

NORTH CAROLINA REGISTER

VOLUME 24 • ISSUE 11 • Pages 815 – 1003

December 1, 2009

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Contact List for Rulemaking Questions or Concerns

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
116 West Jones Street (919) 807-4700
Raleigh, North Carolina 27603-8005 (919) 733-0640 FAX
Contact: Anca Grozav, Economic Analyst osbmruleanalysis@osbm.nc.gov (919)807-4740

NC Association of County Commissioners
215 North Dawson Street (919) 715-2893
Raleigh, North Carolina 27603
contact: Jim Blackburn jim.blackburn@ncacc.org
Rebecca Troutman rebecca.troutman@ncacc.org

NC League of Municipalities (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603
contact: Erin L. Wynia ewynia@nclm.org

Governor's Review

Eddie Speas eddie.speas@nc.gov
Legal Counsel to the Governor (919) 733-5811
116 West Jones Street
Raleigh, North Carolina 27603

Legislative Process Concerning Rule-making

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

contact: Karen Cochrane-Brown, Staff Attorney Karen.cochrane-brown@ncleg.net
Jeff Hudson, Staff Attorney Jeffrey.hudson@ncleg.net

NORTH CAROLINA REGISTER
Publication Schedule for January 2009 – December 2009

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 31st legislative day of the session beginning:	270 th day from publication in the Register
23:13	01/02/09	12/08/08	01/17/09	03/03/09	03/20/09	05/01/09	05/2010	09/29/09
23:14	01/15/09	12/19/08	01/30/09	03/16/09	03/20/09	05/01/09	05/2010	10/12/09
23:15	02/02/09	01/09/09	02/17/09	04/03/09	04/20/09	06/01/09	05/2010	10/30/09
23:16	02/16/09	01/26/09	03/03/09	04/17/09	04/20/09	06/01/09	05/2010	11/13/09
23:17	03/02/09	02/09/09	03/17/09	05/01/09	05/20/09	07/01/09	05/2010	11/27/09
23:18	03/16/09	02/23/09	03/31/09	05/15/09	05/20/09	07/01/09	05/2010	12/11/09
23:19	04/01/09	03/11/09	04/16/09	06/01/09	06/22/09	08/01/09	05/2010	12/27/09
23:20	04/15/09	03/24/09	04/30/09	06/15/09	06/22/09	08/01/09	05/2010	01/10/10
23:21	05/01/09	04/09/09	05/16/09	06/30/09	07/20/09	09/01/09	05/2010	01/26/10
23:22	05/15/09	04/24/09	05/30/09	07/14/09	07/20/09	09/01/09	05/2010	02/09/10
23:23	06/01/09	05/08/09	06/16/09	07/31/09	08/20/09	10/01/09	05/2010	02/26/10
23:24	06/15/09	05/22/09	06/30/09	08/14/09	08/20/09	10/01/09	05/2010	03/12/10
24:01	07/01/09	06/10/09	07/16/09	08/31/09	09/21/09	11/01/09	05/2010	03/28/10
24:02	07/15/09	06/23/09	07/30/09	09/14/09	09/21/09	11/01/09	05/2010	04/11/10
24:03	08/03/09	07/13/09	08/18/09	10/02/09	10/20/09	12/01/09	05/2010	04/30/10
24:04	08/17/09	07/27/09	09/01/09	10/16/09	10/20/09	12/01/09	05/2010	05/14/10
24:05	09/01/09	08/11/09	09/16/09	11/02/09	11/20/09	01/01/10	05/2010	05/29/10
24:06	09/15/09	08/24/09	09/30/09	11/16/09	11/20/09	01/01/10	05/2010	06/12/10
24:07	10/01/09	09/10/09	10/16/09	11/30/09	12/21/09	02/01/10	05/2010	06/28/10
24:08	10/15/09	09/24/09	10/30/09	12/14/09	12/21/09	02/01/10	05/2010	07/12/10
24:09	11/02/09	10/12/09	11/17/09	01/02/10	01/20/10	03/01/10	05/2010	07/30/10
24:10	11/16/09	10/23/09	12/01/09	01/15/10	01/20/10	03/01/10	05/2010	08/13/10
24:11	12/01/09	11/05/09	12/16/09	02/01/10	02/22/10	04/01/10	05/2010	08/28/10
24:12	12/15/09	11/20/09	12/30/09	02/15/10	02/22/10	04/01/10	05/2010	09/11/10

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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



EXECUTIVE ORDER NO. 27
PROCLAMATION OF A STATE OF EMERGENCY
BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA

WHEREAS, I have determined that a state of emergency, as defined in G.S. §166A-4 and G. S. §14-288.1(10), exists in the State of North Carolina, specifically in Haywood County, due to a landslide obstructing highway Interstate 40, beginning on October 25, 2009.

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Pursuant to G. S. §§166A-5 and 14-288.15, I, therefore, proclaim the existence of a state of emergency in the State.

Section 2. I hereby order all state and local government entities and agencies to cooperate in the implementation of the provisions of this proclamation and the provisions of the North Carolina Emergency Operations Plan.

Section 3. I hereby delegate to Reuben F. Young, Secretary of Crime Control and Public Safety, and/or his designee, all power and authority granted to me and required of me by Chapter 166A, and Article 36A of Chapter 14 of the General Statutes for the purpose of implementing the said Emergency Operations Plan and to take such further action as is necessary to promote and secure the safety and protection of the populace in North Carolina.

Section 4. Further, Reuben F. Young, Secretary of Crime Control and Public Safety, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in G. S. §143B-476.

Section 5. I hereby order this proclamation: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the circumstances of the state of emergency prevent or impede, to be promptly filed with the Secretary of Crime Control and Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this proclamation.

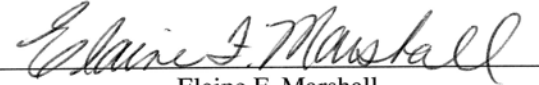
Section 6. This proclamation shall become effective immediately and shall continue until it is terminated in writing.

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 **twenty-eighth** day of **October** in the year of our Lord two thousand and nine, and of the Independence of the United States of America the two hundred and thirty-fourth.




Beverly Eaves Perdue
Governor

ATTEST:


Elaine F. Marshall
Secretary of State

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

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

TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Agriculture intends to amend the rule cited as 02 NCAC 48A .1209.

Proposed Effective Date: April 1, 2010

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rule by submitting a request in writing no later than December 16, 2009, to David S. McLeod, Secretary, NC Board of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.

Reason for Proposed Action: The proposed fee increase would be the first since 1957 and would provide a more realistic expectation of processing the certificates that are issued.

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

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

Comment period ends: February 1, 2010

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 919-431-3000.

Fiscal Impact:

- ☐ State
- ☐ Local
- ☐ Substantial Economic Impact (≥\$3,000,000)
- ☒ None

CHAPTER 48 - PLANT INDUSTRY

SUBCHAPTER 48A - PLANT PROTECTION

SECTION .1200 - NURSERY CERTIFICATION

02 NCAC 48A .1209 COLLECTED PLANT CERTIFICATE

Persons who dig or gather collected plants shall be required to possess a collected plant certificate. To obtain such a certificate, the collector must submit to the Plant Industry Division an application which states where collected plants are to be obtained. Upon approval of this application and payment of an annual fee of ~~one dollar (\$1.00)~~, twenty dollars (\$20.00), a collected plant certificate will be issued. This certificate expires September 30 of each year, but may be revoked sooner for cause. A record of plant collections and sales shall be maintained and shall be made available to any inspector of the North Carolina Department of Agriculture upon request. Nurserymen who also collect plants shall be required to have a collected plant certificate in addition to a nursery certificate. This requirement is waived for digging or collection of plants from the National Forest Land on Roan Mountain, Mitchell County, North Carolina.

Authority G.S. 106-65.45; 106-65.46; 106-284.18; 106-420.

NORTH CAROLINA STATE BOARD OF COMMUNITY COLLEGES

NOTICE OF PUBLIC HEARING

The State Board of Community Colleges has initiated the permanent rule-making process to amend 23 N.C.A.C. 2C.0301 – "Admission to Colleges" as published in 24:08 NCR 568. Please note that a **public hearing** on this Rule will be from **10:00 a.m. – 12:30 p.m. on Friday, 18 December 2009** at the following location:

**Archives and History/State Library Building
109 East Jones Street
Raleigh, NC 27603**

Oral Comments: All persons desiring to provide an oral comment will be required to sign in and provide his or her name, affiliation, city and state prior to speaking. Oral comments will be limited to **three (3) minutes** per person. The Hearing Officer prefers that any person desiring to make an oral presentation at the public hearing present a written copy of the presentation prior to addressing the hearing.

Written Comments: Parties wishing to provide written comments may do so. The deadline for submitting written comments is **5:00 p.m. on Friday, 18 December 2009**. Written comments may be submitted at the public hearing or may be submitted to the following:

**Q. Shanté Martin, Rule-making Coordinator
200 W. Jones Street, 5001 Mail Service Center, Raleigh, NC 27699-5001
Email: publiccomments@nccommunitycolleges.edu**

All comments received during the public hearing or during the written comment period will be considered in the final determination on the rule.

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

This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: NC Commission for the Blind

Rule Citation: 10A NCAC 63F .0402

Effective Date: November 16, 2009

Reason for Action: Immediate adoption of this Rule is required to enable the expenditure of ARRA funds received from the Federal Government.

CHAPTER 63 - SERVICES FOR THE BLIND

SUBCHAPTER 63F - VOCATIONAL REHABILITATION

SECTION .0400 - ECONOMIC NEED

10A NCAC 63F .0402 ECONOMIC NEEDS POLICIES

(a) The Division of Services for the Blind shall establish economic need for each eligible consumer either simultaneously with or prior to the provision of those services for which the Division requires a needs test. The financial need of a consumer shall be determined by the financial needs test specified in Rule .0403 of this Section. If the consumer has been determined eligible for Social Security benefits under Title II or XVI of the Social Security Act, the Division of Services for the Blind shall not apply a financial needs tests or require the financial participation of the consumer. A financial needs test shall be applied for all consumers determined eligible to receive services through the Independent Living Rehabilitation Program regardless of SSA Title II or Title XVI eligibility.

(b) The Division of Services for the Blind shall furnish the following services not conditioned on economic need:

- (1) an assessment for determining eligibility and priority for services except those non-assessed services that are provided during an exploration of the applicant's abilities, capabilities, and capacity to perform in work situations through the use of trial work experiences or an extended evaluation and an assessment by personnel skilled in rehabilitation technology;
- (2) assessment for determining rehabilitation needs by a qualified vocational rehabilitation counselor;
- (3) vocational rehabilitation counseling and guidance, including information and support

- services to assist an applicant or consumer in exercising informed choice;
- (4) tuition and supplies for Community Rehabilitation Program training;
- (5) tuition and fees for:
 - (A) community college/college parallel and vocational programs up to the catalog rate; and
 - (B) post-secondary education up to the maximum rate charged for the North Carolina public university system.

The Division shall require eligible consumers applying for training programs listed in Parts (b)(5)(A) and (B) of this Rule to first apply for all available grants and financial aid. The Division may grant an exception to the rate for tuition and required fees for post-secondary education specified in Part (b)(5)(B) of this Rule when necessary to accommodate the special training needs of severely disabled individuals who must be enrolled in special programs designed for severely physically disabled students;

- (6) interpreter services including sign language and oral interpreter services for applicants or consumers who are deaf or hard of hearing and tactile interpreting services for applicants or consumers who are deaf-blind;
- (7) reader services, rehabilitation teaching services, and orientation and mobility services;
- (8) job-related services, including job search, job placement employment assistance and job retention services;
- (9) DSB Rehabilitation Center or fundamental independent living rehabilitation adjustment services including transportation and training supplies contingent on a consumer's participation in the program;
- (10) diagnostic transportation;
- (11) on-the-job training;
- (12) training and associated maintenance and transportation costs for Business Enterprises Program trainees;
- (13) upward mobility training and associated maintenance and transportation costs for Business Enterprises Program trainees;
- (14) equipment and initial stocks and supplies for state-owned (Randolph-Sheppard) vending stands;
- (15) Supported Employment Services;

- (16) personal assistance services provided while a consumer with a disability is receiving vocational rehabilitation services;
- (17) referral and other services designed to assist applicants or consumers with disabilities in securing needed services from other agencies through agreements developed under Section 101(a)(11) of the Act (P.L. 102-569), if such services are not available under this Act and to advise those individuals about client assistance programs established under the Act;
- (18) transition services for students with disabilities that facilitate the achievement of the employment outcome identified in the student's individualized plan for employment except for those services based on economic need; and
- (19) technical assistance and other consultation services to consumers who are pursuing self-employment or telecommuting or establishing a business operation as an employment outcome.

(c) The following services shall be provided by the Division of Services for the Blind and conditioned on economic need:

- (1) physical and mental restoration services (medical services other than diagnostic);
- (2) maintenance for additional costs incurred while participating in rehabilitation;
- (3) transportation in connection with the rendering of any vocational rehabilitation service except where necessary in connection with determination of eligibility or nature and scope of services;
- (4) services to members of a disabled consumer's family necessary to the adjustment or rehabilitation of the consumer with a disability;
- (5) rehabilitation technology including telecommunications, sensory, and other technological aids and devices;
- (6) post-employment services necessary to assist consumers with visual disabilities to maintain, regain or advance in employment except for those services not conditioned on economic need listed in Paragraph (b) of this Rule;
- (7) fees necessary to obtain occupational licenses;
- (8) tools, equipment, and initial stocks and supplies for items listed in Subparagraphs (1) through (7) of this Paragraph;

- (9) expenditures for short periods not to exceed 30 days of medical care for acute conditions arising during the course of vocational rehabilitation, which if not cared for, will constitute a hazard to the achievement of the vocational rehabilitation objective;
- (10) books and other training materials; and
- (11) other goods and services not prohibited by the Act (P.L. 102-569), which can reasonably be expected to benefit an individual with a disability in terms of his employability or independent living skill development.

(d) Notwithstanding Paragraph (c) of this Rule, the following services are not subject to economic need for individuals being served through the Vocational Rehabilitation Program:

- (1) books and other training materials required for post secondary training; and
- (2) rehabilitation technology including telecommunications, sensory aids, and other technological aids and devices for consumers who have an Individualized Plan for Employment (IPE), who are working toward an employment goal that requires specified technology to attain, regain, or maintain employment and who have the capability to use the equipment.

This Paragraph expires July 31, 2011.

~~(d)~~(e) The Division of Services for the Blind shall publish the standard as determined by the Legislature for measuring the financial need of consumers with respect to normal living requirements and for determining their financial ability to meet the cost of necessary rehabilitation services, and for determining the amount of agency supplementation required to procure the necessary services.

History Note: Authority G.S. 111-28; 34 C.F.R. 361.48; 34 C.F.R. 361.5; 34 C.F.R. 361.52; 34 C.F.R. 361.54; P.L. 102-569, Section 103; S.L. 2009-475;
Eff. February 1, 1976;
Amended Eff. August 1, 1976;
Readopted Eff. November 16, 1977;
Amended Eff. January 1, 1996; June 1, 1993; October 1, 1990;
April 1, 1990;
Temporary Amendment Eff. August 1, 2001;
Amended Eff. August 1, 2002;
Emergency Amendment Eff. September 23, 2009;
Temporary Amendment Eff. November 16, 2009 to expire on June 30, 2012 (See G.S. 150B-21.1B).

*This Section includes a listing of rules approved by the Rules Review Commission followed by the full text of those rules. The rules that have been approved by the RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

Rules approved by the Rules Review Commission at its meeting on October 15, 2009.

**REGISTER CITATION TO THE
NOTICE OF TEXT**

HHS - HEALTH SERVICE REGULATION, DIVISION OF

<u>Performance Standards</u>	10A NCAC 14C .1403*	24:01 NCR
<u>Information Required of Applicant</u>	10A NCAC 14C .1902	24:01 NCR
<u>Performance Standards</u>	10A NCAC 14C .1903*	24:01 NCR
<u>Support Services</u>	10A NCAC 14C .1904*	24:01 NCR
<u>Staffing and Staff Training</u>	10A NCAC 14C .1905	24:01 NCR
<u>Information Required of Applicant</u>	10A NCAC 14C .2002*	24:01 NCR
<u>Performance Standards</u>	10A NCAC 14C .2103*	24:01 NCR
<u>Definitions</u>	10A NCAC 14C .2701	24:01 NCR

HHS - DEAF AND HARD OF HEARING, DIVISION OF SERVICES FOR THE

<u>Certification of Impairment</u>	10A NCAC 17D .0207	23:21 NCR
<u>Financial Eligibility</u>	10A NCAC 17D .0210*	23:21 & 24:02 NCR

PUBLIC HEALTH, COMMISSION FOR

<u>Infection Prevention - Health Care Settings</u>	10A NCAC 41A .0206*	23:15 NCR
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SOCIAL SERVICES COMMISSION

<u>Responsibility</u>	10A NCAC 70E .0702	23:23 NCR
<u>New Licenses</u>	10A NCAC 70E .0703	23:23 NCR
<u>Relicensure and Renewal</u>	10A NCAC 70E .0704*	23:23 NCR
<u>Termination</u>	10A NCAC 70E .0707	23:23 NCR
<u>Foster Home</u>	10A NCAC 70E .1001*	23:23 NCR
<u>Medication</u>	10A NCAC 70E .1102*	23:23 NCR
<u>Criteria for the Family</u>	10A NCAC 70E .1104	23:23 NCR
<u>Conflict of Interest</u>	10A NCAC 70E .1105	23:23 NCR
<u>Relationship to Supervising Agency</u>	10A NCAC 70E .1107	23:23 NCR
<u>Fire and Building Safety</u>	10A NCAC 70E .1108	23:23 NCR
<u>Training Requirements</u>	10A NCAC 70E .1117	23:23 NCR
<u>Governance</u>	10A NCAC 70F .0201	23:23 NCR
<u>Responsibilities of the Governing Body</u>	10A NCAC 70F .0202*	23:23 NCR
<u>Personnel Policies</u>	10A NCAC 70F .0206	23:23 NCR
<u>Placement Services</u>	10A NCAC 70G .0503*	23:23 NCR
<u>Out-of-Home Family Services Agreement for Children Receiv...</u>	10A NCAC 70G .0504*	23:23 NCR
<u>Physical Restraint Holds, Behavior Management</u>	10A NCAC 70G .0512*	23:23 NCR

and Discipline

<u>Critical Incidents</u>	10A NCAC 70G .0513	23:23 NCR
<u>Preplacement Assessment</u>	10A NCAC 70H .0405*	23:23 NCR
<u>Services to Adoptive Applicants and Families</u>	10A NCAC 70H .0407	23:23 NCR
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TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 14C .1403 PERFORMANCE STANDARDS

(a) An applicant shall demonstrate that the proposed project is capable of meeting the following standards:

- (1) if an applicant proposes an increase in the number of the facility's existing Level II, Level III or Level IV beds, the overall average annual occupancy of the total number of existing Level II, Level III and Level IV beds in the facility is at least 75 percent, over the 12 months immediately preceding the submittal of the proposal;
- (2) if an applicant is proposing to develop new or additional Level II, Level III or Level IV beds, the projected occupancy of the total number of Level II, Level III and Level IV beds proposed to be operated during the third year of operation of the proposed project shall be at least 75 percent; and
- (3) the applicant shall document the assumptions and provide data supporting the methodology used for each projection in this rule.

(b) If an applicant proposes to develop a new Level III or Level IV service, the applicant shall document that an unmet need exists in the applicant's defined neonatal service area, unless the State Medical Facilities Plan includes a need determination for neonatal beds in the service area. The need for Level III and Level IV beds shall be computed for the applicant's neonatal service area by:

- (1) identifying the annual number of live births occurring at all hospitals within the proposed neonatal service area, using the latest available data compiled by the State Center for Health Statistics;
- (2) identifying the low birth weight rate (percent of live births below 2,500 grams) for the births identified in (1) of this Paragraph, using the latest available data compiled by the State Center for Health Statistics;
- (3) dividing the low birth weight rate identified in (2) of this Paragraph by .08 and subsequently multiplying the resulting quotient by four; and
- (4) determining the need for Level III and Level IV beds in the proposed neonatal service area as the product of:
 - (A) the product derived in (3) of this Paragraph, and

- (B) the quotient resulting from the division of the number of live births in the initial year of the determination identified in (1) of this Paragraph by the number 1000.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Temporary Amendment Eff. March 15, 2002; Amended Eff. April 1, 2003; Temporary Amendment Eff. February 1, 2009; Amended Eff. November 1, 2009.

10A NCAC 14C .1902 INFORMATION REQUIRED OF APPLICANT

(a) An applicant proposing to acquire radiation therapy equipment shall use the Acute Care Facility/Medical Equipment application form.

(b) An applicant proposing to acquire radiation therapy equipment shall also provide the following additional information:

- (1) a list of all the radiation therapy equipment to be acquired and documentation of the capabilities and capacities of each item of equipment;
- (2) documentation of the purchase price and fair market value of each piece of radiation therapy equipment, each simulator, and any other related equipment proposed to be acquired;
- (3) the projected number of patient treatments by county and by simple, intermediate and complex treatments to be performed on each piece of radiation therapy equipment for each of the first three years of operation following the completion of the proposed project and documentation of all assumptions by which utilization is projected;
- (4) documentation that the proposed radiation therapy equipment shall be operational at least seven hours per day, five days a week;
- (5) documentation that no more than one simulator is available for every two linear accelerators in the applicant's facility, except that an applicant that has only one linear accelerator may have one simulator;
- (6) documentation that the services shall be offered in a physical environment that

- conforms to the requirements of federal, state, and local regulatory bodies; and
- (7) the projected number of patients that will be treated by county in each of the first three years of operation following completion of the proposed project.
- (c) An applicant proposing to acquire a linear accelerator for development of a multidisciplinary prostate health center pursuant to a need determination for a demonstration project in the State Medical Facilities Plan shall provide the following additional information:
- (1) description of all services to be provided by the proposed multidisciplinary prostate health center, including a description of each of the following services:
 - (A) urology services,
 - (B) medical oncology services,
 - (C) biofeedback therapy,
 - (D) chemotherapy,
 - (E) brachytherapy, and
 - (F) living skills counseling and therapy;
 - (2) documentation that urology services, medical and radiation oncology services, biofeedback therapy, brachytherapy and post-treatment living skills counseling and therapy will be provided in the same building;
 - (3) description of any services that will be provided by other facilities or in different buildings;
 - (4) demographics of the population in the county in which the proposed multidisciplinary prostate health center will be located, including:
 - (A) percentage of the population in the county that is African American,
 - (B) the percentage of the population in the county that is male,
 - (C) the percentage of the population in the county that is African American male,
 - (D) the incidence of prostate cancer for the African American male population in the county, and
 - (E) the mortality rate from prostate cancer for the African American male population in the county;
 - (5) documentation that the proposed center is located within walking distance of an established bus route and within five miles of a minority community;
 - (6) documentation that the multiple medical disciplines in the center will collaborate to create and maintain a single or common medical record for each patient and conduct multidisciplinary conferences regarding each patient's treatment and follow-up care;
 - (7) documentation that the center will establish its own prostate/urological cancer tumor board for review of cases;
 - (8) copy of the center's written policies that prohibit the exclusion of services to any patient on the basis of age, race, religion, disability or the patient's ability to pay;
 - (9) copy of written strategies and activities the center will follow to assure its services will be accessible by patients without regard to their ability to pay;
 - (10) description of the center's outreach activities and the manner in which they complement existing outreach initiatives;
 - (11) documentation of number and type of clinics to be conducted to screen patients at risk for prostate cancer;
 - (12) written description of patient selection criteria, including referral arrangements for high-risk patients;
 - (13) commitment to prepare an annual report at the end of each of the first three operating years, to be submitted to the Medical Facilities Planning Section and the Certificate of Need Section, that shall include:
 - (A) the total number of patients treated;
 - (B) the number of African American persons treated;
 - (C) the number of persons in other minority populations treated; and
 - (D) the number of insured, underinsured and uninsured patients served by type of payment category;
 - (14) documentation of arrangements made with a third party researcher to evaluate, during the fourth operating year of the center, the efficacy of the clinical and outreach initiatives on prostate and urological cancer treatment, and develop recommendations regarding the advantages and disadvantages of replicating the project in other areas of the State. The results of the evaluation and recommendations shall be submitted in a report to the Medical Facilities Planning Section and Certificate of Need Section in the first quarter of the fifth operating year of the demonstration project; and
 - (15) if the third party researcher is not a historically black university, document the reasons for using a different researcher for the project.

History Note: Authority G.S. 131E-177(1); 131E-183; Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Amended Eff. November 1, 1996; Temporary Amendment Eff. January 1, 1999; Temporary Amendment Eff. January 1, 1999 Expired on October 12, 1999; Temporary Amendment Eff. January 1, 2000;

Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000;

Amended Eff. April 1, 2001;

Temporary Amendment Eff. January 1, 2005;

Amended Eff. November 1, 2005;

Temporary Amendment Eff. February 1, 2009;

Amended Eff. November 1, 2009.

10A NCAC 14C .1903 PERFORMANCE STANDARDS

(a) An applicant proposing to acquire a linear accelerator shall demonstrate that each of the following standards will be met:

- (1) an applicant's existing linear accelerators located in the proposed radiation therapy service area performed at least 6,750 ESTV treatments per machine or served at least 250 patients per machine in the twelve months prior to the date the application was submitted;
- (2) each proposed new linear accelerator will be utilized at an annual rate of 250 patients or 6,750 ESTV treatments during the third year of operation of the new equipment; and
- (3) an applicant's existing linear accelerators located in the proposed radiation therapy service area are projected to be utilized at an annual rate of 6,750 ESTV treatments or 250 patients per machine during the third year of operation of the new equipment.

(b) A linear accelerator shall not be held to the standards in Paragraph (a) of this Rule if the applicant provides documentation that the linear accelerator has been or will be used exclusively for clinical research and teaching.

(c) An applicant proposing to acquire radiation therapy equipment other than a linear accelerator shall provide the following information:

- (1) the number of patients who are projected to receive treatment from the proposed radiation therapy equipment, classified by type of equipment, diagnosis, treatment procedure, and county of residence; and
- (2) the maximum number and type of procedures that the proposed equipment is capable of performing.

(d) The applicant shall document all assumptions and provide data supporting the methodology used to determine projected utilization as required in this Rule.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Eff. January 4, 1994;

Amended Eff. November 1, 1996

Temporary Amendment Eff. January 1, 1999;

Temporary Amendment effective January 1, 1999 expired October 12, 1999;

Temporary Amended Eff. January 1, 2000;

Temporary Amendment Eff. February 1, 2006;

Amended Eff. November 1, 2006.

Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000;

Amended Eff. April 1, 2001;

Temporary Amendment Eff. March 15, 2002; January 1, 2002;

Amended Eff. April 1, 2003;

Temporary Amendment Eff. February 1, 2008;

Amended Eff. November 1, 2008;

Temporary Amendment Eff. February 1, 2009;

Amended Eff. November 1, 2009.

10A NCAC 14C .1904 SUPPORT SERVICES

(a) An applicant proposing to acquire radiation therapy equipment shall document that the following items will be available; and if any item will not be available, the applicant shall provide information obviating the need for that item:

- (1) a program of radiation therapy continuing education for radiation therapists, technologists and medical staff;
- (2) a program for the collection of utilization data relative to the applicant's provision of radiation therapy services;
- (3) medical laboratory services;
- (4) pathology services; and
- (5) pharmaceutical support services.

(b) An applicant proposing to acquire a linear accelerator for development of a multidisciplinary prostate health center pursuant to a need determination for a demonstration project in the State Medical Facilities Plan shall provide a written description of the center's plans and strategies to establish:

- (1) an African American Prostate Cancer Education/Outreach Program that will partner with and complement existing support groups, such as the N.C. Minority Prostate Cancer Awareness Action Team; and
- (2) an Advisory Board composed of representatives of prostate cancer advocacy groups, prostate cancer patients and survivors that will meet to provide feedback to the center regarding outreach practices which are effective or which need to be changed.

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Eff. January 4, 1994;

Temporary Amendment Eff. February 1, 2009;

Amended Eff. November 1, 2009.

10A NCAC 14C .1905 STAFFING AND STAFF TRAINING

(a) An applicant proposing to acquire radiation therapy equipment shall document the number and availability of staff or provide evidence that obviates the need for staff in the following areas:

- (1) Radiation Oncologist;
- (2) Radiation Physicist;
- (3) Dosimetrist or Physics Assistant;

- (4) Radiation Therapist;
- (5) Radiation-Oncology Administrator;
- (6) Registered Nurse or LPN;
- (7) Physical Therapist;
- (8) Dietician;
- (9) Pharmacist;
- (10) Social Worker; and
- (11) Maintenance Engineer.

(b) An applicant proposing to acquire a linear accelerator for development of a multidisciplinary prostate health center pursuant to a need determination for a demonstration project in the State Medical Facilities Plan shall document that the center will have:

- (1) a medical director who is either a urologist certified by the American Board of Urology, a medical oncologist certified by the American Board of Internal Medicine, or a radiation oncologist certified by the American Board of Radiology; and
- (2) a multidisciplinary team consisting of medical oncologists, radiation oncologists, urologists, urologic pharmacologists, pathologists and therapy specialists.

History Note: Authority G.S. 131E-177(1); 131E-183; Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. January 4, 1994; Amended Eff. November 1, 1996; Temporary Amendment Eff. February 1, 2009; Amended Eff. November 1, 2009.

10A NCAC 14C .2002 INFORMATION REQUIRED OF APPLICANT

(a) An applicant shall identify:

- (1) the counties that are proposed to be served by the new office;
- (2) the proposed types of services to be provided, including a description of each discipline;
- (3) the projected total unduplicated patient count of the new office for each of the first two years of operation;
- (4) the projected number of patients to be served per service discipline for each of the first two years of operation;
- (5) the projected number of visits by service discipline for each of the first two years of operation;
- (6) within each service discipline, the average number of patient visits per day that are anticipated to be performed by each staff person;
- (7) the projected average annual cost per visit for each service discipline;
- (8) the projected charge by payor source for each service discipline;
- (9) the names of the anticipated sources of referrals; and

- (10) documentation of attempts made to establish working relationships with the sources of referrals.

All assumptions, including the specific methodology by which patient utilization and costs are projected, shall be stated.

(b) An applicant shall specify the proposed site on which the office is proposed to be located. If the proposed site is not owned by or under the control of the applicant, the applicant shall specify an alternate site. The applicant shall provide documentation from the owner of the sites or a realtor that the proposed and alternate site(s) are available for acquisition.

(c) An applicant proposing to establish a new home health agency pursuant to a need determination in the State Medical Facilities Plan to meet the special needs of the non-English speaking, non-Hispanic population shall provide the following additional information:

- (1) for each staff person in the proposed home health agency, the foreign language in which the person is fluent to document the home health agency will have employees fluent in multiple foreign languages other than Spanish, including Russian;
- (2) description of the manner in which the proposed home health agency will market and provide its services to non-English speaking, non-Hispanic persons; and
- (3) documentation that the proposed home health agency will accept referrals of non-English speaking, non-Hispanic persons from other home health agencies and entities within Medicare Conditions of Participation and North Carolina licensure rules.

History Note: Authority G.S. 131E-177(1); 131E-183; Eff. March 1, 1996; Temporary Amendment Eff. February 1, 2009; Amended Eff. November 1, 2009.

10A NCAC 14C .2103 PERFORMANCE STANDARDS

(a) In projecting utilization, the operating rooms shall be considered to be available for use five days per week and 52 weeks a year.

(b) A proposal to establish a new ambulatory surgical facility, to increase the number of operating rooms (excluding dedicated C-section operating rooms), to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall not be approved unless:

- (1) the applicant reasonably demonstrates the need for the number of proposed operating rooms in the facility, which is the subject of this review, in the third operating year of the project based on the following formula: $\{[(\text{Number of facility's projected inpatient cases, excluding trauma cases reported by Level I or II trauma centers, cases reported by designated burn intensive care units and cases performed in dedicated open heart and C-section rooms, times 3.0 hours}) \text{ plus } (\text{Number of facility's}$

projected outpatient cases times 1.5 hours)] divided by 1872 hours} minus the facility's total number of existing and approved operating rooms and operating rooms proposed in another pending application, excluding one operating room for Level I or II trauma centers, one operating room for facilities with designated burn intensive care units, and all dedicated open heart and C-section operating rooms. The number of rooms needed is determined as follows:

- (A) in a service area which has more than 10 operating rooms, if the difference is a positive number greater than or equal to 0.5, then the need is the next highest whole number for fractions of 0.5 or greater and the next lowest whole number for fractions less than 0.5; and if the difference is a negative number or a positive number less than 0.5, then the need is zero;
- (B) in a service area which has six to 10 operating rooms, if the difference is a positive number greater than or equal to 0.3, then the need is the next highest whole number for fractions of 0.3 or greater and the next lowest whole number for fractions less than 0.3, and if the difference is a negative number or a positive number less than 0.3, then the need is zero; and
- (C) in a service area which has five or fewer operating rooms, if the difference is a positive number greater than or equal to 0.2, then the need is the next highest whole number for fractions of 0.2 or greater and the next lowest whole number for fractions less than 0.2; and if the difference is a negative number or a positive number less than 0.2, then the need is zero; or

- (2) the applicant demonstrates conformance of the proposed project to Policy AC-3 in the State Medical Facilities Plan titled "Exemption From Plan Provisions for Certain Academic Medical Center Teaching Hospital Projects."

(c) A proposal to establish a new ambulatory surgical facility, to increase the number of operating rooms (excluding dedicated C-section operating rooms) except relocations of existing operating rooms within the same service area, to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall not be approved unless the applicant reasonably demonstrates the need for the number of proposed operating rooms in addition to the rooms in all of the licensed facilities identified in response to 10A NCAC 14C .2102(b)(2) in the third operating year of the proposed project based on the following formula: {[Number of projected inpatient cases for all

the applicant's or related entities' facilities, excluding trauma cases reported by Level I or II trauma centers, cases reported by designated burn intensive care units and cases performed in dedicated open heart and C-section rooms, times 3.0 hours) plus (Number of projected outpatient cases for all the applicant's or related entities' facilities times 1.5 hours)] divided by 1872 hours} minus the total number of existing and approved operating rooms and operating rooms proposed in another pending application, excluding one operating room for Level I or II trauma centers, one operating room for facilities with designated burn intensive care units, and all dedicated open heart and C-Section operating rooms in all of the applicant's or related entities' licensed facilities in the service area. The number of rooms needed is determined as follows:

- (1) in a service area which has more than 10 operating rooms, if the difference is a positive number greater than or equal to 0.5, then the need is the next highest whole number for fractions of 0.5 or greater and the next lowest whole number for fractions less than 0.5; and if the difference is a negative number or a positive number less than 0.5, then the need is zero;
- (2) in a service area which has six to 10 operating rooms, if the difference is a positive number greater than or equal to 0.3, then the need is the next highest whole number for fractions of 0.3 or greater and the next lowest whole number for fractions less than 0.3, and if the difference is a negative number or a positive number less than 0.3, then the need is zero; and
- (3) in a service area which has five or fewer operating rooms, if the difference is a positive number greater than or equal to 0.2, then the need is the next highest whole number for fractions of 0.2 or greater and the next lowest whole number for fractions less than 0.2; and if the difference is a negative number or a positive number less than 0.2, then the need is zero.

(d) An applicant that has one or more existing or approved dedicated C-section operating rooms and is proposing to develop an additional dedicated C-section operating room in the same facility shall demonstrate that an average of at least 365 C-sections per room were performed in the facility's existing dedicated C-section operating rooms in the previous 12 months and are projected to be performed in the facility's existing, approved and proposed dedicated C-section rooms during the third year of operation following completion of the project.

(e) An applicant proposing to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall provide documentation to show that each existing ambulatory surgery program in the service area that performs ambulatory surgery in the same specialty area as proposed in the application is currently utilized an average of at least 1,872 hours per operating room per year, excluding dedicated open heart and C-Section operating rooms. The hours utilized per

operating room shall be calculated as follows: [(Number of projected inpatient cases, excluding open heart and C-sections performed in dedicated rooms, times 3.0 hours) plus (Number of projected outpatient cases times 1.5 hours)] divided by the number of operating rooms, excluding dedicated open heart and C-Section operating rooms.

(f) An applicant proposing to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall reasonably demonstrate the need for the conversion in the third operating year of the project based on the following formula: [(Total number of projected outpatient cases for all ambulatory surgery programs in the service area times 1.5 hours) divided by 1872 hours] minus the total number of existing, approved and proposed outpatient or ambulatory surgical operating rooms and shared operating rooms in the service area. The need for the conversion is demonstrated if the difference is a positive number greater than or equal to one, after the number is rounded to the next highest number for fractions of 0.50 or greater.

(g) The applicant shall document the assumptions and provide data supporting the methodology used for each projection in this Rule.

History Note: Authority G.S. 131E-177; 131E-183(b); Eff. November 1, 1990; Amended Eff. March 1, 1993; Temporary Amendment Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. January 4, 1994; Temporary Amendment Eff. January 1, 2002; July 1, 2001; Amended Eff. August 1, 2002; Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002; Amended Eff. April 1, 2003; Temporary Amendment Eff. January 1, 2005; Amended Eff. November 1, 2005; Temporary Rule Eff. February 1, 2006; Amended Eff. November 1, 2006; Temporary Amendment Eff. February 1, 2008; Amended Eff. November 1, 2008; Temporary Amendment Eff. February 1, 2009; Amended Eff. November 1, 2009.

10A NCAC 14C .2701 DEFINITIONS

The following definitions apply to all rules in this Section:

- (1) "Approved MRI scanner" means an MRI scanner which was not operational prior to the beginning of the review period but which had been issued a certificate of need.
- (2) "Capacity of fixed MRI scanner" means 100 percent of the procedure volume that the MRI scanner is capable of completing in a year, given perfect scheduling, no machine or room downtime, no cancellations, no patient transportation problems, no staffing or physician delays and no MRI procedures outside the norm. Annual capacity of a fixed

MRI scanner is 6,864 weighted MRI procedures, which assumes two weighted MRI procedures are performed per hour and the scanner is operated 66 hours per week, 52 weeks per year.

- (3) "Capacity of mobile MRI scanner" means 100 percent of the procedure volume that the MRI scanner is capable of completing in a year, given perfect scheduling, no machine or room downtime, no cancellations, no patient transportation problems, no staffing or physician delays and no MRI procedures outside the norm. Annual capacity of a mobile MRI scanner is 4,160 weighted MRI procedures, which assumes two weighted MRI procedures are performed per hour and the scanner is operated 40 hours per week, 52 weeks per year.
- (4) "Dedicated breast MRI scanner" means an MRI scanner that is configured to perform only breast MRI procedures and is not capable of performing other types of non-breast MRI procedures.
- (5) "Existing MRI scanner" means an MRI scanner in operation prior to the beginning of the review period.
- (6) "Extremity MRI scanner" means an MRI scanner that is utilized for the imaging of extremities and is of open design with a field of view no greater than 25 centimeters.
- (7) "Fixed MRI scanner" means an MRI scanner that is not a mobile MRI scanner.
- (8) "Magnetic Resonance Imaging" (MRI) means a non-invasive diagnostic modality in which electronic equipment is used to create tomographic images of body structure. The MRI scanner exposes the target area to nonionizing magnetic energy and radio frequency fields, focusing on the nuclei of atoms such as hydrogen in the body tissue. Response of selected nuclei to this stimulus is translated into images for evaluation by the physician.
- (9) "Magnetic resonance imaging scanner" (MRI Scanner) is defined in G.S. 131E-176(14e).
- (10) "Mobile MRI region" means either the eastern part of the State which includes the counties in Health Service Areas IV, V and VI (Eastern Mobile MRI Region), or the western part of the State which includes the counties in Health Service Areas I, II, and III (Western Mobile MRI Region). The counties in each Health Service Area are identified in Appendix A of the State Medical Facilities Plan.
- (11) "Mobile MRI scanner" means an MRI scanner and transporting equipment which is moved at least weekly to provide services at two or more campuses or locations.

- (12) "MRI procedure" means a single discrete MRI study of one patient.
- (13) "MRI service area" means the Magnetic Resonance Imaging Planning Areas, as defined in the applicable State Medical Facilities Plan, except for proposed new mobile MRI scanners for which the service area is a mobile MRI region.
- (14) "MRI study" means one or more scans relative to a single diagnosis or symptom.
- (15) "Multi-position MRI scanner" means an MRI scanner as defined in the State Medical Facilities Plan, pursuant to a special need determination for a demonstration project.
- (16) "Related entity" means the parent company of the applicant, a subsidiary company of the applicant (i.e., the applicant owns 50 percent or more of another company), a joint venture in which the applicant is a member, or a company that shares common ownership with the applicant (i.e., the applicant and another company are owned by some of the same persons).
- (17) "Temporary MRI scanner" means an MRI scanner that the Certificate of Need Section has approved to be temporarily located in North Carolina at a facility that holds a certificate of need for a new fixed MRI scanner, but which is not operational because the project is not yet complete.
- (18) "Weighted MRI procedures" means MRI procedures which are adjusted to account for the length of time to complete the procedure, based on the following weights: one outpatient MRI procedure without contrast or sedation is valued at 1.0 weighted MRI procedure, one outpatient MRI procedure with contrast or sedation is valued at 1.4 weighted MRI procedures, one inpatient MRI procedure without contrast or sedation is valued at 1.4 weighted MRI procedures; and one inpatient MRI procedure with contrast or sedation is valued at 1.8 weighted MRI procedures.
- (19) "Weighted breast MRI procedures" means MRI procedures which are performed on a dedicated breast MRI scanner and are adjusted to account for the length of time to complete the procedure, based on the following weights: one diagnostic breast MRI procedure is valued at 1.0 weighted MRI procedure (based on an average of 60 minutes per procedure), one MRI-guided breast needle localization MRI procedure is valued at 1.1 weighted MRI procedure (based on an average of 66 minutes per procedure), and one MRI-guided breast biopsy procedure is valued at 1.6 weighted MRI procedures (based on an average of 96 minutes per procedure).

History Note: Authority G.S. 131E-177(1); 131E-183(b); Temporary Adoption Eff. September 1, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
 Eff. February 1, 1994;
 Temporary Amendment Eff. January 1, 1999;
 Temporary Amendment Eff. January 1, 1999 Expired on October 12, 1999;
 Temporary Amendment Eff. January 1, 2000;
 Temporary Amendment effective January 1, 2000 amends and replaces a permanent rulemaking originally proposed to be effective August 2000;
 Temporary Amendment Eff. January 1, 2001;
 Temporary Amendment effective January 1, 2001 amends and replaces a permanent rulemaking originally proposed to be effective April 1, 2001;
 Temporary Amendment Eff. January 1, 2002;
 Amended Eff. August 1, 2002;
 Temporary Amendment effective January 1, 2002 amends and replaces the permanent rule effective August 1, 2002;
 Temporary Amendment Eff. January 1, 2003;
 Amended Eff. August 1, 2004; April 1, 2003;
 Temporary Amendment Eff. January 1, 2005;
 Amended Eff. November 1, 2005;
 Temporary Amendment Eff. February 1, 2006;
 Amended Eff. November 1, 2006;
 Temporary Amendment Eff. February 1, 2008;
 Amended Eff. November 1, 2008;
 Temporary Amendment Eff. February 1, 2009;
 Amended Eff. November 1, 2009.

10A NCAC 17D .0207 CERTIFICATION OF IMPAIRMENT

- (a) A prospective user shall be certified as deaf, hard of hearing, speech impaired, or deaf-blind to be eligible to receive an equipment set.
- (b) To be certified a recipient shall submit a Disability Determination form with the application. The Disability Determination form shall be completed by an individual listed in Rule .0206(b)(2) of this Section.

History Note: Authority G.S. 62-157; 143B-216.33(a)(7),(d); 143B-216.33.
 Eff. December 1, 1988;
 Amended Eff. November 1, 2009; May 1, 2007.

10A NCAC 17D .0210 FINANCIAL ELIGIBILITY

- (a) An applicant for an equipment set shall meet the financial needs test of this Rule.
- (b) Applicants for an equipment set who are recipients of Work First, SSI, CSHS (Children's Special Health Services), Medicaid, Health Choice for Children, Section 8 Housing Choice Vouchers, or the Food Stamp Program automatically meet the financial needs test upon submission of a document issued by the State of North Carolina or political subdivision of the State or an agency of the United States or any other document that the

Division determines provides equivalent reliability that shows participation in one of the programs.

(c) Family income limits for applicants not included under (b) of this Rule are described in Rule .0206(b)(4) of this Section.

(d) An applicant's family include the user and the following persons living in the same household as the user if the user is 18 years of age or older or if the user is less than 18 years of age and is married:

- (1) the user's spouse;
- (2) the user's children, including step-children, under 18 years of age;
- (3) other individuals related to the user by blood or marriage who are under 18 years of age and do not have a parent or spouse living in the same household; and
- (4) the user's children or step-children of any age who are living at home or temporarily living away from the household while attending school if they are being claimed as dependents by the user for federal tax purposes.

(e) An applicant's family include the user and the following persons living in the same household as the user if the user is less than 18 years of age and is not married:

- (1) the user's parents, including step-parents;
- (2) siblings, half-siblings, and step-siblings of the user if the siblings are less than 18 years of age;
- (3) siblings, half-siblings, and step-siblings of the user who are living at home or temporarily living away from the household while attending school, if they are being claimed as dependents by the user's parents for federal tax purposes and the parents are living in the same household as the user; and
- (4) other individuals related to the user by blood or marriage who are under 18 years of age and do not have a parent or spouse living in the same household.

(f) Monthly income of the family members shall be considered in the financial needs test. Income includes the following:

- (1) gross salaries and wages;
- (2) adjusted gross earnings from self-employment, except for income that children may earn from babysitting, lawn mowing, or other miscellaneous tasks. Adjusted gross income is calculated by subtracting the operational expenses from the gross receipts of the business in the time period described in Paragraph (h) of this Rule. Any salary or disbursements made to the individual from his business are disregarded in calculating adjusted gross earnings from self-employment;
- (3) unemployment compensation;
- (4) Social Security benefits;
- (5) Veteran's Administration benefits;
- (6) retirement and pension payments;
- (7) worker's compensation payments;
- (8) alimony;
- (9) child support;

- (10) tobacco buyout payments;
- (11) On-the-job training (OJT);
- (12) AmeriCorps stipends;
- (13) Armed Forces pay;
- (14) work release payments;
- (15) rental income;
- (16) annuities; and
- (17) Cherokee Tribal Per Capita Income paid to adult family members.

(g) The following shall be excluded in the computation of monthly income:

- (1) benefits from any program listed in Paragraph (b) of this Rule;
- (2) adoption or foster care payments;
- (3) income from sale of personal assets;
- (4) loans;
- (5) tax refunds; and
- (6) earned income tax credits.

(h) The time period to be used as the basis for computing monthly income is the month preceding the date of application. For income that is not received on a monthly basis, the monthly pro rata share of the most recent receipt of the income shall be included in the computation.

History Note: Authority G.S. 62-157; 143B-216.33; 143B-216.34.

Eff. December 1, 1988;

Amended Eff. November 1, 2009; May 1, 2008; May 1, 2007; April 1, 1990.

10A NCAC 41A .0206 INFECTION PREVENTION – HEALTH CARE SETTINGS

(a) The following definitions apply throughout this Rule:

- (1) "Health care organization" means a hospital; clinic; physician, dentist, podiatrist, optometrist, or chiropractic office; home care agency; nursing home; local health department; community health center; mental health facility; hospice; ambulatory surgical facility; urgent care center; emergency room; Emergency Medical Service (EMS) agency; pharmacies where a health practitioner offers clinical services; or any other organization that provides clinical care.
- (2) "Invasive procedure" means entry into tissues, cavities, or organs or repair of traumatic injuries. The term includes the use of needles to puncture skin, vaginal and cesarean deliveries, surgery, and dental procedures during which bleeding occurs or the potential for bleeding exists.
- (3) "Non-contiguous" means not physically connected.

(b) In order to prevent transmission of HIV, hepatitis B, hepatitis C and other bloodborne pathogens each health care organization that performs invasive procedures shall implement a written infection control policy. The health care organization

shall ensure that health care workers in its employ or who have staff privileges are trained in the principles of infection control and the practices required by the policy; require and monitor compliance with the policy; and update the policy as needed to prevent transmission of HIV, hepatitis B, hepatitis C and other bloodborne pathogens. The health care organization shall designate one on-site staff member for each noncontiguous facility to direct these activities. The designated staff member in each health care facility shall complete a course in infection control approved by the Department. The Department shall approve a course that addresses:

- (1) Epidemiologic principles of infectious disease;
- (2) Principles and practice of asepsis;
- (3) Sterilization, disinfection, and sanitation;
- (4) Universal blood and body fluid precautions;
- (5) Safe injection practices;
- (6) Engineering controls to reduce the risk of sharp injuries;
- (7) Disposal of sharps; and
- (8) Techniques that reduce the risk of sharp injuries to health care workers.

(c) The infection control policy required by this Rule shall address the following components that are necessary to prevent transmission of HIV, hepatitis B, hepatitis C and other bloodborne pathogens:

- (1) Sterilization and disinfection, including a schedule for maintenance and microbiologic monitoring of equipment; the policy shall require documentation of maintenance and monitoring;
- (2) Sanitation of rooms and equipment, including cleaning procedures, agents, and schedules;
- (3) Accessibility of infection control devices and supplies; and
- (4) Procedures to be followed in implementing 10A NCAC 41A .0202(4) and .0203(b)(4) when a health care provider or a patient has an exposure to blood or other body fluids of another person in a manner that poses a significant risk of transmission of HIV or hepatitis B.

(d) Health care workers and emergency responders shall, with all patients, follow Centers for Disease Control and Prevention Guidelines on blood and body fluid precautions incorporated by reference in 10A NCAC 41A .0201.

(e) Health care workers who have exudative lesions or weeping dermatitis shall refrain from handling patient care equipment and devices used in performing invasive procedures and from all direct patient care that involves the potential for contact of the patient, equipment, or devices with the lesion or dermatitis until the condition resolves.

(f) All equipment used to puncture skin, mucous membranes, or other tissues in medical, dental, or other settings must be disposed of in accordance with 15A NCAC 13B .1200 after use or sterilized prior to reuse.

History Note: Authority G.S. 130A-144; 130A-145; 130A-147;
Eff. October 1, 1992;

Amended Eff. January 1, 2010; December 1, 2003; July 1, 1994; January 4, 1994.

10A NCAC 70E .0702 RESPONSIBILITY

Each supervising agency providing foster care services shall assess its applicants and licensees. Supervising agencies shall submit to the licensing authority information and reports that are used as the basis of either issuing or continuing to issue licenses.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;
Eff. September 1, 2007;
Amended Eff. November 1, 2009.

10A NCAC 70E .0703 NEW LICENSES

(a) The supervising agency shall submit all licensing materials to the licensing authority dated within 180 days prior to submitting an application for a new license. The supervising agency shall submit medical examinations of the members of the foster home to the licensing authority dated within 12 months prior to submitting an application for a new license. Fire inspections shall be current as determined by the local fire inspector.

(b) The supervising agency shall submit all licensing application materials required for a license to the licensing authority at one time. The licensing authority shall return incomplete licensing applications to the supervising agency.

(c) The licensing authority shall issue a new license, if approved according to the rules in this Section, effective the date the application and all required materials are received by the licensing authority.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;
Eff. September 1, 2007;
Amended Eff. November 1, 2009.

10A NCAC 70E .0704 RELICENSURE AND RENEWAL

(a) Materials for renewing a license are due to the licensing authority prior to the date the license expires.

(b) All relicensing materials shall be completed and dated within 180 days prior to the date the supervising agency submits materials for licensure to the licensing authority. Medical examinations of the members of the foster home shall be completed and dated within 12 months prior to submitting materials for relicensure. Fire inspections shall be current as determined by the local fire inspector.

(c) All relicensing materials shall be submitted at one time to the licensing authority. Incomplete relicensure applications shall be returned to the supervising agency.

(d) If materials are submitted after the foster home license expires, a license, if approved, shall be issued effective the date the licensing materials are received by the licensing authority.

(e) When a foster home license is terminated for failure to submit relicensure materials, the home shall be relicensed if the relicensure materials are submitted to the licensing authority within one year of the date the license was terminated and all

requirements are met. After one year, the supervising agency shall submit a new licensure application to the licensing authority.

(f) When a foster home license has been terminated in good standing and the foster family wishes to be licensed again, the license shall be renewed if there are no changes or the changes meet the requirements of the Rules of this Section. The period of time for this renewed license is from the date the request is received by the licensing authority to the end date of the license period in effect when the license was terminated.

(g) Unless previously licensed foster parents who have not been licensed within the last 24 consecutive months demonstrate mastery of the parenting skills listed in 10A NCAC 70E .1117(1) to the satisfaction of the supervising agency and documented to the licensing authority, the foster parents shall complete the 30 hours of pre-service training specified in 10A NCAC 70E .1117(1).

(h) Unless previously licensed therapeutic foster parents who have not been licensed within the last 24 consecutive months demonstrate mastery of the therapeutic skills listed in 10A NCAC 70E .1117(2) to the satisfaction of the supervising agency and documented to the licensing authority, the therapeutic foster parents shall complete the 10 hours of pre-service training specified in 10A NCAC 70E .1117(2).

(i) The supervising agency shall provide documentation to the licensing authority that trainings for first aid, CPR, and universal precautions are updated.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;
Eff. September 1, 2007;
Amended Eff. November 1, 2009.

10A NCAC 70E .0707 TERMINATION

(a) Licenses terminate at the end of the two year license period unless all relicensing materials have been received by the licensing authority prior to the license expiration date.

(b) The licensing authority shall terminate a license before the end of the two year license period if requested by the foster parents.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;
Eff. September 1, 2007;
Amended Eff. November 1, 2009.

10A NCAC 70E .1001 FOSTER HOME

(a) No more than five children shall reside in any family foster home at any time. These five children include the foster parent's own children, children placed for family foster care, licensed capacity for in-home day care children, children kept for babysitting or any other children residing in the home. Children kept for in-home day care and babysitting are considered residents of the home.

(b) No more than four children including no more than two foster children shall reside in any therapeutic foster home at any time. The four children include the foster parent's own children, children placed for therapeutic foster care, children placed for family foster care or any other children living in the home.

Therapeutic foster parents shall not provide in-home day care or baby sitting services in the therapeutic foster home.

(c) Exceptions to the capacity standards in Paragraphs (a) and (b) of this Rule may be made:

- (1) if written documentation is submitted to the licensing authority for family foster care that siblings will be placed together and the foster home complies with Subparagraphs (3) and (4) of this Paragraph. The out-of-home family services agreement for each sibling shall specify that siblings will be placed together and shall also address the foster parents' skill, stamina, and ability to care for the children;
- (2) if written documentation is submitted to the licensing authority for therapeutic foster care that siblings will be placed together and the foster home complies with Subparagraphs (3) and (4) of this Paragraph. The person-centered plan or out-of-home family services agreement for each sibling shall specify that siblings shall be placed together and shall also address the foster parents' skill, stamina, and ability to care for the children;
- (3) if written documentation is submitted to the licensing authority that the foster home complies with 10A NCAC 70E .1108; and
- (4) if written documentation is submitted to the licensing authority that the foster home complies with 10A NCAC 70L .0102.

(d) Family foster homes and therapeutic foster homes shall not provide Community Alternative Programs services for Disabled Adults (CAP/DA) as defined in Section 1915(c) of the Social Security Act, unless the disabled adult was placed in the foster home as a Community Alternatives Programs for Children (CAP C) client as defined in Section 1915(c) of the Social Security Act prior to his/her 18th birthday. The disabled adult shall be included in the capacity for the foster home. Family foster homes and therapeutic foster homes shall not provide supervised living services as defined by 10A NCAC 27G .5601.

(e) Members of the household 18 years old and over and not receiving foster care services are not included in capacity, but there shall be physical accommodations in the home to provide them room and board.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;
Eff. September 1, 2007;
Amended Eff. November 1, 2009.

10A NCAC 70E .1102 MEDICATION

Foster parents are responsible for the following regarding medication:

- (1) General requirements:
 - (a) retain the manufacturer's label with expiration dates visible on non-prescription drug containers not dispensed by a pharmacist;
 - (b) administer prescription drugs to a child only on the written order of a

- person authorized by law to prescribe drugs;
 - (c) allow prescription medications to be self-administered by children only when authorized in writing by the child's licensed medical provider;
 - (d) allow non-prescription medications to be administered to a child taking prescription medications only when authorized by the child's licensed medical provider; allow non-prescription medications to be administered to a child not taking prescription medication, with the authorization of the parents, guardian, legal custodian, or licensed medical provider;
 - (e) allow injections to be administered by unlicensed persons who have been trained by a registered nurse, pharmacist, or other person allowed by law to train unlicensed persons to administer injections;
 - (f) record in a Medication Administration Record (MAR) provided by the supervising agency all drugs administered to each child. The MAR shall include the following: child's name; name, strength, and quantity of the drug; instructions for administering the drug; date and time the drug is administered, discontinued, or returned to the supervising agency or the person legally authorized to remove the child from foster care; name or initials of person administering or returning the drug; child requests for changes or clarifications concerning medications; and child's refusal of any drug; and
 - (g) follow-up for child requests for changes or clarifications concerning medications with an appointment or consultation with a licensed medical provider.
- (2) Medication disposal:
 - (a) return prescription medications to the supervising agency or person legally authorized to remove the child from foster care; and
 - (b) return discontinued prescription medications to a pharmacy or the supervising agency for disposal, in accordance with 10A NCAC 70G .0510(c).
- (3) Medication storage:
 - (a) store prescription and over-the-counter medications in a locked cabinet in a clean, well-lighted, well-ventilated room other than bathrooms, kitchen, or utility room between 59° F (15° C) and 86° F (30° C);
 - (b) store medications in a refrigerator, if required, between 36° F (2° C) and 46° F (8° C). If the refrigerator is used for food items, medications shall be kept in a separate, locked compartment or container within the refrigerator; and
 - (c) store prescription medications separately for each child.
- (4) Psychotropic medication review:
 - (a) arrange for any child receiving psychotropic medications to have his/her drug regimen reviewed by the child's licensed medical provider at least every six months;
 - (b) report the findings of the drug regimen review to the supervising agency; and
 - (c) document the drug review in the MAR along with any prescribed changes.
- (5) Medication errors:
 - (a) report drug administration errors or adverse drug reactions to a licensed medical provider or pharmacist; and
 - (b) document the drug administered and the drug reaction in the MAR.

*History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;
Eff. September 1, 2007;
Amended Eff. November 1, 2009.*

10A NCAC 70E .1104 CRITERIA FOR THE FAMILY

(a) Foster parents shall be persons whose behaviors, circumstances, and health are conducive to the safety and well-being of children. Foster parents shall be selected on the basis of demonstrating strengths in the skill areas of Subparagraphs (1) through (12) of this Paragraph which permit them to undertake and perform the responsibilities of meeting the needs of children, in providing continuity of care, and in working with the supervising agency. Foster parents shall demonstrate skills in:

- (1) assessing individual and family strengths and needs and building on strengths and meeting needs;
- (2) using and developing effective communication;
- (3) identifying the strengths and needs of children placed in the home;
- (4) building on children's strengths and meeting the needs of children placed in the home;
- (5) developing partnerships with children placed in the home, parents or the guardians of the children placed in the home, the supervising

- agency and the community to develop and carry out plans for permanency;
- (6) helping children placed in the home develop skills to manage loss and skills to form attachments;
- (7) helping children placed in the home manage their behaviors;
- (8) helping children placed in the home maintain and develop relationships that will keep them connected to their pasts;
- (9) helping children placed in the home build on positive self-concept and positive family, cultural, and racial identity;
- (10) providing a safe and healthy environment for children placed in the home which keeps them free from harm;
- (11) assessing the ways in which providing family foster care or therapeutic foster care affects the family; and
- (12) making an informed decision regarding providing family foster care or therapeutic foster care.

(b) Age. A license may only be issued to persons 21 years of age and older.

(c) Health. The foster family shall be in good physical and mental health as evidenced by:

- (1) a medical examination completed by a licensed medical provider on each member of the foster home within the last 12 months prior to the initial licensing application date, and biennially thereafter;
- (2) documentation that each adult member of the household has had a TB skin test or chest x-ray prior to initial licensure unless contraindicated by a licensed medical provider. The foster parents' children are required to be tested only if one or more of the parent's tests positive for TB;
- (3) a medical history form completed on each member of the household at the time of the initial licensing application and on any person who subsequently becomes a member of the household;
- (4) no indication of alcohol abuse, drug abuse, or illegal drug use by a member of the foster family;
- (5) no indication that a member of the foster family is a perpetrator of domestic violence;
- (6) no indication that a member of the foster family has abused, neglected, or exploited a disabled adult;
- (7) no indication that a member of the foster family has been placed on the North Carolina Sex Offender and Public Protection Registry pursuant to Article 27A Part 2 of G.S. 14;
- (8) no indication that a member of the foster family has been placed on the Health Care Personnel Registry pursuant to G.S. 131E-256; and

- (9) no indication that a member of the foster family has been found to have abused or neglected a child or has been a respondent in a juvenile court proceeding that resulted in the removal of a child or has had child protective services involvement that resulted in the removal of a child.

(d) Education. Foster parent applicants shall have graduated from high school or received a GED (Graduate Equivalency Diploma) or shall have an ability to read and write as evidenced by their ability to administer medications as prescribed by a licensed medical provider, maintain medication administration logs and maintain progress notes.

(e) Required Applicants. Foster parent applicants who are married are presumed to be co-parents in the same household and both shall complete all licensing requirements. Adults 21 years of age or older, living in currently licensed or newly licensed foster homes who have responsibility for the care, supervision, or discipline of the foster child shall complete all licensing requirements. The supervising agency shall assess each adult's responsibility for the care, supervision, or discipline of the foster child.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;

Eff. September 1, 2007;

Amended Eff. November 1, 2009.

10A NCAC 70E .1105 CONFLICT OF INTEREST

(a) County departments of social services and private child-placing agencies shall not supervise foster homes of members of their board of directors, governance structure, social services board, and county commission.

(b) County departments of social services and private child-placing agencies shall not supervise foster homes of agency employees and relatives of agency employees. Relatives include birth and adoptive parents, blood and half blood relative and adoptive relative including brother, sister grandparent, great-grandparent, great-great grandparent, uncle, aunt, great-uncle, great-aunt, great-great uncle, great-great aunt, nephew, niece, first cousin, stepparent, stepbrother, stepsister and the spouse of each of these relatives.

(c) Private child-placing agencies shall not supervise foster homes of their agency owners.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;

Eff. September 1, 2007;

Amended Eff. November 1, 2009.

10A NCAC 70E .1107 RELATIONSHIP TO SUPERVISING AGENCY

(a) Foster parents shall agree to work with the supervising agency in the following ways:

- (1) work with the child and the child's parent(s) or guardian(s) in the placement process, reunification process, adoption process, or any change of placement process;

- (2) consult with social workers, mental health personnel, licensed medical providers, and other persons authorized by the child's parent(s), guardian(s) or custodian who are involved with the child;
- (3) maintain confidentiality regarding children and their parent(s) or guardian(s);
- (4) keep records regarding the child's illnesses, behaviors, social needs, educational needs, and family visits and contacts; and
- (5) report to the supervising agency any changes as required by 10A NCAC 70E .0902.

(b) In addition to Subparagraphs (a)(1) through (5) of this Rule, foster parents who provide therapeutic foster care services shall:

- (1) be trained as set out in 10A NCAC 70E .1117; and
- (2) allow weekly supervision and support from a qualified professional as defined in 10A NCAC 27G .0104 and .0203.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;

Eff. September 1, 2007;

Amended Eff. November 1, 2009.

10A NCAC 70E .1108 FIRE AND BUILDING SAFETY

(a) Each foster home shall be in compliance with all applicable portions of the NC Residential Code in effect at the time the foster home was constructed or last renovated. Information regarding the purchase of all applicable volumes of The North Carolina State Residential Code and referenced standards and codes, can be accessed by reviewing the following web site: (www.ncdoi.com - click on Code Services, click on Code Book Sales) or calling the Code Section within the Department of Insurance at 919-661-5880.

(b) All homes shall be protected from all fire hazards including the following:

- (1) all hallways, doorways, entrances, ramps, steps, and corridors shall be kept clear and unobstructed at all times;
- (2) an evacuation plan shall be developed, and all persons in the home shall be knowledgeable of the plan;
- (3) a mounted "ABC" fire extinguisher with a rating not less than 1-A shall be installed and readily available in the residence;
- (4) homes built prior to July 1975 shall have a battery or electric smoke alarm installed outside every sleeping area. Homes built between July 1975 and June 30, 1999, shall have electric smoke alarms placed outside sleeping areas as required by the NC Residential Code in effect at construction time. Homes built after June 30, 1999 shall have smoke alarms in every sleeping room, outside bedrooms and other areas, interconnected as required in the NC Residential Code;
- (5) a Carbon Monoxide (CO) detector shall be installed in homes that use fuel oil products,

coal, wood or gas to heat, cool, cook, operate a hot water heater or gas logs;

- (6) all homes shall have telephone service;
- (7) no egress door shall have a double keyed dead bolt; and
- (8) extension cords shall not be used as a substitute for permanent wiring. Extension cords shall be used only for portable appliances and shall be listed by Underwriters Laboratory (UL).

Before a home is licensed, it shall be inspected and receive a passing rating on the fire and building safety inspection report completed by the local fire inspector. Before a home is relicensed, it shall have a current fire and building safety inspection report with a passing rating completed by the local fire inspector.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 143B-153;

Eff. September 1, 2007;

Amended Eff. November 1, 2009.

10A NCAC 70E .1117 TRAINING REQUIREMENTS

Each supervising agency shall provide, or cause to be provided, preservice and in-service training for all prospective and licensed foster parents as follows:

- (1) Prior to licensure or within six months from the date a provisional license is issued, each applicant shall successfully complete 30 hours of preservice training. Preservice training shall include the following components:
 - (a) General Orientation to Foster Care and Adoption Process;
 - (b) Communication Skills;
 - (c) Understanding the Dynamics of Foster Care and Adoption Process;
 - (d) Separation and Loss;
 - (e) Attachment and Trust;
 - (f) Child and Adolescent Development;
 - (g) Behavior Management;
 - (h) Working with Birth Families and Maintaining Connections;
 - (i) Lifebook Preparation;
 - (j) Planned Moves and the Impact of Disruptions;
 - (k) The Impact of Placement on Foster and Adoptive Families;
 - (l) Teamwork to Achieve Permanence;
 - (m) Cultural Sensitivity;
 - (n) Confidentiality; and
 - (o) Health and Safety.
- (2) Prior to licensure or within six months from the date a provisional license is issued, therapeutic foster parent applicants shall receive at least ten additional hours of preservice training in behavioral mental health treatment services including the following:
 - (a) role of the therapeutic foster parent;
 - (b) safety planning; and

- (c) managing behaviors.
- (3) During the initial two years of licensure, each therapeutic foster parent shall receive additional training in the following areas:
 - (a) development of the person-centered plan;
 - (b) dynamics of emotionally disturbed and substance abusing youth and families;
 - (c) symptoms of substance abuse;
 - (d) needs of emotionally disturbed and substance abusing youth and families; and
 - (e) crisis intervention.
- (4) Training in first-aid, cardiopulmonary resuscitation (CPR) and universal precautions such as those provided by the American Red Cross, the American Heart Association, or equivalent organizations shall be provided to foster parents before a foster child is placed with the foster family. Training in CPR shall be appropriate for the ages of children in care. First-aid, CPR, and universal precautions training shall be updated as required by the American Red Cross, the American Heart Association, or equivalent organizations. The supervising agency shall ensure that family foster parents and therapeutic foster parents are trained in medication administration before a child is placed with the foster family.
- (5) Child-specific training shall be provided to the foster parents as required in the out-of-home family services agreement or person-centered plan as a condition of the child being placed in the foster home. When the child or adolescent requires treatment for abuse – reactive, sexually reactive and sexual offender behaviors, specific treatment shall be identified in his/her person-centered plan. Training of therapeutic foster parents is required in all aspects of reactive and offender specific sexual treatment and shall be made available by a provider who meets the requirements specified for a qualified professional as defined in 10A NCAC 27G .0104. When the child or adolescent requires treatment for substance abuse, specific treatment shall be identified in his/her person-centered plan. Training and supervision of therapeutic foster parents are required in all aspects of substance abuse and shall be made available by a provider who meets the requirements specified for a qualified substance abuse prevention professional as defined in 10A NCAC 27G .0104. This training shall count towards the training requirements of Item (6) of this Rule.
- (6) Prior to licensure renewal, each foster parent shall successfully complete at least twenty

hours of in-service training. This training may be child-specific or may concern issues relevant to the general population of children in foster care. In order to meet this requirement:

- (a) each supervising agency shall provide, or cause to be provided, at least 10 hours of in-service training for foster parents annually;
- (b) the training shall include subjects that would enhance the skills of foster parents and promote stability for children;
- (c) a foster parent may complete training provided by a community college, a licensed supervising agency, or other departments of State or county governments; and, upon approval by the supervising agency, such training shall count towards meeting the requirements specified in this Item; and
- (d) each supervising agency shall document in the foster parent record the type of activity the foster parent has completed pursuant to this Item.
- (7) A foster family caring for a child with HIV (human immunodeficiency virus) or AIDS (acquired immunodeficiency syndrome) shall complete six hours of training on issues relevant to HIV or AIDS annually. This training may count towards the training requirements Item (6) of this Rule.
- (8) Training requirements for physical restraint holds pursuant to 10A NCAC 70E .1103.

History Note: Authority G.S. 131D-10.1; 131D-10.3; 131D-10.5; 131D-10.6; 131D-10.6A; Eff. September 1, 2007; Amended Eff. November 1, 2009.

10A NCAC 70F .0201 GOVERNANCE

- (a) A private child-placing agency and residential maternity home shall have a governing body that exercises authority and has responsibility for its operation, policies, and practices. The private child-placing agency and maternity home shall notify the licensing authority of the type and structure of the governing body.
- (b) A private child-placing agency and a residential maternity home that operates under articles of incorporation shall file the articles of incorporation with the Department of the Secretary of State (<http://www.secretary.state.nc.us>). An official copy of the articles of incorporation shall be submitted to the licensing authority.
- (c) In the case of non-profit or for-profit corporations, the governing body shall:
 - (1) be composed of no fewer than six members to include men and women;

- (2) provide for a system of rotation for board members and limitation to the number of consecutive terms a member may serve;
- (3) establish standing committees;
- (4) provide orientation for new members; and
- (5) meet at least four times annually with a quorum present.

(d) An agency shall submit to the licensing authority a list of members of the governing body. This list shall indicate the name, address, and term of membership of each member and shall identify each officer and the term of that office.

(e) A governmental agency shall identify the statutory basis for its authority to operate a child-placing agency or a residential maternity home.

(f) The agency shall permanently maintain meeting minutes of the governing body and committees.

History Note: Authority G.S. 131D-1; 131D-10.5; 143B-153; Eff. February 1, 1986; Amended Eff. November 1, 2009; October 1, 2008; July 1, 1990.

10A NCAC 70F .0202 RESPONSIBILITIES OF THE GOVERNING BODY

(a) The governing body shall provide leadership for the agency and shall approve the agency's policies and programs.

(b) The governing body shall employ an executive director who is located in the administrative office within the geographical boundaries of North Carolina and delegate responsibility to that person for the administration and operation of the agency, including the employment and discharge of all agency staff.

(c) The governing body shall require the executive director provide a signed statement that the executive director has no criminal, social or medical history that would adversely affect his or her capacity to work with children and adults. The governing body shall ensure that the criminal histories of an executive director are checked prior to employment and based on the criminal history, a determination is made concerning the individual's fitness for employment. The governing body shall ensure that searches of the North Carolina Sex Offender and Public Protection Registry and the North Carolina Health Care Personnel Registry (pursuant to G.S. 131E-256) are completed prior to employment, and based on these searches, a determination is made concerning the individual's fitness for employment. The governing body shall submit authorization to the licensing authority to search the Responsible Individuals List as defined in 10A NCAC 70A .0102 to determine if the executive director has had child protective services involvement resulting in a substantiation of child abuse or serious neglect, and based on this search, a determination is made concerning the individual's fitness for employment. The governing body shall require that the executive director provide a signed statement prior to employment that he or she has not abused or neglected a child or has been a respondent in a juvenile court proceeding that resulted in the removal of a child or has had child protective services involvement that resulted in the removal of a child. The governing body shall require that the executive director provide a signed statement that he or she has not abused, neglected or exploited a disabled adult and that he or she has not been a domestic violence perpetrator. Agencies or applicants that do

not have a governing body shall provide this information directly to the licensing authority.

(d) The governing body shall annually evaluate the executive director's performance except a sole proprietor or partner is exempt from this Rule if he or she serves as executive director.

(e) The governing body shall approve the annual budget of anticipated income and expenditures necessary to provide the services described in its statement of purpose. Child-placing agencies and residential maternity homes receiving foster care maintenance payments of state funds or state maternity home funds shall submit an annual audit of their financial statements to the Department of Health and Human Services, Controller's Office in compliance with 10A NCAC 70D .0105(a)(5).

(f) The governing body shall annually evaluate the agency's services. This evaluation shall include the agency's interaction with other community agencies to serve its clients.

(g) The governing body shall establish in writing the policies and procedures for control and access to and receipt, use, or release of information about its clients.

(h) The governing body of child-placing agencies providing foster care services shall develop a written disaster plan that is provided to agency personnel and foster parents. The disaster plan shall be prepared and updated at least annually. The governing body of residential maternity homes shall comply with 10A NCAC 70K .0315(g).

(i) The governing body, in the event of the closing of the agency, shall develop a plan for the retention and storage of client records. The specifics of this plan shall be submitted to the licensing authority before the actual closing of the agency.

History Note: Authority G.S. 131D-1; 131D-10.5; 131D-10.6; 143B-153; Eff. February 1, 1986; Amended Eff. July 1, 1990; Temporary Amendment Eff. February 1, 2002; Amended Eff. November 1, 2009; October 1, 2008; July 18, 2002.

10A NCAC 70F .0206 PERSONNEL POLICIES

(a) The agency shall have written policies for all employees (full-time, part-time and contracted) which include the following:

- (1) written job descriptions and titles for each position defining the qualifications, duties, and lines of authority;
- (2) salary scales;
- (3) a description of employee benefits;
- (4) opportunities for professional growth through supervision, orientation, in-service training, and staff development;
- (5) procedures for annual evaluation of the work and performance of each staff member which includes provision for employee participation in the evaluation process;
- (6) a description of the termination procedures established for resignation, retirement, or discharge; and
- (7) a written grievance procedure for employees.

(b) The agency shall have a personnel file for each employee (full-time, part-time, and contracted) which includes the following:

- (1) the application for employment, including record of work experience;
- (2) documentation of at least three references;
- (3) applicable professional credentials or certifications (prior to employment certified college transcripts shall be obtained for positions requiring college degrees);
- (4) signed statement indicating the employee's understanding of and willingness to comply with confidentiality requirements;
- (5) signed statement that the employee has no criminal, social, or medical history which would adversely affect the employee's capacity to work with children and adults;
- (6) criminal record checks certified by the Clerk of Superior Court;
- (7) results of the search of the North Carolina Sex Offender and Public Protection Registry;
- (8) results of the search of the North Carolina Health Care Personnel Registry (pursuant to G.S. 131E-256);
- (9) results of the Responsible Individuals List as defined in 10A NCAC 70A .0102 that indicate the employee has not had child protective services involvement resulting in a substantiation of child abuse or serious neglect;
- (10) signed statement that the applicant has not abused or neglected a child, has been a respondent in a juvenile court proceeding that resulted in the removal of a child, or had child protective services involvement that resulted in the removal of a child;
- (11) signed statement that the applicant has not abused, neglected, or exploited a disabled adult;
- (12) signed statement that the applicant has not been a domestic violence perpetrator;
- (13) log of training;
- (14) written approval letter from executive director or his or her designee authorizing staff to administer physical restraint holds, if applicable;
- (15) annual performance evaluations;
- (16) documentation of disciplinary actions;
- (17) documentation of grievances files;
- (18) employee's starting and termination dates; and
- (19) reason for termination.

(c) The agency shall have written procedures which safeguard the confidentiality of the personnel records.

History Note: Authority G.S. 131D-1; 131D-10.5; 131D-10.6; 143B-153;

Eff. February 1, 1986;

Amended Eff. November 1, 2009; October 1, 2008; July 1, 1990.

10A NCAC 70G .0503 PLACEMENT SERVICES

(a) The agency shall assist the parents or guardian to assume or resume their parental roles and responsibilities as specified in the out-of-home family services agreement or person-centered plan.

(b) The agency shall assist the parents or guardian to gain access to the services necessary to accomplish the goals and objectives specified in the out-of-home family services agreement or person-centered plan.

(c) The agency shall encourage contacts between parents or guardian and children after placement, in accordance with the visitation and contact plan.

(d) The agency shall have a signed agreement with the parents, guardian or legal custodian of the child in care which includes the expectations and responsibilities of the agency and the parents, guardian or legal custodian for carrying out the steps to meet the out-of-home family services agreement or person-centered plan goals, the financial arrangements for the child in care, and visitation and contact plans.

(e) The agency shall select the most appropriate form of care for the child consistent with the needs of the child, parents and guardian for family foster care or therapeutic foster care. The agency shall provide for any services the child may need and shall make every effort when placing the child to select the least restrictive and most appropriate setting closest to the child's home.

(f) The agency shall document any need to place a child in a family foster home or therapeutic foster home that is beyond a radius of 150 miles from the child placing agency and the child's parents or guardian.

(g) The agency, when selecting care, shall take into consideration a child's racial, cultural, ethnic, and religious heritage and preserve them to the extent possible without jeopardizing the child's right to care.

(h) The agency shall involve the parents or guardian in the selection of the placement.

(i) The family foster home or the therapeutic foster home shall be licensed by the Division of Social Services.

(j) The agency social worker for the child shall become acquainted with the child and family prior to placement, except when a child is placed on an emergency basis or in the case of an infant.

(k) The agency social worker shall help the child understand the reasons for placement and prepare him or her for the new environment. The social worker shall, except when placing under emergency conditions, arrange at least one preplacement visit for the child and shall be available to the child, the parents or guardian, and foster parents for supportive services.

(l) No child shall be accepted into a foster home without having had a current medical examination by a licensed medical provider (physician, physician's assistant or nurse practitioner). Medical examinations completed by a licensed medical provider within 12 months prior to the admission of the child in foster care are considered current. If a child has not had a medical examination by a licensed medical provider within 12 months prior to admission, the agency shall arrange a medical examination for the child within two weeks after admission or sooner if indicated by the child's health condition. The medical examination report shall include a signed statement by a licensed medical provider specifying the child's medical condition and

medications prescribed and indicating the presence of any communicable disease which may pose a risk of transmission in the foster home. If a child is in the custody of a county department of social services, is already scheduled to have and is having a medical examination completed annually, and is entering a foster home, the schedule of annual medical examinations do not have to be changed. A copy of the most recent medical examination report shall be obtained from the responsible county department of social services by the agency.

(m) The agency shall obtain and record a developmental history for each child.

(n) The agency shall supervise the care of the child and shall coordinate the planning and services for the child and family as stated in the out-of-home family services agreement or person-centered plan.

(o) Children in family foster homes and therapeutic foster homes shall have a monthly face-to-face contact by the social worker or case manager or more if specified in the out-of-home family services agreement or person-centered plan. The parents or guardian of children in family foster care and therapeutic foster care shall have a monthly face-to-face contact by the social worker or case manager unless the out-of-home family services agreement or person-centered plan indicates a different schedule of face-to-face contacts.

(p) The agency social worker or case manager shall meet with the children and the parents, guardian or legal custodian, either separately or together based on the out-of-home family services agreement or person-centered plan to assess and work on the following:

- (1) progress in resolving problems which precipitated placement;
- (2) parent and child relationship difficulties;
- (3) adjustment to separation;
- (4) adjustment to placement; and
- (5) achievement of out-of-home family services agreement goals or person-centered plan goals.

(q) The agency shall refer the child's parents or guardian to other agencies in the community if they require services the agency does not provide and it is specified in the out-of-home family services agreement or person-centered plan. The agency shall receive reports from the agency providing services regarding the parents' or guardian's progress or lack of progress.

(r) The agency shall make provisions for social work, mental health and health care services as stated in the out-of-home family services agreement or person-centered plan.

(s) The agency shall give foster parents assistance, training, consultation, and emotional support in caring for children and in resolving problems related to their role as foster parents. Foster parents shall have one face-to-face contact per month by the social worker or case manager unless the out-of-home family services agreement or person-centered plan indicates a different schedule of face-to-face contacts for each foster child placed in the home. Phone support and 24-hour on-call support shall be provided to foster parents. Therapeutic foster care parents shall have at least 60 minutes of supervision by a qualified professional as defined in 10A NCAC 27G .0104 on a weekly basis for each therapeutic foster child placed in the foster home. Therapeutic Foster Parents providing treatment to children/youth with substance abuse treatment needs shall receive supervision

from a qualified substance abuse professional as defined in 10A NCAC 27G .0104. The agency shall provide each foster parent with a Foster Parent Handbook that outlines agency procedures, requirements and expectations.

History Note: Authority G.S. 131D-10.5; 143B-153;

Eff. October 1, 2008;

Amended Eff. November 1, 2009.

10A NCAC 70G .0504 OUT-OF-HOME FAMILY SERVICES AGREEMENT FOR CHILDREN RECEIVING FAMILY FOSTER CARE SERVICES

(a) The agency shall develop a written out-of-home family services agreement within 30 days of admission of a child in a family foster home. The out-of-home family services agreement shall be developed in cooperation with the child, parents, guardian or legal custodian and foster parents when possible. The out-of-home family services agreement shall be based upon an assessment of the needs of the child, parents or guardian. The out-of-home family services agreement shall include goals stated in specific, realistic, and measurable terms and plans that are action oriented, including responsibilities of staff, parents or guardian, other family members, legal custodian, foster parents and the child.

(b) The out-of-home family services agreement shall be reviewed by the agency within 60 days of placement; the second out-of-home family services agreement review shall occur within 90 days of the first review, and subsequent reviews shall be held every six months. Parents, guardian, legal custodian, foster parents, the child, as well as any individual or agency designated as providing services, shall participate in the reviews to determine the child's and parents' or guardian's progress or lack of progress towards meeting the goals and objectives, and to determine changes that need to be made in the out-of-home family services agreement.

(c) If the legal custodian is a county department of social services, the child-placing agency, the department of social services, parents or guardian, foster parents, other service providers and child shall develop a single out-of-home family services agreement. A copy of the child's out-of-home family services agreement shall be provided to the parents, guardian, the executive director of the child-placing agency or his or her designee and the foster parents by the county department of social services serving as the legal custodian. The child's out-of-home family services agreement shall be provided to other agencies and individuals listed as providing services to the child and his or her parents or guardian. An age appropriate version of the out-of-home family services agreement shall be written and provided to each child by the legal custodian.

(d) The child-placing agency and foster parents shall attend court reviews, child and family team meetings, agency reviews and permanency planning action team meetings. The Out-of-Home Family Services Agreement (DSS-5240 or DSS-5241) and the Transitional Living Plan (CARS Plan Review) may serve as the out-of-home family services agreement for the child-placing agency if the documents reflect input and participation by the child-placing agency and foster parents.

History Note: Authority G.S. 131D-10.5; 143B-153;

*Eff. October 1, 2008;
Amended Eff. November 1, 2009.*

10A NCAC 70G .0512 PHYSICAL RESTRAINT HOLDS, BEHAVIOR MANAGEMENT AND DISCIPLINE

(a) Agencies using physical restraint holds shall, within 72 hours of an incident involving a physical restraint, review the incident report to ensure that correct steps were followed and forward the report to the parents, guardian or legal custodian and the licensing authority on a report form developed by the licensing authority.

(b) Agencies shall submit a report to the licensing authority by the 10th day of each month indicating the number of physical restraint holds used during the previous month on each child and any injuries that resulted.

(c) Agencies shall maintain reports of physical restraint holds in a manner consistent with the agency's risk management policies (clinical decisions and activities undertaken to identify, evaluate and reduce the risk of injury to clients, staff and visitors and reduce the risk of loss to the agency) and make them available to the licensing authority upon request.

(d) Foster parents and agency staff who utilize physical restraint holds shall receive at least 16 hours of training in behavior management, including techniques for de-escalating problem behavior, the appropriate use of physical restraint holds, monitoring of vital indicators, and debriefing children, foster parents and agency staff involved in physical restraint holds. Foster parents and agency staff authorized to use physical restraint holds shall annually complete at least eight hours of behavior management training, including techniques for de-escalating problem behavior. Foster parents and agency staff shall be trained by instructors who have met the following qualifications and training requirements:

- (1) trainers shall demonstrate competence by scoring 100 percent on testing in a training program aimed at preventing, reducing and eliminating the need for restrictive interventions;
- (2) trainers shall demonstrate competence by scoring 100 percent on testing in a training program teaching the use of physical restraint; trainers shall demonstrate competence by scoring a passing grade on testing in an instructor training program;
- (3) the training shall be competency-based, and shall include measurable learning objectives, measurable testing (written and by observation of behavior) on those objectives and measurable methods to determine passing or failing the course;
- (4) the content of the instructor training shall be approved by the Division of Mental Health, Developmental Disabilities and Substance Abuse Services and shall include presentation of understanding the adult learner, methods of teaching content of the course, evaluation of trainee performance and documentation procedures;

- (5) trainers shall be retrained at least annually and demonstrate competence in the use of physical restraint;
- (6) trainers shall be trained in CPR;
- (7) trainers shall have coached experience in teaching the use of restrictive interventions at least two times with a positive review by the coach;
- (8) trainers shall teach a program on the use of physical restraints at least once annually; and
- (9) trainers shall complete a refresher instructor training at least every two years.

(e) Foster parents and agency staff shall only use physical restraint holds approved by the North Carolina Interventions (NCI) Quality Assurance Committee, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 3022 Mail Service Center, Raleigh, NC 27699-3022. Requests for approval shall be submitted to the North Carolina Interventions (NCI) Quality Assurance Committee, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 3022 Mail Service Center, Raleigh, NC 27699-3022.

(f) Foster parents and agency staff shall receive written approval from the executive director or his or her designee of the supervising agency to administer physical restraint holds. A copy of this letter shall be placed in the foster home record of foster parents and the personnel file of agency staff members.

(g) Agencies shall complete an annual review of the discipline and behavior management policies and techniques to verify that the physical restraint holds being utilized are being applied properly and safely. The review of the policies and techniques shall be documented and submitted to the licensing authority at the time of relicensure as part of the reapplication process.

*History Note: Authority G.S. 131D-10.5; 143B-153;
Eff. October 1, 2008;
Amended Eff. November 1, 2009.*

10A NCAC 70G .0513 CRITICAL INCIDENTS

(a) The agency shall have written policies and procedures for reporting critical incidents.

(b) The agency shall follow policies and procedures for handling any suspected incidents of abuse or neglect of a child involving staff, subcontractors, volunteers, interns or foster parents in a foster home supervised by the agency. The policies and procedures shall include:

- (1) a provision for reporting any suspicion of abuse or neglect to the appropriate county department of social services for investigation;
- (2) a provision for recording any suspected incident of abuse or neglect and for reporting it to the executive director or to the governing body;
- (3) a provision for notifying parents, guardian or legal custodian;
- (4) a provision for preventing a recurrence of the alleged incident pending the investigative assessment;

- (5) a policy concerning personnel action to be taken when the incident involves a staff member, subcontractor, volunteer or intern;
- (6) a policy concerning the action to be taken when the incident involves a foster parent;
- (7) a provision for submitting a critical incident report to the licensing authority within 72 hours of the incident being accepted for an investigative assessment by a county department of social services; and
- (8) a provision for submitting written notification to the licensing authority within 72 hours of the case decision by the county department of social services conducting the investigative assessment.

(c) Critical incident reports shall be submitted to the licensing authority by the executive director or his or her designee on a form provided by the licensing authority within 72 hours of the critical incident. Critical incidents involving a child in placement in a foster home supervised by the agency include the following:

- (1) a death of a child;
- (2) reports of abuse and neglect;
- (3) admission to a hospital;
- (4) suicide attempt;
- (5) runaway lasting more than 24 hours; and
- (6) arrest for violations of state, municipal, county or federal laws.

(d) Documentation of critical incidents shall include:

- (1) name of child or children involved;
- (2) date and time of incident;
- (3) brief description of incident;
- (4) action taken by staff;
- (5) need for medical attention;
- (6) name of staff involved and person completing the report;
- (7) name of child's parent, guardian or legal custodian notified and the date and time of notification; and
- (8) approval of supervisory or administrative staff reviewing the report.

(e) When there is a death of a child in placement in a foster home supervised by the agency, the executive director or his or her designee shall notify the parent, guardian or legal custodian and the licensing authority within 72 hours of the death of the child.

(f) Critical incident reports shall be maintained in manner consistent with the agency's risk management policies that include clinical decisions and activities undertaken to identify, evaluate and reduce the risk of injury to clients, staff and visitors and reduce the risk of loss to the agency and shall be made available to the licensing authority upon request.

*History Note: Authority G.S. 131D-1; 131D-10.5;
Eff. October 1, 2008;
Amended Eff. November 1, 2009.*

10A NCAC 70H .0405 PREPLACEMENT ASSESSMENT

(a) The agency shall complete a preplacement assessment within 90 days after the application for adoption has been approved and the request for the assessment has been received. In a case involving a single adoptive applicant, there shall be two separate face-to-face interviews occurring on two different dates. In a case involving joint applicants, there shall be a separate face-to-face interview with each applicant and an additional two face-to-face interviews with both applicants. At least one interview shall be conducted in the applicants' home. There shall be separate face-to-face interviews with each member of the household ten years of age or older. The assessment process shall be a joint effort of the adoption agency and the applicants to determine the kind of child the applicants can best parent. Any assessment that was completed 18 months or more before placement of a child occurs shall be updated to include current information about the family. Any agency updating a preplacement assessment not originally completed by that agency assumes responsibility for the entire assessment, and the new assessment shall reflect that it is the responsibility of the agency conducting the update. Physical examinations of family members shall be current to within 18 months of the assessment.

(b) The agency shall assess the following areas and shall record the information in the adoptive applicants' record:

- (1) the applicants' reasons for wanting to adopt;
- (2) the strengths and needs of each member of the household;
- (3) the attitudes and feelings of the family, extended family, and other individuals involved with the family toward accepting adoptive children, and parenting children not born to them;
- (4) the attitudes of the applicants toward the birth parents and in regard to the reasons the child is in need of adoption;
- (5) the applicants' attitudes toward child behavior and discipline;
- (6) the applicants' plan for discussing adoption with the child;
- (7) the emotional stability and maturity of applicants;
- (8) the applicants' ability to cope with problems, stress, frustrations, crises, and loss;
- (9) the applicants' ability to give and receive affection;
- (10) the applicants' child-caring skills and willingness to acquire additional skills needed for the child's development;
- (11) the applicants' ability to provide for the child's physical and emotional needs;
- (12) whether the applicant has ever been convicted of a crime other than a minor traffic violation;
- (13) the strengths and needs of birth children or previously adopted children,
- (14) the applicant's physical and mental health, including any addiction to alcohol or drugs;
- (15) financial information provided by the applicant, including property and income;
- (16) the applicants' personal character references;

- (17) the applicant's religious orientation, if any;
- (18) the location and physical environment of the home;
- (19) the plan for child care if parents work;
- (20) recommendations for adoption in regard to the number, age, sex, characteristics, and special needs of children who could be best served by the family;
- (21) any previous request for an assessment or involvement in an adoptive placement and the outcome of the assessment or placement;
- (22) whether the individual has ever been a respondent in a domestic violence proceeding or a proceeding concerning a minor who was allegedly abused, neglected, dependent, undisciplined or delinquent, and the outcome of the proceeding or whether the individual has been found to have abused or neglected a child or has been a respondent in a juvenile court proceeding that resulted in the removal of a child or has had child protective services involvement that resulted in the removal of a child;
- (23) documentation of the results of the search of the Responsible Individual's List as defined in 10A NCAC 70A .0102 for all adult members of the household that indicates they have not had child protective services involvement resulting in a substantiation of child abuse or serious neglect;
- (24) whether the applicant has located a parent interested in placing a child for adoption with the applicant, and a brief, non identifying description of the parent and the child;
- (25) the applicants' age, date of birth, nationality, race or ethnicity;
- (26) the applicant's marital and family status and history, including the presence of any children born to or adopted by the applicant, and any other children in the household;
- (27) the applicant's educational and employment history and any special skills; and
- (28) any additional fact or circumstance that may be relevant to a determination of the applicant's suitability to be an adoptive parent, including the quality of the home environment and the level of functioning of any children in the household.

When any of the information listed in this Paragraph is not reasonably available, the preplacement assessment shall state why the information is unavailable.

(c) The assessment is prepared and typed by the agency and shall be reviewed by the agency's adoption review committee, signed and dated by an authorized agency representative when complete and final, and it shall become part of the applicants' permanent record. The agency's adoption review committee shall be composed of a minimum of three members, including an agency representative in a management position in children's services, the child's social worker(s) responsible for the

placement and adoption functions of the child's case, and an at-large member selected by the agency.

(d) Once the agency has made a decision regarding the suitability of the applicant as an adoptive placement, the preplacement assessment shall include specific documentation of the factors which support that determination. If the agency determines that the applicant is not suitable to be an adoptive parent, the assessment shall state the specific facts that support the determination. A specific concern is one that reasonably indicates the placement of any minor, or a particular minor, in the home of the applicant would pose a significant risk of harm to the well-being of the minor.

(e) The agency preparing the preplacement assessment may redact from the assessment provided to the placing parent or guardian information reflecting the prospective adoptive parent's financial account balances and information about the prospective adoptive parent's extended family members, including surnames, names of employers, names of schools attended, social security numbers, telephone numbers and addresses.

History Note: Authority G.S. 48-2-502; 48-3-303; 131D-10.5; 143B-153;

Eff. October 1, 2008;

Amended Eff. November 1, 2009.

10A NCAC 70H .0407 SERVICES TO ADOPTIVE APPLICANTS AND FAMILIES

(a) The agency shall provide to adoptive applicants a written statement of the adoption services it provides and of its procedure for selecting a prospective adoptive parent for a child, including the role of the child's parent or guardian and any criteria requested by the child's parent or guardian in the selection process. This statement shall include a schedule of any fees or expenses charged by the agency and a summary of the provisions of Chapter 48 of the General Statutes that pertain to the requirements and consequences of a relinquishment and to the selection of a prospective adoptive parent. An agency which prepares preplacement assessments shall state whether it is available to provide post-placement services, including the report to the court pursuant to G.S. 48-2-501, and whether it can provide adoption services to the adoptee and adoptive parents after the decree of adoption has been entered.

(b) The agency shall discuss the children available for adoption with the adoptive applicants. The selection of a prospective adoptive parent for a minor shall be made by the agency.

(c) Following completion of a preplacement assessment, the agency shall prepare the adoptive applicants for the placement of a particular child. Preparation shall include:

- (1) information about the needs and expectations of the child and of the adoptive family;
- (2) information to the extent allowed by law as specified in G.S. 48-3-205 about the child's background and the health history of the child's birth parents and other relatives; and
- (3) visits with the child prior to placement.

(d) An agency social worker shall visit in the home of the adoptive family after the placement of a child and prior to the decree of adoption. The first visit shall occur within two weeks after placement. Frequency of visits thereafter shall be

determined by the child's and family's needs. Observations made during the visits shall be used in making recommendations to the court in regard to the decree of adoption.

(e) When applicable, the agency shall take steps necessary to assure that the adoptive placement is in compliance with the Interstate Compact on the Placement of Children, G.S. 7B-3800.

History Note: Authority G.S. 48-2-502; 48-3-203; 48-3-204; 48-3-205; 131D-10.5; 143B-153;

Eff. October 1, 2008;

Amended Eff. November 1, 2009.

10A NCAC 70I .0301 GOVERNANCE

(a) A private residential child-care facility shall operate under articles of incorporation that are filed with the Department of the Secretary of State (www.secretary.state.nc.us). A private residential child-care facility shall submit a copy of the articles of incorporation to the licensing authority.

(b) A private residential child-care facility shall have a governing body that exercises authority over and has responsibility for its operation, policies and practices. The residential child-care facility shall notify the licensing authority of the type and structure of the governing body.

(c) In the case of non-profit or for-profit corporations, the governing body shall:

- (1) be composed of no fewer than six members to include men and women;
- (2) provide for a system of rotation for board members, for limitation to the number of consecutive terms a member may serve;
- (3) establish standing committees;
- (4) provide orientation for new members; and
- (5) meet at least four times annually with a quorum present.

(d) Public residential child-care facilities operated by governmental agencies shall be governed by appointed officials of a governmental unit.

(e) A residential child-care facility shall submit to the licensing authority a list of members of the governing body. This list shall indicate the name, address and terms of membership of each member and shall identify each officer and the term of that office.

(f) A residential child-care facility shall permanently maintain meeting minutes of the governing body and committees.

History Note: Authority G.S. 131D-10.5; 143B-153;

Eff. July 1, 1999 (See S. L. 1999, c. 237, s. 11.30);

Amended Eff. November 1, 2009; October 1, 2008.

10A NCAC 70I .0613 DISCIPLINE AND BEHAVIOR MANAGEMENT

(a) A residential child-care facility shall have written policies and procedures on discipline and behavior management, including the type and use of physical restraint holds, if utilized. A copy of the written policies and procedures shall be provided to and discussed with each child and the child's parents, guardian or legal custodian prior to or at the time of admission. Policies and procedures shall include:

- (1) proactive means for interacting with and teaching children which emphasize praise and encouragement for exhibiting self control and desired behavior; and
- (2) methods for protecting children and others when a child is out of control.

(b) A residential child-care facility shall implement standards for behavior which are reasonable and developmentally appropriate.

(c) A residential child-care facility shall not engage in discipline or behavior management which includes:

- (1) corporal and physical punishment;
- (2) cruel, severe, or humiliating actions;
- (3) discipline of one child by another child;
- (4) denial of food, sleep, clothing or shelter;
- (5) denial of family contact, including family time, telephone or mail contacts with family;
- (6) assignment of extremely strenuous exercise or work;
- (7) verbal abuse or ridicule;
- (8) mechanical restraints;
- (9) a drug used as a restraint, except as outlined in Paragraph (e) of this Rule;
- (10) seclusion or isolation time-out; or
- (11) physical restraints except as outlined in Paragraph (f) of this Rule.

(d) Time-out means the removal of a child to a separate unlocked room or area from which the child is not physically prevented from leaving. The residential child-care facility may use non-isolation time-out as a behavioral control measure when the facility provides it within hearing distance and sight of a staff member. The length of time alone shall be appropriate to the child's age and development.

(e) A drug used as a restraint means a medication used to control behavior or to restrict a child's freedom of movement and is not a standard treatment for the child's medical or psychiatric condition. A drug used as a restraint shall be employed only if required to treat a medical condition. It shall not be employed for the purpose of punishment, staff convenience or as a substitute for adequate staffing.

(f) Physical restraint of a child means physically holding a child who is at imminent risk of harm to himself or others until the child is calm. A residential child-care facility shall only use physical restraint holds approved by the North Carolina Interventions (NCI) Quality Assurance Committee, Division of Mental Health, Developmental Disabilities and Substance Abuse Services. Requests for approval shall be submitted to the North Carolina Interventions (NCI) Quality Assurance Committee, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 3022 Mail Service Center, Raleigh, NC 27699-3022.

(g) Physical restraint holds shall be administered only by staff trained in the use of physical restraint holds. No child or group of children shall be allowed to participate in the physical restraint of another child.

(h) Before employing a physical restraint, the residential child-care facility shall take into consideration the child's medical condition and any medications the child may be taking.

(i) No child shall be physically restrained utilizing a protective or mechanical device. Physical restraint holds shall:

- (1) not be used for purposes of discipline or convenience;
- (2) only be used when there is imminent risk of harm to the child or others and less restrictive approaches have failed;
- (3) be administered in the least restrictive manner possible to protect the child or others from imminent risk of harm; and
- (4) end when the child becomes calm.

(j) A residential child-care facility shall:

- (1) ensure that any physical restraint hold utilized on a child is administered by a trained staff member with a second trained staff member in attendance. An exception may occur when no other staff member is present or can be called for immediate assistance. Concurrent with the administration of a physical restraint hold and for a minimum of 15 minutes subsequent to the termination of the hold, a staff member shall monitor the child's breathing, ascertain the child is verbally responsive and motorically in control, and ensure the child remains conscious without any complaints of pain.

If at any time during the administration of a physical restraint hold the child complains of being unable to breathe or loses motor control, the staff member administering the physical restraint hold shall immediately terminate the hold or adjust the position to ensure that the child's breathing and motor control are not restricted. If at any time the child appears to be in distress, a staff member shall immediately seek medical attention for the child. Following the use of a physical restraint hold, a staff member shall conduct an interview with the child about the incident, and the staff administering the physical restraint hold shall be interviewed about the incident;

- (2) document each incident of a child being subjected to a physical restraint hold on an incident report. This report shall include the following:
 - (A) the child's name, age, height and weight;
 - (B) the type of hold utilized;
 - (C) the duration of the hold;
 - (D) the staff member administering the hold;
 - (E) the staff member witnessing the hold;
 - (F) the supervisory staff who reviewed the incident report; less restrictive alternatives that were attempted prior to utilizing physical restraint;
 - (G) the child's behavior which necessitated the use of physical restraint; whether the child's

condition necessitated medical attention;

- (H) planning and debriefing conducted with the child and staff to eliminate or reduce the probability of reoccurrence; and
- (I) the total number of restraints of the child since admission.

Within 72 hours, supervisory staff shall review the incident report to ensure that correct steps were followed and shall forward the report to the parents, guardian or legal custodian and the licensing authority on a report form developed by the licensing authority. If a child dies as a result of a physical restraint hold, the residential child-care facility shall report the death of the child to the parents, guardian or legal custodian and to the licensing authority within 72 hours;

- (3) submit a summary report to the licensing authority by the 10th day of each month indicating the number of physical restraint holds used during the previous month on each child and any injuries that resulted;

- (4) ensure that any physical restraint hold utilized on a child is administered by a trained staff member who has completed at least 16 hours of training in behavior management, including techniques for de-escalating problem behavior, the appropriate use of physical restraint holds, monitoring of the child's breathing, verbal responsiveness and motor control. Training shall also include debriefing children and staff involved in physical restraint holds. Thereafter, staff authorized to use physical restraint holds shall annually complete at least eight hours of behavior management training, including techniques for de-escalating problem behavior. Instructor qualifications and training requirements include:

- (A) trainers shall demonstrate competence by scoring 100 percent on testing in a training program aimed at preventing, reducing and eliminating the need for restrictive interventions; trainers shall demonstrate competence by scoring 100 percent on testing in a training program teaching the use of physical restraint;
- (B) trainers shall demonstrate competence by scoring a passing grade on testing in an instructor training program;
- (C) the training shall be competency-based, and shall include measurable learning objectives, measurable testing (written and by observation of behavior) on those objectives and measurable methods to determine passing or failing the course;

- (D) the content of the instructor training shall be approved by the Division of Mental Health, Developmental Disabilities and Substance Abuse Services and shall include, presentation of understanding the adult learner, methods of teaching content of the course, evaluation of trainee performance and documentation procedures;
 - (E) trainers shall be retrained at least annually and demonstrate competence in the use of physical restraint;
 - (F) trainers shall be trained in CPR;
 - (G) trainers shall have coached experience in teaching the use of restrictive interventions at least two times with a positive review by the coach;
 - (H) trainers shall teach a program on the use of physical restraints at least once annually; and
 - (I) trainers shall complete a refresher instructor training at least every two years;
- (5) complete an annual review of the discipline and behavior management policies and techniques to verify that the physical restraint holds being utilized are being applied properly and safely. This review shall be documented and submitted to the licensing authority as part of the biennial licensing renewal application; and
- (6) maintain reports of physical restraint holds in a manner consistent with the agency's risk management policies (clinical decisions and activities undertaken to identify, evaluate and reduce the risk of injury to clients, staff and visitors and reduce the risk of loss to the agency) and make them available to the licensing authority upon request.

History Note: Authority G.S. 131D-10.5; 143B-153; Eff. July 1, 1999; Temporary Amendment Eff. July 20, 1999; Temporary Amendment Eff. May 15, 2000; Amended Eff. November 1, 2009; October 1, 2008; April 19, 2001.

10A NCAC 70I .0901 APPLICATION OF PHYSICAL PLANT REQUIREMENTS

- (a) New construction and existing buildings proposed for use as a residential child-care facility for initial licensure shall comply with the requirements of this Section.
- (b) Except where otherwise specified, existing licensed facilities or portions of existing licensed facilities shall meet licensure and code requirements in effect at the time of construction; change in service; or change in resident capacity or evacuation capability of the residents, addition, renovation or alteration.

- (c) New additions, alterations, modifications and repairs made to the building shall meet the requirements of this Section.
- (d) A residential child-care facility shall not have two different types of occupancies, as defined in the State Building Code, in the same building.
- (e) Rules contained in this Section are the Physical Plant requirements and do not prohibit buildings, systems or operational conditions that exceed these requirements.
- (f) Equivalency: Alternate methods, procedures, design criteria and functional variations from the physical plant requirements shall be approved by the Division of Health Service Regulation when the facility can demonstrate to the Division of Health Service Regulation's satisfaction, that the intent of the physical plant requirements are met and the variation does not reduce the safety or operational effectiveness of the facility.
- (g) The residential child-care facility must comply with all applicable local, state and federal regulations.

History Note: Authority G.S. 131D-10.5; 143B-153; Eff. October 1, 2008; Amended Eff. November 1, 2009.

10A NCAC 70I .0902 DESIGN AND CONSTRUCTION

- (a) Any building licensed for the first time as a residential child-care facility shall meet the applicable requirements of the North Carolina State Building Code. All new construction, additions and renovations to existing buildings shall meet the occupancy requirements of the North Carolina State Building Code as determined by the Division of Health Service Regulation based on the number and age of the licensed children residents and any other dependents of the live-in staff. The North Carolina State Building Code, which is incorporated by reference, including all subsequent amendments can be purchased for one hundred six dollars and twenty-five cents (\$106.25) at the following web site:
(http://www.ncdoi.com/OSFM/Engineering/CodeServices/engineering_codeservices_sales.asp) or calling 919-681-6550.
- (b) Mobile homes, whether mobile or permanently situated, shall not be used for residential child-care facilities.
- (c) Each facility shall be planned, constructed, equipped and maintained to provide the services offered in the facility.
- (d) Any existing building converted from another use to a residential child-care facility shall meet all the requirements of a new facility.
- (e) Any existing licensed residential child-care facility when the license is terminated for more than 60 days shall meet all requirements of a new facility prior to being relicensed.
- (f) Any existing licensed residential child-care facility that is closed or vacant for more than one year shall meet all requirements of a new facility prior to being relicensed.
- (g) Any existing licensed residential child-care facility that plans to have new construction, remodeling or physical changes done to the facility shall have drawings submitted by the owner or his appointed representative to the Division of Health Service Regulation, Construction Section for review and approval prior to commencement of the work.
- (h) The applicant for a resident child-care facility shall consult the local code enforcement official for information on required

permits and building code requirements before starting any construction or renovations.

(i) If the building is two stories in height and is classified as a Residential Occupancy, it shall meet the following requirements:

- (1) Children less than six years old shall not be housed on any floor other than the level of exit discharge with adult supervision.
- (2) A complete fire alarm system with pull stations on each floor and sounding devices which are audible throughout the building shall be provided. The fire alarm system shall be able to transmit an automatic signal to the local emergency fire department dispatch center, either directly or through a central station monitoring company connection.

(j) The basement and the attic shall not to be used for storage or sleeping.

(k) The ceiling shall be at least seven and one-half feet from the floor.

(l) All windows shall be maintained operable.

(m) The sanitation, water supply, sewage disposal and dietary facilities shall comply with the rules of the North Carolina Commission for Public Health, which are incorporated by reference, including all subsequent amendments. The "Rules Governing the Sanitation of Hospitals, Nursing Homes, Adult Care Homes and Other Institutions", 15A NCAC 18A .1300 and the "Rules Governing Sanitation of Residential Care Facilities" 15A NCAC 18A .1600 are available for inspection at the Department of Environment and Natural Resources, Division of Environmental Health, 2728 Capital Boulevard, Raleigh, North Carolina. Copies may be obtained from Environmental Health Services Section, 1632 Mail Service Center, Raleigh, North Carolina 27699-1632 at no cost.

(n) The residential child-care facility shall request and obtain current inspections from the local sanitarian and the local fire inspector. Reports of such inspections shall be maintained in the facility and available for review and shall be submitted to the licensing authority with the licensure renewal application.

*History Note: Authority G.S. 131D-10.5; 143B-153;
Eff. October 1, 2008;
Amended Eff. November 1, 2009.*

10A NCAC 70I .0918 VEHICLES USED FOR TRANSPORTATION OF CHILDREN

(a) Vehicle Requirements for Transporting Children.

- (1) Vehicles shall comply with all motor vehicle laws and regulations for the State of North Carolina.
- (2) Motor vehicles shall be maintained in a safe operating condition and shall be registered and inspected.
- (3) A first-aid kit shall be in all motor vehicles.
- (4) The bed of an open body or a stake bed vehicle shall not be used for transporting children.

(b) Driver Requirements. The name of and a copy of a valid driver's license for each person transporting children shall be maintained in a separate file at the facility.

(c) Safety Practices for Transporting Children.

- (1) The interior of each vehicle shall be maintained in a clean and safe condition with clear passage to operable doors.
- (2) The driver shall ensure that all passengers follow North Carolina laws regarding seat belt usage and shall adhere to child passenger restraint laws when transporting children.
- (3) The driver shall not transport more persons, including children and adults, than allowed by the design capacity of the vehicle.
- (4) Children shall have at least one 30 minute rest stop for every four hours of continuous travel.
- (5) Children shall not be transported for more than 10 hours in any 24-hour period.

(d) Transportation Records. Insurance verification and the vehicle identification certificate shall be kept in the vehicle in accordance with State law. Emergency medical information shall be kept in the vehicle for each child occupying the vehicle.

(e) Insurance. If a residential child-care facility's transportation services are provided by a private individual, a firm under contract, or by another arrangement, the facility shall maintain a file copy of the individual's or firm's insurance coverage.

(f) Emergency Transportation. A residential child-care facility shall have a plan for transporting children when emergency situations arise that includes:

- (1) the need for immediate medical care;
- (2) picking a child up at school before the end of the school day; and
- (3) transporting the child during adverse weather conditions.

*History Note: Authority G.S. 131D-10.5; 143B-153;
Eff. October 1, 2008;
Amended Eff. November 1, 2009.*

10A NCAC 70J .0101 APPLICABILITY

In addition to the rules in 10A NCAC 70I .0100 through .0615, the rules in this Section apply to all persons licensed or seeking licensure for a children's foster care camp as defined in 10A NCAC 70I .0201.

*History Note: Authority G.S. 131D-10.5; 143B-153;
Eff. July 1, 1999 (See S. L. 1999, c.237, s.1130);
Amended Eff. November 1, 2009; October 1, 2008.*

10A NCAC 70K .0201 PERSONNEL

(a) Staff Qualifications and Functions.

- (1) Executive Director. There shall be an executive director employed for the general management and supervision of the maternity home. The executive director shall have a bachelor's degree from a college or university listed in the most current edition of the Higher Education Directory, which can be obtained by calling Higher Education Publications, Inc. at 1-888-349-7715. The executive director shall have the following responsibilities:
 - (A) direct the maternity home's program of care and services in accordance

- with policies established by the governing board and within license standards;
- (B) recruit, employ, supervise and discharge staff;
 - (C) assure a training program for staff;
 - (D) prepare the annual budget, supervise expenditures, and operate within the budget established;
 - (E) establish and maintain good working relationships with other human service agencies and represent the agency in the community; and
 - (F) delegate authority to a staff member meeting the qualifications described in Paragraph (a)(1) of this Rule, during his or her absence.
- (2) Professional Services Staff. The maternity home shall have available professional services personnel to assure appropriate services are provided for each resident in accordance with her case plan or out-of-home family services agreement.
- (3) Social Work Supervisor. Effective July 1, 2010 social work supervisors shall be employed by the maternity home to supervise, evaluate and monitor the work and progress of the social work staff. The social work supervisor shall have a bachelor's degree from a college or university listed in the most current edition of the Higher Education Directory. Social work supervisors shall receive 24 hours of continuing education annually.
- (4) Social Worker. Effective July 1, 2010 social workers shall be employed by the maternity home to provide intake services and social work services to the residents and their families in accordance with the case plan or out-of-home family services agreement. Social workers shall have a bachelor's degree from a college or university listed in the most current edition of the Higher Education Directory. Social workers shall receive 24 hours of continuing education annually.
- (5) Direct Care Staff. All direct care staff shall have a high-school diploma or GED. Direct care staff shall receive 24 hours of continuing education annually.
- (6) Direct Care Supervisory Staff. All direct care supervisory staff shall have a high-school diploma or GED. Direct care supervisory staff shall receive 24 hours of continuing education annually.
- (7) Staff members of the maternity home may maintain dual employment or serve as volunteers with adoption agencies or crisis pregnancy centers as long as the maternity home does not provide services to the clients of the adoption agency or crisis pregnancy center. Staff members of the maternity home may serve on the board of directors of adoption agencies or crisis pregnancy centers as long as the adoption agency or crisis pregnancy center does not provide services to the clients of the maternity home.
- (b) Staffing Requirements. There shall be at least one social worker assigned for every 15 residents. Supervision of social workers shall be assigned as follows:
- | | |
|----------------------|--|
| Supervisors Required | Social Workers Employed |
| 0 | 0-4
(executive director serves as social work supervisor) |
| 1 | 5 |
| 2 | 6-10 |
| 3 | 11-15 |
- There shall be one additional supervisor for every one to five additional social workers.
- (c) Direct Care Staff. Direct care staff shall be employed for direct care of maternity home residents (residents include mothers and infants). There shall be at least one direct care staff member assigned for every eight residents during waking hours and one direct care staff member for every twelve residents during sleeping hours. Additional direct care staff or other personnel shall be available to assist with emergency situations or special needs of the residents.
- (d) Direct Care Supervisory Staff. There shall be at least one direct care supervisor for every 15 direct care staff members.
- (e) Volunteers and Interns. If the maternity home uses volunteers or interns to work directly with residents, the requirements of 10A NCAC 70F .0207 apply.
- (f) Additional Personnel Requirements. In addition to those requirements specified in 10A NCAC 70F .0207, the following rules are applicable to maternity home programs:
- (1) Health Examinations. All direct care staff, food service staff and anyone serving in the capacity of direct care staff and food service staff shall have a medical examination completed by a physician, physician's assistant, or nurse practitioner, hereafter referred to as "licensed medical provider," within at least 12 months before beginning employment and biennially thereafter. The agency shall maintain documentation that all direct care staff and food service staff or anyone serving in the capacity of direct care staff and food service staff have had a TB skin test or chest x-ray prior to employment unless contraindicated by a licensed medical provider. A medical history form shall be completed by all direct care staff and food service staff. Examinations must include tests necessary to determine that the staff member is able to carry out assigned duties and does not have any communicable disease or condition which poses risk of transmission in the facility. A report of each examination shall be made a part of the employee's personnel file. A

medical examination report shall be completed on any adopted children or relative children of direct care staff residing in the maternity home within 12 months prior to the license date. The birth children of direct care staff who reside in the maternity home shall be tested for TB only if one or more of the parents tests positive for TB. There shall be documentation that adopted children or other relative children residing in the maternity home have had a TB skin test or chest x-ray prior to initial licensure unless contraindicated by a licensed medical provider. A medical examination and TB test, if required, shall be completed on any children or relative children of direct care staff who subsequently begin residing in the maternity home. Examinations shall include tests necessary to determine that the children or relative children of staff members who reside in the maternity home do not have any communicable diseases or conditions which pose risk of transmission in the facility. A medical history form shall be completed on any children or relative children of direct care staff who reside in the living unit. Medical examination reports and medical history forms of children of the residents residing the maternity home shall be maintained in the personnel file of their parent or relative.

(2) Staff Development. The maternity home staff shall have a written staff development plan which provides staff training in the following areas:

- (A) medical, physical, and psychological aspects of pregnancy;
- (B) prenatal and postnatal care;
- (C) developmental needs of adolescents and young adults;
- (D) developmental needs of infants and children;
- (E) parenting preparation classes;
- (F) stages of growth in infants;
- (G) day-to-day care of infants;
- (H) disciplinary techniques for infants, children and adolescents;
- (I) education planning;
- (J) job seeking skills;
- (K) locating housing;
- (L) money management;
- (M) food management;
- (N) child care;
- (O) health education;
- (P) stress management;
- (Q) life skills;
- (R) decision making;
- (S) substance abuse;
- (T) pregnancy prevention;
- (U) counseling skills;
- (V) emergency medical care; and

(W) nutrition and food preparation.

History Note: Authority G.S. 131D-1; 143B-153; Eff. February 1, 1986; Amended Eff. June 1, 1990; RRC Objection Eff. April 15, 1993 Due to Lack of Statutory Authority; Amended Eff. November 1, 2009; October 1, 2008; July 2, 1993.

10A NCAC 70K .0204 PROGRAM OF CARE

(a) The program of care shall be suited to the needs of adolescent and adult women experiencing an unplanned pregnancy. There shall be opportunity provided for private time, for family contacts, and for group fellowship.

(b) The residents shall be free from duress to make their own decisions about releasing or keeping their babies.

(c) The residents shall be provided confidentiality concerning their situations and protection from harm insofar as possible.

(d) Educational opportunities shall be provided or arranged by the residential maternity home in accordance with the needs of individual residents and resources available in the community. For those residents who are required to attend school under the compulsory school attendance laws of North Carolina, the maternity home shall arrange for attendance in a public or a nonpublic school which is operated in accordance with the laws of North Carolina. If a school or educational program is maintained and operated by the maternity home which residents attend in lieu of attending public schools, the maternity home shall comply with the North Carolina General Statutes governing nonpublic schools. Opportunity shall be offered to residents who wish to participate in educational courses available in the community.

(e) Health education including information about pregnancy, delivery, and family planning services shall be provided residents. Information about the care of infants shall be made available to the residents who want this information.

(f) Recreational activities shall be provided which meet the needs of residents. Suitable space shall be provided at the maternity home for both indoor and outdoor activities. Participation in community activities shall be provided.

(g) Work assignments in the maternity home shall be geared to the physical health and emotional well-being of the residents in care. Residents shall be given the opportunity to voluntarily seek paid employment when employment is in accordance with the recommendation of their licensed medical provider and other professional staff of the maternity home. No resident shall be required to work for the purpose of paying the maternity home for her care.

(h) The maternity home shall define in writing and make available to applicants and residents those rules and regulations which the residents shall be expected to follow. These rules and regulations shall respect the personal freedom of the residents. These rules and regulations shall not infringe on the residents' rights to send and receive uncensored mail and for planned visits with their families and others. Visitors shall not be allowed to visit minors without prior consent of the parents or guardian, or legal custodian.

(i) Nutritious, foods shall be provided in the variety and amounts necessary to meet the National Research Council's

Recommended Daily Dietary Allowances (USDA Center for Nutrition Policy and Promotion, 1120 20th Street, NW, Suite 200N, Washington, DC 20036). Special diets shall be planned to meet the modified needs of individual residents as prescribed by a licensed medical provider. Menus shall be planned and written by, or in consultation with, a licensed dietician/nutritionist. Menus shall be planned and written at least one week in advance. Snacks shall be recorded on the regular menu.

(j) Each resident shall be provided prenatal care and general health care by a licensed medical provider which includes:

- (1) a complete medical and obstetrical history and examination before or within one week after admission to the home;
- (2) periodic examinations during pregnancy as outlined by the licensed medical provider;
- (3) dental services as needed; and
- (4) medical services as needed.

(k) Each resident shall be provided delivery care in a licensed hospital or any facility licensed as a place for delivery of babies.

(l) All prescription and non prescription medicines shall be stored in a locked cabinet, closet or box not accessible to residents. The agency shall have written policies and procedures regarding staff administering medications to residents that shall be discussed with each resident and their parents or guardian, or legal custodians (if resident is a minor) prior to or upon placement. These policies and procedures shall address:

- (1) medication administration;
- (2) medication dispensing;
- (3) packaging, labeling;
- (4) storage and disposal;
- (5) review;
- (6) education and training; and
- (7) documentation, including medication orders, Medication Administration Record (MAR); orders and copies of lab tests; and, if applicable, administration errors and adverse drug reactions.

The residential maternity home shall maintain a MAR for each resident that documents all medications administered. Upon discharge of a resident, the residential maternity home shall return prescription medications to the resident or person or agency legally authorized to remove the minor from residential maternity care. The residential maternity home shall provide oral or written education to the resident or person or agency legally authorized to remove the minor from residential maternity care regarding the medications. Unwanted, out-dated, improperly labeled, damaged, adulterated or discontinued prescription medications shall be returned to a pharmacy for disposal.

(m) The residential maternity home shall ensure that first aid kits are available for immediate use in each living unit, recreation area and in vehicles to transport residents. A residential maternity home shall obtain a mouthpiece and other precautionary equipment for administering CPR to the residents.

(n) When residents return to the maternity home, post delivery care shall be available to the residents in accordance with the recommendations of the resident's licensed medical provider and the professional staff of the maternity home. A resident shall not

be required to remain in the maternity home after medical discharge. Referral to a licensed medical provider or medical clinic or community family planning resource shall be made if requested by the resident.

(o) A resident and her infant may be considered for aftercare if the resident was in residential care prior to delivery.

(p) The period of aftercare for the resident and her child shall not exceed 12 consecutive months, during which time a plan for independent living shall be developed with the resident and assistance provided in achieving the goal of the plan within the designated time frame.

(q) Services provided for the plan of independent living shall include:

- (1) parenting preparation classes;
- (2) stages of growth in infants, children and adolescents;
- (3) day-to-day care of infants, children and adolescents;
- (4) disciplinary techniques for infants, children and adolescents;
- (5) education planning;
- (6) job seeking skills;
- (7) locating housing;
- (8) money management;
- (9) food management;
- (10) child-care;
- (11) health education;
- (12) stress management;
- (13) life skills;
- (14) decision making;
- (15) substance abuse;
- (16) pregnancy prevention; and
- (17) other services based on the needs of the resident.

(r) A case record shall be maintained at the maternity home for each resident which includes documents concerning all social work, counseling, medical, psychological, and dental services, as well as any other services provided to each resident.

History Note: Authority G.S. 131D-1; 143B-153;

Eff. February 1, 1986;

Amended Eff. November 1, 2009; October 1, 2008; June 1, 1990.

10A NCAC 70K .0302 DESIGN AND CONSTRUCTION

(a) Any building licensed for the first time as a residential maternity home shall meet the applicable requirements of the North Carolina State Building Code. All new construction, additions and renovations to existing buildings shall meet the occupancy requirements of the North Carolina State Building Code as determined by the Division of Health Service Regulation, Construction Section based on the number and age of the mothers, the number of infants and any other dependents of either the expecting mothers or the live-in staff. The North Carolina State Building Code, which is incorporated by reference, including all subsequent amendments can be purchased for one hundred six dollars and twenty-five cents (\$106.25) at the following web site: (http://www.ncdoi.com/OSFM/Engineering/CodeServices/engineering_codeservices_sales.asp) or calling 919-681-6550.

- (b) Mobile homes, whether mobile or permanently situated, shall not be used for residential maternity home facilities.
- (c) Each residential maternity home shall be planned, constructed, equipped and maintained to provide the services offered in the home.
- (d) Any existing building converted from another use to a residential maternity home shall meet all the requirements of a new facility.
- (e) Any existing licensed residential maternity home when the license is terminated for more than 60 days shall meet all requirements of a new home prior to being relicensed.
- (f) Any existing licensed residential maternity home that is closed or vacant for more than one year shall meet all requirements of a new facility prior to being relicensed.
- (g) Any existing licensed residential maternity home that plans to have new construction, remodeling or physical changes done to the facility shall have drawings submitted by the owner or his appointed representative to the Division of Health Service Regulation for review and approval prior to commencement of the work.
- (h) The applicant for a residential maternity home shall consult the local code enforcement official for information on required permits and building code requirements before starting any construction or renovations.
- (i) If the building is two stories in height, and is classified as a Residential Occupancy, it shall meet the following requirements:
 - (1) Infants or children less than six years old shall not be housed on any floor other than the level of exit discharge.
 - (2) A complete fire alarm system with pull stations on each floor and sounding devices which are audible throughout the building shall be provided. The fire alarm system shall be able to transmit an automatic signal to the local emergency fire department dispatch center, either directly or through a central station monitoring company connection.
- (j) The basement and the attic shall not to be used for storage or sleeping.
- (k) The ceiling shall be at least seven and one-half feet from the floor.
- (l) All windows shall be maintained operable.
- (m) The sanitation, water supply, sewage disposal and dietary facilities shall comply with the rules of the North Carolina Commission for Public Health which are incorporated by reference, including all subsequent amendments. The "Rules Governing the Sanitation of Hospitals, Nursing Homes, Adult Care Homes and Other Institutions", 15A NCAC 18A .1300 and the "Rules Governing Sanitation of Residential Care Facilities" 15A NCAC 18A .1600 are available for inspection at the Department of Environment and Natural Resources, Division of Environmental Health, 2728 Capital Boulevard, Raleigh, North Carolina. Copies may be obtained from Environmental Health Services Section, 1632 Mail Service Center, Raleigh, North Carolina 27699-1632 at no cost.
- (n) The residential maternity home shall request and obtain current inspections from the local sanitarian and the local fire inspector. Reports of such inspections shall be maintained in the

facility and available for review and shall be submitted to the licensing authority with the licensure renewal application.

History Note: Authority G.S. 131D-1; 143B-153; Eff. October 1, 2008; Amended Eff. November 1, 2009.

10A NCAC 70K .0307 KITCHEN

- (a) The kitchen in a residential maternity home shall be large enough to provide for the preparation and preservation of food and the washing of dishes.
- (b) The kitchen floor shall have a non-slippery, water-resistant covering.
- (c) The kitchen shall be approved by the local sanitarian for the total number of residents (mothers, infants and any other children), as well as any live-in direct care staff and their dependents.

History Note: Authority G.S. 131D-1; 143B-153; Eff. October 1, 2008; Amended Eff. November 1, 2009.

10A NCAC 70K .0318 VEHICLES USED FOR TRANSPORTATION OF RESIDENTS

- (a) Vehicle Requirements for Transporting Residents.
 - (1) Vehicles shall comply with all motor vehicle laws and regulations for the State of North Carolina.
 - (2) Motor vehicles shall be maintained in a safe operating condition and shall be registered and inspected.
 - (3) A first-aid kit shall be in all motor vehicles.
 - (4) The bed of an open body or a stake bed vehicle shall not be used for transporting children.
- (b) Driver Requirements. The name of and a copy of a valid driver's license for each person transporting residents shall be maintained in a separate file at the facility.
- (c) Safety Practices for Transporting Residents.
 - (1) The interior of each vehicle shall be maintained in a clean and safe condition with clear passage to operable doors.
 - (2) The driver shall ensure that all passengers follow North Carolina laws regarding seat belt usage and shall adhere to child passenger restraint laws when transporting children.
 - (3) The driver shall not transport more persons, including children and adults, than allowed by the design capacity of the vehicle.
 - (4) Residents shall have at least one 30 minute rest stop for every four hours of continuous travel.
 - (5) Residents shall not be transported for more than 10 hours in any 24-hour period.
- (d) Transportation Records. Insurance verification and the vehicle identification certificate shall be kept in the vehicle in accordance with State law. Emergency medical information shall be kept in the vehicle for each resident occupying the vehicle.
- (e) Insurance. If a residential maternity home's transportation services are provided by a private individual, a firm under

contract, or by another arrangement, the facility shall maintain a file copy of the individual's or firm's insurance coverage.

(f) Emergency Transportation. A residential maternity home shall have a plan for transporting residents when emergency situations arise that includes:

- (1) the need for immediate medical care;
- (2) picking residents up at school before the end of the school day; and
- (3) transporting residents during adverse weather conditions.

History Note: Authority G.S. 131D-1; 143B-153; Eff. November 1, 2009.

10A NCAC 71L .0102 APPROVAL CRITERIA

(a) A county department of social services or a licensed private adoption agency is responsible for social work services for clients for whom they are requesting Maternity Home Funds. Social work services include assisting the client to decide to release the baby for adoption or continue parenting the baby.

(b) Marital status and age do not affect eligibility for Maternity Home Funds.

(c) The client must be a resident of the State of North Carolina to be eligible for Maternity Home Funds.

(d) Maternity Home Fund payment shall supplement any other funds available from applicants, county departments of social services, families or private agencies.

(e) Maternity home fund payment to licensed maternity homes is based on the actual per diem cost of care. A maternity home shall maintain a valid maternity home license for a consecutive one year period and submit an audited financial statement to the North Carolina Department of Health and Human Services, Controller's Office (2019 Mail Service Center, Raleigh, NC 27699-2019) before the per diem rate is assigned. A licensed maternity home is eligible for reimbursement from maternity home funds in the second year of operation if this criteria is met and maternity home funds are available.

(f) Maternity home fund payment for care in a foster home is the North Carolina standard board rate for foster care assistance set by the General Assembly. The current standard board payment for foster care assistance can be obtained from the North Carolina Division of Social Services (952 Old U.S. 70 Highway, Black Mountain, NC 28711).

(g) Maternity home fund payment for care in the home of a non-legally responsible relative or in a boarding arrangement shall not exceed the North Carolina standard board rate for foster care assistance.

History Note: Authority G.S. 143B-153; Eff. April 1, 1978; Amended Eff. November 1, 2009; July 1, 1990; January 1, 1983.

15A NCAC 02D .0405 OZONE

The ambient air quality standard for ozone measured by a reference method based on Appendix D of 40 CFR Part 50 and designated according to 40 CFR Part 53 is 0.075 parts per million (ppm), daily maximum 8-hour average. The standard is attained at an ambient air quality monitoring site when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.075 parts per million (ppm) as determined by Appendix P of 40 CFR Part 50, or equivalent methods established under 40 CFR Part 53.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); Eff. February 1, 1976; Amended Eff. January 1, 2010; April 1, 1999; July 1, 1984; July 1, 1979; December 1, 1976.

15A NCAC 02D .0409 PM10 PARTICULATE MATTER

(a) The ambient air quality standard for PM10 particulate matter is 150 micrograms per cubic meter (ug/m3), 24-hour average concentration. This standard is attained when 150 ug/m3, as determined according to Appendix N of 40 CFR Part 50, is not exceeded more than once per year on average over a three-year period.

(b) For the purpose of determining attainment of the standards in Paragraph (a) of this Rule, particulate matter shall be measured in the ambient air as PM10 (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by either:

- (1) a reference method based on Appendix M of 40 CFR Part 50 and designated according to 40 CFR Part 53; or
- (2) an equivalent method designated according to 40 CFR Part 53.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); Eff. July 1, 1988; Amended Eff. January 1, 2010; April 1, 1999.

15A NCAC 02D .0410 PM2.5 PARTICULATE MATTER

(a) The ambient air quality standards for PM2.5 particulate matter are:

- (1) 15.0 micrograms per cubic meter (ug/m3), annual arithmetic mean concentration; and
- (2) 35 micrograms per cubic meter (ug/m3), 24-hour average concentration.

These standards are attained when the annual arithmetic mean concentration is less than or equal to 15.0 ug/m3 and when the 98th percentile 24-hour concentration is less than or equal to 35 ug/m3, as determined according to Appendix N of 40 CFR Part 50.

(b) For the purpose of determining attainment of the standards in Paragraph (a) of this Rule, particulate matter shall be measured in the ambient air as PM2.5 (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:

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- (1) a reference method based on Appendix L of 40 CFR Part 50 and designed according to 40 CFR Part 53; or
- (2) an equivalent method designed according to 40 CFR Part 53.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3);

Eff. April 1, 1999;

Amended Eff. January 1, 2010.

15A NCAC 02L .0202 GROUNDWATER QUALITY STANDARDS

(a) The groundwater quality standards for the protection of the groundwaters of the state are those specified in this Rule. They are the maximum allowable concentrations resulting from any discharge of contaminants to the land or waters of the state, which may be tolerated without creating a threat to human health or which would otherwise render the groundwater unsuitable for its intended best use.

(b) The groundwater quality standards for contaminants specified in Paragraphs (g) and (h) of this Rule are as listed, except that:

- (1) Where the standard for a substance is less than the practical quantitation limit, the detection of that substance at or above the practical quantitation limit constitutes a violation of the standard.
- (2) Where two or more substances exist in combination, the Director shall consider the effects of chemical interactions as determined by the Division of Public Health and may establish maximum concentrations at values less than those established in accordance with Paragraphs (c), (g), or (h) of this Rule. In the absence of information to the contrary, in accordance with Paragraph (d) of this Rule, the carcinogenic risks associated with carcinogens present shall be considered additive and the toxic effects associated with non-carcinogens present shall also be considered additive.
- (3) Where naturally occurring substances exceed the established standard, the standard shall be the naturally occurring concentration as determined by the Director.

(c) Except for tracers used in concentrations which have been determined by the Division of Public Health to be protective of human health, and the use of which has been permitted by the Division, substances which are not naturally occurring and for which no standard is specified shall not be permitted in concentrations at or above the practical quantitation limit in Class GA or Class GSA groundwaters. Any person may petition the Director to establish an interim maximum allowable concentration for a substance for which a standard has not been established under this Rule. The petitioner shall submit relevant toxicological and epidemiological data, study results, and calculations necessary to establish a standard in accordance with Paragraph (d) of this Rule. Within three months after the establishment of an interim maximum allowable concentration

for a substance by the Director, the Director shall initiate action to consider adoption of a standard for that substance.

(d) Groundwater quality standards for substances in Class GA and Class GSA groundwaters are established as the least of:

- (1) Systemic threshold concentration calculated as follows: [Reference Dose (mg/kg/day) x 70 kg (adult body weight) x Relative Source Contribution (.10 for inorganics; .20 for organics)] / [2 liters/day (avg. water consumption)];
- (2) Concentration which corresponds to an incremental lifetime cancer risk of 1×10^{-6} ;
- (3) Taste threshold limit value;
- (4) Odor threshold limit value;
- (5) Maximum contaminant level; or
- (6) National secondary drinking water standard.

(e) The following references, in order of preference, shall be used in establishing concentrations of substances which correspond to levels described in Paragraph (d) of this Rule.

- (1) Integrated Risk Information System (U.S. EPA).
- (2) Health Advisories (U.S. EPA Office of Drinking Water).
- (3) Other health risk assessment data published by U.S. EPA.
- (4) Other relevant, published health risk assessment data, and scientifically valid peer-reviewed published toxicological data.

(f) Groundwater quality standards specified in Paragraphs (g) and (h) of this Rule and interim maximum allowable concentrations established pursuant to Paragraph (c) of this Rule shall be reviewed on a triennial basis. Appropriate modifications to established standards shall be made in accordance with the procedure prescribed in Paragraph (d) of this Rule where modifications are considered appropriate based on data published subsequent to the previous review.

(g) Class GA Standards. Where not otherwise indicated, the standard refers to the total concentration in micrograms per liter of any constituent in a dissolved, colloidal or particulate form which is mobile in groundwater. This does not apply to sediment or other particulate matter which is preserved in a groundwater sample as a result of well construction or sampling procedures. The Class GA standards are:

- (1) Acenaphthene: 80;
- (2) Acenaphthylene: 200;
- (3) Acetone: 6 mg/L;
- (4) Acrylamide: 0.008;
- (5) Anthracene: 2 mg/L;
- (6) Arsenic: 10;
- (7) Atrazine and chlorotriazine metabolites: 3;
- (8) Barium: 700;
- (9) Benzene: 1;
- (10) Benzo(a)anthracene (benz(a)anthracene): 0.05;
- (11) Benzo(b)fluoranthene: 0.05;
- (12) Benzo(k)fluoranthene: 0.5;
- (13) Benzoic acid: 30 mg/L;
- (14) Benzo(g,h,i)perylene: 200;
- (15) Benzo(a)pyrene: 0.005;

(16)	Bis(chloroethyl)ether: 0.03;	(68)	1,1- Diphenyl (1,1,-biphenyl): 400;
(17)	Bis(2-ethylhexyl) phthalate (di(2-ethylhexyl) phthalate): 3;	(69)	Dissolved solids (total): 500 mg/L;
(18)	Boron: 700;	(70)	Disulfoton: 0.3;
(19)	Bromodichloromethane: 0.06;	(71)	Diundecyl phthalate (Santicizer 711): 100;
(20)	Bromoform (tribromomethane): 4;	(72)	Endosulfan: 40;
(21)	n-Butylbenzene: 70;	(73)	Endrin, total: (includes endrin, endrin aldehyde and endrin ketone): 2;
(22)	sec-Butylbenzene: 70;	(74)	Epichlorohydrin: 4;
(23)	tert-Butylbenzene: 70;	(75)	Ethyl acetate: 3 mg/L;
(24)	Butylbenzyl phthalate: 1 mg/L;	(76)	Ethylbenzene: 600;
(25)	Cadmium: 2;	(77)	Ethylene dibromide (1,2-dibromoethane): 0.02;
(26)	Caprolactam: 4 mg/L;	(78)	Ethylene glycol: 10 mg/L;
(27)	Carbofuran: 40;	(79)	Fluoranthene: 300;
(28)	Carbon disulfide: 700;	(80)	Fluorene: 300;
(29)	Carbon tetrachloride: 0.3;	(81)	Fluoride: 2 mg/L;
(30)	Chlordane: 0.1;	(82)	Foaming agents: 500;
(31)	Chloride: 250 mg/L;	(83)	Formaldehyde: 600;
(32)	Chlorobenzene: 50;	(84)	Gross alpha (adjusted) particle activity (excluding radium-226 and uranium): 15 pCi/L;
(33)	Chloroethane: 3,000;	(85)	Heptachlor: 0.008;
(34)	Chloroform (trichloromethane): 70;	(86)	Heptachlor epoxide: 0.004;
(35)	Chloromethane (methyl chloride): 3;	(87)	Heptane: 400;
(36)	2-Chlorophenol: 0.4;	(88)	Hexachlorobenzene (perchlorobenzene): 0.02;
(37)	2-Chlorotoluene (o-chlorotoluene): 100;	(89)	Hexachlorobutadiene: 0.4;
(38)	Chromium: 10;	(90)	Hexachlorocyclohexane isomers (technical grade): 0.02;
(39)	Chrysene: 5;	(91)	n-Hexane: 400;
(40)	Coliform organisms (total): 1 per 100 milliliters;	(92)	Indeno(1,2,3-cd)pyrene: 0.05;
(41)	Color: 15 color units;	(93)	Iron: 300;
(42)	Copper: 1 mg/L;	(94)	Isophorone: 40;
(43)	Cyanide (free cyanide): 70;	(95)	Isopropylbenzene: 70;
(44)	2, 4-D (2,4-dichlorophenoxy acetic acid): 70;	(96)	Isopropylbenzene: 70;
(45)	DDD: 0.1;	(97)	Lead: 15;
(46)	DDT: 0.1;	(98)	Lindane (gamma hexachlorocyclohexane): 0.03;
(47)	Dibenz(a,h)anthracene: 0.005;	(99)	Manganese: 50;
(48)	Dibromochloromethane: 0.4;	(100)	Mercury: 1;
(49)	1,2-Dibromo-3-chloropropane: 0.04;	(101)	Methanol: 4 mg/L;
(50)	Dibutyl (or di-n-butyl) phthalate: 700;	(102)	Methoxychlor: 40;
(51)	1,2-Dichlorobenzene (orthodichlorobenzene): 20;	(103)	Methylene chloride (dichloromethane): 5;
(52)	1,3-Dichlorobenzene (metadichlorobenzene): 200;	(104)	Methyl ethyl ketone (2-butanone): 4 mg/L;
(53)	1,4-Dichlorobenzene (paradichlorobenzene): 6;	(105)	2-Methylnaphthalene: 30;
(54)	Dichlorodifluoromethane (Freon-12; Halon): 1 mg/L;	(106)	3-Methylphenol (m-cresol): 400;
(55)	1,1-Dichloroethane: 6;	(107)	4-Methylphenol (p-cresol): 40;
(56)	1,2-Dichloroethane (ethylene dichloride): 0.4;	(108)	Methyl tert-butyl ether (MTBE): 20;
(57)	1,2-Dichloroethene (cis): 70;	(109)	Naphthalene: 6;
(58)	1,2-Dichloroethene (trans): 100;	(110)	Nickel: 100;
(59)	1,1-Dichloroethylene (vinylidene chloride): 7;	(111)	Nitrate: (as N) 10 mg/L;
(60)	1,2-Dichloropropane: 0.6;	(112)	Nitrite: (as N) 1 mg/L;
(61)	1,3-Dichloropropene (cis and trans isomers): 0.4;	(113)	N-nitrosodimethylamine: 0.0007;
(62)	Dieldrin: 0.002;	(114)	Oxamyl: 200;
(63)	Diethylphthalate: 6 mg/L;	(115)	Pentachlorophenol: 0.3;
(64)	2,4-Dimethylphenol (m-xenol): 100;	(116)	Petroleum aliphatic carbon fraction class (C5 - C8): 400;
(65)	Di-n-octyl phthalate: 100;	(117)	Petroleum aliphatic carbon fraction class (C9 - C18): 700;
(66)	1,4-Dioxane (p-dioxane): 3;		
(67)	Dioxin (2,3,7,8-TCDD): 0.0002 ng/L;		

- (118) Petroleum aliphatic carbon fraction class (C19 - C36): 10 mg/L;
- (119) Petroleum aromatics carbon fraction class (C9 - C22): 200;
- (120) pH: 6.5 - 8.5;
- (121) Phenanthrene: 200;
- (122) Phenol: 30;
- (123) Phorate: 1;
- (124) n-Propylbenzene: 70;
- (125) Pyrene: 200;
- (126) Selenium: 20;
- (127) Silver: 20;
- (128) Simazine: 4;
- (129) Styrene: 70;
- (130) Sulfate: 250 mg/L;
- (131) 1,1,2,2-Tetrachloroethane: 0.2;
- (132) Tetrachloroethylene (perchloroethylene; PCE): 0.7;
- (133) 2,3,4,6-Tetrachlorophenol: 200;
- (134) Toluene: 600;
- (135) Toxaphene: 0.03;
- (136) 2, 4, 5,-TP (Silvex): 50;
- (137) 1,2,4-Trichlorobenzene: 70;
- (138) 1,1,1-Trichloroethane: 200;
- (139) Trichloroethylene (TCE): 3;
- (140) Trichlorofluoromethane: 2 mg/L;
- (141) 1,2,3-Trichloropropane: 0.005;
- (142) 1,2,4-Trimethylbenzene: 400;
- (143) 1,3,5-Trimethylbenzene: 400;
- (144) 1,1,2-Trichloro-1,2,2-trifluoroethane (CFC-113): 200 mg/L;
- (145) Vinyl chloride: 0.03;
- (146) Xylenes (o-, m-, and p-): 500; and
- (147) Zinc: 1 mg/L.

(h) Class GSA Standards. The standards for this class are the same as those for Class GA except as follows:

- (1) chloride: allowable increase not to exceed 100 percent of the natural quality concentration; and
- (2) total dissolved solids: 1000 mg/l.

(i) Class GC Waters.

- (1) The concentrations of substances which, at the time of classification, exceed the standards applicable to Class GA or GSA groundwaters shall not be caused to increase, nor shall the concentrations of other substances be caused to exceed the GA or GSA standards as a result of further disposal of contaminants to or beneath the surface of the land within the boundary of the area classified GC.
- (2) The concentrations of substances which, at the time of classification, exceed the standards applicable to GA or GSA groundwaters shall not be caused to migrate as a result of activities within the boundary of the GC classification, so as to violate the groundwater or surface water quality standards in adjoining waters of a different class.

- (3) Concentrations of specific substances, which exceed the established standard at the time of classification, are listed in Section .0300 of this Subchapter.

History Note: Authority G.S. 143-214.1; 143B-282(a)(2); Eff. June 10, 1979; Amended Eff. November 1, 1994; October 1, 1993; September 1, 1992; August 1, 1989; Temporary Amendment Eff. June 30, 2002; Amended Eff. August 1, 2002; Temporary Amendment Expired February 9, 2003; Amended Eff. January 1, 2010; April 1, 2005.

15A NCAC 02Q .0518 FINAL ACTION

(a) The Director may:

- (1) issue a permit, permit revision, or a renewal containing the conditions necessary to carry out the purposes of G.S. 143, Article 21B and the federal Clean Air Act;
- (2) rescind a permit upon request by the permittee; or
- (3) deny a permit application when necessary to carry out the purposes of G.S. 143, Article 21B and the federal Clean Air Act.

(b) The Director may not issue a final permit or permit revision, except administrative permit amendments covered under Rule .0514 of this Section, until EPA's 45-day review period has expired or until EPA has notified the Director that EPA will not object to issuance of the permit or permit revision, whichever occurs first. The Director shall issue the permit or permit revision within five days of receipt of notification from EPA that it will not object to issuance or of the expiration of EPA's 45-day review period, whichever occurs first.

(c) If EPA objects to a proposed permit, the Director shall respond to EPA's objection within 90 days after receipt of EPA's objection. The Director shall not issue a permit under this Section over EPA's objection.

(d) If EPA does not object in writing to the issuance of a permit, any person may petition EPA to make such objections by following the procedures and meeting the requirements under 40 CFR 70.8(d).

(e) No permit shall be issued, revised, or renewed under this Section unless all the procedures set out in this Section have been followed and all the requirements of this Section have been met. Default issuance of a permit, permit revision, or permit renewal by the Director is prohibited.

(f) Thirty days after issuing a permit, including a permit issued pursuant to Rule .0509 of this Section, that is not challenged by the applicant, the Director shall notice the issuance of the final permit. The notice shall be issued on the North Carolina Division of Air Quality web site at <http://www.ncair.org/permits/>. The notice shall include the name and address of the facility and permit number.

History Note: Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108;

Temporary Adoption Eff. March 8, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Eff. July 1, 1994;
Amended Eff. January 1, 2010; February 1, 1995.

15A NCAC 07B .0901 CAMA LAND USE PLAN AMENDMENTS

(a) Normal Amendment Process:

- (1) The CAMA Land Use Plan may be amended and only the amended portions submitted for CRC certification. If the local government amends half or more of the policies of the CAMA Land Use Plan, a new locally adopted plan shall be submitted to the CRC. Local public hearing and notice requirements shall be in the same manner as provided in 15A NCAC 07B .0801(a). Except for Land Use Plans that were certified prior to August 1, 2002, amendments and changes to the Local Land Use Plan shall be consistent with other required elements for the local land use plan per the requirements of Rule .0702 of this Subchapter.
- (2) The local government proposing an amendment to its CAMA Land Use Plan shall provide to the Executive Secretary of the CRC or her/his designee written notice of the public hearing, a copy of the proposed amendment (including text and maps as applicable), and the reasons for the amendment no less than five business days prior to publication of the public hearing notice. After the public hearing, the local government shall provide the Executive Secretary or her/his designee with a copy of the locally adopted amendment no earlier than 45 days and no later than 30 days prior to the next CRC meeting for CRC certification. If the local government fails to submit the requested documents as specified above and the resolution provided in Subparagraph (5) of this Paragraph, to the Executive Secretary within the specified timeframe, the local government may resubmit the documents within the specified timeframe for consideration at the following CRC meeting.
- (3) For joint plans, originally adopted by each participating jurisdiction, each government retains its sole and independent authority to make amendments to the plan as it affects its jurisdiction.
- (4) CRC review and action on CAMA Land Use Plan amendments shall be in the same manner as provided in 15A NCAC 07B .0802 (b), (c), (d) and (e), except amendments to Land Use

Plans which were certified prior to August 1, 2002 are exempt from Part .0802(c)(3)(D).

- (5) The local resolution of adoption shall include findings which demonstrate that amendments to policy statements or to the Future Land Use Plan Map (FLUP) have been evaluated for their consistency with other existing policies.

(b) Delegation of CRC Certification of Amendments to the Executive Secretary:

- (1) A local government that desires to have the Executive Secretary instead of the CRC certify a CAMA Land Use Plan amendment shall first meet the requirements in Subparagraphs (a)(1) through (5) of this Rule and the following criteria defined in Parts (b)(1)(A) through (D) of this Rule. The local government may then request the Executive Secretary to certify the amendment. The Executive Secretary shall make a determination that all criteria have been met, and mail notification to the local government and CRC members, no later than two weeks after receipt of the request for certification. The CRC's delegation to the Executive Secretary of the authority to certify proposed amendments is limited to amendments that meet the following criteria:
 - (A) Minor changes in policy statements or objectives for the purpose of clarification of intent;
 - (B) Modification of any map that does not impose new land use categories in areas least suitable for development as shown on the Land Suitability Map;
 - (C) New data compilations and associated statistical adjustments that do not suggest policy revisions; or
 - (D) More detailed identification of existing land uses or additional maps of existing or natural conditions that do not affect any policies in the CAMA Land Use Plan.
- (2) If the Executive Secretary certifies the amendment, the amendment becomes final upon certification of the Executive Secretary, and is not subject to further CRC review described in 15A NCAC 07B .0802 (Presentation to CRC for Certification).
- (3) If the Executive Secretary denies certification of the amendment, the local government shall submit its amendment for review by the CRC in accordance with the regular plan certification process in 15A NCAC 07B .0802 (Presentation to CRC for Certification).

(c) Any amendments to the text or maps of the CAMA Land Use Plan shall be incorporated in context in all available copies of the plan and shall be dated to indicate the dates of local adoption and CRC certification. The amended CAMA Land Use Plan shall be maintained as required by G.S. 113A-110(g).

(d) Within 90 days after certification of a CAMA Land Use Plan amendment, the local government shall provide one copy of the amendment to each jurisdiction with which it shares a common border, and to the regional planning entity.

(e) A local government that receives Sustainable Community funding from the Department pursuant to 15A NCAC 07L shall formulate and submit to the CRC for certification a CAMA Land Use Plan Amendment during its first year as a Sustainable Community.

History Note: Authority G.S. 113A-107(a); 113A-110; 113A-124;

Eff. August 1, 2002;

Amended Eff. November 1, 2009; February 1, 2006.

15A NCAC 07H .0205 COASTAL WETLANDS

(a) Description. Coastal wetlands are defined as any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tide waters reach the marshland areas through natural or artificial watercourses), provided this does not include hurricane or tropical storm tides. Coastal wetlands may contain the following marsh plant species:

- (1) Cord Grass (*Spartina alterniflora*),
- (2) Black Needlerush (*Juncus roemerianus*),
- (3) Glasswort (*Salicornia* spp.),
- (4) Salt Grass (*Distichlis spicata*),
- (5) Sea Lavender (*Limonium* spp.),
- (6) Bulrush (*Scirpus* spp.),
- (7) Saw Grass (*Cladium jamaicense*),
- (8) Cat-tail (*Typha* spp.),
- (9) Salt Meadow Grass (*Spartina patens*),
- (10) Salt Reed Grass (*Spartina cynosuroides*).

The coastal wetlands AEC includes any contiguous lands designated by the Secretary of DENR pursuant to G.S. 113-230(a).

(b) Significance. The unique productivity of the estuarine and ocean system is supported by detritus (decayed plant material) and nutrients that are exported from the coastal marshlands. The amount of exportation and degree of importance appears to be variable from marsh to marsh, depending primarily upon its frequency of inundation and inherent characteristics of the various plant species. Without the marsh, the high productivity levels and complex food chains typically found in the estuaries could not be maintained.

Man harvests various aspects of this productivity when he fishes, hunts, and gathers shellfish from the estuary. Estuarine dependent species of fish and shellfish such as menhaden, shrimp, flounder, oysters, and crabs make up over 90 percent of the total value of North Carolina's commercial catch. The marshlands, therefore, support an enormous amount of commercial and recreational businesses along the seacoast.

The roots, rhizomes, stems, and seeds of coastal wetlands act as good quality waterfowl and wildlife feeding and nesting materials. In addition, coastal wetlands serve as the first line of defense in retarding estuarine shoreline erosion. The plant stems and leaves tend to dissipate wave action, while the vast network of roots and rhizomes resists soil erosion. In this way, the coastal wetlands serve as barriers against flood damage and control erosion between the estuary and the uplands.

Marshlands also act as nutrient and sediment traps by slowing the water which flows over them and causing suspended organic and inorganic particles to settle out. In this manner, the nutrient storehouse is maintained, and sediment harmful to marine organisms is removed. Also, pollutants and excessive nutrients are absorbed by the marsh plants, thus providing an inexpensive water treatment service.

(c) Management Objective. It is the objective of the Coastal Resources Commission to conserve and manage coastal wetlands so as to safeguard and perpetuate their biological, social, economic and aesthetic values, and to coordinate and establish a management system capable of conserving and utilizing coastal wetlands as a natural resource essential to the functioning of the entire estuarine system.

(d) Use Standards. Suitable land uses are those consistent with the management objective in this Rule. Highest priority of use is allocated to the conservation of existing coastal wetlands. Second priority of coastal wetland use is given to those types of development activities that require water access and cannot function elsewhere.

Examples of unacceptable land uses include restaurants, businesses, residences, apartments, motels, hotels, trailer parks, parking lots, private roads, highways and factories. Examples of acceptable land uses include utility easements, fishing piers, docks, wildlife habitat management activities, and agricultural uses such as farming and forestry drainage as permitted under North Carolina's Dredge and Fill Law or other applicable laws.

In every instance, the particular location, use, and design characteristics shall be in accord with the general use standards for coastal wetlands, estuarine waters, and public trust areas described in Rule .0208 of this Section.

(e) Alteration of Coastal Wetlands. Alteration of coastal wetlands includes mowing or cutting of coastal wetlands vegetation whether by mechanized equipment or manual means. Alteration of coastal wetlands by federal or state resource management agencies as a part of planned resource management activities is exempt from the requirements of this Paragraph. Mowing or cutting of coastal wetlands by academic institutions associated with research efforts is allowed subject to approval from the Division of Coastal Management. Alteration of coastal wetlands is governed according to the following provisions:

- (1) Alteration of coastal wetlands is exempt from the permit requirements of the Coastal Area Management Act (CAMA) when conducted in accordance with the following criteria:
 - (A) Coastal wetlands may be mowed or cut to a height of no less than two feet, as measured from the coastal wetland substrate, at any time and at any frequency throughout the year;
 - (B) Coastal wetlands may be mowed or cut to a height of no less than six inches, as measured from the coastal wetland substrate, once between each December 1 and March 31;
 - (C) Alteration of the substrate is not allowed;
 - (D) All cuttings/clippings shall remain in place as they fall;

- (E) Coastal wetlands may be mowed or cut to a height of no less than six inches, as measured from the coastal wetland substrate, to create an access path four feet wide or less on waterfront lots without a pier access; and
- (F) Coastal wetlands may be mowed or cut by utility companies as necessary to maintain utility easements.
- (2) Coastal wetland alteration not meeting the exemption criteria of this Rule requires a CAMA permit. CAMA permit applications for coastal wetland alterations are subject to review by the North Carolina Wildlife Commission, North Carolina Division of Marine Fisheries, U.S. Fish and Wildlife Service, and National Marine Fisheries Service in order to determine whether or not the proposed activity will have an adverse impact on the habitat or fisheries resources.

History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(1); 113A-124;
Eff. September 9, 1977;
Amended Eff. November 1, 2009; August 1, 1998; October 1, 1993; May 1, 1990; January 24, 1978.

15A NCAC 09C .0701 PURPOSE

History Note: Authority G.S. 113-8; 113-34; 113-35;
Eff. February 1, 1976;
Amended Eff. October 2, 1978;
Readopted Eff. November 6, 1980;
Amended Eff. October 1, 1984;
Repealed Eff. November 1, 2009.

15A NCAC 09C .0703 CONSTRUCTION

History Note: Authority G.S. 113-8; 113-34; 113-35;
Eff. February 1, 1976;
Readopted Eff. November 6, 1980;
Amended Eff. October 1, 1984;
Repealed Eff. November 1, 2009.

15A NCAC 09C .0705 PERMITS

History Note: Authority G.S. 113-8; 113-34; 113-35;
Eff. February 1, 1976;
Readopted Eff. November 6, 1980;
Amended Eff. October 1, 1984;
Repealed November 1, 2009.

15A NCAC 09C .0707 HUNTING
15A NCAC 09C .0708 FISHING
15A NCAC 09C .0709 TRESPASS
15A NCAC 09C .0710 FIREARMS

15A NCAC 09C .0711 EXPLOSIVES
15A NCAC 09C .0712 DISPOSAL OF REFUSE:
GARBAGE: ETC.
15A NCAC 09C .0713 FLOWERS: PLANTS:
MINERALS: ETC.

History Note: Authority G.S. 113-8; 113-34; 113-35;
Eff. February 1, 1976;
Amended Eff. April 15, 1978;
Readopted Eff. November 6, 1980;
Amended Eff. October 1, 1984;
Repealed Eff. November 1, 2009.

15A NCAC 09C .0721 WARMING FIRES

History Note: Authority G.S. 113-8; 113-34; 113-35;
Eff. February 1, 1976;
Readopted Eff. November 6, 1980;
Amended Eff. October 1, 1984;
Repealed Eff. November 1, 2009.

15A NCAC 09C .0726 ENFORCEMENT
15A NCAC 09C .0727 EXPULSION

History Note: Authority G.S. 113-8; 113-34; 113-35; 113-55.1;
Eff. February 1, 1976;
Amended Eff. October 2, 1978;
Readopted Eff. November 6, 1980;
Amended Eff. October 1, 1984;
Repealed Eff. November 1, 2009.

15A NCAC 09C .0802 DEFINITIONS
15A NCAC 09C .0803 CONSTRUCTION
15A NCAC 09C .0804 TERRITORIAL SCOPE
15A NCAC 09C .0805 PERMITS

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. February 1, 1976;
Amended Eff. October 2, 1978;
Readopted Eff. November 6, 1980;
Amended Eff. July 1, 1988; October 1, 1984;
Repealed Eff. November 1, 2009.

15A NCAC 09C .0814 ANIMALS AT LARGE
15A NCAC 09C .0815 BOATING
15A NCAC 09C .0816 CAMPING
15A NCAC 09C .0817 SPORTS AND GAMES
15A NCAC 09C .0818 HORSES
15A NCAC 09C .0819 BICYCLES
15A NCAC 09C .0820 HUNTING AND FISHING
15A NCAC 09C .0821 EXPLOSIVES
15A NCAC 09C .0822 FIREARMS
15A NCAC 09C .0823 FIRES

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. February 1, 1976;
Readopted Eff. November 6, 1980;
Amended Eff. July 1, 1988; October 1, 1984;

Repealed Eff. November 1, 2009.

15A NCAC 09C .0825 DISORDERLY CONDUCT

*History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. February 1, 1976;
Readopted Eff. November 6, 1980;
Amended Eff. July 1, 1988; October 1, 1984;
Repealed Eff. November 1, 2009.*

15A NCAC 09C .0827 INTOXICATING BEVERAGES AND DRUGS

15A NCAC 09C .0828 COMMERCIAL ENTERPRISES

*History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. February 1, 1976;
Readopted Eff. November 6, 1980;
Amended Eff. July 1, 1988; October 1, 1984;
Repealed Eff. November 1, 2009.*

- 15A NCAC 09C .1201 PURPOSE**
- 15A NCAC 09C .1202 DEFINITIONS OF TERMS**
- 15A NCAC 09C .1203 PERMITS**
- 15A NCAC 09C .1204 ROCK OR CLIFF CLIMBING AND RAPPELLING**
- 15A NCAC 09C .1205 BATHING OR SWIMMING**
- 15A NCAC 09C .1206 HUNTING**
- 15A NCAC 09C .1207 FISHING**
- 15A NCAC 09C .1208 ANIMALS AT LARGE**
- 15A NCAC 09C .1209 BOATING**
- 15A NCAC 09C .1210 CAMPING**
- 15A NCAC 09C .1211 SPORTS AND GAMES**
- 15A NCAC 09C .1212 HORSES**
- 15A NCAC 09C .1213 BICYCLES**
- 15A NCAC 09C .1214 EXPLOSIVES**
- 15A NCAC 09C .1215 FIREARMS**
- 15A NCAC 09C .1216 FIRES**
- 15A NCAC 09C .1217 DISORDERLY CONDUCT**
- 15A NCAC 09C .1218 INTOXICATING BEVERAGES AND DRUGS**
- 15A NCAC 09C .1219 COMMERCIAL ENTERPRISES**
- 15A NCAC 09C .1220 NOISE REGULATION**
- 15A NCAC 09C .1221 MEETINGS AND EXHIBITIONS**
- 15A NCAC 09C .1222 ALMS AND CONTRIBUTIONS**
- 15A NCAC 09C .1223 AVIATION**

*History Note: Authority G.S. 14-190.9; 113-8; 113-22; 113-34; 113-35; 113-264(a);
Temporary Adoption Eff. December 21, 2001;
Eff. April 1, 2003;
Repealed Eff. November 1, 2009.*

15A NCAC 09C .1225 MOTORIZED VEHICLES: WHERE PROHIBITED

15A NCAC 09C .1226 FLOWERS: PLANTS: MINERALS: ETC.

*History Note: Authority G.S. 113-35;
Temporary Adoption Eff. December 21, 2001;*

Eff. April 1, 2003;

Repealed Eff. November 1, 2009.

15A NCAC 09C .1228 SCOPE

(a) This section coordinates the use of all North Carolina's State Forests and Educational State Forests into one combined set of rules. This is in keeping with the Division of Forest Resources mission to develop, protect and manage the multiple resources of North Carolina's forests through professional stewardship, enhancing the quality of life for our citizens while ensuring the continuity of these vital resources. Educational State Forests and other State Forests will each have a mission statement and will be sustainably managed under a State Forest Management Plan.

(b) All North Carolina Educational State Forests and State Forest rules are effective within and upon the properties defined as Educational State Forests and State Forests under the jurisdiction of the Department.

*History Note: Authority G.S. 113-8; 113-34; 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1229 DEFINITIONS OF TERMS

As used in this Rule the following terms have the following meanings:

- (1) "Bike Trail" means any road or trail maintained for bicycles.
- (2) "Bridle Trail" means any road or trail maintained for persons riding on horseback.
- (3) "Department" means the NC Department of Environment and Natural Resources.
- (4) "Division" means the NC Division of Forest Resources.
- (5) "Educational State Forest" refers to any state forest property operated by the Division of Forest Resources for the purpose of educating schoolchildren and the public.
- (6) "Forest Supervisor" means an employee of the Division of Forest Resources who is a forest supervisor and provides supervision to other DFR employees of the forest.
- (7) "Group" means a number of individuals related by a common factor, having structured organization, defined leadership, and activities directed by a charter or written bylaws.
- (8) "Hiking Trail" means any road or trail maintained for pedestrians.
- (9) "Multi-use Trail" means any trail maintained for use by the following: horseback riding, bicycle or pedestrian.
- (10) "Hunting" means the lawful hunting of game animals as defined by the N.C. Wildlife Resources Commission.
- (11) "Motorized vehicle" means every vehicle which is self-propelled or which is pulled by a self-propelled vehicle (such as a camping trailer, fifth-wheel travel trailer, motor home, travel trailer, and truck camper). A self-propelled vehicle shall include, but is not

limited to passenger automobiles, mopeds, off-road vehicles (ORV), golf carts, motorcycles, mini-bikes, all-terrain vehicles, Segways, and go-carts. This does not include motorized wheel chairs or other similar vehicles designed for and used by persons with disabilities. (G.S. 20-4.01)

- (12) "Permit" means any written license issued by or under the authority of the Division or Department permitting the performance of a specified act or acts.
- (13) "Permittee" means any person, corporation, company or association in possession of a valid permit.
- (14) "Person" means any individual, firm, partnership, corporation, association, public or private institution, political subdivision, or government agency. (G.S. 113-60.22(4))
- (15) "Public building" means a climate-controlled structure primarily for human habitation or use, and does not include barns, shelters or sheds.
- (16) "Public nudity" means a person's intentional failure to cover with a fully opaque covering the person's genitals, pubic area, anal area, or female breasts below a point from the top of the areola while in a public place.
- (17) "Rock climbing" means traversing a rock face that is steep enough to require the use of hands and feet to get up or down.
- (18) "Secretary" means the Secretary of the Department.
- (19) "State Forest" means any land owned by the State of North Carolina, under the jurisdiction of the Division of Forest Resources, that is sustainably managed under a State Forest Management Plan approved by the Division Director for the purposes of education, demonstration, training, forest research, wildlife habitat, forest products and recreation as identified in the approved forest management plan.
- (20) "State Forest Management Plan" is a plan prepared by a forester of the N.C. Division of Forest Resources and approved by the Division Director. Such plan shall include management practices to ensure forest productivity and environmental protection of the land to be treated under the management plan.
- (21) "Swimming area" means any beach or water area designated by the Division as a swimming, wading and bathing area.

History Note: Authority G.S. 113-35; 113-28.1; 113-55.1;
Eff. November 1, 2009.

15A NCAC 09C .1230 PERMITS

(a) A permit authorizes an act only when that act conforms with the terms contained in the permit or in applicable rules, and conforms to existing state laws.

(b) Any violation of the permit constitutes grounds for its revocation by the Department. In case of revocation the permit holder shall forfeit to the Department all money for the permit. Furthermore, the department shall consider the permit holder, together with his agents and employees who violated such terms, jointly and severally liable to the Department for all damages suffered in excess of money so forfeited. However, neither the forfeiture of such money, nor the recovery of such damages, nor both, relieves such person from statutory punishment for any violation of a provision of any State Forest or Educational State Forest rule.

(c) Applications for permits shall be made through the State Forest or Educational State Forest office during business hours and approved by the Forest Supervisor or his or her designee in advance of the act permitted.

History Note: Authority G.S. 113-8; 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1231 ROCK OR CLIFF CLIMBING AND REPELLING

A person shall not engage in rock climbing, cliff climbing or rappelling within the boundaries of a state forest, except at designated areas and only after obtaining a permit.

History Note: Authority G.S. 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1232 BATHING OR SWIMMING

(a) A person shall not dive or jump from any waterfalls or rocks or overhangs into any body of water.

(b) A person shall not wade, bathe or swim in any body of water in an Educational State Forest, except in designated swimming areas.

(c) A person may wade, bathe or swim at his or her own risk in any body of water in any State Forest, except within 300 feet upstream of the top of a waterfall, and in other designated non-swimming areas.

(d) Public Nudity:

(1) Public nudity is prohibited in all State Forest and Educational State Forest lands or waters. This Rule does not apply to the enclosed portions of bathhouses, restrooms, tents and recreational vehicles.

(2) Children under the age of five are exempt from this restriction.

History Note: Authority G.S. 14-190.9; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1233 HUNTING

(a) A person shall not hunt on any Educational State Forest lands without obtaining a permit from the Forest Supervisor's

office and must obey all state hunting laws and rules currently in effect.

(b) A person may hunt on a State Forest that is in the Game Land program if the person obtains a Game Land permit from a NC Wildlife Resources Commission designated licensing agent and obeys all state hunting laws and rules currently in effect for the applicable Game Land.

(c) Hunters shall not discharge a firearm or bow and arrow within, into or across a posted safety zone.

(d) Hunters shall not erect or occupy any tree stand attached to any tree, unless it is a portable stand that leaves no metal in the tree.

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1234 FISHING

(a) A person may fish in any waters in State Forests if the person obeys all state fishing laws and rules.

(b) A person may fish in any waters of any Educational State Forest if the person first obtains a permit from the Forest Supervisor's office and obeys all state fishing laws and rules.

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1235 ANIMALS AT LARGE

(a) Except in designated areas, no person shall have any dog, cat or other pet upon a State Forest or Educational State Forest unless the animal is on a leash and under the control of the owner or some other person. Hunting dogs used in accordance with NC Wildlife Commission Game Land Rules pertaining to State Forests are exempt from this Rule.

(b) No dog, cat or other pet shall be allowed to enter any public building on State Forests, except assistance animals for persons with disabilities.

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1236 BOATING

(a) A person shall not operate a boat, canoe, kayak or other watercraft in any waters on Educational State Forests without obtaining a permit from the Forest Supervisor.

(b) Boats, canoes, kayaks or other watercraft may be operated on the waters of State Forests, provided they are manually operated or propelled by means of oars, paddles or electric trolling motors. Boats with gas motors attached are prohibited on any waters of State Forests, except for use by rescue squads, diving teams, or similar organizations conducting training or emergency operations or forest staff conducting maintenance operations.

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1237 CAMPING

(a) No person shall spend the night or maintain a camp in an Educational State Forests or State Forest except under permit, and at such places and for such periods as may be designated.

(b) Unless otherwise provided in this Section, the number of persons camping at a particular site may be limited by the forest supervisor depending upon the size of the group and the size and nature of the campsite.

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1238 SPORTS AND GAMES

No games or athletic contests shall be allowed except in places as may be designated or under permit, and at such places and for such periods as may be designated.

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1239 HORSES

(a) No person shall use, ride or drive a horse except to, from or along a designated bridle path, multi-use trail designated for horses or designated watering point.

(b) Each equestrian user shall remove from designated parking areas all residues (including manure) generated by his or her horse.

(c) When dismounted, horses shall be tied in such a manner as to prevent damage to trees and other plants.

(d) Horses shall cross rivers and streams using bridges or culverts if available.

(e) Horses shall not wade in lakes.

(f) Users shall possess valid Coggins papers for each horse and make them available for inspection upon request.

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1240 BICYCLES

(a) No person shall use or ride a bicycle except on a road or trail authorized for use by motor vehicles or specifically designated as a bicycle or multi-use trail.

(b) When crossing rivers or streams, bicycle use shall be confined to bridges or culverts if available.

History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1241 SKATES, BLADES AND BOARDS

No person shall use or ride roller skates, in-line skates, roller blades, skate boards, or any similar device on any Educational State Forest or State Forest road, trail or other maintained surface.

History Note: Authority G.S. 113-35;
Eff. November 1, 2009.

15A NCAC 09C .1242 EXPLOSIVES

No person shall carry or possess any explosives or explosive substance including fireworks upon Educational State Forests or State Forests. This does not apply to employees of the department when they engage in construction or maintenance activities.

*History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1243 FIREARMS

No person except authorized forest law enforcement officers of the department, or any other sworn law enforcement officer shall carry or possess firearms of any description or air guns or pellet guns, on or upon Educational State Forest or State Forests. Properly licensed hunters that meet the requirements of Rule .1233 of this Section, or persons meeting the requirements of the NC Wildlife Resources Commission Rules applicable to Educational State Forests or State Forests, are exempt from this Rule.

*History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1244 FIRES

- (a) No person shall build or start a fire in any area of an Educational State Forest or State Forest unless that area is designated for such purpose.
- (b) Tree planters and logging crews may build warming fires if they obtain a permit and confine the fire to an area temporarily designated for such purpose.
- (c) Fires ignited for forest management purposes under the provisions of a prescribed burning plan, approved by the Forest Supervisor or his designee, are exempt from this Rule.

*History Note: Authority G.S. 113-22; 113-34; 113-35; 113-60.40; 113-60.41;
Eff. November 1, 2009.*

15A NCAC 09C .1245 DISORDERLY CONDUCT

- (a) No person visiting on an Educational State Forest or State Forest shall disobey a lawful order of a Division employee, law enforcement officer or any other Department official or endanger him or herself or endanger or disrupt others.
- (b) No person shall use, walk or run on or along a road or trail that is designated closed for maintenance, tree removal or any other purpose, or enter an area that is designated "No Entry," "Do Not Enter" or "Authorized Personnel Only," except for Division employees or contractors working under the direction of a Division employee, volunteers or individuals or groups under permit, and at such places and for such periods as may be designated.

*History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1246 INTOXICATING BEVERAGES AND DRUGS

No person shall use, or be under the influences of intoxicants, marijuana, or non-prescribed narcotic drugs as defined in G.S. 90-87, while on an Educational State Forest or State Forest. The public display or use of alcoholic beverages, marijuana or non-prescribed narcotic drugs is prohibited.

*History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1247 DAMAGE TO BUILDINGS, STUCTURES AND SIGNS

No person shall injure, deface, disturb, destroy or disfigure any Educational State Forest or State Forest building, structure, sign, fence, vehicle, machine or any equipment.

*History Note: Authority G.S. 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1248 COMMERCIAL ENTERPRISES

No person shall, while in or on an Educational State Forest or State Forest, sell or offer for sale, hire or lease, any object or merchandise, property, privilege, service or any other thing, or engage in any business except under permit and at such places and for such periods as may be designated. Sales from which proceeds are used in support of the forest or sales conducted or contracted by the Department are exempt from this Rule.

*History Note: Authority G.S. 113-22; 113-34; 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1250 MEETINGS AND EXHIBITIONS

A person, except for Department employees in performance of official duties, shall not hold any meetings or exhibitions, perform any ceremony, or make any speech, on an Educational State Forest or State Forest without a permit.

*History Note: Authority G.S. 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1251 ALMS AND CONTRIBUTIONS

A person shall not solicit contributions for any purpose within an Educational State Forest or State Forest, unless approved by the Division and such contributions are used to benefit the State Forest or Educational State Forest.

*History Note: Authority G.S. 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1252 AVIATION

- (a) Except as noted in Paragraphs (b) and (c) of this Rule, a person shall not voluntarily bring, land or cause to descend or alight, ascend or take off within or upon any Educational State Forest or State Forest area, any airplane, flying machine, balloon, parachute, glider, hang glider, or other apparatus for aviation. "Voluntarily" in this connection shall mean anything other than a forced landing.
- (b) In forest areas where aviation activities are part of the planned forest activities or military, law enforcement or rescue training, a permit shall be required.

(c) Emergency aircraft such as air ambulances and aerial search helicopters, and Division aircraft are exempt from this Rule.

*History Note: Authority G.S. 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1254 MOTORIZED VEHICLES

(a) A person shall not drive a motorized vehicle in an Educational State Forest or State Forest within or, upon a safety zone, hiking trail, bridle trail, multi-use trail, fire trail, service road, or any part of the forest not designated for such purposes, except by permit.

(b) Motor bikes, mini-bikes, all terrain vehicles, and any other unlicensed motor vehicle are prohibited within the forest except by permit.

(c) A person shall not park a motorized vehicle in a manner that blocks forest roads or gates.

(d) Unless otherwise posted, the speed limit on graveled forest roads is 20 miles per hour, and on dirt roads is 10 miles per hour.

(e) Vehicles exempt from this Rule are: Department vehicles, authorized vendors, vehicles used in conjunction with forest and emergency operations, and vehicles of dependant employees and resident family members.

*History Note: Authority G.S. 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1255 FLOWERS, PLANTS, MINERALS, ETC.

(a) A person shall not remove, destroy, cut down, scar, mutilate, take, gather or injure any tree, flower, artifact, fern, shrub, rock or other plant or mineral in any Educational State Forest or State Forest area. Silvicultural activities performed in accordance with an approved State Forest Management Plan are exempt from this Rule.

(b) A person shall not collect plants, animals, minerals or other artifacts from any Educational State Forest or State Forest area without first having obtained a permit.

*History Note: Authority G.S. 113-8; 113-34; 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1256 TRASH AND DEBRIS

A person shall not deposit paper products, bottles, cans or any other trash or debris in an Educational State Forest or State Forest, except in receptacles designated for such materials. Where trash receptacles are not provided persons shall pack their trash out of the forest and dispose of it in a lawful manner.

*History Note: Authority G.S. 113-8; 113-34; 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1258 HOURS OF OPERATION

(a) Hours of operation may vary for individual forests. Hours of operation for each State Forest or Educational State Forest will be posted at the forest entrance, the forest office, and on the Division's web site.

(b) No person except forest employees and authorized persons shall be allowed within the forest between closing and opening hours except under permit.

*History Note: Authority G.S. 113-35;
Eff. November 1, 2009.*

15A NCAC 09C .1259 ENFORCEMENT

Departmental forest law enforcement officers, Forest Rangers, and sworn law enforcement may enforce these Rules.

*History Note: Authority G.S. 113-8; 113-34; 113-35; 113-55.1;
Eff. November 1, 2009.*

15A NCAC 13B .0833 SEPTAGE MANAGEMENT FIRM PERMITS

(a) Septage management firm names must be distinguishable upon the records of the Division from the name of other septage management firms, limited liability companies, non-profit corporations, business corporations, limited partnerships, sole proprietors, general partners and limited liability partnerships operating in North Carolina. Naming preference shall be given to companies that are listed as incorporated with the NC Secretary of State's office.

(b) A person who has not operated a septage management firm during the previous calendar year shall obtain four hours of new operator training from the Division prior to receiving a permit to operate a septage management firm.

(c) To apply for a permit, a person proposing to operate a septage management firm shall submit the following information to the Division by January 1 of each year:

- (1) Owner's name, address and phone number;
- (2) Business name, address and phone number;
- (3) Operator name, address and phone number, if different from owner;
- (4) Permit number, if existing firm;
- (5) Type(s) of septage handled, and the quantity pumped the previous 12 months, if in operation;
- (6) Number of pumper trucks;
- (7) Capacity and type of septage handled by each pumper truck;
- (8) Vehicle license and serial numbers of each pumper truck;
- (9) Counties in which the firm operates;
- (10) Disposal method(s) for septage;
- (11) Permit number for each septage land application site to be used;
- (12) Permit number for each septage detention and treatment facility to be used;
- (13) Technical information pertinent to the operation of a septage management firm;
- (14) Written authorization on official letterhead or a notarized wastewater treatment plant authorization form shall be submitted from an individual responsible for the operation of each wastewater treatment plant used for disposal indicating:

- (A) Type(s) of septage which can be discharged at the plant;
 - (B) Where septage, including grease septage, can be discharged at the plant or in the collection system;
 - (C) Geographic area from which septage will be accepted; and
 - (D) Duration of authorization.
- (15) The appropriate annual permit fee in accordance with G.S. 130A-291.1(e); and
- (16) The date, location, number of hours, and provider of annual septage management firm training required in accordance with G.S. 130A-291.3(a).

(d) Persons that operate a septage land application site or a septage treatment and detention facility, but do not pump septage, shall submit the following information to the Division by January 1 of each year to apply for a permit:

- (1) Facility name, address, phone number, and county;
- (2) Owner's name, address and phone number;
- (3) Operator name, address and phone number, if different from owner;
- (4) Permit number, if existing firm;
- (5) Type(s) of septage managed;
- (6) Facility types and their permit numbers;
- (7) The name and permit number of all permitted septage management firms using the facility;
- (8) The date, location, number of hours, and provider of annual training in accordance with G.S. 130A-291.3(b); and
- (9) The appropriate annual permit fee in accordance with G.S. 130A-291.1(e1).

(e) A septage management firm permit shall not be issued unless the applicant has submitted to the Division written documentation of authorized access to dispose or otherwise manage septage, or any part of septage, at a wastewater treatment plant, a permitted septage land application site, a permitted septage treatment facility, or other appropriately permitted solid waste management facility. Documentation from each plant, site, or other facility shall include the types and amount of septage which may be discharged.

(f) Septage management firm permits shall not be issued until all parts of the application have been completed.

(g) A septage management firm permit shall not be issued to firms that pump septage until its pumper truck(s) have been inspected and approved.

(h) Permits are non-transferable.

(i) Septage management firm permits are issued for up to one calendar year. Permits issued on or after January 1 shall be effective until December 31 of that calendar year.

*History Note: Authority G.S. 130A-291.1;
Eff. November 1, 2009.*

CHAPTER 50 – BOARD OF EXAMINERS FOR PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS

21 NCAC 50 .0202 OBTAINING FORMS

Forms may be obtained on request from the State Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors, 1109 Dresser Court, Raleigh, North Carolina, 27609, or via document download from the Board's official website at <http://www.nclicensing.org>.

History Note: Authority G.S. 87-18;

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

*Amended Eff. January 1, 2010; January 1, 2003; June 11, 1998;
April 1, 1991.*

21 NCAC 50 .0301 QUALIFICATIONS DETERMINED BY EXAMINATION

(a) In order to determine the qualifications of an applicant, the Board shall provide an examination in writing or by computer in the following categories:

Plumbing Contracting, Class I
Plumbing Contracting, Class II
Heating, Group No. 1 - Contracting, Class I
Heating, Group No. 1 - Contracting, Class II
Heating, Group No. 2 - Contracting, Class I
Heating, Group No. 3 - Contracting, Class I
Heating, Group No. 3 - Contracting, Class II
Fuel Piping Contractor
Fire Sprinkler Inspection Technician
Fire Sprinkler Installation Contractor
Fire Sprinkler Inspection Contractor
Fire Sprinkler Maintenance Technician
Residential Fire Sprinkler Installation Contractor

(b) Each person being examined by the Board for a contractor license other than a Fire Sprinkler Installation or Inspection Contractor license shall be required to read, interpret and provide answers to both the business and law part and the technical part of the examination required by G.S. 87-21(b).

(c) Applicants for licensure as a fire sprinkler installation contractor, must submit evidence of current certification by the National Institute for Certification and Engineering Technology (NICET) for Fire Protection Engineering Technician, Level III, subfield of Automatic Sprinkler System Layout as the prerequisite for licensure. Current certification by NICET is in lieu of separate technical examination conducted by the Board. Applicants for licensure as a fire sprinkler installation contractor, must take and pass the business and law part of the exam administered by the Board.

(d) Applicants for licensure in the Fire Sprinkler Inspection Technician classification must either pass the technical examination offered by the Board or submit evidence of Level II Certification in "Inspection and Testing of Water-based Protection Systems" by NICET in lieu of examination.

(e) Applicants for the Fire Sprinkler Inspection Contractor classification must submit evidence of Level III certification in "Inspection and Testing of Water-based Fire Protection Systems" by NICET in lieu of technical examination.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

Contractors who obtain license by NICET certification must maintain such certification thereafter as a condition of license renewal. Applicants for licensure as a fire sprinkler inspection contractor must take and pass the business and law part of the examination administered by the Board in addition to demonstrating NICET certification as set out herein.

(f) Applicants for a license in the Limited Fire Sprinkler Maintenance Technician classification must obtain a license based on maintenance experience, education and job classification set forth in Rule .0306.

(g) Applicants for a license as a Residential Fire Sprinkler Installation Contractor must obtain a license based on experience set forth in Rule .0306 and must take and pass the technical part of the Residential Fire Sprinkler Installation Contractor examination.

History Note: Authority G.S. 87-18; 87-21(a); 87-21(b); Eff. February 1, 1976; Readopted Eff. September 29, 1977; Amended Eff. July 1, 1991; May 1, 1989; August 1, 1982; Temporary Amendment Eff. September 15, 1997; Amended Eff. March 1, 2005; January 1, 2004; July 1, 2003; August 1, 2002; July 1, 1998; Emergency Amendment Eff. December 5, 2005; Emergency Amendment Expired February 13, 2006; Amended Eff. January 1, 2010; May 1, 2006.

21 NCAC 50 .0306 APPLICATIONS: ISSUANCE OF LICENSE

(a) All applicants for licensure or examination shall file an application in the Board office on a form provided by the Board.

(b) Applicants for plumbing or heating examination shall present evidence at the time of application to establish two years of full-time experience in the installation, maintenance, service or repair of plumbing or heating systems related to the category for which a license is sought, whether or not a license was required for the work performed. Applicants for fuel piping examination shall present evidence at the time of application to establish one year of experience in the installation, maintenance, service or repair of fuel piping, whether or not a license was required for the work performed. Up to one-half the experience may be in academic or technical training related to the field of endeavor for which examination is requested. The Board will prorate part-time work of less than 40 hours per week or part-time academic work of less than 15 semester or quarter hours.

(c) The Board shall issue a license certificate bearing the license number assigned to the qualifying individual.

(d) Fire Sprinkler Installation Contractors in the unlimited classification shall meet experience requirements in accordance with NICET examination criteria.

(e) Applicants for examination or licensure in the Limited Fire Sprinkler Inspection Technician classification shall submit evidence adequate to establish that the applicant has either:

- (1) 4000 hours experience involved in inspection and testing of previously installed fire sprinkler systems, consistent with NFPA-25, as a full-time employee of a Fire Sprinkler Inspection Contractor or fire insurance underwriting organization; or

- (2) 4000 hours experience involved in inspection and testing of previously installed fire sprinkler systems, consistent with NFPA-25 as a full time employee of a hospital, manufacturing, government or university facility and under direct supervision of a Fire Sprinkler Inspection Contractor or a Fire Sprinkler Inspection Technician; or

- (3) 4000 hours experience involved in installation of fire sprinkler systems as a full-time employee of a Fire Sprinkler Installation Contractor; or

- (4) a combination of 4000 hours experience in any of the categories listed in this Paragraph.

(f) Applicants for licensure in the Fire Sprinkler Inspection Contractor classification shall meet experience requirements in accordance with NICET certification criteria.

(g) Applicants for initial licensure in the Fire Sprinkler Maintenance Technician classification must submit evidence of 4000 hours experience at the place for which license is sought as a full-time maintenance employee in facility maintenance with exposure to periodic maintenance of fire protection systems as described in 21 NCAC 50. 0515 of this Chapter or 2000 hours of such experience, together with six hours classroom instruction in courses approved by the Board consisting entirely of training in fire system maintenance, repair and restoration to service. Applicants who have held Fire Sprinkler Maintenance Technician license previously at a different facility are not required to demonstrate experience in addition to the experience at the time of initial licensure but shall submit a new application for the new location at which they wish to be licensed.

(h) Applicants for licensure in the Residential Fire Sprinkler Installation Contractor classification must hold an active Plumbing Class I or Class II Contractor license issued by this Board for a minimum of three years and must document attendance at a 16 hour course approved by the Board pursuant to these Rules covering NFPA 13D Multipurpose Residential Plumbing and Residential Fire Sprinkler Systems.

History Note: Authority G.S. 87-18; 87-21(b); Eff. February 1, 1976; Readopted Eff. September 29, 1977; Amended Eff. January 1, 2004; July 1, 2003; August 1, 2002; July 1, 1998; September 1, 1994; November 1, 1993; April 1, 1991; May 1, 1990; Temporary Amendment Eff. August 31, 2004; Amended Eff. January 1, 2010; June 1, 2006; March 1, 2005.

21 NCAC 50 .0307 REFUND OF DEPOSIT

The application fee for license without examination, and the application and examination fee for an examination shall not be refunded.

History Note: Authority G.S. 87-18; 87-21(b); 87-22; 87-22.1; Eff. February 1, 1976; Readopted Eff. September 29, 1977; Amended Eff. May 1, 1989; Temporary Amendment Eff. August 31, 2001;

Amended Eff. January 1, 2010; August 1, 2002.

21 NCAC 50 .0308 REVIEW OF EXAMINATION

(a) Any person who fails to pass an examination may, on written request, review his or her examination at a time and place determined by the Board.

(b) In the event an applicant fails an examination for a particular qualification three times, the applicant must present evidence of six months additional practical experience involving both design and installation of systems of the type for which a license is sought together with at least 24 contact hours of additional classroom education approved by the Board.

History Note: Authority G.S. 87-18; 87-21(b); 87-25; 93B-8(c);

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. January 1, 2010; December 1, 2003; August 1, 2002.

21 NCAC 50 .0309 EXPANDING SCOPE OF LICENSE

Any licensee holding a license as an individual, or a licensee whose name appears on the certificate of license issued in the name of a corporation, partnership, or business that has a trade name, may be examined for the purpose of expansion of his license qualifications upon payment of the required application and examination fee, providing that the individual meets the requirements for licensing in the classification sought.

History Note: Authority G.S. 87-18; 87-21(b); 87-25;

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. July 1, 1991; May 1, 1989;

Temporary Amendment Eff. August 31, 2001;

Amended Eff. January 1, 2010; August 1, 2002.

21 NCAC 50 .0310 APPLICATION FOR LICENSURE BY RECIPROCITY

The Board shall grant license by reciprocity only pursuant to reciprocal licensing agreements worked out with various states after mutual review of the applicable licensing standards and examinations.

History Note: Authority G.S. 87-18; 87-21(g);

Eff. November 1, 1993;

Amended Eff. January 1, 2010; August 1, 2000.

21 NCAC 50 .0402 PERMITS

(a) A licensed contractor shall ensure that a permit is obtained from the local Code Enforcement official before commencing any work for which a license is required by the Board except as set out in Paragraph (c) of this Rule. The contractor shall also ensure that a request for final inspection is made by himself, the general contractor or the owner within 10 days of substantial completion of the work for which a license is required, absent agreement with the owner and the local Code Enforcement official. Absent agreement with the local Code Enforcement official the licensee is not relieved by the Board of responsibility

to arrange inspection until a certificate of compliance or the equivalent is obtained from the local code enforcement official or the licensee has clear and convincing evidence of his effort to obtain same.

(b) A licensed contractor shall not allow a permit to be obtained or his license number to appear upon a permit except for work which he or his employees perform, over which he will provide general supervision until the completion of the work for which he holds an executed contract with the licensed general contractor or property owner and for which he receives the contractual payment.

(c) A plumbing permit is not required for replacement of a water heater in a one or two-family dwelling if there is no change in fuel, energy source, location, capacity, routing or sizing of venting or piping and if the energy use rate or thermal input is not increased and if the licensee personally examines the work at completion and if the licensee ensures that leak test has been performed on any fuel piping.

History Note: Authority G.S. 87-18; 87-21; 87-26;

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. January 1, 2010; December 1, 2003; August 1, 2000; September 1, 1995; November 1, 1993; May 1, 1989.

21 NCAC 50 .0404 ACTIVE EMPLOYMENT

(a) In each business location, branch or facility of any kind from which work requiring a license pursuant to G.S. 87, Article 2 is:

- (1) solicited or proposed; or
- (2) from which contracts for such work are negotiated or entered into; or
- (3) from which requests for such work are received, accepted, or dispatched; or
- (4) from which such work is carried out;

there shall be on duty the lesser of 1500 hours annually, or all hours during which the activities described herein are carried out, at least one individual who holds license in the classification required for the work being proposed or performed, whose license is listed in the name of the particular firm or business at that location, and who is engaged in the work of the firm at the business location or at firm job sites and who has the responsibility to make, modify, terminate and set the terms of contracts, and to exercise general supervision, as defined in Rule .0505 of this Chapter, of all work falling within his license qualification. Evidence of compliance shall be required as a condition of renewal or retention of license, and falsification shall constitute fraud in obtaining license. The standards set forth in Rule 21 NCAC 50 .0512 shall be applied.

(b) If a licensee uses his or her license to qualify a firm and that licensee holds employment elsewhere, no work that requires a license can be performed by the firm based on the qualification of that licensee during the hours the licensee is committed or active in employment elsewhere.

(c) A field or project office used solely to carry out an existing contract or contracts entered into by the main license office and from which none of the other activities in Rule .0404(a) are conducted shall not be deemed a separate place of business or branch requiring compliance with Rule .0404(a).

History Note: Authority G.S. 87-18; 87-21(a)(5); 87-21(a)(6); 87-26;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. January 1, 2010; January 1, 2004; August 1, 2002; August 1, 2000; July 1, 1998; July 1, 1991; May 1, 1989.

21 NCAC 50 .0405 MULTIPLE LICENSES

- (a) In order to maintain the identity of firms and allow effective supervision, each licensed contractor shall qualify only the business location where he is primarily located.
- (b) A licensee may be listed on only one contractor license at any given time, whether the license is issued in the name of the individual or in the name of a firm; provided, however, that the fire sprinkler maintenance technician qualification may be listed separately in the name of the employer to which restricted.
- (c) A licensee other than the holder of a Fire Sprinkler Maintenance Technician license, may, upon deletion of his name and qualifications from a firm license, reinstate his personal license, either as an individual or in the name of some other corporation, partnership, or business that has a trade name, upon compliance with G.S. 87-26.

History Note: Authority G.S. 87-18; 87-21(a)(5); 87-21(a)(6); 87-26;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. January 1, 2010; January 1, 2004; July 1, 1998; May 1, 1989.

21 NCAC 50 .0408 CHANGE OF TRADE NAME

- (a) The trade name under which a license is issued may be changed upon request to and approval by the Board pursuant to these Rules. If the Board approves the name change, the last license issued to the licensee must be returned to the Board before the new license will be sent to the licensee.
- (b) A contractor license shall be issued or renewed using any corporate name, partnership name, or trade name which is not substantially similar to a name already in use according to the records of the Board.
- (c) The licensee shall notify the Board of any change in location, telephone number, physical address or mailing address from that shown on the last license renewal invoice within 30 days after the change takes place.

History Note: Authority G.S. 55B-5; 87-18; 87-26;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. January 1, 2010; December 1, 2003; November 1, 1994; February 1, 1991; May 1, 1989.

21 NCAC 50 .0501 AIR CONDITIONING FURTHER DEFINED

- (a) Heating Group 2 systems are defined in G.S. 87-21(a)(3). Multiple units serving interconnected space and aggregating more than 15 tons are included Heating Group 2 systems in the foregoing whether or not separately ducted or controlled.
- (b) The installation of heating and air conditioning systems or components located in single family dwellings and systems of 15

tons or less capacity in non-residential structures require Heating Group 3 license except where:

- (1) heat is provided by hot water or steam in a Heating Group 1 system, or
- (2) cooling is provided by a unitary appliance such as a window unit in which case a license is not required.

History Note: Authority G.S. 87-18; 87-21(a)(3);
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. August 1, 2000; May 1, 1989;
Temporary Amendment Eff. August 31, 2001;
Amended Eff. January 1, 2010; August 1, 2002.

21 NCAC 50 .0506 MINOR REPAIRS AND ALTERATIONS

- (a) The connection of a factory installed and inspected mobile home drainage system to an existing approved premises sewer system, which premises sewer system extends from the septic tank or municipal sewer system, constitutes a minor repair or replacement. The connection of a factory installed mobile home water system to an existing potable water supply on the premises constitutes a minor repair or replacement.
- (b) The initial installation or the subsequent replacement of any water heater in any structure requires a license in plumbing except where installed by a property owner personally in property not intended or used for sale or rental.
- (c) The installation of a water purification system which interrupts the potable water supply does not constitute a minor repair or replacement within the meaning of G.S. 87-21(c).
- (d) Any connection, repair, or alteration which requires interruption of the potable water supply and if poorly performed creates risk of contamination of the potable water supply is not a minor repair, replacement or alteration.
- (e) Any connection, repair or alteration which if poorly performed creates risk of fire or exposure to carbon monoxide, open sewage or other gases is not a minor repair, replacement or alteration.
- (f) The failure to enumerate above any specific type of repair, replacement or alteration shall not be construed in itself to render said repair, replacement or alteration as minor within the meaning of G.S. 87-21(c).
- (g) A license in plumbing contracting or a license issued pursuant to Article 7A, Chapter 87 of the General Statutes is required of a person who installs pumps or pumping equipment, installs, breaks or reinstalls a well seal or disinfects a well.

History Note: Authority G.S. 87-18; 87-21(a)(1); 87-21(a)(5); 87-21(c); 87-98;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. November 1, 1993; May 1, 1989; April 15, 1978; February 1, 1978;
Temporary Amendment Eff. September 15, 1997;
Temporary Amendment Expired June 28, 1998;
Amended Eff. January 1, 2010; April 1, 2003.

21 NCAC 50 .0508 HEATING: GROUP 3 LICENSE REQUIRED

- (a) A license in heating, group No. 3 is required for the installation or replacement of a furnace, air handler, heat pump, package unit, ductwork or condenser in a heating, group No. 3 system.
- (b) A license in heating, group No. 3 is required to install or replace a self-contained fireplace unit if the unit utilizes ducts or a blower to distribute air to areas not immediately adjacent to the fireplace itself.
- (c) A license in heating, group No. 3 is required when air conditioning of 15 tons or less is added to an already installed heating, group No. 3 system.
- (d) A heating, group No. 2 license is required for the installation or replacement of equipment or ductwork in a Heating Group No. 2 system, unless exempted by G.S. 87-21(a)(3).

History Note: Authority G.S. 87-18; 87-21(a)(3); 87-21(a)(5); 87-21(c); Eff. February 1, 1976; Readopted Eff. September 29, 1977; Amended Eff. August 1, 2002; May 1, 1989; August 1, 1982; Temporary Amendment Eff. August 31, 2001; Amended Eff. January 1, 2010; March 1, 2005; August 1, 2002.

21 NCAC 50 .0513 FIRE SPRINKLER INSPECTION TECHNICIAN LICENSE

- (a) License in the Fire Sprinkler Inspection Technician classification is required of the technician who carries out periodic inspection of fire sprinkler systems consistent with NFPA-25.
- (b) Periodic observation and testing of systems other than NFPA-25 system certification may be carried out by Fire Sprinkler Maintenance Technicians licensed under Rule .0515 of this Chapter. Insurers who carry out inspections for the limited purpose of underwriting or rating for insurance purposes, in situations where the physical tasks are carried out by the on-site Fire Sprinkler Maintenance Technician licensee of the insured, are not required to be licensed pursuant to this Rule. All NFPA-25 reports and system tags must display the name and signature of the licensee who performed the actual inspection as well as the licensee number of the inspection contractor; except that where the Fire Sprinkler Inspection Technician license is issued in the name of a manufacturing, government, university or hospital facility as set out in this Rule, the NFPA-25 report and system tags must display the name, signature and license number of the Inspection Technician.
- (c) Licenses shall be issued based on experience and examination or on experience and certification, as described in Rules .0301 and .0306 of this Chapter and expire annually.
- (d) The duties of fire sprinkler inspection technicians may be carried out as employees of fire sprinkler inspection contractors or as full-time employees at a manufacturing, government, university or hospital facility. Fire Sprinkler Inspection Technician licenses shall be issued and listed either as sublicensees of fire sprinkler inspection contractors or as a fire sprinkler inspection technician license in the name of the manufacturing, government, university or hospital facility where the fire sprinkler inspection technician is employed.

History Note: Authority G.S. 87-21; Eff. January 1, 2004; Amended Eff. January 1, 2010; March 1, 2005.

21 NCAC 50 .0514 FIRE SPRINKLER INSPECTION CONTRACTOR LICENSE

- (a) License in the Fire Sprinkler Inspection Contractor classification is required of persons who engage in the business of contracting to perform or performing independent testing and inspections of fire sprinkler systems consistent with NFPA-25. Insurers who carry out inspections for the limited purpose of underwriting or rating for insurance purposes, in situations where the physical tasks are carried out by the on-site Fire Sprinkler Maintenance technician licensee of the insured, are not required to be licensed pursuant to this Rule.
- (b) Where the NFPA-25 inspection is carried out by a Fire Sprinkler Inspection Contractor, the NFPA-25 report and system tags must display the name, signature and license number of the Fire Sprinkler Inspection Contractor.
- (c) Licenses shall be issued based on experience and examination, as described in Rules .0301 and .0306 of this Chapter and expire annually.

History Note: Authority G.S. 87-21; Eff. January 1, 2004; Amended Eff. January 1, 2010; March 1, 2005.

21 NCAC 50 .0515 FIRE SPRINKLER MAINTENANCE TECHNICIAN LICENSE

- (a) License in the Fire Sprinkler Maintenance Technician classification is required of the technician who carries out periodic maintenance observation or testing of water-based fire protection systems. Licenses shall be issued based on experience and training, as described in Rules .0301 and .0306 of this Chapter and expire annually. This license is limited to work on the systems at the locations of the employer of the licensee for which experience was demonstrated. Upon termination of employment at the location for which certified, the Fire Sprinkler Maintenance Technician license shall lapse, and a new license shall be obtained for the systems at the new place of employment by compliance with the requirements of Rule .0306 of this Chapter. Insurers who carry out inspections for the limited purpose of underwriting or rating for insurance purposes, in situations where the physical tasks are carried out by the on-site Fire Sprinkler Maintenance Technician licensee of the insured, are not required to be licensed pursuant to this Rule.
- (b) Persons holding a Fire Sprinkler Maintenance Technician license may only:
 - (1) Operate and lubricate hydrants and control valves;
 - (2) Adjust valve and pump packing glands;
 - (3) Bleed moisture and condensation from air compressors, air lines and dry pipe system auxiliary drains;
 - (4) Clean strainers;
 - (5) Check for painted, damaged or corroded sprinklers, corroded or leaking piping and verify control valves are open;

- (6) Replace painted, corroded or damaged sprinkler head, using identical serial numbers;
- (7) Replace missing or loose hangers;
- (8) Replace gauges;
- (9) Clean water motor gong;
- (10) Perform air compressor maintenance;
- (11) Reset dry pipe valves;
- (12) Exercise fire pumps, not including conduct of a flow measurement test;
- (13) Perform periodic maintenance observation or testing, not including the annual NFPA-25 inspections; or
- (14) Perform repairs other than the foregoing on an emergency basis where necessary to restore a system to operation, provided the holder of the Fire Sprinkler Maintenance Technician license documents his efforts and inability to obtain the services of the holder of a license as a Fire Sprinkler Installation Contractor prior to performing the repairs, but obtains such services within 72 hours thereafter.

*History Note: Authority G.S. 87-21;
Eff. January 1, 2004;
Amended Eff. January 1, 2010; May 1, 2006; March 1, 2005.*

**21 NCAC 50 .0516 RESIDENTIAL FIRE
SPRINKLER INSTALLATION LICENSE**

License in the Residential Fire Sprinkler Installation Contractor classification is required of persons who engage in the business of contracting to perform or performing the installation of multipurpose single family residential water-based plumbing and fire sprinkler piping systems consistent with NFPA-13D. All multipurpose single family residential plumbing and fire sprinkler piping systems are required to be hydraulically calculated and designed by a licensed North Carolina Fire Sprinkler Installation Contractor or a North Carolina Licensed Professional Engineer for each specific installation. Residential Fire Sprinkler Installation Contractors are required to perform each installation consistent with the calculation and design. Any single purpose single family residential water-based fire sprinkler system shall be installed by a licensed Fire Sprinkler Installation Contractor.

*History Note: Authority G.S. 87-21;
Eff. July 1, 2010.*

21 NCAC 50 .1006 INFORMAL PROCEDURES

- (a) The Board and party or parties may agree at a pre-hearing conference to simplify the hearing by: decreasing the number of issues to be contested at the hearing; accepting the validity of proposed evidence; accepting the findings in another case with relevance to the case at hand; or agreeing to such other matters as may expedite the hearing.
- (b) The Board may establish a resolution committee consisting of the Executive Director and one or two persons appointed by the Executive Director to conduct an informal conference when it appears there may not be a need for a formal hearing. At least two Resolution Committee members must be present and

participate in Committee proceedings. Any party who does not agree with a proposal for resolution resulting from an informal conference may notify the Board within 30 days. The matter will subsequently be heard de novo by a majority of the Board or as otherwise provided by 21 NCAC 50 .1005, or this Rule. If there is no objection to the proposed resolution within 30 days, the proposed resolution will be received and considered by a majority of the Board as a recommendation by the staff, any Board member involved and the licensee for adoption.

(c) As a part of the contested case hearing process, the Board may elect to conduct a summary proceeding in a contested case. The procedure for a summary proceeding is substantially as follows:

- (1) After issuance of a notice of hearing in accordance with 21 NCAC 50 .1004, the matter is considered by a single board member without a record. Each party may tender affidavits, documents and a closing statement. Live testimony shall not be received.
- (2) Each party may present a suggestion as to the terms of a Recommended Order. The board member will consider the materials and suggestions and issue a Recommended Decision in summary proceeding. If there is no objection within 30 days, the Recommended Order shall be received and considered by a majority of the Board as a recommendation by the staff, any Board member involved and the respondent for adoption.
- (3) Any party who does not agree with the recommended decision may notify the Board within 30 days.

(d) Any matter not resolved pursuant to the procedure in Paragraph (b) or (c) of this Rule shall be heard de novo by a majority of the Board or as otherwise provided by 21 NCAC 50 .1005. The de novo hearing shall be conducted as other contested case hearings are conducted pursuant to 21 NCAC 50 .1000. The Board member who conducted the summary proceedings shall be disqualified from the de novo hearing.

*History Note: Authority G.S. 87-18; 150B-41;
Eff. May 1, 1989;
Amended Eff. January 1, 2010; February 1, 2004; August 1, 2000; November 1, 1993.*

21 NCAC 50 .1102 LICENSE FEES

- (a) Except as set out in this Rule, the annual license fee for plumbing, heating and fuel piping licenses by this Board is one-hundred thirty dollars (\$130.00).
- (b) The annual license fee for a licensed individual who holds qualifications from the Code Officials Qualification Board, is employed full-time as a local government plumbing, heating or mechanical inspector and who is not actively employed in business requiring license from this Board is twenty-five dollars (\$25.00).
- (c) The initial application fee for license without examination conducted by the Board is thirty dollars (\$30.00).
- (d) The annual license fee for a contractor or inspection technician whose qualifications are listed as the second or

subsequent individual on the license of a corporation, partnership, or business with a trade name under Paragraphs (a) or (c) of this Rule is thirty dollars (\$30.00).

(e) The annual license fee for fire sprinkler installation contractor and fire sprinkler inspection contractor licenses by this Board is one hundred thirty dollars (\$130.00).

(f) The annual license fee for Fire Sprinkler Maintenance Technician is one hundred thirty dollars (\$130.00).

(g) The annual license fee for Residential Fire Sprinkler Installation Contractor is one hundred thirty dollars (\$130.00).

History Note: Authority G.S. 87-18; 87-21; 87-22;

Eff. May 1, 1989;

Temporary Amendment Eff. November 17, 1989 for a period of 77 days to expire on February 1, 1990;

Amended Eff. November 1, 1994; July 1, 1991; March 1, 1990;

Temporary Amendment Eff. August 31, 2001; September 15, 1997;

Amended Eff. July 1, 2010; March 1, 2005; December 1, 2003; December 4, 2002.

21 NCAC 50 .1104 FEES FOR COPIES OF RECORDS AND RETURNED CHECKS

The Board charges the following fees:

- | | | |
|-----|---|---------|
| (1) | copies of license | \$20.00 |
| (2) | abstract of license record | \$25.00 |
| | per license record search | |
| (3) | processing fee for returned checks | |
| | maximum allowed by law | |
| (4) | copy of Board rules | \$10.00 |
| (5) | processing fee for late renewal | \$25.00 |
| (6) | Business and Project Management for Contractors | \$45.00 |

History Note: Authority G.S. 25-3-506; 87-18; 87-22; 150B-19;

Eff. September 1, 1994;

Amended Eff. July 1, 1998; November 1, 1994;

Temporary Amendment Eff. August 31, 2001;

Amended Eff. July 1, 2010; December 1, 2003; December 4, 2002.

21 NCAC 50 .1401 CONTINUING EDUCATION REQUIREMENTS

(a) Beginning with renewals of license for years beginning on or after January 1, 2003, each holder of a Plumbing, Heating or Fuel Piping license, must have completed six hours of approved continuing education for each calendar year as a condition of license renewal.

(b) Beginning with renewals of license for years beginning on or after January 1, 2010, as part of and not in addition to the requirements set out in Paragraph (a) of this Rule, each applicant for license renewal, other than fire sprinkler licensees, must complete two hours of instruction devoted entirely to N.C. Building Code including recent changes or amendments' to those codes annually.

(c) Courses accredited for renewal of Plumbing, Heating or Fuel Piping license, must be in areas related to plumbing, heating, air conditioning or fuel piping contracting such as the technical and

practical aspects of the analysis of plans and specifications, estimating costs, fundamentals of installation and design, equipment, duct and pipe sizing, code requirements, fire hazards and other business ethics, taxation, payroll, cash management, bid and contract preparation, customer relations subjects as those may relate to engaging in business as a plumbing, heating or fuel piping contractor or to plumbing or heating systems.

(d) Persons holding multiple qualifications from the Board must complete at least six hours annually, but are not required to take hours each year in each qualification, except Plumbing Contractor licensees who also hold a Residential Fire Sprinkler Installation Contractor license must obtain six hours continuing education annually in plumbing and four hours continuing education annually in residential fire sprinkler installation. Licensees with multiple qualifications shall take instruction so as to remain current in all areas of contracting work in which engaged.

(e) Licenses may not be renewed without documentation of course attendance, course name, course number, content and teacher. Falsification or misstatement of continuing education information shall be grounds for failure to renew licenses and disciplinary action, including revocation or suspension of licenses.

(f) Individuals who obtained licensure by means of the NICET certification as a Fire Sprinkler Installation Contractor, Fire Sprinkler Inspection Contractor, or Fire Sprinkler Inspection Technician, must maintain current certification with NICET as a condition of annual license renewal, and shall present evidence of same to the Board. In addition, licensees in this class must also obtain six hours of Board-approved continuing education classes for each calendar year as a condition of license renewal.

(g) Beginning with renewals of license on or after January 1, 2003, each holder of a Fire Sprinkler Installation Contractors or Fire Sprinkler Inspection Contractor or Technician license not required to be current on the continuing education requirements of NICET must complete six hours of approved continuing education in areas related to fire sprinkler contracting during the preceding calendar year as a condition of license renewal. Licensees in the Fire Sprinkler Maintenance Technician classification shall obtain four hours of approved classroom continuing education annually relevant to the systems they maintain.

History Note: Authority G.S. 87-21(b)(3); 87-22;

Eff. April 1, 2001;

Amended Eff. January 1, 2010; May 1, 2006; January 1, 2004; April 1, 2003.

21 NCAC 50 .1402 EXEMPTIONS AND CREDITS

(a) Licensees shall not carry over continuing education hours from one calendar year to the next.

(b) Newly licensed individuals shall have no continuing education requirements for the calendar year in which they first become licensed.

(c) Licensees who are unable to fulfill the required number of hours as the result of illness as certified by an attending physician and who will not be engaged in bidding, supervising or other activities for which license is required may petition the Board in writing for an exemption or request approval of an

individualized plan tailored to their physical limitations. Such requests shall be approved within 90 days consistent with the requirements applicable to all licensees.

(d) Licensees who are over the age of 65, and who shall not be engaged in bidding, supervising or other activities for which license is required during the coming year, except as an employee of another licensee, may apply to the Board and obtain an exemption. If exemption is granted and the licensee thereafter wishes to engage in activity requiring license, the continuing education must be completed and satisfactory proof provided to the Board before any activity requiring license is undertaken.

(e) Instructors in Board-approved courses shall receive continuing education credit for lecture hours in approved courses.

(f) Members of the Board, Board Staff and Resolution Review Committee shall receive continuing education credit for hours spent in hearings, resolution review conferences or in monitoring continuing education courses. Licensees sitting on the Resolution Review Committee or attending formal hearings other than as a Respondent shall receive credit for such hours, but are not relieved of the necessity to obtain the code hours required by 21 NCAC 50 .1401(b)(1).

(g) Licensees who have been called to active duty with any branch of the United States Military Service are not required to obtain continuing education credit hours during times they are deployed on active duty outside North Carolina and will not be required to obtain continuing education credit hours for the license year in which they return to North Carolina from active duty. The licensee will be required to obtain continuing education credit hours the years following return from deployment on active duty outside North Carolina. In order to qualify for exemption from continuing education credit hours based on active military duty, the licensee must submit a copy of the military orders documenting their active duty military deployment and return.

History Note: Authority G.S. 87-21(b)(3); 87-22; Eff. April 1, 2001; Amended Eff. January 1, 2010; May 1, 2006; April 1, 2003.

21 NCAC 50 .1404 COURSE REQUIREMENTS AND LIMITATIONS

(a) In order for course credit to be obtained, the course must be approved and consist of instruction in areas related to plumbing, heating, air conditioning and fire sprinkler contracting or inspection contracting such as the technical and practical aspects of the analysis of plans and specifications, estimating costs, fundamentals of installation and design, equipment, duct and pipe sizing, and NFPA code requirements, fire hazards and other subjects as those may relate to engaging in business as a plumbing, heating, fuel piping or fire sprinkler contractor or to plumbing or heating or fire sprinkler systems. Business ethics, taxation, payroll, cash management, bid and contract preparation, customer relations or similar subjects related to plumbing or heating contracting shall also be approved.

(b) In order for course credit to be obtained, the course must be taught by the instructor or alternate listed when the course was

approved by the Board, absent specific request and approval of the course as modified prior to the delivery of the program.

(c) Courses shall have a minimum of two hours of actual instruction and a maximum of six hours of actual instruction, per day.

(d) Courses shall be held in facilities conducive to learning. Such facilities include community colleges, technical schools, or community centers.

(e) Courses shall be open to all interested licensees that the host facility can reasonably accommodate and for audit by Board representatives; courses may not be restricted to employees, dealers or members of a particular firm or group.

(f) Once listed on the six-month course roster, a course may not be cancelled during that six month period.

(g) Though courses may have commercial sponsors, the courses shall not include promotion of products or services of a particular firm or manufacturer.

(h) Correspondence, home study, license exam preparation (cram) courses shall not be approved.

(i) For the information of all licenses, the Board shall maintain a calendar of all courses available during a six-month period.

(j) Licensees are required to bring with them to any continuing education course a current code book relevant to any particular course where building code is being taught.

(k) The maximum number of students allowed in any Board-approved continuing education class shall be 100.

History Note: Authority G.S. 87-21(b)(3); 87-22; Eff. April 1, 2001; Amended Eff. January 1, 2010; June 1, 2006; April 1, 2003.

21 NCAC 50 .1405 APPROVAL OF COURSES

(a) To obtain approval of a course a provider or proposed provider must submit a written application to the board on or before the first day of September of each year for courses to be offered the following January through June and on or before the first day of March each year for courses to be offered the following July through December. The application must include:

- (1) two complete sets of written course materials and a detailed course outline; and
- (2) an application cover sheet on a form supplied by the Board identifying the applicant, the name, training and experience of all speakers, the proposed date(s) of the course, the host facility, the place where applications for enrollment should be sent, the cost, and the total continuing education hours being offered.

(b) Preliminary review of course applications shall be carried out by a committee appointed by the Board, that shall include some providers of approved courses. Committee recommendations shall be presented to the Board for final approval.

(c) As a condition of course approval, providers shall agree to submit to the board, in the form provided by the Board, an alphabetical listing of all licensees who attended and completed the course and a copy of any course materials distributed to participants together with certification that the course was provided consistent with the application. The foregoing

information shall be submitted within 15 days of the course date set out on the application.

(d) Providers who fail to provide the information set forth in Paragraph (c) of this Rule shall not thereafter be approved to conduct a course.

(e) Licensees may select courses other than those offered by pre-approved providers while attending out of state educational functions. In order to obtain approval, the licensee must submit a written application for approval on a form obtained from the Board upon completion of each such course. In lieu of such form, an advertising brochure may be submitted, provided the

brochure includes the topic, content of lecture material, date, time, location, name and qualifications of speaker and the number of contact hours received upon completion of the program. The licensee must also provide independent verification of attendance. Board evaluation of courses not pre-approved may result in disapproval.

History Note: Authority G.S. 87-21(b)(3); 87-22;

Eff. April 1, 2001;

Amended Eff. January 1, 2010; April 1, 2003.

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) 431-3000. 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

Beecher R. Gray	Randall May
Selina Brooks	A. B. Elkins II
Melissa Owens Lassiter	Joe Webster
Don Overby	

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
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A list of Child Support Decisions may be obtained by accessing the OAH Website: <http://www.ncoah.com/hearings/decisions/>

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Choices Group Home Inc., Victor Vega v. N.C. Department of Health and Human Services	08 DHR 2404	Gray	07/16/09	
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Edward Royal, Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry	08 DHR 2698	Overby	05/27/09	
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Angela Conner Tawes, Conner's Cape Hatteras Supermarket, Inc v. North Carolina Department of Health and Human Services	09 DHR 2717	Gray	06/15/09
Melonie L. Keith, John David Keith v. Central Billing DHHS Controllers Office	09 DHR 2779	Webster	10/22/09
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Ross Patton Gilmore v. North Carolina Alarm Licensing Board	09 DOJ 2452	Morrison	06/04/09
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Jacqueline H. Davis v. NC Dept. of Correction	08 OSP 2342	Overby	08/19/09	
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James Tyler Utt v. UNC Hospitals	09 UNC 2892	May	09/22/09	
Alan Greene v. UNC Hospitals	09 UNC 2894	Overby	08/04/09	
Angela M. Aldridge v. UNC Hospitals	09 UNC 3338	Elkins	10/08/09	
Kathleen G. Finch v. UNC Hospitals	09 UNC 3418	Gray	08/31/09	
R. Michael Pearson v. UNC Hospitals	09 UNC 3423	Gray	08/31/09	
Darice Witherspoon v. UNC Hospitals	09 UNC 3428	Gray	07/30/09	
Timothy H. Keck v. UNC Hospitals	09 UNC 3528	Gray	08/06/09	

CONTESTED CASE DECISIONS

Marion Munn v. UNC Hospitals	09 UNC 3531	Gray	08/31/09
Cynthia D. Baker v. UNC Hospitals	09 UNC 3680	Gray	09/02/09
Eilene Renee Alston v. UNC Hospitals	09 UNC 3926	Gray	08/31/09
Karen E. Current v. UNC Hospitals	09 UNC 4019	Gray	09/08/09
John C. Presley v. UNC Hospitals	09 UNC 4020	Gray	07/21/09
Alberto Berri v. UNC Hospitals	09 UNC 4718	Overby	10/06/09

Filed

STATE OF NORTH CAROLINA
COUNTY OF PENDER

2009 JUN 22 PM 12:00

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 EHR 1765

Office of
Administrative Hearings

Robert Taylor, Grier Fleischauer, Sue Banks,
and Carol Faley,
Petitioners,

vs.

North Carolina Department of Environment
and Natural Resources, Division of Coastal
Management,
Respondent,

and

TP, Inc.,
Intervenor-Respondent.

DECISION

This contested case was commenced on October 25, 2007 by the filing of a petition. The parties filed cross-motions for partial summary judgment on a cantilevering issue which motions were heard before Administrative Law Judge Beecher R. Gray on 22 May 2008 in Raleigh, North Carolina. An oral decision denying Petitioners' motion and allowing partial summary judgment in favor of Respondent and Intervenor-Respondent on the cantilevering issue was rendered at the close of arguments.

This contested case was heard in 2008 in New Bern, North Carolina on June 30, July 1-3, August 19-21 (plus a site visit on August 22), October 1-3, and October 6-8; and in Raleigh, North Carolina on October 14, November 5, November 12-14, December 2-3, and December 7 (all said hearing dates between 30 June 2008 and 7 December 2008 collectively are referred to herein as the "Hearing"), regarding the 6 September 2007 issuance of three minor permits under the Coastal Area Management Act ("CAMA") for the construction of three single family dwellings on property owned by TP, Inc. in Topsail Beach, Pender County North Carolina, which three permits are CAMA Minor Development Permit numbers TB07-17, TB07-18, and TB07-19 (the three permits collectively are referred to herein as the "Permits").

On 16 December 2008, the undersigned issued a ruling by telephone conference call that the Permits properly were issued. Respondent and Intervenor-Respondent filed a joint proposed decision on March 20, 2009. Petitioners filed a proposed decision in the form of a detailed response and motion to reconsider on May 29, 2009.

APPEARANCES

For Petitioners: I. Clark Wright, Jr., Esq.
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New Bern, NC 28560

For Respondents: Elizabeth J. Weese, Esq.
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ISSUE

Whether Town of Topsail Beach Local Permit Officer James Canady's issuance, with Respondent Division of Coastal Management's consultation and concurrence, of three minor development permits for construction of three single family residences on the beachfront on Topsail Beach is supported by the evidence as proper under Article 7, the Coastal Management Act, of Chapter 113A of the General Statutes of North Carolina and applicable rules.

PARTIAL SUMMARY JUDGMENT ISSUE

Whether Respondent's practice of permitting use of cantilevered development oceanward of the ocean erosion setback is a correct interpretation of 15A NCAC 7H.0306 (the "Cantilever Issue").

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 113A, Article 7, Coastal Area Management Act,
15A N.C.A.C. Chapter 7, Coastal Management

WITNESSES

For Petitioner:

- Carol Faley
- Gloria Faley
- Sue Bankes
- James H. Gregson, Director,
Division of Coastal Management
- Jon Giles, Field Representative
Division of Coastal Management
- James Canady, Local Permit Officer
Town of Topsail Beach

-
- Mike Giles
 - Nick Phillips
 - Robert "Buck" Taylor
 - Ronald Bryant, President
TP, Inc.
 - Grier Fleischauer
 - Gary Mitchell
 - Roger Schechter
 - Ted Sampson
 - Michael Ted Tyndall, Assistant Director for
Permits
and Enforcement, Division of Coastal
Management

For Respondent:

- James Canady, CAMA Local Permitting Official
Town of Topsail Beach
- Jon Giles, Field Representative
Division of Coastal Management
- James Gregson, Director
Division of Coastal Management
- Michael Ted Tyndall, Assistant Director for
Permits and Enforcement, Division of Coastal
Management

For Respondent-Intervenor:

- Ronald Bryant, President
TP, Inc.
- Nick Phillips
- James Gregson, Director
Division of Coastal Management

· Michael Ted Tyndall, Assistant Director for
Permits and Enforcement, Division of Coastal
Management
· James Canady, CAMA Local Permitting Official
Town of Topsail Beach

MOTIONS

1. Respondent and Intervenor-Respondent filed motions for partial summary judgment and memoranda of law in support of a ruling on the Cantilever Issue allowing cantilevering. Petitioners also filed a motion for partial summary judgment and a memorandum of law on the Cantilever Issue in opposition to allowing cantilevering. On 22 May 2008, the undersigned heard cross motions for partial summary judgment and, after considering the briefs and oral arguments of the parties, granted partial summary judgment in favor of Respondent and Intervenor-Respondent. The Decision granting partial summary judgment on the cantilevering issue for Respondent and Intervenor-Respondent is set forth below.
2. On or about 23 June 2008 Petitioners filed a Motion to Compel Respondents to provide copies of digital files containing photographs previously provided by Respondent in hard copy. Respondent voluntarily provided the digital files and Petitioners subsequently withdrew that Motion.
3. Petitioners' May 29, 2009 response to Respondent and Intervenor-Respondent's March 20, 2009 proposed decision contained an informal motion to reconsider. The undersigned has considered the motion to reconsider together with all of the evidence produced in this contested case and the proposed decision as well as Petitioners' response and, accordingly, issues the following findings of fact, conclusions of law, and decision.

FINDINGS OF FACT

Based upon careful consideration of the evidence presented at the hearing, the pleadings, and entire record of this case, the undersigned hereby finds as follows:

Procedural History

1. On 17 August 2007, Intervenor TP, Inc., through Nick Phillips as its authorized agent for CAMA permitting purposes, applied for three CAMA minor permits to construct single family residences on properties which then were owned by Nick Phillips and Dean Phillips and which were located in Topsail Beach, North Carolina at: 1811 Ocean Boulevard also known as Lot 6; 1901 Ocean Boulevard also known as Lot 7; and 1903 Ocean Boulevard also known as Lot 8 (all three lots are collectively referred to herein as the "Three Lots"). These three lots are adjacent to each other and adjacent to and south of a handicapped accessible public beach access. At the time the applications were submitted, TP, Inc. had contracted to purchase the Three Lots.

2. On 6 September 2007, the CAMA local permit officer for the town of Topsail Beach issued the three subject CAMA minor permits. The permit numbers are TB07-17 for 1811 Ocean Boulevard, TB07-18 for 1901 Ocean Boulevard, and TB07-19 for 1903 Ocean Boulevard. Said permits earlier were defined as the "Permits."
3. On 26 September 2007, Petitioners filed their Third Party Hearing Request. The petition for contested case hearing also named the CRC as a respondent. By stipulation at the contested case hearing, the CRC was deleted as a respondent. In this case, the Town's local permit officer ("LPO") for CAMA acted as an agent of the State in granting Petitioners' application for three CAMA minor development permits. His actions in relation to the Property regarding CAMA were taken solely in his capacity as an agent for DCM under N.C.G.S. § 113A-116 and N.C.G.S. § 113A-121, and consequently he should not individually be listed as a Respondent.
4. On 10 October 2007, the Chairman of the Coastal Resources Commission ("CRC"), Courtney T. Hackney, granted in part and denied in part Petitioners' Third Party Hearing Request.
5. On 25 October 2007, Petitioners filed a Petition for Contested Case Hearing.

The Parties

6. Petitioners are Robert Taylor, Grier Fleischauer, Sue Bankes, and Carol Faley ("Petitioners"). Petitioners own property immediately across Ocean Boulevard from the Three Lots.
7. Respondent is the North Carolina Department of Environment and Natural Resources ("DENR" or "Agency"), Division of Coastal Management ("DCM" or "Division" or "agency").
8. The Intervenor-Respondent/Permittee, TP, Inc., is a North Carolina corporation that proposes to build a single family residence on each of the Three Lots.

Legal Framework, Jurisdiction, and Rules

9. The relevant statutes in this case are located at N.C.G.S. § 113A, Article 7, "Coastal Area Management." Also applicable are the associated administrative rules for coastal management, found at 15A N.C.A.C. 07, *et seq.* These are the rules of the Coastal Resources Commission ("CRC") for the administration of CAMA, referred to as state guidelines.
10. The Three Lots are within an Inlet Hazard Area, which is a subset of the Ocean Hazard Area of Environmental Concern.
11. The Three Lots are subject to an erosion setback requirement set forth in 15A NCAC 7H.0306. The applicable erosion setback requirement is sixty (60) feet from the "vegetation line" or "measurement line." 15A NCAC 7H.0306. "Vegetation

line” is defined in 15A NCAC 7H.0305(f). A “vegetation line” or “measurement line” marked on the ground is referred to herein at times as the “first line of stable natural vegetation call” or “FLSNV Call.” The first line of stable natural vegetation call made on 27 June 2007, which is the underlying line call for the Permits, is referred to herein as the “27 June 2007 FLSNV Call.”

Key Facts

History of Planting/Irrigating/Fertilizing and Reliance Thereon in the Purchase and Sale of the Three Lots

12. In 2003 and 2004, Nick Phillips observed numerous planted/irrigated/fertilized beachfront properties on Topsail Island that received FLSNV Calls in areas of planted/irrigated/fertilized vegetation on those particular properties.
13. In 2004 and 2005, Nick Phillips planted/irrigated/fertilized approximately 9 lots (not including the Three Lots), and all of those lots successfully received FLSNV Calls in the area of the planted/irrigated/fertilized vegetation.
14. There are numerous examples of properties on Topsail Island which have received FLSNV Calls in areas of vegetation that had been planted/irrigated/fertilized.
15. Immediately prior to the purchase of the Three Lots referenced in the next finding of fact, the location of a likely FLSNV Call (one formally had not been made) on the Three Lots would have resulted in the Three Lots being deemed unbuildable.
16. In 2006, in reliance on Nick Phillips’ observations and personal experiences that planted/irrigated/fertilized vegetation was acceptable to DCM and/or LPO’s and could be the basis for a FLSNV Call, Nick Phillips and Dean Phillips purchased the Three Lots with the intent of obtaining a FLSNV Call in an area of planted/irrigated/fertilized vegetation by following the same successful processes that Nick Phillips previously had observed as well as utilized.
17. Between the planting of the Three Lots in the spring of 2006 and the 27 June 2007 FLSNV Call, Nick Phillips planted/irrigated/fertilized the Three Lots in a manner consistent with his procedure on the aforementioned other 9 lots. On 21 June 2007, LPO Canady made a preliminary staking of the FLSNV on the subject three lots. At the time of this preliminary staking of the FLSNV, LPO Canady, already exposed to persistent opposition from Petitioners, had a significant degree of anxiety about the impending controversy he believed would ensue if the CAMA permits were issued. The land owner was disturbed by that FLSNV call and sought consultation by DCM.
18. On 27 June 2007, the local permit officer, Jimmy Canady, with the assistance and guidance of Ted Tyndall, Assistant Director for Permits and Enforcement of DCM, marked a FLSNV Call on the Three Lots as shown on Exhibit IR314 (TP00324-TP00330), which are attached hereto as Exhibit A, and as located on Exhibit R1, p. 25; Exhibit R2, p. 52; and Exhibit R3, p. 75, 8½ x 11 copies of which are attached

hereto as Exhibit B (said FLSNV call made on 27 June 2007 and shown and located on the aforementioned exhibits is referred to herein as the "27 June 2007 FLSNV Call").

19. Michael Ted Tyndall began working for the Division in 1992. He has been the Assistant Director for Permitting and Enforcement since 2004. Mr. Tyndall holds both a bachelor's and master's degree in biology, as well as an MBA, from East Carolina University. Mr. Tyndall was accepted by the Court as an expert witness in the areas of implementation and enforcement of CAMA and the rules promulgated thereunder; coastal biology and plant identification, delineation of the first line of stable natural vegetation, and coastal management. (T pp. 2968-2964; 2994-2999)
20. Mr. Tyndall met on site with LPO Canady, on 27 June 2007. His role on that date was to determine the Division's position on the line call and to provide guidance to the LPO. He and LPO Canady engaged in a discussion about the vegetation as it related to the characteristics necessary to be considered stable and natural. Mr. Tyndall testified that in his expert opinion LPO Canady's decision to move the FLSNV oceanward of his first call on 21 June 2007 was proper.
21. James H. Gregson is the Director of the Division of Coastal Management. He was accepted by the Court as an expert witness in the areas of CAMA implementation and enforcement and the application and interpretation of the state guidelines adopted under CAMA, including but not limited to determination of the first line of stable natural vegetation.
22. Director Gregson testified about his extensive experience delineating first lines of stable natural vegetation along the North Carolina coast. He has made hundreds of first line calls. He has delineated first lines on most of North Topsail Beach, Surf City and Topsail Beach. Director Gregson also has delineated miles of FLSNV in Brunswick County, on all of Figure Eight Island, and on at least two miles of Bald Head Island.
23. Director Gregson and Assistant Director Tyndall routinely conduct staff training in how to determine the first line of stable natural vegetation.
24. The majority of FLSNV determinations made by Director Gregson have involved planted vegetation.
25. Since 1997, especially on Topsail Island, almost every oceanfront lot has been planted either by the towns or by property owners.
26. On 27 June 2007, Director Gregson saw where the LPO had marked a FLSNV on the subject three lots on 21 June 2007. Director Gregson saw no difference between the vegetation where the line was marked on 21 June 2007 and the vegetation where the line subsequently was marked farther oceanward on 27 June 2007.
27. Because 15A NCAC 7H .0305(f) refers to the FIRST line of stable natural vegetation, as opposed to a line of stable natural vegetation, both Assistant Director

Tyndall and Director Gregson supported the LPO's decision to move the FLSNV seaward.

28. Prior to TP, Inc.'s purchase of the Three Lots, Ron Bryant, President of TP, Inc., was familiar with DCM's and LPO's practice of making FLSNV Calls in the areas of planted/irrigated/fertilized vegetation.
29. On 6 August 2007, in reliance upon his understanding of DCM's and LPO's practices with respect to the propriety of planted/irrigated/fertilized vegetation being satisfactory for a FLSNV, TP, Inc. entered into a contract to buy the Three Lots from Nick Phillips and Dean Phillips.
30. On 11 September 2007, in reliance upon his understanding of DCM's and LPO's practices with respect to the propriety of planted/irrigated/fertilized vegetation being satisfactory for a FLSNV, TP, Inc. bought the Three Lots for \$1,000,000.00.

FLSNV-DCM/LPO Interpretation

31. The long-standing interpretations of DCM staff and LPO's of what is meant by a "first line of stable natural vegetation" can be summarized as follows, based upon cumulative testimony of witnesses in this hearing:

"Stable natural vegetation", as it is used in the CAMA rules, contemplates several factors working in conjunction with each other. "Stable natural vegetation" is applied on a lot-by-lot basis with the various factors receiving different weights based upon the specific circumstances of the vegetation at issue. "Stable natural vegetation" begins with the existence of plant species that can survive in sand dunes or that are native to the surrounding dune areas [the "natural" component], whether planted/watered/fertilized or not. "Stable natural vegetation" generally is vegetation which has existed over a certain period of time, which time period is dictated by case-by-case circumstances (the time could be less than a year, it could be a year, or it could be more). Because a first line of stable natural vegetation is a representation of the seasonal limit of wave induced erosion and exposure to salt water, it serves as a more consistent basis for setback regulations than the more varying wet/dry sand line. The passage of such a time period reveals how the vegetation survives in relation to a sufficient period of tidal events [the "stable" component]. The time period typically includes a winter storm season. In addition, the passage of time reveals whether the vegetation has shown the ability to mature and survive over the long term [the "stable" component]. It is important to see if, over the time period, the vegetation has propagated by rhizomes or seeds

[the "natural" component and the "stable" component]. The propagation of the vegetation by rhizomes or seeds in turn results in a density of the vegetation that is indicative of stability [the "stable" component]. Moreover, the appearance of developed root structures is a further indication of stability [the "stable" component]. The "first line" generally is that "stable natural vegetation" first encountered as one moves landward from the ocean.

32. A first line of stable natural vegetation is a good point from which to measure setbacks because, unlike the high water line or the wet-dry line on the beach, the first line of stable natural vegetation is very indicative of where the seasonal limit of wave-induced erosion is located.
 33. Petitioners' and Respondents' expert witnesses stated that FLSNV Calls can be made within one year of planting the vegetation.
-
34. The determination of a first line of stable natural vegetation is a judgment call.

FLSNV-Variety of Species

35. The following species of vegetation that commonly grow and survive on Topsail Island and are native to Topsail Island were planted in the vegetated area of the Three Lots in the spring of 2006: Spartina Patens, Seashore Elder, Bitter Panicum and American Beachgrass. The individual root stems of those plants generally were placed around 1 foot or more apart from each other.
36. On 27 June 2007, the following species existed within the vegetated area on the Three Lots in the vicinity of the FLSNV Call made on that day: Spartina Patens, Seashore Elder, Bitter Panicum, American Beachgrass, as well as Pennywort/Hydrocotyle and Dollarweed.
37. Pennywort/Hydrocotyle and Dollarweed are species of vegetation that commonly grow and survive on Topsail Island and are native to Topsail Island.
38. On 27 June 2007, the vegetation in the area of the FLSNV Call consisted of a variety of species of vegetation that grow and survive in such dune areas and are native to such dune areas.
39. On 27 June 2007, the vegetation in the area of the FLSNV Call consisted of vegetation that had been planted as well as a majority of the vegetation that had filled in via migration or propagation by rhizomes or seeds.
40. Notwithstanding the variety of species present on the subject three lots on 27 June 2007, vegetation of one primary type (i.e., a monoculture) does not prevent a FLSNV Call.

41. Nick Phillips had observed and experienced numerous properties where FLSNV Calls were made in areas where the vegetation was of one primary type.

FLSNV-Passage of Time (survival/stability, naturalness/propagation,

density, maturity)

42. Over the period of almost 15 months from the time the vegetation was planted in the spring of 2006 until 27 June 2007, the vegetation (including that which had been planted, that which had arisen by rhizome or seed propagation, and that which had migrated to the planted area) survived summer and winter storm seasons. Those summer and winter storm seasons included 3 Nor'easters and 2 tropical storms which specifically included Tropical Storm Ernesto.
43. During that same time period, and as of 27 June 2007, the vegetation propagated by way of rhizomes, seeds, and migration to the point that the density of the vegetation in the area of the 27 June 2007 FLSNV Call was such that one hardly could see the sand through the vegetation. The density of the vegetation in that area increased significantly from the spring of 2006, as is evident in IR-308, to 27 June 2007, as evidenced by IR 314 (TP 330). As of 27 June 2007, the vegetation in that area was very dense such that it was stable in and of itself and it enhanced the stability of the already stable dunes.
44. During that same time period, and as of 27 June 2007, the vegetation in the area of the 27 June 2007 FLSNV Call developed deep and extensive root structures.
45. On 27 June 2007, the vegetation in the planted area had grown significantly and had gone through the natural process of propagation via rhizome and seeds.
46. On 27 June 2007, the vegetation in the area of the 27 June 2007 FLSNV Call was mature.
47. On 27 June 2007, the vegetation and dunes in the planted area were not shifting or fluctuating in position other than the fact that the frontal dune had grown significantly from an accumulation of trapped wind blown sand (the growth of the dune was not the result of any pushing of sand by machinery or other implement). The vegetation in the planted area provided resistance to displacement of the dunes such that the dunes and vegetation had not been dislodged prior to 27 June 2007.
48. As of 6 September 2007, none of the facts set forth in the preceding six findings of fact had changed.

FLSNV- "More Stable Upland Area"

49. At the time of planting in the spring of 2006, the area where the 27 June 2007 first line of stable natural vegetation ultimately was called was an area just immediately seaward of the most seaward fence posts for all of the fencing on the Three Lots other than the northern-most and southern-most end pieces of the sand fencing (see

pink line on IR 308), which also was the area where the seaward toe of the frontal dune was located at that time and which was an elevated and more stable upland area.

50. As of 27 June 2007, the area of the FLSNV Call was an elevated dune area that was a more stable upland area.

FLSNV-Planting/Irrigating/Fertilizing

51. For at least a decade, DCM staff members have interpreted 15A NCAC 7H.0305 to allow planted/watered/fertilized vegetation to satisfy the requirement of "stable natural vegetation." (T pp. 292-293; 297-298; 3072-3073).
52. Hundreds of first line calls have been made by DCM staff or LPO's along the North Carolina coast in areas of planted/irrigated/fertilized vegetation.
53. DCM staff and the Town of Topsail Beach encourage planting of dunes in order to stabilize the dunes. Mr. Tyndall has encouraged irrigation and fertilization.
54. There is no CRC rule which prohibits a FLSNV Call in an area where planted vegetation has been irrigated and fertilized.
55. DCM does not have a policy that a FLSNV Call cannot be made in an area where planted vegetation has been irrigated and fertilized.

FLSNV-27 June 2007 FLSNV Call and Seaward Toe of Frontal Dune

56. The location of the 27 June 2007 FLSNV Call generally is in an area at or just immediately oceanward of where the seaward toe of the frontal dune was located in the spring of 2006.
57. The location of the 27 June 2007 FLSNV Call is landward of where the seaward toe of the frontal dune was located on 27 June 2007.
58. As illustrated by IR-340, the setback line on the Three Lots will result in the placement of structures in a location consistent with the location of new structures north of the Three Lots and more landward of existing older structures north of the Three Lots.

The 21 June 2007 Line Call

59. The 21 June 2007 line call by LPO Canady was conservative, restrictive, and stringent. LPO Canady could see that the vegetation line was growing seaward and knew that permit issuance was going to be controversial; he already had been lobbied by one or more of the Petitioners in opposition to issuance of permits for these three lots and was, as he put it, "dreading to have to deal with the controversy that he knew was coming".

60. The 21 June 2007 line call was not the first line of stable natural vegetation.
61. As of 27 June 2007, the seaward extent of the vegetation on the Three Lots and seaward toe of the frontal dune on the Three Lots were in locations consistent with the then-existing seaward extent of vegetation in some locations extending both south and north of the Three Lots and the extent of the seaward toe of the frontal dune extending both south and north of the Three Lots.
62. As of the end of May of 2008 and as illustrated by IR-33A, the seaward extent of the vegetated area on the Three Lots and the seaward toe of the frontal dune on the Three Lots are consistent with the seaward extent of vegetation and the seaward toe of the frontal dune along the beach both north and south of the Three Lots.
63. There was expert testimony from Respondents, as well as from Petitioners, that extrapolation (or interpolation) was not applicable in a situation such as this case.

The Process of Marking The Line on 27 June 2007

64. On 27 June 2007, James Canady (the Topsail Beach LPO), Jim Gregson (current Director of DCM) and Ted Tyndall (DCM Assistant Director for Permits and Enforcement) met at the Three Lots.
65. On 27 June 2007, LPO Canady, Director Gregson, and Assistant Director Tyndall spent between 45 minutes to 1 hour at the Three Lots in reaching a decision as to where the first line of stable natural vegetation was located.
66. On 27 June 2007, in determining the first line of stable natural vegetation, the following factors were observed and/or considered: (i) that there were a variety of species in the planted area on the Three Lots that grow and survive on Topsail Island or that are native to Topsail Island; (ii) that the vegetation had survived for almost 15 months which included summer and winter storm seasons and which included Tropical Storm Ernesto; (iii) that the plants were stable and had developed root structures and the dunes were stable; (iv) that the vegetation was mature; (v) that the vegetation had gone through the natural process of propagation by way of rhizomes, seeds, and migration such that the majority of stems were from rhizomes or migration and not from planted individual root stems; and (vi) that the vegetation was very dense.
67. The first line call decision on 27 June 2007 was done in a careful and deliberate manner.
68. Director Gregson was very familiar with the Three Lots because he had visited them approximately 6 times between the spring of 2006 and 27 June 2007.
69. LPO Canady also was familiar with the Three Lots.
70. The 27 June 2007 FLSNV Call was made by LPO Canady with the assistance and guidance of Assistant Director Tyndall and the concurrence of Director Gregson.

FLSNV-The Post Permit "No Name" Storm

71. To the extent that it is relevant to consider the impact of the after-the-fact 24-26 September 2008 sub-tropical storm, which the undersigned Judge concludes is irrelevant in the Conclusions of Law that follow, the Court finds that only about 10 inches of vegetation landward of the 27 June 2007 FLSNV call located on Lots 7 and 8 was lost and about 2 to 3 feet of vegetation landward of the 23 June 2007 call on the northern end of Lot 6 was lost.

Management Objectives and Use Standards

72. DCM has a long-standing interpretation of 15A NCAC 7H.0303 that one way the management objectives are enforced is through the setback rules.
73. Management objectives, as well as use standards, must be met prior to permit issuance. One of the primary ways this is accomplished is by placing conditions on the CAMA permit such that no development will be allowed that is inconsistent with the local land use plan or any other applicable state or federal regulations.
74. In applying 15A NCAC 7H.0303(a), the proposed development setback from the 27 June 2007 FLSNV Call does not create an unreasonable danger to life and property.
75. Approval and affirmation of the 27 June 2007 FLSNV Call and the Permits issued on 6 September 2007 strikes a proper balance between the financial, safety, and social factors that are involved in ocean hazard area development.

Enhancement of Dunes

76. The stability of sand dunes is enhanced when they build up with sand.
77. Sand fencing and vegetating are means of building up dunes with sand; dunes built up with sand are beneficial to dune systems.
78. For dunes to grow from wind blown sand, there has to be dry sand beach seaward of the dunes. The dunes in the vegetated area of the Three Lots grew from the spring of 2006 through and beyond 27 June 2007 because of sand being blown by the wind from dry sand beach areas seaward of the vegetated areas onto the Three Lots.

The "Development" Issue

79. DCM's long-standing interpretation of N.C. Gen. Stat. § 113A-103(5)a is that planting is not "development."
80. In the spring of 2006, Nick Phillips planted individual root stems of Bitter Panicum, American Beachgrass, Spartina Patens, and Seashore Elder shown on Exhibit P-55, a copy of which is attached hereto as Exhibit C.

81. In the Petition for Contested Case hearing, Petitioners repeatedly alleged that the Three Lots had been subjected to "sand farming" which resulted in a "crop" and "agricultural crop" being grown.
82. The Permits challenged in this action do not explicitly cover the planting in 2006, but each instead provides, in pertinent part: "This permit authorizes: CONSTRUCTION OF A FOUR BEDROOM SINGLE FAMILY DWELLING ON PILINGS WITH DRIVEWAY, PARKING AREA, SEPTIC SYSTEM, STORM WATER SYSTEM, BEACH ACCESSWAY AND LANDSCAPING."

The Town Planning Board Issue

83. With respect to any factual issue regarding whether the three applications for minor permits were presented to the Topsail Beach town Planning Board for review, which was not raised for the first time until after September of 2008, Petitioners did not satisfy their burden of proof and the Court does not find that the applications were not submitted to the Planning Board.
84. Jimmy Canady was Topsail Beach's "designated local official" under N.C. Gen. Stat. § 113A-121 and Topsail Beach's "local permit officer" under 15A NCAC 7H.0102(f). In addition, Jimmy Canady was Topsail Beach's "permit officer" and "minor development officer" under Topsail Beach Ordinance §§ 14-57 and 14-59, respectively.

The Sand Fencing Issue

85. DCM staff and LPO's exercise judgment and discretion in applying CAMA sand fencing rules.
86. 15A NCAC 7K.0212 was enacted in 2002 and 15A NCAC 7H.0308(b) was enacted prior to 2002.
87. Prior to 2002, sand fencing was not considered "development" under CAMA and did not require a permit. Even though sand fencing now is subject to regulation under CAMA, sand fences which are installed and maintained under 15A NCAC 7K.0212 are exempt from permit requirements.
88. DCM has a long standing interpretation of 15A NCAC 7K.0212(c) whereby it allows sand fencing under circumstances similar to those in this case.
89. All of the sand fencing on the Three Lots was: (i) installed at angles of no less than 45 degrees to the shoreline; (ii) installed such that each section was no less than 7 feet apart. All sections of sand fencing were 10 feet or less in length except the northern-most end piece which equaled the length of the public accessway from CAMA access no. 18. All of the sand fencing on the Three Lots was reviewed by Director Gregson and DCM and considered compliant with the CAMA rules.

90. Except for the northern-most end piece of sand fencing and the southern-most end piece of sand fencing, all of the remaining sand fencing on the Three Lots was landward of the 27 June 2007 FLSNV Call.
91. Except for the northern-most end piece and southern-most end piece of the sand fencing, all of the remaining sand fencing on the Three Lots existed landward of the seaward toe of the frontal dune at the time of the placement of the sand fencing in the spring of 2006 and thereafter.
92. At the time of the 27 June 2007 FLSNV Call, the northern-most and southern-most end pieces of sand fencing extended to the general location of the seaward toe of the frontal dune, and all of the remaining sand fencing on the Three Lots was landward of the seaward toe of the frontal dune.
93. The northern-most end piece and southern-most end piece of sand fencing extended seaward no further than 10 feet from the seaward toe of the frontal dune at the time of the placement of the sand fencing in the spring of 2006 and thereafter.
94. The Permits challenged in this action do not explicitly cover the placement of sand fencing in 2006, but instead provide, in pertinent part: "This permit authorizes: CONSTRUCTION OF A FOUR BEDROOM SINGLE FAMILY DWELLING ON PILINGS WITH DRIVEWAY, PARKING AREA, SEPTIC SYSTEM, STORM WATER SYSTEM, BEACH ACCESSWAY, AND LANDSCAPING."

The Public Trust Issue

95. Notwithstanding DCM's interpretation that the planted vegetation on the Three Lots is not "development," the location of the planted vegetation on the Three Lots generally and in relation to the location of CAMA access ramp no. 18 did not and does not result in an interference with the public's access to or use of the ocean or the public trust portions of the beach in the vicinity of the Three Lots.
96. From the time of planting of the Three Lots in the spring of 2006 through the time of the 27 June 2007 FLSNV Call and the issuance of the Permits on 6 September 2007, the area on the Three Lots within the planted vegetation landward of the 27 June 2007 FLSNV Call was not subject to occasional flooding by tides, including wind tides other than those resulting from a hurricane or tropical storm.
97. From the time of planting of the Three Lots in the spring of 2006 through the time of the 27 June 2007 FLSNV Call and the issuance of the Permits on 6 September 2007, the area on the Three Lots within the planted vegetation seaward of the 27 June 2007 FLSNV Call was not subject to occasional flooding by tides, including wind tides other than those resulting from a hurricane or tropical storm.
98. After the issuance of the Permits on 6 September 2007, there was one time (which is less than occasional) between 24-26 September 2008 when only about 10 inches of lots 7 and 8 and only about 2 to 3 feet of the northern end of lot 6 were subjected to flooding by tides from a sub-tropical storm that had erosional impacts as great as

those experienced from tropical storms and hurricanes. The September 2008 unnamed storm had a significantly greater erosional impact on Topsail Beach than a tropical storm, Hurricane Hanna, that occurred about a week before. A storm of the magnitude of the September 2008 unnamed storm is rare. This unnamed storm was one of the factors which led to the Secretary of DENR's activation of certain provisions of CAMA Emergency General Permit 7H .2500. The difference between the unnamed September 2008 storm and a tropical storm is that the September 2008 unnamed storm did not originate in the tropics.

99. The area of the beach seaward of the Three Lots has been accreting since prior to 2003 and through and including 2008.
100. The location of the sand fencing on the Three Lots generally and in relation to the location of CAMA access ramp no. 18 did not and does not result in an interference with access to or use of the ocean or the public trust portions of the beach in the vicinity of the Three Lots.

-
101. The proposed location of the items explicitly authorized by the Permits will not be an interference with access to or use of the public trust portions of the beach in the vicinity of the Three Lots.
 102. In the near and immediate vicinity of the Three Lots, there is ample and sufficient areas of beach for use of the public as such beach customarily is used.

The Public Comments Issue

103. Jimmy Canady reviewed, or already was aware of the substance of, the submitted written public comments prior to the Permits being issued on 6 September 2007.
104. Jimmy Canady already was aware of the substance of the written public comments before they were submitted to him as one or more of the Petitioners had been in contact with him informing him of reasons to oppose the requested permits.

The Dune Protection Ordinance Issue

105. Prior to issuance of the Permits on 6 September 2007, LPO Canady determined that the planned development under the applications for the minor permits complied with the Dune Protection Ordinance of the Town of Topsail Beach and did not and would not weaken the dune systems on the subject Three Lots.

The Compliance with Ordinances/Regulations/Rules Issue

106. Prior to the issuance of the Permits on 6 September 2007, Jimmy Canady had considered and determined compliance with rules, regulations, or ordinances relating to the following: septic permits, setbacks, zoning and flood plain, flood zone elevation, electrical, storm water program, dune protection ordinance, "and others" as open-endedly asked by Petitioners and answered by LPO Canady.

The Watering Issue

107. From the time that the vegetation was planted in the spring of 2006 until the permits were issued on 6 September 2007, the Town of Topsail Beach took the position that the irrigation efforts of Dean and Nick Phillips were authorized and proper.
108. The watering conducted by Nick and Dean Phillips on the Three Lots prior to the issuance of the CAMA Permits was undertaken through permission granted by the Town of Topsail Beach.
109. Nick Phillips was informed by Director Gregson of DCM that the irrigation of the Three Lots was not regulated under CAMA .
110. N.C.G.S. § 150B-34(a) provides that "[t]he administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." As such, due regard should be afforded to the DCM staff who have specialized knowledge in their respective resource areas (e.g., delineation of the first line of stable natural vegetation, coastal development, etc.).
111. Under N.C.G.S. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dep't of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, rev. denied, 341 N.C. 418, 461 S.E.2d 745 (1995).

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this case under N.C.G.S. § 113A-121.1 and N.C.G.S. § 150B-23.
2. All parties correctly have been designated and properly are before the Office of Administrative Hearings, with no questions of misjoinder or nonjoinder of parties. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter.

3. Under N.C.G.S. § 113A-113(a) and (b)(6), the Coastal Resources Commission has designated Areas of Environmental Concern and has adopted use standards or state guidelines for development within them, located at 15A N.C.A.C. 07H.0100, et seq. Under CAMA, "development" in an area of environmental concern ("AEC") requires a permit. N.C.G.S. § 113A-118. The proposed four bedroom single family dwellings on pilings with driveways, parking areas, septic systems, storm water systems, beach access-ways, and landscaping constitute "development" and are located in an AEC; they, therefore, require minor CAMA permits.
4. Petitioners bear the burden of proof on the issues. Peace v. Employment Sec. Comm'n, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998); see also Overcash. Britthaven v. N.C. Dept. of Human Resources, 118 N.C. App. 379, 382, 455 S.E. 2d 455, 461, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995). To meet this burden, Petitioners must show by a preponderance of the evidence that Respondent substantially prejudiced their rights and that the agency 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 in issuing the Permits.
5. Under the provisions of G.S. 113A-120(b), DCM Staff must issue a permit for proposed development unless the development falls under one of the bases requiring denial found at N.C.G.S. § 113A-120(a).
6. Unless a development proposal is inconsistent with state guidelines or a local land use plan, an application must be granted under CAMA. N.C.G.S. § 113A-120(b).
7. If the Agency's conclusions regarding the regulations are not plainly erroneous or inconsistent with the regulations, the agency's conclusions of law should be upheld. Simonel v. N.C. School of the Arts, 119 N.C. App. 772, 775, 460 S.E.2d 194, 196 (1995).
8. It is commonly held that "longstanding interpretation of a statute by the administering agency should be given deference." MW Clearing & Grading v. N.C. Dep't of Env't and Natural Res., Div. of Air Quality, 171 N.C. App. 170, 186, 614, S.E.2d 568, 578 (2005) (Jackson, J., dissenting, which dissenting opinion was adopted as the basis for the Supreme Courts per curiam reversal at 360 N.C. 392, 628 S.E.2d 379 (2006)).
9. An "agency's construction of its own regulations is entitled to substantial deference . . . [and] must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Morrell v. Flaherty, 338 N.C. 230, 237-38, 449 S.E.2d 175, 179-80 (1994) (emphasis added).
10. Petitioners did not satisfy their burden of proof and the Court does not conclude that the Dune Protection Ordinance would be violated by the planned development under the subject three applications for the minor permits.
11. The planting of individual root stems as done on the subject three lots is not "development" under N.C. Gen. Stat. § 113A-103(5)a.

12. As admitted by Petitioners' own expert, former DCM Director Roger Schecter, and as acknowledged through cross-examination by another of Petitioners' experts, Ted Sampson, planting is not "development" under N.C. Gen. Stat. § 113A-103(5)a.
13. The planted area landward of the 27 June 2007 FLSNV Call was not subject to and did not interfere with or violate public trust rights:
 - a) between the time of planting in the spring of 2006 and 6 September 2007;
 - b) between the time of 6 September 2007 and the end of this hearing on 8 December 2008; or
 - c) during the period of accretion of the beach seaward of the Three Lots (from around 2003 through this hearing) and during any relevant time before the period of accretion.
14. ~~The planted area seaward of the 27 June 2007 FLSNV call was not subject to and did not interfere with or violate public trust rights:~~
 - a) between the time of planting in the spring of 2006 and 6 September 2007;
 - b) between the time of 6 September 2007 and the end of this hearing on 8 December 2008; or
 - c) during the period of accretion of the beach seaward of the Three Lots (from around 2003 through this hearing) and during any relevant time before the period of accretion.
15. The sand fencing within the planted area on the Three Lots never has been subject to and did not interfere with or violate public trust rights.
16. The improvements expressly authorized by the CAMA Permits are not subject to and will not interfere with or violate public trust rights.
17. Assuming, arguendo, that the vegetation planted on the Three Lots was in an area subject to public trust rights, the vegetation was not improper under the CAMA rules because it is not regulated as development under N.C. Gen. Stat. § 113A-103(5)a.
18. Assuming, arguendo, that the vegetation planted on the Three Lots and the sand fencing placed on the Three Lots, as well as the proposed improvements expressly authorized by the Permits, were in areas subject to public trust rights:
 - a) in light of the amount of beach available for customary use by the public, there was and is no material or unreasonable interference with or substantial prejudice to the public's access to and use of the public trust areas of the beach and

- b) in balancing the amount of beach available for customary use by the public and the benefit to the public derived by dunes which are strengthened by planting vegetation and installing sand fencing as occurred in this matter, on the one hand, and the private property interests of TP, Inc. and its predecessors-in-title, on the other hand, there has not been any improper interference with or violation of public trust rights from the planting of vegetation, the sand fencing, or the proposed improvements expressly authorized by the Permits.
19. Alternatively, Petitioners have no standing to assert public trust rights as a basis for invalidating the Permits.
20. Petitioners' challenges relating to sand fencing are not subject to review because sand fencing was not within the purview of the subject minor permits.
21. 15A NCAC 7K.0212 is applicable to this case because it applies to passive building of sand dunes from the trapping of windblown sand. The sand fencing on the subject three lots complied with 15A NCAC 7K.0212 and was proper. The sand fencing installed on the subject three lots did not require CAMA permits because it met the criteria of 15A NCAC 7K.0212, known as "the sand fence exemption."
22. 15A NCAC 7H.0308(b) is not applicable because it applies to active building of sand dunes such as machine or human pushing of sand. The sand fencing on the subject three lots was not prohibited by 15A NCAC 7H.0308(b).
23. To the extent that 15A NCAC 7H.0308(b) could be construed as applicable to the facts of this case, then 15A NCAC 7K.0212 controls because it is the more recent rule and deals more specifically with sand fencing. Moreover, application of 15A NCAC 7K.0212 over 15A NCAC 7H.0308(b) resolves the alleged ambiguity by construing the legislation in favor of the beneficial use of land by a private landowner where there is no demonstrated harm to the public trust interests.
24. Petitioners' own expert, Ted Sampson, admitted that application of CAMA rules relating to sand fencing involves the exercise of judgment and discretion and, therefore, deference is due to Respondents in this case. It is concluded that Respondent properly applied the sand fencing rules and that the sand fencing on the Three Lots was proper.
25. LPO Jimmy Canady complied with the public comment requirements of N.C. Gen. Stat. § 113A-119(b). Even if Jimmy Canady thoroughly did not read the 4 September 2007 public comments of Mr. Taylor as alleged, Petitioners were not substantially prejudiced because LPO Canady already was aware of the substance of the comments.
26. No applicable rules, regulations or ordinances (including the town's Dune Protection Ordinance and local CRC approved land use plan) would be violated by the proposed development on the Three Lots.

27. LPO Canady properly considered whether any applicable rules, regulations, or ordinances (including the Dune Protection Ordinance and local CRC approved land use plan) would be violated before he issued the Permits.
28. Under Section 4-138(2) of the town's Dune Protection Ordinance, a Dune Protection Ordinance permit shall not be issued until the applicant has secured necessary CAMA permits. LPO Canady complied with Section 4-138(2) in this case.
29. It is concluded that the meaning of "first line of stable natural vegetation" is summarized as follows:
- "Stable natural vegetation", as it is used in the CAMA rules, contemplates several factors working in conjunction with each other. "Stable natural vegetation" is applied on a lot-by-lot basis with the various factors receiving different weights based upon the specific circumstances of the vegetation at issue. "Stable natural vegetation" begins with the existence of plant species that can survive in sand dunes or that are native to the surrounding dune areas [the "natural" component], whether planted/watered/fertilized or not. "Stable natural vegetation" generally is vegetation which has existed over a certain period of time, which time period is dictated by case-by-case circumstances (the time could be less than a year, it could be a year, or it could be more). Because a first line of stable natural vegetation is a representation of the seasonal limit of wave induced erosion and exposure to salt water, it serves as a more consistent basis for setback regulations than the more varying wet/dry sand line. The passage of such a time period reveals how the vegetation survives in relation to a sufficient period of tidal events [the "stable" component]. The time period typically includes a winter storm season. In addition, the passage of time reveals whether the vegetation has shown the ability to mature and survive over the long term [the "stable" component]. It is important to see if, over the time period, the vegetation has propagated by rhizomes or seeds [the "natural" component and the "stable" component]. The propagation of the vegetation by rhizomes or seeds in turn results in a density of the vegetation that is indicative of stability [the "stable" component]. Moreover, the appearance of developed root structures is a further indication of stability [the "stable" component]. The "first line" generally is that "stable natural vegetation" first encountered as one moves landward from the ocean.
30. On 27 June 2007, the vegetation located where the 27 June 2007 FLSNV Call was made was stable and natural under 15A NCAC 7H.0305(f), and it was the first line of stable natural vegetation as one moves landward from the ocean on the Three Lots.

31. The species composition of the vegetation, maturity of the vegetation, density of the vegetation, stability of the vegetation and dunes, passage of time, and propagation of the vegetation via rhizomes of seeds was sufficient and appropriate to support the 27 June 2007 FLSNV Call.
32. Respondents correctly and properly determined the first line of stable natural vegetation on the Three Lots as the 27 June 2007 FSNV Call.
33. Consideration of the impact of the 23 September 2008 storm, which occurred approximately 15 months after the 27 June 2007 FLSNV Call made by LPO Canady, with consultation and concurrence by Director Gregson and Assistant Director Tyndal, is irrelevant with respect to the determination of whether a proper FLSNV Call was made on 27 June 2007.
34. Even if consideration of the 23 September 2008 storm were not irrelevant, the minimal impact it had in the area of the 27 June 2007 FLSNV Call ultimately supports affirmation of the 27 June 2007 FLSNV Call.
35. The longstanding and consistent DCM interpretation of 15 NCAC 7H.0305 in allowing planted/irrigated/fertilized vegetation for its protective value to the dunes system and the beachfront and to be considered for a FLSNV Call deserves deference from this Court and hereby is concluded to be appropriate.
36. The watering and fertilizing of the vegetation on the Three Lots was neither proven nor established by Petitioners to be improper.
37. In applying 15A NCAC 7H.0303(a), the proposed development setback from the FLSNV call does not create an unreasonable danger to life and property.
38. Approval and affirmation of the 27 June 2007 FLSNV Call and the Permits issued on 6 September 2007 strike a proper balance between the financial, safety, and social factors that are involved in hazard area development.
39. Because stable natural vegetation was present on the Three Lots on 27 June 2007, there was no basis for applying the fourth sentence of 15A NCAC 7H.0305(f) relating to extrapolation (or interpolation).
40. Petitioners have standing to bring this contested case related to the appropriateness of LPO Canady's issuance of the three permits, including possible environmental concerns resulting from the construction of the houses, but not from any alleged harm to their presently existing oceanfront view. Petitioners have not demonstrated by a preponderance of the evidence that the permitted development has substantially prejudiced their rights.
41. Petitioners have failed to demonstrate by a preponderance of the evidence that Respondent's decision to issue the Permits was improper. The Agency's conclusions regarding the applicable regulations are not plainly erroneous or inconsistent with the regulations.

42. Based upon a preponderance of the evidence at the hearing, and giving due regard to the demonstrated knowledge and expertise of Respondent with respect to facts and inferences within its specialized knowledge, Respondent's analysis was sufficient and its decision to issue the Permits was proper. N.C. Gen. Stat. § 150B-34.
43. By issuing the Permits, Respondent did not act outside its authority, act erroneously, act arbitrarily or capriciously, use improper procedure, or fail to act as required by law or rule. N.C.G.S. § 150B-23(a).
44. Based upon FLSNV Calls made in past situations under similar factual scenarios, any failure on 27 June 2007 to make a FLSNV Call as far seaward on the Three Lots as the 27 June 2007 FLSNV Call was made would be arbitrary and capricious.
45. There was no competent or specific evidence from Petitioners sufficient to satisfy their burden of proof and the Court does not find that, during the period of accretion (through the time of planting in the spring of 2006) and during any relevant time before the period of accretion, the area on the Three Lots within planted vegetation seaward of the 27 June 2007 FLSNV Call was subject to occasional flooding by tides, including wind tides, other than those resulting from a hurricane or tropical storm.
46. There was no competent or specific evidence from Petitioners sufficient to satisfy their burden of proof and the Court does not find that, during the period of accretion (through the time of planting in the spring of 2006) and during any relevant time before the period of accretion, the area on the Three Lots within planted vegetation landward of the 27 June 2007 FLSNV Call was subject to occasional flooding by tides, including wind tides, other than those resulting from a hurricane or tropical storm.
47. In light of conflicting testimony and evidence as well as issues of credibility, Petitioners did not satisfy their burden of proof and the Court does not find that Jimmy Canady failed to review the submitted public comments prior to the Permits being issued on 6 September 2007.
48. Petitioners did not satisfy their burden of proof and the Court does not find that the Dune Protection Ordinance would be violated by the planned development under the subject three applications for minor permits.
49. Petitioners did not satisfy their burden of proof and the Court does not find that any applicable rules, regulations or ordinances would be violated by the development on the Three Lots proposed under the minor permit applications.
50. Petitioners did not satisfy their burden of proof and the Court does not find that LPO Canady failed to consider and determine that the planned development under the subject three applications for minor permits would comply and was compliant with the local Coastal Resources Commission (CRC)-approved land use plan.

51. Petitioners did not satisfy their burden of proof and the Court does not find that there is a factual basis that would justify denying the Permit applications or reversing the issuance of the Permits

DECISION

(Partial Summary Judgment on the Cantilever Issue)

The Cantilever Issue was heard by the undersigned on 22 May 2008 upon cross-motions for partial summary judgment filed by all parties; and the undersigned having considered the pleadings, the affidavits and other submissions of the parties, and the written and oral arguments of counsel; and the undersigned having determined that there are no genuine issues of material fact on the Cantilever Issue, and accordingly that Respondent and Intervenor-Respondent are entitled to Partial Judgment against Petitioners as a matter of law on the Cantilever Issue; it hereby is decided that:

-
1. Partial Summary Judgment is granted for Respondent and Intervenor-Respondent against Petitioners on the Cantilever Issue;
 2. Cantilever development oceanward of the oceanfront setback line is proper under 15A NCAC 7H.0306.
 3. In ruling on the cross-motions for partial summary judgment on the Cantilever Issue, the undersigned identifies, for the sake of clarity for reviewing tribunals, the following undisputed facts under Rule 56(d) of the North Carolina Rules of Civil Procedure:
 - a) TP, Inc. is the fee simple owner of three adjacent lots located at 1811, 1901 and 1903 Ocean Boulevard in Topsail Beach, Pender County, North Carolina. (Aff. of Bryant, ¶3).
 - b) Ronald S. Bryant is the President of TP, Inc. In Mr. Bryant's prior experience of building along the North Carolina coast, he has been involved with approximately 20 or more projects where, under the CAMA rules, cantilevering was allowed oceanward of the ocean erosion setback. (Aff. of Bryant, ¶4).
 - c) The Division of Coastal Management of the Department of Environment and Natural Resources has for decades interpreted 15A NCAC 7H .0306(a) to allow cantilevering of structures over the oceanfront setback line. (Supp. Aff. of Gregson, ¶3).
 - d) On 6 August 2007, Nick D. Phillips, the authorized agent for TP, Inc., submitted applications for a CAMA Minor Development Permit for each of the Lots in order to construct three essentially identical 2-story, piling supported, 4 bedroom residences. (Aff. of Bryant, ¶5).

- d) On 6 August 2007, Nick D. Phillips, the authorized agent for TP, Inc., submitted applications for a CAMA Minor Development Permit for each of the Lots in order to construct three essentially identical 2-story, piling supported, 4 bedroom residences. (Aff. of Bryant, ¶5).
- e) The proposed and permitted residences are designed such that all ground level pilings are landward of the 60-foot CAMA setback line, and attached to the CAMA compliant pilings is a 7-foot cantilevered portion of the house that extends over top of the 60-foot CAMA setback line in an oceanward direction. (Aff. of Phillips, ¶8).
- f) On 6 September 2007, the Topsail Beach LPO approved the plans and the application and issued CAMA permits TB07-17, TB07-18 and TB07-19 to TP, Inc. (Aff. of Bryant, ¶6).

DECISION

(On the Remaining Issues Addressed at the Hearing)

Based upon the foregoing findings of fact and conclusions of law, Petitioners have not demonstrated by a preponderance of the evidence that CAMA Minor Permits TB07-17, TB07-18, and TB07-19 issued to Intervenor-Respondents on 6 September 2007 were improperly issued. The preponderance of the evidence supports LPO Canady's issuance, with Respondent's consultation and concurrence, by and through Director Gregson and Assistant Director Tyndall, of the three CAMA Minor Permits to Intervenor-Respondent TP, Inc.

ORDER

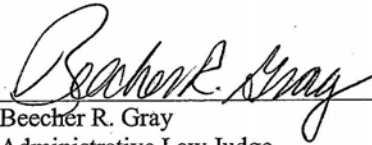
It hereby is ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-36(b)(3).

NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C.G.S. § 150B-36(a).

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

This the 19 day of June, 2009.



Beecher R. Gray
Administrative Law Judge

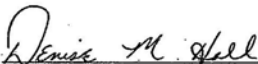
A copy of the foregoing was mailed to:

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ATTORNEYS FOR RESPONDENT

This the 22nd day of June, 2009.


Office of Administrative Hearings
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STATE OF NORTH CAROLINA

COUNTY OF SURRY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 CPS 3399

2009 AUG 25 A 11:12

Spencer's Incorporated of Mount Airy, NC,)
d/b/a Ararat Rock Products Company)
and Jim Crossingham, III,)
Petitioners,)

v.)

North Carolina Highway Patrol,)
Respondent.)

DECISION

THIS MATTER coming on to be heard and being heard before the Honorable J. Randall May, Administrative Law Judge Presiding, during the June 30, 2009, session of Administrative Hearings Court and being heard in High Point, North Carolina at the High Point courthouse; and it appearing to the Court that Petitioners were represented by their attorney, Scott F. Lowry of Mount Airy, North Carolina, and that Respondent was represented by Sebastian Kielmanovich, Assistant Attorney General for the State of North Carolina.

To clarify the proper name of the Petitioner, it should be noted that the citations were issued in the name of Spencer's Inc. of Mount Airy, NC and a petition was filed in the name of Ararat Rock Products by Jim Crossingham, III. Subsequently, a motion was made by the Respondent for clarification of the Petitioner's name and legal status. On June 22, 2009, NOTICE OF REPRESENTATION was entered by Attorney Scott F. Lowry stating the name of the Petitioner as Spencer's Incorporated of Mount Airy, NC, d/b/a Ararat Rock Products Company and Jim Crossingham III. This "de facto" motion to amend the case name was received without objection from the Respondent and without the requested written motion from the Petitioner. It will now be recognized *ex mero motu*.

ISSUES

1. Whether Respondent exceeded its authority, acted erroneously, and/or failed to act as required by statute or law in issuing an overweight penalty.
2. Whether Respondent was arbitrary or capricious in issuing Petitioner an overweight penalty.

Based upon careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember

the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony and the admitted evidence, or the lack thereof, the undersigned makes the following:

FINDINGS OF FACT

1. That on August 15, 2008, at approximately 9:40 a.m., a vehicle, bearing license plate number LK3753 (NC), owned by and registered to Spencer's Incorporated of Mount Airy, North Carolina, was stopped by North Carolina Highway Patrol Trooper Eric M. Todd (hereinafter referred to as "Trooper Todd") on North Carolina Highway 89 in Surry County, North Carolina.

2. That the subject vehicle that was stopped by Trooper Todd on the aforementioned date had four axles, and was marked with the lettering of Ararat Rock Products Company.

3. That Trooper Todd proceeded to measure the distance between axle #2 and axle #4 of the subject vehicle to determine the subject vehicle's compliance with weight allowances as provided by North Carolina law.

4. Trooper Todd indicated that he placed one end of the measuring tape in the tire tread above the middle of axle #2 and stretched the tape to the middle of axle #4. From this vantage point, Trooper Todd discerned his total measurement by a gross visual inspection. According to Trooper Todd, he measured the total distance between axle #2 and axle #4 of the subject vehicle at eight (8) feet exactly.

5. Trooper Todd indicated that since his measurements were performed on the subject vehicle on August 15, 2008, hooks have now been provided to him by Respondent to hook onto the middle of the axle instead of hooking onto the tire tread.

6. As a result of Trooper Todd's measurement, a citation was issued against Petitioners for an overweight violation. Since the subject vehicle was carrying a scale weight of 44,600 pounds and Trooper Todd's measurement between axle #2 and axle #4 was exactly eight (8) feet, the permissible weight allowed by North Carolina law was 38,000 pounds.

7. That Petitioners, by and through Jim Crossingham, III., indicated that the measurement between axle #2 and axle #4 of the subject vehicle was eight (8) feet three (3) inches. Mr. Crossingham has his vehicles custom-built to comply with the weight restrictions as provided by North Carolina law and on August 15, 2008, Mr. Crossingham instructed his driver to return the subject vehicle back to his office shortly after it was stopped by Trooper Todd. At that point, Mr. Crossingham measured the subject vehicle and verified his measurement between axle #2 and axle #4 to be in excess of eight (8) feet.

8. As a result of this measurement, Mr. Crossingham's subject vehicle would have been entitled to carry up to 46,200 pounds since the measurement between axle #2 and axle #4 was in excess of eight (8) feet. At the time of Trooper Todd's stop, the subject vehicle's scale

weight was only 44,600 pounds.

9. That Mr. Timothy Keith Bowman testified on behalf of Petitioners and indicated that his measurement between axle #2 and axle #4 was eight (8) feet, three (3) inches. Mr. Bowman is the owner/operator of Blue Ridge Truck and Trailer and services the vehicles owned by Petitioners.

CONCLUSIONS OF LAW

The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. § 150B-23 *et seq.* All necessary parties have been joined and have received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of law are Findings of Fact, they should be so considered without regard to the given labels. Based on the foregoing the undersigned concludes as follows:

1. That Respondent has the authority and responsibility to regulate and enforce the laws pertaining to commercial and overweight motor vehicles.

2. That N.C. Gen. Stat. § 20-118 provides, in pertinent part, that:

The gross weight imposed upon the highway by any axle group of a vehicle . . . shall not exceed the maximum weight given for the respective distances for their axle grouping as measured longitudinally to the nearest foot as prescribed by law.

3. That the undersigned was unable to ascertain from the trooper's testimony concerning his measurement (of exactly eight (8) feet) whether or not the statutory requirement as prescribed by N.C. Gen. Stat. § 20-118 had been violated. To accept the trooper's inexact measurement would then cause the undersigned to reason that the Respondent had not acted arbitrarily, capriciously or erroneously, and that conclusion would be contrary to the weight of the credible evidence.

4. That Petitioners have shown by a preponderance of the evidence that Respondent acted erroneously, arbitrarily and capriciously.

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

DECISION

It is the decision of the Court that the North Carolina Secretary for Crime Control and Public Safety, on behalf of Respondent, **REVERSE** the agency decision heretofore issued by the North Carolina Highway Patrol against Petitioners.

NOTICE

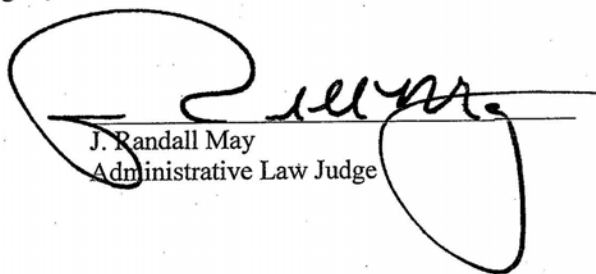
The North Carolina Department of Crime Control and Public Safety will make the Final Decision in this contested case. Pursuant to N.C. Gen. Stat. § 150B-36(a), the agency making the

Final Decision is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those in the agency who will make the Final Decision. In making its Final Decision, the agency must comply with the provisions of N.C. Gen. Stat. §§ 150B-36(b), 36(b1), 36(b2), and 36(b3). The agency may consider only the official record pursuant to N.C. Gen. Stat. § 150B-37.

ORDER

It is hereby ordered that the North Carolina Department of Crime Control and Public Safety shall serve a copy of its Final Decision upon each party and the Office of Administrative Hearings, in accordance with N.C. Gen. Stat. § 150B-36(b3).

ORDERED this the 25 day of August, 2009.


J. Randall May
Administrative Law Judge

A copy was mailed to:

Scott F Lowry
Scott F Lowry, Attorney at Law, PA
PO Box 791
Mt Airy NC 27030
ATTORNEY FOR PETITIONER

Sebastian Kielmanovich
Assistant Attorney General
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9001 Mail Service Center
Raleigh NC 27699-9001
ATTORNEY FOR RESPONDENT

This 25th day of August, 2009.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
919/431-3000
Fax: 919/431-3100

STATE OF NORTH CAROLINA

COUNTY OF BURKE

BLUE RIDGE HEALTHCARE SURGERY
CENTER-MORGANTON, LLC and
GRACE HOSPITAL, INC.,

Petitioners,

v.

N.C. DEPARTMENT OF HEALTH
AND HUMAN SERVICES, DIVISION
OF HEALTH SERVICE REGULATION,
CERTIFICATE OF NEED SECTION,

Respondent,

and

CAROLINA DIGESTIVE CARE, PLLC, and
HMB PROPERTIES, LLC,

Respondent-Intervenors.

FILED IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
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OFFICE OF
ADMIN HEARINGS

RECOMMENDED DECISION

This matter came for hearing before the undersigned Administrative Law Judge ("ALJ") on March 25, 27, 30-31 and April 2-3, 28, 2009. The hearing was held: in High Point, North Carolina, on March 25 and 27; in Charlotte, North Carolina on March 30-31 and April 2-3; and in Greensboro, North Carolina on April 28.

On March 17, 2008, Blue Ridge HealthCare Surgery Center-Morganton, LLC and Grace Hospital, Inc. submitted a certificate of need ("CON") application to develop a freestanding ambulatory surgery center in Morganton by relocating one shared operating room and one gastrointestinal endoscopy room from Grace Hospital to a medical office building on the hospital campus ("Blue Ridge application").

Also on March 17, 2008, Carolina Digestive Care, PLLC and HMB Properties, LLC submitted a CON application to obtain a license for two gastrointestinal endoscopy rooms which it currently operates in its existing unlicensed endoscopy center ("CDC application").

By letter dated August 28, 2008 the Agency issued its required Findings. Although the Blue Ridge application and the CDC application were submitted in the same review period, the Agency determined that they were non-competitive, meaning that the approval of one application would not impact the approval of another application. The Agency approved the CDC application and disapproved the Blue Ridge application. Blue Ridge filed a petition for contested case hearing to appeal its disapproval and to appeal CDC's approval. CDC filed a motion to intervene in this contested case which was granted.

At the end of Blue Ridge's case-in-chief, the Agency and CDC orally made a Motion for Directed Verdict pursuant to North Carolina Rule of Civil Procedure 50 regarding Blue Ridge's

appeal of the CDC application. After hearing oral argument, the Motion for Directed Verdict as to the CDC application was granted on the record. CDC and the Agency also renewed their Motions to Dismiss the Blue Ridge application as moot. After hearing oral argument, the renewed Motions to Dismiss were denied on the record. Pursuant to the Undersigned's order, the parties submitted their proposed Recommended Decisions on June 1, 2009. On that date, Blue Ridge filed a Motion for Reconsideration of the Agency's and CDC's Motion for Directed Verdict. The Motion for Reconsideration was denied by order dated, June 15, 2009.

The Undersigned, having heard all the evidence in the case, considered the arguments of counsel, examined all the exhibits, and reviewed the relevant law, makes the following findings of fact, and by a preponderance of the evidence, enters its conclusions of law thereon, and makes the following Recommended Decision.

APPEARANCES

For Petitioners Blue Ridge HealthCare Surgery Center-Morganton, LLC and Grace Hospital, Inc.:

Maureen Demarest Murray
Allyson Jones Labban
Smith Moore & Leatherwood LLP
P.O. Box 21927
Greensboro, NC 27420

For Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section:

Angel E. Gray
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

For Respondent-Intervenors Carolina Digestive Care, PLLC and HMB Properties, LLC:

Noah H. Huffstetler, III
Elizabeth B. Frock
Nelson Mullins Riley & Scarborough LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

PARTIES

1. Petitioners are Grace Hospital, Inc., a not-for-profit hospital corporation located in Morganton, North Carolina, and Blue Ridge HealthCare Surgery Center-Morganton, LLC, a limited liability company of which Grace Hospital, Inc. is the sole member (collectively, "Blue Ridge").

2. Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section is an agency of the State of North Carolina that administers the Certificate of Need Act (the "CON Act"), codified at Article 9 of Chapter 131E of the North Carolina General Statutes (hereinafter "the CON Section" or "the Agency").

3. Respondent-Intervenors are Carolina Digestive Care, PLLC, a professional limited liability corporation, and HMB Properties, LLC, a limited liability company that owns a condominium property in Morganton, North Carolina (collectively "CDC").

ISSUES PRESENTED

1. Whether the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, resulting in substantial prejudice to Blue Ridge's rights, in finding the Blue Ridge application non-conforming with N.C. Gen. Stat. § 183(a)(1), (3), (4), (5), (6), (18a), and N.C. Gen. Stat. § 131E-183(b), and 10A N.C.A.C. 14C.3903(b), and disapproving the Blue Ridge application.

2. Whether the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, resulting in substantial prejudice to Blue Ridge's rights, by finding the CDC application conforming or conditionally conforming with all statutory review criteria in N.C. Gen. Stat. §131E-183(a) and all regulatory review criteria applicable to the CDC application under N.C. Gen. Stat. §131E-183(b), and approving the CDC application.

APPLICABLE LAW

The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act ("APA"), N.C. Gen. Stat. § 150B-1, *et seq* to the extent not inconsistent with the Certificate of Need Act, N.C. Gen. Stat. § 131E-145, *et seq* (the "CON Act").

The substantive statutory law applicable to this contested case hearing is the North Carolina CON Act, N.C. Gen. Stat. § 131E-175, *et seq*.

The administrative rules applicable to this contested case hearing are the North Carolina Certificate of Need Program administrative rules, 10A N.C.A.C. 14C.0100, *et seq*. and the Office of Administrative Hearings rules, 26 N.C.A.C. 03.0100 *et seq*.

WITNESSES

Witnesses for Petitioner

Daniel Carter, Health Care Consultant, Health Planning Source
Kenneth Wood, CEO, Blue Ridge HealthCare System
Kathy Bailey, Senior Vice President, Blue Ridge HealthCare System

Adverse Witnesses Called by Petitioner

Les Brown, Project Analyst, Certificate of Need Section
Craig Smith, Assistant Chief, Certificate of Need Section

Witnesses for Respondent

Les Brown, Project Analyst, Certificate of Need Section
Craig Smith, Assistant Chief, Certificate of Need Section

Witnesses for Respondent-Intervenors

Respondent-Intervenors did not call any witnesses.

EXHIBITS ADMITTED AT THE HEARING

The following exhibits were admitted into evidence:

Joint Exhibits

- 1 2008 CON Application of Carolina Digestive Care, PLLC and HMB Properties, LLC, Project I.D. No. E-8074-08
- 2 2008 CON Application of Blue Ridge HealthCare Surgery Center-Morganton and Grace Hospital, Inc., Project I.D. No. E-8079-08
- 3 Agency File

Blue Ridge Exhibits

- 4 2007 CON Application of Carolina Digestive Care, PLLC and HMB Properties, LLC, Project I.D. No. E-7837-07
- 5 Floor Plan from the 2007 CDC Application
- 8 N.C. Secretary of State Filings for GI Specialists, P.A.
- 9 N.C. Secretary of State Filings for CDC
- 12 Map showing CDC's Proposed Service Area
- 13 Excerpt from 2008 SMFP, Chapter 6
- 14 Endoscopy Utilization/Capacity Analysis
- 15 Required State Agency Findings, Project I.D. No. J-7732-06
- 16 Required State Agency Findings, Project I.D. No. L-7774-06
- 17 Required State Agency Findings, Project I.D. No. L-8027-07
- 18 Required State Agency Findings, Project I.D. No. Q-7770-06
- 19 Required State Agency Findings, Project I.D. No. G-7907-07
- 21 Required State Agency Findings, Project I.D. No. J-7262-05
- 22 Required State Agency Findings, Project I.D. No. J-7438-05
- 24 Required State Agency Findings, Project I.D. No. J-7941-07
- 31 AORN Guidance Statement: Perioperative Staffing

- 61 Notice of Appeal, *Carolina Digestive Care, PLLC, et al. v. N.C. Dept. of Health and Human Services, etc. and Blue Ridge HealthCare System, Inc., et al.*, File No. 07 DHR 1415
- 62 N.C. Court of Appeals Calendar for April 8, 2009
- 63 Chart: Comparison of Required State Agency Findings
- 66 Chart: Ownership, Operation, and Control of Procedure Rooms by Gastroenterology Specialists, P.A.
- 67 Chart: Three Procedure Rooms Exist at Mica Avenue
- 69 Chart: Reasons Why CDC's Application Should be Disapproved
- 70 Chart: CON Section's Inconsistent Findings on CDC's 2007 and 2008 Applications
- 72 AAAHC Accreditation Application (CDC 1015-18-confidential)—*admitted for impeachment purposes*
- 73 Memorandum dated 1/30/08 to Simon Allport, M.D. from Bob Blake regarding Gastroenterology/Endoscopy Issues (confidential)—*admitted for impeachment purposes*
- 79 C.V. of Kathy C. Bailey, FACHE
- 80 C.V. of Daniel Carter
- 81 Final Agency Decision, *Blue Ridge HealthCare Surgery Center-Morganton, LLC, et al. v. N.C. Dept. of Health and Human Services, etc. and Dr. Mushtaq Bukhari, et al.*, File No. 08 DHR 0204

CDC Exhibits

- 36 Chart: North Carolina Department of Insurance, North Carolina Accident and Health Direct Premiums Written for the Year Ended December 31, 2007
- 53 Charts: Relationship between Carolina Digestive Care, Gastroenterology Specialists, HMB Properties and Edwin H. Holler, M.D., P.A.
- 75 Notice of Appearance, Respondent-Intervenor-Appellees' Motion to Dismiss Appeal, and Respondent-Intervenor-Appellees' Brief in Support of the Motion to Dismiss Appeal, *Carolina Digestive Care, PLLC, et al. v. N.C. Dept. of Health and Human Services, etc. and Blue Ridge HealthCare System, Inc.*, File No. COA-08-952

Agency Exhibits

- 4 Section I of the 2007 CON Application of Blue Ridge
- 5 CON issued to Blue Ridge regarding its 2007 CON Application

OFFERS OF PROOF

During the hearing, the Court sustained certain objections and excluded certain offered evidence. In some instances, the Court permitted CDC to make offers of proof in writing or in writing under seal. These offers of proof were not viewed or considered by the Administrative Law Judge and are not part of the official record for consideration by the final agency decision maker. Other parties to the case also did not have any opportunity to object to the specific

information included by CDC in the written or sealed offers of proof or to cross-examine or rebut such information.

Motion to Strike and Disallow Offer of Proof

On April 28, 2009, the last day of hearing at which the Undersigned heard closing arguments, CDC submitted a cover letter attached to a sealed envelope containing various documents and attached exhibits as an offer of proof. On June 18, 2009, Petitioners filed a Motion to Strike and Disallow Offer of Proof. After careful review of the motion papers, the authorities cited therein, pertinent portions of the transcript of the hearing for the dates April 2, 2009 and April 28, 2009, and in camera review of CDC's offer proof, the Undersigned reaffirms her rulings during the hearing concerning the inadmissibility of these documents and their lack of probative value on the issues within the scope of this administrative proceeding, and hereby grants the Motion to Strike and Disallow Offer of Proof.

PREHEARING MOTIONS

Various prehearing motions were filed, argued and decided by the Undersigned as follows:

North Carolina Medical Society's Motion To Intervene

On February 16, 2009, the North Carolina Medical Society filed a Motion to Intervene based on the asserted interest of promoting fair and equal application of CON law to physician groups. After hearing argument on March 11, 2009, the Motion to Intervene was denied by order dated, March 16, 2009.

Blue Ridge's Motion For Summary Judgment

On February 25, 2009, Blue Ridge filed a Motion for Summary Judgment, arguing that the CDC Application should be disapproved as a matter of law based on: 1) CDC's failure to include as an applicant, Gastroenterology Specialists, P.A., who Blue Ridge alleged was a necessary legal applicant; and 2) CDC's alleged amendment of its application based on its submission of certain information at the public hearing. In response to Blue Ridge's motion, CDC and the Agency made a joint motion pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure that Summary Judgment be entered against Blue Ridge on the ground that Blue Ridge failed to plead facts or bring forth evidence tending to establish that it was "substantially prejudiced" by the Agency's decision. After hearing oral argument on March 11, 2009, both motions were denied by order dated, March 16, 2009.

CDC'S and the Agency's Motion To Dismiss

On February 11, 2009, CDC and the Agency filed a Motion to Dismiss the Blue Ridge Application as moot on the ground that it proposed to develop the same project as the 2007 Blue Ridge Application for which Blue Ridge has already received a CON. Blue Ridge advised that

FINDINGS OF FACT

Procedural Background

2007 Reviews

1. On March 14, 2007, CDC submitted a CON application proposing to develop a new, licensed ambulatory surgical center ("ASC") in Morganton, Burke County, North Carolina in which to perform endoscopy procedures, Project I.D. No. E-7837-07. CDC represented in its cover letter to the Agency that the endoscopy center would be "an extension of our new physician office for Gastroenterology Specialists, P.A." (Pet. Ex. 4)

2. On August 9, 2007, the CON Section issued its Required State Agency Findings regarding the review of the 2007 CDC application and found CDC nonconforming with Criteria 3, 4, 5, 6, 7, 8, 12, and 18a and the regulatory review criteria for endoscopy services at 10A N.C.A.C. 14C.3900, *et seq.* (Jt. Ex. 3 pp. 223-62) The 2007 CDC application was denied.

3. On July 16, 2007, Grace Hospital, Inc. and Blue Ridge HealthCare Surgery Center-Morganton, LLC submitted a CON application proposing to develop a new, licensed ambulatory surgical center in a physician office building on the campus of Grace Hospital in Morganton, Burke County, North Carolina, by relocating one existing, licensed operating room and one existing, licensed endoscopy room from Grace Hospital, Project I.D. No. E-7921-07. (See Jt. Ex. 3 pp. 263-64)

4. On January 7, 2008, the CON Section issued its Required State Agency Findings regarding the review of the 2007 Blue Ridge application, found Blue Ridge nonconforming with Criteria 3, 3a, 4, 5, 12, and 18a and the regulatory review criteria for endoscopy services at 10A N.C.A.C. 14C.3900, *et seq.* (Jt. Ex. 3 pp. 263-300) The 2007 Blue Ridge application was denied.

5. Blue Ridge appealed the denial of its 2007 application. CDC was allowed to intervene as a party in the appeal. During the course of litigation and in response to a motion for summary judgment by Blue Ridge, the Agency acknowledged that it had made errors in the review of the 2007 Blue Ridge application that caused the application to be erroneously denied. CDC opposed Blue Ridge's motion for summary judgment and issuance of a CON to Blue Ridge. The ALJ issued summary judgment recommending that Blue Ridge's application be approved and a CON be issued. The Final Agency Decision adopted the ALJ's Recommended Decision. A CON was issued to Blue Ridge for the 2007 application on January 9, 2009, more than a year following the Agency's erroneous decision. CDC has appealed the issuance of this CON and that appeal is currently pending before the North Carolina Court of Appeals.

2008 Reviews

6. On March 17, 2008, Blue Ridge submitted a CON application to develop a new licensed ambulatory surgery center in Morganton by relocating one existing licensed operating room and one existing licensed gastrointestinal endoscopy room from Grace Hospital to a medical office building on the hospital campus. (Jt. Ex. 2)

CDC had appealed the issuance of that CON, the appeal was currently pending before the North Carolina Court of Appeals, and that the ultimate outcome of the appeal was unknown. See Petitioner's Exhibit 61. After hearing oral argument on March 11, 2009, the Motion to Dismiss was denied by ordered dated, March 16, 2009.

CDC'S Motion For ALJ To View Facility

On March 23, 2009, CDC submitted a motion for the ALJ to view the CDC facility and accept her observation of the facility as evidence. The Undersigned denied the motion on the record on March 25, 2009, but granted leave for the motion to be renewed at a later time.

CDC's Motion In Limine To Exclude Evidence

On March 23, 2009, CDC filed a Motion *In Limine* to exclude any evidence or testimony regarding CDC's billing procedures for submitting claims to Medicare and Medicaid. At the hearing on March 25, 2009, the Court heard argument on this motion and, after discussion on the record, CDC withdrew its motion.

Blue Ridge's Motion In Limine

On March 24, 2009, Blue Ridge filed a Motion *In Limine* to exclude any evidence or testimony regarding: 1) advertisements or publications by Blue Ridge issued or published in January, February, or March 2009; 2) revisions to Blue Ridge's self-insured health plan, effective September 2008 or thereafter; and 3) call coverage obligations of members of Blue Ridge's medical staff. At the hearing on March 25, 2009, the Court heard argument on this motion, and Blue Ridge's motion was granted on the record.

RECOMMENDED DECISION

Based upon careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, the Undersigned makes the following Findings of Fact, Conclusions of Law and Decision, which is tendered to the North Carolina Department of Health and Human Services for a final decision.

7. On March 17, 2008, CDC submitted a CON application to obtain a license for two gastrointestinal endoscopy rooms which it currently operates in its existing endoscopy center. (Jt. Exh. 1)

8. The Agency initially concluded that the 2008 Blue Ridge application was competitive with the 2008 CDC application but ultimately determined in the Findings, however, that the 2008 CDC application and the 2008 Blue Ridge application were noncompetitive. (Jt. Ex. 3, pp. 306-07)

9. On August 28, 2008, the CON Section issued its Required State Agency Findings regarding the review of the 2008 Blue Ridge application, finding Blue Ridge nonconforming with Criteria 1, 3, 4, 5, 6, and 18a and nonconforming with some of the regulatory review criteria for endoscopy services at 10A N.C.A.C. 14C.3900, *et seq.* (Jt. Ex. 3 pp. 333-77) The 2008 Blue Ridge application was disapproved.

10. The findings of noncompliance and denial of the 2008 Blue Ridge application were based on the Agency's conclusion that Valdese Hospital was a related entity as that term is defined at 10A N.C.A.C. 14C.3901(5). (Smith, T. Vol. 3 p. 566; Jt. Ex. 3 pp. 333-77)

11. On August 28, 2008, the CON Section issued its Required State Findings, conditionally approving the CDC application. The Agency found that the CDC application was conforming or was conditionally approved with all statutory review criteria in N.C. Gen. Stat. § 131E-183(a) and with all applicable regulatory review criteria in 10A N.C.A.C. 14C.3900, *et seq.* (Jt. Ex. 3, pp. 301-332)

12. On September 26, 2008, Blue Ridge filed a petition for contested case hearing with the Office of Administrative Hearings ("OAH") in which it appealed both the disapproval of the Blue Ridge application and the approval of the CDC application.

13. On October 7, 2008, CDC filed a motion to intervene in Blue Ridge's contested case which motion was granted by the Undersigned on October 28, 2008.

Review of 2008 CDC Application Pursuant to N.C. Gen. Stat. § 131E-183(a)

Criterion 1

14. N.C. Gen. Stat. § 131E-183(a)(1), ("Criterion 1"), provides, in relevant part, as follows:

The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan

15. For some facilities, services or equipment, the annual State Medical Facilities Plan ("SMFP") sets a determinative limit on the number of facilities, services or equipment that can be developed. For other categories of facilities, services or equipment, the SMFP may

provide information, an inventory of existing providers, and a methodology for determining need, or may be silent.

16. Regardless of whether or not the SMFP contains a determinative limit on a type of facility, service or equipment, a CON application must still comply with all applicable statutory and regulatory review criteria in order to be approved.

17. Pursuant to N.C. Gen. Stat. § 131E-178(a), "[t]he annual State Medical Facilities Plan shall not include policies or need determinations that limit the number of gastrointestinal endoscopy rooms that may be approved." (emphasis added)

18. There is no need determination that applies to the CDC application or limits the number of gastrointestinal endoscopy rooms the Agency can approve.

19. The 2008 SMFP contains an inventory of the number of licensed gastrointestinal endoscopy rooms by county for informational purposes only. (Pet. Ex. 13, p. 69)

20. The Agency found that although it could not limit the number of rooms that could be approved, Policy Gen-3 was applicable to the CDC Application. Policy Gen-3 provides that:

A CON application to meet the need for new healthcare facilities, services or equipment shall be consistent with the three Basic Principles governing the State Medical Facilities Plan (SMFP); promote cost-effective approaches, expand health care services to the medically underserved, and encourage quality health care services. The Applicant shall document plans for providing access to services for patients with limited financial resources, commensurate with community standards, as well as the availability of capacity to provide those services. The Applicant shall also document how its projected volumes incorporate the three Basic Principles in meeting the need identified in the SMFP as well as addressing the needs of all residents in the proposed service area.

Jt. Ex. 3, p. 302

21. CDC demonstrated that it was cost-effective and operationally efficient.

22. The use of the co-pay model with Blue Cross Blue Shield ("BCBS") demonstrated that the care at CDC was affordable to many patients.

23. The existing endoscopy center is certified by the Accreditation Association for Ambulatory Health Care ("AAAHC") which shows that CDC provides quality health care services.

24. The Agency found that the CDC application was conforming with Policy Gen-3 and with Criterion 1. (Jt. Exh. 3, pp. 301-11)

Criterion 3

25. N.C. Gen. Stat. § 131E-183(a)(3), ("Criterion 3"), provides as follows:

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

26. CDC's projections for the service area it proposed to serve were based on the historical patient origin for the existing unlicensed center. (Jt. Ex. 1, p. 51)

27. The proposed primary and secondary service areas in the CDC application were reasonable, and were based on historical data and actual patient origins for the existing unlicensed endoscopy center.

28. CDC identified the population proposed to be served. (Jt. Ex. 3, p. 311)

29. All applications have to demonstrate need; it is irrelevant if it is a competitive or a noncompetitive review, or whether there is a need determination or limitation for the service in the SMFP.

30. An application proposing to convert unlicensed endoscopy rooms to licensed rooms is not subject to any special treatment and must demonstrate need. (Brown, T. Vol. 2 p. 379)

31. The 2008 CDC application used historical utilization at the existing unlicensed center to project volumes for the future to demonstrate the need for the licensed center. (Jt. Ex. 1, pp. 40-43)

32. The CDC application proposed two procedure rooms and, therefore, the application only needed to demonstrate the need for the two rooms proposed.

33. CDC used historical data for the 36 weeks during which the existing center was in operation, and projected forward to estimate volume projections for an entire year. (Jt. Ex. 1, pp. 42-43)

34. At the time CDC submitted its application, the physicians were already performing a sufficient number of procedures at the existing unlicensed center to demonstrate the need for the project proposed in the CDC application.

35. CDC was not required to demonstrate the need for all licensed rooms in the service area.

36. An applicant is not always required to discuss utilization of other existing facilities in the same service area to demonstrate need for a project. (Brown, Vol. 2, pp. 290-92; Smith, Vol. 3, pp. 585-89) Whether an applicant needs to include discussion of utilization of other facilities in the service area depends on the methodology the applicant uses to demonstrate the need for its project. (Smith, T. Vol. 3, pp. 587-88)

37. Because CDC used its own historical volumes to demonstrate need, there was no need to look at the utilization of other facilities in evaluating whether the CDC application demonstrated the need for its project. (Brown, Vol. 2, pp. 291-92)

38. Evidence was presented that a supply/storage room at CDC could be converted for use as an endoscopy room.

39. If, in the future, CDC wanted to develop a third endoscopy room, a new CON application proposing a third room would be required. (Smith, T. Vol. 3, p. 690)

40. The Agency found that the CDC Application was conforming with Criterion 3. (Jt. Ex. 3, pp. 307-11)

Criterion 3a

41. N.C. Gen. Stat. 131E-183(a)(3a) ("Criterion 3a") requires that:

In the case of a . . . relocation of a facility or a service, the applicant shall demonstrate that the needs of the population presently served will be met adequately by the proposed relocation or by alternative arrangements, and the effect of the reduction, elimination or relocation of the service on the ability of low income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care.

42. The Agency found that the endoscopy center would remain in existence and continue to treat patients whether or not a CON was issued. The only change effected by a CON is from an unlicensed setting to a licensed setting.

43. The Agency found that Criterion 3a was not applicable to the CDC application because CDC is not eliminating, reducing, or relocating any service.

44. The Agency found that the CDC application was conforming with Criterion 3a. (Jt. Ex. 3, p. 311)

Criterion 4

45. N.C. Gen. Stat. § 131E-183(a)(4), ("Criterion 4"), provides as follows:

Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.

46. The CDC application discussed the other alternatives it considered besides the project proposed in the application, including a joint venture with Blue Ridge, and explained why the Blue Ridge joint venture was not the most effective alternative and why the project proposed in its application was the most effective alternative. (Jt. Ex. 1, pp. 54-57)

47. One of the benefits of licensing the endoscopy center is that it would be surveyed by the State which provides more oversight and ensures a higher level of quality of care. (Smith, T. Vol. 3, pp. 688, 696-97)

48. The Agency found that CDC had discussed the alternatives and had demonstrated that its proposal was an effective alternative.

49. The Agency conditionally approved the CDC application under Criterion 4. (Jt. Ex. 3, pp. 311-12)

Criterion 5

50. N.C. Gen. Stat. § 131E-183(a)(5), ("Criterion 5"), provides as follows:

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

51. CDC's pro forma financial statements provided reasonable projections of costs and charges for the first three years of operation.

52. The Agency did not consider capital or start-up costs for construction of the endoscopy center as part of its review because the facility was already constructed and in operation at the time the application was submitted. (Brown, T. Vol. 2 pp. 332-34)

53. CDC provided adequate information and assumptions concerning facility fees and professional fees.

54. CDC provided adequate information concerning facility rent and utilities.

55. CDC provided adequate financial information and explanations to supports its application.

56. The Agency found that the CDC application was conforming with Criterion 5. (Jt. Exh. 3, pp. 312-13)

Criterion 6

57. N.C. Gen. Stat. § 131E-183(a)(6), ("Criterion 6"), provides as follows:

The applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities.

58. Criterion 6 and Criterion 3 are related, and the Agency relied on the CDC application's conformity with Criterion 3 in determining that the CDC application was also conforming with Criterion 6. (Brown, T. Vol. 2, pp. 446-47; Smith, T. Vol. 3, p. 557)

59. For purposes of Criterion 6 and evaluating unnecessary duplication, the Agency does not consider the utilization of existing facilities in every review. (Brown, T. Vol. 2, pp. 334-35)

60. It was not necessary for the Agency to look at other providers in order to determine if CON approval for CDC would be an unnecessary duplication of services because the unlicensed rooms were already in existence and operation at the time the CDC application was submitted and because the unlicensed rooms could continue in existence and operation even if the CDC application was disapproved.

61. CDC proposed to continue to serve its existing patients.

62. The Agency found that approval of the CDC application would not be an unnecessary duplication of existing or approved facilities and was conforming with Criterion 6. (Jt. Ex. 3, p. 313)

Criterion 7

63. N.C. Gen. Stat. § 131E-183(a)(7), ("Criterion 7"), provides that:

The applicant shall show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided.

64. The CDC application provided information regarding the staffing levels it proposed to maintain in the endoscopy center if the center were to become licensed. (Jt. Ex. 1, pp. 78-84)

65. The Agency found that the CDC application was conforming with Criterion 7. (Jt. Exh. 3, p. 314)

Criterion 8

66. N.C. Gen. Stat. § 131E-183(a)(8), ("Criterion 8"), provides as follows:

The applicant shall demonstrate that the provider of the proposed services will make available, or otherwise make arrangements for, the provision of the necessary ancillary and support services. The applicant shall also demonstrate that the proposed service will be coordinated with the existing health care system.

67. In addition to the requirements of Criterion 8, 10A N.C.A.C. 14C.3904(a) requires that:

[a]n applicant proposing to establish a new licensed ambulatory surgical facility for performance of GI endoscopy procedures or develop a GI endoscopy room in an existing licensed health service facility shall provide a copy of an agreement between the applicant and a pathologist for the provision of pathology services.

68. The CDC application contained pathology agreements to demonstrate conformity with Criterion 8 and Rule 10A N.C.A.C. 14C.3904(a). (Jt. Ex. 1, pp. 298-303)

69. The CDC application demonstrated that the existing endoscopy center had a transfer agreement with Grace Hospital. (Jt. Ex. 1, pp. 168-174)

70. CDC demonstrated that provision of the necessary ancillary and support services had been arranged.

71. The Agency found that the CDC application was conforming with Criterion 8 and with 10A N.C.A.C. 14C.3904(a). (Jt. Ex. 3, pp. 314-15; 328)

Criterion 12

72. N.C. Gen. Stat. § 131E-183(a)(12), ("Criterion 12"), provides as follows:

Applications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and that applicable energy saving features have been incorporated into the construction plans.

73. It is the Agency's position that if construction for a project is complete at the time the application is submitted, and the applicant was able to lawfully complete construction without CON approval, Criterion 12 is not applicable. (Brown, T. Vol. 2, pp. 372-73; Smith, T. Vol. 3, p. 614) The Agency does not consider costs that have already been incurred when it evaluates applications' conformity with Criterion 12. (*Id.*)

74. At the time the CDC application was submitted to the Agency, construction on the endoscopy center was lawfully complete without CON approval, all capital costs had been incurred, and the endoscopy center was already in operation.

75. The Agency found that Criterion 12 did not apply to the CDC application. (Jt. Ex. 3, p. 316)

Criterion 18a

76. N.C. Gen. Stat. § 131E-183(a)(18a), ("Criterion 18a"), provides as follows:

The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost-effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact.

77. Criterion 18a is closely related to Policy Gen-3, previously discussed with respect to Criterion 1.

78. The CDC application explained that one of the "innovations" its approval would offer was that the co-pay model with BCBS would offer more affordable care to patients and would continue if CDC became a licensed facility. (Jt. Ex. 1, pp. 10-11, 47)

79. The Agency found CDC's application conforming with Criterion 18a on the basis of its findings that CDC's Application was conforming with Criteria 1, 3, 5, 7, 8, 12, 13 and 20. (Jt. Ex. 3, p. 319)

80. The Agency found that the CDC Application was conforming with Criterion 18a. (Jt. Ex. 3, p. 319)

Review of the 2008 CDC Application Pursuant to N.C. Gen. Stat. § 131E-183(b)

81. N.C. Gen. Stat. § 131E-183(b), provides as follows:

The Department is authorized to adopt rules for the review of particular types of applications that will be used in addition to those criteria outlined in subsection (a) of this section and may vary according to the purpose for which a particular review is being conducted or the type of health service reviewed. No such rule adopted by the Department shall require an academic medical center teaching hospital, as defined by the State Medical Facilities Plan, to demonstrate that any facility or service at another hospital is being appropriately utilized in order for that academic medical center teaching hospital to be approved for the issuance of a certificate of need to develop any similar facility or service.

82. The Agency applied N.C. Gen. Stat. § 131E-183(b) and found that the CDC application was conforming or conditionally conforming to all applicable criteria and rules, specifically, the performance standards contained in 10A N.C.A.C. 14C.3900, *et seq.*, the "Criteria and Standards for Gastrointestinal Endoscopy Procedure Rooms in Licensed Health Service Facilities."

10A N.C.A.C. 14C.3902(a)(2)(A)

83. Pursuant to 10A N.C.A.C. 14C.3902(a)(2)(A), an applicant must identify "the number of existing and proposed GI endoscopy rooms in the licensed health service facility in which the proposed rooms will be located."

84. The CDC application identified the two rooms that it was proposing. (Jt. Ex. 1, pp. 9-10)

10A N.C.A.C. 14C.3902(b)(5)

85. Pursuant to 10A N.C.A.C. 14C.3902(b)(5), an applicant must submit the number of GI procedures performed in other licensed facilities in each of the last 12 months.

86. The CDC application provided the total number of procedures its physicians performed at Grace Hospital and Valdese Hospital in the past 12 months combined. (Jt. Ex. 1, p. 26)

10A N.C.A.C. 14C.3903(b)

87. The Agency found the CDC application conforming with Rule .3903(b), which provides that an applicant proposing to establish a new endoscopy ASC "shall reasonably project to perform an average of at least 1,500 GI endoscopy procedures only per GI endoscopy room in each licensed facility the applicant or a related entity owns in the proposed service area, during the second year of operation[.]"

88. The Agency Findings state that "applicants project to perform 3,150 GI endoscopy procedures in two rooms, for an average of 1,575 GI endoscopy procedures per room[.]" (Jt. Ex. 3 p. 326)

10A N.C.A.C. 14C.3903(c)

89. Pursuant to 10A N.C.A.C. 14C.3903(c), an applicant must demonstrate that "at least the following types of GI endoscopy procedures will be provided in the proposed facility or GI endoscopy room: upper endoscopy procedures, esophagoscopy procedures, and colonoscopy procedures."

90. The CDC application stated that the CDC physicians are credentialed to perform esophagoscopy procedures, although they do not generally perform them. (Jt. Ex. 1, p. 30)

10A N.C.A.C. 14C.3903(e)

91. The Agency found the CDC application conforming with Rule .3903(e) which provides that an applicant proposing to establish a new endoscopy ASC "shall describe all assumptions and the methodology used for each projection in this Rule."

92. The Agency Findings state that "[o]n pages 31-32, the applicants describe all assumptions and methodology used in the utilization projections." (Jt. Ex. 3 p. 327)

10A N.C.A.C. 14C.3904(a)

93. The Agency found the CDC application conforming with Rule .3904(a) which provides that an applicant proposing to establish a new endoscopy ASC "shall provide a copy of an agreement between the applicant and a pathologist for provision of pathology services."

94. The Agency Findings state that "Exhibit 21 contains the current agreements between CDC and CBLPath, and CDC and Blue Ridge Pathology Associates." (Jt. Ex. 3 p. 327)

10A N.C.A.C. 14C.3904(d)(1)

95. The Agency found the CDC application conditionally conforming with Rule .3904(d)(1) which provides that an applicant proposing to establish a licensed ASC for the performance of gastrointestinal endoscopy services must provide evidence that the physicians using the proposed facility will have practice privileges at an existing hospital in the county.

96. The Agency Findings gave conditional approval under this rule because CDC failed to provide evidence that its physicians would have practice privileges at an existing hospital and required CDC to provide evidence of such practice privileges prior to the issuance of the CON. (Jt. Ex. 3 p. 328)

10A N.C.A.C. 14C.3905(c)

97. Pursuant to 10A N.C.A.C. 14C.3905(c), an applicant "shall provide the criteria to be used by the facility in extending privileges to medical personnel that will provide services in the facility."

98. The CDC application included information about the criteria used in the credentialing process of physicians seeking privileges at CDC. (Jt. Ex. 1, pp. 355-368)

10A N.C.A.C. 14C.3905(d) and .3906(c)

99. There are certain regulations that only apply to applicants who are not accredited.

100. The existing endoscopy center is accredited by AAAHC and, therefore, the Agency found that 10A N.C.A.C. 14C.3905(d) and .3906(c) are not applicable to the CDC application. (Jt. Ex. 3, pp. 330-32)

10A N.C.A.C. 14C.3906(a)

101. 10A N.C.A.C. 14C.3906(a) provides that:

An applicant proposing to establish a licensed ambulatory surgical facility that will be physically located in a physician's office or within a general acute care hospital shall demonstrate reporting and accounting mechanisms exist that confirm the licensed ambulatory surgery facility is a separately identifiable entity physically and administratively, and is financially independent and distinct from other operations of the facility in which it is located.

102. Based upon review of the floor plan in the 2008 CDC application and observations from a site visit to the existing facility, the Agency determined that the CDC application was conforming with 10A N.C.A.C. 14C.3906(a), and there was no concern about the amount of physical and administrative separation between the medical practice and the endoscopy center. (Brown, T. Vol. 2, p. 434)

103. The Agency found that the CDC application was conforming with 10A N.C.A.C. 14C.3906(a). (Jt. Ex. 3, p. 331)

10A N.C.A.C. 14C.3906(c)

104. Rule .3906(c) provides that an applicant that is not accredited at the time the application is submitted must, among other things, provide a floor plan that shows a receiving/registering area and waiting area that demonstrates that the endoscopy suite is separate and physically segregated from the general office area.

105. The Agency Findings state that "CDC is accredited by AAAHC" and, therefore, this rule is not applicable. (Jt. Ex. 2 p. 332)

Conditions Placed on the CDC Application

106. The Agency has the discretionary authority under North Carolina law to place conditions on the issuance of a CON. N.C. Gen. Stat. § 131E-186; 10A N.C.A.C. 14C.0207(a).

107. The Agency conditioned the CDC application in two areas. The conditions the Agency placed on Criterion 4 of the Agency's Findings are "reminder" conditions and did not reflect any deficiency in the CDC application. (Jt. Ex. 3, p. 312)

108. The Agency also conditioned the CDC application with respect to 10A N.C.A.C. 14C.3904(d), requesting that CDC submit additional documentation that the CDC physicians have privileges at a hospital in Burke County. (Jt. Ex. 3, pp. 328-29)

109. The fact that the Agency found the 2007 CDC application non-conforming with a rule does not mean that the Agency was required to reach the same conclusion with respect to the 2008 CDC application.

Review of the 2008 Blue Ridge Application Pursuant to N.C. Gen. Stat. § 131E-183(a)

110. On or about March 17, 2008, Blue Ridge submitted a CON application for the same project as the 2007 Blue Ridge application, to develop an ASC by relocating one gastrointestinal endoscopy room and one shared operating room from Grace Hospital. (Jt. Exh. 2, p. 3)

111. Since the 2007 Blue Ridge application was submitted, the administrative rules governing operating rooms had changed and, therefore, the 2008 Blue Ridge application responded to and the CON Section applied, the new rules. (See Jt. Ex. 3 pp. 183-89; Brown, T. Vol. 2 pp. 505-06)

112. The 2008 Blue Ridge application also contained different volume projections, historical utilization data, charges, costs, pro forma financial statements and timetable for development of the project than the 2007 Blue Ridge application.

113. The Agency determined that the 2008 Blue Ridge application was non-conforming to N.C. Gen. Stat. § 183(a)(1), (3), (4), (5), (6), (18a), and 10A N.C.A.C. 14C.3903(b). (Jt. Ex. 3, pp. 333-377)

The "Related Entity" Rule

114. In its review of the 2008 Blue Ridge application, the Agency found that (1) Blue Ridge adequately identified the population to be served; (2) Blue Ridge demonstrated the need for the one operating room to be relocated from Grace Hospital; (3) Blue Ridge demonstrated compliance with the operating room rules; (4) the growth projections with regard to the endoscopy room proposed to be relocated from Grace Hospital were reasonable; and (5) concluded that the growth projections "demonstrate that the [proposed ASC] is needed to serve the proposed population." (Jt. Ex. 3 pp. 338, 344-46, 350)

115. The Blue Ridge application was disapproved, however, because the Agency concluded that Valdese Hospital was a "related entity" to Blue Ridge and, therefore, Blue Ridge was required to demonstrate that Valdese Hospital's two endoscopy rooms were each providing at least 1,500 procedures per room per year. (Brown, T. Vol. 1 pp. 175, 187, 194; Jt. Ex. 3 pp. 350-51)

116. The Blue Ridge application did not propose to relocate or renovate the two existing, licensed Valdese Hospital endoscopy rooms.

117. Blue Ridge's 2008 application stated that Valdese Hospital was not a "related entity" as defined at 10A N.C.A.C. 14C.3901(5) and provided information and documentation. (Jt. Ex. 3 pp. 17-18, 42)

118. "Related entity" is defined at 10A N.C.A.C. 14C.3901(5) as:

the parent company of the applicant, a subsidiary company of the applicant (i.e., the applicant owns 50 percent or more of another company), a joint venture in which the applicant is a member, or a company that shares common ownership with the applicant (i.e., the applicant and another company are owned by some of the same persons).

119. Pertinent facts concerning the relationship between Grace Hospital and Valdese Hospital are:

- The applicants in the 2008 Blue Ridge application were Grace Hospital, Inc. and Blue Ridge HealthCare Surgery Center-Morganton, LLC. ("BRHCSC")
- Valdese Hospital is not the parent company of Grace Hospital or of BRHCSC.
- Valdese Hospital is not a subsidiary of Grace Hospital or of BRHCSC.
- Grace Hospital is not a member of Valdese Hospital.
- BRHCSC is not a member of Valdese Hospital.
- Grace Hospital and Valdese Hospital are not owned by the same entities.
- Valdese Hospital is not a joint venture in which Grace Hospital or BRHCSC is a member.
- Valdese Hospital and Grace Hospital are not members of a joint venture.
- Valdese does not share common ownership with BRHCSC.
- Valdese Hospital and Grace Hospital are separate legal entities and are owned by separate legal entities.
- The sole member of Valdese Hospital is Carolinas Hospital Network, Inc.
- The sole member of Grace Hospital is the Grace Community Council.
- Grace Hospital and Valdese Hospital are both managed by Carolinas HealthCare System under a joint operating agreement, but the joint operating agreement does not meet any of the definitions of "related entity" at 10A N.C.A.C. 14C.3901(5).

120. The Agency determined that Valdesse Hospital was a related entity to Blue Ridge. (Jt. Ex. 3 p. 350)

121. The performance standard at 10A N.C.A.C. 14C.3903(b) requires an applicant to “reasonably project” that each licensed endoscopy room in the service area that is owned by the applicant or a related entity will perform an average of at least 1,500 endoscopy procedures per room in year two of the project. (Jt. Ex. 3 p. 350)

122. The Agency relied on 14C.3903(b) in disapproving the Blue Ridge application, based upon its determination that Valdesse Hospital was a related entity to Blue Ridge. (Brown, T. Vol. 1 pp. 176-77; Smith, T. Vol. 3 p. 544; Jt. Ex. 3 pp. 350-51)

123. The determination that Valdesse was a related entity to the applicants was a primary basis for the disapproval of the 2008 Blue Ridge application. (Smith, T. Vol. 3 p. 556)

124. Even though Valdesse Hospital is not a related entity, Blue Ridge also projected in its application that utilization at the two Valdesse Hospital endoscopy rooms would meet the 1,500 procedure threshold by year two. (Jt. Ex. 3 p. 54)

125. Blue Ridge’s application represented that another gastroenterologist had been recruited to the community and would be performing procedures at Grace Hospital beginning in June and that recruitment was underway for additional gastroenterologists and detailed findings by the national Medical Group Management Association concerning the number of endoscopy procedures per year on average that each gastroenterologist would perform. (Jt. Ex. 2 p. 83) The Agency did not question these representations.

126. The Agency determined that the 2008 Blue Ridge application did not demonstrate a need to relocate the one existing, licensed endoscopy room from Grace Hospital to the proposed ASC despite the facts that: the Agency did not have information to show that Valdesse was a related entity to the applicants; the endoscopy rooms at Valdesse were already existing, licensed rooms and would continue to be licensed regardless of the Agency’s decision on Blue Ridge’s application; the Blue Ridge application projected volumes greater than 1,500 procedures per room per year in the existing licensed endoscopy rooms at Grace and Valdesse hospitals by year two; and moving the existing licensed endoscopy room from Grace to BRHCSC would allow patients and payors to obtain endoscopy procedures in a lower cost, lower charge, more convenient outpatient setting on the hospital campus.

127. The effect of the Agency’s disapproval of Blue Ridge’s application was to prevent Blue Ridge from using an existing licensed operating room and an existing licensed endoscopy room in a more cost effective outpatient setting that was more convenient for patients, contrary to the purposes of the CON Act in N.C. Gen. Stat. § 131E-175 and Policy GEN-3 in the 2008 SMFP.

128. The Agency’s disapproval has constrained Blue Ridge from using its existing property and resources, delayed implementation of Blue Ridge’s project, caused Blue Ridge to incur legal expenses, and prevented Blue Ridge from being able to offer a less costly, more effective alternative to the community it serves.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the undersigned Administrative Law Judge enters the following Conclusions of Law.

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.
2. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in this matter.
3. The Agency reviews CON applications pursuant to North Carolina's CON statute. See N.C. Gen. Stat. §§ 131E-182, 131E-183; see also *Living Centers-Southeast, Inc. v. N.C. Dep't of Health and Human Servs.*, 138 N.C. App. 572, 574, 532 S.E.2d 192, 194 (2000).
4. The CON Section determines whether an application is consistent or not in conflict with the review criteria set forth in N.C. Gen. Stat. § 131E-183 and the standards, plans and criteria promulgated thereunder in effect at the time the review commences. 10A N.C.A.C. 14C.0207.
5. In a contested case, "[u]nder N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule." *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). The burden of persuasion placed upon the Petitioner is the "greater weight of evidence." *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 712, 513 S.E.2d 823, 828 (1999) (stating "the standard of proof in administrative matters is by the greater weight of evidence. . ."). A Petitioner must show both substantial prejudice and Agency error cannot rely solely on allegations of Agency error to establish substantial prejudice. See *Presbyterian Hosp. v. N.C. Dept. of Health and Human Services*, 177 N.C. App. 780, 630 S.E.2d 213 (2006).
6. The Agency has clear and express statutory authority to conditionally approve an applicant to ensure that the project conforms with applicable review criteria. N.C. Gen. Stat. § 131E-186; 10A N.C.A.C. 14C.0207(a); see also *Dialysis Care of North Carolina, LLC v. N.C. Dept. of Health and Human Services*, 137 N.C. App. 638, 648-51, 529 S.E.2d 257, 263-64, *aff'd per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000); *In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986).
7. N.C. Gen. Stat. § 131E-188(a) provides that, in the context of a certificate of need review, "any affected person, as defined in subsection (c) of this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes." "Affected person" is defined, in pertinent part, as:

the applicant; ... any person who provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by the applicant;
...

N.C. Gen. Stat. § 131E-188(c)

8. Blue Ridge qualifies as an “affected person” entitled to a contested case hearing with regard to its 2008 application in that it was the denied applicant.

9. Blue Ridge qualifies as an “affected person” entitled to a contested case hearing with regard to the 2008 CDC application because it “provides services, similar to the services under review, to individuals residing within the service area or the geographic area proposed to be served by” CDC and provided the agency with prior written notice of its intent to develop an ambulatory surgical facility for the provision of gastrointestinal endoscopy services.

10. Blue Ridge failed to prove by the greater weight of the evidence that it is substantially prejudiced by the Agency's approval of the CDC application which would make it possible for CDC to obtain a license for its two existing unlicensed rooms.

11. Blue Ridge failed to prove by the greater weight of the evidence that the Agency 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 in determining that the CDC application was conforming or conditionally conforming with all applicable statutory review criteria set forth in N.C. Gen. Stat. § 131E-183(a) and conforming or conditionally conforming with all applicable regulatory review criteria set forth in 10A N.C.A.C. 14C.3900, *et seq.*

12. Blue Ridge met its burden of showing by the greater weight of the evidence that it is substantially prejudiced by the Agency's decision to disapprove the Blue Ridge application because it was prevented from obtaining a CON to use an existing licensed operating room and an existing licensed endoscopy room in a more cost-effective outpatient setting that was more convenient for patients, contrary to the purposes of the CON Act in N.C. Gen. Stat. § 131E-175 and Policy Gen-3 in the 2008 SMFP. As a result, Blue Ridge was deprived of the opportunity to develop the project proposed in the 2008 application.

13. Blue Ridge has met its burden of showing by the greater weight of the evidence that the Agency acted outside its authority and jurisdiction, acted erroneously, used improper procedure, acted arbitrarily and capriciously, and failed to act as required by law and rule in finding that Valdeese Hospital was a “related entity” to the applicants Grace Hospital and BRHCSC, contrary to the Agency's own definition of that term at 10A N.C.A.C. 14C.3901(5), and in finding Blue Ridge's application non-conforming and disapproving it on that basis.

14. Blue Ridge has met its burden of showing by the greater weight of the evidence that the Agency acted outside its authority and jurisdiction, acted erroneously, used improper procedure, acted arbitrarily and capriciously, and failed to act as required by law and rule in finding that Blue Ridge's 2008 application was nonconforming to the following statutory review criteria: N.C. Gen. Stat. §§131E-183(a)(1), (3), (4), (5), (6), (18a), and (b), because these findings of non-

conformity were based upon the Agency's failure to apply the clear language of the Agency's own rule and improper determination that Valdease Hospital was a related entity to the applicants Grace Hospital and BRHCSC.

RECOMMENDED DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby recommended that the decision and findings of the CON Section approving CDC's 2008 application be UPHELD. It is also hereby recommended that the decision and findings of the CON Section disapproving Blue Ridge's 2008 application be REVERSED and that a certificate of need be awarded to Blue Ridge authorizing the development of the project as proposed in Blue Ridge's 2008 application.

ORDER

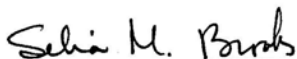
It is hereby ordered that the Agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to standards found in N.C. Gen. Stat. § 150B-36(b)(b1), and (b2). The agency that will make the final decision in this contested case in the North Carolina Department of Health and Human Services ("Department").

Before the Department makes the Final Decision, it is required by N.C. Gen. Stat. § 150B-36(a) to give each party an opportunity to file exceptions to this Recommended Decision, and to present written arguments to those in the Agency who will make the final decision. The Department 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' attorneys of record.

This is the 19th of June, 2009.



Honorable Selina M. Brooks
Administrative Law Judge

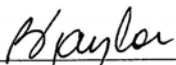
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This the 19th day of June, 2009



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STATE OF NORTH CAROLINA

COUNTY OF WAYNE

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ADMINISTRATIVE HEARINGS
08 OSP 2242

Office of
Administrative Hearings

Isaac T Perkins
Petitioner

vs.

North Carolina Department of Corrections
Respondent

DECISION

On April 27, 2009 and May 12, 2009, Administrative Law Judge Donald W. Overby heard this contested case in Raleigh, North Carolina.

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Raleigh, North Carolina 27602

STATUTES, RULES & POLICIES IN ISSUE

N.C. Gen.Stat. §§ 126-1.1, -34, -34.1, -35, -37; 25 NCAC 1J .0604, .0605, .0608, .0613, .0614; North Carolina Office of State Personnel, Personnel Manual; and the Department of Correction Personnel Manual.

ISSUE

Did Respondent meet its burden of proof that it had just cause to dismiss Petitioner for one or more acts of unacceptable personal conduct in accordance with N.C.G.S. Section 126-35?

WITNESSES

The Respondent, North Carolina Department of Correction (hereinafter Respondent or NC DOC) presented testimony from the following nine witnesses: Thomas Clayton Surber; Linda Surber; Dennis Guy, retired Chief Probation/Parole Officer with NC DOC Division of Community Corrections (hereinafter DCC); Kenneth King, retired DCC Judicial District Manager, District 4A; Lori Millette, DCC Personnel Manager; Terry Gootee, DCC Assistant Division 1 Administrator; Cornell McGill, DCC Division 1 Administrator; Robert Guy, retired Director of DCC; and the Petitioner, Isaac T. Perkins (hereinafter Petitioner).

The Petitioner presented testimony from one witness, Charles Raiford, a DCC Probation/Parole Officer.

EXHIBITS

The following exhibits were offered and admitted into evidence by Respondent:

1. Petition for a Contested Case Hearing
2. Letter from Thomas Surber
3. 8/14/08 written statement from Thomas Surber
4. Letter from Linda Surber
5. 11/29/07 memo from Dennis Guy to Kenneth King
6. 2/11/08 written statement from Petitioner
7. 3/1/07-3/11/07 DCC Narratives Report of Thomas Surber
8. 2/29/08 memo from Kenneth King to Terry Gootee
9. 3/18/08 memo from Terry Gootee to Cornell McGill
10. 3/25/08 memo from Cornell McGill to Lori Millette
11. 4/4/08 e-mail from Terry Gootee to Robert Guy
12. 4/4/08 Memo from Terry Gootee to Cornell McGill
13. 4/7/08 memo from Terry Gootee to Cornell McGill
14. 4/7/08 written statement from Petitioner
15. 4/28/08 letter from Terry Gootee to Petitioner re: Predisciplinary Conference Acknowledgement Form
16. 4/30/08 Predisciplinary Conference Acknowledgement Form
17. 4/30/08 letter from Terry Gootee to Petitioner re: Recommendation for Dismissal
18. 5/1/08 memo from Terry Gootee to Cornell McGill
19. 5/12/08 memo from Cornell McGill to Lori Millette
20. 5/19/08 letter from Terry Gootee to Petitioner, re: Dismissal
21. 9/17/08 letter from Lola Denning to Petitioner
22. Staff Training History for Petitioner
23. DCC Policies-Procedures entitled, "Substance Abuse Screening Program"
24. NC DOC Personnel Manual section entitled, "Disciplinary Policy and Procedures"

Based upon the pleadings and the entire file, sworn testimony of the witnesses, exhibits presented at the hearing and other competent and admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. The Petitioner Isaac Thomas Perkins was a probation officer employed by the Department of Corrections in the Division of Community Corrections. Petitioner began his employment as a probation officer with the North Carolina Department of Corrections on May 1, 1984, and was continuously employed in that capacity until his dismissal on May 19, 2008.
2. Petitioner was dismissed from his position as an Intensive Case Officer with NC DOC effective May 19, 2008 for unacceptable personal conduct. He had 289 months of service at the time of his dismissal. After he was dismissed, Petitioner retired effective June 1, 2008. He has not sought employment since being dismissed.
3. His duties were primarily to supervise criminal offenders who had been sentenced to a period of active incarceration, but whose sentence had been suspended and placed on supervised probation as an alternative to incarceration, subject to certain terms and conditions imposed by the sentencing court. The Petitioner's job was to monitor and enforce the offender's compliance with conditions of probation.
4. A sentencing judge may require, among other conditions, that the probationer submit at reasonable times to warrantless searches by a probation officer of his or her person and random drug testing.
5. Petitioner was assigned the supervision of probationer Thomas Surber. In March of 2007, Mr. Surber was on probation for convictions of felony forgery and uttering, and had a criminal history of previous property offenses. Mr. Surber had previously been incarcerated in prison.
6. NC DOC policy governing its Substance Abuse Screening Program is found in the DCC Policies-Procedures Manual which at the time of the incident at issue had last been revised November 1, 2005. The mission and purpose of the program is as follows:

"The Substance Abuse Screening Program is a supervision tool used to identify offenders with substance abuse problems in order that appropriate treatment services may be provided. DCC recognizes that denial and relapse are expected components of the treatment and recovery process....Probation/Parole Officers will use Substance Abuse Screening to: Augment Substance Abuse Treatment Plans; and provide validation to encourage offenders to enter into treatment."
7. With regard to the collection of urine specimens, the policy states:

“To reduce the possibility of an offender returning with a substance used to adulterate the specimen or concealing a container with a clean urine specimen that could be substituted, the Probation/Parole Officer will not allow the offender to leave the vicinity after a urine specimen has been requested. If the offender refuses to submit a specimen or is unable to provide a specimen, the Probation/Parole Officer will allow the offender no more than two hours to provide one.

Because the consumption of increased amounts of water lowers the concentration of drug in the specimen and possibly renders it undetectable, the offender will consume no more than eight ounces of liquid every hour and no more than sixteen ounces during the entire two-hour period. If the offender does not provide a specimen during the two-hour period, he/she will be in violation of the conditions of his/her probation, parole, or post-release supervision.”

8. This same policy requires a Probation/Parole Officer to escort the offender to the restroom and “[e]nsure that the offender remains in his/her presence without access to a water fountain, faucet, soap dispenser, cleaning agent, or any other material which could be used to adulterate the specimen.” The officer was directed to “observe the collection from a side or frontal view”.
9. Petitioner attended a two-hour drug testing training class on November 28, 1990, taught by the Division of Adult Probation and Parole, wherein the proper procedure for collection of urine specimens and what to do if an offender is unable to produce a specimen was discussed. The DCC policy and procedures for collection of urine specimens have not substantially changed since Petitioner received this training. Chief Probation/Parole Officer Dennis Guy (hereinafter “CPPO Guy”), Judicial District Manager Kenneth King (hereinafter “JDM King”), Assistant Division 1 Administrator Terry Gootee (hereinafter “Assistant Administrator Gootee”), and Division 1 Administrator Cornell McGill (hereinafter “Administrator McGill”) attended the training class with Petitioner.
10. To comply with these requirements, a probation officer conducting a drug screen would have to closely observe the offender’s genitals, close enough to determine that the offender was not attempting in any regard to render a false test, and the officer would have to continue observing the genitals the entire time the offender was urinating into the collection cup.
11. Mr. Surber was subject to random drug screens as a condition of his probation. Petitioner typically conducted Mr. Surber’s drug screens on Sundays at the Town of Wallace Police Department, which he used as a satellite office to meet with offenders between 1:00 pm and 6:00 pm.
12. Mr. Surber contends that he suffers from a condition referred to as “shy bladder”. He contends the condition is a consequence of feeling embarrassed by having an officer closely observe his genitals while he attempted to urinate.

13. "Shy bladder" is a recognized medical condition; the formal name is "paruresis." Kenneth King, the Judicial District Manager who conducted the Respondent's initial investigation, was familiar with the condition, stating "Yes, I have heard of it. Somebody who couldn't go in front of other people."

14. There is no evidence presented that Mr. Surber has a diagnosed medical condition that made it difficult for him to urinate in the presence of others. There is ample evidence that Mr. Surber often had difficulty producing a urine specimen for testing while being observed by others.

15. Mr. Surber had difficulty urinating in front of other probation officers, as well as Petitioner. In each instance he was advised he could drink some water and wait for up to two hours. He was always able to produce a urine specimen in view of the probation officer after using this procedure. Similarly, when Mr. Surber had difficulty producing a urine specimen in prison, he was given an eight-ounce cup of water, told he could wait two hours and was he able to produce the specimen.

16. On occasion when Mr. Surber was unable to produce a urine specimen while being observed, Petitioner did not give him the option of drinking eight ounces of water and waiting up to two hours as DCC policy provides. Instead, Petitioner suggested that he "prime the pump," a prison term to describe a method to stimulate the flow of urine. Most of the time, "priming the pump" was helpful to Mr. Surber in producing the urine specimen. When "priming the pump" did not help Mr. Surber produce a urine sample, Petitioner advised he would be marked as a refusal if he was unable to produce, which would have been a violation of probation.

17. On March 11, 2007, as an alternative, Petitioner told Mr. Surber he could strip naked, "squat and cough" to prove he wasn't hiding anything on his person, and go into the bathroom by himself to produce the urine specimen.

18. There is conflicting evidence as to the origin of the idea for Mr. Surber to strip in order to provide the urine sample. Mr. Surber contends that the Petitioner "gave me the option to strip" and suggested that it was Petitioner's idea. Petitioner testified that the suggestion originated with Mr. Surber. Mr. Surber was familiar with this procedure since he had been subjected to this method of collection while he was in prison.

19. Mr. Surber was not forced to give a sample by stripping. He was aware of the ability to provide a urine specimen in the manner described in the DCC procedures and that he had the option to drink water and wait as much as two hours as well.

20. Mr. Surber was aware that if he did not produce a urine specimen that he would be in violation of the terms and conditions of his probationary sentence as required by DCC policy, and that he could be sent back to prison for a violation.

21. Mr. Surber removed all of his clothes and the Petitioner examined him to see if he had anything that he was trying to secret. Mr. Surber squatted and coughed to show that he had concealed nothing. The door to the bathroom was open but not open in any manner in which

other persons could see Mr. Surber inside the bathroom. The Petitioner waited outside the bathroom until after Mr. Surber had provided the sample. After providing the sample Mr. Surber retrieved his clothing and got dressed.

22. The sample Mr. Surber gave on March 11, 2007 tested positive for cocaine, and combined with a later positive drug screen resulted in a hearing at which he was required to re-enter the DART program at Cherry Hospital.

23. One or more positive drug screens are a method by which a probationer may be ordered into the drug rehabilitation program at DART Cherry. The probationer could not be sent to DART for refusing drug screens.

24. As a result of Mr. Surber's second commitment to DART Cherry for drug treatment, he successfully kicked his drug habit, which allowed him to complete his probation successfully.

25. The procedure used by Mr. Surber and the Petitioner to allow Mr. Surber to produce a urine sample after stripping completely naked was humiliating, but not more humiliating than the standard procedure. Mr. Surber had stripped to produce a urine sample in prison.

26. Mr. Surber told his wife about the naked collection procedure soon after it occurred on March 11, 2007.

27. Mr. Surber did not make or file any complaint regarding the use of this procedure to permit him to produce a urine sample until seventeen months later.

28. Approximately June of 2007, Mr. Surber complained on several occasions to CPPO Dennis Guy, the Petitioner's immediate supervisor. Among his complaints was the frequency of the drug testing, but Mr. Surber made no mention or complaint regarding the method by which he had been giving the urine samples.

29. Between March 11, 2007, and November 2007, Mr. Surber, and his wife, made a number of complaints to the Petitioner's supervisor, regarding other aspects of his supervision of Mr. Surber. In November 2007, Mr. Surber asked to meet with Petitioner's direct supervisor, CPPO Guy, to discuss several instances where Petitioner had acted unprofessionally. Mr. Surber's wife and his former boss also attended the meeting. Mr. Surber did not tell CPPO Guy about stripping naked for drug screens because he contends that he did not know it was against the rules or something that he did not have to do.

30. In November of 2007, CPPO Guy asked the Surbers to put their complaints in writing. Mr. Surber's wife made a written complaint regarding the Petitioner's supervision of her husband, including particularly her contention that the Petitioner had drawn undue attention to her husband's positive drug test at the courthouse after a hearing during which her husband had insisted he would not test positive.

31. She did not complain about or reference naked collections in her letter or in her oral communications with CPPO Guy even though she had known about it for several months.

32. In November 2007, Mr. Surber also made a written complaint to Dennis Guy. Mr. Surber likewise made no complaint or even any mention of the naked collections.

33. After the positive drug test in the November court hearing, Mr. Surber had been sent back to the drug and alcohol treatment program at Cherry Hospital known as the DART program. Mr. Surber wrote "As a probation officer Tom Perkins has given me more than my share of chances. He is again trying to get me some help."

34. After CPPO Guy relayed the Surber's complaints to Judicial District Manager Kenneth King, JDM King requested and received permission from Terry Gootee, his supervisor and the Division One Assistant Administrator, to conduct an internal investigation.

35. On or about February 11, 2008, JDM King interviewed the Petitioner and asked him to respond orally and in writing to the Surbers' complaints. During the investigative interview, JDM King did not ask Petitioner about the procedure he used to conduct drug screens because at the time he was unaware that Petitioner had asked or allowed Mr. Surber to strip naked in order to provide the drug screen specimen.

36. In his written response the Petitioner asked JDM King to review all of the narratives documenting his supervision of Mr. Surber.

37. One of the duties of a probation officer is to make a record of his or her contact visits with each probationer which is recorded as "narratives."

38. These narratives may be reviewed by the probation officer's supervisor in several circumstances. Such a case review would be undertaken whenever a probation officer recommended filing a violation report, or when an offender lodged some complaint against the probation officer, or some times in random case reviews.

39. On March 8, 2007 the Petitioner's narrative report for Mr. Surber noted that he had visited Mr. Surber at his home; that this was the first home visit since Mr. Surber completed his first treatment in the DART Program, and noted that the Petitioner asked Mr. Surber to report to the satellite probation office at the Wallace Police Department on March 11th.

40. It was during this March 11, 2007 office visit that Mr. Surber stripped in order to provide the urine specimen which lead to the Petitioner's dismissal at issue herein.

41. In the narrative report for that visit, Petitioner noted that Mr. Surber had "got married the first weekend out of DART", and that his "wife's son is a serious drug user." The Petitioner then noted "Offender submitted to a random drug screen. Could not use bathroom after several tries. Had offender stip [sic] naked and use bathroom out of officer presence."

42. In February 2008, almost a year after the incident at issue herein, JDM King reviewed the case narratives in Mr. Surber's probation file as part of the internal investigation. During this review, JDM King discovered the entry written by Petitioner on March 11, 2007. King

promptly informed Assistant Administrator Gootee about this narrative and then scheduled a meeting with Mr. Surber. Despite having had occasions to review this narrative in connection with violation reports submitted by the Petitioner, or otherwise, CPPO Guy had not noticed the entry.

43. On February 22, 2008, Mr. King interviewed Mr. Surber regarding how the Petitioner had conducted the drug screens, and Mr. Surber expressed his dislike of the drug testing procedures, both the standard procedure as well as the naked collection. Mr. Surber made no complaint regarding the use of stripping naked procedure at that time.

44. No written statement was requested from Mr. Surber at that time. It was not until August 14, 2008 that Mr. Surber made any complaint about the naked collection procedure, in a written statement requested by Mr. King almost three months after the Petitioner was dismissed and approximately seventeen months after the stripping procedure was used.

45. By memorandum dated February 29, 2008, JDM King advised Assistant Administrator Gootee about the status of the investigation into the complaints about Petitioner's unprofessional conduct and the case narrative wherein Petitioner documented that he had Mr. Surber strip naked for a drug screen. JDM King observed that Petitioner had previously been issued a written warning for inappropriate communication with an offender and staff member. While noting that the written warning was inactive and could not be used against Petitioner, JDM King mentioned it for historical reference because he saw Petitioner's treatment of Mr. Surber as "yet another act of humiliating and/or dominating an offender for his personal pleasure." JDM King stated that this had been "an on-going problem throughout [Petitioner's] . . . career and that corrective action has not had any lasting effect" and recommended dismissal or in the alternative a written warning. (Emphasis added)

46. It is clear from the language that, despite the recitations, the previous written warnings were considered in the recommendation for dismissal.

47. Mr. King's memorandum addresses all of the complaints raised by Mr. and Mrs. Surber over the course of the investigation. All issues other than the stripping for production of a urine specimen were not substantiated and were not used for the discipline at issue herein.

48. Assistant Administrator Gootee took over the internal investigation upon JDM King's retirement. In an interview on March 6, 2008, Petitioner admitted that Mr. Surber stripped naked to submit a drug screen.

49. The Petitioner acknowledged and described the procedure, and stated that he had allowed the offender to give the sample in that way because the offender indicated he could not urinate with someone watching, and the procedure allowed the collection to accommodate that problem while satisfying the Petitioner that Mr. Surber was not concealing anything with which to adulterate or substitute the specimen.

50. The Petitioner was not asked at that time to provide a written statement regarding his use of the procedure.

51. Assistant Administrator Gootee submitted a memorandum to his superior, Administrator McGill on March 18, 2008 about his interview with Petitioner. On March 25, 2008, Administrator McGill forwarded this memorandum and the other internal investigation materials to DCC Personnel Manager Lori Millette (hereinafter "Personnel Manager Millette"), with a recommendation that Petitioner should be issued a minimum of a written warning for his inappropriate conduct.

52. On April 4, 2008, the Petitioner was placed on administrative reassignment.

53. After reviewing the internal investigation materials, Director Robert Guy (hereinafter "Director Guy") requested additional information about the complaints that Mr. and Mrs. Surber had raised in November 2007 concerning several allegations of Petitioner's unprofessional conduct. Director Guy did not feel he needed any further information about the investigation into Petitioner's drug screen practices. Pursuant to Director Guy's request, Assistant Administrator Gootee conducted a follow-up interview with Petitioner on April 7, 2008 to discuss the Surbers' complaints, obtained a written statement, and sent the information back up the chain of command.

54. On April 28, 2008 the Petitioner was given notice of a Pre-Disciplinary Conference to be held on April 30, 2008.

55. Assistant Administrator Gootee held a Pre-Disciplinary Conference on April 30, 2008 to provide Petitioner with an opportunity to respond to the issues supporting the recommendation for dismissal. At the conclusion of the Pre-Disciplinary Conference, Assistant Administrator Gootee presented Petitioner with a letter noting that it was his intention to recommend dismissal for unacceptable personal conduct. By having the letter recommending dismissal already prepared, it is clear that the decision had already been made to recommend dismissal. Petitioner was deprived of any meaningful Pre-Disciplinary Conference.

56. Administrator McGill advised Personnel Manager Millette that he concurred with Assistant Administrator Gootee's recommendation. At the hearing, Administrator McGill explained that he felt dismissal was warranted because DCC policy does not allow for probation officers to obtain drug screens by any means necessary, and Petitioner admitted he violated the written policy.

57. The recommendation was sent up the chain of command, and was approved by the Director of the Division of Community Corrections, Robert Guy.

58. Director Guy considered Petitioner's violation of DCC's drug screen policy and the incidents of unprofessional conduct about which the Surbers had complained when he decided to authorize dismissal. Director Guy testified that Petitioner's willful violation of DCC's drug screen policy was sufficient on its own to warrant dismissal, regardless of whether or not Mr. Surber was humiliated by having to strip naked. Director Guy was not aware that the actual dismissal letter prepared by NC DOC Personnel did not mention the other incidents of unprofessional conduct that had been investigated.

59. Petitioner advised two junior ranking PPOs, Charles Raiford and Mary Barber (hereinafter "PPO Raiford" and "PPO Barber"), that letting an offender strip naked for a drug screen and go into the bathroom alone was an alternative they could use if the offender agreed to it.

60. He did not tell PPO Raiford and PPO Barber that his suggested procedure violated DCC policy. PPO Raiford had only been a probation officer for a month and had not been to basic training. PPO Barber was similarly inexperienced. Petitioner knew that neither was certified. Because PPO Raiford and PPO Barber were new to the job, had not yet been trained on the proper procedures for drug screens, and were following the lead of a veteran probation officer, they received a formal coaching but were not otherwise disciplined.

61. NC DOC policy governing the personal conduct of its employees is found in the NC DOC Personnel Manual as Appendix C to the Disciplinary Policy and Procedures. The policy states, "All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action including dismissal without prior warning."

62. According to the NC DOC Personnel Manual, "the abuse of client(s), patients(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the state" may result in disciplinary action, including dismissal.

63. According to the NC DOC Personnel Manual, the willful violation of known or written work rules constitutes unacceptable personal conduct that may result in disciplinary action, including dismissal.

64. The Pre-Disciplinary Conference letter from Mr. Gootee to Petitioner dated April 28, 2008, specifically cites the reason for the discipline is for unacceptable personal conduct by "the abuse of client(s), patients(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the state." It specifically cites the Department of Correction Personnel Manual Section 6, page 38.

65. The Pre-Disciplinary Conference letter specifically cites that having Mr. Surber strip for the drug screen "made him feel humiliated and constitutes abuse of the probationer."

66. The Pre-Disciplinary Conference letter does not in any regard refer to a violation of a written or known work rule. Petitioner's responses at the pre-disciplinary conference addressed whether or not Mr. Surber was humiliated or embarrassed.

67. Mr. Gootee's letter to Petitioner at the end of the pre-disciplinary conference, dated April 30, 2008, uses the exact same language as the Pre-Disciplinary Conference letter. This letter likewise does not in any regard refer to a violation of a written or known work rule.

68. Mr. Gootee's office memorandum dated May 1, 2008 to Mr. McGill recites Petitioner's responses to the allegations of abuse which humiliated Mr. Surber. This memorandum concludes that Petitioner's actions "constitutes abuse" and recommends that he be dismissed. This memo likewise does not in any regard refer to a violation of a written or known work rule.

69. Mr. McGill's letter to Lori Millette merely concurs with Mr. Gootee's recommendation for dismissal.

70. The Petitioner was informed of his dismissal by way of a letter dated May 19, 2008, signed by Mr. Gootee.

71. Mr. Gootee's dismissal letter to Petitioner, dated May 19, 2008, addresses in more detail the issue of the specimen collection from Mr. Surber by stripping. It references the pre-disciplinary conference and specifically states that the Petitioner was given an opportunity to address the issues supporting the recommendation for dismissal, which would have been that Mr. Surber was humiliated or embarrassed, not the violation of a written or known work rule.

72. Mr. Gootee's dismissal letter to Petitioner specifically states that Petitioner's actions "were unprofessional, inappropriate, demeaning and potentially embarrassing and are considered unacceptable personal conduct . . ." (Emphasis added) It does not say that Mr. Surber was in fact embarrassed.

73. At the time of his dismissal, Petitioner's overall performance rating was very good, and he had no disciplinary actions on his record.

74. Until the internal investigation initiated because of the Surber's complaints, no one in Petitioner's chain of command was aware that he was letting Mr. Surber strip naked for drug screens rather than being marked as a refusal. Petitioner said he didn't feel like he needed to bring it to his supervisor's attention because "it was just a matter of getting the job done and moving on." Petitioner conceded that he never asked anyone in his chain of command for guidance.

75. Petitioner acknowledges that he was aware DCC policy states he should have given Mr. Surber eight ounces of liquid and let him wait up to two hours if Mr. Surber was unable to produce a sample. Petitioner concedes that he did not follow DCC policy.

76. The Petitioner further believed that as a 24 year veteran, he had the discretion to vary from the specific procedures described for collection of a sample in order to effect and carry out the policy of the DCC and the mission of its Substance Abuse Screening Program of identifying offenders with drug problems and steering them towards appropriate drug rehabilitation.

CONCLUSIONS OF LAW

Based on the foregoing Finding of Facts the Court makes the following Conclusions of Law:

1. The parties are properly before the Office of Administrative Hearings.
2. Petitioner is a career State employee subject to dismissal only for just cause. N.C.G.S. § 126-1.1 and § 126-35(a) (2008). The burden of showing just cause for dismissal rests with the department or agency employer. N.C.G.S. § 126-35(d) (2008).
3. "Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, 'whether the employee engaged in the conduct the employer alleges,' and second, 'whether that conduct constitutes just cause for [the disciplinary action taken].'" *N.C. Dep't of Env't & Natural Res. V. Carroll*, 358 N.C. 649, 665, 599 S.E. 2d 888, 893-94 (2004).
4. NC DOC policy governing the personal conduct of its employees is found in the NC DOC Personnel Manual as Appendix C to the Disciplinary Policy and Procedures. The policy states, "All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action including dismissal without prior warning."
5. The policy lists seven types of conduct which is "unacceptable personal conduct." The conduct for which the Petitioner was given notice and upon which his dismissal was premised is "the abuse of client(s), patients(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State." This is the conduct the "employer alleges" and must be proven in order to satisfy the requirement of *Carroll*.
6. According to the NC DOC Personnel Manual, the willful violation of known or written work rules constitutes unacceptable personal conduct that may result in disciplinary action, including dismissal. Respondent's evidence centers on this type of unacceptable personal conduct. Petitioner was not properly on notice of this allegation, but was only on notice of the allegations of "abuse".
7. In February 2008, almost a year after the incident at issue herein, JDM King reviewed the case narratives in Mr. Surber's probation file as part of the internal investigation. It was during this review that JDM King discovered the entry written by Petitioner on March 11, 2007. Petitioner had not tried to hide his actions with Mr. Surber; to the contrary, he had put everything in the narratives. Despite having had occasions to review this narrative in connection with violation reports submitted by the Petitioner, or otherwise, CPPO Guy nor anyone else in the chain of command had noticed the entry.
8. By memorandum dated February 29, 2008, JDM King advised Assistant Administrator Gootee about the status of the investigation into the complaints about Petitioner. JDM King observed that Petitioner had previously been issued a written warning for inappropriate communication with an offender and staff member. While noting that the written warning was inactive and could not be used against Petitioner, JDM King saw Petitioner's treatment of Mr. Surber as "yet another act of humiliating and/or dominating an offender for his personal pleasure." JDM King stated that this had been "an on-going problem throughout [Petitioner's] . .

. career and that corrective action has not had any lasting effect.”

9. It is clear from the language that, despite the recitations, the previous written warnings were considered in the recommendation for dismissal.

10. On August 14, 2008, approximately seventeen months after the stripping procedure was used, Mr. Surber first made a complaint about the naked collection procedure in a written statement requested by Mr. King, which was almost three months after the Petitioner was dismissed.

11. The Pre-Disciplinary Conference letter from Mr. Gootee to Petitioner dated April 28, 2008, specifically cites the reason for the discipline is for unacceptable personal conduct by “the abuse of client(s), patients(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the state.” It specifically cites the Department of Correction Personnel Manual Section 6, page 38, and no other section.

12. At the conclusion of the Pre-Disciplinary Conference, Assistant Administrator Gootee presented Petitioner with a letter noting that it was his intention to recommend dismissal for unacceptable personal conduct. By having the letter recommending dismissal already prepared, it is clear that the decision had already been made to recommend dismissal.

13. Mr. Gootee’s dismissal letter to Petitioner specifically states that Petitioner’s actions “were unprofessional, inappropriate, demeaning and potentially embarrassing and are considered unacceptable personal conduct” It does not state that Mr. Surber was in fact embarrassed.

14. The procedure used by Mr. Surber and the Petitioner to allow Mr. Surber to produce a urine sample after stripping completely naked was humiliating, but not more humiliating than the standard procedure, a process to which he had been subjected numerous times. Mr. Surber also had stripped to produce a urine sample in prison. Such a conclusion is specific to this probationer.

15. Respondent has not met its burden of proof as alleged in Petitioner’s dismissal that Petitioner’s unacceptable personal conduct was “the abuse of client(s), patients(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State.”

16. Based upon Conclusion number 15 above, it is not necessary for this Court to address the matter of “just cause”; however, the Court chooses to address the issue of “just cause” as it pertains to this Petitioner.

17. The second prong of *Carroll* is “just cause.” “‘Just cause,’ like justice itself, is not susceptible of precise definition. It is a ‘flexible concept, embodying notions of equity and fairness,’ that can only be determined upon an examination of the facts and circumstances of each individual case. . . . Thus, not every violation of law gives rise to ‘just cause’ for employee discipline.” 358 N.C. at 669.

18. Petitioner acknowledges that he was aware DCC policy states he should have given Mr. Surber eight ounces of liquid and let him wait up to two hours if Mr. Surber was unable to produce a sample. Petitioner concedes that he did not follow DCC policy.

19. The variance in the procedure adopted by Petitioner in this particular circumstance did not compromise the effectiveness of the procedure and in fact allowed the Petitioner to accomplish the two primary goals of the specific procedures: ensuring the integrity of the urine sample, and documenting its origin and chain of custody.

20. To utilize the process as used with Mr. Surber does not constitute "abuse" and does not constitute "just cause" for termination under the particular facts and circumstances of this case. A less severe punishment would be appropriate under these facts and circumstances.

21. Kenneth King referred to prior written warnings which had expired and recommended dismissal, or alternatively a written warning. On March 25, 2008, Cornell McGill recommended a written warning after reviewing Mr. Gootee's report of the investigation concerning the drug screen.

22. It is clear that other matters entered into the decision to dismiss Petitioner, including other disciplinary actions and other matters under investigation which were not substantiated and not pursued for discipline of the Petitioner.

23. Federal case law seems to indicate that failure to use the method employed by Petitioner with Mr. Surber may violate a prisoner/probationer's rights when he or she has been diagnosed with paruresis. Mr. Surber carries no such diagnosis, but has a clear history of inability to urinate in the presence of others, particularly probation officers and prison personnel.

DECISION

The Respondent's dismissal of Petitioner is vacated. The Petitioner shall be afforded the following remedies:

1. Petitioner shall be reinstated to his former position, with all credit for State service for all purposes being retroactive to the date of dismissal.
2. Petitioner shall be awarded, from the date of dismissal until his reinstatement, back pay and benefits including sick and vacation leave, and with all bonuses and increases he would have been eligible for if he had not been dismissed, minus any amounts Petitioner has earned from gainful employment in the interim.
3. Petitioner shall be permitted to rescind his retirement and be restored to his status in the retirement system prior to his dismissal, upon repayment to the retirement system of all monies he has withdrawn or been paid in benefits.

4. Petitioner is awarded his reasonable attorneys fees and costs, and shall submit a proposed bill of costs and his attorney's affidavit of hours expended together with such information as his attorney wishes the Court to consider in determining reasonable attorney's fees.

NOTICE AND ORDER

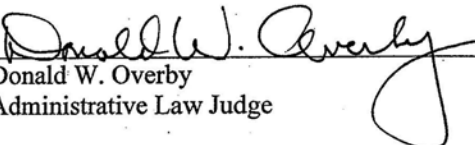
The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. §§ 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. § 150B-36(b)(3) requires the agency to serve a copy of the Final Decision on each party, and to furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

Pursuant to N.C. Gen. Stat. § 150B-35, unless required for disposition of an *ex parte* matter authorized by law, a member or employee of the agency making the final decision shall not communicate, either directly or indirectly, with any person or party or his representative concerning any issue of fact or question of law except on proper notice for all parties to participate.

Pursuant to N. C. Gen. Stat. § 150B-51, the scope and standard of review by the Superior Court of the final agency decision is established. In the event the agency does not adopt the decision of the administrative law judge, the Superior Court shall review the official record *de novo* and make findings of fact and conclusions of law.

This the ¹⁶17th day of September, 2009.

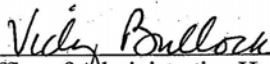

Donald W. Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEYS FOR RESPONDENT

This the 17th day of September, 2009.


Office of Administrative Hearings
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Raleigh, NC 27699-6714
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FILED

NORTH CAROLINA

WAKE COUNTY

TONYA M. JONES,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT
OF HEALTH AND HUMAN SERVICES,
Respondent.

2009 JUN 12 AM 11:30 IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

OFFICE OF
ADMIN HEARINGS

08 OSP 2418

DECISION

THIS MATTER came on for hearing before the Honorable Joe L. Webster, Administrative Law Judge, on February 26, 2009 in Raleigh, North Carolina. After considering the allegations in the Petition, the testimony of the witnesses, and the documentary evidence and exhibits admitted, the undersigned makes the following DECISION:

APPEARANCE S

ON BEHALF OF PETITIONER:

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114 West Edenton Street
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ISSUE

1. Whether Respondent met its burden of proof that it dismissed Petitioner, a career employee, from employment with Respondent with just cause?

EXHIBITS

Petitioner

- 1 Jones v. NCDHHS, Respondent's Response to Petitioner's First Set of Interrogatories and Requests for Production of Documents, 11/26/08
- 2 travel reimbursement information found on Vocational Rehabilitation Services' Intranet
- 3 Vocational Rehabilitation Services' travel system from web site
- 4 State of North Carolina Travel Policies and Regulations, effective 7/1/05
- 5 travel reports, 5/07 - 5/08
- 6 DHHS Policies and Procedures, Section V, Human Resources, Employee Relations, Disciplinary Action, effective 1/28/08
- 7 dismissal letter to Jones, 7/16/08
- 8 letter, Freeman to Jones, 4/9/08, suspension without pay
- 9 performance reviews, 2/6/04 - 3/18/08
- 10 reimbursement requests, 3/5/07 - 6/16/08
- 11 MapQuest directions, 1200 Fairmont Court, Fayetteville, to 1405 West Boulevard, Laurinburg
- 12 letter, Freeman to Jones, 6/25/08

- 13 e-mail, Jones to Guidoni, copied to Harrington and Freeman, 5/28/08
- 14 letter, Jones to Freeman, 6/30/08
- 16 sign in and sign out sheet, 5/2/08 (MKD)
- 17 sign in and sign out sheet, 5/9/08 (MKD)
- 18 sign in and sign out sheet, 5/13/08 (MKD)

Respondent

- 1 Division of Vocational Rehabilitation Services Personnel Policy/Benefit Checklist for Tonya Michelle Jones, 10/10/00
- 2 DHHS Workplan and Appraisal, Vocational Rehabilitation, Tonya M. Jones, 7/1/03 - 6/30/04
- 3 e-mail, Freeman to Jones, 3/10/05
- 4 DHHS Workplan and Appraisal, Vocational Rehabilitation, Tonya M. Jones, 7/1/04 - 6/30/05
- 5 DHHS Workplan and Appraisal, Vocational Rehabilitation, Tonya M. Jones, 7/1/05 - 6/30/06
- *6 Documented Counseling, from Clay Freeman to Tonya Jones, 12/12/06
- 7 e-mail between Jones and Freeman, 12/12/06
- 8 e-mail between Jones and Freeman, 1/9/07
- 9 DHHS Workplan and Appraisal, Vocational Rehabilitation, Tonya M.

Jones, 7/1/06 - 6/30/07

- 10 e-mail between Jones and Freeman,
5/31/07
- 11 development plan for Tonya Jones
signed 8/07
- 12 interim review, midcycle, for Tonya
Jones, signed 3/08
- 13 disciplinary action: suspension
without pay (10 days) to Jones,
4/9/08
- 14 e-mail between Guidoni and Jones,
5/2/08
- 15 letter, Freeman to Jones, re mileage
discrepancies, 6/25/08
- 16 travel report, Jones, 5/07 - 5/08
- 17 letter, Freeman to Jones re pre-
disciplinary conference, 7/8/08
- 18 e-mail between Jones and Freeman,
7/11/08
- 19 letter, Freeman to Jones, re dis-
missal, 7/16/08
- 20 hearing officer's report, Noelle
S. Brown, 10/8/08
- 21 travel reimbursement information
found on Vocational Rehabilitation
Services intranet
- 22 Vocational Rehabilitation Services'
Travel System

*6 Motion to deny admission of Ex. 6 denied; to be given appropriate weight if any.

WITNESSES

Petitioner called the following witnesses: Petitioner

Respondent called the following witnesses: Clay Freeman, Carolyn Temoney, Lenore Guidoni

FINDINGS OF FACT

1. The parties stipulated to adequate notice of the hearing.
2. Petitioner Tonya Jones ("Petitioner") was employed by Respondent DHHS ("Respondent") for approximately eight years. T. 216. Her job responsibilities included working with either the VR or IL Program when it determined that modifications or accommodations to homes or vehicles were necessary for an individual consumer. (T. p. 20). As an engineer Petitioner was responsible for making architectural drawings, writing specifications for or recommending "off the shelf" items, and overseeing construction or delivery of goods and services to meet the consumer needs. As an engineer she would visit the consumer's home with the VR or IL counselor where he/she could assess the situation. The Petitioner would lay out a design plan and then work with the consumer. If the consumer agreed to the plan, the engineer may then oversee selection of a contractor through a bidding process. Once a contractor is selected, the engineer is responsible for inspection and signing off on the project to ensure that it meets specifications. Petitioner and the other engineers travel more frequently than other staff, and they have the broadest coverage areas. (T. pp. 21-23)
3. In May 2008, Respondent dismissed Petitioner, a career employee, on the grounds that she committed unacceptable personal conduct by, "specifically, falsifying your monthly travel Travel Reimbursement Request Forms to reflect significantly extra mileage than was necessary to complete stated division work." T. 39; Respondent's Exhibit 19.
4. Petitioner, under the conditions of her job, was entitled to apply for and receive mileage reimbursements for travel connected with her job.
5. Prior to May 2008, no one in Petitioner's management structure expressed concern to Petitioner over her mileage reimbursement forms. T. 216.
6. Petitioner considered herself to be overworked. T. 217. She had the largest coverage area of any engineer in her work group. T. 217-218. Petitioner's superiors in DHHS ranked her productivity very highly. T. 203. Petitioner's first performance appraisal dated June 24, 2004 showed that she received a "very good" rating. It also showed that Petitioner had an issue of accountability for her time that required continued effort to work on. (R. Ex 2). Petitioner received an "outstanding" rating in June 2005 (R. Ex. 4) Petitioner's supervisor, David Freeman noted in Petitioner's February 6, 2006 interim review that she continued to have a weakness in the area of accountability for her time. Mr. Freeman noted "[y]ou need to adhere to inter office procedures for time management. Providing consistent and meaningful information on the office sign out sheets is required whenever you are out of the office. Remember you are accountable

for your time and whereabouts at all times.” In spite of these remarks in her interim review, Petitioner received a “very good” rating in June 2006. (T. p. 35-36;; R. Ex. 5)

7. Petitioner received a documented counseling letter regarding her time sheet accuracy and appropriate accountability for her time management when out of the office doing field work. On one occasion, Petitioner was observed at a hair salon during a period of time that she had signed out to be doing field work. (T. p. 52-53, 156-157); R. Ex. 13, 29). Petitioner was given a 10 day suspension without pay based on acceptable personal conduct. The undersigned finds that the counseling letter is not dispositive of the only issue before the Court and that is whether Respondent proved by a preponderance of the evidence that it dismissed Petitioners from employment with Respondent with just cause based upon Petitioner’s alleged falsification of her monthly Travel reimbursement request?

8. Petitioner’s work required a substantial amount of driving. T. 218 Engineers such as Petitioner are required not only to do an initial assessment at the client’s home, but also to work along with contractors and follow up with a final inspection. T. 218.

9. Petitioner was never formally instructed on the proper way to do mileage reimbursement sheets. T. 218. In 2000, when Petitioner began work with Respondent, she used an Excel spreadsheet for this purposed. T. 218. At the end of the month she would key in that data into Respondent’s travel reimbursement form, print it, and turn it in. T. 219. She continued to use this process up until the point when she was terminated. T. 219.

10. To calculate mileage on a given trip, Petitioner would reset her odometer to zero and would use whatever the odometer showed when she returned as her mileage entry. T. 220. Petitioner believes her odometer was accurate and never had any reason to feel otherwise. T. 220.

11. In May 2008, Petitioner turned in her mileage forms as usual to Ruth Hair, the secretary. Hair, in turn, would give the sheets to Respondent’s manager Clay Freeman (“Freeman”) to sign off. T. 220.

12. After the usual period of time for such reimbursements had passed, Petitioner inquired as to the status of her reimbursement form and was told it was being reviewed by Carolyn Temoney (“Temoney”) who had filled in for Petitioner’s actual supervisor, Clay Freeman (“Freeman”) who was out on leave. T. 221. Petitioner was puzzled that Temoney was involved in this situation as Freeman was her supervisor. T. 221.

13. Temoney then came to Petitioner and told her that she had “talked to Clay” and that he wanted Petitioner to “relook” at her travel mileage sheets because of first one, and then three specific trips in which Petitioner’s and Temoney’s readings of the mileage involved did not agree. T. 221. Petitioner believes that her statement of the mileage was more accurate as Petitioner actually engaged in the trips and Temoney did not. T. 221.

14. Petitioner discussed at trial three (3) incidents that Temoney referenced in their discussions. T. 222, Petitioner’s Ex. 16. The first, written as a trip to “Fayetteville and return,”

involved not just a trip directly to Fayetteville and return but extended driving within Fayetteville itself, including trips to Lowe's, Home Depot, and Wal-Mart. T. 224. Respondent produced no evidence contradicting that this was the route Petitioner actually took, but based the "appropriate" mileage solely on the sign/in-sign-out sheet information written by Petitioner at the start of the day. Upon discussing the discrepancies with Mr. Freeman, Petitioner told him that she frequently took longer routes because she was more familiar with them. (T. p. 59, 63; R Ex 15). On June 25, 2008, Mr. Freeman instructed Petitioner to use Mapquest or similar online route mapping site, to print out individual directions for each trip, and to attach those directions to her travel reimbursement requests beginning with her June requests. (T. p. 63; R Ex. 15).

14. At Lenore Guidoni's request, Mr. Freeman crosschecked the Travel Reimbursement requests for the period May 2007 through May 2008. Using Mapquest, Mr. Freeman crosschecked the Travel Reimbursement forms with Petitioner's sign-in and sign-out sheets. He reviewed the client data base for addresses and determined the total mileage. He used the address for Petitioner's duty station to the client's address. Mr. Freeman also reviewed the Mapquest map and printout to determine if it reflected the most logical route. He determined that Petitioner had claimed 12, 651 miles, but based on his calculations the total mileage claimed should have been 10,751. (T. pp. 59-60, 70-72, 107, 116, 197; R. Ex. 16 and 26). Mr. Freeman consulted with his supervisor and human resources personnel, and that Mapquest was an appropriate way to verify mileage. (T. pp. 125-116, 205-206).

15. Respondent had these sheets to keep track of employees' whereabouts as best as possible, with the notion that Respondent could telephone, say, Lowe's or Home Depot and track down an employee who was conducting business there. Employees in Petitioner's section had requested cell phones to maintain contact with their office, but these requests were denied. T. 227. Petitioner testified that she would usually put a general description of her planned activities on the sheet. T. 226. This would often change depending on tasks and duties that Petitioner had to undertake while actually in the field that day. T. 226. At no time did Respondent ask or direct Petitioner to go back and amend the sheet. T. 227.

16. A second trip (Petitioner's Exhibit 17), involving a trip to "Clinton and Fayetteville and return," was described by Petitioner as a "project that went haywire because of a contractor," and actually involved two trips to Clinton that day, and return, because a contractor did not show up for an assigned meeting. T. 228-229. Petitioner traveled to Clinton, had to leave for a subsequent trip to Fayetteville, and then had to return to Clinton to meet with the contractor who had originally failed to show up. T. 228-229. Respondent produced no evidence contradicting Petitioner's account of her activities on this trip except to point out that the double trip, previously unscheduled, was not reflected on her sign/in-sign/out sheet. T. 229.

17. A third trip (Petitioner's Exhibit 18) involved a trip to Linden, North Carolina – occurring like the others in May 2008. T. 229. There was no reference to Linden on Petitioner's sign/in-sign/out sheet; Petitioner explained that the client was physically located in Fayetteville but her address of record was in Linden. T. 230. Petitioner once again ended up having to meet with a contractor twice, necessitating two trips that increased her mileage. T. 230. Respondent "calculated" what it considered the appropriate mileage based on a single trip to Fayetteville.

Respondent produced no evidence at trial contradicting Petitioner's assertions as to what she actually did that day as opposed to what her sign/in sheet indicated she would be doing.

18. In each case, Petitioner stated that she believed her contentions as to the mileage, which were based on what she actually did that day instead of what the sheet indicated, and were taken from her odometer, was more accurate than mileage "calculated" from the sign/in sheet and Mapquest only. Petitioner also testified that she took routes with which she was familiar in order to expedite time. T. 234. Based on the workload that she had, she would take routes with which she was familiar in order to arrive at her destination in a timely manner. T. 234. If she did not, the situation would "steamroll" based on being late for subsequent appointments. T. 235.

19. Subsequently, Freeman made Petitioner substitute Freeman's own calculations of Petitioner's mileage for Petitioner's own on her mileage statement, even though she did not agree with them and considered hers to be more accurate. T. 237. Respondent refused to pay Petitioner's travel expenses for May 2008 unless she "agreed" to do this. T. 236-23; T. 124; T. 63-64.

20. Freeman later, at the direction of Guidoni, then went back over the entire past year of Petitioner's mileage reimbursement sheets and "Mapquested" (i.e., looked up the stated mileage as provided by the Maquest.com website) the travel concerned based upon where the sign/out sheet indicated Petitioner was to travel on that day. T. 59-60, Respondent's Exhibit 26.

21. Freeman made his determination on the mileage by (a) taking the information from the sign/in -sign/out sheets, (b) looking up the routes on MapQuest, and stating the MapQuest readings for that information. However, in addition to using the sheet information rather than the actual trip distances Petitioner drove, Freeman also freely substituted his own judgment as to the "best" or most direct route based on his own opinion rather than on the MapQuest statement. Accordingly, Freeman's information is the product not only of MapQuest searches but of Freeman's own judgment as to when MapQuest was "wrong." T. 102-103; T. 116-117. Moreover, per Freeman's own testimony, he did not always use "shortest distance" when doing his MapQuest entries. He would also use "shortest time" (it appears based on his own views) as well as his aforementioned "logic". T. 104, T. 105.

22. On cross examination on this point, Freeman answered "That is correct" to the following question: "So you then just picked out what seemed to you to be the most logical route associated with these multiple stops and entered this based on your assumption. Is that correct?" T. 103.

23. Freeman has no professional training in measuring routes, calculating distances, engineering, or surveying. T. 102. Freeman neither drove any of the routes concerned by himself or directed anyone to drive them to determine the actual mileage. T. 103.

24. Freeman used his "logic" and MapQuest only to measure distances, despite the availability of Google, Expedia, Yahoo directions, and North Carolina maps for such purposes. T. 104.

25. Freeman consistently maintained at trial that Petitioner was attempting to “cheat” the state by inflating her travel statement so as to obtain more money than she was legally entitled to. T. 112; 114-115; T. 119. However, in most months that Freeman examined, there were multiple instances where Petitioner’s statement of the mileage on given trips ended up being less, sometimes very significantly less, than that claimed as legitimate by Freeman. T. 111-123. Accordingly, for these trips, Petitioner submitted and collected less money than Respondent claims she was entitled. In May 2007 the total was \$22.31 less than she was entitled according to Respondent for proper expenditures. T. 111-113. In July, \$2.42. T. 114. In August, \$10.67. T. 114. In October, \$18.43. T. 114-116. In November, \$21.80. T. 117-119. In December, \$10.00. T. 119-120. In January 2008, almost \$35.00. T. 122. In February 2008, almost \$40.00 less than Petitioner was entitled according to Freeman’s calculations.

26. In total, Freeman conceded on cross-examination that Petitioner, whom he claims was trying to cheat the State by falsifying mileage statements, cheated herself out of \$161.05 to which she was legally entitled. T. 123.

27. When asked for an explanation of the above, Freeman stated, “I have no explanation why you would underestimate it unless you other than you weren’t keeping appropriate records.” T. 113. This would include, to take May 2007 alone, approximately half the alleged “overpayment” at issue for that month. T. 113. Ultimately, Freeman could not explain why someone whom he claimed was falsifying records, intentionally, with the goal of cheating the State would choose to simultaneously submit those records in such a fashion as to cheat herself out of significant sums to which Respondent claims she was legally entitled – while intentionally misreporting, allegedly, other trips to allegedly obtain reimbursements to which she was not entitled.

28. Petitioner brought up this “negative mileage” with Respondent on more than one occasion. T. 239. Each time, Lenore Guidoni (“Guidoni”), who supervised Freeman, responded that “Tonya, that’s your fault if you didn’t ask for your money.” Respondent neither then nor at trial answered the relevant question regarding this issue, which was and is: If Petitioner truly wished to defraud the state by falsifying travel records, which was Respondent’s stated reason for dismissal, why would she falsify them in a manner which would cause her to lose money to which, under Respondent’s own calculations, she was completely entitled. T. 239; T. 111-112.¹

29. Respondent’s travel policy does not require employees to use MapQuest when calculating either mileage reimbursement statements or routes, although it gives them the option to on its website. T. 180; T. 211; 213. Respondent’s website also provides a link to Expedia, another travel directions site. T. 213.

30. Petitioner consistently denied, at hearing, any intention to defraud the State. T. 240. Based on the above Findings of Fact, the Court makes the following Conclusions of Law:

¹ As seen elsewhere, Freeman repeatedly contended that Petitioner was attempting to cheat the state. When asked why Petitioner would, if so, submit reimbursement sheets that “cheated” her out of moneys to which Respondent agreed she was fully entitled, Freeman replied, “I have no explanation.” T. 113-114.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter as such.
2. At the time of her discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C.G.S. 126-1 et seq. Petitioner, therefore, could only "be warned, demoted, suspended or dismissed by" Respondent "for just cause." 25 NCAC 01J .0604(a).
3. One of the two bases for "just cause" is "unacceptable personal conduct," 25 NCAC 01J .0604(b), which includes, inter alia, "conduct for which no reasonable person should expect to receive prior warning," "conduct unbecoming a state employee that is detrimental to state service," and "insubordination." 25 NCAC 01J .0614(g), (h). "Insubordination," in turn, is defined as "[t]he willful failure or refusal to carry out a reasonable order from an authorized supervisor." 25 NCAC 01J .0614(g).
4. Respondent complied with the procedural requirements for dismissal for personal conduct pursuant to 25 NCAC 01J .0608 and .0613.
5. Pursuant to N.C.G.S 126-35(a), Respondent was required to set forth in its dismissal letter to Petitioner, in numerical order, the specific acts and omissions for which it claimed it was taking the disciplinary action of dismissal.
6. Pursuant to N.C.G.S 126-35(d), the burden of proof is on Respondent to show that Petitioner (a) committed the conduct alleged, and (b) that the conduct constituted unacceptable personal conduct.
7. While just cause is not susceptible of precise definition, our courts have held that it is "a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." NC DENR v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004). In Carroll, the Supreme Court enunciated the applicable tests for determining just cause in personnel cases. The Supreme Court explained that the fundamental question is whether "the disciplinary action taken was 'just.'" Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." 358 N.C. at 669. The Supreme Court concluded that "not every violation of law gives rise to 'just cause' for employee discipline." 358 N.C. at 669. Further the Supreme Court held that; "Determining whether a public employee had just cause to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." NC DENR v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).
8. Respondent's primary evidentiary source for claiming that Petitioner engaged in this conduct was the "MapQuest" exercise conducted by Freeman. Accordingly, it would be incumbent upon Respondent to demonstrate by the preponderance of the evidence that (a) MapQuest is a

sufficiently reliable source for making this judgment, and (b) if so, did Freeman's admitted conduct of freely substituting his "logic" for MapQuest reading he found illogical.

9. There appears to be no North Carolina case specifically addressing the admissibility of MapQuest readings to prove mileage. However, Petitioner draws the Court's attention to Brown v. Commonwealth of Pennsylvania, 2003 PA Super 486; 839 A.2d 433 (2003). In Brown, the court held that MapQuest itself disclaimed any representations of accuracy with respect to its data, and contained the following disclaimers of warranties:

Our own forays to the MapQuest TM website provide some support for our conclusion that the accuracy of the information does not meet the standard demanded by Pa.R.E. 201(b)(2). The following notices appear on the website:

No Warranty: This information is provided to you "as is," and you agree to use it at your own risk. MapQuest and its licensors (and their licensors and suppliers, including Her Majesty the Queen in Right of Canada) make no guarantees, representations or warranties of any kind, express or implied, arising by law or otherwise, including but not limited to, content, quality, accuracy, completeness, effectiveness, reliability, fitness for a particular purpose, usefulness, use or results to be obtained from this information, or that the information or server will be uninterrupted or error-free.

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10. Brown, Id. Accordingly, given MapQuest itself did not vouch for the accuracy of its information; it was reversible error for a court to take judicial notice of MapQuest distances in determining certain sentencing issues.

11. The undersigned does not take judicial notice of MapQuest's accuracy, as Respondent offered no evidence whatever as to the reliability of MapQuest or its percentages of error, to say nothing of the accuracy or inaccuracy of Freeman's method of employing it. Under such circumstances, the Court cannot rule that Respondent has sufficiently proven the reliability of MapQuest to demonstrate that Petitioner intentionally falsified mileage records that she claimed were based on her odometer readings. Even if the Court could take judicial notice of MapQuest, it cannot take judicial notice of Freeman's admitted (and subjective) practice of freely substituting his own judgment for that of the MapQuest readings when he found them "illogical" – and claiming that Petitioner's differing mileage from his "logical" interpretation constituted falsification of records. This is particularly the case given that Freeman, despite other options being available to check and contract the MapQuest readings, made no attempt to double check his readings with any other source.

12. Moreover, though the evidence shows that Petitioner received more reimbursement according to Freeman's MapQuest/logic determinations than Respondent claims she was entitled to, Respondent completely failed to explain the presence of considerable "negative mileage" statements in Freeman's findings – specifically, numerous cases where Petitioner claimed less mileage, often significantly less mileage, than Freeman claimed Petitioner was entitled to. In short, Respondent asks the Court to find that Petitioner falsified mileage records with the goal of obtaining funds that she was not entitled to receive – yet on numerous occasions cheated herself in those same reports out of moneys she clearly was, according to Respondent, entitled to receive.

13. Under these circumstances, the Court cannot conclude that Respondent met its burden of proof. Petitioner may have been less than perfect, or even irresponsibly negligent, in her mileage records. But Respondent specifically indicated it dismissed her for "falsifying" those records in, according to Respondent's management, an attempt to cheat the State out of funds. The evidence does not, under the appropriate burden of proof, support such a finding – particularly when, as the evidence demonstrates, Respondent never complained about Petitioner's mileage statements until May 2008, and then investigated the previous year's worth of mileage statements under Freeman's "MapQuest-logic" analysis.

14. Accordingly, while the act of falsifying mileage sheets for financial gain would unquestionably be just cause for dismissal had Respondent met its burden of showing that Petitioner engaged in such conduct, it failed to do so – thus failing one of the prongs of the Carroll test. Again, based on the "negative mileage," the method used, and the lack of proof offered by Respondent that the methodology and MapQuest itself were accurate, the Court cannot find that Petitioner falsified these records to show significantly greater mileage than she should have. Bearing in mind Carroll's directive to this Court, it is simply unfair and inequitable to conclude based on this showing of proof that Petitioner intentionally falsified these records rather than simply at times stating them inaccurately.

15. The Court does conclude that in a personal conduct situation the Respondent must show by the preponderance of the evidence that Petitioner tried to intentionally or willfully falsify the records. Blacks Law Dictionary indicates that the term falsify implies more than erroneous or untrue; it indicates knowledge of untruth. Proving knowledge of the falsification of Petitioner's mileage records is an essential element of Respondent's burden of proof. Such was the finding in Davis v. DHHS, 110 N.C. App. 730, 735-736 (1993), in which the Court of Appeals held that this same agency must show that the petitioner there "knowingly" misused State property in driving a State car outside the properly assigned area. Respondent's proof in this case falls short of preponderance standard and therefore Petitioner was dismissed without just cause.

DECISION

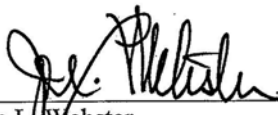
Respondent's decision dismissing Petitioner from employment is **REVERSED**, and Respondent is ordered to return Petitioner to the same or similar position and pay back pay from the date of dismissal until she returns to work. Additionally, Petitioner is entitled to reimbursement of costs, including reasonable attorney's fees, from Respondent.

NOTICE

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

The agency is required by N.C.G.S. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 12th day of June, 2009.



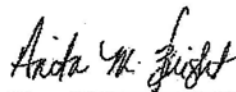
Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

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Kathryn J Thomas
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Raleigh, NC 27699-9001
ATTORNEYS FOR RESPONDENT

This the 12th day of June, 2009.



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STATE OF NORTH CAROLINA

Filed

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09 EDC 2081

COUNTY OF LEE

2009 JUL 27 PM 4:40

Office of
Administrative Hearings
PROVISIONS COMMUNITY DEVELOPMENT CORPORATION dba)
PROVISIONS ACADEMY,)
Petitioner,)
v.)
STATE BOARD OF EDUCATION,)
Respondent.)

DECISION

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on June 25-26 and July 1-2, 2009 at the Office of Administrative Hearings in Raleigh, North Carolina. Based on a June 30, 2009 Order of the Undersigned, the decision of the State Board of Education not to renew Petitioner's Charter effective June 30, 2009, was STAYED until July 31, 2009, or the issuance of a decision by the Undersigned, whichever occurred first. The record was left open for the Parties' submission of materials. After filings by Respondent and Petitioner on July 17, 2009 with the Clerk of the Office of Administrative Hearings (OAH) and receipt by the Undersigned on that same date, the record was closed.

APPEARANCES

For the Petitioner:

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For the Respondent:

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ISSUES

1. Did Respondent State Board of Education act erroneously and/or arbitrarily and/or capriciously in its decision to take no action on Petitioner's Charter when it was time for renewal thereby allowing the Provision Academy's Charter to expire and failing to renew the same?

2. Did Respondent State Board of Education fail to use proper procedure and/or fail to act as required by law or rule in letting Petitioner's Charter expire? If so, did Petitioner experience substantial and material prejudice from the procedural defects so as to significantly affect the nonrenewal of Petitioner's Charter?

EXHIBITS

For Petitioner: Petitioner's Exhibits 1 through 30.

For Respondent: Respondent's Exhibits 1 through 25, and Exhibits 28 through 32

APPLICABLE STATUTES

(including but not limited to the following)

N.C.G.S. 115C-238.29D - N.C.G.S. 115C-238.29G; and N.C.G.S. 115C-238.29I;
N.C.G.S. 150B-22 and 150B-23

PRELIMINARY MATTERS

Respondent filed a Motion to Dismiss for lack of jurisdiction in the Office of Administrative Hearings on April 29, 2009. Both parties having had the opportunity to present matters before the Undersigned, the Motion to Dismiss for lack of jurisdiction was denied.

Petitioner filed a Motion for Injunction in the Office of Administrative Hearings on June 4, 2009. Respondent filed a Motion to Convert Injunction Hearing into Hearing on the Merits on June 10, 2009. Both parties having had the opportunity to be heard agreed that the hearing on the Motion for Injunction and the hearing on the merits could be consolidated for hearing. Based on the conversion of the motion into a hearing on the merits, Petitioner was granted a stay pending the decision on the merits, not to extend beyond July 31, 2009.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge (ALJ) makes the following Findings of Fact. In making these findings of fact, the ALJ has weighed all the evidence and has assessed the credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or

remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Provisions Academy (Provisions) was originally approved in 1999 to receive a Charter and to operate a charter school in North Carolina. Provisions Academy's initial Charter was for a term of five years. Its Charter was renewed by the State Board of Education, effective July 1, 2004 for five more years. In 2005-06 a new 10,000 square foot building was built for school use and leased to Provisions Academy. There is approximately 12 years left on the mortgage. Provisions has received several worthy grants through the years including the upcoming year. At the time of the hearing four teachers at the school were on H-1 Visas. Among its other population as an alternative school, Provisions serves approximately 20 children (most from Lee County) with Individualized Education Programs.

2. Charter schools are governed by General Statutes, by the Charter issued by the State Board of Education, and by policies and rules adopted by the State Board of Education (SBE). In addition, charter schools must comply with any applicable federal laws and regulations.

3. A charter school is a public school that is entitled to receive public monies to operate a school. The legal entity that applies for and receives the charter is a nonprofit corporation. The board of directors of the charter school agrees, in exchange for receipt of public education dollars, to conduct the school including fiscal operations of the school in accordance with State and federal laws and regulations.

4. Provisions' renewal of its Charter in 2004 was for a five-year term and by its own terms would expire on June 30, 2009. In 2007, Provisions began the process of seeking a second renewal of its Charter.

5. The Charter Agreement entered into between the State Board of Education and Provisions Academy contained a provision that the charter school may apply to renew its charter pursuant to the State Board of Education policies and procedures.

6. Prior to April 2007, the Charter School Advisory Committee played a major role in overseeing the renewal of charter schools. That Committee had been appointed by the SBE pursuant to G.S. 238.29 I(d) and for many years had advised the SBE on many issues involving the approval, renewal and revocation of Charter Schools. However, the SBE had decided to abolish that Committee, which was advisory only, in April 2007. In abolishing the Charter School Advisory Committee, the SBE failed to amend its policy governing Charter School renewals (EEO-U-007) to reflect that change. Thus that policy, which remained technically on the books, still referred to the Committee and its role in the renewal process. Notably, the SBE policy, EEO-U-007, had not been formally adopted as a rule pursuant to the rulemaking procedures set forth in Chapter 150B of the General Statutes.

7. The Office of Charter Schools (OCS) reports to several State Board of Education Committees depending on the area of concentration. After the abolishment of the Charter School Advisory Committee, the Leadership for Innovation Committee (LFI) became the primary committee the Office of Charter Schools reported to and made recommendations for action, including approval of applications, approval of enrollment increases, and approval of renewal requests. The Leadership for Innovation Committee makes recommendations to the State Board of Education. The State Board of Education relies on and considers the work of the Office of Charter Schools and the Leadership for Innovation Committee, but the State Board of Education independently considers each matter on its own merits.

8. Since the policy governing renewals was obsolete, at least insofar as it relied upon the existence of a defunct Charter School Advisory Committee, Jean Kruft, a consultant in the Office of Charter Schools who handles the charter school renewal process, did not distribute the policy or rely upon it when she began to communicate with the schools beginning renewal in 2007. The 2007 renewal process targeted Charter Schools whose Charters expired in June 2009.

9. On May 1, 2007, the OCS sent a memorandum to all schools to be renewed in 2009 informing those schools of the process for seeking renewal. The memo did not mention the Charter School Advisory Committee. The memo specifically outlined the procedure and stated that the State Board of Education would vote on the renewed request in "January/February of 2009." Numerous memos and emails followed this initial correspondence further outlining the procedure to be followed, including the procedure for the self study and the on-site visit.

10. On May 2, 2007, Provisions Academy received a notice to apply for renewal from Jean Kruft, and in response, Provisions Academy applied for renewal on October 1, 2007 by electronic submission of the self study.

11. There was a conference call in August 2007, in which all renewal schools were invited to participate in order to clarify and further discuss the procedure for renewal of charters.

12. On November 21, 2007, the OCS sent out a memorandum outlining the procedure for renewal. This memorandum specifically set forth the dates that various actions were scheduled to take place and also specified which entities were responsible for various actions. The memo did not mention the Charter School Advisory Committee. The memo stated that Corrective Action Plans would be presented to the LFI Committee and would be monitored by the OCS "and appropriate divisions of the Department of Public Instruction." The memo stated that renewal data would be presented to the LFI Committee on January 2009 "for discussion" and that the full SBE would take action at its February 2009 meeting.

13. On November 30, 2007 the Office of Charter Schools submitted an action plan request to Provisions Academy concerning student accountability and performance with a deadline for Provisions Academy to respond on or before January 8, 2008 due to performance composite below 60% in March, 2004, April, 2005, May, 2006 and June, 2007.

14. Dr. Sadie Jordan, Principal of Provisions Academy, submitted an action plan on January 8, 2008. The plan was designed to address the issues of student performance at the school. The performance composite issue was resolved because Provisions Academy was

certified as an alternative, charter school by the State Board of Education. Petitioner was found to be compliant in other areas, including the Exceptional Children's Program, finance, SIMS, teacher licensure, and governance.

15. On November 11, 2008 Marie Kelly, an employee who was discharged by Provisions Academy at the beginning of November 2008, sent a letter to Anna Bristow, a Regional Consultant in the Office of Child Nutrition Services at the Department of Public Instruction (DPI). The letter expressed numerous concerns regarding the food and nutrition program, student enrollment data, undocumented suspensions and expulsions, and non-existent employees at Provisions Academy.

16. As a result of that complaint the Office of Child Nutrition Services sent a three-person team to Provisions Academy on November 24, and 25, 2008, to conduct an unannounced audit to monitor Provisions Academy's compliance with Federal and State Regulations governing the operation of the federally funded Child Nutrition Program. The team was unable to obtain required documentation and thus was unable to determine or validate the school's claims for federal reimbursement for nutrition programs. The records were incomplete, inaccurate, or nonexistent and the Office of Child Nutrition Services could not verify compliance with federal law. The school was told to provide the required documentation or it would have its participation in the National School Lunch Program terminated.

17. In addition, the audit by Child Nutrition showed that far fewer students were in attendance at the school than appeared on the rolls, that students were not accounted for, that food was not properly accounted for, and applications for free and reduced lunch were incomplete or inaccurate. Anna Bristow testified that the record-keeping problems at Provisions were "long standing" and ongoing and were "systemic." She stated that no other schools in her experience had problems of "this magnitude." Her testimony was found credible.

18. After the visit on November 24-25, 2008, Dr. Jordan provided documentation addressing balancing the number of students enrolled against the number of students served and addressing application errors.

19. The three-person team that went to Provisions unannounced in November 2008 also noted that there was a significant lack of discipline at the school; that a serious fight broke out in the lunchroom while they were there; that they were frightened to the point that they asked permission to leave early; that there was little apparent learning going on at the school; and that faculty and students lined up in the hall and clapped as they departed the school.

20. The Child Nutrition consultant visited Provisions a second time in December 2008 and found substantially the same problems as before.

21. On December 9, 2008, Dr. Lynn Hoggard, Section Chief, Child Nutrition Services, DPI, sent a memorandum to Jack Moyer, Director, Office of Charter Schools, notifying him that the team had visited Provisions and had found areas of noncompliance with the federal laws governing the Child Nutrition Program. Dr. Hoggard also noted that "there were no means for validating the school's enrollment, which affects not just the Child Nutrition program, but other programs as well."

22. Dr. Hoggard specifically noted the following regarding Provisions:

The reviewers were taken aback by the lack of control and discipline in the school. The reviewers described the environment as disruptive, disorganized . . . hardly conducive to student success. On day two of the review, the reviewers chose to leave the school because students were fighting and the reviewers became uneasy due to the environment.

23. As result of this communication from Dr. Hoggard, Jack Moyer decided to send Scott Douglass and Jean Krufft to Provisions, unannounced, on December 16, 2008. Mr. Douglass is a Student Accounting Consultant, Information Analysis and Reporting Section, School Business Services Division at DPI. Mr. Douglass monitors the use of NCWISE by local school systems and charter schools. NCWISE is a computer data base which houses a multitude of records concerning students: their education information, their attendance information, and their personal information.

24. One day prior to Mr. Douglass's and Ms. Krufft's visit on December 16, Mr. Moyer had met with his staff on December 15, 2008, to review all the information concerning the schools up for renewal in June 2009. The purpose of the meeting was to discuss the charter schools up for renewal and decide which schools should be recommended for renewal, and for how long, and which schools should not be recommended for renewal. On that date (December 15), the staff determined that, based upon information then available, Provisions should be recommended for a 7-year renewal.

25. The following day, December 16, 2008, Ms. Krufft and Mr. Douglass visited Provisions Academy unannounced for the purpose of doing a headcount. The only accurate way to determine the actual enrollment at a charter school and to accurately account for students at a charter school is by physically counting students via an in-person roll call.

26. On December 16, 2008 Scott Douglass and Jean Krufft reported to the school at approximately 9:30 a.m. and met with the Principal, Dr. Jordan. They went over the names of several students who she explained were absent or homebound. There were also students who were suspended and thus not on campus. There was a student who was in jail and another whose car had broken down; these were two of the students classified as "homebound." Some students had left school without signing out. With the assistance of Sadie Jordan, Mr. Douglass and Ms. Krufft conducted a student enrollment count and found 89 students enrolled or registered, and 3 students present at school but not enrolled (new students) for a total enrollment of 92 students. Ms. Krufft and Mr. Douglass visited classes to do a physical headcount. Present for this visit was a total of 33 students out of 92 enrolled. They found the following after conducting the count:

- Present during the DPI count – 33,
- Suspended Students – 12,
- Homebound – 14,
- Reported Absent verbally – 10,
- Signed out for the day – 3,

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- Afternoon only student – 1,
- Whereabouts unknown – 17 students.

(Resp Ex. 15)

27. Ms. Kruff wrote a report summarizing her visit and noted:

It is of grave concern that the school had so few students present for instruction. (there was also no indication that there are usually more students present than what we saw today) It is also of concern that the school appears to be designating students who have difficulty with coming to school regularly, or who have difficulty with the structure of the school day as “homebound”, and that those students are then provided with instruction only when they decide to come to school to get assignments or seek help from a teacher.

28. Mr. Douglass also wrote up his observations from the December 16 visit. He noted that out of 92 students enrolled, only 33 were actually present that day. He tallied up the known absences, the homebound, and the suspended, and determined that there were still 17 students unaccounted for. Mr. Douglass also questioned the school’s application of the “homebound” policy to students who do not fit the definition. Mr. Douglass, additionally, noted that some students were working and only attending school part-time. Finally, Mr. Douglass noted that students do not adhere to any sign-out procedure at the school.

29. On December 16, 2008 Mr. Douglass could not determine the official reporting because Absentee Data had not been entered into the NCWISE system to address the 17 students “whereabouts unknown.” When Mr. Douglass later examined the data from the official NCWISE system, there were numerous discrepancies, including students counted as absent in NCWISE who were in fact present on that day, and students who were not present but were not reported as absent in the system. In the system, there were, in fact, some students whose whereabouts were unknown on the December 16, yet they appeared to be counted “present” in NCWISE.

30. Scott Douglas finished his visit and left Provisions around 11:30 a.m. Before leaving he met again with Dr. Jordan and went over his concerns with her. Mr. Douglas left information with Sadie Jordan that troubled him on an enrollment sheet that he had marked. He stated he would like additional information on the students but did not give her a deadline to provide the information.

31. On December 16, 2008, Provisions Academy was conducting testing in the high school and their Christmas vacation was starting 2 days later

32. On December 17, 2008 Scott Douglass sent the written findings for his December 16, 2008 visit to Jack Moyer and Jean Kruff with the Office of Charter Schools but did not provide a written report to Provisions Academy. On December 17, 2008, Jean Kruff also prepared a written Charter School Visit Report which was sent to Jack Moyer with the results of the student count performed by Scott Douglass on December 16, 2008, but did not send Provisions Academy a copy of the report.

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33. On December 19, 2008, Mr. Moyer met with Jean Kruft to discuss the results of the visit on December 16. Both of them agreed that the findings from that visit, together with the information submitted by the Child Nutrition Section, dictated a different recommendation with respect to the renewal of Provisions' Charter. Both agreed to change the recommendation for renewal for 7 years to a recommendation that the Charter not be renewed. Ms. Kruft stated that except for the December 16, 2008 visit and findings (and information from the Child Nutrition Section), the Charter would have been renewed. This new recommendation was not immediately forwarded to Provisions from either Jack Moyer or Jean Kruft.

34. On December 19, 2008 the Office of Charter Schools recommended to the Leadership for Innovation Committee that three school charters not be renewed. They recommended that Provisions Academy's Charter not be renewed citing information from the December 16, 2008 visit as well as "the school's interpretation of the SBE Homebound Policy is not in line with the text of the policy," the lack of "face to face instruction" for some students, and the occurrence of "an ongoing investigation by the Child Nutrition Section due to an allegation of inflated claims for federal reimbursements." (Pet. Ex. 10) Also the Office of Charter Schools recommended to the Leadership for Innovation Committee that PreEminent's Charter not be renewed because "performance composite has been 50 or below for the last 3 years and low performing two of the 3." (Pet. Ex. 10) The OCS also recommended that Torchlight's charter not be renewed because of academic performance including "APY not met 4 of the last 5 years," and also citing, "testing procedures not in compliance," as well as "food service violations, school lunch program non-compliant," and "several budget problems." (Pet. Ex. 10). The specifics of the OCS recommendations are found in the "Data for Charter Schools Seeking Renewal in 2009" section of Petitioner's Exhibit 10.

35. The recommendation, along with all recommendations regarding the 2009 renewals, was compiled with the materials submitted to SBE for its upcoming January meeting. Those materials were also posted on the internet. The SBE materials posted on the internet included the agenda for its upcoming January meeting, as well as all attachments and supporting documentation for agenda items. The agenda items dealing with the 2009 renewal recommendations listed all the 16 charter schools applying for renewal of their charter and a chart outlining for each school its ABC's performance, whether the school had any areas of noncompliance, and the recommendation of the Office of Charter Schools as to whether or not to renew the Charter and for how long.

36. Dr. Jordan saw the posting on the internet on December 26, 2008. After learning of the recommendation, she attempted to call and discuss the matter with members of the DPI staff, but December 26, 2008, was a holiday and no one was at the office to receive the call. Dr. Jordan left a message on Jean Kruft's voicemail. Ms. Kruft did not receive the voice mail message until she returned from the holiday break, after January 1, 2009.

37. On or about January 2, 2009, Ms. Kruft called Provisions Academy and spoke to an administrator. She did not recall if it was Dr. Jordan or another individual. She informed this individual that the LFI Committee Chair had decided to allow in-person presentations at the LFI Committee meeting on January 7, 2009. The SBE members on the LFI Committee are Melissa Bartlett, Kathy Taft, Wayne McDevitt and Ray Durham. Melissa Bartlett is the chairperson.

38. On January 7, 2009, the issue of the 2009 renewals for 16 charters schools was on the LFI agenda for discussion. The Committee received information regarding the 16 schools and Ms. Bartlett noted that "the three schools not recommended for renewal had representatives in the audience and the representatives would be given an opportunity to speak briefly at the appropriate time." (Minutes of the LFI Committee, January 7, 2009)

39. At the LFI meeting, all three schools whose charters were recommended by the OCS for nonrenewal were, in fact, allowed to present their responses, and any supporting documentation, to the Committee. Dr. Jordan presented on behalf of Provisions and addressed the school's academic performance as well as the attendance issues raised as a result of the December 16, 2008 on-site visit by Ms. Krufft and Mr. Douglass. Dr. Jordan had notice of the LFI meeting and was aware that the school was recommended for nonrenewal by the OCS. She appeared at the LFI meeting with copies of written materials to distribute. She was permitted to make an oral presentation to the Committee and was available to answer questions by the Committee members.

40. The issue of the charter school renewal was on the LFI and SBE January agendas for "discussion only." Ms. Bartlett specifically noted to the LFI Committee and the audience at the January 7, 2009, meeting that the "information will still be out for another 30 days before the SBE acts on the renewals in February." (LFI minutes, January 7, 2009) Ms. Bartlett also informed the schools that they should contact Betsy West if they had any questions or any further information to submit.

41. Provisions Academy was allowed approximately 30 more days during which school representatives could contact SBE members with regard to the upcoming renewal decision. Dr. Jordan testified that she did, in fact, send written information to SBE members during that time period.

42. By the February 5, 2009 meeting of the Leadership for Innovation Committee the Office of Charter Schools had recommended that no action be taken on the charter renewals (i.e. the schools' Charters be allowed to lapse, or expire, thus resulting in the nonrenewal of the Charters effective on June 30, 2009) of Provisions Academy, PreEminent and Torchlight for the same reasons identified at the January 7, 2009 meeting of the Leadership for Innovation Committee.

43. At the February 5, 2009 meeting the State Board of Education voted unanimously to accept the recommendations of the LFI Committee for Provisions Academy. It voted to renew the charter of PreEminent. It voted to delay consideration of Torchlight until the LFI Committee received additional information. Torchlight's charter was eventually renewed.

44. By letter dated February 6, 2009, Jack Moyer informed Dr. Jordan of the action of the SBE and that a DPI employee would be contacting the school regarding close-out and final audit procedures.

45. Provisions timely filed a Petition for Contested Case Hearing in the Office of Administrative Hearings on March 24, 2009.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in the matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. Petitioner has claimed in this action that the decision of the State Board of Education is (1) arbitrary and capricious; (2) erroneous; (3) in violation of law or rule; and/or (4) in violation of proper procedures. The Petitioner, Provisions Academy, has the burden of proof by a greater weight or preponderance of the evidence regarding its claim(s). Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing."

3. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619. The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm'r of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982). In weighing evidence which detracts from the agency decision, "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand" *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

4. The Petitioner has failed to overcome the presumption set forth by law that the State Board of Education's decision denying the renewal of Petitioner's Charter was lawful and correct. As such, the presumption granted by law remains, that, the SBE did not exceed its authority or jurisdiction, did not act erroneously, did not act arbitrarily or capriciously, and acted as required by law or rule.

5. The preponderance of the evidence in the record supports the State Board of Education's reasons to vote not to renew Provisions' Charter to operate a public school in North Carolina. Evidence for Respondent concerning student enrollment, record-keeping, management of students (the Undersigned has noted the challenges faced by the school as an alternative

school) and issues regarding noncompliance with federal law governing the School Lunch Program is not outweighed to that degree required by law by the evidence for Petitioner. As such Petitioner has failed to carry the burden of proof assigned to it by law.

6. With respect to an analysis of alleged substantial and material prejudice from procedural defects so as to significantly affect the nonrenewal of Petitioner's Charter, Petitioner's evidence does not outweigh Respondent's evidence and the presumptions granted by case law.

7. In order to determine what "process" is "due," the United States Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), sets forth a balancing test. The Court in *Mathews* described due process as a flexible process that "calls for such procedural protections as the particular situation demands," and sets out three factors to consider in determining what process is due in a given situation: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

8. With regard to the level of process due under the Constitution of North Carolina prior to the State's termination of individual property rights, North Carolina law parallels U.S. Supreme Court precedent. See *Paschal v. Myers*, 129 N.C. App. 23, 497 S.E.2d 311 (1998)

9. The preponderance of the evidence shows that SBE Policy, EEO-U-007, had been rendered obsolete when, in April 2007, the State Board of Education abolished the Charter School Advisory Committee. All charter schools had been notified of the abolition of this Committee. The Office of Charter Schools crafted a procedural "stand-in" policy that was distributed to all charter schools up for renewal in 2009. Numerous emails and other correspondence were sent to the charter schools outlining the procedure to be followed, and opportunity existed for charter school operators to ask questions and seek clarification of those procedures if such were necessary.

10. Under the General Statutes, charter schools are on notice that they are required to adhere to the accounting and reporting requirements of the State; they are required to adhere to all State and federal laws and regulations; and they may be terminated or non-renewed for violations of law, for material violation of their charter, or for "other good cause identified." G.S. 115C-238.29F(f); 115C-238.29G(a). Provisions was on notice by General Statutes and by the terms of its own Charter that its Charter terminated by its own terms effective June 30, 2009.

11. Prior to December 16, 2008, no decision had been made or action taken by the OCS with respect to not renewing the Charter. In fact, as of December 15, 2008, the OCS had fully intended to recommend that Provisions receive a 7-year renewal of its Charter. That decision changed on December 19, 2008, at which time Mr. Moyer and Ms. Kruff met and decided, based upon the results of the December 16 visit and information from the Office of Child Nutrition Services to change the recommendation of the seven-year renewal to that of nonrenewal. Prior to December 19, 2008, no notice was necessary or possible with regard to the decision to recommend to nonrenewal of the Charter.

12. Provisions was aware in November 2008 that problems existed regarding record-keeping and enrollment at the school as a result of a complaint to the Office of Child Nutrition Services. Further, on December 16, 2008, school officials were alerted to concerns with student accounting, homebound issues, and student registration. Dr. Jordan was aware of the OCS decision regarding nonrenewal and the reasons for such on December 26, 2008, having seen the SBE agenda for the January meeting posted on the internet.

13. Prior to the Respondent's voting on the decision for nonrenewal, Petitioner was allowed to submit documents to the Leadership for Innovation Committee and to have an oral presentation to the LFI Committee. Further, Petitioner was allowed thirty days during which to contact members of the State Board of Education and to respond to the issues or to submit additional information before a final vote on the matter.

14. Applying the legal standards of proper procedure and "due process" to the facts above, the Undersigned determines that Provisions Academy had sufficient notice and opportunity to be heard on the issues involved in the nonrenewal decision.

15. Petitioner has failed to show, by a preponderance of the evidence, that it experienced material prejudice by Respondent's failure to follow specified procedure, even if Respondent had *de minimis* procedural violations.

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

DECISION

Petitioner failed to carry its burden of proof by a preponderance of the evidence that the Respondent acted erroneously and/or arbitrarily and/or capriciously in its decision to take no action on Petitioner's Charter when it was time for renewal thereby allowing the Provision Academy's Charter to expire and failing to renew the same. Further, Petitioner failed to carry its burden of proof by a greater weight of the evidence that it experienced substantial and material prejudice from *de minimis* procedural defects so as to significantly affect the nonrenewal of Petitioner's Charter. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioner's evidence in each of the issues in this case does not overbear in that degree required by law the weight of evidence of Respondent.

NOTICE

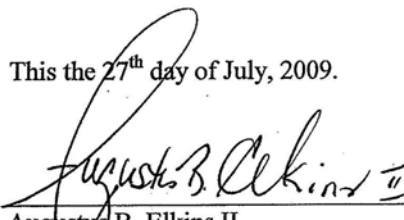
In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set 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.

The agency shall adopt the Decision of the Administrative Law Judge unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record.

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision. N. C. Gen. Stat. § 150B-36(a). The agency that will make the final decision in this case is the North Carolina State Board of Education.

IT IS SO ORDERED.

This the 27th day of July, 2009.



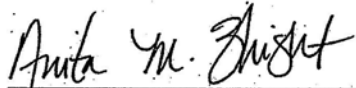
Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

Fred D Webb
Attorney at Law
PO Box 580
Sanford, NC 27331
ATTORNEY FOR PETITIONER

Laura E. Crumpler
PO BOX 629
Raleigh, NC 27602
ATTORNEY FOR RESPONDENT

This the 28th day of July, 2009.



Office of Administrative Hearings
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STATE OF NORTH CAROLINA
COUNTY OF ALLEGHANY

Filed
2009 AUG 18 PM 12:39

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09 EHR 0122

OLDE BEAU GENERAL PARTNERSHIP
Petitioner,

vs.

NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL
RESOURCES, DIVISION OF LAND
RESOURCES,
Respondent.

DECISION

This contested case was heard before Administrative Law Judge Beecher R. Gray on July 15, 2009 in Sparta, North Carolina. In this contested case, Olde Beau General Partnership (hereinafter "Petitioner") appealed the North Carolina Department of Environment and Natural Resources, Division of Land Resources' (hereinafter "Respondent") assessment of a civil penalty against it for violations of the Sedimentation Pollution Control Act of 1973 and the rules promulgated thereunder.

APPEARANCES

For Petitioner:

Anthony Packer, *pro se*
Box 32
Roaring Gap, North Carolina 28668,

For Respondent:

John A. Payne, Esq.
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

STATUTORY SECTIONS AND RULES IN QUESTION

N.C. Gen. Stat. § 113A, Article 4, the Sedimentation Pollution Control Act of 1973
N.C. Admin. Code tit. 15A N.C.A.C 4B.0105
N.C. Admin. Code tit. 15A, N.C.A.C. 4B.0113

ISSUES

1. Whether Respondent's levy of civil penalties against Petitioner for failure to conduct a land-disturbing activity in accordance with an approved erosion and sedimentation control plan developed under the Sedimentation Pollution Control Act of 1973 and rules promulgated thereunder is supported by the evidence.

2. Whether Respondent's levy of civil penalties against Petitioner for failure to take all reasonable measures to protect all public and private property from damage caused by land-disturbing activity under the Sedimentation Pollution Control Act of 1973 and rules promulgated thereunder is supported by the evidence.
3. Whether Respondent's levy of civil penalties against Petitioner for failure to maintain all erosion control measures under the Sedimentation Pollution Control Act of 1973 and rules promulgated thereunder is supported by the evidence.

TESTIFYING WITNESSES

Petitioner:

Frank Smith, Groundskeeper and Maintenance Supervisor for Olde Beau General Partnership

Respondent:

1. Matthew E. Gantt, Regional Director/Engineer, Winston-Salem Regional Office, Division of Land Resources
2. Neil R. Uldrick, Environmental Specialist II, Winston-Salem Regional Office, Division of Land Resources
3. Francis M. Nevils, Jr., Chief, Land Quality Section, Division of Land Resources

EXHIBITS RECEIVED INTO EVIDENCE

Petitioner:

Exhibits 1-14, 16-32, 34, and 36 were admitted

Respondent:

- (A) Approved Erosion Control Plan for Olde Beau General Partnership
- (B) General Warranty Deed--Olde Beau, LTD to Old Beau General Partnership
- (C) Financial Responsibility Ownership Form Naming Olde Beau General Partnership
- (D) Letter of Approval with Modification of Erosion Control Plan
- (E) Sedimentation Inspection Report dated 4/16/2008 with Photographs numbered 1-8
- (F) Notice of Violation of the Sedimentation Pollution Control Act to Olde Beau General Partnership with Return Receipt

- (G) Letter from Tommy L. Maines, Old Beau's General Manager to Matthew Gantt, Land Quality Winston-Salem Regional Officer
- (H) Sedimentation Inspection Report dated 6/4/2008 with photographs numbered 1-5
- (I) Sedimentation Inspection Report dated 7/10/2008
- (J) Notice of Continuing Violation of the Sedimentation Pollution Control Act to Olde Beau General Partnership
- (K) Sedimentation Inspection Report dated 7/29/2008 with photographs numbered 1-9
- (L) Guidelines For Assessing Civil Penalties For Violations of The Sedimentation Pollution Control Act
- (M) Sedimentation Inspection Report dated 9/9/2008 with photographs numbered 1-8
- (N) Civil Penalty Assessment with Cover Letter and Return Receipt
- (O) Worksheet - Civil Penalty Assessment for SPCA Violations
- (P) Not entered into evidence
- (Q) Not entered into evidence
- (R) Resume - Francis M. Nevils, Jr.
- (S) Resume - Matthew Gantt
- (T) Resume - Neil Uldrick
- (U-1) Sedimentation Inspection Report dated 10/5/2006
- (U-2) Sedimentation Inspection Report dated 11/1/2006
- (U-3) Notice of Violation of the Sedimentation Pollution Control Act to Olde Beau General Partnership with Return Receipt
- (U-4) Sedimentation Inspection Report dated 12/7/2006
- (U-5) Sedimentation Inspection Report dated 5/22/2007
- (U-6) Sedimentation Inspection Report 9/20/2007
- (V) Not entered into evidence
- (W) North Carolina General Statute Chapter 113A

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

FINDINGS OF FACT

1. North Carolina General Statute Section 113A-51, entitled Preamble, embodies the legislative statement as to the purpose of the Sedimentation Pollution Control Act of 1973. Section 113A-51 provides:

The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and

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sedimentation is deemed vital to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose. It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation. In recognition of the desirability of early coordination of sedimentation control planning, it is the intention of the General Assembly that preconstruction conferences be held among the affected parties, subject to the availability of staff. (1973, c. 392, s. 2; 1975, c. 647, s. 3.)

2. Petitioner Olde Beau General Partnership owns and operates Olde Beau Golf & Country Club on Turnberry Drive off US Highway 21 in Roaring Gap, North Carolina. (Respondent's Exhibits B & C) Petitioner owns approximately 110 acres of an 800+ acre tract of which approximately 10 acres were the subject of land disturbing activities relative to roadways and infrastructure for a development project beginning in late 2005.
3. Respondent is a State agency established under N.C. Gen. Stat. Chapter 113A, Article 4, and vested with statutory authority to enforce certain of the State's environmental pollution laws, including laws enacted to control sedimentation damage and to help protect the water quality in the State.
4. On August 17, 2005, Respondent approved Petitioner's Sedimentation and Erosion Control Plan that was prepared and sealed by Petitioner's engineering company. (Respondent's Exhibit A)
5. On January 5, 2006, Tim Garrett, an inspector from the Winston-Salem Regional Office for NC DENR, Division of Land Resources (DLR), visited Petitioner's Site ("Olde Beau") and found that Petitioner had begun land disturbing activity prior to installing the sedimentation and erosion control measures called for in the approved plan. (Petitioner's Exhibit 2) Inspector Garrett found no damage from sedimentation. Inspector Garrett's second inspection on February 17, 2006 did not list any corrective actions that Petitioner needed to take and found no damage from sedimentation. (Petitioner's Exhibit 3)
6. On October 5, 2006, Inspector Steve Barron, who also was an inspector from the Winston-Salem Regional Office for DLR, visited and inspected the site.

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Inspector Barron completed a sedimentation inspection report which showed the site had slight sediment damage into an on-site water course contained within the 10 acre project boundaries. The report also stated that Petitioner had failed to follow its approved plan in violation of 15A NCAC 4B.0113, failed to take all reasonable measures in violation of 15A NCAC 4B .0105, and failed to maintain erosion control measures in violation of 15A NCAC 4B .0113. (Respondent's Exhibit U-1).

7. On November 1, 2006, Inspector Barron returned to the site. His sedimentation inspection report found the same violations as his first visit, in addition to two other violations. Inspector Barron requested that Petitioner respond to eight corrective actions which included many repair and installation issues. Inspector Barron found no sedimentation damage since his last visit. (Respondent's Exhibit U-2)
8. The following day, Respondent issued a Notice of Violation ("NOV") to Petitioner. Respondent notified Petitioner that it had 30 days to correct these problems. (Respondent's Exhibit U-3)
9. Inspector Barron returned to the site on December 7, 2006 and completed another sedimentation inspection report. His report documented the site as being in compliance, but asked Petitioner to maintain the sediment trap at Lot #51 and to continue to establish ground cover on the ditch lines. Inspector Barron found no sedimentation damage during this visit. (Respondent's Exhibit U-4)
10. A follow-up inspection report completed by Inspector Charlie Whaley on May 22, 2007 again found violations on the site. In his report, Mr. Whaley requested corrective actions for some of the same actions that Inspector Barron had listed in the November 6, 2006 inspection report. These concerns included that Petitioner repair the ditch lines, restore traps, and provide groundcover on the site. (Respondent's Exhibit U-5) The report included a checked box that showed the site to be in compliance with the SPCA. Matthew Gantt, Regional Engineer of the Winston-Salem Office, testified at this hearing that Inspector Whaley, who wrote the report, no longer was with his office and erroneously had checked the site-in-compliance box because Inspector Whaley had found violations and requested various actions to be taken.
11. On September 20, 2007 Engineer Matthew Gantt visited the site and filled out a sedimentation inspection report. In his report, Engineer Gantt found seven violations of the SPCA and noted off-site sediment into a watercourse on the 10 acre tract with moderate damage. The corrective actions included stabilizing eroding slopes from Lots #51-54, repairing the breached trap on Lot #51, and repairing sediment traps on Lots #17 and 27. Engineer Gantt

testified that the off-site sediment went into a watercourse on the site. He explained that the watercourse is considered waters of the state, and thus off-site, even though it was fully contained on the site and within the tract. Finally, Engineer Gantt noted that Petitioner had to take corrective actions by September 30, 2007 to avoid another notice of violation (NOV). (Respondent's Exhibit U-6)

12. The next inspection of the site occurred on April 16, 2008 when Neil Uldrick, an Environmental Specialist II with the Winston-Salem Regional Office, traveled to the site. Engineer Gantt testified that because his office was understaffed at that time, no one was able to visit the site at an earlier date. (Hearing testimony) Specialist Uldrick's inspection showed six violations of the SPCA and the corresponding North Carolina Administrative Code, including the following violations which carried throughout the time period of the penalty: failure to follow approved plan in violation of N.C.G.S. § 113A-57(3); failure to take all reasonable measures in violation of 15A NCAC 4B .0105; and failure to maintain erosion control measures in violation of 15A NCAC 4B .0113. Specialist Uldrick testified at hearing that Petitioner failed to follow its approved plan by not maintaining required measures, not installing measures per the design specifications within the approved plan, and failing to take the necessary steps to prevent erosion. Inspector testified that Petitioner failed to take all reasonable measures by not repairing the silt fence, not stabilizing diversions, not installing requested measures, and by not establishing required groundcover. Inspector Uldrick also found that Petitioner had repaired diversion ditches, had not cleaned out check dams, and had not maintained sediment traps. In the comments section of his report, Inspector Uldrick found that many of the required corrections from the inspection conducted by Engineer Gantt on September 20, 2007 had not been addressed and recommended issuing a notice of violation. The photographs taken by Inspector Uldrick and his testimony showed that some sediment traps had not been maintained, some silt fence had not been maintained and was lying on the ground, groundcover was not sufficient and a large sediment trap improperly was constructed in his view, even though other inspectors had seen the same trap and had not declared it to be improperly constructed. (Respondent's Exhibit E, pictures 1-8). Inspector Uldrick found no sediment damage on this visit.
13. The following day, Respondent issued another Notice of Violation ("NOV") to Petitioner. Respondent notified Petitioner that it had 15 days to correct these violations. (Respondent's Exhibit F)
14. On May 7, 2008 Respondent received a letter from Petitioner's employee, Tommy Maines. The letter stated that Petitioner had repaired ditches and silt fences, cleaned and repaired rock check dams and sediment traps, and installed erosion control measures to the rear of lot #37.

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15. On June 4, 2008, Inspector Uldrick inspected the site and completed his second sedimentation inspection report. He found no sedimentation damage during this inspection. The report cited the cause of the noted violations including: failure to follow the approved plan; failure to take all reasonable measures; and failure to maintain erosion control measures. Inspector Uldrick noted in the comments section that the silt fence had not been repaired and the area next to the road along lots #52-55 needed to be stabilized. In addition, he noted that check dams had been dipped out, but the sediment had been placed next to the structures. Inspector Uldrick believed that the sediment next to the traps should have been placed in another area and easily could have been, but was not, washed down the road or filled in the lower trap if left next to the trap; this placement of sediment next to the traps in fact acted as a berm during an unusually heavy rain event in August, 2007, helping to prevent overrun of the trap. In addition, Inspector Uldrick's report noted that Petitioner properly had not addressed the issues that he outlined in his previous sedimentation and inspection reports and reports dating back to 2007. Accordingly, the site remained under a notice of violation. The photographs taken on that day showed some silt fence down, dipped out traps with the sediment placed next to them, and rye grass, a temporary groundcover, growing. (Respondent's Exhibit H, pictures 1-5 and hearing testimony)
16. Inspector Uldrick testified that Petitioner did not call to meet with him or contact him, with the exception of the May 4, 2007 letter from Tommy Maines, until after the penalty period. Inspector Uldrick also never called or stopped by to consult or meet with anyone at Petitioner's site even though he made approximately seven (7) inspections of the site. Inspector Uldrick's testimony showed that he believed that the burden was on Petitioner to approach him if it desired any assistance, consultation, or information relative to compliance with the approved plan or to gain a better understanding of what Inspector Uldrick wanted done. (Hearing testimony)
17. On July 10, 2008, Inspector Uldrick inspected the site for a third time. He found no sedimentation damage on this visit. His sedimentation inspection report noted violations including, but not limited to the following: failure to follow the approved plan; failure to take all reasonable measures; and failure to maintain erosion control measures. In the corrective actions, Inspector Uldrick noted that some silt fence needed repair, sediment again had been deposited along the check dams and basins, areas next to the road along lots #52-55 required stabilization and repair, and stabilization along the eroded area along lots #52-55 was needed. In his report, Inspector Uldrick commented that no action appeared to have been taken since the last inspection and recommended a daily civil penalty assessment until all items were completed. The photographs taken on that day show a check dam with

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the sediment lying next to it, eroding slopes and soils, a mini-trap in need of maintenance, and sagging silt fence. (Respondent's Exhibit I, pictures 1-7)

18. On July 11, 2008, Respondent sent Petitioner a Notice of Continuing Violations detailing the corrective actions needed to bring the site into compliance. (Respondent's Exhibit J) Although the Notice stated that the matter was being referred for enforcement, Engineer Gantt and Inspector Uldrick testified at hearing that DLR did not immediately refer the site for enforcement because the office hoped that the additional time would allow Petitioner to bring the site into compliance. The Notice again cited the cause of the violations and proposed corrective measures that Petitioner needed to take to come into compliance with applicable laws. (Respondent's Exhibit J)
19. In response to whether Petitioner could have taken up silt fence or whether the alternative measures on the site that were not according to the plan were effective, Inspector Uldrick testified that if anyone modifies a plan, they need either to send in a modification of the plan to his office for approval, or, if minor, to check with him to see if it was possible to complete the measures without sending in a request for modification. Inspector Uldrick further testified that Petitioner did neither of those things.
20. Inspector Uldrick returned to Petitioner's site on July 29, 2008 and completed another sedimentation inspection report. Inspector Uldrick determined that the site still was in violation and directed additional corrective actions that needed to be taken. In the comment section of the report, Inspector Uldrick noted that some actions had been taken regarding seeding of the roadsides, but nothing had been done in the way of silt fence or eroded area at Lots #52-55. Inspector Uldrick testified that the pictures taken on that day show silt fence down, a sediment trap in need of maintenance because of clogged rock weirs, erosion on the side of the road, an improperly constructed and maintained sediment basin, a sediment trap that properly was not maintained because it was dipped out and the spoil material placed next to the structure, and erosion going down a slope. (Exhibit K, pictures 1-9, hearing testimony of witness)
21. On August 21, 2008, Engineer Gantt and Inspector Uldrick prepared documents for a civil penalty assessment under Respondent's Guidelines for Assessing Civil Penalties for Violations of the Sedimentation and Pollution Control Act against Petitioner for the Chief of Land Quality for a potential civil penalty assessment. (Respondent's Exhibit L) Inspector Uldrick testified that he included willfulness in the assessment, because of Petitioner's history of dealing with the Act and understanding imputed to Petitioner of what it needed to correct on the site.
22. Inspector Uldrick returned to Olde Beau on September 9, 2008 and completed another Sedimentation and Erosion Control Report. In the report, he cited

four violations including: failure to follow the approved plan, failure to take all reasonable measures, and failure to maintain erosion control measures. After detailing corrective actions expected, Inspector Uldrick included comments that some seeding had been done, but not over the entire project. He also stated that the diversion ditches had been addressed in some places but were "untouched" in others. Additionally, he stated that the silt fence remained an issue and the sediment traps were in severe need of maintenance. Accordingly, Inspector Uldrick said he would recommend proceeding with the civil penalty based on the lack of work to resolve the issues on site. (Exhibit M) The pictures and Inspector Uldrick's testimony to explain them show a rock check dam filled with sediment, a sediment trap that had blown out in the bottom, continued erosion next to the road, some silt fence down in various places, a rip-rap apron that needed cleaning, and a sediment trap in need of maintenance. Inspector Uldrick did not find any sedimentation damage on this inspection. (Respondent's Exhibit M, pictures 1-8, hearing testimony)

23. Regional Engineer Matthew Gantt was tendered and accepted without objection as an expert in Environmental Inspections for sedimentation and erosion control and preparing enforcement cases for civil penalty assessment. Engineer Gantt's expert opinion, based upon his personal review of the site and reports from Inspector Uldrick, was that the site was out of compliance over an extended period of time and warranted a civil penalty.
24. Engineer Gantt testified that Petitioner submitted a plan that was prepared and sealed by an engineering company. Engineer Gantt testified that the approved plan showed how the erosion control plan submitted would adequately control sedimentation and erosion during the land disturbing activity of this project. He also noted that the plan detailed how much seeding was needed for temporary and permanent measures and the type of maintenance needed. Engineer Gantt noted that the seeding recommendations included 2,000 lbs/acre of fertilizer and 4,000 lbs/acre of straw, but did not say they would hydro-seed the property. (Respondent's exhibit A, hearing testimony)
25. Engineer Gantt further testified that Petitioner's plan clearly stated that it would check all erosion and sedimentation control practices following each rainfall, repair any measure immediately, clean out rock weirs and/or replace the necessary rock, and perform routine review of silt fence to ensure proper function. Engineer Gantt's testimony paralleled the sedimentation and inspection reports asserting that Petitioner did not closely follow its plan or properly maintain its site. (Respondent's exhibit A, hearing testimony)
26. Francis Nevils, Chief of Land Quality, testified in the hearing. Chief Nevils was tendered and accepted without objection as an expert in Sedimentation and Erosion Control, Reviewing and Assessing Civil Penalties for sedimentation and pollution control, and applying the Sedimentation Pollution

Control Act of 1973 and Chapter 4 of Title 15A of the Administrative Code. Chief Nevils testified that Sedimentation is the number one pollutant in North Carolina and in the United States and detailed the costs of sedimentation and erosion damage. In addition, Chief Nevils testified that the purpose of the Sedimentation and Pollution Control Act is to control sediment which is proactive in nature. His position was that all of the measures for sedimentation and erosion control are to prevent the act from happening and if this site was not corrected or the plan not followed, the site eventually could have lost sediment off site if it already had not done so.

27. In support of his expert opinion, Chief Nevils noted that the basin in one of Respondent's pictures with silt fence across the top should not have had silt fence on the top because the basin was not constructed to totally prevent water from flowing. Instead, the trap was supposed to catch the water and filter it over the top through the small stone while allowing the sediment to settle to the bottom of the trap. Chief Nevils testified that the trap properly was not functioning because the bottom of it was blown out and thus could not retain or filter the water over the top through the rocks. Chief Nevils did note that they did not find any sediment lost off-site and speculated that it may have been washed away in the rainfall and thus he did not assess Petitioner for any off-site sedimentation.
28. On December 5, 2008, Respondent assessed a civil penalty against Petitioner in the amount of nineteen thousand one hundred and ten dollars (\$19,110) at \$130 a day, for a 147 day period beginning on April 16, 2008 and ending on September 9, 2008. (Respondent's Exhibits N & O)
29. Petitioner's employee Frank Smith was the individual in charge of sedimentation and erosion control on the Olde Beau site. He does not deny that there were some violations on the site. Frank Smith did take some measures to retain sediment on the site such as putting a silt fence on top of a sediment trap but did not first ask a DLR representative for approval. Frank Smith did not know whether it would work, as he is not an engineer, but has been with Olde Beau Golf on this site for 19 years and thoroughly knows drainage, grounds maintenance, and this site well. Frank Smith did try to take some measures, albeit without official approval, to improve the likelihood of the success of his erosion control measures by employing such methods as hydro seeding, a more advanced form of seeding in erosion control, and by adding to or constructing berms around certain traps with the placement of sediment spoil which appeared to him to add to the trap's ability to retain sediment in the event of a heavy rain. Frank Smith did not contact NC DENR after any of the sedimentation inspection reports or request a meeting with them during the penalty period. Respondent did not contact Frank Smith as the person in charge of the sedimentation and erosion control program on Petitioner's project at any time during the penalty period. After

an unusual rainfall of approximately seven (7) inches over a two day span from August 27-28, 2008, Frank Smith attended first to the washed out sand traps on the golf course so that an income stream could be maintained in order to meet obligations and avoid further damage to the course. Frank Smith did not attend to the erosion control devices until after September 09, 2008. Frank Smith was aware that the 10 acre land disturbed site was surrounded by the remainder of the 110 acres of Petitioner's project which was surrounded by the remaining 700 acres of virgin forest of this overall tract of land and that no flowing stream was closer to Petitioner's tract than the Mitchell River which also had a 70 acre buffer between the 800 acre parent tract and the River.

30. Engineer Gantt and Chief Nevils both testified to the condition of the site and the problems associated with it. Both expressed opinions that the site was in danger of losing sediment because the proper measures were not taken to prevent sedimentation and erosion on the site. Both of Respondent's experts testified that since the measures were not adequately followed or maintained on this site, sediment eventually could have left the site. Respondent never observed, discovered, or otherwise documented that any sediment left Petitioner's site. No sediment ever left Petitioner's site. Respondent's experts, Engineer Gantt and Chief Nevils, expressed opinions that the Act and its corresponding rules were designed as preventative measures to keep sediment out of the streams and were not produced to clean up a site once sedimentation had damaged a stream or watercourse. (Hearing testimony) There was no damage to a stream or off-site watercourse in this case as no sediment ever left the site.
31. In assessing the civil penalty against Petitioner, Respondent's Chief of Land Quality, Francis M. Nevils, testified that he properly and carefully determined the amount of the penalty considering all the factors required in the Sedimentation and Pollution Control Act of 1973 and the associated Rules. Chief Nevils stated that the amount of the penalty, \$130 per day, was on the lower end of the penalty spectrum which amounted to less than 2% of what could have been assessed per day.
32. The General Assembly has provided mandatory guidance in G.S. 113A-64(1) and (3) to Respondent for application in cases where Respondent determines that it will assess penalties against ... [a]ny person who violates any of the provisions of this Article or any ordinance, rule, or order adopted or issued pursuant to this Article by the Commission or by a local government, or who initiates or continues a land-disturbing activity for which an erosion and sedimentation control plan is required except in accordance with the terms, conditions, and provisions of an approved plan, is subject to a civil penalty. The maximum civil penalty for a violation is five thousand dollars (\$5,000). A civil penalty may be assessed from the date of the violation. Each day of a

continuing violation shall constitute a separate violation. In G.S. 133A-64 (3), the General Assembly provided penalty factors as follows:

In determining the amount of the penalty, the Secretary shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by noncompliance, whether the violation was committed willfully and the prior record of the violator in complying or failing to comply with this Article.

33. Uncontested evidence was produced in this hearing that during 2007 and 2008, the Allegheny County area of North Carolina experienced an extended and severe drought. There is undisputed evidence that this severe drought substantially hindered Petitioner's efforts to establish and maintain groundcover satisfactory to Respondent's inspectors. It also is undisputed that this lack of rainfall may have aided Petitioner in that its erosion control devices were not tested more often or more severely beyond the heavy two day rain of August, 2008.
34. Approximately 16 sedimentation inspections were conducted on Petitioner's site between January 2006 through April 2009 by five (5) different inspectors, four of whom found Petitioner's site to be in compliance upon the completion of one or more of their inspections.
35. Land Quality Section Chief Nevils completed a civil penalty assessment worksheet for SPCA violations in this case. He assessed an overall penalty of \$130 per day for 147 days in the penalty period. The assessment shows \$30 per day cumulatively for the three types of violations as charged by Respondent; \$75 per day for adherence to plan/effectiveness of steps taken to correct violations; and \$25 per day for willfulness of Petitioner in incurring the alleged violations. Chief Nevils could have, but did not, assess staff investigative costs.

Based on the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings; the Office of Administrative Hearings has jurisdiction over both the parties and over the subject matter at issue.
2. All parties correctly have been designated and there is no question as to misjoinder or nonjoinder.

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3. Petitioner is a "person" within the meaning of N.C. Gen. Stat. § 113A-52(8) under 15A NCAC .0105(8) & (9).
4. A "land-disturbing activity" over one acre in size occurred on the Olde Beau site within the meaning of § 113A-52(6).
5. A preponderance of evidence produced in this hearing demonstrated that Petitioner did not follow, to the letter, its approved plan under § 113A-57(3) but without consequential harm to any public or private property.
6. A preponderance of evidence produced in this hearing demonstrated that Petitioner did take reasonable measures under 15A NCAC 4B .0105 to prevent sedimentation pollution; such reasonable measures being defined by Respondent's expert, Chief Nevils, as sedimentation and erosion control devices actually installed on the site. The reasonable measures installed on this site and found to be in compliance on one or more inspections by four out five of Respondent's inspectors were those proposed in Petitioner's erosion control plan approved by Respondent.
7. A preponderance of the evidence produced in this hearing demonstrates that Petitioner properly did not maintain all erosion control measures on its site under 15A NCAC 4B .0113 but without consequential harm to any public or private property.
8. Petitioner may be assessed civil penalties in this matter under N.C. Gen. Stat. § 113A-64(a)(1)(2), which provides that a civil penalty of not more than five thousand dollars (\$5,000) a day may be assessed from the date of the violation and that each day of a continuing violation shall constitute a separate violation.
9. Respondent has authority to assess enforcement costs against Petitioner in this matter under N.C.G.S. § 113A-55, § 113A-58, § 113A-64(2), and NCAC 04B.0121 and NCAC 04B .0103.
10. A nineteen thousand one hundred and ten dollar (\$19,110.00) civil penalty assessed against Petitioner for these violations is not reasonable and appropriate under the circumstances because of the extended severe drought affecting Petitioner's site, the lack of any sediment ever being identified or observed as having left Petitioner's site, and the complete lack of demonstrable harm to anything off-site of Petitioner's project, including no demonstrable harm of any kind to the property of another or to any lake, stream, or off-site watercourse of the State of North Carolina.

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

DECISION

The evidence in this contested case shows that Petitioner violated the SPCA by not at all times following its approved erosion control plan and violated the SPCA by not adequately at all times maintaining its erosion control measures on its site. These violations are established by the evidence produced in the contested case hearing and are, in all fairness, mitigated by the complete lack of any off-site sedimentation or harm to the property of any other entity, including the State, lack of any egregious factors demonstrating intent or willfulness of the Petitioner in incurring or allowing these violations, and the regulatory atmosphere created by 5 different inspectors, each of whom exhibited his own personality with dislikes, interpretations, and preferences peculiar to that individual inspector. Having heard the evidence and considered all of the factors bearing on this case, I find that Petitioner should be, and hereby is, assessed a civil penalty in the amount of forty-five dollars (\$45) per day for the 147 day penalty period for a total of six thousand six hundred and fifteen dollars (\$6,615).

ORDER

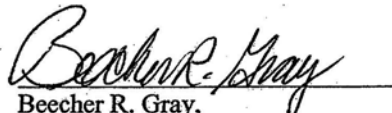
It hereby is ordered that the Secretary of NC DENR serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6417 in accordance with N.C. Gen. Stat. § 150B-36(b).

NOTICE

The Secretary of NC DENR, the agency making the final decision in this contested case, is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The Secretary of NC DENR is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to the Office of Administrative Hearings.

This the 18 day of August, 2009.

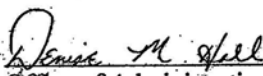

Beecher R. Gray,
Administrative Law Judge

A copy of the foregoing was mailed to:

Anthony W Packer
Olde Beau General Partnersip
PO Box 32
729 Old Beau Boulevard
Roaring Gap, NC 28668
PETITIONER

John A. Payne
Assistant Attorney General
N. C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 18th day of August, 2009.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

IN THE OFFICE OF

Office of
Administrative Hearings

ADMINISTRATIVE HEARINGS
09 OSP 2588

V.

NORTH CAROLINA STATE
HIGHWAY PATROL,
Respondent.

DECISION

APPEARANCES

For Respondent: Tamara S. Zmuda
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699

Whether Respondent had just cause to terminate Petitioner's employment with the State Highway Patrol for unbecoming/unacceptable personal conduct.

FINDINGS OF FACT

1. Petitioner Ronald Gene Ezzell, Jr. was an employee of the North Carolina State Highway Patrol for 19 years prior to his dismissal on February 19, 2009. Petitioner had received numerous awards and commendations for his service on the Patrol.
2. On October 28, 2008, Petitioner was on-duty, in full uniform, and driving a Patrol vehicle while conducting a financial transaction at the drive-through lane of the State Employees Credit Union on Vernon Avenue in Kinston, N.C. While at the drive-through, Petitioner placed in the canister and sent through the tube to the female teller a check to be cashed, his SECU identification card, and a laminated photograph of a little boy standing in a yard, naked with a large penis superimposed on his body. It was an actual photograph of a little boy and a humongous penis, not a cartoon.
3. First Sergeant C.L. Johnston of the Patrol learned about the transaction from his secretary, who had heard about it at a non-patrol function. Sergeant Johnston then filed a complaint which resulted in an Internal Affairs investigation. The State Employees Credit Union branch manager, two tellers involved in the transaction, First Sergeant Johnston and his secretary, and Petitioner were interviewed. Petitioner destroyed the laminated photograph the day following his IA interview "so it would not get him in trouble again," though policy required him to give it to the investigator.
4. The North Carolina State Highway Patrol Policy Manual Directive H.4 Section V states that "only the Commander's Office may impose disciplinary action for Personal Conduct violations classified as serious by the Unit Commander of Internal Affairs." On January 13, 2009, at the conclusion of the Internal Affairs investigation, Major W.R. Scott concluded that a Serious Personal Conduct violation had been substantiated and recommended to the Commander/Colonel that Petitioner be suspended without pay for ten (10) workdays.
5. On February 13, 2009, Colonel Walter J. Wilson, Jr. rejected Major Scott's recommendation and directed that steps be taken to dismiss Petitioner from the Patrol for unacceptable personal conduct based upon a violation of State Highway Patrol Policy Manual Directive H.1, Section V, which states, "Members shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably upon the Highway Patrol and in keeping with the high standards of professional law enforcement. Unbecoming conduct shall include any conduct that constitutes unacceptable personal conduct pursuant to State Personnel Policy and any conduct which tends to bring the Patrol into disrepute, or which reflects discredit upon any member(s) of the Patrol, or which tends to impair the operation and efficiency of the Patrol or of a member, or which violates Patrol policy."
6. Colonel Wilson has known Petitioner since 1992 when he served as Trooper Ezzell's First Sergeant in Jacksonville. They were friends and he is well aware of Petitioner's work record with the Patrol. Under Patrol policy Colonel Wilson had discretion to impose a lesser discipline instead of a dismissal "when all of the surrounding

circumstances and the past work record of a member being disciplined appears to warrant such a reduction in the level of disciplinary action and one or more of the following mitigating factors is present: the property damage was minor, the physical injury was negligible, no disciplinary action has been taken against the member in the past, [and/or] there are other mitigating circumstances which the Commander's Office considers to be significant in the individual case at hand." He chose not to do so after reviewing the Report of Investigation, Pre-Dismissal Conference documents, Major Scott's report, and remembering the fact that in July 2008 he had admonished Petitioner for making inappropriate remarks to a 17-year-old female waitress. He had not administered a lesser sanction in any similar or comparable case during his tenure.

7. On February 23, 2009, Petitioner filed an appeal of grievance to the Secretary of the Department of Crime Control and Public Safety. A five member Employee Advisory Committee, including three females, heard Petitioner's appeal on March 6, 2009. The Committee's report to the Secretary concluded that Petitioner demonstrated unbecoming conduct and should be disciplined, but recommended that the discipline be a demotion from Master Trooper to Trooper, in addition to 10-days suspension from work without pay. The Committee thought that Petitioner's 19 years of service, on the job accomplishments, and the need for his skills as a helicopter pilot in the Patrol's Aviation Unit merited some discipline less than termination.
8. The North Carolina State Highway Patrol Policy Manual Directive H.4 Section XIV outlines the appeal process for members who have faced disciplinary action. Section XIV provides the following: "Upon receiving the recommendations of the Employee Advisory Committee, the Secretary shall determine whether or not to uphold or change the Commander's Office decision as to whether or not the type of violation charged was appropriate and uphold or reduce the disciplinary action taken in the case. The Secretary shall not be bound by the recommendation of the committee, but shall consider its report. The decision shall be based upon evidence and recommendations that addressed the charge(s) forming the basis for the appeal." Secretary Reuben Young complied with this policy in deciding to reject the Committee's recommendation and affirm the Colonel's decision to dismiss Petitioner. He found Petitioner's conduct to be deplorable, offensive, beyond the bounds of decency, and outside a trooper's responsibility. The Secretary concluded that Petitioner's prior commendable service did not justify demotion or suspension without pay in lieu of dismissal. He found the charge and disciplinary action appropriate.
9. On April 15, 2009, Petitioner Ezzell filed a Petition for Contested Case Hearing with the Office of Administrative Hearings, alleging that the Respondent unjustifiably dismissed him and in the process acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. Petitioner admits sending the photograph, contending that it was shared in a joking manner without intent to offend the tellers who felt disgusted and uncomfortable upon receiving it. He classifies his action as "poor judgment" and "not appropriate," but not being sufficient to justify dismissal.

CONCLUSIONS OF LAW

1. Petitioner was a career state employee at the time of his dismissal. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a Decision to the State Personnel Commission. N.C. Gen. Stat. §§ 126-1 *et seq.*, 126-35, 126-37(a) (2007).
2. N.C. Gen. Stat. § 126-35(a) provides that “No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” In a career state employee’s appeal of a disciplinary action, the department or agency employer bears the burden of proving that “just cause” existed for the disciplinary action. N.C. Gen. Stat. § 126-35(d) (2007).
3. N.C. Gen. Stat. § 14-190.17(a)(2) states that a person commits second degree exploitation of a minor if, knowing the character or content of the material, he “distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.” In its definition of “sexual activity,” N.C. Gen. Stat. § 14-190.13(5)(g) includes “the lascivious exhibition of the genitals or pubic area of any person.” Further, N.C. Gen. Stat. § 14-190.13(6)(a) defines “sexually explicit nudity” as the showing of “uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast.” It is a felony to possess, distribute or exhibit such material.
4. 25 N.C. Admin. Code 11.2301(c) enumerates two grounds for disciplinary action, including dismissal based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct. 25 N.C. Admin. Code 1J.0614(i)(1, 2, 4, 5) defines “unacceptable personal conduct” as conduct for which no reasonable person should expect to receive prior warning; job-related conduct which constitutes a violation of state or federal law; willful violation of known or written work rules; or conduct unbecoming a state employee that is detrimental to state service. Petitioner’s conduct with the photograph was unacceptable personal conduct.
5. The North Carolina State Highway Patrol Policy Manual Directive H.1, Section V defines “Unbecoming Conduct” as follows: “Unbecoming conduct shall include any conduct that constitutes unacceptable personal conduct pursuant to State Personnel Policy and any conduct which tends to bring the Patrol into disrepute, or which reflects discredit upon any member(s) of the Patrol.” Petitioner’s conduct violated this patrol policy.
6. 25 N.C. Admin. Code 1J.0604(a) states that “When just cause exists, the only disciplinary actions provided for under this Section are:
 - a. Written warning;
 - b. Disciplinary suspension without pay;

- c. Demotion; and
- d. Dismissal."

State Personnel policy further provides that "The degree and type of action taken shall be based upon the sound and considered judgment of the employing agency----."

- 7. N.C. Dep't. of Envtl. and Natural Res. v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004), held that the fundamental question in determining just cause is "whether the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." The specific facts and circumstances in each case control the determination.
- 8. Respondent has met the burden of persuading me by the greater weight of the evidence presented that it had just cause to discipline Petitioner. Of the four possible sanctions (written warning, disciplinary suspension without pay, demotion and dismissal), Colonel Wilson and Secretary Young chose to terminate Petitioner's employment. While I may have decided to impose a lesser sanction based upon the maxim, "Justice tempered with mercy," for a veteran trooper, I am not convinced that these officials acted erroneously, exceeded their authority or jurisdiction, acted arbitrarily or capriciously, or failed to act as required by law or rule in deciding to fire Petitioner. Thus, their judgment must stand.

DECISION

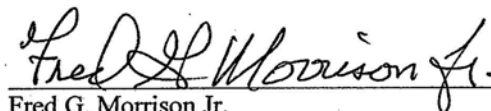
Respondent's decision to terminate Petitioner's employment should be left undisturbed.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 5~~4~~ day of August, 2009.



Fred G. Morrison Jr.
Senior Administrative Law Judge

A copy of the foregoing was mailed to:

William Woodward Webb
The Edmisten & Webb Law Firm
Post Office Box 1509
Raleigh, NC 27602
ATTORNEY FOR PETITIONER

Tamara S. Zmuda
N.C. Department of Justice
Assistant Attorney General
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 5th day of August, 2009.


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