

NORTH CAROLINA

IN THIS ISSUE



REGISTER

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<http://oahnt.oah.state.nc.us/register/CI.pdf>

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22	ADMINISTRATIVE PROCEDURES (REPEALED)	30 Massage & Bodywork Therapy	
23	COMMUNITY COLLEGES	31 Marital and Family Therapy	
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		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)	270 th 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	09/10/04	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.

**EXECUTIVE ORDER NO. 58
EXTENDING EXECUTIVE ORDER NOS. 48 and 12**

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

Executive Order No. 48, Concerning the State Commission on National and Community Service (now known as the “North Carolina Commission on Volunteerism and Community Service”), as previously extended and as previously amended by Executive Order No. 174 issued by Governor James B. Hunt, Jr. on November 8, 2000, and extended by Executive Order No. 12 issued on October 9, 2001, is hereby extended until December 31, 2005.

This order is effective immediately.

Done in Raleigh, North Carolina, this the 20th day of May, 2004.

Michael F. Easley
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

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

Notice of Application for Innovative Approval of a Wastewater System for On-site Subsurface Use

Pursuant to NCGS 130A-343(g), the North Carolina Department of Environment and Natural Resources (DENR) shall publish a Notice in the NC Register that a manufacturer has submitted a request for approval of a wastewater system, component, or device for on-site subsurface use. The following application has been submitted to DENR:

Application by: Orange County Health Dept.
Environmental Health Program Specialist
P.O. Box 8181
Hillsborough, NC 27278
919-245-2360
Fax 919-644-3006

On-Site Wastewater Section
Division of Environmental Health
1642 Mail Service Center
Raleigh, NC 27699-1642
919-733-2895
Fax 919-715-3227

For: Flow Equalization System

Orange County Health Department Contact: Greg Grimes
1-919-245-2360
FAX: 919-644-3006
ggrimes@co.orange.nc.us

DENR Contact: Joe Pearce
1-919-715-3271
FAX 919-715-3227
steven.berkowitz@ncmail.net

The application may be reviewed by contacting the applicant or at 2728 Capital Blvd., Raleigh, NC, On-Site Wastewater Section, Division of Environmental Health. Draft proposed innovative approvals and proposed final action on the application by DENR can be viewed on the On-Site Wastewater Section web site: www.deh.enr.state.nc/oww/.

Written public comments may be submitted to DENR within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Mr. Bill Jeter, Chief, On-site Wastewater Section, 1642 Mail Service Center, Raleigh, NC 27699-1642, or bill.jeter@ncmail.net, or Fax 919.715.3227. Written comments received by DENR in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

**STATE OF NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION
1617 MAIL SERVICE CENTER
RALEIGH, NORTH CAROLINA 27699-1617**

**PUBLIC NOTICE OF INTENT TO ISSUE STATE GENERAL
NPDES PERMITS**

Public notice of intent to reissue expiring State National Pollutant Discharge Elimination System (NPDES) General Permits for Point Source Discharges of Stormwater for the following types of discharges:

NPDES General Permit No. NCG180000 for stormwater point source discharges associated with activities classified as establishments primarily engaged in manufacturing Furniture and Fixtures [standard industrial classification (SIC) 25] or Wood Kitchen Cabinets [standard industrial classification (SIC) 2434].

NPDES General Permit No. NCG190000 for stormwater point source discharges associated with activities classified as establishments primarily engaged in Ship and Boat Building and Repairing [standard industrial classification (SIC) 373] and Marinas (SIC 4493).

On the basis of preliminary staff review and application of Article 21 of Chapter 143 of the General Statutes of North Carolina, Public Law 92-500 and other lawful standards and regulations, the North Carolina Environmental Management Commission proposes to reissue State NPDES General Permits for the discharges as described above.

INFORMATION: Copies of the draft NPDES General Permits and Fact Sheets concerning the draft Permits are available by writing or calling:

William Mills
NC Div of Water Quality
1617 Mail Service Center
Raleigh, NC 27699-1617 919-733-5083, ext 548

Persons wishing to comment upon or object to the proposed determinations are invited to submit their comments in writing to the above address no later than July 16, 2004. All comments received prior to that date will be considered in the final determination regarding permit issuance. A public meeting may be held where the Director of the Division of Water Quality finds a significant degree of public interest in any proposed permit issuance. The draft Permits, Fact Sheets and other information are on file at the Division of Water Quality, 512 N. Salisbury Street, Room 925, Archdale Building, Raleigh, North Carolina. They may be inspected during normal office hours. Copies of the information of file are available upon request and payment of the costs of reproduction. All such comments and requests regarding these matters should make reference to the draft Permit Numbers, NCG180000 or NCG190000.

Date: _____

Alan Klimek, PE, Director
N.C. Division of Water Quality

NORTH CAROLINA DEPARTMENT OF LABOR
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
RALEIGH, NORTH CAROLINA

Order 2004-V-01
Commonwealth Constructors, Inc.
Permanent Variance

Order:

In furtherance of the Interim Order granted by the N.C. Department of Labor ("Department") on April 5, 2004, and in accordance with N.C. Gen. Stat. § 95-132(b) and 13 N.C.A.C. 7A.0700, Commonwealth Constructors, Inc. ("Commonwealth") is granted permission to utilize the conditions set forth in Section VIII, Items 1 through 16, of the Permanent Variance granted to Oak Park Chimney Corp. and American Boiler and Chimney Co. by the United States Department of Labor – Occupational Safety and Health Administration ("OSHA"), that is contained in 68 Fed. Reg. 52961 (September 8, 2003) ("the Oak Park Chimney Variance"), in lieu of the requirements of 29 C.F.R. 1926 which regulate the tackle used for boatswain's chairs (29 C.F.R. 1926.452(o)(3)), as well as the requirements specified for personnel hoists by 29 C.F.R. 1926.552(c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16). This permission is limited to the construction of a reinforced concrete chimney at the Progress Energy–Asheville Plant located in Buncombe County, North Carolina.

Discussion:

Commonwealth is engaged in the construction, repair, inspection, and demolition of tall reinforced concrete, steel and brick chimneys throughout the United States. This work requires the transport of employees and materials to and from elevated work locations on scaffolds located inside or on the exterior of tapered chimneys. While tapering contributes to the stability of a chimney, it necessitates frequent relocation of, and adjustments to, the work platforms and scaffolds so that they will fit the decreasing circumference of the chimney as construction progresses upwards.

In the 1970's and 1980's, nine chimney-construction companies demonstrated to OSHA that the above-referenced regulations contained in 29 C.F.R. 1926, the Occupational Safety and Health Standards for the Construction Industry, result in access problems that pose a serious danger to their employees. These companies requested permanent variances from these requirements, and proposed an alternative apparatus and procedures to protect employees while being transported to and from their elevated worksites during chimney construction and repair. OSHA subsequently granted these companies permanent variances based on the proposed alternative (38 Fed. Reg. 8545, 50 Fed. Reg. 40627, and 52 Fed. Reg. 22552). Thereafter, on September 8, 2003, OSHA granted permanent variances to Oak Park Chimney Corp. and American Boiler and Chimney Co. based upon the same alternative apparatus and procedures approved by OSHA in the earlier variances (68 Fed. Reg. 52961) ("the Oak Park Chimney Variance").

On December 4, 2003, Commonwealth's parent company, Commonwealth Dynamics, Inc., submitted an application for a permanent variance to OSHA that exactly duplicates the Oak Park Chimney Variance. Commonwealth Dynamics, Inc. has been notified by OSHA that the variance request is being processed, but that during the interim period it will not be cited for non-compliance with the applicable standards provided that the equipment and methods employed are in strict accordance with the Oak Park Chimney Variance.

On March 5, 2004, Commonwealth filed an application for a permanent variance with the Occupational Safety and Health Division of the North Carolina Department of Labor ("OSHNC"). The application requested that Commonwealth be allowed to utilize the conditions set forth in Section VIII, Items 1 through 16, of the Oak Park Chimney Variance, in lieu of the requirements of 29 C.F.R. 1926 which regulate the tackle used for boatswain's chairs (29 C.F.R. 1926.452(o)(3)), as well as the requirements specified for personnel hoists by 29 C.F.R. 1926.552(c)(1) through (c)(4), (c)(8), (c)(13), (c)(14)(i), and (c)(16). Thereafter, pursuant to Commonwealth's March 25, 2004 request, the Commissioner of Labor issued an Interim Order to Commonwealth on April 5, 2004, allowing it to meet the requirements set forth above. The language of the Interim Order stated that it would expire on October 3, 2004, or on the effective date of the permanent variance, if approved, whichever occurs first.

A Notice of Request for a Permanent Variance was published in the May 3, 2004 edition of the *N.C. Register* (Volume 18, Issue 21) allowing all interested parties to comment on the proposed variance for a period of time. This Notice of Request was also posted at Commonwealth's place of business for a prescribed period of time. During this time, neither Commonwealth nor the Department received any negative comments regarding the proposed variance.

To that end, the Department hereby grants Commonwealth's request for a permanent variance, provided Commonwealth strictly complies with the requirements of the Oak Park Chimney Variance discussed above, as well as the requirements set forth in the April 5, 2004 Interim Order.

Action:

This order grants Commonwealth's request for a permanent variance. This permanent variance will remain in effect until modified or revoked pursuant to N.C. Gen. Stat. § 95-132(b) and 13 N.C.A.C. 07A.0709.

This the 24th day of May, 2004.

Allen M. McNeely
Director, North Carolina Department of Labor –
Occupational Safety and Health Division

Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.

Statutory reference: G.S. 150B-21.2.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Fiscal Impact

- State
- Local
- Substantive (>\$3,000,000)
- None

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Health and Human Services intends to adopt the rules cited as 10A NCAC 26E .0106-.0107.

Proposed Effective Date: October 1, 2004

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A person may demand a public hearing on the proposed rules by submitting a request in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, by June 30, 2004.

Reason for Proposed Action: The proposed adoptions are necessary as a result of S.L. 2003-398 (H860). The legislation authorized the Department of Health and Human Services to adopt rules relating to the training and qualifications for dog handlers and the certification of drug detection dogs subject to the provisions of G.S. 90-102.1.

Procedure by which a person can object to the agency on a proposed rule: The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018.

Written comments may be submitted to: Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, (919) 733-7011, fax (919) 733-9455, and email cindy.kornegay@ncmail.net.

Comment period ends: August 16, 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.

CHAPTER 26 - MENTAL HEALTH, GENERAL

SUBCHAPTER 26E – MANUFACTURERS: DISTRIBUTORS: DISPENSERS AND RESEARCHERS OF CONTROLLED SUBSTANCES

SECTION .0100 - REGISTRATION OF MANUFACTURERS: DISTRIBUTORS: AND DISPENSERS OF CONTROLLED SUBSTANCES

10A NCAC 26E .0106 TRAINING AND QUALIFICATION REQUIREMENTS FOR DOG HANDLERS

(a) An individual applying for registration as a dog handler shall submit documentation to the Department of Health and Human Services verifying the applicant has demonstrated competence in the field of drug detection dog training and handling from a canine certification association approved by the Department of Health and Human Services pursuant to G.S. 90-102.1.

- (b) Competency shall be demonstrated in the following areas:
- (1) basic obedience;
 - (2) canine safety;
 - (3) drug detection; and
 - (4) legal aspects of searches and controlled substances identification.

(c) The applicant shall submit proof of a Drug Enforcement Administration registration or pending application.

(d) The applicant shall submit five letters of reference showing the applicant is of good moral character and temperate habits in accordance with G.S. 90-102.1.

(e) Pursuant to G.S. 90-102.1, the Department of Justice may provide a criminal record check to the Department of Health and Human Services for an individual who applies for a new or renewal registration. The applicant shall comply with the criminal record check including the use of his or her fingerprints and shall incur any costs associated with the criminal record check.

Authority G.S. 90-100; 90-102.1; 143B-147(a)(5).

10A NCAC 26E .0107 APPROVAL OF CANINE CERTIFICATION ASSOCIATIONS BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

(a) The Department of Health and Human Services shall approve a canine certification association that requests approval and meets any of the following:

- (1) a North Carolina law enforcement agency that provides training in the field of drug detection dog handling;
- (2) an employee of a North Carolina law enforcement agency that provides training in the field of drug detection dog handling; or
- (3) an individual under contract to a North Carolina law enforcement agency that provides training in the field of drug detection dog handling.

(b) A person requesting approval to provide canine certification for drug detection dogs utilized in a commercial detection service shall provide documentation verifying its identification as a North Carolina law enforcement agency, employee or contractor of a North Carolina law enforcement agency. Documentation may include contracts, references or other identification.

(c) The approval of a canine certification association by the Department of Health and Human Services shall be valid for three years.

(d) The Department of Health and Human Services shall maintain a list of approved canine certification associations.

Authority G.S. 90-100; 90-102.1; 143B-147(a)(5).

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for MH/DD/SAS intends to amend the rules cited as 10A NCAC 26E .0102, .0104-.0105, .0111, .0113.

Proposed Effective Date: October 1, 2004

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A person may demand a public hearing on the proposed rules by submitting a request in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, by June 30, 2004.

Reason for Proposed Action: The proposed amendments are necessary as a result of S.L. 2003-398 (H860). The legislation authorized the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services to adopt rules relating to the acquisition, possession and security of controlled substances by person registered under the provisions of G.S. 90-102.1.

Procedure by which a person can object to the agency on a proposed rule: The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018.

Written comments may be submitted to: Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, phone

(919) 733-7011, fax (919) 733-9455, and email cindy.kornegay@ncmail.net.

Comment period ends: August 16, 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 26 - MENTAL HEALTH, GENERAL

SUBCHAPTER 26E – MANUFACTURERS: DISTRIBUTORS: DISPENSERS AND RESEARCHERS OF CONTROLLED SUBSTANCES

SECTION .0100 - REGISTRATION OF MANUFACTURERS: DISTRIBUTORS: AND DISPENSERS OF CONTROLLED SUBSTANCES

10A NCAC 26E .0102 DEFINITIONS

As used in this Section, the following terms shall have the meanings specified:

- (1) The term "act" means the North Carolina Controlled Substances Act (G.S. Chapter 90, Article 5).
- (2) The term "Commission" means the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services.
- (3) The term "basic class" means as to controlled substances listed in Schedules I, II and VI:
 - (a) each of the opiates including its isomers, esters, ethers, salts and salts of isomers, esters and ethers whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation listed in Schedule I of the North Carolina Controlled Substances Act;

- (b) each of the opium derivatives including its salts, isomers and salts of isomers whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation listed in Schedule I of the North Carolina Controlled Substances Act;
 - (c) each of the hallucinogenic substances including its salts, isomers and salts of isomers is possible within the specific chemical designation listed in Schedule I of the North Carolina Controlled Substances Act;
 - (d) each of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis:
 - (i) opium including raw opium, opium extracts, opium fluid extracts, powdered opium, granulated opium, deodorized opium and tincture of opium;
 - (ii) apomorphine;
 - (iii) ethylmorphine;
 - (iv) hydrocodone;
 - (v) hydromorphone;
 - (vi) metopon;
 - (vii) morphine;
 - (viii) oxycodone;
 - (ix) oxymorphone;
 - (x) thebaine;
 - (xi) mixed alkaloids of opium listed in Schedule I of the North Carolina Controlled Substances Act;
 - (xii) cocaine; and
 - (xiii) ecgonine;
 - (e) each of the opiates including its isomers, esters, ethers, salts and salts of isomers, esters and ethers whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation listed in Schedule II of the North Carolina Controlled Substances Act; and
 - (f) methamphetamine including its salts, isomers and salts of isomers when contained in any injectable liquid.
- (4) The term "commercial detection service" means the term as defined in G.S. 90-102.1, that is, any person, firm, association or corporation contracting with another person, firm, association or corporation for a fee or other valuable consideration to place, lease or rent the services of a trained drug detection dog with a dog handler.
- (5) The term "DEA" means the Federal Drug Enforcement Administration.
 - (6) The term "Director" means the Director of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services, Department of Health and Human Services.
 - (7) The term "dog handler" means an individual trained in the handling of drug detection dogs, including the care, feeding and maintenance of drug detection dogs and the procedures necessary to train and control the behavior of drug detection dogs.
 - (8) The term "drug detection dog" means the term as defined in G.S. 90-102.1, that is, a dog trained to locate controlled substances by scent.
 - (9) The term "hearing" means any hearing held pursuant to this part of the granting, denial, revocation or suspension of a registration pursuant to G.S. 90-102 and 90-103.
 - (10) The term "individual practitioner" means a physician, dentist, veterinarian or other individual licensed, registered or otherwise permitted by the state to dispense a controlled substance in the course of professional practice but does not include a pharmacist, a pharmacy or an institutional practitioner.
 - (11) The term "institutional practitioner" means a hospital or other person (other than an individual) licensed, registered or otherwise permitted, by the United States or the jurisdiction in which it practices, to dispense a controlled substance in the course of professional practice, but does not include a pharmacy.
 - (12) The term "person" includes any individual, corporation, government or governmental subdivision or agency, business trust, partnership, association or other legal entity.
 - (13) The terms "register" and "registration" refer only to registration required and permitted by G.S. 90-102.
 - (14) The term "registrant" means any person who is registered pursuant to G.S. 90-102.
 - (15) The term "office-based opioid treatment" means any controlled substance listed in Schedule III-V dispensed for the maintenance or detoxification treatment of opioid addiction or for the detoxification treatment of opioid dependence.
 - (16) Any term not defined in this Section shall have the definition set forth in G.S. 90-87.
- Authority G.S. 90-100; 90-102.1; 143B-147(a)(5).*

10A NCAC 26E .0104 PERSONS REQUIRED TO

REGISTER

(a) ~~Every~~ Any person who manufactures, distributes or dispenses any controlled substance or who proposes to engage in the manufacture, distribution or dispensing of any controlled substance in this state shall obtain annually a registration unless exempted by law or pursuant to Rules .0107 through .0109 of this Section.

(b) Only persons actually engaged in such activities are required to obtain a registration; related or affiliated persons who are not engaged in such activities are not required to be registered. (For example, a stockholder or parent corporation of a corporation manufacturing controlled substances is not required to obtain a registration.)

(c) Any person applying for registration or re-registration shall file, annually, an application for registration with the Department of Health and Human Services and submit the required nonrefundable fee with the application. Categories of applicants and the annual fee for each category are as follows:

CATEGORY	FEE
(1) Clinic	125.00
(2) Hospital	300.00
(3) Nursing Home	100.00
(4) Teaching Institution	100.00
(5) Researcher	125.00
(6) Analytical Laboratory	100.00
(7) Distributor	500.00
(8) Manufacturer	600.00
(9) Off-Based Opioid Trtmt	0.00
(10) Dog Handler	125.00

(d) For any person applying for registration at least six months or less prior to the end of the fiscal year, the required annual fee submitted with the application shall be reduced by one-half of the above listed fee for each category.

Authority G.S. 90-100; 90-101; 90-102.1; 143B-210(9).

10A NCAC 26E .0105 SEPARATE REGISTRATION FOR INDEPENDENT ACTIVITIES

(a) The following groups of activities are deemed to be independent of each other:

- (1) manufacturing controlled ~~substances,~~ substances;
- (2) distributing controlled ~~substances,~~ substances;
- (3) dispensing controlled substances listed in Schedules II through ~~V,~~ V;
- (4) conducting research [other than research described in Subparagraph (6) of this Paragraph] with controlled substances listed in Schedules II through ~~V,~~ V;
- (5) conducting instructional activities with controlled substances listed in Schedule II through ~~V,~~ V;
- (6) conducting research with narcotic drugs listed in Schedules II through V for the purpose of continuing the dependence on such drugs of a narcotic drug dependent person in the course of conducting an authorized clinical investigation in the development of a narcotic

- (7) conducting research and instructional activities with controlled substances listed in Schedules I and ~~VI,~~ VI;
- (8) conducting chemical analysis with controlled substances listed in any and schedule;
- (9) dispensing of controlled substances in Schedule III-V for opioid treatment; and
- (10) possessing or training with controlled substances for the purpose of providing a commercial detection service.

(b) ~~Every~~ Any person who engages in more than one group of independent activities shall obtain a separate registration for each group of activities except as provided in this Paragraph. Any person when registered to engage in the group activities described in each ~~subparagraph-~~ Subparagraph of this Paragraph shall be authorized to engage in the coincident activities described in that ~~subparagraph~~ Subparagraph without obtaining a registration to engage in such coincident activities provided that unless specifically exempted, the person complies with all requirements and duties prescribed by law for persons registered to engage in such coincident ~~activities-~~ activities as follows:

- (1) A person registered to manufacture any controlled substance or basic class of controlled substance shall be authorized to distribute that substance or class but no other substance or class which the person is not registered to manufacture.
- (2) A person registered to manufacture any controlled substance listed in Schedules II through V shall be authorized to conduct chemical analysis and preclinical research (including quality control analysis) with narcotic and nonnarcotic controlled substances listed in those Schedules the person authorized to manufacture.
- (3) A person registered or authorized to conduct research with a basic class of controlled substances listed in Schedules I and VI shall be authorized to manufacture such class if and to the extent that such manufacture is set forth in the research protocol filed with the Drug Enforcement Administration and to distribute such class to other persons registered or authorized to conduct research with such class or registered or authorized to conduct chemical analysis with controlled substances.
- (4) A person registered or authorized to conduct chemical analysis with controlled substances shall be authorized to manufacture such substances for analytical or instructional purposes, to distribute such substances to other persons registered or authorized to conduct chemical analysis or instructional activities or research with such substances and to persons exempted from registration pursuant to ~~Rule~~

~~.0109~~ Rule .0111 of this Section and to conduct instructional activities with controlled substances.

- (5) A person registered or authorized to conduct research [other than research described in Paragraph (a)(6) of this Rule] with controlled substances listed in Schedules II through V shall be authorized to conduct chemical analysis with controlled substances listed in those schedules in which the person is authorized to conduct research, to manufacture such substances if and to the extent that such manufacture is set forth in a statement filed with the application for registration and to distribute such substances to other persons registered or authorized to conduct chemical analysis, instructional activities or research with such substances and to persons exempted from registration pursuant to ~~Rule .0109~~ Rule .0111 of this Section and to conduct instructional activities with controlled substances.

- (6) A person registered to dispense controlled substances listed in Schedules II through V shall be authorized to conduct research [other than research described in Paragraph (a)(6) of this Rule] and to conduct instructional activities with those substances.

(c) A single registration to engage in any group of independent activities may include one or more controlled substances listed in the Schedules ~~schedules~~ authorized in that group of independent activities. A person registered to conduct research with controlled substances listed in Schedules I and VI may conduct research with any substance listed in Schedules I and VI for which the person has filed and approved a research protocol from the Drug Enforcement Administration.

Authority G.S. 90-100; 90-101; 90-102.1; 143B-210(9).

10A NCAC 26E .0111 EXEMPTION OF LAW ENFORCEMENT OFFICIALS

(a) The requirement of registration is waived for the following persons in the circumstances described in this Rule:

- (1) ~~Any~~ any person employed by the following agencies who is lawfully engaged in the enforcement of any North Carolina or federal law relating to controlled substances, drugs or customs and is duly authorized to possess controlled substances in the course of his official duties: the Department of Health and Human Services, the North Carolina Department of Justice, the North Carolina Board of Pharmacy, the Drug Enforcement Administration, the United States Bureau of Customs and the United States Food and Drug ~~Administration~~ Administration;
- (2) any dog handler who is employed or under contract to a North Carolina law enforcement

agency or other person specified in G.S. 90-101(c)(5);

- ~~(2)~~(3) ~~Any~~ any person employed by any political subdivision of the ~~state~~ State who is engaged in the enforcement of any state or local law relating to controlled substances and who is duly authorized to possess controlled substances in the course of his official ~~duties~~ duties; or

- ~~(3)~~(4) ~~The requirement of registration is waived for~~ any official of the United States Army, Navy, Marine Corps, Air Force, Coast Guard or Public Health Service who is authorized to prescribe, dispense or administer but not to procure or purchase controlled substances in the course of his official duties. Such officials shall follow procedures set forth in Section .0400 of this Subchapter regarding prescriptions but shall state the branch of service or agency (e.g., United States Army or Public Health Service) and the service identification number of the issuing official in lieu of the registration number required on prescription forms. The service identification number of a Public Health Service officer is his social security number.

(b) Any official exempted by this Rule may, when acting in the course of his official duties, possess any controlled substance and distribute any such substance to any other official who is also exempted by this Section and acting in the course of his official duties.

(c) Any official exempted by this Rule may procure any controlled substance in the course of an inspection in accordance with .0503(a)(4) of this Subchapter or in the course of any criminal investigation involving the person from whom the substance was procured.

Authority G.S. 90-100; 90-101; 90-102.1; 143B-147(a)(5).

10A NCAC 26E .0113 APPLICATION FORMS: CONTENTS: SIGNATURE

(a) Any person required to be registered and not so registered and applying for registration:

- (1) to manufacture or distribute controlled substances, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 225;
- (2) to dispense controlled substances listed in Schedules II through V, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 224;
- (3) to conduct instructional activities with controlled substances listed in Schedules II through V, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 224;
- (4) to conduct research with controlled substances listed in Schedules II through V other than

- research described in .0105(a)(6) of this Subchapter, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 225 with evidence of federal registration to conduct research with such controlled substances;
- (5) to conduct research with narcotic drugs listed in Schedules II through V, as described in .0105(a)(6) of this Subchapter, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 225 with evidence of federal registration to conduct research with such controlled substance;
- (6) to conduct research with controlled substances listed in Schedules I and VI, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 225 with evidence of federal registration to conduct research with such controlled substances;
- (7) to conduct instructional activities with controlled substances listed in Schedules I and VI, shall apply as a researcher on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 225 with evidence of federal registration to conduct instructional activities with controlled substances;
- (8) to conduct chemical analysis with controlled substances listed in any schedule, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 225;
- (9) to dispense controlled substances in Schedule III-V for opioid treatment, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 224; and
- (10) to provide a commercial detection service, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 225.
- (b) Any person registered and applying for re-registration:
- (1) to manufacture or distribute controlled substances, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 227;
- (2) to dispense controlled substances in Schedules II through V, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 226;
- (3) to conduct instructional activities with controlled substances listed in Schedules II through VI, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 226;
- (4) to conduct research with controlled substances listed in Schedules II through V other than
- research described in Rule .0105(a)(6) of this Subchapter, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 227;
- (5) to conduct research with narcotic drugs listed in Schedules II through V, as described in Rule .0105(a)(6) of this Subchapter, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 227;
- (6) to continue to conduct research with controlled substances listed in Schedules I and VI under one or more approved research protocols, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 227;
- (7) to continue to conduct instructional activities with controlled substances listed in Schedules I and VI under one or more approved federal instructional statements, shall apply as a researcher on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 227; (8) to conduct chemical analysis with controlled substances listed in any schedule, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 227;
- (9) to dispense controlled substances in Schedule III-V in opioid treatment , shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 226; and
- (10) to provide a commercial detection service, shall apply on Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Form 227.
- (c) Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Forms 224 and 225 may be obtained by writing to the Director. Commission for Mental Health, Developmental Disabilities and Substance Abuse Services Forms 226 and 227 will be mailed as applicable to each registered person approximately 60 days before the expiration date of registration; if any registered person does not receive such forms within 45 days before the expiration date of registration, the registered person must promptly give notice of such fact and request such forms by writing to the Director.
- (d) Each application for registration to handle any basic class of controlled substance listed in Schedules I (except to conduct chemical analysis with such classes) and VI and each application for registration to manufacture a basic class of controlled substances listed in Schedule II or to conduct research with any narcotic controlled substance listed in Schedule II shall include the Federal Drug Enforcement Administration code number for each class or substance to be covered by such registration.
- (e) Each application shall include all information called for in the form unless the item is not applicable, in which case this fact shall be indicated.

(f) An applicant may authorize one or more individuals who would not otherwise be authorized to do so to sign applications for the applicant by filing with the director a power of attorney for each such individual. The power of attorney shall be signed by a person who is authorized to sign applications under this Paragraph and shall contain the signature of the individual being authorized to sign applications. The power of attorney shall be valid until revoked by the applicant.

Authority G.S. 90-100; 90-102; 143B-147(a)(5).

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for MH/DD/SAS intends to amend the rules cited as 10A NCAC 27G .0104; .4202.

Proposed Effective Date: January 1, 2005

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A person may demand a public hearing on the proposed rules by submitting a request in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, by June 30, 2004.

Reason for Proposed Action: The Commission for Mental Health, Developmental Disabilities and Substance Abuse Services proposes to amend current professional requirements for staff to include qualifications of substance abuse staff providing prevention services. S.L. 2002-126 requires DHHS to ensure that substance abuse prevention services are provided by qualified professionals.

Procedure by which a person can object to the agency on a proposed rule: The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018.

Written comments may be submitted to: Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, phone (919) 733-7011, fax (919) 733-9455, email cindy.kornegay@ncmail.net.

Comment period ends: August 16, 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 27 - MENTAL HEALTH, COMMUNITY FACILITIES AND SERVICES

SUBCHAPTER 27G - RULES FOR MENTAL HEALTH, DEVELOPMENTAL DISABILITIES, AND SUBSTANCE ABUSE FACILITIES AND SERVICES

SECTION .0100 - GENERAL INFORMATION

10A NCAC 27G .0104 STAFF DEFINITIONS

The following credentials and qualifications apply to staff described in this Subchapter:

- (1) "Associate Professional (AP)" within the mental health, developmental disabilities and substance abuse services (mh/dd/sas) system of care means an individual who is a:
(a) graduate of a college or university with a Masters degree in a human service field with less than one year of full-time, post-graduate degree accumulated mh/dd/sa experience with the population served, or a substance abuse professional with less than one year of full-time, post-graduate degree accumulated supervised experience in alcoholism and drug abuse counseling. Upon hiring, an individualized supervision plan shall be developed and supervision shall be provided by a qualified professional with the population served until the individual meets one year of experience; or
(b) graduate of a college or university with a bachelor's degree in a human service field with less than two years of full-time, post-bachelor's degree accumulated mh/dd/sa experience with the population served, or a substance abuse professional with less than two years of full-time, post-bachelor's degree accumulated supervised experience in alcoholism and drug abuse counseling. Upon hiring, an individualized supervision plan shall be developed and reviewed annually. Supervision shall be provided by a qualified professional with the population served until the

- individual meets two years of experience; or
- (c) graduate of a college or university with a bachelor's degree in a field other than human services with less than four years of full-time, post-bachelor's degree accumulated mh/dd/sa experience with the population served, or a substance abuse professional with less than four years of full-time, post-bachelor's degree accumulated supervised experience in alcoholism and drug abuse counseling. Upon hiring, an individualized supervision plan shall be developed and reviewed annually. Supervision shall be provided by a qualified professional with the population served until the individual meets four years of experience; or
- (d) registered nurse who is licensed to practice in the State of North Carolina by the North Carolina Board of Nursing with less than four years of full-time accumulated experience in mh/dd/sa with the population served. Upon hiring, an individualized supervision plan shall be developed and reviewed annually. Supervision shall be provided by a qualified professional with the population served until the individual meets four years of experience.
- (2) "Certified alcoholism counselor (CAC)" means an individual who is certified as such by the North Carolina Substance Abuse Professional Certification Board.
- (3) "Certified drug abuse counselor (CDAC)" means an individual who is certified as such by the North Carolina Substance Abuse Professional Certification Board.
- (4) "Certified clinical supervisor (CCS)" means an individual who is certified as such by the North Carolina Substance Abuse Professional Certification Board.
- (5) "Certified substance abuse counselor (CSAC)" means an individual who is certified as such by the North Carolina Substance Abuse Professional Certification Board.
- (6) "Certified substance abuse prevention consultant (CSAPC)" means an individual who is certified as such by the North Carolina Substance Abuse Professional Board.
- (7) "Clinical" means having to do with the active direct treatment/habilitation of a client.
- (8) "Clinical staff member" means a qualified professional or associate professional who provides active direct treatment/habilitation to a client.
- (9) "Clinical/professional supervision" means regularly scheduled assistance by a qualified professional or associate professional to a staff member who is providing direct, therapeutic intervention to a client or clients. The purpose of clinical supervision is to ensure that each client receives appropriate treatment or habilitation which is consistent with accepted standards of practice and the needs of the client.
- (10) "Clinical social worker" means a social worker who is licensed as such by the N.C. Social Work Certification and Licensure Board.
- (11) "Director" means the individual who is responsible for the operation of the facility.
- (12) "Licensed professional counselor (LPC)" means a counselor who is licensed as such by the North Carolina Board of Licensed Professional Counselors.
- (13) "Nurse" means a person licensed to practice in the State of North Carolina either as a registered nurse or as a licensed practical nurse.
- (14) "Paraprofessional" within the mh/dd/sas system of care means an individual who, with the exception of staff providing respite services or personal care services, has a GED or high school diploma; or no GED or high school diploma, employed prior to November 1, 2001 to provide a mh/dd/sa service. Upon hiring, an individualized supervision plan shall be developed and supervision shall be provided by a qualified professional or associate professional with the population served.
- (15) "Psychiatrist" means an individual who is licensed to practice medicine in the State of North Carolina and who has completed an accredited training program in psychiatry.
- (16) "Psychologist" means an individual who is licensed to practice psychology in the State of North Carolina as either a licensed psychologist or a licensed psychological associate.
- (17) "Qualified client record manager" means an individual who is a graduate of a curriculum accredited by the Council on Medical Education and Registration of the American Health Information Management Association and who is currently registered or accredited by the American Health Information Management Association.
- (18) "Qualified professional" means, within the mh/dd/sas system of care:
- (a) an individual who holds a license, provisional license, certificate, registration or permit issued by the governing board regulating a human service profession, except a registered

- (b) nurse who is licensed to practice in the State of North Carolina by the North Carolina Board of Nursing who also has four years of full-time accumulated experience in mh/dd/sa with the population served; or
 - (b) a graduate of a college or university with a Masters degree in a human service field and has one year of full-time, post-graduate degree accumulated mh/dd/sa experience with the population served, or a substance abuse professional who has one year of full-time, post-graduate degree accumulated supervised experience in alcoholism and drug abuse counseling; or
 - (c) a graduate of a college or university with a bachelor's degree in a human service field and has two years of full-time, post-bachelor's degree accumulated mh/dd/sa experience with the population served, or a substance abuse professional who has two years of full-time, post-bachelor's degree accumulated supervised experience in alcoholism and drug abuse counseling; or
 - (d) a graduate of a college or university with a bachelor's degree in a field other than human services and has four years of full-time, post-bachelor's degree accumulated mh/dd/sa experience with the population served, or a substance abuse professional who has four years of full-time, post-bachelor's degree accumulated supervised experience in alcoholism and drug abuse counseling.
- (19) "Qualified substance abuse prevention professional (QSAPP)" means, within the mh/dd/sas system of care:(a) a graduate of a college or university with a Masters degree in a human service field and has one year of full-time, post-graduate degree accumulated supervised experience in substance abuse prevention; or
- (b) a graduate of a college or university with a bachelor's degree in a human service field and has two years of full-time, post-bachelor's degree accumulated supervised experience in substance abuse prevention; or
 - (c) a graduate of a college or university with a bachelor's degree in a field other than human services and has four years of full-time, post bachelor's

degree accumulated supervised experience in substance abuse prevention; or

- (d) a substance abuse prevention professional who is certified as a Certified Substance Abuse Prevention Consultant (CSAPC) by the North Carolina Substance Abuse Professional Certification Board.

Authority G.S. 122C-3; 122C-25; 122C-26; 143B-147.

SECTION .4200 - SUBSTANCE ABUSE PRIMARY PREVENTION SERVICES

10A NCAC 27G .4202 STAFF

Each facility that provides primary prevention programs shall designate a director who shall be a Qualified Substance Abuse Prevention Professional (QSAPP).

Authority G.S. 143B-147.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for MH/DD/SAS intends to amend the rules cited as 10A NCAC 28A .0101; 28D .0208.

Proposed Effective Date: January 1, 2005

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): A person may demand a public hearing on the proposed rules by submitting a request in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-2018, by June 30, 2004*

Reason for Proposed Action: *Recommendations received from advocacy groups, and a thorough review, by the Division and the Department, of rules protecting the health, safety and welfare of clients in State-operated facilities and in communities resulted in a decision that client rights rules in State-operated facilities and in communities should be consistent. Specifically, it is necessary to amend the State-operated facility rules 10A NCAC 28A .0101 and 10 NCAC 28D .0208 to be consistent with corresponding rules applicable to community facilities.*

Procedure by which a person can object to the agency on a proposed rule: *The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018.*

Written comments may be submitted to: *Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, phone (919) 733-7011, fax (919) 733-9455, email cindy.kornegay@ncmail.net.*

Comment period ends: August 16, 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 28 - MENTAL HEALTH, STATE OPERATED FACILITIES AND SERVICES

SUBCHAPTER 28A - COMMITTEES AND PROCEDURES

SECTION .0100 – SCOPE AND DEFINITIONS

10A NCAC 28A .0101 SCOPE

(a) The purpose of the rules in Subchapters 28A, 28B, 28C and 28D of this Chapter is to set forth regulations governing human rights for clients in state facilities. The state facilities governed by these Rules are the regional psychiatric hospitals, mental retardation centers, alcohol and drug abuse treatment centers, Wright School, the North Carolina Special Care Center at Wilson, Whitaker School and any other like state owned and operated institutions, hospitals, centers or schools that may be established under the administration of the Division. In addition to these Rules, each state facility shall follow the North Carolina General Statutes regarding client rights which are specified in Article 3 of Chapter 122C.

(b) A state facility that is certified by the Centers for Medicare and Medicaid Services (CMS) as an Intermediate Care Facility for the Mentally Retarded (ICF/MR), or a Medicare/Medicaid Hospital or a Psychiatric Residential Treatment Facility (PRTF) is deemed to be in compliance with the rules in Subchapters 28A, 28B, 28C and 28D of this Chapter, with the exceptions of 28A .0102; 28D .0203; .0206; .0207; .0208; .0209 and .0210. A state facility that is certified as specified in this Paragraph shall comply with the following:

- (1) use of the definition of physical restraint as specified in Rule .0102, Subparagraph (b)(32) of this Section;
- (2) documentation requirements as specified in Rules .0203; .0206; .0207; .0208; .0209 and .0210 of Subchapter 28D;

- (3) debriefing requirements as specified in Rule .0206 of Subchapter 28D; and
- (4) training requirements as specified in Rules .0209 and .0210 of Subchapter 28D.

Authority G.S. 122C-51; 143B-17; 143B-147.

SUBCHAPTER 28D - TREATMENT OR HABILITATION RIGHTS

SECTION .0200 - PROTECTIONS REGARDING CERTAIN PROCEDURES

10A NCAC 28D .0208 INTERVENTIONS REQUIRING ADDITIONAL SAFEGUARDS

(a) The interventions specified in this Rule present a significant risk to the client and therefore require additional safeguards. These procedures shall be followed in addition to the procedures specified in Rule .0203 of this Section.

(b) The following interventions are designed for the primary purpose of reducing the incidence of aggressive, dangerous or self-injurious behavior to a level which will allow the use of less intrusive treatment/habilitation procedures. Such interventions include the use of:

- (1) seclusion, physical restraint or isolation time-out employed as a measure of therapeutic treatment;
- (2) seclusion, physical restraint or isolation time-out used on an emergency basis more than 40 hours in a calendar month or one episode in which the original order is renewed for up to a total of 24 hours in accordance with the limits specified in Subparagraph (1)(8) of Rule .0206 of this Section;
- (3) unpleasant tasting substances;
- (4) planned non-attention to specific undesirable behaviors when the target behavior is health threatening;
- (5) contingent deprivation of any basic necessity;
- (6) contingent application of any noxious substances which include but are not limited to noise, bad smells or splashing with water; and
- (7) any potentially physically painful procedure or stimulus which is administered to the client for the purpose of reducing the frequency or intensity of a behavior.

(c) Such interventions shall never be the sole treatment modality for the elimination of target behavior.

(d) The intervention shall always be accompanied by positive treatment or habilitation methods which shall include, but not be limited to:

- (1) the deliberate teaching and reinforcement of behaviors which are non-injurious;
- (2) the improvement of conditions associated with non-injurious behaviors such as an enriched educational and social environment; and
- (3) the alteration or elimination of environmental conditions which are reliably correlated with self-injury.

(e) Prior to the implementation of any planned use of the intervention the following written approvals and notifications shall be obtained. Documentation in the client record shall include:

- (1) approval of the plan by the treatment/habilitation team;
- (2) that each client whose treatment/habilitation plan includes interventions with reasonably foreseeable physical consequences shall receive an initial medical examination and periodic planned monitoring by a physician;
- (3) that the treatment/habilitation team shall inform the internal client advocate that the intervention has been planned for the client and the rationale for utilization of the intervention;
- (4) the treatment/habilitation team shall explain the intervention and the reason for the intervention to the client and the legally responsible person, if applicable;
- (5) the prior written consent of the client or his legally responsible person shall be obtained except for those situations specified in Rule .0206(g)(1) in this Section. If the client or legally responsible person refuses the intervention, the State Facility Director shall follow the right to refuse treatment procedures as specified in this Subchapter;
- (6) that the plan shall be reviewed and approved by a review committee, designated by the State Facility Director, which shall include that:
 - (A) at least one member of the review committee shall be qualified through experience and training to utilize the planned intervention; and
 - (B) no member of the review committee shall be a member of the client's treatment team.
- (7) that the treatment/habilitation plan may be reviewed and approved by the State Facility Director; and
- (8) if any of the persons or committees specified in Subparagraphs (e)(1), (2), (4), (5) or (6) of this Rule do not approve the continued use of a planned intervention, the planned intervention shall be terminated. The State Facility Director shall establish an appeal mechanism for the resolution of any disagreement over the use of the intervention.

(f) Neither the consents nor the approvals specified in Paragraph (e) of this Rule shall be considered valid for more than six months. The treatment/habilitation team shall re-evaluate the use of the intervention and obtain the client's and legally responsible person's consent for continued use of the intervention.

(g) The plan shall be reviewed at the next meeting of the Human Rights Committee within the constraints of 10A NCAC 28A .0209. The Committee, by majority vote, may recommend approval or disapproval of the plan to the State Facility Director

or may abstain from making a recommendation. If the State Facility Director does not agree with the decision of the Committee, the Committee may appeal the issue to the Division in accordance with the provisions of 10A NCAC 28A .0208.

(h) The intervention shall be used only when the treatment/habilitation team has determined and documented in the client record the following:

- (1) that the client is engaging in behaviors that are likely to result in injury to self or others;
- (2) that other methods of treatment or habilitation employing less intrusive interventions are not appropriate;
- (3) the frequency, intensity and duration of the target behavior, and the behavior's probable antecedents and consequences; and
- (4) it is likely that the intervention will enable the client to stop the target behavior.

(i) The treatment/habilitation team shall designate a state facility employee to maintain written records on the application of the intervention and accompanying positive procedures. These records shall include at a minimum the following:

- (1) data which reflect the frequency, intensity and duration with which the targeted behavior occurs (scientific sampling procedures are acceptable);
- (2) data which reflect the frequency, intensity and duration of the intervention and any accompanying positive procedures; and
- (3) data which reflect the state facility employees who administered the interventions.

(j) The interventions shall be evaluated at least weekly by the treatment team or its designee and at least monthly by the State Facility Director. The designee of the State Facility Director shall not be a member of the client's treatment/habilitation team. Reviews shall be documented in the client record.

(k) During the use of the intervention, the Human Rights Committee shall be given the opportunity to review the treatment/ habilitation plan within the constraints of 10A NCAC 28A .0209.

Authority G.S. 122C-51; 122C-53; 122C-60; 122C-62; 143B-147.

TITLE 11 – DEPARTMENT OF INSURANCE

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 10 .1106.

Proposed Effective Date: *October 1, 2004*

Public Hearing:

Date: *July 8, 2004*

Time: *10:00 a.m.*

Location: *4009 Dobbs Building, 430 N. Salisbury St., Raleigh, NC*

Reason for Proposed Action: *The amendment to this Rule will simplify the filing process required by this Rule.*

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 August 16, 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: *August 16, 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 10 - PROPERTY AND CASUALTY DIVISION

SECTION .1100 - RATE FILINGS

11 NCAC 10 .1106 DEVIATIONS FROM RATES OF THE NORTH CAROLINA RATE BUREAU

(a) Definitions:

- (1) Rate deviation refers to the entire collection of differences from the Rate Bureau rates and rating plan that a company has implemented or proposes to implement. Deviation and aggregate deviation are used synonymously. A company shall have only one rate deviation from each Rate Bureau filing and rating plan.
- (2) Deviation component refers to any individual part of the aggregate deviation. A deviation component may involve a coverage difference, a different territorial relativity, a different class relativity, a different rate for a particular type of insured, etc. Proposed differences in territorial and class relativities (and other

similarly related sets of rating factors) should be treated as one deviation component. (3)

Introduction of a deviation means that a company has no current rate deviation on file for the particular line but is proposing to implement one.

- (4) Modification of a deviation means that a company has a current rate deviation on file for the particular line and that the company proposes to add, change, or eliminate one of the components of the deviation.
- (5) Withdrawal of a deviation means that a company has a rate deviation on file that it proposes to withdraw in its entirety.

(b) Filing Guidelines:

- (1) All rate deviation filings must be made in triplicate.
 - (A) The original and one copy shall be sent to the Department.
 - (B) The second copy shall be sent to the North Carolina Rate Bureau.
- (2) A rate deviation shall be introduced, modified, or withdrawn on an individual company basis even if the company is part of a group.
- (3) All proposed rate deviations shall be expressed in terms of North Carolina Rate Bureau rates, either as percentages or as dollar amounts.
- (4) Filing requirements differ by type of deviation action:
 - (A) To introduce a deviation, see Paragraph (d) of this Rule.
 - (B) To modify a deviation, see Paragraph (e) of this Rule.
 - (C) To withdraw a deviation, see Paragraph (f) of this Rule.

(c) Application of Deviations:

- (1) On approval of the introduction, modification, or withdrawal of one or more rate deviations, the department shall transmit to the company a letter of approval listing all the components in effect for that line and company.
- (2) All deviation components listed shall be applied to all eligible insureds and deviation components not listed shall not be applied to any insured.
- (3) Rate deviations remain in effect until modified or withdrawn.
- (4) Modifications of existing rate deviations are permitted at any time.
- (5) An unmodified rate deviation may be withdrawn only if both of the following conditions have been met:
 - (A) The deviation has been in effect for at least six months.
 - (B) Application for withdrawal is submitted to the department 15 days before the proposed withdrawal date.

- (6) A modified rate deviation may be withdrawn only if both of the following conditions have been met:
 - (A) The deviation has been in effect for at least six months since the date of the last modification.
 - (B) Application for withdrawal is submitted to the department 15 days before the proposed withdrawal date.
- (d) Filings to introduce rate deviations shall contain only the following information:
 - (1) A cover letter containing the following:
 - (A) Company name;
 - (B) Company's Federal Employer's Number;
 - (C) Line of business involved.
 - (2) A completed deviation questionnaire obtained from the Property and Casualty Division.
- (e) Filings to modify rate deviations shall contain only the following information:
 - (1) A cover letter containing the following:
 - (A) Company name;
 - (B) Company's Federal Employer's Number;
 - (C) Line of business involved;
 - (D) Department file number.
 - (2) A completed deviation questionnaire obtained from the Property and Casualty Division.
- (f) Filing letters for withdrawals of rate deviations. Filing letters for withdrawal shall contain only the following information:
 - (1) A cover letter including the following information:
 - (A) Company name;
 - (B) Company's Federal Employer's Number;
 - (C) Line of business involved;
 - (D) Department file number.
 - (2) A statement that the deviation has been in effect for at least six months.
- (g) Deviation questionnaires shall contain the following information (if applicable):
 - (1) Company Name;
 - (2) Company's Federal Employer's Number;
 - (3) Company's file number;
 - (4) Line of insurance;
 - (5) Subline/Program title;
 - (6) Previous Department file number, if applicable;
 - (7) Proposed effective date and rules of implementation;
 - (8) Company's N.C. volume of business;
 - (9) Company's N.C. market share;
 - (10) Company's countrywide volume of business;
 - (11) Number of N.C. insureds affected;
 - (12) Percentage of N.C. insureds affected;
 - (13) Total dollar amount of premiums that will not be collected on an annual basis as a result of this deviation;

- (14) Average dollar difference per exposure from manual rates;
- (15) Maximum deviation;
- (16) If the deviation produces a premium greater than manual for an individual insured, explain;
- (17) List of individual deviation components and the proposed action;
- (18) Certification by a company officer or filings department head; and
- (19) Actuarial certification.

Authority G.S. 58-2-190; 58-36-30(a) and (c).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 25 – INTERPRETER AND TRANSLITERATOR LICENSING BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the Interpreter and Transliterators Licensing Board intends to adopt the rules cited as 21 NCAC 25 .0101-.0102, .0201-.0209, .0301-.0302, .0401-.0405, .0501, .0601-.0603.

Proposed Effective Date: *October 1, 2004*

Public Hearing:

Date: *July 23, 2004*

Time: *3:00 p.m. - 4:00 p.m.*

Location: *Lippard Chapel Assembly Room, Broughton Hospital, 1000 S. Sterling St., Morganton, NC*

Reason for Proposed Action: *The Interpreter and Transliterators Licensing Board was created by NC Session Law 2002-182, as amended by NC Session Law 2003-56. The Board was created "to provide for the regulation of persons offering manual or oral interpreting or transliterating services to individuals who are deaf, hard-of-hearing, or dependent on the use of manual modes of communication in this State." G.S. 90D-2. The Board is authorized to determine the fitness of applications for licensure; to issue, renew, deny, suspend, and revoke licenses; and to set license application fees. G.S. 90D-6 and G.S. 90D-10. The Board must establish licensure standards and procedures by rule before it can issue any licenses under the Act. See, e.g., G.S. 90D-4(b)(2); 90D-6(2), (11); 90D-8(a)(3) and (b); 90D-11.*

Procedure by which a person can object to the agency on a proposed rule: *A person may object to any one or more of the proposed rules by mailing his or her written objection to the NC Interpreter and Transliterators Board at PO Box 1632, Garner, NC 27529.*

Written comments may be submitted to: *NC Interpreter and Transliterators Licensing Board, Attn: Laurie Shaw, PO Box 1632, Garner, NC 27529, phone (919)779-5709, fax (919) 779-5642, and email lshaw@mgmt4u.com.*

Comment period ends: *August 16, 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** 21 NCAC 25 .0202-.0203, .0501
- Local** 21 NCAC 25 .0202-.0203, .0501
- Substantive (>\$3,000,000)**
- None** 21 NCAC 25 .0101-.0102, .0201, .0204-.0209, .0301-.0302, .0401-.0405, .0601-.0603

SECTION .0100 - GENERAL PROVISIONS

21 NCAC 25 .0101 DEFINITIONS

(a) The definitions in G.S. 90D-3 apply to the rules in this Chapter.

(b) The following definitions also apply to the rules in this Chapter:

- (1) **"Applicant"** means any person applying to the Board for any license under G.S. 90D.
- (2) **"Board"** means the North Carolina Interpreter and Transliterator Licensing Board.
- (3) **"Consumer"** means any person who retains or uses the services of an interpreter or transliterator.
- (4) **"Continuing Education"** means post-licensure education that maintains or enhances the knowledge and skills of interpreters and transliterators and enables them to continue to render competent professional services.
- (5) **"Continuing Education Unit"** means the unit of measurement of the continuing education completed by a licensee during a licensure year. In the case of workshops and conferences, 10 clock hours of training equal one continuing education unit ("CEU"). In the case of college class work, one hour of college credit in the quarter system equals one CEU and one hour of college credit in the semester system equals 1.5 CEUs.
- (6) **"Convicted"** or **"Conviction"** means and includes the entry of:
 - (A) a plea of no contest, nolo contendere, or the equivalent;
 - (B) a plea of guilty; or

(C) a verdict or finding of guilt by a jury, judge, or magistrate;
in any duly constituted, established, and recognized civilian or military adjudicating body, court, or tribunal in this State or any other state or nation;

- (7) **"Felony"** means any offense classified as a felony by the laws, statutes, or ordinances of the jurisdiction in which the offense occurred or, absent any such classification, any offense for which the maximum allowable punishment under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of more than two years.
- (8) **"Full license"** means a license issued pursuant to G.S. 90D-7 or S.L. 2002-182, s. 7 (as amended by S.L. 2003-56) that is not currently suspended for disciplinary reasons.
- (9) **"General Studies"** means those studies of the arts, sciences, and humanities that are not directly related to interpreting and transliterating that nevertheless make the individual a better interpreter or transliterator by making the individual more rounded.
- (10) **"Initial license"** means the first license ever issued to a licensee under G.S. 90D-7 or S.L. 2002-182, s. 7 (as amended by S.L. 2003-56) or the first license issued to a licensee under G.S. 90D-7 or S.L. 2002-182, s. 7 (as amended by S.L. 2003-56) after a lapse in licensure.
- (11) **"Initial provisional license"** means the first provisional license ever issued to a licensee under G.S. 90D-8(a). A licensee can acquire only one initial provisional license during his or her lifetime.
- (12) **"Misdemeanor"** means any criminal offense not classified as a felony by the laws, statutes, or ordinances of the jurisdiction in which the offense occurred or, absent any such classification, any offense for which the maximum allowable punishment under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of no more than two years. No traffic offense in any foreign jurisdiction shall be considered a misdemeanor if the offense has been de-criminalized under the motor vehicle laws of North Carolina.
- (13) **"Professional Studies"** means those studies that directly enhance a licensee's ability to interpret and transliterate. Professional studies are divided into:
 - (A) Linguistic and Cultural Studies, which include the study of languages and linguistic systems and the study of specific cultures;
 - (B) Theoretical and Experiential Studies, which include the study of the

- process of interpreting, the study of transliterating theory, and participation in skill-building activities; and
- (C) Specialization Studies, which include the study of the issues and problems unique to interpreting and transliterating for the legal, medical, mental health, and substance abuse recovery professions.

- (6) The applicant's current home and work email addresses;
- (7) The applicant's educational history, including but not limited to, the applicant's continuing education history;
- (8) The applicant's work history;
- (9) The history of the applicant's licensure, registration, certification, or classification as an interpreter or transliterator in this or any other state;
- (10) The history of any complaints filed against the applicant before any body that has licensed, registered, certified, or classified the applicant as an interpreter or transliterator;
- (11) The history of any civil suits arising out of the applicant's performance as an interpreter or transliterator;
- (12) The applicant's criminal record;
- (13) Any and all information needed by the N.C. Department of Justice to obtain State and federal criminal record checks; and
- (14) Any other information necessary to confirm the applicant's eligibility for licensure.

Authority G.S. 90D-6.

21 NCAC 25 .0102 MAILING LIST

(a) Any person may ask to be placed on the Board's mailing list for a period of 12 months by delivering a written request to the Board. The request shall include:

- (1) The person's name, address, telephone number, fax number, and email address;
- (2) Whether the person wants to receive notice of:
 - (A) Public meetings;
 - (B) Public hearings;
 - (C) Rule-making;
 - (D) Declaratory ruling requests;
 - (E) Disciplinary hearings; or
 - (F) Any two or more of Parts (A)-(E) of this Subparagraph;
- (3) Whether the person will accept such notice via e-mail;
- (4) The person's signature; and
- (5) A cashier's check, certified check or money order made payable to the North Carolina Interpreter and Transliterator Licensing Board in the amount of ten dollars (\$10.00) (all persons other than the media).

(b) A request to be placed on the Board's mailing list must be renewed annually by the submission of a new written request and an additional cashier's check, certified check or money order made payable to the North Carolina Interpreter and Transliterator Licensing Board in the amount of ten dollars (\$10.00) (all persons other than the media).

Authority G.S. 90D-6; 143-318.12(b)(2); 150B-20(a).

SECTION .0200 – LICENSING

21 NCAC 25 .0201 THE APPLICATION

The license application may ask the applicant to provide some or all of the following information:

- (1) All names ever used by the applicant;
- (2) The date, city, county, state, and nation of the applicant's birth;
- (3) The applicant's social security number, as required by G.S. 93B-14;
- (4) All home street and post office addresses used by the applicant over the previous five years;
- (5) The applicant's current home and work telephone and fax numbers;

Authority G.S. 90D-6; 90D-7; 90D-8; 90D-9; 90D-11.

21 NCAC 25 .0202 THE APPLICATION PACKAGE

(a) An applicant for licensure shall submit the following materials to the Board:

- (1) A completed, signed, and dated application in the format specified by the Board;
- (2) A clear, two-inch by two-inch, passport-style photograph of the head and shoulders of the applicant, made within two years of the date of application;
- (3) A legible, fully-completed finger print card obtained from a local law enforcement agency;
- (4) The applicant's signed, written consent to a criminal record check;
- (5) One or more cashier's checks, certified checks or money orders made payable to the North Carolina Interpreter and Transliterator Licensing Board in the amounts necessary to cover the cost of all necessary local, State and federal criminal record checks; and
- (6) A cashier's check, certified check or money order made payable to the North Carolina Interpreter and Transliterator Licensing Board in the amount specified by Rule .0203 of this Section.

(b) An applicant for an initial license under S.L. 2002-182, s. 7, as amended by S.L. 2003-56, shall submit the following materials to the Board:

- (1) Invoices or pay stubs documenting that the applicant was actively engaged as an interpreter or transliterator in this State for at least 200 hours for each of the two years immediately preceding 31 October 2002. The invoices or pay stubs must be verified in

- writing by the individual who either paid or approved payment for the services;
- (2) Letters of recommendation from any two individuals who are:
- (A) Interpreters who hold valid National Association of the Deaf level 4 or 5 certifications; or
 - (B) Interpreters who are nationally certified by the Registry of Interpreters for the Deaf, Inc.; or
 - (C) Transliterators who have national certifications recognized by the National Cued Speech Association ("NCSA"); or
 - (D) Interpreters who hold quality assurance North Carolina Interpreter Classification System ("NCICS") level A or B classifications in effect on January 1, 2000; or
 - (E) Consumers of interpreter or transliterator services who have observed the applicant's performance as an interpreter or transliterator; or
 - (F) The parent or legal guardian of a deaf consumer of interpreter or transliterator services who has observed the applicant's performance as an interpreter or Transliterator.

Authority G.S. 90D-6; 90D-7; 90D-10; S.L. 2002-182, s. 7, as amended by S.L. 2003-56.

21 NCAC 25 .0203 APPLICATION FEES

(a) The Board shall not review a license application until the appropriate license fee has been paid pursuant to the following fee schedule:

<u>APPLICATION FOR INITIAL FULL LICENSE UNDER G.S. 90D-7 AND -9</u>	<u>\$225.00</u>
<u>APPLICATION FOR RENEWAL OF FULL LICENSE</u>	<u>\$150.00</u>
<u>APPLICATION FOR INITIAL PROVISIONAL LICENSE UNDER G.S. 90D-8</u>	<u>\$225.00</u>
<u>APPLICATION FOR RENEWAL OF PROVISIONAL LICENSE</u>	<u>\$150.00</u>
<u>APPLICATION FOR INITIAL FULL LICENSE UNDER S. L. 2002-182, s. 7 (GRANDFATHER PROVISION)</u>	<u>\$75.00</u>
<u>APPLICATION FOR REPLACEMENT OF LOST, DAMAGED OR DESTROYED LICENSE</u>	<u>\$10.00</u>

(b) These fees shall be nonrefundable and shall be paid by cashier's check, certified check or money order made payable to the North Carolina Interpreter and Transliterator Licensing Board.

Authority G.S. 90D-6(6); 90D -10(b).

21 NCAC 25 .0204 RENEWAL OF A FULL

LICENSE

- (a) An application for the renewal of a full license is not timely filed unless it is received by the Board on or before the expiration date of the license being renewed.
- (b) If a licensee does not timely file an application for the renewal of a full license, the licensee shall not practice or offer to practice as an interpreter or transliterator for a fee or other consideration, represent himself or herself as a licensed interpreter or transliterator, or use the title "Licensed Interpreter for the Deaf", "Licensed Transliterator for the Deaf", or any other title or abbreviation to indicate that the person is a licensed interpreter or transliterator until he or she receives a new initial license.
- (c) An untimely filed application for the renewal of a full license shall be processed as an application for a new initial license.
- (d) The Board shall not review an untimely filed application for the renewal of a full license until the applicant pays the initial full license fee specified by Rule .0203 of this Section.
- (e) If the license being renewed has been suspended by the Board, any renewal license issued to the applicant shall be suspended as well until the term of the suspension has expired.

Authority G.S. 90D-6; 90D-11; 90D-12.

21 NCAC 25 .0205 RENEWAL OF A PROVISIONAL LICENSE

- (a) An application for the renewal of a provisional license is not timely filed unless it is received by the Board on or before the expiration date of the license being renewed.
- (b) If a licensee does not timely file an application for the renewal of a provisional license, the licensee shall not practice or offer to practice as an interpreter or transliterator for a fee or other consideration, represent himself or herself as a licensed interpreter or transliterator, or use the title "Licensed Interpreter for the Deaf", "Licensed Transliterator for the Deaf", or any other title or abbreviation to indicate that the person is a licensed interpreter or transliterator until he or she receives a either a renewed provisional license or an initial full license.
- (c) If the license being renewed has been suspended by the Board, any renewal license issued to the applicant shall be suspended as well until the term of the suspension has expired.
- (d) The Board may, in its discretion, renew a provisional license a fourth or fifth time if the applicant demonstrates to the Board's satisfaction that the applicant's progress toward full licensure was delayed by:
 - (1) a life-altering event, such as an acute or chronic illness suffered by either the applicant or a member of the applicant's immediate family;
 - (2) active military service; or
 - (3) a catastrophic natural event, such as a flood, hurricane, or tornado.
- (e) The Board shall not for any reason renew a provisional license for a sixth time.
- (f) The Board shall not issue an initial provisional license to anyone who has previously held a provisional license.

Authority G.S. 90D-6; 90D-8; 90D-11; 90D-12.

21 NCAC 25 .0206 RECIPROCITY

(a) An applicant shall not be eligible for a license by reciprocity, pursuant to G.S. 90D-9, if any interpreter's or transliterator's license issued to the applicant by any state:

- (1) has been revoked, suspended, or otherwise restricted or reduced from full licensure status within the 12 months next preceding the date on which the applicant applies for a license by reciprocity; or
- (2) remains suspended or otherwise restricted or reduced from full licensure status as of the date on which the applicant applies for a license by reciprocity

(b) A license issued by reciprocity shall be revoked if the underlying foreign license is surrendered, revoked, suspended, or otherwise restricted or reduced from full licensure status.

Authority G.S. 90D-6; 90D-9.

21 NCAC 25 .0207 MENTORING AND TRAINING EXEMPTION

(a) Pursuant to G.S. 90D-4(b)(2), a person who provides interpreting or transliterating services while enrolled as a student in a mentoring or training program approved by the Board is not required to obtain a license from the Board.

(b) A mentoring or training program is approved by the Board if it meets each of the following criteria:

- (1) The program is operated by a school accredited by the Southern Association of Colleges and Schools, or any other accrediting agency recognized by the U.S. Department of Education;
- (2) Each mentor or trainer used by the program:
 - (A) Holds a valid National Association of the Deaf ("NAD") level 4 or 5 certification; or
 - (B) Is nationally certified by the Registry of Interpreters for the Deaf, Inc. ("RID"); or
 - (C) Has a national certification recognized by the National Cued Speech Association ("NCSA"); or
 - (D) Holds a quality assurance North Carolina Interpreter Classification System ("NCICS") level A or B classification in effect on January 1, 2000;
- (3) Each mentor or trainer used by the program has five years of professional experience as an interpreter or transliterator following graduation from an accredited Interpreter Training Program or following the date on which the mentor or trainer received the certification or classification specified in Subparagraph (b)(2) of this Rule, provided that, until July 1, 2008, a deaf person who is certified as an interpreter by RID may serve as

a mentor or trainer without five years of professional experience;

- (4) Each mentor or trainer used by the program is currently licensed by the Board; and
- (5) The students being mentored or trained always work under the supervision of a mentor or trainer who meets the qualifications set out in Subparagraphs (b)(2) through (b)(4) of this Rule.

(c) A student in a mentoring or training program approved by the Board must obtain a license from the Board before the person provides interpreting or transliterating services for a fee or other consideration outside of the approved mentoring or training program.

(d) As used in Subparagraph (b)(3) of this Rule, the phrase "has five years of professional experience as an interpreter or transliterator" means that the mentor or trainer has provided interpreter or transliterator services for persons other than family members and friends, for a fee or other consideration, for a total of 60 consecutive or nonconsecutive months. Each full month of full-time or part-time employment as an interpreter or transliterator --- or as a teacher of interpreting or transliterating -- shall be counted toward the required 60 months of experience.

(e) As used in Subparagraph (b)(5) of this Rule, the phrase "always work[s] under the supervision of a mentor or trainer" means that a mentor or trainer is routinely available to observe and critique the student's performance, to answer questions, and to demonstrate proper technique. It does not mean that the student is always accompanied by the mentor or trainer.

Authority G.S. 90D-4(b)(2); 90D-6.

21 NCAC 25 .0208 GROUNDS FOR SUSPENSION OR REVOCATION OF A LICENSE

In addition to any other grounds provided by G.S. 90D-12, the Board may suspend or revoke an existing license if the licensee:

- (1) Fails to report being charged with, or convicted of, any crime in any state within 30 days after the charge is filed or the conviction is entered, unless the licensee is prevented from making the report because he or she is incarcerated;
- (2) Fails to report being sued in any court in any state for malpractice or negligence, incompetence, or misconduct in performing interpreter or transliterator services within 30 days after being served with a civil summons or complaint;
- (3) Fails to report a judgment against the licensee in any court in any state for malpractice or negligence, incompetence, or misconduct in performing interpreter or transliterator services within 30 days after judgment is entered, whether or not the licensee intends to appeal the judgment;
- (4) Fails to report that a complaint has been made against the licensee to any interpreter and transliterator licensing board or agency in any other State;

- (5) Fails to report that a complaint has been made against the licensee to any local, regional or national certifying agency, such as NAD, RID, and NCSA, within 30 days after the licensee receives notice of the complaint; or
- (6) Violates the Code Of Ethics adopted in 21 NCAC 25 .0301.

Authority G.S. 90D-6; 90D-7(a)(2).

21 NCAC 25 .0209 PERSONS WHO ARE INELIGIBLE TO APPLY FOR A LICENSE

(a) Any person whose license application is denied by the Board on the ground that the person gave false information to, or withheld information from, the Board while seeking a license shall be ineligible for licensure for a period of two years following the denial.

(b) Any person whose license is revoked by the Board on any grounds other than G.S. 90D-12(5) shall be ineligible for licensure for a period of two years following the revocation.

(c) Any person whose license has been revoked pursuant to G.S. 90D-12(5) for failing to pay child support after having been ordered to do so by a court of competent jurisdiction, or for failing to comply with a subpoena issued pursuant to a child support or paternity establishment proceeding, shall be ineligible to apply for a new license until the Board receives a certification from the appropriate clerk of court that the person is no longer delinquent in child support payments or that the person has complied with, or is no longer subject to, the subpoena.

Authority G.S. 50-13.12; 90D-6; 90D-12.

SECTION .0300 – MORAL FITNESS FOR LICENSURE

21 NCAC 25 .0301 CODE OF ETHICS

(a) The Board hereby adopts and incorporates by reference the Code of Ethics adopted by The Registry of Interpreters for the Deaf, Inc., including all subsequent amendments and editions of that code.

(b) A copy of the code can be obtained free of charge from the Board. The code can also be viewed on-line at RID's web page at: <http://www.rid.org/>.

Authority G.S. 90D-6; 90D-7(a)(2); 90D-12.

21 NCAC 25 .0302 CRIMINAL CONVICTIONS

(a) Except as provided in Paragraph (c) of this Rule, a person shall not be eligible to seek a license if the person has been convicted of:

- (1) Any combination of any two or more felonies, regardless of the dates of conviction;
- (2) Any combination of any three or more misdemeanors, regardless of the dates of conviction;
- (3) Any combination of any single felony and any two or more misdemeanors, regardless of the dates of conviction;

(4) Any single felony within the five years next preceding the date the person applies for a license;

(5) Any single misdemeanor within the two years next preceding the date the person applies for a license.

(b) Except as provided in Paragraph (c) of this Rule, the Board shall revoke a licensee's license upon the licensee's conviction of any single felony or misdemeanor.

(c) Notwithstanding the provisions of Paragraphs (a) and (b) of this Rule, a misdemeanor conviction shall not bar a person from obtaining a license and shall not require the Board to revoke an existing license if the applicant or licensee demonstrates to the Board's satisfaction that:

- (1) The applicant or licensee did not deceive or defraud the public while committing the misdemeanor offense; and
- (2) The misdemeanor offense has no bearing upon the person's fitness to perform interpreter or transliterator services.

Authority G.S. 90D-6; 90D-7(a)(2); 90D-12(2).

SECTION .0400 – REPORTING AND DISCLOSURE REQUIREMENTS

21 NCAC 25 .0401 DUTY TO REPORT CHANGES IN PERSONAL INFORMATION

A licensee shall notify the Board in writing of any change in the applicant's current:

- (1) Name;
- (2) Home street address;
- (3) Home mailing address;
- (4) Home and work telephone numbers;
- (5) Home and work fax numbers; and
- (6) Email address;

within 30 days after the change occurs.

Authority G.S. 90D-6(2) and (4); 90D-7(a)(2) and (c).

21 NCAC 25 .0402 DUTY TO REPORT CONSUMER COMPLAINTS

(a) A license shall notify the Board of any complaint made against the licensee:

- (1) to any interpreter and transliterator licensing board or agency in any other State; or
- (2) to any local, regional or national certifying agency, such as NAD, RID, and NCSA.

(b) The licensee shall give the notice to the Board within 30 days after the licensee receives notice of the complaint.

Authority G.S. 90D-6(2) and (4); 90D-7(a)(2) and (c).

21 NCAC 25 .0403 DUTY TO REPORT CIVIL SUITS
Any licensee named as a defendant in any civil suit arising out of the licensee's practice as an interpreter or transliterator shall:

- (1) Mail a copy of the civil summons and complaint to the Board within 30 days after the

licensee is served with a copy of the civil summons and complaint; and

- (2) Notify the Board of the outcome of the civil suit within 30 days after the civil suit is resolved by dismissal, settlement, trial, or any other means.

Authority G.S. 90D-6(2) and (4); 90D-7(a)(2) and (c).

21 NCAC 25 .0404 DUTY TO REPORT CRIMINAL PROSECUTIONS

Any licensee named as a defendant in any criminal prosecution shall:

- (1) Mail a copy of the criminal warrant, indictment, information, presentment or other criminal process to the Board within 30 days after the licensee is served with a copy of the criminal warrant, indictment, information, presentment or other criminal process; and
- (2) Notify the Board of the outcome of the criminal prosecution within 30 days after the prosecution is resolved by dismissal, pleas of guilty or no contest, trial, or any other means.

Authority G.S. 90D-6(2) and (4); 90D-7(a)(2) and (c).

21 NCAC 25 .0405 MANDATORY DISCLOSURES

Upon the request of any consumer, a licensee shall give the consumer a business card that:

- (1) bears the licensee's name, business address and telephone number;
- (2) states that the licensee is licensed by the North Carolina Interpreter and Transliterator Licensing Board; and
- (3) provides the licensee's license number.

Authority G.S. 90D-2; 90D-4(a); 90D-6(2) and (7).

SECTION .0500 – CONTINUING EDUCATION

21 NCAC 25 .0501 CONTINUING EDUCATION REQUIREMENTS

(a) A licensee shall earn at least two continuing education units ("CEUs") each licensure year. At least 1.0 of those CEUs shall be earned in professional studies and at least 1.0 of those CEUs shall be earned in a traditional classroom setting.

(b) Surplus CEUs shall not be carried forward from the licensure year in which they were earned to any subsequent licensure year.

(c) A licensee may earn CEUs by enrolling in and completing a class or course sponsored by a college or university accredited by the Southern Association of Colleges and Schools or by any other accrediting agency recognized by the U.S. Department of Education. In order to receive CEU credit for the class or course, the licensee must authorize and direct the sponsoring college or university to mail to the Board a certified transcript documenting that the licensee completed the class or course and that the licensee earned at least a 2.0 grade point average in the class or course.

(d) A licensee may earn CEUs by attending workshops and conferences approved by The Registry of Interpreters for the Deaf, Inc. ("RID"). In order to receive CEU credit for attendance at a workshop or conference approved by RID, the licensee must authorize the Board to access the licensee's on-line RID CEU transcript. RID shall be the sole judge of the number of CEUs earned by attendance at a RID approved workshop or conference.

(e) A licensee may earn CEUs by independently studying instructional materials in any format --- including, but not limited to, videotapes, audiotapes, web sites, DVDs, CDs, and books and other printed materials --- so long as the materials have been approved by RID. In order to receive CEU credit for such independent study, the licensee must authorize the Board to access the licensee's on-line RID CEU transcript. RID shall be the sole judge of the number of CEUs earned by the completion of any independent study approved by RID.

Authority G.S. 90D-6; 90D-8; 90D-11.

SECTION .0600 – ADMINISTRATIVE PROCEDURE

21 NCAC 25 .0601 PETITIONS FOR THE ADOPTION, AMENDMENT OR REPEAL OF RULES

(a) Any person may petition the Board to adopt a new rule or to amend or repeal an existing rule by filing a written petition with the Board.

(b) The petition shall contain:

- (1) the petitioner's name, address, telephone number, fax number, email address, and signature;
- (2) the number of the rule the petitioner wants the Board to amend or repeal;
- (3) a draft of the proposed new or amended rule;
- (4) the reasons the petitioner believes the Board should take the requested action; and
- (5) a statement of whether the petitioner wishes to address the Board regarding the petition.

(c) The Board chair, in his or her discretion, may give supporters and opponents of the petition an opportunity:

- (1) to file written comments on the petition; and
- (2) to address the Board on the merits of the petition.

Authority G.S. 90D-6; 150B-20(a).

21 NCAC 25 .0602 DECLARATORY RULINGS

(a) Any person aggrieved may petition the Board to issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the Board or of a rule or order of the Board by filing a written petition with the Board.

(b) A petition for a declaratory ruling must contain:

- (1) The petitioner's name, address, telephone number, fax number, email address, and signature;
- (2) The number of the rule or statute the petitioner wants the Board to construe;

- (3) The given state of facts to be applied in the ruling;
- (4) A plain and concise statement of the ruling sought by the petitioner;
- (5) A statement of how the petitioner is aggrieved by the rule or statute;
- (6) A plain and concise statement of the reasons the ruling sought should be issued by the Board; and
- (7) A statement of whether the petitioner wishes to address the Board regarding the petition.

(c) The Board chair, in his or her discretion, may give supporters and opponents of the petition an opportunity:

- (1) to file written comments on the petition; and
- (2) to address the Board on the merits of the petition.

(d) The Board may decline to issue any ruling:

- (1) When the Board determines that the petitioner is not a person aggrieved;
- (2) When the Board determines that material facts are in dispute;
- (3) When the Board determines that an actual case or controversy exists;
- (4) When the subject matter of the request is being investigated by the Board;
- (5) When the subject matter of the request is involved in pending litigation;
- (6) When the Board has already issued a final decision in a contested case involving the same or substantially similar facts;
- (7) When the Board has already issued a declaratory ruling on the same or substantially similar facts; or
- (8) When the Board determines that the issuance of a ruling is not in the public interest.

Authority G.S. 90D-6; 150B-4.

21 NCAC 25 .0603 FILING

(a) A document is filed with the Board when the document is actually received by the Board and not when it is merely placed into the custody and control of the United States Postal Service or some other public carrier.

(b) A document may be filed with the Board by facsimile transmission.

(c) A document may not be filed with the Board by email transmission.

Authority G.S. 90D-6; 150B-38(h).

CHAPTER 34 - BOARD OF FUNERAL SERVICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Funeral Services intends to adopt the rules cited as 21 NCAC 34B .0406-.0415, amend the rules cited as 21 NCAC 34B .0102-.0107, .0110-.0111, .0120-.0121, .0203-.0205, .0208, .0210-.0211, .0302-.0305, .0309, .0401,

.0404-.0405, .0502, .0508, .0510, .0608, .0610, .0612, .0615; 34D .0101, .0301, .0303, .0402-.0403 and repeal the rule cited as 21 NCAC 34D .0104.

Proposed Effective Date: *November 1, 2004*

Public Hearing:

Date: *July 14, 2004*

Time: *9:00 a.m.*

Location: *1033 Wade Ave., Suite 108, Raleigh, NC*

Reason for Proposed Action: *To make technical corrections under Session Law 2003-420; to amend standards for resident traineeship requirements; to amend examination review procedures; to adopt standards for continuing education sponsor accreditation, continuing education content, course approval, alternative course media, and hour computation; to clarify renewal policies for funeral establishment permits; to prescribe forms for preneed contracts and certificates of performance; to amend recordkeeping requirements for preneed files; to eliminate initial preneed recovery fund funding requirements.*

Procedure by which a person can object to the agency on a proposed rule: *Written objections can be mailed to Paul Harris, 1033 Wade Ave., Suite 108, Raleigh, NC 27605, faxed to (919) 733-8271, or emailed to wpharris@ncbfs.org. A person may also object by attending the public hearing and addressing the Board.*

Written comments may be submitted to: *Paul Harris, 1033 Wade Ave., Suite 108, Raleigh, NC 27605, fax (919) 733-8271, and email wpharris@ncbfs.org.*

Comment period ends: *August 16, 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 34B - FUNERAL SERVICE

SECTION .0100 - RESIDENT TRAINEES

21 NCAC 34B .0102 TRAINEESHIP

The resident traineeship must be either 12 months of full-time employment or 24 months of part-time employment. Each trainee must work at least 2,000 hours during the trainee's resident traineeship. Daytime and nighttime employment shall be acceptable so long as the trainee receives training in all aspects of the license sought, as defined in G.S. 90-210.20(e), (f), and (k).

Authority G.S. 90-210.23(a),(f); 90-210.25(a)(1d),(2d),(3d),(4).

21 NCAC 34B .0103 AUTHORIZED PRACTICE: SUPERVISION

(a) Duly certified resident trainees in training for funeral service, duly certified resident trainees in training for funeral directing and duly certified resident trainees in training for embalming, while participating in learning experiences and while supervised by a person licensed by the Board as a funeral service licensee, funeral director or embalmer, respectively, may assist in the practice of funeral service, funeral directing or embalming respectively, as limited by this Rule.

(b) Duly certified resident trainees in training for funeral service or for funeral directing, while participating in learning experiences and while supervised by a person licensed by the Board as a preneed sales licensee, may also assist in the preneed funeral planning activities described in 21 NCAC 34D .0202(b)(1), (2), (4) and (5).

(c) No credit shall be given for the resident trainee's work that is unsupervised or performed under the supervision of a person not registered with the Board as the resident trainee's supervisor. If the registered supervisor does not supervise the resident trainee for a continuous period of more than two weeks, the traineeship under that supervisor shall terminate, requiring a new traineeship application. When a resident trainee assists in funeral service, funeral directing, embalming or preneed funeral planning on the funeral home premises, a licensed supervisor shall be on the funeral home premises where and while such activities are performed. When a resident trainee assists in funeral service, funeral directing, embalming or any funeral planning off the funeral home premises, such activities shall be performed only in the presence of a licensed supervisor employed with the establishment with which the resident trainee is registered.

(d) A licensed supervisor shall review with the purchaser any contract negotiated by a resident trainee, and then the licensed supervisor shall obtain the purchaser's signature on the contract in the licensed supervisor's presence.

(e) The resident trainee's license certificate for indicating the trainee's authority to assist in the activities described and authorized in this Rule and in 21 NCAC 34D .0202(b) is the resident trainee pocket certificate.

Authority G.S. 90-210.23(a),(f); 90-210.25(a)(4); 90-210.67(a); 90-210.69(a).

21 NCAC 34B .0104 CHANGE IN EMPLOYMENT

Each resident trainee shall notify the Board of any change in his employment during his resident traineeship. Each resident trainee must re-apply for a traineeship under the new employer and shall obtain approval of the Board before entering the employ of any licensed sponsor.

Authority G.S. 90-210.23(a); 90-210.25(a)(4)(c); 150B-11(1).

21 NCAC 34B .0105 FUNERAL DIRECTOR TRAINEE APPLICATION FORM

Form BFS-7 is the application of the funeral director resident trainee. It is used for making application to become a registered resident trainee in funeral directing. It contains space for the applicant's photograph, name, address and biographical data; education; employment history; criminal convictions; verification by the applicant; and an affidavit of a licensee that the trainee is serving under him. A transcript of the applicant's high school record must accompany the application. The form is filed with the Board when making application.

Authority G.S. 90-210.23(a); 90-210.25(a)(4); 150B-11(1).

21 NCAC 34B .0106 EMBALMER TRAINEE APPLICATION FORM

Form BFS-8 is the application of the embalmer resident trainee. It is used for making application to become a registered resident trainee in embalming. It contains space for the applicant's photograph, name, address and biographical data; education; employment history; criminal convictions; verification by the applicant; and an affidavit of a licensee that the trainee is serving under him. A transcript of the applicant's high school record must accompany the application. The form is filed with the Board when making application.

Authority G.S. 90-210.23(a); 90-210.25(a)(4); 150B-11(1).

21 NCAC 34B .0107 FUNERAL SERVICE TRAINEE APPLICATION FORM

Form BFS-9 is the application of the funeral service resident trainee. It is used for making application to become a registered resident trainee in funeral service. It contains space for the applicant's photograph, name, address and biographical data; education; employment history; criminal convictions; verification by the applicant; and an affidavit of a licensee that the trainee is serving under him. A transcript of the applicant's high school record must accompany the application. The form is filed with the Board when making application.

Authority G.S. 90-210.23(a); 90-210.25(a)(4); 150B-11(1).

21 NCAC 34B .0110 REPORTS ON WORK

The resident trainee shall submit a report to the Board every month on a form provided by the Board listing the work assisted in during the preceding month. Such reports shall include the dates and a description of the work and must be certified as correct by the licensee under whom the trainee served during the period and by the manager of the funeral establishment. The names of the deceased persons, and the names of the purchasers of preneed funeral contracts, on whose cases the trainee assisted

and reported during traineeship must be retained by the trainee until his traineeship requirement has been fulfilled, and during such time such information shall be subject to inspection by the Board or its authorized agent. Such reports must be filed in the office of the Board not later than the 10th day of the calendar month which immediately follows the completion of each one month period of resident traineeship. Failure to submit such reports when due shall be sufficient cause for suspension or revocation of the certificate of resident traineeship.

Authority G.S. 90-210.23(a),(d),(f); 90-210.25(a)(4e),(4g); 90-210.67(a); 90-210.69(a).

21 NCAC 34B .0111 WORK REPORT FORM

Form BFS-51 is the resident trainee work report. It is used to report to the Board the training activities of the trainee during a one month period. It contains space for the name of the trainee, the date, the report period, the name and address of the funeral establishment, a list of work performed, the dates the work was performed, the signature of the trainee and certification by the licensed supervisor and the manager of the funeral establishment that the report is correct. The form is filed with the Board every month during resident traineeship.

Authority G.S. 90-210.23(a),(d),(f); 90-210.25(a)(4); 150B-11(1).

21 NCAC 34B .0120 TRAINEE FINAL AFFIDAVIT FORM

Form BFS-10 is the resident trainee affidavit. It is used for certification by the supervising licensee that the trainee has served and performed certain work under him as required by G.S. 90-210.25(a)(4). It contains space for the names of the licensee and the trainee; dates and place of service; and the number of funerals, preneed funeral contracts and embalmings that the trainee has assisted in during traineeship. The form is filed with the Board upon ending resident traineeship with a licensed supervisor.

Authority G.S. 90-210.23(a),(d),(f); 90-210.25(a)(4f); 90-210.67(a); 90-210.69(a).

21 NCAC 34B .0121 EXPIRATION NOTICE

Form BFS-15 is the resident trainee expiration notice. It is used to inform the resident trainee that his certificate of resident traineeship will expire and that, if he is eligible, his traineeship may be renewed or may be certified as completed. It contains the date of expiration, a recital of the renewal fee and late renewal penalty, the date the fee must be received and a recital that the affidavit form is available to have the traineeship certified as completed, if applicable.

Authority G.S. 90-210.23(a); 90-210.25(a)(4d); 150B-11(1).

SECTION .0200 - EXAMINATIONS

21 NCAC 34B .0203 APPLICATION FORM FOR FUNERAL DIRECTOR'S LICENSE

Form BFS-12 is the application for the examination for a funeral director's license. It contains space for the applicant's photograph, name, address, biographical data, education, employment history, criminal convictions, and verification. A certified transcript of the applicant's mortuary science college record must be mailed directly to the Board from the mortuary science college. Three affidavits of the moral character of the applicant submitted by three persons, in compliance with G.S. 90-210.26, must also accompany the application. The form is filed with the Board when making application.

Authority G.S. 90-210.23(a); 90-210.25(a)(1); 150B-11(1).

21 NCAC 34B .0204 APPLICATION FORM FOR EMBALMER'S LICENSE

Form BFS-13 is the application for the examination for an embalmer's license. It contains space for the applicant's photograph, name, address, biographical data, education, employment history, criminal convictions, and verification. A certified transcript of the applicant's mortuary science college record must be mailed to the Board directly from the mortuary science college. Three affidavits of the moral character of the applicant submitted by three persons, in compliance with G.S. 90-210.26, must also accompany the application. The form is filed with the Board when making application.

Authority G.S. 90-210.23(a); 90-210.25(a)(2); 150B-11(1).

21 NCAC 34B .0205 APPLICATION FORM FOR FUNERAL SERVICE LICENSE

Form BFS-14 is the application for the examination for a funeral service license. It contains space for the applicant's photograph, name, address, biographical data, education, employment history, criminal convictions and verification. A certified transcript of the applicant's mortuary science college record must be mailed to the Board directly from the mortuary science college. Three affidavits of the moral character of the applicant submitted by three persons, in compliance with G.S. 90-210.26, must also accompany the application. The form is filed with the Board when making application.

Authority G.S. 90-210.23(a); 90-210.25(a)(3); 150B-11(1).

21 NCAC 34B .0208 PASSING SCORE

The passing score on all examinations administered by the Board shall be such passing score that is established by the International Conference of Funeral Service Examining Boards, Inc. and in effect at the time such examinations are administered by the Board.

Authority G.S. 90-210.23(a); 90-210.25(a)(1),(2),(3).

21 NCAC 34B .0210 REQUEST FOR REVIEW OF EXAMINATION

For the purpose of dealing with a request by an applicant who has failed an examination for a review of his examination, the following procedures shall apply:

- (1) If the examination was prepared by the Board:

- (a) The applicant shall make the request to the Board orally or in writing.
 - (b) Not later than 10 days following the receipt of such request the Board shall notify the applicant, either orally or in writing, of the date and time the applicant may appear in the offices of the Board to review the examination in the presence of the Board or in the presence of one or more duly designated representatives of the Board.
 - (c) Nothing in this Rule shall be construed to give the applicant the right to take from the Board offices any copies of the examination or of the answers thereto.
- (2) If the examination was prepared and graded by the International Conference of Funeral Service Examining Boards, Inc. (ICFSEB):
- (a) The applicant shall make his request to the ICFSEB in writing.
 - (b) The ICFSEB shall notify the applicant, either orally or in writing, of the date and time the applicant may appear in the offices of the ICFSEB to review the examination in the presence of the ICFSEB or in the presence of one or more duly designated representatives of the ICFSEB.
 - (c) Nothing in this Rule shall be construed to give the applicant the right to take from the ICFSEB offices any copies of the examination or of the answers thereto.

Authority G.S. 90-210.23(a); 150B-11(1).

21 NCAC 34B .0211 NATIONAL BOARD CERTIFICATE

The Board shall accept a "National Board Certificate," certifying the successful completion of the National Board Examination of the International Conference of Funeral Service Examining Boards, Inc., as the equivalent of that portion of the Board's examination which deals with basic health sciences, funeral service sciences, and funeral service administration.

Authority G.S. 90-210.23(a); 90-210.25(a)(5); 150B-11(1).

SECTION .0300 - LICENSING

21 NCAC 34B .0302 LICENSE CERTIFICATE FOR PRACTICE OF FUNERAL DIRECTING

Form BFS-21 is the license certificate for the practice of funeral directing. It is used for certifying that the holder thereof is licensed for the practice of funeral directing. It contains the name of the licensee, signatures of the Board members and the date.

Authority G.S. 90-210.23(a); 90-210.25(a)(5); 150B-11(1).

21 NCAC 34B .0303 LICENSE CERTIFICATE FOR PRACTICE OF EMBALMING

Form BFS-22 is the license certificate for the practice of embalming. It is used for certifying that the holder thereof is licensed for the practice of embalming. It contains the name of the licensee, signatures of the Board members and the date.

Authority G.S. 90-210.23(a); 90-210.25(a)(5); 150B-11(1).

21 NCAC 34B .0304 LICENSE CERTIFICATE FOR PRACTICE OF FUNERAL SERVICE

Form BFS-23 is the license certificate for the practice of funeral service. It is used for certifying that the holder thereof is licensed for the practice of funeral service. It contains the name of the licensee, signatures of the Board members and the date.

Authority G.S. 90-210.23(a); 90-210.25(a)(5); 150B-11(1).

21 NCAC 34B .0305 CHANGE OF LICENSE REQUEST

Form BFS-26 is the change of license request. It is used for making request, by a holder of both a license for funeral directing and a license for embalming, for a license for the practice of funeral service. It contains space for the applicant's name and license numbers, a request for the change and the signature of the licensee. The form is filed with the Board when making such a request.

Authority G.S. 90-210.23(a); 90-210.25(a)(5); 150B-11(1).

21 NCAC 34B .0309 LICENSE RENEWAL NOTICE FORM

Form BFS-16 is the license renewal form. This form is sent to all licensees by the end of November each year. It informs all licensees that licenses will be forfeited if not renewed by February 1.

Authority G.S. 90-210.23(a); 90-210.25(a)(5); 150B-11(1).

21 NCAC 34B .0401 ESTABLISHMENT AND APPROVAL OF COURSES

The Board shall cause at least eight hours of continuing education courses to be offered to the licensees annually, either directly or through other organizations or persons procured for such purpose. The Board shall mail to each licensee for whose benefit the course is offered, at least 15 days prior to the date of enrollment, notice of the course and the amount of any registration fee to be charged.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0404 CONTINUING EDUCATION CARD

Form BFS-20 is the continuing education card. It is used for certifying to the Board that the licensee has taken continuing education courses. It contains the name of the licensee, "in

time" and "out time" at the course, the license number, total hours, date and attestation by an authorized official who may be an official of the entity sponsoring the course or a member of the Board or its designated agent. The form must be filed with the Board no later than the time when evidence of having taken such courses is required for license renewal of reinstatement.

Authority G.S. 90-210.23(a); 90-210.25(a)(5); 150B-11(1).

21 NCAC 34B .0405 APPLICATION FORM FOR APPROVAL OF COURSE

Form BFS-42a is the application for approval of a course of continuing education. It is used for making application for Board approval of a course for continuing education credit. It contains space for the date, name of the organization or person making the application, description of the course, name and credentials of the instructor, and a statement by the applicant of how the course will aid the licensee in serving the public. The form must be filed with the Board, when making application, at least 30 days prior to the date of enrollment established for the course.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0406 APPLICATION FORM FOR APPROVAL OF SPONSOR

Form BFS-42b is the application for approval of a sponsor of continuing education. It is used for making application for Board approval of a sponsor for continuing education credit. It contains space for the date, name of the organization or person making the application, description of the sponsor and the types of courses it offers as well as its requirements to be an instructor for its courses, and a statement by the applicant of how its courses will aid the licensee in serving the public. The form must be filed with the Board, when making application, at least 90 days prior to the first course the sponsor intends to offer for CE credit.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0407 PURPOSE AND DEFINITIONS

(a) Purpose:

- (1) The purpose of these continuing education rules is to assist funeral directors, embalmers, and funeral service licensees licensed to practice by The North Carolina Board of Funeral Service in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina Board of Funeral Service, under G.S. 90, is charged with the responsibility of approving continuing education courses.
- (2) At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, funeral service is also in transition (through additions and changes to the body of law, medical advancements, and changes in societal expectations) and is increasing in complexity.

One cannot render competent funeral services without continuous education and training.

(3) It has also become clear that in order to practice funeral service in a professionally responsible manner, a licensee must be able to manage his or her business competently. Sound management practices enable licensees to concentrate on their customers' affairs while avoiding the numerous problems that can be caused by disorganization.

(4) It is in response to such considerations that the North Carolina Board of Funeral Service has adopted these minimum continuing education requirements. The purpose of these minimum continuing education requirements is to ensure that the public at large is served by licensees who are competent and maintain high professional standards.

(b) Definitions: For purposes of this Section, the following definitions shall apply:

- (1) "Accredited sponsor" shall mean an organization whose entire continuing education program has been accredited by the Board.
- (2) "Approved activity" shall mean a specific, individual continuing education activity presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is approved as a continuing education activity under these Rules by the Continuing Education Committee of the Board.
- (3) "Board" means the North Carolina Board of Funeral Service.
- (4) "Continuing education" or "CE" is any educational activity accredited by the Board. Generally, CE will include educational activities designed principally to maintain or advance the professional competence of licensees and/or to expand an appreciation and understanding of the professional responsibilities of licensees.
- (5) "Continuing Education Committee" shall mean the Continuing Education Committee of the North Carolina Board of Funeral Service.
- (6) "Credit hour" means an increment of time of 50 minutes which may be divided into segments of 25 minutes, but no smaller.
- (7) "Inactive licensee" shall mean a licensee of the North Carolina State Board of Funeral Service who is on inactive status.
- (8) "Licensee" shall include any person who is licensed by the Board to practice funeral directing, embalming, and/or funeral service in the state of North Carolina and whose license is currently active.
- (9) "Participatory CE" shall mean courses or segments of courses that encourage the participation of attendees in the educational

experience through, for example, the analysis of hypothetical situations, role playing, mock trials, roundtable discussions, or debates.

- (10) "Self-study" shall mean the reading of professional articles, journals, magazines, and books or the watching of programs on the topics of funeral directing, embalming and funeral services that will increase the licensee's professional competence and proficiency as a licensee.
- (11) "Sponsor" is any person or entity presenting or offering to present one or more continuing education programs, whether or not an accredited sponsor.
- (12) "Year" shall mean calendar year.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0408 CONTINUING EDUCATION PROGRAM

(a) Each active licensee subject to these Rules shall complete five hours of approved continuing education during each calendar year beginning January 1, 2004, as provided by these Rules.

(b) Of the five hours:

- (1) Up to three hours may be in courses required by the Board. If the Board requires licensees to take a particular required course or courses, the Board shall notify licensees no later than October 1 of the year preceding the calendar year in which the course(s) will be required.
- (2) Licensees may take up to one hour of continuing education each year by computer-based CE approved by the Board as set forth in 21 NCAC 34B .0414.
- (3) Licensees may not receive more than two hours of credit for continuing education courses in preneed each year.
- (4) Licensees may not receive credit hours for taking the same CE course within two years.

(c) Licensees may be able to carry over up to five credit hours earned in one calendar year to the next calendar year. Additionally, a newly admitted active licensee may include as credit hours which may be carried over to the next succeeding year, any approved continuing education hours earned after that licensee's graduation from mortuary science college.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0409 ACCREDITATION STANDARDS

The Board shall approve continuing education activities which meet the following standards and provisions.

- (1) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a licensee.
- (2) They shall constitute an organized program of learning dealing with matters directly related

to the practice of funeral directing, embalming or funeral service.

- (3) Credit may be given for continuing education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. Subject to the limitations set forth in 21 NCAC 34B .0408(b)(3) and 21 NCAC 34B .0414, credit may also be given for continuing education activities on CD-ROM and on a computer website accessed via the Internet.
- (4) Continuing education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and equipped with suitable writing surfaces or sufficient space for taking notes.
- (5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer website or CD-ROM. It is recognized that written materials are not suitable or readily available for some types of subjects. The absence of written materials for distribution should, however, be the exception and not the rule.
- (6) Programs that cross academic lines, such as insurance seminars, may be considered for approval by the Board. However, the Board must be satisfied that the content of the activity is directly related to preneed or would otherwise enhance funeral directing and funeral service skills.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0410 ACCREDITATION OF SPONSORS AND PROGRAMS

(a) Accreditation of Sponsors. An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing education activities may apply for accredited sponsor status to the Board. The Board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in 21 NCAC 34B .0409.

(b) Presumptive Approval for Accredited Sponsors.

- (1) Once an organization is approved as an accredited sponsor, the continuing education programs sponsored by that organization are presumptively approved for credit and no application must be made to the Board for approval. The Board may at any time revoke the accreditation of an accredited sponsor for failure to satisfy the requirements of 21 NCAC 34B .0409, and for failure to satisfy the Rules Governing the Administration of the

Continuing Education Program set forth in these Rules.

- (2) The Board may evaluate a program presented by an accredited sponsor and, upon a determination that the program does not satisfy the requirements of 21 NCAC 34B .0409, notify the accredited sponsor that any presentation of the same program, the date for which was not included in the announcement required by 21 NCAC 34B .0411(e), is not approved for credit. Such notice shall be sent by the Board to the accredited sponsor within 30 days after the receipt of the announcement. The accredited sponsor may request reconsideration of such a decision by submitting a letter of appeal to the Board within 15 days of receipt of the notice of disapproval. The decision by the Board on an appeal is final.

(c) Unaccredited Sponsor Request for Program Approval. Any organization not accredited as an accredited sponsor that desires approval of a course or program shall apply to the Board. The Board shall administer the accreditation of such programs consistent with the provisions of 21 NCAC 34B .0409. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the Board within 15 days of receipt of the notice of disapproval. The decision by the Board on an appeal is final.

(d) Licensee Request for Program Approval. An active licensee desiring approval of a course or program that has not otherwise been approved shall apply to the Board. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the Board within 15 days of the receipt of the notice of disapproval. The decision by the Board on an appeal is final.

(e) Program Announcements of Accredited Sponsors. At least 30 days prior to the presentation of a program, an accredited sponsor shall file an announcement, on a form prescribed by the Board, notifying the Board of the dates and locations of presentations of the program, the sponsor's calculation of the CE credit hours for the program, and the cost of the program to attendees.

(f) Records. The Board may provide by regulation for the accredited sponsor, unaccredited sponsor, or active licensee for whom a continuing education program has been approved to maintain and provide such records as required by the Board.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0411 GENERAL COURSE APPROVAL

(a) Mortuary Science College Courses - Courses offered by a mortuary science college approved by the Board or accredited by the American Board of Funeral Service Education with respect to which academic credit may be earned may be approved activities. Computation of CE credit for such courses shall be as prescribed in 21 NCAC 34B .0415. No more than five CE hours in any year may be earned by such courses; except in the case of an inactive licensee who is seeking to earn enough CE credit to return to active status. No credit is available for mortuary

science college courses attended prior to becoming an active licensee of the North Carolina Board of Funeral Service, except in the case of an inactive licensee who is seeking to earn enough CE credits to return to an active status.

(b) Approval – CE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, or of an active licensee on an individual program basis. An application for such CE course approval shall meet the following requirements:

- (1) If advance approval is requested by a sponsor, the application and supporting documentation, including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 30 days prior to the date on which the course or program is scheduled.
- (2) In all other cases, the application and supporting documentation shall be submitted not later than 30 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.
- (3) The application shall be submitted on a form furnished by the Board.
- (4) The application shall contain all information requested on the form.
- (5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic and shows each date and location at which the program will be offered.
- (6) The application shall include a detailed calculation of the total CE hours.

(c) Course Quality – The application and materials provided shall reflect that the program to be offered meets the requirements of 21 NCAC 34B .0409. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the Board at least 30 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(d) Records – Sponsors, including accredited sponsors, shall within 30 days after the course is concluded:

- (1) furnish to the Board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees and their North Carolina Board of Funeral Service license numbers;
- (2) furnish to the Board a complete set of all written materials distributed to attendees at the course or program.

(e) Announcement – Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the North Carolina Board of Funeral Service for continuing education credit in the amount of ____ hours. This course is not sponsored by the Board.

(f) Notice - Sponsors not having advanced approval shall make no representation concerning the approval of the course for CE credit by the Board. The Board will mail a notice of its decision on CE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the Board or if the Board timely notifies the sponsor that the matter has been tabled and the reason therefore.

(g) Facilities - Sponsors must provide a facility conducive to learning with sufficient space for taking notes. Sponsors must also ensure the following requirements are met:

- (1) Access to the facility is to be controlled so that attendees actually attend the entire program or portion of program for which they are seeking credit. Attendees who are late or who leave early shall not be given credit for the portion of the program that they missed.
 - (A) All licensees who attend a program and desire credit for attendance must present their license pocket card to gain admission to the program.
 - (B) The individual or organization conducting the continuing education program must periodically pass out sign-up sheets to ensure continued attendance by all participants.
- (2) The reading of outside material, such as newspapers and magazines, is prohibited during a CE program.
- (3) Cell phones and other disruptive devices must be turned off during instructional periods of the CE program.

(h) Course Materials - In addition to the requirements of 21 NCAC 34B .0411(d) and (f), sponsors, including accredited sponsors, and active licensees seeking credit for an approved activity shall furnish upon request of the Board a copy of all materials presented and distributed at a CE course or program.

(i) Non-funeral service Educational Activities - Approval of courses will not be given for general and personal educational activities. For example, the following types of courses will not receive approval:

- (1) courses within the normal college curriculum such as English, history, and social studies;
- (2) courses that deal with sales and advertising only and would not further educate a licensee as to his or her product knowledge and development of funeral procedures and management models designed to increase the level of service provided to the consumer.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0412 ACCREDITED SPONSORS

In order to receive designation as an accredited sponsor of courses, programs or other continuing education activities under 21 NCAC 34B .0410(a), the application of the sponsor must meet the following requirements:

- (1) The application for accredited sponsor status shall be submitted on a form furnished by the Board.
- (2) The application shall contain all information requested on the form.
- (3) The application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.
- (4) The application shall include a detailed calculation of the total CE hours specified in each of the programs sponsored by the organization.
- (5) The application shall reflect that the previous programs offered by the organization in continuing education have been of consistently high quality and would otherwise meet the standards set forth in 21 NCAC 34B .0409.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0413 ACCREDITATION OF PRERECORDED PROGRAMS AND LIVE PROGRAMS BROADCAST TO REMOTE LOCATIONS BY TELEPHONE, SATELLITE, OR VIDEO CONFERENCING EQUIPMENT

(a) A licensee may receive up to one hour of CE credit each year for attendance at, or participation in, a presentation where prerecorded material is used.

(b) A licensee may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, or video conferencing equipment. The licensee may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast.

(c) A licensee attending a prerecorded presentation is entitled to credit hours if:

- (1) the presentation from which the program is recorded would, if attended by an active licensee, be an accredited course;
- (2) all other conditions imposed by the rules in this subchapter, or by the Board in advance, are met.

(d) A licensee attending a presentation broadcast by telephone, satellite, or video conferencing equipment is entitled to credit if:

- (1) the live presentation of the program would, if attended by a licensee, be an accredited course;
- (2) there is a question and answer session with the presenter or presenters subject to the

- limitations set forth in 21 NCAC 34B .0415(b)(5); and
- (3) all other conditions imposed by the rules in this Subchapter, or by the Board in advance, are met.
- (e) To receive approval for attendance at programs described in Paragraphs (a) and (b) of this Rule, the following conditions must be met:
- (1) Unless the entire program was produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the Board.
 - (2) The person or organization sponsoring the program must have a reliable method for recording and verifying attendance. Attendance at a telephone broadcast may be verified by assigning a personal identification number to a licensee. If attendance is recorded by a person, the person may not earn credit hours by virtue of attendance at that presentation. A copy of the record of attendance of active licensees must be forwarded to the Board within 30 days after the presentation of the program is completed. Proof of attendance may be made by the verifying person on a form provided by the Board.
 - (3) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the original or live program must be made available to those persons attending the prerecorded or broadcast program who desire to receive credit under these regulations.
 - (4) A suitable room must be available for viewing the program and taking of notes.
- (f) A minimum of five licensees must physically attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(g) **EXAMPLES:**

- (1) **EXAMPLE (1):** Licensee X attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Licensee X is also entitled to receive credit, if the additional conditions under this Rule 21 NCAC 34B .0413 are also met.
- (2) **EXAMPLE (2):** Licensee Y desires to attend a videotape program. However, the proposed videotape program:
 - (A) is not presented by an accredited sponsor; and

- (B) has not received individual course approval from the Board. Licensee Y may not receive any credit hours for attending that videotape presentation.
- (3) **EXAMPLE (3):** Licensee Z attends a videotape program. The presentation of the program from which the videotape was made has already been held and approved by the Board for credit. However, no person is present at the videotape program to record attendance. Licensee Z may not obtain credit for viewing the videotape program unless it is viewed in the presence of a person who is not attending the videotape program for credit and who verifies the attendance of Licensee Z and of other licensees at the program. All other conditions of this Rule must also be met.
- (4) **EXAMPLE (4):** Licensee A listens to a live telephone seminar using the telephone in the conference room of her funeral establishment. To record her attendance, Licensee A was assigned a person identification number (PIN) by the seminar sponsor. Once connected, Licensee A punched in the PIN number on her touch tone phone and her attendance was recorded. The seminar received individual course approval from the Board. Licensee A may receive credit if the additional conditions under this Rule are also met.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0414 ACCREDITATION OF COMPUTER-BASED CE

- (a) Effective for courses attended on or after July 1, 2004, a licensee may receive up to one hour of credit each year for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.
- (b) A licensee may apply up to one credit hour of computer-based CE to a CE deficit from a preceding calendar year. A computer-based CE credit hour applied to a deficit from a preceding year will be included in calculating the maximum of one hour of computer-based CE allowed in the preceding calendar year. A licensee may carry over to the next calendar year no more than one credit hour of computer-based CE pursuant to 21 NCAC 34B .0408(b)(2). A credit hour carried-over pursuant to 21 NCAC 34B .0408(b)(2) will not be included in calculating the one hour of computer-based CE allowed in any one calendar year.
- (c) To be accredited, a computer-based CE course must meet all of the conditions imposed by the rules in this subchapter, or by the Board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin Board, with the presenter and/or other participants.

(d) The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the Board within 30 days after a licensee completes his or her participation in the course.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0415 COMPUTATION OF CREDIT

(a) Computation Formula - CE and professional responsibility hours shall be computed by the following formula:

Sum of the total minutes of actual instruction divided by 50 = Total Hours.

For example, actual instruction totaling 175 minutes would equal 3.5 hours toward CE.

(b) Actual Instruction - Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

- (1) introductory remarks;
- (2) breaks;
- (3) business meetings;
- (4) speeches in connection with banquets or other events which are primarily social in nature; and
- (5) question and answer sessions at a ratio in excess of 15 minutes per CE hour and programs less than 30 minutes in length provided, however, that the limitation on question and answer sessions shall not limit the length of time that may be devoted to participatory CE.

(c) Teaching - As a contribution to professionalism, credit may be earned for teaching in an approved continuing education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CE credit on the basis of three hours of credit for each 50 minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, an initial presentation of 50 minutes would qualify for three hours of credit while a subsequent presentation of the same material would qualify the instructor for 1.5 hours of credit.

Authority G.S. 90-210.23(a); 90-210.25(a)(5).

21 NCAC 34B .0502 APPLICATION FORM FOR LICENSE

Form BFS-34 is the application by an out-of-state licensee for a license pursuant to G.S. 90-210.25(b)(1). It contains space for the applicant's photograph, name, address, and biographical data; license applied for; name of the jurisdiction where licensed and the kinds of licenses held; length of continuous practice in the other jurisdiction where he is licensed; and verification by the applicant. One section of the form is a certification by the licensing board of the other jurisdiction that the applicant is

licensed and in good standing in that jurisdiction. This section contains space for the name of the applicant, licenses held and dates granted, the name and address of the Board in such other jurisdiction, and verification by the Secretary or other official of such other board. One section of the form is a certification that the applicant has continuously practiced the profession in the other jurisdiction for at least three years immediately preceding his application for a North Carolina license. It contains space for the name and address of the affiant who is personally acquainted with the applicant, the name of the applicant, the length of time the affiant has known the applicant, the length of the applicant's continuous practice, and verification. The portions of the form pertaining to the applicant's length of practice are not required if the applicant is licensed in a jurisdiction having licensing requirements substantially similar to those of North Carolina. Three affidavits of the moral character of the applicant submitted by three persons, in compliance with G.S. 90-210.26, must accompany the application. The form is filed with the Board when making application.

Authority G.S. 90-210.23(a); 90-210.25(b)(1); 150B-11(1).

21 NCAC 34B .0508 APPLICATION FORM FOR COURTESY CARD

Form BFS-37 is the application for a courtesy card. It contains space for the applicant's photograph, name, address, and biographical data; courtesy card applied for, by license category; name and address of the licensing board where the applicant is licensed; the kind, license number, and expiration date of licenses presently held; an agreement that the applicant will obey North Carolina statutes and rules governing funeral service; verification by the applicant; and certification by the Secretary or other official of the licensing board of the other jurisdiction that the information concerning the applicant's licensure is correct. The form is filed with the Board when making application.

Authority G.S. 90-210.23(a); 90-210.25(b)(3); 150B-11.

21 NCAC 34B .0510 COURTESY CARD EXPIRATION NOTICE

Form BFS-40 is the courtesy card expiration notice. It is used to inform holders of courtesy cards that the cards will expire December 31. It contains the notice of expiration and directions for making an application for a new card.

Authority G.S. 90-210.23(a); 90-210.25(b)(3); 150B-11(1).

21 NCAC 34B .0608 APPLICATION FORM FOR FUNERAL ESTABLISHMENT PERMIT

Form BFS-18 is the application for a funeral establishment permit. It contains space for the name and address of the establishment; the name or names of the owner or owners; the ownership of the stock if it is owned by a corporation; a description of the preparation room; size of the reposing room; names and license numbers of all part-time and full-time licensees employed by the establishment; the name and license number of the manager; and verification by the manager. The

form is filed with the Board by January 1 each year and must be filed no later than February 1 each year.

Authority G.S. 90-210.23(a),(d),(e); 90-210.25(d); 90-210.27A; 150B-11(1).

21 NCAC 34B .0610 FUNERAL ESTABLISHMENT PERMIT EXPIRATION NOTICE

Form BFS-17 is the funeral establishment permit expiration notice. It is used to inform funeral establishment managers that the permit will expire December 31 and that failure to renew registration by February 1 will be cause to cease operations. It contains a notice that the fee and registration are due and a recital of the fee and the late renewal penalty if renewal is made after February 1.

Authority G.S. 90-210.23(a); 90-210.25(d)(3); 150B-11(1).

21 NCAC 34B .0612 PART-TIME AND INDEPENDENT CONTRACTORS AFFIDAVIT

Form BFS-25 is the affidavit for part-time employees and independent contractors. It is used for certifying to the Board, as provided in Rule .0611 of this Section, that the person signing it is performing services for one or more funeral establishments. It contains space for the names and locations of the establishments, a certification of the licensee that he will notify the Board when he ceases to perform such services, the signature of the licensee and verification. The form is filed with the Board upon request of the Board.

Authority G.S. 90-210.23(a),(d),(e); 90-210.25(d); 150B-11(1).

21 NCAC 34B .0615 FUNERAL ESTABLISHMENT INSPECTION FORM

Form BFS-6 is the funeral establishment inspection report. It is used by the Board to record the results of funeral establishment inspections, for the Board files. It contains space for the name and address of the establishment; names of the owner, manager, licensees and resident trainees; grading of the preparation room; recommendations; and signatures of the inspector and an official of the establishment.

Authority G.S. 90-210.23(a),(d),(e); 90-210.24.

SUBCHAPTER 34D - PRENEED FUNERAL CONTRACTS

SECTION .0100 - GENERAL PROVISIONS

21 NCAC 34D .0101 APPROVAL OF CONTRACT FORMS

Only preneed funeral contract forms approved by the Board shall be used.

Authority G.S. 90-210.62(b); 90-210.69(a),(c)(6).

21 NCAC 34D .0104 INDICATION OF APPROVAL OF FORMS

Authority G.S. 90-210.69(a); 90-210.62(b).

SECTION .0300 - OPERATIONS

21 NCAC 34D .0301 RECORD AND BOOKKEEPING REQUIREMENTS

(a) Each preneed funeral establishment licensee shall maintain a general file containing:

- (1) a copy of each of its license applications, including applications for license renewals;
- (2) copies of all preneed examination reports; and
- (3) copies of all annual reports to the Board.

(b) Each such licensee shall maintain files containing all preneed funeral contracts purchased. The files shall be maintained separately for outstanding contracts and for matured or cancelled contracts. The outstanding contract file shall include a copy of each preneed contract filed alphabetically or numerically. The matured or cancelled contract file shall contain a copy of each preneed contract, together with a copy of the certificate of performance, the preneed statement of funeral goods and services and the at-need statement of funeral goods and services, and shall be filed either chronologically or alphabetically by year.

(c) Each such licensee shall maintain the following records:

- (1) a contract register listing the purchaser's name and final disposition of the contract;
- (2) a separate cash journal or separate cash receipt book designated for preneed, showing all preneed payments collected;
- (3) an individual ledger for each contract purchaser showing the purchaser's and beneficiary's names, amount of the contract, amount paid on the contract, amount retained free of trust pursuant to G.S. 90-210.61(a)(2), deposits to trust, withdrawals from trust as permitted by law and the reasons therefor, interest on deposits, total amount of the trust, and amounts paid to insurance companies for insurance-funded contracts;
- (4) copies of bank statements and deposit slips from financial institutions in which trust funds are deposited, certificate of deposit records, including both principal and interest transactions and trust accountings; and
- (5) copies of applications for insurance, insurance policies, beneficiary designation documents and instruments of assignment.

(d) When two or more preneed funeral establishment licensees are wholly owned by the same entity, all of the copies and records required to be maintained by Paragraphs (a) and (b) of this Rule may be maintained at one address of the licensee, or they may be divided among and maintained at various addresses of the licensees, in their discretion.

(e) The copies required to be maintained by Paragraph (a) of this Rule shall be retained a minimum of ten years following their origination. The copies and records required to be maintained by Paragraphs (b) and (c) of this Rule shall be retained a minimum of ten years following the substitution of a different funeral establishment to perform the preneed funeral contract, the revocation of the preneed funeral contract or the death of the contract beneficiary, whichever occurs first.

(f) Individual ledgers and records of the depository financial institutions shall be balanced at least annually to ensure accuracy.

Authority G.S. 90-210.69(a); 90-210.68(a).

21 NCAC 34D .0303 CERTIFICATE OF PERFORMANCE

(a) The certificate of performance as required by G.S. 90-210.64(a) shall be a form as approved by the Board and shall require the following information: the names, addresses and preneed funeral establishment license numbers of the performing funeral establishment and the contracting funeral establishment; the name of the deceased beneficiary of the preneed funeral contract; the date of death and the county where the death certificate was or will be filed; the invoice amount; certification that the contract was or was not performed in whole or in part and how the funds will be applied; certification that the services and merchandise contracted for were supplied, except for any substitutions that are acknowledged in writing by the purchaser on or attached to the final bill; part; the name and address of the financial institution where the preneed trust funds are deposited and the trust account or certificate number; the name and address of the insurance company that issued the prearrangement insurance policy and the policy number; and the amount and the date of the payment by the financial institution or insurance company and to whom paid.

(b) The form shall be completed by each funeral establishment performing any services or providing any merchandise pursuant to the preneed funeral contract, or, if none are performed or provided, by the contracting funeral establishment. The form shall be presented to the financial institution or insurance company for payment. Within 10 days following its receipt of payment, any funeral establishment that is required to complete the form shall mail a copy to the Board.

Authority G.S. 90-210.64(a); 90-210.68; 90-210.69(a).

**SECTION .0400 - PRENEED RECOVERY FUND
21 NCAC 34D .0402 APPLICATION FOR REIMBURSEMENT**

(a) The Board shall furnish a form of application for reimbursement which shall require the following minimum information:

- (1) The name and address of the applicant.
- (2) The name and address of the licensee under G.S. 90, Article 13D, who caused the alleged loss.
- (3) The amount of the alleged loss for which application for reimbursement is made.
- (4) A copy of any preneed funeral contract which was the basis of the alleged loss.
- (5) The date or period of time during which the loss was incurred.
- (6) A general statement of facts relative to the application.
- (7) All supporting documents, including copies of court proceedings and other papers indicating the efforts of the applicant to obtain

reimbursement from the licensee, insurance companies or others.

(8) A documentation of any receipt of funds in partial payment of the loss.

(b) The application form shall contain the following statement in boldface type: "The North Carolina General Assembly in G.S. 90-210.66 established the preneed recovery fund and directed the North Carolina Board of Funeral Service to provide for its funding and administration. The establishment of the fund did not create or acknowledge any legal responsibility on the part of the Board for the acts, or failure to act, of persons, firms or corporations licensed by it. All reimbursements of losses from the fund shall be a matter of privilege in the sole discretion of the Board and not a matter of right. No applicant or member of the public shall have any right in the fund as a third-party beneficiary or otherwise."

(c) An application shall be filed in the office of the Board.

Authority G.S. 90-210.69(a); 90-210.66(a), (c), (d), (f), (g).

21 NCAC 34D .0403 PROCESSING APPLICATIONS

(a) The Board in making investigation of all applications filed for reimbursement from the preneed recovery fund may require the attendance of and examine under oath all persons, including the alleged defalcating licensee, whose testimony it may require. A determination of the application shall be made by a majority vote of those present at a Board meeting at which a quorum is present. The Board may, in its discretion, afford the applicant a reconsideration of the application; otherwise, a rejection is final, and no further consideration shall be given by the Board to the application or to another application based upon the same alleged facts.

(b) ~~he~~ The Board shall, in its discretion, determine the amount of loss, if any, for which the applicant shall be reimbursed from the fund. In making such determination, the Board's considerations shall include:

- (1) The negligence, if any, of the applicant which contributed to the loss.
- (2) The hardship which the applicant suffered because of the loss.
- (3) The total amount of reimbursable losses of applicants on account of any one licensee or association of licensees.
- (4) The total amount of previous reimbursable losses for which total reimbursement has not been made and the total assets of the fund.
- (5) The total amount of insurance available to compensate the applicant for the loss.

(c) The Board may, in its discretion, allow further reimbursements in cases in which a loss has not been fully reimbursed.

(d) Before receiving a payment from the fund, the person who is to receive such payment or his or her legal representative shall execute and deliver to the Board a written agreement stating that in the event the reimbursed applicant or his or her estate ever receives any restitution from the licensee or from any other source, the reimbursed applicant or his or her estate shall repay the fund the restitution received or the amount of reimbursement from the fund, whichever is less.

Authority G.S. 90-210.69(a); 90-210.66(a), (c), (d), (g).

submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

TITLE 23 – COMMUNITY COLLEGES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Community College System intends to adopt the rule cited as 23 NCAC 02C .0109 and amend the rules cited as 23 NCAC 02C .0210, 02E .0204.

Proposed Effective Date: October 1, 2004

Public Hearing:

Date: June 30, 2004

Time: 10 a.m.

Location: NCCCS, Caswell Building, 200 W. Jones Street, Raleigh, NC

Reason for Proposed Action:

23 NCAC 02C .0109 – to establish guidelines for which state funds or administrative support can be withheld from a community college.

23 NCAC 02C .0210 – to establish requirements for the local college board of trustees to adopt, publish and implement personnel policies as outlined in the rule.

23 NCAC 02E .0204 – to outline the courses and standards to be used by the colleges for associate degree, diploma and certificate programs with the requested revision separating and listing individually the requirement for the Associate in Arts Degree and the Associates in Science Degree (these were previously listed together).

Procedure by which a person can object to the agency on a proposed rule: Send written objections to David J. Sullivan, General Counsel, NC Community College System Office, 5001 MSC, Raleigh, NC 27699-5001 within the comment period and must be post-marked by 11:59 p.m. on the last day of the comment period.

Written comments may be submitted to: David J. Sullivan, General Counsel, NC Community College System Office, 5001 MSC, Raleigh, NC 27699-5001, email sullivanand@nccs.cc.nc.us

Comment period ends: August 16, 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

Fiscal Impact

- State
Local
Substantive (>\$3,000,000)
None

SUBCHAPTER 02C - COLLEGES: ORGANIZATION AND OPERATIONS

SECTION .0100 - TRUSTEES AND COLLEGES

23 NCAC 02C .0109 WITHHOLDING OF STATE FUNDS OR ADMINISTRATIVE SUPPORT

(a) Institutions shall be operated in compliance with G.S. 115D and all rules in this Title. In order for an institution to continue receiving state financial and administrative support, the institution shall:

- (1) Maintain accreditation with the Southern Association of Colleges and Schools and acquire and maintain accreditation or licenses for each program offered which has an individual accreditation or licensure requirement in accordance with G.S. 115D-4.1 and 23 NCAC 02C .0603.
(2) Employ faculty, assign teaching and non-teaching loads, and provide technical assistance to faculty consistent with the criteria of the Southern Association of Colleges and Schools in accordance with 23 NCAC 02C .0202.
(3) Submit required data to the System Office on each of the 12 performance measures and publish the ratings on each measure in accordance with G.S. 115D-31.3 and 23 NCAC 02E .0205.
(4) Complete and submit to the System Office all reports conditioned upon receipt of federal funds in accordance with the North Carolina Community College System Annual Reporting Plan.
(5) Manage institutional operations and resources consistent with program and revenue audit policies. An institution that receives four program or revenue audit exceptions per year for two consecutive years shall be in violation of this Rule.
(6) Report the damage, theft, embezzlement, or misuse of any state-owned personal or real property by institutional officials or employees to the Director of the State Bureau of Investigation in accordance with G.S.114-15.1.
(7) Adopt and publish personnel policies addressing the issues listed in Rule 23 NCAC 02C .0210, and submit them to the System President's office.

- (8) Terminate employment of institutional officials or employees for participation in activities involving moral turpitude.
- (9) Comply with any request for information, documents, or any other request of the State Board or the System Office.

The State Board may withhold funds for the President's salary or terminate state financial and administrative support of any institution that fails to comply with any provision of this paragraph.

(b) In addition, the State financial and administrative support of an institution shall be terminated if one of the following conditions exists:

- (1) Failure of the local tax-levying authority(ies) to provide the required local financial support as specified in G.S. 115D-32.
- (2) Need for the institution ceases to exist.
- (3) Failure of the institution to earn sufficient state funds, or failure of the General Assembly to appropriate funds, to support the institution.
- (4) Failure of institutional officials to maintain prescribed standards of administration or instruction in accordance with G.S. 115D-6.

Authority G.S. 114-15.1, 115D-4.1, 115D-6; 115D-31.3; 115D-32.

SECTION .0200 - PERSONNEL

23 NCAC 02C .0210 LOCAL COLLEGE PERSONNEL POLICIES

(a) Each local board of trustees shall ~~adopt~~ adopt, and publish ~~publish, and implement~~ personnel policies consistent with all applicable statutes, rules, and regulations addressing the following issues:

- (1) Adverse weather;
- (2) Annual leave (vacation);
- (3) Drug and alcohol use;
- (4) Civil leave;
- (5) Communicable disease;
- (6) Compensatory leave;
- (7) Definitions of the employment categories and benefits for each:
 - (A) Full-time permanent;
 - (B) Part-time permanent;
 - (C) Full-time temporary; and
 - (D) Part-time temporary;
- (8) Disciplinary action addressing suspension and dismissal;
- (9) Educational leave (reference 23 NCAC 02D.0103);
- (10) Employee evaluation process;
- (11) Employee grievance procedures;
- (12) Employee personnel file;
- (13) Hiring procedures (written and describing procedures used for employment of both full- and part-time employees);
- (14) Leave transfer;
- (15) Leave without pay;

- (16) Longevity pay plan (reference 23 NCAC 02D.0109);
- (17) Military leave (reference 23 NCAC 02D.0104);
- (18) Nepotism (reference 23 NCAC 02C.0204);
- (19) Non-reappointment;
- (20) Other employee benefits;
- (21) Political activities of employees (reference 23 NCAC 02C.0208);
- (22) Professional development;
- (23) Reduction in force;
- (24) Salary determination methods for full- and part-time ~~employess~~; employees that address at least the following:
 - (A) Provisions and criteria for salary determination;
 - (B) Requirements for annual salary review; and
 - (C) Establishment of salary formulas, ranges, or schedules;
- (25) Sexual harassment; ~~and~~
- (26) Tuition exemption (reference 23 NCAC ~~2D.0202~~); 02D .0202);

~~(b)The salary determination policy shall address at least the following:~~

- ~~(1)Provisions and criteria for salary determination;~~
- ~~(2)Requirement for annual salary review; and~~
- ~~(3)Establishment of salary formulas, ranges, or schedules.~~
- (27) Sick leave consistent with provisions of the State Retirement system; and
- (28) Secondary Employment that addresses conflict with the employee's primary job responsibilities and institutional resources (the local board of trustees shall approve or disapprove any secondary employment of the president; the president shall approve or disapprove secondary employment of all full-time employees).

~~(c) Each local board of trustees shall adopt and publish sick leave policies consistent with provisions of the State Retirement System.~~

~~(d)(b)~~ Each local board of trustees shall submit copies of these policies, including amendments, to the System President's Office upon adoption.

Authority G.S. 115D-5; 115d-20.

NOTE: The text in italics in the body of the rule were submitted and approved by Rules Review on April 15, 2004; however, since this amendment was processed under the pre-October 2003 guidelines, Legislative approval is pending.

23 NCAC 02E .0204 COURSES AND STANDARDS FOR CURRICULUM PROGRAMS

A common course library and curriculum standards for associate degree, diploma, and certificate programs shall be as follows:

- (1) Common Course Library.

- (a) The Common Course Library shall contain the following elements for all curriculum program credit and developmental courses approved for the North Carolina Community College System.
 - (i) Course prefix;
 - (ii) Course number;
 - (iii) Course title;
 - (iv) Classroom hours and laboratory, clinical, and work experience contact hours, if applicable;
 - (v) Credit hours;
 - (vi) Prerequisites and corequisites, if applicable; and
 - (vii) Course description consisting of three sentences.
- (b) A numbering system for the Common Course Library is as follows:
 - (i) The numbers 050-099 shall be assigned to developmental courses.
 - (ii) The numbers 100-109 and 200-209 shall be assigned to courses approved only at the certificate and diploma level. These courses shall not be included in associate degree programs.
 - (iii) The numbers 110-199 and 210-299 shall be used for courses approved at the associate degree level. These courses may also be included in certificate and diploma programs.
- (c) The college shall use the course information (prefix, number, title, and classroom, laboratory, clinical, work experience, and credit hours; prerequisites and corequisites; and course description) as listed in the Common Course Library.
 - (i) The college may add a fourth sentence to the course description to clarify content or instructional methodology.
 - (ii) A college may divide courses into incremental units for greater flexibility in providing instruction to part-time students or to provide shorter units of study for abbreviated calendars. The following criteria shall apply to courses divided into incremental units:
 - (A) A curriculum program course may be divided into two or three units, which are designated with an additional suffix following the course prefix and number.
 - (B) The units shall equal the entire course of instruction, without omitting any competencies.
 - (C) The combined contact and credit hours for the units shall equal the contact and credit hours for the course.
 - (D) If the course is a prerequisite to another course, the student shall complete all component parts before enrolling in the next course.
 - (E) The components of a split curriculum program course shall not be used to supplant training for occupational extension.
- (d) The Community *College System Office* shall revise and maintain courses in the Common Course Library.
- (2) Development of Curriculum Standards. The standards for each curriculum program title shall be established jointly by the Community *College System Office* and the institution(s) proposing to offer the curriculum program based on criteria established by the State Board of Community Colleges. Changes in curriculum standards shall be approved by the State Board of Community Colleges. Requests for changes in the standards shall be made to the State Board of Community Colleges under the following conditions:
 - (a) A request is made to the Community *College System Office* to change the

- standards for a curriculum program title; and
- (b) A two-thirds majority of institutions approved to offer the curriculum program title concur with the request.
- (3) Criteria for Curriculum Standards. The standards for each curriculum program title shall be based on the following criteria established by the State Board of Community Colleges for the awarding of degrees, diplomas, and certificates.
- (a) Associate in Applied Science Degree. The Associate in Applied Science Degree shall be granted for a planned program of study consisting of a minimum of 64 and a maximum of 76 semester hours of credit from courses at the 110-199 and 210-299 levels. Within the degree program, the institution shall include opportunities for the achievement of competence in reading, writing, oral communication, fundamental mathematical skills, and the basic use of computers.
 - (i) The associate in applied science degree curriculum program shall include a minimum of 15 semester hours of credit from general education courses selected from the Common Course Library, including six hours in communications, three hours in humanities or fine arts, three hours in social or behavioral sciences, and three hours in natural sciences or mathematics.
 - (ii) The associate in applied science degree curriculum program shall include a minimum of 49 semester hours of credit from major courses selected from the Common Course Library. Major courses are those which offer specific job knowledge or skills.
 - (A) The major hours category shall be comprised of identified core courses or subject areas or both which are required for each curriculum program. Subject areas or core courses shall be based on curriculum competencies and shall teach essential skills and knowledge necessary for employment. The number of credit hours required for the core shall not be less than 12 semester hours of credit.
 - (B) The major hours category may also include hours required for a concentration of study. A concentration of study is a group of courses required beyond the core for a specific related employment field. A concentration shall include a minimum of 12 semester hours, and the majority of the course credit hours shall be unique to the concentration.
 - (C) Other major hours shall be selected from prefixes identified on the curriculum standard. A maximum of nine semester hours of credit may be selected from any prefix listed, with the exception of prefixes listed in the core or concentration.
 - (D) Work experience, including cooperative education, practicums, and internships, may be included in an associate in applied science degree curriculum program

up to a maximum of eight semester hours of credit. Under a curriculum standard specifically designed for select associate degree programs, work experience shall be included in a curriculum up to a maximum of 16 semester hours of credit. The select associate degree programs shall be based on a program of studies registered under the North Carolina Department of Labor Apprenticeship programs. Only eight semester hours of credit of work experience shall earn budget FTE. The ~~Department of~~ Community Colleges Community College System Office shall implement the Pilot Work Experience Project and shall submit to the State Board of Community Colleges a report, including the number of students involved and associated costs, one year after this Rule as revised is effective.

- (iii) An associate in applied science degree curriculum program may include a maximum of seven other required hours to complete college graduation requirements. These courses shall be selected from the Common Course Library.

- (iv) Selected topics or seminar courses may be included in an associate in applied science degree program up to a maximum of three semester hours of credit. Selected topics or seminar courses shall not substitute for required general education or major core courses.

- (b) ~~Associate in Arts and Associate in Science Degrees. Degree.~~ Associate in Arts and Associates in Science Degree shall be granted for planned programs of study consisting of a minimum of 64 and a maximum of 65 semester hours of credit from approved college transfer courses at the 110-199 and 210-299 levels. Within the degree program, the institution shall include opportunities for the achievement of competence in reading, writing, oral communication, fundamental mathematical skills, and the basic use of computers. Diplomas and certificates are not allowed under this degree program.

- (i) The associate in arts ~~and associate in science~~ degree programs shall include a minimum of 44 semester hours of general education core courses selected from the Common Course Library and approved for transfer to the University of North Carolina constituent institutions. The general education core shall include:
 - (A) six semester hours of English composition.
 - (B) 12 semester hours of humanities or fine arts, with four courses to be selected from ~~at least~~ at least three of the following disciplines: music, art, drama, dance, foreign languages, interdisciplinary humanities, literature, philosophy, and religion. At least

- one course shall be a literature course. Three semester hours credit in speech or communication may be substituted for three semester hours credit in humanities or fine arts, but may not substitute as the literature requirement.
- (C) 12 semester hours of social or behavioral sciences, with four courses to be selected from at least three of the following disciplines: anthropology, economics, geography, history, political science, psychology, and sociology. At least one course shall be a history course.
- (D) 14 semester hours of natural sciences or mathematics; six hours shall be mathematics courses; eight hours shall be natural sciences courses, including accompanying laboratory work, selected from among the biological and physical science disciplines.
- (ii) The associate in arts ~~and associate in science~~ degree programs shall include a minimum of 20 and a maximum of 21 additional semester hours of credit selected from courses in the Common Course Library which have been approved for transfer to the University of North Carolina constituent institutions. ~~Courses in health, physical~~ education, ~~college orientation, or study skills may be included. Selected topics or seminar courses up to a maximum of three semester hours credit may be included. Work experience, including cooperative education, practicums, and internships, may be included up to a maximum of one semester hour of credit for career exploration. A non-college transfer course of one semester hour of credit may be included in a 65 semester hour credit associate in arts program. This course will receive transfer evaluation by the receiving institution.~~
- (A) ~~The associate in arts degree curriculum program shall include a minimum of 20 semester hours of credit from general education and pre major courses which have been approved for transfer~~
- (B) ~~The associate in science degree curriculum program shall include a minimum of 14 semester hours in mathematics or science and professional courses which have been approved for transfer.~~
- (c) Associate in Science Degree. The Associate in Science Degree shall be granted for planned programs of study consisting of a minimum of 64 and a maximum of 65 semester hours of credit from approved college transfer courses at the 110-199 and 210-299 levels. Within the degree program, the institution shall include opportunities for the achievement of competence in reading, writing, oral communication, fundamental mathematical skills, and the basic use of computers. Diplomas and

certificates are not allowed under this degree program.

(i) The associate in science degree program shall include a minimum of 44 semester hours of general education core courses selected from the Common Course Library and approved for transfer to the University of North Carolina constituent institutions. The general education core shall include:

(A) six semester hours of English composition.

(B) nine semester hours of humanities or fine arts, to be selected from three of the following disciplines: music, art, drama, dance, foreign languages, interdisciplinary humanities, literature, philosophy, and religion. At least one course shall be a literature course. Three semester hours credit in speech or communication may be substituted for three semester hours credit in humanities or fine arts, but may not substitute as the literature requirement.

(C) nine semester hours of social or behavioral sciences to be selected from three of the following disciplines: anthropology, economics, geography, history, political science, psychology, and sociology. At least one course shall be a history course.

(D) 20 semester hours of natural sciences or mathematics: a minimum of six hours shall be mathematics courses; a minimum of eight hours shall be a two-course sequence in general biology, general chemistry or general physics.

(ii) The associate in science degree program shall include a minimum of 20 and a maximum of 21 additional semester hours of credit selected from courses in the Common Course Library which have been approved for transfer to the University of North Carolina constituent institutions. A minimum of 14 SHC of these courses must be from mathematics, science or computer science courses which have been approved for transfer. A non-college transfer course of one semester hour of credit may be included in a 65 semester hour credit associate in science program. This course will receive transfer evaluation by the receiving institution.

(e)(d) Associate in Fine Arts Degree. The Associate in Fine Arts Degree shall be granted for planned programs of study consisting of a minimum of 64 and a maximum of 65 semester hours of credit from approved college transfer courses at the 110-199 and 210-299 levels. Within the degree program, the institution shall include opportunities for the achievement of competence in reading, writing, oral communication, fundamental mathematical skills, and the basic use of computers.

(i) The associate in fine arts degree programs shall include a minimum of 28 semester hours of general education core courses selected from the Common

Course Library and approved for transfer to the University of North Carolina constituent institutions. The general education core shall include:

- (A) six semester hours of English composition.
- (B) six semester hours of humanities or fine arts, with two courses to be selected from two of the following disciplines: music, art, drama, dance, foreign languages, interdisciplinary humanities, literature, philosophy, and religion. At least one course shall be a literature course. Three semester hours credit in speech or communication may be substituted for three semester hours credit in humanities or fine arts.
- (C) nine semester hours of social or behavioral sciences, with three courses to be selected from three of the following disciplines: anthropology, economics, geography, history, political science, psychology, and sociology. At least one course shall be a history course.
- (D) three semester hours of introductory mathematics.
- (E) four semester hours from the natural sciences, including accompanying laboratory work.

- (ii) The associate in fine arts degree programs shall include a minimum of 36 and a maximum of 37 additional semester hours of credit from courses in the Common Course Library which have been approved for transfer to the University of North Carolina constituent institutions. Courses in health, physical education, college orientation, or study skills may be included. Selected topics or seminar courses up to a maximum of three semester hours credit may be included. Work experience, including cooperative education, practicums, and internships, may be included up to a maximum of one semester hour of credit for career exploration.

~~(d)~~(e) Associate in Engineering Degree. The associate in engineering degree shall be granted for a planned program of study consisting of a minimum of 64 and a maximum of 65 semester hours of credit from approved college transfer courses at the 110-199 and 210-299 levels. Diplomas and certificates are not allowed under this degree program. Within the degree program, the college shall include opportunities for the achievement of competence in reading, writing, oral communication, fundamental mathematical skills, and the basic use of computers.

- (i) The associate in engineering degree program shall include a minimum of 45 semester hours of general education core courses selected from the Common Course Library and which have been approved for transfer to the University of North Carolina constituent institutions. The general education cores shall include:
 - (A) 6 semester hours of English composition;
 - (B) 6 semester hours of humanities or fine arts;

- (C) 6 semester hours of social or behavioral sciences; and
 - (D) 27 semester hours of mathematics and natural sciences.
 - (ii) The associate in engineering degree program shall include a minimum of 19 and a maximum of 20 additional semester hours of credit from courses in the Common Course Library which have been approved for transfer to the University of North Carolina constituent institutions. Courses in college orientation, study skills, and work experience, may be included up to one semester hour credit, but may not transfer to the receiving institution.
- ~~(e)~~(f) Associate in General Education. The Associate in General Education shall be granted for a planned program of study consisting of a minimum of 64 and a maximum of 65 semester hours of credit from courses at the 110-199 and 210-299 levels. Within the degree program, the institution shall include opportunities for the achievement of competence in reading, writing, oral communication, fundamental mathematical skills, and the basic use of computers.
- (i) The associate in general education degree curriculum program shall include a minimum of 15 semester hours of credit from general education courses selected from the Common Course Library, including six hours in communications, three hours in humanities or fine arts, three hours in social or behavioral sciences, and three hours in natural sciences or mathematics.
 - (ii) The remaining hours in the associate in general education degree curriculum program shall consist of additional general education courses selected from the Common Course Library. A maximum of seven semester hours of credit in health, physical education, and college orientation or study skills courses may be included. Selected topics or seminar courses may be included in a program of study up to a maximum of three semester hours credit.
- ~~(f)~~(g) Diploma. The Diploma shall be granted for a planned program of study consisting of a minimum of 36 and a maximum of 48 semester hours of credit from courses at the 100-299 level.
- (i) Diploma curricula shall include a minimum of six semester hours of general education courses selected from the Common Course Library. A minimum of three semester hours of credit shall be in communications, and a minimum of three semester hours of credit shall be selected from courses in humanities and fine arts, social and behavioral sciences, or natural sciences and mathematics.
 - (ii) Diploma curricula shall include a minimum of 30 semester hours of major courses selected from the Common Course Library.
 - (A) A diploma curriculum program which is a stand-alone curriculum program title shall include identified core courses or subject areas or both within the major hours category.
 - (B) Courses for other major hours in a stand-alone diploma curriculum program title shall be selected from prefixes identified on the curriculum standard. A maximum of nine semester hours of credit may be selected from any

- prefix listed, with the exception of prefixes listed in the core or concentration.
- (C) Work experience, including cooperative education, practicums, and internships, may be included in a diploma curriculum program up to a maximum of eight semester hours of credit.
 - (iii) A diploma curriculum program may include a maximum of four other required hours to complete college graduation requirements. These courses shall be selected from the Common Course Library.
 - (iv) An institution may award a diploma under an approved associate in applied science degree curriculum program for a series of courses taken from the approved associate degree curriculum program of study.
 - (A) A diploma curriculum program offered under an approved associate degree curriculum program shall meet the standard general education and major course requirements for the diploma credential.
 - (B) A college may substitute general education courses at the 100-109 level for the associate-degree level general education courses in a diploma curriculum program offered under an approved degree program.
 - (C) The diploma curriculum program
 - offered under an approved associate degree curriculum program shall require a minimum of 12 semester hours of credit from courses extracted from the required core courses and/or subject areas of the respective associate in applied science degree curriculum program.
 - (v) Selected topics or seminar courses may be included in a diploma program up to a maximum of three semester hours of credit. Selected topics and seminar courses shall not substitute for required general education or major core courses.
 - (~~g~~)(h) Certificate Programs. The Certificate shall be granted for a planned program of study consisting of a minimum of 12 and a maximum of 18 semester hours of credit from courses at the 100-299 level.
 - (i) General education is optional in certificate curricula.
 - (ii) Certificate curricula shall include a minimum of 12 semester hours of major courses selected from the Common Course Library.
 - (A) A certificate curriculum program which is a stand-alone curriculum program title or which is the highest credential level awarded under an approved associate in applied science degree or diploma program shall include 12 semester hours of credit from core courses or subject areas or both within the major hours category.
 - (B) Courses for other major hours in a

stand-alone certificate curriculum program shall be selected from prefixes identified on the curriculum standard. A maximum of nine semester hours of credit may be selected from any prefix listed, with the exception of prefixes listed in the core or concentration.

(C) Work experience, including cooperative education, practicums, and internships, may be included in a certificate program up to a maximum of two semester hours of credit.

(iii) A certificate curriculum program may include a maximum of one other required hour of credit to complete college graduation requirements. This course shall be selected from the Common Course Library.

(iv) An institution may award a certificate under an approved degree or diploma curriculum program for a series of courses totaling a minimum of 12 semester hours of credit and a maximum of 18 semester hours of credit taken from the approved associate degree or diploma curriculum program of study.

(v) Selected topics or seminar courses may be included in a certificate program up to a maximum of three semester hours of credit.

(4) Curriculum Standards Compliance. Each institution shall select curriculum program courses from the Common Course Library to comply with the standards for each curriculum program title the institution is approved to

offer. The selected courses shall comprise the college's program of study for that curriculum program.

(a) Each institution shall maintain on file with *Community College System Office* a copy of the official program of study approved by the institution's board of trustees.

(b) When requesting approval to offer a curriculum program title, an institution shall submit a program of study for that curriculum program title.

(c) A copy of each revised program of study shall be filed with and approved by the *Community College System Office* prior to implementation at the institution.

Authority G.S. 115D-5; S.L. 1995, c. 625;

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Community College System intends to amend the rule cited as 23 NCAC 02D .0101, .0312.

Proposed Effective Date: *October 1, 2004*

Public Hearing:

Date: *June 30, 2004*

Time: *10 a.m.*

Location: *NCCCS, Caswell Building, 200 W. Jones Street, Raleigh, NC*

Reason for Proposed Action:

23 NCAC 02D .0101 - To revise guidelines for experience allowed in determining the increment level on the salary schedule for presidents.

23 NCAC 02D .0312 - To prohibit the use of vending machine or other convenience concession funds to supplement presidential salaries.

Procedure by which a person can object to the agency on a proposed rule:

Written objections maybe addressed to David J. Sullivan, General Counsel, NC Community College System, 5001 MSC, Raleigh, NC 27699-5001 within the comment period and must be post-marked by 11:59 p.m. on the last day of the comment period.

Written comments may be submitted to: *David J. Sullivan, General Counsel, NC Community College System, 5001 MSC, Raleigh, NC 27699-5001 phone (919)807-6961, email sullivand@ncccs.cc.nc.us.*

Comment period ends: *August 16, 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 2D - COMMUNITY COLLEGES:
FISCAL AFFAIRS**

SECTION .0100 - SALARIES

23 NCAC 02D .0101 ESTABLISHING PAY RATES

(a) The monthly and annual salaries or hourly rates of pay from state funds for full-time and part-time personnel in community colleges shall be established by the college president and approved by the board of trustees within the budget approved for the college by the State Board and in accordance with the regulations approved by the State Board, except that the state-funded portion of the president's salary shall be approved by the System President in accordance with the state salary schedule for presidents. Salary increases shall be granted annually or upon promotion to a higher position. Legislative increases shall be granted according to requirements set forth by the General Assembly. The State Board shall adopt a minimum and maximum amount of state funds which may be paid to any individual working in a college. Individuals shall be paid no less than the minimum and not more than the maximum amounts at a level determined by the salary approving authority at the college.

(b) All hourly, monthly, and annual salaries for full-time or part-time personnel shall be certified by the president of the college and reported to the System Office.

(c) The State Board shall adopt a state salary schedule for presidents in the system. The System President shall determine the proper placement of a newly-hired president on the state salary schedule based on the size of the college and the individual's years of eligible experience in accordance with the following provisions:

- (1) College size shall be determined by the total FTE served and reported in the enrollment reports furnished the System Office.
- (2) A president of a post-secondary education institution shall be allowed increments for prior experience on a year-for-year basis for a maximum of 10 years.

(3) An executive vice president, vice president, other senior administrator of a post-secondary institution, a state-level administrative department, or a superintendent of a public school system may be given increment experience on the president salary schedule upon recommendation of the board of trustees and approval of the System President as follows:

- one increment for three years experience;
- two increments for five years of experience;
- three increments for seven years of experience;
- four increments for 10 or more years of experience.

A president, chief operating officer or chief financial officer of a business or industry may be granted increment experience as provided in this Part.

- (A) Progression from the minimum or "0" step to the midpoint or step "10" shall be based on additional years of experience;
- (B) Advancement toward grade maximum after attaining the midpoint of the grade shall be based on merit increases as recommended by the local boards and within state allocations available;
- (C) Newly-hired presidents shall not receive salary increments for any years in which a salary freeze was in effect for community college presidents;

(4) Changes in grade levels:

- (A) Presidents with 0 to 10 years of eligible experience moving to another grade shall be placed in the new grade's range at the current experience level; and
- (B) Presidents with greater than 10 years of experience moving to a lower grade will receive a salary adjustment only if the current salary exceeds the new salary grade's maximum salary limit, in which case, the salary will be adjusted to the maximum of the new grade;

(5) Total salary compensation from all sources shall not exceed the maximum for the salary grade as determined by the college's size. Salary compensation is defined as those monies paid from whatever source for which no documentation or expense is required, or which is treated as salary for retirement benefit purposes;

(6) An interim or acting president's salary will be set at the step of the salary grade for the respective

college. Years of eligible experience will be awarded up to 10 years for placement on the appropriate step. However, a board of trustees may grant a college employee appointed interim or acting president a ten percent salary increase instead of placing the employee on the president's salary schedule.

(6) Presidential salary grades shall reflect the following:

FTE Minimum Midpoint Maximum

These data shall be increased annually based on legislative action and reviewed no less than every three years to assure their continued national competitiveness.

(d) Post-secondary institution as used in this rule means a junior college, community college or four-year institution of higher education.

Authority G.S. 115D-5; 115D-54.

SECTION .0300 - BUDGETING: ACCOUNTING: FISCAL MANAGEMENT

23 NCAC 02D .0312 BOOKSTORE: VENDING MACHINE

The board of trustees of each college shall adopt local policies consistent with G.S. 115D-58.13 for the budgeting, accounting and expenditure of funds generated through vending machines and other convenience concession activities.

Funds generated through vending facilities, vending machines, and other convenience concession activities shall not be used to supplement the salary of any college president.

Authority G.S. 115D-5; 115D-58.13.

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Community College System intends to adopt the rule cited as 23 NCAC 03A .0115, amend the rules cited as 23 NCAC 03A .0101-.0113, and repeal the rules cited as 23 NCAC 03A .0114, .0201-.0214.

Proposed Effective Date: October 1, 2004

Public Hearing:

Date: June 30, 2004

Time: 10 a.m.

Location: NCCCS, Caswell Building, 200 W. Jones Street, Raleigh, NC

Reason for Proposed Action: To define terms within the code, to combine correspondence, business, trade and technical schools into one grouping called Proprietary Schools, to establish a mechanism for the State Board of Community Colleges by which a fee schedule is approved in consultation with the Joint Legislative Commission on Government Operations, and to further define licensing requirements for Proprietary Schools.

Procedure by which a person can object to the agency on a proposed rule: Written objections may be addressed to David J. Sullivan, General Counsel, NC Community College System Office, 5001 MSC, Raleigh, NC 27699-5001 within the comment period and must be post-marked by 11:59 p.m. on the last day of the comment period.

Written comments may be submitted to: David J. Sullivan, General Counsel, NC Community College System Office, 5001 MSC, Raleigh, NC 27699-5001

Comment period ends: August 16, 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 3 - MISCELLANEOUS PROGRAMS

SUBCHAPTER 3A - PROPRIETARY SCHOOLS

SECTION .0100 - BUSINESS, TRADE AND TECHNICAL SCHOOLS

23 NCAC 03A .0101 DEFINITIONS AND APPLICATION FOR INITIAL LICENSE

(a) The following terms shall have the following meaning in this subchapter unless the context of a specific rule requires a different interpretation.

- (1) "Proprietary school" as stated in G.S. 115D-87 means any proprietary school which:
 - (A) offers postsecondary education or training for profit or for a tuition charge or offers classes for the purpose of teaching, for profit or for a tuition charge, any program of study or teaching one or more of the courses or subjects needed to train and educate an individual for employment; and

- (B) has any physical presence within the State of North Carolina; and
 - (C) is privately owned and operated by an owner, partnership or corporation.
 - (2) "Classes or schools" as stated in G.S. 115D-88(4a) means classes or schools, which are offered by the seller of the equipment or the seller's agent.
 - (3) "Equipment" as stated in G.S. 115D-88 includes software.
 - (4) "Classes or schools" conducted by employers for their own employees are exempt. Employers may contract with third party agencies to provide training for their employees. Schools or classes conducted by third party agencies for an employer to train his employees are exempt.
 - (5) "Users" as defined in G.S. 115D-88 (4a) means employees or agents of purchasers.
 - (6) "Five or fewer students" as stated in G.S. 115D-88 (4b) means total number of students at the time of maximum enrollment during any term.
 - (7) "Remote sites" means approved instructional environments in the same county that do not have any administrative staff or administrative functions such as recruiting, accounting and record keeping taking place.
- (b) Application for an Initial License:
- (1) Any person or persons operating a proprietary school with an enrollment of more than five persons in a school in the State of North Carolina shall obtain a license from the North Carolina State Board of Community Colleges except as exempt by G.S. 115D-88.
 - (2) A preliminary application shall be submitted setting forth the proposed location of the school, the qualifications of the Chief Administrator of the school, a description of the facilities available, courses to be offered, and financial resources available to equip and maintain the school. Upon approval of the preliminary application, a final application may be submitted. This application shall be verified and accompanied by the following:
 - (A) A certified check or money order in an amount established by the State Board of Community Colleges after consultation with the Joint Legislative Commission on Governmental Operations and made payable to the North Carolina State Treasurer;
 - (B) A guaranty bond or alternative to a guaranty bond as set forth in G.S. 115D-95. Except as otherwise provided herein, the bond amount for a proprietary school shall be at least equal to the maximum amount of prepaid tuition held at any time during the fiscal year. During the initial year of operation, the bond amount shall be based on the projected maximum amount of prepaid tuition that will be held at any time during that year. In any event, the minimum surety bond shall be ten thousand dollars (\$10,000);
 - (C) A copy of the school's catalog or bulletin. The catalog shall include a statement addressing each item listed in G.S. 115D-90(b)(7);
 - (D) A financial statement showing capital investment, assets and liabilities, and the proposed operating budget which demonstrates financial stability or a financial statement and an accompanying opinion of the school's financial stability by either an accountant, using generally accepted accounting principles, or a lending institution;
 - (E) A complete detail of ownership; (This will show stock distribution if the school is a corporation, or partnership agreement if the school will be operated as a partnership.)
 - (F) Information on all administrative and instructor personnel who will be active in the operation of the school, either in full- or part-time capacity; (This information will be submitted on forms provided for this purpose.)
 - (G) Enrollment application or student contract form;
 - (H) School floor plan showing doors, windows, halls, and seating arrangement; also offices, rest rooms, and storage space; the size of each room and seating capacity shall be clearly marked for each classroom; lighting showing kind and intensity shall be indicated for each room; the type of heating and cooling system used for the space occupied shall be stated;
 - (I) Photostatic copies of inspection reports or letters from proper officials to show that the building is safe and sanitary and meets all local city, county, municipal, state, and federal regulations such as fire, building, and sanitation codes;
 - (J) If building is not owned by the school, a photostatic copy of the lease held by the school for the space occupied.
 - (3) A person or persons purchasing a proprietary school already operating as a licensed school

shall comply with all of the requirements for securing an original license. A license is not transferable to a new owner. All application forms and other data shall be submitted in full. Such terms as "previously submitted" when referring to a former owner's file will not be acceptable. A separate license shall be required for each location of the school, or branch thereof in another county. Classes conducted by the school in separate locations shall be reported and approved prior to advertising and commencement of classes.

- (4) Remote sites shall not have any administrative staff or any administrative functions such as recruiting, accounting or record keeping. Each remote site shall be subject to an initial remote site fee and an annual remote site renewal fee. Each remote site shall have an initial site visit and a visit during each annual audit. Classes conducted at remote sites by licensed schools shall be approved prior to advertising and commencement of classes. Any course offered at a remote site shall be a part of an approved program of study for that licensed school.
- (5) Changes in application information presented for licensure or relicensure relating to mission, programs, location or stock distribution require prior approval and licensure amendment by the State Board of Community Colleges.
 - (A) Program additions require curriculum reviews and program or course approvals prior to initiation. A check or money order in an amount established by the State Board of Community Colleges after consultation with the Joint Legislative Commission on Governmental Operations made payable to the North Carolina State Treasurer shall accompany each additional program approval request.
 - (B) Single course additions or revisions may be individually approved when schools submit a request for license amendment. Course additions or revisions requiring curriculum review, instructor evaluation, and equipment site assessment shall be subject to the curriculum review fee established by the State Board of Community Colleges after consultation with the Joint Legislative Commission on Governmental Operations.
 - (C) School relocations require site visits and approvals prior to use. A check or money order in an amount established by the State Board of

Community Colleges after consultation with the Joint Legislative Commission on Governmental Operations made payable to the North Carolina State Treasurer shall accompany each site relocation approval request.

Authority G.S. 115D-88; 115D-89; 115D-90; 115D-91.

23 NCAC 03A .0102 APPLICATION FOR RENEWAL OF LICENSE

- (a) Schools shall be licensed annually, and the licensure shall extend from July 1 through June 30, inclusive.
- (b) Schools desiring the renewal of their license shall submit an application on or before April 1 of each year. The application shall be accompanied by the following:
 - (1) All information required of schools applying for an original license that has not been previously submitted;
 - (2) Copy of current catalog containing all information required of schools applying for original license;
 - (3) Any supplementary information necessary to bring information on the school up to date.
- (c) A check in an amount established by the State Board of Community Colleges after consulting with the Joint Legislative Commission on Governmental Operations made payable to the North Carolina State Treasurer shall be received on or before April 1.

Authority G.S. 115D-91; 115D-92.

23 NCAC 03A .0103 SCHOOL PLANT AND EQUIPMENT

- (a) The school plant, premises, and facilities shall be adequate, safe, and sanitary and shall be in compliance with the statutory provisions and the rules and regulations of all local ordinances pertaining to fire, health, safety, and sanitation.
- (b) The equipment, supplies, and instructional materials of the school shall be satisfactory and adequate in type, quality, and amount, and shall be suitable for satisfactory use in administering the course or courses of instruction. They shall also meet all requirements of statutory provisions and local ordinances, and rules and regulations adopted thereunder in regard to fire, health, safety, and sanitation.

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0104 ADMINISTRATION

- (a) One person shall be designated as the chief administrator of the school or branch thereof. The chief administrator shall be qualified in accordance with the requirements listed in Paragraph (c) of this Rule.
- (b) The chief administrator is defined as the person directly responsible for the school's program, the methods of instruction, the employment of instructors, the organization of classes, the maintenance of the school plant and the equipment, the advertising used, and the maintenance of proper administrative

records and all other procedures related to the administration of the school or class.

(c) The chief administrator shall have the following qualifications:

- (1) Be a person of good moral character;
- (2) Be a graduate of an accredited college or university;
- (3) Have experience as an instructor in one or more of the major subjects taught in the school which one is to administer;

(d) Chief administrators and other administrative personnel who possess qualifications which are equivalent to the requirements prescribed herein for chief administrators may be approved individually by the System President or designee.

Authority G.S. 115D-87; 115D-89; 115D-90.

23 NCAC 03A .0105 ADVERTISING

(a) A licensed school shall not advertise through any media that it offers courses that the school has not been licensed to offer.

(b) Printed catalogs, bulletins, or prospectus information shall be specific with respect to prerequisite training required for admission to the school courses, the curricula, the contents of courses, graduation requirements, tuition and other fees, refunds and allowances for withdrawals and unavoidable or extended absences.

(c) Schools shall not use any name, title, or other designation, by way of advertising or otherwise, that is misleading or deceptive as to character of the institution, or its influence in training and employment for students"

(d) Schools shall not use a photograph, cut, engraving, or illustration in catalogs, sales literature, or otherwise in such a manner as to convey a false impression as to the size, importance, or location of the school's equipment.

(e) Schools shall not use endorsements, commendations, or recommendations by students in favor of a school unless it is with the consent of the writer and without financial compensation or offer of financial compensation. These materials shall be kept on file by the school.

(f) Schools shall publish tuition rates, payment methods, and refund policies in their catalogs or as a catalog addendum and shall not deviate from these rates and policies. All catalog addenda shall show an effective date and be readily available to the student.

(g) Schools shall not make, cause, permit to be made, or publish any false, untrue, or deceptive statement or representation by way of advertising or otherwise concerning other proprietary schools or their activities in attempting to enroll students or concerning the character, nature, quality, value, or scope of any course of instruction or educational service offered or in any other material respect.

(h) A school or class shall not solicit students to enroll by means of "blind" advertisements or advertisements in the "help wanted" or other employment columns of newspapers and publications.

(i) Schools shall not make false, untrue, or deceptive statements of representatives regarding the opportunities in any vocation or field of activity as a result of the completion of any given course of instruction or educational service.

(j) Advertisement shall not use salary-related terms or phrasing such as, "up to", "top", or "high salary".

(k) Any salary claims shall show comparisons between local and national employment data and shall be for entry-level positions.

(l) Any salary claims shall be documented and on file at the institution for public viewing.

(m) Advertisements shall not offer promotions or special inducements to prospective students or enrollees.

(n) Advertisements and school representatives shall not guarantee or imply positions or employment to prospective students.

(o) If a licensed proprietary school, in any of its advertisements, printed materials or media, use the phrase or a similar phrase "Licensed by the North Carolina State Board of Community Colleges" then that phrase must be immediately succeeded by the following disclaimer: "The North Carolina State Board of Community Colleges is not an accrediting agency."

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0106 ADMISSION REQUIREMENTS

(a) The admission requirements for schools licensed under Article 8 of Chapter 115D of the General Statutes of North Carolina shall be made available to the public and administered as written.

(b) The school shall require graduation from a public or private or a state registered home high school as a prerequisite to enrollment in a certificate or diploma course offered by the school. A copy of the high school transcript shall be on file for each student enrolled. Exceptions to this requirement may be made for students who hold a certificate of high school equivalency or for non-high school graduates who are 18 years of age or older who have demonstrated the ability to benefit as determined by accepted test instruments. A copy of the high school equivalency certificate or test results shall be kept in each student's record. The school shall not permit students of high school age to attend the school during the time that high schools are in regular session, except in individual cases approved by the student's high school principal' A copy of the approved form shall be included in the student's record.

(c) The school may admit students to special courses or subjects which are part of the approved curriculum offered by the school when the school deems the student can benefit from the instruction offered.

(d) If total tuition is greater than five-thousand dollars (\$5,000) the school may collect up to 50 percent of the total tuition prior to that mid-point of the program. The remainder of the tuition may only be collected when the student has completed one-half of the program. Federal regulations regarding the disbursement of tuition will supersede state disbursement regulations stated in this Rule.

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0107 RECORDS

(a) A school licensed under G.S. 115D, Article 8, shall maintain current, complete, and accurate records to show the following:

- (1) An application for admissions that includes the student's educational and personal background, age, and other personal characteristics.
- (2) Progress and attendance including date entered, dates attended, subjects studied, and class schedule; this record shall be in a form which permits easy and accurate preparation of transcripts of educational records for purpose of transfer and placement, providing reports to government services or agencies, or for such other purposes as the needs of the student might require. Such transcripts shall be in the form readily understandable by lay persons and educators alike. The grading system on such transcripts shall be fully explained on the transcript form. Subjects appearing on the transcripts shall be numbered or otherwise designated to indicate the exact subject matter covered.
- (3) All student enrollment agreements shall include, at a minimum, monies owed and paid by each student, and refunds issued by the school.
- (4) The students official high school transcript or proof of GED completion.
- (5) Proof of students "ability to benefit" if the student has not earned a high school diploma or GED certificate.

(b) Records of students shall be open for inspection by properly authorized officials of the State Board of Community Colleges.

(c) Financial records of the school shall be open for inspection by properly authorized officials of the State Board of Community Colleges.

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0108 INSTRUCTIONAL PROGRAM

(a) A school licensed under G.S. 115D, Article 8, shall limit its offering in certificate and diploma programs and special subjects to the courses and subjects for which it has been licensed to offer. At the beginning of each term, each school shall post the schedule of subjects being offered during the term. This schedule will show the time and instructor for each subject and designate the room in which the subject will be taught. Each student shall be provided a schedule of classes for each term to show the student's individual schedule.

(b) Schools shall not publish in their catalogs courses which they have not been licensed to offer. When a school is licensed to offer a course or program and enrolls students in the course or program, the school shall maintain sufficient and qualified faculty to teach all subjects required for completing the course or program during the time stipulated in the school's bulletin as the required time to complete the course or program and classes shall be scheduled so that the students will be able to receive instruction in all subjects for the number of instructional hours as advertised in the school's bulletin under which the students enrolled. When a school previously licensed to offer a course or program fails to maintain the qualifications for continuing the

course or program, the course or program shall be removed from the catalog or stamped "not offered."

(c) The number of curriculum programs offered by a school shall be realistic in relationship to faculty employed and students enrolled. As a general rule, the number of curriculum programs offered shall not exceed the number of faculty employed on a full-time basis.

(d) The school shall establish its calendar one calendar year in advance and give full information to prospective and enrolled students about holidays; beginning and ending dates of each term and other important dates.

(e) Schools may measure instruction on a clock-hour or credit-hour basis. The catalog shall provide a clear definition of the method used. The school catalog shall show the number of clock hours or credit hours for each subject offered and the minimum clock hours or credit hours a student shall carry for full-time enrollment. Courses offered on a credit-hour basis shall show class hours, laboratory hours, and credit hours.

(f) The ratio between student and instructor shall not exceed 30 to 1.

(g) Class period shall permit a minimum of 50 minutes net instruction. Class shall not be scheduled for more than two consecutive class periods without a break.

(h) Certificates and diplomas shall be issued only upon successful completion of a standard program of study.

(i) Students enrolled in diploma or certificate programs shall not be enrolled except at the beginning of each term or within the drop/add period which shall not exceed 10 percent of a semester course or 25 percent of quarters or clock hour courses. This provision is not applicable to classes offered on a multi-entry basis.

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0109 INSTRUCTIONAL PERSONNEL

(a) An application for approval to teach in a licensed proprietary school shall be made on forms provided for this purpose. The application shall be filed prior to an instructor's beginning date for teaching in a proprietary school.

(b) An instructor shall be found to be qualified by education or work experience background and must meet the following qualifications as minimum requirements:

- (1) Be a person of good moral character;
- (2) Be at least 18 years of age;
- (3) Be a graduate of an accredited college or university and hold at least an associate degree in a related field or meet the requirements of other occupational licensing, certification, or approval bodies requested to approve instructor adequacy; and
- (4) Personnel who possess and can document qualifications which are equivalent to the requirements prescribed herein for instructor, may be approved on an individual basis by the System President or his designee.

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0110 FINANCIAL STABILITY

- (a) A school licensed under G.S. 115D, Article 8, shall have sufficient finances to establish and carry out a program of education on a continuing basis.
- (b) The North Carolina Community College System Office may request a credit report.

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0111 ETHICS

- (a) Schools licensed under Article 8 of Chapter 115D of the General Statutes of North Carolina shall not offer premiums or special inducement to prospective students or enrollees. Scholarships may be offered provided terms of scholarship are published in the school catalog.
- (b) Failure to maintain tuition rates as published is grounds for suspension or revocation of the license of a school.
- (c) No officer or representative of the school shall solicit any student to leave any school in which the student is enrolled or attends.
- (d) A school representative shall not guarantee positions or employment to prospective students.

Authority G.S. 115D-89; 115D-90; 115D-93.

23 NCAC 03A .0112 REVOKING A LICENSE

The license of a proprietary school may be revoked in accordance with G.S. 150B, Article 3, when it is found that the school has failed to comply with the requirements of the law and the rules adopted by the State ~~Board~~ Board of Community Colleges.

Authority G.S. 115D-93; 150B-22 thru 150B-37.

23 NCAC 03A .0113 STUDENT REFUND

Any proprietary school that is licensed by the State Board of Community Colleges is subject to the following refund policies.

- (1) A refund shall not be made except under the following circumstances:
 - (a) A 100 percent refund shall be made if the student officially withdraws prior to the first day of class(es) as noted in the school calendar. Also, a student is eligible for a 100 percent refund if the class(es) in which the student is officially registered fails to "make" due to insufficient enrollment.
 - (b) A 75 percent refund shall be made for semester courses if the student officially withdraws from class(es) prior to or on the official 10 percent point of the semester.
 - (c) A 75 percent refund shall be made up to the 25 percent point of any term defined by quarters or clock hours for a student who officially withdraws from class(es).
 - (d) Refunds for multi-entry classes will be based on the percentage of class requirements completed.

- (e) To comply with applicable federal regulations regarding refunds; federal regulations regarding refunds will supercede state refund regulations in this Rule.
- (2) Proprietary schools are not required to deposit funds collected for tuition with the State Treasurer's Office.

Authority G.S. 115D-90.

23 NCAC 03A .0114 BUSINESS SCHOOL; SPECIFIC REGULATIONS

""

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0115 TEACH-OUT PLAN AND RECORDS PRESERVATION

- (a) Each proprietary school shall adopt a teach-out plan. The plan shall be kept on file in the school's administrative office. A copy of the plan shall be submitted to the North Carolina Community College System Office, Office of Proprietary Schools, with the application for license. Amendments or revisions to the plan shall be submitted to the Office of Proprietary Schools as they are made.
- (b) The plan shall include the procedure for notifying students of a pending school closure and the teach-out arrangements with other educational or training institutions. The teach-out arrangements shall include provisions for students to complete their programs, to transfer to other equivalent programs at other institutions, and to be refunded that portion of their prepaid tuition and fees not earned by the school.
- (c) Each student shall be given a minimum 30-day written notice of the school's intent to close. Prior to closure, school officials shall assist students with:
 - (1) completing their programs at the school,
 - (2) identifying equivalent programs at other institutions,
 - (3) transferring to other institutions, and
 - (4) receiving refunds.
- (d) Prior to closure, a school shall file a copy of all student permanent academic and financial aid records with the Department of Cultural Resources.

Authority G.S. 115D-90.

SECTION .0200 - CORRESPONDENCE SCHOOLS

23 NCAC 03A .0201 LICENSING PROPRIETARY CORRESPONDENCE SCHOOLS

""Authority G.S. 115D-87; 115D-89; 115D-91; 115D-93; 115D-95; 115D-96.

23 NCAC 03A .0202 STANDARDS

Authority G.S. 115D-87; 115D-89; 115D-90; 115D-91; 115D-92; 115D-93.

23 NCAC 03A .0203 ORGANIZATION AND NATURE OF CORRESPONDENCE COURSES

""Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0204 INSTRUCTION

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0205 FINANCIAL STABILITY

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0206 THE OFFICIAL BULLETIN OR CATALOGUE

Authority G.S. 115D-89; 115D-90

23 NCAC 03A .0207 RESPONSIBILITY FOR PERSONNEL AND AGENTS

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0208 CONTRACT WITH STUDENT

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0209 RESIDENT TRAINING "

(9)——Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0210 STANDARDS FOR

ENROLLMENT

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0211 RECORDS

Authority G.S. 115D-89; 115D-90.

23 NCAC 03A .0212 UNFAIR PRACTICES

Authority G.S. 115D-89; 115D-90; 150B-21.6.

23 NCAC 03A .0213 REVOKING A LICENSE

Authority G.S. 115D-87.97; 150B-22 thru 150B-37.

23 NCAC 03A .0214 APPLICATION FOR RENEWAL OF LICENSE

Authority G.S. 115D-91; 115D-92.

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.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *Medical Care Commission*

Rule Citation: *10A NCAC 13F .0509, .1211, .1501; 13G .0509, .1211, .1301*

Effective Date: *July 1, 2004*

Date Approved by the Rules Review Commission: *May 20, 2004*

Reason for Action: *The General Assembly passed legislation in 2002 providing the Medical Care Commission temporary rulemaking authority for adult care home rules under 10A NCAC 13F and 13G and extended the time frame for that authority through July 1, 2004 in legislation passed in 2003.*

CHAPTER 13 - NC MEDICAL CARE COMMISSION

SUBCHAPTER 13F - LICENSING OF HOMES FOR THE AGED AND INFIRM

SECTION .0500 - STAFF ORIENTATION, TRAINING, COMPETENCY AND CONTINUING EDUCATION

10A NCAC 13F .0509 FOOD SERVICE ORIENTATION

The staff person in charge of the preparation and serving of food shall complete a food service orientation program established by the Department or an equivalent within 30 days of hire for those staff hired on or after the effective date of this Rule. Registered dietitians are exempt from this orientation. The orientation program is available on the internet website, <http://facility-services.state.nc.us/gcpage.htm>, or it is available at the cost of printing and mailing from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284;

Temporary Adoption Eff. July 1, 2004.

SECTION .1200 - POLICIES, RECORDS AND REPORTS

10A NCAC 13F .1211 WRITTEN POLICIES AND PROCEDURES

(a) The facility shall ensure the development of written policies and procedures, that comply with applicable rules of this Subchapter, on the following:

- (1) ordering, receiving, storage, discontinuation, disposition, administration, including self-

administration, and monitoring the resident's reaction to medications, as developed in consultation with a licensed health professional who is authorized to dispense or administer medications;

- (2) use of alternatives to physical restraints and the care of residents who are physically restrained, as developed in consultation with a registered nurse;
- (3) accident, fire safety and emergency procedures;
- (4) infection control;
- (5) refunds;
- (6) missing resident;
- (7) identification and supervision of wandering residents;
- (8) management of physical aggression or assault by a resident;
- (9) handling of resident grievances;
- (10) visitation in the facility by guests; and
- (11) smoking and alcohol use.

(b) In addition to other training and orientation requirements in this Subchapter, all staff shall be trained within 30 days of hire on the policies and procedures listed as Subparagraphs (3), (4), (6), (7), (8), (9), (10) and (11) in Paragraph (a) of this Rule.

(c) Policies and procedures on which staff have been trained shall be available within the facility to staff for their reference.

History Note: Authority 131D -2; 143B-165; S.L. 2002-0160; 2003-0284;
Temporary Adoption Eff. July 1, 2004.

SECTION .1501 - USE OF PHYSICAL RESTRAINTS AND ALTERNATIVES

10A NCAC 13F .1501 USE OF PHYSICAL RESTRAINTS AND ALTERNATIVES

(a) The facility shall assure that a physical restraint, any physical or mechanical device attached to or adjacent to the resident's body that the resident cannot remove easily and which restricts freedom of movement or normal access to one's body, shall be:

- (1) used only in those circumstances in which the resident has medical symptoms that warrant the use of restraints and not for discipline or convenience purposes;
- (2) used only with a written order from a physician except in emergencies, according to Paragraph (e) of this Rule;
- (3) the least restrictive restraint that would provide safety;

- (4) used only after alternatives that would provide safety to the resident and prevent a potential decline in the resident's functioning have been tried and documented in the resident's record.
- (5) used only after an assessment and care planning process has been completed, except in emergencies, according to Paragraph (d) of this Rule;
- (6) applied correctly according to the manufacturer's instructions and the physician's order; and
- (7) used in conjunction with alternatives in an effort to reduce restraint use.

Note: Bed rails are restraints when used to keep a resident from voluntarily getting out of bed as opposed to enhancing mobility of the resident while in bed. Examples of restraint alternatives are: providing restorative care to enhance abilities to stand safely and walk, providing a device that monitors attempts to rise from chair or bed, placing the bed lower to the floor, providing frequent staff monitoring with periodic assistance in toileting and ambulation and offering fluids, providing activities, controlling pain, providing an environment with minimal noise and confusion, and providing supportive devices such as wedge cushions.

(b) The facility shall ask the resident or resident's legal representative if the resident may be restrained based on an order from the resident's physician. The facility shall inform the resident or legal representative of the reason for the request and the benefits of restraint use and the negative outcomes and alternatives to restraint use. The resident or the resident's legal representative may accept or refuse restraints based on the information provided. Documentation shall consist of a statement signed by the resident or the resident's legal representative indicating the signer has been informed, the signer's acceptance or refusal of restraint use and, if accepted, the type of restraint to be used and the medical indicators for restraint use.

Note: Potential negative outcomes of restraint use include incontinence, decreased range of motion, decreased ability to ambulate, increased risk of pressure ulcers, symptoms of withdrawal or depression and reduced social contact.

(c) In addition to the requirements in Rules 13F .0801, .0802 and .0903 of this Subchapter regarding assessments and care planning, the resident assessment and care planning prior to application of restraints as required in Subparagraph (a)(5) of this Rule shall meet the following requirements:

- (1) The assessment and care planning shall be implemented through a team process with the team consisting of at least a staff supervisor or personal care aide, a registered nurse, the resident and the resident's responsible person or legal representative. If the resident or resident's responsible person or legal representative is unable to participate, there shall be documentation in the resident's record that they were notified and declined the invitation or were unable to attend.
- (2) The assessment shall include consideration of the following:

- (A) medical symptoms that warrant the use of a restraint;
- (B) how the medical symptoms affect the resident;
- (C) when the medical symptoms were first observed;
- (D) how often the symptoms occur;
- (E) alternatives that have been provided and the resident's response; and
- (F) the least restrictive type of physical restraint that would provide safety.

- (3) The care plan shall include at least the following:
 - (A) alternatives and how the alternatives will be used prior to restraint use and in an effort to reduce restraint time once the resident is restrained;
 - (B) the type of restraint to be used; and
 - (C) care to be provided to the resident during the time the resident is restrained.

(d) The following applies to the restraint order as required in Subparagraph (a)(2) of this Rule:

- (1) The order shall indicate:
 - (A) the medical need for the restraint;
 - (B) the type of restraint to be used;
 - (C) the period of time the restraint is to be used; and
 - (D) the time intervals the restraint is to be checked and released, but no longer than every 30 minutes for checks and two hours for releases.
- (2) If the order is obtained from a physician other than the resident's physician, the facility shall notify the resident's physician of the order within seven days.
- (3) The restraint order shall be updated by the resident's physician at least every three months following the initial order.
- (4) If the resident's physician changes, the physician who is to attend the resident shall update and sign the existing order.
- (5) In emergency situations, the administrator or administrator-in-charge shall make the determination relative to the need for a restraint and its type and duration of use until a physician is contacted. Contact shall be made within 24 hours and documented in the resident's record.
- (6) The restraint order shall be kept in the resident's record.

(e) All instances of the use of physical restraints and alternatives shall be documented by the facility in the resident's record and include at least the following:

- (1) restraint alternatives that were provided and the resident's response;
- (2) type of restraint that was used;
- (3) medical symptoms warranting restraint use;

- (4) the time the restraint was applied and the duration of restraint use;
 - (5) care that was provided to the resident during restraint use; and
 - (6) behavior of the resident during restraint use.
- (f) Physical restraints shall be applied only by staff who have received training according to Rule .0506 of this Subchapter and been validated on restraint use according to Rule .0903 of this Subchapter.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

SUBCHAPTER 13G - LICENSING OF FAMILY CARE HOMES

SECTION .0500 - STAFF ORIENTATION, TRAINING, COMPETENCY AND CONTINUING EDUCATION

10A NCAC 13G .0509 FOOD SERVICE ORIENTATION
 The staff person in charge of the preparation and serving of food shall complete a food service orientation program established by the Department or an equivalent within 30 days of hire for those staff hired on or after the effective date of this Rule. The orientation program is available on the internet website, <http://facility-services.state.nc.us/gcpage.htm>, or it is available at the cost of printing and mailing from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

SECTION .1200 - POLICIES, RECORDS AND REPORTS

10A NCAC 13G .1211 WRITTEN POLICIES AND PROCEDURES

- (a) The facility shall ensure the development of written policies and procedures, that comply with applicable rules of this Subchapter, on the following:
- (1) ordering, receiving, storage, discontinuation, disposition, administration, including self-administration, and monitoring the resident's reaction to medications, as developed in consultation with a licensed health professional who is authorized to dispense or administer medications;
 - (2) use of alternatives to physical restraints and the care of residents who are physically restrained, as developed in consultation with a registered nurse;
 - (3) accident, fire safety and emergency procedures;
 - (4) infection control;
 - (5) refunds;
 - (6) missing resident;

- (7) identification and supervision of wandering residents;
- (8) management of physical aggression or assault by a resident;
- (9) handling of resident grievances;
- (10) visitation in the facility by guests; and
- (11) smoking and alcohol use.

- (b) In addition to other training and orientation requirements in this Subchapter, all staff shall be trained within 30 days of hire on the policies and procedures listed as Subparagraphs (3), (4), (6), (7), (8), (9), (10) and (11) in Paragraph (a) of this Rule.
- (c) Policies and procedures on which staff have been trained shall be available within the facility to staff for their reference.

History Note: Authority 131D -2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

SECTION .1300 - USE OF PHYSICAL RESTRAINTS AND ALTERNATIVES

10A NCAC 13G .1301 USE OF PHYSICAL RESTRAINTS AND ALTERNATIVES

(a) The facility shall assure that a physical restraint, any physical or mechanical device attached to or adjacent to the resident's body that the resident cannot remove easily and which restricts freedom of movement or normal access to one's body, shall be:

- (1) used only in those circumstances in which the resident has medical symptoms that warrant the use of restraints and not for discipline or convenience purposes;
- (2) used only with a written order from a physician except in emergencies, according to Paragraph (e) of this Rule;
- (3) the least restrictive restraint that would provide safety;
- (4) used only after alternatives that would provide safety to the resident and prevent a potential decline in the resident's functioning have been tried and documented in the resident's record;
- (5) used only after an assessment and care planning process has been completed, except in emergencies, according to Paragraph (d) of this Rule;
- (6) applied correctly according to the manufacturer's instructions and the physician's order; and
- (7) used in conjunction with alternatives in an effort to reduce restraint use.

Note: Bed rails are restraints when used to keep a resident from voluntarily getting out of bed as opposed to enhancing mobility of the resident while in bed. Examples of restraint alternatives are: providing restorative care to enhance abilities to stand safely and walk, providing a device that monitors attempts to rise from chair or bed, placing the bed lower to the floor, providing frequent staff monitoring with periodic assistance in toileting and ambulation and offering fluids, providing activities, controlling pain, providing an environment with minimal noise

and confusion, and providing supportive devices such as wedge cushions.

(b) The facility shall ask the resident or resident's legal representative if the resident may be restrained based on an order from the resident's physician. The facility shall inform the resident or legal representative of the reason for the request and the benefits of restraint use and the negative outcomes and alternatives to restraint use. The resident or the resident's legal representative may accept or refuse restraints based on the information provided. Documentation shall consist of a statement signed by the resident or the resident's legal representative indicating the signer has been informed, the signer's acceptance or refusal of restraint use and, if accepted, the type of restraint to be used and the medical indicators for restraint use.

Note: Potential negative outcomes of restraint use include incontinence, decreased range of motion, decreased ability to ambulate, increased risk of pressure ulcers, symptoms of withdrawal or depression and reduced social contact.

(c) In addition to the requirements in Rules 13F .0801, .0802 and .0903 of this Subchapter regarding assessments and care planning, the resident assessment and care planning prior to application of restraints as required in Subparagraph (a)(5) of this Rule shall meet the following requirements:

- (1) The assessment and care planning shall be implemented through a team process with the team consisting of at least a staff supervisor or personal care aide, a registered nurse, the resident and the resident's responsible person or legal representative. If the resident or resident's responsible person or legal representative is unable to participate, there shall be documentation in the resident's record that they were notified and declined the invitation or were unable to attend.
- (2) The assessment shall include consideration of the following:
 - (A) medical symptoms that warrant the use of a restraint;
 - (B) how the medical symptoms affect the resident;
 - (C) when the medical symptoms were first observed;
 - (D) how often the symptoms occur;
 - (E) alternatives that have been provided and the resident's response; and
 - (F) the least restrictive type of physical restraint that would provide safety.
- (3) The care plan shall include at least the following:
 - (A) alternatives and how the alternatives will be used prior to restraint use and in an effort to reduce restraint time once the resident is restrained;
 - (B) the type of restraint to be used; and
 - (C) care to be provided to the resident during the time the resident is restrained.

(d) The following applies to the restraint order as required in Subparagraph (a)(2) of this Rule:

- (1) The order shall indicate:
 - (A) the medical need for the restraint;
 - (B) the type of restraint to be used;
 - (C) the period of time the restraint is to be used; and
 - (D) the time intervals the restraint is to be checked and released, but no longer than every 30 minutes for checks and two hours for releases.
- (2) If the order is obtained from a physician other than the resident's physician, the facility shall notify the resident's physician of the order within seven days.
- (3) The restraint order shall be updated by the resident's physician at least every three months following the initial order.
- (4) If the resident's physician changes, the physician who is to attend the resident shall update and sign the existing order.
- (5) In emergency situations, the administrator or administrator-in-charge shall make the determination relative to the need for a restraint and its type and duration of use until a physician is contacted. Contact shall be made within 24 hours and documented in the resident's record.
- (6) The restraint order shall be kept in the resident's record.

(e) All instances of the use of physical restraints and alternatives shall be documented by the facility in the resident's record and include at least the following:

- (1) restraint alternatives that were provided and the resident's response;
- (2) type of restraint that was used;
- (3) medical symptoms warranting restraint use;
- (4) the time the restraint was applied and the duration of restraint use;
- (5) care that was provided to the resident during restraint use; and
- (6) behavior of the resident during restraint use.

(f) Physical restraints shall be applied only by staff who have received training according to Rule .0506 of this Subchapter and been validated on restraint use according to Rule .0903 of this Subchapter.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284; Temporary Adoption Eff. July 1, 2004.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: *Coastal Resources Commission*

Rule Citation: *15A NCAC 07H .2701-.2705*

Effective Date: June 15, 2004

Date Approved by the Rules Review Commission: May 20, 2004

Reason for Action: *The 2003 session of the NC General Assembly approved House Bill 1028 authorizing the Coastal Resources Commission (CRC) to adopt both temporary and permanent rules to establish a general permit for the construction of riprap sills for the protection of existing, created or restored wetlands.*

CHAPTER 07 - COASTAL MANAGEMENT

SUBCHAPTER 07H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .2700 – GENERAL PERMIT FOR THE CONSTRUCTION OF RIPRAP SILLS FOR WETLAND ENHANCEMENT IN ESTUARINE AND PUBLIC TRUST WATERS

15A NCAC 07H .2701 PURPOSE

A general permit pursuant to this Section shall allow for the construction of riprap sills for wetland enhancement in estuarine and public trust waters according to the authority provided in Subchapter 07J, Section .1100 and according to the rules in this Section.

History Note: Authority G.S. 113A-107; 113A-118.1; Temporary Adoption Eff. June 15, 2004.

15A NCAC 07H .2702 APPROVAL PROCEDURES

(a) The applicant shall contact the Division of Coastal Management and complete an application form requesting approval for development. The applicant shall provide information on site location, dimensions of the project area, and applicant name and address.

(b) The applicant shall provide:

- (1) confirmation that a written statement has been obtained signed by the adjacent riparian property owners indicating that they have no objections to the proposed work; or
- (2) confirmation that the adjacent riparian property owners have been notified by certified mail of the proposed work. Such notice shall instruct adjacent property owners to provide any comments on the proposed development in writing for consideration by permitting officials to the Division of Coastal Management within 10 days of receipt of the notice, and, indicate that no response will be interpreted as no objection.

(c) DCM staff shall review all comments and determine, based on their relevance to the potential impacts of the proposed project, if the proposed project can be approved by a General Permit.

(d) No work shall begin until an on-site meeting is held with the applicant and appropriate Division of Coastal Management

representative. Written authorization to proceed with the proposed development shall be issued by the Division of Coastal Management. Construction of the project shall start within 90 days of the issuance date of this permit or the general authorization expires and it shall be necessary to re-examine the proposed development to determine if the general authorization can be reissued.

History Note: Authority G.S. 113A-107; 113A-118.1; Temporary Adoption Eff. June 15, 2004.

15A NCAC 07H .2703 PERMIT FEE

The applicant shall pay a permit fee of one hundred dollars (\$100.00). This fee shall be paid by check or money order made payable to the Department.

History Note: Authority G.S. 113A-107; 113A-118.1; 113A-119.1; Temporary Adoption Eff. June 15, 2004.

15A NCAC 07H .2704 GENERAL CONDITIONS

(a) Structures authorized by a permit issued pursuant to this Section shall be riprap or stone sills conforming to the standards in this Rule.

(b) Individuals shall allow authorized representatives of the Department of Environment and Natural Resources (DENR) to make periodic inspections at any time deemed necessary in order to insure that the activity being performed under authority of this general permit is in accordance with the terms and conditions prescribed in this Rule.

(c) The placement of riprap or stone sills authorized in this Rule shall not interfere with the established or traditional rights of navigation of the waters by the public.

(d) This permit shall not be applicable to proposed construction where the Department has determined, based on an initial review of the application, that notice and review pursuant to G.S. 113A-119 is necessary because there are unresolved questions concerning the proposed activity's impact on adjoining properties or on water quality; air quality; coastal wetlands; cultural or historic sites; wildlife; fisheries resources; or public trust rights.

(e) This permit does not eliminate the need to obtain any other required state, local, or federal authorization.

(f) Development carried out under this permit shall be consistent with all local requirements, AEC Guidelines, and local land use plans current at the time of authorization.

History Note: Authority G.S. 113A-107; 113A-118.1; Temporary Adoption Eff. June 15, 2004.

15A NCAC 07H .2705 SPECIFIC CONDITIONS

(a) A general permit issued pursuant to this Section shall only be applicable for the construction of riprap or stone sill structures built in conjunction with existing, created or restored wetlands.

(b) This general permit shall not apply within the Ocean Hazard System Areas of Environmental Concern (AEC) or waters adjacent to these AEC's with the exception of those portions of shoreline within the Inlet Hazard Area AEC that feature

characteristics of Estuarine Shorelines. Such features include the presence of wetland vegetation, lower wave energy, and lower erosion rates than in the adjoining Ocean Erodible Area.

(c) On shorelines where no fill is proposed, the landward edge of the sill shall be positioned no more than five feet waterward of the waterward depth contour of locally growing wetlands or to mid-tide depth contour, whichever is greater. Where no wetlands exist, in no case shall the landward edge on the sill be positioned greater than 30 feet waterward of the mean high water or normal high water line.

(d) On shorelines where fill is proposed, the landward edge of the sill shall be positioned no more than 30 feet waterward of the existing mean high water or normal high water line.

(e) The permittee shall maintain the authorized sill and existing or planted wetlands in conformance with the terms and conditions of this permit, or the remaining sill structures shall be removed within 90 days of notification from the Division of Coastal Management.

(f) The height of sills shall not exceed six inches above mean high water, normal water level, or the height of the adjacent wetland substrate, whichever is greater.

(g) Sill construction authorized by this permit shall be limited to a maximum length of 500 feet.

(h) Sills shall be porous to allow water circulation through the structure.

(i) The sills shall have at least one five-foot drop-down or opening every 100 feet and may be staggered overlapped or left open as long as the five-foot drop-down or separation between sections is maintained. Overlapping sections shall not overlap more than 10 feet. Deviation from these drop-down requirements shall be allowable following coordination with the N.C. Division of Marine Fisheries and the National Marine Fisheries Service.

(j) The riprap structure shall not exceed a slope of a one foot rise over a two foot horizontal distance and a minimum slope of a one and a half foot rise over a one foot horizontal distance. The width of the structure on the bottom shall be no wider than 15 feet.

(k) For the purpose of protection of public trust rights, fill waterward of the existing mean high water line shall not be placed higher than the mean high water elevation.

(l) The permittee shall not claim title to any lands raised above the mean high or normal water levels as a result of filling or accretion.

(m) For water bodies more narrow than 150 feet, the structures shall not be positioned offshore more than one sixth (1/6) the width of the waterbody.

(n) The sill shall not be within a navigation channel marked or maintained by a state or federal agency.

(o) The sill shall not interfere with leases or franchises for shellfish culture.

(p) All structures shall have a minimum setback distance of 15 feet between any parts of the structure and the adjacent property owner's riparian access corridor, unless either a signed waiver statement is obtained from the adjacent property owner or the portion of the structure within 15 feet of the adjacent riparian access corridor is located no more than 25 feet from the mean high or normal water level. The riparian access corridor line is determined by drawing a line parallel to the channel, then

drawing a line perpendicular to the channel line that intersects with the shore at the point where the upland property line meets the water's edge.

(q) The sill shall not interfere with the exercise of riparian rights by adjacent property owners, including access to navigation channels from piers, or other means of access.

(r) Sills shall be marked at 50-foot intervals with yellow reflectors extending at least three feet above mean high water level.

(s) If the crossing of wetlands with mechanized construction equipment is necessary, temporary construction mats shall be utilized for the areas to be crossed. The temporary mats shall be removed immediately upon completion of the construction of the riprap structure.

(t) Sedimentation and erosion control measures shall be implemented to ensure that eroded materials do not enter adjacent wetlands or waters.

(u) No excavation or filling of any native submerged aquatic vegetation is authorized by this general permit.

(v) No excavation of the shallow water bottom or any wetland is authorized by this general permit.

(w) No more than 100 square feet of wetlands may be filled as a result of the authorized activity.

(x) Backfilling of sill structures may only be utilized for the purpose of creating a suitable substrate for the establishment or reestablishment of wetlands. Only clean sand fill material may be utilized.

(y) The riprap material shall consist of clean rock or masonry materials such as granite or broken concrete. Riprap material shall be free of loose sediment or any pollutant. The structures shall be of sufficient size and slope to prevent its movement from the site by wave or current action.

(z) If one or more contiguous acre of property is to be graded, excavated or filled, an erosion and sedimentation control plan shall be filed with the Division of Land Resources, Land Quality Section, or appropriate government having jurisdiction. The plan must be approved prior to commencing the land-disturbing activity.

(aa) In order to ensure that no adverse impacts occur to important fisheries resources, the Division of Marine Fisheries shall review and concur with the location and design of the proposed project prior to the issuance of this general permit.

(bb) Prior to the issuance of this general permit, Division staff shall coordinate with the Department of Administration's State Property Office to determine whether or not an easement will be required for the proposed activity.

(cc) Following issuance of this general permit, the permittee shall contact the N.C. Division of Water Quality and the U.S. Army Corps of Engineers to determine any additional permit requirements. Any such required permits, or a certification from the appropriate agency(s) that no additional permits are required, shall be obtained and copies provided to the Division of Coastal Management prior to the initiation of any development activities authorized by this permit.

History Note: Authority G.S. 113A-107; 113A-118.1; Temporary Adoption Eff. June 15, 2004.

This Section contains information for the meeting of the Rules Review Commission on Thursday, June 17, 2004, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments by Friday, June 11, 2004 to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Jim R. Funderburke - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Thomas Hilliard, III
Robert Saunders
Jeffrey P. Gray

Appointed by House

Jennie J. Hayman - Chairman
Graham Bell
Lee Settle
Dana E. Simpson
Dr. John Tart

RULES REVIEW COMMISSION MEETING DATES

June 17, 2004 July 22, 2004
August 19, 2004 September 16, 2004
October 21, 2004 November 18, 2004
December 16, 2004

RULES REVIEW COMMISSION

MAY 20, 2004

MINUTES

The Rules Review Commission met on Thursday morning, May 20, 2004, in the office of the Rules Review Commission, Suite 159 of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were Jennie Hayman, Graham Bell, Jim Funderburk, Jeffrey Gray, Thomas Hilliard, Robert Saunders, Dana Simpson, and John Tart. Staff members present were: Joseph DeLuca, Staff Director; Bobby Bryan, Rules Review Specialist; and Lisa Johnson, Administrative Assistant.

APPROVAL OF MINUTES

The meeting was called to order at 10:08 a.m. with Commissioner Hayman presiding. Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the April 15, 2004, meeting. The minutes were approved as written.

The Rules Review Commission went into executive session at 10:10 a.m. to discuss the lawsuits against the Rules Review Commission.

The Commission came out of executive session at 11:10 a.m. The meeting was moved to the Main Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. The meeting was reconvened at 11:18 a.m.

John Randall	Attorney/Speech Pathologists and Audiologists
Nadine Pfeiffer	DFS
Claud Whitener	NC Cemetery Commission
Lonnie Christopher	NC Banking Commission
Ha Nguyen	NC Banking Commission
Cindy Kornegay	DMH/DD/SAS
Peggy Balak	DMH/DD/SAS
Shealy Thompson	DMH/DD/SAS
Tom West	Poyner & Spruill
Cindy Kincaid	Ombudsman
Torrey McLean	DHHS
David Mickey	Blue Ridge Environmental Defense League
Melissa Fiffer	Blue Ridge Environmental Defense League
Susan Grayson	DENR

Thomas Allen	DENR/DAQ
Lisa Martin	NC Home Builders Association
Denise Shin	DENR
Kristi Nixon	DENR
Elizabeth Kountis	DENR
Doug Barrick	DFS
Julian Council	DMV
Sharon Matthews	DMV/DOT
Steve Hill	DENR
Melissa Miles	ORDRHS
Elizabeth Freeman-Lambar	ORDRHS
Denise Stanford	Attorney/Pharmacy Board
Jerry Cooper	NCALA
Susan Collins	DMH/DD/SAS
Daniel Garner	NC Banking Commission
Lou Wilson	NC Association of Long Term Care Facilities
Dedra Alston	DENR
David McLeod	Department of Agriculture

FOLLOW-UP MATTERS

10A NCAC 13F .0213; .0504; .0507; .0702; .0905; .0906; .1206: Medical Care Commission – The Commission approved the rewritten rules submitted by the agency.

10A NCAC 13G .0204; .0504; .0507; .0705: Medical Care Commission – The Commission approved the rewritten rules submitted by the agency.

12 NCAC 7D .0707: NC Private Protective Services Board – The Commission approved the rewritten rule submitted by the agency. Commissioner Gray did not vote on or participate in any discussion concerning the NC Private Protective Services Board.

15A NCAC 2D .0101; .0521; .0538; .0933; .1404; .1409; .1416; .1417; .1418; .1419; .1422: Environmental Management Commission – The Commission approved the rewritten rules submitted by the agency.

15A NCAC 2D .0543: Environmental Management Commission – No response has been received from OSBM and no action was taken.

15A NCAC 2D .0902: Environmental Management Commission – The Commission objected to this rule due to ambiguity. The first problem comes from the fact that many of the rules referred to in (a) – (c) contain the same statements of applicability. There is always the chance that one of these rules may be amended without amending the corresponding reference here. That should be avoided. The other possible problem is that once you start looking at those rules or even paragraphs within this rule, then you start wondering whether there is some hidden meaning or application because of the way the rules are structured. For instance (a) in this rule specifies that certain rules apply statewide (and of course there is nothing in those cited rules to create any question of whether those rules apply statewide, so this rule should be unnecessary). Paragraph (d)(1) of this rule states that the rules of this section apply to Mecklenburg and Gaston Counties. Isn't that already implied by (a), since those two counties are within the meaning of "statewide"? Making it potentially more confusing, (d) begins by stating "with the exceptions stated in Paragraphs (a)," How is (a), stating that these rules apply statewide, an exception as stated in (d), if (d)(1) continues to apply to two counties within the state? Along the same lines (h), if it actually means what it states, that "this section [.0900] does not apply to [three named emission sources], then it seems that this paragraph should be a separate rule entirely to draw attention to itself. There are numerous other examples of how one could start to question why this rule is written the way it is. It is unclear in the context of all the other rules stating the application of 2D .0900 rules and needs to be rewritten to address a possible confusion before it actually happens.

15A NCAC 2Q .0806; .0809: Environmental Management Commission – The Commission approved the rules submitted by the agency.

15A NCAC 10B .0409: Wildlife Resources Commission – The Commission approved the rewritten rule submitted by the agency.

15A NCAC 10F .0333: Wildlife Resources Commission – The Commission approved the rewritten rule submitted by the agency.

15A NCAC 18A .3506; .3508; .3519: Commission for Health Services – The Commission approved rewritten rules .3506 and .3508 submitted by the agency. Rule .3519 was withdrawn by the agency.

21 NCAC 46 .1604; .1806; .2504: Pharmacy Board – The Commission approved the rewritten rules submitted by the agency. Commissioner Hayman did not vote or participate in any discussion concerning the Pharmacy Board rules. Commissioner Funderburk presided over the review of the Pharmacy Board rules.

21 NCAC 46 .2508: Pharmacy Board – The Commission objected to the Rule based on lack of authority and ambiguity. There is no authority for the Board to require a pharmacy to or forbid a pharmacy from taking the actions set out in this rule. Arguably this might fall under adopting "rules governing the filling of ... prescription orders" as covered by 90-85.32(a). However, this statute does not specifically allow rules directed at pharmacies, as this rule is. And the other authority cited, 90-85.6, refers to a specific grant of authority, both in the Pharmacy Board's enabling statutes and any other authority granted: The Board shall have all of the duties,

powers and authorities specifically granted by and necessary for the enforcement of this Article, as well as any other duties, powers and authorities that may be granted from time to time by other appropriate statutes. This rule could be rewritten to require a pharmacist to or prohibit a pharmacist from taking the actions set out in this rule. In addition the rule is unclear as to what is meant by "directly or indirectly" prohibiting or restricting a patient's choice of providers. It is unclear to me how a pharmacy could directly restrict a patient's choice, since a patient is generally free to choose another pharmacy. It is unclear what would constitute an "indirect" prohibition or restriction.

21 NCAC 46 .2510: Pharmacy Board – No rewritten rule was received therefore no action was taken.

21 NCAC 64 .0212; .0213: NC Examiners for Speech & Language Pathologists & Audiologists– The Commission objected to these rules based on the same ambiguity in each rule. In .0212(f) and .0213(d) it is unclear to what extent the audiologist or pathologist is required to provide on-site supervision or the standards used to determine what is acceptable supervision. It is impossible to understand from the rule what the supervisor is expected to do in terms of supervising on-site.

23 NCAC 2D .0202: NC State Board of Community Colleges – No rewritten rule was received therefore no action was taken.

25 NCAC 1D .0518; .1402: State Personnel Commission – No rewritten rules were received therefore no action was taken.

25 NCAC 1E .2005: State Personnel Commission – No rewritten rule was received therefore no action was taken.

LOG OF FILINGS

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

2 NCAC 34 .0605: NC Structural Pest Control Committee – The Commission objected to this rule based on lack of statutory authority. There is no authority cited to require a pest control operator to offer a warranty of any sort as required by (d)(15), page 3 line 5. This goes beyond requiring that the operator's communications with the owner or builder be in writing or otherwise set out what work is done or how it was done. It goes beyond specifying in writing whether or not a warranty is offered. It requires the operator to warrant something, and there is no authority cited to require that.

15A NCAC 2D .1904: Environmental Management Commission – The Commission objected to this rule due to ambiguity. In (b)(6), it is not clear who is to certify on-site visible emissions readers.

15A NCAC 2Q .0702; .0711: Environmental Management Commission - The Commission approved these rules. Ten letters requesting that the rules be subject to legislative review were received after the meeting.

15A NCAC 2Q .0706: Environmental Management Commission – The Commission objected to the rule due to ambiguity. In (c), it is not clear what toxic air pollutants have been identified by the Director as significantly increasing the risk to human health, or conversely, what standards the Director is to use in identifying the pollutants. Ten letters requesting that the rules be subject to legislative review were received after the meeting.

15A NCAC 2Q .0714: Environmental Management Commission - The Commission objected to the rule due to ambiguity. In (b)(1), it is not clear what standards the Director will use in approving estimation methods or factors. Ten letters asking that the rules be subject to legislative review were received after the meeting.

LOG OF FILINGS TEMPORARY RULES

Chairman Hayman presided over the review of the log of temporary rules and all rules were approved unanimously with the exception of Commissioner Bell being opposed to the approval of the Coastal Resources Commission Temporary Rules.

COMMISSION PROCEDURES AND OTHER BUSINESS

The Commission discussed House Bill 1449. Jim Funderburk made a motion to give Mr. DeLuca the discretion to go before the APO Committee and request the bill be changed to read time of meeting rather than date. The motion was approved with Commissioners Bell and Saunders opposed.

The meeting adjourned at 1:10 p.m.

The next meeting of the Commission is Thursday, February 19, 2004 at 10:00 a.m.

Respectfully submitted,
Lisa Johnson

Commission Review/Administrative Rules

Log of Filings (Log #210)

April 21, 2004 through May 20, 2004

DEPARTMENT OF ADMINISTRATION

Responsibility	01 NCAC 41B .0101	Adopt
Scope	01 NCAC 41B .0102	Adopt
Rule Making Authority	01 NCAC 41B .0103	Adopt
Definitions	01 NCAC 41B .0104	Adopt
Reserved for Future Use	01 NCAC 41B .0200	Adopt
Solicitations	01 NCAC 41B .0300	Adopt
North Carolina Products	01 NCAC 41B .0301	Adopt
Solicitation Documents	01 NCAC 41B .0302	Adopt
Treasurer's Cost Estimate of Financing	01 NCAC 41B .0303	Adopt
General Fund Preference	01 NCAC 41B .0304	Adopt
Prohibition on Federal Funds	01 NCAC 41B .0305	Adopt
Advertisement Requirements	01 NCAC 41B .0306	Adopt
Conference/Site Visits	01 NCAC 41B .0307	Adopt
Information Required for Precertification	01 NCAC 41B .0401	Adopt
Precertification Evaluation	01 NCAC 41B .0402	Adopt
Contesting Precertification	01 NCAC 41B .0403	Adopt
Responsibility	01 NCAC 41B .0404	Adopt
Precertified Entity Restriction	01 NCAC 41B .0405	Adopt
Late Offers Modifications or Withdrawals	01 NCAC 41B .0501	Adopt
Extension of Acceptance Time	01 NCAC 41B .0502	Adopt
Error Clarification	01 NCAC 41B .0503	Adopt
Basis for Rejection	01 NCAC 41B .0504	Adopt
Public Record	01 NCAC 41B .0505	Adopt
Guaranteed Energy Savings	01 NCAC 41B .0506	Adopt
Proposal Evaluation	01 NCAC 41B .0507	Adopt
Guaranteed Energy Savings Contracts	01 NCAC 41B .0508	Adopt
Tabulations and Abstracts	01 NCAC 41B .0509	Adopt
Responsibility	01 NCAC 41B .0510	Adopt
Contract Execution	01 NCAC 41B .0511	Adopt
Reserved for Future Use	01 NCAC 41B .0600	Adopt
Office of State Budget and Management Certifi	01 NCAC 41B .0701	Adopt
Office of Treasurer Approval	01 NCAC 41B .0702	Adopt
Reserved for Future Use	01 NCAC 41B .0800	Adopt
Annual Reports and Inspections	01 NCAC 41B .0901	Adopt
CULTURAL RESOURCES, DEPARTMENT OF/N C HISTORICAL COMMISSION		
Scope of Rules and Overview of Statutory Authority	07 NCAC 04R .0909	Amend
Fees for Processing Rehabilitation Certification	07 NCAC 04R .0916	Adopt
Coordination with the Federal Income-Producing His	07 NCAC 04R .0917	Adopt
MEDICAL CARE COMMISSION		
Definitions	10A NCAC 22N .0101	Adopt
Signed Agreements	10A NCAC 22N .0102	Adopt
Definitions	10A NCAC 22N .0201	Adopt
Disclosure of Ownership	10A NCAC 22N .0202	Adopt
Enrollment Restrictions	10A NCAC 22N .0203	Adopt
Definitions	10A NCAC 22N .0301	Adopt
Disclosure of Ownership	10A NCAC 22N .0302	Adopt
Enrollment Restrictions	10A NCAC 22N .0303	Adopt
Definitions	10A NCAC 26E .0102	Amend
Persons Required to Register	10A NCAC 26E .0104	Amend
Separate Registration for Independent Activities	10A NCAC 26E .0105	Amend
Exemption of Individual Practitioners	10A NCAC 26E .0108	Amend
Application Forms Contents Signature	10A NCAC 26E .0111	Amend
Licensure Procedures	10A NCAC 27G .0405	Amend
Medical Services Covered	10A NCAC 43H .0111	Amend
DEPARTMENT OF INSURANCE		
Unsound Condition	11 NCAC 11A .0102	Amend
CPA Workpapers	11 NCAC 11A .0511	Amend
Custody Agreement for Securities and Other Assets	11 NCAC 11B .0152	Adopt
Report of Policyholders Position Mortgage Guaranty	11 NCAC 11C .0407	Adopt

License Steps	11 NCAC 11H .0102	Amend
Information Required During Pre-Incorporation	11 NCAC 14 .0201	Amend
Information Required After Organizational Meeting	11 NCAC 14 .0202	Amend
Power of Attorney for Service of Legal Process	11 NCAC 14 .0416	Amend
Power of Attorney for Sale of Securities	11 NCAC 14 .0417	Amend
Application Forms	11 NCAC 14 .0501	Amend
Authorized Lines of Business for a Foreign Company	11 NCAC 14 .0503	Amend
Foreign Company Must Have Conducted Successful Bus	11 NCAC 14 .0504	Amend
Waivers of Three-Year Net Income Requirement	11 NCAC 14 .0505	Amend
Financial Information Required	11 NCAC 14 .0603	Amend
Deletion From Eligible Company List	11 NCAC 14 .0605	Amend
Purchasing Group Filing Requirements	11 NCAC 14 .0702	Amend
Updates and Amendments to Filings	11 NCAC 14 .0704	Amend
DENR/SOIL AND WATER CONSERVATION COMMISSION		
Definitions for Subchapter 6E	15A NCAC 06E .0102	Amend
Cost Share and Incentive Payments	15A NCAC 06E .0105	Amend
Objectives	15A NCAC 06G .0101	Amend
Eligibility	15A NCAC 06G .0102	Amend
Conservation Plan	15A NCAC 06G .0103	Amend
Approving State Agreements	15A NCAC 06G .0104	Amend
Payment	15A NCAC 06G .0105	Amend
DENR/COMMISSION FOR HEALTH SERVICES		
Pools, Spa's, Hot Tubs	15A NCAC 18A .2532	Amend
NC STATE BOARD OF CHIROPRACTIC EXAMINERS		
Application for Licensure	21 NCAC 10 .0202	Amend
Examination	21 NCAC 10 .0203	Amend
Individual-Study Continuing Education	21 NCAC 10 .0210	Adopt
NC MEDICAL BOARD		
Location	21 NCAC 32A .0101	Amend
Definitions	21 NCAC 32B .0101	Amend
Discarding Application Material	21 NCAC 32B .0102	Amend
Forms	21 NCAC 32B .0103	Amend
Medical Education	21 NCAC 32B .0201	Amend
Certified Photograph and Certification of Graduation	21 NCAC 32B .0204	Amend
Application Forms	21 NCAC 32B .0206	Amend
Letters of Recommendation	21 NCAC 32B .0207	Amend
Examination Fee	21 NCAC 32B .0209	Amend
Required Application Materials	21 NCAC 32B .0210	Amend
Passing Score	21 NCAC 32B .0211	Amend
Examination Times	21 NCAC 32B .0212	Amend
Graduate Medical Education and Training For License	21 NCAC 32B .0213	Amend
Personal Interview	21 NCAC 32B .0214	Amend
Examination Combinations	21 NCAC 32B .0215	Repeal
Medical Education	21 NCAC 32B .0301	Amend
ECFMG Certification	21 NCAC 32B .0302	Amend
Application Forms	21 NCAC 32B .0304	Amend
Examination Basis for Endorsement	21 NCAC 32B .0305	Amend
Letters of Recommendation	21 NCAC 32B .0306	Amend
Certified Photograph and Certification of Graduation	21 NCAC 32B .0307	Amend
Personal Interview	21 NCAC 32B .0309	Amend
Deadline	21 NCAC 32B .0310	Repeal
Endorsement Relations	21 NCAC 32B .0311	Amend
Routine Inquiries	21 NCAC 32B .0312	Amend
Graduate Medical Education and Training	21 NCAC 32B .0313	Amend
Passing Exam Score	21 NCAC 32B .0314	Amend
Ten-Year Qualification	21 NCAC 32B .0315	Amend
Spex Fee	21 NCAC 32B .0316	Repeal
Personal Interview	21 NCAC 32B .0608	Amend
Personal Interview	21 NCAC 32B .0705	Amend

Personal Interview	21 NCAC 32B .0808	Amend
Definitions	21 NCAC 32M .0101	Amend
Scope of Practice	21 NCAC 32M .0102	Amend
Nurse Practitioner Registration	21 NCAC 32M .0103	Adopt
Process for Approval to Practice	21 NCAC 32M .0104	Amend
Education and Certification Requirements for Regis	21 NCAC 32M .0105	Amend
Annual Renewal	21 NCAC 32M .0106	Amend
Continuing Education (CE)	21 NCAC 32M .0107	Amend
Inactive Status	21 NCAC 32M .0108	Amend
Prescribing Authority	21 NCAC 32M .0109	Amend
Quality Assurance Standards for a Collaborative	21 NCAC 32M .0110	Amend
Method of Identification	21 NCAC 32M .0111	Amend
Disciplinary Action	21 NCAC 32M .0112	Amend
Fees	21 NCAC 32M .0115	Amend
Practice During a Disaster	21 NCAC 32M .0116	Amend
NC BOARD OF FUNERAL SERVICES		
Agency Name and Address	21 NCAC 34A .0101	Amend
Purpose of Board	21 NCAC 34A .0102	Amend
Petition for Nomination	21 NCAC 34A .0103	Amend
Voting Records	21 NCAC 34A .0104	Amend
Requests for Promulgation Amendment or Repeal	21 NCAC 34A .0107	Amend
Requests for Declaratory Ruling	21 NCAC 34A .0108	Amend
Administrative Hearing Procedures	21 NCAC 34A .0109	Amend
Form of Subpoena	21 NCAC 34A .0117	Amend
Form of Subpoena to Produce Document or Object	21 NCAC 34A .0118	Amend
Character Affidavit Form	21 NCAC 34A .0122	Amend
Consumer Complaint Form	21 NCAC 34A .0123	Amend
Definitions	21 NCAC 34A .0124	Amend
Complaints Preliminary Determinations	21 NCAC 34A .0126	Amend
Election to Crematory Authority	21 NCAC 34C .0101	Amend
Form of Documents	21 NCAC 34C .0102	Amend
Application Form for Crematory License	21 NCAC 34C .0103	Amend
Crematory License Certificate	21 NCAC 34C .0104	Amend
Crematory Inspection Form	21 NCAC 34C .0105	Amend
Refrigeration	21 NCAC 34C .0202	Amend
Pulverization	21 NCAC 34C .0203	Repeal
Cremation Containers	21 NCAC 34C .0204	Repeal
Labels	21 NCAC 34C .0205	Amend
Authorization to Cremate	21 NCAC 34C .0301	Repeal
Waiver Form	21 NCAC 34C .0302	Amend
Records of Cremation and Delivery	21 NCAC 34C .0303	Amend
Cremation and Delivery Form	21 NCAC 34C .0304	Repeal
Monthly Reports	21 NCAC 34C .0305	Amend
Retention of Records	21 NCAC 34C .0306	Amend
NC BOARD OF NURSING		
Approval and Practice Parameters for Nurse Practitioners	21 NCAC 36 .0227	Amend
NC STATE BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS		
Initial Licensure Fee	21 NCAC 37D .0202	Amend
Required Course	21 NCAC 37D .0303	Amend
Application to Become Administrator-in-training	21 NCAC 37D .0402	Amend
Administrator-In-Training Selection of Preceptor	21 NCAC 37D .0404	Amend
National Exam Application	21 NCAC 37D .0602	Adopt
Subject Areas	21 NCAC 37D .0605	Amend
State Examination Administration	21 NCAC 37D .0703	Amend
Application Process	21 NCAC 37E .0101	Amend
Application Contents	21 NCAC 37E .0102	Amend
Renewal Fee	21 NCAC 37G .0102	Amend
Reinstatement of License	21 NCAC 37G .0301	Amend
Restoration of Lapsed License	21 NCAC 37G .0302	Adopt

RULES REVIEW COMMISSION

Continuing Education Programs of Study	21 NCAC 37H .0102	Amend
STATE PERSONNEL COMMISSION		
Accommodating Request for Access to Public Service	25 NCAC 02 .0101	Adopt
Dispute Resolution Process	25 NCAC 02 .0201	Adopt

AGENDA
RULES REVIEW COMMISSION
June 17, 2004

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow Up Matters
 - A. NC Structural Pest Control Committee – 2 NCAC 34 .0605 (DeLuca)
 - B. Environmental Management Commission – 15A NCAC 2D .0543 (DeLuca)
 - C. Environmental Management Commission – 15A NCAC 2D .0902 (DeLuca)
 - D. Environmental Management Commission – 15A NCAC 2D .1904 (Bryan & DeLuca)
 - E. Environmental Management Commission – 15A NCAC 2Q .0706; .0714 (Bryan & DeLuca)
 - F. Pharmacy Board – 21 NCAC 46 .2508 (DeLuca)
 - G. Pharmacy Board – 21 NCAC 46 .2510 (DeLuca)
 - H. Examiners for Speech and Language Pathologists & Audiologists – 21 NCAC 64 .0212; .0213 (DeLuca)
 - I. NC State Board of Community Colleges – 23 NCAC 2D .0202 (DeLuca)
 - J. State Personnel Commission – 25 NCAC 1D .0518; .1402 (DeLuca)
 - K. State Personnel Commission – 25 NCAC 1I .2005 (DeLuca)
- IV. Review of Rules (Log Report #210)
- V. Review of Temporary Rules
- VI. Commission Business
- VII. Next meeting: July 22, 2004

CONTESTED CASE DECISIONS

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

RULES DECLARED VOID

04 NCAC 02S .0212 CONSUMPTION: INTOXICATION BY PERMITTEE PROHIBITED
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge James L. Conner, II declared 04 NCAC 02S .0212(b) void as applied in NC Alcoholic Beverage Control Commission v. Midnight Sun Investments, Inc. t/a Tiki Cabaret (03 ABC 1732).

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).

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>				
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 LLLPH Inc T/A Tsunami Sportsbar & Grill, 947 Carter Dr, Suite 4, Calabash, NC 28467	03 ABC 1530	Conner	02/05/04	
ABC Commission v. Erick Salgado,T/A Confety's 123 2613 Lee Avenue Sanford, NC 27330	03 ABC 2342	Mann	04/13/04	
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	
ABC Commission v. Jus Imagine, LLC, T/A Imagine	04 ABC 0173	Gray	03/31/04	
ABC Commission v. Raleigh Bryce Olive T/A Olives Cash Svc Ctr	04 ABC 0174	Gray	03/22/04	
<u>MEDICAL BOARD</u>				
NC Medical Board v. Miles James Jones	03 BME 1338	Elkins	03/26/04	18:22 NCR 2063
<u>AGRICULTURE</u>				
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
<u>CRIME CONTROL AND PUBLIC SAFETY</u>				
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	
Dolores Chavis v. NC Crime Victim Compensation Commission	03 CPS 0359	Conner	03/18/04	18:22 NCR 2067
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	

CONTESTED CASE DECISIONS

Frances H Abegg v Bryan E Beatty, Sec DCCPS	03 CPS 1359	Gray	01/23/04	
James L. Dominick Jr. v. Victims Compensation Commission	03 CPS 1394	Mann	04/29/04	
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A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions.

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Tammy Lynn Redmon v. Sheriffs' Educ. & Trng. Stds. Comm	03 DOJ 1245 ¹⁴	Gray	05/05/04	
Robert Lee Way v. Sheriffs' Educ. & Trng Stds. Comm.	03 DOJ 1263	Chess	12/08/03	
Charles D Metters, Jr. v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 1471	Chess	12/09/03	
Garry Lamont Lavender v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 1642	Chess	01/13/04	
Shelton W. Belch v. Sheriffs' Educ. & Training Standards Comm.	03 DOJ 1701	Lassiter	04/06/04	
Michael Dewain Summerskill v. Sheriffs' Educ. & Training Stds. Comm.	03 DOJ 1790	Overby	05/06/04	
Emmett Hamilton Barnes, Jr. v. Sheriffs' Educ. & Training Stds. Comm.	03 DOJ 1880	Lassiter	05/05/04	
Damon Cunningham v. Dept of Justice, Company Police Program	03 DOJ 2112	Lassiter	01/23/04	
Joseph V. Milligan v. Sheriffs' Educ & Training Standards Comm.	03 DOJ 2424	Morrison	03/19/04	

DEPARTMENT OF STATE TREASURER

Burton L. Russell v. Dept. of State Treasurer	03 DST 1715	Lassiter	04/05/04	18:22 NCR 2070
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DEPARTMENT OF TRANSPORTATION

Chris Azar v. Department of Transportation	03 DOT 1345	Morrison	09/08/03	
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DEPARTMENT OF STATE TREASURER

Shirlyn D. Brickhouse v. Dept. of St. Treasurer, Ret. Sys. Div.	02 DST 2315	Chess	06/03/03	
J W Walton v DST, Retirement Systems Division	03 DST 0933	Gray	01/30/04	18:17 NCR 1578

DEPARTMENT OF PUBLIC INSTRUCTION

Robert Andrew Bartlett Sr. v. Dept. of Public Instruction	00 EDC 1306	Gray	08/04/03	
Mary Margaret Davis v Dept of Public Instruction	02 EDC 0155	Gray	12/19/03	
Charles Wordsworth v. State Board of Education	02 EDC 0572	Lassiter	10/17/03	

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Charles Eugene Smith v. Department of Public Instruction	02 EDC 1082	Mann	05/26/03	
Catherine Lockley v. Weldon High School Principal Mr. David Jones Exceptional Program District	04 EDC 0144	Lassiter	04/28/04	
<u>ENVIRONMENT AND NATURAL RESOURCES</u>				
C B Roberson, Inc & Southside Oil Co, Inc v Env Mgmt Commission	95 EHR 0274 ¹²	Gray	02/04/04	
C B Roberson, Inc & Southside Oil Co, Inc v Env Mgmt Commission	95 EHR 0275 ¹²	Gray	02/04/04	
C B Roberson, Inc & Southside Oil Co, Inc v Env Mgmt Commission	95 EHR 0276 ¹²	Gray	02/04/04	
C B Roberson, Inc & Southside Oil Co, Inc v Env Mgmt Commission	95 EHR 0277 ¹²	Gray	02/04/04	
C B Roberson, Inc & Southside Oil Co, Inc v Env Mgmt Commission	95 EHR 0278 ¹²	Gray	02/04/04	
Larry E. Sadler v. DENR	00 EHR 1322	Gray	07/02/03	
Lester Hill v. Person Co. Health Dept., DENR	00 EHR 1392	Gray	05/29/03	
John Burr v. Health Department, Mecklenburg County	01 EHR 1204	Gray	05/28/03	
Richard S Pacula v. CAMA-Coastal Area Mgmt. Assoc.	01 EHR 2269 ¹	Chess	05/14/03	
Rosa & Eddie Brame v. DENR	02 EHR 0319	Wade	06/27/03	
Trafalgar Properties LLC v. County of Durham	03 EHR 0630	Wade	07/18/03	
Gerald Max Toney and Lynn N. Toney v. DENR (McDowell Co.)	02 EHR 0887	Mann	05/28/03	
Forest Sound Homeowners Assoc, James P Hynes, Pres. V. DENR, Div. of Coastal Management	02 EHR 1078	Wade	06/09/03	
Richard S Pacula v. CAMA-Coastal Area Mgmt. Assoc.	02 EHR 1119 ¹	Chess	05/14/03	
James Odom Jr. v. Dept of Public Health	02 EHR 1152	Gray	03/31/04	
Raphael J Scharf & wife Guylene Scharf v. DENR	02 EHR 1155	Gray	11/24/03	
Former Center Mart, Joe Fred Ledbetter v. DENR, Div. of Waste Mgmt.	02 EHR 1302	Conner	05/29/03	
Raleigh-Durham Airport Authority v DENR, Div. of Water Quality	02 EHR 1648	Gray	12/19/03	
Lee Roy Smyre v. DENR, Div. of Water Quality	02 EHR 1509	Wade	09/05/03	
Murphy's All Land Dev Inc d/b/a Emerald Cove Town homes at Wells Lake v. DENR	02 EHR 1735	Conner	07/22/03	
Glenn Sasser v. DENR, Division of Coastal Management	02 EHR 1794	Morrison	08/28/03	18:07 NCR 485
Michael E Hendrix v. Caldwell Co. Dept of Environmental Health	03 EHR 0006	Gray	07/02/03	
Lawndale Service Ctr, Inc. C Valley v. DENR	03 EHR 0016	Lassiter	06/05/03	
Daniel W Bulla III v. Env. Health Section Stokes Co Health Dept.	03 EHR 0156	Conner	09/11/03	
Nash-Rocky Mt Schools, Mark Strickland v DENR, Div of Wtr Quality	03 EHR 0242	Lassiter	10/30/03	
Nash-Rocky Mt Schools, Mark Strickland v DENR, Div of Wtr Quality	03 EHR 0242 ⁶	Lassiter	10/30/03	
Nash-Rocky Mt Schools, Mark Strickland v DENR, Div of Wtr Quality	03 EHR 0254 ⁶	Lassiter	10/30/03	
Alliance for Legal Action, Inc, Piedmont Quality of Life Coalition (an uninc assoc) Alberta Anderson, Cameron Anderson, Jean Black Richard Black, Walter S Druce, Ron Goga, Gil Happel, Carol Hoppe, Michael Hoppe, Patricia Nussbaum, Christine Peeler, Laura Pollak, Randall Schultz, Roch Smith Jr, Vassilia Smith v. Water Quality Comm, Env Mgmt Comm and Piedmont Triad Airport Authority	03 EHR 0345	Gray	01/08/04	
Robert Calvin Wyatt Jr, Calvin Wyatt v. DENR	03 EHR 0535	Wade	07/31/03	
Charles Wakild/Susan Wakild v DENR, Div. Coastal Mgmt/Rick Gray	03 EHR 0663	Morrison	12/09/03	
Pacemaker Leasing Co v. DENR	03 EHR 0711	Conner	09/10/03	
Curtis Carney v. Pitt Co Health Dept., Env. Health Div.	03 EHR 0766	Conner	07/25/03	
J B Hooper v DENR	03 EHR 0876	Lassiter	10/22/03	
W E Ormond v DENR, Div of Waste Management	03 EHR 0883	Gray	01/21/04	
Danny L Ottaway v. DENR, Div. of Air Quality	03 EHR 0948	Gray	08/15/03	
Robert L Shepard v. Alamance Co. Health Board	03 EHR 0949	Gray	07/30/03	
Lorraine E. Caracci v. Nash Co. Health Dept. Env. Health	03 EHR 0986	Gray	11/26/03	
Megan Powell v. DENR	03 EHR 1071	Lassiter	08/18/03	
Redditt Alexander, Ida L Alexander v. Co. of Durham, Eng. Dept.	03 EHR 1074	Morrison	07/31/03	
Robert A Valois v. Coastal Resources Commission	03 EHR 1125	Elkins	11/18/03	
St. Paul's Lutheran Church v. DENR	03 EHR 1151	Morrison	10/01/03	
Quible & Assoc PC; Joseph S Lassiter agent for Wilma M Midgett v. DENR, Div of Coastal Management	03 EHR 1193	Elkins	11/06/03	
Connell E Purvis v DENR, Div of Marine Fisheries	03 EHR 1228	Elkins	11/06/03	
Bobby Leathers v. DENR	03 EHR 1722	Lassiter	04/27/04	
Jerry B Lytton v. Mecklenburg County Health Department	03 EHR 1850	Morrison	12/29/03	
In the Matter of Willie Sloan v DENR	03 EHR 1927	Elkins	02/13/04	
Donnie O. Lewis v. Div of Coastal Management	03 EHR 2251	Gray	03/31/04	
Kenneth L Owen v. DENR	03 EHR 2276	Wade	03/12/04	
Philip Brooks, Stephanie Brooks v. DENR, Div of Coastal Management	04 EHR 0104	Wade	05/12/04	
Alexander and Sandra King v. DENR	04 EHR 0235	Morrison	04/16/04	
<u>HEARING AID DEALERS & FITTERS BOARD</u>				
Robert H Knox v. State Hearing Aid Dealers & Fitters Board	03 HAF 1785	Morrison	12/30/03	
<u>HUMAN RELATIONS FAIR HOUSING</u>				
Sara E. Parker v. Human Relations Fair Housing	02 HRC 0621	Gray	05/16/03	
Orange County Human Relations on behalf of Ginny Wolpin and Ginny Wolpin v. Cornerstone Realty Income Trust, Inc.	03 HRC 1116	Elkins	03/24/04	
Legislative Testor & Afflant: Charliciar Pratt & Family v Durham Co Clerk of Court & Records Division of NC	03 HRC 1886	Lassiter	02/13/04	
<u>TEACHERS' & STATE EMPLOYEES COMP. MAJOR MED PLAN</u>				
Alma Louise Triplett v. Teachers' & St Emp Comp Maj Med Plan	02 INS 0268	Gray	07/15/03	18:04 NCR 338

CONTESTED CASE DECISIONS

Shawna J Talley v. Teachers' & St. Emp. Comp. Maj. Med. Plan	02 INS 1257	Conner	08/06/03	18:05 NCR	405
Bertha Reeves by her husband Laconya Reeves v. Teachers' & St. Emp. Comp Maj. Med. Plan	02 INS 1285	Chess	08/26/03		
Carol W Walker v. Teachers' & State Emp. Comp Major Medical Plan	02 INS 1306	Conner	12/19/03	18:15 NCR	1356
Larry Pendry on behalf of Charles Elledge v Teachers' & St. Emp. Comp. Major Medical Plan	03 INS 0280	Chess	09/11/03		
JEL Company, Leonard Jackson v. DOI & Diane G Miller, Asst Atty.	03 INS 0811	Mann	08/28/03		
Lula F Bowman, Laura A Bowman v. Teachers' & St. Emp. Comp. Maj. Med. Plan	03 INS 0975	Wade	10/22/03		
Barbara Jean Gribble v Teachers' & St Emp. Comp Major Medical Plan	03 INS 1130	Mann	12/31/03		
David C Karasow v St. of NC Teachers' & St Emp Comp Maj. Med Plan	03 INS 1227	Chess	11/20/03		
Cathy Penney v Teachers' & State Emp Comp Major Medical Plan	03 INS 1459	Gray	12/04/03		
Harold L. Bastiste v. State Health Plan	03 INS 1486	Wade	03/12/04	18:21 NCR	1924
Heather A Smith v. Teachers & St Emp Comp Major Medical Plan	03 INS 1558	Morrison	12/12/03		
William F. Small, II v. Teachers & St. Emp. Comp. Major Medical Plan	04 INS 0143	Gray	04/07/04		

LOCKSMITH LICENSING BOARD

Kenneth Allen Pace v. Locksmith Licensing Board	03 LLB 1325	Conner	03/24/04		
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MISCELLANEOUS

Sara Parker & Deirdre M Parker v. NC Utilities Commission	04 MIS 0305	Elkins	03/23/04		
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OFFICE OF STATE PERSONNEL

Alvin Earl Williams v Dir of Cumberland Co Dept of Social Services	00 OSP 1490	Chess	11/05/03		
Dorris D Wright v. Cabarrus Co. Dept. of Social Services	00 OSP 1506	Gray	04/22/03		
Robert Banks Hinceman v. DHHS/Broughton Hospital	01 OSP 0827	Elkins	05/01/03	18:01 NCR	45
Robin Ritzheimer Austin v. Jim Jones, Hlth Dir, Judie DeMuth, Admin Asst & the County of Stanly	01 OSP 0888 ⁴	Lassiter	09/08/03		
Edward Allen Hughes, Jr v. Department of Correction	01 OSP 1011	Gray	08/01/03		
Wanda Gore v. Department of Correction	01 OSP 1286	Gray	05/16/03		
James F Pridgen Jr v. A&T State University	01 OSP 2182	Gray	08/08/03		
Alan Foster v. Comm of Ag Meg Scott Phipps & DOA	02 OSP 0173	Lewis	09/26/03		
James Earl Ray Artis v. East Carolina University	02 OSP 0274	Gray	03/01/04		
Jerry Thomas Ferrell v. Department of Correction	02 OSP 0375	Conner	09/15/03		
Angie Richardson v Department of Correction	02 OSP 0867 ⁹	Wade	11/14/03		
Carolyn Davis v. Durham MH/DD/SA Area Authority d/b/a The Durham Ctr	02 OSP 1001	Lassiter	08/06/03	18:05 NCR	410
Carolyn Davis v. Durham MH/DD/SA Area Authority d/b/a The Durham Ctr	02 OSP 1001	Lassiter	08/06/03	18:07 NCR	494
Terence G Westry v A&T State University	02 OSP 1019	Conner	06/30/03		
Angie Richardson v Department of Correction	02 OSP 1027 ⁹	Wade	11/14/03		
Robert L. Swinney v. Department of Transportation	02 OSP 1109	Gray	05/07/03		
Robin Ritzheimer Austin v. Jim Jones Hlth Dir Stanly County	02 OSP 1166 ⁴	Lassiter	09/08/03		
Cynthia Michelle Guess-Godwin v. Winston Salem State Univ	02 OSP 1255	Gray	09/04/03		
James Thomas Kinlaw v. ESC of NC	02 OSP 1343	Wade	10/23/03		
Bennie Leon Corbett v Div. of Motor Vehicles	02 OSP 1454	Morrison	04/26/04	18:24 NCR	0000
Norman Burton v. Chatham County	02 OSP 1483 ²	Gray	05/12/03		
Jonah Uduagbomen v. Department of Transportation	02 OSP 1597	Gray	06/19/03		
Charles M Alexander v. ESC of NC	02 OSP 1613	Chess	07/01/03		
Gary P Ramsey v Div. of Motor Vehicles	02 OSP 1623	Gray	04/28/04	18:24 NCR	0000
Gregory M Lewis v. DMV, Enforcement Section	02 OSP 1624 ³	Gray	07/23/03		
Norman Burton v. Chatham County	02 OSP 1625 ²	Gray	05/12/03		
Edward K Royal v. Dept. of Crime Control & Public Safety, Div. of State Highway Patrol	02 OSP 1631	Lassiter	06/25/03		
Leonard Williams v Durham Co DSS, Children's Services	02 OSP 1681	Elkins	01/28/04		
Gregory M Lewis v. DMV, Enforcement Section	02 OSP 1695 ³	Gray	07/23/03		
Patricia A Mabry v. Department of Corrections	02 OSP 1774	Chess	06/27/03		
Chester Michael Martin v. Cumberland Co. Dept. of Social Services	02 OSP 1797	Conner	05/09/03		
Linda H Boyle v. Wayne Co. Mental Health Area Board	02 OSP 1951	Wade	08/13/03		
Patricia Doggett v. Trend Mental Health	02 OSP 2128	Conner	07/08/03		
Sharon F Greene v. Weldon Freeman, Crime Control & Public Safety	02 OSP 2144	Chess	08/29/03		
C.W. McAdams v. Division of Motor Vehicles	02 OSP 2265	Conner	11/14/03		
Michael J Stolarik Sr v. Piedmont Behavioral Health Care	02 OSP 2293	Chess	12/22/03		
William Michael McDuffie v. Wake Co Juvenile Detention Center	03 OSP 0013	Wade	08/11/03		
Steven Wayne McCartney v. Lumberton Correctional Institution	03 OSP 0026	Conner	05/29/03		
Deborah B. Estridge v. Buncombe County Health Center	03 OSP 0047	Gray	04/07/04		
Eric M Petree v. Department of Corrections	03 OSP 0116	Lassiter	06/24/03		
Monica Lynn Johnson v. NC School of the Arts	03 OSP 0180	Conner	07/29/03		
Dennis D Nielsen v DOC, Div of Community Correction	03 OSP 0195	Wade	02/06/04		
Jeffrey W Byrd v. Fayetteville State University	03 OSP 0204	Chess	06/04/03		
Tamara V McNeill v DPI	03 OSP 0212	Conner	10/29/03		
Elmer Jack Smith v Employment Security Commission of NC	03 OSP 0295	Elkins	01/29/04		
Tina Marie Walker v. Buncombe Co Dept of Social Services	03 OSP 0429	Chess	08/18/03		
Lisa C Banks v. Craven Co Child Support Enforcement Office	03 OSP 0268	Conner	07/31/03		
Beverly M Jennings v. Juv Justice, Swananoa Valley Youth Dev Center	03 OSP 0408	Chess	08/11/03		
Maranda Sharpe v. Department of Transportation	03 OSP 0412	Chess	06/03/03		
James E. Sharpe v Department of Transportation, Div. 14 (Graham Co.)	03 OSP 0413	Chess	06/03/03		
Larry S Height v. NC Utilities Commission	03 OSP 0507	Conner	07/17/03		
Gary Melvin Moore v. Western Piedmont Community College	03 OSP 0548	Wade	07/29/03		
Joan Milligan, Patricia Flanigan, Pauletta Highsmith, Edna Cummings v. Fayetteville State University	03 OSP 0562	Conner	06/06/03		

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Ty Atkinson v M S C Center	03 OSP 0577	Conner	10/28/03	
Lisa D Barrett v. East Carolina University	03 OSP 0597	Mann	08/05/03	
Stanley L Ingram & Clifford Wayne Brown v. Dept of Correction	03 OSP 0599 ⁸	Chess	10/20/03	
Wrenete Oladoye v Whitaker School	03 OSP 0620	Conner	08/15/03	
Stanley L Ingram & Clifford Wayne Brown v. Dept of Correction	03 OSP 0629 ⁸	Chess	10/20/03	
Melinda O Wiggins v. Moore Co Health Department	03 OSP 0632	Morrison	09/17/03	
William Harold Maready Jr v. DOC, Pasquotank Correctional Inst.	03 OSP 0644	Conner	08/01/03	
Henry Earl Stewart v Department of Transportation	03 OSP 0645	Lassiter	08/26/03	
Derwin D Johnson v. Department of Correction	03 OSP 0660	Lassiter	06/24/03	
Wanda Steward-Medley v. Department of Corrections, Div. of Prisons	03 OSP 0656	Conner	06/20/03	
Sharon D Barnes v Satana Deberry, DHHS	03 OSP 0669	Gray	01/16/04	
Priscilla Sledge v. Department of Correction	03 OSP 0675	Conner	08/13/03	
Jerry B Davis v. Dorothea Dix Hospital/DHHS	03 OSP 0678	Gray	07/14/03	
Leslie AllenWhittington v. Swannanoa Youth Dev. Center	03 OSP 0696	Lassiter	09/24/03	
Cathy S Carson v. NC School for the Deaf	03 OSP 0715	Wade	07/22/03	
Edwin E Kirton III v. DOC, Warren Correctional	03 OSP 0769 ¹¹	Conner	12/22/03	
Edwin E Kirton III v. DOC, Warren Correctional	03 OSP 0770 ¹¹	Conner	12/22/03	
Edwin E Kirton III v. DOC, Warren Correctional	03 OSP 0771 ¹¹	Conner	12/22/03	
David L McMurray Jr. v. Highway Patrol	03 OSP 0801	Lassiter	06/19/03	
Harold Lorenzo Person v. E. Reg. Off. DOC, Div. of Prisons	03 OSP 0805	Conner	08/21/03	
LaWanda J Abeguunrin v. Franklin Correctional Center	03 OSP 0825	Gray	06/18/03	
Sheryl P Morton & Cassandra McDowell v. DHHS, Dis. Det. Section	03 OSP 0840 ¹³	Gray	03/01/04	
Sheryl P Morton & Cassandra McDowell v. DHHS, Dis. Det. Section	03 OSP 0841 ¹³	Gray	03/01/04	
Joseph Nichols v UNC at Chapel Hill	03 OSP 0857	Gray	12/04/03	
Lazona Gale Spears v. Employment Security Commission	03 OSP 0859	Lassiter	06/26/03	
Martin Hernandez v. Dobbs Youth Dev Ctr, DOJJ&DP	03 OSP 0862 ⁵	Morrison	09/29/03	
Gail Hernandez v. Dobbs Youth Dev Ctr, DOJJ&DP	03 OSP 0863 ⁵	Morrison	09/29/03	
Wanda Steward-Medley v Dept of Corrections, Div of Prisons	03 OSP 0873	Morrison	08/12/03	
Michael L Hillis v DHHS/Office of the Controller	03 OSP 0874 ⁷	Lassiter	11/10/03	
Jeffrey J Medley v. Department of Correction	03 OSP 0879	Gray	06/30/03	
Everette C Body v Department of Correction	03 OSP 0885	Conner	11/12/03	
Comatha B Johnson v. DHHS, Cherry Hospital	03 OSP 0942	Chess	08/19/03	
Dawn H Nelson v Department of Correction	03 OSP 0980	Chess	02/11/04	
Ayesha Neal-Harry v Department of Correction	03 OSP 0974	Gray	01/20/04	
Edith C Fisher v. Cabarrus Health Alliance	03 OSP 1010	Conner	12/22/03	
Monica Dockery v. DOC, Div. of Prisons	03 OSP 1016	Mann	07/18/03	
Walter D Giese v. George O'Daniel Onslow Co Health Dept.	03 OSP 1017	Morrison	09/08/03	
Theresa R Rogers v. Off of the Secretary of State of NC	03 OSP 1044	Morrison	09/25/03	
David Upchurch v. DOC	03 OSP 1076	Connor	09/23/03	
Roberta Lane v DOC	03 OSP 1077	Conner	10/29/03	
Mable Lynn Kelly v. SEAA	03 OSP 1129	Chess	10/20/03	
Leon C Rogers v. John Umstead Hospital	03 OSP 1152	Morrison	09/11/03	
Patrick O Holmes v. DOT, Ferry Division	03 OSP 1154	Lassiter	05/13/04	
Mable Lynn Kelly v SEAA	03 OSP 1184	Chess	10/20/03	
Marcella Thorne v Department of Correction	03 OSP 1225	Elkins	11/14/03	
Sharon D Wallace v. Department of Corrections		03 OSP 1231	Wade	09/17/03
Michael L Hillis v DHHS/ENCSD	03 OSP 1239 ⁷	Lassiter	11/10/03	
Michael L Hillis v DHHS/Eastern NC School for the Deaf	03 OSP 1240 ⁷	Lassiter	11/10/03	
Michael L Hillis v DHHS/Eastern NC School for the Deaf	03 OSP 1241 ⁷	Lassiter	11/10/03	
Luvae J Wall v. DHHS, Payroll Office	03 OSP 1259	Morrison	12/02/03	
Russell M Haas v Edgecombe Co Health Department	03 OSP 1261	Elkins	11/06/03	
Sergeant Tracy Millington v. Department of Correction	03 OSP 1262	Conner	10/21/03	
David Dotson v. NC State University Zoology Department	03 OSP 1317	Wade	10/27/03	
Walter Eugene Agers v. Winston-Salem State University	03 OSP 1321	Lassiter	09/24/03	
Sheryl P Morton & Cassandra McDowell v. DHHS, Dis. Det. Section	03 OSP 1339 ¹³	Gray	03/01/04	
Sheryl P Morton & Cassandra McDowell v. DHHS, Dis. Det. Section	03 OSP 1433 ¹³	Gray	03/01/04	
Dennis D Foster v. Durham Co Sheriff's Department	03 OSP 1353	Morrison	09/12/03	
Victor Marc Sain v. Catawba Valley Community College	03 OSP 1380	Conner	11/19/03	
Kimberly Ann Summers v. Bobby White Co Mgr, Caldwell	03 OSP 1393	Conner	11/04/03	
Willie Allen v Swannanoa Youth Dev Ctr (DJJDP)	03 OSP 1412	Conner	01/05/04	
Gloria Bennett v Dept of Correction DART Cherry Program	03 OSP 1428	Morrison	12/04/03	
Richard Todd McLean v. John Umstead Hospital	03 OSP 1448	Wade	11/26/03	
Charles G Horne Jr v. DOC	03 OSP 1479	Lassiter	10/28/03	
Charles G Horne Jr v. DOC	03 OSP 1480	Lassiter	10/29/03	
Patricia Ann Palmer v NC State University	03 OSP 1481	Wade	02/11/04	
Yolanda Lopez v DOC Harnett Correctional Inst	03 OSP 1501	Elkins	12/22/03	
Mable Lynn Kelly v State Educ. Assistance Authority	03 OSP 1502	Chess	12/03/03	
Stephen Wyatt Edwards v. Crime Control &PublicSafety, St Hwy Patrol	03 OSP 1554	Gray	03/03/04	18:20 NCR 1838
Manuel C Fleming v Department of Revenue	03 OSP 1576	Morrison	11/12/03	
Jesse C Whitaker v. Facilities Mgmt Operations of NCSU	03 OSP 1645	Lassiter	11/26/03	
Peter A Fillare v. NCSU Dining	03 OSP 1646	Lassiter	12/02/03	
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	12/16/03	
Sheerlene Artis v. Correction Enterprises, Manpower Services	03 OSP 1670	Lassiter	03/11/04	
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	

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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	
Richard Jones v. NC Department of Revenue	03 OSP 1963	Mann	03/31/04	
William Russell Robinson v School of Science & Math et. Al.	03 OSP 1977	Lassiter	02/16/04	
Dennis D. Foster v. Durham County Sheriff's Dept.	03 OSP 2070	Mann	04/26/04	
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	
Lonnie E. Williams v. NCCU	03 OSP 2301	Mann	03/24/04	
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
Vonnie C. Atkins v. Scotland Correctional Don Wood, Superintendent	03 OSP 2314 ¹⁵	Lassiter	04/28/04	
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	
Milton Blackwell v. Elizabeth City State University	03 OSP 2365	Mann	04/20/04	
Shelia Whitehurst v. East Carolina University	03 OSP 2406	Mann	04/16/04	
Vonnie C. Atkins v. Scotland Correctional Don Wood, Superintendent	03 OSP 2442 ¹⁵	Lassiter	04/28/04	
Miracle L Smith v. State Highway Patrol	04 OSP 0039	Gray	03/10/04	
Carol Caudle Lawrence v. UNC Charlotte	04 OSP 0159	Conner	04/21/04	
Shirley Faith Crudup v. Murdoch Center	04 OSP 0160	Gray	03/31/04	
Derone Brown, Jr v. DOC, Eastern Correctional Institution	04 OSP 0236	Gray	03/31/04	

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	
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STATE OF NORTH CAROLINA

IN THE OFFICE OF

ADMINISTRATIVE HEARINGS

COUNTY OF PENDER

02 OSP 1454

BENNIE LEON CORBETT)

PETITIONER)

VS.)

N. C. DIVISION OF MOTOR VEHICLES)

RESPONDENT)

DECISION

This contested case was heard before Fred G. Morrison Jr., Senior Administrative Law Judge, in Surf City, North Carolina, on November 13 & 14, 2003. Following the hearing the parties ordered copies of the transcript and on January 30, 2004, filed proposed findings of fact and conclusions of law. At the request of the judge, supplemental filings were made on February 23 & 26, 2004, concerning an Opinion of the Attorney General of North Carolina dealing with State employees running for Sheriff in partisan elections. A telephone conference was subsequently held with counsel who agreed that they would attempt to discern and report whether a suitable job could be found for Petitioner to resolve the case. Filings on April 19, 20, and 22, 2004, reported that no agreement had been reached.

APPEARANCES

For Petitioner: Julius L. Chambers, Esquire
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Suite 300
Charlotte, NC 28204

For Respondent: Tracy Curtner
Assistant Attorney General
NORTH CAROLINA DEPARTMENT OF JUSTICE
P. O. Box 629
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ISSUE

Whether Petitioner's resignation from the position of motor carrier officer (Vehicle Enforcement Officer I) was a result of discrimination based upon race?

STATUTES AND RULES IN ISSUE

N.C. Gen. Stat. §§ 126-16, 34, 34.1 & 36

FINDINGS OF FACT

Petitioner Bennie Leon Corbett is an African American male who was born on March 6, 1967. He was employed in 1997 by Respondent Division of Motor Vehicles as a Motor Carrier Officer, but his job was changed during training to that of Weight Officer. About two years later, he was reassigned to the position of Motor Carrier Officer. He had great references and his job evaluations indicate that he performed well as a State employee.

In January of 2002, learning that the incumbent sheriff would not seek reelection, Petitioner decided to enter the Democratic Primary as a candidate for Sheriff of Pender County. On February 22, 2002, he notified his superiors that he intended to run in this partisan election. While he did not get a written response, as did a White employee in the same circumstance, a superior officer orally advised him to campaign on his own time and not use any State resources. No mention was made about the Hatch Act. Petitioner paid his filing fee and began to campaign accordingly.

Sometime on or before early June 2002 someone contacted Republican United States Senator Jesse Helms' office to complain about Petitioner's candidacy. Senator Helms' staff then contacted the United States Office of Special Counsel concerning the possible violation of the federal Hatch Act, which resulted in the Special Counsel's staff contacting Petitioner's superiors to determine whether any federal funds were involved in Petitioner's salary and or equipment. Petitioner was never afforded or offered a hearing before the Merit System Protection Board to determine whether he was in fact violating the Hatch Act. His superiors in State government testified that they had never heard of the Hatch Act and they don't have any written policies or regulations to let them or their employees know their obligations in such cases. No one from the Special Counsel's staff appeared at the contested case hearing to testify about the Petitioner's situation and provide evidence presented to them which led to their opinion about a possible violation of the Hatch Act.

Following contact from the Special Counsel's Office, Petitioner's superiors demanded that he withdraw as a candidate or resign from his job (at first within twenty-four hours, and later within ten days). The memo of June 14, 2002, closed by advising Petitioner that failure to do so would result in further action "up too[sic] and including dismissal from the Section." Also, they mistakenly had told him that he could cost the State all of its highway funding as well as be criminally prosecuted. In fact, had he been given a hearing and been determined to be in violation of the act, the State could have been penalized \$59,400(2 years of Petitioner's salary). He was denied a day's leave request to look into these matters, a request to be reassigned (as Respondent had done before for him and others) as a Weight Officer (a position perhaps not violative of Hatch Act), and an oral offer to take leave without pay. He had a fellow employee willing to trade positions with him. Respondent refused to accommodate Petitioner in any of these requests as he coped under stress with the demands of his superiors.

Officer H. J. Sealey, another African American employee of Respondent, was treated the same way as Petitioner in the Spring of 2002. He was serving as a Weight Officer when he filed as a candidate in a partisan election for County Commissioner in Robeson County. He was also advised by memo that unless he resigned his job or withdrew from the campaign he would face further action "up too[sic] and including dismissal from the Section."

Petitioner's evidence showed that over the years, including 2002, White employees of Respondent had campaigned for and/or held partisan political positions while continuing their employment without being treated or threatened as were officers Corbett and Sealey. These other employees served as inspector, motor carrier officer or weight officer. Evidence was presented that those in the three types of positions often worked out of the same office and shared the same equipment. G. S. 126-13 and Respondent's General Orders permit State employees to seek political office in partisan or nonpartisan elections so long as they do not campaign while on duty or during times when they are expected to perform their duties. Respondent's General Orders do not advise employees about the Hatch Act and its applicability in certain instances.

On July 21, 2002, Petitioner, under protest, submitted his letter of resignation effective August 1, 2002. He stated therein that it was not voluntary, that he had been treated unjustly, discriminatorily, unprofessionally, and deceptively.

Based on these Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

Petitioner was a career state employee at all times relevant hereto as defined in N.C. Gen. Stat. § 126-1.1 and was subject to the provisions of Chapter 126.

The Office of Administrative Hearings has jurisdiction to hear this case and issue a Decision pursuant to G. S. 150B-34.

Thomas Jefferson's 1801 inaugural address included the phrase "equal and exact justice to all men." Those entering the United States Supreme Court Building in Washington, D.C. walk under the slogan "Equal Justice Under Law". The North Carolina General Assembly has declared in G. S. 143-422.2 that "It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race-----and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general." G. S. 126-16, 34, 34.1, & 36 give State employees the right to contested case hearings.

North Carolina courts look to federal employment discrimination law for guidance in establishing evidentiary standards for contested cases filed under the State Personnel Act. *North Carolina v. Gibson*, 308 N.C. 130, 301 S.E.2d 78 (1983).

In order to prove a discrimination claim, Petitioner must first establish a prima facie case of discrimination. *See N.C. Department of Correction v. Hodge*, 99 N.C. App. 602, 611, 394 S.E.2d 285 (1990) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

Petitioner has met his prima facie burden by establishing that he was an African American employee of Respondent who was running for partisan political office. He has further established that Respondent treated him and another African American differently than White employees who had sought such offices in the past and one who was also running for sheriff in 2002.

To rebut this inference, the burden then shifts to Respondent to present evidence that [Petitioner] was [treated differently than other political candidates], for a legitimate, non-discriminatory reason. This burden is one of production, not persuasion. *Reeves, 530 U.S. at 142.*

The Respondent has met this burden of production by establishing that it was notified by the Office of Special Counsel in June 2002 that Petitioner's activities appeared to be a violation of the Hatch Act which could require that he withdraw from the campaign or terminate his employment.

The burden then shifts back to the Petitioner to prove that Respondent's reason for advising Petitioner as it did was merely a pretext, and not a legitimate, nondiscriminatory reason. "Although the intermediate burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 143. In attempting to satisfy this burden, Petitioner must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* Petitioner met his ultimate burden in establishing to the undersigned that his resignation was the result of racial discrimination. His prima facie evidence set forth in my findings of fact was relied upon to reach this conclusion. Also, it did not seem credible that Respondent's officials had never heard of the Hatch Act until two African American employees sought to run for sheriff and county commissioner. It is more likely than not that they knew or should have known about this act. They could have had it included in their general orders and given notice if they were going to apply it to their employees.

Finally, supervisors of State employees are to be color-blind concerning terms and conditions of employment for those under their charge. Demanding, under threat of dismissal, resignations or withdrawals from their campaigns by two African American employees without benefit of hearings before the Merit System Protection Board, and refusing reasonable requests for leave or transfer, indicates that it is more likely than not that race was a factor. Respondent rushed to judgment in this case without exploring fairly all alternatives to forced resignation. State officials in North Carolina have made much progress in eradicating discrimination in the workplace. Wherever vestiges remain, they must be eliminated.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned renders the following:

DECISION

Petitioner be reinstated by the State of North Carolina to the same or similar position from which he resigned with restoration of pay and benefits to which he is entitled as well as reimbursement for attorney's fees.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this matter.

Pursuant to N.C. Gen. Stat. § 150B-36(b), that agency shall adopt each Finding of Fact contained in the Administrative Law Judge's decision unless the Finding is clearly contrary to the preponderance of the admissible evidence. For each Finding of Fact not adopted by the agency, the agency shall set forth separately and in detail (1) the reasons for not adopting the Finding of Fact and (2) the evidence in the record relied upon by the agency in not adopting the Finding of Fact. For each new Finding of Fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the Finding of Fact.

Any new Finding of Fact made by the agency shall be supported by a preponderance of the admissible evidence in the record. Any Finding of Fact not specifically rejected shall be deemed accepted for purposes of judicial review of the Final Decision pursuant to Article 4 of N.C. Gen. Stat. § 150B.

The agency shall adopt the Administrative Law Judge's decision unless the agency demonstrates that the Administrative Law Judge's decision is clearly contrary to the preponderance of the admissible evidence in the official record. If the agency does not adopt the Administrative Law Judge's decision as its Final Decision, the agency shall set forth its reasoning for the Final Decision in light of the Findings of Fact and Conclusion of Law in the Final Decision, including any exercise of discretion by the agency.

CONTESTED CASE DECISIONS

Pursuant to N.C. Gen. Stat. § 150B-36(a), before that 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. Pursuant to N.C. Gen. Stat. 150B-36(b3), the agency shall serve a copy of its Final Decision on each party, and shall furnish a copy to each party's attorney of record and to the Office of Administrative Hearings.

This the 26th day of April, 2004.

Fred G. Morrison Jr.
Senior Administrative Law Judge

6. Director John Robinson, Jr. of the Enforcement Section of DMV found Petitioner to have an excellent work record, to be a hard worker, and to be a “good guy,” and enjoyed working with him over the years. (August 12, p. 200)

7. Prior to the year in which Petitioner was discharged, he never received any performance evaluations which were less than outstanding, the highest rating available. (November 25, p. 20-p. 21)

8. Prior to 1998 (and having begun in the mid 1990’s), the practice of the Enforcement Section had been to hold Captain’s meetings outside of Raleigh one to two times per year at different locations around the state. These meetings were attended by all Captains and Lieutenants throughout the eight districts of North Carolina as well as personnel from the headquarters in Raleigh and representatives from the Commissioner’s office.

9. The meetings typically included training and instruction for certain days or portions of days with golf available for the other days or portions of days. Persons attending these meetings generally stayed at the hotel/facility where the meetings were held, and certain meals were provided. Payment for the meetings came in the form of each attendee paying out of his or her own pocket for meals and lodging. The evidence is conflicting as to how many, if any, attendees paid out of pocket for golf. Golfing fees were not furnished or reimbursed by the State.

10. The meetings were planned by the local Captain in the district where the meeting would be held, with potential assistance from other DMV personnel.

11. Prior to 1998, it was determined by headquarters staff that the upcoming fall 1998 Captains’ Meeting would be held in District VIII. Petitioner, once informed that the meeting would be held in his district, began preparations for planning and hosting the meeting.

12. During the course of his preparations, Petitioner determined that he would not be able to keep the cost of the lodging and meals within the amount allowed by state per diem. (T. p. 40)

13. Prior to the 1998 Waynesville Country Club Captains’ Meeting, Petitioner sent to DMV’s Raleigh headquarters Petitioner’s Exhibit 14 which detailed the expenses of the 1998 Waynesville Country Club meeting and showed charges in excess of the per diem. (November 25, p. 43-45)

14. Petitioner’s Exhibit 14 also includes the statement: “My understanding is that you want each person to be responsible for a \$52.00 charge only.” (November 25, p. 44-45)

15. Petitioner’s Exhibit 14 also included a statement from the Waynesville Country Club which said “good luck on your fundraising.” (November 25, p. 45)

16. During the course of his preparations, Petitioner determined that he would not be able to keep the cost of the lodging and meals within the amount allowed by State per diem, approximately \$52. When asked by Captain Carl Pigford in September, 2001, in the course of an internal affairs investigation into the sources of funding for these meetings, how he planned to cover the excess expenses, Petitioner told Captain Pigford that he was going to host the meeting in Asheville no matter what the cost. According to Captain Pigford, Petitioner stated that “so I had talked with Inspector Elingburg and we decided, hey, we’re going to put the thing on, whatever it costs us out of pocket, we’ll do that. And so he’s sort of in a situation like me. I’m not going to tell you that I’ve got all the money in the world, but I had enough to be able to take care of the additional expense out of my pocket if I needed to”.

17. Petitioner’s testimony is that, in addition to sending Exhibit 14 to the Raleigh headquarters, Petitioner orally informed Lt. Col. Brinson that the 1998 event could not be put on at the Waynesville Country Club within the per diem. Lt. Col. Brinson told Petitioner that he should talk to his “dealer friends” and that “no Captain was worth his salt” who couldn’t get some help from his dealers. “Dealers” referred to automobile dealers regulated by DMV. Colonel Brinson testified that Petitioner never told him any of this and that he never advised Petitioner to raise money from the Division VIII automobile dealers.

18. Before the 1998 Waynesville Captains’ Meeting, Petitioner said, in a meeting with Lt. Ricky Lyall and Lt. Henry Snypes, that Lt. Col. Brinson had told him he should get funds from the local dealers to help with the meeting (Aug. 14, p. 41 & 42) During the course of these proceedings, Lt. Snypes took actions that were directly adverse to and detrimental to Petitioner. Nevertheless, Lt. Snypes remembered that Petitioner had told him about Lt. Col. Brinson’s statement prior to the 1998 Waynesville Captains’ Meeting. Colonel (retired) David Richards was the Director of the Division of Motor Vehicles Law Enforcement Section at the time Petitioner was a Captain in District VIII. Colonel Richards testified in his deposition that he did not recall whether Petitioner ever had told him about Col. Brinson’s alleged instructions to Petitioner to seek funds from his dealers. Later, at the contested case

hearing, Col. Richards testified that he did recall Petitioner telling him sometime around the captains' meeting in 1999 that Col. Brinson had instructed him to go to see his automobile dealers to raise money for the captains' meeting.

19. Colonel Richards testified also that he heard Col. Brinson say, during the 1999 captains' meeting, that "we need to thank the western North Carolina dealers for their help with this event". Petitioner, Inspector Lyall, and Inspector Charles Elingburg also testified that they heard Col. Brinson make that statement at the 1999 meeting along with similar statements made by other DMV members of senior management from Raleigh at the hospitality suite during the 1999 meeting.

20. Petitioner testified that he told Captain Pigford during the internal affairs investigation that he had informed one or more persons in the Raleigh headquarters that he could not keep the cost within State per diem. Petitioner testified during the hearing that Captain Pigford turned the tape recorder off during his investigative interview with Petitioner and that Petitioner then told him about Col. Brinson's alleged instruction to contact dealers in his area for help with the fund raising. Captain Pigford testified that Petitioner never made any such statement to him either on or off the tape. Petitioner had been interviewed approximately one year earlier in July, 2000 by Agent Marshal Tucker of the State SBI during a criminal investigation of the events occurring in Division VIII. Agent Tucker testified that Petitioner never mentioned during the interview that he had informed anyone in the Raleigh headquarters about his predicament or that he had received instructions from anyone in Raleigh about how to raise money for the captains' meeting. Other than Col. David Richards and officers Lyles and Snypes, Petitioner did not mention to anyone that he had been instructed from Raleigh about how to raise money for the meeting expense until his deposition in April, 2003 when he testified that Co. Brinson told him to talk to his dealers.

21. Both in the fall of 1998 and the fall of 1999, Captains' Meetings were held at the Waynesville Country Club in Haywood County, North Carolina. Prior to the beginning of each meeting, a master account was established at Waynesville Country Club. Prior to the 1998 meeting, the initial arrangements were made with Lieutenant Ricky Brookshire of DMV and then switched over to Petitioner. Prior to the 1999 meeting, all arrangements from beginning to end were handled by Petitioner. The master account was established in advance of the arrival date for the purposes of collecting and recording advance deposits which were made on behalf of the DMV group. Checks were mailed or delivered to Waynesville Country Club from numerous individuals and automobile dealers and were made payable to Waynesville Country Club. Those checks then were deposited and credited to DMV's master account. Each attendee from DMV paid the per diem for their room at the time of check-out. Any excess amount which was not billed to or paid for by the attendee was paid out of the advance deposits collected in the master account.

22. Automobile dealers in Western North Carolina first became aware of the first Captains' Meeting at the Waynesville Country Club from a statement made by Inspector Snypes at a meeting of the Western North Carolina Independent Dealers Association.

23. Advance deposits came primarily in the form of checks from automobile dealers throughout the District VIII area. Prior to the 1998 meeting, thirty-four automobile dealers contributed a total of \$3,500.00 towards the Captains' Meeting at the Waynesville Country Club. Those deposits were in the form of 33 checks made payable to Waynesville Country Club in the amount of \$100.00 each and one (1) check in the amount of \$200.00.

24. Prior to the 1999 meeting, advance deposits were received from twelve automobile dealers who contributed a total of \$2,950.00 towards the Captains' Meeting at the Waynesville Country Club. Those deposits again were in the form of checks payable to Waynesville Country Club at an increased amount of \$250.00 per check. No one from the Waynesville Country Club advised the automobile dealers what amount the checks should be written for. Automobile dealers and others in District VIII contributed door prizes of greater than *de minimis* value to the 1999 meeting.

25. There are approximately 600-800 automobile dealers in District VIII.

26. At both Waynesville Country Club Captains' Meetings in 1998 and 1999 many door prizes of greater than *de minimis* value were given away. Of the door prizes given away, a substantial amount had marks on them identifying them as having been provided by automobile dealers in Western North Carolina. (November 25, p. 63, p. 64, & p. 217)

27. Most of the advance deposits were delivered to the Waynesville Country Club by Petitioner and Inspector Rick Lyall in the form of checks and some cash which had been collected by Inspector Elingburg and Inspector Lyall. The monies were collected from dealers and brought to Petitioner at the district office, although in at least one instance, Inspector Lyall took two checks directly to Waynesville Country Club. Inspector Lyall often picked up the checks from Petitioner and delivered them to the Club because he lived in Haywood County where the Club is located.

28. Petitioner, when interviewed by Agent Tucker in 2000 and by Captain Pigford in 2001, denied any knowledge of dealers having contributed to the Captains' meetings. At the contested case hearing, Petitioner testified that he did in fact receive one

or more envelopes with Waynesville Country Club written on them and that Inspector Elingburg handed him at least one open envelope containing Cash. Although Petitioner previously had denied doing so, he admitted that he very well may have been the one who placed checks into envelopes and marked them for Waynesville Country Club.

29. It is established by the evidence that Inspectors Elingburg and Lyall collected money, primarily in the form of checks, from automobile dealers in District VIII for the 1998 and 1999 captains' meetings under the direction and knowledge of Petitioner. It also is established by the evidence that Petitioner had a good faith belief that he had explicit or implicit sanction from Lt. Col. Brinson of DMV in Raleigh to go to the dealers for fundraising for the captains' meetings.

30. The automobile dealers solicited for funds for the 1998 and 1999 captains' meetings were under the regulatory control and supervision of the DMV and in particular those inspectors and officers in District VIII who directly or indirectly solicited funds, including Inspector Lyall, Inspector Elingburg, and Captain Ramsey.

31. It was apparent to any reasonable person attending and participating in either the 1998 or 1999 Waynesville Country Club Captains' Meetings that all of the rooms, meals, golf, refreshments, prizes, and gifts provided could not have been provided for the within state per diem.

32. At the final meeting of the 1998 Waynesville Captains' Meeting, those in attendance decided by acclamation to hold the event there again in the fall of 1999. (August 12, p. 203)

33. At the final meeting of the Waynesville Captains' Meeting in 1999, those in attendance decided by acclamation to hold the event there again in 2000. (August 12, p. 2003)

34. The decision to hold another Captains' Meeting in Waynesville in 2000 was reversed after a substantial amount of media attention was focused on the DMV Enforcement Section. (August 12, p. 204)

35. For both of the Waynesville Captains' Meetings in 1998 and 1999, Petitioner provided his credit card to the Waynesville Country Club so that any expenses in excess of monies paid would be paid by Petitioner directly. (August 12, p. 143) (November 25, p. 68-79)

36. Following both the Waynesville Captains' Meeting in 1998 and the Waynesville Captains' Meeting in 1999, Petitioner returned to the Waynesville Country Club and personally paid \$150.00 to \$175.00 to the employees as tips for their service those years. (August 12, p. 143- p. 144) (November 25, p. 52, 53, 54, 55, 56)

37. Petitioner paid substantial amounts of his own money towards meals, refreshments, prizes, and gifts for both the 1998 and 1999 Waynesville Captains' Meetings. (August 14, p. 67, p. 68, p. 85, 86, 87, & 92)

38. Inspector Charles Elingburg voluntarily spent over \$800.00 in 1998 and over \$1200.00 in 1999 of his own money in connection with the Waynesville Captains' Meetings. (August 14, P. 136 - p. 138 & p. 143)

39. At the end of the 1998 Waynesville Country Club Captains' Meeting there was \$845.00 left in the account at the Waynesville Country Club. (November 25, p. 69)

40. After discussions with Charles Elingburg, who also had contributed a substantial amount of money to the 1998 event, Petitioner put the \$845.00 into his personal bank account to hold for use towards the following year's event.

41. The amount of money that Petitioner put into his personal bank account was less than what he and Inspector Elingburg personally had contributed.

42. At the end of the 1999 Waynesville Country Club Captains' Meeting, there was \$1,850.84 left in the account at the Waynesville Country Club. (November 25, p. 70) The "leftover" amount was greater in 1999 because the Meeting was held later in the season after having been delayed by a hurricane.

43. After discussions with Charles Elingburg, who also had contributed a substantial amount of money to the 1999 event, Petitioner put the \$1,850.84 into his personal bank account to hold for use towards the following year's event.

44. The amount of money that Petitioner put into his personal bank account was less than what he and Inspector Elingburg personally had contributed.

45. Since 1998, Petitioner always has retained substantially more in his personal accounts at the State Employees Credit Union than the amounts he placed there after the Waynesville Country Club Captains' Meetings.
46. Petitioner's actions do not reflect an intent to use these funds placed into his personal account for his personal benefit.
47. Over a period of years prior to the Waynesville Captains' Meeting, DMV enforcement section employees solicited large cash donations for Special Olympics from dealers, motor carriers and others regulated by DMV. (August 12, p. 208 & p. 209)
48. The Division of Motor Vehicles raised approximately \$90,000.00 for Special Olympics in one year during which the North Carolina Secretary of Transportation was on the Special Olympics board. (August 14, p. 154)
49. The Division of Motor Vehicles solicited and accepted a donation from Food Lion of \$5,000.00 toward Special Olympics during one of the years DMV was raising money for Special Olympics. (August 12, p. 182)
50. Food Lion places many large trucks on the roads in North Carolina and is regulated by the Division of Motor Vehicles Enforcement Section.
51. The DMV Enforcement Section Special Olympics effort was coordinated by Charles Carden, who was a Major in the DMV Enforcement Section operating out of the Raleigh headquarters. (November 25, p. 14)
52. SASHTO is the Southeastern Association of State and Highway Transportation Officials. Employees of the Division of Motor Vehicles and of the Department of Transportation are members of SASHTO and attend SASHTO meetings. SASHTO members solicit funds from entities that are regulated by the Department of Transportation for use towards SASHTO events, which the Department of Transportation and DMV employees attend.
53. DMV Enforcement Section employees solicited money from automobile dealers in the areas where they worked for Special Olympics, IAATI (as hereinafter set out) and other DMV functions. (November 25, p. 10 & 11)
54. Petitioner's Exhibit 4 consists of door prizes that Petitioner received at various DMV events as well as some of the door prizes given out at the 1998 and 1999 Waynesville Country Club events.
55. From the time he became a Captain, Petitioner attended Captains' Meetings at various locations around the state. (November 25, p. 25 & p. 26)
56. At Captains' Meetings outside of Raleigh that occurred before the Waynesville Captains' Meetings, meals, alcohol, and "door prizes" were sometimes provided without charge to the participants.
57. At the retirement event for Jerry Arrowood, a former Major with the DMV Enforcement Section, a significant number of door prizes with more than de minimis value were given to DMV employees.
58. Assistant Director (then Captain) Carl Pigford was the primary Division of Motor Vehicles and Internal Affairs investigator into the incidents leading to the termination of Petitioner.
59. During the course of the FBI investigation, which began in April 2000 upon Commissioner Janice Faulkner's request after corrupt activities allegations were made by a disgruntled former DMV employee, Captain Pigford was directed and instructed by Lt. Col. (later Col.) Michael Sizemore to conduct a limited investigation for DMV so as not to interfere with the ongoing SBI investigation and to make his report to Lt. Col. Sizemore.
60. In November 2001, Captain Pigford submitted his internal affairs investigation report of Petitioner to Lt. Col. Sizemore. (August 12, p. 174)
61. Captain Pigford believed that his investigation into Gary Ramsey was not a "thorough investigation," and he told Lt. Col. Sizemore so. (August 12, p. 68)
62. If Captain Pigford had been able to make his own determination about the extent of his investigation, he would have interviewed many more witnesses. (August 12, p. 73)

63. Lt. Col. Sizemore was aware that Captain Pigford wanted to do a more thorough investigation. Lt. Col. Sizemore could have allowed Captain Pigford to do an additional investigation, but he did not do so. (August 12, p. 74 - p. 75)
64. The information that then Lt. Col. Robinson (who became Lt. Col. when Lt. Col. Sizemore became Colonel) had about the investigation regarding Petitioner was quite limited at the time of Petitioner's termination. (August 12, p. 200)
65. John Robinson, Jr. held the position of Major with the DMV Enforcement Section from 1993 until May of 2002, the Lt. Colonel position from May 2002 until May 2003, and the position of Director (or Colonel) from May 2003 until the time of this hearing. (August 12, p. 187)
66. In the DMV Enforcement Section, personnel matters were typically handled, except for final decisions, by the Lt. Colonel.
67. Respondent's Exhibit 2, Petitioner's termination letter, was signed by then Lt. Col. Robinson, but actually had been drafted by then Col. Sizemore. (August 12, p. 200)
68. Petitioner was terminated less than three days after Michael Sizemore became Colonel of the DMV Enforcement Section. (August 12, p. 201)
69. Contrary to past practice, Col. Mike Sizemore alone made the decision to terminate the Petitioner. (August 12, p. 208)
70. At the time he left the position of Colonel on 14 May 2002, David Richards (Sizemore's predecessor) did not believe there was sufficient evidence to terminate Petitioner. (August 12, p. 179- p. 180)
71. During 1998 and 1999 Lt. Henry Snypes solicited contributions from automobile dealers to use towards the IAATI conference to be held in Asheville in 1999. (August 12, p. 92)
72. No investigation was initiated about the IAATI donations solicited by DMV employees until perjury and obstruction of justice by Lt. Snypes were uncovered by Petitioner's counsel in this matter. (August 12, p. 99- p. 100)
73. Lt. Snypes raised money for the IAATI conference by soliciting funds from automobile dealers in the Western part of North Carolina.
74. According to Lt. Snypes, Lt. Colonel Mike Sizemore told him that he had done nothing wrong in raising funds for IAATI. (August 14, p. 43)
75. During the course of this proceeding, through written discovery, Petitioner requested Respondent to produce documents, among others, related to fundraising for a conference for the International Association of Auto Theft Investigators (IAATI). Respondent's counsel produced a very limited number of documents, believing those documents to be all the documents that Respondent retained.
76. Following Petitioner's Request for Production of Documents, Lt. Snypes made copies of the documents requested and took them to Raleigh where he met with then Col. Sizemore. (August 12, p. 101- p. 102)
77. Lt. Snypes had a conversation with Col. Sizemore from which Lt. Snypes believed, according to Captain Pigford, that Col. Sizemore wanted the requested documents to "disappear." (August 12, p. 102- p. 104) (August 14, p. 52) (August 14, p. 58 & p. 59)
78. Assistant Director Pigford found Lt. Snypes to be very credible in his assertion that he threw the documents away because Col. Sizemore wanted him to do so.
79. After that meeting with Col. Sizemore, Lt. Snypes brought the documents back to Asheville and ordered that they be thrown away by one of the inmates working for DMV.
80. Before the documents were removed from the garbage bin at DMV, they were discovered by an employee of DMV and provided to Petitioner's counsel.

81. At the direction of then Col. Mike Sizemore, Lt. Henry Snypes attempted to destroy documents in the possession of Respondent (through Snypes) which had been requested by Petitioner's counsel and which were relevant to this proceeding.

82. Counsel for Respondent was unaware of Col. Sizemore's efforts to have the above referenced documents destroyed.

83. It reasonably can be inferred that Col. Sizemore believed the IAATI documents showed a pattern of conduct similar to that with which Petitioner was charged, which pattern of conduct by others had not been disciplined in any fashion.

84. John Robinson, Jr. is the current Director of the Enforcement section of DMV. He testified that he believed that Petitioner's actions violated General Order 24, and that Petitioner's termination was proper.

85. However, Director Robinson also testified that it now was clear to him that similar actions had taken place on a wide scale over many years at the DMV Enforcement Section. These previous actions had not been disciplined in any fashion.

86. In fact, similar acts of receiving monetary contributions and other things of value had taken place within DMV's Enforcement section and other areas of DOT over a period of time prior to the Waynesville Country Club Captain's Meetings. These similar acts related, among other events, to Special Olympics, IAATI, SASHTO, previous Captains' Meetings, and previous DMV retirement functions. Those individuals involved in these previous fundraising actions have not been disciplined in any fashion.

87. Although Director Robinson did not know about the wide scale of these similar actions over the years prior to this contested case proceeding, some in the upper management of the DMV Enforcement Section did know about these and previous activities and condoned them, directly or indirectly, even attending these and other previous functions and enjoying the benefits provided by the money and tangible items donated by automobile dealers and others.

88. Petitioner testified that, at the time he took the actions in question in 1998 and 1999, he believed his actions were not a violation of General Order 24 based upon his reading of General Order 24, his knowledge of previous activities within DMV and DOT, and his direction from his superior, Lt. Colonel Brinson.

89. Petitioner also testified that, after ethics training all DMV employees received in 2000, he had changed his mind and believed that donations should not have been accepted for the Waynesville Country Club events. (November 25, pp. 82-83)

90. Following exhaustive state and federal investigations over a span of more than three years, both the North Carolina Attorney General and United States Department of Justice found no criminal wrongdoing on the part of Petitioner.

91. Respondent DMV's General Order No. 24 provides, in pertinent part:

C. Bribes, Gifts, Gratuities

1. Members shall neither solicit nor accept from any person, business or organization any bribe, gift, or gratuity, for the benefit of the member, their family, or the Enforcement Section if it may reasonably be inferred that the person, business, or organization giving the gift:
 - a. seeks to influence the action of an official nature, or
 - b. seeks to affect the performance or non-performance of an official duty, or
 - c. has an interest which may be substantially affected, either directly or indirectly, by the performance or non-performance of an official duty. DMV General Rules of Conduct, General Order No. 24 Section VIII C (April 1998).

92. DMV General Order No. 24 V. A. prohibits on or off duty conduct which tends to bring reproach or discredit upon themselves or the Enforcement Section.

93. North Carolina General Statute Section 126-35 in the State Personnel Act provides, in pertinent part:

No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.

94. The State Personnel Manual defines unacceptable personal conduct, in pertinent part, as conduct for which no reasonable person should expect to receive prior warnings.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner became and remained a career state employee under Chapter 126 of the General Statutes of North Carolina prior to the captains' meetings of 1998 and 1999.
3. Petitioner's participation in the solicitation and acceptance of money and other tangible items from District VIII automobile dealers and other regulated parties was in violation of General Order No. 24 because it was for the benefit of the soliciting members, as DMV Enforcement employees, and the Enforcement Section, and because it may reasonably be inferred that the dealers and other donors have interests which may be substantially affected either directly or indirectly by the performance or non-performance of the members' official duties.
4. Petitioner's actions instructing Inspectors Elingburg and Lyall to solicit and accept money and other tangible items from automobile dealers and other regulated parties in District VIII constitutes a violation of DMV General Order No. 24 Section V.A. governing personal conduct of members both on and off duty and prohibiting conduct tending to bring reproach or discredit upon themselves or the Enforcement Section.
5. Petitioner's actions instructing Inspectors Elingburg and Lyall to solicit and accept money from automobile dealers and other regulated parties in District VIII so as to fund the excess costs above state per diem rates for the 1998 and 1999 captains' meetings at the Waynesville Country Club and his acceptance of portions of that money constitute unacceptable personal conduct and form the basis of just cause sufficient for his dismissal.
6. Fundraising for Special Olympics, SASHTO, International Association of Auto Theft Investigators (IAATA), and the receipt of door prizes for other DMV events all constituted soliciting and/or accepting money and other things of value from people and entities regulated by the Division of Motor Vehicles and/or the Department of Transportation in violation of General Order No. 24, including Section V.A.
7. At the time Petitioner engaged in solicitation and acceptance of money and other tangible items from automobile dealers and other regulated parties in DMV District VIII, he held a good faith belief that his actions were within the accepted pattern and practice of employees in the DMV Enforcement Section in funding captains' meetings, Special Olympics, SASHTO (Southeastern Association of State and Highway Transportation Officials), and IAATI meetings. Lt. Col. Brinson gave some color to this good faith belief through his comments to Petitioner about funding of the captains' meetings and from his public and vocal call at the 1998 and 1999 captains' meetings for thanks to the western automobile dealers for assistance in enabling the assembled DMV members to enjoy Waynesville Country Club meetings beyond the reach of state per diem rates.
8. In consideration of Petitioner's reasonably held good faith belief that his actions were within the existing pattern and practices of DMV, it is concluded that, although the evidence constitutes good cause for his dismissal, a reasonable person in Petitioner's circumstances existing at the time would more likely than not expect to be warned that conduct which he had observed as a pattern and practice at DMV, with apparent acceptance by superiors in DMV, was sufficient to compel his discharge. His sustained dismissal under these facts would be a miscarriage of the principle of fairness for this Petitioner, an outstanding work record employee, to be dismissed solely on the basis of his actions in connection with the 1998 and 1999 captains' meetings.

DECISION

Based upon the foregoing findings of fact and conclusions of law, I find that sufficient evidence has been produced to constitute just cause for Petitioner's dismissal but that, considering Petitioner's outstanding work record and his good faith belief that his actions were within the accepted pattern and practice of the DMV Enforcement Section, it is ordered that:

1. Petitioner be reinstated to the position of Captain in DMV District VIII or another District within reasonable proximity to his home;
2. Respondent pay Petitioner back pay and all benefits to which he would have been entitled but for his dismissal from the date of his dismissal on May 23, 2002 until the date of his reinstatement;
3. Petitioner receive no attorney's fees in connection with this contested case; and

- Petitioner receive a written warning.

ORDER

It is ordered that the agency making the final decision in this matter serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-367(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency in making the final decision according to the standards found in N.C. Gen. Stat. §150b-36(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

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

This the 26th day of April, 2004.

Beecher R. Gray
Administrative Law Judge

of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner Centia Jackson is the 8-year old child of Melva Dickens. She is diagnosed with spastic cerebral palsy with respiratory compromise and microcephaly. She is nonambulatory and cannot perform any activities of daily living. (Joint Ex. 11) Petitioner requires the same total care as that of an infant. She lives with her mother and step-father and two older brothers. She attends school, riding the bus each way. On behalf of Centia Jackson, Ms. Dickens applied to Respondent for Medicaid services, specifically Private Duty Nursing (PDN).

2. Respondent North Carolina Department of Health & Human Services, Division of Medical Assistance, determines entitlement for Private Duty Nursing services paid by Medicaid. Petitioner requested sixteen hours of private duty nursing care for seven days per week which Respondent denied on March 26, 2003.

3. Centia Jackson (hereinafter, Centia) resides with her family in Tarboro, Edgecombe County, North Carolina. (MD, tape 4, side 1). Centia was born on September 22, 1995 in Tacoma, Washington. During the birth, Centia suffered a myconium aspiration, which resulted in oxygen deprivation, leading to severe brain injury. (LP, tape 2, side 1; MD, tape 4, side 1). As a result of the brain injury, Centia suffers from spastic quadriplegic cerebral palsy, which renders her immobile and causes rigidity to muscles. (LP, tape 2, side 1).

4. Reflux disease caused Centia to produce and expel stomach acids into her esophagus, which resulted in the closing of her esophagus in a procedure called "Nissan Fundoplication" at age 7. (LP, tape 2, side 1; MD, tape 4, side 1). "Nissan Fundoplication" can loosen over time and require repair. (LP, tape 2, side 1)

5. Centia also has severe dysphasia, or difficulty in swallowing. (LP, tape 2, side 1). Centia cannot cough to expel any built-up amount of saliva or other secretions in her mouth, esophagus or breathing tubes. (LP, tape 2, side 1). Centia is unable to control any swallowing functions. She requires active intervention for the elimination of secretions. Failure to properly remove secretions creates a threat of serious harm, even death, from obstruction of her respiratory passages. (LP, tape 2, side 1)

6. Centia sometimes is combative in resisting suctioning. Her resistance includes kicking and other efforts to prevent the insertion of the catheter. (KB, tape 6, side 1)

7. Because Centia has reflux disease and dysphasia and because a "Nissan fundoplication" was performed, it is impossible for Centia to take nourishment orally. She is fed through a gastronomy tube (G-tube). (LP, tape 2, side 1)

8. Centia suffers from respiratory ailments, including tracheomalacia and asthma. (LP, tape 2, side 1; AWW, tape 3, side 1) Because of severe limitations of her breathing ability, Centia must be monitored on a device called a pulse oximeter, which measures the level of oxygen saturation of the blood. (LP, tape 2, side 1; AWW, tape 3, side 1)

9. Centia is at risk for recurrent pneumonia. (LP, tape 2, side 1; AWW, tape 3, side 1). Centia was hospitalized twice for occurrences of pneumonia while residing in Virginia (LP, tape 2, side 1) and once in North Carolina. (AWW, tape 3, side 1)

10. Centia suffers profound mental retardation. (LP, tape 2, side 1; AWW, tape 3, side 1). Centia is incapable of verbal communication. She is "incapable of truly communicating what is going on." (LP, tape 2, side 1)

11. Centia suffers from seizures. Seizures suffered by Centia are manifested by small alterations of her behavior, expression or demeanor and require close observation to detect. (LP, tape 2, side 1; AWW, tape 3, side 1; MD, tape 4, side 1)

12. Centia's lack of movement causes osteopenia, or thinning of the bones, and results in an increased risk of breaking. (LP, tape 2, side 1). Centia's inability to move also creates a risk of bedsores and skin ulceration. (LP, tape 2, side 1; KB, tape 6, side 1) Centia has suffered skin ulceration. (LP, tape 2, side 1; KB, tape 6, side 1)

13. Centia's cerebral palsy creates a risk of scoliosis. (LP, tape 2, side 1; AWW, tape 3, side 1)

14. Centia's condition on the date of application for PDN services is expected to deteriorate over time. There is no

expectation of improvement. (LP, tape 2, side 1)

15. Centia has been found disabled and has been found eligible to receive SSI, and by that determination, also qualifies for Medicaid and Medical Assistance Services. Petitioner's medical care needs include oxygen therapy, chest physiotherapy, oral suctioning, nebulizer treatments, pulse oximetry and gastrostomy tube feeding.

16. Respondent's denial of sixteen hours of private duty nursing care for seven days per week was based upon findings made by Alison Weatherman, R.N. C, after she reviewed letters from Dr. Ada Williams, Dr. Jean Shelton, Wendy Dickens, R.N., Sandra Cyrus Mills, R.N. and nurse employee time slips dated February 17-21, 2003. (Joint Ex. 13-19) Alison Weatherman is qualified as an expert Medicaid private duty nursing consultant and as an expert in registered nursing, particularly in the field of skilled nursing services provided to patients in skilled nursing facilities. Ms. Weatherman has worked as a certified nurse aide and has supervised certified nurse aides in skilled nursing facilities. Ms. Weatherman found that the nursing interventions performed for Petitioner were outcome predictable; done at the same time every day; and that her medication administration was typically routine. Ms. Weatherman opined that the nursing interventions documented in the evidence are consistent with the frequency and complexity of services that can be provided to a patient in a skilled nursing facility. Respondent found that chest physiotherapy, oral suctioning, gastrostomy tube feedings and administration of routine medications through the gastrostomy tube were not skilled nursing services.

17. Ms. Weatherman also stated that a nurse is "constantly assessing" the needs of the patient and that a certified nursing assistant (CAN) cannot make assessments. (AW, tape 2, side 2). (AW, tape 1, side 1). She stated that oxygen administration is a skilled function that requires a nurse to assess and intervene. (AW, tape 2, side 2). Respondent also stated that Petitioner's prn medication was a skilled nursing service. Respondent admitted that a CNA cannot assess a patient's medical needs. (AW, tape 2, side 2)

18. Respondent stated that Respondent uses the Community Care Manual, which is a guidance manual for care providers, in the course of determining eligibility for services. (AW, tape 2, side 2) Ms. Weatherman admitted that she made her findings without familiarity with the requirements of the EPSDT Program. (AW, tape 2, side 2)

19. Centia's primary care physician in Virginia was Dr. Lawrence Pasquinelli, a doctor at the Children's Hospital of the King's Daughters in Norfolk, Virginia. Dr. Pasquinelli specializes in pediatrics, and serves on the faculty of Eastern Virginia Medical School. Dr. Pasquinelli was a witness in this proceeding. (LP, tape 1, side 2) Dr. Pasquinelli is a general pediatrician qualified as an expert in pediatrics. He last saw Petitioner on January 29, 2003 before she moved to North Carolina. Dr. Pasquinelli states that Petitioner needs some skilled nursing for suctioning, monitoring, feeding, range of motion, equipment and hygiene. Petitioner also needs regular assessment and observation for seizures.

20. Dr. Pasquinelli opined that if Petitioner were institutionalized, she would be placed in a children's nursing home similar to a senior nursing home. According to Dr. Pasquinelli, a certified nurse aide with proper training could provide much of Petitioner's care. He did state that caregivers must interpret nonverbal signals and physical manifestations to determine Centia's health status and that any and all diagnosis and treatment determinations must be based upon interpretation of physical symptoms, including but not limited to breathing patterns, secretions and other signals.

21. Dr. Ada Williams-Wooten is Centia's current primary care physician. She first saw Petitioner in March 2003. At the time of the hearing she had examined Petitioner on three or four occasions. Dr. Williams-Wooten opined that Centia requires continual observation for aspiration of respiratory secretions, oxygen saturations, feedings and seizures. She believed that assessing whether or not Centia is suffering from a seizure requires skilled observations and assessment. Although Centia does not suffer from weekly or even monthly episodes of either aspiration or seizures, the risk of either one of these two serious medical problems exist all of the time (AWW, tape 2, side 2). . Dr. Williams-Wooten opined that Centia's needs could only be met through ongoing one on one monitoring and assessment (AWW, tape 3, side 1) and that Petitioner needs constant interventions

22. Dr. Williams-Wooten also observed that a lot of children in Petitioner's condition are in facilities. She believed that Centia's medical needs and daily care needs could not be met in an institution or skilled care facility providing less than constant one on one care. (AWW, tape 3, side 2). Dr. Wooten-Williams recommended that the Department of Medical Assistance provide Private Duty Nursing for Centia Jackson for sixteen hours per day. (Jt. Ex. 15). Her recommendation was rejected by the Department of Medical Assistance. (Jt. Ex. 1)

23. Wendy Dickens, R.N., prepared the acuity assessment for Pediatric Services of America which she based on an interview with Petitioner's mother. (Joint Ex. 22) Pediatric Services of America is the agency that would provide Medicaid private duty nursing services if they had been approved.

24. Wendy Dickens opined that Centia requires continual assessments by a licensed nurse. She thought Centia was similar to long term children she had worked with who did not have a one to one nurse to patient ratio. The Undersigned finds Dickens comparison unpersuasive.

25. Centia received Private Duty Nursing services through Medicaid in the state of Washington and in the state of Virginia from a time shortly after her birth until her relocation with her family to North Carolina in February 2003. (MD, tape 4, side 1)

26. Centia received Private Duty Nursing care in the state of Virginia at home from a variety of sources. Nurses who treated and provided services in-home were Marissa Miller, Barbara Epps, and Kimberly Beaver. (Jt. Ex. 23; KB, tape 6, side 1)

27. Centia's mother, Melva Dickens, is the principle provider of care at the present time. (LP, tape 2, side 1; AWW, tape 3, side 1; MD, tape 3, side 1). Centia requires continuous observation because of a seizure disorder. Centia requires administration of albuterol every four hours throughout each day by inhalation through a nebulizer, and has orders for the increase of administration to every two hours, if needed. Centia requires Chest Physical Therapy (CPT) to loosen secretions for extraction by suctioning. Centia ordinarily requires suctioning every four hours throughout each day. Suctioning may be oral or nasal, and may require deep placement of the catheter. Nebulizer treatment, CPT and suctioning are coordinated to assist in clearing Centia's throat, lungs and breathing passages. Centia requires monitoring of Oxygen Saturation Level throughout each day, using a pulse oximeter. Centia requires the administration of oxygen throughout each day. Centia requires feeding by gastronomy tube five times each day. During each feeding, Centia must be monitored for proper ingestion. Centia requires the application of Benex gloves and splints several times each day. These treatments address the spasticity and rigidity of her muscles.

28. Ms. Dickens is presently employed at Abbott Laboratories. At the time of the hearing, she was scheduled to work from 8am to 3pm Ms. Dickens had received notification from her employer of an impending change to second shift hours. (MD, tape 4, side 1)

29. At present, Centia is enrolled at Tarboro Montessori Schools in Tarboro. In order for Centia to attend school, the Edgecombe County School system has assigned a nurse to provide assistance to Centia throughout the school day, including the time spent in transit to and from school. (MD, tape 4, side 1; PB, tape 5, side 1)

30. Edgecombe County Schools determined that Centia's needs warranted one on one nursing care throughout the school day. (MD, tape 4, side 1)

31. The nurse assigned by Edgecombe County Schools to provide Centia's one-on-one care during the school day is Pam Blackwell. The nurse meets Centia Jackson at 7:00 a.m. each day at the family's home, makes preparations there for the trip to school, and escorts Centia to school on the bus. (MD, tape 4, side 1; PB, tape 5, sides 1 and 2). To prepare Centia to leave the home it is necessary to pack her post scimitar and her oxygen machine, her oxygen tank, her suctioning machine, gather her medications and place Centia in her wheelchair. (PB, tape 5, side 1) The nurse spends the school day with Centia. Services provided during the school day include observations, medication, suctioning, respiratory assistance, feeding, and cleaning. (PB, tape 5, sides 1 and 2)

32. Ms Blackwell believed Centia requires constant monitoring and observation and evaluation and should not be left alone at any time during the day. (PB, tape 5, side 1) She thought Centia's condition could change "in the blink of an eye." Monitoring and assessing of Centia include but are not limited to assessing fluids and secretions including but not limited to saliva, urine, stool and suctioned fluids. Monitoring of fluids and secretions is critical to assessing whether or not Centia is properly hydrated, properly digesting her nutrition and/or showing signs of potential infection or illness.

33. On August 26, 2003, Centia Jackson's medical condition changed unexpectedly. Skilled nursing care was crucial to assessing, evaluating, and intervening to address this medical problem. (PB, tape 5, side 2) A skilled nurse assessed and evaluated Centia's physical condition to determine that the problem was not related to her lungs or her stomach. Interventions such as venting her stomach through the G-Tube were attempted. The skilled nurse was able to assess that these interventions did not produce any relief or positive change. Centia's treating physician was called and after learning of the failure of the skilled interventions, recommended immediate hospitalization. (PB, tape 5, side 2)

34. Centia also receives services during the school day from Down East Respiratory Service. The services provided include suctioning and physical therapy. (MD, tape 4, side 1)

35. Ms. Kimberly Beaver is a licensed practical nurse who works in Norfolk, Virginia. Ms. Beaver was employed by the agency which provided services to Centia while she was at home and eligible for Private Duty Nursing services in the state of Virginia from December 2001 until January 2003. (KB, tape 6, side 1). Ms. Beaver provided services which included suctioning,

physical therapy, medication by inhalation, feeding, and cleaning. (KB, tape 6, side 1) Services provided to Centia incorporate readiness to intervene immediately if her conditions warrant active intervention and constant observation to determine if such interventions are required. Nursing services provided include the observation and assessment of Centia's status, including interpretation of the amount, color, and consistency of fluid extracted from the lung by suctioning and observation of any waste. Furthermore, nursing services included observation of effectiveness of breathing function and successfulness of each feeding. (KB, tape 6, side 1) Ms. Beaver believed the observations are those of a studied and trained individual and cannot be provided by an individual who is not trained in the skills of nursing. (KB, tape 6, side 1)

36. Ms. Beaver had previous employment at a pediatric care facility. (KB, tape 6, side 1) She believed Centia Jackson would not receive adequate care and observation at a pediatric care facility. (KB, tape 6, side 1).

37. State Medicaid records show that Centia receives EPSDT services referred to in North Carolina as Health Check. (Petitioner's Ex. 11).

38. Respondent admitted that Respondent does not have a standard definition for what constitutes substantial and continuously complex care. (AW, tape 2, side 1). Respondent stated that the determination of what constitutes substantial and continuously complex care is made on a case by case comparison which involves subjective opinion. (AW, tape 2, side 2)

39. Centia requires services that are substantial. (LP, tape 2, side 1; AWW, tape 3, side 1; KB, tape 6, side 1). Centia requires services that are continuous. (LP, tape 2, side 1; AWW; KB, tape 6) Centia requires services that are complex. (LP, tape 2, side 1; AWW, tape 3; KB, tape 6)

40. "Private Duty Nursing services means nursing services for recipients who require more individual and continuous care than is available from a visiting nurse or routinely provided by the nursing staff of a hospital or skilled nursing facility. These services are provided (a) by a registered nurse or licensed practical nurse; (b) under the direction of the recipient's physician; and (c) to a recipient in one or more of the following locations at the option of the state – (1) his or her own home; (2) a hospital; or (3) a skilled nursing facility. 42 CFR 440.80

41. "Medically necessary Private Duty Nursing services are provided when they are prescribed by a physician and prior approved by the Division of Medical Assistance or its designee." 10 NCAC 26B .0122(a)

42. Private duty nursing services are considered medically necessary when the person must require substantial and complex continuous nursing care by a licensed nurse. Professional judgment and a thorough evaluation of the medical complexity and psychosocial needs of the patient are involved in determining the need for PDN. 10 NCAC 26B .0122(c)

43. "An individual with a medical condition that necessitates this [PDN] service normally is unable to leave the home without being accompanied by a licensed nurse and leaving the home requires considerable and taxing effort." 10 NCAC 26B .0122(d)

44. Federal and State Regulations do not provide any specific definition for the terms "substantial and continuously complex" and so determinations of entitlement are made by subjective application of the rules.

45. The Division of Medical Assistance, in denying PDN services, stated that "the medical record documentation provided at the reconsideration review, and that submitted after the review, supports the conclusion that the care that Centia routinely requires is not consistent with the continuous, substantial and complex nursing services described in the Medicaid guidelines for PDN services. Certainly Centia requires a tremendous amount of care and assistance with the activities of daily living; however, the skilled nursing interventions that are documented are episodic, not continuous." (Jt. Ex. 1)

46. The Division of Medical Assistance, in denying PDN services, relies upon the Community Care Manual, Section 9.1, which defines PDN as "medically necessary continuous, substantial and complex nursing services" and then erroneously equates "nursing services" with "interventions" and then issues its denial because the interventions are not continuous, despite evidence that nursing services that are required are in fact continuous. In its denial, the Division of Medical Assistance admits that "Centia requires a tremendous amount of care." (Jt. Ex. 1)

47. The Community Care Manual is a document prepared by the NCDHHS/Division of Medical Assistance as an interpretive guide for service providers to funded services under Medicaid law. The Community Care Manual does not have the force of law.

48. Under Medicaid law, there is a special provision providing an increase level of services for children who are under

age 21. Such services are entitled in the law Early Periodic Screening Diagnosis and Treatment (EPSDT).

49. The Medicaid Act, 42 USC 1396, a part of the Social Security law, establishes a State and Federal cooperative program in which states may choose to participate. Once the state agrees to participate in the program, it must establish a plan to provide medical services to low income individuals that meets federal requirements.

50. Services provided under the Medicaid Act include but are not limited to inpatient hospital services, outpatient hospital services, nursing services, physicians services, and early and periodic screening diagnostic, and treatment services (EPSDT) for qualified recipients under the age of 21. See 42 USC § 1396a(1) to (5).

51. EPSDT services are a mandatory component of Medicaid and therefore are available to all Medicaid recipients who are under 21 years of age.

52. Centia Jackson is a recipient of Medicaid services under age 21 and is eligible to receive EPSDT services.

53. The Medicaid Act mandates coverage for “(5) Such other necessary health care, diagnostic services, treatment and other measures described in section 1905(a) to correct or ameliorate defects and other physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.” 42 USC 1396d(r).

54. “A State Plan for Medical Assistance must...(43) provide for...(c) arranging for (directly or through referral to appropriate agencies, organizations or individuals) corrective treatment the need for which is disclosed by such child health screening services...” 42 USC 1396a(a)(43).

55. The state has a duty under 42 USC 1396a(a)(43) to inform Medicaid recipients about the EPSDT services that are available to them and that it must arrange for the corrective treatments prescribed by physicians.

56. “Medical necessity” is defined in the applicable federal regulations as “those services which are in the opinion of the treating physician, reasonable and necessary in establishing a diagnosis and providing palliative, curative or restorative treatment for physical and/or mental health conditions in accordance with standards of medical practice generally accepted at the time services are rendered. Each service must be sufficient in amount, duration and scope to reasonably achieve its purpose; and the amount, duration, or scope of coverage may not arbitrarily be denied or reduced solely because of the diagnosis, type of illness or condition.” 42 CFR 440.230

57. The Home Health Care standard states that it covers “the following services when they are medically necessary to help restore, rehabilitate, or maintain a patient in the home and the patient’s home is the most appropriate setting for the care. Services include skilled nursing, physical therapy...” and other services. (*Community Care Manual 5.1*)

58. Skilled Nursing visits are provided by a licensed registered nurse (RN) or by a licensed practical nurse (LPN) under the direction of a licensed RN. Services must be reasonable and necessary to the diagnoses and treatment of the patient’s illness or injury. The services include: observation and assessment...
management and evaluation...
teaching and training...
skilled nursing procedures...” (*Community Care Manual 5.1.1*)

59. North Carolina places a limit of 34 hours upon skilled nursing care under its Home Health Services. (*Community Care Manual 5.3.2*)

BASED UPON the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to the North Carolina General Statutes and there is no question as to misjoinder or nonjoinder.

2. Petitioner Centia is eligible for Medicaid services from the Division of Medical Assistance as a recipient of SSI benefits.

3. The risk for rapid deterioration in Centia's condition requires constant monitoring, observation and assessment by a skilled nurse.
4. Monitoring, observation and assessment, performed by a skilled nurse, to determine the present need for active intervention or that there is no present need for immediate intervention, is a substantial and complex service. Such observation and assessment, when performed constantly throughout the time that services are provided, is substantial and complex continuous service.
5. The appearance of stable health and the absence of frequent medical crises do not mean that the care required by Centia is not substantial and continuously complex. Continuous respiratory deficiencies which affect Centia can pose a significant threat to her health status and could result in death.
6. Centia does not have to show constant skilled interventions to show that the care she requires is substantial and continuously complex. The assessment and evaluation to determine that intervention is or is not necessary, requires a skilled nurse and does constitute substantial and continuously complex care.
7. Although the occurrence of a medical emergency requiring skilled intervention may appear episodic, the reliance upon actual interventions to determine whether care needs are continuous is erroneous.
8. The type of care that Centia requires on a daily basis is the level of care described in 21 NCAC 36.0225, components of nursing practices for the license practical nurse. Because Centia Jackson requires ongoing assessment and evaluation, Centia's care requires at a minimum a licensed practical nurse and can not be provided by a certified nursing assistant.
9. Because Centia's treating physician has prescribed PDN, Centia Jackson requires care at home, Centia's care is substantial and continuously complex and Centia can not leave home without been accompanied by a licensed nurse and requires considerable and taxing efforts to leave home, her required level of care satisfies the standard imposed by 10 NCAC 26B.0112.
10. The ongoing and continued assessment, implication, and evaluation of Centia's medical needs and medical care requires skilled nursing care as described in 21 NCAC -36.0225, the standards of practice for a licensed practicing nurse.
11. Centia qualifies for private duty nursing services as described in 42 CFR 440.80. Centia has had private duty nursing services for many years first in the State of Washington and then in the State of Virginia. The Edgecombe County School system in North Carolina also found the need for and provides private duty nursing for Centia.
12. The possibility or fact that a person's medical needs can be met in a skilled facility is not dispositive of the issue whether or not a person may qualify for private duty nursing. A person requiring Tracheotomy care qualifies for private duty nursing (10 NCAC 26B.0112(c)) even though such a person can have his/her medical needs met in a skilled facility.
13. Petitioner, Centia Jackson, requires constant monitoring. Her medical conditions are such that rapid deterioration is distinctly possible which requires immediate and skilled interventions.
14. The assessment and evaluation of Centia is continuous and because the types of problems being assessed and evaluated require a skilled nurse, Centia's monitoring, assessment, and evaluation is substantial and continuously complex.
15. Centia meets the legal and regulatory requirements for private duty nursing services. Additionally, Centia is entitled to services through Health Check under the EPSDT rules. Through EPSDT, available services include Private Duty Nursing and Home Health Care.
16. Under EPSDT rules, the Department of Medical Assistance must provide medically necessary services to Centia Jackson without limitations that otherwise exist in Medicaid rules for other beneficiaries. Further, under EPSDT rules, the Department of Medical Assistance must coordinate and assist in the provision of necessary medical services.
17. The Division of Medical Assistance is obliged to actively assist in the provision of services for children receiving Medicaid coverage. The State Division of Medical Assistance has an affirmative obligation to inform Centia, through her mother, of available services, and to provide treatment for her conditions.
18. Under Medicaid rules, Centia is entitled to services that are deemed medically necessary.
19. The thirty-four hour limit upon nursing services available under Home Health Care services (Community Care Manual 5.3.2) is overruled by the EPSDT mandate, and so PDN services are available under Home Health Care rules as well.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Based on the specific facts of this case and the applicable law, the Undersigned finds and so holds that the decision of the Division of Medical Assistance to deny Private Duty Nursing (PDN) Services to Petitioner Centia Jackson was and is **IN ERROR**. Respondent should with all haste provide Private Duty Nursing (PDN) Services for the care of Centia Jackson in an amount sufficient to provide necessary care up to sixteen (16) hours each day, less any amount of Private Duty Nursing Services provided by the Edgecombe County Schools.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and to present written arguments regarding this Decision issued by the Undersigned in accordance with N. C. Gen. Stat. § 150B-36.

In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina Department of Health and Human Services.

IT IS SO ORDERED.

This the 23rd day of March, 2004.

Augustus B. Elkins II
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF CRAVEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 DHR 1499

CRAVEN REGIONAL MEDICAL)
 AUTHORITY d/b/a CRAVEN)
 REGIONAL MEDICAL CENTER)
 Petitioner,)
)
 v.)
)
 N.C. DEPARTMENT OF HEALTH AND)
 HUMAN SERVICES, DIVISION OF)
 FACILITY SERVICES, CERTIFICATE OF)
 NEED SECTION,)
 Respondent,)
)
 and)
)
 COASTAL CAROLINA HEALTH CARE,)
 P.A. d/b/a COASTAL CAROLINA)
 IMAGING)
 Respondent-Intervenor.)

RECOMMENDED
DECISION

Pursuant to N.C. Gen. Stat. §131E-188(a) and 150B-23, on April 15 – 22, 2004, Administrative Law Judge Melissa Owens Lassiter conducted a contested case hearing in this matter in Raleigh and New Bern, North Carolina. Pursuant to the undersigned’s request, the parties filed proposed Recommended Decisions on or before May 7, 2004. Having heard all the evidence in the case, considered the exhibits, arguments, and relevant law, the undersigned makes the following Findings Of Fact, and Conclusions of Law:

APPEARANCES

For Petitioner:

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APPLICABLE LAW

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-2 et seq. and §131E-188 of the North Carolina Certificate of Need law.
2. The substantive statutory law applicable to this contested case is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175 et seq.
3. The administrative regulations applicable to this contested case 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.2700 et seq. (Criteria and Standards for Magnetic Resonance Imaging Scanners), and the Office of Administrative Hearing Regulations, 26 N.C.A.C. 3.0001 et seq.

ISSUE

Whether Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law and substantially prejudiced Petitioner's rights in disapproving the certificate of need ("CON") application of Petitioner, and approving the CON application of Respondent-Intervenor?

FINDINGS OF FACT

Parties

1. Petitioner is a hospital located in New Bern, Craven County, North Carolina. (CRMC Application, Ex. 3, p. 6). Currently, Petitioner owns and operates the only two fixed MRI scanners in Craven County. Id.
2. Respondent is Respondent responsible for the administration of North Carolina's Certificate of Need law, N.C. Gen. Stat. Chapter 131E, Article 9.
3. Respondent-Intervenor is a professional association incorporated on October 29, 1997. Respondent-Intervenor is comprised of diagnostic centers and physician practices that provide health care services to the residents of Craven and surrounding counties. (CCI Application, Ex. 2, pp. 5, 7-8).

Procedural Background

4. The 2003 State Medical Facilities Plan ("SMFP") allocated one additional fixed MRI for MRI Service Area 23 (the "Service Area"), which includes the counties of Craven, Jones, Onslow, Pamlico and Carteret. (Agency File, Ex. 1, p. 277).
5. Four applicants, Respondent-Intervenor Coastal Carolina Health Care, P.A. ("CCHC") d/b/a Coastal Carolina Imaging ("CCI"), Respondent-Intervenor Craven Regional Medical Authority d/b/a Craven Regional Medical Center ("CRMC"), Eastern Carolina Internal Medicine, P.A. d/b/a ECIM ("ECIM"), and Jacksonville Diagnostic Imaging, LLC d/b/a Coastal Diagnostic Imaging ("CDI"), filed certificate of need ("CON") applications with Respondent to acquire the fixed MRI scanner. These applications were reviewed competitively since only one additional MRI could be allocated from the review. (Agency File, Ex.1, pp. 276-334).
6. By letter dated July 28, 2003, Respondent notified all applicants that CCI's application was approved and the applications of CRMC, ECIM, and CDI were disapproved. (Agency File, Ex. 1, pp. 12-15). On July 30, 2003, Respondent issued the Required State Agency Findings (the "Agency Findings") upon which it based its decision. (Agency File, Ex. 1, pp. 16-17, 276-334).
7. Petitioner CRMC filed a Petition for Contested Case Hearing challenging the approval of CCI's application and the disapproval of CRMC's application. By Order dated, November 6, 2003, CCI was permitted to intervene in the contested case.

Respondent's Decision

8. Louise Beville was the project analyst that reviewed the four competing applications. (Beville, Vol. 3 p. 532). Lee Hoffman, Chief of the CON Section, reviewed, edited, and signed Respondent Findings. (Hoffman, Vol. 1, pp. 134-135).

9. Respondent determined that both the CCI and CRMC applications were conforming with all statutory and regulatory review criteria. (Agency File, Ex. 1, pp. 276-334; Beville, Vol. 3, p. 534; Hoffman, Vol. 1, pp. 131-135).

10. Respondent then performed a comparative analysis of the applications to determine which proposal should be approved. (Agency File, Ex. 1, pp. 324-334). Respondent determined that the CCI application was the most effective alternative proposed, and therefore disapproved the CRMC application. (Id.; Beville, Vol. 3, p. 534; Hoffman, Vol. 1, p. 134).

Respondent-Intervenor CCI's Application

Criterion 3 and Related Regulatory Criteria

11. N.C. Gen. Stat. §131E-183(a)(3) ("Criterion 3") requires that an applicant identify the population to be served by the proposed project, and demonstrate the need that this population has for the services proposed..." N.C.G.S. §131E-183(a)(3). (Agency File, Ex. 1, pp. 278-279).

12. 10 N.C.A.C. 3R .2714(c)(5) requires:

(c) An applicant proposing to acquire a magnetic resonance imaging scanner, including a mobile MRI scanner, shall provide the following additional information....

...

(5) documentation of the need for an additional MRI scanner in the proposed MRI service area and description of the methodology used to project need, including all assumptions regarding the population to be served.

(Agency File, Ex. 1, pp. 316-317).

13. 10 NCAC. 3R .2715(b)(2) requires:

(b) An applicant proposing to acquire a magnetic resonance imaging scanner for which the need determination in the State Medical Facilities Plan was based on the utilization of fixed MRI scanners, shall:

(2) demonstrate annual utilization in the third year of operation is reasonably projected to be an average of 2900 procedures per scanner for all existing, approved and proposed MRI scanners or mobile MRI scanners to be operated by the applicant in the MRI service area(s) in which the proposed equipment will be located; and

(3) document the assumptions and provide data supporting the methodology used for each projection required in this rule.

(Agency File, Ex. 1, pp. 318-319).

14. Respondent found that CCI adequately demonstrated the need the population to be served has for its proposed MRI services, using a methodology that projects a reasonable procedure use rate yielding at least 3,190 procedures. (Agency File, Ex. 1, pp. 279-284). Further, Respondent found that CCI provided letters of support from 57 physicians who indicated their intent to refer at least 5,352 procedures to CCI's proposed MRI scanner. (Agency File, Ex. 1, p. 284).

15. When determining an applicant's conformity with the statutory and regulatory criteria, Respondent looks at the entire application and all of the information available to Respondent. (Hoffman, Vol. 1, p. 188). An applicant can also explain information in its application. (Hoffman, Vol. 1, p. 163).

16. CCI's methodology resulted in a projected number of scans for 2002 that was comparable to the actual number of scans performed in the Service Area for the year 2002. (CCI Ex. 13; Nuckolls, Vol. 3, pp. 723-724). For 2002, CCI projected 16,663 scans would be performed. (Id.). The actual number of procedures performed in the Service Area for 2002 was 16,528. (Id.).

17. CCI documented its assumptions and provided data supporting the methodology used in its projections. (CCI Application, Ex. 2, pp. 67-77, 236-285). CCI derived a procedure use rate per one thousand (1,000) population of 59.8 and applied that number to the entire population of the Service Area to reach a number of projected procedures for the Service Area. (Id. at 67-77). From the number of projected procedures for the Service Area, CCI factored in patients coming in and leaving the Service Area to derive its projected total of procedures to be performed in the Service Area. (Id.)
18. All of the information used to derive CCI's use rate per one thousand (1,000) population was available to Respondent at the time of the review. (Nuckolls, Vol. 3, p. 725-726).
19. CRMC's procedure use rate per one thousand (1,000) population of 65.9 is higher than CCI's projected procedure use rate of 59.8. (Nuckolls, Vol. 3, p. 716).
20. No number in CCI's methodology was challenged other than the MRI procedure to patient ratio of 1.411. (David French, Vol. 1, 282-286; Louise Beville, Vol. 3, pp. 604- 605).
21. CCI divided the reported population of North Carolina patients who received MRI service in North Carolina, by the number of reported procedures performed by North Carolina providers, to derive a MRI procedure to patient ratio of 1.411. (CCI Application, Ex. 2, p.72). The 1.411 ratio was multiplied by the patient use rate for the Service Area to determine a procedure use rate. (Id. at 68; Nuckolls, Vol. 4, p. 765).
22. CRMC contends that the 1.411 ratio is an unreasonably high estimate, because it was derived from incomplete data provided by the Medical Facilities Planning Section of the Division of Facility Services. (French, Vol. 1, pp. 80, 85-86). However, the data used to derive the 1.411 procedure to patient ratio was the best data available. (Nuckolls, Vol. 3, p. 709; Beville, Vol. 3, p. 550). All of the testimony presented by CRMC came from witnesses who did not know the actual procedure to patient ratio for the Service Area. (Elkins, Vol. 1, pp. 42, 52; Beville, Vol. 3, p. 561; Hoffman, Vol. 1, p. 200; French, Vol. 1, p. 256). The procedure to patient ratio is greater than 1:1. (Elkins, Vol. 1, p. 43; French, Vol. 1, p.256). A 1:1 ratio indicates that an entity is reporting procedures rather than patients. (Nuckolls, Vol. 4, p. 820). Many MRI service facilities report the total number of procedures or the number of encounters, but not patients. (Id.). Reports of a 1:1 ratio of procedures to patients, and reports of procedures rather than patients, lead to a ratio of procedures to patients that is artificially low.
23. Replacing CCI's ratio of 1.411 with a procedure to patient ratio of 1.23 (on line 3 of the chart on page 68 of the CCI application) would result in a scan volume in excess of 2,900 procedures in CCI's third year of operation. (Nuckolls, Vol. 4, p. 768; CCI Application, Ex. 2, p. 68). CRMC's procedure to patient ratio was 1.25 for 2002. (CRMC Ex. 16, p. 2; Nuckolls, Vol. 4, pp. 769-770). By CRMC's admission, the 1.25 ratio is low, because CRMC counts a single person as a new patient, when that person is scanned at the hospital-based scanner, and scanned at CRMC's diagnostic center's scanner on different occasions. (CRMC's Vice President of Administration, Raymond Leggett, Vol. 4, p. 882). The procedure to patient ratio would be understated if a patient is counted as a new patient each time they receive a MRI service during the course of a year. (French, Vol. 1, p. 258).
24. David French's, CRMC's expert witness, calculation of patient to procedure ratios of 1.08 and 1.18 are not reliable, because Mr. French inconsistently calculated the ratios and included data he admitted was inaccurate. (French, Vol. 1, pp. 86-89, 91, 99-100, 257, 296; Vol. 2, pp. 338-340, 361).
25. The project analyst, Louise Beville, calculated a ratio of 1.369 MRI procedures per patient as opposed to the 1.41 MRI procedures per patient calculated by CCI. (Agency File, Ex. 1, p. 284; Beville, Vol. 3, pp. 545-548). Ms. Beville knew the data she used in such calculation was incomplete, because all mobile providers do not report patient origin. (Beville, Vol 3, pp 550, 554-555). Even though Beville knew that the date she used in her calculation was incomplete, such data was the best data available. (Beville, Vol 3, pp 550, 554-555)
26. The actual statewide procedure to patient ratio is unknown; however, ratios for existing facilities range from a 1:1 ratio up to a ratio of 2.24. (Petitioner's Exh 17)
27. Respondent has approved MRI CON applications in prior reviews that relied upon the ratios of 1.36 and 1.4 MRI procedures per patient in projecting utilization. (CCI Ex. 14, 15; Beville, Vol. 3, pp. 622-624).
28. During the review, Lee H. Hoffman, Chief of Respondent's CON Section, was aware that some MRI providers report MRI procedures, but not patients. However, she was not aware there was a whole group of providers, ie. mobile MRI providers, who did not report patients. (Hoffman, Vol 1, pp 139-140)
29. At the administrative hearing, Hoffman opined that she now believes that using the calculation of dividing the number of procedures reported to the Medical Facilities Planning Section by the number of patients reported, to get a ratio of procedures to patients, is an inappropriate calculation, because the data is missing a significant number of patients in order to make a reasonable calculation. (Hoffman, Vol 1, pp140-141) Had Hoffman been aware, at the time of the review, that many MRI providers report MRI procedures but not patients, she would not have allowed Beville's projection of 1.37 procedures per patient to be included in Respondent's Findings, because Beville's 1.37 ratio was inappropriate. She believes that Beville's 1.37 ratio was inappropriate

because the denominator in such ratio did not include a significant number of patients who were served by the mobile MRI providers. (Hoffman, Vol 1, pp 143-144)

30. In its application, CCI included letters of support from sixty-five physicians as documentation demonstrating that CCI reasonably projected to perform at least 2,900 procedures in its third year of operation. (CCI Application, Ex. 2, pp. 75, 236-285; Nuckolls, Vol. 2, p. 493; Vol. 4, pp. 844-845). The letters received by CCI provided specific volumes of referrals that physicians would make to the CCI scanner. These specific pledges totaled over 8,600 procedures. (CCI Application, Ex. 2, p. 75; Nuckolls, Vol. 2, p. 493).

31. CRMC, currently the only provider of fixed MRI services in the parties' primary service area, received letters of support from only fourteen (14) physicians. (Nuckolls, Vol. 4, p. 844-845; CRMC Application, Ex. 3, pp. 184-196).

32. CCI approached the physician community of the Service Area, and asked, physician by physician, and practice by practice, whether health care providers would actually send patients to CCI's MRI scanner for service. (Nuckolls, Vol. 2, pp. 415, 492).

33. CRMC presented incomplete and inconsistent data challenging the number of MRI procedures historically referred by the physicians who wrote letters of support on CCI's behalf. (French, Vol. 1, pp. 286-289, Vol. 2, pp. 321-326).

34. The CCI application reasonably demonstrated that the proposed CCI scanner would average 2,900 procedures in the third year of operation. CCI projected a reasonable number of MRI procedures to be performed in Service Area 23. Based upon the best data available at the time of this review, CCI's 1.411 procedure to patient ratio was a reasonable ratio. The letters of support documenting pledged referrals, in light of the application as a whole, might be a sufficient methodology to find CCI's application is conforming with Criterion 3. (Agency File, Ex. 1, pp.279-284; Hoffman, Tr. Vol. I, p. 144).

35. Respondent properly found the CCI application conforming with Criterion 3 and the related regulatory criteria on the grounds that CCI clearly documented the need for the proposed project, and CCI's utilization projections were based upon reasonable assumptions.

Criterion 4

36. Criterion 4 requires "[w]here alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed." N.C.G.S. §131E-183(a)(4). (Agency File, Ex. 1, p.295).

37. Respondent concluded in its Findings that CCI considered several alternatives in its application, and the proposal was an effective alternative for providing MRI services. (Agency File, Ex. 1, p. 295).

38. CCI proposed an open .7 Tesla MRI scanner to be located in its freestanding outpatient diagnostic center. (CCI Application, Ex. 2, p. 12). Catherine Everett, MD, a radiologist in Craven County, thought that a .7 Tesla scanner produces diagnostic quality scans, and is especially designed for obese, claustrophobic, and pediatric patients. (Everett, Vol. 4, pp. 738, 743-744, 756).

39. A freestanding, outpatient facility is an effective alternative, because most MRI procedures are performed on an outpatient basis, and CRMC currently provides inpatient MRI services. (Hoffman, Vol. 1, p. 185).

40. Respondent properly found CCI conforming with Criterion 4.

Criterion 5

41. Criterion 5 requires 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." N.C. Gen. Stat. § 131E-183(a)(5). (Agency File, Ex. 1, p. 295).

42. CCI adequately demonstrated that the projected number of procedures to be performed is reasonable. (Agency File, Ex. 1, p. 297).

43. CCI proposed to acquire its MRI equipment through an operating lease with GE. (CCI Application, Ex. 2, p. 116, 287-297; Agency File, Ex. 1, p. 296; Nuckolls, Vol. 4, p. 807).

44. Respondent did not require GE to be a co-applicant of CCI, because GE is an equipment manufacturer that offers to lease equipment to an applicant, and is not offering a new institutional health service. (Hoffman, Vol. 1, p. 188-189; Beville, Vol. 3, p. 612). GE would not be involved in the management of the CCI project or the operation of its proposed MRI scanner. (Nuckolls, Vol. 4, p. 807).

45. Ms. Beville determined that GE's documentation was sufficient to demonstrate CCI's ability to acquire its proposed scanner, even though the quote expired before the March 1, 2003, review began. (Agency File, Ex. 1, p. 296-297; Beville, Vol. 3, pp. 611-612). A quote acquired during the preparation of a CON application is sufficient, because there are variations in the terms offered by different vendors. (Beville, Vol. 3, pp. 611-612). It is not reasonable to expect a financing offer to be held open indefinitely. (French, Vol. 2, p. 332). Respondent would not find an applicant nonconforming because of the expiration of a lease. (Hoffman, Vol. 1, p. 201). Respondent can condition someone to demonstrate the financial availability of funds or availability of financing after its application is approved. (*Id.*).

46. CCI estimated its capital expenditure for the project to be \$481,629. (Agency File, Ex. 1, p. 296; CCI Application, Ex. 2, pp. 109-111). CCI did not include the value of the MRI equipment it proposed to obtain by an operating lease in its estimate of capital costs. (CCI Application, Ex. 2, pp. 109-111). CCI relied upon generally accepted accounting principles to determine that an operating lease is not to be included in capital costs. (CCI Application, Ex. 2, pp. 109-111). An applicant should use generally accepted accounting principles in preparing its application. (Hoffman, Vol. 1, p. 191). David French, CRMC's expert witness, uses generally accepted accounting principles when he prepares CON applications. (French, Vol. 2, p. 360).

47. Respondent does not require the cost associated with an operating lease to be included as a part of an applicant's capital costs. (Beville, Vol. 3, pp. 610-611). Respondent instructs applicants not to include operating costs as capital costs. (Hoffman, Vol. 1, pp. 189-190; Beville, Vol. 3, p. 611). Respondent uses the definition of "capital expenditure" as defined in the CON statutes to determine whether a CON is required for a project. (Hoffman, Vol. 1, pp. 190-195). Respondent differentiates between the capital cost projections required in the CON application form, and "capital expenditure" in the determination of what constitutes a new institutional health service. (Hoffman, Vol. 1, pp. 189-190).

48. CCI based its application fee on the projected capital costs stated in its application, which did not include the costs of its proposed operating lease for the MRI equipment. (CCI Application, Ex. 2, p. 110; Agency File, Ex. 1, pp. 3-4). The application fee should be based on the capital costs projected in the application. (Hoffman, Vol. 1, pp. 192-193; Beville, Vol. 3, p. 611). CCI paid the correct application fee. (Agency File, Ex. 1, p. 5).

49. CCI met the requirements of Criterion 5 to demonstrate the immediate and long-term financial feasibility of its project based upon reasonable projections of cost and charges. Respondent properly found CCI conforming with Criterion 5.

Criterion 7 and 8

50. Criterion 7 requires that "[t]he applicant shall show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided." N.C. Gen. Stat. § 131E-183(a)(7). (Agency File, Ex. 1, p. 302).

51. Criterion 8 requires that "[t]he applicant shall demonstrate that the provider of the proposed services will make available, or otherwise make arrangements for, the provision of the necessary ancillary and support services. The applicant shall also demonstrate that the proposed service will be coordinated with the existing health care system." N.C. Gen. Stat. § 131E-183(a)(8). (Agency File, Ex. 1, p. 303).

52. The CCI application stated that physician services would be available for its proposed MRI services. (CCI Application, Ex. 2, pp. 102-106). Nursing staff is not required to be available at an outpatient MRI center. (Beville, Vol. 3, pp. 612-613; French, Vol. 2, p. 340). Physicians can oversee medication administration and can fulfill any duties for which a nurse might be responsible. (French, Vol. 2, pp. 314-315; Beville, Vol. 3, pp. 612-613).

53. Respondent properly found CCI conforming with Criterion 7 and Criterion 8.

CRMC's Application

Regulatory Criteria 10 N.C.A.C. 3R.2714

54. 10 N.C.A.C. 3R.2714(c)(3) provides:

(c) An applicant proposing to acquire a magnetic resonance imaging scanner, including a mobile MRI scanner, shall provide the following information....

(3) the average charge to the patient, regardless of who bills the patient, for each of the twenty most frequent MRI procedures to be performed for each of the first three years of operation after completion of the project and a description of the items included in the charge...

(Agency File, Ex. 1, p. 316).

55. Respondent found that CRMC provided the average charge per procedure by type for the twenty (20) most frequently performed MRI procedures and found CRMC conforming with 10 N.C.A.C. 3R.2714(c)(3). (Agency File, Ex. 1, pp. 316-317).

56. CRMC provided a chart listing twenty (20) procedures for each of its MRI locations. (CRMC Application, Ex. 3, p. 19-20). The charts CRMC provided were inaccurate. (Budrys, Vol. 5, p. 894; Ludwig, Vol. 2, p. 393; Conner, Vol. 4, pp. 856-859). The procedures and charges listed by CRMC were based upon errors in coding and billing that CRMC had been committing for many years. (Ludwig, Vol. 2, pp. 386-388; Conner, Vol. 4, pp. 855-856). A number of the procedures that CRMC listed as procedures to be performed "with contrast" should have been listed as combined ("with and without contrast") procedures. (Ludwig, Vol. 2, pp. 393-396; Conner, Vol. 4, pp. 858-859). CRMC does not know the quantity of the erroneously labeled procedures; however, a significant volume of MRI performed procedures are combined procedures. (Ludwig, Vol. 2, pp. 391, 393-396; Leggett, Vol. 4, p. 874). CRMC was aware of the errors prior to the filing of the CRMC application. (Ludwig, Vol. 2, pp. 390-391; Sherron, Vol. 4, p. 867).

57. During the review, Respondent was not aware of the inaccuracy in CRMC's list of the twenty (20) most frequently performed procedures. (Beville, Vol. 3, pp. 615-616). The information required to determine the appropriate volume, type and charge for each inaccurate list was not provided in the CRMC application. (Ludwig, Vol. 4, p. 399).

58. The Agency has the authority and ability to find an applicant conditionally conforming with some rules. (Beville, Tr. Vol. 3, p. 653.) No evidence was offered in the contested case hearing indicating that the Agency could not have found CRMC's application conditionally conforming with this rule.

59. The Agency properly found the CRMC application conforming with 10 N.C.A.C. 3R.2714.

Criterion 5

60. Criterion 5 requires 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." N.C. Gen. Stat. § 131E-183(a)(5). (Agency File, Ex. 1, p.295).

61. Respondent found the CRMC application conforming with Criterion 5 based upon CRMC's representation with respect to its charges for the twenty (20) most frequently performed MRI procedures. (Agency File, Ex. 1, p. 300-301). Respondent found the CRMC application conforming with Criterion 5 based upon CRMC's representation with respect to its projected costs of CRMC's proposed MRI project. (Id.). Respondent found the CRMC application conforming with Criterion 5 based upon CRMC's representation with respect to its projected profit of CRMC's proposed MRI project. (Id.).

62. CRMC's pro forma financial statements contained numerous errors that made them unreliable. (Nuckolls, Vol. 4, p. 802; CCI Ex. 52). Mr. Romuldas Budrys, President and CEO of CRMC, testified that he would not have signed the CRMC application and allowed it to be filed had he been aware of the errors. (Budrys, Vol. 5, p. 896).

63. CRMC acknowledged that there were numerous errors contained in its pro forma financial statements. (Hinson, Vol. 5, p. 905-906, 946-947; Leggett, Vol. 4, pp. 872-873; Budrys, Vol. 5, p. 896).

64. A 7.75 percent increase in charges was omitted from CRMC's pro forma financial statements. (CRMC Application, Ex. 3, pp. 78-79, 409-410; French, Vol. 1, p. 274; Hinson, Vol. 5, 905-906).

65. CRMC's charges were understated by an indeterminable amount because CRMC's twenty (20) most frequently performed procedures were inaccurate. (Ludwig, Vol. 2, pp. 393-396, 398). The charges for the twenty (20) most frequently performed procedures are the charges used to develop an applicant's average charge per procedure. (Beville, Vol. 3, p. 614; Hinson, Vol. 5, p. 936).

66. CRMC's charges are also understated because the charge for gadolinium ("contrast material") was omitted from the financial pro formas. (Ludwig, Vol. 2, p. 397).

67. The contractual adjustments to revenue provided in the CRMC pro forma financial statements are too high. (Cowin, Vol. 5, p. 963, Nuckolls, Vol. 4, pp. 822-825). CRMC represented that it allows Blue Cross Blue Shield ("BCBS") a thirty percent (30%) discount from gross charges. (CRMC Application, Ex. 3, p. 409-410). CRMC is reimbursed at an amount greater than its actual charge for the vast majority of its outpatient MRI procedures. (Nuckolls, Vol. 4, pp. 771-776). Approximately ninety percent (90%) of CRMC's MRI procedures are performed on an outpatient basis. (Nuckolls, Vol. 4, pp. 824-825). Even assuming that CRMC is not reimbursed for any of its inpatient procedures, the maximum BCBS discount would be less than ten percent (10%). (Nuckolls, Vol. 4, pp. 797-799, 824-825).

68. CRMC understated expenses that increase as gross revenues increase from its pro forma financial statements. (Hinson, Vol. 5, pp. 913-914, 946-947).

69. The information needed to develop reasonable pro forma financial statements for the CRMC project was not made available to Respondent. (Hinson, Vol. 5, pp. 943-944). There is no information in CRMC's application that provides an accurate projection of the twenty (20) most frequently performed procedures or the charges for those procedures. (Ludwig, Vol. 2, p. 399). CRMC does not know the quantity of the procedures that should have been listed as combined charges to determine an average weighted charge per procedure. (Ludwig, Vol. 2, pp. 392-396).

70. There is no information in the CRMC application that states CRMC's charge for gadolinium. (Ludwig, Vol. 2, p. 399). However, CCI presented Respondent with CRMC's charge for gadolinium during the written comment period of the review. (Agency File, Ex. 1, p. 52; Beville, Vol. 3, pp. 629-630).

71. There is no information in the CRMC application that explains the formula or assumptions to determine how CRMC allocates hospital-wide overhead expenses from non-revenue producing departments to the MRI department. (CRMC Application, Ex. 3, pp. 409-410).

72. Stephen Nuckolls, an expert in financial accounting, accounting for health care entities, and health planning, testified that it cannot be determined whether CRMC's project will be financially feasible. (Nuckolls, Vol. 4, p. 778). CRMC primarily contracts with payors on a fixed price basis. (Hinson, Vol. 5, p. 944). When CRMC is paid on a fixed price basis, its net revenues do not change even when gross revenues increase. (Hinson, Vol. 5, p. 944-945). CRMC allocates hospital-wide overhead expenses from non-revenue producing departments to revenue producing departments (MRI in this case) based upon the revenue producing department's gross revenues. (CRMC Application, Ex. 3, p. 409-410). The effect of the higher charges increases CRMC's gross revenues and increases its expenses, but the net revenue collected by CRMC remains constant. (Nuckolls, Vol. 4, pp. 781-783).

73. During this contested case, CRMC prepared two different revised pro forma financial statements in an attempt to correct the errors made in the pro forma financial statements included in CRMC's application. (CRMC Application, Ex. 3, p. 409-410; CCI Ex. 62; CRMC Ex. 68; Hinson, Vol. 5, pp. 911-919).

74. In the first of these revised pro forma financial statements, CRMC created new errors. (Nuckolls, Vol. 4, pp. 785-796). In the new defective pro forma financial statements, gross revenue increased \$1,600,000 or 16.23 percent. (Nuckolls, Vol. 4, p. 788).

75. In the second of CRMC's revised pro forma financial statements, David Hinson, the Assistant Controller at CRMC, was told by counsel for CRMC to hold expenses constant while increasing revenues. (Hinson, Vol. 5, pp. 939-940).

76. An applicant must demonstrate that its projections of costs and charges are reasonable and reliable in order to determine whether the project is financially feasible. (Hoffman, Vol. 1, pp. 211-212; Beville, Vol. 3, p. 627). If financial feasibility cannot be determined, the application is nonconforming with Criterion 5. (Hoffman, Vol. 1, p. 211).

77. Even though the pro formas submitted by CRMC contained errors, the Respondent would have still found CRMC conforming to Criterion 5, because the errors in the pro formas would have increased the profitability of the project and the project

would have remained financially feasible. (Hoffman, Tr. Vol. 1, p. 204-206; Beville, Tr. Vol. 3, p. 645-646; French, Tr. Vol. 2, p. 352-353).

Comparison of the CCI and CRMC Applications

Geographic Distribution

78. CRMC and CCI each proposed to locate a new MRI scanner in Craven County. (Agency File, Ex. 1, pp. 324-327).

79. Respondent determined that Craven County, North Carolina was the most effective location for the MRI scanner, and that CCI and CRMC were equally effective with respect to geographical distribution. (Hoffman, Vol. 1, p. 164; Beville, Vol. 3, p. 582).

Location

80. CCI proposed to acquire a fixed MRI scanner, and locate such scanner in its freestanding diagnostic center. (CCI Application, Ex. 2, p. 12; Agency File, Ex. 1, p. 328). CRMC proposed to locate its proposed fixed MRI scanner on its hospital campus. (CRMC Application, Ex. 3, p. 8; Agency File, Ex. 1, pp. 292, 328). CRMC currently has two MRI scanners, one of which is in the hospital and the other is in an outpatient facility. (Agency File, Ex. 1, pp. 292, 328; CRMC Application, Ex. 3, pp. 6-8).

81. Approximately ninety percent (90%) of MRI procedures are performed on outpatients in Craven County. (French, Vol. 1, p. 271; Beville, Vol. 3, p. 583). Because CRMC currently has two MRI scanners, one which is located in the hospital, a more effective alternative is to place a MRI scanner at a freestanding outpatient facility. (Hoffman, Vol. 1, p. 185).

82. A freestanding outpatient facility is a more effective alternative, because (1) approximately 90% of the patients who receive MRI scans are outpatients, and (2) in the outpatient setting, the outpatients would not have their procedures delayed to accommodate the needs of the inpatients and emergency patients. Additionally, as the outpatient population shifts to the freestanding facility, capacity of the hospital's scanner will increase. (Agency File, Ex. 1, pp. 327-328; Beville, Vol. 3, p. 584).

83. If CRMC requires a second MRI scanner at the hospital, CRMC can move its existing scanner from its outpatient facility to the hospital without applying for a CON. (Beville, Vol. 3, pp. 602-603).

84. CCI's proposal to locate a fixed MRI scanner in a freestanding outpatient facility is the most effective alternative with regard to location. (Agency File, Ex. 1, pp. 327-328).

Access by Underserved Groups

85. Based upon information presented in the applications, CCI's projected percentage of MRI service for Medicare patients is greater than CRMC's. Also, CCI's projected percentage of MRI service for Medicaid patients is greater than CRMC's. (Agency File, Ex. 1, p. 328). CCI based its percentages on its experience in operating a diagnostic imaging center. (CCI Application, Ex. 2, pp. 99-100; Beville, Vol. 3, pp. 590-591; Nuckolls, Vol. 2, pp. 439-440). CCI used the best data available to project its payor mix and does not expect the payor mix to change. (Nuckolls, Vol. 2, p. 440).

86. CCI is the most effective alternative with respect to access to underserved groups, because it proposed the highest percentage of MRI service for Medicare patients as well as Medicaid patients. (Hoffman, Vol. 1, p. 186).

Revenues/Net Revenues Per Procedure

87. Respondent determines the more effective applicant with regard to net revenue, is the one proposing the lowest net revenue per procedure if the applicant's revenues are based on reasonable assumptions. (Hoffman, Vol. 1, p. 187). Respondent believes net revenue is a more important factor than charges, because deductions from revenue vary by provider and payor. (Id.).

88. CCI was the most effective alternative with regard to net revenue per procedure, because it projected the lowest net revenue per procedure of all the applicants. (Hoffman, Vol. 1, pp. 186-187; Agency File, Ex. 1, pp. 330-331).

89. Even though CRMC's net revenue cannot be determined because of the errors in its pro formas, the errors would have resulted in higher revenue, and would result in CRMC being even less effective. (Nuckolls, Vol. 4, pp. 848-849).

90. CCI is the most effective alternative with regard to net revenue per procedure. (Agency File, Ex. 1, pp. 330-331).

Access to Open MRI Scanner

91. A significant number of letters from physicians in the Service Area discussed the need for an open MRI option in the Service Area in order to better accommodate claustrophobic and obese patients. (Beville, Vol. 3, p. 600; CCI Application, Ex. 2, pp. 236-285).
92. David French, CRMC's expert witness, contradicted his testimony regarding the effectiveness of a .7 Tesla open scanner, by acknowledging that he had previously prepared a CON application for a .7 Tesla open scanner. (French, Vol. 1, pp. 263-270; CCI Ex. 40).
93. Out of the four applications considered in this review, three proposed open MRI scanners. (Beville, Vol. 3, p. 624, Agency File, Ex. 1, p. 332).
94. At the time of the review, the only open scanner located in the Service Area was a mobile MRI scanner which was only available one day per week. (French, Vol. 1, p. 292).
95. An open scanner is the most effective alternative for the Service Area. (Agency File, Ex. 1, p. 332).
96. Respondent properly concluded that CCI's application was conforming with all applicable statutory and regulatory review criteria, and that CCI's project was competitively superior to the CRMC application

CONCLUSIONS OF LAW

Based upon the foregoing Findings Of Fact, the undersigned concludes as follows:

1. The parties are properly before the Office of Administrative Hearings.
2. As Petitioner, CRMC bears the burden of proof on each and every element of its case. Southland Amusements and Vending, Inc., v. Rourk, 143 N.C. App. 88, 94, 545 S.E. 2d 254,254 (2001).
3. In a contested case concerning a Certificate of Need, the Administrative Law Judge is limited to a review of the information presented or available to Respondent at the time of the review. Britthaven, Inc. v. N.C. Department of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, rev. denied, 341, N.C. 418, 61 S.E.2d 754 (1995). Also see In re Application of Wake Kidney Clinic, 85 N.C. App. 639, 355 S.E.2d 788, review denied, 320 N.C. 793, 361 S.E.2d 89 (1987).
4. North Carolina law presumes that the Agency has properly performed its duties, and this presumption is rebutted only by a showing that the Agency was arbitrary or capricious in its decision making. Application of Broad and Gales Creek Community Assoc., 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); Adams v. N.C. State Bd. of Reg. for Prof. Eng. and Land Surveyors, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998); In Re Land and Mineral Co., 49 N.C. App. 529, 531, 272 S.E.2d 6, 7, rev. denied, 302 N.C. 397, 279 S.E.2d 351 (1980)(holding that "the official acts of a public agency . . . are presumed to be made in good faith and in accordance with law").
5. Administrative agency decisions may be reversed as arbitrary and capricious only if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration," or "fail to indicate 'any course of reasoning and the exercise of judgment.'" ACT-UP Triangle v. Comm'n for Health Services for the State of North Carolina, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997).
6. North Carolina law also gives great deference to an agency's interpretation of a law it administers. Frye Regional Medical Center v. Hunt, 350 N.C. 39, 45, 510 S.E.2d 159, 162 (1999). See also Carpenter v. North Carolina Dep't of Human Resources, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992), rev. denied, 333 N.C. 533, 427 S.E.2d 874 (1993)(a reviewing court should defer to the agency's interpretation of a statute it administers "so long as the agency's interpretation is reasonable and based on permissible construction of the statute."); High Rock Lake Ass'n. v. N.C. Env'tl. Mgmt. Comm'n, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981)(the interpretation of a statute given by the agency charged with carrying it out is entitled to great weight).
7. CCI met the requirements of Criterion 3 and the related regulatory review criteria. CCI reasonably demonstrated that its proposed MRI scanner will perform at least 2900 procedures in its third year of operation. CRMC did not meet its burden of showing that the ratio of 1.411 procedures per patient, solely, defeats CCI's methodology in demonstrating the need for its project. Ratios for existing facilities range from a 1:1 ratio up to a ratio of 2.24. CCI's 1.411 procedures per patient ratio was reasonable given that it was based upon the best data available at the time of the review. The fact that Ms. Hoffman would now change her Agency Findings regarding the procedure per patient ratio, does not change the reasonableness of CCI's procedure per patient ratio, given the best data available at the time of the review. The CCI application reasonably demonstrated that the proposed CCI scanner would average at least 2900 procedures in the third year of operation. CCI projected a reasonable number of MRI procedures to be performed in Service Area 23.

8. Respondent properly determined that the CCI application conformed with N.C.Gen. Stat. §131E-183(a) (3), (4), (5), (6), (7), (8), (18a) and the regulatory criteria.
9. The CCI application is conforming with all the statutory and regulatory review criteria.
10. Respondent properly determined that the CRMC application conformed with all the statutory and regulatory review criteria.
11. The CRMC application is conforming with all the statutory and regulatory review criteria.
12. Respondent properly determined that CCI's application was comparatively superior to CRMC's application because CCI's application was the most effective alternative with regard to the comparative factors which the Agency described as: (a) location; (b) access by underserved groups ;(c) revenues\net revenues per procedure; and (d) access to open MRI scanner.

RECOMMENDED DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby recommends that Respondent **UPHOLD** its decision to approve CCI's application for a CON to acquire a fixed MRI in Service Area 23, and to deny CRMC's application to acquire a fixed MRI in Service Area 23.

ORDER AND NOTICE

The North Carolina Department of Health and Human Services will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures Respondent must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before Respondent 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 Respondent who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires Respondent to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 13th day of May 2004.

Melissa Owens Lassiter
Administrative Law Judge