

# ***NORTH CAROLINA REGISTER***

**VOLUME 28 • ISSUE 24 • Pages 2975 – 3111**

**June 16, 2014**

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**NORTH CAROLINA REGISTER**  
Publication Schedule for January 2014 – December 2014

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment Period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 <sup>th</sup> day from publication in the Register
28:13	01/02/14	12/06/13	01/17/14	03/03/14	03/20/14	05/01/14	05/2014	09/29/14
28:14	01/15/14	12/19/13	01/30/14	03/17/14	03/20/14	05/01/14	05/2014	10/12/14
28:15	02/03/14	01/10/14	02/18/14	04/04/14	04/21/14	06/01/14	01/2015	10/31/14
28:16	02/17/14	01/27/14	03/04/14	04/21/14	05/20/14	07/01/14	01/2015	11/14/14
28:17	03/03/14	02/10/14	03/18/14	05/02/14	05/20/14	07/01/14	01/2015	11/28/14
28:18	03/17/14	02/24/14	04/01/14	05/16/14	05/20/14	07/01/14	01/2015	12/12/14
28:19	04/01/14	03/11/14	04/16/14	06/02/14	06/20/14	08/01/14	01/2015	12/27/14
28:20	04/15/14	03/25/14	04/30/14	06/16/14	06/20/14	08/01/14	01/2015	01/10/15
28:21	05/01/14	04/09/14	05/16/14	06/30/14	07/21/14	09/01/14	01/2015	01/26/15
28:22	05/15/14	04/24/14	05/30/14	07/14/14	07/21/14	09/01/14	01/2015	02/09/15
28:23	06/02/14	05/09/14	06/17/14	08/01/14	08/20/14	10/01/14	01/2015	02/27/15
28:24	06/16/14	05/23/14	07/01/14	08/15/14	08/20/14	10/01/14	01/2015	03/13/15
29:01	07/01/14	06/10/14	07/16/14	09/02/14	09/22/14	11/01/14	01/2015	03/28/15
29:02	07/15/14	06/23/14	07/30/14	09/15/14	09/22/14	11/01/14	01/2015	04/11/15
29:03	08/01/14	07/11/14	08/16/14	09/30/14	10/20/14	12/01/14	01/2015	04/28/15
29:04	08/15/14	07/25/14	08/30/14	10/14/14	10/20/14	12/01/14	01/2015	05/12/15
29:05	09/02/14	08/11/14	09/17/14	11/03/14	11/20/14	01/01/15	01/2015	05/30/15
29:06	09/15/14	08/22/14	09/30/14	11/14/14	11/20/14	01/01/15	01/2015	06/12/15
29:07	10/01/14	09/10/14	10/16/14	12/01/14	12/22/14	02/01/15	05/2016	06/28/15
29:08	10/15/14	09/24/14	10/30/14	12/15/14	12/22/14	02/01/15	05/2016	07/12/15
29:09	11/03/14	10/13/14	11/18/14	01/02/15	01/20/15	03/01/15	05/2016	07/31/15
29:10	11/17/14	10/24/14	12/02/14	01/16/15	01/20/15	03/01/15	05/2016	08/14/15
29:11	12/01/14	11/05/14	12/16/14	01/30/15	02/20/15	04/01/15	05/2016	08/28/15
29:12	12/15/14	11/20/14	12/30/14	02/13/15	02/20/15	04/01/15	05/2016	09/11/15

## **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) text of proposed rules;
- (3) text of permanent rules approved by the Rules Review Commission;
- (4) emergency rules
- (5) Executive Orders of the Governor;
- (6) 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; and
- (7) other information the Codifier of Rules determines to be helpful to the public.

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

### **FILING DEADLINES**

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

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

### **NOTICE OF TEXT**

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

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

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

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





# State of North Carolina

**PAT McCrORY**  
GOVERNOR

## **EXECUTIVE ORDER NO. 51**

### **DISASTER DECLARATION FOR FEBRUARY 2014 WINTER STORM FOR TEN MUNICIPALITIES IN SOUTHEASTERN NORTH CAROLINA**

**WHEREAS**, the North Carolina Emergency Management Act, Chapter 166A of the North Carolina General Statutes authorizes the issuance of a disaster declaration for an emergency area as defined in N.C.G.S. § 166A-19.3(7) and categorizing the disaster as a Type I, Type II or Type III disaster as defined in N.C.G.S. § 166A-19.21(b); and

**WHEREAS**, starting on or about February 11, 2014, the Towns of Belville and Carolina Shore in Brunswick County; the Towns of Bolton, Brunswick, Chadbourn, Lake Waccamaw, Tabor City and the City of Whiteville in Columbus County; the City of Wilmington in New Hanover County; and the Town of Burgaw in Pender County, were impacted by severe winter weather which caused heavy amounts of ice that downed power lines and generated significant amounts of vegetative debris; and

**WHEREAS**, each of municipalities or the counties they are located in proclaimed local states of emergency on or around February 11, 2014; and

**WHEREAS**, due the impact of the severe winter weather, a joint preliminary damage assessment was done by local, state and federal emergency management officials starting on or about February 11, 2014 and is on-going; and

**WHEREAS**, I have determined that a Type I disaster, as defined in N.C.G.S. § 166A-19.21(b)(1), exists in the State of North Carolina, specifically in the Towns of Belville and Carolina Shore in Brunswick County; the Towns of Bolton, Brunswick, Chadbourn, Lake Waccamaw, Tabor City and the City of Whiteville in Columbus County; the City of Wilmington in New Hanover County; and the Town of Burgaw in Pender County; and

**WHEREAS**, pursuant to N.C.G.S. § 166A-19.21(b)(1), the criteria for a Type I disaster are met if: (1) the Secretary of the Department of Public Safety has provided a preliminary damage assessment to the Governor and the General Assembly; (2) the Towns of Belville and Carolina Shore in Brunswick County, the Towns of Bolton, Brunswick, Chadbourn, Lake Waccamaw, Tabor City and the City of Whiteville in Columbus County, the City of Wilmington in New Hanover County; and the Town of Burgaw in Pender County declared local state of emergency pursuant to N.C.G.S. § 166A-19.22; (3) the preliminary damage assessment meets or exceeds the State infrastructure criteria set out in G.S. 166A-19.41(b)(2)a.; and (4) a major disaster declaration by the President of the United States pursuant to the Stafford Act has not been declared; and

**WHEREAS**, pursuant to N.C.G.S. § 166A-19.41(b), if a disaster is declared, the Governor may make State funds available for emergency assistance in the form of individual assistance and public assistance for recovery from those disasters for which federal assistance under the Stafford Act is either not available or does not adequately meet the needs of the citizens of the State in the emergency area.

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

**Section 1.** Pursuant to N.C.G.S. § 166A-19.21(b)(1), a Type I disaster is hereby declared for the Towns of Belville and Carolina Shore in Brunswick County; the Towns of Bolton, Brunswick, Chadbourn, Lake Waccamaw, Tabor City and the City of Whiteville in Columbus County; the City of Wilmington in New Hanover County; and the Town of Burgaw in Pender County.

**Section 2.** I authorize state disaster assistance in the form of public assistance grants to eligible governments located within the emergency area that meet the terms and conditions under N.C.G.S. § 166A-19.41(b)(2). The public assistance grants are for the following:

- a. Debris clearance.
- b. Emergency protective measures.
- c. Roads and bridges.

**Section 3.** I hereby order this declaration: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) to be promptly filed with the Secretary of Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to ensure proper implementation of this declaration.

**Section 4.** This Type I disaster declaration shall expire 60 days after issuance unless renewed by the Governor or the General Assembly. Such renewals may be made in increments of 30 days each, not to exceed a total of 120 days from the date of first issuance.

**IN WITNESS WHEREOF**, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 29<sup>th</sup> day of April in the year of our Lord two thousand and fourteen, and of the Independence of the United States of America the two hundred and thirty-eight.

  
Pat McCrory  
Governor

**ATTEST:**

  
Elaine F. Marshall  
Secretary of State





# State of North Carolina

**PAT McCrORY**

GOVERNOR

May 13, 2014

**EXECUTIVE ORDER NO. 52**

**ESTABLISHMENT OF NORTH CAROLINA GOVERNOR'S SUBSTANCE ABUSE  
AND UNDERAGE DRINKING  
PREVENTION AND TREATMENT TASK FORCE**

**WHEREAS**, alcohol and other substance abuse at an early age are critical risk factors for lifelong physical and mental health problems and the development of healthy behaviors at an early age promotes lifelong wellness; and

**WHEREAS**, substance abuse is a major public health problem that costs the citizens of North Carolina billions in medical care, work time lost, law enforcement and criminal justice response and pain and suffering; and

**WHEREAS**, underage drinkers consume nearly 10% of all alcohol sold in North Carolina and binge and underage drinking are the third leading preventable cause of death in the United States among youth; and

**WHEREAS**, the State of North Carolina has a responsibility to raise awareness and reduce the prevalence of substance abuse and to increase treatment and recovery services for individuals battling substance abuse; and

**WHEREAS**, the State of North Carolina is working to mobilize efforts with community partners and individuals statewide to implement strategies designed to reduce instances of substance abuse including underage drinking, binge drinking, illegal drug use, abuse of prescription drugs and to increase treatment and recovery services; and

**WHEREAS**, the ABC Commission is committed to developing and implementing programs to address alcohol and substance abuse among underage persons; and

**WHEREAS**, the University of North Carolina System is committed to developing collegiate wellness programs to address substance abuse issues among collegians;

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

**Section 1. Establishment.**

The North Carolina Governor's Substance Abuse and Underage Drinking Prevention and Treatment Task Force is hereby established (hereinafter the "Task Force").

**Section 2. Task Force.**

The Task Force shall consist of twenty (20) members, each appointed for a term of two years. All members shall be appointed by the Governor and shall serve at the pleasure of the Governor. The Governor's appointees shall include:

- i. The Chair of the ABC Commission who shall also serve as co-chair;
- ii. The Secretary of The Department of Public Safety who shall also serve as co-chair;
- iii. A representative from UNC General Administration;
- iv. A representative from the North Carolina Independent Colleges and Universities;
- v. A representative from the NC Community Colleges System Office;
- vi. A member of the NC State Board of Education;
- vii. A representative from one of the UNC system campuses;
- viii. A representative from a private, nonprofit college or university in North Carolina;
- ix. A representative from NC DHHS;
- x. A representative from the Office of the Governor;
- xi. A representative from ALE;
- xii. A representative from a local law enforcement agency;
- xiii. A representative from an alcohol or substance abuse treatment organization;
- xiv. A representative from an alcohol treatment organization with an emphasis on youth treatment;
- xv. A representative from the NC Department of Transportation, Division of Motor Vehicles;
- xvi. A representative from the wholesale alcohol industry;
- xvii. A representative from the Administrative Office of the Courts;
- xviii. An individual in recovery;
- xix. Two current students, at least one of whom is under age 21.

Members shall serve without compensation.

**Section 3. Meetings.**

- (a) The Task Force shall meet quarterly and as often as called by the Chair to carry out the Task Force's purpose. The Chair shall set the times and locations of all meetings.
- (b) For the purpose of conducting business, a quorum of the Task Force shall consist of seven members.

**Section 4. Purpose.**

- (a) The Task Force shall receive, no later than August 1, 2015:
  1. A comprehensive report from the ABC Commission regarding its efforts to combat underage drinking and substance abuse, including a detailed report of the use of State appropriations and ABC Commission funds to facilitate its effort;
  2. A comprehensive report from the six pilot campuses on the use of appropriated funds and the effectiveness of their prevention efforts; and
  3. A comprehensive report from the Center for Safer Schools regarding its efforts to combat underage drinking and substance abuse.

(b) The Task Force shall prepare and submit to the Governor and the General Assembly by October 1, 2015 a comprehensive plan for effectively addressing (1) the underage sale and use of alcohol and drugs, (2) risky behaviors and substance abuse among collegians, (3) and the provision of treatment and recovery services for individuals struggling with substance abuse. The Task Force shall review and consider the reports outlined in Section (a) above in the development of the report to submit to the Governor and General Assembly no later than October 1, 2015.

(c) The Task Force shall, in preparation of the comprehensive plan, adapt existing national efforts for application to North Carolina and/or create new awareness program elements designed to combat substance abuse in North Carolina. The Initiative's recommendation shall be actionable, measurable, and able to be replicated in local communities and/or public and private colleges.

- (d) The Task Force may convene workgroups to aid the Task Force in its mission.

Section 5. Staffing.

The ABC Commission shall provide administrative and staff support to the Task Force. The Department of Health and Human Services, Division of Mental Health, Developmental Disabilities and Substance Abuse shall provide additional support as necessary and as determined by the Co-Chairs.


Section 6. Cooperation of State Agencies.

All cabinet agencies and boards, commissions, councils and offices, now existing and hereafter established, which are administratively housed in the cabinet agencies or the Office of the Governor, shall cooperate with the Task Force in the development of the plan and recommendations to the Governor for actions that are deemed necessary under Section 4 of this Order. The Board of Governors of the University of North Carolina System, the State Board of Community Colleges, local boards of education, and the Council of State agencies are encouraged and invited to participate in this Executive Order.

Section 7. Effect and Duration.

This Executive Order is effective immediately and shall remain in effect until December 31, 2015, pursuant to N.C. Gen. Stat. § 147-16.2, or until earlier rescinded.


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

  
Pat McCrory  
Governor

ATTEST:

  
Elaine F. Marshall  
Secretary of State



  
Virginia O. Hurd  
Steve Ballard  
Steve Scarscia  
Sybil R.  
Willie M. Dwyer  
John B. Perry





# State of North Carolina

**PAT McCrORY**

GOVERNOR

May 14, 2014

## EXECUTIVE ORDER NO. 53

### DISASTER DECLARATION FOR APRIL 25, 2014 TORNADOES

**WHEREAS**, the North Carolina Emergency Management Act, Chapter 166A of the North Carolina General Statutes authorizes the issuance of a disaster declaration for an emergency area as defined in N.C.G.S. § 166A-19.3(7) and categorizing the disaster as a Type I, Type II or Type III disaster as defined in N.C.G.S. § 166A-19.21(b); and

**WHEREAS**, on April 25, 2014 the counties of Beaufort, Chowan, Pasquotank, and Perquimans suffered damages from tornadoes, high winds, and severe storms; and

**WHEREAS**, as a result of the severe weather and tornadoes the counties of Beaufort, Chowan, Pasquotank, and Perquimans proclaimed local states of emergency on or about April 25, 2014; and

**WHEREAS**, as a result of the severe weather and tornadoes, I proclaimed a state of emergency for the counties of Beaufort, Chowan, Pasquotank and Perquimans on April 28, 2014; and

**WHEREAS**, due the impact of the severe weather and tornadoes, a joint preliminary damage assessment was conducted by local, state and federal emergency management officials on April 29 and April 30, 2014; and

**WHEREAS**, I have determined that a Type I disaster, as defined in N.C.G.S. § 166A-19.21(b)(1), exists in the following counties of North Carolina: Beaufort, Chowan, Pasquotank, Perquimans; and

**WHEREAS**, pursuant to N.C.G.S. § 166A-19.21(b)(1), the criteria for a Type I disaster are met if: (1) the Secretary of the Department of Public Safety has provided a preliminary damage assessment to the Governor and the General Assembly; (2) the counties of Beaufort, Chowan, Pasquotank, and Perquimans declared a local state of emergency pursuant to N.C.G.S. § 166A-19.22; (3) the preliminary damage assessment has met or exceeded the criteria established for the Small Business Disaster Loan Program pursuant to 13 C.F.R. § 123; and (4) a major disaster declaration by the President of the United States pursuant to the Stafford Act has not been declared; and

**WHEREAS**, pursuant to N.C.G.S. § 166A-19.41(b), if a disaster is declared, the Governor may make State funds available for emergency assistance in the form of individual assistance and public assistance for recovery from those disasters for which federal assistance under the Stafford Act is either not available or does not adequately meet the needs of the citizens of the State in the emergency area.

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

**Section 1.** Pursuant to N.C.G.S. § 166A-19.21(b)(1), a Type I disaster is hereby declared for the following North Carolina counties: Beaufort, Chowan, Pasquotank, and Perquimans.

**Section 2.** I authorize state emergency assistance funds in the form of grants to individuals and families located within the declared areas that meet the terms and conditions under N.C.G.S. § 166A-19.41(b)(1).

**Section 3.** I hereby order this declaration: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) to be promptly filed with the Secretary of the Department of Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to ensure proper implementation of this declaration.

**Section 4.** This Type I disaster declaration shall expire 60 days after issuance unless renewed by the Governor or the General Assembly. Such renewals may be made in increments of 30 days each, not to exceed a total of 120 days from the date of first issuance.

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

  
Pat McCrory  
Governor

ATTEST:

  
Elaine F. Marshall  
*Chief Deputy* Secretary of State

PUBLIC NOTICE

STATE OF NORTH CAROLINA

ENVIRONMENTAL MANAGEMENT COMMISSION

**The Division of Energy, Mineral, and Land Resources (DEMLR) invites public comment on, or objections to, the permitting actions listed below.** Persons wishing to comment or object may submit written comments to the address below by the due dates indicated. All comments received prior to the dates will be considered in the final determinations regarding permit issuance. Public comments on the draft permits may result in changes to the final versions. All comments should reference the specific permitting actions listed below and the permit number. DEMLR intends to renew the following NPDES General Permits for the discharge of industrial stormwater to the surface waters of North Carolina.

NCG150000 – Air Transportation and Airports. Public comment period ends August 13, 2014.

NCG160000 – Asphalt Paving Mixtures. Public comment period ends September 12, 2014.

NCG170000 – Textile Mill Products. Public comment period ends July 16, 2014.

NCG180000 – Furniture and Fixtures. Public comment period ends August 13, 2014.

The draft General Permits and Fact Sheets may be viewed at

<http://portal.ncdenr.org/web/lr/public-notice>

Please direct comments or objections to:

Stormwater Permitting Program

NC Division of Energy, Mineral, and Land Resources

1612 Mail Service Center

Raleigh, NC 27699-1612

Telephone Number: (919) 807-6376

[ken.pickle@ncdenr.gov](mailto:ken.pickle@ncdenr.gov)



**Decision in Response to the Third Amended Certificate of Public Advantage Periodic Report  
September 30, 2013 Submitted By: Mission Health, Inc. and Mission Hospital, Inc.**

The Division of Health Service Regulation of the Department of Health and Human Services in conjunction with the Attorney General of the State of North Carolina has reviewed the Periodic Report cited above and the Comments received from the Public in connection thereto.

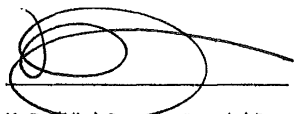
The Department and the Attorney General have determined that the Certificate should remain in effect as is because the benefits of the COPA continue to outweigh any detriments. The Department and the Attorney General have concluded that the request from the public that the Vistnes Report should be updated may have merit but, the decision as to updating the Report should be deferred until the effects of the Affordable Care Act on Hospitals are determinable.

Dated this 25<sup>th</sup> day of April, 2014



Drexel R. Pratt, Director

Division of Health Service Regulation



K. D. (Kip) Sturgis, Special Deputy Attorney General

North Carolina Department of Justice

**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 11 – DEPARTMENT OF INSURANCE

**Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commissioner of Insurance intends to amend the rule cited as 11 NCAC 06A .0809.

### Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:  
☒ RRC certified on: May 15, 2014  
☐ Not Required

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
[http://www.ncdoi.com/LS/LS\\_Rules.aspx](http://www.ncdoi.com/LS/LS_Rules.aspx)

**Proposed Effective Date:** October 1, 2014

### Public Hearing:

**Date:** July 11, 2014

**Time:** 10:00 a.m.

**Location:** Jim Long Hearing Room – 3<sup>rd</sup> Floor – Dobbs Building, 430 N. Salisbury Street, Raleigh, NC 27603

**Reason for Proposed Action:** North Carolina is the only state in the country that limits one-day "classroom" courses to six (6) hours, unless an exam is offered. The exam rule negatively impacts many national CE providers of professional designation programs in North Carolina. Due to the North Carolina's exam requirement for courses more than 6 hours in length, national providers for professional designations have had to revise their courses to 6 hours. However, it is very difficult to adequately cover the material in six hours. Additionally, licensee and designees from surrounding states who attend a 6 hour course in North Carolina are unable to earn any state CE for their resident state's requirement because the national courses are approved for seven (not six) hours in other states. 11 NCAC 06A .0809 refines some continuing education requirements specified in NCGS 58-33-130.

**Comments may be submitted to:** Karen E. Waddell, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919) 807-6004

**Comment period ends:** August 15, 2014

**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 (check all that apply).

- ☐ State funds affected  
☐ Environmental permitting of DOT affected  
☐ Analysis submitted to Board of Transportation  
☐ Local funds affected  
☐ Substantial economic impact (≥\$1,000,000)  
☒ No fiscal note required by G.S. 150B-21.4

## CHAPTER 06 – AGENT SERVICES DIVISION

### SUBCHAPTER 06A – AGENT SERVICES DIVISION

#### SECTION .0800 – CONTINUING EDUCATION

#### 11 NCAC 06A .0809 APPROVAL OF COURSES

(a) ~~Providers~~ All providers of all courses specifically approved under Rule .0803 of this Section shall pay the fee prescribed in G.S. 58-33-133(b) and shall ~~file with~~ provide to the Commissioner or Administrator copies of:

- (1) ~~program catalogs, catalogs;~~
- (2) ~~course outlines, outlines; and~~
- (3) ~~copies of advertising literature, literature and pay the fee prescribed in G.S. 58-33-133(b).~~

(b) All providers of courses not specifically approved under Rule .0803 of this Section shall do the following:

- (1) Any individual, school, insurance company, insurance industry association, or other organization intending to provide classes, seminars, or other forms of instruction as approved courses ~~shall shall:~~
  - (A) apply on forms provided by the Commissioner or ~~Administrator;~~ Administrator, located on the N.C. Department of Insurance's website at [http://www.ncdoi.com/ASD/ASD\\_CE\\_Ins\\_Providers.aspx](http://www.ncdoi.com/ASD/ASD_CE_Ins_Providers.aspx);
  - (B) pay the fee prescribed in ~~G.S. 58-33-133(b);~~ G.S. 58-33-133(b);
  - (C) provide detailed outlines of the subject matter to be ~~covered, covered;~~ and

- (D) provide copies of handouts to be given.
- (2) ~~Providers~~All providers of supervised individual study programs shall file copies ~~of of:~~

- (A) the study programs and programs;  
 (B) the examination, examination; and  
 (C) the Internet course security procedures.

(c) The Commissioner shall indicate the number of ICECs that have been assigned ~~to the course that has been approved, to the approved course.~~

(d) If a course is not approved or disapproved by the Commissioner or his designee within 60 days after receipt of all required information, the course is deemed to be approved at the end of the 60-day period.

~~(d)(e)~~ If a course approval application is ~~denied, denied by the Commissioner or his designee,~~ a written explanation of the reason for ~~such action denial~~ shall be furnished ~~with the denial to the provider.~~

~~(e)(f)~~ Course approval applications shall include the following:

- (1) ~~Aa~~ statement for whom the course is designed;
- (2) ~~The~~the course objectives;
- (3) ~~The~~the names and duties of all persons who will be affiliated in an official capacity with the course;
- (4) ~~The~~the course provider's tuition and fee refund policy;
- (5) ~~Aan~~an outline that shall include:
  - (A) a statement of whether there will be a written examination, a written report, or a certification of attendance only;
  - (B) the method of presentation;
  - (C) a course content outline with instruction hours assigned to the major topics; and
  - (D) the schedule of dates, beginning and ending ~~times~~times, and places the course will be offered, along with the names of instructors for each course session, submitted at least 30 days before any subsequent course ~~offerings; offerings.~~
- (6) ~~Aa~~ copy of the course completion certificate;
- (7) ~~Aa~~ course rating form;
- (8) ~~Aa~~ course bibliography; and
- (9) ~~Aan~~an electronic copy of the course content and course examination for Internet courses.

~~(f)(g)~~ A provider may request that its materials be kept confidential if they are of a proprietary nature.

~~(g)(h)~~ Courses awarded more than ~~six~~seven ICECs shall have an examination approved by the Commissioner in order for the licensee to get full credit.

~~(h)(i)~~ A provider may request an exemption to the examination requirement in 11 NCAC 06A .0809(g) when filing a long-term care partnership continuing education course of eight hours.

~~(i)(j)~~ A provider shall not cancel a course unless the provider gives written notification to all students on the roster and to the

Commissioner or Administrator at least five days before the date of the course.

~~(j)(k)~~ A provider shall submit course attendance records electronically to the Commissioner or Administrator within 15 business days after course completion.

~~(k)(l)~~ An error on the licensee's record that is caused by the provider in submitting the course attendance records shall be resolved by the provider within 15 days after the discovery of the error by the provider.

Authority G.S. 58-2-40; 58-33-130; 58-33-132; 58-33-133.

## TITLE 12 – DEPARTMENT OF JUSTICE

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 09B .0202, .0205, .0209, .0226, .0227, .0232, .0233, .0302, .0304, .0401, .0406, .0408, .0413-.0414; 09C .0211, .0403; and 09G .0308, .0314, .0414.*

### Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:  
☒ RRC certified on: April 17, 2014 and May 16, 2013  
☐ Not Required

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
[http://www.ncdoj.gov/getdoc/b624de9e-34a3-4c46-a6e3-75d174107e93/Public-Hearing\\_Rule-Revisions\\_8-21-14.aspx](http://www.ncdoj.gov/getdoc/b624de9e-34a3-4c46-a6e3-75d174107e93/Public-Hearing_Rule-Revisions_8-21-14.aspx)

**Fiscal Note if prepared posted at:**  
[http://www.osbm.state.nc.us/files/pdf\\_files/DOJ06042013\\_4.pdf](http://www.osbm.state.nc.us/files/pdf_files/DOJ06042013_4.pdf)

**Proposed Effective Date:** November 1, 2014

### Public Hearing:

**Date:** August 21, 2014

**Time:** 10:30 a.m.

**Location:** Wake Technical Community College, Public Safety Training Center, 321 Chapanoke Road, Raleigh, NC 27603

**Reason for Proposed Action:** *The Criminal Justice Education and Training Standards Commission voted to remove the comprehensive written examination from the curricula of all Commission courses. The examination is still required for certification, but is being removed as part of the individual courses. This will allow students to successfully complete the course work, yet will still have to pass the required exam in order to become certified as officers, instructors or Speed Measurement Instrument operators.*

**Comments may be submitted to:** Trevor Allen, 1700 Tryon Park Drive, Raleigh, NC 27610; phone (919) 779-8205; fax (919) 779-8210; email tjallen@ncdoj.gov

**Comment period ends:** August 21, 2014

**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 (check all that apply).**

- ☐ **State funds affected**
- ☐ **Environmental permitting of DOT affected**
- ☐ **Analysis submitted to Board of Transportation**
- ☒ **Local funds affected**
- ☐ **Substantial economic impact (≥\$1,000,000)**
- ☐ **No fiscal note required by G.S. 150B-21.4**

**CHAPTER 09 – CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS**

**SUBCHAPTER 09B – STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT: EDUCATION: AND TRAINING**

**SECTION .0200 – MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOLS AND CRIMINAL JUSTICE TRAINING PROGRAMS OR COURSES OF INSTRUCTION**

**12 NCAC 09B .0202 RESPONSIBILITIES OF THE SCHOOL DIRECTOR**

(a) In planning, developing, coordinating, and delivering each Commission-certified criminal justice training course, the School Director shall:

- (1) Formalize and schedule the course curriculum in accordance with the curriculum standards established in this Subchapter;
- (2) Select and schedule instructors who are certified by the Commission;
- (3) Provide each instructor with a current Commission course outline and all necessary additional information concerning the instructor's duties and responsibilities;
- (4) Notify each instructor that he or she must comply with the Basic Law Enforcement Training Course Management Guide and provide him or her access to the most current version of the Course Management Guide;
- (5) Review each instructor's lesson plans and other instructional materials for conformance to Commission standards and to minimize repetition and duplication of subject matter;

- (6) Arrange for the timely availability of appropriate audiovisual aids and materials, publications, facilities, and equipment for training in all topic areas;
- (7) Develop, adopt, reproduce, and distribute any supplemental rules, regulations, and requirements determined by the school to be necessary or appropriate for:
  - (A) effective course delivery;
  - (B) establishing responsibilities and obligations of agencies or departments employing or sponsoring course trainees; and
  - (C) regulating trainee participation and demeanor and ensuring trainee attendance and maintaining performance records;
- (8) If appropriate, recommend housing and dining facilities for trainees;
- (9) Administer the course delivery in accordance with Commission procedures and standards, give consideration to advisory guidelines issued by the Commission, and ensure that the training offered is safe and effective;
- (10) Maintain direct supervision, direction, and control over the performance of all persons to whom any portion of the planning, development, presentation, or administration of a course has been delegated. The comprehensive final examination shall be administered by the Criminal Justice Education and Training Standards Commission; and
- (11) Report the completion of each presentation of a Commission-certified criminal justice training course to the Commission.
- (12) All forms required for submission to the Commission are located on the Agency's website: <http://www.ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards/Criminal-Justice-Education-and-Training-Standards/Forms-and-Publications.aspx>.

(b) In addition to Paragraph (a) of this Rule, in planning, developing, coordinating and delivering each Commission-certified Basic Law Enforcement Training Course, the School Director shall:

- (1) Deliver training in accordance with the most current version of the Basic Law Enforcement Training Course Management Guide as published by the North Carolina Justice Academy;
- (2) Schedule course presentation to include 12 hours of instruction each week during consecutive calendar weeks, except that there may be as many as three one-week breaks until course requirements are completed;
- (3) Schedule only those instructors certified by the Commission to teach those high liability areas

- as specified in Rule .0304(a) of this Subchapter as either the lead instructor or in any other capacity;
- (4) With the exception of the First Responder, Physical Fitness, Explosives and Hazardous Materials, and topical areas as outlined in Rule .0304(a) of this Subchapter, schedule one specialized certified instructor certified by the Commission for each six trainees while actively engaged in a practical performance exercise;
  - (5) Schedule one specialized certified instructor certified by the Commission for each eight trainees while actively engaged in a practical performance exercise in the topical area "Subject Control Arrest Techniques;"
  - (6) Not schedule any single individual to instruct more than 35 percent of the total hours of the curriculum during any one delivery of the Basic Law Enforcement Training Course presentation;
  - (7) Not less than 15 days before commencing delivery of the Basic Law Enforcement Training Course, submit to the Commission a Pre-Delivery Report of Training Course Presentation as set out in 12 NCAC 09C .0244 .0211. The Pre-Delivery Report (Form F-10A) shall indicate a requested date and location for the administration of the state comprehensive exam, along and include with the following attachments:
    - (A) a course schedule showing arrangement of topical presentations and proposed ~~instructional~~ instructional assignments; and
    - (B) a copy of any rules, regulations, and requirements for the school. A copy of such rules shall also be given to each trainee and to the executive officer of each trainee's employing or sponsoring agency or department at the time the trainee enrolls in the course;
  - (8) Monitor, or designate an instructor certified by the Commission to monitor, a presentation of each instructor once during each three year certification period in each topic taught by the instructor and prepare a written evaluation on the instructor's performance and suitability for subsequent instructional assignments. The observations shall be of sufficient duration to ensure that the instructor is using the Instructional System Design model, and that the delivery is objective based, documented by and consistent with a Commission-approved lesson plan. For each topic area, the School Director's evaluation shall be based upon the course delivery observations, the instructor's use of the approved lesson plan, and the results of the student evaluations of the instructor. For probationary instructors, the evaluations conducted by another instructor shall be prepared on Commission forms and forwarded to the Commission. Based on this evaluation, the School Director shall recommend approval or denial of requests for General Instructor Certification. For all other instructors, these evaluations shall be prepared on Commission forms in accordance with Commission standards as set out in this Chapter. These evaluations shall be kept on file by the school for a period of three years and shall be made available for inspection by a representative of the Commission upon request. In the event the evaluation of an instructor indicates that his or her performance was less than acceptable, the School Director shall forward a copy of the evaluation to the Commission. Any designated instructor certified by the Commission who is evaluating the instructional presentation of another instructor shall hold certification in the same instructional topic area as that for which the instructor is being evaluated;
  - (9) Administer or designate a staff person to administer appropriate tests during course delivery:
    - (A) to determine and record the level of trainee comprehension and retention of instructional subject- matter;
    - (B) to provide a basis for a final determination or recommendation regarding the minimum degree of knowledge and skill of each trainee to function as an inexperienced law enforcement officer; and
    - (C) to determine subject or topic areas of deficiency for the application of Rule .0405(a)(3) of this ~~Subchapter;~~ Subchapter; and
  - ~~(10) During a delivery of Basic Law Enforcement Training, make available to the Commission four hours of scheduled class time and classroom facilities for the administration of a written examination to those trainees who have satisfactorily completed all course work; and~~
  - ~~(11)~~(10) Not more than 10 days after receiving from the Commission's representative the Report of Examination Scores, the conclusion of a school's offering of Basic Law Enforcement Training, submit to the Commission a Post-Delivery Report of Training Course Presentation (Form F-10B) ~~which that~~ shall include:
    - (A) a "Student Course Completion" form for each individual enrolled on the day of orientation; and

- (B) a "Certification and Test Score Release" form.
- (c) In addition to Paragraph (a) of this Rule, in planning, developing, coordinating and delivering each Commission-certified "Criminal Justice Instructor Training Course" the School Director shall:
- (1) Schedule course presentation to include 40 hours of instruction each week during consecutive calendar weeks until course requirements are completed;
  - (2) Schedule at least one evaluator for each six trainees, as follows:
    - (A) no evaluator shall be assigned more than six trainees during a course delivery;
    - (B) each evaluator, as well as the instructors, must have successfully completed a Commission-certified instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise; and
    - (C) each instructor and evaluator must document successful participation in a program presented by the North Carolina Justice Academy for purposes of familiarization and supplementation relevant to delivery of the instructor training course and trainee evaluation;
  - (3) Not fewer than 30 days before commencing delivery of the course, submit to the Commission a Pre-Delivery Report of Training Course Presentation ~~Form F-10A(ITC)~~ [Form F-10A(ITC)] with the following attachments:
    - (A) a course schedule showing arrangement of topical presentations and proposed instructional assignments;
    - (B) the names and last four digits of the social security numbers of all instructors and evaluators; and
    - (C) a copy of any rules, regulations, and requirements for the school; and
  - (4) Not more than 10 days after course ~~completion~~ completion, submit to the Commission a Post-Delivery Report [Form F-10B(ITC)] containing the following:
    - (A) class enrollment roster;
    - (B) a course schedule with designation of instructors and evaluators utilized in delivery;
    - (C) scores recorded for each trainee on ~~both the 80 minute skill presentation~~
- ~~and the final written examination; presentation; and~~
- (D) designation of trainees who ~~successfully~~ completed the course in its entirety and whom the School Director finds to be competent to instruct.
- (d) In addition to Paragraph (a) of this Rule, in planning, developing, coordinating and delivering each Commission-certified radar, radar and time-distance, time-distance, or lidar speed measurement operator training course or re-certification course, the School Director shall:
- (1) select and schedule radar, time-distance, or lidar speed measurement instrument instructors who are certified by the Commission as instructors for the specific speed measurement instruments in which the trainees are to receive ~~instruction;~~ instruction as follows:
    - (A) provide to the instructor the Commission form(s) for motor skill examination on each trainee;
    - (B) require the instructor to complete the motor skill examination form on each trainee indicating the level of proficiency obtained on each specific instrument; and
    - (C) require each instructor to sign each individual form and submit the original to the School Director;
  - (2) not fewer than 30 days before the scheduled starting ~~date~~ date, submit to the Director of the Standards Division a ~~Request for Training Pre-Delivery Report of Speed Measuring Instrument~~ Course Presentation [Form F-10A (SMI)] which shall contain a period of course delivery including the proposed starting date, course ~~location~~ location, requested date and location for the administration of the state exam and the number of trainees to be trained on each type of approved speed measurement instrument. The Director of the Standards Division shall review the request and notify the School Director if the request is approved or denied; and
  - (3) upon completing delivery of the Commission-certified course, and not more than 10 days after ~~receiving from the Commission's representative the Report of Examination Scores,~~ the conclusion of a school's offering of a certified radar, radar and time-distance, time-distance, or lidar speed measurement operator training course or re-certification course, the School Director shall notify the Commission regarding the progress and achievements of each trainee by submitting a Post-Delivery Report of Training Course ~~Presentation~~ Presentation [Form F-10B (SMI)]. This report shall include the original motor-skill

examination form(s) completed and signed by the certified instructor responsible for administering the motor-skill examination to the respective trainee.

*Authority G.S. 17C-6.*

**12 NCAC 09B .0205 BASIC LAW ENFORCEMENT TRAINING**

(a) The basic training course for law enforcement officers consists of instruction designed to provide the trainee with the skills and knowledge to perform those tasks essential to function in law enforcement.

(b) The course entitled "Basic Law Enforcement Training" shall consist of a minimum of ~~620~~ 616 hours of instruction and shall include the following identified topical areas and minimum instructional hours for each:

- (1) **LEGAL UNIT**
  - (A) Motor Vehicle Laws 20 Hours
  - (B) Preparing for Court and Testifying in Court 12 Hours
  - (C) Elements of Criminal Law 24 Hours
  - (D) Juvenile Laws and Procedures 8 Hours
  - (E) Arrest, Search and Seizure/Constitutional Law 28 Hours
  - (F) ABC Laws and Procedures 4 Hours

UNIT TOTAL 96 Hours
- (2) **PATROL DUTIES UNIT**
  - (A) Techniques of Traffic Law Enforcement 24 Hours
  - (B) Explosives and Hazardous Materials Emergencies 12 Hours
  - (C) Traffic Crash Investigation 20 Hours
  - (D) In-Custody Transportation 8 Hours
  - (E) Crowd Management 12 Hours
  - (F) Patrol Techniques 28 Hours
  - (G) Law Enforcement Communication and Information Systems 8 Hours
  - (H) Anti-Terrorism 4 Hours
  - (I) Rapid Deployment 8 Hours

UNIT TOTAL 124 Hours
- (3) **LAW ENFORCEMENT COMMUNICATION UNIT**
  - (A) Responding to Victims and the Public 10 Hours
  - (B) Domestic Violence Response 12 Hours
  - (C) Ethics for Professional Law Enforcement 4 Hours
  - (D) Individuals with Mental Illness and Developmental Disabilities 8 Hours
  - (E) Crime Prevention Techniques 6 Hours
  - (F) Communication Skills for Law Enforcement Officers 8 Hours

UNIT TOTAL 48 Hours
- (4) **INVESTIGATION UNIT**

- (A) Fingerprinting and Photographing Arrestee 6 Hours
  - (B) Field Note-taking and Report Writing 12 Hours
  - (C) Criminal Investigation 34 Hours
  - (D) Interviews: Field and In-Custody 16 Hours
  - (E) Controlled Substances 12 Hours
  - (F) Human Trafficking 2 Hours
- UNIT TOTAL 82 Hours
- (5) **PRACTICAL APPLICATION UNIT**
    - (A) First Responder 32 Hours
    - (B) Firearms 48 Hours
    - (C) Law Enforcement Driver Training 40 Hours
    - (D) Physical Fitness (classroom instruction) 8 Hours
    - (E) Fitness Assessment and Testing 12 Hours
    - (F) Physical Exercise 1 hour daily, 3 days a week 34 Hours
    - (G) Subject Control Arrest Techniques 40 Hours

UNIT TOTAL 214 Hours
  - (6) **SHERIFF-SPECIFIC UNIT**
    - (A) Civil Process 24 Hours
    - (B) Sheriffs' Responsibilities: Detention Duties 4 Hours
    - (C) Sheriffs' Responsibilities: Court Duties 6 Hours

UNIT TOTAL 34 Hours
  - (7) **COURSE ORIENTATION** 2 Hours
  - (8) **TESTING** ~~20~~ 16 Hours
- TOTAL COURSE HOURS** ~~620~~ 616 Hours

(c) The "Basic Law Enforcement Training Manual" published by the North Carolina Justice Academy shall be used as the curriculum for this training course for law enforcement officers as administered by the Commission. Copies of this publication may be inspected at the office of the agency:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27602

and may be obtained at a cost of eighty-seven dollars and ten cents (\$87.10) from the North Carolina Justice Academy at the following address:

North Carolina Justice Academy  
Post Office Drawer 99  
Salemberg, North Carolina 28385

(d) The "Basic Law Enforcement Training Course Management Guide" published by the North Carolina Justice Academy shall be used by school directors in planning, implementing and delivering basic training courses. Copies of this guide may be obtained at the cost of printing and postage from the Justice Academy.

*Authority G.S. 17C-6; 17C-10.*

**12 NCAC 09B .0209 CRIMINAL JUSTICE  
INSTRUCTOR TRAINING**

(a) The instructor training course required for general instructor certification shall consist of a minimum of ~~77~~ 75 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice instructor.

(c) Each instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

- |      |   |                                  |
|------|---|----------------------------------|
| (1)  | Orientation/Self Assessment   | 3 Hours                          |
| (2)  | Curriculum Development: ISD Model                                       | 3 Hours                          |
| (3)  | Law Enforcement Instructor Liabilities and Responsibilities             | 2 Hours                          |
| (4)  | Interpersonal Communication in Instruction                              | 4 Hours                          |
| (5)  | Lesson Plan Preparation: Professional Resources                         | 2 Hours                          |
| (6)  | Lesson Plan Preparation: Format and Objectives                          | 6 Hours                          |
| (7)  | Teaching Adults   | 4 Hours                          |
| (8)  | Principles of Instruction: Demonstration Methods and Practical Exercise | 6 Hours                          |
| (9)  | Methods and Strategies of Instruction                                   | 4 Hours                          |
| (10) | The Evaluation Process  | 4 Hours                          |
| (11) | Principles of Instruction: Audio-Visual Aids                            | 6 Hours                          |
| (12) | Student 10-Minute Talk and Video Critique                               | 6 Hours                          |
| (13) | Student Performance:  |                                  |
|      | First 30-Minute Presentation  | 6 Hours                          |
|      | Second 30-Minute Presentation   | 6 Hours                          |
|      | Final 80-Minute Presentation and Review                                 | 12 Hours                         |
| (14) | <del>Examination and</del> Course Closing                               | <del>3 Hours</del> <u>1 Hour</u> |

(d) The ~~"Basic Instructor Training Manual"~~ "Instructor Training" manual as published by the North Carolina Justice Academy shall be ~~applied~~ used as the ~~basic~~ curriculum for delivery of ~~basic~~ instructor training courses. Copies of this publication may be inspected at the agency:

Criminal Justice Standards Division  
North Carolina Department of Justice  
~~114 West Edenton Street~~  
~~Old Education Building~~ 1700 Tryon Park Drive  
Post Office Drawer 149

Raleigh, North Carolina 27602

and may be purchased from the Academy at the following address:

North Carolina Justice Academy  
Post Office Drawer 99  
Salemberg, North Carolina 28385

Authority G.S. 17C-6.

**12 NCAC 09B .0226 SPECIALIZED FIREARMS  
INSTRUCTOR TRAINING**

(a) The instructor training course for specialized firearms instructor certification shall consist of a minimum of ~~83~~ 81 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each specialized firearms instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice firearms instructor in a Basic Law Enforcement Training Course or a ~~"Law Enforcement Officers' In-Service Firearms Training and Qualification Program"~~ law enforcement officer in-service firearms training program.

(c) Each applicant for specialized firearms instructor training shall:

- |     |   |
|-----|---|
| (1) | have completed the criminal justice general instructor training course; and   |
| (2) | present a written endorsement by either   |
| (A) | a certified school director indicating the student will be utilized to instruct firearms in the Basic Law Enforcement Training Course; or   |
| (B) | a department head, certified school director, or in-service training coordinator, indicating the student will be utilized to instruct firearms in a <del>"Law Enforcement Officers' In-Service Firearms Training and Qualification Program"</del> <u>law enforcement officer in-service firearms training program</u> . |

(d) Each specialized firearms instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

- |      |  |                                  |
|------|--|----------------------------------|
| (1)  | Orientation/Pretest  | 8 Hours                          |
| (2)  | Range Operations   | 38 Hours                         |
| (3)  | Civil Liability  | 4 Hours                          |
| (4)  | Night Firing   | 2 Hours                          |
| (5)  | Combat Shooting  | 8 Hours                          |
| (6)  | Mental Conditioning  | 1 Hours                          |
| (7)  | Shotgun Operation and Firing                               | 4 Hours                          |
| (8)  | Service Handgun - Operation and Use                        | 5 Hours                          |
| (9)  | Rifle - Operation and Maintenance                          | 4 Hours                          |
| (10) | Service Handgun - Maintenance and Cleaning                 | 2 Hours                          |
| (11) | Range Medical Emergencies                                  | 2 Hours                          |
| (12) | In-Service Firearms Requirements                           | 2 Hours                          |
| (13) | BLET Lesson Plan <del>Review/Post-Test</del> <u>Review</u> | <del>3 Hours</del> <u>1 Hour</u> |

(e) The "Specialized Firearms Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the ~~basic~~ curriculum for delivery of specialized firearms instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149



Raleigh, North Carolina 27610  
and may be obtained at no cost to the student from the Academy  
at the following address:

North Carolina Justice Academy  
Post Office Box 99

Salemberg, North Carolina 28385

(f) The Commission-certified school that is certified to offer the "Specialized Firearms Instructor Training" course is the North Carolina Justice Academy.

*Authority G.S. 17C-6.*

**12 NCAC 09B .0227 SPECIALIZED DRIVER INSTRUCTOR TRAINING**

(a) The instructor training course required for specialized driver instructor certification shall consist of a minimum of ~~35~~ 33 hours of instruction presented during a continuous period of not more than one week.

(b) Each specialized driver instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice driver instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' Annual In-Service Training Program."

(c) Each applicant for specialized driver instructor training shall:

- (1) have completed the criminal justice general instructor training course;
- (2) present a written endorsement by either
  - (A) a certified school director indicating the student will be utilized to instruct driving in Basic Law Enforcement Training Courses; or
  - (B) a department head, certified school director, or in-service training coordinator, indicating the student will be utilized to instruct driver training in the "Law Enforcement Officer's Annual In-Service Training Program";
- (3) possess a valid operator driver's license; and
- (4) maintain a safe driving record where no more than four points have been assigned against the driving record within the past three years.

(d) Each specialized driver instructor training course shall include the following identified topic areas and instructional hours for each area:

- |     |   |                                  |
|-----|---|----------------------------------|
| (1) | Orientation   | 1 Hours                          |
| (2) | Lesson Plan Review (BLET)                           | 4 Hours                          |
| (3) | General Mechanical Knowledge                        | 1 Hour                           |
| (4) | Before - Operation Inspection                       | 1 Hour                           |
| (5) | Laws of Natural Force & Operating Characteristics   | 2 Hours                          |
| (6) | Driver Practicum/Pre-Test                           | 19 Hours                         |
| (7) | Fundamentals of Professional Liability for Trainers | 4 Hours                          |
| (8) | Course <del>Review/State Exam</del> <u>Review</u>   | <del>3 Hours</del> <u>1 Hour</u> |

(e) The "Specialized Driver Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for delivery of specialized driver instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149

Raleigh, North Carolina 27610

and may be obtained at no cost to the student from the Academy  
at the following address:

North Carolina Justice Academy  
Post Office Box 99

Salemberg, North Carolina 28385

(f) Commission-certified schools that are certified to offer the "Specialized Driver Instructor Training" course ~~are~~ are The North Carolina Justice Academy and The North Carolina State Highway Patrol.

*Authority G.S. 17C-6.*

**12 NCAC 09B .0232 SPECIALIZED SUBJECT CONTROL ARREST TECHNIQUES INSTRUCTOR TRAINING**

(a) The instructor training course required for specialized subject control arrest techniques instructor certification shall consist of a minimum of ~~80~~ 78 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each specialized subject control arrest techniques instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice subject control arrest techniques instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' Annual In-Service Training Program."

(c) Each applicant for specialized subject control arrest techniques instructor training shall:

- (1) have completed the criminal justice general instructor training course;
- (2) present a letter from a licensed physician stating the applicant's physical fitness to participate in the course; and
- (3) present a written endorsement by either
  - (A) a certified school director indicating the student will be utilized to instruct subject control arrest techniques in Basic Law Enforcement Training Courses; or
  - (B) a department head, certified school director, or in-service training coordinator indicating the student will be utilized to instruct Subject Control Arrest Techniques for the "Law Enforcement Officers' In-Service Training Program."

(d) Each specialized subject control arrest techniques instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

- |     |             |        |
|-----|-------------|--------|
| (1) | Orientation | 1 Hour |
|-----|-------------|--------|

(2)	Skills Pre-Test	1 Hour
(3)	Student Instructional Practicum	3 Hours
(4)	Practical Skills Evaluation	3 Hours
(5)	Response to Injury	4 Hours
(6)	Combat Conditioning	12 Hours
(7)	Safety Guidelines/Rules	2 Hours
(8)	Practical Skills Enhancement	4 Hours
(9)	Subject Control/Arrest Techniques Practical Skills and Instructional Methods	44 Hours
(10)	Fundamentals of Professional Liability For Law Enforcement Trainers	4 Hours
(11)	<del>State Comprehensive Examination/Course Closing</del>	<del>2 Hours</del>
	<b>TOTAL</b>	<b><del>80</del> 78 Hours</b>

(e) The "Specialized Subject Control Arrest Techniques Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for delivery of specialized subject control arrest techniques instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27610

and may be obtained at no cost to the student from the Academy at the following address:

North Carolina Justice Academy  
Post Office Box 99  
Salemberg, North Carolina 28385

(f) The Commission-certified school that is certified to offer the "Specialized Subject Control Arrest Techniques Instructor Training" course is the North Carolina Justice Academy.

*Authority G.S. 17C-6.*

## **12 NCAC 09B .0233 SPECIALIZED PHYSICAL FITNESS INSTRUCTOR TRAINING**

(a) The instructor training course required for specialized physical fitness instructor certification shall consist of a minimum of ~~60~~ 58 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each specialized physical fitness instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice physical fitness instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' Annual In-Service Training Program."

(c) Each applicant for specialized physical fitness training shall:

- (1) qualify through one of the following three options:
  - (A) have completed the criminal justice general instructor training course; or
  - (B) hold a current and valid North Carolina Teacher's Certificate and hold ~~a minimum of~~ a baccalaureate degree in physical education and be teaching in physical education topics;

(C) be presently instructing physical education topics in a community college, college or university and ~~hold a minimum of~~ possess a baccalaureate degree in physical education; and

- (2) present a written endorsement by either
  - (A) a school director indicating the student will be utilized to instruct physical fitness in Basic Law Enforcement Training Courses; or
  - (B) a certified school director, or in-service training coordinator indicating the student will be utilized to instruct physical fitness for the "Law Enforcement Officers' In-Service Training Program";
- (3) present a letter from a physician stating fitness to participate in the course.

(d) Each specialized physical fitness instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

(1)	Orientation	5 Hours
(2)	Lesson Plan Review	4 Hours
(3)	Physical Fitness Assessments, Exercise Programs and Instructional Methods	31 Hours
(4)	Injury Care and Prevention	4 Hours
(5)	Nutrition	6 Hours
(6)	Civil Liabilities for Trainers	2 Hours
(7)	CVD Risk Factors	2 Hours
(8)	Developing In-Service Wellness Programs and Validating Fitness Standards	4 Hours
(9)	<del>State Examination</del>	<del>2 Hours</del>
	<b>TOTAL</b>	<b><del>60</del> 58 Hours</b>

(e) The "Physical Fitness Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for delivery of specialized physical fitness instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27610

and may be obtained at no cost to the student from the Academy at the following address:

North Carolina Justice Academy  
Post Office Box 99  
Salemberg, North Carolina 28385

(f) The Commission-certified school that is certified to offer the "Specialized Physical Fitness Instructor Training" course is the North Carolina Justice Academy.

*Authority G.S. 17C-6.*

## **SECTION .0300 – MINIMUM STANDARDS FOR CRIMINAL JUSTICE INSTRUCTORS**

**12 NCAC 09B .0302 GENERAL INSTRUCTOR CERTIFICATION**

(a) General Instructor Certification issued after December 31, 1984 shall be limited to those topics which are not expressly incorporated under the Specific Instructor Certification category. Individuals certified under the general instructor category are not authorized to teach any of the subjects specified in Rule 09B .0304, entitled "~~Specific Instructor Certification~~". Certification. To qualify for issuance of General Instructor Certification, an applicant shall demonstrate a combination of education and experience in criminal justice and proficiency in the instructional process to the satisfaction of the Commission. The applicant shall meet the following requirements for General Instructor Certification:

- (1) Present documentary evidence showing that the applicant:
  - (A) is a high school graduate, or has passed the General Education Development Test (GED) indicating high school equivalency, and
  - (B) has acquired four years of practical experience as a criminal justice officer or as an administrator or specialist in a field directly related to the criminal justice system.
- (2) Present evidence showing successful completion of a Commission-certified instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.
- (3) Successfully pass the comprehensive written examination administered by the Commission, as required in Rule .0413(d) of this Subchapter.

(b) Applications for General Instructor Certification shall be submitted to the Standards Division within 60 days of the date the applicant successfully ~~passed the state comprehensive examination administered at the conclusion of~~ completed the Commission-certified instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.

(c) Persons having completed a Commission-certified instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise, and not having made application within 60 days of completion of the course shall complete a subsequent Commission-certified instructor training course in its entirety.

(d) Applicants for Speed Measuring Instrument Instructor courses must possess full general instructor certification.

*Authority G.S. 17C-6.*

**12 NCAC 09B .0304 SPECIALIZED INSTRUCTOR CERTIFICATION**

(a) The Commission may issue a Specialized Instructor Certification to an applicant who has developed specific motor skills and abilities by virtue of special training and demonstrated experience in one or more of the following topical areas:

- (1) Subject Control Arrest Techniques;
- (2) First Responder;
- (3) Firearms;
- (4) Law Enforcement Driver Training;
- (5) Physical Fitness;
- (6) Restraint, Control and Defense Techniques (Department of Public Safety, Division of Adult Correction and Juvenile Justice);
- (7) Medical Emergencies (Department of Public Safety, Division of Adult Correction and Juvenile Justice); or
- (8) Explosive and Hazardous Materials Emergencies.

(b) To qualify for and maintain any Specialized Instructor Certification, an applicant must possess a valid CPR Certification that includes cognitive and skills testing, through ~~an organization whose curriculum meets the national standards set forth by the International Guidelines Conference on Cardiopulmonary Resuscitation and Emergency Cardiovascular Care, the American Red Cross, American Heart Association, American Safety and Health Institute or National Safety Council;~~

(c) An applicant must achieve a minimum score of 75 percent on the comprehensive written exam, as specified in Rule .0414 of this Subchapter in order to qualify for Specialized Instructor Certification in the following topical areas:

- (1) Subject Control Arrest Techniques;
- (2) Firearms;
- (3) Law Enforcement Driver Training;
- (4) Physical Fitness; and
- (5) Explosive and Hazardous Materials Emergencies.

~~(e)(d)~~ To qualify for Specialized Instructor Certification in the Subject Control Arrest Techniques topical area, an applicant must meet the following requirements:

- (1) Hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
- (2) ~~Successfully complete~~ Complete the pertinent Commission-approved specialized instructor ~~training course and achieve a minimum score of 75 percent on the Commission's comprehensive written examination;~~ course; and
- (3) Obtain the recommendation of a Commission-certified school director or in-service training coordinator.

~~(d)(e)~~ To qualify for Specialized Instructor Certification in the First Responder topical area, an applicant must satisfy one of the following two options:

- (1) The first option is:

- (A) hold CPR instructor certification through the American Red Cross, American Heart Association, American Safety and Health Institute or National Safety Council; ~~an organization whose curriculum meets the national standards set forth by the International Guidelines Conference on Cardiopulmonary Resuscitation and Emergency Cardiovascular Care~~;
- (B) hold, or have held, basic Emergency Medical Technician certification;
- (C) have successfully completed the Department of Transportation's 40 hour EMT Instructor Course or equivalent within the last three years or hold a North Carolina ~~teaching certificate~~; Professional Educator's License, issued by the Department of Public Instruction; and
- (D) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

(2) The second option is:

- (A) hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
- (B) hold CPR instructor certification through an organization whose curriculum meets the national standard;
- (C) hold, or have held, basic EMT certification; and
- (D) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

~~(e)~~(f) To qualify for Specialized Instructor Certification in the Firearms topical area, an applicant must meet the following requirements:

- (1) Hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
- (2) ~~Successfully complete~~ Complete the pertinent Commission-approved specialized instructor training ~~course and achieve a minimum score of 75 percent on the Commission's comprehensive written examination~~; course; and
- (3) Obtain the recommendation of a Commission-certified school director or in-service training coordinator.

~~(f)~~(g) To qualify for Specialized Instructor Certification in the Law Enforcement Driver Training topical area, an applicant must meet the following requirements:

- (1) Hold General Instructor Certification, either probationary status or full general instructor

status, as specified in Rule .0303 of this Section;

- (2) ~~Successfully complete~~ Complete the pertinent Commission-approved specialized instructor training ~~course and achieve a minimum score of 75 percent on the Commission's comprehensive written examination~~; course; and
- (3) Obtain the recommendation of a Commission-certified school director or in-service training coordinator.

~~(g)~~(h) To qualify for Specialized Instructor Certification in the Physical Fitness topical area, an applicant shall become certified through one of the following two methods:

- (1) The first method is:
  - (A) hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
  - (B) successfully complete the pertinent Commission-approved specialized instructor training ~~course and achieve a minimum score of 75 percent on the Commission's comprehensive written examination~~; course; and
  - (C) obtain the recommendation of a Commission-certified School Director.

(2) The second method is:

- (A) ~~successfully complete~~ Complete the pertinent Commission-approved specialized instructor training ~~course and achieve a minimum score of 75 percent on the Commission's comprehensive written examination~~; course;
- (B) obtain the recommendation of a Commission-certified School director or in-service training coordinator; and
- (C) meet one of the following qualifications:
  - (i) hold a valid North Carolina ~~Teacher's Certificate~~ Professional Educator's License, issued by the Department of Public Instruction and hold a baccalaureate degree in physical education and be presently teaching in physical education topics; or
  - (ii) be presently instructing physical education topics in a community college, college or university and hold a baccalaureate degree in physical education.

~~(h)~~(i) To qualify for Specialized Instructor Certification in the Department of Public Safety, Division of Adult Correction and

Juvenile Justice Restraint, Control and Defense Techniques topical area, an applicant must meet the following requirements:

- (1) Hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
- (2) ~~Successfully complete~~ Complete the pertinent Commission-approved specialized instructor training course; and
- (3) Obtain the recommendation of a Commission-certified school director.

~~(j)~~(j) To qualify for Specialized Instructor Certification in the Department of Public Safety, Division of Adult Correction and Juvenile Justice Medical Emergencies topical area, an applicant must meet the following requirements:

- (1) Have ~~successfully~~ completed a Commission-certified basic instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private ~~enterprise, within the 12 month period preceding application; enterprise;~~
- (2) Hold instructor certification in CPR and First Aid by ~~fulfillment of the American Red Cross Instructor requirements; and the American Red Cross, American Heart Association, American Safety and Health Institute or National Safety Council; and~~
- (3) Obtain the recommendation of a Commission-certified school director.

~~(j)~~(k) To qualify for Specialized Instructor Certification in the Explosive and Hazardous Materials Emergencies topical area, an applicant must satisfy one of the following two options:

- (1) The first option is:
  - (A) hold General Instructor Certification, either probationary status or full general instructor status, as specified in Rule .0303 of this Section;
  - (B) ~~successfully complete~~ Complete the pertinent Commission-approved specialized instructor training ~~course and achieve a minimum score of 75 percent on the Commission's comprehensive written examination;~~ course; and
  - (C) obtain the recommendation of a Commission-certified school director or in-service training coordinator.
- (2) The second option is:
  - (A) have successfully completed the Fire Service Instructor Methodology Course or the equivalent utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise;
  - (B) ~~successfully complete~~ Complete the pertinent Commission-approved

specialized instructor training course; and

- (C) obtain the recommendation of a Commission-certified school director or in-service training coordinator.

*Authority G.S. 17C-6.*

## **SECTION .0400 – MINIMUM STANDARDS FOR COMPLETION OF TRAINING**

### **12 NCAC 09B .0401 TIME REQUIREMENT FOR COMPLETION OF TRAINING**

(a) Each criminal justice officer, with the exception of law enforcement officers, holding probationary certification shall satisfactorily complete a commission-accredited basic training course which includes training in the skills and knowledge necessary to perform the duties of his office. The officer shall complete such course within one year from the date of his original appointment as determined by the date of the probationary certification.

(b) Each law enforcement officer, except wildlife enforcement officers, shall have satisfactorily completed in its entirety the accredited basic training course as prescribed in 12 NCAC 09B .0205(b) prior to obtaining probationary certification.

(c) Each wildlife enforcement officer shall have satisfactorily completed in its entirety the Basic Training – Wildlife Enforcement Officers' course stipulated in 12 NCAC 09B .0228(b) prior to obtaining probationary certification.

(d) If a trainee completes the basic training course prior to being employed as a law enforcement officer, the trainee shall be duly appointed and sworn as a law enforcement officer within one year of ~~the completion of training successfully passing the comprehensive written exam as specified in Rule .0406 of this Section~~ for that basic training course to be recognized under these Rules. ~~This one year period shall begin with the successful completion of the State Comprehensive Examination.~~

(e) If local confinement supervisory and administrative personnel complete basic training prior to being employed by a facility in a supervisory and administrative position ~~which that~~ requires certification, such personnel shall be duly appointed to a local confinement facility supervisory and administrative position within one year of the completion of training for ~~that the~~ basic training course specified in 12 NCAC 09B .0205, to be recognized under these Rules. This one year period shall begin with the successful completion of the ~~State Comprehensive Examination; comprehensive written exam.~~

*Authority G.S. 17C-2; 17C-6; 17C-10.*

### **12 NCAC 09B .0406 COMPREHENSIVE WRITTEN EXAMINATION – BASIC LAW ENFORCEMENT TRAINING**

(a) ~~At~~ Within 60 days of the conclusion of a school's offering of the Basic Law Enforcement Training Course in its entirety, the Commission shall administer a comprehensive written examination to each trainee who has satisfactorily completed all of the required course work. A trainee shall not be administered

the comprehensive written examination until such time as all of the course work is completed.

(b) The examination shall be comprised of six units as specified in 12 NCAC 09B .0205(a). ~~.0205(b). Each unit is designed to test the trainees' proficiency in that unit.~~

(c) The Commission's representative shall submit to the school director within five business days of the administration of the examination a report of the results of the test for each trainee examined.

(d) A trainee shall have ~~successfully completed~~ achieved a passing score on the comprehensive written examination upon achieving a minimum of 70 percent correct answers on each of the six units as prescribed in ~~12 NCAC 09B .0406(b). Paragraph (b) of this Rule.~~

(e) A trainee who has fully participated in a scheduled delivery of an accredited training course and has demonstrated satisfactory competence in each motor-skill or performance area of the course curriculum but has failed to achieve the minimum score of 70 percent on no more than two units of the Commission's comprehensive written examination may request the Director of the Standards Division to authorize a re-examination of the trainee in only those units for which ~~he/she~~ he or she failed to make a passing score of 70 percent:

- (1) ~~the~~ The trainee's request for re-examination shall be made in writing on the Commission's form and shall be received by the Standards Division within 30 days of the examination.
- (2) ~~the~~ The trainee's request for re-examination shall include the favorable recommendation of the school director who administered the course(s).
- (3) ~~a~~ A trainee shall have, within ~~90~~ 60 days of the original examination(s), only one opportunity for re-examination and shall satisfactorily complete the subsequent unit examination in its entirety.
- (4) ~~the~~ The trainee will be assigned in writing by the Director of the Standards Division a place, time, and date for re-examination.
- (5) ~~should~~ Should the trainee on re-examination not achieve ~~the prescribed~~ a minimum score of 70 percent on the examination, the trainee ~~may not be given successful course completion and~~ shall enroll and ~~successfully~~ successfully complete a subsequent offering of the Basic Law Enforcement Training Course in its entirety.

(f) A trainee who fails to achieve a passing score of 70 percent on three or more of the units as prescribed in 12 NCAC 09B .0406(b) shall not be given the opportunity for re-examination on those units; and shall enroll in and successfully complete a subsequent offering of the Basic Law Enforcement Training Course in its entirety.

*Authority G.S. 17C-6; 17C-10.*

**12 NCAC 09B .0408 COMPREHENSIVE WRITTEN EXAMINATION – BASIC SMI CERTIFICATION**

(a) ~~At~~ Within 60 days of the conclusion of the classroom instruction portion of a school's offering of any speed

measurement instrument operator course or re-certification course, ~~an authorized representative of the Commission shall administer to all candidates for certification as operators a comprehensive written examination. the Commission shall administer a comprehensive written examination to each trainee who has satisfactorily completed all of the required course work.~~

(b) The examination shall be an objective test covering the topic areas contained in the certified course curriculum.

(c) The Commission's representative shall submit to the school director within five business days of the administration of the examination a report of the results of the test for each candidate for certification.

(d) A trainee shall pass the operator training course as required in 12 NCAC 09B .0212, .0213, .0214, .0238, .0242, or .0244 by achieving 70 percent correct answers.

(e) An operator seeking recertification shall pass the operator training recertification course as specified in 12 NCAC 09B .0220, .0221, .0222 .0240, .0243, or .0245 by achieving 75 percent correct answers.

(f) A trainee who has fully participated in a scheduled delivery of a certified training course and has demonstrated 100 percent competence in each motor-skill or performance area of the course curriculum but has failed to achieve ~~the prescribed~~ a passing score, as specified in Paragraph (d) of this Rule, on the Commission's comprehensive written examination may request the Director of the Standards Division to authorize a re-examination of the ~~trainee.~~ trainee, under the following requirements:

- ~~(g)~~ (1) The trainee's request for re-examination shall be made in writing on the Commission's Re-Examination Request form and shall be received by the Standards Division within 30 days of the ~~examination.~~ examination;
- ~~(h)~~ (2) The trainee's request for re-examination shall include the favorable recommendation of the school director who administered the ~~course.~~ Course;
- ~~(i)~~ (3) A trainee shall have, within ~~90~~ 60 days of the original examination, only one opportunity for re-examination and shall satisfactorily complete the subsequent examination in its ~~entirety.~~ entirety; and
- ~~(j)~~ (4) The trainee shall be notified by the Standards Division staff of a place, time, and date for re-examination.

(g) The Request for Re-Examination Form is available on the agency's website: <http://www.ncdoj.gov/getdoc/b38b7eee-e311-4ec3-8f9c-bd8fd58f6281/SMI-6-Reexam-6-11.aspx>.

~~(k)~~ (h) If the trainee fails to achieve the ~~prescribed~~ minimum score as specified in Paragraph (d) of this Rule on the re-examination, the trainee may not be recommended for certification and shall enroll and complete a subsequent course offering in its entirety before further examination may be permitted.

*Authority G.S. 17C-6.*

**12 NCAC 09B .0413 COMPREHENSIVE WRITTEN EXAM – INSTRUCTOR TRAINING**

(a) An authorized representative of the Commission shall administer a comprehensive written examination to each trainee who has satisfactorily completed the first 12 units of the "Criminal Justice Instructor Training Course" as described in the "Basic Instructor Training Manual." This comprehensive written examination shall be administered within 60 days of the successful completion of the first 12 units of the "Criminal Justice Instructor Training Course, as specified in Rule .0209 of this Subchapter."

(b) The examination shall be an objective test consisting of multiple-choice, true-false, or similar questions covering the topic areas contained in the accredited course curriculum.

(c) The Commission's representative shall submit to the school director within five business days of the administration of the examination a report of the results of the test for each trainee examined.

(d) A trainee shall ~~successfully complete~~ achieve a passing score on the comprehensive written examination if ~~he/she~~ he or she achieves a minimum of 75 percent correct answers.

(e) A trainee who has fully participated in a scheduled delivery of an accredited training course and has demonstrated satisfactory competence in each performance area of the course curriculum, who has scored at least 65 percent but has failed to achieve the minimum passing score of 75 percent on the Commission's comprehensive written examination, may request the Director of the Standards Division to authorize a re-examination of the trainee.

- (1) The trainee's request for re-examination shall be made in writing on the Commission's form and shall be received by the Standards Division within 30 days of the examination.
- (2) The trainee's request for re-examination shall include the favorable recommendation of the school director who administered the course.
- (3) A trainee shall have, within ~~90~~ 60 days of the original examination, only one opportunity for re-examination and shall satisfactorily complete the subsequent examination in its entirety.
- (4) The trainee will be assigned in writing by the Standards Division staff a place, time, and date for re-examination.
- (5) Should the trainee on re-examination not achieve the prescribed minimum score on the examination, the trainee may not be given successful course completion and shall enroll and ~~successfully complete~~ a subsequent offering of the instructor course in its entirety before further examination may be permitted.

(f) A trainee who fails to score at least 65 percent on the Commission's comprehensive written examination shall be terminated from the course.

*Authority G.S. 17C-6; 17C-10.*

**12 NCAC 09B .0414 COMPREHENSIVE WRITTEN EXAM - SPECIALIZED INSTRUCTOR TRAINING**

(a) ~~At the conclusion of a school's offering of the "Specialized Firearms Instructor Training," "Specialized Driver Instructor Training," "Specialized Subject Control Arrest Techniques Instructor Training," "Specialized Physical Fitness Instructor Training," "Specialized Explosives and Hazardous Materials Instructor Training," the "Radar Instructor Training," the "Criminal Justice Time Distance/Speed Measurement Instrument (TD/SMI) Instructor Training," the "LIDAR Instructor Training," the "Re Certification Training for Radar Instructors," the "Re Certification Training for TD/SMI Instructors," and the "Re Certification Training for LIDAR Instructors" courses, the~~ The Commission shall administer a comprehensive written examination to each trainee who has satisfactorily completed all of the required course ~~work.~~ work for the following courses:

- (1) Specialized Firearms Instructor Training;
- (2) Specialized Driver Instructor Training;
- (3) Specialized Subject Control Arrest Techniques Instructor Training;
- (4) Specialized Physical Fitness Instructor Training;
- (5) Specialized Explosives and Hazardous Materials Instructor Training;
- (6) Radar Instructor Training;
- (7) Criminal Justice Time-Distance/Speed Measurement Instrument (TD/SMI) Instructor Training;
- (8) LIDAR Instructor Training;
- (9) Re-Certification Training for Radar Instructors;
- (10) Re-Certification Training for TD/SMI Instructors; and
- (11) Re-Certification Training for LIDAR Instructors.

The Commission shall administer the comprehensive written examination within 60 days of the trainee's completion of all required course work. A trainee cannot be administered the comprehensive written examination until such time as all of the required course work is completed.

(b) The examination shall be an objective test consisting of multiple-choice, true-false, or similar questions covering the topic areas contained in the certified course curriculum.

(c) The Commission's representative shall submit to the school director within five business days of the administration of the examination a report of the results of the test for each trainee examined.

(d) A trainee shall ~~successfully complete~~ achieve a passing score on the comprehensive written examination if he or she achieves 75 percent correct answers.

(e) A trainee who fails to achieve a minimum score of 75 percent on the Commission's comprehensive written examination shall enroll and ~~successfully~~ complete a subsequent offering of the specialized instructor training course in its entirety before further examination may be permitted.

*Authority G.S. 17C-6; 17C-10.*

**12 NCAC 09B .0416 SATISFACTION OF MINIMUM TRAINING – SMI INSTRUCTOR**

(a) To acquire successful completion of the "Speed Measurement Instrument (SMI) Instructor Training Courses," and the "SMI Instructor Re-Certification Courses", the trainee ~~shall~~ shall

- (1) satisfactorily complete all required course work as specified in Rules .0210, .0211, .0218, .0219, .0237, or .0239 of this Subchapter for the specific course in ~~attendance; and attendance.~~
- (2) ~~achieve a score of 75 percent correct answers on a Commission administered comprehensive written examination.~~

(b) If the trainee ~~passes the written examination but fails to meet the minimum criteria on an area demonstrate 100 percent competence in each of motor skills motor-skill or performance area, testing, he/she he or she~~ shall be authorized one opportunity for a re-test. Such re-test ~~must~~ shall be at the recommendation of the school director and a request ~~must~~ shall be made to the Standards Division within 30 days of the original testing. Re-examination ~~must~~ shall be completed within 90 days of the original testing. Failure on the re-test requires enrollment in a subsequent SMI operator course and an SMI instructor course.

*Authority G.S. 17C-6; 17C-10.*

**SUBCHAPTER 09C – ADMINISTRATION OF CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS**

**SECTION .0200 – FORMS**

**12 NCAC 09C .0211 PRE-DELIVERY REPORT OF TRAINING COURSE PRESENTATION**

The Pre-delivery Report of Training Course Presentation, is a form on which the School Director notifies the Commission of its intent to present the Basic Law Enforcement Training course. Information requested ~~includes includes; the number of hours; delivery period; location; anticipated number of trainees; and a topical course schedule including proposed instructional assignments.~~

- (1) The number of training hours;
- (2) The training delivery period;
- (3) Location;
- (4) Anticipated number of trainees;
- (5) The requested date and location for the administration of the state comprehensive exam; and
- (6) Topical course schedule including proposed instructional assignments.

*Authority G.S. 17C-6; 150B-11.*

**SECTION .0400 – ACCREDITATION OF CRIMINAL JUSTICE SCHOOLS AND TRAINING COURSES**

**12 NCAC 09C .0403 REPORTS OF TRAINING COURSE PRESENTATION AND COMPLETION**

(a) Each presentation of the "Basic Law Enforcement Training" course shall be reported to the Commission as follows:

- (1) After acquiring accreditation for the course and before commencing each delivery of the course, the school director shall notify the Commission of the school's intent to offer the training course by submitting a Pre-delivery Report of Training Course Presentation; and
- (2) Not more than 10 days Upon after ~~Not more than 10 days after receiving from the Commission's representative the Report of Examination Scores, course,~~ the school director shall notify the Commission regarding the progress and achievement of each enrolled trainee by submitting a Post-delivery Report of Training Course Presentation.

Note: Special arrangements shall be made between the Standards Division and the school director for the reporting of law enforcement achievement in a Public Safety Officer course.

(b) Upon successful completion of a Commission-accredited training course by ~~state youth services~~ Juvenile Justice Officer trainees, the director of the school conducting such course shall notify the Commission of the satisfactory achievement of trainees by submitting a monthly Report of Training Course Completion.

*Authority G.S. 17C-6; 17C-10.*

**SUBCHAPTER 09G – STANDARDS FOR CORRECTIONS EMPLOYMENT, TRAINING, AND CERTIFICATION**

**SECTION .0300 – CERTIFICATION OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, PROBATION/PAROLE OFFICERS-INTERMEDIATE, AND INSTRUCTORS**

**12 NCAC 09G .0308 GENERAL INSTRUCTOR CERTIFICATION**

(a) General Instructor Certification after December 31, 1984 shall be limited to those topics which are not expressly incorporated under the Specialized Instructor Certification category. Individuals certified under the general instructor category are not authorized to teach any of the subjects specified in 12 NCAC 09G .0310, entitled "Specialized Instructor Certification." To qualify for issuance of General Instructor Certification, an applicant shall demonstrate a combination of education and experience in corrections and proficiency in the instructional process to the satisfaction of the Commission. The applicant shall meet the following requirements for General Instructor Certification:

- (1) Present documentary evidence showing that the applicant:
  - (A) is a high school graduate, or has passed the General Education Development Test (GED) indicating high school equivalency;



- (B) has acquired four years of practical experience as a criminal justice officer or as an administrator or specialist in a field directly related to the criminal justice system.
- (2) Present evidence showing successful completion of a Commission-certified instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.
- (3) Successfully pass the comprehensive written examination administered by the Commission, as specified in Rule .0413(d) of this Subchapter, within 60 days of completion of the Commission-certified instructor training program.

(b) Applications for General Instructor Certification shall be submitted to the Standards Division within 60 days of the date the applicant successfully ~~passed the state comprehensive examination administered at the conclusion of the~~ completed the Commission-certified instructor training program or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise.

(c) Persons having completed a Commission-certified instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise, and not having made application within 60 days of completion of the course shall complete a subsequent Commission-certified instructor training course in its entirety.

*Authority G.S. 17C-6.*

#### **12 NCAC 09G .0314 COMPREHENSIVE WRITTEN EXAM - INSTRUCTOR TRAINING**

- (a) An authorized representative of the ~~North Carolina Department of Correction Standards Division~~ shall administer a comprehensive written examination to each trainee who has ~~satisfactorily~~ completed the first 12 units of the ~~Corrections Criminal Justice Instructor Training Course~~ as described in the ~~"Basic Instructor Training Manual."~~ "Instructor Training" manual.
- (b) The examination shall be an objective test consisting of multiple-choice, true-false, or similar questions covering the topic areas contained in the accredited course curriculum.
- (c) A trainee shall ~~successfully complete~~ achieve a passing score on the comprehensive written examination if ~~he/she~~ he or she achieves a minimum of 75 percent correct answers.
- (d) A trainee who has fully participated in a scheduled delivery of an accredited training course and has demonstrated satisfactory competence in each performance area of the course curriculum, who has scored at least 65 percent but has failed to achieve the minimum passing score of 75 percent on the comprehensive written examination, may request the Director of

the Standards Division to authorize a re-examination of the trainee.

- (1) The trainee's request for re-examination shall be made in writing on the Commission's Re-Examination Request form and shall be received by the Standards Division within 30 days of the examination. The form is found on the Agency's website: <http://www.ncdoj.gov/getdoc/b38b7eee-e311-4ec3-8f9c-bd8fd58f6281/SMI-6-Reexam-6-11.aspx>.
- (2) The trainee's request for re-examination shall include the favorable recommendation of the School Director who administered the course.
- (3) A trainee shall have, within ~~90~~ 60 days of the original examination, only one opportunity for re-examination and shall satisfactorily complete the subsequent examination in its entirety.
- (4) The trainee will be assigned in writing by the Standards Division staff a place, time, and date for re-examination.
- (5) Should the trainee on re-examination not achieve ~~the prescribed~~ a minimum score of 75 percent on the examination, the trainee may not be given successful course completion and shall enroll and ~~successfully~~ complete a subsequent offering of the instructor course in its entirety before further examination may be permitted.
- (~~f~~)(e) A trainee who fails to score at least 65 percent on the comprehensive written examination shall be terminated from the course.

*Authority G.S. 17C-6; 17C-10.*

#### **SECTION .0400 – MINIMUM STANDARDS FOR TRAINING OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, AND PROBATION/PAROLE OFFICERS-SURVEILLANCE**

#### **12 NCAC 09G .0414 INSTRUCTOR TRAINING**

- (a) The instructor training course required for general instructor certification shall consist of a minimum of ~~80~~ 78 hours of instruction presented during a continuous period of not more than two weeks.
- (b) Each instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice instructor.
- (c) Each instructor training course shall include, as a minimum, the following identified topic areas:
  - (1) Orientation and Pretest;
  - (2) Curriculum Development: ISD Model;
  - (3) Civil Liability for Law Enforcement Trainers;
  - (4) Interpersonal Communication in Instruction;
  - (5) Lesson Plan Preparation: Professional Resources;
  - (6) Lesson Plan Preparation: Format and Objectives;

- (7) Teaching Adults;
- (8) Principles of Instruction: Demonstration Methods and Practical Exercise;
- (9) Methods and Strategies of Instruction;
- (10) The Evaluation Process;
- (11) Principles of Instruction: Audio-Visual Aids;
- (12) Student 10-Minute Talk and Video Critique; Critique; and
- (13) Student Performance: First 30-Minute Presentation; Second 30-Minute Presentation; Final 80-Minute Presentation; and Presentation.
- ~~(14) Examination.~~

(d) The "Basic Instructor Training Manual" as published by the North Carolina Justice Academy is to be applied as the basic curriculum for delivery of basic instructor training courses. Copies of this publication may be inspected at the agency:

Criminal Justice Standards Division  
North Carolina Department of Justice  
~~114 West Edenton Street~~ 1700 Tryon Park Drive  
~~Old Education Building~~  
Post Office Drawer 149

Raleigh, North Carolina 27602

and may be purchased at the cost of printing and postage from the North Carolina Justice Academy at the following address:

North Carolina Justice Academy  
Post Office Drawer 99  
Salemberg, North Carolina 28385

Authority G.S. 17C-6.

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*Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rule cited as 12 NCAC 09B .0403.*

**Agency obtained G.S. 150B-19.1 certification:**

- ☐ OSBM certified on:
- ☒ RRC certified on: February 21, 2014
- ☐ Not Required

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
[http://www.ncdoj.gov/getdoc/b624de9e-34a3-4c46-a6e3-75d174107e93/Public-Hearing\\_Rule-Revisions\\_8-21-14.aspx](http://www.ncdoj.gov/getdoc/b624de9e-34a3-4c46-a6e3-75d174107e93/Public-Hearing_Rule-Revisions_8-21-14.aspx)

**Proposed Effective Date:** November 1, 2014

**Public Hearing:**

**Date:** August 21, 2014

**Time:** 10:30 a.m.

**Location:** Wake Technical Community College, 321 Chapanoke Road, Raleigh, NC 27603

**Reason for Proposed Action:** The revision of this rule is necessary for the incorporation of G.S. 93B-15.1, to provide

*guidelines for the certification of separating military members and military spouses.*

**Comments may be submitted to:** Trevor Allen, 1700 Tryon Park Drive, Raleigh, NC 27610; phone (919) 779-8211; fax (919) 779-8210; email [tjallen@ncdoj.gov](mailto:tjallen@ncdoj.gov)

**Comment period ends:** August 21, 2014

**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 (check all that apply).**

- ☒ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☐ No fiscal note required by G.S. 150B-21.4

## CHAPTER 09 – CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

### SUBCHAPTER 09B – STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT: EDUCATION: AND TRAINING

#### SECTION .0400 – MINIMUM STANDARDS FOR COMPLETION OF TRAINING

#### 12 NCAC 09B .0403 EVALUATION FOR TRAINING WAIVER

(a) The ~~division~~ Standards Division staff shall evaluate each law enforcement officer's training and experience to determine if equivalent training has been satisfactorily completed as specified in Rule ~~.0402(a)~~ .0402(a) of this Section. Applicants for certification with prior law enforcement experience shall have been employed in a full-time, sworn law enforcement position in order to be considered for training evaluation under this Rule. Applicants for certification with a combination of full-time and part-time experience shall be evaluated on the basis of the full-time experience only. The following criteria shall be used by ~~division~~ Standards Division staff in evaluating a law enforcement officer's training and experience to determine eligibility for a waiver of training requirements:

- (1) Persons having completed a ~~commission-accredited~~ Commission-accredited basic training program and not having been duly appointed and sworn as a law enforcement officer within one year of completion of the program shall complete a subsequent ~~commission-accredited~~ Commission-accredited basic training program in its entirety and successfully pass the State Comprehensive Examination prior to obtaining probationary law enforcement certification, unless the Director determines that a delay in applying for certification was not due to neglect on the part of the applicant, in which case the Director may accept a ~~commission-accredited~~ Commission-accredited basic training program which is over one year old. Such extension of the one year period shall not exceed 30 days from the ~~expiration date of a commission-accredited basic training program;~~ first year anniversary of the successful completion of the state comprehensive examination;
- (2) Out-of-state transferees shall be evaluated to determine the amount and quality of their training and experience. Out-of-state transferees ~~cannot~~ shall not have a break in service exceeding one year. At a minimum, out-of-state transferees shall have two years' full-time, sworn law enforcement experience and have successfully completed a basic law enforcement training course accredited by the ~~State from which transferring.~~ transferring State. Prior to employment as a certified law enforcement officer, out-of-state transferees must successfully complete the employing agency's in-service firearms training and qualification program as prescribed in 12 NCAC ~~9E 09E~~ .0100. At a minimum, out-of-state transferees shall successfully complete the Legal Unit in a ~~commission-accredited~~ Commission-accredited Basic Law Enforcement Training Course as prescribed in ~~12 NCAC Rule 9B~~ .0205(b)(1) of this Subchapter and shall successfully pass the State Comprehensive Examination in its entirety within the 12 month probationary period;
- (3) Persons who have completed a minimum 369-hour basic law enforcement training program accredited by the ~~North Carolina Criminal Justice Education and Training Standards~~ Commission under guidelines administered beginning October 1, 1984 and have been separated from a sworn position for over one year but less than three years who have had a minimum of two years' experience as a full-time, sworn law enforcement officer in North Carolina shall successfully complete the ~~refresher training enumerated in Rule .0403(a)(2)~~ Legal Unit in a Commission-accredited Basic Law Enforcement Training Course as prescribed in Rule .0205(b)(1) of this Subchapter, and shall successfully pass the State Comprehensive Examination in its entirety within the 12 month probationary period. Prior to employment as a certified law enforcement officer, these persons shall successfully complete the employing agency's in-service firearms training and qualification program as prescribed in ~~12 NCAC 09E .0100;~~ 12 NCAC 09E;
- (4) Persons out of the law enforcement profession for over one year but less than three years who have had less than two years' experience as a full-time, sworn law enforcement officer in North Carolina shall complete a ~~commission-accredited~~ Commission-accredited basic training program in its entirety and successfully pass the State Comprehensive Examination;
- (5) Persons out of the law enforcement profession for over three years regardless of prior training or experience shall complete a ~~commission-accredited~~ Commission-accredited basic training program in its entirety and shall successfully pass the State Comprehensive Examination;
- (6) Persons who separated from law enforcement employment during their probationary period after having completed a ~~commission-accredited~~ Commission-accredited basic training program and who have separated from a sworn law enforcement position for more than one year shall complete a subsequent ~~commission-accredited~~ Commission-accredited basic training program in its entirety and successfully pass the State Comprehensive Examination;
- (7) Persons who separated from a sworn law enforcement position during their probationary period after having successfully completed a ~~commission-accredited~~ Commission-accredited basic training program and who have separated from a sworn law enforcement position for less than one year shall serve a new 12 month probationary ~~period,~~ period as prescribed in Rule .0401(a) of this Section, but need not complete an additional training program;
- (8) Persons who have completed a minimum 160-hour basic law enforcement training program accredited by the North Carolina Criminal Justice Training and Standards Council under guidelines administered beginning on July 1, 1973 and continuing through September 30, 1978 and who have separated from a sworn law enforcement position for over one year but

- less than two years shall be required to complete the Legal Unit and the topical area entitled "Law Enforcement Driver Training" of a ~~commission-accredited~~ Commission-accredited Basic Law Enforcement Training Course as prescribed in ~~12 NCAC Rule 9B .0205(b)(1) and .0205(b)(5)(C) of this Subchapter~~ and successfully pass the State Comprehensive Examination within the 12 month probationary period;
- (9) Persons who have completed a minimum 160-hour basic law enforcement training program accredited by the North Carolina Criminal Justice Training and Standards Council under guidelines administered beginning on July 1, 1973 and continuing through September 30, 1978 and have been separated from a sworn law enforcement position for over two years shall be required to complete a current ~~commission-accredited~~ Commission-accredited basic training program in its entirety regardless of training and experience and shall successfully pass the State Comprehensive Examination;
- (10) Persons who have completed a minimum 240-hour basic law enforcement training program accredited by the ~~North Carolina Criminal Justice Education and Training Standards Commission~~ under guidelines administered beginning October 1, 1978 and continuing through September 30, 1984 and have been separated from a sworn position over one year but less than three years shall be required to complete the Legal Unit in a ~~commission-accredited~~ Commission-accredited Basic Law Enforcement Training Course as prescribed in ~~12 NCAC Rule 9B .0205(b)(1) of this Subchapter~~ and successfully pass the State Comprehensive Examination within the 12 month probationary period;
- (11) Persons previously holding law enforcement certification in accordance with G.S. 17C-10(a) who have been separated from a sworn law enforcement position for over one year and who have not previously completed a minimum basic training program accredited by either the North Carolina Criminal Justice Training and Standards Council or the ~~North Carolina Criminal Justice Education and Training Standards Commission~~ shall be required to complete a ~~commission-accredited~~ Commission-accredited basic training program in its entirety and shall successfully pass the State Comprehensive Examination prior to ~~employment~~ employment;
- (12) Persons who have completed training as a federal law enforcement officer and are ~~appointed~~ candidates for appointment as a sworn law enforcement officer in North Carolina shall be required to complete a ~~commission-accredited~~ Commission-accredited basic training program in its entirety and shall successfully pass the State Comprehensive Examination;
- (13) Applicants with part-time experience who have a break in service in excess of one year shall complete a ~~commission-accredited~~ Commission-accredited basic training program in its entirety and successfully pass the State Comprehensive Examination prior to employment;
- (14) Applicants who hold or previously held certification issued by the North Carolina Sheriffs' Education and Training Standards Commission shall be subject to evaluation of their prior training and experience on an individual basis. The ~~division~~ Standards Division staff shall determine the amount of training required of these applicants;
- (15) Alcohol law enforcement agents who separate from employment with the Division of Alcohol Law Enforcement and transfer to another law enforcement agency in a sworn capacity shall be subject to evaluation of their prior training and experience on an individual basis. The ~~division~~ Standards Division staff shall determine the amount of training required of these ~~applicants~~ and applicants;
- (16) Wildlife enforcement officers who separate from employment with the Wildlife Enforcement Division and transfer to another law enforcement agency in a sworn capacity shall be subject to evaluation of their prior training and experience on an individual basis. The ~~division~~ Standards Division staff shall determine the amount of training required of these ~~applicants~~ applicants;
- (17) Active duty, guard or reserve military members failing to successfully complete all of the required annual in-service training topics, as defined in 12 NCAC 09E .0105, due to military obligations, are subject to the following training requirements as a condition for return to active criminal justice status. The agency head shall verify the person's completion of the appropriate training by submitting a statement, on a Commission approved form;
- (A) Active duty, guard or reserve military members holding probationary or general certification as a criminal justice officer who fail to successfully complete all of the required annual in-service training topics due to military obligations for up to a period of three years, shall complete the previous year's required in-service

training topics, the current year's required in-service training topics, and successfully complete the appointing agency's in-service firearms training and qualification program as prescribed in 12 NCAC 09E prior to their return to active criminal justice status;

(B) Active, guard or reserve military members holding probationary or general certification as a criminal justice officer who fail to successfully complete all of the required annual in-service training topics due to military obligations for a period greater than three years shall undertake and successfully complete the following topic areas within the following time frames:

(i) The person shall successfully complete the previous year's required in-service training topics, the current year's required in-service training topics, and successfully complete the appointing agency's in-service firearms training and qualification program as prescribed in 12 NCAC 09E prior to their return to active criminal justice status;

(ii) The person shall successfully pass the practical skills testing for some of the topics enumerated in Rule .0205(b)(5) of this Subchapter prior to return to active criminal justice status. The required topics include First Responder, Law Enforcement Driver Training, and Subject Control Arrest Techniques. The person shall complete one physical fitness assessment in lieu of the Fitness Assessment and Testing topic. The person must also be examined by a physician per Rule .0104(b) of this Subchapter. This practical skills testing may be undertaken either in a Commission-accredited Basic Law Enforcement Training course or under the instruction of a Commission

certified instructor for that particular skill; and

(iii) The person shall successfully complete some of the topics in the legal unit of instruction in the Basic Law Enforcement Training course as set forth in Rule .0205(b)(1) of this Subchapter. The required topics include Motor Vehicle Law; Juvenile Laws and Procedures; Arrest, Search and Seizure/Constitutional Law; and ABC Laws and Procedures. The person shall successfully pass the appropriate topic tests for each course delivery. The person may undertake each of these legal unit topics of instruction either in a Commission-accredited Basic Law Enforcement Training course or under the instruction of a Commission certified instructor for that particular topic of instruction. The person shall have 12 months from the beginning of their return to active criminal justice status to successfully complete each of the enumerated topics of instruction.

(b) A military trained individual seeking certification pursuant to G.S. 93B-15.1 who applies to the Standards Division for a certification issued by the Commission must meet, and submit documentation to the Standards Division verifying his or her compliance with the following requirements:

- (1) Been awarded a military occupational specialty that is substantially equivalent to or exceeds the training requirements required for certification and performed in the occupational specialty;
- (2) Completed a military program of training, completed testing or equivalent training and experience as determined by Paragraph (d) of this Rule;
- (3) Engaged in the active practice of that occupation for at least two of the five years prior to the date of application; and
- (4) Not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension or revocation of a license to practice that occupation in this State at the time the act was committed.

(c) Military spouses who, pursuant to G.S. 93B-15.1, apply to the Standards Division for a certification issued by the

Commission must meet, and submit documentation to the Standards Division verifying his or her compliance with, the following requirements:

- (1) Hold a current license, certification or registration from another jurisdiction which is substantially equivalent to or exceeds the requirements required for certification;
- (2) Be in good standing with the issuing agency and not been disciplined by the agency that has the jurisdiction to issue the license, certification or permit; and
- (3) Demonstrate competency in the occupation by:
  - (A) Having completed continuing education comparable to the education and training required for the type of certification for which the application is being made, as determined by Paragraph (b) of this Rule; or
  - (B) Having engaged in the active practice of that occupational specialty for at least two of the five years prior to the date of application.

(d) A military trained individual or military spouse seeking General Certification as a law enforcement officer must meet, at a minimum, the requirements of Rule .0403(a)(2) of this Section. The Division shall review the documents received to determine if any additional training is required to satisfy the certification requirements of this Subchapter.

(e) In the event the applicant's prior training is not substantially equivalent to the Commission's standards, the Commission shall prescribe as a condition of certification, supplementary or remedial training deemed necessary to equate previous training with current standards.

(f) Where certifications issued by the Commission require satisfactory performance on a written examination as part of the training, the Commission shall require such examinations for the certification.

(g) In those instances not specifically incorporated within this Section Rule or where an evaluation of the applicant's prior training and experience determines that required attendance in the entire Basic Law Enforcement Training Course would be impractical, the Director of the Standards Division is authorized to exercise his discretion in determining the amount of training those persons shall complete during their probationary period.

(h) The following criteria shall be used by division Standards Division staff in evaluating prior training and experience of local confinement personnel to determine eligibility for a waiver of training requirements:

- (1) Persons who hold probationary, general, or grandfather certification as local confinement personnel and separate after having completed a commission-accredited course as prescribed in 12 NCAC Rule 9B .0224 or .0225 of this Subchapter and have been separated for more than one year shall complete a subsequent commission-accredited training course in its entirety and successfully pass the State Comprehensive Examination during the

probationary period as prescribed in 12 NCAC 9B .0401(a); Rule .0401(a) of this Section;

- (2) Persons who separated from a local confinement personnel position after having completed a commission-accredited course as prescribed in 12 NCAC Rule 9B .0224 or .0225 of this Subchapter and who have been separated for less than one year shall serve a new 12 month probationary period, but need not complete an additional training program;
- (3) Applicants who hold or previously held "Detention Officer Certification" issued by the North Carolina Sheriffs' Education and Training Standards Commission shall be subject to evaluation of their prior training and experience on an individual basis. Where the applicant properly obtained certification and successfully completed the required 120 hour training course, and has not had a break in service in excess of one year, no additional training will be required; and
- (4) Persons holding certification for local confinement facilities who transfer to a district or county confinement facility shall satisfactorily complete the course for district and county confinement facility personnel, as adopted by reference in 12 NCAC 9B .09B .0224, in its entirety and successfully pass the State Comprehensive Examination during the probationary period as prescribed in 12 NCAC 9B .0401(a); Rule .0401(a) of this Section.

*Authority G.S. 17C-2; 17C-6; 17C-10; 93B-15.1.*

## **TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment and Natural Resources intends to amend the rules cited as 15A NCAC 02B .0206; .0211; .0212; .0214-.0216; .0218; .0220.*

**Agency obtained G.S. 150B-19.1 certification:**

- ☒ **OSBM certified on:** April 23, 2014
- ☐ **RRC certified on:**
- ☐ **Not Required**

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<http://portal.ncdenr.org/web/guest/rules>

**Proposed Effective Date:** January 1, 2015

**Public Hearings:**

**Date:** Tuesday, July 15, 2014

**Time:** 2:00 p.m.

**Location:** Ground Floor Hearing Room, Archdale Building, 512 N Salisbury St., Raleigh, NC

**Date:** Wednesday, July 16, 2014

**Time:** 3:00 p.m.

**Location:** Statesville Civic Center, 300 South Center Street, Statesville, NC

**Reason for Proposed Action:** The Environmental Management Commission (EMC) will conduct public hearings to consider proposed permanent amendments to various rules that establish the surface water quality standards for North Carolina. These proposed amendments comprise the State's Triennial Review of Surface Water Quality Standards, which is mandated by the federal Water Pollution Control Act (Clean Water Act or CWA). If adopted, the proposals would implement the following changes to the surface water quality standards for North Carolina:

1) Based on revised US Environmental Protection Agency (US EPA) research, new health information is available for 2,4 D ( a chlorophenoxy herbicide). When implemented, the standard will lower the applicable acceptable human health protective concentration.

2) Updated aquatic life protective concentrations for Arsenic, Beryllium, Cadmium, Chromium III, Chromium VI, Copper, Lead, Nickel, Silver and Zinc are proposed. The revisions reflect the latest scientific knowledge regarding the effects of the pollutants on aquatic organisms. With the exception of Mercury and Selenium, which are both bioaccumulative metals, the state proposes changing to dissolved metal water quality standards. The dissolved fraction more closely estimates the portion of the metal that is toxic to aquatic life. The revised criteria are average concentrations that can be present in a water body, but should not result in unacceptable effects to aquatic organisms and the designated use of the water body on both a shorter (acute) and a longer (chronic) term basis. Where metals toxicity is hardness-dependent, applicable hardness values are defined. With the exception of Mercury and Selenium, the proposals allow careful consideration of aquatic life biological integrity to take precedence over ambient standard violations for water quality assessment purposes.

3) The standards for Iron and Manganese are proposed for removal. Both chemicals are federally designated "non-priority" pollutants. The standard for Total Chromium is also proposed for removal, but is replaced by human health and aquatic life protective standards for Chromium III and Chromium VI.

4) Codify the use of 1Q10 stream flows for implementation of acute water quality standards in NPDES permitting. Allow the use of the median instream hardness values in calculating permit limits based on proposed hardness-dependent metals standards.

5) The public will have the opportunity to comment on three variances from surface water quality standards and federal 316(a) thermal variances. The three surface water standards exemptions consist of two variances from the chloride standard for Mt. Olive Pickle Company and Bay Valley Foods, LLC (formerly Dean Pickle and Specialty Products Company) (NC0001074 & NC0001970) and a variance from the color standard for Evergreen Packaging (d.b.a. Blue Ridge Paper Products) (NC0000272). Information concerning any of these variances can be obtained by contacting the individual named in the comment procedures.

6) Variances from applicable standards, revisions to water quality standards, or site-specific water quality standards may be granted by the Environmental Management Commission on a case-by-case basis pursuant to GS 143-215.3(e), 143-214.3 or 143-214.1. For metals standards, the proposed language details that alternative site-specific standards can be developed when studies are designed in accordance with the "Water Quality Standards Handbook: Second Edition" published by the US EPA (EPA 823-B-94-005a). The mechanisms outlined in the US EPA publication are for the Water Effect Ratio, the Recalculation Procedure, and the Resident Species Procedure. The EMC is seeking comment on the application of these provisions with respect to modifying the metals criteria.

#### **Comment Procedures:**

It is important that all interested and potentially affected persons or parties make their views known to the EMC whether in favor of, or opposed to, any and all of the proposed amendments and current regulations. As the state and US Environmental Protection Agency (US EPA) have a strong interest in assuring that the decisions are legally defensible, are based on the best scientific information available, and are subject to full and meaningful public comment and participation, clear records are critical to the administrative review by the EMC and the US EPA.

The public hearing will be recorded. It will consist of a presentation by DWR staff, followed by an open comment period. The EMC appointed hearing officer may limit the length of time that you may speak, if necessary, so that all those who wish to speak will have an opportunity. You may attend the public hearing to make verbal comments and/or submit written comments. You may present conceptual ideas, technical justifications, or specific language you believe is necessary and relevant to 15A NCAC 02B surface water quality classifications and standards regulations. No items will be voted on and no decisions will be made at this hearing.

In case of inclement weather on either of the two published hearing dates, a continuance date for the public hearing has been established as July 29th , 1:30 p.m., Ground Floor Hearing Room, Archdale Building, 512 North Salisbury Street, Raleigh, NC. A recorded message regarding any continuance to the hearing record will be available at the below noted telephone number.

**Comments may be submitted to:** Connie Brower, 1611 Mail Service Center, Raleigh, NC 27699-1611; phone (919) 807-6416, main line (919) 707-9000; fax (919) 807-6497; email [DWR-Classifications-Standards@ncdenr.gov](mailto:DWR-Classifications-Standards@ncdenr.gov)

**Comment period ends:** 5:00 p.m. Friday, August 22, 2014

#### **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 (check all that apply).**

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☒ Local funds affected
- ☒ Substantial economic impact ( $\geq \$1,000,000$ )
- ☐ No fiscal note required by G.S. 150B-21.4

**CHAPTER 02 – ENVIRONMENTAL MANAGEMENT**

**SUBCHAPTER 02B – SURFACE WATER AND WETLAND STANDARDS**

**SECTION .0200 – CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS AND WETLANDS OF NORTH CAROLINA**

**15A NCAC 02B .0206 FLOW DESIGN CRITERIA FOR EFFLUENT LIMITATIONS**

(a) Water quality based effluent limitations are developed to allow appropriate frequency and duration of deviations from water quality standards so that the designated uses of receiving waters are protected. There are water quality standards for a number of categories of pollutants and to protect a range of water uses. For this reason, the appropriate frequency and duration of deviations from water quality standards is not the same for all categories of standards. A flow design criterion is used in the development of water quality based effluent limitations as a simplified means of estimating the acceptable frequency and duration of deviations. More complex modeling techniques can also be used to set effluent limitations directly based on frequency and duration criteria published by the U.S. Environmental Protection Agency pursuant to Section 304(a) of the Federal Clean Water Act as amended. Use of more complex modeling techniques to set water quality based effluent limitations will be approved by the Commission or its designee on a case-by-case basis. Flow design criteria to calculate water quality based effluent limitations for categories of water quality standards are listed as follows:

- (1) All standards except toxic substances and aesthetics will be protected using the minimum average flow for a period of seven consecutive days that has an average recurrence of once in ten years (7Q10 flow). Other governing flow strategies such as varying discharges with the receiving waters ability to assimilate wastes may be designated by the Commission or its designee on a case-by-case basis if the discharger or permit applicant provide

evidence which establishes to the satisfaction of the Director that the alternative flow strategies will give equal or better protection for the water quality standards. Better protection for the standards means that deviations from the standard would be expected less frequently than provided by using the 7Q10 flow.

- (2) Toxic substance standards to protect aquatic life from chronic toxicity will be protected using the 7Q10 flow.
  - (3) Toxic substance standards to protect aquatic life from acute toxicity will be protected using the 1Q10 flow.
  - ~~(3)~~(4) Toxic substance standards to protect human health will be:
    - (A) The 7Q10 flow for standards to protect human health through the consumption of water, fish and shellfish from noncarcinogens;
    - (B) The mean annual flow to protect human health from carcinogens through the consumption of water, fish and shellfish unless site specific fish contamination concerns necessitate the use of an alternative design flow;
  - (5) Aesthetic quality will be protected using the minimum average flow for a period of 30 consecutive days that has an average recurrence of once in two years (30Q2 flow).
- (b) In cases where the stream flow is regulated, a minimum daily low flow may be used as a substitute for the 7Q10 flow except in cases where there are acute toxicity concerns for aquatic life. In the cases where there are acute toxicity concerns, an alternative low flow such as the instantaneous minimum release may be used on a case-by-case basis.
- (c) Flow design criteria are used to develop water quality based effluent limitations and for the design of wastewater treatment facilities. Deviations from a specific water quality standard resulting from discharges which are affirmatively demonstrated to be in compliance with water quality based effluent limitations for that standard will not be a violation pursuant to G.S. 143-215.6 when the actual flow is significantly less than the design flow.
- (d) In cases where the 7Q10 flow of the receiving stream is estimated to be zero, water quality based effluent limitations will be assigned as follows:
- (1) Where the 30Q2 flow is estimated to be greater than zero, effluent limitations for new or expanded (additional) discharges of oxygen consuming waste will be set at  $BOD_5 = 5 \text{ mg/l}$ ,  $NH_3\text{-N} = 2 \text{ mg/l}$  and  $DO = 6 \text{ mg/l}$ , unless it is determined that these limitations will not protect water quality standards. Requirements for existing discharges will be determined on a case-by-case basis by the Director. More stringent limits will be applied in cases where violations of water quality standards are



predicted to occur for a new or expanded discharge with the limits set pursuant to this Rule, or where existing limits are determined to be inadequate to protect water quality standards.

- (2) If the 30Q2 and 7Q10 flows are both estimated to be zero, no new or expanded (additional) discharge of oxygen consuming waste will be allowed. Requirements for existing discharges to streams where the 30Q2 and 7Q10 flows are both estimated to be zero will be determined on a case-by-case basis.
- (3) Other water quality standards will be protected by requiring the discharge to meet the standards unless the alternative limitations are determined by the Director to protect the classified water uses.

(e) Receiving water flow statistics will be estimated through consultation with the U.S. Geological Survey. Estimates for any given location may be based on actual flow data, modeling analyses, or other methods determined to be appropriate by the Commission or its designee.

Authority G.S. 143-214.1; 143-215.3(a)(1).

#### 15A NCAC 02B .0211 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS C WATERS

General. The water quality standards for all fresh surface waters are the basic standards applicable to Class C waters. ~~See Rule .0208 of this Section for standards for toxic substances and temperature. Water quality standards for temperature and numerical water quality standards for the protection of human health applicable to all fresh surface waters are in Rule .0208 of this Section.~~ Additional and more stringent standards applicable to other specific freshwater classifications are specified in Rules .0212, .0214, .0215, .0216, ~~.0217~~, .0218, .0219, .0223, .0224 and .0225 of this Section. Action Levels for purposes of NPDES permitting are specified in Item (22) of this Rule.

- (1) Best Usage of Waters: aquatic life propagation and maintenance of biological integrity (including fishing and fish), wildlife, secondary recreation, agriculture and any other usage except for primary recreation or as a source of water supply for drinking, culinary or food processing purposes;
- (2) Conditions Related to Best Usage: the waters shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard;
- (3) ~~Quality standards applicable to all fresh surface waters:~~
- (3) Chlorine, total residual: 17 ug/l;
- (4)(a) Chlorophyll a (corrected): not greater than 40 ug/l for lakes, reservoirs, and other waters subject to growths of macroscopic or

microscopic vegetation not designated as trout waters, and not greater than 15 ug/l for lakes, reservoirs, and other waters subject to growths of macroscopic or microscopic vegetation designated as trout waters (not applicable to lakes or reservoirs less than 10 acres in surface area). The Commission or its designee may prohibit or limit any discharge of waste into surface waters if, in the opinion of the Director, the surface waters experience or the discharge would result in growths of microscopic or macroscopic vegetation such that the standards established pursuant to this Rule would be violated or the intended best usage of the waters would be impaired;

- (5) Cyanide, total: 5.0 ug/L;
- (6)(b) Dissolved oxygen: not less than 6.0 mg/l for trout waters; for non-trout waters, not less than a daily average of 5.0 mg/l with a minimum instantaneous value of not less than 4.0 mg/l; swamp waters, lake coves or backwaters, and lake bottom waters may have lower values if caused by natural conditions;
- (7) Fecal coliform: shall not exceed a geometric mean of 200/100ml (MF count) based upon at least five consecutive samples examined during any 30 day period, nor exceed 400/100ml in more than 20 percent of the samples examined during such period. Violations of the fecal coliform standard are expected during rainfall events and, in some cases, this violation is expected to be caused by uncontrollable nonpoint source pollution. All coliform concentrations are to be analyzed using the membrane filter technique unless high turbidity or other adverse conditions necessitate the tube dilution method; in case of controversy over results, the MPN 5-tube dilution technique shall be used as the reference method;
- (8)(e) Floating solids, settleable solids, or sludge deposits: only such amounts attributable to sewage, industrial wastes or other wastes as shall not make the water unsafe or unsuitable for aquatic life and wildlife or impair the waters for any designated uses;
- (9) Fluorides: 1.8 mg/l;
- (10)(d) Gases, total dissolved: not greater than 110 percent of saturation;
- (e) ~~Organisms of the coliform group: fecal coliforms shall not exceed a geometric mean of 200/100ml (MF count) based upon at least five consecutive samples examined during any 30 day period, nor exceed 400/100ml in more than 20 percent of the samples examined during such period. Violations of the fecal coliform standard are expected during~~

~~rainfall events and, in some cases, this violation is expected to be caused by uncontrollable nonpoint source pollution. All coliform concentrations are to be analyzed using the membrane filter technique unless high turbidity or other adverse conditions necessitate the tube dilution method; in case of controversy over results, the MPN 5 tube dilution technique shall be used as the reference method;~~

**(11) Metals:**

**(a)** With the exception of mercury and selenium, freshwater aquatic life standards for metals shall be based upon measurement of the dissolved fraction of the metal. Mercury and Selenium water quality standards must be based upon measurement of the total recoverable metal. Alternative site-specific standards can be developed where studies are designed in accordance with the "Water Quality Standards Handbook: Second Edition" published by the US Environmental Protection Agency (EPA 823-B-94-005a) hereby incorporated by reference including any subsequent amendments;

**(b)** Freshwater metals standards that are not hardness-dependent are as follows:

- (i) Arsenic, dissolved, acute: 340 ug/l;
- (ii) Arsenic, dissolved, chronic: 150 ug/l;
- (iii) Beryllium, dissolved, acute: 65 ug/l;
- (iv) Beryllium, dissolved, chronic: 6.5 ug/l;
- (v) Chromium VI, dissolved, acute: 16 ug/l;
- (vi) Chromium VI, dissolved, chronic: 11 ug/l;
- (vii) Mercury, total recoverable, chronic: 0.012 ug/l;
- (viii) Selenium, total recoverable, chronic: 5 ug/l;
- (ix) Silver, dissolved, chronic: 0.06 ug/l;

Hardness-dependent freshwater metals standards are located in Sub-Item (c) and in Table A: Dissolved

Freshwater Standards for Hardness-Dependent Metals;

**(c)** Hardness-dependent freshwater metals standards are as follows:

**(i)** Hardness-dependent metals standards shall be derived using the equations specified in Table A: Dissolved Freshwater Standards for Hardness-Dependent Metals. If the actual instream hardness (expressed as CaCO<sub>3</sub> or Ca+Mg) is less than 25 milligrams/liter (mg/l), standards shall be calculated based upon 25 mg/l hardness. If the actual instream hardness is greater than 25 mg/l and less than 400 mg/l, standards will be calculated based upon the actual instream hardness. If the instream hardness is greater than 400 mg/l, the maximum applicable hardness shall be 400 mg/l;

**(ii)** Hardness-dependent metals standards in NPDES permitting: for NPDES permitting purposes, application of the equations in Table A: Dissolved Freshwater Standards for Hardness-Dependent Metals requires hardness values (expressed as CaCO<sub>3</sub> or Ca+Mg) established using the median of instream hardness data collected within the local US Geological Survey (USGS) and Natural Resources Conservation Service (NRCS) 8-digit Hydrologic Unit (HU). The minimum applicable instream hardness shall be 25 mg/l and the maximum applicable instream hardness shall be 400 mg/l, even when the actual median instream hardness is less than 25 mg/l and greater than 400 mg/l;

Table A: Dissolved Freshwater Standards for Hardness-Dependent Metals  
 Numeric standards listed below are calculated at 25 mg/l hardness for illustrative purposes.

<u>Metal</u>	<u>Equations for Hardness-Dependent Freshwater Metals (ug/l)</u>	<u>Standard at 25 mg/l hardness (ug/l)</u>
<u>Cadmium, Acute</u>	$\{1.136672 - [\ln \text{ hardness}](0.041838)\} \cdot e^{\{0.9151 [\ln \text{ hardness}] - 3.1485\}}$	<u>0.82</u>
<u>Cadmium, Acute Trout waters</u>	$\{1.136672 - [\ln \text{ hardness}](0.041838)\} \cdot e^{\{0.9151 [\ln \text{ hardness}] - 3.6236\}}$	<u>0.51</u>
<u>Cadmium, Chronic</u>	$\{1.101672 - [\ln \text{ hardness}](0.041838)\} \cdot e^{\{0.7998 [\ln \text{ hardness}] - 4.4451\}}$	<u>0.15</u>
<u>Chromium III, Acute</u>	$0.316 \cdot e^{\{0.8190 [\ln \text{ hardness}] + 3.7256\}}$	<u>180</u>
<u>Chromium III, Chronic</u>	$0.860 \cdot e^{\{0.8190 [\ln \text{ hardness}] + 0.6848\}}$	<u>24</u>
<u>Copper, Acute</u>	$0.960 \cdot e^{\{0.9422 [\ln \text{ hardness}] - 1.700\}}$ Or, <u>Aquatic Life Ambient Freshwater Quality Criteria—Copper 2007 Revision (EPA-822-R-07-001)</u>	<u>3.6</u>  <u>N/A</u>
<u>Copper, Chronic</u>	$0.960 \cdot e^{\{0.8545 [\ln \text{ hardness}] - 1.702\}}$ Or, <u>Aquatic Life Ambient Freshwater Quality Criteria—Copper 2007 Revision (EPA-822-R-07-001)</u>	<u>2.7</u>  <u>N/A</u>
<u>Lead, Acute</u>	$\{1.46203 - [\ln \text{ hardness}](0.145712)\} \cdot e^{\{1.273 [\ln \text{ hardness}] - 1.460\}}$	<u>14</u>
<u>Lead, Chronic</u>	$\{1.46203 - [\ln \text{ hardness}](0.145712)\} \cdot e^{\{1.273 [\ln \text{ hardness}] - 4.705\}}$	<u>0.54</u>
<u>Nickel, Acute</u>	$0.998 \cdot e^{\{0.8460 [\ln \text{ hardness}] + 2.255\}}$	<u>140</u>
<u>Nickel, Chronic</u>	$0.997 \cdot e^{\{0.8460 [\ln \text{ hardness}] + 0.0584\}}$	<u>16</u>
<u>Silver, Acute</u>	$0.85 \cdot e^{\{1.72 [\ln \text{ hardness}] - 6.59\}}$	<u>0.30</u>
<u>Zinc, Acute</u>	$0.978 \cdot e^{\{0.8473 [\ln \text{ hardness}] + 0.884\}}$	<u>36</u>
<u>Zinc, Chronic</u>	$0.986 \cdot e^{\{0.8473 [\ln \text{ hardness}] + 0.884\}}$	<u>36</u>

- (d) Compliance with acute instream metals standards shall only be evaluated using an average of two or more samples collected within one hour. Compliance with chronic instream metals standards shall only be evaluated using averages of a minimum of four samples taken on consecutive days, or as a 96-hour average;
- (e) With the exception of mercury and selenium, demonstrated attainment of the applicable aquatic life use in a waterbody will take precedence over

the application of the aquatic life criteria established for metals associated with these uses. An instream exceedence of the numeric criterion for metals shall not be considered to have caused an adverse impact to the instream aquatic community if biological monitoring has demonstrated attainment of biological integrity.

- ~~(12)~~ (12) Oils, deleterious substances, colored or other wastes: only such amounts as shall not render the waters injurious to public health, secondary recreation or to aquatic life and

wildlife or adversely affect the palatability of fish, aesthetic quality or impair the waters for any designated uses. For the purpose of implementing this Rule, oils, deleterious substances, colored or other wastes shall include but not be limited to substances that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines pursuant to 40 CFR 110.3(a)-(b) which are hereby incorporated by reference including any subsequent amendments and additions. This material is available for inspection at the Department of Environment and Natural Resources, Division of ~~Water Quality, Water Resources~~, 512 North Salisbury Street, Raleigh, North Carolina. ~~Copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9325 at a cost of forty five dollars (\$45.00);~~

**(13) Pesticides:**

- (a) Aldrin: 0.002 ug/l;
- (b) Chlordane: 0.004 ug/l;
- (c) DDT: 0.001 ug/l;
- (d) Demeton: 0.1 ug/l;
- (e) Dieldrin: 0.002 ug/l;
- (f) Endosulfan: 0.05 ug/l;
- (g) Endrin: 0.002 ug/l;
- (h) Guthion: 0.01 ug/l;
- (i) Heptachlor: 0.004 ug/l;
- (j) Lindane: 0.01 ug/l;
- (k) Methoxychlor: 0.03 ug/l;
- (l) Mirex: 0.001 ug/l;
- (m) Parathion: 0.013 ug/l;
- (n) Toxaphene: 0.0002 ug/l;

~~(g)~~(14) pH: shall be normal for the waters in the area, which generally shall range between 6.0 and 9.0 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions;

~~(h)~~(15) Phenolic compounds: only such levels as shall not result in fish-flesh tainting or impairment of other best usage;

(16) Polychlorinated biphenyls (total of all PCBs and congeners identified): 0.001 ug/l;

~~(i)~~(17) Radioactive substances:

~~(i)~~(a) Combined radium-226 and radium-228: the maximum average annual activity level (based on at least four samples collected quarterly) for combined radium-226 and radium-228 shall not exceed five picoCuries per liter;

~~(ii)~~(b) Alpha Emitters: the average annual gross alpha particle activity (including radium-226, but excluding radon and uranium) shall not exceed 15 picoCuries per liter;

~~(iii)~~(c) Beta Emitters: the maximum average annual activity level (based on at least four samples, collected quarterly) for strontium-90 shall not exceed eight picoCuries per liter; nor shall the average annual gross beta particle activity (excluding potassium-40 and other naturally occurring radio-nuclides) exceed 50 picoCuries per liter; nor shall the maximum average annual activity level for tritium exceed 20,000 picoCuries per liter;

~~(j)~~(18) Temperature: not to exceed 2.8 degrees C (5.04 degrees F) above the natural water temperature, and in no case to exceed 29 degrees C (84.2 degrees F) for mountain and upper piedmont waters and 32 degrees C (89.6 degrees F) for lower piedmont and coastal plain Waters; the temperature for trout waters shall not be increased by more than 0.5 degrees C (0.9 degrees F) due to the discharge of heated liquids, but in no case to exceed 20 degrees C (68 degrees F);

(19) Toluene: 11 ug/l or 0.36 ug/l in trout classified waters;

(20) Trialkyltin compounds: 0.07 ug/l expressed as tributyltin;

~~(k)~~(21) Turbidity: the turbidity in the receiving water shall not exceed 50 Nephelometric Turbidity Units (NTU) in streams not designated as trout waters and 10 NTU in streams, lakes or reservoirs designated as trout waters; for lakes and reservoirs not designated as trout waters, the turbidity shall not exceed 25 NTU; if turbidity exceeds these levels due to natural background conditions, the existing turbidity level shall not be increased. Compliance with this turbidity standard can be met when land management activities employ Best Management Practices (BMPs) [as defined by Rule .0202 of this Section] recommended by the Designated Nonpoint Source Agency [as defined by Rule .0202 of this Section]. BMPs must be in full compliance with all specifications governing the proper design, installation, operation and maintenance of such BMPs;

~~(l) Toxic substances: numerical water quality standards (maximum permissible levels) for the protection of human health applicable to all fresh surface waters are in Rule .0208 of this Section. Numerical water quality standards (maximum permissible levels) to protect aquatic life applicable to all fresh surface waters:~~

~~(i) Arsenic: 50 ug/l;~~

- (ii) ~~Beryllium: 6.5 ug/l;~~
- (iii) ~~Cadmium: 0.4 ug/l for trout waters and 2.0 ug/l for non-trout waters; attainment of these water quality standards in surface waters shall be based on measurement of total recoverable metals concentrations unless appropriate studies have been conducted to translate total recoverable metals to a toxic form. Studies used to determine the toxic form or translators must be designed according to the "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA 823-B-94-005a) or "The Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators;~~
- (iv) ~~Chlorine, total residual: 17 ug/l;~~
- (v) ~~Chromium, total recoverable: 50 ug/l;~~
- (vi) ~~Cyanide, 5.0 ug/l, unless site specific criteria are developed based upon the aquatic life at the site utilizing The Recalculation Procedure in Appendix B of Appendix L in the Environmental Protection Agency's Water Quality Standards Handbook hereby incorporated by reference including any subsequent amendments;~~
- (vii) ~~Fluorides: 1.8 mg/l;~~
- (viii) ~~Lead, total recoverable: 25 ug/l, collection of data on sources, transport and fate of lead shall be required as part of the toxicity reduction evaluation for dischargers who are out of compliance with whole effluent toxicity testing requirements and the concentration of lead in the effluent is concomitantly determined to exceed an instream level of 3.1 ug/l from the discharge;~~
- (ix) ~~Mercury: 0.012 ug/l;~~
- (x) ~~Nickel: 88 ug/l, attainment of these water quality standards in surface waters shall be based on measurement of total recoverable metals concentrations unless appropriate studies have been conducted to translate total recoverable metals to a toxic form. Studies used to determine the toxic form or translators must be designed according to the "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA 823-B-94-005a) or "The Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators;~~
- (xi) ~~Pesticides:~~
  - (A) ~~Aldrin: 0.002 ug/l;~~
  - (B) ~~Chlordane: 0.004 ug/l;~~
  - (C) ~~DDT: 0.001 ug/l;~~
  - (D) ~~Demeton: 0.1 ug/l;~~

- (E) ~~Dieldrin: 0.002 ug/l;~~
- (F) ~~Endosulfan: 0.05 ug/l;~~
- (G) ~~Endrin: 0.002 ug/l;~~
- (H) ~~Guthion: 0.01 ug/l;~~
- (I) ~~Heptachlor: 0.004 ug/l;~~
- (J) ~~Lindane: 0.01 ug/l;~~
- (K) ~~Methoxychlor: 0.03 ug/l;~~
- (L) ~~Mirex: 0.001 ug/l;~~
- (M) ~~Parathion: 0.013 ug/l;~~
- (N) ~~Toxaphene: 0.0002 ug/l;~~
- (xii) ~~Polychlorinated biphenyls: (total of all PCBs and congeners identified) 0.001 ug/l;~~
- (xiii) ~~Selenium: 5 ug/l;~~
- (xiv) ~~Toluene: 11 ug/l or 0.36 ug/l in trout waters;~~
- (xv) ~~Trialkyltin compounds: 0.07 ug/l expressed as tributyltin;~~

**(4)(22) Action Levels for Toxic Substances: Substances Applicable to NPDES Permits:**

- (a) ~~Copper: 7 ug/l; Copper, dissolved, chronic: 2.7 ug/l;~~
- (b) ~~Iron: 1.0 mg/l;~~
- (e)(b) ~~Silver: Silver, dissolved, chronic: 0.06 ug/l;~~
- (d)(c) ~~Zinc: Zinc, dissolved, chronic: 50 ug/l; 36 ug/l;~~
- (e)(d) ~~Chloride: 230 mg/l;~~

The hardness-dependent freshwater action levels for Copper and Zinc, provided here for illustrative purposes, corresponds to a hardness of 25 mg/l. Copper and Zinc action level values for other instream hardness values shall be calculated per the chronic equations specified in Item (11) of this Rule and in Table A: Dissolved Freshwater Standards for Hardness-Dependent Metals. If the Action Levels for any of the substances listed in this ~~Subparagraph Item~~ (which are generally not bioaccumulative and have variable toxicity to aquatic life because of chemical form, solubility, stream characteristics or associated waste characteristics) are determined by the waste load allocation to be exceeded in a receiving water by a discharge under the specified ~~low flow 7Q10~~ criterion for toxic substances (Rule .0206 in this Section), substances, the discharger shall monitor the chemical or biological effects of the discharge; efforts shall be made by all dischargers to reduce or eliminate these substances from their effluents. Those substances for which Action

Levels are listed in this ~~Subparagraph Item~~ shall be limited as appropriate in the NPDES permit based on the Action Levels listed in this ~~Subparagraph~~ if sufficient information (to be determined for metals by measurements of that portion of the dissolved instream concentration of the Action Level parameter attributable to a specific NPDES permitted discharge) exists to indicate that any of those substances may be a causative factor resulting in toxicity of the effluent. ~~NPDES permit limits may be based on translation of the toxic form to total recoverable metals. Studies used to determine the toxic form or translators must be designed according to "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA 823-B-94-005a) or "The Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators.~~

~~For purposes other than consideration of NPDES permitting of point source discharges as described in this Subparagraph, the Action Levels in this Rule, as measured by an appropriate analytical technique, per 15A NCAC 02B .0103(a), shall be considered as numerical instream water quality standards.~~

*Authority G.S. 143-214.1; 143-215.3(a)(1).*

**15A NCAC 02B .0212 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS WS-I WATERS**

The following water quality standards apply to surface waters within water supply watersheds that are classified WS-I. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-I waters.

- (1) The best usage of WS-I waters are as follows: a source of water supply for drinking, culinary, or food-processing purposes for those users desiring maximum protection of their water supplies; waters located on land in public ownership; and any best usage specified for Class C waters;
- (2) The conditions related to the best usage are as follows: waters of this class are protected water supplies within essentially natural and undeveloped watersheds in public ownership with no permitted point source dischargers except those specified in Rule .0104 of this Subchapter; waters within this class must be relatively unimpacted by nonpoint sources of

- pollution; land use management programs are required to protect waters from nonpoint source pollution; the waters, following treatment required by the ~~Division of Environmental Health~~, Division, shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, and food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard. The Class WS-I classification may be used to protect portions of Class WS-II, WS-III and WS-IV water supplies. For reclassifications occurring after the July 1, 1992 statewide reclassification, the more protective classification requested by local governments shall be considered by the Commission when all local governments having jurisdiction in the affected area(s) have adopted a resolution and the appropriate ordinances to protect the watershed or the Commission acts to protect a watershed when one or more local governments has failed to adopt necessary protection measures;
- (3) Quality standards applicable to Class WS-I Waters are as follows:
- (a) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;
  - (b) Nonpoint Source Pollution: none shall be allowed that would adversely impact the waters for use as a water supply or any other designated use;
  - (c) Organisms of coliform group: total coliforms not to exceed 50/100 ml (MF count) as a monthly geometric mean value in watersheds serving as unfiltered water supplies;
  - (d) Chlorinated phenolic compounds: not greater than 1.0 ug/l to protect water supplies from taste and odor problems from chlorinated phenols;
  - (e) Sewage, industrial wastes: none shall be allowed except those specified in ~~Subparagraph Item~~ (2) of this ~~Paragraph Rule~~ or Rule .0104 of this Subchapter;
  - (f) Solids, total dissolved: not greater than 500 mg/l;
  - (g) Total hardness: not greater than 100 mg/l as calcium ~~carbonate~~; carbonate ( $\text{CaCO}_3$  or  $\text{Ca} + \text{Mg}$ );
- (h) Toxic and other deleterious substances:
    - (i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-I waters:
      - (A) Barium: 1.0 mg/l;
      - (B) Chloride: 250 mg/l;
      - ~~(C) Manganese: 200 ug/l;~~
      - ~~(D)(C)~~ Nickel: 25 ug/l;
      - ~~(E)(D)~~ Nitrate nitrogen: 10.0 mg/l;
      - ~~(F)(E)~~ 2,4-D: ~~100 ug/l;~~ 70 ug/l;
      - ~~(G)(F)~~ 2,4,5-TP (Silvex): 10 ug/l;
      - ~~(H)(G)~~ Sulfates: 250 mg/l;
    - (ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-I waters:
      - (A) Aldrin: 0.05 ng/l;
      - (B) Arsenic: 10 ug/l;
      - (C) Benzene: 1.19 ug/l;
      - (D) Carbon tetrachloride: 0.254 ug/l;
      - (E) Chlordane: 0.8 ng/l;
      - (F) Chlorinated benzenes: 488 ug/l;
      - (G) DDT: 0.2 ng/l;
      - (H) Dieldrin: 0.05 ng/l;
      - (I) Dioxin: 0.000005 ng/l;
      - (J) Heptachlor: 0.08 ng/l;
      - (K) Hexachlorobutadiene: 0.44 ug/l;
      - (L) Polynuclear aromatic hydrocarbons (total of all PAHs): 2.8 ng/l;
      - (M) Tetrachloroethane (1,1,2,2): 0.17 ug/l;
      - (N) Tetrachloroethylene: 0.7 ug/l;

- (O) Trichloroethylene:  
2.5 ug/l;
- (P) Vinyl Chloride:  
0.025 ug/l.

*Authority G.S. 143-214.1; 143-215.3(a)(1).*

**15A NCAC 02B .0214 FRESH SURFACE WATER  
QUALITY STANDARDS FOR CLASS WS-II WATERS**

The following water quality standards apply to surface waters within water supply watersheds that are classified WS-II. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-II waters.

- (1) The best usage of WS-II waters are as follows: a source of water supply for drinking, culinary, or food-processing purposes for those users desiring maximum protection for their water supplies where a WS-I classification is not feasible and any best usage specified for Class C waters;
- (2) The conditions related to the best usage are as follows: waters of this class are protected as water supplies which are in predominantly undeveloped watersheds and meet average watershed development density levels as specified in Sub-Items (3)(b)(i)(A), (3)(b)(i)(B), (3)(b)(ii)(A) and (3)(b)(ii)(B) of this Rule; discharges which qualify for a General Permit pursuant to 15A NCAC 02H .0127, trout farm discharges, recycle (closed loop) systems that only discharge in response to 10-year storm events and other stormwater discharges are allowed in the entire watershed; new domestic and industrial discharges of treated wastewater are not allowed in the entire watershed; the waters, following treatment required by the ~~Division of Environmental Health, Division~~, shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, and food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard. The Class WS-II classification may be used to protect portions of Class WS-III and WS-IV water supplies. For reclassifications of these portions of Class WS-III and WS-IV water supplies occurring after the July 1, 1992 statewide reclassification, the more protective classification requested by local governments shall be considered by the Commission when all local governments having jurisdiction in the affected area(s) have adopted a resolution and the appropriate ordinances to protect the

watershed or the Commission acts to protect a watershed when one or more local governments has failed to adopt necessary protection measures;

- (3) Quality standards applicable to Class WS-II Waters are as follows:

- (a) Sewage, industrial wastes, non-process industrial wastes, or other wastes: none shall be allowed except for those specified in either Item (2) of this Rule and Rule .0104 of this Subchapter; none shall be allowed that have an adverse effect on human health or that are not effectively treated to the satisfaction of the Commission and in accordance with the requirements of the ~~Division of Environmental Health, North Carolina Department of Environment and Natural Resources. Division~~. Any discharger may be required upon request by the Commission to disclose all chemical constituents present or potentially present in their wastes and chemicals which could be spilled or be present in runoff from their facility which may have an adverse impact on downstream water quality. These facilities may be required to have spill and treatment failure control plans as well as perform special monitoring for toxic substances;

- (b) Nonpoint Source and Stormwater Pollution: none that would adversely impact the waters for use as a water supply or any other designated use;

- (i) Nonpoint Source and Stormwater Pollution Control Criteria for Entire Watershed:

- (A) Low Density Option: development density must be limited to either no more than one dwelling unit per acre of single family detached residential development (or 40,000 square foot lot excluding roadway right-of-way) or 12 percent built-upon area for all other residential and



- non-residential development in the watershed outside of the critical area; stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;
- (B) High Density Option: if new development exceeds the low density option requirements as stated in Sub-Item (3)(b)(i)(A) of this Rule, then engineered stormwater controls must be used to control runoff from the first inch of rainfall; new residential and non-residential development shall not exceed 30 percent built-upon area;
- (C) Land within the watershed shall be deemed compliant with the density requirements if the following condition is met: the density of all existing development at the time of reclassification does not exceed the density requirement when densities are averaged throughout the entire watershed area at the time of classification;
- (D) Cluster development is allowed on a project-by-project basis as follows:
- (I) overall density of the project meets associated density or stormwater control requirements of this Rule;
- (II) buffers meet the minimum statewide water supply watershed protection requirements;
- (III) built-upon areas are designed and located to minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas, and maximize the flow length through vegetated areas;
- (IV) areas of concentrated development are located in upland areas and away, to the maximum extent practicable, from surface waters and drainageways;
- (V) remainder of tract to remain in vegetated or natural state;
- (VI) area in the vegetated or natural state may be conveyed to a property owners association, a local government for preservation as a park or greenway, a conservation organization, or placed in a permanent conservation or farmland preservation easement;
- (VII) a maintenance agreement for the vegetated or natural area shall be filed with the Register of Deeds; and
- (VIII) cluster development that

- meets the applicable low density option requirements shall transport stormwater runoff from the development by vegetated conveyances to the maximum extent practicable;
- (E) A maximum of 10 percent of each jurisdiction's portion of the watershed outside of the critical area as delineated on July 1, 1993 may be developed with new development projects and expansions of existing development of up to 70 percent built-upon surface area in addition to the new development approved in compliance with the appropriate requirements of Sub-Item (3)(b)(i)(A) or Sub-Item (3)(b)(i)(B) of this Rule. For expansions to existing development, the existing built-upon surface area is not counted toward the allowed 70 percent built-upon surface area. A local government having jurisdiction within the watershed may transfer, in whole or in part, its right to the 10 percent/70 percent land area to another local government within the watershed upon submittal of a joint resolution and review by the Commission. When the water supply watershed is composed of public lands, such as National Forest land, local governments may count the public land acreage within the watershed outside of the critical area in calculating the acreage allowed under this provision. For local governments that do not choose to use the high density option in that WS-II watershed, each project must, to the maximum extent practicable, minimize built-upon surface area, direct stormwater runoff away from surface waters and incorporate best management practices to minimize water quality impacts. If the local government selects the high density development option within that WS-II watershed, then engineered stormwater controls must be employed for the new development;
- (F) If local governments choose the high density development option which requires stormwater controls, then they shall assume ultimate responsibility for operation and maintenance of the required controls as outlined in Rule .0104 of this Subchapter;
- (G) Minimum 100 foot vegetative buffer is required for all new development activities that exceed the low density option requirements as specified in Sub-Items (3)(b)(i)(A) and Sub-Item (3)(b)(ii)(A) of this Rule, otherwise a minimum 30 foot vegetative buffer for development activities is required along all perennial waters indicated on the most recent versions of U.S.G.S. 1:24,000 (7.5

- minute) scale topographic maps or as determined by local government studies. Nothing in this Rule shall stand as a bar to artificial streambank or shoreline stabilization;
- (H) No new development is allowed in the buffer; water dependent structures, or other structures such as flag poles, signs and security lights, which result in only de minimus increases in impervious area and public projects such as road crossings and greenways may be allowed where no practicable alternative exists. These activities shall minimize built-upon surface area, direct runoff away from the surface waters and maximize the utilization of BMPs;
- (I) No NPDES permits shall be issued for landfills that discharge treated leachate;
- (ii) Critical Area Nonpoint Source and Stormwater Pollution Control Criteria:
- (A) Low Density Option: new development is limited to either no more than one dwelling unit of single family detached residential development per two acres (or 80,000 square foot lot excluding roadway right-of-way) or six percent built-upon area for all other residential and non-residential development; stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;
- (B) High Density Option: if new development density exceeds the low density requirements specified in Sub-Item (3)(b)(ii)(A) of this Rule, then engineered stormwater controls must be used to control runoff from the first inch of rainfall; new residential and non-residential development density not to exceed 24 percent built-upon area;
- (C) No new permitted sites for land application of residuals or petroleum contaminated soils are allowed;
- (D) No new landfills are allowed;
- (c) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;
- (d) Odor producing substances contained in sewage or other wastes: only such amounts, whether alone or in combination with other substances or wastes, as shall not cause taste and odor difficulties in water supplies which cannot be corrected by treatment, impair the palatability of fish, or have a deleterious effect upon any best usage established for waters of this class;
- (e) Chlorinated phenolic compounds: not greater than 1.0 ug/l to protect water supplies from taste and odor problems from chlorinated phenols;
- (f) Total hardness: not greater than 100 mg/l as calcium ~~carbonate~~; carbonate ( $\text{CaCO}_3$  or  $\text{Ca} + \text{Mg}$ );
- (g) Total dissolved solids: not greater than 500 mg/l;
- (h) Toxic and other deleterious substances:
- (i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-II waters:
- (A) Barium: 1.0 mg/l;
- (B) Chloride: 250 mg/l;

- (C) ~~Manganese: 200 ug/l;~~  
~~(D)(C)~~ Nickel: 25 ug/l;  
~~(E)(D)~~ Nitrate nitrogen: 10 mg/l;  
~~(F)(E)~~ 2,4-D: ~~100 ug/l;~~ 70 ug/l;  
~~(G)(F)~~ 2,4,5-TP (Silvex): 10 ug/l;  
~~(H)(G)~~ Sulfates: 250 mg/l;
- (ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-II waters:
- (A) Aldrin: 0.05 ng/l;  
 (B) Arsenic: 10 ug/l;  
 (C) Benzene: 1.19 ug/l;  
 (D) Carbon tetrachloride: 0.254 ug/l;  
 (E) Chlordane: 0.8 ng/l;  
 (F) Chlorinated benzenes: 488 ug/l;  
 (G) DDT: 0.2 ng/l;  
 (H) Dieldrin: 0.05 ng/l;  
 (I) Dioxin: 0.000005 ng/l;  
 (J) Heptachlor: 0.08 ng/l;  
 (K) Hexachlorobutadiene: 0.44 ug/l;  
 (L) Polynuclear aromatic hydrocarbons (total of all PAHs): 2.8 ng/l;  
 (M) Tetrachloroethane (1,1,2,2): 0.17 ug/l;  
 (N) Tetrachloroethylene: 0.7 ug/l;  
 (O) Trichloroethylene: 2.5 ug/l;  
 (P) Vinyl Chloride: 0.025 ug/l.

- (2) The conditions related to the best usage are as follows: waters of this class are protected as water supplies which are generally in low to moderately developed watersheds and meet average watershed development density levels as specified in Sub-Items (3)(b)(i)(A), (3)(b)(i)(B), (3)(b)(ii)(A) and (3)(b)(ii)(B) of this Rule; discharges that qualify for a General Permit pursuant to 15A NCAC 02H .0127, trout farm discharges, recycle (closed loop) systems that only discharge in response to 10-year storm events, and other stormwater discharges are allowed in the entire watershed; treated domestic wastewater discharges are allowed in the entire watershed but no new domestic wastewater discharges are allowed in the critical area; no new industrial wastewater discharges except non-process industrial discharges are allowed in the entire watershed; the waters, following treatment required by the ~~Division of Environmental Health, Division,~~ shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, or food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard. The Class WS-III classification may be used to protect portions of Class WS-IV water supplies. For reclassifications of these portions of WS-IV water supplies occurring after the July 1, 1992 statewide reclassification, the more protective classification requested by local governments shall be considered by the Commission when all local governments having jurisdiction in the affected area(s) have adopted a resolution and the appropriate ordinances to protect the watershed or the Commission acts to protect a watershed when one or more local governments has failed to adopt necessary protection measures;
- (3) Quality standards applicable to Class WS-III Waters are as follows:
- (a) Sewage, industrial wastes, non-process industrial wastes, or other wastes: none shall be allowed except for those specified in Item (2) of this Rule and Rule .0104 of this Subchapter; none shall be allowed that have an adverse effect on human

Authority G.S. 143-214.1; 143-215.3(a)(1).

#### **15A NCAC 02B .0215 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS WS-III WATERS**

The following water quality standards apply to surface water supply waters that are classified WS-III. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-III waters.

- (1) The best usage of WS-III waters are as follows: a source of water supply for drinking,

health or that are not effectively treated to the satisfaction of the Commission and in accordance with the requirements of the ~~Division of Environmental Health, North Carolina Department of Environment and Natural Resources.~~ Division.

Any discharger may be required by the Commission to disclose all chemical constituents present or potentially present in their wastes and chemicals which could be spilled or be present in runoff from their facility which may have an adverse impact on downstream water quality. These facilities may be required to have spill and treatment failure control plans as well as perform special monitoring for toxic substances;

(b) Nonpoint Source and Stormwater Pollution: none that would adversely impact the waters for use as water supply or any other designated use;

(i) Nonpoint Source and Stormwater Pollution Control Criteria For Entire Watershed:

(A) Low Density Option: development density must be limited to either no more than two dwelling units of single family detached residential development per acre (or 20,000 square foot lot excluding roadway right-of-way) or 24 percent built-upon area for all other residential and non-residential development in watershed outside of the critical area; stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;

(B) High Density Option: if new development density exceeds the low density option requirements specified in Sub-Item (3)(b)(i)(A) of this Rule then development must control runoff

from the first inch of rainfall; new residential and non-residential development shall not exceed 50 percent built-upon area;

(C) Land within the watershed shall be deemed compliant with the density requirements if the following condition is met: the density of all existing development at the time of reclassification does not exceed the density requirement when densities are averaged throughout the entire watershed area;

(D) Cluster development is allowed on a project-by-project basis as follows:

(I) overall density of the project meets associated density or stormwater control requirements of this Rule;

(II) buffers meet the minimum statewide water supply watershed protection requirements;

(III) built-upon areas are designed and located to minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas, and

- |        |  |     |  |
|--------|--|-----|--|
|        | maximize the flow length through vegetated areas;  |     | extent practicable;  |
| (IV)   | areas of concentrated development are located in upland areas and away, to the maximum extent practicable, from surface waters and drainageways;   | (E) | A maximum of 10 percent of each jurisdiction's portion of the watershed outside of the critical area as delineated on July 1, 1993 may be developed with new development projects and expansions of existing development of up to 70 percent built-upon surface area in addition to the new development approved in compliance with the appropriate requirements of Sub-Item (3)(b)(i)(A) or Sub-Item (3)(b)(i)(B) of this Rule. For expansions to existing development, the existing built-upon surface area is not counted toward the allowed 70 percent built-upon surface area. A local government having jurisdiction within the watershed may transfer, in whole or in part, its right to the 10 percent/70 percent land area to another local government within the watershed upon submittal of a joint resolution and review by the Commission. When the water supply watershed is composed of public lands, such as National Forest land, local governments may count the public land acreage within the watershed outside of the critical area in figuring the acreage allowed under this provision. For local governments that do not choose to use the high density option in that WS-III watershed, each project must, to the maximum extent practicable, |
| (V)    | remainder of tract to remain in vegetated or natural state;  |     |  |
| (VI)   | area in the vegetated or natural state may be conveyed to a property owners association, a local government for preservation as a park or greenway, a conservation organization or placed in a permanent conservation or farmland preservation easement; |     |  |
| (VII)  | a maintenance agreement for the vegetated or natural area shall be filed with the Register of Deeds; and   |     |  |
| (VIII) | cluster development that meets the applicable low density option requirements shall transport stormwater runoff from the development by vegetated conveyances to the maximum   |     |  |

- minimize built-upon surface area, direct stormwater runoff away from surface waters, and incorporate best management practices to minimize water quality impacts. If the local government selects the high density development option within that WS-III watershed, then engineered stormwater controls must be employed for the new development;
- (F) If local governments choose the high density development option which requires engineered stormwater controls, then they shall assume ultimate responsibility for operation and maintenance of the required controls as outlined in Rule .0104 of this Subchapter;
- (G) Minimum 100 foot vegetative buffer is required for all new development activities that exceed the low density requirements as specified in Sub-Item (3)(b)(i)(A) and Sub-Item (3)(b)(ii)(A) of this Rule, otherwise a minimum 30 foot vegetative buffer for development is required along all perennial waters indicated on the most recent versions of U.S.G.S. 1:24,000 (7.5 minute) scale topographic maps or as determined by local government studies. Nothing in this Rule shall stand as a bar to artificial streambank or shoreline stabilization;
- (H) No new development is allowed in the buffer; water
- dependent structures, or other structures such as flag poles, signs and security lights, which result in only de minimus increases in impervious area and public projects such as road crossings and greenways may be allowed where no practicable alternative exists. These activities shall minimize built-upon surface area, direct runoff away from surface waters and maximize the utilization of BMPs;
- (I) No NPDES permits shall be issued for landfills that discharge treated leachate;
- (ii) Critical Area Nonpoint Source and Stormwater Pollution Control Criteria:
- (A) Low Density Option: new development limited to either no more than one dwelling unit of single family detached residential development per acre (or 40,000 square foot lot excluding roadway right-of-way) or 12 percent built-upon area for all other residential and non-residential development; stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;
- (B) High Density Option: if new development exceeds the low density requirements specified in Sub-Item (3)(b)(ii)(A) of this Rule, then engineered stormwater controls must be used to

- control runoff from the first inch of rainfall; development shall not exceed 30 percent built-upon area;
- (C) No new permitted sites for land application of residuals or petroleum contaminated soils are allowed;
- (D) No new landfills are allowed;
- (c) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;
- (d) Odor producing substances contained in sewage, industrial wastes, or other wastes: only such amounts, whether alone or in combination with other substances or wastes, as shall not cause taste and odor difficulties in water supplies which cannot be corrected by treatment, impair the palatability of fish, or have a deleterious effect upon any best usage established for waters of this class;
- (e) Chlorinated phenolic compounds: not greater than 1.0 ug/l to protect water supplies from taste and odor problems from chlorinated phenols;
- (f) Total hardness: not greater than 100 mg/l as calcium carbonate; carbonate ~~(CaCO<sub>3</sub> or Ca + Mg)~~;
- (g) Total dissolved solids: not greater than 500 mg/l;
- (h) Toxic and other deleterious substances:
- (i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-III waters:
- (A) Barium: 1.0 mg/l;
- (B) Chloride: 250 mg/l;
- ~~(C) Manganese: 200 ug/l;~~
- ~~(D)~~(C) Nickel: 25 ug/l;
- ~~(E)~~(D) Nitrate nitrogen: 10 mg/l;
- ~~(F)~~(E) 2,4-D: ~~100 ug/l~~; 70 ug/l;
- (ii)
- ~~(G)~~(F) 2,4,5-TP (Silvex): 10 ug/l;
- ~~(H)~~(G) Sulfates: 250 mg/l;
- Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-III waters:
- (A) Aldrin: 0.05 ng/l;
- (B) Arsenic: 10 ug/l;
- (C) Benzene: 1.19 ug/l;
- (D) Carbon tetrachloride: 0.254 ug/l;
- (E) Chlordane: 0.8 ng/l;
- (F) Chlorinated benzenes: 488 ug/l;
- (G) DDT: 0.2 ng/l;
- (H) Dieldrin: 0.05 ng/l;
- (I) Dioxin: 0.000005 ng/l;
- (J) Heptachlor: 0.08 ng/l;
- (K) Hexachlorobutadiene: 0.44 ug/l;
- (L) Polynuclear aromatic hydrocarbons (total of all PAHs): 2.8 ng/l;
- (M) Tetrachloroethane (1,1,2,2): 0.17 ug/l;
- (N) Tetrachloroethylene: 0.7 ug/l;
- (O) Trichloroethylene: 2.5 ug/l;
- (P) Vinyl Chloride: 0.025 ug/l.

*Authority G.S. 143-214.1; 143-215.3(a)(1).*

#### **15A NCAC 02B .0216 FRESH SURFACE WATER QUALITY STANDARDS FOR WS-IV WATERS**

The following water quality standards apply to surface water supply waters that are classified WS-IV. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-IV waters.

- (1) The best usage of WS-IV waters are as follows: a source of water supply for drinking, culinary, or food-processing purposes for those users where a more protective WS-I, WS-II or WS-III classification is not feasible and any other best usage specified for Class C waters;
- (2) The conditions related to the best usage are as follows: waters of this class are protected as water supplies which are generally in



moderately to highly developed watersheds or protected areas and meet average watershed development density levels as specified in Sub-Items (3)(b)(i)(A), (3)(b)(i)(B), (3)(b)(ii)(A) and (3)(b)(ii)(B) of this Rule; discharges which qualify for a General Permit pursuant to 15A NCAC 02H .0127, trout farm discharges, recycle (closed loop) systems that only discharge in response to 10-year storm events, other stormwater discharges and domestic wastewater discharges shall be allowed in the protected and critical areas; treated industrial wastewater discharges are allowed in the protected and critical areas; however, new industrial wastewater discharges in the critical area shall be required to meet the provisions of 15A NCAC 02B .0224(1)(b)(iv), (v) and (vii), and 15A NCAC 02B .0203; new industrial connections and expansions to existing municipal discharges with a pretreatment program pursuant to 15A NCAC 02H .0904 are allowed; the waters, following treatment required by the ~~Division of Environmental Health, Division~~, shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, or food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard. The Class WS-II or WS-III classifications may be used to protect portions of Class WS-IV water supplies. For reclassifications of these portions of WS-IV water supplies occurring after the July 1, 1992 statewide reclassification, the more protective classification requested by local governments shall be considered by the Commission when all local governments having jurisdiction in the affected area(s) have adopted a resolution and the appropriate ordinances to protect the watershed or the Commission acts to protect a watershed when one or more local governments has failed to adopt necessary protection measures;

- (3) Quality standards applicable to Class WS-IV Waters are as follows:
- (a) Sewage, industrial wastes, non-process industrial wastes, or other wastes: none shall be allowed except for those specified in Item (2) of this Rule and Rule .0104 of this Subchapter and none shall be allowed that shall have an adverse effect on human health or that are not

effectively treated to the satisfaction of the Commission and in accordance with the requirements of the ~~Division of Environmental Health, North Carolina Department of Environment and Natural Resources. Division~~. Any discharges or industrial users subject to pretreatment standards may be required by the Commission to disclose all chemical constituents present or potentially present in their wastes and chemicals which could be spilled or be present in runoff from their facility which may have an adverse impact on downstream water supplies. These facilities may be required to have spill and treatment failure control plans as well as perform special monitoring for toxic substances;

- (b) Nonpoint Source and Stormwater Pollution: none shall be allowed that would adversely impact the waters for use as water supply or any other designated use.
- (i) Nonpoint Source and Stormwater Pollution Control Criteria For Entire Watershed or Protected Area:
- (A) Low Density Option: development activities which require a Sedimentation/Erosion Control Plan in accordance with 15A NCAC 04 established by the North Carolina Sedimentation Control Commission or approved local government programs as delegated by the Sedimentation Control Commission shall be limited to no more than either: two dwelling units of single family detached development per acre (or 20,000 square foot lot excluding roadway right-of-way) or 24 percent built-upon on area for all other residential and non-residential development; or three dwelling units per acre or 36 percent

- built-upon area for projects without curb and gutter street systems in the protected area outside of the critical area; stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;
- (B) High Density Option: if new development activities which require a Sedimentation/Erosion Control Plan exceed the low density requirements of Sub-Item (3)(b)(i)(A) of this Rule then development shall control the runoff from the first inch of rainfall; new residential and non-residential development shall not exceed 70 percent built-upon area;
- (C) Land within the critical and protected area shall be deemed compliant with the density requirements if the following condition is met: the density of all existing development at the time of reclassification does not exceed the density requirement when densities are averaged throughout the entire area;
- (D) Cluster development shall be allowed on a project-by-project basis as follows:
- (I) overall density of the project meets associated density or stormwater control requirements of this Rule;
- (II) buffers meet the minimum statewide water supply watershed protection requirements;
- (III) built-upon areas are designed and located to minimize stormwater runoff impact to the receiving waters, minimize concentrated stormwater flow, maximize the use of sheet flow through vegetated areas, and maximize the flow length through vegetated areas;
- (IV) areas of concentrated development are located in upland areas and away, to the maximum extent practicable, from surface waters and drainageways;
- (V) remainder of tract to remain in vegetated or natural state;
- (VI) area in the vegetated or natural state may be conveyed to a property owners association, a local government for preservation as a park or greenway, a conservation organization, or placed in a permanent conservation or farmland preservation easement;
- (VII) a maintenance agreement for the vegetated or natural area shall be filed with the Register of Deeds; and
- (VIII) cluster development that meets the applicable low density option requirements shall

- transport  
stormwater runoff  
from the  
development by  
vegetated  
conveyances to the  
maximum extent  
practicable;
- (E) If local governments choose the high density development option which requires engineered stormwater controls, then they shall assume ultimate responsibility for operation and maintenance of the required controls as outlined in Rule .0104 of this Subchapter;
- (F) Minimum 100 foot vegetative buffer is required for all new development activities that exceed the low density option requirements as specified in Sub-Item (3)(b)(i)(A) or Sub-Item (3)(b)(ii)(A) of this Rule, otherwise a minimum 30 foot vegetative buffer for development shall be required along all perennial waters indicated on the most recent versions of U.S.G.S. 1:24,000 (7.5 minute) scale topographic maps or as determined by local government studies;
- (G) No new development shall be allowed in the buffer; water dependent structures, or other structures, such as flag poles, signs and security lights, which result in only de minimus increases in impervious area and public projects such as road crossings and greenways may be allowed where no practicable alternative exists. These activities
- shall minimize  
built-upon surface area,  
divert runoff away from  
surface waters and  
maximize the utilization  
of BMPs;
- (H) For local governments that do not use the high density option, a maximum of 10 percent of each jurisdiction's portion of the watershed outside of the critical area as delineated on July 1, 1995 may be developed with new development projects and expansions to existing development of up to 70 percent built-upon surface area in addition to the new development approved in compliance with the appropriate requirements of Sub-Item (3)(b)(i)(A) of this Rule. For expansions to existing development, the existing built-upon surface area shall not be counted toward the allowed 70 percent built-upon surface area. A local government having jurisdiction within the watershed may transfer, in whole or in part, its right to the 10 percent/70 percent land area to another local government within the watershed upon submittal of a joint resolution for review by the Commission. When the designated water supply watershed area is composed of public land, such as National Forest land, local governments may count the public land acreage within the designated watershed area outside of the critical area in figuring the acreage allowed under this provision. Each project

- shall, to the maximum extent practicable, minimize built-upon surface area, direct stormwater runoff away from surface waters and incorporate best management practices to minimize water quality impacts;
- (ii) Critical Area Nonpoint Source and Stormwater Pollution Control Criteria:
- (A) Low Density Option: new development activities which require a Sedimentation/Erosion Control Plan in accordance with 15A NCAC 04 established by the North Carolina Sedimentation Control Commission or approved local government programs as delegated by the Sedimentation Control Commission shall be limited to no more than two dwelling units of single family detached development per acre (or 20,000 square foot lot excluding roadway right-of-way) or 24 percent built-upon area for all other residential and non-residential development; stormwater runoff from the development shall be transported by vegetated conveyances to the maximum extent practicable;
- (B) High Density Option: if new development density exceeds the low density requirements specified in Sub-Item (3)(b)(ii)(A) of this Rule, engineered stormwater controls shall be used to control runoff from the first inch of rainfall; new residential and non-residential development shall not exceed 50 percent built-upon area;
- (C) No new permitted sites for land application of residuals or petroleum contaminated soils shall be allowed;
- (D) No new landfills shall be allowed;
- (c) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;
- (d) Odor producing substances contained in sewage, industrial wastes, or other wastes: only such amounts, whether alone or in combination with other substances or waste, as will not cause taste and odor difficulties in water supplies which can not be corrected by treatment, impair the palatability of fish, or have a deleterious effect upon any best usage established for waters of this class;
- (e) Chlorinated phenolic compounds: not greater than 1.0 ug/l to protect water supplies from taste and odor problems due to chlorinated phenols shall be allowed. Specific phenolic compounds may be given a different limit if it is demonstrated not to cause taste and odor problems and not to be detrimental to other best usage;
- (f) Total hardness shall not exceed 100 mg/l as calcium ~~carbonate~~carbonate (CaCO<sub>3</sub> or Ca + Mg);
- (g) Total dissolved solids shall not exceed 500 mg/l;
- (h) Toxic and other deleterious substances:
- (i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-IV waters:
- (A) Barium: 1.0 mg/l;
- (B) Chloride: 250 mg/l;
- ~~(C) Manganese: 200 ug/l;~~
- ~~(D)(C)~~ Nickel: 25 ug/l;
- ~~(E)(D)~~ Nitrate nitrogen: 10.0 mg/l;
- ~~(F)(E)~~ 2,4-D: ~~100 ug/l;~~ 70 ug/l;
- ~~(G)(F)~~ 2,4,5-TP (Silvex): 10 ug/l;
- ~~(H)(G)~~ Sulfates: 250 mg/l;
- (ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue

consumption for carcinogens in Class WS-IV waters:

- (A) Aldrin: 0.05 ng/l;
- (B) Arsenic: 10 ug/l;
- (C) Benzene: 1.19 ug/l;
- (D) Carbon tetrachloride: 0.254 ug/l;
- (E) Chlordane: 0.8 ng/l;
- (F) Chlorinated benzenes: 488 ug/l;
- (G) DDT: 0.2 ng/l;
- (H) Dieldrin: 0.05 ng/l;
- (I) Dioxin: 0.000005 ng/l;
- (J) Heptachlor: 0.08 ng/l;
- (K) Hexachlorobutadiene: 0.44 ug/l;
- (L) Polynuclear aromatic hydrocarbons (total of all PAHs): 2.8 ng/l;
- (M) Tetrachloroethane (1,1,2,2): 0.17 ug/l;
- (N) Tetrachloroethylene: 0.7 ug/l;
- (O) Trichloroethylene: 2.5 ug/l;
- (P) Vinyl Chloride: 0.025 ug/l.

- (2) The conditions related to the best usage are as follows: waters of this class are protected water supplies; the waters, following treatment required by the ~~Division of Environmental Health, Division~~, shall meet the Maximum Contaminant Level concentrations considered safe for drinking, culinary, or food-processing purposes which are specified in the national drinking water regulations and in the North Carolina Rules Governing Public Water Supplies, 15A NCAC 18C .1500; no categorical restrictions on watershed development or wastewater discharges are required, however, the Commission or its designee may apply management requirements for the protection of waters downstream of receiving waters (15A NCAC 02B .0203). Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard;

- (3) Quality standards applicable to Class WS-V Waters are as follows:

- (a) Sewage, industrial wastes, non-process industrial wastes, or other wastes: none shall be allowed that have an adverse effect on human health or that are not effectively treated to the satisfaction of the Commission and in accordance with the requirements of the ~~Division of Environmental Health, North Carolina Department of Environment and Natural Resources, Division~~. Any discharges or industrial users subject to pretreatment standards may be required by the Commission to disclose all chemical constituents present or potentially present in their wastes and chemicals which could be spilled or be present in runoff from their facility which may have an adverse impact on downstream water supplies. These facilities may be required to have spill and treatment failure control plans as well as perform special monitoring for toxic substances;
- (b) MBAS (Methylene-Blue Active Substances): not greater than 0.5 mg/l to protect the aesthetic qualities of water supplies and to prevent foaming;
- (c) Nonpoint Source and Stormwater Pollution: none that would adversely impact the waters for use as water supply or any other designated use;
- (d) Odor producing substances contained in sewage, industrial wastes, or other

*Authority G.S. 143-214.1; 143-215.3(a)(1).*

#### **15A NCAC 02B .0218 FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS WS-V WATERS**

The following water quality standards apply to surface water supply waters that are classified WS-V. Water quality standards applicable to Class C waters as described in Rule .0211 of this Section also apply to Class WS-V waters.

- (1) The best usage of WS-V waters are as follows: waters that are protected as water supplies which are generally upstream and draining to Class WS-IV waters; or waters previously used for drinking water supply purposes; or waters used by industry to supply their employees, but not municipalities or counties, with a raw drinking water supply source, although this type of use is not restricted to WS-V classification; and all Class C uses. The Commission may consider a more protective classification for the water supply if a resolution requesting a more protective classification is submitted from all local governments having land use jurisdiction within the affected watershed;

- wastes: only such amounts, whether alone or in combination with other substances or waste, as will not cause taste and odor difficulties in water supplies which can not be corrected by treatment, impair the palatability of fish, or have a deleterious effect upon any best usage established for waters of this class;
- (e) Chlorinated phenolic compounds: not greater than 1.0 ug/l to protect water supplies from taste and odor problems due to chlorinated phenols; specific phenolic compounds may be given a different limit if it is demonstrated not to cause taste and odor problems and not to be detrimental to other best usage;
- (f) Total hardness: not greater than 100 mg/l as calcium ~~carbonate~~carbonate ( $\text{CaCO}_3$  or  $\text{Ca} + \text{Mg}$ );
- (g) Total dissolved solids: not greater than 500 mg/l;
- (h) Toxic and other deleterious substances:
- (i) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for non-carcinogens in Class WS-V waters:
- (A) Barium: 1.0 mg/l;
- (B) Chloride: 250 mg/l;
- ~~(C) Manganese: 200 ug/l;~~
- ~~(D)(C)~~ Nickel: 25 ug/l;
- ~~(E)(D)~~ Nitrate nitrogen: 10.0 mg/l;
- ~~(F)(E)~~ 2,4-D: ~~100 ug/l;~~70 ug/l;
- ~~(G)(F)~~ 2,4,5-TP (Silvex): 10 ug/l;
- ~~(H)(G)~~ Sulfates: 250 mg/l.
- (ii) Water quality standards (maximum permissible concentrations) to protect human health through water consumption and fish tissue consumption for carcinogens in Class WS-V waters:
- (A) Aldrin: 0.05 ng/l;
- (B) Arsenic: 10 ug/l;
- (C) Benzene: 1.19 ug/l;
- (D) Carbon tetrachloride: 0.254 ug/l;
- (E) Chlordane: 0.8 ng/l;
- (F) Chlorinated benzenes: 488 ug/l;
- (G) DDT: 0.2 ng/l;
- (H) Dieldrin: 0.05 ng/l;
- (I) Dioxin: 0.000005 ng/l;
- (J) Heptachlor: 0.08 ng/l;
- (K) Hexachlorobutadiene: 0.44 ug/l;
- (L) Polynuclear aromatic hydrocarbons (total of all PAHs): 2.8 ng/l;
- (M) Tetrachloroethane (1,1,2,2): 0.17 ug/l;
- (N) Tetrachloroethylene: 0.7 ug/l;
- (O) Trichloroethylene: 2.5 ug/l;
- (P) Vinyl Chloride: 0.025 ug/l.

*Authority G.S. 143-214.1; 143-215.3(a)(1).*

#### **15A NCAC 02B .0220 TIDAL SALT WATER QUALITY STANDARDS FOR CLASS SC WATERS**

General. The water quality standards for all tidal salt waters are the basic standards applicable to Class SC waters. Additional and more stringent standards applicable to other specific tidal salt water classifications are specified in Rules .0221 and .0222 of this Section. Action Levels, for purposes of NPDES permitting, are specified in Item (20) of this Rule.

- (1) Best Usage of Waters: any usage except primary recreation or shellfishing for market purposes; usages include aquatic life propagation and maintenance of biological integrity (including fishing, fish and functioning PNAs), wildlife, and secondary recreation;
- (2) Conditions Related to Best Usage: the waters shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, and secondary recreation. Any source of water pollution which precludes any of these uses, including their functioning as PNAs, on either a short-term or a long-term basis shall be considered to be violating a water quality standard;
- ~~(3) Quality standards applicable to all tidal salt waters:~~
- ~~(a)(3)~~ Chlorophyll a (corrected): not greater than 40 ug/l in sounds, estuaries, and other waters subject to growths of macroscopic or microscopic vegetation. The Commission or its designee may prohibit or limit any

discharge of waste into surface waters if, in the opinion of the Director, the surface waters experience or the discharge would result in growths of microscopic or macroscopic vegetation such that the standards established pursuant to this Rule would be violated or the intended best usage of the waters would be impaired;

(4) Cyanide: 1 ug/l;

~~(b)(5)~~ Dissolved oxygen: not less than 5.0 mg/l, except that swamp waters, poorly flushed tidally influenced streams or embayments, or estuarine bottom waters may have lower values if caused by natural conditions;

(6) Enterococcus, including *Enterococcus faecalis*, *Enterococcus faecium*, *Enterococcus avium* and *Enterococcus gallinarum*: not to exceed a geometric mean of 35 enterococci per 100 ml based upon a minimum of five samples within any consecutive 30 days. In accordance with 33 U.S.C. 1313 (Federal Water Pollution Control Act) for purposes of beach monitoring and notification, "Coastal Recreational Waters Monitoring, Evaluation and Notification" regulations (15A NCAC 18A .3400) are hereby incorporated by reference including any subsequent amendments;

~~(e)(7)~~ Floating solids, settleable solids, or sludge deposits: only such amounts attributable to sewage, industrial wastes or other wastes, as shall not make the waters unsafe or unsuitable for aquatic life and wildlife, or impair the waters for any designated uses;

~~(d)(8)~~ Gases, total dissolved: not greater than 110 percent of saturation;

~~(e)~~ Enterococcus, including *Enterococcus faecalis*, *Enterococcus faecium*, *Enterococcus avium* and *Enterococcus gallinarum*: not to exceed a geometric mean of 35 enterococci per 100 ml based upon a minimum of five samples within any consecutive 30 days. In accordance with 33 U.S.C. 1313 (Federal Water Pollution Control Act) for purposes of beach monitoring and notification, "Coastal Recreational Waters Monitoring, Evaluation and Notification" regulations (15A NCAC 18A .3400) are hereby incorporated by reference including any subsequent amendments;

(9) Metals:

(a) With the exception of mercury and selenium, tidal salt water quality standards for metals shall be based upon measurement of the dissolved fraction of the metals. Mercury and Selenium must be based upon measurement of the total recoverable metal. Alternative site-specific standards can be developed where studies are designed according to the

"Water Quality Standards Handbook: Second Edition" published by the US Environmental Protection Agency (EPA 823-B-94-005a) hereby incorporated by reference, including any subsequent amendments;

(b) Compliance with acute instream metals standards shall only be evaluated using an average of two or more samples collected within one hour. Compliance with chronic instream metals standards shall only be evaluated using averages of a minimum of four samples taken on consecutive days, or as a 96-hour average;

(c) With the exception of mercury and selenium, demonstrated attainment of the applicable aquatic life use in a waterbody will take precedence over the application of the aquatic life criteria established for metals associated with these uses. An instream exceedence of the numeric criterion for metals shall not be considered to have caused an adverse impact to the instream aquatic community if biological monitoring has demonstrated attainment of biological integrity;

(d) Acute and chronic tidal salt water quality metals standards are as follows:

- (i) Arsenic, acute: 69 ug/l;
- (ii) Arsenic, chronic: 36 ug/l;
- (iii) Cadmium, acute: 40 ug/l;
- (iv) Cadmium, chronic: 8.8 ug/l;
- (v) Chromium VI, acute: 1100 ug/l;
- (vi) Chromium VI, chronic: 50 ug/l;
- (vii) Copper, acute: 4.8 ug/l;
- (viii) Copper, chronic: 3.1 ug/l;
- (ix) Lead, acute: 210 ug/l;
- (x) Lead, chronic: 8.1 ug/l;
- (xi) Mercury, total recoverable, chronic: 0.025 ug/l;
- (xii) Nickel, acute: 74 ug/l;
- (xiii) Nickel, chronic: 8.2 ug/l;
- (xiv) Selenium, total recoverable, chronic: 71 ug/l;
- (xv) Silver, acute: 1.9 ug/l;
- (xvi) Silver, chronic: 0.1 ug/l;
- (xvii) Zinc, acute: 90 ug/l;
- (xviii) Zinc, chronic: 81 ug/l;

~~(f)(10)~~ Oils, deleterious substances, colored or other wastes: only such amounts as shall not render the waters injurious to public health, secondary recreation or aquatic life and

wildlife or adversely affect the palatability of fish, aesthetic quality or impair the waters for any designated uses. For the purpose of implementing this Rule, oils, deleterious substances, colored or other wastes shall include but not be limited to substances that cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines pursuant to 40 CFR 110.3;

(11) Pesticides:

- (a) Aldrin: 0.003 ug/l;
- (b) Chlordane: 0.004 ug/l;
- (c) DDT: 0.001 ug/l;
- (d) Demeton: 0.1 ug/l;
- (e) Dieldrin: 0.002 ug/l;
- (f) Endosulfan: 0.009 ug/l;
- (g) Endrin: 0.002 ug/l;
- (h) Guthion: 0.01 ug/l;
- (i) Heptachlor: 0.004 ug/l;
- (j) Lindane: 0.004 ug/l;
- (k) Methoxychlor: 0.03 ug/l;
- (l) Mirex: 0.001 ug/l;
- (m) Parathion: 0.178 ug/l;
- (n) Toxaphene: 0.0002 ug/l;

~~(g)~~(12) pH: shall be normal for the waters in the area, which generally shall range between 6.8 and 8.5 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions;

~~(h)~~(13) Phenolic compounds: only such levels as shall not result in fish-flesh tainting or impairment of other best usage;

(14) Polychlorinated biphenyls: (total of all PCBs and congeners identified) 0.001 ug/l;

~~(i)~~(15) Radioactive substances:

~~(i)~~(a) Combined radium-226 and radium-228: The maximum average annual activity level (based on at least four samples, collected quarterly) for combined radium-226, and radium-228 shall not exceed five picoCuries per liter;

~~(ii)~~(b) Alpha Emitters. The average annual gross alpha particle activity (including radium-226, but excluding radon and uranium) shall not exceed 15 picoCuries per liter;

~~(iii)~~(c) Beta Emitters. The maximum average annual activity level (based on at least four samples, collected quarterly) for strontium-90 shall not exceed eight picoCuries per liter; nor shall the average annual gross beta particle activity (excluding potassium-40 and other naturally occurring radio-nuclides) exceed 50 picoCuries per liter; nor shall the maximum average annual activity

level for tritium exceed 20,000 picoCuries per liter;

~~(j)~~(16) Salinity: changes in salinity due to hydrological modifications shall not result in removal of the functions of a PNA. Projects that are determined by the Director to result in modifications of salinity such that functions of a PNA are impaired will be required to employ water management practices to mitigate salinity impacts;

~~(k)~~(17) Temperature: shall not be increased above the natural water temperature by more than 0.8 degrees C (1.44 degrees F) during the months of June, July, and August nor more than 2.2 degrees C (3.96 degrees F) during other months and in no cases to exceed 32 degrees C (89.6 degrees F) due to the discharge of heated liquids;

(18) Trialkyltin compounds: 0.007 ug/l expressed as tributyltin;

~~(l)~~(19) Turbidity: the turbidity in the receiving water shall not exceed 25 NTU; if turbidity exceeds this level due to natural background conditions, the existing turbidity level shall not be increased. Compliance with this turbidity standard can be met when land management activities employ Best Management Practices (BMPs) [as defined by Rule .0202 of this Section] recommended by the Designated Nonpoint Source Agency (as defined by Rule .0202 of this Section). BMPs must be in full compliance with all specifications governing the proper design, installation, operation and maintenance of such BMPs;

~~(m) Toxic substances: numerical water quality standards (maximum permissible levels) to protect aquatic life applicable to all tidal saltwaters:~~

~~(i) Arsenic, total recoverable: 50 ug/l;~~

~~(ii) Cadmium: 5.0 ug/l; attainment of these water quality standards in surface waters shall be based on measurement of total recoverable metals concentrations unless appropriate studies have been conducted to translate total recoverable metals to a toxic form. Studies used to determine the toxic form or translators must be designed according to the "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA 823-B-94-005a) or "The~~



~~Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators;~~

- (iii) Chromium, total: 20 ug/l;
- (iv) Cyanide: 1.0 ug/l;
- (v) Mercury: 0.025 ug/l;
- (vi) Lead, total recoverable: 25 ug/l; collection of data on sources, transport and fate of lead shall be required as part of the toxicity reduction evaluation for dischargers that are out of compliance with whole effluent toxicity testing requirements and the concentration of lead in the effluent is concomitantly determined to exceed an instream level of 3.1 ug/l from the discharge;
- (vii) Nickel: 8.3 ug/l; attainment of these water quality standards in surface waters shall be based on measurement of total recoverable metals concentrations unless appropriate studies have been conducted to translate total recoverable metals to a toxic form. Studies used to determine the toxic form or translators must be designed according to the "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA 823-B-94-005a) or "The Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the

~~Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators;~~

- (viii) Pesticides:
  - (A) Aldrin: 0.003 ug/l;
  - (B) Chlordane: 0.004 ug/l;
  - (C) DDT: 0.001 ug/l;
  - (D) Demeton: 0.1 ug/l;
  - (E) Dieldrin: 0.002 ug/l;
  - (F) Endosulfan: 0.009 ug/l;
  - (G) Endrin: 0.002 ug/l;
  - (H) Guthion: 0.01 ug/l;
  - (I) Heptachlor: 0.004 ug/l;
  - (J) Lindane: 0.004 ug/l;
  - (K) Methoxychlor: 0.03 ug/l;
  - (L) Mirex: 0.001 ug/l;
  - (M) Parathion: 0.178 ug/l;
  - (N) Toxaphene: 0.0002 ug/l;
- (ix) Polychlorinated biphenyls: (total of all PCBs and congeners identified) 0.001 ug/l;
- (x) Selenium: 71 ug/l;
- (xi) Trialkyltin compounds: 0.007 ug/l expressed as tributyltin.

(4)(20) Action Levels for Toxic Substances: Substances Applicable to NPDES Permits:

- (a) ~~Copper:~~ Copper, dissolved, chronic: 3 ug/l; 3.1 ug/l;
- (b) ~~Silver:~~ Silver, dissolved, chronic: 0.1 ug/l;
- (c) ~~Zinc:~~ Zinc, dissolved, chronic: 86 ug/l; 81 ug/l

If the chronic Action Levels for any of the substances listed in this Subparagraph Item (which are generally not bioaccumulative and have variable toxicity to aquatic life because of chemical form, solubility, stream characteristics or associated waste

characteristics) are determined by the waste load allocation to be exceeded in a receiving water by a discharge under the ~~specified low-flow~~ 7Q10 flow criterion for toxic substances (Rule .0206 in this Section), substances, the discharger shall be required to monitor the chemical or biological effects of the discharge; efforts shall be made by all dischargers to reduce or eliminate these substances from their effluents. Those substances for which Action Levels are listed in this ~~Subparagraph-Item~~ may ~~shall~~ be limited as appropriate in the NPDES permit if sufficient information (to be determined for metals by measurements of that portion of the dissolved instream concentration of the Action Level parameter attributable to a specific NPDES permitted discharge) exists to indicate that any of those substances may be a causative factor resulting in toxicity of the effluent. NPDES permit limits may be based on translation of the toxic form to total recoverable metals. Studies used to determine the toxic form or translators must be designed according to: "Water Quality Standards Handbook Second Edition" published by the Environmental Protection Agency (EPA 823-B-94-005a) or "The Metals Translator: Guidance For Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" published by the Environmental Protection Agency (EPA 823-B-96-007) which are hereby incorporated by reference including any subsequent amendments. The Director shall consider conformance to EPA guidance as well as the presence of environmental conditions that limit the applicability of translators in approving the use of metal translators.

Authority G.S. 143-214.1; 143-215.3(a)(1).

## TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

### CHAPTER 23 – IRRIGATION CONTRACTORS' LICENSING BOARD

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Irrigation Contractors' Licensing Board intends to adopt the rule cited as 21 NCAC 23 .0105; and amend the rules cited as 21 NCAC 23 .0206; .0207; and .0505.*

Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:
- ☐ RRC certified on:
- ☒ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c): [www.nciclb.org](http://www.nciclb.org)

**Proposed Effective Date:** October 1, 2014

**Instructions on How to Demand a Public Hearing:** (must be requested in writing within 15 days of notice): Please submit a written request for a public hearing to Barbara Geiger, P.O. Box 41421, Raleigh, NC 27629.

#### Reason for Proposed Action:

**21 NCAC 23 .0206(a)** – The Board proposes to amend this rule in order to allow the Board to elect to refer contested cases to OAH for disposition as allowed under N.C. Gen. Stat. 150B-40(e). The rule currently requires that all contested cases be heard only by a majority of the Board.

**21 NCAC 23 .0207** – The intention is to allow the Board additional flexibility in the timely issuance of final agency decisions, insofar as they meet the requirements of the Administrative Procedures Act. This additional flexibility is necessary as the Board continues to hold regular Board meetings on a monthly basis.

**21 NCAC 23 .0505 (l) and (m)** – These amendments are proposed in order to reflect the increasing diversity in accepted industry practice in the treatment of the specified components.

**21 NCAC 23 .0105** – Like other self-regulating professional boards, the Board seeks to ensure the ethical integrity, transparency and accountability of its licensees in the course of their business conduct.

**Comments may be submitted to:** Barbara Geiger, P.O. Box 41421, Raleigh, NC 27629; fax (919) 872-1598; email [info@nciclb.org](mailto:info@nciclb.org)

**Comment period ends:** August 15, 2014

**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 (check all that apply).**

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)

☒ **No fiscal note required by G.S. 150B-21.4**

### **SECTION .0100 - LICENSING**

#### **21 NCAC 23 .0105      ETHICS**

It shall be unethical to defame competitors by falsely imputing to them dishonorable conduct or competency. A licensee may be disciplined by the Board upon a showing of such defamation or harassment.

*Authority G.S. 89G-5.*

### **SECTION .0200 – HEARING RULES OF THE NORTH CAROLINA IRRIGATION CONTRACTORS LICENSING BOARD**

#### **21 NCAC 23 .0206      CONDUCT OF HEARING**

(a) Hearings in contested cases shall be conducted by a majority of the ~~Board~~ Board or referred to the Office of Administrative Hearings pursuant to ~~The chair shall serve as presiding officer unless he is absent or disqualified, in which case the vice chair shall preside. Hearings shall be conducted as prescribed in G.S. 150B-40.~~

(b) Disqualification. An affidavit seeking disqualification of any Board member, if filed in good faith and in a timely manner, shall be ruled on by the remaining members of the Board. An affidavit is considered timely if it is filed:

- (1) Prior to the hearing; or
- (2) As soon after the commencement of the hearing as the affiant becomes aware of facts which give rise to his belief that a Board member should be disqualified.

(c) Evidence. The admission of evidence in a hearing in a contested case shall be as prescribed in G.S. 150B-41.

*Authority G.S. 89G-5; 150B-38.*

#### **21 NCAC 23 .0207      DECISION OF BOARD**

(a) The form and content of the Board's decision in a contested case shall be as prescribed by G.S. 150B-42(a), and its decision shall be served upon the parties in a manner consistent with the statute.

(b) At the conclusion of the hearing and deliberations, the Board shall announce its findings of fact and conclusions of law. If the Board concludes that the hearing respondent has violated a provision of the rules in this Chapter or of G.S. 89G, it shall announce the nature and extent of any sanction it orders be imposed upon the hearing respondent. The Board may then direct its legal counsel, the respondent's counsel, if represented, or such independent legal counsel as may be provided by the North Carolina Department of Justice for the purpose of advising the Board in the course of that hearing, to draft a proposed order consistent with its announcement. ~~The person tasked with drafting the order shall submit the original to the Board's administrator and a copy to all other counsel participating in the hearing at least 10 days prior to the Board's next regularly scheduled meeting. The Order shall be drafted in accordance with G.S. 150B-42.~~

(c) The official record of the hearing in a contested case shall contain those items specified in G.S. 150B-42(b).

*Authority G.S. 89G-5; 150B-38.*

#### **21 NCAC 23 .0505      TRENCHING AND PIPING**

(a) All portions of an irrigation system that do not meet the standards in this Rule must be noted on the record drawing.

(b) An irrigation contractor shall protect the root systems of the trees on the site by not trenching across the established root systems of existing trees and shrubs.

(c) When the irrigation contractor finds that it is necessary to trench into the root zone of an established plant, trenching shall be done so that the trench is at a right angle to the base of the tree or shrub.

(d) An irrigation contractor shall cut damaged roots cleanly at a right angle.

(e) Piping in irrigation systems must be designed and installed so that the flow of water in the pipe will not exceed a velocity of five feet per second for polyvinyl chloride (PVC), polyethylene (PE) and high density polyethylene (HDPE) pipe and seven feet per second for metal pipe.

(f) The main line and lateral line piping must be installed to provide a minimum of 12 inches between the top of the pipe and the natural grade.

(g) The bottom of the trench shall be smooth and provide a flat bed on which to rest the pipe.

(h) The irrigation contractor shall clean backfill material of any debris that may damage the pipe.

(i) If a utility, man-made structure or roots create an unavoidable obstacle which makes the 12 inch depth coverage requirement impractical, the piping shall be installed inside a larger section of pipe for added protection.

(j) When swing joints are used, the depth of the pipe must allow the swing joint to operate as designed.

(k) All trenches and holes created during installation of an irrigation system must be backfilled and compacted to the final grade. The trench shall be compacted in lifts no greater than six inches to insure proper compaction.

(l) All new irrigation systems that are installed using PVC shall be ~~cleaned with a PVC pipe cleaner or primer on male and female ends~~ prepared according to manufacturer's recommendations prior to applying the PVC cement connection.

(m) When the irrigation contractor uses PR 200 pipe, the manufacturer's directions shall be followed ~~primer shall not be used.~~

(n) The irrigation contractor shall use the manufacturer's approved lubricant

(o) The irrigation contractor shall use Teflon tape on all threaded fittings, wrapping the tape three times to insure a proper seal.

(p) When the irrigation system uses reclaimed water the irrigation contractor shall use purple pipe or mark the pipe with purple tape placed above all piping in the system. Tape must be within six inches of the top of the pipe. The irrigation contractor shall use purple valve box covers and purple quick coupler flaps and place an eight inch by eight inch sign with purple background stating "RECLAIMED WATER-DO NOT DRINK," and "AGUA DE RECUPERION-NO BEBER."

Authority G.S. 89G-5.

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## CHAPTER 26 – LICENSING BOARD OF LANDSCAPE ARCHITECTS

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Licensing Board of Landscape Architects intends to adopt the rules cited as 21 NCAC 26 .0106-.0107; .0309-.0315 and amend the rules cited as 21 NCAC 26 .0101; .0103; .0105; .0201; .0301; .0303; .0307; and .0510.*

Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:
- ☐ RRC certified on:
- ☒ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):  
[www.ncbola.org](http://www.ncbola.org)

**Proposed Effective Date:** October 1, 2014

**Public Hearing:**

**Date:** July 17, 2014

**Time:** 2:00 p.m.

**Location:** North Carolina State University Club, 4200 Hillsborough St, Raleigh, NC 27606

**Reason for Proposed Action:** *These rule amendments and adoptions make changes for clarity and consistency; make clarifying changes since the Board has now gone to a national examination; fulfill the mandate of N.C.G.S. 93B-2; provide for a definition section; change the terminology from "reciprocity" to "comity"; update and refine the continuing education procedures; establish exempt licensees for continuing education; establish, by rule, the Board's license renewal and reinstatement policies; reflect in the Board's rules the statutes governing corporate practice in North Carolina; and establish, by rule, the Board's disciplinary review process.*

**Comments may be submitted to:** Barbara U. Geiger, P.O. Box 41225, Raleigh, NC 27629, phone (919) 850-9088, fax (919)872-1598, email [contact@ncbola.org](mailto:contact@ncbola.org)

**Comment period ends:** August 15, 2014

**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 (check all that apply).**

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

## SECTION .0100 – STATUTORY AND ADMINISTRATIVE PROVISIONS

### 21 NCAC 26 .0101 AUTHORITY: NAME AND LOCATION OF BOARD

The "North Carolina Landscape Architecture Act," G.S. 89A, establishes and authorizes the "North Carolina Board of Landscape Architects," hereafter called the "~~board~~," "Board." Unless otherwise directed, all communications shall be addressed to the ~~board~~ Board at Post Office Box 41225, Raleigh, North Carolina 27629.

Authority G.S. 89A-3.1.

### 21 NCAC 26 .0103 ORGANIZATION OF THE BOARD: OFFICERS

~~Meeting~~ Meetings of the ~~board~~ Board shall be open and public except that the ~~board~~ Board may meet in the closed session to prepare, approve, administer or grade written examinations; or to examine and deliberate the qualifications of an applicant for registration; or to dispose of a proceeding to discipline a registered landscape architect.

Authority G.S. 89A-3.

### 21 NCAC 26 .0105 FEES

- (a) ~~Application fees~~ The fee for any license application shall be one hundred dollars (\$100.00).
- (b) Examination fees shall be equal to the current cost of examinations incurred by the Board, plus administrative costs, and shall be paid prior to the examination.
- (c) Fees for portions of examinations will be based on the actual charges to the ~~board~~ Board for procuring, administering and grading the portion of the exam. The fees shall be paid prior to the examination.
- (d) The fee for a license by ~~reciprocity~~ comity shall be one hundred fifty dollars (\$150.00).
- (e) The fee for a corporate certificate of registration shall be two hundred dollars (\$200.00).
- (f) The fee for the annual renewal of any certificate of registration of any person, firm or corporation shall be one hundred dollars (\$100.00).
- (g) Annual renewal fees received after ~~July 1~~ July 1st of each year shall be subject to a ~~one-time late payment penalty~~ late fee of fifty dollars (\$50.00). Lapse of license renewal in excess of

one year shall require an application reinstatement and an application fee of one hundred dollars (\$100.00).

(h) The fee for re-issue of a lost or damaged certificate ~~or permit is ten dollars (\$10.00).~~ shall be twenty-five dollars (\$25.00).

*Authority G.S. 89A-3.1; 89A-6.*

**21 NCAC 26 .0106      SUSPENSION OF AUTHORITY  
TO EXPEND FUNDS**

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

*Authority G.S. 93B-2.*

**21 NCAC 26.0107      DEFINITIONS**

(a) "Board Executive" means the administrator of the Board.

(b) "CLARB" means the Council of Landscape Architectural Registration Boards.

(c) "Contact hour" means 60 continuous minutes.

(d) "CEAC" means the Continuing Education Advisory Committee of the Board.

(e) "Direct Supervision" means the level of supervision by a licensed professional overseeing the work of another in which both work in circumstances where professional contact is relevant and routine, and the supervisor has both control over and detailed professional knowledge of the work prepared under his or her supervision.

(f) "Education Activity" means an activity that increases the professional knowledge or skills of a licensee and relates to the protection or enhancement of the health, safety and welfare of the public and is approved by the Board.

(g) "Examination" means the process by which the Board determines the experience, academic or other qualifications and fitness for practice of an applicant, and may include a written examination administered by the Board or a third party.

(h) "Foreign Corporation" means a foreign corporation as defined in G.S. 55B-16(b).

(i) "LAAB" means the Landscape Architecture Accreditation Board.

(j) "LARE" means the Landscape Architecture Registration Exam administered by the CLARB.

(k) "License Year" means July 1 through June 30.

(l) "Resident licensed professional" means a licensee who spends a majority of the licensee's normal working time in a specifically identified place of business within North Carolina. Such time shall not be less than a majority of the operating hours of the business. A licensed professional shall be the resident licensee at only one place of business at one time unless each business is at least one-third owned by the resident professional and is specifically approved by the Board after a determination that the businesses are integrated in operation, ownership, office location and that the licensee will be in responsible charge of the professional services.

*Authority G.S. 89A-3.1(2).*

**SECTION .0200 – PRACTICE OF REGISTERED  
LANDSCAPE ARCHITECTS**

**21 NCAC 26 .0201      BOARD LISTING OF  
INDIVIDUAL AND FIRM NAMES**

Every individual licensee, partnership, firm or corporation has the continuing responsibility of keeping the Board currently advised of ~~his proper and his, her or its~~ current mailing address and other contact information and the name or names under which ~~he is practicing~~ he, she or it is practicing landscape architecture. Each licensee or firm shall immediately notify the Board of any and all changes of ~~association or address~~ association, address or contact information. Upon the dissolution or change of a professional relationship, the member or members thereof shall ~~promptly~~ promptly notify the Board in writing concerning such dissolution, and of the succeeding status and addresses of the individual or ~~firm~~ firm within 10 days of the change.

*Authority G.S. 89A-3.1(2).*

**SECTION .0300 – EXAMINATION AND LICENSING  
PROCEDURES**

**21 NCAC 26 .0301      EXAMINATION AND  
LICENSURE**

(a) ~~Notice. The Board shall hold at least one examination during each year and may hold such additional examinations as may appear necessary. The secretary Board Executives shall give public notice of the time and place for each examination at least 60 days in advance of the date set for the examination.~~

~~(b) Examination. The Landscape Architect Registration Examination published by the Council of Landscape Architectural Registration Boards shall be the examination given by the Board, so long as the Board shall remain a member of the Council of Landscape Architectural Registration Boards. The Board may administer a state supplement to the Landscape Architecture Registration Exam (LARE) as allowed by the Council.~~

(a) The LARE published by CLARB shall be the examination recognized by the Board, so long as the Board shall remain a member of the CLARB. The Board may administer a state supplement to the LARE as allowed by the CLARB.

(b) All persons desiring to submit an application to take the LARE are encouraged to first make application through CLARB. Upon successfully taking and passing all sections of the LARE, candidates shall complete the Board application for license by examination and submit the non-refundable application fee as established in Rule .0105. If an application is complete and the applicant is otherwise qualified by statute and these rules to sit for examination, the Board shall approve the application for licensure by examination.

(c) The fees for the LARE, or parts thereof, are set by the CLARB. Fee information will be made available to all applicants for examination on the Board web site and may be obtained from the CLARB.

~~(d)(e) "Qualified Applicant" An applicant is deemed qualified to take the Landscape Architects Registration Examination (LARE) for examination and licensure upon graduation from a Landscape Architect's Accreditation Board (LAAB) LAAB accredited collegiate curriculum in landscape architecture and has completed the experience requirements, both as set forth in Paragraphs (d) and (e) of this Rule. architecture, passage of the LARE and the experience requirements of Paragraph (f) of this Rule.~~

~~(e)(d) ( Educational Requirements.—In allowing credit for education in fulfilling the minimum qualification requirements established by statute, the Board will allow credit for educational experience as follows: An an undergraduate, a masters, or a doctorate degree from an accredited curriculum approved by the Landscape Architectural Accreditation Board (LAAB) LAAB shall be deemed to have met the educational requirement.~~

~~(e) Experience Requirements.—~~

- ~~(1) An applicant shall have a minimum of 8,000 hours of professional experience in landscape architecture working under the direct supervision of a registered landscape architect. In submitting an application to the Board for registration, a licensed landscape architect shall certify that the applicant has completed the number of hours indicated on the form; or~~
- ~~(2) An applicant may petition the Board for up to 8,000 hours of experience credit by providing proof of work experience that is directly related to the practice of landscape architecture as defined by G.S. 89A-1(3).~~
- ~~(3) Experience credits shall be based on a full-time work week of 40 hours and a work year of at least 2,000 hours. Part time work must be fully described and can be given proportional credit.~~
- ~~(4) One cannot receive experience credit if the work is fulfilling an educational requirement.~~

~~(f) To fulfill the experience requirements established by statute an applicant shall have a minimum of 8,000 hours of professional experience in landscape architecture working under the direct supervision of a registered landscape architect. In submitting an application to the Board for registration, a licensed landscape architect shall certify that the applicant has completed the number of hours indicated on the form. An applicant may petition the Board for up to 8,000 hours of experience credit by providing proof of work experience that is directly related to the practice of landscape architecture as defined by G.S. 89A-1(3). Experience credits shall be based on a full-time work week of 40 hours and a work year of at least 2,000 hours. Part-time work must be fully described and can be given proportional credit. An applicant is ineligible to receive experience credit if the work was in fulfillment of an educational requirement.~~

~~(g) The Board shall treat as confidential and not subject to disclosure except to the extent required by law or by Rule of the Board individual test scores and applications and material relating thereto, including letters of reference relating to an application.~~

*Authority G.S. 89A-3.1(3); 89A-4(a), (b).*

## **21 NCAC 26 .0303**

### **RECIPROCITY LICENSE BY COMITY**

~~(a) To assure that the requirements of the other state are at least equivalent to those of this state, an applicant for a certificate of registration by reciprocity license by comity shall show education and experience equal to those required of applicants residing in this state who seek registration licensure by examination.~~

~~(b) An application for a certificate of registration by reciprocity license by comity must be made on the form provided by the board Board and must be accompanied by the fee.~~

~~(c) To be approved for a certificate of registration by reciprocity, license by comity the applicant must meet the following requirements:~~

- ~~(1) Provide evidence of having successfully completed the written examination published established by the Council of Landscape Architectural Registration Boards CLARB or hold a certificate issued by the Council of Landscape Architectural Registration Boards; CLARB; and~~
- ~~(2) Provide certification from the proper official of any state having a landscape architectural registration act that the individual is currently certified, licensed or registered and in good standing in that state.~~
- ~~(3) In lieu of the requirements of Subparagraph (1) of this Paragraph an applicant for reciprocity who was licensed prior to the adoption of a national examination shall show proof of having met the requirements of their licensing state at the time of their licensure.~~
- ~~(4)(3) Submit such additional information concerning the applicant's qualifications as may be requested by the board Board.~~
- ~~(5)(4) Submit examples of work upon request.~~

~~(d) In lieu of the requirements of Subparagraph (c)(1) of this Rule, an applicant for licensure by comity who was licensed prior to the adoption of a national written examination shall show proof of having met the requirements of their licensing state at the time of their licensure.~~

*Authority G.S. 89A-3.1(3); 89A-4(c).*

## **21 NCAC 26 .0307**

### **CONTINUING EDUCATION AS A CONDITION OF ANNUAL RENEWAL**

~~(a) Every licensee shall meet the continuing education requirements for professional development as a condition for license renewal.~~

~~(a)(b) In order for a licensee to qualify for license renewal as a Landscape Architect landscape architect in North Carolina, the licensee must have completed 10 contact hours of Board approved continuing education within the previous year license year. Such continuing education shall be obtained by active participation in courses, seminars, sessions or programs approved by the Board.~~

~~(b)(c) To be acceptable for credit toward this requirement, all courses, seminars, webinars, sessions or programs shall first be submitted to a five member Advisory Committee of North~~

~~Carolina licensed Landscape Architects appointed by the Chairman of the Board with the advice and consent of the Board. The Continuing Education Advisory Committee the CEAC which shall recommend any course, seminar, webinar, session or program for continuing education credit to the Board that the Advisory Committee CEAC finds to meet determines meets the criteria in Paragraph (b)(1)(2) of this Rule Rule .0308(b) through (d) of this Section.~~

~~(d) Advisory Committee members shall be reimbursed per diem and travel expenses for official meetings at rates equivalent to rates allowed for Board members. Advisory Committee CEAC members shall serve at the discretion of the Board.~~

~~(1) Each course, seminar, session or program to be recommended for approval by the Board shall, in the opinion of a majority of the members of the Advisory Committee, CEAC, have a direct relationship to the practice of Landscape Architecture landscape architecture as defined in Chapter 89A of the General Statutes of North Carolina and contain elements which will enhance the health, safety and welfare of the citizens of North Carolina served by North Carolina licensed Landscape Architects.~~

~~(2) The Continuing Education Advisory Committee CEAC shall meet at least once during each three month quarter of the year and act on each course, seminar, session or program properly submitted for its review. Each program shall be recommended for approval, recommended for disapproval or deferred for lack of information. Programs recommended for approval shall be accompanied by a brief statement of findings by the committee of how the program meets the criteria established by this Rule. Programs deferred for lack of information shall be deferred only once; and if information is still lacking when next considered, the program shall be recommended for disapproval. Programs may be recommended for pre-approval by the Advisory Committee CEAC before they actually occur.~~

~~(3) Note: insert schedule for submittal of hours here).~~

~~(4) The Board may establish, in consultation with the CEAC, mandatory continuing education topics for a calendar year.~~

~~(e)(d) Documentation of compliance with this Section Rule shall be by affidavit provided on the application for license renewal. Erroneous or false information attested to by the licensee shall be deemed as grounds for denial of license renewal and possible suspension of license or denial of consideration for future license reinstatement, at the discretion of the Board.~~

~~(d) Twenty contact hours within the previous two years shall be allowed for license renewals during the period of July 1, 1995 to June 30, 1996.~~

~~(e) The Board may establish, in consultation with the CEAC, mandatory continuing education topics for a license year.~~

*Authority G.S. 89A-3.1(2); 89A-5.*

## **21 NCAC 26 .0308 DUTIES AND FUNCTIONS OF CONTINUING EDUCATION ADVISORY COMMITTEE (CEAC)**

(a) CEAC members shall be reimbursed per diem and travel expenses for official meetings at rates equivalent to rates allowed for Board members.

(b) CEAC members shall serve at the discretion of the Board. The Board Chair shall appoint the CEAC Chair who shall serve at the discretion of the Board Chair.

(c) Each continuing education activity recommended for approval by the Board shall, in the opinion of a majority of the members of the CEAC, have a direct relationship to the practice of landscape architecture as defined in Chapter 89A of the General Statutes of North Carolina and contain elements which will enhance the health, safety and welfare of the citizens of North Carolina served by North Carolina licensed landscape architects.

(d) The CEAC shall meet at least once during each three month quarter of the year and act on each course, seminar, webinar, session or program properly submitted for its review. Each program shall be recommended for approval, recommended for disapproval or deferred for lack of information. Programs recommended for approval shall be accompanied by a brief statement of findings by the committee of how the program meets the criteria established by this Rule.

(e) An activity may be recommended for pre-approval by the CEAC before it actually occurs.

*Authority G.S. 89A-3.1(6); 89A-5.*

## **21 NCAC 26 .0309 EXEMPTIONS**

(a) A registrant shall be exempt from the continuing education requirements for any of the following reasons:

(1) New registrants by way of examination or comity for the current registration year.

(2) A licensee serving on temporary active duty in the armed forces of the United States for a period of time exceeding 90 consecutive days in a year or as provided by statute, whichever is greater.

(3) A licensee experiencing physical disability or illness if supporting documentation is approved by the Board. Such documentation shall be in the form of a sworn statement by the registrant, a statement from a physician, or medical records which show that the disability or illness prevented registrant's participation in a course which the registrant had enrolled, or prevented registrant's participation in the continuing education program for at least 90 consecutive days in a year.

(4) A licensee with emeritus status from the Board.

(b) In order to return to active practice, registrants who have received an exemption shall complete continuing education requirements for each exempted year, not to exceed two years.

*Authority G.S. 89A-3.1(6); 89A-5*

**21 NCAC 26 .0310 REINSTATEMENT CRITERIA**

A former licensee may only apply for reinstatement pursuant to G.S. 89A-5 if he or she has earned all delinquent contact hours within the 12 months preceding the application. However, if the total number of contact hours required to become current exceeds 24, then upon application, the Board shall determine the number of hours required.

*Authority G.S. 89A-3.1(6); 89A-5*

**21 NCAC 26 .0311 APPLICATIONS FOR APPROVAL**

(a) Renewal applications require the completion of a continuing education form specified by the Board outlining credit claimed. The licensee must supply sufficient detail on the form to permit audit verification, certify and sign the form, and submit the form with the renewal application and fee.

(b) The following schedule for submittal of hours shall apply:

- (1) Application for approval of continuing education shall be submitted online or by paper application.
- (2) The deadline for submittal of an application shall be seven days prior to the regularly scheduled meeting of the CEAC.
- (3) Activity forms submitted after May 15<sup>th</sup> cannot be guaranteed approval within the license renewal year.
- (4) Applications for continuing education must be completed in full and the answers to the essay questions contained in the application must be in complete sentences, using proper grammar.
- (5) Administrative staff, the CEAC and the Board may defer any application deemed unsatisfactory, to the licensee for further information or if the application does not meet the requirements set forth in this Section.
- (6) Failure of a registrant to complete the continuing education requirements, or failure to file a report of completed continuing education are grounds for denial of license renewal and possible suspension of license, or denial of consideration for future license reinstatement.

*Authority G.S. 89A-3.1(6); 89A-5.*

**21 NCAC 26 .0312 COMPLIANCE**

(a) Compliance with annual continuing education requirements shall be determined through an audit process conducted by the Board. Determination of individuals to be audited shall be accomplished through a random selection process or as the result of information available to the Board. Licensees selected for auditing shall provide the Board with the following documentation of the continuing education activities claimed for the renewal period:

- (1) Attendance verification records in the form of transcripts, completion certificates, other

documents supporting evidence of attendance; and

- (2) Information regarding course content, instructors and sponsoring organization, for activities presented by other than approved sponsors as defined in Rule .0313 of this Section.

(b) Attendance records shall be maintained by individual licensees for a period of two years for audit verification purposes.

*Authority G.S. 89A-3.1(6); 89A-5.*

**21 NCAC 26 .0313 INDIVIDUAL LICENSES**

(a) License registration must be renewed on or before the first day in July each year. No less than 30 days prior to the renewal date, the Board shall send a renewal reminder to each individual licensee. The licensee shall complete the current license renewal documentation required by the Board. The licensee shall submit to the Board the completed license renewal documentation, along with the annual license renewal fee. The Board shall not accept incomplete renewal documentation. If the accompanying charge, draft or check in the amount of the renewal fee is dishonored by the landscape architect's drawee bank for any reason, the Board shall suspend the license until the renewal fee is paid. When the annual renewal has been completed according to the provisions of G.S. 89A-5 and Rule.0307 of this Section, the Board Executive shall approve renewal of the license for the current license year.

(b) If the Board has not received the annual renewal fee and completed renewal documentation, on or before the first day of July each year the license shall expire and be delinquent. The license may be renewed at any time within one year of being deemed delinquent, upon the return of the completed renewal documentation, the annual renewal fee and the late renewal fee and demonstration of compliance with Rule.0307 of this Section. After one year from the date of delinquency the license may no longer be renewed, but the licensee must seek reinstatement. Reinstatement shall occur according to the provisions of G.S. 89A-5 and Rule.0301 of this Section.

(c) Renewal fees are non-refundable.

(d) Any individual who is currently licensed by and in good standing with the Board who is serving in the armed forces of the United States shall not be subject to late fees, suspension or revocation for failure to renew licensure on or before the first day July each year, provided that the individual has been granted an extension of time to file a tax return as set forth in G.S. 105-249.2. The licensee shall, however, comply with the continuing education requirement of Rule.0310 of this Section.

*Authority G.S. 89A-5.*

**21 NCAC 26 .0314 CORPORATE PRACTICE OF LANDSCAPE ARCHITECTURE**

(a) Prior to offering and rendering landscape architectural services as set forth in G.S. 89A and Rule .0206 of this Chapter, all corporations must submit an application for registration and be granted registration by the Board. Application for registration to practice landscape architecture within the State of



North Carolina shall be made upon forms provided by the Board and include the required application fee. Certificates for corporate practice may be issued only under the provisions of Chapter 55B of the General Statutes, except as provided in Paragraph (b) of this Rule and G.S. 57C.

(b) Applications for certificate of registration as exempt from the Professional Corporation Act under the provisions of G.S. 55B-15 shall be made upon forms provided by the Board. Completed applications must be accompanied by the corporate application fee. To be eligible as an exempt corporation under the provisions of G.S. 55B-15, the following conditions must exist:

- (1) The corporation or limited liability company must have been incorporated or organized prior to June 5, 1969 and permitted by law to render professional services or must be a corporate successor to such corporation or limited liability company as defined by G.S. 55B-15; or
- (2) The corporation or limited liability company must have been incorporated or organized prior to October 1, 1979 and must have been a *bona fide* firm engaged in the practice of landscape architecture and such services as may be ancillary thereto within the State of North Carolina prior to that date.

(c) Firm registration must be renewed on or before June 30<sup>th</sup>. If the Board has not received the annual renewal fee and completed application on or before June 30<sup>th</sup>, the firm license shall expire and be delinquent. No less than 30 days prior to the renewal date, the Board shall send a notice of renewal to each registered firm. The firm must designate a firm manager to complete the renewal documentation required by the Board. The Board shall not accept incomplete renewal documentation. Renewal documentation must be accompanied by the renewal fee. If the accompanying payment in the amount of the renewal fee is dishonored by the firm's drawee bank for any reason, the Board shall suspend the firm registration until the renewal fee is paid. When the annual renewal has been completed according to the provisions of G.S. 89A-5, the Board Executive shall approve renewal for the firm registration for the current renewal year. The firm license shall not be renewed until the individual landscape architect in responsible charge for the firm has completed the individual renewal process.

(d) Within one year of expiration the firm license may be renewed at any time upon the return of the completed renewal documents, the annual renewal fee and the late renewal fee. After one year from the date of expiration for non-payment of the annual renewal fee the licensee shall not be eligible to seek reinstatement, as set forth in G.S. 89A-5, and the Board may reinstate the firms' certificate of registration only as allowed by G.S. 89A-4.

(e) Renewal fees are non-refundable.

(f) Each registered corporation shall adopt a seal pursuant to Rule .0207 of this Chapter.

(g) In addition to the requirements and limitations of Chapter 55 and Chapter 55B of the General Statutes, the firm name used by a landscape architectural corporation shall conform with Rule .0206 of this Chapter and be approved by the Board before being

used. This Rule shall not prohibit the continued use of any firm name adopted in conformity with the General Statutes of North Carolina and the Board's rules in effect at the date of such adoption.

(h) Landscape architects may practice in this State through duly authorized limited liability companies only as provided under G.S. 57C-2-01(c). Any limited liability company that offers to practice or practices landscape architecture in this State must comply with the same requirements applicable to professional corporations under Rules .0201, .0206, .0214, .0218 and .0219 of this Chapter.

*Authority G.S. 55B-5; 55B-10; 55B-15; 89A-3.1(4).*

## **21 NCAC 26 .0315 OUT-OF-STATE ENTITIES**

(a) Landscape architectural entities from other states may be granted certificates of registration for practice in this State upon receipt by the Board of a completed application, fees, the submission of a certified copy of its corporate charter, or other corresponding documents, amended as may be necessary to ensure compliance with all requirements of Chapter 55B, the Professional Corporation Act of the State of North Carolina, and the payment of the firm application fee. In addition to the other requirements as set out in G.S. 83A-8, out-of-state (or "foreign") entities must, prior to registration, receive from the Secretary of State of North Carolina a certificate of authority to do business within the state. A certificate for filing for a certificate of authority must be obtained from the Board prior to submitting the application to the Secretary of State.

(b) An out-of-state entity may be permitted to practice landscape architecture within the State of North Carolina provided that it complies with G.S. Chapter 55B. If an out-of-state entity offers landscape architectural services, then it must comply with requirements set forth in G.S. Chapter 89A. An out-of-state entity must have at least one officer or director licensed in the State as a landscape architect. Two-thirds of the issued and outstanding shares of the out-of-state corporations must be held by a landscape architect, architect, geologist, engineer or land surveyor licensed to practice the profession in a jurisdiction of the United States. However, the entity must designate at least one landscape architect who is licensed in the State of North Carolina to be in responsible charge for the entity's practice of landscape architecture within the State of North Carolina. Notwithstanding the requirements of this Rule, an individual landscape architect who is licensed under G.S. Chapter 89A, *et seq.*, may practice as an individual.

(c) An out-of-state Limited Liability Company may practice landscape architecture, if the Limited Liability Company complies with G.S. 57C and at least one member and one manager or member/manager is licensed as a landscape architect, architect, geologist or engineer to comply with Paragraph (a) of this Rule.

(d) An out of state Limited Liability Partnership may practice landscape architecture, if the Limited Liability Partnership complies with G.S. 59-84.2, and at least one partner is licensed in this State as an individual pursuant to Rule .0301 of this Section.

(e) If the Board has not received the annual firm renewal fee and completed application on or before June 30<sup>th</sup>, the firm

registration shall expire and be deemed delinquent. The firm registration may be renewed at any time within one year upon the payment of the annual renewal fee and the late renewal fees. After one year from the date of expiration for non-payment of the annual renewal fee, the license shall be automatically revoked. The Board may reinstate the firm's certificate of registration, as allowed by Rule .0301 of this Section.

Authority G.S. 55B-6; 83A-6; 89A-2(a1).

## **SECTION .0500 – BOARD DISCIPLINARY PROCEDURES**

### **21 NCAC 26 .0510 DISCIPLINARY REVIEW PROCESS**

(a) ~~General.~~ Allegations or evidence of a violation of the Landscape Architecture Licensing Act or the rules in this Chapter shall be preliminarily reviewed by the Board Chair and legal counsel to the Board. Upon a determination that evidence of a violation exists, the matter shall be subject to Board investigation and may be subject to disciplinary action by the Board.

(b) ~~Preliminary Review.~~

(1) ~~Upon receipt of a complaint involving a registrant, an investigation shall be initiated by the Board's Chairman.~~

(2) ~~A~~ An investigation shall be initiated by a written notice and explanation of the allegation shall be being forwarded to the person or firm entity against whom the charge is made and a response shall be requested of the person or firm so charged within 30 days of receipt of said notice to show compliance with all lawful requirements for retention of the certificate of registration. license. Notice of the charge and of the alleged facts or alleged conduct shall be given personally or by certified mail, return receipt requested.

(3)(c) In the discretion of the Board Chair, a field investigation may be performed.

(4)(d) ~~After preliminary~~ After additional evidence has been obtained, the Board Chair shall either:

(A)(1) recommend dismissal of the charge, or;

(B)(2) refer the matter to the Disciplinary Review Committee.

(5)(e) If the Board Chair recommends dismissal, the ~~Chairman~~ Chair shall give a summary report to the Board and a vote shall be called to dismiss the complaint. If the Board does not vote to dismiss the complaint, the matter shall be forwarded to the Disciplinary Review Committee for further consideration.

(c) ~~The Disciplinary Review Committee.~~

(1)(f) The Disciplinary Review Committee shall be made up of a minimum of one member of the Board and the Board Chair.

(2) ~~Upon review of the evidence, the Disciplinary Review Committee shall present to the Board a written recommendation that may include the following:~~

(g) Upon review of the evidence, and further investigation if necessary, the Disciplinary Review Committee shall present to

the Board a written recommendation that may include the following:

(A)(1) The charge be dismissed as unfounded or that the Board is without jurisdiction over the matter;

(B)(2) The charge is admitted as true, whereupon the Board may accept the admission of guilt by the person charged and ~~sanction-discipline the individual or company person or entity accordingly;~~

(C)(3) The Board accept a proposed settlement negotiated in an effort to resolve the alleged violations; or

(D)(4) The charge be presented to the full Board for a hearing and determination of sanctions by the Board in accordance with the substantive and procedural requirements of the provisions of ~~G.S. 150B.~~ Article 3A of Chapter 150B of the General Statutes.

(d)(h) ~~Consultant.~~ A consultant to the Disciplinary Review Committee shall be designated by the legal counsel of the Board if the Chair of the Disciplinary Review Committee determines that it needs assistance. The consultant shall be a currently ~~registered Landscape Architect,~~ licensed landscape architect selected from former Board members or other ~~registered~~ licensed professionals who are knowledgeable with the Board's processes and have expressed an interest in serving as a consultant. The consultant shall review all case materials and assist the Disciplinary Review Committee in making a recommendation as to the merits of the case.

(e)(i) ~~Board Decision.~~ At least 15 days written notice of the date of consideration by the Board of the recommendations of the Disciplinary Review Committee shall be given to the ~~party~~ person or entity against whom the charges have been brought and the ~~party person~~ submitting the charge.

(f)(j) ~~Settlement Conference.~~ When the Board issues a notice of ~~hearing,~~ hearing against whom the charges are brought, the ~~registrant person or entity~~ may request in writing a settlement conference to pursue resolution of the issue(s) through informal procedures. If, after the completion of a settlement conference, the ~~registrant person or entity~~ and the Board's Disciplinary Review Committee do not agree to a resolution of the dispute for the full Board's consideration, the original disciplinary review process shall commence. During the course of the settlement conference, no sworn testimony shall be taken.

Authority G.S. 89A-3.1(7), (8), (9); 89A-7.

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## **CHAPTER 69 – BOARD FOR LICENSING OF SOIL SCIENTISTS**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board for Licensing of Soil Scientists intends to amend the rules cited as 21 NCAC 69 .0101 and .0104.*

Agency obtained G.S. 150B-19.1 certification:

☐ OSBM certified on:

- ☐ RRC certified on:  
☒ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):  
[www.ncblss.org](http://www.ncblss.org)

**Proposed Effective Date:** December 15, 2014

**Instructions on How to Demand a Public Hearing:** *(must be requested in writing within 15 days of notice): Submit written request for public hearing to the NCBLSS office, P.O. Box 41368, Raleigh, NC 27629 or by email to [elaine@execman.net](mailto:elaine@execman.net).*

**Reason for Proposed Action:**

**21 NCAC 69 .0101** – To bring Administrative Code Section 21 NCAC 69 .0101 up to date with the current address of the NCBLSS.

**21 NCAC 69 .0104** – Allowing the Board to increase the fees to cover the actual expenses incurred by the Board, allows the Board to operate in a sound and balanced financial way.

**Comments may be submitted to:** Elaine Christian, P.O. Box 41368, Raleigh, NC 27629; fax (919) 878-7413; email [elaine@execman.net](mailto:elaine@execman.net)

**Comment period ends:** August 30, 2014

**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 (check all that apply).**

- ☐ State funds affected  
☐ Environmental permitting of DOT affected  
 Analysis submitted to Board of Transportation  
☐ Local funds affected  
☐ Substantial economic impact (≥\$1,000,000)  
☒ No fiscal note required by G.S. 150B-21.4

**SECTION .0100 – STATUTORY AND ADMINISTRATIVE PROVISIONS**

**21 NCAC 69 .0101 AUTHORITY: NAME AND LOCATION OF BOARD**

The "North Carolina Soil Scientist Licensing Act", G.S. 89F, establishes and authorizes the "North Carolina Board for Licensing of Soil Scientists", hereafter called the "Board". Unless otherwise directed all communications shall be addressed to the North Carolina Board for Licensing of Soil Scientists at PO Box 5316, Raleigh, North Carolina 27650-5316. PO Box 41368, Raleigh, NC 27629-1368.

Authority G.S. 89F-4; 89F-5.

**21 NCAC 69 .0104 FEES**

(a) Each completed application form shall be accompanied by the prescribed fee. Application fees shall not be refunded regardless of Board approval or disapproval of the application.

(1)	application for license	50.00
(2)	<del>examination</del>	<del>125.00</del>
(3)(2)	license	85.00
(4)(3)	renewal of license	85.00
(5)(4)	restoration of license	110.00
(6)(5)	replacement of license	50.00
(7)(6)	licensed soil scientist seal	30.00

(b) The Board may charge the applicant the actual cost of preparation, administration, and grading of examinations for soil scientists, in addition to its other fees.

Authority G.S. 55B-10; 55B-11; 89F-25; 150B-19.

*This Section contains information for the meeting of the Rules Review Commission on May 15, 2014 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 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2<sup>nd</sup> business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.*

**RULES REVIEW COMMISSION MEMBERS****Appointed by Senate**

Margaret Currin (Chair)  
Jeff Hyde  
Jay Hemphill  
Faylene Whitaker

**Appointed by House**

Garth Dunklin (1<sup>st</sup> Vice Chair)  
Stefanie Simpson (2<sup>nd</sup> Vice Chair)  
Jeanette Doran  
Ralph A. Walker  
Anna Baird Choi

**COMMISSION COUNSEL**

Joe Deluca	(919)431-3081
Amanda Reeder	(919)431-3079
Abigail Hammond	(919)431-3076
Amber Cronk May	(919)431-3074

**RULES REVIEW COMMISSION MEETING DATES**

June 18, 2014	July 17, 2014
August 21, 2014	September 18, 2014

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**RULES REVIEW COMMISSION MEETING****MINUTES****May 15, 2014**

The Rules Review Commission met on Thursday, May 15, 2014, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Stephanie Simpson, Ralph Walker and Faylene Whitaker.

Staff members present were: Commission counsels Joe DeLuca, Abigail Hammond, Amber Cronk May and Amanda Reeder; and Julie Brincefield, Tammara Chalmers, Dana Vojtko.

The meeting was called to order at 10:01 a.m. with Chairman Currin presiding.

Chief Administrative Law Judge Julian Mann presented Commission Counsel Joe DeLuca with his retirement certificate and The Old North State certificate and acknowledged his years of service to the state.

Commissioner Currin read a resolution honoring Commission Counsel Joe DeLuca. It was adopted by acclamation and a copy is attached.

Chairman Currin read the notice required by NCGS 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts. The Chairman reminded the Commission members that the audio of the meeting was being broadcast.

**APPROVAL OF MINUTES**

Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the April 17, 2014 meeting. There were none and the minutes were approved as distributed.

**FOLLOW-UP MATTERS**

**NC Rural Electrification Authority**

Rule 04 NCAC 08 .0313 was unanimously approved.

**Department of Justice, Division of Criminal Information**

12 NCAC 04H .0101, .0102, .0103, .0201, .0202, .0203, .0301, .0302, .0303, .0304, .0401, .0402, .0403; 04I .0101, .0102, .0103, .0104, .0201, .0202, .0203, .0204, .0301, .0302, .0303, .0401, .0402, .0403, .0404, .0405, .0406, .0407, .0408, .0409, .0410, .0501, .0601, .0602, .0603, .0701, .0801; 04J .0101, .0102, .0103, .0201, .0301. The agency has not responded in accordance with G.S. 150B-21.12. There was no action for the Commission to take at the meeting.

**Wildlife Resources Commission**

15A NCAC 10K .0101 was unanimously approved.

Kate Pipkin from the agency addressed the Commission.

**State Board of Education**

16 NCAC 06C .0701 was withdrawn at request of the agency.

**Cemetery Commission**

21 NCAC 07A .0101, .0103, .0104, .0106, .0201, .0202, .0203, .0204, .0205; 07B .0103, .0104, .0105; 07C .0103, .0104, .0105; 07D .0101, .0102, .0104, .0105, .0201, .0202, .0203. The Commission approved Rules 07A .0103, .0104, .0106, .0201, .0202, .0203, .0204, .0205; 07C .0103, .0104, .0105, .0202, and .0203 unanimously.

Rules 21 NCAC 07A .0101; 07B .0103, .0104, .0105; 07C .0105; 07D .0101, .0102, .0104 and .0201 were withdrawn by the agency.

**Board of Examiners in Optometry**

Rules 21 NCAC 42B .0107 and .0114 were approved unanimously.

**State Human Resources Commission**

Prior to the review of the rules from the State Human Resources Commission, Commissioner Doran recused herself and did not participate in any discussion or vote concerning these rules because of she is a state employee and supervises other state employees.

Valerie Bateman from the agency addressed the Commission.

Tom Harris from SEANC addressed the Commission.

25 NCAC 01B .0350, .0413, .0414, .0429, .0430; 01C .0311, .0403, .0404, .0411, .0412; 01D .0201; 01E .0901; 01H .0901, .0902, .0904, .0905, .1001, .1003, .1004, .1005; 01I .2002; 01J .0603, .0610, .0615, .0616, .1101, .1201, .1202, .1203, .1204, .1205, .1206, .1207, .1208, .1301, .1302, .1303, .1304, .1305, .1306, .1307, .1312, .1313, .1314, .1315, .1316, .1317, .1318, .1319, .1321, .1401, .1402, .1403, .1404, .1405, .1406, .1407, .1408, .1409, .1410, .1411, .1412. All rules were unanimously approved with the following exceptions:

25 NCAC 01H .1003, .1004, .1005; 01I .2002; 01J .0615, .0616 were withdrawn at the request of the agency.

25 NCAC 01J .1321 - The Commission objected to this rule based on ambiguity, lack of clear authority and based on its considerations and reasoning in extending the period of review on OAH's similar proposed rule last month. The Commission noted that the phrase "reasonable hourly rate based upon prevailing market rate" in (1)(a) is ambiguous as a standard standing alone without consideration of other factors. Further, the Commission noted that there are well settled criteria for the determination of reasonable attorney's fees, use of which (by statement or reference) might eliminate the ambiguity and avoid possible concerns with anti-trust issues were attorneys required to argue that there is a prevailing rate to establish their fees. The Commission noted that while G.S. 126-4(11) does provide authority to award reasonable attorney's fees, it is not clear whether that authority applies to the cases contemplated by the proposed rule. Commissioner Dunklin suggested forming an *ad hoc* committee to work with OSHR to clarify circumstances in which the rule would apply and to address the ambiguity considerations as to this Rule.

**State Human Resources Commission**

25 NCAC 01J .1310 was unanimously approved.

**Office of Administrative Hearings**

Commissioner presided over the review of the rules from the Office of Administrative Hearings

Commissioner Walker was not present and did not participate in the discussion and vote.

26 NCAC 03 .0103 was unanimously approved.

26 NCAC 03 .0132 was withdrawn at the request of the agency.

**Building Code Council**

2015 NC Existing Building Code – All rules were unanimously approved.

Commissioner Walker was not present and did not participate in the discussion and vote.

**LOG OF FILINGS**

**Board of Agriculture**

All rules were unanimously approved.

**Historical Commission**

Sarah Koonts with the agency addressed the Commission.

All rules were unanimously approved.

**Commission for Mental Health**

Denise Baker with the agency addressed the Commission.

Dr. Susan Saik Peebles with the agency addressed the Commission.

10A NCAC 28C .0201 was unanimously approved.

**Home Inspector Licensure Board**

All rules were unanimously approved with the following exception:

11 NCAC 08 .1103 – The Commission extended the period of review to allow the Board additional time to review staff's Request for Technical Changes.

**Alarm Systems Licensing Board**

12 NCAC 11 .0105 was unanimously approved.

**Veterinary Medical Board**

21 NCAC 66 .0101 was unanimously approved.

**Building Code Council**

All rules were unanimously approved.

**G.S. 150B-19.1(h) RRC CERTIFICATION**

**Commissioner of Insurance**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 11 NCAC 06A .0809.

**COMMISSION BUSINESS**

Staff gave the Commission a brief legislative update.

Staff gave the Commission an update of how many reports have been filed pursuant to G.S. 150B-21.3A and reminded the Commission that the first reports would be reviewed at the July 2014 meeting.

The meeting adjourned at 12:36 p.m.

The next regularly scheduled meeting of the Commission is Wednesday, June 18<sup>th</sup> at 10:00 a.m.

There is a digital recording of the entire meeting available from the Office of Administrative Hearings /Rules Division.

Respectfully Submitted,

\_\_\_\_\_  
Julie Brincefield  
Administrative Assistant

Minutes approved by the Rules Review Commission:

\_\_\_\_\_  
Margaret Currin, Chair

Rules Review Commission

Meeting

Please Print Legibly

MAY 15, 2014

Name	Agency
Denise Stanford	NC HILB
Denise Baker	DIHS, DMH/DP/BS
Susan DeDe Reelfs	DSOHE, DIHS
Karen Wadell	NCDOJ
Mike Hodge	NCDOJ/NC HILB
Jonathan Owens	SEANC
Frances Liles	NCREA
Colleen Hudak-Weise	NC DATCS
Josh Davis	NC DCR
Sarah Keonts	NC DCR
Karen Blum	NC DOT
Carolyn Detmer	NC DOT
Tom Harris	SEANC
Jon Canier	NC DA
Kate Pipkin	NCWRC
Shari Howard	OSHR
Janice Davidson	NC DOR
Elizabeth "Beth" Blackwell	NC DOI
Valerie Bateman	OSHR



*RETIREMENT RESOLUTION  
IN APPRECIATION*

*WHEREAS, the Rules Review Commission has been officially advised of the retirement, effective May 30, 2014, of*

*Joseph J. DeLuca, Jr.*

*WHEREAS, Joseph (Joe) J. DeLuca, Jr. has served as counsel to the North Carolina Rules Review Commission since 1989;*

*WHEREAS, during his service to the Commission, Joe DeLuca has served as an agency head of the Rules Review Commission and then Senior Counsel, helping to shape the direction of the Commission through his leadership;*

*WHEREAS, Joe DeLuca has served as the historian for the Commission, sharing wisdom, wit, insight, and anecdotes with Commissioners, colleagues, agencies, and the public alike to ensure that the purpose and work of this Commission and rulemaking are understood and appreciated;*

*WHEREAS, during his tenure, Joe DeLuca has faithfully served to promote the best interests of this Commission and the citizens of the State of North Carolina;*

*WHEREAS, during his tenure, Joe DeLuca has revised more than 25,000 rules that are, or have been, in the North Carolina Administrative Code;*

*WHEREAS, during his tenure, Joe DeLuca has trained and counseled over sixty commissioners of different political backgrounds and beliefs;*

*WHEREAS, during his tenure, Joe DeLuca has given numerous presentations to groups such as legislators, lawyers, and students about rulemaking and the role of the Commission;*

*WHEREAS, during his tenure, Joe DeLuca has also trained and counseled numerous rule writers for various agencies and boards;*

*WHEREAS, Joe DeLuca's experiences with rulemaking extend from agencies governing the practice of acupuncture to running the state's zoo; rules with "deep public interests" including those concerning the placement of storm water and Jordan Lake; massage therapy and defining "body cavity"; and State employees and human resource management;*

*WHEREAS, during his tenure, Joe DeLuca has been a committed member of the legal counsel staff, in attendance at most of the monthly meetings since 1989;*

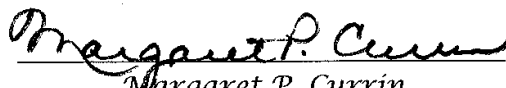
*WHEREAS, Joe DeLuca has been supported by Roberta, his wife; and his three loving children, daughter Sara, and sons Kaz and Raimis;*

*WHEREAS, Joe DeLuca has used his free time to devote attention to his skill of making his neckties and relaxing at his lake house; and*

*WHEREAS, Joe DeLuca now prepares for retirement and free time to spend with family and friends, cooking meals for his family, enjoying his lake house, and traveling;*

*NOW BE IT THEREFORE RESOLVED that the members of the North Carolina Rules Review Commission thank Joseph DeLuca for his dedicated service to the Commission, rulemaking bodies, and the citizens of the State of North Carolina; and*

*BE IT FURTHER RESOLVED that this Resolution be presented to Joe DeLuca and a copy of this document be placed in the official files of the Rules Review Commission as part of the permanent record of the Commission as a lasting tribute to his accomplishments and contributions.*

  
Margaret P. Currin  
Chairman of the Commission

**LIST OF APPROVED PERMANENT RULES  
May 15, 2014 Meeting**

**AGRICULTURE, BOARD OF**

<u>Admission Rules</u>	02	NCAC	20B	.0104
<u>Plant Analysis Service</u>	02	NCAC	37	.0202

**NC RURAL ELECTRIFICATION AUTHORITY**

<u>Arbitration Policies</u>	04	NCAC	08	.0313
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**HISTORICAL COMMISSION**

<u>Statement of Purpose of Archives and Records Section</u>	07	NCAC	04M	.0101
<u>Archives Search Room Hours</u>	07	NCAC	04M	.0102
<u>Archives Reference Services</u>	07	NCAC	04M	.0103
<u>Archives Stacks</u>	07	NCAC	04M	.0104
<u>Public Research Facilities Regulations</u>	07	NCAC	04M	.0105
<u>Duplication Services</u>	07	NCAC	04M	.0106
<u>Outer Banks History Center Gallery Regulations</u>	07	NCAC	04M	.0107
<u>Procedures for Listing</u>	07	NCAC	04M	.0202
<u>Approval of Requests</u>	07	NCAC	04M	.0203
<u>Removal of Names from the List</u>	07	NCAC	04M	.0204
<u>Definition of Good Cause</u>	07	NCAC	04M	.0205
<u>Acceptance of Non-Government Papers</u>	07	NCAC	04M	.0301
<u>Valuation</u>	07	NCAC	04M	.0302
<u>Organizational Records</u>	07	NCAC	04M	.0303
<u>Bible Records</u>	07	NCAC	04M	.0304
<u>Review</u>	07	NCAC	04M	.0401
<u>Preparation of Lists</u>	07	NCAC	04M	.0402
<u>Approval by Historical Commission</u>	07	NCAC	04M	.0403
<u>Transfer of Records to State Records Center</u>	07	NCAC	04M	.0501
<u>Legal Custody of Records</u>	07	NCAC	04M	.0502
<u>Procedures for Transfer of Records</u>	07	NCAC	04M	.0503
<u>Records Center Reference Service</u>	07	NCAC	04M	.0505
<u>Personnel Records</u>	07	NCAC	04M	.0507
<u>Certification by Agency with Custody</u>	07	NCAC	04M	.0508
<u>Destruction of Records in State Records Center</u>	07	NCAC	04M	.0509
<u>Methods of Destruction</u>	07	NCAC	04M	.0510
<u>Destruction of Certain Records Scheduled for Archives</u>	07	NCAC	04M	.0511
<u>Restricted Areas in State Records Facilities</u>	07	NCAC	04M	.0512
<u>Statement of Purpose</u>	07	NCAC	04V	.0101
<u>Outer Banks History Center Search Room Hours</u>	07	NCAC	04V	.0102
<u>Outer Banks History Center Reference and Technical Services</u>	07	NCAC	04V	.0103
<u>Admission to Outer Banks History Center Stacks</u>	07	NCAC	04V	.0104
<u>Outer Banks History Center Search Room Regulations</u>	07	NCAC	04V	.0105
<u>Public History Gallery Hours</u>	07	NCAC	04V	.0201
<u>Public History Gallery Regulations</u>	07	NCAC	04V	.0202

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<u>Trainee Appointments</u>	25 NCAC 01C .0403
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<u>Policy and Scope</u>	25 NCAC 01H .0901
<u>Requirements for Reduction in Force Priority Consideration</u>	25 NCAC 01H .0902
<u>Agency and Employee Responsibilities</u>	25 NCAC 01H .0904
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<u>Discrimination and Retaliation/Special Provisions</u>	25 NCAC 01J .1204
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**RULES REVIEW COMMISSION**

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<u>Minimum Procedural Requirements</u>	25 NCAC 01J .1301
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<u>Agency and University Grievance Reports and Data Entry</u>	25 NCAC 01J .1303
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**May 15, 2014 Meeting**

**INSURANCE, COMMISSIONER OF**

<u>Approval of Courses</u>	11 NCAC 06A .0809
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**CONTESTED CASE DECISIONS**

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*This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 431-3000. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.*

**OFFICE OF ADMINISTRATIVE HEARINGS**

**Chief Administrative Law Judge**  
**JULIAN MANN, III**

**Senior Administrative Law Judge**  
**FRED G. MORRISON JR.**

**ADMINISTRATIVE LAW JUDGES**

Melissa Owens Lassiter  
Don Overby  
J. Randall May

A. B. Elkins II  
Selina Brooks  
Craig Croom

J. Randolph Ward

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<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
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Playground LLC, T/A Playground v. ABC Commission	11 ABC 14031	05/16/12	27:01 NCR 64
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	11 ABC 14036	07/05/12	
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William James Becker v. Criminal Justice Education and Training Standards Commission	11 DOJ 13160	08/16/12	
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Justin Thomas Medlin v. Alarm Systems Licensing Board	11 DOJ 14493	04/23/12	
Argentina Rojas v. Department of Justice, Campus Police Officer Commission	12 DOJ 00394	11/02/12	
Bruce Clyde Shoe v. Private Protective Services Board	12 DOJ 00556	09/26/12	
Angela Louise Giles v. Private Protective Services Board	12 DOJ 00557	04/18/12	
Timothy Tyler Russell v. Sheriffs' Education and Training Standards Commission	12 DOJ 00649	02/28/14	28:22 NCR 2768
Marshall Todd Martin v. Sheriffs' Education	12 DOJ 00650	07/13/12	
Frances Gentry Denton v. Sheriffs' Education and Training Standards Commission	12 DOJ 00651	08/30/12	
James Philip Davenport v. Criminal Justice Education and Training Standards Commission	12 DOJ 00653	11/21/12	
Alvin Louis Daniels v. Criminal Justice Education and Training Standards Commission	12 DOJ 00654	08/17/12	
Michael Wayne McFalling v. Private Protective Services Board	12 DOJ 00814	05/21/12	
Robert John Farmer v. Alarm Systems Licensing Board	12 DOJ 00887	05/04/12	
Ricky Lee Ruhlman v. Private Protective Services Board	12 DOJ 01211	04/18/12	
Leroy Wilson Jr., Private Protective Services Board	12 DOJ 01293	04/18/12	
Clyde Eric Lovette v. Alarm Systems Licensing Board	12 DOJ 01498	05/02/12	
Vincent Tyron Griffin v. Alarm Systems Licensing Board	12 DOJ 01663	09/27/12	
Andre Carl Banks Jr., v. Alarm Systems Licensing Board	12 DOJ 01695	06/22/12	
Ryan Patrick Brooks v. Private Protective Services Board	12 DOJ 01696	06/05/12	
Dustin Lee Chavis v. Private Protective Services Board	12 DOJ 01697	06/01/12	
Jeffrey Adam Hopson v. Sheriffs' Education and Training Standards Commission	12 DOJ 01761	06/07/12	
John Henry Ceaser v. Sheriffs' Education and Training Standards Commission	12 DOJ 01762	06/18/12	
Jerome Douglas Mayfield v. Private Protective Services Board	12 DOJ 02381	06/15/12	
Elijah K. Vogel v. Private Protective Services Board	12 DOJ 02619	06/05/12	
Timmy Dean Adams v. Department of Justice, Company Police Program	12 DOJ 02778	12/21/12	
Carlito Soler v. Alarm Systems Licensing Board	12 DOJ 03457	09/26/12	
Danielle Marie Taylor v. Criminal Justice Education and Training Standards Commission	12 DOJ 03838	01/24/13	28:06 NCR 554
Rodney Lyndolph Bland v. Criminal Justice Education and Training Standards Commission	12 DOJ 03839	01/11/13	
Sherman Montrell Devon McQueen v. Criminal Justice Education and Training and Standards Commission	12 DOJ 03842	12/21/12	
Matthew Brian Hayes v. Criminal Justice Education and Training Standards Commission	12 DOJ 03843	11/27/12	27:22 NCR 2139
Antonio Cornelius Hardy v. Criminal Justice Education and Training Standards Commission	12 DOJ 03844	11/19/12	27:21 NCR 1994
Jonathan Dryden Dunn v. Sheriffs' Education and Training Standards	12 DOJ 03845	03/28/13	
Barry Louis Christopher, Jr v. Private Protective Services Board	12 DOJ 05041	08/27/12	27:15 NCR 1570
Bettina Hedwig Vredenburg v. Sheriffs' Education and Training Standards Commission	12 DOJ 05140	11/09/12	27:21 NCR 2002
Wallace Connell Ranson v. Sheriffs' Education and Training Standards Commission	12 DOJ 05141	05/07/13	28:07 NCR 676

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Raymond Louis Soulet v. Sheriffs' Education and Training Standards Commission	12 DOJ 05142	08/27/12	
Graham Avon Hager v. Sheriffs' Education and Training Standards Commission	12 DOJ 05143	12/19/12	28:07 NCR 686
Dustin Wilson Grant v. Sheriffs' Education and Training Standards Commission	12 DOJ 05145	10/25/12	
Glenn Alvin Brand v. Sheriffs' Education and Training Standards Commission	12 DOJ 05146	10/08/12	
Shannon Wallace v. DHHS	12 DOJ 05355	02/26/13	
Lawrence W. Sitgraves v. Private Protective Services	12 DOJ 06059	09/13/12	
Collin Michael Berry v. Private Protective Services Board	12 DOJ 06590	10/22/12	
Tiffany Ann Misel v. Private Protective Services Board	12 DOJ 06817	10/17/12	
John Machouis v. Alarm Systems Licensing Board	12 DOJ 07161	12/19/12	
Moses Lavan Balls v. Private Protective Services Board	12 DOJ 07162	01/07/14	
Tina Marie Fallon v. NC Alarm Systems Licensing Board	12 DOJ 07298	01/08/14	
William John Cherpak v. Private Protective Services Board	12 DOJ 07300	01/08/14	
Christopher A. Field v. Private Protective Services Board	12 DOJ 07548	12/19/12	
Porschea Renee Williams v. Private Protective Services Board	12 DOJ 07549	01/09/13	
Ralph R. Hines v. Criminal Justice Education and Training Standards	12 DOJ 07812	11/07/12	
Kevin Lee Hullett v. Criminal Justice Education and Training Standards Commission	12 DOJ 08007	09/10/13	28:17 NCR 2126
Shannon Pendergrass v. Criminal Justice Education and Training Standards Commission	12 DOJ 08008	12/05/13	
William Franklin Dietz v. Criminal Justice Education and Training Standards	12 DOJ 08010	02/19/13	
Elizabeth Crooks Goode v. Criminal Justice Education and Training Standards Commission	12 DOJ 08014	12/14/12	
Kareen Jesaad Taylor v. Sheriffs' Education and Training Standards Commission	12 DOJ 08018	04/02/13	28:08 NCR 751
Brian Thomas Jones v. Sheriffs' Education and Training Standards Commission	12 DOJ 08023	11/26/13	
Sheronica Hall Smith v. Sheriffs' Education and Training Standards Commission	12 DOJ 08026	09/11/13	28:15 NCR 1831
Sabrina Richelle Wright v. Sheriffs' Education and Training Standards Commission	12 DOJ 08048	01/16/13	
Phillip Eugene Dendy v. Sheriffs' Education and Training Standards Commission	12 DOJ 08049	01/18/13	
Reginald E. James v. Private Protective Services Board	12 DOJ 08195	12/20/12	
Kenneth Levern Bradley v. Private Protective Services Board	12 DOJ 08260	01/08/14	
Omega Young v. Private Protective Services Board	12 DOJ 08261	12/17/12	
Joseph T. Ferrara v. Private Protective Services Board	12 DOJ 08309	01/11/13	
Jovan Lamont Sears v. Private Protective Services Board	12 DOJ 08447	12/20/12	
Christopher Robell Hunter v. Sheriffs' Education and Training Standards Commission	12 DOJ 10182	05/07/13	28:08 NCR 758
Joseph Ryan Fowler v. Sheriffs' Education and Training Standards Commission	12 DOJ 10184	11/26/13	
Gregory Paul Kelly v. Sheriffs' Education and Training Standards Commission	12 DOJ 10187	09/30/13	28:17 NCR 2139
Marilyn Cash Smalls v. Sheriffs' Education and Training Standards Commission	12 DOJ 10188	04/29/13	
Timothy Allen Bruton v. Criminal Justice Education and Training Standards Commission	12 DOJ 10199	05/29/13	
Bilal Abdus-Salaam v. Criminal Justice Education and Training Standards Commission	12 DOJ 10200	08/16/13	
Lee Daniel Wilkerson v. Criminal Justice Education and Training Standards Commission	12 DOJ 10201	10/10/13	
Brad Tisdale v. Criminal Justice Education Training Standards Commission	12 DOJ 10203	05/06/13	
Ron Allen Hedrington v. Criminal Justice Education and Training Standards Commission	12 DOJ 10204	08/23/13	28:13 NCR 1544
Forrest Travis Coston v. Criminal Justice Education and Training Standards Commission	12 DOJ 10205	03/25/14	
Clinton Weatherbee Jr v. Criminal Justice Education and Training Standards Commission	12 DOJ 10206	03/25/13	
Scott Douglas Neudecker v. Criminal Justice Education and Training Standards Commission	13 DOJ 01924	09/03/13	28:17 NCR 2165
JonPaul D. Wallace v. Private Protective Services Board	13 DOJ 02422	04/26/13	
Andrew George Anderson v. Sheriffs' Education and Training Standards Commission	13 DOJ 03417	08/29/13	
Frank John Fontana, Jr. v. NC Alarm Systems Licensing Board	13 DOJ 03740	09/12/13	
Jerome Douglas Mayfield v. Private Protective Services Board	13 DOJ 04393	04/26/13	
Cameron Imhotep Clinkscale v. Private Protective Services Board	13 DOJ 05095	04/26/13	
Ashely B. Sellers v. NC Alarm Systems Licensing Board	13 DOJ 08759	10/30/13	
Eddie Hugh Hardison v. Private Protective Services Board	13 DOJ 08765	04/02/13	
Antonio R. Dickens v. Private Protective Services Board	13 DOJ 08953	08/09/13	28:14 NCR 1684
Danielle J. Rankin v. Private Protective Services Board	13 DOJ 09038	08/09/13	28:14 NCR 1689
Tony Lynn Cannon v. Sheriffs' Education and Training Standards Commission	13 DOJ 09567	10/22/13	
Trudy Lane Harris v. Sheriffs' Education and Training Standards Commission	13 DOJ 09570	10/01/13	28:17 NCR 2173
Thomas Lee Phillips, Jr. v. Sheriffs' Education and Training Standards Commission	13 DOJ 09571	11/19/13	
Jesse Alan Tyner v. NC Alarm Systems Licensing Board	13 DOJ 09863	08/09/13	28:15 NCR 1837
Marcus Teer Benson v. Private Protective Services Board	13 DOJ 09974	05/15/13	28:10 NCR 1155
Steven Wesley Jones v. Sheriffs' Education and Training Standards Commission	13 DOJ 11188	10/22/13	
Logan Roy Clonts v. Sheriffs' Education and Training Standards Commission	13 DOJ 11694	10/17/13	
LaMarcus Jarrel Outing v. Criminal Justice Education and Training Standards Commission	13 DOJ 11932	08/07/13	
Jeffrey D. Angell v. NC Alarm Systems Licensing Board	13 DOJ 12333	10/09/13	
Patricia Mary Cotto v. Criminal Justice Education and Training Standards Commission	13 DOJ 12452	12/10/13	
Casmire E. Perez v. NC Alarm Systems Licensing Board	13 DOJ 13006	02/26/14	
Myron Troy Davidson v. Private Protective Services Board	13 DOJ 13379	09/13/13	
Rhonda N. Thorpe v. NC Alarm Systems Licensing Board	13 DOJ 13600	12/11/13	



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Marcus L. Fuller v. Private Protective Services Board	13 DOJ 13653	09/03/13	
Christopher T. Place v. NC Alarm Systems Licensing Board	13 DOJ 13859	08/02/13	28:14 NCR 1695
Cathy M. Brown v. Private Protective Services Board	13 DOJ 14219	01/13/14	28:18 NCR 2266
Martise Lamar Jones v. NC Alarm Systems Licensing Board	13 DOJ 14844	10/30/13	
Marshall Letitus Wiley v. Criminal Justice Education and Training Standards Commission	13 DOJ 15365	01/10/14	
Dominic Orlando Chavis v. Criminal Justice Education and Training Standards Commission	13 DOJ 15454	01/29/14	
Trina Liverman Basnight v. Criminal Justice Education and Training Standards Commission	13 DOJ 15455	01/07/14	
Charles Robert Austin, Jr. v. NC Alarm Systems Licensing Board	13 DOJ 15507	10/30/13	
Bobby Russell v. Sheriffs' Education and Training Standards Commission	13 DOJ 13549	01/17/14	
Deane Eugene Barnette v. Sheriffs' Education and Training Standards Commission	13 DOJ 16248	12/03/13	
Reza M. Salami v. NC Department of Justice and Attorney General Roy Cooper	13 DOJ 17903	11/12/13	
Jesse J. Williamson v. Private Protective Services Board	13 DOJ 17912	02/19/14	
Alejandro Laurent v. Private Protective Services Board	13 DOJ 17940	01/31/14	
Jimmy Wayne Ford v. NC Alarm Systems Licensing Board	13 DOJ 17997	01/27/14	
David Lee Kroger v. NC Alarm Systems Licensing Board	13 DOJ 18373	01/13/14	28:18 NCR 2271
Vernon L. Rodden v. NC Alarm Systems Licensing Board	13 DOJ 18445	01/13/14	28:18 NCR 2275
Kelsie Lamel Floyd v. Private Protective Services Board	13 DOJ 18988	02/21/14	
Annette Sellers Blue v. Sheriffs' Education and Training Standards Commission	13 DOJ 19151	04/23/14	

Ronald Ciron Mason v. Criminal Justice Education and Training Standards Commission	14 DOJ 00528	04/29/14	
Joshua Zane Strickland v. Criminal Justice Education and Training Standards Commission	14 DOJ 00560	04/08/14	
Jerome Alford v. Sheriffs' Education and Training Standards Commission	14 DOJ 00877	04/24/14	
In Re: Firearms Registration Certifications for Alvin Thomas Bennett	14 DOJ 01061	05/14/14	
Dominque Ray Pittman v. NC Alarm Systems Licensing Board	14 DOJ 01403	04/25/14	

**DEPARTMENT OF LABOR**

United Quest Care Services v. Department of Labor	13 DOL 12224	09/17/13	
Absolute Contracting Service Inc., Felicia Myers v. NCDOL, Adriana King	13 DOL 16701	10/30/13	
TP's Resurrection Co., LLC, Thomas A. Patterson, Registered Agent v. NC Department of Labor (NCDOL)	13 DOL 18426	01/31/14	

Turf-Builders Inc. Edward Melvin v. Department of Labor	14 DOL 01731	05/15/14	
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**DEPARTMENT OF TRANSPORTATION**

Lorie Cramer v. NC Quick Pass Customer Service Center and DOT	13 DOT 08753	07/19/13	28:06 NCR 589
Rudolpho Gonzalez doing business as Latino Auto Sales v. NC Division of Motor Vehicles	14 DOT 01981	05/20/14	

**DEPARTMENT OF STATE TREASURER**

Dwaine C. Coley v. Department of State Treasurer	10 DST 00233	04/05/13	28:02 NCR 81
Ella Joyner v. Department of State Treasurer Retirement System Division	11 DST 02437	07/12/12	27:07 NCR 758
William R. Tate v. Department of Treasurer, Retirement System Division	11 DST 04675	09/07/12	27:15 NCR 1574
Brenda C. Hemphill v. Department of Treasurer, Retirement System Division	11 DST 10252	09/26/12	
Russell E. Greene v. Department of State Treasurer Retirement Systems Division	11 DST 10875	06/14/12	27:04 NCR 543
James A Layton v. Department of State Treasurer	11 DST 12958	11/30/12	
Marsha W Lilly, Robert L Hinton v. Retirement System	12 DST 01108	05/22/12	
Karen L. Stewart, Executor of Thurman A. Stewart Estate v. Department of State Treasurer, Retirement Systems Division and Betty J. Stewart	13 DST 12408	11/07/13	28:21 NCR 2672
Reza M. Salami v. NC A&T State University, Chancellor Harold Martin, General Counsel Charles Waldrup, Vice Chancellor Linda McAbee, Interim Provost Winser Alexander, and Chairman Willie Deese	13 DST 13911	02/06/14	
Ruby J. Edmondson v. Department of Treasurer	13 DST 15268	11/12/13	28:18 NCR 2280
Nathaniel I. Orji v. Department of State Treasurer, Retirement Systems Division	13 DST 16695	02/04/14	

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Reza M. Salami v. UNC-General Administration, UNC President Thomas Ross, UNC Vice President for Legal Affairs Laura B. Fjeld, UNC Board of Governors Peter D. Hans	13 EBD 13914	02/06/14	
Reza M. Salami v. North Carolina A & T State University, Chancellor Harold Martin, General Counsel Charles Waldrup, Vice Chancellor Linda McAbee, Interim Provost Winser Alexander, and Chairman Willie Deese	13 EBD 13916	11/20/13	

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Louis A. Hrebar v. State Board of Education	11 EDC 01445	07/27/12	
Delene Huggins v. Department of Public Instruction	11 EDC 08899	06/28/12	
Myra F. Moore v. NC Board of Education	11 EDC 11927	05/01/12	
Dwayne White v. Department of Public Instruction, NC State Board of Education	11 EDC 11864	07/18/12	27:07 NCR 769
Jeffery Sloan v. NCDPI	11 EDC 14077	11/09/12	27:21 NCR 1974
Lia C Long v. DPI	12 EDC 00805	10/18/13	27:16 NCR 1716
North Carolina Learns Inc. d/b/a North Carolina Virtual Academy	12 EDC 01801	05/18/12	
Katherine Kwesell Harris v. Public Schools, Board of Education	12 EDC 06520	09/05/12	
Bonnie Aleman v. State Board of Education, Department of Public Instruction	12 EDC 07293	06/14/13	
Emma Seward v. Department of Public Instruction	12 EDC 07438	07/17/13	
Jodi Esper v. Department of Public Instruction	12 EDC 10259	06/04/13	
Glennette McRae v. NC State Board of Education	12 EDC 10448	11/15/13	
Matthew Schneider v. Department of Public Instruction	12 EDC 12183	07/17/13	28:12 NCR 1467
Wanda McLaughlin v. State Board of Education	12 EDC 12410	03/27/13	
Kirk V. Stroupe v. State Board of Education	13 EDC 13003	01/16/14	
Gary Alan Cooper v. Department of Public Instruction	13 EDC 13731	12/30/13	
Scott W. Morgan v. Department of Public Instruction	13 EDC 16807	01/15/14	28:24 NCR 3083
Megan Trainor v. NC State Board of Education	14 EDC 00465	04/14/14	

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

Pamlico-Tar River Foundation, NC Coastal Federation, Environmental Defense Fund, and Sierra Club v. DENR, Division of Water Quality and PCS Phosphate Company, Inc	09 EHR 1839	04/26/12	27:01 NCR 87
ALCHEM Inc., v. NCDENR	10 EHR 00296	02/05/13	
Don Hillebrand v. County of Watauga County Health Dept	10 EHR 00933	05/10/12	
ALCHEM Inc., v. NCDENR	10 EHR 05463	02/05/13	
House of Raeford Farms, Inc., v. DENR	10 EHR 05508	05/31/12	27:01 NCR 99
Lacy H Caple DDS v. Division of Radiation Protection Bennifer Pate	11 EHR 11454	05/09/12	
Friends of the Green Swamp and Blue Ridge Environmental Defense League, Inc v. DENR Division of Waste Management and Waste Management of the Carolinas, Inc., d/b/a Waste Management of Wilmington	11 EHR 12185	08/08/12	27:12 NCR 1224
Holmes Development & Realty, LLC, and H.L. Homes v. DENR – Land Quality Section (Re: LQS 11-018)	11 EHR 13208	06/29/12	27:07 NCR 774
Ik Kim IT and K Enterprise v. DENR	11 EHR 13910	11/06/12	
Edward Dale Parker v. DENR	11 EHR 14390	02/22/13	
Janezic Building Group LLC v. Orange County	12 EHR 01104	12/03/12	27:21 NCR 2008
Save Mart of Duplin LLC v. DENR	12 EHR 02328	07/25/12	
NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality and Carolina Cement Company, LLC	12 EHR 02850	09/23/13	
James D. Halsey v. DENR, Division of Environmental Health	13 EHR 10216	06/05/13	
Joe Waldroop v. NC DENR	13 EHR 12077	11/20/13	
NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality	13 EHR 16148	11/04/13	
American Rivers v. DENR, Division of Water Resources	13 EHR 17234	02/06/14	
Paul M. Stella v. DHHS, Division of Public Health	13 EHR 19269	02/06/14	
Denise Leavitt v. DENR, Division of Coastal Management	13 EHR 19954	02/07/14	
Eun Suk Jeoung v. Division of Environmental Health, Orange County	14 EHR 00662	04/22/14	28:24 NCR 3109

**DIVISION OF EMPLOYMENT SECURITY**

Dwight Marvin Wright v. Department of Commerce, Division of Employment Security	12 ESC 05042	07/27/12	
Reza M. Salami v. Employment Security Commission	13 ESC 13908	02/28/14	

**DEPARTMENT OF INSURANCE**

Megan L. Hartzog v. NC State Health Plan	12 INS 00364	05/06/13	28:07 NCR 691
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Jan Fjelsted v. NC State Health Plan	12 INS 04763	01/16/13	28:07 NCR 706
Susan E. Montgomery Lee v. State Health Plan; Blue Cross Blue Shield	12 INS 10145	03/25/13	
Lori Matney v. Blue Cross Blue Shield of NC, State Health Plan	12 INS 10790	08/20/13	
Jean Kirkland and John Ritchie v. State Health Plan	12 INS 11957	04/11/13	

**BOARD OF LICENSED PROFESSIONAL COUNSELORS**

Beth Ford v. Bonnie Strickland	14 LPC 00313	03/26/14	
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**MISCELLANEOUS**

Richard Lee Taylor v. City of Charlotte	11 MIS 14140	05/15/12	
Lloyd M Anthony v. New Hanover County Sheriff Office	12 MIS 01803	06/07/12	
Jackie Poole, Jamyan Brooks v. Orange County	12 MIS 02379	11/09/12	27:21 NCR 2016
David L. Smith v. State of North Carolina Lexis Publishing	13 MIS 12130	05/15/14	
David L. Smith v. NC Innocence Inquiry Commission	13 MIS 12404	06/19/13	28:10 NCR 1160
Thomas Franklin Cross, Jr. v. NC Innocence Inquiry Commission	13 MIS 12642	06/19/13	28:10 NCR 1160
Moses Leon Faison v. NC Parole Commission, Paul G. Butler, Jr.	13 MIS 13004	09/05/13	
Jabar Ballard v. NC Innocence Inquiry Commission	13 MIS 13005	06/19/13	28:10 NCR 1160
Paul Michael Simmons v. Luis Hernandez, Forest City Police Department	13 MIS 14274	11/13/13	
Jason Vicks, Mekeisha Vicks v. NC Administrative Offices of the Courts	13 MIS 20224	04/28/14	
Beth Ford v. UNC-G Police Chief	14 MIS 01132	04/25/14	
Beth Ford v. Pat Bazemore, Chief of Cary PD	14 MIS 01134	04/08/14	

**OFFICE OF STATE PERSONNEL**

Patrice A. Bernard v. NC A&T	08 OSP 01724	03/10/14	28:21 NCR 2676
Patrice Bernard v. N.C. A&T State University	09 OSP 03187	03/03/14	28:21 NCR 2677
Amanda Thaxton v. State Ethics Commission	09 OSP 03754	09/20/12	
Betty M. Jones v. DHHS, DMA	10 OSP 00085	11/22/13	28:21 NCR 2687
Nathan Anthony Swanson v. DHHS, Division of Mental Health	10 OSP 00929	01/31/14	28:21 NCR 2694
Jacob W. Scott v. Department of Crime Control and Public Safety Alcohol Law Enforcement	10 OSP 04582	07/19/13	28:12 NCR 1419
Dorothy H. Williams v. DHHS, Central Regional Hospital	10 OSP 05424	03/28/12	27:01 NCR 119
Stephen R. West v. The University of North Carolina at Chapel Hill	10 OSP 01567	11/26/12	27:21 NCR 1959
Larry F. Murphy v. Employment Security Commission of North Carolina	10 OSP 03213	06/04/12	
Walter Bruce Williams v. Dept. of Crime Control and Public Safety Butner Public Safety Division	10 OSP 03551	04/23/12	27:01 NCR 148
Teresa J. Barrett v. DENR	10 OSP 04754	10/22/12	27:16 NCR 1726
Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division	10 OSP 04792	05/30/12	
Steven M Mukumgu v. DAG	10 OSP 05199	08/07/12	
Valerie Small v. NC Agricultural and Technical State University	11 OSP 03245	05/24/13	28:11 NCR 1231
Beatrice T. Jackson v. Durham County Health Department	11 OSP 03835	06/08/12	
Brenda D. Triplett v. DOC	11 OSP 04605	03/20/12	27:06 NCR 669
Barry G. Eriksen v. NC State University	11 OSP 04968	12/16/13	
Tommie J. Porter v. DOC	11 OSP 05352	06/05/12	27:06 NCR 678
Fortae McWilliams v. DOC	11 OSP 06236	05/30/12	27:06 NCR 684
Katheryn Renee Johnson v. NC Department of Correction	11 OSP 06493	12/16/13	
Kimberly F. Loflin v. DOT, DMV	11 OSP 06762	07/10/12	
John Hardin Swain v. DOC, Hyde Correctional Inst.	11 OSP 07956	04/23/12	27:06 NCR 693
John Fargher v. DOT	11 OSP 08111	04/18/12	
Maria Isabel Prudencio-Arias v. UNC at Chapel Hill	11 OSP 09374	03/28/13	28:02 NCR 99
Gerald Price v. Department of Agriculture & Consumer Services, Standards Division	11 OSP 09588	02/27/13	28:02 NCR 139
Tammy Cagle v. Swain County, Department of Social Services	11 OSP 10307	09/26/12	27:16 NCR 1747
Purnell Sowell v. DOT, Division of Motor Vehicles	11 OSP 10308	01/31/14	28:22 NCR 2759
Doris Wearing v. Polk Correctional Inst. Mr. Solomon Superintendent	11 OSP 11023	10/19/12	
Fredericka Florentina Demmings v. County of Durham	11 OSP 11498	06/12/12	
Derick A Proctor v. Crime Control and Public Safety, State Capital Police Division	11 OSP 11499	12/06/12	
David B. Stone v. Department of Cultural Resources	11 OSP 11926	08/10/12	27:12 NCR 1245
Pattie Hollingsworth v. Fayetteville State University	11 OSP 12152	02/27/13	
William C. Spender v. Dept. of Agriculture & Consumer Services, Veterinary Division	11 OSP 12479	04/27/12	
Terrence McDonald v. NCSU	11 OSP 12682	05/21/12	

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Terrence McDonald v. DHHS, Emery Milliken	11 OSP 12683	05/18/12	
Phyllis Campbell v. DOC	11 OSP 13381	08/27/12	27:15 NCR 1579
Thomas W. Wheeler v. NC Department of Transportation	11 OSP 13440	12/03/13	
Raeferd Quick v. DOC	11 OSP 14436	05/22/12	
Larry Christopher Maness v. Department of Corrections, Division of Prisons	11 OSP 14632	04/24/14	28:23 NCR 2932
Tawana McLaurin v. DOC	12 OSP 00116	08/21/12	
Vera Ricks v. NC Department of Public Safety	12 OSP 00246	03/28/13	28:07 NCR 714
Marva G. Scott v. Edgecombe County Social Services Board (Larry Woodley, Fate Taylor, Ernest Taylor, Viola Harris and Evelyn Johnson), Edgecombe County Commissioners and Edgecombe county manager, Lorenzo Carmon	12 OSP 00430	12/20/12	27:22 NCR 2152
Ladeana Z. Farmer v. Department of Public Safety	12 OSP 00460	04/10/13	28:06 NCR 564
Rhonda Whitaker v. DHHS	12 OSP 00519	05/17/13	28:08 NCR 766
Thomas B. Warren v. DAG, Forest Services Division	12 OSP 00615	11/27/12	
Bon-Jerald Jacobs v. Pitt County Department of Social Services	12 OSP 00634	06/12/12	
Sherry Baker v. Department of Public Safety	12 OSP 00841	10/09/12	
James Thomas Stephens v. Division of Community Corrections	12 OSP 01288	08/26/13	28:22 NCR 2778
Diane Farrington v. Chapel Hill-Carrboro City Schools	12 OSP 01300	07/12/12	
Cynthia Moats v. Harnett County Health Dept	12 OSP 01536	08/10/12	
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Clark D. Whitlow v. UNC-Chapel Hill	12 OSP 01740	06/12/12	
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Marilyn R. Brewington v. NC Agricultural & Technical State University	12 OSP 02283	01/03/14	28:20 NCR 2477
Larry Batton v. Dept of Public Safety	12 OSP 02320	02/18/13	
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**CONTESTED CASE DECISIONS**

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**CONTESTED CASE DECISIONS**

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People for the Ethical Treatment of Animals, Inc., v. NC Wildlife Resources Commission	12 WRC 07077	11/13/12	27:22 NCR 2165
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Filed

STATE OF NORTH CAROLINA  
COUNTY OF RUTHERFORD

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IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12DHR09028

Office of  
Administrative Hearings

KD SUPPORT SERVICES LLC,  
Petitioner,

v.

Western Highlands Network,  
Respondent.

**FINAL DECISION GRANTING  
SUMMARY JUDGMENT FOR  
RESPONDENT**

THIS MATTER came before Beecher R. Gray, Administrative Law Judge presiding, in Waynesville, North Carolina on October 28, 2013, for consideration of *Respondent's Motion for Summary Judgment*, *Respondent's Motion in Limine to Conclusively Establish Admitted Matters*, and *Respondent Western Highlands Network's Motion in Limine to Exclude Evidence, Reference to Evidence, Testimony or Argument that Contests Prior Investigative Findings, Conclusions or Final Decisions* filed with the Office of Administrative Hearings ("OAH") on October 16, 2013.

During this hearing, Petitioner tendered Consolidated Responses to Respondent's Motions in Limine, and for Summary Judgment. Petitioner filed a post-hearing document under the caption Affidavit of Kenneth D. Dellinger Concerning Prior Affidavit. Respondent filed a post-hearing Reply to Petitioner's Consolidated Responses to Respondent's Motions in Limine and for Summary Judgment on October 30, 2013. Having reviewed the file, heard the oral arguments of the parties' respective counsel, and considered all matters of record appropriate and relevant for consideration, including Respondent's Motions and all of Petitioner's Responses and Affidavits, I find that Respondent's Motion for Summary Judgment should be allowed as a matter of law. Uncontroverted findings are set forth in this Decision to aid future tribunals in review of this Decision.

**FINDINGS OF FACT**

1. At all relevant times prior to October 1, 2013, Respondent Western Highlands Network ("Respondent" or "WHN") was a multi-county area mental health, developmental disabilities, and substance abuse authority organized by the Boards of Commissioners of Buncombe, Henderson, Madison, Mitchell, Polk, Rutherford, Transylvania, and Yancey Counties (which eight counties comprised "WHN Catchment Area") under G.S. 122C-115 and existing as a local political subdivision of the State of North Carolina under G.S. 122C-116, also known as a Local Management Entity ("LME") as defined in G.S. 122C-3(20b).
2. By agreement that went into effect January 3, 2012 between Respondent and the N.C. Department of Health and Human Services ("NC DHHS"), and with the approval of the



Centers for Medicare and Medicaid Services, Respondent operated as a Prepaid Inpatient Health Plan ("PIHP") under 42 C.F.R. §438.2. PIHPs are authorized to operate Medicaid managed care programs under Medicaid waivers.

3. Under Sections 1915(b) and 1915(c) of the Social Security Act (42 U.S.C. § 1396n(b) and (c)), the U.S. Department of Health and Human Services has waived portions of North Carolina's traditional fee-for-service Medicaid programs and replaced them with a managed care program (the "1915(b)/(c) Medicaid Waiver"). At all relevant times prior to October 1, 2013, Respondent operated the 1915(b)/(c) Medicaid Waiver in its eight-county WHN Catchment Area.
4. Respondent did not itself provide services to clients or consumers, but managed the system of care in its WHN Catchment Area through a network of contract service providers, of which Petitioner KD Support Services, LLC ("Petitioner") had been one.
5. Respondent entered into a contract with Petitioner with an effective beginning date of January 3, 2012, which enrolled Petitioner as service provider within the WHN Catchment Area, ("Contract"). Petitioner provided Medicaid-funded services for consumers within the WHN Catchment Area and provides Medicaid-funded services for consumers in other counties in the State.
6. The letter dated April 27, 2012 and the March 22, 2012 Provider Report enclosed with the letter (both attached as Exhibit A to Respondent *Western Highlands Network's Motion In Limine to Exclude Evidence, Reference to Evidence, Testimony or Argument that Contests Prior Investigative Findings, Conclusions or Final Decisions* ("Motion to Exclude Evidence" and incorporated herein by reference)) relate to Respondent's Focused Monitoring Review of Petitioner ("First Final Decision").
7. The letter dated May 31, 2012 and the May 30, 2012 Investigation Findings Report enclosed with the letter (both attached as Exhibit B to Respondent's Motion to Exclude Evidence and incorporated herein by reference) relate to Respondent's second Investigation Monitoring Review of Petitioner ("Second Final Decision").
8. The letter dated June 15, 2012 and the June 13, 2012 Investigation Findings Report enclosed with the letter (both attached as Exhibit C to Respondent's Motion to Exclude Evidence and incorporated herein by reference) relate to Respondent's third Investigation Monitoring Review of Petitioner ("Third Final Decision").
9. The letter dated July 11, 2012, the July 11, 2012 Investigation Findings Report enclosed with the letter, and the Notice of Decision dated July 30, 2012 (all attached as Exhibit D to Respondent's Motion to Exclude Evidence and incorporated herein by reference) relate to Respondent's fourth Investigation Monitoring Review of Petitioner (with said Notice of Decision dated July 30, 2012 being the "Fourth Final Decision").

10. Petitioner did not appeal for reconsideration to Respondent's Reconsideration Review Committee the First Final Decision, Second Final Decision, or Third Final Decision. (Admissions Request and Response #5, 6, 8, 9, 11, and 12).
11. Petitioner did not appeal to OAH or NC DHHS the Fourth Final Decision. (Admissions Requests and Responses #14).
12. Exhibits E through H and J to Respondent's Motion to Exclude Evidence are true and accurate photocopies of the original pages of the *Deposition of Kenneth D. Dellinger* taken in this action.
13. Exhibit I to Respondent's Motion to Exclude Evidence is a true and accurate photocopy of an electronic mail correspondence by, between, or among former employees of Respondent and Kenneth D. Dellinger for Petitioner.
14. All of the Exhibits to the document entitled Respondent's Prehearing Statement and dated April 17, 2013 filed in this action are true and accurate photocopies of the document they purport to be. (Admissions Requests and Responses #2, 3, 4, 7, 10, 13, 15, 16, and 17).
15. By letter dated August 2, 2012, Respondent terminated with cause the Contract with Petitioner, effective September 10, 2012.
16. Petitioner sought reconsideration of such termination from Respondent. By letter dated August 27, 2012, Respondent, after careful review and reconsideration, notified Petitioner through its "Notice of Decision" that Respondent upheld the termination of the Contract with cause and the grounds therefor. Said Notice of Decision informed Petitioner of its rights to file a petition for review.
17. This Notice of Decision, a copy of which is attached as Exhibit I to Respondent's Prehearing Statement, forms the basis of Petitioner's appeal to OAH in this action. (Admission Requests and Responses #1 and 12).
18. Petitioner identifies reinstatement of its Contract with WHN in its prehearing statement as an issue to be resolved. (Petitioner's Prehearing Statement filed October 23, 2012, ¶1).
19. On April 5, 2013, NC DHHS informed Respondent that its 1915(b)(c) Medicaid Waiver Contract between NC DHHS and Respondent and its contract with the North Carolina Division of Mental Health, Developmental Disabilities, and Substances Abuse Services would not be renewed and was to be terminated with an effective date of July 31, 2013. (Reuss Aff., ¶4).
20. In or around May or early June 2013, NC DHHS informed Respondent that the terms of the contracts with Respondent would be extended to September 30, 2013. (Reuss Aff., ¶5).

21. The Secretary of NC DHHS has approved a plan of dissolution for Respondent and expansion of the catchment area for Smoky Mountain Center ("SMC"), also a multi-county area mental health, intellectual/developmental disabilities, and substance abuse area authority existing as a LME, to add the eight counties formerly comprising the WHN Catchment Area. (Reuss Aff., ¶7).
22. On or about October 4, 2013, Respondent and SMC consolidated, and all of Respondent's operations, other than those necessary to complete the effective winding up and closeout process of WHN, ceased. The closeout activities for Respondent include the resolution of this provider appeal action. (Reuss Aff., ¶8).
23. As of October 4, 2013, WHN no longer enters into or maintains contracts with service providers for enrollment to provide services to consumers formerly in the WHN Catchment area, has a catchment area, authorizes services for consumers in any catchment area, processes claims, pays providers for services provided to a consumer after September 30, 2013, or has consumers served in a catchment area. (Reuss Aff., ¶9).
24. Petitioner currently has a contract with SMC, which enrolled Petitioner as service provider within the SMC catchment area, which now includes the eight counties formerly comprising the WHN Catchment Area. Through Petitioner's contract with SMC, Petitioner can provide Medicaid funded services for SMC consumers, some of whom were former WHN consumers. (Kenneth D. Dellinger Deposition, pg. 38).

**CONCLUSIONS OF LAW**

1. This matter properly is before the Undersigned for determination of the pending motions.
2. Petitioner failed to exhaust all of its administrative remedies as to the First Final Decision, Second Final Decision, Third Final Decision, and Fourth Final Decision. All of the matters alleged in those Decisions are deemed admitted under the provisions of G.S. 1A-1, Rule 36.
3. There is no genuine issue as to any material fact.
4. Respondent is entitled to summary judgment as a matter of law.

**FINAL DECISION**

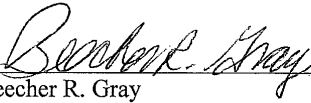
In view of the foregoing, I find that Respondent's Motion for Summary Judgment should be, and the same hereby is ALLOWED.

**NOTICE**

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 20 day of NOVEMBER, 2013.

  
Beecher R. Gray  
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA

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IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12OSP04550

COUNTY OF

Office of

<p>LARRY RANDALL HINTON Petitioner</p> <p>v.</p> <p>NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY DIVISION OF ADULT CORRECTION Respondent.</p>	<p align="center"><b>FINAL DECISION</b></p>
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This contested case was heard before Beecher R. Gray, Administrative Law Judge, on December 18, 2013 in Raleigh, North Carolina. Petitioner's Proposed Decision was filed on December 31, 2013. Respondent's Objections and Exceptions were filed on January 03, 2014.

**APPEARANCES**

Petitioner: J. Heydt Philbeck, Bailey & Dixon, LLP, Raleigh, North Carolina

Respondent: Yvonne B. Ricci, N.C. Department of Justice, Raleigh, North Carolina

**ISSUES:**

1. Whether Respondent showed by a preponderance of the evidence that it had just cause to terminate Petitioner's employment for having engaged in unacceptable personal conduct under N.C. Gen. Stat. § 126-35 and 25 N.C.A.C. 1J.0604, *et seq.* when Petitioner entered into a prison compound with a personal cell phone attached to his belt.
2. Whether Respondent should reinstate Petitioner to his former State position and recover back pay, benefits, attorney fees, and any other remedies or damages permitted under N.C. Gen. Stat., Ch. 126 and N.C. Admin. Code, Ch. 25, *et seq.*

**EXHIBITS**

Respondent offered the following exhibits, which were entered into evidence:

1. Written warning dated January 19, 2011;
2. Written warning dated August 18, 2011;
3. Internal investigation statement by Petitioner;
4. Petitioner's work performance evaluation for FY 2010-2011;

5. Notice of pre-disciplinary conference dated December 22, 2011;
6. Pre-disciplinary conference acknowledgement;
7. Respondent's recommendation for disciplinary action;
8. Notice of termination dated January 17, 2012;
9. Internal investigation statement of Supervisor Fraser;
10. Internal investigation report dated October 27, 2011;
11. (Document was not offered or admitted into evidence)
12. Solomon's recommendation for dismissal dated January 5, 2012;
13. Respondent's Prison Entrance/Exit Policy;
14. Polk Correctional Institute's Prison Entrance/Exit Policy;
15. Respondent's Disciplinary Policy and Procedures;
16. Respondent's Notice about Specific Contraband

Petitioner offered the following exhibits, which were entered into evidence:

1. Respondent's directive concerning Petitioner's entry and pacemaker;
2. Solomon's recommendation for Written Warning;
3. Solomon's recommendation for Dismissal;
4. ERC's recommendation against Dismissal;
5. Disciplinary action Decisions by Respondent for Similar Cases;
6. Petitioner's work performance evaluation for FY 2005-2006;
7. Petitioner's work performance evaluation for FY 2006-2007;
8. Petitioner's work performance evaluation for FY 2007-2008;
9. Petitioner's work performance evaluation for FY 2008-2009;
10. Petitioner's work performance evaluation for FY 2009-2010.

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility including, but not limited to, the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case. The undersigned makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT:**

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each party acknowledged on the record proper notice of the date, time, and place of hearing.
2. The parties acknowledged that Petitioner Larry Randal Hinton ("Petitioner") properly exhausted his administrative remedies prior to filing the petition for contested case in this matter and that the filing of the petition for contested case was timely.

3. Respondent North Carolina Department of Public Safety ("Respondent") is a State agency within the government of North Carolina and at all times has been subject to N.C. Gen. Stat. § 126-1, *et seq.*
4. By an Act of the North Carolina General Assembly, the North Carolina Department of Correction was merged with the North Carolina Department of Public Safety, effective January 1, 2012.
5. From around August 23, 2004 to January 17, 2012, Petitioner continuously was employed by Respondent to work in its Food Services unit. Respondent assigned Petitioner to work at Respondent's prison facility known as Polk Correctional Institution ("Polk"). At all relevant times, Shaun Fraser ("Supervisor Fraser"), Correctional Food Services Manager, served as Petitioner's immediate supervisor.
6. From August 1, 2005 to August 1, 2009, Respondent rated Petitioner's overall work performance as "Very Good." (P. Exs. 6-9) For fiscal year 2009-2010, Respondent rated Petitioner's overall work performance as "Good." (P. Ex. 10)
7. On January 19, 2011, Respondent issued Petitioner a written warning for unsatisfactory job performance for allegedly using unnecessary force on an inmate. (R. Ex. 1) On August 18, 2011, Respondent issued Petitioner a written warning for unsatisfactory job performance for allegedly not having reported the use of chemical force on an inmate. (R. Ex. 2)
8. Notwithstanding the written warnings, Respondent rated Petitioner's overall work performance as "Good" for fiscal year 2010-2011. (R. Ex. 4)
9. At all relevant times, Respondent had a policy that prohibited the introduction or possession of a personal cell phone inside the secure perimeter of a prison facility, unless otherwise authorized by Respondent. (R. Exs. 13 & 14)
10. Prior to entry into Respondent's Polk facility, all personnel are required to walk through a metal detector or, alternatively, be subjected to a metal detector hand-held "wand" at the gatehouse, unless otherwise permitted by Respondent. (R. Exs. 13 & 14)
11. The purpose is to detect whether an employee has any items on his or her person that are not permitted inside the perimeter of Respondent's Polk facility, including a personal cell phone. (R. Exs. 13 & 14)
12. Generally, if an employee inadvertently walks through the metal detector at the gatehouse with a personal cell phone, that employee is directed to take the personal cell phone back to the employee's vehicle before going back through the metal detector. Typically, such employees who are found to inadvertently have walked personal cell phones through the metal detector are not subjected to any disciplinary action by Respondent.

13. On or about July 2, 2008, Respondent sent a memo to various managers and to the Security Post officer informing them that Petitioner had a pacemaker installed in his chest and that he no longer would be required to walk through the metal detector or be subjected to a hand-held metal detector wand. (P. Ex. 1) Respondent's memo permitted, but did not require, that Petitioner be subjected to a "pat-down" search upon his entry into Polk's perimeter. (P. Ex. 1)
14. On October 22, 2011 at 10:30 a.m., Petitioner reported to work at Polk, as directed by Respondent. At his arrival, Petitioner walked through Polk's gatehouse to gain entry into Polk's perimeter in the same way that he customarily entered.
15. When Petitioner walked through the gate house at Polk on October 22, 2011, Petitioner inadvertently had a personal cell phone attached to his belt within plain view. At no time upon his entry into Polk's perimeter was Petitioner ever informed that he had a personal cell phone on his belt.
16. Immediately after his entry into Polk's perimeter, Petitioner reported to the Food Services Unit, as he customarily did. As Petitioner walked into the Food Services room, Petitioner's supervisor, Shaun Fraser, noticed that Petitioner had what appeared to be a personal cell phone on his belt.
17. Supervisor Fraser asked Petitioner, "What's that?" as he pointed to Petitioner's belt. Petitioner then discovered that he inadvertently had failed to remove his personal cell phone from his belt upon exiting his vehicle before entering the Polk gatehouse.
18. As soon as Petitioner became aware that his cell phone still was on his belt, he apologized to Supervisor Fraser and asked permission to return the cell phone to his vehicle in the parking lot. Upon receiving Supervisor Fraser's permission, Petitioner returned his personal cell phone to his vehicle and returned to work.
19. Later that day, Supervisor Fraser reported the incident to his supervisor and Respondent initiated a disciplinary investigation against Petitioner for having violated policy by bringing a personal cell phone inside the perimeter of Polk on October 22, 2011.
20. Prior to this incident on October 22, 2011, Petitioner never had violated Respondent's policy that prohibits an employee from bringing a personal cell phone into the perimeter of a prison facility without express authorization.
21. If Petitioner had been checked at the gatehouse as required--by pat down in his case--then Petitioner's personal cell phone would have been discovered on his belt, and Petitioner would have been permitted to return his cell phone to his vehicle, as other employees have been, and are, permitted to do, without being subjected to disciplinary action.
22. At no time did Respondent subject any other personnel to any disciplinary action for having failed to search Petitioner at the time of his entry through the gatehouse on



October 22, 2011. Petitioner testified that he presented himself at the gatehouse, raised his arms for the pat down search but that no one carried out a pat down.

23. At all times during the underlying internal investigation, Petitioner was honest and cooperative with Respondent. At all times, Petitioner readily admitted to his inadvertent error.
24. On December 22, 2011, Respondent provided Petitioner with a notice of pre-disciplinary conference that was set for the following day at 11:00 a.m. (R. Ex. 5) In the notice, Respondent informed Petitioner that a recommendation for disciplinary action against him had been determined for Petitioner having inadvertently violated Respondent's policy on bringing a personal cell phone into the perimeter of a prison facility.
25. On December 23, 2011, Petitioner appeared at the pre-disciplinary conference as directed by Respondent. (R. Ex. 6) At the conference, Petitioner informed Respondent's managers that his bringing in his personal cell phone inside the perimeter of Polk was inadvertent and was the first time he ever had erred in this manner.
26. Later on December 23, 2011, Respondent's managers prepared a recommendation that Respondent terminate Petitioner's employment for having violated Respondent's policy on the possession of personal cell phones inside the perimeter of a prison facility. (R. Ex. 7)
27. On or about January 17, 2012, Respondent decided to terminate Petitioner's employment, effective immediately. (R. Ex. 8)
28. From January 1, 2004 to January 1, 2012, Respondent had issued disciplinary actions against approximately twenty-nine (29) employees for violation of Respondent's policy prohibiting an employee from possessing a personal cell phone inside the perimeter of a prison facility. (P. Ex. 5) For twenty-eight (28) of those employees, Respondent's disciplinary sanction was to issue a written warning (P. Ex. 5) Petitioner was the only employee Respondent terminated for having violated its cell phone policy. (P. Ex. 5)
29. Following his termination, Petitioner timely exhausted any and all administrative remedies that were available to him in accordance with Respondent's grievance policies and procedures. Petitioner filed the petition for contested case in this matter within thirty (30) days after being notified of Respondent's final agency decision as to his grievance in opposition to the termination without just cause.

**CONCLUSIONS OF LAW:**

1. The parties properly are before the Office of Administrative Hearings.

2. A “career State employee” is defined as a state employee who is in a permanent position appointment and continuously has been employed by the State of North Carolina in a non- exempt position for the immediate 24 preceding months. N.C. Gen. Stat. § 126-1.1.
3. Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1, *et seq.* at the time of his discharge.
4. Under N.C. Gen. Stat. § 126-35, no career State employee subject to the State Personnel Act shall be discharged for disciplinary reasons, except for just cause. N.C. Gen. Stat. § 126-35.
5. By statute, “just cause” for the dismissal, suspension, or demotion of a career state employee may be established only on the basis of unsatisfactory job performance or unacceptable personal conduct. *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).
6. Under the *State Personnel Act*, unacceptable personal conduct is defined as:
  - (a) conduct for which no reasonable person should expect to receive prior warning;
  - (b) job-related conduct which constitutes a violation of state or federal law;
  - (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee’s service to the State;
  - (d) the willful violation of known or written work rules;
  - (e) conduct unbecoming a state employee that is detrimental to state service;
  - (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
  - (g) absence from work after all authorized leave credits and benefits have been exhausted;
  - (h) falsification of a state application or in other employment documentation.

25 N.C.A.C. 1J.0614(7).

7. Several examples of personal misconduct include: abuse of patients or residents, insubordination, reporting to work under the influence of drugs or alcohol, and stealing or misusing State property. *Amanini v. Dep’t of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994).

8. Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).
9. The fundamental question in a case brought under N.C. Gen. Stat. § 126-35 is whether a disciplinary action taken was “just.” Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations. “Just cause,” like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, which can only be determined upon an examination of the facts and circumstances of each individual case. Thus, not every violation of law gives rise to “just cause” for employee discipline. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).
10. Respondent has the burden of showing by a preponderance of the evidence that it had “just cause” to discharge Petitioner from employment. N.C. Gen. Stat. § 126-35(d); N.C. Gen. Stat. § 150B-29(a); *See 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).
11. A career state employee who alleges he or she has been dismissed, demoted, or suspended without pay in violation of N.C. Gen. Stat. § 126-35 must first pursue any grievance procedures established by the employing agency or department. N.C. Gen. Stat. §§ 126-34, 126-37(a). Once such internal grievance procedures have been exhausted, the aggrieved employee may demand a formal evidentiary hearing by filing a petition for a “contested case” with the Office of Administrative Hearings (OAH). N.C. Gen. Stat. §§ 126-34, 126-34.1(a)(1), 150B-23, 150B-25.
12. Respondent failed to prove by a preponderance of the evidence that it had just cause to terminate Petitioner’s employment for allegedly having engaged in unacceptable personal conduct under N.C. Gen. Stat. § 126-35 and 25 N.C.A.C. 1J.0608, *et seq.*
13. Respondent failed to prove by a preponderance of the evidence that Petitioner at any time *willfully* violated any known or written work rules or otherwise engaged in conduct for which no reasonable person should expect to receive a prior warning.
14. Respondent failed to show by a preponderance of the evidence that it exercised sound and considered judgment when it determined that dismissal was the appropriate sanction for Petitioner under 25 N.C.A.C. 1J for Petitioner’s alleged actions leading to dismissal.

#### **FINAL DECISION**

Based on the foregoing findings of fact and conclusions of law, Respondent terminated Petitioner’s employment without just cause in violation of N.C. Gen. Stat. § 126-35. Accordingly, Respondent shall reinstate Petitioner to his former position with Respondent and

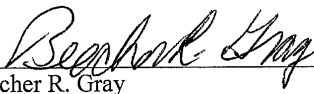
shall reimburse Petitioner for his back pay, benefits, and attorneys' fees under the provisions of N.C. Gen. Stat., Ch. 126 and N.C. Admin. Code, Ch. 25, *et seq.* The term "shall" as used in this decision means "mandatory" and does not mean "directory."

**NOTICE**

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 08 day of January, 2014.

  
\_\_\_\_\_  
Beecher R. Gray  
Administrative Law Judge

FILED

STATE OF NORTH CAROLINA 2014 JAN 15 PM 12:45 IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
COUNTY OF IREDELL OFFICE OF 13 EDC 16807  
ADMIN HEARINGS

Scott W Morgan,	)	
Petitioner,	)	
v.	)	<b>FINAL DECISION</b>
NC Department of Public Instruction,	)	
Respondent.	)	

This matter came on to be heard before Administrative Law Judge Selina M. Brooks on December 6, 2013 in Morganton, North Carolina.

**APPEARANCES**

For the Petitioner: Scott Morgan, *Pro se*  
152 Massey Deal Road  
Statesville, NC 28625

For the Respondent: Tiffany Y. Lucas  
Assistant Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, NC 27602

**ISSUE**

Whether Petitioner's Standard Professional I (initial) license should have been converted to a Standard Professional II (continuing) license.

**APPLICABLE STATUTES AND POLICIES**

N.C. Gen. Stat. § 115-296  
State Board of Education Policy TCP-A-004

**WITNESSES**

For Petitioner: Scott Morgan  
Jeffery R. James  
Brady L. Johnson

For Respondent: Toya Kimbrough  
Alvera J. Lesane

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner: Exhibits 1 – 2

For Respondent: Exhibits 1 – 12

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witnesses, any interest, bias, or prejudice the witnesses may have, the opportunity for the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, the Undersigned makes the following Findings of Fact, Conclusions of Law and Final Decision:

**FINDINGS OF FACT**

1. N.C. General Statute §115C-296(a) provides, in pertinent part, as follows:

The State Board of Education shall have entire control of licensing all applicants for teaching positions in all public elementary and high schools of North Carolina; and it shall prescribe the rules and regulations for the renewal and extension of all licenses... for each grade and type of license which it authorizes.

N.C. Gen. Stat. § 115-296(a)

2. Consistent with its statutory authority to control the licensure process and to set licensure standards and requirements, the State Board of Education (hereinafter the “SBE”) has adopted a policy, TCP-A-004, entitled “Policies on the Beginning Teacher Support Program.” Among other things, Section 4.00 of the policy provides that “[i]nitial (Standard Professional 1) licenses are issued to teachers with fewer than three years of appropriate teaching experience (normally considered to be public school experience) in their initial licensure area. All teachers who hold initial (Standard Professional 1) licenses...are required to participate in a three year induction period with a formal orientation, mentor support, observations and evaluation prior to the recommendation for continuing (Standard Professional 2) licensure.” (Resp. Exhibit 1)

3. Section 4.90 of the policy, entitled “Conversion Process” sets forth the process by which the Licensure Section at the North Carolina Department of Public Instruction (“DPI”) converts a teacher’s initial (Standard Professional 1) license to a continuing (Standard Professional 2) license. Section 4.90 provides, in part, that “[t]he official designated by the LEA in its approved Beginning Teacher Support Program plan is responsible for approving the acceptance of the continuing license issued through this process. If a teacher has not taught three

years, or if the designated official has knowledge of any reason related to conduct or character to deny the individual a continuing license, then the automatic conversion license cannot be accepted.” (Resp. Exhibit 1)

4. In this case, Petitioner was issued a North Carolina Standard Professional I (initial) license in August 2009, which was due to expire on June 30, 2012. On or about October 5, 2011, Petitioner’s employer school district, Iredell-Statesville Schools, requested an extension of Petitioner’s initial license through June 30, 2013, in order for him to complete the Beginner Teacher Support Program. The extension request was granted by DPI. (Resp. Exhibits 4, 5; T. pp. 17-20)

5. On or about April 8, 2013, however; during the time that Petitioner held an initial (SP I) license, he was placed on disciplinary suspension without pay by Iredell-Statesville Schools and notified of the school system’s decision to recommend to the local board of education that his employment contract not be renewed. The basis for the suspension and the recommendation not to renew the Petitioner’s employment contract was the Petitioner’s “failure to abide by local and state policy regarding the use of controlled substances and required drug testing” and the “failure to adequately communicate with administration and staff regarding adherence to established policies, as well as [Petitioner’s] attempt to circumvent the process.” Specifically, Petitioner had tested positive for marijuana use and had failed to report for drug testing when first instructed by his school system to do so. (Resp. Exhibits 6, 7, 9, 10)

6. Subsequently, on or about July 1, 2013, Dr. Alvera Lesane, Associate Superintendent of Human Resources at Iredell-Statesville Schools, submitted a recommendation to DPI that Petitioner’s Standard Professional I license not be converted to a Standard Professional II license. (Resp. Exhibit 12)

7. The recommendation not to convert to a Standard Professional II license was based on Petitioner’s failure to successfully complete the evaluation process of the Beginning Teacher Support Program. More specifically, because of concerns raised about the Petitioner’s conduct and character, and consistent with section 4.90 of State Board Policy TCP-A-004, Petitioner’s employing school system was not able to recommend that he be granted a continuing license. (Resp. Exhibit 12; T. pp. 47-49)

8. DPI accepted the local school system’s recommendation that Petitioner not be granted a continuing license and denied the request for conversion from a Standard Professional I license to a Standard Professional II license. The denial was based upon the Petitioner’s failure to complete the Beginning Teacher Support Program as required by Policy TCP-A-004. (Resp. Exhibit 13)

9. Petitioner appealed the decision not to convert his license to the Office of Administrative Hearings.

10. At the hearing in this matter, Petitioner admitted that he tested positive for marijuana use while employed as a teacher at Iredell-Statesville Schools. Petitioner also admitted that he failed to report for drug testing despite being instructed by his employer to

attend. Petitioner also acknowledged that illegal drug use is inconsistent with the North Carolina Code of Ethics for North Carolina Educators. (T. pp. 69, 79-80; Petitioner's Exhibit 1; Resp. Exhibit 2)

11. Dr. Alvera Lesane, Associate Superintendent of Human Resources at Iredell-Statesville Schools, testified that the recommendation not to convert Petitioner's initial license to a continuing license was based on concerns the school system had about Petitioner's conduct and character due to his apparent attempts to avoid drug testing, the positive test result for marijuana use, as well as Petitioner's failure to take full responsibility for testing positive for drugs. (T. pp. 48-49).

12. Toya Kimbrough, a licensure specialist at DPI, testified that DPI's decision not to convert Petitioner's initial license to a continuing license was based on the recommendation and supporting documentation received from Iredell Statesville Schools regarding the Petitioner's positive drug test and the failure to report to drug testing as instructed. (T. pp. 22-23).

### CONCLUSIONS OF LAW

1. Teachers are required in this State, both by Rule and by case law, to maintain the highest level of ethical and moral standards, and to serve as a positive role model for children. 16 N.C.A.C. 6C.0602(b)(2); Faulkner v. New Bern-Craven Board of Education, 311 N.C. 42, 59, 316 S.E.2d 281, 291 (1984)

2. As our Supreme Court observed in Faulkner:

Our inquiry focuses on the intent of the legislature with specific application to teachers who are entrusted with the care of small children and adolescents. We do not hesitate to conclude that these men and women are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges. *Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil.* It is not inappropriate or unreasonable to hold our teachers to a *higher standard of personal conduct*, given the youthful ideals they are supposed to foster and elevate.

Id. (emphasis added)

3. The burden is on Petitioner to demonstrate, by a preponderance of the evidence, that the Respondent erred in not converting his initial license to a continuing license. Peace v. Employment Sec. Comm'n, 349 N.C.315, 507 S.E. 2d 272 (1988)

4. Petitioner's conduct is not consistent with the high standards of conduct expected of teachers in this State. See Faulkner v. Board of Education, 311 N.C. 42, 316 S.E.2d 281 (1984)



5. Respondent did not act arbitrarily or capriciously in not converting Petitioner's initial license to a continuing license.

6. Respondent did not and has not unlawfully deprived Petitioner of any property to which he is entitled.

7. Respondent has not prejudiced the rights of Petitioner nor acted arbitrarily or capriciously.

Based on the foregoing, the undersigned makes the following:

**DECISION**

The Petitioner has not met his burden of proof by the preponderance of the evidence and therefore the Petition for Contested Case hereby is **DENIED**.

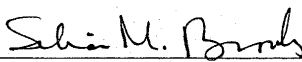
**NOTICE**

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or the superior court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Serviced attached to this Final Decision. Under N.C.G.S. 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 14th day of January, 2014.

  
Selina M. Brooks  
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA

COUNTY OF ORANGE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
13 OSP 02680

Office of  
Administrative Hearings

Beverly J Payne  
Petitioner

vs.

University of North Carolina at Chapel Hill  
Respondent

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**FINAL DECISION**

On December 19-20, 2013, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Chapel Hill, North Carolina. On March 5, 2014, the parties filed their respective proposed Final Decisions with the Office of Administrative Hearings.

**APPEARANCES**

For Petitioner: Alan M. McSurely, Esq.  
McSurely & Turner, PLLC  
109 North Graham St., Suite 100  
Chapel Hill, NC 27516

For Respondent: Katherine A. Murphy  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

**ISSUES**

1. Whether Respondent, its agents, or employees discriminated against Petitioner, based upon her race, color, national origin, or age when it eliminated Petitioner's position on September 21, 2012 pursuant to a Reduction In Force ("RIF")?

2. Whether Respondent, its agents, or employees retaliated against Petitioner, based upon her race or age, by eliminating Petitioner's position on September 21, 2012 pursuant to a RIF, after Petitioner declined her supervisor's questions about whether Petitioner could retire?

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner:

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	11/23/10	Email exchange between Lynne Kahn and Robin Rooney
2	09/07/12	Email exchanges between Lynne Kahn and Natalie Nelson
3	09/20/12	Various emails
4	05/25/13 05/27/13	Emails between Lynne Kahn and Samuel Odom
5	08/29/13	Email from Robin Rooney to Lynne Kahn
6	08/29/13	Email from Robin Rooney to Lynne Kahn
7	08/29/13	Emails from Robin Rooney to Lynne Kahn
8	06/07/11	Email exchanges between Lynne Kahn and Natalie Nelson
9	08/07/12	Email from Natalie Nelson to Karl Pfister
10	08/07/12	SPA Layoff Request Form
11	08/21/12	Email from Natalie Nelson to Karl Pfister
12	08/28/13	Email exchange between Lynne Kahn and Natalie Nelson
13	09/18/12	SPA Layoff Request Form
14	08/21/12	SPA Layoff Request Form
15	09/18/12	SPA Layoff Request Form
16	06/19/12	Federal Register Volume 77, Number 118
17	09/20/12	Email from Beverly Payne to staff
18	09/20/12	Email from Lynne Kahn to Natalie Nelson
19	11/16/12	Letter from Sean Womack to Beverly Payne; form letter
21	10/26/12	SPA Grievance Step 1 Filing Form
22	N/A	Document entitled "Attachment A"
23	08/28/12	SPA Filled Positions by Department
24	09/17/12	SPA Vacant Position Report

25	08/09/12	Analysis of Layoff v. Pool
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For Respondent: None

**WITNESSES**

For Petitioner: Lynne Kahn, Robin Rooney, Beverly J. Payne, Greg Burress

For Respondent: Lynne Kahn

**FINDINGS OF FACT**

Procedural Background

1. At 5:00 pm on Friday, September 28, 2012, Respondent informed Petitioner that Respondent was eliminating Petitioner's position due to a Reduction in Force. Respondent's department head, Dr. Lynne Kahn, handed Petitioner a Notice of Separation Due to Layoff dated September 21, 2012. In that Notice, Respondent informed Petitioner that:

Due to a loss of funding and after evaluating alternative measures, I must inform you that your employment with the department will end Wednesday, October 31, 2012.

(Document Constituting Agency Action) Respondent advised Petitioner that she must submit her appeal of this action to the Employee & Management Relations Division of Respondent's Office of Human Resources within 30 calendar days of receiving this layoff notification. (Document Constituting Agency Action)

2. On October 26, 2012, Petitioner filed a grievance with Respondent alleging termination based on race, age, sex, and in retaliation for Petitioner declining Dr. Kahn's question whether Petitioner could retire. Petitioner alleged that Respondent failed to provide any reasons for her termination, and she was the only person laid off in her department. Petitioner also alleged that there was no business reason for her layoff, because the department was notified it had received a \$21.8 million grant on October 18, 2012.

3. On November 16, 2012, Respondent notified Petitioner that Respondent was unable to proceed with her grievance, because the information in her grievance was insufficient. On November 20, 2012, Respondent advised Petitioner she could file an appeal directly with OSP without receiving a Final Agency Decision. (See Respondent's Motion to Dismiss, Attachments)

4. On January 25, 2013, Petitioner filed a contested case petition with the Office of Administrative Hearing appealing her termination from employment. In her petition, Petitioner alleged the following grounds for her appeal:

(1) Respondent discharged Petitioner from her job without just cause based on a Reduction in Force.

(2) Respondent discriminated and/or retaliation against Petitioner based on Petitioner's race, color, national origin, and age when it terminated her from employment through a RIF in which Petitioner was the only employee who lost her job.

(3) Petitioner also alleged that Respondent retaliated against her, by discharging Petitioner from employment due to a RIF, after Petitioner declined her supervisor's question, whether Petitioner could retire, on two occasions. (Petition)

5. On May 15, 2013, the undersigned issued a Final Decision in part, granting Respondent's Motion to Dismiss Petitioner's claim that she was Reduced in Force without just cause as the Office of Administrative Hearings lacked jurisdiction over such an allegation based on *University of N.C. at Chapel Hill vs. Feinstein*, 161 N.C. App. 700, 590 S.E. 2d 401 (2003).

#### Adjudicated Facts

6. At all times relevant to this case, Petitioner was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes. Petitioner had 24 years of state service, and was 57 years old when Respondent terminated her employment by a Reduction in Force.

7. At all times relevant to this case, Respondent UNC-CH was subject to Chapter 126, and was Petitioner's employer.

8. Petitioner is tri-racial, and a member of the Occaneechi Tribe. T. pp. 235-36. Petitioner is a former Chief of the Occaneechi Tribe, and remains an active member of the Occaneechi Band of the Saponi Nation Tribe, one of the Native American Tribes recognized by the State of North Carolina.

9. In 1989, Respondent hired Petitioner as a full-time secretary working in the Frank Porter Graham Child Development Institute ("FPG"). Although Petitioner's title changed, her position did not change. T. pp. 238-39. Petitioner was always paid by grant money, also known as "soft money."

10. Dr. Lynne Kahn (Caucasian female) has worked at FPG since 1983, has a Ph.D., and worked in an area called "Technical Assistance." T. pp. 11, 14-15, 312. Dr. Kahn was the Associate Director for evaluation on the NECTAC project until 2006. In 2006, Kahn became the interim Director of NECTAC. Around 2007, Dr. Kahn became one of Directors of NECTAC. T. pp. 32-33.

11. The NECTAC program was a grant project funded by the federal government, which enabled FPG to establish a national center that has been continuously supported by federal grant money for many years. Each federal grant typically lasts between three and five years. According to Dr. Kahn, NECTAC is just one of many grants in the FPG Institute. "We're not independent from it [FPG]. And we are not managed separately from it. If you look at the FPG website, there's a hundred or more of us." "FPG has many projects and a lot of project directors, and a lot of people like me." T. p. 30.

12. Each time a new federal grant was advertised, it had a different scope of work associated with it. Each time FPG was awarded the grant, it was required to rename the project supported by the grant. T. pp. 15-16. When a grant was about to end, Reductions in Force were planned for the employees supported by the grant in case a new grant was not obtained to cover salaries. T. pp. 75, 78-79, 234-35, 240-41.

13. In 2007, Dr. Kahn promoted Petitioner to the position of Events Coordinator, or Business Services Coordinator with FPG's Child Development Behavioral Services Department. Kahn promoted Petitioner, because Petitioner was a hard worker, well-organized, and smart. At that time, Dr. Kahn was aware that Petitioner was Native American, and over 40 years old. T. pp. 43, 45-46, 239-40, 312-13, 342-43

14. In her new role, Petitioner was primarily in charge of planning large-scale conferences for both NECTAC, and a project supported by a grant from the State known as "NCTA." Petitioner was supported 50/50 by the two grants.

15. Dr. Kahn was Petitioner's direct supervisor on the NECTAC grant. Robin Rooney was the director of the NCTA project, and was Petitioner's direct supervisor for Petitioner's work on NCTA. Dr. Kahn was Dr. Rooney's direct supervisor. T. pp. 38-39, 46-47, 196-97, 243-44, 248-49

16. In 2009, the federal funding agency revised the scope of work on the NECTAC grant to remove the national conference planning from FPG. Conference planning had been Petitioner's main responsibility for the NECTAC project, and was approximately 30% to 40% of her job. T. pp. 47, 244. Petitioner used to work almost half of the year preparing for the NECTAC national meeting. Thus, when the federal government removed that duty from FPG, Petitioner lost her main duty, or approximately 30% of her job. T. p. 47 As a result, beginning in 2010, Dr. Kahn had to find new duties to assign Petitioner under the NECTAC grant. T. pp. 46-49, 343.

17. In August 2010, Dr. Vivian James, the funder for NCTA, asked Dr. Rooney to reassign Petitioner's duties on the NCTA project to someone else, because Dr. James was upset by the tone of Petitioner's statements, and felt Petitioner had been disrespectful to James. Based on her interaction with Petitioner, Dr. James no longer wanted to work with Petitioner.

18. At the same time, Dr. Rooney was preparing to submit a new grant proposal to Dr. James for a multi-million dollar contract, on a larger scale than the then-current NCTA project. Dr. James expressed concerns about whether Petitioner had the technical skills to do the work required, and Dr. Rooney shared those concerns. At Dr. James' request, Dr. Rooney did not include Petitioner in the new NCTA grant proposal. The new NCTA grant began in 2011. T. pp. 38-40, 196-202, 205, 207, 219-22, 270-72; (Pet. Exs. 5-7).

19. On August 18, 2010, Rooney wrote to her subordinate, Debbie Cate, that she had:

Talked to bev. I told her that I was going to tell her what someone told me years ago—don't let your mouth get your ass in trouble. Then I gave her the spiel about how things don't always communicate on email that even if you think you are being playful, it can come across as DISRESPECTFUL.

(Pet. Ex. 6, p. 461)

20. On August 26, 2010, Ms. Rooney met with Petitioner, and other employees, to insure everyone knew their new duties. Due to Petitioner's lack of skill with Excel, job duties requiring more developed computer skills were transferred from Petitioner to Matt Coy, a young white male employee for the remainder of the 2010 NCTA grant. T. pp. 166-67, 200-02, 207, 213-14, 249-50. Matt was a Social Clinical Research Assistant, a lower position than Petitioner. T. p. 170. Rooney also removed "other" duties from Petitioner as Rooney "no longer wanted her [Petitioner] involvement in, but that I wasn't sure who would do." (Pet. Ex. 7) Rooney told Dr. Kahn, in May 2013, that the point of that meeting "was to show that responsibilities were being shifted to Matt that had previously been Bev's." (Pet. Ex. 7, pp. 462-3)

21. With Petitioner not working on the NCTA grant, Dr. Kahn rewrote Petitioner's job responsibilities, so that all of Petitioner's duties were under NECTAC.

22. In a November 23, 2010 email, Rooney questioned Kahn whether Petitioner could be reduced to part-time work or RIFed when the NECTAC grant ended in the fall of 2011. In an email titled "Personnel Questions," Rooney asked Kahn:

. . . Do we need to have the info about her roles and responsibilities in some kind of other form before our meeting on 11/29? In the meeting, would it be appropriate to ask what she's [Payne] working on, and get her input as to what she can be doing to contribute positively to the organization? Maybe this is crazy—but what if we encouraged her to go to part time—whatever the minimum is to still get benefits? One other thought—if nectac gets re-configured this fall (assuming there is an RFA and that we respond and get it - is that an opportunity for layoffs for peeps who don't have the needed skills to move forward with the new

organization?? DELETE THIS MESSAGE AFTER READING!! I think these are the kinds of questions you're not supposed to write down....

(Pet. Ex. 1, p 380)

23. Five minutes later, Kahn replied to Rooney by email:

And yet, they are excellent questions. I think my answers are all YES." I think we can encourage her to work part time, but we can't make her go part time. We'll have to talk more later. She took today and tomorrow off saying 'she didn't have anything to do here so she wasn't coming.' She didn't mention anything about getting the email about meeting next Monday. She doesn't really read her email . . .

(Id.)

24. At this time, Dr. Kahn also asked Natalie Nelson, HR person for FPG, what were the different options regarding Petitioner's employment, and the consequences of taking those options regarding Petitioner's position.

a. One path would be to take disciplinary action against Petitioner regarding her below good work, and not meeting her job expectations, if Petitioner did not improve her skills and help out with things that needed to be done. The other path would involve determining what employees to RIF, including Petitioner. T. pp. 64, 92-94.

b. Kahn and Nelson also talked about the order of laying off about 30 employees. Kahn understood from their HR person that letting Petitioner go for not performing her work would have implications for Petitioner's ability to find future jobs. Kahn chose to work with Petitioner until she was sure there wasn't work that Petitioner "did that was contributing." T. pp. 64, 92-94.

25. On June 7, 2011, Nelson advised Kahn that even though Kahn had removed some responsibilities from Payne's duties:

If there are training opportunities (such as professionalism, etc.) that may benefit her in whatever duties she currently has, I would strongly recommend you document that in Section VI-Performance Action Plan on the Work Plan. This is all part of the documentation process should you need to escalate disciplinary action in the coming cycle year.

(Pet. Ex. 8, 402) Nelson also informed Kahn that she needed to include a detailed action plan on Petitioner's 2011 performance evaluation, because Kahn had given Petitioner a below good rating on her 2011 performance evaluation. Based on that recommendation, Kahn included an action plan in Petitioner's 2011 performance evaluation that Petitioner would improve her skills at using Excel, so Petitioner would be



equipped to handle more complex and independent Excel tasks. T. pp. 183-183. (Resp. Motion for Summary Judgment, Ex. 4)

26. Around August 2011, Respondent learned the federal government had extended the NECTAC grant, at the same levels, for one additional fiscal year of September 2011 to the end of September 2012. Due to that renewal, Dr. Kahn did not need to consider RIFing 30 employees, including Petitioner. T. pp. 57-62, 207-08, 218-22 (Pet. Ex. 1) Petitioner's job was then funded 100% by NECTAC through the expiration of that grant. T. pp. 58-59, 62, 340.

27. With the loss of the national conference duties under NECTAC, Dr. Kahn struggled to find work for Petitioner to do under NECTAC. During the extra year of NECTAC funding, from September of 2011 to the fall of 2012, Dr. Kahn encouraged Petitioner to improve her computer skills. Kahn tried to assist and motivate Petitioner to work on improving those skills, but was unsuccessful.

28. Dr. Kahn specifically asked Petitioner to work with Matt Coy to learn how to produce reports analyzing each state's data on programs for children birth to three, and programs for children three to twenty-one. "That's a huge job, and a lot of people work on it. Every year, it takes about four months of the year." T. p. 50. The staff in their offices pulls each report, divide it into chapters, build a file, and write a national summary. Dr. Kahn asked Petitioner to work with Matt on last year's work to learn how to do the work, so she would be part of that team the next time it came around. T. p. 51.

29. When Kahn met with the team about preparing these reports, Kahn learned that Petitioner had decided to wait until there was real data to learn how to do the job, and had not learned how to do the job requested. When the real data came, Petitioner could not perform the work, because she didn't have the required software, Adobe Acrobat, installed on her computer, and FPG wasn't able to install the software in time for her to work on that team. T. pp 52-53. Dr. Kahn was angry and really disappointed that Petitioner chose not to do what Kahn asked, and that the situation hadn't worked out the way Kahn hoped it would. T. pp 53-54.

30. Dr. Kahn warned Petitioner that she needed to find something to do, because she could not be employed if there was no work for her. T. pp. 49-53, 61-62, 72, 81, 102, 106-08, 110-11, 168-72, 184, 250, 252, 324-26, 344-45.

31. Kahn also thought that Petitioner's lack of skills with computer software, such as Excel, was a detriment. For example, Petitioner had kept track of contact information for NCTA in notebooks, but NCTA was moving towards using an Excel database.

32. Petitioner's 2011-12 Performance Management and Competency Assessment showed that Petitioner's Position Competencies were: 30% Business and Records Administration, 30% Financial Management, 20% Info Processing and

Decision-making, and 10% Communication. According to Petitioner's 2011-12 Performance Management and Competency Assessment, Petitioner's principal job functions as a Business Services Coordinator were: 50% providing support for NECTAC technical assistance, 40% administrative support to staff on AR evaluation project, and 10% contributing to NECTAC organizational functioning and collaboration on activities. Petitioner's primary job functions as a Business Services Coordinator included administrative support such as duplicating and organizing materials, coordinating conference events, and collaborating with hotels and participants regarding registering for conferences. (Respondent's Motion for Summary Judgment, Exh. 5)

33. The deadline for submitting the new NECTAC applications was July 19, 2012. (Pet. Ex. 16) Kahn submitted the new proposal on or before July 7, 2012. T. p. 101. In the old NECTAC, there was five support staff or administrative assistants with various roles. In the new NECTAC proposal, there were one and one-half full-time staff positions left, and the new NECTAC was cut by \$1 million. T. p 107.

a. When Dr. Kahn wrote Respondent's new NECTAC proposal, she saw what the work was, how much money they had, figured out who could do the work and how much of their time they could support. None of the jobs required conference coordination, and there were no jobs that did not require use of technology and software. T. pp. 88, 92-94, 101-02, 105-08, 111-12, 140, 176, 315-16, 324-26, 332; (Pet. Ex. 2) "There was not money in it for several people's positions." Kahn acknowledged that she had "money for people who could do the work." T. p. 147.

b. Dr. Kahn did not include Petitioner in the new NECTAC proposal, because Petitioner was not able to contribute to the scope of work required by the grant. "In my best judgment, there was not work in the proposal that matched what she [Petitioner] was good at doing." T. p. 93. Kahn thought that Petitioner didn't do the tasks in a way that was acceptable, or that Kahn was hoping Petitioner would do. T. p 107. "Petitioner was the only one that didn't have a role in this proposal nor other backup proposals." T. p.102. Kahn chose to lay off Petitioner with layoff benefits and high-priority status, and was willing to write a letter [of recommendation] for Petitioner if she needed it. T. p. 94.

c. Petitioner had not developed the advanced computer skills that would have made her useful in other ways to the new NECTAC or other projects.

34. In meetings with Petitioner, Dr. Kahn asked Petitioner several times "Are you sure?" During the summer of 2012, Dr. Kahn asked Petitioner if she could retire. When Petitioner objected to this question, and told Kahn she could not retire, Kahn replied, "Are you sure?" Dr. Kahn was trying to help Petitioner explore her employment options given that she was going to be RIFed. T. pp. 151-52, 264-65.

35. Dr. Kahn asked Petitioner if she could retire, but she also asked every employee, who had been there as long as Kahn had, that question in exploring their options in case they were RIFed from their jobs with Respondent.

36. In August 2012, Dr. Kahn verbally informed Petitioner that she had not included Petitioner in the proposal for the new NECTAC grant, and that Petitioner would be RIFed from employment. T. pp. 141, 254. Khan also identified eight NECTAC employees, including Petitioner, to be reduced in force from employment.

37. Dr. Kahn worked with FPG HR Manager Natalie Nelson to get approval for the RIF of Petitioner. Dr. Kahn provided Ms. Nelson with the information and her reasons for Petitioner's RIF. Dr. Kahn advised Ms. Nelson that they were ending the current contract so Petitioner's current job, as would everyone else's, would be gone. She also informed Nelson that Kahn had not included Petitioner in any new proposal, because her skills as event coordinator were not required. After Kahn communicated that to Nelson, Nelson "made up the words to match how she fills out forms." T. p 98, 100.

38. Greg Burress, FPG Associate Director of Administration and Finance, supervised Nelson. At hearing, he verified that the HR manager provides the purpose, intent, or reasons for a RIF on the Layoff Request form, and that it was not unusual for HR facilitator to help with the phrasing in completing that form. T. p. 297.

39. On August 7, 2012, Ms. Nelson sent the first version of a SPA Layoff Request Form for Petitioner to Mr. Karl Pfister, Respondent's Office of Human Resources Employment Consultant. (Pet. Ex. 9, p. 754) The Layoff Request Form was signed with FPG Director Sam Odom's electronic signature and dated 8.7.12. The "Reason for RIF" was "New work scope, reduction/elimination of role." Steps taken to avoid RIF were listed as: "Employee given the encouragement to gain new skills for changed role." Beverly Payne was the only employee proposed for the RIF. (Pet. Ex. 10, pp. 755-757)

40. On August 20, 2012, Mr. Pfister emailed Ms. Nelson his feedback on the Layoff Request for Petitioner, hoping that "this will help clarify the information we need for this request." He asked Nelson for more detail on the "Reasons" for the layoff such as:

Was funding taken away? Did a grant expire? . . .

What is the new work scope? . . .

What actual steps were taken to avoid laying [off] Petitioner? For instance, did the department apply for more funding? Were other positions outside the subunit looked into for possible transfer situations so Mrs. Payne didn't have to be let go? . . . What does it mean that "Employee given the encouragement to gain new skills for changed role?" Did the department try to cut costs so she could remain? . . .

. . . [T]he most important question for this section is where are [sic] the duties of this position going when Mrs. Payne is gone?

(Pet. Ex. 11)

41. Ms. Nelson forwarded Mr. Pfister's questions to Dr. Kahn, who answered such questions on August 21, 2012 as follows:

We have applied for a new project that we will hear about in September. Even if we are successful in getting the new project, the scope of work is different, and there is not a role in the new work scope for Ms. Payne Betts' position. . . .

We did not include Beverly Payne in the proposal, because the combination of tasks did not require anyone with her skills or her role/position. . . .

I encouraged Ms. Payne to take courses in Word, Excel, PowerPoint.... to gain skills needed to back up professional staff with supports in those areas. She did not choose to do so. . .

[i]n the proposals that we wrote for new business, we needed personnel as research assistants with Microsoft Office Suite software expertise.

There will not be any such duties. We can say that her job is eliminated due to loss of funding.

(Pet. Ex. 12, pp. 432, 433)

42. On September 18, 2012, a second version of the SPA Layoff Request Form was sent to Respondent's HR Office. Director Odom's signature was electronically affixed to that version, and dated 8.7.12. (Pet. Ex. 13, p. 679) The "Justification for RIF" section of this form contained a much longer reason for Petitioner's RIF than the justification on the first draft. That justification read:

The funding for this project will end in September, 2012. We have no funds to extend Beverly Payne's position beyond October 31, 2012. We have applied for a new project that we will hear about in September. Even if we are successful in getting the new project, the scope of work is different, and will not require the duties found in this position. This position is primarily responsible for the coordination and planning of national conferences, event planning, and negotiating conference venues for Technical Assistance Center events. Our new project does not require these responsibilities.

(Pet. Ex. 13, p. 677)

43. A third version of the Layoff Request Form for Petitioner had Mr. Odom's electronic signature affixed, and was dated 8.21.12. (Pet. Ex. 14, 781) This version's "Reason for RIF" included the explanation from the prior draft of this Form, plus the additional information:

The new work scope is a proposal we wrote in response to Applications for New Awards: Technical Assistance and Dissemination To Improve Services and Results for Children with Disabilities; Early Childhood Technical Assistance . . . The Center is required to perform about 20 specific tasks for the Office of Special Education Programs. We proposed how we would conduct the task, and what personnel would be needed. We did not include Beverly Payne in the proposal because the combination of tasks did not require anyone with her skills or her role/position. . . .

Steps taken to avoid RIF: . . . we needed personnel as research assistants with Microsoft Office Suite software expertise. Beverly Payne was given the encouragement to gain new skills of a changed role. I encouraged Beverly Payne to take courses in Word, Excel, PowerPoint (either online or in person) to gain skills needed to back up professional staff with supports in those areas. She did not choose to do so. She has been inquiring about employment with other FPG projects.

(Pet. Ex. 14)

44. Respondent created a fourth version of the SPA Layoff Request Form. That version of the Form was not signed by anyone approving the Form. (Pet. Ex. 15, p. 798) It contained a shorter "Reason for the RIF" stating:

The elimination of this role: The funding for the project will end in September 2012. We have no funds to extend Beverly Payne's position beyond October 31, 2012. We have applied for a new project that we will hear about in September. Even if we are successful in getting the new project, the scope of work is different, and there is not a role in the new work scope for Beverly Payne's position.

(Pet. Ex. 15, p 796) This unsigned version was sent to OHR on 9/18/12.

45. In the fourth SPA Layoff Request Form, Respondent explained that:

The new project work scope does not have a role for this position. It is a different set of tasks that we are proposing to do for the federal Office of Special Education Programs (OSEP).

(Pet. Exh. 15, p. 2)

46. Ms. Nelson worked with UNC-CH's central Office of Human Resources, and completed the SPA Layoff Request Forms, including using one factor to justify the reason Petitioner was RIFed. (Pet. Ex. 10, 13 – 15) Ms. Nelson didn't testify at hearing. Kahn had no knowledge about the number of drafts of the SPA Layoff Request Forms, which Ms. Nelson completed, the stated reason for each successive draft, the order in which the drafts were prepared, or which version of the form was the final version. T. pp. 104-05, 318-22. (Pet. Ex. 12) Dr. Kahn never saw the forms until after the petition in this matter was filed. T. pp. 95-105, 112-18, 296-97.

47. On September 19, 2012, Ms. Kahn e-mailed the whole NECTAC staff that they had been awarded the new NECTAC grant. Kahn stated that, "Yes. The rumors are true. All is wee (sic) and the new NECTAC is ours. Yay and OPA to all." (Pet. Ex. 17)

48. At 10:34 am on September 20, 2012, Petitioner sent the following email to her NECTAC coworkers:

This is GREAT news! Yayyyyyyyyyyy! Thanks to all that put their greatness into getting it accomplished, and particularly thanks to you Lynne.

(Pet. Ex. 17) At 12:12 pm that same day, Ms. Nelson informed Dr. Kahn that "OHR has approved the layoff of Beverly Payne," and Kahn should give the letter and packet "to Beverly by the end of the day tomorrow, if at all possible." (Pet. Exs. 18, 21)

49. On Monday, September 24, 2012, Kahn received the separation of employment notice, dated September 21, 2012, to give Petitioner. Kahn signed the letter that day, but did not give it to Petitioner until Friday, September 28, 2012. Kahn knew when she signed that letter that Respondent was getting a new contract with work in it that "completely covered the people who were proposed in it, to do the job which did not include" Petitioner. T. p. 139.

50. Kahn waited until Friday, September 28, 2012 to give Petitioner the separation notice, because she thought it was better to give the letter to Petitioner before the weekend. T. p. 139. Nelson had told Kahn the date to comply was September 28, 2012.

51. At the close of the September 28, 2012 work day, Dr. Kahn handed the September 21, 2012 letter to Ms. Payne advising her that her position was terminated due to layoff and "to a loss of funding." (Pet. Ex. 20)

52. Dr. Kahn encouraged Petitioner to look for other positions over at least a 90-day period, but she "didn't look very hard to help her find another position." T. p. 141. Kahn did not ask FPG Director Sam Odom, or anyone else, other than informally, to help Petitioner remain employed at FPG. T. pp. 109-110. Kahn didn't do that because she "couldn't recommend her [Petitioner] for anything that required the use of

technology that was advanced.” T. p. 110. “Everyone else in our department is able to sue Microsoft Office Suite, and the Adobe Suite.” T. p. 112.

53. Petitioner met with FPG layoff coordinators on Tuesday, October 9, 2012. T. p. 274. Petitioner’s RIF from Respondent was effective October 31, 2012. (T. pp. 138, 264) At that time, Ms. Payne earned \$45,878 annually. (Pet. Ex. 23, p. 740) After her termination, Petitioner applied for as many as 12 positions with UNC. T. p. 267.

54. Dr. Kahn did not “RIF” the 7 other employees, she had initially identified to be RIFed, because those RIFs were rescinded. T. p. 96. In essence, Kahn included these 7 other employees in multiple budgets for multiple proposals where their skills matched, either through projects Kahn wrote, or through those employees’ own initiatives. A couple of people chose to work part-time. T. pp. 179-180. The end result was that “everybody is either employed at full-time or part-time except for Petitioner.” T. pp. 179-180. (Pet. Ex. 23, p. 743)

55. In May 2013, Dr. Kahn acknowledged that she met with FPG Director Sam Odom, and Ms. Nelson to discuss Petitioner’s appeal. Kahn advised Odom about the sequence of events, how she tried to come up with a job for Petitioner that would work out, how the NCTA funder asked that Petitioner not be included on a grant, and about Kahn’s inability to get Petitioner engaged in other work. T. p. 121. Mr. Odom advised Kahn that “this isn’t what the case is about. Do you have the money for a position that Beverly has the skills for?” Kahn replied, “No.” T. p. 121. Odom told Kahn that this is a layoff based on a project with different roles and responsibilities than the old projects, and you need not make it so complicated. T. p. 122.

56. On May 25, 2013, Kahn sent an email to Odom, thanking him for clarifying for her “the appropriate response.” She informed him that “None of the proposals we wrote last spring and summer required conference or meeting coordination. If that works for you two, that’s a much simpler explanation.” (Pet. Ex. 4) By a May 27, 2013 email, Odom reiterated his understanding that Petitioner’s position was terminated because Petitioner’s prior responsibilities with NECTAC were no longer a part of the new center proposal, and no longer funded by OSEP. He noted that:

This seems clear and stating it for the record in an email seems appropriate, since emails can be accessed and become public information in any court proceedings.

(Pet. Exh. 4)

57. In August of 2013, Kahn asked Rooney to look for emails involving Petitioner in response to Petitioner’s discovery requests. Rooney located and forwarded several emails from 2010 to Kahn. In forwarding this emails, Rooney commented to Kahn, “This is a good one,” and:

Great example of inappropriate communication with our clients. . . . It's also a good example of not being able to do a pretty simple task . . . We haven't had any problems with this – at all- since Matt took over.

(Pet. Ex. 5). In another email, Rooney noted that, "I was glad Vivian reacted the way she did and gave bev feedback." "I told her [Petitioner] that I was going to tell her what someone told me years ago – don't let your mouth get your ass in trouble." (Pet. Ex. 7) In the last email, Rooney remarked "This email exchange below. . . provides a good example of not being able to do the most basic of tasks for NCTA." (Pet. Ex. 7)

58. At hearing, Petitioner did not dispute that she unintentionally offended Vivian James, that her duties under NECTAC associated with conference planning disappeared, or that she did not have significant skills using Excel or other software programs. After Dr. Kahn asked Petitioner to learn Excel, Petitioner did a self-study and did work on Excel "a little bit." T. p. 277. However, Kahn noted on Petitioner's 2012 performance review that she couldn't see any improvement in Petitioner's Excel skills and other computer applications.

59. According to a document created by the University called "Analysis of Layoff v. Pool", created on August 9, 2012, (Pet. Ex. 25, p. 729), Petitioner was in a pool of one (1). In that document, Petitioner was designated as a female, minority, but not as an American Indian or any other racial category.

60. When Kahn terminated Petitioner from employment, 5 of 32 employees under Kahn's supervision were people of color; two African-American employees, one African employee, one Asian employee, and one Native American employee. T. p. 153.

61. As of August 28, 2012, FPG Institute employed 133 SPA employees whose salaries ranged from the mid \$20,000s to an Executive Assistant who earned \$112,349. (Pet. Ex. 23, p. 741)

62. As of September 17 2012, the FPG Child Development Institute had 44 vacant SPA positions (Pet. Ex. 24, 744-748). Several of these vacancies had "Position Rates" similar to Ms. Payne. Specifically, a Business Services Coordinator at FPG, position no. 60843, had been vacant since April 12, 2012. (Pet. Ex. 24)

63. In its September 21, 2012 Notice of Separation due to Layoff, Respondent cited "loss of funding and after evaluating alternative measures" as the reason for Petitioner's RIF or layoff. However, the preponderance of the evidence proved that "loss of funding" was not the real reason for Petitioner being laid off from employment due to a RIF.

a. On September 19, 2012, the day before Natalie Nelson notified Dr. Kahn that OHR had approved Petitioner's layoff, Dr. Kahn learned Respondent had been awarded the new NECTAC grant for \$21.8 million. (Pet. Ex. 3)



b. At hearing, Dr. Kahn acknowledged that "I'm not sure why the University keeps putting loss of funds when I keep correcting them to say changed work scope with new roles. . . . HR keeps putting in loss of funds." T. pp. 189, 190.

c. Kahn explained that although Petitioner's separation notice stated that such separation was based on a "loss of funding," Kahn meant such separation was based on a "loss of work." T. p. 139. Dr. Kahn articulated that the reasons for Petitioner being RIFed were that (1) Petitioner's longstanding job duties of event coordinating and planning no longer existed as OSEP had removed those duties from the NECTAC grant in 2010, and (2) Petitioner did not have the skills to perform the [outlined] duties under the new grant. T. pp. 139-40. She explained at hearing that "I could not write a person into a new contract without any job to do." T. p. 140.

64. It was clear from the August 2010 emails between Dr. Kahn and Ms. Rooney that Kahn and Rooney had been dissatisfied with Petitioner's job performance since 2010. However, neither Kahn nor Rooney took the required disciplinary actions against Petitioner so they could properly terminate Petitioner's employment for unsatisfactory job performance.

65. The preponderance of the evidence also proved that Rooney and Petitioner did not have a good working relationship. Petitioner described Rooney as conniving, and Petitioner didn't trust Rooney. Petitioner wasn't surprised by Rooney's emails about her, because Petitioner had "been on that side of Robin already." T. pp. 245-246.

66. At hearing, Petitioner explained Dr. Kahn's repeated statement, "Are you sure?," made Petitioner second-guess or be obsessive-compulsive, because you're always double-checking yourself to make sure. T. p. 266. In the internal grievance Petitioner filed with Respondent, Petitioner stated:

. . . Dr. Kahn habitually says to me, when I state a fact to her, 'Are you sure?' Whether she is conscious of it or not, this is a demeaning statement toward me as a Native American. I was never given any performance or conduct warnings.

(Pet. Ex. 22, no. 12)

67. At hearing, Petitioner acknowledged that in the early 1990s, she and Dr. Kahn scheduled conferences together in the Southwest [part of the US] because Kahn, Petitioner, and a former director Pat Trohanis liked the Southwest. Petitioner opined that Kahn liked the Southwest because "she's into Indians." T. pp. 275-276.

#### **CONCLUSIONS OF LAW**

1. Pursuant to N.C. Gen. Stat. § 126-34.1(a)(2), the Office of Administrative Hearings has subject matter jurisdiction over the issue whether a RIF constitutes

unlawful discrimination on the basis of race, color, national origin, or age. *Feinstein*, 161 N.C. App. at 703, 590 S.E.2d at 403. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. The Office of Administrative Hearings does not have subject matter jurisdiction over the issue of whether a RIF was without just cause or failed to comply with procedural requirements. N.C. Gen. Stat. § 126-34.1; *University of N.C. v. Feinstein*, 161 N.C. App. 700, 590 S.E.2d 401 (2003).

3. Petitioner was a career state employee at the time of her separation from employment based on a Reduction in Force (RIF). Because Petitioner is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent discriminated and retaliated against her, the Office of Administrative Hearings has jurisdiction to hear her appeal and issue a Decision.

4. 25 NCAC 01C .1004 REDUCTION IN FORCE provides:

(a) A State government agency may separate an employee whenever it is necessary due to shortage of funds or work, abolishment of a position or other material change in duties or organization. Retention of employees in classes affected shall be based on systematic consideration of all the following factors: type of appointment, relative efficiency, actual or potential adverse impact on the diversity of the workforce and length of service.

5. Petitioner has the burden of proving that Respondent unlawfully discriminated and/or retaliated against her, because of her race, color, national origin, and age. With regard to Petitioner's discrimination claim, the North Carolina Supreme Court has adopted the burden-shifting scheme used by federal courts, which was articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See *North Carolina Dep't of Corr. v. Gibson*, 308 N.C. 131, 301 S.E.2d 78 (1983); *North Carolina Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 537-38, 616 S.E.2d 594, 600 (2005).

6. Under the *McDonnell Douglas* burden-shifting scheme, a Petitioner must first establish a prima facie case of discrimination. If a Petitioner establishes her prima facie case, the burden then shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its decision. If the Respondent articulates a legitimate, non-discriminatory reason for the decision, then the burden shifts back to the Petitioner to prove that the reason given by the Respondent was a pretext for discrimination. *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011); *Greene*, 172 N.C. App. at 537-38, 616 S.E.2d at 600.

7. The “ultimate burden” of proving that the employer intentionally discriminated against the employee remains with the employee at all times. *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83.

8. In order to prove discrimination, Petitioner employee must prove that the protected trait(s) actually motivated the adverse employment decision. *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 286 (4th Cir. 2004) (“The protected trait must have actually played a role in the employer’s decision-making process, and had a determinative influence on the outcome.” (internal quotation marks omitted)).

9. “A prima facie case of discrimination may also be made . . . by showing the discharge of a black employee and the retention of a white employee under apparently similar circumstances.” *Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 83. An employee may meet that burden when he proves that he was treated less favorably than other employees of a different race. *N.C. Dept. of Correction v. Hodge*, 99 N.C. app. 602, 394 S.E.2d 285, 290 (1990).

10. In this case, Petitioner established a prima facie case of discrimination based on race, color, national origin, and age. Petitioner was the only American Indian out of 33 employees with Respondent, and a member of a protected class. She was separated from employment by a RIF, while a younger white male employee, with fewer years of employment and a lower job classification, retained his job.

11. Since Petitioner proved a prima facie case of discrimination based on race, color, national origin and age, the burden then shifts to Respondent to articulate that Petitioner’s RIF from employment was based on a legitimate non-discriminatory reason. *Gibson*, *supra* requires that:

The employer is not required to prove that its action was actually motivated by the proffered reasons . . . [I]t is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination.

*Gibson*, 308 N.C. at 138, 301 S.E. 2d at 83. An employer’s burden at this stage “is not one of production, not persuasion; it can involve no credibility assessment.” *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 142 (2000); *Boutin v. Hampton Inn, Hickory, LLC*, 2013 WL 5567506 (W.D. N.C.)

12. Respondent articulated a legitimate, non-discriminatory reason for separating Petitioner from employment; namely, the scope of work under the new grant that replaced NECTAC did not include work that matched Petitioner’s skills and job description. The new NECTAC grant required Respondent provide technical and research-based assistance “to improve services and results for children with disabilities” for the federal Office of Special Education and Rehabilitative Services, Department of Education.” The preponderance of the evidence showed that Petitioner lacked the computer software skills to be a research assistant under the new NECTAC grant.

Petitioner's job duties as an event coordinator had been eliminated from NECTAC grants since in 2010.

13. Given Respondent's production of a legitimate non-discriminatory reason for separating Petitioner from employment by a RIF, the burden shifts back to Petitioner to prove that the reason given by the Respondent was a pretext for discrimination. To demonstrate that Respondent's stated reasons are a pretext for intentional discrimination, Petitioner "can reuse evidence from [her] prima facie showing." *Gibson*, 308 N.C. at 139, 301 S.E. 2d at 84.

14. The issue is not whether the employer's decision was reasonable, but whether it was unlawfully motivated. *Enoch v. Alamance County DSS*, 164 N.C.App. 233, 595 S.E.2d 744, 752 (2004)(citing *Olsen v. Southern Pac. Transp. Co.*, 480 F.Supp. 773, 780 (N.D. Cal. 1979)) "It is not enough . . . to disbelieve the employer; the factfinder must believe the [claimant's] explanation of intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519, 125 L. Ed. 2d 407, 424 (1993).

15. Courts have considered "evidence of the employer's treatment of the employee during his term of employment" as relevant evidence of pretext. *Gibson*, 308 N.C. at 139-40, 301 S.E.2d at 84. In *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), Justice O'Connor wrote:

[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated (*in St. Mary's*):

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

*Reeves v. Sanderson*, 530 U.S. at 147.

16. However, the "[t]rier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination." *Gibson*, 308 N.C. at 139, 301 S.E. 2d at 84.

17. Here, Petitioner argued that Respondent's purported "legitimate non-discriminatory reason" for RIFing Petitioner was false, and not believable, and, combined with a suspicion of mendacity surrounding the four different SPA Layoff Request Forms, that showed Respondent intentionally discriminated against Petitioner.

18. The evidence at hearing strongly suggested that the real reason Respondent separated Petitioner from employment was because Dr. Kahn and Dr. Rooney were dissatisfied with Petitioner's job performance for two years, and disappointed and/or displeased that Petitioner had not improved her computer skills as they had urged Petitioner to do. However, since Respondent had not issued the required disciplinary actions to Petitioner, Respondent could not terminate Petitioner from employment for unsatisfactory job performance.

19. Nonetheless, Petitioner failed to prove ultimately that Respondent's reasons for the RIF were a pretext for discrimination based on Respondent's race, color, national origin, or age. In particular, Petitioner failed to prove Dr. Kahn, as the decision maker, had a discriminatory animus against Petitioner based on Petitioner's race, color, age, and national origin.

20. As to Petitioner's claim for retaliation for her engaging in protected activity, "[t]o establish a *prima facie* case of retaliation, it must be shown that (1) the plaintiff engaged in a protected activity, (2) the employer took adverse action, and (3) there existed a causal connection between the protected activity and the adverse action." *Salter v. E & J Healthcare Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003) (quoting *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 690, 504 S.E.2d 580, 586 (1998), *disc. rev. denied*, 350 N.C. 91, 527 S.E.2d 662 (1999)). Federal courts use the same burden-shifting schemes for retaliation claims. See, e.g., *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4<sup>th</sup> Cir. 2011).

21. In this case, Petitioner failed to establish a *prima facie* case of retaliation, because she failed to establish that she engaged in any protected activity. Moreover, even if she had demonstrated she engaged in any protected activity, she failed to establish a causal connection between the protected activity and the adverse action. Petitioner presented no evidence of a discriminatory animus by Respondent against Petitioner.

22. Respondent's evidence shows a legitimate non-retaliatory reason for Respondent's action, and Petitioner failed to establish any evidence of retaliatory intent by her supervisors. Petitioner failed to present any evidence that Respondent's legitimate non-retaliatory reason for the RIF was pretextual, or that retaliation was the real reason for the action.

23. Based on the foregoing, Respondent's separation of Petitioner from employment based on a RIF was not the result of discrimination based on race, color, national origin, or age. Respondent's separation of Petitioner from employment based on a RIF was not the result of retaliation based on age.

**FINAL DECISION**

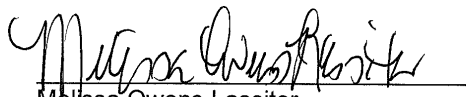
Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to separate Petitioner from employment based on a Reduction in Force.

**NOTICE**

**This is a Final Decision** issued under the authority of N.C.Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This 28<sup>th</sup> day of April, 2014.

  
Melissa Owens Lassiter  
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA      APR 22 PM 2:38      IN THE OFFICE OF  
COUNTY OF ORANGE      Office of      ADMINISTRATIVE HEARINGS  
   Administrative Hearings      14 EHR 00662

Eun Suk Jeoung	)	
Petitioner	)	
	)	
vs.	)	<b>FINAL DECISION</b>
	)	<b>ORDER OF DISMISSAL</b>
Division of Environmental Health, Orange	)	
County,	)	
Respondent	)	

THIS MATTER COMES to be heard, via the undersigned's own motion, *sua sponte*, on the grounds that Petitioner failed to comply with G.S. 150B-23 by failing to file the requisite filing fee within 60 days of the date the contested case petition was filed.

**ISSUE**

Whether the Office of Administrative Hearings has subject matter jurisdiction over Petitioner's contested case petition when Petitioner failed to file the requisite filing fee?

**FINDINGS OF FACT**

1. On January 16, 2014, Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings (OAH) alleging that Respondent required them to renovate a storage area, and if they are not allowed to complete such renovation by February 5, 2014, they will be shut down and lose their business. (Petition)

2. By letter dated and mailed on January 28, 2014, OAH Deputy Clerk Maria Erwin advised Petitioner that its petition was received and considered filed on January 16, 2014, but it did not pay the filing fee. Ms. Erwin advised Petitioner that it must pay a \$20.00 filing fee with OAH "within 60 days of the date the petition was filed." She further explained that:

The Office of Administrative Hearings permits a late payment of the filing fee to be made within 60 days of the date the petition was filed. If the filing fee is not paid as provided herein, the petitioner has failed to comply with statutory provisions and the petition shall be dismissed by the presiding administrative law judge, except upon proof by the petitioner of financial hardship, excusable neglect or other equivalent circumstances.

3. As of today's date, Petitioner has failed to file the required \$20.00 filing fee with the Office of Administrative Hearings, or proven financial hardship, excusable neglect, or other equivalent circumstances.

**CONCLUSIONS OF LAW**

1. This contested case is subject to dismissal pursuant to Rules 12(b) of the North Carolina Rules of Civil Procedure and N.C.G.S. § 150B-23.2(a).

2. N.C. Gen. Stat. § 150B-23.2 requires:

(a) Filing Fee. - In every contested case commenced in the Office of Administrative Hearings by a person aggrieved, the petitioner shall pay a filing fee, and the administrative law judge shall have the authority to assess that filing fee against the losing party, in the amount of one hundred twenty-five dollars (\$125.00), unless the Office of Administrative Hearings establishes a lesser filing fee by rule.

(b) Time of Collection. - All fees that are required to be assessed, collected, and remitted under subsection (a) of this section shall be collected by the Office of Administrative Hearings at the time of commencement of the contested case except as may be allowed by rule to permit or complete late payment or in suits in forma pauperis.

3. 26 NCAC 03 .0103 COMMENCEMENT OF CONTESTED CASE: NOTICE AND FILING FEE provides:

(a) A contested case in the Office of Administrative Hearings is commenced by the filing of a petition as required by G.S. 150B-23 and payment of the appropriate filing fee (if a fee is required by G.S. 150B-23.2) . . .

(d) In contested cases commenced by a person aggrieved which do not involve the causes of action listed in Paragraph (c) of this Rule, the petitioner shall pay a fee of twenty dollars (\$20.00).

(e) The filing fee shall be waived in a contested case in which the petition is filed in forma pauperis and supported by such proofs as are required in G.S. 1-110. A petitioner seeking to have the filing fee waived under this Paragraph shall file the appropriate OAH form with the chief hearings clerk simultaneously when filing the petition for a contested case.

4. In this case, Petitioner was required to file a \$20 filing fee within 60 days of the date it filed its petition, or within 60 days of January 16, 2014. Petitioner failed to comply with N.C. Gen. Stat. § 150B-23.2(a) by failing to file the required filing fee within



60 days of January 16, 2014, the date Petitioner filed its contested case petition. By failing to file the required filing fee, Petitioner failed to comply with N.C. Gen. Stat. § 150B-23.2 and 26 NCAC 03 .0103. For that reason, the OAH lacks subject matter jurisdiction over Petitioner's contested case petition.

**FINAL DECISION**

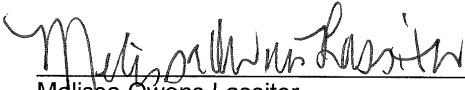
Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **DISMISSES** this contested case petition with prejudice.

**NOTICE AND ORDER**

**This is a Final Decision** issued under the authority of N.C. Gen. Stat. § 150B-34. Under North Carolina General Statute § 150B-45, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed.

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 22<sup>nd</sup> day of April, 2014.

  
\_\_\_\_\_  
Melissa Owens Lassiter  
Administrative Law Judge