

NORTH CAROLINA REGISTER

VOLUME 24 • ISSUE 21 • Pages 1831 - 1950

May 3, 2010

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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.

Office of Administrative Hearings
Rules Division
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact: Molly Masich, Codifier of Rules molly.masich@oah.nc.gov (919) 431-3071
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Rule Review and Legal Issues

Rules Review Commission
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact: Joe DeLuca Jr., Commission Counsel joe.deluca@oah.nc.gov (919) 431-3081
Bobby Bryan, Commission Counsel bobby.bryan@oah.nc.gov (919) 431-3079

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

Edwin M. Speas, Jr. edwin.speas@nc.gov
General Counsel to the Governor (919) 733-5811
116 West Jones Street
20301 Mail Service Center
Raleigh, North Carolina 27699-0301

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 2010 – December 2010

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
24:13	01/04/10	12/09/09	01/19/10	03/05/10	03/22/10	05/01/10	05/12/10	10/01/10
24:14	01/15/10	12/22/09	01/30/10	03/16/10	03/22/10	05/01/10	05/12/10	10/12/10
24:15	02/01/10	01/08/10	02/16/10	04/05/10	04/20/10	06/01/10	01/26/11	10/29/10
24:16	02/15/10	01/25/10	03/02/10	04/16/10	04/20/10	06/01/10	01/26/11	11/12/10
24:17	03/01/10	02/08/10	03/16/10	04/30/10	05/20/10	07/01/10	01/26/11	11/26/10
24:18	03/15/10	02/22/10	03/30/10	05/14/10	05/20/10	07/01/10	01/26/11	12/10/10
24:19	04/01/10	03/11/10	04/16/10	06/01/10	06/21/10	08/01/10	01/26/11	12/27/10
24:20	04/15/10	03/24/10	04/30/10	06/14/10	06/21/10	08/01/10	01/26/11	01/10/11
24:21	05/03/10	04/12/10	05/18/10	07/02/10	07/20/10	09/01/10	01/26/11	01/28/11
24:22	05/17/10	04/26/10	06/01/10	07/16/10	07/20/10	09/01/10	01/26/11	02/11/11
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25:01	07/01/10	06/10/10	07/16/10	08/30/10	09/20/10	11/01/10	01/26/11	03/28/11
25:02	07/15/10	06/23/10	07/30/10	09/13/10	09/20/10	11/01/10	01/26/11	04/11/11
25:03	08/02/10	07/12/10	08/17/10	10/01/10	10/20/10	12/01/10	01/26/11	04/29/11
25:04	08/16/10	07/26/10	08/31/10	10/15/10	10/20/10	12/01/10	01/26/11	05/13/11
25:05	09/01/10	08/11/10	09/16/10	11/01/10	11/22/10	01/01/11	01/26/11	05/29/11
25:06	09/15/10	08/24/10	09/30/10	11/15/10	11/22/10	01/01/11	01/26/11	06/12/11
25:07	10/01/10	09/10/10	10/16/10	11/30/10	12/20/10	02/01/11	05/2012	06/28/11
25:08	10/15/10	09/24/10	10/30/10	12/14/10	12/20/10	02/01/11	05/2012	07/12/11
25:09	11/01/10	10/11/10	11/16/10	01/03/11	01/20/11	03/01/11	05/2012	07/29/11
25:10	11/15/10	10/22/10	11/30/10	01/14/11	01/20/11	03/01/11	05/2012	08/12/11
25:11	12/01/10	11/05/10	12/16/10	01/31/11	02/21/11	04/01/11	05/2012	08/28/11
25:12	12/15/10	11/22/10	12/30/10	02/14/11	02/21/11	04/01/11	05/2012	09/11/11

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. 54

ASSESSMENT OF STATE'S READINESS FOR AGING POPULATION

WHEREAS, North Carolina is undergoing a major demographic shift with the aging of its population; and

WHEREAS, North Carolina's 2.4 million "baby boomers" represent more than a quarter of our present population; and

WHEREAS, 30 of North Carolina's counties today have more persons age 60 and older than persons age 17 and younger, and many more counties are expected to face this circumstance by 2029; and

WHEREAS, the aging of North Carolina's workforce may result in skill and labor shortages; and

WHEREAS, it is vitally important that North Carolina be well prepared to meet the challenges and realize the opportunities of an aging population.

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

Section 1. **Purpose and Administration of Assessment**

Cabinet agencies will assess their readiness to serve our aging population and will develop strategies and proposals to strengthen their preparedness for and response to our aging population. The Division of Aging and Adult Services, Department of Health and Human Services and the Governor's Policy Office will work with the University of North Carolina Institute on Aging and the Governor's Advisory Council on Aging (hereinafter collectively referred to as the "Aging Assessment Team") to plan, prepare, administer and report on this assessment.

Section 2. **Scope of Assessment**

The assessment should include a review of the following:

- a. existing and proposed policies, programs and services specifically targeted toward older adults;
- b. other documents and initiatives that have examined the effect of an aging population on policies and programs;
- c. the participation of older adults, their families and caregivers in shaping relevant programs, policies or services;
- d. the participation of the private sector and local government in shaping relevant programs and policies; and
- e. other relevant items identified by the Aging Assessment Team.

Section 3. Participation by Other State Agencies

Other state agencies under the authority of The Board of Governors of the University of North Carolina System, the State Board of Community Colleges, the State Board of Education, and the Council of State that are requested to participate in the assessment are encouraged to do so.

Section 4. Participation by Local Government Entities

Upon completion of the statewide assessment, the Aging Assessment Team will work with local government entities to assess their readiness to serve the aging population. Local government entities that are requested to participate in the assessment are encouraged to do so.

Section 5. Effect and Duration

This Executive Order is effective immediately and shall remain in effect until December 31, 2012, unless earlier rescinded.

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 thirtieth day of March in the year of our Lord two thousand and ten, 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

State of North Carolina



BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 55

ENHANCED DISCLOSURES FROM APPLICANTS TO BOARDS AND COMMISSIONS

WHEREAS, as Governor, I appoint hundreds of persons each year to numerous boards, commissions, councils, committees, task forces, or similar entities (hereinafter "boards") to assist the State in its work for the citizens of North Carolina; and

WHEREAS, the current method used to select persons to serve on these boards has not provided the Office of the Governor with sufficient information to thoroughly evaluate applicants for these boards; and

WHEREAS, the citizens of North Carolina are entitled to have well qualified persons appointed to fill seats on the many boards created to serve important needs of our citizens; and

WHEREAS, the citizens of North Carolina expect that the Governor, in selecting well qualified members to serve on boards, will have full knowledge of the personal, professional, and economic interests of the applicants.

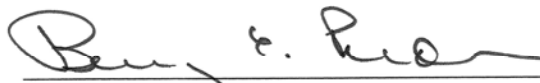
NOW, THEREFORE, by the power vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED:**

All persons under consideration for appointment to any board through my Office will complete the attached application, or a substantially similar application, fully and accurately prior to appointment.

This Executive Order shall be effective immediately and shall remain in effect until rescinded.

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 fifth day of April in the year of our Lord two thousand and ten, 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

Application for Boards and Commissions

Office of Governor Bev Perdue
State of North Carolina

BOARD OR COMMISSION FOR WHICH YOU ARE APPLYING:									
First Name				MI	Last Name			Prefix	
Home Address					City		State	Zip	
County			Home Phone #		Personal Email				
Congressional District		Senate District			House District		Registered Voter:	Yes	No
Are you a resident of NC? Yes No					If yes, how long have you been a resident of NC?				
Age	Gender: M F		Race (optional)						
Present Employer/Occupation					Job Title				
Business Address					City		State	Zip	
Business Phone #					Business Email				
Cell Phone #					Correspondence Preference: Home Business				
Spouse's Name					Spouse's Employer				

EDUCATION HISTORY (Specify school attended, year of graduation and type of degree received, if any)

High School/Equivalence (G.E.D.)
Undergraduate
Graduate/Professional

PROFESSIONAL LICENSE (Identify all of your professional license(s) and provide the information requested. Specify if your license is in a name other than your name listed above.)

Type of License	License #	Issuance Date	Has the license been continuously active since issuance?

REFERENCES (List three persons, not related to you, who have known you at least a year.)

NAME	ADDRESS	PHONE #

PUBLIC OFFICIAL/OFFICES (List all appointed or elected positions you currently hold on any board, commission, council, authority or other entity created by local, state or federal government.)

Answer each question below. Please attach an additional sheet(s) to explain any "Yes" answers.

CRIMINAL		
1. Have you ever been charged with a felony in North Carolina or elsewhere?	Yes _____	No _____
2. Have you ever been convicted of a felony in North Carolina or elsewhere?	Yes _____	No _____
3. Have you ever been charged with a misdemeanor, other than a traffic offense, in North Carolina or elsewhere?	Yes _____	No _____
4. Have you ever been convicted of a misdemeanor, other than a traffic offense, in North Carolina or elsewhere?	Yes _____	No _____
5. Has your driver's license ever been suspended, revoked, or limited?	Yes _____	No _____
PROFESSIONAL/EMPLOYMENT		
6. Have you ever had any grievance or complaint filed against you with any board that regulates your professional license(s) or had a professional license suspended, revoked or modified?	Yes _____	No _____
7. Have you ever had any sanction or reprimand entered against your professional license?	Yes _____	No _____
8. Have you, or any business in which you own a controlling interest, ever been fined or otherwise sanctioned by a local, state or federal agency?	Yes _____	No _____
9. Have you ever been disciplined by the board to which you seek appointment?	Yes _____	No _____
TAXES		
10. Have you ever failed to file state or federal income tax returns?	Yes _____	No _____
11. Are you, or any company in which you or your spouse has a controlling interest, delinquent in paying any local, state or federal taxes?	Yes _____	No _____
LOBBYIST		
12. Are you currently a registered lobbyist, have you been a registered lobbyist in the last year, or have you employed a registered lobbyist in the last year?	Yes _____	No _____
CONFLICT OF INTEREST/OTHER DISCLOSURES		
13. Are you or your spouse regulated by, licensed by, or engaged in a business relationship with the board to which you are seeking appointment?	Yes _____	No _____
14. Do you have any financial interest in any company that does business with the State of North Carolina?	Yes _____	No _____
15. Are you, or any entity in which you have a financial or other interest, the recipient of any grant or appropriation from the State of North Carolina?	Yes _____	No _____
16. Are you aware of any other information that would be relevant for the Governor to know as she considers appointing you to a board or commission?	Yes _____	No _____

I certify that the facts contained in this application are true and correct to the best of my knowledge. I release all parties from all liability for any damage that may result from furnishing such information. I understand that failure to fill out this form accurately and truthfully shall subject me to immediate removal.

SIGNATURE _____ DATE _____

Return completed form to: Office of the Governor; Attn: Boards and Commissions Office; 20301 Mail Service Center; Raleigh, NC 27699-0301 or via fax to (919) 715-4239.



EXECUTIVE ORDER NO. 56

**PROCLAMATION OF A STATE OF DISASTER
FOR DAVIDSON AND GUILFORD COUNTIES**

WHEREAS, the North Carolina Emergency Management Act, Chapter 166A of the North Carolina General Statutes, N.C.G.S. § 166A-6, authorizes the issuance of a proclamation defining an area subject to a state of disaster and categorizing the disaster as a Type I, Type II or Type III disaster; and

WHEREAS, on March 28, 2010, Davidson and Guilford counties in North Carolina were impacted by tornadoes; and

WHEREAS, Guilford and Davidson Counties proclaimed local states of emergency; and

WHEREAS, I have determined that a State of a Disaster, as defined in G.S. §166A-6, exists in the State of North Carolina specifically in Davidson and Guilford counties; and

WHEREAS, pursuant to N.C.G.S. § 166A-6, the criteria for a Type I disaster are met if: (1) the Secretary of Crime Control and Public Safety has provided a preliminary damage assessment to the Governor and the General Assembly; (2) Davidson and Guilford counties have declared a local state of emergency pursuant to N.C.G.S. § 166A-8; (3) the preliminary damage assessment has met or exceeded the criteria established for the Small Business Disaster Loan Program pursuant to 13 C.F.R. Part 123, and (4) a major disaster declaration by the President of the United States pursuant to the Stafford Act has not been declared; and

WHEREAS, pursuant to N.C.G.S. § 166A-6.01, if a state of disaster is proclaimed, the Governor may make State funds available for disaster assistance in the form of individual assistance and public assistance for recovery from those disasters for which federal assistance under the Stafford Act is either not available or does not adequately meet the needs of the citizens of the State in the disaster area.

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 N.C.G.S. § 166A-6, a Type I state of disaster is hereby declared for the counties of Davidson and Guilford.

Section 2. I authorize state disaster assistance in the form of public assistance grants to eligible entities located within the disaster area that meet the terms and conditions under N.C.G.S. § 166A-6.01.

Section 3. 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) 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 ensure proper implementation of this proclamation.


Section 4. This Type I Disaster Declaration shall expire 30 days after issuance unless renewed by the Governor or the General Assembly. Such renewals may be made in increments of 30 days each, not to exceed a total of 120 days from the date of first issuance.

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 seventh day of April in the year of our Lord two thousand and ten, 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 21 - OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 12 - LICENSING BOARD FOR GENERAL CONTRACTORS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Licensing Board for General Contractors intends to amend the rule cited as 21 NCAC 12 .0503 and adopt the rule cited as 21 NCAC 12 .0507.

Proposed Effective Date: September 1, 2010

Public Hearing:

Date: July 14, 2010

Time: 10:00 a.m.

Location: 3739 National Drive, Suite 200, Cumberland Building, Glenwood Place, Raleigh, NC 27612

Reason for Proposed Action:

21 NCAC 12 .0503 – This Rule is proposed for amendment to comply with G.S. 93B-15.

21 NCAC 12 .0507 – This Rule is proposed for adoption to comply with G.S. 93B-2.

Procedure by which a person can object to the agency on a proposed rule: Persons may submit objections regarding the proposed rule changes to Mark Selph, NC Licensing Board for General Contractors, P.O. Box 17187, Raleigh, NC 27619.

Comments may be submitted to: Mark D. Selph, NC Licensing Board for General Contractors, P.O. Box 17187, Raleigh, NC 27619

Comment period ends: July 14, 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

SECTION .0500 - LICENSE

21 NCAC 12 .0503 RENEWAL OF LICENSE

(a) Form. A licensee's application for renewal requires the licensee to set forth whether there were any changes made in the status of the licensee's business during the preceding year and also requires the licensee to give a financial statement for the business in question. The financial statement need not be prepared by a certified public accountant or by a qualified independent accountant but may be completed by the licensee on the form itself.

(b) The Board shall require a licensee to submit an audited financial statement if there is any evidence indicating that the licensee may be unable to meet its financial obligations. A licensee shall be required to provide evidence of continued financial responsibility satisfactory to the Board if there are indications that the licensee is insolvent, financially unstable, or unable to meet its financial responsibilities. Except as provided herein, evidence of financial responsibility shall be subject to approval by the Board in accordance with the requirements of Rule .0204 of this Chapter. A licensee shall provide the Board with a copy of any bankruptcy petition filed by the licensee within 30 days of its filing. A licensee in bankruptcy shall provide to the Board an audited financial statement with a classified balance sheet as part of any application for renewal. A corporate licensee shall notify the Board of its dissolution or suspension of its corporate charter within 30 days of such dissolution or suspension.

(c) Display. The certificate of renewal of license granted by the Board, containing the signatures of the Chairman and the Secretary-Treasurer, must be displayed at all times by the licensee at his place of business.

(d) Upon receipt of a written request by or on behalf of a licensee who is currently in good standing with the Board, is serving in the armed forces of the United States, and to whom G.S. 105-249.2 grants an extension of time to file a tax return, the Board shall grant that same extension of time for complying with renewal application deadlines, for paying renewal fees, and for meeting any other requirement or conditions related to the maintenance or renewal of the license issued by the Board. A copy of the military orders or the extension approval by the

Internal Revenue Service or by the North Carolina Department of Revenue shall be furnished to the Board.

Authority G.S. 87-1; 87-10; 93B-15.

21 NCAC 12 .0507 FUND SUSPENSION

In the event the Board's authority to expend funds is suspended pursuant to G.S. 93B-2, the Board shall continue to issue and renew licenses and all fees tendered shall be placed in an escrow account maintained by the Board for this purpose. Once the Board's authority is restored, the funds shall be moved from the escrow account into the general operating account.

Authority G.S. 87-4; 93B-2.

CHAPTER 61 – NORTH CAROLINA RESPIRATORY CARE BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Respiratory Care Board intends to amend rules cited as 21 NCAC 61 .0103, .0204, .0302, .0308 and .0401.

Proposed Effective Date: *September 1, 2010*

Public Hearing:

Date: *May 18, 2010*

Time: *1:00 p.m.*

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

Reason for Proposed Action:

21 NCAC 61 .0103 – *To define the practice of respiratory care as it relates to the management of respiratory care services.*

21 NCAC 61 .0204 – *To increase the renewal fee from sixty-five dollars (\$65.00) per year to seventy-five dollars (\$75.00) per year to meet budgetary requirements due to increase in expenses for the Board.*

21 NCAC 61 .0302 – *This amendment is being submitted pursuant to Session Law 2009-458.*

21 NCAC 61 .0308 – *To inform licensees that failure to make a report within 15 days does not bar the Board from investigating or taking action on the matter when it is reported.*

21 NCAC 61 .0401 – *To add another credentialing exam that RCP's may take for continuing education credit and to change the way continuing education approval fees are calculated.*

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

Comments may be submitted to: *Floyd Boyer, RCP Executive Director, 1100 Navaho Drive, Suite 242, Raleigh, NC 27609;*

phone (919) 878-5595; fax (919) 878-5565; email fboyer@ncrcb.org

Comment period ends: *July 2, 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**

SECTION .0100 - ORGANIZATION AND GENERAL PROVISIONS

21 NCAC 61 .0103 DEFINITIONS

The definitions of terms contained in G.S. 90-648 apply to this Chapter. In addition, the following definitions apply with regard to these Rules:

- (1) Assessment means a clinical evaluation of the individual patient and the suitability and efficacy of a respiratory care procedure or treatment, including an assessment of the suitability and efficacy of equipment for the individual patient if equipment is to be used in the procedure or treatment. Assessment can be performed by physician, Respiratory Care Practitioner (RCP) or other licensed health care provider within their scope of practice.
- (2) Respiratory care includes any acts, tests, procedures, treatments or modalities that are routinely taught in educational programs or in continuing education programs for respiratory care practitioners and are routinely performed in respiratory care practice settings.
- (3) The practice of respiratory care includes the application of a range of evaluation and treatment procedures related to the observing and monitoring of signs and symptoms, general behavior, and general physical response to respiratory care treatment and diagnostic testing, including the determination of whether such signs, symptoms, reactions,

behavior, or general response exhibit abnormal characteristics. In addition to the general activities identified in G.S. 90-648(10), each of the following specific activities constitutes the practice of Respiratory care:

- (a) the performance of pulmonary diagnostic and sleep related testing,
- (b) the administration of pharmacologic agents related to respiratory care procedures,
- (c) establishment and maintenance of arterial lines for hemodynamic monitoring,
- (d) therapeutic evaluation and assessment relating to mechanical or physiological ventilatory support, including positive pressure support apparatus,
- (e) airway clearance techniques, postural drainage and chest percussion,
- (f) assistance with bronchoscopy,
- (g) asthma and respiratory disease management,
- (h) cardiopulmonary rehabilitation,
- (i) alleviating respiratory impairment and functional limitation by designing, implementing, and modifying therapeutic care plans,
- (j) patient instruction in respiratory care, functional training in self-care and home respiratory care management, and the promotion and maintenance of respiratory care fitness, health, and quality of life,
- (k) those advanced practice procedures that are recognized by the Board in Declaratory Rulings as being within the scope of respiratory care, when performed by an RCP with appropriate ~~training~~ training,
- (l) managing the delivery of respiratory care services through the on-going supervision, teaching and evaluation of respiratory care.

Authority G.S. 90-652.

SECTION .0200 - APPLICATION FOR LICENSE

21 NCAC 61 .0204 FEES

(a) Fees are as follows:

- (1) For an initial application, a fee of fifty dollars (\$50.00);
- (2) For issuance of an active license, a fee of one hundred twenty-five dollars (\$125.00);
- (3) For the renewal of an active license, a fee of ~~sixty five dollars (\$65.00);~~ seventy-five dollars (\$75.00);

- (4) For the late renewal of any license, an additional late fee of seventy- five dollars (\$75.00);
- (5) For a license with a provisional or temporary endorsement, a fee of fifty dollars (\$50.00);
- (6) For official verification of license status, a fee of twenty dollars (\$20.00);

(b) Fees shall be nonrefundable and shall be paid in the form of a cashier's check, certified check or money order made payable to the North Carolina Respiratory Care Board. However, personal checks shall be accepted for payment of renewal fees.

Authority G.S. 90-652(2); (9); 90-660.

SECTION .0300 - LICENSING

21 NCAC 61 .0302 LICENSE RENEWAL

(a) Any licensee desiring the renewal of a license shall apply for renewal and shall submit the fee established in this Chapter.

(b) Any person whose license is lapsed or expired and who engages in the practice of respiratory care as defined in G.S. 90-648(10) will be subject to the penalties prescribed in G.S. 90-659.

(c) Each applicant for renewal shall provide proof of completion of continuing education requirements as established in this Chapter.

(d) Each applicant for renewal shall provide a copy of current certification in Basic Life Support (BLS) which includes Adult, Child and Infant Cardiopulmonary Resuscitation (CPR), the Heimlich Maneuver, and Automatic External Defibrillator (AED) use by the American Heart Association, the American Red Cross or the American Safety and Health Institute. The board shall accept a copy of the applicant's BLS Instructor certificate or Advanced Cardiac Life Support (ACLS) certificate in lieu of the BLS certificate.

(e) Licenses lapsed in excess of 24 months shall not be renewable. Persons whose licenses have been lapsed in excess of 24 months and who desire to be licensed shall apply for a new license and shall meet all the requirements then existing.

(f) Members of the armed forces whose licenses are in good standing and to whom G.S 105-249.2 grants an extension of time to file a tax return are granted that same extension of time to pay the license renewal fee and to complete the continuing education requirements prescribed in 21 NCAC 61 .0401. A copy of military orders or the extension approval by the Internal Revenue Service must be furnished to the Board. If approved, continuing education credits acquired during this extended time period shall not be utilized for future renewal purposes.

Authority G.S. 90-652(1), (2), (4) and (13).

21 NCAC 61 .0308 CONTINUING DUTY TO REPORT

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

- (1) convictions of, or pleas of guilty or nolo contendere to:
 - (A) any felony;

- (B) any misdemeanor or other offense, such as fraud, when an element of the crime involves conduct by the licensee which indicates a lack of honesty, integrity, or competence directly relating to the licensee's delivery of respiratory care, including crimes whose elements include violations of Rule .0307(2), (5), (7), (10), (19), (21), (22), (23), (24) and (25) of this Chapter; and
 - (2) the existence of any civil suit which arises out of or is related to the licensee's practice of respiratory care.
- (b) All supervising respiratory care practitioners are under a continuing duty to report to the Board any and all:
- (1) terminations of any respiratory care practitioner for violations of the practice act or Board rules; and
 - (2) violations of the practice act or Board rules by any respiratory care practitioner under his or her supervision.
- (c) The reports required by this Rule must be made within 15 days of the ~~occurrence~~ occurrence, but a failure to make a report within 15 days does not bar the Board from investigating or taking action on the matter when it is reported.

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

SECTION .0400 - CONTINUING EDUCATION REQUIREMENTS FOR LICENSE HOLDERS

21 NCAC 61 .0401 CONTINUING EDUCATION REQUIREMENTS

(a) Upon application for license renewal, a licensee shall attest to having completed one or more of the following learning activity options during the preceding renewal cycle and be prepared to submit evidence of completion if requested by the Board:

- (1) Completion of a minimum of 12 hours of Category I Continuing Education (CE) activities directly related to the licensee's practice of respiratory care and currently approved by the Board, the American Association for Respiratory Care (AARC) or the Accreditation Council for Continuing Medical Education (ACCME). "Category I" Continuing Education is defined as participation in an educational activity directly related to respiratory care, which includes any one of the following:
 - (A) Lecture – a discourse given for instruction before an audience or through teleconference.
 - (B) Panel – a presentation of a number of views by several professionals on a given subject with none of the views considered a final solution.
 - (2) Retake the Certified Respiratory Therapist Examination (CRT), administered by the National Board for Respiratory Care (NBRC), and achieve a passing score as determined by the NBRC or take any of the following examinations and achieve a passing score as determined by the sponsor of the examination: the Registry Examination for Advanced Respiratory Therapists (RRT), administered by the NBRC; the Neonatal/Pediatric Respiratory Care Specialty Examination (NPS), administered by the NBRC; the Certification Examination for Entry Level Pulmonary Function Technologists (CPFT), administered by the NBRC; the Registry Examination for Advanced Pulmonary Function Technologist (RPFT), administered by the NBRC; the Sleep Disorders Specialty (SDS) exam, administered by the NBRC; the Registry Examination for Polysomnographic Technologist (RPSGT), administered by the Board of Registered Polysomnographic Technologists (BRPT); or the Asthma Educators Certification Examination (AE-C), administered by the National Asthma Educator Certification Board (NAECB).
 - (3) Completion of a Respiratory Care refresher course offered through a Respiratory Care Education program accredited by the Commission for the Accreditation of Allied Health Educational Programs.
 - (4) Completion of a minimum of three semester hours of post-licensure respiratory care academic education leading to a baccalaureate or masters degree in Respiratory Care.
 - (5) Presentation of a Respiratory Care Research study at a continuing education conference.
 - (6) Authoring a published Respiratory Care book or Respiratory Care article published in a medical peer review journal.
- (b) The completion of certification or recertification in any of the following: Advanced Cardiac Life Support (ACLS) by the

American Heart Association, Pediatric Advanced Life Support (PALS) by the American Heart Association, and Neonatal Resuscitation Program (NRP) by the American Academy of Pediatrics, shall count for a total of five hours of continuing education for each renewal period; but no more than five hours of total credit will be recognized for each renewal period for the completion of any such certification or recertification.

(c) A licensee shall retain supporting documentation to provide proof of completion of the option chosen in Paragraph (a) of this Rule for a period of no less than three years.

(d) A licensee shall maintain a file at his or her practice facility that contains a copy of the RCP license, a copy of a current Basic Cardiac Life Support (BCLS) certification, a copy of advanced life support certifications and a copy of all credentials issued by the National Board for Respiratory Care.

(e) A licensee is subject to random audit for proof of compliance with the Board's requirements for continuing education.

(f) The Board shall inform licensees of their selection for audit upon notice of license renewal or request for reinstatement. Evidence of completion of the requirements of Paragraph (a) of this Rule shall be submitted to the Board no later than 30 days of receipt of the audit notice.

(g) Failure of a licensee to meet the requirements of this Rule shall result in disciplinary action pursuant to G.S. 90-666.

(h) The Board shall charge the following fees for providers of continuing education that apply for approval of continuing education programs:

- (+) Twenty dollars (\$20.00) per approved hour of CE with a maximum of one hundred fifty dollars (\$150.00) per application. Programs approved for one to two hours of CE: Non Profit Organizations and Government

~~Agencies, ten dollars (\$10.00); For Profit Organizations, twenty dollars (\$20.00).~~

~~(2) Programs approved for three to five hours of CE: Non Profit Organizations and Government Agencies, twenty dollars (\$20.00); For Profit Organizations, forty dollars (\$40.00).~~

~~(3) Programs approved for six to ten hours of CE: Non Profit Organizations and Government Agencies, forty dollars (\$40.00); For Profit Organizations, eighty dollars (\$80.00).~~

~~(4) Programs approved for 11 or more hours of CE: Non Profit Organizations and Government Agencies, eighty dollars (\$80.00); For Profit Organizations, one hundred fifty dollars (\$150.00).~~

(i) The Board shall grant requests for extensions of the continuing education requirements due to personal circumstances as follows. The Board shall require documentation of the circumstances surrounding the licensee's request for extension.

- (1) Having served in the regular armed services of the United States at least six months of the 12 months immediately preceding the license renewal date; or
- (2) Having suffered a serious or disabling illness or physical disability that prevented completion of the required number of continuing education hours during the 12 months immediately preceding the licensee renewal date.

Authority G.S. 90-652(2)(13); 90-658; 90-660(b)(9).

PROPOSED RULES

*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 March 18, 2010.

**REGISTER CITATION TO THE
NOTICE OF TEXT****HHS - MEDICAL ASSISTANCE, DIVISION OF**Membership

10A NCAC 22M .0102* 24:10 NCR

HOME INSPECTOR LICENSURE BOARDEquivalent Experience

11 NCAC 08 .1004* 24:09 NCR

INSURANCE, DEPARTMENT OFDefinitions

11 NCAC 12 .1901* 24:09 NCR

Scope

11 NCAC 22 .0101* 24:12 NCR

Definitions

11 NCAC 22 .0102* 24:12 NCR

General Eligibility

11 NCAC 22 .0103* 24:12 NCR

Filing Requirements

11 NCAC 22 .0104 24:12 NCR

Financial Requirements

11 NCAC 22 .0105 24:12 NCR

Administrative, Provider, and Management Contracts

11 NCAC 22 .0106 24:12 NCR

Trust Submittal and Plan of Operation

11 NCAC 22 .0107* 24:12 NCR

Claims Payments

11 NCAC 22 .0108* 24:12 NCR

Dissolution

11 NCAC 22 .0109* 24:12 NCR

Minimum Reserve Standards

11 NCAC 22 .0110* 24:12 NCR

Claim Reserves

11 NCAC 22 .0111* 24:12 NCR

Premium Reserves

11 NCAC 22 .0112* 24:12 NCR

Maximum Net Retention Standard

11 NCAC 22 .0113* 24:12 NCR

Qualified Actuary; Maximum Net Retention Filing

11 NCAC 22 .0114* 24:12 NCR

Certification of Reserves Filing

11 NCAC 22 .0115* 24:12 NCR

Definitions and Certification of Rates Filing

11 NCAC 22 .0116* 24:12 NCR

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSIONAdmission of Trainees

12 NCAC 09B .0203* 24:03 NCR

CRIME CONTROL AND PUBLIC SAFETYRotation Wrecker Service Regulations

14A NCAC 09H .0321* 24:09 NCR

ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OFOrganization and Purpose

15A NCAC 12A .0101* 24:10 NCR

Directory of State Parks and Recreation Areas

15A NCAC 12A .0104* 24:10 NCR

Natural and Cultural Resource Protection

15A NCAC 12B .0201* 24:10 NCR

Bathing and Swimming Activities Where Prohibited

15A NCAC 12B .0301* 24:10 NCR

Disposal of Refuse: Garbage, Etc.

15A NCAC 12B .0401* 24:10 NCR

PUBLIC HEALTH, COMMISSION FOR

<u>STDS Applicable to Generators of Hazardous Waste-Part 262</u>	15A	NCAC	13A	.0107	24:09 NCR
<u>Septage Land Application Site Permits</u>	15A	NCAC	13B	.0835*	23:15 NCR
<u>Septage Detention and Treatment Facility Permits</u>	15A	NCAC	13B	.0836*	23:15 NCR
<u>Standards for Septage Detention and Treatment Facilities</u>	15A	NCAC	13B	.0841*	23:15 NCR
<u>Innovative or Alternative Treatment or Storage Methods</u>	15A	NCAC	13B	.0842*	23:15 NCR

ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF

<u>Purpose</u>	15A	NCAC	28	.0101	24:12 NCR
<u>Facilities</u>	15A	NCAC	28	.0102	24:12 NCR
<u>Users</u>	15A	NCAC	28	.0103*	24:12 NCR
<u>Permissible Activities</u>	15A	NCAC	28	.0104*	24:12 NCR
<u>Permission for Use</u>	15A	NCAC	28	.0105*	24:12 NCR
<u>Scheduling Permissible Activities</u>	15A	NCAC	28	.0106	24:12 NCR
<u>Available Areas</u>	15A	NCAC	28	.0107*	24:12 NCR
<u>Long-Term Use Prohibited</u>	15A	NCAC	28	.0108	24:12 NCR
<u>Scheduling Activities for Regular Hours</u>	15A	NCAC	28	.0201*	24:12 NCR
<u>Aquarium Responsibilities</u>	15A	NCAC	28	.0202	24:12 NCR
<u>Scheduling Activities for Non-regular Hours</u>	15A	NCAC	28	.0203*	24:12 NCR
<u>Fee Schedule</u>	15A	NCAC	28	.0302*	24:12 NCR
<u>Lethal Instruments</u>	15A	NCAC	28	.0401*	24:12 NCR
<u>Fires</u>	15A	NCAC	28	.0403	24:12 NCR
<u>Smoking</u>	15A	NCAC	28	.0404	24:12 NCR
<u>Uses Not Covered by Policy</u>	15A	NCAC	28	.0405	24:12 NCR
<u>Disorderly Conduct</u>	15A	NCAC	28	.0501	24:12 NCR
<u>Loud Radios</u>	15A	NCAC	28	.0505	24:12 NCR
<u>Proper Dress</u>	15A	NCAC	28	.0506	24:12 NCR
<u>Coaster Conveyances</u>	15A	NCAC	28	.0507	24:12 NCR
<u>Acceptance of Donated Personal Property</u>	15A	NCAC	28	.0606*	24:12 NCR
<u>Parking</u>	15A	NCAC	28	.0703*	24:12 NCR
<u>Food and Beverages Prohibited Inside</u>	15A	NCAC	28	.0704	24:12 NCR

BARBER EXAMINERS, BOARD OF

<u>Where Barber Services May Be Performed</u>	21	NCAC	06L	.0111*	24:07 NCR
<u>Additional Duties of Barber Shop Owners and Managers and ...</u>	21	NCAC	06L	.0116*	24:07 NCR
<u>Fees</u>	21	NCAC	06N	.0101*	24:07 NCR

GENERAL CONTRACTORS, LICENSING BOARD FOR

<u>Multiunit Buildings</u>	21	NCAC	12	.0211*	24:06 NCR
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DENTAL EXAMINERS, BOARD OF

<u>Definitions</u>	21	NCAC	16B	.0901*	24:10 NCR
<u>Exemptions Granted</u>	21	NCAC	16B	.0902*	24:10 NCR
<u>Definitions</u>	21	NCAC	16I	.0110*	24:10 NCR
<u>Exemptions Granted</u>	21	NCAC	16I	.0111*	24:10 NCR

DIETETICS/NUTRITION, BOARD OF

<u>Definitions</u>	21	NCAC	17*	.0101	24:09 NCR
<u>Code of Ethics for Professional Practice and Conduct</u>	21	NCAC	17	.0114	24:09 NCR
<u>Violations, Complaints, Subsequent Board Action, and Hear...</u>	21	NCAC	17	.0116*	24:09 NCR
<u>Suspension of Authority and Escrow of Funds</u>	21	NCAC	17	.0117	24:09 NCR
<u>Armed Services Licensees</u>	21	NCAC	17	.0118	24:09 NCR

MASSAGE AND BODYWORK THERAPY, BOARD OF

<u>License Renewal</u>	21	NCAC	30	.0303*	24:10 NCR
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MEDICAL BOARD

<u>Supervision of Anesthesiologist Assistants</u>	21	NCAC	32W	.0109	24:06 NCR
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PHARMACY, BOARD OF

<u>Extension of Period for Certain Members of the Armed Forces</u>	21	NCAC	46	.1613*	24:08 NCR
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APPRAISAL BOARD

<u>Appraisal Reports</u>	21	NCAC	57A	.0405	24:08 NCR
<u>Supervision of Trainees</u>	21	NCAC	57A	.0407*	24:08 NCR
<u>Registered Trainee Course Requirements</u>	21	NCAC	57B	.0101	24:08 NCR
<u>Course Completion Standards</u>	21	NCAC	57B	.0303	24:08 NCR
<u>Course Scheduling</u>	21	NCAC	57B	.0304*	24:08 NCR
<u>Criteria for Course Recognition</u>	21	NCAC	57B	.0307*	24:08 NCR
<u>Course Operational Requirements</u>	21	NCAC	57B	.0606*	24:08 NCR
<u>Sponsor Reporting of Continuing Education Credit</u>	21	NCAC	57B	.0608*	24:08 NCR
<u>Renewal of Approval and Fees</u>	21	NCAC	57B	.0611*	24:08 NCR

COMMUNITY COLLEGES, BOARD OF

<u>Education Services for Minors</u>	23	NCAC	02C	.0305*	24:10 NCR
<u>Limitations in Reporting Student Membership Hours</u>	23	NCAC	02D	.0325	24:10 NCR
<u>Maintenance of Plant Flexibility</u>	23	NCAC	02D	.0329	24:10 NCR
<u>Definitions and Application for Initial License</u>	23	NCAC	03A	.0101	24:10 NCR
<u>Application for Renewal of License</u>	23	NCAC	03A	.0102*	24:10 NCR
<u>Administration of the Student Protection Fund</u>	23	NCAC	03A	.0116	24:10 NCR

These rules are subject to the next Legislative Session. (See G.S. 150B-21.3(b1))

APPRAISAL BOARD

<u>Qualifications for Trainee Registration and Appraiser Cer...</u>	21	NCAC	57A	.0201*	24:08 NCR
<u>Continuing Education</u>	21	NCAC	57A	.0204*	24:08 NCR
<u>Certified Residential Real Estate Appraiser Course Requir...</u>	21	NCAC	57B	.0102*	24:08 NCR
<u>Certified General Real Estate Appraiser Course Requirements</u>	21	NCAC	57B	.0103*	24:08 NCR
<u>Instructor Requirements</u>	21	NCAC	57B	.0306*	24:08 NCR
<u>Criteria for Course Approval</u>	21	NCAC	57B	.0603*	24:08 NCR

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 22M .0102 MEMBERSHIPS

(a) The DUR Board shall consist of the Division of Medical Assistance Drug Use Review Coordinator and the following appointed positions:

- (1) five licensed and practicing physicians;
- (2) five licensed and practicing pharmacists; and
- (3) at least two additional individuals with knowledge and expertise in one or more of the following:
 - (A) prescribing of Medicaid covered outpatient drug;
 - (B) dispensing and monitoring of Medicaid covered outpatient drugs;
 - (C) drug use review, evaluation, and intervention; or
 - (D) medical quality assurance.

(b) The Division shall appoint members of the DUR Board for up to three one-year terms. Either party shall have the right to terminate the membership upon five days notice in writing to the other party. The DUR Coordinator is not an appointed member, is not subject to the term requirement and only serves on the Board while actively employed with DMA as the DUR Coordinator.

(c) The North Carolina Association of Pharmacists, the North Carolina Medical Society, and the Old North State Medical Society shall be asked by DMA's DUR Coordinator to make nominations for some of the positions on the Board. The Director may accept or reject nominations received.

History Note: Authority G.S. 108A-68; 42 U.S.C. 1396r-8(g)(3)(B);

Eff. January 4, 1993;

Amended Eff. April 1, 2010.

TITLE 11 – DEPARTMENT OF INSURANCE

11 NCAC 08 .1004 EQUIVALENT EXPERIENCE

(a) The Board shall consider equivalent experience of applicants who do not meet the experience requirements of G.S. 143-151.51(5)a. Any one of the following descriptions of experience is considered sufficient to meet the equivalent experience requirements:

- (1) A bachelor of science degree from any engineering, architecture or building technology school and two years experience working in building design, construction, or inspection of building, electrical, mechanical, and plumbing systems.
- (2) A two year Associate of Applied Science degree from a community college or technical school in building technology, civil engineering, electrical engineering, mechanical engineering, or architecture; and

either four years of design experience in building, electrical, mechanical, and plumbing systems, or four years experience as an employee who works under the direct supervision of a licensed general (residential or building) contractor and who supervises electrical, mechanical, and plumbing subcontractors.

- (3) Six years experience as an employee who works under the direct supervision of a licensed general contractor (residential or building) performing building construction and who supervises electrical, mechanical, and plumbing subcontractors.
- (4) Certification by the North Carolina Code Officials Qualification Board as a Code Enforcement Official with Standard Level I (or higher) inspection certification in four areas: building, electrical, mechanical, and plumbing.
- (5) Any combination of certification listed in Paragraph (a)(4) of this Rule and a license as an electrical contractor (limited or greater) issued by the N.C. Board of Electrical Examiners, or a license as a heating or cooling contractor (H1, H2, or H3), or a plumbing contractor issued by the N.C. Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors, resulting in either a certificate or a license in four areas in building, electrical, mechanical, and plumbing contracting or inspections.

(b) Applicants may submit other experience in the design, installation, or inspection of buildings and electrical, mechanical, and plumbing systems. The Board's Application Evaluation Committee shall consider such experience on a case-by-case basis.

(c) Successful completion of a home inspection course or training program, approved by the Board, is sufficient to meet the equivalent experience requirement for licensure. The applicant must provide to the Board certification from the home inspection course or training program demonstrating that the applicant has met all requirements of that program, including attendance, testing, and training as applicable. The home inspection course or training program shall consist of at least 120 hours of instruction. The Board shall approve a home inspection course or training program if such course or program provides adequate instruction to teach all skills and knowledge necessary to be a fully licensed home inspector in this State. The Board shall request any documentation or information needed to demonstrate that a home inspection course or training program meets such requirements.

History Note: Authority G.S. 143-151.49(a)(13); 143-151.51(5)b;

Codifier determined that agency findings did not meet criteria for temporary rule Eff. October 15, 1996;

Temporary Adoption Eff. October 24, 1996;

Eff. July 1, 1998;

Amended Eff. April 1, 2010.

11 NCAC 12 .1901 DEFINITIONS

As used in this Section, the following terms have the meanings ascribed to them:

- (1) "Abuse" means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner or caretaker:
 - (a) Attempting to cause or intentionally, knowingly or recklessly causing another person bodily injury, physical harm, severe emotional distress, psychological trauma, rape, sexual assault or involuntary sexual intercourse;
 - (b) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person or minor child, under circumstances that place the person or minor child in reasonable fear of bodily injury or physical harm;
 - (c) Subjecting another person to false imprisonment; or
 - (d) Attempting to cause or intentionally, knowingly, or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another person.
- (2) "Abuse-related medical condition" means a medical condition sustained by a subject of abuse that arises in whole or part out of an act or pattern of abuse.
- (3) "Abuse status" means the fact or perception that a person is, has been, or may be a subject of abuse, irrespective of whether the person has sustained abuse-related medical conditions.
- (4) "Health benefit plan" or "plan" means an accident and health insurance policy or certificate; a nonprofit hospital or medical service corporation contract; a health maintenance organization subscriber contract; a plan provided by a multiple employer welfare arrangement; a plan provided by a Professional Employer Organization; or a plan provided by another benefit arrangement, to the extent permitted by the Employee Retirement Income Security Act of 1974, as amended, or by any waiver of or other exception to that Act provided under federal law or regulation. "Health benefit plan" includes accident only, credit health, dental, vision, Medicare supplement or long-term care insurance, coverage issued as a supplement to liability insurance, short-term and catastrophic health insurance, coverage only for a specified

disease or illness, hospital indemnity or other fixed indemnity insurance, disability income insurance, and a policy that pays on a cost-incurred basis. "Health benefit plan" does not mean the N.C. State Health Plan, workers' compensation insurance or any plan implemented or administered by the North Carolina or United States Department of Health and Human Services, or any successor agency, or its representatives.

- (5) "Insurance professional" means an agent, broker, or adjuster as defined in G.S. 58-33-10 or a third party administrator as defined in G.S. 58-56-2.
- (6) "Insurer" means an insurance company subject to Chapter 58 of the General Statutes, a service corporation organized under Article 65 of Chapter 58 of the General Statutes, a health maintenance organization organized under Article 67 of Chapter 58 of the General Statutes, a multiple employer welfare arrangement subject to Article 49 of Chapter 58 of the General Statutes, the North Carolina Health Insurance Risk Pool subject to Part 6 of Article 50 of Chapter 58 of the General Statutes, and a Professional Employee Organization subject to Article 89A of Chapter 58 of the General Statutes.
- (7) "Insured" means a party named on a health benefit plan as the person with legal rights to the benefits provided by the health benefit plan. For group plans, "insured" includes a person who is a beneficiary covered by a group health benefit plan.
- (8) "Subject of abuse" means a person against whom an act of abuse has been directed; who has current or prior injuries, illnesses or disorders that resulted from abuse; who seeks, may have sought, or had reason to seek medical or psychological treatment for abuse; or protection, court-ordered protection or shelter from abuse.

History Note: Authority G.S. 58-2-40; 58-63-65;
Eff. April 1, 2010.

11 NCAC 22 .0101 SCOPE

This Chapter applies to self-funded trusts sponsored by professional employer organizations if the trust is subject to Article 89A of Chapter 58 of the General Statutes.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0102 DEFINITIONS

(a) The definitions in G.S. 58-89A-5, including subsequent amendments or editions, are incorporated by reference into this Chapter.

(b) As used in this Chapter, the following terms have the meanings ascribed to them:

- (1) "Claims accrued" means liability for accrued benefits, that portion of claims incurred on or prior to the valuation date that result in liability of the trust for the payment of benefits for medical services that have been rendered on or prior to the valuation date, and for the payment of benefits for days of hospitalization and days of disability that have occurred on or prior to the valuation date, that the trust has not paid as of the valuation date, but for which it is liable, and will have to pay after the valuation date.
- (2) "Claims reported" means when a trust has been informed that a claim has been incurred; if the date reported is on or prior to the valuation date, the claim is considered as a reported claim for annual statement purposes.
- (3) "Claims unaccrued" means liability for unaccrued benefits, that portion of claims incurred on or before the valuation date that result in liability of the trust for the payment of benefits for medical services expected to be rendered after the valuation date, and for benefits expected to be payable for days of hospitalization and days of disability occurring after the valuation date.
- (4) "Claims unreported" means a claim that has been incurred on or before the valuation date, but the trust has not been informed.
- (5) "Claim reserves" mean reserves or liabilities held for claims incurred on or before the valuation date, but unpaid as of the valuation date. Claim reserves include both reported and unreported claims. Claim reserves are established for both accrued and unaccrued benefits.
- (6) "Incurred date" means the date that a claim is determined to be a liability of the trust. For example, the charges for inpatient hospital and physician visits in hospitals would be assigned an incurred date equal to the date of admission; outpatient hospital charges would be assigned an incurred date equal to the date of service; surgical expenses would be assigned an incurred date equal to the date of the surgery.
- (7) "Trust" means a self-funded health benefit plan trust sponsored by a PEO that covers the PEO's employees or assigned employees, or both.
- (8) "Unearned premium reserves" mean reserves established for premiums received that

produce insuring periods extending beyond the valuation date.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0103 GENERAL ELIGIBILITY

(a) Each PEO shall provide to the Commissioner documentation that the PEO sponsored health benefit plan is operated pursuant to a trust agreement by a board of trustees that has fiscal control over and is responsible for all operations of the health benefit plan.

(b) Trustees of the trust may be owners, partners, officers, directors, or employees of the PEO or of one or more of the PEO's client employers. With the Commissioner's approval, a person who is not an owner, partner, officer, director or employee may serve as a trustee. Trustees may contract with a licensed third party administrator to administer the operations of the trust.

(c) The trust shall provide benefits solely for the PEO's employees or the assigned employees, or both.

(d) Any profits from the operation of a trust shall be invested in securities in accordance with G.S. 58-7-160 through G.S. 58-7-200. Interest or other profits accrued or received from the securities shall be used to stabilize premium rates or provide other benefits for the insured employees on which the PEO and the Commissioner agree.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0104 FILING REQUIREMENTS

(a) All communications and filings required by this Chapter related to a trust shall be submitted to the Department's Life & Health Division and made pursuant to 11 NCAC 12 .0329.

(b) During the pendency of the review of a submittal under this Chapter, the PEO shall keep all required information, statements, documents, and materials current and accurate.

(c) A submittal is not complete until the PEO has provided all information required by this Chapter. The Commissioner is not required to process an incomplete submittal.

(e) All financial information required by this Chapter shall be prepared in accordance with United States Generally Accepted Accounting Principles.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0105 FINANCIAL REQUIREMENTS

(a) A trust may participate in a cash management program as long as the trust has direct access to its funds at all times and the depository or custodian maintains a separate accounting for each account. The depository or custodian must be a national or state bank, savings and loan association, or trust company.

(b) No surplus note or the interest from the note shall be paid or repaid without the written approval of the Commissioner. If

there is more than one surplus note, each note shall have its own unique identification number in the upper left hand corner of each page of the document.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0106 ADMINISTRATIVE, PROVIDER, AND MANAGEMENT CONTRACTS

(a) As used in this Rule, "fees" means any compensation that is transferred for either contracted or noncontracted services that are rendered to a trust or the PEO.

(b) A trust is prohibited from paying any fees, other than for reimbursement of specific expenses, to its sponsoring PEO unless the services rendered to the trust are available to the trust from persons other than the PEO.

(c) The fees for such services shall be determined by comparing those charged to MEWA's in North Carolina, as defined in G.S. 58-49-30(a).

(d) A PEO shall give the Commissioner written notification of any proposed change to the trust's management or administrative contract at least 45 days before the effective date of the change.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0107 TRUST SUBMITTAL AND PLAN OF OPERATION

(a) In order to sponsor and maintain a trust pursuant to G.S. 58-89A-106, a PEO shall submit to the Commissioner a plan of operation as well as the following information:

- (1) Copy of the plan administrator's North Carolina TPA license.
- (2) Copy of the current contract between the PEO employee benefit plan trust and the administrator.
- (3) Description of the marketing plan for the PEO's services and a list of PEO employees who solicit client employers for the PEO.
- (4) A list of all client employers contracted with the PEO, including a list of all insured employees who are not assigned by the PEO.
- (5) A copy of each optional plan of benefits summary plan description and evidence of the coverage and benefits offered by the trust.
- (6) The schedule of the premium rates or the base rates and factors that will be used to calculate the premiums for each trust.
- (7) Actuarial certifications to meet each of the following requirements:
 - (A) Actuarial soundness of the trust as required by G.S. 58-89A-106(a)(11);
 - (B) Adequacy of rates charged as provided in 11 NCAC 22 .0116 and 22 .0117.

- (C) Provisions made for incurred but not reported claims as provided in 11 NCAC 22 .0116 and 22 .0117.
- (8) Report on Financial Condition of the trust, including:
 - (A) The Annual Statement of Condition and Affairs Exhibit;
 - (B) The Accident and Health Exhibit;
 - (C) The General Expense Exhibit;
 - (D) The Development of Incurred Losses Exhibit;
 - (E) Audited Financial Statements as outlined in Paragraph (b) of this Rule.
- (9) A copy of the stop-loss insurance agreement covering the trust along with a summary of the description of the agreement that explains the nature of the coverage and net retention limits.
- (10) A power of attorney, as required by G.S. 58-16-5(10).

(b) After the initial submittal required by this Rule, every PEO shall, within 150 days after the end of each of the trust's fiscal years or within any such extension of time that the Commissioner grants, file a plan of operation, along with all information required by Paragraph (a) of this Rule, with the Commissioner, on forms prescribed by the Commissioner and verified by the oath of a member of the PEO's board of directors and by an administrative executive appointed by the board, showing the trust's financial condition on the last day of the preceding fiscal year. The plan shall contain an audited financial statement of the trust prepared in accordance with United States Generally Accepted Accounting Principles, including its balance sheet and a statement of the operations for the preceding fiscal year certified by an independent certified public accountant. The plan shall also include an analysis of the adequacy of reserves and contributions or premiums charged, based on a review of past and projected claims and expenses, pursuant to this Chapter.

(c) In addition to the information called for and furnished in connection with the plan of operation, the Commissioner may request information that summarizes paid and incurred expenses and contributions or premiums received, as well as evidence that the trust is actuarially sound. That information and evidence shall be furnished by the PEO not later than 30 days after the request, unless the Commissioner grants an extension.

(d) Annually the PEO shall submit an actuarial certification prepared by an independent qualified actuary that indicates:

- (1) The trust is actuarially sound, considering the rates, benefits, and expenses of, and any other funds available for the payment of obligations of, the trust;
- (2) The rates being charged and to be charged for the trust are actuarially adequate to the end of the period for which rates have been guaranteed to the covered persons;
- (3) Incurred but not reported claims and claims reported but not fully paid have been adequately provided for.

(e) For the first year, beginning with October 1, 2009, the Commissioner may require the PEO to file quarterly, within 45 days after the end of each of its fiscal quarters, an unaudited

financial statement on a form provided by the Commissioner, verified by the oath of a member of the PEO's board of directors and an administrative executive appointed by the board, showing the trust's financial condition on the last day of the preceding quarter.

(f) Any PEO or its employee benefit plan trust that fails to file a plan of operation and other information as required by this Rule is subject to G.S. 58-2-70; and after notice and opportunity for hearing, the Commissioner may suspend the PEO's authority to enroll new insured's or to do business in this State while the failure continues. Nothing in this subsection prohibits a PEO from continuing to operate a trust while the documentation required under this Rule is under review by the Department as long as the PEO operates the plan in accordance with this Chapter and G.S. 58-89A-106.

(g) A request for an extension of time to file the annual plan of operation and other information required by this Rule must be made in writing and filed with the Life & Health Division no later than 15 days before the due date of the plan. Any request for extension received less than 15 days before the due date of the plan shall be denied except in instances of death or disability of key personnel or destruction of records by fire or natural disaster declared a major disaster by the President of the United States under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, et. seq., as amended or a proclaimed disaster by the Governor of the State where the trust offices are located.

(h) All exhibits referenced in this Rule shall be in the format as provided by the Commissioner, and exhibit forms may be obtained from the Life & Health Division.

(i) Every submittal made pursuant to this Rule shall contain a certification that any changes to the information required by this Rule shall be reported to the Commissioner.

(j) Any change in the information required by this Chapter or by G.S. 58-89A-106 or by G.S. 58-89A-107 shall be reported to the Commissioner within 10 business days after the change.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0108 CLAIMS PAYMENTS

A trust shall make claims payments in accordance with G.S. 58-3-225.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0109 DISSOLUTION

Any request to dissolve a trust shall be made on Form PEO-5 entitled "Application for Dissolution".

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0110 MINIMUM RESERVE STANDARDS

(a) Claim reserves and premium reserves shall be established by every trust.

(b) The adequacy of reserves of a trust shall be determined on the basis of the two categories combined, but actuarially appropriate reserves for each category must be established separately.

(c) When a trust determines that the adequacy of its reserves necessitates a reserve amount greater than the minimum standards, the increased reserves shall be established and held as the minimum reserves for that trust.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0111 CLAIM RESERVES

(a) Minimum claim reserves are required for all incurred but unpaid claims, which include claims accrued and claims unaccrued.

(b) For the current year exposures, where historical claim information is either not available or not credible as determined by an actuary, the minimum claim reserve shall be calculated in the following manner:

- (1) Calculate the total earned premium as of the end of a valuation period for each self funded plan of coverage in force under the trust.
- (2) Multiply the total earned premium by the expected incurred loss ratio for each self funded plan of coverage in force under the trust. The sum of the results of these multiplications is referred to as the "total incurred claims".
- (3) Subtract from the total incurred claims the total amount of claims paid as of the end of a valuation period. The result of this subtraction is the total "minimum" amount that shall be added to the claim reserves established at the beginning of the valuation period.
- (4) The calculations in Subparagraphs (b)(1) and (2) of this Rule may give recognition to duration.

(c) For later years of exposures, where historical claim information is available and credible as determined by an actuary, the minimum reserve shall be calculated using any generally accepted or reasonable actuarial claim runoff method. Claim runoff schedules shall be developed by using appropriate incurred dates and paid dates for claims. Adequacy of the claim reserves shall be determined in the aggregate.

(d) Appropriate claim expense reserves are required with respect to the estimated expense of settlement of all incurred but unpaid claims. Claim settlement expenses shall include both allocated and unallocated expenses.

(e) All claim reserves for prior valuation periods shall be tested for adequacy and reasonableness in accordance with claim runoff schedules pursuant to the statutory financial statement including consideration of any residual unpaid liability.

(f) Each trust shall develop a follow-up study comparing its previous reserve estimates against subsequent claims actually paid together with the remaining estimated liability as of the valuation date. The results of this study shall be filed with the Actuarial Service Division of the Department by March 1 of each calendar year.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106; Eff. April 1, 2010.

11 NCAC 22 .0112 PREMIUM RESERVES

(a) Unearned premium reserves are required for each trust with respect to the period of coverage for which premiums, other than premiums paid in advance, have been paid beyond the date of valuation.

(b) If premiums due and unpaid are carried as an asset, such premiums must be treated as premiums in force, subject to unearned premium reserve determination. The value of the unpaid commissions and the cost of collection associated with due and unpaid premiums must be carried as an offsetting liability.

(c) The minimum unearned premium reserve with respect to any contract is the pro rata gross unearned modal premium that applies to the premium period beyond the valuation date.

(d) A trust may employ suitable approximations or estimates, including groupings, averages, and aggregate estimation, in computing premium reserves for all of the trust options it offers. Such approximations or estimates shall be tested periodically by the PEO to determine their continuing adequacy and reliability.

History Note: Authority G.S. 58-2-4; 58-89A-15; 58-89A-105; 58-89A-106; Eff. April 1, 2010.

11 NCAC 22 .0113 MAXIMUM NET RETENTION STANDARD

(a) The specific maximum net retention limit for any trust, associated with the period of time that the excess insurance coverage is in force, shall be calculated in the following manner:

- (1) Determine the total expected dollar value of claims;
- (2) Determine the total surplus at the beginning of the period of time that the excess insurance coverage is scheduled to be in force;
- (3) Multiply Subparagraph (a)(1) of this Rule by one percent and add that product to Subparagraph (a)(2) of this Rule;
- (4) Multiply the result of the calculation in Subparagraph (a)(3) of this Rule times itself;
- (5) Multiply Subparagraph (a)(1) of this Rule by the number 3.4; and
- (6) Divide the product of the calculation in Subparagraph (a)(4) of this Rule by the product of the calculation in Subparagraph (a)(5) of this Rule.

(b) The specific maximum net retention limit shall not exceed the lesser of:

- (1) The amount in Subparagraph (a)(6) of this Rule;
- (2) Twenty-five thousand dollars (\$25,000); or
- (3) The specific maximum net retention limit determined by or for the trust in accordance with sound actuarial principles.

(c) The aggregate maximum net retention shall not exceed the lesser of:

- (1) One hundred twenty-five percent of Subparagraph (a)(1) of this Rule; or
- (2) The aggregate maximum net retention limit determined by or for the trust in accordance with sound actuarial principles.

(d) The Commissioner may approve a specific maximum net retention limit or an aggregate maximum net retention limit or both in excess of those calculated pursuant to this Rule, upon application to the Commissioner and the Commissioner's determination that the increase would not inhibit the ability of the trust to perform its present and future contractual obligations to insured employees under the trust.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106; Eff. April 1, 2010.

11 NCAC 22 .0114 "QUALIFIED ACTUARY"; MAXIMUM NET RETENTION FILING

(a) As used in this Rule and in 11 NCAC 22 .0116 and 11 NCAC 22 .0117, "qualified actuary" means an individual who is either an Associate or Fellow of the Society of Actuaries or a Member of the American Academy of Actuaries.

(b) Every year each PEO shall calculate its trust's maximum net retention limit in accordance with 11 NCAC 22 .0114. This calculation must be performed before the anniversary date of the PEO's stop-loss insurance contract and shall be filed, no later than 30 days before the anniversary date of the stop-loss insurance contract, with the Actuarial Services Division of the Department. This calculation shall include the numerical results of all steps in 11 NCAC 22 .0114 and shall be performed by a qualified actuary.

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106; Eff. April 1, 2010.

11 NCAC 22 .0115 CERTIFICATION OF RESERVES FILING

Every year each PEO shall file the following actuarial certifications executed by a qualified actuary in the following manner:

"I (Name of Qualified Actuary) am a qualified actuary as defined by 11 NCAC 22 .0115 and I have reviewed:"

- (1) 11 NCAC 22 .0111 titled, "Minimum Reserve Standards," and I certify that if the adequacy of the trust reserves requires reserves in excess of the minimum standards described in 11 NCAC 22 .0112 and 11 NCAC 22 .0113, then such increased reserves will be held and

- considered the minimum reserves for (Name of PEO) trust.
- (2) 11 NCAC 22 .0112 titled, "Claim Reserves," and I certify that the trust claim reserves are being calculated in an actuarially sound manner that produces reserves at least as great as those prescribed in 11 NCAC 22 .0112.
 - (3) 11 NCAC 22 .0113 titled, "Premium Reserves," and I certify that the trust premium reserves are being calculated in an actuarially sound manner that produces reserves at least as great as those prescribed in 11 NCAC 22 .0113.
 - (4) 11 NCAC 22 .0114 titled, "Maximum Net Retention Standard," and I certify that the trust maximum net retention limits are being calculated in an actuarially sound manner that produces maximum net retention limits no greater than those prescribed in 11 NCAC 22 .0114, unless the Commissioner has approved such higher limits as described in 11 NCAC 22 .0114(d).

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

11 NCAC 22 .0116 DEFINITIONS AND CERTIFICATION OF RATES FILING

(a) For purposes of this Chapter, the following terms have the meanings ascribed to them:

- (1) "Rates are adequate" for a given block of policies or certificates means that the total payments collected now and in the future by the trust plus the investment earnings attributable to any net retained funds should be at least sufficient to fund the current and future benefits promised plus cover related expenses.
- (2) "Block of plans" means all coverage plans or certificates issued by the trust under the same schedule of rates and on the same plan document or form.
- (3) "Rates are not excessive" for a given block of plans means that the most recent calendar year incurred loss ratio is greater than or equal to one minus the expense ratio for that given block of policies or certificates.
- (4) "Expense ratio" means the ratio of the trust's operating expenses for a block of plans or certificates to its earned premium for that block of plans or certificates.
- (5) "Operating expense" means any combination of the following expenses:
 - (A) Commissions;
 - (B) Other acquisitions;
 - (C) General administration;
 - (D) Taxes, licenses, and fees; and
 - (E) Profit and contingency margin.

- (6) Rates are not "unfairly discriminatory" if they reflect equitably differences in expected risk.

(b) Every year each trust shall file the following actuarial certification executed by a qualified actuary in the following manner:

"I (Name of Qualified Actuary) am a qualified actuary as defined in 11 NCAC 22 .0115 and I certify that the rates developed for the trust of (Name of PEO) are calculated in an actuarially sound manner and that these rates are adequate, not excessive, and not unfairly discriminatory."

History Note: Authority G.S. 58-2-40; 58-89A-15; 58-89A-105; 58-89A-106;
Eff. April 1, 2010.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 09B .0203 ADMISSION OF TRAINEES

(a) The school director shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who is not a citizen of the United States.

(b) The school shall not admit any individual younger than 18 years of age as a trainee in any non-academic basic criminal justice training course.

(c) The school shall give priority admission in certified criminal justice training courses to individuals holding full-time employment with criminal justice agencies.

(d) The school shall not admit any individual as a trainee in a presentation of the "Criminal Justice Instructor Training Course" who does not meet the education and experience requirements for instructor certification under Rule .0302(1) of this Subchapter within 60 days of successful completion of the Instructor Training State Comprehensive Examination.

(e) The school shall not admit an individual, including partial or limited enrollees, as a trainee in a presentation of the Basic Law Enforcement Training Course unless the individual has taken the reading component of a nationally standardized test within one year prior to admission to Basic Law Enforcement Training and has scored at or above the tenth grade level, or the equivalent. A nationally standardized test is a test that:

- (1) reports scores as national percentiles, stanines or grade equivalents; and
- (2) compares student test results to a national norm.

(f) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual has provided to the School Director a medical examination report, completed by a physician licensed to practice medicine in North Carolina, a physician's assistant, or a nurse practitioner, to determine the individual's fitness to perform the essential job functions of a criminal justice officer. The Director of the Standards Division shall grant an exception to this standard for a period of time not to exceed the commencement of the physical fitness topical area when failure

to timely receive the medical examination report is not due to neglect on the part of the trainee.

(g) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual is a high school graduate or has passed the General Educational Development Test indicating high school equivalency. High school diplomas earned through correspondence enrollment are not recognized toward the educational requirements.

(h) The school shall not admit any individual trainee in a presentation of the Basic Law Enforcement Training Course unless as a prerequisite the individual has provided the certified School Director a certified criminal record check for local and state records for the time period since the trainee has become an adult and from all locations where the trainee has resided since becoming an adult. An Administrative Office of the Courts criminal record check or a comparable out-of-state criminal record check will satisfy this requirement.

(i) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who has been convicted of the following:

- (1) a felony;
- (2) a crime for which the punishment could have been imprisonment for more than two years;
- (3) a crime or unlawful act defined as a "Class B Misdemeanor" within the five year period prior to the date of application for employment unless the individual intends to seek certification through the North Carolina Sheriffs' Education and Training Standards Commission;
- (4) four or more crimes or unlawful acts as defined as "Class B Misdemeanors" regardless of the date of conviction;
- (5) four or more crimes or unlawful acts defined as "Class A Misdemeanors" except the trainee may be enrolled if the last conviction occurred more than two years prior to the date of enrollment;
- (6) a combination of four or more "Class A Misdemeanors" or "Class B Misdemeanors" regardless of the date of conviction unless the individual intends to seek certification through the North Carolina Criminal Justice Education and Training Standards Commission.

(j) Individuals charged with crimes as specified in Paragraph (i) of this Rule, and such offenses were dismissed or the person was found not guilty, may be admitted into the Basic Law Enforcement Training Course but completion of the Basic Law Enforcement Training Course does not ensure that certification as a law enforcement officer or justice officer through the North Carolina Criminal Justice Education and Training Standards Commission will be issued. Every individual who is admitted as a trainee in a presentation of the Basic Law Enforcement Training Course shall notify the School Director of all criminal offenses which the trainee is arrested for or charged with, pleads no contest to, pleads guilty to or is found guilty of, and notify the School Director of all Domestic Violence Orders (G.S. 50B) which are issued by a judicial official that provide an

opportunity for both parties to be present. This includes all criminal offenses except minor traffic offenses and specifically includes any offense of Driving Under the Influence (DUI) or Driving While Impaired (DWI). A minor traffic offense is defined, for the purposes of this Paragraph, as an offense where the maximum punishment allowable by law is 60 days or less. Other offenses under G.S. 20 (Motor Vehicles) or other similar laws of other jurisdictions which shall be reported to the School Director include G.S. 20-139 (persons under influence of drugs), G.S. 20-28 (driving while license permanently revoked or permanently suspended), G.S. 20-30(5) (fictitious name or address in application for license or learner's permit), G.S. 20-37.8 (fraudulent use of a fictitious name for a special identification card), G.S. 20-102.1 (false report of theft or conversion of a motor vehicle), G.S. 20-111(5) (fictitious name or address in application for registration), G.S. 20-130.1 (unlawful use of red or blue lights), G.S. 20-137.2 (operation of vehicles resembling law enforcement vehicles), G.S. 20-141.3 (unlawful racing on streets and highways), G.S. 20-141.5 (speeding to elude arrest), and G.S. 20-166 (duty to stop in event of accident). The notifications required under this Paragraph must be in writing, must specify the nature of the offense, the court in which the case was handled, the date of the arrest or criminal charge, the date of issuance of the Domestic Violence Order (G.S. 50B), the final disposition, and the date thereof. The notifications required under this Paragraph must be received by the School Director within 30 days of the date the case was disposed of in court. The requirements of this Paragraph are applicable at all times during which the trainee is enrolled in a Basic Law Enforcement Training Course. The requirements of this Paragraph are in addition to the notifications required under 12 NCAC 10B .0301 and 12 NCAC 09B .0101(8).

History Note: Authority G.S. 17C-6; 17C-10;

Eff. January 1, 1981;

Amended Eff. June 1, 2010; December 1, 2004; July 1, 2004; August 1, 2002; August 1, 2000; January 1, 1995; March 1, 1992; July 1, 1989; January 1, 1985.

TITLE 14A – DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

14A NCAC 09H .0321 ROTATION WRECKER SERVICE REGULATIONS

(a) The Troop Commander shall include on the Patrol Rotation Wrecker List only those wrecker services which agree in writing to adhere to the following provisions:

- (1) A wrecker service desiring to be included on the Highway Patrol Rotation Wrecker List shall complete a wrecker application on a form designated by the Patrol. All applications shall be submitted to the appropriate District First Sergeant.
- (2) In order to be listed on a rotation wrecker list within a zone, a wrecker service must have a full-time business office within that Rotation Wrecker Zone that is staffed and open during

- normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding holidays, and a storage facility. The Wrecker service must have someone available to accept telephone calls from the Patrol, and to allow access to towed vehicles, or to retrieve towed vehicles by the registered owner, operator, or legal possessor during business hours. The business office may not be the same physical address as the owner's residence unless zoned for commercial purposes and advertised as a business property. A representative from the wrecker service shall be available on call on a 24-hour basis, for emergencies. The wrecker service shall allow vehicles to be retrieved between the hours of 8:00 a.m. to 5:00 p.m., seven days a week, excluding holidays. An individual (registered owner, legal possessor, or operator) shall not be charged a storage fee for days that he/she could not retrieve his/her vehicle as a result of an action or omission on the part of the wrecker service (such as where the wrecker service was not open, did not answer the telephone or a representative was not available to release the vehicle).
- (3) Wrecker service facilities and equipment, including vehicles, office, telephone lines, office equipment and storage facilities may not be shared with or otherwise located on the property of another wrecker service and must be independently insured. Vehicles towed at the request of the Patrol must be placed in the storage owned and operated by the wrecker service on the rotation list. A storage facility for a small wrecker shall be located within the assigned zone. For wrecker services with large wreckers the storage facility for vehicles towed with the large wrecker may be located anywhere within the county. To be listed on the large rotation wrecker list, a wrecker service must have at least one large wrecker. To be listed on the small rotation wrecker list, a wrecker service must have at least one small wrecker. In any case where husband and wife or other family members are engaged in the business of towing vehicles and desire to list each business separately on the Patrol wrecker rotation list, the wrecker service shall establish that it is a separate legal entity for every purpose, including federal and state tax purposes.
 - (4) Each wrecker must be equipped with legally required lighting and other safety equipment to protect the public and the equipment must be in good working order.
 - (5) Each wrecker on the Patrol Rotation Wrecker List must be equipped with the equipment required on the application list and the equipment must, at all times, be operating properly.
 - (6) The wrecker service operator must remove all debris, other than hazardous materials, from the highway and the right-of-way prior to leaving the incident/collision scene. This service must be completed as a part of the required rotation service and shall not be charged as an extra service provided. Hazardous materials consist of those materials and amounts that are required by law to be handled by local Hazardous Materials Teams. Hazardous Materials or road clean-up other than debris may be billed in quarter hour increments after the first hour on scene.
 - (7) The wrecker service must be available to the Patrol for rotation service on a 24-hour per day basis and accept collect calls (if applicable) from the Patrol. Calls for service must not go unanswered for any reason.
 - (8) The wrecker service shall respond, under normal conditions, in a timely manner. Failure to respond in a timely manner may result in a second rotation wrecker being requested. If the second wrecker is requested before the arrival of the first rotation wrecker, the initial requested wrecker shall forfeit the call and shall immediately leave the collision/incident scene.
 - (9) For Patrol-involved incidents, the wrecker service shall respond only upon request from Patrol authority or at the request of the person in apparent control of the vehicle to be towed.
 - (10) The wrecker service, when responding to rotation wrecker calls, shall charge reasonable fees for services rendered. Towing, storage and related fees charged for rotation services may not exceed the wrecker service's charges for nonrotation service calls that provide the same service, labor, and conditions. Wrecker services may secure assistance from another rotation wrecker service when necessary, but only one bill shall be presented to the owner or operator of the vehicle for the work performed. A price list for recovery, towing and storage shall be established and kept on file at the place of business. A price list for all small wreckers and rollbacks with a GVWR of less than 26,001 pounds shall be furnished, in writing on a Patrol form, to the District First Sergeant upon request. The District First Sergeant shall approve all price lists submitted within their respective District if they are determined to be reasonable, consistent with fees charged by other Highway Patrol rotation wrecker services within the District and do not exceed the wrecker service's charges for nonrotation service calls that provide the same service, labor, and conditions. The District

- First Sergeant shall retain a copy of all approved price lists in the appropriate wrecker service file located in the district office. Storage fees shall not begin to accrue until the next calendar day following the initial towing of the vehicle. Wrecker service towing fees for recovery and transport of vehicles after 5:00 p.m. and on weekends may not exceed the towing fees for recovery and transport of vehicles charged during regular "Business Hours" by more than 10 percent. A mileage fee may only be charged if the customer requests the vehicle to be towed to a location outside of the assigned wrecker zone or county. If a mileage fee is warranted, the wrecker driver shall inform the owner, operator or legal possessor of the vehicle of any additional charge for mileage prior to towing. Each Troop Commander shall designate a Troop Lieutenant to serve as a Rotation Wrecker Liaison for their respective Troop. The individual price list for each respective wrecker service shall be made available to customers upon request. Copies of the approved price list shall be maintained within each wrecker and shall be given to the owner, operator or legal possessor of a vehicle being towed as a result of a Highway Patrol rotation wrecker call by the wrecker driver, if the owner, operator or legal possessor of the vehicle being towed is present at the scene. Prices indicated on this form shall be the maximum amount that will be charged for a particular service; however, this does not prevent charges of a lesser amount for said service.
- (11) All wrecker operators shall have a valid driver's license for the type of vehicles driven; a limited driving privilege is not allowed.
 - (12) Wrecker owners, operators and employees shall not be abusive, disrespectful, or use profane language when dealing with the public or any member of the Patrol and shall cooperate at all times with members of the Patrol.
 - (13) The wrecker service shall adhere to all Federal and State laws and local ordinances and regulations related to registration and operation of wrecker service vehicles and have insurance as required by G.S. 20-309(a).
 - (14) The wrecker service shall employ only wrecker operators who demonstrate an ability to perform required services in a safe, timely, efficient and courteous manner and who satisfy all of the requirements for wrecker drivers established or referenced herein.
 - (15) The wrecker service must notify the District First Sergeant of any insurance lapse or change. Wrecker Services shall ensure the NC Highway Patrol is listed as "Certificate Holder" on the Certificate of Liability Insurance, in c/o the District First Sergeant, complete with the current mailing address for the Highway Patrol District Office tasked with the responsibility for ensuring compliance with Highway Patrol policy regarding the respective wrecker service.
 - (16) The wrecker service shall notify the Patrol whenever the wrecker service is unable to respond to calls.
 - (17) Notification of rotation wrecker calls shall be made to the owner/operator or employee of the wrecker service. Notification shall not be made to any answering service, pager or answering machine.
 - (18) Wrecker service vehicles shall be marked on each side by printing the wrecker service name, city and state in at least three inch letters. No magnetic or stick-on signs shall be used. Decals are permissible. The wrecker service operator shall provide a business card to the investigating officer or person in apparent control of the vehicle before leaving the scene.
 - (19) Each wrecker service vehicle must be registered with the Division of Motor Vehicles in the name of the wrecker service and insured by the wrecker service. Dealer tags shall not be displayed on wreckers that respond to rotation calls.
 - (20) Wrecker Services shall secure all personal property at the scene of a collision to the extent possible, and preserve personal property in a vehicle which is about to be towed.
 - (21) Upon application to the Patrol Rotation Wrecker List, the owner shall ensure that the owner and each wrecker driver has not been convicted of, pled guilty to, or received a prayer for judgment continued (PJC):
 - (A) Within the last five years of:
 - (i) A first offense under G.S. 20-138.1, G.S. 20-138.2, G.S. 20-138.2A or G.S. 20-138.2B;
 - (ii) Any misdemeanor involving an assault, an affray, disorderly conduct, being drunk and disruptive, larceny or fraud;
 - (iii) Misdemeanor Speeding to Elude Arrest; or
 - (iv) A violation of G.S. 14-223, Resist, Obstruct, Delay.
 - (B) Within the last ten years of:
 - (i) Two or more offenses in violation of G.S. 20-138.1, G.S. 20-138.2, G.S. 20-138.2A or G.S. 20-138.2B;

- (ii) Felony speeding to elude arrest; or
 - (iii) Any Class F, G, H or I felony involving sexual assault, assault, affray, disorderly conduct, being drunk and disruptive, fraud, larceny, misappropriation of property or embezzlement.
- (C) At any time of:
 - (i) Class A, B1, B2, C, D, or E felonies;
 - (ii) Any violation of G.S. 14-34.2, Assault with deadly weapon on a government officer or employee, 14-34.5, Assault with firearm on a law enforcement officer; or G.S. 14-34.7, Assault on law enforcement officer inflicting injury;
 - (iii) Any violation of G.S. 20-138.5, Habitual DWI. For convictions occurring in federal court, another state or country or for North Carolina convictions for felonies which were not assigned a class at the time of conviction, the North Carolina offense which is substantially similar to the federal or out of state conviction or the class of felony which is substantially similar to the North Carolina felony shall be used to determine whether the owner or driver is eligible. Any question from the owner of a Wrecker Service concerning a criminal record shall be discussed with the First Sergeant or his designee; or
 - (iv) Three felony offenses in any federal or state court or combination thereof. The commission of a felony is not considered to be a second or subsequent felony unless it is committed after the conviction or guilty plea to the previous felony.
- (22) Upon employment or upon the request of the District First Sergeant, the owner of the wrecker service shall supply the Patrol with the full name, current address, date of birth, and photo copy of drivers license, valid work VISA, or other INS Documentation for all wrecker drivers and owner(s) in order for the Patrol to obtain criminal history information. The Wrecker Service shall also provide a certified copy of the driving record for the owner and each driver authorized to drive on rotation upon initial application, upon the hiring of a driver if hired after initial application, and at the time of periodic wrecker inspections. The wrecker service shall inform the District First Sergeant if the owner or a driver is charged with, convicted of, enters a plea of guilty or no contest to, or receives a prayer for judgment continued (PJC) for any of the crimes listed in Subparagraph (21) of this Paragraph. Upon notification that a driver or owner was charged with any of the crimes listed in this Rule, the Patrol may conduct an independent administrative investigation. Willful failure to notify the District First Sergeant as required herein shall result in removal from the rotation wrecker service for a minimum of 12 months.
- (23) Upon request or demand, the rotation wrecker shall return personal property stored in or with a vehicle, whether or not the towing, repair, or storage fee on the vehicle has been or will be paid. Personal property, for purposes of this provision, includes any goods, wares, freight, or any other property having any value whatsoever other than the functioning vehicle itself.
- (24) The wrecker service shall tow disabled vehicles to any destination requested by the vehicle owner or other person with apparent authority, after financial obligations have been finalized.
- (25) Unless the vehicle is being preserved by the Patrol as evidence, the wrecker service shall allow insurance adjusters access to and allow inspection of the vehicle at any time during normal working hours.
- (26) Being called by the Patrol, to tow a vehicle, does not create a contract with or obligation on the part of Patrol or Patrol personnel to pay any fee or towing charge except when towing a vehicle owned by the Patrol, a vehicle that is later forfeited to the Patrol, or if a court determines that the Patrol wrongfully authorized the tow and orders the Patrol to pay transportation and storage fees.
- (27) Being placed on the Patrol Rotation Wrecker List does not guarantee a particular number or quantity of calls, does not guarantee an equivalent number of calls to every wrecker service on the rotation wrecker list, nor entitle any wrecker service to any compensation as a consequence for not being called in accordance with the list or when removed from the rotation wrecker list.

- (28) The failure to respond to a call by the Patrol shall result in the wrecker service being placed at the bottom of any rotation wrecker list and the wrecker service shall then be "automatically by-passed" when that wrecker service comes up for its next rotation call.
- (29) The District First Sergeant or his designee shall subject rotation wreckers and facilities to inspections during normal business hours.
- (30) A rotation wrecker service, upon accepting a call for service from the Patrol, must use its wrecker. Wrecker companies shall not refer a call to another wrecker company or substitute for each other.
- (31) If a rotation wrecker service moves its business location or has a change of address, the owner of the wrecker service must notify the District First Sergeant of the new address or location. Notification shall be made in writing, no later than ten days prior to the projected move. The wrecker service is not entitled to receive rotation calls prior to inspection of the new facility.
- (32) A wrecker service may dispatch either a wrecker or a car carrier "rollback" in response to a Patrol rotation wrecker call, except where the wrecker service is advised that a particular type of recovery vehicle is needed due to existing circumstances.
- (33) A rotation wrecker driver or employee shall not respond to a Patrol related incident with the odor of alcohol on his/her breath or while under the influence of alcohol, drugs or any impairing substance.
- (34) A wrecker service shall have in effect a valid hook or cargo insurance policy issued by a company authorized to do business in the State of North Carolina in the amount of fifty thousand dollars (\$50,000) for each small wrecker and one hundred fifty thousand dollars (\$150,000) for each large wrecker or as otherwise required by Federal regulation, whichever is greater. In addition, each wrecker service shall have a garage keeper's insurance policy from an insurance company authorized to do business in the State of North Carolina covering towed vehicles in the amount of one hundred thousand dollars (\$100,000).

(b) The District First Sergeant shall conduct an investigation of each wrecker service desiring to be placed on the Patrol Rotation Wrecker List and determine if the wrecker service meets the requirements set forth in this Rule. If the District First Sergeant determines that a wrecker service fails to satisfy one or more of the requirements set forth in this Rule, the First Sergeant shall notify the wrecker service owner of the reason(s) for refusing to place it on the rotation wrecker list. Any wrecker service that fails to comply with the requirements of this Rule may be removed from the rotation wrecker list.

(c) The Troop Commander or designee shall ensure that a wrecker service will only be included once on each rotation wrecker list.

(d) If the Troop Commander or designee chooses to use a contract, zone, or other system administered by a local agency, the local agency rules govern the system.

(e) If a wrecker service responds to a call it shall be placed at the bottom of the rotation wrecker list unless the wrecker service, through no fault of its own, is not used and receives no compensation for the call. In that event, it shall be placed back at the top of the rotation list.

History Note: Authority G.S. 20-184; 20-185; 20-187; 20-188;

Temporary Adoption Eff. June 9, 2000;

Eff. April 1, 2001;

Amended Eff. April 1, 2010; July 18, 2008.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 12A .0101 ORGANIZATION AND PURPOSE

The Division of Parks and Recreation manages State Parks and Recreation Areas, plans for a balanced park and recreation system, protects the natural diversity of the state; and, promotes and assists in the provisions of recreation and leisure opportunities at all service levels--local, state, federal, commercial, private. The rules in this Chapter govern the access to and usage of, State Parks and Recreation Areas by visitors. Park employees, their agents and contractors are exempt from the provisions of these Rules when performing management duties. Persons may contact the Division at the following address:

Director--Division of Parks and Recreation
 Department of Environment and Natural Resources
 1615 Mail Service Center
 Raleigh, North Carolina 27699-1615

History Note: Authority G.S. 113-8; 113-35;

Eff. February 1, 1976;

Amended Eff. Pending RRC approval of other rules; January 1, 1983; April 4, 1979.

15A NCAC 12A .0104 DIRECTORY OF STATE PARKS AND RECREATION AREAS

State parks and recreation areas under the stewardship of the Department include the following and the year they were established, plus any additional units authorized by the General Assembly pursuant to G.S. 113-44.14:

- (1) state rivers:
 - (a) Linville River, Avery County 1975;
 - (b) New River, Alleghany and Ashe Counties 1975;
 - (c) Horsepasture River, Transylvania County 1985; and

- (d) Lumber River, Scotland, Hoke, Robeson, and Columbus Counties 1989;
- (2) state natural areas:
 - (a) Mount Jefferson State Natural Area, Ashe County 1956;
 - (b) Weymouth Woods Sandhills Nature Preserve, Moore County 1963;
 - (c) Theodore Roosevelt State Natural Area, Carteret County 1971;
 - (d) Chowan Swamp State Natural Area, Gates County 1973;
 - (e) Hemlock Bluffs State Natural Area, Wake County 1976;
 - (f) Masonboro Island State Natural Area, New Hanover County 1976;
 - (g) Mitchell's Mill State Natural Area, Wake County 1976;
 - (h) Bushy Lake State Natural Area, Cumberland County 1977;
 - (i) Baldhead Island State Natural Area, Brunswick County 1979;
 - (j) Run Hill State Natural Area, Dare County 1995;
 - (k) Occonechee Mountain State Natural Area, Orange County 1997;
 - (l) Bullhead Mountain State Natural Area, Alleghany County 2000;
 - (m) Lea Island State Natural Area, Pender County 2000;
 - (n) Beech Creek Bog State Natural Area, Watauga County 2002;
 - (o) Lower Haw River State Natural Area, Chatham County 2003;
 - (p) Pineola Bog State Natural Area, Avery County 2006;
 - (q) Sugar Mountain Bog State Natural Area, Avery County 2006;
 - (r) Sandy Run Savannas State Natural Area, Pender and Onslow Counties 2006;
 - (s) Bear Paw State Natural Area, Avery County 2008; and
 - (t) Yellow Mountain State Natural Area, Mitchell and Avery Counties 2008;
- (3) state parks:
 - (a) Mount Mitchell State Park, Yancy County 1916;
 - (b) Fort Macon State Park, Carteret County 1924;
 - (c) Hanging Rock State Park, Stokes County 1935;
 - (d) Morrow Mountain State Park, Stanley County 1935;
 - (e) Pettigrew State Park, Tyrrell and Washington Counties 1936;
 - (f) Jones Lake State Park, Bladen County 1939;
 - (g) Singletary Lake State Park, Bladen County 1939;
 - (h) Cliffs of the Neuse State Park, Wayne County 1945;
 - (i) William B. Umstead State Park, Wake County 1945;
 - (j) Hammocks Beach State Park, Onslow County 1961;
 - (k) Lake Norman State Park, Iredell County 1962;
 - (l) Pilot Mountain State Park, Surry and Yadkin Counties 1968;
 - (m) Carolina Beach State Park, New Hanover County 1969;
 - (n) Stone Mountain State Park, Alleghany and Wilkes Counties 1969;
 - (o) Raven Rock State Park, Harnett County 1970;
 - (p) Crowders Mountain State Park, Gaston County 1973;
 - (q) Eno River State Park, Durham and Orange Counties 1973;
 - (r) Medoc Mountain State Park, Halifax County 1973;
 - (s) Merchants Millpond State Park, Gates County 1973;
 - (t) Dismal Swamp State Park, Camden County 1974;
 - (u) Goose Creek State Park, Beaufort County 1974;
 - (v) Jockeys Ridge State Park, Dare County 1975;
 - (w) New River State Park, Alleghany and Ashe Counties 1975;
 - (x) Lake Waccamaw State Park, Columbus County 1976;
 - (y) South Mountain State Park, Burke County 1978;
 - (z) Bay Tree Lake State Park, Bladen County 1979;
 - (aa) Lake James State Park, Mc Dowell and Burke Counties 1987;
 - (bb) Lumber River State Park, Scotland, Hoke, Robeson and Columbus Counties 1989;
 - (cc) Gorges State Park, Transylvania County 1999;
 - (dd) Elk Knob State Park, Watauga and Ashe Counties 2002;
 - (ee) Haw River State Park, Rockingham and Guilford Counties 2003;
 - (ff) Mayo River State Park, Rockingham County 2003;
 - (gg) Carvers Creek State Park, Cumberland County 2005;
 - (hh) Chimney Rock State Park, Rutherford, Polk, Buncombe and Henderson Counties 2005; and

- (ii) Grandfather Mountain State Park, Avery, Watauga and Caldwell Counties 2009;
- (4) state recreation areas:
 - (a) Kerr Lake State Recreation Area, Vance and Warren Counties 1952;
 - (b) Jordan Lake State Recreation Area, Chatham County 1981;
 - (c) Falls Lake State Recreation Area, Wake and Durham Counties 1982; and
 - (d) Fort Fisher State Recreation Area, New Hanover County 1986;
- (5) state lakes:
 - (a) Bay Tree Lake, Bladen County 1929;
 - (b) Jones Lake, Bladen County 1929;
 - (c) Lake Phelps, Tyrrell and Washington Counties 1929;
 - (d) Salters Lake, Bladen County 1929;
 - (e) Singletary Lake, Bladen County 1929;
 - (f) Lake Waccamaw, Columbus County 1929; and
 - (g) White Lake, Bladen County 1929; and
- (6) state trails:
 - (a) French Broad River State Trail 1987;
 - (b) Yadkin River State Trail 1987;
 - (c) Mountains-to-Sea State Trail 2000; and
 - (d) Deep River State Trail 2007.

*History Note: Authority G.S. 113-35;
Eff. February 1, 1976;
Amended Eff. Pending RRC approval of other rules; January 1, 1983.*

15A NCAC 12B .0201 NATURAL AND CULTURAL RESOURCE PROTECTION

- (a) A person shall not remove, possess, or disturb any plant, fungus, mineral, living or dead wild animal, or the products thereof, or any archeological or cultural resource or artifact in any park area except as otherwise provided in this Section.
- (b) Harassing, or intentionally disturbing wildlife and their nesting, breeding or other activities is prohibited.
- (c) The placement or distribution of agricultural products, natural or processed foods, or any other item for the purpose of attracting or feeding any wildlife is prohibited.
- (d) A person shall not collect any natural or cultural resources or artifacts from any park area except as authorized by a research activity permit. A research activity permit for collections shall be issued only to a representative of a scientific educational institution, non-profit agency or a State or Federal agency for the purpose of research, baseline inventories, monitoring, impact analysis, group study, or museum display when the superintendent determines that the collection is necessary to the stated scientific or resource management goals of the institution or agency and that all applicable Federal and State permits have been acquired and that the intended use of the specimens and

their final disposal is in accordance with applicable law. Application for research activity permits shall be made as provided by Rule .0104 of this Subchapter. A research activity permit for personal or commercial purposes is prohibited.

*History Note: Authority G.S. 113-35;
Eff. February 1, 1976;
Amended Eff. Pending RRC approval of other rules; January 1, 1983.*

15A NCAC 12B .0301 BATHING AND SWIMMING ACTIVITIES: WHERE PROHIBITED

A person shall not bathe, wade, surf, dive, scuba dive or swim in any waters in any park area except at such times and in such places as the Division designates.

*History Note: Authority G.S. 113-35;
Eff. February 1, 1976;
Amended Eff. Pending RRC approval of other rules; October 1, 1984; January 1, 1983.*

15A NCAC 12B .0401 DISPOSAL OF REFUSE: GARBAGE: ETC.

- (a) No one shall dispose of household or business refuse, or garbage, in any park.
- (b) The disposal of vegetable matter, fruits, meat products or other food substances in other than a park refuse receptacle is prohibited.

*History Note: Authority G.S. 113-35;
Eff. February 1, 1976;
Amended Eff. Pending RRC approval of other rules; October 1, 1984; January 1, 1983.*

15A NCAC 13A .0107 STDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE - PART 262

- (a) 40 CFR 262.10 through 262.12 (Subpart A), "General", are incorporated by reference including subsequent amendments and editions.
- (b) 40 CFR 262.20 through 262.27 (Subpart B), "The Manifest", are incorporated by reference including subsequent amendments and editions except that 262.24, 262.25, and 262.26 are not incorporated by reference.
- (c) 40 CFR 262.30 through 262.34 (Subpart C), "Pre-Transport Requirements", are incorporated by reference including subsequent amendments and editions.
- (d) 40 CFR 262.40 through 262.44 (Subpart D), "Recordkeeping and Reporting", are incorporated by reference including subsequent amendments and editions. In addition, a generator shall keep records of inspections and results of inspections required by Section 262.34 for at least three years from the date of the inspection.
- (e) 40 CFR 262.50 through 262.58 (Subpart E), "Exports of Hazardous Waste", are incorporated by reference including subsequent amendments and editions.

- (f) 40 CFR 262.60 (Subpart F), "Imports of Hazardous Waste", is incorporated by reference including subsequent amendments and editions.
- (g) 40 CFR 262.70 (Subpart G), "Farmers" is incorporated by reference including subsequent amendments and editions.
- (h) 40 CFR 262.80 through 262.89 (Subpart H), "Transfrontier Shipments of Hazardous Waste for Recovery within the OECD", are incorporated by reference including subsequent amendments and editions, except that 40 CFR 262.89(e) is not incorporated by reference.
- (i) 40 CFR 262.200 through 262.216 (Subpart K), "Alternative Requirements for Hazardous Waste Determination and Accumulation of Unwanted Material for Laboratories Owned by Eligible Academic Entities", is incorporated by reference including subsequent amendments and editions.
- (j) The appendix to 40 CFR Part 262 is incorporated by reference including subsequent amendments and editions.

History Note: Authority G.S. 130A-294(c); 150B-21.6; Eff. November 19, 1980;
Amended Eff. December 1, 1988; June 1, 1988; August 1, 1987; May 1, 1987;
Transferred and Recodified from 10 NCAC 10F .0030 Eff. April 4, 1990;
Amended Eff. August 1, 1990;
Recodified from 15A NCAC 13A .0008 Eff. August 30, 1990;
Amended Eff. April 1, 1993; October 1, 1990;
Recodified from 15A NCAC 13A .0007 Eff. December 20, 1996;
Amended Eff. May 1, 2010; November 1, 2007; January 1, 2007; April 1, 2001; August 1, 1998.

15A NCAC 13B .0835 SEPTAGE LAND APPLICATION SITE PERMITS

- (a) No person shall establish, or allow to be established on his land, a septage management facility to, treat, manage, store, or dispose of septage, or any component of septage, unless a permit has been obtained from the Division. Disposal of septage by trenching or burial is prohibited under the rules of this Section.
- (b) Any person that has not operated as a septage land application site during the previous calendar year shall receive at least three hours of new land application site operator training from the Division prior to receiving a permit to operate a septage land application site.
- (c) To apply for a permit for a septage land application site, the following information shall be submitted to the Division:
- (1) Location of the site;
 - (2) Name, address, and phone number of:
 - (A) the applicant;
 - (B) the land owner or the owner's legal representative in control of the site; and
 - (C) the proposed operator;
 - (3) Written authorization to operate a septage land application site signed by each landowner (if other than the permit holder) or his legal representative;
 - (4) Types of septage (as defined in G.S. 130A-290) and the proposed annual volume of each

type of septage proposed for land application per acre, based on the nutrient management plan submitted.

- (5) Substances other than septage previously disposed of at this location, and the amounts of those substances;
- (6) Aerial photography extending for a distance of at least 2500 feet in all directions from the site, with site property boundaries accurately depicted. Photograph scale shall be 1" = 400 feet or less;
- (7) Alternative plan for the detention or disposal of septage, during adverse weather conditions;
- (8) Treatment method for each type of septage to be discharged and the permit number of any treatment facilities;
- (9) Vicinity map (county road map) showing the site location;
- (10) A written report that documents compliance with Rule .0837 of this Section, including, but not limited to the following: If required by G.S. 89F, G.S. 89C and G.S. 89E, a licensed soil scientist, professional engineer, or licensed geologist shall prepare these documents. [Note: The North Carolina Board of Licensing of Soil Scientists, Board of Examiners for Engineers and Surveyors and the Board of Licensing of Geologists has determined, via letters dated November 16, 2009, March 11, 2010 and January 7, 2010, that preparation of documents pursuant to this Paragraph constitutes soil science, practicing engineering, or geology under G.S. 89F, G.S. 89C and G.S. 89E.]
 - (A) A representative soils analysis (i.e., Standard Soil Fertility Analysis), conducted within the last six months, on each proposed field of each proposed land application site. The Standard Soil Fertility Analysis shall include, but is not necessarily limited to: acidity, base saturation (by calculation), calcium, cation exchange capacity, exchangeable sodium percentage (by calculation), magnesium, manganese, percent humic matter, pH, phosphorus, potassium, and sodium;
 - (B) A total metal analysis for each proposed field shall be conducted for arsenic, cadmium, copper, lead, nickel, selenium, and zinc. A North Carolina Department of Agriculture & Consumer Services (NCSA&CS) mehlich-3 extraction is an acceptable substitute for a total metal analysis. Mercury shall be sampled if the applicant proposes to land apply domestic or industrial or commercial

- treatment plant septage, or if warranted by previous site use;
 - (C) Field description of soil profile(s), based on examinations of excavation pits and auger borings, within four feet of the land surface or to bedrock describing the following parameters by individual diagnostic horizons: thickness of the horizon; texture; color and other diagnostic features; structure; internal drainage; depth, thickness, and type of restrictive horizon(s); and presence or absence and depth of evidence of any seasonal high water table. Applicants may be required to dig pits when necessary for proper evaluation of the soils at the site;
 - (D) A soil map, scale 1" = 400 feet or less, delineating major soil mapping units within each proposed land application site and showing all physical features, location of pits and auger borings, applicable setbacks, legends, scale, and a north arrow;
 - (E) If the annual application rate is proposed to exceed 125,000 gallons per acre per year field descriptions to a depth of six feet, shall be required; and
 - (F) Global Positioning System (GPS) data compatible with the Department's datalogger shall be provided for proposed sites 30 acres or more in size.
- (11) Applicants proposing to land apply 200,000 gallons per acre per year or more shall provide a plan for monitoring soil moisture levels and the depth to seasonal wetness to determine when land application can occur without impacting ground water or hydraulic overloading. The plan shall include recommendations concerning annual and instantaneous loading rates of liquids, solids, other wastewater constituents and amendments based on in-situ measurement of saturated hydraulic conductivity in the most restrictive horizon. If required by G.S. 89C, G.S. 89F and G.S. 89E, a professional engineer, licensed soil scientist or licensed geologist shall prepare these documents. [Note: The North Carolina Board of Examiners for Engineers and Surveyors, Board of Licensing of Soil Scientists and the Board of Licensing of Geologists has determined, via letters dated March 11, 2010, November 16, 2009 and January 7, 2010, that preparation of documents pursuant to this Paragraph constitutes practicing engineering, soil science or geology, under G.S. 89C, G.S. 89F and G.S. 89E.]
- (12) Nutrient management plan, prepared by a Technical Specialist, including at least the following:
- (A) Crops that will be planted on the site, including cover crops, and where each crop will be planted. Crop planting locations shall be depicted on an aerial photograph or on a plat map (scale 1" = 400 feet or less);
 - (B) Nitrogen needs of the crops based on the realistic yield expectations for the soils on the site, and crop management practices proposed;
 - (C) Crop stand density required to meet the realistic yield expectations for the proposed crop;
 - (D) Approximate crop planting times and the seeding or sprigging rates for crops to be established;
 - (E) Crop harvest frequency appropriate for the proposed realistic yield expectations and nitrogen needs, and approximate crop harvest times;
 - (F) Approximate monthly discharge rate to match the nitrogen needs and potential uptake of the crop;
 - (G) Sites proposed to receive more than 50,000 gallons per acre per year of domestic septage, or domestic or industrial or commercial treatment plant septage shall include nitrogen carry over when determining annual application rates;
 - (H) Weed control recommendations;
 - (I) Crop use or removal;
 - (J) Results from at least four samples of treated septage if the application is proposing an increased application rate for the land application of septage treated to reduce nutrients;
 - (K) A Technical Specialist is not required for nutrient management plans for subsequent applications that do not contain changes that would affect nutrient uptake; and
 - (L) All nutrient management plans shall bear the signature of the site operator.
- (13) Application rates for sites proposed to receive treated septage shall be determined based on the most limiting nutrient;
- (14) Erosion and runoff management plan showing:
- (A) Buffer locations and widths based on the direction and amount of slope adjacent to the land application site;
 - (B) Vegetation type and stand density in the buffer areas; and

- (C) Buffer maintenance fertility requirements.
- (15) Proposed land application method,
- (16) Proposed distribution plan if required in Paragraph (e) of Rule .0837 of this Section;
- (17) Sites proposing to use spray irrigation as a land application method shall include:
 - (A) The location of all fixed irrigation heads or the location of traveling gun irrigation lanes;
 - (B) Irrigation head spacing and traveling gun lane spacing shall be determined based on standards in NC Cooperative Extension Documents AG-553-6 and AG-553-7 or other similar publications;
 - (C) The size of all spray nozzles;
 - (D) System operating pressure at the irrigation head;
 - (E) Calculation of the wettable acres vs. permitted acreage;
 - (F) Calibration methods and frequency; and
 - (G) Irrigation system operation and maintenance plan.
- (18) Demonstration from the appropriate State or Federal Government agency that the land application site complies with Paragraph (g) of Rule .0837 of this if any part of the site specified for land application is not agricultural land;
- (19) The date, location, number of hours, and provider of annual septage land application site operator training required in accordance with G.S. 130A-291.3(b);
- (20) Technical information pertinent to the suitability of the proposed site;
- (21) An applicant who proposes to land apply septage, as defined in G.S. 130A-290, on a public contact site, shall provide the Division evidence of adequate public notice and the applicant shall have successfully completed the Land Application of Residuals and Biosolids Course and maintain a Land Application of Residuals Certificate given by the Department of Environment and Natural Resources; and
- (22) An applicant who proposes to land apply commercial/industrial treatment plant septage or domestic treatment plant septage, as defined in G.S. 130A-290, shall have successfully completed the Land Application of Residuals and Biosolids Course and maintain a Land Application of Residuals Certificate given by the Department of Environment and Natural Resources; and
- (23) An applicant who proposes to land apply septage, as defined in G.S. 130A-290, in excess of 50,000 gallons per acre per year

shall provide the Division with evidence of adequate public notice which shall at a minimum be publication in a local newspaper, shall have successfully completed the Land Application of Residuals and Biosolids Course and maintain a Land Application of Residuals Certificate issued by the Department of Environment and Natural Resources.

- (d) Application rates for septage in excess of 50,000 gallons per acre per year and permits to land apply domestic, or industrial or commercial treatment plant septage shall not be granted to persons who have not demonstrated that they can properly operate a septage land application site for at least a 12 month period.
- (e) Applications shall be submitted to the Division of Waste Management, Solid Waste Section, 1646 Mail Service Center, Raleigh NC 27699-1646. Applications for permits will not be reviewed until all parts of the application have been completed and submitted to the Division.
- (f) Applications for sites or treatment methods which do not meet the standards in accordance with this Section shall be denied.
- (g) Applications for renewal permits shall be submitted to the Division at least 90 days prior to the expiration date of the permit. The Division shall notify permit holders of facility permit expiration dates 120 days prior to permit expiration.
- (h) Applications for permit modification shall be required for the following changes:
 - (1) Permitted area or field boundaries;
 - (2) Property ownership;
 - (3) Annual application rates;
 - (4) Receiver crop; or
 - (5) Types of septage discharged.
- (i) Applications for renewal permits submitted in accordance with Paragraph (g) of this Rule and applications for permit modifications shall not be required to resubmit the information required in Subparagraphs (c)(6), (8), (9), (10), (16), (17), and (18) unless changes are made in those plans.
- (j) Septage land application site permits are not transferable.
- (k) Maximum permit duration including renewals is five years.
- (l) Issuance of a permit does not relieve the permit holder of the responsibility of obtaining applicable zoning approvals prior to operation of the site.

*History Note: Authority G.S. 130A-291.1;
Eff. May 1, 2010.*

15A NCAC 13B .0836 SEPTAGE DETENTION AND TREATMENT FACILITY PERMITS

- (a) No person, shall establish on his land, or allow to be established on his land, a septage detention facility, unless a permit for the facility has been obtained from the Division or the facility is operating in accordance with a NPDES permit issued by the NC Division of Water Quality.
- (b) Septage detention and treatment facilities shall be designed, located, constructed, and operated in accordance with the standards specified in Rule .0841 of this Section.

(c) To apply for a permit for a septage detention or treatment facility the applicant shall submit the following information to the Division:

- (1) Name, address, and phone number of
 - (A) the applicant;
 - (B) land owner or the owner's legal representative in control of the site; and
 - (C) the proposed operator;
- (2) Location of the facility;
- (3) Vicinity map or county road map showing the site location;
- (4) Types of septage to be stored or treated;
- (5) A description of the facility including the size, number, and type of structures to be used at the site and construction materials to be used;
- (6) An explanation of the methods for discharge into and removal from the detention or treatment facility, the methods for treating leaks or spills at the site, and methods for odor control;
- (7) Septage land application site permit number and the name of any wastewater treatment plant(s) where the septage will be disposed;
- (8) Written documentation of acceptable locations to manage any solid or liquid wastes generated at a treatment facility;
- (9) An aerial photograph, extending for a distance of at least 1,000 feet in all directions from the site property lines, scale 1" = 400 feet or less;
- (10) Written authorization to operate a septage detention or treatment facility signed by each landowner (if other than the permit holder) or his legal representative; and
- (11) Technical information pertinent to the suitability of the proposed facility.

(d) To apply for a permit to construct a septage treatment facility and obtain an interim permit to operate the facility, for a period not to exceed 12 months, plans and specifications shall be submitted. If required by G.S. 89C, a professional engineer shall prepare these documents. [Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter and resolution dated March 11, 2010, that preparation of engineering design documents pursuant to this Paragraph constitutes practicing engineering under G.S. 89C.]

(e) Treatment shall include, but not be limited to, aerobic or anaerobic digestion, dewatering or thickening, pressing, centrifuging, the use of organisms or enzymes, and pathogen reduction methods or vector attraction reduction methods other than lime stabilization. In addition to the requirements of Paragraph (c) of this Rule, the plans shall include:

- (1) Site plan at a scale appropriate to show the detail of the facility, but in no case greater than 100 feet per inch;
- (2) Engineering plans for the entire system, including treatment, storage, and disposal equipment, and containment structures;
- (3) Detail drawings shall be at a scale appropriate to show pumps, tanks, valves, controls, meters,

pipes, and other items critical to the operation of the facility;

- (4) An operation and maintenance manual outlining information and instruction on how the facility is to be operated, equipment maintenance, required safety and personnel training, and an outline of reports to be submitted to the Division. Contingency plans shall be included to address at least equipment failure, human error, inclement weather, and spill and leak cleanup; and
- (5) A quality assurance plan for the process and final product if treatment involves meeting pathogen reduction or vector attraction reduction standards.

(f) A permit to operate a septage treatment facility shall be issued pending receipt of the following:

- (1) Certification that the construction of the treatment facility is complete and consistent with the plans approved as part of the permit to construct;
- (2) An updated operation and maintenance manual, including all the information required in Subparagraph (e)(4) of this Rule;
- (3) As built drawings if facility construction is not consistent with the approved plans;
- (4) Operation and maintenance manuals and quality assurance plans signed by the applicant; and
- (5) Acceptable compliance history for the facility.

(g) A permit for a new septage detention or a septage treatment facility shall not be issued until the proposed site has been approved by the Division.

(h) Operation of a new septage detention or a new septage treatment facility shall not commence until the facility has been inspected by the Division and found to be consistent with the permit application.

(i) A permit to operate a treatment facility shall not be issued until the facility has been inspected by the Division and found to be consistent with the permit application and operation has been found to be consistent with the operation and maintenance manual.

(j) Application packages for permit renewals shall include:

- (1) Updated drawings if there are changes to the facility,
- (2) Updated site plans (if required as part of original submittal) if there are changes to the site plan,
- (3) A revised operation and maintenance manual,
- (4) A revised quality assurance plan for the process and final product if treatment involves meeting pathogen reduction or vector attraction reduction standards.

(k) Engineering plans and specifications for marina detention tanks that do not meet the minimum setbacks in .0841(m) or are located below grade shall be submitted. If required by G.S. 89C, a professional engineer shall prepare these documents. [Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter and resolution dated March

11, 2010, that preparation of engineering design documents pursuant to this Paragraph constitutes practicing engineering under G.S. 89C.] The facilities shall be certified to be constructed in substantial compliance with the plans and specifications.

(l) Parts of detention and treatment facilities located below grade and lagoons shall be certified to be constructed in substantial compliance with the plans and specifications.

(m) Applications shall be submitted to the Division of Waste Management, Solid Waste Section, 1646 Mail Service Center, Raleigh NC 27699-1646. Applications for permits will not be reviewed until all parts of the application have been completed and submitted to the Division.

(n) Applications for renewal permits shall be made at least 90 days prior to the expiration of the permit. The Division will notify permit holders of facility permit expiration dates 120 days prior to permit expiration.

(o) Applications for renewal permits submitted in accordance with Paragraph (j) of this Rule and applications for permit modifications shall not be required to resubmit the information required in Subparagraphs (c)(3) and (9), and Paragraph (d) unless changes are made in those plans.

(p) Septage detention and treatment facility permits are not transferable.

(q) Maximum permit duration including renewals is five years.

(r) Applications for permit modifications shall be required for changes in:

- (1) Property ownership;
- (2) Treatment methods;
- (3) Types of septage to be stored or treated; or
- (4) Size and number of treatment or storage structures.

(s) Applications for facilities which do not meet the standards set forth in this Section shall be denied.

(t) An application requesting reduced setbacks in accordance with Rule .0841(m)(7) shall include a letter from the appropriate local zoning office, approving proposed reduced setbacks.

(u) Issuance of a permit does not relieve the permit holder of the responsibility of obtaining applicable zoning approvals prior to operation of the facility.

History Note: Authority G.S. 130A-291.1; Eff. May 1, 2010.

15A NCAC 13B .0841 STANDARDS FOR SEPTAGE DETENTION AND TREATMENT FACILITIES

(a) Septage detention facilities, used to meet the requirements of Rule .0838 (a)(20) or (21) of this Section, shall have a minimum size equal to the average volume of septage pumped per week. This does not limit the maximum capacity of a septage detention facility. Capacity shall be increased if it is demonstrated during site operation that this volume is inadequate or if specific site considerations would warrant such increases.

(b) Septage detention facilities for sites permitted to land apply in excess of 50,000 gallons per acre per year shall have a minimum size equal to two percent of the maximum annual application rate. Facilities permitted as of the effective date of this rule shall have 12 months to meet this requirement.

(c) Septage treatment and detention facility containers shall be structurally sound and constructed of steel, concrete, or fiberglass. If required by G.S. 89C, plans and specifications for proposed containers constructed of materials not specifically addressed in this Rule shall be prepared by a professional engineer. [Note: The North Carolina Board of Examiners for Engineers and Surveyors, has determined, via letter and resolution dated March 7, 2010, that certification of documents pursuant to this Paragraph constitutes practicing engineering, under G.S. 89C.]

(d) A septage Treatment and Detention Facility permit holder and operator are responsible for the actions of any septage management firm that uses the detention or treatment facility.

(e) Each detention and treatment facility shall be designed, constructed, and maintained in such a manner as to:

- (1) Prevent leaks or the flow of septage out of the facility into the seasonally high water table, onto the ground surface, or into any surface waters;
- (2) Minimize the attraction or admittance of vectors; and
- (3) Prevent unauthorized entry into septage containers or lagoons.

(f) Septage detention and treatment facilities located below grade shall:

- (1) If required by G.S. 89C, a professional engineer shall certify that the construction was completed in substantial compliance with the plans and specifications prior to any waste being introduced into the system. [Note: The North Carolina Board of Examiners for Engineers and Surveyors, has determined, via letter and resolution dated March 11, 2010, that certification of documents pursuant to this Paragraph constitutes practicing engineering, under G.S. 89C.];
- (2) Be constructed to a traffic rated standard or protected from vehicular traffic; and
- (3) Not be constructed of used metal tanks. Used metal tanks are allowed to be located beside a wall or embankment for gravity access as long as the entirety of the tank is visible.

(g) The permit holder of a septage treatment or detention facility shall control odors from the facility at the property boundary.

(h) Ground water monitoring wells or a leak detection system may be required around treatment or detention systems if necessary to assure protection of public health and the environment.

(i) The area around tanks shall be free of debris and vegetation to allow for access and inspection for a distance of at least 5 feet.

(j) Septage shall be transferred to and from a detention system in a safe and sanitary manner that prevents leaks or spills of septage, including septage in pipes used for transferring waste to and from vehicles.

(k) Access roads or paths crossing or leading to the facility shall be posted with "NO TRESPASSING" signs.

(l) Requirements for lined lagoons:

- (1) Lined lagoons shall be permitted only at sites where the construction and use of a lagoon

- shall not jeopardize the public health or environment.
- (2) Portions of lined lagoons may be located below grade in accordance with Subparagraph (f)(1) of this Rule.
 - (3) Only lagoons designed, constructed and inspected in accordance with accepted engineering principles providing for the protection of the underlying groundwater will be considered for use in a septage treatment or detention system. If required by G.S. 89C, a professional engineer shall certify that the construction was completed in substantial compliance with the plans and specifications prior to any waste being introduced into the system. [Note: The North Carolina Board of Examiners for Engineers and Surveyors, has determined, via letter and resolution dated March 11, 2010, that certification of documents pursuant to this Paragraph constitutes practicing engineering under G.S. 89C.]
 - (4) Liners shall be a minimum of 12 inches of clay compacted to a maximum permeability of 10^{-7} cm/sec or equivalent synthetic liner.
 - (5) Synthetic liners shall have a minimum thickness of 30 mils. A synthetic liner shall have a demonstrated water vapor transmission rate of not more than 0.03 gm/m²/day. Liner material and any seaming materials shall have chemical and physical resistance not adversely affected by environmental exposure or waste placement.
 - (6) Clay liners with a permeability more than 10^{-7} cm/sec may be used in conjunction with a synthetic liner to meet the maximum permeability of 10^{-7} cm/sec or equivalent.
 - (7) The surface of the supporting soil on which the liner will be installed shall be reasonably free of stones, organic matter, protrusions, loose soil, and any abrupt changes in grade that could affect the integrity of the liner.
 - (8) Lagoons shall be designed and maintained to have adequate storage to handle the additional water from a 25-year storm.
 - (9) Lagoons shall be protected from entry by unauthorized individuals by fencing or other appropriate means.
- (m) Septage detention and treatment facilities shall adhere to the following minimum setback requirements:
- (1) Residence, place of business, or place of public assembly – 100 feet;
 - (2) Well or water supply spring – 100 feet;
 - (3) Surface waters – 100 feet;
 - (4) Property lines – 50 feet;
 - (5) Facilities permitted after the effective date of this Rule shall not be located in the 100-year flood plain hazard area.
 - (6) Soil wetness, as determined in Part (a)(3)(A) of Rule .0837 – 12 inches;
 - (7) Setbacks in Subparagraphs (1) and (4) of this Paragraph may be in accordance with local zoning ordinances if located in areas zoned for industrial use.
 - (8) Setbacks in Subparagraphs (1) through (4) shall be increased 100% for lagoons; and
 - (9) Accurate property line location is the responsibility of the site operator.
- (n) All setbacks shall be maintained.
- (o) The setbacks in Subparagraph (m)(1) through (4) of this Rule shall be increased for storage facilities with a capacity in excess of 25,000 gallons permitted after the effective date of this Rule to prevent offsite contamination from major spills, or 100% containment shall be provided. Increased setbacks shall be up to twice the minimum distance as indicated in Subparagraph (m)(1) through (4) of this Rule. Permitted volume and the proximity to residences, wells or water supply springs, surface waters, and property lines will determine the setback.
- (p) Storage containers for individual restaurants shall be:
- (1) Located above grade and protected from vehicular traffic;
 - (2) Maintained fly tight and in a sanitary condition;
 - (3) Placed at a location and acceptable to standards determined by the NC Division of Environmental Health; and
 - (4) No greater than 200 gallons in size.
- (q) Setbacks for detention tanks at marinas may be reduced for storage capacity of 2000 gallons or less when the facility is designed to prevent leaks or spills or has containment equaling 100% of the storage volume plus rainfall from a 25-year storm event. Setbacks shall in no case be less than what is approved by applicable local government, state or federal laws or rules.
- (r) Septage shall not be stored in a detention or treatment facility for more than six months.
- (s) Septage shall not be stored or treated at a new septage treatment or detention facility until a representative of the Division has inspected the facility to determine compliance with these Rules and consistency with the permit application and all permit conditions.
- (t) Septage detention and treatment facility closure shall include:
- (1) A completed ceased operation form submitted to the Division;
 - (2) All liquids and solids, resulting from septage detention or treatment, removed from all portions of the facility and properly managed or disposed at an appropriate, approved facility; and
 - (3) All parts of the facility removed from property under separate ownership, unless all landowners provide the Division with written documentation that the facility may remain at the site.
- (u) Record keeping for detention facilities that receive septage from more than one septage management firm shall include:

- (1) The date that the septage is received at and removed from the facility;
- (2) Name of the septage management firm that delivered the septage;
- (3) Type and amount, in gallons, of septage received; and
- (4) Where septage is discharged.

(v) Record keeping for treatment facilities shall include:

- (1) Date septage is received at the facility;
- (2) Name of the septage management firm that delivered the septage;
- (3) Type and amount, in gallons, of septage received;
- (4) Date processed material(s) is removed from the facility;
- (5) Type and amount, in tons or gallons, of material removed from the facility; and
- (6) Management methods for each type of material removed by the facility

(w) Alarms shall be required to detect high liquid levels, leaks and spills, or system operation parameters at detention or treatment facilities when the location, design, capacity, or operational complexities of the facility warrant the additional safety precautions.

*History Note: Authority G.S. 130A-291.1;
Eff. April 1, 2010.*

15A NCAC 13B .0842 INNOVATIVE OR ALTERNATIVE TREATMENT OR STORAGE METHODS

(a) Applications for permits for innovative or alternative treatment methods that do not fit the criteria outlined in this section will be reviewed in accordance with N.C.G.S. 130A-291.1(i).

(b) Applications shall include: If required by G.S. 89C, a professional engineer shall prepare these documents. [Note: The North Carolina Board of Examiners for Engineers and Surveyors has determined, via letter dated March 11, 2010, that preparation of engineering design documents for alternative treatment methods that do not fit the criteria outlined in this Section constitutes practicing engineering under G.S. 89C.]

- (1) The information required in Rule .0836(c) of this Section;
- (2) An operation and maintenance manual consistent with the requirements of Rule .0836(e)(4);
- (3) Means of demonstrating that the proposed method of treatment or storage will meet the appropriate standards for vector attraction reduction and pathogen reduction in this Section; and
- (4) Testing methods and schedule to document Subparagraph (3) of this Paragraph.

(c) Innovative or alternative design criteria shall be approved in cases where the applicant can demonstrate that the alternative design criteria will provide the following:

- (1) Equal or better treatment of the waste;

- (2) Equal or better protection of the waters of the state; and
- (3) No increased potential for nuisance conditions from noise, odor or vermin.

*History Note: Authority G.S. 130A-291.1;
Eff. May 1, 2010.*

**15A NCAC 28 .0101 PURPOSE
15A NCAC 28 .0102 FACILITIES**

*History Note: Authority G.S. 143b-390.2(b);
Eff. February 1, 1987;
Repealed Eff. April 1, 2010.*

15A NCAC 28 .0103 USERS

The Aquariums and the grounds immediately surrounding them are available for use by public agencies and private groups and for non-commercial activities providing the users and uses do not interfere with regularly-scheduled Aquarium functions or other scheduled uses.

*History Note: Authority G.S. 143B-289.41(a)(1b)b.; 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0104 PERMISSIBLE ACTIVITIES

Approved private activities may include sales or solicitations if approved by the Aquarium Director at least 10 days before the date of the activity. No other sales or solicitations by private groups and individuals are allowed on Aquarium property.

*History Note: Authority G.S. 143B-289.41(a)(1b)b.; 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0105 PERMISSION FOR USE

All potential users shall obtain prior written permission from the Aquarium Director for use of the building or grounds. Approved users of the facilities shall sign a written contract.

*History Note: Authority G.S. 143B-289.41(a)(1b)b.; 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0106 SCHEDULING PERMISSIBLE ACTIVITIES

*History Note: Authority G.S. 143b-390.2(b);
Eff. February 1, 1987;
Repealed Eff. April 1, 2010.*

15A NCAC 28 .0107 AVAILABLE AREAS

Each facility has the following functional areas available for use:

- (1) auditorium,

- (2) classrooms,
- (3) Aquarium galleries,
- (4) conference room, and
- (5) garden or nearby natural areas.

A group wishing to use the facility may request a specific functional area, but the Aquarium Director has final authority in assigning the use of any particular area.

History Note: Authority G.S. 143B-289.41(a)(1b)b.; 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.

15A NCAC 28 .0108 LONG-TERM USE PROHIBITED

History Note: Authority G.S. 143b-390.2(b);
Eff. February 1, 1987;
Repealed Eff. April 1, 2010.

15A NCAC 28 .0201 SCHEDULING ACTIVITIES FOR REGULAR HOURS

The Aquarium Director must give written permission to groups wishing to use the Aquarium during normal operating hours. Groups shall be scheduled at a time and in a functional area that do not interfere with the normal operations of the Aquarium.

History Note: Authority G.S. 143B-289.41(a)(1b)b.; 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.

15A NCAC 28 .0202 AQUARIUM RESPONSIBILITIES

History Note: Authority G.S. 143b-390.2(b);
Eff. February 1, 1987;
Repealed Eff. April 1, 2010.

15A NCAC 28 .0203 SCHEDULING ACTIVITIES FOR NON-REGULAR HOURS

Any group wishing to use the facility before or after normal operating hours shall enter into a written agreement that includes the following requirements:

- (1) The user provides supervision adequate for the activity being planned;
- (2) An employee of the facility must be present at all times;
- (3) The user leaves the building and grounds in the same condition as before the activity;
- (4) No illegal substances, firearms (except those in the possession of law enforcement officials), or pets are permitted on the premises during the activity;
- (5) The user shall acquire prior permission from the Division Director if alcoholic beverages are to be consumed on the property;
- (6) Smoking is prohibited in all indoor areas and allowed only in designated outside areas; and

- (7) The Aquarium may cancel a scheduled event due to a hurricane or other natural disaster or may move or terminate a scheduled event for the safety and well-being of the exhibits or captive animals.

History Note: Authority G.S. 143B-289.41(a)(1b)b.; 143B-289.41(b);
Eff. May 1, 1987;
Amended Eff. April 1, 2010.

15A NCAC 28 .0302 FEE SCHEDULE

(a) The following schedule of fees is applicable to govern admission to the North Carolina Aquariums:

- (1) Roanoke Island:
 - Adult, 13 and over \$8.00
 - Senior, 62 and over \$7.00
 - Child, 3 through 12 \$6.00
- (2) Fort Fisher:
 - Adult, 13 and over \$8.00
 - Senior, 62 and over \$7.00
 - Child, 3 through 12 \$6.00
- (3) Pine Knoll Shores:
 - Adult, 13 and over \$8.00
 - Senior, 62 and over \$7.00
 - Child, 3 through 12 \$6.00

(b) Free admission is offered to the following groups:

- (1) Aquarium Society Members;
- (2) Preregistered North Carolina School groups;
- (3) Association of Zoos and Aquariums' reciprocals; and
- (4) Children under the age of three.

Free admission is offered on the following days: Martin Luther King, Jr. holiday and Veteran's Day on November 11.

History Note: Authority G.S. 143B-289.41(b); 143B-289.44;
Eff. March 1, 2004;
Amended Eff. January 1, 2006;
Transferred and Recodified from 15A NCAC 01R .0101 Eff. August 1, 2007;
Amended Eff. April 1, 2010.

15A NCAC 28 .0401 LETHAL INSTRUMENTS

Carrying or possessing firearms, airguns, bows and arrows, slingshots or lethal instruments of any kind in the Aquarium or on Aquarium property, except by law enforcement officials with jurisdictional authority, is prohibited.

History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.

15A NCAC 28 .0403 FIRES

All fires, including grills, are prohibited except in designated areas.

History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);

*Eff. February 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0404 SMOKING

Smoking is prohibited in the buildings. Smoking is prohibited on Aquarium grounds within the paid perimeter and in other outside areas except where smoking is designated.

*History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0405 USES NOT COVERED BY POLICY

*History Note: Authority G.S. 143B-390.2(b);
Eff. May 1, 1987;
Repealed Eff. April 1, 2010.*

15A NCAC 28 .0501 DISORDERLY CONDUCT

No person shall engage in disorderly conduct, be intoxicated, or be impaired by controlled or illegal substances while on Aquarium property or while involved in an Aquarium-sponsored program that is conducted off the premises.

*History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0505 LOUD RADIOS

The playing of radios, tape players or other audio equipment in such a manner as to disturb others is prohibited inside the Aquarium and on Aquarium property.

*History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);
Eff. May 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0506 PROPER DRESS

Any person using the facility or participating in programs must wear shirts, pants or shorts and shoes at all times and safety equipment if required for a particular program. Uncovered or wet bathing suits are prohibited inside the Aquarium.

*History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);
Eff. May 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0507 COASTER CONVEYANCES

Skateboards, roller blades, "healie" shoes and other similar coaster conveyances are not allowed inside the buildings or in the gardens. These conveyances are allowed on Aquarium bicycle paths and parking lots.

*History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);
Eff. April 1, 2010.*

15A NCAC 28 .0606 ACCEPTANCE OF DONATED PERSONAL PROPERTY

The Aquarium Division shall accept donated personal property only if the donation is made through the N.C. Aquarium Society and meets the following requirements:

- (1) The personal property is relevant to the purpose and mission of the N.C. Aquariums;
- (2) The donor provides evidence of lawful ownership of the property, including evidence that the donor possesses any permit required to own or possess the property;
- (3) The donation is made without restrictions on the use and disposition of the property;
- (4) The N.C. Aquariums Division has identified storage space or a display venue for the property prior to acceptance of the property; and
- (5) If payment, such as shipping cost, is required to be made by the N.C. Aquariums Division as a condition of the donation, the property shall be accepted only if funds are available to make the payment prior to acceptance.

*History Note: Authority G.S. 143B-289.41(b); 143B-289.42;
Eff. April 1, 2010.*

15A NCAC 28 .0703 PARKING

All privately-owned vehicles shall be parked in designated parking areas of the Aquarium property. All other vehicles shall be parked only as directed by the Aquarium Director. Visitors shall not leave vehicles on Aquarium property overnight. Drivers of vehicles parked on Aquarium property shall turn off engines.

*History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);
Eff. February 1, 1987;
Amended Eff. April 1, 2010.*

15A NCAC 28 .0704 FOOD AND BEVERAGES PROHIBITED INSIDE

Visitors shall not bring food or beverages, except bottled water, inside the Aquarium during normal operating hours.

*History Note: Authority G.S. 143B-289.41(a)(1b); 143B-289.41(b);
Eff. April 1, 2010.*

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 06 - BOARD OF BARBER EXAMINERS

21 NCAC 06L .0111 WHERE BARBER SERVICES MAY BE PERFORMED

(a) Except as provided in this Rule, all barber services as defined in G.S. 86A-2 and 21 NCAC 06P .0103 shall only be performed at a location permitted by the Board as a barber shop.

(b) A Registered Barber may perform barbering services in a client's home, and the home be exempt from the inspection requirements of G.S. 86A-15(b), under the following conditions:

- (1) The client upon whom barber services are being performed is unable, due to a medical necessity, to come to a licensed barber shop;
- (2) The licensed barber maintains a log of each instance where this exemption is used, including the name of the client, address of the home where the services were performed, and the date services were performed - and the medical necessity requiring that barber services be provided in the home. The log shall be made available to the Board and its inspectors for review upon request; and
- (3) The licensed barber otherwise complies with G.S. 86A-15(a).

(c) For purposes of this Rule, a "client's home" includes the client's residence, nursing homes, rest homes, retirement homes, mental institutions and similar institutions where the client has established permanent residency.

*History Note: Authority G.S. 86A-15; 86A-15(c);
Eff. June 1, 2008;
Amended Eff. April 1, 2010.*

21 NCAC 06L .0116 ADDITIONAL DUTIES OF BARBER SHOP OWNERS AND MANAGERS AND LIMITATIONS ON SHOP MANAGERS

(a) All barber shop owners and managers shall positively identify any licensee to determine that the licensee is, in fact, the person whose name appears on the license or Registered Barber permit prior to allowing the licensee to perform barbering services in the shop, and maintain a record of the identifying information about the licensee.

(b) A barber shop manager shall not also be manager of a barber school.

(c) The barber shop manager is accountable for activities at the shop whether present on the premises or not.

*History Note: Authority G.S. 86A-1; 86A-10; 86A-11; 86A-15; 86A-22;
Eff. June 1, 2008;
Amended Eff. April 1, 2010.*

21 NCAC 06N .0101 FEES

(a) The Board charges the following amounts for the fees authorized by G.S. 86A-25:

- (1) Certificate of registration or renewal as a barber \$ 50.00
- (2) Certificate of registration or renewal as an apprentice barber \$ 50.00
- (3) Barbershop permit or renewal \$ 50.00

- (4) Examination to become a registered barber \$ 85.00
- (5) Examination to become a registered apprentice barber \$ 85.00
- (6) Late fee for restoration of an expired barber certificate within first year after expiration \$ 35.00
- (7) Late fee for restoration of an expired barber certificate after first year after expiration but within five years after expiration \$ 70.00
- (8) Late fee for restoration of an expired apprentice certificate within the first year after expiration \$ 35.00
- (9) Late fee for restoration of an expired apprentice certificate after first year after expiration but within three years of first issuance of the certificate \$ 45.00
- (10) Late fee for restoration of an expired barber shop certificate \$ 45.00
- (11) Examination to become a barber school instructor \$165.00
- (12) Student permit \$ 25.00
- (13) Issuance of any duplicate copy of a license, certificate or permit \$ 10.00
- (14) Barber school permit or renewal \$130.00
- (15) Late fee for restoration of an expired barber school certificate \$ 85.00
- (16) Barber school instructor certificate or renewal \$ 85.00
- (17) Late fee for restoration of an expired barber school instructor certificate within first year after expiration \$ 45.00
- (18) Late fee for restoration of an expired barber school instructor certificate after first year after expiration but within three years after expiration \$ 85.00
- (19) Inspection of newly established barbershop \$120.00
- (20) Inspection of newly established barber school \$220.00
- (21) Issuance of a registered barber or apprentice certificate by certification \$120.00
- (22) Charge for certified copies of public documents \$10.00 for first page, \$0.25 per page thereafter
- (23) Charge for duplication services and material shall be as set forth in 26 NCAC 01 .0103
- (24) Certificate of registration or renewal as a barber for barbers over 70 years of age \$ 0.00
- (25) Administrative fee for paying any required fee for renewal or restoration, or a civil penalty and attorney fee, where the licensee or Registered Barber is subject to a pick-up order issued to an inspector. \$ 70.00

(b) In the event the Board's authority to expend funds is suspended pursuant to G.S. 93B-2, the Board shall continue to issue and re-new licenses and all fees tendered shall be placed in the escrow account maintained by the Board for this purpose.

History Note: Authority G.S. 86A-25; 86A-27(d);
Eff. February 1, 1976;
Readopted Eff. February 8, 1978;
Amended Eff. April 1, 2010; September 1, 2009; June 1, 2008;
April 1, 2005; May 1, 1989; March 1, 1983.

CHAPTER 12 - LICENSING BOARD FOR GENERAL CONTRACTORS

21 NCAC 12 .0211 MULTIUNIT BUILDINGS

For the purposes of determining whether or not the cost of the undertaking is thirty thousand dollars (\$30,000) or more under G.S. 87-1, and whether or not the value of any single project falls within the license limitations established by G.S. 87-10(a), if a project consists of the construction or alteration of one or more buildings comprised of three or more units within each building, including apartments, condominiums, and townhomes, then all such units in a building shall be considered in determining the cost of the undertaking under G.S. 87-1 and the value of the project under G.S. 87-10(a).

History Note: Authority G.S. 87-1; 87-4; 87-10;
Eff. August 11, 2009;
Amended Eff. April 1, 2010.

CHAPTER 16 – BOARD OF DENTAL EXAMINERS

21 NCAC 16B .0901 DEFINITIONS

The following definitions apply only to this Subchapter:

- (1) "Dental Board" -- the North Carolina State Board of Dental Examiners.
- (2) "Eligible licensees"-- all dentists currently licensed by and in good standing with the North Carolina State Board of Dental Examiners who are serving in the armed forces of the United States and who are eligible for an extension of time to file a tax return pursuant to G.S. 105-249.2.
- (3) "Extension period" -- the time period disregarded pursuant to 26 U.S.C. 7508.
- (4) "Good standing" -- a dentist whose license is not suspended or revoked.

History Note: Authority G.S. 90-28; 93B-15;
Eff. April 1, 2010.

21 NCAC 16B .0902 EXEMPTIONS GRANTED

(a) Eligible licensees are granted a waiver of their mandatory continuing education requirements.

(b) Eligible licensees are granted an extension period in which to pay license renewal fees and comply with all other requirements imposed by the Dental Board as conditions for maintaining licensure and current sedation permits.

History Note: Authority G.S. 90-28; 93B-15;
Eff. April 1, 2010.

21 NCAC 16I .0110 DEFINITIONS

The following definitions apply only to this Subchapter:

- (1) "Dental Board" -- the North Carolina State Board of Dental Examiners.
- (2) "Eligible licensees"-- all hygienists currently licensed by and in good standing with the North Carolina State Board of Dental Examiners who are serving in the armed forces of the United States and who are eligible for an extension of time to file a tax return pursuant to G.S. 105-249.2.
- (3) "Extension period" -- the time period disregarded pursuant to 26 U.S.C. 7508.
- (4) "Good standing" -- a hygienist whose license is not suspended or revoked.

History Note: Authority G.S. 90-28; 93B-15;
Eff. April 1, 2010.

21 NCAC 16I .0111 EXEMPTIONS GRANTED

(a) Eligible licensees are granted a waiver of their mandatory continuing education requirements.

(b) Eligible licensees are granted an extension period in which to pay license renewal fees and comply with all other requirements imposed by the Dental Board as conditions for maintaining licensure and current sedation permits.

History Note: Authority G.S. 90-28; 93B-15;
Eff. April 1, 2010.

CHAPTER 17 – BOARD OF DIETETICS/NUTRITION

21 NCAC 17 .0101 DEFINITIONS

As used in this Chapter, the following terms and phrases, which have not already been defined in the Practice Act, G.S. 90-350 through 90-369, have the meanings specified:

- (1) "Act" means Dietetics/Nutrition Practice Act.
- (2) "ADA" means The American Dietetic Association.
- (3) "Applicant" means any person who has applied to the Board for a license to practice dietetics/nutrition in the State of North Carolina.
- (4) "Application" means a written request directed to and received by the Board, on forms supplied by the Board, for a license to practice dietetics/nutrition in the State of North Carolina, together with all information,

- documents and other materials necessary for the Board to act on that application.
- (5) "CDR" means the Commission on Dietetic Registration which is a member of the National Commission for Health Certifying Agencies.
 - (6) "CADE" means the Commission on Accreditation for Dietetics Education.
 - (7) "Degree" means a degree received from a college or university that was regionally accredited at the time the degree was conferred.
 - (8) "Dietitian/nutritionist" means one engaged in dietetics/nutrition practice.
 - (9) "Executive Secretary" means the person employed to carry out the administrative functions of the Board.
 - (10) "Health care practitioner" includes any individual who is licensed under G.S. 90.
 - (11) "Nutrition assessment" means the evaluation of the nutrition needs of individuals and groups based upon biochemical, anthropometric, physical, and food intake and diet history data to determine nutritional needs and recommend appropriate nutrition intake including enteral and parenteral nutrition.
 - (12) "Nutrition counseling" means the advice and assistance provided by licensed dietitians/nutritionists to individuals or groups on nutrition intake by integrating information from the nutrition assessment with information on food and other sources of nutrient and meal preparation consistent with cultural background, socioeconomic status and therapeutic needs.
 - (13) "Provisionally licensed dietitian/nutritionist" means a person provisionally licensed under this act.
 - (14) "Equivalent major course of study" means one which meets the knowledge requirements of the ADA-Approved Didactic program in Dietetics as referenced in the most current edition of the "Accreditation/Approval Manual for Dietetic Education Programs". This standard includes any subsequent amendments and editions of the referenced material. Copies of this manual may be purchased from the ADA Sales Order Department, P.O. Box 97215, Chicago, IL 60678-7215 at a cost of twenty-nine dollars and ninety-five cents (\$29.95).
 - (15) "Supervised practice program" means one which meets the standards of the ADA-approved/accredited supervised practice program in dietetics as referenced in the most current edition of the "Accreditation/Approval Manual for Dietetic Education Programs". This standard includes any subsequent amendments and editions of the referenced

material. Copies of this manual may be purchased from the ADA Sales Order Department, P.O. Box 97215, Chicago, IL 60678-7215 at a cost of twenty-nine dollars and ninety-five cents (\$29.95).

*History Note: Authority G.S. 90-352; 90-356;
Temporary Adoption Eff. March 19, 1992 for a period of 180 days to expire on September 13, 1992;
Eff. June 1, 1992;
Recodified from 21 NCAC 17 .0001 Eff. February 1, 1995;
Amended Eff. April 1, 2010; July 18, 2002; March 1, 1996.*

21 NCAC 17 .0114 CODE OF ETHICS FOR PROFESSIONAL PRACTICE AND CONDUCT

(a) Licensees, under the Act, shall comply with the following Code of Ethics in their professional practice and conduct. The Code reflects the ethical principles of the dietetic/nutrition professional and outlines obligations of the licensee to self, client, society and the profession and sets forth mandatory standards of conduct for all licensees.

- (1) The licensee shall provide professional services with objectivity and with respect for the unique needs and values of individuals as determined through the nutritional assessment.
- (2) The licensee shall conduct all practices of dietetics/nutrition with honesty and integrity.
- (3) The licensee shall present substantiated information and interpret controversial information without personal bias, recognizing that legitimate differences of opinion exist.
- (4) The licensee shall practice dietetics/nutrition based on scientific principles and current information.
- (5) The licensee shall assume responsibility and accountability for personal competence in practice.
- (6) The licensee shall inform the public of his/her services by using factual information and shall not advertise in a false or misleading manner.
- (7) The licensee shall not exercise undue influence on a client, including the promotion or the sale of services or products. The licensee shall be alert to any conflicts of interest and shall provide full disclosure when a real or potential conflict of interest arises.
- (8) The licensee shall not reveal information about a client obtained in a professional capacity, without prior consent of the client, except as authorized or required by law and shall make full disclosure about any limitations on his/her ability to guarantee this.
- (9) The licensee shall recognize and exercise professional judgment within the limits of the licensee's qualifications and shall not accept or perform professional responsibilities which the licensee knows or has reason to know that he or she is not qualified to perform.

- (10) The licensee shall take action, with prior consent of the client, to inform a client's physician or other health care practitioner in writing in cases where a client's nutritional status indicates a change in health status.
- (11) The licensee shall give sufficient information based on the client's ability to process information such that the client can make his or her own informed decisions. The licensee shall not guarantee that nutrition care services will cause any certain outcome or particular result for the client.
- (12) The licensee shall permit use of that licensee's name for the purpose of certifying that dietetic/nutrition services have been rendered only if the licensee has provided or supervised those services.
- (13) The licensee shall notify the Board in writing within 30 days of the occurrence of any of the following:
 - (A) The Licensee seeks any medical care or professional treatment for the chronic or persistent use of intoxicants, drugs or narcotics.
 - (B) The Licensee is adjudicated to be mentally incompetent.
 - (C) The Licensee has been convicted or entered into a plea of guilty or nolo contendere to any crime involving moral turpitude.
 - (D) The licensee has been disciplined by an agency of another state that regulates the practice of dietetics or nutrition.
- (14) The licensee shall comply with all laws and rules concerning the profession.
- (15) The licensee shall uphold the Code of Ethics for professional practice and conduct by reporting suspected violations of the Code and the Act to the Board.
- (16) The licensee shall not interfere with an investigation or disciplinary proceeding by willful misrepresentation of facts to the Board or its representative or by the use of threats or harassment against any person.
- (17) The licensee shall not engage in kissing, fondling, touching or in any activities, advances, or comments of a sexual nature with any client or, while under the licensee's supervision, with any student, trainee, provisional licensee or person aiding the practice of dietetics/nutrition.
- (18) The licensee shall not invite, accept, or offer gifts, monetary incentives, or other considerations that affect or reasonably give an appearance of affecting the licensee's professional judgment.

(b) Conduct and circumstances which may result in disciplinary action by the Board include the following:

- (1) The licensee is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his/her ability to practice dietetics/nutrition.
- (2) The licensee is mentally, emotionally, or physically unfit to practice dietetics/nutrition and is afflicted with such a mental, emotional or physical disability as to be dangerous to the health and welfare of a client.
- (3) The licensee has been disciplined by an agency of another state that regulates the practice of dietetics or nutrition and at least one of the grounds for the discipline is the same or substantially equivalent to the grounds for discipline in this state.
- (4) The licensee has violated any provisions of the Act or any of the rules in this Chapter.

History Note: Authority G.S. 90-356(3); 90-356(2); Temporary Adoption Eff. March 19, 1992 for a period of 180 days to expire on September 13, 1992; Eff. July 1, 1992; Recodified from 21 NCAC 17 .0014 Eff. February 1, 1995; Amended Eff. April 1, 2010; July 1, 2004; July 18, 2002; March 1, 1996.

21 NCAC 17 .0116 VIOLATIONS, COMPLAINTS, SUBSEQUENT BOARD ACTION, AND HEARINGS

(a) The definitions contained in G.S. 150B-2 (1), (2), (2b), (4a), (4b), (5), (8), (8a), (8b) are incorporated by reference within this Rule. In addition, the following definitions apply:

- (1) "Administrative Law Counsel" means an attorney whom the Board has retained to serve as procedural counsel to advise the hearing officer concerning questions of procedure for contested cases.
- (2) "Prosecuting Attorney" means the attorney retained by the Board to prepare and prosecute contested cases.

(b) Before the North Carolina Board of Dietetics/Nutrition makes a final decision in any contested case, the person, applicant or licensee affected by such decision shall be afforded an administrative hearing pursuant to the provisions of Article 3A, Chapter 150B of the North Carolina General Statutes. This Rule applies to the conduct of all contested cases heard before or for the North Carolina Board of Dietetics/Nutrition. The following general statutes, rules, and procedures apply and are incorporated by reference within this Rule, unless another specific statute or rule of the North Carolina Board of Dietetics/Nutrition provides otherwise:

- (1) the Rules of Civil Procedure as contained in G.S. 1A-1;
- (2) the Rules of Evidence pursuant to G.S. Chapter 8C;
- (3) the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes; and

- (4) Canons 1, 2 and 3 of the Code of Judicial Conduct adopted in accordance with G.S. 7A-10.1.

Every document filed with the Board shall be signed by the person, applicant, licensee, or the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, title/position, address, and telephone number. If the individual involved is a licensed dietitian/nutritionist, the license number shall appear on all correspondence with the Board. An original and one copy of each document shall be filed.

(c) Anyone may complain to the Board alleging that a person, applicant or licensee has committed an action prohibited by G.S. 90-350 through G.S. 90-369 or the rules of the Board. A person wishing to complain about an alleged violation of G.S. 90-350 through G.S. 90-369 or the rules of the Board may notify the Executive Secretary. A complaint regarding the Executive Secretary, the staff or the Board may be directed to the chair of the Board or any Board member. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the Executive Secretary's office.

Upon receipt of a complaint, the Executive Secretary, unless the health and safety of the public otherwise requires, shall send to the complainant an acknowledgement letter, and request the complainant complete and file a complaint form before further action shall be taken.

(d) An Investigator or other authorized Board staff shall investigate a complaint and shall take one or more of the following actions:

- (1) determine that an allegation is groundless and dismiss the complaint;
- (2) determine that the complaint does not come within the Board's jurisdiction, advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such complaints;
- (3) determine that a nonlicensed person has committed a prohibited action and take appropriate legal action against the violator; or
- (4) determine that a licensee has violated the Act or the rules of the Board and propose an enforcement action authorized by law.

(e) Whenever a complaint is dismissed or a complaint file closed, the Executive Secretary shall give a summary report of the final action to the Board, the complainant, and the accused party.

(f) In accordance with G.S. 150B-3(c), a license may be summarily suspended if Board finds that the public health, safety, or welfare requires emergency action. Such a finding shall be incorporated with the order of the Board and the order shall be effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and shall continue to be effective during the proceedings. Failure to receive the order because of refusal of service or unknown address does not invalidate the order. Proceedings shall be promptly commenced.

(g) The Board, through its staff, shall issue a Letter of Charges only upon completion of an investigation of a written complaint and review with legal counsel or prosecuting attorney. Subsequent to an investigation and validation of a complaint, a

Letter of Charges shall be sent on behalf of the Board to the person, applicant or licensee who is the subject of the complaint. The Letter of Charges shall be served in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure. The Letter of Charges shall serve as the Board's formal notification to the person that an allegation of possible violation(s) of the Act or the rules of the Board has been initiated. The Letter of Charges does not constitute a contested case. The Letter of Charges shall include the following:

- (1) a statement of the factual allegations;
- (2) a citation of the relevant sections of the statutes or rules involved;
- (3) notification that a settlement conference will be scheduled upon request;
- (4) explanation of the procedure used to govern the settlement conference;
- (5) notification that if a settlement conference is not requested, or if held, does not result in resolution of the case, a contested case hearing will be scheduled; and
- (6) an offer of voluntary surrender for alleged violations of the Act.

A case becomes a contested case after the agency and the person, applicant or licensee do not agree to a resolution of the dispute through a settlement conference or either the agency or the person, applicant or licensee requests a contested case hearing.

(h) No Board member shall discuss with any party the merits of any case pending before the Board. If a party files in good faith an affidavit of personal bias or other reason for disqualification of any member of the Board, the Board shall determine the matter as part of the record in the case.

(i) A settlement conference, if requested by the applicant or licensee, shall be held for the purpose of attempting to resolve a dispute through informal procedures prior to the commencement of formal administrative proceedings. The conference shall be held in the offices of the Board, unless another site is designated by mutual agreement of all involved parties. All parties shall attend or be represented at the settlement conference. The parties shall be prepared to discuss the alleged violations and the incidents on which these are based. At the conclusion of the day during which the settlement conference is held, a form must be signed by all parties which indicates whether the settlement offer is accepted or rejected. Subsequent to this decision:

- (1) if a settlement is reached, the Board shall forward a written settlement agreement containing all conditions of the settlement to the other party(ies); or
- (2) if a settlement cannot be reached, the case shall proceed to a contested case hearing by the filing of a petition with the Board by the agency, person, applicant, or licensee.

(j) Informal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement or consent order at any time prior to or during the hearing of a contested case.

(k) The Board shall give the parties in a contested case a Notice of Hearing not less than 15 calendar days before the hearing. The Notice shall be given in accordance with G.S. 150B-38(b) and (c). The Notice shall include:

- (1) acknowledgement of service, or attempted service, of the Letter of Charges in compliance with Paragraph (g) of this Rule;
- (2) date, time, and place of the hearing;
- (3) a short and plain statement of the factual allegations;
- (4) a citation of the relevant sections of the statutes or rules involved;
- (5) notification of the right of a party to represent himself or to be represented by an attorney;
- (6) a statement that, pursuant to Paragraph (n) of this Rule, subpoenas may be requested by the licensee to compel the attendance of witnesses or the production of documents;
- (7) a statement advising the licensee that a notice of representation, containing the name of licensee's counsel, if any, shall be filed with the Board not less than 10 calendar days prior to the scheduled date of the hearing;
- (8) a statement advising the licensee that a list of witnesses for the licensee shall be filed with the Board not less than 10 calendar days prior to the scheduled date of the hearing; and
- (9) a statement advising the licensee that failure to appear at the hearing may result in the allegations of the Letter of Charges being taken as true and that the Board may proceed on that assumption.

(l) Prehearing conferences may be held to simplify the issues to be determined, to obtain stipulations in regards to foundations for testimony or exhibits, to obtain stipulations of agreement on undisputed facts or the application of particular laws, to consider the proposed witnesses for each party, to identify and exchange documentary evidence intended to be introduced at the hearing, and to consider such other matters that may be necessary or advisable for the efficient and expeditious conduct of the hearing. The prehearing conference shall be conducted in the offices of the Board, unless another site is designated by mutual agreement of all parties. The prehearing conference shall be an informal proceeding and shall be conducted by a Board-designated member. All agreements, stipulations, amendments, or other matters resulting from the prehearing conference shall be in writing, signed by all parties, and introduced into the record at the beginning of the formal administrative hearing.

(m) Prehearing conferences or administrative hearings conducted before a majority of Board members shall be held in the county where the Board maintains its principal office, or by mutual consent in another location which will better promote the ends of justice or better serve the convenience of witnesses or the Board. For those proceedings conducted by an Administrative Law Judge, the venue shall be determined in accordance with G.S. 150B-38(e). All hearings conducted by the Board shall be open to the public.

(n) The Board may issue subpoenas for the Board or a licensee, in preparation for, or in the conduct of, a contested case. Subpoenas for the attendance and testimony of witnesses or the production of documents or information, either at the hearing or for the purposes of discovery, shall be issued in accordance with G.S. 150B-39 and G.S. 1A-1, Rule 45. Requests by a licensee

for subpoenas shall be made in writing to the Board and shall include the following:

- (1) the full name and home or business address of all persons to be subpoenaed; and
- (2) the identification, with specificity, of any documents or information being sought.

Subpoenas shall include the date, time, and place of the hearing and the name and address of the party requesting the subpoena. In the case of subpoenas for the purpose of discovery, the subpoena shall include the date, time, and place for responding to the subpoena.

Subpoenas shall be served as in the manner provided by G.S. 150B-39 and G.S. 1A-1, Rule 45. The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314. Objections to subpoenas shall be heard in accordance with G.S. 150B-39 and G.S. 1A-1, Rule 45.

(o) All motions related to a contested case, except motions for continuance and those made during the hearing, shall be in writing and submitted to the Board at least 10 calendar days before the hearing, if any, is to be held either on the motion or the merits of the case. Prehearing motions shall be heard at a prehearing conference or at the contested case hearing prior to the commencement of testimony. The Board-designated hearing officer shall hear the motions and the response from the non-moving party pursuant to Rule 6 of the General Rules of Practice for the Superior and District Courts and rule on such motions. If the prehearing motions are heard by an Administrative Law Judge from Office of Administrative Hearings, the provisions of G.S. 150B-40(e) shall govern the proceedings.

(p) Motions for a continuance of a hearing may be granted upon a showing of good cause. Unless time does not permit, a request for a continuance of a hearing shall be made in writing and received by the office of the Board no less than seven calendar days before the hearing date. In determining whether good cause exists, consideration shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A motion for a continuance filed less than seven calendar days from the date of the hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of the hearing shall be ruled on by the hearing officer or the Administrative Law Judge. All other motions for continuance shall be ruled on by the majority of the Board members or Administrative Law Judge sitting at the hearing. As used in this Rule:

- (1) "Good cause" includes death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties if either more time is necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the administrative law judge have agreed to new hearing date or parties

have agreed to a settlement of the case that has been or is likely to be approved by the final decision maker.

- (2) "Good cause" does not include intentional delay; unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged; unavailability of a witness if the witness testimony can be taken by deposition, and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the Board shall either order the additional testimony taken by deposition or continue the hearing to a future date for which oral notice on the record is sufficient. In such situations and to such extent as possible, the seated members of the Board and the Board-designated hearing officer shall receive the additional testimony. If new members of the Board or a different hearing officer must participate, a copy of the transcript of the hearing shall be provided to them prior to the receipt of the additional testimony. A continuance shall not be granted when to do so would prevent the case from being concluded within any statutory or regulatory deadline.

(q) All hearings by the Board shall be conducted by a majority of members of the Board, except as provided in this Paragraph. The Board shall designate one of its members to preside at the hearing. The Board shall designate an administrative law counsel as procedural officer to conduct the proceedings of the hearing. The seated members of the Board shall hear all evidence, make findings of fact and conclusions of law, and issue an order reflecting a majority decision of the Board. When a majority of the members of the Board is unable or elects not to hear a contested case, the Board shall request the designation of an administrative law judge from the Office of Administrative Hearings to preside at the hearing. The provisions of G.S. 150B, Article 3A and 21 NCAC 17 .0116 govern a contested case in which an administrative law judge is designated as the Hearing Officer. In the event that any party or attorney at law or other representative of a party engages in behavior that obstructs the orderly conduct of proceedings or would constitute contempt if done in the General Court of Justice, the Board may apply to the applicable superior court for an order to show cause why the person(s) should not be held in contempt of the Board and its processes.

(r) All parties may present evidence, rebuttal testimony, and argument with respect to the issues of law and policy, and to cross-examine witnesses. The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes applies to contested case proceedings, except as provided otherwise in this Rule and G.S. 150B-41. Sworn affidavits may be introduced by mutual agreement from all parties. All oral testimony shall be under oath or affirmation and shall be recorded. Unless otherwise stipulated by all parties, witnesses are excluded from the hearing room until such time that they have completed their testimony and have been released.

(s) Upon compliance with the provisions of G.S. 150B-40(e), if applicable, and G.S. 150B-42, and review of the official record, as defined in G.S. 150B-42(b) and (c), the Board shall make a written final decision or order in a contested case. The final decision or order shall be rendered by the Board meeting in quorum and by a majority of those present and voting. The decision or order shall be made based on:

- (1) competent evidence and arguments presented during the hearing and made a part of the official record in accordance with G.S. 150B-41 and Paragraph (r) of this Rule;
- (2) stipulations of fact;
- (3) matters officially noticed; and
- (4) other items in the official record that are not excluded by G.S. 150B-41 and Paragraph (r) of this Rule.

All final decisions or orders shall be signed by the Executive Secretary and the Chair of the Board. A copy of the decision or order shall be served as in the manner provided by G.S. 150B-41(a). The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314.

(t) The official record of a contested case is available for public inspection upon reasonable request. The official record shall be prepared in accordance with G.S. 150B-42(b) and (c). Contested case hearings shall be recorded either by a magnetic type recording system or a professional court reporter using stenomask or stenotype. Transcripts of proceedings during which oral evidence is presented shall be made only upon request of a party. Transcript costs shall include the cost of an original for the Board. Cost of the transcript or part thereof or copy of said transcript or part thereof which a party requests shall be divided equally among the party(ies) requesting a transcript. Cost shall be determined under supervision of the Executive Secretary.

(u) The Board may recover against a licensee or person found to be in violation of the Act or rules adopted by the Board the following costs of disciplinary actions incurred by the Board for the investigation, prosecution, hearing or other administrative action:

- (1) witness fees and statutorily-allowed expenses for witnesses;
- (2) direct costs of the Board in taking or obtaining of depositions of witnesses; and
- (3) costs incurred by reason of administrative or staff time of employees of the Board directly attributable to the action leading to the final decision or order.

These costs may be assessed by the Board pursuant to final decisions or orders of the Board following an administrative hearing pursuant to Article 3A of Chapter 150B of the North Carolina General Statutes. These costs may be assessed against a person or licensee for an investigation or action in the nature of disciplinary action, other than a final decision or order of the Board, pursuant to the express consent by the person in a consent order approved by the Board.

History Note: Authority G.S. 90-356; 90-363; 90-370;

Temporary Adoption Eff. July 16, 1992 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Eff. November 30, 1992;

Recodified from 21 NCAC 17 .0016 Eff. February 1, 1995;

Amended Eff. April 1, 2010; July 18, 2002; January 1, 1996.

**21 NCAC 17 .0117 SUSPENSION OF AUTHORITY
AND ESCROW OF FUNDS**

Not later than October 31 of each year, the Board shall file the reports required by G.S. 93B-2. In the event the reports required by G.S. 93B-2 are not timely filed and the Board's authority to expend any funds is therefore suspended, the Board shall deposit any fees or funds received during the period of suspension to an escrow account established by the Board solely for this purpose, and shall not expend such fees or funds until such time as the required reports are filed in accordance with G.S. 93B-2.

*History Note: Authority G.S. 90-356; 93B-2;
Eff. April 1, 2010.*

21 NCAC 17 .0118 ARMED SERVICES LICENSEES

Upon receipt of a written request on or behalf of a licensee who is currently in good standing with the Board, is serving in the armed forces of the United States, and to whom G.S. 105-249 grants an extension of time to file a tax return, the Board shall waive or postpone renewal fees, renewal application deadlines, continuing education requirements and any other requirement or conditions related to the maintenance of the license issued by the Board or to the renewal thereof for a period of time not less than the extended period of time to file a tax return that is granted pursuant to G.S. 93B-15.

*History Note: Authority G.S. 90-356; 93B-15;
Eff. April 1, 2010.*

**CHAPTER 30 - BOARD OF MASSAGE AND BODYWORK
THERAPY**

21 NCAC 30 .0303 LICENSE RENEWAL

(a) Any licensee desiring the renewal of a license shall comply with all continuing education requirements, shall apply for renewal and shall submit the required fee.

(b) A license that has not been renewed prior to its expiration date is considered expired. An expired license may be reinstated within the first 24 months. All required continuing education for license renewal must be completed before the license is reinstated.

(c) Licenses expired in excess of 24 months are not renewable. Persons whose licenses have been expired for more than 24 months must apply for a new license.

(d) Any person whose license has expired and who engages in any massage and bodywork therapy activities governed by the Practice Act will be subject to the penalties prescribed in G.S. 90-634 and G.S. 90-634.1.

(e) Members of the armed forces whose licenses are in good standing and to whom G.S. 105-249.2 grants an extension of

time to file a tax return are granted that same extension of time to pay the license renewal fee and to complete the continuing education requirement prescribed in 21 NCAC 30 .0700. A copy of military orders or the extension approval by the Internal Revenue Service must be furnished to the Board. If approved, continuing education acquired during this extended time period shall not be utilized for future renewal purposes.

*History Note: Authority G.S. 90-626(3); 90-626(9); 90-631;
93B-15(b); 105-249.2;*

Temporary Adoption Eff. February 15, 2000;

Eff. April 1, 2001;

Amended Eff. April 1, 2010; September 2, 2005.

CHAPTER 32 – MEDICAL BOARD

**21 NCAC 32W .0109 SUPERVISION OF
ANESTHESIOLOGIST ASSISTANTS**

(a) The Primary Supervising Anesthesiologist shall ensure that the Anesthesiologist Assistant's scope of practice is identified; that delegation of anesthesia services is appropriate to the level of competence of the Anesthesiologist Assistant; that the relationship of, and access to, each Supervising Anesthesiologist is defined; and that a process for evaluation of the Anesthesiologist Assistant's performance is established.

(b) The Supervision Agreement defined in Rule .0101(10) of this Subchapter must be signed by the Primary Supervising Anesthesiologist(s) and Anesthesiologist Assistant and shall be made available upon request by the Board or its agents. A list of all Supervising Anesthesiologists, signed and dated by each Supervising Anesthesiologist, the Primary Supervising Anesthesiologist, and the Anesthesiologist Assistant, must be retained as part of the Supervision Agreement and shall be made available upon request by the Board or its representatives.

(c) A Supervising Anesthesiologist, who need not be the Primary Supervising Anesthesiologist, shall supervise the Anesthesiologist Assistant and ensure that all anesthesia services delegated to the Anesthesiologist Assistant are consistent with the Anesthesiologist Assistant's Supervision Agreement.

(d) A Supervising Anesthesiologist may supervise up to four Anesthesiologist Assistants at one time.

(e) Entries by an Anesthesiologist Assistant into patient charts of inpatients (hospital, long term care institutions) must comply with the rules and regulations of the institution.

History Note: Authority G.S. 90-18(c)(20); 90-18.5;

Temporary Adoption Eff. January 28, 2008;

Eff. April 1, 2008;

Amended Eff. April 1, 2010.

CHAPTER 46 – BOARD OF PHARMACY

**21 NCAC 46 .1613 EXTENSION PERIOD FOR
CERTAIN MEMBERS OF THE ARMED FORCES**

(a) Definitions:

- (1) "Eligible licensee" means a pharmacist who holds a license in good standing from the Board of Pharmacy, who serves the armed forces of the United States, and who is eligible for an extension of time in which to file a tax return pursuant to G.S. 105-249.2. "Eligible licensee" includes a pharmacist who holds a Clinical Pharmacist Practitioner credential or who is a pharmacist vaccinator.
 - (2) "Eligible registrant" means a pharmacy technician, dispensing physician, dispensing nurse practitioner or dispensing physician assistant who holds a registration in good standing from the Board of Pharmacy, who serves the armed forces of the United States, and who is eligible for an extension of time in which to file a tax return pursuant to G.S. 105-249.2.
 - (3) "Extension period" means the time period specified in 26 U.S. Code 7508.
 - (4) "Good standing" means a license or registration that is not suspended, revoked or subject to a current disciplinary order.
- (b) Extension of time to pay license or registration renewal fee and waiver of continuing education requirements:
- (1) An eligible licensee or registrant shall notify the Board of eligibility for the extension period before his or her current license or registration expires. Upon such notification, the Board shall maintain the license or registration in active status through the extension period.
 - (2) If an eligible licensee or registrant fails to notify the Board of eligibility for the extension period before his or her current license or registration expires, upon receipt and acceptance of a renewal application within the extension period and presentation of proof that the licensee or registrant was an eligible licensee or registrant on the date that is the deadline for renewal, the expired license or registration shall be deemed retroactively to have not expired.
 - (3) Notwithstanding 21 NCAC 46 .1612(a) and .3301(a), an eligible licensee or registrant who submits a renewal application and pays the renewal fee required by the Board within the extension period shall not be deemed to hold a lapsed license or registration subject to reinstatement fees.
 - (4) Notwithstanding 21 NCAC 46 .2201, .3101(d) and .2507(d), an eligible licensee may renew his or her license within the extension period despite failing to complete the specified continuing education requirements.
 - (5) A licensee or registrant shall provide proof of eligibility for the extension period when the licensee or registrant submits the renewal application.

History Note: Authority G.S. 90-18.1; 90-18.2; 90-85.6; 90-85.15A; 90-85.17; 90-85.21(b); 90-85.24; 90-85.26A; 93B-15; Eff. April 1, 2010.

CHAPTER 57 – APPRAISAL BOARD

21 NCAC 57A .0201 QUALIFICATIONS FOR TRAINEE REGISTRATION AND APPRAISER CERTIFICATION

- (a) Applicants for trainee registration and for certification as a certified real estate appraiser must satisfy the qualification requirements stated in G.S. 93E-1-6 and in this Section.
- (b) Applicants for trainee registration shall have completed, within the five-year period immediately preceding the date application is made, 90 hours of education as set forth in 21 NCAC 57B .0101 or education found by the Board to be equivalent to such courses. Applicants for trainee registration must possess a high school diploma or a GED.
- (c) Applicants for certification as a certified residential real estate appraiser shall have completed, within the five-year period immediately preceding the date application is made, 200 hours of education as set forth in 21 NCAC 57B .0102 or education found by the Board to be equivalent to such courses. In addition, applicants for certification as a certified residential real estate appraiser must hold an Associate's degree, or higher, from an accredited college, junior college, community college, or university. In lieu of the Associate's degree requirements, applicants shall have successfully completed 21 semester credit hours in the following collegiate subject matter courses from an accredited college or university: English composition; principles of economics (macro or micro); finance; algebra; geometry or higher mathematics; statistics; introduction to computers, including word processing and spreadsheets; and business or real estate law. Applicants shall have obtained at least 2,500 hours of appraisal experience acquired within the five-year period immediately preceding the date application is made and over a minimum period of two calendar years. Applicants must have been engaged in real estate appraising for at least two calendar years prior to the date application is made. At least 50 percent of this appraisal experience must have been of one to four family residential properties in which the sales comparison approach was utilized in the appraisal process.
- (d) Applicants for certification as a certified general real estate appraiser shall have completed 300 hours of education as set forth in 21 NCAC 57B .0103 or education found by the Board to be equivalent to such courses. In addition, applicants for certification as a certified general estate appraiser must hold a Bachelor's degree or higher from an accredited college or university. In lieu of the Bachelor's degree requirements, applicants shall have successfully completed 30 semester credit hours in the following collegiate subject matter courses from an accredited college university: English composition, micro economics, macro economics, finance, algebra, geometry or higher mathematics, statistics, introduction of computers, including word processing and spreadsheets, business or real estate law, and two elective courses in accounting, geography, business management or real estate. Applicants shall have

obtained at least 3,000 hours of appraisal experience acquired within the five-year period immediately preceding the date application is made and over a minimum period of two and a half calendar years of which at least 50 percent must have been in appraising non-residential real estate. Applicants must have been engaged in real estate appraising for at least two and one-half calendar years prior to the date application is made. At least 50 percent of the non-residential appraisal experience must have been of special use properties such as schools, churches, or hospitals in which the income approach is not applicable or of improved properties in which the income approach was utilized in the appraisal process.

(e) Applicants for certification who are currently registered trainees must submit a copy of their complete appraisal log. Applicants for certification who are currently licensed or certified appraisers must submit an appraisal log showing that they possess the requisite amount and length of experience as set forth in Paragraphs (c) and (d) of this Rule. All applicants shall provide to the Board copies of appraisal reports in support of experience credit. In order for an appraisal to be given experience credit, it must comply with the Uniform Standards of Professional Appraisal Practice (USPAP) and with any applicable state statutes or rules.

(f) When a trainee or a licensed real estate appraiser becomes a certified real estate appraiser, his previous registration or licensure shall be immediately canceled by the Board. When a certified residential real estate appraiser becomes certified as a general real estate appraiser, his previous certification shall be immediately canceled by the Board.

(g) In the event that the Board asks an applicant to submit updated information or provide further information necessary to complete the application and the applicant fails to submit such information within 90 days following the Board's request, the Board shall cancel the applicant's application and the application fee shall be retained by the Board. An applicant whose application has been cancelled and who wishes to obtain a registration or certificate must start the licensing process over by filing a complete application with the Board and paying all required fees.

(h) An applicant may request that his or her application be withdrawn at any time before final action is taken by the Appraisal Board on the application.

(i) If an application is withdrawn, cancelled or denied, the applicant must wait six months from the date the application is withdrawn, cancelled or denied to file a new application.

(j) If an applicant has a current open complaint before the North Carolina Appraisal Board or an appraiser licensing board from any other state, or if the applicant has pending criminal charges in this or any state, the application shall be accepted but no further action shall be taken on the application until the complaint or criminal charges are resolved. For the purposes of this Section, criminal charges do not include speeding tickets or traffic infractions.

History Note: Authority G.S. 93E-1-6(a); 93E-1-10; Eff. July 1, 1994; Amended Eff. September 1, 2008; January 1, 2008; March 1, 2007; April 1, 2006; July 1, 2005; August 1, 2002; April 1, 1999;

Amended Eff. Pending Legislative Review.

21 NCAC 57A .0204 CONTINUING EDUCATION

(a) All registered trainees, real estate appraiser licensees and certificate holders shall, upon the renewal of their registration, license or certificate in every odd-numbered year, present evidence satisfactory to the Board of having obtained continuing education as required by this Section. Trainees and appraisers who initially registered with the Board after January 1 of an odd numbered year are not required to show continuing education credit for renewal of their registration in that odd numbered year.

(b) Each trainee, licensee and certificate holder who must complete continuing education pursuant to .0204(a) must complete 28 hours of continuing education before June 1 of every odd numbered year. Except as provided in Paragraphs (g) and (h) of this Rule, such education must have been obtained by taking courses approved by the Board for continuing education purposes, at schools approved by the Board to offer such courses. Such education must relate to real estate appraisal and must contribute to the goal of improving the knowledge, skill and competence of trainees, and licensed and certified real estate appraisers. There is no exemption from the continuing education requirement for trainees or appraisers whose registered, licensed or certified status has been upgraded to the level of licensed residential, certified residential or certified general appraiser since the issuance or most recent renewal of their registration, license or certificate, and courses taken to satisfy the requirements of a higher level of certification shall not be applied toward the continuing education requirement. Trainees, licensees and certificate holders shall not take the same continuing education course more than once during the two year continuing education cycle.

(c) Each appraisal continuing education course must involve a minimum of three and one-half classroom hours of instruction on real estate appraisal or related topics such as the application of appraisal concepts and methodology to the appraisal of various types of property; specialized appraisal techniques; laws, rules or guidelines relating to appraisal; standards of practice and ethics; building construction; financial or investment analysis; land use planning or controls; feasibility analysis; statistics; accounting; or similar topics. The trainee, license or certificate holder must have attended at least 90 percent of the scheduled classroom hours for the course in order to receive credit for the course.

(d) Each trainee, licensee and certificate holder who is required to complete continuing education pursuant to .0204(a) must, as part of the 28 hours of continuing education required in .0204(b) of this Section, complete the seven hour National USPAP update course, as required by the Appraiser Qualifications Board of the Appraisal Foundation, or its equivalent, prior to June 1 of every odd numbered year.

(e) A licensee who elects to take approved continuing education courses in excess of the requirement shall not carry over into the subsequent years any continuing education credit.

(f) Course sponsors must provide a certificate of course completion to each trainee, licensee and certificate holder satisfactorily completing a course. In addition, course sponsors must send directly to the Board a certified roster of all who successfully completed the course. This roster must be sent

within 15 days of completion of the course, but not later than June 15 of each year. In order to renew a registration, license or certificate in a timely manner, the Board must receive proper proof of satisfaction of the continuing education requirement prior to processing a registration, license or certificate renewal application. If proper proof of having satisfied the continuing education requirement is not provided, the registration, license or certificate shall expire and the trainee, licensee or certificate holder shall be subject to the provisions of Rules .0203(e) and .0206 of this Section.

(g) A current or former trainee, licensee or certificate holder may request that the Board grant continuing education credit for a course taken by the trainee, licensee or certificate holder that is not approved by the Board, or for appraisal education activity equivalent to a Board-approved course, by making such request and submitting a non-refundable fee of fifty dollars (\$50.00) as set out in G.S. 93E-1-8(d) for each course or type of appraisal education activity to be evaluated. Continuing education credit for a non-approved course shall be granted only if the trainee, licensee or certificate holder provides satisfactory proof of course completion and the Board finds that the course satisfies the requirements for approval of appraisal continuing education courses with regard to subject matter, course length, instructor qualifications, and student attendance. Appraisal education activities for which credit may be awarded include, but are not limited to, teaching appraisal courses, authorship of appraisal textbooks, and development of instructional materials on appraisal subjects. Up to 14 hours of continuing education credit may be granted in each continuing education cycle for participation in appraisal education activities. Trainees or licensed or certified appraisers who have taught an appraisal course or courses approved by the Board for continuing education credit shall be deemed to have taken an equivalent course and shall not be subject to the fee prescribed in G.S. 93E-1-8 (d), provided they submit verification satisfactory to the Board of having taught the course(s). A trainee, licensee or certificate holder who teaches a Board-approved continuing education course may not receive continuing education credit for the same course more than once every two years, regardless of how often he teaches the course. Requests for equivalent approval for continuing education credit must be received before June 15 of an odd-numbered year to be credited towards the continuing education requirement for that odd-numbered year. Equivalent approval shall be granted only for courses that are seven hours or longer, and will only be granted for a minimum of seven hours.

(h) A trainee, licensee or certificate holder may receive continuing education credit by taking any of the Board-approved precertification courses, other than Basic Appraisal Principles and Basic Appraisal Procedures, or their approved equivalents. These courses cannot be used for both continuing education credit and for credit for licensing purposes. Trainee, licensees and certificate holders who wish to use a precertification course for continuing education credit must comply with the provisions of 21 NCAC 57B .0604.

(i) A trainee, licensee or certificate holder who resides in another state and is currently licensed by the appraiser certification board of that state may satisfy the requirements of this section by providing a current letter of good standing from

the resident state showing that the licensee has met all continuing education requirements in the resident state. A trainee, licensee or certificate holder who became licensed in North Carolina by reciprocity and now resides in North Carolina may renew by letter of good standing for his or her first renewal as a resident of North Carolina only if the trainee or appraiser moved to North Carolina on or after January 1 of an odd numbered year. If a trainee or appraiser was a resident of this state before January 1 of an odd-numbered year, the trainee or appraiser must comply with the requirements of this Section regardless of how the registration, license or certificate was obtained.

(j) A trainee, licensee or certificate holder who returns from active military duty on or after February 1 of an odd-numbered year will be allowed to renew his or her registration, license or certificate in that odd-numbered year even if the required continuing education is not completed before June 1 of that year. All required continuing education must be completed within 180 days of when the trainee, licensee or certificate holder returns from active duty. Failure to complete the required continuing education within 180 days will be grounds for revocation. This Rule applies to an individual who is serving in the armed forces of the United States and to whom G.S. 105-249.2 grants an extension of time to file a tax return.

History Note: Authority G.S. 93E-1-7(a); 93E-1-10; Eff. July 1, 1994; Amended Eff. January 1, 2008; March 1, 2007; March 1, 2006; July 1, 2005; July 1, 2003; August 1, 2002; April 1, 1999; Amended Eff. Pending Legislative Review.

21 NCAC 57A .0405 APPRAISAL REPORTS

(a) Each written appraisal report prepared by or under the supervision of a licensed or certified real estate appraiser shall bear the signature of the licensed or certified appraiser, the license or certificate number of the licensee or certificate holder in whose name the appraisal report is issued, and the designation "licensed residential real estate appraiser," "certified residential real estate appraiser," or "certified general real estate appraiser," as applicable. Each such appraisal report shall also indicate whether or not the licensed or certified appraiser has personally inspected the property, and shall identify any other person who assists in the appraisal process other than by providing clerical assistance. Such identification must be placed in the body of the report. Appraisers shall personally affix their signature to their appraisal reports and shall not allow any other person or entity to affix their signature. Trainees are not required to affix their signatures to appraisal reports, but if they do so, they must personally affix their signature and shall not allow any other person or entity to affix their signature. Trainees and appraisers shall sign their reports with the same name and in the same manner as it printed on their pocket cards.

(b) Every licensed and certified real estate appraiser shall affix or stamp to all appraisal reports a seal which shall set forth the name and license or certificate number of the appraiser in whose name the appraisal report is issued and shall identify the appraiser as a "licensed residential real estate appraiser", a "certified residential real estate appraiser", or as a "certified general real estate appraiser", as applicable. The seal must be

legible, must conform to the seal authorized by the Board at time of initial licensure or certification, and must be a minimum of one inch in diameter. Appraisers shall personally affix their seal to their appraisal reports and shall not allow any other person or entity to affix their seal. Registered trainees are prohibited from using a seal on appraisal reports.

(c) A licensed or certified real estate appraiser who signs an appraisal report prepared by another person, in any capacity, shall be responsible for the content and conclusions of the report.

(d) A written appraisal report shall be issued on all real estate appraisals performed in connection with federally related transactions.

(e) Appraisers shall keep a log of all appraisals performed. The log shall contain, at a minimum, the appraiser's license or certificate number, the street address of the subject property, the date the report was signed, the name of anyone assisting in the preparation of the report and the name of the client. These logs shall be updated at least every 30 days.

(f) Any appraiser who signs an appraisal report is entitled to make or retain a copy of that appraisal report, as long as the copy is made at the time the report is prepared. Any appraiser who signs an appraisal report must be given a copy of the appraisal report and the work file upon request for the purpose of submission of the report and work file to the Appraisal Board, compliance with due process of law, such as a subpoena, submission to a peer review committee, or in accordance with retrieval arrangements made by the appraiser and the person or entity retaining the report and work file.

(g) Appraisal reports transmitted electronically to clients shall be sent in a secure and unalterable format, such as Adobe PDF.

History Note: Authority G.S. 93E-1-10;

Eff. July 1, 1994;

Amended Eff. July 1, 2010; September 1, 2008; January 1, 2008; March 1, 2007; March 1, 2006; July 1, 2003; August 1, 2002; April 1, 1999.

21 NCAC 57A .0407 SUPERVISION OF TRAINEES

(a) A licensed or certified real estate appraiser may engage a registered trainee to assist in the performance of real estate appraisals, provided that the licensed or certified real estate appraiser:

- (1) has been licensed or certified for at least two years;
- (2) has no more than one trainee working under his or her supervision at any one time, if the supervisor is a licensed real estate appraiser. A certified residential appraiser may have two trainees working under his or her supervision at any one time. Once at least one of those trainees has completed 50 percent of the required appraisal experience to upgrade, a certified residential appraiser may add another trainee. At no time may a certified residential appraiser have more than three trainees working under his or her supervision. A certified general appraiser may have three trainees working under his or her supervision. Prior to the date any trainee begins performing

appraisals under his or her supervision, the supervisor must inform the Board of the name of the trainee. The supervisor must also inform the Board when a trainee is no longer working under his or her supervision;

- (3) actively and personally supervises the trainee on all appraisal reports and appraisal related activities until the trainee is no longer under his or her supervision;
- (4) reviews all appraisal reports and supporting data used in connection with appraisals in which the services of a trainee is utilized, and assures that research of general and specific data has been adequately conducted and properly reported, application of appraisal principles and methodologies has been properly applied, that the analysis is sound and adequately reported, and that any analysis, opinions, or conclusions are adequately developed and reported so that the appraisal report is not misleading;
- (5) complies with all provisions of Rule .0405 of this Section regarding appraisal reports;
- (6) prepares and furnishes to each trainee, whose services were utilized in connection with the appraisal, a report describing the nature and extent of assistance rendered by the trainee in connection with the appraisal, and places a copy of such report in the supporting file for the appraisal within 30 days of the date the appraisal report was signed. In addition, the supervisor must make available to the trainee a copy of every appraisal report where the trainee performs more than 75 percent of the work on the appraisal; and
- (7) has not received any disciplinary action regarding his or her appraisal license or certificate from the State of North Carolina or any other state within the previous two years. For the purposes of this Section, disciplinary action means an active suspension or a revocation.

(b) Active and personal supervision includes direction, guidance, and support from the supervisor. The supervising appraiser shall have input into and full knowledge of the appraisal report prior to its completion, and shall make any necessary and appropriate changes to the report before it is transmitted to the client. In addition, the supervisor must accompany the trainee on the inspections of the subject property on the first 50 appraisal assignments or the first 1500 hours of experience, whichever comes first, for which the trainee will perform more than 75 percent of the work. After that point, the trainee may perform the inspections without the presence of the supervisor provided that the trainee is competent to perform those inspections, and provided that the subject property is less than 50 miles from the supervisor's primary business location. The supervisor must accompany the trainee on all inspections of subject properties that are located more than 50 miles from the supervisor's primary business location.

(c) The trainee must maintain a log on a form that includes each appraisal performed by the trainee, the type of property appraised, type of appraisal performed, complete street address of the subject property, the date the report was signed, the points claimed, the name of the supervisor for that appraisal, the supervisor's license or certificate number, and whether the supervisor accompanied the trainee on the inspection of the subject. The log must show all appraisals performed by the trainee and must be updated at least every 30 days.

(d) An appraiser who wishes to supervise a trainee must attend an education program offered by the Appraisal Board regarding the role of a supervisor either before such supervision begins, or within 90 days after such supervision begins. If the supervisor does not take the class within 90 days after the supervision begins, the trainee may no longer work under the supervision of that supervisor until the class is taken.

(e) Trainees must assure that the supervisor has completed and sent the Supervisor Declaration Form to the Appraisal Board on or before the day the trainee begins assisting the supervising appraiser. Trainees shall not receive appraisal experience credit for appraisals performed in violation of this Paragraph.

(f) Supervising appraisers shall not be employed by a trainee or by a company, firm or partnership in which the trainee has a controlling interest.

(g) If a trainee signs an appraisal report or provides significant professional assistance in the appraisal process and thus is noted in the report as having provided such assistance, all licensed and certified appraisers signing that appraisal report must have notified the Appraisal Board before the appraisal is signed that they are supervisors for the trainee.

History Note: Authority G.S. 93E-1.6.1; 93E-1-10; Eff. July 1, 1994; Amended Eff. July 1, 2010; September 1, 2008; January 1, 2008; March 1, 2007; March 1, 2006; July 1, 2005; August 1, 2002; April 1, 1999.

**21 NCAC 57B .0101 REGISTERED TRAINEE
COURSE REQUIREMENTS**

(a) Each applicant for registration as a trainee shall complete a minimum of 90 hours of precertification education, consisting of the following:

- (1) A minimum of 30 hours in Basic Appraisal Principles;
- (2) A minimum of 30 hours in Basic Appraisal Procedures;
- (3) A minimum of 15 hours in Residential Market Analysis and Highest and Best Use; and
- (4) A minimum of 15 hours in The Uniform Standards of Professional Appraisal Practice (USPAP).

(b) Credit for these courses must be earned from a Board-approved course sponsor or school and all course content shall be approved by the Appraisal Board in accordance with the rules in this Subchapter. These courses must be completed within the five-year period immediately preceding the date when application for registration is made to the Board.

(c) Basic Appraisal Principles shall be a prerequisite to taking Basic Appraisal Procedures, and Basic Appraisal Procedures

shall be a prerequisite to taking Residential Market Analysis and Highest and Best Use. The 15 hour USPAP course may be taken any time after the successful completion of Basic Appraisal Procedures.

(d) These four courses must have been obtained in a classroom setting. No credit will be given for these courses taken by any other method, such as correspondence school courses or on-line courses.

History Note: Authority G.S. 93E-1-6(a); 93E-1-8(a); 93E-1-10; Eff. July 1, 1994; Amended Eff. July 1, 2010; September 1, 2008; January 1, 2008; July 1, 2005; July 1, 2003; August 1, 2002.

**21 NCAC 57B .0102 CERTIFIED RESIDENTIAL
REAL ESTATE APPRAISER COURSE REQUIREMENTS**

(a) Each applicant for certification as a certified residential real estate appraiser shall complete a minimum of 200 hours of precertification education, consisting of the following:

- (1) A minimum of 30 hours in Basic Appraisal Principles;
- (2) A minimum of 30 hours in Basic Appraisal Procedures;
- (3) A minimum of 15 hours in Residential Market Analysis and Highest and Best Use;
- (4) A minimum of 15 hours in Residential Appraiser Site Valuation and Cost Approach;
- (5) A minimum of 30 Hours in Residential Sales Comparison and Income Approaches;
- (6) A minimum of 15 hours in Residential Report Writing and Case Studies;
- (7) A minimum of 15 hours in The Uniform Standards of Professional Appraisal Practice (USPAP);
- (8) A minimum of 15 hours in Statistics, Modeling and Finance;
- (9) A minimum of 15 hours in Advanced Residential Applications and Case Studies; and
- (10) A minimum of 20 hours of appraisal subject matter electives.

Credit for these courses must be earned from a Board-approved course sponsor or school.

(b) An applicant who is currently registered with the Board as a trainee shall satisfy the educational requirements to become a certified residential real estate appraiser by completing the following education:

- (1) A minimum of 15 hours in Residential Appraiser Site Valuation and Cost Approach;
- (2) A minimum of 30 Hours in Residential Sales Comparison and Income Approaches;
- (3) A minimum of 15 hours in Residential Report Writing and Case Studies;
- (4) A minimum of 15 hours in Statistics, Modeling and Finance;
- (5) A minimum of 15 hours in Advanced Residential Applications and Case Studies; and

- (6) A minimum of 20 hours of appraisal subject matter electives.

(c) An applicant who is currently a licensed residential appraiser shall satisfy the educational requirements to become a certified residential real estate appraiser by completing the following education:

- (1) A minimum of 15 hours in Statistics, Modeling and Finance;
- (2) A minimum of 15 hours in Advanced Residential Applications and Case Studies; and
- (3) A minimum of 20 hours of appraisal subject matter electives.

(d) An applicant who is not currently registered by the Board as a trainee or who is not currently licensed by the Board as a licensed residential real estate appraiser must have completed all required courses within the five-year period immediately preceding the date application is made to the Board.

(e) An applicant who is currently registered by the Board as a trainee or who is currently licensed by the Board as a licensed residential real estate appraiser must have completed all courses required beyond those required for his current registration, licensure or certification within the five-year period immediately preceding the date application is made to the Board.

(f) The Basic Appraisal Principles, Basic Appraisal Procedures, Residential Market Analysis, USPAP and Residential Sales Comparison and Income Approach classes must have been obtained in a classroom setting. All other courses in this section may be taken on-line via the Internet.

History Note: Authority G.S. 93E-1-6(b); 93E-1-8(a); 93E-1-10;

Eff. July 1, 1994;

Amended Eff. September 1, 2008; January 1, 2008; March 1, 2007; July 1, 2003; August 1, 2002;

Amended Eff. Pending Legislative Review.

21 NCAC 57B .0103 CERTIFIED GENERAL REAL ESTATE APPRAISER COURSE REQUIREMENTS

(a) An applicant for certification as a certified general real estate appraiser shall complete the following precertification courses;

- (1) A minimum of 30 hours in Basic Appraisal Principles;
- (2) A minimum of 30 hours in Basic Appraisal Procedures;
- (3) A minimum of 30 hours in General Appraiser Market Analysis and Highest and Best Use;
- (4) A minimum of 15 hours in Statistics, Modeling and Finance;
- (5) A minimum of 30 hours in General Appraiser Sales Comparison Approach;
- (6) A minimum of 30 hours in General Appraiser Site Valuation and Cost Approach;
- (7) A minimum of 60 hours in General Appraiser Income Approach;
- (8) A minimum of 30 hours in General Appraiser Report Writing and Case Studies;
- (9) A minimum of 30 hours of appraisal subject matter electives; and

- (10) A minimum of 15 hours in The Uniform Standards of Professional Appraisal Practice (USPAP).

Credit for all courses must be earned from a Board-approved course sponsor or school, and all courses shall comply with the course content standards prescribed in Rule .0302 of this Subchapter.

(b) An applicant who is currently registered with the Board as a trainee shall satisfy the educational requirements to become a general real estate appraiser by completing the following education:

- (1) A minimum of 30 hours in General Appraiser Market Analysis and Highest and Best Use;
- (2) A minimum of 15 hours in Statistics, Modeling and Finance;
- (3) A minimum of 30 hours in General Appraiser Sales Comparison Approach;
- (4) A minimum of 30 hours in General Appraiser Site Valuation and Cost Approach;
- (5) A minimum of 60 hours in General Appraiser Income Approach; and
- (6) A minimum of 30 hours in General Appraiser Report Writing and Case Studies; and
- (7) A minimum of 30 hours of appraisal subject matter electives.

(c) An applicant who is currently licensed with the Board as a licensed residential real estate appraiser shall satisfy the educational requirements to become a general real estate appraiser by completing the following education:

- (1) A minimum of 15 hours in General Appraiser Market Analysis and Highest and Best Use;
- (2) A minimum of 15 hours in Statistics, Modeling and Finance;
- (3) A minimum of 15 hours in General Appraiser Sales Comparison Approach;
- (4) A minimum of 15 hours in General Appraiser Site Valuation and Cost Approach;
- (5) A minimum of 45 hours in General Appraiser Income Approach;
- (6) A minimum of 15 hours in General Appraiser Report Writing and Case Studies; and
- (7) A minimum of 30 hours of appraisal subject matter electives.

(d) An applicant who is currently certified with the Board as a certified residential real estate appraiser shall satisfy the educational requirements to become a general real estate appraiser by completing the following education:

- (1) A minimum of 15 hours in General Appraiser Market Analysis and Highest and Best Use;
- (2) A minimum of 15 hours in General Appraiser Sales Comparison Approach;
- (3) A minimum of 15 hours in General Appraiser Site Valuation and Cost Approach;
- (4) A minimum of 45 hours in General Appraiser Income Approach; and
- (5) A minimum of 10 hours in General Appraiser Report Writing and Case Studies.

(e) An applicant who is not currently registered by the Board as a trainee or who is not currently licensed or certified by the

Board as a licensed residential or certified residential real estate appraiser must have completed all the required courses within the five-year period immediately preceding the date application is made to the Board.

(f) An applicant who is currently registered by the Board as a trainee or who is currently licensed or certified by the Board as a licensed residential or certified residential real estate appraiser must have completed all courses required beyond those required for his current registration, licensure or certification within the five-year period immediately preceding the date application is made to the Board.

(g) The Basic Appraisal Principles, Basic Appraisal Procedures, USPAP, and General Appraiser Income Approach classes must have been obtained in a classroom setting. All other courses in this section may be taken on-line via the Internet.

History Note: Authority G.S. 93E-1-6(c); 93E-1-8(a); 93E-1-10; Eff. July 1, 1994; Amended Eff. September 1, 2008; January 1, 2008; March 1, 2007; July 1, 2003; August 1, 2002; Amended Eff. Pending Legislative Review.

21 NCAC 57B .0303 COURSE COMPLETION STANDARDS

(a) Academic standards for course completion shall reasonably assure that students receiving a passing grade possess knowledge and understanding of the subject areas prescribed for the course. A student's grade shall be based solely on his or her performance on examinations and on graded homework and class work assignments.

(b) Course completion requirements shall include a comprehensive final course examination which covers all prescribed subject areas and which accounts for at least 50 percent of a student's grade for the course. Take-home or open-book final course examinations are prohibited. Schools and course sponsors may, within 90 days of the course ending date, allow a student one opportunity to make up any missed course examination or to retake any failed course examination without repeating the course, however any make up examination shall be comparable to the initial examination with regard to the number of questions and overall difficulty, and at least 75 percent of the questions in the make up examination shall be different from those used in the initial examination.

(c) The minimum attendance required for satisfactory course completion is 90 percent of all scheduled classroom hours for the course.

(d) The instructor may offer additional hours of instruction so that students can make up lost hours of instruction.

(e) Students who are taking a precertification course, other than the 15 hour National USPAP course, for continuing education credit may sit for the final course examination, but they are not required to take and pass the examination in order to receive continuing education credit. Students who pass the examination and who comply with the provisions of this Rule shall be given a course completion certificate. Students who do not take and pass the examination but who otherwise comply with the provisions of this Rule shall be given a certificate of attendance. Students who are taking the course as a result of a conditional

dismissal, consent order or order of the Board after a hearing must take and pass the examination.

History Note: Authority G.S. 93E-1-8(a); 93E-1-10; Eff. July 1, 1994; Amended Eff. July 1, 2010; September 1, 2008; July 1, 2005; August 1, 2002.

21 NCAC 57B .0304 COURSE SCHEDULING

(a) All courses must have fixed beginning and ending dates, and schools and course sponsors shall not utilize a scheduling system that allows students to enroll late for a course and then complete their course work in a subsequently scheduled course. Late enrollment is permitted only if the enrolling student can satisfy the minimum attendance requirement set forth in Paragraphs (c) and (d) of Rule .0303 of this Section.

(b) Courses may be scheduled in a manner that provides for class meetings of up to eight classroom hours in any given day; however credit for courses shall be limited to 30 classroom hours per seven-day period.

(c) A classroom hour consists of 50 minutes of classroom instruction and ten minutes of break time. For any class meeting that exceeds 50 minutes in duration, breaks at the rate of 10 minutes per hour must be scheduled and taken at reasonable times.

(d) Instruction must be given for the minimum hours specified in 57B .0101, .0102, and .0103. Instructors shall not accumulate unused break time to end the class early.

(e) All courses, except those taught on-line via the Internet, must have a minimum number of five students enrolled in order for the course to be held.

History Note: Authority G.S. 93E-1-8(a); 93E-1-10; Eff. July 1, 1994; Amended Eff. July 1, 2010; January 1, 2008; July 1, 2005; August 1, 2002.

21 NCAC 57B .0306 INSTRUCTOR REQUIREMENTS

(a) Except as indicated in Paragraph (b) of this Rule, all precertification courses or courses deemed equivalent by the Board shall be taught by instructors who possess the fitness for licensure required of applicants for trainee registration or real estate appraiser certification and either the minimum appraisal education and experience qualifications listed in this Rule or other qualifications that are found by the Board to be equivalent to those listed. These qualification requirements shall be met on a continuing basis. The minimum qualifications are as follows:

- (1) Residential appraiser courses: 200 classroom hours of real estate appraisal education equivalent to the residential appraiser education courses prescribed in Rules .0101 and .0102 of this Subchapter and two years' full-time experience as a certified residential or general real estate appraiser within the previous five years. At least one-half of such experience must be in residential property appraising.
- (2) General appraiser courses: 300 classroom hours of real estate appraisal education

equivalent to the general appraiser education courses prescribed in Rules .0101, .0102 and .0103 of this Subchapter and three years' full-time experience as a general real estate appraiser within the previous five years. At least one-half of such experience must be in income property appraising. Instructors must also be a certified general real estate appraiser and have been so certified for at least five years.

- (3) USPAP: certification by the Appraiser Qualifications Board of the Appraisal Foundation as an instructor for the National USPAP Course. The instructor must be a certified residential or a certified general appraiser. If a USPAP instructor fails to renew or loses his or her certification by the Appraiser Qualifications Board, the instructor must immediately stop teaching and notify the Appraisal Board of the loss of certification.

- (4) Statistics, modeling and finance: must have previously completed this class, or must have completed three semester hours of statistics in an accredited college or university.

(b) Guest lecturers who do not possess the qualifications stated in Paragraph (a) of this Rule may be utilized to teach collectively up to one-fourth of any course, provided that each guest lecturer possesses education and experience directly related to the particular subject area the lecturer is teaching.

(c) Instructors shall conduct themselves in a professional manner when performing their instructional duties and shall conduct their classes in a manner that demonstrates knowledge of the subject matter being taught and mastery of the following basic teaching skills:

- (1) The ability to communicate effectively through speech, including the ability to speak clearly at an appropriate rate of speed and with appropriate grammar and vocabulary;
- (2) The ability to present instruction in an accurate, logical, orderly, and understandable manner, to utilize illustrative examples as appropriate, and to respond appropriately to questions from students;
- (3) The ability to effectively utilize varied instructive techniques other than straight lecture, such as class discussion or other techniques;
- (4) The ability to effectively utilize instructional aids to enhance learning;
- (5) The ability to maintain an effective learning environment and control of a class; and
- (6) The ability to interact with adult students in a manner that encourages students to learn, that demonstrates an understanding of students' backgrounds, that avoids offending the sensibilities of students, and that avoids personal criticism of any other person, agency or organization.

(d) Upon request of the Board, an instructor or proposed instructor must submit to the Board a videotape or DVD in a manner and format which depicts the instructor teaching portions of a prelicensing course specified by the Board and which demonstrates that the instructor possesses the basic teaching skills described in Paragraph (c) of this Rule.

(e) The inquiry into fitness shall include consideration of whether the instructor has ever had any disciplinary action taken on his or her appraisal license or certificate or any other professional license or certificate in North Carolina or any other state, or whether the instructor has ever been convicted of or pleaded guilty to any criminal act. This inquiry may include consideration of whether disciplinary action or criminal charges are pending.

(f) Instructors shall not have received any disciplinary action regarding his or her appraisal license or certificate from the State of North Carolina or any other state within the previous two years. For the purposes of this Section, disciplinary action means a reprimand, suspension (whether active or inactive) or a revocation.

(g) Proposed precertification instructors who do not meet the minimum appraisal education and experience qualifications listed in Paragraph (a) of this Rule, and who seek to have their qualifications determined by the Board to be equivalent to the qualifications listed in Paragraph (a) of this Rule, must supply the Board with copies of sample appraisal reports or other evidence of experience.

(h) Persons desiring to become instructors for precertification courses must file an application for approval with the Board. There is no fee for application for instructor approval. Once an instructor has been approved to teach a specific precertification course, that person may teach the course at any school or for any course sponsor approved by the Appraisal Board to offer precertification courses.

(i) Current Appraisal Board members shall not be eligible to teach precertification courses during their term of office on the Board

History Note: Authority G.S. 93E-1-8(a); 93E-1-10; Eff. July 1, 1994;

Amended Eff. September 1, 2008; March 1, 2007; March 1, 2006; July 1, 2005; July 1, 2003; August 1, 2002;

Amended Eff. Pending Legislative Review.

21 NCAC 57B .0307 CRITERIA FOR COURSE RECOGNITION

(a) Schools and course sponsors seeking to offer appraiser precertification courses shall make written application to the Board and pay applicable fees as required by G.S. 93E-1-8(b).

(b) Appraisal subject matter electives offered for precertification credit shall meet all other requirements of this Chapter. The content of these electives shall be directly related to the appraisal of real property to be approved for precertification credit. Appraisal subject matter elective courses shall contain a minimum of 15 hours.

(c) Various combinations of courses may be recognized as equivalent to the appraiser precertification courses specified in 57B .0101, .0102 and .0103.

(d) The 15 hour USPAP course shall be the 15-hour National USPAP Course approved by the Appraiser Qualifications Board of the Appraisal Foundation, or its equivalent.

(e) The application shall state the name of the instructor for the course. All instructors shall be approved by the Board pursuant to 57B .0306(h). After the course is approved, if a school or course sponsor wishes to change instructors, the school shall notify the Board of the name of the new instructor at least seven calendar days before the proposed change would take effect. If the proposed instructor is not currently approved in accordance with 57B .0306(h), the instructor shall be approved by the Board before the school or course sponsor may change instructors.

(f) Course sponsors may offer classes on-line via the Internet. The Board must be provided access to the course via the internet at a date and time satisfactory to the Board and shall not be charged any fee for such access. To be approved for credit, an on-line precertification education course must meet all of the conditions imposed by the rules in this Subchapter in advance, except where otherwise noted. The course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and other participants. The sponsor of an on-line course must have a reliable method for recording and verifying attendance. A participant may periodically log on and off of an-line course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. The course design and delivery mechanism for an on-line course offered on the Internet must have received approval from the International Distance Education Certification Center (IDECC). A course completion certificate must be forwarded to the student as stated in Rule .0303(e) of this Section.

History Note: Authority G.S. 93E-1-8(a); 93E-1-10; Eff. July 1, 1994; Amended Eff. July 1, 2010; September 1, 2008; January 1, 2008; August 1, 2002.

21 NCAC 57B .0603 CRITERIA FOR COURSE APPROVAL

The following requirements must be satisfied in order for course sponsors to obtain approval of a course for appraiser continuing education credit:

- (1) The subject matter of the course must comply with the requirements of Rule .0204 of Subchapter 57A and the information to be provided in the course must be both accurate and current.
- (2) The course must involve a minimum of three and one-half classroom hours of instruction on acceptable subject matter. A classroom hour consists of 50 minutes of classroom instruction and 10 minutes of break time. Instruction must be given for the full number of hours for which credit is given. Instructors may not accumulate unused break time to end the class early.
- (3) The course instructor(s) must:
 - (a) possess the fitness for licensure required of applicants for trainee

registration, real estate appraiser licensure or certification; and

(b) either:

- (i) two years' full-time experience that is directly related to the subject matter to be taught;
- (ii) a baccalaureate or higher degree in a field that is directly related to the subject matter to be taught;
- (iii) two years' full-time experience teaching the subject matter to be taught;
- (iv) an equivalent combination of such education and experience; or
- (v) be approved by the Board pursuant to 57B. 0606(11).

(4) If two or more instructors shall be utilized to teach a course during the approval period and the course shall be taught in states other than North Carolina, it is sufficient for the course sponsor to show that it has minimum instructor requirements comparable to these requirements. The inquiry into fitness shall include consideration of whether the instructor has had any disciplinary action taken on his or her appraisal license or any other professional license in North Carolina or any other state, or whether the instructor has been convicted of or pleaded guilty to any criminal act.

(5) The course must be one involving a qualified instructor who, except as noted in Item (6) of this Rule, shall be physically present in the classroom at all times and who shall personally provide the instruction for the course. The course instructor may utilize videotape instruction, remote television instruction or similar types of instruction by other persons to enhance or supplement his personal instruction; however, such other persons shall not be considered to be the course instructor and the course instructor must be physically present when such indirect instruction by other persons is being utilized. No portion of the course may consist of correspondence instruction. The instructor must comply with Rule .0306(c) of this Subchapter. Instructors for the National USPAP courses must be certified by the Appraiser Qualifications Board of the Appraisal Foundation. Current Appraisal Board members shall not teach continuing education courses during their term of office on the Board.

(6) A trainee or appraiser may receive up to 14 hours of credit every two years in the period ending on June 1 of each odd numbered year

for participation in a course offered on-line via the Internet. A sponsor seeking approval of a computer-based education course must provide the Board access to the course via the internet at a date and time satisfactory to the Board and the Board shall not be charged any fee for such access. To be approved for credit, an on-line course must meet all of the conditions imposed by the Rules in this Subchapter in advance, except where otherwise noted. The course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and other participants. The sponsor of an on-line course must have a reliable method for recording and verifying attendance. A participant may periodically log on and off of an on-line continuing education course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. The course design and delivery mechanism for an on-line course offered on the Internet must have received approval from the International Distance Education Certification Center (IDECC). A course completion certificate must be forwarded to the student as stated in Rule .0607 of this Section, and a course roster must be sent to the Appraisal Board in accordance with Rule .0608 of this Section.

- (7) The course must be an educational program intended to improve the knowledge, skill and competence of trainees, and licensed and certified real estate appraisers. Activities not eligible for approval as a continuing education course include in-house training programs of a firm, organization or agency, trade conferences or similar activities.
- (8) The course sponsor must certify that the course shall be conducted in accordance with the operational requirements stated in Rule .0606 of this Section and that the course sponsor will comply with all other applicable rules contained in this Section.
- (9) The course title may not include the words "Uniform Standards of Professional Appraisal Practice" or "USPAP" unless the course is either the 15 hour National USPAP course or the 7 hour National USPAP update course. If the course is the 7 hour National USPAP course, the course title must state which edition of USPAP will be taught in that specific course.
- (10) Each course must utilize a textbook or course materials that have been approved by the Board.
- (11) If the course content is related to technology, such as software, hardware, electronic devices, manuals, or databases, the course shall be

developed specifically for utilization in the real estate appraisal business in order to be approved for continuing education credit. Such courses shall not require the student to purchase specific products, and shall not use the course to sell or advertise particular products or software.

History Note: Authority G.S. 93E-1-8(c); 93E-1-10; Eff. July 1, 1994; Amended Eff. January 1, 2008; March 1, 2007; March 1, 2006; July 1, 2005; July 1, 2003; August 1, 2002; Amended Eff. Pending Legislative Review.

21 NCAC 57B .0606 COURSE OPERATIONAL REQUIREMENTS

Course sponsors must at all times assure compliance with the criteria for course approval stated in Rule .0603 of this Section and must also comply with the following requirements relating to scheduling, advertising and conducting approved appraisal continuing education courses:

- (1) Courses must be scheduled and conducted in a manner that limits class sessions to a maximum of eight classroom hours in any given day and that includes appropriate breaks for each class session. A classroom hour consists of 50 minutes of classroom instruction and ten minutes of break time. For any class meeting that exceeds 50 minutes in duration, breaks at the rate of ten minutes per hour must be scheduled and taken at reasonable times.
- (2) Course sponsors must not utilize advertising of any type that is false or misleading in any respect. If the number of continuing education credit hours awarded by the Board for a course is less than the number of scheduled classroom hours for the course, any course advertisement or promotional materials which indicate that the course is approved for appraiser continuing education credit in North Carolina must specify the number of continuing education credit hours awarded by the Board for the course.
- (3) Course sponsors must, upon request, provide any prospective student a description of the course content sufficient to give the prospective student a general understanding of the instruction to be provided in the course.
- (4) Courses must be conducted in a facility that provides an appropriate learning environment. At a minimum, the classroom must be of sufficient size to accommodate comfortably all enrolled students, must contain a student desk or sufficient worktable space for each student, must have adequate light, heat, cooling and ventilation, and must be free of distractions that would disrupt class sessions. Sponsors are required to comply with all applicable local, state and federal laws and regulations

- regarding safety, health and sanitation. Sponsors shall furnish the Board with inspection reports from appropriate local building, health and fire inspectors upon the request of the Board. Sponsors must supply separate restroom facilities for males and females. Classes may not be held in a personal residence under any circumstances.
- (5) The course sponsor must require students to attend at least 90 percent of the scheduled classroom hours in order to satisfactorily complete the course, even if the number of continuing education credit hours awarded by the Board for the course is less than the number of scheduled classroom hours. Attendance must be monitored during all class sessions to assure compliance with the attendance requirement. Instruction must be given for the number of hours for which credit is given. Instructors may not accumulate unused break time to end the class early.
 - (6) Instructors must require reasonable student attentiveness during class sessions. Students must not be permitted to engage in activities that are not related to the instruction being provided.
 - (7) Course sponsors for which an application fee is required by Rules .0602(b) and .0611(b) of this Section must fairly administer course cancellation and fee refund policies. In the event a scheduled course is canceled, reasonable efforts must be made to notify preregistered students of the cancellation and all prepaid fees received from such preregistered students must be refunded within 30 days of the date of cancellation or, with the student's permission, applied toward the fees for another course.
 - (8) Upon request of the Board, the course sponsor must submit to the Board a videotape in a manner and format which depicts the instructor teaching portions of any continuing education course specified by the Board and which demonstrates that the instructor possesses the basic teaching skills described in Rule .0306(c) of this Section.
 - (9) Course sponsors shall provide the Board with the dates and locations of all classes the sponsor is or will be offering in the State of North Carolina at least 30 calendar days before such class is offered, unless circumstances beyond the control of the course sponsor require that the course be rescheduled. If the dates or location of the classes change after such information is provided to the Board, the course sponsor must notify the Board of such changes.
 - (10) Course sponsors must participate in the Board's course and instructor evaluation program. Course sponsors must require that students complete a course evaluation form upon completion of the course, and shall tally the results of the evaluations onto one form. Course sponsors must also send the completed course evaluation forms and the tally to the Board together with the roster required pursuant to 21 NCAC 57B .0608.
 - (11) If an instructor has any disciplinary action taken on his or her appraisal license or any other professional license in North Carolina or any other state, or if the instructor has been convicted of or pleaded guilty to any criminal act, the school or course sponsor must report that fact to the Board within 15 business days.
 - (12) All courses, except those taught on-line via the Internet, must have a minimum number of five students enrolled in the course.

History Note: Authority G.S. 93E-1-8(c); 93E-1-10; Eff. July 1, 1994; Amended Eff. July 1, 2010; January 1, 2008; March 1, 2007; July 1, 2005; August 1, 2002.

21 NCAC 57B .0608 SPONSOR REPORTING OF CONTINUING EDUCATION CREDIT

Course sponsors must, within 15 days of course completion but no later than June 15 of each year, submit to the Board a roster of all North Carolina registered trainees, licensed and certified appraisers who satisfactorily completed the course.

History Note: Authority G.S. 93E-1-8(c); 93E-1-1; Eff. July 1, 1994; Amended Eff. July 1, 2010; January 1, 2008; July 1, 2005; August 1, 2002.

21 NCAC 57B .0611 RENEWAL OF APPROVAL AND FEES

(a) Board approval of appraisal continuing education courses expires on the next December 31 following the date of issuance. In order to assure continuous approval, applications for renewal of Board approval, accompanied by the prescribed renewal fee, must be filed with the Board annually on or before December 1. All applications for renewal of course approval received on or before December 1, which are incomplete as of that date, as well as all applications for renewal of course approval submitted after December 1, shall be treated as original applications for approval of continuing education courses. Schools and course sponsors must send a copy of all course materials every third renewal of a continuing education course.

(b) The annual fee for renewal of Board approval shall be that specified in G.S. 93E-1-8(d) for each course for which renewal of approval is requested, provided that no fee is required for course sponsors that are exempted from original application fees by Rule .0602(b) of this Section. The fee is non-refundable.

History Note: Authority G.S. 93E-1-8(c),(d); 93E-1-10; Eff. July 1, 1994;

Amended Eff. July 1, 2010; January 1, 2008; March 1, 2007; August 1, 2002.

TITLE 23 – DEPARTMENT OF COMMUNITY COLLEGES

23 NCAC 02C .0305 EDUCATION SERVICES FOR MINORS

(a) The major purpose of community colleges is to serve students who have graduated from high school or are beyond the compulsory age limit of the public school and have left public school. However, a minor may seek admission to a community college subject to the conditions in this Section.

(b) Drop-out. A minor, 16 years old or older, who is not currently enrolled in a public or private educational agency may be admitted to a Basic Skills or Continuing Education program at a college if a North Carolina local public or private educational agency, where the minor now resides, determines that admission to a Basic Skills or Continuing Education program is the best educational option for the student and the admission of the student to a Basic Skills or Continuing Education program is approved by the college under one of the following conditions:

- (1) If the minor, 16 years old or older, has officially withdrawn from a public or private educational agency within the last six months, a college may admit the minor to a Basic Skills or Continuing Education program if the minor obtains a signed official withdrawal form from the local public or private educational agency and a notarized petition of the minor's parent, legal guardian, or other person or agency having legal custody and control. The petition shall certify the minor's residence, date of birth, date of leaving school, name of last school attended, and the petitioner's legal relationship to the minor.
- (2) If the minor, 16 years old or older, has officially withdrawn from a public or private educational agency for at least six months, a college may admit the minor to a Basic Skills or Continuing Education program without the release form from the public or private educational agency. However, the minor must obtain a notarized petition of the minor's parent, legal guardian, or other person or agency having legal custody and control. The petition shall certify the minor's residence, date of birth, date of leaving school, name of last school attended, and the petitioner's legal relationship to the minor.
- (3) If the minor is an emancipated minor, the requirement for the release form from the public or private educational agency and the requirement for the notarized petition are waived. The minor must provide legal documentation of emancipation. Admission

requirements for an emancipated minor shall be the same as for an applicant 18 years old or older.

(c) Concurrent Enrollment. Concurrent enrollment allows a high school student to be enrolled in high school and in a local institution of higher education at the same time. A high school student, 16 years old or older, based upon policies approved by the local public or private board of education and board of trustees, may be admitted to any curriculum course one hundred level and above or any continuing education course, except adult basic skills, concurrently under the following conditions:

- (1) Upon recommendation of the chief administrative school officer and approval of the president of the college;
- (2) Upon approval of the student's program by the chief administrative school officer and the president of the college; and
- (3) Upon certification by the chief administrative school officer that the student is taking the equivalent of one-half of a full-time schedule and is making progress toward graduation.

(d) High school students, taking courses pursuant to Paragraph (c) of this Rule, shall not displace adults but may be admitted during any term on a space-available basis to any curriculum course one hundred level and above or any continuing education course, except adult basic skills. Once admitted, they shall be treated the same as all other students.

(e) Huskins. Huskins programs enrich high school students by providing college level academic, technical, and advanced vocational courses to high school students that would not otherwise be available to them. Local boards of trustees and local school boards may establish cooperative programs in areas they serve in order to provide college courses to high school students. College credits shall be awarded to those high school students upon successful completion of the courses. Cooperative programs shall be approved, prior to implementation, by the State Board or its designee.

(f) Learn and Earn Online Program:

- (1) Definition of Credits. For the purposes of this section, credits mean curriculum courses 100 level or above. For the purposes of this section, credits do not include continuing education courses, cooperative education courses (COE), selected topics (SEL), or seminar topics (SEM).
- (2) Definition of Disabilities. For the purposes of this Section, disabilities shall mean "persons with disabilities" as defined in G.S. 168A-3(7a).
- (3) Student Eligibility. A student shall be permitted to enroll in any online courses through North Carolina community colleges for college credit, regardless of the college service areas in which the student resides under the following conditions:
 - (A) The student must be enrolled in a North Carolina school or have completed all high school graduation requirements in a North Carolina

- school throughout the duration of the online course;
 - (B) The student must be enrolled in the 9th, 10th, 11th, or 12th grades;
 - (C) The student's enrollment in an online course for college credit is subject to space availability;
 - (D) The student must meet the prerequisites, co-requisites and course admission requirements as published in the college's catalog at the time the student seeks to enroll in the online course;
 - (E) A student enrolled in grades 9th, 10th, 11th, or 12th is participating in the Learn and Earn Online program by virtue of enrolling in a Learn and Earn Online course; and
 - (F) High school students attending a nonpublic school may enroll in any Learn and Earn Online course with space available that has been offered to but not filled by any eligible public school student.
- (4) Course Eligibility.
 - (A) Only online courses in the NCCCS Combined Course Library numbered 100 and above are eligible for Learn and Earn Online credits, excluding cooperative education courses (COE), selected topics (SEL), and seminar topics (SEM).
 - (B) Only online courses that generate budget FTE are eligible for Learn and Earn Online credits.
 - (C) To be eligible for course credit under the Learn and Earn Online Program, courses must be the same as those delivered to other adult college students.
- (5) Costs.
 - (A) A student enrolled in Learn and Earn Online shall be exempt from tuition and calculated as budget FTE regardless of the term during which the instruction is provided.
 - (B) North Carolina Community Colleges may seek reimbursement from the Department of Public Instruction for technology, course fees, and textbooks required for course participation as set out in S.L. 2009-451, s. 8.6(a).
 - (C) A student participating in the Learn and Earn Online program is exempt from any additional college fees.
- (6) Coding. Enrollment in a Learn and Earn Online course shall be coded as T90920.
- (7) Program Completion. If students meet the curriculum program requirements effective at the time of enrollment, they are awarded a certificate, diploma or degree. Students shall meet the curriculum program requirements that are applicable to the college from which they are seeking to obtain a certificate, diploma, or degree.
- (8) Transfer of Learn and Earn Online courses. Learn and Earn Online courses listed in the North Carolina Comprehensive Articulation Agreement or listed in the North Carolina Independent Comprehensive Articulation Agreement shall be treated the same as all other courses listed in either Agreement.
- (9) Transfer degree. Learn and Earn Online students who obtain a degree listed in the North Carolina Comprehensive Articulation Agreement or listed in the North Carolina Independent Comprehensive Articulation Agreement shall be treated the same as all other students who have obtained a degree listed in either Agreement.
- (10) Persons with Disabilities. Learn and Earn Online students must abide by the college's disability eligibility standards, as set forth by the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973, Chapter 1, Part 104, Subchapter E (34 C.F.R. 104.41 through 104.47).
- (g) Intellectually Gifted and Mature Students. Students less than 16 years old who are mature enough to function well in an adult education setting and are intellectually gifted as evidenced by a score in the range from the 92nd percentile to the 99th percentile on an aptitude and an achievement test selected from a list of tests approved by the System Office may be admitted to community colleges. Tests included on the System Office approved list shall be selected from the Mental Measurements Year Book published by the Buros Institute of Mental Measurements. The student shall be ranked by an official of the student's school in the top 10 percent on the following behavioral characteristics: mature, observant, inquisitive, persistent, innovative, analytical, adaptable, leadership, desire to achieve, self-confidence and communications skills. Students less than 16 years old shall not displace adults but may be admitted any term on a space-available basis to any curriculum course one hundred level and above. Students admitted to community colleges under this Paragraph shall pay the same tuition and fees as other curriculum students.
- (h) Except as authorized by G.S. 115D-20(4), colleges shall not start classes, offer summer school courses, or offer regular high school courses for high school students.
- (i) A college may make available to persons of any age non-credit, non-remedial, enrichment courses during the summer reporting period. These courses shall be self-supporting and shall not earn credit toward a diploma, certificate, or degree at the college or high school.
- (j) At the request of the director of a youth development center having custody of juveniles committed to the Department of

Juvenile Justice and Delinquency Prevention, a college may make available to these juveniles any course offered by that college if they meet the course admission requirements. The director's request shall include the director's approval for each juvenile to enroll in the course.

History Note: Authority G.S. 115D-1; 115D-5; 115D-20; S.L. 1995, c. 625; S.L. 2009-451, s. 7.10(j); Eff. January 1, 1987; Amended Eff. September 1, 1993; Temporary Amendment Eff. June 1, 1997; Amended Eff. July 1, 1998; Temporary Amendment Eff. August 22, 2001; Amended Eff. April 1, 2010, April 1, 2003.

23 NCAC 02D .0325 LIMITATIONS IN REPORTING STUDENT MEMBERSHIP HOURS

(a) Student hours shall not be reported for budget/FTE which result from:

- (1) Conferences or visits.
- (2) Seminars or Meetings.
- (3) Programs of a service nature rather than instructional classes.
- (4) Enrollment of high school students not in compliance with 23 NCAC 02C .0301 and 02C .0305.
- (5) Unsupervised classes.
- (6) Proficiency or challenge exams except that the actual time required to take the exam may be counted in membership; students shall be registered in the class consistent with Paragraph (a) of Rules .0202 and .0203 of this Subchapter.
- (7) Homework assignments.
- (8) Inter-institutional or intramural sports activities including those of prison inmates.
- (9) Effective July 1, 1993, no budget/FTE shall be generated by occupational extension students after their first repetition of an occupational extension course. Students who take an occupational extension course more than twice within a five-year period shall pay their cost for the course based on the amount of funds generated by a student membership hour for occupational extension multiplied by the number of actual hours the class is to be taught. These students shall not generate budget/FTE. The funds collected from these students shall be used by the colleges to offer additional educational courses. This Subparagraph does not apply to fire, rescue, or law enforcement training courses taken by fire, rescue, or law enforcement personnel.

(b) A statement on occupational extension course repetitions consistent with the requirements of this rule shall be included in college advertisements, schedules and catalogs. Students shall be notified during registration that they will be charged the full cost of courses which they have taken twice within a five-year period and in which they wish to enroll. Students shall be

primarily responsible for monitoring course repetitions; however, the colleges shall review records and charge students full cost for courses taken more than twice.

(c) Senior citizens who are legal residents of North Carolina and who wish to enroll in an occupational extension course, shall not be required to pay for taking the course twice. Senior citizens who take an occupational extension course more than twice within a five-year period shall pay their cost for the course based on the amount of funds generated by a student membership hour for occupational extension multiplied by the number of actual hours the class is to be taught. These senior citizens shall not generate budget/FTE. The funds collected from these senior citizens shall be used by the colleges to offer additional educational courses.

(d) Students may repeat occupational extension courses more than once if the repetitions are required for certification, licensure, or recertification. The colleges shall submit annual reports to the State Board of Community Colleges naming the students and the certification, licensure or recertification requirements that necessitated the repetition.

(e) Self-supporting classes shall not be reported for regular budget purposes (those classes supported by student fees or a class in which instruction is provided gratis); all recreational extension classes fall in this category.

(f) Occupational extension instruction shall not be offered in sheltered workshops and adult developmental activity centers (ADAP) except sheltered workshops and ADAP centers may contract with the community college to provide occupational extension courses on a self-supporting basis.

(g) Educational programs offered in a correctional department setting shall report full-time equivalent (FTE) student hours on the basis of contact hours.

History Note: Authority G.S. 115D-5; Eff. September 1, 1988; Temporary Amendment Eff. October 15, 1992, for a period of 180 days to expire on April 15, 1993; Amended Eff. September 1, 1993; Temporary Amendment Eff. November 1, 1993, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. April 1, 2010; June 1, 2008; April 1, 1997; June 1, 1994.

23 NCAC 02D .0329 MAINTENANCE OF PLANT FLEXIBILITY

(a) Notwithstanding any other provision of law, a community college that received State funds for maintenance of plant pursuant to G.S. 115D-31.2 for the 2008-2009 fiscal year may use non-instructional State funds allocated to it through the institutional support allotment for maintenance of plant for the 2009-2010 and 2010-2011 fiscal years.

(b) The amount of these funds used for the 2009-2010 fiscal year for maintenance of plant shall not exceed the total amount of maintenance of plant funds received for the 2008-2009 fiscal year. The amount of these funds used for the 2010-2011 fiscal year for maintenance of plant shall not exceed 50 percent of the amount of maintenance of plant funds received for the 2008-

2009 fiscal year. This Rule is effective for the 2009-2011 fiscal biennium.

History Note: Authority G.S. 115D-5; S.L. 2009-451, s. 8.17(b);

Emergency Adoption Eff. September 30, 2009;

Temporary Adoption Eff. December 29, 2009;

Eff. April 1, 2010.

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

(a) Classes or schools conducted by employers for their own employees are exempt from the provisions of this Subchapter. Employers may contract with third party agencies to provide training for their employees. Schools or classes conducted by third party agencies for an employer to train his employees are exempt from the provisions of this Subchapter.

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

- (1) "Catastrophic loss amount" means the amount of funds required to protect prepaid student tuition in case of a large-scale event that would draw against the Student Protection Fund. The amount is one million dollars (\$1,000,000).
- (2) "Classes or schools" as stated in G.S. 115D-88(4a) means classes or schools, which are offered by the seller of the equipment or the seller's agent.
- (3) "Equipment" as stated in G.S. 115D-88 includes software.
- (4) "Five or fewer students" as stated in G.S. 115D-88(4b) means the total number of students at the time of maximum enrollment during any term.
- (5) "Fund cap amount" means the catastrophic loss amount plus a reserve amount. The fund cap amount is one million five hundred thousand dollars (\$1,500,000).
- (6) "Proprietary school" means any business school, trade school, technical school, or correspondence school which:
 - (A) offers postsecondary education or training for profit or for a tuition charge or offers classes for the purpose of teaching, for profit or for a tuition charge, any program of study or teaching one or more of the courses or subjects needed to train and educate an individual for employment; and
 - (B) has any physical presence within the State of North Carolina; and
 - (C) is privately owned and operated by an owner, partnership or corporation.
- (7) "Remote sites" means approved instructional environments in the same county that do not

have any administrative staff or administrative functions such as recruiting, accounting and record keeping taking place.

- (8) "Reserve amount" means the difference between the catastrophic loss amount and the fund cap amount. Its purpose is to reduce the possibility of the Student Protection Fund being completely depleted. The reserve amount is five hundred thousand dollars (\$500,000).

- (9) "Student Protection Fund" is a statewide fee-supported fund. The purpose of the Student Protection Fund is to compensate students enrolled in a proprietary school licensed under G.S. 115D-90 who have suffered a loss of tuition, fees, or any other instruction-related expenses paid to the school by reason of the failure of the school to offer or to complete student instruction, academic services, or other goods and services related to course enrollment. Students are eligible to be compensated under the Student Protection Fund only if the school ceases to operate for any reason, including, but not limited to the suspension, revocation, or nonrenewal of a school's license, bankruptcy, or foreclosure.

- (10) "Users" as stated in G.S. 115D-88(4a) means employees or agents of purchasers.

(c) Application for an Initial License:

- (1) Any person or persons operating a proprietary school with an enrollment of more than five persons in a school in the State of North Carolina shall obtain a license from the North Carolina State Board of Community Colleges except as exempt by G.S. 115D-88.
- (2) Any person or persons seeking to operate a proprietary school that requires licensure shall submit a preliminary application setting forth the proposed location of the school, the qualifications of the Chief Administrator of the school, a description of the facilities available, courses to be offered, and financial resources available to equip and maintain the school. Upon approval of the preliminary application, a final application may be submitted. The final application shall be verified and accompanied by the following:
 - (A) A certified check or money order for the initial license fee in the amount of two thousand five hundred dollars (\$2,500) made payable to the North Carolina State Treasurer;
 - (B) A guaranty bond or alternative to a guaranty bond as set forth in G.S. 115D-95. Except as otherwise provided herein, the bond amount for a proprietary school shall be at least equal to the maximum amount of prepaid tuition held at any time

- during the fiscal year. During the initial year of operation, the guaranty bond amount or an alternative to a guaranty bond amount shall be based on the projected maximum amount of prepaid tuition that will be held at any time during that year. In any event, the minimum surety bond shall be twenty five thousand dollars (\$25,000);
- (C) A certified check or money order for the Student Protection Fund in the amount of one thousand two hundred and fifty dollars (\$1,250) made payable to the North Carolina State Treasurer;
 - (D) A copy of the school's catalog or bulletin. The catalog shall include a statement addressing each item listed in G.S. 115D-90(b)(7);
 - (E) A financial statement showing capital investment, assets and liabilities, and the proposed operating budget which demonstrates financial stability or a financial statement and an accompanying opinion of the school's financial stability by either an accountant, using generally accepted accounting principles, or a lending institution;
 - (F) A detail of ownership; (This must show stock distribution if the school is a corporation, or partnership agreement if the school will be operated as a partnership.)
 - (G) Information on all administrative and instructor personnel who will be active in the operation of the school, either in full- or part-time capacity; (This information must be submitted on forms provided for this purpose.)
 - (H) Enrollment application or student contract form;
 - (I) School floor plan showing doors, windows, halls, and seating arrangement; also offices, rest rooms, and storage space; the size of each room and seating capacity shall be clearly marked for each classroom; lighting showing kind and intensity shall be indicated for each room; the type of heating and cooling system used for the space occupied shall be stated;
 - (J) Photostatic copies of inspection reports or letters from proper officials to show that the building is safe and sanitary and meets all local city, county, municipal, state, and federal regulations such as fire, building, and sanitation codes; and
 - (K) If the building is not owned by the school, a photostatic copy of the lease held by the school for the space occupied.
- (3) A person or persons purchasing a proprietary school already operating as a licensed school shall comply with all of the requirements for securing an initial license. A license is not transferable to a new owner. All application forms and other data shall be submitted in full. Such terms as "previously submitted" when referring to a former owner's file are not acceptable. If a proprietary school offers classes in more than one county, the school's operations in each such county constitutes a separate school requiring a separate license. Classes conducted by the school in separate locations shall be reported and approved prior to advertising and commencement of classes.
 - (4) Remote sites shall not have any administrative staff or any administrative functions such as recruiting, accounting or record keeping. Each remote site shall be subject to an initial remote site fee of one thousand dollars (\$1,000) and an annual remote site renewal fee of seven hundred and fifty dollars (\$750.00) to be paid by a certified check or money order made payable to the North Carolina State Treasurer. Each remote site shall have an initial site visit and a visit during each annual audit.
 - (5) Classes conducted at remote sites by licensed schools shall be approved prior to advertising and commencement of classes. Any course offered at a remote site shall be a part of an approved program of study for that licensed school.
 - (6) Changes in application information presented for licensure or relicensure relating to mission, programs, location or stock distribution require prior approval and licensure amendment by the State Board of Community Colleges.
 - (A) Program additions require curriculum reviews and program or course approvals prior to initiation. A certified check or money order in the amount of two hundred dollars (\$200.00) made payable to the North Carolina State Treasurer shall accompany each additional program approval request.
 - (B) Single course additions or revisions may be individually approved when schools submit a request for license amendment. Course additions or revisions requiring curriculum review, instructor evaluation, and equipment site assessment are subject

- to the curriculum review fee of two hundred dollars (\$200.00) to be paid by a certified check or money order made payable to the North Carolina State Treasurer.
- (C) School relocations require site visits and approvals prior to use. A certified check or money order in the amount of four hundred dollars (\$400.00) made payable to the North Carolina State Treasurer shall accompany each site relocation approval request.
- (D) Other site assessment visits, such as for program additions and revisions, shall require a certified check or money order made payable to the North Carolina State Treasurer in the amount of two hundred dollars (\$200.00).

History Note: Authority G.S. 115D-88; 115D-89; 115D-90; 115D-91; 115D-92; 115D-95.1; Eff. September 1, 1993; Amended Eff. July 1, 2010; August 13, 2005; December 1, 2004.

23 NCAC 03A .0102 APPLICATION FOR RENEWAL OF LICENSE

- (a) Schools shall be licensed annually, and the licensure shall extend from July 1 through June 30, inclusive.
- (b) Schools desiring the renewal of their license shall submit an application on or before April 1 of each year. The application shall be accompanied by the following:
- (1) All information required of schools applying for an initial license that has not been previously submitted;
 - (2) For a school that has been licensed for one year but less than six years, verification that the guaranty bond or alternative to the guaranty bond is in an amount equal to the greatest amount of unearned paid tuition in the school's possession at any time during the prior fiscal year. This verification shall be in the form of quarterly reports to the President of the North Carolina Community College System evaluating the amount of the guaranty bond or alternative to the guaranty bond. Quarterly evaluation reports requiring an increase of five percent or more in the amount of the bond held by the school must show an immediate increase in the bond amount at the time of the evaluation. At the time of the school's annual license renewal, the guaranty bond or alternative to the guaranty bond shall be an amount equal to the greatest amount of unearned paid tuition in the school's possession at any time during the prior fiscal year;

- (3) Copy of current catalog containing all information required of schools applying for initial license; and
 - (4) Any supplementary information necessary to bring information on the school up to date.
- (c) A certified check or money order in the amount of one thousand two hundred and fifty dollars (\$1,250) plus fifty dollars (\$50.00) per program made payable to the North Carolina State Treasurer shall be received on or before April 1.
- (d) Proprietary schools shall make payment to the Student Protection Fund in the amount set forth in G.S. 115D-95.1.
- (1) In addition to the payments required under G.S. 115D-95.1, as a condition of license renewal for the 2010-2011 fiscal year, each proprietary school shall pay into the Student Protection Fund an amount based on its total enrollment for the previous calendar year as follows:

Number of Students	Amount of Assessment
0-49	\$500.00
50-99	\$1,000
100-499	\$2,000
500-999	\$3,000
1,000-1,499	\$4,000
More than 1,500	\$5,000

- (2) "Total enrollment" means the number of students enrolled on January 1, 2009, plus new students enrolled during the calendar year plus students reentering from a period of nonattendance during the calendar year.
 - (3) The full and timely payment into the Student Protection Fund pursuant to this Chapter is a condition of licensure.
 - (4) The State Board of Community Colleges shall not refund any payment to the Student Protection Fund in the event that a school's license application is rejected or a school's license is suspended or revoked.
- (e) Proprietary schools shall make adjustments to the guaranty bond or alternative to the guaranty bond requirements of schools based on G.S. 115D-95. A guaranty bond or alternative to the guaranty bond shall be required for license renewal for a school that has been continuously licensed to operate for more than five years in the State, as follows:
- (1) If the balance of the Student Protection Fund in G.S. 115D-95.1 is below the catastrophic loss amount, the school shall file a guaranty bond or alternative to the guaranty bond in an amount equal to the maximum amount of prepaid tuition held by the school during the prior fiscal year multiplied by the percentage amount the fund is deficient.
 - (2) If the school held prepaid tuition in excess of the Student Protection Fund catastrophic loss amount during the prior fiscal year, in addition to any guaranty bond or alternative to a guaranty bond amount required by Subparagraph (1) of this Paragraph, the school

shall file a guaranty bond for the difference between the prepaid tuition amount held in the previous fiscal year and the Student Protection Fund catastrophic loss amount.

(f) The State Board of Community Colleges, acting by and through the President of the Community College System, will tabulate the balance of the Student Protection Fund as of December 31 of each year and establish the percentage amounts identified in Subparagraph (e)(1) of this Rule. The State Board of Community Colleges, acting by and through the President of the Community College System, will report these calculations to the Student Protection Fund Advisory Committee for its review on an annual basis.

History Note: Authority G.S. 115D-89; 115D-91; 115D-92; 115D-95.1; S.L. 2009-562 s.4;
Eff. September 1, 1993;
Amended Eff. July 1, 2010; August 13, 2005; December 1, 2004.

23 NCAC 03A .0116 ADMINISTRATION OF THE STUDENT PROTECTION FUND

(a) The State Board of Community Colleges, acting by and through the President of the Community College System, shall administer the Student Protection Fund.

(b) If the Student Protection Fund balance is equal to or exceeds the Student Protection Fund cap amount, the State Board of Community Colleges shall suspend payments into the Student Protection Fund for schools that have been continuously licensed in North Carolina for more than eight years. The State Board of Community Colleges shall require schools to resume payments into the Student Protection Fund if the balance of the Student Protection Fund is less than the catastrophic loss amount.

(c) If claims against the Student Protection Fund exceed the catastrophic loss amount, the State Board of Community Colleges may assess additional fees to compensate students qualified for repayment under the Student Protection Fund. The amount of the catastrophic assessment shall not exceed one-half of the amount of the annual revenue payment required by G.S. 115D-95.1. If the amount of the catastrophic assessment will be insufficient to cover qualified claims, the State Board of Community Colleges shall allocate funds among claims proportional to the amount of student loss and the amount in the Student Protection Fund.

(d) A student, or the student's parent or guardian, who has suffered a loss of tuition, fees, or any other instruction-related expenses paid to a proprietary school licensed under G.S. 115D-90 by reason of the school ceasing to operate for any reason, including, but not limited to the suspension, revocation, or nonrenewal of a school's license, bankruptcy, or foreclosure, may qualify for repayments under the Student Protection Fund. The State Board of Community Colleges must first issue repayment from the guaranty bonds and alternatives to the guaranty bond issued under G.S. 115D-95. If the Student Protection Fund is insufficient to cover the qualified claims, the State Board of Community Colleges must allocate funds among claims proportional to the amount of student loss and the amount in the Student Protection Fund.

(e) The Student Protection Fund Advisory Committee shall meet once per year to review the Fund adjustments or as needed in order to respond to other matters related to the Fund.

History Note: Authority G.S. 115D-89; 115D-95.1;
Eff. July 1, 2010.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on Thursday, November 19, 2009 9:00 a.m. at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3100. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Jim R. Funderburk - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Ralph A. Walker
Jerry R. Crisp
Jeffrey P. Gray

Appointed by House

Jennie J. Hayman - Chairman
John B. Lewis
Clarence E. Horton, Jr.
Daniel F. McLawhorn
Curtis Venable

COMMISSION COUNSEL

Joe Deluca (919)431-3081
Bobby Bryan (919)431-3079

RULES REVIEW COMMISSION MEETING DATES

May 20, 2010 June 17, 2010
July 15, 2010 August 19, 2010

AGENDA

RULES REVIEW COMMISSION Thursday, May 20, 2010 9:00 A.M.

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
- II. Approval of the minutes from the last meeting
- III. Follow-Up Matters:
 - A. Office of the Commissioner of Banks – 04 NCAC 03M .0101, .0205, .0301, .0401, .0604 (DeLuca)
 - B. Social Services Commission – 10A NCAC 70F .0202, .0203, .0207 (DeLuca)
 - C. Social Services Commission – 10A NCAC 70G .0501 (DeLuca)
 - D. Social Services Commission – 10A NCAC 70H .0401 (DeLuca)
 - E. Social Services Commission – 10A NCAC 70I .0302, .0404, .0405 (DeLuca)
 - F. Environmental Management Commission – 15A NCAC 02B .0250, .0252 (DeLuca)
 - G. Coastal Resources Commission – 15A NCAC 07H .0208, .0309 (DeLuca)
 - H. Licensing Board for General Contractors – 21 NCAC 12 .0208 (Bryan)
- IV. Review of Log of Filings (Permanent Rules) for rules filed between March 23, 2010 and April 20, 2010
- V. Review of Log of Filings (Temporary Rules)
- VI. Commission Business
 - Next meeting: June 17, 2010

Commission Review *Log of Permanent Rule Filings*

March 23, 2010 through April 20, 2010

SOCIAL SERVICES COMMISSION

The rules in Chapter 70 concern children's services.

The rules in Subchapter 70I concern the minimum licensing standards for residential child-care including general licensing requirements (.0100); minimum licensure standards (.0200); organization and administration (.0300); personnel (.0400); service planning (.0500); service delivery (.0600); buildings, grounds and equipment (.0700); best practice standards (.0800); and physical plant (.0900).

Governance
Amend/**

10A NCAC 70I .0301

LABOR, DEPARTMENT OF

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

The rules in Subchapter 7F cover specific OSHA standards for various industries: general (.0100); construction (.0200); agriculture (.0300); shops fabricating structural steel and steel plate (.0400); maritime (.0500); communication towers (.0600); blasting and use of explosives (.0700); and cranes and derricks standards (.0900).

Steel Erection
Amend/*

13 NCAC 07F .0205

Design, Construction and Testing
Amend/*

13 NCAC 07F .0909

TRANSPORTATION, DEPARTMENT OF

The rules in Chapter 2 are from the Division of Highways.

The rules in Subchapter 2D concern highway operations including standards for design and construction (.0100); landscape (.0200); field operations-maintenance and equipment (.0400); ferry operations (.0500); oversize-overweight permits (.0600); highway design branch (.0700); prequalification advertising and bidding regulations (.0800); regulations for informal construction and repair contracts (.0900); adopt-a-highway program (.1000); and disadvantaged business enterprise, minority business enterprise and women business enterprise programs for highway and bridge construction contracts (.1100).

Permits-Weight, Dimensions and Limitations
Amend/*

19A NCAC 02D .0607

CHIROPRACTIC EXAMINERS, BOARD OF

The rules in Chapter 10 include organization of the Board (.0100); the practice of chiropractic (.0200); rules of unethical conduct (.0300); rule-making procedures (.0400); investigation of complaints (.0500); contested cases and hearings in contested cases (.0600-.0700); and miscellaneous provisions (.0800).

Certification of Radiologic Technologists
Amend/**

21 NCAC 10 .0206

COSMETIC ART EXAMINERS, BOARD OF

The rules in Subchapter 14A are the Cosmetic Art Board of Examiners departmental rules including organizational rules (.0100); and license renewal waiver for armed forces (.0400).

License Renewal Waiver for Armed Forces
Adopt/*

21 NCAC 14A .0401

The rules in Subchapter 14F govern all aspects of licensing a beauty salon.

Separation of Beauty Salon 21 NCAC 14F .0104
Amend/**

The rules in Subsection 14G give the requirements for the establishment of cosmetic art schools.

Space Requirements 21 NCAC 14G .0103
Amend/**

Equipment and Teachers 21 NCAC 14G .0107
Amend/*

The rules in Subchapter 14I govern the operation of cosmetic art schools including record keeping (.0100); the reception area (.0200); classrooms (.0300); and licensure of convicted felons (.0400).

Transfer of Credit 21 NCAC 14I .0105
Amend/*

Report of Enrollment 21 NCAC 14I .0107
Amend/*

Seal 21 NCAC 14I .0108
Amend/*

Recitation Room 21 NCAC 14I .0301
Amend/*

Application/Licensure/Individuals Who Have Been Convicted... 21 NCAC 14I .0401
Amend/*

The rules in Subchapter 14J cover the cosmetology curriculum including the beginners' department (.0100); the advanced department (.0200); combined studies (.0300); the course of study (.0400); and credit for study outside of North Carolina (.0500).

Equipment for Beginner Department 21 NCAC 14J .0106
Amend/*

Equipment in Advanced Department 21 NCAC 14J .0206
Amend/*

Live Model/Mannequin Performance Requirements 21 NCAC 14J .0207
Amend/*

Internships 21 NCAC 14J .0208
Amend/*

The rules in Subchapter 14L deal with teacher qualifications and examinations (.0100) and teacher program and curriculum (.0200).

Supervision of Cosmetic Art Teacher Trainee 21 NCAC 14L .0208
Amend/*

The rules in Subchapter 14N deal with examinations including general provisions (.0100), cosmetologist exam (.0200), manicurist exam (.0300), cosmetologist teacher exam (.0400), and manicurist teach examination (.0500), esthetician examination (.0600), and esthetician teacher examination (.0700).

Passing Grades for Examination 21 NCAC 14N .0110
Amend/**

Re-examination 21 NCAC 14N .0113
Amend/**

Full Time and Part Time Equivalency 21 NCAC 14N .0115
Amend/**

The rules in Subchapter 14P are civil penalty rules.

<u>Revocation of Licenses and Other Disciplinary Measures</u> Amend/*	21	NCAC 14P .0108
<u>Establishment of Cosmetic Art Schools</u> Amend/**	21	NCAC 14P .0111
<u>Operations of Schools of Cosmetic Art</u> Amend/*	21	NCAC 14P .0113
<u>Cosmetology Curriculum</u> Amend/*	21	NCAC 14P .0114

The rules in Subchapter 14R are continuing education rules.

<u>Continuing Education Requirements</u> Amend/*	21	NCAC 14R .0101
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PHARMACY, BOARD OF

The rules in Chapter 46 cover organization of the Board (.1200); general definitions (.1300); hospitals and other health facilities (.1400); admission requirements and examinations (.1500); licenses and permits (.1600); drugs dispensed by nurse and physician assistants (.1700); prescriptions (.1800); forms (.1900); administrative provisions (.2000); elections (.2100); continuing education (.2200); prescription information and records (.2300); dispensing in health departments (.2400); miscellaneous provisions (.2500); devices (.2600); nuclear pharmacy (.2700); sterile parenteral pharmaceuticals (.2800); product selection (.2900); disposal of unwanted drugs (.3000); clinical pharmacist practitioner (.3100); impaired pharmacist peer review program (.3200); and registry of pharmacist technicians (.3300).

<u>Advanced Pharmacy Technician</u> Adopt/*	21	NCAC 46 .1418
<u>Drug, Supplies and Medical Device Repository Program</u> Adopt/*	21	NCAC 46 .2513

REAL ESTATE COMMISSION

The rules in Chapter 58 are from the North Carolina Real Estate Commission.

The rules in Subchapter 58A are rules relating to real estate brokers and salesmen including rules dealing with general brokerage (.0100); application for license (.0300); examinations (.0400); licensing (.0500); real estate commission hearings (.0600); petitions for rules (.0700); rulemaking (.0800); declaratory rulings (.0900); real estate recovery fund (.1400); forms (.1500); discriminating practices prohibited (.1600); mandatory continuing education (.1700); limited nonresident commercial licensing (.1800); post-licensure education (.1900); annual reports (.2000); brokers in military service (.2100).

<u>Broker-In-Charge</u> Amend/*	21	NCAC 58A .0110
<u>Offers and Sales Contracts</u> Amend/*	21	NCAC 58A .0112
<u>Residential Property Disclosure Statement</u> Amend/*	21	NCAC 58A .0114
<u>Attendance and Participation Requirements</u> Amend/*	21	NCAC 58A .1705
<u>Filing</u> Adopt/*	21	NCAC 58A .2001
<u>Escrow Account</u> Adopt/*	21	NCAC 58A .2002
<u>Applicability</u>	21	NCAC 58A .2101

Adopt/*		
<u>Postponement of Fees</u>	21	NCAC 58A .2102
Adopt/*		
<u>Postponement of Continuing Education</u>	21	NCAC 58A .2103
Adopt/*		
<u>Postponement of Postlicensing Education</u>	21	NCAC 58A .2104
Adopt/*		
<u>Proof of Eligibility</u>	21	NCAC 58A .2105
Adopt/*		

The rules in Subchapter 58C deal with real estate prelicensing education schools including rules dealing with the licensing of all schools except private real estate schools (.0100); private real estate schools (.0200); prelicensing courses (.0300); and pre-licensing course instructors (.0600).

<u>Application for Approval</u>	21	NCAC 58C .0102
Amend/*		
<u>Criteria for Approval</u>	21	NCAC 58C .0103
Amend/*		
<u>Administration</u>	21	NCAC 58C .0206
Amend/*		
<u>Program Structuring and Admission Requirements</u>	21	NCAC 58C .0302
Amend/*		

The rules in Subchapter 58E are the real estate continuing education rules both update and elective course components including rules dealing with update courses (.0100); update course instructors (.0200); elective courses, sponsors, and instructors (.0300); general sponsor requirements (.0400); course operational requirements (.0500); broker-in-charge annual review (.0600).

<u>Criteria for Elective Course Approval</u>	21	NCAC 58E .0304
Amend/*		
<u>Denial or Withdrawal of Approval</u>	21	NCAC 58E .0412
Amend/*		
<u>Course Operational Requirements</u>	21	NCAC 58E .0510
Amend/*		
<u>Purpose and Applicability</u>	21	NCAC 58E .0601
Adopt/*		
<u>Course Description</u>	21	NCAC 58E .0602
Adopt/*		
<u>Authority to Conduct Course</u>	21	NCAC 58E .0603
Adopt/*		
<u>Course Operational Requirements</u>	21	NCAC 58E .0604
Adopt/*		

BUILDING CODE COUNCIL

<u>NC Administrative Code - Approval Required</u>	107.3
Amend/*	
<u>NC Building Code - Cooperative Innovative High School Pro...</u>	202
Amend/*	
<u>NC Building Code - Business Group B Occupancies</u>	304.1
Amend/*	
<u>NC Building Code - Educational Group E</u>	305.1
Amend/*	

<u>NC Building Code - General</u> Amend/*	3103.1
<u>NC Fire Code - Cooperative Innovative High School Program</u> Amend/*	202
<u>NC Fire Code - Fire and Evacuation Drill Frequency and Pa...</u> Amend/*	Table 405.2
<u>NC Plumbing Code - Identification of Nonpotable Water</u> Amend/*	608.8
<u>NC Plumbing Code - Information</u> Amend/*	608.8.1
<u>NC Plumbing Code - Color</u> Amend/*	608.8.2
<u>NC Plumbing Code - Above-ground Sanitary Drainage and Ven...</u> Amend/*	702.1
<u>NC Plumbing Code - Fittings</u> Amend/*	702.4
<u>NC Plumbing Code - Inside Storm Drainage Conductors</u> Amend/*	1102.2
<u>NC Plumbing Code - Fittings</u> Amend/*	1102.7
<u>NC Residential Code - Maximum Slope</u> Amend/*	R311.6.1
<u>NC Residential Code - Concrete and Masonry Foundation Walls</u> Amend/*	R404.1

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 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
Selina Brooks
Melissa Owens Lassiter
Don Overby

Randall May
A. B. Elkins II
Joe Webster

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL BEVERAGE CONTROL COMMISSION</u>				
NC Alcoholic Beverage Control Commission v. Ciro Maya Maya, T/A Carolina Sports Arena	08 ABC 2411	Overby	06/29/09	
NC Alcoholic Beverage Control Commission v. Abdu Suleh Ali d/b/a Harlam Mini Mart	08 ABC 2980	Overby	01/07/10	
NC Alcoholic Beverage Control Commission v. Danny Wilson Hayes, Debra Ann Hayes, T/A Double D Sports Bar and Grill	09 ABC 0006	Gray	01/28/10	
N.C. Alcoholic Beverage Control Commission v. Du Cong Phan T/A Good Food Market	09 ABC 0565	May	05/18/09	
North Carolina Alcoholic Beverage Control Commission v. Mayra Leticia Rodriguez, T/A La Perla Del Pacifico	09 ABC 0975	Gray	07/28/09	
N.C. Alcoholic Beverage Control Commission v. Roberta White Bridges T/A Christina Restaurant and Catering	09 ABC 1899	May	07/28/09	
N.C. Alcoholic Beverage Control Commission v. Mobashar Hassan Chaudhary	09 ABC 3579	Gray	09/30/09	
N.C. Alcoholic Beverage Control Commission v. Partnership T/A El Paraiso II	09 ABC 4171	May	02/16/10	
N.C. Alcoholic Beverage Control Commission Young's Market LLC and Anjanette Young Enmyeche	09 ABC 4931	Webster	03/11/10	24:21 NCR 1910
NC Alcoholic Beverage Control Commission v. La Tienda Mexicana Corp. T/A Tienda La Unica	09 ABC 4379	Brooks	09/17/09	
NC Alcoholic Beverage Control Commission v. Jose Elias Bautista T/A Bar Mexico Lindo	09 ABC 4680	May	12/30/09	
NC Alcoholic Beverage Control Commission v. Uwem Eyo Equan, T/A Sahara Restaurant and Lounge	09 ABC 4682	May	11/13/09	
NC Alcoholic Beverage Control Commission v. KAM Properties Inc. T/A Grays Creek Superette	09 ABC 4686	Gray	10/19/09	
N.C. Alcoholic Beverage Control Commission v. Bee Nui Carson, T/A Big Boys Market	09 ABC 5209	Brooks	12/11/09	
NC Alcoholic Beverage Control Commission v. Rimal Enterprise, Inc., T/A R B FoodMarket	09 ABC 5213	Brooks	12/11/09	
NC Alcoholic Beverage Control Commission v. Alhobishi Convenience Stores & Rentals, Inc T/A Happy Mart 4	09 ABC 5293	Lassiter	01/19/10	
NC Alcoholic Beverage Control Commission v. Mike's Private Club, Inc., T/A EL Rincon Caliente	09 ABC 5423	Brooks	12/10/09	
NC Alcoholic Beverage Control Commission v. Xuan Huong Thi Le T/A Billiards and Grill	09 ABC 5424	Brooks	12/10/09	
NC Alcoholic Beverage Control Commission v. Rumba D Cache Inc, T/A Rumba D Cache	09 ABC 6277	Brooks	03/25/10	
NC Alcoholic Beverage Control Commission v. Yong Cha Kim, T/A Asian Odyssey	09 ABC 6412	Overby	02/12/10	
<u>BOARD OF COSMETIC ARTS EXAMINERS</u>				
Douglas Van Essen v. NC State Board of Cosmetic Arts Examiners	09 BCA 2773	Webster	01/20/10	24:18 NCR 1638
<u>CRIME VICTIMS COMPENSATION</u>				
Mary D. Malone v. State of North Carolina, Department of Crime Control., Victims Compensations Services	08 CPS 2463	Gray	07/09/09	
Tony Ray Ross v. North Carolina State Highway Patrol	08 CPS 2546	Overby	10/06/09	
Ricky F. Smith v. Crime Control and Public Safety	08 CPS 2582	May	08/06/09	
Robert Melvin v. Janice Carmichael, NC Crime Victim Compensation	08 CPS 2634	Elkins	06/01/09	
B-Red Enterprises, Inc., Linda Parrish v. Secretary of Crime Control and Public Safety	08 CPS 3043	Webster	06/23/09	
Spencer's Incorporated of Mount Airy, NC d/b/a Ararat Rock Products Company and Jim Crossingham, III v. North Carolina Highway Patrol	08 CPS 3399	May	08/25/09	24:11 NCR 908
Apex PTO & Trailer, Inc. Morris F. Purdy v. NC Dept. of Crime Control & Public Safety, Division of	09 CPS 0010	Lassiter	08/17/09	

CONTESTED CASE DECISIONS

State Highway Patrol, Carrier Enforcement Section			
Peggy Guley, Guley's Backhoe Service v. Crime Control and Public Safety	09 CPS 0085	Overby	06/04/09
Peter Thomas, Southeast Forest Works, LLC v. NC State Highway Patrol	09 CPS 1257	Gray	05/19/09
Allen Bender, AB's Gravel Driveways, LLC v. North Carolina State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 1259	Gray	06/29/09
Bruce E. Tyndall v. NC Dept. of Crime Control & Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 1494	Webster	07/29/09
Ramdog Enterprises, LLC v. NC Highway Patrol, Troop G, District V and Captain F.T. Stout	09 CPS 1531	Brooks	01/13/10
Cape Romain Contractors, Inc., Andrew Dupre v. North Carolina Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 1599	Gray	07/02/09
John Emiliani, Jr., v. N.C. Division of Motor Vehicles	09 CPS 1604	Brooks	06/15/09
Clifton Artis v. Secretary of Crime Control and Public Safety	09 CPS 1732	Gray	10/26/09
Alexander Rybak v. NC DMV, State Highway Patrol	09 CPS 1834	Brooks	08/11/09
Shelby T. Wallace v. Motor Carrier Enforcement, NC State Highway Patrol	09 CPS 1840	Brooks	08/11/09
Wanda K. McNeill v. Crime Victims Compensation Commission	09 CPS 3873	Gray	02/05/10
Rowland L. Simmons v. North Carolina State Highway Patrol	09 CPS 2087	Brooks	05/19/09
Covenant Trucking Company, Inc. v. NC Dept. of Crime Control & Public Safety	09 CPS 2361	Cella	08/11/09
SEKO-Charlotte, Inc. v. NC State Highway Patrol	09 CPS 2380	May	07/28/09
James Christian Laubach and the Auto Barn, Inc. v. NC State Highway Patrol	09 CPS 2385	Mann	07/28/09
Joseph Moseley v. NC State Highway Patrol	09 CPS 2390	Gray	12/22/09
George Allen Cook (Case #08-35780), v. N.C. Department of Crime Control and Public Safety, Victim Compensation Services Division	09 CPS 2391	May	07/29/09
Cynthia K. Shreve v. Victims Compensation Program	09 CPS 2404	May	06/23/09
Robert C. Bacon v. NC State Highway Patrol	09 CPS 2426	Gray	12/18/09
Allen Robinson v. NCSHP	09 CPS 2449	Overby	06/17/09
Walter D. Cochran v. NC Dept. of Crime Control and Public Safety	09 CPS 2458	Cella	08/14/09
Gregory Vett Arnold v. NC State Highway Patrol	09 CPS 2509	Gray	08/25/09
Jeffrey Andrew Kennedy v. NC State Highway Patrol, Citation and Notice of Assessment	09 CPS 2511	May	07/09/09
George M. Gause v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 2551	Webster	09/30/09
Rowland L. Simmons v. North Carolina State Highway Patrol	09 CPS 2885	May	06/11/09
Shane D. Norman v. N.C. Crime Victims Compensation Commission	09 CPS 3112	Brooks	02/18/10
Derik Core V. NCHP	09 CPS 3500	Overby	07/29/09
Graves Construction Services Inc, Highway Patrol Motor Carrier Division	09 CPS 3537	Gray	01/29/10
Randy Stewart v. State Highway Patrol	09 CPS 3646	Brooks	10/09/09
Rachel Strickland v. NC Crime Victims Compensation Commission	09 CPS 3650	Brooks	10/06/09
D&D Auto Transport, Jimmy Donald v. NC State Highway Patrol	09 CPS 3690	Cella	10/30/09
Goodfellas Auto Transport v. NC State Highway Patrol	09 CPS 3757	Gray	01/15/10
Jennifer Elizabeth Bollinger v. NC Dept. of Crime Control & Public Safety, Division of Victims Compensation Commission	09 CPS 3765	Gray	10/07/09
CL Hill Hauling, LLC, Christopher Hill v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 3784	Gray	09/08/09
KJ Logistics, LLC v. NC State Highway Patrol	09 CPS 3876	Gray	09/08/09
Jorge Rodriguez v. Secretary of Crime Control & Public Safety	09 CPS 3921	Gray	09/10/09
TMC Transportation Inc. v. NC State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 3996	Lassiter	09/17/09
Douglas Harris v. NC Dept. of Crime Control and Public Safety	09 CPS 4023	Brooks	11/23/09
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McIntyre Holdings Inc. D/B/A TurfMasters Sod Farms v. NC Crime Control and Public Safety, NC State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 4067	Cella	03/08/10
John Kevin Hartley v. Dept of Crime Control and Public Safety, Highway Patrol	09 CPS 4152	Brooks	04/01/10
Andrew S. McJunkin v. NC Victim and Justice Services	09 CPS 4206	Brooks	10/07/09
Larry Williams NOLA Bus Tours Inc. v. Crime Control and Public Safety	09 CPS 4209	Elkins	03/01/10
Shirley Wilson v. State Highway Patrol	09 CPS 4332	Gray	10/07/09
Darryl Tyrone Davis, D&G Excavating Services	09 CPS 4363	Gray	10/07/09
Ronald William Duke v. NC State Highway Patrol	09 CPS 4366	Lassiter	10/13/09
Robert D. Cooper v. NC State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 4434	Overby	03/01/10
Linda S. Johnson	09 CPS 4450	May	12/28/09
Triad Solutions, Inc., Gene Petty v. NC State Highway Patrol Motor Carrier Enforcement Division	09 CPS 4455	Brooks	10/20/09
Chrystal N. Clark v. NC Victims Compensation Commission v. Respondent	09 CPS 4451	Lassiter	10/15/09
Lowell Thomas Blue v. NC State Highway Patrol	09 CPS 4509	Gray	10/07/09
Lindsey Carol Bollinger v. NC Dept. of Crime Control & Public Safety, Division of Victims Compensation Services	09 CPS 4514	May	09/27/09
Larry George Willoughby v. NC Department of Crime Control and Public Safety	09 CPS 4569	Gray	12/16/09
Michelle Kyong Woods v. Victim Compensation	09 CPS 4622	Overby	01/27/10
Palmetto Sealing Co., Inc. v. NC Secretary of Crime Control and Public Safety	09 CPS 4632	Gray	11/30/09
Eddy L. Cheek v. NC Dept. of Crime Control & Public Safety, State Highway Patrol	09 CPS 4633	May	10/09/09
NOLA Bus Tours Inc, NC State Highway Patrol	09 CPS 4739	Elkins	03/01/10
Crst Malone v. NC State Highway Patrol	09 CPS 4741	Overby	01/27/10
Yurry Demyanchuk v. RR Sheets, NC State Highway Patrol	09 CPS 4799	Lassiter	09/29/09
Piedmont Cheerwine Bottling Co. v. NC Dept. of Crime Control and Public Safety	09 CPS 4852	Brooks	11/09/09
Phillip J. Evans v. Highway Motor Carrier	09 CPS 4953	Overby	10/28/09
Jesse M Staton v. NC State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 4997	Overby	01/21/10
Poplar Ridge Lumber Company, Blaine J. Snyder, II v. NC State Highway Patrol	09 CPS 5089	Gray	02/16/10
Atlantic Construction Services, Inc., Frederick George Lempe II v. NC Dept. of Crime Control and	09 CPS 5161	Lassiter	12/01/09

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Public Safety

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Boxley Block, LLC v. NC State Highway Patrol Motor Carrier Enforcement Administration	09 CPS 5445	May	02/04/10
CMT Trucking Inc. Charles M. Tyson v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 5446	Gray	12/16/09
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Palmetto Sealing Inc v. NC Secretary Crime Control and Public Safety	09 CPS 6169	Overby	01/27/10
Michael Davis v. NC Department of Crime Control and Public Safety, State Highway Patrol	09 CPS 6190	Gray	01/27/10
Gilberto Santiago v. NC Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 6191	Gray	01/27/10
William Terry Ivey v. NC Hwy Patrol, Division of Motor Vehicles	09 CPS 6250	Elkins	02/26/10
Curtis Junior Miles v. NC State Highway Patrol	09 CPS 6854	Gray	03/10/10
Mack Padgett v. Crime Control and Public Safety	10 CPS 0107	Brooks	03/01/10
Stephen McNeil DBA S&L Transport Co v. Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	10 CPS 0295	Lassiter	04/06/10

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

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Henry Neese and Patricia Neese v. NC Department of Agriculture and Consumer Services	09 DAG 2899	Mann	11/25/09	24:18 NCR 1662
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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Patricia L. Tiller v. NC Dept. of Health & Human Ser., Health Care Personnel Registry Sec	07 DHR 0302	Lassiter	07/14/09	
Martha's Group Home, Inc. v. NCDHHS, Ms. Emery Milliken, General Counsel	07 DHR 1714	Gray	02/24/10	
Teresa S. Reid, Reid's Health Care v. DHHS, Division of Medical Assistance	08 DHR 0596	Elkins	01/21/10	
Ely Enterprises, Inc., D/B/A A Home Away from Home v. DHHS	08 DHR 0906	Gray	02/22/10	
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Cynthia Curtis v. Department of Health and Human Services, Division of Health Service Regulation	08 DHR 1485	Brooks	05/07/09	24:07 NCR 408
MedExpress Pharmacy LTD. V. NC Dept. of Health and Human Services and NC Dept. of Administration	08 DHR 1566	Elkins	11/30/09	
Lilieth P. Brown v. Office of Administrative Hearings	08 DHR 1807	Morrison	08/13/09	
Blue Ridge Healthcare Surgery Center-Morganton, LLC & Grace Hospital, Inc. v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section & Carolina Digestive Care, PLLC and HMB Properties, LLC	08 DHR 2216	Brooks	06/19/09	24:11 NCR 913
Bethlehem Center of Charlotte v. Child and Adult Care Food Program, Division of Public Health, NC Dept. of Health and Human Services	08 DHR 2284	Brooks	05/26/09	
Edward A. Patterson v. Division of Child Development	08 DHR 2364	Webster	06/02/09	
Choices Group Home Inc., Victor Vega v. N.C. Department of Health and Human Services	08 DHR 2404	Gray	07/16/09	
MJKM, LLC d/b/a Pueblo Supermarket v. NC Dept. of Health and Human Services, Division of Public Health, Women and Children's Health Section	08 DHR 2443	Gray	09/03/09	
Jasper Tyson v. Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry	08 DHR 2444	May	05/21/09	
Choices Group Home Inc, Victor Vega v. Office of Administrative Hearings, Department of Health and Human Services	08 DHR 2512	Gray	07/16/09	
Tabitha Raeford v. DHHS, Division of Health Service Regulation	08 DHR 2566	Gray	03/26/10	
Pepper Dawn Kirk-McLendon Peppermint Daycare v. N.C Department of Health and Human Services, Division of Child Development	08 DHR 2571	Mann	07/07/09	24:07 NCR 416
Edward Royal, Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry	08 DHR 2698	Overby	05/27/09	
C. Vann Pierce, Executive Officer, Heritage Care of Rocky Mount, Licensee, License No. Hal-033-005 v. N.C DHHS, Division of Health Service Regulation, Adult Care Licensure Section	08 DHR 2732	Lassiter	11/03/09	24:16 NCR 1435
Josephine Keke v DHHS, Division of Health Service Regulation, Health Care Personnel Registry	08 DHR 2739	Gray	02/08/10	
Abundant Life Child Care Center, Tiffany D. Monroe v. Division of Child Development, June Locklear, Brenda Faircloth	08 DHR 2954	Elkins	06/03/09	
Outreach Home v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Mental Health Licensure and Certification Section	08 DHR 2981	Gray	09/17/09	
L&J Group Homes, Inc. v. NC DHHS/Div. of Health Service Regulation, Mental Health	08 DHR 3108	Lassiter	10/06/09	
Amy G. Poteat v. Health Care Personnel Registry	08 DHR 3489	May	06/03/09	
Freedom House Recovery Center, Inc. v. NC Division of Health Service Regulation	08 DHR 3674	Gray	10/13/09	
Kathy Dunning Bright v. Health Care Personnel Registry	09 DHR 0057	Overby	08/04/09	
Gaynelle Smith v. DHHS	09 DHR 0223	May	02/24/09	
Marie Jagne v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Registry Section	09 DHR 0444	Lassiter	07/27/09	
Brenda V. Patterson v. Division of Child Development	09 DHR 0667	Webster	06/02/09	
Sonya C. Ragland, Joseph K. Ragland, Barbara Washington, and The Seed of Abraham Learning Center v. NC Dept. of Health and Human Services	09 DHR 1261	Gray	06/08/09	
Sonya C. Ragland, Joseph K. Ragland, Barbara Washington, and The Seed of Abraham Learning Center v. NC Dept. of Health and Human Services	09 DHR 1262	Gray	06/08/09	
Sonya C. Ragland, Joseph K. Ragland, Barbara Washington, and The Seed of Abraham Learning Center v. NC Dept. of Health and Human Services	09 DHR 1263	Gray	06/08/09	
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Michael Parks Fresh Start Residential Services Inc. v. NC DHHS Division of Health Service Regulation Mental Health Licensure Certification	09 DHR 1474	Overby	06/17/09	
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Contour Service, Inc., (MHL #090-101) v. Department of Health Services, Division of Health Service Regulation	09 DHR 2350	May	07/21/09	
Community Alternative Resources, Inc. Wayne L. Burch and Michelle M. Dolphus v. Dept. of Health and Human Services	09 DHR 2456	May	08/28/09	
Charlene M. Hatfield v. NC Dept. of Health and Human Services, Division of Health Service Regulation	09 DHR 2503	Gray	08/31/09	
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Trinia E. McCorkle v. North Carolina Department of Health and Human Services	09 DHR 2829	Brooks	07/10/09	
Kashina L. Davis v. North Carolina Department of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry Section	09 DHR 2832	Gray	07/01/09	
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Rickie Annas v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry	09 DHR 2962	Brooks	08/10/09	
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Mary's House, Inc., MHL #041-288, Craig Thomas, Executive Director v. Ms. Emery Milliken, General Counsel, Department of Health and Human Services, Office of Legal Affairs	09 DHR 3008	Mann	07/22/09	
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Angel's Childcare, Treva Richardson v. Division of Child Development, Dept. of Health and Human Services	09 DHR 3688	Elkins	10/08/09	
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Labrisha Keller v. Health Care Personnel Registry	09 DHR 4336	Lassiter	02/04/10	
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Ward Life Outreach of Cape Fear v. Division of Health Service Regulation Health Care Personnel Registry	09 DHR 4711	Gray	11/18/09	
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A Positive Life, Inc. v. NC Dept. of Health and Human Services, Division of Health Service Regulation, Mental Health Licensure and Certification Section	09 DHR 4956	Lassiter	10/22/09	
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James Phifer, Executor of the Estate of Sarah Geneva Phifer and Robert Wilford Phifer v. NC Dept. of Health and Human Services, Division of Medical Assistance	09 DHR 5063	Brooks	12/07/09	
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Debbie L. Williams v. Surry Co, DHHS	09 DHR 5598	Mann	03/03/10	
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Gemika Steele, First Steps Child Dev Center, DHHS, Division of Public Health Child and Adult Care Food Program	09 DHR 6694	Brooks	01/28/10
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Charles W. Johnson v. Supt. David Mitchell and Mt. View Administrative Authority	09 DOC 4883	May	11/03/09	
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Ross Patton Gilmore v. North Carolina Alarm Licensing Board	09 DOJ 2452	Morrison	06/04/09	
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DEPT. OF ENVIRONMENT AND NATURAL RESOURCES

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Cherokee County Health Department James Pann(managing member, Creek Ridge Holdings, LLC) v. N.C. Department of Environment and Natural Resources	08 EHR 2986	Gray	05/27/09	
Olde Beau General Partnership v. NC Dept. of Environment and Natural Resources, Division of Land Resources	09 EHR 0122	Gray	08/18/09	24:11 NCR 983
Saint Gobain Containers, Inc. v. NC Dept. of Environment and Natural Resources, Division of Air Quality	09 EHR 1616	Overby	10/23/09	
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Kyle D. Page v. NC Dept. of Environment and Natural Resources	09 EHR 4623	Gray	10/07/09	
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John Randolph Ingram v. NC Teachers' and State Employees' Comprehensive Major Medical Plan	08 INS 2952	Gray	09/08/09
Elizabeth M. Bailey v. NC Teachers' and State Employees' Comprehensive Major Medical Plan	09 INS 0661	Lassiter	08/03/09
Erin Tapley v. Blue Cross Blue Shield	09 INS 2393	Gray	10/07/09
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STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

Filed

IN THE OFFICE
OF ADMINISTRATIVE HEARINGS
2010 MAR 11 PM 4:26 ABC 4931

		Office of Administrative Hearings	
YOUNG'S MARKET LLC and ANJANETTE YOUNG)		
ENMYECHE)		
Petitioner,)		
)		DECISION
v.)		
)		
NORTH CAROLINA ALCOHOLIC BEVERAGE)		
CONTROL COMMISSION,)		
Respondent.)		

This matter was heard before Joe L. Webster, Administrative Law Judge, on November 12, 2009 at the Brunswick County Courthouse in Bolivia, North Carolina. Thereafter, Counsel appearing in the case, along with the presiding Judge, traveled to Wilmington, N.C. to conduct a view of 519 Chestnut Street (Property) and surrounding neighborhood.

APPEARANCES

For Petitioner:	William A. Raney, Jr. Wessell & Raney, L.L.P. P. O. Box 1049 Wilmington, NC 28401
For Respondent:	LoRita Pinnix, Assistant Counsel NC Alcoholic Beverage Control Commission 4307 Mail Service Center Raleigh, NC 27699-4307

ISSUES

Whether the Respondent in its denial of a permit to Petitioner for off premises sale of malt beverage and unfortified wine acted erroneously, acted arbitrarily or capriciously, or failed to act as required by law or rule?

FINDINGS OF FACT

1. The Petitioner leased property at 519 Chestnut Street, Wilmington, NC (Property) in early November 2008 which had been previously operated as a convenience store for some time. (T. pp. 13 and 50)

2. In November 2008 the Petitioner was issued a privilege license by the City of Wilmington to run a convenience store at the Property. (T. p. 14)

3. Residents in the vicinity of the store challenged the decision by the City that the store was entitled to operate under the City Zoning Ordinance. (T. p. 15)

4. The City's decision that the store complied with the City Zoning Ordinance was upheld by the Wilmington Board of Adjustment and the New Hanover Superior Court. (T. p. 15)

5. The Petitioner cleaned and renovated the store and reopened the store as Young's Market (Store) on March 28, 2009.

6. Beginning in December 2008 the Petitioner began preparing an application for an alcoholic beverage control commission (Commission) permit to sell malt beverage, wine and unfortified wine for off premises consumption at the Store. (T. p. 16)

7. The Petitioner completed the application in February, 2009 and submitted it to the City for completion of a Local Government Opinion (LGO) form by the City which must accompany the application when submitted to the Commission. (T. pp. 16 and 19)

8. The LGO form was submitted to Detective Reinhart at the Wilmington Police Department and the final City Opinion was signed by City Manager, Sterling Cheatham on March 9, 2009. (T. p. 18) (P. Ex. 1)

9. The City's position reflected on the LGO form indicated that the City did not approve the applicant nor the location for the ABC permit. (P. Ex. 1)

10. The explanation of the objection by the City restated the language in N.C.G.S. 18B-901(C)(9)b. & c. with summary factual information as follows:

"b. evidence of illegal drug activity on or about the licensed premises:

- six narcotics calls from CAD History from 2000 - present for 519 Chestnut
- 18 drug related arrests from 2003 to present on or about one block from 519 Chestnut"

"c. evidence of fighting, disorderly conduct and other dangerous activities on or about licensed premises:

- Part One crimes for 519 Chestnut St. from 1998 to 2008

Seven Robberies
One Burglary
Three Larcenies
One Aggravated Assault

- CAD History

Eleven Disputes" (P. Ex. 1)

11. The LGO was dated prior to the time the Petitioners began operating the store in March, 2009.

12. After receiving the LGO from the City, Anjanette Young Enmyeche prepared a statement for inclusion in the permit application in which she addressed the statements in the LGO concerning illegal drug and other criminal activity and asking the Commission to further investigate the statistics to determine their validity and to determine how they compared to other licensed premises in Wilmington. (P. Ex. 1)

13. The Enmyeche letter also cites hearsay evidence that she and the owner of the premises had discussions with police officials who indicated that telephone calls from one or two neighbors of the store were the primary reason for the City's objection.

14. The information submitted by the City with the LGO did not contain any information indicating that Ms. Enmyeche was an unsuitable person to hold a permit. (P. Ex. 1) (T. pp. 19 and 48).

15. The Petitioner Enmyeche has held off premises ABC permits in the past and currently holds an ABC permit for a store in New Hanover County, North Carolina.

16. Neither she nor the business entities operating the locations for which she held permits have been cited with violations of ABC laws or rules. (T. pp. 41 and 42)

17. The operator of the stores for which Ms. Enmyeche has held ABC permits have received certifications from the Commission for upholding the laws regarding alcohol sales.

18. Ms. Enmyeche took the application package to the Commission offices in Raleigh on April 30, 2009 and met with Sally Blackmon, an employee of the Commission, who checked the contents of the application. (T. pp. 21 and 22)

19. Ms. Blackmon checked the application and left the room saying that she had to check something. Upon returning to the room, Ms. Blackmon indicated that a temporary permit could not be issued because of comments received by the Commission prior to the filing of the application. (T. pp. 21 and 22)

20. Ms. Enmyeche then spoke to Mr. Michael Herring, Administrator of the Commission, who also indicated that objections had been received by the Commission and that Ms. Enmyeche could withdraw the application or submit the application and have it investigated by the Commission prior to final action by the Commission. (T. pp. 23 and 25)

21. Ms. Enmyeche decided to amend the application to delete the request for a permit for fortified wine and then submitted the application for investigation and decision. (T. pp. 22 - 26)

22. Ms. Enmyeche was contacted by Alcohol Law Enforcement Agent, Bisette, who discussed the permit application with her by phone and later submitted a report on a form captioned Investigative Report. (T. p. 27) (P. Ex. 3)

23. The Investigative Report form contains boxes to be marked concerning compliance with various standards that may be applicable to the type of permit being applied for. The Investigative Report for Young's Market was completed by marking all of the boxes in a manner that showed compliance with all of the relevant standards for issuance of a permit. (P. Ex. 3) (T. p. 28)

24. The Investigative Report submitted by Agent Bisette indicates that the establishment meets the recommendations of local governing bodies/neighborhood for location and applicant. (P. Ex. 3)

25. On June 25, 2009, an Official Notice of Rejection was sent by Respondent to Petitioner disapproving Respondent's application for a Malt Beverage off Premise permit and an Unfortified Wine off Premise permit. The reasons for the rejection were:

- (1) Objection of the local governing body to the issuance of ABC permits at the location pursuant to N.C.G.S. 18B-901(c)(7) because operation of the business with ABC permits would be detrimental to the neighborhood, and
- (2) The business is not a suitable location to hold ABC permits and operation of the business with ABC permits would be detrimental to the neighborhood pursuant to N.C.G.S. 18B-901 (c)(9).

26. The Official Notice of Rejection did not indicate what information was considered prior to objecting to the application. The only information considered by the Commission, based on the information provided to the Petitioner was the application, the Lawler Letter and the Investigative Report. (Respondents Prehearing Statement, Ex. A) (T. pp. 28 and 31)

27. The preponderance of the evidence shows that, at the time the Commission made its decision to deny the permit, the information provided to the Commission in the form of the application and the Investigative Report showed that the Petitioner met all the standards for the issuance of the permit requested by Petitioner.

28. The preponderance of the evidence shows that, at the time the Commission made its decision to deny the permit, there was no relevant and material evidence that the operation of the store with an ABC permit at that location would be detrimental to the neighborhood as compared to a store without an ABC permit.

29. Sam Darakjy, a former Alcohol Law Enforcement Agent for fourteen years and ABC Commission Auditor for three years, testified on behalf of the Petitioner that he had specialized in doing Investigative Reports on applications for permits when he was an ALE agent. (T. pp. 55 and 56)

30. Mr. Darakjy testified that when he investigated an application where neighbors expressed concerns, he would talk to relevant witnesses and include information in the comments portion of the Investigative Report regarding his findings. (T. pp. 57 - 60)

31. The Investigative Report submitted by Agent Bisette for Young's Market made no mention of contacts with neighbors or any findings related to the neighbors concerns.

32. A letter dated April 15, 2009 from Paul Lawler (Lawler Letter) to Michael Herring with attachments was stamped received by the Commission on April 17, 2009. The Lawler Letter was sent on a letterhead indicating Downtown North Community Watch. (P. Ex. 2)

33. Mr. Lawler did not testify at the hearing. (T. pp. 3 and 4)

34. The Lawler Letter objects to the issuance of a permit stating that "We believe – based on past history – that the sale of alcohol at this store would be extremely detrimental to the neighborhood". (P. Ex. 2)

35. The Lawler Letter also indicates that "Convenient stores at this location have a bad history of being detrimental to the neighborhood" thereby indicating that a convenience store, even without the sale of alcohol, is objectionable to the neighborhood. (P. Ex. 2)

36. The Lawler Letter attaches photocopies of six newspapers articles, three of which concern criminal actions by a prior operator of the store, and three of which relate to robberies at or near the prior store in March 2003, November 2007 and on a unknown date. (P. Ex. 2)

37. Neither the criminal actions of the prior owner nor the robberies had any apparent connection to alcohol sales at the store. (P. Ex. 2)

38. The Petitioner has no connection with the prior owners of the store. (T. p. 31)

39. Another convenience store with an ABC permit is located three blocks north of the Petitioner's Store, and two other convenience stores are located several blocks down Chestnut Street from the store. (T. pp. 88, 92, 93, 97, 106)

40. The Petitioners have been approved by appropriate governmental agencies for sale of North Carolina Education Lottery products and Food Stamps. (T. p. 41)

41. The immediate one block area around the Store consists of mixed commercial and residential uses with mostly office uses to the west, mostly residential uses to the north and east and mixed office and residential uses to the south. (T. pp. 37 - 40) (P. Ex. 6) Most of the

neighborhood buildings around Petitioner's business are residential with mostly owner-occupied homes. (T. p. 77, 82). Since 1995, the city of Wilmington has encouraged renovation in the neighborhood. (T. p. 77, 78, 79). The neighborhood has been designated a Local Historic District and is part of a National Register District (T. p. 78). This area of Wilmington is located close to downtown. (T. p. 78) Residents have restored older homes in the area or moved houses to lots in the neighborhood and renovated them. (T. p. 79, 86, 96, 112) Behind Young's Market is a park owned by the city of Wilmington. (T. p. 82)

42. Since 1995 two businesses have operated at 519 Chestnut Street in Wilmington with alcohol permits. In the mid-1990s, Mount Olive Deli and Grocery was operating and later, Safe Mart. (T. p. 83, 91) these businesses were convenience stores that in addition to other items, sold alcoholic beverages until 2006. (T. p. 83, 97)

43. Mary Ann Keiser, a member of the Wilmington "Historic Preservation Commission," testified that when she moved into the neighborhood in the mid-1990s, she observed prostitution, drug sales, drug use, break-ins, and shootings, including gunshots fired through a front bedroom window of a home and a murder/suicide in her front yard. (T. p. 82, 83, 84) Safety was such a concern that, residents installed bars on their windows and described the neighborhood as "not a very safe place to be". (T. p. 79, 80) The business located at 519 Chestnut Street was a gathering place for illegal drug activity. (T. p. 83)

44. Lorrie Wagoner DeYoung testified that she moved into the neighborhood that there is a lot of foot traffic in the neighborhood, a parade of people, garbage, including needles, condoms, and alcoholic beverage containers. (T. pp. 97-98). She also testified that what brings people to go to Young's and the other convenience store is the park where people hang out. (t. 98) She has observed fights and a shooting, and persons drunk falling down. (T. p. 103-104). Ms. DeYoung admitted that she can't say that all of this is alcohol-related or heroin related or anything like that; that "she thinks it is just the combination of accessibility that is socioeconomically a little depressed, especially in this last year and a half of people losing a lot more than we all hope for anybody to ever lose." (T. p. 103. Ms. DeYoung testified that were transients of ethnic culture and when asked by the Court what she meant by that she testified that "we live in a culturally diverse neighborhood, and fortunate or unfortunate, on the other side of Red Cross is primarily a black neighborhood, and that's why I chose to live there because that's my believe because that's the world." (T. p. 109)

45. Carolyn Cardwell testified that she observed a lot of trash, quite a few wrecks at the intersection of Sixth and Chestnut and what appeared to be drug deals going down. (T. pp. 113-115). She also testified that she has seen a change in activity since move people have moved into the neighborhood to restore the homes and help pick up trash. (T. p. 1160)

46. Richard Mechling testified for Respondent that he has observed "a lot gathering of small groups of two or three people that would be behind the store near the park, and larger gatherings would be in the park that would be more in the playground area, at the edge of the park towards Fifth Street, where they have brick walls to sit on..." He has observed public urination in the park and once told a friendly looking fellow- "You could get a - possibly get on a sex offender list for something..." (T. p. 122-124).

47. Additional testimony by Respondent's witnesses may be summarized as follows: that when the two prior businesses operated with ABC permits, customers consumed alcoholic beverages on the property of the business and some would pass out in the park behind the business and on the property of nearby residents. Residents observed public urination and defecation, patrons of the business throwing up and intoxicated patrons falling and injuring themselves. (T. p. 83, 84, 104, 114, 117, 123, 124) People would loiter on the property of neighborhood residents, there was increased foot traffic through the neighborhood and people would hang out behind the store near the park. (T. p. 96, 98, 99, 100, 122) The Park behind the location was a gathering place and attracted people to congregate. (T. p. 97, 98, 122) When the location sold alcoholic beverages, the park was full of homeless people, some living in the park. Starting at 3:00 or 4:00 in the afternoon, patrons of the business would consume alcoholic beverages and urinate in the park. (T. p. 85, 123) A child of one of the neighborhood residents was assaulted in the park by adults. (T. p. 101) Since 2006, when alcoholic beverages sales stopped at the location, residents have seen fewer disturbances, less trash, less foot traffic and fewer traffic accidents. (T. p. 98, 101, 116) There is no longer a problem with public urination and people who have passed out. Problems have greatly improved or have been eliminated (T. p. 86, 87, 88, 126) Loitering on private property and at the location has decreased. (T. p. 102, 127) The area around the business "feels like a real neighborhood again" and residents feel safer. (T. p. 102, 105) Fewer people hang out or congregate in the park and more women and children use the park. (T. p. 126, 127, 132)

48. The area around Youngs Market has limited parking. There is one designated space in front of the store. The loading zone is on the corner of North Sixth Street and when large trucks make deliveries, they block the stop sign and this has led to accidents. (T. p. 85, 116)

49. The undersigned finds that while Respondent introduced evidence that the property located at 509 Chestnut Street and surrounding community has experienced littering, criminal activity, traffic accidents and other offensive problems in the past, and that the witnesses had noticed fewer problems since the convenience store was closed or while operating without alcohol sales, there was no credible evidence that tied the problems in the area to the sale or lack of the sale of alcoholic beverages. The undersigned finds that the incidence of these problems identified could have just as easily resulted from other factors such as the neighborhood homes low property occupancy in previous years. Two of Respondent's witnesses testified that the problem activities begin to lessen as more residents moved into the neighborhood. Moreover, it appears just as likely that the Park itself, where large numbers of persons gather, may be more problematic than the Petitioner obtaining a permit to sale beer or wine in a neighborhood store.

50. There was no evidence that the Commission had any of the information presented by the Respondent's witnesses at the time it made its decision on the permit application.

51. There was no evidence that the Commission had any information at the time it made its decision that the selling of malt beverage and wine at the store would be more detrimental to the neighborhood than the simple operation of a convenient store without alcohol sales.

52. Because Respondent did not give Petitioner a temporary permit, the Respondent did not provide the Petitioner an opportunity to show how the business would operate and whether the sale of alcohol would be detrimental to the neighborhood as compared to the lawful operation of a convenience store without alcohol sales.

53. The Official Notice of Rejection of the application was signed by Ann H. Johnson, Permit Compliance Director for the Commission (Respondent Prehearing Statement, Ex. A). Ms. Johnson was not called by the Respondent as a witness.

54. Michael Herring was the person who advised Ms. Enmyeche that she would not be able to secure a temporary permit due to objections received by the Commission before the application was delivered, and he was also the person who advised her by telephone that the application had been denied. (T. pp. 25 and 29)

55. Mr. Herring was not called by the Respondent as a witness.

56. Wilmington Police Detective, Reinhart, was the officer who apparently collected the information on the attachment to the LGO form from the City of Wilmington. (T. pp. 18 and 20)

57. Detective Reinhart was not called by the Respondent as a witness.

58. Sterling Cheatham was the official of the City of Wilmington who signed the LGO form on behalf of the City. (P. Ex. 1)

60. Mr. Cheatham was not called by the Respondent as a witness.

61. ALE Agent Bissette was the official who investigated and reported to the Commission concerning the standards for granting or denying a permit to the Petitioner. (P. Ex. 3) Agent Bissette was not called by the Respondent as a witness.

61. The Official Notice of Rejection cited two statutory provisions as reasons for denial of the permit but did not indicate what information was considered prior to objecting the application. The only information considered by the Commission, based on the information provided to the Petitioner was the application, the Lawler Letter and the Investigative Report. (Respondents Prehearing Statement, Ex. A) (T. pp. 28 and 31)

62. The preponderance of the evidence shows that, at the time the Commission made its decision to deny the permit, the information provided to the Commission in the form of the application and the Investigative Report showed that the Petitioner met all the standards for the issuance of the permit requested by Petitioner.

63. The preponderance of the evidence shows that, at the time the Commission made its decision to deny the permit, there was no relevant and material evidence that the operation of

the store with an ABC permit at that location would be detrimental to the neighborhood as compared to a store without an ABC permit.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter in this contested case.

2. The grounds for denial contained in the Official Notice of Rejection were stated as follows:

"1. Objection of the local governing body to the issuance of ABC permits at the location pursuant to N.C.G.S. 18B-901(c)(7) because operation of the business with ABC permits would be detrimental to the neighborhood.

2. The business is not a suitable location to hold ABC permits and operation of the business with ABC permits would be detrimental to the neighborhood pursuant to N.C.G.S. 18B-901(c)(9)".

3. The Petitioner, Young's Market LLC, received various approvals from the City of Wilmington concerning the operation of a convenience store at this location and in this neighborhood, including zoning approval, Historic District approval and building permit approval.

4. The Investigative Report performed by the Respondent indicated that the Petitioner met all of the specific statutory and regulatory standards for issuance of the permit for which application was made.

5. The Petitioner established a prima facie case that it was entitled to the permit for which application was made.

6. There is no evidence that, at the time the Respondent made its decision, the Respondent knew about or considered any of the evidence submitted by the Respondent at the hearing through the testimony of the four witnesses who testified for the Respondent; thus the evidence presented through the four witnesses is not material or relevant to the issue of whether the Commission erred in its decision to deny the permit.

7. The crime statistics attached to the LGO have little probative value because they did not establish any link between the crimes and the sale of alcohol at 519 Chestnut.

8. The crime statistics attached to the LGO have little probative value without a comparison of the crimes that occurred when alcohol was being sold at 519 Chestnut and crimes that occurred while the store was open without selling alcohol at some point in 2006.

9. The information about crimes contained in the letter from Paul Lawler to Mike Herring related to the prior owner of the convenience store at 519 Chestnut Street or to crimes that have no connection to the sale of alcoholic beverage; therefore the information has no probative value regarding the alleged bases for permit denial.

10. The hearsay statements contained in the Lawler Letter concerning crime statistics while the store was closed is relevant only to whether the operation of a convenience store at this location had an impact on crime statistics and not whether the sale of alcohol had an impact on crime statistics.

11. The decision to deny the permit on the basis of N.C.G.S. 18B-901(c)(7) (recommendation of the local governing body) was not justified when the recommendation of the City of Wilmington as set out in the LGO is based on factual information that is irrelevant or of little probative value.

12. The decision to deny the permit on the basis of N.C.G.S. 18B-901(c)(9) (detrimental to neighborhood based on evidence admissible under G.S. 150B-29(a) of a drug activity or dangerous activities) was not justified when the record shows that the Respondent based its determination on evidence that was not relevant and/or was not admissible under G.S. 150B-29(a).

13. The preponderance of the evidence establishes that the Petitioner met these standards for issuance of a permit by the Commission to sell off premises malt beverage and unfortified wine at 519 Chestnut Street.

14. The preponderance of the evidence shows that the documentation on which the Respondent based its decision to deny the permit did not provide a basis for denial of the permit requested by the Petitioner.

15. The preponderance of the evidence establishes that the Commission acted erroneously, acted arbitrarily or capriciously and failed to act as required by law or rule in denying the Petitioner's application for a permit to sell malt beverage and unfortified wine for off premises consumption.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is the decision of the Court that the Commission REVERSE the Official Notice of Rejection of Petitioner's ABC permit application and ISSUE the Petitioner the permit for which application was made.

ORDER

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

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision in accordance with the standards found in N.C.G.S. 150B-36(b1) & (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision under N.C.G.S 150B-36(a).

The agency that will make the final decision in this contested case is the North Carolina Alcoholic Beverage Commission.

This 11th day of March, 2010.



Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

W. A. Raney Jr.
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ATTORNEY FOR PETITIONER

LoRita K Pinnix
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ATTORNEY FOR RESPONDENT

This the 12th day of March, 2010.



Office of Administrative Hearings
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

Filed

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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09 DHR 3473

Office of
Administrative Hearings

Wake Radiology Services LLC,
Wake Radiology Diagnostic Imaging Inc.,
Wake Radiology Consultants PA,
Smithfield Radiology Inc., and Raleigh MR
Imaging LP,

Petitioners,

vs.

North Carolina Department of Health and
Human Services, Division of Health Service
Regulation, Certificate of Need Section,
Respondent,

and

Pinnacle Health Services of North
Carolina, LLC, d/b/a Raleigh Radiology at
Cedarhurst,
Respondent-Intervenor.

**RECOMMENDED
DECISION**

This matter came on for hearing before Beecher R. Gray, Administrative Law Judge ("ALJ"), on January 25-27, 2010, in Raleigh, North Carolina. Having heard all of the admitted evidence in the case, and having considered the exhibits, arguments, and relevant law, the undersigned makes Findings of Fact by a preponderance of the evidence, enters Conclusions of Law thereon, and makes the following recommended decision. Under N.C. Gen. Stat. §§ 131E-188(a) and 150B-23, a contested case hearing was held in this matter. At the end of Petitioner's case-in-chief, Respondent-Intervenor, joined by Respondent, orally made a Motion for an Involuntary Dismissal under N.C. R. Civ. P. 41(b). After hearing oral argument from all parties, said motion was granted.

APPEARANCES

For Petitioners Wake Radiology Services, LLC, Wake Radiology Diagnostic Imaging, Inc., Wake Radiology Consultants, PA, Smithfield Radiology, Inc., and Raleigh MR Imaging, LP (collectively "Petitioner" or "Wake Radiology"):

Frank S. Kirschbaum, Esq.
Chad Lorenz Halliday, Esq.
Kirschbaum, Nanney, Kennan & Griffin, P.A.
PO Box 19766
Raleigh, NC 27619-9766

For Respondent N.C. Department of Health and Human Services, Division of Health
Service Regulation, Certificate of Need Section ("Respondent" "Agency" or "CON Section"):

June S. Ferrell, Esq.
Assistant Attorney General
N.C. Department of Justice
PO Box 629
Raleigh, NC 27602-0629

For Respondent-Intervenor Pinnacle Health Services of North Carolina, LLC d/b/a
Raleigh Radiology at Cedarhurst ("Respondent-Intervenor" or "Pinnacle"):

Marcus C. Hewitt, Esq.
Elizabeth Sims Hedrick, Esq.
Williams Mullen
PO Box 1000
Raleigh, NC 27602

APPLICABLE LAW

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-2 *et seq.* and § 131E-188 of the North Carolina Certificate of Need Law.
2. The substantive statutory law applicable to this contested case is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175 *et seq.*
3. The administrative regulations applicable to this contested case are the North Carolina Certificate of Need Program Administrative Regulations, including 10 N.C.A.C. 14C.2700 *et seq.* (Criteria and Standards for Magnetic Resonance Imaging Scanner), and the Office of Administrative Hearing Regulations, 26 N.C.A.C. 3.0100 *et seq.*

BURDEN OF PROOF

As Petitioner, Wake Radiology has the burden of proof by preponderance of the evidence. See N.C. Gen. Stat. § 150B-23(a); N.C. Gen. Stat. § 150B-29(a); *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006).

ISSUES

Whether the Agency substantially prejudiced Wake Radiology's rights; 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 approving Pinnacle's certificate of need (CON) application.

Whether Wake Radiology's rights substantially were prejudiced by the Agency's decision to approve Pinnacle's CON application.

WITNESSES**Witnesses for Petitioner Wake Radiology:**

Thomas W. Elkins, Project Analyst, CON Section
Craig R. Smith, Chief of the CON Section
Daniel R. Carter, Jr., Consultant, Health Planning Source
Robert E. Schaaf, M.D., President of Wake Radiology

EXHIBITS ADMITTED INTO EVIDENCE**Joint Exhibits**

1. Agency File, certificate of need review for Project ID No. J-8268-08
2. Pinnacle Application for Project ID No. J-8268-08

Wake Radiology Exhibits

1. Excerpts from 2007 Johnston MRI, LLC certificate of need Application, Project ID No. J-7900-07
2. Johnston Memorial Fixed MRI Inventory 2010 Projections
5. Agency Findings for Project I.D. No. F-6734-02, Carolina Neurosurgery & Spine Associates
6. 2009 Hospital License Renewal Application for Johnston Memorial Hospital
7. Procedure Volume Charts for Wake Radiology's Garner Office and Johnston Memorial Hospital
9. Excerpt of Agency File pp. 310-12 with Craig Smith's handwritten revisions
10. Illustrative Charts of Daniel Carter's Analysis of Utilization of Other Providers
11. Excerpts from Deposition of Craig Smith, Volume 1

12. Excerpts from Deposition of Craig Smith, Volume 2
13. Excerpts from Deposition of Thomas Elkins, Volume 1
14. Excerpts from Deposition of Susan Hawkins

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 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

Parties

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. Petitioner Wake Radiology Services, LLC, is a North Carolina limited liability company with its principal place of business located in Wake County, North Carolina.
3. Petitioner Wake Radiology Diagnostic Imaging, Inc., is a North Carolina corporation with its principal place of business located in Wake County, North Carolina.
4. Petitioner Wake Radiology Consultants, PA, is a North Carolina professional association with its principal place of business located in Wake County, North Carolina.
5. Petitioner Smithfield Radiology, Inc., is a North Carolina corporation with its principal place of business located in Wake County, North Carolina.
6. Petitioner Raleigh MR Imaging, LP, is a North Carolina limited partnership with its principal place of business located in Wake County, North Carolina.
7. Respondent CON Section is the State agency responsible for the administration of North Carolina's Certificate of Need Law, N.C. Gen. Stat. Chapter 131E, Article 9.
8. Respondent-Intervenor Pinnacle is a Tennessee limited liability company authorized to do business in North Carolina, with its registered office in Wake County, North Carolina.

Expert Witnesses

9. Consultant Daniel R. Carter, Jr. was accepted as an expert witness for Petitioner in Certificate of Need ("CON") application preparation and analysis, and health planning. Mr. Carter has prepared over 200 CON applications. (Carter T. Vol. 2 at 224).

Procedural and Factual Background

10. On or about November 17, 2008, Pinnacle filed an application for a CON ("Pinnacle's Application" or "Application") to acquire a mobile magnetic resonance imaging ("MRI") scanner to replace its existing mobile MRI scanner provided to Pinnacle under a service contract with Alliance Imaging, Inc. ("Alliance MRI Service Contract"). Pinnacle has offered magnetic resonance imaging ("MRI") services for several years, and at the time of the application at issue, Pinnacle provided MRI services at three locations: Pinnacle's "Raleigh Radiology at Cedarhurst" office in Raleigh and its "Raleigh Radiology at Wake Forest" office in Wake County; and its "Raleigh Radiology at Clayton MRI" office in Johnston County. (Jt. Ex. 2 at 19).

11. Pinnacle applied for a CON to obtain its own mobile MRI scanner asserting several reasons: (a) providing MRI service with its own mobile MRI presented a cost savings of approximately 45% compared to offering MRI services via the Alliance MRI Service Contract; (b) obtaining its own mobile MRI scanner would allow Pinnacle more control over operational and quality-related aspects of the MRI service, including the MRI scanner itself, staffing the scanner, and controlling the schedule and locations at which service was provided; and (c) obtaining its own mobile MRI would better ensure patient access to MRI services and capacity for the future in a cost-effective manner. (Jt. Ex. 2 at 19-23).

12. The primary service area identified by Pinnacle for the proposed project was Wake County, North Carolina and Johnston County, North Carolina. The Application proposed to use the mobile MRI scanner at the same three sites at which Pinnacle already was providing MRI services. (Jt. Ex. 2 at 19; Jt. Ex. 1 at 292).

13. The Application was assigned Project I.D. No. J-8268-08 and was not part of a competitive review. On 29 April 2009, the Agency issued its decision approving the Application, and on 6 May 2009 it issued the associated required state agency findings ("Agency Findings") (Jt. Ex. 1 at 292-344). The conditions placed on the award of the CON to Pinnacle included that:

- a. Pinnacle must terminate the Alliance MRI Service Contract before beginning service with its own mobile MRI scanner; and
- b. The mobile MRI scanner only may serve the three sites proposed in the Application unless Pinnacle requests and obtains a declaratory ruling permitting a change of sites. (Jt. Ex. 1 at 313-314).

14. On 29 May 2009, Wake Radiology filed a petition for a contested case hearing with the North Carolina Office of Administrative Hearings ("OAH"), assigned case No. 09 DHR 3473 challenging the Agency's decision. One or more of the Wake Radiology entities offers MRI services in Wake County, and one or more of the Wake Radiology entities interprets MRI studies performed by hospitals staffed by Wake Radiology radiologists in Wake and Johnston Counties. (Schaaf, T. Vol. 2 at 344).

15. On June 22, 2009, Pinnacle moved to intervene in this contested case.

16. By Order dated July 2, 2009, Pinnacle was permitted to intervene in all aspects of this contested case, with full rights of a party.

17. Respondent and Respondent-Intervenor moved for summary judgment against Petitioner under Rule 56, N.C. Rules of Civil Procedure prior to the hearing in this contested case on the grounds that Petitioner could not meet its burden of showing substantial prejudice to its rights as a result of the Agency decision at issue, as required by N.C. Gen. Stat. § 150B-23(a). The Undersigned denied the motion and allowed Petitioner the opportunity to put on its evidence. (T. Vol. 1 at 111-112).

Agency Decision and Findings

18. Thomas W. Elkins was the project analyst assigned to review the Pinnacle Application. (Elkins, T. Vol. 1 at 16). Craig R. Smith, at the time the Assistant Chief for the CON Section, reviewed, edited, and co-signed the Agency Findings. (Smith, T. Vol. 1 at 178-79). Assistant Chief Smith later was promoted to Chief of the CON Section. (Smith, T. Vol. 1 at 177).

19. The Agency determined that the Pinnacle Application conformed to all applicable statutory review criteria set forth in N.C. Gen. Stat. § 131E-183(a), and all applicable regulatory criteria and standards set forth in 10A NCAC 14C.2700 *et seq.* (Jt. Ex. 1 at 292-338).

20. At the contested case hearing in this matter, Wake Radiology contended that Pinnacle's Application should have been found nonconforming with statutory review criteria 1, 3, 6, and 13(c) (Carter, T. Vol. 2 at 224), and that the Agency erred in approving the Application.

Criterion 1

21. Criterion 1 requires that a "proposed project . . . be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating room, or home health offices that may be approved." N.C. Gen. Stat. § 131E-183(a)(1).

22. The State Medical Facilities Plan did not contain a need determination for mobile MRI scanners, and therefore no need determination applicable to the review of Pinnacle's Application (Jt. Ex. 1 at 293; Smith, T. Vol. 1 at 184).

23. The Agency found the Pinnacle Application conforming to Criterion 1 based on its finding that Pinnacle complied with policy GEN-3 from the 2008 State Medical Facilities Plan, which requires the project to be consistent with the three basic principles governing the State Medical Facilities Plan: to promote cost-effective approaches, expand health care services to the medically underserved, and encourage quality health care services (Jt. Ex. 1 at 293-96; Elkins, T. Vol. 1 at 164).

Criterion 3

24. Criterion 3 requires an applicant to "identify the population to be served by the proposed project . . . and 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." N.C. Gen. Stat. § 131E-183(a)(3).

25. The Agency found that the Application conformed to Criterion 3. (Jt. Ex. 1 at 296-313).

26. The only performance standards applicable to Pinnacle's Application are 10 NCAC 14C.2703(a)(2) and 14C.2703(a)(3). (Jt. Ex. 1 at 337-341). The standards require the applicant to "demonstrate annual utilization in the third year of operation is reasonably projected to be at least 3,328 weighted MRI procedures on each of the existing, approved, and proposed mobile MRI scanners owned by the applicant or a related entity to be operated in the mobile MRI region in which the proposed equipment will be located," and to "document the assumptions and provide data supporting the methodology used for each projection required in the Rule." 10 NCAC 14C.2703(a)(2); 10 NCAC 14C.2703(a)(3).

27. Neither Pinnacle nor any related entity owned any mobile MRI scanners in North Carolina or a controlling interest in any mobile MRI scanners in North Carolina. With respect to the proposed mobile MRI scanner, the Agency found Pinnacle's Application conforming with both performance standards. (Jt. Ex. 1 at 337-38).

28. Pinnacle demonstrated compliance with Criterion 3 by reasonably projecting that it would perform at least 3,328 weighted MRI procedures in the third year of operation after implementation of the proposed project, in conformity with 10 NCAC 14C.2703(a)(2). (Jt. Ex. 1 at 298-311; Smith, T. Vol. 1 at 188).

29. There are no statutory or regulatory criteria or standards applicable to Pinnacle's Application that required Pinnacle to demonstrate the effect of its project on other providers or to demonstrate or project the utilization of other providers of MRI services in the service area. (Elkins, T. Vol. 1 at 148; Carter, T. Vol. 2 at 282).

30. The Agency Findings noted, based on MRI procedure volumes reported during the review for fiscal year 2008, that Pinnacle's utilization of the contracted mobile MRI scanner

provided by Alliance Imaging, Inc. ("Alliance Mobile MRI") already met the required performance standard. (Jt. Ex. 1 at 309-10).

31. The Agency determined that Pinnacle's utilization projections were reasonable based on historical data, growth trends, and documented physician referrals, a finding that Wake Radiology does not challenge. (Jt. Ex. 1 at 311; Smith, T. Vol. 1 at 181-82; Carter, T. Vol. 2 at 290).

Criterion 6

32. Criterion 6 requires the applicant to "demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C. Gen. Stat. § 131E-183(a)(6).

33. There are no statutory or regulatory criteria or standards applicable to Pinnacle's Application that required Pinnacle to demonstrate the effect of its project on other providers or to demonstrate the utilization of other providers of mobile MRI scanners. (Elkins, T. Vol. 1 at 148; Carter, T. Vol. 2 at 282). However, the Agency, in an abundance of caution, considered the impact Pinnacle's project could have on other providers in response to public comments made by certain other providers that Pinnacle's project was not necessary and would result in unnecessary duplication. (Smith, T. Vol. 1 at 183; Jt. Ex. 1 at 311-313).

34. As part of this analysis, the Agency projected utilization for existing and approved MRI providers in Wake County and Johnston County and determined that Pinnacle's project would not result in unnecessary duplication. (Jt. Ex. 1 at 317; Smith, T. Vol. 1 at 183).

35. Because there are no rules requiring other providers to be at a certain utilization level before an application for a mobile MRI can be approved, the Agency noted certain planning thresholds for fixed MRIs as "guidance" or "a tool." (Smith, T. Vol. 1 at 183-84; Jt. Ex. 1 at 310-313). Accordingly, the Agency noted other providers' projected utilization relative to such planning thresholds, but did not state or imply that such thresholds were minimum utilization levels below which Pinnacle's project would constitute "unnecessary duplication" under Criterion 6 (Smith, T. Vol. 1 at 183-84; Jt. Ex. 1 at 310-313).

36. In projecting utilization for other Johnston County MRI providers, the Agency projected utilization for Johnston MRI, LLC ("Johnston MRI"), an approved provider that was not yet operational, by using the projections from its CON application. The Agency projected utilization for Johnston Memorial Hospital, an existing provider, by assuming its reported utilization volume for fiscal year 2007 would remain constant (Jt. Ex. 1 at 312). However, Wake Radiology's expert witness testified that the Agency did not take into account that Johnston MRI had projected a shift of certain procedure volumes from Johnston Memorial Hospital to Johnston MRI when Johnston MRI's MRI scanner went into service. (Carter, T. Vol. 2 at 244).

37. The Agency acknowledged that it used faulty assumptions in projecting the utilization of the two existing and approved providers in Johnston County, and that the Agency's assumptions did not take into account Johnston MRI, LLC's projected shift in patient volumes.

(Elkins, T. Vol. 1 at 150; Smith, T. Vol. 1 at 189-90). However, Chief Smith testified that had he recognized the inconsistency, the Agency also would have realized that other related assumptions also were faulty and a different analysis would have been required (Smith, T. Vol. 1 at 192-93). When questioned at deposition, Chief Smith testified as to the assumptions the Agency would have employed, using the information it had available to it during the review of Pinnacle's Application. (Pet. Ex. 9; Smith, T. Vol. 1 at 196).

38. Wake Radiology's expert witness, Consultant Daniel Carter, disagreed with the assumptions used by Chief Smith. (Carter, T. Vol. 2 at 294-99). Consultant Carter offered several alternative calculations he opined the Agency should have used in performing this analysis. (Carter, T. Vol. 2 at 259; 264-66; Pet. Ex. 10).

39. Consultant Carter also testified that, in his opinion, the Agency should have based its projections for existing providers in Johnston County on 2008 utilization data from Johnston Memorial Hospital's 2009 licensure renewal application. Consultant Carter used the 2008 hospital licensure renewal data in several alternative calculations upon which he based his opinion that the Pinnacle Application did not conform to Criterion 6. (Carter, T. Vol. 2 at 257-62; Pet. Ex. 10). However, there is no rule or regulation requiring the Agency to consider hospital licensure renewal application data. (Carter, T. Vol. 2 at 299-300).

40. In addition, Consultant Carter acknowledged that the utilization figure on which his calculations were based was inconsistent with other data in the same hospital licensure renewal application, but he could not explain the inconsistency. (Carter, T. Vol. 2 at 316-319; Petitioner's Ex. 6, pp. 127, 141, 127-129). Wake Radiology's president, Robert E. Schaaf, M.D. testified that he believed that the number of scans Consultant Carter used from the licensure renewal application was lower than the actual number of MRI procedures performed at Johnston Memorial Hospital in 2008. (Schaaf, T. Vol. 2 at 389).

41. Consultant Carter also acknowledged that no rule specified the calculations or assumptions which the Agency must use if it chose to analyze the potential impact on other providers in the service area. (Carter, T. Vol. 2 at 281-82; 325). Nor could he identify any previous Agency findings in which the Agency required that other providers be at a specific utilization level in order to approve a mobile MRI application. (Carter, T. Vol. 2 at 284-85).

42. Consultant Smith testified that, even acknowledging the reasons Wake Radiology disagreed with the assumptions and analysis the Agency used in reviewing the potential impact on other providers, the Agency would have reached the same conclusion that Pinnacle's project is needed and would not result in unnecessary duplication of services under Criteria 3 and 6. (Smith, T. Vol. 1 at 209).

Criterion 13(c)

43. Criterion 13(c) requires the applicant to "demonstrate the contribution of the proposed service in meeting the needs of the elderly and of members of medically underserved groups" by showing "[t]hat the elderly and the medically underserved groups identified in this

subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services." N.C. Gen. Stat. § 131E-183(a)(13)(c).

44. In evaluating conformity with Criterion 13(c), the Agency considers applicants' proposed "payor mix," or the distribution of its projected utilization among payment source (e.g., Medicare, Medicaid, self-pay, Blue Cross, Commercial, etc.) expressed in percentages. (See, e.g., Jt. Ex. 1 at 323).

45. Pinnacle projected its payor mix for each site at which it proposed to provide mobile MRI services based on its actual historical payor mix from its past provision of MRI services at each site. (Jt. Ex. 1 at 323; Jt. Ex. 2 at 96-101). On this basis, the Agency found the Application conforming to Criterion 13(c). (Jt. Ex. 1 at 323).

46. Wake Radiology's expert witness testified that Pinnacle should have been found nonconforming with Criterion 13(c) because Pinnacle's projected payor mix for its Johnston County site included a smaller percentage of Medicare, Medicaid, and self-pay patients than Johnston Memorial Hospital's payor mix. (Carter, T. Vol. 2 at 230-231). Consultant Carter based his opinion on the Agency's findings in a previous review in which Pinnacle was denied a CON for a fixed MRI scanner in Johnston County and Johnston MRI, LLC was approved (the "Johnston MRI Findings"). (See Jt. Ex. 1 at 244-91; Carter, T. Vol. 2 at 230-31).

47. However, in the Johnston MRI Findings, the Agency specifically stated that Pinnacle's nonconformity with Criterion 13(c) was based on Pinnacle's use of its historical payor mix in *Wake County* to project its payor mix in *Johnston County*. (Jt. Ex. 1 at 269; Smith, T. Vol. 1 at 203-04). Because Pinnacle used Wake County data, the Agency, in the Johnston MRI Findings, compared Pinnacle's projected payor mix to the only other MRI services provider in the area, Johnston Memorial Hospital. (Smith, T. Vol. 1 at 203-04). In contrast, Pinnacle's projected payor mix in the Application at issue in this case was based on its own historical payor mix at the same site and thus was considered reliable by the Agency. (Smith, T. Vol. 1 at 203).

48. The Chief of the CON Section testified that there is no minimum standard for Medicare, Medicaid, and self-pay payors and that the Agency generally considers the reasonableness an applicant's representations. (Smith, T. Vol. 1 at 201). Mr. Smith testified that hospitals, such as Johnston Memorial, typically provide higher Medicare and Medicaid access than outpatient centers, such as Pinnacle. (Smith, T. Vol. 1 at 204). Wake Radiology also acknowledged that Wake Radiology's hospital sites all have payor mixes with higher percentages of Medicare, Medicaid, and self-pay patients than its own outpatient sites, and that Pinnacle's Clayton office is an outpatient facility. (Schaaf, T. Vol. 2 at 376; 382).

Harm to Wake Radiology from Pinnacle's MRI Services

49. Wake Radiology provides the professional interpretation of MRI scans performed at Johnston Memorial Hospital. (Schaaf, T. Vol. 2 at 349-50).

50. Wake Radiology's president, Robert E. Schaaf, M.D. testified that he observed a decline in the volume of MRI procedures performed at Johnston Memorial Hospital and Wake

Radiology's Garner office (located in Wake County) since Pinnacle began offering mobile MRI services at its Clayton office using the Alliance Mobile MRI in late 2007. (Schaaf, T. Vol. 2 at 351, 357-358).

51. Dr. Schaaf also testified that he had observed a change in Johnston Memorial Hospital's and Wake Radiology's payor mixes since Pinnacle began offering mobile MRI services at its Clayton office on the Alliance Mobile MRI in 2007. (Schaaf, T. Vol. 2 at 357-358). Dr. Schaaf observed that Johnston Memorial Hospital and Wake Radiology's Garner site have seen higher percentages of lower paying groups (Medicare, Medicaid and self-pay patients) relative to commercially insured patients since Pinnacle initiated mobile MRI services at its Clayton office in 2007. (Schaaf, T. Vol. 2 at 351; Petitioner's Ex. 7).

52. However, Dr. Schaaf relied entirely on Wake Radiology's own volume and payor mix data for the five-year period from 2005-2009. (Schaaf, T. Vol. 2 at 356-358). No data or evidence was offered to identify the causes of any decline in MRI volumes or payor mix at Wake Radiology or at Johnston Memorial Hospital or to attribute any such declines to Pinnacle's entrance into the market. (Schaaf, T. Vol. 2 at 348-372).

53. Moreover, the declines in payor mix and MRI volume in and near Johnston County identified by Dr. Schaaf all took place during the period since 2007 in which Pinnacle already offered mobile MRI service using the Alliance Mobile MRI at its Clayton location. (Petitioner's Ex. 7). Thus, even if any such trends could be attributed to Pinnacle, they occurred before the Agency's decision and could not be a result of the Agency's decision.

No Change from Status Quo

54. Although Wake Radiology argued that Pinnacle's current provision of mobile MRI services using the Alliance Mobile MRI is harmful to other providers, Pinnacle's current service is not the result of the Agency decision at issue in this contested case. Prior to the Application, the Agency recognized that Pinnacle already was an existing provider of MRI services in Wake and Johnston Counties using the Alliance Mobile MRI (See Jt. Ex. 1 at 292).

55. Further, since the Alliance Mobile MRI was a "grandfathered" mobile MRI scanner, Pinnacle was free to continue and expand its service using the Alliance Mobile MRI or similar contract arrangement without obtaining a CON (Smith, T. Vol. 1 at 207-209; Carter, T. Vol. 2 at 268-269).

56. Wake Radiology's witnesses identified no contractual or legal limitation under the Alliance MRI Service Contract in effect at the time of the Application that would have prevented Pinnacle from adding more hours and/or days of service, adding more sites, or even additional contracted MRI scanners (Schaaf, T. Vol. 2 at 372-74; Carter, T. Vol. 2 at 276-277).

57. Pinnacle's application proposed to serve only the same three sites at which it already provided MRI services, and proposed to terminate the Alliance MRI Service Contract prior to starting service with its own mobile MRI scanner. Consequently, the approval of the

Application would result in no change in the number of MRI scanners operated by Pinnacle or the locations at which service is provided (Jt. Ex. 1 at 292).

58. Despite its dissatisfaction with Pinnacle's existing MRI services, Wake Radiology failed to offer any evidence other than speculation as to how it would be harmed by the award of a CON to Pinnacle to replace the Alliance Mobile MRI with its own mobile MRI scanner. If Pinnacle received a CON for its own mobile MRI, Wake Radiology's President testified that he expects "more of the same." (Schaaf, T. Vol. 2 at 368-372, 375).

59. Neither Dr. Schaaf nor Wake Radiology's expert witness offered any prospective analysis or projections of any kind to demonstrate any harm expected as a result of Pinnacle's obtaining its own mobile MRI scanner, compared with the continuation of Pinnacle's existing MRI service using the Alliance Mobile MRI (Schaaf, T. Vol. 2 at 375, 384; Carter, T. Vol. 2 at 281).

60. Instead, Dr. Schaaf testified that his basis for believing Wake Radiology would suffer harm as a result of Pinnacle's acquiring its own mobile MRI was Wake Radiology's own experience at Wake Radiology in moving from a leased MRI to a purchased MRI. (Schaaf, T. Vol. 2 at 375-76).

61. Dr. Schaaf also testified that Pinnacle projected a payor mix lower in Medicare, Medicaid and self-pay patients than the payor mix of MRI procedures performed at Johnston Memorial Hospital (Schaaf, T. Vol. 2 at 376). However, Pinnacle's projected payor mix was identical to its historical payor mix at all three of its proposed sites, and therefore would not constitute any change to the status quo (Jt. Ex. 2 at 96-101; Schaaf, T. Vol. 2 at 365).

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. A court need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 449, 429 S.E. 2d 611, 612 (1993).
3. Respondent and Respondent-Intervenor acknowledge, and the Undersigned concludes as a matter of law, that Wake Radiology is an "affected person" within the meaning of N.C. Gen. Stat. § 131E-188 by virtue of the MRI services provided by one or more Wake Radiology entities in Wake County.
4. The North Carolina Court of Appeals has held that the exercise of an applicant's right to an evidentiary hearing under the contested case provision of N.C. Gen. Stat. § 131E-188(a) does not commence a *de novo* proceeding by the ALJ intended to lead to a formulation of the final decision. *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). The Court expressly recognized that to do so would misconstrue the nature of contested case hearings under the CON law and the Administrative Procedure Act. *Id.*

5. The appropriate standard of review in this case depends upon the issue being reviewed. When an appellant charges that a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency. *Britthaven*, 118 N.C. App. at 384, 455 S.E.2d at 460. However, when an appellant questions whether the Agency's decision was supported by the evidence or whether it was arbitrary or capricious, the appropriate standard is the whole record test. *Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461.

6. Under the whole record test, "a court must examine all the record evidence – that which detracts from the agency's findings and conclusions as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency's decision." *Good Hope Health Sys. v. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 543, 659 S.E.2d 456, 462 (2008) (quoting *Watkins v. N.C. State Bd. Of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)). Substantial evidence is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b). The whole record test merely gives the reviewing court the capability to determine whether the administrative decision has a rational basis in the evidence. *Carillon Assisted Living, LLC, v. N.C. Dep't of Health & Human Servs.*, 175 N.C. App. 265, 270, 623 S.E.2d 629, 633 (2006).

7. In a contested case concerning a Certificate of Need, the ALJ is limited to a review of the information presented or available to the agency at the time of the review, but is not limited to that part of the evidence that the Agency actually relied upon in making its decision. *In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 791, rev. denied, 320 N.C. 793, 361 S.E.2d 89 (1987).

8. North Carolina law presumes that the Agency properly has performed its duties, and this presumption is rebutted only by a showing that the Agency was arbitrary or capricious in its decision making. See, e.g., *In re Broad & Gales Creek Cmty. Assoc.*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); *Adams v. N.C. State Bd. Of Registration for Prof'l Eng'g & Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998); *In re Land & Mineral Co.*, 49 N.C. App. 529, 531, 272 S.E.2d 6, 7, disc. rev. denied, 302 N.C. 397, 297 S.E.2d 351 (1981) (holding that "[t]he official acts of a public agency . . . are presumed to be made in good faith and in accordance with the law").

9. Administrative agency decisions may be reversed as arbitrary and capricious only if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate any course of reasoning in the exercise of judgment." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (internal citation and quotations omitted).

10. The "arbitrary and capricious" standard is a difficult one to meet. *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001).

11. North Carolina law also gives great deference to an agency's interpretation of a law it administers. *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). See also *Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992), disc. rev. improvidently allowed, 333 N.C. 533, 427 S.E.2d 874 (1993) (holding that a

reviewing court should defer to the agency's interpretation of a statute it administers "so long as the agency's interpretation is reasonable and based on permissible construction of the statute").

12. As petitioner, Wake Radiology bears the burden of proof on each and every element of its case. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006). In a contested case "[u]nder N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether 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 or capriciously, used improper procedure, or failed to act as required by law or rule." *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (emphasis in the original). The burden of persuasion placed upon Wake Radiology is the "greater weight of the 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 the evidence").

13. Petitioner's burden therefore is two-fold: (1) to demonstrate substantial prejudice to its rights; and (2) to demonstrate that the Agency acted erroneously, arbitrarily, or capriciously, or used improper procedure, or failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23 provides that a petitioner in a contested case "shall state facts tending to establish that the agency . . . has deprived Petitioner of property, has ordered Petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced Petitioner's rights." "It is well established that 'the word "shall" is generally imperative or mandatory.'" *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 362 N.C. 372, 378, 646 S.E.2d 356, 360 (2007). Even where, as here, there is no dispute that Petitioner is an "affected person" under N.C. Gen. Stat. § 131E-188, the appellate courts of this State have affirmed that a petitioner also must demonstrate substantial prejudice to its legal rights in order to maintain a contested case. *Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 780, 630 S.E.2d 213 (2006) (upholding ALJ's grant of summary judgment on the basis that petitioner failed to demonstrate substantial prejudice to its rights from the grant of a non-competitive CON to petitioner's competitor); *Bio-Medical Applications v. N.C. Dep't of Health & Human Servs.*, No. COA04-1644, 2005 N.C. App. LEXIS 2090 (2005) (holding that petitioner failed to carry its burden of proving substantial prejudice to its rights from a grant of a non-competitive CON to petitioner's competitor).

14. Under the whole record test, error in the Agency's analysis of an approved applicant does not require the applicant's disapproval if the error does not affect the outcome of the review. See, e.g., *Britthaven*, 118 N.C. App. at 386, 455 S.E.2d at 461.

Agency Error

15. With regard to the Agency's finding that Pinnacle was conforming to N.C. Gen. Stat. § 131E-183(a)(1) ("Criterion 1"), the Agency properly determined that Pinnacle had complied with Policy GEN-3 for reasons including, but not limited to, the cost savings that could be achieved by Pinnacle's proposed project. The Undersigned finds that the Agency did not err in determining that Pinnacle's Application conformed to Criterion 1.

16. With regard to the Agency's finding that Pinnacle was conforming to N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3"), Pinnacle reasonably projected that it would perform at least 3,328 procedures by the third year of operation of the proposed project, in conformance with 10 NCAC 14C.2703(a)(2), and thus the Agency properly determined that Pinnacle had demonstrated need for the proposed project. The Undersigned finds that the Agency did not err in determining that Pinnacle's Application was conforming to Criterion 3.

17. With regard to the Agency's analysis of the utilization of other MRI service providers in Wake County or Johnston County used to evaluate N.C. Gen. Stat. § 131E-183(a)(6) ("Criterion 6"), no statutory criterion, rule or regulatory standard required Pinnacle to demonstrate or project the utilization rates of other MRI providers in the service area in order to be approved for a CON. Furthermore, the analysis in the Agency Findings did not require existing and approved providers to be at any specific utilization rates in order to find Pinnacle conforming to Criteria 3 and 6.

18. Wake Radiology's expert witness disagreed with certain assumptions used in the Agency Findings and disagreed with the Agency as to the proper data and assumptions upon which to evaluate conformity with criterion 6.

19. The Agency Findings, including the finding that Pinnacle's proposed project would not unnecessarily duplicate existing health service facilities in the service area, were rationally based on information available to the Agency during the review of the Pinnacle Application. Therefore, under the whole record test, the Undersigned concludes that the Agency Findings were not arbitrary or capricious and did not constitute Agency error.

20. Further, if the assumptions used in the Agency's analysis of impact on other providers had constituted Agency error, the Agency would nevertheless have concluded that Pinnacle's project presented no unnecessary duplication and complied with Criteria 3 and 6. Consequently, any such error was harmless and would not require disapproval of the Application. See *Britthaven*, 118 N.C. App. at 384, 455 S.E.2d at 460.

21. With regard to N.C. Gen. Stat. § 131E-183(a)(13c) ("Criterion 13(c)"), the Agency properly determined that Pinnacle's projected payor mix at its Clayton office was reliable and based on historical data, and Criterion 13(c) did not require Pinnacle to project any certain payor mix. The Agency thus properly found the Application conforming to Criterion 13(c). The Undersigned finds that the Agency did not err in finding Pinnacle conforming to Criterion 6. The Undersigned further finds that, if any assumptions used by the Agency had been in error, such error was harmless and would not have changed the Agency's determination that the Application conformed with Criteria 3 and 6. Consequently, the Agency still would properly have approved the Pinnacle Application.

22. The Agency properly determined that Pinnacle conformed to all applicable statutory and regulatory review criteria and standards.

23. Because Wake Radiology failed to establish that the Agency acted outside its authority, acted erroneously, acted arbitrarily or capriciously, used improper procedure, or failed

to act as required by law or rule, it has failed to prove an essential element of its case and therefore its case is subject to dismissal without regard to whether it proved substantial prejudice to its rights.

Substantial Prejudice

24. Wake Radiology failed to demonstrate substantial prejudice to its legal rights as required by N.C. Gen. Stat. § 150B-23. Wake Radiology's allegations regarding potential harm were speculative and/or were based on conditions that predated the Agency's decision.

25. Wake Radiology offered no competent evidence that any decline in MRI procedure volumes it may have experienced was caused by the Agency's decision to approve Pinnacle's Application for a CON.

26. Wake Radiology offered no competent evidence that any deterioration in its payor mix was caused by the Agency's decision to approve Pinnacle's Application for a CON.

27. Wake Radiology instead relied on conclusory and speculative assumptions that deterioration of its MRI procedure volumes and payor mix were caused by Pinnacle's provision of services *prior* to the Agency's decision, and that Wake Radiology expects "more of the same" following the grant of the CON to Pinnacle. However, before the Application was filed, Pinnacle already provided MRI services at the same sites proposed in its Application. The conditions complained of by Wake Radiology thus did not result from the Agency decision, but were instead the status quo prior to the decision.

28. Wake Radiology failed to present any evidence that the Agency decision would result in any change to Pinnacle's MRI scanner capacity, to the sites at which Pinnacle provides service, or to Pinnacle's payor mix. Wake Radiology indeed failed to offer any competent evidence or testimony to show how the acquisition of Pinnacle's own mobile MRI scanner to replace the Alliance Mobile would affect Wake Radiology in any way. Consequently, Wake Radiology failed to offer any competent evidence to meet its burden to show that the agency decision at issue substantially prejudiced its rights. See *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459; *Presbyterian Hosp.*, 177 N.C. App. at 785, 630 S.E.2d at 216 (2006); *Bio-Medical Applications v. N.C. Dep't of Health & Human Servs.*, No. COA04-1644, 2005 N.C. App. LEXIS 2090, at 13 (N.C. Ct. App. 2005).

29. Further, the evidence demonstrated that Wake Radiology's primary concern is the effect of competition. The fact that some patients have chosen or may choose to receive services at a Pinnacle facility rather than a facility staffed by Wake Radiology does not support or define any legal right that is substantially prejudiced by the Agency's decision to grant Pinnacle a CON to obtain its own mobile MRI scanner. "Everyone [has] the right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition." *Coleman v. Whisnant*, 225 N.C. 494, 506, 35 S.E.2d 647, 655 (1945). Wake Radiology "is not being prevented from benefiting from 'the fruits and advantages of [its] own enterprise, industry, skill, and credit,' but merely is being required to compete for such

benefit." *Bio-Medical Applications v. N.C. Dep't of Health & Human Servs.*, 179 N.C. App. 483, 491-92, 634 S.E.2d 572, 578 (2006) (quoting *Coleman*, 255 N.C. at 506, 35 S.E.2d at 665).

30. Because Wake Radiology has failed to establish that substantial prejudice to its legal rights resulted or will result from the Agency's decision, it has failed to prove an essential element of its case and therefore its case is subject to dismissal without regard to whether it proved agency error.

RECOMMENDED DECISION

Based upon the foregoing findings of fact and conclusions of law, it hereby is recommended that the decision of the Certificate of Need Section approving the Pinnacle Application be affirmed as supported by the evidence.

ORDER

It hereby is 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).

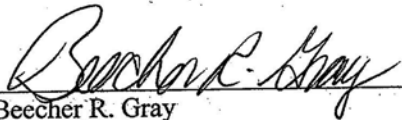
NOTICE

The Agency making the final decision in this contested case 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. Gen. Stat. § 150B-36(a).

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

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services.

This the 22 day of February, 2010.


Beecher R. Gray
Administrative Law Judge

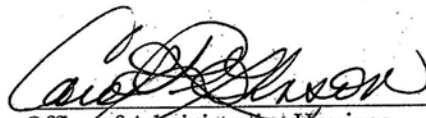
A copy of the foregoing was mailed to:

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ATTORNEY FOR RESPONDENT INTERVENOR

This the 23rd day of February, 2010.


Office of Administrative Hearings
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Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA

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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF LENOIR

09 DHR 4743

Office of
Administrative Hearings

DESMOND LASHAWN WOOTEN,
Petitioner,

v.

NC DEPARTMENT OF HEALTH and
HUMAN SERVICES, Division of Health
Services Regulation, Health Care Personnel
Registry,
Respondent.

DECISION

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on December 15, 2009 in Goldsboro, North Carolina. The record was left open for the Parties' submission of materials, including but not limited to supporting Memorandums of Law. After filing by Respondent on January 13, 2010 and Petitioner on January 14, 2010 with the Clerk of the Office of Administrative Hearings (OAH) and receipt by the Undersigned on January 19, 2010, the record was closed on January 19, 2010.

APPEARANCES

For Petitioner: Desmond LaShawn Wooten, *pro se*

For Respondent: Juanita B. Twyford
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether Respondent has substantially prejudiced Petitioner's rights; and acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law when Respondent notified Petitioner of its intent to enter his name with a finding that on or about August 18, 2008, he "abused a resident, (SD) by willfully pulling resident's hair, hitting resident's head against bed and using fist to hold resident's jaw against the bed while restraining resident resulting in mental anguish."

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23
42 CFR § 488.301
10A N.C.A.C. 13O.0101

PETITIONER'S WITNESSES

Petitioner
Crystal Wooten
Clifton Dean Hill

RESPONDENT'S WITNESSES

Petitioner
Deborah Tyndall
Wray Faulkner
Billy Tart

Nate Carmichael appeared at the request of Respondent.
Mr. Carmichael operated the laptop computer used to view Respondent's Exhibit #9.

EXHIBITS

Joint Exhibit #1 – Stipulations signed by parties

Petitioner's Exhibits A-D were admitted

Respondent's Exhibits 1-17 were admitted

Respondent's Exhibit #9 - Surveillance Video [M-13] is an encrypted CD and is sealed to maintain confidentiality

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 evidence presented, the undersigned makes the following Findings of Fact.

FINDINGS OF FACT

1. At all times relevant to this matter Petitioner, Desmond LaShawn Wooten, was employed at Cherry Hospital as a Health Care Technician I. He began work at Cherry Hospital in November 1995. At all times relevant to this matter Cherry Hospital in Goldsboro, NC was a state psychiatric facility.

2. Pursuant to N.C. Gen Stat. §131E-256, the Respondent Department of Health and Human Services is responsible for investigating allegations of resident abuse, neglect, misappropriation of property, diversion of drugs, and fraud by a nurse aide or health care personnel.

3. In a letter dated October 23, 2008 from the Health Care Personnel Registry Section to Petitioner he was informed that the "Department had determined that an investigation is to be conducted of the allegation that on or about August 17, 2008 you abused a resident at Cherry Hospital." Resp. Ex. 3.

4. The investigation of this matter came about when on or about September 16, 2008 Dr. Steve Peters, a psychologist at Cherry Hospital was reviewing surveillance video tapes to use for educational purposes. A video tape from August 18, 2008 (date cited in the 24-Hour Initial Report) appeared to Dr. Peters to show excessive force being used while placing SD in restraints. There were five Health Care Technicians and one nurse involved in the placing of SD in restraints. Dr. Peters was not called as a witness by Respondent and no HCPR Interview of Dr. Peters was conducted by Respondent.

5. On or about September 16, 2008, Respondent received a 24 Hour Initial Report form signed September 15, 2008 by Brenda M. Wells from Cherry Hospital alleging that on or about August 18, 2008, Petitioner abused SD while putting the patient in restraints. Resp. Ex. 1.

6. On or about October 1, 2008, Respondent received a 5 Working Day Report from Cherry Hospital signed by Brenda Wells on September 30, 2008 alleging that on or about, August 18, 2008, Petitioner abused resident SD. Attached to the report was a copy of the facility investigation substantiating that Petitioner abused the Patient by excessive use of force. The report also substantiated neglect by two (Hill and C. Wooten) of the four other Health Care Technicians due to their failure to report. Lastly the report acknowledged "concerns regarding the lack of assistance provided to them during this incident by three medical students and a psychiatrist who were on the ward that morning." Resp. Ex. 2.

7. Wray Faulkner, RN, is an investigator with the Health Care Personnel Registry. Faulkner is charged with investigating allegations against health care personnel and investigated the allegation reports that Petitioner had abused Resident SD. By letter dated October 23, 2008, Faulkner notified Petitioner that Respondent would be investigating the allegation he had abused a resident at Cherry Hospital, and that his name would be listed on the Health Care Personnel Registry pending investigation of the allegation. The letter gave notice of appeal rights.

8. SD was a morbidly obese patient with Chronic Mental Illness who carried multiple diagnoses including but not limited to Impulse Control disorder, Schizoaffective Disorder (Bipolar type) and Mild Mental Retardation. SD has had multiple hospitalizations to Cherry Hospital. In the reasons for admission during this time period as a result of violence against group home staff, it is noted that SD had been "released from Cherry on Wednesday of this week." Resp. Ex. 4

9. The parties stipulate that there is no dispute about the following:

- a. SD is the female patient in the surveillance video [M-13] taken on 8/18/08 around 6:37 a.m. in Woodard Building on Cherry campus.
- b. SD has a dual diagnosis of mild mental retardation with an impulse control disorder. Medical problems include seizure disorder and morbid obesity.
- c. SD was admitted to Ward U-2, an adult acute admissions ward, but was transferred to Woodard Building from U-2 due to overcrowding in U-2. Woodard uses an intercom alarm system, and is not equipped with beepers and body alarms for staff.
- d. On the morning of 8/18/08, Dr. Chengappa was present in Woodard when SD became angry and aggressive. After SD turned over a night stand and attempted to throw another night stand at staff, Dr. Chengappa gave an order for SD to be placed in seclusion and restraints. Woodard staff called for male help.
- e. The following individuals are seen in video surveillance carrying SD down the hall from her bedroom to the seclusion/restraint room in Woodard: Jordan Stevens, RN; Patricia Bynum, HCT; Crystal Wooten, HCT; Lakitra Smith, HCT; Clifton Hill, HCT; and Petitioner. In the video, Petitioner is the tall black male dressed in jeans and a grey tee shirt. Dr. Chengappa can be seen on the video standing at the door of the seclusion/restraint room.
- f. Staff had difficulty carrying SD down the hall due to SD's size and resistance. Once inside the seclusion/restraint room, staff continued to struggle with lifting SD onto the restraint bed and securing SD in four point restraints.
- g. After SD was placed in four point restraints, staff left the room and SD was monitored in the seclusion area until she was released at 7:50 a.m.
- h. The incident report concerning the restraint of SD completed on 8/18/08 documents that no injuries to SD were noted.
- i. Petitioner reported that he injured his back during the restraint of SD. Two other staff involved in the restraint also reported injuries.

- j. On or about 9/17/08, the investigatory committee at Cherry initiated an investigation in response to a complaint that SD was abused. While reviewing camera footage to find good examples of how to place a patient in restraints, reporter reviewed a video of the 8/18/08 restraint of SD and reported that he observed SD's hair being pulled, her head hitting the headboard while being positioned on the restraint bed, and staff placing a closed fist against SD's jaw while forcing her head into the mattress.
- k. After reviewing the video surveillance tape and interviewing all staff involved in the restraint, the committee substantiated that Petitioner abused SD by his use of excessive force during the restraint.
- l. By letter dated October 2, 2008, Petitioner was informed that Cherry Hospital Management had decided to dismiss him from employment for unacceptable personal conduct related to the restraint of SD on 8/18/08.
- m. By Hearing Officer's Report dated April 8, 2009, Noelle S. Browne, DHHS Hearing Officer, recommended that: the decision to dismiss Petitioner be rescinded; that Petitioner be demoted due to grossly inefficient job performance related to the restraint of SD; and that Petitioner receive back pay.
- n. By letter dated April 13, 2009, Petitioner received notice of the decision on his grievance appeal from his dismissal from Cherry Hospital. The Secretary of DHHS modified the recommendation of the Hearing Officer. Petitioner was reinstated in lieu of dismissal, subject to a 10 working day suspension without pay. In addition, the letter advised Petitioner that upon return to work management would work closely with him in an effort to improve Petitioner's skills.

10. Mr. Faulkner conducted his own investigation of the allegation of abuse for the Health Care Personnel Registry. During the investigation, Mr. Faulkner filled out HCPR interview forms on Petitioner and five other Cherry Hospital staff. Resp. Ex. 10-15. He also reviewed SD's record, reviewed Petitioner's personnel file, reviewed facility documentation and investigation, and observed video surveillance of the incident.

11. After considering the information he gathered, Mr. Faulkner completed an Investigation Conclusion Report substantiating the allegation that on or about August 18, 2008, Petitioner a health care personnel, employed at a state facility, Cherry Hospital, in Goldsboro, North Carolina, abused resident SD by "willfully pulling resident's hair, hitting resident's head against bed, and using his fist to hold resident's jaw against the bed while restraining resident resulting in mental anguish." Resp. Ex. 16.

12. Petitioner was notified by letter dated July 21, 2009, that the allegation of abuse was substantiated. Attached to the letter were the Entries of Finding, which are the substantiated

findings as they would appear on the Health Care Personnel Registry. The letter also notified Petitioner of his appeal rights. Resp. Ex. 17. Petitioner timely filed a Petition for Contested Case Hearing with the Office of Administrative Hearings contesting the listing of the allegation of abuse on the Health Care Personnel Registry.

13. Debbie Tyndall, Director of Nursing Education, Cherry Hospital, testified for Respondent. Ms. Tyndall was not involved in the investigation of the incident concerning the restraint of SD on 8/18/08 and she does not know Petitioner. She had no knowledge of the incident until about a week prior to the hearing when counsel for Respondent asked her to watch video surveillance of the restraint of SD on 8/18/08.

14. Regarding the allegations of the willful hitting of SD's head against the bed, Ms. Tyndall was of the opinion that this was the result of an accident. Under the circumstances, she believed that staff misjudged the amount of force necessary to move the patient. Ms. Tyndall concluded that Petitioner did not intentionally hit SD's head against the headboard.

15. Ms. Tyndall explained that health care technicians at Cherry Hospital receive restraint training each year. Until about 2002, Cherry Hospital offered PIC (preventive intervention crisis). The PIC curriculum was designed to teach techniques useful in dealing with patients in crisis, and included education on how to restrain patients. In about 2002, the PIC course was replaced with the NCI (nonviolent crisis intervention training) course. Participants in the course earn certification in implementation of strategies and interventions useful in preventing escalation of behavior and safe management of patients. In addition, the Nursing Education Department at Cherry Hospital offers Seclusion/Restraint training to employees, including doctors and health care technicians. This course teaches interventions and strategies useful in safely managing patients who are in crisis and require restraints to prevent injury to the patient and others.

16. Petitioner attended the following trainings: 11/28/95 - P.I.C. (full course); 2/10/98 - Restraint and Seclusion refresher; 6/15/98 - P.I.C. (full course); 9/28/98 - Restraint and Seclusion Competency; 4/1/99 - Restraint and Seclusion Training; 7/1/99 - Restraint and Seclusion Competency; 7/26/99 - Restraint and Seclusion Refresher; 10/19/99 - PIC recertification; 7/1/00 - Medical Restraints Competency; 7/1/00 - Restraint and Seclusion Competency; 12/20/00 PIC (recertification); 7/1/01 - Restraint and Seclusion Refresher and Competency; 12/20/01 - PIC (recertification); 7/1/02 - Medical Restraints and Restraint and Seclusion Competency; 12/31/02 - Restraint and Seclusion Refresher; 7/1/03 - Restraint and Seclusion Refresher; 7/1/04 - Restraint and Seclusion Refresher; 12/20/05 - Medical Restraints and Restraint and Seclusion Competency; and 6/7/07 - Restraint and Seclusion Refresher.

17. Besides her comments, where she believed the willful hitting of SD's head against the bed allegation was actually an accident, Ms. Tyndall commented on two other parts of the allegations of abuse. After viewing the surveillance video, Ms. Tyndall formed an opinion that Petitioner abused SD by willfully and intentionally pulling SD's hair and willfully and intentionally placing his fist against SD's jaw/neck. She thought that because SD's airway could have been compromised by Petitioner's fist, Ms. Tyndall explained that Petitioner's actions created the potential for serious injury or possibly death and was abusive. Ms. Tyndall opined

that the placement of Petitioner's fist against SD's neck area could have increased her level of anxiety because she was not able to respond with fight or flight. Though Ms. Tyndall discussed the potential for harm related to placing patients in general in restraints, she acknowledged that she had no information about any actual injury to SD.

18. Clifton Dean Hill described the restraint of SD, and stated Petitioner did not abuse SD. Mr. Hill is a Health Care Technician and has been at Cherry Hospital for twenty-five (25) years. He was present and involved in the restraint of SD along with Petitioner and the other Health Care Techs and nurse. In fact while SD was on the floor in the restraint room, pick up of SD for placement in the bed was on Mr. Hill's command. Mr. Hill explained that all who were involved were doing the best that they could to get SD restrained. Mr. Hill reported that SD was hollering, cussing, and trying to spit throughout the restraint. He stated she was very aggressive and unpredictable. Mr. Hill stated that Petitioner's actions in pick up and in holding SD's head to the side were not abusive. He testified that SD was never in any danger of having her airway blocked. She was in fact talking/yelling the entire time.

19. Because of SD's multiple hospitalizations at Cherry, and Mr. Hill's 25-year employment at Cherry, he is very familiar with her and had dealt with her many times. SD is not the type of patient that if you did something, you wouldn't hear about it. She would be very vocal if she had been hit, hair pulled, or choked in any way. Further, after any incident, she would have been complaining of any harm had she experienced it. This was not the case regarding the allegations against Petitioner.

20. Crystal Wooten described the restraint of SD, and denied seeing Petitioner abuse SD. Ms. Wooten is Petitioner's spouse and has been at Cherry Hospital since 1994, some fifteen years. On the day of the incident SD was one of four or five ladies on the Ward. SD got in a verbal confrontation with another patient which escalated after the doctor came on the ward for a visit. The doctor called for SD to be put in restraints and because of SD's size and aggressiveness a call for male help went out. That is what drew Petitioner and Mr. Hill over to the Ward to assist. Ms. Wooten explained that each participant did the best they could and that there were no intentional actions of abuse.

21. Petitioner described the restraint of SD, and denied the allegations of abuse. On August 18, 2008, Petitioner got a call for help for U2. After rushing over, he heard patients yelling and a doctor exclaiming, "need help, need help." Petitioner observed SD spitting, cursing and throwing chairs. The doctor said to put SD in restraints. Petitioner and several Health Care Techs got her into the restraint room where she was placed on the floor. As stated previously SD was morbidly obese and was aggressive during this time. Petitioner testified that when the lift command was given he lifted her by the arm with one of his hands and placed the other hand under her shoulder blade trying to cradle her head so it would not hit the headboard. He stated during the lift his hand became tangled in her hair. He stated he was not lifting her by the hair. After SD was in the bed Petitioner stated he placed his hand with fingers curled on SD's cheek to prevent her from biting or spitting while others attached the restraints. Petitioner stated he did not block her airway.

22. The Undersigned acknowledges with gratitude, the assistance of DHHS employee Nate Carmichael who worked with the Office of Administrative Hearings' Network Administrator to install the encryption needed for the Undersigned to view the surveillance video (Respondent's Exhibit 9) on the computer at his desk. The Undersigned has viewed the video multiple times including multiple frame by frame examinations.

23. The surveillance video shows the sequence of events beginning on or around 06:48:30 hours. The tape at approximately 06:49:04-05 shows Petitioner's right hand on the mid to lower shoulder of SD and his left hand picking up SD's left arm at her wrist area. In the 06:49:06-08 timeframe, his right hand has slid up her shoulder and his left arm is parallel to the floor as he uses that arm and hand to pick SD up. As the pick up proceeds Petitioner's left elbow is high in the air (almost vertical) pulling SD by the arm in lifting. As Petitioner is lifting with his left hand and arm, his right hand slides into SD's hair where he is cradling her head. Though his right hand is in her hair with some movement, Petitioner is not lifting SD by the hair.

24. In the 06:49:13 frame SD is laying in the bed surrounded by six Cherry Staff. Petitioner's left hand is holding SD's arm just around/below the elbow. His right hand (with fingers curled) is mildly pushing on the upper cheek area of SD. By the 06:49:15 time the side of Petitioner's arm is holding (lightly) SD's left cheek with her head turned to the right. In the frames that follow, Petitioner adjusts himself and places a curled hand with no pushing against SD's cheek. The bed area is being pushed down in the right area of SD's head as a result of Petitioner pushing down on SD's right shoulder with his left hand and arm while Mr. Hill is pushing SD's lower right arm down to get in restraints. Also during that time Petitioner is pushed forward for a moment by the Health Care Tech who is behind him placing SD's left arm in restraints.

25. The evidence shows that Petitioner did not willfully pull resident's hair to use in lifting, intentionally hit resident's head against the headboard or forcefully use his fist to hold SD's head against the bed endangering her airway.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in the matter. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. Petitioner is a "health care personnel" and is subject to the provisions of N.C. Gen. Stat. § 131E-256. Cherry Hospital is a health care facility as defined in N.C. Gen. Stat. § 131E-256.

3. 42 CFR § 488.301 states that, "Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish."

4. All patients in residential care have the absolute right to be free from abuse perpetuated at the hands of caregivers. Because of the consequences that can result to an accused Petitioner who is listed in a Registry for abuse, it is equally important that an investigation establish abuse by a preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing."

5. The evidence does not support a finding that Petitioner's behavior or actions on August 18, 2008 were abusive. A conclusion that Petitioner committed abuse in violation of 42 CFR § 488.301 involves a two-step analysis. First, the evidence must support a finding that Petitioner engaged in the willful infliction of injury, unreasonable confinement, intimidation, or punishment. Second, said willful conduct must then result in physical harm, pain, or mental anguish. The greater weight of the evidence supports the conclusion that Petitioner did not engage in the willful infliction of injury, unreasonable confinement, intimidation, or punishment during the restraining of SD. Further, the preponderance of the evidence shows that Petitioner's conduct did not result in physical harm, pain, or mental anguish to SD.

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

DECISION

The Undersigned finds that Respondent's decision to place findings of abuse regarding the patient, SD, against Petitioner on the Health Care Personnel Registry and/or Nurse Aide I Registry was not supported by the evidence. As such, Respondent's decision in placing allegations of abuse against Petitioner in the Health Care Personnel Registry and/or Nurse Aide Registry was **IN ERROR** and Petitioner's name should be removed from any and all Registries in all respects.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and to present written arguments regarding this Decision issued by the Undersigned in accordance with N. C. Gen. Stat. § 150B-36.

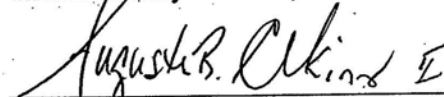
In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the

administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina Department of Health and Human Services.

IT IS SO ORDERED.

This the 3rd day of March, 2004.



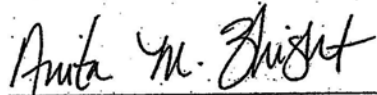
Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 5th day of March, 2010.



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