

NORTH CAROLINA REGISTER

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August 15, 2007

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For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

Rule Notices, Filings, Register, Deadlines, Copies of Proposed Rules, etc.

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Fiscal Notes & Economic Analysis

Office of State Budget and Management
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Raleigh, North Carolina 27603-8005
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(919) 733-0640 FAX

contact: Nathan Knuffman, Economist III nathan.Knuffman@ncmail.net (919)807-4728
Jonathan Womer, Asst. State Budget Officer jonathan.womer@ncmail.net (919)807-4737

Governor's Review

Reuben Young reuben.young@ncmail.net
Legal Counsel to the Governor (919) 733-5811
116 West Jones Street(919)
Raleigh, North Carolina 27603

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee
545 Legislative Office Building
300 North Salisbury Street
Raleigh, North Carolina 27611
(919) 733-2578
(919) 715-5460 FAX

contact: Karen Cochrane-Brown, Staff Attorney karenc@ncleg.net
Jeff Hudson, Staff Attorney jeffreyh@ncleg.net

County and Municipality Government Questions or Notification

NC Association of County Commissioners
215 North Dawson Street
Raleigh, North Carolina 27603
(919) 715-2893

contact: Jim Blackburn jim.blackburn@ncacc.org
Rebecca Troutman rebecca.troutman@ncacc.org

NC League of Municipalities
215 North Dawson Street
Raleigh, North Carolina 27603
(919) 715-4000

contact: Anita Watkins awatkins@nclm.org

NORTH CAROLINA REGISTER
Publication Schedule for January 2007 – December 2007

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

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.

State of North Carolina



MICHAEL F. EASLEY
GOVERNOR

EXECUTIVE ORDER NO. 120
ACCELERATING TEACHER AND OTHER PERSONNEL RECRUITMENT
AND THE IMPLEMENTATION OF NEEDED ACADEMIC SUPPORT PROGRAMS
FOR AT-RISK CHILDREN IN LIGHT OF JUDICIAL MANDATES,
BUDGET DEVELOPMENTS, AND IMPENDING SCHOOL OPENINGS

WHEREAS, the 2007 General Assembly enacted House Bill 2044, which keeps state government operating through July 31, 2007, and which provides additional funding for enrollment increases and which was signed into law on June 29, 2007; and

WHEREAS, in the budget submitted to the General Assembly for the 2007-09 fiscal years, I recommended funding to meet the increased operation costs of our public schools while providing for the needs of disadvantaged students; and

WHEREAS, public schools across the state must plan now for their opening in a few weeks, and the state court monitoring of North Carolina's effort to ensure a sound, basic education for every student continues; and

WHEREAS, in the school funding lawsuit, known as *Leandro*, the Court stated that at a minimum every school must be provided the resources necessary to support an effective instructional program within that school so that the educational needs of all children, including at-risk children, can be met; and

WHEREAS, the Court has isolated particular problems of meeting the needs of at-risk students in North Carolina's high schools and outlined the need for the state to bring together the "combined expertise, educators, resources, and money to fix the 'high school problem' so that the children attending those schools will be provided with the opportunity to obtain a sound, basic education;" and

WHEREAS, the Court has scheduled a *Leandro* hearing for August 1 and 2, 2007, to inquire into the proficiency of middle schools and the best practices for ensuring proficiency; and

WHEREAS, pre-kindergarten programs for at-risk children and class size reduction are necessary for improving educational opportunities and outcomes for children across North Carolina; and

WHEREAS, these programs are fundamental to addressing the needs of at-risk students, eliminating the achievement gap, reducing the State's persistently high dropout rate, increasing college enrollments, and meeting other educational challenges; and

WHEREAS, House Bill 1473, "The 2007 Appropriations Act," under consideration by the House and Senate has not been passed; and

WHEREAS, while the General Assembly continues working to ratify a final budget I can approve, the school year for the majority of North Carolina's children is about to begin and preplanning, hiring, and facilities preparation must take place.

NOW THEREFORE, in light of the factual circumstances set forth above, including the decision in *Leandro*, and under the legal authority vested in me as Governor by Article I, Section 15 of the Constitution of North Carolina (which states that "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."), Article III of the Constitution of North Carolina, and N.C.G.S. §143C-6-4, I hereby **AUTHORIZE AND INSTRUCT**:

Section 1. The Director of the More at Four Pre-Kindergarten Program to recruit the teachers necessary to expand the program; and

Section 2. The Superintendent of Public Instruction, working with and through local school system superintendents, to put into place the additional teachers and academic support programs needed to support the achievement of at-risk students in districts eligible for Disadvantaged Student Supplemental Funding and to keep class size ratios at current levels.

This Executive Order is effective July 20, 2007.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twentieth day of July in the year of our Lord two thousand and seven, and of the Independence of the United States of America the two hundred and thirty-first.




Michael F. Easley
Governor

ATTEST:


Elaine F. Marshall 
Secretary of State 

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



U.S. Department of Justice
Civil Rights Division

JKT:RPL:ER:jdh
DJ 166-012-3
2007-2825

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 12, 2007

Ms. Karen M. McDonald
City Attorney
P.O. Box 1513
Fayetteville, North Carolina 28302-1513

Dear Ms. McDonald:

This refers to four annexations (Ordinance Nos. 2006-12-499 and 2007-02-500 through 2007-02-502) and their designations to city council districts of the City of Fayetteville in Cumberland County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 18, 2007.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41).

Sincerely,

A handwritten signature in dark ink, appearing to read "John Tanner", written over a light blue circular stamp.

John Tanner
Chief, Voting Section



U.S. Department of Justice

Civil Rights Division

JKT:YR:JER:jdh
DJ 166-012-3
2007-2909

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 9, 2007

Michael Crowell, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, North Carolina 27602

Dear Mr. Crowell:

This refers to Session Law 2007-49 (H.B. 410), which changes the stagger of terms of the Cleveland County Board of Education, including the 2007 implementation schedule, in Cleveland County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 23, 2007.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "John Tanner".

John Tanner
Chief, Voting Section



STATE BOARD OF ELECTIONS

6400 Mail Service Center • Raleigh, North Carolina 27699-6400

GARY O. BARTLETT
Executive Director

MAILING ADDRESS:
P.O. BOX 27255
RALEIGH, NC 27611-7255

July 16, 2007

Mr. John Wallace
Wallace, Nordan & Sarda, L.L.P.
Post Office Box 12065
Raleigh, North Carolina 27605

Re: Request of the Hewett for Sheriff Committee
Pursuant to N.C.G.S. § 163-278.23

Dear Mr. Wallace:

I am in receipt of your letter dated June 29, 2007, in which you request an advisory opinion in behalf of your client, the Committee to Elect Ronald E. Hewett, and Deborah Isenhour, Treasurer. According to your letter, Sheriff Hewett would like to use his Committee funds to make expenditures for legal counsel and related costs in connection with inquiries made by the United States Attorney of the Eastern District of North Carolina. You indicate that these inquiries are related to Sheriff Hewett's candidacy and matters arising from his holding of public office.

Effective October 1, 2006, candidates must comply with the provisions of N.C.G.S. § 163-278.16B, when making campaign expenditures. Specifically, the statute provides eight permissible purposes for which a candidate or the candidate campaign committee can use contributions. The first two purposes provide for expenditures resulting from the campaign for public office by the candidate or the candidate's campaign committee and expenditures resulting from holding public office. Based on the information provided in your letter, the expenditures for legal counsel and related costs are either a result of campaigning for public office or as a result of holding public office. Therefore, expenditures from the campaign would be permissible for these purposes. If the inquiries are not a result of activities related to Sheriff Hewett's candidacy for public office or his holding of public office, the expenditures would not be permitted.

This opinion is based upon the information provided in your letter of June 29, 2007. If the information should change, you should evaluate whether this opinion is still applicable and binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

Sincerely,

Gary O. Bartlett
Gary O. Bartlett

cc: Julian Mann, III, Codifier of Rules

LOCATION: 506 NORTH HARRINGTON STREET • RALEIGH, NORTH CAROLINA 27603 • (919) 733-7173

NC WILDLIFE RESOURCES COMMISSION
NOTICE OF RESCHEDULED PUBLIC HEARING

15A NCAC 10F .0201 – Safety Equipment

The North Carolina Wildlife Resources Commission proposed amendment for the referenced rule was published July 2, 2007 in Issue 22:01 of the North Carolina Register. The public hearing is rescheduled as follows:

Date: *August 30, 2007*

Time: *2:00pm*

Location: *Wildlife Resources Commission Meeting Room, 5th floor, 1751 Varsity Drive, Raleigh, NC*

Please submit comments to Norman Young, Agency Council, Office of the NC Attorney General, P.O. Box 629, Raleigh, NC 27602, email nyoung@ncdoj.gov.

The comment period ends August 31, 2007.

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

Notice of Rule-making Proceedings is hereby given by NC Building Code Council in accordance with G.S. 150B-21.5(d).

Citation to Existing Rule Affected by this Rule-Making: NC Building Code.

Authority for Rule-making: G.S. 143-136; 143-138.

Reason for Proposed Action: To incorporate changes in the NC Building Codes as a result of rulemaking petitions filed with the NC Building Code Council and to incorporate changes proposed by the Council.

Public Hearing: September 10, 2007, 1:00PM, NC Department of Insurance, SHIIP, 11 South Boylan Avenue, Raleigh, NC 27603.

Comment Procedures: Written comments may be sent to Chris Noles, Secretary, NC Building Code Council, c/o NC Department of Insurance, 1202 Mail Service Center, Raleigh, NC 27699-1202. Comment period expires on October 15, 2007.

Statement of Subject Matter:

1. Request by David Smith, Chairman of the Residential Standing Committee, to amend the 2006 NC Building Code, Section 1609.2. The proposed amendment is as follows:

1609.2 DEFINITIONS. WIND-BORNE DEBRIS REGION. Areas within ~~hurricane-prone regions~~ 1500 feet (456 m) of the mean high water line of the Atlantic Ocean defined as that area east of the inland waterway from the NC/SC State line north to Beaufort Inlet; from that point to include the barrier islands to the NC/VA State line.

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 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commissioner of Agriculture intends to adopt the rules cited as 02 NCAC 58 .0101 - .0108.

Proposed Effective Date: December 1, 2007

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rules by submitting a request in writing no later than August 30, 2007, to David S. McLeod, 1001 Mail Service Center, Raleigh, NC 27699-1001.

Reason for Proposed Action: The Agricultural Development and Farmland Preservation Trust Fund was designed to be utilized in funding and coordinating projects that encourage the preservation of certain agricultural, horticultural, and forest lands throughout North Carolina and to foster the growth, development, and sustainability of family farms. In carrying out its mission, the Trust Fund will distribute grants for preservation projects and agricultural development programs. The proposed rules are designed to establish procedures for: (1) the receipt of applications for Trust Fund disbursements; (2) the evaluation of those applications to determine eligibility for funding; and (3) the selection of those that will receive funding. The proposed rules also impose requirements upon those entities whose grant applications are selected for funding, such as the execution of a grant agreement and certain reporting and recordkeeping criteria.

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

Comments may be submitted to: David S. McLeod, 1001 Mail Service Center, Raleigh, NC 27699-1001, phone (919) 733-7125 extension 238, fax (919) 716-0090, email david.mcleod@ncmail.net

Comment period ends: October 15, 2007

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S.

150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

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

CHAPTER 58 - AGRICULTURAL DEVELOPMENT AND FARMLAND PRESERVATION TRUST FUND

SECTION .0100 - GENERAL PROVISIONS

02 NCAC 58 .0101 PURPOSE

This Chapter describes the operating procedures for the Agricultural Development and Farmland Preservation Trust Fund Advisory Committee and the Chair under the guidance of the North Carolina Department of Agriculture and Consumer Services implementing the Agricultural Development and Farmland Preservation Trust Fund for continuation and preservation of agriculture in North Carolina. Procedures and guidelines for participating applicants are also described. The purpose of the program is to fund projects to encourage the preservation of qualifying agricultural, horticultural, and forestlands to foster the growth, development, and sustainability of family farms.

Authority G.S. 106-744.

02 NCAC 58 .0102 FUNDING PRIORITIES

As part of its authority to develop guidelines and criteria for eligibility for disbursement of funds, to determine grants to be awarded, and to develop procedures for applying for and reviewing applications for grants from the Agricultural Development and Farmland Preservation Trust Fund, the Commissioner with the advise of the Advisory Committee may:

- (1) periodically set a list of funding priorities which it will follow in awarding grants for qualified agricultural, horticultural and

- forestland preservation projects and agricultural development programs;
- (2) request proposals to address specific funding priorities or to encourage specific farmland preservation projects or agricultural development programs intended to encourage farmland preservation and protect the State's agricultural economy, stabilize and maintain local tax bases, and optimally use natural resources; and
- (3) work cooperatively with other government agencies as well as agricultural, conservation, and rural entities to develop plans to maximize agricultural, horticultural, and forestland preservation efforts.

Authority G.S. 106-744.

02 NCAC 58 .0103 DEFINITIONS

The following terms used in this Chapter have the following meanings:

- (1) "Advisory Committee" means the Agricultural Development and Farmland Preservation Trust Fund Advisory Committee.
- (2) "ADFPTF," "ADFP Trust Fund," or "Trust Fund" means the Agricultural Development and Farmland Preservation Trust Fund.
- (3) "Agricultural development program" means a public or private enterprise program that will promote profitable and sustainable family farms through assistance to farmers in developing and implementing plans for the production of food, fiber, forest, and value-added products, agritourism activities, marketing and sales of agricultural products produced on the farm, and other agriculturally related business activities.
- (4) "Allocation" means the annual share of the State's appropriation to participating districts.
- (5) "American Tree Farm Member" refers to being a member of the American Tree Farm System, a program of the American Forest Foundation, committed to sustaining forests, watershed and healthy habitats through the power of private stewardship.
- (6) "Applicant" means a nonprofit conservation organization or county who applies for funds from the ADFP Trust Fund.
- (7) "Beginning farmer" is defined in G.S. 143-215.74.
- (8) "Century Farm Member" means a farm that has had continuous ownership by a family for 100 years or more and is enrolled in the North Carolina Department of Agriculture and Consumer Services' "Century Farms" program.
- (9) "Chair" or "Commissioner" means the Chair of the Advisory Committee who is also the Commissioner of Agriculture.
- (10) "Conservation Plan of Operation (CPO)" means a written plan scheduling the applicant's decisions concerning land use, and both cost shared and noncost shared Best Management Practices to be installed and maintained on an operating unit or farm.
- (11) "Department" or "NCDA&CS" means the North Carolina Department of Agriculture and Consumer Services.
- (12) "Forest Management Plan" is a written document listing activities that enhance or improve forest resources (wildlife, timber, soil, water, recreation, and aesthetics) on private land over a period of time.
- (13) "Forest Stewardship Program Member" means a member of the Forest Stewardship Program (FSP) authorized by the Cooperative Forestry Assistance Act of 1978. FSP provided technical assistance, through State forestry agency partners, to nonindustrial private forest (NIPF) owners to encourage and enable active long-term forest management. A primary focus of the Program is the development of comprehensive, multi-resource management plans that provide landowners with the information they need to manage their forests for a variety of products and services.
- (14) "Goodness Grows in NC Member" means a grower or producer in North Carolina that is enrolled in the North Carolina Department of Agriculture and Consumer Services' "Goodness Grows in NC" program.
- (15) "In-kind contribution" means a contribution from a source other than the Trust Fund towards the grant requested by the ADFP Trust Fund. In-kind contributions shall be approved by the ADFP Trust Fund and can include but not be limited to labor, fuel, machinery use, and supplies and materials necessary for completing the project or program.
- (16) "Landowner" means any natural person or other legal entity, including a governmental agency, who holds either an estate or freehold (such as a fee simple absolute or a life estate) or an estate for years or from year to year in land, but does not include an estate at will or by sufferance in land.
- (17) "Limited resource farmer" is defined in G.S. 143-215.74.
- (18) "Nonprofit conservation organization" is any nonprofit organization that provides assistance to landowners to protect their lands and can legally hold agricultural conservation easements.
- (19) "Project" means an agricultural conservation easement, conservation agreement, or an agricultural development program of which an applicant is requesting funds to complete.

- (20) "Transactional costs" means the cost including labor, administrative work, surveys, deed recording, legal expenses, and other direct costs required to establish a conservation easement or agricultural agreement. This does not include indirect costs or administrative overhead.
- (21) "Waste Management Plan" means a plan that details the amount of waste generated, the fields and associated crops receiving the waste, and the Best Management Practices specific to the operation.

Authority G.S. 106-744.

02 NCAC 58 .0104 ELIGIBLE APPLICANTS

On behalf of farmers and forest landowners, organizations who apply to the ADFPTF must be a nonprofit conservation organization or county.

Authority G.S. 106-744.

02 NCAC 58 .0105 EVALUATION OF APPLICATIONS

(a) Applicants should submit two unbound complete applications suitable for photocopying. Applications must be sent by Fed-Ex, UPS, certified mail, or hand-delivered to: NCDA&CS, NCADFP Trust Fund at 2 West Edenton Street, Raleigh, NC 27601.

(b) Two separate applications will be online or available from the Department as noted in Paragraphs (c) and (d) of this Rule.

(c) To be eligible for consideration for funding for agricultural conservation easements or agricultural agreements applicants shall complete the Agricultural Development and Farmland Preservation Application Form for Conservation Easements and Agricultural Agreements which contain the following information:

- (1) identifying information;
- (2) a description of the eligible type of organization of the applicant;
- (3) project affiliations, matching funds, and partnerships;
- (4) whether funds are for an agricultural conservation easement or an agricultural agreement and the term years;
- (5) current land value assessment, requested amount of funds, estimated easement value, project completion date;
- (6) operation management plans;
- (7) values relevant to the easement;
- (8) agricultural, horticultural, or forestry property inventory;
- (9) what transition plans are in place to continue operations for the future;
- (10) threats of conversion;
- (11) conservation and environmental concerns; and
- (12) listed attachments.

(d) To be eligible for consideration for funding for agricultural development programs applicants shall complete the

Agricultural Development and Farmland Preservation Application Form for Public and Private Enterprise Programs, which contain the following information:

- (1) identifying information;
- (2) a description of the eligible type of organization of the applicant;
- (3) project affiliations, matching funds, and partnerships;
- (4) a description of goals, target audience, and success measurements; and
- (5) listed attachments.

(e) Each completed application shall be evaluated by the staff based on the information provided in the application and in accordance with the ADFPTF criteria described in this Rule.

(f) The staff shall review all applications for completeness. If an application is incomplete after the application deadline, the applicant may be asked to reapply for the next grant cycle.

(g) During the review and evaluation of proposals, the staff will report on any site visits that may be required for full consideration of the grant proposal. Applications will be chosen on criteria score and site visits by the staff.

(h) The Advisory Committee shall review the project evaluations and other relevant data prepared by the applicant and by ADFPTF staff. The Advisory Committee shall make recommendations to the Chair on the approved projects for funding.

(i) The Commissioner and Advisory Committee shall consider the relative needs of the farmland preservation project and determine the proportion of available funds to be allocated for each eligible project.

(j) Grants will be awarded contingent on the availability of sufficient funds to do so. Funds will be conveyed to grantees through contracts with the Trust Fund. If it is determined that grant funds are not being used for the purpose for which they were awarded, the Trust Fund may cease making payments under the grant schedule until the problem has been resolved or may demand immediate return of any unspent money and interest from the grant. Grantees must reimburse the Trust Fund any funds that are determined to have not been spent for the purpose for which they were granted. Grantees must return any grant money which remains unspent at the conclusion of the grant project, with any interest earned on grant money.

(k) The following general criteria shall be used to evaluate conservation easement or agricultural agreement projects only:

- (1) parcel information;
- (2) planning for the future; and
- (3) site visits.

(l) The following general criteria shall be used to evaluate agricultural development programs only:

- (1) project description;
- (2) project implementation; and
- (3) applicant interview.

(m) The Commissioner and Advisory Committee shall also consider the following factors when evaluating projects:

- (1) the geographic distribution of projects;
- (2) the presence or absence of other funding sources;
- (3) the level of compliance with prior grant agreements;

- (4) the amount of funds available;
- (5) the amount of funds requested;
- (6) priority funding map; and
- (7) other relevant information in the application.

Authority G.S. 106-744.

02 NCAC 58 .0106 GRANT AGREEMENT

- (a) Upon approval, a written agreement shall be executed between the grant recipient(s) and the ADFPTF.
- (b) The agreement shall define the ADFPTF's and grant recipient's responsibilities and obligations, the project period, project scope and the amount of grant assistance.
- (c) The approved application and support documentation shall become a part of the grant agreement.
- (d) The grant agreement may be amended upon mutual consent and approval by the Chair and the grant recipient(s). The grant recipient(s) shall submit a written request to the ADFPTF.
- (e) Projects may not begin until the ADFPTF and grant recipient(s) sign the agreement.

Authority G.S. 106-744.

02 NCAC 58 .0107 REPORTING

- (a) Grant recipients shall submit written progress reports at six-month intervals or upon completion of the project, whichever is sooner. Written reports shall describe the status of the project, progress toward achieving program objectives, notable occurrences and any significant problems encountered and steps taken to overcome the problems. Upon completion of the project, the successful applicant must make a final written report to the ADFPTF which shall include project accomplishments and benefits, all expenditures by line item as established in the approved budget, and verification of the number of hours or money in matching funds.
- (b) The staff shall review the progress reports for completeness, which shall include a showing of how the project is meeting its stated goals and performance standards. If the staff finds that the report is deficient in showing how the project is meeting its stated goals and performance standards, the grantee will be notified of the deficiency and must provide a changed and corrected report within 30 working days. If a corrected or changed report is not received in the specified time the Trust Fund may withhold the next grant payment.

Authority G.S. 106-744.

02 NCAC 58 .0108 RECORDS

- (a) Successful applicants must keep financial and other records of the project for a period of three years, following completion of the project, or until audited. Such records will be made available to the Trust Fund at their request. Recipients should contact Trust Fund staff at the North Carolina Department of Agriculture and Consumer Services before destroying records or in the event that records are destroyed.
- (b) All applications, attachments to applications and written reports received by the Trust Fund are public records, unless determined otherwise by court order or other applicable law.

Authority G.S. 106-744.

TITLE 11 – DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Home Inspector Licensure Board/ NC Department of Insurance intends to adopt the rules cited as 11 NCAC 08 .1117 - .1119 and amend the rules cited as 11 NCAC 08 .1011, .1103, .1319.

Proposed Effective Date: *December 1, 2007*

Public Hearing:

Date: *September 14, 2007*

Time: *9:00 a.m.*

Location: *Wingate Inn, 6057 Nations Ford Road, Charlotte, NC 28217*

Reason for Proposed Action: *Allows a one-year suspension of the renewal fees for Home Inspector & Associate Home inspector licenses and establishes guidelines for "Summary" to be included in written report provided to client.*

Procedure by which a person can object to the agency on a proposed rule: *The Home Inspector Licensure Board/ NC Department of Insurance will accept written objections to these rules until the expiration of the comment period on October 15, 2007.*

Comments may be submitted to: *Ellen K. Sprenkel, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919) 733-4529, fax (919) 733-7405, email esprenkel@ncdoi.net*

Comment period ends: *October 15, 2007*

Procedure for Subjecting a Proposed Rule to Legislative Review: *If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.*

Fiscal Impact:

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

**CHAPTER 08 - ENGINEERING AND BUILDING CODES
DIVISION**

**SECTION .1000 - N.C. HOME INSPECTOR LICENSURE
BOARD**

11 NCAC 08 .1011 FEE SCHEDULE

(a) The following fees apply to the licensure of home inspectors:

Application for Home Inspector License	\$25.00
Application for Associate Home Inspector License	\$15.00
Home Inspector Examination	\$75.00
Associate Home Inspector Examination	\$75.00
Initial Issuance of Home Inspector License	\$150.00
Initial Issuance of Associate Home Inspector License	\$100.00
Annual Renewal of Home Inspector License	\$150.00
Annual Renewal of Associate Home Inspector License	\$100.00
Late Renewal Penalty Fee - Home Inspector License	\$25.00
Late Renewal Penalty Fee - Associate Home Inspector License	\$15.00
Copies of Board Rules and License Standards	\$5.00

(b) The home inspector and the associate home inspector initial issuance license fees are due after successful completion of the examination. The Board shall not issue a license until it receives the appropriate fee. The license shall be valid from the date of issue until the following September 30.

(c) The one hundred fifty dollar (\$150. 00) fee for the Annual Renewal of Home Inspector License and the one hundred dollar (\$100.00) fee for the Annual Renewal of Associate Home Inspector License assessed under Paragraph (a) of this Rule are suspended for a one-year period beginning October 1, 2008, ending on September 30, 2009. This license fee suspension does not apply to late license renewals or any inactive licenses that are not currently active on October 1, 2008.

Authority G.S. 143-151.49; 143-151.55; 143-151.57.

**SECTION .1100 - N.C. HOME INSPECTOR STANDARDS
OF PRACTICE AND CODE OF ETHICS**

11 NCAC 08 .1103 PURPOSE AND SCOPE

(a) Home inspections performed according to this Section shall provide the client with an understanding of the property conditions, as inspected at the time of the home inspection.

(b) Home inspectors shall:

- (1) Provide a written contract, signed by the client, before the home inspection is performed that shall: contract in accordance with Rule .1117 of this Section;
 - (A) State that the home inspection is in accordance with the Standards of Practice of the North Carolina Home Inspector Licensure Board;

- ~~(B) Describe what services shall be provided and their cost; and~~
- ~~(C) State, when an inspection is for only one or a limited number of systems or components, that the inspection is limited to only those systems or components;~~

(2) Inspect readily visible and readily accessible installed systems and components listed in this Section; and

(3) Submit a written report to the client ~~that shall:~~ in accordance with Rule .1118 of this Section; ~~and~~

~~(A) Describe those systems and components required to be described in Rules .1106 through .1115 of this Section;~~

~~(B) State which systems and components designated for inspection in this Section have been inspected, and state any systems or components designated for inspection that were not inspected, and the reason for not inspecting;~~

~~(C) State any systems or components so inspected that do not function as intended, allowing for normal wear and tear, or adversely affect the habitability of the dwelling;~~

~~(D) State whether the condition reported requires repair or subsequent observation, or warrants further investigation by a specialist; and~~

~~(E) State the name, license number, and signature of the person supervising the inspection and the name, license number, and signature of the person conducting~~

(4) Follow a standard report format as specified in Rule .1119 of this Section.

(c) This Section does not limit home inspectors from:

- (1) Reporting observations and conditions or rendering opinions of items in addition to those required in Paragraph (b) of this Rule; or
- (2) Excluding systems and components from the inspection if requested by the client, and so stated in the written contract.

~~(d) Written reports required by this Rule for pre-purchase home inspections of three or more systems shall include a separate section labeled "Summary" that includes any system or component that:~~

- ~~(1) does not function as intended or adversely affects the habitability of the dwelling; or~~
- ~~(2) warrants further investigation by a specialist or requires subsequent observation.~~

~~This summary shall not contain recommendations for routine upkeep of a system or component to keep it in proper functioning condition or recommendations to upgrade or enhance the function or efficiency of the home. This summary~~

~~shall contain the following statements: "This summary is not the entire report. The complete report may include additional information of concern to the client. It is recommended that the client read the complete report."~~

Authority G.S. 143-151.49.

11 NCAC 08 .1117 CONTRACT BETWEEN INSPECTOR AND CLIENT

The contract between the home inspector and the home inspector's client shall:

- (1) Be in writing and signed by the client;
- (2) Be provided to the client before the home is inspected;
- (3) State that the home inspection is in accordance with the Standards of Practice of the North Carolina Home Inspector Licensure Board;
- (4) Describe what services shall be provided and their cost; and
- (5) State, when an inspection is for only one or a limited number of systems or components, that the inspection is limited to only those systems or components.

Authority G.S. 143-151.49.

11 NCAC 08 .1118 REPORT TO CLIENT

The home inspector shall provide the client with a written report, which report shall:

- (1) Describe those systems and components required to be described in Rules .1106 through .1115 of this Section;
- (2) State which systems and components designated for inspection in this Section have been inspected, and state any systems or components designated for inspection that were not inspected, and the reason for not inspecting;
- (3) State any systems or components so inspected that do not function as intended, allowing for normal wear and tear, or adversely affect the habitability of the dwelling;
- (4) State whether the condition reported requires repair or subsequent observation, or warrants further investigation by a specialist; and
- (5) State the name, license number, and signature of the person supervising the inspection and the name, license number, and signature of the person conducting the inspection.

Authority G.S. 143-151.49.

11 NCAC 08 .1119 STANDARD REPORT FORMAT

(a) The cover page of the home inspector's report to the client shall include the inspection property address, client name(s), date of the inspection, inspector's name, license number, and signature, and if applicable, associate inspector's name, license number, and signature.

(b) All written reports for home inspections of three or more systems shall include a separate section entitled, "Summary," which shall follow the cover page.

(c) The summary shall include any system or component that does not function as intended and is in need of repair or warrants further investigation by a specialist. The summary shall not contain any recommendation for routine upkeep of a system or component to keep it in proper functioning condition or contain any recommendation to upgrade or enhance the function, efficiency, or safety of the home. As used in the summary, "repair" refers to a system or component that is not functioning as intended and is in need of repair or replacement; and "investigate" refers to a system or component that needs additional investigation by a specialist to determine if repairs are needed. The Summary shall contain the following statement:

"This summary is not the entire report. The complete report may include additional property information and safety concerns of interest to the client. It is recommended that the client read the complete report."

(d) The summary shall follow the same order as the Standards of Practice, and shall be organized by systems in the same manner as the Standards of Practice. Each system section shall have a header identifying the section, and shall be labeled the same as the section of the Standards of Practice. "Repair" and "investigate" items shall be placed in the appropriate system section. Items needing repair shall each have the heading, "Repair." Items needing additional investigation to determine if repairs are needed shall each have the heading, "Investigate." Section headings shall be as follows:

- (1) Structural components;
- (2) Exterior;
- (3) Roofing;
- (4) Plumbing;
- (5) Electrical;
- (6) Heating;
- (7) Air conditioning;
- (8) Interiors;
- (9) Insulation and ventilation; and
- (10) Built-in kitchen appliances.

(e) The body of the report shall follow the summary, and shall be organized by systems in the same manner as the Summary. Each system shall use the same headings as used in the summary.

(f) All pages in the report, including the cover page, shall be numbered "page x of y" ("x" being the current page and "y" being the total number of pages). Each page shall also contain the client's name and the address of the home inspected.

Authority G.S. 143-151.49.

SECTION .1300 - HOME INSPECTOR CONTINUING EDUCATION

11 NCAC 08 .1319 APPLICATION FOR ORIGINAL APPROVAL OF AN ELECTIVE COURSE

A person seeking original approval of a proposed elective course shall make application on a form prescribed by the Board. The course shall be submitted to the Board for approval no less than 45 days before the course presentation date. The Board shall not

accept an application for original approval between July 1 and September 30. This restriction shall not apply when an applicant is seeking approval to conduct a course for which another sponsor has obtained approval. The applicant shall submit a nonrefundable fee of one hundred fifty dollars (\$150.00) per course which may be in the form of a check or money order payable to the Home Inspector Licensure Board. The application shall be accompanied by a copy of the course plan or instructor's guide for the course and a copy of materials that will be provided to students. An applicant that is not a resident of North Carolina shall also file with the application a consent to service of process and pleadings.

Authority G.S. 143-151.49(13); 143-151.64.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Insurance intends to adopt the rule cited as 11 NCAC 11F .0406.

Proposed Effective Date: December 1, 2007

Public Hearing:

Date: September 4, 2007

Time: 10:30 a.m.

Location: 430 N. Salisbury Street, Raleigh, NC 27603

Reason for Proposed Action: The rule incorporates a recent amendment made by the NAIC to Actuarial Guideline XXXVIII.

Procedure by which a person can object to the agency on a proposed rule: The Department of Insurance will accept written objections to this rule until the expiration of the comment period on October 15, 2007.

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

Comment period ends: October 15, 2007

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
- ☐ Local
- ☐ Substantive (\geq \$3,000,000)
- ☒ None

CHAPTER 11 - FINANCIAL EVALUATION DIVISION

SUBCHAPTER 11F - ACTUARIAL

SECTION .0400 – COMMISSIONER'S RESERVE VALUATION METHOD

11 NCAC 11F .0406 LIMITED USE OF ANTICIPATED WITHDRAWAL RATES

(a) This rule applies only to universal life insurance policies and certificates issued after December 31, 2006, and before January 1, 2011, that contain a secondary guarantee that the death benefits will remain in effect as long as the accumulation of premiums paid satisfies the secondary guarantee requirement stated in the policy or certificate.

(b) For purposes of applying 11 NCAC 11F .0405(b) and 11 NCAC 11F .0405(c), a withdrawal rate of no more than two percent per year for the first five policy years, followed by no more than one percent per year to the policy anniversary specified in the following table, and zero percent thereafter shall be used. If the duration determined by reference to the table is less than five policy years, a withdrawal rate of no more than two percent per year shall be used through that duration, with zero percent per year used thereafter.

<u>Issue Age</u>	<u>Duration</u>
0-50	Policy Duration 30 years.
51-60	Duration at which policyholder reaches attained age 80.
61-70	Policy Duration 20 years.
71-89	Duration at which policyholder reaches attained age 90.
90 and over	No withdrawal rate assumption allowed.

Authority G.S. 58-2-40; 58-58-50(b); 58-58-50(l).

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Insurance intends to adopt the rule cited as 11 NCAC 16 .0801.

Proposed Effective Date: December 1, 2007

Public Hearing:

Date: September 4, 2007

Time: 10:30 a.m.

Location: 3rd Floor Hearing Room, Dobbs Building, 430 N. Salisbury St., Raleigh, NC

Reason for Proposed Action: Prescribes language that actuaries are required to use to certify statutory compliance with the Small Group Health Insurance Reform Act.

Procedure by which a person can object to the agency on a proposed rule: *The Department of Insurance will accept written objections to this rule until the expiration of the comment period on October 15, 2007.*

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

Comment period ends: *October 15, 2007*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

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

CHAPTER 16 - ACTUARIAL SERVICES DIVISION

SECTION .0800 - SMALL EMPLOYER GROUP HEALTH INSURANCE ACTUARIAL CERTIFICATION

11 NCAC 16 .0801 SMALL EMPLOYER GROUP HEALTH INSURANCE ACTUARIAL CERTIFICATION

(a) To fulfill the requirements of G.S. 58-50-130(f), each small employer group carrier, as defined in G.S. 58-50-110(23), shall use the following language in its actuarial certification:

(1) The opening paragraph shall indicate the actuary's relationship to the carrier and the actuary's qualifications to provide the certification.

(A) For a carrier actuary, the opening paragraph shall read as follows: "I, (name and title of actuary), am an (officer, employee) of (name of carrier) and am a member of the American Academy of Actuaries. I am familiar with G.S. 58-50-130."

(B) For a consulting actuary, the opening paragraph shall read as follows: "I, (name and title of consulting actuary), am associated with (name of actuarial consulting firm) and am a member of

the American Academy of Actuaries. I have been involved in the preparation of the small employer group health insurance premium rates for the (name of carrier) and am familiar with G.S. 58-50-130."

(2) A scope paragraph shall be included, which shall read as follows: "I have examined the actuarial assumptions and methodology used by (name of carrier) in determining small employer group health benefit plan premium rates and the procedures used by (name of carrier) in implementing the small employer group health benefit plan rating provisions of G.S. 58-50-130."

(3) If the actuary has examined the underlying records, the scope paragraph shall read as follows: "I have examined the underlying records and summaries of data used by (name of carrier) in determining small employer group health benefit plan premium rates and procedures used by (name of carrier) in implementing the small employer group health benefit plan rating provisions of G.S. 58-50-130."

(4) If the actuary has not examined the underlying records, but has relied upon listings and summaries of data prepared by an officer of the company, the scope paragraph shall read as follows: "I have not examined the underlying records used by (name of carrier) in determining small employer group health benefit plan premium rates and procedures used by (name of carrier) in implementing the small employer group health benefit plan rating provisions of G.S. 58-50-130. I have relied upon listings and summaries of data prepared by (name and title of company officer) as certified in the attached statement."

(5) The certification paragraph shall read as follows: "I certify that for the period from January 1, (year) to December 31, (year) the rating method(s) of (name of carrier) are actuarially sound and that:

(A) The rating factors used by (name of carrier) in its adjusted community rating (ACR) methodology are being applied consistently, not being applied individually in the final premium rate charged to an employee, and being applied uniformly to the premium rate charged to all eligible employee enrollees in a small employer group.

(B) Periodic adjustment factors that give recognition to medical claim or medical inflation trends are based on (name of carrier)'s entire small employer group health benefit plan

- business, the same in a given month for a new and a renewing small employer group with the exception of Part (I) of this Subparagraph, and the same for 12 consecutive months for a given small employer group.
- (C) All small employer groups within a given medical care system have the same medical care system factor.
- (D) The medical care system factors produce rates that are not excessive, not inadequate and are not unfairly discriminatory in the medical care system areas and are revenue neutral to the small employer group carrier for its small group business in North Carolina.
- (E) The medical care system factors reflect only the relative differences in expected costs.
- (F) Rate differences because of differences in health benefit plan design only reflect benefit differences.
- (G) Participation and contribution requirements do not vary by policy form.
- (H) Stop loss, catastrophic, or reinsurance coverage provided to small employers complies with the underwriting, rating, and other applicable standards in G.S. 58-50-100 through G.S. 58-50-156.
- (I) The percentage increase in the premium rate charged to a small employer for a new rating period does not exceed the sum of the following: the percentage change in the ACR as measured from the first day of the previous rating period to the first day of the new rating period; any adjustment, not to exceed 15 percent annually, because of claim experience, health status, or duration of coverage of the employees or dependents of the small employer; and any adjustment because of change in coverage or change in case characteristics of the small employer group.
- (J) Any adjustment because of duration of coverage only reflects a difference between first year and renewal coverage.
- (K) (Name of carrier) uses an ACR methodology as prescribed in G.S. 58-50-130(b)(1) and that the premium rates charged during a rating period to small employer groups with similar case characteristics for the same coverage do not deviate from the adjusted community rate by more than 25 percent for any reason, including differences in administrative costs and claims experience.
- (L) Differences in administrative costs, defined as all non-medical care costs, within a policy form are reflected within the 25 percent deviation from the ACR.
- (M) (Name of carrier) only uses the following demographic factors, as prescribed by G.S. 58-50-130(b)(2): age, gender, family size, medical care system, and industry.
- (N) All small employer group health benefit plans are guaranteed issue as prescribed by G.S. 58-68-40.
- (O) The industry rate factor associated with any industry classification divided by the lowest industry rate factor associated with any other industry classification shall not exceed 1.2.
- (P) All small employer group health benefit plan premium rates are guaranteed for 12 months as prescribed in G.S. 58-50-130(b)(3).
- (Q) All small employer group health benefit plan premium rate increases include a common premium rate increase shared by all small employer group business.
- (R) The premium rates exhibit a reasonable relationship to the benefits provided by the policies and are not excessive, are not inadequate, and are not unfairly discriminatory."
- (b) A description and sample numerical demonstration of how the small employer group health benefit plan premium rates were tested for compliance.
- (c) If the certifying actuary has not examined the underlying records or summaries, the person or persons who performed the examination of the underlying records or summaries shall provide the following certification, which shall be signed, dated, and attached to the actuarial certification: "I, (name and title of certifying officer), am (title) of (name of insurer). I hereby affirm that the listings and summaries of data for (name of carrier) prepared for and submitted to (name of certifying actuary) were prepared under my direction and, to the best of my knowledge and belief, are accurate and complete."
- (d) If the certifying actuary submits a qualified certification, the following information must be attached to the small employer group actuarial certification:
- (1) A description of the incident or incidents that resulted in the certifying actuary submitting a qualified certification.

- (2) A submission of a remedial plan to bring the incidents described in Subparagraph (1) of this Paragraph into compliance with G.S. 58-50-130(b).

Authority G.S. 58-2-40; G.S. 58-50-130.

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Sheriffs' Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 10B .0103, .0204 - .0206, .0302, .2005, .2007.

Proposed Effective Date: *January 1, 2008*

Public Hearing:

Date: *August 30, 2007*

Time: *9:00 a.m.*

Location: *114 W. Edenton Street, Raleigh (Old Education Bldg., Room G22)*

Reason for Proposed Action:

12 NCAC 10B .0103 and .0302 – *Proposed amendment to clarify what will satisfy the requirement for High School Graduation or Equivalent.*

12 NCAC 10B .0204 - .0206 – *Both Commissions now require in-service training and unfortunately a small number of officers, who the Criminal Justice Commission suspended, try to transfer over to a Sheriff's Office without having completed in-service training. The changes are meant to stop this practice.*

12 NCAC 10B .2005 and .2007 – *Proposed amendment to set out the 2008 In-service training requirement which will improve performance, reduce errors and reduce the number of lawsuits, and protect the public health, safety and welfare by ensuring each officer remains knowledgeable in their areas of enforcement, corrections, or communications.*

Procedure by which a person can object to the agency on a proposed rule: *Objections shall be submitted in writing explaining the reasons for objection and specifying the portion of the rule to which the objection is being made. Such objection should be sent to: Julia Lohman, Sheriffs' Standards Division, NC Department of Justice, P.O. Box 629, Raleigh, NC 27602.*

Comments may be submitted to: *Julia Lohman, Post Office Box 629, Raleigh, NC 27602, phone (919) 716-6460, fax (919) 716-6753, email jlohman@ncdoj.gov*

Comment period ends: *October 15, 2007*

Procedure for Subjecting a Proposed Rule to Legislative Review: *If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting*

review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact: A copy of the fiscal note can be obtained from the agency.

- ☒ **State**
- ☒ **Local**
- ☒ **Substantive ($\geq \$3,000,000$)**
- ☐ **None**

CHAPTER 10 - N.C. SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION

SUBCHAPTER 10B - N.C. SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION

SECTION .0100 - COMMISSION ORGANIZATION AND PROCEDURES

12 NCAC 10B .0103 DEFINITIONS

In addition to the definitions set forth in G.S. 17E-2, the following definitions apply throughout this Chapter, unless the context requires otherwise:

- (1) "Appointment" as it applies to a deputy sheriff means the date the deputy's oath of office is administered; and as it applies to a detention officer means either the date the detention officer's oath of office was administered, if applicable, or the detention officer's actual date of employment as reported on the Report of Appointment (Form F-4) by the employing agency, whichever is earlier; and as it applies to a telecommunicator, the telecommunicator's actual date of employment as reported on the Report of Appointment (Form F-4T).
- (2) "Convicted" or "Conviction" means and includes, for purposes of this Chapter, the entry of:
 - (a) a plea of guilty;
 - (b) a verdict or finding of guilt by a jury, judge, magistrate, or other adjudicating body, tribunal, or official, either civilian or military; or
 - (c) a plea of no contest, nolo contendere, or the equivalent.
- (3) "Department Head" means the chief administrator of any criminal justice agency or communications center. Department head includes the sheriff or a designee appointed in writing by the Department head.

- (4) "Director" means the Director of the Sheriffs' Standards Division of the North Carolina Department of Justice.
- (5) "Division" means the Sheriffs' Standards Division.
- (6) "High School Graduation" means successful completion of all requirements necessary to satisfy the North Carolina Course of Study Graduation Requirements in this state as set forth in G.S. 115C or in the jurisdiction where the student graduated. A certificate or diploma reflecting the person accomplished some but not all graduation requirements is not sufficient. The high school must meet the compulsory attendance requirements in the jurisdiction in which the school is located.
~~"School" means graduation from a high school that meets the compulsory attendance requirements in the jurisdiction in which the school is located.~~
- (7) "Enrolled" means that an individual is currently participating in an on-going presentation of a commission-certified basic training course which has not been concluded on the day probationary certification expires.
- (8) "Essential Job Functions" means those tasks deemed by the agency head to be necessary for the proper performance of a justice officer.
- (9) "Lateral Transfer" means certification of a justice officer when the applicant for certification has previously held general or grandfather certification as a justice officer or a criminal justice officer as defined in G.S. 17C-2(c), excluding state correctional officers, state probation/parole officers, and state youth services officers, provided the applicant has been separated from a sworn law enforcement position for no more than one year, or has had no break in service.
- (10) "Misdemeanor" means those criminal offenses not classified by the North Carolina General Statutes, the United States Code, the common law, or the courts as felonies. Misdemeanor offenses are classified by the Commission as follows:
 - (a) "Class A Misdemeanor" means:
 - (i) an act committed or omitted in violation of any common law, duly enacted ordinance or criminal statute of this state which is not classified as a Class B Misdemeanor pursuant to Sub-item (10)(b) of this Rule. Also specifically included herein as a Class A Misdemeanor is the offense of driving while impaired, if the offender was sentenced under punishment

level three [G.S. 20-179(i)], level four [G.S. 20-179(j)], or level five [G.S. 20-179(k)]. All other traffic offenses under Chapter 20 (motor vehicles) are not classified as Class A Misdemeanors.

- (ii) acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ordinance or criminal statute, of this state for which the maximum punishment allowable for the designated offense included imprisonment for a term of not more than six months. Also specifically included herein as a Class A Misdemeanor is the offense of driving while impaired, if the offender was sentenced under punishment level three [G.S. 20-179(i)], level four [G.S. 20-179(j)], or level five [G.S. 20-179(k)]. All other traffic offenses under Chapter 20 (motor vehicles) are not classified as Class A Misdemeanors.

- (iii) any act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of not more than six months. Specifically excluded from this grouping of "Class A Misdemeanor" criminal offenses for jurisdictions other than North Carolina, are motor vehicle or traffic offenses designated as misdemeanors under the laws of other jurisdictions, or duly enacted ordinances of an authorized governmental entity with the

- exception of the offense of driving while impaired which is expressly included herein as a class A misdemeanor, if the offender could have been sentenced for a term of not more than six months.
- (b) "Class B Misdemeanor" means:
- (i) an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this state which is classified as a Class B Misdemeanor as set forth in the "Class B Misdemeanor Manual" as published by the North Carolina Department of Justice and shall automatically include any later amendments and editions of the incorporated material as provided by G.S. 150B-21.6. Copies of the publication may be obtained from the North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602. There is no cost per manual at the time of adoption of this Rule. "
 - (ii) acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ordinance, or criminal statute, of this state for which the maximum punishment allowable for the designated offense included imprisonment for a term of more than six months but not more than two years. Specifically excluded from the grouping of "Class B misdemeanors" committed or omitted in North Carolina prior to October 1, 1994 are motor vehicle or traffic offenses designated as being misdemeanors under G.S. 20 (motor vehicles), with the following exceptions: "Class B misdemeanors" committed or omitted in North Carolina prior to October 1, 1994 expressly include, either first or subsequent offenses of G.S. 20-138(a) or (b), G.S. 20-166 (duty to stop in the event of an accident), G.S. 20-138.1 (impaired driving) if the defendant was sentenced under punishment level one [G.S. 20-179(g)] or punishment level two [G.S. 20-179(h)] for the offense, and shall also include a violation of G.S. 20-28(b) [driving while license permanently revoked or suspended].
 - (iii) any act committed or omitted in violation of any common law, duly enacted ordinance, or criminal statute of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of more than six months but not more than two years. Specifically excluded from this grouping of "Class B Misdemeanor" criminal offenses for jurisdictions other than North Carolina, are motor vehicle or traffic offenses designated as being misdemeanors under the laws of other jurisdictions with the following exceptions: Class B Misdemeanor does expressly include, either first or subsequent offenses of driving while impaired if the maximum allowable punishment is for a term of more than six months but not more than two years, and driving while license permanently revoked or permanently suspended.
- (11) "Felony" means any offense designated a felony by the laws, statutes, or ordinances of the jurisdiction in which the offense occurred.
- (12) "Dual Certification" means that a justice officer holds probationary, general, or

- grandfather certification in two or more of the following positions with the same agency:
- (a) deputy sheriff;
 - (b) detention officer;
 - (c) telecommunicator.
- (13) "Detention Officer" means any person performing responsibilities, either on a full-time, part-time, permanent or temporary basis, which includes the control, care, and supervision of any inmates incarcerated in a county jail or other confinement facility under the direct supervision and management of the sheriff. "Detention Officer" shall also mean the administrator and the other custodial personnel of district confinement facilities as defined in G.S. 153A-219.
- (14) "Deputy Sheriff" means any person who has been duly appointed and sworn by the sheriff and who is authorized to exercise the powers of arrest in accordance with the laws of North Carolina.
- (15) "Telecommunicator" means any person performing responsibilities, either on a full-time, part-time, permanent or temporary basis, for communication functions to include receiving calls or dispatching for emergency and law enforcement services.
- (16) "Commission" as it pertains to criminal offenses shall mean a finding by the North Carolina Sheriffs' Education and Training Standards Commission or an administrative body, pursuant to the provisions of G.S. 150B, that a person performed the acts necessary to satisfy the elements of a specified criminal offense.
- (17) "Sworn Law Enforcement Position" means a position with a criminal justice agency of the United States, any state, or a political subdivision of any state which, by law, has general power of arrest and requires each of the following:
- (a) successful completion of the Basic Law Enforcement Training curriculum offered by the respective state or federal entity; and
 - (b) an independent oath of office providing for the execution of the laws of the respective state or federal jurisdiction.
- (18) "General Powers of Arrest" shall mean the authority to enforce the state or federal laws within the officer's territorial and subject matter jurisdiction to include the authority to arrest and cite offenders under the laws of the jurisdiction. These powers must be conferred on the officer by virtue of occupying a sworn law enforcement position. General powers of arrest shall mean those powers, even though limited by subject matter jurisdiction, which may be exercised as a routine responsibility of the office. General powers of arrest shall not mean those powers of arrest conferred by virtue of a special appointment or those granted as an incidental, as opposed to a primary, function of the office.
- (19) "In-Service Training Coordinator" means the person designated by the Department Head to administer the agency's in-service training program.

Authority G.S. 17E-7.

SECTION .0200 - ENFORCEMENT RULES

12 NCAC 10B .0204 SUSPENSION: REVOCATION: OR DENIAL OF CERTIFICATION

(a) The Commission shall revoke or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of:

- (1) a felony; or
- (2) a crime for which the authorized punishment could have been imprisonment for more than two years.

(b) The Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer:

- (1) has not enrolled in and satisfactorily completed the required basic training course in its entirety within a one year time period as specified by the rules in this Subchapter; or
- (2) fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300; or
- (3) fails to satisfactorily complete the in-service training requirements as presented in 12 NCAC 10B .2000 and ~~.2100~~ or .2100 or 12 NCAC 09E .0100; or
- (4) has refused to submit to the drug screen as required in 12 NCAC 10B .0301(a)(6) or .0410(a) or in connection with an application for or certification as a justice officer or a criminal justice officer as defined in 12 NCAC 09A .0103(6); or
- (5) has produced a positive result on any drug screen reported to the Commission as specified in 12 NCAC 10B .0410 or reported to any commission, agency, or board established to certify, pursuant to said commission, agency, or boards' standards, a person as a justice officer or a criminal justice officer as defined in 12 NCAC 09A .0103(6), unless the positive result is due to a medically indicated cause.

(c) The Commission may revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or certified justice officer:

- (1) has knowingly made a material misrepresentation of any information required

for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Rule shall also apply to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100; or

- (2) has knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Rule shall also apply to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100; or
- (3) has knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, aided another in obtaining or attempting to obtain credit, training, or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Rule shall also apply to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100; or
- (4) has been removed from office by decree of the Superior Court in accordance with the provisions of G.S. 128-16 or has been removed from office by sentence of the court in accord with the provisions of G.S. 14-230; or
- (5) has been denied certification or had such certification suspended or revoked by the North Carolina Criminal Justice Education and Training Standards Commission, or a similar North Carolina, out-of-state or federal approving, certifying or licensing agency.

(d) The Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of:

- (1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of initial certification; or
- (2) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor within the five-year period prior to the date of appointment; or
- (3) four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(b) as Class B misdemeanors regardless of the date of commission or conviction; or
- (4) an accumulation of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor,

regardless of the date of commission or conviction except the applicant shall be certified if the last conviction or commission occurred more than two years prior to the date of appointment; or

- (5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

(e) Without limiting the application of G.S. 17E, a person who has had his certification suspended or revoked shall not exercise the authority or perform the duties of a justice officer during the period of suspension or revocation.

(f) Without limiting the application of G.S. 17E, a person who has been denied certification revoked shall not be employed or appointed as a justice officer or exercise the authority or perform the duties of a justice officer.

(g) If the Commission does revoke, suspend, or deny the certification of a justice officer pursuant to this Rule, the period of such sanction shall be as set out in 12 NCAC 10B .0205.

Authority G.S. 17E-7.

**12 NCAC 10B .0205 PERIOD OF SUSPENSION:
REVOCATION: OR DENIAL**

When the Commission suspends, revokes, or denies the certification of a justice officer, the period of sanction shall be:

- (1) permanent where the cause of sanction is:
 - (a) commission or conviction of a felony; or
 - (b) commission or conviction of a crime for which authorized punishment included imprisonment for more than two years; or
 - (c) the second revocation, suspension, or denial of an officer's certification for any of the causes requiring a five-year period of revocation, suspension, or denial as set out in Item (2) of this Rule.
- (2) not less than five years where the cause of sanction is:
 - (a) commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(1).
 - (b) material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.
 - (c) knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North

- Carolina Criminal Justice Education and Training Standards Commission.
- (d) knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, aiding another in obtaining or attempting to obtain credit, training, or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Rule shall also apply to obtaining or attempting to obtain credit for in-service training as required by 12 NCAC 10B .1700, .1800, .2000, or .2100.
 - (e) failure to make either of the notifications as required by 12 NCAC 10B .0301(a)(7); or
 - (f) removal from office under the provisions of G.S. 128-16 or the provisions of G.S. 14-230.
 - (g) a positive result on a drug screen, or a refusal to submit to drug testing both pursuant to 12 NCAC 10B .0301 and 12 NCAC 10B .0406, or in connection with an application for certification as a criminal justice officer as defined in 12 NCAC 09A .0103(6).

The Commission may either reduce or suspend the periods of sanction under this Item or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension, in the discretion of the Commission.

- (3) for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is:
 - (a) failure to meet or satisfy relevant basic training requirements.
 - (b) failure to meet or maintain the minimum standards of employment or certification;
 - (c) failure to meet or satisfy the in-service training requirements as prescribed in 12 NCAC 10B .1700 or ~~.2100~~, .2100 or 12 NCAC 09E .0100.
 - (d) commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(2), (3), (4) and (5).

- (e) denial, suspension, or revocation of certification pursuant to 12 NCAC 10B .0204(c)(5).

The Commission may either reduce or suspend the periods of sanction where revocation, denial or suspension of certification is based upon Subparagraphs .0204(d)(3), (d)(4), and (d)(5) or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension, in the discretion of the Commission.

Authority G.S. 17E-4; 17E-7.

12 NCAC 10B .0206 SUMMARY SUSPENSIONS: OR DENIALS

(a) The Commission may summarily suspend or deny the certification of a justice officer or instructor when, in the opinion of the Commission, the public health, safety, or welfare requires this emergency action of summary suspension or denial. The Commission has determined that the following conditions specifically affect the public health, safety, or welfare and therefore it, by and through the Director, shall utilize summary suspension or denial following a full investigation of the matter when:

- (1) the applicant for certification or the certified justice officer has committed or been convicted of a violation of the criminal code which would require a permanent revocation or denial of certification; or
- (2) the justice officer has failed to comply with the training requirements of 12 NCAC 10B .0500, .0600, and 1300; or
- (3) the certified deputy sheriff or detention officer fails to satisfactorily complete the minimum in-service training requirements as prescribed in 12 NCAC 10B .1700 or ~~.2100~~, or .2100 or 12 NCAC 09E .0100; or
- (4) the applicant for certification has refused to submit to the drug screen as required in 12 NCAC 10B .0301(6) or .0406(c)(3) or in connection with an application for or certification as a justice officer or a criminal justice officer as defined in 12 NCAC 09A .0103(6); or
- (5) the applicant for certification or the certified officer has produced a positive result on any drug screen reported to the Commission as specified in 12 NCAC 10B .0410 or reported to any commission, agency, or board established to certify, pursuant to said commission, agency, or boards' standards, a person as a justice officer or a criminal justice officer as defined in 12 NCAC 09A .0103(6),

unless the positive result is due to a medically indicated cause.

(b) Without limiting the application of G.S. 17E, a person who has had his or her certification summarily suspended or denied may not exercise the authority or perform the duties of a justice officer during the period of suspension or denial.

History Note: Authority G.S. 17E-8; 17E-9; 150B-3(c).

SECTION .0300 – MINIMUM STANDARDS FPR EMPLOYMENT AND CERTIFICATION AS A JUSTICE OFFICER

12 NCAC 10B .0302 DOCUMENTATION OF EDUCATIONAL REQUIREMENT

(a) Each applicant shall furnish documentary evidence of high school, college or university graduation to the employing agency. Documentary evidence consists of diplomas from ~~recognized~~ public schools or approved private schools, colleges or universities which meet ~~approval guidelines of standards approved by~~ either the North Carolina Department of Public Instruction, the Division of Non-Public Instruction, or a comparable out of state agency.

(b) High School Diplomas earned through home school programs must be accompanied by a true and accurate or certified transcript and must met the requirements of Part 3 of Article 39 of Chapter 115C of the North Carolina General Statutes, or a comparable out-of-state agency.

(c) Diplomas earned from High Schools outside of the United States must be translated into English and be accompanied by an authenticated transcript. Transcripts reflecting curriculum requirements not scholastically comparable to those in the United State shall not be acceptable.

~~(d)(b)~~ High School diplomas earned through correspondence courses are not recognized toward ~~these~~ the minimum educational requirements.

~~(e)(e)~~ Documentary evidence of having passed the General Educational Development Test (GED) shall be satisfied by a certified copy of GED test results or by a copy of the applicant's GED diploma.

~~(f)(d)~~ Documentary evidence of the attainment of satisfactory scores on any military high school equivalency examination ~~will be~~ is acceptable as evidence of high school graduation ~~as if~~ verified by a true copy of the veteran's DD214.

Authority G.S. 17E-4.

SECTION .2000 - IN-SERVICE TRAINING FOR JUSTICE OFFICERS

12 NCAC 10B .2005 MINIMUM TRAINING REQUIREMENTS

(a) A Sheriff or Department Head may choose to use a lesson plan developed by the North Carolina Justice Academy, or may opt to use a lesson plan for any of the topical areas developed by another entity. The Sheriff or Department Head may also opt to use a lesson plan developed by a certified instructor, provided that the instructor develops the lesson plan, in accordance with

the Instructional Systems Development model as taught in Criminal Justice Instructor Training in 12 NCAC 09B .0209.

(b) The 2006 Law Enforcement In-Service Training Program requires a minimum of 24 hours of training in the following topical areas:

- (1) Legal Update;
- (2) Ethics;
- (3) Juvenile Minority Sensitivity Training;
- (4) Methamphetamine Awareness or Methamphetamine Investigative Issues;
- (5) Firearms Training and Requalification for deputy sheriffs and detention officers as set out in Section .2100 of this Subchapter; and
- (6) Any topic areas of the Sheriff's choosing.

(c) The 2007 Law Enforcement In-Service Training Program requires a minimum of 24 hours of training in the following topical areas:

- (1) Legal Update;
- (2) Ethics (on-duty or off-duty);
- (3) Juvenile Minority Sensitivity Training;
- (4) Domestic Violence;
- (5) Interacting with Special Populations (which shall include autism);
- (6) Firearms Training and Requalification for deputy sheriffs and detention officers as set out in Section .2100 of this Subchapter; and
- (7) Any topic areas of the Sheriff's choosing.

(d) The 2007 Detention Officer In-Service Training Program requires a minimum of 16 hours of training in the following topical areas:

- (1) Detention Legal Update;
- (2) Ethics for Detention Officers;
- (3) Special Inmate Population Management; and
- (4) Any topic areas of the Sheriff's or Department Head's choosing.

(e) The 2007 Telecommunicator In-Service Training Program requires a minimum of 16 hours of training in the following topical areas:

- (1) Handling Suicidal Callers;
- (2) Emergency Call Taking Procedures;
- (3) Terrorism Training an Awareness Level For Telecommunicators;
- (4) Officer Safety Training for Telecommunicators; and
- (5) Any topic areas of the Sheriff's or Department Head's choosing.

(f) The 2008 Law Enforcement In-Service Training Program requires a minimum of 24 hours of training in the following topical areas:

- (1) Legal Update;
- (2) Career Survival: Truth or Consequences;
- (3) Juvenile Minority Sensitivity Training;
- (4) Response to Critical Incidents;
- (5) Firearms Training and Requalification for deputy sheriffs as set out in Section .2100 of this Subchapter; and
- (6) Any topic areas of the Sheriff's choosing.

(g) The 2008 Detention Officer In-Service Training Program requires a minimum of 16 hours of training in the following topical areas:

- (1) Legal Update;
- (2) Professionalism;
- (3) Inmate Movement; and
- (4) Any topic areas of the Sheriff's or Department Head's choosing.

(h) The 2008 Telecommunicator In-Service Training Program requires a minimum of 16 hours of training in the following topical areas:

- (1) Teletypewriter (TTY);
- (2) Customer Service;
- (3) Incident Command; and
- (4) Any topic areas of the Sheriff's or Department Head's choosing.

Authority G.S. 17E-4; 17E-7.

12 NCAC 10B .2007 SHERIFF/AGENCY HEAD RESPONSIBILITIES

Each Sheriff or Department Head shall ensure that the respectively required In-Service Training Program established by this Section is conducted. In addition, the Sheriff or Department Head shall:

- (1) report to the Division those deputy sheriffs, detention officers and telecommunicators who are inactive;
- (2) maintain a roster of each deputy sheriff, detention officer and telecommunicator who successfully completes the respectively required In-Service Training Program;
- (3) report to the Division by January 15th, 2007, those active deputy sheriffs who fail to complete the 2006 Law Enforcement In-Service Training Program in accordance with 12 NCAC 10B .2005. Such reporting shall be on a Commission form;
- ~~(4) report to the Division by January 15th, 2008, those active deputy sheriffs who fail to complete the 2007 Law Enforcement In-Service Training Program in accordance with 12 NCAC 10B .2005. Such reporting shall be on a Commission form;~~
- ~~(5) report to the Division by January 15th, 2008, those active detention officers who fail to complete the 2007 Detention Officer In-Service Training Program in accordance with 12 NCAC 10B .2005. Such reporting shall be on a Commission form; and~~
- ~~(6) report to the Division by January 15th, 2008, those active telecommunicators who fail to complete the 2007 Telecommunicator Officer In-Service Training Program in accordance with 12 NCAC 10B .2005. Such reporting shall be on a Commission form.~~
- (4) report to the Division by January 15th, 2008:
 - (a) those active telecommunicators who fail to complete the 2007

Telecommunicator Officer In-Service Training Program in accordance with 12 NCAC 10B .2005;

(b) those active detention officers who fail to complete the 2007 Detention Officer In-Service Training Program in accordance with 12 NCAC 10B .2005;

(c) those active deputy sheriffs who fail to complete the 2007 Law Enforcement In-Service Training Program in accordance with 12 NCAC 10B .2005;

Such reporting shall be on a Commission form.

(5) report to the Division by January 15th, 2009:

(a) those active telecommunicators who fail to complete the 2008 Telecommunicator Officer In-Service Training Program in accordance with 12 NCAC 10B .2005;

(b) those active detention officers who fail to complete the 2008 Detention Officer In-Service Training Program in accordance with 12 NCAC 10B .2005;

(c) those active deputy sheriffs who fail to complete the 2008 Law Enforcement In-Service Training Program in accordance with 12 NCAC 10B .2005.

Such reporting shall be on a Commission form.

Authority G.S. 17E-4; 17E-7.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rule cited as 15A NCAC 02H .1005.

Proposed Effective Date: *March 1, 2008*

Public Hearing:

Date: *September 18, 2007*

Time: *7:00 p.m.*

Location: *Beaufort County Community College – Building #8 Auditorium, 5337 Highway 264 East, Washington, NC 27889*

Date: *September 20, 2007*

Time: *7:00 p.m.*

Location: *College of the Albemarle (the old Manteo Middle School auditorium), Roanoke Island Campus, 205 Highway 64 South Business, Manteo, NC 27954*

Date: September 25, 2007

Time: 7:00 p.m.

Location: Crystal Coast Civic Center (upstairs room), 3505 Arendell Street, Morehead City, NC 28557

Date: October 2, 2007

Time: 7:00 p.m.

Location: Coastline Convention Center, 501 Nutt Street, Wilmington, NC 28401

Reason for Proposed Action: *The purpose of this rulemaking is to amend 15A NCAC 02H .1005, Stormwater Requirements: Coastal Counties, in order to fully protect this State's aquatic resources. These proposed amendments will extend controls similar to the more stringent Phase 2 Stormwater control requirements that were mandated for several of the Coastal Counties in Session Law 2006-246 to all 20 of North Carolina's Coastal Counties. This rulemaking is deemed necessary as a result of a DWQ study that found that the existing rules were outdated and ineffective in protecting some of the State's coastal aquatic resources.*

Procedure by which a person can object to the agency on a proposed rule: *You may attend one of the Public Hearings and make relevant verbal comments, and/or submit written comments, data or other relevant information by October 15, 2007. The Hearing Officers may limit the length of time that you may speak at the Public Hearing, if necessary, so that all those who wish to speak may have an opportunity to do so. The Environmental Management Commission (EMC) is very interested in all comments pertaining to the proposed amendments. In addition, the EMC is specifically soliciting comments regarding the alternative language options that are contained in the proposed rule text. Furthermore, the EMC is also soliciting comments as to whether these proposed rule amendments should incorporate the Shellfish Resource (SR) Waters designation for EMC-classified Shellfishing (SA) Waters, which is contained in Session Law 2006-246. All persons interested and potentially affected by the proposal are strongly encouraged to read this entire notice and make comments on the proposed amendments. The EMC may not adopt a rule that differs substantially from the text of the proposed rule published in this notice unless the EMC publishes the text of the proposed different rule and accepts comments on the new text (see General Statute 150B 21.2(g)). Written comments may be submitted to Tom Reeder of the DWQ Wetlands and Stormwater Branch at the postal address, e-mail address, or fax number listed in this notice.*

Comments may be submitted to: Tom Reeder, DENR/DWQ, Wetlands and Stormwater Branch, 1617 Mail Service Center, Raleigh, NC 27699-1617, phone (919) 733-5083 extension 528, fax (919) 733-9612, email tom.reeder@ncmail.net

Comment period ends: October 15, 2007

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the

Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact: A copy of the fiscal note can be obtained from the agency.

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

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02H - PROCEDURES FOR PERMITS: APPROVALS

SECTION .1000 - STORMWATER MANAGEMENT

15A NCAC 02H .1005 STORMWATER REQUIREMENTS: COASTAL COUNTIES

~~All development activities within the coastal counties which require a stormwater management permit in accordance with Rule .1003 of this Section. Notwithstanding, the provisions of 15A NCAC 02H .1003(b), all development activities within the coastal counties that disturb more than 10,000 square feet, including projects that disturb less than 10,000 square feet of land that are part of a larger common plan of development or sale that disturbs more than 10,000 square feet, [Alternate language: All development activities within the coastal counties which require a stormwater management permit in accordance with Rule .1003 of this Section] shall manage stormwater runoff as follows:~~ follows, with exception of NC Department of Transportation activities that shall be regulated in accordance with the provisions of that agency's existing NPDES Stormwater Permit:

- (1) ~~development~~ Development activities within the coastal counties draining to Outstanding Resource Waters (ORW) shall meet requirements contained in Rule .1007 of this Section; ~~Section.~~
- (2) ~~development~~ Development activities within one-half mile of and draining to SA waters or within one-half mile of SA waters and draining to unnamed freshwater tributaries to SA waters:
 - (a) Low Density Option: Development shall be permitted pursuant to Rule .1003(d)(1) of this Section if the development has:

- (i) ~~built upon~~ Built-upon area of ~~25~~ 12 percent or less; ~~or proposes development of single family residences on lots with one third of an acre or greater with a built upon area of 25 percent or less;~~ Development within 575 feet of the mean high water line of areas designated by the Environmental Management Commission as Outstanding Resource Waters (ORW) shall be limited to a built upon area of 25 percent or less; however, development with a built upon area of greater than 12 percent must comply with the requirements of Sub-Item (b) of this Item;
- (ii) ~~stormwater~~ Stormwater runoff transported primarily by vegetated ~~conveyances;~~ conveyances. ~~conveyance~~ (Conveyance system shall not include a discrete stormwater collection system as defined in Rule .1002 of this Section.); and
- (iii) ~~a~~ A 30 foot wide vegetative buffer. [Alternative language: A 50 foot wide vegetative buffer.]
- (b) High Density Option: Higher density developments shall be permitted pursuant to Rule .1003(d)(2) of this Section if stormwater control systems meet the following criteria:
 - (i) ~~no~~ No direct outlet channels or pipes to SA waters unless permitted in accordance with 15A NCAC 2H .0126;
 - (ii) ~~control~~ Control systems must be infiltration systems designed in accordance with Rule .1008 of this Section to control and treat the runoff from all surfaces generated by one and one-half inches of ~~rainfall~~ rainfall or the difference in the stormwater runoff from all surfaces from the predevelopment and post-development conditions for a one-year, 24-hour storm, whichever is greater. Alternatives as described in
- (iii) ~~runoff~~ Runoff in excess of the design volume must flow overland through a vegetative filter designed in accordance with Rule .1008 of this Section with a minimum length of 50 feet measured from mean high water of SA waters; and
- (iv) A 30 foot wide vegetative buffer. [Alternative language: A 50 foot wide vegetative buffer.]
- (c) In addition to the other measures required in this Rule, all development activities, including both low and high density projects, shall prohibit new points of stormwater discharge to SA waters or expansion (increase in the volume of stormwater flow through conveyances or increase in capacity of conveyances) of existing stormwater conveyance systems that drain to SA waters. Any modification or redesign of a stormwater conveyance system within the contributing drainage basin must not increase the net amount or rate of stormwater discharge through existing outfalls to SA waters. Infiltration of stormwater runoff from the one-year, 24-hour storm or diffuse flow of stormwater at a non-erosive velocity to a vegetated buffer, or other natural area, capable of providing effective infiltration of the runoff from the one-year, 24-hour storm shall not be considered a direct point of stormwater discharge. Permit applicants shall take into consideration soil type, slope, vegetation, and existing hydrology when evaluating infiltration effectiveness.
- (3) ~~development~~ Development activities within the coastal counties except those areas defined in Items (1) and (2) of this Paragraph:
 - (a) Low Density Option: Development shall be permitted pursuant to Rule .1003(d)(1) of this Section if the development has:
 - (i) ~~built upon~~ Built-upon area of ~~30~~ 24 percent or less; ~~or proposes development of~~

- (ii) ~~single family residences on lots with one third of an acre or greater with a built upon area of 30 percent or less;~~ stormwater Stormwater runoff transported primarily by vegetated conveyances; ~~conveyance~~ (Conveyance system shall not include a discrete stormwater collection system as defined in Rule .1002 of this ~~Section;~~ Section.); and
- (iii) ~~a~~ A 30 foot wide vegetative buffer. *[Alternative language: A 50 foot wide vegetative buffer.]*
- (b) High Density Option: Higher density developments shall be permitted pursuant to Rule .1003(d)(2) of this Section if stormwater control systems meet the following criteria:
- (i) ~~control~~ Control systems must be infiltration systems, wet detention ~~ponds~~ ponds, bioretention systems, constructed stormwater wetlands, sand filters, or alternative stormwater management systems designed in accordance with Rule .1008 of this Section;
- (ii) ~~control~~ Control systems must be designed to store, control and treat the stormwater runoff from all surfaces generated by one and one-half inch of rainfall; and
- (iii) A 30 foot wide vegetative buffer. *[Alternative language: A 50 foot wide vegetative buffer.]*
- (4) Structural stormwater controls required under this Rule shall meet the following criteria:
- (a) Remove an 85 percent average annual amount of Total Suspended Solids;
- (b) For detention ponds, draw down the treatment volume no faster than 48 hours, but no slower than 120 hours;
- (c) Discharge the storage volume at a rate equal or less than the pre-development discharge rate for the one-year, 24-hour storm; and
- (d) Meet the General Engineering Design Criteria set forth in 15A NCAC 02H .1008(c).
- (5) Areas defined as Coastal Wetlands under 15A NCAC 07H .0205 shall not be included in the
- overall project area to calculate impervious surface density. *[Alternate language: For the purposes of this Rule, all areas defined as jurisdictional wetlands or isolated wetlands shall not be included in the overall project area to calculate impervious surface density.]* Stormwater runoff from built upon areas that is directed to flow through any wetlands must flow through these wetlands in a diffuse manner with the use of a level spreader.
- (6) For structural stormwater controls that are required under this Rule and that require separation from the seasonal high-water table, a minimum separation of two feet is mandated. This separation shall be provided by at least 12 inches of naturally occurring soil above the seasonal high-water table with a minimum soil hydraulic conductivity of one inch per hour.
- Authority G.S. 143-214.1; 143-214.7; 143-215.1; 143-215.3(a).
-
- ## TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS
- ### CHAPTER 18 - BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS
- Notice is hereby given in accordance with G.S. 150B-21.2 that the State Board of Examiners of Electrical Contractors intends to amend the rules cited as 21 NCAC 18B .0209, .0303, .0404.*
- Proposed Effective Date:** December 1, 2007
- Public Hearing:**
Date: September 12, 2007
Time: 2:00 p.m.
Location: State Board of Examiners of Electrical Contractors, 3101 Industrial Drive, Suite 206, Raleigh, NC 27609
- Reason for Proposed Action:**
21 NCAC 18B .0209 – is being amended to raise the examination fees from \$75.00 to \$90.00. The fee has not changed in five years, and costs to the Board have increased. Other changes in the Rule rewrite the Rule without change in its effect.
21 NCAC 18B .0303 – is being amended to conform to recent legislation enactments in House Bill 1338, 2007 season, particularly section 4 of the Bill which appears in the Session Law but not in G.S. 87-43.3 or G.S. 87-43.2(a). The purpose is to increase the scope of work for limited and intermediate licenses in line with inflation.
21 NCAC 18B .0404 – changes the license fees by \$15.00 each. The fee has not changed in five years and costs to the board have increased.
- Procedure by which a person can object to the agency on a proposed rule:** *Objections, suggestions, proposed changes, or*

alternative language may be provided to the Board by written submission prior to the public hearing, by written or oral statement at the hearing or by written submission to the Board received by the Board prior to the end of the comment period. Each submission should be clearly labeled as either a suggestion, a proposed change, as alternative language or as an objection.

Comments may be submitted to: Rule-making Coordinator, State Board of Examiners of Electrical Contractors, 3101 Industrial Drive, Suite 206, Raleigh, NC 27609, phone (919) 733-9042, fax (919) 733-6105

Comment period ends: October 15, 2007

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

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

**SUBCHAPTER 18B - BOARD'S RULES FOR THE
IMPLEMENTATION OF THE ELECTRICAL
CONTRACTING LICENSING ACT**

SECTION .0200 – EXAMINATIONS

21 NCAC 18B .0209 FEES

- (a) The examination fee for regular qualifying examinations is ~~seventy-five~~ninety dollars ~~(\$75.00)~~(\$90.00) for all classifications.
- (b) The examination fee for a specially-arranged qualifying examination is two-hundred dollars (\$200.00) for all classifications.
- (c) The fee for a supervised review of a failed examination ~~with the Board or staff assistance~~ is twenty-five dollars ~~(\$25.00)~~ for all classifications. (\$25.00). All reviews are supervised by the Board or staff.
- (d) The examination fees for regular or specially-arranged examinations in all classifications and the fees for examination reviews may be in the form of cash, check, money order, Visa or Mastercard made payable to the Board and must accompany the respective applications when filed with the Board.

(e) Examination fees received with applications filed for qualifying examinations shall be retained by the Board unless:

- (1) an application is not filed as prescribed in Rule .0210 of this Section, in which case the examination fee and application shall be returned; or
- (2) the applicant does not take the examination during the ~~examination period applied for which application was made~~, and files with the Board a written request for a refund, setting out extenuating ~~circumstances. The~~ circumstances, and the Board shall refund the examination fee if it finds extenuating circumstances.

(f) Examination review fees are non-refundable unless the applicant does not take the ~~review and~~ review, files with the Board a written request for a refund, setting out extenuating ~~circumstance. The circumstance, and the~~ circumstance, and the Board shall refund the fee if it finds extenuating circumstances.

(g) Any fee retained by the Board shall not be creditable toward ~~the payment of any future application of examination fee or the fee for an examination review.~~

(h) Extenuating circumstances for the purposes of Paragraphs (e)(2) and (f) of this Rule shall be the applicant's illness, bodily injury or death, or death of the applicant's spouse, child, parent or sibling, or a breakdown of the applicant's transportation to the designated site of the examination or examination review.

Authority G.S. 87-42; 87-43.3; 87-43.4; 87-44.

**SECTION .0300 - DEFINITIONS AND EXPLANATIONS
OF TERMS APPLICABLE TO LICENSING**

**21 NCAC 18B .0303 ELECTRICAL INSTALLATION:
PROJECT: PROJECT VALUE-LIMITATION**

For the purpose of implementing G.S. 87-43.3 pertaining to the limited and intermediate electrical contracting license classifications, the following provisions shall apply:

- (1) Electrical Installation. Electrical work is construed to be an electrical installation when the work is made or is to be made:
 - (a) in or on a new building or structure;
 - (b) in or on an addition to an existing building or structure;
 - (c) in or on an existing building or structure, including electrical work in connection with lighting or power rewiring or with the addition or replacement of machines, equipment or fixtures; or
 - (d) in an area outside of buildings or structures, either overhead or underground or both.
- (2) Project. An electrical installation is construed to be a separate electrical contracting project if all the following conditions are met:
 - (a) the installation is, or will be, separate and independently supplied by a

- separate service, feeder or feeder system; and
- (b) the installation is for:
- (i) an individual building or structure which is separated from other buildings or structures by a lot line or, if located on the same lot with other buildings or structures, is physically separated from such other buildings or structures by an open space or an area separation fire wall;
 - (ii) an individual townhouse single-family dwelling unit constructed in a series or group of attached units with property lines separating such units;
 - (iii) an individual tenant space in a mall-type shopping center;
 - (iv) an addition to an existing building or structure;
 - (v) an existing building or structure, including electrical work in connection with lighting or power rewiring or with the addition or replacement of machines, equipment or fixtures; or
 - (vi) an outdoor area either overhead or underground or both.
- (c) the negotiations or bidding procedures for the installation are carried out in a manner totally separate and apart from the negotiations or bidding procedures of any other electrical installation or part thereof;
- (d) except for new additions, alterations, repairs or changes to a pre-existing electrical installation, no electrical interconnection or relationship whatsoever will exist between the installation and any other electrical installation or part thereof;
- (e) a separate permit is to be obtained for each individual building structure or outdoor area involved from the governmental agency having jurisdiction; and
- (f) if a question is raised by a party at interest or if requested by the Board or Board's staff for any reason, the owner or the awarding authority or an agent of either furnishes to the Board, and to the inspections department having jurisdiction, a sworn affidavit confirming that each and every one of the conditions set forth in (2)(a) through (e) of this Rule are satisfied.
- (3) Relationship of Plans and Specifications to Definition of Project. Even though such electrical work may not fully comply with each and every condition set out in Subparagraph (2) of this Rule, the entire electrical work, wiring, devices, appliances or equipment covered by one set of plans or specifications is construed to be a single electrical contracting project.
- (4) Project Value Limitation. In determining the value of a given electrical contracting project, the total known or reasonable estimated costs of all electrical wiring materials, equipment, fixtures, devices, and installation must be included in arriving at this value, regardless of who furnishes all or part of same, and regardless of the form or type of contract or subcontract involved. As an example, on a given electrical contracting project, the owner or general contractor will furnish all or part of the electrical wiring, material, etc. and
- (a) if the total cost of the wiring, materials, etc., including that furnished by others, plus the total cost of the installation involved, will be more than forty twenty-five thousand dollars ~~(\$40,000)~~~~(\$25,000)~~ but not more than one hundred teneventy-five thousand dollars ~~(\$110,000)~~~~(\$75,000)~~, then only an electrical contractor holding either an intermediate or unlimited license shall be eligible to submit a proposal or engage in the project.
 - (b) if the total cost of the wiring, materials, etc., including that furnished by others, plus the total cost of the installation involved, will exceed one hundred teneventy-five thousand dollars ~~(\$110,000)~~~~(\$75,000)~~, then only an electrical contractor holding an unlimited license shall be eligible to submit a proposal or engage in the project.
- If a given electrical contracting project is subdivided into two or more contracts or subcontracts for any reason, then the total value of the combined contracts or subcontracts which may be awarded to or accepted by any one licensee of the Board must be within the total project value in accordance with this Rule. The Board's staff shall make a determination of what constitutes a project in any given situation, and any party at interest shall have the right to appeal any staff determination to the Board for a final binding decision.

Authority G.S. 87-42; 87-43.

SECTION .0400 - LICENSING REQUIREMENTS

21 NCAC 18B .0404 ANNUAL LICENSE FEES

(a) The annual license fees and license renewal fees for the various license classifications are as follows:

LICENSE FEE SCHEDULE

CLASSIFICATION	LICENSE FEE
Limited	\$ 60.00 <u>\$ 75.00</u>
Intermediate	\$100.00 <u>\$115.00</u>
Unlimited	\$150.00 <u>\$165.00</u>

SP-SFD ~~\$ 60.00~~ \$ 75.00

Special Restricted ~~\$ 60.00~~ \$ 75.00

(b) License fees may be paid by ~~in the form of~~ cash, check, money order, Visa or Mastercard made payable to the ~~Board and Board.~~ Board. Payment ~~and~~ must accompany any ~~the applicant's~~ license or license renewal ~~application or license renewal application when either is~~ filed with the Board.

Authority G.S. 87-42; 87-44.

This Section contains information for the meeting of the Rules Review Commission on Thursday July 26, 2007 & August 23, 2007, 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 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
John B. Lewis
Mary Beach Shuping
Judson A. Welborn
John Tart

RULES REVIEW COMMISSION MEETING DATES

August 23, 2007
October 18, 2007

September 20, 2007
November 15, 2007

RULES REVIEW COMMISSION

**July 26, 2007
MINUTES**

The Rules Review Commission met on Thursday, July 26, 2007, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were: Jim Funderburk, Jeff Gray, Jennie Hayman, Thomas Hilliard, Robert Saunders, Mary Shuping, John Tart.

Staff members present were: Joseph DeLuca and Bobby Bryan, Commission Counsel.

The following people attended the meeting:

Julie Edwards	Office of Administrative Hearings
Felicia Williams	Office of Administrative Hearings
Molly Masich	Office of Administrative Hearings
Nancy Pate	Department of Environment and Natural Resources
Barry Gupton	NCDOI-Building Code Council
Jonathan Womer	Office of State Budget and Management
Robin H. Rademacher	DENR/Division of Environmental Health/Radiation Protection
Lee Cox	DENR/Division of Environmental Health/Radiation Protection
Kristin Nixon	DENR/Division of Environmental Health
Larry Michael	DENR/Division of Environmental Health
Cris Harrelson	DENR/Division of Environmental Health
John P. Barkley	Department of Justice
Peggy Oliver	Office of State Personnel
Jim Wellons	Department of Justice/Interpreter and Transliterator Licensing Board
Ellie Sprenkel	Department of Insurance
Ann Christian	Attorney/Acupuncture Licensing Board
Nan Cameron	Acupuncture Licensing Board
Paola Ribadeneira	Acupuncture Licensing Board
Jackie Obusek	Department of Insurance
Jan Andrews	Department of Insurance
Steve Berkowitz	DENR/Department of Environmental Health
Chris Hoke	DHHS/Division of Public Health

APPROVAL OF MINUTES

The meeting was called to order at 10:18 a.m. with Ms. Hayman presiding. She reminded the Commission that all members have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e). Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the June 28, 2007 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

15A NCAC 02D .0540, .1211 – Environmental Management Commission. The Commission approved the rewritten rules submitted by the agency.

25 NCAC 01O .0101, .0106 – State Personnel Commission. The Commission approved the rewritten rules submitted by the agency.

903.2.1.2: Building Code Council – No action was taken. The objection is under discussion by a committee of the Building Code Council. It might be September before they are able to provide a response.

LOG OF FILINGS

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

15A NCAC 07H .1102: Coastal Resources Commission - The Commission objected to this Rule due to ambiguity. Paragraph (c) of this Rule says that written authorization to proceed with the proposed development "may" be issued during the on-site visit of the Division of Coastal Management representative. Construction of the structure must be completed within 120 days of the visit. It is not clear what happens if authorization to proceed is not granted during the visit. If authorization is granted late, it is not clear if the applicant must still complete construction within 120 days of the visit. This objection applies to existing language in the rule.

15A NCAC 07H .1202: Coastal Resources Commission - The Commission objected to this Rule due to ambiguity. In (c) and (d), it is not clear if "approval of individual projects" and "approval of the permit" is the same thing. It is not clear when either approval occurs. This objection applies to existing language in the rule.

15A NCAC 07H .1402: Coastal Resources Commission - The Commission objected to this Rule due to ambiguity. In (c) and (d), it is not clear if "approval of individual projects" and "approval of the permit" is the same thing. It is not clear when either approval occurs. This objection applies to existing language in the rule.

15A NCAC 07H .2102: Coastal Resources Commission - The Commission objected to this Rule due to ambiguity. Paragraph (c) of this Rule says that written authorization to proceed with the proposed development "may" be issued during the on-site visit of the Division of Coastal Management representative. Construction of the structure must be completed within 120 days of the visit. It is not clear what happens if authorization to proceed is not granted during the visit. If authorization is granted late, it is not clear if the applicant must still complete construction within 120 days of the visit. This objection applies to existing language in the rule.

15A NCAC 07H .2402: Coastal Resources Commission - The Commission objected to this Rule due to ambiguity. Paragraph (c) of this Rule says that written authorization to proceed with the proposed development "may" be issued during the on-site visit of the Division of Coastal Management representative. Construction of the structure must be completed within 120 days of the visit. It is not clear what happens if authorization to proceed is not granted during the visit. If authorization is granted late, it is not clear if the applicant must still complete construction within 120 days of the visit. This objection applies to existing language in the rule.

15A NCAC 07H .2702: Coastal Resources Commission - The Commission objected to this Rule due to ambiguity. In (d), it is not clear who is the "appropriate" Division of Coastal Management representative. It is also not clear if the second sentence requires the Division of Coastal Management to issue an authorization to proceed or if it means that the Division may issue it after determining that everything is okay. It is not clear when this authorization is to be granted. This objection applies to existing language in the rule.

15A NCAC 07M .0307: Coastal Resources Commission - The Commission objected to this Rule due to ambiguity and lack of statutory authority. In (2), it is not clear what other factors may be considered in funding decisions under the Public Beach and Coastal Waterfront Access Program. There is no authority cited for setting those factors outside of rulemaking. This objection applies to existing language in the rule.

17 NCAC 10 .0505: Department of Revenue - The Commission objected to this Rule due to ambiguity and lack of statutory authority. In lines 7 and 8 it is unclear what the standards are for approving continuing education programs or the hours to be allowed for them. It is also unclear whether the hours allowed will be based on the length of the program or its content. Lines 7 and 8 refer to approving the "credit hours allowed" for a program whereas lines 10 and 11 refer to "the actual length of the program" and also states that fifty minutes equals one credit hour. There is no authority cited to set those standards outside rulemaking.

17 NCAC 10 .0507: Department of Revenue - The Commission objected to this Rule due to ambiguity and lack of statutory authority. In lines 9 and 10 it is unclear what the standards are for approving continuing education programs or the hours to be allowed for them. It is also unclear whether the hours allowed will be based on the length of the program or its content. Line 9 refers to approving the "credit hours allowed" for a program whereas lines 11 and 12 refer to "the actual length of the program" and also states that fifty minutes equals one credit hour. There is no authority cited to set those approval standards outside rulemaking.

21 NCAC 26 .0207: Board of Landscape Architects - The Commission objected to this Rule due to ambiguity. It is unclear whether a landscape architect may affix his or her seal to certain documents not prepared personally by the landscape architect or by someone under the landscape architect's immediate supervision. Paragraph (b) lines 10 - 12 refers to "standard design documents" and indicates that they are design drawings and specifications "prepared by another" for "review and certification" by the landscape architect. It does not state but does imply that these design documents need not be prepared personally or under the immediate supervision of the landscape architect. It refers to these documents as "prepared by another and obtained by the landscape architect for review and certification." It then goes on in that paragraph to state that those drawings may be sealed by the landscape architect. However (d) lines 21 and 22 states that the landscape architect's seal may be applied "only to documents prepared personally or under the immediate supervision of the landscape architect." This would appear to contradict the implication under (b) that a landscape architect could affix his or her seal to a "standard design document prepared by another" even if it was not prepared under the personal supervision of the landscape architect.

21 NCAC 26 .0301: Board of Landscape Architects - The Commission objected to this Rule due to ambiguity. The education and experience equivalents set out in (d) and (e) are not clear. N.C.G.S. 89A-4(a)(3) sets out a specific degree requirement and (a)(4) sets out a specific four years experience requirement. The next paragraph in the statute, (a1), then provides an alternative way of meeting that requirement. For those who do not have the specific degree, a combination of ten years of education and experience can satisfy the education and experience qualification. The board has the responsibility to determine what is a "suitable" combination and has written this rule to prescribe what equivalencies different types of education that do not satisfy the educational qualification have in terms of years of experience and what type of work experience are equivalent to "experience in landscape architecture." It is unclear what any of percentages specified in paragraphs (d) and (e) belong to. I.e., what are they percentages of? It is also not clear if all the options in these paragraphs need to be listed. Item (d)(1) actually satisfies the education requirement in G.S. 89A-4(a)(3). Once that is satisfied a person needs only four years experience under the statute. So there is no need to set it out here where other types of education that do not satisfy the statute are given equivalencies. .

21 NCAC 26 .0303: Board of Landscape Architects - This rule was approved. However the requested technical changes have not been received and the rule will be removed from the approved rules list and carried over to the August meeting.

COMMISSION PROCEDURES AND OTHER BUSINESS

Chairman Hayman reported that the committee reviewing the proposed RRC rules met to discuss the rules. The committee considered comments received and have made some changes. The committee will report back to the Commission next month.

The meeting was adjourned at 11:11 p.m.

The next scheduled meeting of the Commission is Thursday, August 23, 2007 at 10:00 a.m.

Respectfully,
Dana Vojtko

LIST OF APPROVED PERMANENT RULES July 26, 2007 Meeting

PUBLIC HEALTH, COMMISSION FOR

Food, Lodging/Inst Sanitation/Public Swimming Pools/Spas

10A NCAC 46 .0213

INSURANCE, DEPARTMENT OF

<u>Transactions Subject to Prior Notice-Notice Filing</u>	11	NCAC	11B	.0222
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ENVIRONMENTAL MANAGEMENT COMMISSION

<u>Particulates from Fugitive Dust Emission Sources</u>	15A	NCAC	02D	.0540
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<u>Other Solid Waste Incineration Units</u>	15A	NCAC	02D	.1211
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COASTAL RESOURCES COMMISSION

<u>Approval Procedures</u>	15A	NCAC	07H	.1302
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<u>Approval Procedures</u>	15A	NCAC	07H	.2002
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<u>Approval Procedures</u>	15A	NCAC	07H	.2202
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<u>Replacement of Existing Structures</u>	15A	NCAC	07J	.0210
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<u>Exemption/Accessory Uses/Maintenance Repair/Replacement</u>	15A	NCAC	07K	.0209
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<u>Guidelines for Public Access</u>	15A	NCAC	07M	.0303
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<u>Local Government and State Involvement in Access</u>	15A	NCAC	07M	.0306
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ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF

<u>Payment Due</u>	15A	NCAC	11	.1102
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<u>Delinquent and Uncollectible Fees</u>	15A	NCAC	11	.1104
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<u>X-Ray Fee Amounts</u>	15A	NCAC	11	.1105
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<u>Radioactive Materials and Accelerator Fee Amounts</u>	15A	NCAC	11	.1106
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<u>Fees and Payment</u>	15A	NCAC	11	.1423
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PUBLIC HEALTH, COMMISSION FOR

<u>Modifications to Septic Tank Systems</u>	15A	NCAC	18A	.1956
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<u>Definitions</u>	15A	NCAC	18A	.2601
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<u>Inspections and Reinspections</u>	15A	NCAC	18A	.2604
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ACUPUNCTURE LICENSING BOARD

<u>Application and Practice Requirements for Licensure</u>	21	NCAC	01	.0101
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<u>Fees</u>	21	NCAC	01	.0103
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<u>Board Mailing Address</u>	21	NCAC	01	.0104
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<u>Change of Name or Address</u>	21	NCAC	01	.0106
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<u>Renewal of Licensure</u>	21	NCAC	01	.0201
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<u>Process to Obtain Inactive License; Activate License</u>	21	NCAC	01	.0202
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<u>Standards for Continuing Education</u>	21	NCAC	01	.0301
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INTERPRETER AND TRANSLITERATOR LICENSING BOARD

<u>Renewal of a Provisional License</u>	21	NCAC	25	.0205
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<u>Persons Who Are Ineligible to Apply for a License</u>	21	NCAC	25	.0209
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<u>Time-Limited, Nonresident Exemption</u>	21	NCAC	25	.0210
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<u>Continuing Education Requirements</u>	21	NCAC	25	.0501
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<u>Proration of Continuing Education Requirements</u>	21	NCAC	25	.0502
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<u>Failure to Meet Continuing Education Requirements</u>	21	NCAC	25	.0503
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RULES REVIEW COMMISSION

<u>CEU Credit for College Courses</u>	21	NCAC	25	.0504
<u>CEU Credit for Workshops, Conferences, and Independent St...</u>	21	NCAC	25	.0505
<u>CEU Credit For Workshops, Conferences, and Independent St...</u>	21	NCAC	25	.0506
<u>Schedule of Penalties</u>	21	NCAC	25	.0701
<u>Evaluation of Mitigating and Aggravating Factors</u>	21	NCAC	25	.0702
<u>Identification of Separate Offenses</u>	21	NCAC	25	.0703

STATE PERSONNEL COMMISSION

<u>Policy</u>	25	NCAC	010	.0101
<u>Monitoring, Evaluating, Reporting</u>	25	NCAC	010	.0106

AGENDA
RULES REVIEW COMMISSION
Thursday, August 23, 2007, 10:00 A.M.

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
 - II. Approval of the minutes from the last meeting
 - III. Follow-Up Matters:
 - A. DENR/Coastal Resources Commission – 15A NCAC 07H .1102, .1202, .1402, .2102, .2402, .2702 (Bryan)
 - B. DENR/Coastal Resources Commission – 15A NCAC 07M .0307 (Bryan)
 - C. Department of Revenue – 17 NCAC 10 .0505, .0507 (DeLuca)
 - D. Board of Landscape Architects – 21 NCAC 26 .0207, .0301 (DeLuca)
 - E. Building Code Council – 903.2.1.2 (DeLuca)
 - IV. Review of Log of Permanent Rule filings for RRC review filed between June 21 and July 20, 2007 (attached)
 - V. Review of Temporary Rules
 - VI. Commission Business
 - Findings from committee to review proposed RRC Rules
 - Next meeting: September 20, 2007
-

Commission Review
Log of Permanent Rule Filings
June 21, 2007 through July 20, 2007

CEMETERY COMMISSION

The rules in Title 4, Chapter 5 are from the N.C. Cemetery Commission.

The rules in Subchapter 5A cover the organization of the commission including general provisions (.0100) and the structure and organization of the commission (.0200).

<u>Name and Address</u>	04	NCAC	05A	.0101
<u>Amend/*</u>				

The rules in Subchapter 05B concern rule-making and declaratory rulings (.0100); and contested cases (.0200).

<u>Petitions</u>	04	NCAC	05B	.0101
Amend/*				
<u>Notice</u>	04	NCAC	05B	.0102
Amend/*				
<u>Hearings</u>	04	NCAC	05B	.0103
Amend/*				
<u>Declaratory Rulings</u>	04	NCAC	05B	.0105
Amend/*				

The rules in Subchapter 5C are rules dealing with the licensing of cemeteries (.0100); cemetery sales organizations, management organizations and brokers (.0200); and individual pre-need salespeople (.0300).

<u>Display</u>	04	NCAC	05C	.0303
Amend/*				

The rules in Subchapter 05D concern trust funds including maintenance and care of funds (perpetual care funds) (.0100); and pre-need cemetery merchandise, pre-constructed mausoleums and below ground crypts trust funds (.0200).

<u>Report</u>	04	NCAC	05D	.0101
Amend/*				
<u>Report</u>	04	NCAC	05D	.0201
Amend/*				

SOCIAL SERVICES COMMISSION

The rules in Chapter 6 deal with the operation of programs for the aging.

The rules in Subchapter 6R concern adult day care standards for certification and include introduction (.0100); definition of terms (.0200); administration (.0300); the facility (.0400); program operation (.0500); certification procedure (.0600); construction requirements for day care home (.0700); certification information (.0800); and special care for persons with alzheimer's disease or other dementias, mental health disabilities or other special needs diseases or conditions in adult day care centers (.0900).

<u>Personnel Centers Home With Operator and Staff</u>	10A	NCAC	06R	.0305
Amend/*				
<u>Personnel Day Care Homes Only Staff Person Is Operator</u>	10A	NCAC	06R	.0306
Amend/*				
<u>General Requirements</u>	10A	NCAC	06R	.0401
Amend/*				
<u>Building Construction</u>	10A	NCAC	06R	.0402
Amend/*				
<u>Procedure</u>	10A	NCAC	06R	.0601
Amend/*				

The rules in Subchapter 6S concern adult day health standards for certification and include introduction and definitions (.0100); administration (.0200); facility requirements for centers and homes (.0300); program operation (.0400); certification information (.0500); and special care for persons with alzheimer's disease or related disorders, mental health disabilities, or other special needs diseases or conditions in adult day care centers (.0600)

<u>Staff Requirements</u>	10A	NCAC	06S	.0204
Amend/*				

The rules in Chapter 70 are for Children's Services.

The rules in Subchapter 70E concern licensing of family foster homes including foster mutual home assessment (.0100); forms (.0200); definitions (.0300); standards for licensing (.0400); licensing regulations and procedures (.0500); general (.0600); licensing regulations and procedures (.0700); mutual home assessment (.0800); forms (.0900); capacity (.1000); and standards for licensing (.1100).

<u>Purpose</u> Repeal/*	10A	NCAC	70E	.0101
<u>Method of Mutual Home Assessment</u> Repeal/*	10A	NCAC	70E	.0102
<u>Assessment Process</u> Repeal/*	10A	NCAC	70E	.0103
<u>Use of References</u> Repeal/*	10A	NCAC	70E	.0104
<u>Periodic Reassessment of Home</u> Repeal/*	10A	NCAC	70E	.0105
<u>Agency Foster Parent Agreement</u> Repeal/*	10A	NCAC	70E	.0106
<u>License Application</u> Repeal/*	10A	NCAC	70E	.0201
<u>Agency Foster Parents' Agreement</u> Repeal/*	10A	NCAC	70E	.0202
<u>Department of Social Services Intercounty Agreement</u> Repeal/*	10A	NCAC	70E	.0203
<u>Definitions</u> Repeal/*	10A	NCAC	70E	.0301
<u>Family Foster Home: Qualification</u> Repeal/*	10A	NCAC	70E	.0302
<u>Client Rights and Care of Foster Children</u> Repeal/*	10A	NCAC	70E	.0401
<u>Criteria For the Family</u> Repeal/*	10A	NCAC	70E	.0402
<u>Physical Facility</u> Repeal/*	10A	NCAC	70E	.0403
<u>Licensing Compliance Visits</u> Repeal/*	10A	NCAC	70E	.0404
<u>Criminal Histories</u> Repeal/*	10A	NCAC	70E	.0405
<u>Responsibility</u> Repeal/*	10A	NCAC	70E	.0501
<u>New Licenses</u> Repeal/*	10A	NCAC	70E	.0502
<u>Renewal</u> Repeal/*	10A	NCAC	70E	.0503
<u>Change in Factual Information on the License</u> Repeal/*	10A	NCAC	70E	.0504
<u>Termination</u> Repeal/*	10A	NCAC	70E	.0505
<u>Revocation or Denial</u> Repeal/*	10A	NCAC	70E	.0506
<u>Licensing Authority Function</u>	10A	NCAC	70E	.0507

Repeal/*				
<u>Kinds of Licenses</u>	10A	NCAC	70E	.0508
Repeal/*				
<u>Out-of-State Facilities and Family Foster Homes</u>	10A	NCAC	70E	.0509
Repeal/*				
<u>Reports of Abuse and Neglect</u>	10A	NCAC	70E	.0510
Repeal/*				
<u>Criminal History Checks</u>	10A	NCAC	70E	.0511
Repeal/*				
<u>Training Requirements</u>	10A	NCAC	70E	.0512
Repeal/*				
<u>Scope</u>	10A	NCAC	70E	.0601
Adopt/*				
<u>Definitions</u>	10A	NCAC	70E	.0602
Adopt/*				
<u>Licensing Authority Function</u>	10A	NCAC	70E	.0701
Adopt/*				
<u>Responsibility</u>	10A	NCAC	70E	.0702
Adopt/*				
<u>New Licenses</u>	10A	NCAC	70E	.0703
Adopt/*				
<u>Relicensure and Renewal</u>	10A	NCAC	70E	.0704
Adopt/*				
<u>Change in Factual Information on the License</u>	10A	NCAC	70E	.0705
Adopt/*				
<u>Foster Home Transfer Procedures</u>	10A	NCAC	70E	.0706
Adopt/*				
<u>Termination</u>	10A	NCAC	70E	.0707
Adopt/*				
<u>Revocation or Denial</u>	10A	NCAC	70E	.0708
Adopt/*				
<u>Kinds of Licenses</u>	10A	NCAC	70E	.0709
Adopt/*				
<u>Out-of-State Facilities and Foster Homes</u>	10A	NCAC	70E	.0710
Adopt/*				
<u>Purpose</u>	10A	NCAC	70E	.0801
Adopt/*				
<u>Method of Mutual Home Assessment</u>	10A	NCAC	70E	.0802
Adopt/*				
<u>Assessment Process</u>	10A	NCAC	70E	.0803
Adopt/*				
<u>Use of References</u>	10A	NCAC	70E	.0804
Adopt/*				
<u>Periodic Reassessment of Home</u>	10A	NCAC	70E	.0805
Adopt/*				
<u>Agency Foster Parent Agreement</u>	10A	NCAC	70E	.0806
Adopt/*				
<u>License Application</u>	10A	NCAC	70E	.0901
Adopt/*				
<u>Agency Foster Parents' Agreement</u>	10A	NCAC	70E	.0902
Adopt/*				
<u>Department of Social Services Intercounty Agreement</u>	10A	NCAC	70E	.0903

Adopt/*				
<u>Foster Home</u>	10A	NCAC	70E	.1001
Adopt/*				
<u>Client Rights</u>	10A	NCAC	70E	.1101
Adopt/*				
<u>Medication</u>	10A	NCAC	70E	.1102
Adopt/*				
<u>Physical Restraints</u>	10A	NCAC	70E	.1103
Adopt/*				
<u>Criteria for the Family</u>	10A	NCAC	70E	.1104
Adopt/*				
<u>Conflict of Interest</u>	10A	NCAC	70E	.1105
Adopt/*				
<u>Day Care Center Operations</u>	10A	NCAC	70E	.1106
Adopt/*				
<u>Relationship to Supervising Agency</u>	10A	NCAC	70E	.1107
Adopt/*				
<u>Fire and Building Safety</u>	10A	NCAC	70E	.1108
Adopt/*				
<u>Health Regulations</u>	10A	NCAC	70E	.1109
Adopt/*				
<u>Environmental Regulations</u>	10A	NCAC	70E	.1110
Adopt/*				
<u>Room Arrangements</u>	10A	NCAC	70E	.1111
Adopt/*				
<u>Exterior Setting and Safety</u>	10A	NCAC	70E	.1112
Adopt/*				
<u>Licensing Compliance Visits</u>	10A	NCAC	70E	.1113
Adopt/*				
<u>Criminal Histories</u>	10A	NCAC	70E	.1114
Adopt/*				
<u>Responsible Individual List</u>	10A	NCAC	70E	.1115
Adopt/*				
<u>Criminal History Checks</u>	10A	NCAC	70E	.1116
Adopt/*				
<u>Training Requirements</u>	10A	NCAC	70E	.1117
Adopt/*				

The rules in Subchapter 70G concern child placing agencies and foster care including general provisions (.0100); minimum licensing standards (.0200); and best practice standards (.0300).

<u>Staffing Requirements</u>	10A	NCAC	70G	.0301
Adopt/*				
<u>Training Requirements</u>	10A	NCAC	70G	.0302
Adopt/*				

The rules in Subchapter 70I concern the minimum licensing standards for residential child-care including general licensing requirements (.0100); minimum licensure standards (.0200); organization and administration (.0300); personnel (.0400); service planning (.0500); service delivery (.0600); buildings, grounds and equipment (.0700); and best practice standards (.0800).

<u>Licensing Actions</u>	10A	NCAC	70I	.0101
Amend/*				
<u>Staffing Requirements</u>	10A	NCAC	70I	.0801

Adopt/*

Training Requirements

10A NCAC 70I .0802

Adopt/*

The rules in Chapter 71 concern Adult and Family Support.

The rules in Subchapter 71R concern the social services block grant including services to be provided (.0100); administrative requirements (.0200); general conditions for provision of services (.0300); application for social services (.0400); conditions of eligibility (.0500); eligibility determination (.0600); eligibility determination (.0700); notice to applicant: recipient: authorized representative (.0800); and service definitions (.0900).

Fiscal Management

10A NCAC 71R .0201

Amend/*

INSURANCE, DEPARTMENT OF

The rules in Chapter 11 are from the Financial Evaluation Division.

The rules in Subchapter 11H concern continuing care facilities.

License-Steps

11 NCAC 11H .0102

Amend/*

LABOR, DEPARTMENT OF

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

Elevator, Escalator, Dumbwaiter, and Special Equipment An...

13 NCAC 15 .0702

Amend/*

ENVIRONMENTAL MANAGEMENT COMMISSION

The rules in Chapter 2 concern environmental management and are promulgated by the Environmental Management Commission or the Department of Environment and Natural Resources.

The rules in Subchapter 02N concern underground storage tanks including general considerations (.0100); program scope and interim prohibition (.0200); UST systems: design, construction, installation, and notification (.0300); general operating requirements (.0400); release detection (.0500); release reporting, investigation, and confirmation (.0600); release response and corrective action for UST systems containing petroleum or hazardous substances (.0700); out-of-service UST systems and closure (.0800); and performance standards for UST system or UST system component installation or replacement completed on or after november 1, 2007 (.0900).

Applicability

15A NCAC 02N .0201

Amend/*

Definitions

15A NCAC 02N .0203

Amend/*

Performance Standards for New UST System Installations or...

15A NCAC 02N .0301

Amend/*

Upgrading of Existing UST Systems After December 22, 1988...

15A NCAC 02N .0302

Amend/*

Implementation Schedule for Performance Standards for New...

15A NCAC 02N .0304

Amend/*

Requirements for Petroleum UST Systems

15A NCAC 02N .0502

Amend/*

<u>Requirements for Hazardous Substance UST Systems</u>	15A	NCAC	02N	.0503
Amend/*				
<u>General Requirements</u>	15A	NCAC	02N	.0901
Adopt/*				
<u>Notification</u>	15A	NCAC	02N	.0902
Adopt/*				
<u>Tanks</u>	15A	NCAC	02N	.0903
Adopt/*				
<u>Piping</u>	15A	NCAC	02N	.0904
Adopt/*				
<u>Containment Sumps</u>	15A	NCAC	02N	.0905
Adopt/*				
<u>Spill Buckets</u>	15A	NCAC	02N	.0906
Adopt/*				
<u>National Codes of Practice and Industry Standards</u>	15A	NCAC	02N	.0907
Adopt/*				

The rules in Subchapter 02S concern the rules and criteria for the administration of the dry-cleaning solvent cleanup fund including general provisions (.0100); minimum management practices (.0200); petitions for certification (.0300); assessment agreements (.0400); and risk-based corrective action approach (.0500).

<u>Scope and Purpose</u>	15A	NCAC	02S	.0101
Amend/*				
<u>Definitions</u>	15A	NCAC	02S	.0102
Amend/*				
<u>Prioritization Assessment</u>	15A	NCAC	02S	.0401
Repeal/*				
<u>Purpose and Applicability</u>	15A	NCAC	02S	.0501
Adopt/*				
<u>Abatement of Imminent Hazard</u>	15A	NCAC	02S	.0502
Adopt/*				
<u>Prioritization of Certification Facilities and Sites</u>	15A	NCAC	02S	.0503
Adopt/*				
<u>Contaminated Site Characterization</u>	15A	NCAC	02S	.0504
Adopt/*				
<u>Preliminary Source Removal</u>	15A	NCAC	02S	.0505
Adopt/*				
<u>Tiered Risk Assessment</u>	15A	NCAC	02S	.0506
Adopt/*				
<u>Remedial Action Plan</u>	15A	NCAC	02S	.0507
Adopt/*				
<u>Land-Use Restrictions</u>	15A	NCAC	02S	.0508
Adopt/*				
<u>No Further Action Criteria</u>	15A	NCAC	02S	.0509
Adopt/*				

MEDICAL BOARD

The rules in Chapter 32 are from the Board of Medical Examiners.

The rules in Subchapter 32B concern license to practice medicine including general provisions (.0100); license by written examination (.0200); license by endorsement (.0300); temporary license by endorsement of credentials (.0400); resident's training license (.0500); special limited license (.0600); certificate of registration for visiting professors (.0700); medical school facility

license (.0800); and special volunteer license (.0900).

<u>Passing Score</u>	21	NCAC	32B	.0211
Amend/*				
<u>Passing Exam Score</u>	21	NCAC	32B	.0314
Amend/*				

NC MEDICAL BOARD/PERFUSION ADVISORY COMMITTEE

The rules in Subchapter 32V are rules covering licensure of perfusionists and the practice of perfusion. Perfusion primarily concerns operating cardiopulmonary bypass systems during cardiac surgery cases.

<u>Scope</u>	21	NCAC	32V	.0101
Adopt/*				
<u>Definitions</u>	21	NCAC	32V	.0102
Adopt/*				
<u>Qualifications for License</u>	21	NCAC	32V	.0103
Adopt/*				
<u>Registration</u>	21	NCAC	32V	.0104
Adopt/*				
<u>Continuing Education</u>	21	NCAC	32V	.0105
Adopt/*				
<u>Supervision of Provisional Licensed Perfusionists</u>	21	NCAC	32V	.0106
Adopt/*				
<u>Supervising Perfusionist</u>	21	NCAC	32V	.0107
Adopt/*				
<u>Designation of Primary Supervision Perfusionist For Provi...</u>	21	NCAC	32V	.0108
Adopt/*				
<u>Civil Penalties</u>	21	NCAC	32V	.0109
Adopt/*				
<u>Identification Requirements</u>	21	NCAC	32V	.0110
Adopt/*				
<u>Practice During a Disaster</u>	21	NCAC	32V	.0111
Adopt/*				
<u>Temporary Licensure</u>	21	NCAC	32V	.0112
Adopt/*				
<u>Orders for Assessments and Evaluations</u>	21	NCAC	32V	.0113
Adopt/*				
<u>Provisional License to Full License</u>	21	NCAC	32V	.0114
Adopt/*				

RECREATIONAL THERAPY LICENSURE, BOARD OF

The rules in Chapter 65 cover the practice of recreational therapy including general provisions (.0100); requirements for practice (.0200); requirements for licensure (.0300); application (.0400); fees (.0500); license renewal requirements (.0600); reinstatement (.0700); inactive status (.0800); reciprocity (.0900); and revocation, suspension or denial of licensure (.1000).

<u>Minimum Level of Education and Competency for Licensed Re...</u>	21	NCAC	65	.0301
Amend/*				
<u>Minimum Level of Education and Competency for Licensed Re...</u>	21	NCAC	65	.0302
Amend/*				

BUILDING CODE COUNCIL

<u>NC Building/Fire Code - Opening Limitations</u>	1012.3
Amend/*	
<u>NC Plumbing Code - Separate Facilities</u>	403.2
Amend/*	
<u>NC Plumbing Code - Public Lavatories</u>	405.3.2
Amend/*	
<u>NC Fire Code - Alarm Activations</u>	401.3.2
Amend/*	
<u>NC Fire Code - Evacuation Plan</u>	404.2
Amend/*	
<u>NC Residential Code - Elevators and Platform Lifts</u>	R324
Amend/*	

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.
Selina Brooks
Melissa Owens Lassiter
Don Overby

Beecher R. Gray
A. B. Elkins II
Joe Webster

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL BEVERAGE CONTROL COMMISSION</u>				
ABC Commission v. La Fiesta Mexicana II, Inc., T/A La Fiesta Mexicana	07 ABC 0149	Gray	04/19/07	
ABC Commission v. NK Group, Inc., T/A NK Food Mart,	07 ABC 0163	Overby	04/18/07	
A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions .				
<u>CRIME VICTIMS COMPENSATION</u>				
Pricilla McAllister v. Crime Victims Compensation Commission	06 CPS 1166	Webster	06/14/07	
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>				
Hanson Hill Rest Home and Faiger Blackwell v. DHHS, DFS, Adult Care Licensure Section	03 DHR 0945	Overby	04/16/07	
Kristen Valerie Kennedy v. Div. of Mental Health/Development Disabilities/ Substance Abuse Services at Dix	06 DHR 0984	Mann	05/08/07	
Eyvette Abbott, Robbie Wilson Community Services, Inc., v. DHHS (DMH/ DD/SAS)	06 DHR 1139	Webster	06/06/07	
Amran Hussein, Trading as Laurinburg Food Mart v. DHHS, Div. of Public Health	06 DHR 1569	Webster	04/17/07	
James Hampton for South Haven Assisted Living v. DHHS, DFS, Mental Health Licensure and Certification Section	06 DHR 1783	Gray	04/23/07	
Burnell Yancey, Jr. v. DHHS, Div. of Medical Assistance	06 DHR 1817	Elkins	05/29/07	22:01 NCR 82
Nidal Dahir, DHHS, Division of Public Health	06 DHR 1916	Lassiter	05/14/07	
Mary K. Short for Kathryn M. Short v. DHHS, Division of Mental Health, Developmental Disabilities and Substance Abuse	06 DHR 2282	Gray	05/18/07	
Egusta Ford v. DMA, Third Party Recovery	06 DHR 2364	Gray	05/14/07	
Annette L. Gwynn v. DHHS, Division of Medical Assistance	07 DHR 0030	Webster	06/08/07	
John A. Millan and Cornelia D. Millan v. DHHS	07 DHR 0031	Gray	05/23/07	
Doris Durden/MID #945-63-2642K v. DHHS	07 DHR 0055	Overby	06/04/07	
Rita Amirahmadi v. DHHS, Division of Medical Assistance	07 DHR 0250	Elkins	06/05/07	
Linda S. Little, Littles Day Care	07 DHR 0266	Overby	05/23/07	
Kareem S. Scott v. DHHS, DFS	07 DHR 0300	Webster	05/11/07	
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Geraldine Fenner v. DHHS	07 DHR 0367	Overby	05/23/07	
Annette L. Gwyn v. DHHS/Division of Medical Assistance	07 DHR 0382	Lassiter	04/16/07	
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Leonard Atkins Jr. v. Rowan County DSS (Ms. Tate)	07 DHR 0464	Gray	06/07/07	
Visitacion T Uy v. DHHS/Division of Medical Assistance	07 DHR 0489	Overby	05/10/07	
Dorothy Sue Johnson v. DHHS, DFS	07 DHR 0502	Webster	06/15/07	
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Jeremy Shayne Pearce v. DOJ, Campus Police Program	06 DOJ 2424	Overby	04/16/07		
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Citizens for the Preservation of Willis Landing, Kenneth M. Seigler v. DOT	07 DOT 0175	Gray	03/27/07		
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Sparkle Nicole Jones v. DST and Denise Virginia Lee and Arthur E. Seay, III	05 DST 1612	Gray	05/23/07		
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Paul A. Stennett v. DENR, Public Water Supply Section	07 EHR 0170	Overby	05/04/07		
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Toni W. Goodwin v. Teachers and State Employees Comprehensive Major Medical Plan	06 INS 1016	Overby	05/07/07		
Larry Miller v. Teachers' and State Employees' Comprehensive Major Medical Plan	06 INS 1236	Overby	04/11/07		
Randall A. Meder v. Teachers' and State Employees' Comprehensive Major Medical Plan	06 INS 1413	Overby	07/16/07	22:04 NCR	264
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Angelia Davis v. UNC-Charlotte	06 OSP 1908	Gray	03/08/07		
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Larry L. Deyton v. Mitchell County Commission Board	06 OSP 2415	Gray	04/19/07
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Dorothy H. Williams v. John Umstead Hospital	07 OSP 0265	Lassiter	04/24/07
Pei Wang v. UNC-Chapel Hill	07 OSP 0273	Lassiter	04/19/07

Candace R. Berguson v. Caswell County DSS and Mr. Jeff Earp, County Manager	07 OSP 0294	Lassiter	04/20/07
Shannon Harris Tadlock v. Wilson County, Department of Public Health	07 OSP 0491	Lassiter	05/07/07
Patricia G. Flanigan v. Fayetteville State University	07 OSP 0503	Overby	05/10/07
Tobias M. Guilluame v. FSU Police & Public Safety	07 OSP 0565	Overby	05/10/07

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Mary C. Brandon v. Department of the Secretary of State	06 SOS 1839	Elkins	04/02/07
Samuel Abraham , pro-se v. SOS, General Counsel Ann Wall	07 SOS 0224	Overby	04/27/07
Mr. Tim Rhodes, President, Event Marketing Services, Inc. v. SOS	07 SOS 0374	Overby	06/14/07

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Kenneth Trivette v. UNC Hospitals	06 UNC 2014	Elkins	04/02/07
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CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
06 INS 1413

Randall A. Meder)	
)	
Petitioner,)	
)	
v.)	DECISION
)	
N.C. Teachers' and State Employees')	
Comprehensive Major Medical Plan,)	
)	
Respondent.)	

On May 2, 2007, the undersigned conducted an evidentiary hearing in this case in Raleigh, North Carolina. On June 21, 2007, counsel for the Respondent filed its proposed Decision, on June 30, 2007, counsel for the Petitioner filed his proposed Decision, and the official record in this case is now closed.

APPEARANCES

For the Petitioner:	Robert O. Jenkins P. O. Box 30124 Raleigh, NC 27622
For the Respondent:	Thomas M. Woodward Assistant Attorney General N.C. Department of Justice P. O. Box 629 Raleigh, NC 27602-0629

EXHIBITS ADMITTED

For the Petitioner:	Exhibits 3, 4, 8, 9, 10 and 12 (8, 9, 10 and 12 are admitted without the opportunity for counsel for the Respondent to cross exam the authors of these documents)
For the Respondent:	Exhibits 1 through 13

ISSUE

Whether the State Health Plan ("Plan") erred in its payment of professional charges submitted by Dr. Sacco for the care and treatment of Evan Meder on October 18, 2005?

Based on the evidence presented, the Court makes the following

FINDINGS OF FACTS

1. The Respondent is an agency of the State of North Carolina that offers health care benefits to eligible State employees, retirees and their dependents (State employees and retirees participating in the Plan are referred to herein as "members," and members and their covered dependents are jointly referred to herein as "covered persons"). N.C. Gen. Stat. § 135-40 *et seq.*
2. The Petitioner was a member of the Plan at the time the matter addressed in his Petition arose and his son, Evan Meder, was a covered person.
3. Evan Meder was born on June 14, 2004 with Apert Syndrome, a rare craniofacial condition that can also affect other parts of the body. Children with Apert Syndrome have complex medical problems that require highly complex surgical procedures to attempt

to correct their skull and facial deformities to prevent increased cranial pressure and possible brain damage or death. One corrective medical procedure to address Apert Syndrome is surgery to “reshape” the patient’s brain and skull.

4. Upon the advice and recommendation of Dr. Cynthia Powell at UNC, the Petitioner selected the Craniofacial Center at the Medical City Dallas Hospital, located in Dallas, Texas, as the facility where his son’s surgery would be performed. Petitioner and his wife consulted with and received advice from Dr. Cynthia M. Powell, an Associate Professor of Pediatrics and genetics and Chief of the Division of Genetics and metabolism at the University of North Carolina. Dr. Powell advised the Petitioner that this surgery required comprehensive care provided by a specialized team and that the surgery required both a craniofacial plastic surgeon and a pediatric neurosurgeon. Dr. Powell informed the Petitioner that at that time UNC did not have a pediatric neurosurgeon at North Carolina Children’s Hospital and that Duke did not have a comprehensive craniofacial clinic. Dr. Powell advised the Petitioner to look outside of North Carolina and in her opinion the care provided at The Craniofacial Center in Dallas was not available in North Carolina. Pet. Ext. 8.

5. Blue Cross and Blue Shield of North Carolina is the medical claims processing contractor (“Claims Processor”) for the Plan, and in this capacity provides, among other services, claims processing and payment services, pre-certification authorizations, customer services, and appeals reviews. All non-emergency inpatient hospital admissions and surgeries require pre-certification by the Claims Processor. See Resp. Ex. 2, 2004 Summary Plan Description, (“SPD”), pp 31-32.

6. On October 4, 2005, Joanne from Dr. Fearon’s office (one of Evan’s doctors in Dallas) called the Plan’s Customer Services Department to verify benefits for Evan Meder. She was told the following: the \$350.00 Plan year deductible for Evan Meder had been met; benefits are paid at 80% of the allowable amount; Evan Meder had met \$458.19 of his \$2,000.00 yearly out-of-pocket maximum; once the out-of-pocket yearly maximum was met, the Plan would pay benefits at 100% of allowed amounts; there is a \$15.00 co-pay for office services; and there was no referral needed. Resp. Ex. 3, ¶ 20.

7. On October 5, 2005, the Claims Processor mailed a preadmission letter to the Petitioner at his home address authorizing Evan Meder’s surgery, therefore making the operation a “covered service” by the Plan. This letter includes the following statement: **“Disclaimer: ...The member is always responsible for the Plan year deductible, coinsurance amounts, inpatient admission co-payment and charges for non-covered services. Effective September 1, 2003, the State Health Plan (SHP) has a contract with Private Healthcare Systems (PHCS) to provide an out-of-state provider network for SHP members who receive services outside of North Carolina. Contracting hospitals and professional providers (doctors, therapists, etc.) in North Carolina and out-of-state hospitals and professional providers in the PHCS network agree to accept the Plan allowance. They will not hold the member responsible for in cost if the charge is higher than the Plan’s allowance. If the member receives services in a non-contracting hospital or by a non-contracting professional provider in North Carolina, OR in an out-of-state hospital or by an out-of-state professional provider who is not in the PHCS network, and the charge is higher than the Plan’s allowance, the hospital or professional provider may hold the member responsible for the difference in cost. ... To determine if your provider outside of North Carolina is participating or to obtain a list of participating providers, please contact PHCS toll free at 1-866-680-7427 or visit their website at www.phcs.com. [Bolded as it appears in document.]** Resp. Ex. 8.

8. Evan’s mother, Margaret Meder, coordinated all of the necessary approvals prior to the October 18, 2005 surgery, and it was her understanding that the subject treatment, including the work to be performed by Dr. Sacco was approved and would be covered. Pet. Ext. 5. There is no evidence that the Petitioner ever attempted to contact the Plan to verify benefits. Ex. 3, ¶ 22.

9. The surgery Evan Meder underwent is a long, complex and involved procedure that was performed by a two surgeon team that included Dr. Jeffrey Fearon, a craniofacial plastic surgeon and Dr. David Sacco, a pediatric neurosurgeon. Evan underwent an anterior bifrontal cranial vault remodeling. The surgery was necessary to restore normal calvarial anatomy and to enlarge the frontal cranial fossa to allow room for Evan’s brain to grow. Pet. Ext. 10. This operation was performed on Evan by Dr. Fearon and Dr. Sacco on October 18, 2005 at the Medical City of Dallas Hospital in Dallas, Texas.

10. The Medical City Dallas Hospital is one of the busiest centers in the country for treating children with Apert Syndrome. It is considered a comprehensive craniofacial clinic that can coordinate the numerous surgeries that children with Apert Syndrome require.

11. Once a covered service is provided to a covered person by a qualified health care professional (“provider”), the provider will submit a claim form to the Claims Processor. The claim form lists, among other information, a CPT Code for each service provided to the covered person and the provider’s requested fee for each service. CPT codes are five digit numbers that describe an extensive number and type of medical services and are used as the standard method for medical claims processing in the United States.

12. The Plan pays in-State providers and out-of-State providers that do not participate in the Private Healthcare Systems (PHCS) network based on a fee schedule that reflects the usual, customary, and reasonable (“UCR”) rate for the services rendered. The UCR rate is determined by the Plan based on the usual charge made by an individual doctor for his or her private patients for a particular

service, or the customary charge within the range of usual fees charged by most doctors of similar skill and training in North Carolina for the comparable service, whichever is lower. Each CPT Code has a UCR allowance assigned to it.

13. In cases of unusual complexity and cases involving supplemental skills of two or more doctors, reasonable charges are determined by the Plan's claims administrator after consulting with its medical advisors. N.C. Gen. Stat. § 135.40.1(19). In this matter, Dr. Fearon and Dr. Sacco submitted separate claims and were both paid as primary surgeons.

14. Once the Claims processor determines the UCR rate for the covered service by applying the statutory guidelines, the Plan pays the provider the UCR rate for the service minus any applicable deductible or coinsurance amount owed by the member. N.C. Gen. Stat. § 135-40.6.

15. The Plan offers two programs that protect members from charges in excess of the UCR rate - the CostWise program and the PHCS network for out-of-State providers. The CostWise program is an agreement between the Plan's Claims Processor and participating North Carolina providers whereby participating providers agree not to bill a Plan member for any amount above the UCR rate. PHCS is a nationwide network of out-of-State physicians, hospitals, labs, health care professionals, and other ancillary services, that have agreed to accept the Plan's UCR rates and not bill Plan members for any charges above a negotiated rate. The Plan "covers" charges from providers who do not participate in these programs provided that the services billed are covered by the Plan and are medically necessary; however, the charges are only covered up to the UCR rate.

16. The 2004 Summary Plan Description ("SPD") is a booklet provided to all Plan members that contains a summary of benefits provided by the Plan and includes descriptions of the UCR rate, the CostWise Program, and the PHCS network. The SPD cautions members that if they choose to receive services from a provider who does not participate in either CostWise or the PHSC network, they may be responsible for the provider's bill in excess of the UCR rate as determined by the Plan. The SPD provides members with a toll free telephone number to call in order to determine if a provider participates in CostWise. The SPD further provides members with a toll free telephone number and a website address to determine whether a provider is part of the PHSC network. This information is also available on the Plan's website and the toll free numbers are listed on the back of the member's insurance card.

17. It is not usual for providers to submit claims to State Health Plan which are significantly higher than the payment they will accept for a service. Medical claims were submitted to the State Health Plan from various health care providers who provided care to Evan Meder in connection with his October 18, 2005 surgery. The Medical City Dallas Hospital, Dr. Jeffrey Fearon, Dr. William H. Jones, MCD Pathology and Radiology Consultants provided services to Evan and had contracts with the Plan through PHCS. The Plan paid out a total of \$91,069.51 to these providers. For these providers, the Petitioner was held responsible only for the \$664.00 co-payment and coinsurance amounts as required by the terms and conditions of his Plan coverage. He was not held responsible for the \$84,174.85 differences between charges and allowances of the contracted providers of services. Ex. 3, ¶ 29.

18. All providers who did not have a contract with PHCS, with the exception of Dr. Sacco, have accepted the Plan's UCR allowed amounts as payment in full and have written off any balances.

19. Dr. Sacco did not participate in the PHCS network and therefore should have been paid based on the UCR rate. Dr. Sacco billed the Plan \$8,300.20 for his services, the Plan determined that the UCR allowable amount for the services was \$2,844 of which the Petitioner would be responsible for \$586.80 as the coinsurance amount. Accordingly, the Plan paid Dr. Sacco \$2,275.20 leaving a balance owed to Dr. Sacco by the Petitioner of \$5,456.20. Resp. Ex. 4.

20. Dr. Danya Lucas, the Plan's medical director and a board-certified physician in pediatric medicine and utilization review management, qualified as an expert in general medicine, pediatric medicine, and utilization review management. She performed an analysis to determine whether the UCR allowance was "fair and reasonable" for the service rendered by Dr. Sacco in this case.

21. Dr. Lucas testified that she is not an expert concerning UCR calculations and that these calculations are performed by a separate branch within Blue Cross & Blue Shield. Ms. Overby confirmed that UCR was performed by a separate branch at Blue Cross & Blue Shield and that it is updated bi-annually. Dr. Lucas provided the only evidence of how the UCR allowances are determined, that it is basically a computer program which analyzes data concerning the fees and charges submitted by doctors in North Carolina and that it is self-adjusting as it is updated bi-annually according to the information supplied by the doctors.

22. The Plan is not authorized to pay charges in excess of the UCR rate to those providers for whom it is applicable except in circumstances where there is a regional discrepancy in charges for the service that justifies a deviation from the UCR rate or where the Plan's Claims Processor determines that fairness and equity in a particular set of circumstances require a greater or lesser charge be considered. N.C. Gen. Stat. § 135-40.7(10).

23. In reviewing this case, Dr. Lucas considered the fact that this service was provided in Dallas, Texas but concluded that North Carolina does not recognize Texas as a state that would justify a deviation from the UCR rate because of a regional discrepancy, and thereby require payment of higher fees. It is, therefore, appropriate to use the UCR numbers applicable to North Carolina doctors.

24. In an effort to be fair and reasonable, Dr. Lucas decided to use Medicare allowances for comparison since Medicare is a national data base and oftentimes gives higher allowances. In this case, she compared the Plan's allowed amount for the CPT Code submitted by Dr. Sacco, 61557, with that of the Dallas area Medicare allowances for the procedure. Dr. Lucas determined that the Plan's UCR allowance was 174% greater than what Medicare would have allowed for that locality. Although North Carolina is not controlled by the Medicare allowances, Dr. Lucas would have paid the amount allowed by Medicare if it had been higher. Based on this comparison, Dr. Lucas determined that an increased payment by the Plan was not warranted in her professional opinion.

25. Dr. Lucas did not have information on what private insurance providers may have paid and did not consider Dr. Sacco's letter concerning private insurance since the Plan is controlled by statute. Based on the information that she reviewed, it was her expert opinion that the payment for Dr. Sacco's claim should not be increased from the UCR amount.

26. Robert O. Jenkins, Petitioner's counsel, submitted a post-hearing affidavit, as permitted by the undersigned, in which he indicates that he contacted the following providers to determine their charge for CPT Code 61577, the CPT Code billed by Dr. Sacco in October 2005. Based on his telephone conversations, he received the following information:

- a. Wake Forest University Physicians would have charged \$4,544 in May 2007.
- b. UNC Physicians and Associates would have charged \$3,138 on October 2005, the date of Evan Meder's operation.
- c. Carolinas Neurosurgery and Spine Associates would have charged from \$5,999 to \$7,188 in May 2007. Pet. Ext. 13.

27. Respondent's counsel submitted the Affidavit of Michelle Overby in reply to the Affidavit of Robert O. Jenkins. In her affidavit, Ms. Overby states that all providers listed in the Affidavit of Robert O. Jenkins have agreed to accept the State Health Plan's UCR allowances and would not have billed the Petitioner for any amount over \$2,844, the State Health Plan's allowance for CPT Code 61577. Ms. Overby further states that a professional provider's "charge" for any given service varies widely, is not necessarily representative as to the amount that they accept for services, and it is not unusual for a provider to submit a bill that is 2 to 3 times the amount of the fee that they will accept from the Plan.

28. Had the Petitioner elected to have his surgery performed by one of the three North Carolina pediatric neurosurgeons contacted by the Petitioner's attorney, from any other participating neurosurgeon in North Carolina who works with a plastic surgeon to perform the procedure, or from any physician or hospital group that can perform this procedure and participates in the PHCS network, all he would have owed for the surgery was his co-payment and co-insurance amount.

29. N.C. Gen. Stat. § 135.40.1(19) defines "Usual, Customary and Reasonable" by stating "the term 'UCR' shall be developed from criteria used for determining reasonable charges for services, . . . and shall be **based on** the usual charge made by an individual doctor for his or her private patients . . . , **or** the customary charge within the range of usual fees charged by most doctors of similar skill and training in North Carolina for the comparable service, **whichever is the lower.**" (Emphasis added) The language of the statute clearly states that the amount is "based upon" the usual charge by the doctor and is not equivalent to that charge, which is consistent with Dr. Lucas' description of how the UCR is determined. The statute requires that the starting point for this determination be based on what the physicians "charge," not what they have contracted to accept or are willing to accept as payment.

30. The Plan determined that the allowable amount for the surgical services rendered by Dr. Sacco was \$2,844.00. According to statute, this amount should have been determined by looking at the customary charge within the range of usual fees charged by most doctors of similar skill and training in North Carolina for the comparable service and determining if that amount is lower than the fee normally charged by Dr. Sacco.

31. Dr. Lucas explained that the "customary" amount is set at a ninety percentile in that ninety percent of all doctors of similar skill and training and performing comparable service would be paid at the established rate or lower based upon the bills submitted by the doctors. She further explained that as the doctors rates increased and they billed accordingly, the UCR rates would adjust accordingly as well. The statutory language and as it is correctly applied does not necessarily compensate the individual doctor for the exact amount he or she charges.

32. There are at least four groups of providers/hospitals in North Carolina who could have performed the operation on Evan Meder. Although there is no evidence of the skill or training of any of the doctors at issue, including Dr. Sacco, for comparison, these North Carolina providers could have provided the comparable service for Evan's treatment. All of the pediatric neurosurgeons who could have performed the operation would have accepted the Plan's UCR allowance.

33. The evidence presented is that on October 2005, the date of Evan Meder's operation, UNC Physicians and Associates would have charged \$3,138 and Duke University would have charged \$6,349.00. Although Wake Forest University Physicians and Carolinas Neurosurgery and Spine Associates were unable to provide what they would have charged in October 2005, each provided information on what they would charge in May 2007, which was substantially higher than the previously allowed UCR or the amount UNC Physicians would have charged.

34. It is not reasonable to conclude that the North Carolina General Assembly meant that "charge" means that the State Health Plan is committed to pay whatever North Carolina providers would like to be paid for their services, as there is nothing to control the amount that a provider may submit as a bill. Such an interpretation could result in the State paying inordinate amounts without justification. The intent of the General Assembly was illustrated when they authorized the State Health Plan to offer HMOs and PPOs in order to reduce the cost of the Plan. N.C. Gen. Stat. § 135-39.5B (a) and (b).

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this matter.
2. The Petitioner has the burden to prove his case by a preponderance of the evidence.
3. The Plan is a creature of statute and is therefore governed by the applicable North Carolina General Statutes and the medical policies adopted in accordance therewith.
4. Based on the evidence, there are a limited number of doctors of similar skill and training in North Carolina who could have provided comparable service to Dr. Sacco, and their usual and customary fee would be \$3,138.00, and that amount is reasonable.

DECISION

Based on the foregoing Findings of Facts and Conclusions of Law, it is hereby recommended that the decision of the Respondent to deny the Petitioner's grievance related to the State Health Plan's payment of Dr. Sacco be REVERSED and that Dr. Sacco be paid the sum of \$3,138.00 for services to the Petitioner, less any amounts previously remitted.

NOTICE

The agency that will make the final decision in this contested case is the Board of Trustees of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan ("Agency"). The Agency is required to give each party an opportunity to file exceptions to and written arguments concerning this Recommended Decision. The Agency is further required to serve a copy of the Final Agency Decision on all parties or their attorneys of record and on the Office of Administrative Hearings.

This the 16th day of July, 2007.

Donald W. Overby
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 INS 0008BARBARA SMITH PEARCE,
Petitioner,

v.

NORTH CAROLINA STATE HEALTH PLAN,
Respondent.)
)
)
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)
)
)**DECISION**

THIS MATTER came on for hearing before the undersigned, Donald W. Overby, Administrative Law Judge, on June 1, 2007, in Raleigh, North Carolina.

APPEARANCES

For Petitioner:

Barbara Smith Pearce
3507 Baugh Street
Raleigh, NC 27604
Pro se

For Respondent:

Thomas W. Woodward
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27600-9001**ISSUE**

Whether the Respondent North Carolina State Health Plan acted erroneously, failed to use proper procedure, or acted arbitrarily or capriciously when it sought reimbursement from Petitioner's providers for payments it paid as the primary payor between September 1, 2003 and October 1, 2005.

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner:

None

For Respondent:

1-5

At the hearing held in this matter, the parties orally entered into the following:

STIPULATIONS

1. The Petitioner is enrolled as a member of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan ("State Health Plan") and was so enrolled at the time the matter addressed in her Petition arose.
2. The Petitioner has Medicare coverage as a result of a disability.
3. By letter dated November, 9, 2005, the Petitioner received notice from the Social Security Administration that her Medicare Part A (hospital) coverage was effective as of September 1, 2003; that her Medicare Part B (medical) coverage would become effective as of October 1, 2005 unless she declined such coverage in writing; that she was eligible to have her Medicare Part B coverage become effective September 1, 2003 by paying back premiums in the amount \$1,737.80; and that if she chose to have her Medicare Part B coverage become effective as of September 1, 2003, she could make the back premium payments in installments.

4. The Petitioner did not contact Medicare in writing to either decline Part B coverage or to elect Part B coverage to become effective September 1, 2003; therefore, her Medicare Part B coverage became effective October 1, 2005.
5. The Petitioner contacted an attorney and Ms. Obiol, an employee with the Senior Health Insurance Program, prior to making her decision not to begin her Medicare Part B coverage effective September 1, 2003.
6. There is no documented evidence that the Petitioner contacted the State Health Plan, the State Health Plan's Customer Service Department, or Medicare prior to making her decision concerning the effective date of her Medicare Part B coverage.
7. When the State Health Plan learned that the Petitioner was first eligible for Medicare Part B coverage to begin on September 1, 2003, it wrote to those providers who submitted claims for the medical treatment of the Petitioner for the period from September 1, 2003 to October 1, 2005 and requested a refund amounting to the difference in what the State Health Plan paid on these claims and what it would have paid as a secondary payor to Medicare.
8. The Petitioner was not directly informed of the State Health Plan's decision to seek recovery of what it determined to be overpayments it made to her providers, but she did receive copies of all letters sent to those providers.

BASED UPON careful consideration of the testimony presented at the hearing, the documents and exhibits received into evidence, and the entire record in this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1. Although Petitioner was not actively employed by the State she still continued to receive health care benefits under the State Health Plan while she was out on disability.
2. In a letter dated November 9, 2005, Petitioner received notice from the Social Security Administration (hereinafter SSA) informing her that she was entitled to monthly disability benefits. The benefits were backdated to September 2001 and were awarded in a lump sum of \$42,579.00.
3. Petitioner was not given earlier medical insurance under Medicare because SSA did not process it timely. The letter from SSA dated November 9, 2005 stated that "[w]e have recently discovered that you should have been entitled to Supplementary Medical Insurance Coverage beginning September 2003."
4. The State Health Plan coordinates benefits with Medicare. The State Health Plan Benefits Booklet includes the following notice regarding the importance of enrolling in Medicare:

If you are not an active employee, OR if you have end stage renal disease (ESRD), and are eligible for Medicare Part B, it is recommended that you enroll. If you choose not to enroll in Medicare Part B, the Plan estimates the amount that Medicare would have paid for covered services, and considers for Plan payment only the remaining balance just as if Medicare had paid.
5. The date Petitioner became eligible for Medicare Part B coverage is in dispute.
6. According to Petitioner, she became eligible for Medicare Part B coverage on October 1, 2005. Petitioner's Medicare card shows a date of September 1, 2003 for Part A and a date of October 1, 2005 for Part B.
7. According to Respondent State Health Plan, Petitioner became eligible for Medicare Part B coverage in September of 2003 and opted not to purchase those benefits. The State Health Plan held the Petitioner accountable for choosing not to purchase backdated Medicare Part B benefits and sought reimbursement from Petitioner's providers for payments made as the primary coverage for the period from September 1, 2003 to October 1, 2005. Medicare was not available when these claims were filed.
8. All of Petitioner's requests for appeal and grievance reviews were denied.
9. The amount currently in dispute is \$8,444.93.

BASED UPON the foregoing Stipulations and Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this matter.
2. In 1965, Congress established the Medicare Program as Title XVIII of the Social Security Act. 42 U.S.C. §§ 1395-1395ccc. There are two parts to the Medicare program. Medicare Part A provides hospital insurance and is funded by Social Security payroll contributions. 42 U.S.C. §§ 1395c-1395i-2. Medicare Part B is a voluntary supplemental insurance program available to Medicare-eligible individuals who elect to enroll and requires the payment of a monthly premium. 42 U.S.C. §§ 1395j-1395w.
3. Petitioner's letter from SSA informed her that she "should have been entitled to Supplementary Medical Insurance Coverage beginning September 2003 [and] [a]ction has now been taken to provide you with this coverage beginning October 2005." She was automatically enrolled in Medicare Part B beginning October 1, 2005, but was provided the option of declining enrollment. "An eligible individual who is automatically enrolled in the Medicare Part B supplementary medical insurance program is granted a specified period, at least two months after the month in which the SSA mails notice of the enrollment, in which to decline enrollment. Enrollment is declined by submitting to the SSA a signed statement that he or she does not want supplementary medical insurance." 42 C.F.R. 407.17(b)(2).
4. Petitioner never submitted a signed statement declining enrollment in Medicare Part B. In fact, Petitioner stated that she contacted Ms. Carla Obiol, an employee with the Senior Health Insurance Program, and was informed by a staff member that she needed to be enrolled in Medicare Part B to maintain full benefits, and that was why she did not submit the form declining enrollment. Petitioner stated that she did not purchase retroactive benefits because all of her past claims had been covered by the State Health Plan. Since neither the statutes nor the State Health Plan's Benefits Booklet address the issue of retroactive benefits, and Petitioner contacted her attorney and the Senior Health Insurance Program, it is concluded that Petitioner acted as a reasonable person in good faith.
5. Petitioner's letter from SSA dated November 9, 2005, clearly states "[w]e have recently discovered that you *should have been* entitled to Supplementary Medical Insurance Coverage beginning September 2003." Thus, Petitioner was not covered under Medicare from September 2003 to September 2005. The mere fact that SSA provided Petitioner with the option to purchase backdated/retroactive Medicare Part B coverage does not equate to the enrollment or eligibility standards required by relevant statutes and regulations.
6. Since Petitioner did not have Medicare when claims were filed between September 2003 and September 2005, the State Health Plan served as primary coverage. During that time, there was no indication that Medicare was, or would be, a liable option for coverage, so these claims were properly paid by the State Health Plan.
7. "In the case of employees eligible under the [State Health] Plan who are also eligible for Medicare benefits, benefits under the [State Health] Plan will be paid in coordination with Medicare benefits in a manner *consistent with federal law*." N.C.G.S. § 135-40.13(d) (emphasis added).
8. "Under the federal statutes and regulations, the mere existence of possible Medicare eligibility does not create third party Medicare liability." Duke University Medical Center v. Bruton, 134 N.C. App. 39, 516 S.E.2d 633 (1999).
9. "Probable liability is established at the time claim is filed." 42 C.F.R. 433.139 (b). "The establishment of third party liability takes place when the agency receives confirmation from the provider or a third party resource indicating the extent of third party liability." 42 C.F.R. 433.139 (b)(1). In this case, confirmation was not available until SSA notified Petitioner of her Medicare entitlement in November of 2005.
10. "If the probable existence of third party liability cannot be established or third party benefits are not available to pay the recipient's medical expenses *at the time the claim is filed*, the agency must pay the full amount allowed under the agency's payment schedule." 42 C.F.R. 433.139(c) (emphasis added); see also Duke University Medical Center v. Bruton, 134 N.C. App. 39, 516 S.E.2d 633 (1999).
11. Here, even assuming that the State Health Plan correctly determined the probable existence of future Medicare coverage by inferring potential liability from Petitioner's disability, the State Health Plan would nonetheless be unable to confirm the actual existence or amount of Medicare liability, as required by the regulation, because *at the time the claims at issue were filed*, no such Medicare liability existed. Therefore, Petitioner was entitled to have the contested claims paid by the State Health Plan.

12. Respondent State Health Plan acted erroneously in seeking reimbursement from Petitioner's providers. The State Health Plan's Claims Processor did not have the right pursuant to N.C. Gen. Stat. § 135-40.13(g) to seek reimbursement from Petitioner's providers.

13. Under the State Health Plan, the right of recovery is triggered:

Whenever payments have been made by the Claims Processor with respect to *covered services* in a total amount which is, at any time, in excess of the maximum amount of payment necessary *at that time* to satisfy the intent of this provision, irrespective of whom paid, the Claims Processor shall have the right to recover such payments, to the extent of such excess, from among one or more of the following, as the Claims Processor shall determine: any persons to or for or with respect to whom such payments were made, any insurance companies, or any other organizations.

N.C. Gen. Stat. § 135-40.13(g) (emphasis added).

14. While N.C. Gen. Stat. § 135-40.10(c) states that "benefits under this [State Health] program will be reduced by the amounts to which the covered individuals would be entitled to under Parts A and B of Medicare, even if they choose not to enroll for Part B[.]" this statute is not applicable in this case. As stated previously, Petitioner never submitted a signed statement declining enrollment in Medicare Part B and her enrollment began October 1, 2005. The time period at issue is from September 1, 2003 to September 2005, the time period Petitioner was given the option to backdate her Medicare coverage. Petitioner's decision not to backdate her Medicare Part B coverage does not equate to declining enrollment.

15. Benefits payable for covered expenses under the State Health Plan are "reduced by any benefits payable for the same *covered expenses under Medicare*, so that Medicare will be the primary carrier except where compliance with federal law specifies otherwise." N.C. Gen. Stat. § 135-40.10(a) (emphasis added). At the time services were rendered to the Petitioner between September 2003 and September 2005, she was not covered by Medicare and any services provided to her were not covered expenses under Medicare and are therefore, not subject to the right of recovery in N.C. Gen. Stat. § 135-40.13(g).

16. This decision is in accord with the decision made by Senior Administrative Law Judge Fred Morrison, Jr. in Kelly v. N.C. State Health Plan, 06 INS 0013 (2006).

BASED UPON the foregoing Stipulations, Findings of Fact, and Conclusions of Law, the undersigned renders the following:

DECISION

Respondent acted erroneously in seeking reimbursement from Petitioner's providers and therefore must repay any refunded claims.

ORDER AND NOTICE

The Board of Trustees of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan will make the Final Decision in this contested case. The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Board is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the _____ day of July, 2007.

Donald W. Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

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JAMES EDWARD THOMAS and
MARCUS ROBINSON and
ARCHIE LEE BILLINGS,
Petitioners,

v.

NORTH CAROLINA COUNCIL OF STATE,
Respondent

07 GOV 0264

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APPLICABLE STATUTES AND RULES

Official notice is taken of the following statutes and rules applicable to this case:

N.C. Const. art. XI § 1 & 2
N.C. Gen. Stat. § 150B-1 et seq.; § 90-2 & § 11-7
N.C. Gen. Stat. § 15-187-88, 190 (2006)
06 NCAC 01 .0106

ISSUE

Whether the Respondent's February 6, 2007, approval of an Execution Protocol substantially prejudiced Petitioners' rights

and whether, in approving the protocol, the Respondent exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule.

WITNESSES FOR PETITIONERS

Philip G. Boysen
Kevin Concannon
David McCoy
Obi C. Umesi

WITNESSES FOR RESPONDENT

None

EXHIBITS RECEIVED INTO EVIDENCE

Petitioners

Exhibit Notebook containing Exhibits 1-27.

Respondent

Exhibit Notebook containing Items 1-18.

Based upon a preponderance of the substantial evidence admitted into the record, the testimony presented at the hearing, the documents and exhibits received into evidence, and the entire record in this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioners Jerry W. Conner, James A. Campbell, James Edward Thomas, Marcus Robinson, and Archie Lee Billings, are convicted first degree murderers in the custody of the North Carolina Department of Correction who have been sentenced to be executed by lethal injection.
2. Article XI, Section 2 of the North Carolina Constitution has provided for punishment by death where the General Assembly so enacts. The North Carolina General Statutes provide for the penalty of death for those convicted of first degree murder.
3. There have been three methods of execution since North Carolina assumed responsibility for capital punishment from the counties in 1909, including the electric chair, the gas chamber, and lethal injection.
4. In 1998, North Carolina established lethal injection as its sole method of performing prisoner executions. See Current Operations Appropriations and Capital Improvement Appropriations Act of 1998, 1998 N.C. Sess. Laws 212, amending N.C. Gen. Stat. §15- 187-88, 190.
5. N.C. Gen. Stat. § 15-187 provides for prisoner executions through the administration of lethal drugs:

Any person convicted of a criminal offense and sentenced to death shall be executed only by the administration of a lethal quantity of an ultrashort-acting barbituate in combination with a chemical paralytic agent.
6. Though it is not specified in N.C. Gen. Stat. § 15-187, the North Carolina Department of Correction also uses potassium chloride in its lethal injection protocol, thus we have a three-drug combination: sodium pentothal to render an inmate unconscious and unable to feel pain; pancuronium bromide to paralyse the inmate and stop the breathing; potassium chloride to stop the heart. If the pentothal is not properly administered, an inmate could be conscious and suffer a very painful death from the other two lethal drugs. If not unconscious but paralysed, an inmate would not be able to move or scream while painfully suffocating or when the deadly, burning potassium chloride is injected into the veins causing more excruciating pain while stopping the heart.
7. N.C. Gen. Stat. § 15-188 further describes the manner and place of execution while § 15-190 provides for persons to be designated by the Warden of Central Prison to execute the death sentence, persons to supervise the execution, and persons to

be present: “[a]t such execution there shall be present the warden or deputy warden or some person designated by the warden in the warden’s place, and the surgeon or physician of the penitentiary.”

8. Death sentenced inmates across the country have been challenging the constitutionality of lethal injection protocols. A number of North Carolina death row inmates have or have had lethal injection challenges pending in federal court pursuant to 42 U.S.C. § 1983. One such challenge was brought by death row inmate Willie Brown several months prior to his scheduled execution date in April 2006. Brown sought to enjoin his execution on the grounds that the existing lethal injection protocol created an unreasonable risk of a prolonged and torturous execution.
9. On April 7, 2006, Judge Malcolm Howard found serious questions about the constitutionality of the lethal injection procedures that the State of North Carolina intended to use in Willie Brown’s execution on April 21, 2006, and refused to allow Brown’s execution until the State could ensure him that “there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure that Plaintiff is in all respects unconscious prior to and at the time of the administration of any pancuronium bromide or potassium chloride. Should plaintiff exhibit effects of consciousness at any time during the execution, such personnel shall immediately provide appropriate medical care so as to insure Plaintiff is immediately returned to an unconscious state.”
10. In its response dated April 12, 2006, the State advised Judge Howard that it had changed its execution procedures to address his concerns. The protocol provided for a licensed registered nurse and a licensed physician to be available to observe and read the values of a BIS monitor, and thus, monitor the inmate’s level of consciousness. The State’s protocol further allowed for prison officials to administer additional quantities of sodium pentothal should the inmate not be unconscious based on readings of the BIS monitor after an initial 3000 mg injection of sodium pentothal.
11. In a Final Order dated April 17, 2006, Judge Howard denied Willie Brown’s request for an injunction or stay of execution. “The State’s use of the BIS monitor, the execution team’s resulting awareness of the level of unconsciousness of the plaintiff, and the administration, if necessary, of additional quantities of sodium pentothal” satisfactorily addressed the Court’s concerns “that improper techniques or other errors would lead to failed administration of sodium pentothal, rendering plaintiff paralysed but able to perceive pain at later stages of the execution.” Judge Howard’s Final Order also contained the following: “The State has further provided that a licensed registered nurse and a licensed physician will be positioned in the observation room where they can both observe and read the values of the BIS monitor”; “The court is satisfied by the State’s plan to use a licensed registered nurse and a licensed physician to monitor the level of plaintiff’s consciousness”; and, “The court is also satisfied that the licensed registered nurse and licensed physician used by defendants in plaintiff’s execution will be satisfactorily trained and fully capable of reading the BIS monitor and responding appropriately to the data they receive.”
12. The Fourth Circuit Court of Appeals affirmed Judge Howard’s Denial of a Preliminary Injunction and the State of North Carolina executed inmate Willie Brown as scheduled on April 21, 2006. The licensed physician present in the observation room during this execution was not asked to monitor the level of Brown’s consciousness, did not do so, did not observe and read the values of the BIS monitor, and has never received any training on the use of the BIS monitor. The doctor stood almost as far away as possible from the observation room window through which he could have observed Brown.
13. On January 18, 2007, the North Carolina Medical Board adopted a Position Statement “that physician participation in capital punishment is a departure from the ethics of the medical profession.” According to its Position Statement, physicians may be “present” but may not “participate” in an execution. The Medical Board describes participation as “prescribing or administering tranquilizers and other psychotropic agents and medications that are part of the execution procedure; monitoring vital signs on site or remotely (including monitoring electrocardiograms); attending or observing an execution as a physician; and rendering of technical advice regarding execution.” “Participation” does not include “witnessing an execution in a totally nonprofessional capacity”, or “relieving the acute suffering of a condemned person while awaiting execution, including providing tranquilizers at the specific voluntary request of the condemned person to help relieve pain or anxiety in anticipation of the execution.”
14. The North Carolina Medical Board noted in its January 18, 2007, Position Statement that N.C. Gen. Stat. § 15-190 requires the presence of “the surgeon or physician of the penitentiary” during the execution; therefore, the Medical Board stated that it will not discipline licensees for merely being “present” during an execution in conformity with N.C. Gen. Stat. § 15-190, but “any physician who engages in any verbal or physical activity, beyond the requirements of §15-190, that facilitates the execution may be subject to disciplinary action by this board.”
15. The Medical Board was created by the General Assembly to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina. It has 12 members appointed by the governor for three-year terms. Members take the following oath of office: “I do solemnly and sincerely swear that I will support the Constitution of the United States;

that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability, so help me God.”

16. Prior to the filing of the petitions for contested cases that have been consolidated for hearing in this proceeding, Petitioners filed actions either in the Superior Court of Wake County, North Carolina, or in the United States District Court for the Eastern District of North Carolina, seeking a review of the means of execution employed by the State of North Carolina, alleging, among other things, that such means of execution were unconstitutional or otherwise unlawful.
17. On January 22, 2007, Petitioners Marcus Robinson and James Edward Thomas filed an action in Wake County Superior Court challenging North Carolina’s lethal injection protocol and seeking injunctive relief. Robinson, et al. v. Beck, et al., Civil Action No. 07 CVS 001109 (Wake County Superior Court). Such action was brought as a result of the Position Statement issued by the North Carolina Medical Board on January 18, 2007, which sought to preclude the participation of a physician in a lethal injection as required by the protocol approved by Judge Howard in Brown. Counsel for state officials informed the judge that they were going to comply with the Medical Board’s decision and that while physicians would be present, they would no longer participate during executions by supervising others or monitoring a prisoner’s medical condition.
18. On January 25, 2007, Judge Donald W. Stephens of Wake County Superior Court issued a Preliminary Injunction staying the executions of Petitioners Marcus Robinson and James Edward Thomas. Judge Stephens ruled that in light of N.C. Gen. Stat. § 15-188, which specifically requires the Governor and Council of State to approve the Warden’s provision of the necessary appliances for the infliction of the punishment of death and qualified personnel to perform all necessary tasks for an execution, the Department of Correction could not change the protocol approved in Brown until the Governor and Council of State had reviewed and approved the new protocol.
19. As a result of Judge Stephens’ ruling, the North Carolina Department of Correction sought the approval of its proposed Execution Protocol by the Council of State.
20. Respondent North Carolina Council of State is composed of nine elected officers (Lieutenant Governor, Beverly Perdue; State Treasurer, Richard H. Moore; State Auditor, Les Merritt; Commissioner of Labor, Cherie K. Berry; Attorney General, Roy A. Cooper, III; Secretary of State, Elaine F. Marshall; Commissioner of Insurance, James E. Long; Superintendent of Public Instruction, June Atkinson; and Commissioner of Agriculture, Steve Troxler) and Governor Mike Easley. Their offices are created by our Constitution.
21. Respondent Council is an “Agency” of the executive branch of the government of this State as provided in N.C. Gen. Stat. § 150B-2(1a).
22. David McCoy, State Budget Director and Secretary to the Council of State, was authorized to seek information and ensure that the Council of State had adequate information with which to consider the proposed execution protocol.
23. On February 1, 2007, Petitioner Conner submitted a request for Rulemaking to the Council of State, requesting that the members adopt a rule banning the use of the bispectral index monitor (“BIS monitor”) in carrying out sentences of death by lethal injection, which request had not been ruled on as of the date of the hearing in this matter.
24. Counsel for James Campbell made a request for allocation of time to address the Council of State at its February 6, 2007, meeting concerning the proposed Execution Protocol .
25. In a letter to Attorney Elizabeth Kuniholm dated February 5, 2007, Mr. McCoy denied the request to speak at the February 6, 2007, meeting. The Council of State has traditionally refused such requests and has excluded public comment at regular meetings.
26. On or about February 2, 2007, Central Prison Warden Marvin L. Polk and Secretary of the Department of Correction, Theodis Beck, filed a proposed Execution Protocol with the Council of State for approval at its meeting on February 6, 2007.
27. On or about February 2, 2007, the NC Academy of Trial Lawyers sent a binder (Respondent’s Exhibit 1) of materials and information concerning the proposed lethal injection protocol to McCoy. McCoy relayed the material to the Governor’s counsel who returned it to him on or about February 5th. McCoy did not share this data with other Council members. This information supports Petitioners’ contentions in these cases.

28. On February 6, 2007, the Council of State considered the February 2, 2007, Execution Protocol proposed by the Department of Correction.
29. At the February 6, 2007, meeting, after the Department of Correction presented its submission, the Governor asked the Attorney General for the status of pending death penalty challenges, and also allowed counsel for the Department of Correction, who represents the Council of State and DOC in this matter, to present the proposed protocol to the Council of State and inform the members as to why the protocol should be approved. Petitioners' counsel were present, but were not recognized or permitted to address the Council of State regarding the protocol.
30. At the February 6, 2007, meeting, Respondent Council members primarily considered the Execution Protocol's requirement that a physician monitor the inmate in light of the Medical Board's position statement, and the protocol's consistency with recent federal court decisions. They did not discuss in any detail the types of drugs used, the purchase or use of the BIS monitor, or the prevention of an inmate's undue pain and suffering, nor did they reference any material that Petitioners or the trial lawyers had presented to Mr. McCoy. They seemed intent on approving the protocol and allowing the legislature and courts to further examine the issues involved.
31. Upon motion made and seconded at the February 6, 2007, meeting the Council of State approved the following "Execution Protocol" by a vote of 7-3 pursuant to N.C. Gen. Stat. § 15-188:

Chapter 15, Article 19, of the North Carolina General Statutes prescribes the manner and procedures through which the sentence of death shall be carried out through lethal injection by the State of North Carolina acting through the North Carolina Department of Correction and the Warden of Central Prison. Article 19 vests the Warden of Central Prison with direct responsibility for providing necessary drugs, appliances and qualified personnel to carry out the sentence of death in accordance with law and the Execution Protocol approved by the Governor and Council of State. The following Execution Protocol has therefore been developed by the Warden of Central Prison and approved by the Secretary of the North Carolina Department of Correction.

I. Lethal Injection

Death by lethal injection is caused by the administration of a lethal quantity of an ultrashort-acting barbiturate, such as sodium pentothal, in combination with a chemical paralytic agent, such as pancuronium bromide, and potassium chloride into the veins of a condemned prisoner. The condemned prisoner's level or state of consciousness during the execution process is observed visually and monitored utilizing an appliance, such as a bispectral index (BIS) monitor, from which the electrical activity in the condemned prisoner's brain can be interpreted

The lethal injection protocol ordinarily involves the successive, simultaneous slow intravenous administration of the three lethal chemicals and non-lethal saline solution into the body of a condemned prisoner through two IV lines by means of a series of five injections. The lethal injection protocol is composed of the following steps:

- a) The first injection is an ultrashort-acting barbiturate, such as dose of not less than 3000 mg of sodium pentothal, which quickly renders the condemned prisoner unconscious.
- b) The second injection is a dose of not less than 30 mL of a saline solution, which flushes the equipment used for the intravenous administration of the lethal chemicals and saline solution following the administration of the ultrashort-acting barbiturate.
- c) The Warden of Central Prison pauses the administration of the lethal chemicals and saline solution to verify that the output value displayed on the monitoring appliance, such as a value reading on a BIS monitor below 60, confirms a reduced level of electrical activity in the condemned prisoner's brain sufficient to indicate a very high probability of unconsciousness.

d) If a very high probability of unconsciousness is confirmed, such as value reading on a BIS monitor below 60, the Warden resumes the injection of the remaining lethal chemicals and saline solution. However, if a very high probability of unconsciousness is not confirmed, such as value reading on a BIS monitor of 60 or above, repeated identical injections of the ultrashort-acting barbiturate, such as doses of not less than 3000 mg of sodium pentothal, will be administered until a very high probability of unconsciousness is confirmed, such as a value reading on a BIS monitor below 60, and the injection of the remaining lethal chemicals and saline solution is resumed.

e) The third injection is a chemical paralytic agent, such as a dose of not less than 40 mg of pancuronium bromide, which paralyzes the muscles of the condemned prisoner.

f) The fourth injection is a dose of not less than 160 mEq of potassium chloride, which interrupts nerve impulses to the heart causing the condemned prisoner's heart to stop beating.

g) The fifth injection is a dose of not less than 30 mL of a saline solution, which flushes the equipment used for the intravenous administration of the lethal chemicals and saline solution and completes the lethal injection protocol.

II. Appliances

The Warden will acquire, from reputable manufacturers or suppliers, all appliances, equipment and other supplies as are required to carry out the administration of lethal drugs as described above. Such appliances, equipment and supplies shall include, at a minimum, the syringes, intravenous tubes and related materials ordinarily used by medical personnel to administer intravenous fluids to human patients. The Warden will also acquire and maintain such monitors or other equipment as shall be necessary to review human vital signs and functions, including cardiac activity, electrical activity in the brain, and respiration. The Warden will also be responsible for acquiring such other appliances, equipment, supplies or materials as medical personnel shall recommend for the purpose of ensuring that the sentence of death is carried out without exposing the condemned prisoner to a substantial risk of serious harm, pain or suffering and in accordance with constitutional requirements.

III. Personnel

The Warden shall ensure that the lethal injection procedure is administered by personnel who are qualified to set up and prepare the injections described above, administer the preinjections, insert the IV catheter, and to perform other tasks required for this procedure in accordance with the requirements of Article 19 and this Execution Protocol. Medical doctors, physician assistants, advanced degree nurses, registered nurses, and emergency medical technician-paramedics, who are licensed or certified by their respective licensing boards and organizations, shall be deemed qualified to participate in the execution procedure. As required by Article 19, a licensed medical doctor shall be present at each execution. The doctor shall monitor the essential body functions of the condemned inmate and shall notify the Warden immediately upon his or her determination that the inmate shows signs of undue pain or suffering. The Warden will then stop the execution. The doctor shall also be responsible for certifying the death of the inmate at such time as he or she determines the procedure has been completed as required by N.C.G.S. §15-192.

It is the intent of this Execution Protocol to carry out the sentence of death as required by the North Carolina General Statutes in accordance with all constitutional requirements as determined by the courts of North Carolina and the United States.

32. Prior to its February 6, 2007, meeting, the Council of State had never approved any execution protocol. It had not and has not approved any purchase of a BIS Monitor.

33. The most crucial point during an execution by lethal injection under the approved protocol would occur when the Warden pauses the process after pentothal is injected to determine whether the inmate is unconscious and unable to feel pain. A doctor and nurse as approved by Judge Howard should assist the Warden in determining the level of consciousness before the lethal drugs are injected. It would be dangerous to rely upon the BIS Monitor alone to make this determination for it is not a stand-alone monitor. Clinical judgment should always be used when interpreting the BIS in conjunction with other available clinical signs. Reliance on the BIS alone for intraoperative anesthetic management is not recommended by its manufacturer. Surgical patients with BIS readings of 40, 45, and 50, after awakening, have noted some awareness during the procedure. To the extent that pancuronium bromide paralyzes the inmate and lowers the BIS reading, the BIS monitor cannot solely determine an inmate's level of consciousness with the reliability necessary to ensure an inmate will not suffer undue pain during the execution. Trained medical personnel should be available to observe the inmate and measure vital signs, including heart rate, blood pressure, and breathing. Had Dr. Scott Kelley, Vice President of Aspect Medical Systems, Inc., known that the State planned to use his company's BIS Monitor in executions, he would not have sold the product to the State. Pancuronium bromide, administered while the inmate is conscious, would result in conscious paralysis and excruciating pain. Potassium chloride, likewise, would cause excruciating pain and burns if administered to a conscious inmate. In either case, the inmate would not be able to inform execution personnel of his suffering due to the paralytic effects of the pancuronium bromide; nor could an observing doctor or nurse notice signals of pain or suffering from a paralysed inmate as there could be none given.
34. The American Veterinary Medical Association (AVMA) has explicitly concluded that the use of neuromuscular paralyzing drugs, to include pancuronium bromide, solely or in conjunction with other drugs, is unacceptable as a means of euthanasia of animals.
35. In executions prior to use of the BIS monitor, the physician would wait downstairs in the Warden's office during the execution. The Warden would determine an inmate was unconscious upon hearing the inmate's "snoring." Afterwards, the physician would certify the inmate's death. The BIS could be as misleading as snoring if not used appropriately by trained personnel in conjunction with other indicators of consciousness.
36. In previous executions where the BIS monitor was used, the physician was merely "present" and did not monitor the patient. Dr. Obi Umesi was never trained or asked to read and interpret the BIS monitor or EKG during the two executions with the BIS monitor for which he was present. Dr. Umesi stood in the observation room in a position making it "practically impossible to monitor the inmate's pain and suffering." Dr. Umesi would not perform the monitoring function required by the current protocol, more likely than not because of the position statement from the Medical Board.
37. Veterinarian Kevin Concannon would not use the approved Execution Protocol in his hospital, nor would he recommend the protocol for euthanasia. According to Concannon, the BIS monitor is inadequate to solely determine a patient's state of consciousness. Because the combination of drugs used under the protocol increases the probability of pain and distress, Concannon opined that it is essential that a physician be in direct contact with the inmate.
38. Considering the toxicity of the drugs involved, trained medical personnel should be in direct view of the inmate to observe any extravasation that may occur during the IV and injection process.
39. From the observation room adjacent to the execution chamber, a physician appropriately positioned can see the inmate (covered by a sheet) lying on the gurney, the BIS monitor, and the electrocardiogram (EKG). The IVs in an inmate's arms cannot be seen.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C. Gen. Stat. § 150B-23.
2. The North Carolina Administrative Procedure Act confers upon any "person aggrieved" the right to commence an administrative hearing to resolve a dispute with an agency involving the person's rights, duties, or privileges. N.C. Gen. Stat. § 150B-23(a); See also Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 584 (1994).
3. A "person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or her person, property, or employment by an administrative decision. N.C. Gen. Stat. § 150B-2(6).

4. Petitioners, as human beings sentenced to die according to the method described in the Execution Protocol, are persons aggrieved within the meaning of the statute. They are entitled to the presence of medical personnel who are appropriately placed, trained and qualified to help ensure that they are unconscious and unable to feel pain prior to and at the time of the administration of any pancuronium bromide or potassium chloride. Although a sentencing court has determined that Petitioners have no right to life, they retain a right to die without the risk of undue pain and suffering.
5. As persons aggrieved by Respondent's decision to approve the protocol, Petitioners bear the burden of proving by the preponderance or greater weight of the evidence that in making its decision the Respondent: (1) exceeded its authority or jurisdiction; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23.
6. Petitioners failed to persuade me that Respondent exceeded its statutory authority or jurisdiction; acted arbitrarily or capriciously; or failed to act as required by law or rule in approving the Execution Protocol. Pursuant to N.C. Gen. Stat. § 15-188, the Governor and Council of State have the authority to approve the warden's provision of the "necessary appliances for the infliction of the punishment of death and qualified personnel to set up and prepare the injection, administer the preinjections, insert the IV catheter, and to perform other tasks..."
7. Respondent's decision to approve the Execution Protocol was not erroneous for including limited involvement of a doctor in the face of the Medical Board's Position Statement. Angel of mercy, not agent of harm, is the role inmates seek for the doctor. They want help, not harm, from a doctor. Palliative care from a doctor to prevent unnecessary suffering, prior to a person being injected with lethal drugs which can cause excruciating pain, is not unprofessional or unethical. To threaten to discipline a doctor for helping in this manner is not regulating medicine for the benefit and protection of the people of North Carolina. The oath of office taken by members of the North Carolina Medical Board binds them to support our constitutions and constitutional authorities (the Council of State). Our state and federal constitutions authorize the death penalty. Our General Assembly has authorized it for those convicted of first degree murder. It is part of North Carolina's public policy, which is not to be stymied by a non-binding position statement.
8. Petitioners persuaded me that it was erroneous to approve the provision in the protocol allowing the warden to determine unconsciousness after injection of pentothal solely upon a reading of 60 or below on a BIS Monitor, especially without involvement and consultation with a licensed registered nurse and licensed physician as approved by Judge Howard. Unless a nurse and doctor fully trained on the BIS Monitor are participating in the Warden's decision, the later sentence in the protocol stating that the doctor will monitor the prisoner for signs of undue pain or suffering could be meaningless for if the inmate remains conscious and is paralysed he or she could not show or send such signs.
9. Petitioners persuaded me that it was erroneous to include the sentence "The Warden will then stop the execution." under Section III of the protocol, especially without further explanation. The Warden is not given such authority as G. S. § 15-188 says in part "the mode of executing a death sentence must in every case be by administering to the convict or felon a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent **until the convict or felon is dead.**" The Warden could pause the process so medical personnel could return an inmate to an unconscious state per Judge Howard's ruling. There is no need for a recovery room or crash cart.
10. ESSE QUAM VIDERI is our North Carolina State Motto—"To be, rather than to seem". Prison officials through their attorneys seemed to be telling a federal judge that a licensed registered nurse and licensed physician would be: observing the inmate lying on the gurney while also monitoring vital signs via BIS and other monitors to be sure of unconsciousness before injection of painful drugs. This persuaded the judge to let them execute Willie Brown. The doctor did not observe the inmate nor did he monitor vital signs. The proposed protocol seeks to modify what was presented to Judge Howard. Petitioners have persuaded me that the proposed protocol does not ensure that inmates will be rendered unconscious prior to and throughout the period during which lethal drugs are injected into their bloodstream, such that they will be prevented from perceiving pain during their execution.
11. The essence of due process is the right to be heard. It was not proper procedure to consider only documents and comments from those proposing the protocol and not hear from counsel for the condemned inmates. This error can be corrected by members of the Council of State reviewing this Decision, the Transcript of the May 21st hearing, Exhibit notebooks introduced by Petitioners and Respondent, as well as Exceptions and written arguments filed by the parties, prior to making their final agency decision.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned renders the following:

DECISION

That the Council of State reconsider its approval of the Execution Protocol.

ORDER AND NOTICE

The North Carolina Council of State is the agency that will make the Final Decision in this contested case. Prior to the issuance of its Final Decision, the Council of State is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to the members of the Council of State who will make the Final Decision. N.C. Gen. Stat. § 150B-36(a).

N.C. Gen. Stat. § 150B-36(b), (b)(1), (b)(2), and (b)(3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge. The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

Pursuant to N.C. Gen. Stat. § 150B-36(b)(3), the agency is required to serve a copy of its Final Decision upon each party personally or by certified mail and to furnish a copy to each attorney of record and the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714.

This the 9th day of August, 2007.

Fred G. Morrison Jr.
Senior Administrative Law Judge