

NORTH CAROLINA

REGISTER

IN THIS ISSUE



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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major classifications of rules. Three of these, titles, chapters, and sections are mandatory. The major classification of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. Subchapters are optional classifications to be used by agencies when appropriate.

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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 2005 – December 2005

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
19:13	01/03/05	12/08/04	01/18/05	03/04/05	03/21/05	05/01/05	05/06	09/30/05
19:14	01/18/05	12/22/04	02/02/05	03/21/05	04/20/05	06/01/05	05/06	10/15/05
19:15	02/01/05	01/10/05	02/16/05	04/04/05	04/20/05	06/01/05	05/06	10/29/05
19:16	02/15/05	01/25/05	03/02/05	04/18/05	04/20/05	06/01/05	05/06	11/12/05
19:17	03/01/05	02/08/05	03/16/05	05/02/05	05/20/05	07/01/05	05/06	11/26/05
19:18	03/15/05	02/22/05	03/30/05	05/16/05	05/20/05	07/01/05	05/06	12/10/05
19:19	04/01/05	03/10/05	04/16/05	05/31/05	06/20/05	08/01/05	05/06	12/27/05
19:20	04/15/05	03/24/05	04/30/05	06/14/05	06/20/05	08/01/05	05/06	01/10/06
19:21	05/02/05	04/11/05	05/17/05	07/01/05	07/20/05	09/01/05	05/06	01/27/06
19:22	05/16/05	04/25/05	05/31/05	07/15/05	07/20/05	09/01/05	05/06	02/10/06
19:23	06/01/05	05/10/05	06/16/05	08/01/05	08/22/05	10/01/05	05/06	02/26/06
19:24	06/15/05	05/24/05	06/30/05	08/15/05	08/22/05	10/01/05	05/06	03/12/06
20:01	07/01/05	06/10/05	07/16/05	08/30/05	09/20/05	11/01/05	05/06	03/28/06
20:02	07/15/05	06/23/05	07/30/05	09/13/05	09/20/05	11/01/05	05/06	04/11/06
20:03	08/01/05	07/11/05	08/16/05	09/30/05	10/20/05	12/01/05	05/06	04/28/06
20:04	08/15/05	07/25/05	08/30/05	10/14/05	10/20/05	12/01/05	05/06	05/12/06
20:05	09/01/05	08/11/05	09/16/05	10/31/05	11/21/05	01/01/06	05/06	05/29/06
20:06	09/15/05	08/25/05	09/30/05	11/14/05	11/21/05	01/01/06	05/06	06/12/06
20:07	10/03/05	09/12/05	10/18/05	12/02/05	12/20/05	02/01/06	05/06	06/30/06
20:08	10/17/05	09/26/05	11/01/05	12/16/05	12/20/05	02/01/06	05/06	07/14/06
20:09	11/01/05	10/11/05	11/16/05	01/03/06	01/20/06	03/01/06	05/06	07/29/06
20:10	11/15/05	10/24/05	11/30/05	01/17/06	01/20/06	03/01/06	05/06	08/12/06
20:11	12/01/05	11/07/05	12/16/05	01/30/06	02/20/06	04/01/06	05/06	08/28/06
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EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

END OF REQUIRED COMMENT PERIOD: An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

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

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

Note from the Codifier: 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 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Building Commission intends to amend the rules cited as 01 NCAC 30D .0103, .0302.

Proposed Effective Date: April 1, 2005

Public Hearing:

Date: February 1, 2005

Time: 12:00p.m.

Location: State Construction Office, Room 450A ("large conference room"), 301 N. Wilmington St., Raleigh, NC

Reason for Proposed Action: G.S. 143-135.26 requires the State Building Commission to adopt rules governing selection of design professionals for the design of capital improvement projects. The State's adoption of the 2002 North Carolina State Building Code included the Special Inspections provisions contained in Chapter 17 of the Code. Special Inspections activities require professional services that, while closely related to traditional design services, present unique selection and procurement challenges. This amendment offers added flexibility for the array of owning agencies and may expedite the selection of qualified firms for such work. This amendment was adopted by the State Building Commission on July 27, 2004.

Procedure by which a person can object to the agency on a proposed rule: Written objections may be submitted to the Director of the State Construction Office. Objections will be received by mail, delivery service, hand delivery or facsimile transmission. Objections may be directed to Speros Fleggas, Director, N.C. State Construction Office, MSC 1307, Raleigh NC 27699-1307. Fax: (919)807-4110.

Written comments may be submitted to: Speros Fleggas, Director, NC State Construction, MSC 1307, Raleigh, NC 27699-1307, Phone (919)817-4100, fax (919)807-4110, email speros.fleggas@ncmail.net.

Comment period ends: February 14, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 30 - STATE CONSTRUCTION

SUBCHAPTER 30D - STATE BUILDING COMMISSION DESIGNER AND CONSULTANT SELECTION POLICY

SECTION .0100 - GENERAL PROVISIONS

01 NCAC 30D .0103 DEFINITIONS

For purposes of this Subchapter, the following definitions shall apply:

- (1) "Annual Service Agreement" means an open end agreement for professional services with a designer or consultant, subject to the limitations of this policy, for the provision of small miscellaneous and/or urgent design services.
- (2) "Capital Projects Coordinator" means the individual authorized by each funded agency to coordinate all capital improvement projects and related matters with the State Construction Office and to represent that agency on all matters presented to the SBC. The individual so designated for purposes of these Rules may have other titles within his agency but shall carry out the duties assigned herein to the Capital Projects Coordinator. Whenever the Capital Projects Coordinator is referenced herein, it shall be understood to include a designated assistant or representative.
- (3) "Designer" means any individual, firm, partnership, corporation, association or other legal entity licensed to practice architecture, engineering, or landscape architecture in the State of North Carolina.
- (4) "Consultant" means any individual, firm, partnership, corporation, association or other legal entity selected for planning and studies of an architectural and engineering nature

associated with a capital improvement project. The consultant must be licensed to practice architecture or engineering in the State of North Carolina.

- (5) "Contact person" means the person named in the public advertisement who shall be the Capital Projects Coordinator or his designee.
- (6) "Funded agency" means the department, agency, authority, or office that is named in the legislation appropriating funds for the design and/or construction project.
- (7) "Major projects" means those capital improvement projects whose authorized funding or estimated cost is greater than five hundred thousand dollars (\$500,000.00) or a planning study activity whose authorized funding is greater than fifty thousand dollars (\$50,000.00).
- (8) "Minor projects" means those capital improvement projects whose authorized funding or estimated cost is five hundred thousand dollars (\$500,000.00) or less or a planning or study activity whose authorized funding is fifty thousand dollars (\$50,000.00) or less. Minor projects may also include a grouping of small non-specified or anticipated projects whose aggregate total falls within the minor project cost limitations.
- (9) "Professional services" means those services within the scope of the practice of architecture, engineering or landscape architecture as defined by the public laws of North Carolina.
- (10) "Using agency" means the sub-division of the funded agency for whose use the project is to be provided. If the funded agency is so subdivided for administrative control, the using agency would be a division, geographically self-contained facility, campus, or similar body, as determined by the administrative head of the funded agency.
- (11) "Special inspections" means detailed inspections of materials, installation, fabrication, erection or placement of components and connections requiring special expertise to ensure compliance with approved construction documents and referenced standards as per Section 1704 of the NC State Building Code.

one representative from the State Construction Office. On major projects the pre-selection committee shall consist of at least the Capital Projects Coordinator, a representative of the using agency and two representatives from the State Construction Office. At least one member of all pre-selection committees shall be a licensed design professional.

(b) General Procedure for All Projects: The Capital Projects Coordinator shall review with the using agency the requirements of the project. This step shall take place prior to public advertisement in the Purchase Directory, because designers and consultants have a significant need to know in advance the program intent of a project in order to demonstrate their qualifications for the project in their letter of interest. The Capital Projects Coordinator shall receive all letters of interest and other qualification information either directly or from the designated contact person. After a pre-selection priority list is prepared, the list shall remain confidential except to the Secretary of the SBC. If fewer than three letters of interest are received on major projects, the project shall be readvertised in the Purchase Directory. If fewer than three letters of interest are received following the re-advertisement, the Capital Projects Coordinator may proceed with the selection process using the data received or may advertise again.

(c) Special Procedures for Minor Projects: The Capital Projects Coordinator shall review with the using agency the requirements of the project and the qualifications of all firms expressing interest in a specific project. The Capital Projects Coordinator and a representative of the using agency shall meet with the representative from the State Construction Office for the evaluation of each firm and development of a list of three firms in priority order to be presented to the SBC. The Capital Projects Coordinator may institute the interview procedures in Paragraph (d) of this Rule if he deems it beneficial in evaluating the firms. The Capital Projects Coordinator shall submit to the Secretary of the SBC the list of three firms in priority order, including pre-selection information and written recommendations, to be presented to the SBC. The Capital Projects Coordinator shall state in the submission to the SBC that the established rules for public announcement and pre-selection have been followed.

(d) Special Procedures for Major Projects: The pre-selection committee shall review the requirements of a specific project and the qualification of all firms expressing interest in that project and shall select from that list not more than six nor less than three firms to be interviewed and evaluated. The pre-selection committee shall interview each of the selected firms, evaluate each firm interviewed, and rank in order three firms. The Capital Projects Coordinator shall state in his submission that the established rules for public announcement and pre-selection have been followed.

(e) Special Procedures for Emergency Projects: On occasion, emergency design or consultation services may be required for restoration or correction of a facility condition which by its nature poses a hazard to persons or property, or when an emergency exists. Should this situation occur, in all likelihood there will not be sufficient time to follow the normal procedures described herein. The Capital Projects Coordinator on these rare occasions may declare an emergency, notify the State Construction Office and then obtain the services of a designer or

Authority G.S. 143-135.25; 143-135.26.

SECTION .0300 - SELECTION OF DESIGNERS OR CONSULTANTS

01 NCAC 30D .0302 PRE-SELECTION

(a) A pre-selection committee shall be established for all projects requiring professional service. On minor projects the pre-selection committee shall consist of at least the Capital Projects Coordinator, a representative of the using agency and

consultant for consultation or design of the corrective action. In all cases, such uses of these emergency powers shall involve a written description of the condition and rationale for employing this special authority signed by the head of the agency and presented to the SBC at its next normal meeting. Timeliness for obligation of funds or other non-hazardous or non-emergency situations do not constitute sufficient grounds for invoking this special authority.

(f) Fixed Term Contract: A Funded Agency or a Using Agency may require the services of designer(s) or consultant(s) for small projects under three hundred thousand dollars (\$300,000) on a fixed term basis for one year. In such cases, designer(s) or consultant(s) for fixed term contracts shall be selected in accordance with the procedures for minor projects in Paragraph (c). In addition, no fixed term contract fee under the jurisdiction of the State Building Commission shall exceed one hundred fifty thousand dollars (\$150,000) in total volume per year regardless of the number of projects. No fee shall exceed thirty-six thousand dollars (\$36,000) per project. Fixed term contracts may be extended for a term of one additional year. Total fees shall not exceed one hundred fifty thousand dollars (\$150,000) for the first year or three hundred thousand dollars (\$300,000) for the two-year period regardless of the number of projects.

(g) Special Procedures for Department of Environment and Natural Resources: For Division of Water Quality projects under the Wetlands Restoration Program, the Funded Agency may require the services of multiple designer(s) or consultant(s) for design and construction management of wetland, stream and riparian buffer restoration projects on a routine basis. In such cases, designer(s) or consultant(s) for such open-ended contracts shall be selected in accordance with the procedures described for minor projects. This does not preclude the Funded Agency's use of the designer selection procedures specified for major or minor projects if it elects to do so. The total volume of business in terms of negotiated design fee shall not exceed seven hundred thousand dollars (\$700,000) for the biannual contract term and no single project fee shall exceed three hundred fifty thousand dollars (\$350,000). In no case shall individual projects exceeding one million five hundred thousand dollars (\$1,500,000) in total costs be assigned for design under an open-end agreement. Open-end agreements under this procedure shall not be extended beyond a two-year term. The funded agency must readvertise on a biannual basis.

(h) Special Procedures for Special Inspections: Special Inspections professional services may be selected utilizing any one of the following methods:

- (1) The special inspections services may be performed as part of the project design services rendered by the project designer selected in accordance with Paragraphs (a) through (d) of this Rule.
- (2) The special inspections services may be performed, independent of the project design services contract, by:
 - (A) a firm selected in accordance with Paragraphs (a) through (d) of this Rule.
 - (B) a firm selected via Annual Contract procedures. Firms for such open-

ended contracts will be selected in accordance with the procedures described for minor projects. This does not preclude the Funded Agency's use of the designer selection procedures specified for major or minor projects if it elects to do so. In addition, no annual contract fee will exceed three hundred thousand dollars (\$300,000) in total volume and no single fee shall exceed one hundred thousand dollars (\$100,000). Annual contracts may be extended for one additional year. However, if extended for an additional one-year period, the designer may not be selected for the next annual contract. Total annual fees will not exceed three hundred thousand dollars (\$300,000) for first year or six hundred thousand dollars (\$600,000) for two-year period. If and when these fees are used to limit, the agency must readvertise.

(C) a firm selected from the consultants formally identified in Article 13 of the Standard Form of Agreement Between Owner and Designer.

(D) a firm initially selected using a qualifications based selection process, currently under contract for that project, and qualified to perform special inspections services.

Authority G.S. 143-135.25; 143-135.26; S.L. 2001-442, Sec. 6(c).

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Child Care Commission intends to adopt the rules cited as 10A NCAC 09 .2601-.2610.

Proposed Effective Date: *October 1, 2005*

Public Hearing:

Date: *Thursday, February 10, 2005*

Time: *11:00a.m. – 1:00p.m.*

Location: *NC Division of Child Development, 319 Chapanoke Rd., Suite 120, Raleigh, NC*

Reason for Proposed Action: *The NC Child Care Commission proposes rulemaking to adopt requirements for child care centers that choose to provide pediatric day health care. These rules are a result of the Commission's authority under Sec. 10.35 of S.L. 2004-124 to adopt rules for child care facilities which*

provide care children who are medically fragile. These children have medical needs that require some type of nursing or health care services.

Procedure by which a person can object to the agency on a proposed rule: *Anyone wishing to comment on these proposed rules or to request copies of the rules should contact Dedra Alston, Rule-making Coordinator, NC Division of Child Development, 2201 Mail Service Center, Raleigh, NC 27699-2201, at 919-662-4543 or Dedra.Alston@ncmail.net. Written comments will be accepted through February 14, 2005. Oral comments may be made during the public hearing. The Commission Chairperson may impose time limits for oral remarks.*

Written comments may be submitted to: *Dedra Alston, 2201 Mail Service Center, Raleigh, NC 27699-2201, phone (919)662-4543, fax (919)662-4568, email dedra.alston@ncmail.net.*

Comment period ends: *February 14, 2005*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 09 - CHILD CARE RULES

SECTION .2600 – CHILD CARE FOR CHILDREN WHO ARE MEDICALLY FRAGILE

10A NCAC 09 .2601 SCOPE

The regulations in this Section apply to all child care centers offering pediatric day health care services to children who are medically fragile and their families. Care may be provided to children who are medically fragile as a component of a child care center, or care may be provided in a separate stand alone program. All rules in this Chapter shall apply except as provided in this Section.

Authority G.S. 110-88(13).

10A NCAC 09 .2602 DEFINITIONS

(a) "Health care professional" is defined as:

- (1) a physician licensed in North Carolina;
- (2) a certified nurse practitioner in good standing with the North Carolina Board of Nursing;
- (3) a licensed nurse in good standing with the North Carolina Board of Nursing; or
- (4) a certified physician assistant.

(b) "Medically fragile" is defined as having an acute or chronic health problem requiring therapeutic intervention and skilled nursing care during all or part of the day.

(c) "Pediatric day health care" is defined as a family-centered health care service prescribed by a physician for children less than 13 years of age who are medically fragile and/or technologically dependent.

(d) "Technology-dependent" means a child from birth to 13 years of age, who has a chronic disability, which requires specific nursing interventions to compensate for the deficit of a life sustaining body function. The child requires daily, ongoing, intermittent care or monitoring by health care professionals and/or other trained personnel as prescribed by a physician.

(e) "Unlicensed personnel" is defined as a Nurse Aide I in good standing with the Division of Facility Services Nurse Aide Registry or a Nurse Aide II in good standing with the North Carolina Board of Nursing Nurse Aide II Registry.

(f) "Program Director" is defined as the person responsible for day-to-day administration and clinical management of the center. The program director shall be a Registered Nurse with a Bachelor of Science degree in nursing (BSN) with a minimum of two years full-time work experience in the Pediatric Intensive Care Unit or Neonatal Intensive Care Unit.

Authority G.S. 110-88(13).

10A NCAC 09 .2603 SPECIAL PROVISIONS FOR LICENSURE

(a) A license shall be issued that indicates approval to provide services to children who are medically fragile. The license shall also indicate the designated areas where care will be provided. The designated area shall be used solely for the care of children who are medically fragile.

(b) Children who are medically fragile shall receive pediatric day health care services as prescribed by their primary physician who is licensed and in good standing with the North Carolina Medical Board.

(c) To receive approval to provide care for children who are medically fragile the center shall have:

- (1) A temporary license with no pending administrative action; or
- (2) A four star rated license with at least four points in program standards.

(d) Developmental Day certification as defined in 10A NCAC 27G .2400, "Developmental Day Services for Children with or at Risk for Developmental Delays, Developmental Disabilities or Atypical Development", shall be obtained by the end of the temporary time period.

(e) Prior to receiving a license, the applicant who shall be legally responsible for the operation of the center shall show

proof of liability insurance for the center. The operator shall maintain liability insurance for as long as the license is active.

Authority G.S. 110-88(13).

10A NCAC 09 .2604 OPERATIONAL POLICIES

In addition to all other policies required in Section .1600 of this Chapter, the center shall develop written policies that contain the following:

- (1) Admission requirements;
- (2) Discharge requirements;
- (3) Health assessment procedures;
- (4) Procedures for obtaining physician's prescribed orders on admission, renewal every 60 days and when the condition of the child has a significant change;
- (5) Requirements for medical records and documentation;
- (6) Procedures for developing each child's individualized plan of care;
- (7) Plans for staff training and communication with parents and health care professionals;
- (8) Emergency readiness and procedures;
- (9) Inclusion/Exclusion criteria;
- (10) Transportation/field trips procedures;
- (11) Infection control procedures;
- (12) Clinical quality improvement plan;
- (13) Medication administration procedures; and
- (14) Coordination with community agencies and programs such as: Early Intervention, Department of Public Instruction, North Carolina Subsidized Child Care System, Community Alternatives Program for Children (CAP-C), Community Alternatives Program for Persons of Mental Retardation/Developmental Disabilities (CAP-MR/DD), and Child/Adult Care Food Program.

These policies shall be reviewed and approved by the Division prior to enrolling children who are medically fragile.

Authority G.S. 110-88(13).

10A NCAC 09 .2605 STAFF/CHILD RATIOS

The staff/child ratio shall be one health care professional or unlicensed personnel to three children. The maximum group size shall be nine children. A minimum of one licensed Registered Nurse shall be with each group of children at all times.

Authority G.S. 110-88(13).

10A NCAC 09 .2606 SPACE REQUIREMENTS

In the rooms designated for children who are medically fragile there shall be at least 50 square feet of inside space per child. When space is measured the following will not be included: closets, hallways, storage areas, kitchens, bathrooms, utility areas, thresholds, foyers, space or rooms used for administrative activities or space occupied by adult-sized desks, cabinets, file

cabinets, etc.; any floor space occupied by or located under equipment, furniture, or materials not used by children; and any floor space occupied by or located under built-in equipment or furniture.

Authority G.S. 110-88(13).

10A NCAC 09 .2607 STAFF QUALIFICATIONS

(a) All staff working with children who are medically fragile shall complete all requirements relevant in General Statutes 110 and this Chapter pertaining to preservice training, inservice training and staff records based on job duties. In addition, the following requirements shall be met for staff that care for children who are medically fragile:

- (1) When on site, the program director may serve as the licensed Registered Nurse as required in Paragraph (c) of this Rule. The program director may serve as the child care administrator as long as requirements set forth in G.S. 110-91(8) and Rule .0704 of this Chapter are being met. The program director shall be on site at least 50 percent of the total daily hours of operation, based on a normal working schedule; and that 50 percent may include times when the program director may be off site due to illness or vacation.
- (2) Staff needed to meet staff/child ratios set forth in Rule .2605 of this Section shall have a minimum of two years full-time nursing experience in pediatric health care.
- (3) Each group of children shall have a lead teacher or teacher present as required by Rule .0714 in Paragraph (c) of this Chapter. This individual may also be one of the health care professionals or unlicensed personnel required to meet the staff/child ratios in Rule .2605 of this Section. The lead teacher shall have Infant/Toddler certification or B-K Licensure with a minimum of two years full-time early childhood work experience prior to assuming care giving responsibilities. The teacher shall have the North Carolina Early Childhood Credential or its equivalent within six months of assuming care giving responsibilities.
- (4) A board certified physician shall serve as the medical consultant. The medical consultant shall be in good standing with the North Carolina Medical Board and shall be a pediatrician, neonatologist, or hold another pediatric subspecialty. Responsibilities shall include:
 - (A) A liaison role with the medical community;
 - (B) A quarterly review of services to assure acceptable levels of quality;
 - (C) Availability to provide consultation to center staff; and
 - (D) Review reports of accidents or unusual incidents quarterly.

(b) In addition to all other special training required in Rule .0705 of this Chapter, the following shall be completed:

- (1) Any one counted in staff/child ratios shall successfully complete a cardiopulmonary resuscitation (CPR) course within 12 months prior to assuming care giving responsibilities. The course shall be appropriate for the ages of children in care. The course shall be taken annually from the completion of the previous CPR course.
- (2) Any unlicensed personnel counted in staff/child ratios shall complete a course in basic first aid training within 12 months prior to assuming care giving responsibilities. Basic first aid training shall be completed every three years from the completion of previous basic first aid training.

(c) A licensed Registered Nurse shall be on site during operating hours.

Authority G.S. 110-88(13).

10A NCAC 09 .2608 CHILDREN'S PLAN OF CARE

(a) Each child shall have an individualized plan of care that includes written goals and intervention that address their social, emotional, physical and cognitive needs. The individualized plan of care shall be developed in collaboration with the following, as designated by their signatures: direct caregivers, parents, the child's physician(s), and other relevant care providers.

(b) The initial individualized plan of care shall be developed within 10 working days of admission and reviewed and revised every 60 days and when the condition of the child has a significant change, whichever comes first.

Authority G.S. 110-88(13).

10A NCAC 09 .2609 NUTRITION REQUIREMENTS

Meals and snacks shall be provided in accordance with Section .0900 of this Chapter unless a child's medical plan of care specifies otherwise.

Authority G.S. 110-88(13).

10A NCAC 09 .2610 TRANSPORTATION

(a) If transportation is provided, it shall be provided in accordance with Section .1000 of this Chapter. In addition, the driver shall:

- (1) Be at least 21 years old;
- (2) Successfully complete a cardiopulmonary resuscitation (CPR) course within 12 months prior to transporting children. The course shall be completed annually from the completion of previous CPR course; and
- (3) Complete a course in basic first aid training within 12 months prior to transporting children. Basic first aid training shall be completed every three years from the completion of previous basic first aid training.

(b) The staff/child ratio requirements in Rule .2605 of this Section shall be maintained when transporting children. The driver shall not be counted in the staff/child ratio. At least one licensed Registered Nurse, who may be counted in the staff/child ratio, shall be on the vehicle at all times.

(c) All vehicles used to transport children who are medically fragile shall be equipped with emergency medical supplies appropriate to children being transported as well as a fire extinguisher and a functioning cellular telephone or other functioning two-way voice communication device in case of an emergency situation.

Authority G.S. 110-88(13).

TITLE 15A – DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Wildlife Resources Commission intends to amend the rules cited as 15A NCAC 10F .0308, .0311, .0327, .0355, .0361, .0366, .0369.

Proposed Effective Date: *May 1, 2005*

Public Hearing:

Date: *January 12, 2005*

Time: *10:00 a.m.*

Location: *The Wildlife Resources Conference Room, 3rd floor, 512 N. Salisbury Street (Archdale Building), Raleigh, NC.*

Reason for Proposed Action: *To add new "no wake" zones and swimming zones to boating and water safety regulations.*

Procedure by which a person can object to the agency on a proposed rule: *A person may object by notifying the agency in writing or by attending the public hearing to voice objections in person. To notify the agency by writing, please send correspondence to Joan Troy, WRC, 1701 Mail Service Center, Raleigh, NC 27699-1701.*

Written comments may be submitted to: *Joan Troy, 1701 Mail Service Center, Raleigh, NC 27699-1701*

Comment period ends: *February 14, 2005*

Procedure for Subjecting a Proposed Rule to Legislative Review: *If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10F - MOTORBOATS AND WATER SAFETY

SECTION .0300 - LOCAL WATER SAFETY REGULATIONS

15A NCAC 10F .0308 CLAY COUNTY

(a) Regulated Area. This Rule applies to the waters of Lake Chatuge that lie within 50 yards of the boat ramp at Ho-Hum Campground.

(b) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter any marked public swimming area established with the approval of the Executive Director, or his representative, on the regulated area.

(c) Speed Limit. It is unlawful to operate any motorboat or vessel at a speed greater than no-wake speed within 50 yards of ~~the High Bridge, Gibson Cove access area, Chatuge Cove Complex II Marina, Lakeside Cottages and Marina, Chatuge Dam Spillway access area located on the regulated area.~~ the following areas:

- (1) The High Bridge;
- (2) Gibson Cove access area;
- (3) Chatuge Cove Complex II Marina;
- (4) Lakeside Cottages and Marina;
- (5) Chatuge Dam Spillway access area; and
- (6) McCracken Cove on Lake Chatuge.

(d) Placement and Maintenance of Markers. The Board of Commissioners of Clay County is designated a suitable agency for placement and maintenance of the markers implementing this Rule, subject to the approval of the United States Coast Guard and the United States Army Corps of Engineers. With regard to marking Lake Chatuge, supplementary standards as set forth in Rule .0301(g)(1) to (7) of this Section shall apply.

Authority G.S. 75A-3; 75A-15.

15A NCAC 10F .0311 GRANVILLE, VANCE AND WARREN COUNTIES

(a) Regulated Areas. This Rule applies to the following waters of John H. Kerr Reservoir in Granville, Vance and Warren Counties:

- (1) Kimball Point - Within 50 yards of the shoreline in the northernmost cove of the Kimball Point Recreation Area located at the western end of SR 1204 in Warren County.

- (2) Kerr Lake Methodist Campground - Beginning 50 yards north and ending 50 yards east of the Kerr Lake Methodist Campground.
- (3) Lower Mill Creek - Beginning at a point on the eastern side of Lower Mill Creek where it intersects the North Carolina - Virginia state line, running across the creek with said state line and then running in a southerly direction on both the east and west sides of the creek to the head waters and including all waters of the creek south of the state line.
- (4) Flat Creek at NC Highway 39 Bridge - Within 50 yards on either side of the NC Highway 39 Bridge.

(b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any concrete boat launching ramp located on the reservoir.

(c) Speed Limit in Mooring Areas. No person shall operate a vessel at greater than no-wake speed while within a designated mooring area established by or with the approval of the US Army Corps of Engineers on the waters of the reservoir.

(d) Speed Limit. No person shall operate a vessel at greater than no-wake speed within any regulated area of the reservoir described in Paragraph (a) of this Rule.

(e) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter ~~any a~~ a designated swimming area established by or with the approval of the US Army Corps of Engineers on the waters of the reservoir. This Rule applies to the following area: Satterwhite Point State Recreation Area.

(f) Placement and Maintenance of Markers. Each of the boards of Commissioners of the above-named counties is designated a suitable agency for placement and maintenance of markers implementing this Rule for regulated areas within their territorial jurisdiction in accordance with the Uniform System, subject to the approval of the US Army Corps of Engineers.

Authority G.S. 75A-3; 75A-15.

15A NCAC 10F .0327 MONTGOMERY COUNTY

(a) Regulated Areas. This Rule applies to the waters and portions of waters described as follows:

- (1) Badin Lake:
 - (A) Lakeshore Drive Cove as delineated by appropriate markers.
 - (B) Entrance to fueling site and marina west of the main channel of Lake Forest Drive Cove.
 - (C) Gar Creek
- (2) Lake Tillery:
 - (A) Woodrun Cove as delineated by appropriate markers.
 - (B) Carolina Forest Cove as delineated by appropriate markers.
- (3) Tuckertown Reservoir.

(b) Speed Limit Near Shore Facilities. No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked boat launching area, dock, pier, bridge, marina, boat

storage structure, or boat service area on the waters of the regulated areas described in Paragraph (a) of this Rule.

(c) Speed Limit. No person shall operate a vessel at greater than no-wake speed within any regulated area described in Paragraph (a) of this Rule.

(d) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter any marked public swimming area established with the approval of the Wildlife Resources Commission on the waters of the regulated areas described in Paragraph (a) of this Rule.

(e) Placement and Maintenance of Markers. The Board of Commissioners of Montgomery County is hereby designated a suitable agency for placement and maintenance of the markers implementing this Rule in accordance with the Uniform System.

Authority G.S. 75A-3; 75A-15.

15A NCAC 10F .0355 PERQUIMANS COUNTY

(a) Regulated Areas. This Rule applies to the following waters:

- (1) Perquimans River:
 - (A) The canals of Holiday Island;
 - (B) The area within 50 yards of the Hertford City Boat Ramp; and
 - (C) The area within 75 yards of the Perquimans River Bridge on U.S. 17 Business also known as the Hertford S-Shaped Bridge.
- (2) Yeopim River:
 - (A) The area within 75 yards of the Albemarle Plantation Marina Piers; and
 - (B) The area of Beaver Cove as delineated by appropriate markers.
 - (C) The canal entrance between Navaho Trail and Cherokee Trail
 - (D) The canal entrance between Cherokee Trail and Ashe Street
 - (E) The boat ramp at Ashe and Pine Street
 - (F) The canal entrance between Pine Street and Linden Street
 - (G) The canal entrance and boat ramp between Willow Street and Evergreen Drive
 - (H) The canal entrance between Sago Street and Alder Street; and
 - (I) The swimming area at the Snug Harbor Park and Beach
- (3) Yeopim Creek
 - (A) The canal entrance between Mohave Trail and Iowa Trail
 - (B) The canal entrance between Iowa Trail and Shawnee Trail

(b) Speed Limit. No person shall operate any motorboat or vessel at greater than no-wake speed within the regulated area described in Paragraph (a) of this Rule.

(c) Placement and Maintenance of Markers. The Board of Commissioners of Perquimans County is designated a suitable

agency for placement and maintenance of markers implementing this Rule.

Authority G.S. 75A-3; 75A-15.

15A NCAC 10F .0361 WILKES COUNTY

(a) Regulated Area. This Rule applies ~~to those waters within 50 yards of any marked boat launching area, bridge, dock, pier, marina, boat storage structure, or boat service area located on W. Kerr Scott Reservoir located in Wilkes County.~~ to the following:

- (1) Those waters within 50 yards of any marked public boat launching area, bridge, dock, pier, marina, boat storage structure, or boat service area located on W. Kerr Scott Reservoir located in Wilkes County.
- (2) The entire cove located between Bandit's Roost Campground and Berry Mountain Swim Beach.

(b) Speed Limit. No person shall operate any motorboat or vessel at greater than no-wake speed within any of the regulated area described in Paragraph (a) of this Rule.

(c) Restricted Swimming Areas. No person operating or responsible for the operation of a vessel shall permit it to enter any designated swimming area established by or with the approval of the Unites States Army Corp of Engineers.

~~(e)(d)~~ Placement and Maintenance of Markers. The Wilkes County Board of Commissioners is designated a suitable agency for placement and maintenance of the markers implementing this Rule. Rule, provided that such placement and maintenance is subject to approval by the Unites States Army Corp of Engineers.

Authority G.S. 75A-3; 75A-15.

15A NCAC 10F .0366 MACON COUNTY

(a) Regulated Area. This Rule applies to the following waters of Natahala Lake: ~~that area within 50 yards of the Lakes End Boat Dock.~~

- (1) That area within 50 yards of the Lakes End Boat Dock.
- (2) That area within 100 yards from the end of the Mountain Shadows Community Dock.

(b) Speed Limit. No person shall operate a vessel at greater than no-wake speed in the waters of the regulated area specified in Paragraph (a) of this Rule.

(c) Placement and Maintenance of Markers. The Board of Commissioners of Macon County is designated a suitable agency for placement and maintenance of the markers implementing this Rule.

Authority G.S. 75A-3; 75A-15.

15A NCAC 10F .0369 TOWN OF SWANSBORO

(a) Regulated Area. This Rule applies to the waters of the ~~New River~~ White Oak River from the Highway 24 bridge southward toward Casper's Marina, approximately 50 yards from the east shoreline of the Swansboro Town limits and marked by buoys.

(b) Speed Limit. No person shall operate any motorboat or vessel at greater than no-wake speed within any of the regulated area described in Paragraph (a) of this Rule.

(c) Placement and Maintenance of Markers. The Town of Swansboro is designated a suitable agency for placement and maintenance of the markers implementing this Rule.

Authority G.S. 71A-15; 72A-3.

TITLE 18 – SECRETARY OF STATE

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Secretary of State, Securities Division intends to amend the rules cited as 18 NCAC 06 .1205, .1313.

Proposed Effective Date: April 1, 2005

Public Hearing:

Date: January 18, 2005

Time: 10:00 a.m.

Location: 300 North Salisbury Street, Suite 100, Raleigh, NC

Reason for Proposed Action: The amendment of these rules will permit, closely-held business enterprise to:

(1) obtain the benefits of organization as a limited liability company; and

(2) access capital investment in that enterprise

Without having to make currently required exemption filings with the Securities Division, and without being subject to currently required minimum cash investments.

Procedure by which a person can object to the agency on a proposed rule: By attending the public hearing scheduled for January 18, 2005 at 10:00 a.m. located at 300 North Salisbury Street, Raleigh, NC or by submission of written comments on or before February 14, 2005 to Allan C.J. Russ, NC Securities Division, P.O. Box 29622, Raleigh, 27626-0622.

Written comments may be submitted to: Allan C.J. Russ, NC Securities Division, P.O. Box 29622, Raleigh, 27626-0622, phone (919)733-3924, fax (919)821-0818, email aruss@sosnc.com.

Comment period ends: February 14, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 6 - SECURITIES DIVISION

SECTION .1200 - EXEMPTIONS

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

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

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

- (1) No commission, discount, finder's fee or other similar remuneration or compensation shall be paid, directly or indirectly, to any person for soliciting any prospective purchaser of the security sold to a resident of this State unless such person is either registered pursuant to G.S. 78A-36 or exempt from registration thereunder or the issuer reasonably believes that such person is so registered or exempt therefrom.
(2) In all offers or sales of direct participation program securities, the provisions of Rule .1313 of this Chapter regarding registered offerings of direct participation program securities shall be applicable; provided that such compliance shall not be

- required with respect to offers or sales to individuals who will be actively engaged, on a regular basis, in the management of the issuer's business. In all sales of viatical settlement contracts, the provisions of Rule .1320 shall be applicable.
- (3) Any prospectus or disclosure document used in offering the securities in this state shall disclose the legend(s) as required by the provisions of Rule .1316 of this Chapter.
- (4) Not less than 10 business days prior to any sale of the securities to a resident of this State which shall include but not be limited to the receipt by the issuer, or any person acting on the issuer's behalf of a signed subscription agreement of, or the receipt of consideration from, a purchaser, the issuer shall file with the administrator, or cause to be so filed:
- (A) A statement signed by the issuer and acknowledged before a notary public or other similar officer:
- (i) identifying the issuer (including name, form of organization, address and telephone number);
 - (ii) identifying the person(s) who will be selling the securities in this State (and in the case of such persons other than the issuer and its officers, partners and employees, describing their relationship with the issuer in connection with the transaction and the basis of their compliance with or exemption from the requirements of G.S. 78A-36) and describing any commissions, discounts, fees or other remuneration or compensation to be paid to such persons;
 - (iii) containing a summary of the proposed offering including:
 - (I) a description of the securities to be sold;
 - (II) the name(s) of all general partners of an issuer which is a partnership and, with respect to a corporate issuer or any corporate general partner(s) of any issuer which is a partnership, the date and place of
- (B) A consent to service of process naming the North Carolina Secretary of State as service agent using the Uniform Consent to Service of Process (Form U-2) signed by the issuer and acknowledged before a notary public or other similar officer;
- (III) the anticipated aggregate dollar amount of the offering;
- (IV) the anticipated required minimum investment, if any, by each purchaser of the securities to be offered;
- (V) a brief description of the issuer's business and the anticipated use of the proceeds of the offering; and
- (VI) a list of the states in which the securities are proposed to be sold;
- (iv) containing an undertaking to furnish to the administrator, upon written request, evidence of compliance with Subparagraphs (1), (2), and (3) of this Paragraph (b);
- (v) in the case of a direct participation program security, containing an undertaking to furnish to the administrator, upon written request, a copy of any written document or materials used or proposed to be used in connection with the offer and sale of the securities; and
- (vi) in the case of a viatical settlement contract, the filing shall include a copy of all written documents or materials, including advertising, used or proposed to be used in connection with the offer and sale of the securities.

and accompanied by a properly executed Corporate Resolution (Form U-2A), if applicable;

(C) A non-refundable filing fee as established by G.S. 78A-17(9), payable to the North Carolina Secretary of State.

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

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

~~(6) Except in the case of the offer or sale of a viatical settlement contract, compliance with the provisions of Subparagraph (4) of this Paragraph shall not be required if the security is offered to:~~

~~(A) not more than five individuals who reside in this State, excluding individuals described in Subparagraph (6)(B) of this Paragraph; and~~

~~(B) individuals who will be actively engaged, on a regular basis, in the management of the issuer's business.~~

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

Authority G.S. 78A-13; 78A-17(9); 78A-49(a).

SECTION .1300 - REGISTRATION OF SECURITIES

18 NCAC 06 .1313 REGISTRATION OF DIRECT PARTICIPATION PROGRAM SECURITIES

(a) As a condition to the registration of direct participation program securities, the issuer or dealer(s) effecting sales of such securities pursuant to such registration shall:

(1) deliver to each offeree of the security in this State prior to any sale of the security to such offeree, a written statement of the investor suitability standards which each offeree must meet in order to purchase the security. The statement may be contained in any offering circular, prospectus or other written document delivered to the offeree; and

(2) determine, prior to the sale of the security to each person in this State, that the person meets

the investor suitability standards applicable to the security. For purposes of this determination, the issuer or dealer(s) shall be entitled to rely conclusively upon a written statement or questionnaire signed by the person and received in good faith and without knowledge that the information stated therein is ~~inaccurate; inaccurate.~~

~~(3) require that the minimum initial cash investment by each purchaser of such securities in this state be five thousand dollars (\$5,000) except that no minimum investment shall be required for tax-qualified plans.~~

(b) The minimum investor suitability standards which shall be imposed for registered offerings of direct participation program securities are as follows:

(1) The investor shall either have a minimum net worth of two hundred twenty-five thousand dollars (\$225,000) or a minimum net worth of sixty thousand dollars (\$60,000) and had during the last tax year or estimates that the investor will have during the current tax year, taxable income of at least sixty thousand dollars (\$60,000) without regard to the investment in the security.

(2) Net worth shall be determined exclusive of principal residence, mortgage thereon, home furnishings and automobiles. In the case of sales to fiduciary accounts, the investor suitability standards shall be met by the fiduciary or the fiduciary account or by the donor who directly or indirectly supplies the funds to purchase the securities.

(c) The administrator will permit the substitution of lower suitability standards ~~and a minimum initial cash investment of not less than two thousand five hundred dollars (\$2,500)~~, if such lower standards are consistent with the standards outlined in the NASAA policy statement for that specific type of program. (See CCH NASAA Reports for such policy statements.)

(d) The administrator may modify or waive, upon the showing of good cause, the requirements of Paragraphs (a), (b) and (c) of this Rule, in whole or in part, with respect to a particular security, offering or transaction or the administrator may require higher investor suitability standards ~~and minimum investment requirements~~ with respect to a particular security offering or transaction where necessary for the protection of investors.

Authority G.S. 78A-49(a).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 52 - BOARD OF PODIATRY EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Podiatry Examiners intends to adopt the rules cited as 21 NCAC 52 .0210-.0211, .0804 and amend the rules cited as 21 NCAC 52 .0201, .0205, .0601, .1302.

Proposed Effective Date: April 1, 2005

Public Hearing:

Date: January 21, 2005

Time: 10:00 a.m.

Location: 1000 Club Road, Grandover Resort, Greensboro, NC

Reason for Proposed Action:

21 NCAC 52 .0201 – The proposed amendment adds the requirement that all licensing applicants obtain passing scores on all parts of the National Board of Podiatric Medical Examiners' examinations, a requirement for licensing in most, if not all, other states. The North Carolina Board of Podiatry Examiners has again contracted with the National Board for pre-registration and score transmission of the exams.

21 NCAC 52 .0205 – Enables the Board to schedule and mandate a practice and ethics orientation for new licensees prior to their obtaining of their actual license to practice.

21 NCAC 52 .0210 – Allows the Board to comply with U.S. Public Law 100-293, the Prescription Drug Marketing Act of 1987, and the U.S. Code of Federal Regulations (21 CFR, Parts 203 and 205) of the Food and Drug Administration, and the Freedom of Information laws, to provide computerized lists of its licensees and their licensing status to companies engaged in the business of providing data information services to the pharmaceutical and healthcare industries for the purposes of validating the licensing status of health care professional and charge a data processing fee of \$300 per order.

21 NCAC 52 .0211 – Adopts rules with regard to issuing of temporary licenses by the Board of Podiatry Examiners to podiatrists practicing on federal military installations within the state.

21 NCAC 52 .0601 – Updates the address of the Executive Secretary and allows for the obtaining of the examination application from the Board in electronic, as well as hard-copy format.

21 NCAC 52 .0804 – Provides for interested persons to be added to the Board's mailing list for an annual fee of \$15 to receive notice of rule-making hearings.

21 NCAC 52 .1302 – Allows for electronic notice of elections; requires a minimum of two, but no more than three, nominees for a Board seat; enables the Board to establish a voting deadline for mail ballots, after which ballots will not be counted.

Procedure by which a person can object to the agency on a proposed rule: Objections in writing may be submitted on or before 2/14/05 to: David J. Feild, Board of Podiatry Examiners, 1500 Sunday Drive, Suite 102, Raleigh, NC 27607-5151, phone (919)861-5583, fax(919)787-4916, email info@ncbpe.org.

Written comments may be submitted to: David J. Feild, Board of Podiatry Examiners, 1500 Sunday Drive, Suite 102, Raleigh, NC 27607-5151, phone (919)861-5583, fax(919)787-4916, email info@ncbpe.org.

Comment period ends: February 14, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

SECTION .0200 - EXAMINATION AND LICENSING

21 NCAC 52 .0201 APPLICATION

Anyone who meets the statutory requirements and wishes to apply for examination may do so by submitting a written application to the office of the executive secretary of the board at 1500 Sunday Drive, Post Office Box 1088, Raleigh, North Carolina 27602 27607. Such application shall be made on Application for Examination or Application of Reciprocity shall be make on a form provided by the Board BPE Form No. 1 (Application for Examination) or BPE Form No. 2 (Application for Reciprocity). Applicants shall furnish the board with certification of graduation from a four year high school, completion of at least two years of undergraduate college education, and graduation from an accredited college of podiatric medicine, and passing scores on all parts of the National Boards, including PM-Lexis, as provided in the statutes. The application will state the amount of the fee, which is non-refundable. The application must be accompanied by the application fee, which shall be the maximum amount provided by statute. Applications must also be notarized by a Notary Public in good standing. Applications shall also include Release of Information Forms.

Authority G.S. 90-202.5; 90-202.6; 90-202.7.

21 NCAC 52 .0205 PRACTICE ORIENTATION

The board may require each applicant applicant, who has otherwise successfully completed their requirements to practice in the state, to attend a practice- and ethics-orientation prior to receiving his/her license. At its discretion, the board may require an applicant to spend up to one week as a trial period to better equip them to practice podiatry in North Carolina in the office of and under the direction of a podiatrist practicing in North Carolina. Such orientation shall take place only in those offices approved by the board and assignment of an orientation office in which to work shall be considered as a portion of the

clinical examination in podiatry. The license shall not be issued until the orientation requirement has been fulfilled.

Authority G.S. 90-202.4(g); 90-202.6(a)(b).

21 NCAC 52 .0210 FEE FOR VALIDATION OF LICENSEE LISTS; COMPUTER SERVICES

In order to validate a podiatrist's authority to receive drug samples pursuant to U.S. Public Law 100-293, the Prescription Drug Marketing Act of 1987, and the U.S. Code of Federal Regulations (21 CFR, Parts 203 and 205) of the Food and Drug Administration, and through the Freedom of Information laws, the Board will provide computerized lists of its licensees and their licensing status to companies engaged in the business of providing data information services to the pharmaceutical and healthcare industries for the purposes of validating the licensing status of health care professionals for a fee of three hundred dollars (\$300.00) per order, payable in advance. Orders for a list of licensees should be placed at least 4 weeks in advance.

Other Data Processing Services. The Board may provide data processing services related to the Board's powers and duties upon request from research and/or educational organizations. Fees for such services may be assessed, based on the actual cost to the Board and the purposes for the data. Any such fees shall be required to be paid in advance.

Authority G.S. 90-202.3; 90-85.3(f); 90-85.3(i); 90-86; 90-87; 150B-19(5)e.

21 NCAC 52 .0211 TEMPORARY LICENSE

The Board may grant temporary license privileges to podiatrists practicing solely on federal military installations within North Carolina. Application for temporary license shall require the same education as for a permanent license, but there shall be no examination nor application fee assessed. Temporary licenses shall be granted for a maximum of one-year, renewable annually so long as the podiatrist continues to practice on the federal military installation.

Authority G.S. 90-202.6.

SECTION .0600 - FORMS USED BY THE BOARD

21 NCAC 52 .0601 APPLICATION FOR EXAMINATION

The application for examination (~~BPE Form No.1~~) will be used by all applicants who wish to take the examination for licensure. ~~The form may be modified from time to time by the board.~~ It shall require the applicant to furnish the board with detailed information ~~regarding his education and moral character~~ required or permitted by these Rules. The form may be obtained in hard-copy or electronic format from the office of the executive secretary at 1500 Sunday Drive, Suite 102, Post Office Box 1088, Raleigh, North Carolina 27602-27607.

Authority G.S. 90-202.5.

SECTION .0800 - NOTICE OF RULEMAKING HEARINGS

21 NCAC 52 .0804 NOTICE MAILING LIST

(a) Upon a determination to hold a rule-making proceeding, either in response to a petition or otherwise, the Board shall give notice to all interested parties of the proceedings in accordance with the requirements of Chapter 150B of the General Statutes.

(b) Mailing List. Any person desiring to be placed on the mailing list for the rule-making notices may file a request in writing, furnishing his name and mailing address to the Board. The request shall state the subject areas within the authority of the Board for which notice is requested.

(c) Fee Charged. At the Board's discretion, the cost to be on the mailing list for rule-making notices shall be charged at fifteen dollars (\$15.00) per year. A notice and invoice will be mailed in February of each year to persons on the mailing list. Persons who do not renew their request to remain on the mailing list by remitting the fee by March 1 of each year will be deleted from the list.

Authority G.S. 150B-12; 150B-12(a)(2); 150B-21.2; 150B-19.5(e).

SECTION .1300 - NOMINATIONS FOR PODIATRISTS MEMBERS OF THE BOARD OF PODIATRY EXAMINERS: BOARD OF PODIATRY EXAMINERS CONSTITUTING A BOARD OF PODIATRY ELECTIONS: PROCEDURES FOR HOLDING AN ELECTION

21 NCAC 52 .1302 PROCEDURES FOR CONDUCTING ELECTIONS

The procedures to be followed in the conducting of elections to fill podiatrists' positions on the Board of Podiatry Examiners are as set forth in this Rule:

- (1) At least 30 days prior to the expiration of the term of a board member, written notice of the holding of an election will be sent to every podiatrist with a current North Carolina license residing in this state using a mailing or electronic address as contained in the board's official records.
- (2) The notice shall have with it a list of at least two, but no more than three nominees proposed by the Board of Podiatry Examiners for the board member position to be filled.
- (3) The election or voting for the board member position will take place annually prior to July 1 of each year. Additional nominations may be received from the floor or as write-in nominations on a ballot and may be received from any licensed podiatrist residing in North Carolina.
- (4) Ballots will be prepared by the Board of Podiatry Elections and distributed or mailed to all North Carolina licensed podiatrists who reside in North Carolina. Any podiatrist who is eligible to vote and who wishes to vote and who will not be in attendance at the election meeting may request a written ballot from the executive secretary or secretary-treasurer and

shall return the ballot prior to the election meeting. Each voting podiatrist will mark his/her ballot and cast his/her ballot in the ballot box or other designated receptacle, or return mail the ballot to the ~~board~~ board by the specified deadline for receipt of ballots. Late ballots will not be counted.

- (5) The ~~executive secretary~~ secretary, secretary-treasurer or such other member of the board as may be designated by the President of the Board of Podiatry Examiners will conduct a tally of the ballots, record the two names receiving the highest number of votes and their respective percentages, and submit to the president of the board the names of the two nominees receiving the highest number of votes and their respective percentage of votes.
- (6) The president of the board will in turn submit to the Governor the two names who received the highest number of votes and their respective percentage of votes with biographical data on the two podiatrists being submitted.
- (7) It will not be necessary for an individual podiatrist to receive a majority of votes of those North Carolina licensed podiatrists participating in the election. All licensees will be notified of the results of the election.
- (8) To be eligible for board membership, a podiatrist must be a licensed podiatrist in North Carolina at least for the period of time prescribed by statute. A vote for any licensed podiatrist not holding a North Carolina license for that minimum period will not be counted.

Authority G.S. 90-202.4.

TITLE 23 – DEPARTMENT OF COMMUNITY COLLEGES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Community College System intends to amend the rules cited as 23 NCAC 03A .0101-.0102.

Proposed Effective Date: April 1, 2005

Public Hearing:

Date: January 5, 2005

Time: 1 p.m.

Location: NCCCS, Caswell Building, 200 W. Jones Street, Raleigh, NC 27699

Reason for Proposed Action: *To increase fees for the licensing of proprietary schools to move towards the required administrative and operational costs becoming self-supporting.*

Procedure by which a person can object to the agency on a proposed rule: *Send written objections to President, 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: *President, Community College System Office, 5001 MSC, Raleigh, NC 27699-5001, sullivan@ncccs.cc.nc.us.*

Comment period ends: February 19, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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 03 - MISCELLANEOUS PROGRAMS

SUBCHAPTER 03A - 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" means any proprietary business school, proprietary trade school, proprietary technical school, or correspondence 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 the amount of ~~seven hundred and fifty dollars (\$750.00)~~ two thousand five hundred dollars (\$2,500) 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 detail of ownership; (This must 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 must 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~~ initial 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 are not acceptable. If a proprietary school offers classes in more than one county, the school's operations in each such county constitutes a separate school requiring a separate license. 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 of one thousand dollars (\$1,000) and an annual remote site renewal fee of seven hundred and fifty dollars (\$750.00) to be paid by a certified check or money order made payable to the North Carolina State Treasurer. 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 certified check or money order in the amount of ~~one hundred dollars (\$100.00)~~ two hundred dollars (\$200.00) 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~~ are subject to the curriculum review fee of ~~one hundred dollars (\$100.00)~~ two hundred dollars (\$200.00) to be paid by a certified check or money order made payable to the North Carolina State Treasurer.

(C) School relocations require site visits and approvals prior to use. A certified check or money order in the amount of ~~two hundred dollars (\$200.00)~~ four hundred dollars (\$400.00) made payable to the North Carolina State Treasurer shall accompany each site relocation approval request.

(D) Other site assessment visits, such as for program additions and revisions, will require a certified check or money order made payable to the North Carolina State Treasurer in the amount of two hundred dollars (\$200.00).

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~~ initial license that has not been previously submitted;
- (2) Copy of current catalog containing all information required of schools applying for ~~original~~ initial license;
- (3) Any supplementary information necessary to bring information on the school up to date.

(c) A certified check or money order in the amount of ~~five hundred dollars (\$500.00)~~ one thousand two hundred and fifty dollars (\$1,250) plus fifty dollars (\$50.00) per program made payable to the North Carolina State Treasurer shall be received on or before April 1.

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

This Section contains information for the meeting of the Rules Review Commission on Thursday, December 16, 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 Monday, December 13, 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

December 16, 2004	April, 21, 2005
January 20, 2005	May 19, 2005
February 17, 2005	June 16, 2005
March 17, 2005	July 21, 2005

**RULES REVIEW COMMISSION
NOVEMBER 18, 2004
MINUTES**

The Rules Review Commission met on Thursday, November 18, 2004, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were: Graham Bell, Jim Funderburk, Jennie Hayman, Thomas Hilliard, Jeffrey Gray, Robert Saunders, Lee Settle, Dana Simpson, and John Tart.

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

The following people attended:

John Hoomoni	Department of Labor
Lynette Johnson	Department of Labor
Ivette Mercado-Bijikersma	Department of Labor
Kevin Beauregard	Department of Labor
Allen McNeely	Department of Labor
Diane G. Miller	Attorney General's Office
Jean Stanley	Board of Nursing
Sharon Thompson	NC Community College System
Nancy Pate	DENR
Steve Dirksen	Attorney/Board of Funeral Services
Thom Allen	DENR/DAQ
Dana Sholes	OAH
Julie Brincefield	OAH
Julian Mann	OAH
Molly Masich	OAH
Barry Gupton	Department of Insurance
Palmer Sugg	Board of Massage & Bodywork Therapy
Lynn Bannon	Board of Massage & Bodywork Therapy
Grady McCallie	NC Conservation Network

John Randall
Ann Christian
John Hunter
Jack Forshey
Denise Stanford

Speech & Language Pathologists & Audiologists
Attorney/American Massage Therapy Association
Attorney
Department of Labor
Pharmacy Board

APPROVAL OF MINUTES

The meeting was called to order at 10:08 a.m. with Chairman Hayman presiding. Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the October 21, 2004 meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

12 NCAC 9B .0304: Criminal Justice Education and Training Standards Commission – The Commission approved the rewritten rule submitted by the agency.

21 NCAC 30 .0102; .0203-.0206; .0301-.0303; .0403; .0404; .0501-.0515; .0604; .0701; .0702; .0901-.0905: Board of Massage and Bodywork Therapy – The Commission approved the rewritten rules submitted by the agency. They were redrafted after the September Rule Review Commission meeting to respond to staff and public concerns. Section .0600 with the exception of .0604, was withdrawn.

21 NCAC 30 .0102; .0204; .0205; .0206; .0301; .0303; .0404; .0501-.0505; .0509; .0511; .0514; .0515; .0604; .0701; .0702; .0902-.0905: Board of Massage and Bodywork Therapy – The letters the Commission received requesting that some or all of these rules be subject to Legislative review have been forwarded to the codifier of rules.

21 NCAC 34B .0102; .0104; .0408; .0409; .0411-.0415: Board of Funeral Services – The Commission approved the rewritten rules submitted by the agency.

25 NCAC 1L .0304; .0305: State Personnel Commission – No action was taken.

LOG OF FILINGS

Chairman Hayman presided over the review of the log of permanent rules. All rules were approved unanimously with the following exceptions:

13 NCAC 7F .0605: Department of Labor – This rule was withdrawn by the agency.

13 NCAC 7F .0606: Department of Labor – The Commission objected to this rule due to ambiguity. In (b)(1), it is not clear what, besides an RF Safety Program, would constitute “appropriate means” of education for awareness of exposure.

13 NCAC 7F .0607: Department of Labor – The Commission objected to this rule due to ambiguity. In (b)(3)(E), it is not clear what is meant by “appropriate” heavy duty thimbles.

13 NCAC 15 .0202: Department of Labor – The Commission objected to the rule due to ambiguity. In (a)(2), it is not clear what standards the Director will use in approving safeties not designed and installed in accordance with the National Code. In (b)(2), it is not clear what standards the Director will use in approving hoistway guards as adequate. This objection applies to existing language in the rule.

13 NCAC 15 .0429: Department of Labor – This rule was withdrawn by the agency.

15A NCAC 2Q .0102: Environmental Management Commission – This rule was sent to the Office of State Budget Management for determination of whether the rule has a substantial economic impact at the request of William Arent of the Carolinas Ready Mixed Concrete Association..

17 NCAC 6B .3503: Department of Revenue – The Commission objected to the rule due to lack of statutory authority. G.S. 105-154(c) requires a partnership return to be signed by one of the partners. Paragraph (a) of this rule requires the form to be signed by the managing partner. There does not appear to be authority for the Department to limit the signing authority to the managing partner. This objection applies to existing language in the rule.

21 NCAC 14J .0502: Board of Cosmetic Art Examiners – This rule was withdrawn by the agency.

TEMPORARY RULES

10A NCAC 6T .0201: Social Services Commission – This rule was withdrawn by the agency.

COMMISSION PROCEDURES AND OTHER BUSINESS

No new business was discussed.

The meeting adjourned at 11:00 a.m.

The next meeting of the Commission is Thursday, December 16, at 10:00 a.m.

Respectfully submitted,
Lisa Johnson

**LIST OF APPROVED PERMANENT RULES
November 18, 2004 Meeting**

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

Specialized Instructor Certification 12 NCAC 09B .0304

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Hazard Identification and Assessment	13	NCAC	07F	.0604
Record Keeping	13	NCAC	07F	.0608
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Elevator and Amusement Device Division	13	NCAC	15	.0101
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Maintenance and Periodic Inspections and Tests	13	NCAC	15	.0307
Responsibility for Compliance	13	NCAC	15	.0402
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Control of Visible Emissions	15A	NCAC	02D	.0521
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Other Large Coal or Residual Oil Boilers	15A	NCAC	02D	.0608
Model Year 2008 & Subsequent Model Year	15A	NCAC	02D	.1009
Other Incinerators	15A	NCAC	02D	.1208
Commercial and Industrial Solid Waste Incineration Units	15A	NCAC	02D	.1210
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Purpose and Scope	15A	NCAC	02Q	.0901
Permit Exemption for Portable Crushers	15A	NCAC	02Q	.0902
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License Suspension and Revocation	16	NCAC	06C	.0312
Military Duty Without Loss of Pay	16	NCAC	06C	.0406
 REVENUE, DEPARTMENT OF				
Remainder Interest	17	NCAC	03C	.0104
Completing a Return	17	NCAC	06B	.0104
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Soldiers' and Sailors' Civil Relief Act	17	NCAC	06B	.3407
Allocation of Income Attributable to Nonresidents	17	NCAC	06B	.3724
Seamen	17	NCAC	06C	.0112
Wage and Tax Statements	17	NCAC	06C	.0119
Annual Reports	17	NCAC	06C	.0203
 COSMETIC ART EXAMINERS, BOARD OF				
Departmental Rules-Definitions	21	NCAC	14A	.0101
Forms	21	NCAC	14G	.0102
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Sanitation Prohibited Practices	21	NCAC	14H	.0121
Operations of Schools of Cosmetic Art	21	NCAC	14I	.0105
Cosmetology Curriculum-Uniform	21	NCAC	14J	.0102
Manicurist Curriculum-Uniforms	21	NCAC	14K	.0101
Teacher Program and Curriculum	21	NCAC	14L	.0210
Continuing Education Requirements	21	NCAC	14R	.0101
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 MASSAGE AND BODYWORK THERAPY, BOARD OF				
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Facility Requirements	21	NCAC	30	.0513
Informing Board of Violations	21	NCAC	30	.0514
Continuing Duty to Report Certain Crimes and Civil Suits	21	NCAC	30	.0515
Approval Designation	21	NCAC	30	.0604
Continuing Education Requirements	21	NCAC	30	.0701
Continuing Education Definitions	21	NCAC	30	.0702
Purpose and Scope	21	NCAC	30	.0901
Complaints	21	NCAC	30	.0902
Action on a Complaint	21	NCAC	30	.0903
Formal Hearing	21	NCAC	30	.0904
Disciplinary Sanctions	21	NCAC	30	.0905

FUNERAL SERVICE, BOARD OF

Traineeship	21	NCAC	34B	.0102
Change in Employment	21	NCAC	34B	.0104
Continuing Education Program	21	NCAC	34B	.0408
Accreditation Standards	21	NCAC	34B	.0409
General Course Approval	21	NCAC	34B	.0411
Accredited Sponsors	21	NCAC	34B	.0412
Accreditation of Prerecorded Programs and Live Programs	21	NCAC	34B	.0413
Accreditation of Computer-Based CE	21	NCAC	34B	.0414
Computation of Credit	21	NCAC	34B	.0415
Application Form for Funeral Establishment Permit	21	NCAC	34B	.0608
Funeral Establishment Permit Renewal Form	21	NCAC	34B	.0610

NURSING, BOARD OF

Licensure by Examination	21	NCAC	36	.0211
License Required	21	NCAC	36	.0221

SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS, BOARD OF EXAMINERS FOR

Audiology Advertising	21	NCAC	64	.0214
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COMMUNITY COLLEGES, BOARD OF

Withholding of State Funds or Administrative Support	23	NCAC	02C	.0109
Establishing Pay Rates	23	NCAC	02D	.0101
Bookstore Vending Machine	23	NCAC	02D	.0312
Courses and Standards for Curriculum Programs	23	NCAC	02E	.0204
Definitions and Application for Initial License	23	NCAC	03A	.0101
Application for Renewal of License	23	NCAC	03A	.0102
School Plant and Equipment	23	NCAC	03A	.0103

RULES REVIEW COMMISSION

Administration	23	NCAC	03A	.0104
Advertising	23	NCAC	03A	.0105
Admission Requirements	23	NCAC	03A	.0106
Records	23	NCAC	03A	.0107
Instructional Program	23	NCAC	03A	.0108
Instructional Personnel	23	NCAC	03A	.0109
Financial Stability	23	NCAC	03A	.0110
Ethics	23	NCAC	03A	.0111
Revoking a License	23	NCAC	03A	.0112
Student Refund	23	NCAC	03A	.0113
Business School Specific Regulations	23	NCAC	03A	.0114
Teach-Out Plan and Records Preservation	23	NCAC	03A	.0115
Licensing Proprietary Correspondence Schools	23	NCAC	03A	.0201
Standards	23	NCAC	03A	.0202
Organization and Nature of Correspondence Courses	23	NCAC	03A	.0203
Instruction	23	NCAC	03A	.0204
Financial Stability	23	NCAC	03A	.0205
The Official Bulletin or Catalogue	23	NCAC	03A	.0206
Responsibility for Personnel and Agents	23	NCAC	03A	.0207
Contract with Student	23	NCAC	03A	.0208
Resident Training	23	NCAC	03A	.0209
Standards for Enrollment	23	NCAC	03A	.0210
Records	23	NCAC	03A	.0211
Unfair Practices	23	NCAC	03A	.0212
Revoking a License	23	NCAC	03A	.0213
Application for Renewal of License	23	NCAC	03A	.0214

**Commission Review/Permanent Rules
Log of Filings #216
October 21, 2004 through November 22, 2004**

AGRICULTURE, BOARD OF

Chapter 9 rules are from the Food and Drug Protection Division of the Department of Agriculture. They cover rules incorporated by reference; manufacturing standards for specific food industries; canned dog and cat food; feed; antifreezes; milk products; disposition of certain foods; aflatoxin testing; testing of milk, cream, and frozen deserts; pesticides; and drugs.

The rules in Subchapter 9N set standards of quality for infant formula.

Infant Formula Standards of Quality 02 NCAC 09N .0101
Adopt/*

The rules in Chapter 48 are Department of Agriculture rules governing the plant industry, including plant protection; fertilizer, seeds, liming materials and landplaster, and genetically engineered organisms.

The rules in Subchapter 48A are plant protection rules directed at specific plant problems or methods of protection including the

honey and bee industry (.0200); protection against the boll weevil (.0600); vegetable plant certification (.1000); tobacco plant certification (.1100); and control of noxious weeds (.1700).

<u>Definitions</u>	02	NCAC	48A	.1701
Amend/*				
<u>Regulated Areas</u>	02	NCAC	48A	.1703
Amend/*				

The rules in Chapter 52 cover the veterinary division within the department.

The rules in Subchapter 52B cover animal diseases, treatment, and protection including quarantine (.0100), admission of livestock to North Carolina (.0200), brucellosis regulations (.0300), equine infectious anemia (.0400), poultry diseases (.0500), and poultry hatcheries (.0600).

<u>Importation Requirements: Goats</u>	02	NCAC	52B	.0208
Amend/*				
<u>Importation Requirements: Sheep</u>	02	NCAC	52B	.0209
Amend/*				

CHILD CARE COMMISSION

The Rules in Chapter 9 are child care rules including definitions (.0100); general provision relating to licensing (.0200); procedures for obtaining a license (.0300); issuance of provisional and temporary licenses (.0400); age appropriate activities for centers (.0500); safety requirements for child care centers (.0600); health and other standards for center staff (.0700); health standards for children; (.0800); nutrition standards (.0900); transportation standards (.1000); building code requirements for child care centers (.1300); space requirements (.1400); temporary care requirements (.1500); requirements for voluntary enhanced program standards (.1600); family child care home requirements (.1700); discipline (.1800); special procedures concerning abuse/neglect in child care (.1900); rulemaking and contested case procedures (.0200); religious sponsored child care center requirements (.2100); administrative actions and penalties (.2200); forms (.2300); child care for mildly ill children (.2700); child care for school age children (.2500); criminal records checks (.2700) and voluntary rated licenses (.2800).

<u>Preservice Requirements for Lead Teachers, Teachers and A...</u>	10A	NCAC	09	.0710
Amend/*				

HHS-MEDICAL ASSISTANCE

The rules in Chapter 22 concern medical assistance eligibility.

The rules in Subchapter 22G cover reimbursement plans including reimbursement for nursing facility services (.0100); hospital inpatient reimbursement plan (.0200); ICF-MR prospective rate plan (.0300); provider fee schedules (.0400); reimbursement for services (.0500); and home health prospective reimbursement (.0600).

<u>Rate Setting Methods</u>	10A	NCAC	22G	.0102
Amend/*				
<u>Reasonable and Non-Allowable Costs</u>	10A	NCAC	22G	.0103
Amend/*				
<u>Cost Reporting Auditing</u>	10A	NCAC	22G	.0104
Amend/*				
<u>Case-Mix Index Calculation</u>	10A	NCAC	22G	.0105
Amend/*				
<u>Reconsideration Reviews</u>	10A	NCAC	22G	.0106

Amend/*				
<u>Payment Assurance</u>	10A	NCAC	22G	.0107
Amend/*				
<u>Reimbursement Methods for State-Operated Facilities</u>	10A	NCAC	22G	.0108
Amend/*				
<u>Provider Assessment</u>	10A	NCAC	22G	.0109
Adopt/*				
<u>Definitions</u>	10A	NCAC	22G	.0110
Adopt/*				

MENTAL HEALTH, COMMISSION OF

The rules in Chapter 26 concern mental health.

The rules in Subchapter 26B cover confidentiality rules including general rules (.0100); release of confidential information with consent (.0200); and disclosure of confidential information without consent (.0300).

<u>Documentation of Release</u>	10A	NCAC	26B	.0207
Amend/*				
<u>Documentation of Disclosure</u>	10A	NCAC	26B	.0303
Repeal/*				

HEALTH SERVICES, COMMISSION FOR

The rules in Chapter 41 are Health and Epidemiology rules adopted by the Commission for Health Services.

The rules in Subchapter 41A concern communicable disease control including rules about reporting (.0100); control measures (.0200) and (.0300); immunizations (.0400); purchase and distribution of vaccine (.0500); special program and project funding (.0600); licensed nursing home services (.0700); grants and contracts (.0800); and the biological agent registry (.0900).

<u>Reportable Diseases and Conditions</u>	10A	NCAC	41A	.0101
Amend/*				
<u>Hospital Emergency Department Reporting</u>	10A	NCAC	41A	.0105
Adopt/*				
<u>Dosage & Age Requirements for Immunization</u>	10A	NCAC	41A	.0401
Amend/*				

STATE REGISTRAR

The rules in Subchapter 41H concern vital records including general provisions (.0100); local registrars, deputy registrars, subregistrars (.0200); birth registration (.0300); delayed registration of births (.0400); death registration (.0500); certified copies (.0600); fees and refunds (.0700); change of names (.0800); corrections and amendments (.0900); new certificates (.1000); legitimations (.1100); removal of graves (.1200); access to records (.1300); and divorce and annulment (.1400).

<u>Routine Requests for Certified Copies</u>	10A	NCAC	41H	.0701
Amend/*				
<u>Research Requests</u>	10A	NCAC	41H	.0702
Amend/*				
<u>Fees for Corrections and Amendments</u>	10A	NCAC	41H	.0703
Amend/*				
<u>Fees for Preparing New Certificate: Adoption and Legitima...</u>	10A	NCAC	41H	.0704
Amend/*				
<u>Information Needed for Locating Records</u>	10A	NCAC	41H	.1301

Amend/*

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

The rules in Chapter 10 concern N.C. Sheriffs' Education and Training Standards Commission.

The rules in Subchapter 10B include commission organization and procedure (.0100); enforcement rules (.0200); minimum standards for employment as a justice officer (deputy or jailer) (.0300); certification of justice officers (.0400); standards and accreditation for justice officers schools, training programs, and the instructors (.0500-.0900); certificate and awards programs for sheriffs, deputies, justice officers, jailers, reserve officers, and telecommunicators (.1000-.1600); in-service training (.2000); and firearms in-service training and re-qualification (.2100).

<u>Suspension: Revocation: or Denial of Certification</u> Amend/*	12	NCAC	10B	.0204
<u>Minimum Standards for Justice Officers</u> Amend/*	12	NCAC	10B	.0301
<u>Report of Separation</u> Amend/*	12	NCAC	10B	.0405
<u>Lateral Transfer/Reinstatements</u> Amend/*	12	NCAC	10B	.0406
<u>Evaluation for Training Waiver</u> Amend/*	12	NCAC	10B	.0505
<u>Administration of Detention Officer Certification Course</u> Amend/*	12	NCAC	10B	.0703
<u>Responsibilities: School Directors</u> Amend/*	12	NCAC	10B	.0704
<u>Responsibilities: School Directors, Telecommunicator Cert...</u> Amend/*	12	NCAC	10B	.0709
<u>Admission of Trainees</u> Amend/*	12	NCAC	10B	.0713
<u>Accreditation: Delivery/Detention Officer Certification C...</u> Amend/*	12	NCAC	10B	.0802
<u>Cert: Instructors for Detention Officer Certification Couese</u> Amend/*	12	NCAC	10B	.0903
<u>Detention Officer Instructor Certification</u> Amend/*	12	NCAC	10B	.0904
<u>Terms and Conditions of Detention Officer Instructor Cert...</u> Amend/*	12	NCAC	10B	.0905
<u>Suspension: Revocation: Denial of Detention Officer Instr...</u> Amend/*	12	NCAC	10B	.0911
<u>Cert: Instructors for Telecommunicator Certification Course</u> Amend/*	12	NCAC	10B	.0913
<u>Telecommunicator Instructor Certification</u> Amend/*	12	NCAC	10B	.0914
<u>Terms and Conditions of Telecommuncator Instructor Certif...</u> Amend/*	12	NCAC	10B	.0915
<u>Suspension: Revocation: Denial of Telecommunicator Instru...</u> Amend/*	12	NCAC	10B	.0919

LABOR, DEPARTMENT OF

The rules in Chapter 7 are from the Commissioner of Labor and cover the Occupational and Safety Health Act (OSHA).

The rules in Subchapter 7F cover specific OSHA standards for various industries: general (.0100); construction (.0200); agriculture (.0300); shops fabricating structural steel and steel plate (.0400); maritime (.0500); and communication tower standards (.0600).

Fall Protection 13 NCAC 07F .0605
 Adopt/*

The rules in Chapter 15 pertain to elevators and amusement devices and include general provisions (.0100); various industry codes and standards (.0200); elevators and related equipment (.0300); amusement devices (.0400); penalties (.0500); forms (.0600); fees (.0700).

Go Karts 13 NCAC 15 .0429
 Amend/*

RADIATION PROTECTION COMMISSION

The rules in Chapter 11 are from the Division of Radiation Protection and cover a broad and diverse range of applications including general provisions (.0100), registration of radiation machines, facilities and services (.0200), licensing of radioactive material (.0300), safety requirements for industrial radiography operations (.0500), use of x-rays in the healing arts (.0600 - .0700), requirements for analytical x-ray (x-ray diffraction or fluorescence analysis) equipment (.0800), requirements for particle accelerators (.0900), requirements for notices, instructions, reports, and inspections (.1000), fees (.1100), land disposal of radioactive waste (.1200), tanning facilities and equipment (.1400), requirements for obtaining licenses authorizing access to low-level radioactive waste disposal facilities (.1500), and standards for protection against radiation resulting from activities regulated by this Chapter (.1600).

Definitions 15A NCAC 11 .0104
 Amend/*

Type of Licenses: General and Specific 15A NCAC 11 .0306
 Amend/*

General Licenses: Other Than Source Material 15A NCAC 11 .0308
 Amend/*

General Licenses: Measuring Gauging: Controlling Devices 15A NCAC 11 .0309
 Amend/*

General Licenses: Install Generally Licensed Devices 15A NCAC 11 .0310
 Amend/*

Limitations 15A NCAC 11 .0510
 Amend/*

Personnel Monitoring 15A NCAC 11 .0512
 Amend/*

Records of Industrial Radiography 15A NCAC 11 .0523
 Amend/*

Intersitial: Intracavitary and Superficial Application 15A NCAC 11 .0702
 Amend/*

Definitions 15A NCAC 11 .1302
 Amend/*

Radiation Survey Instruments 15A NCAC 11 .1307
 Amend/*

Leak Testing of Sealed Sources 15A NCAC 11 .1308
 Amend/*

Design: Performance: and Certification Criteria 15A NCAC 11 .1311
 Amend/*

Labeling 15A NCAC 11 .1312
 Amend/*

<u>Personnel Monitoring</u> Amend/*	15A	NCAC	11	.1316
<u>Notification of Incidents: Abandonment: and Lost Sources</u> Amend/*	15A	NCAC	11	.1324
<u>Energy Compensation Sources</u> Adopt/*	15A	NCAC	11	.1326
<u>Tritium Neutron Generator Target Sources</u> Adopt/*	15A	NCAC	11	.1327
<u>Monitoring of External and Internal Occupational Dose</u> Amend/*	15A	NCAC	11	.1614
<u>Use of Process or Other Engineering Controls</u> Amend/*	15A	NCAC	11	.1618
<u>Use of Other Controls to Restrict Internal Exposure</u> Amend/*	15A	NCAC	11	.1619
<u>Use of Individual Respiratory Protection Equipment</u> Amend/*	15A	NCAC	11	.1620
<u>Restrictions on the Use of Respiratory Protection Equipment</u> Amend/*	15A	NCAC	11	.1621

TREASURER, DEPARTMENT OF STATE

The Rules in Chapter 2 are retirement systems rules.

The Rules in Subchapter 20 are rules about the disability income plan of North Carolina.

<u>Scope</u> Repeal/*	20	NCAC	020	.0101
<u>Short-Term Disability</u> Repeal/*	20	NCAC	020	.0102
<u>Long-Term Disability</u> Repeal/*	20	NCAC	020	.0103

FORESTERS, BOARD OF REGISTRATION FOR

The rules in Chapter 20 cover registered foresters. North Carolina forbids the use of the title "registered forester," but apparently not the use of the term "forester" or the practice of anything that can be done by a registered forester. Forester means a person who by reason of special knowledge and training is qualified to engage in the practice of forestry, which is defined as giving professional forestry services, including consultation, investigation, evaluation, education, planning, or responsible supervision of any forestry activities requiring knowledge, training, and experience in forestry principles and techniques.

<u>Registration Fees</u> Amend/*	21	NCAC	20	.0106
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LOCKSMITH LICENSING BOARD

The rules in Chapter 29 are from the Locksmith Licensing Board and include general rules (.0100); rules about examinations (.0200); licensing requirements (.0400); Code of Ethics (.0500); and administrative law procedures (.0600).

<u>Application Form</u> Adopt/*	21	NCAC	29	.0701
<u>Due Date</u> Adopt/*	21	NCAC	29	.0702
<u>Reinstatement of Expired License</u>	21	NCAC	29	.0703

Adopt/*				
<u>Establishment of Moral and Ethical Character</u>	21	NCAC	29	.0704
Adopt/*				
<u>Definitions</u>	21	NCAC	29	.0801
Adopt/*				
<u>Requirements</u>	21	NCAC	29	.0802
Adopt/*				
<u>Determination of Credit</u>	21	NCAC	29	.0803
Adopt/*				
<u>Record Keeping</u>	21	NCAC	29	.0804
Adopt/*				
<u>Exceptions</u>	21	NCAC	29	.0805
Adopt/*				
<u>Non Compliance</u>	21	NCAC	29	.0806
Adopt/*				

PHARMACY, BOARD OF

The rules in Chapter 46 are from the Board of Pharmacy and cover organization of the Board (.1200); general definitions (.1300); hospitals and other health facilities (.1400); admission requirements and examinations (.1500); licenses and permits (.1600); drugs dispensed by nurse and physician assistants (.1700); prescriptions (.1800); forms (.1900); administrative provisions (.2000); elections (.2100); continuing education (.2200); prescription information and records (.2300); dispensing in health department (.2400); miscellaneous provisions (.2500); devices (.2600); nuclear pharmacy (.2700); sterile parenteral pharmaceuticals (.2800); product selection (.2900); disposal of unwanted drugs (.3000); clinical pharmacist practitioner (.3100); and impaired pharmacist peer review program (.3200).

<u>Drug Distribution and Control</u>	21	NCAC	46	.1414
Amend/*				
<u>Application</u>	21	NCAC	46	.1501
Amend/*				
<u>License by Reciprocity</u>	21	NCAC	46	.1602
Amend/*				
<u>Reinstatement of Licenses and Permits</u>	21	NCAC	46	.1612
Amend/*				
<u>Automated Dispensing or Drug Supply Devices</u>	21	NCAC	46	.1814
Amend/*				
<u>Responsibilities of Pharmacist-Manager</u>	21	NCAC	46	.2502
Amend/*				
<u>Definitions</u>	21	NCAC	46	.2702
Amend/*				
<u>Obtaining a Nuclear Pharmacy Permit</u>	21	NCAC	46	.2703
Amend/*				
<u>Req for Pharmacists Providing Radiopharmaceutical Services</u>	21	NCAC	46	.2704
Amend/*				
<u>Labeling Requirements of Radiopharmaceuticals</u>	21	NCAC	46	.2705
Adopt/*				
<u>Prohibitions</u>	21	NCAC	46	.2706
Adopt/*				
<u>Registration</u>	21	NCAC	46	.3301
Amend/*				

PODIATRY EXAMINERS, BOARD OF

RULES REVIEW COMMISSION

The rules in Chapter 52 concern Board of Podiatry Examiners including organization of the Board (.0100); examination and licensing (.0200); professional corporations (.0300); revocation or suspension of license (.0400); certification of podiatric assistant (.0500); forms used by the Board (.0600); petitions for rules (.0700); notice of rulemaking hearings (.0800); rulemaking hearings (.0900); declaratory rulings (.1000); administrative hearing procedures (.1100); administrative hearings: decisions: related rights and procedures (.1200); nominations for podiatrists members of the board of podiatry examiners constituting a board of podiatry elections: procedures for holding an election (.1300) and scope of practice (.1400).

<u>Name and Purpose</u> Amend/*	21	NCAC	52	.0101
<u>Application</u> Amend/*	21	NCAC	52	.0201
<u>Annual Renewal of License</u> Amend/*	21	NCAC	52	.0207
<u>Application for Examination</u> Amend/*	21	NCAC	52	.0601
<u>Appl/Exam/Podiatrist Licensed/Other States Reciprocity</u> Amend/*	21	NCAC	52	.0610
<u>Petition for Rulemaking Hearings</u> Amend/*	21	NCAC	52	.0701
<u>Submission of Request for Ruling</u> Amend/*	21	NCAC	52	.1002

AGENDA
RULES REVIEW COMMISSION
December 16, 2004, 10:00 A.M.

Call to Order and Opening Remarks

Review of minutes of last meeting

Follow Up Matters

- (A) Department of Labor – 13 NCAC 7F .0606; .0607 (Bryan)
- (B) Department of Labor – 13 NCAC 15 .0202 (Bryan)
- (C) Environmental Management Commission – 15A NCAC 2Q .0102 (Bryan)
- (D) Department of Revenue – 17 NCAC 6B .3503 (Bryan)
- (E) State Personnel Commission – 25 NCAC 1L .0304; .0305 (DeLuca)

Review of Rules (Log Report #216)

Review of Temporary Rules (if any)

Commission Business

Next meeting: January 20, 2005

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>ABC COMMISSION</u>				
ABC Commission v. Pantry, Inc. T/A Pantry 355	03 ABC 1094	Gray	09/01/04	
ABC Commission v. Richard Martin Falls, Jr., T/A Falls Quick Stop	04 ABC 0341	Mann	07/16/04	
ABC Commission v. Nichos, Inc., T/A Mexican Store	04 ABC 0626	Gray	10/15/04	
ABC Commission v. Red Lion Manestream, Inc., T/A Red Lion Manestream	04 ABC 0695	Wade	07/20/04	
ABC Commission v. KOL, Inc, T/A Wards Grocery	04 ABC 0872	Wade	09/21/04	
ABC Commission v. Carlos Salas, T/A Boom Boom Room Night Club	04 ABC 0938	Chess	10/19/04	
<u>VICTIMS COMPENSATION</u>				
Lonnie Jones v. Dept. Crime Control & Public Safety, Victims Compensation	03 CPS 2320	Conner	07/23/04	
Angelique M. Jones on behalf of a juvenile victim, her son, Jaquial Jones v. Victims Compensation Commission	03 CPS 2353	Conner	07/12/04	
Jean Stevens on Behalf of Amber Nichole Sewell v. Victim and Justice Services	04 CPS 0399	Chess	09/16/04	
Margaret J. Jackson v. NC Victim & Justice Services	04 CPS 0746	Morrison	11/17/04	19:12 NCR 1028
Krista Chmiel v. Crime Victims Compensation Commission Case #CV-65-04-0020899	04 CPS 0992	Gray	09/31/04	
John Selden Clem v. State Highway Patrol, Trooper C.J. Owens	04 CPS 1705	Chess	11/17/04	
<u>DEPARTMENT OF AGRICULTURE</u>				
NC Spring Water Assoc, Inc., Wiley Fogleman (President) v. DOA, David McLeod and Table Rock Spring Water Co.	04 DAG 0110	Gray	07/21/04	
<u>DEPARTMENT OF ADMINISTRATION</u>				
Larry Yancey v. GACPD, DOA	04 DOA 0896	Morrison	07/28/04	
<u>HEALTH AND HUMAN SERVICES</u>				
Bejeer Smiles Child Care Learning Center, Inc. v. DHHS, Div of Child Development	98 DHR 0235	Gray	09/16/04	
Margaret Bollo v. DHHS, Broughton Hospital	03 DHR 0444	Gray	07/21/04	
Walter Ray Nelson, Jr., Karen Marie Nelson v. DHHS	03 DHR 0884	Lassiter	05/18/04	
Winter McCotter v. DHHS, Div. of Facility Services, Healthcare Personnel Registry Section	03 DHR 0905	Gray	10/20/04	

CONTESTED CASE DECISIONS

Blaine Ryan Walsh-Child, Bonnie L. Walsh-Mother v. DHHS, Div. of Medical Assistance	03 DHR 1113	Gray	10/15/04
Olufemi Augustine Ohome v. DHHS, Div. of Facility Services	03 DHR 1062	Lassiter	05/24/04
Karen A. Anders v. DHHS, Div of Facility Services	03 DHR 1217	Gray	09/20/04
Charles Crawford Cox v. DHHS	03 DHR 1546	Lassiter	07/07/04
Bio-Medical Applications of North Carolina, Inc v. DHHS, Div of Facility Services, CON Section and Total Renal Care of NC, LLC	03 DHR 1553	Chess	06/02/04
Tomeeka K. Blount v. DHHS, Caswell Center	03 DHR 1728	Elkins	10/15/04
Lativia L. Gibbs v. DHHS, Div. of Child Development	03 DHR 1746	Smith	07/23/04
Rebecca Stephens Short v. DHHS, Div of Facility Services	03 DHR 1806	Conner	06/11/04
Jacqueline Haltiwanger v. DHHS, Div of Facility Services	03 DHR 1818	Conner	09/24/04
Loretta Kaye Dulakis v. DHHS, Div. of Facility Services	03 DHR 1848	Wade	08/20/04
Pamela Narron (Legal Guardian for) Benjamin Chad Pierce v. DHHS, Div of Mental Health – DD-SA	03 DHR 2377	Conner	07/19/04
Mooreville Hospital Management Assoc, Inc d/b/a Lake Norman Reg. Medical Center v. DHHS, Div of Facility Services, CON Section and Novant Health, Inc. (Lessor) and Forsyth Memorial Hospital (Lessee) d/b/a Forsyth Medical Center	03 DHR 2404	Conner	06/08/04
Louvenia Jones, Sheryl Willie – General Power of Attorney v. DHHS, Div of Child Development	03 DHR 2445	Gray	06/15/04
Antonia Marie Collins v. DHHS, Div of Facility Services	03 DHR 2450	Mann	09/15/04
John Michael Thompson v. DHHS, DFS	04 DHR 0046	Lassiter	07/27/04
Donna R. Gardner v. Health Care Personnel Registry, DHHS, Div of Facility Services	04 DHR 0048	Gray	09/17/04
Johnny Rouse v. DHHS, Div of Facility Services	04 DHR 0107	Wade	10/07/04
Alisa Hodges Yarborough v. DHHS, DFS	04 DHR 0176	Elkins	07/19/04
Chinedu Eucharia Akamelu v. DHHS, Division of Facility Services	04 DHR 0185	Elkins	11/23/04
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1 Combined Cases

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 CPS 0746

Margaret J. Jackson)
Petitioner)
)
vs.)
)
N.C. Victim and Justice Services,)
Respondent.)

DECISION

A Petition for a Contested Case Hearing in the above captioned case was filed in the Office of Administrative Hearings on May 7, 2004. The contested case was heard by Senior Administrative Law Judge Fred G. Morrison Jr. on September 28, 2004.

APPEARANCES

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ATTORNEY FOR RESPONDENT

APPLICABLE LAW

N.C.G.S. § 15B North Carolina Crime Victims Compensation Act

ISSUES

1. Is the Petitioner a victim of criminally injurious conduct within the meaning of N.C.G.S. §15B-2(5) and (13)?
2. Is the Petitioner’s alleged loss an allowable expense pursuant to N.C.G.S. §15B-2(1)?
3. Did the petitioner suffer an economic loss within the meaning of N.C.G.S. §15B-2(10) and did petitioner provide substantial evidence within the meaning of N.C.G.S. §15B-2(12a) of such economic loss?
4. Did the petitioner suffer work loss within the meaning of N.C.G.S. §15B-2(14) and provide substantial evidence within the meaning of N.C.G.S. §15B-2(12a) of such economic loss?
5. Were the Petitioner’s alleged losses incurred after one year from the date of the criminally injurious conduct pursuant to N.C.G.S. §15B-11(a)(2)?
6. Has Petitioner’s alleged losses upon which her claim is based been or will be recouped from a collateral source pursuant to N.C.G.S. §15B-11(d)?

The undersigned makes the following:

FINDINGS OF FACT

1. Between July 2000 and March 2003, Petitioner’s two minor children were victims of sexual abuse committed by Petitioner’s ex-husband, William Christopher Bradshaw, who was arrested and charged for these acts.

2. Petitioner was instructed by medical providers to seek therapy for her children. The children's therapists recommended that the Petitioner also seek therapy because she had experienced distress as a result of the sexual abuse and needed to learn how to support her children through this trauma.
3. Petitioner began therapy in October 2003 and was diagnosed with Adjustment Disorder with Mixed Anxiety and Depression. As of June 3, 2004, Petitioner had attended 20 therapy sessions at \$100 per session, five of these sessions occurring after March 2004.
4. In September 2003, Petitioner submitted three Victim Compensation Applications, one for each child and one for herself. The Respondent approved the applications for the children, but denied Petitioner's application on March 25, 2004.
5. Respondent denied Petitioner's claim for the following reason : "Claimant's claim for compensation is not, on its face, a claim for economic loss resulting from physical or mental injuries suffered as a *direct* and proximate result of criminally injurious conduct within the meaning of G.S. 15B." Determination of Director Denied Case: CV-26-04-0020406 (emphasis added). As discussed more fully below, GS 15B does not require the injury to be a *direct* result of criminally injurious conduct, rather it requires the injury to be the proximate result of criminally injurious conduct.
6. Ms. Robin Baker, an investigator with the Respondent, was responsible for Petitioner's application. Ms. Baker testified that she denied Petitioner's application because she was not a victim under the Act who had suffered criminally injurious conduct. Ms. Baker testified that to be a victim the Petitioner would have to suffer *direct* injury which is punishable under the law.
7. The undisputed evidence presented was that Petitioner suffered from emotional distress as a result of the sexual abuse of her children and needed professional treatment.
8. Petitioner also requested compensation for lost wages for the three hours per week that she missed taking her children to therapy and for her own treatment. Respondent asserts that petitioner can not be reimbursed for this expense because she did not submit the proof required by statute to support such a claim.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case.
2. N.C.G.S. §15B-4 provides that "compensation for criminally injurious conduct shall be awarded to a claimant if substantial evidence establishes that the requirements for an award have been met."
3. Criminally injurious conduct is "conduct that by its nature poses a substantial threat of personal injury or death, and is punishable by fine or imprisonment or death." Mr. William Christopher Bradshaw was arrested and charged for sexual activity upon children. This conduct meets the definition of "criminally injurious conduct."
4. Per N.C.G.S. §15B-2(2), a claimant is *inter alia*, a victim.
5. Per N.C.G.S. §15B-2(13), a victim is a "person who suffers personal injury or death *proximately* caused by criminally injurious conduct." (emphasis added).
6. Contrary to Respondent's interpretation, the statute clearly states that the injury be *proximately* caused by criminally injurious conduct, not *directly* caused by the criminally injurious conduct.
7. N.C.G.S. §15B-4 states that the "Commission shall follow the rules of liability applicable to civil tort law in North Carolina."
8. The North Carolina Supreme Court has defined proximate cause as "a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." "Foreseeable injury is a requisite of proximate cause[.]" Barefoot v. Joyner, 270 N.C. 388, 393 (1967). To be a legal cause of an injury, the event must be the "but for" cause and the proximate cause. That means 1) without the event, the injury would not have occurred 2) there was no intervening cause and 3) the injury was foreseeable. Ratliffe v. Duke Power Company, 286 N.C. 605, 614 (1966).

9. Based on the N.C. Supreme Court's definition of proximate cause in the context of North Carolina Tort law, a victim under §15B-2(13) is a person who suffers an injury that would not have occurred but for the criminally injurious conduct, was foreseeable by a reasonable person under the facts as they existed, and there was no intervening cause. In this case, the Petitioner's economic injury would not have occurred but for Mr. Bradshaw's criminally injurious conduct. Substantial evidence demonstrates that Petitioner was seeking therapy as a result of Mr. Bradshaw's criminally injurious conduct and it is foreseeable by a reasonable person that a mother would require such therapy upon discovering that her husband was sexually abusing her children. Thus, Petitioner is a victim for the purposes of being a claimant under N.C.G.S. §15B-4.

10. N.C.G.S. §15B-4(a) provides that compensation shall only be paid for economic loss. Economic loss means economic detriment consisting only of "allowable expense, work loss, replacement loss, and household support loss." N.C.G.S. §15B-2(10).

11. N.C.G.S. §15B-2(1) defines an allowable expense as "reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, medically related property, and other remedial treatment and care." Mental counseling is an allowable expense as indicated by the Victim Compensation Application.

12. N.C.G.S. §15B-2(14) provides that work loss is "loss of income from work that the injured person would have performed if he had not been injured and expenses reasonably incurred by him to obtain services in lieu of those he would have performed for income[.]" Furthermore, "A claim for work loss will be paid only upon proof that the injured person was gainfully employed at the time of the criminally injurious conduct and, by physician's certificate, that the injured person was unable to work." Petitioner did not submit such proof with her application and must do so to the satisfaction of Respondent before she can be reimbursed for lost income.

13. §15B-11(a)(2) Provides that a claim shall be denied if "the economic loss is incurred after one year from the date of the criminally injurious conduct that caused the injury[.]" Five of Petitioner's sessions took place after the March 2004 reimbursement deadline, and therefore cannot be reimbursed under the statute.

14. Petitioner has presented substantial evidence that she was a victim as defined in N.C.G.S. §15B-2(13) and that she has incurred allowable costs under the Act. Petitioner should be reimbursed for those therapy expenses that were incurred prior to the one year time bar ending March 31, 2004. Petitioner should be reimbursed for \$1500 for 15 therapy sessions occurring prior to March 31, 2004, and lost income shown by affidavit from her employer.

DECISION

The decision of the Respondent to deny Petitioner's application is reversed and compensation should be awarded to Petitioner in accordance with the findings herein.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. §150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to the Decision and to present written arguments to those in the agency that will consider this Decision. See N.C.G.S. §150B-36(a).

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

This the 17th day of November, 2004.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 DOJ 0379

COUNTY OF CRAVEN

William Earl Arrington,)
Petitioner,)
)
v.)
)
N.C. Criminal Justice Education and Training)
Standards Commission,)
Respondent.)

PROPOSAL FOR DECISION

THIS MATTER was heard before Senior Administrative Law Judge Fred G. Morrison Jr. on August 16, 2004, in Surf City, North Carolina.

APPEARANCES

Petitioner: Robert J. McAfee
Attorney for Petitioner
315 Metcalf Street
New Bern, NC 28560

Respondent: Ashby T. Ray, Assistant Attorney General
Attorney for Respondent
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Whether Respondent has sufficient cause to suspend Petitioner’s certification as a correctional officer?

RULES AT ISSUE

12 NCAC 9G .0102 (9)(cc)
12 NCAC 9G .0504 (b)(3)
12 NCAC 9G .0505 (b)(1)
N.C.G.S. §14-223

FINDINGS OF FACT

Stipulated Facts

1. All parties have been correctly designated.
2. Respondent has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9, to certify law enforcement officers and to deny, revoke, or suspend such certification.
3. On August 9, 2003, Petitioner was present at the residence of Ayanna Slade, his sister, when Kevin Slade, his nephew, was arrested by the New Bern Police.
4. On August 9, 2003, Petitioner was cited by New Bern Police under N.C.G.S. § 14-223 for Resisting, Delaying or Obstructing a Police Officer.
5. On October 1, 2003, Petitioner was found Not Guilty of that offense in Craven County District Court.

6. Respondent initiated a complaint against Petitioner's certification status and held a meeting of its Probable Cause Committee on February 19, 2004.

7. On February 24, 2004, Respondent's Director, Scott Perry, issued a letter to Petitioner informing him that the Probable Cause Committee had found probable cause to believe Petitioner's correctional officer certification should be suspended.

8. Petitioner initiated this contested case at OAH in a timely manner, and OAH has jurisdiction over this contested case. Venue is also proper for the hearing of the matter, notice having been given to all parties in a timely manner.

Adjudicated Facts

1. Petitioner received his probationary certification as a correctional officer from the North Carolina Criminal Justice Education and Training Standards Commission on September 13, 2002. (Respondent's Exhibit 2)

2. Petitioner received his General Certification as a correctional officer from the North Carolina Criminal Justice Education and Training Standards Commission on July 29, 2003. (Respondent's Exhibit 3).

3. On August 9, 2003, the Petitioner was arrested for and charged with Resist, Delay or Obstruct a Police Officer in violation of N.C.G.S. § 14-223.

4. Petitioner properly reported his arrest to his supervisors at the Department of Correction and to the Commission.

5. As a result of the report of arrest and disposition of the charge, the Petitioner's case was referred to Edward Zapolsky, an Investigator with the Commission.

6. Investigator Zapolsky's job is to investigate alleged rule violations by individuals who are certified as correctional officers or are seeking to become certified as correctional officers through the Commission. Investigator Zapolsky was made aware of the Petitioner's arrest as a result of the REPORT OF DISPOSITION OF CASE which was submitted to the Commission by Ron Gillespie, Director of Human Resources for the North Carolina Department of Correction. (Respondent's Exhibit 5)

7. Investigator Zapolsky presented his findings in written form to the Probable Cause Committee of the North Carolina Criminal Justice Education and Training Standards Commission on February 19, 2004.

8. The Probable Cause Committee found that there was probable cause to believe that the Petitioner committed the offense of Resist, Delay, Obstruct a law enforcement officer in violation of N.C.G.S. § 14-223 by:

[U]nlawfully and willfully refusing to comply and be seated while New Bern Police Department officers were conducting an investigation with a shooting suspect and by failing to comply and resisting New Bern officers while they attempted to apply handcuffs by pulling away and refusing to place your hands behind your back.

(Respondent's Exhibit 1)

9. On February 24, 2004, the Petitioner was sent, by certified mail, a letter informing him of the Probable Cause Committee's decision to suspend his correctional officer certification.

(Respondent's Exhibit 1).

10. The arresting officer, T.M. Martin, of the New Bern Police Department, testified at this contested case hearing.

11. Officer Martin served for 11 years in the United States Coast Guard, 10 of which were in a law enforcement capacity, before going to work as a police officer with the Pine Knoll Shores Police Department.

12. Officer Martin worked for the Pine Knoll Shores Police Department for approximately one year prior to joining the New Bern Police Department, where he has been employed since August of 2002.

13. Officer Martin was employed and on duty with the New Bern Police Department on the evening of August 7, 2003.

14. As part of his job description and in performance of his official law enforcement duties, Officer Martin, along with several other New Bern Police officers, responded to the private residence of Ayanna Slade in an attempt to serve an arrest warrant on an individual who was a suspect in a shooting that had occurred earlier that evening.

15. When Officer Martin and the other officers arrived at the residence in question, the shooting suspect, Kevin Slade, was located in the front yard of the residence, along with several of his family members, including his uncle, the Petitioner in this matter.

16. As Kevin Slade was being taken into custody, Officer Martin began to conduct pat down searches of the individuals in the yard. These searches were done for reasons of officer safety since the officers were there to serve an arrest warrant for a recent shooting.

17. Office Martin was attempting to pat down the subjects in the yard, and once he determined they had no weapons, have them remain in a designated area where they could be watched by one officer. This practice was done to facilitate the investigation that accompanied the arrest of Kevin Slade.

18. The shooting for which Kevin Slade was arrested did not occur on the property where he was arrested, but two to three miles away. Nevertheless, Officer Martin and the other officers on the scene, felt it necessary to frisk and control the movement of everybody on the premises because they had not yet located the weapon used in the shooting.

19. There were several officers and subjects moving about in the yard during the arrest of Kevin Slade. There was a lot of shouting and moving around at the scene, which created a potentially volatile situation.

20. The Petitioner was at the residence in an attempt to persuade his nephew, Kevin Slade, to surrender himself to the police.

21. The Petitioner was located in the yard outside the residence when Kevin Slade was taken into custody. Officer Martin conducted a pat down search of a juvenile who was in the yard and instructed him to remain by a tree away from the rest of the yard. Next, officer Martin informed the Petitioner that he was going to conduct a pat down search of his person, and instructed him to place his hands on a vehicle parked in the yard.

22. As Officer Martin attempted to conduct a pat down search of the Petitioner, the Petitioner repeatedly took his hands off the vehicle while the search was being conducted. Officer Martin repeatedly instructed the Petitioner to leave his hands on the vehicle.

23. After Officer Martin completed his frisk of the Petitioner, he instructed the Petitioner to remain by a tree away from the house and the other subjects who had not yet been searched.

24. The Petitioner continued to walk around the yard and the driveway and refused to comply with Officer Martin's instructions to remain by the tree.

25. Officer Martin again instructed the Petitioner to remain by the tree and then told him to have a seat on the ground by the tree.

26. Officer Martin wanted the Petitioner to sit by the tree so he could be easily watched by another officer while Martin continued conducting searches of individuals located in the yard.

27. After the Petitioner refused to sit on the ground or remain by the tree, Sgt. J.E. Smith of the New Bern Police Department, approached and told him that they were attempting to conduct an investigation into a shooting and they needed him to stay out of the way so the officers could control the scene.

28. Sgt. Smith then told the Petitioner that if he didn't want to sit on the ground or remain by the tree, he could leave the property altogether.

29. When Petitioner refused to leave the property and continued to walk about the yard, officer Martin told him that he was under arrest and placed a handcuff on one of his wrists.

30. As Officer Martin placed a handcuff on Petitioner's wrist, the Petitioner turned away from Officer Martin, so Sgt. Smith came over to assist Martin in completing the arrest.

31. Officer Martin and Sgt. Smith determined that, due to the Petitioner's resistance, it was necessary to take the Petitioner to the ground in order to place him under arrest. Once on the ground, the Petitioner refused to remove his arm from under his chest in compliance with the officer's instructions.

32. It was not until another New Bern Police Department officer with a K9 unit told the Petitioner that if he did not comply with the officer's instructions he would utilize the K9 on him, that Petitioner complied with the officers' instructions.

33. The Petitioner was transported to the magistrate's office where he was charged with Resist, Delay, Obstruct a law enforcement officer, in violation of N.C.G.S. § 14-223.

34. Petitioner went to court and pled not guilty. After a bench trial, the Petitioner was found not guilty of Resist, Delay, Obstruct a law enforcement officer.

35. During the evening of August 7, 2003, Officer Martin was in full uniform and driving a marked police vehicle.

36. Petitioner was aware that Officer Martin and Sgt. Smith were law enforcement officers who were attempting to serve an arrest warrant and conduct an investigation.

CONCLUSIONS OF LAW

1. Both parties are properly before this Administrative Law Judge in that jurisdiction is proper and both parties received notice of hearing.

2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9, to certify correctional officers and to deny, revoke, or suspend such certification.

3. There is sufficient evidence that Petitioner committed the misdemeanor offense of Resisting, Delaying or Obstructing a Police Officer, in violation of N.C.G.S. § 14-223.

4. An individual is guilty of the offense of Resisting, Delaying or Obstructing an Officer if that person willfully resists or delays or obstructs a person which he or she knows to be a public officer while that officer is discharging or attempting to discharge a duty of his or her office.

5. The criminal offense of Resisting, Delaying or Obstructing a Police Officer, in violation of N.C.G.S. § 14-223, constitutes a misdemeanor pursuant to 12 NCAC 09G.0102(9)(cc) of the Commission's Administrative Rules.

6. 12 NCAC 09G 0504(b)(3) allows for the Commission to suspend or revoke the certification of a correctional officer when he has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification.

7. 12 NCAC 09G .0505(b)(1) states:

When the Commission suspends ... the certification of a corrections officer pursuant to 12 NCAC 09G .0504 of this Section, the period of sanction shall be not less than three years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (c) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is commission or conviction of a misdemeanor as defined in 12 NCAC 09G .0102.

8. The fact that the Petitioner was found not guilty in District Court does not preclude the commission from suspending the Petitioner's correctional officer certification. 12 NCAC 09G .0504(b)(3) requires only the commission of an offense.

9. Unlike a criminal proceeding where the burden of proof is beyond a reasonable doubt, in an administrative hearing the burden of proof is preponderance of the evidence.

10. N.C.G.S. § 15B-34 states that;

The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to the facts and inferences within the specialized knowledge of the agency.

11. The Commission has sufficient grounds pursuant to 12 NCAC 9G .0102 (9)(cc), 12 NCAC 9G .0504 (b)(3), and 12 NCAC 9G .0505 (b)(1), to suspend Petitioner's correctional officer certification.

Based upon the above Findings of Fact and Conclusions of Law, the undersigned makes the following:

PROPOSED DECISION

It is hereby proposed that Petitioner's criminal justice officer certification be suspended for a period of not less than three (3) years for commission of a misdemeanor as defined in 12 NCAC 09G .0102(9)(cc), with a period of probation being substituted for an active suspension.

NOTICE

The agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this Recommended Decision, to submit proposed findings of fact, and to present oral and written arguments to the agency. N.C. Gen. Stat. § 150B-40(e). The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission.

This the 29th day of October, 2004.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF LENOIR

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 OSP 1727

TOMEIKA K. BLOUNT,
Petitioner,

vs.

N.C. DEPARTMENT OF HEALTH &
HUMAN SERVICES, CASWELL
CENTER,
Respondent.

DECISION

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on February 17, 18, 19, 2004, March 16, 17, 2004, and April 6, 7, 8, 2004 in Kinston, North Carolina. This was a consolidated case heard with 04 DHR 1728.

APPEARANCES

Attorneys for Petitioner: John R. Keller
Josune Drummond
Legal Aid of North Carolina, Inc.
P. O. Box 2688
Wilson, NC 27894

Attorney for Respondent: Ben Turnage
Assistant Attorney General
201 Stevens Mill Road
Goldsboro, North Carolina 27530

ISSUES

Did Respondent, NC Department of Health & Human Services, Caswell Center, have just cause under N.C.G.S. §126-35 to terminate Petitioner based upon unacceptable personal conduct on May 19, 2003?

Was the Petitioner dismissed from her position as a Developmental Care Technician at Caswell Center for just cause based upon Petitioner's failure to follow a known work rule?

BURDEN OF PROOF

Pursuant to N.C.G.S. § 126-35 (d), Respondent has the burden of proof to show that Respondent had just cause to terminate Petitioner.

EXHIBITS

For Petitioner: 2, 3, 5, 28, 29, 30, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 47, 48, 50, 51, 52, 53, 54, 56, 57, 59, 60, 61, 63, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 85, 86, 88, 89, 90, 91. (T p. 2238, 6-15). Pet. added 13, 16, 20, 23, 24A, 25 in 04 DHR 1728

- 2. T. Harper Interim Review-1/14/04
- 3. T. Harper Interim Review-8/06/02
- 5. T. Harper Trainer II description
- 28. Profound Hearing Loss Definition
- 29. Habilitation Plan 8/02 pp. 11-28
- 30. Personal/Social Assessment pp. 45-49
- 32. Behavior In-service pp. 55-56
- 33. Behavior Reviews pp. 59-81
- 34. Psychological Evaluation pp. 10-113

35. Speech/Language Evaluation pp. 114-115
36. Record of Inappropriate Behavior, 2003
37. Record of Inappropriate Behavior
39. Signs p.11
40. Habilitation Plan 2/03 pp. 34-49
41. Program Progress Notes pp. 89-98
42. Personal/Social Assessment pp. 99-104
43. Behavior Guidelines/strategies pp. 112-116
44. Sensory adaptations pp. 117-118
45. Sensory impaired Evaluation pp. 122-123
47. Psychological Evaluation pp. 127-132
48. Daily Routine assessment pp. 135-136
50. Audiology Evaluation - 3/12/97
51. Personal Communication System - 2/15/03
52. Record of Inappropriate Behavior
53. Height/Weight
54. Habilitation Plan 4/02 pp. 6-21
56. Habilitation Plan 3/03 pp. 23-36
57. Objective Plans pp. 45-46
59. Objective Plans pp. 58-59
60. Personal/Social Assessment pp. 72-77
61. Behavior Plan 9H pp. 78-83
63. Behavior Reviews pp. 90-101
68. Record of Inappropriate Behavior
69. Height/Weight
70. Petitioner Performance Evaluation, created 8/9/01
71. Petitioner Review, 1/10/01
72. Petitioner Review, 1/5/01
73. Petitioner Performance Evaluation, completed 5/30/01
74. Petitioner Performance Evaluation, created 8/7/02
75. Petitioner Approval of Secondary Employment
76. Petitioner Leave Record as of 6/13/03
77. Sam Moss Handwritten Notes, copy 1
78. Sam Moss Handwritten Notes, copy 2
79. Rights Investigation Report, 2003-56
80. Pamela Kane Incident Report
81. Birchwood A Home Log, 5/19/03
85. Caswell Center Investigation Process powerpoint
86. Grace B. Education/Home Evaluation, 2/12/03 pp. 137-140
88. Statement of Gwen Rhem 5/19
89. Cheryl Clark Statement
90. Ida Grady Statement
91. Petitioner midcycle review

For Respondent: A through Z, except M., AA through AZ, except AJ, AL, AM, AN, AP, AQ, AR, AU, and AY, BA through BO. (T pp. 2239, 5 to 2240, 10). **Respondent,** NC DHHS, DFS in 04 DHR 1728 presented Exhibits 1-34

- A. EM Visual Body Check
- B. GB Visual Body Check
- C. TB Visual Body Check
- D. Incident Report
- E. Incident Report
- F. Incident Report
- G. Incident Report
- H. Incident Report
- I. Incident Report
- J. Description of DT1 position
- K. Abuse Neglect Policy 2.2.9
- L. Discipline Policy 5.1.8

- M. I.C.F. Guidelines
- N. Omitted
- O. Client Rights Inservice 2003
- P. Petitioner confidentiality agreement
- Q. Petitioner Statement Administration Investigation Report
- R. Cheryl Beaulieu Statement Administration Investigation Report
- S. Sheila Arnold Statement Administration Investigation Report
- T. Tonyah Harper Statement Administration Investigation Report
- U. Gwen Rhem Statement Administration Investigation Report
- V. Cheryl Clark Statement Administration Investigation Report
- W. Sylvia Campbell Statement Administration Investigation Report
- X. Joyce Forrest Statement Administration Investigation Report
- Y. Ida Grady Statement Administration Investigation Report
- Z. Definition Unacceptable Personal Conduct
- AA. Birchwood A assignment sheet May 19, 2003
- AA. 5/19/03 Investigative Placement with Pay
- AB. 6/9/03 Predissmissal Conference letter
- AC. Written Rebuttal to predissmissal
- AD. 5/19/03 Written Rebuttal to predissmissal
- AE. 6/11/03 Written Rebuttal to predissmissal
- AF. 6/12/03 Notice of Dismissal
- AG. Step 2 Grievance and Rebuttal to Dismissal
- AH. 7/10/03 Directors decision to uphold dismissal at Step 2
- AI. 9/8/03 Secretary DHHS decision to uphold dismissal at Step 3
- AK. 3/12/03 Written Warning for 2/28/03 inappropriate verbal interaction
- AO. 5/5/03 Special Interim Review Patient Safety
- AS. EM Habilitation Report pp. 72,73
- AT. EM Habilitation Report p 8
- AV. EM Habilitation Report p. 36
- AW. GB signs p. 6
- AX. GB signs p. 12
- AZ. GB signs in-service attendance sheet
- BA. GB inappropriate behavior attendance sheet
- BB. GB Habilitation Report p. 103
- BC. GB Habilitation Report p. 113
- BD. Caswell Center Investigation Procedure Inservice
- BE. GB Habilitation Report pp. 99, 100
- BF. GB Habilitation Report p. 115
- BG. Lancaster's Handwritten Interview Notes
- BH. Advocacy In-Service Roster 4/29/03
- BI. Moss's Handwritten Interview Notes
- BJ. Exterior Birchwood A Hall
- BK. Front Birchwood A Hall
- BL. Interior Door Birchwood A Hall
- BM. Front half Birchwood A Hall
- BN. Partition in Birchwood A Hall
- BO. Back half Birchwood A Hall

PETITIONER'S WITNESSES

Tomeeka K. Blount (Petitioner), Gwendolyn Rhem, Cheryl Clark, Ida Grady, Betty Bradley

RESPONDENT'S WITNESSES

Sheila Arnold, Cheryl Beaulieu, Tanyah Harper, Sam Moss, Deborah Lancaster, Sylvia Campbell, Joyce Forrest

STIPULATIONS OF FACT

1. Petitioner was a permanent, career state employee with 101 months of service (8.4 years) as of 6/13/03. Petitioner's position at Caswell Center was as a Health Care Technician I, aka Developmental Care Technician I.
 2. Petitioner was assigned to Division 7, Birchwood A Unit at Caswell Center, Kinston, NC as of May 19, 2003.
 3. Respondent Caswell Center is an institution for the mentally retarded located in Kinston, North Carolina. Respondent Caswell Center is an institution under the direction and control of Defendant North Carolina Department of Health and Human Services (DHHS) which is an agency of the State of North Carolina.
 4. Caswell Center is a center for the mentally retarded. Residents at Caswell Center require continuing and constant supervision. The residents of Caswell Center are identified variously as residents, clients, patients, and/or individuals.
 5. Developmental Care Technicians at Caswell Center provide first line care and supervision to residents at Caswell Center. The primary purpose of Developmental Care Technicians is in assuring the physical and emotional well being of clients and active participation in the implementation and maintenance of clients' habilitation plans.
 6. The performance requirements of those employed as Developmental Care Technicians at Caswell Center are outlined in inservice training, directives, memorandums, program and activity schedules, and Caswell Center policies in accordance with state and federal laws.
 7. Petitioner was assigned to Birchwood A/Division 7 on June 1, 2000 on second shift. On March 11, 2002, Petitioner was assigned to first shift in Birchwood A/Division 7 where she remained until her dismissal on June 13, 2003.
 8. On May 19, 2003, Petitioner's immediate supervisor was Sylvia Campbell. Ms. Campbell is employed by Caswell Center as a Developmental Technician Supervisor in Birchwood A home. The home manager or Mental Retardation Habilitation Coordinator (MRHC) in Birchwood A on May 19, 2003, was Joyce ("Bunny") Forrest. Deborah Lancaster was the Mental Retardation Unit Director (MRUD).
 9. The state Personnel Commission Personnel Manual (Manual), and Caswell Center policy 5.1.8, in effect during Petitioner's employment provided for dismissal for unacceptable personal conduct. Unacceptable personal conduct includes conduct for which no reasonable person should expect to receive prior warning; or willful violation of known or written work rules; or job-related conduct which constitutes a violation of State or federal law; or the abuse of client(s) over whom the employee has charge or to whom the employee has a responsibility.
 10. The State Personnel Commission Personnel Manual (Manual) and Caswell Center policy 5.1.8, in effect during Petitioner's employment, also provided for a progressive disciplinary procedure with the written warning as the first type of disciplinary action that an employee may receive. The supervisor may give a written warning for unacceptable personal conduct. However, this policy does not require a written warning before management takes other disciplinary action in these types of cases.
 11. Caswell Center policy provides temporary disability benefits to employees who are absent from work due to delivery and recovery time after delivery due to pregnancy. Medical documentation is required. Prior notice and request for leave is required. As of June 13, 2003, Ms. Blount had the following time balances available for use:

Vacation:	287 hours 50 minutes
Sick:	472 hours 30 minutes
Comp Time:	1 hour
Bonus Leave:	72 hours
- Since her dismissal, Petitioner has been paid for 240 hours of vacation time, 1 hour of comp time and 72 hours of bonus leave.
12. Caswell Center Policy 2.2.9, entitled "Abuse, Neglect, and Exploitation," states that "abuse, neglect or exploitation of Caswell Center individuals is strictly prohibited and will not be tolerated." This policy defines emotional abuse as the knowing and willful use of intimidation, harassment..., loud and/or disrespectful communication (toward or in the presence of individuals), threatening gestures or communications, or other behavior that may result in mental anguish or emotional harm.
 13. All employees receive training on what constitutes abuse. Caswell employees receive a yearly in-service on this policy. The in-service on abuse, neglect and exploitation is provided in a live program by the advocacy department and is contained in a written document in question and answer format.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearings, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings 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. At the time of Petitioner's discharge, Petitioner had worked as a Developmental Technician I in Birchwood A for three years.
2. Petitioner was trained on Policy 2.2.9, the abuse and neglect policy related to resident care. (R1 Ex. J; R1 Ex. N)
3. Petitioner was knowledgeable of the general behaviors and habilitation goals of residents GB, TB, and EM. Petitioner had provided direct care to each of these residents during the entire time she worked in Birchwood A (T pp. 1824; pp. 1924-1928).
4. Petitioner assisted Betty Bradley with Bradley's orientation as the new Developmental Supervisor I in Birchwood A in 2001. (T p. 1824, 7-10). While serving as Petitioner's supervisor in Birchwood A in 2001 and 2002, Bradley would leave Petitioner in charge of the unit if Bradley and the Developmental Technician II were unavailable (T p. 1851, 12 and 17-18).
5. Petitioner's last regular interim performance review was conducted January 8, 2003. Petitioner was noted to be "very client oriented." Her supervisors did note concern about Petitioner's verbal interaction with staff. (P Ex. 91). Petitioner was opinionated and spoke her mind to fellow staff regarding resident care and proper implementation of resident behavior plans. Her manner could be gruff when interacting with staff, and staff did not always like this. (T pp. 1826-1827).
6. Petitioner's last annual performance appraisal was conducted on June 3, 2002. Petitioner's overall performance rating was "Outstanding". Petitioner was commended for taking pride in her performance, demonstrating good leadership skills, initiating and seeking to improve care to residents, and being very knowledgeable of the job requirements. An interim review during the evaluation cycle noted Petitioner's potential for a leadership role, being dependable and flexible and knowing the unit routine. (P Ex. 70). Petitioner's previous annual performance appraisal (May 29, 2001) was also rated "Outstanding". (P Ex. 74).
7. Birchwood A (sometimes referred herein as the unit or Hall) is part of Division 7. The Division 7 Director is Debra Lancaster. The Behavioral Program Specialist assigned to the unit is Cheryl Beaulieu. The Education Team assigned to the unit is Cheryl Clark, Teacher, and Tanyah Harper, Education Development Assistant. Birchwood A Hall is the ground floor of a two-story dormitory at Caswell. The Hall consists of twenty-seven rooms of varying sizes and home uses.(Registry Ex. 33) The interior of Birchwood A Hall is approximately 150 to 160 feet in length. (T p. 1259, lines 18-24). The front of Birchwood A Hall is separated from the rear of the hall by a glass partition and open doorway. (R. Ex BM, BN, BO) The glass partition and doorway are adjacent to the elevator. (R. Ex. 33). Birchwood A is the home for 15 female residents. These residents are all ambulatory, but have either severe mental health issues or behavioral illnesses. All the residents have some degree of moderate to severe mental retardation.
8. Staff communicates with residents through total communication, that is, oral instructions, signs and gestures, tactile cues, and physical prompts. Staff can wave to gain a resident's attention. (T pp. 266, 4; 266, 24 to 267, 1; 1931, 11-23).
9. Residents do exhibit undesirable conduct, known as problem behaviors. Each resident's habilitation plan and other evaluation and assessment documents note the problem behaviors. The unit maintains on-site a Record of Inappropriate Behaviors. All staff are trained and required to note the occurrence of a resident's problem behavior in this log. This duty applies 7 days per week, 24 hours per day (T pp. 294, 16 to 295, 20; 334, 11-21).
10. GB was born in 1959. GB is severely mentally retarded. GB is in the severe range of retardation intellectually and in the moderate range adaptively. She has profound bilateral hearing loss, rendering her deaf. GB also cannot speak. (Vol. II, pg. 340) She is legally blind, with the ability to see peripherally but cannot see out of her central vision field. (P Ex. 40, pp. 37, 42; P Ex. 42, pp. 100, 101; T pp. 333, 15 to 334, 2).. GB has severely restricted sensory abilities. (P Ex. 50). GB receives instructions through total communication, meaning that staff orally states the instruction, use manual signs, and also employ tactile cues and physical prompts. (P Ex. 43, P Ex. 51; R2 Ex. 7). GB will turn her head from side to side and up and down to see the instructions given by staff. (P Ex. 40, p. 37; P Ex. 44; P Ex. 51).

11. GB's problem behaviors include agitation (rocking back and forth and pacing), aggression, hoarding, crying and moaning. (P Ex. 40, p. 37; P Ex. 42). GB's problem behaviors are generally triggered by physical pain or discomfort, but GB does have a psychiatric disorder as well. Some problem behaviors have no known antecedent. GB can be exhibiting inappropriate problem behaviors for which staff does not know why it is occurring. (Vol. II, pg. 332) GB should not be pushed or pulled. (P Ex. 41; P Ex. 42; R2 Ex. 7; T p. 332, 1-4).

12. EM was born in 1951. EM is profoundly mentally retarded. She has a moderate to severe hearing loss. She has an auditory processing delay, which results in EM either failing to comprehend an instruction or taking extra time to comprehend an instruction. (P Ex. 54, 56, 57). EM's auditory processing delay applies to verbal and non-verbal signals. This auditory processing delay can cause difficulty following instructions and inconsistent auditory behavior. (P Ex. 28; R2 Ex. 6). Inconsistent instructions and insufficient delay between instructions will create confusion. EM receives instructions through total communication. EM also interprets facial features and body language to process instructions. (P Ex. 54, p. 8; P Ex. 57, 58, 59).

13. EM's problem behaviors include agitation, manifested by spitting and sputtering, clothes tearing, aggressive behavior, and self injurious behavior, such as scratching. (P Ex. 60). EM is very conscious about her clothing and will become agitated if she does not like the clothing that she is wearing. (P Ex. 60, p. 75; T pp. 363, 14 to 364, 1). EM will also exhibit a problem behavior, such as agitation, with no apparent antecedent event to trigger the agitation. EM can exhibit a problem behavior even when a staff person is correctly using a gentle teaching strategy or other approved protocol. (T pp. 358, 15-19; 368, 10-16).

14. TB was born in 1957. TB is profoundly mentally retarded. She can understand simple commands. She can express her feelings through either physical expressions or with words. (P Ex. 29, pp. 14-15; P Ex. 30, p. 46). TB can get her coat (T p. 297, 8-18). She is cooperative in response to familiar commands. (T p. 299, 8-24; R2 Ex. 9).

15. TB's problem behaviors include agitation, property destruction, clothes tearing, aggressive behavior and self injurious behavior. (P Ex. 30, p. 45). TB's problem behaviors can be triggered by noisy situations, excessive demands, disruptive peers and unstructured time. When TB becomes upset, she can state, "I'm mad." (P Ex. 29, p. 16; P Ex. 30, p. 45; P Ex. 34, p. 108; T p. 310, 19-22; R2 Ex. 9).

16. Medication is administered daily to the residents by a nurse in the unit located in Room 137 (the nurse's station). During first shift, the administration of medications (known as "meds pass") takes place generally between 8:00 a.m. and 8:30 a.m. (T pp. 663, 19; 1871, 14; R2 Ex. 33).

17. A unit staff person, either the Manager, Developmental Supervisor I, Developmental Technician II, or a Developmental Technician I, will be assigned to monitor the nurse's station, meaning that the staff person stands outside the door to the nurse's station. The staff person's purpose is to make sure that only one resident is in the nurse's station at a time to receive medications from the nurse (T pp. 663-664; 697, 23 to 698, 19). Only one resident is permitted in the nurse's station at a time to ensure that medication administration errors are not made. (T pp. 663, 23 to 664, 2).

18. It is not uncommon to have one resident in the nurse's station receiving medication and one resident waiting outside the nurse's station at the door. When one resident exits that nurse's station, the resident who is waiting can enter, and staff will send another resident down to the nurse's station. The most recently sent resident will either wait outside the nurse's station or can enter immediately if the other resident in the nurse's station has finished and is exiting (T pp. 699, 14-22; 702, 9-15; 1877, 13-16; 1877, 18-22; 1879, 20-22).

19. The residents can come from the activity room and the living room to get their medications. The staff person assigned to the activity room or the living room will typically communicate with the staff person outside the nurse's station to coordinate meds pass. The DT staff outside the activity room/living room exercise discretion to select the order the residents are sent to the nurse. The activity room (Room 109) and the living room (Room 104) are located at the opposite end of the hall from the nurse's station (T pp. 663-665; 713, 18 to 714, 2; 1876-1877; R2 Ex. 33).

20. When Joyce Forrest monitors the nurse's station, Forrest communicates with staff at the opposite end of the hall through both hand signals and oral instructions. Forrest raises her voice, not to yell or to shout, but to communicate with staff at the opposite end of the hall (T pp. 664, 20; 674, 8-23; 675, 1-4; 711, 18; 712, 8-17).

21. Staff uses various manual signs to instruct a resident to go the nurse's station. Signs include pointing with your index finger and tapping your wrist with two fingers. It is acceptable to use one or both signs. (T pp. 228, 18 to 229, 8).

22. Residents GB and EM understand the meds pass routine and understand when and how to go to the nurse's station when prompted by staff. (T pp. 228, 18 to 229, 8). EM and GB walk to the nurse's station. If either resident had run to the nurse's station, that would be an unusual event (T pp. 722, 8-18; 724, 7-10).

23. On Monday, May 19, 2003, first shift began at 6:00 a.m. Petitioner timely reported to work (T p. 1932, 16).

24. On May 19, 2003, the staff on duty in the unit, first shift, included Joyce Forrest, Sylvia Campbell, Cheryl Clark, Tanyah Harper, Cheryl Beaulieu, Ida Grady, Gwendolyn Rhem, and the Petitioner.

25. Sylvia Campbell prepared the assignments. Petitioner was assigned to the living room (Room 104). Arnold was assigned to the activity room (Room 109). Petitioner was assigned to residents identified as Group II. Arnold was assigned to residents identified as Group III. Grady and Rhem were assigned to the dining room/kitchen. Arnold, Grady, and Petitioner were also assigned to transport the residents to on-campus workshops later in the shift. (T p. 1932, 24; R1 Ex. Z). Residents EM, GB and TB were in a group assigned to the living room.

26. The census on Birchwood A Hall on May 19, 2003, was 15 residents. (T p. 808, line 8) DTI staff began waking the residents at approximately 6:30 a.m. and performed the necessary bathing and grooming to get each resident up for the day (T p. 1934, 17). From 8:00 a.m. to approximately 9:15 a.m. the residents of Birchwood A Hall are involved in different activities: breakfast in the dining room, brushing teeth in various bedrooms and bathrooms after breakfast, and medication administration. (P Ex. 81; T p. 138, lines 8-9) All of these activities are occurring simultaneously with residents completing each activity at a controlled pace while being monitored by DT staff. After each resident is bathed and dressed, the resident may remain in her room, go to the activity room, or go to the living room (T p. 1935, 9-17). Once all of the morning activities were completed on May 19, 2003, the residents prepared for transportation to the programming area.

27. Petitioner bathed, dressed, and groomed the five residents assigned to her care (T pp. 1870, 21; 1935 – 1939). After completing the care of her residents, Petitioner went to her assignment, monitoring the residents in the living room (T p. 1939, 9-10).

28. Petitioner arrived to the living room at approximately 7:00 – 7:10 a.m., at which time Sylvia Campbell left the living room and went to assist Ida Grady and Gwendolyn Rhem with breakfast preparations in the dining room. Petitioner interacted with approximately 6 residents in the living room, performing simple tasks such as applying hand lotion and looking at magazines (T pp. 1940, 13; 1941, 6; 1941, 19-20).

29. At approximately 7:55 a.m., Cheryl Beaulieu arrived at the unit. After reviewing the records of the residents' behavior for the preceding weekend, Beaulieu went to the living room. Beaulieu arrived at the living room about 8:00 a.m. (T pp. 253, 14; 375, 19-22; 1946, 1). Cheryl Beaulieu, Behavioral Programming Specialist, has worked with the ladies of Birchwood A for 33 months. (T p. 257, line 24; p. 258, lines 1-5). A Behavioral Programming Specialist assists the staff's licensed psychologist in writing and implementing behavior plans and psychological evaluations for residents. (T p. 251, lines 2-10). Beaulieu's usual routine when arriving at the unit was to join staff and residents in the living room (T p. 254, 21-22; 377, 7-15).

30. Petitioner and Beaulieu spoke, and Petitioner then continued interacting with the residents in the living room (T p. 1946).

31. Resident SM was in the living room (T p. 1946). Petitioner was SM's personal advocate. When DT staff serves as a personal advocate for a resident, that staff gives special attention to that resident regarding such issues as clothing, personal items, and opportunities for travel outside the unit (T pp. 1890, 9-14; 1890- 1891).

32. Petitioner believed SM's hair had not been properly washed that morning. Sheila Arnold was assigned to wash SM's hair that morning (T p. 1946, 13-21). Petitioner asked Beaulieu if SM's hair appeared oily (T p. 1946, 13-21). Beaulieu responded that SM's hair did appear a little oily. (T p. 1946, 23-24). Petitioner asked Cheryl Beaulieu to supervise the residents in Petitioner's assigned location while Petitioner washed the hair of resident SM.

33. Petitioner exited the living room with SM to take SM to wash her hair. Petitioner saw Arnold in the activity room (T p. 1947, 1-12). Petitioner confronted Arnold and questioned Arnold about whether or not Arnold had washed SM's hair (T p. 1947, 13-24). Arnold stated that she had. Petitioner objected that SM's did not look to be washed. Arnold conceded that she had only sprayed SM's hair. Petitioner stated that spraying was not washing. (T p. 1947, 13-24).

34. Petitioner continued down the hall with SM to a bathroom where she washed SM's hair (T pp. 1948, 20 to 1950, 13). Arnold remained in her assigned activity room.

35. When Petitioner finished washing SM's hair, Petitioner returned to the living room (T p. 1951, 6-7). Petitioner then asked Beaulieu to continue monitoring the living room, so that Petitioner could assist with the brushing of residents' teeth that were completing breakfast. (T pp. 1951 to 1952, 3). It was not uncommon for Beaulieu to monitor the residents in the living room while the staff person assigned to the living room left the living room to brush residents' teeth. Ms. Campbell did not have a problem with Petitioner leaving the living room that morning to brush teeth while leaving Beaulieu in charge of the residents in the living room (T pp. 255, 10-18; 829, 8 to 830, 2; 1951, 6-7; 1952, 7-13).

36. Petitioner brushed several residents' teeth, some in their room and some in the bathroom (T p. 1953, 10).

37. At approximately, 8:00 a.m., MRHC II Joyce Forrest began medication administration ("med pass")(T p.83). The nurse's station, R 137, is at the opposite end of the hall from the Living Room. (Registry Ex 33). Forrest was conducting med pass while standing outside of the nurse's station. (T p. 669, line 20; T p. 663, lines 19-22) Forrest's role was to ensure that only one resident was at the nurse's station at a time so that the nurse would make no medication error. (T p. 663, lines 23-24; p. 664, lines 1-2; T p. 667, lines19-23).

38. Arnold assisted Forrest during the med pass. Forrest communicated to Arnold to send one resident at a time.(T p. 82, line 21;T p. 675, lines 9-10, T pp. 674, 8-23; 675, 1-4). After Arnold finished sending all of the residents in her assigned group to med pass, the activity room was empty. The residents from the Activity Room went to breakfast after completing med pass. (T p. 83, lines 3-9). According to Beaulieu, Arnold "was in the side activity room and she had asked me (Beaulieu) to send GB and EM to her." (Vol I, p. 260) When GB and EM went to Arnold, Beaulieu noticed that Arnold, "was holding their hands down at her side just saying, you know, "Wait right here with me."" (Vol I, p. 260) Petitioner had not returned from assisting in brushing the teeth of the residents at that point.

39. When Petitioner finished brushing the teeth of her last resident (Room 129 or 130), Petitioner and resident walked back to the living room. While at that end of the hallway near Room 129/130, Petitioner observed that residents were coming in and out of the dining room, but that no one appeared to be waiting outside the nurse's station (T pp. 1954, 13-15; 1954, 23 to 1955, 5; 1962, 12-13). While walking up the hallway, Petitioner heard Forrest call for additional residents to come to the nurse's station. (T pp. 1954, 23 to 1955, 4). At approximately 8:30 a.m. Forrest called out the names of those residents who had not yet received their medication from her location outside the nurse's station to Arnold at her location in the hallway between the activity room and the living room. Forrest specifically called the names GB and EM (T pp. 377, 16 to 378, 17; 1954, 23 to 1955, 4). Beaulieu heard Forrest's instruction to send GB and EM to the nurse (T pp. 377, 16 to 378, 17). Beaulieu was in the living room (T p. 377, 7-15).

40. Beaulieu heard raised voices in the hallway, so she walked to the door of the living room and stood in the doorway to see what was going on. (T p. 256, 261, 2-9). Petitioner had approached Arnold and stated to Arnold to send GB and EM to the nurse. Petitioner stated that GB and EM could go to the nurse's station because by the time GB and EM arrived, any resident in the nurse's station would be finished. (T p. 261, 12-16). Petitioner also stated to Arnold that one resident could be sent and by the time that resident got down the hall, it would be time to send another one. (R2 Ex. 20). Arnold objected because Forrest had said send one at a time. (T p. 261, 18-19). Arnold held GB and EM by the wrists, preventing either resident from going to the nurse (T p. 380, 8-22).

41. Petitioner and Arnold continued to dispute whether or not the residents should be sent to the nurse (T pp. 261, 19-23; 263, 20-24). Petitioner's voice became somewhat loud, kind of a little bit harsh, and frustrated in tone (T p. 264, 10-11; 268, 6-8; R2 Ex. 21). Her voice was louder than usual (T p. 264, 10-11). Arnold's voice also became louder than her regular voice. (T pp. 261; 268, 15-18; 390, 22-24; 20; R2 Ex.21). Petitioner directed her words to Arnold (T pp. 261, 19-23; 263, 20-24).

42. Beaulieu saw Petitioner push on one of the two clients there, telling them to just go down the hall. She could not recall which client. Petitioner's voice was a little loud and "kind of a little bit harsh." (Vol I, p. 265, 268) The push was not a forceful push, not the kind that would make someone fall. (Vol I, p. 267) This physical touching was more than the gentle teaching strategies taught, but was not severe enough to cause injury (T p. 267, R2 Ex. 20).

43. EM turned around where Beaulieu could see her face. EM uses facial expressions and gestures to communicate. Beaulieu saw EM's "eyes were kind of up, and her forehead was kind of shrugged." (Vol I, p. 269) Beaulieu thought she was surprised or confused, "like she wasn't really sure what was going on." Petitioner removed Arnold's grip from EM's wrist, pulled briefly EM's arm to direct her towards the nurse, and signed for EM to go to the nurse (T pp. 286, 14-20; 396, 1-12; 1966, 13-18).

44. Beaulieu did not see GB's facial expressions. GB has dual sensory impairments, they being hearing and vision. She can see some things but has difficulty focusing. She can not see straight ahead but would have to turn her head in order to be able to focus on another person. GB did not exhibit any noticeable reactions while in Petitioner's and Arnold's presence and Beaulieu did not observe any unusual behavior coming from GB during the Arnold/Blount interaction. (Vol II. Pg. 337). GB did not duck down in

fear from any gesture by Petitioner (T p. 284, 21). Beaulieu could not discern whether it was Blount's pointing or Arnold's indication or signal to stay that was the trigger of confusion for GB. Petitioner did not pull GB by the arm and walk several steps with GB in toe toward the nurse (T p. 396, 13-20).

45. Forrest saw Petitioner, Arnold, EM and GB in the hallway in the area of the Living Room door after Forrest called EM and GB to med pass. (Registry Ex. 14) (T p. 735, lines 1-16) EM and GB were standing abreast of Arnold in the hallway after Forrest called EM and GB for med pass. (T at p. 99, lines 12-15; p. 260, lines 12-15; R Ex. 12, p. 2, ¶ 3). After Forrest called EM and GB for med pass, Forrest saw two residents coming to the nurse's station simultaneously. (T p. 726, lines 23-24; p. 727, lines 1-4). Forrest put her hand up indicating to Arnold, "I just want one." (T p. 675, lines 5-14) Forrest did not continue to observe the activity in the area of the Living Room. (T p. 725, lines 22-24; p. 726, lines 7-8; p. 734, lines 10-12). EM and GB did go to the nurse. (T pp. 285, 18 to 286, 5). EM and GB did not arrive together at the nurse's station. (T p. 680, 3-7).

46. Forrest was in a position to hear loud noises coming from the end of the hallway near the living room, was in a position to see any unusual activity occurring at that end of the hall, and would have noted anything out of the ordinary had it occurred. (T pp. 712, 7; 724, 17 to 725, 6; 728, 11-22; 734, 1-12; 750, 17-20). Forrest left the unit at approximately 8:30 a.m. to go to Pinewood, an administrative building adjacent to the unit (T pp. 714, 23 to 715, 1). Forrest returned to the unit between 8:33 a.m. and 8:35 a.m. (T pp. 714, 23 to 715, 1). Forrest returned through the front door (T p. 727, 15-24). Forrest then went to her office (Room 123) where she worked for approximately 20-25 minutes (T pp. 715, 2-13; 716, 15). The office door was closed (T pp. 716, 19 to 717, 9).

47. Beaulieu is trained on respondent's policy 2.2.9 and was aware of her duty to report suspected abuse and/or neglect. Beaulieu did not make a report of suspected abuse and/or neglect after witnessing the meds pass incident between Petitioner and Arnold (T pp. 290, 20 to 292, 18).

48. Beaulieu observed EM to be agitated prior to meds pass. Beaulieu interpreted EM's agitation as likely to be caused by displeasure with the clothing that she was wearing that morning. (T pp. 259, 11-24; 364, 2-9; R2 Ex. 21). EM remained agitated after meds pass (T pp. 363, 20 to 366, 12). Beaulieu indicated that she had no basis upon which to state whether EM remained agitated after meds pass as a result of the clothing she was wearing or as a result of the alleged conduct during meds pass (T p. 366, 3-12).

49. After GB and EM had gone down the hall towards the nurse's station, Petitioner returned to the living room (T p. 1970, 17-22). Beaulieu was in the living room (T p. 403, 2-4, 11-15). Beaulieu remained in the living room from 8:30 a.m. until transport with Petitioner and the residents (T p. 403, 2-4, 11-15; 1972, 7-12). Petitioner continued to interact with the residents in the living room (T p. 1970, 17-22).

50. Shortly after meds pass concluded at approximately 8:30 a.m., Arnold briefly approached Beaulieu. Arnold was upset when she asked Beaulieu if Beaulieu had seen how Petitioner had pushed her (Arnold) during meds pass. Arnold was upset because of the way she had been treated by Petitioner. (T pp. 182, 8; 393, 5-14).

51. Breakfast concluded at approximately 8:40 a.m. (P Ex. 81; T p. 817, 2-5). Campbell left the dining room when breakfast ended and went to her office (Room 124-B) (T p. 766, 1-2; 1870, 2; R2 Ex. 33). Arnold went to speak with Campbell at approximately 8:45 a.m. – 8:55 a.m. (T pp. 766, 4-6; R1 Ex. V). Arnold stated that she had something to discuss, but stated that she would like to discuss it later. Campbell stated that she could discuss it now and Campbell and Arnold went into Campbell's office (T p. 766, 4-10; 777, 10-15). Arnold stated that Petitioner had talked really ugly to her during meds pass. (T p. 766, 10-12; 777, 14-17; R1 Ex. V). The matter did not appear urgent, and Campbell stated that she would follow-up on this matter later. Arnold did not object. (T p. 766, 14-17; 778, 15-24).

52. Arnold did not state to Campbell that Petitioner had yelled at GB or EM, pushed or pulled GB or EM, or otherwise acted in any way inappropriately to the residents. Arnold did not state to Campbell that GB or EM appeared to be frightened or in any way upset by Petitioner's conduct during meds pass (T p. 822, 13-20).

53. Campbell was aware of her duty to report any suspected abuse or neglect (T p. 813, 16-20). Campbell did not report any suspected abuse or neglect after talking with Arnold at approximately 8:45 a.m., because Arnold did not report any conduct of Petitioner that was potentially in violation of policy 2.2.9. (T pp. 822, 13 to 823, 1).

54. Tanyah Harper, the educational developmental assistant, arrived at the unit at approximately 8:30 a.m., after meds pass had concluded (T p. 419, 4). Harper entered through the front door. The front door is the door located at the end of the building outside the living room (T p. 481, 15-20; R 2 Ex. 33; R1 Ex. BK).

55. Shortly after Arnold had met with Campbell and prior to 9:00 a.m., Arnold approached and talked with Harper outside the front door on the porch (T pp. 183, 19 to 184, 9; R2 Ex. 33; R1 Ex. BK). Arnold was upset and crying. Arnold told Harper that Petitioner had pushed her and talked ugly to her that morning (T p. 184, 15-17). Arnold also told Harper that Petitioner had pushed and pulled the residents that morning (T p. 184, 17-23). Harper was not upset; she appeared to be her normal self. Harper did not say anything in response to Arnold (T pp. 185, 3-11; 188, 7-15). Arnold then left the unit to get the van for transport (T p. 185, 6-11).

56. Between 8:30 a.m. and approximately 8:50 a.m., Petitioner remained in the living room working with the residents (T p. 1970, 17-22; 1972, 2). Around 8:50 a.m., the residents were assisted with getting their coats in preparation for transport (T p. 1970, 21-22). Petitioner assisted the residents with getting their coats for transport. Petitioner assisted several residents, including TB (T pp. 1972, 17 to 1975, 5). The residents gathered in the living room prior to transport (T p. 1975, 5-9).

57. During the time for gathering coats, Harper alleges that she saw an incident where Petitioner pushed resident TB in the back and said to her, "get your coat, stupid." There were no witnesses to this alleged incident.

58. Harper testified that when she arrived at work at approximately 8:30, "things looked pretty chaotic." She further stated that the "ladies were kind of running around here and there, in this room, out of that room." Harper testified that "everything seemed to be out of order." She said she had the impression that the "ladies seemed to be scared." Harper further testified that Petitioner was "in the hallway pretty much shouting at the ladies and using gestures to them to go, go, go." Harper testified that she believed Petitioner was telling the ladies to get their coats because they were getting ready to leave. It is at this point in her testimony that Harper states she had "moved up closer to the living room area" and alleges Petitioner said something to TB about, "I told you to go get your coat." Harper also alleges that Petitioner "said something about calling (TB) stupid and shoved her in her back." (Vol II, pg 420-23)

59. Harper stated at around 8:30 am, when she walked in to work, she noticed that Arnold was crying and asked Arnold what was wrong. Harper stated that Arnold told her it had been chaotic pretty much that morning. (Vol II, pg 420-22) Harper stated she told Arnold to talk to Campbell and Arnold told her she already had.

60. Arnold was in the area of the activity room between 8:30 a.m. and 8:55 a.m., except for the time when she met with Campbell. Arnold observed nothing out of the ordinary. (T pp. 175, 5-21; 203, 1-4).

61. Campbell was in the hallway at approximately 8:55 a.m. – 9:00 a.m. when the residents were preparing for transport (T pp. 779, 6-14). Campbell observed nothing out of the ordinary. (T pp. 779-781).

62. Cheryl Clark was in the hallway on at least one occasion between 8:45 a.m. and 9:00 a.m. Clark observed nothing out of the ordinary (T pp. 1680; 1724, 13-24; P Ex. 89).

63. Ida Grady remained in the dining room until a few minutes before 9:00 a.m. Grady assisted the residents with getting their coats for transport on the van. Grady observed nothing out of the ordinary. (T pp. 1764, 8-13; 1774, 15 to 1775, 17; P Ex. 90).

64. Gwendolyn Rhem left the dining room to assist residents in the unit with brushing teeth and then getting coats after breakfast concluded and prior to transport at 9:00 a.m.. She spent about 5 minutes assisting with coats. Rhem observed nothing out of the ordinary. (T pp. 1635, 5-16; 1649, 3-6; P Ex. 88).

65. The atmosphere in the unit between 8:30 a.m. and 9:00 a.m. was not chaotic. Regarding the alleged TB incident, no staff person (other than Harper) heard Petitioner talk in a loud or harsh tone to the residents and no staff person saw Petitioner interact in any inappropriate manner with the residents. (P Ex. 79) There are no notes of any problem behaviors for GB, TB, and EM in the Record of Inappropriate Behavior for May 19, 2003. (P Ex. 36, 37, 52, 68).

66. At 9:00 a.m., Arnold, Grady, and Petitioner and approximately 8-9 residents left the unit on the van to go to their respective work assignments (T p. 1975, 12-23). Included in the group of residents on the van were GB, TB, and EM (T p. 1975, 18). While on the van, Grady questioned Arnold about washing SM's hair that morning. Arnold responded that she had (T p. 1976, 16-18). Petitioner interjected that Arnold had not, she had only sprayed SM's hair (T p. 1976, 19-24). Petitioner did not exhibit any inappropriate conduct on the van relating to the residents (T pp. 199, 8 to 202, 7; T pp. 1785, 14; 1790, 12-13). GB, TB, and EM did not exhibit any problems on the transport trip. (T pp. 199, 8 to 202, 7; 1785, 14; 1790, 12-13; T pp. 1977, 1-4).

67. GB and EM and Petitioner exited the van after approximately 5 minutes and entered another building for the assigned workshop (T p. 1977, 7-10). Petitioner worked at a work table with EM until 10:10 – 10:20 a.m., at which time Petitioner was summoned to go to the Pinewood Building (T p. 1979, 1-13).

68. Campbell approached Beaulieu shortly after 9:00 a.m. regarding the meds pass incident between Arnold and Petitioner. Beaulieu told Campbell that Petitioner and Arnold argued and that the situation could have been handled better (T pp. 783, 13-22; 823, 17 to 824, 3).

69. Harper went to the Pinewood Building at 9:45 a.m. (T p. 1019, 6-14; P Ex. 79). Other than talking briefly with her supervisor Clark shortly before 8:45 a.m., talking briefly with Arnold shortly before 9:00 a.m., and allegedly attempting to telephone Advocacy from the unit at approximately 9:30 a.m., Harper's activities and location are unknown between 8:45 a.m. and 9:45 a.m. (T pp. 427, 17 to 428, 3; 430, 17-24; 530, 5-19).

70. Harper reported to Deborah Lancaster, Division 7 Director, and Sam Moss, Advocate, that Petitioner had engaged in acts of physical and verbal abuse earlier that morning and that it was chaotic in the unit that morning (T pp. 836, 12 to 837, 10). Harper appeared visibly upset when she made her report at Pinewood at 9:45 a.m. (T pp. 836, 12; 1129, 8-20; R2 Ex. 17). Lancaster determined that Harper's report to Management was timely and in accordance with Caswell's Policy 2.2.9. (T p. 1069, lines 14-21). If staff reports emotional abuse up to an hour after the event, the reporting is considered timely. (T p. 1130, lines 15-21). The timeliness would have been based on the incident reported to be at or after 8:45 am. Harper first testified that the incident she observed was shortly after 8:30 am when she arrived to work. There was a new reporting procedure which went into effect on May 1, 2003, seventeen (17) days prior to Petitioner's behavior.

71. Lancaster and Moss determined that Harper's allegations justified the initiation of an investigation. (T p. 837, 20-24). An investigation was initiated in accordance with Caswell Center Policy 2.2.9. Lancaster and Moss conducted the investigation of this case for Caswell. The investigators obtained a verbal incident report from Harper at 9:45 a.m. on May 19, 2003. From that report, the investigators called in the witnesses for formal interviews. The investigators then took written statements from the witnesses.(T pp 1375-1379).

72. Lancaster immediately called Forrest. Lancaster asked Forrest if anything occurred in the unit that morning. Forrest replied that she was not aware of anything (T pp. 838, 3-6; 728, 11-22; 734, 1-12; 750, 17-20)

73. Petitioner was questioned by Lancaster and Moss beginning at approximately 10:20 a.m. (T pp. 838, 17-20; 1979, 10-11; P Ex. 79). Petitioner prepared a statement in response to the issues raised by Lancaster and Moss. (R1 Ex. P). Petitioner denied abusing any resident that morning (T p. 1982, 6-18; R1 Ex. P). Petitioner was not informed of her accuser at this time (T pp. 1985, 20 to 1986, 8).

74. Petitioner was placed on investigative status with pay. (R. Ex. AA). Petitioner was suspended on May 19, 2003 pending the investigation for alleged emotional and physical abuse. (R1 Ex. AA; T p. 1989, 13-16).

75. Respondent conducted an investigation, issued findings, and concluded that Petitioner had emotionally abused residents GB, EM and TB. This investigation summary describes the events in the order the team understood them to have occurred. The summary is the Rights Investigate Report 2003-56 (P Ex. 79; T p. 1311, 23). Respondent found that Petitioner did not commit any act of physical abuse (P Ex. 79). Respondent found that Petitioner had not committed any act of physical abuse because Respondent believed that Petitioner did not intend to inflict any physical harm or discomfort to a resident with any of her physical actions directed toward GB, EM, and TB (T pp. 1023, 13 to 1024, 6; P Ex. 79). Respondent concluded that PB was not emotionally abused by Petitioner because Petitioner did not direct any loud, harsh commands or intimidating conduct to PB (T p. 1057, 2-16).

76. Respondent found that the alleged pushing and pulling of the residents by Petitioner contributed to the intimidating atmosphere and used these to support a finding of emotional abuse (T pp. 1022, 9 to 1023, 13; 1027, 7-16). The team makes a determination of abuse by evaluating the entire context of the incident, including the staff person's conduct, the staff person's intent and the effect upon the resident(s) based upon the resident's behavior. The team concluded that residents GB, TB, and EM were emotionally abused because the team believed that these residents were frightened and intimidated by Petitioner's conduct (T p. 1027, 107 P Ex. 79). The investigators considered Petitioner's intent to cause emotional abuse. They found intent to abuse EM, GB and TB due to the fact that Petitioner's behaviors were directed specifically at EM, GB and TB. (T p. 1057, lines 17-22) The investigators determined that the pushing and pulling of residents caused an atmosphere of intimidation. (T p. 1023, lines 1-4). It created fear and confusion in the residents. (T p. 1024, lines 13-16). It demonstrated a lack of respect for the residents involved and a failure to protect the dignity of the residents involved. (T p. 1024, lines 17-19).

77. Failure to follow a resident's behavior plan when interacting with a resident does not mean that the resident has been abused, even if the resident has a problem behavior. (T pp. 1054, 1-6; 1055, 4-13). Inappropriate gestures or conduct directed to a resident does not mean that abuse has occurred (T pp. 1026, 14-20; 1055, 4-13; 1111, 11-16).

78. A resident being confused by a staff's conduct does not constitute emotional abuse (T p. 1025, 10-24).

79. Lancaster made the administrative decision to terminate Petitioner's employment for violation of policy 2.2.9. (T pp. 1392, 20 to 1393, 11). Lancaster, MRUD, is authorized to discipline Petitioner. Lancaster determined that Petitioner's emotional abuse of residents was unacceptable personal conduct. Lancaster determined that dismissal was the appropriate disciplinary action for Petitioner's unacceptable personal conduct. (R. Ex. AF). Lancaster discussed her plan of discipline with management and obtained authorization for a pre-dismissal conference. (T p. 845). Lancaster discussed her plan of discipline with Marty Unruh, Director of Residential Services ("Unruh"). Lancaster and Unruh discussed that Petitioner had a recent incident of unacceptable personal conduct for calling her supervisor a "dumb ass." (T p. 1155, lines 6-12). Lancaster received approval for dismissal from the Center Director, Mike Moseley and from the Division of Human Resources. (T. p. 897).

80. Petitioner received a Pre-Dismissal Notice dated June 9, 2003 on June 10, 2003. (R1 Ex. AB). This was the first time Petitioner learned of the specific allegations of abuse against her as well as the identity of her accusers (T p. 1992, 13-18).

81. Petitioner met with Lancaster on June 11, 2003 in her pre-dismissal conference (T p. 1993, 19-22). In the conference, Lancaster gave Petitioner the recommendation for dismissal and the reasons for Lancaster's decision to dismiss. (T p. 890). Lancaster provided Petitioner with an opportunity for written and oral rebuttal. (T p. 892)

82. Petitioner prepared a written statement in response to the allegations in the June 9, 2003 Pre-Dismissal Notice that she presented at her pre-dismissal conference on June 11, 2003. (R1 Ex. AE; T p. 1993, 19-22).

83. Respondent issued a Notice of Dismissal dated June 12, 2003 effective June 13, 2003. (R1 Ex. AF). The reasons for dismissal stemmed largely from reporting by Tanya Harper. They included "pulling and pushing as well as hollering at the ladies in Birchwood A." They also included shoving TB "in the back" and calling her "stupid," as well as Ms. Harper's reporting that "throughout the morning" in the hallway she witnessed Petitioner "talking to the ladies in a harsh and intimidating voice." Respondent further found (through the reporting of Shelia Arnold) that Petitioner sent EM and GB down the hallway to receive their medications at the same time and that Petitioner pushed and pulled EM and GB, talked to them in a harsh, loud tone and signed, and pointed and waved her arms that seemed to be "frightening and intimidating based on the response of GB and EM." Harper also reported to Lancaster that she witnessed Petitioner "grabbing EM by the arm to turn her around while in the hall." Respondent found that Petitioner's conduct was threatening, intimidating, disrespectful and resulted in emotional abuse. (R1 Ex. AF). The notice of dismissal contained notice of appeal rights. The notice of dismissal was served by certified mail on June 16, 2004. (R. Ex. AF).

84. Respondent found that Petitioner violated policy 2.2.9 because of Petitioner's actions directed to the residents, not because of Petitioner's actions directed to staff that may have occurred in the presence of the residents (T p. 1057, 2-23; R1 Ex. AF).

85. Respondent afforded Petitioner procedural due process in her pre-dismissal conference on June 12, 2003 as well as through step 2 and step 3 of the internal grievance process. (R1 Exs. AG, AH, AI).

86. Respondent alleges as an alternative basis for discharge that Petitioner willfully violated a known work rule (See Pre-Trial Order, Issue 2). The work rule is as follows: Staff are not permitted to send two residents to the nurse's station at the same time during meds pass (T pp. 1012, 6 to 1014, 2). This practice had been in place for approximately 3 (three) years. It was a known practice in the unit. It had not, however, been reduced to writing. (T pp. 1014, 8-9; 1015, 2-8). Others had through the years sent more than one person down to the nurse's station and the infractions did not result in a discharge.

87. On May 19, 2003, Respondent alleges that Petitioner sent GB and EM to the nurse's station at the same time (P Ex. 79; R Ex. AE and AF).

88. Petitioner's statement (R1 Ex. P) that "I sent EM and GB to the nurse" is found to mean that she wanted to send one right after the other with the thought that one would arrive and have her medication and upon exiting the other would already be waiting to go in next.

89. Even if Petitioner had sent GB and EM to the nurse's station at the same time on May 19, 2003, this alleged work rule violation would not support Petitioner's termination, based upon the following facts:

a. Lancaster did not rely upon this alleged work rule violation when she made the decision to terminate Petitioner (T pp. 1015, 22 to 1016, 19; 1017, 5-11).

b. The Notice of Dismissal does not state that this alleged work rule violation constitutes a basis for discharge. (R1 Ex. AF; T pp. 1016, 20 to 1017, 4).

c. Respondent did not rely upon this alleged work rule violation as an alternative basis for discharge in step 2 or step 3 of the grievance process (T pp. 1017, 12-19; 2006, 15 to 2007, 18).

d. Lancaster did not discuss this alleged work rule violation as an alternative basis for discharge with anyone in Caswell Center management either before or after Petitioner's termination (T p. 1017, 5-19).

e. Violation of the work rule for the first time warrants an initial counseling only. Termination for violation of this work rule would require multiple warnings, including a final written warning, per Respondent Caswell Center's own understanding of its enforcement of this work rule. (T pp. 702, 5 to 704, 22; 1152, 16 to 1153, 4). Petitioner had not received any prior disciplinary counseling or warning regarding violation of this work rule.

f. Caswell Center does not consider a one time violation of this work rule to be grounds for immediate dismissal (T pp. 704, 10-22; 1152, 16-24; 1153, 1-4).

g. There have been prior occasions where two residents arrive at the nurse's station. One is permitted to enter, and the other is allowed to wait outside the nurse's station. Supervisory staff have not deemed this occurrence to warrant any investigation to determine if a staff person had sent two residents at the same time. When crowding at the nurse's station has occurred, supervisory staff simply remind unit staff at a meeting that only one resident at a time should be sent to the nurse's station (T pp. 169, 13-21; 699, 14 to 703, 23).

90. Recognizing that Respondent must investigate an allegation of abuse in prompt fashion, the Undersigned cannot find the team's findings, conclusions, or credibility assessments as conclusive based upon the evidence and testimony at this hearing especially that evidence as it relates to witnesses credibility found in this hearing.

91. Debbie Lancaster and Sam Moss constituted the investigative team (the team). The team used the Caswell Center Investigative protocol adopted May 1, 2003. (P Ex. 85; T p. 1291).

92. Policy 2.2.9 states that potential witnesses should be separated after Respondent learns of an allegation of abuse. (R1 Ex. J, p. 6, para. 3.c). The team did not separate the potential witnesses to the alleged abuse on May 19, 2003. Specifically, Arnold and Harper worked in the unit until their respective interviews at 1:45 p.m. and 2:35 p.m. on May 19, 2003 (P Ex. 79; T p. 1083, 1-6).

93. The team did not interview the nurse on duty on May 19, 2003 to inquire as to the appearance, emotional or physical, of residents GB and EM when each arrived for her medication at the nurse's station. This information is relevant to whether GB or EM ran to the nurse's station and whether GB or EM may have suffered emotional abuse (T pp. 1041, 17 to 1043, 6; 1313 to 1314).

94. The team interviewed resident PK. PK did not provide any evidence that Petitioner abused her. The team then disregarded this information as unhelpful to their investigation. The team did not ask PK if Harper treated her well (T pp. 1318, 12 to 1320, 3; 1322 to 1323).

95. The team recognized Harper's allegations (both the chaotic atmosphere and the specific allegations against Petitioner) were not corroborated by any other individual. Harper was the sole eye witness to the allegations made by her (T pp. 1027, 17 to 1028, 1 P Ex. 79). The team understood Harper to allege that everyone in the unit was caught up in the chaotic atmosphere in the unit that morning. It appears, however, that some of the staff were not questioned as to their whereabouts during the time Harper alleged Petitioner engaged in her abusive conduct. This inquiry is relevant to determine whether it was reasonable that no one could corroborate Harper's allegations (T pp. 1019, 1-9; 1444, 3 to 1445, 3; 1380, 15-21). Given the scope of Harper's allegations and the proximity of numerous staff (Arnold, Beaulieu, Campbell, Forrest, Rhem, Grady and Clark) to observe Harper's allegations, (T pp. 1330 – 1336; 1336, 6-12), and given the testimony at this hearing by staff on duty at the time, the team failed to analyze the factual accuracy of Harper's "chaos" observations and failed to give adequate consideration to this lack of corroboration as a factor to question Harper's credibility (T pp. 880, 6-14; 882, 21-23). In fact, testimony given by the majority of witnesses at this hearing do not "paint" the chaos portrayed by Harper.

96. Harper appeared to Lancaster at 9:45 a.m. to be visibly upset and almost frantic as a result of the alleged abuse she had witnessed. Ms. Lancaster testified that the team did not question any staff about Harper's demeanor in the unit that morning. This inquiry is relevant to assess Harper's credibility. (T pp. 1067, 7 to 1068, 1).

97. Harper failed to report the alleged abuse to any manager in the unit (T pp. 1036, 20 to 1037, 12) and waited quite some time to report to Lancaster. Per Caswell Center's abuse and neglect reporting procedure, Harper could have reported immediately to a senior manager in the unit, Forrest or Campbell (T p. 1293, 6-10; P Ex. 85, p. 1, Box 5). Ms. Lancaster testified that Harper's failure to intervene or report immediately was troubling because Petitioner could have been separated immediately from the

individuals, rather than continuing to work in the unit and then go out on transport with them (T pp. 1088, 23 to 1089, 11). The failure to report is relevant to assess credibility.

98. Finding that Petitioner was to blame for creating the conflict during meds pass (T p. 1154, 8-13) cannot be sustained by a preponderance of the evidence. Beaulieu acknowledged that it was not possible to say who caused the confusion, Arnold or Petitioner. (T pp. 167, 4 to 168, 18; 169, 2-4; 341, 19).

99. There is a contradiction between Arnold's statement that she had informed Campbell of Petitioner's abusive conduct during their meeting at 8:45-8:55 a.m. and Campbell's statement that Arnold stated only that Petitioner had talked real ugly to her. The Undersigned finds this contradiction relevant and important in assessing Arnold's credibility (T pp. 1351, 16 to 1353, 21; 1354 to 1355, 3; 1371, 17 to 1372, 21). Further, the team characterized Arnold's description of the meds pass incident involving Petitioner as having been corroborated by Beaulieu (T pp. 1110 to 1111, 4). However, Arnold stated that the residents were frightened. Beaulieu stated that the residents appeared confused. Additionally, Lancaster recalled Beaulieu stating to her that she (Beaulieu) observed nothing inappropriate involving the residents during meds pass. (T pp. 868, 1; 1105, 2-7) Beaulieu's observations contradicted rather than corroborated Arnold's account to the team.

100. EM was agitated prior to meds pass (R2 Ex. 21). Respondent's finding that Petitioner caused EM's agitation or added to it (T p. 1345, 22-24) cannot be sustained by a preponderance of the evidence.

101. Mr. Moss assumed that one cannot hear from one end of the hall to the other end of the unit (T pp. 1336 to 1341). Forrest, Beaulieu, Arnold and Petitioner all testified that staff can be heard from one end of the hall to the other.

102. It appears that Petitioner's history of talking loudly on occasion with staff made it more likely that she would speak loudly with residents was a factor in Respondent's decision (T p. 1150, 15-21) and that Petitioner's March 12, 2003 warning for unacceptable conduct directed to her supervisor made it more likely that Petitioner engaged in unacceptable personal conduct towards residents. (T. p. 1183, 17). The Undersigned finds merit in Forrest's and Bradley's testimony that despite problems related to personal interactions with staff, Petitioner did not interact inappropriately with residents and did not present any risk that she would speak in a gruff or loud way to residents.

103. Lancaster believed the May 5, 2003 Special Interim Review for failure to follow proper procedure made it more likely that Petitioner failed to follow proper procedure on May 19, 2003. (T. p. 1183, 4-9). However, Campbell disciplined all DT I staff involved in the incident, including Petitioner, and each received the identical counseling. (T pp. 812; 813, 3-10). This incident carries little relevancy to assess the events of May 19, 2003.

104. Cheryl Beaulieu's description of the meds pass incident appears to be most credible. Beaulieu has no interest or bias in either supporting or opposing any witness who testified in this matter.

105. Beaulieu is trained in clinical psychology. Her specific job is to evaluate the residents to develop appropriate behavior plans. She is trained to observe resident behavior, interpret resident behavior, and implement behavior plans based upon those observations. Beaulieu is familiar with EM and GB. Beaulieu's attention was focused on these individuals during the meds pass exchange between Arnold and Petitioner. (T pp. 251, 11-20; 269, 5-6). Because of Beaulieu's lack of bias, professional judgment and training, familiarity with EM and GB, her physical location to observe the incident, the consistency between her written statements and trial testimony, and calm demeanor while testifying, the Undersigned finds Beaulieu's observations and interpretations of resident EM's and resident GB's conduct during meds pass to be credible.

106. Beaulieu would have initiated a report of abuse and neglect to the appropriate staff shortly after the meds pass incident between Arnold and Petitioner if Beaulieu had observed what she believed to be conduct in violation of policy 2.2.9. Beaulieu would have indicated in her statement if the residents had been abused because Beaulieu put in her statement what most concerned her about the meds pass incident. Beaulieu's statement and testimony reflect an inappropriate interaction between staff that could have been handled better rather than any abusive conduct by Petitioner directed to the residents. (R2 Ex. 21; T pp. 401, 12-18; 411, 1-6).

107. Arnold testified that Petitioner initiated the meds pass incident by coming out of the living room yelling "go, go, go", swinging her arms, and gesturing wildly. Beaulieu did not observe this conduct and by her location in the living room, Beaulieu's attention would have been caught by such conduct. (T pp. 84, 14-15 and 22-24; 102, 1-3; 232, 19 to 233, 22; 234, 1-18).

108. Arnold testified that she brought residents GB and EM out of the living room into the hallway. Beaulieu testified that Arnold was in the activity room, not the living room, as EM and GB were called. Beaulieu states that she sent EM and GB out of the living room and Arnold met them in the hallway outside the living room. (T p. 260, 3-15).

109. Arnold testified that EM immediately took off running down the hallway as Petitioner came out of the living room. Beaulieu observed EM standing in the hall being held by Arnold. (T pp. 155, 9-24).

110. Arnold testified alternatively that EM took off running when Petitioner shoved Arnold (T p. 89, 3-4); EM took off running when Petitioner came out of the living room (T p. 155, 21-24); and EM took off running when Petitioner came up the hall. (T p. 99, 23-24). Arnold testified that EM ran all the way down the hallway to the nurse's station. Arnold also testified that she saw Forrest still standing outside the nurse's station. However, Forrest did not see EM run to the nurse's station. (T pp. 157, 3-19; 157, 20 to 158, 5; 222, 16-20; 722, 14 to 724).

111. Arnold stated that she observed EM's facial expression and concluded that EM was frightened. This conclusion is based upon Arnold's observation that EM's eyes opened widely. Arnold stated that this facial expression represented both fear and confusion. Arnold could not explain how in the very brief time she alleges she observed EM's facial expression, she distinguished fear from confusion in the same facial expression. Beaulieu observed this same facial expression on EM. Beaulieu believed this facial expression meant that EM was experiencing surprise or confusion. (T pp. 120, 11 to 121; 1; 211, 6 to 212, 20; 214, 4-23; 269, 13-16).

112. Arnold testified that she was not holding on to any residents. Beaulieu saw Arnold hold EM and GB by the wrist in each of her hands. (T p. 155, 4-8).

113. Arnold testified that Petitioner pushed her in the chest, causing her to take one-two steps back. Arnold told Ms. Rebecca Buck (DHHS Investigator) that Petitioner pushed her up against the wall. Beaulieu observed the meds pass incident until it appeared EM and GB were beginning to head down the hall to get their medications. Beaulieu never observed Petitioner push Arnold. (T pp. 154, 17 to 155, 3; R2 Ex. 12).

114. Arnold testified that GB can see straight ahead. GB does not see in her central vision field and has only peripheral vision. (T p. 160, 3-19).

115. Arnold concluded that GB was frightened because she ducked down in fear of Petitioner's gestures and swinging arms. Beaulieu saw GB from behind and did not observe GB duck down or Petitioner swing her arms or gesture wildly at the residents. Arnold also believed GB was frightened because of her facial expression. Although Beaulieu could not observe GB's facial expression, she did not observe anything unusual about GB's behavior during meds pass. (T pp. 216, 4 to 217, 2; 218, 3-6).

116. Arnold testified that GB ran really fast to the nurse's station and that Forrest was present at the nurse's station when GB arrived. Beaulieu did not observe GB run down the hallway. Forrest did not observe GB arrive running to the nurse's station. (T pp. 162, 19-24; 163, 1-11; 724, 7-16).

117. Arnold testified that the conflict with Petitioner ended by Arnold backing away and leaving the situation alone. The Undersigned finds this conduct consistent with the fact that Petitioner engaged in a personal disagreement with Arnold but does not support abusive conduct towards GB and EM. (T pp. 165, 16 to 166, 6).

118. Arnold testified that she can hear Forrest call for residents during meds pass when Forrest is at the nurse's station and Arnold is at the opposite end of the hallway between the activity room and living room. Arnold testified that Petitioner's voice when allegedly yelling at GB and EM was much louder than Forrest's voice when Forrest makes the call for residents during meds pass. Forrest never heard any yelling by Petitioner despite the fact that Forrest was in the hallway and observed both Arnold and Petitioner with the residents out in the hall. (T pp. 171, 4 to 172, 9; 173, 22-24; 174, 3-11; R2 Ex 14 and 15).

119. Arnold testified that she told Campbell that morning the story of the meds pass incident, including Petitioner pushing and pulling the residents, yelling at the residents, and that both residents appeared frightened by Petitioner's conduct. Campbell states that Arnold said only that Petitioner talked ugly to her that morning. Campbell did not initiate any report of potential abuse after speaking with Arnold. Campbell testified that Arnold's complete allegations would have prompted her to follow up with a report of abuse had Arnold informed her. Given Campbell's role in the unit, the recognition of her duties under Policy 2.2.9, and no apparent bias for or against either Arnold or Petitioner, the Undersigned finds Campbell's testimony credible. (T pp. 196, 2 to 198, 8; 822, 13 to 823, 1).

120. The Undersigned finds Petitioner had confronted Arnold on two occasions the morning of the incident and was upset by Petitioner's conduct towards her. Taking into account Arnold's demeanor, bias, and emotional state on May 19, 2003, internal inconsistencies of her story, inconsistency between her statements and trial testimony, and lack of corroboration of important parts of

her story by Beaulieu, Campbell, and Forrest, the Undersigned cannot accept in totality Arnold's description of the meds pass incident as prevailing.

121. Beaulieu confirmed that Petitioner was working with the residents without any problems upon her arrival to the living room. Arnold and Grady (1759, 1-6) confirmed that Petitioner washed SM's hair that morning during the breakfast hour. Beaulieu is consistent with Petitioner's principle statements that Petitioner touched one resident on the shoulder; Petitioner removed Arnold's hand from one resident's wrist; Petitioner did not gesture wildly and the residents did not run away. Beaulieu confirms that Petitioner worked in the living room after meds pass without incident. Arnold and Grady confirm that Petitioner participated in transport without incident.

122. Petitioner's trial testimony contradicts her previous written and oral rebuttal. Petitioner admits observing that there were already residents near the nurse's station at the opposite end of the hall. (T p. 2185, line 15-19) At trial, Petitioner stated that the med pass situation with EM and GB happened without any incident. (T p.1957, line 19)(T p. 1969, line 13,16,19). The Undersigned believes that Petitioner's perception of the meds pass incident is less reliable than Beaulieu's because of the interaction with Arnold. The Undersigned cannot credit Petitioner's testimony that EM and GB were in the hall with her and Arnold separately during meds pass.

123. Tanyah Harper presented allegations of conduct that take place after meds pass and prior to transport. Harper testified that as she arrived at the unit at 8:30 a.m., she could hear Petitioner's loud voice through the closed door separating the entrance foyer from the hallway. This is a large, solid steel door (T pp. 481, 15 to 485, 18; 1446, 11; R2 Ex. 18; R1 Ex. BL). Harper testified that Petitioner was located in the hallway when she first arrived. Beaulieu and Arnold remained in the living room and general vicinity of the activity room, respectively, at this time. (T pp. 489, 22 to 490, 6). Neither Beaulieu or Arnold corroborated Harper's testimony on this point. Had Petitioner been speaking in such a loud voice as described by Harper outside the living room, Beaulieu and Arnold would have heard Petitioner.

124. Harper saw Arnold and Beaulieu in the area of the activity room and living room at 8:30 a.m. when Harper alleges she first observed Petitioner's loud and angry voice in the hallway. Harper described the situation in the unit upon her arrival at 8:30 a.m. in multiple occasions as chaos and wrong. Harper testified that she believed Arnold heard Petitioner's loud and angry voice shortly after 8:30 a.m. based on Arnold's facial expression in reaction to Petitioner's conduct. Arnold and Beaulieu did not observe this. (T pp. 489, 22 to 490, 6; 490, 21-22; 491, 16-24).

125. After testifying that Arnold was present and observant of her allegations, Harper then retracted her testimony by stating that these initial events all happened very fast and she was now not sure/couldn't remember if Arnold was there. (T p. 492, 12-23).

126. Harper alleged that "it was not unusual" to see Petitioner act "out of line even in front of management," and that management did nothing to correct Petitioner's behavior. Harper's allegation that unit management condones Petitioner's alleged "out of line" behavior is not supported by the evidence. (T pp. 495, 6-8; 495, 9-13; 561, 20 to 564, 1).

127. Harper testified that upon arriving at the unit, Petitioner's loud and angry voice was different that morning than any other mornings. Harper changed her testimony to state that Petitioner's voice was not different that morning, but rather it was her physical conduct such as shoving that made the situation different. (T pp. 495, 14-18; 495, 19 to 496, 4).

128. When questioned about which physical gestures she recalled being the problem shortly after 8:30 a.m., Harper could not recall what gestures she observed. Harper then testified that the gestures she remembers were later that morning after Petitioner's alleged abusive conduct allegedly escalated. Harper testified "I am confused. I don't remember." regarding what conduct she observed at 8:30 a.m. versus which conduct she observed later when the conduct allegedly escalated. (T pp. 498 to 499, 16; 500, 12-19).

129. Harper acknowledged that her statement given to Buck (R2 Ex. 18) states that residents were trying to get away from Petitioner at 8:30 a.m. and that Petitioner pulled EM at 8:30 a.m. Harper recanted the story by testifying that these events happened later that morning. (T pp. 509, 15 to 511, 12).

130. Harper describes the atmosphere in the unit upon her arrival at 8:30 as chaotic, with the ladies seeming to be running in and out of the rooms. Forrest reentered the unit through the front door between 8:33 a.m. and 8:35 a.m. and did not observe any such activity. (T pp 486, 14 to 488, 20).

131. Harper wrote in her statements and testified on direct examination that after entering the unit, she went to the dining room to speak with Campbell regarding the grocery shopping list. When questioned on cross-examination about this interaction,

Harper testified that she couldn't remember if she ever saw Campbell in the dining room and couldn't remember if she needed to speak with Campbell regarding the grocery shopping list that morning. (T pp. 513, 22 to 516).

132. Harper testified that after leaving the dining room area and walking up the hallway to her supervisor, Clark's office (Room 123), Harper did not notice any chaotic activity in the hallway. She explained that one couldn't really tell that something was wrong until in the middle of it and therefore Harper could not make any observations near Clark's office. Harper's statement to Buck (R1 Ex. 18) states that she observed further abusive conduct by Petitioner on her way to Clark's office, not after exiting Clark's office as she testified at the hearing. (T pp. 579, 7-17; 575, 8 to 576, 15).

133. At approximately 8:45 a.m., Harper testified that Petitioner's voice became louder and louder and the situation grew increasingly more chaotic. Harper was "sure" that Petitioner's voice could be heard in the activity room and in the living room. (T pp. 496, 5-19; 561, 5-18; 571, 3-12; 583, 21 to 584, 11). Harper alleges that Petitioner was yelling "Go, go, go" to the residents in the hallway during the time coats were gathered prior to transport. Beaulieu was in the living room and Rhem and Campbell were in the area during this time. No one else heard Petitioner yelling in this manner. (T p. 422, 18-24).

134. Harper did not report her alleged observations to either Campbell or Forrest. (T p. 548, 5-12). Harper testified that she did not report her alleged observations to her supervisor Clark, because Harper believed Clark would ignore her report and excuse Petitioner's alleged abuse as Petitioner's normal behavior in the unit. Clark was aware of her duty to report suspected abuse under policy 2.2.9 and would have made a report to advocacy had Harper informed Clark of Harper's allegations. Harper's explanation for failure to report to her supervisor is without merit. (T pp. 576, 22 to 578, 21; 1684, 11-23).

135. Harper could not adequately state what she did or where she went between 9:00 a.m. and 9:30 a.m. (T p. 530, 9-14).

136. Harper testified that she was very upset and frantic when she made her report of Petitioner's alleged abuse at Pinewood at 9:45 a.m. Harper could not identify any staff person who could state that she saw Harper between 9:00 a.m. and 9:45 a.m. to comment upon her demeanor. Campbell would have recalled Harper being upset if she had seen Harper upset that morning (T pp. 550, 15-21; 550, 22 to 551, 2; 820, 21 to 821, 6).

137. Harper testified at the hearing that her statement to Division of Facility Services (R2 Ex. 18), page 2, the second and third paragraphs needed to be reversed to correct the chronological sequence of events. Harper stated that she borrowed some one else's glasses when she reviewed her statement. (T p. 476, 16-17; R2 Ex. 18). Harper also offered as explanation for her failure to correct the chronological sequence of events at the time she reviewed her statement on August 15, 2003 by stating that she may not have read paragraphs two and three as closely as she read other parts of her statement. Harper stated that she was still upset when she was reviewing her statement and could have overlooked this error because of her emotional state. (T pp. 477, 1-10; 479, 16). Despite reviewing her statement (R2 Ex. 18) prior to hearing to acknowledge the need to reverse paragraphs 2 and 3, Harper admitted at the hearing that an additional statement was out of sequence and should have been changed. (T pp. 511, 13 to 512, 2).

138. When questioned regarding the proper sequence of events, specifically did the allege push of resident TB occur before or after Harper's conversation with Arnold, Harper testified "I can't remember the sequence of events." When questioned how she could reverse the chronological sequence of paragraphs two and three to Buck (R2 Ex. 18, p. 2) if she could not remember the sequence of events, Harper testified, "I am just confused." (T pp. 533, 14-24; 534 to 535, 4).

139. Harper stated that when she called Advocacy, she did not leave a message because she did not want the advocate to call additional attention to the already chaotic situation in the unit. (T pp. 425, 19 to 426, 6). Harper testified that she couldn't remember if she had left a message for the advocate when she called, contradicting her earlier testimony that she did not leave a message. Harper then testified as to explain this inconsistency, "I am upset. I am not thinking clearly. I cannot remember the sequence of events." (T pp. 544).

140. Harper did not make her alleged first telephone call to Advocacy until approximately 9:30 a.m. to 9:35 a.m. By this time, Petitioner had been gone from the unit for over 30 minutes. Harper had no explanation as to why she would wait over ½ hour to make a report after deciding that the situation in the unit had gotten worse, and that she needed to take action. (T pp. 427, 24 to 428, 3; 430, 17-24).

141. When questioned why she did not state that the alleged abuse occurred at 8:30 a.m. rather than 8:45 a.m. in her May 19, 2003 statement, Harper testified that the initial 8:30 a.m. conduct was acceptable for Petitioner. When reminded that she had previously testified that Petitioner's 8:30 a.m. conduct was wrong, Harper returned to her previous testimony that the 8:30 a.m. conduct was wrong as well. (T pp 561, 5 to 564, 1). When questioned why the May 19, 2003 statement did not indicate that the alleged abuse began occurring at 8:30 a.m., Harper could not give an explanation. (T pp. 565, 7 to 566, 7).

142. Harper believed that Petitioner's voice was loud enough to be heard by Forrest at the end of the hallway and by persons in the living room. Harper testified that Petitioner's voice grew louder and angrier throughout the time period 8:45 a.m. until transport. (T pp. 545-548; 571, 3-12; 583, 21; 584, 11).

143. Harper and Petitioner did not get along. Petitioner was critical of the changes brought to the unit by the introduction of the home model in 2002 in which the education staff (including Harper) would be based directly in the unit and work full-time in the unit. (T pp. 587, 10-14; 588, 12-19).

144. Harper's inconsistent testimony at trial was not the result of mere nervousness or the passage of time from the date of the incident. Harper changed her testimony on numerous occasions between direct examination and cross-examination and during cross-examination alone. The Undersigned was unimpressed by Harper's multiple use of responses such as "I can't remember," during cross-examination. Taking into account Harper's demeanor at hearing, acknowledged dislike of Petitioner, the inconsistencies within her testimony at trial, the inconsistencies between her testimony at trial and her previous written statements of the events of May 19, 2003, and the absence of corroboration of her allegations, , the Undersigned cannot accept Harper's allegations as prevailing.

145. Petitioner admitted using a "firm" tone in the presence of the residents during the med pass incident. (R. Ex. AE p. 1) Petitioner admitted using "gestures" and "tactile cues" to direct the residents during med pass. (R. Ex. AE, p. 2). Petitioner admitted that EM was being held in the hallway by Arnold at the same time that Petitioner signed and pointed down the hall to direct GB to go to the nurses station. (R. Ex. AC p. 2)(R.Ex. AD, p. 1, last line).

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in the matter. To the extent that the findings of facts 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.

2. The Petitioner was a career state employee, as defined in N.C.G.S. § 126 and is subject to the State Personnel Act. N.C.G.S. § 126-35 provides that no career State employee subject to the State Personnel Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause.

3. Respondent Caswell Center provided Petitioner with procedural due process in compliance with N.C.G.S. § 126 regarding her dismissal for unacceptable personal conduct based upon alleged emotional abuse of Caswell Center residents in violation of Policy 2.2.9.

4. N.C.G.S. § 126 states that in contested cases pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.

5. The Respondent has the burden of proof by a greater weight or preponderance of the evidence that its dismissal of Petitioner was for just cause. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

6. Respondent has failed to prove by a preponderance of the evidence that Petitioner emotionally abused residents EM, GB, and TB as described in the Notice of Dismissal dated June 12, 2003. The evidence does not support a finding that Petitioner's behavior on May 19, 2003 was threatening or intimidating and resulted in emotional abuse to EM, GB and/or TB.

7. As set out above, the testimony of the two primary witnesses relied on by Respondent cannot be accepted as credible regarding key factors in Respondent's decision to dismiss. The inconsistencies of testimonies at trial, the inconsistencies between testimony at trial and previous written statements, and the absence of corroboration for the required elements of emotional abuse lead the Undersigned to find that Respondent's evidence does not overbear, in some degree, the weight upon the other side; and as such, The finder of fact cannot properly act upon the weight of evidence, in favor of the Respondent as the one having the *onus*.

8. Respondent did not provide Petitioner pre-dismissal notice that an alternative basis for discharge included willful violation of a known work rule, specifically sending more than one resident at a time for meds pass. Further, Respondent does not specifically list violation of a work rule as a cause of dismissal in the letter of June 12, 2003. Disregarding these procedural violations

for a moment, even if Respondent used this alternative basis for discharge, Respondent has failed to prove by a preponderance of evidence that Petitioner willfully violated said work rule for the same reasoning as cited above regarding credibility. Furthermore, Respondent has failed to prove by a preponderance of evidence that Petitioner could be terminated for a one first-time offense. Violation of this type of work rule normally requires prior warnings before violation of the work rule can result in termination and, moreover, Respondent would face serious inconsistencies in issuing a dismissal to this Petitioner in light of the testimony showing violations of this work rule by others which did not result in a termination action.

9. State Personnel Commission rules provide the Commission with various legal and equitable remedies when dismissal of an employee is not upheld, including reinstatement, back pay and attorney's fees.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

It is the decision of the Undersigned that Respondent has failed to carry its burden of proof by a preponderance of the evidence that Petitioner was discharged for just cause. The evidence of this case does not uphold Respondent's contention that Petitioner was emotionally abusive to residents at Caswell Center. As such, it is the decision of the Undersigned that Respondent reinstate Petitioner to the same or similar position that she was in at the time of her dismissal and that Petitioner be awarded back pay and the return of all lost benefits. Further, Petitioner should be awarded reasonable attorney fees pursuant to 25 N.C.A.C. 1B.0414 upon submission by the Petitioner's counsel of a Petition to the North Carolina State Personnel Commission for Attorney Fees with an accompanying itemized statement of the fees and costs incurred in representing the Petitioner.

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 State Personnel Commission.

IT IS SO ORDERED.

This the 14th day of October, 2004.

Augustus B. Elkins II
Administrative Law Judge