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The Office of Administrative Hearings
Rules Division
6714 Mail Service Center
Raleigh, NC 27699-6714
Telephone (919) 431-3000
Fax (919) 431-3104

Julian Mann, III, Director
Camille Winston, Deputy Director
Molly Masich, Codifier of Rules
Dana Vojtko, Publications Coordinator
Julie Edwards, Editorial Assistant
Tammara Chalmers, Editorial Assistant

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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
	Dana Vojtko, Publications Coordinator	dana.vojtko@oah.nc.gov	(919) 431-3075
	Julie Edwards, Editorial Assistant	julie.edwards@oah.nc.gov	(919) 431-3073
	Tammara Chalmers, Editorial Assistant	tammara.chalmers@oah.nc.gov	(919) 431-3083

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

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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:	270th 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	11/26109
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
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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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25:04	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

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EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

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State of North Carolina

BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 57

NORTH CAROLINA INTERAGENCY COUNCIL FOR COORDINATING HOMELESS PROGRAMS

WHEREAS, the problem of homelessness denies a segment of our population their basic need for adequate housing; and

WHEREAS, several State agencies offer programs and services for homeless persons; and,

WHEREAS, to combat the problem of homelessness most effectively, it is critical that these agencies coordinate program development and delivery of essential services with a shared goal to end homelessness.

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

Section 1. Establishment

The North Carolina Interagency Council for Coordinating Homeless Programs (hereinafter the "Interagency Council") is hereby established.

Section 2. Membership

The Interagency Council shall consist of a Chairperson appointed by the Governor and 28 additional members who shall be appointed by the Governor from the following public and private agencies and categories of qualifications:

a. One member from the Department of Administration.
b. One member from the North Carolina Housing Finance Agency.
c. One member from the Office of State Budget and Management.
d. One member from the North Carolina Community College System.
e. One member from the Department of Correction.
f. One member from the Department of Juvenile Justice and Delinquency Prevention.

g. One member from the Department of Commerce.
h. Three members from the Department of Health and Human Services that represent persons with disabilities, older adults, and the economically disadvantaged.
i. One member from the State Board of Education or a member from the Department of Public Instruction.
j. One county government official.
k. One city government official.
l. One member from the faith-based community.
m. Four members from non-profit agencies concerned with housing issues and other services for homeless people.
n. One member from the North Carolina Coalition to End Homelessness.
o. One homeless or formerly homeless person.
p. One member from the private sector.
q. One member representing Public Housing Authorities.
r. Three members of the NC Senate.
s. Three members of the NC House of Representatives.

Section 3. Term of Membership

All members shall be appointed for a term of three (3) years and shall serve at the pleasure of the Governor. A vacancy occurring during a term of appointment shall be filled by the Governor for the balance of the unexpired term.

Section 4. Meetings

The Interagency Council shall meet quarterly and at other times at the call of the Chairperson or upon written request of at least five (5) of its members.

Section 5. Duties

a. The Interagency Council shall advise the Governor and the Secretary of the Department of Health and Human Services on issues related to the problems of persons who are homeless or at risk of becoming homeless; identify and secure available resources throughout the State and nation; and provide recommendations for joint and cooperative efforts and policy initiatives in carrying out programs to meet the needs of the homeless.

b. The Interagency Council shall set short-term and long-term goals and determine yearly priorities.

c. The Interagency Council shall submit an annual report to the Governor, by November 1, on its accomplishments and the status of homelessness in North Carolina.

Section 6. Administration

The Department of Health and Human Services shall provide administrative and staff support services required by the Interagency Council. Administrative costs, special function expenses

and the cost of member per diem, travel and subsistence expenses shall be paid from state funds appropriated to the Department of Health and Human Services.

Section 7. Effect and Duration

This Executive Order is effective immediately. It supersedes and replaces all other executive orders on this subject and specifically rescinds Executive Order No. 137, dated February 26, 2008. This Executive Order shall remain in effect until April 12, 2014, pursuant to N.C. Gen. Stat. § 147-16.2, or 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 thirteenth 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

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

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

Citation to Existing Rule Affected by this Rule-Making: *North Carolina Building, Energy Conservation, Fire, Fuel Gas, Mechanical, Plumbing and Residential Codes.*

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

Reason for Proposed Action: *To incorporate changes in the NC State Building Codes as a result of rulemaking petitions filed with the NC Building Code Council and to incorporate changes proposed by the Council. To adopt the 2012 NC State Building Codes.*

Public Hearing: *June 15, 2010, 9:00AM, NCSU McKimmon Center, 1101 Gorman Street, Raleigh, NC 27606*

Comment Procedures: *Written comments may be sent to Chris Noles, Secretary, NC Building Code Council, NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comment period expires on July 16, 2010.*

Statement of Subject Matter:

1. Request by Robert Kinniburgh, to amend the 2009 NC Fire Prevention Code, Section 2403. The proposed amendment is as follows:

SECTION 2403 – TEMPORARY TENTS, CANOPIES AND MEMBRANE STRUCTURES

2403.5 Use Period. Temporary tents, air-supported, air inflated or tensioned membrane structures and canopies ~~shall not be erected for period more than 180 days within a 12 month period on a single premise~~ shall be erected for a period of less than 180 consecutive days or a maximum of 179 days in any 12 month period.

2403.8.2 Location. Tents and canopies or membrane structures shall not be located within 20 feet (6096 mm) of lot lines, buildings, other tents, canopies or membrane structures, parked vehicles or internal combustion engines. For the purpose of determining required distances, support ropes and guy wires shall be considered part of the temporary membrane structure, tent or canopy.

Exceptions:

1. Separation distance between membrane structures, tents and canopies not used for cooking, is not required when the aggregate floor area does not exceed 15,000 square feet (1394 m2).
2. Membrane structures, tents and canopies need not be separated from buildings when all of the following conditions are met:
2.1. The aggregate floor area of the membrane structure, tent or canopy shall not exceed 10,000 square feet (929 m2).
~~2.2. The aggregate floor area of the building and membrane structure, tent or canopy shall not exceed the allowable floor area including increases as indicated in the *International Building Code*.~~
2.3. Required means of egress provisions are provided for both the building and the membrane structure, tent or canopy, including travel distance.
2.4 Fire apparatus access roads are provided in accordance with Section 503.

2. Request by Art Weirauch, with Omega Flex, Inc., to add an exception to the 2009 NC Fuel Gas Code, Section 310.2.

Exception: CSST which has been tested and shown to be resistant to lightning energy shall be bonded in accordance with the National Electrical Code NFPA 70 and the CSST manufacturer's installation instructions.

3. Request by David Smith, Building Code Council, to amend the 2009 NC Residential Code, FIGURE R301.2(4). The proposed amendment is as follows:

BASIC DESIGN WIND VELOCITIES FOR MOUNTAIN REGIONS

FIRST FLOOR FINISH ~~CONTROLLING~~ ELEVATION IN FEET[1,2,3,4,5]	**DESIGN WIND (MPH)**
Less than 2,700 ~~or less~~	90
2,700 to less than 3,000 feet	100

3,000 to less than 3,500 feet	110
3,500 to less than 4,500 feet	120
4,500 feet or greater ~~and above~~	130

For SI: 1 foot = 304.8, 1 mile per hour = 0.44 m/s.

~~1. Wind velocities are to apply to all mountain tops, crests, knobs, or peaks as named on the USGS Quadrangle maps.~~

~~2. Effect of the 130 mph wind is to extend downward from crest for 200 feet or to the controlling elevation for 120 mph wind, whichever is the lesser.~~

~~3. Effect of the 120 mph wind is to extend downward from crest for 100 feet or to the controlling elevation for 110 mph wind, whichever is the lesser.~~

~~4. Effect of the 110 mph wind is to extend downward from crest for 70 feet or to the controlling elevation for 100 mph wind, whichever is the lesser.~~

~~5. Effect of the 100 mph wind is to extend downward from crest for 50 feet or to the controlling elevation for 90 mph wind, whichever is the lesser.~~

FIGURE R301.2(4)—continued BASIC DESIGN WIND SPEEDS FOR 50-YEAR MEAN RECURRENCE INTERVAL – Delete the Mountain Peak DIAGRAM

4. Request by David Smith, Building Code Council, to amend the 2009 NC Residential Code, Section R202 Definitions. The proposed amendment is as follows:

ATTIC STORAGE. A floored area, reqardless of size, within an attic space that is served by an attic access.
Exception: A floor walkway not less than 24 inches wide or greater than 48 inches wide that serves as an access for the service of utilities and/or equipment, and a level service space not less than 30 inches deep or greater than 48 inches deep and not less than 30 inches wide or greater than 48 inches wide at the front or service side of the appliance, shall not be considered as attic storage. Such floored area shall be labeled at the attic access opening, "NOT FOR STORAGE". The lettering shall be a minimum of 2 inches in height.

5. Request by Kevin Cochran, with Free Rain, to amend the 2009 NC Plumbing Code, APPENDIX I. The proposed amendment is as follows:

SECTION I101 GENERAL
I101.1 Scope. The provisions of this appendix shall govern the materials, design, construction and installation of rain water systems for automatic clothes washers, flushing of water closets, flushing of urinals, and cooling tower make up water, and cleaning applications (i.e. equipment washing, floor washing, indoor/outdoor spigots). Nothing in this appendix shall be construed to restrict the use of rain water for outdoor irrigation.
I101.3 Definition. The following terms shall have the meaning shown herein.
CONDENSATE. Condensed water collected from the surfaces of an air conditioning unit's evaporator coils or a dehumidifier unit's evaporator coils.
RAIN WATER. Water collected from runoff of roofs or other structures after a rain event. Rain water may also include condensate.

I101.4 Permits. Check with the local authority having jurisdiction for permit requirements.
I101.5 Installation. In addition to the provisions of Section I101, systems for flushing of water closets, flushing of urinals, and cooling tower make up water shall comply with Section I102. Except as provided for in Appendix I, all systems shall comply with the provisions of the 2006 North Carolina State Plumbing Code.
I101.6 Materials. Above-ground drain, waste and vent piping for rain water systems shall conform to one of the standards listed in Table 702.1. Rain water underground building drainage and vent pipe shall conform to one of the standards listed in Table 702.2.
I101.7 Tests. Drain, waste and vent piping for rain water systems shall be tested in accordance with Section 312.
I101.8 Inspections. Check with the local authority having jurisdiction for inspection requirements.
I101.9 Potable water connections. Only connections in accordance with Section I102.3 shall be made between a rain water harvesting system and a potable water system.
I101.10 Collection reservoir. Rain water shall be collected in an approved reservoir constructed of durable, nonabsorbent and corrosion-resistant materials. The reservoir shall be a closed vessel. Access openings shall be provided to allow inspection and cleaning of the reservoir interior.
I101.11 Filtration. Rain water shall pass through filter system suitable for intended use prior to distribution.
I101.12 Overflow. The overflow pipe discharge shall indirectly flow to the normal storm water drainage system and shall be sized equal to or larger than the influent pipe.

I101.13 Drain. A method for draining the collection reservoir shall be provided and shall not be connected to the sanitary drainage.
I101.14 Venting required. The reservoir shall be provided with venting to allow for the induction and release of air to allow for the proper operation of the reservoir.

SECTION I102 SYSTEMS FOR FLUSHING WATER CLOSETS AND URINALS
I102.2 Disinfection. Rain water shall be disinfected by an approved method that employs one or more disinfectants, such as chlorine, iodine, ozone, UV, or other approved disinfectants.
I102.3 Makeup water. Potable water shall be supplied as a source of makeup water for the rain water system. The potable water supply shall be protected against backflow by the installation of an air gap device or in accordance with Section 608.
I102.4 Materials. Distribution piping shall conform to one of the standards listed in Table 605.4.
I102.5 Identification. Distribution plumbing fixtures and reservoirs shall be identified as containing non-potable water. Piping shall be purple and identified in accordance with Section 608.8.

2012 NC State Building Codes (Items 6 through 13 below)
The 2012 NC Amendment packages, produced by the Ad-Hoc Committees, will be posted online prior to 5/17/2010 at the following link for public review and comment.
http://www.ncdoi.com/OSFM/Engineering/BCC/engineering_bcc_ah_minutes.asp

The summary amendment packages (Ad-Hoc Committee information incorporated into 2009 International Code Sections) will be posted online prior to 5/17/2010 at the following link.
http://www.ncdoi.com/OSFM/Engineering/engineering_home.asp
(STATE BUILDING CODES, BUILDING CODES - 2012 EDITION - PROPOSED AMENDMENTS)

The Base Documents for the 2012 NC Codes are the 2009 International Codes. The 2012 NC Amendments are replacements to the Sections printed in the Base Documents. The 2009 International Codes are available at www.iccsafe.org for purchase. A printed copy is available for review only at the following location.

NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603 919-661-5880 x 254

The anticipated adoption date of the 2012 NC Building, Energy Conservation, Fire, Fuel Gas, Mechanical, Plumbing and Residential Codes is September 14, 2010. The proposed effective date is September 1, 2011.

6. 2012 NC Building Code Amendments
A petition put forward by John Hitch to adopt the ad-hoc committee amendments to the 2009 ICC Building Code for publication as the 2012 NC Building Code.

7. 2012 NC Fire Code Amendments
A petition put forward by Alan Perdue to adopt ad-hoc committee amendments to the 2009 ICC Fire Code for publication as the 2012 NC Fire Code.

8. 2012 NC Fuel Gas Code Amendments
A petition put forward by Ralph Euchner to adopt ad-hoc committee amendments to the 2009 ICC Fuel Gas Code for publication as the 2012 NC Fuel Gas Code.

9. 2012 Mechanical Code Amendments
A petition put forward by Al Bass to adopt ad-hoc committee amendments to the 2009 ICC Mechanical Code for publication as the 2012 NC Mechanical Code.

10. 2012 Plumbing Code Amendments
A petition put forward by Al Bass to adopt ad-hoc committee amendments to the 2009 ICC Plumbing Code for publication as the 2012 NC Plumbing Code.

11. 2012 Residential Code Amendments
A petition put forward by David Smith to adopt ad-hoc committee amendments to the 2009 ICC Residential Code for publication as the 2012 NC Residential Code.

11A. Townhouse Sprinkler Amendment
The Chairman identified that a parallel code change for the Residential Code be prepared without townhouse sprinklers so that this does not affect the adoption of the overall Residential Code.

12. 2012 Energy Conservation Code
A petition put forward by Tom Turner to adopt ad-hoc committee amendments to the 2009 ICC Energy Conservation Code for publication as the 2012 NC Energy Conservation Code.

13. HVAC System Verification Amendment
A petition put forward by Tom Turner to address HVAC verification in parallel to the adoption of the Energy Conservation code. This was taken out of the adoption for the Energy Concervation Code with concern that questions of this section would affect adoption of the Energy Conservation Code.

14. Request by Alan Perdue, NCBCC, to amend the 2009 Fuel Gas Code, Section 406.7. The proposed amendment is as follows:

406.7 Purging. Purging of 2 ½ inch nominal pipe size or larger ~~piping~~ shall comply with Sections 406.7.1 through 406.7.4.

406.7.1 Removal from service. Where gas piping is to be opened for servicing, addition, or modification, the section to be worked on shall be turned off from the gas supply at the nearest convenient point, and the line pressure vented to the outdoors~~, or to ventilated areas of sufficient size to prevent accumulation of flammable mixtures.~~ The remaining gas in this section of pipe shall be displaced with an inert gas as required by Table 406.7.1.

Exception: If the line pressure cannot be vented to the outdoors; the building and all effected spaces shall be evacuated of personnel not involved with purging the gas lines, quantities of flammable gas shall not exceed 25% of the lower explosive limit (1.0% fuel / air mixture for natural gas or 0.6% fuel / air mixture for LP gas) as measured by a combustible gas detector, eliminate all ignition sources and provide adequate ventilation to prevent accumulation of flammable gases.

TABLE 406.7.1
SIZE AND LENGTH OF PIPING REQUIRING PURGING WITH INERT GAS FOR SERVICING OR MODIFICATION

NOMINAL PIPE SIZE (Inches)	LENGTH OF PIPING REQUIRING PURGING
$2^1/_2$	> 50 feet
3	> 30 feet
4	> 15 feet
6	> 10 feet
8 or larger	Any length

For SI: 1 inch = 25.4 mm, 1 foot = 304.8 mm.

406.7.2 Placing in operation. Where piping full of air is placed in operation, the air in the piping shall be displaced with fuel gas, except where such piping is required by Table 406.7.2 to be purged with an inert gas prior to introduction of fuel gas. The air can be safely displaced with fuel gas provided that a moderately rapid and continuous flow of fuel gas is introduced at one end of the line and air is vented out at the other end. The fuel gas flow shall be continued without interruption until the vented gas is free of air. The point of discharge shall not be left unattended during purging. After purging, the vent shall then be closed. Where required by Table 406.7.2, the air in the piping shall first be displaced with an inert gas, and the inert gas shall then be displaced with fuel gas.

TABLE 406.7.2
SIZE AND LENGTH OF PIPING REQUIRING PURGING WITH

INERT GAS BEFORE PLACING IN OPERATION

NOMINAL PIPE SIZE (Inches)	LENGTH OF PIPING REQUIRING PURGING
3	> 30 feet
4	> 15 feet
6	> 10 feet
8 or larger	Any length

For SI: 1 inch = 25.4 mm, 1 foot = 304.8 mm.

406.7.3 Discharge of purged gases. The open end of piping systems being purged shall not discharge into confined spaces or areas where there are sources of ignition unless precautions are taken to perform this operation in a safe manner. ~~by ventilation of the space, control of purging rate and elimination of hazardous conditions~~ All potential sources of ignition shall be identified and eliminated or controlled. Precautions shall be taken to maintain the concentration of the flammable gas below 25% of the lower-explosive limits (1.0% fuel / air mixture for natural gas or 0.6% fuel / air mixture for LP gas) such as adequate ventilation and control of purging rate. ~~and other measures as appropriate for the elimination of all hazardous conditions.~~ The point of discharge shall not be left unattended during purging.

406.7.4 Placing appliances and equipment in operation. After the piping system has been placed in operation, all appliances and equipment shall be purged and then placed in operation, as necessary.

406.7.5 Personnel Training. Personnel performing purging operation shall be trained to the hazards associated with purging and shall not rely on odor when monitoring the concentration of combustible gas.

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 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Medical Care Commission intends to amend the rule cited as 10A NCAC 13B .3106.*

Proposed Effective Date: *October 1, 2010*

Public Hearing:
Date: *July 6, 2010*
Time: *10:00 a.m.*
Location: *Room 201 Council Building, Division of Health Service Regulation, Dorothea Dix Campus, 701 Barbour Drive, Raleigh, NC 27603*

Reason for Proposed Action: *This amendment is in response to HB 1297 for modifying licensure inspection practices of hospitals, amending G.S. 131E-80. Non-JCAHO hospitals that were subject to being surveyed every 3 years will not be subject to routine licensure inspections if they have received accreditation by other accrediting bodies approved by CMS rather than just those that are JCAHO accredited.*

Procedure by which a person can object to the agency on a proposed rule: *An individual may object to the agency on the proposed Rule by submitting written comments on the proposed Rule. They may also object by attending the public hearing and personally voice their objections during that time.*

Comments may be submitted to: *Nadine Pfeiffer, Division of Health Service Regulation, 2701 Mail Service Center, Raleigh, NC 27699-2701, fax (919)733-7021, email DHSR.RulesCoordinator@dhhs.nc.gov*

Comment period ends: *July 16, 2010*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13B – LICENSING OF HOSPITALS

SECTION .3100 - PROCEDURE

10A NCAC 13B .3106 LICENSURE SURVEYS

(a) Prior to the initial issuance of a license to operate a facility, the Division shall conduct a survey to determine compliance with rules promulgated pursuant to G.S. 131E-79.

(b) The Division may conduct an investigation of a ~~specific~~ complaint in any facility.

(c) Facilities that are accredited ~~by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) shall choose one of the following options:~~

~~(1) Accredited hospitals may agree to provide the Division with:~~
~~(A) JCAHO Accreditation Certificate;~~
~~(B) JCAHO Statement of Construction;~~
~~(C) JCAHO Reports and Recommendations;~~
~~(D) JCAHO Interim Self-Survey Reports; and~~
~~(E) permission to participate in any regular survey conducted by the JCAHO.~~

~~If a review of the information listed in Parts (c)(1)(A) (c)(1)(D) of this Rule indicates non-compliance with licensure rules contained in this Subchapter, then the Division may conduct surveys or partial surveys with special emphasis on deficiencies noted. If a review indicates compliance with licensure regulations contained in this Subchapter, the Division will not conduct a licensure survey except as provided in Paragraphs (b), (c)(1)(E), and (d) of this Rule.~~

~~(2) Accredited hospitals which do not agree to provide the Division with JCAHO reports found in Subparagraph (c)(1) of this Rule shall be surveyed at least once every three years.~~

through an accrediting body approved pursuant to section 1865(a) of the Social Security Act shall not be subject to routine inspections.

~~(d) The Division reserves the right to conduct any validation survey in facilities that choose the option under Subparagraph (e)(1) of this Rule.~~

~~(e)~~(d) The Division shall survey non-accredited facilities at least once every three years.

Authority G.S. 131E-79; 131E-80.

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Medical Care Commission intends to adopt the rules cited as 10A NCAC 13P .1401-.1405.*

Proposed Effective Date: *October 1, 2010*

Public Hearing:
Date: *June 1, 2010*
Time: *10:00 a.m.*
Location: *Room 201 Council Building, Division of Health Service Regulation, Dorothea Dix Campus, 701 Barbour Drive, Raleigh, NC 27603*

Reason for Proposed Action: *This adoption is in response to HB 878 which authorizes the establishment of programs for aiding in the recovery and rehabilitation of EMS personnel who experience chemical addiction or abuse and programs for monitoring such EMS personnel for safe practice. It amends G.S. 143-509.*

Procedure by which a person can object to the agency on a proposed rule: *An individual may object to the agency on the proposed rules by submitting written comments on the proposed rules. They may also object by attending the public hearing and personally voice objections during that time.*

Comments may be submitted to: *Nadine Pfeiffer, Division of Health Service Regulation, 2701 Mail Service Center, Raleigh, NC 27699-2701, fax (919)733-7021, email DHSR.RulesCoordinator@dhhs.nc.gov*

Comment period ends: *July 16, 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: A copy of the fiscal note can be obtained from the agency.
☒ **State**
☐ **Local**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☐ **None**

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13P – EMERGENCY MEDICAL SERVICES AND TRAUMA RULES

SECTION 1400 – RECOVERY AND REHABILITATION OF CHEMICALLY DEPENDENT EMS PERSONNEL

10A NCAC 13P .1401 CHEMICAL ADDICTION OR ABUSE TREATMENT PROGRAM REQUIREMENTS

(a) The OEMS shall provide a treatment program for aiding in the recovery and rehabilitation of EMS personnel subject to disciplinary action for being unable to perform as credentialed EMS personnel with reasonable skill and safety to patients and the public by reason of use of alcohol, drugs, chemicals, or any other type of material and who are recommended by the EMS Disciplinary Committee pursuant to G.S. 143-519.

(b) This program requires:

(1) an initial assessment by a healthcare professional specialized in chemical dependency affiliated with the treatment program;

(2) a specific treatment plan developed for the individual using the findings of the initial assessment;

(3) random body fluid screenings;

(4) the individual attend at least three self-help recovery meetings each week for the first year of participation, and a minimum of two each week for the remainder of participation in the treatment program;

(5) monitoring of the individual for compliance with the treatment program; and

(6) written progress reports available for review by the EMS Disciplinary Committee:

(A) upon completion of the initial assessment by the treatment program;

(B) upon request by the EMS Disciplinary Committee throughout the individual's participation in the treatment program;

(C) upon completion of the treatment program;

(D) of all urine or blood drug screenings showing chain of custody;

(E) by Therapist and Counselor; and

(F) listing attendance at self-help recovery meetings.

Authority G.S. 131E-159(f); 143-508(d)(10); 143-509(13); 143-519.

10A NCAC 13P .1402 PROVISIONS FOR PARTICIPATION IN THE CHEMICAL ADDICTION OR ABUSE TREATMENT PROGRAM

Individuals recommended by the EMS Disciplinary Committee to enter the Treatment Program defined in Rule .1401 of this Section may participate if:

(1) the individual acknowledges, in writing, the actions which violated the performance requirements found in this Subchapter;

(2) the individual has not been charged or convicted of diverting chemicals for the purpose of sale or distribution or dealing or selling illicit drugs;

(3) the individual is not under investigation or subject to pending criminal charges by law enforcement;

(4) the individual ceases in the direct delivery of any patient care and surrenders all EMS credentials until either the individual is eligible for issuance of an encumbered EMS credential pursuant to Rule .1403 of this Section, or has successfully completed the treatment program established in Rule .1401 of this Section; and

(5) the individual agrees to accept responsibility for all costs including assessment, treatment, monitoring, and body fluid screening.

Authority G.S. 131E-159(f); 143-508(d)(10); 143-509(13); 143-519.

10A NCAC 13P .1403 CONDITIONS FOR RESTRICTED PRACTICE WITH LIMITED PRIVILEGES

(a) Individuals who have surrendered their EMS credential as a condition of entry into the treatment program may be reviewed by the EMS Disciplinary Committee to determine if a recommendation to the OEMS for issuance of an encumbered EMS credential is warranted.

(b) In order to be considered for restricted practice with limited privileges, an individual must:

(1) be compliant for a minimum of 90 consecutive days with the treatment program described in Paragraph (b) of Rule .1402 of this Section;

(2) be recommended in writing for review by the individual's treatment counselor;

(3) be interviewed by the EMS Disciplinary Committee; and

(4) be recommended in writing by the EMS Disciplinary Committee for issuance of an encumbered EMS credential. The EMS Disciplinary Committee shall detail in their recommendation to the OEMS all restrictions and limitations to the individual's practice privileges.

(c) The individual must agree to sign a consent agreement with the OEMS which details the practice restrictions and privilege limitations of the encumbered EMS credential, and which contains the consequences of failure to abide by the terms of this agreement.

(d) The individual will be issued the encumbered credential within 10 business days following execution of the consent agreement described in Paragraph (c).

Authority G.S. 131E-159(f); 143-508(d)(10); 143-509(13); 143-519.

10A NCAC 13P .1404 REINSTATEMENT OF AN UNENCUMBERED EMS CREDENTIAL

Reinstatement of an unencumbered EMS credential is dependant upon the individual successfully completing all requirements of the treatment program as defined in this Section.

Authority G.S. 131E-159(f); 143-508(d)(10); 143-509(13).

10A NCAC 13P .1405 FAILURE TO COMPLETE THE CHEMICAL ADDICTION OR ABUSE TREATMENT PROGRAM

Individuals who fail to complete the treatment program, upon review and recommendation by the North Carolina EMS Disciplinary Committee to the OEMS, are subject to revocation of their EMS credential.

Authority G.S. 131E-159(f); 143-508(d)(10); 143-519.

TITLE 11 – DEPARTMENT OF INSURANCE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Department of Insurance/Office of State Fire Marshall intends to amend the rules cited as 11 NCAC 05A .0101, .0301-.0303, .0503, .0505, .0507, .0603, .0703.*

Proposed Effective Date: *September 1, 2010*

Public Hearing:
Date: *June 11, 2010*
Time: *10:00 a.m.*
Location: *430 N. Salisbury Street, Raleigh, NC, 3rd floor hearing room*

Reason for Proposed Action:
***11 NCAC 05A .0101, .0503, .0505, .0507** – is proposed for amendment to address needed changes and new programs for the fire and rescue community that are critical to the future of the NC fire service.*
***11 NCAC 05A .0301-.0303 –** is proposed for amendment to update and make current outdated wording*
***11 NCAC 05A .0603, .0703 –** is proposed for amendment to reflect electronic filings.*

Procedure by which a person can object to the agency on a proposed rule: *The NC Department of Insurance/OSFM will accept written objections to these rules until the expiration of the comment period on July 16, 2010.*

Comments may be submitted to: *Karen E. Waddell, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919)733-4529, fax (919)733-6495, email karen.waddell@ncdoi.gov*

Comment period ends: *July 16, 2010*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

CHAPTER 05 – OFFICE OF STATE FIRE MARSHAL

SUBCHAPTER 05A - FIRE AND RESCUE

SECTION .0100 - GENERAL PROVISIONS

11 NCAC 05A .0101 DEFINITIONS
As used in this Subchapter:

(1) "ISO" means the Insurance Services Office, Inc., or any successor organization.

(2) "North Carolina Fire Suppression Rating Schedule" or "NCFSRS" means the ISO Fire Suppression Rating Schedule. The NCFSRS is incorporated into this Subchapter by reference, including subsequent amendments or editions. The NCFSRS may be obtained from the ISO at http://www.iso.com/ for fifty-five dollars ($55.00). Fire chiefs and local government chief administrative officials may request a single copy of the FSRS, or on-line access to the FSRS and commentaries, free of charge.

(3) "NFIRS" means the National Fire Incident Reporting System administered by the United States Fire Administration (USFA) and coordinated and collected in North Carolina by the Office of the State Fire Marshal. The NFIRS can be accessed electronically and free software and copies of the program may be obtained by contacting the NC Office of the State Fire Marshal at:
Office of the State Fire Marshal
P.O Box 1202 Mail Service Center
Raleigh, NC 27699-1202
or by contacting the USFA at http://www.usfa.dhs.gov.

~~(3)~~(4) "Office of State Fire Marshal" or "OSFM" means the Office of State Fire Marshal of the North Carolina Department of Insurance.

Authority G.S. 58-2-40; 58-79-45.

SECTION .0300 - FIREFIGHTERS' RELIEF FUND

11 NCAC 05A .0301 ELIGIBLE MEMBERS
The certification provided by the North Carolina State Firemen's Association to the Department under G.S. 58-84-40(b) shall contain the balance in each local fund, and a verification that a financial statement and status of fire department membership was submitted.

Authority G.S. 58-2-40(1); 58-84-40.

11 NCAC 05A .0302 CERTIFICATION OF ELIGIBILITY
The certification form required by G.S. 58-84-46 shall be entitled "Report of Fire Conditions" and shall, in addition to the information required by G.S. 58-84-46, include the following:

(1) The name of the city, fire district, or sanitary district;

(2) Names of the "Board of Trustees of the Local ~~Firemen's~~ Firefighters' Relief Fund"; and

(3) Identity of the Treasurer of the Local ~~Firemen's~~ Firefighters' Relief Fund.

Authority G.S. 58-2-40(1); 58-84-46.

11 NCAC 05A .0303 ADMINISTRATION OF FIREFIGHTERS' RELIEF FUND
(a) The Fire and Rescue Services Division shall compile and maintain accurate records utilizing ~~both~~ computer ~~and~~ or paper records, including ~~but not limited to~~ the following information:

(1) Certifications of the "Report of Fire Conditions" filed by the local clerks or finance officers;

(2) Certifications of the member fire departments, the fund balance of each fund, and the bond amount covering each fund, filed by the North Carolina State Firemen's Association each year;

(3) Amount of ~~Firemen's~~ Firefighters' Relief Fund tax assigned by the ~~Financial Compliance Division of the North Carolina Department of Insurance to each city, county fire district, and sanitary district.~~ North Carolina Department of Revenue; and

(4) Amount of property tax values for each rated fire district as filed by each County.

(b) If a fire department dissolves, the following procedures apply:

(1) If a neighboring fire department elects to expand its boundaries to include the area served by the dissolved fire department, ~~with the approval of the Department of Insurance~~, the ~~Firemen's~~ Firefighters' Relief Fund account ~~will~~ shall be transferred to the expanding fire department.

(2) If no neighboring fire department elects to include the dissolved fire department's territory into its own, the dissolved fire department ~~will~~ shall not be certified and shall forfeit its right to annual payments from the funds mentioned in Article 84 of Chapter 58.~~be shown as "disqualified" according to G.S. 58-84-40, 58-84-45, and 58-84-50.~~

(3) If a department serving two or more rated fire districts splits into two or more districts, the relief fund money for each district shall remain with the rated fire department that provided the fire protection before the split.

(c) ~~The Division then shall certify to the Budget Division of the North Carolina Department of Insurance the eligibility of each city, county fire district, and sanitary district to receive annual payments from the fund.~~ Fire department checks ~~will~~ shall be disbursed by the Department of Insurance to the finance officer of the local government entity.

Authority G.S. 58-2-40(1); 58-84-25; 58-84-40; 58-84-50; 58-85-1; 58-86-25.

SECTION .0500 - INITIAL CERTIFICATION AND RESPONSE RATINGS FOR FIRE DEPARTMENTS

11 NCAC 05A .0503 ESTABLISHMENT OF FIRE DEPARTMENT

To become a certified fire department, a fire department shall apply and meet the following criteria:

(1) The fire department shall be incorporated under Chapter 55A of the General Statutes or be operated by a city, county, or sanitary district as a division of that governmental unit.

(2) If the fire department is incorporated, it shall operate under a contract with a city, county, or sanitary district or any combination thereof.

(3) Boundaries defining the area of responsibility shall be established by a County Board of Commissioners for areas outside municipalities pursuant to G.S. 153A-233.

(4) The fire department shall provide the OSFM with a hand drawn map and written description or a GIS computer generated map of its initial or revised fire district.

(5) Whenever the fire department responds to a fire, a chief of that department shall complete or cause to be completed a fire incident report on the current version of the National Fire Incident Reporting System (NFIRS) approved for use in North Carolina by the Office of State Fire Marshal. The fire department shall forward a copy of the report on a quarterly basis to the County Fire Marshal of that County, or the County Commissioners. The fire department shall retain the original of the report.

Authority G.S. 58-2-40; 58-79-45; 58-86-25.

11 NCAC 05A .0505 DRILLS AND MEETING REQUIREMENTS

All members of fire departments shall comply with the drills and meetings requirements of G.S. 58-86-25. The Chief of the Department shall, within one year of appointment, complete a class approved by the Office of State Fire Marshal that teaches the administrative responsibilities of the chief officer. The class shall be titled "Chief 101" and shall be completed by each chief a minimum of every five years.

Authority G.S. 58-2-40; 58-86-25.

11 NCAC 05A .0507 RECORDS AND DOCUMENTS

In addition to personnel records, the city or county manager or fire department chief or county fire marshal shall keep records on dates, times and locations of ~~emergencies,~~ emergencies on the current version of the National Fire Incident Reporting System (NFIRS) approved for use in North Carolina by the Office of State Fire Marshal, inventory of equipment, and maintenance of apparatus; and shall submit the following documents to the Department of Insurance: roster, charter, contract(s) with city and county, service test report, weight tickets, current map and ~~description,~~ written description of the map, an inventory of protective clothing, and verification from the county approving the fire district boundaries.

Authority G.S. 58-2-40; 58-36-10(3); 58-79-45; 58-86-25.

SECTION .0600 - VOLUNTEER FIRE DEPARTMENT FUND

11 NCAC 05A .0603 REQUIREMENTS

(a) Application forms shall be ~~mailed~~ made available by the Division to all ~~known~~ departments registered with the Division and approved by the Division by ~~January 2~~ the first business day of January of each year.

(b) Any application received by the Division that is incorrect or incomplete shall be returned to the department with a request that the correct or complete information be sent to the Division within 10 business days after receipt by the department. The failure of the department to return the requested correct or complete information shall result in the forfeiture by the department of its eligibility for a grant during that ~~current~~ grant cycle.

(c) Applications shall be ~~mailed~~ submitted to the Division and be postmarked or electronic date stamped no later than March 1. Applications bearing postmarks or electronic date stamps later than March 1 are disqualified. The names of grant recipients

shall be announced on May 15. If May 15 falls on a weekend, the announcement shall be made on the following Monday.

~~(d) The Division shall approve all or part of a complete application.~~

~~(e)~~(d) If the application includes a request for a motor vehicle, the vehicle specifications and, if used, the previous year's maintenance records shall accompany the application.

~~(f)~~(e) The following documents shall accompany a grant application:

(1) A contract verification form showing an agreement between the department and a county for the department to provide fire protection to a district;

(2) An active roster comprising a list of ~~members meeting the training requirements in G.S. 58-86-30;~~ eligible firemen as defined in G.S. 58-86-25;

~~(3) A charter showing the incorporation of the department as a nonprofit corporation;~~

~~(4)~~(3) A statement verifying the population that the department serves;

~~(5)~~(4) A financial statement showing the fiscal status of the department; and

~~(6)~~(5) A statement verifying that the department is financially able to match the grant.

~~(g)~~(f) Statements that there are no overdue taxes, conflict of interest ~~statements,~~ statements as defined in G.S. 143C-6-23(b), payment agreements, and equipment invoices shall be received by the Division no later than September 30 following the announcement of grant recipients. Departments submitting incorrect invoices, such as sales orders, acknowledgements, and packing slips, on or before September 30 shall be contacted by the Division and given 10 business days to submit correct documents. The failure of any department to comply shall result in the department forfeiting its eligibility for a grant from the Fund. Equipment or capital improvements that are ordered by a department before May 15 or equipment that is back-ordered by a department on or before September 30 shall not be funded by grants from the Fund.

~~(h)~~(g) Equipment purchased with grants is subject to ~~periodic~~ inspection by Division personnel.

Authority G.S. 58-2-40(1); 58-36-10(3); 58-87-1; 143C-6-23(b).

SECTION .0700 - VOLUNTEER RESCUE/EMS FUND

11 NCAC 05A .0703 REQUIREMENTS FOR UNITS REQUIRED TO MATCH GRANTS

(a) Application forms shall be ~~mailed~~ made available by the Division to all ~~known units~~ departments registered with Division and approved by the Division by ~~August 1~~ the first business day of August of each year.

(b) Any application received by the Division that is incorrect or incomplete shall be returned to the unit with a request that the correct or complete information be sent to the Division within 10 business days after receipt by the unit. The failure by the unit to return the requested correct or complete information shall result in the forfeiture by the unit of its eligibility for a grant during that ~~current~~ grant cycle.

(c) Applications shall be ~~mailed~~ submitted to the Division and be postmarked or electronic date stamped no later than October 1. Applications bearing postmarks or electronic date stamps later than October 1 are disqualified. The names of the grant recipients shall be announced on December 15. If December 15 falls on a weekend, the announcement ~~will~~ shall be made on the following Monday.

~~(d) The Division shall approve all or part of a complete application.~~

~~(e)~~(d) If the application includes a request for a vehicle, the vehicle specifications and, if used, the previous year's maintenance records shall accompany the application.

~~(f)~~(e) The following documents shall accompany a grant application;

(1) A ~~contract~~ Rescue Provider Statement showing that a county recognizes the unit as providing rescue or rescue/EMS services to a specified district. As used in this Subparagraph, "rescue provider statement" means a statement, signed by representatives of a unit and the county in which the rescue or rescue/EMS services are provided, that the unit provides rescue or rescue/EMS services within the county;

~~(2) A charter showing the incorporation of the unit as a nonprofit corporation;~~

~~(3)~~(2) An active roster ~~comprising a list~~ of unit members;

~~(4)~~(3) A statement verifying that the unit is financially able to match the amount of the grant; and

~~(5)~~(4) A financial statement showing the fiscal status of the ~~unit; and~~ unit.

~~(6) A rescue provider statement, which may be submitted in lieu of the contract required by Subparagraph (1) of this Paragraph. As used in this Subparagraph, "rescue provider statement" means a notarized statement, signed by representatives of a unit and the county in which the rescue or rescue/EMS services are provided, that the unit provides rescue or rescue/EMS services within the county.~~

~~(g)~~(f) Statements that there are no overdue taxes, conflict of interest ~~statements,~~ statements as defined in G.S. 143C-6-23(b), payment agreements, and equipment invoices shall be received by the Division no later than April 30. Units submitting incorrect invoices, such as sales orders, acknowledgements, and packing slips, before April 30 shall be contacted by the Division and given 10 business days to submit the correct documents. The failure of any unit to comply shall result in the unit forfeiting its eligibility for a grant from the Fund. Equipment or capital improvements that are ordered by a unit before December 15 or equipment that is back-ordered by a unit on or before April 30 shall not be funded by grants from the Fund.

(h) Equipment purchased with grants is subject to ~~periodic~~ inspection by Division personnel.

Authority G.S. 58-2-40(1); 58-87-5; 143C-6-23(b).

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Home Inspector Licensure Board intends to amend the rules cited as 11 NCAC 08 .1011, .1104, .1116, .1332.*

Proposed Effective Date: *October 1, 2010*

Public Hearing:
Date: *July 16, 2010*
Time: *9:00 a.m.*
Location: *322 Chapanoke Road, Suite 115, Raleigh, NC 27603*

Reason for Proposed Action:
11 NCAC 08 .1011, .1332 – *to increase fees as authorized by SL 2009-451*
11 NCAC 08 .1104 – *to remove language that is redundant to the definition of the term "inspect"*
11 NCAC 08 .1116 *– to clarify and address conflicts of interest*

Procedure by which a person can object to the agency on a proposed rule: *The Home Inspectors Licensure Board will accept written objections to this rule until the expiration of the comment period on August 2, 2010.*

Comments may be submitted to: *Karen Waddell, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919)733-4529, fax (919)733-6495, email karen.waddell@ncdoi.gov*

Comment period ends: *August 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**

CHAPTER 08 - ENGINEERING AND BUILDING CODES DIVISION

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

11 NCAC 08 .1011 FEE SCHEDULE

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

Application for Home Inspector License ~~$25.00~~$35.00
Application for Associate Home Inspector License ~~$15.00~~$20.00
Home Inspector Examination ~~$75.00~~$80.00
Associate Home Inspector Examination ~~$75.00~~$80.00
Initial Issuance or Annual Renewal of Home Inspector License ~~$150.00~~$160.00
Initial Issuance or Annual Renewal of Associate Home Inspector License ~~$100.00~~$110.00
~~Annual Renewal of Home Inspector License $150.00~~
~~Annual Renewal of Associate Home Inspector License $100.00~~
Late Renewal Penalty Fee - Home Inspector License ~~$25.00~~$30.00
Late Renewal Penalty Fee - Associate Home Inspector License ~~$15.00~~$20.00
Copies of Board Rules and License Standards $5.00

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

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

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

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

11 NCAC 08 .1104 GENERAL LIMITATIONS

(a) Home inspections done in accordance with this Section ~~are visual and~~ are not technically exhaustive.

(b) This Section applies to buildings with four or fewer dwelling units, and individually owned residential units within multi-family buildings, and their attached garages or carports.

Authority G.S. 143-151.49.

11 NCAC 08 .1116 CODE OF ETHICS

(a) Licensees shall discharge their duties with fidelity to the public, their clients, and with fairness and impartiality to all.

(b) Opinions expressed by licensees shall only be based on their education, experience, and honest convictions.

(c) A licensee shall not disclose any information about the results of an inspection without the approval of the client for

whom the inspection was performed, or the client's designated representative.
(d) No licensee shall accept compensation or any other consideration from more than one interested party for the same service without the consent of all interested parties.
(e) No licensee shall accept or offer commissions or allowances, directly or indirectly, from other parties dealing with the client in connection with work for which the licensee is responsible.
(f) No licensee shall express, within the context of an inspection, an appraisal or opinion of the market value of the inspected property.
(g) Before the execution of a contract to perform a home inspection, a licensee shall disclose to the client any interest in a business that may affect the client. No licensee shall allow his or her interest in any business to affect the quality or results of the inspection work that the licensee may be called upon to perform.
(h) A licensee shall not solicit for repairs of systems or components found defective in the course of a home inspection performed by the licensee or that licensee's company.
~~(h)~~(i) Licensees shall not engage in false or misleading advertising or otherwise misrepresent any matters to the public.
(j) Inspectors shall not inspect properties under contingent arrangements whereby any compensation or future referrals are dependent on reported findings or on the sale of a property.

Authority G.S. 143-151.49.

SECTION .1300 - HOME INSPECTOR CONTINUING EDUCATION

11 NCAC 08 .1332 PER STUDENT FEE
Following completion of any approved continuing education update or elective course, the course sponsor shall submit to the Board, along with the roster and the items required to be submitted by Rule .1331 of this Section, a fee in the amount of ~~three dollars and fifty cents ($3.50)~~ five dollars ($5.00) per credit hour for each licensee who ~~satisfactorily~~ completes the course according to the criteria in Rule .1305 of this Section. Fees paid by check or money order shall be made payable to the Home Inspector Licensure Board. The sponsor shall make a separate fee payment for each separate class session.

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

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 30 - BOARD OF MASSAGE AND BODYWORK THERAPY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Board of Massage and Bodywork Therapy intends to amend the rule cited as 21 NCAC 30 .0629.*

Proposed Effective Date: *October 1, 2010*

Public Hearing:
Date: *June 17, 2010*
Time: *11:00 a.m.*
Location: *Wachovia Capital Center, 13th floor Conference Room, 150 Fayetteville Street, Raleigh, NC*

Reason for Proposed Action: *This amendment is being submitted to clarify the Massage and Bodywork Therapy Practice Act.*

Procedure by which a person can object to the agency on a proposed rule: *Any person may object to this proposed amendment by submitting a written statement to Charles P. Wilkins at PO Box 2539, Raleigh, NC 27602 postmarked on or before August 3, 2010.*

Comments may be submitted to: *Charles P. Wilkins, PO Box 2539, Raleigh, NC 27602, phone (919)833-2752, fax (919)833-1059, email cwilkins@bws-law.com*

Comment period ends: *August 3, 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 .0600 - MASSAGE AND BODYWORK THERAPY SCHOOLS

21 NCAC 30 .0629 STUDENT ENROLLMENT AGREEMENT
(a) An approved school shall execute a Student Enrollment Agreement for training with every student. The agreement shall contain the following:
(1) Name and telephone number of the school and location of where the student will attend classes;
(2) Student's name, address, telephone number;
(3) Name of the program in which student is enrolling, number of clock or credit hours of

the program, beginning and ending dates, length of program in weeks or months, and expected graduation date;

(4) Program tuition and all related costs, including application and registration fees, and estimated cost of books and supplies;

(5) Refund and cancellation policies, including student's right to cancel;

(6) Payment methods, including cash, installment payment plans, or financial aid (as applicable); interest charged; methods used to collect delinquent tuition;

(7) Placement guarantee disclaimer;

(8) Grounds for dismissal from the school;

(9) Statement that you must hold a North Carolina massage and bodywork therapy license in order to practice massage and bodywork therapy in North Carolina;

(10) Statement that good moral character is a requirement for licensure as a massage and bodywork therapist in North Carolina and, pursuant to G.S. 90-629.1, the North Carolina Board of Massage and Bodywork Therapy may deny a license to practice massage and bodywork therapy if an applicant has a criminal record or there is other evidence that indicates the applicant lacks good moral character;

(11) Statement pursuant to G.S. 90-629.1, the North Carolina Board of Massage and Bodywork Therapy may deny a license to practice massage and bodywork therapy if an applicant has a criminal record or there is other evidence that indicates the applicant lacks good moral character;

~~(9)~~(12) Statement referencing the school catalog and student handbook as a part of the enrollment agreement;

~~(10)~~(13) Statement certifying that student has read and understands all terms of the enrollment agreement; and

~~(11)~~(14) Signature lines for school official and student.

(b) A copy of the executed agreement shall be provided to the student and a copy shall be placed in the student's permanent file.

Authority G.S. 90-626(9); 90-631.

* *

CHAPTER 46 - BOARD OF PHARMACY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Board of Pharmacy intends to repeal the rule cited as 21 NCAC 46 .1204.*

Proposed Effective Date: *September 1, 2010*

Public Hearing:
Date: *July 19, 2010*
Time: *5:00 p.m.*
Location: *North Carolina Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517*

Reason for Proposed Action: *The Board has determined the Rule is unnecessary. In addition, with a change in the Board's mailing address, it will no longer be accurate.*

Procedure by which a person can object to the agency on a proposed rule: *Any person may object to the proposed repeal by attending the public hearing on July 19, 2010 and/or by submitting a written objection by July 19, 2010 to Jay Campbell, Executive Director, North Carolina Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, 27517, fax (919)246-1056, email jcampbell@ncbop.org. The North Carolina Board of Pharmacy is interested in all comments pertaining to the rule. All persons interested and potentially affected by the repeal are strongly encouraged to read this entire notice and make comments on the rule.*

Comments may be submitted to: *Jay Campbell, 6015 Farrington Road, Suite 201 , Chapel Hill NC, 27517, fax (919) 246-1056, email jcampbell@ncbop.org*

Comment period ends: *July 19, 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 .1200 - ORGANIZATION OF THE BOARD

21 NCAC 46 .1204 OFFICE OF THE BOARD

~~The office of the Board is located at 6015 Farrington Road, Suite 201, Chapel Hill, North Carolina. Its mailing address is Post Office Box 4560, Chapel Hill, North Carolina 27515-4560.~~

Authority G.S. 90-85.6.

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	**Appointed by House**
Jim R. Funderburk - 1st Vice Chair	Jennie J. Hayman - Chairman
David Twiddy - 2nd Vice Chair	John B. Lewis
Ralph A. Walker	Clarence E. Horton, Jr.
Jerry R. Crisp	Daniel F. McLawhorn
Jeffrey P. Gray	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

RULES REVIEW COMMISSION
April 15, 2010
MINUTES

The Rules Review Commission met on Thursday, April 15, 2010, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Jennie Hayman, Clarence Horton, Dan McLawhorn, David Twiddy and Ralph Walker.

Staff members present were: Joe DeLuca and Bobby Bryan, Commission Counsel; Tammara Chalmers, Julie Edwards and Dana Vojtko.

The following people were among those attending the meeting:

Bryan Dowdy	DENR/Division of Parks and Recreation
Mike Lambert	DENR/Division of Parks and Recreation
David Griffin	Department of Environment and Natural Resources
Kim Dove	Board of Dietetics/Nutrition
Will Corbett	NC Commissioner of Banks
Gail Bledsoe	DENR/Division of Forest Resources
Bob Hensley	DHHS/Division of Social Services
Myrtle Hamrick	Board of Electrolysis Examiners
Margaret Wingate	Board of Electrolysis Examiners
Anca Grozav	Office of State Budget and Management
Lisa Johnson	DHHS/Division of Social Services
Amy Chapman	DENR/Division of Water Quality
Sue Homewood	DENR/Division of Water Quality
Marco Zarate	Adelante Education Coalition/NC Society of Hispanic Professionals
Adriene Weaver	DENR/Division of Water Quality
Chreatha Alston	NC Community College System
Kris Horton	DHHS/Division of Medical Assistance
Norman Young	Wildlife Resources Commission
Charlie Fields	NC Commissioner of Banks

Jim Burnette	Department of Agriculture and Consumer Services
Jim Hayes	DENR/Division of Environmental Health
Kate Pipkin	Wildlife Resources Commission
Kent Nelson	Wildlife Resources Commission
Betsy Foard	Wildlife Resources Commission
Charles McDarris	Private Protective Services Board & Alarm System Licensing Board
George Teague	Nelson, Mullins, Riley and Scarborough, LLP

APPROVAL OF MINUTES

The meeting was called to order at 9:03 a.m. with Ms. Hayman presiding. She reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e). Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the March 18, 2010 meeting. There were none and the minutes were approved as distributed.

BOARD OF COMMUNITY COLLEGES

The Commission proceeded to take up the two rules from the Board of Community Colleges out of its normal order. It did so because it anticipated that there would be considerable public interest in the board's rule concerning admission to community colleges and anticipated that there would be a number of people who would wish to speak in favor of and opposed to this rule. By taking this rule out of order and making prior notice of this decision to the other agencies on the agenda and the public, the Commission could avoid having to make a large number of agency people and the public wait an indeterminate amount of time for the consideration of this rule. It turned out that this did not occur and both rules were approved unanimously although the Commission did require a technical change to 23 NCAC 02C .0301 which was subsequently received.

The Commission received more than fifty written letters of objection to this rule and this rule is subject to legislative review and a delayed effective date.

FOLLOW-UP MATTERS

10A NCAC 22O .0118 – Division of Medical Assistance. The Commission approved the rewritten rule submitted by the agency.

Prior to the review of the rules from the Private Protective Services Board, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because he teaches for the Board pursuant to a contract.

12 NCAC 07D .0405, .0702 – Private Protective Services Board. The Commission approved the rewritten Rule .0405 submitted by the agency contingent on receiving a technical change. The technical change has been received. The Commission approved the rewritten Rule .0702 submitted by the agency.

15A NCAC 07H .0208, .0309 – Coastal Resources Commission. No rewritten rules have been submitted and no action was taken.

15A NCAC 07H .1704, .1705 – Coastal Resources Commission. The Commission approved the rewritten rules submitted by the agency.

15A NCAC 12A .0105 – Department of Environment and Natural Resources. The Commission approved the rewritten rule submitted by the agency.

15A NCAC 12B .0104, .0203, .0204, .0501, .0502, .0601, .0602, .0701, .0802, .1001, .1003, .1004, .1101, .1105, .1201, .1205, .1206 – Department of Environment and Natural Resources. The Commission approved the rewritten Rules .0104, .0601, and .1201 submitted by the agency contingent on receiving technical changes. The technical changes have been received. The Commission approved all other rewritten rules submitted by the agency.

15A NCAC 28 .0301, .0502, .0503, .0504, .0602, .0603, .0604, .0605, .0701 – Department of Environment and Natural Resources. The Commission approved the rewritten Rules .0502 and .0503 submitted by the agency contingent on receiving technical changes. The technical changes have been received. The Commission approved all other rewritten rules submitted by the agency.

21 NCAC 12 .0208 – Licensing Board for General Contractors. No rewritten rule has been received and no action was taken.

21 NCAC 17 .0401 – Board of Dietetics/Nutrition. The Commission approved the rewritten submitted by the agency.

LOG OF FILINGS

Chairman Hayman presided over the review of the log of permanent rules.

Pesticide Board
The permanent rule was approved unanimously.

The meeting recessed at 10:37 a.m. and reconvened at 10:47 a.m.

Office of the Commissioner of Banks
Prior to the review of the rules from the Office of the Commissioner of Banks, Commissioner Twiddy recused himself and did not participate in any discussion or vote concerning these rules because he is an executive official of a bank.

All permanent rules were approved unanimously with the following exceptions:

04 NCAC 03M .0101 - The Commission objected to this rule based on ambiguity. In Item (10)(a) lines 18 – 20 it is unclear whether this is a "reasonable person" standard, i.e., what a reasonable person would know or believe. As it is written it does not appear to be so. The same objection would apply in (10)(c) lines 17 and 18. In (10)(a)(iv) it is unclear what constitutes "other plea agreement" that is not a conviction or a pending criminal charge as set out in (iii).

04 NCAC 03M .0205 - The Commission objected to this rule based on ambiguity. In (3)(A) is unclear what is meant by the requirement to have a "credit score of 600." Literally this could be a credit score from anyone. It is unclear whether this is what the Banking Commission actually intends or whether they intend a specific credit rating agency's (or agencies') score to be used.

04 NCAC 03M .0301, .0401, .0604 – The Commission extended the period of review on these rules.

Social Services Commission
10A NCAC 70F .0202 - The Commission objected to this rule based on ambiguity. In (d) and (e) it is unclear whether a conviction of any felony assault or battery within the last five years is a bar to employment as an executive director for these agencies.

10A NCAC 70F .0203 - The Commission objected to this rule based on ambiguity. In (a) it is unclear what constitutes a plan of financing for the subject agencies that "assures" "sufficient funds" to carry out the purposes of the agency and provide the required child care and services. In (b) it is unclear what is meant or required by (b) to develop "adequate resources" and manage them "prudently" as set out in the rule. It is unclear what constitutes "adequate resources" and "prudent" management of them.

10A NCAC 70F .0207 - The Commission objected to this rule based on ambiguity. In (c) and (d) it is unclear whether a conviction of any felony assault or battery within the last five years is a bar to employment as an executive director for these agencies.

10A NCAC 70G .0501 - The Commission objected to this rule based on ambiguity. It is unclear whether the agency intends to enforce (a) line 11, (b) line 19 and (c) line 28 by requiring a degree from a college that is still currently functioning. If that is not the intent of the agency, then the rule is unclear.

10A NCAC 70G .0506 was approved unanimously.

10A NCAC 70H .0401 - The Commission objected to this rule based on ambiguity. It is unclear whether the agency intends to enforce (a) line 11, (b) line 19 and (c) line 28 by requiring a degree from a college that is still currently functioning. If that is not the intent of the agency, then the rule is unclear.

10A NCAC 70I .0302 - The Commission objected to this rule based on ambiguity. In (7) and (8) it is unclear whether a conviction of any felony assault or battery within the last five years is a bar to employment as an executive director for these agencies.

10A NCAC 70I .0404 - The Commission objected to this rule based on ambiguity. In (b) and (c) it is unclear whether a conviction of any felony assault or battery within the last five years is a bar to employment as an executive director for these agencies.

10A NCAC 70I .0405 - The Commission objected to this rule based on ambiguity. It is unclear whether the agency intends to enforce (b) line 1, (g)(1) page 3 line 16 and (h)(1) page 3 line 27 and page 4 line 1 by requiring a degree from a college that is still currently functioning. If that is not the intent of the agency, then the rule is unclear.

Environmental Management Commission
15A NCAC 02B .0248 was approved unanimously.

15A NCAC 02B .0250 - The Commission objected to this rule based on lack of statutory authority and ambiguity. The standards to be used by the Director in (c) page 10 to approve the stream maps developed by local governments are unclear. There is no authority to set the approval standards outside rulemaking. If the standards are contained within this rule or other rules in this section, that is unclear as well. It is beyond the agency's authority to order a local government to issue a specific final decision, i.e. either granting or denying an application as set out in (14)(a), (b) and (c) page 27. It also seems to be an unnecessary step since the "final" decision has in fact already been made by the EMC.

15A NCAC 02B .0252 - The Commission objected to this rule based on ambiguity. It is unclear where property donated for mitigation purposes must be located. This rule sets out the mitigation requirements for any type of allowed use requiring mitigation for the damage inflicted within a riparian buffer area, or any variance that requires mitigation. Item (4) of the rule specifies the location of any mitigation be "[a specified distance] from the Cape Fear River … and within the watershed of Lake Randleman …" without qualification for the specific mitigation option selected under (6). Item (6) specifies the three methods or options for mitigation including "(b) donation of real property … [or] (c) restoration or enhancement of a … riparian buffer." This would make it appear that all mitigation must be within the geographic limitation set out in Item (4). Item (9) addresses the mitigation option selected under (6)(c) for enhancing or restoring riparian buffers located elsewhere. It specifies in (9)(b) that the location of the restoration or enhancement must "comply with the requirements in Item (4) of this Rule" even though one would normally interpret this rule to require that location even without emphasizing it in (9)(b). Item (8) addresses the mitigation option selected under (6)(b) for donating real property rather than enhancing or restoring forested property selected under (6)(c). Item (8)(c)(i) requires a location that is "within an area that is … in the Basinwide Wetlands and Riparian Restoration Plan … or … at a site that is otherwise consistent with the goals outlined in the Basinwide Wetlands … Plan." It is not clear whether such a site would always be within the geographic limitation set out in Item (4). It appears that it could be outside that location especially given the language of the alternative location in (8)(c)(i), "or … at a site that is otherwise consistent" with the goal [of] the Basinwide … Plan." It would seem to me that if the location allowed for donation of real property is not consistent with Item (4), both (4) and (8) should make that clear. If it must be consistent with Item (4) then that should be clarified in Item (8) as well, especially given the language of (9) repeating that the location must be as set out in (4).

Sedimentation Control Commission
The permanent rule was approved unanimously.

Coastal Resources Commission
All permanent rules were approved unanimously.

Wildlife Resources Commission
All permanent rules were approved unanimously with the following exceptions:

15A NCAC 10B .0126 – The Commission objected to this rule based on ambiguity. In (a), it is not clear what standards the Executive Director or his designee is to use in exercising his discretion to issue a permit to an entity that otherwise meets the requirements of this Rule.
15A NCAC 10B .0222 – The Commission objected to this rule based on ambiguity. This rule seems to contradict Rule 15A NCAC 10B .0302. This rule says there is no closed season for armadillo implying that all seasons are open. Rule .0302 limits the open season to a three or four month period. It is not clear what season is open for armadillo.

15A NCAC 10B .0302 – The Commission objected to this rule based on ambiguity. This rule seems to contradict Rule 15A NCAC 10B .0222. This rule limits the open season for armadillo to a three or four month period. Rule .0222 says there is no closed season for armadillo implying that all seasons are open. It is not clear what seasons are open for armadillo.

15A NCAC 10H .0304 – The Commission objected to this rule based on ambiguity and lack of statutory authority. In (d)(2), it is not clear what standards the Executive Director is to use in granting a waiver that brings a licensee into compliance with all captivity rules and statutes. This amounts to a waiver provision without specific guidelines in violation of G.S. 150B-19(6).

The Commission granted the Request for Waiver of Rule 26 NCAC 05 .0108(a) or (d) submitted by the Wildlife Resources Commission and approved re-written rules 15A NCAC 10B .0126, .0222, .0302 and 10H .0304.

Commission for Public Health
All permanent rules were approved unanimously.

Board of Occupational Therapy
All permanent rules were approved unanimously.

State Personnel Commission
All permanent rules were approved unanimously.

TEMPORARY RULES

There were no Temporary Rules filed for review.

COMMISSION PROCEDURES AND OTHER BUSINESS

There was no other business.

The meeting adjourned at 11:56 a.m.

The next scheduled meeting of the Commission is Thursday, May 20 at 9:00 a.m.

Respectfully Submitted,

_____
Dana Vojtko
Publications Coordinator

LIST OF APPROVED PERMANENT RULES
April 15, 2010 Meeting

PESTICIDE BOARD		
Certification/Recertification Fee	02	NCAC 09L .1111
BANKS, OFFICE OF THE COMMISSIONER OF		
Notices	04	NCAC 03M .0102
Application	04	NCAC 03M .0201
Nontransferability	04	NCAC 03M .0202
Experience	04	NCAC 03M .0204
Surety Bond	04	NCAC 03M .0206
Mortgage Loan Originator Qualified Written Test	04	NCAC 03M .0302
Requirements for Providers	04	NCAC 03M .0303
Amendments to Information on File With the Commissioner	04	NCAC 03M .0402
Termination of Operations	04	NCAC 03M .0403
Records to be Maintained	04	NCAC 03M .0501
Form and Location of Records	04	NCAC 03M .0502
Transfer of Servicing Rights	04	NCAC 03M .0701
Requirements for Mortgage Services to Communicate Effecti...	04	NCAC 03M .0702
Cessation of Foreclosure Activity During Pendency of Loss...	04	NCAC 03M .0703
HHS - MEDICAL ASSISTANCE, DIVISION OF		
Pharmacy Services	10A	NCAC 22O .0118
SOCIAL SERVICES COMMISSION		

Client Records	10A NCAC 70G .0506
PRIVATE PROTECTIVE SERVICES BOARD	
Private Investigator's Use of a Badge	12 NCAC 07D .0405
Fees for Unarmed Security Guard Registration	12 NCAC 07D .0702
ALARM SYSTEMS LICENSING BOARD	
Fees for Registration	12 NCAC 11 .0302
ENVIRONMENTAL MANAGEMENT COMMISSION	
Randleman Lake Water Supply Watershed: Nutrient Managemen...	15A NCAC 02B .0248
SEDIMENTATION CONTROL COMMISSION	
Self-Inspections	15A NCAC 04B .0131
COASTAL RESOURCES COMMISSION	
General Conditions	15A NCAC 07H .1704
Specific Conditions	15A NCAC 07H .1705
Approval Procedures	15A NCAC 07H .2302
Permit Fee	15A NCAC 07H .2303
General Conditions	15A NCAC 07H .2304
Specific Conditions	15A NCAC 07H .2305
WILDLIFE RESOURCES COMMISSION	
Importation of Wild Animals and Birds	15A NCAC 10B .0101
Importation of Wild Animals and Birds	15A NCAC 10B .0101
Wildlife Taken for Depredations or Accidentally	15A NCAC 10B .0106
Big Game Kill Reports	15A NCAC 10B .0113
Wild Birds Defined	15A NCAC 10B .0121
State Hunting License Exemptions	15A NCAC 10B .0126
Bear	15A NCAC 10B .0202
Squirrels	15A NCAC 10B .0206
Armadillo	15A NCAC 10B .0222
Open Seasons	15A NCAC 10B .0302
Tagging Furs	15A NCAC 10B .0402
Trappers and Hunters	15A NCAC 10B .0404
Fur Dealers	15A NCAC 10B .0405
Misuse of Tags	15A NCAC 10B .0406
Public Mountain Trout Waters	15A NCAC 10C .0205
Open Seasons: Creel and Size Limits	15A NCAC 10C .0305
Manner of Taking Non-game Fishes: Purchase and Sale	15A NCAC 10C .0401
Taking Non-game Fishes for Bait or Personal Consumption	15A NCAC 10C .0402
General Regulations Regarding Use	15A NCAC 10D .0102
Hunting On Game Lands	15A NCAC 10D .0103
Fishing on Game Lands	15A NCAC 10D .0104
Definition	15A NCAC 10E .0101

Regulations Posted	15A NCAC 10E .0102
Use of Areas Regulated	15A NCAC 10E .0104
Alexander County	15A NCAC 10F .0332
McDowell County	15A NCAC 10F .0339
License to Operate	15A NCAC 10H .0101
Quality of Birds Released	15A NCAC 10H .0104
General Requirements	15A NCAC 10H .0301
Minimum Standards	15A NCAC 10H .0302
Captive Cervid Herd Certification Program	15A NCAC 10H .0304
Disposition of Birds or Eggs	15A NCAC 10H .0904
General Regulations Regarding Use of Conservation Areas	15A NCAC 10J .0102

ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF

Definitions	15A NCAC 12A .0105
Permits	15A NCAC 12B .0104
Metal Detectors Prohibited	15A NCAC 12B .0203
Rock or Cliff Climbing and Rappelling	15A NCAC 12B .0204
Vehicles; Where Prohibited	15A NCAC 12B .0501
Parking	15A NCAC 12B .0502
Boating	15A NCAC 12B .0601
Camping	15A NCAC 12B .0602
Sports and Games: When Permitted	15A NCAC 12B .0701
Fishing	15A NCAC 12B .0802
Noise Regulation	15A NCAC 12B .1001
Intoxication Liquors: Controlled Substance or Beverages	15A NCAC 12B .1003
Animals at Large	15A NCAC 12B .1004
Commercial Enterprises	15A NCAC 12B .1101
Public Assemblies and Meetings; Special Activity Permit	15A NCAC 12B .1105
Closing and Opening Hours; Restricted Areas	15A NCAC 12B .1201
Reservation Periods	15A NCAC 12B .1205
Fees and Charges	15A NCAC 12B .1206

PUBLIC HEALTH, COMMISSION FOR

Definitions	15A NCAC 18A .2508
Plan Review and Approval	15A NCAC 18A .2509
Public Swimming Pool Operation Permits	15A NCAC 18A .2510
Inspections	15A NCAC 18A .2511
Materials of Construction	15A NCAC 18A .2514
Design Details	15A NCAC 18A .2515
Pool Profile	15A NCAC 18A .2516
Circulation System	15A NCAC 18A .2518
Ladders, Recessed Steps, and Stairs	15A NCAC 18A .2521
Depth Markings and Safety Ropes	15A NCAC 18A .2523
Lighting and Ventilation	15A NCAC 18A .2524
Fences	15A NCAC 18A .2528
Wading Pools	15A NCAC 18A .2531

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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

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Pamela Lynn Jordan v. Forsyth County Department of Social Services	09 OSP 6435	Brooks	03/05/10	
Scott Minter v. Pender County Schools Board of Education	09 OSP 6449	Morrison	04/14/10	
Marie Barton Backus v. Union County Health Dept	09 OSP 6719	Brooks	03/16/10	
Charlene Ratliff v. Department of Correction	10 OSP 0109	May	04/19/10	
Christopher D. Beam v. Dept. of Crime Victims Compensation Commission	10 CPS 0588	May	04/19/10	

OFFICE OF SECRETARY OF STATE

Sarah D. Larson v. N.C. Department of the Secretary of State	08 SOS 1200	Overby	06/04/09	24:07 NCR 478
Robert Lee Evans v. NC Office of Administrative Hearings	09 SOS 2300	Lassiter	06/03/09	
Asali J. Howard v. North Carolina Department of The Secretary Of State	09 SOS 2707	May	07/16/09	
Pamela Nickles v. Dept. of Secretary of NC State	09 SOS 3120	Brooks	10/16/09	
Stanley Young v. The Notary Public Section	09 SOS 4001	Brooks	09/18/09	
Jeremy Glen Blow v. NC Office of the Secretary of State	09 SOS 4245	Overby	09/14/09	
Martha C. Graybeal v. NC Dept. of the Secretary of State Certification Filing Division	09 SOS 4273	Brooks	10/07/09	
Brandi Alexis Meeker v. Dept. of the Secretary of State	09 SOS 4580	Overby	10/29/09	
Diana King Barnes v. NC Dept. of the Secretary of State	09 SOS 4906	Gray	12/02/09	

UNC HOSPITALS

Carlos A Perez-Sanchez v. UNC Hospitals	09 UNC 1294	Overby	06/03/09	
Bobbie Perlow v. UNC Hospitals	09 UNC 1606	Brooks	07/15/09	
Nicole Bryant v. UNC Hospitals	09 UNC 2022	Lassiter	06/16/09	
Jennifer Thompson Stewart v. UNC Hospitals	09 UNC 2147	Mann	08/07/09	
Cynthia K. Yellock v. UNC Hospitals	09 UNC 2298	Mann	07/21/09	
Jennifer Jacobs v. UNC Hospitals	09 UNC 2409	Mann	07/21/09	
Ryan Rockey v. UNC Hospitals	09 UNC 2587	May	07/15/09	
Mary Ann Strickland v. UNC Hospitals	09 UNC 2712	Overby	06/04/09	
James Tyler Utt v. UNC Hospitals	09 UNC 2892	May	09/22/09	
Alan Greene v. UNC Hospitals	09 UNC 2894	Overby	08/04/09	
Angela M. Aldridge v. UNC Hospitals	09 UNC 3338	Elkins	10/08/09	
Kathleen G. Finch v. UNC Hospitals	09 UNC 3418	Gray	08/31/09	
R. Michael Pearson v. UNC Hospitals	09 UNC 3423	Gray	08/31/09	
Darice Witherspoon v. UNC Hospitals	09 UNC 3428	Gray	07/30/09	
Timothy H. Keck v. UNC Hospitals	09 UNC 3528	Gray	08/06/09	
Marion Munn v. UNC Hospitals	09 UNC 3531	Gray	08/31/09	
Cynthia D. Baker v. UNC Hospitals	09 UNC 3680	Gray	09/02/09	
Eilene Renee Alston v. UNC Hospitals	09 UNC 3926	Gray	08/31/09	
Karen E. Current v. UNC Hospitals	09 UNC 4019	Gray	09/08/09	
John C. Presley v. UNC Hospitals	09 UNC 4020	Gray	07/21/09	
Richard F. Shoe v. UNC Hospitals	09 UNC 4396	Elkins	11/24/09	
Alberto Berri v. UNC Hospitals	09 UNC 4718	Overby	10/06/09	

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 08 OSP 3111
ELSIE HINTON, Petitioner, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Respondent.	**DECISION**

On January 5, 6, and 7, 2010, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. On February 22, 2010, Respondent filed its proposed Decision. On February 24, 2010, the undersigned closed the official record after receiving the parties' respective decisions.

APPEARANCES

For Petitioner: John E Campion
Attorney at Law
PO Box 2656
Raleigh, NC 27602-2656

For Respondent: Allison A. Angell
Tina A. Krasner
Assistant Attorneys General
NC Department of Transportation
1505 Mail Service Center
Raleigh, NC 27699-1505

ISSUES

1. Did Respondent have just cause to dismiss Petitioner from her employment for unsatisfactory job performance and unacceptable personal conduct?

2. Did Respondent discriminate against Petitioner based on a handicapping condition by terminating Petitioner from employment?

WITNESSES

For Petitioner: Elsie Hinton

For Respondent: Ashley Memory, Julie Schmidt, Ernie Seneca, Nicole Meister, Emily Jones, and Patricia Broadhurst

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 3-5, 10, and 18

For Respondent: 1-6, 6A-6B, 7-16, 16A, 17, 17A-17C, 18-26, 29-30, 33A-33C, 34-35, 35A, 38, and 41-42

FINDINGS OF FACT

Based upon the sworn testimony of the witnesses, exhibits entered into evidence and the other competent evidence admitted at the hearing, the undersigned finds the following facts:

1. In November of 1992, Elsie Hinton ("Petitioner") began her employment as an Artist Illustrator II with the North Carolina Department of Transportation ("DOT"). She was hired to work in the Public Affairs office, and was subsequently moved to the Construction Unit. Her office was located in the Highway Building at 1 South Wilmington, Raleigh, North Carolina. (Pet. Exh. 18; T p 383)

2. From August 1968 through June 1971, Petitioner attended North Carolina Central University, and received a Bachelor of Arts in Art Education. Petitioner also attended North Carolina State University from August 1986 through May 1992, and received a Master's degree in product design. (Pet. Exh. 18; T p 382)

3. During graduate school, Petitioner became extremely tired during the day, and had problems staying awake. Despite experiencing problems staying awake, Petitioner did not seek medical treatment. She self-medicated by drinking espresso, other caffeinated beverages and splashing cold water on her face. (T pp. 437-439)

4. In December 1995, Respondent posted the position of Artist Illustrator III ("AI III"). Plaintiff applied for this position, was offered, and accepted such position. She worked in the Art Department in the Public Affairs office (formerly called Public Information Office). She was responsible for graphic design projects. At her own request, Petitioner worked from 7:40 am to 4:40 pm, because she used the bus to

commute to work. She held this position until her dismissal. (Pet. Exh. 18; T pp. 233, 384-386)

5. Ashley Memory is the Senior Assistant Director of Admissions for Communications at the University of North Carolina at Chapel Hill. Before that, she worked in the Public Information Office for DOT from March 1999 through September 2005. From 2003 to 2004, Memory served as Acting Director, and managed DOT's daily communications including media, print and electronic communications. (T pp. 18-20)

6. Memory and Petitioner worked in the same office. Petitioner had a history of falling asleep at work. Petitioner's supervisor, Julie Schmidt, Memory, and other office employees witnessed Petitioner sleeping during business hours, and had to awaken her on numerous occasions. As Acting Director, Memory had several informal meetings with Petitioner, and explained that her sleeping on the job prevented her supervisors from assigning additional projects to her. She asked Petitioner about sleeping at work, and if she had a medical condition. Memory directly addressed the issue in order to make an effort to work with Petitioner. Petitioner advised that she had trouble sleeping at night. Memory recommended that Petitioner seek medical treatment for her own peace of mind, and for her work in the office. (Resp. Exh. 3; T pp. 22-23, 409-410)

7. On October 29, 2003, Memory issued Petitioner a Written Warning for unacceptable personal conduct for sleeping on the job. Memory and Jeffrey Plowman, Petitioner's direct supervisor, presented the warning to Petitioner. Petitioner was not happy about receiving the warning and refused to sign it. Memory and Plowman signed the warning to acknowledge Petitioner received it. (Resp. Exh. 1; T pp. 21-22)

8. Petitioner understood the October 2003 warning was for unacceptable personal conduct; specifically, sleeping on the job. She admitted she was placed on notice to make improvements. (T p 409)

9. In November 2003, Petitioner sought treatment for her sleeping problem. Dr. Mary Connelly with Rock Quarry Road Family Medicine, Raleigh, North Carolina, treated her. (Resp. Exh. 34)

10. Sometime in November 2003, Petitioner gave Memory a doctor's note dated November 5, 2003. The note showed Petitioner was absent from work on November 5, 2003. At the bottom of the note, the word "Restrictions" was printed. The medical provider checked a box labeled "None," that was located immediately to the right of "Restrictions." The medical provider also wrote "on medication started today for sleeping problem." Petitioner gave the note to Memory, but did not provide any additional information. The note was placed in Petitioner's personnel file in Respondent's office. (Resp. Exh. 2; T pp. 23-24)

11. A preponderance of evidence showed that Petitioner did not request an accommodation for her sleeping problem from Memory during the time Memory supervised Petitioner. (T p 27)

12. In December 2003, Julie Schmidt (formerly Whichard) started in the Public Information Office at DOT as an Artist Illustrator III. Her working title was Art Director. Schmidt supervised Petitioner and two other employees. Petitioner was also an Artist Illustrator III, but did not have supervisory duties. Schmidt was responsible for DOT's graphic design projects and reported to Memory. Memory asked Schmidt to record whenever she observed Petitioner asleep. Memory kept a log of those observations in her office. (T pp. 32-35)

13. Schmidt worked from 8:30 pm to 5:30 pm. Her office was located in the Highway Building. Her office space consisted of a cubicle in the corner on the first floor. When Schmidt left her cubicle, she looked directly into Petitioner's cubicle before turning and entering the main area. (T pp. 35, 37)

14. When Schmidt observed Petitioner sleeping, and when time allowed, Schmidt contemporaneously recorded her observations of Petitioner sleeping, and provided the information to Ms. Memory. (T pp. 36, 72, 84)

15. In 2004, Ashley Memory became Director. By this time, Memory's relationship with Petitioner had significantly deteriorated. Petitioner continued to fall asleep at work, while Memory regularly awakened Petitioner. Memory and Petitioner did not converse after Memory awakened Petitioner. Around this time, the Public Information Office was renamed the Communications Office. (T pp. 19, 27)

16. On October 27, 2004, Schmidt attended a Seminar for Adobe Creative, along with another DOT employee and Petitioner. The seminar was five hours long with a lunch break in the middle. All three sat in the front row, approximately two feet from the presenter. Schmidt observed Petitioner fall asleep from 10:30 -11:45 am and 1:20 - 1:40 pm. Schmidt also heard Petitioner snoring. (Resp. Exh. 3; T pp. 39-40)

17. On November 8, 2004, at 3:30 pm, Memory observed Petitioner asleep at work, and awakened her. (Resp. Exh. 3)

18. On March 15, 2005, Schmidt, Memory, and Meister observed Petitioner fall asleep at a weekly staff meeting. (Resp. Exh. 3; T pp. 40-41)

19. On March 31, 2005, Memory issued Petitioner a Second Written Warning for unacceptable personal conduct for continued sleeping on the job. The warning documented ten dates and times beginning October 27, 2004, through March 18, 2005, that Petitioner fell asleep at work. The information was recorded in a log by Memory, Schmidt and other employees. At the meeting to discuss the warning, Memory suggested placing Petitioner's desk in the middle of a common traffic area in the office,

to help Petitioner stay alert and keep her from falling asleep. Petitioner was upset with the suggestion, and told Memory she did not like the idea. Petitioner's desk was not moved. Petitioner did not offer a suggestion to help herself stay awake. (Resp. Exh. 3; T pp. 24-25, 411-412, 465-466)

20. Nicole Meister was the Deputy Director of the Communications Office since 2003. Starting in 1992, Meister worked as receptionist, a public relations officer, and then Acting Deputy Director for Respondent. As Deputy Director, Meister reported to Memory, and assisted Director Memory in the overall office management. Twelve employees directly report to Meister. Ms. Meister's office is located on the first floor in the Highway Building. Petitioner was already working for Respondent when Respondent hired Meister. (T pp. 211-214)

21. Meister assisted Memory in drafting the March 31, 2005 written warning issued to Petitioner. Meister kept a list of dates and times she observed Petitioner asleep at work. Meister observed Petitioner asleep during the staff meeting on March 15, 2005. Another time, Meister observed Petitioner slumped in her chair and sound asleep. Meister was unable to arouse Petitioner, and became scared that Petitioner was unconscious. Petitioner's direct supervisor, Plowman, came over, and was finally able to awaken Petitioner. (Resp. Exh. 3; T pp. 214-217)

22. On September 9, 2005, Ernie Seneca started as the Director of the Public Information Office for Respondent. He supervised twenty-eight employees. The March 2008 Organizational Chart for the Communications Office showed the following three employee directly reported to Seneca: Nicole Burris, Deputy Director; Emily Jones, Art Director; and Marsha Thorpe, Office Manager/Customer Service Office Manager.

23. During Seneca's tenure as Director, the office was renamed the Communications Office. The name change served to centralize the coordinated activities for public relations, public affairs and public information activities. Seneca's office was located on the first floor of the Highway Building. In June 2009, he left DOT to become the Public Affairs Director for the North Carolina Department of Crime Control and Public Safety. (Resp. Exh. 4; T pp. 98-99)

24. As Memory had done as Director, Seneca requested Burris, Jones, and Thorpe notify him if they observed Petitioner sleeping at work, and document their observations. (T pp. 105, 110)

25. On November 22, 2005, Schmidt observed Petitioner asleep at her desk around 12 noon. Petitioner continued to sleep all afternoon. (Resp. Exh. 5; T p 43)

26. On December 8, 2005, Schmidt observed Petitioner asleep at her desk around 10:40 am, and again at 4:30 pm. A few minutes later, Schmidt awakened Petitioner so she would not miss her bus ride home. (Resp. Exh. 5; T pp. 43-44)

27. On December 16, 2005, Seneca issued Petitioner a Written Warning for unsatisfactory job performance and unacceptable personal conduct for sleeping on the job. Seneca and Schmidt presented the written warning to Petitioner. Seneca read the warning to Petitioner. Petitioner signed the warning, acknowledging receipt thereof. Below her signature, Petitioner wrote:

> I would like to attach this document to a document from my physician that should be in my work file. The letter from my physician addresses this issue.

(Resp. Exh. 5) During this meeting, Petitioner did not provide any additional information to Seneca, other than her written statements on the warning. Since Seneca and Schmidt were not aware of a prior letter from Petitioner's physician, Seneca told Petitioner he would check, and get back to her. Seneca contacted Human Resources.

28. Human Resources found a doctor's note, not a letter, in Petitioner's personnel file. The note was the doctor's note that Petitioner had given Ashley Memory in November 2003. (Resp. Exh. 2)

29. On December 28, 2005, Seneca and Schmidt met with Petitioner to show her the doctor's note. On the note, Petitioner's name was listed as the patient. A box entitled, "Absent from work" was marked, noting Petitioner's absence from work on November 5, 2003. The bottom of the note listed the word "Restrictions." Immediately to the right of "Restrictions," the medical provider checked the box for "None," and wrote, "on medication started today for sleeping problem." (Resp. Exh. 2 and 5; T pp. 103-105)

30. After seeing the doctor's note, Petitioner was unsure about a letter from her physician. Seneca told her that DOT could not accommodate her sleeping on the job, as her position was not part-time. The November 5, 2003 doctor's note did not address the recent December 16, 2005 Written Warning for unsatisfactory job performance and unacceptable personal conduct. At this time, Petitioner did not request an accommodation, and she did not say anything about a medical condition. Petitioner admitted that Seneca told her that DOT could not accommodate her sleeping on the job. She admitted DOT placed her on notice to make improvements. Petitioner was aware that if she failed to improve, she could be subject to further disciplinary action up to, and including, dismissal. (Res. Exh. 6, T pp. 109-110, 174-175, 413, 468)

31. On January 9, 2006, Schmidt observed Petitioner asleep at her desk in the morning and afternoon. The next day Petitioner called in sick. (Resp. Exh. 6A; T pp. 47-48)

32. During the morning of January 20, 2006, Schmidt observed Petitioner at her desk "slowly pulling her head up and waking up." (Resp. Exh. 6A; T pp. 48-49)

33. On February 1, 2006, Petitioner did not come to work. (Resp. Exh. 6A)

34. On February 2, 2006, Schmidt observed Petitioner asleep at her desk several times in the morning. Schmidt told her that she needed to go home if she could not stay awake. Petitioner replied, "I know," and left work one hour later. (Resp. Exh. 6A)

35. On February 3, 2006, Petitioner did not come to work. As per ther typical practice, Petitioner left a message on her supervisor's voicemail that morning, saying that she did not sleep well the night before, and she would be staying at home. (Resp. Exh. 6A; T pp. 49-50)

36. On February 15, 2006, Schmidt observed Petitioner asleep at her desk. Later that same day, Seneca observed Petitioner asleep from 4:15 to 4:18 pm. Seneca used his personal watch to record the length of time. When Petitioner roused, Seneca asked Petitioner if she was okay, because she appeared to be "completely out of it." Petitioner said she was fine. Seneca told Petitioner she had been asleep, and could not sleep at work. Petitioner kept her back to Seneca, and did not respond. (Resp. Exh. 6A and 6B; T pp. 51-52, 110-112)

37. On February 16, 2006, Petitioner did not come to work. She called in the morning, and said she did not sleep well the night before so she would be staying at home. (Resp. Exh. 6A and 6B; T pp. 51-52, 110-112)

38. Schmidt did not record all the days and times she observed Petitioner asleep at work due to time constraints as she was going to the print shop or to a meeting. (T p 66)

39. On February 24, 2006, Seneca issued Petitioner a pre-disciplinary Conference Notification for unsatisfactory job performance and unacceptable personal conduct. In such notification, Seneca recommended that Petitioner be dismissed for: (a) sleeping on the job, (b) conduct unbecoming a State employee detrimental to State service, and (c) conduct for which no reasonable person should expect to receive warning prior to dismissal. Seneca and Schmidt presented the notification to Petitioner. Petitioner did not say anything, and refused to sign it. Seneca and Schmidt signed their names to acknowledge the notification was reviewed with Petitioner. The pre-disciplinary conference was scheduled for February 27, 2006 at 9:00 am to allow Petitioner an opportunity to respond to the recommendation. (Resp. Exh. 7; T pp. 54-56, 112-114)

40. On February 27, 2006, Seneca conducted the pre-disciplinary conference with Petitioner, and made notes. Although Schmidt was also present, she does not remember the conference. Immediately upon entering the room Petitioner asked, "Who has slept at work besides me?" and raised her hand and said, "We've all been tired." Petitioner said she had a medical condition, and believed that DOT had been made aware to accommodate that medical condition. She was taking medication, but had an aversion to the medication. Notwithstanding three written warnings and a

recommendation for dismissal, Petitioner believed her sleeping problem was not affecting her work. Petitioner did not agree with the descriptions outlined in the written warning. (Resp. Exh. 8; T pp. 114-117, 471-472)

41. At the pre-disciplinary conference, Petitioner did not provide any specific information about her medical condition, including how and when Respondent was made aware of her medical condition. Furthermore, Petitioner did not provide any specific information related to a previous request for an accommodation. This was the first time Seneca heard Petitioner make these statements. (T pp. 116-117, 187-188, 415-416)

42. Seneca contacted Patricia Broadhurst and Charlie Watson in Human Resources. Since July of 2009, Broadhurst, Assistant Human Resources Director of Personnel Services, has managed Personnel Services. Personnel Services included Employee Relations and Training and Development. In her prior position, Broadhurst served as Manager of the Employee Relations Section for fifteen years. In her current position, Broadhurst supervised nine employee relations representatives, who were assigned to specific geographical locations throughout the State. Charlie Watson was one of the employee relations representatives who reported to Broadhurst. (T pp. 328-330)

43. As Assistant Human Resources Director, Broadhurst was responsible for reviewing all disciplinary actions prior to issuance. She was familiar with Petitioner, having first heard of her in 2003. Respondent could have dismissed Petitioner for one act of unacceptable personal conduct of sleeping on the job on February 28, 2006. (Resp. Exh. 10; T pp. 331-332)

44. Seneca decided not to dismiss Petitioner, but give Petitioner another chance to show she could perform her job duties and stay awake.

45. On February 28, 2006, Seneca met with Petitioner, and informed her that he was suspending her for two weeks without pay. He also advised Petitioner that she needed to return to the office ready to work and stay awake. Petitioner appreciated his decision, and told Seneca that he would not regret it. Petitioner reviewed and signed the suspension document. (Resp. Exh. 9 and 10; T pp. 118-120)

46. On March 28, 2006, Schmidt completed a Performance Management Work Plan for Petitioner for the appraisal period of April 1, 2005 through March 31, 2006. At the bottom of the work plan, Schmidt rated Petitioner for her performance. Schmidt included the following, "She has had a problem sleeping during work hours, and is working on a development plan." In Part III for the Dimension of "Performance Stability," Schmidt wrote, "Elsie has a continued problem with sleeping during work hours. This is unacceptable personal conduct." Schmidt rated Petitioner "Below Good" for that particular dimension. Schmidt reviewed the plan with Petitioner, and Petitioner signed the plan. (Resp. Exh. 11; T pp. 57-59)

47. On March 28, 2006, Schmidt placed Petitioner on a Development Plan, which specifically outlined Petitioner's work expectations. The first expectation was, "Be awake and alert during the entire work day." Schmidt read the plan to Petitioner, and both of them signed it. Schmidt scheduled a follow-up meeting for 45 days later. (Resp. Exh. 12; T pp. 59-61)

48. Sometime in March of 2006, Dr. Connelly suggested Petitioner have a sleep test. (Resp. Exh. 34; T pp 440-441)

49. On Friday, May 26, 2006, Petitioner requested to meet with Seneca and Schmidt. Seneca, Schmidt, and Petitioner met in Seneca's office. Petitioner provided Seneca a report of an April 17, 2006 sleep study conducted on Petitioner by Wake Med Neurodiagnostics Department at 3000 New Bern Avenue, Raleigh, North Carolina. Petitioner told them she was diagnosed with sleep apnea. She requested reinstatement of pay for her two-week suspension, and requested that all information for her sleeping problem be packaged together in her personnel file. Seneca told her he would talk with Human Resources, and get back to her.

50. The last paragraph of the sleep study was called "Impression/Interpretation." Dr. Naseem J. Masood interpreted the data from the study as showing Petitioner had severe obstructive sleep apnea. In the report, Dr. Masood stated that use of a CPAP would significantly resolve Petitioner's sleep apnea, and recommended that she use one. The sleep study did not include work restrictions. (Resp. Exh. 13; T pp. 391- 394, 443-445)

51. Seneca talked with Human Resources representatives Patricia Broadhurst and Charlie Watson, and provided them with a copy of the sleep study. Both Broadhurst and Watson advised that Respondent would not accommodate Petitioner's sleeping on the job. (Resp. Exh. 13, 14 and 15; T pp. 59-60, 122-124, 193, 346-348, 395)

52. At the contested case hearing, Petitioner explained that she told Seneca and Schmidt on Friday, May 26, 2006, that she would do her very best not to have another [sleeping] episode, but could not promise. If she felt an episode coming on, and she was getting drowsy or sleepy, she would go home. Petitioner considered such statement to be a request for an accommodation. However, on cross-examination Petitioner explained that, "I made a statement. I didn't ask. . . . If I felt it coming on, I would go home." Petitioner did not feel that she needed to follow up with Respondent. Petitioner indicated that Seneca and Schmidt did not respond to her statement. Seneca and Schmidt do not recall Petitioner making such a statement to leave work, or requesting to leave work if she felt sleepy. (Resp. Exh. 34 [Interrogatory 7]; T pp. 66, 396-397, 429, 450-455, 522)

53. If Petitioner had requested to go home whenever she felt sleepy, Seneca would not have considered such request reasonable. The nature of the work in the Communications Office is intense due to mandatory deadlines to issue news releases,

respond to media requests, conduct interviews, produce state maps and fact sheets, cover board meetings, and staff business events, such as a road or bridge opening. When the office is short staffed, the remaining employees must work harder to complete the work; otherwise, the office fails to meet the deadline. Employees must be present and alert at work, and put forth the effort to complete their work. (T pp. 522-525)

54. Seneca does not have a medical background. His understanding of sleep apnea was that a person had trouble sleeping at night, and could have difficulty breathing. Although he knew others with sleep apnea, he was not familiar with a CPAP machine. Seneca treated the employees he supervised as professionals, and expected them to act in a professional manner at work. Falling asleep at work is not professional. Petitioner was not performing her job when she was asleep. He explained that Petitioner was repeatedly placed on notice that her sleeping on the job was unacceptable, and that she needed to address her problem. Seneca opined that Petitioner needed to take the initiative to do what was necessary for her to perform her job duties and not fall asleep at work. (T pp. 190-192, 194-195)

55. On June 1, 2006, Seneca sent an email to Petitioner responding to her questions on May 26, 2006. Per her request, the document related to her sleep test was placed in her personnel file. He advised her that the period for appealing her suspension and request for reinstatement of pay had passed. Seneca also wrote:

> I hope this diagnosis helps you address your problem. As I have stated to you in previous warning letters and conversations, sleeping on the job will not be condoned here and constitutes unsatisfactory job performance and unacceptable personal conduct.

(Resp. Exh. 15) Seneca copied Schmidt and Burris copied on the email. At hearing, Petitioner admitted that Seneca's email answered questions she raised at the May 26, 2006 meeting. She also admitted that she did not reply to that email. (Resp. Exh. 15; T pp. 124-126, 193, 449)

56. On June 12, 2006, Schmidt reviewed Petitioner's progress since their March 28, 2006 meeting, and placed Petitioner on a new development plan. Schmidt read the expectations to Petitioner: "Be awake and alert during the entire work day." Both Schmidt and Petitioner signed the plan. (Resp. Exh. 16; T pp. 62-63)

57. During the time Schmidt supervised Petitioner, Petitioner did not discuss a medical condition or any treatment for a condition. Neither did Petitioner request an accommodation for a medical condition from Schmidt. Shortly thereafter, Schmidt left her employment with Respondent. (T pp. 66-67, 80-81, 88)

58. On July 2, 2007, Seneca issued Anita Hudson, an Information Processing Technician in the Communications Office, a written warning for unsatisfactory job performance and unacceptable personal conduct for sleeping on the job. Seneca had observed Hudson asleep at her desk on June 29, 2007. Seneca reviewed the warning

with Hudson. Since Hudson did not fall asleep at work again, Seneca took no further disciplinary action against Hudson for that issue. (Resp. Exh. 17A; T pp. 127-129)

59. In May of 2007, Emily Jones became the Art Director in the Communications Office, the position formerly held by Schmidt, as an Art Illustrator III. Jones had begun working for Respondent in December 2006 as an Artist Illustrator II. As the Art Director, Jones was responsible for graphics, photography, and video assignments. She supervised five employees, and formerly supervised Petitioner. She reported to the Director of the Communications Office, Ernie Seneca. Her office was located on the first floor in the Highway Building. (T pp. 230-232, 284)

60. When Jones became Art Director, Seneca advised Jones that Petitioner had received written warnings for sleeping on the job. He requested Jones inform him if she observed Petitioner asleep. (T pp. 284-285)

61. On August 17, 2007, Jones requested Petitioner scan a document into PDF. The scanner is located in the photo lab, which is located off the main hall of the Communications Office. Inside the lab, an "L" shaped black countertop holds the scanner and several computers.

a. Jones entered the photo lab, and sat at a computer diagonally behind Petitioner, about seven feet away. Petitioner was sitting on a stool on wheels in front of the scanner. Jones typically turns on the overhead lights as she works in the photo lab. About one minute after Jones began working on the computer, she noticed the scanner stopped making noise. The scanner makes noise when it is in use. Jones looked up from the computer, and noticed Petitioner's head was down, her body was not moving, and she was asleep. Petitioner slept for one minute, and woke herself up. Jones left the photo lab, and returned to her desk. At 2:32 p.m., Jones informed Seneca by email that Petitioner was sleeping in the photo lab. Seneca was in a meeting.

b. Jones returned to the photo lab to retrieve some files off the computer. About 2:35 pm, Petitioner fell asleep with her head tilted back. She slept for one minute. The sound of Jones' clicking pen awakened Petitioner, and she turned her head in Jones' direction. Jones continued to work on the computer. A short time later, Petitioner fell asleep again with her head facing downward. She slept for one minute, and woke herself up. Around 2:55 pm, Jones asked if Petitioner was feeling okay, because she saw Petitioner sleeping. Petitioner said that she ate too much cake, but was over it now. In an effort to encourage Petitioner to re-energize herself or drink a caffeinated beverage, Jones told Petitioner she should get something to drink or take a walk. Jones left the photo lab for a photography assignment. At 4:09 pm, Petitioner apologized to Jones for "going under," and falling asleep, and figured it was the bread and cake she ate at lunch. (Resp. Exh. 17B; T pp. 234-241, 295-303)

62. Jones told Seneca what happened in the photo lab. Seneca gave Petitioner's file to Jones, which included the doctor's note for Petitioner's November 5, 2003 absence from work, and Petitioner's sleep test provided on May 26, 2006. Neither

document contained work restrictions related to Petitioner's job. (Resp. Exh. 2 and 13; T pp. 284-288, 322-323)

63. On August 20, 2007, Seneca issued Petitioner a written warning for unacceptable personal conduct for sleeping on the job on August 17, 2007, and for conduct unbecoming a State employee that is detrimental to State service. Seneca and Jones presented the warning to Petitioner. Petitioner made no comments, and signed the warning. Petitioner did not say anything about a medical condition, and did not request an accommodation. (Resp. Exh. 17C; T pp. 130-132, 241-242)

64. At hearing, Petitioner admitted that she was still falling asleep at work, even though she had been using her CPAP machine since May of 2006. (T p 463)

65. On November 2, 2007, Jones performed an interim review for Petitioner's Performance Management Work Plan for April 1, 2007 through March 31, 2008. The review included the following comments, "She is working on not falling asleep during the entire work day." (Resp. Exh. 41; T pp. 242-244)

66. On May 9, 2008, Jones completed a Performance Management Work Plan for Petitioner for April 1, 2007 through March 31, 2008. In Part III, under the Dimension of "Performance Stability," Jones wrote the following comment: "Elsie is working on staying awake at her workstation." (Resp. Exh. 41; T pp. 244-245)

67. On June 20, 2008, at 1:40 pm, Jones returned from lunch, and observed Petitioner leaving the parking lot, outside the Highway Building, in a DOT Print Shop van. Jones had not given Petitioner an assignment that required her to leave work that day. Further, employees in the Communications Office use a State van supplied through the Secretary's Office. Jones spoke with the Print Shop Supervisor, Mitchell Dixon. Petitioner had told Dixon she had an errand to run.

a. After speaking with Dixon, Jones returned to the office to check the white dry erase board. Employees list their whereabouts on the dry erase board when he or she leaves the office. On that board, Petitioner had written, "Print Shop/Lunch" by her name.

b. At 2:45 pm, Petitioner returned to the office. Jones told Petitioner that she had seen Petitioner leave work in the van, and asked where she had gone. Petitioner reported that she had an "accident," and had gone home. Petitioner did not provide more information. Jones did not ask her to elaborate. (T pp. 245-249) Jones informed Seneca what happened.

68. On June 23, 2008, Seneca issued Petitioner a written warning for unacceptable personal conduct for misusing State equipment for personal use on June 20, 2008, and willfully violating known or written work rules. The DOT Print Shop van is for work purposes only, and is used to deliver large print assignments and pick up paper. It is not supposed to be used for personal business by a State employee. North Carolina General Statute §14-247 states that it is unlawful for a State employee to use a

State-owned vehicle for private purposes. Seneca and Jones presented the warning to Petitioner, and she signed it. Petitioner did not explain to Seneca why she used the print shop van to go home. (Resp. Exh. 19; T pp. 132-136, 250-251, 427)

69. At the contested case hearing, Petitioner admitted that she had an "accident" of a personal nature at work, and asked Dixon to use the van. Dixon was accustomed to Petitioner using the van for work purposes, such as going to vendors, and picking up supplies. Petitioner did not explain to Dixon that she intended to use the van for personal reasons. (T pp. 427-428, 430)

70. In addition to the written warning, Jones placed Petitioner on a Development Plan for the unacceptable personal conduct on June 23, 2008. The plan advised that Petitioner's usage of State equipment would be monitored. The plan accompanied Petitioner's performance review for the 2008-09 work cycle. Jones scheduled a follow-up meeting scheduled for thirty days. Jones reviewed the plan with Petitioner, and Petitioner signed it that day. (Resp. Exh. 18 and 42; T pp. 251-254)

71. During the summer of 2008, Petitioner's CPAP supplier was unable to reach her by telephone. On July 15, 2008, the supplier mailed a correspondence to Petitioner at Petitioner's home address, requesting Petitioner contact them at her earliest convenience. They had attempted to contact her for replacement of her CPAP supplies, and provided her an 800 number. Instead of calling them, Petitioner also had the option to complete and return an enclosed self-addressed, postage stamped, card. "CPAP Supply Refill" was listed at the top of the card. Below that title were questions asking for a name, address, phone number, and email address. Next, a box with, "Please send the items that are scheduled to be replaced on my CPAP," was listed, followed by three blank lines. The bottom of the card, "Allow seven to ten days for delivery." As Petitioner usually received her mail at a Post Office box, Petitioner did not check the mailbox at her home until some time later. (Resp. Exh. 35; T pp. 508-513)

72. On July 28, 2008, at 8:58 am, Seneca was going to a mandatory weekly staff meeting. As he walked by Petitioner's cubicle, he observed Petitioner sound asleep. She was "out for the count in her chair, head leaned back, just snoozing away." (T pp. 136-139) Seneca wanted other witnesses to corroborate his observation, so he called Burris, Thorpe, and Jones to come over.

a. As they watched, Seneca moved towards Petitioner until he was only three to five feet away from her. Seneca took pictures using a camera on his personal cell phone. Seneca took the pictures over a four-minute time span from 8:58 am - 9:02 am. The pictures showed different screen savers appeared on Petitioner's computer. These screensavers appear, and change when there is no activity on the computer. (Resp. Exh. 22, T pp. 136-139)

b. As Jones approached Petitioner's cubicle, she observed Petitioner sleeping at her desk. Her head was leaned back, her eyes were shut, and there was no

movement in her body. Jones watched as Seneca took pictures. (Resp. Exh. 20, T pp. 255-256)

73. Nicole Meister, who was Deputy Director at the time, observed Seneca motioning her to come over. Meister walked towards Seneca, and observed Petitioner sitting in her chair with her head back and her body completely still. Petitioner remained in that position for several minutes. Meister watched as Seneca took pictures. Petitioner never discussed her sleeping problem with Meister. The only personal comment Petitioner had ever made to Meister was about Petitioner changing her eating habits, and that comment was made several years ago. (T pp. 218-220)

74. At some point, Petitioner stirred a little bit and ruffled some papers on her desk. Petitioner turned in her chair, and saw Seneca, Meister, and Jones looking at her. Thorpe had left to complete a work project. Seneca asked Petitioner if anything was wrong, but she did not reply. He told her that she could not sleep at work, as they had discussed in the past, and they would discuss this incident with her later. Petitioner did not respond. Seneca left and went to his office to gather materials for the meeting. Jones also left and returned to her office.

75. After a few minutes, Petitioner approached Jones and said, "Well, I guess I'll be going home now." Jones told her that she needed to check with Seneca, and then asked Petitioner what type of leave she would use for the day. Petitioner said "yes," and walked away.

76. Petitioner approached Seneca as he walked down the hallway on his way to the meeting. She asked for time off to leave the office. Seneca responded that she could not be doing what they observed her doing earlier, and remain at work. Petitioner walked away, and left the office at 9:30 am. Later that day, Seneca contacted Human Resources, and told them what happened. (Resp. Exh. 20 and 24, T pp. 140-143, 218-220, 257-259)

77. At 8:54 am the next morning, July 29, 2008, Petitioner called Jones, and told her she had visited the doctor after leaving work on Monday.

a. Petitioner saw the doctor, because her CPAP machine had not been working properly for the last two weeks. Some parts on the machine need replacing, and the manufacturer had failed to send the parts. Petitioner called the local representative with no luck. She advised Jones that she had not been sleeping well for the last few weeks, and that the failing CPAP machine caused that. She had hoped to make do until the parts arrived. This is the reason she fell asleep at work. Petitioner told Jones she would be staying home from work to catch up on her sleep.

b. Jones informed Petitioner that she needed to pick up a letter from work. Jones also told Petitioner that if she was going to be absent from work due to illness, then she needed to provide Jones with a doctor's note. Petitioner said she would call

her doctor about a note, and would come into work later that day to get the letter. (Resp. Exh. 20, T pp. 259-262, 406)

78. On July 29, 2008, at 4:00 pm, Petitioner arrived at the office. Seneca and Jones met with Petitioner in Seneca's office, where Seneca presented Petitioner with a Notice of Pre-disciplinary conference for unsatisfactory job performance and unacceptable personal conduct. In the Notice, Seneca recommended that Petitioner be dismissed from employment for: (1) sleeping during work hours, (2) conduct unbecoming a State employee detrimental to State service, and (3) conduct for which no reasonable person should expect to receive prior warning. Seneca cited the four previous written warnings for sleeping on the job, and Petitioner's two-week suspension without pay for sleeping on the job.

a. Respondent considered the four prior warnings still active, because there was subsequent disciplinary action, i.e. "another incident of performance or conduct," occurred during the 18-month active cycle of the prior warning, and that subsequent action was related to the first disciplinary action. As a result, the subsequent warnings "basically piggybacks on the previous" action, and Petitioner's 2003 and subsequent disciplinary actions all remained active through the time of her dismissal in 2008. (Resp. Exh. 22; T pp. 263-264, 338-339)

b. Seneca read the Notice of Pre-disciplinary conference to Petitioner, and Petitioner signed it. Below her signature, Petitioner wrote, "Elsie presented doctor's notice to be out due to illness until August 4, 2008." Petitioner handed Seneca a Certificate to Return to Work from Raleigh Associated Medical Specialists dated Tuesday, July 29, 2008. The note indicated that Karen Jones Brown, a Family Nurse Practitioner, treated Petitioner on Monday, July 28, 2008, and Petitioner was expected to return to work a week later on Monday, August 4, 2008. Written immediately to the right of her return date was the sentence, "Due to illness." "Please excuse from work till date above." (Resp. Exh. 21 and 22; T pp. 264-266, 495)

79. During the pre-disciplinary conference, Seneca took notes. After Petitioner gave them Nurse Brown's note, she wanted to know how her absence would affect the pre-disciplinary conference scheduled for Thursday, July 31, 2008. Seneca told her he would check. As they got up to leave the office, Petitioner said the doctor put August 4th on the note to allow her time to receive parts for her machine. For clarification, Seneca restated back to Petitioner that the provider had written, "Due to illness" on the doctor's note to allow Petitioner time to receive parts for her machine. Petitioner replied that neither state nor federal law required her to tell her employer the type of illness. The nurse wrote, "[d]ue to illness" on the note to explain why Petitioner was excused from work. Nevertheless, the doctor's note did not mention sleep apnea, a disability, or any work restrictions related to Petitioner's job. Neither did Petitioner request an accommodation. After the meeting, Seneca contacted Patricia Broadhurst, and provided her with a copy of Petitioner's recent doctor note. (Resp. Exh. 20, 21, 22 and 23; T pp. 146-148, 266-267, 335-336, 498)

80. Seneca and Jones were not aware that Petitioner used a machine to sleep at night. Petitioner first volunteered this information to them on Tuesday, July 29, 2008. There were times when Petitioner called in sick, and left Jones a voice mail saying that she had not slept well the night before and would be staying home that day. This happened a few times each month. Other than that information, Petitioner never mentioned a health condition or sleep apnea to Jones. (T pp. 148, 260-263)

81. The next morning, Wednesday, July 30, 2008, Jones notified Petitioner by phone that the pre-disciplinary conference scheduled for Thursday, July 31, 2008 had been cancelled. They would notify her of the rescheduled date. (Resp. Exh. 20 and 22; T pp. 267-268, 335)

82. Petitioner returned to work on Monday, August 4, 2008. She submitted a Request for Leave form to Jones, requesting 38.5 hours of sick leave for July 28, 2008, beginning at 9:10 am, through August 1, 2008. The requested leave was to allow time for her CPAP supplies to arrive. Jones approved the leave request on August 4, 2008. (Resp. Exh. 35A; T pp. 268-269, 507)

83. Jones gave Petitioner a letter that Respondent had rescheduled the pre-disciplinary conference to Thursday, August 7, 2008, in order to accommodate Petitioner's absence from work. (Resp. Exh. 24; T pp. 148-150, 268, 335-336)

84. On Thursday, August 7, 2008, Seneca and Jones conducted a pre-disciplinary conference with Petitioner. Seneca explained that it was Petitioner's opportunity to respond to the recommendation that she be dismissed.

a. Petitioner explained that she had been having difficulty at work, and had been diagnosed with sleep apnea. This was the first time Seneca and Jones heard Petitioner refer to her sleep apnea condition as a "disability." She thought she had requested an accommodation for her sleep apnea, which she deemed a disability. However, Petitioner did not explain what accommodation she thought she requested, or when she made the request. She found her sleeping condition to be a source of embarrassment and ridicule in the office. She was under prescribed medication, and disagreed with the statements in the pre-disciplinary notification. Since she had not received replacement supplies for her CPAP machine, her condition worsened, and she "lapsed terribly." (Resp. Exh. 20 and 25; T pp. 150-153, 205, 271-274, 312, 337, 500)

b. Regarding using the State van, Petitioner explained that she had an "accident" of a personal nature, and used the State van to drive home. She admitted she had a lapse in judgment. Petitioner concluded by stating that her disability has not affected her work performance. She thought she was such a good employee that she should be fashioning herself a service award. Seneca told Petitioner that Respondent could not accommodate sleeping on the job, and that he had advised her of this, each time she was disciplined.

c. Seneca asked whether she had a response to receiving four written warnings and a two-week suspension without pay for sleeping on the job. Petitioner responded that since 2006 she had not received a written warning for sleeping on the job. Seneca and Jones corrected Petitioner, and reminded her of a written warning she received in August 2007 for sleeping on the job. Petitioner did not respond and just repeated she was missing parts to her CPAP machine. The conference ended with Seneca telling Petitioner he would let her know of his decision. After the conference, Seneca discussed the matter with Patricia Broadhurst. She agreed with Seneca's decision to dismiss Petitioner. (Resp. Exh. 20 and 25; T pp. 150-153, 205, 271-274, 312, 337, 500)

85. Patricia Broadhurst and Charlie Watson received training related to the American with Disabilities Act ("ADA"). Based on Broadhurst's understanding of the ADA, allowing an employee to go home whenever he/she felt sleepy was not reasonable, as the request is too wide open and too difficult to manage in a work environment. (T pp. 339-340, 345-351)

86. Broadhurst remembered only one DOT employee who claimed to have sleep apnea. The employee proposed an alternative work schedule, which allowed him to come to work later in the morning. Broadhurst and the supervisor thought the request was reasonable. Broadhurst also recalled another DOT employee getting caught sleeping on the job. He told his supervisor that he often got tired after lunch. Therefore, he requested to take walks during his lunch hour. Broadhurst and his supervisor thought his request was reasonable. Adjusting an employee's work hours is a reasonable accommodation as long as the adjusted hours comply with DOT's policy for alternate work schedules. (T pp. 340-345, 354, 368-370)

87. At the hearing, Petitioner explained that she obtained a CPAP machine for her personal use in 2006. The machine is located at her personal residence and contains parts that must be replaced according to a regular schedule. The timely replacement of the parts is essential for optimal comfort and proper CPAP operation. To prevent such problems, Petitioner's insurer established a replacement schedule for her supplies. A customer service representative would call regularly to confirm her need for supplies. The supplier would ship the replacement parts to Petitioner, according to that schedule. The supplier could also be contacted at (919) 380-7999 with any questions or need for supplies prior to receiving a call. A local supplier from Morrisville would automatically ship the replacement supplies/parts to Petitioner's home address. (Pet. Exh. 10; 397, 401, 407, 462)

88. According to the replacement schedule provided by her supplier, Petitioner must replace her CPAP mask every three months. While Petitioner verified in her petition that her mask must be replaced every six months, she indicated at hearing that the mask replacement is every three months. (Pet. Exh. 10; 401-402; 458)

89. Petitioner admitted her episodes of falling asleep are unpredictable and temporary. She does not have control over when they are going to happen. Petitioner

was affected by drowsiness all day at work before receiving her CPAP machine. After the first night of using the CPAP machine, Petitioner felt much better. Petitioner opined that she was able to stay awake at work. (T pp. 404, 408, 456-457)

90. According to Jones, a standing order allowing Petitioner to leave work whenever she felt sleepy is not a reasonable accommodation. Given the nature of the work in the office, they could not have accommodated Petitioner's request. The office handles many time-sensitive projects, which also require work from other departments for completion (i.e. print shop, management approval). The work cannot wait in the office for several days to be completed. (T pp. 282-284, 317-320)

91. On rebuttal, Seneca explained that he would not have considered Petitioner's request to go home, whenever she felt sleepy, to be a reasonable request. The nature of the work in the Communications Office is intense due to mandatory deadlines to issue news releases, respond to media requests, conduct interviews, produce state maps and fact sheets, cover board meetings and staff business events such as a road or bridge opening. When the office is short staffed, the remaining employees must work harder to complete the work, otherwise the office fails to meet the deadline. Employees must be present, alert at work, and make the effort to complete their work. (T pp. 522-525)

92. Sleeping on the job is considered conduct unbecoming a State employee as well as conduct for which no reasonable person should expect to receive a warning. Sleeping on the job is also considered to be performance related, because a sleeping employee is not working. The essential functions of Petitioner's job are being awake and regular attendance. (Resp. Exh. 38; T pp. 339-340, 345-351)

93. A preponderance of the evidence established that Petitioner did not request specific equipment to perform her job, and she did not request a change in her schedule to perform her job. Petitioner was already working a flexible schedule to enable her to take the bus to and from work. (Resp. Exh. 20; T p 207)

94. On August 8, 2008, Seneca dismissed Petitioner for unsatisfactory job performance and unacceptable personal conduct for (1) sleeping during work hours, (2) conduct unbecoming a State employee detrimental to State service, and (3) conduct for which no reasonable person should expect to receive prior warning. Seneca cited the July 28, 2008 sleeping event and the four prior written warnings of October 29, 2003, March 31, 2005, December 16, 2005, and August 20, 2007 as examples of Petitioner's unacceptable personal conduct. He advised Petitioner that:

> Your failure to stay awake during the work hours and perform your job duties as directed constitutes unsatisfactory job performance. In addition, it is unbecoming a State employee detrimental to State service and conduct for which no reasonable person should expect to receive prior warning. This constitutes unacceptable personal conduct.

(Resp. Exh. 26) Seneca also dismissed Petitioner for using the print shop van for personal use. He advised that the willful violation of Respondent's State equipment and State property policy are both considered unacceptable personal conduct. (Resp. Exh. 26)

95. On December 4, 2008, Petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings appealing Respondent's decision. Petitioner alleged that Respondent lacked just cause to dismiss her, and discriminated against her, based on her handicapping condition of sleep apnea, in dismissing her from employment. Petitioner contended that her severe obstructive sleep apnea is a disabling condition that caused her severe sleep disruption. When her mask for her CPAP machine failed to seal properly, and her replacement mask did not arrive, Petitioner experienced severe sleep interruptions characteristic of chronic sleep apnea. This left her tired during the day and subject to involuntarily falling asleep.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the parties and this case. The parties received proper notice of hearing.

2. At the time of her separation, Petitioner was a career state employee entitled to the protections of the North Carolina State Personnel Act; specifically, the just cause provision of N.C. Gen. Stat. § 126-35.

Just Cause Claim

3. The State Personnel Act permits disciplinary action against career state employees for "just cause." N.C. Gen. Stat. § 126-35. Although "just cause" is not defined in the statute, the words are to be accorded their ordinary meaning. *Amanini v. Dep't of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining "just cause" as, among other things, good or adequate reason).

4. Respondent has the burden of proof in this contested case hearing to show that it had just cause to dismiss Petitioner in accordance with N.C. Gen. Stat. § 126-35. *Teague v. N.C. Dep't of Transportation*, 177 N.C. App. 215, 628 S.E.2d 395, *disc. rev. denied*, 360 N.C. 581 (2006).

5. Administrative regulations provide two grounds for discipline or dismissal based on just cause, unsatisfactory job performance, and unacceptable personal conduct. 25 NCAC 1J .0604(b).

6. Petitioner was dismissed from her employment with the DOT for unsatisfactory job performance and unacceptable personal conduct, which includes: (1) conduct for which no reasonable person should expect to receive prior warning; and (5)

conduct unbecoming a State employee detrimental to State service. 25 NCAC 1J .0614(h); see also *Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. 594, 620 S.E.2d 14 (2005).

7. One act of unacceptable personal conduct presents just cause for any discipline, up to and including dismissal. *Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. at 597, 620 S.E.2d 17 (2005).

8. According to the State Personnel Manual, just cause to warn or take other disciplinary action for unacceptable personal conduct may be created by either intentional or unintentional acts. The conduct may be job related or off duty as long as there is a sufficient connection between the employee's conduct and job. (Resp. Exh. 38; T pp. 347-348)

9. According to the State Personnel Manual, just cause for unsatisfactory job performance occurs when an employee fails to meet, in a satisfactory manner, the job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency. Just cause may be established by any work-related performance problem. (Resp. Exh. 38) 25 NCAC 1J .0614(i)

10. Respondent met its burden of proof and showed by a preponderance of the evidence that it had just cause to dismiss Petitioner, in accordance with N.C. Gen. Stat. § 126-35, for unsatisfactory job performance and unacceptable personal conduct for repeatedly sleeping on the job. Petitioner failed to perform the requirements in her performance work plans by continually sleeping at work. By continually falling asleep and sleeping at work, Petitioner engaged in unacceptable personal conduct of 25 NCAC 1J .0614(h)(1) conduct for which no reasonable person should expect to receive prior warning, and (5) conduct unbecoming a State employee detrimental to State service.

Discrimination Claim – American with Disabilities Act

State Law

11. Chapter 126 of the North Carolina General Statutes provides the rights and remedies available to Petitioner. Specifically, a State employee has a remedy under state law and therefore a right to file a petition for a contested case hearing before the Office of Administrative Hearings ("OAH") where she could allege the following claim:

> An alleged unlawful State employment practice constituting discrimination . . . including: [d]emotion, reduction in force, or termination of an employee in retaliation for the employee's opposition to alleged discrimination on

account of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by Chapter 168A of the General Statutes.

N.C. Gen. Stat. § 126-34.1(2)b.

12. Under the North Carolina Persons With Disabilities Protection Act, a "person with a disability" means any person who:

(i) has a physical or mental impairment which substantially limits one or more major life activities;
(ii) has a record of such an impairment; or
(iii) is regarded as having such an impairment.

N.C. Gen. Stat. § 168A-3(7a)) (2007). The term "physical or mental impairment" in this subdivision excludes: (A) sexual preferences; (B) active alcoholism or drug addiction or abuse; and (C) any disorder, condition or disfigurement which is temporary in nature leaving no residual impairment." N.C. Gen. Stat. § 168A-3(7a)a. (2007) The term "major life activities" is defined as, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. N.C. Gen. Stat. § 168A-3(7a)b. (2007)

13. The Supreme Court of North Carolina narrowly defined disability in the context of Chapter 168A as a "present, non-correctible loss of function which substantially impairs a person's ability to function normally." *Burgess v. Brewing Co.*, 298 N.C. 520, 259 S.E. 2d 248 (1979).

14. In this case, Petitioner failed to prove by a preponderance of the evidence that she had a present, non-correctible loss of function, and thus, failed to show that she is a handicapped person under Chapter 168A of the North Carolina General Statutes. She admitted that her sleep apnea is temporary and correctible with the use of a CPAP machine.

Federal Law

15. The American with Disabilities Act Amendments Act of 2008 ("the new Act") makes changes to the definition of the term "disability." The new Act emphasizes the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA. The new Act became effective as of January 1, 2009, therefore, it does not apply to Petitioner who filed her petition on December 4, 2008.

16. Petitioner claims that the DOT discriminated against her by terminating her employment in violation of the ADA. Absent direct evidence of discrimination, a plaintiff must satisfy the three-step proof scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to prevail on her ADA claim. First, Plaintiff must establish a *prima facie* case of discrimination by a preponderance of the evidence.

Once established, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the alleged disparate treatment. If the defendant does so, the presumption created by the *prima facie* case is rebutted and drops from the case. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). The plaintiff must then demonstrate that the employer's reason was a pretext for illegal discrimination. *Id.* at 510-11.

17. To establish a *prima facie* case of discriminatory discharge under the ADA, Petitioner in this case must prove that (1) she has a disability; (2) she is otherwise qualified for the job in question; and (3) she was discharged solely because of her disability. *See Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 197 (4th Cir. 1997).

18. The ADA requires that in order to be disabled, a person must have:

A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
B) a record of such impairment; or
C) [being] regarded as having such an impairment.

42 U.S.C. § 12102(2).

19. Major life activities for purposes of ADA claims include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning. A major life activity is substantially limited when the person is either unable to perform the activity or is significantly restricted as to the condition, manner or duration in which she can perform the activity compared to the average person in the general population. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S.Ct. 681 (2002). However, intermittent manifestations of an illness are insufficient to establish a substantial limitation on a major life activity. *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001).

20. In this case, Petitioner failed to prove by a preponderance of the evidence that her sleeping apnea condition substantially limited one or more major life activities. She did not present sufficient evidence of a record of impairment, and no evidence suggests that Respondent regarded her as having an impairment. As a result, Petitioner failed to prove that she is disabled under the ADA.

21. "Under the ADA, an individual is 'otherwise qualified' if he, 'with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'" *Halperin*, 128 F.3d at 197 (citing 42 U.S.C.A. § 12111(8)).

22. To determine a job's essential functions, it initially must be determined whether the employer actually requires employees holding the position to perform the particular function. 20 C.F.R. Pt. 1630, App., § 1630.2(n); EEOC Title I Technical Assistance Manual at II-13.

23. Evidence of whether a particular function is essential may include but is not limited to, written job descriptions prepared before the job was filled; the amount of time spent by the employee on the particular function; and the terms of a collective bargaining agreement. 29 C.F.R. Pt. 1630, App. § 1630.2(n).

24. Lack of physical presence is a commonly accepted disqualification for ADA protection. *Grubb v. Southwest Airlines,* 296 Fed. Appx. 383 (2008), (citing *Rogers v. Int'l Marine Terminals*, Inc., 87 F.3d 755, 759 (5th Cir. 1996)); *Jackson v. Veterans Admin.*, 22 F.3d 277, 279 (11th Cir. 1994); *Amato v. St. Luke's Episcopal Hosp.*, 987 F. Supp. 523, 530 (S.D. Tex. 1997).

25. Consideration shall be given to the employer's judgment as to what functions of a job are essential. 42 U.S.C. 12111(8) Numerous courts have held that attendance at work, the most basic element of an employee's duties, is an essential element of almost every job. *Amato v. St. Luke's Episcopal Hosp.*, 987 F. Supp. 523, (S.D. Tex. 1997) (citing *Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994)); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994); *Law v. United States Postal Serv.*, 852 F.2d 1278, 1279-80 (Fed. Cir. 1988); *EEOC v. AIC Sec. Investigation Ltd.*, 820 F. Supp. 1060, 1064 (N.D. Ill. 1993).

26. However, no disabled person is "qualified" if he needs accommodation precisely because he failed to manage an otherwise controllable disorder. *Amato v. St. Luke's Episcopal Hosp.*, 987 F. Supp. 523, (S.D. Tex. 1997) (citing *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995)).

27. Petitioner bears the burden of demonstrating that she is a "qualified individual with a disability." *See Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994).

28. In this case, Petitioner failed to prove by a preponderance of the evidence that she was a "qualified individual with a disability," and thus, failed to present a claim under the ADA. As a result, Petitioner is not within the ADA's protected class.

Reasonable Accommodations

29. Assuming arguendo that Petitioner was a "qualified individual with a disability," Petitioner's requested accommodation to be able to go home whenever she felt sleepy was not reasonable. *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 353 (4th Cir. 2001). Independently of the undue hardship provision, an employer is required to make only those accommodations that are reasonable. The ADA's reasonable accommodation standard does not require an employer to abandon a legitimate and non-discriminatory company policy. *Id.* at 353-54.

30. Reasonable accommodations are physical and job duty modifications that would accommodate the disabling conditions to enable the qualified person with a disability to return to work. N.C. Gen. Stat. § 168A-3(10)a.

31. Reasonable accommodations do not require an employer to hire additional employees; reassign duties to other employees without assigning the disabled employee's compensable duties; reassign duties away from the disabled employee that would increase the skill, effort, or responsibility of the other employees; provide personal accommodations such as hearing aids or eyeglasses; or make physical changes that would cost more than the statutory formula. (N.C. Gen. Stat. § 168A-3(10)a)

32. It is Petitioner's burden to request reasonable accommodations. *Grubb v. Southwest Airlines*, 296 Fed. Appx. 383 (2008); (citing *Jenkins v. Cleco Power*, LLC, 487 F.3d 309, 315 (5th Cir. 2007)). This request then triggers the employer's obligation to participate in the interactive process of determining one. *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996).

33. Petitioner is required to demonstrate, as part of her *prima facie* case, that an accommodation of her disability exists and that such accommodation is reasonable. *Riel v. Electronic Data Sys. Corp.*, 99 F.3d 678, 683 (5th Cir. 1996).

34. The ADA does not require an employer to assume that an employee with a disability necessarily suffers from a limitation; a disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation." *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, at 165 (5th Cir. 1996)

35. The ADA does not require an employer to reduce its performance standards to allow a disabled employee to perform the essential functions of the job. *Johnson v. Maryland*, 940 F.Supp. 873 (D. Md. 1996)(no requirement for employer to eliminate an essential duty to accommodate disabled employee), *aff'd*, 113 F.3d 1232 (4th Cir. 1997)

Undue Hardship

36. Employers are not required to provide the accommodation that the employee be allowed to work only when her illness permits. *Walders v. Garrett*, 765 F. Supp. 303, 313 (E.D. Va 1991). If an accommodation causes undue hardship, the agency is not required to provide the accommodation. 29 C.F. R. § 1613.704(a).

37. In this case, Petitioner failed to prove by a preponderance of the evidence that she actually requested an accommodation from Respondent. However, assuming arguendo that she did prove she requested an accommodation, a request to leave work whenever she felt sleepy would have created an undue hardship on the operations of

the Communications Office, as Respondent would have to reassign Petitioner's work to other employees at unpredictable times.

38. Based on the foregoing, Petitioner has failed to prove by a preponderance of the evidence that Respondent discriminated against her based on a handicapping condition.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to dismiss Petitioner from her position as an Artist Illustrator III should be **AFFIRMED.**

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This 7th day of April, 2010.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

John E Campion
Attorney at Law
PO Box 2656
Raleigh, NC 27602-2656
Attorney for Petitioner

Allison A. Angell
Tina A. Krasner
Assistant Attorneys General
NC Department of Transportation
1505 Mail Service Center
Raleigh, NC 27699-1505
Attorneys for Respondent

This the 7th day of April, 2009.

Vicky Bullock
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Phone: (919) 431-3000
Fax: (919) 431-3100