; amend the rules citied as 04 NCAC 03B .0101-.0103, .0105 and repeal the rules cited as 04 NCAC 03B .0201-.0206, .0209-.0218.*

Proposed Effective Date: *August 1, 2004*

Public Hearing:
Date: *April 30, 2004*
Time: *9:00 a.m.*
Location: *316 W. Edenton Street, Raleigh, NC*

Reason for Proposed Action: *To update the agency's address in several rules; to incorporate statutory revisions into and otherwise update the agency's rules governing administrative hearings and appeals to the full Banking Commission in contested cases.*

Procedure by which a person can object to the agency on a proposed rule: *Objections may be submitted in writing to William H. Finlay, Agency Legal Specialist, 4309 Mail Service Center, Raleigh, NC 27699-4309, or by email, wfinlay@nccob.org. Objections may also be made in person at the public hearing.*

Written comments may be submitted to: *William H. Finlay, Agency Legal Specialist, 4309 Mail Service Center, Raleigh, NC 27699-4309, phone (919)715-0082, Fax (919)733-6918, and email wfinlay@nccob.org.*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

SUBCHAPTER 3B - RULE-MAKING AND CONTESTED CASES

SECTION .0100 - RULE-MAKING

04 NCAC 03B .0101 PETITIONS
(a) Any person wishing to submit a petition requesting the adoption, amendment, or repeal of a rule by the Banking Commission shall address a petition to:

Office of The Commissioner of Banks
~~P.O. Box 10709~~ 4309 Mail Service Center
Raleigh, North Carolina ~~27605-0709.~~ 27699-4309.
Attention: Rule-making Coordinator

(b) The Commissioner of Banks will determine, based on a study of the facts stated in the petition, whether the public interest will be served by granting it. He will consider all the contents of the submitted petition, plus any additional information he deems relevant.

Authority G.S. 53-92; 150B-20.

04 NCAC 03B .0102 NOTICE
(a) Any person or agency desiring to be placed on the mailing list for Banking Commission rule-making notices may file a request in writing, furnishing their name and mailing address to:

Office of The Commissioner of Banks
~~P.O. Box 10709~~ 4309 Mail Service Center
Raleigh, North Carolina ~~27605-0709.~~ 27699-4309.
Attention: Rule-making Coordinator

The request must state the subject areas within the authority of the Banking Commission for which notice is requested.
(b) Persons desiring information in addition to that provided in a particular rule-making notice may contact:

Office of The Commissioner of Banks
~~P.O. Box 10709~~ 4309 Mail Service Center
Raleigh, North Carolina ~~27605-0709.~~ 27699-4309.
Attention: Rule-making Coordinator

Authority G.S. 53-92; 150B-20.

04 NCAC 03B .0103 HEARINGS
(a) Unless otherwise stated in a particular rule-making notice, hearings before the Banking Commission shall be held in Raleigh, North Carolina, at regular scheduled or special called meetings of the Banking Commission.
(b) Any person desiring to present oral data, views, or arguments on the proposed rule must, before the hearing, file a notice with:

Office of The Commissioner of Banks
~~P.O. Box 10709~~ 4309 Mail Service Center
Raleigh, North Carolina ~~27605-0709.~~ 27699-4309.
Attention: Rule-making Coordinator

Any person permitted to make an oral presentation shall submit a written copy of the presentation to the above-named person prior to or at the hearing.
(c) A request to make an oral presentation must contain a brief summary of the individual's views with respect thereto, and a statement of the length of time the individual wants to speak.

Presentations may not exceed 15 minutes unless, upon request, either before or at the hearing, the Commissioner of Banks or the presiding officer should determine that fundamental fairness and procedural due process require an extension of time.

(d) Upon receipt of a request to make an oral presentation the Commissioner of Banks shall acknowledge receipt of the request, and inform the person requesting of the imposition of any limitations deemed necessary to the end of a full and effective public hearing on the proposed rule.

(e) Upon receipt of such written comments prompt acknowledgment shall be made including a statement that the comments therein shall be considered fully by the Banking Commission.

(f) The presiding officer at the hearing shall have complete control of the proceedings, including: extensions of any time requirements, recognition of speakers, time allotments for presentations, direction of the flow of the discussion, and the management of the hearing. The presiding officer, at all times, shall take care that each person participating in the hearing is given a fair opportunity to present views, data, and comments.

Authority G.S. 53-92; 150B-21.2.

04 NCAC 03B .0105 DECLARATORY RULINGS

(a) Any person substantially affected by a statute administered or rule promulgated by the Commissioner of Banks or the Banking Commission may request a declaratory ruling as to:

(1) whether, and if so how, the statute or rule applies to a given factual situation; or

(2) whether a particular agency rule is valid.

All decisions of the Commissioner of Banks relative to declaratory rulings shall be subject to review by the Banking Commission upon written application of any aggrieved party.

(b) The Commissioner of Banks will have the sole power to make such declaratory rulings. All requests for declaratory rulings shall be written and mailed to:

Office of The Commissioner of Banks
~~P.O. Box 10709~~ 4309 Mail Service Center
Raleigh, North Carolina ~~27605-0709.~~ 27699-4309.
Attention: Legal Division

(c) All requests for a declaratory ruling must include the following information:

(1) name and address of petitioner;

(2) statute or rule to which petition relates;

(3) concise statement of the manner in which petitioner is aggrieved by the rule or statute or its potential application to him;

(4) a statement of whether an oral hearing is desired, and if so the reasons for such an oral hearing.

(d) Whenever the Commissioner of Banks believes for good cause that the issuance of a declaratory ruling is undesirable, he may refuse to do so. When good cause for refusing to issue a declaratory ruling is deemed to exist, the Commissioner of Banks will notify the petitioner of his decision in writing, stating reasons for the denial of a declaratory ruling.

(e) Where a declaratory ruling is deemed appropriate, the Commissioner of Banks will issue the ruling within 60 days of receipt of the petition.

(f) A declaratory ruling procedure may consist of written submissions, oral hearings, or such other procedures as may be appropriate in a particular case.

Authority G.S. 53-92; 150B-17.

SECTION .0200 - CONTESTED CASES

04 NCAC 03B .0201 BANKING COMMISSION HEARINGS

~~The regular or called meetings of the Banking Commission shall be the forum for all contested cases involving the Banking Commission. In addition to those contested cases automatically subject to hearing by the Banking Commission, the agenda for meetings of the Banking Commission shall provide for the hearing of any appeal by an interested party of any decision or action of the Commissioner of Banks, as well as any specific dispute which any party may have with the Commissioner of Banks or with the Banking Commission.~~

Authority G.S. 53-92; 150B-2(2).

04 NCAC 03B .0202 HEARINGS BEFORE THE COMMISSIONER OF BANKS

~~Whenever, pursuant to statute, the Commissioner of Banks is authorized or required to hold a hearing, the Commissioner of Banks shall be the hearing officer and such hearing shall be conducted in compliance with and subject to the provisions of Section .0200 of Subchapter 3B of these rules.~~

Authority G.S. 53-92; 150B-2(2).

04 NCAC 03B .0203 REQUEST FOR HEARING

~~(a) Whenever a person believes his rights, duties, or privileges have been affected by action of the Commissioner of Banks and he has not been notified of a right to a hearing, he may request an administrative hearing.~~

~~(b) Before a hearing request can be made, a person must first make reasonable efforts to resolve the problem with the Commissioner of Banks informally. This requirement will be satisfied by contacting:~~

~~The Commissioner of Banks~~
~~P.O. Box 951~~
~~Raleigh, North Carolina 27602.~~

~~(c) Following such informal contact with the Commissioner of Banks, if still dissatisfied, the person may file a written request with:~~

~~*The Commissioner of Banks*~~
~~*P.O. Box 951*~~
~~*Raleigh, North Carolina 27602.*~~

~~Such request must contain the following information:~~

~~(1) name and address of petitioner,~~

~~(2) a concise statement of the agency action being challenged,~~

~~(3) a concise statement of the way in which the petitioner has been aggrieved,~~

~~(4) a clear and specific demand for a hearing.~~

~~(d) Such request will be acknowledged within 30 days after submission of the request and a hearing scheduled promptly.~~

Authority G.S. 53-92; 150B-38.

04 NCAC 03B .0204 NOTICE

(a) Notice of a hearing shall be given reasonably in advance of the hearing so as to allow the party affected reasonable time to prepare for the hearing, and will not be less than 15 days, except as authorized for emergencies.

(b) Notice of a hearing shall include:

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

(2) a reference to the particular sections of the statutes and rules involved;

(3) a short and plain statement of the factual allegations.

Authority G.S. 53-92; 150B-38(b).

04 NCAC 03B .0205 WRITTEN ANSWERS TO NOTICE

Any person receiving notice of a contested case hearing may file a written answer. Such answer must be filed at least 30 days prior to commencement of the hearing by delivering or mailing it to person indicated in the notice.

Authority G.S. 53-92; 150B-38.

04 NCAC 03B .0206 REPRESENTATION BY AN ATTORNEY

The administrative hearing is especially designed to give any person the opportunity to effectively represent himself to protect his rights, duties, and privileges. However, if a party desires, he may employ an attorney to represent him at the administrative hearing.

Authority G.S. 53-92; 150B-38.

04 NCAC 03B .0209 DISCOVERY

Any aggrieved party may discover any information from the Banking Commission or the Commissioner of Banks which may be available, except records related solely to the internal procedures of the agency or those which have been properly classified as confidential under statutory authority.

Authority G.S. 53-92; 53-99; 53-125; 150B-39.

04 NCAC 03B .0210 RULES OF EVIDENCE

The rules of evidence as applied in the Superior and District Court Divisions of the General Court of Justice shall be followed in any proceeding before the Banking Commission or the Commissioner of Banks involving a contested case. Irrelevant, immaterial, and unduly repetitious evidence shall be excluded.

Authority G.S. 53-92; 150B-41.

04 NCAC 03B .0211 PRE-HEARING CONFERENCE

(a) In any contested cases, the hearing officer, the Commissioner of Banks, or such other person or persons as the Banking Commission may designate may hold a conference in advance of holding the hearing and require attendance of all parties.

(b) This conference will be informal in nature.

(c) This conference will be noted in the notice of hearing or in a subsequent notice if a conference is later determined to be necessary by the hearing officer.

(d) The purposes of this conference will be to discuss:

(1) the possibility of simplification of issues,

(2) stipulation of facts or findings,

(3) identification of areas where evidence will be needed,

(4) indications of depositions or subpoenas needed,

(5) the need for consolidation of cases or joint hearings,

(6) any other matters which will reduce costs or save time or otherwise aid expeditious disposition of the contested cases.

Authority G.S. 53-92; 150B-40.

04 NCAC 03B .0212 PLACE AND FORUM FOR CONTESTED CASES

All administrative hearings conducted by the Commissioner of Banks or by the Banking Commission shall be held at the location stipulated in the notice.

Authority G.S. 53-92; 150B-24.

04 NCAC 03B .0213 FAILURE TO APPEAR FOR A CONTESTED CASE

If a party served with notice fails to appear without having notified the hearing officer and no continuance, adjournment, or like disposition is ordered, the hearing officer may proceed with the hearing in the party's absence.

Authority G.S. 53-92; 150B-40.

04 NCAC 03B .0214 CONSOLIDATION OF CONTESTED CASES

(a) In appropriate cases, i.e., when there is a common question of law or fact, when the same or related parties are involved, or to avoid unnecessary cost and delay, the hearing officer may order the cases consolidated into one hearing.

(b) When such an order is made, the Commissioner of Banks shall give notice to the parties involved of the consolidation.

Authority G.S. 53-92; 150B-38.

04 NCAC 03B .0215 INTERVENTION OF A NEW PARTY INTO A CONTESTED CASE

(a) A petition to intervene as of right or permissively as provided in North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of Rule 24 and is timely. It will be deemed untimely if a grant would cause substantial prejudice to the rights of the parties, substantial added expense, or compellingly serious inconvenience to the parties or the Banking Commission.

(b) A person desiring to intervene in a contested case must file a written petition with:

The Commissioner of Banks
P.O. Box 951
Raleigh, North Carolina 27602.

(c) The petition must be made on Form 22 which can be obtained from the Commissioner, which form includes the following information:

(1) a citation to any statutory or nonstatutory grounds for intervention (if any; if not, so state);
(2) a statement of the claim or defense in respect of which intervention is sought;
(3) name and address;
(4) business or occupation;
(5) full identification of the hearing in which petitioner is seeking to intervene;
(6) summary of the arguments or evidence petitioner seeks to present.

(d) In the event the Commissioner of Banks determines to allow intervention, notification of that decision will be issued promptly to all parties and to the petitioner. In cases of discretionary intervention, such notification will include a statement of the limitations, if any, of time, subject matter, evidence, or whatever else is deemed necessary, which are imposed on the intervenor.

(e) In the event the Commissioner's decision is to deny intervention, the petitioner will be notified promptly. Such notice will be in writing, will state all reasons for the decision, and will be issued to the petitioner and to all parties.

Authority G.S. 53-92; 150B-38(f).

04 NCAC 03B .0216 DISQUALIFICATION OF HEARING OFFICER

(a) If for any reason the hearing officer determines that personal bias or other factors would keep him from being able to conduct the hearing and perform all duties in an impartial manner, he shall submit in writing to the Commissioner of Banks his disqualification and the reasons therefor.

(b) If for any reason any party in a contested case believes that the hearing officer is personally biased or otherwise unable to conduct the hearing and perform all duties in an impartial manner, the party may file a sworn, notarized, affidavit with the Commissioner of Banks.

(c) The affidavit must state all facts the party deems relevant to the disqualification of the hearing officer.

(d) An affidavit of disqualification will be considered timely if filed before commencement of the hearing. Any other affidavit may be found timely provided it is filed at the first opportunity after the party becomes aware of facts which give rise to a reasonable belief the officer may be disqualified under this rule.

(e) Procedure. The Banking Commission shall decide whether to disqualify the person in the following manner:

(1) The allegations of the affidavit shall be investigated by the Commissioner of Banks.
(2) The person whose disqualification is to be determined will not participate in the decision but may be called on to furnish information to the Commissioner of Banks.
(3) The Commissioner of Banks will report his findings and his recommendations to the Banking Commission who will then decide whether to disqualify the challenged individual.
(4) A record of proceedings and the reasons for decisions reached will be maintained as part of the contested case record.

(f) Resumption of Hearing. When a hearing officer is disqualified or otherwise is unable to continue the hearing, another hearing officer will replace him and that hearing will be resumed except as follows:

(1) When oral testimony has already been given, and it is determined by the successor hearing officer that the viewing of the witness is an important element of the case, that portion of the testimony and evidence will be repeated.
(2) When continuation of the hearing would result in substantial prejudice, for whatever reasons, to the rights of the parties, either a new hearing will be initiated or the case will be dismissed without prejudice.

(g) The determination of whether resuming and continuing the case will result in substantial prejudice is to be made by the new hearing officer.

(h) Determinations of decisions of disqualification, continuation of the hearing, rehearing of a portion or all of a contested case, or dismissal of a case without prejudice, together with a statement of reasons, will be part of the record of the case and communicated to all parties promptly.

Authority G.S. 53-92; 150B-40.

04 NCAC 03B .0217 SUBPOENAS

(a) The hearing officer is empowered to issue subpoenas in the Banking Commissioner's name.

(b) Subpoenas requiring the attendance of witnesses, or those to produce documents, evidence, or things, will be issued promptly by the hearing officer after receipt of a request from a party to the case for such subpoena, except as stated herein.

(c) The hearing officer will have the discretion to refuse a request for the issuance of a subpoena if, clearly, on its face, the request is objectionable or unreasonable.

(d) Except as may be otherwise stated in a particular subpoena, any person receiving a subpoena from the Banking Commission may object thereto by filing a written objection to the subpoena with:

The Commissioner of Banks
P.O. Box 951
Raleigh, North Carolina 27602.

Such request must include a concise but complete statement of reasons why the subpoena should be revoked or modified. These reasons may include lack of relevancy of the evidence requested, lack of particularity in the description of the evidence sought, or any other reason sufficient in law for holding the subpoena invalid, such as that the evidence is privileged, that appearance or production would be so disruptive as to be unreasonable in light of the significance of the evidence sought, or other undue hardships.

(e) The person subpoenaed must simultaneously with filing his objection with the agency serve his objection on the party who requested the subpoena.
(f) The party requesting the subpoena, in such time as may be granted by the hearing officer, may file a written response to the objection. The response shall be served in like manner as the objection.
(g) After receipt of the objection and a response thereto, if any, the hearing officer shall issue a notice to the party who requested the subpoena and the party challenging the subpoena and may notify all other parties of an open hearing, to be scheduled as soon as practicable, at which time evidence and testimony may be presented limited to the questions raised by the objection and response, if any.
(h) Promptly after the close of such hearing, the officer will rule on the challenge and issue a written decision. A copy of his decision will be issued to all parties and made a part of the record.
(i) The request for subpoena must include the following information:
(1) name of agency and contested case,
(2) name of party requesting the subpoena,
(3) name of person subpoenaed and person on whose behalf he is to testify,
(4) specification of the materials requested.
(j) The subpoena must include:
(1) name of agency and contested case,
(2) name of person subpoenaed and person on whose behalf he is to testify,
(3) specification of the materials requested,
(4) notice that the agency can apply to the courts for an order of contempt if the subpoenaed person does not comply.

Authority G.S. 53-92; 150B-39.

04 NCAC 03B .0218 PUBLIC INSPECTION OF FILES
Files containing the material listed herein shall be maintained and shall be available for public inspection during normal business hours at the office of:
The Commissioner of Banks
P.O. Box 951
Raleigh, North Carolina 27602.
(1) all rules and all other written statements of policy or interpretations formulated, adopted, or used by the Commissioner of Banks and the Banking Commission in the discharge of its functions;
(2) all final orders, decisions, and opinions made after February 1, 1976, together with all materials that were before the deciding officers at the time the final order, decision, or opinion was made, except materials properly for good cause held confidential.

Authority G.S. 53-92; 53-99.

04 NCAC 03B .0219 DEFINITIONS
As used in this Subchapter:
(1) "Appellate Panel" means an appellate review panel appointed pursuant to G.S. 53-92(d).
(2) "Commission" means the North Carolina State Banking Commission.
(3) "Commissioner" means the North Carolina Commissioner of Banks.
(4) "Court" means a North Carolina District or Superior Court.
(5) "Day" means a calendar day, other than a Saturday, Sunday or North Carolina state holiday.
(6) "Hearing officer" means the Commissioner or an individual appointed by the Commissioner pursuant to G.S. 53-93.
(7) "Rules of Civil Procedure " means the North Carolina Rules of Civil Procedure, G.S. 1A-1, et seq., as the same may be amended from time to time.
(8) Terms used herein which are defined by G.S. 150B shall be defined as in G.S. 150B.

Authority G.S. 53-92; 53-93; 150B-38(h).

04 NCAC 03B .0220 HEARINGS
Whenever the Commissioner is authorized or required by law to hold a hearing, the hearing officer shall conduct the hearing in accordance with the applicable provisions of law, the Rules of Civil Procedure, the Rules of Evidence and the procedures set forth in this Subchapter.

Authority G.S. 53-92; 53-93; 53-186; 53-208.10; 53-208.23; 53-224.25; 53-228; 53-233.16; 53-243.12; 53-251; 53-271(c); 53-284; 53 321; 53-327; 53-369; 53-370; 53-412; 150B-38(h).

04 NCAC 03B .0221 APPLICATION OF THE RULES OF CIVIL PROCEDURE
Except as otherwise provided in this Subchapter or in G.S. 150B, the Rules of Civil Procedure shall apply in hearings and prehearing proceedings governed by this Subchapter to the same extent as though the hearing or prehearing proceeding was pending in a Court.

Authority G.S. 53-93; 150B-38(h).

04 NCAC 03B .0222 FILING OF DOCUMENTS
(a) All requests for hearing, written answers, motions, responses to motions or other papers required or permitted to be filed in any contested case shall be signed by the party or the party's attorney and the original thereof filed with the Commissioner addressed as follows:
If filed via the United States Postal Service:
Office of the Commissioner of Banks
4309 Mail Service Center
Raleigh, NC 27699-4309
Attn: Legal Division
If filed via a private overnight mail service or via hand delivery:
Office of the Commissioner of Banks
316 W. Edenton Street

Raleigh, NC 27603-1716
Attn: Legal Division

(b) A copy of any papers filed with the Commissioner, together with any attachments, shall be served upon all parties in any manner permitted by the Rules of Civil Procedure.

(c) Any paper required or permitted to be filed pursuant to this Rule shall be considered filed on the date it is actually received at the address above.

Authority G.S. 53-93; 150B-38(h).

04 NCAC 03B .0223 REQUEST FOR A HEARING

(a) A person aggrieved may request a hearing, which shall be conducted by a hearing officer. The request shall be made in writing, state all statutory or other legal bases for the request, describe the events or circumstances giving rise to the request and shall include a copy of any supporting documents or other papers supporting the request. If applicable, the request may (but need not) include a statement of pertinent legal issues or questions.

(b) If the Commissioner determines that it is appropriate to do so, he may direct his staff to schedule a hearing, notwithstanding the fact that no request for a hearing has been received. In such cases, the Commissioner's direction shall be treated as a request for a hearing.

Authority G.S. 53-93; 53-208.10(c); 53-208.23; 53-243.12(b); 150B-38(h).

04 NCAC 03B .0224 DATE, TIME AND LOCATION OF HEARING; MOTIONS TO CONTINUE

(a) The date, time and location of any hearing under this Subchapter shall be set forth in the notice of hearing or other paper which commences the hearing process.

(b) Any party may move to continue the hearing.

(c) The hearing officer shall rule on any motion to continue. Unless oral argument is requested by the hearing officer, motions to continue shall be decided based upon the written submissions of the parties.

Authority G.S. 53-93; 150B-38(h).

04 NCAC 03B .0225 MOTIONS

(a) Any party may file any motion which would be permitted under the Rules of Civil Procedure if the contested case was pending in a Court.

(b) The opposing party may file such response as is permitted by the Rules of Civil Procedure to any such motion within five days of the date that it is filed with the Commissioner.

(c) The hearing officer shall promptly rule on any such motion. The hearing officer may rule on any motion with or without oral argument. If the hearing officer determines that oral argument is appropriate, he shall notify the parties of the date for such argument. The notice shall indicate whether the argument is to be conducted in person or by conference call.

Authority G.S. 53-93; 150B-38(h).

04 NCAC 03B .0226 PRE-HEARING CONFERENCE

(a) If the hearing officer determines that to do so would aid in the prompt and efficient resolution of any contested case, the hearing officer may order that the parties attend a pre-hearing conference. The notice of the conference shall either be included in the document referred to in Rule .0224(a) of this Subchapter or in a separate written order. The purpose of a pre-hearing conference is to:

(1) explore any grounds upon which a contested case may be resolved without the need for a hearing;
(2) determine the scope of discovery each party wishes to pursue;
(3) exchange exhibits and other evidence;
(4) reach stipulations or other agreements; and
(5) pursue any other matters which will reduce the cost, save time, simplify the issues to be heard, or otherwise aid in the expeditious disposition of the matters to be addressed by the hearing.

(b) The pre-hearing conference may be conducted informally between the parties. At the request of either party, the pre-hearing conference may be conducted by a member of the Commissioner's legal staff.

Authority G.S. 53-93; 150B-38(h); 150B-41(c).

04 NCAC 03B .0227 HEARINGS

(a) Prior to the commencement of a hearing, the hearing officer shall rule on any outstanding motions.

(b) Once a hearing has begun the hearing officer, may adjourn the hearing and reconvene the same at a later time or date.

(c) Hearings are open to the public, except as to any testimony or other evidence regarding matters made confidential by law.

(d) Hearings shall be conducted in a manner which conforms to the extent reasonably possible to the Rules of Civil Procedure and the Rules of Evidence. The order of evidence shall be determined by the hearing officer.

(e) Persons permitted to intervene pursuant to the Rules of Civil Procedure shall be permitted to participate in the hearing only to the extent the hearing officer determines is necessary for a full and fair adjudication of the case.

Authority G.S. 53-92(d); 53-93; 150B-38(h).

04 NCAC 03B .0228 STIPULATIONS

Parties may by written stipulation agree upon the facts or any portion thereof and their stipulation may be regarded and used as evidence at the hearing. However, the hearing officer shall not be precluded from requiring or allowing the introduction of additional evidence concerning the issues to which the parties have stipulated.

Authority G.S. 53-93; 150B-38(h).

SECTION .0300 - APPEALS TO THE STATE BANKING COMMISSION

04 NCAC 03B .0301 APPOINTMENT OF APPELLATE PANEL

In the event the Chairman of the Commission, pursuant to G.S. 53-92(d), appoints an Appellate Panel to consider an appeal and make a recommended decision to the State Banking Commission, the Commissioner's staff shall send all parties written notice of that appointment.

Authority G.S. 53-92(c); 53-92(d); 53-95; 53-107.2(a); 53-115; 53-215; 53-224.30; 53-231; 53-232.17; 53-243.02; 53-252; 53-272; 53-289; 53-350; 53-410; 53-412; 150B-38(h).

04 NCAC 03B .0302 RECORD ON APPEAL; HEARING DATE; MEMORANDA OF LAW

(a) The record on appeal shall consist of the official agency record as set forth in G.S. 150B-42.

(b) The Commissioner's counsel, after consulting with the chair of the Commission or Appellate Panel, shall provide each party with written instructions setting forth the deadlines by which memoranda of law shall be filed by the parties, when the appeal will be considered by the Commission or Appellate Panel, and whether oral argument will be heard.

Authority G.S. 53-92(c); 53-92(d); 150B-38(h).

04 NCAC 03B .0303 ORAL ARGUMENT

(a) The decision to hear oral argument in an appeal to the Commission shall be in the discretion of the Commission or Appellate Panel. If oral argument is permitted, the chair of the Commission or Appellate Panel shall notify the Commissioner, who shall notify all parties and set a date and time for same.

(b) If oral argument is permitted, each party shall be allowed a maximum of 30 minutes for oral argument, including rebuttal arguments.

Authority G.S. 53-92; 53-95; 150B-38(h).

04 NCAC 03B .0304 COMMISSION REVEW OF APPELLATE PANEL'S RECOMMENDED DECISION

(a) If an appeal is heard by an Appellate Panel, that Appellate Panel, after reviewing the record on appeal, memoranda of law and hearing oral arguments, if any, shall make a recommended decision to the Commission. The Commission shall, by a vote of the majority of its members present and voting at any regular or special meeting, either affirm, affirm with modifications or reject the recommended decision of the Appellate Panel.

(b) If the Commission rejects the Appellate Panel's recommended decision, it shall specify the actions the Appellate Panel or the Commissioner shall take with regard to the appeal.

(c) A decision to affirm or to affirm with modifications shall be considered a "final agency decision" for purposes of G.S. 150B-42.

Authority G.S. 53-92; 53-95; 150B-38(h).

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Care Commission intends to amend the rules cited as 10A NCAC 13B .3401-.3402, .3405, .6204 and repeal the rules cited as 10A NCAC 13B .3403-.3404.*

Proposed Effective Date: *October 1, 2004*

Public Hearing:
Date: *June 3, 2004*
Time: *10:00 a.m.*
Location: *Council Building, Room 201, Dorothea Dix Campus, 701 Barbour Dr., Raleigh, NC*

Reason for Proposed Action: *The NC Medical Care Commission has approved to initiate permanent rulemaking for these Rules. The "Notice of Text" is the first step in the permanent rule-making process. These rules pertain to the licensure of hospitals. The changes include, but are not limited to, an omission of amending a rule regarding neonatal services organization with rule amendments effective April 1, 2003, technical changes rules to reflect the current Federal Government name designation for the Small Rural Hospital Flexibility Program and repealing rules that no longer apply to hospitals participating in the Small Rural Health Flexibility Program in accordance with 42 CFR 485 Subpart F.*

Procedure by which a person can object to the agency on a proposed rule: *A person may object to the agency on the proposed rules by submitting written comments on the proposed rules. They may also object by attending the public hearing and personally voice their objections during that time.*

Written comments may be submitted to: *Nadine Pfeiffer, NCDFS, 2711 Mail Service Center, Raleigh, NC 27699-2711, phone (919) 733-7461, fax (919) 733-8274, and email nadine.pfeiffer@ncmail.net.*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13B –LICENSING OF HOSPITALS

SECTION .3400 - SUPPLEMENTAL RULES FOR THE LICENSURE OF CRITICAL ACCESS HOSPITALS

10A NCAC 13B .3401 SUPPLEMENTAL RULES

The rules of this Section pertain only to designated ~~Primary Care Hospitals or Federally Certified Primary Care Hospitals.~~Critical Access Hospitals in accordance with 42 CFR 485 Subpart F. The general requirements of this Subchapter shall apply to such facilities except where they are specifically waived or modified by the rules of this Section.

Authority G.S. 131E-79.

10A NCAC 13B .3402 DEFINITIONS

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

(1) "Available" means provided directly by the facility or by written agreement with a qualified provider of the service within one ~~hour.~~ hour driving time.

(2) ~~"Designated Primary Care Hospital"~~ "Critical Access Hospital" means a facility designated by the North Carolina Office of Research, Demonstrations and Rural Health Development in accordance with ~~G.S. 131E-76(6).~~42 CFR 485 Subpart F.

~~(3) "Federally Certified Primary Care Hospital" means a hospital which has been designated and certified as a Federally Certified Rural Primary Care Hospital under the Essential Access Community Hospital Program administered through the North Carolina Office of Research, Demonstrations and Rural Health Development in accordance with P.L. 101-239 and P.L. 101-508.~~

~~(4) "Primary Care Inpatient Services" means that the hospital provides acute care inpatient services appropriate to the level of service at the facility up to a maximum annual average daily census of 15 patients per day. In addition, the facility may also provide long term care in "swing bed" or distinct part status and psychiatric distinct part beds.~~

Authority G.S. 131E-79.

10A NCAC 13B .3403 LICENSURE APPLICATION

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

Authority G.S. 131E-79.

10A NCAC 13B .3404 FEDERALLY CERTIFIED PRIMARY CARE HOSPITAL

~~(a) The requirements of 10A NCAC 13B .3500 through .5206 shall be waived for a facility which the North Carolina Office of Research, Demonstrations and Rural Health Development certified as a designated Federally Certified Primary Care Hospital, and Rule .6227 (f) and (g) of that Subchapter shall not apply to such facilities which do not provide emergency room service or maintain any life support systems.~~

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

Authority G.S. 131E-79.

10A NCAC 13B .3405 DESIGNATED CRITICAL ACCESS HOSPITALS

The requirements of 10A NCAC 13B shall apply to ~~Designated Primary Care Hospitals~~ Critical Access Hospitals with the following modifications:

(1) Autopsy facilities required in Rule .4907 of this Subchapter are not required ~~for a Designated Primary Care Hospital,~~ provided that the facility has in effect a written agreement with another facility meeting Rule .4907 of this Subchapter for providing autopsy services.

(2) Radiological services required in Section .4800 of this Subchapter are not required ~~for Designated Primary Care Hospitals~~ provided that the facility has ~~radiological equipment on site and~~ a written agreement with another licensed facility meeting the requirements of Section .4800 of this Subchapter which makes radiological service available.

(3) Emergency services required in Rules .4102 - .4110~~Section .4100~~ of this Subchapter are not required.~~required for Designated Primary Care Hospitals.~~ Emergency response capability set forth in Rule .4101 of this Subchapter shall be provided. Medical staff ~~of a Designated Primary Care Hospital~~ shall ~~participate in training facility personnel in~~ require that facility personnel are capable of initiating life-saving measures at a first-aid level of response for any patient or person in need of such services. This shall include:

(a) Establishing protocols or agreements with any facility providing emergency services;

(b) Initiating basic ~~cardio-respiratory~~ cardio-pulmonary resuscitation according to the American Red Cross or American Heart Association standards;

(c) Availability of intravenous fluids and supplies required to establish intravenous access; and

(d) Availability of first-line emergency drugs as specified by the medical staff.

(4) Anesthesia services required in Section .4600 of this Subchapter are not required in ~~Designated Primary Care Hospitals~~ hospitals not offering outpatient surgery services.

(5) Food services required in Section .4700 of this Subchapter shall be provided for inpatients ~~of Designated Primary Care Hospitals~~ either directly or made available through contractual arrangements.

Authority G.S. 131E-79.

SECTION .6200 - CONSTRUCTION REQUIREMENTS

10A NCAC 13B .6204 NEONATAL LEVEL III AND LEVEL IV NURSERY

(a) Units shall be accessible to post-partum nursing and delivery units.

(b) The nursery shall be located and arranged to preclude unrelated traffic through the nursery.

(c) Each nursery shall contain the following:

(1) Lavatory located within 20 feet travel distance of each bassinet;

(2) Emergency calling system; and

(3) Charting facilities.

(d) There shall be six feet between bassinets for Neonatal Level ~~III~~ IV units and five feet between bassinets for Neonatal Level ~~II~~ III units. Neonatal Level ~~III~~ IV nurseries shall have 80 square feet per bassinet not including corridors and cabinets. Neonatal Level ~~II~~ III nurseries shall have 50 square feet per bassinet not including cabinets and corridors. Corridors or aisles shall have at least eight feet of clear width for access to bassinets.

(e) Each nursery shall be served by a connecting workroom. It shall contain gowning facilities at the entrance for staff and housekeeping personnel, lavatory, and storage. One workroom may serve more than one nursery. The workroom may be omitted if equivalent work area and facilities are provided within the nursery. Gowning and hand washing facilities shall be provided at the entrance to each nursery.

(f) Space for examination and treatment shall be provided and shall contain a counter, storage, and lavatory. It may serve more than one nursery room and may be located in a workroom.

(g) If commercially prepared formula is not used, space and equipment to accommodate the handling, storage, and preparation of formula shall be provided.

(h) A janitor's closet for the exclusive use of the housekeeping staff in maintaining the nursery suite shall be provided. It shall contain a floor receptor or service sink and storage space for housekeeping equipment and supplies.

(i) Doors to nurseries shall be no less than three feet wide. If doors are provided directly from nurseries to public corridors or public spaces, they shall be equipped with "one-way" hardware for exit only to prevent unauthorized entry.

(j) Smoke detection shall be provided in each nursery bed space.

Authority G.S. 131E-79.

TITLE 11 – DEPARTMENT OF INSURANCE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Insurance intends to amend the rules cited as 11 NCAC 01 .0403 .0416, .0418, .0425, .0427, .0429.*

Proposed Effective Date: *August 1, 2004*

Public Hearing:
Date: *May 4, 2004*
Time: *10:00 a.m.*
Location: *Dobbs Building, 3rd Floor Hearing Room, 430 N. Salisbury St., Raleigh, NC*

Reason for Proposed Action: *The amendments are technical in nature and are just being updated.*

Procedure by which a person can object to the agency on a proposed rule: *The Department of Insurance will accept written objections to these Rules until the expiration of the comment period (June 14, 2004). Objections need to be specific and sent to the attention of the APA Coordinator.*

Written comments may be submitted to: *Ellen K. Sprenkel, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919) 733-4529, fax (919) 733-6495, and email esprenke@ncdoi.net.*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 1 - DEPARTMENTAL RULES

SECTION .0400 - ADMINISTRATIVE HEARINGS

11 NCAC 01 .0403 REQUEST FOR HEARING

(a) A request for an administrative hearing under 11 NCAC 1 .0401 must be in writing and shall contain the following information:

(1) name and address of the person requesting the hearing,

(2) a concise statement of the departmental action being challenged,

(3) a concise statement of the manner in which the petitioner is aggrieved, and

(4) a clear and specific demand for a public hearing.

(b) The request for hearing shall be filed with: ~~Commissioner of Insurance, ATTENTION: Deputy Commissioner, Hearings Office, N.C. Department of Insurance, Post Office Box 26387, Raleigh, North Carolina 27611~~. General Counsel, N.C. Department of Insurance, 1201 Mail Service Center, Raleigh, NC 27699-1201.

Authority G.S. 58-2-40; 150B-38.

11 NCAC 01 .0416 DUTIES OF THE HEARING OFFICER

In conjunction with the powers in this Section, in General Statute Chapter 58, and in Article 3A of General Statute Chapter 150B, the hearing officer shall perform the following duties, consistent with law:

(1) Hear and rule on motions;

(2) Grant or deny continuances;

(3) Issue orders regarding prehearing matters, including directing the appearance of the parties at a prehearing conference;

(4) Examine witnesses when deemed to be necessary to make a complete record and to aid in the full development of material facts in the case;

(5) Make preliminary, interlocutory, or other orders as deemed to be appropriate;

(6) ~~Recommend~~ Order a summary disposition of the case or any part thereof when there is no genuine issue as to any material fact or recommend dismissal when the case or any part thereof has become moot or for other reasons; and

(7) Apply sanctions in accordance with 11 NCAC 1 .0423.

Authority G.S. 58-2-40(1); 58-2-50; 58-2-55; 58-2-70; 150B-38(h).

11 NCAC 01 .0418 SETTLEMENT CONFERENCE

(a) A settlement conference is for the primary purpose of assisting the parties in resolving disputes and for the secondary purpose of narrowing the issues and preparing for hearing.

(b) Upon the request of any party, the hearing officer shall assign the case to another hearing officer appointed by the Commissioner under G.S. 58-2-55 for the purpose of conducting a settlement conference. Unless the parties and the other hearing officer agree, a unilateral request for a settlement conference does not constitute good cause for a continuance. The conference shall be conducted at a time and place agreeable to all parties and the hearing officer. It shall be conducted by telephone if any party would be required to travel more than 50 miles to attend, unless that party agrees to travel to the location set for the conference. ~~It~~ If a telephone conference is scheduled, the parties must be available by telephone at the time of the conference.

(c) All parties shall attend or be represented at a settlement conference. Parties or their representatives shall be prepared to participate in settlement discussions.

(d) The parties shall discuss the possibility of settlement before a settlement conference if they believe that a reasonable basis for settlement exists.

(e) At the settlement conference, the parties shall be prepared to provide information and to discuss all matters required in 11 NCAC 1 .0415.

~~(f) If, following a settlement conference, a settlement has not been reached but the parties have reached an agreement on any facts or other issues, the hearing officer presiding over the settlement conference shall issue an order confirming and approving, if necessary, those matters agreed upon. The order is binding on the hearing officer who is assigned to hear the case.~~

Authority G.S. 58-2-40(1); 58-2-50; 58-2-55; 58-2-70; 150B-38(h).

11 NCAC 01 .0425 INTERVENTION

(a) Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall file a timely motion to intervene and shall serve the motion upon all existing parties. Timeliness will be determined by the hearing officer in each case based on circumstances at the time of filing. The motion shall show how the movant's rights, duties, or privileges may be determined or affected by the contested case; shall show how the movant may be directly affected by the outcome or show that the movant's participation is authorized by statute, rule, or court decision; shall set forth the grounds and purposes for which intervention is sought; and shall indicate movant's statutory right to intervene if one exists.

(b) Any party may object to the motion for intervention by filing a written notice of objections with the hearing officer within five days after service of the motion if there is sufficient time before the hearing. The notice of objection shall state the party's reasons for objection and shall be served upon all parties. If there is insufficient time before the hearing for a written objection, the objection may be made at the hearing.

(c) When the hearing officer deems it to be necessary to develop a full record on the question of intervention, he may conduct a hearing on the motion to determine specific standards that will apply to each intervenor and to define the extent of allowed intervention.

(d) The hearing officer ~~shall~~ may allow intervention upon a proper showing under this Rule, unless he finds that the movant's interest is adequately represented by one or more parties participating in the case or unless intervention is mandated by

statute, rule, or court decision. An order allowing intervention shall specify the extent of participation permitted the intervenor and shall state the hearing officer's reason. An intervenor may be allowed to:

(1) File a written brief without acquiring the status of a party;
(2) Intervene as a party with all the rights of a party; or
(3) Intervene as a party with all the rights of a party but limited to specific issues and to the means necessary to present and develop those issues.

Authority G.S. 58-2-40(1); 58-2-50; 58-2-55; 58-2-70; 150B-38(h).

11 NCAC 01 .0427 RIGHTS AND RESPONSIBILITIES OF PARTIES

(a) A party has the right to present evidence, rebuttal testimony, and argument with respect to the issues of law and policy, and to cross-examine witnesses, including the author of a document prepared by, on behalf of, or for use of the Department and offered in evidence.

(b) A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their needs become evident to the requesting party. In cases when the hearing time is expected to exceed one day, the parties shall be prepared to present their evidence at the date and time ordered by the hearing officer or agreed upon at a prehearing conference.

(c) The hearing officer shall send copies of all orders or decisions to all parties simultaneously. Any party sending a letter, exhibit, brief, memorandum, or other document to the hearing officer shall simultaneously send a copy to all other parties.

(d) All parties have the continuing responsibility to notify the hearing officer of their current addresses and telephone numbers.

(e) A party need not be represented by an ~~attorney.~~ attorney unless the party is a corporate entity. A corporate entity shall not be represented by its President or other officers. If a party has notified other parties of that party's representation by an attorney, all communications shall be directed to that attorney.

(f) With the approval of the hearing officer, any person may offer testimony or other evidence relevant to the case. Any nonparty offering testimony or other evidence may be questioned by parties to the case and by the hearing officer.

(g) Before issuing a recommended decision, the hearing officer may order any party to submit proposed findings of fact and written arguments. Before issuing a final decision, the Commissioner may order any party to submit proposed findings of fact and written arguments.

Authority G.S. 58-2-40(1); 58-2-50; 58-2-55; 58-2-70; 150B-38(h).

11 NCAC 01 .0429 EVIDENCE

(a) The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes govern in all contested case proceedings, except as provided otherwise in this Section and G.S. 150B-41.

(b) The hearing officer may admit all evidence that has probative value. Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The hearing officer may, in his discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will require undue consumption of time or create substantial danger of undue prejudice or confusion.

(c) Contemporaneous objections by a party or a party's attorney are ~~not~~ required in the course of a hearing to preserve the right to object to the consideration of evidence by the hearing officer in reaching a decision or by the court upon judicial review.

(d) All evidence to be considered in the case, including all records and documents or true and accurate photocopies thereof, shall be offered and made a part of the record in the case. Except as provided in Paragraph (f) of this Rule, factual information or evidence that is not offered shall not be considered in the determination of the case. Documentary evidence incorporated by reference may be admitted only if the materials so incorporated are available for examination by the parties.

(e) Documentary evidence in the form of copies or excerpts may be received in the discretion of the hearing officer or upon agreement of the parties. Copies of a document shall be received to the same extent as the original document unless a genuine question is raised about the accuracy or authenticity of the copy or, under the circumstances, it would be unfair to admit the copy instead of the original.

(f) The hearing officer may take notice of judicially cognizable facts by entering a statement of the noticed fact and its source into the record. Upon a timely request, any party shall be given the opportunity to contest the facts so noticed through submission of evidence and argument.

(g) A party may call an adverse party; or an officer, director, managing agent, or employee of the State or any local government, of a public or private corporation, or of a partnership or association or body politic that is an adverse party; and may interrogate that party by leading questions and may contradict and impeach that party on material matters in all respects as if that party had been called by the adverse party. The adverse party may be examined by that party's counsel upon the subject matter of that party's examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the testimony.

Authority G.S. 58-2-40(1); 58-2-50; 58-2-55; 58-2-70; 150B-38(h).

* * * * * * * * * * * * * * * * * * * *

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Insurance intends to amend the rules cited as 11 NCAC 11F .0301-.0303, .0306-.0307 and repeal the rules cited as 11 NCAC 11F .0304-.0305, .0308.*

Proposed Effective Date: *August 1, 2004*

Public Hearing:
Date: *May 4, 2004*
Time: *10:00 a.m.*
Location: *Dobbs Building, 3rd Floor Hearing Room, 430 N. Salisbury St., Raleigh, NC*

Reason for Proposed Action: *To comply with changes made in the NAIC Model Laws*

Procedure by which a person can object to the agency on a proposed rule: *The Department of Insurance will accept written objections to the changes in these Rules until the expiration of the comment period on June 14, 2004.*

Written comments may be submitted to: *Ellen K. Sprenkel, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919) 733-4529, fax (919) 733-6495, and email esprenke@ncdoi.net.*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 11 - FINANCIAL EVALUATION DIVISION

SUBCHAPTER 11F – ACTUARIAL

SECTION .0300 - ACTUARIAL OPINION AND MEMORANDUM

11 NCAC 11F .0301 APPLICABILITY AND SCOPE

(a) This Section applies to all life insurance companies and fraternal benefit societies doing business in this State and to all life insurance companies and fraternal benefit societies that are authorized to reinsure life insurance, annuities, or accident and health insurance business in this State. This Section shall be applied in a manner that allows the appointed actuary to utilize his or her professional judgment in performing the asset analysis and developing the actuarial opinion and supporting memoranda, consistent with relevant Actuarial Standards of Practice. However, the Commissioner shall have the authority to specify specific methods of actuarial analysis and actuarial assumptions when these specifications are necessary for an acceptable opinion to be rendered relative to the adequacy of reserves and related items. All cross references to rule numbers are to rules within this Section.

(b) This Section applies to all annual statements filed with the Commissioner after December 31, 2004. ~~December 31, 1994. Except for companies that are exempt under Rule .0304 of this Section, a~~ A statement of opinion on the adequacy of the reserves and related actuarial items based on an asset adequacy analysis in accordance with Rule .0306 of this Section and a supporting memorandum in accordance with Rule .0307 of this Section are required each year. ~~Any company so exempted must file an opinion under Rule .0305 of this Section.~~

~~(c) The Commissioner may require any company otherwise exempt under this Section to submit an opinion and to prepare a supporting memorandum in accordance with Rules .0306 and .0307 of this Section if an asset adequacy analysis for the company is necessary because of the financial condition of the company.~~

Authority G.S. 58-2-40; 58-24-120; 58-58-50(i); 58-58-50(j).

11 NCAC 11F .0302 DEFINITIONS

(a) "Annual statement" means that statement required to be filed each year under G.S. 58-2-165.

(b) "Appointed actuary" means any individual who is appointed or retained in accordance with Rule .0303(c) of this Section to provide the actuarial opinion and supporting memorandum as required by G.S. 58-58-50(i) and this Section.

(c) "Asset adequacy analysis" means an analysis that meets the standards and other requirements referred to in Rule .0303(d) of this Section. ~~Section; and includes cash flow testing, sensitivity testing, or applications of risk theory.~~

(d) "Board" means the Actuarial Standards Board established by the American Academy of Actuaries to develop and promulgate standards of actuarial practice, and its successors.

(e) "Company" means a life insurance company, fraternal benefit society, or reinsurer subject to this Section.

~~(f) "Non-investment grade bonds" are those designated as medium to lower quality by the NAIC Securities Valuation Office.~~

~~(g)~~(f) "Opinion" ~~means:~~ means the statement of actuarial opinion of an appointed actuary regarding the adequacy of the reserves and related actuarial items based on an asset adequacy analysis in accordance with Rule .0306 of this Section and with applicable actuarial standards of practice.

~~(1) For Rules .0306, .0307, or .0308 of this Section, the statement of actuarial opinion of an appointed actuary regarding the adequacy of the reserves and related actuarial items based on an asset adequacy test in accordance with Rule .0306 of this Section and with presently accepted actuarial standards;~~

~~(2) For Rule .0305 of this Section, the statement of actuarial opinion of an appointed actuary~~

~~regarding the calculation of reserves and related items, in accordance with Rule .0305 of this Section and with those presently accepted actuarial standards that specifically relate to this opinion.~~

~~(h)~~(g) "Qualified actuary" means any individual who meets the requirements set forth in Rule .0303(b) of this Section.

Authority G.S. 58-2-40; 58-24-120; 58-58-50(i); 58-58-50(j).

11 NCAC 11F .0303 GENERAL REQUIREMENTS

(a) Submission of Opinion:

(1) There shall be included on or attached to page 1 of the annual statement for each year beginning with calendar year ~~1994,~~ 2004, the statement of an appointed actuary, entitled "Statement of Actuarial Opinion," setting forth an opinion relating to reserves and related actuarial items held in support of policies and contracts, in accordance with Rule .0306 of this Section.~~Section; provided, however, that any company exempted under Rule .0304 of this Section from submitting an opinion in accordance with Rule .0306 of this Section shall include on or attach to page 1 of the annual statement an opinion rendered by an appointed actuary in accordance with Rule .0305 of this Section.~~

~~(2) If in the previous year a company provided an opinion in accordance with Rule .0305 of this Section, and in the current year fails the exemption criteria of Rules .0304(c)(1), .0304(c)(2), or .0305(c)(5) of this Section to again provide an opinion in accordance with Rule .0305 of this Section, the opinion in accordance with Rule .0306 of this Section shall not be required until August 1 following the date of the annual statement. In this instance, the company shall provide an opinion in accordance with Rule .0305 of this Section with appropriate qualification noting the intent to subsequently provide an opinion in accordance with Rule .0306 of this Section.~~

~~(3)~~(2) Upon written request by the company the Commissioner ~~may~~ shall grant a 45-day extension of the date for submission of the opinion. In the written request, the company shall state the reason that such extension is needed.

(b) A "qualified actuary" is an individual who:

(1) Is a member in good standing of the American Academy of Actuaries;

(2) Is qualified to sign opinions for life and health insurance company annual statements in accordance with the American Academy of Actuaries qualification standards for actuaries signing such opinions;

(3) Is familiar with the valuation requirements applicable to life and health insurance companies;

(4) Has not been found by the Commissioner (or if so found has subsequently been reinstated as a qualified actuary), to have:

(A) Violated any provision of, or any obligation imposed by, any law or rule in the course of his or her dealings as a qualified actuary;

(B) Been found by a court of competent jurisdiction to be guilty of a fraudulent or dishonest practice;

(C) ~~Demonstrated his or her incompetency, lack of cooperation, or untrustworthiness to act as a qualified actuary;~~ Failed to comply with the Code of Professional Conduct as published by the Board;

(D) Submitted to the Commissioner during the past five years, under this Section, an opinion or memorandum that the Commissioner rejected because it did not meet the provisions of this Section, including standards set by the Board; or

(E) Resigned or been removed as an actuary within the past five years as a result of acts or omissions indicated in any adverse report on an examination or as a result of failure to adhere to generally acceptable actuarial standards; and

(5) Has not failed to notify the Commissioner of any action taken by any insurance regulator of any other state similar to that under Subparagraph (b)(4) of this Rule.

(c) An "appointed actuary" is a qualified actuary who is appointed or retained to prepare the opinion required by this Section, either directly by or by the authority of the board of directors through an executive officer of the company. The company shall, within 45 days after the date of the appointment, give the Commissioner written notice of the name, title (and, in the case of a consulting actuary, the name of the firm), and manner of appointment or retention of each person appointed or retained by the company as an appointed actuary and shall state in such notice that the person meets the requirements of Paragraph (b) of this Rule. Once notice is furnished, no further notice is required for the actuary, provided that the company gives the Commissioner written notice if the actuary ceases to be appointed or retained as an appointed actuary or no longer meets the requirements of Paragraph (b) of this Rule. If any person appointed or retained as an appointed actuary replaces a previously appointed actuary, the notice shall so state and give the reasons for replacement.

(d) The asset adequacy analysis required by this Section:

(1) Shall conform to the standards of practice as promulgated from time to time by the Board and on any additional standards under this

Section, which standards are to form the basis of the opinion in accordance with Rule .0306 of this Section; and

(2) Shall be based on methods of analysis that are deemed to be consistent with Actuarial Standards of Practice adopted ~~appropriate for such purposes~~ by the Board.

(e) Liabilities to be Covered:

(1) The opinion shall apply to all in force business on the annual statement date regardless of when or where issued, e.g., aggregate reserves for life insurance and annuity policies and contracts, aggregate reserves for accident and health contracts, aggregate reserves for deposit-type contracts, and policy and contract claims liabilities for life and accident and health policies and contracts, ~~reserves of Exhibits 8, 9 and 10, and claim liabilities in Exhibit 11, Part 1~~ and equivalent items in the separate account statement or statements..

(2) If the appointed actuary determines as the result of asset adequacy analysis that a reserve should be held in addition to the aggregate reserve held by the company and calculated in accordance with methods set forth in G.S. 58-58-50(d), 58-58-50(d-1), 58-58-50(g), 58-58-50(h), and 58-58-50(k), the company shall establish such additional reserve.

~~(3) For years ending before December 31, 1996, the company may, in lieu of establishing the full amount of the additional reserve in the annual statement for that year, set up an additional reserve in an amount not less than the following:~~

~~(A) December 31, 1994, the additional reserve divided by three.~~

~~(B) December 31, 1995, two times the additional reserve divided by three.~~

~~(4)~~(3) Additional reserves established under Subparagraph (e)(2) ~~or (e)(3)~~ of this Rule and deemed to be unnecessary in later years may be released. Any amounts released must be disclosed in the opinion for the applicable year. The release of such reserves ~~are~~is not deemed to be an adoption of a lower standard of valuation.

Authority G.S. 58-2-40; 58-58-50(i); 58-58-50(j).

11 NCAC 11F .0304 REQUIRED OPINIONS

~~(a) The opinion submitted under G.S. 58-58-50(i) shall be in accordance with the applicable provisions in this Rule.~~

~~(b) For purposes of this Rule, companies are classified as follows, based on the admitted assets as of the end of the calendar year for which the actuarial opinion is applicable:~~

~~(1) Category A comprises companies whose admitted assets do not exceed twenty million dollars ($20,000,000).~~

~~(2) Category B comprises companies whose admitted assets exceed twenty million dollars ($20,000,000) but do not exceed one hundred million dollars ($100,000,000).~~

~~(3) Category C comprises companies whose admitted assets exceed one hundred million dollars ($100,000,000) but do not exceed five hundred million dollars ($500,000,000).~~

~~(4) Category D comprises companies whose admitted assets exceed five hundred million dollars ($500,000,000).~~

~~(c) Exemption Eligibility Tests:~~

~~(1) Any Category A company that, for any year beginning with calendar year 1994, meets all of the following criteria is eligible for exemption from submission of an opinion in accordance with Rule .0306 of this Section for the year in which these criteria are met. The ratios in Parts (c)(1)(A), (c)(1)(B), and (c)(1)(C) of this Rule shall be calculated based on amounts as of the end of the calendar year for which the opinion is applicable.~~

~~(A) The ratio of the sum of capital and surplus to the sum of cash and invested assets is at least equal to .10.~~

~~(B) The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is less than .30.~~

~~(C) The ratio of the book value of the non-investment grade bonds to the sum of capital and surplus is less than .50.~~

~~(D) The Examiner Team for the NAIC has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the opinion is applicable; or the company has resolved the first or second priority status to the satisfaction of the insurance regulator of the company's state of domicile and that regulator has so notified the chair of the NAIC Life and Health Actuarial Task Force and the NAIC Staff and Support Office.~~

~~(2) Any Category B company that, for any year beginning with calendar year 1994, meets all of the following criteria shall be eligible for exemption from submission of an opinion in accordance with Rule .0306 of this Section for the year in which the criteria are met. The ratios in Parts (c)(2)(A), (c)(2)(B), and (c)(2)(C) of this Rule shall be calculated based~~

on amounts as of the end of the calendar year for which the opinion is applicable.

(A) The ratio of the sum of capital and surplus to the sum of cash and invested assets is at least equal to .07.

(B) The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is less than .40.

(C) The ratio of the book value of the non-investment grade bonds to the sum of capital and surplus is less than .50.

(D) The Examiner Team for the NAIC has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the opinion is applicable; or the company has resolved the first or second priority status to the satisfaction of the insurance regulator of the company's state of domicile and that regulator has so notified the chair of the NAIC Life and Health Actuarial Task Force and the NAIC Staff and Support Office.

(3) Any Category A or Category B company that meets all of the criteria set forth in Subparagraphs (c)(1) and (c)(2) of this Rule, whichever is applicable, is exempt from having to submit an opinion under Rule .0306 of this Section unless the Commissioner specifically indicates to the company that the exemption is not to be taken.

(4) Any Category A or Category B company that, for any year beginning with calendar year 1994, is not exempt under Subparagraph (c)(3) of this Rule shall submit an opinion in accordance with Rule .0306 of this Section for the year for which it is not exempt.

(5) Any Category C company that, after submitting an opinion in accordance with Rule .0306 of this Section, meets all of the following criteria, shall not be required, unless required in accordance with Subparagraph (c)(6) of this Rule, to submit an opinion in accordance with Rule .0306 of this Section more frequently than every third year. Any Category C company that fails to meet all of the following criteria for any year shall submit an opinion in accordance with Rule .0306 of this Section for that year. The ratios in Parts (c)(5)(A), (c)(5)(B), and (c)(5)(C) of this Rule shall be calculated based on amounts as of the end of the calendar year for which the opinion is applicable.

(A) The ratio of the sum of capital and surplus to the sum of cash and invested assets is at least equal to .05.

(B) The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is less than .50.

(C) The ratio of the book value of the non-investment grade bonds to the sum of the capital and surplus is less than .50.

(D) The Examiner Team for the NAIC has not designated the company as a first priority company in either of the two calendar years preceding the calendar year for which the opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the opinion is applicable, or the company has resolved the first or second priority status to the satisfaction of the insurance regulator of the company's state of domicile and that regulator has so notified the chair of the NAIC Life and Health Actuarial Task Force and the NAIC Staff and Support Office.

(6) Any company that is not required by this Rule to submit an opinion in accordance with Rule .0306 of this Section for any year shall submit an opinion in accordance with Rule .0305 of this Section for that year unless, as provided for by Rule .0301 of this Section, the Commissioner requires an opinion in accordance with Rule .0306 of this Section.

(d) Every Category D company shall submit an opinion in accordance with Rule .0306 of this Section for each year, beginning with calendar year 1994.

Authority G.S. 58-2-40; 58-58-50(i); 58-58-50(j).

11 NCAC 11F .0305 OPINION WITHOUT ASSET ADEQUACY ANALYSIS

(a) The opinion required by G.S. 58-58-50(i) shall comprise:

(1) a paragraph identifying the appointed actuary and his or her qualifications.

(2) a regulatory authority paragraph stating that the company is exempt under this Section from submitting an opinion based on an asset adequacy analysis and that the opinion, which is not based on an asset adequacy analysis, is rendered in accordance with this Rule.

(3) a scope paragraph identifying the subjects on which the opinion is to be expressed and describing the scope of the appointed actuary's work.

(4) an opinion paragraph expressing the appointed actuary's opinion as required by G.S. 58-58-50(i).

(b) The following language provided is that which in typical circumstances would be included in an opinion in accordance with this Section. The language may be modified as needed to meet the circumstances of a particular case, but the appointed actuary shall use language that clearly expresses his or her professional judgment. However, in any event the opinion shall retain all pertinent aspects of the language provided in this Rule.

(1) The opening paragraph shall indicate the appointed actuary's relationship to the company.

(A) For a company actuary, the opening paragraph of the actuarial opinion shall read as follows:

"I, [name of actuary], am [title] of [name of company] and a member of the American Academy of Actuaries. I was appointed by, or by the authority of, the Board of Directors of the insurer to render this opinion as stated in the letter to the Commissioner dated [insert date]. I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health companies."

(B) For a consulting actuary, the opening paragraph of the actuarial opinion shall contain a sentence such as:

"I, [name and title of actuary], a member of the American Academy of Actuaries, am associated with the firm of [insert name of consulting firm]. I have been appointed by, or by the authority of, the Board of Directors of [name of company] to render this opinion as stated in the letter to the Commissioner dated [insert date]. I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health insurance companies."

(2) The regulatory authority paragraph shall include a statement such as the following:

"Said company is exempt under Rule [insert designation] of the [name of state] Insurance Department from submitting a statement of actuarial opinion based on an asset adequacy analysis. This opinion, which is not based on an asset adequacy analysis, is rendered in accordance with 11 NCAC 11F .0305.

(3) The scope paragraph shall contain a sentence such as the following:

"I have examined the actuarial assumptions and actuarial methods used in determining reserves and related actuarial items listed below, as shown in the annual statement of the company, as prepared for filing with state regulatory officials, as of December 31, [year]."

The scope paragraph shall list items and amounts with respect to which the appointed actuary is expressing an opinion. The list shall include:

(A) Aggregate reserve and deposit funds for policies and contracts included in Exhibit 8;

(B) Aggregate reserve and deposit funds for policies and contracts included in Exhibit 9;

(C) Deposit funds, premiums, dividend and coupon accumulations and supplementary contracts not involving life contingencies included in Exhibit 10; and

(D) Policy and contract claims liability end of current year included in Exhibit 11, Part I.

(4) If the appointed actuary has examined the underlying records, the scope paragraph shall also include the following:

"My examination included such review of the actuarial assumptions and actuarial methods and of the underlying basic records and such tests of the actuarial calculations as I considered necessary."

(5) If the appointed actuary has not examined the underlying records, but has relied upon listings and summaries of policies in force prepared by the company or a third party, the scope paragraph shall include a sentence such as one of the following:

(A) "I have relied upon listings and summaries of policies and contracts and other liabilities in force prepared by [name and title of company officer certifying in force records] as certified in the attached statement. (See accompanying affidavit by a company officer.) In other respects my examination included review of the actuarial assumptions and actuarial methods and such tests of the actuarial calculations as I considered necessary." or

(B) "I have relied upon [name of accounting firm] for the substantial accuracy of the in force records inventory and information concerning other liabilities, as certified in the attached statement. In other respects my examination included review of the actuarial assumptions and actuarial methods and such tests of the actuarial calculations as I considered necessary."

The statement of the person certifying shall follow the form indicated by Subparagraph (b)(10) of this Rule.

(6) The opinion paragraph shall include the following:

"In my opinion the amounts carried in the balance sheet on account of the actuarial items identified above:

1. Are computed in accordance with those presently accepted actuarial standards that specifically relate to the opinion required under this Section;

2. Are based on actuarial assumptions that produce reserves at least as great as those called for in

any contract provision as to reserve basis and method, and are in accordance with all other contract provisions;

3. Meet the requirements of the Insurance Law and regulations of the state of [state of domicile] and are at least as great as the minimum aggregate amounts required by the state in which this statement is filed.

4. Are computed on the basis of assumptions consistent with those used in computing the corresponding items in the annual statement of the preceding year-end with any exceptions as noted below; and

5. Include provision for all actuarial reserves and related statement items that ought to be established.

The actuarial methods, considerations and analyses used in forming my opinion conform to the appropriate compliance guidelines as promulgated by the Actuarial Standards Board, which guidelines form the basis of this statement of opinion."

(7) The concluding paragraph shall document the eligibility for the company to provide an opinion as provided by this Rule. It shall include the following:

"This opinion is provided in accordance with 11 NCAC 11F .0305. As such it does not include an opinion regarding the adequacy of reserves and related actuarial items when considered in light of the assets that support them. Eligibility of 11 NCAC 11F .0305 is confirmed as follows:

1. The ratio of the sum of capital and surplus to the sum of cash and invested assets is [amount], which equals or exceeds the applicable criteria based on the admitted assets of the company (11 NCAC 11F .0304(c)).

2. The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is [amount], which is less than the applicable criteria based on the admitted assets of the company (11 NCAC 11F .0304(c)).

3. The ratio of the book value of the non-investment grade bonds to the sum of capital and surplus is [amount], which is less than the applicable criteria of .50.

4. To my knowledge, no NAIC Examiner Team has designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the actuarial opinion is applicable or the company has resolved the first or second priority status to the satisfaction of the insurance regulator of the state of the company's domicile.

5. To my knowledge there is not a specific request from any insurance regulator requiring an asset adequacy analysis opinion.

_____

Signature of Appointed Actuary

_____

Address of Appointed Actuary

_____

Telephone Number of Appointed Actuary"

(8) If there has been any change in the actuarial assumptions from those previously employed, that change shall be described in the annual statement or in a paragraph of the opinion, and the reference in Part (b)(6)(D) of this Rule to consistency should read as follows:

" ... with the exception of the change described on Page [number] of the annual statement (or in the preceding paragraph)."

The adoption for new issues or new claims or other new liabilities of an actuarial assumption that differs from a corresponding assumption used for prior new issues or new claims or other new liabilities is not a change in actuarial assumptions within the meaning of this Paragraph.

(9) If the appointed actuary is unable to form an opinion, he or she shall refuse to issue an opinion. If the appointed actuary's opinion is adverse or qualified, he or she shall issue an adverse or qualified actuarial opinion explicitly stating the reason or reasons for such opinion. This statement shall follow the scope paragraph and precede the opinion paragraph.

(10) If the appointed actuary does not express an opinion as to the accuracy and completeness of the listings and summaries of policies in force, there shall be attached to the opinion the statement of a company officer or accounting firm who prepared such underlying data similar to the following:

"I [name of officer], [title] of [name and address of company or accounting firm], hereby affirm that the listings and summaries of policies and contracts in force as of December 31, [year], prepared for and submitted to [name of appointed actuary], were prepared under my direction and, to the best of my knowledge and belief, are substantially accurate and complete.

_____

Signature of the Officer of the Company or Accounting Firm

_____

Address of the Officer of the Company or Accounting Firm

_____

Telephone Number of the Officer of the Company or Accounting Firm"

Authority G.S. 58-2-40; 58-58-50(i); 58-58-50(j).

11 NCAC 11F .0306 OPINION BASED ON ASSET ADEQUACY ANALYSIS

(a) The opinion submitted in accordance with this Rule shall comprise:

(1) A paragraph identifying the appointed actuary and his or her qualifications as prescribed by Subparagraph (b)(1) of this Rule;

(2) A scope paragraph identifying the subjects on which an opinion is to be expressed and describing the scope of the appointed actuary's work, including a tabulation delineating the reserves and related actuarial items that have been analyzed for asset adequacy and the method of analysis, as prescribed by Subparagraph (b)(2) of this Rule and identifying the reserves and related actuarial items covered by the opinion that have not been so analyzed;

(3) A reliance paragraph describing those areas, if any, where the appointed actuary has deferred to other experts in developing data, procedures or assumptions, (~~e.g.,~~for example, anticipated cash flows from currently owned assets, including variation in cash flows according to economic scenarios as prescribed by Subparagraph (b)(3) of this ~~Rule,~~ Rule), supported by a statement of each such expert in the form prescribed by Paragraph (e) of this Rule; and

(4) An opinion paragraph expressing the appointed actuary's opinion with respect to the adequacy of the supporting assets to mature the liabilities as prescribed by Subparagraph (b)(6) of this Rule;

(5) One or more additional paragraphs shall be needed in individual company cases if the appointed actuary:

(A) Considers it necessary to state a qualification of his or her opinion;

~~(B) Must disclose the method of aggregation for reserves of different products or lines of business for asset adequacy analysis;~~

~~(C) Must disclose reliance upon any portion of the assets supporting the Asset Valuation Reserve (AVR), Interest Maintenance Reserve (IMR) or other mandatory or voluntary statement of reserves for asset adequacy analysis.~~

~~(D)~~(B) Must disclose an inconsistency in the method of analysis or basis of asset allocation used at the prior opinion date with that used for this opinion.

~~(E)~~(C) Must disclose whether additional reserves of the prior opinion date are released as of this opinion date, and the extent of the release.

~~(F)~~(D) Chooses to add a paragraph briefly describing the assumptions that form the basis for the actuarial opinion.

(b) The following paragraphs are to be included in the opinion in accordance with this Rule. ~~Language is that which in typical circumstances shall be included in an opinion. The language may be modified as needed to meet the circumstances of a particular case, but the~~ The appointed actuary shall use language that clearly expresses his or her own professional judgement. ~~However, in any event the~~ The opinion shall retain all pertinent aspects of the language provided in this Section.

(1) The opening paragraph shall ~~generally~~ indicate the appointed actuary's relationship to the company and his or her qualifications to sign the opinion.

(A) For a company actuary, the opening paragraph of the actuarial opinion shall read as follows:

"I [name], am [title] of [insurance company name] and a member of the American Academy of Actuaries. I was appointed by, or by the authority of, the Board of Directors of the insurer to render this opinion as stated in the letter to the commissioner dated [insert date]. I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health insurance companies."

(B) For a consulting actuary, the opening paragraph shall contain a sentence substantially similar to the following:~~such as:~~

"I, [name], a member of the American Academy of Actuaries, am associated with the firm of [name of consulting firm]. I have been appointed by, or by the authority of, the Board of Directors of [name of company] to render this opinion as stated in the letter to the Commissioner dated [insert date]. I meet the Academy qualification standards for rendering the opinion and am familiar with the valuation requirements applicable to life and health insurance companies."

(2) The scope paragraph shall include a statement ~~such as~~ substantially similar to the following:

"I have examined the actuarial assumptions and actuarial methods used in determining reserves and related actuarial items listed below, as shown in the annual statement of the company, as prepared for filing with state regulatory officials, as of December 31, [year]. Tabulated below are those reserves and related actuarial items that have been subjected to asset adequacy analysis.

(Include reserves and related actuarial items that correspond to the Asset Adequacy Tested Amounts ~~Reserve and Liability~~ Reserves and Liabilities

Table listed in the NAIC Model Regulation titled, "Actuarial Opinion and Memorandum Regulation," and any subsequent amendments and editions. A copy of the Table may be obtained from the North Carolina Department of Insurance at a cost prescribed in G.S. 58-6-5(3)).

(3) If the appointed actuary has relied on other experts to develop certain portions of the analysis, the reliance paragraph shall include a statement ~~such as~~ substantially similar to one of the following:

(A) "I have relied on [name], [title] for [e.g., anticipated cash flows from currently owned assets, including variations in cash flows according to economic scenarios] ~~and,~~ as certified in the attached ~~statement,~~statement. I have reviewed the information relied upon for reasonableness. ...", or

(B) "I have relied on personnel as cited in the supporting memorandum for certain critical aspects of the analysis in reference to the accompanying statement. I have reviewed the information relied upon for reasonableness."

Such a statement of reliance on other experts shall be accompanied by a statement by each of such experts of the form prescribed by Paragraph (e) of this Rule.

(4) If the appointed actuary has examined the underlying asset and liability records, the reliance paragraph shall also include the following:

"My examination included such review of the actuarial assumptions and actuarial methods and of the underlying basic asset and liability records and such tests of the actuarial calculations as I considered necessary. I also reconciled the underlying basic asset and liability records to [exhibits and schedules listed as applicable] of the company's current annual statement."

(5) If the appointed actuary has not examined the underlying records, but has relied upon data (e.g., listings and summaries of policies in force or asset ~~records~~ records) prepared by the company or a third party, the reliance paragraph shall include a ~~sentence~~ statement substantially similar to~~such as one of~~ the following:

~~(A)~~ "In forming my opinion on [specify types of reserves] I ~~"I have~~ relied upon data ~~listings and summaries [of policies and contracts, of asset records]~~ prepared by [name and title of company officer certifying in-force records or other data] as certified in the attached statement. I evaluated that data for reasonableness and consistency. I also reconciled that data to [exhibits and schedules to be listed as applicable] of the company's current annual statement. In other respects my examination included such review of the actuarial assumptions and actuarial methods used and such tests of the actuarial calculations as I considered necessary."~~necessary.", or~~

~~(B) "I have relied upon [name of accounting firm] for the substantial accuracy of the in-force records inventory and information concerning other liabilities, as certified in the attached statement. In other respects my examination included review of the actuarial assumptions and actuarial methods and tests of the actuarial calculations as I considered necessary."~~

Such a sentence must be accompanied by a statement by each person relied upon of the form prescribed by Paragraph (e) of this Rule.

(6) The opinion paragraph of an unqualified opinion shall include the following:

(A) "In my opinion the reserves and related actuarial values concerning the statement items identified above:

1. Are computed in accordance with presently accepted actuarial standards consistently applied and are fairly stated, in accordance with sound actuarial principles;

2. Are based on actuarial assumptions that produce reserves at least as great as those called for in any contract provision as to reserve basis and method, and are in accordance with all other contract provisions;

3. Meet the requirements of the insurance laws and rules of the state of [state of domicile] and are at least as great as the minimum aggregate amounts required by the state in which this statement is filed;

4. Are computed on the basis of assumptions consistent with those used in computing the

corresponding items in the annual statement of the preceding year-end (with any exceptions noted below); and

5. Include provision for all actuarial reserves and related statement items that ought to be established.

The reserves and related items, when considered in light of the assets held by the company with respect to such reserves and related actuarial items including, but not limited to, the investments earnings on such assets, and the considerations anticipated to be received and retained under such policies and contracts, make adequate provision, according to presently accepted actuarial standards of practice, for the anticipated cash flows required by the contractual obligations and related expenses of the company.

The actuarial methods, considerations and analyses used in forming my opinion conform to the appropriate Standards of Practice as promulgated by the Actuarial Standards Board, which standards form the basis of this statement of opinion.

(B) Select one of the following two paragraphs:

(i) This opinion is updated annually as required by law. To the best of my knowledge, there have been no material changes from the applicable date of the annual statement to the date of the rendering of this opinion that should be considered in reviewing this opinion. or

(ii) The following material change(s) that occurred between the date of the statement for which this opinion is applicable and the date of this opinion should be considered in reviewing this opinion. (Describe the change or changes.)

The effect of unanticipated events after the date of this opinion is beyond the scope of this opinion. The analysis of asset adequacy portion of this opinion should be viewed recognizing that the company's future experience may not follow all the assumptions used in the analysis.

_____

Signature of Appointed Actuary

_____

Address of Appointed Actuary

_____

Telephone Number of Appointed ~~Actuary"~~ Actuary

_____

Date"

(c) The adoption for new issues or new claims or other new liabilities of an actuarial assumption that differs from a corresponding assumption used for prior new issues or new claims or other new liabilities is not a change in actuarial assumptions within the meaning of this Rule.

(d) If the appointed actuary is unable to form an opinion, then he or she shall refuse to issue an opinion. If the appointed actuary's opinion is adverse or qualified, then he or she shall issue an adverse or qualified opinion explicitly stating the reason or reasons for such opinion. This statement shall follow the scope paragraph and precede the opinion paragraph. If the appointed actuary's opinion is adverse or qualified, the appointed actuary shall modify the language prescribed in Rule .0306(b)(6) of this Section as made necessary by the reason or reasons for the qualified opinion, and shall label the opinion paragraph with the words "Qualified Opinion."

(e) If the appointed actuary relies on the certification of others on matters concerning the accuracy or completeness of any data underlying the opinion, or the appropriateness of any other information used by the appointed actuary in forming the opinion, the opinion should so indicate the persons the actuary is relying upon and a precise identification of the items subject to reliance. In addition, the persons on whom the appointed actuary relies shall provide a certification that precisely identifies the items on which the person is providing information and a statement as to the accuracy, completeness or reasonableness, as applicable, of the items. This certification shall include the signature, title, company, address, and telephone number of the person rendering the certification, as well as the date on which it is signed. ~~does not express an opinion as to the accuracy and completeness of the listings and summaries of policies in force or asset oriented information, there shall be attached to the opinion the statement of a company officer or accounting firm officer who prepared such underlying data similar to the following:~~

~~"I [name of officer], [title], of [name of company or accounting firm], hereby affirm that the listings and summaries of policies and contracts in force as of December 31, [year], and other liabilities prepared for and submitted to [name of appointed actuary] were prepared under my direction and, to the best of my knowledge and belief, are substantially accurate and complete.~~

_____

~~Signature of the officer of the Company or Accounting Firm~~

~~Address of the Officer of the Company or Accounting Firm~~

~~Telephone Number of the officer of the Company or Accounting Firm"~~

~~or~~

~~"I, [name of officer], [title] of [name of company, accounting firm, or security analyst], hereby affirm that the listings, summaries and analyses relating to data prepared for and submitted to [name of appointed actuary] in support of the asset-oriented aspects of the opinion were prepared under my direction and, to the best of my knowledge and belief, are substantially accurate and complete.~~

~~Signature of the Officer of the Company, Accounting Firm or the Security Analyst~~

~~Address of the Officer of the Company, Accounting Firm or the Security Analyst~~

~~Telephone Number of the Officer of the Company, Accounting Firm or the Security Analyst"~~

Authority G.S. 58-2-40; 58-58-50(i); 58-58-50(j).

11 NCAC 11F .0307 ACTUARIAL MEMORANDUM WITH ASSET ADEQUACY ANALYSIS

(a) General:

(1) In accordance with G.S. 58-58-50(i) and (j), the appointed actuary shall prepare a memorandum to the company describing the analysis done in support of his or her opinion regarding the reserves under an opinion prescribed by Rule .0306 of this Section. The memorandum shall be made available for examination by the Commissioner upon request and shall be returned to the company after the examination and shall not be subject to automatic filing with the Commissioner.

(2) In preparing the memorandum, the appointed actuary may rely on, and include as a part of his or her own memorandum, memoranda prepared and signed by other actuaries who are qualified within the meaning of Rule .0303(b) of this Section, with respect to the areas covered in such memoranda, and so state in their memoranda.

(3) If the Commissioner requests a memorandum and no such memorandum exists or if the Commissioner finds that the analysis described in the memorandum fails to meet the standards of the Board or the standards and requirements of this Section, the Commissioner shall ~~may~~ designate a qualified actuary to review the opinion and prepare such supporting memorandum as is required for review. The reasonable and necessary expense of the independent review shall be paid by the company but shall be directed and controlled by the Commissioner.

(4) The reviewing actuary shall have the same status as an examiner for purposes of obtaining data from the company and the work papers and documentation of the reviewing actuary shall be retained by the Commissioner; provided, however, that any information provided by the company to the reviewing actuary and included in the work papers shall be considered as material provided by the company to the Commissioner and shall be kept confidential to the same extent as is prescribed by law with respect to other material provided by the company to the Commissioner under G.S. 58-58-50(j). The reviewing actuary shall not be an employee of a consulting firm involved with the preparation of any prior memorandum or opinion for the company under this Section for any one of the current year or the preceding three years.

(5) In accordance with G.S. 58-58-50(j), the appointed actuary shall prepare a regulatory asset adequacy issues summary, the contents of which are specified in Paragraph (c) of this Rule. The regulatory asset adequacy issues summary will be submitted no later than March 15 of the year following the year for which a statement of actuarial opinion based on asset adequacy is required. The regulatory asset adequacy issues summary is to be kept confidential to the same extent and under the same conditions as the actuarial memorandum.

(b) When an actuarial opinion under Rule .0306 of this Section is provided, the memorandum shall demonstrate that the analysis has been done in accordance with the standards for asset adequacy referred to in Rule .0303(d) of this Section and any additional standards under this Section. It shall specify:

(1) For reserves:

(A) Product descriptions, including market description, underwriting, and other aspects of a risk profile, and the specific risks the appointed actuary deems to be significant;

(B) Source of liability in force;

(C) Reserve method and basis;

(D) Investment reserves;

(E) Reinsurance ~~arrangements.~~

arrangements;

(F) Identification of any explicit or implied guarantees made by the general account in support of benefits provided through a separate account or under a separate account policy or contract and the methods used by the appointed actuary to provide for the guarantees in the asset adequacy analysis;

(G) Documentation of assumptions to test reserves for the following:

(i) Lapse rates (both base and excess);

(ii) Interest crediting rate strategy;

(iii) Mortality;

(iv) Policyholder dividend strategy;

(v) Competitor or market interest rate;

(vi) Annuitization rates;

(vii) Commissions and expenses; and

(viii) Morbidity.

The documentation of assumptions shall be such that an actuary reviewing the actuarial memorandum could form a conclusion as to the reasonableness of the assumptions.

(2) For assets:

(A) Portfolio descriptions, including a risk profile disclosing the quality, distribution, and types of assets;

(B) Investment and disinvestment assumptions;

(C) Source of asset data;

(D) Asset valuation ~~bases.~~ bases; and

(E) Documentation of assumptions made for:

(i) Default costs;

(ii) Bond call function;

(iii) Mortgage prepayment function;

(iv) Determining market value for assets sold due to disinvestment strategy; and

(v) Determining yield on assets acquired through the investment strategy.

The documentation of the assumptions shall be such that an actuary reviewing the actuarial memorandum could form a conclusion as to the reasonableness of the assumptions.

(3) ~~Analysis~~ For the analysis basis:

(A) Methodology;

(B) Rationale for inclusion or exclusion of different blocks of business and how pertinent risks were analyzed;

(C) Rationale for degree of rigor in analyzing different blocks of business (include in the rationale the level of "materiality" that was used in determining how rigorously to analyze different blocks of business);

(D) Criteria for determining asset adequacy (include in the criteria the precise basis for determining if assets are adequate to cover reserves under "moderately adverse conditions" or other conditions as specified in relevant actuarial standards of practice); and

(E) Effect of federal income taxes, reinsurance, and other actuarially or financially relevant factors.

(4) Summary of ~~results~~ any changes in methods, procedures, or assumptions from the prior year's asset adequacy analysis which the appointed actuary considers to be material.

(5) ~~Conclusion(s).~~ Summary of results; and

(6) Conclusions.

(c) The regulatory asset adequacy issues summary shall include:

(1) Descriptions of the scenarios tested (including whether those scenarios are stochastic or deterministic) and the sensitivity testing done relative to those scenarios. If negative ending surplus results under any tests in the aggregate, the actuary should describe those tests and the amount of additional reserve as of the valuation date that, if held, would eliminate the negative aggregate surplus values. Ending surplus values shall be determined by either extending the projection period until the in force and associated assets and liabilities at the end of the projection period are considered by the appointed actuary to be immaterial or by adjusting the surplus amount at the end of the projection period by an amount that appropriately estimates the value that can reasonably be expected to arise from the assets and liabilities remaining in force.

(2) The extent to which the appointed actuary uses assumptions in the asset adequacy analysis that are considered by the appointed actuary to be materially different than the assumptions used in the previous asset adequacy analysis;

(3) The amount of reserves and the identity of the product lines that had been subjected to asset adequacy analysis in the prior opinion but were not subject to analysis for the current opinion;

(4) Comments on any interim results that may be of significant concern to the appointed actuary;

(5) The methods used by the actuary to recognize the impact of reinsurance on the company's cash flows, including both assets and liabilities, under each of the scenarios tested; and

(6) Whether the actuary has been satisfied that all options whether explicit or embedded, in any asset or liability (including those affecting cash flows embedded in fixed income securities) and equity-like features in any investments have been appropriately considered in the asset adequacy analysis.

(d) The regulatory asset adequacy issues summary shall contain the name of the company for which the regulatory asset adequacy issues summary is being supplied, and shall be signed and dated by the appointed actuary rendering the actuarial opinion.

~~(c)~~(e) The memorandum shall include a statement:

"Actuarial methods, considerations and analyses used in the preparation of this memorandum conform to the appropriate Standards of Practice as promulgated by the Actuarial Standards Board, which standards form the basis for this memorandum."

(f) An appropriate allocation of assets in the amount of the interest maintenance reserve (IMR), whether positive or negative, shall be used in any asset adequacy analysis. Analysis of risks regarding asset default may include an appropriate allocation of assets supporting the asset valuation reserve (AVR); these AVR assets may not be applied for any other risks with respect to reserve adequacy. Analysis of these and other risks may include assets supporting other mandatory or voluntary reserves available to the extent not used for risk analysis and reserve support. The amount of the assets used for the AVR shall be disclosed in the table of reserves and liabilities of the opinion and in the memorandum. The method used for selecting particular assets or allocated portions of assets shall be disclosed in the memorandum.

(g) The appointed actuary shall retain on file, for at least seven years, all documentation necessary to determine the procedures followed, the analyses performed, the bases for the assumptions, and the results obtained.

Authority G.S. 58-2-40; 58-58-50(i); 58-58-50(j).

11 NCAC 11F .0308 ADDITIONAL CONSIDERATIONS FOR ANALYSIS

~~(a) For the asset adequacy analysis for the opinion provided in accordance with Rule .0306 of this Section, reserves and assets may be aggregated by either of the following methods:~~

~~(1) Aggregate the reserves and related actuarial items and the supporting assets for different products or lines of business before analyzing the adequacy of the combined assets to mature the combined liabilities. The appointed actuary must be satisfied that the assets held in support of the reserves and related actuarial items so aggregated are managed in such a manner that the cash flows from the aggregated assets are available to help mature the liabilities from the blocks of business that have been aggregated.~~

~~(2) Aggregate the results of asset adequacy analysis of one or more products or lines of business, the reserves for which prove through analysis to be redundant, with the results of one or more products or lines of business, the reserves for which prove through analysis to be deficient. The appointed actuary must be satisfied that the asset adequacy results for the various products or lines of business for which the results are so aggregated:~~

~~(A) Are developed using consistent economic scenarios, or~~

~~(B) Are subject to mutually independent risks, i.e., the likelihood of events affecting the adequacy of the assets supporting the redundant reserves is completely unrelated to the likelihood of events affecting the adequacy of the assets supporting the deficient reserves.~~

~~In the event of any aggregation, the actuary must disclose in his or her opinion that such reserves were aggregated on the basis of the methods described in Subparagraphs (a)(1), (a)(2)(A), or (a)(2)(B) of this Rule, whichever is applicable, and describe the aggregation in the supporting memorandum.~~

~~(b) The appointed actuary shall analyze only those assets held in support of the reserves that are the subject for specific analysis, hereinafter called "specified reserves." A particular asset or portion thereof supporting a group of specified reserves cannot support any other group of specified reserves. An asset may be allocated over several groups of specified reserves. The annual statement value of the assets held in support of the reserves shall not exceed the annual statement value of the specified reserves, except as provided in Paragraph (c) of this Rule. If the method of asset allocation is not consistent from year to year, the extent of its inconsistency shall be described in the supporting memorandum.~~

~~(c) An appropriate allocation of assets in the amount of the Interest Maintenance Reserve (IMR), whether positive or negative, shall be used in any asset adequacy analysis. Analysis of risks regarding asset default may include an appropriate allocation of assets supporting the Asset Valuation Reserve (AVR); these AVR assets may not be applied for any other risks with respect to reserve adequacy. Analysis of these and other risks may include assets supporting other mandatory or voluntary reserves available to the extent not used for risk analysis and reserve support.~~

~~The amount of the assets used for the AVR must be disclosed in the Table of Reserves and Liabilities of the opinion in the memorandum. The method used for selecting particular assets or allocated portions of assets must be disclosed in the memorandum.~~

~~(d) For the purpose of performing the asset adequacy analysis required by this Section, the qualified actuary shall follow standards adopted by the Board; provided, however, that the~~

~~appointed actuary must consider in the analysis the effect of at least the following interest rate scenarios:~~

~~(1) Level with no deviation;~~
~~(2) Uniformly increasing over 10 years at one-half of one percent per year and then level;~~
~~(3) Uniformly increasing at one percent per year over five years and then uniformly decreasing at one percent per year to the original level at the end of 10 years and then level;~~
~~(4) An immediate increase of three percent and then level;~~
~~(5) Uniformly decreasing over 10 years at one-half of one percent per year and then level;~~
~~(6) Uniformly decreasing at one percent per year over five years and then uniformly increasing at one percent per year to the original level at the end of 10 years and then level; and~~
~~(7) An immediate decrease of three percent and then level.~~

~~For these and other scenarios that may be used, projected interest rates for a five-year U.S. Treasury Note need not be reduced beyond the point where the five-year U.S. Treasury Note yield would be at 50 percent of its initial level.~~

~~The beginning interest rates may be based on interest rates for new investments as of the valuation date similar to recent investments allocated to support the product being tested or be based on an outside index, such as U.S. Treasury yields, of assets of the appropriate length on a date close to the valuation date. Whichever method is used to determine the beginning yield curve and associated interest rates shall be specifically defined. The beginning yield curve and associated interest rates shall be consistent for all interest rate scenarios.~~

~~(e) The appointed actuary shall retain on file, for at least seven years, sufficient documentation so that it will be possible to determine the procedures followed, the analyses performed, the bases for assumptions and the results obtained.~~

Authority G.S. 58-2-40; 58-58-50(i); 58-58-50(j).

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Insurance intends to amend the rule cited as 11 NCAC 12 .0447.*

Proposed Effective Date: *August 1, 2004*

Public Hearing:
Date: *May 4, 2004*
Time: *10:00 a.m.*
Location: *Dobbs Building, 3rd Floor Hearing Room, 430 N. Salisbury St., Raleigh, NC*

Reason for Proposed Action: *The amendment to this Rule is needed to be in compliance with the NAIC Model Laws.*

Procedure by which a person can object to the agency on a proposed rule: *The Department of Insurance will accept written objections to the amendment of this Rule until the expiration of the comment period on June 14, 2004.*

Written comments may be submitted to: *Ellen K. Sprenkel, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919) 733-4529, fax (919) 733-6495, and email esprenke@ncdoi.net.*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 12 - LIFE AND HEALTH DIVISION

SECTION .0400 - LIFE: GENERAL NATURE

11 NCAC 12 .0447 FREE LOOK PROVISION

(a) An insurer, prior to the time that any individual life insurance or annuity policy is issued for delivery or delivered, shall ensure that a "Ten Day Free Look" provision is displayed by sticker or printed on the face of each life insurance or annuity policy.~~policy, containing the following as appropriate:~~

~~(1) if there is replacement of existing life insurance by an insurer not utilizing an agent in the sale or delivery of its policies, a "Thirty Day Free Look" provision;~~
~~(2) in all other cases, except in replacements regulated by 11 NCAC 12 .0607(4), a "Ten Day Free Look".~~

(b) The free look provision required by this Rule shall afford the policyholder a period of time, following receipt of the policy, during which the policy may be returned to the company for a prompt refund of the premium paid. This ~~Paragraph~~ Rule also applies to any group life insurance or annuity policy or certificate that contains a free look provision.

Authority G.S. 58-2-40; 58-58-1.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the DENR/Environmental Health intends to amend the rules cited as 15A NCAC 01N .0201, .0606, .0701 and repeal the rule cited as 15A NCAC 01N .0304.*

Proposed Effective Date: *August 1, 2004*

Public Hearing:
Date: *May 5, 2004*
Time: *2:00 p.m.*
Location: *Parker Lincoln Building, Room 1a201, 2728 Capital Blvd., Raleigh, NC*

Reason for Proposed Action:
15A NCAC 01N .0201 – *This rule is being modified by the addition of Paragraph (b) to describe the process whereby proposed projects may be added to the IUP/CPPL to address unanticipated emergency situations in accordance with the federal guidelines and rules including advertising and holding a public hearing/meeting related to such projects.*
15A NCAC 01N .0304, .0701 – *These rules setting forth funding ceilings are being revised to allow easier funding of larger projects while maintaining emphasis on priority rating including public health.*
15A NCAC 01N .0606 – *This rule is being modified to further encourage source protection and water conservation.*

Procedure by which a person can object to the agency on a proposed rule: *If you have any objections to the proposed rules please forward a typed or handwritten letter indicating your specific reasons for your objections to the following address: Sid Harrell, 1634 Mail Service Center, Raleigh, NC 27699-1634.*

Written comments may be submitted to: *Sid Harrell, 1634 Mail Service Center, Raleigh, NC 27699-1634, phone (919) 715-3216, fax (919) 715-4374, and email sid.harrell@ncmail.net.*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 1 - DEPARTMENTAL RULES

SUBCHAPTER 01N - DRINKING WATER TREATMENT FUND RULES

SECTION .0200 - AVAILABILITY OF LOANS

15A NCAC 01N .0201 AVAILABILITY OF LOANS
(a) Loans are available only for projects that appear on the state approved intended use plan submitted to the U.S. Environmental Protection Agency and that are in compliance with the requirements of this Subchapter.
(b) An intended use plan may be amended at any time to add projects addressing an emergency situation and submitted to the U.S. Environmental Protection Agency for approval. All sections of these Rules shall be applicable to such projects. Such projects would include those where some type of failure was unanticipated and requires immediate attention to protect public health.
~~(b)~~(c) During any fiscal year 15 percent of the annual allocation shall be available solely for providing assistance to public water systems which regularly serve fewer than 10,000 persons to the extent such funds can be obligated for eligible projects.
~~(c)~~(d) During any fiscal year a maximum of five percent of the annual allocation may be used for loans for project planning purposes only.

Authority G.S. 159G-5; 159G-15.

SECTION .0300 - ELIGIBILITY REQUIREMENTS

15A NCAC 01N .0304 MAXIMUM LOAN AMOUNT
~~The maximum principal amount of loan commitment from any fiscal year's allocation made to an applicant shall be three million dollars ($3,000,000.00), except that the maximum amount of loan commitment from any fiscal year's allocation for a project planning purposes only loan shall be twenty-five thousand dollars ($25,000).~~

Authority G.S. 159G-5; 159G-15.

SECTION .0600 - PRIORITY CRITERIA

15A NCAC 01N .0606 SOURCE PROTECTION AND MANAGEMENT
The maximum value to be given for source protection and management categorical elements is ~~10~~ 15 points. Points shall only be awarded for existing activities or programs that efficiently protect the public health, as follows:

(1) Participation in source water protection activities; points may be awarded in Sub-Items (a) and (b) of this Item up to the maximum, as follows:
(a) Voluntary water supply watershed protection activities, five points, or
(b) Voluntary wellhead protection ~~program,~~ program approved by the Division, five points.

(2) Efficient water use, as shown by the applicant's establishment and administration of the described programs; points may be awarded in Sub-Items (a), (b), and (c) of this Item up to the maximum, as follows:
(a) Water loss reduction program which includes water audits, comprehensive metering, and hidden leak detection, three points;
(b) Cross-connection control program, three points;
(c) Demand management strategies, such as a water conservation incentive rate structure, incentives for new or replacement installation of low flow faucets, showerheads and toilets, or a water reclamation or reuse system, three ~~points.~~points per strategy;
(d) Adoption of a Water Conservation Plan developed in accordance with the 1998 EPA Guidelines and approved by the Division, three points.

Authority G.S. 159G-5; 159G-15.

SECTION .0700 - AWARD, COMMITMENT AND DISBURSEMENT OF LOANS

15A NCAC 01N .0701 DETERMINATION OF AWARDS AND BYPASS PROCEDURES

(a) All funds appropriated for a fiscal year and all other funds accruing from loan principal repayments, interest payments, interest earned on funds, excess funds not awarded in the previous priority review period, and any other source shall be available for loans during the priority review period.

~~(b) Of the funds available at the beginning of a priority review period, five percent will shall be set aside for potential adjustments under Rule .0703 of this Section. Any funds set aside for this purpose that are not used to adjust loans during a priority review period will shall return to the account for the next priority review period.~~

~~(c)~~(b) The funds available in a priority review period shall be awarded in the form of a binding commitment in descending order of priority rating upon EPA approval of that IUP considering Section .0201(b) of this Subchapter ~~except for~~ to those eligible projects that are ~~not~~ ready to proceed. A project ~~shall be funded unless at the time of binding agreement:~~ is defined as ready to proceed when the following conditions have been met:

(1) Project plans and specifications are ~~not~~ approved by the Division; ~~receiving agency;~~
(2) Any environmental review ~~assessment or impact statement~~ required is complete; ~~not complete and approved;~~
(3) One hundred percent funding necessary for the project is committed; and ~~not commited or~~
(4) Authorization To Construct is issued by the Division.~~The receiving agency is unable to determine from review of the business plan and other information whether the applicant has the technical, managerial, and financial capacity to ensure compliance with the Act.~~

(c) Except as provided in Paragraph (d) of this Rule, the maximum principal amount of loan commitment from any fiscal year's allocation made to an applicant shall be three million dollars ($3,000,000.00), except that the maximum amount of loan commitment from any fiscal year's allocation for a project planning purposes only loan shall be twenty-five thousand dollars ($25,000.00).

(d) Any funds remaining after the initial allocation of Paragraphs (b) and (c) of this Rule shall be awarded in descending order of priority rating to those eligible projects in any approved IUP that are ready to proceed subject to the limitation of Paragraph (c) of this Rule for each "pass" through the remaining available funding.

Authority G.S. 159G-5; 159G-15.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 46 – BOARD OF PHARMACY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Pharmacy intends to amend the rule cited as 21 NCAC 46 .2201.*

Proposed Effective Date: *August 1, 2004*

Public Hearing:
Date: *May 17, 2004*
Time: *12:00 noon*
Location: *North Carolina Board of Pharmacy Office, 6015 Farrington Rd., Suite 201, Chapel Hill, NC*

Reason for Proposed Action: *To ensure that pharmacists who have been on inactive status are competent to return to practice.*

Procedure by which a person can object to the agency on a proposed rule: *Persons may submit objections regarding the proposed amendment to David K. Work, North Carolina Board of Pharmacy, 6015 Farrington Rd., Suite 201, Chapel Hill, NC 27517.*

Written comments may be submitted to: *David K. Work, North Carolina Board of Pharmacy, 6015 Farrington Rd., Suite 201, Chapel Hill, NC 27517*

Comment period ends: *June 14, 2004*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

SECTION .2200 – CONTINUING EDUCATION

21 NCAC 46 .2201 HOURS: RECORDS: PROVIDERS: CORRESPONDENCE: RECIPROCITY

(a) As a condition of license renewal, each practicing pharmacist holding an active license shall report on renewal forms the hours of continuing education obtained during the preceding year. Annual accumulation of ten hours is considered satisfactory to meet the quantitative requirement of this Rule.

(b) All records, reports of accredited hours and certificates of credit shall be kept at the pharmacist's regular place of practice for verification by inspectors during regular or other visits. The Board may require submission of such documentation on a random basis. Pharmacists who do not practice regularly at one location shall produce such records within 24 hours of a request from Board authorized personnel. All records of hours and certificates of credit shall be preserved for at least three years.

(c) All continuing education shall be obtained from a provider approved by the Board. In order to receive credit, continuing education courses shall have the purpose of increasing the participant's professional competence and proficiency as a pharmacist. At least five hours of the continuing education credits must be obtained through contact programs in any calendar year. Contact programs are those programs in which there is an opportunity for live two-way communication between the presenter and attendee.

(d) Continuing education shall not serve as a barrier to reciprocity; however all licensees by reciprocity must observe the continuing education standards specified in (a), (b) and (c) of this Rule within the first renewal period after licensure in this state.

(e) Pharmacists who list their status as "Inactive" on the annual application for license renewal and who certify that they are no longer engaged in the practice of pharmacy are not required to obtain the continuing education hours required by this Rule. Pharmacists on inactive status are prohibited from practicing pharmacy in this State. Should a pharmacist on inactive status wish to return to active status, then all continuing education hours for the period of inactive status must be ~~obtained. A pharmacist who has been on inactive status for five or more years must appear before the Board and submit evidence that he can safely and properly practice pharmacy before he can be returned to active status.~~ obtained, and the pharmacist will be treated the same as an applicant for reinstatement.

Authority G.S. 90-85.6; 90-85.17; 90-85.18.

Note from the Codifier: *The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.*
This section of the Register may also include, 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.

EXPIRED TEMPORARY RULES

The following temporary rules will expire on the dates listed and will be removed from the NC Administrative Code. The date shown to the right of the rule citation is the original effective date and the date the rule expires.

Rule Citation	Effective Date	Expiration Date
Administration		
1 NCAC 41B .0101-.0104	August 1, 2003	April 27, 2004
1 NCAC 41B .0301-.0307	August 1, 2003	April 27, 2004
1 NCAC 41B .0401-.0405	August 1, 2003	April 27, 2004
1 NCAC 41B .0501-.0511	August 1, 2003	April 27, 2004
1 NCAC 41B .0701-.0702	August 1, 2003	April 27, 2004
1 NCAC 41B .0901	August 1, 2003	April 27, 2004
DENR/Marine Fisheries Commission		
15A NCAC 03S .0101-.0102	July 1, 2003	April 27, 2004

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 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

RULE DECLARED VOID BY DECISION

The following cited decision is a recent decision by the Office of Administrative Hearings, which voids a rule in the North Carolina Administrative Code

20 NCAC 02B .0508 FAILURE TO RESPOND
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge Melissa Owens Lassiter declared 20 NCAC 02B .0508 void as applied in Burton L. Russell v. Department of State Treasurer, Retirement Systems Division (03 DST 1715).

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION				
Ice 2 K t/a Sports Dimensions, Inc. v. ABC Commission	02 ABC 0683	Gray	11/25/03	
Carolina Sports Arena LLC T/A NC Sports Arena v ABC Comm.	02 ABC 1491	Conner	09/11/03	
ABC v. Fast Fare Inc, T/A Fast Fare NC 576	02 ABC 1882	Gray	09/22/03	
Ki Young Kim v. Ann H. Johnson, ABC Commission in Raleigh	03 ABC 0177	Mann	06/17/03	
ABC Commission v. Pantana Bob's, Inc. T/A Pantana Bob's	03 ABC 0233	Mann	10/03/03	
C&C Entertainment, Inc. d/b/a Carolina Live	03 ABC 1037	Lassiter	09/30/03	
ABC v. Lake Point Restaurant, Inc. T/A Larkins on the Lake Bay Front Bar and Grill	03 ABC 1246	Hunter	01/01/04	18:17 NCR 1540
ABC Commission v LLPH Inc T/A Tsunami Sportsbar & Grill, 947 Carter Dr, Suite 4, Calabash, NC 28467	03 ABC 1530	Conner	02/05/04	
ABC Commission v. Chelsie Paul Grose, Brown Mountain Grocery And Service Station	04 ABC 0064	Chess	03/03/04	
ABC Commission v. Jose-Martin Ortega Ramirez T/A Dona Ole Rest.	04 ABC 0094	Gray	03/02/04	
ABC Commission v. Taqueria El Azteca Inc T/A Taqueria El Azteca	04 ABC 0095	Gray	03/02/04	
AGRICULTURE				
Phoenix Ski Corp. v. Dept. of Ag. & Cons. Svcs. & Dept. of Admin. & Carolina Cable Lift, LLC.	02 DAG 0560	Lewis	06/30/03	18:03 NCR 217
CRIME CONTROL AND PUBLIC SAFETY				
Myrtle J. Price v. Crime Victims Comp. Comm, Dept. of Crime Control & Public Safety, Victims Compensation Services Division	03 CPS 0173	Wade	06/27/03	
Regis A Urik v DOCCPS, Div. of Victim Comp. Services	03 CPS 0707	Gray	10/21/03	
Fredrica Wood-Jones v DOCC&PS, Div of Victim Comp. & Svcs.	03 CPS 0804	Gray	10/06/03	
Michael L Pompey v. Crime Control & Public Safety, Div. of Victim Compensation Services	03 CPS 0828	Gray	09/03/03	
Frances H Abegg v Bryan E Beatty, Sec DCCPS	03 CPS 1359	Gray	01/23/04	
Tricia Diane Gerke v. Victim's Compensation Commission	03 CPS 1413	Gray	10/06/03	

HEALTH AND HUMAN SERVICES

A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions.

Yelton's Healthcare v DHHS, Div of Fac. Svcs, Group Care Lic Sec	00 DHR 0249	Gray	01/16/04	
Guilford Co Comm Action Program Inc v. DHHS	00 DHR 0984	Gray	09/08/03	
Mary Edge v DHHR, Div of Child Development	01 DHR 0720	Gray	09/23/03	
Richard Hart & Jeannette Hart, Little People Day Car, ID 3355048	01 DHR 1464	Wade	11/14/03	
v. Div of Child Dev Health & Human Services	01 DHR 1464	Wade	11/14/03	
Sunshine Schools, Inc. ID No. 9255424 v. DHHS, Div. of Child Dev.	02 DHR 0708	Wade	11/24/03	18:14 NCR 1209
Robbie Cummings v. DHHS	02 DHR 0815	Conner	06/09/03	
Lee Co. Dept of Social Services v. DHHS	02 DHR 1021	Elkins	12/01/03	18:14 NCR 1212
Linda Ann Tyson v. Div. of Facility Services, Health Care Personnel Registry Section	02 DHR 1103	Lassiter	05/12/03	
Ricky Roberts for Angela Roberts v. DHHS, Div. of Med. Assistance	02 DHR 1138	Lassiter	04/25/03	18:01 NCR 52
Wanda J. Vanhook v. DHHS, Div. of Med. Assistance	02 DHR 1459	Gray	04/24/03	
Elaine B Shelton v. DHHS, Div. of Facility Services	02 DHR 1489	Conner	05/28/03	
Juli A Murphy, Murphy's Munchkin Land Daycare ID 54000197 v. Div. of Child Development	02 DHR 1555	Lassiter	09/05/03	
Jones Hill Day Care, Ola M Jones v. (CACPP) Child & Adult Care Food Program	02 DHR 1601	Lassiter	05/16/03	
Michelle's Lullaby Day Care, Jerri Howell v. Div. of Child Development June Locklear	02 DHR 1672	Wade	06/10/03	
Bibby's Group Home, Billy McEachern v. Mental Health Licensure and	02 DHR 1749	Gray	12/08/03	
Joanne F Ranta v. DHHS, Div. of Facility Services	02 DHR 1752	Mann	05/15/03	
Gregory Tabron v. DHHS, Div. of Facility Services	02 DHR 1789	Elkins	05/16/03	
Oncology Svcs Corp & Mountainside Holdings LLC v. DHHS, Div of Fac Svcs, Cert of Need Section & Scotland Mem Hospital, Inc.	02 DHR 1983	Wade	08/13/03	18:06 NCR 439
Doretha Leonard v. DHHS, Div. of Medical Assistance	02 DHR 2183	Lassiter	06/13/03	
Jonathan Louis Jefferson, a minor by & through his parents, Cynthia & Louie Jefferson v. DHHS< Div. of Medical Assistance	02 DHR 2186	Lassiter	10/08/03	
Orlando Stephen Murphy v. DHHS, Div. of Fac Svcs, Health Care Personnel Registry Section	02 DHR 2206	Wade	11/04/03	
Tanile Woodberry, By & Through Her Attorney-in-Fact, Linda Monroe v. DHHS, Division of Medical Assistance	02 DHR 2212	Chess	11/06/03	18:15 NCR 1353
Veronica Walker, Ph.D v. DHHS, Div. of Facility Services	02 DHR 2246	Chess	06/20/03	
Gloria Howard v. DHHS	02 DHR 2256	Gray	09/04/03	
Latrese Sherell Harris v. Nurse Aide Registry	02 DHR 2290	Chess	06/16/03	
Wanda S Hudson v. Wake County Public School System	02 DHR 2305	Wade	09/22/03	
Lawyers Glen Retirement Living Ctr, Charlotte Elliotte v DHHS, Div of Facility Svcs, Mecklenburg Co Dept of Social Services	02 DHR 2319	Chess	10/22/03	
James E Hill v. DHHS, Div. of Facility Services	03 DHR 0028	Wade	05/30/03	
Duffie G Hunt v. Medicaid	03 DHR 0085	Conner	06/06/03	
Valencia L Brown v Division of Medical Assistance (DMA)	03 DHR 0099	Chess	11/17/03	
Sidney Elkins, Debra Elkins v. Columbus Co Dept of Social Services	03 DHR 0105	Gray	03/10/04	
Sarah P Jordan v. DHHS, Div. of Facility Services	03 DHR 0155	Gray	06/18/03	
Martha Banks (ID #72000027) v. Div. of Child Dev., Child Abuse/Neglect Dept., Perquimans Co. DSS	03 DHR 0168	Wade	06/12/03	
Southeastern Reg Med Ctr & Lumberton Radiological Assoc P.A. v DHHS, Div. of Facility Services	03 DHR 0226	Wade	10/31/03	18:12 NCR 1011
Little Angels Child Care Center v Arnette Cowan, Sup of Spec Nut. Prog.	03 DHR 0229	Lassiter	11/24/03	
Aaron Atwater v. DHHS, Div. of Medical Assistance	03 DHR 0262	Chess	08/18/03	
Grace Browning, Grorge D Browning Jr v John Umstead Hospital	03 DHR 0285	Mann	10/03/03	
Vivian P Bailey v. DHHS, Div. of Child Development	03 DHR 0296	Gray	12/18/03	
Nakeisha Shawon Leak v. DHHS, Office of Legal Affairs	03 DHR 0308	Wade	06/25/03	
Krystal Hyatt v. Broughton Hospital	03 DHR 0316	Chess	07/07/03	
Cahterine Williams v. DHHS	03 DHR 0320	Mann	07/17/03	
Rachel Peek,Yancey Co. DSS v. DHHS	03 DHR 0330	Chess	07/24/03	
Penny Yvette McCullers v DHHS, Div. of Facility Services	03 DHR 0336[10]	Mann	01/08/04	18:17 NCR 1543
Lisa Mendez v. Health Care Personnel Registry	03 DHR 0351	Gary	06/27/03	
Twan Fields v. DHHS, Div. of Facility Services	03 DHR 0355	Morrison	09/10/03	
Kevin Douglas Heglar v. DHHS, Dorothea Dix Hospital	03 DHR 0357	Gray	09/17/03	
Yolanda Covington v. RHA Health Svcs, DHS	03 DHR 0360	Lassiter	07/17/03	
Constance Basnight v. Pasquotank County DSS	03 DHR 0385	Lassiter	05/29/03	
Waddell B Taylor v DHHS, John Umstead Hospital	03 DHR 0394	Gray	09/23/03	
Dorothy Ann Bell v. DHHS, Div. of Facility Services	03 DHR 0437	Morrison	06/30/03	
Edmund Bond Small v. DHHS, Walter B Jones, ADATC	03 DHR 0445	Lassiter	07/21/03	
Janitta Brown v. DHHS, Dorothea Dix Hospital	03 DHR 0461	Lassiter	09/15/03	
Gerry Dwayne Cashwell v. DHHS	03 DHR 0469	Gray	07/28/03	
Total Renal Care of NC, LLC v DHHS, Div. of Facility Services, CON Section & Bio-Medical Applications of NC	03 DHR 0499	Conner	12/09/03	18:17 NCR 1548
Charlotte Orthopedic Specialists, P.A. v DHHS, Div. of Facility Svcs CON Section & Orion Imaging LLC Mercy Hospital Inc d/b/a Carolinas Medical Center-Pineville	03 DHR 0505	Gray	12/23/03	18:19 NCR 1746
Gregory Lewis Berry v. Burke Co. Dept of Social Services	03 DHR 0514	Wade	08/19/03	
Robert L Scott v DHHS	03 DHR 0527	Conner	12/02/03	
Donna Kay Kirkland v. DHHS, Broughton Hospital	03 DHR 0547	Wade	08/29/03	
Penny Yvette McCullers v DHHS, Div. of Facility Services	03 DHR 0558[10]	Mann	01/08/04	18:17 NCR 1543
The Presbyterian Hospital v. DHHS, Division of Facility Services and	03 DHR 0567	Wade	12/19/03	18:15 NCR 1362

Mooresville Hosp Mgmt Assoc Inc d/b/a Lake Norman Reg Med Ctr				
Grace Browning v. John Umstead Hospital	03 DHR 0571	Mann	10/03/03	
Becky Wood, Guardian Rep The Arc/NCLifeguardianship on behalf of Mary Short (Ward) v. Richard Visingardi, Dir, Div of MH, DD, SAS	03 DHR 0575	Chess	12/22/03	
Sabrina Regina Betts v. DHHS, Div. of Facility Services	03 DHR 0595	Gray	09/12/03	
Andrea Ford v DHHS, Div. of Facility Services	03 DHR 0609	Morrison	06/04/03	
Wallace C Levi v. Div. of Medical Assistance	03 DHR 0633	Wade	08/12/03	
Timothy Batts v. DHHS, Div. of Facility Services	03 DHR 0640	Gray	09/12/03	
Bestway Food's, Osama M Dari v. DOH WIC, Cory Menees, Unit Super.	03 DHR 0662	Morrison	07/28/03	
Charles Wakild & Susan Wakild v DENR, Div of Coastal Management	03 DHR 0663	Morrison	12/09/03	
Denise A Worthington v. DHHS, Office of the Controller	03 DHR 0672	Gray	10/06/03	
Wake Radiology Services, LLC, Wake Radiology Consultants, P.A., Raleigh MR Imaging Center Ltd Partnership & Wake Radiology Diagnostic Imaging, Inc. v. DHHS, Div. of Facility Svcs., CON Sec., Robert J. Fitzgerald, Dir, Lee B Hoffman, Chief of CON Sec. & Mobile Imaging of North Carolina, LLC	03 DHR 0676	Gray	07/07/03	
Nedall H Hassan d/b/a GNS Express Mart v. DHHS	03 DHR 0695	Lassiter	10/14/03	
Samantha Jacobs v. DHHS, Div. of Facility Services	03 DHR 0697	Lassiter	06/19/03	
Jane McMillan v. DHHS, Div. of Facility Services	03 DHR 0698	Lassiter	06/19/03	
Veronica Williams v. Div. of Med. Assistance, Dana Harris, Super.	03 DHR 0737	Mann	08/28/03	
Patti L Cain Small Fries by Patti v. Nutrition Services	03 DHR 0768	Morrison	07/31/03	
Humans United Giving Greater Services "Huggs" v DHHS	03 DHR 0767	Lassiter	01/15/04	
Essie Mae Crawley Davis v. DHHS, Division of Facility Services	03 DHR 0773	Elkins	03/02/04	
Brian Keith Heilig v. DHHS, Div. of Medical Assistance	03 DHR 0779	Mann	07/17/03	
Mrs Soon Ja An v. DHHS	03 DHR 0780	Morrison	07/28/03	
Kimberly Donyelle Miles v. DHHS, Div. of Facility Services	03 DHR 0795	Lassiter	09/11/03	
Sharmia Barnes v DHHS, Div of Facility Services	03 DHR 0830	Conner	01/05/04	
Pamela Powell v. DMA Outpatient Therapy	03 DHR 0834	Lassiter	10/13/03	
Angela Carter Precious Love Turtledove v. Tarin Goodwin, St. of NC, DCD	03 DHR 0850	Connor	09/23/03	
Donald Eugene Lowery by & through his guardian, Dennis Parise v. CAP (DMA) Div. of Medical Assistance	03 DHR 0868	Gray	12/17/03	
Nequita Williams v. DHHS, Div. of Medical Assistance	03 DHR 0895	Wade	11/21/03	
Native Angels Home Care Agency, Inc. v. DHHS, Div. of Facility Services, Certificate of Need Section & Community Health, Inc. d/b/a Community Home Care and Hospice; and Consolidated Health Services	03 DHR 0903	Conner	02/20/04	18:20 NCR 1804
Ali Alsaras d/b/a University Market v. DHHS	03 DHR 0917	Conner	12/02/03	
Kimberly Roberts v. DHHS, Div. of Facility Services	03 DHR 0927	Gray	08/15/03	
Michael Hillis v. Department of Revenue	03 DHR 0935	Conner	07/28/03	
Rose McCallum, Individually & as Owner & Representative of NC Preschool Academy & Tina Octetree, Individually & as Director & Representative Of NC Preschool Academy v. DHHS, Div. of Public Health	03 DHR 0951[11]	Elkins	02/02/04	18:17 NCR 1571
Rose McCallum, Individually & as Owner & Representative of NC Preschool Academy & Tina Octetree, Individually & as Director & Representative Of NC Preschool Academy v. DHHS, Div. of Public Health	03 DHR 0952[11]	Elkins	02/02/04	18:17 NCR 1571
Alvin Paulk v. DHHS, Div. of Child Development	03 DHR 0971	Conner	07/25/03	
Nazih Hasan & Emao Hasan, Nes Convenient Mart v DHHS	03 DHR 0985	Lassiter	10/31/03	
Victor J Gray v Dorothea Dix Hospital	03 DHR 1039	Morrison	09/29/03	
Pine Forest Rest Home v DHHS, Div. of Facility Services	03 DHR 1066	Gray	10/10/03	
Doris Froneberger v. DHHS, Div. of Facility Services	03 DHR 1081	Gray	09/12/03	
Heather M Wood v. DHHS	03 DHR 1083	Morrison	10/30/03	
Lisa S Lincoln, Honeybees Creative Ctr v DHHS, Nutrition Branch	03 DHR 1091	Elkins	11/13/03	
Wardeh Abukeshk v DHHS	03 DHR 1117	Gray	12/10/03	
Esther M Huntley, Children Learning Ctr, Formerly Rainbow Nursery Sch v. DHHS, Division of Child Development	03 DHR 1118	Elkins	12/23/03	
Jaris Davis v. DHHS, Div. of Facility Services	03 DHR 1136	Gray	10/07/03	
Albert Brower v. DHHS	03 DHR 1153	Wade	09/04/03	
Sherry Autry v. DHHS	03 DHR 1204	Elkins	12/22/03	
Angela Sadler v. DHHS, Div. of Facility Services	03 DHR 1210	Conner	11/04/03	
Bernard Frederic v Div of MH/DD/SAS	03 DHR 1298	Conner	01/07/04	
Lisa Dupree v. NC State Veterans Nursing Home	03 DHR 1306	Lassiter	09/15/03	
LaQuasha K Massey v. DSS, Mecklenburg County	03 DHR 1375	Elkins	12/16/03	
David L Hayden Sr, Margaret R Hayden v DHHS	03 DHR 1405	Morrison	12/19/03	18:16 NCR 1483
Calvin Harris, Jr. v. Health Care Personnel Registry	03 DHR 1434	Wade	10/06/03	
Karen J Andrews v. DHHS	03 DHR 1461	Lassiter	11/25/03	
Apple Nursing Services v. DHHS	03 DHR 1488	Chess	12/10/03	
Coastal Carolina Health Care PA d/b/a Coastal Carolina Imaging (P-6766-03) V DHHS Div of Facility Svcs, Certificate of Need Section	03 DHR 1496	Lassiter	11/06/03	
Roger William Suttles v. Broughton Hospital	03 DHR 1536	Gray	12/22/03	
Barbara Hammond for Dennis Hammond v. DHHS	03 DHR 1539	Elkins	12/23/03	
Kimberly Shepard v Western NC Group Home for Autistic Persons	03 DHR 1557	Gray	02/10/04	
Virginia Ruth Mahala v. DHHS, Office of Legal Affairs	03 DHR 1574	Conner	03/10/04	
Karoline Hatfield Kranicz v. DHHS, Div. of Facility Services	03 DHR 1584	Gray	01/16/04	
Delaine Hairston v DHHS	03 DHR 1604	Mann	11/25/03	
Linda Joyce Lindsey v DHHS, Div of Facility Services	03 DHR 1605	Wade	02/11/04	
Stevie Meadows v DHHS, Div. of Facility Services	03 DHR 1607	Lassiter	01/28/04	
Tammy Hoyle for Leslie Hoyle v DHHS	03 DHR 1614	Elkins	01/29/04	
Jermaine L Thurston Sr v. Health Care Personnel Registry	03 DHR 1622	Elkins	01/26/04	
Ronald Bryan Gatlyn v. Health Care Personnel Registry	03 DHR 1655	Lassiter	10/28/03	
Sheila Ferrell Meeks v Office of Administrative Hearings	03 DHR 1672	Lassiter	12/02/03	

Willie S Neely v DHHS, Div. of Facility Services	03 DHR 1674	Gray	11/20/03	
Mohammed Khalil v DHHS	03 DHR 1694	Mann	02/03/04	
Christine Gordon v Health Care Personnel Registry	03 DHR 1697	Elkins	12/16/03	
Doris Duff v DHHS, Div. of Facility Services	03 DHR 1720	Lassiter	12/02/03	
Rochelle M Jones v DHHS, Div of Facility Services	03 DHR 1734	Wade	02/11/04	
Paditra C Dalton v DHHS, Div of Facility Services	03 DHR 1738	Elkins	01/28/04	
Lalita Russell, Garfield Home Day Care v DHHS, Div of Child Dev.	03 DHR 1740	Lassiter	01/29/04	
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A Louise Nilsen Mankes v. Dr. Gatewood, UNC Gen Admin Dept NCSEAA	03 OSP 1660	Lassiter	12/16/03	
A Louise Nilsen Mankes v. Mr. Anthony Bordeaux, UNC Gen Admin Dept NCSEAA	03 OSP 1661	Lassiter	12161/03	
John N Leak v Dept. of Public Instruction	03 OSP 1711	Lassiter	12/31/03	
Hamid Mozafaripour v Nursing Dept at Dorothea Dix Hospital	03 OSP 1745	Lassiter	02/10/04	
Carolyn A Little v Eastern Area Treatment Program	03 OSP 1810	Lassiter	01/12/04	
Terry T Pigford v Eastern Area Treatment Program	03 OSP 1811	Lassiter	01/12/04	
Sandra J Dills v Smokey Mtn Healthcare Assoc	03 OSP 1962	Chess	01/12/04	
William Russell Robinson v School of Science & Math et. Al.	03 OSP 1977	Lassiter	02/16/04	
Elizabeth A Gregory, Correction Officer v Pasquotank Corr Inst #3740	03 OSP 2209	Lassiter	02/23/04	
Patricia Stoddard v Elizabeth City State University	03 OSP 2228	Lassiter	02/18/04	
Christopher Paul Davis v DHHS and Caswell Center	03 OSP 2275	Conner	01/14/03	
Deborah Ann Bozsan v Henderson Co Board of Public Education	03 OSP 2303	Wade	02/11/04	
Bernie C Thomas v Fayetteville State University	03 OSP 2306	Morrison	03/03/04	
Leonard Gibson v Brown Creek Correctional Institution	03 OSP 2317	Gray	03/08/04	
Andora Taylor Hailey v Roslyn G Powell (Div Chief) Dept of Comm Corr.	03 OSP 2318	Gray	03/05/04	
Miracle L Smith v. State Highway Patrol	04 OSP 0039	Gray	03/10/04	

UNIVERSITY OF NORTH CAROLINA HOSPITALS

Donald R. Smith v. UNC Hospitals	02 UNC 1361	Conner	06/05/03	
Martin B Strickland v. UNC Hospitals, Patient Accounts Services	02 UNC 1620	Wade	08/29/03	
Mary Dieudone Frantz v. UNC Hospitals	03 UNC 0409	Mann	08/07/03	
Susan Kay Fryar v. UNC Hospitals	03 UNC 0410	Mann	08/07/03	
Kendall Adams v. UNC Hospitals	03 UNC 0536	Gray	08/11/03	
Janice Block v. UNC Hospitals	03 UNC 0720	Gray	09/04/03	
Alfred Tilden Ward, Jr. v. UNC Hospitals & UNC Physicians & Assoc.	03 UNC 0723	Gray	06/23/03	

Ieshia Marlina Baskett v. UNC Hospitals, Patient Account Services	03 UNC 0894	Gray	09/04/03
Michael Gray Simmons v. UNC Hospitals	03 UNC 0977	Wade	11/25/03
Keith Bagby Sr & Patricia Bagby v UNC Hospitals	03 UNC 1011	Elkins	11/07/03
Mary P Kearney v. UNC Hospitals	03 UNC 1035	Elkins	02/25/04
D. Parker Lynch v. UNC Hospitals	03 UNC 1124	Wade	11/19/03
Steven R. Wilkerson v. UNC Hospitals	03 UNC 1177	Chess	09/18/03
Yvonne Schreiner v. UNC Hospitals	03 UNC 1512	Morrison	10/31/03
Michael J Cassidy v. UNC Hospitals	03 UNC 2428	Conner	03/10/04

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STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF ROBESON	**03 DHR 0903**

NATIVE ANGELS HOME CARE AGENCY, INC., Petitioner,	
v.	
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION,	**RECOMMENDED DECISION**
Respondent,	
And	
COMMUNITY HEALTH, INC. d/b/a COMMUNITY HOME CARE AND HOSPICE; AND CONSOLIDATED HEALTH SERVICES, Respondent-Intervenors.	

RECOMMENDED DECISION

In the above-captioned contested case, Petitioner Native Angels Home Care Agency, Inc. ("Native Angels") challenges the decision of the North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section ("CON Section" or "the Agency") to award a Certificate of Need ("CON") to Community Health, Inc. d/b/a Community Home Care and Hospice ("Community") and to deny Native Angels' application for a CON.

Pursuant to N.C.G.S. §§ 131E-188(a) and 150B-23, a contested case hearing was held in this matter on December 8-16, 2003, in Raleigh, North Carolina before Administrative Law Judge James L. Conner II.

APPEARANCES

Renée J. Montgomery and Susan L. Dunathan of Parker, Poe, Adams & Bernstein, LLP represented Petitioner Native Angels Home Care Agency, Inc. Jane L. Oliver, Assistant Attorney General, represented Respondent CON Section. Louis B. Meyer III of Poyner & Spruill, LLP represented Respondent-Intervenor Community Health, Inc. d/b/a Community Home Care and Hospice. Bryan P. Gavigan of Wishart, Norris, Henninger & Pittman, P.A. represented Respondent-Intervenor Consolidated Health Services, Inc.

APPLICABLE LAW

1. The procedural statutory law applicable to this contested case is Article 3 of the North Carolina Administrative Procedure Act, N.C.G.S. § 150B-22, *et seq*., § 131E-188 of the North Carolina Certificate of Need law, and N.C.G.S. § 1A-1.

2. The substantive statutory law applicable to this contested case is the North Carolina Certificate of Need law, N.C.G.S. § 131E-175, *et seq.*

3. The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Regulations, 10 N.C.A.C. 3R.0100, *et seq*., in particular 10 N.C.A.C. 3R.4200, *et seq*. ("Criteria and Standards for Hospice Home Care Programs"). These regulations have been recodified as 10A N.C.A.C. 14C.0100, *et seq.*, and 10A N.C.A.C. 14C.1500, *et seq.* The Office of Administrative Hearings regulations, 26 N.C.A.C. 3.0001, *et seq.* are also applicable to this contested case hearing.

ISSUES

The issues in this contested case are:

1. Whether the CON Section, in making its decision to deny the application of Native Angels and to conditionally approve the application of Community, violated the standards of N.C.G.S. § 150B-23(a) by (1) exceeding its authority or jurisdiction; (2) acting erroneously; (3) failing to use proper procedure; (4) acting arbitrarily or capriciously; or (5) failing to act as required by law or rule.

2. Whether the Certificate of Need Section violated the standards of N.C.G.S. § 150B-23(a) by reviewing and approving Community's application when Community is not proposing to develop a new hospice home care program in Robeson County.

PRELIMINARY MATTERS

The parties filed a Final Prehearing Order at the outset of this contested case hearing which, among other things, stipulated that notice and jurisdiction over the parties and subject matter were proper.

WITNESSES

At the hearing, the following testimony was received:

Volume Number	**Witness**	**Affiliation**	**Pages**
Volume I – December 8	Dr. Stanley Knick	Expert witness for Native Angels	106-169
Volume I – December 8	Louise Beville	CON Section	179-303
Volume II – December 9	Bobbie Jacobs-Ghaffar	Native Angels	309-650
Volume III – December 10	David French	Expert witness for Native Angels	659-779 822-958
Volume III – December 10	William J. Smith	Expert witness for Native Angels	780-821
Volume IV – December 11	Louise Beville	CON Section	978-1255
Volume V – December 12	Louise Beville	CON Section	1268-1313
Volume V – December 12	Lee Hoffman	CON Section	1314-1447
Volume VI – December 15	C. Saunders Roberson	Community Hospice	1455-1783
Volume VII – December 16	Nanci Feliciano	Community Hospice	1789-1870
Volume Number	**Witness**	**Affiliation**	**Pages**
Volume VII – December 16	Michael Hale	Community Hospice	1870-1969
Volume VII – December 16	Lesa Jacobs	Native Angels	1981-2007
Volume VII – December 16	Bobbie Jacobs-Ghaffar	Native Angels	2008-2037
Volume VII – December 16	David French	Native Angels	2038-2094

EXHIBITS

In addition, the following exhibits were admitted into evidence:

Stipulated Exhibits

1. Official Agency File for 2002 Robeson County Hospice Review
2. Community Hospice's CON Application in 2002 Robeson County Hospice Review
3. Native Angels' CON Application in 2002 Robeson County Hospice Review

Native Angels' Exhibits

Petitioner Exh. No.	Description
1.	Certificate of Need Definitions, N.C.G.S. § 131E-176
2.	Certificate of Need Statutory Review Criteria, N.C.G.S. § 131E-183
3.	Criteria and Standards for Hospices, 10 N.C.A.C. 3R.4200
4.	Service area Definitions, 10 N.C.A.C. 3R.0110 and .6205
5.	The 2002 State Medical Facilities Plan Chapter on Amending and Revising the Plan and Chapter on Hospice Services
6.	The 2003 State Medical Facilities Plan Chapter on Hospice Services
7.	Resume of David French
8.	Resume of William Smith
9.	Resume of Stanley Knick, PhD
10.	Findings in Hospice Home Care Review for Wake County
12.	Excerpts of Findings in the MRI Review for MRI Planning Area 15 – January 7, 2002
13.	Excerpts of Findings - MRI Review for MRI Planning Area 17 – 3/06/02
14.	License Granted to Community to Operate a Hospice Home Care Agency in Lumberton
15.	2003 Data Supplement to Licensure Application for Consolidated Health Services, Inc.
16.	Calculation of Native Angels' Cost Per Day by Level of Service
17.	Native Angels' Pro Forma Income Statement Using Data from the CON Application

Petitioner Exh. No.	Description
18.	Report Prepared by Strategic Healthcare Consultants Regarding Community's Applications
19.	Community's 2003 Annual Data Supplement to Licensure Application for Robeson County
20.	Community's 2003 Annual Data Supplement to Licensure Application for Cumberland County
21.	Community's 2003 Annual Data Supplement to Licensure Application for Sampson County
22.	Community's 2003 Annual Data Supplement to Licensure Application for Lee County
23.	Community's 2003 Annual Data Supplement to Licensure Application for Harnett County
24.	Community's 2003 Annual Data Supplement to Licensure Application for Wake County
25.	Community's 2003 Annual Data Supplement to Licensure Application for Bladen County
26.	Community's 2003 Annual Data Supplement to Licensure Application for Johnston County
30.	Chart entitled "Excerpts From the Agency's Comparative Analysis of the Competing Applications"
31.	Chart entitled "Continuous Care and Respite Care Days Provided by Community"
32.	Chart entitled "Percentage of Community's Patients Who Died in Institutions"
33.	Chart entitled "Robeson County Percent of Hospice Deaths Compared to the State Average"
34.	Hospice Care Conditions of Participation, 42 C.F.R. Part 418, Subparts A through G.
35.	Section 230.3 of the CMS Hospice Manual.
36.	Hospice Facts and Statistics from Hospice Association of America

CON Section's Exhibits

Respondent Exh. No.	Description
1.	Resume of Louis Beville

Community's Exhibits

Intervenor Exh. No.	Description
4.	Certificate of Need Statutes, N.C. Gen. Stat. §§ 131E-175 through 131E-191
11.	Excerpt from Louise Beville Deposition in Rowan County contested case
12.	Excerpt from Agency Finding in Rowan County Hospice Review
13.	Supplemental Information provided by Community Hospice in relation to Craven County Hospice Review
14.	Native Angels Form B Pro Forma that was omitted from Native Angels' CON Application
18.	Pemberton Hospice License Application 2002
20.	Hospice of Robeson License Application 2002
21.	Hospice of Robeson License Application 2003
25.	Resume of C. Saunders Roberson
26.	Resume of Michael Hale
32.	Blank Application Form for Hospice Home Care CON Application
35.	Certificates of Need for Community Hospice's hospice agencies in Wilson County, Craven County, and Johnston County
39.	Excerpt from Community Hospice's CON Application in Craven County Hospice Review
41.	Agency Findings in Wilson County Hospice Review
42.	Agency Findings in Craven County Hospice Review
43.	Community Hospice's Petition for Contested Case Hearing in Craven County contested case

Intervenor Exh. No.	Description
44.	Native Angels Staffing and Medical Supplies Cost Analysis

Consolidated's Exhibits

Consolidated offered no additional exhibits.

FINDINGS OF FACT

After examination of the record and consideration of the evidence presented at the hearing and the proposed Findings of Fact and Conclusions of Law presented by the parties, the undersigned Administrative Law Judge makes the following Findings of Fact:

PARTIES

1. Petitioner Native Angels owns and operates a licensed home care agency in Robeson County. (Stipulated Ex. 3, p. 3).

2. Respondent CON Section is the Agency responsible for the administration of North Carolina's Certificate of Need law, N.C.G.S. Chapter 131E, Article 9.

3. Respondent-Intervenor Community's sister corporation, Carrolton Home Care, Inc. ("Carrolton"), operates a hospice home care office in Robeson County. (Stipulated Ex. 2, p. 6).

4. Respondent-Intervenor Consolidated Health Services, Inc. also operates a hospice home care office in Robeson County. (Consolidated's Motion to Intervene, p. 3).

PROCEDURAL BACKGROUND

5. The 2002 State Medical Facilities Plan ("SMFP") allocated one new hospice home care program in Robeson County in a review beginning on December 1, 2002. (Pet. Ex. 5, p. 279). Native Angels, Community, and another applicant submitted applications to be considered in this review. (Agency File, Stipulated Ex. 1, p. 334). These applications were required to be reviewed competitively since only one additional hospice home care program could be allocated from the review. (*Id*.).

6. By letter dated April 29, 2002, the CON Section notified all the applicants that Community's application was approved and the applications of Native Angels and the other competing applicant were disapproved. (Stipulated Ex. 1, pp. 7-10, 36-38). On May 2, 2003, the CON Section issued the written findings upon which it based its decision. (*Id*. at pp. 334-380).

7. Native Angels filed a Petition for Contested Case Hearing challenging the approval of Community's application and the disapproval of its application. By Order dated August 12, 2003, Community was permitted to intervene in this contested case. Consolidated Health Services, Inc. also was permitted to intervene by Order dated August 12, 2003.

THE AGENCY'S DECISION

8. Louise Beville was the project analyst who reviewed the Native Angels and Community applications. She was the only person at the CON Section who reviewed the applications. (Beville, Vol. 1, pp. 180, 215-216). Lee Hoffman, the Chief of the CON Section, edited Ms. Beville's findings and signed the Agency Decision but did not review the applications or do any financial analysis of the applications. (*Id*.; Hoffman, Vol. 5, p. 1348 at 1375-1376). Even though Ms. Beville does not consider financial analysis to be her strongpoint, no one with financial analysis experience helped her in reviewing the applications and analyzing the financial components. (Beville, Vol. 4, pp. 1150-1152).

9. The Agency's findings include a section titled "Comparative Analysis of the Competing Applications." (Stipulated Ex. 1, pp. 372-379). Six factors were discussed in this Comparative Analysis and Native Angels' application was found to be the most effective alternative with regard to five of these factors – services to medically underserved populations, provision of culturally

sensitive services, clinical education, staffing, and continuous care and respite care. (*Id.*; Pet. Ex. 30). Nevertheless, Native Angels' application was denied because the Agency determined it was "unapprovable." (Stipulated Ex. 1, p. 379; Beville, Vol. 1, p. 217).

10. The CON Section determined that Native Angels' application failed to conform with N.C.G.S. § 131E-183(a)(4), (5), 18(a) (hereinafter referred to as "Statutory Criteria" or "Criteria 4, 5, and 18(a)"), and 10 N.C.A.C. 3R.4202(b)(8) and 4205(b)(7). (Stipulated Ex. 1, pp. 343, 346-348, 362, 366, 371). The Agency's determination on Criteria 4 and 18(a) was entirely dependent upon its findings on Criterion 5. (*Id.* at pp. 343, 362; Beville, Vol. 4, pp. 1030-1032). Native Angels' application would have been the approved applicant if Ms. Beville had been able to determine that the project conformed with Criterion 5. (Beville, Vol. 5, pp. 1297-1299).

11. The Agency also found certain deficiencies in Community's application under Criterion 5 but the Agency did not find Community's application nonconforming with this criterion. (Stipulated Ex. 1, pp. 343-345). Instead, the approval of Community's application was conditioned upon the CON Section receiving documentation from Community that it would meet the requirements of this criterion prior to the issuance of the Certificate of Need. (*Id.* at p. 345).

THE 2002 SMFP ALLOCATION FOR
A NEW HOSPICE HOME CARE PROGRAM

12. The methodology in the 2002 SMFP for hospice home care services compares the number of deaths served by hospice in a particular county compared to the state average and allocates an additional hospice home care agency if there is a sufficient disparity. (Pet. Ex. 5, p. 252; French, Vol. 3, p. 703); Hoffman, Vol. 5, pp. 1325-1329. There was a sufficient disparity between the number of people needing hospice services and the number being served to warrant the allocation of an additional hospice home care agency in Robeson County. (Pet. Ex. 5, p. 271). The 2002 SMFP showed a percentage of hospice deaths for Robeson County of 12.48% compared to the state average of 19.36%. (Pet. Ex. 33).

13. The allocation from the 2002 SMFP at issue in this review is for a new hospice home care program in Robeson County. (Pet. Ex. 5, p. 279). The Agency determined that Community's application was for a new hospice home care program in Robeson County even though Community, through its sister corporation, Carrolton, already has a licensed hospice home care agency in Robeson County offering hospice home care services. (Stipulated Ex. 1, p. 335; Beville, Vol. 1, pp. 181-182; Pet. Ex. 14). Carrolton and Community have the same ownership. (Roberson, Vol. 6, pp. 1664-1665). (Hereinafter Carrolton will also be referred to as "Community.")

14. Carrolton opened a hospice home care office in Robeson County in August of 2001 which became a separately licensed hospice home care agency. (Roberson, Vol. 6, p. 1665; Beville, Vol. 1, p. 181; Pet. Ex. 14). The license states that it is "issued to Carrolton Home Care, Inc. to operate an agency known as Community Home Care and Hospice located at 2402 North Roberts Avenue, City of Lumberton, North Carolina." (Pet. Ex. 14). The CON Section uses the terms "program" and "agency" interchangeably. (Beville, Vol. 4, p. 1310; Hoffman, Vol. 5, pp. 1435).

15. Community was able to develop this office without a Certificate of Need because of the position of the Agency that a CON approved hospice home care agency does not need a Certificate of Need to open a new hospice home care office in a county which it is already serving. (Beville, Vol. 4, p. 1168). Carrolton received a Certificate of Need for a hospice home care agency in Cumberland County which has been in operation since 1995. (Agency File, Stipulated Ex. 2, p. 10). Carrolton was serving some residents from Robeson County out of its Fayetteville office which allowed it to open a new hospice home care office in Robeson County in 2001. (Pet. Ex. 5, p. 265; Beville, Vol. 4, p. 1168).

16. Community's existing Robeson County hospice home care office is able to serve all areas of Robeson County without exception, to provide the full range of hospice services to Robeson County residents, receive Medicare and Medicaid reimbursement, and make its own administrative staffing decisions. (Roberson, Vol. 6, pp. 1666-1667).

17. If Community should receive the Certificate of Need for a new hospice home care program in Robeson County, the office location and staff will remain the same and there will be no services provided that cannot already be provided without a Certificate of Need. (Hale, Vol. 7, p. 1939; Beville, Vol. 1, pp. 182-183).

18. The Certificate of Need law defines the term "hospice" as a "coordinated program of home care with provision for inpatient care for terminally ill patients and their families." N.C.G.S. § 131E-176(13a). Community already has a coordinated program of home care in Robeson County and a contract for inpatient care for terminally ill patients and their families. (Stipulated Ex. 2, pp. 14-15). The Agency admits that the services provided by Community in Robeson County meet this definition. (Beville, Vol. 5, pp. 1275-1276). In its findings, the Agency refers to Community's hospice home care office in Robeson County as "the existing hospice program". (Stipulated Ex. 1, p. 342).

19. The 2002 SMFP, which allocates a new hospice home care program in Robeson County, uses the term "hospice program" to refer to each separately licensed home care office. (Pet. Ex. 5, p. 279; Beville, Vol. 5, p. 1273). Community already had a separately licensed hospice home care office in 2002 when it submitted its CON application. (Stipulated Ex. 2, p. 13; Pet. Ex. 14).

20. The Certificate of Need law also defines "Certificate of Need" as a ". . . written order which affords the person so designated as the legal proponent of the proposed project the opportunity to proceed with the development of such project." N.C.G.S. § 131E-176(3). A Certificate of Need would allow Community to proceed with developing services it already provides. (Beville, Vol. 5, p. 1278). Community does not need a Certificate of Need since it has already developed a hospice home care office in Robeson County that can provide all hospice home care services. (Stipulated Ex. 2, pp. 14-15; Beville, Vol. 1, pp. 182-183).

COMMUNITY'S NONCONFORMITY WITH CRITERION 1

21. N.C.G.S. § 131E-183(a)(1), review Criterion 1, requires that a proposed project be consistent with applicable policies and need determinations in the State Medical Facilities Plan. The need determination in the 2002 SMFP is for a new hospice home care program in Robeson County. (Pet. Ex. 5, p. 279).

22. Community is not planning to develop a new hospice home care program in Robeson County. See Findings 12-21, supra. Community will not be a new provider and will not give patients a new choice. (French, Vol. 3, p. 704). The Agency admits that Community will not be providing any additional services with the Certificate of Need. (Beville, Vol. 4, pp. 1246-1247). Community already has a hospice home care office in Robeson County which can offer all of the hospice services that a Certificate of Need approved hospice home care agency can provide. (Beville, Vol. 1, pp. 182-183; Hale, Vol. 7, p. 1939).

23. Awarding a Certificate of Need to Community would prevent Native Angels, a potential competitor, from establishing a new hospice home care agency in Robeson County. (Stipulated Ex. 1, pp. 334-336, 379; Roberson, Vol. 6, pp. 1673-1674). Preventing competition is not a benefit to the people of Robeson County. (French, Vol. 3, pp. 730-731). Furthermore, it is not a benefit to the people of Robeson County that if Community received a Certificate of Need, Community will be able to separately sell its operation in Robeson and expand its service area beyond Robeson County. (Beville, Vol. 5, p. 1279). The allocation in the SMFP should be for the benefit of the people of Robeson County, not to further the business interests of a particular provider. (French, Vol. 7, pp. 2060-2061).

24. In applying Criterion 1, the Agency erroneously determined that Community is not offering a hospice home care program in Robeson County at the present time because the Robeson County office is considered a "branch" office and does not have a separate provider number. (Hoffman, Vol. 5, pp. 1354-1355; Stipulated Ex. 1, p. 335). There is no mention in the definition of "hospice" in the Certificate of Need law about separate provider numbers or branch or parent offices. (Beville, Vol. 5, p. 1276). N.C.G.S. § 131E-176(13a).

25. The Agency erred in finding Community's application conforming with Criterion 1. (Pet. Ex. 18, p. 1). Community has not demonstrated that its application is responding to the need for a new hospice program in Robeson County and, consequently, the application fails to conform with Criterion 1. (French, Vol. 3, pp. 703-704).

26. Community points out that the need determination in the 2002 SMFP was based on data from 1999 and 2000. (*See* Vol. 5, Hoffman, pp. 1325-29). Because Community's hospice program in Robeson County began operation in 2001, its services were not captured for State health planning purposes in the 2002 SMFP data. This is an interesting glitch in the system. It is possible, though there was no evidence on this point, that Community had already filled the need identified in the 2002 SMFP by opening its branch office in Robeson County in 2001. Likewise, had Community not opened a Robeson County office in 2001, and had Community applied for this CON and been denied, under existing State policy, Community could have still opened a Robeson County hospice office in addition to the hospice program approved by the CON Section. None of this changes the fact that Community, in this review, was not seeking to develop a new hospice care program in Robeson County. It already has the program and may continue to provide hospice services without any limitation imposed as the result of this CON review and award to Native Angels.

COMMUNITY'S NONCONFORMITY WITH CRITERION 3

27. N.C.G.S. § 131E-183(a)(3), review Criterion 3, states that

> The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

28. Community's application contains inconsistent information about the number of patients that will be served in year two. (Stipulated Ex. 2, pp. 53, 68, 69, 70, and 71; Pet. Ex. 18, p. 1; French, Vol. 3, p. 708). In some parts of the application, Community states that 90 patients will be served in year two and in other parts of the application it states that 95 patients will be served in year two. (*Id.*)

29. In reviewing Community's application, the Agency was not sure of whether Community was basing its projections on serving 90 or 95 patients in the second year. (Beville, Vol. 4, pp. 1217-1218).

30. In the year prior to filing the application, Community served 138 patients. (Stipulated Ex. 2, p. 40). However, it projected serving 86 patients in its first year of operation with a CON. (*e.g.* Stipulated Ex. 2, p. 92). Community does not actually anticipate that it will decrease the number of patients to be served if it should receive the Certificate of Need and admits that it is more likely that they will serve 138 patients in the first year rather than 86. (Roberson, Vol. 6, pp. 1738-39). Therefore, in addition to having inconsistent patient numbers for year 2, Community's projection of patients to be served is not accurate or reasonable. (*Id.*) Community has not adequately identified the population to be served as required by Criterion 3. (French, Vol. 3, pp. 708-709).

31. Hospice home care services involve four levels of care -- routine home care, continuous home care, respite care and inpatient care (French, Vol. 3, pp. 667-670; Pet. Ex. 36, p. 7). The majority of hospice home care is routine home care, typically provided by a nurse, a nursing assistant, or a home health aide. (French, Vol. 3, p. 667). The visits are usually an hour or a little more than an hour and the staff does patient care, patient assessments, and patient and family education. (*Id.* at pp. 667 and 668.)

32. Inpatient care is when a patient is admitted to a facility and hospice staff works with the facility to provide or assist the family through the death process. (French, Vol. 3, pp. 669-670).

33. Continuous care is nursing care on a continuous basis for as much as 24 hours a day during periods of crisis as necessary to maintain an individual at home. (Pet. Ex. 34; 42 C.F.R. § 418.204(a)). The care must be predominately nursing care and must involve at least eight hours during a twenty-four hour period. (*Id.*) Continuous care is extremely important because without continuous care, many patients could not remain at home and would need to be admitted to a nursing facility, hospice inpatient facility, or the hospital. (French, Vol. 3, pp. 668-669; Beville, Vol. 1, pp. 185-187).

34. Respite care is short-term inpatient care provided to the individual when necessary to relieve the family members or other persons caring for an individual. (*Id.*, 42 C.F.R. § 418.204(b)(1)). The provision of respite care allows many patients to remain at home. (Beville, Vol. 1, pp. 185-187).

35. Hospice home care agencies are required to provide continuous care and respite care. (Pet. Ex. 34; *See* 42 C.F.R. § 418.50(b)(2) and § 418.204(a) and (b)).

36. North Carolina home health agencies should be providing more continuous and respite care because of their importance to the hospice patient and his or her family and the ability of the patient to remain at home. (Beville, Vol. 1, pp. 185-186; Jacobs, Vol. 2, pp. 375-377).

37. It is less costly for hospice patients to remain at home. (Hale, Vol. 7, pp. 1953-1954; French, Vol. 3, pp. 671-672; Pet. Ex. 36, p. 11). Medicare pays substantially more for patients in skilled nursing facilities and in hospitals than patients receiving hospice services at home. Id.

38. Community has been unable or unwilling to implement a full scope of hospice services in response to the needs of the community. (Pet. Ex. 18, p. 1; French, Vol. 3, pp. 709-713). In Robeson County, Community provided zero days of respite care and zero days of continuous care in the year prior to filing the application. (Stipulated Ex. 2, pp. 63 and 65; Pet. Ex. 19, p. 3). Community often encourages families to move patients to general inpatient care during a medical crisis. (Feliciano, Vol. 7, pp. 1831-1832, 1863-1864).

39. Community served a total of 1,249 patients in eight different locations during the year prior to filing its application and in all those locations provided only 2 days of continuous care and 21 days of respite care. (Pet. Ex. 31; French, Vol. 3, p. 711). While the information showing that Community also was providing virtually no continuous care or respite care at its other locations was available to the Agency during the review, the Agency never reviewed this information. (Beville, Vol. 1, pp. 209, 214).

40. Community uses inpatient care as its default level of care for patients requiring more than routine home care ostensibly because inpatient care is less expensive to the health care system. However, providing continuous care for 16 of 24 hours

in one day would be less expensive to the health care system than inpatient care. (Roberson, Vol. 6, pp. 148-149; Hale, Vol. 7, pp. 153-154). Most patients prefer to be at home instead of in an inpatient facility. (Beville, Vol. 1, pp. 185-186).

41. Although Community's witnesses identified the necessity for a doctor's order as a barrier to continuous care, it is as easy to obtain a physician's order for continuous care as it is to obtain a physician's order for inpatient care. Physicians change patient care plans whenever appropriate during their stay in hospice. The hospice staff can have a change to the care plan based on the patient's need by picking up the telephone and calling the physician if needed. The hospice staff can take action on a physician's verbal order given over the phone. (Hale, Vol. 7, p. 1951; Jacobs, Vol. 7, pp. 1991-1992).

42. Community states that it has not been able to document the total amount of continuous care it is actually providing to patients in Robeson County because it does not have an adequate time keeping system to track and validate the continuous care level of care. (Robeson, Vo. 6, pp. 1542-1543). I do not find this excuse to be credible. Community admits that other agencies have figured out how to bill for continuous care services they provide. (Hale, Vol. 7, pp. 1952-1953).

43. It is a requirement for hospice home care agencies to track the service rendered to patients. The caregiver documents the care and care level being given at the time the services are provided by writing it down on a form provided by the Agency that meets Medicare/Medicaid and licensure rules. Medicare provides free software and a very user-friendly website to report and bill for the services they have provided to patients. (Jacobs-Ghaffar, Vol. 7, pp. 2012-2017).

44. The Agency attempted to explain Community's failure to provide any continuous care or respite care in Robeson County as being typical for a new agency. However, the federal requirement to have these services available does not distinguish between new and old agencies. (Beville, Vol. 1, pp. 212-213; Pet. Ex. 34). Furthermore, Community has had a hospice home care office in Fayetteville since 1995. In the year prior to filing its application for Robeson County, Community provided only two days of continuous care and zero days of respite care for the 528 patients served from the Cumberland County office. (Pet. Ex. 20, p. 3; Beville, Vol. 1, pp. 212-213).

45. Licensure reports filed by Community show that a much higher percentage of Community's patients die in institutions in comparison with the state average. (Pet. Ex. 19-26, 32; French, Vol. 3, pp. 712-713). Community has a history of not providing all levels of care. (*Id.*)

46. Under Criterion 3, the applicant should demonstrate how the population will be served by the proposed project. N.C.G.S. § 131E-183(a)(3). (French, Vol. 3, p. 713). Community has not demonstrated that it has been willing to provide continuous care and respite care in the past which makes its projections of these services unreasonable and inconsistent with its track record. (*Id.*).

47. Criterion 3 also requires that an applicant address how low income, the elderly, and other underserved groups will be served by the proposed project. (French, Vol. 3, p. 714). In comparing Community's projection of Medicare and Medicaid percentages to Community's historical service, Community proposes to serve a combined percentage of Medicare and Medicaid of 81.11% when its current utilization in Robeson County is 98.20%. (Stipulated Ex. 1, p. 372).

48. In its Comparative Analysis, the Agency noted that Community is projecting to decrease service to the elderly from 95.4% to 69.87% and failed to demonstrate the basis for this decline in service. (Stipulated Ex. 1, p. 372). This decline in service to Medicare and Medicaid also should have been a concern of the Agency's under Criterion 3 which requires that the applicant demonstrate the extent to which the elderly will have access to services. (French, Vol. 3, pp. 714-715). Ms. Beville testified that it is not reasonable for Community to show a decline in service to Medicare and Medicaid. (Beville, Vol., 4, p. 1216).

49. The Agency erred in finding Community's application conforming with Criterion 3. Community has failed to meet the requirements of Criterion 3 because it has failed to adequately identify the population to be served, failed to show that it will provide a full scope of services, and failed to show that elderly persons will have adequate access to its proposed services. (French, Vol. 3, pp. 708-715; Pet. Ex. 18, pp. 1-2).

COMMUNITY'S NONCONFORMITY WITH CRITERION 4

50. Criterion 4 requires that an applicant demonstrate that the least costly or most effective alternative has been proposed where alternative methods of meeting the needs for the proposed project exist. N.C.G.S. § 131E-183(a)(4).

51. In its application, Community states that the two alternatives to consider are continuing to operate the existing hospice program as a branch of its Fayetteville agency or establishing the current office as a separately licensed and certified hospice

homecare program. (Stipulated Ex. 1, p. 342). Community already is separately licensed and is certified to provide Medicare and Medicaid services in Robeson County. (Pet. Ex. 14; Stipulated Ex. 2, p. 40).

52. The Community application states:

> "Financially, either option would result in the same costs to us. We will not incur additional capital costs, staffing costs, or supply costs that we would not otherwise realize. We are already an established and successful provider in Robeson County, and our overall costs will be adjusted, based on census growth, the same under both scenarios . . ."

(Stipulated Ex. 2, p. 61; Stipulated Ex. 1, p. 342).

53. The Agency admits that Community will not be providing any additional services with a certificate of need and having a certificate of need will not affect the care that Community will be providing in Robeson County. (Beville, Vol. 4, pp. 1246-1247). Community has failed to show that the alternative of having a certificate of need, rather than continuing to operate the same services without a certificate of need, is the less costly or most effective alternative for Community. (Pet. Ex. 18, p. 2; French, Vol. 3, pp. 719-720).

54. The Agency erred in finding Community's application conforming with Criterion 4. Community has failed to meet the requirements of this criterion. (French, Vol. 3, pp. 719-720).

THE AGENCY'S ANALYSIS OF THE APPLICATIONS UNDER CRITERION 5

55. N.C.G.S. § 131E-183(a)(5), review Criterion 5, states that

> "[f]inancial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service."

56. The Agency found that both the Community and Native Angels' applications had deficiencies under Criterion 5 but, nevertheless, approved Community's application conditioned upon the receipt of documentation from Community showing that it would meet the requirements of this criterion prior to the issuance of the Certificate of Need. (Stipulated Ex. 1, p. 345). Community failed to provide any documentation in its application to show how it would fund $34,795 projected as initial operating expenses. (Stipulated Ex. 1, pp. 343-344).

57. The project analyst testified that she denied Native Angels' application, even though it was superior in five out of six factors used in her Comparative Analysis, because she was unable to determine: (1) that Native Angels' proposed hospice home care services would show a profit in year two; or (2) that the application included a statement that Native Angels intended to subsidize its hospice operations with excess revenue from its home care operations. (Stipulated Ex. 1, p. 348; Beville, Vol. 4, pp. 1175-1178).

58. The Agency overlooked many deficiencies in Community's application under Criterion 5. (French, Vol. 3, pp. 665-666, 691-694, 721-726; Vol. 7, pp. 2074-2075, 2093). The Agency's own analysis showed that Community's project would not be profitable in year two. (Beville, Vol. 4, pp. 1191-1192; French, Vol. 3, pp. 691, 694; Stipulated Ex. 1, p. 134), though Community's own calculations did show a profit.

59. Hospice projects are different from CON projects involving big capital expenditures. (French, Vol. 3, pp. 674-677; Vol. 7, pp. 2090-2091). When there is a big capital expenditure involved, it is important for the Agency to determine that the debt to be incurred can be paid by the applicant. (French, Vol. 3, pp. 675-676, 738-739; Vol. 7, pp. 2090-2091). Financial projections showing that the project will have a profit by a certain year are important. (Id.) With hospice, however, there is little or no capital expenditure involved, the source of revenue is certain, and there is no tendency to over-utilize the services. (French, Vol. 3, pp. 676-677). Financial feasibility should be assessed based upon the type of project. (*Id*. at 674-675).

60. Both the Community and Native Angels' applications have deficiencies in the financial information provided in their applications, but that should not have been the deciding factor in this review. (French, Vol. 3, pp. 666, 739). Instead, the Agency should have considered which of the applicants would be best for the community. (French, Vol. 3, pp. 665-666, 697-698, 739-740).

61. Review of CON Applications, as practiced by the CON Section, is an extremely odd practice. Much of what is reviewed and evaluated, as if it were gospel fact, is pure fiction. Ms. Beville testified frankly that the financial portions of "[a]ll applications, for the most part, are fiction." (Beville, Vol. 4, p. 1226). The testimony of CON staff gives the distinct impression that CON Section review has more to do with determining which candidate has done a better job of filling up all the blanks in the application form with fictional numbers than with determining which applicant will actually best serve the public.

62. For example, the "Pro Formas," about which I heard hours of testimony, are simply the applicants' self-serving projections of what the expenses and income of the business may be if the CON is granted and if things go as the applicant expects. This is a reasonable ball-parking exercise, since predictions are all we know about the future. But imbuing these forms full of fiction with an almost religious significance – allowing no supplementation to the 'original text' and making the absence of all the correct imaginary numbers the damnation of an otherwise superior application – is bizarre, arbitrary, and capricious.

63. As the comparatively superior application in the review, Native Angels' application should have been approved and not disqualified based upon Criterion 5. The CON Section improperly elevated Criterion 5 over all other factors, including the big picture of what would be best for the community. (*See* French, Vol. 3, p. 665-666).

A. Community's Application

64. Community's revenue projections are based upon serving 95 patients in year two. (Stipulated Ex. 2, p. 145; Pet. Ex. 18, p. 3). However, Community states in its application that it will only serve 90 patients in year two. (Stipulated Ex. 2, pp. 53, 68). Community contends that the correct number is 90 patients in year two. (Roberson, Vol. 6, pp. 1741-1742).

65. Community's inconsistent information about the numbers of patients to be served in year two has a major impact on Community's projected revenues. (French, Vol. 3, pp. 708-709).

66. If revenues are reduced to project services to 90 instead of 95 patients, Community would show a loss in year two on its financial pro forma. (Stipulated Ex. 2, p. 139; French, Vol. 3, pp. 708-709). In reviewing Community's application, Ms. Beville never calculated whether Community's project would show a loss based on serving 90 patients in the second year when its calculations were based on serving 95. (Beville, Vol. 1, p. 262).

67. The number of patients to be served each year is a starting point for many of the calculations in the application. (Beville, Vol. 1, p. 257). If the beginning patient number is wrong, then days of care, visits and staffing would be wrong. (Beville, Vol. 1, pp. 257-258). This also has a bearing on whether costs are reasonable and whether a project is financially feasible. (Id.)

68. Community also failed to demonstrate that the projected number of visits per discipline were based upon reasonable assumptions. (Pet. Ex. 18, p. 2, French, Vol. 3, pp. 715-716). Community admits that its visit assumptions are erroneous. (Roberson, Vol. 6, pp. 1707-1709, 1712).

69. The visit assumptions set forth in Community's application are inconsistent with the number of visits projected. (Stipulated Ex. 2, pp. 72 and 73; Pet. Ex. 18, pp. 2 and 6, French, Vol. 3, pp. 715-716). The assumptions stated in the application would result in 1,756 nursing visits in year one and 1,977 nursing visits in year two. (*Id.*). However, the visits stated in Community's application, which were used to project staffing, are considerably less – 1,095 visits in year one and 1,602 visits for year two. (Stipulated Ex. 2, p. 73; Pet. Ex. 18, p. 6). Home health aide staffing also has been understated. (*Id.*)

70. Because of the erroneous number of visits projected, Community has understated its staffing expense in its pro formas. (French, Vol. 3, p. 726; Pet. Ex. 18, p. 4). Staffing is the largest expense in a hospice operation. (French, Vol. 7, pp. 2044-2047).

71. In reviewing Community's application, Ms. Beville did not realize the discrepancy between Community's assumptions regarding visits and the actual visits used in its projections. (Beville, Vol. 1, pp. 268-269). She testified that if Community had based its projected visits on its assumptions, Community would need more staff than proposed. (Beville, Vol. 1, pp. 271-272). She also testified that an applicant's visit assumptions are important and are used to determine staffing expenses, and that it is important to have accurate information regarding the number of times a nurse is going to visit a patient each week. (Beville, Vol. 4, pp. 1205-1206).

72. Community also projects significantly fewer visits per patient per week than is reasonable. (French, Vol. 3, p. 716). Community projects providing only 1.36 visits per week by nurses when other applications recently filed by Community show a considerably higher number of nursing visits per week. (French, Vol. 3, pp. 717-718).

73. Community also projected more visits for social workers than for nurses, which is not reasonable. (French, Vol. 3, p. 718; Stipulated Ex. 2, p. 108; Pet. Ex. 18, p. 2) This is contrary to the assumptions in Community's application. (Beville, Vol. 1, p. 266-267). The Agency admits that by understating nursing visits and overstating social worker visits, Community could show lower staffing costs than it will actually incur. (Beville, Vol. 1, p. 265). All of these factors make Community's staffing projections and staffing costs unreasonable and unreliable. (French, Vol. 3, pp. 715-718).

74. Community admits that it is more likely that it will be serving 138 patients in the first year rather than 86. (Roberson, Vol. 6, pp. 1738-1739). However, Community's application did not base any of its projections on the number of patients it was actually likely to be serving. (Beville, Vol. 4, pp. 1223-1225). There is no staffing projected for serving 138 patients in the first year and revenue and expenses are not based upon the number of patients Community is likely to be serving. (*Id.*).

75. Community's pro forma income statement also includes an "Other" line item in projected revenue for each of the three years included in the projections. (Stipulated Ex. 2, p. 139). There is no explanation of the source of this "Other" revenue, even though the application form states that the applicant should provide the assumptions utilized for each line item. (*Id.* at p. 137; French, Vol. 3, pp. 722-724). Community's historical financial statement also does not include "Other" revenue. (Stipulated Ex. 2, p. 141).

76. If the "Other" revenue amount had not been included, Community's pro forma financial statement would show a loss in the first two years of the project. (French, Vol. 3, pp. 722-724; Stipulated Ex. 2, p. 139; Pet. Ex. 18, p. 3). Ms. Beville admitted that if the "Other" revenue had not been included in Community's pro forma, Community would show a loss in both year one and year two and that the "Other" revenue amount is not explained in Community's application. (Beville, Vol. 1, pp. 256-257). The Agency should not have found this "Other" revenue to be credible. (French, Vol. 3, p. 724).

77. Ms. Beville testified that she knew of what this "Other" revenue consisted based upon her review of other Community applications and discussions about the denial of these applications with Community. This use of extraneous information, obtained from the applicant outside the application itself, is in capricious contrast to the CON Section's refusal to ask Native Angels, a first-time applicant, for more information or clarification where needed. This issue will be discussed further below.

78. Other expenses in Community's pro forma income statement appear to be omitted or understated. (Pet. Ex. 18, pp. 4 and 11; French, Vol. 3, pp. 723-726). If these understated expenses had been included in Community's financial pro forma, even without reducing revenues by the "Other" revenue amounts, Community's financial pro forma would show a loss in all three years. (Pet. Ex. 18, p. 11). None of these discrepancies and omissions were noted by Ms. Beville in reviewing Community's application. (Stipulated Ex. 1, pp. 343-345).

79. Ms. Beville ignored historical staffing information in Community's application because she knew it was inaccurate. (Beville, Vol. 4, p. 1236).

80. In analyzing Community's application under Criterion 5, the Agency erroneously concluded that the applicant's projected costs were based upon reasonable assumptions regarding the number of persons to be served, the number of staff to be employed and the number of visits to be provided. (Stipulated Ex. 1, p. 345; French, Vol. 3, pp. 708-709, 715-716, 722-728).

81. In signing the decision to approve Community's application, Ms. Hoffman was not aware of the visit problems in Community's application. (Hoffman, Vol. 5, p. 1410).

82. Community's application also failed to include any financial statements showing the availability of funds to support its project. (French, Vol. 3, p. 721; Ex. 18, p. 3). If Community actually incurred the losses that Ms. Beville calculated using the rural reimbursement rates, there were no financial statements in the application to show whether Community had the financial strength to deal with these losses. (Beville, Vol. 4, pp. 1191-1192).

83. Ms. Beville told the President of Community that a financial statement would not be required if a bank letter were provided instead. (*Id.* at pp. 1192-1193). However, Community's application also failed to provide a bank letter. (*Id.*).

B. Native Angels' Application

84. Native Angels' application did not include a Pro Forma B, Revenue and Expense Statement, because the accountant who was preparing that form for Native Angels did it incorrectly and Native Angels did not have sufficient time to correct the form before the application had to be filed. (Jacobs-Ghaffar, Vol. 2, pp. 422-423). Native Angels intended to file a Pro Forma B. However, the Pro Forma was removed from its application for the purpose of making corrections and never replaced when Native Angels' principals, Ms. Jacobs-Ghaffar and Ms. Jacobs, drove to Raleigh to file the application. (Jacobs-Ghaffar, Vol. 2, p. 424).

85. In preparing the application, Native Angels focused on demonstrating the needs of Robeson County for the hospice home care services it was proposing. (Jacobs-Ghaffar, Vol., 2, pp. 420-421). Ms. Jacobs-Ghaffar did not believe that the financial projections were as important since Native Angels is very strong financially. (Jacobs-Ghaffar, Vol. 2, p. 424). The Agency informed Ms. Jacobs-Ghaffar that issues such as cultural sensitivity and the provision of continuous care and respite care would be important issues in the review. (Jacobs-Ghaffar, Vol. 2, pp. 350-352).

86. There are no regulations requiring that a pro forma financial statement be submitted with the CON application. (French, Vol. 3, p. 673). There are different ways that an applicant can demonstrate financial feasibility. (*Id.*).

87. An applicant can show that the project, standing alone, is financially feasible or, if the project is part of a larger operation, that the organization as a whole will be financially feasible with the addition of the project. (French, Vol. 3, p. 673).

88. Ms. Beville testified that if she had been able to determine that the hospice home care services proposed by Native Angels would be profitable in year two or if the application had included a statement that Native Angels intended to subsidize any losses with profits from its home care operations, she would have found the application conforming with Criterion 5 and Native Angels would have been the approved applicant. (Beville, Vol. 1, p. 229; Vol. 4, pp. 1172, 1175-1176). The lack of a Pro Forma B was not, in and of itself, a reason for finding Native Angels non-conforming with Criterion 5. (Beville, Vol. 1, pp. 229-230).

89. After the decision was made, Ms. Beville called Ms. Jacob-Ghaffar, the President of Native Angels, and told her that if the application had included the statement that Native Angels intended to subsidize any losses with profits from its home care operations, she would have approved the application. (Jacobs-Ghaffar, Vol. 2, pp. 414-416).

90. Native Angels proposed offering hospice home care services as part of its total home care operations. (Jacobs-Ghaffar, Vol. 2, p. 420; Stipulated Ex. 3, pp. 18-19, 31-34). Native Angels operates a very profitable home care agency. (Stipulated Ex. 3, pp. 105-108; French, Vol. 3, p. 679; Beville, Vol. 4, p. 1190). Ms. Beville admitted that because Native Angels does not intend to operate its hospice services separately from its other services, profits made on home care services would naturally offset any losses on another service, such as hospice. (Beville, Vol. 1, p. 232).

91. Native Angels' application showed a very strong cash position at the time the application was filed with over $600,000 cash in the bank. (Stipulated Ex. 3, p. 308; French, Vol. 3, pp. 689-691). Native Angels also submitted a profit and loss statement ending October 31, 2002 showing net income of over $539,000. (Stipulated Ex. 3, p. 309). Retained earnings were over $658,000, showing strong financial resources and available cash. (French, Vol. 3, pp. 689-690; Stipulated Ex. 3, p. 310). Native Angels also submitted a profit and loss statement for the prior year showing net income of $119,000 and cash available of $184,000. (Stipulated Ex. 3, pp. 302-303, French, Vol. 3, pp. 690-691).

92. Native Angels' application showed a strong trend of increased earnings when the 2002 financial statements were compared with the 2001 financial statements. (French, Vol. 3, pp. 690-691). Ms. Beville agrees that Native Angels has a very profitable home care agency and if Native Angels were awarded the Certificate of Need, Native Angels' would be able to provide hospice services and continue operating at a profit. (Beville, Vol. 4, p. 1190).

93. If Native Angels had a loss from its operation of the hospice home care services, there was substantial documentation in the application to show that any losses could easily be offset by the substantial profits from its home care operations. (French, Vol. 3, pp. 679, 688; Jacobs-Ghaffar, Vol. 2, p. 436; Stipulated Ex. 3, pp. 264, 268, 308-309). Several places in Native Angels' application state Native Angels' intent to financially support the hospice home care services, if necessary, from its home care operations. (French, Vol. 3, pp. 679, 688; Jacobs-Ghaffar, Vol. 2, pp. 430-432; Stipulated Ex. 3, pp. 34, 87, 264, 268, 308).

94. Page 34 of Native Angels' application specifically states that "Native Angels has built ample cash reserves to fund and maintain the hospice service." (Stipulated Ex. 3, p. 34). Ms. Beville did not consider this statement to be a sufficient indication of Native Angels' willingness to support the hospice services with its home care operations, if necessary, apparently because the statement referred to "ample cash reserves" instead of profits. (Beville, Vol. 4, pp. 1177-1178).

95. Native Angels has demonstrated the financial feasibility of adding hospice home care services by demonstrating that its total operation is very profitable and by demonstrating that it is committed to using cash reserves and profits from its home care operations to offset any losses, if necessary. (French, Vol. 3, pp. 679, 688-691; Stipulated Ex. 3, pp. 34, 87, 264, 268, 303-304, 308-310).

96. In her findings, Ms. Beville included an analysis showing Native Angels would have a profit of $89,000 in year one and a loss of $47,000 in year two. (Stipulated Ex. 1, p. 348). Ms. Beville admits that the $500,000 profit that Native Angels had from its home care agency would be more than enough to fund any losses that she calculated. (Beville, Vol. 1, pp. 231-232).

97. Although the source of revenues is certain, hospice is not a service from which a provider can expect large profits. (French, Vol. 3, p. 677). Lee Hoffman, the Chief of the CON Section, testified that the CON Section is willing to look at overall revenues of a health care operation (*e.g.* a hospital) to meet the financial feasibility requirement, even when the operation cannot show that the proposed new service itself will make a profit. (Hoffman, Vol. 5, pp. 1430-1432, 1445-1446). Under such circumstances, her Agency will find a project financially feasible, even if it projects losing money, because the hospital otherwise has large profits. (*Id.*). The Agency considers it sufficient if the hospital overall has shown profits over the last two years. (*Id.* at 1446).

98. There is no reason that this approach to accessing financial feasibility should not be applied to assessing the financial feasibility of Native Angels' proposal. (French, Vol. 7, pp. 2038-2041). Native Angels is proposing almost no capital expense, with guaranteed revenues, to be operated as part of a very profitable home care operation. (French, Vol. 7, pp. 2041-2042). Showing a profit on a hospice operations, separate from total operations, should not be a necessity in determining that Native Angels proposal to add hospice home care services is financially feasible. (*Id.* at 2038-2042).

99. Nevertheless, the Agency did calculations to determine whether the hospice home care services would show a profit in year two without considering the profitability of total operations. (Stipulated Ex. 1, pp. 347-348). In the Agency findings, Ms. Beville included two different analyses of financial information in Native Angels' application. (*Id.*)

100. Ms. Beville's first analysis showed that the hospice services would have an overall profit in the first two years of over $40,000, but there would be a loss in the second year. (*Id.*; Beville, Vol. 1, p. 236). If Ms. Beville had used the rural reimbursement rates in this analysis, there would be a profit in the second year. (Beville, Vol. 1, p. 243).

101. Ms. Beville did a second analysis using the rural reimbursement rates for each level of care and the costs for each level of care contained in a table in the application. (*Id.*; Stipulated Ex. 3, p. 94). Because the costs used by Ms. Beville were actually charges, (*see* ¶ 104, *infra*) her analysis showed losses in both the first and second years of operation. (Stipulated Ex. 1, p.348; French, Vol. 3, pp. 683-684).

102. If Ms. Beville had used the rural reimbursement rates to determine revenue and the actual costs shown in Native Angels' cash flow statement, this analysis would have shown a profit in both year one and year two. (Pet. Ex. 17; French, Vol. 3, pp. 678-679, 683-685). There was information in Native Angels' application from which it could be determined that the hospice home care services, standing alone, would show a profit in year two. (*Id.*; Beville, Vol. 4, p. 1214).

103. Ms. Beville provided testimony concerning the expenses in Native Angels' cash flow statement being incomplete, but there was no mention in her findings about this concern. (Beville, Vol. 4, pp. 1184-1185). N.C.G.S. § 131E-186(b) requires that the Department provide written notice of all the findings and conclusions upon which it bases its decisions. (*Id.* at p. 1183). Native Angels' application includes very detailed staffing information and was found to be conforming with the staffing criteria. (Beville, Vol. 5, pp. 1291-1292). Therefore, the staffing expense amount in Native Angels' cash flow statement which is the largest expense for a hospice agency, must be considered in view of all of the staffing information in the application. (*Id.*; French, Vol. 7, pp. 2045-2047)

104. Native Angels' application did not show cost by level of service since Ms. Jacobs-Ghaffar mistakenly believed that the form was requesting charges, not costs (that is, she believed "cost" to refer to the cost of the service to the patient – called "charges" by the CON Section – rather than cost to the provider of providing the service). (French, Vol. 3, pp. 684-685; Jacobs-Ghaffar, Vol. 2, pp. 545-546; Stipulated Ex. 3, p. 94). However, the cost by level of service can be calculated based upon information in Native Angels' application. (Pet. Ex. 16; French, Vol. 3, pp. 685-687; Beville, Vol. 4, pp. 1213-1214).

105. The Agency erred in denying Native Angels' application under Criterion 5. The application contained adequate information to demonstrate that Native Angels' total operations would be profitable with the addition of hospice services. (French, Vol. 3, pp. 688-691). The application also contained substantial information that Native Angels is committed to using cash reserves and profits from its home care operations to offset any losses, if necessary. (French, Vol. 3, pp. 679, 688; Jacobs-Ghaffar, Vol. 2, pp. 430-433; Stipulated Ex. 3, pp. 34, 87, 264). Although not required, there also was information in the application from which the analyst could have determined that the hospice services, without considering total operations, would be financially feasible. (Beville, Vol. 1, p. 243; Pet. Ex. 17).

C. The Agency's Authority to Request Addi tional Information

106. The Agency could have requested additional information from Native Angels if the Agency determined that it needed additional information to determine conformity with Criterion 5. (French, Vol. 3, p. 700; Vol. 7, pp. 2052-2053). In her findings, and in her testimony, Ms. Beville indicated that a statement or representation from Native Angels that it intended to support its hospice operations with excess revenue from its home care operations would have been sufficient. (Stipulated Ex. 1, p. 348;

Beville, Vol. 4, pp. 1175-1178). In the alternative, if Native Angels had submitted a Pro Forma financial statement showing a profit in year two of as little as $10,000, the Agency would have approved the application. (Beville, Vol. 4, pp. 1186-1187). This documentation could have been requested by the Agency.

107. The Agency has a regulation, 10A N.C.A.C. 14C.0204, allowing the Agency to request additional information during a review. Providing such information is not considered an amendment. (*Id*.)

108. Ms. Beville did not feel that Ms. Hoffman would allow her to ask Native Angels for information which she thought was needed to approve Native Angels' application. (Beville, Vol. 4, p. 1191).

109. The Agency also could have conditionally approved Native Angels' application to provide additional financial information. N.C.G.S. §131E-186(a); 10A N.C.A.C. 14C.0207(a). If a proposal is not consistent with all applicable criteria, the Agency may still issue a Certificate of Need subject to those conditions necessary to ensure that the proposal is consistent with such criteria. (*Id*.)

110. Ms. Hoffman testified that the Agency generally conditions in cases where it is a matter of documentation that the applicant failed to provide in its application. (Hoffman, Vol. 5, p. 1337).

111. The Agency could have conditionally approved Native Angels' application to provide additional documentation under Criterion 5, just as the Agency was willing to condition Community's application to provide documentation under Criterion 5. (French, Vol. 3, pp. 695-698). The Agency conditioned Community's application under Criterion 5 to provide documentation demonstrating the availability of funding for the working capital expenses for the project. (Stipulated Ex. 1, p. 345).

112. The Agency should seek to approve the application that best meets the needs of the Community. Since Native Angels' application was comparatively superior, the Agency should have used a condition on Criterion 5 if it felt it needed additional information. (French, Vol. 3, pp. 697-698).

D. The Agency's Inconsistent Treatment of the Applications And Inconsistent Application of Criterion 5.

113. The Agency treated the Native Angels and Community applications inconsistently under Criterion 5 in several ways. (French, Vol. 3 , pp. 693-695).

114. The Agency ignored numerous omissions and inconsistencies in Community's patient numbers, projections of visits, and projected revenues and expenses which, if considered, may have resulted in a determination that Community failed to conform with Criterion 5. (French, Vol. 3, pp. 715-718). Community's application also failed to provide financial statements. (French, Vol. 3, pp. 720-721). Despite these problems, Community's application was found conforming with Criterion 5. (Stipulated Ex. 1, pp. 348, 379).

115. In contrast, Native Angels provided consistent numbers on patients to be served and projected visits. Native Angels also presented financial statements from January 1, 2001 until the application was filed showing a very strong financial performance. (Stipulated Ex. 3, pp. 303-304, 308-310; French, Vol. 3, pp. 679, 689-691). Nevertheless, the Agency determined that Native Angels did not demonstrate conformity with Criterion 5. (Stipulated Ex. 1, pp. 348, 379).

116. The Agency relied upon the information outside of Community's application, including financial statements submitted with other applications and settlement documents in other cases appealed by Community, to explain the "Other" revenue amounts. (Beville, Vol. 4, pp. 1087-1088, 1229-1231; Vol. 5, pp. 1302-1303). The Agency also imposed a condition on Community's approval that it submit documentation that was missing to demonstrate conformity with Criterion 5. In contrast, the Agency was not willing to allow Native Angels to submit additional information, either by a request from the Agency during the review or by the imposition of a requirement to provide information as a condition of approval. (French, Vol. 3, pp. 697-700; Vol. 7, pp. 2052-2053, 2055-2056; Beville, Vol. 4, p. 1057).

117. Ms. Beville testified that big corporations are given an advantage in the CON process, especially those that have filed previous CON applications. (Beville, Vol. 4, pp. 1231-1232). Ms. Beville explained that it is permissible for her to rely upon information outside of Community's application, such as information contained in other Community applications, to determine its conformity with Criteria 5. (*Id*.) However, the Agency does not allow an applicant like Native Angels to provide additional information after its application has been submitted. (Id.)

118. Ms. Beville and Ms. Hoffman gave differing testimony about how Criterion 5 is applied and whether it is a two-part or three-part Criterion. Ms. Beville testified that Criterion 5 is a two-part Criterion, while Ms. Hoffman testified it is a three-part Criterion. (Beville, Vol. 4, pp. 1044-1045; Hoffman, Vol. 5, pp. 1338-1339). Ms. Beville testified that the term "availability of funds for . . . operating needs" as used in Criterion 5 refers only to funds for initial operating expenses, while Ms. Hoffman testified that this refers to funds for both initial operating expenses and long-term operating expenses. (Beville, vol. 4, pp. 1197-1198; Hoffman, Vol. 5, p. 1425). The CON Section has no regulations addressing how the Agency should assess financial feasibility under Criterion 5. (Hoffman, Vol. 5, p. 1427).

119. Although the Agency takes the position that the "first part" of Criterion 5 can be conditioned, but not the "second" or "third" part, there are no written standards or regulations setting forth such limitations on the Agency's conditioning authority. (Beville, Vol. 4, pp. 1194-1196).

COMMUNITY'S NONCONFORMITY WITH CRITERION 7

120. N.C.G.S. § 131E-183(a)(7), review Criterion 7, requires that the applicant show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided. This criterion requires that an applicant propose sufficient staffing for its proposed services. (French, Vol. 3, p. 726).

121. Community has projected an unrealistically low number of visits per week by nurses and staffing is based upon the number of nursing visits projected. (French, Vol. 3, pp. 716-717). Community projects providing only 1.36 visits per week by nurses when other applications recently filed by Community show two to four nursing visits per week. (French, Vol. 3, p. 718; Pet. Ex. 18, p. 7). In his deposition, the President of Community testified that anything less than 1.75 nursing visits per week is insufficient. (Roberson, Vol. 6, pp. 1719-1720).

122. Community's projection of more visits for social workers than for nurses is inconsistent with how hospice programs typically provide services. (French, Vol. 3, p. 718; Beville, Vol. 1, p. 264). This was overlooked by Ms. Beville when she reviewed Community's application. (Beville, Vol. 1, p. 264). Ms. Hoffman also was not aware that Community was projecting more social work visits than or nursing visits. (Hoffman, Vol. 5, p. 1410).

123. There are no hospice home care agencies that provide more social work visits than nursing visits. (Stipulated Ex. 1, pp. 189-193; Beville, Vol. 1, pp. 264-265). Community's patient care coordinator would not expect that social work visits would be greater than nursing visits. (Feliciano, Vol. 7, pp. 1858-1859).

124. As discussed under Criterion 5, Community also projected lower visits than supported by its own assumptions in its application. (French, Vol. 3, pp. 715-716). Ms. Beville testified that Community would need more staffing and projected if it provided the number of visits supported by its assumptions. (Beville, Vol. 1, pp. 271-272). The number of projected patients to be served in year two is not reasonable. (French, Vol. 3, p. 708; Pet. Ex. 18, p. 1). As a result, Community has understated its staffing and is not consistent with the requirements of Criterion 7. (French, Vol. 3, p. 726; Ex. 18, p. 4).

125. The Agency erred in finding that Community's application conformed with Criterion 7.

COMMUNITY'S NONCONFORMITY WITH CRITERION 13(a)

125. N.C.G.S. § 131E-183(a)(13)(a) requires that the applicant show the extent to which medically underserved populations currently use the applicant's existing services, in comparison to the percentage of the population in the applicant's service area which is medically underserved.

126. As discussed under Criterion 3, Community has a history of providing no continuous care or respite care in Robeson County, or in any of the other seven counties where Community has hospice home care offices. (French, Vol. 3, p. 727-728; Pet. Ex. 19-26, 31). Community has failed to show that it provides access to respite and continuous care services for Medicare and Medicaid patients and other underserved groups. (*Id.*)

127. The Agency erred in finding Community's application conformed with Criterion 13(a).

COMMUNITY'S NONCONFORMITY WITH CRITERION 18(a)

126. N.C.G.S. § 131E-183(a)(18), Criterion 18(a), provides that an applicant

> "shall demonstrate the expected affects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; . . ."

127. The Agency admits that approving Community's application will not have a positive impact on competition. (Beville, Vol. 4, p. 1247). Approving Community's application simply preserves the status quo and does not add a new provider to the community. (French, Vol. 3, pp. 730-731; Vol. 7, pp. 2061-2063). Community can provide the same services without a Certificate of Need. (Beville, Vol. 1, pp. 182-183). Community's project also will not increase access since Community proposes to provide substantially less service to Medicare and Medicaid than it currently provides. (Stipulated Ex. 1, p. 372; French, Vol. 3, p. 731).

128. The Agency erred in finding Community's application conforming with Criterion 18(a). There will be no positive impact on competition and no positive impact upon access to the services proposed. (French, Vol. 3, pp. 730-731; Pet. Ex. 18, p. 5).

APPLICATION OF THE SPECIAL CRITERIA TO COMMUNITY

129. The Agency's Special Criteria, 10 N.C.A.C. 3R.4202(b)(2) and (3), requires that an applicant provide the annual unduplicated number of hospice patients projected to be served in each of the first two years following completion of the project and the projected number of hospice patients to be served in each of the first twenty-four (24) months with the methodology and assumptions used to make the projections. The Agency found Community's application conforming with these Special Criteria, even though it was unclear whether Community intended to serve 90 or 95 patients in year two. (Beville, Vol. 4, pp. 1217-1218). Perhaps more importantly, Community's application and the Section's response to it delved once more into the bizarrely solemn treatment of purely fictional numbers. Community's patient projections are essentially lies: they have already served 138 patients in their first year, and have no plans to decrease that number.

130. Because there were inconsistencies in Community's application regarding the number of patients to be served in year one and year two, Community failed to meet the requirements of 10 N.C.A.C. 3R.4202(b)(2) and (3). (Pet. Ex. 18, p. 5; Stipulated Ex. 2, pp. 53, 68, 69, 70 and 71). Community's application should have been found non-conforming with these special criteria. (French, Vol. 3, pp. 731-732).

APPLICATION OF THE SPECIAL CRITERIA TO NATIVE ANGELS

131. The Agency's Special Criteria, 10 N.C.A.C. 3R.4202(b)(8) states that an applicant should provide a copy of proposed agreements for the provision of inpatient care. 10 N.C.A.C. 3R.4205(b)(7) requires that meetings of the interdisciplinary care team be held at least every two weeks.

132. The Agency found deficiencies in Native Angels' application in these two areas. (Stipulated Ex. 1, pp. 366, 371). Although Native Angels had a letter of support from the local hospital indicating its intention to support Native Angels' proposal if it were approved and the hospital can provide inpatient services, the Agency determined that Native Angels should have provided a proposed contract for the provision of inpatient services. (Stipulated Ex. 1, p. 366; Stipulated Ex. 3, p. 118).

133. The Agency also determined that the Medical Director contract in Native Angels' application should have specified that Native Angels' Medical Director will attend interdisciplinary team meetings every two weeks, not quarterly, to match the application which states that the team, which includes the medical director, will meet bi-weekly. (Stipulated Ex. 1, p. 371).

134. The Agency admits that these deficiencies could have been the subject of a condition. (French, Vol. 3, pp. 700-701; Beville, Vol. 4, pp. 1164-1165). Native Angels' Medical Director will attend interdisciplinary team meetings as often as required. His contract can easily be amended to reflect that commitment. There should be no problem securing an agreement for the provision of inpatient services. (Jacobs-Ghaffar, Vol. 2, pp. 439-440, 521-522).

THE COMPARATIVE ANALYSIS

135. The Agency's findings include a section entitled "Comparative Analysis". (Stipulated Ex. 1, pp. 372-378). In this section, the Agency considered the factors of services to medically underserved populations, provisions of culturally sensitive services, clinical education, staffing, costs and charges, and continuous care and respite care. (Stipulated Ex. 1, pp. 372-378). It was appropriate for the Agency to consider these factors in its comparative analysis. (French, Vol. 3, pp. 732-735).

(a) Services to Medically Underserved Populations.

136. Native Angels proposed providing an higher percentage of hospice days of care to Medicare and Medicaid than Community, 89% compared to 81.11%. (Stipulated Ex. 1, pp. 372-373). Services to medically underserved is an important consideration in reviewing these certificate of need applications for hospice homecare services. (Beville, Vol. 1, pp. 192-193; Stipulated Ex. 1, p. 372).

137. Community's application includes an unexplained reduction in its proposed service to Medicare and Medicaid from 98.2% to 81.11%. (Stipulated Ex. 1, p. 372).

138. The Agency correctly determined that Native Angels is the most effective alternative with regard to services to medically underserved populations. (Stipulated Ex. 1, pp. 372-373).

(b) Provision of Culturally Sensitive Services.

139. The issue of providing culturally sensitive services is a particularly important issue in Robeson County. (Beville, Vol. 1, p. 193; French, Vol. 3, pp. 736-737). The population of Robeson County is not the same as the population in the State as a whole. Lumbee Indians make up a large portion of the population of Robeson County (38%). In fact, there are more Lumbees than whites, and the total "minority" population is approximately 64 per cent. (Id; Stipulated Ex. 3, p. 43; Smith, Vol. 3, p. 783; Jacobs-Ghaffar, Vol. 2, pp. 313-314).

140. Hospice services are being underutilized in Robeson County. (French, Vol. 3, pp. 706-707). The 2002 SMFP showed a percentage of hospice deaths for Robeson County of 12.48% compared to the state average of 19.36%. "Hospice deaths" is the percentage of total deaths that occur under hospice care. (Pet. Ex. 33). The 2003 SMFP, available at the time the Agency made the decision at issue, showed a decline for Robeson County of 11.95% hospice deaths compared to a state average of 20.34% hospice deaths. (*Id.*). The percent of hospice deaths in Robeson County declined, whereas the state-wide percentage of hospice deaths increased. (French, Vol. 3, p. 707).

141. Culture can be defined as how a community views the world, including spirituality, family, sense of "home place" and connection to the land, and involves how people relate to each other through spoken and unspoken language, shared knowledge and traditions. (Knick, Vol. 1, pp. 162-163).

142. Being culturally sensitive requires first being aware that cultural differences exist, and then negotiating an understanding between the cultures. A person who is an active participating member of a culture would automatically provide health services in a culturally sensitive way. (Knick, Vol. 1, pp. 125-126, 129-130).

143. Strong cultural traditions exist among the Native American Lumbee people. (Id.; Knick, Vol. 1, pp. 134-136). There are cultural differences between the Lumbee, African-American and Anglo populations in Robeson County. The "home place", home church and family are of particular importance to Lumbee Indians. At death, cultural traditions concerning family and spirituality combine to create a critical crossroads for the patient and the extended family. It is vital to have culturally sensitive care at death. (Knick, Vol. 1, pp. 133-134; Smith, Vol. 3, pp. 784, 799, 805-806).

144. Native Americans tend to have a greater number of people involved in their health care. Children, grandparents and extended family become involved. Twenty or thirty family members may come to rally around the dying family member, making a hospital or nursing home often an inappropriate place for their care. (Smith, Vol. 3, pp. 796-797; Jacobs-Ghaffar, Vol. 2, pp. 378-378).

145. Hospitals and nursing homes usually limit the number of visitors and cannot accommodate a patient's extended family during the dying process. (Jacobs-Ghaffar, Vol. 2, pp. 378-379). Continuous care is crucial to allowing Native Americans to remain at home with extended family during medical crises. (Knick, Vol. 1, pp. 134-136; Jacobs-Ghaffar, Vol. 2, pp. 376-377).

146. The Lumbee community functions in socio-political dans called sets. The Lumbee culture differs from Anglo culture in language, food, family, traditional spirituality in addition to Christian heritage, connectedness to the land, and ways of addressing each other and communicating. (Jacobs-Ghaffar, Vol. 2, pp. 381-382; Knick, Vol. 1, pp. 122-124, 126-129).

147. A culturally sensitive hospice provider will not judge the condition of the patient's home or encourage the family to move the patient from their home to a nursing facility. A culturally sensitive provider will respect the patient's life condition and work with the patient in their surroundings. (Jacobs-Ghaffar, Vol. 7, pp. 2018-2019, 2031-2033).

148. For health organizations to be trusted in Robeson County, they must be a visible, on-going presence for some time. A healthcare agency cannot get the community to buy into the services they offer on a short term basis. (Smith, Vol. 3, pp. 799-800).

149. Even the County Health Dept. has had to rely on alliances with church groups and ministers to reach county residents with needed health care services in order to address critical health care issues in the community. (Smith, Vol. 3, pp. 805-807).

150. When health care services are needed, the community tends to choose known providers for services. Being a locally owned agency, active and known in the community in multiple ways, whose owners are active in local churches and in community affairs, gives the people of Robeson County a way to know and develop trust in the agency. (Smith, Vol. 3, p. 791).

151. In order to provide culturally sensitive services, the entire organization, from the top management down, must reflect the cultural values of and sensitivity to the culture it serves. Having staff that is conversant with Lumbee culture at every level of the organization is an advantage to the organization. (Jacobs-Ghaffar, Vol. 2, pp. 397-398; Knick, Vol. 1, p. 165).

152. Death magnifies the need for cultural sensitivity. The time frame for care at death is much shorter than with other health services. Hospice providers need an existing base relationship with the community so the community will accept the care when it is needed. Native Angels is known and trusted in the community. They have been accepted due to the long-standing community presence of the management. (Smith, Vol. 3, pp. 795, 804).

153. Native Angels is able to provide culturally sensitive care in their home care business because the owners live in and are members of the same culture. They have built in cultural competency because they are from the same community. There are barriers others must overcome that do not exist for Native Angels. (Jacobs-Ghaffar, Vol. 2, p. 379).

154. To address cultural and community needs other than that of the Lumbee population, Native Angels' application includes plans to make available Spanish language interpretation to serve the growing Hispanic community in Robeson County, and a sign language interpreter to serve the hearing impaired population in the community. (Jacobs-Ghaffar, Vol. 2, pp. 399-401).

155. The Robeson County Health Department first became aware of Native Angels when Bobbie Jacob-Ghaffar let the Health Department know that she was establishing a home care agency. Mr. Smith, the county Health Director, has had an on-going dialogue with Ms. Jacobs-Ghaffar as they have worked on grant proposals during the past 10 – 12 years. Native Angels has participated in health fairs with the County Health Dept. as well as doing food assistance and other social services programs on its own. Native Angels contacted the Health Dept. to be involved in community projects. Mr. Smith provided a letter of support for Native Angels' application, which he authored, which states in part, "[y]ou've worked closely with this agency, which contains a Robeson County Home Health agency, and have shown your willingness to work collaboratively with many institutions within the county and delivered care in a compassionate, competent manner to all residents in the county." (Smith, Vol. 3, pp. 800-804).

156. Prior to deciding to apply for the CON in Robeson County, Native Angels contacted many members of the community to confirm the need for an additional hospice agency and to learn whether the community would support Native Angels' desire to offer hospice services. (Jacobs-Ghaffar, Vol. 2, pp. 339-340).

157. To demonstrate the community's support for Native Angels' application, Native Angels submitted a petition signed by over 500 individuals and over 65 letters from community leaders, medical providers and citizens familiar with Native Angels' home care services, including a letter from Dr. Joe Roberts, a local physician who serves as the Medical Director for Community Hospice. (Native Angels Application, pp. 136; Jacobs-Ghaffar, Vol. 2, pp. 352-367, 643-644).

158. Community Hospice is not known to the Robeson County Health Department, except the Director has an awareness of its physical location. Although he has been Health Director at the Robeson County Health Dept. since 1988, Mr. Smith does not know Nancy Feliciano, the Patient Care Coordinator, nor any one else on the staff at Community. He does not know the ethnic make-up of their staff. No one from Community has contacted the Health Dept. to be involved in community projects. Mr. Smith has not heard of anyone in the community using Community's services. (Smith, Vol. 3, pp. 804-805, 814, 816, 819)

159. Community specifically spent far more time developing the financial aspects of its application than addressing the cultural and community aspects of its application. (Roberson, Vol. 6, pp. 1486-1487).

160. Community contacted only two people in the community in advance of submitting its application and did not have a great deal of community interaction in the development of its application. (Hale, Vol. 7, pp. 1960-1961).

161. Some of the letters submitted as part of Community's application are 2-3 years old and written long before the Robeson County hospice application was contemplated, some of the letters submitted are in support of Community's Wake County hospice CON application, and some of the letters included are actually letters from Community to members of the community requesting support. (Hale, Vol. 7, pp. 1961-1962).

162. By its own admission, Community's application did not document an established, good, solid relationship with the community in Robeson County. (Hale, Vol. 7, p. 1961). The Community application does state that Community provides care regardless of cultural background, and regardless of ethnic or religious background, or sexual orientation. (Stipulated Ex. 2, p. 104; Roberson, Vol. 6, p. 1567).

163. Culturally sensitive services are important for all patients regardless of their background. However, there is no discussion of the unique cultural components of Robeson County's population and no indication that Community has taken the time to understand the cultural differences in Robeson County and the impact these differences have on the delivery of hospice services. Community admits that its application does not show any recognition of understanding of cultural differences. (Roberson, Vol. 6, pp. 1565-1566, 1614; Stipulated Ex. 1, p. 373).

164. Community did not get letters of support from the community to submit with its application. (Roberson, Vol. 6, pp. 1675-1676).

165. Community's staff orientation and training policies and procedures, and quality control policies, are all set at the corporate level without individualizing for the specific county. (Feliciano, Vol. 7, pp. 1848-1849). The owners of Community conduct business from Nash County. (Stipulated Ex. 2, p. 373).

166. The patient care coordinator in Community's Robeson County office is a Lumbee Indian. (Feliciano, Vol. 7, pp. 1791-1792). She is not considered the administrator of the office and has no ownership in the business. (Feliciano, Vol. 7, pp. 1798-1800). Ms. Feliciano is being transferred to Community's Fayetteville office. (*Id.* at p. 1847).

167. Native Angels' application documented extensive efforts to propose a project that meets the needs of the Community. (Stipulated Ex. 1, pp. 374-375). The application documented the necessity for providing culturally sensitive services so that Native American, African American, and rural white people will be less resistant to using hospice services. (Id.) The owners of Native Angels are members of the Lumbee Tribe and lifelong residents of Robeson County. (*Id.*)

168. In contrast, the owners and administrators of Community's existing hospice home care office are not residents of Robeson County and conduct their business from a Nash County office. (Stipulated Ex. 1, p. 373). Even though Robeson County has over a 64% minority population, the applicant did not address in its application the need for the provision of hospice services that are culturally sensitive to the population and the applicant's ability to provide those services. (*Id.*).

169. Native Angels will provide the most culturally sensitive services to the people of Robeson County. The Agency correctly determined that Native Angels is the most effective alternative with regard to documentation of its efforts and commitment to the provision of culturally sensitive care to the minority population in Robeson County. (Stipulated Ex. 1, p. 375).

(c) Clinical Education.

170. Native Angels' application documented extensive efforts to provide clinical education opportunities for its employees and for the community. (Stipulated Ex. 1, p. 375). Native Angels has assisted employees in becoming registered nurses and obtaining additional education. Native Angels also works with the NAFTA Job Retraining Program and the Lumber River Council of Governments Youth Opportunity Program. (Id.).

171. The Agency correctly determined that Native Angels is the most effective alternative with regard to its efforts to offer a range of clinical education opportunities. (Stipulated Ex. 1, p. 375).

(d) Staffing.

172. Community's application proposed insufficient staffing for the visits projected. (French, Vol. 3, p. 726) *See* Findings 121-126, *supra*. Native Angels provided sufficient staff for the visits proposed and projected the greater number of employees than any of the other applicants in the review. (Stipulated Ex. 1, p. 377). In addition to having more RN and LPN staff to provide hospice services, Native Angels proposes a half-time nurse practitioner to make home visits. (*Id.*; Beville, Vol. 1, pp. 200-201).

173. The Agency correctly determined that Native Angels is the most effective alternative with regard to the staff proposed in its application. (Stipulated Ex. 1, p. 377).

(e) Costs and Charges

174. As set forth in Findings 28-31, 121-126 above, Community's application was based upon inconsistencies in the number of patients to be served, the visits to be provided, and inadequate staffing. Some expenses also were omitted or understated. Consequently, it is not reasonable to attempt to compare costs. (French, Vol. 3, p. 734).

175. It also is not reasonable to compare charges because each hospice homecare provider receives the same Medicare and Medicaid rate. (French, Vol. 3, p. 734). Some providers set their charges above these rates, only because they do not want to be underpaid should there be an increase in Medicare/Medicaid rates. (French, Vol. 3, pp. 734-735). Providers do not get paid charges by Medicare and Medicaid but only the established rates. *Id.*

(f) Continuous Care and Respite Care

176. Medical crises arise when a patient is receiving hospice, especially during the active phase of death near the end of life. (Jacobs, Vol. 7, pp. 1987-1990). Family members often get frightened during these phases and need medical help at home. (Jacobs, Vol. 7, pp. 1990-1991; Beville, Vol. 4, p. 1155).

177. Because continuous care and respite care are important services, the project analyst compared projections of these services in the Comparative Analysis. (Beville, Vol. 1, p. 202). As the Agency stated in its findings, Native Angels is committed to keeping patients at home as the cultural norm dictates. (Stipulated Ex. 1, p. 378; Jacobs-Ghaffar, Vol. 2, pp. 386-388).

178. As a result, Native Angels has projected 3,120 hours of continuous care and 130 days of respite care in the first year of operation, and 3,336 hours of continuous care and 139 hours of respite care in the second year of operation. (Stipulated Ex. 1, p. 378). In comparison, Community projected only 659 hours of continuous care and 5 days of respite care in the first year of operation and 815 hours of continuous care and 7 days of respite care in the second year of operation. (Id.) Not only are Community's projections much lower, but based upon Community's history of providing no respite and continuous care, its projections are not credible. (French, Vol. 3, p. 713).

179. The Agency correctly found that Native Angels is the most effective alternative with regard to the provision of continuous care and respite care. (French, Vol. 3, pp. 733-734).

(g) Other Comparative Factors

180. Another factor that should have been considered in the comparative review is competition. (French, Vol. 3, p. 735). Native Angels' application is clearly superior in this area because it provides patient choice and will enhance competition among providers of hospice home care services in Robeson County. (*Id.*)

181. Approval of Community's application does not promote competition because it will not result in a new provider in Robeson County and will simply maintain the status quo. (French, Vol. 3, p. 704; Vol. 7, p. 2063). In fact, it will stifle competition by keeping out a competitive provider with a different style of service.

THE DISQUALIFICATION OF NATIVE ANGELS' APPLICATION AS "UNAPPROVABLE"

182. Even though Native Angels' application was found superior in five out of the six factors analyzed in this section, Native Angels' application was disapproved because the Agency determined it was "unapprovable". (Stipulated Ex. 1, p. 379; Beville, Vol. 1, p. 217; Hoffman, Vol. 5, pp. 1377-1378).

183. According to Ms. Hoffman, the Chief of the CON Section, it would not matter if Native Angels' application were superior to Community's on 20 or even 50 comparative factors. The Agency still would disapprove the application. (Hoffman, Vol. 5, p. 1378). According to Ms. Hoffman, if the CON Section determines an application is "unapprovable", the comparative analysis makes no difference in the Agency's decision. (*Id.* at 1380-1381).

184. The Agency does a comparative analysis, even when it determines an application is "unapprovable", in case there is litigation and the court disagrees with the Agency on the determination of conformity or nonconformity with the criteria. (Hoffman, Vol. 5, pp. 1346-1347).

185. The term "unapprovable" or "unapprovable application" is not contained in any Certificate of Need regulations or the Certificate of Need statute. (Beville, Vol. 1, pp. 218-219). In this case, the Agency's determination that Native Angels' application was "unapprovable" resulted in the Agency approving Community's application, which it determined to be the less effective alternative in several important areas.

186. For the reasons set forth above, Native Angels' application should not have been found nonconforming with Criterion 5. If the Agency determined it needed additional information, it was incumbent upon the Agency to request information during the review or by condition so that the best applicant in the review could be approved. (French, Vol. 3, pp. 696-700).

187. There are no Certificate of Need rules or written guidelines used by the Agency in determining when it will and when it will not impose a condition to be able to approve an application that does not entirely conform with the statutory and regulatory criteria. (Beville, Vol. 1, p. 221; Hoffman, Vol. 5, pp. 1393-1394). Whether a deficiency can be conditioned is a determination that is made solely by Chief Hoffman without any written guidelines or rules. (Beville, Vol. 4, p. 1165) (*Id.*)

188. 10A N.C.A.C. 14C.0207(a) provides that

> "[if] a proposal is not consistent with all applicable standards, plans, and criteria, the Agency decision shall be to either not issue the Certificate of Need or issue one subject to those conditions necessary to ensure that the proposal is consistent with applicable standards, plans, and criteria. The Agency may only impose conditions which relate directly to applicable standards, plans, and criteria."

Conditions should be used whenever necessary to approve the most effective alternative among competing applicants. (French, Vol. 3, pp. 697-698).

189. Without any written guidelines or regulations, the Agency has determined that it will not condition the "second part" of Criterion 5, and a deficiency in the "second part" of Criterion 5 makes the application "unapprovable". (Beville, Vol. 4, pp. 1194-1196; Hoffman, Vol. 5, pp. 1390-1391). The Certificate of Need statute or regulations do not include any limitation on the Agency's authority to condition. (*Id.*).

190. In this case, the Agency approved Community's application, even though it was less effective in five out of six factors analyzed in the comparative review, and conditioned its decision on the receipt by the Agency of certain documentation from Community that would make its application conforming to Criterion 5. (Stipulated Ex. 1, pp. 345, 372-380). On the other hand, the Agency disapproved Native Angels' application on Criterion 5 without requesting additional information, even though the Agency determined Native Angels' application was a more effective alternative. (*Id.*) This decision is not in the best interests of the people of Robeson County.

191. Considering all of the factors addressed above, Native Angels presented a more effective alternative than Community and should have been the approved applicant in this review.

CONCLUSIONS OF LAW

To the extent that certain portions of the foregoing findings of fact constitute mixed issues of law and fact, such findings of fact shall be deemed incorporated herein by reference as conclusions of law. Based upon the foregoing findings of fact, the undersigned makes the following conclusions of law:

1. The parties are properly before the Office of Administrative Hearings. Petitioner is an affected person and a person aggrieved by the Agency decision to deny its application and approve the application of Community. N.C.G.S. § 131E-188(a) and (c), § 150B-2(6).

2. The position of the Agency that Community is proposing a new hospice home care program for Robeson County is contrary to the Certificate of Need statute and regulations and the 2002 State Medical Facilities Plan. The development of a "new health service facility" requires a Certificate of Need. N.C.G.S. § 131E-176(16)(a), § 131E-178(a). The term "health service facility" includes hospice. N.C.G.S. § 131E-176(9b). The term "hospice" is defined as ". . .any coordinated program of home care with

provision for inpatient care for terminally ill patients and their families. . . ." N.C.G.S. § 131E-176(13a). Only a "new" hospice home care program requires a Certificate of Need. Since Community already has a hospice home care program in Robeson County, Community is not proposing a "new" hospice home care program.

3. The CON regulations recognize that a hospice program is located where the hospice office is located. 10A N.C.A.C. 14C.0304(r) defines a hospice service area as ". . . the hospice planning area in which the hospice is located. Each of the 100 counties in the State is a separate hospice planning area." Community already has a separate license for a hospice home care agency in Robeson County, which is considered to be a hospice program under CON regulations. The 2002 State Medical Facilities Plan also refers to each separately licensed hospice home care office as a "hospice program."

4. A certificate of need allows the legal proponent of a proposed project the opportunity to proceed with the development of such project. N.C.G.S. § 131E-176(3). Since Community has already developed a hospice homecare office in Robeson County that can provide all hospice homecare services, Community does not need a certificate of need.

5. The Agency is required to make decisions that are consistent with the State Medical Facilities Plan, including its need determinations. N.C.G.S. § 131E-183(a)(1). Since Community is not proposing a new hospice home care program for Robeson County, the Agency erred in reviewing Community's application in this review.

6. The Agency's reliance on *Total Care, Inc. v. Dept. of Human Resources*, 99 N.C. App. 517, 393 S.E.2d 338 (1990) is misplaced. The *Total Care* decision does not address or define "hospice program" or "programs" generally. Instead, *Total Care* addresses a different issue and dealt with a different definition – the definition of home health agency. 99 N.C. App. at 519, 393 S.E.2d at 340.

7. After deciding it would review the application, the Agency erred in determining that Community's application conformed with the requirements of N.C.G.S. § 131E-183(a)(1), Criterion 1. Because Community is not proposing a new hospice home care program for Robeson County, it could not conform with Criterion 1 which requires that the proposed project be consistent with applicable policies and need determinations in the State Medical Facilities Plan.

8. Native Angels has met the requirements of N.C.G.S. § 131E-183(a)(5), Criterion 5. Native Angels has demonstrated that its operations with the hospice services would be financially feasible. The Agency erred in its determination that Native Angels' application failed to conform with Criterion 5.

9. The Agency acted erroneously in overlooking errors and omissions in Community's application relating to Criterion 5. The Agency also acted erroneously in finding that based on the Agency's own analysis, Community's hospice home care services would be profitable in year two.

10. However, the results of this review should not depend upon whether Community or Native Angels had more errors or omissions in the financial portions of their respective applications. Both Native Angels and Community will be able to operate financially feasible hospice home care services in Robeson County. The Agency erred in elevating Criterion 5 as a threshold Criterion which was treated as being more important than any other factors in the review. Instead, because these are hospice services, with guaranteed revenues and little or no capital expense involved, Criterion 5 should not be applied in a technical manner to eliminate either Community or Native Angels from the review.

11. By approving the application which the Agency determined was the least effective alternative based upon an alleged lack of information in Native Angels' application, the Agency has elevated form over substance and has failed to make the decision which is in the best interests of the people of Robeson County.

12. If the Agency believed it needed additional information from Native Angels, the Agency should have requested such information during the review or as a condition imposed upon the approval of Native Angels' application, as the CON regulations and the law allow. N.C.G.S. § 131E-186(a); 10A N.C.A.C. 14C.0204, .0207(a).

13. The Agency acted arbitrarily and capriciously by using inconsistent standards to review the Community and Native Angels' applications on Criterion 5. The Agency's willingness to supplement Community's application with information from other applications and settlement documents in a case previously appealed by Community, while at the same time finding Native Angels' application "unapprovable" because the Agency determined that certain information was lacking, is arbitrary or capricious.

14. The Agency erred and acted arbitrarily and capriciously in imposing a condition upon Community's application allowing Community, after the review, to submit information to demonstrate conformity with Criterion 5, while at the same time not

being willing to impose a condition upon Native Angels' application that it provide additional information on Criterion 5 that the Agency believed was needed to demonstrate conformity.

15. The CON Section acted erroneously in disqualifying Native Angels' application because of its determination that Native Angels' application was "unapprovable" based on Criterion 5. The Agency's disqualification of Native Angels' application as "unapprovable" is erroneous and a failure to use proper procedure.

16. As set forth in *Living Centers – Southeast, Inc. v. N.C. Dept. of Health and Human Services*, 138 N.C. App. 572, 532 S.E.2d 192 (2000), ". . . it is inherent that where two or more Certificate of Need applications *conform to the majority of the criteria in N.C. Gen. Stat. § 131E-183*, as in the case at bar, and are reviewed comparatively, there will always be genuine issues of fact as to who is the superior applicant." The Agency's designation of an application as "unapprovable" can result in decisions to approve the least effective or most costly application. In this case, because the Agency erroneously determined that Native Angels' application was "unapprovable", the Agency's determination that Native Angels demonstrated that it would provide the most culturally sensitive services, that it would provide better opportunities for clinical education, that it would provide more access for Medicare and Medicaid recipients, that its staffing would be superior, and that it would propose significantly more continuous care and respite care services, which are very important to keeping hospice patients at home, became irrelevant. Instead, the Agency should have approved Native Angels' application because it demonstrated its superiority in these areas.

17. The Agency's method of disqualifying applicants, and going through the motions of a comparison between applications for litigation purposes only, rather than conducting a meaningful comparative review considering all the relevant factors, is contrary to the express purpose and intent of the Certificate of Need law. N.C.G.S. § 131E-175. In addition, by disqualifying Native Angels as "unapprovable", Native Angels was denied the right to a meaningful comparative review on the merits of its application, contrary to North Carolina law. The Agency acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, and failed to act as required by law and rule.

18. The Agency acted erroneously in determining that Community's application conformed with N.C.G.S. § 131E-183(a)(1), (4), (7), (13a), (13c), and (18a) and 10 N.C.A.C. 3R.4202(b)(2) and (3) and in approving Community's application.

19. The Agency acted erroneously in failing to conditionally approve Native Angels' application and in finding that Native Angels' application failed to conform or conditionally conform with N.C.G.S. § 131E-183(a)(5) and 10 N.C.A.C. 3R.4202(b)(8) and .4205(b)(7). Native Angels' application should have been approved, conditioned upon providing a proposed agreement for inpatient services and an amended contract with its proposed medical director indicating that the proposed medical director will attend interdisciplinary team meetings every two weeks.

20. The CON Section substantially prejudiced Native Angels' rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, and acted arbitrarily or capriciously, in determining that Native Angels' application should be denied and Community's application should be approved.

21. Native Angels should be awarded the Certificate of Need at issue in this contested case.

RECOMMENDED DECISION

It is hereby recommended that the Director of the Division of Facility Services, Department of Health and Human Services, enter a final agency decision to approve the application of Native Angels Homecare Agency, Inc. and to disapprove the application of Community Health, Inc. It is further recommended that the approval of Native Angels' application include a condition requiring that Native Angels submit a proposed agreement for in-patient services and an amended contract with its proposed medical director indicating that the medical director will attend interdisciplinary team meetings every two weeks.

ORDER

It is hereby ordered that the Agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714, in accordance with N.C.G.S. § 150B-36(b).

NOTICE

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

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

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services.

This the 20th day of February, 2004.

_____

James L. Conner, II
Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF MECKLENBURG	**04 DHR 0051**

D.M., a minor, by his guardian J. TIMOTHY M., Petitioner,	)	
v.	)	**DECISION**
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES Respondent.	)	

This matter came on to be heard and was heard before the undersigned administrative law judge on February 20, 2004, the parties having been represented by counsel, Douglas Sea, Legal Services of Southern Piedmont, and Brett Loftis, Council for Children, for the Petitioner, and Diane Martin Pomper, Assistant Attorney General, for the Respondent; and the Court having heard the testimony and received and admitted the evidence of the parties, hereby makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT

1. Petitioner was born February 12, 1989. Because he is a minor, his name and that of his minor sister are not being used in this publicly available decision.

2. While in his biological mother's custody, Petitioner was a victim of sexual abuse and neglect and lived in an environment which involved drug and alcohol abuse, domestic violence and criminal behavior.

3. In 1995, at age 6, Petitioner was temporarily placed in Social Services custody in South Carolina.

4. In 1996, after being returned to his biological mother, Petitioner was diagnosed with:
   Axis 1 – Post-traumatic Stress Disorder
   Axis 1 – Oppositional Defiant Disorder
   Axis 1 – Rule out Dysthymic Disorder
   Axis 1 – Rule out Learning Disorder NOS
   Axis IV – Extreme, 5: sexual abuse, physical abuse, neglect and chaotic home environment, and foster placement (CMC Report 3/28/96).

5. In December 1996, Petitioner was placed in the legal custody of the Mecklenburg County Department of Social Services (DSS) for substantiated abuse and neglect.

6. In December 1996, Petitioner was placed by Mecklenburg DSS in a foster home.

7. In October 1997, Petitioner was removed by Mecklenburg DSS from his foster home because of severe aggression toward foster parents and toward his biological sister, S. (date of birth 4/30/91).

8. On October 1997, Petitioner was placed by Mecklenburg DSS with Tim and Crystal M_____. (hereinafter "the M's"), as foster parents.

9. In Fall 1997 and Winter 1998 Petitioner was treated by Dr. Jeannette Kolker and Dr. Harry Mahannah and was diagnosed with Attention Deficit Disorder.

10. In August 1998, Petitioner's biological sister, S., came to live in the M's home.

11. Mecklenburg DSS records include evidence of sexual abuse by Petitioner of his biological sister S. while in custody of his biological mother, and during his first foster home placement, and while placed with the M's.

12. In November 1999, Petitioner and his sister S. were adopted by the M's.

13. After November 1999, Petitioner continued to have problems with aggression, sneakiness, and with bonding to his new family.

14. In the Fall of 2000, the M's took Petitioner for therapy with Cameron Cooke, M.A., L.P.C. at First Baptist Counseling Center.

15. In January 2001, Cameron Cook referred Petitioner to Frank Gaskill, PhD.

16. Dr. Frank Gaskill is an expert in Reactive Attachment Disorder and in child psychology.

17. In October, 2001 Dr. Gaskill diagnosed Petitioner with Reactive Attachment Disorder.

18. The diagnosis of Reactive Attachment Disorder has been confirmed by other qualified practitioners, including Dana Horne, MSW, Sara Nafziger-Shelly, LCSW, of Crossroads Counseling Center, and Dr. Dejuan Singletary M.D., who is petitioner's treating psychiatrist.

19. In the Spring of 2002, based on Dr. Gaskill's referral, the M's contacted Mecklenburg Area Mental Health Authority to request services for Petitioner.

20. The 2002 documentation by Mecklenburg Area Mental Health includes reports of Petitioner's assaults, threatening family members, harming pets, self-mutilation, stealing, impulsive behavior, unruly and ungovernable, oppositional, lying, abandonment issues, a CAFAS score of 50 and a NC SNAP score at Level 4.

21. In a June 12, 2002 report, Dr. Gaskill recommended to Mecklenburg Area Mental Health for Petitioner a two-week intensive treatment session by Reactive Attachment Disorder specialists, respite resources, case management to facilitate various services which may require in-school supervision, day treatment, and specialized psychiatric services, all to be provided by persons with training in Reactive Attachment Disorder.

22. In August 2002, the M's and Petitioner participated in a two-week intensive therapy program for Reactive Attachment Disorder provided by Crossroads Counseling Center, in Hickory, N.C. The M's arranged for this treatment directly and paid most of its costs.

23. Petitioner made progress during the 2-week intensive, but was unable to sustain that progress due to the lack of adequate follow-up services by providers specializing in Reactive Attachment Disorder.

24. Beginning on July 29, 2002, Respondent approved Medicaid coverage for Petitioner to receive in-home community based services (CBS) through Family Preservation Services.

25. In October 2002, Respondent terminated CBS services to Petitioner.

26. Dr. Gaskill provided individual and family counseling for Petitioner and the M's until May 2003.

27. In May 2003, Dr. Gaskill referred Petitioner to Dana Horne, M.S.W. for more specialized therapy for Reactive Attachment Disorder.

28. Dana Horne is an expert in Reactive Attachment Disorder and one of only two therapists in the state of North Carolina to be certified by the Association for Treatment and Training in the Attachment of Children (ATTACh).

29. In a May 20, 2003 report, Dr. Gaskill recommended that Petitioner receive respite, in school supervision, day treatment, psychiatric services, case management, and family therapy, with all these services to begin immediately and to continue for at least twenty-four months by providers trained in the area of reactive attachment disorder.

30. In May 2003, the M's returned to Area Mental Health with Dr. Gaskill's report and requested services for Petitioner.

31. The only Reactive Attachment Disorder-specific services the Petitioner has received were individual and family therapy from Dr. Gaskill, Ms. Horne, and Crossroads Counseling Center, which were all procured directly by the family.

32. None of the remaining services recommended by Dr. Gaskill's May 2003 report were provided or arranged for by Mecklenburg Area Mental Health by any provider with Reactive Attachment training because such services for Reactive Attachment Disorder do not exist in Charlotte or the surrounding region.

33. In April 2003, the M's contacted Crossroads Counseling Center to request a second two-week intensive program. Crossroads Counseling Center wrote to Area Mental Health on May 2, 2003 recommending instead that Petitioner receive an out-of-home residential placement. intensive program. Crossroads Counseling Center wrote to Area Mental Health on May 2, 2003 recommending instead that Petitioner receive an out-of-home residential placement.

34. In June 2003, the M's met with Mecklenburg Area Mental Health and requested an out-of-home placement for Petitioner that provides specialized treatment for Reactive Attachment Disorder.

35. In June 2003, Mecklenburg Area Mental Health declined to provide an out-of-home placement and instead recommended CBS through the Virtual Residential Program of Family Preservation Services for Petitioner.

36. In August 2003, the Pisgah Institute's Center for Neural Therapy performed brain mapping testing which showed abnormalities consistent with Reactive Attachment Disorder.

37. In August 2003, Family Preservation Services began providing Virtual Residential services to Petitioner in the M's home.

38. Professional CBS through Family Preservation Services to Petitioner were terminated in November 2003 because Virtual Residential services were decertified by Respondent.

39. Paraprofessional CBS through Family Preservation Services were terminated in November 2003 due to determination by Respondent that the service was not therapeutically effective for Petitioner.

40. All in-home services offered by Respondent were based upon a behavior modification model and did not include any attachment focus. Such a treatment model is contraindicated for Petitioner's Reactive Attachment Disorder and may worsen his condition.

41. Petitioner was never able to maintain any progress with in-home services provided in 2003, as he never made it off the "Basic" level of service, and the services were discontinued as unsuccessful.

42. In a September 12, 2003 report, Petitioner's therapist Dana Horne recommended that Petitioner receive residential treatment specializing in Reactive Attachment Disorder. She also stated that Chaddock Institute in Quincy, Illinois was the only facility she was aware of that provides the specialized treatment that Petitioner could benefit from.

43. Dr. William Goble, Ph.D, one of the nation's leading authorities on Reactive Attachment Disorder, consulted with Ms. Horne concerning the Petitioner on at least three occasions.

44. In reaching her opinion that Petitioner requires the services provided by the Chaddock Institute, Ms. Horne consulted with and obtained support from both Petitioner's treating psychiatrist, Dr. Singletary, and Dr. William Goble, Ph.D.

45. Specialized residential treatment for Reactive Attachment Disorder is not available within the state of North Carolina for children of Petitioner's age.

46. Dana Horne assessed Petitioner's treatment needs with the Randolph Attachment Disorder Quotient (RADQ), on which he scored a 91, which placed him in the range for needing residential treatment. This result was determined by Ms. Horne to be consistent with her clinical observations and Petitioner's history.

47. The RADQ has been tested for reliability and validity, and is a better measure of needs for Reactive Attachment Disorder than the Child and Adolescent Functional Assessment Scale (CAFAS) test. Dana Horne was trained to administer the RADQ by the test's creator.

48. In September 2003, the M's repeated their request to Mecklenburg Area Mental Health that Petitioner receive an out-of-home placement for Reactive Attachment Disorder.

49. In Fall 2003, Petitioner was suspended twice for 10 days each from school for drug paraphernalia and stealing.

50. On December 8th 2003, Mecklenburg Area Mental Health notified the M's in writing that their request for out-of-state placement for Petitioner was denied.

51. The M's appealed the December 8, 2003 denial. After an informal hearing, on December 19, 2003, the Local Appeals Panel chose not to render a decision and instead strongly recommended that local/regional treatment resources for Reactive Attachment Disorder be developed.

52. On December 8, 2003, Petitioner was placed in Emergency Respite Care.

53. On January 8, 2004 Petitioner was placed in Therapeutic Foster Care with Access Family Services.

54. The respite providers arranged by Respondent for Petitioner were not required to receive any specialized training in Reactive Attachment therapy.

55. The therapeutic foster care provider arranged by Respondent and Access Family Services for Petitioner has received no specialized training in Reactive Attachment therapy.

56. The therapeutic foster care provider arranged for by Access Family Services is a single mother with three small children.

57. Petitioner, if not monitored on a twenty-four hour basis, currently poses a significant risk to small children because of his history of sexual abuse, both as a victim and as an abuser.

58. The services provided to Petitioner by Respondent pursuant to its December 8, 2003 decision make use of behavior modification techniques, which are contraindicated in this case if not used in conjunction with Attachment Therapy techniques.

59. No services have been offered or provided or arranged by Mecklenburg Area Mental Health for Petitioner by practitioners specializing in Reactive Attachment Disorder.

60. Petitioner has been an authorized recipient of the N.C. Medicaid program since at least 1997.

61. Petitioner meets Respondent's Child Levels of Care Criteria for Mental Health and Substance Abuse Treatment Services (Petit. Exh. 21) for Level D and for Residential Treatment-Level III/High.

62. Petitioner meets Respondent's criteria for coverage under the North Carolina At-Risk Children's program, under the Comprehensive Treatment Services Program (CTSP), and is eligible for CTSP funding.

63. CTSP funding is commonly used by Respondent to pay for the room and board portion of residential treatment for Medicaid recipients and such funding remains available for the current fiscal year to pay for the room and board portion of treatment in this case.

64. Petitioner needs residential services in a program specializing in Reactive Attachment Disorder for at least one year, as prescribed by his treating clinicians.

65. Chaddock Institute in Quincy, Illinois is an appropriate accredited residential program specializing in Reactive Attachment Disorder and is recognized by ATTACh.

66. Chaddock Institute in Quincy, Illinois is not a locked facility and is therefore within Respondent's definition of a Level III residential treatment facility.

67. Respondent previously offered to place Petitioner at a wilderness camp, which is classified by Respondent as Level III residential treatment.

68. Level III facilities such as wilderness camps, which do not use Reactive Attachment Disorder therapy techniques and do use behavior modification techniques, are not appropriate for Petitioner and would likely do more harm than good.

69. Chaddock Institute in Quincy, Illinois accepts Medicaid from several other states.

70. Chaddock Institute in Quincy, Illinois provides the treatment and rehabilitation services that are necessary to ameliorate Petitioner's Reactive Attachment Disorder.

71. The treatment team of Chaddock Institute, after reviewing written information concerning Petitioner and consulting with Dana Horne, M.S.W., has approved Petitioner as an appropriate candidate for admission to their Integrative Attachment Therapy Program and has accepted Petitioner for admission.

72. Without intensive residential services specializing in the treatment Reactive Attachment Disorder, the Petitioner's prognosis is poor and he is likely to end up in the correctional system or to present a continuing danger to other persons, particularly younger children.

73. The medical necessity of the services offered by Chaddock Institute for Petitioner was confirmed by all of Petitioner's treating clinicians, including the expert testimony of Ms. Horne and Dr. Gaskill, and by the testimony of the Clinical Director of Mecklenburg Area Mental Health, Dr. Elizabeth Peterson-Vita.

74. The residential treatment at Chaddock Institute requested in this appeal has not been denied by Respondent on the ground that the treatment is unsafe or experimental.

75. The testimony of all of the witnesses testifying on behalf of the Petitioner is found to be credible, based on the demeanor of the witnesses, the supporting records, the detail and consistency of their testimony, the expertise of the witnesses, and other observations of the fact finder.

76. The opinions of the expert witnesses testifying on behalf of the Petitioner, Dr. Frank Gaskill, Ph.D. and Dana Horne, MSW, are being given substantial weight by the fact-finder because of these witnesses' demonstrated expertise in Reactive Attachment Disorder, their significant longitudinal and recent history of treating the Petitioner, their detailed testimony explaining the basis for their opinions, and the consistency of their opinions with supporting reports, testing and the other evidence admitted, including the testimony of Dr. Peterson-Vita.

77. Petitioner has shown by a preponderance of the evidence that the prescribed residential treatment at the Chaddock Institute in Quincy, Illinois is necessary to ameliorate the Reactive Attachment Disorder from which Petitioner suffers. The overwhelming weight of the competent medical testimony from qualified licensed practitioners in this case indicates that such treatment services are necessary to the proper treatment of Petitioner's disorder. The weight of the evidence indicates that without such services Petitioner's condition and behavior will likely worsen and that he and others in the community will be at significant risk.

78. Respondent is currently in the process of planning to develop specialized services for the treatment of Reactive Attachment Disorder in the Charlotte and North Carolina communities. However, such services will not be available to Petitioner within the State of North Carolina with reasonable promptness.

79. Petitioner, a Medicaid recipient under the age of twenty-one, has received screening services from a qualified medical provider which identified the existence of Reactive Attachment Disorder, a mental illness or condition, within the scope of 42 U.S.C. §1396d(r).

80. Petitioner's mental illness or condition identified through screening services, Reactive Attachment Disorder, requires necessary health care, treatment or rehabilitation services within the meaning of 42 U.S.C. §1396d(r) and 42 U.S.C. §1396d(a)(6) and (13).

81. The specialized residential treatment (except for the cost of room and board) requested in this appeal is a medical or remedial service recommended by a licensed practitioner within the meaning of 42 U.S.C. §1396d(a)(13).

82. Respondent admitted in discovery that it has a duty under 42 U.S.C. §1396d(r)(5) and 42 U.S.C. §1396a(a)(43) to arrange for the residential treatment requested in this appeal (except for the cost of room and board), if that treatment is necessary to correct or ameliorate Petitioner's Reactive Attachment Disorder, whether or not the requested service is otherwise covered under the N.C. State Medicaid plan.

83. Specialized residential treatment at the Chaddock Institute is a medical or remedial service recommended by a licensed practitioner within the meaning of 42 U.S.C. §1396d(a)(13) and is necessary for a period of at least one year in order to ameliorate Petitioner's Reactive Attachment Disorder.

84. Upon Petitioner's discharge from the Chaddock Institute, community-based medical and rehabilitative services provided by persons specifically trained in the treatment of Reactive Attachment Disorder, as prescribed by Petitioner's treating practitioners, will

be necessary in order to permit Petitioner to be properly reintegrated into his family and community and to ameliorate Petitioner's Reactive Attachment Disorder.

85. The determination of medical necessity for the above-specified services for Petitioner, as prescribed by his treating practitioners, is in accordance with generally accepted community practice standards for North Carolina mental health professionals.

CONCLUSIONS OF LAW

1. The N.C. Office of Administrative Hearings has jurisdiction of this contested case, for which a formal appeal was timely and properly requested pursuant to 10A NCAC 22H .0100 and G.S. 150B-23.

2. Federal law mandates that each state participating in the Medicaid program must designate "a single state agency" responsible for the program in that state. 42 U.S.C. §1396a(a)(5). The N.C. Department of Health and Human Services operates as this state's single state agency.

3. The N.C. Department of Health and Human Services' rules concerning appeals by Medicaid recipients for the denial, termination or reduction in services (10A N.C.A.C. Subch. 22H) have been promulgated pursuant to the federal provisions of 42 C.F.R. §431, Subpt. E (200 to 246). These provisions, along with North Carolina's Administrative Procedures Act (N.C. Gen. Stat. Ch.150B), entitle Medicaid recipients requesting review of denials of requested Medicaid services to pursue their due process rights through Article 3 of N.C. Gen. Stat. Ch. 150B.

4. The federal regulations governing the Medicaid appeal process mandate that a final agency decision be made within ninety (90) days from the date of the request for hearing. 42 C.F.R. §431.244(f). Based on this regulation, the parties agreed to and the undersigned entered on January 20, 2004 a Scheduling Order for the expedited disposition of this matter, which Order requires that a final decision by Respondent be issued within thirty (30) days of the date of this recommended decision, unless good cause for further delay is shown.

5. Pursuant to 42 C.F.R. §431.244 and G.S. §150B-34, this recommended decision is issued pursuant to a *de novo* hearing held on February 20, 2004, and the findings of fact are based upon the preponderance of the evidence adduced at the hearing.

6. The federal Medicaid statute creates special rights for recipients under the age of twenty-one to Early and Periodic Screening, Diagnostic, and Treatment Services (EPSDT). Participation in Medicaid requires state Medicaid agencies to "arrange for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment" to Medicaid recipients under the age of twenty-one. 42 U.S.C. §1396a(a)(43). The duty to provide corrective treatment includes all "necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions[.]" 42 U.S.C. § 1396d(r)5).

7. The federal EPSDT provisions obligate the state Medicaid agency to provide all necessary treatment to children to ameliorate conditions discovered by screenings if such services are listed in 42 U.S.C. §1396d(a). Pereira v. Kozlowski, 996 F.2d 723 (4th Cir. 1993). Listed services include "any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level." 42 U.S.C. § 1396d(a)(13).

8. States must ensure that such medical assistance is "furnished with reasonable promptness to all eligible individuals." 42 U.S.C. §1396a(a)(8). States are obligated to make available a variety of healthcare providers willing and qualified to provide treatment services to meet the needs of children who are eligible for Medicaid. 42 C.F.R. § 441.61. States must "take advantage of all resources available" to achieve adequate provider participation in Medicaid services. CMS State Medicaid Manual § 5220.

9. Petitioner, as a Medicaid recipient under the age of twenty-one, is entitled to receive necessary mental health treatment under North Carolina's Medicaid program. 42 U.S.C. §1396d(a)(13) & (r)(5).

10. Respondent has a duty under 42 U.S.C. §1396a(a)(43) to arrange for treatment necessary to correct or ameliorate Petitioner's Reactive Attachment Disorder.

11. The determination that a service is necessary lies primarily with the child's treating physician or other qualified health care provider. Sen. Rpt. No. 404, 89th Cong. 1st Sess., reprinted in 1965 U.S.C.C.A.N. 1943 (1986) ("The physician is to be the key figure in determining the utilization of health services. It is the physician who is to decide upon …treatments.") The state agency may review this determination; however, absent evidence the prescribed treatment is not medical in nature, or is unsafe or experimental, the

agency should normally defer to the recommendation of the treating practitioner if it is supported by other evidence. See, e.g., Jackson v. Millstone, 369 Md. 575, 801 A.2d 1034 (2002) (holding that Maryland Medicaid regulation requiring that services be both "necessary" and "appropriate" conflicted with federal Medicaid law because the appropriateness is not required under EPSDT); Georgia Dept. of Comm. Health v. Freels, 576 S.E.2d 2 (Ga. Ct. of App. 2002)(medical necessity standard under EPSDT more expansive than for adults). See also, e.g., Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989) (holding that state must defer to treating physician); Hillburn by Hillburn v. Maher, 795 F.2d 252 (2d Cir. 1986)(same).

12. In determining the issue of necessity of treatment in this case, the opinions of Petitioner's treating clinicians are entitled to deference, particularly given their demonstrated expertise, long and recent treating history with Petitioner, supporting reports and other evidence, and the absence of substantial evidence to the contrary.

13. Respondent has a duty under 42 U.S.C. §1396d(r)(5) and 42 U.S.C. §1396a(a)(43) to arrange for the residential treatment requested in this appeal (except for the cost of room and board), because that treatment is necessary to correct or ameliorate Petitioner's Reactive Attachment Disorder, whether or not the requested service is otherwise covered under the N.C. State Medicaid plan.

14. Respondents are not relieved of this duty to provide the medically necessary treatments to Petitioner by simply *attempting* to refer Petitioner to such services. The EPSDT provisions of Medicaid impose a higher duty on the state to assure access to EPSDT services than to other Medicaid services. Thus, in contrast to other Medicaid services, the state must not only cover needed EPSDT services but must "arrang[e] for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment." 42 U.S.C. 1396a(a)(43). Many health law commentators have commented on this higher standard, *i.e.* George Annas et. Al. American Health Law 186-87 (Little, Brown and Company (1990) (Whereas a state generally is required only to pay for medical necessary services, "a *state must provide* for early and periodic, screening, diagnosis and treatment (EPSDT) for eligible children" (emphasis in original). See also *Doe v. Pickett*, 480 F. Supp. 1218, 1221 (S.D. W. Va 1979) (EPSDT "imposes on the states an affirmative obligation to see that minors actually receive necessary treatment and medical services").

15. The federal statutory requirement that the State must arrange for such services to be provided, either "directly or through referral" is a clear indication that the Respondent, in this case acting through the Mecklenburg Area Mental Health Authority, must assure that the prescribed, necessary, medical services are provided to Petitioner. These services must be provided with "reasonable promptness."

16. Payment for the room and board portion of the cost of medically necessary residential treatment for Medicaid recipients under the age of twenty-one may be funded in North Carolina through the Comprehensive Treatment Services Program (CTSP). Session Law 2001-424, Section 21.60. CTSP provides appropriate, medically necessary residential and nonresidential treatment services including placements for sexually aggressive youth and children with serious emotional disturbances. Id. at § 21.60(a)(3) and (4). CTSP services are not an entitlement unless the child is Medicaid eligible. Id. at § 2160(e).

17. Petitioner meets the eligibility criteria for the CTSP program and is entitled to payment of the room and board portion of the cost of the requested residential treatment from CTSP funding.

18. The December 8, 2003 decision by Respondent to deny the services requested in this appeal was erroneous, arbitrary and capricious, a failure to act as required by law, and based upon improper procedure.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, THE UNDERSIGNED MAKES THE FOLLOWING:

DECISION

1. It is recommended that Respondent's denial of Petitioner's request for out-of state specialized residential treatment for Petitioner be REVERSED.

2. Effective immediately, Respondent shall arrange for Petitioner to receive the services recommended by Petitioner's treating practitioners for a period of at least one year at the Chaddock Institute in Quincy, Illinois, and to pay the facility's reasonable, customary charges for the services provided, including treatment, rehabilitation, transportation, education, room and board, and other attendant expenses, through the Medicaid and CTSP programs, in a manner consistent with the direction of Petitioner's licensed treating practitioners.

3. After one year of treatment at Chaddock, or earlier upon the recommendation of Petitioner's treating practitioners, Respondent shall conduct a utilization review to determine if further treatment at Chaddock is necessary under the standards established in this decision.

4. Prior to terminating payment for services at Chaddock, Respondent shall issue proper advance written notice of such action with the right to appeal and to obtain continued services pending appeal pursuant to 10A NCAC 22H .0104.

5. Beginning immediately, Respondent shall perform a review in order to determine what post-discharge services to Petitioner are likely to be necessary. Respondent shall develop a detailed plan, pursuant to which such services shall be expeditiously contracted for in the Charlotte community. The progress and results of this review and plan shall be shared with counsel for the Petitioner and with Petitioner's treating clinicians at least every three months. Pursuant to this review and plan, Respondent shall develop and arrange for the provision to Petitioner of all necessary medical and rehabilitative post-discharge services in order to permit Petitioner to be properly reintegrated into his family and community. Such post-discharge services shall be provided by persons specifically trained in the treatment of Reactive Attachment Disorder. All necessary medical and rehabilitative post-discharge services shall begin immediately upon Petitioner's discharge from Chaddock and shall be made available by Respondent prior to Respondent's termination of payment for services at Chaddock.

ORDER AND NOTICE

The North Carolina Health and Human Services, will make the Final Decision in this contested case. N.C.G.S. § 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.G.S. § 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.G.S. § 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, N.C. 27699-6714.

This the 3rd day of March, 2004.

_____
William A. Creech
Temporary Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF CLEVELAND	**03 OSP 1554**

STEPHEN WYATT EDWARDS, **Petitioner,**	)	
v.	)	**DECISION**
N.C. DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, NC STATE HIGHWAY PATROL, **Respondent.**	)	

PROCEDURAL BACKGROUND

The appeal of Stephen Wyatt Edwards, Petitioner herein, was heard before Beecher R. Gray, administrative law judge, Office of Administrative Hearings, on February 18, 2004, in the County Courthouse in Cleveland County, Shelby, North Carolina. The parties stipulated on the record that notice of hearing was proper.

APPEARANCES

Petitioner: Brian R. Hochman, Esq.
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(704) 376-0808

Respondent: Mr. Joseph P. Dugdale, Esq.
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ISSUES

The issue presented by the evidence at the hearing is whether the Respondent had just cause to dismiss Petitioner on the basis of Plaintiff's off-duty conduct that occurred on November 27, 2002.

FINDINGS OF FACT

A. BACKGROUND

1. Petitioner Stephen Wyatt Edwards (hereinafter "Petitioner" or "Edwards") was employed by the Department of Transportation, Division of Motor Vehicles, as a DMV Enforcement Officer in November 1998.

2. Petitioner was involved on an off-duty shooting at approximately 11:30 p.m. on November 27, 2002, at which time he shot Mr. Michael Tim Morrow with his personally owned .25 cal. Beretta handgun.

3. A criminal investigation of the incident was conducted by the Shelby Police Department.

4. Immediately following the shooting incident, Petitioner was placed on investigatory placement for a period not to exceed 30 days and an internal investigation was initiated by the Division of Motor Vehicles.

5. On December 31, 2002, Petitioner was given notice that, as a consequence of his alleged unacceptable personal conduct on November 27, 2002, he was to appear for a Pre-Dismissal Conference to be conducted in the office of the Deputy Director of the DMV Enforcement Section on January 3, 2003.

6. On January 1, 2003, Petitioner, along with other members of the DMV Motor Vehicle Enforcement Section, was transferred to the Department of Crime control and Public Safety, pursuant to Session Law 2002-190. The Secretary of Crime Control and Public Safety re-designated these officers as Motor Carrier Enforcement Officers and placed them within the Highway Patrol. Accordingly, the Commissioner of Motor Vehicles, at the request of the Secretary of Crime Control and Public Safety, transferred the Internal Affairs file of Petitioner to the Highway Patrol.

7. The Highway Patrol investigated the incident further and, while the investigation continued, kept Petitioner on Investigatory Placement and/or administrative duties. Petitioner never was returned to full duty.

8. On or about July 1, 2003, Petitioner again was given notice of a Pre-Dismissal Conference; appeared for a Pre-Dismissal Conference on July 10, 2003; and was dismissed from the Highway Patrol on July 24, 2003.

9. Petitioner appealed to the Secretary of the Department of Crime Control and Public Safety who upheld his dismissal.

10. Petitioner filed a Petition for Contested Case Hearing on September 10, 2003.

B. THE INCIDENT

11. During the morning hours of November 27, 2002, Petitioner left his residence and drove to the golf course to play 18 holes of golf. He took his .25 cal. Beretta with him but left it in his truck as while he played golf. He played golf from approximately 10:00 a.m. until 2:30 p.m. and consumed three (3) Miller Lite beers while at the golf course. After playing golf, he put his pistol in his pants pocket and drove to his daughter's school and his son's daycare where he picked up his children and drove them home.

12. Later that evening, Petitioner went to Ichabods Eatery, a restaurant/nightclub. According to Petitioner, he arrived at Ichabods at approximately 7:30 p.m.

13. Although Petitioner knew he had consumed alcoholic beverages earlier in the day and although he anticipated he would be consuming alcoholic beverages at Ichabods; he carried his personally owned .25 cal. pistol in his front pants pocket as he entered Ichabods. Petitioner told Internal Affairs that he had been carrying his pistol everywhere he went for fifteen years; he stated: "it is just like putting on my pants." He testified that he even carried his pistol while consuming alcohol.

14. Petitioner told Internal Affairs that he consumed two (2) Miller Lites at Ichabods. He said he ordered one beer with his meal at approximately 7:30 p.m. and that he had a second beer "probably an hour after dinner." During his Pre-Dismissal Conference, he also told Captain Moody that he had two (2) Miller Lites but said he had of both them with dinner and that; afterwards, he had water and tea. In his statement to Detective Duncan of the Shelby Police Department, he stated he had "a couple of beers spread out over the whole night." Petitioner has consistently maintained that he only consumed two (2) beers while at Ichabods but was inconsistent in his statements as to when he drank them.

15. Ms. Rea Smiley, one of the bartenders on duty on November 27, 2002, told Shelby Police and testified that she recalled serving Petitioner 3 or 4 beers. Additionally, several employees and patrons told Shelby Police and testified that they had seen Petitioner "with a beer in his hand" at various times during the night. Ms. Susan McKinney testified that she had seen Petitioner with a beer in his hand at 11:00 p.m. or a little after. Petitioner's explanation for having a beer bottle in his hand throughout the evening was that he chews tobacco and could have been carrying it as a spittoon. Several witnesses, however, testified that Petitioner appeared to be intoxicated.

16. At approximately 11:30 p.m., Petitioner was dancing on the dance floor when a fight broke out on the other side of the room. The uncontradicted evidence was that Petitioner attempted to break up the fight. In doing so, he identified himself as a law enforcement officer but never displayed a badge or other law enforcement credentials. The crowd was somehow pushed out the door and Mr. Morrow struck Petitioner in the head with a glass vase 2 or 3 times. Petitioner, believing his life was in danger, removed his personally owned .25 cal pistol from his pocket and shot Mr. Morrow twice.

17. Petitioner and Mr. Morrow were both transported to the Hospital Emergency room where Petitioner received ten sutures on his forehead and seven staples in his scalp.

18. At approximately 1:00 a.m., Detective Duncan, spoke to Petitioner in the emergency room. At that time, he detected a strong odor of alcohol and he formed an opinion that Petitioner was impaired. Detective Currier, while taking photographs of Petitioner at approximately 1:30 a.m., also detected a strong odor of alcohol on Petitioner's person. Three (3) Cleveland County

Sheriff's Deputies, all friends of Petitioner, arrived at the hospital after Detective Duncan. They each spoke to Petitioner and testified that they did not detect any odor of alcohol on Petitioner and that they did not believe he was impaired.

19. The Shelby Police officers asked Petitioner voluntarily to submit to a blood test to determine his blood alcohol concentration. Petitioner stated that his attorney advised him not to submit to the test. The officers told Petitioner that they would apply for a search warrant but did not arrest or detain Petitioner. Petitioner left the hospital before the officers returned with the search warrant. Petitioner testified that when he left the hospital, he went straight home to 1515 Barbee Drive. He testified that, upon arriving at his residence, he took a shower, drank a beer, and then paged his supervisor, Sgt. Deason. Sgt. Deason received a page from Petitioner at approximately 3:35 a.m.

20. Shelby police obtained a search warrant at 3:30 a.m. Upon discovering Petitioner left the hospital, they went to his residence to serve the warrant. They arrived at Petitioner's residence, located at 1515 Barbee Drive at approximately 3:45 a.m. and discovered the lights were on and other evidence that Petitioner was home. They knocked on the doors and rang the doorbell for several minutes but no one came to the door. They decided not to make a forced entry and left. Petitioner testified he never heard the officers knock on his door or ring his doorbell.

21. At about the same time Shelby police officers were knocking on Petitioner's door, Petitioner was awake and talking to DMV supervisors. Sgt. Deason called Petitioner at approximately 3:50 or 3:55 a.m. Petitioner's mother answered the telephone and Petitioner came to the telephone. F/Sgt Stamey called Petitioner at approximately 4:30 a.m. and Petitioner answered the telephone. Petitioner did not provide any explanation as to why he did not hear the officers knocking on his door when they were attempting to execute the search warrant for blood.

22. F/Sgt Stamey went to Petitioner's residence sometime after 4:30 a.m. and picked up Petitioner's gun, badge and credentials. F/Sgt Stamey detected a strong odor of alcohol on Petitioner at that time. Petitioner's explanation was that he drank a beer at his residence upon returning from the emergency room.

23. N.C.G.S. § 126-35 states that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35 also states, "in contested cases conducted pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer."

C. DISMISSAL

24. The Highway Patrol determined that Petitioner's conduct on November 27, 2002 amounted to unacceptable personal conduct. Specifically, the Highway Patrol determined that his conduct violated DMV General Order #45 in several respects. General Order 45 is captioned "Weapons, Ammunition and Use of Force."

25. The investigation conducted by the Highway Patrol revealed that Petitioner violated General Order #45 in that he possessed and carried a concealed, personally owned, unapproved firearm, on his person while off-duty, and that he did so:

a. Without first requesting approval from his District Supervisor; and
b. Without approval of the Training Unit firearms instructor; and
c. Without first having qualified with the firearm or ammunition carried; and
d. Without having obtained an "Authorization to Carry Firearm" (Form ENF-136); and
e. Without having in his possession, his official badge and identification holder; and
f. While consuming an alcoholic beverage.

26. Petitioner admitted to each of the above-described violations of General Order #45 while testifying in this matter.

27. The Highway Patrol also determined that Petitioner was in violation of N.C.G.S. 14-269; carrying a concealed Weapon. Although Petitioner admits to carrying a concealed weapon, he denies that he is guilty of this criminal violation of law because he was a sworn law enforcement officer. Petitioner was charged on a criminal summons and convicted of this offense in Criminal District Court in Cleveland County on June 10, 2003; but has appealed his conviction to Superior Court.

28. N.C.G.S. 14-269 makes it unlawful to carry a concealed weapon. Subsection (5) creates an exception for sworn law enforcement officers but conditions that exception, in pertinent part, in that even sworn officers may not carry a concealed weapon while consuming or under the influence of alcoholic beverages.

29. The Highway Patrol also determined that Petitioner was in violation of N.C.G.S. 14-269.3 in that he carried his .25 cal pistol into Ichabods Eatery. Petitioner admits he carried his pistol into Ichabods on November 27, 2002 and admits that Ichabods has on-premises ABC permits for beer, wine and spirituous liquor. He denies he is guilty of this offense because although he was

charged with this offense on a criminal summons, he was found not guilty in criminal court and because he was a sworn law enforcement officer at the time.

30. N.C.G.S. 14-269.3, like 14-269 creates an exception for sworn law enforcement officers. That exception, however, has the same limitation in that even a sworn law enforcement officer may not carry a firearm into an ABC establishment where alcoholic beverages are sold and consumed if the officer is consuming or under the influence of an alcoholic beverage.

31. North Carolina Administrative Code 25 NCAC 1J.0614(h)(4) defines unacceptable personal conduct as the willful violation of a known or written work rule.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.

2. Petitioner Stephen Wyatt Edwards was a career State employee prior to his discharge, and was subject to the provisions of the State Personnel Act.

3. Petitioner's conduct on November 27, 2002, constituted a willful violation of DMV General Order # 45. Petitioner made a judicial admission that he was aware of the policy and that he violated the policy on a recurring basis. There is no evidence that his employer had any prior knowledge of this violation or that the agency in any way condoned or tolerated this violation. For this reason, Petitioner's conduct on November 27, 2002, constituted unacceptable personal conduct, sufficient to justify Respondent's dismissal of Petitioner pursuant to 25 NCAC 1J.0614(h)(4).

4. Petitioner's conduct on November 27, 2002, constituted a violation of N.C.G.S. 14-269; carrying a Concealed Weapon. Although he was a sworn law enforcement officer, he had no lawful authority to carry a concealed firearm off-duty while consuming alcohol. For this reason, Petitioner's conduct on November 27, 2002, constituted unacceptable personal conduct, sufficient to justify Respondent's dismissal of Petitioner pursuant to 25 NCAC 1J.0614(h)(4).

5. Petitioner's conduct on November 27, 2002, constituted a violation of N.C.G.S. 14-269(3); Carrying a Firearm Into An Establishment Where Alcoholic Beverages Are Sold And Consumed. Although he was a sworn law enforcement officer, he had no lawful authority to carry a firearm into Ichabods knowing that he had consumed alcoholic beverages earlier in the day and that he would be consuming alcoholic beverages on the premises. For this reason, Petitioner's conduct on November 27, 2002, constituted unacceptable personal conduct, sufficient to justify Respondent's dismissal of Petitioner pursuant to 25 NCAC 1J.0614(h)(4).

DECISION

Respondent's decision to terminate Petitioner from his employment for unacceptable personal conduct is supported by the evidence and is affirmed.

ORDER

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

NOTICE

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

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

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

This the 3rd day of March, 2004.

_____

Beecher R. Gray
Administrative Law Judge