

NORTH CAROLINA REGISTER

VOLUME 23 • ISSUE 18 • Pages 1861 - 1951

March 16, 2009

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PUBLISHED BY

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Contact List for Rulemaking Questions or Concerns

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

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

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

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

Fiscal Notes & Economic Analysis

Office of State Budget and Management
116 West Jones Street (919) 807-4700
Raleigh, North Carolina 27603-8005 (919) 733-0640 FAX

contact: William Crumbley, Economic Analyst william.crumbley@ncmail.net (919) 807-4740

Governor's Review

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

Legislative Process Concerning Rule-making

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

contact: Karen Cochrane-Brown, Staff Attorney karen@ncleg.net
Jeff Hudson, Staff Attorney jeffreyh@ncleg.net

County and Municipality Government Questions or Notification

NC Association of County Commissioners
215 North Dawson Street (919) 715-2893
Raleigh, North Carolina 27603

contact: Jim Blackburn jim.blackburn@ncacc.org
Rebecca Troutman rebecca.troutman@ncacc.org

NC League of Municipalities (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603

contact: Erin L. Wynia ewynia@nclm.org

NORTH CAROLINA REGISTER
 Publication Schedule for January 2009 – December 2009

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 th day from publication in the Register
23:13	01/02/09	12/08/08	01/17/09	03/03/09	03/20/09	05/01/09	05/2010	09/29/09
23:14	01/15/09	12/19/08	01/30/09	03/16/09	03/20/09	05/01/09	05/2010	10/12/09
23:15	02/02/09	01/09/09	02/17/09	04/03/09	04/20/09	06/01/09	05/2010	10/30/09
23:16	02/16/09	01/26/09	03/03/09	04/17/09	04/20/09	06/01/09	05/2010	11/13/09
23:17	03/02/09	02/09/09	03/17/09	05/01/09	05/20/09	07/01/09	05/2010	11/27/09
23:18	03/16/09	02/23/09	03/31/09	05/15/09	05/20/09	07/01/09	05/2010	12/11/09
23:19	04/01/09	03/11/09	04/16/09	06/01/09	06/22/09	08/01/09	05/2010	12/27/09
23:20	04/15/09	03/24/09	04/30/09	06/15/09	06/22/09	08/01/09	05/2010	01/10/10
23:21	05/01/09	04/09/09	05/16/09	06/30/09	07/20/09	09/01/09	05/2010	01/26/10
23:22	05/15/09	04/24/09	05/30/09	07/14/09	07/20/09	09/01/09	05/2010	02/09/10
23:23	06/01/09	05/08/09	06/16/09	07/31/09	08/20/09	10/01/09	05/2010	02/26/10
23:24	06/15/09	05/22/09	06/30/09	08/14/09	08/20/09	10/01/09	05/2010	03/12/10
24:01	07/01/09	06/10/09	07/16/09	08/31/09	09/21/09	11/01/09	05/2010	03/28/10
24:02	07/15/09	06/23/09	07/30/09	09/14/09	09/21/09	11/01/09	05/2010	04/11/10
24:03	08/03/09	07/13/09	08/18/09	10/02/09	10/20/09	12/01/09	05/2010	04/30/10
24:04	08/17/09	07/27/09	09/01/09	10/16/09	10/20/09	12/01/09	05/2010	05/14/10
24:05	09/01/09	08/11/09	09/16/09	11/02/09	11/20/09	01/01/10	05/2010	05/29/10
24:06	09/15/09	08/24/09	09/30/09	11/16/09	11/20/09	01/01/10	05/2010	06/12/10
24:07	10/01/09	09/10/09	10/16/09	11/30/09	12/21/09	02/01/10	05/2010	06/28/10
24:08	10/15/09	09/24/09	10/30/09	12/14/09	12/21/09	02/01/10	05/2010	07/12/10
24:09	11/02/09	10/12/09	11/17/09	01/02/10	01/20/10	03/01/10	05/2010	07/30/10
24:10	11/16/09	10/23/09	12/01/09	01/15/10	01/20/10	03/01/10	05/2010	08/13/10
24:11	12/01/09	11/05/09	12/16/09	02/01/10	02/22/10	04/01/10	05/2010	08/28/10
24:12	12/15/09	11/20/09	12/30/09	02/15/10	02/22/10	04/01/10	05/2010	09/11/10

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

Brunswick County Proposed Interbasin Transfer

NOTICE OF PUBLIC MEETINGS

April 16, 2009, 6:00 PM

Brunswick County Commissioners Chambers
Brunswick County Government Center
David R. Sandifer Administration Building
30 Government Center Drive NE, Bolivia, NC

April 21, 2009, 6:00 PM

Leland Town Hall
102 Town Hall Drive, Leland, NC

April 23, 2009, 6:00 PM

Carolina Shores Commissioners Chambers
Carolina Shores Town Hall
200 Persimmon Road, Carolina Shores, NC

April 28, 2009, 6:00 PM

Elizabethtown Council Chambers
Elizabethtown Town Hall
805 West Broad Street, Elizabethtown, NC

Brunswick County and the towns of Oak Island, Shallotte, Holden Beach, and Ocean Isle Beach will hold four public meetings in cooperation with the North Carolina Division of Water Resources to receive comments on their request for an interbasin transfer (IBT) from the Cape Fear River Basin to the Waccamaw River Basin and Shallotte River Basin.

Notice of these meetings is given in accordance with N.C. General Statute § 143-215.22L. The purpose of the meeting is to provide information to interested parties and the public regarding the nature and extent of the proposed transfer and to receive comment on the scope of the required environmental document. The first public meeting will begin at 6:00 p.m. on April 16, 2009 at the Brunswick County Government Center in Bolivia, NC. Three additional meetings will be held: April 21 at the Leland Town Hall, April 23 at the Carolina Shores Town Hall, and April 28 at the Elizabethtown Town Hall. At each of the meetings, a brief presentation will be made followed by an opportunity to provide oral comments. Representatives from the County and the Division of Water Resources will be in attendance.

Brunswick County, among the fastest growing counties in the state, provides water to more than 29,000 retail customers and 10 wholesale customers. Future demand for water has prompted a proposal to expand the County's Northwest Water Treatment Plant (WTP). In conjunction with this proposed expansion, future increases in the transfer of water from the Northwest WTP's source, the Cape Fear River, to customers in the adjacent Lumber Major River Basin, are expected to trigger the need for an IBT certificate from the North Carolina Environmental Management Commission (EMC) under the Regulation of Surface Water Transfers Act.

The County has two water treatment plants: the Northwest WTP, located near Northwest and supplied by water from the Cape Fear River, and the 211 WTP, located near St. James and supplied by 15 groundwater wells into the Castle Hayne Aquifer. The Lower Cape Fear Water and Sewer Authority (LCFWSA) supplies raw water to the Northwest WTP from an intake on the Cape Fear River above Lock and Dam 1. The Northwest WTP and 211 WTP have permitted capacities of 24 million gallons per day (MGD) and 6 MGD, respectively. The Northwest WTP is now approaching 80 percent capacity on peak days. To meet future water demand, the County is proposing to expand the Northwest WTP from 24 MGD to 36 MGD.

The expansion of the Northwest WTP plant is expected to trigger the need for an IBT certificate since a portion of the surface water treated at the Northwest WTP in the Cape Fear River Basin, as defined by G.S. § 143-215.22G, is distributed to customers in the Shallotte River Basin and the Waccamaw River Basin, both of which are located in the Lumber Major River Basin. Waters located in the Lumber Major River Basin (except for the Lockwoods Folly and Shallotte rivers), including the Waccamaw River, are tributaries of the Pee Dee River, which flows to Winyah Bay in South Carolina. The Shallotte River and Lockwoods Folly River are also considered part of the Lumber Major River Basin and flow directly into the Atlantic Ocean.

Under the grandfather provision of the Regulation of Surface Water Transfers Act, Brunswick County may transfer up to 10.44 MGD from one designated river basin to another without an IBT certificate. Based on water demand projections, it is expected that the County's grandfathered transfer capacity will be exceeded during the year 2012 and therefore require an IBT certificate. At that time, 9.68 MGD and 0.76 MGD are expected to be transferred to the Shallotte River Basin and Waccamaw River Basin, respectively, and not returned to the source river basin. The County is requesting an IBT certificate from the EMC for a maximum transfer of 18.35 MGD to the Shallotte River Basin and a maximum transfer of 0.94 MGD to the Waccamaw River Basin based on projections through 2040.

The purpose of this announcement is to encourage those interested in this matter to provide comments and to comply with statutory notice requirements. You may attend either of the public meetings and make relevant oral comments and/or submit written comments. All statements made at the meeting will be audio recorded. However, written submissions of oral comments at the hearings are kindly requested. The meeting conveners may limit the length of oral presentations if many people want to speak.

If you are unable to attend, written comments can be mailed to Brunswick County Public Utilities Department, Attn. Jerry Pierce, P.E., P.O. Box 249, Bolivia, NC 28422 or emailed to jpierce@brunsc.net. Comments on the alternatives and issues that should be addressed in the environmental document required by the governing statute are requested. Oral, mailed, and emailed comments will be given equal consideration. Comments will be accepted up to 30 days following the last public meeting. Interested parties will also have future opportunities to provide comments during the IBT request process.

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
WLA Garner Land, L.L.C.**

Pursuant to N.C.G.S. § 130A-310.34, WLA Garner Land, L.L.C. has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Notice of Intent") in Raleigh, Wake County, North Carolina. The Brownfields Property ("Property") consists of 1.981 acres and is located at 816 & 818 Purser Drive, Garner, NC. Environmental contamination exists on the Property in groundwater. WLA Garner Land, L.L.C. has committed itself to redevelop the Property as a parking lot associated with a retail shopping center, with residential, office and hotel uses possible in the future. Attached to the Notice of Intent is a proposed Notice of Brownfields Property prepared in accordance with N.C.G.S. § 130A-310.35, to which in turn are attached (a) a proposed Brownfields Agreement between DENR and WLA Garner Land, L.L.C., (b) a reduced plat map, and (c) a legal description of the Property. Attached to the proposed Brownfields Agreement is a map showing the location of the Property; and included in it are: (a) a description of the contaminants involved and their concentrations in the media of the Property, (b) the above-stated description of the intended future use of the Property, and (c) any proposed investigation and remediation at the Property.

The full Notice of Intent may be reviewed at the NC Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents.

Written public comments may be submitted to DENR within 30 days after the date this Summary of the Notice of Intent is published in a newspaper of general circulation serving the area in which the Property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 21 days after the period for written public comments begins. Thus, if WLA Garner Land, L.L.C., as it plans, publishes this Summary of the Notice of Intent in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the Property is located, and if it effects publication of this Summary of the Notice of Intent in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on March 17, 2009. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
WLA Garner Retail, L.L.C.**

Pursuant to N.C.G.S. § 130A-310.34, WLA Garner Retail, L.L.C. has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Notice of Intent") in Raleigh, Wake County, North Carolina. The Brownfields Property ("Property") consists of 21.708 acres and is located at 4500 Fayetteville Road in Garner, NC. Environmental contamination exists on the Property in groundwater. WLA Garner Retail, L.L.C. has committed itself to redevelop the Property as a retail shopping center with residential, office and hotel uses possible in the future. Attached to the Notice of Intent is a proposed Notice of Brownfields Property prepared in accordance with N.C.G.S. § 130A-310.35, to which in turn are attached (a) a proposed Brownfields Agreement between DENR and WLA Garner Retail, L.L.C., (b) a reduced plat map, and (c) a legal description of the Property. Attached to the proposed Brownfields Agreement is a map showing the location of the Property; and included in it are: (a) a description of the contaminants involved and their concentrations in the media of the Property, (b) the above-stated description of the intended future use of the Property, and (c) any proposed investigation and remediation at the Property.

The full Notice of Intent may be reviewed at the NC Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents.

Written public comments may be submitted to DENR within 30 days after the date this Summary of the Notice of Intent is published in a newspaper of general circulation serving the area in which the Property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 21 days after the period for written public comments begins. Thus, if WLA Garner Retail, L.L.C., as it plans, publishes this Summary of the Notice of Intent in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the Property is located, and if it effects publication of this Summary of the Notice of Intent in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on March 17, 2009. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

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 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration intends to amend the rules cited as 01 NCAC 44A .0201, .0203, .0207.

Proposed Effective Date: July 1, 2009

Public Hearing:

Date: April 8, 2009

Time: 2:00 p.m.

Location: N.C. Department of Administration, Administration Building, 5th Floor, Commission Room 5034, 116 West Jones Street, Raleigh, North Carolina 27603

Reason for Proposed Action: Changes to legislation N.C.G.S. 143-128.4 and N.C.G.S. 143-48.4

Procedure by which a person can object to the agency on a proposed rule: Written objections may be submitted to Sheryl Cromedy, Certification Coordinator, North Carolina Department of Administration, Office for Historically Underutilized Businesses. Objections may be received by mail, delivery service, hand delivery or facsimile transmission. Objections may be directed to Sheryl Cromedy, 1336 Mail Service Center, Raleigh, NC 27699-1336. Fax: (919) 807-2335.

Comments may be submitted to: Sheryl Cromedy, Certification Coordinator, N.C. Department of Administration, Office for Historically Underutilized Businesses, 1336 Mail Service Center, Raleigh, NC 27699-1336, phone (919) 807-2330, fax (919) 807-2335, email sheryl.cromedy@doa.nc.gov

Comment period ends: May 15, 2009

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. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 44 - OFFICE FOR HISTORICALLY UNDERUTILIZED BUSINESSES

SUBCHAPTER 44A – CERTIFICATION

SECTION .0200 - HUB CERTIFICATION APPLICATION

01 NCAC 44A .0201 APPLICATION

A business shall complete the following steps to initiate an application for certification:

- (1) The business shall complete an application using the Vendor Link NC system <http://www.ips.state.nc.us/ips/Vendor/vndrtrips.asp>;
- (2) The business shall complete, sign and attest to the information submitted online in the Vendor Link NC system; and
- (3) The application is not complete until ~~an~~ the Affidavit for Certification is received by the HUB Office, and requested supporting documentation are received by the HUB Office. Incomplete applications will be returned to the applicant after 30 days.

Authority G.S. 143-48.4; 143-128.4.

01 NCAC 44A .0203 APPROVAL

- (a) The HUB Office shall grant HUB Certification ~~if the to business businesses that meets meet the definition of minority business found at G.S. 143-128.4(a1) and 143-128.2(e)-eligibility requirements concerning operational status, group membership, ownership, control and management.~~
- (b) The business shall log on to the Vendor Link system at least once during each 12 month ~~period.~~ period to validate the accuracy of their information.
- (c) Businesses will be notified in writing when the application for certification is approved.
- (d) Certification decisions shall be rendered within 60 days with a 30 day extension with good cause and notification to the applicant.

Authority G.S. 143-48.4; 143-128.4.

01 NCAC 44A .0207 ANNUAL RENEWAL

(a) To renew HUB ~~certification~~ Certification the HUB shall annually attest that there have been no changes in the ownership or the management and control of daily business operations of the business entity since the last certification or renewal.

(b) If there has been a change in the ownership or the management and control of daily business operations of the business entity, the HUB shall submit documentation detailing the change(s) within 30 days of the change.

(c) In the on-line Vendor Link system, HUB status is "Inactive" if the vendor fails to update or submit necessary documentation.

(d) HUBs who fail to submit renewal documentation shall be decertified for failure to cooperate.

Authority G.S. 143-48.4; 143-128.4.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to amend the rules cited as 10A NCAC 43D .0201 - .0204, .0207, .0302, .0303, .0305, .0408 - .0411, .0501, .0502, .0701 - .0706 and repeal the rules cited as 10A NCAC 43D .0101 - .0107, .0206, .0401 - .0407, .0601 - .0604, .1001, .1003, .1004.

Proposed Effective Date: October 1, 2009

Public Hearing:

Date: April 1, 2009

Time: 2:00 p.m. – 4:00 p.m.

Location: Cardinal Room, 5605 Six Forks Road, Raleigh, NC 27609

Reason for Proposed Action: *The rule amendments are proposed for three primary reasons: (1) to comply with the interim rule published in the Federal Register on December 6, 2007 as part of 7 CFR Part 246 which requires State agencies to implement significant changes to the WIC food packages by October 1, 2009; (2) to limit pharmacies to providing only exempt infant formula due to federal regulations relating to cost containment; and (3) to make technical changes to make the language consistent with current operations, definitions, and regulations. The reason for the proposed rules repeals is that they are no longer relevant or the content has been incorporated by reference to federal regulations.*

Procedure by which a person can object to the agency on a proposed rule: *Objections may be submitted in writing to Chris Hoke, Rule-Making Coordinator, during the public comment period. Additionally, objections may be made orally or in writing at the public hearing.*

Comments may be submitted to: Chris Hoke, 1915 Mail Service Center, Raleigh, NC 27699-1915, email chris.hoke@ncmail.net

Comment period ends: May 15, 2009

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. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 43 – PERSONAL HEALTH

SUBCHAPTER 43D - WIC/NUTRITION

SECTION .0100 - DEFINITIONS

10A NCAC 43D .0101 DIETETICS

~~Dietetics is a profession in the health field focusing on nutrition.~~

Authority G.S. 130A-361.

10A NCAC 43D .0102 DIETITIAN

~~An American Dietetic Association member dietitian has successfully completed the examination for registration and maintains continuing education requirements. In providing nutritional care, the dietitian applies the science and art of human nutrition in helping select and obtain food for the primary purpose of nourishing their bodies in health or disease throughout the life cycle. This participation may be in single or combined functions in food service systems management; in extending knowledge of food and nutrition principles; in teaching these principles for application according to particular situations; or in dietary counseling. Registered dietitians must meet the Department of Human Resources personnel criteria for education and experience.~~

Authority G.S. 130A-361.

10A NCAC 43D .0103 NUTRITIONIST

~~The nutritionist, with specialized community dietetic preparation, functions as a member of the community health team in assessing nutritional needs of individuals and groups. The community dietitian plans, organizes, coordinates, and evaluates the nutritional component of health care services for an organization.~~

Authority G.S. 130A-361.

10A NCAC 43D .0104 THE AMERICAN DIETETIC ASSOCIATION

~~The American Dietetic Association is the professional association for those who meet the academic and experience requirements for membership.~~

Authority G.S. 130A-361.

10A NCAC 43D .0105 HOME ECONOMIST

~~A home economist works as a member of the health team in the promotion of good nutrition habits and homemaking skills. He works under the close supervision of the nutritionist.~~

Authority G.S. 130A-361.

10A NCAC 43D .0106 COMPETENT DIETARY PROFESSIONAL

~~A competent dietary professional is recognized as a registered dietitian, nutritionist or home economist. Persons who use these terms have acquired a specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills or methods.~~

Authority G.S. 130A-361.

10A NCAC 43D .0107 WIC

~~WIC is the special supplemental food program for women, infants, and children administered by the Nutrition Services Section.~~

Authority G.S. 130A-361.

SECTION .0200 - WIC PROGRAM GENERAL INFORMATION

10A NCAC 43D .0201 DESCRIPTION

The Nutrition Services ~~Section Branch~~ shall be responsible for the administration of the WIC program in North Carolina.

Authority G.S. 130A-361; 7 C.F.R. 246.

10A NCAC 43D .0202 DEFINITIONS

For the purposes of this Subchapter, all definitions set forth in 7 C.F.R. Part 246.2 are hereby incorporated by reference, including subsequent amendments and additions, with the following additions and modifications:

- (1) An "administrative appeal" is an appeal in accordance with Section .0800 of this Subchapter through which a local WIC agency, potential local WIC agency, authorized WIC vendor or potential authorized WIC vendor may appeal the adverse actions listed in 7 C.F.R. 246.18(a)(1)(i), (a)(1)(ii) and (a)(3)(i).

- (2) An "authorized store representative" includes an owner, manager, assistant manager, head cashier, or chief fiscal officer.
- (3) An "authorized WIC vendor" is a food retailer or free-standing pharmacy that has executed a currently effective North Carolina WIC Vendor Agreement.
- (4) A "chain store" is a store that is owned or operated by a corporation, partnership, cooperative association, or other business entity that has 20 or more stores owned or operated by the business entity.
- (5) A "fair hearing" is the informal dispute resolution process in Section .0900 of this Subchapter through which any individual may appeal a state or local agency action which results in a claim against the individual for repayment of the cash value of improperly issued benefits or results in the individual's denial of participation or disqualification from the WIC Program. This process must be complied with prior to requesting a contested case hearing in accordance with G.S. 150B.
- ~~(6) A "food instrument" means a voucher, check, electronic benefits transfer card (EBT), coupon, or other document which is used to obtain supplemental foods.~~
- ~~(6)(7)~~ "FNS" means the Food and Nutrition Service of the U.S. Department of Agriculture.
- ~~(7)(8)~~ "Free-standing pharmacy" means a pharmacy that does not operate within another retail store. Free-standing pharmacy includes free-standing pharmacies that are chain stores and free-standing pharmacies participating under a WIC corporate agreement.
- ~~(8)(9)~~ The "local WIC agency" is the local agency which enters into an agreement with the Division of Public Health to operate the Special Supplemental Nutrition Program for Women, Infants and Children.
- ~~(9)(40)~~ A "local WIC program plan" is a written compilation of information on the local WIC agency policies concerning program operation, including administration, nutrition education, personnel functions, costs and other information prepared by the local WIC agency and submitted to the Nutrition Services Branch in accordance with instructions issued by the Branch.
- ~~(10)(44)~~ A "predominantly WIC vendor" ~~is a vendor that is an 'above-50-percent vendor' as defined in 7 C.F.R. 246.2 that~~ derives more than 50 percent of its annual food sales revenue from WIC food instruments.
- ~~(11)(42)~~ "Redemption" is the process by which a vendor deposits a food instrument or cash-value voucher for payment and the state agency (or its financial agent) makes payment

to the vendor for the food ~~instrument~~
~~instrument or cash-value voucher.~~

- ~~(12)~~(13) "Shelf price" is the price a vendor charges a non-WIC customer for a WIC supplemental food.
- ~~(13)~~(14) The "state agency" is the Nutrition Services Branch, Women's and Children's Health Section, Division of Public Health, Department of Health and Human Services.
- ~~(14)~~(15) "Store" means the physical building located at a permanent and fixed site that operates as a food retailer or free-standing pharmacy.
- ~~(15)~~(16) "Supplemental food" or "WIC supplemental food" is a food which satisfies the requirements of 10A NCAC 43D .0501.
- ~~(16)~~(17) "Support costs" are clinic costs, administrative costs, and nutrition education costs.
- ~~(17)~~(18) "Transaction" is the process by which a WIC customer tenders a food instrument or a cash-value voucher to a vendor in exchange for authorized supplemental foods.
- ~~(18)~~(19) "Vendor applicant" is a store that is not yet authorized as a WIC vendor.
- ~~(19)~~(20) A "vendor overcharge" is intentionally or unintentionally charging more for supplemental food provided to a WIC customer than to a non-WIC customer or charging more than the current shelf price for supplemental food provided to a WIC customer.
- ~~(20)~~(21) A "WIC corporate agreement" is a single WIC Vendor Agreement with a corporate entity that has 20 or more stores authorized as WIC vendors under the Agreement.
- ~~(21)~~(22) "WIC customer" means a WIC participant, parent or caretaker of an infant or child participant, proxy or compliance investigator who tenders a food instrument or a cash-value voucher to a vendor in exchange for WIC supplemental food.
- ~~(22)~~(23) "WIC program" means the special supplemental nutrition program for women, infants and children Special Supplemental Nutrition Program for Women, Infants, and Children authorized by 42 U.S.C. 1786 of the Child Nutrition Act of 1966 as amended.

A copy of 7 C.F.R. Part 246.1 through 246.28 is available for inspection at the Department of Health and Human Services, Division of Public Health, Women's and Children's Health Section, Nutrition Services Branch, 5601 Six Forks Road, Raleigh, North Carolina. Copies are available at no cost from the Supplemental Nutrition Programs Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 540, Alexandria, Virginia 22302 by calling (703) 305-2730 or access <http://www.access.gpo.gov/nara/cfr/index.html>.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

10A NCAC 43D .0203 REFERENCES

~~(a) In order to accomplish the purpose of Rule .0601(a) of this Subchapter, the~~ The state agency shall administer the WIC program in accordance with: ~~according to the following rules and standards:~~

- (1) 42 U.S.C. 1771-1785, ~~the Child Nutrition Act of 1966, as amended;~~ 1786;
- (2) 7 C.F.R. 246.1 through ~~25~~ (1982); 246.28, United States Department of Agriculture, Food and Nutrition Service, Special Supplemental Food-Nutrition Program for Women, Infants and Children, ~~final rule: Children.~~

(b) The documents listed in ~~Rule .0603(a) of this Subchapter Paragraph (a) of this Rule~~ are available for inspection at the state agency during regular business hours.

Authority G.S. 130A-361.

10A NCAC 43D .0204 CONTRACT WITH FNS

(a) The Division of Public Health Services ~~is~~ authorized to maintain an agreement with the United States Department of Agriculture, Food and Nutrition Service.

~~(b) The state agency is bound by the terms of the contract with FNS and the guidelines and instructions issued by FNS in policy letters and management evaluations.~~

~~(b)(e)~~ The state agency shall prepare, submit to FNS, and maintain the North Carolina State WIC Program Plan of Operations to fulfill the requirements of 7 C.F.R. ~~246.4 (1979).~~ 246.4. This plan is available for inspection at the state agency during business hours.

Authority G.S. 130A-361.

10A NCAC 43D .0206 GENERAL ADMINISTRATION

~~(a) Local WIC agencies shall submit in a timely manner any reasonable information requested by the state agency to facilitate the operation of the WIC program.~~

~~(b) All WIC program records shall be compiled and retained for a period of five years or until all audit exceptions have been resolved, whichever is later. A letter from the division of health services stating that the audit is closed shall be on file before records from the audited period are discarded.~~

~~(c) Local WIC agencies shall prepare, submit to the state agency and revise as necessary a local WIC program plan according to time frames and requirements established by the state agency.~~

~~(d) All WIC program operations shall be carried out in a manner which ensures that no person is subject to any discrimination under the program because of race, religion, color, creed, political beliefs, national origin, sex, age, or handicapping condition except as noted in 10 NCAC 1K .0205, which is adopted by reference in accordance with G.S. 150B-14(c).~~

Authority G.S. 130A-361.

10A NCAC 43D .0207 LOCAL WIC AGENCY AGREEMENT AND BUDGET

(a) The state agency shall enter into an agreement and negotiate a budget with each local WIC agency in accordance with the North Carolina State WIC Program Plan of Operations.

(b) The availability of budgeted support cost funds for each local WIC agency is contingent ~~upon~~ upon the availability of WIC program support cost funds.

- ~~(1) The availability of WIC program support cost funds;~~
- ~~(2) Compliance of other the local WIC agency with WIC program rules and policies, and with the terms of the agreement with the DPHEHNR, including but not limited to the provision of the local WIC agency of WIC program benefits to a projected number of participants to be served.~~

(c) Since local support cost funds are allocated according to the assigned number of participants to be served, in the event a local WIC agency is unable to serve the assigned number of participants, the state agency may reduce the amount of support cost funds provided to the local WIC agency by a portion reflective of the level of underperformance.

(d) In the event a local WIC agency is expending support cost funds at a rate which will result in an underexpenditure of support cost funds during the budget period, the state agency may reduce the amount of support cost funds provided to the local WIC agency by a portion reflective of the level of underexpenditure.

(e) The state agency shall notify the local WIC agency in writing of any reduction of support cost funds available to the local WIC agency.

(f) When state food dollars are overexpended during a federal fiscal year, local WIC Programs that have maintained an active case load in excess of their assigned number of participants may be required to reimburse to the state their proportionate share of the overexpenditure.

Authority G.S. 130A-361.

SECTION .0300 - SELECTION OF LOCAL WIC AGENCIES

10A NCAC 43D .0302 CRITERIA FOR SELECTION OF LOCAL AGENCIES

- (a) The state agency can only accept applications from local agencies as defined in 7 C.F.R. ~~246.2 (1979); 246.2.~~
- (b) The application must be to provide WIC program benefits to an area or population not presently receiving program benefits from a local WIC agency.
- (c) WIC program funds must be available to serve the area or population described in the application.
- (d) The local agency priority system and Affirmative Action Plan described in 7 C.F.R. ~~246.5 (1979)~~ shall be considered in making the decision to fund or not to fund an application.

Authority G.S. 130A-361.

10A NCAC 43D .0303 CONTINUATION OF LOCAL WIC AGENCIES

(a) All grants to local WIC agencies shall ~~terminate on the last day of the state fiscal year, i.e., the thirtieth day of June~~ be issued annually through an agreement unless terminated as specified in Rule .0305 of this Section.

(b) All local WIC agencies are eligible to obtain a grant for the next fiscal year provided that:

- (1) WIC program funds are available to serve the area or population;
- (2) The agency continues to operate as a local WIC agency;
- (3) The agency signs and submits the grant agreement and budget ~~provided~~ required by the state agency.

Authority G.S. 130A-361.

10A NCAC 43D .0305 TERMINATION OF LOCAL WIC AGENCIES

(a) The authority to operate a local WIC program may be terminated for noncompliance. ~~The local WIC agency may appeal that decision as provided in 10A NCAC 01K .0900; COMPLIANCE.~~

(b) If FNS terminates or suspends the North Carolina WIC program, the state agency may in turn, terminate or suspend its agreements with local WIC agencies.

~~(c) If a local WIC agency is terminated for reasons other than those specified in (a) and (b) of this Rule, the agency may appeal the decision according to Section .0800 of this Subchapter.~~

(c) Termination of a local agency is subject to the appeal provisions of 7 C.F.R. 246.18(a)(3) and Section .0800 of this Subchapter.

~~(d) Operation of the program at a local agency may be otherwise terminated as specified in the grant agreement.~~

Authority G.S. 130A-361.

SECTION .0400 - ELIGIBILITY FOR WIC PROGRAM PARTICIPATION

10A NCAC 43D .0401 ELIGIBILITY

~~(a) In order to be eligible for WIC program benefits, a person must be:~~

- ~~(1) a pregnant, postpartum or breastfeeding woman, an infant, or a child up to his fifth birthday;~~
- ~~(2) a resident of the health service delivery area of the local WIC agency;~~
- ~~(3) income eligible, that is, her gross family income shall be equal to or less than 185% of the poverty income guidelines issued annually by the U.S. Department of Health and Human Services;~~
- ~~(4) certified at nutritional risk according to the certification criteria referenced in Rule .0404 of this Section.~~

~~(b) An individual shall be certified as eligible to receive WIC program benefits when her eligibility has been determined and documented by the local WIC agency.~~

~~(c) The certification of nutritional risk shall be made through a medical and nutritional assessment, as provided in Rule .0403 of this Section made by a competent health professional employed or designated by the local WIC agency.~~

Authority G.S. 130A-361; 7 C.F.R. 246.

10A NCAC 43D .0402 APPLICATION

(a) ~~An individual shall be considered an applicant for the WIC program when the individual visits the local WIC agency and specifically requests to participate in the program. At this time the local WIC agency shall fill out DEHNR Form 3367, WIC Certification Form, or complete application procedures as outlined in the WIC Local Data Entry Manual. This form is available from the Division of Public Health, 1915 Mail Service Center, Raleigh, North Carolina 27699-1915.~~

(b) ~~Applications shall be accepted by a local WIC agency whenever the agency is open to the public.~~

(c) ~~The decision and notification of eligibility or ineligibility shall be made in accordance with 7 C.F.R. 246.7(c), which is adopted by reference in accordance with G.S. 150B-14(c).~~

Authority G.S. 130A-361.

10A NCAC 43D .0403 MEDICAL AND NUTRITION ASSESSMENT

(a) ~~As part of the WIC program eligibility, the medical and nutrition assessment shall determine if the individual meets one or more of the nutritional risk certification criteria contained in the North Carolina WIC Program Manual.~~

(b) ~~The essential components of a medical and nutrition assessment for the determination of WIC program eligibility shall be as follows:~~

(1) ~~Anthropometric: height or length, weight, and evaluation of growth pattern or weight gain pattern;~~

(2) ~~Biochemical: hemoglobin, hematocrit or free erythrocyte protoporphyrin following the policy below:~~

(A) ~~infants, six months and older at certification and at subsequent certifications;~~

(B) ~~women, at all certifications and subsequent certifications;~~

(C) ~~children:~~

(i) ~~one year to two years of age; at every certification during this time;~~

(ii) ~~two years to five years of age.~~

(I) ~~at initial certifications;~~

(II) ~~at all subsequent certifications if hemoglobin was less than or equal to 11.0 grams or hematocrit was less than or equal to 34 percent during the preceding certification period;~~

(III) ~~at yearly intervals after a certification~~

where hematological values were determined to be within the range considered to be normal;

(IV) ~~at subsequent certification if no other nutritional risk criteria is found. A child cannot be considered to have had a complete nutritional assessment without this evaluation. A parent or caretaker could waive their option to have the bloodwork done under this last circumstance if they have been fully informed that the child's ineligibility has been determined without a complete assessment;~~

(V) ~~as otherwise ordered due to individual need or more frequently as indicated in the local program plan.~~

(3) ~~clinical: medical history and evaluation;~~

(4) ~~dietary evaluation if no other nutritional risk factors have been determined and identification of a dietary inadequacy would allow enrollment of the individual.~~

(c) ~~The data needed for the medical and nutrition assessment may be provided by competent health professionals in private practice or health care facilities other than the local WIC agency.~~

(d) ~~Additional interpretive information on the medical and nutrition assessment for the determination of WIC program eligibility is contained in the North Carolina WIC Program Manual.~~

Authority G.S. 130A-361; 143B-10.

10A NCAC 43D .0404 NUTRITIONAL RISK CERTIFICATION CRITERIA

For the purposes of WIC program eligibility determination, the presence of one or more of the conditions listed in North Carolina WIC Program Manual, Attachment IV A shall define an individual as being at nutritional risk.

Authority G.S. 130A-361.

10A NCAC 43D .0405 SCHEDULE OF CERTIFICATION

~~The period of certification of an individual shall follow the schedule contained in 7 C.F.R. 246.7(f), which is adopted by reference in accordance with G.S. 150B-14(e), as interpreted in the North Carolina WIC Program Manual.~~

Authority G.S. 130A-361.

10A NCAC 43D .0406 DOCUMENTATION OF CERTIFICATION

~~(a) 7 C.F.R. 246.7 which is adopted by reference in accordance with G.S. 150B-14(e), requires that specific information be recorded on the same or separate forms, that the forms be signed by the individual making the determination and that certain statements be read and signed by the participant. DEHNR Form 3367, WIC Certification Form, or DEHNR Form 3717, Informed Consent/Signature Form, shall be completed in order to meet these requirements.~~

~~(b) At initial certification and each subsequent certification visit, the medical and nutrition assessment data and other pertinent information needed for certification shall be recorded in the individual's medical record at the local WIC agency as source documentation.~~

Authority G.S. 130A-361.

10A NCAC 43D .0407 TRANSFER OF CERTIFICATION

~~(a) Individuals who have been participating in a WIC program in another area in North Carolina or in another state whose certification period has not yet expired and who present a valid verification of certification card or who otherwise have their certification verified by the preceding local agency shall be eligible to transfer their certification to the local WIC agency serving the new area of residence.~~

~~(b) The transfer participant must be enrolled in the WIC program immediately unless no one is being enrolled by the local WIC agency, in which case the transfer shall be placed on the top of the waiting list. Individuals who transfer to a new local WIC agency do not have to meet the income eligibility or waiting list policy of the local agency until their current period of eligibility expires. At that time they must meet all eligibility criteria of the local WIC agency.~~

Authority G.S. 130A-361.

10A NCAC 43D .0408 WAITING LIST

(a) If the local WIC agency is serving its maximum caseload or spending its maximum food money and additional participants cannot be issued food instruments, a waiting list must be established. ~~In order to~~ To establish a waiting list, the local agency's waiting list policy must be approved by the state agency.

(b) Local WIC agencies maintaining a waiting list shall continue to provide WIC program benefits to all individuals

currently enrolled in the program until the expiration of their current certification period.

(c) Local WIC agencies shall enroll individuals in a manner which ensures that applicants in a higher priority group are first given an opportunity to receive food instruments in accordance with ~~7 C.F.R. 246.7(d)(3)~~ 246.7 (e)(4) which is ~~adopted by reference in accordance with G.S. 150B-14(e), incorporated by reference with all subsequent amendments and editions.~~

Authority G.S. 130A-361.

10A NCAC 43D .0409 REQUIRED NOTIFICATIONS

7 C.F.R. 246.7 which is adopted by reference in accordance with G.S. 150B-14(c), mandates that individuals who apply for or participate in the WIC program shall be notified in certain specified situations. The time frames and ~~contents~~ requirements of these notices ~~shall be reproduced~~ are included in the North Carolina WIC Program Manual. The notices shall include but not be limited to a statement of non-discrimination and a statement of a right to a fair hearing as described in Rule .0904 of this Subchapter.

Authority G.S. 130A-361.

10A NCAC 43D .0410 PARTICIPANT VIOLATIONS AND SANCTIONS

(a) The State agency shall assess a claim for the full value of Program benefits that have been obtained or disposed of improperly as the result of a participant violation. "Participant violation" means those violations listed in 7 C.F.R. 246.2 which are incorporated by reference in Rule .0202 of this Subchapter. A claim shall not be paid by offsetting the claim against future Program benefits.

(b) The following participant violations committed by a participant, parent or caretaker of an infant or child participant, or proxy shall result in a one-year disqualification of the participant from the WIC Program, except as provided in Paragraphs (c) and (d) of this Rule:

- (1) Exchanging food ~~instruments—~~instruments, cash-value vouchers or supplemental food for cash;
- (2) Exchanging food ~~instruments—~~instruments, cash-value vouchers or supplemental food for alcohol, alcoholic beverages, tobacco products, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802;
- (3) A claim for dual participation resulting from intentional misrepresentation;
- (4) Intentionally making false or misleading statements or intentionally misrepresenting, concealing, or withholding facts to obtain Program benefits;
- (5) Any participant violation for which a claim of one hundred dollars (\$100.00) or more is assessed;
- (6) A second or subsequent claim assessed for any participant violation, regardless of the dollar amount. The second or subsequent claim does

not have to be for the same participant violation as the initial claim to result in a one-year disqualification; and

(7) Physical harm to clinic or vendor staff.

(c) The one-year disqualification referenced in Paragraph (b) of this Rule shall not be imposed against the participant if a claim is assessed and full payment is made or a repayment schedule is agreed upon within 30 days of receipt of a written demand for repayment of the claim for the improperly obtained or disposed of Program benefits.

(d) The one year disqualification referenced in Paragraph (b) of this Rule shall not be imposed against the participant if the participant is an infant, child, or under age 18 and the state or local agency approves the designation of a proxy for the participant. Designation of a proxy shall be approved if the proxy:

- (1) is at least 18 years of age;
- (2) presents proof of identification in the form of a government-issued photo identification card, work or school identification card, health benefits or social services program card, social security card, birth certificate, or a pay stub or utility bill no more than 60 days old;
- (3) has written authorization from the participant or the parent or caretaker of an infant or child participant;
- (4) will not be serving as proxy for more than two families at the same time; and
- (5) will be the person who transacts the food instruments.

(e) Except as provided in Subparagraphs (b)(5) and (b)(6) of this Rule, the following participant violations committed by a participant, parent or caretaker of an infant or child participant, or proxy shall result in a written warning for the first violation and the assessment of a claim for the full amount of any improperly obtained or disposed of Program benefits:

- (1) Exchanging food ~~instruments—instruments~~, cash-value vouchers or supplemental food for credit;
- (2) Exchanging food ~~instruments—instruments~~, cash-value vouchers or supplemental food for non-food items, other than alcohol, alcoholic beverages, tobacco products, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802; and
- (3) Exchanging food ~~instruments—instruments~~, cash-value vouchers or supplemental food for unauthorized food items, including supplemental foods in excess of those listed on the participant's food instrument.

For the violations listed in this Paragraph, failure to pay a claim in full or agree to a repayment schedule within 30 days of receipt of a written demand for repayment of a claim, shall result in a 90-day disqualification of the participant, unless the participant is an infant, child, or under age 18 and the state or local agency approves the designation of a proxy for the participant in accordance with Paragraph (d) of this Rule.

(f) The occurrence of a second or subsequent participant violation listed in Paragraph (e) of this Rule shall result in a one-

year disqualification of the participant and the assessment of a claim for the full amount of any improperly obtained or disposed of Program benefits. The second or subsequent violation does not have to be the same as the initial violation to result in a one-year disqualification. The one-year disqualification shall not be imposed against the participant if full payment is made or a repayment schedule is agreed upon within 30 days of receipt of a written demand for repayment of a claim. Additionally, the one year disqualification shall not be imposed against the participant if the participant is an infant, child, or under age 18 and the state or local agency approves the designation of a proxy for the participant in accordance with Paragraph (d) of this Rule.

(g) Threatening physical harm to or verbal abuse of clinic or vendor staff by a participant, parent or caretaker of an infant or child participant, or proxy shall result in a written warning for the first occurrence of this violation. A second occurrence within a 12-month period shall result in a 90-day disqualification of the participant, unless the participant is an infant, child, or under age 18 and the state or local agency approves the designation of a proxy for the participant in accordance with Paragraph (d) of this Rule.

(h) For any disqualification imposed under this Rule, a participant may reapply for Program participation if during the period of the disqualification full payment is made or a repayment schedule is agreed upon, or in the case of a participant who is an infant, child, or under age 18, the state or local agency approves the designation of a proxy in accordance with Paragraph (d) of this Rule.

(i) The participant has a right to a fair hearing in accordance with Section .0900 of this Subchapter for sanctions imposed under this Rule.

Authority G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786.

10A NCAC 43D .0411 DUAL PARTICIPATION

(a) A WIC participant shall not participate simultaneously ~~in the WIC Program~~ in one or more than one WIC clinic, or participate in the WIC Program and the Commodity Supplemental Food Program ("CSFP") during the same period of time. For purposes of this Rule, participate means certification as a WIC participant for the receipt of WIC food instruments or cash-value vouchers or certification as a CSFP participant for the receipt of CSFP food.

(b) The state agency shall immediately terminate the participation in one of the clinics or Programs, or the simultaneous participation in a single clinic, in accordance with 7 C.F.R. ~~246.7(l)(1)(iii)~~ 246.7(l) when a participant is found to be in violation of Paragraph (a) of this Rule.

(c) In the case of dual participation resulting from intentional misrepresentation, the participant, parent or caretaker of an infant or child participant, or proxy shall repay Program benefits improperly issued as a result of the dual participation, and the participant shall be disqualified from participation in both Programs or clinic(s) in accordance with 7 C.F.R. ~~246.7(l)(1)(iv)~~ 246.7(l) and Paragraph (b) of Rule .0410 of this Section. For purposes of this Paragraph, receiving WIC food instruments or cash-value vouchers under two or more participant identities in a single WIC clinic during the same issuance period and transacting one or more of the food instruments or cash-value

vouchers received under two or more of the identities constitutes dual participation based on intentional misrepresentation. Receiving WIC food instruments or cash-value vouchers from more than one WIC clinic during the same issuance period and transacting one or more of the food instruments or cash-value vouchers received from two or more of the clinics constitutes dual participation based on intentional misrepresentation. Additionally, receiving WIC food instruments or cash-value vouchers and CSFP food during the same time period and transacting one or more of the WIC food instruments or cash-value vouchers constitutes dual participation based on intentional misrepresentation.

Authority G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786.

SECTION .0500 – WIC PROGRAM FOOD PACKAGE

10A NCAC 43D .0501 SUPPLEMENTAL FOODS

(a) The foods which may be provided to WIC program participants are specified in 7 C.F.R. 246.10, which is incorporated by reference including any subsequent amendments and editions. This material is available for inspection at the Department of Health and Human Services, Division of Public Health, ~~1330 Saint Mary's Street, 5601 Six Forks Road,~~ Raleigh, North Carolina ~~27609~~ and may be obtained from Nutrition Services at no cost.

(b) The following exclusions from the food package have been adopted by the North Carolina WIC program and approved by the United States Department of Agriculture, Food and Nutrition service:

- (1) ~~shredded~~ shredded, diced, grated and organic cheese;
- (2) eggs other than white, fresh, grade A large; ~~large or extra large fresh and "cholesterol reducing";~~
- (3) ~~infant cereal fruit and cereal formula combinations;~~
- (4) ~~cheese in excess of four pounds per month, unless a physician documents that the recipient is lactose intolerant, or is a postpartum woman who is breast feeding exclusively;~~
- (5) ~~all formulas other than standard milk-based iron fortified infant formulas, unless a physician prescribes a formula and documents the presence of a medical condition, the reason for the specific formula prescribed, and the duration of its use;~~
- (6) ~~if the WIC program executes a sole source contract for an infant formula, that formula shall be specified in the vendor agreement and on the food instrument, and all other formulas shall be excluded from the food package, unless a physician prescribes a different formula and documents the presence of a medical condition, the reason for the specific formula prescribed, and the duration of its use;~~
- (7) ~~infant juice;~~
- (8) ~~peanut butter other than plain, smooth, crunchy or whipped;~~

- (9) ~~dried beans and peas other than mature and unflavored;~~
- (3)(4) ~~tuna other than chunk light in water; and mackerel and sardines;~~
- (4) ~~carrots other than raw, canned or frozen organic foods other than fruits and vegetables obtained with cash-value vouchers;~~
- (5) ~~goat milk; and~~
- (6) ~~dried fruits and vegetables.~~

(c) The state agency may ~~waive application of this Rule and~~ exclude foods other than those described in Paragraph (b) of this Rule if it determines such foods to be inappropriate for provision as supplemental foods through the WIC program as a result of their cost, nutritional composition, ~~packaging packaging, statewide availability, participant acceptance,~~ or promotion in a manner which is contrary to the purpose of the program as contained in 7 C.F.R. 246.1.

Authority G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786.

10A NCAC 43D .0502 QUANTITY OF FOODS

The amount of supplemental foods provided shall not exceed the maximum quantities specified in 7 C.F.R. 246.10, which is ~~adopted by reference in accordance with G.S. 150B-14(e);~~ incorporated by reference with all subsequent amendments and editions.

Authority G.S. 130A-361.

SECTION .0600 - WIC PROGRAM NUTRITION EDUCATION

10A NCAC 43D .0601 EDUCATION OF PARTICIPANTS

(a) ~~The rules governing the provision of nutrition education are contained in 7 C.F.R. 246.9 (1979); the guidelines shall be included in the North Carolina WIC Program Manual.~~

(b) ~~Nutrition education shall be considered a benefit of the WIC program and shall be provided to each participant at no cost.~~

(c) ~~The local WIC agency shall encourage all participants to participate in nutrition education services and shall stress the long-term benefits of utilizing such services.~~

(d) ~~All adult participants and the caretakers of infant and child participants shall be provided the opportunity to participate in two or more nutrition education contacts during each certification period.~~

(e) ~~No participant shall be denied supplemental food for failure to participate in the nutrition education services offered.~~

(f) ~~Local WIC agencies which identify individuals or groups within their service population who have specialized nutrition education needs shall take reasonable efforts to meet these special needs.~~

Authority G.S. 130A-361.

10A NCAC 43D .0602 DOCUMENTATION OF NUTRITION EDUCATION

~~(a) A plan of nutrition care shall be developed and be part of the medical record for each participant. WIC program nutrition education contacts shall be documented in the medical record.~~
~~(b) Guidelines for the development of nutrition care plans are contained in the "Guidelines for Nutrition and Dietary Services Programs in North Carolina Local Health Departments." These guidelines shall be available from the Nutrition Services Section. Additional guidelines shall be contained in the North Carolina WIC Program Manual.~~

Authority G.S. 130A-361.

10A NCAC 43D .0603 CONTINUING EDUCATION OF STAFF

~~Nutrition education services provided by the WIC program shall include continuing education and training of state agency and local WIC agency staff for the purpose of developing and updating the skills and knowledge necessary for the promotion or delivery of nutrition education to WIC program participants or staff.~~

Authority G.S. 130A-361.

10A NCAC 43D .0604 THE LOCAL AGENCY NUTRITION EDUCATION PLAN

~~Each fiscal year all local WIC agencies shall prepare and submit to the Division of Public Health, a nutrition education plan. This plan shall be prepared according to instructions provided by the state agency.~~

Authority G.S. 130A-361.

SECTION .0700 - WIC PROGRAM FOOD DELIVERY SYSTEM

10A NCAC 43D .0701 THE NORTH CAROLINA AUTOMATED WIC SYSTEM

The WIC program shall provide supplemental foods through a uniform retail distribution ~~system, system~~ as described in the North Carolina State WIC Program Plan, the North Carolina WIC Program Manual, the North Carolina WIC ADP Manual and the North Carolina WIC Vendor Manual, in accordance with 7 C.F.R. 246.12. An automated data processing system called the "North Carolina Automated WIC System" shall be utilized to promote the provision of and accounting for food instruments and cash-value vouchers issued for ~~participants to participants~~ and to assist in fulfilling other program requirements.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

10A NCAC 43D .0702 ISSUANCE OF FOOD INSTRUMENTS

(a) Local WIC agencies shall issue WIC program food instruments and cash-value vouchers to program participants in a manner which ensures that participants can receive the

appropriate supplemental foods that have been prescribed for them.

(b) Local WIC agencies shall issue food instruments and cash-value vouchers in a manner which prevents theft and shall retain documentation of the disposition of the food ~~instruments, instrument and cash-value vouchers~~. The documentation of issuance shall include the dated signature of the authorized individual receiving the food instruments or cash-value vouchers unless the food instruments or cash-value vouchers are mailed.

~~(c) The authorized individual receiving the food instrument shall sign it on the "signature" line. The person who so signs the food instrument is the only individual who can transact it.~~

~~(c)(d)~~ Participants shall be given appointments to receive food instruments or cash-value vouchers in a manner which promotes coordination with WIC program certification, nutrition education, other health services and the services being received by other family members.

~~(d)(e)~~ Food instruments and cash-value vouchers shall be issued only to the participant, the participant's parent, the participant's caretaker, ~~an authorized~~ a proxy, or a compliance investigator.

Authority G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786.

10A NCAC 43D .0703 USE OF FOOD INSTRUMENTS

(a) Participants may transact food instruments and cash-value vouchers on any day on or between the "date of issue" and "participant must use by" dates printed on the food ~~instrument, instrument or cash-value voucher~~. The "participant must use by" date shall be 30 days from the "date of issue."

(b) North Carolina WIC program food instruments and cash-value vouchers shall be transacted only at authorized WIC vendors in accordance with the terms of the signed WIC Vendor Agreement (~~DHHS Form 2768~~) and WIC Program rules, regulations, and statutes. Vendors shall assume full responsibility for food instruments and cash-value vouchers not properly transacted. Neither an agency of the United States government, the State of North Carolina, the local WIC agency nor a past or present WIC participant, parent or caretaker of an infant or child participant, or proxy is under any obligation to pay for food instruments or cash value vouchers accepted by a store that was not an authorized WIC vendor on the date of transaction of the food ~~instrument, instrument or cash-value voucher~~.

~~(e) Only the individual who has received the food instrument at the local or state agency or through the mail and has signed the signature line may countersign the food instrument. Vendors shall assume full responsibility for food instruments not properly countersigned.~~

~~(c)(d)~~ North Carolina WIC food instruments and cash-value vouchers shall be deposited at the vendor's bank. These food instruments and cash-value vouchers shall not be assigned, transferred, sold or otherwise negotiated.

Authority G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786.

10A NCAC 43D .0704 VALIDITY OF WIC FOOD INSTRUMENTS

(a) North Carolina WIC food instruments and cash-value vouchers shall not be valid if:

- (1) the instrument or voucher has not been legibly imprinted with an authorized WIC vendor stamp;
- (2) the instrument or voucher has been counterfeited or the signature forged;
- (3) the instrument or voucher has been mutilated, defaced or otherwise tampered with or altered;
- (4) the instrument or voucher is not deposited in the vendor's bank within 60 days of the "date of issue" assigned to the ~~instrument;~~ instrument or voucher;
- (5) the "pay exactly" amount (i.e. purchase price) is not recorded on the food ~~instrument;~~ instrument or voucher;
- (6) the signature ~~and countersignature do not match or the countersignature~~ is missing;
- (7) the "date transacted" entered on the instrument or voucher is not on or between the "date of issue" and "participant must use by" dates assigned to the ~~instrument;~~ instrument or voucher;
- (8) the instrument or voucher is not completed in indelible ink.

- (5) for a food instrument or cash-value voucher invalid under Subparagraph (a)(4) of this Rule, the state WIC office gives approval to the local WIC agency to ~~revalidate-replace.~~ The state WIC office shall give approval to the local WIC agency to ~~revalidate-replace~~ unless:
 - (A) the total value of food instruments and cash-value vouchers submitted at one time to the local WIC agency exceeds five hundred dollars (\$500.00);
 - (B) the vendor has submitted food instruments or cash-value vouchers for ~~revalidation-replacement~~ to the local agency on two separate occasions within the preceding 12 months; or
 - (C) the date the vendor submits the food instrument(s) or cash-value voucher(s) to the local WIC agency for ~~revalidation-replacement~~ is more than six months past the "date of issue" on the food ~~instrument(s)-instrument(s) or cash-value voucher(s).~~

Invalid food instruments and cash-value vouchers shall be stamped with the reason for invalidity and returned to the vendor without payment.

(b) A vendor may attempt to justify or correct an invalid food instrument or cash-value voucher and shall receive payment if:

- (1) for a food instrument or cash-value voucher invalid under Subparagraph (a)(1) of this Rule, the vendor legibly imprints the authorized WIC vendor stamp on the food instrument or cash-value voucher and redeposits it within 95 days from the "date of issue" on the food ~~instrument;~~ instrument or cash-value voucher;
- (2) for a food instrument or cash-value voucher invalid under Subparagraphs (a)(2) or (a)(3) of this Rule, the vendor can demonstrate the food instrument or cash-value voucher was invalid due solely to the actions of a third party other than the vendor's owners, officers, managers, agents, or employees and the "pay exactly" amount is legible or can be verified by the vendor with a receipt.
- (3) for a food instrument or cash-value voucher invalid under Subparagraph (a)(3) of this Rule, the food instrument or cash-value voucher was unintentionally mutilated or defaced by the vendor's owners, officers, managers, agents, or employees and the "pay exactly" amount is legible or can be verified by the vendor with a receipt.
- (4) for a food instrument or cash-value voucher invalid under Subparagraph (a)(3) of this Rule, the "pay exactly" amount has been altered and the vendor provides a receipt that confirms the altered amount is the correct "pay exactly" amount;

Authority G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786.

10A NCAC 43D .0705 PAYMENT OF WIC FOOD INSTRUMENTS

The State of North Carolina shall:

- (1) accept North Carolina WIC food instruments and cash-value vouchers through the Federal Reserve ~~System;~~ and commercial banking systems;
- (2) ensure that WIC food instruments and cash-value vouchers ~~received~~ are valid through procedures established by the Division of Public Health;
- (3) provide payment ~~to the Federal Reserve~~ for all valid ~~or revalidated~~ WIC food instruments and cash-value vouchers ~~received~~. To the extent that sufficient funds are available in the WIC disbursing account, payment shall be provided according to established Department of Health and Human Services procedures; ~~procedures; for payment of state warrants;~~
- (4) ensure that every invalid WIC food instrument or cash-value voucher is stamped to indicate the reason for invalidity;
- (5) ensure that invalid WIC food instruments and cash-value vouchers are returned ~~through the Federal Reserve System~~ to the banks from which they were received, according to established banking procedures.

Authority G.S. 130A-361; 42 U.S.C. 1786; 7 C.F.R. 246.

10A NCAC 43D .0706 AUTHORIZED WIC VENDORS

(a) Vendor applicants and authorized vendors shall be placed into peer groups as follows:

- (1) When annual WIC supplemental food sales are not yet available, vendor applicants and authorized vendors, excluding chain stores, stores under a WIC corporate agreement, military commissaries, predominantly WIC vendors, and free-standing pharmacies, shall be placed into peer groups based on the number of cash registers in the store until six months of WIC supplemental food sales become available. The following are the peer groups based on the number of cash registers in the store:

- Peer Group I - - zero to two cash registers;
- Peer Group II - - three to five cash registers; and
- Peer Group III - - six or more cash registers.

WIC sales figures of new vendors shall be reviewed six months from authorization. A vendor whose first six months of WIC sales exceed twenty five thousand dollars (\$25,000) shall be placed in ~~at~~ the peer group designation in accordance with the dollar thresholds of Subparagraph (a)(2) of this Rule.

- (2) Authorized vendors for which annual WIC supplemental food sales is available, excluding chain stores, stores under a WIC corporate agreement, military commissaries, predominantly WIC vendors, and free-standing pharmacies, shall be placed into peer groups as follows, except as provided in Subparagraph (a)(8) of this Rule.

- Peer Group I - - two thousand dollars (\$2,000) to twenty five thousand dollars (\$25,000) annually in WIC supplemental food sales at the store;
- Peer Group II - - greater than twenty five thousand dollars (\$25,000) but not exceeding seventy five thousand dollars (\$75,000) annually in WIC supplemental food sales at the store;
- Peer Group III - - greater than seventy five thousand dollars (\$75,000) but not exceeding three hundred thousand dollars (\$300,000) annually in WIC supplemental food sales at the store; and
- Peer Group IV - - greater than three hundred thousand dollars (\$300,000) annually in WIC supplemental food sales at the store;

- (3) Chain stores, stores under a WIC corporate agreement (20 or more authorized vendors under one agreement), military commissaries, predominantly WIC vendors, and free-

standing pharmacies, including free-standing pharmacy chain stores and free-standing pharmacies participating under a WIC corporate agreement, shall be placed into peer groups as follows:

- Peer Group IV - - chain stores, stores under a WIC corporate agreement (20 or more authorized vendors under one agreement), military commissaries, and predominantly WIC vendors; and
- Peer Group V - - free-standing pharmacies, including free-standing pharmacy chain stores and free-standing pharmacies participating under a WIC corporate agreement;

- (4) Annual WIC supplemental food sales is the dollar amount in sales of WIC supplemental foods at the store within a 12-month period.

- ~~(5) If a vendor applicant has at least 30 percent ownership in the applying store and at least 30 percent ownership in a store(s) already authorized, the applying store shall be placed in the peer group of the highest designation of the already authorized stores(s). Upon reauthorization of the WIC Vendor Agreement all stores held under common ownership shall be placed in the highest peer group among those held commonly. Common ownership is ownership of 30 percent or more in two or more stores.~~

- ~~(6)(5) In determining a vendor's peer group designation based on annual WIC supplemental food sales under Subparagraph (a)(2) of this Rule, the state agency shall look at the most recent 12-month period for which sales data is available of sales data. If the most recent available 12-month period of WIC sales data ends more than one year prior to the time of designation, the peer group designation shall be based on the number of cash registers in the store in accordance with Subparagraph (a)(1) of this Rule.~~

- (6) All stores held under common ownership shall be placed in the highest peer group among those commonly held. Common ownership is ownership of 30 percent or more in each of the stores commonly held.

- (7) The state agency may reassess an authorized vendor's peer group designation at any time during the vendor's agreement period and place the vendor in a different peer group if upon reassessment the state agency determines that the vendor is no longer in the appropriate peer group.

- (8) A vendor applicant previously authorized in a peer group under Subparagraph (a)(2) of this Rule that is being reauthorized following the nonrenewal or termination of its Agreement or disqualification or withdrawal from the WIC

Program shall be placed into the same peer group the vendor applicant was previously in under Subparagraph (a)(2) of this Rule, provided that no more than one year has passed since the nonrenewal, ~~termination, termination or disqualification, disqualification or withdrawal~~. If more than one year has passed, the vendor applicant shall be placed into a peer group in accordance with Subparagraph (a)(1) of this Rule.

(b) To become authorized as a WIC vendor, a vendor applicant shall comply with the following vendor selection criteria:

- (1) A vendor applicant shall accurately complete a WIC Vendor Application, a WIC Price List, and a WIC Vendor Agreement. A vendor applicant shall submit its current highest shelf price for each WIC supplemental food listed on the WIC Price List.
- (2) A vendor applicant, at the time of application and throughout the term of authorization, shall submit all completed forms to the local WIC program, except that a corporate entity operating under a WIC corporate agreement shall submit one completed WIC corporate agreement and the WIC Price Lists to the state agency and a separate WIC Vendor Application for each store to the local WIC agency. A corporate entity operating under a WIC corporate agreement may submit a single WIC Price List for those stores that have the same prices for WIC supplemental foods in each store, rather than submitting a separate WIC Price List for each store.
- (3) A vendor applicant shall agree to purchase all infant formula, exempt infant formula, and WIC-eligible medical food directly from:
 - (A) Infant formula manufacturers registered with the U.S. Food and Drug Administration;
 - (B) Food and drug wholesalers registered with the North Carolina Secretary of State and inspected or licensed by the North Carolina Department of Agriculture and Consumer Services;
 - (C) Retail food stores that purchase directly from suppliers described in Part (b)(3)(A) or Part (b)(3)(B) of this Rule; ~~from infant formula manufacturers in accordance with Part (b)(3)(A) of this Rule an approved wholesaler in accordance with Part (b)(3)(B) of this Rule~~; or
 - (D) A supplier on another state's list of approved infant formula suppliers as verified by the state that state's agency.

Authorized vendors shall agree to make available to the state or local WIC agency, upon request, invoices or receipts documenting purchases of all infant formula, exempt infant

formula, and WIC-eligible medical food ~~foods directly from the above listed sources~~. Acceptable receipts include company letterhead or name of ~~wholesaler/manufacturer, wholesaler or manufacturer with~~ date(s) of purchase and itemization of purchases reflecting infant formula, exempt infant formula, and WIC-eligible medical food purchases.

(4) A vendor applicant's current highest shelf price for each WIC supplemental food listed on the WIC Price List must not exceed the maximum price set by the state agency for each supplemental food within that vendor applicant's peer group, except as provided in Part (b)(4)(B) of this Rule.

(A) The most recent WIC Price Lists submitted by authorized vendors within the same peer group shall be used to determine the maximum price for each supplemental food. The WIC Price Lists of predominantly WIC vendors shall be excluded from the maximum price determination. The maximum price shall be the 97th percentile of the current highest shelf prices for each supplemental food within a vendor peer group. The state agency shall reassess the maximum price set for each supplemental food at least four times a year. For two of its price assessments, the state agency shall use the WIC Price Lists which must be submitted by all vendors by April 1 and October 1 each year in accordance with Subparagraph ~~(e)(30)~~ (c)(31) of this Rule. The other two price assessments shall be based on WIC Price Lists requested from a sample of vendors within each peer group in January and July of each year. The sample of vendors shall exclude predominantly WIC vendors.

(B) If any of the vendor applicant's price(s) on its WIC Price List exceed the maximum price(s) set by the state agency for that applicant's peer group, the applicant shall be notified in writing. Within 30 days of the date of the written notice, the vendor applicant may resubmit price(s) that it will charge the state WIC Program for those foods that exceeded the maximum price(s). If none of the vendor applicant's resubmitted prices exceed the maximum prices set by the state agency, the vendor applicant shall be deemed to have met the requirements of Subparagraph (b)(4) of this Rule. If any of the vendor applicant's resubmitted prices still

exceed the maximum prices set by the state agency, or the vendor applicant does not resubmit prices within 30 days of the date of written notice, the application shall be denied in writing. The vendor applicant must wait 90 days from the date of receipt of the written denial to reapply for authorization.

- (5) A vendor applicant shall pass a monitoring review by the local WIC program to determine whether the store has minimum inventory of supplemental foods as specified in Subparagraph ~~(e)(23)-(c)(24)~~ of this Rule. A vendor applicant ~~who~~that fails this review shall be allowed a second opportunity for an unannounced monitoring review within 14 days. If the applicant fails both reviews, the applicant shall wait 90 days from the date of the second monitoring review before submitting a new application.
- (6) A vendor applicant shall attend, or cause a manager or other authorized store representative to attend, WIC Vendor Training provided by the local WIC Program prior to authorization and ensure that the applicant's employees receive instruction in WIC program procedures and requirements.
- (7) An applicant shall mark the current shelf prices of all WIC supplemental foods on the foods or have the prices posted on the shelf or display case at all times.
- (8) The store shall be located at a permanent and fixed location within the State of North Carolina. The store shall be located at the address indicated on the WIC vendor application and shall be the site at which WIC supplemental foods are selected by the WIC customer.
- (9) The store shall be open throughout the year for business with the public at least six days a week for at least 40 hours per week between 8:00 a.m. and 11:00 p.m.
- (10) The store shall not use ~~either~~ the acronym "WIC" or the WIC logo, including close facsimiles, in total or in part, ~~either~~ in the official name in which the business is registered or in the name under which it does ~~business, if different, business.~~
- (11) A vendor applicant shall not submit false, erroneous, or misleading information in an application to become an authorized WIC vendor or in subsequent documents submitted to the state or local WIC agency.
- (12) The owner(s), officer(s) or manager(s) of a vendor applicant shall not be employed, or have a spouse, child, or parent who is employed by the state WIC program or the local WIC program serving the county in which the vendor applicant conducts business.
- (13) A vendor applicant shall not have an employee who handles, transacts, deposits, or stores WIC food instruments or cash-value vouchers who is employed, or has a spouse, child, or parent who is employed by the state WIC program or the local WIC program serving the county in which the vendor applicant conducts business.
- (14) WIC vendor authorization shall be denied if in the last six years any of the vendor applicant's current owners, officers, or managers have been convicted of or had a civil judgment entered against them for any activity indicating a lack of business integrity, including, fraud, antitrust violations, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, and obstruction of justice. For purposes of this Subparagraph, "convicted" or "conviction" means and includes a plea of guilty, a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established, adjudicating body, tribunal, or official, either civilian or military, or a plea of no contest, nolo contendere, or the equivalent. Entry of a prayer for judgment continued following a conviction as defined in this Rule is the same as a conviction for purposes of this Subparagraph.
- (15) A vendor applicant shall not be authorized if it is currently disqualified from the ~~Food Stamp Program-Special Nutrition Assistance Program~~ ("SNAP") or it has been assessed a ~~Food Stamp Program-SNAP~~ civil money penalty for hardship and the disqualification period that otherwise would have been imposed has not expired.
- (16) A vendor applicant, excluding chain stores and stores under a WIC corporate agreement that have a separate manager on site for each store, shall not have an owner who holds a financial interest in any of the following:
 - (A) a ~~Food Stamp-SNAP~~ vendor which is disqualified from participation in the ~~Food Stamp Program-SNAP~~ or has been assessed a civil money penalty for hardship in lieu of disqualification and the time period during which the disqualification would have run, had a penalty not been paid, is continuing; or
 - (B) another WIC vendor which is disqualified from participation in the WIC Program or which has been assessed an administrative penalty pursuant to G.S. 130A-22(c1), Paragraph (k), or Paragraph (l) of this

Rule as the result of violation of Paragraphs (g), (h)(1)(A), (h)(1)(B), (h)(1)(C), (h)(1)(D) or (h)(2)(D) of this Rule, and if assessed a penalty, the time during which the disqualification would have run, had a penalty not been assessed, is continuing.

The requirements of this Subparagraph shall not be met by the transfer or conveyance of financial interest during the period of disqualification. Additionally, the requirements of this Subparagraph shall not be met even if such transfer or conveyance of financial interest in a ~~Food Stamp-SNAP~~ vendor under Part (b)(15)(A) of this Subparagraph prematurely ends the disqualification period applicable to that ~~Food Stamp-SNAP~~ vendor. The requirements of this Subparagraph shall apply until the time the ~~Food Stamp-SNAP~~ vendor disqualification otherwise would have expired.

- (16) A vendor applicant, excluding free-standing pharmacies, must have ~~Food Stamp Program SNAP~~ authorization for the store as a prerequisite for WIC vendor authorization and must provide its ~~Food Stamp Program-SNAP~~ authorization number to the state agency.
- (17) A vendor applicant shall not become authorized as a WIC vendor if the store has been disqualified from participation in the WIC Program and the disqualification period has not expired.

(c) By signing the WIC Vendor Agreement, the vendor agrees to:

- (1) Process WIC program food instruments and cash-value vouchers in accordance with the terms of ~~this agreement, the Vendor Agreement and~~ state and federal WIC program rules, regulations and applicable law;
- (2) Accept WIC program food instruments and cash-value vouchers in exchange for WIC supplemental foods. Supplemental foods are those foods which satisfy the requirements of 10A NCAC 43D .0501;
- (3) Provide only the authorized supplemental foods listed on the food instrument, or authorized fruits and vegetables with a cash-value voucher, accurately determine the charges to the WIC program, and complete the "Pay Exactly" box on the food instrument or cash-value voucher prior to obtaining the ~~countersignature—signature~~ of the WIC customer. The WIC customer is not required to get all of the supplemental foods listed on the ~~food instrument;~~ instrument or the full dollar value of the cash-value voucher. However, a WIC customer may obtain more fruits and vegetables than the full dollar value

of a cash-value voucher if the WIC customer pays the difference;

- (4) Enter in the "Pay Exactly" box on the food instrument or cash-value voucher only the total amount of the current shelf prices, or less than the current shelf prices, for the supplemental food actually provided and shall not charge or collect sales taxes for the supplemental food provided;
- (5) Charge no more for supplemental food provided to a WIC customer than to a non-WIC customer or no more than the current shelf price, whichever is less;
- (6) Accept payment from the state WIC Program only up to the maximum price set by the state agency for each food instrument within that vendor's peer group. The maximum price for each food instrument shall be based on the maximum prices set by the state agency for each supplemental food, as described in Part (b)(4)(A) of this Rule, listed on the food instrument. A food instrument deposited by a vendor for payment which exceeds the maximum price shall be paid at the maximum price set by the state agency for that food instrument. Payment to predominantly WIC vendors for a food instrument shall not exceed the statewide average for that food instrument. This average excludes data from predominantly WIC vendors;
- ~~(7)~~ Accept payment from the state WIC Program only up to the full dollar value of the cash-value voucher;
- ~~(7)(8)~~ Not charge the state WIC Program more than the maximum price set by the state agency under Part (b)(4)(A) of this Rule for each supplemental food within the vendor's peer group;
- ~~(8)(9)~~ For non-contract brand milk-based and soy-based infant formulas, excluding exempt infant formulas, accept payment from the state WIC Program only up to the maximum price established for contract brand infant formulas under Part (b)(4)(A) of this Rule for the vendor's peer group;
- ~~(9)(10)~~ For free-standing pharmacies, provide only exempt infant formula and WIC-eligible medical foods;
- ~~(10)(11)~~ Excluding free-standing pharmacies, redeem at least two thousand dollars (\$2,000) annually in WIC supplemental food sales. Failure to redeem at least two thousand dollars (\$2,000) annually in WIC supplemental food sales shall result in termination of the WIC Vendor Agreement. The store must wait 180 days to reapply for authorization;
- ~~(11)(12)~~ Accept WIC program food instruments and cash-value vouchers only on or between the

- "Date of Issue" and the "Participant Must Use By" dates;
- (12)(13) Prior to obtaining the ~~countersignature, signature,~~ enter in the "Date Transacted" box the month, day and year the WIC food instrument or cash-value voucher is exchanged for supplemental food;
- (13)(14) Ensure that the food instrument or cash-value voucher is ~~countersigned—signed~~ in the presence of the cashier;
- (14)(15) Refuse to ~~transact acceptance of~~ any food instrument or cash-value voucher ~~on which quantities, signatures or dates have been altered; that has been altered;~~
- (15)(16) Not transact food instruments or cash-value vouchers in whole or in part for cash, credit, unauthorized foods, or non-food items;
- (16)(17) Not provide refunds or permit exchanges for authorized supplemental foods obtained with food ~~instruments, instruments or cash-value vouchers,~~ except for exchanges of an identical authorized supplemental food when the original authorized supplemental food is defective, spoiled, or has exceeded its "sell by," "best if used by," or other date limiting the sale or use of the food. An identical authorized supplemental food means the exact brand, type and size as the original authorized supplemental food obtained and returned by the WIC customer;
- (17)(18) Imprint the authorized WIC vendor stamp in the "Pay the Authorized WIC Vendor Stamped Here" box on the face of the food instrument or cash-value voucher to enable the vendor number to be read during the Program editing process;
- (18)(19) Imprint the vendor's bank deposit stamp or the vendor's name, address and bank account

Food Item
Milk

Type of Inventory

Whole fluid: gallon
-and-
Skim/lowfat fluid: gallon
Nonfat dry: quart
package
-or-

Evaporated: 12 ounce
can

Cheese

2 varieties in 8 or
16 ounce 1 pound package

Cereals

4 types: 2 types: whole grain
(minimum package size 12 ounce)

Eggs

Grade A, ~~large or~~
extra large: white
~~or brown: large, white;~~ one dozen
size carton

Juices

Frozen: 11.5 12 ounce
container

- number in the "Authorized WIC Vendor Stamp" box in the endorsement;
- (19)(20) Promptly deposit WIC program food instruments and cash-value vouchers in the vendor's bank. All North Carolina WIC program food instruments and cash-value vouchers must be deposited in the vendor's bank within 60 days of the "Date of Issue" on the food ~~instrument; instrument or cash-value voucher;~~
- (20)(21) Ensure that the authorized WIC vendor stamp is used only for the purpose and in the manner authorized by this agreement and assume full responsibility for the unauthorized use of the authorized WIC vendor stamp;
- (21)(22) Maintain storage of the authorized WIC vendor stamp so only the staff designated by the vendor owner or manager have access to the ~~authorized WIC vendor stamp~~ and immediately report loss of this stamp to the local agency;
- (22)(23) Notify the local WIC agency of misuse (attempted or actual) of ~~the~~ WIC program food ~~instrument(s); instruments or cash-value vouchers;~~
- (23)(24) Maintain a minimum inventory of supplemental foods in the store for purchase. Supplemental foods that are outside of the manufacturer's expiration date do not count towards meeting the minimum inventory requirement. The following items and sizes constitute the minimum inventory of supplemental foods for vendors in Peer Groups I through III of Subparagraph (a)(1) of this Rule, vendors in Peer Groups I through IV of Subparagraph (a)(2) of this Rule and vendors in Peer Group IV of Subparagraph (a)(3) of this Rule:

Quantities Required

~~Total of 6 gallons~~
~~fluid milk whole~~
2 gallons

4 gallons
Total of 5 quarts
when reconstituted

5 cans

Total of 6 pounds
2 pounds

6 dozen ~~2 dozen~~ Total of 12 packages ~~6 packages~~

6 dozen ~~2 dozen~~

10 containers

PROPOSED RULES

	Single strength:	10 containers
	46 ounce 48 ounce container	<u>4 containers</u>
	<u>64 ounce container</u>	<u>4 containers</u>
	Orange juice must be available in frozen and single strength. A second flavor must be available in frozen or single strength.	
Dried Peas and Beans	2 varieties: one pound package or	3 packages <u>2 packages</u>
Peanut Butter	Plain (smooth, crunchy, or whipped; No reduced fat): <u>16 to 18 ounce container</u>	3 containers <u>2 containers</u>
Infant Cereal	Plain no fruit added: <u>2 cereal grains (one must be rice);</u> 8 ounce box ; <u>box brand specified in Vendor Agreement</u>	6 box combination <u>6 boxes</u>
Infant Formula	milk-based concentrate; 13 ounce -and- soy-based concentrate; 13 ounce -and- milk-based powder; 12—14.3 <u>12.9 to 14.3</u> ounce -and- soy-based powder; 12—14.3 <u>12.9 to 14.3</u> ounce Brand specified in Vendor Agreement <u>Brands must be the primary contract infant formulas</u>	31 cans <u>34 cans</u> 15 cans <u>17 cans</u> 9 cans <u>10 cans</u> 4 cans <u>5 cans</u>
Tuna	Chunk light in water: 6-6.5 ounce can	4 cans
Carrots	Raw, canned or frozen 14.5-16 ounce size	2 packages/cans
<u>Fruits</u>	<u>14 to 16 ounce can: 2 varieties</u>	<u>6 cans</u>
<u>Vegetables</u>	<u>14 to 16 ounce can: 2 varieties</u>	<u>6 cans</u>

- All vendors in Peer Groups I through III of Subparagraph (a)(1) of this Rule, Peer Groups I through IV of Subparagraph (a)(2) of this Rule and Peer Groups IV and V of Subparagraph (a)(3) of this Rule shall supply ~~milk or milk~~, soy-based ~~infant formula in 32 ounce ready-to-feed~~ or lactose-free infant formula in 32 ounce ready-to-feed or lactose-free powder within 48 hours of request by the state or local WIC agency;
- ~~(24)~~(25) Ensure that all supplemental foods in the store for purchase are within the manufacturer's expiration date;
 - ~~(25)~~(26) Permit the purchase of supplemental food without requiring other purchases;
 - ~~(26)~~(27) Attend, or cause a manager or other authorized store representative to attend, annual vendor training ~~class~~ upon notification ~~of class~~ by the local agency;
 - ~~(27)~~(28) Inform and train vendor's cashiers and other staff on WIC Program requirements;
 - ~~(28)~~(29) Be accountable for the actions of its owners, officers, managers, agents, and employees who commit vendor violations;
 - ~~(29)~~(30) Allow monitoring and inspection of the store premises and procedures to ensure compliance with the agreement and state and federal WIC Program rules, regulations and statutes. This includes ~~allowance of~~ allowing access to all WIC food instruments and cash-value vouchers at the store, vendor records pertinent to the purchase and sale of WIC supplemental foods, including invoices, copies of purchase orders, and any other proofs of purchase, federal and state corporate and individual

income tax and sales and use tax returns and all records pertinent to these returns, and books and records of all financial and business transactions. These records must be retained by the vendor for a period of three years or until any audit pertaining to these records is resolved, whichever is later. Failure or inability to provide these records or providing false records for an inventory audit shall be deemed a violation of 7 C.F.R. 246.12(l)(1)(iii)(B) and Subparagraph (g)(1) of this Rule;

- (~~30~~)(31) Submit a current accurately completed WIC Price List when signing this agreement, and by April 1 and October 1 of each year. The vendor also agrees to submit a WIC Price List within one week of any written request by the state or local WIC agency. Failure to submit a WIC Price List as required by this Subparagraph within 30 days of the required submission date shall result in disqualification of the vendor from the WIC Program in accordance with Part (h)(1)(D) of this Rule;
- (~~31~~)(32) Reimburse the state agency within 30 days of written notification of a claim assessed due to a vendor violation that affects payment to the vendor or a claim assessed due to the unauthorized use of the ~~authorized~~ WIC vendor stamp. The state agency shall deny payment or assess a claim in the amount of the full purchase price of each food instrument or cash-value voucher ~~rendered~~ invalid under Subparagraphs (a)(2), (a)(5), (a)(6) or (a)(7) of Rule .0704 of this Section. Denial of payment by the state agency or payment of a claim by the vendor for a vendor violation(s) shall not absolve the vendor of the violation(s). The vendor shall also be subject to any vendor sanctions authorized under this Rule for the vendor violation(s);
- (~~32~~)(33) Not seek restitution from the WIC customer for reimbursement paid by the vendor to the state agency or for WIC food instruments or cash-value vouchers not paid or partially paid by the state agency. Additionally, the vendor shall not charge the WIC customer for authorized supplemental foods obtained with food ~~instruments; instruments or cash-value vouchers;~~
- (~~33~~)(34) Not contact a WIC customer outside the store regarding the transaction or redemption of WIC food ~~instruments; instruments or cash-value vouchers;~~
- (~~34~~)(35) Notify the local WIC agency in writing at least 30 days prior to a change of ownership, change in location, cessation of operations, or withdrawal from the WIC Program. Change of ownership, change in location of more than three miles from the vendor's previous

location, cessation of operations, withdrawal from the WIC Program or disqualification from the WIC Program shall result in termination of the WIC Vendor Agreement by the state agency. Change of ownership, change in location, ceasing operations, withdrawal from the WIC Program or nonrenewal of the WIC Vendor Agreement shall not stop a disqualification period applicable to the store;

- (~~35~~)(36) Return the authorized WIC vendor stamp to the local WIC agency upon termination of this ~~agreement~~ Agreement or disqualification from the WIC Program;
- (~~36~~)(37) Offer WIC customers the same courtesies as offered to other customers;
- (~~37~~)(38) Not provide incentive items to WIC customers unless each incentive item is less than two dollars (\$2.00) in cost to the vendor in accordance with ~~federal regulations~~ 42 USC 1786(h)(14). If incentive items are offered to WIC customers, no more than one incentive item per visit is permitted. Vendors shall not provide to WIC customers transportation to or from the vendor's premises, delivery of supplemental foods, lottery tickets, ~~not or~~ cash gifts. The limitations of this Subparagraph apply only to predominantly WIC vendors;
- (~~38~~)(39) Reapply to continue to be authorized beyond the period of its current WIC Vendor Agreement. Additionally, a store must reapply to become authorized following the expiration of a disqualification period or termination of the Agreement. In all cases, the vendor applicant shall be subject to the vendor selection criteria of Paragraph (b) of this Rule; and
- (~~39~~)(40) Comply with all the requirements for vendor applicants of Subparagraphs (~~b~~)(3), (b)(4) and (b)(7) through (b)(16) of this Rule throughout the term of authorization. The state agency may reassess a vendor at any time during the vendor's period of authorization to determine compliance with these requirements. The state agency shall terminate the WIC Vendor Agreement of any vendor that fails to comply with Subparagraphs (b)(4), (b)(8), (b)(9), (b)(12), (b)(13) or (b)(15) of this Rule during the vendor's period of authorization, and terminate the Agreement of or sanction or both any vendor that fails to comply with Subparagraphs (~~b~~)(3), (b)(7), (~~b~~)(10), (b)(11), (b)(14) or (b)(16) of this Rule during the vendor's period of authorization.

(d) By signing the WIC Vendor Agreement, the local agency agrees to the following:

- (1) Provide annual vendor training ~~classes~~ on WIC procedures and rules;

- (2) Monitor the vendor's performance under this ~~agreement~~ Agreement to ensure compliance with the ~~agreement~~ Agreement and state and federal WIC program rules, regulations, and applicable law. A minimum of one-third of all authorized vendors shall be monitored within a contract year (October 1 through September 30) and all vendors shall be monitored at least once within three consecutive contract years. Any vendor shall be monitored within one week of written request by the state agency;
 - (3) Provide vendors with the North Carolina WIC Vendor Manual, all Vendor Manual amendments, blank WIC Price Lists, and the authorized WIC vendor stamp indicated on the signature page of the WIC Vendor Agreement; and
 - (4) Assist the vendor with questions which may arise under this ~~agreement~~ Agreement or through the vendor's participation in the WIC ~~Program; and Program.~~
 - (5) ~~Keep records of the transactions between the parties under this agreement pursuant to 10A NCAC 43D .0206.~~
- (e) ~~In order for~~ For a food retailer or free-standing pharmacy to participate in the WIC ~~Program~~ Program, a current WIC Vendor Agreement must be signed by the vendor, the local WIC agency, and the state agency.
- (f) If an application for status as an authorized WIC vendor is denied, the applicant is entitled to an administrative appeal as described in Section .0800 of this Subchapter.
- (g) Title 7 C.F.R. 246.12(l)(1)(i) through (vi) and (xii) are incorporated by reference with all subsequent amendments and editions. In accordance with 7 CFR 246.12(l)(1)(i), the state agency shall not allow imposition of a civil money penalty in lieu of disqualification for a vendor permanently disqualified. A pattern, as referenced in 7 CFR 246.12 (l)(1)(iii)(B) through (F) and 246.12(l)(1)(iv), shall be established as follows:
- (1) claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for six or more days within a 60-day period. The six or more days do not have to be consecutive days within the 60-day period. Failure or inability to provide records or providing false records required under Subparagraph ~~(e)(29)(c)(30)~~ of this Rule for an inventory audit shall be deemed a violation of 7 C.F.R. 246.12(l)(1)(iii)(B) and this Subparagraph;
 - (2) two occurrences of vendor overcharging within a 12-month period;
 - (3) two occurrences of receiving, transacting or redeeming food instruments or cash-value vouchers outside of authorized channels, including the use of an unauthorized vendor or an unauthorized person within a 12-month period;
 - (4) two occurrences of charging for supplemental food not received by the WIC customer within a 12-month period;
 - (5) two occurrences of providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food instruments or cash-value vouchers within a 12-month period; or
 - (6) three occurrences of providing unauthorized food items in exchange for food ~~instruments;~~ instruments or cash-value vouchers, including charging for supplemental food provided in excess of those listed on the food instrument within a 12-month period.
- (h) Title 7 C.F.R. Section 246.12(l)(2)(i) is incorporated by reference with all subsequent amendments and editions. Except as provided in 7 C.F.R. 246.12 (l)(1)(xii), a vendor shall be disqualified from the WIC Program for the following state-established violations in accordance with the sanction system below. The total period of disqualification shall not exceed one year for state-established violations investigated as part of a single investigation, as defined in Paragraph (i) of this Rule:
- (1) When a vendor commits any of the following violations, the state-established disqualification period shall be:
 - (A) 90 days for each occurrence of failure to properly transact a WIC food instrument or cash-value voucher by not completing the date or purchase price on the WIC food instrument or cash-value voucher before obtaining the ~~countersignature~~ signature, by not obtaining the ~~countersignature signature~~ signature in the presence of the cashier, or by accepting a WIC food instrument or cash-value voucher prior to the "Date of Issue" or after the "Participant Must Use By" dates on the food ~~instrument;~~ instrument or cash-value voucher;
 - (B) 60 days for each occurrence of requiring a cash purchase to transact a WIC food ~~instrument;~~ instrument or cash-value voucher;
 - (C) 30 days for each occurrence of requiring the purchase of a specific brand when more than one WIC supplemental food brand is available; and
 - (D) 30 days for each occurrence of failure to submit a WIC Price List as required by Subparagraph ~~(e)(30)(c)(31)~~ of this Rule.
 - (2) When a vendor commits any of the following violations, the vendor shall be assessed sanction points as follows for each occurrence:
 - (A) 2.5 points for:

- (i) stocking WIC supplemental foods outside of the manufacturer's expiration date; or
 - (ii) unauthorized use of the "WIC" acronym or the WIC logo ~~in accordance with Paragraph (b)(10) of this Rule.~~ logo.
- (B) 5 points for:
- (i) failure to attend annual vendor training;
 - (ii) failure to stock minimum inventory;
 - (iii) failure to mark the current shelf prices of all WIC supplemental foods on the foods or have the prices posted on the shelf or display case; or
 - (iv) ~~offering improper incentives, free merchandise, or services by a predominantly WIC vendor in accordance with~~ failure of a predominantly WIC vendor to comply with Subparagraph (e)(37)(c)(38) of this Rule. Rule regarding incentive items and services.
- (C) 7.5 points for:
- (i) discrimination on the basis of WIC participation (separate WIC lines, denying trading stamps, etc.); or
 - (ii) contacting a WIC customer in an attempt to recoup funds for a food instrument(s) or a cash-value voucher(s) or contacting a WIC customer outside the store regarding the transaction or redemption of a WIC food instrument(s) or a cash-value voucher(s).
- (D) 15 points for:
- (i) failure to allow monitoring of a store by WIC staff when required;
 - (ii) failure to provide WIC food ~~instrument(s) instruments or~~ cash-value vouchers for review when requested;
 - (iii) failure to provide store inventory records when requested by WIC staff, except as provided in Subparagraph (e)(29)(c)(30) and Subparagraph (g)(1) of this Rule for failure or inability to provide records for an inventory audit;
- (iv) nonpayment of a claim ~~made~~ assessed by the state agency;
 - (v) providing false information on vendor records (application, vendor agreement, price list, WIC food ~~instrument(s),~~ instruments, cash-value vouchers or monitoring forms), except as provided in Subparagraph (e)(29)(c)(30) and Subparagraph (g)(1) of this Rule for providing false records for an inventory audit; or
 - (vi) failure to purchase infant formula, exempt infant formula, and WIC-eligible medical food from an authorized ~~supplier.~~ supplier as required by Subparagraphs (b)(3) and (c)(40) of this Rule.
- (3) For the violations listed in Subparagraph (h)(2) of this Rule, all sanction points assessed against a vendor remain on the vendor's record for 12 months or until the vendor is disqualified as a result of those points. If a vendor accumulates 15 or more points, the vendor shall be disqualified. The nature of the violation(s) and the number of violations, as represented by the points assigned in Subparagraph (h)(2) of this Rule, are used to calculate the period of disqualification. The formula used to calculate the disqualification period is the number of points assigned to the violation carrying the highest number of sanction points multiplied by 18 days. Additionally, if the vendor has accumulated more than 15 points, 18 days shall be added to the disqualification period for each point over 15 points.
- (i) For investigations pursuant to this Section, a single investigation is:
- (1) Compliance buy(s) conducted by undercover investigators within a 12-month period to detect the following violations:
 - (A) buying or selling food instruments or cash-value vouchers for cash (trafficking);
 - (B) selling firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food ~~instruments;~~ instruments or cash-value vouchers;

- (C) selling alcohol or alcoholic beverages or tobacco products in exchange for food ~~instruments;~~instruments or cash-value vouchers;
 - (D) vendor overcharging;
 - (E) receiving, transacting, or redeeming food instruments or cash-value vouchers outside of authorized channels, including the use of an unauthorized vendor or an unauthorized person;
 - (F) charging for supplemental food not received by the WIC customer;
 - (G) providing credit or non-food items, other than alcohol, alcoholic beverages, tobacco products, cash, firearms, ammunition, explosives, or controlled substances as defined in 21 U.S.C. 802, in exchange for food ~~instruments;~~instruments or cash-value vouchers;
 - (H) providing unauthorized food items in exchange for food ~~instruments;~~instruments or cash-value vouchers, including charging for supplemental food provided in excess of those listed on the food instrument;
 - (I) failure to properly transact a WIC food ~~instrument;~~instrument or cash-value voucher;
 - (J) requiring a cash purchase to transact a WIC food ~~instrument;~~instrument or cash-value voucher; or
 - (K) requiring the purchase of a specific brand when more than one WIC supplemental food brand is available.
- (2) Monitoring reviews of a vendor conducted by WIC staff within a 12-month period which detect the following violations:
- (A) failure to stock minimum inventory;
 - (B) stocking WIC supplemental food outside of the manufacturer's expiration date;
 - (C) failure to allow monitoring of a store by WIC staff when required;
 - (D) failure to provide WIC food ~~instrument(s)–instruments or cash-value vouchers~~ for review when requested;
 - (E) failure to provide store inventory records when requested by WIC staff; ~~or~~
 - (F) failure to mark the current shelf prices of all WIC supplemental foods on the foods or have the prices posted on the shelf or display ~~ease-case;~~
 - (G) failure of a predominantly WIC vendor to comply with Subparagraph (c)(38) of this Rule regarding incentive items and services; or
 - (H) unauthorized use of the "WIC" acronym or the logo.
- (3) Any other method used by the state or local agency to detect the following violations by a vendor within a 12-month period:
- (A) failure to attend annual vendor training;
 - (B) failure to submit a WIC Price List as required by Subparagraph ~~(e)(30)~~(c)(31) of this Rule;
 - (C) discrimination on the basis of WIC participation (separate WIC lines, denying trading stamps, etc.);
 - (D) contacting a WIC customer in an attempt to recoup funds ~~or for food instrument(s)–instruments or cash-value vouchers~~ or contacting a WIC customer outside the store regarding the transaction or redemption of WIC food ~~–instruments;~~ instruments or cash-value vouchers;
 - (E) nonpayment of a claim ~~made~~assessed by the state agency;
 - (F) providing false information on vendor records (application, vendor agreement, price list, WIC food ~~instrument(s)–instruments, cash-value vouchers or monitoring forms); or~~
 - (G) claiming reimbursement for the sale of an amount of a specific supplemental food item which exceeds the store's documented inventory of that supplemental food item for a specific period of time, or failure or inability to provide records or providing false records required under Subparagraph ~~(e)(29)~~(c)(30) of this Rule for an inventory ~~audit;~~ audit; or
 - (H) failure to purchase infant formula, exempt infant formula or WIC–eligible medical foods from an authorized supplier.
- (j) The ~~Food Stamp Program~~SNAP disqualification provisions in 7 C.F.R. 246.12(1)(1)(vii) are incorporated by reference with all subsequent amendments and editions.
- (k) The participant access provisions of 7 C.F.R. 246.12(1)(1)(ix) and 246.12(1)(8) are incorporated by reference with all subsequent amendments and editions. The existence of any of the factors listed in Parts (1)(3)(A), (1)(3)(B) or (1)(3)(C) of this Rule shall conclusively show lack of inadequate participant access provided there is no geographic barrier, such as an impassable mountain or river, to using the other authorized WIC vendors referenced in these Subparagraphs. The agency shall not consider other indicators of inadequate participant access when any of these factors exist.

(l) The following provisions apply to civil money penalties assessed in lieu of disqualification of a vendor:

- (1) The civil money penalty formula in 7 C.F.R. 246.12(l)(1)(x) is incorporated by reference with all subsequent amendments and editions, provided that the vendor's average monthly redemptions shall be calculated by using the six-month period ending with the month immediately preceding the month during which the notice of administrative action is dated.
- (2) The state agency may also impose civil money penalties in accordance with G.S. 130A-22(c1) in lieu of disqualification of a vendor for the state-established violations listed in Paragraph (h) of this Rule when the state agency determines that disqualification of a vendor would result in participant hardship in accordance with Subparagraph (l)(3) of this Rule.
- (3) In determining whether to disqualify a WIC vendor for the state-established violations listed in Paragraph (h) of this Rule, the agency shall not consider other indicators of hardship if any of the following factors, which conclusively show lack of hardship, are found to exist:
 - (A) the noncomplying vendor is located outside of the limits of a city, as defined in G.S. 160A-2, and another WIC vendor is located within seven miles of the noncomplying vendor;
 - (B) the noncomplying vendor is located within the limits of a city, as defined in G.S. 160A-2, and another WIC vendor is located within three miles of the noncomplying vendor; or
 - (C) a WIC vendor, other than the noncomplying vendor, is located within one mile of the local agency at which WIC participants pick up their food ~~instruments.~~instruments or cash-value vouchers.
- (4) The provisions for failure to pay a civil money penalty in 7 C.F.R. 246.12(l)(6) are incorporated by reference with all subsequent amendments and editions.

(m) The provisions of 7 C.F.R. 246.12(l)(1)(viii) prohibiting voluntary withdrawal from the WIC Program or nonrenewal of the WIC Vendor Agreement as an alternative to disqualification are incorporated by reference with all subsequent amendments and editions.

(n) The provision in ~~7 C.F.R. 246.12(l)(3)~~42 USC 1786 (f)(26) regarding prior warning to vendors is incorporated by reference with all subsequent amendments and editions.

(o) The state agency may ~~set off~~offset payments to an authorized vendor if the vendor fails to reimburse the state agency in accordance with Subparagraph ~~(e)(31)~~(c)(32) of this Rule.

(p) In accordance with 7 C.F.R. 246.12(l)(7) or 246.12(u)(5) or both, North Carolina's procedures for dealing with abuse of the WIC program by authorized WIC vendors do not exclude or replace any criminal or civil sanctions or other remedies that may be applicable under any federal ~~and or~~ state law.

(q) Notwithstanding other provisions of this Rule, for the purpose of providing a one-time payment to a non-authorized store for WIC food instruments or cash-value vouchers accepted by the store, an agreement for a one-time payment need only be signed by the store manager and the state agency. The store may request such one-time payment directly from the state agency. The store manager shall sign an agreement indicating that the store has provided foods as prescribed on the food ~~instrument,~~ instrument or as allowed with the cash-value voucher, charged current shelf prices or less than current shelf prices, not charged sales tax, and verified the identity of the WIC customer. Any agreement entered into in this manner shall automatically terminate upon payment of the food ~~instrument~~in question. ~~instruments or cash-value vouchers.~~ After entering into an agreement for a one-time payment, a non-authorized store shall not be allowed to enter into any further one-time payment agreements for WIC food instruments or cash-value vouchers accepted thereafter.

(r) Except as provided in 7 C.F.R. 246.18(a)(2), an authorized WIC vendor shall be given at least 15 days advance written notice of any adverse action which affects the vendor's participation in the WIC Program. The vendor appeal procedures shall be in accordance with 10A NCAC 43D .0800.

Authority *G.S. 130A-361; 7 C.F.R. 246; 42 U.S.C. 1786.*

SECTION .1000 - CONSULTATION SERVICES

10A NCAC 43D .1001 ADMINISTRATION

~~The Nutrition Services Section administers the special food service program according to the federal regulations promulgated under 42 U.S.C. sec. 1761.~~

Authority *G.S. 130A-361; 42 U.S.C. 1761.*

10A NCAC 43D .1003 PUBLIC HEALTH DIETITIANS

~~(a) Public Health Dietitians are assigned to each regional office of the DEHNR.~~

~~(b) The Public Health Dietitian shall have the following responsibilities:~~

- ~~(1) to provide technical assistance to administrators, dietitians, and food supervisors of facilities in hospitals, homes for the aged, child care centers, day care centers, and confinement facilities;~~
- ~~(2) to assess the needs of groups and facilities and to plan, develop, and implement nutrition programs for them;~~
- ~~(3) to provide for or direct surveys of facilities for licensure;~~
- ~~(4) to provide technical assistance to architects and equipment specialists in planning and evaluating food service department physical facilities; and~~

- (5) ~~to provide education programs and staff development for professional and auxiliary institution and nutrition staffs.~~

Authority G.S. 130A-361.

10A NCAC 43D .1004 NUTRITION PROGRAM CONSULTANTS

~~(a) One nutrition program consultant is assigned to each regional office of the Department of Human Resources.~~

~~(b) The nutrition program consultant shall have the following responsibilities:~~

- ~~(1) to develop and implement public health nutrition programs within the Department of Human Resources region;~~
- ~~(2) to provide technical assistance to local health officers, nutritionists, nurses and other professional personnel in planning, developing, supervising, and evaluating nutritional aspects of public health programs;~~
- ~~(3) to coordinate nutritional programs within and between health agencies;~~
- ~~(4) to provide inservice for professionals and paraprofessionals;~~
- ~~(5) to interpret nutrition findings and research to individuals and groups; and~~
- ~~(6) to develop educational materials, to provide service to individuals through local health workers, and to develop standards for nutritional care.~~

Authority G.S. 130A-361.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to adopt the rule cited as 15A NCAC 02D .1010 and amend the rules cited as 15A NCAC 02D .0405, .0409, .0410; 02Q .0518, and .0521.

Proposed Effective Date: September 1, 2009

Public Hearing:

Date: March 31, 2009

Time: 6:00 p.m.

Location: The Kannapolis Train Station, 201 South Main Street, Kannapolis, NC 28081

Public Hearing:

Date: April 1, 2009

Time: 6:00 p.m.

Location: 2728 Capital Boulevard, Division of Air Quality Training Room AQ526, Raleigh, NC 27604

Reason for Proposed Action:

15A NCAC 02D .0405 – This Rule is proposed for amendment to adjust the ambient air quality standards to match the United States Environmental Protection Agency (USEPA) 8-hour ozone standard.

15A NCAC 02D .0409 – This Rule is proposed for amendment to adjust the ambient air quality standards to match the USEPA standard for PM10.

15A NCAC 02D .0410 – This Rule is proposed for amendment to adjust the ambient air quality standard for daily PM2.5 to the USEPA standard which was strengthened in 2006 (in 40 CFR Part 50).

15A NCAC 02Q .0518 – This Rule is proposed for amendment to replace the newspaper publishing requirements for public notices on the issuance of the final actions with a requirement to post these public notices on the DAQ web site.

15A NCAC 02Q .0521 – This Rule is proposed amendment to replace the newspaper publishing requirements for public notices on the issuance of the draft permits and permit revisions, except permit revisions issued under Rules 15A NCAC .0514, .0515, .0524, with a requirement to post these public notices on the DAQ web site.

15A NCAC 02D .1010 – This Rule is proposed for adoption to reduce nitrogen oxide (NOx) and particulate emissions from heavy-duty trucks (both gasoline and diesel fueled) through the reduction of unnecessary idling.

Procedure by which a person can object to the agency on a proposed rule: *Anyone who has objections to the proposed rules may mail a letter including the specific reasons for objection to Mr. Michael Abraczinskas, Division of Air Quality, 1641 Mail Service Center, Raleigh, NC 27699-1641.*

Comments may be submitted to: *Mr. Michael Abraczinskas, Division of Air Quality, 1641 Mail Service Center, Raleigh, NC 27699-1641, phone (919) 715-3473, fax (919) 715-7476, email michael.abraczinskas@ncmail.net*

Comment period ends: May 15, 2009

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. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact: **A copy of the fiscal note can be obtained from the agency.**

- State** 15A NCAC 02Q .0518, .0521; and 02D .1010
- Local** 15A NCAC 02D .1010

- Substantive (>\$3,000,000)
- None: 15A NCAC 02D .0405, .0409, .0410

These rules have insignificant impacts. – 15A NCAC 02Q .0518 and .0521

Fiscal Note posted at

http://www.osbm.state.nc.us/files/pdf_files/DENR02162009.pdf -
- 15A NCAC 02D .1010

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02D - AIR POLLUTION CONTROL REQUIREMENTS

SECTION .0400 - AMBIENT AIR QUALITY STANDARDS

15A NCAC 02D .0405 OZONE

The ambient air quality standard for ozone measured by a reference method based on Appendix D of 40 CFR Part 50 and designated according to 40 CFR Part 53 is ~~0.08~~ 0.075 parts per million (ppm), daily maximum 8-hour average. The standard is attained at an ambient air quality monitoring site when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to ~~0.08~~ 0.075 parts per million (ppm) as determined by ~~Appendix I~~ Appendix P of 40 CFR Part 50, or equivalent methods established under 40 CFR Part 53.

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

15A NCAC 02D .0409 PM10 PARTICULATE MATTER

(a) The ambient air quality ~~standards~~ standard for PM10 particulate matter ~~are:~~ is

- (1) 150 micrograms per cubic meter (ug/m3), 24-hour average ~~concentration.~~ concentration; and
- (2) ~~50 micrograms per cubic meter (ug/m3), annual arithmetic mean.~~

~~These standards are~~ This standard is attained when ~~the annual arithmetic mean concentration is less than or equal to 50 ug/m3, and when the 99th percentile 24 hour concentration is less than or equal to 150 ug/m3, as determined according to Appendix N of 40 CFR Part 50. 50, is not exceeded more than once per year on average over a three-year period.~~

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

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

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

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

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

- (1) 15.0 micrograms per cubic meter (ug/m3), annual arithmetic mean concentration; and
- (2) ~~65~~ 35 micrograms per cubic meter (ug/m3), 24-hour average concentration.

These standards are attained when the annual arithmetic mean concentration is less than or equal to 15.0 ug/m3 and when the 98th percentile 24-hour concentration is less than or equal to ~~65~~ 35 ug/m3, as determined according to Appendix N of 40 CFR Part 50.

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

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

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

SECTION .1000 - MOTOR VEHICLE EMISSION CONTROL STANDARD

15A NCAC 02D .1010 HEAVY-DUTY VEHICLE IDLING RESTRICTIONS

(a) Applicability. The requirements of this Rule apply to on-road heavy-duty vehicles powered in-part or entirely by an internal combustion engine.

(b) Definitions. For the purposes of this Rule, the following definitions apply:

- (1) "Auxiliary power unit" means a mechanical or electrical device affixed to a vehicle that is designed to be used to generate an alternative source of power for any of the vehicle's systems other than the primary propulsion engine;
- (2) "Congestion" means a situation which occurs when the volume of traffic exceeds the capacity of a roadway;
- (3) "Emergency" means a situation that poses an immediate risk to health, life, property, or environment;
- (4) "Emergency vehicle" means any vehicle that responds to or supports an emergency. These vehicles are operated by part of the government, charities, non-governmental organizations, and commercial companies;
- (5) "Gross vehicle weight rating" means the weight specified by the manufacturer as the loaded weight of a single vehicle;
- (6) "Heavy-duty vehicle" means a motor vehicle (excluding trailer(s)) with a gross vehicle weight rating of 10,001 pounds or greater for the purpose of this Rule;

- (7) "Idling" means the operation of a motor vehicle's propulsion engine while the vehicle is stationary;
- (8) "Military vehicle" means a motor vehicle owned by the U.S. Department of Defense;
- (9) "Motor vehicle" means any self-propelled vehicle used for transporting property or persons;
- (10) "Passenger bus" means any bus, including school buses, which is designed to carry 16 or more passengers;
- (11) "Power take off" means a device used to transfer mechanical energy from a heavy-duty vehicle's propulsion engine to equipment that supplies mechanical, pneumatic, hydraulic, or electric power to non-vehicular mechanical, pneumatic, hydraulic, or electrically operated devices; and
- (12) "Queue area" means an area used by heavy-duty vehicles waiting to provide or receive services.
- (13) "On-road vehicle" means a self-propelled vehicle that is designed for use on a highway.

- (9) A passenger bus when non-driver passengers are on board the vehicle and up to 20 minutes prior to passengers boarding;
- (10) Heavy-duty vehicles may idle to provide customer climate controlled comfort during periods of providing customer services (e.g., library bookmobile, blood mobile, safety shoe and safety glasses vendors). This exemption does not apply when idling only for driver comfort; and
- (11) Heavy-duty vehicles may idle if when operating defrosters, heaters, air conditioners, or other equipment solely to prevent a safety or health emergency.

(d) Requirements.

- (1) No person who owns or operates a heavy-duty vehicle shall cause, let, permit, suffer or allow idling for a period of time in excess of five consecutive minutes in any 60 minute period.
- (2) Heavy-duty vehicles located in a queue area are not exempted from this Rule.

Authority: G.S. 143-215.3(a)(1); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.107(b).

(c) Exemptions. The following exemptions to idle restrictions apply to this Rule:

- (1) Heavy-duty vehicles may idle if they remain motionless due to traffic conditions, traffic control devices or signals, congestion, or at the direction of law enforcement officials;
- (2) Emergency vehicles may idle while performing an emergency or training function. This exemption does not apply when idling only for driver comfort;
- (3) Military vehicles;
- (4) Heavy-duty vehicles may idle main propulsion engines to operate power take offs to perform the heavy-duty vehicle's designed functions (e.g., refrigeration of cargo, processing of cargo, dumping, lifting, hoisting, drilling, mixing, loading, unloading, other operations requiring the use of power take offs). This exemption does not apply when idling only for driver comfort;
- (5) Heavy-duty vehicles may idle if following manufacturer's recommendations for cold engine startup and engine cool-down, maintenance, inspection, servicing, repairing, or diagnostic purposes, if idling is required for such activity;
- (6) Heavy-duty vehicles with an occupied sleeper berth compartment may idle for the purposes of air conditioning or heating during federally mandated rest or sleep periods. This exemption shall expire on May 1, 2011;
- (7) Auxiliary power units;
- (8) Heavy-duty vehicles with a primary diesel engine meeting the nitrogen oxide idling emission standard in Title 13, of the California Code of Regulations, Section 1956.8(a)(6)(C);

SUBCHAPTER 02Q - AIR QUALITY PERMITS PROCEDURES

SECTION .0500 - TITLE V PROCEDURES

15A NCAC 02Q .0518 FINAL ACTION

(a) The Director may:

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

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

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

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

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

(f) Thirty days after issuing a permit, including a permit issued pursuant to Rule .0509 of this Section, that is not challenged by the applicant, the Director shall notice the issuance of the final permit. The notice shall be issued ~~in a newspaper of general circulation in the area where the facility is located.~~ on the North Carolina Division of Air Quality web site. The notice shall include the name and address of the facility and permit number.

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

15A NCAC 02Q .0521 PUBLIC PARTICIPATION

(a) The Director shall give public notice with an opportunity for comments and a hearing on all draft permits and permit revisions except permit revisions issued under Rules .0514, .0515, .0524 of this Section. The Director may give public notice with an opportunity for comments and a hearing on draft permit revisions issued under Rule .0514, .0515, .0524 of this Section.

(b) The notice ~~of any draft permit for an existing facility for which a public hearing is scheduled,~~ or new facilities, shall be given by publication in a newspaper of general circulation in the area where the facility is ~~located~~ located, posting on the North Carolina Division of Air Quality web site, and shall be ~~mailed~~ emailed to persons who are on the Division's ~~mailing~~ emailing list for air quality permits.

(c) The notice for existing facilities for which a public hearing is not scheduled shall be given by posting the draft permit on the North Carolina Division of Air Quality web site, and shall be emailed to persons who are on the Division's emailing list for air quality permit notices.

~~(e)~~(d) The notice shall identify:

- (1) the affected facility;
- (2) the name and address of the permittee;
- (3) the name and address of the person to whom to send comments and requests for public hearing;
- (4) the name, address, and telephone number of Divisional staff from whom interested persons may obtain additional information, including copies of the permit draft, the application, compliance plan, monitoring and compliance reports, all other relevant supporting materials, and all other materials available to Division that are relevant to the permit decision;
- (5) the activity or activities involved in the permit action;
- (6) any emissions change involved in any permit modification;
- (7) a brief description of the comment procedures;
- (8) the procedures to follow to request a hearing unless a hearing has already been scheduled; and
- (9) the time and place of any hearing that has already been scheduled.

~~(d)~~(e) The Director shall send a copy of the notice to affected States and EPA.

~~(e)~~(f) The notice shall allow 30 days for public comments.

~~(f)~~(g) If the Director finds that a public hearing is in the best interest of the public, the Director shall require a public hearing to be held on a draft permit. Notice of a public hearing shall be given at least 30 days before the hearing.

~~(g)~~(h) If EPA requests a record of the comments and of the issues raised during the public participation process, the Director shall provide EPA this record.

~~(h)~~(i) Persons who desire to be placed on the Division's ~~mailing~~ email notification list for air quality permit notices ~~shall send their request to the~~ subscribe to the permits email list serve at <http://www.ncair.org/permits/>. ~~Director, Division of Air Quality, P.O. Box 29580, Raleigh, North Carolina 27626-0580 and shall pay an annual fee of thirty dollars (\$30.00).~~

~~(i) Any persons requesting copies of material identified in Subparagraph (e)(4) of this Rule shall pay ten cents (\$0.10) a page for every page copied. Confidential material shall be handled in accordance with Rule .0107 of this Subchapter.~~

Authority G.S. 143-215.3(a)(1),(3); 143-215.107(a)(10); 143-215.108; 143-215.111(4).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 16 – BOARD OF DENTAL EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. State Board of Dental Examiners intends to amend the rules cited as 21 NCAC 16B .0501; 16C .0501; 16Q .0101, .0301, .0401, .0402, .0501.

Proposed Effective Date: July 1, 2009

Public Hearing:

Date: April 30, 2009

Time: 6 p.m.

Location: N.C. Dental Board Office, 507 Airport Blvd., Morrisville, NC 27560

Reason for Proposed Action:

21 NCAC 16B .0501 – This Rule is proposed for amendment to clarify that applicants for dental licensure by credentials must have held an active, unrestricted dental license issued by another U.S. state or territory for the five years immediately preceding the application date.

21 NCAC 16C .0501 – This Rule is proposed for amendment to clarify that applicants for licensure as a hygienist by credentials must have held an active, unrestricted dental license issued by another U.S. state or territory for the five years immediately preceding the application date.

21 NCAC 16Q .0101 – This Rule is proposed for amendment to define anxiolysis to include provision of a single dose of a minor psychosedative the night before a procedure, followed by a single dose of a minor psychosedative on the day of treatment,

before treatment begins and that nitrous oxide may also be administered on the day of treatment.

21 NCAC 16Q .0301 – This Rule is proposed for amendment to clarify the three routes for qualification to administer moderate conscious sedation or moderate pediatric conscious sedation. Pursuant to 21 NCAC 16Q .0301(c)(1), an applicant must complete a Board approved 60 hour didactic course in addition to PALS or its age specific equivalent or satisfactorily manage a minimum of 10 patients, under supervision using IV. Pursuant to 21 NCAC 16Q .0301(c)(3) as proposed, the applicant must complete a U.S. pediatric internship or residency approved by CODA. Paragraph (d) of this Rule is proposed for amendment to provide that a dentist who holds a moderate conscious sedation permit may qualify to administer moderate pediatric conscious sedation by completing a pediatric dental degree or pediatric residency approved by CODA. Paragraph (e) of this Rule is proposed for amendment to require applicants for permits to administer moderate conscious sedation, moderate pediatric conscious sedation or moderate conscious sedation limited to oral routes to demonstrate competency in the areas listed in 21 NCAC 16Q .0401(d)(2)-(4). Paragraph (i) of this Rule is proposed for reorganization. No substantive changes to the Rule are contemplated.

21 NCAC 16Q .0401 – Paragraph (f) of this Rule is proposed for adoption to provide that a dentist who seeks a permit to administer minimal conscious sedation must comply with the facility requirements set out in 21 NCAC 16Q .0302.

21 NCAC 16Q .0402 – This Rule is proposed for amendment to delete an outdated definition of anxiolysis and refer to the definition of anxiolysis included in 21 NCAC 16Q .0101(3).

21 NCAC 16Q .0501 – Paragraph (c) of this Rule is proposed for amendment to require applicants for renewal of a general anesthesia permit to document current completion of BLS, rather than annual completion of BLS. Paragraph (d) of this Rule is proposed for amendment to provide that applicants for renewal of a moderate conscious sedation permit or moderate pediatric conscious sedation permit need not document current ACLS training. The amendment would also make it clear that moderate pediatric conscious sedation permit holders must have current PALS training to renew their permits.

Procedure by which a person can object to the agency on a proposed rule: Written objections may be sent to Bobby D. White, Chief Operations Officer, N.C. Dental Board, 507 Airport Boulevard, Ste. 105, Morrisville, NC 27560.

Comments may be submitted to: Bobby D. White, 507 Airport Boulevard, Ste. 105, Morrisville, NC 27560

Comment period ends: May 16, 2009

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. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in

G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:

- State
- Local
- Substantive (≥\$3,000,000)
- None

SUBCHAPTER 16B - LICENSURE DENTISTS

SECTION .0500 – LICENSURE BY CREDENTIALS

21 NCAC 16B .0501 DENTAL LICENSURE BY CREDENTIALS

(a) An applicant for a dental license by credentials shall submit to the Board:

- (1) a completed, notarized application form provided by the Board;
- (2) the licensure by credentials fee;
- (3) an affidavit from the applicant stating for the five years immediately preceding application:
 - (A) the dates that and locations where the applicant has practiced dentistry;
 - (B) that the applicant has provided at least 5000 hours of clinical care directly to patients, not including post graduate training, residency programs or an internship;
 - (C) that the applicant has continuously held an active, unrestricted dental license issued by another U.S. state or any U.S. territory;
- (4) if applicable, a statement disclosing and explaining any disciplinary actions, investigations, malpractice claims, state or federal agency complaints, judgments, settlements, or criminal charges;
- (5) if applicable, a statement disclosing and explaining periods, within the last 10 years, of observation, assessment, or treatment for substance abuse, with verification demonstrating that the applicant has complied with all provisions and terms of any county or state drug treatment program, or impaired dentists or other impaired professionals program;
- (6) a copy of a current course completion certification card in cardiopulmonary resuscitation; and
- (7) a statement disclosing whether or not the applicant holds or has ever held a registration with the federal Drug Enforcement Administration (DEA) and whether such

registration has ever been surrendered, surrendered for cause, or revoked.

(b) In addition to the requirements of Paragraph (a) of this Rule, an applicant for a dental license by credentials shall arrange for and ensure the submission to the Board office, the following documents as a package, with each document in an unopened envelope sealed by the entity involved:

- (1) official transcripts from the applicant's dental school verifying that the applicant has graduated from a dental school accredited by the Commission on Dental Accreditation of the American Dental Association;
- (2) if the applicant is or has ever been employed as a dentist by or under contract with a federal agency, a letter certifying the applicant's current status and disciplinary history from each federal agency where the applicant is or has been employed or under contract;
- (3) certificate of the applicant's licensure status from the dental regulatory authority or other occupational or professional regulatory authority and complete information regarding any disciplinary action taken or investigation pending, from all licensing jurisdictions where the applicant holds or has ever held a dental license or other occupational or professional license;
- (4) a report from the National Practitioner Databank;
- (5) a report of any pending or final malpractice actions against the applicant verified by the malpractice insurance carrier covering the applicant. The applicant must submit a letter of coverage history from all current and all previous malpractice insurance carriers covering the applicant;
- (6) a score certification letter from a dental professional regulatory board or regional testing agency of a passing score on a clinical licensure examination substantially equivalent to the clinical licensure examination required in North Carolina and such examination shall be administered by the dental professional regulatory board or its designated agent other than an educational institution.

- (A) Such certification shall state that the examination included procedures performed on human subjects as part of the assessment of restorative clinical competencies and shall have included evaluations in at least four of the following subject areas:
 - (i) periodontics, clinical abilities testing;
 - (ii) endodontics, clinical abilities testing;
 - (iii) amalgam preparation and restoration;

- (iv) anterior composite preparation and restoration;
- (v) posterior ceramic or composite preparation and restoration;
- (vi) cast gold, clinical abilities testing;
- (vii) prosthetics, written or clinical abilities testing;
- (viii) oral diagnosis, written or clinical abilities testing; or
- (ix) oral surgery, written or clinical abilities testing.

(B) In addition to the foregoing requirements, to be eligible for consideration for equivalency, a licensure examination after January 1, 1998 shall include:

- (i) anonymity between candidates and examination raters;
- (ii) standardization and calibration of raters; and
- (iii) a mechanism for post exam analysis;

(7) the applicant's passing score on the Dental National Board Part I and Part II written examination administered by the Joint Commission on National Dental Examinations; and

(8) the applicant's passing score on the licensure examination in general dentistry conducted by a regional testing agency or independent state licensure examination substantially equivalent to the clinical licensure examination required in North Carolina as set out in Subparagraph (b)(6) of this Rule.

(c) All information required must be completed and received by the Board office as a complete package with the initial application and application fee. If all of the information is not received as a complete package, the application shall be returned to the applicant.

(d) All applicants shall submit to the Board a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of the application.

(e) An applicant for dental licensure by credentials must successfully complete written examinations as set out in G.S. 90-36 and, if deemed necessary based on the applicant's history, a clinical simulation examination administered by the Board. If the applicant fails any of the examinations, the applicant may retake the examination failed two additional times during a one year period.

(f) Should the applicant reapply for licensure by credentials, an additional licensure by credentials fee shall be required.

(g) Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

Authority G.S. 90-28; 90-36.

SUBCHAPTER 16C - LICENSURE DENTAL HYGIENISTS

SECTION .0500 – LICENSURE BY CREDENTIALS

21 NCAC 16C .0501 DENTAL HYGIENE LICENSURE BY CREDENTIALS

(a) An applicant for a dental hygiene license by credentials shall submit to the Board:

- (1) a completed, notarized application form provided by the Board;
(2) the licensure by credentials fee;
(3) an affidavit from the applicant stating:
(A) the dates that and locations where the applicant has practiced dental hygiene;
(B) that the applicant has provided at least 2000 hours of clinical care directly to patients, during the two years immediately preceding application;
(C) that the applicant has continuously held an active, unrestricted dental hygiene license issued by another U.S. state or any U.S. territory;
(4) a statement disclosing and explaining any disciplinary actions, investigations, malpractice claims, state or federal agency complaints, judgments, settlements, or criminal charges;
(5) if applicable, a statement disclosing and explaining periods, within the last 10 years, of observation, assessment, or treatment for substance abuse, with verification demonstrating that the applicant has complied with all provisions and terms of any county or state drug treatment program, or impaired dental hygiene or other impaired professionals program; and
(6) a copy of a current course completion certification card in cardiopulmonary resuscitation.

(b) In addition to the requirements of Paragraph (a) of this Rule, an applicant for a dental hygiene license by credentials shall arrange for and ensure the submission to the Board office, the following documents as a package, with each document in an unopened envelope sealed by the entity involved:

- (1) official transcripts certifying that the applicant has graduated from a dental hygiene program accredited by the Commission on Dental Accreditation of the American Dental Association;
(2) if the applicant is or has ever been employed as a dentist or dental hygienist by or under contract with a federal agency, a certification letter of the applicant's current status and disciplinary history from each federal agency where the applicant is or has been employed or under contract;

- (3) certificate of the applicant's licensure status from the regulatory authority or other occupational or professional regulatory authority and information regarding all disciplinary actions taken or investigations pending, from all licensing jurisdictions where the applicant holds or has ever held a dental hygiene license or other occupational or professional license;
(4) a report from the National Practitioner Databank, if reporting is required or allowed by federal law;
(5) a report of any pending or final malpractice actions against the applicant verified by the malpractice insurance carrier covering the applicant. The applicant must submit a letter of coverage history from all current and all previous malpractice insurance carriers covering the applicant;
(6) the applicant's passing score on the National Board Dental Hygiene Examination administered by the Joint Commission on National Dental Examinations; and
(7) the applicant's passing score on the licensure examination conducted by a regional testing agency or independent state licensure examination that is substantially equivalent to the clinical licensure examination required in North Carolina.

(c) All information required must be completed and received by the Board office as a complete package with the initial application and application fee. If all of the information is not received as a complete package, the application shall be returned to the applicant.

(d) All applicants shall submit to the Board a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of the application.

(e) An applicant for dental hygiene licensure by credentials must successfully complete written examinations and, if deemed necessary based on the applicant's history, a clinical simulation examination administered by the Board. If the applicant fails any of the examinations, the applicant may retake the examination failed two additional times during a one year period.

(f) Should the applicant reapply for licensure by credentials, an additional licensure by credentials fee shall be required.

(g) Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

Authority G.S. 90-223; 90-224.1.

SUBCHAPTER 16Q - GENERAL ANESTHESIA AND SEDATION

SECTION .0100 – DEFINITIONS

21 NCAC 16Q .0101 GENERAL ANESTHESIA AND SEDATION DEFINITIONS

For the purpose of these Rules relative to the administration of minimal conscious sedation, moderate conscious sedation, moderate conscious sedation limited to oral routes or nitrous oxide inhalation, moderate pediatric conscious sedation or general anesthesia by or under the direction of a dentist, the following definitions shall apply:

- (1) "Analgesia" – the diminution or elimination of pain.
- (2) "Anti-anxiety sedative" – a sedative agent administered in a dosage intended to reduce anxiety without diminishing consciousness or protective reflexes.
- (3) "Anxiolysis" – pharmacological reduction of anxiety through the administration of a single dose of a minor psychosedative ~~psychosedative, possibly in combination with nitrous oxide~~, to children or adults on the night before the appointment, followed by an additional single dose of a minor psychosedative prior to commencement of treatment on the day of the appointment which allows for uninterrupted interactive ability in a totally awake patient with no compromise in the ability to maintain a patent airway continuously and without assistance. Nitrous oxide may be administered on the day of treatment in addition to the minor psychosedative without constituting multiple dosing for purpose of these Rules.
- (4) "Behavior control" – the use of pharmacological techniques to control behavior to a level that dental treatment can be performed effectively and efficiently.
- (5) "Behavioral management" – the use of pharmacological or psychological techniques, singly or in combination, to modify behavior to a level that dental treatment can be performed effectively and efficiently.
- (6) "Competent" – displaying special skill or knowledge derived from training and experience.
- (7) "Conscious sedation" - an induced state of a depressed level of consciousness that retains the patient's ability to independently and continuously maintain an airway and respond appropriately to physical stimulation and verbal command, and that is produced by pharmacologic or non-pharmacologic agents, or a combination thereof. In accordance with this particular definition, the drugs or techniques used shall carry a margin of safety wide enough to render unintended loss of consciousness unlikely.
- (8) "Deep sedation" – an induced state of a depressed level of consciousness accompanied by partial loss of protective reflexes, including the ability to continually maintain an airway

- (9) "Direct supervision" – the dentist responsible for the sedation/anesthesia procedure shall be physically present in the facility and shall be continuously aware of the patient's physical status and well being.
- (10) "Facility" – the location where a permit holder practices dentistry and provides anesthesia/sedation services.
- (11) "Facility inspection" - an on-site inspection to determine if a facility where the applicant proposes to provide anesthesia/sedation is supplied, equipped, staffed and maintained in a condition to support provision of anesthesia/sedation services that meet the minimum standard of care.
- (12) "General anesthesia" -- the intended controlled state of a depressed level of consciousness that is produced by pharmacologic agents and accompanied by a partial or complete loss of protective reflexes, including the ability to maintain an airway and respond purposefully to physical stimulation or verbal commands.
- (13) "Immediately available" – on-site in the facility and available for immediate use.
- (14) "Local anesthesia" – the elimination of sensations, especially pain, in one part of the body by the regional application or injection of a drug.
- (15) "May" – indicates freedom or liberty to follow a reasonable alternative.
- (16) "Minimal conscious sedation" – conscious sedation characterized by a minimally depressed level of consciousness, in which patient retains the ability to independently and continuously maintain an airway and respond normally to tactile stimulation and verbal command, provided to patients 13 years or older, by oral or rectal routes of administration of a single pharmacological agent, in one or more doses, not to exceed the manufacturer's maximum recommended dose, at the time of treatment, possibly in combination with nitrous oxide. Minimal conscious sedation is provided for behavioral management.
- (17) "Minor psychosedative/Minor tranquilizer" – pharmacological agents which allow for uninterrupted interactive ability in a patient with no compromise in the ability to maintain a patent airway continuously and without assistance and carry a margin of safety wide enough to render unintended loss of consciousness unlikely.
- (18) "Moderate conscious sedation" – conscious sedation characterized by a drug induced depression of consciousness, during which patients respond purposefully to verbal

commands, either alone or accompanied by light tactile stimulation, provided to patients 13 years or older, by oral, nasal, rectal or parenteral routes of administration of multiple pharmacological agents, in multiple doses, within a 24 hour period, including the time of treatment, possibly in combination with nitrous oxide. Moderate conscious sedation is provided for behavior control.

- (19) "Moderate conscious sedation limited to oral routes and nitrous oxide inhalation" – conscious sedation characterized by a drug induced depression of consciousness during which patients respond purposefully to verbal commands, either alone or accompanied by light tactile stimulation, provided to patients 13 years or older, by oral routes of administration and nitrous oxide inhalation, of single or multiple pharmacological agents, in single or multiple doses, within a 24 hour period. Moderate conscious sedation limited to oral routes and nitrous oxide inhalation is provided for behavior control.
- (20) "Moderate pediatric conscious sedation" -- conscious sedation characterized by a drug induced depression of consciousness, during which patients respond purposefully to verbal commands, either alone or accompanied by light tactile stimulation, provided to patients under 13 years of age, by oral, nasal, rectal or parenteral routes of administration of single or multiple pharmacological agents, in single or multiple doses, within a 24 hour period, including the time of treatment, possibly in combination with nitrous oxide. Moderate pediatric conscious sedation is provided for behavior control.
- (21) "Must" or "shall" – indicates an imperative need or duty or both; an essential or indispensable item; mandatory.
- (22) "Parenteral" --the administration of pharmacological agents intravenously, intraosseously, intramuscularly, subcutaneously, submucosally, intranasally, or transdermally.
- (23) "Protective reflexes" – includes the ability to swallow and cough.
- (24) "Supplemental dosing" – the oral administration of a pharmacological agent that results in an enhanced level of conscious sedation when added to the primary sedative agent administered for the purpose of oral moderate conscious sedation, and which, when added to the primary agent, does not exceed the maximum safe dose of either agent, separately or synergistically.
- (25) "Vested adult" – a responsible adult who is the legal parent or guardian, or designee of a legal parent or guardian, entrusted with the care of a

minor following the administration of general anesthesia or conscious sedation.

Authority G.S. 90-28; 90-30.1.

SECTION .0300 - PARENTERAL CONSCIOUS SEDATION

21 NCAC 16Q .0301 CREDENTIALS AND PERMITS FOR MODERATE CONSCIOUS SEDATION, MODERATE PEDIATRIC CONSCIOUS SEDATION AND MODERATE CONSCIOUS SEDATION LIMITED TO ORAL ROUTES OF ADMINISTRATION AND NITROUS OXIDE

(a) Before a dentist licensed to practice in North Carolina may administer or supervise a certified registered nurse anesthetist (CRNA) to administer moderate conscious sedation, moderate pediatric conscious sedation or moderate conscious sedation limited to oral routes of administration and nitrous oxide to dental patients on an outpatient basis, the dentist shall obtain a permit from the Board by completing an application form provided by the Board and paying a fee of one hundred dollars (\$100.00). Such permit shall be renewed annually and shall be displayed with the current renewal at all times in a conspicuous place in the facility of the permit holder.

(b) For a dentist to employ a certified registered nurse anesthetist to administer moderate conscious sedation, moderate conscious sedation limited to oral routes and nitrous oxide or moderate pediatric conscious sedation, the dentist must demonstrate through the permitting process that he/she is capable of performing all duties and procedures to be delegated to the CRNA. The dentist must not delegate said CRNA to perform procedures outside of the scope of the technique and purpose of moderate conscious sedation, moderate pediatric conscious sedation or moderate conscious sedation limited to oral routes and nitrous oxide as defined in Rule .0101 of this Subchapter.

(c) A dentist applying for a permit to administer moderate conscious sedation or moderate pediatric conscious sedation must meet at least one of the following criteria:

- (1) Satisfactory completion of a Board approved course that provides a minimum of 60 hours of didactic training, including PALS, in addition to PALS or age-specific equivalent, and instruction in intravenous conscious sedation and satisfactory management of a minimum of 10 patients, under supervision, using intravenous sedation; or
- (2) Satisfactory completion of a pre-doctoral dental or postgraduate program which included intravenous conscious sedation training equivalent to that defined in Subparagraph (c)(1) of this Rule; or
- (3) Satisfactory completion of ~~an~~ a U.S. pediatric internship or U.S. pediatric residency approved by the Commission on Dental Accreditation, which included intravenous conscious sedation training equivalent to that defined in Subparagraph (c)(1) of this Rule; or

(d) A dentist may modify his/her moderate conscious sedation permit to include the privilege of moderate pediatric conscious sedation by completing a ~~Board approved~~ pediatric dental degree or pediatric dental residency program approved by the Commission on Dental Accreditation or obtaining the equivalent hours of continuing education program in pediatric dental anesthesia. If said qualifications are satisfied, it shall be so designated on the dentist's moderate conscious sedation permit and will be subject to the renewal requirements stated in .0501(d) of this Subchapter.

(e) To be eligible for a moderate conscious sedation permit, moderate conscious sedation limited oral routes and nitrous oxide inhalation or moderate pediatric conscious sedation permit, a dentist must operate within a facility which includes the capability of delivering positive pressure oxygen, and is staffed with supervised auxiliary personnel for each procedure performed. The dentist shall ensure that auxiliary personnel document annual, successful completion of basic life support (BLS) training and are capable of assisting with procedures, problems and emergencies incident thereto.

(f) Prior to issuance of a moderate conscious sedation permit, moderate conscious pediatric sedation permit or moderate conscious sedation permit limited to oral routes and nitrous oxide inhalation permit, the applicant shall undergo an evaluation which includes a facility inspection. The Board shall direct an evaluator to perform this evaluation. The applicant shall be notified in writing that an evaluation and facility inspection is required and provided with the name of the evaluator who shall perform the evaluation and facility inspection. The applicant shall be responsible for successful completion of the evaluation and inspection of his or her facility within three months of notification. An extension of no more than 90 days shall be granted if the designated evaluator or applicant requests one. The dentist will demonstrate competency in the areas set out in Rule .0401(d)(2) – (4) of this Subchapter.

(g) The evaluator shall assign a grade of pass or fail and shall report his recommendation to the Board, setting out the basis for his conclusion. The Board is not bound by the evaluator's recommendation and shall make a final determination regarding whether the applicant has passed the evaluation. The applicant shall be notified of the Board's decision in writing.

(h) A dentist who holds a moderate conscious sedation, moderate conscious sedation limited to oral routes and nitrous oxide inhalation or moderate pediatric conscious sedation permit shall not intentionally administer deep sedation although deep sedation may occur briefly and unintentionally.

(i) A dentist may obtain a moderate conscious sedation permit limited to oral routes of administration and nitrous oxide inhalation, including the ability to add supplemental dosing to the techniques set out in Rule .0101(23) of this Subchapter upon compliance with the following requirements:

- (1) successfully complete 24 hours of Board approved didactic training and manage at least 10 adult case experiences, including at least three live clinical dental experiences. The live clinical cases shall not be handled by groups with more than five participants. The remaining cases may include simulations,

video presentations or both, but must include one experience in returning/rescuing a patient from deep to moderate sedation; or

~~(2) document, with patient names and dates of completion, at least 100 cases of oral moderate conscious sedation procedures successfully completed within one year preceding the effective date of these Rules; and~~

~~(3) fulfill all the requirements listed in .0401 for minimal conscious sedation, moderate sedation, or~~

(2) document, with patient names and dates of completion, at least 100 cases of oral moderate conscious sedation procedures successfully completed between July 3, 2007 and July 3, 2008 and fulfill all the requirements listed in Rule .0401 of this Subchapter for minimal conscious sedation.

(j) A dentist who is qualified to administer general anesthesia, moderate conscious sedation or moderate pediatric conscious sedation and holds a general anesthesia, moderate conscious sedation permit or a moderate pediatric conscious sedation permit may administer minimal conscious sedation without obtaining a separate minimal conscious sedation permit.

(k) Any dentist who holds an active parenteral conscious sedation permit as of the effective date of these amendments shall be deemed to hold an active moderate conscious sedation permit. Such permits shall be subject to the renewal requirements set out in .0501 of this Subchapter.

Authority G.S. 90-28; 90-30.1.

SECTION .0400 - ENTERAL CONSCIOUS SEDATION

21 NCAC 16Q .0401 MINIMAL CONSCIOUS SEDATION CREDENTIALS, EVALUATION AND PERMIT

(a) Before a dentist licensed to practice in North Carolina may administer or supervise a certified registered nurse anesthetist to administer minimal conscious sedation, the dentist shall obtain a Board-issued permit for minimal conscious sedation, moderate pediatric conscious sedation, moderate conscious sedation or general anesthesia. A permit is not required for prescription administration of DEA controlled drugs prescribed for postoperative pain control intended for home use. A dentist may obtain a minimal conscious sedation permit from the Board by completing an application form provided by the Board and paying a fee of one hundred dollars (\$100.00). Such permit must be renewed annually and shall be displayed with the current renewal at all times in a conspicuous place in the office of the permit holder.

(b) Only a dentist who holds a general anesthesia license may administer deep sedation or general anesthesia.

(c) Application:

- (1) A minimal conscious sedation permit may be obtained by completing an application form provided by Board, a copy of which may be obtained from the Board office, and meeting

the requirements of Section .0400 of this Subchapter.

- (2) The application form must be filled out completely and appropriate fees paid.
- (3) An applicant for a minimal conscious sedation permit shall be licensed and in good standing with the Board in order to be approved. For purposes of these Rules "good standing" means that the applicant is not subject to a disciplinary investigation and his or her license has not been revoked or suspended and is not subject to a probation or stayed suspension order.

(d) Evaluation:

- (1) Prior to issuance of a minimal conscious sedation permit the applicant shall undergo a facility inspection. The Board shall direct an evaluator qualified to administer minimal sedation to perform this inspection. The applicant shall be notified in writing that an inspection is required and provided with the name of the evaluator who shall perform the inspection. The applicant shall be responsible for successful completion of inspection of his or her facility within three months of notification. An extension of no more than 90 days shall be granted if the designated evaluator or applicant requests one.
- (2) During an inspection or evaluation, the applicant or permit holder shall demonstrate competency in the following areas:
 - (A) Monitoring of blood pressure, pulse, pulse oximetry and respiration;
 - (B) Drug dosage and administration (by verbal demonstration);
 - (C) Treatment of untoward reactions including respiratory or cardiac depression (by verbal demonstration);
 - (D) Sterilization;
 - (E) Use of CPR certified personnel;
 - (F) Monitoring of patient during recovery (by verbal demonstration); and
 - (G) Sufficiency of patient recovery time (by verbal demonstration).
- (3) During an inspection or evaluation, the applicant or permit holder shall verbally demonstrate competency to the evaluator in the treatment of the following clinical emergencies:
 - (A) Laryngospasm;
 - (B) Bronchospasm;
 - (C) Emesis and aspiration;
 - (D) Respiratory depression and arrest;
 - (E) Angina pectoris;
 - (F) Myocardial infarction;
 - (G) Hypertension/Hypotension;
 - (H) Syncope;
 - (I) Allergic reactions;
 - (J) Convulsions;

- (K) Bradycardia;
- (L) Insulin shock; and
- (M) Cardiac arrest.

- (4) The evaluator shall assign a grade of pass or fail and shall report his recommendation to the Board, setting out the basis for his conclusion. The Board is not bound by the evaluator's recommendation and shall make a final determination regarding whether the applicant has passed the evaluation. The applicant shall be notified of the Board's decision in writing.

(e) Educational/Professional Requirements:

- (1) The dentist applying for a minimal conscious sedation permit shall meet one of the following criteria:
 - (A) successful completion of training consistent with that described in Part I or Part III of the American Dental Association (ADA) Guidelines for Teaching the Comprehensive Control of Pain and Anxiety in Dentistry, and have documented administration of minimal conscious sedation in a minimum of five cases;
 - (B) successful completion of an ADA accredited post-doctoral training program which affords comprehensive training necessary to administer and manage minimal conscious sedation;
 - (C) successful completion of an 18-hour minimal conscious sedation course which must be approved by the Board based on whether it affords comprehensive training necessary to administer and manage minimal conscious sedation;
 - (D) successful completion of an ADA accredited postgraduate program in pediatric dentistry; or
 - (E) is a North Carolina licensed dentist in good standing who has been using minimal conscious sedation in a competent manner for at least one year immediately preceding October 1, 2007 and his or her office facility has passed an on-site inspection by a Board evaluator as required in Paragraph (d) of this Rule. Competency shall be determined by presentation of successful administration of minimal conscious sedation in a minimum of five clinical cases.
- (2) All applicants for a minimal sedation permit must document successful completion of a Basic Life Saving (BLS) course within the 12 months prior to the date of application.

(f) A dentist administering minimal conscious sedation must ensure that the facility meets the requirements set out in Rule .0302(a) of this Subchapter.

Authority G.S. 90-28; 90-30.1.

21 NCAC 16Q .0402 MINIMAL CONSCIOUS SEDATION PERMIT REQUIREMENTS, CLINICAL PROVISIONS AND EQUIPMENT

(a) Minimal conscious sedation is indicated for use only as defined in Rule .0101(15) of this Subchapter (relating to Definitions). Minimal conscious sedation is not indicated for use to achieve deep sedation.

(b) A minimal conscious sedation permit is not required for minor psychosedatives used for anxiolysis, as defined in Rule .0101(3) of this Subchapter. ~~anxiolysis—prescribed for administration outside of the dental office when pre-procedure instructions are likely to be followed.~~ Medication administered for the purpose of minimal conscious sedation shall not exceed the maximum doses recommended by the drug manufacturer, sedation textbooks, or juried sedation journals. Except for nitrous inhalation, drugs in combination are not permitted for minimal conscious sedation. During longer periods of minimal conscious sedation, in which the amount of time of the procedures exceeds the effective duration of the sedative effect of the drug used, the incremental doses of the sedative shall not exceed total safe dosage levels based on the effective half-life of the drug used.

(c) Each dentist shall:

- (1) adhere to the clinical requirements as detailed in Paragraph (e) of this Rule;
- (2) maintain under continuous direct supervision any auxiliary personnel, who shall be capable of assisting in procedures, problems, and emergencies incident to the use of minimal conscious sedation or secondary to an unexpected medical complication;
- (3) utilize sufficient auxiliary personnel for each procedure performed who shall document ~~current annual~~ successful completion of basic life support training; and
- (4) not allow a minimal conscious sedation procedure to be performed in his or her office by a Certified Registered Nurse Anesthetist (CRNA) unless the dentist holds a permit issued by the Board for the procedure being performed. This provision addresses dentists and is not intended to address the scope of practice of persons licensed by any other agency.

(d) Each dentist shall meet the following requirements:

- (1) **Patient Evaluation.** Patients who are administered minimal conscious sedation must be evaluated for medical health risks prior to the start of any sedative procedure. A patient receiving minimal conscious sedation must be healthy or medically stable (ASA I, or ASA II as defined by the American Society of Anesthesiologists). An evaluation is a review

of the patient's current medical history and medication use. However, for individuals who are not medically stable or who have a significant health disability Physical Status III (ASA III, as defined by the American Society of Anesthesiologists) a consultation with their primary care physician or consulting medical specialist regarding potential procedure risk is required.

- (2) **Pre-procedure preparation, informed consent:**
 - (A) The patient or guardian must be advised of the procedure associated with the delivery of the minimal conscious sedation.
 - (B) Equipment must be evaluated and maintained for proper operation.
 - (C) Baseline vital signs shall be obtained at the discretion of the operator depending on the medical status of the patient and the nature of the procedure to be performed.
 - (D) Dentists administering minimal conscious sedation shall use sedative agents that he/she is competent to administer and shall administer such agents in a manner that is within the standard of care.

(e) **Patient monitoring:**

- (1) Patients who have been administered minimal conscious sedation shall be monitored during waiting periods prior to operative procedures. An adult who has accepted responsibility for the patient and been given written pre-procedural instruction may provide such monitoring. The patient shall be monitored for alertness, responsiveness, breathing and skin coloration.
- (2) Dentists administering minimal conscious sedation shall maintain direct supervision of the patient during the operative procedure and for such a period of time necessary to establish pharmacologic and physiologic vital sign stability.
 - (A) **Oxygenation.** Color of mucosa, skin or blood shall be continually evaluated. Oxygen saturation shall be evaluated continuously by pulse oximetry, except as provided in Paragraph (e)(4) of this Rule.
 - (B) **Ventilation.** Observation of chest excursions or auscultation of breath sounds or both shall be performed.
 - (C) **Circulation.** Blood pressure and pulse shall be taken and recorded initially and thereafter as appropriate except as provided in Paragraph (e)(4) of this Rule.
 - (D) **AED.** Dentists administering minimal conscious sedation shall maintain a

functioning automatic external defibrillator (AED).

- (3) An appropriate time oriented anesthetic record of vital signs shall be maintained in the permanent record including documentation of individual(s) administering the drug and showing the name of drug, strength and dosage used.
- (4) If the dentist responsible for administering minimal conscious sedation must deviate from the requirements set out in this Rule, he or she shall document the occurrence of such deviation and the reasons for such deviation.

(f) Post-operative procedures:

- (1) Following the operative procedure, positive pressure oxygen and suction equipment shall be immediately available in the recovery area or operatory.
- (2) Vital signs shall be continuously monitored when the sedation is no longer being administered and the patient shall have direct continuous supervision until oxygenation and circulation are stable and the patient is sufficiently responsive for discharge from the office.
- (3) Patients who have adverse reactions to minimal conscious sedation shall be assisted and monitored either in an operatory chair or recovery area until stable for discharge.
- (4) Recovery from minimal conscious sedation shall include:
 - (A) cardiovascular function stable;
 - (B) airway patency uncompromised;
 - (C) patient easily arousable and protective reflexes intact;
 - (D) state of hydration within normal limits;
 - (E) patient can talk, if applicable;
 - (F) patient can sit unaided, if applicable;
 - (G) patient can ambulate, if applicable, with minimal assistance; and
 - (H) for the patient who is disabled, or incapable of the usually expected responses, the pre-sedation level of responsiveness or the level as close as possible for that patient shall be achieved.
- (5) Prior to allowing the patient to leave the office, the dentist shall determine that the patient has met the recovery criteria set out in Paragraph (f)(4) of this Rule and the following discharge criteria:
 - (A) oxygenation, circulation, activity, skin color and level of consciousness are sufficient and stable and have been documented;
 - (B) explanation and documentation of written postoperative instructions

have been provided to the patient or a responsible adult at time of discharge; responsible individual is available for the patient to transport the patient after discharge;

- (C)
- (D) A vested adult must be available to transport patients for whom a motor vehicle restraint system is required and an additional responsible individual must be available to attend to the patients.

(g) The dentist, personnel and facility shall be prepared to treat emergencies that may arise from the administration of minimal conscious sedation, and shall have the ability to provide positive pressure ventilation with 100% oxygen with an age appropriate device.

Authority G.S. 90-28; 90-30.1.

SECTION .0500 - RENEWAL OF PERMITS

21 NCAC 16Q .0501 ANNUAL RENEWAL REQUIRED

(a) General anesthesia and all sedation permits shall be renewed by the Board annually. Such renewal shall be accomplished in conjunction with the license renewal process, and applications for permits shall be made at the same time as applications for renewal of licenses. A one hundred (\$100.00) annual renewal fee shall be paid at the time of renewal.

(b) All sedation permits shall be subject to the same renewal deadlines as are dental practice licenses, in accordance with G.S. 90-31. If the permit renewal application is not received by the date specified in G.S. 90-31, continued administration of general anesthesia or any level of conscious sedation shall be unlawful and shall subject the dentist to the penalties prescribed by Section .0700 of this Subchapter.

(c) As a condition for renewal of the general anesthesia permit, the permit holder shall meet the requirements of 21 NCAC 16Q .0202 and document current, successful completion of advanced cardiac life support (ACLS) training, or its age-specific equivalent or other equivalent course, and auxiliary personnel shall document ~~current annual~~, successful completion of basic life support (BLS) training.

(d) As a condition for renewal of the moderate conscious sedation permit or moderate pediatric conscious sedation permit, the permit holder shall meet the requirements of 21 NCAC 16Q .0302 and the following criteria:

- (1) document annual, successful completion of BLS training and obtain three hours of continuing education each year in one or more of the following areas, which may be counted toward fulfillment of the continuing education required each calendar year for license renewal:
 - (A) sedation;
 - (B) medical emergencies;
 - (C) monitoring IV sedation and the use of monitoring equipment;

- (D) pharmacology of drugs and agents used in IV sedation;
- (E) physical evaluation, risk assessment, or behavioral management; or
- (F) audit ACLS/Pediatric Advanced Life Support (PALS) ~~courses, courses; or~~

- (2) document current, successful completion of ACLS training or its age-specific equivalent, or other equivalent course and annual successful completion of ~~BLS; and BLS.~~
- ~~(3) moderate pediatric conscious sedation permit holders must have current PALS at all times.~~

(e) Moderate pediatric conscious sedation permit holders must have current PALS at all times.

~~(f)~~ As a condition for renewal of the minimal conscious sedation permit and the moderate conscious sedation permit limited to oral routes and nitrous oxide inhalation, the permit holder shall meet the requirements of 16Q .0402 and shall document annual, successful completion of BLS training and obtain six hours of continuing education every two years in one or more of the following areas, which may be counted toward fulfillment of the continuing education required each calendar year for license renewal:

- (1) pediatric or adult sedation;
- (2) medical emergencies;
- (3) monitoring sedation and the use of monitoring equipment;
- (4) pharmacology of drugs and agents used in sedation;
- (5) physical evaluation, risk assessment, or behavioral management; or
- (6) audit ACLS/PALS courses.

~~(g)~~ Any dentist who fails to renew a general anesthesia or sedation permit on or before March 31 of each year must complete a reinstatement application, pay the one hundred dollar (\$100.00) renewal fee and a one hundred dollar (\$100.00) penalty and comply with all conditions for renewal set out in this Rule for the permit sought. Dentists whose anesthesia or sedation permits have been lapsed for more than 12 calendar months must pass a facilities inspection as part of the reinstatement process.

Authority G.S. 90-28; 90-30.1; 90-48.

CHAPTER 30 - BOARD OF MASSAGE AND BODYWORK THERAPY

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Massage and Bodywork Therapy intends to amend the rule cited as 21 NCAC 30 .0602.

Proposed Effective Date: August 1, 2009

Public Hearing:
Date: April 16, 2009
Time: 11:00 a.m.

Location: Wachovia Capital Center, 13th Floor Conference Room, 150 Fayetteville St., Raleigh, NC 27601

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

Procedure by which a person can object to the agency on a proposed rule: Any person may object to this proposed amendment by submitting a written statement to Charles P. Wilkins at PO Box 2539, Raleigh, NC 27602, postmarked on or before June 1, 2009.

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

Comment period ends: June 1, 2009

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. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:
 State
 Local
 Substantive (≥\$3,000,000)
 None

SECTION .0600 - MASSAGE AND BODYWORK THERAPY SCHOOLS

21 NCAC 30 .0602 DEFINITIONS

The following definitions shall apply to this Section:

- (1) Accreditation; accredited. – Status granted to a post-secondary institution of higher learning that has met standards set by an accrediting agency recognized by the Secretary of the United States Department of Education.
- (2) Additional location. – A facility not part of, nor adjoining the facility of an approved school, where an approved school intends to offer a program. Each such location is considered a separate school, requiring a new Application for School Approval to be submitted to the Board.

- (3) Additional program. – A program that is of a different title, subject matter, or that increases or decreases by more than 10 percent the number of hours of instruction than the program under which the school received its initial approval from the Board. An approved school that intends to offer an additional program shall submit an Application for Additional Program Approval.
- (4) College. – An institution of higher learning that awards an Associate degree or higher.
- ~~(4)~~(5) Instructor. – A person who meets the qualifications set forth Rule .0612 who is responsible for delivering course content according to curricula established by the school, and who is responsible for managing the classroom environment.
- ~~(5)~~(6) Key administrative staff. – The school's program director, director of education, and other administrative staff members who direct key areas such as operations, admissions, financial aid, placement, or student services.
- ~~(6)~~(7) Massage and bodywork therapy school. – Any educational institution that conducts a program, as defined in this Rule, for a tuition charge. Such institutions may be organized as proprietary schools, that are privately owned and operated by a sole proprietor, partnership, corporation, association, or other entity; or may be post-secondary colleges or universities, whether publicly or privately owned.
- ~~(7)~~(8) One classroom hour of supervised instruction. – At least 50 minutes of any one clock hour during which the student participates in a learning activity in the physical presence of a member of the school's instructional staff.
- ~~(8)~~(9) One year of professional experience. – In determining the qualifications of administrative or instructional staff members, at least 500 hours of documentable work in the professional job responsibility or subject area in a given year.
- ~~(9)~~(10) Program. – A course of study or curriculum consisting of a specified number hours of instruction consistent with the standards set forth in Rule .0620 that is intended to teach adults the skills and knowledge necessary for the professional practice of massage and bodywork therapy, as defined in G.S. 90-622(3). Each program of a specified number of instructional hours shall be considered a separate program for the purposes of Board approval, and shall require a separate application for approval.
- ~~(10)~~(11) Student enrollment. – The total number of students at an approved school in a designated year who have begun a program for which they have registered and paid a fee in said

fiscal year, and who have completed more than 15 percent of such program.

~~(11)~~(12) Teaching assistant. – A person who meets the qualifications set forth Rule .0612, who is in the classroom to support the role of the instructor, and who may provide instruction to students only in the presence of and under the direct supervision of the instructor.

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

TITLE 23 – DEPARTMENT OF COMMUNITY COLLEGES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Community Colleges intends to repeal the rule cited as 23 NCAC 02E .0402.

Proposed Effective Date: September 1, 2009

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): To demand a public hearing please send the written demand to Q. Shanté Martin, Rule-making Coordinator, NC Community College System, 200 West Jones Street, MSC 5001, Raleigh, NC , 27699-5001 or by emailing the demand to martins@nccommunitycolleges.edu. Demands must be received within 15 days of the publication of the proposed rule in the North Carolina Register.*

Reason for Proposed Action: *Repealing 23 NCAC 02E .0402 would promote system simplification. These training programs have limited applicability evidenced by the fact that only three community colleges participated in the program in the last fiscal year and very few companies utilize this program.*

Procedure by which a person can object to the agency on a proposed rule: *Written objections shall be addressed to President, NC Community College System Office, 5001 MSC, Raleigh, NC 27699-5001 within the comment period and must be postmarked by 11:59 p.m. on the last day of the comment period.*

Comments may be submitted to: *Q. Shanté Martin, Rule-making Coordinator, 200 W. Jones Street, 5001 MSC, Raleigh, NC 27699-5001, phone (919)807-6961, fax (919)807-7171, email martins@nccommunitycolleges.edu*

Comment period ends: May 15, 2009

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. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission*

approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact: A copy of the fiscal note can be obtained from the agency.

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 02 - COMMUNITY COLLEGES

SUBCHAPTER 02E – EDUCATIONAL PROGRAMS

SECTION .0400 - INDUSTRIAL SERVICES

23 NCAC 02E .0402 WORK STATION OCCUPATIONAL SKILLS TRAINING

~~(a) Training as defined by this Rule is designed to assist manufacturing, service, or governmental organizations with in-service training of their employees. The goal is the development of skilled workers to support the continued economic growth of the North Carolina economy thereby enhancing the quality of life for the citizens of the state. Courses supported with public funds that provide occupational skills training at an individual's work station must meet the following conditions:~~

- ~~(1) Training courses shall be available to all local companies.~~
- ~~(2) Training shall occur in the facilities or at the sites in which the company normally operates.~~
- ~~(3) Trainees may be newly hired employees who need job skills training or existing employees who need job skills up grading.~~
- ~~(4) Training shall be conducted at the employee's assigned work station during normal working hours.~~
- ~~(5) Training shall be directly related to job skills.~~
- ~~(6) Training shall prepare new or current employees to use technology, equipment, or production processes.~~

~~(b) Colleges may offer work station based courses in those situations where the development of job skills is dependent on technology, equipment or production processes in the work environment which cannot be duplicated in a traditional classroom or laboratory training setting. The purpose of work station based training is to teach the skills of a particular job. The instruction provided shall not duplicate or supplant company training.~~

~~(c) Colleges may offer work station based training, as defined in this Rule, in the following ways:~~

- ~~(1) Occupational Extension at the Work Station: A college may teach an occupational extension~~

~~course at an individual's work station if the training is provided by a community college instructor, the trainee is in a full-time training capacity, and the training is offered consistent with Rules 23 NCAC 02D .0324 and 23 NCAC 02E .0101(2)(a). The employee shall not be performing any work duties during the training. When these criteria are met, the college will earn regular budget FTE.~~

- ~~(2) Structured On the Job Training: Structured On the Job Training shall earn FTE on a contact hour basis for the applied learning component. Structured On the Job Training shall meet the following criteria:~~

- ~~(A) The applied learning component of the course shall be based on skill competencies determined by industry, employer standards, external agency licensing or certification requirements, or general accepted practices in the field of specialization;~~
- ~~(B) The course content and designated instructional hours for a structured on-the-job training course shall comply with the program criteria of the Continuing Education Unit of the Southern Association of Colleges and Schools;~~
- ~~(C) The System President shall approve a course when the course outline contains specific student learning objectives and a method of measuring student performance; and~~
- ~~(D) All instructional components shall follow a structured training outline. The outline shall be kept on file at the college until released by audit.~~

- ~~(3) Customized On the Job Training: Colleges may offer Customized On the Job Training as an occupational extension course when an outline of the proposed training course, including learning objectives and training assessments, has been approved in advance by the System President. Customized On the Job Training classes shall be limited to 15 trainees per instructor, consist of no more than 240 hours of training per trainee per course, and shall be taught by a community college instructor. If these criteria are met, the college will earn budget FTE on a contact hour basis after the training has been reported to and approved by the local college board of trustees.~~

- ~~(4) Company Provided Training: When a college can document that the public purpose is justified, the college may use Occupational Extension funds to reimburse company instructors for providing training. The public purpose shall be justified when the skills~~

taught in the course are transferable to work in other companies involved in the same or similar industry cluster, such that the benefit to the public is the development of a skilled workforce. Company instructors shall operate in a full-time training capacity during the designated instructional periods, and shall follow a structured training outline that is jointly developed by the college and the company. The training outline including the public purpose documentation shall be kept on file at the college until released by audit. Company Provided Training shall earn the administrative component only of the budget FTE, after being reported to and approved by the college board of trustees. Company Provided Training shall be limited to no more than 15 trainees per instructor, no more than 240 hours of training per trainee, per course, and shall be taught by a company instructor.

(d) Content of all courses offered under this Rule shall be supported by an analysis of the job for which training is offered. The job analysis shall designate each separate task within a job and assign a number of hours required to teach each separate task.

(e) A work station based course shall not be offered on a repetitive or recurring basis to the same employees within the same organization. An employee may not take a given course more than twice.

(f) An instructor conducting training under this Rule, whether an employee of the organization in which instruction is offered or an employee of the sponsoring college, shall not, during hours of instruction, be involved in any activity other than instruction. An instructor shall not engage in any administrative, supervisory, or operational functions of the organization in which instruction is offered during those hours when the instructor is partially or totally paid by the college. An official of the organization in which instruction is offered shall agree in writing to these conditions.

Authority G.S. 115D-5.

TITLE 25 – DEPARTMENT OF STATE PERSONNEL

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to amend the rules cited as 25 NCAC 01D .0112; 01H .0631.

Proposed Effective Date: August 1, 2009

Public Hearing:

Date: April 22, 2009

Time: 10:00 a.m.

Location: Office of State Personnel, Administration Building, 3rd Floor, 121 West Jones Street, Raleigh, NC 27603

Reason for Proposed Action: The amendment is being proposed because of a decision of the N.C. Court of Appeals that said that an issue regarding the manner in which a reduction in force is carried out is no longer considered a contested case issue. This change recognizes the impact of that decision.

Procedure by which a person can object to the agency on a proposed rule: A person may object to these proposed rules by one of the following methods: 1. A written letter to Peggy Oliver, HR Policy Administrator, Office of State Personnel, 1331 Mail Service Center, Raleigh, NC 27699-1331, 2. An e-mail to peggy.oliver@osp.nc.gov, 3. A telephone call to Peggy Oliver at (919) 807-4832.

Comments may be submitted to: Peggy Oliver, 1331 Mail Service Center, Raleigh, NC 27699-1331, phone (919) 807-4832, fax (919) 715-9750, email peggy.oliver@osp.nc.gov

Comment period ends: May 15, 2009

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. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 01 - OFFICE OF STATE PERSONNEL

SUBCHAPTER 01D - COMPENSATION

SECTION .0100 - ADMINISTRATION OF THE PAY PLAN

25 NCAC 01D .0112 TOTAL STATE SERVICE DEFINED

(a) Total state service is the time of full-time or part-time (half-time or over) ~~employees-employment~~ with a permanent, trainee, probationary or time-limited ~~appointment, whether subject to or exempt from the State Personnel Act~~ appointment in a North Carolina state government position or a position in one of the agencies listed under Paragraph (e) of this Rule.

(b) The agency shall credit time for State government employment that is subject to and exempt from the State Personnel Act.

~~(c) If an~~The agency shall ~~employee~~ credit time for the entire pay period if the employee ~~so appointed~~ is in pay status or is on authorized military leave or workers' compensation leave for at least one-half of the regularly scheduled workdays and holidays in a pay period, credit shall be given for the entire pay period. The employees shall receive full credit for each pay period they are in pay status for one half of their regularly scheduled workdays and holidays.

(d) If an employee's work schedule is less than 12 months and the employee works all the months scheduled (e.g., a school year), the agency shall credit time for the full year; however, if the employee works less than the scheduled time, the agency shall credit time on a month for month basis for the actual months worked.

~~(e) Credit shall also be given~~In addition, the agency shall credit time for:

- (1) Employment with other governmental units which are now North Carolina State agencies (Examples: county highway maintenance forces, War Manpower Commission, ~~Judicial System~~System);
- (2) ~~Authorized military leave from any of the governmental units for which service credit is granted provided the employee is reinstated within the time limits outlined in the State military leave policies.~~Employment with the North Carolina county agricultural extension service;
- (3) Employment with the ~~county Agricultural Extension Service~~, Community College system and the public school system of North Carolina, ~~with the provision that a school year is equivalent to one full year (credit for a partial year is given on a month for month basis of the actual months worked).~~Carolina;
- (4) Employment with a local Mental Health, Public Health, Social Services or Emergency Management agency in North Carolina if such employment is subject to the State Personnel Act;Act;
- (5) Employment with the General Assembly of North Carolina (except for participants in the Legislative Intern Program and pages). All of the time, both permanent and temporary, of the employees and the full legislative terms of the members shall be counted. ~~The full legislative terms of the members shall also be counted.~~counted;
- (6) Authorized military leave from any of the governmental units for which service credit is granted provided the employee is reinstated within the time limits outlined in the State military leave rules (25 NCAC 01E .0800); and

(7) Authorized workers' compensation leave from any of the governmental units for which service credit is granted.

Authority G.S. 126-4(5),(10).

SUBCHAPTER 01H - RECRUITMENT AND SELECTION

SECTION .0600 - GENERAL PROVISIONS

25 NCAC 01H .0631 POSTING AND ANNOUNCEMENT OF VACANCIES

(a) Vacant positions shall be publicized by the agency having the vacancy.

(b) Vacancies which shall be filled from within the agency workforce shall have an application period of not less than five working days and shall be prominently posted in at least the following locations:

- (1) The personnel office of the agency having the vacancy; and
- (2) The particular work unit of the agency having the vacancy.

(c) Vacancies to be filled from within or outside the state government workforce shall be listed with the Office of State Personnel and the Employment Security Commission as required by G.S. 96-29. Such vacancies shall have an application period of not less than five working days. For purposes of this Rule, "state government workforce" shall mean those employees who are subject to Articles 1, 2, 5, 6, 7, 8, 13 and 14 of Chapter 126 of the North Carolina General Statutes.

(d) Each vacancy shall be described in an announcement which includes:

- (1) For graded classes: the position number, classification title, salary grade and range, essential functions, knowledge, skills, abilities, minimum training and experience, and any vacancy-specific qualifications as determined by the agency in accordance with 25 NCAC 01H .0607(c), the application period, and the appropriate contact information;
- (2) For banded classes: the position number, banded class title, competency level, banded class salary range or recruitment range corresponding to the competencies and duties, salary grade equivalency, essential functions, competencies, minimum training and experience, vacancy-specific qualifications as determined by the agency in accordance with 25 NCAC 01H .0607(c), the application period, and the appropriate contact information; and
- (3) For all vacancy listings: a closing date shall be given unless the classification has been determined as critical. Factors used in determining critical classifications shall include: agency turnover; number of positions in class; geographic location; scarcity of skills; safety, health or quality of care for clients. Such critical classifications shall be approved

by the State Personnel Commission. On those classes determined to be critical, which are considered open and continuous postings, agencies shall determine how long applications shall be considered active.

(e) Posting is not required when an agency determines that it will not openly recruit. This decision shall be based upon a bona fide business need and is the responsibility of the agency head.

Examples are:

- (1) Vacancies that are committed to a budget reduction;
- (2) Vacancies used to avoid a reduction in force;
- (3) Vacancies used for disciplinary transfers or demotions;
- (4) Vacancies to be filled by transfer of an employee to avoid the threat of bodily harm;
- (5) Vacancies that are designated exempt policymaking under G.S. 126-5(d);
- (6) Vacancies that must be filled immediately to prevent work stoppage in constant demand situations, or to protect the public health, safety, or security;
- (7) Vacancies to be filled by chief deputies and chief administrative assistants to elected or

appointed department heads; and vacancies for positions to be filled by confidential assistants and confidential secretaries to elected or appointed department heads, chief deputies, or chief administrative assistants;

- (8) Vacancies to be filled by an eligible exempt employee who has been removed from an exempt position and is being placed back in a position subject to all provisions of the State Personnel Act;
- (9) Vacancies to be filled by a legally binding settlement agreement;
- (10) Vacancies to be filled in accordance with a formal, pre-existing written agency workforce plan; and
- (11) Vacancies that must be filled immediately because of a widespread outbreak of a serious communicable disease.

(f) The Office of State Personnel may withhold approval for an agency to fill a job vacancy as set out in G.S. 126-7.1.

Authority G.S. 96-29; 126-4(4); 126-5(d); 126-7.1.

RULES REVIEW COMMISSION

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

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Jim R. Funderburke - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Keith O. Gregory
Jerry R. Crisp
Jeffrey P. Gray

Appointed by House

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

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

March 19, 2008 April 16, 2009
May 21, 2009 June 18, 2009

RULES REVIEW COMMISSION

February 19, 2009

MINUTES

The Rules Review Commission met on Thursday, January 22, 2009, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Keith Gregory, Jennie Hayman, Clarence Horton, John Lewis, Dan McLawhorn and Curtis Venable.

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

The following people were among those attending the meeting:

Catherine Blum	DENR/Division of Marine Fisheries
Nadine Pfeiffer	DHHS/Division of Health Service Regulation
Nancy Pate	Department of Environment and Natural Resources
Will Crumbley	Office of State Budget and Management
Julia Lohman	Sheriffs' Education and Training and Standards Commission
Mike Abraczinskas	DENR/Division of Air Quality
John Aldridge	DOJ/Sheriffs' Education and Training Standards Commission
Diane Konopka	Sheriffs' Education and Training Standards Commission
Gary Saunders	DENR/Division of Air Quality
Catherine Jorgensen	Hearing Aid Dealers and Fitters Board
Michael Pjetraj	DENR/Division of Air Quality

APPROVAL OF MINUTES

The meeting was called to order at 9:03 a.m. with Ms. Hayman presiding. She reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e). Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the January 22, 2009 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

02 NCAC 38 .0701 – Board of Agriculture. The Commission approved the rewritten rule submitted by the agency.

10A NCAC 27G .0504 – Commission for Mental Health. No rewritten rule has been submitted and no action was taken.

12 NCAC 07D .0402, .0501 –Private Protective Services Board. No rewritten rules have been submitted and no action was taken.

12 NCAC 10B .0202 – Sheriff's Education and Training Standards Commission. The Commission approved the rule. Commissioners Crisp, Gray, McLawhorn, Lewis, Horton and Gregory voted to approve the rule. Commissioners Funderburk and Venable voted against the motion to approve.

15A NCAC 02D .1205, .1212 – Environmental Management Commission. The Commission objected to Rule .1205 as originally submitted by the agency for review at the December meeting. The Commission did this based on ambiguity in (e)(3) (page 9 of the rule). The ambiguity is uncertainty about whether or not new testing is required under the rule. The Commission was satisfied with the rewritten language in the rule. However it believes the changes in the rule represent a substantial change that requires approval by the EMC prior to its review by the RRC. Since there were conforming changes to Rule .1212 as well, the RRC took the same position with regards to that rule. The RRC objected to the revisions to both rules based on G.S. 150B-21.9(a)(4) for failure to comply with the Administrative Procedure Act and have the rules approved by the EMC.

15A NCAC 03I .0101, .0104 – Marine Fisheries Commission. The Commission approved the rewritten rules submitted by the agency. Commissioners Crisp, McLawhorn, Lewis, Horton, Gregory, and Funderburk voted to approve the rules. Commissioners Gray and Venable voted against the motion to approve.

15A NCAC 03J .0502 – Marine Fisheries Commission. The Commission approved the rewritten rule submitted by the agency.

15A NCAC 07J .0701 – Coastal Resources Commission. The Commission approved the rewritten rule submitted by the agency.

15A NCAC 07J .0703 – Coastal Resources Commission. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 14H .0105 – Board of Cosmetic Art Examiners. No rewritten rule has been submitted and no action was taken.

LOG OF FILINGS

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

All permanent rules were approved unanimously with the following exceptions:

10A NCAC 13P .0905: Medical Care Commission - The Commission objected to this rule based on ambiguity. In (b)(10) and (c)(12) of this Rule, it is unclear who gives the time period for up to 12 months to demonstrate compliance, and what the criteria is for determining exactly how much time will be given. This objection applies to existing language in the Rule.

12 NCAC 09B .0301: Criminal Justice Education and Training Standards Commission – This rule was withdrawn by the agency and re-filed for the next month's meeting.

12 NCAC 09H .0101, .0102, .0103, .0104, .0105: Criminal Justice Education and Training Standards Commission – These rules were withdrawn by the agency and re-filed for the next month's meeting.

COMMISSION PROCEDURES AND OTHER BUSINESS

The meeting adjourned at 10:03 a.m.

The next scheduled meeting of the Commission is Thursday, March 19, 2009 at 9:00 a.m.

Respectfully Submitted,

Dana Vojtko
Publications Coordinator

LIST OF APPROVED PERMANENT RULES
February 19, 2009 Meeting

AGRICULTURE, BOARD OF

Adoption by Reference 02 NCAC 38 .0701

HHS - MENTAL HEALTH, DIVISION OF

Scope 10A NCAC 26C .0101

Application 10A NCAC 26C .0102

Review Process 10A NCAC 26C .0103

Designation 10A NCAC 26C .0104

Appeal 10A NCAC 26C .0105

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

Sanctions for Violations by Agencies or Schools 12 NCAC 10B .0202

MARINE FISHERIES COMMISSION

Definitions 15A NCAC 03I .0101

Introduce, Transfer or Hold Imported Marine and Estuarine... 15A NCAC 03I .0104

Pound Net Set Permit Application and Processing 15A NCAC 03J .0502

COASTAL RESOURCES COMMISSION

Variance Petitions 15A NCAC 07J .0701

Procedures for Deciding Variance Petitions 15A NCAC 07J .0703

HEARING AID DEALERS AND FITTERS, BOARD OF

Fee Schedule 21 NCAC 22B .0603

STATE PERSONNEL COMMISSION

Sign-On Bonus 25 NCAC 01D .0116

Severance Salary Continuation 25 NCAC 01D .2701

BUILDING CODE COUNCIL

NC Residential Code - Wood Decks Appendix M

NC Building Code - Press Boxes 1104.3.2

NC Building Code - Temporary Overflow Shelter 202

NC Building Code - Temporary Overflow Shelters 422.1

NC Fire Code - Temporary Overflow Shelters 316.1

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 431-3000. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

*Chief Administrative Law Judge
JULIAN MANN, III*

*Senior Administrative Law Judge
FRED G. MORRISON JR.*

ADMINISTRATIVE LAW JUDGES

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

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOL BEVERAGE CONTROL COMMISSION</u>				
Partnership T/A C Js Lounge v. ABC Commission	07 ABC 0201	Overby	03/11/08	
Michael Daniel Clair v. T/A Par 3 Bistro v. ABC Commission	07 ABC 1289	Lassiter	10/07/08	
ABC Commission v. Rainbow Enterprises, Inc T/A Club N Motion	07 ABC 1532	Gray	06/20/08	23:05 NCR 489
Benita, Inc., T/A Pantana Bob's v. ABC Commission	07 ABC 1584	Overby	04/21/08	23:01 NCR 141
Original Grad, Inc/ T/A Graduate Food and Pub	07 ABC 1648	Joseph	02/25/08	
N.C. Alcoholic Beverage Control Commission v. Feest Inc. T/A Spankys Sports Bar and Grill	07 ABC 2135	Gray	09/12/08	
Don Mariachi Ventures, T/A EL Mariachi Gordo	07 ABC 2155	Webster	11/05/08	
N.C. Alcoholic Beverage Control Commission v. Jenny S. Chanthalacksa T/A JB Food Mart	08 ABC 0097	May	09/03/08	
N.C. Alcoholic Beverage Control Commission v. Jenny S. Chanthalacksa T/A JB Food Mart	08 ABC 0351	May	09/03/08	
AM Enterprises of Fayetteville, Inc., T/A Izzy's Sports Bar v. ABC Commission	08 ABC 0371	Lassiter	06/13/08	
Bhavesh Corporation, T/A K&B Foomart v. ABC Commission	08 ABC 0508	Overby	05/19/08	
Downtown Event Center, Inc. T/A Downtown Event Center v. ABC Commission	08 ABC 0937	May	09/16/08	
<u>CRIME VICTIMS COMPENSATION</u>				
Patricia Ginyard v. Crime Victim Compensation Commission	06 CPS 1720	Gray	05/27/08	
Carrie R. McDougal v. Victims Compensation Services Division	07 CPS 1970	Elkins	05/23/08	
Hillary Holt v. Crime Victims Compensation Commission	07 CPS 2292	Brooks	09/18/08	
Taareka S Johnson v. NC Crime Victims Compensation Commission	08 CPS 0402	Morrison	08/08/08	
Rich's Towing and Service Inc. v. NC Department of Crime Control And Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 0698	May	08/13/08	
Steel Supply and Erection Co., Department of Crime Control and Public Safety, Division of State Highway Patrol and Department of Revenue	08 CPS 0777	Overby	05/29/08	
ATS Specialized, Inc, v. Dept. of Crime Control and Public Safety, Div. Of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 0864	May	09/11/08	
Willie Trucking, Inc d/b/a Allstate Transport Co v. Dept. of Crime Control & Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 0897	May	09/11/08	
Randy S. Griffin v. NC Crime Victims Compensation Commission	08 CPS 0995	May	09/11/08	
Kenneth Lee Moore v. Dept. of Crime Control and Public Safety	08 CPS 1093	Webster	10/27/08	
Interstate Crushing Inc. v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1086	Overby	09/29/08	

CONTESTED CASE DECISIONS

Sterett Equipment Company LLC v. N.C. Dept. of Crime Control And Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1206	Overby	09/29/08
Bertrand E. Dupuis d/b/a New England Heavy Hauling v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1207	Overby	09/29/08
Bulldog Erectors, Inc v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1208	Overby	09/29/08
Continental Machinery Movers Inc. v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1209	Overby	09/29/08
Michael Alan Moore v. Crime Victims Compensation Commission	08 CPS 1478	Lassiter	09/08/08
TNT of York County, Inc., Tony McMillan v. State Highway Patrol Motor Carrier Enforcement	08 CPS 1508	Joseph	12/11/08
SOOF Trucking, Ray Charles Solomon v. Secretary of Crime Control And Public Safety	08 CPS 1526	Overby	09/09/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1800	Brooks	12/15/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1801	Brooks	12/15/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1802	Brooks	12/15/08
Kayonna Goodwin Pollard c/o Chad Lopez Pollard v. Crime Control & Victim Compensation Services	08 CPS 1850	Gray	10/24/08
John D. Lane v. Diversified Drilling Corp v. Office of Admin Svc, Sec. of Crime Control and Public Safety	08 CPS 2049	Joseph	11/06/08
Richard Pratt v. Dept. of Crime Control and Public Safety	08 CPS 2417	Lassiter	01/15/08
Robert D. Reinhold v. Dept. of Transportation, Division of Motor Vehicles	08 CPS 2501	Gray	12/10/08

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

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Gloria McNair Jean's Jewels v. Div. of Child Development, DHHS	06 DHR 0633	Lassiter	07/11/08
Gloria McNair Jean's Jewels v. Div. of Child Development, DHHS	06 DHR 1350	Lassiter	07/11/08
Character Builders, Inc., Clavon Leonard v. DMA, Developmental Disabilities and Substance Abuse Services	07 DHR 0124	Elkins	08/07/08
Character Builders, Inc., Clavon Leonard v. DMA, Developmental Disabilities and Substance Abuse Services	07 DHR 0125	Elkins	08/07/08
Arthur Burch and Margaret and Burch v. Department of Health and Human Services	07 DHR 0242	Brooks	04/30/08
The "M" Company LLC, v. DHHS, DMA, Program Integrity	07 DHR 0429	Webster	05/29/08
Brenda F. Ervin v. DHHS, DFS, Health Care Personnel Registry	07 DHR 0493	Gray	12/08/08
Judy E. Pettus v. Office of Chief Medical Examiner, Thomas B. Clark, Iii, Md, Pathologist	07 DHR 0535	Webster	05/05/08
Clorie Bivens Owen on Behalf of Williams Baxter Bivens – Estate of Leroy A. Bivens v. DHHS	07 DHR 0701	Elkins	12/08/08
Alterra Clare Bridge of Asheville v. DHHS, DFS, Adult Care Licensure Section	07 DHR 0914	Gray	06/06/08
Shirley Brooks Dial v. Health Care Personnel Registry	07 DHR 0931	Webster	02/27/08
Midtown Food Mart #2, Kerab Giebrehiwot, Mehreteab Wooldeghebibel and Fesseha Zeru	07 DHR 1044	Webster	04/25/08
Midtown Food Mart III, Chenet Haileslassi and Fesseha Zeru v. DHHS	07 DHR 1045	Webster	04/28/08
Kelly Schofield MD, Clinical Director, Youth Quest, Inc. v. DHHS, DFS Mental Health Licensure and Certification	07 DHR 1064	Joseph	10/17/08
Carolyn E. Reed v. DHHS, Division of Social Services Program Integrity AFDC/Work First	07 DHR 1214	Webster	07/21/08
Mrs. Elizabeth Futrell v. Value Options	07 DHR 1331	Lassiter	06/09/08
Cornell Jones v. DHHS, Division of Health Services Regulation	07 DHR 1399	Joseph	04/22/08
Dianetta Foye v. Division of Child Development, DHHS, Services	07 DHR 1440	Joseph	05/07/08
Rufus Patrick Devers v. DHHS, Division of Health Service Regulation Health Care Personnel Registry	07 DHR 1442	Joseph	05/29/08
Ray Dukes, Bright Future Learning Center v. DHHS, Division of Public Health, Child and Adult Care Food Program	07 DHR 1473	Joseph	04/08/08
William Manning c/o Thyllis Smith, A Touch From the Heart Staff v. NC Department of Health and Human Services, Division of	07 DHR 1060	Webster	10/14/08

CONTESTED CASE DECISIONS

Medical Assistance				
Hospice of the Piedmont, Inc., v. DHHS, Division of Health Service Regulation, Licensure and Certification Section and DHHS, Division of Health Service Regulation, CON Section	07 DHR 1617	Elkins	05/21/08	
Janice Addison v. Value Options	07 DHR 1618	Webster	05/16/08	
Donna Hicks Crocker v. DHHS/DMA	07 DHR 1629	Joseph	08/01/08	
Rebecca Dehart v. DHHS, Division of Health Service Regulation Health Care Personnel Registry Section	07 DHR 1650	Elkins	05/21/08	
Ellen Brown v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	07 DHR 1651	Elkins	05/21/08	
Life Solutions of Lumberton, NC, LLC d/b/a Timberwood and Bridgecrest	07 DHR 1758	Joseph	12/04/08	
Life Solutions of Lumberton, NC, LLC d/b/a Timberwood and Bridgecrest	07 DHR 1759	Joseph	12/04/08	
Joann Lennon v. Value Options Medicaid	07 DHR 1770	Webster	05/16/08	
Angeline Currie v. DHHS	07 DHR 1986	Elkins	06/04/08	
Tameala Jones v. OAH	07 DHR 1993	Webster	05/16/08	
Dianetta Foye v. Division of Child Development, DHHS, Services	07 DHR 2020	Joseph	05/07/08	
Lashauna Reid v. CCMHC (PFCS-Service Provider)	07 DHR 2039	Elkins	08/05/08	
Presbyterian Diagnostic Center at Cabarrus LLC v. N.C. Department of Health and Human Services, Division of Health Service Regulation and Southern Piedmont Imaging, LLC	07 DHR 2043	Lassiter	08/18/08	23:16 NCR 1600
Southern Piedmont Imaging, LLC v. N.C. Department of Health and Human Services, Division of Health Service Regulation and Presbyterian Diagnostic Center at Cabarrus, LLC	07 DHR 2045	Lassiter	08/18/08	23:16 NCR 1600
Family & Youth Services, Inc. Angela Ford, President v. DHHS, Division of Medical Assistance Provider Services	07 DHR 2057	Webster	05/16/08	
Yolanda Jones v. DHHS, Adult Licensure Section	07 DHR 2081	Webster	05/16/08	
Tianna Troy Legal guardian Mother Traci Lookadoo v. Value Option	07 DHR 2087	Elkins	05/23/08	
Gary Carlton, Sr., v. DHHS	07 DHR 2099	Brooks	07/10/08	
Alexis Ford/Linda M McLaughlin v. DHHS	07 DHR 2111	Elkins	06/04/08	
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STATE OF NORTH CAROLINA
VANCE COUNTY

Filed

2009 DEC 16 PM 4:39

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 OSP 0362

MILTON R. PERRY,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION,

Respondent.

Office of
Administrative Hearings

DECISION

On September 10 and 11, 2008, Administrative Law Judge Melissa Owens Lassiter conducted an administrative hearing in this contested case in Raleigh, North Carolina. On November 6, 2006, Petitioner and Respondent filed their proposed Decisions with the Office of Administrative Hearings.

APPEARANCES

For Petitioner: Stewart W. Fisher
Glenn, Mills, Fisher & Mahoney, P.A.
P.O. Drawer 3865
Durham, North Carolina 27702-3865

For Respondent: Ebony J. Pittman & Tina A. Krasner
Assistant Attorneys General
NC Department of Justice - Transportation Section,
1505 Mail Service Center, Raleigh, NC 27699-1505

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 2-4, 7-10, 12-15, 17-19, 19A, 20-21, and 25-34

For Respondent: 1-8, 10-13, 9 (Offer of Proof)

WITNESSES

For Petitioner: Petitioner, Bob King, Larry Darnell Neal, Darius Harris
Kenneth Earl Brody, Dennis Hargrove, Donnie Lee Hicks,
Sterling McKinley Terry, William House

For Respondent: Jonathan David Tyndall, Dwight Thomas Cottrell, Sr.

ISSUES

1. Did Respondent intentionally discriminate against Petitioner based on his race, in violation of N.C. Gen. Stat. § 126-34.1(b)(1) or (3), by failing to hire Petitioner for a permanent Transportation Worker position?

2. Did Respondent retaliate against Petitioner for opposing race discrimination, in violation of N.C. Gen. Stat. § 126-34.1(a)(2)b, by failing to hire Petitioner for a permanent Transportation Worker position?

3. Did Respondent intentionally discriminate against Petitioner based on his race, in violation of N.C. Gen. Stat. § 126-34.1(a)(2), by denying Petitioner the right to proper training?

FINDINGS OF FACT

Based upon the official documents in the file, the sworn testimony of the witnesses, and the other competent evidence admitted at the hearing, the undersigned finds as follows:

I. Procedural Facts

1. On March 5, 2007, Petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings alleging that Respondent discriminated against him based on his race, and retaliated against him for opposing race discrimination by failing to hire Petitioner for a permanent Transportation Worker position. Petitioner also alleged that Respondent discriminated against him based on his race by denying him training. Specifically, Petitioner contended:

I was a temporary worker for the Dept. of Transportation at the Franklin Co. Division, which is located on the yard in Henderson, NC. I was denied the right to proper training and when I applied for a permanent position, I was denied the permanent position. I had complained of race discrimination before I was terminated and before I was denied a permanent position.

(Petition)

II. Background Facts

2. Petitioner is an African American male, who graduated from Gold Sand High School in Franklin County, North Carolina. (T. at 18; Pet. Ex. 18). Petitioner grew up on a farm, and has wide experience with a variety of farm equipment including

tractors, bush hogs, chain saws, etc. (T. at 18-19) Petitioner operated a chain saw since he was eleven (11) years old. (T. at 19)

3. Since 1994, Petitioner has held a Class A commercial driver's license. (T. at 20) Petitioner drove long distance trucks including tractor-trailers in connection with his employment with CVS Pharmacy and in other jobs. (T. at 20)

4. After the CVS Pharmacy closed in 2004, Petitioner worked for Respondent in a temporary position as a Transportation Worker at the Gillburg Yard Franklin County site for three weeks in May of 2004. (T. at 255)

5. Supervisor Tommy Cottrell hired Petitioner for the temporary Transportation Worker position at the Franklin County Maintenance Yard. (T. pp 23, 256; Pet. Exh. 10) After approximately three weeks on the job, Petitioner left a better job with Arlington Press in Raleigh. (T pp 21, 254-255) ^{copy} ^

6. Before leaving Respondent's employment, Petitioner advised Bobby Robbins, his immediate supervisor and patch crew foreman, and Supervisor Cottrell that he was leaving. (T. at 41-42) Supervisor Cottrell admits that Petitioner approached him "two weeks ahead of time," and informed him that he was looking for another job. (T. at 256) Cottrell does not dispute that Petitioner informed Bobby Robbins that he was leaving for a better job, although he disputed Petitioner personally advised him he was leaving employment. (T. at 280) Respondent's official written records show that Petitioner "resigned for better employment." (T. at 249, 281, Resp. Ex. 8)

7. The "Gillburg Yard" is part of Division 5, District 3 of Respondent's Division of Highways, and consists of three separate areas of operation: the District Office area, a Vance County highway maintenance area, and a Franklin County highway maintenance area.

8. The District Office houses District Engineer Steve Winstead (white male), and his Administrative Assistant Donna Murphy (white female).

9. The Franklin County Office houses Supervisor Tommy Cottrell; Administrative Assistant Alicia Ramsey (white female); Assistant Supervisors Bobby King (white male) and Kent Perdue (white male) as Transportation Supervisors I; and a large open area known as the "bullpen." Transportation workers gather in the bullpen in the mornings to obtain their daily assignments.

10. Mr. Tommy Cottrell has been employed by the DOT for 28 years, and served as Transportation Supervisor III at the Gillburg Yard for over 7 years. He is responsible for maintaining approximately 500 miles of road in the north/northwest part of Franklin County. He supervises 20 employees, prepares their daily work schedules, and oversees their work. (T pp 251-253, 286) Cottrell directly supervises Ms. Ramsey, Mr. King, and Mr. Perdue.

11. Mr. King and Mr. Perdue supervise various Transportation Workers, both permanent and temporary, on any given day. (T pp 28-29, 186; Resp. Exh. 1) Mr. King runs the digging crew, also known as the "pipe crew," while Perdue runs the asphalt crew, also known as the "patch crew." (T. at 35)

12. Mr. Jonathan Tyndall is County Maintenance Engineer (white male) who supervises Mr. Cottrell. Mr. Tyndall has been employed by the DOT for over 20 years, and has been the County Maintenance Engineer for 8½ years. He is responsible for the overall supervision of all highway and right-of-way maintenance and construction in Franklin County. He also supervises approximately 48 employees. Mr. Tyndall's office is located in Bunn, North Carolina, in Franklin County. He reports directly to District Engineer Steve Winstead. Mr. Winstead reports to the Division Engineer, located in Durham, North Carolina. (T pp 28, 184-185)

13. On February 9, 2006, Supervisor Tommy Cottrell interviewed and hired Petitioner as a temporary Transportation Worker position at Respondent's Franklin County Maintenance Yard (a/k/a "Gillburg Yard") in Henderson, North Carolina.

14. During the interview for this job, Petitioner told Cottrell that he wanted a full-time permanent position with Respondent. (T. at 40) Petitioner knew that a permanent Transportation Worker, Monty Kimball, had transferred out of the Gillburg Yard Franklin County site. (T. at 41, 284) When Cottrell hired Petitioner for the temporary position, he told Petitioner that a permanent position would be coming open in four to five months. (T. at 41, 284)

15. Respondent's Temporary Employee policy required a temporary employee's appointment not exceed 12 months. (Resp. Exhs. 10 & 11) Petitioner learned of this policy when he was hired and during orientation. (T pp 61, 91, 187) Under that policy, Petitioner's temporary employment expired on February 9, 2007.

16. During his one-year employment as a temporary Transportation Worker, Petitioner arrived at work early, and worked hard. (T. at 43) Cottrell assigned Petitioner different daily assignments, including working on the patch crew for Assistant Supervisor Perdue, and on the digging crew for Assistant Supervisor King. (T. at 38-39) Petitioner worked overtime when asked. (T. at 44)

a. During this employment, Petitioner also operated the following equipment: steel wheel roller, a single axle dump truck, rubber tire loader, tractor broom, slope mower, chainsaw, and cut-off saw. (T. at 46) Petitioner passed the tests for the cut-off saw (also known as concrete saw), the chainsaw, single axle dump truck, the tandem (double axle) dump truck, and steel wheel roller. (T. at 48-50)

b. Maintenance Engineer Tyndall, Supervisor Cottrell, and Assistant Supervisors Bobby King and Kent Perdue, attested that Petitioner was a good employee, and was qualified to be hired as a permanent Transportation Worker. (T. 119-121, 206, 264-265, 279, 342)

17. The Gillburg Road site used the state program for Skill-Based Pay. That program is a compensation program designed to encourage and reward employees for acquiring and performing critical skills identified by management. Specifically, the program is a five-level, five-layer skill block plan whereby a Transportation Worker, upon his or her own initiative, can receive training and testing, whether it be on different pieces of equipment, or different skill sets such as a lead worker. After completing a written test and on-the-job training, permanent Transportation Workers can receive monetary compensation for skill blocks.

18. Temporary Transportation Workers can test and train for skill blocks, but do not receive monetary compensation unless and until they are hired permanently. However, they should be able to acquire every one of the seven (7) skill blocks in Level 1 during a one-year temporary tenure. (T pp 198- 200)

III. Denial of Permanent Transportation Worker Position

19. In September 2006, Maintenance Engineer Tyndall asked Donna Murphy to post a position for a permanent Transportation Worker. An employee named Simmons was out on worker's compensation. (T. at 219) Tyndall was "adamant" that he wanted that position posted in September 2006. (T. at 219)

20. In October 2006, Supervisor Cottrell met with Petitioner and Kenneth Ayscue in his office. Cottrell told them that a permanent job would be coming open. Supervisor Cottrell advised Petitioner and Ayscue that they were both good employees, but he had only one open position. (T. at 59, 289) Cottrell also indicated that he would try to get another position transferred from the Bunn office so he could hire both employees. (T. at 60, 285-29)

21. Every few weeks, Petitioner asked Supervisor Cottrell about the posting of the permanent Transportation Worker position. (T. at 285) Petitioner also asked Maintenance Engineer Tyndall why the permanent worker position had not been posted. (T. at 218) Supervisor Cottrell repeatedly told Petitioner that he "hadn't heard anything." (T. at 59)

22. On November 8, 2006, when Petitioner had not heard any news about the permanent worker opening, he asked Mr. Tyndall's assistant, Donna Murphy, about such opening. Ms. Murphy handled the paperwork on job openings. (T. at 60-61) Ms. Murphy advised Petitioner that she had already informed Supervisor Cottrell that a position could not be transferred from Bunn to create another job. (T. at 61)

23. Soon thereafter, Supervisor Cottrell learned that Petitioner had asked Administrative Assistant Murphy to inquire about the job posting. (T. at 290) Although there was nothing wrong with Petitioner going to see Administrative Assistant Murphy about the job posting, Cottrell became upset that Petitioner did not "follow the chain of command." (T. at 290-291) Supervisor Cottrell made written notes about Petitioner's

visit to Administrative Assistant Murphy to ask about the job posting. (T. at 334-35, Pet. Ex. 7)

24. Supervisor Cottrell initiated job postings for the positions reporting to him. At hearing, he admitted that he could influence the timing of a job posting. (T. at 189, 218, 257, 289)

25. On November 28, 2006, the Gillburg Yard maintenance crew and Maintenance Engineer Tyndall attended a safety meeting at the Gillburg work site. (T. at 291) After the meeting, Petitioner asked Mr. Tyndall why the subject position had not been posted. (T. at 61-62, 218) Mr. Tyndall was surprised the job had not been posted, and felt he had been "either lied to or misled" about the position being posted. Tyndall advised Petitioner it should have already been posted. (T. 61-62, 219-220)

26. Petitioner and Tyndall walked to Cottrell's office. Mr. Tyndall stood in the threshold of Cottrell's office door, while Petitioner stood beside him. (T. at 291) Tyndall asked Cottrell why the posting had not been made. Supervisor Cottrell claimed that the posting was "held up." (T. at 62)

27. Later that day, November 28, 2006, Respondent posted a vacancy for the permanent Transportation Worker Position (Position No. 27019) for two weeks. (T. at 62, 220, Pet Ex 18) This position reported to Supervisor Tommy Cottrell. (Resp. Ex. 4)

28. Respondent's Human Resources collected and reviewed the applications to determine which applicants met the minimum qualifications. (T. at 190) Thirteen persons applied for the Transportation Worker position, including Petitioner. Respondent's Human Resources Unit rated eleven applicants as "qualified" and thus, meeting the minimum qualifications for the position. The qualified applicant pool included eight (8) white males and three (3) black males. (T pp 258-259; Resp. Exh. 4)

29. The Transportation Worker position posting indicated that the position participated in the DOT's Skill Based Pay Program. The position required "some knowledge, skills, and abilities of operating-doing manual labor, operating small-hand tools, lifting, shoveling, chainsaws, driving dump trucks, and operating some pieces of equipment." (T. at 257) The job posting required, "Entry level: high school or equivalent." (Pet. Ex. 4) The position also required a Class 'A' CDL within 60 days of employment and pre-employment drug testing. (T pp 194, 257; Resp. Exh. 3)

30. On November 28, 2006, Petitioner submitted his application for the permanent Transportation Worker position. At that time, he had been employed as a temporary Transportation Worker in the Gillburg Yard for the past ten (10) months. Petitioner had a high school diploma, and a current Class 'A' CDL. He had prior work experience as a forklift driver and shipping supervisor for Wal-Mart, a truck driver for Little River Propane, a support person for Arlington Press, a mechanic for Billings & Garrett, and as a supervisor lead person for CVS Warehouse for 29 years. (T pp 19-22, 262; Resp. Exh. 7)

31. Kenneth Ayscue, a white male, also applied for the permanent Transportation Worker position. At the time, he had been employed as a temporary Transportation Worker in the Gillburg Yard for the past nine (9) months, starting work one month after Petitioner. Mr. Ayscue did not have a high school diploma, and held a Class 'A' CDL. He had prior work experience as a termite technician for Dodson Pest Control, a floor builder for Clayton homes, a truck driver for Ayscue's Dump Truck Service, and as a construction worker for #1 Construction. (T pp 196, 261; Resp. Exh.6)

32. On December 19, 2006, Mr. Cottrell conducted the interviews for the position. Mr. Tyndall normally participated in the interview process. (T p 192) However, since Tyndall was unavailable to attend the interviews, Ms. Ramsey, Mr. Cottrell's secretary, attended the interviews as a witness. (T pp 67, 192, 259, 261-262) Mr. Cottrell recalls interviewing six (6) persons for the position. Petitioner and Mr. Ayscue were the only applicants interviewed who were currently employed as temporary Transportation Workers for Respondent. (T pp 259-260)

33. During the interviews, Mr. Cottrell possessed a standard set of interview questions for each person interviewed. He wrote notes of the applicants' responses, and Ms. Ramsey typed his notes onto the interview records. (T pp 260-261; Resp. Exh. 5). Cottrell incorrectly dated the interview records for November 19, 2006. Mr. Cottrell looked for the following qualities in a Transportation Worker: skills, abilities, and work ethic (i.e. taking the initiative in doing the work). Seniority can be a factor, but a person's work history can override seniority. (T p 262)

34. Mr. Cottrell was familiar with the working abilities and skills of Petitioner and Mr. Ayscue. He characterized both men as "good" workers. (T pp 265, 277) Mr. Cottrell thought that Mr. Ayscue was the most qualified and best-suited candidate for the Transportation Worker position based on Ayscue's prior work experience. Before Ayscue began working for DOT, he had construction experience involving "operating" heavy equipment such as backhoes, dump trucks, front-end loaders, and bucket trucks. In addition, while working at DOT, Mr. Ayscue performed his tasks quickly and efficiently. He showed initiative by taking and passing every test for Level 1 of the Skill Based Pay Plan, and some tests for Level 2. Overall, Mr. Ayscue passed eight (8) skill block tests. (T pp 263- 273-274, 277; Resp. Exh. 6)

35. In contrast, Cottrell noted that Petitioner only had prior experience "servicing" heavy equipment; i.e., changing the fuel filter, oil, and hydraulic fluid, and making sure everything was working correctly. (T pp 31, 91, 278) Petitioner passed five (5) skill block tests while working at DOT. (T p 268; Resp. Exh 8)

36. Before recommending Ayscue for the job, Mr. Cottrell and Mr. Tyndall reviewed each candidate's application and work experience. Based on Cottrell's recommendations, Mr. Tyndall agreed that Mr. Ayscue was the most qualified person for the position based on his relevant work experience in construction and the operation

of heavy equipment. Mr. Ayscue would require less training to complete the job assignments, and to learn how to operate the equipment safely. They also considered dependability, and the fact that Petitioner had worked for the DOT for a very short time before quitting in 2004. (T pp 195-197, 205-208, 225, 261, 265) Cottrell and Tyndall decided that Petitioner would have been management's second choice for the permanent Transportation Worker position.

37. However, a preponderance of evidence at hearing showed that Mr. Tyndall "had to rely on Cottrell in order to formulate" his opinion about the reasons why Tyndall did not select Petitioner for the position." (T. p. 214)

38. After Respondent advised Petitioner he had not received this position, Mr. Tyndall offered to provide Petitioner with a letter of recommendation for future DOT positions. (T pp 206, 265)

IV. Analysis

A. The Interview Process

39. The preponderance of the evidence at hearing showed that Respondent's interview process was incomplete, and flawed. Supervisor Cottrell was supposed to use a standardized set of questions to interview for the permanent Transportation Worker job. (T. at 66-67, Pet. Ex. 17) However, Supervisor Cottrell did not ask all the standardized questions during each candidate's interview. (T. at 67, 302) For example, Supervisor Cottrell told Petitioner he already knew what Petitioner could do, and therefore, did not ask Petitioner the questions about his qualifications or abilities. (T. at 68)

40. Supervisor Cottrell took handwritten notes during the interviews, but those notes have now been destroyed. (T. at 283) The only alleged documentation of the interviews are the typed "Interview Records." (Pet. Ex 18, 19) Pursuant to Cottrell's direction, Alicia Ramsey typed the Interview Records. (T. at 261) These "Interview Records" have obvious errors. For example, the date shown on Petitioner's Interview Record is November 20, 2006. This date is clearly wrong because Petitioner did not even submit his application until November 28, 2006. (Ex. 18, T. at 75) More importantly, the Interview Records exaggerate the experience of Ayscue as compared to Petitioner. (Pet. Ex. 18, 19)

41. The timing of the posting for the permanent position was important. Pursuant to Respondent's Temporary Employee policy, Petitioner needed to apply and be hired before his temporary employment expired. (T. at 61) On February 9, 2007, Petitioner's temporary employment as a Transportation Worker ended. (T. at 80, Pet. Ex. 32) At that time, Petitioner had not heard about being hired as a permanent Transportation Worker. (T. at 79)

a. Supervisor Cottrell knew that under the temporary employee policy, Petitioner would be "laid off" if he had been employed by Respondent for one year, and had not been hired for a permanent job. (T. at 292) Supervisor Cottrell knew that that if the job at issue was not posted in time for Petitioner to apply and be hired before his year was up, that Petitioner "would be out of luck." (T. at 293) Supervisor Cottrell also knew that Kenneth Ayscue would still be employed as a temporary worker when Petitioner's temporary employment expired. (T. at 292)

b. In March 2006, less than one month after Petitioner was terminated, and before the one-year anniversary of Kenneth Ayscue being hired as a temporary Transportation Worker, Ayscue was hired as a permanent Transportation Worker. (T. at 83, Pet. Ex. 19A, 21) On March 26, 2007, Petitioner was notified that he would not be hired as the permanent Transportation Worker. (Pet. Ex. 33) Three months after he was hired for the position of permanent Transportation Worker. Ayscue quit work. (T. at 227)

B. Evidence Refuting Contention That Ayscue Better Qualified

42. By all accounts, including those of Maintenance Engineer Tyndall, Supervisor Cottrell, and Assistant Supervisors Bobby King and Kent Perdue, Petitioner was a good employee and was qualified to be hired as a permanent Transportation Worker. (T. 119-121, 206, 264-265, 279, 342) Numerous co-workers and supervisors of Petitioner opined that Petitioner was a "good" worker. They also thought that Mr. Ayscue was a "good" worker. (T pp 118, 121, 164, 170, 182)

43. Contrary to Mr. Cottrell's determination, a preponderance of the evidence at hearing showed that Mr. Ayscue was not the most qualified person for the permanent Transportation Worker position. The job required an applicant possess a high school diploma or the equivalent. Ayscue's job application indicated that Ayscue dropped out of school in the ninth grade, and never graduated from high school. (T pp 222-224, Pet Exhs 19 & 19A) Respondent failed to present credible evidence at hearing showing that Mr. Ayscue had the functional equivalent of a high school diploma such as a G.E.D.

44. On the Interview Record for Kenneth Ayscue, Supervisor Cottrell noted, "Mr. Ayscue has experience in flagging operations, operating small and tandem dump trucks, rubber tire loader, tractor broom, patch roller, and various other pieces of equipment used in regular maintenance operations." (Pet. Ex 19) By contrast, on the Interview Record for Petitioner, Supervisor Cottrell failed to mention his "experience in flagging operations" or his use of the "rubber tire loader," or the "tractor broom." (Pet. Ex 18)

45. Cottrell's more detailed interview notes on applicant Ayscue created a false impression in the Interview Records that Ayscue had a wider range of experience with equipment. The preponderance of the evidence established that Petitioner had the same, if not better experience, than Mr. Ayscue. (T. at 72-73)

a. At hearing, Petitioner explained that he did flagging operations, and operated the tractor broom and rubber tire loader. (T. at 72-74) Supervisor Cottrell admitted that Petitioner had used the tractor broom and rubber tire loader, and claimed that Petitioner had been given some experience on the backhoe. (T. at 276. 303-304)

b. A preponderance of the evidence demonstrated that Mr. Ayscue had poor driving skills, even though driving trucks and heavy equipment was part of the Transportation Worker job. In May 2006, all Transportation Workers were required to drive a single-axle dump truck through an obstacle course of orange cones, back the truck through the cones, and parallel park. (T pp 54-56) Mr. Ayscue knocked down numerous cones, and could not parallel park. (T pp 55-56, 296) In contrast, Petitioner did not knock down any cones, and received a perfect score on his test.

c. There was also strong evidence that Kenneth Ayscue was unable to back up a truck with a trailer attached. (T. at 56, 296) In fact, Ayscue originally failed the skill block tests for towing a trailer and for the tractor sweeper. (T. at 228-230)

46. Cottrell's interview notes on Ayscue also stated that Ayscue "has shown outstanding initiative by taking and passing every test necessary to advance through Level 1 and some test [sic] for Level 2." (Pet. Ex. 19) This statement is unfair to Petitioner, and is deceptive for several reasons.

a. First, during cross-examination, Supervisor Cottrell admitted that Petitioner could have obtained the same skill blocks that Ayscue had obtained. (T. 319-323, Pet. Ex. 18)

b. Second, obtaining certification on pieces of equipment requires passing a test where you must be able to read and write properly. (T. at 304) The evidence at hearing established that Mr. Ayscue had poor handwriting and could not spell. For example, on Ayscue's November 28, 2006 job application, Ayscue misspelled the words "truck," "transportation," "floor," "spraying," and "chemical." (T pp 112-14, Pet Exh 19) On December 1, 2006, Ayscue submitted another job application for the subject job. (Resp Exh 6) Someone else had completed that application by hand for Mr. Ayscue. Petitioner thought that the handwriting on that application looked like the handwriting of Cottrell's assistant, Alicia Ramsey. (Pet Exh 19 & 19A)

c. Third, there was credible evidence that Supervisor Cottrell assisted Kenneth Ayscue in passing the skill block tests, but offered no assistance to Petitioner. Petitioner observed Supervisor Cottrell "going over" training manuals with Mr. Ayscue. (T. at 112-113) When Mr. Ayscue walked out of Supervisor Cottrell's office with books, Petitioner saw Ayscue holding books down beside his legs like he was hiding the books. (T. at 115) One of the books he was hiding was a test booklet. (T. at 115) After failing some of the first tests, Ayscue began to make better scores on tests. (T. at 230) Supervisor Cottrell admitted that he may have sat down with Ayscue and gone over the training materials with Ayscue. (T. at 294) Supervisor Cottrell also admitted that he never went over training materials with Petitioner. (T. at 294)

47. The preponderance of the evidence showed that the Interview Record of Ayscue's "use of equipment" and "initiative" in taking and passing skill block tests does not provide a valid non-discriminatory basis for distinguishing Ayscue from Petitioner and awarding Ayscue the job.

48. Supervisor Cottrell wrote in the Interview Record, and explained at hearing, that he selected Ayscue because of his work ethic and job efficiency. He characterized Ayscue as "a go-getter." (Ex. 19, T. at 277) However, other witnesses at the hearing contradicted Cottrell's subjective opinion about Ayscue.

a. Petitioner indicated that Ayscue did not come to work early, despite what Cottrell noted on the interview form. (T. at 71) In contrast, Petitioner arrived early for work, always carried what he needed to work, such as hardhat and vest, and was always prepared for work. However, Ayscue would leave behind safety equipment, such as his orange hat that was used by the employee directing traffic. (T. at 57)

b. Transportation Worker Larry Neal worked for Respondent for sixteen years, and observed both men on the job. (T. at 126-127) Neal explained that Ayscue did not take the equipment that he needed to job sites (T. at 129-130), but that Perry was always ready to go and would leave as soon as he received his assignment. (T. at 130) Neal opined that Ayscue was not more efficient or more of a "go-getter" than Petitioner. (T. at 131)

c. Transportation Worker Dennis Hargrove worked for Respondent for sixteen years, is the back-up operator on the backhoe, and is sometimes placed in charge of the work crews. (T. at 162-163) Hargrove worked with both Petitioner and Ayscue, and had the opportunity to observe both men's work. He did not observe Ayscue to be more efficient or more of a "go-getter" than Petitioner Perry. (T. at 163, 164) He also observed that Ayscue had the tendency to complain at work. (T. at 164) Hargrove would have chosen Petitioner over Ayscue if he had been asked to choose for the permanent position. (T. at 165, 167)

d. Transportation Worker Donnie Lee Hicks has worked on the patch crew for twenty-two years. He opined that Petitioner is a good worker, would be on time every morning, and that he would have recommended Petitioner for a permanent job. (T. at 170)

e. Transportation Worker Sterling Terry worked with the Department of Transportation for eighteen years and is a motor grader operator. (T. at 172, Pet. Ex. 2) Terry has been placed in charge of crews, and asked to direct their work and evaluate the crew. (T. at 177) Terry worked with both Ayscue and Petitioner, and had an opportunity to observe their work. (T. at 172) Terry would not have graded Kenneth Ayscue as being more efficient or more of a "go-getter" than Petitioner. (T. at 173)

f. Transportation Worker William House worked for Respondent for sixteen years and worked with both Petitioner and Kenneth Ayscue when they were employed as temporary workers. (T. at 179) House worked with Ayscue seventy per cent of the time. (T. at 181) He would not have rated Ayscue as being more of a "go-getter" or being more efficient than Petitioner. (T. at 180)

49. Lastly, evidence at hearing established that Ayscue had a bad attitude toward his work assignments, and complained if he was asked to flag traffic or asked to drive the truck picking up the dead animals. (T. at 57) Driving the "dead animal" truck was a very nasty assignment involving rotting animals that had bugs and worms in them. (T. at 58) Cottrell made the daily assignments. The evidence showed that the assignment of driving the animal truck was normally given to a black worker.

50. The preponderance of the evidence at hearing showed that Cottrell's explanation why he picked Ayscue for the permanent position was not credible. In his pretrial deposition, Supervisor Cottrell explained that he chose Ayscue for the permanent job, because Assistant Supervisor Bobby King had recommended Ayscue over Petitioner. (T. at 297-298) Cottrell also stated during his deposition that King described Ayscue as a "go-getter," who had more initiative in getting the job done and doing things. (T. at 298-299, 306)

a. Yet, at hearing, Supervisor King's testimony contradicted Cottrell's statement. (T. at 177-120) Assistant Bobby King has worked for the state for forty years, and had been in charge of the digging crew at the Gillburg Yard for twelve to fifteen years. (T. at 117-118) Assistant Supervisor King thought both Petitioner Perry and Kenneth Ayscue were good employees, but he never told Supervisor Cottrell that he favored Ayscue over Petitioner. In fact, Assistant Supervisor King never told Supervisor Cottrell that Ayscue was better than Petitioner. (T. at 119)

b. According to Assistant Supervisor King, Ayscue did not have any previous experience on the "different types of equipment that helped out with his job performance." (T. at 121) Although Supervisor Cottrell claimed that Ayscue had prior experience with construction equipment, that experience was not listed on Ayscue's applications for employment with Respondent, and is not supported by the testimony of the Assistant Supervisor in charge of the digging crew. (T. at 224, 278)

51. Supervisor Cottrell said he relied upon the opinion of another white Assistant Supervisor, Kent Perdue, but this testimony is also suspect. Assistant Supervisor Perdue's nickname is "Chicken." He is a friend of Supervisor Cottrell and socializes with him in the mornings in Cottrell's office along with the other white employees. Supervisor Cottrell admitted that he attends barbeques at Perdue's house with other white workers, where black workers are not invited. (T. at 216, 351)

a. At hearing, Assistant Supervisor Perdue initially testified on direct examination that Supervisor Cottrell called him and Assistant Supervisor King into Cottrell's office, and asked them whether to hire Petitioner or Ayscue. (T. at 342-343)

However, during cross-examination, Assistant Supervisor Perdue changed his testimony with regard to this meeting. He admitted he could not give the date for the meeting, and that there were no notes from the meeting. He admitted that he made no written recommendations regarding Ayscue. Finally, he admitted, "I don't know if there was a meeting with him and King." (T. at 354)

b. Assistant Supervisor Perdue acknowledged that Assistant Supervisor King supervises work on the backhoe, because King supervises the digging crew. Assistant Supervisor Perdue admitted that he did not know whether King ever recommended Ayscue over Petitioner. (T. at 353-355)

52. Supervisor Cottrell admitted that seniority may play a role in hiring decisions. (T. at 262) He also admitted that if all other things are equal, then seniority may break the tie. (T. at 306) Yet, Supervisor Cottrell admitted that he did not even consider seniority in deciding to choose Ayscue for the permanent position. (T. At 306).

53. Supervisor Cottrell admitted that he was the only one who interviewed the candidates, and that Jonathan Tyndall had to rely on him for job performance of the employees. (T. at 330)

54. County Maintenance Engineer Tyndall admitted that he had to rely on Cottrell's evaluation of Petitioner's work performance, and on Cottrell's opinions to formulate his own opinions about Petitioner and Ayscue. (T. at 213) If Supervisor Cottrell favored Ayscue because of his race, then Tyndall admitted that he relied on the opinion of a racially-biased supervisor. (T. at 214)

V. Retaliation for Complaining of Race Discrimination

55. After Petitioner submitted his application for the permanent position, Supervisor Cottrell called him into the office, and told him that there was a problem with his commercial driver's license. This problem could have prevented Petitioner from being able to get the permanent job, because a CDL was required. (T. at 75) Petitioner drove to the Warren County maintenance yard to investigate why there was a problem with his commercial driver's license. Petitioner spoke with the officer who had administered Petitioner's CDL test, Mr. Kevin Smith. (T. at 75-77) Petitioner determined that Mr. Smith had either failed to ask Petitioner particular questions, or failed to check off the boxes on a form he used during the "pre-trip" inspection of test truck. (T. at 77, 103-107)

56. When Petitioner returned from meeting with Kevin Smith, Petitioner learned that Cottrell was extremely upset with him for visiting Smith to clear up the matter. (T. at 78) Cottrell admitted that he was unhappy with Petitioner for going to see Kevin Smith, because he felt like Petitioner had not followed the "chain of command." (T. at 288) Petitioner explained that he had gone on his own time, in his own vehicle, and did not think that it was a problem. (T. at 78) Petitioner asked Supervisor Cottrell,

"Is this a race thing?" (T. at 78) Cottrell became angrier after Petitioner brought up race discrimination. (T. at 79)

VI. Additional Evidence of Disparate Treatment Based on Race

57. There was additional evidence of disparate treatment of black employees by Supervisor Cottrell. The preponderance of the evidence established that Cottrell denied promotions to Transportation Worker Larry Neal, who is black. A white employee got the job that Larry Neal applied for even though Neal was qualified and found qualified by the state. (T. at 132-133) Transportation Worker Neal applied for promotions on six different occasions. (T. at 134-135)

58. Transportation Worker Brody operated heavy machinery, including the motor grader and the "low boy," a tractor-trailer used for hauling heavy equipment around. A white employee, Orin Edwards, also operated the low boy. (T. at 146) When Brody returned to the office after a trip with the low boy, Cottrell would assign Brody another job, such as working on the patch crew or helping with the pipe crew. However, when Edwards returned to the office, he would hang out in the yard or play on the computer, rather than being given another assignment by Supervisor Cottrell. Edwards was never assigned to do manual work. (T. at 148)

59. Darius Harris, a black man, had a similar experience with Supervisor Cottrell. Harris had worked as a temporary Transportation Worker under Supervisor Cottrell in 2006. (T. at 140-142) Darius Harris also had wanted a permanent position at the same time that a white worker, Barry Tart, was seeking a permanent job opening. (T. at 140) Supervisor Cottrell told Harris that he would like to hire both men, but that he only had one job opening. (T. at 141) Supervisor Cottrell told Harris that he wanted to try to get a position transferred from Bunn, North Carolina. (T. at 141) Rather than rely upon Supervisor Cottrell, Darius Harris transferred into a permanent position in Vance County, out from under Supervisor Cottrell. (T. at 141) Supervisor Cottrell gave the permanent position to the white worker, Barry Tart. (T. at 142)

60. During the seven years that Cottrell was a Supervisor at the Gillburg Yard, he often promoted and hired white employees over black employees. Cottrell hired Kent Perdue (a white male) over James Bullock (a black male) as an Assistant Supervisor, because Perdue was a "go-getter." Yet, at hearing, Supervisor Cottrell admitted that Bullock was well qualified. (T. at 307)

61. There was no testimony at the hearing to establish that Cottrell had ever hired a black temporary worker as a permanent employee until after this contested case was filed. Supervisor Cottrell admitted at the hearing that Brian Hicks, a black temporary employee, was hired from temporary to permanent status after Petitioner filed this case alleging race discrimination. (T. at 333)

62. During Respondent's investigation of Petitioner's complaint in this case, Supervisor Cottrell told the State EEO Investigator George Nixon that Petitioner had a

poor attitude from the first day he worked and believed he was owed a permanent job. (T. at 285-286, Resp. Ex. 25) At hearing, Supervisor Cottrell denied making this statement to the EEO Investigator. (T. at 287)

63. Supervisor Cottrell rode to the contested case hearing with white employees, while the black employees rode in a different truck. (T. at 40)

VII. Denial of Training on Equipment

64. While Petitioner held a Class A Commercial Drivers License, he was only allowed to operate the double axle (tandem) dump truck on one occasion. (T. at 46) Supervisor Cottrell does not dispute Petitioner's testimony that Perry was allowed to drive the tandem dump truck only one time. (T. at 294-295)

65. By contrast, Ayscue, who was hired one month after Petitioner, was allowed to operate the dump truck in the first few days after he was hired, and continued to operate it. (T. at 45)

66. Petitioner also wanted to train to run the slope mower, but he was allowed to run the slope mower on only a couple of occasions. Bob Watkins, the regular slope mower operator, was assigned to train Petitioner on the slope mower. Mr. Watkins told Petitioner that he could run the slope mower as well as Mr. Watkins could run it. (T. at 51)

67. Respondent contended that Petitioner was removed from training on the slope mower, because Petitioner said he was afraid to run the machine, believing it to be "too dangerous." (T. 275-276, 326) Contrary to Respondent's contention, Petitioner was not afraid to run the slope mower. Petitioner has been working on a farm since he was a child and running a chain saw since he was eleven years old. Petitioner personally owns a tractor and a bush hog. Petitioner described the slope mower as nothing but a remote-controlled bush hog. (T. 368)

68. Petitioner also asked for training on the backhoe, but Respondent denied Petitioner that opportunity. (T. at 52) Before starting work for Respondent, Petitioner had serviced backhoes in one of his past jobs. (T. at 93-95)

69. Supervisor Cottrell admits that Petitioner asked him for backhoe training. (T. at 294) Petitioner explained, and Transportation Worker Sterling Terry confirmed, that Cottrell laughed at Petitioner when Petitioner asked Supervisor Cottrell for training on the backhoe. (T. at 52-53, 101-102, 173)

70. Supervisor Cottrell had a history of denying black employees training on equipment. (T. at 238-39) Transportation Worker Earl Brody complained that Supervisor Cottrell had denied him training on a piece of equipment, because of his race. Brody wanted to run the low boy. (T. at 238-39)

71. Supervisor Cottrell brought in Paul Schuster, a white man from another county, to run the low boy. (T. at 150-151) Transportation Worker Brody complained that Cottrell brought a white man to run the low boy when he could do it. (T. at 151) Brody also complained to May Rogers, the Equal Employment Opportunity Officer for the State of North Carolina, about race discrimination. (T. at 152-153) At a meeting with the Maintenance Engineer Tyndall and Supervisor Cottrell, EEO Officer Rogers questioned Cottrell why he had not given training to Brody on the low boy, and made him the backup driver for the low boy. (T. at 160)¹ It was only after Transportation Worker Brody made a race discrimination complaint that he "finally got a chance to get on the low boy and get his training." (T. at 161, 238-240)

Petitioner's Damages

72. If Petitioner had received the permanent Transportation Worker position, he would have received a salary of \$22,088.00 annually, plus state benefits. (T. at 84) The state benefits would have been worth at least 25% of his salary or \$7,000 per year. (T. at 84)

73. Petitioner sought other employment after Respondent denied Petitioner the permanent Transportation Worker position. Petitioner worked with a flooring company, a lawn service. (T. at 85)

74. On August 8, 2007, Petitioner was hired permanently with K-Flex USA as a Hazardous Waste Technician, making more than he would have made at the State. (T. at 86)

75. During the six months before he obtained another permanent job, Petitioner lost \$14,544.00. (T. at 87) Before being hired by K-Flex, Petitioner made \$3,200 the various jobs. (T. at 87) Petitioner's total losses from the failure to be hired into the permanent position are \$11,344.00. (T. at 87)

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings as the Office of Administrative Hearings ("OAH") has jurisdiction over this matter. The parties received proper notice of the hearing in this matter.

2. Petitioner's claim with regard to discriminatory failure to train is governed by N.C. Gen. Stat. § 126-34.1(a)(2)a, which states:

¹The Transcript of the hearing at page 160 has a transcription error. It mistakenly has Earl Brody referring to a meeting with "Danny." It should have been properly transcribed as "Tommy" (i.e., Cottrell). There was no "Danny" in the department and Cottrell himself admitted being in the meeting with Brody and the EEO officer. (T. at 238-239)

A State employee or former State employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes only as to the following personnel actions or issues (2) an alleged unlawful state employment practice constituting a discrimination as prescribed by G.S. 126-36, including:

- a. denial of promotion, transfer or training on account of the employees age, sex, race, color, national origin, religion, creed, political affiliation, or handicap in condition as defined by Chapter 168A of the General Statutes."

3. Petitioner's claim that Respondent discriminated against him by failing to hire him for the permanent Transportation worker position is governed by N.C. Gen. Stat. § 126-34.1(b)(1) and (3), which states:

an applicant for initial State employment may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes based upon:

- (1) Alleged denial of employment in violation of G.S. 126-16 . . .
- (3) Denial of equal opportunity for employment and compensation on account of the employee's. . . race . . .

4. N.C. Gen. Stat. § 126-16 states that, "All state departments and agencies and local political subdivisions of North Carolina shall give equal opportunity for employment and compensation without regard to race..."

5. Petitioner's claim of retaliation is governed by N.C. Gen. Stat. § 126-36(a), which states:

Any State employee or former State employee who has reason to believe that employment, promotion, training, or transfer was denied the employee or that demotion, layoff, transfer or termination of employment was forced upon the employee in retaliation for opposition to alleged discrimination or because of the employee's age, sex, race, color, national origin, religion, creed... shall have the right to appeal directly to the State Personnel Commission.

Denial of Transportation Worker Position

6. Pursuant to McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) and N.C. Department of Correction v. Gibson, 308 N.C. 131 (1983), the U.S. Supreme Court and the N.C. Supreme Court respectively have adopted the standards in an unlawful discrimination case. Under these standards, the burden of production is as follows:

- (1) The claimant carries the initial burden of establishing a *prima facie* case of discrimination.
- (2) The burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the action taken by the employer.
- (3) If a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for the action taken was, in fact, a pretext for discrimination.

North Carolina Dep't of Correction v. Gibson, 308 N.C. 131, 137, 301 S.E.2d 78, 82 (1983). The ultimate burden of proving illegal discrimination in the action lies with the Petitioner or complainant. *Id.* at 138, 301 S.E.2d at 83.

7. When discrimination is alleged in promotion—as opposed to initial hiring—cases, the Fourth Circuit applies a modified *McDonnell Douglas* standard, which it set forth in *Holmes v. Bevilacqua*, 794 F.2d 142 (4th Cir. 1986). In promotion cases, courts should employ the *McDonnell Douglas* standard using a substitute fourth prong, which requires a plaintiff to “present some evidence that [the applicant’s membership in a class] was a factor considered by his employer in not granting him the promotion.” *Id.* at 147.

8. Therefore, in order to establish a *prima facie* case that Respondent discriminated against Petitioner based on his race by failing to selecting him for the permanent Transportation worker job, Petitioner must show that:

- (1) He is a member of a protected class;
- (2) He was qualified for the position for which he applied;
- (3) He was not selected for the promotion; and
- (4) A person who is not a member of the protected class was placed into the position.

9. In *Saint Mary’s Honors Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993) and in *Vanderburg v. N.C. Dept. of Revenue*, 168 N.C. App. 598, 612, 608 S.E.2d 813, 841, the U.S. Supreme Court and North Carolina Court of Appeals respectively examined the standards for the finder of fact to determine whether the employer’s proffered reason for the contested employment decision was actually a pretext for unlawful discrimination.

a. In *St. Mary’s Honor Center*, the Supreme Court found:

the fact finder’s disbelief of the reasons put forward by the defendant (particular if disbelief is accompanied by a suspension of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered

reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.

509 U.S. at 511.

b. Similarly, in Vanderburg, the Court of Appeals upheld a finding by the Administrative Law Judge that the Respondent's evidence was "not worthy of belief." 168 N.C. App. at 612.

10. Once the employer introduces evidence of legitimate, nondiscriminatory reasons for its action, the legal presumption raised by the Petitioner in the *prima facie* case is rebutted and completely drops out of the case. *St. Mary's Honor Center*, 509 U.S. at 510-11, 125 L. Ed. 2d at 416. After the presumption is dropped from the case, Petitioner must show that Respondent's reasons are merely a pretext. *Id.* at 515-17, 125 L. Ed. 2d at 418.

11. The primary claim in this case is that Respondent failed to hire Petitioner as a permanent Transportation Worker because of Petitioner's race, and retaliated against Petitioner, based on his race, by failing to hire Petitioner. There is no dispute that Petitioner has proven his *prima facie* case of failure to hire. All of the witnesses for Respondent, including Franklin County Maintenance Engineer Jonathan Tyndall, Supervisor Tommy Cottrell, and Assistant Supervisors Bobby King and Kent Perdue admitted that Petitioner was qualified for the position of permanent Transportation Worker. Petitioner was denied this job, and it was given to a white coworker, Kenneth Ayscue. The preponderance of the evidence established Petitioner's *prima facie* case of a racially discriminatory failure to hire.

12. Respondent proffered evidence of non-discriminatory reasons for selecting the white employee, Kenneth Ayscue, instead of Petitioner for the permanent position of Transportation Worker. However, after examining the documentary evidence, hearing the testimony, and observing the demeanor of all the witnesses in this case, the undersigned finds that Respondent's non-discriminatory reasons for its failure to hire Petitioner are not worthy of belief.

13. First, the preponderance of the evidence showed that Petitioner was, at a minimum, equally as qualified as Mr. Ayscue, the white applicant, for the permanent Transportation Worker job. The white applicant did not meet one of the minimum qualifications for the job, a high school diploma, or the equivalent. Petitioner met this qualification.

14. Second, Supervisor Cottrell admitted he told Petitioner the permanent position would be posted within five months of his initial hiring. Petitioner made repeated inquiries about the job posting, but Supervisor Cottrell made excuses for not posting the job. Even though Maintenance Engineer Tyndall directed that the job be posted, it was still not posted. When Petitioner Perry asked Administrative Assistant

Donna Murphy about the job posting, Supervisor Cottrell became upset that Petitioner had violated the chain of command.

15. Supervisor Cottrell knew that if he did not post the position so Petitioner would be hired before he had been employed for one year, Petitioner would be terminated from State employment before the permanent position came open. This delay in posting appears to have been Supervisor Cottrell's attempt to time the posting to favor the white employee, Kenneth Ayscue. Supervisor Cottrell only posted the position after being confronted by Franklin County Maintenance Engineer Tyndall at Petitioner's request on November 28, 2006.

16. After the posting, Supervisor Cottrell appeared to challenge Petitioner's commercial driver's license, and became upset with Petitioner for "violating the chain of command" by assuring that his commercial driver's license was not in dispute. A valid challenge to Petitioner's CDL would have made him ineligible for the position.

17. The application process for the permanent Transportation Worker position was suspect. The evidence demonstrated that Supervisor Cottrell favored the white employee during the process. Petitioner prepared and submitted his own application, by himself, as soon as the job came open. By contrast, the white employee, who was unable to spell common words and had difficulty writing, prepared his initial application, making obvious spelling errors. The preponderance of evidence strongly suggested that Supervisor Cottrell's Secretary, Alicia Ramsey, completed a second application for Mr. Ayscue, in a perfectly legible, properly spelled manner. The second application was used as Mr. Ayscue's official application for the job. At the very least, the evidence indicates that Supervisor Cottrell and his Secretary were assisting the white employee during the application process.

18. Third, the interview process and the rationale used for making the hiring decision were fatally flawed. In normal circumstances, County Maintenance Engineer Tyndall would have been present for the interviews. Instead, Supervisor Cottrell conducted these interviews with his secretary as an attendee. Supervisor Cottrell was, in essence, the decision-maker in this case as he interviewed the candidates, had documentation completed from his interview notes, and recommended his selected candidate to Mr. Tyndall.

19. The evidence established that Supervisor Cottrell did not ask all the questions on the form designed for hiring interviews, a form intended to give each applicant an equal chance to show his skills and qualifications during the interview process. Supervisor Cottrell made handwritten notes during the interview process, but those notes are now unavailable. Instead, what exists are Interview Records typed by Ms. Ramsey at Cottrell's direction.

20. The Interview Records and testimony of Cottrell regarding his "non-discriminatory" reasons for hiring Ayscue are untrue and unfairly biased in favor of the white employee, Kenneth Ayscue. Cottrell's written records and testimony do not

properly reflect the skills, abilities, and performance of Petitioner in a manner that was known or should have been known to Supervisor Cottrell. Supervisor Cottrell admitted that Petitioner was qualified to operate the same equipment that Cottrell listed, on Ayscue's Interview Record, that Ayscue could operate. Yet, neither Mr. Cottrell nor Ms. Ramsey recorded that Petitioner was able to operate that equipment on Petitioner's Interview Record.

21. This discrepancy as to what was listed on the Interview Records is important, because Cottrell used Ayscue's ability and experience running additional equipment as one of the non-discriminatory reasons he chose Ayscue over Petitioner. Assistant Supervisor Bobby King, who ran the digging crew, did not support Cottrell's testimony regarding Ayscue's ability to run equipment. Moreover, testimony at the hearing showed that Supervisor Cottrell knew Perry was qualified on numerous pieces of equipment that were not recorded on Perry's Interview Record.

22. Testimony regarding the backhoe is illustrative of another problem. Petitioner had some experience servicing and operating a backhoe. There was no indication on Ayscue's application for employment, or other written materials before the Court, that Ayscue actually had prior experience operating a backhoe. The preponderance of the evidence proved that when Petitioner requested training on the backhoe from Cottrell, Supervisor Cottrell laughed at Petitioner, and denied him training on the backhoe. Evidence at hearing also proved that Supervisor Cottrell had previously denied training on equipment to black employees, until he was forced to do so by Respondent's EEO officer.

23. Supervisor Cottrell contended that Mr. Ayscue had a better work ethic and was more of a "go-getter" than Petitioner Perry, and therefore, that was another non-discriminatory reason for hiring Mr. Ayscue. However, numerous coworkers and supervisors who had the opportunity to observe both Petitioner and Ayscue work, specifically refuted this subjective reason. These coworkers confirmed that Petitioner arrived at work early, was ready to work, and was a good worker. They confirmed that Ayscue complained about job assignments, did not carry necessary equipment to the job site, and had a bad attitude. It is noteworthy that three months after Ayscue was hired for the permanent Transportation Worker position, Ayscue quit the job.

24. Finally, Supervisor Cottrell's explanation, that his assistant supervisors recommended Ayscue for the job, was not believable. At his deposition, Cottrell indicated that he consulted with Assistant Supervisor Bobby King about the applicants, and King recommended Ayscue over Petitioner for the subject job. Yet, at the hearing, Assistant Supervisor King denied making such recommendation. The other Assistant Supervisor, Mr. Perdue, undermined his own credibility by claiming that he had attended a meeting with Cottrell and King to discuss who should get the job. But, during cross-examination, Perdue recanted his testimony, and admitted that such a meeting never occurred.

25. Mr. Cottrell had been a Supervisor for seven years, but never hired any black employee from a temporary to a permanent position as Transportation Worker before Petitioner filed this case. There was testimony regarding other race discrimination complaints against Cottrell, and evidence showing Cottrell favored white employees in training and job assignments. During Respondent's investigation of Petitioner's complaint in this case, Supervisor Cottrell told the State EEO Investigator George Nixon that Petitioner had a poor attitude from the first day he worked and believed he was "owed" a permanent job. (T. at 285-286, Resp. Ex. 25) Yet, at this hearing, Supervisor Cottrell denied making such statement to the EEO Investigator.

26. The preponderance of the evidence established that Mr. Tyndall believed Petitioner was qualified for the permanent Transportation Worker position. Yet, the evidence also proved that Mr. Tyndall relied on Mr. Cottrell to formulate his opinion regarding who was the most qualified candidate for the job at issue.

27. A preponderance of the evidence demonstrated that Petitioner proved his *prima facie* case of racial discrimination, and proved that the proffered reasons given by Respondent for hiring the white employee, instead of Petitioner, were unworthy of belief, and therefore, pretextual. Petitioner proved that Respondent discriminated against Petitioner, based on his race, when it failed to hire Petitioner for the permanent Transportation Worker.

28. The preponderance of the evidence also showed that Respondent racially discriminated against Petitioner in retaliation for Petitioner raising race discrimination as an issue when Cottrell questioned Petitioner about Petitioner's Commercial Driving License. The evidence established that Cottrell became angry with Petitioner after Petitioner did not follow Cottrell's "chain of command," and especially after, Petitioner asked Cottrell if the CDL issue was about race. Within three months, Petitioner was denied employment for the permanent Transportation Worker job. The temporal nexus between the complaint of race discrimination and the denial of the position was sufficiently close to conclude that Petitioner suffered retaliation for the assertion of his right to be free from discrimination.

29. Based on the foregoing, Petitioner proved by a preponderance of the evidence that unlawful retaliation for opposition to race discrimination is an alternative reason for Respondent's failure to hire Petitioner to a permanent position as a Transportation Worker.

Denial of Training Claim

30. In order to establish a *prima facie* case of denial of training due to unlawful discrimination, a plaintiff must prove that:

- (1) He is a member of a protected class;
- (2) His employer provided training to its employees;
- (3) He was eligible for the training; and

- (4) He was not provided training under circumstances giving rise to an inference of discrimination.

Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649-50 (4th Cir. 2002).

31. In this case, Petitioner proved his prima facie case of discrimination in training. Petitioner, a black employee, was denied training on the backhoe and his training on the slope mower was curtailed, while the white employee, Kenneth Ayscue was allowed equipment training, including training on the backhoe. Plaintiff was also denied assignment to the tandem dump truck, while Ayscue was assigned to the tandem dump truck from the outset of his employment.

32. Defendant gave no non-discriminatory reason for this disparate treatment or gave reasons that are worthy of credence. Petitioner also presented credible evidence that Cottrell denied other black employees, training on equipment due to their race. The preponderance of the evidence showed that Respondent discriminated against Petitioner based on his race by failing to give Petitioner proper training on equipment.

33. Based on the foregoing, Petitioner is entitled to be hired in the position of permanent Transportation Worker, and be awarded back pay for \$11,344.00 plus interest.

34. Petitioner is also entitled to reasonable attorney's fees based upon Petitioner's attorney submitting an itemized statement of fees and costs incurred in representing Petitioner in a Petition to the North Carolina State Personnel Commission.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that the State Personnel Commission should **REVERSE** Respondent's decision not to select Petitioner for promotion to the Transportation Worker position. Pursuant to N.C. Gen. Stat. § 126-37(a), Petitioner should be hired and placed in a permanent Transportation Worker position or a substantially similar position with full back pay accruing from March 2007, the date Respondent hired Mr. Ayscue for the subject position.

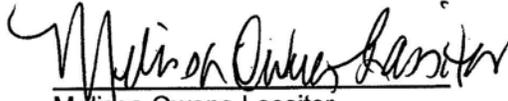
Petitioner is also entitled to: (1) appropriate adjustment of such salary for any across the board legislative salary increases, and (2) all other benefits of continuous State employment, (3) and back pay. Pursuant to 25 N.C.A.C. 1B.0414, Petitioner should be awarded reasonable attorney fees, based upon Petitioner's attorney's submitting an itemized statement of the fees and costs incurred in representing the Petitioner, in a Petition to the North Carolina State Personnel Commission.

ORDER AND NOTICE

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

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

This the 16th day of December, 2008.



Melissa Owens Lassiter
Administrative Law Judge

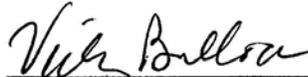
CERTIFICATE OF SERVICE

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

Stewart W. Fisher
Glenn Mills and Fisher PA
PO Drawer 3865
Durham, NC 27702-3865
ATTORNEY FOR PETITIONER

Ebony Pittman
Tina Krasner
Assistant Attorney General
NC Department of Justice
Transportation Section
1505 Mail Service Center
Raleigh, NC 27699-1505
ATTORNEYS FOR RESPONDENT

This the 16th day of December, 2008.



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

Filed

STATE OF NORTH CAROLINA
COUNTY OF WAKE

2008 OCT 31 PM 1:24

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 OSP 1584

KENNETH L. CASSIDY,
Petitioner,

Office of
Administrative Hearings

v.

N.C. DEPARTMENT OF
TRANSPORTATION, DIVISION OF
MOTOR VEHICLES,
Respondent.

DECISION

This contested case was heard by Senior Administrative Law Judge Fred G. Morrison Jr. on September 17, 2008, in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Michael C. Byrne, Attorney at Law, Raleigh, North Carolina

For Respondent: Neil Dalton, Special Deputy Attorney General, North Carolina
Department of Justice, Raleigh, North Carolina

ISSUE

Whether the Respondent had just cause to terminate Petitioner's employment for insubordination/unacceptable personal conduct.

FINDINGS OF FACT

1. Petitioner Kenneth L. Cassidy was an employee of the Division of Motor Vehicles for 17 years without being subject to prior disciplinary actions. At the time of his termination on March 20, 2008, he was an Assistant District Supervisor, assigned to the License and Theft Bureau at the Avent Ferry Road office (District III) in Raleigh, North Carolina.

2. The License and Theft Bureau is divided into two sections: (1) the theft or police side and (2) the emissions side. Several members of both sections work in the Avent Ferry Road office. These members share common areas at the office, including the parking lot, lunchroom, and smoking facility. Petitioner had no supervisory authority over emissions personnel who worked in this office or out in the field.

3. On August 10, 2007, William Gore became the Commissioner of the North Carolina Division of Motor Vehicles. Prior to his appointment, Gore served as a North Carolina District Court judge for ten years, and as a Superior Court judge for seventeen and a half years.

4. Petitioner was the source for several unfavorable articles about the DMV printed in the **Raleigh News & Observer**. Petitioner told a **News & Observer** reporter that the DMV emissions specialists did not have enough work to do, and that the DMV had engaged in problematic hirings. James Burgess, an emissions specialist in the Avent Ferry Road office, was the purported beneficiary of one of these hirings. Reports of these hirings within the DMV led to an SBI investigation in 2007 which resulted in a dismissal and several subsequent retirements or resignations by DMV personnel who had been involved.

5. After surmising that Petitioner was the source for the newspaper articles, employees in the emissions section and elsewhere were angry with him and retaliated by making allegations concerning his conduct toward his fellow employees, such as: referring to call center employees as being dumb or stupid; calling an emissions specialist a "Highway Patrol flunky"; telling an employee to shut off the television during her lunch break; telling another emissions specialist to stop having lunch with her daughter in the office; following emissions specialists around and pestering/harassing them. No specific dates or times were given for the transactions.

6. Upon being informed of these allegations, Commissioner Gore, without investigating them, asked Petitioner to remain in his conference room for a meeting on January 4, 2008. Deputy Commissioner Wayne Hurder was also in attendance. Commissioner Gore explained that he had received complaints regarding Petitioner's conduct, as well as Petitioner's requests that employees speak to the media. Commissioner Gore then issued Petitioner a verbal order, later reduced to writing and presented to Petitioner on March 17, 2008. The order includes a signature line in the bottom corner for the addressee to acknowledge receipt; the signature line was never signed. The order, dated January 4, 2008, reads:

You are hereby specifically directed *not* to issue instructions or directions to any emissions personnel employed by the N.C. Division of Motor Vehicles pending further orders. You are directed further not to socialize with, “joke” with, touch or otherwise have any personal or professional interaction with any said Emissions staff during working hours or while said personnel is present at duty stations at a DMV facility or in the field. This order does not purport to prohibit voluntary communication or association with said Emissions staff on private premises during non-work hours. Violation of this order will result in disciplinary action.

Commissioner Gore’s stated reason for this order was an effort to maintain peace and harmony in the workplace by putting distance between Petitioner and some 100 members in the emissions section located in Raleigh and across North Carolina.

7. The next day, January 5, 2008, Commissioner Gore visited the Avent Ferry Road office where he told emissions employees not to have any interaction with Petitioner, and that Petitioner had been ordered not to have any interaction with emissions personnel in the DMV. He did not at any time provide a written order to emissions employees.

8. Commissioner Gore did not receive any further allegations, reports or complaints about conduct by Petitioner until March 12, 2008, more than two months later.

9. On March 10, 2008, James Burgess, an emissions specialist working in the Avent Ferry Road office, submitted his resignation. After Bobby Flaherty, Petitioner’s immediate supervisor, told Petitioner that James Burgess had resigned, Petitioner saw Burgess leaving the office; spontaneously asked him to step into Flaherty’s office; he told Burgess that he was sorry Burgess felt he had to resign; he wished Burgess well; they shook hands and parted company.

10. Ms. Dunston saw Petitioner and Burgess enter Flaherty’s office, and reported this incident to Debbie Brewer, her supervisor. At the hearing, Ms. Dunston testified that she did not know what the men said during their conversation. On March 12, 2008, Ms. Dunston met with Commissioner Gore to discuss Petitioner’s action. The DMV conducted an internal investigation on March 12 and March 13, 2008, into the allegation of Petitioner’s conduct with Burgess. G.C. Lockamy, a supervisor in the Office of Professional Standards, interviewed Ms. Dunston, Mr. Burgess, and Petitioner. When asked whether he had violated Commissioner Gore’s order, Petitioner answered, “Yes I did. Yes I did. Yes.” At the conclusion of his Internal Affairs

Investigation report, Mr. Lockamy concluded that Petitioner had violated the Commissioner's order. During this investigation, Ms. Dunston told Lockamy that she heard Petitioner tell Burgess that he had not done anything wrong and did not need to resign.

11. On March 17, 2008, Petitioner was placed on Investigatory Placement with pay, notified of his Pre-disciplinary conference on March 18, and presented with the written version of Commissioner Gore's order, dated January 4, 2008. On March 20, 2008, Petitioner was dismissed for unacceptable personal conduct, specifically: willfully failing to follow a lawful order given to you by a superior officer.

12. On June 3, 2008, the N.C. Department of Transportation Employee Relations Committee held a grievance hearing for Petitioner. Following the hearing, the Committee unanimously recommended that Petitioner be reinstated and issued a written warning for failing to follow Commissioner Gore's order. The Committee also recommended that allegations of Petitioner's inappropriate personal conduct be thoroughly investigated.

13. After reviewing the Committee's recommendation, Petitioner's dismissal was upheld by the Chief Deputy Secretary for the N.C. Department of Transportation, who concluded that DMV management had just cause to dismiss Petitioner for insubordination. Petitioner subsequently filed a Petition for a Contested Case Hearing alleging lack of just cause for his dismissal and asking to be reinstated with an award of back pay and attorney's fees.

CONCLUSIONS OF LAW

1. Petitioner was a career State employee at the time of his dismissal. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a Decision to the State Personnel Commission. N.C. GEN. STAT. §§ 126-1 *et seq.*, 126-35, 126-37(a). (2007).

2. N.C. GEN. STAT. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career State employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C. GEN. STAT. § 126-35(d) (2007).

3. 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. One definition of “unacceptable personal conduct” is insubordination, which is the willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is considered unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning. 25 NCAC 11.2304(b)(8) (2007).

4. The Division of Motor Vehicles, License and Theft Bureau General Rules of Conduct defines Insubordination as the “failure or deliberate refusal of any member to obey any lawful order given by any superior officer.” General Directive 2.07 (B)(2). To appeal an unlawful or unjust order, members must submit an appeal in writing to a higher authority through proper channels. 2.07 (B)(7). Because the order to Petitioner was issued by the DMV’s highest supervisor, Petitioner would have had to appeal to the DOT Secretary who approved his firing.

5. 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 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.”

6. Respondent has not met the burden of persuading by the greater weight of the evidence presented that it had just cause to terminate Petitioner’s employment. The second sentence of the order was overly broad and unreasonable by its terms: **“You are further directed not to socialize with, “joke” with, touch or otherwise have any personal or professional interaction with any said Emissions staff during working hours or while said personnel is present at duty stations at a DMV facility or in the field”** forbade all types of communication. According to this directive, Petitioner could not shake hands with or wish emissions specialists “Good Morning”, “Happy Birthday”, or “Merry Christmas”. Petitioner could not apologize to emissions specialists if he spilled coffee in the lunchroom or say “thank you” if an emissions specialist held a door open for him to pass through. Under this order, Petitioner could not warn emissions specialists if the drinking water in the Avent Ferry Road office was contaminated and he was the first person to learn such news; could not warn them or push them away from the path of a moving vehicle in the parking lot; nor could he alert an

emissions specialist that a spouse or family member was in a car accident if he happened to answer the phone call reporting same, whether it was from an emissions specialists or some other person. Commissioner Gore swore that he issued this order in an effort to maintain peace and harmony between Petitioner and the emissions staff. Petitioner did not violate the purpose for Commissioner Gore's order when he spoke with Burgess. In fact, Petitioner was furthering the purpose for the order by promoting peace and harmony through expressing regret upon learning of the Burgess resignation and wishing him well. His appropriate comments to Burgess were reasonable under the circumstances existing at the time they were made.

7. Under the specific facts and circumstances of this case, Petitioner's interaction with Mr. Burgess was not unacceptable personal conduct constituting just cause for his dismissal because the second sentence of this order is excessive, punitive, unreasonable and not lawful as it chilled appropriate speech and effectively made Petitioner a pariah in his workplace.

DECISION

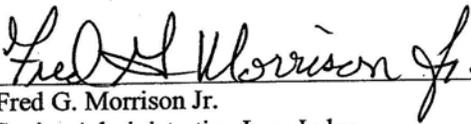
Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to terminate Petitioner's employment should be reversed and Petitioner should be reinstated with back pay and attorney's fees.

ORDER AND NOTICE

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

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

This the 31st day of October, 2008.


Fred G. Morrison Jr.
Senior Administrative Law Judge

A copy of the foregoing was mailed to:

Michael Byrne
Wachovia Capital Center
Suite 1130
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Raleigh, NC 27601
ATTORNEY FOR PETITIONER

Neil Dalton
NC Dept of Justice
Special Deputy Attorney General
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 30th day of October, 2008.



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