

NORTH CAROLINA

REGISTER

IN THIS ISSUE



Volume 19, Issue 16
Pages 1299 - 1325

February 15, 2005

This issue contains documents officially filed through January 25, 2005.

Office of Administrative Hearings
Rules Division
424 North Blount Street (27601)
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2678
FAX (919) 733-3462

Julian Mann III, Director
Camille Winston, Deputy Director
Molly Masich, Director of APA Services
Dana Sholes, Publication Coordinator
Linda Dupree, Editorial Assistant
Julie Brincefield, Editorial Assistant

I. EXECUTIVE ORDERS

Executive Order No. 71 1299

II. PROPOSED RULES

Licensing Boards

Locksmith Licensing Board 1300
Medical Examiners, Board of..... 1300 - 1301
Nursing, Board of..... 1301 - 1302
Respiratory Care Board 1302 - 1303

III. EMERGENCY RULES

Health and Human Services

Commission for Health Services 1304 - 1305

IV. RULES REVIEW COMMISSION..... 1306 - 1314

V. CONTESTED CASE DECISIONS

Index to ALJ Decisions..... 1315 - 1320
Text of Selected Decisions
04 DHR 1066 1321 - 1325

For the **CUMULATIVE INDEX to the NC Register** go to:
<http://ncoah.com/register/CI.pdf>

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

NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

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

NCAC TITLES		TITLE 21 LICENSING BOARDS	TITLE 24 INDEPENDENT AGENCIES
1	ADMINISTRATION	1 Acupuncture	1 Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2 Architecture	2 Agricultural Finance Authority
3	AUDITOR	3 Athletic Trainer Examiners	3 Safety & Health Review Board
4	COMMERCE	4 Auctioneers	4 Reserved
5	CORRECTION	6 Barber Examiners	5 State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8 Certified Public Accountant Examiners	
7	CULTURAL RESOURCES	10 Chiropractic Examiners	
8	ELECTIONS	11 Employee Assistance Professionals	
9	GOVERNOR	12 General Contractors	
10A	HEALTH AND HUMAN SERVICES	14 Cosmetic Art Examiners	
11	INSURANCE	16 Dental Examiners	
12	JUSTICE	17 Dietetics/Nutrition	
13	LABOR	18 Electrical Contractors	
14A	CRIME CONTROL & PUBLIC SAFETY	19 Electrolysis	
15A	ENVIRONMENT & NATURAL RESOURCES	20 Foresters	
16	PUBLIC EDUCATION	21 Geologists	
17	REVENUE	22 Hearing Aid Dealers and Fitters	
18	SECRETARY OF STATE	25 Interpreter/Transliterator	
19A	TRANSPORTATION	26 Landscape Architects	
20	TREASURER	28 Landscape Contractors	
21*	OCCUPATIONAL LICENSING BOARDS	29 Locksmith Licensing	
22	ADMINISTRATIVE PROCEDURES (REPEALED)	30 Massage & Bodywork Therapy	
23	COMMUNITY COLLEGES	31 Marital and Family Therapy	
24*	INDEPENDENT AGENCIES	32 Medical Examiners	
25	STATE PERSONNEL	33 Midwifery Joint Committee	
26	ADMINISTRATIVE HEARINGS	34 Funeral Service	
27	NC STATE BAR	36 Nursing	
28	JUVENILE JUSTICE AND DELINQUENCY PREVENTION	37 Nursing Home Administrators	
		38 Occupational Therapists	
		40 Opticians	
		42 Optometry	
		44 Osteopathic Examination (Repealed)	
		45 Pastoral Counselors, Fee-Based Practicing	
		46 Pharmacy	
		48 Physical Therapy Examiners	
		50 Plumbing, Heating & Fire Sprinkler Contractors	
		52 Podiatry Examiners	
		53 Professional Counselors	
		54 Psychology	
		56 Professional Engineers & Land Surveyors	
		57 Real Estate Appraisal	
		58 Real Estate Commission	
		60 Refrigeration Examiners	
		61 Respiratory Care	
		62 Sanitarian Examiners	
		63 Social Work Certification	
		64 Speech & Language Pathologists & Audiologists	
		65 Therapeutic Recreation Certification	
		66 Veterinary Medical	
		68 Substance Abuse Professionals	
		69 Soil Scientists	

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

NORTH CAROLINA REGISTER
 Publication Schedule for January 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
20:12	12/15/05	11/22/05	12/30/05	02/13/06	02/20/06	04/01/06	05/06	09/11/06

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

**EXECUTIVE ORDER NO. 71
PROCLAMATION OF STATE OF EMERGENCY
BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA**

Section 1. I have determined that a state of emergency, as defined in N.C.G.S. § 14-288.1(10), exists in Wake County, North Carolina, due to snow and ice, which began on January 19, 2005, and which has produced hazardous travel conditions.

Section 2. Pursuant to N.C.G.S. § 14-288.15, I, therefore, proclaim the existence of a state of emergency in Wake County.

Section 3. I hereby order all state and local government entities and agencies to cooperate in the implementation of the provisions of this proclamation and the provisions of the North Carolina Emergency Operations Plan.

Section 4. I hereby delegate to Bryan E. Beatty, Secretary of Crime Control and Public Safety, and/or his designee, all power and authority granted to me and required of me by Chapter 166A, and Article 36A of Chapter 14 of the General Statutes for the purpose of implementing the said Emergency Operations Plan and to take such further action as is necessary to promote and secure the safety and protection of the populace in the county.

Section 5. Further, Bryan E. Beatty, Secretary of Crime Control and Public Safety, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in N.C.G.S. § 143B-476.

Section 6. I hereby order this proclamation: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the circumstances of the state of emergency prevent or impede, to be promptly filed with the Secretary of Crime Control and Public Safety, the Secretary of State, and the clerks of superior court in the county to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this proclamation.

Section 7. This proclamation shall become effective immediately and shall continue until it is terminated in writing.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of North Carolina at the Capitol in Raleigh this 19th day of January in the year of our Lord two thousand and five.

MICHAEL F. EASLEY
GOVERNOR

ATTEST:

ELAINE MARSHALL
SECRETARY OF STATE

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 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 29 – LOCKSMITH LICENSING BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the Locksmith Licensing Board intends to adopt the rules cited as 21 NCAC 29 .0702,-.0703 with changes from the proposed text noticed in the Register, Volume 19, Issue 6, page 617.

Proposed Effective Date: June 1, 2005

Reason for Proposed Action: First 3 year licenses were issued in September 2005. Renewals will begin in Summer 2005. These rules set late and reinstatement fees.

Procedure by which a person can object to the agency on a proposed rule: Write to Board or attend Board meeting.

Written comments may be submitted to: Jim Scarborough, P.O. Box 10572, Raleigh, NC 27605, phone (919)838-8782.

Comment period ends: April 18, 2005

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

Fiscal Impact

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

SECTION .0700 – LICENSE RENEWAL REQUIREMENTS

21 NCAC 29 .0702 DUE DATE

Applications for license renewal shall be submitted at least 90 days prior to the date of license expiration. Applications submitted after the due date but before the license expiration date shall be subject to a late fee as specified in GS 74F-9. of one hundred fifty dollars (\$150.00) in addition to the license renewal fee specified in Rule .0404 of this chapter. Applications shall be deemed submitted on the date of their postmark or upon receipt by staff at the Board's offices, whichever is earlier.

Authority G.S. 74F-6; 74F-9; 74F-10.

21 NCAC 29 .0703 REINSTATEMENT OF EXPIRED LICENSE

A former licensee may apply for reinstatement of an expired license only if he has completed at least eight contact-hours of continuing education within one year preceding the application. Applicants for reinstatement must pay license renewal, reinstatement and late fees in accordance with G.S. 74F-9 along with the application. the following fees:

- (1) License renewal fee as specified in Rule .0404 of of this chapter;
(2) Late fee as specified in Rule .0702 of this chapter; and
(3) A reinstatement fee of one hundred fifty dollars (\$150.00).

Authority G.S. 74F-6; 74F-9; 74F-10.

CHAPTER 32 – BOARD OF MEDICAL EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Board intends to amend the rule cited as 21 NCAC 32M .0106.

Proposed Effective Date: June 1, 2005

Public Hearing:

Date: March 16, 2004

Time: 12:00 p.m.

Location: NC Medical Board, 1203 Front St., Raleigh, NC

Reason for Proposed Action: To adopt a registration late fee for Nurse Practitioners. This late fee is necessary to provide additional revenue to the North Carolina Medical Board to help offset processing costs and to balance annual revenues with

expenditures. This late fee is similar to the late fee charged to Physician Assistants and Physicians.

Authority G.S. 90-6; 90-18(14); 90-171.23(b).

Procedure by which a person can object to the agency on a proposed rule: *Objections may be submitted via e-mail to Brian Blankenship and at the public hearing.*

CHAPTER 36 - BOARD OF NURSING

Written comments may be submitted to: *Brian L. Blankenship, 1203 Front St., Raleigh, NC 27609, email brian.blankenship@ncmedboard.org.*

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Nursing intends to amend the rules cited as 21 NCAC 36 .0803 and .0806.

Comment period ends: *April 18, 2005*

Proposed Effective Date: *July 1, 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.

Public Hearing:
Date: *March 16, 2005*
Time: *12:00 noon*
Location: *NC Medical Board, 1203 Front Street, Raleigh, NC*

Reason for Proposed Action:
21 NCAC 36 .0803 - *A technical change to accurately identify the type of national body that accredits nursing education programs.*
21 NCAC 36 .0806 - *Add a reinstatement fee to the annual renewal for the nurse practitioner who fails to register within the timeframe as required, consistent with the rules established by North Carolina Medical Board.*

- Fiscal Impact**
 State
 Local
 Substantive (≥\$3,000,000)
 None

Procedure by which a person can object to the agency on a proposed rule: *Persons may submit objections to this Rule by contacting Jean H. Stanley, APA Coordinator, North Carolina Board of Nursing, P.O. Box 2129, Raleigh, NC 27602, voicemail (919)782-3211, ext. 252, fax (919)781-9461 and email jeans@ncbon.com.*

SUBCHAPTER 32M - APPROVAL OF NURSE PRACTITIONERS

Written comments may be submitted to: *Jean H. Stanley, North Carolina Board of Nursing, P.O. Box 2129, Raleigh, NC 27602, voicemail (919)782-3211, ext. 252, fax (919)781-9461 and email jeans@ncbon.com.*

SECTION .0100 – GENERAL

21 NCAC 32M .0106 ANNUAL RENEWALS

(a) Each registered nurse who is approved to practice as a nurse practitioner in this state shall annually renew each approval to practice with the Medical Board no later than 30 days after the nurse practitioner's birthday by:

Comment period ends: *April 18, 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.

- (1) Maintaining current RN licensure;
- (2) Submitting the fee required in Rule .0115 of this Subchapter; and
- (3) Completing the renewal form.

(b) A nurse practitioner who fails to register as required by this Section shall pay an additional fee of twenty dollars (\$20.00) to the Board.

~~(b)(c)~~ A nurse practitioner with first-time approval to practice after January 1, 2000, shall provide evidence of certification or recertification by a national credentialing body.

~~(e)(d)~~ If the nurse practitioner has not renewed within 60 days of her/his birthday, the approval to practice as a nurse practitioner shall lapse.

Fiscal Impact

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

CHAPTER 61 - NORTH CAROLINA
RESPIRATORY CARE BOARD

SECTION .0800 – APPROVAL AND PRACTICE
PARAMETERS FOR NURSE PRACTITIONERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Respiratory Care Board intends to amend the rules cited as 21 NCAC 61 .0305, .0308.

21 NCAC 36 .0803 NURSE PRACTITIONER
REGISTRATION

Proposed Effective Date: June 1, 2005

- (a) The Board of Nursing shall register an applicant who:
- (1) has an unrestricted license to practice as a registered nurse in North Carolina and, when applicable, an unrestricted approval, registration or license as a nurse practitioner in another state, territory, or possession of the United States;
 - (2) has successfully completed a nurse practitioner education program as outlined in Rule .0805 of this Section; and
 - (3) has supplied information necessary to evaluate the application.
- (b) Beginning January 1, 2005 all registered nurses seeking first-time nurse practitioner registration in North Carolina shall:
- (1) hold a Master's Degree in Nursing or related field with primary focus on Nursing;
 - (2) have successfully completed a graduate level nurse practitioner education program accredited by a national accrediting credentialing body, and in addition have met the criteria as outlined in Rule .0805(a) and (c) of this Section; and
 - (3) provide documentation of certification by a national credentialing body.

Public Hearing:

Date: March 3, 2005

Time: 1:00 p.m.

Location: NC Respiratory Care Board, 1100 Navaho Drive, Suite 242, Raleigh, NC 27609

Reason for Proposed Action:

21 NCAC 61 .0305 – To extend the period a licensee may be on inactive status and provide the continuing education requirements to change from inactive to active status.

21 NCAC 61 .0308 – To provide clarification of reporting requirements for licensees.

Procedure by which a person can object to the agency on a proposed rule: A person may object to the Board on proposed rule by sending a written objection addressed to Floyd Boyer, RRT RCP Executive Director, North Carolina Respiratory Care Board, 1100 Navaho Drive, Suite 242, Raleigh, NC 27609. Phone (919)878-5595, Fax (919)878-5565, email fboyer@ncrcb.org.

Written comments may be submitted to: Floyd Boyer, RRT RCP, 1100 Navaho Drive, Suite 242, Raleigh, NC 27609. Phone (919)878-5595, Fax (919)878-5565, email fboyer@ncrcb.org.

Authority G.S. 90-18(13); 90-18.2; 90-171.20(7); 90-171.23(b); 90-171.83.

Comment period ends: April 20, 2005

21 NCAC 36 .0806 ANNUAL RENEWAL

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.

- (a) Each registered nurse who is approved to practice as a nurse practitioner in this state shall annually renew each approval to practice with the Medical Board no later than 30 days after the nurse practitioner's birthday by:

- (1) Maintaining current RN licensure;
- (2) Submitting the fee required in Rule .0813 of this Section; and
- (3) Completing the renewal form.

(b) A nurse practitioner who fails to register as required by this Section shall pay an additional fee of twenty dollars (\$20.00) to the Board.

(c)(b) A nurse practitioner with first-time approval to practice after January 1, 2000, shall provide evidence of certification or recertification by a national credentialing body.

(d)(e) If the nurse practitioner has not renewed within 60 days of her/his birthday, the approval to practice as a nurse practitioner shall lapse.

Fiscal Impact

State

Authority G.S. 90-6; 90-18(14) 90-171.23(b); 90-171.83.

- Local
- Substantive (≥\$3,000,000)
- None

SECTION .0300 –LICENSING

21 NCAC 61 .0305 INACTIVE STATUS

(a) A licensee who wishes to retain a license but who will not be practicing respiratory care may obtain inactive status by indicating this intention on the annual renewal and payment of a fee of twenty dollars (\$20.00). An individual licensed on inactive status may not practice respiratory care during the period in which he or she remains on inactive status.

(b) An individual licensed on inactive status may convert his or her license to active status by submission of ~~an~~ a renewal application and payment of the renewal fee and late fee. The renewal application must contain evidence of the following: completion of a minimum of 10 hours of continuing education that meets the requirements of 21 NCAC 61 .0401 for each full year of inactivity.

- ~~(1) Regular practice of respiratory care in another State or Territory of the United States of America or that the applicant is not affected by Article 38 of the General Statutes of North Carolina pursuant to G.S. 90-664(3); or~~
- ~~(2) Completion of a minimum of 10 hours of approved continuing education during the prior 12 months of the application for reinstatement, or passage of an NBRC examination during the prior 12 months as required in 21 NCAC 61-0401.~~

(c) In no case may an individual remain on inactive status for more than ~~24~~ 60 months.

Authority G.S. 90-652(1),(2),(4).

21 NCAC 61 .0308 CONTINUING DUTY TO REPORT

(a) All licensed respiratory care practitioners and provisional licensees are under a continuing duty to report to the Board any and all:

- (1) convictions of, or pleas of guilty or nolo contendere to, a felony or any crime, such as fraud, that involves moral turpitude; and
- (2) involvement in a civil suit arising out of or related to the licensee's practice of respiratory care.

(b) All supervising respiratory care practitioners are under a continuing duty to report to the Board any and all:

- (1) terminations of any respiratory care practitioner; and
- (2) violations of the practice act and/or Board rules by any respiratory care practitioner under his/her supervision.

~~(b)(c) A licensee or a provisional licensee must report a conviction, plea, or involvement in a civil suit. The reports required by this Rule must be made within 30~~ 15 ~~days after it~~ occurs of the occurrence.

Authority G.S. 90-652(2).

Note from the Codifier: *The rules published in this Section of the NC Register are emergency rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code. The agency must subsequently publish a proposed temporary rule on the OAH website (www.ncoah.com/rules) and submit that adopted temporary rule to the Rules Review Commission within 60 days from publication of the emergency rule or the emergency rule will expire on the 60th day from publication. This section of the Register may also include, from time to time, a listing of emergency rules that have expired. See G.S. 150B-21.1A and 26 NCAC 02C .0600 for adoption and filing requirements.*

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *Commission for Health Services*

Rule Citation: *10A NCAC 41A .0201*

Effective Date: *January 24, 2005*

Findings Reviewed and Approved by the Codifier: *January 13, 2005*

Reason for Action: *The period of high influenza activity in North Carolina normally occurs each year during the January – March. Consequently, available vaccines should be utilized without delay if they are to be of any use. Adherence to notice and hearing requirements of temporary or permanent rulemaking would delay the effective date of this change to the point that the period of heavy influenza activity would be past before the expanded vaccinations would be authorized.*

CHAPTER 41 – HEALTH: EPIDEMIOLOGY

SUBCHAPTER 41A – COMMUNICABLE DISEASE CONTROL

SECTION .0200 - CONTROL MEASURES FOR COMMUNICABLE DISEASES

10A NCAC 41A .0201 CONTROL MEASURES – GENERAL

(a) Except as provided in Rules of this Section, the recommendations and guidelines for testing, diagnosis, treatment, follow-up, and prevention of transmission for each disease and condition specified by the American Public Health Association in its publication, Control of Communicable Diseases Manual shall be the required control measures. Control of Communicable Diseases Manual is hereby incorporated by reference including subsequent amendments and editions. Guidelines and recommended actions published by the Centers for Disease Control and Prevention shall supercede those contained in the Control of Communicable Disease Manual and are likewise incorporated by reference, including subsequent amendments and editions. Copies of the Control of Communicable Diseases Manual may be purchased from the American Public Health Association, Publication Sales Department, Post Office Box 753, Waldora, MD 20604 for a cost of twenty-two dollars (\$22.00) each plus five dollars (\$5.00) shipping and handling. Copies of Centers for Disease Control and Prevention guidelines contained in the Morbidity and

Mortality Weekly Report may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 for a total cost of three dollars and fifty cents (\$3.50) each. Copies of both publications are available for inspection in the Division of Public Health, 1915 Mail Service Center, Raleigh, North Carolina 27699-1915.

(b) In interpreting and implementing the specific control measures adopted in Paragraph (a) of this Rule, and in devising control measures for outbreaks designated by the State Health Director and for communicable diseases and conditions for which a specific control measure is not provided by this Rule, the following principles shall be used:

- (1) control measures shall be those which can reasonably be expected to decrease the risk of transmission and which are consistent with recent scientific and public health information;
- (2) for diseases or conditions transmitted by the airborne route, the control measures shall require physical isolation for the duration of infectivity;
- (3) for diseases or conditions transmitted by the fecal-oral route, the control measures shall require exclusions from situations in which transmission can be reasonably expected to occur, such as work as a paid or voluntary food handler or attendance or work in a day care center for the duration of infectivity;
- (4) for diseases or conditions transmitted by sexual or the blood-borne route, control measures shall require prohibition of donation of blood, tissue, organs, or semen, needle-sharing, and sexual contact in a manner likely to result in transmission for the duration of infectivity.

(c) Persons with congenital rubella syndrome, tuberculosis, and carriers of Salmonella typhi and hepatitis B who change residence to a different local health department jurisdiction shall notify the local health director in both jurisdictions.

(d) Isolation and quarantine orders for communicable diseases and communicable conditions for which control measures have been established shall require compliance with applicable control measures and shall state penalties for failure to comply. These isolation and quarantine orders may be no more restrictive than the applicable control measures.

(e) An individual enrolled in an epidemiologic or clinical study shall not be required to meet the provisions of 10A NCAC 41A .0201 - .0209 which conflict with the study protocol if:

- (1) the protocol is approved for this purpose by the State Health Director because of the

scientific and public health value of the study, and

- (2) the individual fully participates in and completes the study.

(f) A determination of significant risk of transmission under this Subchapter shall be made only after consideration of the following factors, if known:

- (1) The type of body fluid or tissue;
- (2) The volume of body fluid or tissue;
- (3) The concentration of pathogen;
- (4) The virulence of the pathogen; and
- (5) The type of exposure, ranging from intact skin to non-intact skin, or mucous membrane.

(g) The term "household contacts" as used in this Subchapter means any person residing in the same domicile as the infected person.

(h) Notwithstanding the provisions of Paragraph (a) of this Rule, Influenza Vaccination Recommendations for the 2004–05

Influenza Season published by the Centers for Disease Control and Prevention are not incorporated by reference as required control measures.

History Note: Authority G.S. 130A-135; 130A-144; Temporary Rule Eff. February 1, 1988, for a period of 180 days to expire on July 29, 1988; Eff. March 1, 1988; Amended Eff. February 1, 1990; November 1, 1989; August 1, 1988; Recodified Paragraphs (d), (e) to Rule .0202; Paragraph (i) to Rule .0203 Eff. June 11, 1991; Amended Eff. April 1, 2003; October 1, 1992; December 1, 1991; August 1, 1998; Emergency Amendment Eff. January 24, 2005.

This Section contains information for the meeting of the Rules Review Commission on Thursday February 17, 2005, 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, February 14, 2005 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

March 17, 2005
April 21, 2005
June 16, 2005
May 19, 2005
July 21, 2005

**RULES REVIEW COMMISSION
JANUARY 19, 2004
MINUTES**

The Rules Review Commission met on Wednesday, January 19, 2005, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were: Jennie Hayman, Thomas Hilliard, Jeffrey Gray, Robert Saunders, Lee Settle, Dana Simpson, John Tart and David Twiddy.

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

The following people attended:

John Hoomani	Department of Labor
Diane Miller	Department of Justice
Barry Gupton	NCDOI
Ron Chiltom	NCDOI
Nancy Pate	DENR
Thomas Allen	DENR/DAQ
Denise Stanford	Board of Pharmacy
John Barkley	Department of Justice
Lisa Martin	NC Home Builders Association
Dana Sholes	OAH
Molly Masich	OAH
Julian Mann	OAH

APPROVAL OF MINUTES

The meeting was called to order at 10:06 a.m. with Chairman Hayman presiding.

She reminded the Commissioners of their obligations under the governor's Executive Order #1 to refrain from taking part in consideration of any rules for which they have or may appear to have a conflict of interest.

Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the December 16, 2004 meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

10A NCAC 22G .0106: DHHS/Medical Assistance – The Commission approved the rewritten rules submitted by the agency.

13 NCAC 7F .0606: Department of Labor – No response was received from the agency and no action was taken.

13 NCAC 15 .0429: Department of Labor – The Commission approved the rewritten rule submitted by the agency.

15A NCAC 2Q .0102: Environmental Management Commission – No response was received from the agency and no action was taken.

21 NCAC 46 .1414; .1814; .2502; .2702-.2704; .3301: Board of Pharmacy – The Commission approved these rules. Rule .1814 was rewritten by the agency, at the request of the RRC, as several rules. They are to be recodified as rules .3401-.3408.

21 NCAC 46 .1602; .1612: Board of Pharmacy – The Commission approved the rewritten rules submitted by the agency.

LOG OF FILINGS

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

11 NCAC 08 .1101; .1103; .1105-.1115; .1203; .1204: Home Inspector Licensure Board – These rules were withdrawn by the agency.

COMMISSION PROCEDURES AND OTHER BUSINESS

Mr. DeLuca updated the Commission with information concerning the Environmental Management Commission law suit. An April 11, 2005 court date has been scheduled with a tentative deadline of February 25, 2005 for motions and supporting briefs and a March 25, 2005 deadline for response briefs.

Mr. DeLuca mentioned that we have received several letters in response to 15A NCAC 2L .0202, a rule that has not been filed with the Commission (and which could not have even been adopted by the agency at the time the letters were written). He suggested that the Commission return these letters. He also asked the Commission for general guidance on receiving this type of letter of objection and a request for legislative review on rules we have not yet received. Chairman Hayman asked Mr. DeLuca to respond to the persons who sent the letters in writing and instruct them on what they should do. Mr. DeLuca indicated he would also prepare draft rules on how the Commission should handle this situation in the future.

Commissioner Simpson asked whether any hearing date has been scheduled in the Pharmacy Board lawsuit. Neither Mr. DeLuca nor Denise Stanford, attorney for the Pharmacy Board, had any information to report.

The meeting adjourned at 10:49 a.m.

The next meeting of the Commission is Thursday, February 17, 2005 at 10:00 a.m.

Respectfully submitted,
Lisa Johnson

Commission Review/Permanent Rules
Log of Filings #218
December 21, 2004 through January 20, 2005

COMMERCE, DEPARTMENT OF

The rules in Chapter 01 are departmental rules including rulemaking, personnel, revenue bonds, loan programs, and tax credit programs provisions.

The rules in Subchapter 01E deal with industrial and pollution control revenue bonds including purpose and definitions (.0100), application procedures (.0200), and review criteria (.0300).

Manufacturing Wage Test	04	NCAC	01E	.0303
Repeal/*				

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

Rules in Subchapter 10B are from the N. C. Sheriffs' Education and Training Standards Commission. These rules govern the 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).

Suspension: Revocation: or Denial of Certification Amend/*	12	NCAC	10B	.0204
Period of Suspension: Revocation: or Denial Amend/*	12	NCAC	10B	.0205
Summary Suspensions: or Denials Amend/*	12	NCAC	10B	.0206
Sheriff Responsibilities Adopt/*	12	NCAC	10B	.1701
Instructors Adopt/*	12	NCAC	10B	.1702
Minimum Training Requirements Adopt/*	12	NCAC	10B	.1703
Domestic Violence In-Service Training Program Specifications Adopt/*	12	NCAC	10B	.1704
Failure to Complete in-Service Domestic Violence Training... Adopt/*	12	NCAC	10B	.1705
Topical Areas Amend/*	12	NCAC	10B	.2002

EDUCATION, BOARD OF

The rules in Chapter 06 cover elementary and secondary education including transportation, personnel, curriculum, textbooks, testing, students, public relations, and federal programs.

The rules in Subchapter 06B cover the student transportation system.

Purchasing Flexibility Exemption	16	NCAC	06B	.0108
Repeal/*				

The rules in Subchapter 06D cover instruction including curriculum (.0100), textbooks (.0200), testing programs (.0300), and accountability standards and graduation requirements (.0500).

Definitions Amend/*	16	NCAC	06D	.0501
State Graduation Requirements Amend/*	16	NCAC	06D	.0503
Local Accountability Procedures Amend/*	16	NCAC	06D	.0505
Students with Disabilities Amend/*	16	NCAC	06D	.0506
Students with Limited English Proficiency Amend/*	16	NCAC	06D	.0507

The rules in Subchapter 06G cover education agency relations including private business, trade, and correspondence schools (.0100); accreditation of local school boards (.0200); local school board improvement plans and accountability (.0300); how to deal with low performing schools (.0400); and charter schools (.0500).

Annual Performance Standards, Grades K-12 Amend/*	16	NCAC	06G	.0305
Liability Insurance Amend/*	16	NCAC	06G	.0501

GENERAL CONTRACTORS, LICENSING BOARD FOR

The rules of the Licensing Board for General Contractors include the board's organization (.0100); licensing requirements (.0200); application procedures (.0300); examinations (.0400); licenses (.0500); disciplinary procedures (.0700); contested cases (.0800); and home-owners recovery fund (.0900).

Eligibility Amend/*	21	NCAC	12	.0204
Application for Payment Amend/*	21	NCAC	12	.0903

PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS, BOARD OF EXAMINERS FOR

The rules in Chapter 50 cover plumbing, heating, and fire sprinkler contractors. They include the board's organization (.0100); forms (.0200); examinations (.0300); general procedures (.0400); policy statements and interpretive rules (.0500); contested case hearings (.1000); fees (.1100); petitions for rulemaking (.1200); and declaratory rulings (.1300).

Qualifications Determined by Examination Amend/*	21	NCAC	50	.0301
Issuance of License Amend/*	21	NCAC	50	.0306
General Supervision and Standard of Competence Amend/*	21	NCAC	50	.0505
Heating: Group 3 License Required Amend/*	21	NCAC	50	.0508
Limited Fire Sprinkler Inspection Amend/*	21	NCAC	50	.0513
Limited Fire Sprinkler Inspection Contractor License Amend/*	21	NCAC	50	.0514
Limited Fire Sprinkler Maintenance Technician License Amend/*	21	NCAC	50	.0515
Examination Fees Amend/*	21	NCAC	50	.1101
License Fees Amend/*	21	NCAC	50	.1102

STATE PERSONNEL COMMISSION

The rules in Title 25 are from the Office of State Personnel and cover all aspects of regulation of state employment under the State Personnel Act.

The rules in Subchapter 01C are personnel administration rules including general employment policies (.0200); personnel records and reports (.0300); appointment (.0400); work schedule (.0500); competitive service (.0600); secondary employment (.0700); requirements for teleworking programs (.0800); employee recognition programs (.0900); and separation (.1000).

Reduction in Force Amend/*	25	NCAC	01C	.1004
-------------------------------	----	------	-----	-------

The rules in Subchapter 01D are the rules dealing with compensation and include administration of the pay plan (.0100); new appointments (.0200); promotion (.0300); demotions or reassignments (.0400); separation (.0500); reallocation (.0600); salary range revision (.0700); initial classification (.0800); transfer (.0900); reinstatement (.1000); performance salary increases (.1100); longevity pay (.1200); holiday premium pay (.1300); shift premium pay (.1400); emergency call-back pay (.1500); foreign service pay (.1600); employment of physicians for extended duty (.1800); hours of work and overtime compensation (.1900); unemployment insurance (.2000); special salary adjustments (.2100); payment of salary (.2200); accelerated pay plan (.2300); comprehensive compensation system (.2500); and in range salary adjustments (.2600).

State Employees Subject to the Fair Labor Standards Act Amend/*	25	NCAC	01D	.1924
Overtime Compensation Amend/*	25	NCAC	01D	.1925
Compensation-Non-exempt Amend/*	25	NCAC	01D	.1928
Hourly Rate of Pay Amend/*	25	NCAC	01D	.1929
Non-Overtime Workweeks Repeal/*	25	NCAC	01D	.1930
Hours Worked Repeal/*	25	NCAC	01D	.1932
Unauthorized Work Repeal/*	25	NCAC	01D	.1933
On Call Repeal/*	25	NCAC	01D	.1934
Meal Period Repeal/*	25	NCAC	01D	.1936
Training Time Repeal/*	25	NCAC	01D	.1938
Travel Time Repeal/*	25	NCAC	01D	.1939
Recordkeeping Repeal/*	25	NCAC	01D	.1940
Executive Administrative and Professional Employees Repeal/*	25	NCAC	01D	.1941
Executive Employees Repeal/*	25	NCAC	01D	.1942
Administrative Employees Repeal/*	25	NCAC	01D	.1943
Professional Employees Repeal/*	25	NCAC	01D	.1944
Special Provisions Amend/*	25	NCAC	01D	.1945
Ot/Comp Time Off Opt/Law Enf: Fire Prot/Emgcy Resp Repeal/*	25	NCAC	01D	.1946
Tour of Duty and Compensable Hours of Work Repeal/*	25	NCAC	01D	.1947
Occasional or Sporadic Employment/Different Capacity Repeal/*	25	NCAC	01D	.1948
Substitution Repeal/*	25	NCAC	01D	.1949
Volunteers Repeal/*	25	NCAC	01D	.1950
Overtime Compensation Prohibited: Exempt Employees Repeal/*	25	NCAC	01D	.1951
Amount of Career Growth Recognition Award Amend/*	25	NCAC	01D	.2502
Employees Eligible for Performance Bonus	25	NCAC	01D	.2511

Amend/*

The rules in Subchapter 01J cover employee grievances (.0500), disciplinary actions including suspensions and dismissals (.0600), Governor's Award for Excellence (.0800); internal performance pay dispute resolution procedures (.0900); state employees assistance program (.1000); unlawful workplace harassment (.1100); employee grievances (.1200); employee appeals and grievance process (.1300); and employee mediation and grievance process (.1400).

General Provisions Repeal/*	25	NCAC	01J	.0501
Agency Responsibilities Repeal/*	25	NCAC	01J	.0502
Minimum Procedural Requirements Repeal/*	25	NCAC	01J	.0503
Alternative Dispute Resolution Repeal/*	25	NCAC	01J	.0504
Minimum Procedural Requirements-Alternative Dispute Resolution Repeal/*	25	NCAC	01J	.0505
Discrimination Repeal/*	25	NCAC	01J	.0506
Leave In Connection with Grievances Repeal/*	25	NCAC	01J	.0507
SPC Approval of ADR Agreement Repeal/*	25	NCAC	01J	.0508
Agency Grievance Reports Repeal/*	25	NCAC	01J	.0509
Final Agency Action Repeal/*	25	NCAC	01J	.0510
Grandfather Clause Repeal/*	25	NCAC	01J	.0511
Special Provision Amend/*	25	NCAC	01J	.0615
General Provisions Adopt/*	25	NCAC	01J	.1201
Agency Responsibilities Adopt/*	25	NCAC	01J	.1202
Agency Grievance Reports Adopt/*	25	NCAC	01J	.1203
Discrimination and Retaliation/Special Provisions Adopt/*	25	NCAC	01J	.1204
Unlawful Workplace Harassment Adopt/*	25	NCAC	01J	.1205
Time Limits Adopt/*	25	NCAC	01J	.1206
Final Agency Action Adopt/*	25	NCAC	01J	.1207
Leave In Connection with Grievances Adopt/*	25	NCAC	01J	.1208
Minimum Procedural Requirements Adopt/*	25	NCAC	01J	.1301
Minimum Procedural Requirements Adopt/*	25	NCAC	01J	.1401
Flexibility Adopt/*	25	NCAC	01J	.1402
Informal Meeting with Supervisor Adopt/*	25	NCAC	01J	.1403
Mediation Procedure Adopt/*	25	NCAC	01J	.1404

Conclusion of Mediation Adopt/*	25	NCAC	01J	.1405
Limitations on a Mediation Agreement Adopt/*	25	NCAC	01J	.1406
Post Mediation Adopt/*	25	NCAC	01J	.1407
Employee Responsibilities for Mediation Adopt/*	25	NCAC	01J	.1408
Agency Responsibilities for Mediation Adopt/*	25	NCAC	01J	.1409
Office of State Personnel Responsibilities Adopt/*	25	NCAC	01J	.1410
Agency Procedural Requirements for Employee Mediation and... Adopt/*	25	NCAC	01J	.1411
Office of State Personnel Responsibilities for Employee m... Adopt/*	25	NCAC	01J	.1412

The rules in Subchapter 01K are human resource development rules including general provisions (.0100); North Carolina State Personnel Development Center rules (.0200); the educational assistance program (.0300); use of non-State government education and training sources (.0400); apprenticeship training (.0500); work planning/performance review (.0600); and the North Carolina certified public manage program (.0700).

State Human Resource Development Policy Amend/*	25	NCAC	01K	.0104
Centers of Responsibility Amend/*	25	NCAC	01K	.0105
Cost of Training Amend/*	25	NCAC	01K	.0106
Office of State Personnel Human Resource Development Amend/*	25	NCAC	01K	.0209
Office of State Personnel Human Resource Development Group Amend/*	25	NCAC	01K	.0210
Programs Repeal/*	25	NCAC	01K	.0211
Office of State Personnel Human Resource Development Facilities Amend/*	25	NCAC	01K	.0212
Location and Hours of Operation Repeal/*	25	NCAC	01K	.0214
Determination of Need for Training Amend/*	25	NCAC	01K	.0402
Selection of Non-Government Sources Amend/*	25	NCAC	01K	.0403
Procedure for Approval of Non-State Sources Amend/*	25	NCAC	01K	.0404
NC Certified Public Manager Program Amend/*	25	NCAC	01K	.0701
NC Certified Public Manager Program Purpose Amend/*	25	NCAC	01K	.0702
NC Certified Public Manager Program Accreditation Amend/*	25	NCAC	01K	.0703
NC Certified Public Manager Program Participation Amend/*	25	NCAC	01K	.0705
Certificate of Completion of NC Certified Public Manager ... Amend/*	25	NCAC	01K	.0706
Funding for NC Certified Public Manager Program Amend/*	25	NCAC	01K	.0708

The rules in Subchapter 01O are rules dealing with the performance management system.

Policy	25	NCAC	01O	.0101
Amend/*				
Performance Management Process	25	NCAC	01O	.0201
Amend/*				
Components of an Operative System	25	NCAC	01O	.0202
Amend/*				
Relationship/Performance Management and Other Human Resources	25	NCAC	01O	.0203
Amend/*				
Responsibilities of the State Personnel Commission	25	NCAC	01O	.0204
Amend/*				
Responsibilities of the Office of State Personnel	25	NCAC	01O	.0205
Amend/*				
Responsibilities of Agencies	25	NCAC	01O	.0206
Amend/*				
In General	25	NCAC	01O	.0301
Repeal/*				
Benefits	25	NCAC	01O	.0302
Repeal/*				
The Performance Management Process	25	NCAC	01O	.0303
Repeal/*				
Components of an Operative System	25	NCAC	01O	.0304
Repeal/*				

**LIST OF APPROVED PERMANENT RULES
January 19, 2005 Meeting**

HHS-MEDICAL ASSISTANCE

Reconsideration Reviews	10A	NCAC	22G	.0106
-------------------------	-----	------	-----	-------

MENTAL HEALTH, COMMISSION OF

Definitions	10A	NCAC	26E	.0102
Persons Required to Register	10A	NCAC	26E	.0104
Separate Registration for Independent Activities	10A	NCAC	26E	.0105
Training and Qualification Requirements for Dog Handlers	10A	NCAC	26E	.0106
Approval of Canine Certification Associations by the Department	10A	NCAC	26E	.0107
Exemption of Law Enforcement Officials	10A	NCAC	26E	.0111
Application Forms: Contents: Signatures	10A	NCAC	26E	.0113

LABOR, DEPARTMENT OF

Go Karts	13	NCAC	15	.0429
----------	----	------	----	-------

ENVIRONMENTAL MANAGEMENT COMMISSION

Purpose and Scope	15A	NCAC	02D	.0801
Highway Projects	15A	NCAC	02D	.0803
Applications	15A	NCAC	02Q	.0603

RULES REVIEW COMMISSION

Final Action on Permit Applications	15A	NCAC	02Q	.0605
Applicability	15A	NCAC	02Q	.0701
Demonstrations	15A	NCAC	02Q	.0709
Emission Rates Requiring a Permit	15A	NCAC	02Q	.0711

HEALTH SERVICES, COMMISSION FOR

Approval and Permitting of on-Site wastewater Systems	15A	NCAC	18A	.1969
---	-----	------	-----	-------

PHARMACY, BOARD OF

Drug Distribution and Control	21	NCAC	46	.1414
License by Reciprocity	21	NCAC	46	.1602
Reinstatement of Licenses and Permits	21	NCAC	46	.1612
Responsibilities of Pharmacist-Manager	21	NCAC	46	.2502
Definitions	21	NCAC	46	.2702
Obtaining a Nuclear Pharmacy Permit	21	NCAC	46	.2703
Req for Pharmacists Providing Radiopharmaceutical Services	21	NCAC	46	.2704
Registration	21	NCAC	46	.3301
Automated Dispensing or Drug Supply Devices	21	NCAC	46	.3401
General requirements for the use of automated medication ...	21	NCAC	46	.3402
Multidisciplinary committee for decentralized automated m...	21	NCAC	46	.3403
Stocking or restocking of an automated medication system	21	NCAC	46	.3404
Centralized automated medication systems	21	NCAC	46	.3405
Quality Assurance Program	21	NCAC	46	.3406
Record Keeping	21	NCAC	46	.3407
Compliance	21	NCAC	46	.3408

AGENDA
RULES REVIEW COMMISSION
February 17, 2005, 10:00 A.M.

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow Up Matters
 - A. Department of Labor – 13 NCAC 07F .0606 (Bryan)
 - B. Environmental Management Commission – 15A NCAC 02Q .0102 (Bryan)
- IV. Review of Rules (Log Report #218)
- V. Review of Temporary Rules (if any)
- VI. Commission Business
- VII. Next meeting: March 17, 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. Nicos, 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	
Krista Chmiel v. Crime Victims Compensation Commission Case #CV-65-04-0020899	04 CPS 0992	Gray	09/31/04	
Isaac Cornell Mitchell v. Victim and Justice Services	04 CPS 1529	Gray	01/13/05	
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	

CONTESTED CASE DECISIONS

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
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
Tony Worley v. DHHS, Div of Facility Services	03 DHR 2427	Mann	12/07/04
Mooresville 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
LaDunna K. Brewington v. DHHS, Div of Medical Assistance	04 DHR 0192	Mann	06/09/04
Martha Williams, Kidtz Town v Div of Child Development	04 DHR 0200	Elkins	06/11/04
Mary P. Daniels v. DHHS	04 DHR 0232	Gray	08/09/04
Paulette Simato v. DHHS, Div of Facility Services	04 DHR 0302	Conner	09/22/04
Eula P. Street v. DHHS, DFS	04 DHR 0332	Elkins	07/14/04
Donnell Williams v. Harnet County DSS	04 DHR 0334	Conner	06/28/04
Terry William Waddell v. Medicaid/NC Health Choice	04 DHR 0335	Mann	06/04/04
Peter Young v. DHHS	04 DHR 0372	Conner	10/08/04
Paula Una Simon v. DHHS	04 DHR 0386	Chess	09/10/04
Nathan E. Lang vs DHHS	04 DHR 0439	Conner	06/23/04
Johnny Street v. DHHS	04 DHR 0441	Wade	10/19/04
Phyllis S. Weaver v. DHHS	04 DHR 0457	Conner	07/19/04
Beverly Manago v. DHHS, Division of Facility Services	04 DHR 0473	Chess	11/30/04
Bervin D. Pearson Sr. v. DHHS, Broughton Hospital	04 DHR 0476	Morrison	09/09/04
Tracy M. Anderson v. DHHS, Div. of Facility Services	04 DHR 0501	Conner	09/14/04
Bio-Medical Applications of NC, Inc., v. DHHS, Div. of Facility Services, S CON , Section, Health Systems Management, Inc. (Lessor) and Clayton Dialysis Center., Inc. (Lessee)	04 DHR 0516	Elkins	12/17/04
Ray J. Bobbitt v. Nash County Dept. of Social Services	04 DHR 0529	Elkins	07/13/04
Connie Watt Redice v. DHHS	04 DHR 0546	Lassiter	06/29/04
Edrica Mekoyo v. DHHS, Div. of Facility Services	04 DHR 0560	Gray	09/17/04
Shirly Thaggard v. DHHS, Div. of Facility Services	04 DHR 0588	Morrison	11/05/04
Maggie E. Clinding v. DHHS, Div. of Facility Services	04 DHR 0590	Conner	11/08/04
Judith Marie Carson v. DHHS, Broughton Hospital	04 DHR 0594	Gray	10/08/04
Francho Peoples v. DHHS, Division of Medical Assistance	04 DHR 0596	Elkins	11/23/04
Emelie Kashangura v. DHHS, DFS	04 DHR 0602	Elkins	07/14/04
Rush Street Food Mart, Ghassan Dahir v. DHHS, WIC, Div. of Public Health	04 DHR 0640	Elkins	09/24/04
Zack's Food Mart, Nidal Dahir v. DHHS, WIC, Div of Public Health	04 DHR 0641	Elkins	09/24/04
Sabrina Betts v. NC Health Personnel Registry	04 DHR 0644	Lassiter	06/02/04
Velma J. Thomas, Thomas Child Care v. Div of Child Development	04 DHR 0645	Conner	12/03/04
Amy Hensley v. DHHS	04 DHR 0696	Elkins	09/01/04
Tanisha Mitchell v. DHHS, Div. of Facility Services	04 DHR 0787	Mann	06/23/04
Rudolph Lofton v. Medicaid Program	04 DHR 0788	Wade	11/23/04
Stacey Curtis v. Dorothea Dix Hospital	04 DHR 0791	Lassiter	09/01/04
Michelle Cross v. DHHS	04 DHR 0811	Morrison	11/24/04
Progressive Child Care, Inc. Drake Groves/Director v. Div of Child Development c/o Forsyth County Department of Social Services	04 DHR 0844	Mann	09/22/04
Tanya H. Dey v. Medicaid	04 DHR 0864	Elkins	11/10/04
Judy W. Dickson v. DHHS, Div. of Facility Services	04 DHR 0865	Elkins	10/11/04
Fox's Tot, Inc., Connie Fox v. DHHS	04 DHR 0881	Elkins	07/20/04
Oyetoun M Oladipo v. Health Care Personnel Registry, DHHS	04 DHR 0887	Morrison	09/23/04
Linda Brown v. DHHS, Div. of Medical Assistance	04 DHR 0919	Gray	01/19/05
K.E.C., Jr., by parent or guardian, E.D.C v. Division of Mental Health, Developmental Disabilities, and Substance Abuse Services	04 DHR 0967	Mann	12/10/04
Kids Kingdon Christian Learning Center, Inc., v. Div. of Child Development, Regulatory Services Section	04 DHR 0974	Conner	08/10/04

CONTESTED CASE DECISIONS

Winfred Keene v. Health Care Personnel Registry Section	04 DHR 0976	Lassiter	10/18/04	
EDS Information Services, LLC, v Office of Information Technology Svcs & DHHS and ACS State Healthcare, LLC.	04 DHR 1066	Morrison	01/11/05	19:16 NCR 1321
Sandra Elaine Patrick v. DHHS, Div of Facility Services	04 DHR 1073	Conner	10/01/04	
Roger Penland, Jr v. DHHS, Division of Facility Services	04 DHR 1096	Gray	11/29/04	
New Beginnings Childcare v. Div. of Child Dev. & Lee Co. DSS	04 DHR 1112	Lassiter	08/18/04	
Roberta Bell v. DHHS, Div of Medical Assistance	04 DHR 1134	Wade	09/15/04	
Manley Yates & Cynthis Yates, Ham Grocery, Inc. v. DHHS, WIC	04 DHR 1136	Elkins	09/14/04	
Grace A. Wright v. Wake County Human Services Program Integrity – Dedi H. Bateman	04 DHR 1152	Mann	09/23/04	
Michael J. Shelton, Pinnacle Homes #2 v. DHHS, Div. of Medical Assistance	04 DHR 1166	Gray	09/03/04	
Wade Assisted Living, Inc., T/A Laurie Edwards	04 DHR 1174	Wade	11/08/04	
Charlynn Keough v. Cherokee Co. DSS, BeBe McClure	04 DHR 1225	Wade	01/24/05	
S.H., by his parent/guardian D.H. v. DHHS	04 DHR 1250	Creech	11/30/04	
Alicia Colon v. DHHS, Division of Facility Services	04 DHR 1280	Mann	11/16/04	
Monica Dockery v. DHHS	04 DHR 1281	Wade	12/02/04	
Julia Matheson v. DHHS, Div. of Facility Services	04 DHR 1301	Wade	10/19/04	
Faye Rice, CEO Rice & Rice Co., Inc v. Marvin Sanders DHHS, Div of MH Dev. Disabilities	04 DHR 1303	Wade	01/24/05	
Martha Abare v. DHHS, Div. of Facility Services	04 DHR 1310	Wade	11/01/04	
Lakresha McIver v. Health Care Registry	04 DHR 1330	Elkins	11/10/04	
Vonzella Malone v. DHHS, Division of Facility Services	04 DHR 1331	Gray	11/23/04	
Renita M. Walton v. DHHS, Div of Facility Services	04 DHR 1359	Wade	10/14/04	
Elizabeth D. Hedgepeth v. Dept. of Health Services	04 DHR 1364	Elkins	11/10/04	
Cydra Pajiete Seegers v. DHHS, Div. of Facility Services	04 DHR 1366	Mann	11/09/04	
Ghazaelleh Abdel-Kader v. DHHS, WIC, Division of Public Health	04 DHR 1373	Gray	12/15/04	
Adib Abdullah v. DHHS	04 DHR 1380	Gray	10/22/04	
Madeleine C. Pacheco v. DHHS, Div. of Facility Services	04 DHR 1381	Wade	10/14/04	
Anita Whitehurst v. MRNC	04 DHR 1620	Chess	12/08/04	
Olivera Leross Langston v. Cherry Hospital	04 DHR 1802	Chess	12/09/04	

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

DEPARTMENT OF JUSTICE

Larry Mitchel Batton, Jr. v. Criminal Justice Educ. & Training Stds. Comm	03 DOJ 1067	Lassiter	06/15/04	
Steve A. Matthews v. Sheriff's Educ. & Training Stds. Comm	03 DOJ 1702	Conner	05/10/04	
Cindy L. Schumacher v. Sheriff's Educ. & Training Stds. Comm	03 DOJ 2341	Chess	12/29/04	
Tony M. Evans and Kristopher D. Harris v. Criminal Justice Educ. & Training Standards Commission	03 DOJ 2354	Mann	07/19/04	
Tony M. Evans and Kristopher D. Harris v. Criminal Justice Educ. & Training Standards Commission	03 DOJ 2355	Mann	07/19/04	
Addie Joanne Foreman v. Private Protective Services Board	03 DOJ 2405	Elkins	08/26/04	
Charles Robert Branham v. Criminal Justice Educ & Training Stds. Comm.	03 DOJ 2431	Conner	06/22/04	
Robert R. Johnson, Jr. v. Sheriff's Education & Training Standards Comm.	04 DOJ 0062	Chess	08/23/04	
Bernard Cotton v. DOJ	04 DOJ 0063	Chess	06/03/04	
Robert Alan Kilpatrick v. Criminal Justice Educ. & Training Standards Comm	04 DOJ 0259 ²	Wade	01/10/05	
Linnell Davis, Jr. v. Private Protective Services Board	04 DOJ 0299	Elkins	08/26/04	
Jason Oneil Rice v. Sheriffs' Education & Training Standards Commission	04 DOJ 0318	Mann	06/24/04	
Lisa Anne Weaver v. Criminal Justice Educ. & Training Standards Comm.	04 DOJ 0490	Wade	11/01/04	
Guy Wesley Prevette v. Criminal Justice Educ. & Training Standards Comm.	04 DOJ 0511	Chess	07/08/04	
Connelly Allen Locklear v. Criminal Justice Educ. & Training Stds. Comm	04 DOJ 0514	Gray	07/15/04	
Creo Melvin Mciver, II v. Criminal Justice Educ. & Training Stds. Comm	04 DOJ 0567	Gray	10/15/04	
Roger Wayne Alvarico v. Sheriffs' Education & Training Standards Comm	04 DOJ 0636	Gray	11/29/04	
Charlie Ray Hunt v. Criminal Justice Educ. & Training Stds. Comm	04 DOJ 0658	Gray	09/20/04	
George Williams, Jr., v. Criminal Justice Educ. & Training Standards Comm.	04 DOJ 0688	Wade	10/29/04	
John Allen Hester, Jr. v. Private Protective Services Board	04 DOJ 0707	Gray	01/14/05	
Robert Dustin Bryant v. Private Protective Services Board	04 DOJ 0708	Gray	11/16/04	
Joshua Adam Greene v. Sheriffs' Education & Training Standards Comm	04 DOJ 0730	Mann	10/08/04	
Joel Patrick Holt v. Sheriffs' Education & Training Standards Comm	04 DOJ 0731	Wade	01/10/05	
George Eugene White v. Sheriffs' Education & Training Standards Comm	04 DOJ 0732	Wade	10/04/04	
Jerry Adrian Crawley v. Sheriffs' Education & Training Standards Comm	04 DOJ 0828	Gray	09/16/04	
Maureen Cleary Williams v. Sheriffs' Education & Training Standards Comm	04 DOJ 0829	Mann	07/28/04	
Tommy Dwight Hunt v. Sheriffs' Educ & Training Stds. Comm	04 DOJ 0830	Elkins	08/24/04	
Michael Lee Millner v. Sheriffs' Educ & Training Stds. Comm	04 DOJ 0831	Gray	12/16/04	
David R. Pacheco v. Criminal Justice Educ. & Training Standards Comm	04 DOJ 0966	Gray	11/16/04	
Murphy D. Riggan v. Criminal Justice Educ & Training Standards Comm	04 DOJ 0985	Gray	11/19/04	
Lance Tyree Rice v. Criminal Justice Educ. & Training Standards Comm	04 DOJ 1013	Morrison	10/29/04	
Randall Douglas Hughes v. Criminal Justice Education & Training Standards Comm	04 DOJ 1078	Elkins	09/30/04	
Ernest Alvin Gaddy v. Sheriffs' Education and Training Standards Comm	04 DOJ 1153	Wade	12/02/04	
Kenneth R. Moore v. Dept of Justice, Company Police Program Comm	04 DOJ 1180	Gray	09/29/04	
Robert Wrenn Spencer, Jr., v. Sheriffs' Educ & Training Standards Comm	04 DOJ 1209	Mann	11/09/04	
Robert Alan Kilpatrick v. Criminal Justice Educ. & Training Standards Comm	04 DOJ 1215 ²	Wade	01/10/05	
Gordon Shane Smith v. Criminal Justice Education & Training Standards Comm	04 DOJ 1241	Gray	09/29/04	
Lance Harviell Patterson v. Private Protective Services Board	04 DOJ 1242	Morrison	10/29/04	
Marcus Fuller v. Private Protective Services Board	04 DOJ 1244	Morrison	11/12/04	

CONTESTED CASE DECISIONS

Reginald Mungo v. Private Protective Services Board	04 DOJ 1268	Morrison	11/04/04		
Umba M Bushiri v. Private Protective Services Board	04 DOJ 1269	Morrison	11/12/04		
Jacquelyn M. McClaud v. DOJ, Company Police Program	04 DOJ 1398	Lassiter	10/18/04		
Adam C. Lentz v. Sheriffs' Educ & Training Standards Comm	04 DOJ 1551	Morrison	11/19/04		
Mark James Tucker v. Alarm Systems Licensing Board	04 DOJ 1594	Mann	11/09/04		
Nicholas Allen Epley v. Private Protective Services Board	04 DOJ 2017	Gray	01/14/05		
<u>DEPARTMENT OF TRANSPORTATION</u>					
Harrison Holdings, LLC d/b/a Ultimate Imports v. Dept. & Comm. Of Motor Vehicles	04 DOT 0452	Chess	09/13/04		
Virginia Edwards Estate, Gerald Dee Edwards v. In the General Court of Justice Superior Court Division	04 DOT 1326	Morrison	12/17/04		
<u>DEPARTMENT OF TREASURER</u>					
Bryant Lee Deaton v. DOT, Retirement Service Division	02 DST 1029	Gray	09/03/04	19:11 NCR	983
Claudia L. Rapier, Gregory S. Rapier v. DOT, Retirement Systems Division	03 DST 2375	Wade	10/14/04		
Mary Pender v. DOT, Retirement Systems Division	04 DST 0027	Conner	07/23/04		
<u>DEPARTMENT OF PUBLIC INSTRUCTION</u>					
Alice Bins Rainey, Michele R Rotosky and Madeline Davis Tucker	02 EDC 2310	Lassiter	06/01/04	19:01 NCR	153
Emily H. Thompson v. Dept. of Public Instruction	03 EDC 1958	Chess	09/15/04		
Felder Wayne Poplin v. Dept. of Public Instruction	04 EDC 0824	Mann	10/28/04		
Knowledge Network Solutions v. Dept. of Public Instruction, Office of Information Technology Services	04 EDC 1634	Elkins	11/23/04		
<u>ENVIRONMENT AND NATURAL RESOURCES</u>					
Beltex Corporation, a Debtor-in Possession v. DENR, Div of Air Quality	00 EHR 1706	Gray	06/18/04		
J.L. Marsh Smith Farms, Inc v. DENR, Div of Air Quality	00 EHR 2116	Gray	06/04/04		
Raymond Wallace, The Golden Mirror vs. Div of Radiation Protection	01 EHR 1558	Mann	06/17/04		
Friends of the Green Swamp, et al, v. DENR, Div. of Water Quality and Riegel Ridge, LLC, and Waste Management of Carolinas, Inc	03 EHR 0058	Conner	08/26/04		
Old Beau Golf Club v. DENR	03 EHR 1260	Conner	07/28/04		
Sandy Mush Properties, Inc v. DENR, Div of Air Quality	03 EHR 1411	Conner	06/28/04		
Ronald Frye v DENR	03 EHR 1636	Gray	06/23/04		
Alliance for Legal Action, Inc, Piedmont Quality of Life Coalition (an unincorporated association), Alberta Anderson, Cameron Anderson, Jean Black, Richard Black, Walter S. Druce, Ron Goga, Gil Happel, Carol Hoppe, Michael Hoppe, Patricia Nussbaum, Christine Peeler, Laura Pollak, Randall Schultz, Roch Smith, Jr., and Vassilia Smith v. Div of Water Quality of DENR And Piedmont Triad Airport Authority	03 EHR 1664	Gray	09/08/04		
Herbert B. Simmons, Sr., v. DENR	03 EHR 1773	Gray	10/21/04		
Robert I. Swinson Sr. v. DENR, Div of Marine Fisheries	03 EHR 2248	Chess	06/10/04		
Winston N. Cahoon v. DENR	03 EHR 2305	Lassiter	07/01/04		
Jimmy Mathis, Mathis Pump & Well v. DENR	03 EHR 2336	Wade	05/25/04		
James D & Jane Lathan Ray; James D. & Brenda W Moser, Jr.; John G. & Sheila A Conner v. DENR, Div. of Coastal Resources and R. Carter Pate	04 EHR 0073 ¹	Wade	08/13/04		
R. Carter Pate v. DENR, Div. of Coastal Resources & Steve Bond	04 EHR 0150 ¹	Wade	08/13/04		
Coy Carter v. DENR, Div of Land Resources	04 EHR 0179	Morrison	10/22/04		
Joseph R. Dunn v. DENR, Division of Water Quality	04 EHR 0201	Conner	12/01/04		
Tad Dexter v. DENR, Div. of Water Quality	04 EHR 0363	Morrison	12/29/04		
Dennis Graham v. DENR, Division of Water Quality	04 EHR 0402	Conner	12/14/04		
Joseph Glenn Henson v. DENR, Div. of Air Quality	04 EHR 0566	Conner	10/04/04		
Raymond Earl Dail, Sr., and wife, Linda M. Dail, v. DENR, Pamlico Cty. Health Dept.	04 EHR 0508	Wade	12/02/04		
Big Beaver Drilling Rig v. UST Trust Fund Section Final Agency Decision	04 EHR 0612	Wade	05/25/04		
Wellington by the Sea Homeowner's Association v. DENR, Div of Coastal Management	04 EHR 0674	Wade	12/02/04		
Virginia I Crews v DENR	04 EHR 0996	Conner	12/10/04	19:14	1193
Jeffrey D. Cline v. DENR, Division of Waste Management	04 EHR 1148	Morrison	10/29/04		
Brookside Montessori School, Inc v. DENR, Div. of Environmental Health	04 EHR 1219	Gray	08/27/04		
Margaret D. Ryan Executrixes of the Estate of O.F. Dumas v. DENR, Div. Of Waste Management, UST Section Trust Fund	04 EHR 1475	Gray	12/22/04		
Joy Murray v. DENR, Division of Waste Management	04 EHR 1478	Gray	11/24/04		
<u>DEPARTMENT OF INSURANCE</u>					
Speros J. Fleggas vs. DOI	04 INS 0251	Elkins	06/10/04		
<u>LOCKSMITH LICENSING BOARD</u>					
Billy R. Perry, Jr. v. Locksmith Licensing Board	04 LLB 1438	Gray	01/19/05		

CONTESTED CASE DECISIONS

MISCELLANEOUS

Alesia Braswell Al Wahshi v. Deborah Mcintyre, Wayne Co, Dept. of Social Services	04 MIS 0146	Gray	06/18/04
O'marr S. Reid v. Gaston Co. Judicial System and Defendants 1,2,3,4,5,6,7,8,9,10	04 MIS 0682	Elkins	06/22/04
Larry Yancey v. State Bar Grievance Com., Dept of Justice	04 MIS 0891	Morrison	07/27/04
Larry Yancey v. State Bar Grievance Com., Dept of Justice	04 MIS 0892	Morrison	07/27/04
Larry Yancey v. Durham Housing Authority, City of Durham, State of NC	04 MIS 0893	Morrison	07/27/04
Larry Yancey v. Independent Living Rehab Prog, Div of VRS State of NC	04 MIS 0894	Morrison	07/27/04
Larry Yancey v. Durham Dept. of Social Services, State of NC	04 MIS 0895	Morrison	07/27/04
Darrick Lamonte King v. Administrative Office of the Courts	04 MIS 1289	Mann	12/07/04
Earl Hardy Jr. v. Brunswick County Dept of Social Services	04 MIS 1765	Morrison	12/10/04

OFFICE OF STATE PERSONNEL

Diane Kemp v. Swannanoa Valley Youth Development Center	02 OSP 1552	Gray	12/16/04
Kathy M Sledge v. DOC	02 OSP 2117	Conner	08/03/04
James E. Sharpe v. DOT, Div. 14 (Graham County)	03 OSP 0395	Chess	12/02/04
Pearl A. Wilkins v. NCSU	03 OSP 0400	Gray	07/26/04
Phillip Harris v. Dept. of Juvenile Justice & Delinquency Prevention	03 OSP 0836	Gray	09/17/04
Henry Brad Stevens v. Dept. of Crime Control & Public Safety/State Hwy Patrol	03 OSP 1566	Morrison	10/27/04
Romda Arnold v. Dept of Social Services, William Scarlett	03 OSP 2261	Wade	12/02/04
Wanda R. Small v. Dept of Social Services, William Scarlett	03 OSP 2262	Wade	12/02/04
Phyllis Holt v. NCSU	03 OSP 2415	Conner	10/14/04
James A. Ray v. Mr. Don Shore, Human Resources, UNC Greensboro	03 OSP 2451	Elkins	06/01/04
James A. Ray v. Sherry Stevens and Facility Services Management, UNC Greensboro	03 OSP 2452	Elkins	06/01/04
James A. Ray v. Hoyte Phifer and Facility Services Management, UNC Greensboro	03 OSP 2453	Elkins	06/01/04
Terry H. Mitchell v. Elizabeth City State University	04 OSP 0015	Conner	07/23/04
Miracle L. Smith v. NC State Highway Patrol	04 OSP 0039	Gray	07/14/04
Samuel Williams v. DOC, Div of Alcoholism, Chemical Dependency Programs	04 OSP 0194	Mann	06/09/04
Jerry William Wiley v. Div of Public Health and DHHS	04 OSP 0210	Elkins	06/23/04
Donnie Gordon v. Southern Correctional Institution	04 OSP 0280	Wade	10/11/04
James Sturdivant v. UNC Pembroke	04 OSP 0285	Conner	11/17/04
Lillian Marie Adcock v. UNCG	04 OSP 0380	Lassiter	09/23/04
Richard Westmoreland v. Dept. of Crime Control and Public Safety/Highway Patrol	04 OSP 0409	Morrison	12/31/04
Barbara Hoffner v. DOC, Div of Prisons, Central Prison	04 OSP 0415	Chess	06/17/04
Jeff Nichols v. DOC	04 OSP 0419	Conner	06/29/04
Adriel Williams v. UNC Chapel Hill	04 OSP 0435	Chess	09/20/04
Phyllis Holt v. UNC Chapel Hill	04 OSP 0486	Chess	06/01/04
John V. Smith v. NCSU	04 OSP 0505	Chess	06/17/04
David Earl Beasley v. NCSU	04 OSP 0513	Gray	08/27/04
Mark A. Boyce v. Dept. of Commerce	04 OSP 0543	Gray	07/06/04
Barbara H. Crisp v. Toe River Health District	04 OSP 0565	Conner	11/19/04
Eldredia B. Mizelle v. Craven Correctional Institution, Dept. of Corrections, David W. Chester, Capt. Kathryn Brown	04 OSP 0582	Wade	06/24/04
Bernadine Ralph v. O'Berry Center	04 OSP 0706	Lassiter	06/29/04
Jesse D. Goodman v. NC A&T University	04 OSP 0719	Lassiter	09/23/04
James A. Ray v. UNC at Greensboro, Facility Services	04 OSP 0751	Elkins	07/14/04
Gwendolyn Robertson Horton v. DHHS	04 OSP 0792	Morrison	07/26/04
Melvin B. Jones v. Elizabeth City State University	04 OSP 0841	Wade	10/14/04
Lekisha Branch Thorpe v. The Whitaker School	04 OSP 0923	Morrison	09/09/04
Katrina Pittman v. Kenny Gibbs, Div of Vocational Rehab	04 OSP 0930	Lassiter	08/06/04
Bonnie J. Winn, RN v. DOC	04 OSP 0955	Creech	12/20/04
Veronica J. Johnson v. SOS	04 OSP 0961	Morrison	07/23/04
Gregory Tabron v. John Umstead Hospital	04 OSP 1014	Lassiter	07/26/04
James Clint Dixon Sr. v. Butner Public Safety, Crime Control & Public Safety	04 OSP 1104	Lassiter	10/08/04
Emily Deveaugh v. Pender Correctional Institution	04 OSP 1149	Elkins	10/20/04
Ronnetta Lynn Copeland v. Buncombe County Mental Health Center	04 OSP 1208	Wade	10/28/04
Sharon Carr v. DHHS, Div of Social Services, Human Resources Gwen Sanders	04 OSP 1270	Mann	09/24/04
Patricia O'Neal v. Polk Youth Institution	04 OSP 1284	Mann	11/22/04
Andrea T. Hailey v. Dept. of Correction	04 OSP 1309	Conner	11/19/04
Michael L. Hillis v. DHHS	04 OSP 1369	Mann	12/08/04
Lucie J. Riggsbee v. DHHS – Div. of Public Health	04 OSP 1389	Wade	12/02/04
Diane Barnes v. Dorthea Dix Hospital	04 OSP 1582	Gray	01/14/05
Frances Shabazz v. UNC	04 OSP 1615	Gray	12/03/04
Deena Ward v. Columbus Co. Dept. of Social Services	04 OSP 2092	Lassiter	01/24/05
Terry M Knotts v. Davie County Inspection	04 OSP 2124	Morrison	12/22/04

UNC HOSPITALS

Carrie Ann Sykes v. Chapel Hill Hospital	04 UNC 0245	Elkins	06/25/04
--	-------------	--------	----------

CONTESTED CASE DECISIONS

Loretta Boddie v. UNC Hospitals	04 UNC 0289	Gray	12/20/04
Danielle Catoe v. UNC Hospitals	04 UNC 0291	Elkins	06/25/04
Rex A. Coughenour v. UNC Hospitals	04 UNC 0306	Elkins	06/22/04
P. Nettles v. UNC Hospitals	04 UNC 0393	Morrison	07/23/04
P. Nettles v. UNC Hospitals	04 UNC 0393	Morrison	07/23/04
Garris Faison v. UNC Hospitals	04 UNC 0396	Conner	10/08/04
Vanessa Bailey v. UNC Hospitals	04 UNC 0440	Conner	08/09/04
Dennis McCuller v. UNC Hospitals	04 UNC 0458	Chess	08/02/04
Joe Hatcher v. UNC Hospitals	04 UNC 0480	Morrison	07/23/04
Cattrual Heggins v. UNC Hospitals	04 UNC 0496	Chess	08/09/04
Tammy Bottoms v. UNC Hospitals	04 UNC 0502	Elkins	07/21/04
Sandra Lee Petty v. UNC Hospitals	04 UNC 0522	Chess	07/23/04
Michael F. Kamaka v. UNC Hospitals	04 UNC 0534	Gray	12/20/04
Thomas Sherman Tate v. UNC Hospitals	04 UNC 0538	Chess	06/15/04
Sherry Smith v. UNC Hospitals	04 UNC 0585	Wade	10/01/04
Tracy Lane v. UNC Hospitals	04 UNC 0601	Gray	07/23/04
Carl Graves, Jr. v. UNC Hospitals	04 UNC 0613	Wade	09/21/04
Betty Tripp v. UNC Hospitals	04 UNC 0660	Wade	10/01/04
Ellen Lamoureux v. UNC Hospitals	04 UNC 0677	Wade	10/01/04
Martha W. Foust v. UNC Hospitals	04 UNC 0680	Morrison	11/18/04
Holly M. Taylor v. UNC Hospitals	04 UNC 0743	Chess	10/04/04
Chris Oduok v. UNC Hospitals	04 UNC 0760	Morrison	07/26/04
Xiaoyan Luo v. UNC Hospitals	04 UNC 0761	Morrison	11/18/04
Pamela L. Chevalier v. UNC Hospitals	04 UNC 0773	Morrison	07/26/04
Ann M Taft v. UNC Hospitals	04 UNC 0781	Morrison	11/23/04
Kuiran Jiao, Zhenghong Fan v. UNC Hospitals	04 UNC 0847	Morrison	12/21/04
Nicole Bissell Curliss v. UNC Hospitals	04 UNC 0849	Morrison	11/18/04
June K. Foushee v. UNC Hospitals	04 UNC 0850	Morrison	11/23/04
Jill Weinstein v. UNC Hospitals	04 UNC 0918	Morrison	11/18/04
Trenda L. Smith v. UNC Hospitals	04 UNC 0951	Morrison	11/23/04
Lisa Stewart v. UNC Hospitals	04 UNC 0960	Morrison	12/10/04
Joyce Miller v. UNC Hospitals	04 UNC 0963	Morrison	11/23/04

- 1 Combined Cases
- 2 Combined Cases

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04-DHR-1066

EDS INFORMATION SERVICES, LLC,)
)
 Petitioner,)
)
 v.)
)
 OFFICE OF INFORMATION)
 TECHNOLOGY SERVICES and)
 NORTH CAROLINA DEPARTMENT)
 OF HEALTH AND HUMAN SERVICES,)
)
 Respondents,)
)
 and)
)
 ACS STATE HEALTHCARE, LLC,)
)
 Respondent-Intervenor.)

**PROPOSED DECISION RECOMMENDING
SUMMARY JUDGMENT FOR PETITIONER**

PROPOSED DECISION

This matter was initiated by a Request for Administrative Hearing filed by Petitioner EDS Information Services, LLC (“EDS”) with the Office of Information Technology Services (“ITS”) on June 10, 2004. EDS protests the contract award by the North Carolina Department of Health and Human Services (“DHHS”), as approved by ITS, of the North Carolina Medicaid Management Information System (“NCMMIS+”) pursuant to Request for Proposal No. 30-DHHS-736-04 (the “RFP”). At the request of ITS pursuant to N.C. Gen. Stat. § 150B-40(e), an agency governed by Article 3A of the Administrative Procedure Act (“Act”), the undersigned was assigned to preside in this case. ACS State Healthcare, LLC (“ACS”) (“Intervenor”), the putative awardee of the contract, has been permitted to intervene.

This matter came on for decision before the undersigned on the motion of EDS for summary judgment. The motion was supported by exhibits and deposition transcripts, and responses were filed by ITS/DHHS (the “State” or “Respondents”) and ACS, including exhibits and affidavits. A hearing on EDS’ motion for summary judgment was held before the undersigned on December 29, 2004. J. Mitchell Armbruster and B. Davis Horne, Jr. appeared on behalf of Petitioner; James Wellons appeared on behalf of the Respondents; and Renee Montgomery appeared on behalf of the Intervenor. Based on the pleadings, the materials presented in favor and in opposition to EDS’ motion, the arguments of counsel and memoranda submitted, and all other relevant material, the undersigned PROPOSES that summary judgment be granted in favor of Petitioner for the following reasons:

1. Through a series of contracts over the past twenty-seven (27) years, the State of North Carolina has contracted the Fiscal Agent duties of the State’s Medicaid Program, including the operation of its federally certified Medicaid Management Information System (MMIS), to an outside entity.
2. On September 5, 2003, DHHS issued an RFP soliciting proposals for “replacement of the certified NCMMIS+, with the provision for ongoing maintenance and modification of a certified system with newer technology that emphasizes more efficient and effective processing.” NCMMIS+ Initiative Selection Committee Summary Report and Recommendation for Award (“Recommendation for Award”) at 3. The procurement was required to be a “best value” procurement under North Carolina law. N.C. Gen. Stat. § 147.3395(b)(1) (2004) (stating that ITS procurements are governed by best value standards); 09 NCAC 06B.0301 (same).
3. On December 10, 2003, DHHS received proposals from three bidders: EDS, ACS, and Unisys Corporation (Unisys).
4. Section 4.1 of the RFP required that proposed solutions conform to North Carolina Statewide Technical Architecture (“STA”):

The State requires a new, technologically advanced system and operational solution that supports the State's requirements detailed throughout RFP Section 4. The solution shall conform to North Carolina's Statewide Technical Architecture Standards as identified on http://ets.state.nc.us/NCSTA/ets_index.html, the Web site for the State's Enterprise Technology Strategies, formerly known as Information Resource Management.

5. Immediately following the requirement that the operational solution "shall conform to North Carolina's Statewide Technical Architecture Standards", RFP Section 4.1 also specifically stated that:

The NCMMS+ Replacement System shall support the following NCMMS+ multi-payer functions:

Recipient Subsystem,
Eligibility Verification Subsystem (EVS),
Automated Voice Response Subsystem (AVRS),
Provider Subsystem,
Reference Subsystem,
Prior Approval Function,
Claims Processing Subsystem,
Managed Care Subsystem,
Health Check Subsystem,
Drug Rebate Subsystem,
Third-Party Liability Subsystem,
Management and Administrative Reporting Subsystem (MARS), and
Financial Management and Accounting Subsystem.
Information Systems and Services
Integrated Test Facilities
NCMMIS+ Interfaces

6. Compliance with the Statewide Technical Architecture was a mandatory requirement of the RFP. No exceptions to this requirement are identified by the RFP. Moreover, State agencies are required to adhere to the Statewide Technical Architecture "when designing, purchasing, upgrading, or enhancing information technology." STA, Roles and Responsibilities, at 5. All information technology ("IT") projects in State Government must obtain the approval of ITS, [Sligh Aff. ¶ 11], and IT procurements are conducted under the auspices of ITS.
7. Standard 2.01.02 of the Statewide Technical Architecture requires new applications acquired by the State to be "3-tier or N-tier." "3-tier" application architecture means the logical separation of the user interface, business rules, and data access code of an application. [Griffith Aff. ¶ 23.] This division "allows for simple, straightforward additions to each of the three tiers without undue impacts on the others." Standard 2.01.02, Rationale. Thus, "all new agency applications should be developed using 3-tier or N-tier architecture in order to maximize flexibility and scalability."
8. A "draft" position paper issued by ITS staff on or about March 1, 2004, is consistent with the plain text of Standard 2.01.02: "[T]he proper separation of an application's presentation logic, business logic, and data is a fundamental principle that must be followed. . . . Separation of these applications components is required by the current principles, practices, and standards specified in the North Carolina Statewide Technical Architecture." (emphasis added). No position papers contrary to this statement have been introduced by the State.
9. A vendor question was asked prior to the deadline for submitting proposals regarding whether the State's current and older COBOL language-based MMIS system complied with the Statewide Technical Architecture. The State's answer was "no."
10. The RFP did not have any exceptions to the requirement that proposals "shall conform" to the Statewide Technical Architecture. In other RFPs, the State at times has limited the mandatory application of the Statewide Technical Architecture. In early 2004, DHHS let an RFP for a statewide Immunization Registry which states that the project "does not fully conform to the STA. For bug fixes and basic maintenance, the current programming language and approach can remain the same. For other changes and enhancements the Vendor must be in conformance to the STA. . . ." RFP No. 30-DIRM-170-04, at 31 (emphasis added).
11. In a draft report evaluating the technical architecture of the ACS proposal, dated February 11, 2004, the State's own reviewers reiterated that "the Statewide Technical Architecture (Standard 2.01.02) requires that applications be developed using a 3-tier or N-tier architecture." The report further stated that "the following application systems do not satisfy the STA architecture standard," citing three components of the ACS solution: DRAMS, OmniTrack, and the Claims Adjudication System ("CAS").

12. As to DRAMS and OmniTrack, the February 11 report concluded that these components of the ACS proposal were “2-tier” systems and that “[t]he business rules, in this configuration, must reside in the presentation and/or data tiers, both of which are not consistent with the North Carolina STA.” As to CAS, the report concluded that this system had mainframe applications with a “monolithic design” which “typically possesses intertwined presentation, business, and data access logic.”
13. The DRAMS component of the ACS proposal was intended to provide the drug rebate functionality required by the RFP. Because the federal government, through Medicaid, is a large purchaser of prescription drugs, it is able to negotiate substantial discounts with pharmaceutical manufacturers. These discounts take the form of rebates, and are administered by each individual state Medicaid Program. Between 1998 and 2002, North Carolina recovered over \$700 million through its drug rebate program. Section 4.1 of the RFP specifically identified the functionality of the “Drug Rebate Subsystem” as part of the new NCMMIS system.
14. The OmniTrack component of the ACS proposal was intended to track all interactions and correspondence between service providers (*e.g.*, doctors, hospitals, *etc.*) and the NCMMIS system. ACS’s proposal described OmniTrack as “the centerpiece of the provider Customer Service Center.” ACS Proposal § G.6 (Provider Subsystem), at p.11. Section 4.1 of the RFP specifically identified the functionality of the “Provider Subsystem” as part of the new NCMMIS system.
15. Each of the bidders gave an oral presentation to the State regarding the technical architecture of its proposed solution. ACS’s oral presentation was on February 16, 2004.
16. Section 1.6 of the RFP (“Oral Presentation”) stated that in the event oral presentations were held, the “presentation proceedings shall be tape recorded.” The purpose of the presentations was “to provide an opportunity for the Offeror to clarify its Proposal. Original submissions shall not be supplemented, changed, or corrected in any way.” The oral presentations made by EDS, ACS, and Unisys were not tape recorded by the State.
17. The Proposal Evaluation Plan (“PEP”) developed by the State for the evaluation of Proposals required that if oral presentations were conducted, a written report be made substantiating what occurred at such proceedings. No written reports were created regarding the oral presentations made by EDS, ACS, and Unisys.
18. ITS Procurement Regulation 4.0 requires that all clarifications made by vendors during a procurement be memorialized in writing. There is no written substantiation of any clarifications ACS may or may not have made at its oral presentation to the State. One of the reviewer’s handwritten notes from the ACS oral presentation indicates that ACS did make a “CHG FROM PROPOSAL,” though the specifics of that change were not noted.
19. The final report reviewing the technical architecture of the ACS proposal was completed on March 3, 2004.
20. This final report concluded that the DRAMS and OmniTrack components of the ACS proposed solution, as well as the Pharmacy POS system, were of “2 tier design” and were “not consistent with the NCSTA.” The State concedes that the DRAMS and OmniTrack components are 2-tier subsystems.
21. The final report concluded that the CAS component of the ACS proposed solution was “n tier” in conformance with the Statewide Technical Architecture. This is a change from the February 11 draft report. The State claims that the architecture review team changed its conclusion from the prior draft based on information provided by ACS during its oral presentation. There was no report created describing that information.
22. The Recommendation for Award, which incorporated the findings of the technical architecture reviewers, concluded that the EDS and Unisys proposals had “the essential characteristics of an N-tier design” without exception. In contrast, the report found that only the “core solution” of the ACS proposal “has an n-tier design,” and that the 3 subsystems identified above (DRAMS, Omnitrack, and PharmacyPOS) “have a 2-tier design.” Recommendation for Award at 18. The RFP does not define any particular part of the vendor’s solutions as the “core solution.”
23. Neither Unisys nor EDS were informed of the possibility or given an opportunity by reviewers to amend their proposals to offer components that did not comply with the 3-tier requirement of the Statewide Technical Architecture.
24. Based on the point scoring evaluation scheme developed by the State for evaluating proposals, ACS received the most points out of any of the bidders. EDS received the second highest total of points, followed by Unisys.

CONCLUSIONS OF LAW

1. This proceeding is governed by Article 3A of the Administrative Procedure Act. Homoly v. State Bd. of Dental Examiners, 121 N.C. App. 695, 699, 468 S.E.2d 481, 484 (“[T]he contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely.”), review denied, 343 N.C. 306, 471 S.E.2d 71 (1996).
2. To withstand the scrutiny of judicial review, the decision of an agency cannot be supported “if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
 - (1) In violation of constitutional provisions;
 - (2) In excess of the statutory authority or jurisdiction of the agency;
 - (3) Made upon unlawful procedure;
 - (4) Affected by other error of law;
 - (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
 - (6) Arbitrary, capricious, or an abuse of discretion.”

N.C. Gen. Stat. § 150B-51(b); cf. N.C. Gen. Stat. § 150B-23(a) (pleading requirements for Article 3 proceedings).

3. Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. R. Civ. P. 56(c); see also 09 NCAC 06B .1015 (granting the undersigned authority to recommend summary dispositions in this proceeding). In opposing a motion for summary judgment, the non-moving party may not rely on conclusory allegations unsupported by facts. Lowe v. Bradford, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). Rather, the non-moving party “must set forth specific facts showing that there is a genuine issue for trial.” Id.
4. Under ITS regulations and the general precepts requiring fair competition in bidding, the State is not permitted to award a contract to a non-responsive bidder. 9 NCAC 06B.0302(1)(h). “Indeed, it is the duty of the public authorities to reject all bids that do not comply substantially with the terms of the proposal, for any other rule would destroy free competition.” 64 Am Jur. 2d Public Works and Contracts § 57 (2001). A disappointed bidder is prejudiced by the failure to reject a non-responsive bid if there was a substantial chance it would have received the contract award. See, e.g., Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999); see also Professional Food Services Mgmt., Inc. v. N.C. Dep’t of Admin., 109 N.C. App. 265, 270, 426 S.E.2d 447, 451 (1993) (bidder found to be prejudiced by improper rejection of conforming bid).
5. Section 4.1 of the RFP required that the bidders’ proposed solutions shall conform to the Statewide Technical Architecture. The ACS solution did not comply with the 3-tier requirement of the Statewide Technical Architecture. It is undisputed that DRAMS and OmniTrack are 2-tier subsystems and simply do not comply.
6. The State chose not to make any exceptions in the RFP to its own requirement that solutions shall conform to the Statewide Technical Architecture. Even if the RFP required construction on this point, it would be construed against the State as the drafter. WellPath Select, Inc. v. N.C. Teachers’ and State Employees’ Comprehensive Major Medical Plan, 2001 WL 34055817 (OAH 2001); Novacare Orthotics & Prosthetics East, Inc. v. Speelman, 137 N.C. App. 471, 528 S.E.2d 918 (2000) (“when an ambiguity is present in a written instrument, the court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language.”).
7. The State was permitted to exercise substantial discretion in the development of the RFP. But the State cannot, as it suggests, exercise “professional judgment” after proposals are submitted to determine whether parts of the Statewide Technical Architecture do not need to be followed. [Fenton Aff. ¶ 8.] In order to preserve the requirement of fair competition, bidders need to be informed prior to bid submission if their entire solution does not need to conform to RFP specifications. Otherwise, a level playing field cannot be maintained and the right of bidders to a fair competition is prejudiced. Here, for example, Section 4.1 of the RFP specifically listed the “Drug Rebate System” and “Provider Subsystem” as a part of the requested NCMMIS solution, and required a “solution” that “shall conform” to the Statewide Technical Architecture.

8. EDS was prejudiced under N.C. Gen. Stat. § 150B-51(b) because, as the highest rated proposal among the remaining two bidders, there was a substantial chance it would have received the contract award but for the failure of the State to disqualify the ACS proposal.
9. The State violated the RFP by failing to tape the vendor oral presentations pursuant to RFP § 1.6.
10. The State violated the PEP by failing to create a written report substantiating what occurred at the oral presentations.
11. The State violated ITP Procurement Regulation 4.0 to the extent the State claims that ACS made any clarifications at its oral presentation upon which it relies, because those clarifications were not memorialized in writing.
12. The failure to preserve an adequate record of the oral presentations in violation of the procedures set forth in the RFP, PEP, and ITS regulations also prejudiced the rights of EDS. The State asserts that it concluded the CAS component of the ACS solution was found to comply with the 3-tier requirement of the Statewide Technical Architecture based on the ACS oral presentation. The ability of the public, including EDS, to investigate what occurred at the oral presentations, as well as the State's ability to introduce a record of what occurred without resorting to post-award litigation affidavits, are destroyed by the failure to abide by these requirements. As noted by the Court of Appeals in Watkins v. Board of Dental Examiners, 358 N.C. 190, 198, 593 S.E.2d 764, 768 (2004), "the preservation of a record for judicial review [is] a cornerstone of the Administrative Procedure Act in that it enables a reviewing court to determine whether an agency . . . has engaged in a reasoned evaluation and analysis of [the] evidence presented." If agencies were permitted to violate their own rules for preservation of the record with impunity, and thus impede the ability of citizens to question decisions, agencies would undermine this "cornerstone" of the Act.

PROPOSED DECISION

Based on the foregoing, it is HEREBY PROPOSED that:

1. EDS's motion for summary judgment be GRANTED on the grounds that the State erred by failing to find ACS's bid nonresponsive to the RFP's mandatory requirement of compliance with the Statewide Technical Architecture because it is undisputed that the DRAMS and OmniTrack components of the ACS proposal did not comply with the 3-tier requirement of the Statewide Technical Architecture.

2. DHHS officials shall disqualify the ACS bid, cancel this procurement, issue a new RFP with any exceptions noted about fully complying with the STA, seek new proposals for award, and record all oral presentations made by offerors prior to making a decision on awarding a new contract for the North Carolina Medicaid Management Information System.

NOTICE

The agency making the final decision in this proceeding is required to give each party an opportunity to file exceptions and proposals and to present oral and written arguments to it before the decision is made. The Final Agency Decision is to be made by the State Chief Information Officer, Office of Information Technology Services. N.C. Gen. Stat. § 150B-40(e).

This the 11th day of January, 2005

Fred G. Morrison Jr.
Senior Administrative Law Judge