

NORTH CAROLINA REGISTER

VOLUME 29 • ISSUE 01 • Pages 1 –103

July 1, 2014

I. EXECUTIVE ORDERS

Executive Order No. 54 1 – 2

II. PROPOSED RULES

Health and Human Services, Department of
Medical Care Commission 3 – 18
Occupational Licensing Boards and Commission
Acupuncture Licensing Board 18 – 22

III. TEMPORARY RULES

State Human Resources, Office of
State Human Resources Commission 23 – 43

IV. APPROVED RULES 44 – 59

Agriculture and Consumer Services, Department of
Agriculture, Board of
Commerce, Department of
Rural Electrification Authority
Cultural Resources, Department of
Historical Commission
Environment and Natural Resources, Department of
Wildlife Resources Commission
Health and Human Services Department of
Mental Health, Commission for
Insurance, Department of
Home Inspector Licensure Board
Justice, Department of
Alarm Systems Licensing Board
Occupational Licensing Boards and Commissions
Cemetery Commission
Optometry, Board of Examiners in
Veterinary Medical Board
Office of Administrative Hearings

V. RULES REVIEW COMMISSION 60 – 68

VI. CONTESTED CASE DECISIONS

Index to ALJ Decisions 69
Text of ALJ Decisions
13 DHR 17094 70 – 73
13 DOJ 15368 74 – 78
13 DOJ 16246 79 – 83
13 OSP 15762 84 – 94
13 OSP 15896 95 – 103

Contact List for Rulemaking Questions or Concerns

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

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

Office of Administrative Hearings

Rules Division

1711 New Hope Church Road

(919) 431-3000

Raleigh, North Carolina 27609

(919) 431-3104 FAX

contact: Molly Masich, Codifier of Rules

molly.masich@oah.nc.gov

(919) 431-3071

Dana Vojtko, Publications Coordinator

dana.vojtko@oah.nc.gov

(919) 431-3075

Tammara Chalmers, Editorial Assistant

tammara.chalmers@oah.nc.gov

(919) 431-3083

Lindsay Woy, Editorial Assistant

lindsay.woy@oah.nc.gov

(919) 431-3078

Rule Review and Legal Issues

Rules Review Commission

1711 New Hope Church Road

(919) 431-3000

Raleigh, North Carolina 27609

(919) 431-3104 FAX

contact: Joe DeLuca Jr., Commission Counsel

joe.deluca@oah.nc.gov

(919) 431-3081

Amanda Reeder, Commission Counsel

amanda.reeder@oah.nc.gov

(919) 431-3079

Abigail Hammond, Commission Counsel

abigail.hammond@oah.nc.gov

(919) 431-3076

Amber Cronk May, Commission Counsel

amber.cronk@oah.nc.gov

(919) 431-3074

Julie Brincefield, Administrative Assistant

julie.brincefield@oah.nc.gov

(919) 431-3073

Fiscal Notes & Economic Analysis and Governor's Review

Office of State Budget and Management

116 West Jones Street

(919) 807-4700

Raleigh, North Carolina 27603-8005

(919) 733-0640 FAX

Contact: Anca Grozav, Economic Analyst

osbmruleanalysis@osbm.nc.gov

(919) 807-4740

NC Association of County Commissioners

215 North Dawson Street

(919) 715-2893

Raleigh, North Carolina 27603

contact: Amy Bason

amy.bason@ncacc.org

NC League of Municipalities

(919) 715-4000

215 North Dawson Street

Raleigh, North Carolina 27603

contact: Erin L. Wynia

ewynia@nclm.org

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee

545 Legislative Office Building

300 North Salisbury Street

(919) 733-2578

Raleigh, North Carolina 27611

(919) 715-5460 FAX

contact: Karen Cochrane-Brown, Staff Attorney

Karen.cochrane-brown@ncleg.net

Jeff Hudson, Staff Attorney

Jeffrey.hudson@ncleg.net

NORTH CAROLINA REGISTER
Publication Schedule for January 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 th 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.

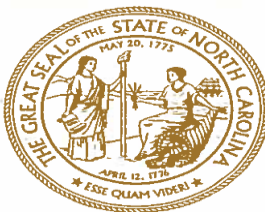
NOTICE OF TEXT

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

May 19, 2014

EXECUTIVE ORDER NO. 54

AVIATION DEVELOPMENT TASK FORCE

WHEREAS, the aviation industry, both commercial and general, is directly responsible for over 100,000 jobs in North Carolina and the continued promotion and development of the industry is critical to both maintaining and growing the related employment base; and

WHEREAS, the annual impact of the aviation industry in North Carolina exceeds \$25 billion dollars annually; and

WHEREAS, the vast majority of the airports in North Carolina are locally owned and governed and the direct tax revenue generated by those airports exceeds \$770 million annually. These tax dollars go to the respective counties in which the airports are located; and

WHEREAS, the North Carolina Department of Transportation, Division of Aviation ("DOA") is charged with the oversight of grant money and development of publicly owned airports in the State that are eligible for funding, management of both State and Federal aviation related grants, and the operation of the State owned fleet; and

WHEREAS, the General Assembly enacted the Strategic Transportation Investments bill (HB817) on June 26, 2013 in order to more effectively allocate Department of Transportation capital expenditures, based on State, regional and divisional needs. This legislation combined the process for prioritization for airport projects along with other non-highway modes of transportation; and

WHEREAS, the oversight, promotion of, funding for and development of airports in our State is critical to the continued employment growth and fostering of both our local and Statewide economies.

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

Section 1. Establishment

The North Carolina Aviation Development Task Force is hereby established (hereinafter "Task Force").

Section 2. Membership

The Task Force shall consist of thirteen (13) members. Members shall be persons experienced in the aviation industry or those industries reliant upon aviation and represent geographically diverse areas of the State. Membership of the Task Force shall include a current member of the North Carolina Board of Transportation and the Secretary of Transportation or his/her designee. All positions shall be appointed by the Governor and shall serve at the pleasure of the Governor. The Governor shall appoint the Chair and Vice Chair of the Task Force who shall likewise serve at the pleasure of the Governor.

Section 3. Meetings

The Task Force shall meet as necessary to properly exercise its functions, but no less frequently than quarterly, or upon the call of the Governor or the Chair.

Section 4. Duties

The Task Force shall, by May 1, 2015, submit a comprehensive report and recommendations to the Secretary of Transportation for the enhancement of the State's Aviation programs. The report shall include, but not be limited to, the following:

1. Review and study of the current programs, published policies and standard operating procedures within the Division of Aviation.
2. Review and study of how revisions to the Division of Aviation's existing programs and policies can enhance its role as an advocate for aviation and publicly owned airports throughout the State.
3. Review of new or alternative funding sources for the Division of Aviation.
4. Recommendations for improving efficiencies within the Division so as to ensure the highest level of customer service.
5. Recommendations on how the Division of Aviation can provide additional assistance to cities, towns, counties and other governmental subdivisions for the enhancement and operation of airports, landing fields and other aviation facilities.
6. Strategies for maximizing the economic impact of publicly owned airports in their respective communities and across the State.
7. Strategies to recruit more aerospace manufacturing in North Carolina.
8. Strategies for the promotion of military aviation and collaboration with existing military in North Carolina.
9. Recommendations on how to recruit retired military personnel to remain in North Carolina to become a part of the aerospace manufacturing industry.
10. Any other duties as assigned by the Governor or the Secretary of Transportation.

Section 5. Administration

The Division of Aviation shall provide administrative and staff support services, including meeting space, as may be required. Members of the Task Force shall serve without compensation, but may receive reimbursement for travel in accordance with State law and the policies and regulations of the Office of State Budget and Management.

Section 6. Effect and Duration

This Executive Order is effective immediately and shall remain in effect until July 1, 2015, pursuant to N.C. Gen. Stat. § 147-16.2(b)

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 nineteenth day of May, in the year of our Lord two thousand 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



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

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

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Medical Care Commission intends to adopt the rules cited as 10A NCAC 13B .2101-.2105 and amend the rules cited as 10A NCAC 13B .3110, .3502; 13C .0103, .0202, .0205, and .0301.

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

- ☒ **OSBM certified on:** June 20, 2014
- ☐ **RRC certified on:**
- ☐ **Not Required**

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncdhhs.gov/dhsr/ruleactions.html>

Proposed Effective Date: November 1, 2014

Public Hearing:

Date: August 20, 2014

Time: 10:00 a.m.

Location: Dortehea Dix Campus, Wright Building, Room 131, 1201 Umstead Dr, Raleigh, NC

Reason for Proposed Action: The proposed amendments and adoptions of rules in Chapters 10A NCAC 13B Licensing of Hospitals and 10A NCAC 13C Licensing of Ambulatory Surgical Facilities are in response to enactment of Session Law 2013-382, Part X. Transparency in Health Care Costs and Part XII. Fair Health Care Facility Billing and Collections Practices, which became effective on October 1, 2013. This act requires the N.C. Medical Care Commission (MCC) to adopt rules to ensure the provisions of this act are properly implemented and the required data is submitted to the Department of Health and Human Services (DHHS) in a uniform manner.

These rules were drafted upon the recommendation of a stakeholder committee consisting of hospital and ambulatory surgical facility representatives, insurers, the public, DHHS staff, Agency legal counsel, and MCC members. The rule language sets forth the process by which facilities shall submit data, as well as requirements for providers in regard to policies and procedures governing billing and collections practices. Additionally, in order to ensure uniformity in data submission, the MCC, with input from stakeholders, determined that certified statewide data processor shall be the entity responsible for collecting data and submitting it to DHHS for publication on its website.

These rules seek to provide the public with current information pertaining to the costs of common medical procedures, and to protect patient's rights in relation to billing and collections practices.

Comments may be submitted to: Megan Lamphere, 2707 Mail Service Center, Raleigh, NC 27699-2707; Email DHSR.RulesCoordinator@dhhs.nc.gov

Comment period ends: September 2, 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 13 – MEDICAL CARE COMMISSION

SUBCHAPTER 13B – LICENSING OF HOSPITALS

SECTION .2100 – TRANSPARENCY IN HEALTH CARE COSTS

10A NCAC 13B .2101 DEFINITIONS

The following definitions shall apply throughout this section, unless text otherwise indicates to the contrary:

- (1) "Commission" means the North Carolina Medical Care Commission.
- (2) "Current Procedural Terminology (CPT)" means a medical code set developed by the American Medical Association.
- (3) "Diagnostic Related Group (DRG)" means a system to classify hospital cases assigned by a grouper program based on ICD (International Classification of Diseases) diagnoses, procedures, patient's age, sex, discharge status,

- and the presence of complications or comorbidities.
- (4) "Department" means the North Carolina Department of Health and Human Services.
- (5) "Financial Assistance" means a policy, including charity care, describing how the organization will provide assistance at its hospital(s) and any other facilities. Financial assistance includes free or discounted health services provided to persons who meet the organization's criteria for financial assistance and are unable to pay for all or a portion of the services. Financial assistance does not include:
- (a) bad debt;
 - (b) uncollectable charges that the organization recorded as revenue but wrote off due to a patient's failure to pay;
 - (c) the cost of providing such care to such patients;
 - (d) the difference between the cost of care provided under Medicare or other government programs, and the revenue derived therefrom.
- (6) "Governing Body" means the authority as defined in G.S. 131E-76.
- (7) "Healthcare Common Procedure Coding System (HCPCS)" means a three tiered medical code set consisting of Level I, II and III services and contains the CPT code set in Level I.
- (8) "Health Insurer" means service benefit plans, managed care organizations, or other parties that are by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service as a condition of doing business in the State. This excludes self-insured plans and group health plans as defined in section 607(1) of the Employee Retirement Income Security Act of 1974.
- (9) "Hospital" means a medical care facility licensed under Article 5 of Chapter 131E or under Article 2 of Chapter 122C of the General Statutes.
- (10) "Public or Private Third Party" means the State, federal government, employers, health insurers, third-party administrators and managed care organizations.

Authority G.S. 131E-214.7; S.L. 2013-382(s.10.1),(s.13.1).

10A NCAC 13B .2102 REPORTING REQUIREMENTS

(a) The lists of the statewide 100 most frequently reported DRGs, 20 most common outpatient imaging procedures, and 20 most common outpatient surgical procedures performed in the hospital setting to be used for reporting the data required in Paragraphs (b) through (d) of this Rule are provided in Rules .2103, .2104, and .2105 of this Subchapter. The lists are also

- available on the Commission's website at: <http://www.ncdhhs.gov/dhsr/ncmcc>.
- (b) In accordance with G.S. 131E-214.7 and quarterly per year all licensed hospitals shall report the data required in Paragraph (d) of this Rule related to the statewide 100 most common DRGs to the certified statewide data processor in a format provided by the certified statewide processor. The data reported shall be from the quarter ending three months previous to the date of reporting and includes all sites operated by the licensed hospital.
- (c) In accordance with G.S. 131E-214.7 and quarterly per year all licensed hospitals shall report the data required in Paragraph (d) of this Rule related to the statewide 20 most common outpatient imaging procedures and the statewide 20 most common outpatient surgical procedures to the certified statewide data processor in a format provided by the certified statewide processor. This report shall include the related primary CPT and HCPCS codes. The data reported shall be from the quarter ending three months previous to the date of reporting and includes all sites operated by the licensed hospital.
- (d) The reports as described in Paragraphs (b) and (c) of this Rule shall be specific to each reporting hospital and shall include:
- (1) the average gross charge for each DRG or procedure if all charges are paid in full without any portion paid by a public or private third party;
 - (2) the average negotiated settlement on the amount that will be charged for each DRG or procedure as required for patients defined in Subparagraph (d)(1) of this Rule. The average negotiated settlement is to be calculated using the average amount charged all patients eligible for the hospital's financial assistance policy, including self-pay patients;
 - (3) the amount of Medicaid reimbursement for each DRG or procedure, including all supplemental payments to and from the hospital;
 - (4) the amount of Medicare reimbursement for each DRG or procedure; and
 - (5) on behalf of patients who are covered by a Department of Insurance licensed third-party and teachers and State employees, report the lowest, average, and highest amount of payments made for each DRG or procedure by the hospital's top five largest health insurers.
 - (A) each hospital shall determine its five largest health insurers based on the dollar volume of payments received from those insurers;
 - (B) the lowest amount of payment shall be reported as the lowest payment from any of the five insurers on the DRG or procedure;
 - (C) the average amount of payment shall be reported as the arithmetic average of all of the five health insurers payment amounts;

- (D) the highest amount of payment shall be reported as the highest payment from any of the five insurers on the DRG or procedure; and
- (E) the identity of the top five largest health insurers shall be redacted prior to submission.

(e) The data reported, as defined in Paragraphs (b) through (d) of this Rule, shall reflect the payments received from patients and health insurers for all closed accounts. For the purpose of this Rule, closed accounts are patient accounts with a zero balance at the end of the data reporting period.

(f) A minimum of three data elements shall be required for reporting under Paragraphs (b) and (c) of this Rule.

(g) The information submitted in the report shall be in compliance with the federal "Health Insurance Portability and Accountability Act of 1996."

(h) The Department shall provide the location of each licensed hospital and all specific hospital data reported pursuant to this Rule on its website. Hospitals shall be grouped by category on the website. On each quarterly report, hospitals shall determine one category that most accurately describes the type of facility. The categories are:

- (1) "Academic Medical Center Teaching Hospital," means a hospital as defined in Policy AC-3 of the N.C. State Medical Facilities Plan. The N.C. State Medical Facilities Plan can be accessed at the Division's website at: <http://www.ncdhhs.gov/dhsr/ncsmfp>.
- (2) "Teaching Hospital," means a hospital that provides medical training to individuals provided that such educational programs are accredited by the Accreditation Council for Graduated Medical Education to receive graduate medical education funds from the Centers for Medicare & Medicaid Services.
- (3) "Community Hospital," means a general acute hospital that provides diagnostic and medical treatment, either surgical or nonsurgical, to inpatients with a variety of medical conditions, and that may provide outpatient services, anatomical pathology services, diagnostic imaging services, clinical laboratory services, operating room services, and pharmacy services, that is not defined by the categories listed in this Subparagraph and Subparagraphs (h)(1), (2) and (5) of this Rule.
- (4) "Critical Access Hospital," means a hospital defined in the Centers for Medicare & Medicaid Services' State Operations Manual, Chapter 2 – The Certification Process, 2254D – Requirements for Critical Access Hospitals (Rev. 1, 05-21-04), including all subsequent updates and revisions. The manual may be accessed at no cost at the internet website: http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf

- (5) "Mental Health Hospital," means a hospital providing psychiatric services as defined in G.S. 131E-176(21).

Authority G.S. 131E-214.4; S.L. 2013-382(s.10.1).

10A NCAC 13B .2103 100 MOST FREQUENTLY REPORTED DIAGNOSTIC RELATED GROUPS (DRGS)

(a) The list of the statewide 100 most frequently reported DRGs, specific to North Carolina and established by the Commission, is based on data provided by the certified statewide data processor. Hospitals shall report data specific to each DRG in the list pursuant to Rule .2102 of this Section.

(b) The statewide 100 most frequently reported DRGs with associated medical descriptions are:

<u>Number</u>	<u>DRG Code</u>	<u>Description</u>
<u>1</u>	<u>57</u>	<u>Degenerative nervous system disorders without major complications and comorbidities</u>
<u>2</u>	<u>64</u>	<u>Intracranial hemorrhage or cerebral infarction with major complications and comorbidities</u>
<u>3</u>	<u>65</u>	<u>Intracranial hemorrhage or cerebral infarction with complications and comorbidities</u>
<u>4</u>	<u>66</u>	<u>Intracranial hemorrhage or cerebral infarction without complications and comorbidities or major complications and comorbidities</u>
<u>5</u>	<u>69</u>	<u>Transient ischemia</u>
<u>6</u>	<u>74</u>	<u>Cranial and peripheral nerve disorders without major complications and comorbidities</u>
<u>7</u>	<u>101</u>	<u>Seizures without major complications and comorbidities</u>
<u>8</u>	<u>153</u>	<u>Otitis media and upper respiratory infection without major complications and comorbidities</u>
<u>9</u>	<u>176</u>	<u>Pulmonary embolism without major complications and comorbidities</u>
<u>10</u>	<u>177</u>	<u>Respiratory infections and inflammations with major complications and comorbidities</u>
<u>11</u>	<u>178</u>	<u>Respiratory infections and inflammations with complications and comorbidities</u>
<u>12</u>	<u>189</u>	<u>Pulmonary edema and respiratory failure</u>
<u>13</u>	<u>190</u>	<u>Chronic obstructive pulmonary disease with major complications and comorbidities</u>
<u>14</u>	<u>191</u>	<u>Chronic obstructive pulmonary disease with complications and</u>

PROPOSED RULES

		<u>comorbidities</u>
<u>15</u>	<u>192</u>	<u>Chronic obstructive pulmonary disease without complications and comorbidities or major complications and comorbidities</u>
<u>16</u>	<u>193</u>	<u>Simple pneumonia and pleurisy with major complications and comorbidities</u>
<u>17</u>	<u>194</u>	<u>Simple pneumonia and pleurisy with complications and comorbidities</u>
<u>18</u>	<u>195</u>	<u>Simple pneumonia and pleurisy without complications and comorbidities or major complications and comorbidities</u>
<u>19</u>	<u>202</u>	<u>Bronchitis and asthma with complications and comorbidities or major complications and comorbidities</u>
<u>20</u>	<u>203</u>	<u>Bronchitis and asthma without major complications and comorbidities or major complications and comorbidities</u>
<u>21</u>	<u>207</u>	<u>Respiratory system diagnosis with ventilator support 96+ hours</u>
<u>22</u>	<u>208</u>	<u>Respiratory system diagnosis with ventilator support less than 96 hours</u>
<u>23</u>	<u>238</u>	<u>Major cardiovascular procedures without major complications and comorbidities</u>
<u>24</u>	<u>247</u>	<u>Percutaneous cardiovascular procedure with drug-eluting stent without major complications and comorbidities</u>
<u>25</u>	<u>249</u>	<u>Percutaneous cardiovascular procedure with non-drug-eluting stent without major complications and comorbidities</u>
<u>26</u>	<u>280</u>	<u>Acute myocardial infarction, discharged alive with major complications and comorbidities</u>
<u>27</u>	<u>281</u>	<u>Acute myocardial infarction, discharged alive with complications and comorbidities</u>
<u>28</u>	<u>282</u>	<u>Acute myocardial infarction, discharged alive without complications and comorbidities or major complications and comorbidities</u>
<u>29</u>	<u>287</u>	<u>Circulatory disorders except acute myocardial infarction, with cardiac catheterization without major complications and comorbidities</u>
<u>30</u>	<u>291</u>	<u>Heart failure and shock with major complications and comorbidities</u>

<u>31</u>	<u>292</u>	<u>Heart failure and shock with complications and comorbidities</u>
<u>32</u>	<u>293</u>	<u>Heart failure and shock without complications and comorbidities or major complications and comorbidities</u>
<u>33</u>	<u>300</u>	<u>Peripheral vascular disorders with complications and comorbidities</u>
<u>34</u>	<u>305</u>	<u>Hypertension without major complications and comorbidities</u>
<u>35</u>	<u>308</u>	<u>Cardiac arrhythmia and conduction disorders with major complications and comorbidities</u>
<u>36</u>	<u>309</u>	<u>Cardiac arrhythmia and conduction disorders with complications and comorbidities</u>
<u>37</u>	<u>310</u>	<u>Cardiac arrhythmia and conduction disorders without complications and comorbidities or major complications and comorbidities</u>
<u>38</u>	<u>312</u>	<u>Syncope and collapse</u>
<u>39</u>	<u>313</u>	<u>Chest pain</u>
<u>40</u>	<u>314</u>	<u>Other circulatory system diagnoses with major complications and comorbidities</u>
<u>41</u>	<u>329</u>	<u>Major small and large bowel procedures with major complications and comorbidities</u>
<u>42</u>	<u>330</u>	<u>Major small and large bowel procedures with complications and comorbidities</u>
<u>43</u>	<u>331</u>	<u>Major small and large bowel procedures without complications and comorbidities or major complications and comorbidities</u>
<u>44</u>	<u>372</u>	<u>Major gastrointestinal disorders and peritoneal infections with complications and comorbidities</u>
<u>45</u>	<u>377</u>	<u>Gastrointestinal hemorrhage with major complications and comorbidities</u>
<u>46</u>	<u>378</u>	<u>Gastrointestinal hemorrhage with complications and comorbidities</u>
<u>47</u>	<u>379</u>	<u>Gastrointestinal hemorrhage without complications and comorbidities or major complications and comorbidities</u>
<u>48</u>	<u>389</u>	<u>Gastrointestinal obstruction with complications and comorbidities</u>
<u>49</u>	<u>390</u>	<u>Gastrointestinal obstruction without complications and comorbidities or major complications and comorbidities</u>
<u>50</u>	<u>391</u>	<u>Esophagitis, gastroenteritis and miscellaneous digestive disorders</u>

PROPOSED RULES

		<u>with major complications and comorbidities</u>
<u>51</u>	<u>392</u>	<u>Esophagitis, gastroenteritis and miscellaneous digestive disorders without major complications and comorbidities</u>
<u>52</u>	<u>394</u>	<u>Other digestive system diagnoses with complications and comorbidities</u>
<u>53</u>	<u>418</u>	<u>Laparoscopic cholecystectomy without common duct exploration with complications and comorbidities</u>
<u>54</u>	<u>419</u>	<u>Laparoscopic cholecystectomy without common duct exploration without complications and comorbidities or major complications and comorbidities</u>
<u>55</u>	<u>439</u>	<u>Disorders of pancreas except malignancy with complications and comorbidities</u>
<u>56</u>	<u>440</u>	<u>Disorders of pancreas except malignancy without complications and comorbidities or major complications and comorbidities</u>
<u>57</u>	<u>460</u>	<u>Spinal fusion except cervical without major complications and comorbidities</u>
<u>58</u>	<u>470</u>	<u>Major joint replacement or reattachment of lower extremity without major complications and comorbidities</u>
<u>59</u>	<u>473</u>	<u>Cervical spinal fusion without complications and comorbidities or major complications and comorbidities</u>
<u>60</u>	<u>481</u>	<u>Hip and femur procedures except major joint with complications and comorbidities</u>
<u>61</u>	<u>491</u>	<u>Back and neck procedures except spinal fusion without complications and comorbidities or major complications and comorbidities</u>
<u>62</u>	<u>494</u>	<u>Lower extremity and humerus procedures except hip, foot, and femur without complications and comorbidities or major complications and comorbidities</u>
<u>63</u>	<u>552</u>	<u>Medical back problems without major complications and comorbidities</u>
<u>64</u>	<u>603</u>	<u>Cellulitis without major complications and comorbidities</u>
<u>65</u>	<u>621</u>	<u>Operating room procedures for obesity without complications</u>

		<u>and comorbidities or major complications and comorbidities</u>
<u>66</u>	<u>637</u>	<u>Diabetes with major complications and comorbidities</u>
<u>67</u>	<u>638</u>	<u>Diabetes with complications and comorbidities</u>
<u>68</u>	<u>639</u>	<u>Diabetes without complications and comorbidities or major complications and comorbidities</u>
<u>69</u>	<u>640</u>	<u>Miscellaneous disorders of nutrition, metabolism, and fluids and electrolytes with major complications and comorbidities</u>
<u>70</u>	<u>641</u>	<u>Miscellaneous disorders of nutrition, metabolism, and fluids and electrolytes without major complications and comorbidities</u>
<u>71</u>	<u>682</u>	<u>Renal failure with major complications and comorbidities</u>
<u>72</u>	<u>683</u>	<u>Renal failure with complications and comorbidities</u>
<u>73</u>	<u>689</u>	<u>Kidney and urinary tract infections with major complications and comorbidities</u>
<u>74</u>	<u>690</u>	<u>Kidney and urinary tract infections without major complications and comorbidities</u>
<u>75</u>	<u>743</u>	<u>Uterine and adnexa procedures for non-malignancy without complications and comorbidities or major complications and comorbidities</u>
<u>76</u>	<u>765</u>	<u>Cesarean section with complications and comorbidities or major complications and comorbidities</u>
<u>77</u>	<u>766</u>	<u>Cesarean section without complications and comorbidities or major complications and comorbidities</u>
<u>78</u>	<u>767</u>	<u>Vaginal delivery with sterilization and/or dilation and curettage</u>
<u>79</u>	<u>774</u>	<u>Vaginal delivery with complicating diagnoses</u>
<u>80</u>	<u>775</u>	<u>Vaginal delivery without complicating diagnoses</u>
<u>81</u>	<u>781</u>	<u>Other antepartum diagnoses with medical complications</u>
<u>82</u>	<u>791</u>	<u>Prematurity with major problems</u>
<u>83</u>	<u>792</u>	<u>Prematurity without major problems</u>
<u>84</u>	<u>793</u>	<u>Full term neonate with major problems</u>
<u>85</u>	<u>794</u>	<u>Neonate with other significant problems</u>
<u>86</u>	<u>795</u>	<u>Normal newborn</u>
<u>87</u>	<u>811</u>	<u>Red blood cell disorders with</u>

		<u>major complications and comorbidities</u>
<u>88</u>	<u>812</u>	<u>Red blood cell disorders without major complications and comorbidities</u>
<u>89</u>	<u>847</u>	<u>Chemotherapy without acute leukemia as secondary diagnosis with complications and comorbidities</u>
<u>90</u>	<u>853</u>	<u>Infectious and parasitic diseases with operating room procedure with major complications and comorbidities</u>
<u>91</u>	<u>871</u>	<u>Septicemia or severe sepsis without mechanical ventilation 96+ hours with major complications and comorbidities</u>
<u>92</u>	<u>872</u>	<u>Septicemia or severe sepsis without mechanical ventilation 96+ hours without major complications and comorbidities</u>
<u>93</u>	<u>881</u>	<u>Depressive neuroses</u>
<u>94</u>	<u>885</u>	<u>Psychoses</u>
<u>95</u>	<u>897</u>	<u>Alcohol/drug abuse or dependence without rehabilitation therapy without major complications and comorbidities</u>
<u>96</u>	<u>917</u>	<u>Poisoning and toxic effects of drugs with major complications and comorbidities</u>
<u>97</u>	<u>918</u>	<u>Poisoning and toxic effects of drugs without major complications and comorbidities</u>
<u>98</u>	<u>945</u>	<u>Rehabilitation with complications and comorbidities or major complications and comorbidities</u>
<u>99</u>	<u>946</u>	<u>Rehabilitation without complications and comorbidities or major complications and comorbidities</u>
<u>100</u>	<u>948</u>	<u>Signs and symptoms without major complications and comorbidities</u>

<u>Number</u>	<u>CPT Code</u>	<u>Description</u>
<u>1</u>	<u>70450</u>	<u>Computed tomography, head or brain; without contrast material</u>
<u>2</u>	<u>70553</u>	<u>Magnetic resonance (e.g., proton) imaging, brain (including brain stem); without contrast material followed by contrast material(s) and further sequences</u>
<u>3</u>	<u>71010</u>	<u>Radiologic examination, chest; single view, frontal</u>
<u>4</u>	<u>71020</u>	<u>Radiologic examination, chest; two views, frontal and lateral</u>
<u>5</u>	<u>71260</u>	<u>Computed tomography, thorax; with contrast material(s)</u>
<u>6</u>	<u>71275</u>	<u>Computed tomographic angiography, chest (noncoronary), with contrast material(s), including noncontrast images, if performed, and image postprocessing</u>
<u>7</u>	<u>72100</u>	<u>Radiologic examination, spine, lumbosacral; two or three views</u>
<u>8</u>	<u>72110</u>	<u>Radiologic examination, spine, lumbosacral; minimum of four views</u>
<u>9</u>	<u>72125</u>	<u>Computed tomography, cervical spine; without contrast material</u>
<u>10</u>	<u>73030</u>	<u>Radiologic examination, shoulder; complete, minimum of two views</u>
<u>11</u>	<u>73110</u>	<u>Radiologic examination, wrist; complete, minimum of three views</u>
<u>12</u>	<u>73130</u>	<u>Radiologic examination, hand; minimum of three views</u>
<u>13</u>	<u>73510</u>	<u>Radiologic examination, hip, unilateral; complete, minimum of two views</u>
<u>14</u>	<u>73564</u>	<u>Radiologic examination, knee; complete, four or more views</u>
<u>15</u>	<u>73610</u>	<u>Radiologic examination, ankle; complete, minimum of three views</u>
<u>16</u>	<u>73630</u>	<u>Radiologic examination, foot; complete, minimum of three views</u>
<u>17</u>	<u>74000</u>	<u>Radiologic examination, abdomen; single anteroposterior view</u>
<u>18</u>	<u>74022</u>	<u>Radiologic examination, abdomen; complete acute abdomen series, including supine, erect, and/or decubitus views, single view chest</u>

Authority G.S. 131E-214.4; 131E-214.7; S.L. 2013-382(s.10.1).

10A NCAC 13B .2104 20 MOST COMMON OUTPATIENT IMAGING PROCEDURES

(a) The list of the statewide 20 most common outpatient imaging procedures, specific to North Carolina and established by the Commission, is based on data provided by the certified statewide data processor. Hospitals shall report data specific to each CPT code in the list pursuant to Rule .2102 of this Section.

(b) The statewide 20 most common outpatient imaging procedures by CPT code with associated medical descriptions are:

<u>19</u>	<u>74176</u>	<u>Computed tomography, abdomen and pelvis; without contrast material</u>
<u>20</u>	<u>74177</u>	<u>Computed tomography, abdomen and pelvis; with contrast material(s)</u>

Authority G.S. 131E-214.4; 131E-214.7; S.L. 2013-382(s.10.1).

10A NCAC 13B .2105 20 MOST COMMON OUTPATIENT SURGICAL PROCEDURES

(a) The list of the statewide 20 most common outpatient surgical procedures, specific to North Carolina and established by the Commission, is based on data provided by the certified statewide data processor. Hospitals shall report data specific to each CPT code in the list pursuant to Rule .2102 of this Section.

(b) The statewide 20 most common outpatient surgical procedures by CPT code with associated medical descriptions are:

<u>Number</u>	<u>CPT Code</u>	<u>Description</u>
<u>1</u>	<u>29827</u>	<u>Arthroscopy, shoulder, surgical; with rotator cuff repair</u>
<u>2</u>	<u>29880</u>	<u>Arthroscopy, knee, surgical; with meniscectomy (medial and lateral, including any meniscal shaving) including debridement/shaving of articular cartilage (chondroplasty), same or separate compartment(s), when performed</u>
<u>3</u>	<u>29881</u>	<u>Arthroscopy, knee, surgical; with meniscectomy (medial or lateral, including any meniscal shaving) including debridement/shaving of articular cartilage (chondroplasty), same or separate compartment(s), when performed</u>
<u>4</u>	<u>42820</u>	<u>Tonsillectomy and adenoidectomy; younger than age 12</u>
<u>5</u>	<u>42830</u>	<u>Adenoidectomy, primary; younger than age 12</u>
<u>6</u>	<u>43235</u>	<u>Upper gastrointestinal endoscopy including esophagus, stomach, and either the duodenum and/or jejunum as appropriate; diagnostic, with or without collection of specimen(s) by brushing or washing (separate procedure)</u>
<u>7</u>	<u>43239</u>	<u>Upper gastrointestinal endoscopy including esophagus, stomach, and either the duodenum and/or jejunum as appropriate; with biopsy, single or multiple</u>

<u>8</u>	<u>43248</u>	<u>Upper gastrointestinal endoscopy including esophagus, stomach, and either the duodenum and/or jejunum as appropriate; with insertion of guide wire followed by dilation of esophagus over guide wire</u>
<u>9</u>	<u>43249</u>	<u>Upper gastrointestinal endoscopy including esophagus, stomach, and either the duodenum and/or jejunum as appropriate; with balloon dilation of esophagus (less than 30 mm diameter)</u>
<u>10</u>	<u>45378</u>	<u>Colonoscopy, flexible, proximal to splenic flexure; diagnostic, with or without collection of specimen(s) by brushing or washing, with or without colon decompression (separate procedure)</u>
<u>11</u>	<u>45380</u>	<u>Colonoscopy, flexible, proximal to splenic flexure; with biopsy, single or multiple</u>
<u>12</u>	<u>45384</u>	<u>Colonoscopy, flexible, proximal to splenic flexure; with removal of tumor(s), polyp(s), or other lesion(s) by hot biopsy forceps or bipolar cautery</u>
<u>13</u>	<u>45385</u>	<u>Colonoscopy, flexible, proximal to splenic flexure; with removal of tumor(s), polyp(s), or other lesion(s) by snare technique</u>
<u>14</u>	<u>62311</u>	<u>Injection(s), of diagnostic or therapeutic substance(s) (including anesthetic, antispasmodic, opioid, steroid, other solution), not including neurolytic substances, including needle or catheter placement, includes contrast for localization when performed, epidural or subarachnoid; lumbar or sacral (caudal)</u>
<u>15</u>	<u>64483</u>	<u>Injection(s), anesthetic agent and/or steroid, transforaminal epidural, with imaging guidance (fluoroscopy or computed tomography); lumbar or sacral, single level</u>
<u>16</u>	<u>64721</u>	<u>Neuroplasty and/or transposition; median nerve at carpal tunnel</u>
<u>17</u>	<u>66821</u>	<u>Dissection of secondary membranous cataract (opacified posterior lens capsule and/or anterior hyaloid); laser surgery (e.g., YAG laser) (one or more stages)</u>
<u>18</u>	<u>66982</u>	<u>Extracapsular cataract removal</u>

		<u>with insertion of intraocular lens prosthesis (one stage procedure), manual or mechanical technique (e.g., irrigation and aspiration or phacoemulsification), complex, requiring devices or techniques not generally used in routine cataract surgery (e.g., iris expansion device, suture support for intraocular lens, or primary posterior capsulorrhexis) or performed on patients in the amblyogenic developmental stage</u>
<u>19</u>	<u>66984</u>	<u>Extracapsular cataract removal with insertion of intraocular lens prosthesis (stage one procedure), manual or mechanical technique (e.g., irrigation and aspiration or phacoemulsification)</u>
<u>20</u>	<u>69436</u>	<u>Tympanostomy (requiring insertion of ventilating tube), general anesthesia</u>

Authority G.S. 131E-214.4; 131E-214.7; S.L. 2013-382(s.10.1).

SECTION .3100 - PROCEDURE

10A NCAC 13B .3110 ITEMIZED CHARGES

(a) The facility shall either present an itemized list of charges to all discharged patients or the facility shall include on patients' ~~bills, which bills that~~ are not itemized, notification of the right to request an itemized bill within ~~30 days~~ three years of receipt of the non-itemized ~~bill, bill~~ or so long as the hospital, a collections agency, or other assignee asserts the patient has an obligation to pay the bill.

(b) If requested, the facility shall present an itemized list of charges to each ~~patient, patient or the patient's responsible party, representative~~. This list shall detail in language comprehensible to an ordinary layperson the specific nature of the charges or expenses incurred by the patient.

(c) The itemized listing shall ~~include, at a minimum, those charges incurred~~ include each specific chargeable item or service in the following service areas:

- (1) room rates;
- (2) laboratory;
- (3) radiology and nuclear medicine;
- (4) surgery;
- (5) anesthesiology;
- (6) pharmacy;
- (7) emergency services;
- (8) outpatient services;
- (9) specialized care;
- (10) extended care;
- (11) prosthetic and orthopedic appliances; and
- (12) professional services provided by the facility ~~other independently billing medical personnel.~~

Authority G.S. 131E-79; 131E-91; S.L. 2013-382(s.13.1).

SECTION .3500 – GOVERNANCE AND MANAGEMENT

10A NCAC 13B .3502 REQUIRED POLICIES, RULES, AND REGULATIONS

(a) The governing body shall adopt written policies, rules, and regulations in accordance with all requirements contained in this Subchapter and in accordance with the community responsibility of the facility. ~~As a minimum, the~~ The written policies, rules, and regulations shall:

- (1) state the ~~general and specific goals purpose~~ of the facility;
- (2) describe the powers and duties of the governing body officers and committees and the responsibilities of the chief executive officer;
- (3) state the qualifications for governing body membership, the procedures for selecting members, and the terms of service for members, officers and committee chairmen;
- (4) describe the authority delegated to the chief executive officer and to the medical staff. No assignment, referral, or delegation of authority by the governing body shall relieve the governing body of its responsibility for the conduct of the facility. The governing body shall retain the right to rescind any such delegation;
- (5) require Board approval of the bylaws of any auxiliary organizations established by the hospital;
- (6) require the governing body to review and approve the bylaws of the medical staff organization;
- (7) establish a procedure for processing and evaluating the applications for medical staff membership and for the granting of clinical privileges;
- (8) establish a procedure for implementing, disseminating, and enforcing a Patient's Bill of Rights as ~~described set forth~~ in Rule .3302 of this Subchapter and in compliance with ~~G.S. 131E-117 where applicable; and~~ G.S. 131E-117; and
- (9) require the governing body to institute procedures to provide for:
 - (A) orientation of newly elected board members to specific board functions and procedures;
 - (B) the development of procedures for periodic reexamination of the relationship of the board to the total facility community; and
 - (C) the recording of minutes of all governing body and executive committee meetings and the dissemination of those minutes, or summaries thereof, on a regular basis to all members of the governing body.

(b) The governing body shall assure written policies and procedures to assure billing and collection practices in accordance with G. S. 131E-91. These policies and procedures shall include:

- (1) a financial assistance policy as defined in Rule .2101 of the Subchapter;
- (2) how a patient may obtain an estimate of the charges for the statewide 100 most frequently reported DRGs, where applicable, and 20 most common outpatient imaging procedures, and 20 most common outpatient surgical procedures. The policy shall require that the information be provided to the patient in writing, either electronically or by mail, within three business days;
- (3) how a patient or patient's representative may dispute a bill;
- (4) issuance of a refund within 45 days of the patient receiving notice of the overpayment when a patient has overpaid the amount due to the hospital;
- (5) providing written notification to the patient or patient's representative, at least 30 days prior to submitting a delinquent bill to a collections agency;
- (6) providing the patient or patient's representative with the facility's charity care and financial assistance policies, if the facility is required to file a Schedule H, federal form 990;
- (7) the requirement that a collections agency, entity, or other assignee obtain written consent from the facility prior to initiating litigation against the patient or patient's representative;
- (8) a policy for handling debts arising from the provision of care by the hospital involving the doctrine of necessities, in accordance with G.S. 131E-91(d)(5); and
- (9) a policy for handling debts arising from the provision of care by the hospital to a minor, in accordance with G.S. 131E-91(d)(6).

~~(b)-(c)~~ The written policies, rules, and regulations shall be reviewed at least every three years, revised as necessary, and dated to indicate when last reviewed or revised.

(d) To qualify for licensure or license renewal, each facility must provide to the Division, upon application, an attestation statement in a form provided by the Division verifying compliance with the requirements of this Rule.

(e) On an annual basis, on the license renewal application provided by the Division, the facility shall provide to the Division the direct website address to the facility's financial assistance policy. This Rule applies only to facilities required to file a Schedule H, federal form 990.

Authority G.S. 131E-79; 131E-91; S.L. 2013-382(s.10.1), (s.13.1).

SUBCHAPTER 13C – LICENSING OF AMBULATORY SURGICAL FACILITIES

SECTION .0100 - GENERAL

10A NCAC 13C .0103 DEFINITIONS

As used in this Subchapter, unless the context clearly requires otherwise, the following terms have the meanings specified:

- (1) "Adequate" means, when applied to various areas of services, that the services are at least satisfactory in meeting a referred to need when measured against contemporary professional standards of practice.
- (2) "AAAASF" means American Association for Accreditation of Ambulatory Surgery Facilities.
- (3) "AAAHC" means Accreditation Association for Ambulatory Health Care.
- (4) "Ancillary nursing personnel" means persons employed to assist registered nurses or licensed practical nurses in the care of patients.
- (5) "Anesthesiologist" means a physician whose specialized training and experience qualify him or her to administer anesthetic agents and to monitor the patient under the influence of these agents. For the purpose of these Rules the term "anesthesiologist" shall not include podiatrists.
- (6) "Anesthetist" means a physician or dentist qualified, as defined in Item ~~(22)~~(26) of this Rule, to administer anesthetic agents or a registered nurse qualified, as defined in Item ~~(22)~~(26) of this Rule, to administer anesthesia.
- (7) "Authority Having Jurisdiction" means the Division of Health Service Regulation.
- (8) "Chief executive officer" or "administrator" means a qualified person appointed by the governing authority to act in its behalf in the overall management of the facility and whose office is located in the facility.
- (9) "Commission" means the North Carolina Medical Care Commission.
- (10) "Current Procedural Terminology (CPT)" means a medical code set developed by the American Medical Association.
- ~~(9)~~(11) "Dentist" means a person who holds a valid license issued by the North Carolina Board of Dental Examiners to practice dentistry.
- ~~(40)~~(12) "Department" means the North Carolina Department of Health and Human Services.
- ~~(44)~~(13) "Director of nursing" means a registered nurse who is responsible to the chief executive officer and has the authority and direct responsibility for all nursing services and nursing care for the entire facility at all times.
- (14) "Financial Assistance" means a policy, including charity care, describing how the organization will provide assistance at its facility. Financial assistance includes free or discounted health services provided to persons who meet the organization's criteria for financial assistance and are unable to pay for

- all or a portion of the services. Financial assistance does not include:
- (a) bad debt;
 - (b) uncollectable charges that the organization recorded as revenue but wrote off due to a patient's failure to pay;
 - (c) the cost of providing such care to such patients;
 - (d) the difference between the cost of care provided under Medicare or other government programs, and the revenue derived therefrom.
- ~~(12)~~(15) "Governing authority" means the individual, agency or group or corporation appointed, elected or otherwise designated, in which the ultimate responsibility and authority for the conduct of the ambulatory surgical facility is vested.
- (16) "Health Insurer" means service benefit plans, managed care organizations, or other parties that are by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service as a condition of doing business in the State. This excludes self-insured plans and group health plans as defined in section 607(1) of the Employee Retirement Income Security Act of 1974.
- (17) "Healthcare Common Procedure Coding System (HCPCS)" means a three tiered medical code set consisting of Level I, II and III services and contains the CPT code set in Level I.
- ~~(13)~~(18) "JCAHO" or "Joint Commission" means Joint Commission on Accreditation of Healthcare Organizations.
- ~~(14)~~(19) "Licensing agency" means the Department of Health and Human Services, Division of Health Service Regulation.
- ~~(15)~~(20) "Licensed practical nurse" (L.P.N.) means any person licensed as such under the provisions of G.S. 90-171.
- ~~(16)~~(21) "Nursing personnel" means registered nurses, licensed practical nurses and ancillary nursing personnel.
- ~~(17)~~(22) "Operating room" means a room in which surgical procedures are performed.
- ~~(18)~~(23) "Patient" means a person admitted to and receiving care in a facility.
- ~~(19)~~(24) "Person" means an individual, a trust or estate, a partnership or corporation, including associations, joint stock companies and insurance companies; the state, or a political subdivision or instrumentality of the state.
- ~~(20)~~(25) "Pharmacist" means a person who holds a valid license issued by the North Carolina Board of Pharmacy to practice pharmacy in accordance with G.S. 90-85.
- ~~(21)~~(26) "Physician" means a person who holds a valid license issued by the North Carolina Medical Board to practice medicine. For the purpose of carrying out these Rules, a "physician" may also mean a person holding a valid license issued by the North Carolina Board of Podiatry Examiners to practice podiatry.
- ~~(27)~~ "Public or Private Third Party" means the State, federal government employers, health insurers, third-party administrators and managed care organizations.
- ~~(22)~~(28) "Qualified person" when used in connection with an occupation or position means a person:
- (a) who has demonstrated through relevant experience the ability to perform the required functions; or
 - (b) who has certification, registration or other professional recognition.
- ~~(23)~~(29) "Recovery area" means a room used for the post anesthesia recovery of surgical patients.
- ~~(24)~~(30) "Registered nurse" means a person who holds a valid license issued by the North Carolina Board of Nursing to practice nursing as defined in G.S. 90-171.
- ~~(25)~~(31) "Surgical suite" means an area which includes one or more operating rooms and one or more recovery rooms.

Authority G.S. 131E-149; S.L. 2013-382(s.10.1),(s.13.1).

SECTION .0200 – LICENSING PROCEDURES

10A NCAC 13C .0202 REQUIREMENTS FOR ISSUANCE OF LICENSE

- (a) Upon application for a license from a facility never before licensed, a representative of the Department shall make an inspection of that facility. Every building, institution or establishment for which a license has been issued shall be inspected for compliance with the rules found in this Subchapter. An ambulatory surgery facility shall be deemed to meet licensure requirements if the ambulatory surgery facility is accredited by The Joint Commission (formerly known as "JCAHO"), JCAHO, AAAHC or AAAASF. Accreditation does not exempt a facility from statutory or rule requirements for licensure nor does it prohibit the Department from conducting inspections as provided in this Rule to determine compliance with all requirements.
- (b) If the applicant has been issued a Certificate of Need and is found to be in compliance with the Rules found in this ~~Subchapter~~ Subchapter, then the Department shall issue a license to expire on December 31 of each year.
- (c) The Department shall be notified at the time of:
- (1) ~~any change of the owner or operator; as to the person who is the operator or owner of an ambulatory surgical facility;~~
 - (2) any change of location;
 - (3) any change as to a lease; and
 - (4) any transfer, assignment or other disposition or change of ownership or control of 20 percent

or more of the capital stock or voting rights thereunder of a corporation which is the operator or owner of an ambulatory surgical facility, or any transfer, assignment, or other disposition of the stock or voting rights thereunder of such corporation which results in the ownership or control of more than 20 percent of the stock or voting rights thereunder of such corporation by any person.

A new application shall be submitted to the Department in the event of such a change or changes.

(d) The Department shall not grant a license until the plans and specifications, ~~specifications~~ which are stated in Section .1400 of this Subchapter, covering the construction of new buildings, additions, or material alterations to existing buildings are approved by the Department.

(e) The facility design and construction shall be in accordance with the licensure rules for ambulatory surgical facilities found in this Subchapter, the North Carolina State Building Code, and local municipal codes.

(f) Submission of Plans-Plans.

- (1) Before construction is begun, plans and specifications covering construction of the new buildings, alterations, renovations or additions to existing buildings, shall be submitted to the Division for approval.
- (2) The Division shall review the plans and notify the licensee that said buildings, alterations, additions, or changes are approved or disapproved. If plans are disapproved the Division shall give the applicant notice of deficiencies identified by the Division.
- (3) In order to avoid unnecessary expense in changing final plans, as a preliminary step, proposed plans in schematic form shall be reviewed by the Division.
- (4) The plans shall include a plot plan showing the size and shape of the entire site and the location of all existing and proposed facilities.
- (5) Plans shall be submitted in duplicate, ~~duplicate in order that the~~ The Division ~~may~~ shall distribute a copy to the Department of Insurance for review of the North Carolina State Building Code ~~requirements~~ requirements if required by the North Carolina State Building Code which is incorporated by reference, including all subsequent amendments. Copies of the code may be purchased from the International Code Council online at <http://www.iccsafe.org/Store/Pages/default.aspx> at a cost of five hundred twenty-seven dollars (\$527.00) or accessed electronically free of charge at http://www.ecodes.biz/ecodes_support/Free_Resources/2012NorthCarolina/12NorthCarolina_main.html.

(g) To qualify for licensure or license renewal, each facility must provide to the Division, upon application, an attestation

statement in a form provided by the Division verifying compliance with the requirements defined in Rule .0301(d) of this Subchapter.

Authority G.S. 131E-91; 131E-147; 131E-149; S.L. 2013-382.

10A NCAC 13C .0205 ITEMIZED CHARGES

(a) The facility shall either present an itemized list of charges to all discharged patients or the facility shall include on patients' bills which are not itemized notification of the right to request an itemized bill within ~~30 days~~ three years of receipt of the non-itemized ~~bill~~ bill or so long as the facility, collections agency, or other assignee asserts the patient has an obligation to pay the bill.

(b) If requested, the facility shall present an itemized list of charges to each ~~patient~~ patient or his or her representative. ~~responsible party~~. This list shall detail in language comprehensible to an ordinary layperson the specific nature of the charges or expenses incurred by the patient.

(c) The listing shall ~~include, at a minimum, those charges incurred in the following service areas:~~ include each specific chargeable item or service in the following service areas:

- (1) Surgery (facility fee);
- (2) Anesthesiology;
- (3) Pharmacy;
- (4) Laboratory;
- (5) Radiology;
- (6) Prosthetic and Orthopedic appliances; and
- (7) Other professional services.

(d) The facility shall indicate on the initial or renewal license application that patient bills are itemized, or that each patient or ~~responsible party~~ his or her representative is formally advised of the patient's right to request an itemized listing within ~~30 days~~ three years of receipt of a non-itemized bill.

Authority G.S. 131E-91; 131E-147.1; S.L. 2013-382(s.13.1).

10A NCAC 13C .0206 REPORTING REQUIREMENTS

(a) The lists of the statewide 20 most common outpatient imaging procedures and 20 most common outpatient surgical procedures performed in the ambulatory surgical facility setting to be used for reporting the data required in Paragraphs (b) through (c) of this Rule are provided in Rules .0207 and .0208 of this Subchapter. The lists are also available on the Commission's website at: <http://www.ncdhhs.gov/dhsr/ncmcc>.

(b) In accordance with G.S. 131E-214.7 and quarterly per year all licensed ambulatory surgical facilities shall report the data required in Paragraph (c) of this Rule related to the statewide 20 most common outpatient imaging procedures and the statewide 20 most common outpatient surgical procedures to the certified statewide data processor in a format provided by the certified statewide processor. This report shall include the related primary CPT and HCPCS codes. The data reported shall be from the quarter ending three months previous to the date of reporting.

(c) The report as described in Paragraphs (b) of this Rule shall be specific to each reporting ambulatory surgical facility and shall include:

- (1) the average gross charge for each DRG or procedure if all charges are paid in full without any portion paid by a public or private third party;
- (2) the average negotiated settlement on the amount that will be charged for each DRG or procedure as required for patients defined in Subparagraph (c)(1) of this Rule. The average negotiated settlement is to be calculated using the average amount charged all patients eligible for the facility's financial assistance policy, including self-pay patients;
- (3) the amount of Medicaid reimbursement for each DRG or procedure, including all supplemental payments to and from the ambulatory surgical facility;
- (4) the amount of Medicare reimbursement for each DRG or procedure; and
- (5) on behalf of patients who are covered by a Department of Insurance licensed third-party and teachers and State employees, report the lowest, average, and highest amount of payments made for each DRG or procedure by the facility's top five largest health insurers.
 - (A) each ambulatory surgical facility shall determine its five largest health insurers based on the dollar volume of payments received from those insurers;
 - (B) the lowest amount of payment shall be reported as the lowest payment from any of the five insurers on the DRG or procedure;
 - (C) the average amount of payment shall be reported as the arithmetic average of all of the five health insurers payment amounts;
 - (D) the highest amount of payment shall be reported as the highest payment from any of the five insurers on the DRG or procedure; and
 - (E) the identity of the top five largest health insurers shall be redacted prior to submission.

(e) The data reported, as defined in Paragraphs (b) through (c) of this Rule, shall reflect the payments received from patients and health insurers for all closed accounts. For the purpose of this Rule, closed accounts are patient accounts with a zero balance at the end of the data reporting period.

(f) A minimum of three data elements shall be required for reporting under Paragraph (b) of this Rule.

(g) The information submitted in the report shall be in compliance with the federal "Health Insurance Portability and Accountability Act of 1996."

(h) The Department shall provide all specific ambulatory surgical facility data reported pursuant to this Rule on its website.

10A NCAC 13C .0207 20 MOST COMMON OUTPATIENT IMAGING PROCEDURES

(a) The list of the statewide 20 most common outpatient imaging procedures, specific to North Carolina and established by the Commission, is based on data provided by the certified statewide data processor. Ambulatory surgical facilities shall report data specific to each CPT code in the list pursuant to Rule .0206 of this Section.

(b) The statewide 20 most common outpatient imaging procedures by CPT code with associated medical descriptions are:

<u>Number</u>	<u>CPT Code</u>	<u>Description</u>
<u>1</u>	<u>70450</u>	<u>Computed tomography, head or brain; without contrast material</u>
<u>2</u>	<u>70553</u>	<u>Magnetic resonance (e.g., proton) imaging, brain (including brain stem); without contrast material followed by contrast material(s) and further sequences</u>
<u>3</u>	<u>71010</u>	<u>Radiologic examination, chest; single view, frontal</u>
<u>4</u>	<u>71020</u>	<u>Radiologic examination, chest; two views, frontal and lateral</u>
<u>5</u>	<u>71260</u>	<u>Computed tomography, thorax; with contrast material(s)</u>
<u>6</u>	<u>71275</u>	<u>Computed tomographic angiography, chest (noncoronary), with contrast material(s), including noncontrast images, if performed, and image postprocessing</u>
<u>7</u>	<u>72100</u>	<u>Radiologic examination, spine, lumbosacral; two or three views</u>
<u>8</u>	<u>72110</u>	<u>Radiologic examination, spine, lumbosacral; minimum of four views</u>
<u>9</u>	<u>72125</u>	<u>Computed tomography, cervical spine; without contrast material</u>
<u>10</u>	<u>73030</u>	<u>Radiologic examination, shoulder; complete, minimum of two views</u>
<u>11</u>	<u>73110</u>	<u>Radiologic examination, wrist; complete, minimum of three views</u>
<u>12</u>	<u>73130</u>	<u>Radiologic examination, hand; minimum of three views</u>
<u>13</u>	<u>73510</u>	<u>Radiologic examination, hip, unilateral; complete, minimum of two views</u>
<u>14</u>	<u>73564</u>	<u>Radiologic examination, knee; complete, four or more views</u>
<u>15</u>	<u>73610</u>	<u>Radiologic examination, ankle; complete, minimum of three views</u>

Authority G.S. 131E-214.4; S.L. 2013-382(s.10.1).

<u>16</u>	<u>73630</u>	<u>Radiologic examination, foot; complete, minimum of three views</u>
<u>17</u>	<u>74000</u>	<u>Radiologic examination, abdomen; single anteroposterior view</u>
<u>18</u>	<u>74022</u>	<u>Radiologic examination, abdomen; complete acute abdomen series, including supine, erect, and/or decubitus views, single view chest</u>
<u>19</u>	<u>74176</u>	<u>Computed tomography, abdomen and pelvis; without contrast material</u>
<u>20</u>	<u>74177</u>	<u>Computed tomography, abdomen and pelvis; with contrast material(s)</u>

Authority G.S. 131E-214.4; 131E-214.7; S.L. 2013-382(s.10.1).

10A NCAC 13C .0208 20 MOST COMMON OUTPATIENT SURGICAL PROCEDURES

(a) The list of the statewide 20 most common outpatient surgical procedures, specific to North Carolina and established by the Commission, is based on data provided by the certified statewide data processor. Ambulatory surgical facilities shall report data specific to each CPT code in the list pursuant to Rule .0206 of this Section.

(b) The statewide 20 most common outpatient surgical procedures by CPT code with associated medical descriptions are:

<u>Number</u>	<u>CPT Code</u>	<u>Description</u>
<u>1</u>	<u>29827</u>	<u>Arthroscopy, shoulder, surgical; with rotator cuff repair</u>
<u>2</u>	<u>29880</u>	<u>Arthroscopy, knee, surgical; with meniscectomy (medial and lateral, including any meniscal shaving) including debridement/shaving of articular cartilage (chondroplasty), same or separate compartment(s), when performed</u>
<u>3</u>	<u>29881</u>	<u>Arthroscopy, knee, surgical; with meniscectomy (medial or lateral, including any meniscal shaving) including debridement/shaving of articular cartilage (chondroplasty), same or separate compartment(s), when performed</u>
<u>4</u>	<u>42820</u>	<u>Tonsillectomy and adenoidectomy; younger than age 12</u>
<u>5</u>	<u>42830</u>	<u>Adenoidectomy, primary; younger than age 12</u>
<u>6</u>	<u>43235</u>	<u>Upper gastrointestinal endoscopy</u>

		<u>including esophagus, stomach, and either the duodenum and/or jejunum as appropriate; diagnostic, with or without collection of specimen(s) by brushing or washing (separate procedure)</u>
<u>7</u>	<u>43239</u>	<u>Upper gastrointestinal endoscopy including esophagus, stomach, and either the duodenum and/or jejunum as appropriate; with biopsy, single or multiple</u>
<u>8</u>	<u>43248</u>	<u>Upper gastrointestinal endoscopy including esophagus, stomach, and either the duodenum and/or jejunum as appropriate; with insertion of guide wire followed by dilation of esophagus over guide wire</u>
<u>9</u>	<u>43249</u>	<u>Upper gastrointestinal endoscopy including esophagus, stomach, and either the duodenum and/or jejunum as appropriate; with balloon dilation of esophagus (less than 30 mm diameter)</u>
<u>10</u>	<u>45378</u>	<u>Colonoscopy, flexible, proximal to splenic flexure; diagnostic, with or without collection of specimen(s) by brushing or washing, with or without colon decompression (separate procedure)</u>
<u>11</u>	<u>45380</u>	<u>Colonoscopy, flexible, proximal to splenic flexure; with biopsy, single or multiple</u>
<u>12</u>	<u>45384</u>	<u>Colonoscopy, flexible, proximal to splenic flexure; with removal of tumor(s), polyp(s), or other lesion(s) by hot biopsy forceps or bipolar cautery</u>
<u>13</u>	<u>45385</u>	<u>Colonoscopy, flexible, proximal to splenic flexure; with removal of tumor(s), polyp(s), or other lesion(s) by snare technique</u>
<u>14</u>	<u>62311</u>	<u>Injection(s), of diagnostic or therapeutic substance(s) (including anesthetic, antispasmodic, opioid, steroid, other solution), not including neurolytic substances, including needle or catheter placement, includes contrast for localization when performed, epidural or subarachnoid; lumbar or sacral (caudal)</u>
<u>15</u>	<u>64483</u>	<u>Injection(s), anesthetic agent and/or steroid, transforaminal epidural, with imaging guidance</u>

		(fluoroscopy or computed tomography); lumbar or sacral, single level
<u>16</u>	<u>64721</u>	Neuroplasty and/or transposition; median nerve at carpal tunnel
<u>17</u>	<u>66821</u>	Discission of secondary membranous cataract (opacified posterior lens capsule and/or anterior hyaloid); laser surgery (e.g., YAG laser) (one or more stages)
<u>18</u>	<u>66982</u>	Extracapsular cataract removal with insertion of intraocular lens prosthesis (one stage procedure), manual or mechanical technique (e.g., irrigation and aspiration or phacoemulsification), complex, requiring devices or techniques not generally used in routine cataract surgery (e.g., iris expansion device, suture support for intraocular lens, or primary posterior capsulorrhexis) or performed on patients in the amblyogenic developmental stage
<u>19</u>	<u>66984</u>	Extracapsular cataract removal with insertion of intraocular lens prosthesis (stage one procedure), manual or mechanical technique (e.g., irrigation and aspiration or phacoemulsification)
<u>20</u>	<u>69436</u>	Tympanostomy (requiring insertion of ventilating tube), general anesthesia

Authority G.S. 131E-214.4; 131E-214.7; S.L. 2013-382(s.10.1).

SECTION .0300 – GOVERNING AUTHORITY AND MANAGEMENT

10A NCAC 13C .0301 GOVERNING AUTHORITY

(a) The facility's governing authority shall adopt bylaws or other appropriate operating policies and procedures ~~which shall~~ to assure that:

- (1) ~~specify by name the person to whom responsibility for operation and maintenance of the facility is delegated and methods established by the governing authority for holding such individuals responsible;~~
a named individual is identified who is responsible for the overall operation and maintenance of the facility. The governing authority shall have methods in place for the oversight of the individual's performance.
- (2) ~~provide for~~ at least annual meetings of the governing authority are conducted if the governing authority consists of two or more

- (3) ~~maintain a policies and procedures manual which is designed to ensure professional and safe care for the patients. The manual shall be reviewed, and revised when necessary, at least annually.~~ a policy and procedure manual is created which is designed to ensure professional and safe care for the patients. The manual shall be reviewed annually and revised when necessary. The manual shall include provisions for administration and use of the facility, compliance, personnel quality assurance, procurement of outside services and consultations, patient care policies and services offered; and
- (4) ~~provide for annual reviews and evaluations of the facility's policies, management, and operation.~~ annual reviews and evaluations of the facility's policies, management, and operation are conducted.

(b) When services such as dietary, laundry, or therapy services are purchased from others, the governing authority shall be responsible to assure the supplier meets the same local and state standards the facility would have to meet if it were providing those services itself using its own staff.

(c) The governing authority shall provide for the selection and appointment of the professional staff and the granting of clinical privileges and shall be responsible for the professional conduct of these persons.

(d) The governing authority shall establish written policies and procedures to assure billing and collection practices in accordance with G. S. 131E-91. These policies and procedures shall include:

- (1) a financial assistance policy as defined in Rule .0103 of the Subchapter;
- (2) how a patient may obtain an estimate of the charges for the statewide 20 most common outpatient imaging procedures and 20 most common outpatient surgical procedures based on the primary CPT code. The policy shall require that the information be provided to the patient in writing, either electronically or by mail, within three business days;
- (3) how a patient or patient's representative may dispute a bill;
- (4) issuance of a refund within 45 days of the patient receiving notice of the overpayment when a patient has overpaid the amount due to the facility;
- (5) providing written notification to the patient or patient's representative, at least 30 days prior to submitting a delinquent bill to a collections agency;
- (6) providing the patient or patient's representative with the facility's charity care and financial assistance policies, if the facility is required to file a Schedule H, federal form 990;

- (7) the requirement that a collections agency, entity, or other assignee obtain written consent from the facility prior to initiating litigation against the patient or patient's representative;
- (8) a policy for handling debts arising from the provision of care by the ambulatory surgical facility involving the doctrine of necessities, in accordance with G.S. 131E-91(d)(5); and
- (9) a policy for handling debts arising from the provision of care by the ambulatory surgical facility to a minor, in accordance with G.S. 131E-91(d)(6).

Authority G.S. 131E-91; 131E-149; S.L. 2013-382(s.10.1), S.L. 2013-382 (s.13.1).

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Medical Care Commission intends to amend the rules cited as 10A NCAC 13D .2402 and .2503.

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

- ☒ **OSBM certified on:** May 14, 2014 and May 1, 2014
- ☐ **RRC certified on:**
- ☐ **Not Required**

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncdhhs.gov/dhsr/ruleactions.html>

Proposed Effective Date: November 1, 2014

Public Hearing:

Date: August 5, 2014

Time: 10:00 a.m.

Location: Wright Building, Room 131, Dorthea Dix Campus, 1201 Umstead Drive, Raleigh, NC

Reason for Proposed Action: *The proposed rule amendments are a result of meetings with stakeholders in an effort to update rules to reflect current practices and lessen the burden on the regulated provider. Rule 10A NCAC 13D .2402 is being re-published after changes were made to the rule based on public comment received during the previous public comment period for this rule. The rule language is now clearer, easier to understand, and lessens the burden on providers.*

Comments may be submitted to: Megan Lamphere; 2707 Mail Service Center, Raleigh, NC 27699-2707; Email DHSR.RulesCoordinator@dhhs.nc.gov

Comment period ends: September 2, 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 13 – MEDICAL CARE COMMISSION

SUBCHAPTER 13D – RULES FOR THE LICENSING OF NURSING HOMES

SECTION .2000 – GENERAL INFORMATION

10A NCAC 13D.2402 **PRESERVATION OF MEDICAL RECORDS**

(a) ~~The manager of medical records~~ Medical records are the property of a facility. A facility shall ensure that keep medical records, whether original, computer media or microfilm, be kept on file for a minimum of five years following the discharge of an adult patient.

(b) ~~The manager of medical records shall ensure that if~~ If the patient is a minor when discharged from the nursing facility, then the records shall be kept on file until his or her 19th birthday and for the timeframe specified in G.S. 1-17(b) for commencement of an action on behalf of a minor and, then, for five years.

(c) If a facility discontinues operation, the licensee shall ~~make known to~~ inform the Division of Health Service Regulation where its records are stored. Records ~~are to~~ shall be stored in a business offering retrieval services for at least ~~44~~ five years after the closure date.

(d) ~~The manager of medical records~~ A facility may authorize the microfilming copying of medical records. Microfilming Copying may be done on or off the premises. If done off the premises, the facility shall take precautions to ensure the confidentiality and safekeeping of the records. The original of the microfilmed medical records shall not be destroyed until the manager of medical records has had an opportunity to review the processed film for content.

(e) ~~Nothing in this Subchapter shall be construed to prohibit the use of automation of medical records, provided that all of the provisions in this Rule are met and the medical record is readily available for use in patient care.~~

(f) ~~(e)~~ All medical records are confidential. ~~Only authorized personnel shall have access to the records. Signed authorization forms concerning approval or disapproval of release of medical~~

~~information outside the facility shall be a part of each patient's medical record. The facility shall be compliant with the Health Insurance Portability and Accountability Act. Representatives of the Department shall be notified at the time of inspection of the name and record number of any patient who has denied medical record access to the Department.~~

(f) At the time of inspection, the facility shall inform the surveyor of the name of any patient who has denied the Department access to their medical record.

~~(g) Medical records are the property of the facility, and they shall not be removed from the facility except through a court order. Copies shall be made available for authorized purposes such as insurance claims and physician review.~~

Authority G.S. 131E-104; 131E-105.

10A NCAC 13D .2503 USE OF NURSE PRACTITIONERS AND PHYSICIAN ASSISTANTS

(a) If a facility employs physician assistants or nurse practitioners it shall maintain the following information for each nurse practitioner and physician assistant:

- (1) ~~a statement of verification of current approval to practice as a nurse practitioner by the Board of Medical Examiners-Medical Board and~~ Board of Nursing for each practitioner, or ~~a statement verification of current approval to practice as a physician assistant by the Board of Medical Examiners-Medical Board for each physician assistant;~~
- ~~(2) verification of current approval to practice; and~~
- ~~(3)~~(2) a copy of instructions or written protocols signed by the nurse practitioner or physician assistant and the supervising physicians.

(b) The privileges of the nurse practitioner or physician assistant shall be clearly defined by the facility's policies and procedures and shall be limited to those privileges authorized in 21 NCAC 32M and 21 NCAC 36 .0800 for the nurse practitioner or 21 NCAC 32O 21 NCAC 32S for the physician assistant.

Authority G.S. 131E-104.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 01 – NORTH CAROLINA ACUPUNCTURE LICENSING BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the Acupuncture Licensing Board intends to adopt the rules cited as 21 NCAC 01 .0108-.0111; .0601-.0609 and amend the rule cited as 21 NCAC 01 .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.ncalb.com

Proposed Effective Date: November 1, 2014

Public Hearing:

Date: September 12, 2014

Time: 9:00 a.m.

Location: 1406 Washington Street, Raleigh, NC 27605

Reason for Proposed Action: As professional field is growing these proposed rules respond to greater need of public and professionals to obtain clarity regarding ethical standards for the practice of acupuncture. Additional definitions as well as revisions to avoid confusion and enable better enforcement of ethical standards. Rule regarding escrow prescribed by G.S. 93B-15 and 93B-15.1. basis for military applicant rules.

Comments may be submitted to: Ms. Paola Learoyd, Executive Director, NCALB; P.O. Box 10686, Raleigh, NC 27605; email paola@recanc.com

Comment period ends: September 12, 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 – LICENSURE

21 NCAC 01 .0104 DEFINITIONS

The following definitions shall apply throughout this Chapter:

- (1) "Acupuncture adjunctive therapies" ~~include but are not limited to~~ means auricular, nose, face, hand, foot, and scalp acupuncture therapy; and stimulation to acupuncture points and channels by any of the following: ~~needles~~;

- ~~cupping, thermal methods, magnets, gwa sha scraping techniques.~~
- (a) ~~Needles;~~
- (b) ~~Cupping;~~
- (c) ~~Thermal methods;~~
- (d) ~~Magnets;~~
- (e) ~~Gua-sha scraping techniques; and~~
- (f) ~~Laser therapy.~~
- (2) "Acupuncture diagnostic techniques" ~~include but are not limited to~~ means the use of observation, listening, smelling, inquiring, palpation, pulse diagnosis, tongue diagnosis, hara diagnosis, physiognomy, five element correspondence, ryodoraku, akabani, and electro-acupuncture.
- (3) "Acupuncture needles" mean solid filiform needles and include but are not limited to intradermal, plum blossom, press tacks, and prismatic needles.
- (4) "Dietary guidelines" ~~include but are not limited to~~ means nutritional counseling and the recommendation of food and supplemental substances.
- (5) "Dual relationship" means a relationship in addition to the professional relationship with a patient to whom the acupuncturist delivers service during the course of the practice that may impair professional judgment or increase the risk of exploitation of the patient.
- ~~(5)(6)~~ "Electrical stimulation" ~~includes but is not limited to~~ means the treatment or diagnosis of energetic imbalances using TENS, Piezo electrical stimulation, acuscope therapy, auricular therapy devices, and percutaneous and transcutaneous electrical nerve stimulation.
- ~~(6)(7)~~ "Herbal medicine" ~~includes but is not limited to tinctures, patent remedies, decoction, powders, diluted herbal remedies, freeze-dried herbs, salves, poultices, medicated oils, and liniments.~~ means the use, prescription, recommendation, and administration of plants, animals or mineral substances and includes all such preparations to promote, maintain and restore health and to prevent disease.
- (8) "Impairment" means a mental illness, substance abuse, chemical dependence, physical illness, or physical disability that impacts professional competence.
- ~~(7)(9)~~ "Massage and manual techniques" ~~include but are not limited to~~ means acupressure, shiatsu, Tui-Na, qi healing, and medical qi gong.
- (10) "Reprimand" means a disciplinary action imposed when the acupuncturist violates a statute or rule, causing harm or potential harm to a patient, the profession, or the public.
- (11) "Revocation" means a disciplinary action resulting in the loss of licensure imposed when an acupuncturist violates a statute or rule, causing harm to a patient, the profession or the public and for a period of up to five years at which time the professional may then petition the Board for reinstatement.
- (12) "Sexual activity" means contact between the penis and the vulva or the penis and the anus; contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.
- (13) "Sexual contact" means vaginal intercourse, cunnilingus, fellatio, or anal intercourse, kissing or the intentional touching of the other's lips, genital area, groin, inner thigh, buttocks, breasts, or any other body parts, as well as the clothing covering any of these body parts for the purpose of sexual stimulation or gratification of either the acupuncturist or the patient.
- (14) "Suspension" means a disciplinary action resulting in the loss of licensure imposed for a period of up to five years when an acupuncturist violates a statute or rule, causing harm to a patient, the profession, or the public after which the professional may be reinstated upon payment of the required fees and compliance with any other conditions established by the Board.
- ~~(8)(15)~~ "Therapeutic exercise" ~~includes but is not limited to~~ means a type of exercise including qi gong, Taoist self-cultivation exercises, dao yin, tai qi chuan, ba gua, and meditative exercises.
- ~~(9)(16)~~ "Thermal methods" ~~include but are not limited to~~ means a heat therapy and moxibustion, hot and cold packs and ~~laser acupuncture.~~ heat lamps. All acupuncture devices shall be administered in accordance with Federal Drug Administration guidelines.

Authority G.S. 90-454.

21 NCAC 01 .0108 SUSPENSION OF AUTHORITY AND ESCROW OF FUNDS

The Board shall file the annual reports set forth in G.S. 93B-2 no later than October 31 of each year. In the event the Board fails to file the reports as required by G.S. 93B-2 and the Board's authority to expend any funds is suspended until such time as the Board files the required reports, the Board shall deposit any fees or funds received during the period of suspension into an escrow account established by the Board solely for this purpose.

Authority G.S. 90-525; 93B-2.

21 NCAC 01 .0109 ARMED SERVICES EXTENSION FOR CREDENTIAL

Upon receipt of a written request by or on behalf of a licensed acupuncturist who is currently in good standing with the Board, is serving in the armed forces of the United States, and to whom G.S. 105-249 authorizes an extension of time to file a tax return, the Board shall postpone renewal fees, renewal application deadlines, continuing education requirements and any other requirements or conditions related to the maintenance of the credential issued by the Board or to the renewal thereof for the same period of time as the extended period of time to file a tax return that is granted pursuant to G.S. 93B-15.

Authority G.S. 90-525; 90B-15.

21 NCAC 01 .0110 ACUPUNCTURE LICENSE BY RECIPROCITY BASED ON MILITARY SERVICE

(a) An applicant for licensure by reciprocity based on military service shall submit to the Board:

- (1) a completed, signed and notarized application form provided by the Board as found on its website;
- (2) the application fee required by Rule .0103 of this Section;
- (3) written evidence demonstrating that the applicant has been awarded a military occupational specialty in acupuncture and that the applicant:
 - (A) has completed a military program of training substantially equivalent to or greater than that required for licensure as an acupuncturist in North Carolina;
 - (B) has completed testing or equivalent training and experience substantially equivalent to or greater than that required for licensure as an acupuncturist in North Carolina, as set forth in Article 30 of Chapter 90 of the General Statutes; and
 - (C) has engaged in the active practice of acupuncture as defined in G.S. 90-451 for at least 1,500 clinical hours per year during at least two of the five years preceding the date of application; and
- (4) a statement disclosing and explaining the commission of any prohibited act set out in G.S. 90-456, any disciplinary actions, investigations, malpractice claims, state or federal agency complaints, judgments, settlements, or criminal charges.

(b) All information required must be completed and received by the Board office as a complete package with the initial application and application fee. Incomplete application packages shall be returned to the applicant.

(c) All applicants shall submit to the Board a signed release form and completed Fingerprint Record Card, obtained from the Board.

Authority G.S. 90-451; 90-454; 90-455; 90-456; 93B-15.1.

21 NCAC 01 .0111 ACUPUNCTURE LICENSE BY RECIPROCITY BASED ON STATUS AS MILITARY SPOUSE

(a) An applicant for an acupuncture license by reciprocity based on the applicant's status as a military spouse shall submit to the Board:

- (1) a completed, signed and notarized application form provided by the Board as found on its website;
- (2) the application fee required by Rule .0103 of this Section;
- (3) written evidence demonstrating that the applicant is married to an active member of the U.S. military and that such applicant:
 - (A) holds a current acupuncture license from another jurisdiction whose standards for the license are substantially equivalent to or greater than those required for licensure as an acupuncturist in North Carolina as set forth in these Rules; and
 - (B) has engaged in the active practice as an acupuncturist as defined by G.S. 90-451 for at least 1,500 clinical hours per year during at least two of the five years preceding the date of application; and
- (4) a statement disclosing and explaining the commission of an act set out in G.S. 90-456, any disciplinary actions, investigations, malpractice claims, state or federal agency complaints, judgments, settlements, or criminal charges.

(b) All information required must be completed and received by the Board office as a complete package with the initial application and application fee. Incomplete application packages shall be returned to the applicant.

(c) All applicants shall submit to the Board a signed release form and completed Fingerprint Record Card, obtained from the Board.

Authority G.S. 90-451; 90-454; 90-455; 90-456; 93B-15.1.

SECTION .0600 – CODE OF ETHICS

21 NCAC 01 .0601 PURPOSE AND SCOPE

(a) The primary goal of the rules in this Section is to set forth standards to guide the conduct of the acupuncturist in the profession. The Board may find deviation from the rules in this Section to be malpractice, gross negligence, incompetence or engaging in conduct that could result in harm or injury to the public.

(b) Prior to completion of the application process, each applicant shall review the ethical standards set forth in the rules in this Section, consent to be governed by these standards, and return a signed and dated statement appearing in the application form to the Board as evidence of this consent.

Authority G.S. 90-450; 90-454; 90-455; 90-456.

21 NCAC 01 .0602 NON-DISCRIMINATION

The acupuncturist shall not discriminate on any basis prohibited by federal or state law.

Authority G.S. 90-450; 90-454; 90-455; 90-456.

21 NCAC 01 .0603 COMPETENCE

(a) An acupuncturist shall employ the requisite knowledge, skill, and proficiencies of a competent professional providing services within his or her scope of practice as a licensed acupuncturist.

(b) An acupuncturist who has personal knowledge of unethical conduct or of unprofessional practice by an acupuncturist shall report the conduct or practice to the Board.

(c) An acupuncturist shall only offer services or use techniques within his or her professional competency and scope of practice.

(d) An acupuncturist who identifies a need for services outside his or her skill, training or experience shall refer the patient to an appropriate professional or shall seek supervision and training to provide the required services for the individual.

(e) An acupuncturist shall complete reports and record keeping in a manner that supports the patient's treatment and welfare.

(f) An acupuncturist shall recognize and acknowledge in writing to the Board the negative impact that impairment has on his or her professional performance. Once the impairment is identified the acupuncturist shall seek an assessment by a Board approved licensed provider of substance abuse services or a board approved licensed health professional and follow all of the professional's recommendations if the Board determines he or she has an impairment.

Authority G.S. 90-450; 90-451; 90-454; 90-455; 90-456; 90-457.

21 NCAC 01 .0604 SERVING SENTENCE

No applicant shall be licensed as an acupuncturist who is serving any part of a court-ordered sentence for a felony or Class 1A misdemeanor. Service of a sentence includes community service, supervised or unsupervised probation, or the payment of restitution. If any person is serving or begins serving such sentence during the course of the application process, this person shall notify the Board as soon as is practicable.

Authority G.S. 90-450; 90-451; 90-454; 90-455; 90-456; 90-457.

21 NCAC 01 .0605 EDUCATION AND TRAINING STANDARDS

(a) The acupuncturist shall not knowingly make false, deceptive, or fraudulent statements concerning his or her:

- (1) Training, experience, or competence;
- (2) Academic degrees;
- (3) Credentials;
- (4) Institutional or association affiliations;
- (5) Services;
- (6) Products;
- (7) Fees;

(8) Publications or research findings; or

(9) Results or degree of success of his or her services and the historical, scientific or clinical basis for these services.

(b) The acupuncturist shall, upon request by the Board, provide the Board an oral or written source for any materials or techniques used when making either public statements or providing education and training.

Authority G.S. 90-450; 90-454; 90-455.

21 NCAC 01 .0606 PATIENT WELFARE

(a) An acupuncturist shall treat each patient with respect and protect the safety and welfare of the patient.

(b) In the presence of a personal or professional conflict of interest, an acupuncturist shall act primarily with the welfare of the patient in mind.

(c) An acupuncturist shall inform the patient, guardian, or patient designated entity of any responsibilities or inquiries to and from third parties involved with the care and welfare of the patient.

(d) When faced with a complaint pursuant to Rule .0702 of this Chapter, an acupuncturist shall discontinue the behavior in question, taking care to minimize any adverse effects.

(e) An acupuncturist who anticipates the cessation or interruption of service to a patient shall notify the patient and seek the cessation, transfer, referral, or continuation of service in relation to the patient's needs and preferences.

Authority G.S. 90-450; 90-451; 90-454; 90-455; 90-456; 90-457; 90-457.1.

21 NCAC 01 .0607 CONFIDENTIALITY

(a) An acupuncturist shall protect the privacy of a patient and shall not disclose confidential information without consent except as set out in Paragraph (d) of this Rule.

(b) When using personally identifying information such as an observation, recording or photograph of a patient, an acupuncturist shall inform the patient and obtain written permission that specifies the intended use of the information.

(c) An acupuncturist shall provide for the maintenance of confidentiality, storage and disposition of patient records. Records shall be retained for at least five years before disposition.

(d) An acupuncturist shall only reveal information received in confidence as follows:

- (1) When the patient is in imminent danger or experiencing a medical emergency, and then only to the professional providing emergency care or public safety authorities;
- (2) When compelled by law to provide such information;
- (3) With written consent, by the patient or guardian; or
- (4) For internal clinical communications and communications that do not disclose patient-identifying information.

(e) An acupuncturist shall use material in classroom teaching and writing only when the identity of the person involved is

protected adequately to prevent disclosure or with the written permission of the patient.

Authority G.S. 90-450; 90-454; 90-455; 90-456; 90-457.1.

21 NCAC 01 .0608 CLIENT RELATIONSHIPS

An acupuncturist shall avoid dual relationships that may impair professional judgment or increase the risk of exploitation of the patient. Unless a sexual relationship existed prior to the treatment of the patient, sexual activity or sexual contact of an acupuncturist with a patient shall be restricted as follows:

- (1) An acupuncturist shall not engage in or solicit sexual activity or sexual contact with a current patient.
- (2) An acupuncturist shall not engage in or solicit sexual activity or sexual contact with a former patient for a period of at least six months after

termination of the professional relationship after which a copy of a patient termination statement shall be kept in the patient record.

Authority G.S. 90-450; 90-451; 90-454; 90-455; 90-456; 90-457; 90-457.1.

21 NCAC 01 .0609 BOARD INVESTIGATION

An acupuncturist shall cooperate with any Board investigation and promptly supply requested information unless prohibited by law. A response is considered prompt if supplied within 30 days from the date the request is received or sent to the last known address of the respondent.

Authority G.S. 90-450; 90-454; 90-455; 90-456.

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

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

TITLE 25 – OFFICE OF STATE HUMAN RESOURCES

Rule-making Agency: State Human Resources Commission

Rule Citation: 25 NCAC 01B .0350, .0413, .0414, .0429, .0430; 01C .0311, .0403, .0404, .0411, .0412; 01D .0201; 01E .0901; 01H .0901, .0902, .0904, .0905, .1001; and 01J .0603, .0610, .1101, .1201-.1208, .1301-.1307, .1310, .1312-.1320, .1401-.1412.

Effective Date: May 23, 2014

Date Approved by the Rules Review Commission: May 15, 2014

Reason for Action: The effective date of a recent act of the General Assembly: HB 834 [Session Law 2013-382]; effective August 21, 2103.

25 NCAC 01B .0350, .0413, .0414, .0429, .0430 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, as well as other areas of importance to State employees. These rules are being amended to make it clear that it does not apply to cases involving grievance filed on or after August 21, 2013. The need for certainty in the grievance process justifies an abbreviated notice and hearing process.

25 NCAC 01C .0311 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, as well as other areas of importance to State employees. This rule is being amended to make clear how, after August 21, 2013, an employee may pursue a grievance if the employee objects to material in the employee's human resources files. The need for certainty in the grievance process justifies an abbreviated notice and hearing process.

25 NCAC 01C .0403 – The State Human Resources Act was amended to change the length of the probationary period required. Other rules in place are affected by the length of the probationary period, for example, trainee appointments. It is necessary to amend this rule to make it clear that after 24 months an employee in a trainee appointment is no longer a probationary employee, even though the employee might remain in a trainee appointment. Because other rights flow from obtaining career status, an abbreviated notice and hearing process is critical to ensure that employees and managers understand the rights of employees in trainee appointments as soon as possible.

25 NCAC 01C .0404, .0411, .0412 – The State Human Resources Act was amended to change length of the probationary period required. It is necessary to amend these rules to make it clear that after 24 months an employee in a probationary appointment obtains career status. Because other

rights flow from obtaining career status, an abbreviated notice and hearing process is critical to ensure that employees and managers understand the rights of employees in trainee appointments as soon as possible.

25 NCAC 01D .0201 – The State Human Resources Act was amended to change the length of the probationary period required. It is necessary to amend this rule to make it clear that after 24 months an employee in a probationary appointment obtains career status. Because other rights flow from obtaining career status, an abbreviated notice and hearing process is critical to ensure that employees and managers understand the rights of employees in trainee appointments as soon as possible. In addition, the State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, as well as other areas of importance to State employees. This rule is being amended to make it clear that it does not apply to cases involving grievance filed on or after August 21, 2013. The need for certainty in the grievance process justifies an abbreviated notice and hearing process.

25 NCAC 01E .0901 – The State Human Resources Act was amended to change the number of holidays. Because of the necessity to have immediate clarification as to which days will be designated as holidays for employees, an abbreviated notice and hearing process is justified.

25 NCAC 01H .0901 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect. The change was effective August 21, 2013. Because employees are reduced in force with some frequency, it is necessary to amend this rule to have immediate clarification as to the appeal process for employees appealing denial of priority consideration. Therefore, an abbreviated notice and hearing process is justified.

25 NCAC 01H .0902 – The State Human Resources Act was amended to change the nature and scope of reduction in force priority consideration rights. Because employees are reduced in force with some frequency, it is necessary to have immediate clarification as to the nature and scope of the priority and associated rights. Therefore, an abbreviated notice and hearing process is justified. Other changes are being made to explain and match current practice. For these changes, the need to avoid a wasteful duplicative process in having to take the exact same rule through the permanent rulemaking process where there are no substantive changes also justifies an abbreviated notice and hearing process.

25 NCAC 01H .0904 – The State Human Resources Act was amended to change the nature and scope of reduction in force priority consideration rights. Because employees are reduced in force with some frequency, it is necessary to have immediate clarification as to the nature and scope of the priority and associated right, as well as the instances in which agencies should notify the Office of State Human Resources regarding the

status of employees related to their priority consideration. Therefore, an abbreviated notice and hearing process is justified in order to eliminate confusion on the part of reduced in force employees and unnecessary frustration.

25 NCAC 01H .0905 – The State Human Resources Act was amended to change the nature and scope of reduction in force priority consideration rights. Because employees are reduced in force with some frequency, it is necessary to have immediate clarification as to the nature and scope of the priority and associated rights. The Office of State Human Resources has no statutory or budgetary authority to provide the services described in Paragraph (b). Thus, that Paragraph is being repealed. Because employees may refer to this Paragraph when researching their rights, clarity is needed regarding exactly what resources are available from the Officer of State Human Resources. Therefore, an abbreviated notice and hearing process is justified in order to eliminate confusion and unnecessary frustration on the part of reduced in force employees.

25 NCAC 01H .1001 – The State Human Resources Act was amended to change the nature and scope of priority and reemployment rights under G.S. 126-5(e) for employees hired on or after June 30, 2013. In addition, G.S. 126-14.4 was repealed and the grievance process under that rule eliminated. Finally, there is no current requirement that employees specifically notify agencies that they wish to exercise their one-time priority for specific vacancies, but rather the employees must indicate that they wish to exercise their priority for all instances where the priority is applicable. In order to clarify the application of the priority for employees removed from exempt positions, an abbreviated notice and hearing process is justified in order to eliminate confusion on the part of employees, who may refer to the rules and misunderstand the nature of the rights to which they are entitled and the duties of the employing agency.

25 NCAC 01J .0603, .0610 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, as well as other areas of importance to State employees. This rule is being amended to clarify the changes in the grievance and appeals process for grievances filed on or after August 21, 2013. The need for certainty in the grievance process justifies an abbreviated notice and hearing process.

25 NCAC 01J .1101 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, as well as other areas of importance to State employees. This rule is being amended to clarify the changes in the grievance and appeals process for grievances filed on or after August 21, 2013. The need for certainty in the grievance process justifies an abbreviated notice and hearing process. In addition, paragraph (f) is being repealed because it is duplicative of provisions contained in Subchapter 1L dealing with EEO. To avoid waste of State resources, an abbreviated notice and hearing process is justified to bring the repeal of (f) in a separate rule filing from the repeal of (e).

25 NCAC 01J .1201-.1206 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, and changed effective August 21, 2013. This rule and others in this section are being repealed and moved elsewhere in Subchapter 1J. The need for certainty in

the grievance process and organization in the rules justifies an abbreviated notice and hearing process.

25 NCAC 01J .1207, .1208 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, and changed effective August 21, 2013. Other rules in this section are being repealed and moved elsewhere in Subchapter 1J. These particular rules are duplicated in Subchapter 1E and are simply being repealed but not replaced. The need for certainty in the grievance process and organization in the rules justifies an abbreviated notice and hearing process.

25 NCAC 01J .1301 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, and changed effective August 21, 2013. This rule is being repealed because it is inconsistent with the statute. This chapter is being reorganized to include all rules on the employee appeals and grievance process and most of the rules from Section .1200 and from Subchapter 1B are being adopted here but are virtually the same rules that have appeared elsewhere in Title 25. The need for certainty in the grievance process and organization in the rules justifies an abbreviated notice and hearing process.

25 NCAC 01J .1302 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, and changed effective August 21, 2013. This rule is being adopted in order to replace another rule repealed because it is inconsistent with the statute. **This chapter** is being reorganized to include all rules on the employee appeals and grievance process and most of the rules from Section .1200 and from Subchapter 1B are being adopted here but are virtually the same rules that have appeared elsewhere in Title 25. The need for certainty in the grievance process and organization in the rules justifies an abbreviated notice and hearing process.

25 NCAC 01J .1303, .1304, .1306, .1307, .1312-.1320 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, and changed effective August 21, 2013. These rules are being adopted in order to replace repealed rules elsewhere and to reflect the change in the statute. This chapter is being reorganized to include all rules on the employee appeals and grievance process and most of the rules from Section .1200 and from Subchapter 1B are being adopted here but are virtually the same rules that have appeared elsewhere in Title 25. The need for certainty in the grievance process and organization in the rules justifies an abbreviated notice and hearing process.

25 NCAC 01J .1305 – The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, and changed effective August 21, 2013. This rule is being adopted in order to provide a process for the review of Final Agency decisions, a new responsibility for the OSHR Director. This chapter is being reorganized to include all rules on the employee appeals and grievance process and most of the rules from Section .1200 and from Subchapter 1B are being adopted here but are virtually the same rules that have appeared elsewhere in Title 25. The need for certainty in the grievance process and organization in the rules justifies an abbreviated notice and hearing process.

25 NCAC 01J .1310 – This rule is very similar to a rule which currently appears in Subchapter 1B (State Personnel

Commission). Its virtual twin is being amended to clarify that it applies to matters which arose before the effective date of the recent amendments to the State Human Resources Act. The adoption of this rule as a temporary rule is required by the terms of G.S. 126-34.01 and 126-34.02, which are derived from HB 834. Adherence to usual notice and hearing schedules may result in employees' not knowing in a timely manner about the changes in law which might then mislead employees regarding whether the employee would be entitled to interest on any award obtained as the result of a successful grievance.

25 NCAC 01J .1401-.1405 – *The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, and changed effective August 21, 2013. These rules are being repealed because they are not needed given that the statute authorizes OSHR to require one agency grievance procedure, which included mediation. This repeal is part of the reorganization of this chapter in order to include all rules on the employee appeals and grievance process. The need for certainty in the grievance process and organization in the rules justifies an abbreviated notice and hearing process.*

25 NCAC 01J .1406-.1412 – *The State Human Resources Act was amended to change the grievance and contested case provisions formerly in effect, as well as other areas of importance to State employees. These rules are being repealed because they are no longer accurate given the change in the grievance procedure to one process. Previously, an agency could choose to have a "grievance" policy or a "grievance and mediation" policy. Now, all agencies have one policy and it includes mediation. So, these rules are now obsolete and have been replaced by the rules being adopted in 01J .1300.*

CHAPTER 01 – OFFICE OF STATE HUMAN RESOURCES

SUBCHAPTER 01B – STATE HUMAN RESOURCES COMMISSION

SECTION .0300 – CONTESTED CASE HEARING PROCEDURE

25 NCAC 01B .0350 TIME FRAME FOR RAISING ALLEGATION OF DISCRIMINATION

For cases arising before August 21, 2013, allegations of discrimination based on G.S. 126-16, 36, 36.1 must be raised within 30 days, either in a direct appeal to the State Personnel Commission Office of Administrative Hearings or within the departmental grievance procedure, of the date of the action that is alleged to be discriminatory. Failure to raise such an allegation within 30 days shall be cause to have such allegation dismissed.

*History Note: Authority G.S. 126-4; 126-34.01; 126-34.02; 126-38;
Eff. February 1, 1985;
Temporary Amendment Eff. May 23, 2014.*

SECTION .0400 – APPEAL TO COMMISSION

25 NCAC 01B .0413 EXERCISE OF COMMISSION DISCRETION

For cases arising before January 1, 2012, the ~~The State Personnel Human Resources~~ Commission ~~will~~ shall weigh all relevant factors and circumstances in employee contested cases, including factors of mitigation and justification, in making a decision in a contested case of whether disciplinary action was imposed for just cause.

*History Note: Authority G.S. 126-4(9); 126-37;
Eff. August 1, 1980;
Amended Eff. May 1, 1989;
Temporary Amendment Eff. May 23, 2014.*

25 NCAC 01B .0414 SITUATIONS IN WHICH ATTORNEY'S FEES MAY BE AWARDED

For cases arising before August 21, 2013, attorney's fees may be awarded by the State ~~Personnel Human Resources~~ Commission only in the following situations:

- (1) the grievant is reinstated in accordance with Rule .0428 of this Section;
- (2) the grievant is awarded back pay from either a demotion or a dismissal, without regard to whether the grievant has been reinstated;
- (3) the grievant is determined, by the Commission or by the agency's internal grievance procedure, to have been discriminated against or harassed in violation of G.S. 126-16 or G.S. 126-36;
- (4) the grievant is awarded back pay as the result of a successful grievance alleging a violation of G.S. 126-7.1;
- (5) the grievant is the prevailing party in a final appeal of a Commission decision; or
- (6) any combination of the situations listed in this Rule.

Attorney's fees may be awarded when any of the above situations occur, either within the agency internal grievance procedure, in an appeal to the State ~~Personnel Human Resources~~ Commission, or in an appeal of a State ~~Personnel Human Resources~~ Commission decision.

*History Note: Authority G.S. 126-4(11);
Eff. September 1, 1987;
Amended Eff. March 1, 1996; July 1, 1989;
Temporary Amendment Eff. February 18, 1999;
Amended Eff. August 1, 2000;
Temporary Amendment Eff. May 23, 2014.*

25 NCAC 01B .0429 RECOMMENDATION OF DISCIPLINARY ACTION

For cases arising before January 1, 2012, the ~~The State Personnel Human Resources~~ Commission shall have the authority to recommend to the respondent agency that disciplinary action be imposed on an employee who, as a result of any employee's failure to observe state policy and procedures in effecting disciplinary actions and dismissals, dismissals, fails to observe state policies and procedures.

History Note: Authority G.S. 126-4(9);
Eff. September 1, 1987;
Temporary Amendment Eff. May 23, 2014.

25 NCAC 01B .0430 REMOVAL OF MATERIAL FROM PERSONNEL FILE

~~For cases arising before January 1, 2012, the The State Personnel Human Resources Commission shall have the authority to order the removal of any material in a personnel file which that it finds to be inaccurate or misleading.~~

History Note: Authority G.S. 126-4(9); 126-25 (prior to S.L. 2013-382);
Eff. September 1, 1987;
Temporary Amendment Eff. May 23, 2014.

SUBCHAPTER 01C – PERSONNEL ADMINISTRATION

SECTION .0300 – PERSONNEL RECORDS AND REPORTS

25 NCAC 01C .0311 EMPLOYEE OBJECTION TO MATERIAL IN FILE

~~(a) An employee, former employee, or applicant for employment who objects to material in the employee's file may place in his or her file a written statement relating to the material he or she considers to be inaccurate or misleading.~~

~~(b) An employee, former employee, or applicant for employment who objects to material in his or her personnel file must seek the removal on the basis that the information is inaccurate or misleading by filing a grievance through the agency grievance procedure.~~

~~(c) If the agency determines that the material in the employee's personnel file is inaccurate or misleading, the agency shall remove or amend the inaccurate material so that the material objected to is accurate.~~

~~(d) The employee does not have the right to appeal the contents of a performance appraisal or written warning.~~

~~(e) No appeal involving objection to material in the file shall be filed with the Office of Administrative Hearings.~~

An employee, former employee, or applicant objecting to material in his or her personnel file may follow the internal agency grievance procedure in order to bring the existence of inaccurate or misleading information to the attention of the agency, so long as that information is not a written disciplinary action or a performance appraisal. If, during the agency grievance procedure, the agency agrees that the information should be removed or amended from the file, the agency shall remove or amend the information. However, the employee may not appeal the agency's decision to the Office of Administrative Hearings.

History Note: Authority G.S. 126-25;
Temporary Adoption Eff. May 23, 2014.

SECTION .0400 – APPOINTMENT

25 NCAC 01C .0403 TRAINEE APPOINTMENTS

(a) A trainee appointment may be made to a permanent position when:

- (1) the job specification includes provisions for a trainee progression leading to regular ~~appointment, appointment;~~
- (2) recruitment efforts fail to attract qualified ~~candidates, candidates;~~
- (3) operating need warrants a ~~trainee, trainee;~~ or
- (4) the recommended applicant fails to meet State education and experience requirements.

(b) Employees with a trainee appointment earn leave, and receive total state service credit, retirement benefits, and health benefits. ~~When applicable, trainees~~ Trainees not in time limited positions subject to a reduction in force who have completed six months of service or who had a permanent appointment prior to entering a trainee appointment shall receive severance pay as provided in G.S. 126-8.5 and priority reemployment consideration.

(c) Employees with a trainee appointment shall work 24 continuous months to attain career status. An employee with a trainee appointment shall achieve career status but remain in a trainee appointment if the length of the trainee progression is greater than 24 months.

History Note: Authority G.S. 126-1.1; 126-4;
Eff. February 1, 1976;
Amended Eff. October 1, 2004; August 1, 1995; August 1, 1978;
Temporary Amendment Eff. May 23, 2014.

25 NCAC 01C .0404 PROBATIONARY APPOINTMENTS

(a) ~~Individuals~~ Reinstatements that follow a break in service or new hires receiving ~~initial~~ appointments to permanent or time-limited ~~permanent~~ positions must serve a probationary period. The probationary ~~periods~~ period is an extension of the selection process and provides the time for effective adjustment of the new employee or elimination of those whose performance ~~will~~ does not meet acceptable standards. The ~~maximum~~ length of the probationary period shall be ~~not less than three nor more than nine~~ 24 months of either full-time or part-time employment from the actual date of employment. ~~Within 90 days of employment, prior to the granting of a permanent or time limited permanent appointment, credentials~~ Credentials and application information provided by the employee must be ~~verified.~~ verified within 90 days of employment. Agencies shall inform applicants in writing that credentials must be verified prior to the granting of a permanent or time-limited permanent appointment.

(b) Employees with a probationary appointment earn leave, and receive total state service credit, retirement benefits, and health benefits. They are not eligible for severance pay or priority reemployment consideration.

History Note: Authority G.S. 96-29; 126-1.1; 126-4;
Eff. February 1, 1976;
Amended Eff. June 1, 1983; August 1, 1980; January 1, 1979;
August 1, 1978;
Legislative Objection Lodged Eff. June 13, 1983;
Curative Amended Eff. June 22, 1983;

*Amended Eff. December 1, 1985;
Temporary Amendment Eff. January 1, 1988 For a Period of
180 Days to Expire on June 28, 1988;
Amended Eff. August 1, 1995; March 1, 1988;
Temporary Amendment Eff. May 23, 2014.*

**25 NCAC 01C .0411 TYPES OF APPOINTMENTS
PROVIDING PROBATIONARY PERIOD CREDIT**

Satisfactory service during a ~~probationary~~, probationary ~~temporary~~, or trainee appointment may constitute part or all of the probationary ~~period~~, period, which is 24 months of continuous service. Employment in an intermittent appointment ~~as defined in Rule .0408 of this Section may shall~~ not be credited toward the probationary period.

*History Note: Authority G.S. 126-1.1; 126-4;
Eff. December 1, 1985;
Amendment Eff. December 1, 1988;
Temporary Amendment Eff. May 23, 2014.*

**25 NCAC 01C .0412 PERSONNEL CHANGES
SUBJECT TO/NOT SUBJECT TO A PROBATIONARY
PERIOD**

(a) ~~A~~ An additional probationary period shall not be required when any of the following changes are made:

- (1) ~~Promotion promotion of an employee a career State employee; who has a permanent or time-limited permanent appointment;~~
- (2) ~~Transfer transfer of an employee a career State employee; who has a permanent or time-limited permanent appointment;~~
- (3) ~~Demotion demotion of an employee a career State employee; who has a permanent or time-limited permanent appointment;~~
- (4) ~~Reinstatement reinstatement~~ after leave without pay; or
- (5) ~~The the~~ return of a policy-making/confidential exempt employee to a nonpolicy-making position.

(b) Personnel ~~Changes~~ changes may be subject to a probationary ~~period~~, period as provided in G.S. 126-1.1. An employee with reduction in force priority consideration may be required to serve a new probationary period if the employee has a break in service of more than 31 days as outlined in 25 NCAC 1D .0510 (Priority Reemployment Consideration). 25 NCAC 01H .0901 (POLICY AND SCOPE).

*History Note: Authority G.S. 126-1.1; 126-4;
Eff. December 1, 1985;
Amended Eff. March 1, 1996; June 1, 1994;
Temporary Amendment Eff. May 23, 2014.*

SUBCHAPTER 01D – COMPENSATION

SECTION .0200 – NEW APPOINTMENTS

25 NCAC 01D .0201 INITIAL EMPLOYMENT

(a) A new appointment is the initial employment of an individual to a position ~~or the re-employment of individuals who~~

~~are either not eligible for reinstatement or, at the agency's option, are not offered reinstatement.~~ in State government.

(b) An employee entering into state service in a permanent or time-limited permanent position shall be given a probationary or trainee appointment unless the employee is eligible for and the agency chooses to make reinstatement with a permanent appointment. The probationary and trainee appointment periods are intended to serve as an extension of the selection process and are used to determine whether the person meets acceptable performance standards for the work for which employed. The employee shall earn all the benefits of an employee with a permanent appointment during this time.

(c) The duration of a probationary appointment shall be ~~not less than three nor more than nine~~ 24 months of either full-time or part-time employment. ~~The determination of the appropriate length shall depend on the complexity of the position and the rate of progress of the employee.~~ (This probationary period is not the same as the probationary period prescribed for criminal justice officers in 12 NCAC 05 .0401.) The duration of the trainee appointment is established for each regular classification to which a trainee appointment is made.

(d) The conditions of the probationary and trainee appointments shall be ~~clearly~~ conveyed to the applicant prior to appointment. During the probationary or trainee period, the supervisor shall work ~~closely~~ with the employee in counseling and assisting the employee to achieve a satisfactory performance level; progress of the employee shall be reviewed during discussions between the employee and the supervisor. Following the probationary period when the supervisor in consultation with other appropriate administrators determines that the employee's performance indicated capability to become a satisfactory performer and merits retention in the position, the employee shall be given a permanent appointment to the class. If the determination is that the employee's performance indicates that the employee is not suited for the position and ~~cannot be expected to~~ does not meet acceptable performance standards, the employee shall be separated from that position. Employees may ~~also~~ be separated during a probationary appointment for causes related to performance of duties or unacceptable personal conduct. Employees in or trainee appointment appointments who are not career State employees may also be separated for causes related to performance of duties or unacceptable personal conduct. Except in cases of alleged discrimination, harassment, or retaliation, a dismissal-separation under these conditions of an employee in a trainee appointment who is not a career State employee is not subject to the right of appeal to the State Personnel Commission. may not be appealed through the agency grievance procedure and then on to the Office of Administrative Hearings.

*History Note: Authority G.S. 126-1.1; 126-4; 126-34.01;
126-34.02;
Eff. February 1, 1976;
Amended Eff. August 1, 1995; December 1, 1988; January 1, 1979; December 1, 1978;
Temporary Amendment Eff. May 23, 2014.*

SUBCHAPTER 01E – EMPLOYEE BENEFITS

SECTION .0900 – HOLIDAYS

25 NCAC 01E .0901 APPROVED HOLIDAYS

~~G.S. 126-4(5) specifies the number of holidays to be observed and mandates the observance of Martin Luther King, Jr.'s Birthday and Veterans' Day. The State Personnel Commission shall designate the remaining holidays to be observed. The following additional holidays are adopted by the State Personnel Commission and approved by the Governor: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving (2 days), and Christmas (2 or 3 days). In addition to Martin Luther King, Jr.'s Birthday and Veteran's Day, the following are designated as holidays: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving and the day after, and December 25 (Christmas) and the last business day before Christmas and the first business day after Christmas.~~

History Note: Authority G.S. 126-4(5);

Eff. February 1, 1976;

Amended Eff. January 1, 2004; February 1, 1995; December 1, 1988; October 1, 1977;

Temporary Amendment Eff. May 23, 2014.

SUBCHAPTER 01H – RECRUITMENT AND SELECTION

SECTION .0900 – REDUCTION-IN-FORCE - PRIORITY REEMPLOYMENT

25 NCAC 01H .0901 REDUCTION IN FORCE APPLICATION AND APPEAL

(a) The rules in this Section apply to employees notified of or separated due to a reduction in force.

(b) Priority consideration shall be provided to career State employees who have received written notification of imminent separation due to reduction in force. An employee who is separated from a time-limited appointment is not eligible for priority consideration unless the appointment extends beyond three years.

(c) A career State employee, as defined in G.S. 126-1.1, with priority consideration who has reason to believe priority consideration was denied in a selection ~~decision~~ decision, and who chooses to appeal may shall appeal directly to the State Personnel Commission through the established contested hearing process in accordance with G.S. 126-34.1(a)(5). ~~agency grievance procedure in accordance with G.S. 126-34.02.~~

History Note: Authority G.S. 126-1A; 126-5(c)(2); 126-5(d)(1); 126-7.1;

Eff. March 1, 1987;

Amended Eff. December 1, 1995; March 1, 1994; June 1, 1992; March 1, 1991;

Recodified from 25 NCAC 01D .0510 Eff. December 29, 2003;

Amended Eff. February 1, 2007;

Temporary Amendment Eff. May 23, 2014.

25 NCAC 01H .0902 REQUIREMENTS FOR REDUCTION IN FORCE PRIORITY CONSIDERATION

Upon written notification of imminent separation through reduction in force (RIF), ~~an employee~~ a career state employee shall receive priority consideration for positions at an equal or lower salary grade (or salary grade equivalency) for a period of 12 months pursuant to ~~G.S. 126-7.1(c1)~~ G.S. 126-7.1, unless the priority has been satisfied in accordance with this Section. The following conditions apply:

~~(1) If the applicants for reemployment for a position include State employees currently possessing priority consideration as a result of RIF, a RIF employee with more than 10 years of service shall receive priority consideration over a RIF employee having less than 10 years of service in the same or related position classification;~~

~~(2)(1)~~ For employees receiving notification of imminent separation from trainee or flat rate positions, the salary grade for which priority is to be afforded shall be determined as follows: For employees in flat rate positions, the salary grade shall be the grade which has as its maximum a rate nearest to the flat rate salary of the eligible employee. For eligible employees in trainee status, the salary grade shall be the salary grade of the full class;

~~(3)(2)~~ An employee notified ~~For employees receiving notification~~ of imminent separation through reduction in force while actively possessing priority consideration from a previous reduction in force shall retain the initial priority for the remainder of the 12-month priority period. A new priority consideration period shall then ~~be afforded~~ begin at the salary grade (or salary grade equivalency), ~~salary rate and appointment status of the position held at the most recent notification of separation;~~ separation and shall expire 12 months from the most recent notification date;

~~(4)(3)~~ An employee who, If after receiving formal notice of ~~impending~~ imminent reduction in force, an employee ~~retires;~~ retires or applies for retirement or leaves state government employment prior to the separation date date, ~~waives the~~ an employee has no right to priority consideration; ~~consideration;~~ An employee who applies for retirement after being separated through reduction in force may exercise priority consideration;

~~(5)(4)~~ Priority consideration is intended to provide employment at an equal or appointment status to that held at the time of notification. Acceptance of a position at a lower appointment status shall not affect priority. Employees notified of separation from permanent full-time positions shall have priority consideration ~~to~~ for permanent full-time and permanent part-time positions.

- Employees notified of separation from permanent part-time positions shall have priority consideration ~~to~~ for permanent part-time positions only;
- (6)(5) Employees who have priority status at the time of application for a vacant position, and who apply during the designated agency recruitment period, shall be continued as priority applicants until the selection process is complete;
- (7)(6) ~~An If an employee with priority status may not decline applies for a position but declines an interview or offer of the position, interviews or offers for positions within 35 miles of the employee's original work station without losing the employee loses priority and any remaining severance salary continuation, if the position is at an appointment status, a salary grade (or salary grade equivalency), and or salary rate equal to or greater than that held at the time of notification;~~
- (7) If an employee with priority status is placed in a position within 35 miles of the employee's original work station prior to the separation due to reduction in force, the employee does not lose priority if the position is at a lower salary grade (or salary grade equivalency) or salary rate less than that held at the time of notification and if the position is at the same appointment status;
- (8) An employee with priority status may accept a temporary position at any level and retain priority consideration. ~~consideration and severance salary continuation.~~ An employee receiving severance salary continuation shall not be employed under a contractual arrangement in any State agency, other than State universities and community colleges, until 12 months have elapsed since the separation as provided by G.S. 143-27.2; G.S. 126-8.5;
- (9) When priority has been granted for a lower salary grade (or salary grade equivalency) ~~or~~ and salary rate than that held at the time of notification, the employee retains priority for higher salary grades (or salary grade equivalencies) ~~and salary rate~~ up to and including that held at the time of the notification of separation;
- (10) An employee with priority consideration may accept employment outside State government or in a State position not subject to the State Personnel Human Resources Act and retain such consideration through the 12-month priority period;
- (11) Priority consideration is terminated when an eligible employee:
- (a) ~~refuses an interview or offer for a position within 35 miles of the~~ employee's original workstation if the position is at an appointment status and the same salary grade (or salary grade equivalency) salary grade (or salary grade equivalency) and salary rate equal to or greater than that held at the time of notification;
- (b)(a) ~~accepts a position equal to or greater than the salary rate or employee's salary grade (or salary grade equivalency) grade (or salary grade equivalency), salary rate and appointment status of the full-time or part-time position held at the time of notification; notification, in accord with Item (4) of this Rule; or~~ accepts a position equal to or greater than the salary rate or employee's salary grade (or salary grade equivalency) grade (or salary grade equivalency), salary rate and appointment status of the full-time or part-time position held at the time of notification; notification, in accord with Item (4) of this Rule; or
- (c)(b) ~~has received 12 months priority consideration;~~
- (12) Priority consideration for employees notified of or separated through reduction in force does not include priority to any exempt positions;
- (13) When an employee with priority status accepts a position at a lower salary rate or lower employee's salary grade (or salary grade equivalency) grade (or salary grade equivalency) or salary rate and is subsequently terminated by disciplinary action, any remaining priority consideration ceases; and
- (14) An employee with priority status ~~may be required to shall~~ shall serve a new probationary period ~~only when: when there is a break in service, as defined in 25 NCAC 01D .0114.~~
- (a) ~~the essential duties and responsibilities of the position into which the employee is being reemployed are significantly different from those of the position held at the time of reduction in force notification;~~
- (b) ~~the prior, documented performance history of the employee indicates performance failings; or~~
- (c) ~~the prior, documented unacceptable personal conduct of the employee would make a probationary period a prudent protection of agency interests.~~
- ~~A decision by an agency to require a new probationary period shall not, however, nullify the employee's right to a future period of priority reemployment status should that employee receive reduction in force notification again while serving in probationary status.~~
- History Note: Authority G.S. 126-4(6),(10); 126-7.1; Eff. March 1, 1987; Amended Eff. December 1, 1995; April 1, 1993; June 1, 1992; January 1, 1990;*

*Recodified from 25 NCAC 01D .0511 Eff. December 29, 2003;
Amended Eff. February 1, 2007;
Temporary Amendment Eff. May 23, 2014.*

25 NCAC 01H .0904 AGENCY AND EMPLOYEE RESPONSIBILITIES

(a) The employing agency shall notify the employee of ~~impending imminent~~ separation in accordance with ~~G.S. 126-7.1(a1)~~, G.S. 126-7.1(b) and inform the employee of the priority consideration to be afforded.

(b) The agency shall notify the Office of State ~~Personnel~~ Human Resources when:

- (1) an employee is officially notified of reduction in force;
- (2) an eligible employee accepts a position that satisfies the priority consideration;
- (3) ~~an employee with priority status due to reduction in force is offered a lateral transfer or promotion and refuses, unless the position offered is more than 35 miles from the employee's original workstation; or an eligible employee refuses an interview or an offer that would satisfy the priority consideration; or~~
- (4) other conditions that would satisfy or terminate an eligible employee's priority consideration are discovered.

*History Note: Authority G.S. 126-4(6),(10); 126-7.1;
Eff. March 1, 1987;
Amended Eff. December 1, 1995, June 1, 1992; June 1, 1992;
November 1, 1988;
Recodified from 25 NCAC 01D .0515 Eff. December 29, 2003;
Amended Eff. November 1, 2011; February 1, 2007;
Temporary Amendment Eff. May 23, 2014.*

25 NCAC 01H .0905 OFFICE OF STATE HUMAN RESOURCES RESPONSIBILITIES

(a) The Office of State ~~Personnel~~ Human Resources shall maintain a list of employees notified of reduction in force that will serve as a reference for agencies in applying priority consideration reemployment.

(b) The Office of State ~~Personnel~~ Human Resources shall also provide outplacement assistance to separated employees who wish to seek employment in the private sector. Such assistance includes resumé preparation, personal marketing, and interview skills, along with Division of Employment Security ~~Commission~~ coordination for placement referral.

*History Note: Authority G.S. 126-4(6),(10);
Eff. March 1, 1987;
Recodified from 25 NCAC 01D .0516 Eff. December 29, 2003;
Amended Eff. November 1, 2011; February 1, 2007;
Temporary Amendment Eff. May 23, 2014.*

SECTION .1000 – EXEMPT PRIORITY CONSIDERATION

25 NCAC 01H .1001 EXEMPT PRIORITY CONSIDERATION – POLICY AND SCOPE

(a) The rules in this Section H .1000 apply to employees hired on or before August 20, 2013 and removed from:

- (1) Exempt policymaking positions for reasons other than just cause; and
- (2) Exempt managerial positions for reasons other than just cause, ~~cause but not because the employee's selection violated G.S. 126-14.2; and~~
- (3) ~~Exempt managerial positions because the employee's selection violated G.S. 126-14.2.~~

(b) A career State employee with less than 10 years cumulative service in subject positions prior to placement in an exempt policymaking position, who is removed from an exempt policymaking position for reasons other than just cause, shall receive a one-time priority. This priority shall be exercised by the employee within one year following the date of the employee's separation. Upon notice to the agency that priority is being requested, the [The] employee shall be offered any available non-exempt position for which the employee has applied and is qualified when the position applied for is equal to or below the salary grade (or salary grade equivalency) of the most recent subject position held prior to placement in the exempt policymaking position unless an offer has been made to, and accepted by, a person qualified under ~~25 NCAC 01H .1005 Rule .1005 of this Section~~ or an employee notified of or separated by a reduction in force, or a current State employee with greater cumulative State service subject to the State Personnel Human Resources Act.

(c) A career State employee with less than 10 years cumulative service in subject positions prior to placement in an exempt managerial position, who is removed from an exempt managerial position for reasons other than just cause ~~but not because the employee's selection violated G.S. 126-14.2~~, shall receive a one-time reemployment priority, to be exercised by the employee within one year following the date of the employee's separation. Upon notice to the agency that priority is being requested, the employee shall be offered any available non-exempt position for which the employee has applied and is qualified, when the position applied for is equal to or below the salary grade (or salary grade equivalency) of the most recent subject position held prior to placement in the exempt managerial position unless an offer has been made to, and accepted by, a person qualified under 25 NCAC 01H .1005, Rule .1005 of this Section, or an employee notified of or separated by a reduction in force, or a current State employee with greater cumulative State service subject to the State Personnel Human Resources Act.

~~(d) A career State employee with less than 10 years of service who was removed from an exempt managerial position because the employee's selection violated G. S. 126-14.2 shall receive a one time reemployment priority, to be exercised by the employee within one year following the date of the employee's separation. Upon notice to the agency that priority is being requested, the employee shall be offered any available non-exempt position for which the employee has applied and is qualified, when the position applied for is equal to or below the salary grade (or salary grade equivalency) of the most recent position held prior to placement in the exempt managerial~~

~~position unless an offer has been made to, and accepted by, a person qualified under 25 NCAC 01H .1005, or an employee notified of or separated by a reduction in force, or a current State employee with greater cumulative State service subject to the State Personnel Act.~~

~~(e)(d)~~ The priority considerations described in ~~Paragraph Paragraphs~~ (a), (b) and (c) of this Rule shall expire when a formal written offer is extended for employment in the position for which the employee has applied regardless of the position's salary grade (or salary grade ~~equivalency~~; equivalency) if the employee has notified the agency in writing that the employee wishes to exercise priority consideration.

(f) If an eligible exempt employee applies for and accepts a position through the regular, non-priority selection process, which is at a salary grade (or salary grade equivalency) below that held in the most recent subject position, that person shall retain the one-time priority for higher level positions for the remainder of the 12-month period.

(g) If an employee does not receive notice as described in 25 NCAC 01H .0630(b), Rule .0630(b) of this Subchapter, the employee remains subject to the State Personnel Human Resources Act until 10 working days after the employee receives written notification of the exempt status. If an otherwise eligible employee is removed from the position designated as exempt, the employee has priority consideration to a position at the same salary grade (or salary grade equivalency) as the most recent subject position.

History Note: Authority G.S. 126-1.1; 126-5; S.L. 2013-382, s. 4.3, 4.4, 4.6, 7.6.;

Eff. March 1, 1987;

Amended Eff. June 1, 1994; June 1, 1992; November 1, 1988;

Recodified from 25 NCAC 01D .0512 Eff. December 29, 2003;

Amended Eff. February 1, 2007;

Temporary Amendment Eff. May 23, 2014.

SUBCHAPTER 01J – EMPLOYEE RELATIONS

SECTION .0600 – DISCIPLINARY ACTION: SUSPENSION AND DISMISSAL

25 NCAC 01J .0603 APPEALS

(a) A career employee who has been demoted, suspended or dismissed shall have 15 calendar days from the date of his or her receipt of written notice of such action to file an appeal with his department/university grievance procedure. If an employee does not appeal his or her dismissal through the agency grievance procedure within 15 days, ~~the initial letter of dismissal setting forth the specific acts or omissions that are the basis of the dismissal shall become the agency's final agency decision. then the employee shall have no right to file a contested case with the~~ Office of Administrative Hearings under G.S. 126-34.02.

(b) If an employee appeals his or her dismissal through the agency grievance procedure, then the initial dismissal letter shall not constitute the final agency decision, but the final agency decision shall be the decision made at the conclusion of the employee's appeal through the agency grievance procedure. ~~Grievances which do not allege discrimination, a violation of G.S. 126-7.1(a) or (c), a violation of G.S. 126-82, or that do not~~

~~allege a denial of employment or promotion in violation of G.S. 126-14.2 must follow the department or university grievance procedure. An appeal to the State Personnel Commission of a final departmental or university decision must be filed with the Office of Administrative Hearings in accordance with G.S. 150B-23 within 30 calendar days of receipt of the final agency decision. Grievances which allege unlawful workplace harassment must be submitted in writing to the agency or department, within 30 calendar days of the alleged harassing action, and the agency or department must be given 60 calendar days in which to take remedial action, if any, unless the department or agency has waived the 60 day period, and the employee has acknowledged such waiver. The acknowledgement and waiver shall be in writing. An appeal to the State Personnel Commission of unlawful workplace harassment must be filed with the Office of Administrative Hearings in accordance with G.S. 150B-23 and within 30 calendar days of notification of the remedial action, if any, taken by the agency.~~

~~(b)(c)~~ Grievances which that allege discrimination not including unlawful workplace harassment may, at the election of the employee, proceed through the department or university procedure or proceed directly to the State Personnel Commission (SPC) for a hearing by the Office of Administrative Hearings (OAH) and a decision by the SPC. A direct appeal to the SPC (such appeal involving a contested case hearing by the OAH and a decision by that agency to the SPC) alleging discrimination not including unlawful workplace harassment must be filed in accordance with G.S. 150B-23 and must be filed within 30 calendar days of receipt of notice of the alleged discriminatory act discrimination, harassment, or retaliation must also follow the agency grievance process. Employees with grievances alleging discrimination, harassment, or retaliation who do not follow the agency grievance process shall have no right to file a contested case with the Office of Administrative Hearings.

~~(c)~~ Grievances which allege a violation of G.S. 126-14.2 must be filed with the Civil Rights Division of the OAH within 30 calendar days after the employee or applicant receives written notice that the position in question has been filled. The employee or applicant must file a petition for a contested case hearing pursuant to G.S. 126-34.1 and Article 3 of Chapter 150B within 15 days of the initial determination by the OAH Civil Rights Division that there has been a violation of G.S. 126-14.2.

~~(d)~~ Grievances filed on an untimely basis (see G.S. 126-14.4, 126-35, 126-36 and 126-38) must be dismissed. Allegations of discrimination raised more than 30 calendar days after receipt of notice of the occurrence of the alleged discriminatory act must be dismissed. Grievances alleging unlawful workplace harassment raised more than 30 calendar days after notification of the remedial action, if any, taken by the agency must be dismissed.

(d) The following grievances must also follow the agency grievance procedure before being filed in the Office of Administrative Hearings: denial of veteran's preference provided for in Chapter 128 of the General Statutes; denial of hiring or promotion because of an unlawful failure to post a position; denial of hiring or promotion due to failure to receive career State employee priority consideration; denial of hiring or promotion due to failure to receive reduction in force priority

consideration; and a whistleblower grievance as provided in Article 14 of Chapter 126.

History Note: Authority G.S. 126-1A; 126-34.01; 126-34.02; 126-35; 150B, Article 3; 150B-23;

Eff. February 1, 1976;

Amended Eff. March 1, 1994; April 1, 1989; December 1, 1984; October 1, 1984;

Temporary Amendment Eff. February 18, 1999;

Amended Eff. February 1, 2011; July 18, 2002;

Temporary Amendment Eff. May 23, 2014.

25 NCAC 01J .0610 WRITTEN WARNING

(a) The supervisor shall monitor and promote the satisfactory performance of work assignments and assure that employees do not engage in unacceptable personal conduct. All types of performance-related job inadequacies may constitute unsatisfactory job performance under this Section. Unacceptable personal conduct may be work-related ~~and~~ or non-work-related conduct and may be intentional or unintentional. When the supervisor determines that disciplinary action is appropriate for unsatisfactory job performance, a written warning is the first type of disciplinary action that an employee must receive. The supervisor may elect to issue a written warning for grossly inefficient job performance or unacceptable personal conduct. The written warning must:

- (1) ~~Inform~~ inform the employee that this is a written warning, and not some other non-disciplinary process such as counseling;
- (2) ~~Inform~~ inform the employee of the specific issues that are the basis for the warning;
- (3) ~~Tell~~ tell the employee what specific ~~improvements if applicable~~ improvements, if applicable, must be made to address these specific issues;
- (4) ~~Tell~~ tell the employee the time frame allowed for making the required improvements/corrections. Absent a specified time frame, 60 days is the time frame allowed for correcting unsatisfactory job performance and immediate correction is required for grossly inefficient job performance or unacceptable personal conduct; and
- (5) ~~Tell~~ tell the employee the consequences of failing to make the required improvements/corrections;

(b) A written warning must be issued in accordance with the procedural requirements of this Section. ~~Section, and include any applicable appeal rights.~~

History Note: Authority G.S. 126-4; 126-34.02;

Eff. February 1, 1976;

Amended Eff. October 1, 1995; November 1, 1990; January 1, 1989;

September 1, 1988;

Temporary Amendment Eff. May 23, 2014.

SECTION .1100 – UNLAWFUL WORKPLACE HARASSMENT

25 NCAC 01J .1101 UNLAWFUL WORKPLACE HARASSMENT AND RETALIATION

(a) Purpose. The purpose of this Rule is to establish that the State of North Carolina prohibits in any form unlawful workplace harassment or retaliation based on opposition to unlawful workplace harassment of state employees or applicants and to require that every agency and university with employees subject to the State Human Resources Act establish policies and programs to ensure that work sites are free of unlawful workplace harassment and retaliation.

(b) As used in this Rule:

- (1) "unlawful workplace harassment" means unsolicited and unwelcome speech or conduct based upon race, sex, ~~ereed~~, religion, national origin, age, color, disability, or genetic information that creates a hostile work environment or under circumstances involving quid pro quo.
- (2) "hostile work environment" means an environment that both a reasonable person would find hostile or abusive and one that the particular person who is the object of the harassment perceives to be hostile or abusive. Whether a hostile work environment exists is determined by looking at all of the circumstances, including the frequency of the allegedly harassing conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.
- (3) "quid pro quo" harassment means unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct when:
 - (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
 - (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
- (4) "retaliation" means adverse action taken because of opposition to unlawful workplace harassment.

(c) Policy. No state employee shall engage in conduct that falls under the definition of unlawful workplace harassment or retaliation, and no personnel employment decisions shall be made on the basis of race, sex, ~~ereed~~, religion, national origin, age, color, disability, or genetic information.

~~(a) Purpose. The purpose of this Rule is to establish that the State of North Carolina prohibits in any form unlawful workplace harassment or retaliation based on opposition to unlawful workplace harassment of state employees or applicants and to require that every agency and university with employees subject to the State Personnel Act establish policies and programs to ensure that work sites are free of unlawful workplace harassment and retaliation.~~

~~(b) As used in this Rule:~~

- (1) ~~Unlawful workplace harassment is defined as unsolicited and unwelcome speech or conduct based upon race, sex, creed, religion, national origin, age, color, or disabling condition as defined by G.S. 168A-3 that creates a hostile work environment or circumstances involving quid pro quo.~~
- (2) ~~Hostile Work Environment is one that both a reasonable person would find hostile or abusive and one that the particular person who is the object of the harassment perceives to be hostile or abusive. Hostile work environment is determined by looking at all of the circumstances, including the frequency of the allegedly harassing conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.~~
- (3) ~~Quid Pro Quo harassment consists of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct when:~~
 - (A) ~~submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or~~
 - (B) ~~submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.~~
- (4) ~~Retaliation is defined as adverse action taken because of opposition to unlawful workplace harassment.~~

~~(c) Policy. No state employee shall engage in conduct that falls under the definition of unlawful workplace harassment or retaliation as defined in Paragraph (b) of this Rule, and no personnel decisions shall be made on the basis of race, sex, creed, religion, national origin, age, color, or disabling condition as defined by G.S. 168A-3.~~

~~(d) All employees are guaranteed the right to work in an environment free from unlawful workplace harassment and retaliation.~~

~~(e) Grievances. Any current or former state employee who feels he or she has been the victim of unlawful workplace harassment or retaliation in violation of this Rule shall file a grievance through the departmental grievance procedure. Filing such a written complaint is a prerequisite to any further appeal to the Office of Administrative Hearings regarding unlawful workplace harassment or retaliation. After the employee's written complaint is submitted to the agency or university, the department, agency or university shall have 60 days within which to consider the complaint and take any remedial action, unless the department, agency or university has waived the 60-day period, and the employee has acknowledged such waiver. The waiver and acknowledgement shall be in writing. Any current or former state employee who feels that he or she has been subjected to unlawful workplace harassment or retaliation may appeal directly to the Office of Administrative Hearings~~

~~(such appeal consisting of a contested case hearing under G.S. 150B and a decision by the Office of Administrative Hearings) only after submitting a written complaint through the agency grievance and waiting 60 days or receiving notification of remedial action, if any, by the department, agency or university whichever shall occur first.~~

~~(f) Agency or University Plans. Each agency head or university chancellor shall include as a supplement to the Affirmative Action Plan or Equal Employment Opportunity Plan a plan setting forth the steps to be taken to prevent and correct unlawful workplace harassment and retaliation. Each department, agency or university shall submit such a plan to the Office of State Personnel for review, technical assistance, and approval by the Director of the Office of State Personnel. Each plan on unlawful workplace harassment and retaliation shall include:~~

- ~~(1) publication and dissemination of a policy statement establishing that unlawful workplace harassment and retaliation of employees and applicants is prohibited;~~
- ~~(2) establishment of internal procedure to handle complaints of unlawful workplace harassment and retaliation. This procedure shall provide investigation and resolution of complaints within the department or university and shall offer the employee recourse other than through the immediate supervisor;~~
- ~~(3) utilization of training and other methods to prevent unlawful workplace harassment and retaliation;~~
- ~~(4) statement that the department will, in allegations of unlawful workplace harassment or retaliation, review the entire record and the totality of the circumstances, to determine whether the alleged conduct constitutes unlawful workplace harassment or retaliation;~~
- ~~(5) development of disciplinary actions for conduct determined to constitute unlawful workplace harassment or retaliation, to be implemented on a case by case basis on the facts of each complaint;~~
- ~~(6) prohibition of internal interference, coercion, restraint or reprisal against any person complaining of alleged unlawful workplace harassment or retaliation; and~~
- ~~(7) notification to all employees that a complaint or allegation of unlawful workplace harassment or retaliation must be filed within the department, agency or university and that the department, agency or university has 60 days (or fewer, if waived by the department, agency or university and acknowledged by employee) to take action, if any, in response to the complaint prior to the filing of a complaint of unlawful workplace harassment or retaliation with the Office of Administrative Hearings.~~

History Note: Authority G.S. 126-4; 126-16; 126-17; 126-34.01; 126-34.02; 126-36; 126-36.1;

Eff. December 1, 1980;
Amended Eff. November 1, 1988; April 1, 1983;
Temporary Amendment Eff. February 18, 1999;
Amended Eff. July 18, 2002;
Recodified from 25 NCAC 01C .0214 Eff. December 29, 2003;
Amended Eff. June 1, 2012;
Temporary Amendment Eff. May 23, 2014.

SECTION .1200 – EMPLOYEE GRIEVANCES

25 NCAC 01J .1201 GENERAL PROVISIONS

- ~~(a) This Section contains general provisions for two grievance procedure options: the Employee Appeals and Grievance Process, 25 NCAC 01J .1301 and the Employee Mediation and Grievance Process, 25 NCAC 01J .1400.~~
- ~~(b) Agencies may choose to adopt the Employee Appeals and Grievance Process, which does not offer mediation, or choose to adopt the Employee Mediation and Grievance Process. The provisions of 25 NCAC 01J .1201 through .1208 apply to both processes.~~
- ~~(c) An employee who has access to the agency grievance procedure shall initiate the grievance proceeding no later than 15 calendar days after the last act that constitutes the basis of the grievance.~~
- ~~(d) For the purpose of this Section, except for appeals brought under G.S. 126-25, the term "career state employee" as used in this Section shall have the meaning assigned to it by the State Personnel Act. The employee must have attained career status at the time the act, grievance or employment practice that is the basis of the grievance occurs.~~
- ~~(e) Neither the agency nor the employee shall be represented by any outside parties during any internal grievance or mediation proceedings.~~

History Note: Authority G.S. 126-1.1; 126-4(17); 126-25; 126-34; 126-35; 126-39;
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1202 AGENCY RESPONSIBILITIES

- ~~(a) The agency grievance procedure shall be implemented and continuously evaluated by the agency. Each agency shall, on or before January 1 of each even numbered year, submit to the Office of State Personnel either:~~
- ~~(1) the current agency grievance procedure for approval; or~~
 - ~~(2) a statement that its grievance procedure has not changed since January 1 of the last prior even numbered year, including a certification that the current agency procedure is in compliance with current state law and rules and the effective date of the last change to the agency procedure.~~
- ~~(b) The Office of State Personnel shall review the reports of each agency as required by Rule .1203 of this Section and the grievance procedures of each agency for compliance with applicable law, rules and good employee relations practices. After such review and following resolution of any areas of disagreement, the Office of State Personnel shall forward the~~

~~grievance procedure to the State Personnel Commission for reaffirmation of an unchanged agency grievance procedure previously approved or for approval of a new or modified agency grievance procedure. No agency grievance procedure is applicable to any employee until it has been approved by the State Personnel Commission.~~

History Note: Authority G.S. 126-4(9);
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1203 AGENCY GRIEVANCE REPORTS

- ~~(a) Every agency shall, semi-annually and as otherwise requested by the Office of State Personnel, compile information on employee grievances. These reports shall be due to the Office of State Personnel on the first business day of each of the following months: January and July.~~
- ~~(b) The Office of State Personnel shall make reports to the full State Personnel Commission at its February and August meetings based upon the information supplied in these semi-annual agency reports.~~

History Note: Authority G.S. 126-4(9);
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1204 DISCRIMINATION AND RETALIATION / SPECIAL PROVISIONS

~~Employees alleging illegal discrimination or retaliation may choose to follow the agency grievance procedure, including mediation, or choose to appeal directly to the State Personnel Commission. The 30 day timeframe to file a grievance alleging discrimination must be adhered to whether the employees choose to follow the agency grievance procedure, including mediation, or whether they choose to appeal directly to the State Personnel Commission by filing a petition for a contested case hearing with the Office of Administrative Hearings. The 30 day timeframe is not applicable to discrimination complaints filed with the Equal Employment Opportunity Commission.~~

History Note: Authority G.S. 126-4(9); 126-16; 126-17; 126-34.1(a); 126-36(a);
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1205 UNLAWFUL WORKPLACE HARASSMENT

~~Employees alleging unlawful workplace harassment or retaliation concerning unlawful workplace harassment shall follow the procedure established in the agency Unlawful Workplace Harassment Policy, as required by 25 NCAC 01J .1101(f), in order to bring a subsequent appeal to the State Personnel Commission. Employees may bypass any step in the agency's grievance procedure involving discussions with or review by the alleged harasser. The agency shall complete processing of an allegation of unlawful workplace harassment or retaliation within 60 days. Nothing in this Rule extends the amount of time an agency has in which to complete a review of~~

such an allegation, even if the employee chooses mediation as an option in the agency's Unlawful Workplace Harassment Policy.

History Note: Authority G.S. 126-4(9); 126-4(11); 126-34.1(a); 126-36(b)(1),(2)
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1206 TIME LIMITS

(a) ~~A final agency decision (FAD) must be issued within a reasonable period of time from the date the grievance is filed or the employee may, if eligible, appeal to the State Personnel Commission without receiving a FAD.~~

(b) ~~For cases involving discharge or demotion of a career State employee for disciplinary reasons, the reasonable period of time is 90 days from the filing of the grievance to the issuance of the FAD. For all issues except demotion or dismissal, a reasonable period of time for an employee to receive a FAD is 120 days from the time the grievance was filed. The employee and the agency may mutually agree to extend the time in either case.~~

(c) ~~If the employee cannot obtain the FAD within a reasonable period of time, the employee's right of appeal shall be governed by G.S. 126-34.1 and G.S. 150B-23(f).~~

History Note: Authority G.S. 126-4(9); 126-34.1;
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1207 FINAL AGENCY ACTION

~~In every employee grievance in which the grievant has the right of appeal to the State Personnel Commission (SPC), the final decision of the agency head must inform the grievant in writing that any appeal from the final agency decision must be made to the SPC within 30 days after receipt of notice of the decision or action which triggers the right of appeal. Further, the agency shall inform the grievant in writing that an appeal to the SPC shall be made by filing a petition for contested case hearing with the Office of Administrative Hearings, 424 North Blount Street, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714.~~

History Note: Authority G.S. 126-4(9); 126-7.2; 126-35; 126-37; 126-38; 150B-23(a);
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1208 LEAVE IN CONNECTION WITH GRIEVANCES

(a) ~~An employee shall be allowed time off from regular duties as may be necessary and reasonable up to a maximum of eight hours for the preparation of an internal grievance under the procedures adopted within the agency without loss of pay, vacation leave or other time credits.~~

(b) ~~Necessary and reasonable time for participation in contested case hearings and other administrative proceedings outside the agency in connection with employment, as a party, shall be granted upon request to the employee's supervisor or personnel officer without loss of pay, vacation leave or other time credits. Management may require prior official notice of the scheduling of and documentation by the presiding official or designee of the~~

~~time the employee spent in attendance at these administrative proceedings.~~

History Note: Authority G.S. 126-4(9);
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

SECTION .1300 – EMPLOYEE APPEALS AND GRIEVANCE PROCESS

25 NCAC 01J .1301 MINIMUM PROCEDURAL REQUIREMENTS

~~The following provisions are the requirements of an agency employee appeals and grievance process for approval by the State Personnel Commission.~~

- (1) ~~An employee with a grievance that does not allege unlawful discrimination as defined by G.S. 126-16 or G.S. 126-36, that does not allege a violation of G.S. 126-7.1(a) or (c), that does not allege a violation of G.S. 126-82, or that does not allege a denial of employment or promotion in violation of G.S. 126-14.2 shall be required to first discuss the problem with the immediate supervisor. Where the grievance does not fall within the administrative or decision making authority of the immediate supervisor, the immediate supervisor, shall within 48 hours of receipt of the grievance, refer the grievance to the lowest level supervisor with administrative or decision making authority over the subject matter of the grievance and notify the employee of the fact of and the basis for the referral. The agency grievance procedure shall outline those issues in addition to contested case issues under G.S. 126-34.1, if any, that are grievable under each agency's internal grievance procedure and whether and to what extent persons who have not attained career status under G.S. 126-1.1 may utilize the agency grievance procedure.~~
- (2) ~~The employee shall have the right to have the decision of the immediate supervisor reviewed. The step or steps after the immediate supervisor's step shall include a step at which the employee has the right to orally present the grievance and where the reviewer is outside the employee's chain of command.~~
- (3) ~~Any decision rendered after the step of the supervisor's decision shall be issued in writing and the final agency decision shall be issued within a reasonable period of time as defined in 25 NCAC 01J .1206(b).~~
- (4) ~~At the step involving the reviewer (person or body) outside the employee's chain of command, the employee shall have the right to challenge whether the reviewer can render an unbiased decision. The agency grievance~~

~~procedure shall establish a process for challenging the reviewer's impartiality and the process for the selection of a replacement when necessary.~~

- (5) ~~For matters that are contested case issues under G.S. 126-34.1, if the employee is not satisfied by the final decision of the agency head, the employee shall have the right to appeal to the State Personnel Commission within 30 days of receipt of the final agency decision. If the employee is unable within a reasonable period of time to obtain a final agency decision, the employee's right of appeal is governed by G.S. 150B-23(f).~~
- (6) ~~The agency shall state the methods of notifying current employees and newly appointed employees of any change to the agency grievance procedure no later than 30 days prior to the effective date of the change.~~
- (7) ~~The agency shall establish the time limit for the agency and employee to respond at each step in the grievance procedure. No time limit for an agency to respond or to act shall be more than twice the time limit for the employee.~~
- (8) ~~The grievance procedure shall include the effective date of the procedure and of any changes to the procedure.~~
- (9) ~~The grievance procedure shall comply with the requirements of 25 NCAC 01J .0615.~~

History Note: Authority G.S. 126-4(9); 126-4(10); 126-4(17); 126-7.2; 126-16; 126-34; 126-34.1; 126-34.2; 126-35; 126-36; 126-37; 126-38; 150B-23;
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1302 GENERAL AGENCY GRIEVANCE PROCEDURE REQUIREMENTS

- (a) All agencies and universities shall adopt the Employee Grievance Policy, which shall be approved by the ~~Office of State Human Resources~~. Resources Commission, based on the standards in Paragraph (d) of this Rule.
- (b) Grievances filed on an untimely basis must be dismissed.
- (c) A grievant who has an unexcused failure to attend the Step 1 - Mediation or Step 2 - Hearing as scheduled forfeits the right to proceed with the ~~internal~~ grievance process.
- (d) An agency or university grievance process shall include the following:
 - (1) A list of who may file a grievance;
 - (2) A list of grounds for filing a grievance under the internal grievance process;
 - (3) A list of grounds for which contested cases may be brought to the Office of Administrative Hearings after the conclusion of the ~~internal~~ grievance process;
 - (4) An informal process for attempting to resolve a grievable issue prior to the ~~employee~~ employee's filing a formal ~~internal~~ grievance;

- (5) The timeframes in which grievable issues must be raised in both the informal and formal ~~internal~~ grievance process;
- (6) The timeframes in which the agency or university must complete the informal process and each step of the formal ~~internal~~ grievance process;
- (7) Mediation shall serve as Step 1 of the formal ~~internal~~ grievance process. A ~~detailed~~ description of the mediation process and timeframe to be followed in Step 1 shall be provided to include that a mediation agreement is legally binding and that if impasse ~~occurs~~; occurs, the agency shall inform the grievant of the Step 2 grievance process and timeframe for filing;
- (8) A Hearing shall serve as Step 2 of the formal ~~internal~~ grievance process. A ~~detailed~~ description of the hearing process and timeframe to be followed in Step 2 shall be provided, including that a grievant has the opportunity to present the grievance orally to a reviewer(s) outside the grievant's chain of command, ~~eg., e.g. Hearing Officer hearing officer or Hearing Panel. hearing panel.~~ The Hearing Officer hearing officer or Hearing Chair hearing chair shall draft a proposed recommendation with findings of fact for a ~~Final Agency Decision; final agency decision;~~
- (9) The process and timeframe for the proposed recommendation to be submitted to the Office of State Human Resources for review and approval;
- (10) The process and timeframe for issuance of a Final Agency Decision shall not exceed 90 calendar days of the initial filing of the grievance in the formal ~~internal~~ grievance process;
- (11) Information about any applicable appeal rights to the Office of Administrative Hearings shall be included in the Final Agency Decision;
- (12) The responsibilities of all parties involved in the grievance process to include: grievant, respondent, hearing officer, hearing panel and chair, agency and university Human Resource Office, Equal Employment Officer, Affirmative Action Officer, Agency Head and designee, and the Director of the Office of State Human Resources and designees; and
- (13) The manner in which changes in the grievance policies will be communicated to employees.

History Note: Authority G.S. 126-34.01; 126-34.02;
Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1303 AGENCY AND UNIVERSITY GRIEVANCE REPORTS AND DATA ENTRY

- (a) Every agency and university shall, semi-annually and as otherwise requested by the Office of State Human Resources,

compile information on employee grievances. These reports shall be due to the Office of State Human Resources on the first business day of each of the following months: January and July.

(b) The Office of State Human Resources shall make reports to the State Human Resources Commission at its February and August meetings based upon the information supplied in semi-annual agency reports.

(c) Every agency and university shall ~~Enter enter~~ and maintain all grievance data on a monthly basis in the State's HR/Payroll system or other applicable human resources information system.

*History Note: Authority G.S. 126-4(6),(9);
Temporary Adoption Eff. May 23, 2014.*

25 NCAC 01J .1304 SETTLEMENTS/CONSENT AGREEMENTS IN GRIEVANCES, CONTESTED CASES

(a) Any mediation agreement, settlement agreement, or consent agreement in a grievance or contested case that requires the entering of data into human resources and payroll information system used by agencies with employees subject to Chapter 126, must be approved by the Office of State Human Resources for compliance with all rules contained in Subchapters 01C (Personnel Administration), 01D (Compensation), 01E (Employee Benefits), 01H (Recruitment and Selection), and 01J (Employee Relations) in Title 25 of the North Carolina Administrative Code before the agency enters the data.

(b) Data is required to be entered into the human resources and payroll information system by an agency when it determines that an action must be taken that affects classification, salary, leave, demotion, reassignment, transfer, or for any other human resources action, except where the only ~~personal~~ personnel action taken as a result of the settlement is the substitution of a resignation for a dismissal.

(c) Approval by the Office of State Human Resources shall be indicated by the signature of the State Human Resources Director or his or her designee in an appropriate place on the settlement or consent agreement or by other means acceptable to the Office of State Human Resources Director. This provision shall not be construed to require Office of State Human ~~Resources~~ Resources' approval of a settlement in which the only portion requiring approval is the awarding of attorney's fees to the employee's attorney by the State Human Resources Commission.

(d) This provision shall also not be construed to require approval of any settlement the terms of which allow an employee to substitute a resignation for a dismissal and to withdraw a grievance or a contested case action.

(e) The provisions of 25 NCAC 01A .0104 (EXCEPTIONS AND VARIANCES) must be complied with when any provision of a settlement or consent agreement in a grievance or contested case requires an exception to or variance from the rules in this ~~Chapter.~~ Chapter contained in Subchapters 01C (Personnel Administration), 01D (Compensation), 01E (Employee Benefits), 01H (Recruitment and Selection), and 01J (Employee Relations). This compliance shall be in addition to the requirements of this Rule. Any settlement or consent agreement that contains a provision that requires an exception to or variance from existing human resources policy must be reviewed and approved by the Office of State Human Resources Director

prior to the processing of any human resources action forms by the Office of State Human Resources or the university human resources and payroll system.

(f) Requests to enter data into the State's human resources and payroll system that are required by the provisions of any settlement or consent agreement that has not been approved by the Office of State Human Resources as required by this ~~Rule,~~ Rule shall not be processed by the human resources and payroll information system used by agencies with employees subject to Chapter 126, and shall be returned to the agency without action.

(g) Any mediation agreement, settlement agreement, consent agreement or order issued under Chapter 126 of the General Statutes shall comply with the rules in this Subchapter. However, no rules in this Subchapter shall constrain the authority of any agency to request an exception from these Rules; nor shall any provision of these Rules restrict the discretion and authority of any decision maker applying these rules to apply the rules consistent with the decision maker's discretion and authority.

*History Note: Authority G.S. 126-4; 126-34.01;
Temporary Adoption Eff. May 23, 2014.*

25 NCAC 01J .1305 OFFICE OF STATE HUMAN RESOURCES REVIEW AND APPROVAL OF FINAL AGENCY DECISION (FAD)

The Director of the Office of State Human ~~Resources shall~~ Resources:

- (1) ~~Review~~ Shall review every agency/university final agency decision (FAD).
- (2) ~~Establish~~ Shall establish criteria and standards for the content of a FAD.
- (3) May approve as written or make recommendations for modifications or reversal to the agency so that the FAD complies with criteria established by the Office of State Human Resources.

*History Note: Authority G.S. 126-34.01; 126-34.02;
Temporary Adoption Eff. May 23, 2014.*

25 NCAC 01J .1306 BACK PAY

In grievances filed on or after August 21, 2013:

- (1) Back pay may be awarded in all cases in which back pay is warranted by law.
- (2) Full or partial back pay is not dependent upon whether reinstatement is ordered.
- (3) Gross back pay shall always be reduced by any interim earnings, except that interim earnings from employment which was approved secondary employment prior to dismissal shall not be set off against gross back pay. Any unemployment insurance benefits paid to the employee shall also be deducted from the gross back pay amount ~~due,~~ due if unemployment insurance benefits were not taxed when received by the employee.
- (4) All applicable state and federal withholding taxes, including social security ~~taxes~~ taxes.

shall be paid from the reduced gross back pay ~~due; due, reduced~~ "Reduced gross back pay ~~pay~~" ~~being is~~ gross back pay due minus interim earnings ~~or—and~~ and unemployment insurance ~~benefits~~ received.

- (5) The employee's regular retirement contribution shall be paid on the total, unreduced amount of gross back pay due.
- (6) Back pay shall include payment for all holidays ~~which that~~ the grievant would have been paid for except for the interruption in employment status. Holiday premium pay shall ~~never not~~ be a part of any back pay award.
- (7) Shift premium pay shall be a part of a back pay ~~award, award~~ if the grievant would have been entitled to such pay in the absence of the interruption in employment. This benefit shall not be applicable in cases involving a failure to hire or a failure to promote.
- (8) Employees shall not be entitled to any discretionary pay ~~which that~~ may or may not have been awarded to them in the absence of the interruption in employment (for example, merit increments).
- (9) Back pay shall include any across the board compensation ~~which that~~ would have been included in the grievant's regular salary except for the interruption in employment. This includes one time ~~"bonuses", "bonuses,"~~ across the board legislative increments or across the board legislative pay increases.
- (10) If the grievant's longevity eligibility date occurred during the period of interrupted employment, back pay shall include the difference between the prorated longevity payment made at dismissal and the amount of longevity pay that would have been payable had employment not been interrupted. If the grievant is reinstated prior to his or her longevity date, no adjustment for longevity pay shall be made in the back pay award. The prorated longevity payment made at the time of dismissal shall be deducted from the full amount otherwise payable on the next longevity eligibility date.
- (11) Back pay must be applied for on the appropriate Office of State Human Resources form, available on the Office of State Human Resources website, www.oshr.nc.gov.
- (12) One component of the decision to award back pay shall be evidence, if any, of the grievant's efforts to obtain available, suitable employment following separation from state government. The burden of proof that a grievant did not mitigate his or her lost wages by seeking employment following separation shall be on the agency. The burden of proof that an employee mitigated his or her lost

wages by seeking employment following separation shall be on the employee.

History Note: Authority G.S. 126-4(9); 126-34.01; 126-34.02;

Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1307 FRONT PAY

In grievances filed on or after August 21, 2013:

- (1) Front pay may be awarded in all cases in which front pay is warranted by law.
- (2) ~~Front pay~~ "Front pay" is the payment ~~of an amount~~ to an employee above ~~his/her~~ his or her regular salary, such excess amount representing the difference between the employee's salary in ~~his/her~~ his or her current position and a higher salary determined to be appropriate due to a finding of discrimination.
- (3) Front pay may also result from an order of reinstatement to a position of a particular ~~level, level~~ which that the agency is unable to accommodate immediately. Front pay shall be paid for such period as the agency is unable to hire, ~~promote—promote,~~ or reinstate the employee to a position at the appropriate level and as warranted by law.
- (4) Front pay shall terminate upon acceptance or rejection of a position ~~consistent with the order of the commission, to which the employee has been determined to be entitled.~~
- (5) Front pay shall be available as a remedy in cases involving hiring, promotion, ~~demotion~~ demotion, or dismissal.
- (6) Front pay shall be payable under the same conditions as back pay except that the only deductions from front pay shall be for usual and regular deductions for state and federal withholding taxes and the employee's retirement contribution. There may also be a deduction for other employment earnings, whether paid by the state or another employer, so as to avoid unjust enrichment of the grievant.
- (7) Shift premium pay and holiday premium pay shall not be available on front pay.

History Note: Authority G.S. 126-4(9); 126-34.02;
Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1310 INTEREST

The state shall not ~~be required to~~ pay interest on any back pay award.

History Note: Authority 126-4(9);
Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1312 CAUSES FOR REINSTATEMENT

For grievances filed on or after August 21, 2013, reinstatement from dismissal, suspension, or demotion may be ordered only upon a finding of lack of substantive just cause (25 NCAC 01J .0604) or ~~discrimination~~ discrimination, harassment, or retaliation prohibited by G.S. 126-16 and ~~126-34.02~~ 126-34.02 or that an employee was dismissed, suspended, or demoted in violation of G.S. 126-34.02 because he or she was a whistleblower. For the purpose of this Rule, and in addition to those matters listed in ~~25 NCAC 01J .0604~~ Rule .0604 of this Subchapter, failure to issue the required number and kind of warnings or other disciplinary actions prior to dismissal for unsatisfactory job performance shall also be considered to constitute a lack of substantive just cause.

History Note: Authority G.S. 126-4(9); 126-34.02; 126-35; Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1313 SUSPENSION WITHOUT PAY

For grievances filed on or after August 21, 2013, back pay shall be ordered in those cases in which it is determined that a suspension without pay lacked substantive just cause or was an act of ~~discrimination~~ discrimination, harassment, or retaliation prohibited by G.S. 126-16 or ~~126-34.02~~ 126-34.02, or violated G.S. 126-34.02 because the employee was found to be whistleblower under Article 14 of Chapter 126 of the General Statutes.

History Note: Authority G.S. 126-4(6); 126-16; 126-34.02; 126-35; Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1314 DISCRIMINATION, HARASSMENT, OR RETALIATION

For grievances filed on or after August 21, 2013, back pay, transfer, ~~promotion~~ promotion, or other appropriate ~~remedies~~ remedies, including corrective remedies to ensure that the same or similar acts do not recur, may be ordered where discrimination, harassment, or retaliation in violation of G.S. 126-16 or 126-34.02 ~~are~~ is found.

History Note: Authority G.S. 126-4(9); 126-16; 126-34.02; Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1315 VOLUNTARY PROGRAMS OR BENEFITS

Voluntary programs or benefits (such as the 401K program, voluntary health and life insurance programs or deferred compensation) are the choice of the employee and are the employee's responsibility. Such voluntary programs or benefits are not addressed by any awards under these Rules and Chapter ~~126, but may be governed by contractual provisions with non-state agencies.~~ 126. Retroactive contributions or membership in any such program shall not be part of any remedy awarded to any employee. To the extent that retroactive coverage or membership is available, the grievant is responsible for any action seeking to obtain such benefits.

History Note: Authority G.S. 126-4(9); 126-34.02; Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1316 REMEDIES FOR PROCEDURAL VIOLATIONS

(a) Failure to give written notice of applicable appeal rights in connection with a dismissal, demotion or suspension without pay shall be deemed a procedural violation. The sole remedy for this violation shall be an extension of the time in which to file an appeal. The extension shall be from the date of the procedural violation to no more than 30 calendar days from the date the employee is given written notice of applicable appeal rights.
(b) Failure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation. Back pay, attorney's fees, or both may be awarded for such a violation. Back pay or attorney's fees, or ~~both~~ both may be awarded for such a period of time as is appropriate under the law, considering all the circumstances.
(c) Failure to conduct a pre-dismissal conference shall be deemed a procedural violation. Further, the remedy for this violation shall require that the employee be granted back pay from the date of the dismissal until a date determined appropriate in light of the purpose of pre-dismissal conferences, which is to provide notice to the employee and an opportunity to be heard. Reinstatement shall not be a remedy for lack of a pre-dismissal conference.

History Note: Authority G.S. 126-4(9); 126-34.02; 126-35; Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1317 REMEDIES: SALARY ADJUSTMENTS

(a) No department, agency or institution may use within-grade or within-range salary adjustments as a method of resolving any grievance, contested case or lawsuit without advance notice to the Office of State Human Resources and the specific, written approval of the State Human Resources Director.
(b) Any within-grade or within-range salary adjustment proposed to be approved by the State Human Resources Director must be in compliance with existing salary administration policies (see 25 NCAC 01D .0100 et seq) or shall have prior approval as an exception to or waiver from such policies in accordance with 25 NCAC 01A .0104.

History Note: Authority G.S. 126-4(2); S.L. 2013-382; Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1318 CERTAIN REMEDIES NOT AVAILABLE

Punitive, ~~exemplary~~ exemplary, and other ~~such~~ damages are not available as remedies in appeals brought under Chapter 126 of the North Carolina General Statutes.

History Note: Authority G.S. 126-4(9); 126-34.02; Temporary adoption Eff. May 23, 2014.

25 NCAC 01J .1319 SITUATIONS IN WHICH ATTORNEY'S FEES MAY BE AWARDED

For grievances filed on or after August 21, 2013, attorney's fees may be awarded only in the following situations:

- (1) the grievant is reinstated;
- (2) the grievant is awarded back pay from either a demotion or a dismissal, without regard to whether the grievant has been reinstated; or
- (3) the grievant prevails in a whistleblower grievance.

History Note: Authority G.S. 126-4(11); 126-34.02;
Temporary Adoption Eff. May 23, 2014.

25 NCAC 01J .1320 ATTORNEY'S FEES MAY BE AWARDED AS A RESULT OF A SETTLEMENT

Attorney's fees may be paid as the result of a settlement in the grievance procedure, providing such fees are explicitly incorporated as a part of a ~~written~~ settlement agreement signed by both parties. Attorney's fees shall not be awarded as the result of a settlement unless such fees are a specific part of the written settlement agreement.

History Note: Authority G.S. 126-4(11); 126-34.01; 126-34.02;
Temporary Adoption Eff. May 23, 2014.

SECTION .1400 – EMPLOYEE MEDIATION AND GRIEVANCE PROCESS

25 NCAC 01J .1401 MINIMUM PROCEDURAL REQUIREMENTS

- (a) ~~Mediation involves the services of a neutral third person that assists an employee and an agency representative in resolving an employee grievance in a mutually acceptable manner.~~
- (b) ~~In situations where mediation does not produce agreement or if a grievance involves an issue that the agency has identified as not subject to mediation, employees may present the grievance to a Hearing Officer or Hearing Panel within the agency. The Hearing Officer or Hearing Panel shall forward a recommendation to the Agency Head for a Final Agency Decision (FAD).~~
- (c) ~~Employees may appeal the FAD to the Office of Administrative Hearings (OAH) where an Administrative Law Judge will render a recommended decision to the State Personnel Commission. The State Personnel Commission will issue a Final Decision and Order.~~
- (d) ~~Grievances alleging discrimination may, at the grievant's choice, proceed either through the agency procedure or may proceed directly to the OAH. Complaints of unlawful workplace harassment shall proceed through the agency's Unlawful Workplace Harassment procedure as required by 25 NCAC 01J .1100.~~

History Note: Authority G.S. 126-4(1); 126-4(9); 126-16; 126-34; 126-34.1; 126-34.2; 126-35; 126-36; 126-37; 126-38; 150B-23; S.L. 2013-382;
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1402 FLEXIBILITY

~~Agencies shall have the flexibility to decide which grievable issues will not be subject to mediation. In addition, agencies may choose to mediate nongrievable issues by developing internal agency policies and procedures outside the scope of the rules in this Section. Agencies may utilize mediators serving in the OSP Mediator Pool, 25 NCAC 01J .1410, for mediating nongrievable issues. In such situations, OSP and the requesting agency shall work out a mutually acceptable process to access the mediator pool of resources.~~

History Note: Authority G.S. 126-4(9); 126-4(10); S.L. 2013-382;
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1403 INFORMAL MEETING WITH SUPERVISOR

~~For all grievable issues, the agencies shall encourage employees to first attempt to resolve a grievable issue with their immediate or other supervisor in the employee's chain of command.~~

History Note: Authority G.S. 126-4(9); 126-4(10); S.L. 2013-382;
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1404 MEDIATION PROCEDURE

- (a) ~~Where an agency has designated an issue as subject to mediation, mediation is Step 1 in the Employee Mediation and Grievance Process. Mediation follows unsuccessful attempts by employees to resolve grievable issues with their immediate or other supervisor in the employee's chain of command. An employee must begin the grievance process by filing a grievance in accordance with the agency's grievance procedure. An employee filing a grievance shall do so not later than 15 calendar days after the last incident for which the employee is filing the grievance or after unsuccessfully attempting to resolve the grievance informally, whichever is longer.~~
- (b) ~~The Office of State Personnel (OSP) shall assign mediators to grievances. The mediation process shall be concluded within 45 calendar days from the filing of the grievance unless the parties agree in writing to a longer period of time.~~
- (c) ~~Mediations shall be conducted in a location approved by the mediator and shall be scheduled for an amount of time determined by the mediator to be sufficient. Mediations may be recessed by the mediator and reconvened at a later time.~~
- (d) ~~Only mediators in the OSP Mediation Pool, 25 NCAC 01J .1410, shall mediate grievances presented by state agency employees.~~
- (e) ~~The following pertains to attendance at the mediation proceedings:~~
 - (1) ~~A designated agency representative with the authority to reach an agreement shall attend on behalf of the agency.~~
 - (2) ~~In situations where the selected mediator cannot attend the mediation, there must be an emergency substitution of a mediator. This~~

~~substitution must be approved by the OSP Mediation Administrator or designee.~~

- ~~(3) OSP Mediation Administrator and designees may attend as observers.~~
- ~~(4) Representatives, advisors and attorneys are not permitted to attend.~~
- ~~(5) Audiotape, videotape or other automated recordings are not permitted.~~

~~(f) Because mediation is Step 1 of the internal agency grievance process, attorneys are not permitted to participate directly in the process. However, because a mediation that resolves an employee's grievance will result in a Mediation Agreement, either party may ask for a recess at any time during the mediation in order to obtain legal advice regarding the terms of the Mediation Agreement.~~

History Note: Authority G.S. 126-4(9); 126-4(10); 126-4(17); 126-34; 126-35; S.L. 2013-382; Eff. March 1, 2005; Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1405 CONCLUSION OF MEDIATION

~~(a) At the end of mediation, the mediator shall prepare either a Mediation Agreement that is signed by the parties, or a statement that mediation did not result in resolution.~~

~~(b) When mediation resolves a grievance, the following shall occur:~~

- ~~(1) Employee and agency representative sign a Mediation Agreement.~~
- ~~(2) Each party receives a copy of the signed Mediation Agreement.~~
- ~~(3) Mediation Agreements shall be maintained on file in the agency for not less than three years.~~
- ~~(4) Mediation Agreements shall not transfer to another agency if the employee transfers.~~
- ~~(5) Mediation Agreements shall be binding on both parties.~~

~~(c) Mediation Agreements are considered public documents under G.S. 132-1.3.~~

History Note: Authority G.S. 126-4(9); 126-4(10); 126-4(17); S.L. 2013-382; Eff. March 1, 2005; Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1406 LIMITATIONS ON A MEDIATION AGREEMENT

~~(a) Parties to the mediation shall not enter into an agreement that would exceed the scope of their authority. The Mediation Agreement shall:~~

- ~~(1) serve as a written record;~~
- ~~(2) not contain any provision contrary to State Personnel Commission rules, and applicable state and federal law; and~~
- ~~(3) not be transferable to another state agency.~~

~~(b) When mediation resolves a grievance but it is later determined that one or more provisions of the Mediation Agreement do not comply with State Personnel Commission rules, applicable state or federal law, the parties may return to~~

~~mediation to resolve those issues that can be resolved by the parties.~~

~~(c) Any resolution achieved through mediation, to the extent that it involves a grievance or a contested case issue, shall be treated as a settlement agreement and, as such, is subject to approval by the State Personnel Director and the State Personnel Commission as outlined in Rule .1412 of this Section.~~

History Note: Authority G.S. 126-4(9); 126-4(10); S.L. 2013-382; Eff. March 1, 2005; Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1407 POST MEDIATION

~~(a) Employees and supervisors who breach a mediated agreement may be subject to disciplinary action up to and including dismissal based on unacceptable personal conduct.~~

~~(b) Except for the Mediation Agreement itself, all other documents generated during the course of mediation and any communications shared in connection with mediation are confidential to the extent provided by law.~~

~~(c) When mediation does not result in agreement, the employee may proceed to Step 2, 25 NCAC 01J .1411(6) through (8), in the grievance process following written notice to the employee that mediation did not result in resolution of the grievance.~~

History Note: Authority G.S. 126-4(6); 126-4(7); 126-4(10); 126-34; S.L. 2013-382; Eff. March 1, 2005; Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1408 EMPLOYEE RESPONSIBILITIES FOR MEDIATION

~~Each employee shall:~~

- ~~(1) make a good faith effort to mediate disputes;~~
- ~~(2) attend mediations as scheduled by the agency; and~~
- ~~(3) notify agency personnel in advance when circumstances prevent the employee from attending a scheduled mediation. Failure to make such an advanced notification shall cause the grievance to be dismissed.~~

History Note: Authority G.S. 126-4(9); S.L. 2013-382; Eff. April 1, 2005; Temporary Repeal Eff. May 23, 2014.

25 NCAC 01J .1409 AGENCY RESPONSIBILITIES FOR MEDIATION

~~(a) Each agency shall:~~

- ~~(1) administer the mediation program within the agency;~~
- ~~(2) appoint an agency intake coordinator who will be responsible for organizing the mediation process;~~
- ~~(3) determine suitable locations for conducting mediations;~~
- ~~(4) ensure confidentiality of the mediation to the extent provided by law;~~

- ~~(5) schedule only mediators from the OSP Mediation Pool for each mediation session;~~
- ~~(6) reimburse mediators for travel and other expenses at state approved rates and covering any administrative costs associated with mediation;~~
- ~~(7) designate management personnel, such as human resources personnel and legal counsel, to be available to answer questions that may arise during the mediation process;~~
- ~~(8) designate agency representatives who will mediate in good faith and who will have the authority to reach an agreement on behalf of the agency to resolve a grievance;~~
- ~~(9) submit data to OSP for the purpose of evaluating the mediation process for cost containment and resolution of grievances efficiently and effectively; and~~
- ~~(10) submit to OSP a copy of all Mediation Agreements executed by the agency.~~

~~(b) An agency employee designated to attend mediation on behalf of the agency shall notify agency personnel in advance when circumstances prevent the employee from attending a scheduled mediation. Failure to make such an advanced notification may subject the employee to disciplinary action.~~

*History Note: Authority G.S. 126-4(6); 126-4(9); 126-4(10); S.L. 2013-382;
Eff. April 1, 2005;
Temporary Repeal Eff. May 23, 2014.*

25 NCAC 01J .1410 OFFICE OF STATE PERSONNEL RESPONSIBILITIES

The Office of State Personnel (OSP) shall:

- ~~(1) appoint the OSP Mediation Administrator as program manager;~~
- ~~(2) develop an OSP mediator pool;~~
- ~~(3) identify mediator training programs and resources; and~~
- ~~(4) conduct on-going studies/analysis to evaluate program effectiveness.~~

*History Note: Authority G.S. 126-4(9); 126-4(10); S.L. 2013-382;
Eff. April 1, 2005;
Temporary Repeal Eff. May 23, 2014.*

25 NCAC 01J .1411 AGENCY PROCEDURAL REQUIREMENTS FOR EMPLOYEE MEDIATION AND GRIEVANCE POLICY

The following are minimum procedures for an agency grievance process:

- ~~(1) The agency grievance procedure shall state the issues that, in addition to those listed in G.S. 126 may be grieved at the agency level.~~
- ~~(2) The agency grievance procedure shall list which issues are subject to mediation (Step 1) and which issues shall proceed directly to a grievance hearing (Step 2).~~

- ~~(3) The agency grievance procedure shall encourage direct communication between employees and their immediate supervisor or other supervisor in the chain of command to attempt to resolve the grievance.~~
- ~~(4) All decisions issued by the agency after the discussion between the employee and the immediate supervisor or other supervisor in the chain of command shall be in writing and a copy provided to the employee.~~
- ~~(5) For those issues subject to mediation, the agency grievance process shall require both the employee and an agency representative to mediate a dispute by attending a scheduled mediation.~~
- ~~(6) If mediation does not result in agreement, the employee is entitled to proceed to Step 2. The agency shall notify the employee within 10 days of the unsuccessful mediation of the option to present the grievance orally to a reviewer or reviewers outside of the chain of command, e.g., Hearing Officer or Hearing Panel.~~
- ~~(7) The employee shall have the right to challenge whether the person, or body of persons outside of the chain of command review level, can render an unbiased recommendation. The agency procedure shall establish a process for the challenge as well as the procedure for selection of a replacement reviewer, when necessary.~~
- ~~(8) The agency shall set up time limits for appeal and for the employee and the agency to respond to each other during the grievance procedure. The agency may not set any time limit for itself that is more than twice the time limit established for employees.~~
- ~~(9) An employee filing a grievance shall do so not later than 15 calendar days after the last incident for which the employee is filing the grievance unless the internal agency procedure provides for a longer period.~~
- ~~(10) Neither party to the grievance shall be represented by attorneys or other persons during the internal agency grievance procedure or during any mediation procedure.~~

*History Note: Authority G.S. 126-4(9); 126-4(10); 126-34.1(a); S.L. 2013-382;
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.*

25 NCAC 01J .1412 OFFICE OF STATE PERSONNEL RESPONSIBILITIES FOR EMPLOYEE MEDIATION AND GRIEVANCE PROCESS

The Office of State Personnel shall:

- ~~(1) review each proposed Employee Mediation and Grievance Process for conformity with~~

TEMPORARY RULES

- ~~State Personnel Commission rules, and applicable state and federal law;~~
- (2) ~~present the procedure to the State Personnel Commission for consideration and approval at its next available scheduled meeting; and~~
- (3) ~~provide consultation and technical assistance to agencies as needed.~~

History Note: Authority G.S. 126-4(9); 126-4(10); S.L. 2013-382;
Eff. March 1, 2005;
Temporary Repeal Eff. May 23, 2014.

APPROVED RULES

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

Rules approved by the Rules Review Commission at its meeting on June 18, 2014.

**REGISTER CITATION TO THE
NOTICE OF TEXT****AGRICULTURE, BOARD OF**

<u>Admission Rules</u>	02	NCAC	20B	.0104*	28:15 NCR
<u>Plant Analysis Service</u>	02	NCAC	37	.0202*	28:15 NCR

NC RURAL ELECTRIFICATION AUTHORITY

<u>Arbitration Policies</u>	04	NCAC	08	.0313*	n/a G.S. 150B-21.12(c)
-----------------------------	----	------	----	--------	------------------------

HISTORICAL COMMISSION

<u>Statement of Purpose of Archives and Records Section</u>	07	NCAC	04M	.0101	28:11 NCR
<u>Archives Search Room Hours</u>	07	NCAC	04M	.0102	28:11 NCR
<u>Archives Reference Services</u>	07	NCAC	04M	.0103	28:11 NCR
<u>Archives Stacks</u>	07	NCAC	04M	.0104*	28:11 NCR
<u>Public Research Facilities Regulations</u>	07	NCAC	04M	.0105*	28:11 NCR
<u>Duplication Services</u>	07	NCAC	04M	.0106*	28:11 NCR
<u>Outer Banks History Center Gallery Regulations</u>	07	NCAC	04M	.0107*	28:11 NCR
<u>Procedures for Listing</u>	07	NCAC	04M	.0202*	28:11 NCR
<u>Approval of Requests</u>	07	NCAC	04M	.0203*	28:11 NCR
<u>Removal of Names from the List</u>	07	NCAC	04M	.0204*	28:11 NCR
<u>Definition of Good Cause</u>	07	NCAC	04M	.0205	28:11 NCR
<u>Acceptance of Non-Government Papers</u>	07	NCAC	04M	.0301*	28:11 NCR
<u>Valuation</u>	07	NCAC	04M	.0302	28:11 NCR
<u>Organizational Records</u>	07	NCAC	04M	.0303	28:11 NCR
<u>Bible Records</u>	07	NCAC	04M	.0304	28:11 NCR
<u>Review</u>	07	NCAC	04M	.0401*	28:11 NCR
<u>Preparation of Lists</u>	07	NCAC	04M	.0402*	28:11 NCR
<u>Approval by Historical Commission</u>	07	NCAC	04M	.0403*	28:11 NCR
<u>Transfer of Records to State Records Center</u>	07	NCAC	04M	.0501	28:11 NCR
<u>Legal Custody of Records</u>	07	NCAC	04M	.0502*	28:11 NCR
<u>Procedures for Transfer of Records</u>	07	NCAC	04M	.0503*	28:11 NCR
<u>Records Center Reference Service</u>	07	NCAC	04M	.0505	28:11 NCR
<u>Personnel Records</u>	07	NCAC	04M	.0507*	28:11 NCR
<u>Certification by Agency with Custody</u>	07	NCAC	04M	.0508*	28:11 NCR
<u>Destruction of Records in State Records Center</u>	07	NCAC	04M	.0509*	28:11 NCR
<u>Methods of Destruction</u>	07	NCAC	04M	.0510*	28:11 NCR
<u>Destruction of Certain Records Scheduled for Archives</u>	07	NCAC	04M	.0511*	28:11 NCR
<u>Restricted Areas in State Records Facilities</u>	07	NCAC	04M	.0512*	28:11 NCR

APPROVED RULES

<u>Statement of Purpose</u>	07	NCAC	04V	.0101	28:11 NCR
<u>Outer Banks History Center Search Room Hours</u>	07	NCAC	04V	.0102	28:11 NCR
<u>Outer Banks History Center Reference and Technical Services</u>	07	NCAC	04V	.0103	28:11 NCR
<u>Admission to Outer Banks History Center Stacks</u>	07	NCAC	04V	.0104	28:11 NCR
<u>Outer Banks History Center Search Room Regulations</u>	07	NCAC	04V	.0105	28:11 NCR
<u>Public History Gallery Hours</u>	07	NCAC	04V	.0201	28:11 NCR
<u>Public History Gallery Regulations</u>	07	NCAC	04V	.0202	28:11 NCR

MENTAL HEALTH, COMMISSION FOR

<u>State Facility Environment</u>	10A	NCAC	28C	.0201*	28:08 NCR
-----------------------------------	-----	------	-----	--------	-----------

HOME INSPECTOR LICENSURE BOARD

<u>Fee Schedule</u>	11	NCAC	08	.1011*	28:15 NCR
<u>Definitions</u>	11	NCAC	08	.1020	28:15 NCR
<u>Definitions</u>	11	NCAC	08	.1201*	28:15 NCR
<u>Definitions</u>	11	NCAC	08	.1301	28:15 NCR
<u>Continuing Education Required for Renewal of Active License</u>	11	NCAC	08	.1302*	28:15 NCR
<u>Elective Course Component</u>	11	NCAC	08	.1318*	28:15 NCR

ALARM SYSTEMS LICENSING BOARD

<u>Prohibited Acts</u>	12	NCAC	11	.0105*	28:12 NCR
------------------------	----	------	----	--------	-----------

WILDLIFE RESOURCES COMMISSION

<u>Course Requirements</u>	15A	NCAC	10K	.0101*	28:12 NCR
----------------------------	-----	------	-----	--------	-----------

CEMETERY COMMISSION

<u>Areas of Responsibility</u>	21	NCAC	07A	.0103	28:07 NCR
<u>Functions</u>	21	NCAC	07A	.0104	28:07 NCR
<u>Fees</u>	21	NCAC	07A	.0106*	28:07 NCR
<u>Cemetery Commission Members</u>	21	NCAC	07A	.0201	28:07 NCR
<u>Administrator of Cemetery Commission</u>	21	NCAC	07A	.0202	28:07 NCR
<u>Cemetery Commission Examiners</u>	21	NCAC	07A	.0203	28:07 NCR
<u>Clerical</u>	21	NCAC	07A	.0204	28:07 NCR
<u>Meetings</u>	21	NCAC	07A	.0205	28:07 NCR
<u>Change of Control</u>	21	NCAC	07C	.0103*	28:07 NCR
<u>Quality Specifications</u>	21	NCAC	07C	.0104	28:07 NCR
<u>Deposit for Multiple Burials</u>	21	NCAC	07D	.0105	28:07 NCR
<u>Delivery</u>	21	NCAC	07D	.0202*	28:07 NCR
<u>Trust Accounts</u>	21	NCAC	07D	.0203*	28:07 NCR

OPTOMETRY, BOARD OF EXAMINERS IN

<u>National Board Examinations</u>	21	NCAC	42B	.0107*	28:13 NCR
<u>Military License</u>	21	NCAC	42B	.0114*	28:13 NCR

VETERINARY MEDICAL BOARD

<u>Authority: Name and Location of Board</u>	21	NCAC	66	.0101*	n/a G.S. 150B-21.5(a)(4)
--	----	------	----	--------	--------------------------

ADMINISTRATIVE HEARINGS, OFFICE OF

<u>Commencement of Contested Case: Notice and Filing Fee</u>	26	NCAC	03	.0103*	28:14 NCR
--	----	------	----	--------	-----------

TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

History Note: Authority G.S. 106-503; Eff. February 1, 1976;

02 NCAC 20B .0104 ADMISSION RULES

(a) All persons entering the North Carolina State Fair grounds must pay the established admission fee except persons holding worker's permits, or persons admitted via special promotion. One-time-only, or fair-length admissions may be issued to those persons who are employed by the Fair or are asked to appear on the grounds by the Fair management for a specific purpose relative to the operation of the fair.

Amended Eff. August 16, 2010; February 1, 2007; July 1, 2000; October 1, 1993; June 1, 1989; July 1, 1985; April 1, 1984. Amended Eff. Pending Consultation pursuant to G.S. 12-3.1.

(b) The gates of the North Carolina State Fair shall be open to visitors on the following schedule during the fair:

- | | | |
|-----|----------------------------|-----------|
| (1) | Opening Thursday | 3:00 p.m. |
| | until 11:00 p.m. | |
| (2) | Both Fridays and Saturdays | 8:00 a.m. |
| | until midnight | |
| | and the second Thursday | |
| (3) | All other days | 8:00 a.m. |
| | until 11:00 p.m. | |

Exhibit buildings shall be open from 9:00 a.m. to 9:45 p.m. daily, except for opening Thursday when the buildings will open at 4:00 p.m.

(c) The State Fair Manager may operate a pass-out system at one or more of the outside gates. Persons exiting through these gates may, upon request, have their hand or vehicle stamped for readmittance through the same gate without additional charge. Readmittance must occur before 10:00 p.m. on the same day as pass-out or the hand stamp shall not be honored.

(d) Outside gate admission prices are as follows:

- | | | |
|-----|---------------------------------------|--------|
| (1) | adult/child, 13 years of age and over | \$9.00 |
| (2) | child, 6 through 12 years of age | \$4.00 |
| (3) | military, with valid ID | \$5.00 |
| (4) | senior citizen, 65 and over | Free |
| (5) | child, under 6 years of age | Free |

(e) Outside gate admission prices for advance ticket sales are as follows:

- | | | |
|-----|--|--------|
| (1) | adult/child, 13 years of age and over | \$7.00 |
| (2) | child, 6 through 12 years of age | \$3.00 |
| (3) | senior citizen, 65 and over | Free |
| (4) | child, under 6 years of age | Free |
| (5) | adult group sales purchasing a minimum of 40 tickets | \$5.00 |

02 NCAC 37 .0202 PLANT ANALYSIS SERVICE

(a) Individuals desiring plant analysis may obtain plant tissue mailers and instructions from the Agronomic Services Division, county extension office, farm supply dealers, Agronomic Division Regional Agronomists, or other local agricultural advisors. All samples shall be analyzed for nitrogen, phosphorus, potassium, calcium, magnesium, manganese, copper, zinc, boron and other elements as needed. Results of the test and recommendations for corrective action shall be provided. For the purposes of this Rule, "plant analyses" shall include analysis of wastes, soilless media, and other solutions for agronomic purposes.

(b) Fees for these services, to be paid at the time of submission, are as follows:

- | | |
|-----|--|
| (1) | Routine plant analysis - \$5.00. |
| (2) | Routine solution analysis - \$5.00. |
| (3) | Routine soilless media analysis - \$5.00. |
| (4) | Routine waste analysis - \$8.00. |
| (5) | Research plant, waste, soilless media, and solution analysis - \$12.00. |
| (6) | Nonresident plant, waste, soilless media, and solution analysis - \$25.00. |
| (7) | Special services: |
| (A) | Waste-heavy metals - \$10.00. |
| (B) | Waste-N breakout - \$10.00. |
| (C) | Waste-liming equivalent - \$10.00. |
| (D) | Plant-chloride - \$2.00. |
| (E) | Plant-molybdenum - \$2.00. |
| (F) | Plant-petiole nitrates - \$2.00. |

History Note: Authority G.S. 106-22(17); Eff. July 17, 1981; Temporary Amendment Eff. July 7, 1989 for a Period of 180 Days to Expire on January 2, 1990; Amended Eff. June 1, 1990; January 2, 1990; Temporary Amendment Eff. December 3, 2013; Amended Eff. June 1, 2014.

TITLE 04 – DEPARTMENT OF COMMERCE

04 NCAC 08 .0313 ARBITRATION POLICIES

The Authority shall arbitrate any interconnection disputes between a TMC and other telecommunications carriers as described in Section 252 of the 1996 Telecommunications Act ("the Act"). This Rule sets forth the procedures for that process.

- (1) When the Authority is requested to arbitrate an interconnection agreement pursuant to Section 252(b)(1) of the Act or pursuant to a valid contractual agreement between a North Carolina cooperative and another telecommunication carrier, the petitioning party shall provide the Authority with the information required under Section 252(b)(2) of the Act and the non-petitioning party shall have the opportunity to respond in the timeframe set forth in Section 252(b)(3).
- (2) The Authority shall send each party a list of approved arbitrators. The parties shall have 15 days to review the list, strike names they object to, rank the remaining names in the order of preference and return the list to the Authority. The Authority shall then select the arbitrator agreed to by the parties. If the parties do not agree on the selection, the Authority shall select an arbitrator of its choosing from the list.
- (3) The parties seeking the arbitration shall be held accountable for any financial obligations, and each shall be responsible for an equal portion of the arbitrator fee, regardless of the outcome of the recommendation submitted to the Authority. The fee shall be paid directly to the arbitrator.
- (4) At the request of any party, or at the discretion of the arbitrator, the arbitrator may:
 - (a) schedule a preliminary hearing with the parties or its representatives;
 - (b) direct the production of documents and other information and the identification of any witnesses to be called at the hearing; or
 - (c) order the parties to attend a formal arbitration hearing.
- (5) The parties shall respond to requests for hearing dates by the deadline established by the Authority or the arbitrator, be cooperative in scheduling the earliest practical hearing date, and adhere to the established hearing schedule. The arbitrator shall send a notice of hearing to the parties at least 20 calendar days in advance of the hearing date, unless otherwise agreed to by the parties. At least five business days prior to the arbitration hearing, the parties shall exchange copies of

all exhibits each party intends to submit at the hearing.

- (6) The arbitrator shall conclude the resolution of any unresolved issues no later than nine months following the date on which the request for arbitration was originally received by the Authority.
- (7) The petitioning party shall present evidence to support its petition. The non-petitioning party shall then present evidence in response. The arbitrator has the discretion to vary this procedure, but each party shall have the right to be heard and be given an opportunity to present his or her case.
- (8) The arbitrator shall make a decision on the issues presented for arbitration that contains applicable findings of fact and conclusions of law and forward this recommended decision to the Authority.
- (9) The Authority shall consider the decision of the arbitrator to be a recommendation. The Authority shall make the final decision in any arbitration hearing and may order additional written or oral testimony from the parties in order to render the decision. The Authority may accept the recommended decision from the arbitrator as its final decision, amend the recommended decision, or reject the recommended decision and render its own independent decision.
- (10) In accordance with 47 U.S.C. 252, a resolution of any unresolved issues shall be reached not later than nine months following the date on which the request for arbitration was originally received by the Authority.

History Note: Authority G.S. 117-31; 47 U.S.C. 252;
Eff. June 1, 2014.

TITLE 07 – DEPARTMENT OF CULTURAL RESOURCES

**07 NCAC 04M .0101 STATEMENT OF PURPOSE OF
ARCHIVES AND RECORDS SECTION
07 NCAC 04M .0102 ARCHIVES SEARCH ROOM
HOURS
07 NCAC 04M .0103 ARCHIVES REFERENCE
SERVICES**

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a;
Eff. February 1, 1985;
Amended Eff. April 1, 2001; June 1, 1989, May 3, 1986;
Repealed Eff. June 1, 2014.

07 NCAC 04M .0104 ARCHIVES STACKS

The stacks storing archival collections are not public spaces.

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a; Eff. February 1, 1985; Amended Eff. June 1, 2014; April 1, 2001; June 1, 1989.

07 NCAC 04M .0105 PUBLIC RESEARCH FACILITIES

Rules governing researchers' use of the Division of Archives and Records public research facilities are as follows:

- (1) Brief cases, attache cases, bags, coats, or other bulky clothing, notebooks, envelopes, pad folders, privately owned books, maps, and old manuscripts shall not be taken into the research facilities. Lockers and coat racks are provided outside the research facilities for such items.
- (2) Access to the archival collections shall only be by presentation of current photo identification, providing accurate name and address.
- (3) Researchers shall request archival records by completing the call slips or records request form provided by each facility. Information required to request records includes researcher's name, date, and citation or records to be requested.
- (4) The research facility in Raleigh shall issue researchers identification cards to be used when requesting archival records. To receive records in Raleigh, the identification card shall be surrendered to a member of the research facility staff. Upon leaving the research facility in Raleigh, the researcher shall surrender his or her identification card to a member of the research facility staff.
- (5) A researcher may request more than one box or volume of records. However, a researcher may access only one box of loose records or up to three volumes of records at any one time. When use of the box or volumes is completed, the researcher shall return the records prior to obtaining another box or other volumes of records.
- (6) Staff shall examine any materials the researcher brings into or removes from the research facilities.
- (7) Researchers shall exercise care in handling records, manuscripts, books, or other materials. In particular, researchers shall observe the following:
 - (a) Manuscripts shall not be marked or otherwise altered or defaced.
 - (b) Pens, highlighters, and other writing instruments that create permanent marks shall not be permitted in research facilities.
 - (c) No items shall be used as "pointers" when reading original records.
 - (d) Tape and other office supplies, such as correction fluid and gum erasers,

shall not be permitted in the research facilities. Pencils shall be used with great care to ensure no marks or other damages are made to the materials.

- (e) Researchers shall not return books or other materials to research facility shelves; these shall be replaced by a staff member.
- (f) All manuscripts, volumes, and reference books from the research facility shelves shall be placed on the tables or reading stands provided in the research facility; they shall not be held in the lap or propped against the edge of a table.
- (g) Only one folder of loose papers from a box of loose papers shall be opened at one time in order to avoid mixing of records or folders.
- (h) Papers shall not be rearranged under any circumstances. If a researcher thinks something is out of order, he or she shall notify a staff member.
- (i) Records from the stacks and reference materials from the research facility shall not be permitted in the microfilm reading room.
- (8) Smoking, eating, or drinking shall not be permitted in the research facilities.
- (9) A researcher wishing to temporarily leave the research facility must turn in all pulled archival records and verify his or her registration when reentering.
- (10) Orders for copies placed in person by a researcher shall not exceed 50 copies per researcher per day. Fees for such orders shall be paid at the time the copies are made and may not be billed.
- (11) Equipment deemed by the Archives Conservator to be damaging to archival records shall not be used in the research facilities. The Archives Conservator shall make this determination based upon harm caused by excessive light exposure, tearing, or otherwise defacing the document. This shall include the use of equipment that sits on top of or pulls an original item through it to capture the image or provides light levels that damage the document.

History Note: Authority G.S. 121-4(3); 121-5(d); 132-6.2; 143B-62(2)a; Eff. February 1, 1985; Amended Eff. June 1, 2014; April 1, 2001; June 1, 1989.

07 NCAC 04M .0106 DUPLICATION SERVICES

The Division of Archives and Records shall charge fees pursuant to G.S. 121-5(d) for duplication services for archival records in its custody. The following duplication services are available for

archival records in the custody of the Division of Archives and Records:

- (1) photocopies of loose documents;
- (2) imaging of paper and photographic materials;
- (3) paper prints from microfilm;
- (4) negative, first-generation or "original" microfilm of records and manuscripts in the custody of the Division, except those under restriction by law or donation agreement;
- (5) duplicate microfilm of entire rolls of microfilm in the collections of the Division;
- (6) certified photocopies of public records of state agencies, counties, municipalities, or other political subdivisions of North Carolina; and
- (7) exemplifications prepared for introduction as evidence in a court of law.

History Note: Authority G.S. 121-4(3); 121-4(14); 121-5(d); 132-6.2; 143B-62(2)a;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; April 1, 2001; June 1, 1989.

07 NCAC 04M .0107 OUTER BANKS HISTORY CENTER GALLERY REGULATIONS

- (a) Eating, drinking, and smoking are not permitted in the Gallery.
- (b) Visitors may not touch artifacts, art works, or graphics.
- (c) Children under 12 years old must be accompanied by an adult over 18 years old.

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a; 143B-62(2)d;
Eff. June 1, 2014.

07 NCAC 04M .0202 PROCEDURE FOR LISTING

- (a) A person wishing to have his or her name listed as professional researcher shall make application in writing to: Director, Division of Archives and Records, 4614 Mail Service Center, Raleigh, North Carolina 27699-4614.
- (b) The application shall include a brief resume of the applicant's experience that demonstrates his or her qualifications and aids in establishing his or her credentials. No special form is required for the application. The application must be accompanied by three letters of recommendation from persons who have engaged the applicant in the capacity of a paid researcher.
- (c) Letters of recommendation shall be from persons who have a professional relationship with the applicant related to the subject matter of the application. The letters of recommendation shall not be from a relative of the applicant.
- (d) The letters of recommendation shall:
 - (1) outline the nature and extent of the research that the applicant undertook for pay; and
 - (2) attest the satisfaction of the reference with the services rendered.

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a;
Eff. February 1, 1985;

Amended Eff. June 1, 2014; April 1, 2001.

07 NCAC 04M .0203 APPROVAL OF REQUESTS

The Director of the Division of Archives and Records shall review applications submitted for inclusion in the list of professional researchers. If determined that the applicant satisfies the procedures for listing as set forth in Rule .0202 of this Section, then the name of the researcher shall be placed on the list of available researchers as published by the State Archives of North Carolina. The list of professional researchers shall be made available on the Division website at www.ncdcr.gov.archives and upon request in research facilities.

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; April 1, 2001; June 1, 1989.

07 NCAC 04M .0204 REMOVAL OF NAMES FROM THE LIST

- (a) The Director of the Division of Archives and Records may for good cause remove any person from the list of professional researchers.
- (b) The term "good cause" as used in this Rule shall mean:
 - (1) misrepresentation of credentials or services to be provided; or
 - (2) more than three complaints in a one-year period from patrons about the work of the researcher.

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a;
Eff. February 1, 1985;
Amended Eff. June 1, 2014.

07 NCAC 04M .0205 DEFINITION OF GOOD CAUSE

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a;
Eff. February 1, 1985;
Amended Eff. April 1, 2001;
Repealed Eff. June 1, 2014.

07 NCAC 04M .0301 ACCEPTANCE OF NON-GOVERNMENT PAPERS

- (a) Original materials of historical and cultural significance may be accepted for custody in the State Archives of North Carolina as a gift, subject to the approval of the Director of the Division of Archives and Records, or a designated representative from within the Division. Prior to acceptance, the Division shall provide a contract of gift for the donor(s) to execute. The contract of gift shall be maintained in the Division's permanent files.
- (b) Materials that may be accepted include:
 - (1) private manuscripts;
 - (2) audio visual materials;
 - (3) records of private, professional, or civic organizations;

- (4) copies of pre-1913 family Bible pages listing genealogical data; and
- (5) student academic and financial aid records from defunct post-secondary schools and colleges having a campus in North Carolina.

History Note: Authority G.S. 121-4(1); 121-4(3); 121-5(d); 143B-62(2)a;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; June 1, 1989.

07 NCAC 04M .0302 VALUATION
07 NCAC 04M .0303 ORGANIZATIONAL RECORDS
07 NCAC 04M .0304 BIBLE RECORDS

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a;
Eff. February 1, 1985;
Amended Eff. April 1, 2001; June 1, 1989;
Repealed Eff. June 1, 2014.

07 NCAC 04M .0401 REVIEW

(a) The Director of the Division of Archives and Records shall review any accessioned records in the State Archives of North Carolina when records are:

- (1) duplicates;
- (2) not in keeping with the Division collection policies available on the Division website and upon request; or
- (3) no longer have permanent historical value.

(b) Each record series of the subject records shall be inventoried. The inventory shall be forwarded to the Director of the Office of Archives and History.

History Note: Authority G.S. 121-4(3); 121-4(12); 121-5(d); 143B-62(2)a;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; April 1, 2001.

07 NCAC 04M .0402 PREPARATION OF LISTS

If the Director of the Office of Archives and History concurs with the decision to deaccession the identified records series, the Director of the Office of Archives and History shall ask the staff of the Division or Archives and Records to prepare a detailed list for each series of records. The detailed list shall include:

- (1) series name;
- (2) description of the records;
- (3) date(s) and the quantity of records;
- (4) statement of rationale for decision to deaccession the records; and
- (5) statement of proposed disposition of the records. Disposition methods include:
 - (a) destruction;
 - (b) transfer to another institution; or
 - (c) return to donor or heirs.

History Note: Authority G.S. 121-4(3); 121-4(12); 121-5(d); 143B-62(2)a,b;
Eff. February 1, 1985;

Amended Eff. June 1, 2014.

07 NCAC 04M .0403 APPROVAL BY HISTORICAL COMMISSION

(a) The Director of the Office of Archives and History shall send the list as set forth in Rule .0402, the rationale for the decision to deaccession the records, and the proposed disposal of the records to each member of the North Carolina Historical Commission at least seven days before the meeting at which the proposal will be considered.

(b) Following approval by the North Carolina Historical Commission, the complete list of records authorized for deaccessioning will be entered into the minutes, along with the disposal method as set forth in Rule .0402(e) of this Section.

(c) Upon receipt of the minutes of the Commission granting permission for deaccessioning, the Director of the Division of Archives and Records shall proceed as directed by the Commission, retaining records of the action within the Division's files.

History Note: Authority G.S. 121-4(3); 121-4(12); 121-5(d); 143B-62(2)a,b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014.

07 NCAC 04M .0501 TRANSFER OF RECORDS TO STATE RECORDS CENTER

The State Records Center shall accept for transfer to its custody the records of state agencies, county agencies, or municipal agencies, provided the records are scheduled to be transferred to the State Records Center on an approved records retention and disposition schedule. A records retention and disposition schedule is approved when signed by the creating agency and the Department of Cultural Resources.

History Note: Authority G.S. 121-4(2); 121-5(d); 132-8.1; 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014.

07 NCAC 04M .0502 LEGAL CUSTODY OF RECORDS

(a) Public records sent to the State Records Center in accordance with the provisions of an approved records retention and disposition schedule, or in accordance with any other agreement between the Department of Cultural Resources and the originating agency or department, are considered to remain in the legal and official custody of the agency that created or received the records and transferred them to the State Records Center. A request for access to, or inspection of, these records by a person other than an authorized employee of the legal custodian shall not be honored until the appropriate official of the agency having legal custody provides written authority for the request.

(b) Public records transferred to the Division of Archives and Records for permanent retention may be accessed through the public research facilities of the Division.

History Note: Authority G.S. 121-4(2); 121-5(d); 132-6(a); 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; June 1, 1989.

07 NCAC 04M .0503 PROCEDURES FOR TRANSFER OF RECORDS

(a) A custodian of public records shall initiate the transfer of records to the State Records Center. A representative of the custodian shall submit to the State Records Center supervisor a records transfer notice form including agency name, title of records, reference to schedule, quantity of records, their inclusive dates, and the name and telephone number of the representative submitting the request. The custodian shall request from the Division the records transfer notice form.

(b) For transfer of paper and other physical media:

- (1) The State Records Center shall only accept records packed in State Records Center boxes. Upon request of the transferring custodian, the Division shall send the agency State Records Center boxes, labels, paper tape, and instructions on packing and labeling the boxes. The agency shall pay the Division for the materials and shipping.
- (2) The custodian initiating the transfer shall arrange records in the boxes and label boxes in accordance with instructions. Boxes that do not comply with instructions shall be returned to the custodian for correction.
- (3) Records that cannot be identified clearly and completely by the information on the label of the State Records Center box shall be accompanied by a typewritten index or box list prepared by the custodian initiating the transfer.
- (4) Records transferred from within 10 miles of Capitol Square, Raleigh, shall be shipped by arrangement with the State Records Center staff. Records transferred from beyond 10 miles of Capitol Square, Raleigh, shall be shipped by the custodian concerned and at the custodian's expense.

(c) For transfer of electronic public records:

- (1) Transfers of databases shall be accompanied by index information required in G.S. 132-6.1.
- (2) The custodian shall scan records and find them to be free of viruses. The State Records Center shall not accept any electronic public records that contain viruses.
- (3) The custodian shall generate a hash algorithm for each file being transferred. The custodian shall include the hash algorithm as part of the transfer.
- (4) The custodian shall include any metadata generated at the time of file creation and any subsequent metadata created during the use of the file in the records transfer.
- (5) Upon receipt of the transfer of electronic records, the State Records Center shall verify

that the electronic records transferred were complete and unaltered by reviewing the hash algorithm and using antivirus software prior to accepting them for storage by the Division of Archives and Records.

History Note: Authority G.S. 121-4(2); 121-5(d); 132-2; 132-6.1; 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; April 1, 2001; June 1, 1989.

07 NCAC 04M .0505 RECORDS CENTER REFERENCE SERVICE

History Note: Authority G.S. 121-4(2); 121-5(d); 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 1989;
Repealed Eff. June 1, 2014.

07 NCAC 04M .0507 PERSONNEL RECORDS

Any employee or former employee desiring access to personnel records in the possession of the State Records Center shall make the request through the personnel office of the agency that retains legal custody of the records. Upon receipt of request from the appropriate personnel office, the State Records Center shall forward personnel information to that office.

History Note: Authority G.S. 121-4(2); 121-5(d); 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; June 1, 1989.

07 NCAC 04M .0508 CERTIFICATION BY AGENCY WITH CUSTODY

- (a) The Department of Cultural Resources shall certify only copies of records that are in its legal custody.
- (b) Copies of records that are only in the physical custody of the State Records Center must be certified by the agency having legal custody, if such certification is requested.
- (c) If records of terminated agencies are in the State Records Center and are in the legal custody of the Department of Cultural Resources, copies shall be certified by the Department of Cultural Resources.

History Note: Authority G.S. 121-4(2),(3); 121-5(d); 132-4; 143B-62(2)b,c;
Eff. February 1, 1985;
Amended Eff. June 1, 2014.

07 NCAC 04M .0509 DESTRUCTION OF RECORDS IN STATE RECORDS CENTER

Records transferred to the State Records Center according to Rule .0501 of this Section shall retain the same records retention and disposition schedule as when they were transferred. If the disposition of transferred records is destruction, the records shall not be destroyed until the agency with legal custody concurs in writing.

History Note: Authority G.S. 121-4(2); 121-5(b),(c),(d); 132-8.1; 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014.

07 NCAC 04M .0510 METHODS OF DESTRUCTION

(a) When used in an approved records retention and disposition schedule, the provision that paper records are to be destroyed means that the records shall be:

- (1) burned, unless prohibited by local ordinance;
- (2) shredded or torn so as to destroy the record content of the documents or materials concerned;
- (3) placed in acid vats so as to reduce the paper to pulp and to terminate the existence of the document or materials concerned; or
- (4) sold as waste paper, provided that the purchaser agrees in writing that the documents or materials concerned will not be resold without pulverizing or shredding the documents so that the information contained within cannot be practicably read or reconstructed.

(b) When used in an approved records retention and disposition schedule, the provision that electronic records are to be destroyed means that the data and metadata are to be overwritten, deleted, and unlinked so the data and metadata may not be practicably reconstructed.

(c) When used in an approved records retention and disposition schedule, the provision that confidential records of any format are to be destroyed means the data, metadata, and physical media are to be destroyed in such a manner that the information cannot be read or reconstructed under any means.

History Note: Authority G.S. 121-4(2); 121-4(12); 121-5(b),(c),(d); 132-3; 132-8.1; 132-8.2; 143B-62(1)g; 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; April 1, 2001; June 1, 1989.

07 NCAC 04M .0511 DESTRUCTION OF CERTAIN RECORDS SCHEDULED FOR ARCHIVES

Records scheduled in an approved records retention and disposition schedule to be transferred to the State Archives, but not yet accessioned by the State Archives may be destroyed provided:

- (1) the records are considered by the Director of the Division of Archives and History not to have permanent historical value pursuant to G.S. 121-5(c); or
- (2) the records are exact duplicates or copies of other records in the records series transferred or accessioned.

History Note: Authority G.S. 121-4(2); 121-5(b),(c),(d); 132-8.1; 132-8.2; 143B-62(1)g; 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; April 1, 2001; June 1, 1989.

07 NCAC 04M .0512 RESTRICTED AREAS IN STATE RECORDS FACILITIES

Access to the facilities controlled by the State Records Center shall be limited to persons on official business. Visitors shall not be permitted in the records storage areas or beyond the administrative office without an escort provided by the State Records Center. All visitors shall sign in when entering and sign out when leaving the facilities. Requests for access by visitors not on official business shall be denied.

History Note: Authority G.S. 121-4(2); 132-6; 143B-62(2)b;
Eff. February 1, 1985;
Amended Eff. June 1, 2014; April 1, 2001; June 1, 1989.

**07 NCAC 04V .0101 STATEMENT OF PURPOSE
 07 NCAC 04V .0102 OUTER BANKS HISTORY
 CENTER SEARCH ROOM HOURS
 07 NCAC 04V .0103 OUTER BANKS HISTORY
 CENTER REFERENCE AND TECHNICAL SERVICES
 07 NCAC 04V .0104 ADMISSION TO OUTER BANKS
 HISTORY CENTER STACKS**

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a.;
Eff. March 1, 1990;
Repealed Eff. June 1, 2014.

**07 NCAC 04V .0105 OUTER BANKS HISTORY
 CENTER SEARCH ROOM REGULATIONS**

History Note: Authority G.S. 121-4(3); 121-4(14); 121-5(d); 143B-62(2)a.;
Eff. June 1, 1990;
Repealed Eff. June 1, 2014.

**07 NCAC 04V .0201 PUBLIC HISTORY GALLERY
 HOURS
 07 NCAC 04V .0202 PUBLIC HISTORY GALLERY
 REGULATIONS**

History Note: Authority G.S. 121-4(3); 121-5(d); 143B-62(2)a.;
Eff. March 1, 1990;
Repealed Eff. June 1, 2014.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

**10A NCAC 28C .0201 STATE FACILITY
 ENVIRONMENT**

(a) The State Facility Director shall assure the provision of an esthetic and humane environment that enhances the positive self-image of the client and preserves human dignity. This includes:

- (1) providing warm and cheerful furnishings;
- (2) providing flexible and humane schedules; and
- (3) directing state facility employees to address clients in a respectful manner.

(b) The State Facility Director shall also, to the extent possible, make every effort to:

- (1) provide a quiet atmosphere for uninterrupted sleep during scheduled sleeping hours; and
- (2) provide areas accessible to the client for personal privacy that may be provided for and limited in compliance with the provisions of G.S. 122C-62(e).

History Note: Authority G.S. 122C-51; 122C-62(e). 131E-67; 143B-147(a)(1);
Eff. October 1, 1984;
Amended Eff. June 1, 2014; April 1, 1990; July 1, 1989.

TITLE 11 – DEPARTMENT OF INSURANCE

11 NCAC 08 .1011 FEE SCHEDULE

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

Application for Home Inspector License	\$ 35.00
Home Inspector Examination	\$ 80.00
Issuance or Renewal of Home Inspector License	\$160.00
Late Renewal of Home Inspector License	\$ 30.00
Copies of Board Rules and License Standards	
Cost of printing and mailing	
Unapproved Continuing Education Course	\$ 50.00

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

History Note: Authority G.S. 143-151.49; 143-151.55; 143-151.57;
Codifier determined that agency findings did not meet criteria for temporary rule Eff. October 15, 1996;
Temporary Adoption Eff. October 24, 1996;
Eff. July 1, 1998;
Amended Eff. October 1, 2014; October 1, 2010; January 1, 2008.

11 NCAC 08 .1020 DEFINITIONS

(a) As used in Rules .1020 through .1028 of this Section:

- (1) "Course Sponsor" means a person approved by the Board to conduct home inspection preclicensing courses.
- (2) "Credit hour" means one continuing education course hour, comprising at least 50 minutes of instruction.
- (3) "License period" means October 1 through the following September 30.
- (4) "Licensee" means a home inspector licensed by the Board under G.S. 143, Article 9F.
- (5) "Person" means an individual, partnership, firm, association, corporation, joint-stock company, trust, any similar entity, or any combination of the foregoing acting in concert.

(b) The definitions contained in G.S. 143-151.45 apply to this Section.

History Note: Authority G.S. 143-151.45; 143-151.49; 143-151.51;
Eff. October 1, 2011;
Amended Eff. October 1, 2014.

11 NCAC 08 .1201 DEFINITIONS

(a) As used in this Section:

- (1) "Party" means the Board, the licensee, or an intervenor who qualifies under G.S. 150B-38(f). "Party" does not include a complainant unless the complainant is allowed to intervene under G.S. 150B-38(f).
- (2) "Service or serve" means personal delivery or, unless otherwise provided by law or rule, delivery by first class United States Postal Service mail or a licensed overnight express mail service, addressed to the person to be served at his or her last known address. A Certificate of Service meeting the requirements of G.S. 1A-1, Rule 5(b1) by the person making the service shall be appended to every document requiring service under these Rules. Service by mail or licensed overnight express mail is complete upon addressing, enveloping, and placing the item to be served in an official depository of the United States Postal Service or delivering the item to an agent of an overnight express mail service.

(b) The definitions contained in G.S. 143-151.45 apply to this Section.

History Note: Authority G.S. 143-151.49; 150B-38(h);
Codifier determined that agency findings did not meet criteria for temporary rule Eff. October 15, 1996;
Temporary Adoption Eff. October 24, 1996;
Eff. July 1, 1998;
Amended Eff. October 1, 2014.

11 NCAC 08 .1301 DEFINITIONS

(a) As used in this Section:

- (1) "Credit hour" means one continuing education course hour, comprising at least 50 minutes of instruction.
- (2) "License period" means October 1 through the following September 30.
- (3) "Licensee" means a home inspector licensed by the Board under G.S. 143, Article 9F and Section .1000 of this Chapter.
- (4) "Person" means an individual, partnership, firm, association, corporation, joint-stock company, trust, any similar entity, or any combination of the foregoing acting in concert.

(b) The definitions contained in G.S. 143-151.45 apply to this Section.

History Note: Authority G.S. 143-151.49; 143-151.55;
Eff. August 1, 1998;
Amended Eff. October 1, 2014; July 18, 2002.

**11 NCAC 08 .1302 CONTINUING EDUCATION
REQUIRED FOR RENEWAL OF ACTIVE LICENSE**

(a) In order to renew an active home inspector license for the license renewal periods beginning on or after October 1, 2014, the licensee shall complete 12 credit hours during the license renewal period, except as described in Paragraph (b) of this Rule.

(b) In order to renew an active home inspector license for license renewal periods beginning on or after October 1, 2014, home inspectors who are newly licensed on or after October 1, 2014, who have not completed the pre-licensing education program established pursuant to G.S. 143-151.51(a)(5)a or its equivalent pursuant to Rule .1004(c) of this Chapter, shall complete 16 hours of continuing education per year for the first three years of licensure that include the following:

- (1) Four hours of a Board approved course consisting of the following:
 - (A) for the first year, a Board approved course on the Standards of Practice and Report Writing; and
 - (B) for each of the second and third years, a Board approved course of the home inspector's choosing.
- (2) Four hours of the update course component described in Rule .1309 of this Chapter; and
- (3) Eight hours of Board approved elective courses.

(c) A licensee who is newly licensed on or after June 1 is exempt from this Section for the initial license period.

History Note: Authority G.S. 143-151.49; 143-151.51; 143-151.55; 143-151.64;
Eff. August 1, 1998;
Amended Eff. October 1, 2014; February 1, 2011; July 18, 2002.

**11 NCAC 08 .1318 ELECTIVE COURSE
COMPONENT**

(a) Licensee Requirements: To renew a license on active status, a licensee shall complete eight classroom hours of instruction in two or more Board approved elective courses within the licensure period in addition to satisfying the continuing education mandatory update course requirement described in Rule .1309 of this Section.

(b) Sponsor Requirements: Approval of an elective course requires approval of the sponsor and instructor(s) as well as the course itself. The approval authorizes the sponsor to conduct the approved course using the instructor(s) who have been found by the Board to satisfy the instructor requirements set forth in Rule .1322 of this Section. The sponsor may conduct the course at any location as frequently as is desired during the approval period. However, the sponsor may not conduct any session of an approved course for home inspector continuing education purposes between September 10 and September 30, inclusive, of any approval period.

History Note: Authority G.S. 143-151.49(13); 143-151.64;
Eff. July 18, 2002;
Amended Eff. October 1, 2014; October 1, 2011.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 11 .0105 PROHIBITED ACTS

In addition to the prohibited acts set forth elsewhere in this Subchapter and in Chapter 74D of the General Statutes, any applicant, licensee, or registrant who does any of the following shall have his or her application denied, or his or her license or registration revoked or suspended:

- (1) Displays or causes or permits to be displayed, or has in his or her possession any cancelled, revoked, suspended, fictitious, fraudulently altered license or registration identification card, or any document simulating a license or registration identification card or purporting to be or to have been issued as a license or registration identification card;
- (2) Lends his or her license or registration identification card to any person or allows the use thereof by another;
- (3) Displays or represents any license or registration identification card not issued to him or her as being his or her license or registration identification card;
- (4) Includes in any advertisement a statement which implies official state authorized certification or approval other than this statement: "Licensed by the Alarm Systems Licensing Board of the State of North Carolina." Licensees may include their license number.
- (5) Includes in the company name the word "police" or other law enforcement designation that implies that the alarm company is affiliated with a local, state, or federal law enforcement agency.
- (6) Makes any false statement or gives any false information to a third party provider in connection with any criminal history record check provided to the Board.

History Note: Authority G.S. 74D-5; 74D-6; 74D-10;
Temporary Rule Eff. January 9, 1984, for a Period of 120 Days to Expire on May 7, 1984;
Eff. May 1, 1984;
Amended Eff. June 1, 2014; August 1, 2007.

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

15A NCAC 10K .0101 COURSE REQUIREMENTS

(a) The Commission shall provide a hunter education instructor-led course with a minimum of six hours of instruction or a

Commission-approved self-paced, independent study option that instructs on the topics identified in Paragraph (b) of this Rule. Information on instructor-led courses and registration for the self-paced study option is at <http://www.ncwildlife.org/Hunting/BeforetheHunt/HunterEducationCourses.aspx>. Both the instructor-led and self-paced study option shall meet the standards adopted by the International Hunter Education Association, including all subsequent amendments, found at <http://ihea-usa.org/hunting-and-shooting/hunter-education/ihea-standards>.

(b) Of the instruction required by Paragraph (a) of this Rule, 60 percent of the time shall be devoted to instruction related to the safe handling of firearms. The remaining course time shall include instruction on hunter responsibility (ethics), wildlife conservation, and wildlife management; and may include wildlife identification, game care, specialty hunting, survival and first aid, water safety, and special concerns (alcohol and drugs, turkey hunting, trapping, all terrain vehicles, and hunting dogs).

(c) The hunter education course shall be administered by an instructor certified by the Wildlife Resources Commission.

(d) The following requirements must be satisfied by the course participant in order to successfully complete a hunter education course and be entitled to the issuance of a Certificate of Competency:

- (1) complete all of the instruction or all the material contained in the independent study course;
- (2) score a minimum of 70 percent on the final examination; and
- (3) review safe firearm handling skills, except current and former military personnel, current and former law enforcement officers, and National Rifle Association certified firearms instructors are exempt from this requirement. Exempt individuals must show current documentation of their exempt status.

History Note: Authority G.S. 113-134; 113-270.1A;
Eff. October 1, 1991;
Amended Eff. June 1, 2014, April 1, 2003; April 1, 1996.

- (1) Two dollars (\$2.00) per grave space, mausoleum crypt, and niche when interment, entombment or inurnment rights are conveyed;
- (2) Five dollars (\$5.00) per pre-need vault when contracted;
- (3) Five dollars (\$5.00) per each crypt in a bank of below ground crypts or lawn crypt garden when contracted. An additional two dollars (\$2.00) shall be paid for each crypt as provided in Item (1) of this Rule;
- (4) Five dollars (\$5.00) per pre-need memorial when contracted;
- (5) Five dollars (\$5.00) per pre-constructed mausoleum crypt or niche when contracted. An additional two dollars (\$2.00) shall be paid for each crypt or niche as provided in Item (1) of this Rule;
- (6) All at need merchandise, property or services, cash or credit sales, do not require any assessments;
- (7) Five dollars (\$5.00) per pre-need opening and closing of a grave space when contracted.

History Note: Authority G.S. 65-49; 65-54;
Eff. February 1, 1976;
Readopted Eff. January 16, 1978;
Amended Eff. December 1, 1981;
Temporary Amendment Eff. October 5, 1987, for a period of 180 days to expire on April 2, 1988;
Amended Eff. June 1, 2014; June 1, 2004; May 3, 1993; March 1, 1988.

21 NCAC 07A .0201 CEMETERY COMMISSION MEMBERS
21 NCAC 07A .0202 ADMINISTRATOR OF CEMETERY COMMISSION
21 NCAC 07A .0203 CEMETERY COMMISSION EXAMINERS
21 NCAC 07A .0204 CLERICAL STAFF
21 NCAC 07A .0205 MEETINGS

History Note: Authority G.S. 65-49; 65-50; 65-52; 65-53(1);
Eff. February 1, 1976;
Readopted Eff. January 16, 1978;
Repealed Eff. June 1, 2014.

21 NCAC 07C .0103 CHANGE OF CONTROL

(a) Any entity wishing to purchase or acquire control of an existing cemetery company shall first make written application to the Cemetery Commission on the Commission's Application for Change of Control. This form provides space for the name and address of the present and proposed owner, along with the name of the corporation and the name of the cemetery. This form may be obtained by writing to the Commission at the address in Rule 21 NCAC 07A .0101.

(b) This form must be accompanied by a five hundred dollar (\$500.00) filing fee. The Commission also requires the following:

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 07 – CEMETERY COMMISSION

21 NCAC 07A .0103 AREAS OF RESPONSIBILITY
21 NCAC 07A .0104 FUNCTIONS

History Note: Authority G.S. 65-49; 65-50; 65-52; 65-53(1); 150B-10;
Eff. February 1, 1976;
Readopted Eff. January 16, 1978;
Repealed Eff. June 1, 2014.

21 NCAC 07A .0106 FEES

In addition to the licensing and penalty fees provided by statute to this Commission, the following fees are required:

- (1) an examination by the Commission's inspectors to establish compliance with trust fund requirements, with the actual cost of the examination to be paid by the applicant;
- (2) a signed certificate assuming liabilities of the existing cemetery company;
- (3) a financial statement of the existing cemetery company showing net worth;
- (4) certification by title insurance policy or by certificate of an attorney-at-law that the cemetery land, subject to appropriate acreage requirements of G.S. 65-55(f)(3), is owned in fee simple, free of all encumbrances;
- (5) a financial statement of the proposed owner, showing the proposed owner's net worth and a statement of the proposed owner's experience in the cemetery business;
- (6) when the applicant's intention is to bond, documentation satisfactory to the Commission establishing that the applicant is and will continue to be in compliance with all laws, rules and regulations relating to bonding and other insurance policies. Such documentation shall include all old bonding policies, all existing bonding policies and written proof of the terms of any future continuance of such bonding policies; and
- (7) a true and correct copy of the most recent survey and, if it exists, recorded plat of the property that is the subject of the applicant's application for change of control.

(c) No one shall take over the operation of a cemetery company in anticipation of a change of control until all necessary information concerning that change of control has been submitted to the Cemetery Commission and until the Commission issues the certificate of approval. No one shall change control of a cemetery company without first obtaining approval of the Cemetery Commission. Once a change of control has been approved by the Cemetery Commission, the change of control must be completed within 90 days of the date of the Cemetery Commission's approval. If the change of control is not completed within 90 days of the date of the Cemetery Commission's approval, then the entity wishing to effect the change of control shall make a new application to the Cemetery Commission in accordance with the provisions of this Rule. Upon completion of the change of control, the entity requesting the change of control shall provide written notice to the Cemetery Commission of the completion. A representative of the buyer and the seller shall be notified by the Commission of and be present at any meeting when the Commission is going to consider the change of control application.

History Note: Authority G.S. 65-49; 65-53(2); 65-53(6); 65-55; 65-59; 65-69;
Eff. February 1, 1976;
Readopted Eff. January 16, 1978;
Amended Eff. June 1, 2014; July 1, 2005; May 3, 1993; March 1, 1990; October 1, 1989; March 1, 1984.

21 NCAC 07C .0104 QUALITY SPECIFICATIONS

All cemeteries must file plans and specifications showing minimum quality standards of any vaults, crypts or markers sold.

History Note: Authority G.S. 65-49; 65-53(7);
Eff. September 1, 1979;
Amended Eff. June 1, 2014.

21 NCAC 07D .0105 DEPOSIT FOR MULTIPLE BURIALS

Each interment, entombment or inurnment right shall require a deposit to the care and maintenance trust fund.

History Note: Authority G.S. 65-49; 65-63;
Eff. September 1, 1983;
Amended Eff. June 1, 2014.

21 NCAC 07D .0202 DELIVERY

(a) The Commission shall not consider vaults and crypts delivered unless installed or stored on the cemetery premises or stored off premises by a supplier.

(b) The Commission shall not consider markers, bases and vases delivered unless installed or stored at the cemetery or, if stored off premises by a supplier, there shall be no additional charge for delivery or freight, unless specified in bold print in the contract. If vaults, crypts or other merchandise are stored off premises, the cemetery company must submit to the Cemetery Commission not less than annually a report by a certified public accountant of each item which has been purchased through a licensed North Carolina cemetery company that, as of the date of the report, is in storage and thus, the property of the customer and not the supplier. If vaults, crypts or other merchandise are stored at the cemetery, the cemetery company must submit to the Cemetery Commission not less than annually a report by an accountant of each item that, as of the date of the report, is in storage and thus, the property of the customer and not the supplier.

History Note: Authority G.S. 65-49; 65-60.1(c); 65-66;
Eff. February 1, 1976;
Readopted Eff. January 16, 1978;
Amended Eff. June 1, 2014; December 1, 2008; May 3, 1993;
July 1, 1988; April 1, 1987; September 1, 1979.

21 NCAC 07D .0203 TRUST ACCOUNTS

(a) Withdrawal requests made pursuant to G.S. 65-66(b)(4) shall be made no more than once per month.

(b) The corporate trustee or financial institution shall make full disclosure of the amount in the trust account available to the Commission within two business days upon request.

(c) Interest earned on trust accounts may be used to fund future deposits or, with written prior approval of the Commission, withdrawn.

History Note: Authority G.S. 65-49; 65-66(b)(4);
Eff. September 1, 1979;
Amended Eff. June 1, 2014; May 3, 1993.

**CHAPTER 42 – BOARD OF EXAMINERS IN
OPTOMETRY**

**21 NCAC 42B .0107 NATIONAL BOARD
EXAMINATIONS**

(a) Each applicant must submit evidence of having reached the recommended levels of acceptable performance on the National Board examinations given by the National Board of Examiners in Optometry on or after the April 1978 administration in one of the following formats and under the following conditions prior to Board approval of his or her application to take the clinical practicum examination administered by the Board. The applicant shall authorize the release of his or her official score report by the National Board to the Board prior to the approval by the Board of his or her application to take the clinical practicum examination.

- (1) April 1978 through August 1986 administrations: passing scores on Parts I, IIA, and IIB, with scores of not less than 75 in Section 7 (Pathology) and Section 9 (Pharmacology) on the Part IIB examination, and a score of not less than 75 on the National Board's Treatment and Management of Ocular Disease: (TMOD) examination.
- (2) April 1987 through August 1992 administrations: passing scores on the Part I Basic Science (BS) examination and Part II Clinical Science (CS) examination of the National Board, with scores of not less than 75 on the Ocular Disease/Trauma and Clinical Pharmacology sections of the Part II CS examination, and a score of not less than 75 on the TMOD examination.
- (3) April 1993 through December 2008 administrations: passing score on the Part I BS Examination of the National Board.
- (4) April 1993 through April 2009 administrations: passing score on the Part II CS Examination of the National Board, with a score of not less than 75 on the Ocular Disease/Trauma component within the CS examination, and a score of not less than 75 on either the TMOD component within the CS examination, or on the equivalent stand-alone TMOD examination.
- (5) March 2009 administrations through November 2009 administrations: passing score on Part I Applied Basic Science (ABS) examination of the National Board.
- (6) December 2009 administrations through February 2010 administrations: passing score on Part II Patient Assessment and Management (PAM) examination of the National Board, with a score of not less than 75 on the Disease/Trauma component within the PAM examination, and a score of not less than 75 on the TMOD component within the PAM.

- (7) March 2010 administrations through February 2014 administrations: passing score on the Part III Clinical Skills Examination (CSE) of the National Board.
- (8) June 1, 2014 administrations through March 2015 administrations: passing score on Part III Injection Skills Examination (ISE) of the National Board.
- (9) Beginning with March 2015 administrations: all applicants must have a passing score on Part III CSE with a score of not less than 75 on the Skills of gonioscopy, binocular indirect ophthalmoscopy and slit lamp biomicroscopy, and a passing score on Part III ISE of the National Board.

(b) For candidates with passing scores on at least one National Board examination part under different formats and time periods described in Subparagraphs (a)(1), (a)(2), (a)(3), (a)(4), and (a)(5) of this Rule, the following equivalences shall apply:

- (1) Part I and IIA is the equivalent of BS;
- (2) Part IIB is the equivalent of CS without the inclusion of TMOD;
- (3) Part I ABS is the equivalent of Part I BS; and
- (4) Part II PAM is the equivalent of Part II CS.

History Note: Authority G.S. 90-117.5; 90-118; Eff. February 1, 1976;

Readopted Eff. May 30, 1978;

Amended Eff. June 1, 2014; April 1, 2011; July 1, 1998; May 1, 1995; April 1, 1993; June 1, 1989; September 30, 1981.

21 NCAC 42B .0114 MILITARY LICENSE

(a) Permanent Unrestricted License Military Optometrist: The Board shall issue a permanent license to a military-trained applicant to allow the applicant to lawfully practice optometry in North Carolina if, upon application to the Board, the applicant satisfies the following conditions:

- (1) Awarded a military occupational specialty in optometry and has done all of the following at a level that the Board, through an oral interview or administration of a clinical practicum examination, determines to be substantially equivalent to or exceeds the requirements for licensure in this State:
 - (A) completed a military program of optometry training that includes additional clinical experience in the diagnosis, treatment, and management of diseases of the eye and its adnexa;
 - (B) completed testing or equivalent training and experience; and
 - (C) performed in the occupational specialty;
- (2) Engaged in the practice of optometry for at least two of the five years, which may include clinical residency, preceding the date of the application under this Paragraph;

- (3) Not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice optometry in this State at the time the act was committed; and
 - (4) Pays the application, examination, and licensing fees required by the Board.
- (b) Permanent Unrestricted License-Optometrist Spouse of Military Personnel: The Board shall issue to a military spouse a license to practice optometry in this State if, upon application to the Board, the military spouse satisfies the following conditions:
- (1) Holds a current license, certification, or registration from another jurisdiction, and that jurisdiction's requirements for licensure, certification, or registration are substantially equivalent to or exceed the requirements for licensure in this State;
 - (2) Can demonstrate competency in optometry through methods determined by the Board, such as passing the Board's clinical practicum examination, completing continuing education units, or having had recent clinical experience in the diagnosis, treatment, and management of diseases of the eye and its adnexa for at least two of the five years preceding the date of the application under this Paragraph;
 - (3) Not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice optometry in this State at the time the act was committed;
 - (4) Submits written evidence demonstrating that the applicant is married to an active member of the U.S. military;
 - (5) Is in good standing and has not been disciplined by the agency that had jurisdiction to issue the license, certification, or permit; and
 - (6) Pays the application, examination, and licensing fees required by the Board.
- (c) All optometric medical experience of a military service member in the discharge of official duties or, for a military spouse, all optometric medical experience, including full-time and part-time experience, regardless of whether in a paid or volunteer capacity, shall be credited in the calculation of years of practice required under Paragraphs (a) and (b) of this Rule.
- (d) A nonresident licensed under this Rule shall be entitled to the same rights and subject to the same obligations as required of a resident licensed by the Board in this State.

History Note: Authority G.S. 90-123; 93B-15.1; Eff. July 1, 2014.

CHAPTER 66 – VETERINARY MEDICAL BOARD

21 NCAC 66 .0101 AUTHORITY: NAME AND LOCATION OF BOARD

The "North Carolina Veterinary Practice Act," Article 11, Chapter 90, of the General Statutes of North Carolina, establishes and authorizes the "North Carolina Veterinary Medical Board," hereafter referred to as the "Board." Unless otherwise directed, all communications shall be addressed to the Board at Office of the Executive Director, 1611 Jones Franklin Road, Suite 106, Raleigh, North Carolina 27606.

History Note: Authority G.S. 90-182; 90-185(6); Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. June 1, 2014; January 1, 2006; May 1, 1996; May 1, 1989.

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARINGS

26 NCAC 03 .0103 COMMENCEMENT OF CONTESTED CASE: NOTICE AND FILING FEE

(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).

(b) Within five days of filing a petition to commence a contested case, the Chief Administrative Law Judge shall assign an administrative law judge to the case. Within ten days of the filing of a petition commencing a contested case, the chief hearings clerk of the Office of Administrative Hearings shall serve a Notice of Contested Case Filing and Assignment upon all who are parties to the dispute. The notice shall contain the following:

- (1) Name of case and date of filing;
- (2) Name, address, and telephone number of the administrative law judge; and
- (3) A request that the party send within 30 days a copy of the document constituting the agency action that caused the filing of the petition.

(c) In contested cases commenced by a person aggrieved involving the following causes of action, the petitioner shall pay a filing fee of one hundred twenty-five dollars (\$125.00):

- (1) Contested cases challenging certificate of need filed pursuant to G.S. 131E-188;
- (2) Contested cases challenging permit actions under G.S. 143-215.1, G.S. 143-215.10C, G.S. 143-215.15, and G.S. 143-215.108;
- (3) Contested cases where the amount in controversy is fifty thousand dollars (\$50,000) or greater.

(d) In contested cases commenced by a person aggrieved that 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.

APPROVED RULES

(f) The filing fee shall be waived in a contested case involving a mandated federal cause of action.

(g) If the filing fee is not paid, or is paid in an incorrect amount, at the time of filing, the Office of Administrative Hearings shall notify the petitioner in writing and permit 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 and good cause is not shown by the petitioner within the 60 days of the date of filing, the petition shall be dismissed by the Administrative Law Judge.

(h) The filing fee shall be reimbursed when applicable in accordance with Rule .0105(7) of this Section.

(i) The method of payment of the filing fee shall be:

(1) cash;

(2) money order;

(3) certified check; or

(4) check drawn on an attorney's trust or operating account.

History Note: Authority G.S. 150B-23; 150B-23.2; 150B-33; Eff. August 1, 1986;

Amended Eff. October 1, 1991; November 1, 1987; September 1, 1986;

Emergency Amendment Eff. October 1, 2009;

Temporary Amendment Eff. December 1, 2009;

Amended Eff. June 1, 2014; October 1, 2010.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on July 17, 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 2nd 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 (1st Vice Chair)
Stefanie Simpson (2nd 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

July 17, 2014	August 21, 2014
September 18, 2014	October 16, 2014

AGENDA

RULES REVIEW COMMISSION
THURSDAY, JULY 17, 2014 10:00 A.M.
1711 New Hope Church Rd., Raleigh, NC 27609

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
- II. Approval of the minutes from the last meeting
- III. Follow-up matters:
 - A. Medical Care Commission – 10A NCAC 13D .3201 (May)
 - B. Commission for Public Health – 10A NCAC 43K .0101, .0102, .0103 (Hammond)
 - C. Department of Public Safety – 14B NCAC 07A .0116 (Reeder)
 - D. Engineers and Surveyors, Board of Examiners for – 21 NCAC 56 .0501, .0502, .0503, .0601, .0602, .0603, .0802, .0901, .1402, .1602, .1603, .1604, .1606, .1608, .1703, .1704, .1705 (Reeder)
 - E. Real Estate Commission – 21 NCAC 58A .1709 (Reeder)
- IV. Review of Log of Filings (Permanent Rules) for rules filed between April 22, 2014 and May 20, 2014
 - Commissioner of Agriculture (Reeder)
 - Commission for Public Health (May)
 - Department of Justice, Division of Criminal Information (May)
 - Criminal Justice Education and Training Standards Commission (May)
 - Coastal Resources Commission (May)
 - Board of Cosmetic Art Examiners (Hammond)
 - Board of Dental Examiners (Reeder)
 - Board of Pharmacy (May)
- V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days prior to the RRC Meeting
- VI. G.S. 150B-19.1 Certification

- VII. Commission Business
- Next meeting: Thursday, August 21, 2014
-

Commission Review
Log of Permanent Rule Filings
May 21, 2014 through June 20, 2014

AGRICULTURE, COMMISSIONER OF

The rules in Chapter 52 are from the Commissioner of Agriculture and cover the Veterinary Division of the department.

The rules in subchapter 52K concern the permitting and operation of animal exhibitions where the animals are displayed for the purpose of physical contact with humans. They include the rules purpose and scope (.0100); definitions (.0200); signage (.0300); fencing and other operational requirements (.0400); food, drink, and hand-washing requirements (.0500); animal keeping and exhibition requirements (.0600); and permitting and record-keeping (.0700).

<u>Signage</u>	02	NCAC	52K	.0301
Amend/*				
<u>Fencing</u>	02	NCAC	52K	.0401
Amend/*				
<u>Hand Washing Stations</u>	02	NCAC	52K	.0501
Amend/*				

PUBLIC HEALTH, COMMISSION FOR

The rules in Chapter 41 concern epidemiology health.

The rules in Subchapter 41A deal with communicable disease control and include reporting of communicable diseases (.0100); control measures for communicable diseases including special control measures (.0200-.0300); immunization (.0400); purchase and distribution of vaccine (.0500); special program/project funding (.0600); licensed nursing home services (.0700); communicable disease grants and contracts (.0800); and biological agent registry (.0900).

<u>Reportable Diseases and Conditions</u>	10A	NCAC	41A	.0101
Amend/*				

JUSTICE, DEPARTMENT OF - DIVISION OF CRIMINAL INFORMATION

The rules in Subchapter 4E concern organizational rules and functions including general provisions (.0100); requirements for access (.0200); standards and agreements (.0300); operation of DCI terminal (.0400).

<u>Name and Location</u>	12	NCAC	04E	.0101
Repeal/*				
<u>Function of DCI</u>	12	NCAC	04E	.0102
Repeal/*				
<u>Advisory Policy Board</u>	12	NCAC	04E	.0103
Repeal/*				
<u>Definitions</u>	12	NCAC	04E	.0104
Repeal/*				
<u>Forms</u>	12	NCAC	04E	.0105
Repeal/*				
<u>Manuals</u>	12	NCAC	04E	.0106
Repeal/*				
<u>Eligibility for Full or Limited Access to the DCI Network</u>	12	NCAC	04E	.0201

Repeal/*				
<u>Management Control Requirements</u>	12	NCAC	04E	.0202
Repeal/*				
<u>Non-Terminal Access</u>	12	NCAC	04E	.0203
Repeal/*				
<u>SBI Task Force Management Control</u>	12	NCAC	04E	.0204
Repeal/*				
<u>User Agreement</u>	12	NCAC	04E	.0301
Repeal/*				
<u>User Access Fee Agreement</u>	12	NCAC	04E	.0302
Repeal/*				
<u>Servicing Agreement</u>	12	NCAC	04E	.0303
Repeal/*				
<u>Management Control Agreement</u>	12	NCAC	04E	.0304
Repeal/*				
<u>Disclosure Agreement</u>	12	NCAC	04E	.0305
Repeal/*				
<u>DCI Terminal Operator</u>	12	NCAC	04E	.0401
Repeal/*				
<u>Certification and Recertification of DCI Operators</u>	12	NCAC	04E	.0402
Repeal/*				
<u>Suspension and Revocation of Operator Certification</u>	12	NCAC	04E	.0403
Repeal/*				
<u>Period of Suspension</u>	12	NCAC	04E	.0404
Repeal/*				
<u>Minimum Standards for DCI Terminal Operators</u>	12	NCAC	04E	.0405
Repeal/*				

The rules in Subchapter 4F concern security and privacy including security at local sites (.0100); DCI/NCIC hot files (.0200); submission of data for criminal history records (.0300); computerized criminal history access and use requirements (.0400); removal of criminal history record information (.0500); automated fingerprint identification system (.0600); driver history (.0700).

<u>Security of DCI Equipment</u>	12	NCAC	04F	.0101
Repeal/*				
<u>Official Use of DCI Information</u>	12	NCAC	04F	.0102
Repeal/*				
<u>Documentation and Accuracy</u>	12	NCAC	04F	.0201
Repeal/*				
<u>Validations</u>	12	NCAC	04F	.0202
Repeal/*				
<u>Hit Confirmation</u>	12	NCAC	04F	.0203
Repeal/*				
<u>Arrest Fingerprint Card</u>	12	NCAC	04F	.0301
Repeal/*				
<u>Final Disposition Information</u>	12	NCAC	04F	.0302
Repeal/*				
<u>Prison Fingerprint Card</u>	12	NCAC	04F	.0303
Repeal/*				
<u>Dissemination of CCH Records</u>	12	NCAC	04F	.0401
Repeal/*				
<u>Accessing of CCH Records</u>	12	NCAC	04F	.0402

Repeal/*				
<u>Use of CCH for Criminal Justice Employment</u>	12	NCAC	04F	.0403
Repeal/*				
<u>Individual's Rights to Review</u>	12	NCAC	04F	.0404
Repeal/*				
<u>CCH Licensing and Non-Criminal Justice Employment Purposes</u>	12	NCAC	04F	.0405
Repeal/*				
<u>Restrictive Use of CCH for Employment Purposes</u>	12	NCAC	04F	.0406
Repeal/*				
<u>Research Use and Access of CCH Records</u>	12	NCAC	04F	.0407
Repeal/*				
<u>Limitation Requirements</u>	12	NCAC	04F	.0408
Repeal/*				
<u>Expungements</u>	12	NCAC	04F	.0501
Repeal/*				
<u>Purges</u>	12	NCAC	04F	.0502
Repeal/*				
<u>Automated Fingerprint Identification System</u>	12	NCAC	04F	.0601
Repeal/*				
<u>Eligibility for Full or Limited Access to the AFIS Network</u>	12	NCAC	04F	.0602
Repeal/*				
<u>AFIS Agreement</u>	12	NCAC	04F	.0603
Repeal/*				
<u>Available Data</u>	12	NCAC	04F	.0604
Repeal/*				
<u>Dissemination of Driver History Information</u>	12	NCAC	04F	.0701
Repeal/*				
<u>Audits</u>	12	NCAC	04F	.0801
Repeal/*				

The rules in Subchapter 04G concern penalties and administrative hearings including definitions and penalty provisions (.0100); notice of violations (.0200); informal hearing procedure (.0300).

<u>Definitions</u>	12	NCAC	04G	.0101
Repeal/*				
<u>Penalty Provisions</u>	12	NCAC	04G	.0102
Repeal/*				
<u>Notice of Violation</u>	12	NCAC	04G	.0201
Repeal/*				
<u>Informal Hearing Procedure</u>	12	NCAC	04G	.0301
Repeal/*				

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

The rules in Chapter 9 are from the Criminal Justice Education and Training Standards Commission. This Commission has primary responsibility for setting statewide education, training, employment, and retention standards for criminal justice personnel (not including sheriffs).

The rules in Subchapter 9A cover the Commission organization and procedure (.0100) and enforcement of the rules (.0200).

<u>Applicability of Radar/TDS Standards Pre 7/1/82</u>	12	NCAC	09A	.0108
Repeal/*				

The rules in Subchapter 9B cover minimum standards for: employment (.0100); schools and training programs (.0200); criminal justice instructors (.0300); completion of training (.0400); school directors (.0500); and certification of post-secondary criminal justice education programs (.0600).

Certified Instructors Pre 7/1/82
Repeal/*

12 NCAC 09B .0311

The rules in Subchapter 9C concern the administration of criminal justice education and training standards including responsibilities of the criminal justice standards division (.0100); forms (.0200); certification of criminal justice officers (.0300); accreditation of criminal justice schools and training courses (.0400); minimum standards for accreditation of associate of applied science degree programs incorporating basic law enforcement training (.0500); and equipment and procedures (.0600).

Application for Law Enforcement Employment
Repeal/*

12 NCAC 09C .0217

Form Order Blank
Repeal/*

12 NCAC 09C .0218

Acquisition of Forms
Repeal/*

12 NCAC 09C .0220

COASTAL RESOURCES COMMISSION

The rules in Subchapter 7H are the state guidelines for areas of environmental concern (AECs) including introduction and general comments (.0100); the estuarine system (.0200); ocean hazard areas (.0300); public water supplies (.0400); natural and cultural resource areas (.0500); development standards (.0600); general permits for construction or maintenance of bulkheads and the placement of riprap for shoreline protection in estuarine and public trust waters (.1100); piers, docks and boat houses in estuarine and public trust waters (.1200); general permit to construct boat ramps along estuarine and public trust shorelines and into estuarine and public trust waters (.1300); groins in estuarine and public trust waters (.1400); excavation within or connecting to existing canals, channels, basins, or ditches in estuarine waters, public trust waters, and estuarine shoreline AECs (.1500); aerial and subaqueous utility lines with attendant structures in coastal wetlands, estuarine waters, public trust waters and estuarine shorelines (.1600); emergency work requiring a CAMA or a dredge and fill permit (.1700); beach bulldozing landward of the mean high-water mark in the ocean hazard AEC (.1800); temporary structures within the estuarine and ocean hazard AECs (.1900); authorizing minor modifications and repair to existing pier/mooring facilities in estuarine and public trust waters and ocean hazard areas (.2000); construction of sheetpile sill for shoreline protection in estuarine and public trust waters (.2100); construction of freestanding moorings in established waters and public trust areas (.2200); replacement of existing bridges and culverts in estuarine waters, estuarine shorelines, public trust areas and coastal wetlands (.2300); placement of riprap for wetland protection in estuarine and public trust waters (.2400); replacement of structures; the reconstruction of primary or frontal dune systems; and the maintenance excavation of existing canals, basins, channels, or ditches, damaged, destroyed, or filled in by hurricanes or tropical storms (.2500); construction of wetland, stream and buffer mitigation sites by the North Carolina Ecosystem Enhancement Program or the North Carolina Wetlands Restoration Program (.2600); and the construction of riprap sills for wetland enhancement in estuarine and public trust waters (.2700).

Technical Standards for Beach Fill Projects
Adopt/*

15A NCAC 07H .0312

General Conditions
Amend/*

15A NCAC 07H .1204

Specific Conditions
Amend/*

15A NCAC 07H .1205

Specific Conditions
Amend/*

15A NCAC 07H .1305

COSMETIC ART EXAMINERS, BOARD OF

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

<u>License Waiver for Armed Forces</u>	21	NCAC	14A	.0401
Amend/*				

The rules in Subchapter 14B concern rule-making procedures including petitions for rule-making (.0100); notice (.0200); hearings (.0300); declaratory rulings (.0500); and fees (.0600).

<u>Issuance of Declaratory Ruling</u>	21	NCAC	14B	.0504
Repeal/*				

The rules in Subchapter 14H are sanitation rules for both operators and facilities including sanitation (.0100); shop licensing and physical dimensions (.0200); cosmetic art shop and equipment (.0300); sanitation procedures and practices (.0400); and enforcement, maintenance of licensure (.0500).

<u>Licensees and Students</u>	21	NCAC	14H	.0401
Amend/*				

<u>Systems of Grading Beauty Establishments</u>	21	NCAC	14H	.0504
Amend/*				

<u>Rule Compliance and Enforcement Measures</u>	21	NCAC	14H	.0505
Amend/*				

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

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

The rules in Subchapter 14K deal with the manicurist curriculum.

<u>Live Model Performances</u>	21	NCAC	14K	.0107
Repeal/*				

The rules in Subchapter 14O are esthetician curriculum rules.

<u>Live Model Performances</u>	21	NCAC	14O	.0106
Repeal/*				

The rules in Subchapter 14P are civil penalty rules.

<u>Operations of Schools of Cosmetic Art</u>	21	NCAC	14P	.0113
Amend/*				

The rules in Subchapter 14R are continuing education rules.

<u>Continuing Education</u>	21	NCAC	14R	.0105
Amend/*				

The rules in Subchapter 14T concern cosmetic art schools including the scope of the rules and school applications (.0100); physical requirements for cosmetic art schools (.0200); school equipment and supplies (.0300); student equipment (.0400); record keeping (.0500); curricula for all cosmetic art disciplines (.0600); school licensure,

operations, closing and relocating schools (.0700); school inspections (.0800); and disciplinary actions (.0900).

<u>Esthetics Curriculum</u>	21	NCAC	14T	.0604
Amend/*				
<u>Manicuring Curriculum</u>	21	NCAC	14T	.0605
Amend/*				
<u>Natural Hair Care Styling Curriculum</u>	21	NCAC	14T	.0606
Amend/*				
<u>Field Trips</u>	21	NCAC	14T	.0615
Amend/*				
<u>Additional Hours</u>	21	NCAC	14T	.0616
Amend/*				
<u>Teacher Trainees</u>	21	NCAC	14T	.0617
Amend/*				
<u>School Operations/Licensure Maintenance</u>	21	NCAC	14T	.0701
Amend/*				

DENTAL EXAMINERS, BOARD OF

The rules in Chapter 16 cover the licensing of dentists and dental hygienists.

The rules in Subchapter 16B concern licensure examination for dentists including examination required (.0100); qualifications (.0200); application (.0300); Board conducted examinations (.0400); licensure by credentials (.0500); limited volunteer dental license (.0600); instructor's license (.0700); temporary volunteer dental license (.0800); and exemptions for active military (.0900).

<u>Examination Required; Exemptions</u>	21	NCAC	16B	.0101
Amend/*				
<u>In General</u>	21	NCAC	16B	.0201
Amend/*				
<u>Student May Apply</u>	21	NCAC	16B	.0202
Amend/*				
<u>Application for Licensure</u>	21	NCAC	16B	.0301
Amend/*				
<u>Board Approved Examinations</u>	21	NCAC	16B	.0303
Amend/*				
<u>Application for Board Conducted Examination</u>	21	NCAC	16B	.0401
Repeal/*				
<u>Time for Filing</u>	21	NCAC	16B	.0402
Repeal/*				
<u>Examination Conducted by the Board</u>	21	NCAC	16B	.0403
Repeal/*				
<u>Patients and Supplies for Board Conducted Clinical Examin...</u>	21	NCAC	16B	.0404
Repeal/*				
<u>Scope of Board Conducted Clinical Examination</u>	21	NCAC	16B	.0405
Repeal/*				
<u>Board Conducted Reexamination</u>	21	NCAC	16B	.0406
Repeal/*				
<u>Dental Licensure by Credentials</u>	21	NCAC	16B	.0501
Amend/*				
<u>Limited Volunteer Dental License</u>	21	NCAC	16B	.0601
Amend/*				

<u>Instructor's License</u>	21	NCAC	16B	.0701
Amend/*				
<u>Temporary Volunteer Dental Permit</u>	21	NCAC	16B	.0801
Amend/*				
<u>Definitions</u>	21	NCAC	16B	.0901
Amend/*				
<u>Dental Licensure by Endorsement Based on Status as Milita...</u>	21	NCAC	16B	.1002
Amend/*				
<u>Proof of Competency</u>	21	NCAC	16B	.1101
Adopt/*				

The rules in Subchapter 16C are dental hygienist licensure rules including general provisions (.0100); qualifications (.0200); application (.0300); Board conducted examinations (.0400); and licensure by credentials (.0500).

<u>Licensure</u>	21	NCAC	16C	.0101
Amend/*				
<u>Student May Apply</u>	21	NCAC	16C	.0202
Amend/*				
<u>Application for Licensure</u>	21	NCAC	16C	.0301
Amend/*				
<u>Board Approved Examinations</u>	21	NCAC	16C	.0303
Amend/*				
<u>Reexamination</u>	21	NCAC	16C	.0311
Adopt/*				
<u>Application for Examination Conducted by the Board</u>	21	NCAC	16C	.0401
Repeal/*				
<u>Time for Filing</u>	21	NCAC	16C	.0402
Repeal/*				
<u>Examination Conducted by the Board</u>	21	NCAC	16C	.0403
Repeal/*				
<u>Patients and Supplies for Board Conducted Clinical Examin...</u>	21	NCAC	16C	.0404
Repeal/*				
<u>Board Conducted Reexamination</u>	21	NCAC	16C	.0405
Repeal/*				
<u>Dental Hygiene Licensure by Credentials</u>	21	NCAC	16C	.0501
Amend/*				
<u>Proof of Competency</u>	21	NCAC	16C	.0601
Adopt/*				

The rules in Subchapter 16Q concern general anesthesia and sedation including definitions (.0100); general anesthesia (.0200); parenteral conscious sedation (.0300); enteral conscious sedation (.0400); renewal of permits (.0500); reporting and penalties (.0600); and penalty for non-compliance (.0700).

<u>Temporary Approval Prior to Site Inspection</u>	21	NCAC	16Q	.0303
Amend/*				

PHARMACY, BOARD OF

The rules in Chapter 46 cover organization of the board (.1200); general definitions (.1300); hospitals and other health facilities (.1400); admission requirements and examinations (.1500); licenses and permits (.1600); drugs dispensed by nurse and physician assistants (.1700); prescriptions (.1800); forms (.1900); administrative provisions (.2000); elections (.2100); continuing education (.2200); prescription information and records (.2300); dispensing in health departments

(.2400); miscellaneous provisions (.2500); devices (.2600); nuclear pharmacy (.2700); sterile parenteral pharmaceuticals (.2800); product selection (.2900); disposal of unwanted drugs (.3000); clinical pharmacist practitioner (.3100); impaired pharmacist peer review program (.3200); and registry of pharmacist technicians (.3300).

<u>Medication in Health Departments</u>	21	NCAC	46	.2401
Amend/*				

<u>Drugs and Devices to be Dispensed</u>	21	NCAC	46	.2403
Amend/*				

CONTESTED CASE DECISIONS

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

J. Randolph Ward

A. B. Elkins II
Selina Brooks
Craig Croom

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>			
Genesis Project 1 Inc. v. DHHS, Division of Medical Assistance and its agent, Mecklink Behavioral Healthcare	13 DHR 17094	12/16/13	29:01 NCR 70
<u>DEPARTMENT OF JUSTICE</u>			
Kent Patrick Locklear v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 15368	01/03/14	29:01 NCR 74
Michael Tyler Nixon v. NC Alarm Systems Licensing Board	13 DOJ 16246	11/25/13	29:01 NCR 79
<u>OFFICE OF STATE PERSONNEL</u>			
Rena Pearl Bridges v. Department of Commerce	13 OSP 15896	02/19/14	29:01 NCR 95

Filed

STATE OF NORTH CAROLINA
COUNTY OF WAKE

SEP 16 AM 11:21 IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
Office of
Administrative Hearings 13DHR17094

<p>GENESIS PROJECT 1 INC Petitioner</p> <p>v.</p> <p>N C DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE AND ITS AGENT, MECKLINK BEHAVIORAL HEALTHCARE Respondent</p>	<p align="center">FINAL DECISION</p>
---	---

THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding for consideration of pending motions in the above captioned contested case.

PROCEDURAL HISTORY

A contested case petition was filed electronically with the Office of Administrative Hearings ("OAH") in this case on August 28, 2013, with a hard copy filed with OAH on the following day. Also on August 29, 2013, Petitioner Genesis filed with OAH a Motion for Qualified Protective Order and a Verified Motion for Stay, Temporary Restraining Order and Preliminary Injunction. On September 30, 2013, Respondent MeckLINK filed its Response in Opposition to Petitioner's Motion for Preliminary Injunction. A hearing was held on September 23, 2013 before the undersigned Administrative Law Judge on the issue of the request for a temporary restraining order. The temporary restraining order was to remain in effect pending this Court's ruling on dispositive motions. On October 4, 2013, Respondent filed its Memorandum of Law on Threshold Issues to be Determined prior to Adjudication of Petitioner's Motion for Preliminary Injunction. Also on October 4, 2013, Petitioner filed its Brief on Legal issues and Motion for Summary Judgment. On October 9, 2013, Respondent filed its Motion to Dismiss based upon the Memorandum of Law on Threshold Issues filed on October 4. There are other matters of record in the file which are not necessary to be addressed in this Order.

ISSUE

The over-reaching issue in this contested case is the ability of MeckLINK and DHHS to contract for the provision of Medicaid services; more particularly, to what degree DHHS may legally delegate its authority as the single state agency responsible for Medicaid to its contractors. More particularly this decision is based on the issue of whether or not DHHS/DMA may validly delegate its authority to a contractor to establish an administrative review process as part of the required appeals process, and, if so, is the provider required to pursue such remedy.

BACKGROUND AND FACTS

Petitioner is a North Carolina corporation which provides treatment for mental health and substance abuse services to Medicaid recipients in Charlotte, North Carolina and surrounding areas. Respondent Department of Health and Human Services (DHHS), Division of Medical Assistance (DMA) is the single state agency to administer or supervise the administration of the Medicaid program under Title XIX of the Social Security Act. Respondent MeckLINK is a department of Mecklenburg County government. It is the state-contracted LME/MCO and/or prepaid inpatient health plan (PIHP) agent of DHHS/DMA which was hired, to among other things, manage the provision of Medicaid funded mental health, developmental disabilities and substance abuse services in Mecklenburg County, which is MeckLINK's "catchment area." MeckLINK is an agent of DHHS/DMA and has general authority to enter into the contracts both with DMA and with Genesis. Judgment is reserved on whether or not MeckLINK had sufficient general authority to terminate its contract with Genesis.

On June 14, 2013, MeckLINK notified Petitioner in writing of an initial routine monitoring review to be held on July 10, 2013, as provided in MeckLINK's contractual obligation with DMA. After review on July 10 and 17, 2013, MeckLINK concluded that Petitioner had failed to properly comply with applicable policy requirements and on August 13, 2013 issued an initial thirty day notice of termination to Petitioner Genesis' contract effective September 12, 2013.

MeckLINK contends that it was terminating Petitioner's Medicaid contract "for cause" while Petitioner denied the allegations.

In this contested case the contract between DHHS/DMA and MeckLINK requires MeckLINK to provide a process for provider appeals. In keeping with the contract, MeckLINK established Procedures for Local Reconsideration which addresses contract terminations such as at issue herein. The Notice of Termination did properly cite Genesis to a right to local reconsideration review of the initial termination decision. It advised Genesis to submit a request for the reconsideration review, along with any supporting information Genesis wished to submit and a brief statement of the basis upon which MeckLINK's decision is being challenged.

On August 15, 2013, MeckLINK received Genesis' timely request for reconsideration review. Genesis' response addressed the substantive allegations but failed to submit additional information as requested by MeckLINK. On August 21, 2013, Petitioner Genesis' Clinical Director emailed Respondent MeckLINK regarding the process for the reconsideration review. MeckLINK responded by email on August 23, 2013. Genesis did not respond further with MeckLINK, but instead filed this contested case with OAH on August 28, 2013. After the petition was filed at OAH, there was further communication between the parties concerning the reconsideration review; however there was no resolution and Genesis did not complete the review process.

CONCLUSIONS OF LAW

The Fourth Circuit Court of Appeals case of *K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107 (4th Cir. 2013) stresses that the ultimate responsibility for administering the Medicaid program is DHHS/DMA as the “single state agency.” *Shipman* also expressly recognizes that contractual relationships such as those at issue here in between the MeckLINK and DHHS are contemplated and fairly well expected. Citing 42 C.F.R. §§ 438.1(b), 438.6, the Fourth Circuit states:

This does not mean, of course, that a single state agency may never delegate responsibilities to other entities. Such agency relationships are expressly contemplated, for example in the context of MCOs like PBH that manage the provision of Medicaid on the state's behalf. But the single state agency requirement does mean that a delegation can go only so far. . . . *Id.* at 113.

Thus the Court recognizes the statutory authority for such contracts but notes that there are limitations on the delegation of authority from DHHS.

This Tribunal has consistently and continuously ruled that due process is an essential and required element in these provider cases; i.e., the providers are entitled to notice and appeal rights whenever the MCO takes an adverse action. The plaintiffs in *Shipman* sued DHHS and their MCO who provided services to the plaintiffs pursuant to a contract with DHHS. The plaintiffs asserted that their health care services had been reduced without notice and an opportunity for a hearing.

Because the Medicaid regulations require an MCO to provide notice and hearing rights only when it has taken “action,” 42 C.F.R. § 431.200(b), the court focused its attention on defendants' argument that the reduction of plaintiffs' budgets did not amount to “action” in the first place. The court noted that “action” is defined in relevant part as the “reduction, suspension, or termination of a previously authorized service, 42 C.F.R. § 438.400(b).” *Shipman* at 111.

The district court found that the reduction of services constituted an “agency action.” The district court went further by saying that, having found an agency action, the “plaintiffs were entitled to the notice and appeal rights provided for by the Medicaid statute and the Fourteenth Amendment.” *Shipman* at 111.

In this contested case, MeckLINK states that “this termination does not constitute an adverse action.” In accord with the federal district court's holding in *Shipman*, which was not disturbed on appeal, it is specifically found as fact and concluded as a matter of law that MeckLINK's decision to terminate Genesis at issue herein is an “adverse agency action” which would require MeckLINK to provide Genesis with notice and appeal rights.

In this contested case, the contractual provision which provides for a local reconsideration review is a valid and binding provision within the contract. Such a provision is reasonable and should be required. It allows a process of administrative remedies for the parties to try to resolve their controversy without the necessity of coming to OAH or any other forum. The conclusion of the administrative review would have been the final decision which would have constituted the “agency action” from which the Respondent would have been required to

provide appeal rights as required by the Medicaid statutes and the Fourteenth Amendment of the United States Constitution.

“An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies.” *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548(2010). Genesis failed to exhaust its administrative remedies. As such this matter should be dismissed for lack of subject matter jurisdiction.

FINAL DECISION

It is therefore **ORDERED** that Respondent MeckLINK’s Motion to Dismiss is **ALLOWED** and Petitioner Genesis’ Motion for Summary Judgment is **DENIED**.

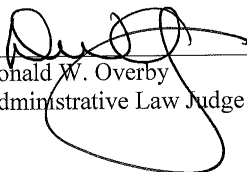
The decision entered herein very consciously and specifically does not address the myriad of other legal issues raised by this contested case, including but not limited to the forum selection provision of the contract between the parties. Jurisdiction is retained for purposes of entering this decision on the pending motions, but does not address the substantive issue of the validity of the forum selection clause of the contract between the parties.

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 16th day of December, 2013.


 Donald W. Overby
 Administrative Law Judge

Filed

STATE OF NORTH CAROLINA IN THE OFFICE OF
COUNTY OF ROBESON ADMINISTRATIVE HEARINGS
13DOJ15368

Kent Patrick Locklear, Petitioner, v. North Carolina Sheriffs' Education And Training Standards Commission, Respondent.	<p align="center">PROPOSAL FOR DECISION</p>
--	--

On December 4, 2013, Administrative Law Judge Beecher R. Gray heard this case in Lumberton, North Carolina. This case was heard after Respondent requested, under N.C.G.S. § 150B-40(e), the designation of an administrative law judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Kent Patrick Locklear, *Pro Se*
11683 NC Hwy 72E
Lumberton, North Carolina 28358

Respondent: Matthew L. Boyatt, Assistant Attorney General
Attorney for Respondent
NC Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Whether Petitioner refused to submit to a drug screen on December 12, 2012.

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing. Petitioner received, by certified mail, the proposed Summary Denial of Justice Officer's Certification letter mailed by Respondent Sheriffs' Commission on June 7, 2013.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter referred to as the "Commission" or the "Sheriffs' Commission") has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.
3. 12 NCAC 10B. 0204(b) states:

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

 - (4) Has refused to submit to the drug screen as required by the rules in this Chapter or the rules of the Criminal Justice Education and Training Standards Commission or has refused to submit to an in-service drug screen pursuant to the guidelines set forth in the Drug Screening Implementation Guide as required by the employing agency through which the officer is certified.
4. Petitioner was an applicant for detention officer certification through the Robeson County Sheriff's Office. In May of 2013, Petitioner left the Robeson County Sheriff's Office in order to pursue employment with the Lumberton Police Department. However, because of budget cuts, Petitioner's position at the Lumberton Police Department was eliminated, and Petitioner currently is unable to pursue certification through the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter the "CJ Commission"). Petitioner wishes to continue to pursue certification through the Sheriffs' Commission.
5. Petitioner was an applicant for certification through the CJ Commission in 2012. At that time, Petitioner was pursuing a corrections officer position at Scotland Correctional Institution through the North Carolina Department of Public Safety. Petitioner was required to undergo a psychological evaluation and mandatory drug screen as part of the employment screening process.
6. On or about December 12, 2012, Petitioner traveled to Kernersville, North Carolina in furtherance of his application through the Department of Public Safety. Petitioner was to complete a psychological evaluation and then a mandatory drug screen. During the application process on December 12, 2012, Petitioner was advised that under the drug testing rules of the Department of Public Safety and the CJ Commission, Petitioner was required to take the drug test on the same day as the psychological examination. Both tests were to be completed on December 12, 2012. Petitioner was also told there were no exceptions to this requirement.
7. Petitioner signed a NC Department of Correction Drug Screening Consent Form on December 12, 2012. On this Form, Petitioner again was cautioned that the drug screen must be conducted within 24 hours. Petitioner was advised in writing that failure to

complete the drug screen within 24 hours “may be considered a refusal to submit to a drug test.” Petitioner signed this Consent Form on December 12, 2012, indicating his understanding of the drug testing policies and procedures of the NC Department of Correction. (R. Ex. 3)

8. Petitioner was given instruction on where the drug testing facility was located and was provided a map with directions. Petitioner traveled to LabCorp in the early afternoon of December 12, 2012. Petitioner’s desire was to complete the drug screen in order to become employed at Scotland Correctional Institution.
9. Petitioner arrived at LabCorp and provided the receptionist with his paperwork and identification. Petitioner was advised to wait, but was not given any other verbal instruction regarding the testing procedure. Petitioner became thirsty and attempted to drink water from a fountain within the main lobby of LabCorp. Unable to get water from the fountain, Petitioner exited the main lobby in order to search for water. Upon his return to the LabCorp main lobby, Petitioner was confronted by the receptionist. Petitioner was advised that he could no longer take the drug screen because he left the main lobby.
10. Petitioner was advised by the receptionist that he could return to Kernersville, NC in order to obtain a new Drug Screening Consent Form in order to complete the drug screen. Petitioner was advised that he would need to return before 4:00 p.m. on December 12, 2012, and that LabCorp would not test him after that time.
11. Petitioner made the trip back to Kernersville, North Carolina on the afternoon of December 12, 2012, in order to obtain a new Drug Screening Consent Form. While in Kernersville, Petitioner explained to Department of Correction personnel what had transpired at the LabCorp testing facility. Petitioner was given a new Drug Screening Consent Form by Kathy Blackburn and was advised that he should return immediately to LabCorp in order to complete the drug screen within the mandatory 24 hour period. (Blackburn Affidavit, paragraph 11)
12. Petitioner made the drive back to the LabCorp testing facility, which was approximately 40 minutes from Kernersville. Upon arrival, Petitioner was advised that he could not be tested because he missed the 4:00 p.m. testing deadline. Petitioner pleaded with the LabCorp personnel and asked to be tested. Petitioner was advised by the LabCorp receptionist that he could return in the morning if he wished. Petitioner again pleaded with the LabCorp receptionist, advising her that he was required to be tested on the same day as his psychological examination, per the guidelines established by the Department of Public Safety and the CJ Commission. LabCorp declined to conduct the drug screen, as Petitioner had arrived back at the testing facility outside of the 4:00 p.m. cutoff for drug screening on December 12, 2012.
13. Petitioner contacted Department of Public Safety personnel in order to obtain a waiver of the 24 hour testing requirement. The basis of this request was that Petitioner did not intentionally miss the drug screen appointment and did not willfully refuse to be tested.

Petitioner's desire was to submit to the drug screen on December 12, 2012, in order to obtain employment with Scotland Correctional Institution. Petitioner was told that he could not be retested and that his failure to submit to the drug screen within 24 hours of notice would be considered a refusal.

14. On December 13, 2012, Petitioner was advised in writing that his conditional offer of employment with the Department of Public Safety was being withdrawn for three (3) years because of Petitioner's refusal to obtain a drug screen on December 12, 2012. (R. Ex. 4)
15. On January 15, 2013, Petitioner was advised in writing by the Interim Director of the CJ Commission that Petitioner's application for certification through the CJ Commission was being denied for three (3) years because of Petitioner's refusal to submit to a drug screen within the time required, in violation of the CJ Commission's rules. (R. Ex. 5)
16. Notwithstanding the above-referenced finding by the CJ Commission, Petitioner's desire on December 12, 2012 was to submit to a drug screen in order to obtain employment at Scotland Correctional Institution. Petitioner did not attempt to thwart the drug screen on December 12, 2012. Rather, Petitioner attempted to return to LabCorp a second time for the purpose of being tested on that date after being turned away for leaving the main lobby to get a drink of water. Petitioner was genuinely upset that he was being turned away despite efforts to comply with the mandatory 24 hour testing procedure. Petitioner's failure to make the 4:00 p.m. testing cutoff at LabCorp on December 12, 2012 was not intentional and certainly was not an attempt by Petitioner to avoid the drug screen or otherwise willfully refuse to be tested.
17. Department of Public Safety personnel classified Petitioner's conduct as a refusal on the Criminal Justice Drug Testing Report Form because the form does not have an option for someone who fails to complete the drug screen on time. (Blackburn Affidavit, paragraph 18) For this reason, a notation was made on the Report Form indicating that Petitioner "failed to go to LabCorp to complete drug screen." (R. Ex. 4)
18. Based on the evidence presented at the administrative hearing, the Undersigned finds that although Petitioner's conduct may have been technically classified as a refusal under the regulations established by the Department of Public Safety and the CJ Commission, Petitioner's conduct on December 12, 2012 did not constitute a willful refusal to submit to a drug screen. Petitioner's intent was to comply with the screening procedures and to submit to a drug screen within 24 hours of completing his psychological examination.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. 12 N.C.A.C. 10B. 0301(6)(c) requires every justice officer employed in North Carolina to produce negative drug screen results.

3. Under 12 N.C.A.C. 10B.0205(2)(g), when Respondent summarily denies the certification of a justice officer for refusing to submit to a drug screen, the period of sanction shall be not less than five years; however, Respondent may either reduce or suspend the period of sanction under this Rule or substitute a period of probation in lieu of revocation of certification following an administrative hearing, where extenuating circumstances brought out at the administrative hearing warrant such a reduction.
4. After considering the evidence presented and the record in this case, the undersigned concludes the Petitioner did not willfully refuse to submit to a drug screen on December 12, 2012, within the meaning of the Commission's Rules. Therefore, Petitioner's inability to complete a drug screen on December 12, 2012 shall not bar Petitioner from obtaining certification through the Sheriffs' Commission, provided Petitioner meets all other certification requirements, including, but not limited to, a negative drug screen.
5. This Proposal for Decision shall in no way impact any previous notices, orders, or decisions of the North Carolina Criminal Justice Education and Training Standards Commission.

PROPOSAL FOR DECISION

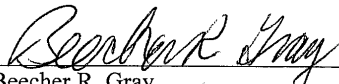
Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends that the failure of Petitioner to obtain a drug screen on December 12, 2012 shall not stand as a bar to Petitioner's certification through the Sheriffs' Commission, provided Petitioner meets all other certification requirements of the Sheriffs' Commission. Petitioner's failure to obtain a drug screen on December 12, 2012 arose out of mistake. Petitioner did not willfully refuse to submit to a drug screen on that date for the reasons stated hereinabove.

NOTICE AND ORDER

The North Carolina Sheriffs' Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 03 day of January, 2014.



Beecher R. Gray
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
11/25/2013 2:05 PM

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DOJ16246

MICHAEL TYLER NIXON PETITIONER, V. NC ALARM SYSTEMS LICENSING BOARD RESPONDENT.	AMENDED PROPOSAL FOR DECISION
--	--

Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical and/or mathematical error, IT IS HEREBY ORDERED that the "PROPOSAL FOR DECISION" issued from this office on November 5, 2013, is AMENDED as follows.

On September 24, 2013, Administrative Law Judge J. Randall May called this case for hearing in Raleigh, North Carolina. A follow-up conference call with counsel was conducted on November 21, 2013. During this call it came to the attention of the undersigned that a clerical and/or mathematical error had occurred in that the time for filing proposed decisions had been extended to November 13, 2013. Therefore, in consideration of Petitioner's proposed decision, the case papers, and arguments of counsel, the Proposal for Decision is AMENDED by substitution of the following:

APPEARANCES

Petitioner appeared *pro se*.

Respondent was represented by attorney Jeffrey P. Gray.

WITNESSES

Petitioner: Petitioner testified on his own behalf.

Respondent: Anthony Bonapart, Alarm Systems Licensing Board Deputy Director, and Kim Odom, Investigator for the Alarm Systems Licensing Board, testified for Respondent Board.

ISSUE

Whether grounds exist for Respondent to deny Petitioner's application for a Burglar Alarm Business License pursuant to N.C. Gen. Stat. § 74D-1 *et seq.* based on Petitioner's lack of good moral character and temperate habits as evidenced by his employment history and driving record.

BURDEN OF PROOF

Respondent has the burden of proving that Petitioner lacks good moral character or temperate habits. Petitioner may rebut Respondent's showing.

STATUTES AND RULES APPLICABLE TO THE CONTESTED CASE

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

N.C. Gen. Stat. §§ 74D-2; 74D-6; 74D-10; 12 NCAC 11.0209(c).

FINDINGS OF FACT

1. Respondent Board is established under N.C. Gen. Stat. § 74D-4, *et seq.*, and is charged with the duty of licensing and registering individuals engaged in the alarm systems business.
2. In an application received by Respondent on January 31, 2013, Petitioner applied to Respondent Board for a Burglar Alarm Business License. Petitioner's application was introduced and submitted as Respondent's Exhibit 1. In the application, Petitioner notes he intends to do business under the name Infinity Alarms, L.L.C. as the qualifying agent and manager.
3. Mr. Bonaparte testified that no reason for denial existed on the face of Petitioner's application but an investigation by Respondent Board revealed a negative employment history and criminal history. Respondent Board cited Petitioner's negative employment and criminal history in a denial letter dated May 23, 2013. Respondent introduced and the court admitted said letter as Respondent's Exhibit 2.
4. Petitioner appealed the denial of his application.
5. Investigator Kim Odom testified on behalf of Respondent Board regarding Petitioner's employment history and criminal background.
6. According to Ms. Odom, Petitioner had been registered, but not licensed, with the Alarm System Licensing Board since 1993. His registration was last renewed on April 10, 2013.

7. Petitioner's criminal history revealed 22 traffic violations between March 6, 1996 and June 15, 2012. According to Ms. Odom, these violations consisted of six speeding infractions, one exceeding a safe speed and fifteen infractions for improper equipment. Ms. Odom admitted that the Respondent Board does not typically deny an application for traffic infractions but may look at a pattern of violations as a disregard for the law.
8. Ms. Odom testified that she spoke with Petitioner's current employer, James Lee, who gave petitioner a favorable review. She also spoke with Petitioner's previous employer at Access Control Consultants. Ms. Odom testified that Petitioner was terminated from Access Control Consultants for excessive and continuous tardiness and falsifying time sheets. Petitioner's employer at Access Control Consultants also cited insubordination and attitude problems as reasons for the termination. Because her investigations only look back ten years, Ms. Odom did not speak with any of Petitioner's other prior employers.
9. Upon Petitioner's termination from Access Control Consultants, Petitioner was asked to leave the premises while his personal effects were removed from the company vehicle. At this point, Petitioner informed his employer that a small handgun was in the company vehicle. According to Petitioner's employers, carrying a weapon in a company vehicle was against company policy. Ms. Odom was not aware of what company rule or policy had been violated and was not shown a company policy. No company policy was submitted for the court's review. Access Control Consultants told Ms. Odom a Guilford County Police officer was on scene when Petitioner was terminated and said officer retrieved the weapon and gave it back to Petitioner. After his termination, Petitioner was emotional about losing his job but was otherwise calm.
10. Access Control Consultants told Ms. Odom they were concerned about Petitioner having a gun in the company vehicle since their firm sometimes serviced schools. Petitioner was not charged or convicted with any crime related to carrying or possessing the weapon.
11. Petitioner testified that he was not given any warning of his termination from Access Control Consultants. Further, no one from Access Control Consultants confronted Petitioner on any matters regarding insubordination or poor attitude. Petitioner testified that he was the only service technician for the entire company and had been asking for help for nearly two years. Petitioner speculated that his asking for help might have contributed to his employer's determination that he had a bad attitude.
12. Petitioner also believed that the GPS records kept by Access Control Consultants were inaccurate. He cited discrepancies in hand-written notes on certain time sheets and the GPS reports and noted that the GPS records indicated he was in certain cities when he knew he had not traveled to those locations.
13. Petitioner testified that around the time he was terminated from Access Control Consultants the company was merging with another company, Brady Services. He was unaware of any policy at Access Control Consultants that prevented him from carrying

a weapon in a company vehicle but admitted that Brady Services may have had such a policy. In any case, Petitioner was never told to operate under Brady Services Policies. Petitioner has had a concealed weapon permit since 1998. Petitioner also testified that he made his own service schedule and avoided carrying the weapon when he knew he would be at a school. He admitted to taking the weapon on school grounds on one occasion during an emergency call but the weapon remained locked in the vehicle.

14. Petitioner claimed no officer was present when he was terminated from Access Control Consultants as evidenced by a letter from Guilford Metro 9-1-1 introduced and admitted as Petitioner's Exhibit 1. However, Petitioner was asked to leave the premises of Access Control Consultants upon his termination and did not see the weapon being retrieved.
15. Petitioner did not carry the weapon on his person while at Access Control Consultants. Petitioner has not carried the weapon in a company vehicle since his termination from Access Control Consultants.
16. Petitioner's current employer, James Lee, president of Alarmguard Security, wrote a letter dated September 23, 2013 recommending Petitioner for licensure. Petitioner introduced said letter as Petitioner's Exhibit 2. The letter was admitted and read into the record as Petitioner's Exhibit 2.
17. Petitioner admitted that his driving record reflected twenty-two traffic violations over a sixteen-year period. Petitioner could not recall whether the violations on his record were reductions from more serious offenses. Petitioner did testify that all of the violations occurred in company vehicles and that he retained an attorney for every violation.

CONCLUSIONS OF LAW

1. Pursuant to N.C. Gen. Stat. § 74D-6(3), Respondent Board may refuse to issue an alarm systems registration permit for lack of good moral character or temperate habits.
2. Pursuant to N.C. Gen. Stat. § 74D-6(3) conviction of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking or entering, burglary or larceny or of any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug shall be prima facie evidence that the applicant does not have good moral character or temperate habits.
3. Pursuant to 12 NCAC 11.0209(c), it shall be prima facie evidence of good moral character if a director or officer of a company applying for a Burglar Alarm Business License has not been convicted of any crime involving the illegal use, carrying, or possession of a firearm; conviction of a crime involving a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an

act of violence; conviction of a crime involving unlawful breaking or entering, burglary or larceny or of any offense involving moral turpitude; or does not have a history of addiction to alcohol or a narcotic drug.

4. The evidence presented by Respondent Board at the hearing failed to establish by a preponderance of the evidence that Petitioner lacked a good moral character and temperate habits as defined under N.C. Gen. Stat. § 74D-6(3) and 12 NCAC 11.0209(c).

BASED ON THE FOREGOING, the undersigned makes the following:

PROPOSAL FOR DECISION

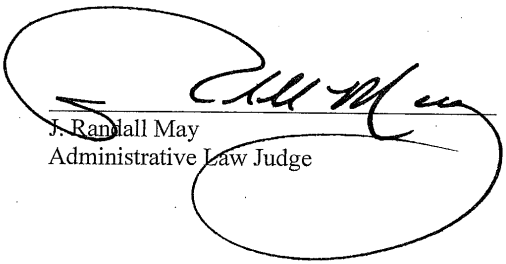
Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned proposes that Respondent REVERSE its decision to deny Petitioner's application for a burglar alarm business license, and issue Petitioner an individual burglar alarm business license.

NOTICE AND ORDER

The North Carolina Alarm Systems Licensing Board is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 25th day of November, 2013.


J. Randall May
Administrative Law Judge

ISSUE

Whether Respondent had just cause to demote Petitioner for the unacceptable personal conduct of displaying a baton to a subordinate and allegedly intimidating a subordinate?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 - 4

For Respondent: 1 – 6, 8, 10 - 13

WITNESSES

For Petitioner: Petitioner

For Respondent: Donald Riley, Michael Mills, Cleo Jenkins.

PRELIMINARY MATTERS

At the beginning of the hearing, the undersigned granted Petitioner's Motion to Sequester All Witnesses from the hearing room. The undersigned took under advisement Petitioner's prehearing motion to exclude from evidence all evidence supporting any alleged ground for dismissal that was not cited in the demotion letter as required by law, specifically N.C. Gen. Stat. 126-35(a).

FINDINGS OF FACT**Procedural Background**

1. On May 1, 2013, Respondent demoted Petitioner for engaging in unacceptable personal conduct on December 12, 2012 in violation of Respondent's Workplace Violence policy, Unlawful Harassment policy, and Professional Conduct policy. (Resp Exh 4) Respondent demoted Petitioner from a Correctional Assistant Unit Manager, pay grade 62, to a Correctional Officer, pay grade 62, and reduced Petitioner's annual salary from \$37,500 to \$28,600 (7.5%).

2. On July 25, 2013, Petitioner appealed his demotion by filing a contested case petition with the Office of Administrative Hearings. In that petition, Petitioner alleged that Respondent demoted him without just cause, and requested reinstatement, back pay, benefits, costs, and attorney's fees. Petitioner disputed that he attempted to intimidate anyone, and that his conduct constituted unacceptable personal conduct. He

contended that the disciplinary action Respondent took in demoting him flunked the *Warren* test in that the act at issue did not justify so drastic a disciplinary action as a demotion. (Petition)

Adjudicated Facts

3. At all times relevant to this case, Petitioner was a career state employee, having been employed with Respondent for 17 years. Petitioner began his employment with Respondent as a Correctional Sergeant. During the course of Petitioner's employment, Respondent promoted Petitioner to Correctional Assistant Unit Manager. At the time of his demotion, Petitioner was employed as a Correctional Assistant Unit Manager at Nash Correctional Institution in Nashville, North Carolina.

4. Respondent had taken no prior formal disciplinary action against Petitioner before demoting Petitioner from employment.

5. One of Petitioner's duties as Correctional Assistant Unit Manager was to keep track of overtime accrued by persons under his supervision. Both Petitioner and his subordinate managers were expected to reduce earned overtime as much as reasonably possible. In the course of those duties, Petitioner reviewed timesheets submitted and approved by subordinate managers. While doing so, Petitioner observed that one subordinate, Correctional Officer Michael Mills, had accrued some overtime without documents demonstrating the need for such overtime.

6. Officer Mills was a member of the Prison Emergency Response Team ("PERT"). Serving on the PERT team was done on a volunteer/selection basis that was in addition to the member's regular work duties. Mills reported to Sgt. Gilbert for his PERT team activities. Whenever the PERT team had scheduled training, the PERT supervisors sent an email to the work supervisors advising them of that training.

7. If Officer Mills was required to attend training for PERT when he was scheduled to work at Nash Correctional, Mills was required to find a replacement to work his shift at Nash Correctional. Correctional Sergeant Donald Riley was Officer Mills' direct supervisor.

8. Around 8:00 p.m. on December 12, 2012, Officer Mills asked Sgt. Riley if he had received an email from Sgt. Gilbert that Mills had PERT training on December 14, 2012. Riley had not received an email, and walked to Petitioner's office to ask him if he had received such an email.

9. Petitioner informed Sgt. Riley that he had not received an email regarding upcoming PERT training for Officer Mills. Petitioner directed Riley to have Mills report to Petitioner's office to find out what was going on. Petitioner intended to discuss Mills' PERT training, overtime, and the reasons for Mills' overtime. Sgt. Riley arranged for Mills to come to Petitioner's office, and was present for the discussion between Mills and Petitioner.

10. Officer Mills had previous discussions with other members of the PERT team who had been questioned by their regular supervisors about the frequency of their PERT team training and/or activities. However, Petitioner had no prior interaction with Mills on this issue or any other issue.

11. During the discussion, Petitioner initially questioned Mills about his service on the PERT team, and asked Mills who had approved Mills to be on the PERT rifle team. Mills told Petitioner he had been on the PERT team for one year. Petitioner advised Mills that he did not have an email showing Mills was on any team. Petitioner asked Mills when his training was. Mills stated Friday [12/14/12] at 6:00 am at Rocky Mount firing range. After Petitioner asked Mills who scheduled [PERT] training, Mills stated that Sgt. Gilbert sent an email to his supervisors. Petitioner informed Mills that he did not receive the email. Mills informed Petitioner that he could get with Sgt. Gilbert or Mr. Tuck. Petitioner told Mills he knew who to call. Petitioner asked Officer Mills, "Do you think it is fair that you get to go off with PERT and leave the unit short?" Mills responded that he is working when he with PERT, but he doesn't control the schedule. (Resp. Exhs. 9, 10; Riley & Mills testimony)

12. Petitioner asked, "How long do you think you've been gone?" Officer Mills opened his calendar, and read all his PERT activities from September 5, 2012 to December 11, 2012. Mills advised that sometimes he works eight days in a row without complaint. Petitioner asked Mills if he wanted to take leave time. Mills responded, "Sir, I don't want to talk about it." Petitioner said, "I'm going to talk about it." Mills said again, "Sir, I really don't want to talk about this." (Resp. Exhs. 9, 10; Riley & Mills testimony)

13. At this point, while individual witnesses tell different versions of the words used, the conversation became heated. Petitioner became angry, and started to raise his voice. Mills, without previously being dismissed by the Petitioner, stated that he "needed to leave," stood up, and walked through the door to leave Petitioner's office.

14. Petitioner ordered Mills back into the office, and told Mills that he had not given Mills permission to leave. Mills walked back into Petitioner's office to sit down when Petitioner stated, "Are you threatening me?" Neither Riley nor Mills understood why Petitioner made that statement. Mills advised Petitioner that he's never late for work, he works hard, and he does what he's told.

15. Officer Mills is in his early thirties, and in very good physical shape as he works out regularly and is trained in martial arts. Petitioner is in his early fifties, appears in sedentary physical shape, and is quite heavy. Both men have military backgrounds.

16. Petitioner claimed he was afraid of Mills due to his threatening actions and the significant disparity in their ages, physical status, and physical fitness. Petitioner was also on edge, because his brother had recently been murdered in a violent attack.

17. As Mills reentered the room, Petitioner remained seated, and opened his desk drawer where he kept a work-issued baton. A preponderance of the evidence established that Petitioner pulled the baton from the drawer, and held it below the desk level. Officer Mills could see the baton from where he was standing, but could no longer see the baton when he sat down. Petitioner kept the baton at the low profile position. Petitioner asked Mills "Are you going to assault me? Are you threatening me?" Petitioner ordered Mills to sit down. Petitioner did not attempt to use the baton, nor did he threaten to strike Mills with the baton. (Resp. Exhs. 9, 10; Riley & Mills testimony)

18. Riley placed his hand on Petitioner's right hand. Petitioner replied, "No, I got this." Petitioner stared at Mills. Mills thought Petitioner was trying to intimidate him. (Resp. Exhs. 9, 10; Riley & Mills testimony)

19. Mills asked Petitioner, "Why do you think I'm going to assault you? Just because I come back into your office and say something in a passionate tone, you take that as a threat?" Petitioner replied, "Another officer tried that in the other unit, and I handles [sic] him too." Mills told Petitioner he had on a blue uniform, and was on the same team as Petitioner. Petitioner replied, "That doesn't mean anything." Mills asked Petitioner, "If someone walking into your office, talking to you like that makes you think they are coming to assault you, you've been in the business too long." Petitioner replied, "No. I ain't been doing this too long. You wasn't [sic] here when this was a close custody camp. How many use of force you been in?" Mills responded, "Not many, but enough to know when someone is trying to assault me." Mills explained that he reports to PERT when he's told, and 95% of the time, Petitioner, Mr. Sledge, or Sgt. Riley get emails about PERT training. Sgt. Riley agreed that 90-95% of the time, he receives some sort of email or memo telling him that Mills will be out of the unit. (Resp. Exhs. 9, 10; Riley & Mills testimony)

20. Shortly after this exchange, tempers cooled. Petitioner told Mills he had no problem with Mills' service on PERT, but merely wished for the proper documentation. Petitioner and Mills shook hands before the meeting ended, and Officer Mills left the office with Petitioner's permission.

21. On December 13, 2012, Sgt. Riley reported to work early, and reported the incident between Petitioner and Mills to the unit manager. Riley also wrote a statement about the incident, and placed the written statement in a drawer. Riley gave his statement to management after it launched its investigation into the matter.

22. Nothing was heard about the incident for several weeks. Petitioner considered writing Mills up for insubordination, but decided to let the issue go given the meeting ended on a good note. Mills likewise filed no complaint regarding Petitioner.

23. On January 4, 2013, Captain Juanita James, who did not testify, received a telephone call from a non-DPS employee, Misty Clark, who reported the incident. Misty Clark likewise did not testify at the hearing.

24. Following this telephone call, Respondent launched an investigation into the December 12, 2012 conversation. Cleo Jenkins, Assistant Superintendent of Custody, investigated the matter, and reported his findings to Butch Jackson, the Administrator in Charge.

25. During the investigation, Petitioner informed Mr. Jenkins that "when Officer Mills jumped out of his chair, his instincts took over, and that he still had his brother on his mind who was just recently been murdered." (Resp. Exh. 7, p. 2)

26. In his report, Jenkins concluded that Petitioner violated Respondent's Unlawful Workplace Harassment and Workplace Violence policies on December 12, 2012 as follows:

The act of taking the baton from his drawer during what is described as a heated conversation with a subordinate and his apparent efforts to intimidate him with stares as he held the baton in his hand in unacceptable under both policies.

(Resp. Exh. 6)

27. At hearing, both Sgt. Riley and Asst. Superintendent Jenkins conceded that Petitioner's job was to monitor and review overtime. They also conceded that Petitioner was entitled to, as part of his job, question Officer Mills about his PERT activity, and his overtime, and that Mills was required to respond to such inquiries by Petitioner.

28. During cross-examination, Sgt. Riley acknowledged that Mills was insubordinate two times during the December 12, 2012 conversation with Petitioner. First, Mills was insubordinate when he repeatedly told Petitioner he did not want to discuss Petitioner's concerns about Mills' PERT activities. Second, Mills was insubordinate when Mills got out of his chair and walked towards the door to leave the office without being dismissed. (Riley testimony)

29. The preponderance of the evidence demonstrated that Mills was not disciplined, either formally or informally, for his insubordinate actions toward Petitioner. Likewise, Respondent did not discipline Officer Mills, either formally or informally, for advancing on a superior officer in what that superior considered was a threatening or assaultive manner.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the parties and this contested case, and the parties received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. Petitioner was a career state employee at the time of his demotion. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for his demotion, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a Final Agency Decision.

3. N.C.G.S. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career State employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C.G.S. § 126-35(d) (2007).

4. 25 NCAC 11.2301(c) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct.

5. The sole issue in this case is whether Respondent had just cause to demote Petitioner based on Petitioner's alleged unacceptable personal conduct; to wit, whether Petitioner (1) violated Respondent's Unlawful Workplace Harassment and Workplace violence policies, (2) engaged in conduct for which no reasonable person should expect to receive a written warning, and (3) engaged in conduct unbecoming a state employee.

6. *N.C. D.E.N.R. v. Clifton Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was just. Citing further, "Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." Our Supreme Court has said that there is no bright line test to determine "just cause"—it depends upon the specific facts and circumstances in each case. Furthermore, "not every violation of law gives rise to 'just cause' for employee discipline."

7. Though just cause is case-dependent and not exclusive, *Carroll* provides examples of some other actions where just cause were found:

Although there is no bright line test to determine whether an employee's conduct establishes "unacceptable personal conduct" and thus "just cause" for discipline, we draw guidance from those prior cases where just cause has been found. .. See, e.g., *Kea*, 153 N.C. App. 595, 570 S.E.2d 919 (employee violated known and written work rules, disobeyed direct order from superior, and made crude and offensive sexual advances to a co-worker); *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 565 S.E.2d 716 (2002) (highway patrol officer was stopped for speeding and driving while intoxicated); *N.C. Dep't of Corr. v. McNeely*, 135 N.C. App. 587, 521 S.E.2d 730 (1999) (correctional officer abandoned post without authorization and failed to remain alert while on duty); *Gray v.*

Orange Cty. Health Dep't, 119 N.C. App. 62, 457 S.E.2d 892 (1995) (health department inspector engaged in inappropriate sexually oriented behavior during inspections of catering businesses [***53] owned by women), disc. rev. denied, 341 N.C. 649, 462 S.E.2d 511 (1995); Leiphart v. N.C. Sch. of the Arts, 80 N.C. App. 339, 342 S.E.2d 914 (1986) (division director at North Carolina School of the Arts surreptitiously organized meetings with other division directors to discuss complaints against their superior), cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986).

8. In the recent case of *Warren v. NC Dept. of Crime Control & Public Safety*, the Court of Appeals crystallized the *Carroll* analysis as follows:

The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

Warren v. N.C. Dep't of Crime Control & Pub. Safety, 726 S.E.2d 920, 925 (N.C. Ct. App. 2012).

9. In this case, the undersigned applies the *Warren* just cause analysis as follows:

Step One: Did Petitioner Commit The Conduct Alleged?

10. Sgt. Riley and Officer Mills offered consistent testimony in their written statements and testimony at hearing. They described how Petitioner opened his desk drawer, took his baton out of drawer, and held the baton in a low profile position. In contrast, Petitioner provided inconsistent versions regarding his actions with the baton. In his January 8, 2013 statement, Petitioner first stated that he grabbed the baton for protection. His instincts took over, and his brother had just been murdered. (Resp. Exh. 8) Yet, in his February 20, 2013 statement, Petitioner claimed he "touched" the baton by moving it so he could get out a NC 18 form to write down all comments and actions." (Resp. Exh. 3) Later, in his February 28, 2013 statement, Petitioner explained that he "reached for my desk drawer to pull out a NC 18 (Employee Witness Statement form). He noted that these forms were underneath the baton, OC spray, and handcuffs. (Resp. Exh. 11) Finally, during cross-examination, Petitioner claimed that he was scared, and put his hand on the baton.

11. There is no evidence that Petitioner actively threatened to strike Mills with the baton.

12. Respondent proved by the preponderance of the evidence that Petitioner committed the conduct of displaying the baton to subordinate Mills while in Petitioner's office.

Step Two: Did Petitioner's Actions Constitute Unacceptable Personal Conduct?

13. Respondent's Workplace Violence Policy states that:

It is the responsibility of every employee and agent of the Department to conduct himself or herself in a manner that contributes to a workplace environment that is not only free of unlawful workplace harassment, . . .

Examples of Prohibited and Legally Dangerous conduct

1. Threats of physical violence of harm; display of items that imply such a threat.

(Resp. Exh. 12)

14. Respondent proved by a preponderance of the evidence that Petitioner displayed the baton in a manner that implied a threat to Officer Mills, even if the Petitioner did not overtly threaten to use or imply the baton. Petitioner's display of the baton constituted the unacceptable personal conduct of a "willful violation of known or written work rules," conduct for which no reasonable person should expect to receive prior warning, and conduct unbecoming a state employee that is detrimental to state service.

Step 3: Did The Unacceptable Personal Conduct Justify The Discipline Imposed?

15. The third step in the *Warren* analysis is determining whether the discipline imposed for that conduct was just in that:

If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based 'upon an examination of the facts and circumstances of each individual case.'

The Warren Court refers to this process as "balancing the equities." *Id.* at 902, 925.

16. In conducting this process, the Court notes Petitioner's long, discipline-free employment history with Respondent. (See *Warren*, referencing *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004): "In reaching

this result, the Court examined the petitioner's exemplary employment record as well as the circumstances under which the petitioner exceeded the posted speed limit.")

17. The undersigned, as directed by *Warren* and *Carroll*, looks at the "circumstances" under which Petitioner committed the conduct alleged. Here, Officer Mills was insubordinate to Petitioner during Petitioner's proper inquiry into Mills' PERT activities. By his own admission, Officer Mills refused and/or resisted Petitioner's attempts to discuss the issue, and attempted to leave Petitioner's office of his own volition, and without being first being dismissed. Under the applicable personnel policies of any State agency, insubordination constitutes unacceptable personal conduct.

18. Examination of the third prong also requires consideration of "mitigating factors" in the employee's conduct. (See *Warren*, citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985). In this case, the undersigned concludes that Mills' insubordination towards Petitioner, and the fact that Petitioner's brother had just been murdered were mitigating factors that warranted Respondent taking less disciplinary action against Petitioner than demotion. These mitigating factors obviously influenced Petitioner's perceived view of a threat by Mills, and obviously influenced Petitioner's actions on December 12, 2012.

19. Given the above mitigating factors, the undersigned concludes that Petitioner's misconduct did not rise to a sufficient level to warrant Respondent demoting Petitioner to a Correctional Officer position. Instead, based on a preponderance of the evidence and the above mitigating factors, the undersigned concludes there was just cause for Respondent to suspend Petitioner for ten days without pay.

20. Petitioner is hereby awarded attorney's fees, which he reasonably incurred in pursuing and prosecuting this action. Based upon the Affidavit of Petitioner's Attorney, Michael C Byrne, Petitioner is hereby awarded attorney's fees in the amount of \$10,458.75, which shall be paid as provided by law.

FINAL AGENCY DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and all the competent evidence at hearing, Respondent's decision to demote Petitioner is **REVERSED**. Respondent shall retroactively reinstate Petitioner to the same or similar position held prior to his demotion, with all back pay, and benefits which he would have been entitled to receive since his demotion on May 1, 2013.

Petitioner is hereby awarded Attorney's Fees in the amount of \$10,458.75, as supported by the fee petition submitted in this case, to Petitioner's attorney, Michael C Byrne, as provided by law. Instead of the discipline imposed by Respondent, Respondent shall suspend Petitioner from employment for ten days without pay. The relevant documents in Petitioner's personnel file shall be adjusted to reflect this change.

ORDER AND NOTICE

Under the provisions of N.C. Gen. Stat. § 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 in which the party resides. **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 26 N.C.A.C. 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-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 26 day of February, 2014.


Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

Filed
2014 FEB 12 PM 3:13

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 15896

RENA PEARL BRIDGES,	Office of Administrative Hearings)	
Petitioner,)	
)	
v.)	FINAL DECISION
)	
NORTH CAROLINA DEPARTMENT OF)	
COMMERCE,)	
Respondent.)	

On November 26, 2013, Administrative Law Judge Melissa Owens Lassiter heard this contested case Raleigh, North Carolina. On December 18, 2013, the undersigned issued an Order ruling that Respondent had just cause to terminate Petitioner from employment. On February 6, 2014, Respondent filed its proposed Final Decision with the Office of Administrative Hearings.

APPEARANCES

For Petitioner:	J. Gabe Talton Krompecher Law Firm, PLLC P. O. Box 6639 Raleigh, NC 27628
For Respondent:	Sharon A. Johnston Sheena J. Cobrand North Carolina Department of Commerce Division of Employment Security PO Box 25903 Raleigh, North Carolina 27611-5903

ISSUE

Whether Respondent had just cause to terminate Petitioner's employment for unacceptable personal conduct?

STATUTES, RULES & POLICIES IN ISSUE

N.C. Gen. Stat. §§126-34, 126-34.1, 126-35
Title 25 of the N.C. Administrative Code on State Personnel

State Human Resources Manual, Section 7

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: None

For Respondent: 1 through 8

WITNESSES

For Petitioner: Petitioner

For Respondent: Kenneth Royster, Catherine Moessner, MaryMolly Taylor,
Stephanie Beard

FINDINGS OF FACT

Procedural Background

1. On April 3, 2013, Respondent terminated Petitioner from employment as Administrative Assistant I for unacceptable personal conduct for losing her custodial agent certification by the NC Department of Corrections which allowed Petitioner to supervise inmates on the cleaning crew for the Kendall complex. (Resp. Exh. 4)

2. On July 31, 2013, Petitioner filed a petition for contested case hearing with the Office of Administrative Hearings alleging that Respondent had: (1) discharged her without just cause, and (2) retaliated against her for having filed a worker's compensation claim. Petitioner alleged how she had been harmed by Respondent's actions as follows:

Petitioner was terminated due to loss of Department of Correction privileges based on unsubstantiated inmate charge. Petitioner worked for Dept. of Commerce overseeing Dept of Corrections work release program. Petitioner had work comp restrictions at the time.

(Petition)

3. On October 3, 2013, the undersigned ALJ issued a Final Decision (In Part), granting Respondent's Motion to Dismiss Petitioner's claim of "worker's compensation retaliation," and dismissed such claim. The Office of Administrative Hearings retained subject matter jurisdiction over the just cause claim.

Parties/Background Facts

4. On September 1, 2003, the Employment Security Commission hired Petitioner as an Administrative Assistant I to supervise inmate cleaning crews. (T. pp. 37, 105)

5. Petitioner continued her employment when the Employment Security Commission became a Division of the Respondent on November 1, 2011, pursuant to 2011 N.C. Sess. Laws 401 (hereinafter referred to as the "Division"). The working title of Petitioner's job was "custodial agent." (T. pp. 37)

6. At all times relevant to this case, Petitioner's supervisor was Catherine Moessner, Facilities Operations Manager ("Moessner") (T. p. 37)

7. Wake Correctional Center is part of the North Carolina Department of Public Safety ("NCDPS") (T. p. 21). NCDPS is the certifying authority of who will be a custodial agent. (T. pp. 26-27, 107) A "custodial agent" is an employee of either the NCDPS or of another State agency who has attended training and been issued custodial agent certification by Wake Correctional. (T. pp. 24, 41)

8. Respondent's Division of Employment Security contracted with Wake Correctional Center for Wake Correctional Center to provide inmate labor to perform janitorial services at the Division's offices at 700 Wade Avenue, Raleigh, North Carolina. (T. pp. 23, 38, 39; Resp. Exh. 1) The Division's offices consist of two buildings, the Daniels Building and the Kendall Complex. (T. p. 38) That contract required inmates be supervised by a custodial agent while at the Division's offices. (T. pp. 23, 40; Resp. Exh. 1, p. 1) Specifically, Section I., E. of that contract provides, "No inmate will be allowed to work in an area that is not supervised by a Custodial Agent." (Resp. Exh. 1, p. 1)

9. In June 2010, Kenneth Royster ("Royster") became the Correctional Superintendent II at Wake Correctional Center. (T. p. 21) He signed the contract between Wake Correctional Center and the Division on behalf of Wake Correctional Center.

10. Individuals eligible for appointment as a custodial agent must be at least 20 years old, pass a criminal background check, and be in good standing with the State agency at which the inmate labor is to be provided. (T. p. 24) Individuals selected to be custodial agents also undergo training which includes training on the Prison Rape Elimination Act. (T. p. 24) Once an individual meets the qualifications and undergoes training, the NCDPS issues the individual a certification card. (T. pp. 24-25) The certification is valid for one year, and is renewed annually upon completion of refresher training. (T. p. 25) The certification is required pursuant to G.S. §148-4. (T. p. 25)

11. NCDPS determines whether an individual will continue to serve as a custodial agent, requiring that the individual not have a criminal history, be able to perform the tasks required to supervise inmates, and can foster an appropriate relationship and/or rapport with the inmates. (T. p. 27)

12. Inmates routinely complain about custodial agents. (T. p. 27) When an inmate complaint is received, NCDPS determines the type of investigation, if any, is needed. (T. p. 27) If a complaint possibly involving sexual violence or harassment of

an inmate, NCDPS is mandated to conduct an investigation under the 2003 federal Prison Rape Elimination Act ("PREA") (T. p. 28)

Adjudicated Facts

13. Petitioner was certified as a custodial agent, and supervised inmates at the Division's offices at 700 Wade Avenue, Raleigh, NC for nine years until February 2013. (T. pp. 32-33, 40, 107; Resp. Exhs. 2 and 3)

14. Petitioner's position description listed the primary purpose of Petitioner's position with the Division as being:

responsible for the services such as janitorial, facility maintenance, furniture relocation, disposal of materials, and other tasks as assigned at the Kendall Complex. This position therefore oversees inmate labor to provide the tasks as described, and provides other support in the absence of the inmates. To successfully provide the services required, this position must be formally trained in rules applicable to inmate supervision.

(T. pp. 61-62; Resp. Exh. 8, sec. I. B.)

15. Petitioner's position description listed that "License or Certification Required by Statute or Regulation: Not applicable." (Resp. Exh. 8, p. 7). However, Petitioner's annual performance evaluation plan provided that "the certification card [to supervise inmates] must be kept and maintained at all times and reviewed annually." (T. p. 62)

16. Petitioner's daily job duty was to supervise the inmate labor in the Daniels Building. (T. pp. 42, 106; Resp. Exh. 8) She typically supervised a crew of three inmates. She was responsible for transporting the inmates to and from Wake Correctional. Petitioner was responsible for making sure the inmates performed their work, and giving them instructions based on a typed instructional list of expectations. (T. p. 43) The inmates' duties included cleaning the bathrooms, dusting and vacuuming the hallways, offices and stairwells, stocking the cleaning cart and bathrooms, emptying the trash, cleaning the cafeteria, and performing other duties as directed. (T. pp. 43, 106) Petitioner was not responsible for personally providing cleaning services when she had an inmate crew present. If Petitioner did not have an inmate crew, she was responsible for these duties. If Petitioner had one inmate, she was required to help clean. (T. pp. 44, 61-62, 106; Resp. Exh. 8)

17. On or about January 17, 2012 [sic] [2013], Royster learned that an inmate complained that Petitioner had made an inappropriate or harassing comment to him. (T. p. 28) Royster requested Lieutenant Sandra Foster ("Foster"), with North Carolina Central Prison, to conduct a PREA investigation into that complaint. Foster was a trained PREA investigator used by Royster, because Royster did not have a trained PREA investigator at the time. (T. pp. 28-29) During an investigation, anything

uncovered is examined, and can be considered when deciding whether to continue or terminate a custodial agent's certification. (T. pp. 31-32)

18. On or about January 17, 2013, Ms. Moessner, Petitioner's supervisor, was notified by Wake Correctional Center that Petitioner's custodial agent certification was temporarily revoked pending an investigation. As a result, Ms. Moessner relieved Petitioner of her supervising duties pending the investigation, and pending further notice from Wake Correctional Center. (T. pp. 48, 104-105)

19. Foster prepared a report of her investigation, and Royster reviewed such report. Foster's investigation did not necessarily substantiate, meaning it didn't disprove or prove, the inmate's allegations. According to Mr. Royster, "the other findings in the investigation were equally as serious in my opinion. Therefore, based on the totality of the investigation," and as part of his job duties, Royster decided to terminate Petitioner's certification to supervise inmates. (T. p. 32)

20. After Foster's investigation was complete, Moessner received a letter from Lateisha D. Thrash, Assistant Superintendent of Programs at Wake Correctional Center dated February 20, 2013. The letter stated, in pertinent part:

Effective immediately, custodial agent certification for Ms. Rena Bridges has been terminated. As a result of this termination, Wake Correctional Center cannot permit Ms. Bridges to supervisor [sic] inmates assigned to this labor agreement. Additionally, she must immediately surrender the certification cards issued to her as part of the Custodial Agent Training she received.

(T. p. Resp. Exh. 2) Based on this letter, Moessner informed Petitioner that she could no longer supervise the inmates. (T. pp. 52)

21. Ronald Stancil was the other custodial agent overseeing an inmate cleaning crew on a daily basis in Division's Kendall Complex. (T. p. 44) The loss of Petitioner's certification caused a manpower issue, because there was only one supervisor to manage both the Kendall Complex and the Daniels Building. (T. p. 53)

22. With the loss of Petitioner's certification, the only job duties available to Petitioner were cleaning bathrooms, vacuuming, and trash collection. (T. p. 53) From January 17, 2013 through February 20, 2013, Petitioner sat at her work station, and asked her supervisor, Ms. Moessner, for work. However, Ms. Moessner "had no work – it was all administrative – to give" Petitioner. "Because of the investigation, we were not sure what to do so there were no job duties assigned." (T. p. 64) During that period, Petitioner stocked the bathrooms. After February 20, 2013, Petitioner performed the bathroom cleaning for approximately 2 days. (T. p. 55) Since Petitioner was recovering from knee replacement surgery, she was unable to perform the other duties. (T. p. 55)

23. In mid to late February of 2013, Petitioner contacted MaryMolly Taylor ("Taylor"), EEO Representative, to obtain assistance in finding her another position within the Division. (T. p. 73) Petitioner informed Ms. Taylor that the prisoners would not be available for her to supervise, that Petitioner's health was getting worse, and she would be unable to perform housekeeping duties. (T. p. 73)

24. Taylor considered and reviewed an imaging position and a position in the mail room as possible jobs for Petitioner. Taylor learned that the imaging job required heavy lifting, and there were no permanent positions available in that area. Taylor discovered that the mailroom job would have required heavy lifting. Ms. Taylor had learned from Petitioner's supervisor that Petitioner was unable to perform heavy lifting. (T. pp. 74-75) Taylor also looked at open positions of the same grade and salary level as Petitioner. The open position required office skills, but Petitioner did not have the required office skills. Further, Petitioner told Taylor the Division did not have anything else for her to do. (T. p. 76; Resp. Exh. 6)

25. On or about March 4, 2013, Petitioner met with Ms. Taylor, and gave Taylor a doctor's notes that restricted or limited Petitioner's ability to push, pull, stand, or bend. These restrictions rendered Petitioner unavailable to perform any cleaning work. (T. pp. 55-56, 76-77; Resp. Exh. 5) However, since Petitioner's primary job duty was to supervise and watch the inmates who cleaned the Respondent's building, the fact that Petitioner could not push, pull, stand or bend herself did not matter, and Petitioner would not be "unavailable" to work. (T. p. 83)

26. Respondent consulted Stephanie Beard, Personnel Supervisor II in Human Resources ("Beard"), to determine whether dismissal of Petitioner for loss of her custodial agent certification would be consistent with State policy. Beard recommended that dismissal would be consistent with the State Human Resource Manual's "Disciplinary Actions, Suspension and Dismissal" section which reads in pertinent part:

Employees in such classifications are responsible for obtaining and maintaining current, valid credentials as required by law, rule or regulation. Failure to obtain or maintain the legally required credentials constitutes a basis for immediate dismissal without prior warning, consistent with dismissal for unacceptable personal conduct or grossly inefficient job performance. An employee who fails to obtain or maintain legally required credentials may be dismissed without prior warning following a pre-disciplinary conference.

(T. pp. 90-91; Resp. Exh. 7)

27. On April 3, 2013, the Division sent Petitioner a letter dismissing her from employment with the Division based on unacceptable personal conduct. In this letter, Respondent explained that:

The decision to dismiss is based on the following:

1. Loss of Custodial Agent Certification that allowed you supervision of inmates on the cleaning crew for the Kendall complex.

(T. pp. 57-58; Resp. Exh. 4)

28. A preponderance of the evidence established that Petitioner's primary job duty was the supervision of inmates. Petitioner losing her custodial agent certification card meant Petitioner was unable to perform her daily job duties. (T. p. 65, Resp. Exh. 8)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal jurisdiction over the parties in this case, and the Office of Administrative Hearings (OAH) has subject matter jurisdiction. All parties are properly noticed.

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

3. N.C. Gen. Stat. §126-35(a) provides, in pertinent part, "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." The burden of showing the career State employee was discharged for "just cause" rests with the department or agency employer. N.C. Gen. Stat. §126-35(d)

4. 25 NCAC 01J .0604(b) enumerates two grounds for disciplinary action, including dismissal, for just cause: (1) unsatisfactory job performance, including grossly inefficient job performance, and (2) unacceptable personal conduct. "Unacceptable personal conduct" is defined to include conduct for which no reasonable person should expect to receive prior warning; job-related conduct which constitutes a violation of state or federal law; willful violation of known or written work rules; and conduct unbecoming a state employee that is detrimental to state service. 25 NCAC 01J .0614(8)

5. "Dismissal" is defined as "involuntary termination or ending of the employment of an employee for disciplinary purposes or failure to obtain or maintain necessary credentials." 25 NCAC 01J .0614(4)

6. The policy of the State as set out in the State Human Resources Manual regarding credentials is as follows:

B. Credentials

By statute, regulation, and administrative rule, some duties assigned to positions in the State service may be performed only by persons who are duly licensed, registered or certified as required by the relevant law or policy. All such requirements and restrictions are specified in the statement of essential qualifications or recruitment standards for classifications established by the State Human Resources Commission.

Obtaining and Maintaining Credentials

Employees in such classifications are responsible for obtaining and maintaining current, valid credentials as required by law, rule or regulation. Failure to obtain or maintain the legally required credentials constitutes a basis for immediate dismissal without prior warning, consistent with dismissal for unacceptable personal conduct or grossly inefficient job performance. An employee who fails to obtain or maintain legally required credentials may be dismissed without prior warning following a pre-disciplinary conference. An employee dismissed on this basis shall be given a written letter of dismissal with the specific reason for the dismissal and written notice of the right of appeal.

State Human Resources Manual, Discipline/Appeals/Grievances, Section 7, p. 20
(Revised: February 1, 2011)

7. State departments, institutions, agencies, and political subdivisions may hire inmates to perform work. In such cases, N.C. Gen. Stat. §148-4 provides in pertinent part:

Employees of departments, institutions, agencies, and political subdivisions of the State hiring prisoners to perform work outside prison confines may be designated as the authorized agents of the Secretary of Public Safety for the purpose of maintaining control and custody of prisoners who may be placed under the supervision and control of such employees, including guarding and transferring such prisoners from place to place in the State as their duties might require, and apprehending and arresting escaped prisoners and returning them to prison. The governing authorities of the State prison system are authorized to determine by rules and regulations the manner of designating these agents and placing prisoners under their supervision and control, which rules and regulations shall be established in the same manner as other rules and regulations for the government of the State prison system.

8. A preponderance of the evidence demonstrated that the Division had just cause to dismiss Petitioner from employment, pursuant to N.C. Gen. Stat. §126-35, as

Petitioner lost her custodial agent certification that allowed Petitioner to perform the primary function of her job to supervise an inmate cleaning crew.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's decision to dismiss the Petitioner from employment for unacceptable personal conduct.

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 17th day of February, 2014.



Melissa Owens Lassiter
Administrative Law Judge