

The **NORTH CAROLINA REGISTER**

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INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars (\$105.00) for 24 issues. Individual issues may be purchased for eight dollars (\$8.00).

Requests for subscription to the *North Carolina Register* should be directed to the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, N. C. 27611-7447.

ADOPTION AMENDMENT, AND REPEAL OF RULES

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

TEMPORARY RULES

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions in G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier of Rules enters the rule in the Code or on the sixth business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule or 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

NORTH CAROLINA ADMINISTRATIVE CODE

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages of material of which approximately 35% of is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down by chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

- (1) Single pages may be obtained at a minimum cost of two dollars and 50 cents (\$2.50) for 10 pages or less, plus fifteen cents (\$0.15) per each additional page.
- (2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars (\$750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions for supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

CITATION TO THE NORTH CAROLINA REGISTER

The *North Carolina Register* is cited by volume, issue, page number and date. 1:1 NCR 101-201, April 1, 1986 refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

FOR INFORMATION CONTACT: Office of Administrative Hearings, ATTN: Rules Division, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, (919) 733-2678.

NORTH CAROLINA REGISTER



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NORTH CAROLINA REGISTER
Publication Schedule
(August 1992 - December 1993)

Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing	Earliest Date for Adoption by Agency	Last Day to Submit to RRC	*Earliest Effective Date
*****	*****	*****	*****	*****	*****	*****
08/03/92	07/13/92	07/20/92	08/18/92	09/02/92	09/20/92	11/02/92
08/14/92	07/24/92	07/31/92	08/29/92	09/13/92	09/20/92	11/02/92
09/01/92	08/11/92	08/18/92	09/16/92	10/01/92	10/20/92	12/01/92
09/15/92	08/25/92	09/01/92	09/30/92	10/15/92	10/20/92	12/01/92
10/01/92	09/10/92	09/17/92	10/16/92	10/31/92	11/20/92	01/04/93
10/15/92	09/24/92	10/01/92	10/30/92	11/14/92	11/20/92	01/04/93
11/02/92	10/12/92	10/19/92	11/17/92	12/02/92	12/20/92	02/01/93
11/16/92	10/23/92	10/30/92	12/01/92	12/16/92	12/20/92	02/01/93
12/01/92	11/06/92	11/13/92	12/16/92	12/31/92	01/20/93	03/01/93
12/15/92	11/24/92	12/01/92	12/30/92	01/14/93	01/20/93	03/01/93
01/04/93	12/09/92	12/16/92	01/19/93	02/03/93	02/20/93	04/01/93
01/15/93	12/22/92	12/31/92	01/30/93	02/14/93	02/20/93	04/01/93
02/01/93	01/08/93	01/15/93	02/16/93	03/03/93	03/20/93	05/03/93
02/15/93	01/25/93	02/01/93	03/02/93	03/17/93	03/20/93	05/03/93
03/01/93	02/08/93	02/15/93	03/16/93	03/31/93	04/20/93	06/01/93
03/15/93	02/22/93	03/01/93	03/30/93	04/14/93	04/20/93	06/01/93
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06/15/93	05/24/93	06/01/93	06/30/93	07/15/93	07/20/93	09/01/03
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09/15/93	08/24/93	08/31/93	09/30/93	10/15/93	10/20/93	12/01/93
10/01/93	09/10/93	09/17/93	10/16/93	10/31/93	11/20/93	01/04/94
10/15/93	09/24/93	10/01/93	10/30/93	11/14/93	11/20/93	01/04/94
11/01/93	10/11/93	10/18/93	11/16/93	12/01/93	12/20/93	02/01/94
11/15/93	10/22/93	10/29/93	11/30/93	12/15/93	12/20/93	02/01/94
12/01/93	11/05/93	11/15/93	12/16/93	12/31/93	01/20/94	03/01/94
12/15/93	11/24/93	12/01/93	12/30/93	01/14/94	01/20/94	03/01/94

* The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.

**EXECUTIVE ORDER NUMBER 172
INCREASED RECYCLED PRODUCT
PROCUREMENT AND EXPANDED
SOLID WASTE REDUCTION ACTIVITY
BY STATE AGENCIES**

By the authority vested in me by the Constitution and laws of North Carolina, **IT IS ORDERED:**

Pursuant to my constitutional obligation to see that the laws are faithfully executed and in accordance with the requirements of N.C.G.S. 130A-309.14, I direct the Department of Administration to promulgate rules and regulations that satisfy the requirements and policies of N.C.G.S. 130A-309.14 and this Executive Order. All departments are invited to comment fully on the requirements of this Order as part of the rule making process.

Section 1. PURPOSE

That all state departments shall maximize opportunities to reduce the amount of solid waste they generate, to recycle material recoverable from solid waste originating at their facilities, and to maximize procurement of recycled products.

Section 2. APPLICABILITY

For the purposes of the administrative rules and regulations, "state departments" shall include state government departments, the General Assembly, the General Court of Justice, and the University of North Carolina pursuant to the requirements of N.C.G.S. 130A-309.14.

Section 3. REQUIREMENTS

(a) **Oversight**

Each department head shall designate an individual or group of individuals to see that the requirements of the administrative rules and regulations are fulfilled.

(b) **Disposal**

- (1) All state departments shall ensure that employees have access to containers for recycling office paper and aluminum cans.
- (2) All state employees are required to use the recycling containers for identified recyclable materials generated in the course of department operations. It shall be the duty of each state department to educate its employees about department recycling/waste reduction goals and

procedures and to ensure participation.

(c) **Reporting**

- (1) On at least an annual basis, beginning October 1, 1993, each state department shall report to the Office of Waste Reduction in the Department of Environment, Health and Natural Resources the amounts and types of materials recycled by the department during the course of department operations. The report shall also document activities or programs implemented to reduce the amount of waste generated by the department.
- (2) The Office of Waste Reduction shall compile this information and provide an annual update to the Governor on the status of recycling and waste reduction by state government.

**Section 4. PURCHASE AND USE
OF RECYCLED PRODUCTS
BY STATE AGENCIES**

To set an example for local government and the private sector, and to support recycling efforts mandated by N.C.G.S. 130A-309.09B, all state departments shall encourage the use of recycled products.

(a) **Goals**

It shall be the goal of state government to increase its purchase of goods and supplies made from recycled materials, as compared with the amount purchased during fiscal year 1992-93, by at least the following percentage of goods and supplies made from recycled materials: 20% by June 30, 1994; 25% by June 30, 1995; 30% by June 30, 1996; and 40% by June 30, 1998.

(b) **Guidelines**

The Department of Administration and the Department of Environment, Health and Natural Resources shall develop guidelines for minimum content standards for recycled products purchased by state agencies.

(c) **Purchasing**

- (1) In cooperation with the Office of Waste Reduction, the Division of Purchase and Contract in the Department of Administration shall make every effort to identify products made from recycled materials that meet appropriate standards for use by state departments.
- (2) A list of recycled products available on

state contract shall be published on a semi-annual basis and distributed to all potential purchasers to increase awareness of opportunities to purchase recycled products.

(d) Recycled Paper

State departments are directed to purchase and utilize recycled paper for all reports, memoranda, and other documents unless a written authorization is obtained from the agency head or a designee.

(e) Reporting

Beginning October 1, 1993, each state department shall submit an annual report to the Office of Waste Reduction documenting the amounts and types of recycled products purchased during the course of the previous fiscal year. The Office of Waste Reduction shall prepare a summary of recycled product purchasing by state government departments to submit to the Governor annually.

(f) Department Review

State departments having delegated purchasing authority shall review their existing specifications to ensure that restrictive language or other barriers to purchasing recycled products are removed, provided staff exists to perform this task.

Section 5. REDUCTION OF WASTE

(a) Photocopies

To encourage source reduction of waste, all state departments shall require two-sided copying on all documents whenever feasible. All new photocopy machines purchased shall have duplexing capabilities if their capacity is rated at sixty thousand (60,000) copies or more per month. Care shall be exercised to avoid unnecessary printing or photocopying of printed materials.

(b) Miscellaneous

State departments shall discourage the use of disposable products where reusable products are available and economically viable for use. Further, state departments shall assess their waste generation with regard to purchasing decisions and make every attempt to purchase items only when needed and in amounts that are not excessive.

When purchases are necessary, preference shall be given to durable items, items having minimal packaging, and items that are readily recyclable when discarded.

Section 6. EFFECT OF OTHER EXECUTIVE ORDERS

Departments shall notify the Office of the Governor of all Executive Orders or portions of Executive Orders inconsistent with the mandates of this Order and the rules and regulations to be promulgated pursuant to the Order so that noncomplying Orders may be brought into compliance.

Section 7. EFFECTIVE DATE

This Executive Order shall be effective immediately.

Done in Raleigh, North Carolina, this the 24th day of July, 1992.

**EXECUTIVE ORDER NUMBER 173
EXTENDING EXECUTIVE ORDER 106
WHICH EXTENDED
EXECUTIVE ORDER 66**

By the authority vested in me as Governor by the Constitution and laws of North Carolina, **IT IS ORDERED:**

Effective January 29, 1992, Executive Order Number 106 extending Executive Order Number 66 establishing the State Employees Combined Campaign, is extended.

Done in Raleigh, this the 24th day of July, 1992.

**EXECUTIVE ORDER NUMBER 174
AMENDMENT TO EXECUTIVE
ORDER NUMBER 162**

By the authority vested in me as Governor by the Constitution and laws of North Carolina, **IT IS ORDERED:**

Section 2. MEMBERS OF THE COUNCIL

The membership of the Council shall include, but not be limited to, the following persons or their designees:

- (1) State Health Director, who will serve as Chairman;
- (2) Director of the Division of Medical Assistance, Department of Human

- Resources;
- (3) Director of the Office of State Planning;
 - (4) Commissioner of Insurance;
 - (5) State Budget Officer;
 - (6) Director of the Office of Rural Health and Resources Development, Department of Human Resources;
 - (7) Director of the Division of Aging, Department of Human Resources;
 - (8) Chairperson of the Commission for Health Services;
 - (9) Director of the Division of Facility Services, Department of Human Resources;
 - (10) Director of the Division of Mental Health, Developmental Disabilities, and Substance Abuse, Department of Human Resources;
 - (11) Chairperson of the State Health Coordinating Council;
 - (12) President of the Association of Local Health Directors;
 - (13) President of the North Carolina Hospital Association;
 - (14) President of the North Carolina Medical Society;
 - (15) Director of the Duke University Institute for Health Policy;
 - (16) President of the North Carolina Minority Health Center;
 - (17) President of Citizens for Business and Industry; and
 - (18) President of the North Carolina Health Care Facilities Association.

Governor. All vacancies shall be filled by the Governor.

This Executive Order shall become effective immediately.

Done in Raleigh, this the 30th day of July, 1992.

The membership of the Council shall also include one member of the North Carolina House, one member of the North Carolina Senate, and two representatives of private insurance companies doing business within North Carolina.

The following persons or their designees shall serve as ex officio members of the Council:

- (1) Director of the State Center for Health and Environmental Statistics;
- (2) Executive Director of the Medical Database Commission; and
- (3) Director of the Health Policy Unit of the Cecil G. Sheps Center for Health Services Research, University of North Carolina School of Public Health.

All members shall serve at the pleasure of the

G.S. 120-30.9H, effective July 16, 1986, requires that all letters and other documents issued by the Attorney General of the United States in which a final decision is made concerning a "change affecting voting" under Section 5 of the Voting Rights Act of 1965 be published in the North Carolina Register.

U.S. Department of Justice

Civil Rights Division

Voting Section

P.O. Box 66128

Washington, D.C. 20035-6128

JRD:LLT:RA:dmb

DJ 166-012-3

92-2761

August 3, 1992

George A. Weaver, Esq.
Lee, Reece, & Weaver
P.O. Box 2047
Wilson, North Carolina 27894-2047

Dear Mr. Weaver:

This refers to the change in location for the board of elections, including the main voter registrar's office, and the elimination of certain registration hours for Wilson County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on June 5, 1992.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

John R. Dunn
Assistant Attorney General
Civil Right Division

By:

Steven H. Rosenbaum
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

Voting Section

P.O. Box 66128

Washington, D.C. 20035-6128

JRD:LLT:TGL:sab

DJ 166-012-3

92-2646

August 28, 1992

DeWitt F. McCarley, Esq.

City Attorney

P.O. Box 7207

Greenville, North Carolina 27835-7207

Dear Mr. McCarley:

This refers to five annexations {Ordinance Nos. 2424, 2430, 2431, 2447 and 2448 (1992)} and the designation of the annexed areas to election District 5 for the City of Greenville in Pitt County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on June 1, 1992.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

John R. Dunn

Assistant Attorney General

Civil Right Division

By:

Steven H. Rosenbaum

Chief, Voting Section

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Director of the Division of Mental Health, Developmental Disabilities & Substance Abuse Services intends to amend rule (s) cited as 10 NCAC 18A .0125-.0128; .0130; .0132; .0133; and .0135.

The proposed effective date of this action is January 4, 1993.

The public hearing will be conducted at 10:00 a.m. on September 17, 1992 at the Albemarle Building, 325 N. Salisbury Street, 11th Floor Conference Room, Raleigh, N.C. 27603.

Reason for Proposed Action: The Division Director has statutory authority to develop Rules for monitoring services provided by area programs and their contract agencies. These Rules are proposed for amendment to clarify the role of area programs and contract agencies in reviewing services, and to make the process consistent with the expectations of the Division.

Comment Procedures: Any interested person may present his comments by oral presentation or by submitting a written statement to Charlotte Tucker, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 325 N. Salisbury St., Raleigh, N.C. 27603. Persons wishing to make oral presentations should contact Charlotte Tucker at the above address by September 16, 1992. Time limits for oral remarks may be imposed by the Division Director. Written comments must state the rules to which the comments are addressed, and be received in this office by October 1, 1992. Fiscal information on these Rules is available upon request.

CHAPTER 18 - MENTAL HEALTH: OTHER PROGRAMS

SUBCHAPTER 18A - MONITORING PROCEDURES

SECTION .0100 - REVIEW PROCESS FOR AREA PROGRAMS AND THEIR CONTRACT AGENCIES

.0125 DEFINITIONS

As used in this Section, the following terms have the meanings specified:

- (1) "Area Authority" means the same as specified in G.S. 122C-3.
- (12) "Area program" means the legally constituted agency which provides providing mental health, developmental disabilities, and substance abuse services, either directly or under contract, for the area authority in a designated catchment area.
- (23) "Certification Accreditation" means the designation given a service by the Division to indicate:
 - (a) compliance with all applicable statutes and rules General Statutes and Rules of the Commission and the Secretary; or
 - (b) evidence that action is being taken to correct all an out-of-compliance findings finding.
- (4) "Certificate" means the document issued by the Division for a service to indicate accreditation.
- (35) "Commission" has the same meaning means the same as specified in G.S. 122C-3.
- (4) ~~"Decertification" means the loss of certification status for a service when the Division determines that an area program or its contract agency fails to meet applicable statutes or rules within designated time frames or when non compliance presents an immediate threat to the health, welfare or safety of the individuals served. Decertification may result in the delay, reduction or denial of state and federal funds. Under the provisions of Pioneer and the State Medicaid Plan, payments will not be made for services which are decertified.~~
- (56) "Division" has the same meaning means the same as specified in G.S. 122C-3.
- (67) "Provider" means the person or agency responsible for the provision of a service.
- (78) "Service" means the care, treatment, rehabilitation or habilitation which is provided by an area program. For the purpose of this document, the term "service" may refer to one or more sites where the service is provided or to a System of Services as approved by the Commission.

Statutory Authority G.S. 122C-113; 122C-141(b);

122C-142(a); 122C-191(d).

.0126 GENERAL PROVISIONS

(a) All area-operated and contracted services of an area program shall be reviewed for compliance with the applicable ~~general statutes~~ General Statutes and Rules of the Commission and the Secretary. The accreditation review shall be conducted in accordance with the Rules in this Section. Following ~~certification~~ accreditation, each a service shall continue to be reviewed, at a minimum, once during every triennial review cycle.

(b) A service shall:

- (1) be authorized by the Division to receive start-up Division funds; and
- (2) following an on-site review, be accredited by the Division to continue to receive Division funds. ~~Each service shall be certified in order to receive state and federal funds.~~

(c) ~~A facility subject to licensure shall not serve clients until properly licensed in accordance with applicable statutes and Rules.~~

(d) ~~The Rules used in any review for certification shall be the applicable Rules as codified in 10 NCAC 181 through 189 and other applicable Rules of the Commission and the Secretary.~~

(e) ~~The on-site accreditation review and the written certification report for a an area-operated service are the responsibility of the; the Division. On site review and the written certification report for a contracted service are the responsibility of the area director with participation by the Division as needed.~~

(1) Division for an area-operated service; and

(2) area director for a contracted service.

The Division Director's designee shall make the determination of responsibility for review of a service when there is a question of responsibility.

(d) A memorandum of agreement shall exist between the area program contracting for a service and the area program in whose area it is located. This agreement shall designate responsibility for emergency or crisis intervention services, commitment evaluation, and any other services requiring resources of the respective area programs.

(f) ~~Reviews conducted for the purpose of continuing certification Accreditation shall be accomplished maintained through a participation in a triennial survey as described in Rule .0130 of this Section.~~

(g) The Division shall be responsible for approval and issuance of ~~certification~~ the certificate for an area-operated ~~services~~ service.

(h) The area director and the Division shall be responsible for approval and issuance of ~~certification~~ the certificate for a contracted ~~services~~ service.

(i) The Division shall notify the area director in writing when authorization for funds or the accreditation of a service ~~an area-operated service's certification is denied, or changed or when the service is decertified~~ revocation of accreditation is initiated. The written notification shall give the ~~reasons~~ reason for such action and the right to appeal the decision according to Rule .0135 of this Section. The area director shall provide the same notification to the contracted provider or agency director when such action involves a ~~contract~~ contracted service.

(j) In addition to the review procedures prescribed in this Section, other reviews may be conducted as follows:

- (1) The Division Director may, at any time, authorize an on-site review of a any service.
- (2) An Any area-operated or contracted service may, ~~at any time,~~ with the approval of the area director, request an on-site review from the Division for the purpose of consultation and technical assistance. ~~However, with the understanding that Rule .0128 of this Section does not apply, the Division's responsibility in recognizing compliance with all other Rules of this Section remains.~~
- (3) An area director may request approval of a System of Services, in the format approved by the Commission.

Statutory Authority G.S. 122C-113; 122C-141(b); 122C-142(a); 122C-191(d).

.0127 ACCREDITATION

(a) The area program shall submit an application for ~~certification for accreditation~~ of a service, as specified in this Rule, on the Division's "Application for Certification Accreditation" form.

(b) The area program shall submit the application to the Division for ~~all new a service~~ services at least 30 days prior to:

- (1) provision of service to a client in an ~~uncertified a non-accredited~~ service;
- (2) change in provider for an existing service; or
- (3) change of location ~~if requested by the Division or addition of sites.~~ The Division shall determine if an on-site accreditation review is required based

on the information provided on the application and current status of the accredited service.

(c) ~~An approved "Application for Certification" serves as the notice of certification. Authorization for the service to receive Division funds~~ Certification shall be granted upon a determination by the Division that sufficient data has been provided by the applicant and there is reasonable assumption that the applicant will be able to fully perform all obligations pursuant to the certification accreditation.

(d) ~~If the service appeals the denial of certification, state funds shall not be available to the service unless it agrees to meet the Division requirements pending the outcome of the appeal.~~

(ed) Certification Authorization to receive Division funds shall not begin prior to the date of the area director's signature on the application for certification.

(g) ~~During the six months following application, the appropriate staff shall provide consultation and technical assistance to the service provider in order to familiarize the provider with applicable statutes and rules.~~

(fe) An on-site accreditation review of a service which has been initially approved, authorized to receive Division funds shall be completed within six months of the approved effective date of application, unless waived by the Division Director in accordance with Rule .0135 of this Section.

(f) The date of accreditation shall be the date of the on-site accreditation review.

Statutory Authority G.S. 122C-113; 122C-141(b); 122C-142(a); 122C-191(d).

.0128 OUT-OF-COMPLIANCE FINDING

(a) When a service is found to be out-of-compliance with one or more applicable ~~statutes or rules~~ Statutes or Rules, which do not present an immediate threat to the health, ~~welfare or safety~~ safety or welfare of the ~~an individual~~ individuals served, the area program shall show evidence that action ~~is, has been or will be;~~ is, has been or will be; taken to correct ~~all the~~ the out-of-compliance ~~findings~~ finding. This is accomplished through the development of a corrective action plan.

(b) The area director shall submit a corrective action plan within 30 days of written notification of ~~an~~ an out-of-compliance ~~findings~~ finding for review and approval by the Division. If not approved, the Division returns the plan to the area director for further resolution.

(e) ~~When out of compliance findings are docu-~~

~~mented, the Division shall provide consultation and technical assistance to the area program service, if requested. The area director shall be responsible for contracted services, but may request assistance from the Division.~~

(dc) The time allowed for the corrective action to be taken ~~may~~ shall not exceed six months ~~unless except when waived by the Division Director in accordance with Rule .0135 of this Section.~~

(ed) When ~~an~~ an out-of-compliance ~~issues are~~ issue ~~is~~ is fully resolved with supporting documentation, a letter shall be sent ~~from the Division~~ from the Division to the area board chairman and the area director, ~~from the Division, stating that all the issues are~~ issue is resolved.

(fe) If ~~an~~ an out-of-compliance ~~issues are~~ issue is not fully resolved and it is felt by the Division that there is not evidence that acceptable action is being taken to correct the out-of-compliance ~~findings~~ finding, a letter shall be sent ~~from the Division~~ from the Division to the area board chairman and area director, ~~from the Division, stating that decertification revocation of accreditation~~ procedures will be initiated.

Statutory Authority G.S. 122C-113; 122C-141(b); 122C-142(a); 122C-191(d).

.0130 TRIENNIAL ACCREDITATION REVIEW

(a) ~~An area programs program~~ An area programs program shall maintain ~~certification accreditation of its services~~ certification accreditation of its services by participation in ~~a the~~ a the triennial, on-site, ~~certification accreditation~~ certification accreditation review process as described in this Section.

(b) At least 60 days, ~~but not more than 180 days,~~ prior to the on-site review, the area director shall assure that:

- (1) the Inventory of Services, which is provided by the Division, is an accurate reflection of its current area-operated and contracted services; and
- (2) all area-operated and contracted services are reviewed and a statement of compliance or a corrective action plan is submitted to the Division.

(c) The area director shall be responsible for corrective actions which ~~address~~ addresses ~~an~~ an out-of-compliance ~~findings~~ finding identified during the review as described in Rule .0128 of this Section.

Statutory Authority G.S. 122C-113; 122C-141(b); 122C-142(a); 122C-191(d).

.0132 DENIAL OR REVOCATION OF ACCREDITATION

(a) ~~Decertification~~ The denial or revocation of accreditation of for a service shall be initiated:

- (1) ~~immediately~~ upon confirmation that a service subject to licensure is not licensed;
- (2) ~~immediately upon notification by the licensing agency that the license for a service has been revoked;~~
- (32) ~~immediately~~, when there is substantiated evidence of a condition ~~conditions~~ which ~~threaten~~ threatens the health, safety or welfare of an individual ~~individuals~~ served;
- (43) upon failure to complete corrective action in accordance with the approved plan; or
- (54) upon failure to participate in the triennial survey.

(b) ~~If, after review of evidence,~~ the Division finds that a service meets one or more of the conditions specified in Paragraph (a) of this Rule and that the appropriate procedures have been followed by the Division, Division funds shall be withheld as outlined in accounting Rule 10 NCAC 14C .0103 until compliance is achieved as determined by the Division Director.

Statutory Authority G.S. 122C-113; 122C-141(b); 122C-142(a); 122C-191(d).

.0133 CHANGES IN STATUS

A "Change In Status" form, provided by the Division, shall be submitted immediately by the area director to the Division, when a change occurs in information for a service in the Inventory of Services, excluding those situations requiring an ~~application for certification~~ "Application for Accreditation", as specified in Rule .0127(b) of this Section.

Statutory Authority G.S. 122C-113; 122C-141(b); 122C-142(a); 122C-191(d).

.0135 APPEALS AND WAIVERS

(a) An area boards board may informally appeal to the Division Director regarding ~~certification~~ accreditation and the withholding of Division funds set forth in Rule .0127 of this Section. A formal appeal ~~Formal appeals~~ may be requested in accordance with procedures specified in ~~accounting rule~~ Rule 10 NCAC 14C .0103 and the rules for contested cases as codified in 10 NCAC 14B, Section .0300.

(b) Waiver of ~~any a~~ rule in this Section may be granted in accordance with the procedures codified in 10 NCAC 14B .0500. The ~~basis for the waiver decision may include~~ shall be based on, but not be limited to, ~~the following~~:

- (1) whether the health, safety or welfare of the client is threatened;
- (2) the nature and extent of the request; and
- (3) the past record of the service provider with compliance of rules.

The decision to deny a waiver request is a final agency decision for purposes of initiating a contested case hearing.

Statutory Authority G.S. 122C-113; 122C-141(b); 122C-142(a); 122C-191(d).

TITLE 11 - DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Insurance intends to adopt rule cited as 11 NCAC 1 .0108.

The proposed effective date of this action is December 1, 1992.

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): A request for a public hearing must be made in writing, addressed to Ellen K. Sprenkel, N.C. Department of Insurance, P.O. Box 26387, Raleigh, N.C. 27611. This request must be received within 15 days of this notice.

Reason for Proposed Action: To prohibit service of process through electronic media.

Comment Procedures: Written comments may be sent to Ellen K. Sprenkel, P.O. Box 26387, Raleigh, N.C. 27611. Anyone having questions should call Bill Hale or Ellen K. Sprenkel at (919) 733-4529.

CHAPTER 1 - DEPARTMENTAL RULES

SECTION .0100 - GENERAL PROVISIONS

.0108 ELECTRONIC PROCESS PROHIBITED

Service of legal process upon the Commissioner

as attorney to receive process under G.S. 1A-1, Rule 4 or under General Statute Chapter 58 is not valid and will not be accepted if it is made through any electronic medium, including facsimile transmission. Only those methods of service of process upon the Commissioner provided for in G.S. 1A-1, Rule 4 and in General Statute Chapter 58 will be recognized by the Commissioner or his duly appointed deputy.

Statutory Authority: G.S. 58-2-40(1); 58-16-30; 58-16-35.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Insurance intends to repeal rules cited as 11 NCAC 3 .0002, .0005-.0008. Previous notice was published for these rules in the Register, Volume 7, Issue 2, pages 124 - 125.

The proposed effective date of this action is December 1, 1992.

Comment Procedures: Written comments may be sent by October 1, 1992 to Bill Hale, Hearings Division, P.O. Box 26387, Raleigh, NC 27611. Anyone having questions should call Bill Hale or Ellen Sprenkel at (919) 733-4529.

CHAPTER 3 - HEARINGS DIVISION

.0002 PURPOSE OF DIVISION

~~The Legal Division counsels, advises and renders legal assistance to the commissioner and his staff in all matters necessary for the general administration of the insurance laws of this state and other matters over which the commissioner has supervisory and regulatory jurisdiction.~~

Statutory Authority G.S. 58-7.3; 58-9.

.0005 SERVICE OF LEGAL PROCESS

~~North Carolina General Statute Section 58-153, 58-153.1, 58-397, 58-440, 58-508(1), 58-512(b), and 58-615(h)(2) provide that service of legal process may be made upon insurance companies, insurance support organizations, risk retention and purchasing groups, and non resident licensees doing business in this state by serving such process upon the commissioner or a deputy duly appointed~~

~~for such purpose. The commissioner will appoint a deputy or deputies within the department to receive and perfect all legal process in accordance with the provisions of the applicable statutes.~~

Statutory Authority G.S. 58-153; 58-153.1; 58-397; 58-440; 58-508(1); 58-512(b); 58-615(h)(2).

.0006 RECORDS OF DIVISION

~~Hearing records, transcripts and orders of the commissioner as well as copies of documents in civil actions in which the commissioner is a party are on file in the Legal Division and may be inspected in accordance with 11 NCAC 1 .0107.~~

Statutory Authority G.S. 58-9; 150A-12(f).

.0007 PURCHASE OF HEARING TRANSCRIPTS

~~A copy of the hearing transcript may be purchased provided a request therefor is made in writing with the hearing officer prior to or at the commencement of the hearing.~~

Statutory Authority G.S. 58-9.3.

.0008 LEGAL OPINIONS

~~When a person who is regulated by the department requests clarification of a statute or rule where the person is about to engage in a business activity that may violate the statute or rule, the department may honor the request, subject to available resources or in the discretion of the deputy commissioner of the Legal Division.~~

~~A request for a legal opinion made by a person involved in a legal or factual dispute shall not be honored.~~

~~A request for a legal opinion on a hypothetical fact situation shall not be honored.~~

~~Every request for a legal opinion as to how to apply a statute or rule to a fact situation must be made in writing. The person making the request should be advised that it may not be appropriate for the department to render a legal opinion and that any legal opinion rendered by the commissioner or his counsel, other than a declaratory ruling issued under G.S. 150B-17, is not binding on the commissioner, and does not prevent the commissioner from subsequently acting in a manner inconsistent with the legal opinion's conclusion.~~

Statutory Authority G.S. 58-7.3; 58-9.

TITLE 12 - DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Justice/State Bureau of Investigation intends to adopt rule cited as 12 NCAC 4E .0204 and amend rule cited as 12 NCAC 4G .0201.

The proposed effective date of this action is December 1, 1992.

The public hearing will be conducted at 9:00 am on September 16, 1992 at the Division of Criminal Information, 407 N. Blount Street, Raleigh, NC 27601.

Reason for Proposed Action:

12 NCAC 4E .0204 - The purpose of this rule is to permit SBI task force supervisors to have temporary management control over authorized personnel assigned to the task force from other agencies for purposes of DCI access and certification.

12 NCAC 4G .0201 - This action is necessary to make sure that it is clear that either an agency or an individual found to be in violation has a right to an appeal.

Comment Procedures: Comments may be submitted in writing, or may be presented orally at the public hearing. Written comments should be submitted to E.K. Best, Division of Criminal Information, 407 North Blount Street, Raleigh, NC 27601.

CHAPTER 4 - DIVISION OF CRIMINAL INFORMATION

SUBCHAPTER 4E - ORGANIZATIONAL RULES AND FUNCTIONS

SECTION .0200 - REQUIREMENTS FOR ACCESS

.0204 SBI TASK FORCE MANAGEMENT CONTROL

(a) When the SBI Director grants approval for the Bureau to participate in, and supervise a joint criminal justice agency task force, those authorized staff assigned to the task force shall be temporarily considered under SBI management control for NCIC/DCI access, and certification purposes

provided the SBI supervisor responsible for the task force insures that:

- (1) Each person assigned to the task force shall be under the direct, and immediate management control of a criminal justice agency, or criminal justice board;
- (2) Each person shall be properly identified in DCI certification records as to the SBI district responsible for him, and the local agency having management control over him pursuant to Subparagraph (1) of this Rule;
- (3) The responsible SBI supervisor shall treat all task force staff as SBI employees in all matters pertaining to these Rules; and
- (4) The responsible SBI supervisor shall immediately notify DCI in writing of the termination of any task force member upon such member's departure from the task force.

(b) Any in-service certification obtained while a member of a task force shall be terminated upon notification of such member's departure.

Statutory Authority G.S. 114-10; 114-10.1.

SUBCHAPTER 4G - PENALTIES AND ADMINISTRATIVE HEARINGS

SECTION .0200 - APPEALS

.0201 NOTICE OF VIOLATION

(a) Upon determination that a violation of these procedures has occurred, written notice of the violation shall be sent by certified mail, return receipt requested to the offending agency or employee. The notice shall inform the party of his appeal rights as provided in Paragraph (b) of this Rule and shall also contain the citation of the specific administrative rule alleged to have been violated.

(b) ~~An operator whose certification has been revoked or suspended, or an agency found to be in violation of these Rules~~ may request an informal hearing before the Advisory Policy Board or may appeal directly to OAH by filing a petition for a contested case. A request for an informal hearing must be in writing and submitted to the SBI Assistant Director for DCI within 15 days from the date of notification of violation. A petition for a contested case must be filed with OAH within 60 days in accordance with G.S. 150B-23(f). DCI shall notify the offending agency or employee of the results of the informal hearing within two

weeks following the hearing and inform the parties of their rights of appeal under G.S. 150B-23.

Statutory Authority G.S. 114-10; 114-10.1; 150B-3(b); 150B-23(f).

**TITLE 15A - DEPARTMENT OF
ENVIRONMENT, HEALTH, AND
NATURAL RESOURCES**

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - Coastal Management intends to amend rule(s) cited as 15A NCAC 7H .0208, .0306 & .0309.

The proposed effective date of this action is February 1, 1993.

The public hearing will be conducted at 4:00 p.m. on September 24, 1992 at the Coast Line Convention Center, 501 Nutt Street, Wilmington, NC.

Reason for Proposed Action:

Rule 15A NCAC 7H .0208 - To establish in Rules the definition of what a SAV is and to address maintenance dredging in channels going through SAV beds.

Rules 15A NCAC 7H .0306 & .0309 - To clarify the intent of the Commission in directing the location of structures in Ocean Hazard Areas.

Comment Procedures: *All persons interested in this matter are invited to attend the public hearing. The Coastal Resources Commission will receive mailed written comments postmarked no later than October 1, 1992. Any person desiring to present lengthy comments is requested to submit a written statement for inclusion in the record of proceedings at the public hearing. Additional information concerning the hearing or the proposals may be obtained by contacting Dedra Blackwell, Division of Coastal Management, P.O. Box 27687, Raleigh, NC 27611-7687, (919) 733-2293.*

Editors Note: *Text shown in Italic in Rules 7H .0208 and 7H .0306 was adopted by agency on July 24, 1992. These changes are pending review by the Rules Review Commission for an effective date of October 1, 1992.*

CHAPTER 7 - COASTAL MANAGEMENT

**SUBCHAPTER 7H - STATE GUIDELINES
FOR AREAS OF ENVIRONMENTAL
CONCERN**

**SECTION .0200 - THE ESTUARINE
SYSTEM**

.0208 USE STANDARDS

(a) General Use Standards

- (1) Uses which are not water dependent will not be permitted in coastal wetlands, estuarine waters, and public trust areas. Restaurants, residences, apartments, motels, hotels, trailer parks, private roads, factories, and parking lots are examples of uses that are not water dependent. Uses that are water dependent may include: utility easements; docks; wharfs; boat ramps; dredging; bridges and bridge approaches; revetments, bulkheads; culverts; groins; navigational aids; mooring pilings; navigational channels; simple access channels and drainage ditches.
- (2) Before being granted a permit by the CRC or local permitting authority, there shall be a finding that the applicant has complied with the following standards:
 - (A) The location, design, and need for development, as well as the construction activities involved must be consistent with the stated management objective.
 - (B) Before receiving approval for location of a use or development within these AECs, the permit-letting authority shall find that no suitable alternative site or location outside of the AEC exists for the use or development and, further, that the applicant has selected a combination of sites and design that will have a minimum adverse impact upon the productivity and biologic integrity of coastal marshland, shellfish beds, submerged grass beds, beds of submerged aquatic vegetation, spawning and nursery areas, important nesting and wintering sites for waterfowl and wildlife, and important natural erosion barriers (cypress fringes, marshes, clay soils).
 - (C) Development shall not violate water

and air quality standards.

- (D) Development shall not cause major or irreversible damage to valuable documented archaeological or historic resources.
- (E) Development shall not measurably increase siltation.
- (F) Development shall not create stagnant water bodies.
- (G) Development shall be timed to have minimum adverse significant affect on life cycles of estuarine resources.
- (H) Development shall not impede navigation or create undue interference with access to, or use of, public trust areas or estuarine waters.
- ~~(I) Development proposed in estuarine waters must also be consistent with applicable standards for the ocean hazard system AECs set forth in Section .0300 of this Subchapter.~~
- (3) When the proposed development is in conflict with the general or specific use standards set forth in this Rule, the CRC may approve the development if the applicant can demonstrate that the activity associated with the proposed project will have public benefits as identified in the findings and goals of the Coastal Area Management Act, that the public benefits clearly outweigh the long range adverse effects of the project, that there is no reasonable and prudent alternate site available for the project, and that all reasonable means and measures to mitigate adverse impacts of the project have been incorporated into the project design and will be implemented at the applicant's expense. These measures taken to mitigate or minimize adverse impacts may include actions that will:
 - (A) minimize or avoid adverse impacts by limiting the magnitude or degree of the action;
 - (B) restore the affected environment; or
 - (C) compensate for the adverse impacts by replacing or providing substitute resources.
- (4) Primary nursery areas are those areas in the estuarine system where initial post larval development of finfish and crustaceans takes place. They are usually located in the uppermost sections of a system where populations are uni-

formly early juvenile stages. They are officially designated and described by the N.C. Marine Fisheries Commission in 15A NCAC 3B .1405 and by the N.C. Wildlife Resources Commission in 15A NCAC 10C .0110.

- (5) Outstanding Resource Waters are those estuarine waters and public trust areas classified by the N.C. Environmental Management Commission pursuant to Title 15A, Subchapter 2B .0216 of the N.C. Administrative Code as Outstanding Resource Waters (ORW) upon finding that such waters are of exceptional state or national recreational or ecological significance. In those estuarine waters and public trust areas classified as ORW by the Environmental Management Commission (EMC), no permit required by the Coastal Area Management Act will be approved for any project which would be inconsistent with applicable use standards adopted by the CRC, EMC, or Marine Fisheries Commission (MFC) for estuarine waters, public trust areas, or coastal wetlands. For development activities not covered by specific use standards, no permit will be issued if the activity would, based on site specific information, materially degrade the water quality or outstanding resource values unless such degradation is temporary.

- (6) Beds of submerged aquatic vegetation (SAV) are those habitats in public trust and estuarine waters vegetated with one or more species of submergent vegetation. These vegetation beds occur in both subtidal and intertidal zones and may occur in isolated patches or cover extensive areas. In either case, the bed is defined by the presence of above-ground leaves or the below-ground rhizomes and propagules.

(b) Specific Use Standards

- (1) Navigation channels, canals, and boat basins must be aligned or located so as to avoid primary nursery areas highly productive shellfish beds, ~~beds of submerged vegetation,~~ beds of submerged aquatic vegetation, or significant areas of regularly or irregularly flooded coastal wetlands.
- (A) Navigation channels and canals can be allowed through narrow fringes of

- regularly and irregularly flooded coastal wetlands if the loss of wetlands will have no significant adverse impacts on fishery resources, water quality or adjacent wetlands, and, if there is no reasonable alternative that would avoid the wetland losses.
- (B) All spoil material from new construction shall be confined landward of regularly and irregularly flooded coastal wetlands and stabilized to prevent entry of sediments into the adjacent water bodies or marsh.
 - (C) Spoil from maintenance of channels and canals through irregularly flooded wetlands shall be placed on non-wetland areas, remnant spoil piles, or disposed of by an acceptable method having no significant, long term wetland impacts. Under no circumstances shall spoil be placed on regularly flooded wetlands.
 - (D) Widths of the canals and channels shall be the minimum required to meet the applicant's needs and provide adequate water circulation.
 - (E) Boat basin design shall maximize water exchange by having the widest possible opening and the shortest practical entrance canal. Depths of boat basins shall decrease from the waterward end inland.
 - (F) Any canal or boat basin shall be excavated no deeper than the depth of the connecting channels.
 - (G) Canals for the purpose of multiple residential development shall have:
 - (i) no septic tanks unless they meet the standards set by the Division of Environmental Management and the Division of Environmental Health;
 - (ii) no untreated or treated point source discharge;
 - (iii) storm water routing and retention areas such as settling basins and grassed swales.
 - (H) Construction of finger canal systems will not be allowed. Canals shall be either straight or meandering with no right angle corners.
 - (I) Canals shall be designed so as not to create an erosion hazard to adjoining property. Design may include bulkheading, vegetative stabilization, or adequate setbacks based on soil characteristics.
 - (J) Maintenance excavation in canals, channels and boat basins within primary nursery areas and beds of submerged aquatic vegetation should be avoided. However, when essential to maintain a traditional and established use, maintenance excavation may be approved if the applicant meets all of the following criteria as shown by clear and convincing evidence accompanying the permit application. This Rule does not affect restrictions placed on permits issued after March 1, 1991.
 - (i) The applicant can demonstrate and document that a water-dependent need exists for the excavation; and
 - (ii) There exists a previously permitted channel which was constructed or maintained under permits issued by the State and/or Federal government. If a natural channel was in use, or if a human-made channel was constructed before permitting was necessary, there must be clear evidence that the channel was continuously used for a specific purpose; and
 - (iii) Excavated material can be removed and placed in an approved disposal area without significantly impacting adjacent nursery areas and beds of submerged aquatic vegetation; and
 - (iv) The original depth and width of a human-made or natural channel will not be increased to allow a new or expanded use of the channel.
- (2) Hydraulic Dredging
 - (A) The terminal end of the dredge pipeline should be positioned at a distance sufficient to preclude erosion of the containment dike and a maximum distance from spillways to allow adequate settlement of suspended solids.
 - (B) Dredge spoil must be either confined on high ground by adequate retaining structures or if the material is suitable, deposited on beaches for purposes of renourishment, with the excep-

- tion of (G) of this Subsection (b)(2).
- (C) Confinement of excavated materials shall be on high ground landward of regularly and irregularly flooded marshland and with adequate soil stabilization measures to prevent entry of sediments into the adjacent water bodies or marsh.
- (D) Effluent from diked areas receiving disposal from hydraulic dredging operations must be contained by pipe, trough, or similar device to a point waterward of emergent vegetation or, where local conditions require, below mean low water.
- (E) When possible, effluent from diked disposal areas shall be returned to the area being dredged.
- (F) A water control structure must be installed at the intake end of the effluent pipe.
- (G) Publicly funded projects will be considered by review agencies on a case-by-case basis with respect to dredging methods and spoil disposal.
- (H) Dredge spoil from closed shellfish waters and effluent from diked disposal areas used when dredging in closed shellfish waters shall be returned to the closed shellfish waters.
- (3) Drainage Ditches
 - (A) Drainage ditches located through any marshland shall not exceed six feet wide by four feet deep (from ground surface) unless the applicant can show that larger ditches are necessary for adequate drainage.
 - (B) Spoil derived from the construction or maintenance of drainage ditches through regularly flooded marsh must be placed landward of these marsh areas in a manner that will insure that entry of sediment into the water or marsh will not occur. Spoil derived from the construction or maintenance of drainage ditches through irregularly flooded marshes shall be placed on nonwetlands wherever feasible. Non-wetland areas include relic disposal sites.
 - (C) Excavation of new ditches through high ground shall take place landward of a temporary earthen plug or other methods to minimize siltation to adjacent water bodies.
 - (D) Drainage ditches shall not have a significant adverse effect on primary nursery areas, productive shellfish beds, ~~submerged grass beds~~, beds of submerged aquatic vegetation, or other documented important estuarine habitat. Particular attention should be placed on the effects of freshwater inflows, sediment, and nutrient introduction. Settling basins, water gates, retention structures are examples of design alternatives that may be used to minimize sediment introduction.
- (4) Nonagricultural Drainage
 - (A) Drainage ditches must be designed so that restrictions in the volume or diversions of flow are minimized to both surface and ground water.
 - (B) Drainage ditches shall provide for the passage of migratory organisms by allowing free passage of water of sufficient depth.
 - (C) Drainage ditches shall not create stagnant water pools or significant changes in the velocity of flow.
 - (D) Drainage ditches shall not divert or restrict water flow to important wetlands or marine habitats.
- (5) Marinas. Marinas are defined as any publicly or privately owned dock, basin or wet boat storage facility constructed to accommodate more than 10 boats and providing any of the following services: permanent or transient docking spaces, dry storage, fueling facilities, haulout facilities and repair service. Excluded from this definition are boat ramp facilities allowing access only, temporary docking and none of the preceding services. Expansion of existing facilities shall also comply with these standards for all development other than maintenance and repair necessary to maintain previous service levels.
 - (A) Marinas shall be sited in non-wetland areas or in deep waters (areas not requiring dredging) and shall not disturb valuable shallow water, submerged aquatic vegetation, and wetland habitats, except for dredging necessary for access to high-ground sites. The following four alternatives for siting marinas are listed in order of preference for the least damaging

- alternative; marina projects shall be designed to have the highest of these four priorities that is deemed feasible by the permit letting agency:
- (i) an upland basin site requiring no alteration of wetland or estuarine habitat and providing adequate flushing by tidal or wind generated water circulation;
 - (ii) an upland basin site requiring dredging for access when the necessary dredging and operation of the marina will not result in the significant degradation of existing fishery, shellfish, or wetland resources and the basin design shall provide adequate flushing by tidal or wind generated water circulation;
 - (iii) an open water site located outside a primary nursery area which utilizes piers or docks rather than channels or canals to reach deeper water; and
 - (iv) an open water marina requiring excavation of no intertidal habitat, and no dredging greater than the depth of the connecting channel.
- (B) Marinas which require dredging shall not be located in primary nursery areas nor in areas which require dredging through primary nursery areas for access. Maintenance dredging in primary nursery areas for existing marinas will be considered on a case-by-case basis.
 - (C) To minimize coverage of public trust areas by docks and moored vessels, dry storage marinas shall be used where feasible.
 - (D) Marinas to be developed in waters subject to public trust rights (other than those created by dredging upland basins or canals) for the purpose of providing docking for residential developments shall be allowed no more than 27 sq. ft. of public trust areas for every one lin. ft. of shoreline adjacent to these public trust areas for construction of docks and mooring facilities. The 27 sq. ft. allocation shall not apply to fairway areas between parallel piers or any portion of the pier used only for access from land to the docking spaces.
 - (E) To protect water quality of shellfishing areas, marinas shall not be located within areas where shellfish harvesting for human consumption is a significant existing use or adjacent to such areas if shellfish harvest closure is anticipated to result from the location of the marina. In compliance with Section 101(a)(2) of the Clean Water Act and North Carolina Water Quality Standards adopted pursuant to that section, shellfish harvesting is a significant existing use if it can be established that shellfish have been regularly harvested for human consumption since November 28, 1975 or that shellfish apparently are propagating and surviving in a biologically suitable habitat and are available and suitable for harvesting for the purpose of human consumption. The Division of Marine Fisheries shall be consulted regarding the significance of shellfish harvest as an existing use and the magnitude of the quantities of shellfish which have been harvested or are available for harvest in the area where harvest will be affected by the development.
 - (F) Marinas shall not be located without written consent from the controlling parties in areas of submerged lands which have been leased from the state or deeded by the state.
 - (G) Marina basins shall be designed to promote flushing through the following design criteria:
 - (i) the basin and channel depths shall gradually increase toward open water and shall never be deeper than the waters to which they connect; and
 - (ii) when possible, an opening shall be provided at opposite ends of the basin to establish flow-through circulation.
 - (H) Marinas shall be designed to minimize adverse effects on navigation and public use of public trust areas while allowing the applicant adequate access to deep waters.
 - (I) Marinas shall be located and constructed so as to avoid adverse impacts on navigation throughout all

federally maintained channels and their immediate boundaries. This includes mooring sites (permanent or temporary), speed or traffic reductions, or any other device, either physical or regulatory, that may cause a federally maintained channel to be restricted.

- (J) Open water marinas shall not be enclosed within breakwaters that preclude circulation sufficient to maintain water quality.
- (K) Marinas which require dredging shall provide acceptable areas to accommodate disposal needs for future maintenance dredging. Proof of the ability to truck the spoil material from the marina site to an acceptable disposal area will be acceptable.
- (L) Marina design shall comply with all applicable requirements for management of stormwater runoff.
- (M) Marinas shall post a notice prohibiting the discharge of any waste from boat toilets and explaining the availability of information on local pump-out services.
- (N) Boat maintenance areas must be designed so that all scraping, sandblasting, and painting will be done over dry land with adequate containment devices to prevent entry of waste materials into adjacent waters.
- (O) All marinas shall comply with all applicable standards for docks and piers, bulkheading, dredging and spoil disposal.
- (P) All applications for marinas shall be reviewed to determine their potential impact and compliance with applicable standards. Such review shall consider the cumulative impacts of marina development.
- (Q) Replacement of existing marinas to maintain previous service levels shall be allowed provided that the preceding rules are complied with to the maximum extent possible, with due consideration being given to replacement costs, service needs, etc.
- (6) Docks and Piers
 - (A) Docks and piers shall not significantly interfere with water flows.
 - (B) To preclude the adverse effects of shading coastal wetlands vegetation,

docks and piers built over coastal wetlands shall not exceed six feet in width. "T"s and platforms associated with residential piers must be at the waterward end, and must not exceed a total area of 500 sq. ft. with no more than six feet of the dimension perpendicular to the marsh edge extending over coastal wetlands. Water dependent projects requiring piers or wharfs of dimensions greater than those stated in this Rule shall be considered on a case-by-case basis.

- (C) Piers shall be designed to minimize adverse effects on navigation and public use of waters while allowing the applicant adequate access to deep waters by:
 - (i) not extending beyond the established pier length along the same shoreline for similar use;
 - (ii) not extending into the channel portion of the water body; and
 - (iii) not extending more than one-third the width of a natural water body or man-made canal or basin. Measurements to determine widths of the channels, canals or basins shall be made from the waterward edge of any coastal wetland vegetation which borders the water body. The one-third length limitation will not apply in areas where the U.S. Army Corps of Engineers, or a local government in consultation with the Corps of Engineers, has established an official pier-head line.
- (D) Pier alignments along federally maintained channels must meet Corps of Engineers District guidelines.
- (E) Piers shall not interfere with the access to any riparian property and shall have a minimum setback of 15 feet between any part of the pier and the adjacent property owner's areas of riparian access. The line of division of areas of riparian access shall be established by drawing a line along the channel or deep water in front of the properties, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge. The minimum

setback provided in the rule may be waived by the written agreement of the adjacent riparian owner(s) or when two adjoining riparian owners are co-applicants. Should the adjacent property be sold before construction of the pier commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the permitting agency prior to initiating any development of the pier. Application of this rule may be aided by reference to an approved diagram illustrating the rule as applied to various shoreline configurations. Copies of the diagram may be obtained from the Division of Coastal Management.

- (F) Docks and piers shall not significantly interfere with shellfish franchises or leases. Applicants for authorization to construct a dock or pier shall provide notice of the permit application or exemption request to the owner of any part of a shellfish franchise or lease over which the proposed dock or pier would extend.
- (7) Bulkheads and Shore Stabilization Measures
 - (A) Bulkhead alignment, for the purpose of shoreline stabilization, must approximate mean high water or normal water level.
 - (B) Bulkheads shall be constructed landward of significant marshland or marshgrass fringes.
 - (C) Bulkhead fill material shall be obtained from an approved upland source, or if the bulkhead is a part of a permitted project involving excavation from a non-upland source, the material so obtained may be contained behind the bulkhead.
 - (D) Bulkheads or other structures employed for shoreline stabilization shall be permitted below approximate mean high water or normal water level only when the following standards are met:
 - (i) the property to be bulkheaded has an identifiable erosion problem, whether it results from natural causes or adjacent bulkheads, or it has unusual geographic or geologic features, e.g. steep grade bank,

which will cause the applicant unreasonable hardship under the other provisions of this ~~Regulation~~ Rule;

- (ii) the bulkhead alignment extends no further below approximate mean high water or normal water level than necessary to allow recovery of the area eroded in the year prior to the date of application, to align with adjacent bulkheads, or to mitigate the unreasonable hardship resulting from the unusual geographic or geologic features;
- (iii) the bulkhead alignment will not result in significant adverse impacts to public trust rights or to the property of adjacent riparian owners;
- (iv) the need for a bulkhead below approximate mean high water or normal water level is documented in the Field Investigation Report or other reports prepared by the Division of Coastal Management; and
- (v) the property to be bulkheaded is in a nonoceanfront area.
- (E) Where possible, sloping rip-rap, gabions, or vegetation may be used rather than vertical seawalls.
- (8) Beach Nourishment
 - (A) Beach creation ~~and/or~~ or maintenance may be allowed to enhance water related recreational facilities for public, commercial, and private use.
 - (B) Beaches can be created ~~and/or~~ or maintained in areas where they have historically been found due to natural processes. They will not be allowed in areas of high erosion rates where frequent maintenance will be necessary.
 - (C) Placing unconfined sand material in the water and along the shoreline will not be allowed as a method of shoreline erosion control.
 - (D) Material placed in the water and along the shoreline shall be clean sand free from pollutants and highly erodible finger material. Grain size shall be equal to or larger than that found naturally at the site.
 - (E) Material from dredging projects can be used for beach nourishment if:

- (i) it is first handled in a manner consistent with ~~regulations~~ rules governing spoil disposal;
 - (ii) it is allowed to dry for a suitable period; and
 - (iii) only that material of acceptable grain size is removed from the disposal site for placement on the beach. Material shall not be placed directly on the beach by dredge or dragline during maintenance excavation.
- (F) Beach creation shall not be allowed in any primary nursery areas, nor in any areas where siltation from the site would pose a threat to shellfish beds.
- (G) Material shall not be placed on any coastal wetlands or beds of submerged aquatic vegetation.
- (H) Material shall not be placed on any submerged bottom with significant shellfish resources.
- (I) Beach construction shall not create the potential for filling adjacent or nearby navigation channels, canals, or boat basins.
- (J) Beach construction shall not violate water quality standards.
- (K) Permit renewal of these projects shall require an evaluation of any adverse impacts of the original work.
- (L) Permits issued for this development shall be limited to authorizing beach nourishment only one time during the life of the permit. Permits may be renewed for maintenance work or repeated need for nourishment.
- (9) Wooden and Riprap Groins
- (A) Groins shall not extend more than 25 ft. waterward of the mean high water or normal water level unless a longer structure can be justified by site specific conditions, sound engineering and design principals.
- (B) Groins shall be set back a minimum of 15 ft. from the adjoining property lines. This setback may be waived by written agreement of the adjacent riparian owner(s) or when two adjoining riparian owners are co-applicants. Should the adjacent property be sold before construction of the groin commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and

- submit it to the permitting agency prior to initiating any development of the groin.
- (C) Groins shall pose no threat to navigation.
- (D) The height of groins shall not exceed 1 ft. above mean high water or the normal water level.
- (E) No more than two structures shall be allowed per 100 ft. of shoreline unless the applicant can provide evidence that more structures are needed for shoreline stabilization.
- (F) "L" and "T" sections shall not be allowed at the end of groins.
- (G) Riprap material used for groin construction shall be free from loose dirt or any other pollutant in other than non-harmful quantities and of a size sufficient to prevent its movement from the site by wave and current action.

Statutory Authority G.S. 113A-107(b); 113A-108; 113A-113(b); 113A-124.

SECTION .0300 - OCEAN HAZARD AREAS

.0306 GENERAL USE STANDARDS FOR OCEAN HAZARD AREAS

(a) In order to protect life and property, all development not otherwise specifically exempted or allowed by law or elsewhere in these Rules shall be located according to whichever of the following rules is applicable.

- (1) If neither a primary nor frontal dune exists in the AEC on or behind landward of the lot on which the development is proposed, the development shall be landward of the erosion setback line. The erosion setback line shall be set at a distance of 30 times the long-term annual erosion rate from the first line of stable natural vegetation or measurement line, where applicable. In areas where the rate is less than 2 feet per year, the setback line shall be 60 feet from the vegetation line or measurement line, where applicable.
- (2) If a primary dune exists in the AEC on or behind landward of the lot on which the development is proposed, the development shall be landward of the crest of the primary dune or the long-term erosion setback line, whichever is

farthest from the first line of stable natural vegetation or measurement line, where applicable. For existing lots, however, where setting the development behind landward of the crest of the primary dune would preclude any practical use of the lot, development may be located seaward of the primary dune. In such cases, the development shall be located behind landward of the long-term erosion setback line and shall not be located on or in front of a frontal dune. The words "existing lots" in this Rule shall mean a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership.

- (3) If no primary dune exists, but a frontal dune does exist in the AEC on or behind landward of the lot on which the development is proposed, the development shall be set behind landward of the frontal dune or behind landward of the long-term erosion setback line, whichever is farthest from the first line of stable natural vegetation or measurement line, where applicable.
- (4) Because large structures located immediately along the Atlantic Ocean present increased risk of loss of life and property, increased potential for eventual loss or damage to the public beach area and other important natural features along the oceanfront, increased potential for higher public costs for federal flood insurance, erosion control, storm protection, disaster relief and provision of public services such as water and sewer, and increased difficulty and expense of relocation in the event of future shoreline loss, a greater oceanfront setback is required for these structures than is the case with smaller structures. Therefore, in addition to meeting the criteria in this Rule for setback behind landward of the primary or frontal dune or both the primary and frontal dunes, for all multi-family residential structures (including motels, hotels, condominiums and moteliniums) of more than 5,000 square feet total floor area, and for any non-residential structure

with a total area of more than 5,000 square feet, the erosion setback line shall be twice the erosion setback as established in .0306(a)(1) of this Rule, provided that in no case shall this distance be less than 120 feet. In areas where the rate is more than 3.5 feet per year, this setback line shall be set at a distance of 30 times the long-term annual erosion rate plus 105 feet.

- (5) Established common-law and statutory public rights of access to and use of public trust lands and waters in ocean hazard areas shall not be eliminated or restricted. Development shall not encroach upon public accessways nor shall it limit the intended use of the accessways.

(b) In order to avoid weakening the protective nature of ocean beaches and primary and frontal dunes, no development will be permitted that involves the significant removal or relocation of primary or frontal dune sand or vegetation thereon. Other dunes within the ocean hazard area shall not be disturbed unless the development of the property is otherwise impracticable, and any disturbance of any other dunes shall be allowed only to the extent allowed by Rule .0308(b).

(c) In order to avoid excessive public expenditures for maintaining public safety, construction or placement of growth-inducing public facilities to be supported by public funds will be permitted in the ocean hazard area only when such facilities:

- (1) clearly exhibit overriding factors of national or state interest and public benefit,
- (2) will not increase existing hazards or damage natural buffers,
- (3) will be reasonably safe from flood and erosion related damage,
- (4) will not promote growth and development in ocean hazard areas.

Such facilities include, but are not limited to, sewers, waterlines, roads, and bridges, ~~and erosion control structures.~~

(d) Development shall not cause major or irreversible damage to valuable documented historic architectural or archaeological resources documented by the Division of Archives and History, the National Historical Registry, the local land-use plan, or other reliable sources.

(e) Development shall be consistent with minimum lot size and set back requirements established by local regulations.

(f) Mobile homes shall not be placed within the

high hazard flood area unless they are within mobile home parks existing as of June 1, 1979.

(g) Development shall be consistent with general management objective for ocean hazard areas set forth in Rule .0303 of this Section.

(h) Development shall not create undue interference with legal access to, or use of, public resources nor shall such development increase the risk of damage to public trust areas.

(i) Development proposals shall incorporate all reasonable means and methods to avoid or minimize adverse impacts of the project. These measures shall be implemented at the applicant's expense and may include actions that will:

- (1) minimize or avoid adverse impacts by limiting the magnitude or degree of the action,
- (2) restore the affected environment, or
- (3) compensate for the adverse impacts by replacing or providing substitute resources.

(j) Prior to the issuance of any permit for development in the ocean hazard AECs, there shall be a written acknowledgement from the applicant that the applicant is aware of the risks associated with development in this hazardous area and the limited suitability of this area for permanent structures. By granting permits, the Coastal Resources Commission does not guarantee the safety of the development and assumes no liability for future damage to the development.

(k) All relocation of structures requires permit approval. Structures relocated with public funds shall comply with the applicable setback line as well as other applicable AEC rules. Structures including septic tanks and other essential accessories relocated entirely with non-public funds shall be relocated the maximum feasible distance landward of the present location; septic tanks may not be located seaward of the primary structure. In these cases, all other applicable local and state rules shall be met.

(l) Permits shall include the condition that any structure shall be relocated or dismantled when it becomes imminently threatened by changes in shoreline configuration. The structure(s) shall be relocated or dismantled within two years of the time when it becomes imminently threatened, and in any case upon its collapse or subsidence. However, if natural shoreline recovery or beach renourishment takes place within two years of the time the structure becomes imminently threatened, so that the structure is no longer imminently threatened, then it need not be relocated or dismantled at that time. This condition shall not

affect the permit holder's right to seek authorization of temporary protective measures allowed under Rule .0308(a)(2) of this Section.

Statutory Authority G.S. 113A-107; 113A-113(b)(6); 113A-124.

.0309 USE STANDARDS FOR OCEAN HAZARD AREAS: EXCEPTIONS

(a) The following types of development may be permitted seaward of the oceanfront setback requirements of Rule .0306(a) of the Subchapter if all other provisions of this Subchapter and other state and local regulations are met:

- (1) campgrounds that do not involve substantial permanent structures;
- (2) parking areas with clay, packed sand or similar surfaces;
- (3) outdoor tennis courts;
- (4) elevated decks not exceeding a footprint of 500 square feet;
- (5) beach accessways consistent with Rule .0308(c) of this Subchapter;
- (6) unenclosed, uninhabitable gazebos with a footprint of 200 square feet or less;
- (7) uninhabitable, single-story storage sheds with a footprint of 200 square feet or less;
- (8) temporary amusement stands; and
- (9) swimming pools.

In all cases, this development shall only be permitted if it is landward of the vegetation line; involves no significant alteration or removal of primary or frontal dunes or the dune vegetation; has overwalks to protect any existing dunes; is not essential to the continued existence or use of an associated principal development; is not required to satisfy minimum requirements of local zoning, subdivision or health regulations; and meets all other non-setback requirements of this Subchapter.

(b) Where strict application of the oceanfront setback requirements of Rule .0306(a) of this Subchapter would preclude placement of permanent substantial structures on lots existing as of June 1, 1979, single family residential structures may be permitted seaward of the applicable setback line in ocean erodible areas, but not inlet hazard areas, if each of the following conditions are met:

- (1) The development is set back from the ocean the maximum feasible distance possible on the existing lot and the development is designed to minimize encroachment into the setback area;
- (2) The development is at least 60 feet landward of the vegetation line;

- (3) The development is not located on or in front of a frontal dune, but is entirely ~~behind~~ landward of the landward toe of the frontal dune;
- (4) The development incorporates each of the following design standards, which are in addition to those required by Rule .0308(d) of this Subchapter.
 - (A) All pilings have a tip penetration that extends to at least four feet below mean sea level;
 - (B) The footprint of the structure be no more than 1,000 square feet or 10 percent of the lot size, whichever is greater.
- (5) All other provisions of this Subchapter and other state and local regulations are met. If the development is to be serviced by an on-site waste disposal system, a copy of a valid permit for such a system must be submitted as part of the CAMA permit application.

For the purposes of this Rule, an existing lot is a lot or tract of land which, as of June 1, 1979, is specifically described in a recorded plat and which cannot be enlarged by combining the lot or tract of land with a contiguous lot(s) or tract(s) of land under the same ownership. The footprint is defined as the greatest exterior dimensions of the structure, including covered stairways, when extended to ground level.

Statutory Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b)(6)a.; 113A-113(b)(6)b.; 113A-113(b)(6)d.; 113A-124.

TITLE 16 - DEPARTMENT OF PUBLIC EDUCATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Board of Education intends to amend rules cited as 16 NCAC 1A .0001 and 16 NCAC 6D .0103.

The proposed effective date of this action is December 1, 1992.

The public hearing will be conducted at 9:30 am on September 21, 1992 at the Education Building, 3rd floor Conference Room, 116 West Edenton Street, Raleigh, NC 27603-1712.

Reason for Proposed Action: Amendments are designed to provide a high school exit document for special education students who have met the requirements of their course of study.

Comment Procedures: Any interested person may submit oral comments at the hearing or written comments by October 1, 1992.

CHAPTER 1 - DEPARTMENTAL RULES

SUBCHAPTER 1A - ORGANIZATIONAL RULES

.0001 DEFINITIONS

As used in this Title:

- (1) "Basic Education Program" (BEP) means that comprehensive program developed by the SBE and implemented by each LEA in accordance with the provisions of G.S. 115C-81.
- (2) "Certificate" means
 - (a) that document issued by the department to professional public school employees which indicates that they have met the minimum criteria for serving in a professional position; ~~and~~
 - (b) ~~that document issued by LEAs to students who have not passed the competency test but have met all other criteria for graduation.~~
- (3) "Certificate of attendance" means that document issued by LEAs to students pursuant to 16 NCAC 6D .0103(a).
- (4) ~~(3)~~ "Department" means the Department of Public Education.
- (5) "Graduation certificate" means that document issued by LEAs to students pursuant to 16 NCAC 6D .0103(c).
- (6) ~~(4)~~ "Local Education Agency" (LEA) means local board of education. As used in 16 NCAC 6H .0005 - .0010, LEA includes the Departments of Human Resources and Correction.
- (7) ~~(5)~~ "State Board of Education" (SBE) means the head of the Department of Public Education.
- (8) ~~(6)~~ "Superintendent" means the Superintendent of Public Instruction.

Authority N.C. Constitution, Article IX, Section 5.

CHAPTER 6 - ELEMENTARY AND

SECONDARY EDUCATION

SUBCHAPTER 6D - INSTRUCTION

SECTION .0100 - CURRICULUM

.0103 GRADUATION REQUIREMENTS

(a) In order to graduate and receive a high school diploma, public school students must meet the requirements of Paragraph (b) of this Rule and attain passing scores on competency tests adopted by the SBE and administered by the LEA. Students who satisfy all state and local graduation requirements but who fail the competency tests will receive a certificate of attendance and transcript and ~~may~~ shall be allowed by the LEA to participate in graduation exercises.

- (1) LEAs score the competency tests separately according to passing scores or criterion levels approved by the SBE.
- (2) LEAs may change the form or content of the competency tests where necessary to allow special education students to participate, but these students must achieve a level of performance on each test equal to the passing scores or criteria levels.
- (3) Special education students may apply in writing to be exempted from taking the competency tests. Before it approves the request, the LEA must assure that the parents, or the child if aged 18 or older, understand that each student must pass the competency tests to receive a high school diploma.
- (4) Any student who has failed to pass the competency tests by the end of the last school month of the year in which the student's class graduates may receive additional remedial instruction and continue to take the competency tests during regularly scheduled testing until the student reaches maximum school age.

(b) In addition to the requirements of Paragraph (a), students must successfully complete 20 course units in grades 9-12 as specified in this Paragraph:

- (1) Effective with the class entering ninth grade for the 1992-93 school year, the 20 course units must include:
 - (A) four units in English;
 - (B) three units in mathematics, one of which must be Algebra I;
 - (C) three units in social studies, one of which must be in government and

economics, one in United States history and one in world studies;

- (D) three units in science, one of which must be biology and one a physical science;
 - (E) one unit in physical education and health; and
 - (F) six units designated by the LEA, which may be undesignated electives or courses designated from the standard course of study.
- (2) LEAs may count successful completion of course work in the ninth grade at a school system which does not award course units in the ninth grade toward the requirements of this Rule.
 - (3) LEAs may count successful completion of course work in grades 9-12 at a summer school session toward the requirements of this Rule.
 - (4) LEAs may count successful completion of course work in grades 9-12 at an off-campus institution toward the requirements of this Rule. No high school may approve enrollment in post-secondary institutions during the regular school year in excess of five percent of its enrollment in grades 10-12 except as allowed by the SBE. 23 NCAC 2C .0301 governs enrollment in community college institutions.

(c) Effective with the class entering ninth grade for the 1992-93 school year, special needs students as defined by G.S. 115C-109, excluding academically gifted, speech-language impaired, orthopedically impaired, other health impaired, and pregnant, who do not meet the requirements for a high school diploma will receive a graduation certificate and shall be allowed to participate in graduation exercises if they meet the following criteria:

- (1) successful completion of 20 course units by general subject area (4 English, 3 math, 3 science, 3 social studies, 1 health and physical education, and 6 local electives) under Paragraph (b) of this Rule. These students are not required to pass the specially designated courses such as Algebra I, Biology or United States history;
- (2) completion of all IEP requirements.

Statutory Authority G.S. 115C-12(9)c.; 115C-81(a); 115C-180.

TITLE 19A - DEPARTMENT OF
TRANSPORTATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Transportation intends to amend rule(s) cited as 19A NCAC 02D .0822 and .0824.

The proposed effective date of this action is December 1, 1992.

Instructions on How to Demand a Public Hearing: A demand for a public hearing must be made in writing and mailed to Emily Lee, Department of Transportation, P.O. Box 25201, Raleigh, NC 27611. The demand must be received within 15 days of this Notice.

Reason for Proposed Action: The amendment is needed to revise the time limit for contractors to submit performance and payment bonds after contract award.

Comment Procedures: Any interested person may submit written comments on the proposed rule by mailing the comments to Emily Lee, Department of Transportation, P.O. Box 25201, Raleigh, NC 27611, within 30 days after the proposed rule is published or until the date of any public hearing held on the proposed rule, whichever is longer.

CHAPTER 2 - DIVISION OF HIGHWAYS

SUBCHAPTER 2D - HIGHWAY
OPERATIONS

SECTION .0800 - PREQUALIFICATION:
ADVERTISING

.0822 CONTRACT BONDS

The successful bidder, within ~~ten days~~ 14 calendar days after the notice of award is received by him, shall provide the Department with a contract payment bond and a contract performance bond each in an amount equal to 100 percent of the amount of the contract. All bonds shall be in conformance with G.S. 44A-33. The corporate surety furnishing the bonds shall be authorized to do business in the State.

Statutory Authority G.S. 136-18(1).

.0824 FAILURE TO FURNISH
CONTRACT BONDS

The successful bidder's failure to file acceptable bonds within ~~10 days~~ 14 calendar days after the notice of award is received by him ~~will~~ shall be just cause for the forfeiture of the bid bond or bid deposit and rescinding the award of the contract. Award may then be made to the next lowest responsible bidder or the work may be readvertised and constructed under contract or otherwise, as the Board of Transportation may decide.

Statutory Authority G.S. 136-18(1).

TITLE 21 - OCCUPATIONAL LICENSING BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Architecture intends to amend rules cited as 21 NCAC 2 .0108, .0301-.0302.

The proposed effective date of this action is December 1, 1992.

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): Any request for a public hearing on these rules must be submitted, in writing, to Cynthia Skidmore, North Carolina Board of Architecture, 501 N. Blount Street, Raleigh, NC 27604, by 4:00 pm on September 16, 1992.

Reason for Proposed Action:

21 NCAC 2 .0108 - To remove the requirement which specifies that all fees must be paid by certified check or money order.

21 NCAC 2 .0301 - To require completion of an application form to sit for the Architecture Registration Examination, and to establish an application filing deadline for the December examination.

21 NCAC 2 .0302 - Clarifies the maximum credit a student may receive for education other than the specified degree.

Comment Procedures: Written comments on these rules must be delivered to the Board office by 4:00 pm on October 1, 1992.

CHAPTER 2 - BOARD OF ARCHITECTURE

SECTION .0100 - GENERAL PROVISIONS

.0108 FEES

Fees required by the Board, are payable in advance ~~by certified check or money order~~ and are set forth below:

Initial Application	
Individual	
Residents	\$50.00
Nonresidents	\$50.00
Corporate	\$75.00
Examination	At Cost (See Rule .0301)
Re-examination	\$25.00
Annual license renewal	
Individual	\$75.00 <u>50.00</u>
Corporate	\$100.00
Late renewal Penalty	\$50.00
Reciprocal registration	\$150.00

Copies of the roster and other publications and services provided by the Board are available at a reasonable cost from the Board office.

Statutory Authority G.S. 83A-4.

SECTION .0300 - EXAMINATION PROCEDURES

.0301 APPLICATION FOR EXAMINATION OR REGISTRATION

(a) All persons desiring to submit applications for written examination must complete ~~a form~~ an application and submit the application fee. All new applications and supporting documents for the Architectural Registration Examination (ARE) must be on file in the office of the Board not later than March 1st of each year for the June examination and October 1st of each year for the December examination in order for the applicant's eligibility to be determined and in order that the candidate may receive proper instructions to prepare for the examination. Applications and any supporting documents submitted after midnight of March 1st or October 1st of each year shall be deemed by the Board to be incomplete and the candidate shall not be eligible to sit for the next administration of the examination. If an application is in proper form and the applicant is otherwise qualified by statute and the rules of the Board to sit for the examination, notice will be mailed to the applicant, with detailed information as to the time, place and other requirements of the examination.

(b) The fees for examination, or parts thereof, will be established by the Board in order that all costs for examination materials are recovered. Fees will be published in a separate schedule and will be made available to all applicants for examination. A non-refundable application fee as established in Rule .0108 must be submitted with each first-time application in addition to the examination fee.

Statutory Authority G.S. 83A-4; 83A-6; 83A-7.

.0302 WRITTEN EXAMINATION

(a) Licensure Examination. All applicants for architectural registration in North Carolina by written examination must pass the Architectural Registration Examination (ARE), administered in North Carolina, prepared by the National Council of Architectural Registration Boards (NCARB). Provided, applicants who have never been registered in any state or territory may transfer credits for portions of the examination previously passed in another state if at the time of taking the exam elsewhere they otherwise qualified for taking the exam in North Carolina.

- (1) Description. The nature of the examination is to place the candidate in areas relating to actual architectural situations whereby his abilities to exercise competent value judgements will be tested and evaluated.
- (2) Qualifications. The prequalifications necessary for an applicant's admission to the Architectural Registration examination (ARE) are as follows:
 - (A) be of good moral character as defined in North Carolina General Statute 83A-1(5);
 - (B) be at least 18 years of age;
 - (C) hold a degree in architecture from a college or university where the degree program has been approved by the Board, or professional education equivalents as outlined and defined in the North Carolina Board of Architecture's Table of Equivalents for Education and Experience, Appendix A. Beginning July 1, 1991, the professional education qualification shall be a NAAB (National Architectural Accrediting Board) accredited professional degree in architecture; provided that an applicant whose education equivalents otherwise qualified under the Board's rules in effect prior to 1989 may apply for admission to the Architectural Registration Examination. However, an applicant who does not hold a NAAB accredited professional degree may not accumulate more than three and one half years of education credits in the aggregate from all degree programs in which he was enrolled. Further provided, the applicant must file with the Board by December 31, 1991, a notice of intent to sit for the examination on or before June 30, 1995.
 - (D) have three years' practical training or experience in the offices of registered architects or its equivalent as outlined and defined in the North Carolina Board of Architecture's Table of Equivalents for Education and Experience, Appendix A. All applicants who apply for architectural registration subsequent to July 1, 1987 shall be required to follow the Intern Development Program (IDP) through the National Council of Architectural Registration Boards or an equivalent program approved by the North Carolina Board of Architecture in order to satisfy the requirements of this Section. In the case of any applicant certifying to the Board that he or she had accrued sufficient training credits under the requirements of the current Appendix A prior to July 1, 1987, so that 12 or fewer months of training remained to be acquired, then the current Appendix A shall continue in effect for such applicant.

(b) Retention of Credit. Transfer credits for parts of the examination passed prior to the 1983 Architectural Registration Examination (ARE), shall be as established by the Board. Information as to transfer credits will

be provided, when appropriate, to candidates as an inclusion with the application forms.

(c) **Practical Training.** Practical training means practical experience and diversified training as defined in the North Carolina Board of Architecture's Table of Equivalents for Education and Experience, Appendix A. However, the Board reserves the right to judge each case on its own merits.

(d) **Personal Audience.** The candidate may be required to appear personally before the examining board or a designated representative of the Board and afford the Board an opportunity to judge his natural endowments for the practice of architecture, his ethical standards, and by questions gain further knowledge of his fitness for the practice of architecture. The time for this audience will be set by the examining body.

(e) **Grading.** The ARE shall be graded in accordance with the methods and procedures recommended by the NCARB.

(1) To achieve a passing grade on the ARE, an applicant must receive a passing grade of 75 in each division. Grades from the individual divisions may not be averaged. Applicants will have unlimited opportunities to retake divisions which they fail, but all divisions, previously failed, must be retaken at one time at a subsequent examination.

(2) In order to insure fairness in grading and to preserve anonymity until after the examinations have been graded, each candidate will receive a number that will be unique for each candidate. This number shall be placed by the candidate on all papers and exhibits.

(f) **Time and place.** Beginning in 1983, the Board will administer the ARE over a four day period to all applicants eligible, in accordance with the requirements of this Rule. The place and exact dates will be announced in advance of the examination.

Statutory Authority G.S. 83A-1; 83A-6; 83A-7.

TITLE 25 - OFFICE OF STATE PERSONNEL

Notice is hereby given in accordance with G.S. 150B-21.2 that the Office of State Personnel/State Personnel Commission intends to adopt rules cited as 25 NCAC 1L .0107-.0119, and repeal rules cited as 25 NCAC 1C .0202 and 1L .0101-.0106.

The proposed effective date of this action is December 1, 1992.

The public hearing will be conducted at 9:00 am on October 6, 1992 at the State Personnel Development Center, 101 W. Peace Street, Raleigh, NC 27603.

Reason for Proposed Action:

25 NCAC 1C .0202 and 1L .0101-.0106 - These rules are proposed to be repealed in order to adopt new rules to conform to current legislation: S.L. 1991 c. 919.

25 NCAC 1L .0107-.0119 - These rules are proposed to be adopted to ensure that the administration and implementation of all personnel policies, practices and programs are fair and equitable.

Comment Procedures: Interested persons may present statements either orally or in writing at the public hearing or in writing prior to the hearing by mail addressed to: Barbara A. Coward, Office of State Personnel, 116 W. Jones Street, Raleigh, NC 27603.

CHAPTER 1 - OFFICE OF STATE PERSONNEL

SUBCHAPTER 1C - PERSONNEL ADMINISTRATION

SECTION .0200 - GENERAL EMPLOYMENT POLICIES

.0202 EQUAL EMPLOYMENT OPPORTUNITY

(a) ~~Special provisions relative to handicap:~~

(1) ~~Equal employment opportunity for persons with disabilities includes the making of a reasonable accommodation to the known physical limitations of a qualified handicapped applicant or employee who would be able to perform the essential duties of the job if such accommodation is made. This may include:~~

(A) ~~making facilities used by employees readily accessible to and usable by~~

such person;

- (B) ~~job restructuring (reassigning non essential duties and/or using part time or modified work schedules);~~
- (C) ~~acquisition or modification of equipment or devices;~~
- (D) ~~provision of readers or interpreters; and/or other similar actions.~~

Agencies are required to make such adjustments for the known limitations of otherwise qualified handicapped applicants and employees, unless it can be demonstrated that a particular adjustment or alteration would impose an undue hardship on the operation of the agency.

- (2) ~~Whether an accommodation is reasonable must depend on the facts in each case. Factors to be considered in determining this include:~~

- (A) ~~the nature and cost of the accommodation needed;~~
- (B) ~~the type of the agency's operation, including the composition and structure of its work force; and~~
- (C) ~~the overall size of the agency or particular program involved, with respect to number of employees, number and type of facilities, and size of budget.~~

(b) ~~Bona Fide Occupational Qualifications:~~

- (1) ~~Age, sex or physical requirements may be considered if they constitute a bona fide occupational qualification necessary for job performance in the normal operations of the agency. Whether such a requirement is a bona fide occupational qualification will depend on the facts in each case. This exemption will be construed very narrowly and the agency will have the burden of proving the exemption is justified.~~
- (2) ~~Physical fitness requirements based upon preemployment physical examinations relating to minimum standards for employment may be a reasonable employment factor, provided that such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age or sex.~~
- (3) ~~A differentiation based on a physical examination may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupa-~~

~~tional factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous. Job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity and endurance would fall in this category.~~

- (4) ~~To establish age, sex or physical requirements as a bona fide occupational qualification, it will be necessary to submit a recommendation to the Office of State Personnel setting forth all facts and justification as to why the requirement should be considered as an employment factor in each of the classifications in question.~~

~~(e) Effective July 1, 1985, direct appeal to the State Personnel Commission (such appeal involving a contested case hearing pursuant to Ch. 150B) on the basis of political affiliation discrimination is provided only to employees who meet the standards for continuous state service set out in G.S. 126-5(e)(1), or to employees who served or were separated from positions subject to competitive service.~~

~~(d) Special Provisions Relative to Communicable and Infectious Diseases:~~

- (1) ~~Persons with communicable or infectious disease, including Acquired Immune Deficiency Syndrome (AIDS), are handicapped if the disease results in an impairment which substantially limits one or more major life activities. All of the statutory provisions relative to persons with handicaps are applicable to persons with communicable and infectious diseases, including the requirements for a reasonable accommodation to the known limitations of an otherwise qualified applicant or employee.~~
- (2) ~~It is not discriminatory action to fail to hire, transfer, or promote, or to discharge a handicapped person because the person has a communicable disease which would disqualify a non-handicapped person from similar employment. However, such action may be taken on that basis only when it has been determined necessary to prevent the spread of the communicable or infectious disease. There must be documentation of consultation with private physicians and/or public health officials in arriving at the determination. Concern for other~~

employees who may fear working with the infected co worker must never be the basis for the action, in the absence of a medically documented health hazard to other persons.

- (3) ~~It must be remembered that AIDS, unlike most communicable diseases, is transmitted only by exchange of body fluids through sexual contact, sharing of needles and syringes, or transfusion of infected blood. According to the U.S. Department of Health and Human Services, Public Health Service, no cases have been found where the AIDS virus has been transmitted by casual contact, and there is no evidence that it can be transmitted by casual contact. There is no evidence that employing a person with AIDS would present a health hazard to other persons in the usual work place.~~

Statutory Authority G.S. 126-4; 126-5(c)(1)-(4); 126-16; 126-36; 168A-5(b)(3); P.L. 92-261, March 24, 1972.

SUBCHAPTER 1L - AFFIRMATIVE ACTION

SECTION .0100 - AFFIRMATIVE ACTION PLANS

.0101 DUTIES OF SECTION

The affirmative action section of the Office of State Personnel is responsible for developing and administering a program to ensure greater utilization of all persons by identifying previously underutilized groups in the workforce, such as minorities, women, and handicapped persons; and making special efforts toward their recruitment, selection, development and upward mobility.

Statutory Authority G.S. 126-4; 126-16.

.0102 POLICY

(a) It is the official policy of the State of North Carolina to provide all current employees and applicants for state employment with equal employment opportunities, without discrimination on the basis of race, color, religion, national origin, sex, age, or handicapping condition.

(b) The commitment to equal career opportunity shall be undertaken through a continuing program of affirmative action in order to:

- (1) ~~assure that all personnel policies and practices relevant to total employment in state government will guarantee and preserve equal employment opportunities for all persons of the state;~~
- (2) ~~assure more equitable representation of women, minorities, and handicapped persons throughout all aspects of the state's workforce.~~

Statutory Authority G.S. 126-4(10); 126-16.

.0103 PROGRAM IMPLEMENTATION: STATE LEVEL

- (a) ~~The Office of State Personnel in cooperation with the several departments of state government shall develop and implement a State Affirmative Action Plan to promote equal employment opportunity to include, but not be limited to, the following:~~

- (1) ~~recruitment,~~
- (2) ~~interviewing,~~
- (3) ~~selection,~~
- (4) ~~hiring,~~
- (5) ~~promotion,~~
- (6) ~~training,~~
- (7) ~~compensation and benefits,~~
- (8) ~~performance appraisal (WPPR),~~
- (9) ~~reduction in force.~~

(b) ~~The Office of State Personnel shall provide technical assistance to each department of state government.~~

Statutory Authority G.S. 126-4(10); 126-16.

.0104 PROGRAM IMPLEMENTATION: DEPARTMENT AND UNIVERSITY LEVEL

(a) ~~Each department head of state government and University Chancellor shall develop and implement a departmental or university affirmative action program designed to solve problems in those areas that adversely affect minorities, women and handicapped persons.~~

(b) ~~Each department and university shall present a plan for this affirmative action program to the Office of State Personnel for review, technical assistance and approval by the Director of State Personnel.~~

(c) ~~Each department's and university's affirmative action plan shall meet all requirements of the administrative EEO/AA Planning and Resources Guide and shall include but not be limited to the following elements:~~

- (1) ~~a workforce analysis designed to examine the number and levels at which it employs minorities, women, and handicapped persons;~~
- (2) ~~a set of objectives, goals and timetables;~~
- (3) ~~a recruitment program designed to attract minorities, women and handicapped persons to all levels of employment;~~
- (4) ~~an interviewing program that includes, for each vacancy, the interviewing of at least three applicants representative of the ethnic, sex and handicapped composition of available applicants;~~
- (5) ~~a program of promotion and career ladders for present employees;~~
- (6) ~~a program of training to enhance employee development and advancement opportunities. Such programs shall include a process to ensure that minorities, women and handicapped persons have adequate representation and participation in internal and external training programs such as Supervisory Training, Public Managers Program, and Educational Assistance Program;~~
- (7) ~~a program of orientation and training in equal employment opportunity and affirmative action compliance for all managers, supervisors and others authorized to make or recommend personnel actions;~~
- (8) ~~Reduction in force procedures are designed to maintain the proportion of protected group members in the departmental or university workforce and preserves gains made in utilizing protected group members;~~
- (9) ~~An annual internal evaluation system (WPPR) to hold managers to all levels accountable for the progress of the department's and university's affirmative action program;~~
- (10) ~~an internal reporting system to measure total program effectiveness.~~

(d) ~~Each department head shall assign responsibility and authority for the affirmative action program to a high level official or an equal employment opportunities officer (EEOO). Division heads and appropriate supervisors shall participate in developing the program and shall be responsible for implementing it in the work unit.~~

Statutory Authority G.S. 126-4(10); 126-16.

.0105 PROGRAM PLAN REVIEW

(a) ~~Each state department/agency and university employing SPA employees shall submit annually an Affirmative Action Plan (update of entire plan or revisions as specified) or shall submit an application for a three year EEO/AA planning cycle and a Three year Affirmative Action plan to the Office of State Personnel for review, technical assistance, and approval by the State Personnel Director. The submission date will be January 31 for annual plans or January 31 of the year immediately following the last year for which the previously approved three year plan ended.~~

(b) ~~Each state department/agency and university applying for three year Affirmative Action Plan approval shall, in the judgement of the State Personnel Director, meet each of the preliminary requirements for three year EEO/AA plan approval stated in the Standards For Three Year Plan Approval issued by the Equal Opportunity Services Division of the Office of State Personnel.~~

(c) ~~All reports submitted to the Office of State Personnel shall be reviewed by the department head or university chancellor and signed by the EEO Officer, verifying the process of program implementation.~~

Statutory Authority G.S. 126-4(10); 126-16.

.0106 COMPLIANCE INFORMATION

(a) ~~To assist in the evaluation of the State's Affirmative Action Program, each state agency or institution shall provide the State Personnel Commission with the following compliance information concerning investigations or other review made by the Equal Employment Opportunity Commission, or through court proceedings:~~

- (1) ~~A copy of all correspondence to the EEOC concerning a "negotiated settlement," more recently referred to as a no fault settlement;~~
- (2) ~~A copy of "position statements" prepared by the department or institution which outlines an analyses of the facts and makes a recommendation to EEOC that they make a finding of no reasonable cause;~~
- (3) ~~where investigations are conducted by the EEOC, a statement as to the nature of the complaint, a copy of the agreement, conciliation, or other settlement reached between the EEOC or the courts and the state department or institution, including the cost of settlement to the state, if any.~~

~~(b) The Office of State Personnel will provide staff assistance to agency EEO officers in the investigation and preparation of responses to the EEOC.~~

Statutory Authority G.S. 126-4; 126-16.

SUBCHAPTER 1L - EQUAL EMPLOYMENT OPPORTUNITY

SECTION .0100 - EQUAL EMPLOYMENT OPPORTUNITY/DIVERSITY PLAN

.0107 PURPOSE

(a) In the State of North Carolina, neither race, religion, color, creed, national origin, sex, age, political affiliation, nor disability is to be considered in the:

- (1) Recruitment, selection and hiring of new employees of the State;
- (2) Selection of employees for promotion, training, career development, transfer, re-assignment for fiscal purposes, and/or reduction-in-force;
- (3) Administration of disciplinary policies or termination for cause;
- (4) Award of compensation, including salary adjustment, reallocations and/or annual performance increases;
- (5) Provision and administration of other terms, conditions or privileges of employment; and
- (6) Administration and implementation of all personnel practices and policies.

(b) Therefore, the purpose of this Rule is to ensure: equal employment opportunity for applicants and employees; more equitable representation of traditionally underutilized groups; that the administration and implementation of all personnel rules, policies, practices and programs are fair and equitable; and to address the underutilizations that may be created by changing workforce demographics and to help the State remain competitive in a global economy.

(c) The State of North Carolina shall continue to take positive measures and develop programs to ensure the full utilization of underrepresented groups.

(d) This Rule and any related rules, policies and programs adopted by the State Personnel Commission represent the commitment of the State and shall be implemented by every State agency, department and university.

Statutory Authority G.S. 126-4; 126-4(10); 126-16;

S.L. 1991, c. 919.

.0108 ADMINISTRATION

(a) The head of each agency, department or university shall be responsible for the implementation of this Rule and any related rules, policies or programs adopted by the State Personnel Commission and shall take positive measures to ensure that equal opportunity is available in all areas of employment including: recruitment, selection, hiring, promotion, demotion, compensation, termination, reduction in force-layoffs, re-employment priorities, and other terms, conditions and privileges of employment.

(b) Measures shall also be taken to ensure a work environment consistent with the intent of this Rule and to provide instruction to managers and supervisors on management practices which support equal opportunity and address the changing composition of the work force and its diversity.

Statutory Authority G.S. 126-4(10); 126-16; S.L. 1991, c. 919.

.0109 RESPONSIBILITIES OF THE STATE PERSONNEL COMMISSION

The State Personnel Commission shall submit a report to the General Assembly on the status of Equal Employment Opportunity plans and programs for all State departments, agencies, and universities, on or before June 1 of each year. The status report shall include:

- (1) Reasons for disapproval of any plan;
- (2) Data analysis of at least new hires and promotions, according to:
 - (A) Number of persons employed by job category,
 - (B) Salary,
 - (C) Race,
 - (D) Sex,
 - (E) Other demographics;
- (3) Status of goal achievement.

Statutory Authority G.S. 126-4(10); S.L. 1991, c. 919.

.0110 RESPONSIBILITIES OF THE OFFICE OF STATE PERSONNEL

The Equal Opportunity Services Division of the Office of State Personnel shall provide technical assistance, resource/support programs, monitoring, audit and evaluation, training, and oversight. Systems shall be developed to review, analyze and evaluate trends, and make recommendations regarding all personnel policies and decisions

affecting recruitment, rate of pay, hiring, promotions, training, reallocations, demotions, terminations, transfers, discipline and all other terms, privileges and conditions of employment. Data programs for EEO plan development and reporting, which reflect NC's population at all occupational levels, will be developed. The EOS Division shall also develop a statewide EEO plan.

Statutory Authority G.S. 126-4; 126-16; S.L. 1991, c. 919.

**.0111 RESPONSIBILITY OF
DEPARTMENTS, AGENCIES,
AND UNIVERSITIES**

(a) Each department/agency head and University Chancellor shall develop and implement a plan and program designed to solve problems in those areas that adversely affect minorities, women, persons with disabilities and other underutilized groups.

(b) Each department/agency and university shall present its plan and program to the Office of State Personnel for review, technical assistance and approval by the Director of State Personnel.

(c) Each department and university's plan and program shall meet all requirements of the Program Planning and Resources Guide and shall include, but not be limited to, the following elements:

- (1) A Work Force Analysis designed to examine the number and levels at which minorities, women, persons with disabilities and older workers (40+) are employed.
- (2) A Set of Numerical Goals based on North Carolina's population and the timetable for achieving identified goals.
- (3) A Set of Measurable Program Goals and Objectives.
- (4) A Recruitment Program designed to attract applicants to address the underrepresentation of women, minorities, persons with disabilities and older workers (40+) in all occupational categories.
- (5) An Interviewing Program that includes, for each occupational category in which there is underutilization, efforts to generate at least three candidates representative of the underutilized group.
- (6) Selection Procedures designed to assure that the total process in no way discriminates on the basis of race, color, creed, religion, sex, age, national origin, and disability.

(7) A Program of Promotion and Career Development for present employees to enhance upward mobility and fully utilize the skills of the existing workforce.

(8) A Program of Training to enhance employee development and advancement opportunities. Such program shall include a process to ensure that the traditionally underutilized groups (minorities, women and persons with disabilities) have adequate representation and participation in internal and external training programs including but not limited to occupational/technical training in the assigned area of work, Supervisory Training, Public Managers Program, and Educational Assistance Program.

(9) A Management Training Program in Equal Employment Opportunity for all managers, supervisors and others authorized to make or recommend personnel actions.

(10) Reduction-in-Force Procedures designed to analyze layoff decisions and to determine their actual and/or potential adverse impact on underrepresented groups.

(11) An Annual Performance Evaluation System (agency-specific); i.e., PMS to hold managers at all levels accountable for the progress of the department's/-agency's/university's equal employment opportunity program. The system should include the pay dispute resolution process and the annual report from the pay advisory committee.

(12) An Internal Data Management System to measure total program effectiveness.

(13) A Positive Emphasis Program to attract, accommodate and retain persons with disabilities.

(14) A Program to protect the right of older workers (40+).

(15) A Sexual Harassment Prevention Training Program to prevent and remedy sexual harassment in the workplace.

(16) A Work and Family Issues Program designed to offer a variety of policies and practices to manage work and family concerns.

(d) Each State department, agency and university shall submit on or before March 1 of each year an Equal Employment Opportunity Plan (update of

entire plan or revisions as specified) or shall submit an application for a three-year EEO planning cycle and a Three-year Equal Employment Opportunity plan to the Office of State Personnel for review, technical assistance and approval by the State Personnel Director. Applications for three-year plans shall be submitted by January 31. Plans not in by the specified date will be disapproved.

(e) Each state department/agency and university applying for three-year Equal Employment Opportunity Plan approval shall, in the judgment of the State Personnel Director, meet each of the preliminary requirements for three-year EEO plan approval stated in the Standards For Three-Year Plan Approval issued (in the Planning and Resources Guide) by the Equal Opportunity Services Division of the Office of State Personnel.

Statutory Authority G.S. 126-4(10); 126-16; S.L. 1991, c. 919.

.0112 SPECIAL PROVISION RELATIVE TO POSITIVE MEASURES

A Positive Measures Program has been identified by State Government as a means to achieve equal employment opportunity in and throughout all aspects of its workforce. Positive Measures as related to the EEO plan means structured, continuous activities and programs designed to address the underrepresentation of women, minorities, persons with disabilities, and older workers (40+) in the North Carolina State government workforce. Special efforts should be made toward the recruitment, selection, development and upward mobility of women, minorities, persons with disabilities, and older workers (40+) to ensure greater utilization of the diverse workforce.

Statutory Authority G.S. 126-4(10); 126-16; S.L. 1991, c. 919.

.0113 SPECIAL PROVISION RELATIVE TO AGE

Equal employment opportunity plan as related to age applies only to persons who are age 40 and over. State and Federal laws prohibit employment discrimination on the basis of age for these persons. It is unlawful "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his/her compensation, terms, conditions, or privileges of employment, because of such individual's age".

Statutory Authority G.S. 126-4; 126-16; 126-36;

S.L. 1991, c. 919.

.0114 SPECIAL PROVISION RELATIVE TO DISABILITY

(a) Equal employment opportunity for persons with disabilities includes the making of a reasonable accommodation for the known disabilities of a qualified applicant or employee with a disability who would be able to perform the essential functions of the job if such accommodation is made. This may include: making facilities used by employees readily accessible to and usable by such person; job re-structuring (re-assigning non-essential functions and/or using part-time or modified work schedules); acquisition or modification of equipment or devices; provision of readers or interpreters; and/or other similar actions. Agencies are required to make such adjustments for the known disabilities of qualified applicants and employees, unless it can be demonstrated that a particular adjustment, alteration, or modification would impose an undue hardship on the operation of the agency.

(b) Whether an accommodation is reasonable must depend on the facts in each case. Factors to be considered in determining this include: the net cost of the accommodation needed; the resources of the agency; the type of operation including structure and functions of the workforce; and the impact of the accommodation on the operation of the agency.

Statutory Authority G.S. 126-4; 126-16; 126-36; S.L. 1991, c. 919.

.0115 SPECIAL PROVISION RELATIVE TO COMMUNICABLE/INFECTIOUS DISEASES

(a) Persons with communicable or infectious disease, including AIDS/HIV are persons with disabilities under the Rehabilitation Act, Section 504, as amended and the Americans with Disabilities Act of 1990. This includes persons who test positive for HIV without having the symptoms of AIDS. All of the statutory provisions relative to persons with disabilities are applicable to persons with communicable and infectious diseases, including the requirement for a reasonable accommodation for the known disabilities of a qualified applicant or employee.

(b) AIDS/HIV, unlike most communicable diseases, has been shown to be transmitted only by exchange of body fluids through sexual contact, sharing of needles and syringes, or transfusion of infected blood. According to the U.S. Department

of Health and Human Services, Public Health Service, no cases have been found where AIDS/HIV has been transmitted by casual contact, and there is no evidence that it can be transmitted by casual contact. There is no evidence that employing a person with AIDS/HIV would present a health hazard to other persons in the usual work place.

Statutory Authority G.S. 126-4; 126-16; 126-36; S.L. 1991, c. 919.

.0116 DIRECT THREAT TO HEALTH OR SAFETY

(a) There is no requirement that a person with a disability be employed in a position in which the individual would create a direct threat to health or safety in the workplace. Under the Americans with Disabilities Act of 1990, however, rejection, re-assignment, or dismissal of an applicant/employee on the basis of a direct threat to health or safety requires:

- (1) Evidence of a significant risk of substantial harm;
- (2) Identification of the specific risk;
- (3) Prevalence of the risk at the time (risk cannot be speculative or remote);
- (4) Assessment of the risk that is based on objective medical or other factual evidence regarding a particular individual.

(b) Even if a significant risk of substantial harm exists, the agency must consider whether the risk can be eliminated or reduced below the level of a direct threat by reasonable accommodation.

Statutory Authority G.S. 126-4; 126-16; 168A-5(b)(3); S.L. 1991, c. 919.

.0117 SPECIAL PROVISION RELATIVE TO BONA FIDE OCCUPATIONAL QUALIFICATIONS

(a) Age or sex may be considered if they constitute a bona fide occupational qualification necessary for job performance in the normal operations of the agency. Whether such a requirement is a bona fide occupational qualification will depend on the facts in each case. This exemption will be construed very narrowly and the agency will have the burden of proving the exemption is justified.

(b) To establish age or sex as a bona fide occupational qualification, it will be necessary to submit a recommendation to the Office of State Personnel setting forth all facts and justification as to why the requirement should be considered as a reasonable employment factor in each of the

classifications in question.

Statutory Authority G.S. 126-4; 126-16; 126-36; S.L. 1991, c. 919.

.0118 QUALIFICATION STANDARDS THAT SCREEN OUT DISABILITIES

Under the Americans with Disabilities Act, tests, physical or mental requirements, or any other qualification standards that screen out persons with disabilities must be job-related and consistent with business necessity. Evidence of job-relatedness and business necessity may include a job description written before advertising the position and/or a review of the actual work currently performed by an individual on the job. However, job relatedness and business necessity do not relieve the agency from providing reasonable accommodations if the individual:

- (1) Possesses the pre-requisites for the job in question; and
- (2) Can perform the essential functions of the job with reasonable accommodations.

Statutory Authority G.S. 126-4; 126-16; S.L. 1991, c. 919.

.0119 DISCRIMINATION COMPLAINTS

(a) Any applicant for employment or any employee who believes that employment, promotion, training, transfer, salary, salary adjustment or a performance increase was denied him/her or that demotion, transfer, lay-off or termination was forced on him/her, because of race, religion, color, creed, national origin, sex, age, political affiliation, or disability may appeal directly to the Office of Administrative Hearings.

(b) Direct appeal to the State Personnel Commission on the basis of political affiliation discrimination is provided only to employees who have achieved permanent status pursuant to G.S. 126-39 or in positions subject to competitive service.

(c) Retaliatory actions against employees or applicants for employment who make a charge of employment discrimination, or testify, assist or participate in any manner in a hearing, proceeding or investigation of employment discrimination are prohibited.

Statutory Authority G.S. 126-4; 126-16; 126-36; 126-39; S.L. 1991, c. 919.

The Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).

AGRICULTURE**Structural Pest Control Division**

2 NCAC 34 .0406 - Spill Control	RRC Objection	07/16/92
2 NCAC 34 .0603 - Waivers	RRC Objection	07/16/92
2 NCAC 34 .0902 - Financial Responsibility	RRC Objection	07/16/92

ECONOMIC AND COMMUNITY DEVELOPMENT**ABC Commission**

4 NCAC 2R .0702 - Disciplinary Action of Employee	RRC Objection	05/21/92
Rule Returned to Agency		06/18/92
4 NCAC 2R .1205 - Closing of Store	RRC Objection	05/21/92
Agency Repealed Rule	Obj. Removed	06/18/92
4 NCAC 2S .0503 - Pre-Orders	RRC Objection	05/21/92
Rule Returned to Agency		06/18/92

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES**Coastal Management**

15A NCAC 7H .0306 - General Use Standards for Ocean Hazard Areas	RRC Objection	05/21/92
Rule Returned to Agency		06/18/92

Departmental Rules

15A NCAC 1J .0204 - Loans from Emergency Revolving Loan Accounts	RRC Objection	06/18/92
15A NCAC 1J .0302 - General Provisions	RRC Objection	06/18/92
15A NCAC 1J .0701 - Public Necessity: Health: Safety and Welfare	RRC Objection	06/18/92

Environmental Health

15A NCAC 18A .3101 - Definitions	RRC Objection	06/18/92
Agency Revised Rule	Obj. Removed	06/18/92

Environmental Management

15A NCAC 2O .0302 - Self Insurance	RRC Objection	06/18/92
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Health: Epidemiology

15A NCAC 19H .0601 - Birth Certificates	RRC Objection	06/18/92
Agency Revised Rule	Obj. Removed	06/18/92

Soil and Water Conservation

RRC OBJECTIONS

15A NCAC 6E .0007 - Cost Share Agreement
Agency Revised Rule

RRC Objection 06/18/92
Obj. Removed 06/18/92

Wildlife Resources and Water Safety

15A NCAC 10E .0004 - Use of Areas Regulated

RRC Objection 06/18/92

HUMAN RESOURCES

Aging

10 NCAC 22R .0301 - Definitions
Agency Revised Rule

RRC Objection 07/16/92
RRC Objection 07/16/92

Day Care Rules

10 NCAC 46D .0305 - Administration of Program
Agency Revised Rule
10 NCAC 46D .0306 - Records
Agency Revised Rule

RRC Objection 06/18/92
Obj. Removed 06/18/92
RRC Objection 06/18/92
Obj. Removed 06/18/92

Mental Health: General

10 NCAC 14M .0704 - Program Director
Agency Revised Rule

RRC Objection 05/21/92
Obj. Removed 06/18/92

INSURANCE

Departmental Rules

11 NCAC 1 .0106 - Organization of the Department
Agency Revised Rule

RRC Objection 06/18/92
Obj. Removed 06/18/92

Multiple Employer Welfare Arrangements

11 NCAC 18 .0019 - Description of Forms

RRC Objection 06/18/92

Seniors' Health Insurance Information Program

11 NCAC 17 .0005 - SHIIP Inquiries to Insurers and Agents

RRC Objection 06/18/92

LICENSING BOARDS AND COMMISSIONS

Dietetics/Nutrition

21 NCAC 17 .0014 - Code of Ethics for Professional Practice/Conduct
Agency Revised Rule
Agency Revised Rule

RRC Objection 05/21/92
RRC Objection 05/21/92
Obj. Removed 06/18/92

STATE PERSONNEL

Office of State Personnel

25 NCAC 1E .1301 - Purpose
25 NCAC 1E .1302 - Policy

RRC Objection 07/16/92
RRC Objection 07/16/92

RRC OBJECTIONS

25 NCAC 1E .1303 - Administration	RRC Objection	07/16/92
25 NCAC 1E .1304 - Qualifying to Participate in Voluntary Shared Leave Prgm	RRC Objection	07/16/92
25 NCAC 1E .1305 - Donor Guidelines	RRC Objection	07/16/92
25 NCAC 1E .1306 - Leave Accounting Procedures	RRC Objection	07/16/92
25 NCAC 1H .0603 - Special Recruiting Programs	RRC Objection	05/21/92
Agency Repealed Rule	Obj. Removed	06/18/92
25 NCAC 11 .1702 - Employment of Relatives	RRC Objection	07/16/92
25 NCAC 11 .1903 - Applicant Information and Application	RRC Objection	07/16/92
25 NCAC 11 .2401 - System Portion I: Recruitment, Selection, & Advancement	RRC Objection	07/16/92
25 NCAC 11 .2402 - System Portion II: Classification/Compensation	RRC Objection	07/16/92
25 NCAC 11 .2403 - System Portion III: Training	RRC Objection	07/16/92
25 NCAC 11 .2404 - System Portion IV: Employee Relations	RRC Objection	07/16/92
25 NCAC 11 .2405 - System Portion V: Equal Emp Oppty/Affirmative Action	RRC Objection	07/16/92
25 NCAC 11 .2406 - System Portion VI: Political Activity	RRC Objection	07/16/92
25 NCAC 1J .1005 - Eligibility for Services	RRC Objection	05/21/92
Agency Revised Rule	Obj. Removed	06/18/92

This Section of the Register lists the recent decisions issued by the North Carolina Supreme Court, Court of Appeals, Superior Court (when available), and the Office of Administrative Hearings which invalidate a rule in the North Carolina Administrative Code.

1 NCAC 5A .0010 - ADMINISTRATIVE PROCEDURES

Thomas R. West, Administrative Law Judge with the Office of Administrative Hearings, declared two portions of Rule 1 NCAC 5A .0010 void as applied in *Stauffer Information Systems, Petitioner v. The North Carolina Department of Community Colleges and The North Carolina Department of Administration, Respondent and The University of Southern California, Intervenor-Respondent* (92 DOA 0666).

15A NCAC 19A .0202(d)(10) - CONTROL MEASURES - HIV

Brenda B. Becton, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 19A .0202(d)(10) void as applied in *ACT-UP TRIANGLE (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe, Petitioners v. Commission for Health Services of the State of North Carolina, Ron Levine, as Assistant Secretary of Health and State Health Director for the Department of Environment, Health, and Natural Resources of the State of North Carolina, William Cobey, as Secretary of the Department of Environment, Health, and Natural Resources of the State of North Carolina, Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the North Carolina Department of Environment, Health, and Natural Resources, Wayne Bobbitt Jr., as Chief of the HIV/STD Control Branch of the North Carolina Department of Environment, Health, and Natural Resources, Respondents* (91 EHR 0818).

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) 733-2698.

KEY TO CASE CODES

ABC	Alcoholic Beverage Control Commission	DST	Department of State Treasurer
BDA	Board of Dental Examiners	EDC	Department of Public Instruction
BME	Board of Medical Examiners	EHR	Department of Environment, Health, and Natural Resources
BMS	Board of Mortuary Science	ESC	Employment Security Commission
BOG	Board of Geologists	HAF	Hearing Aid Dealers and Fitters Board
BON	Board of Nursing	HRC	Human Relations Committee
BOO	Board of Opticians	IND	Independent Agencies
CFA	Commission for Auctioneers	INS	Department of Insurance
COM	Department of Economic and Community Development	LBC	Licensing Board for Contractors
CPS	Department of Crime Control and Public Safety	MLK	Milk Commission
CSE	Child Support Enforcement	NHA	Board of Nursing Home Administrators
DAG	Department of Agriculture	OAH	Office of Administrative Hearings
DCC	Department of Community Colleges	OSP	Office of State Personnel
DCR	Department of Cultural Resources	PHC	Board of Plumbing and Heating Contractors
DCS	Distribution Child Support	POD	Board of Podiatry Examiners
DHR	Department of Human Resources	SOS	Department of Secretary of State
DOA	Department of Administration	SPA	Board of Examiners of Speech and Language Pathologists and Audiologists
DOJ	Department of Justice	WRC	Wildlife Resources Commission
DOL	Department of Labor		
DSA	Department of State Auditor		

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Anne R. Gwaltney, Milton H. Askew, Jr. and Anna L. Askew v. EHR and Pamlico County Health Department	89 DHR 0699	Reilly	07/17/92
Eleanor R. Edgerton-Taylor v. Cumberland County Department of Social Services	89 OSP 1141	Morrison	08/18/92
Annette Carlton v. Cleveland County Department of Social Services	90 OSP 0024	Chess	08/14/92
Janice Parker Haughton v. Halifax County Mental Health, Mental Retardation, Substance Abuse Program	90 OSP 0221	West	08/18/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
CSX Transportation, Inc. v. Department of Environment, Health, & Natural Resources	90 EHR 0628	Reilly	07/17/92
Bruce Keeter v. Beaufort County Health Department	90 EHR 0666	Morgan	07/28/92
JHY Concord, Inc. v. Department of Labor	90 DOL 1421	Morgan	07/28/92
Lick Fork Hills, Inc., Marion Bagwell, President v. Department of Environment, Health, & Natural Resources	91 EHR 0023	Morgan	07/28/92
Albert J. Johnson v. N.C. Victims Compensation Commission	91 CPS 0038	Morgan	07/28/92
William B. Holden v. Department of Environment, Health, & Natural Resources	91 EHR 0176	Morgan	08/18/92
Brenda P. Price v. North Carolina Central University	91 OSP 0219	Morrison	08/21/92
Century Care of Laurinburg, Inc. v. DHR, Division of Facility Services, Licensure Section	91 DHR 0257	West	06/30/92
Richard L. Gainey v. Department of Justice	91 OSP 0341	Becton	08/10/92
Wade Charles Brown, Jr. v. N.C. Crime Victims Compensation Commission	91 CPS 0345	Chess	07/08/92
Charles E. Roe v. Department of Environment, Health, & Natural Resources	91 OSP 0520	Nesnow	07/23/92
Lisa M. Reichstein v. Office of Student Financial Aid, East Carolina University	91 OSP 0662	Nesnow	06/24/92
DHR, Division of Facility Svcs, Child Day Care Section v. Mary Goodwin, Jean Dodd, D/B/A Capital City Day Care Center	91 DHR 0720	Morgan	07/30/92
Kenneth Helms v. Department of Human Resources	91 OSP 0729	Chess	07/15/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Alcoholic Beverage Control Commission v. Daniels Investments, Inc., t/a Leather & Lace - East 4205 Monroe Road, Charlotte, N.C. 28205	91 ABC 0799	Mann	07/14/92
Zelma Babson v. Brunswick County Health Department	91 OSP 0804	Gray	08/14/92
ACT-UP Triangle (AIDS Coalition to Unleash Power Triangle, Steven Harris, and John Doe v. Commission for Health Services of the State of N.C., Ron Levine, as Assistant Secretary of Health and State Health Director for EHR of the State of N.C., William Cobey, as Secretary of EHR of the State of N.C., Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the N.C. EHR, Wayne Bobbitt, Jr., as Chief of the HIV/STD Control Branch of the N.C.EHR	91 EHR 0818	Becton	07/08/92
Jane C. O'Malley, Melvin L. Cartwright v. EHR and District Health Department Pasquotank-Perquim- ans-Camden-Chowan	91 EHR 0838	Becton	07/02/92
Thomas E. Vass v. James E. Long, Department of Insurance	91 INS 0876	Morrison	08/14/92
Grotgen Nursing Home, Inc., Britthaven, Inc. v. Certificate of Need Section, Div of Facility Svcs, DHR	91 DHR 0964 91 DHR 0966	Nesnow	07/06/92
Ramona S. Smith, R.N. v. N.C. Teachers'/St Emps' Comp Major Medical Plan	91 DST 0984	Chess	06/18/92
Walter McGlone v. DHR, Division of Social Services, CSE	91 CSE 1030	Morrison	07/13/92
William Oscar Smith v. DHR, Division of Social Services, CSE	91 CSE 1042	Gray	07/24/92
William Watson v. DHR, Division of Social Services, CSE	91 CSE 1047	Becton	07/08/92
Marie McNeill-Pridgen v. Department of Environment, Health, & Natural Resources	91 EHR 1059	Nesnow	07/17/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Catawba Memorial Hospital v. DHR, Div of Facility Svcs, Certificate of Need Section and Frye Regional Medical Ctr, Inc. and Amireit (Frye), Inc. and Thoms Rehabilitation Hospital Health Services Corp. and Frye Regional Medical Ctr, Inc. and Amireit (Frye), Inc. v. DHR, Div of Facility Svcs, Certificate of Need Section and Thoms Rehabilitation Hospital Health Services Corp. and Catawba Memorial Hospital	91 DHR 1061 91 DHR 1087	Reilly	07/13/92
Edward R. Peele v. Sheriffs' Education & Training Stds. Commission	91 DOJ 1092	Morrison	08/18/92
William Torres v. Dept of Justice, Lacy H. Thornburg, Attorney General	91 DOJ 1098	Morrison	08/07/92
Wade A. Burgess v. DHR, Division of Social Services, CSE	91 CSE 1114	Gray	07/01/92
Harry L. King v. Department of Transportation	91 OSP 1162	Morgan	07/13/92
Gilbert Lockhart v. DHR, Division of Social Services, CSE	91 CSE 1178	Morrison	07/30/92
Isaac H. Galloway v. DHR, Division of Social Services, CSE	91 CSE 1190	Reilly	06/30/92
Russell A. Barclift v. DHR, Division of Social Services, CSE	91 CSE 1207 92 CSE 0275	Reilly	06/30/92
Herman Edward Main II v. DHR, Division of Social Services, CSE	91 CSE 1225	Nesnow	07/07/92
Albert Louis Stoner III v. DHR, Division of Social Services, CSE	91 CSE 1244	Gray	07/01/92
James E. Greene v. DHR, Division of Social Services, CSE	91 CSE 1245	Nesnow	07/14/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Joseph W. Harris v. DHR, Division of Social Services, CSE	91 CSE 1247	Morgan	07/28/92
Rodney Powell v. DHR, Division of Social Services, CSE	91 CSE 1257	Morgan	07/29/92
Floyd L. Rountree v. DHR, Division of Social Services, CSE	91 CSE 1275	Morgan	07/22/92
Ruth Smith Hensley Shondales v. ABC Commission	91 ABC 1280	Chess	08/05/92
City-Wide Asphalt Paving, Inc. v. Department of Environment, Health, & Natural Resources	91 EHR 1360	Chess	07/01/92
Alcoholic Beverage Control Commission v. Tre Three, Inc., T/A Crackers, Airport Rd., Rockingham, NC 28379	91 ABC 1372	Chess	07/07/92
Alcoholic Beverage Control Commission v. Rode Enterprises, Inc., T/A Jordan Dam Mini Mart	91 ABC 1388	Gray	07/30/92
Donald R. Allison v. DHR, Caswell Center	91 OSP 1427	Reilly	06/30/92
Lavern Fesperman v. Mecklenburg County	92 OSP 0030	Chess	07/17/92
Carrolton of Williamston, Inc. v. DHR, Division of Facility Services, Licensure Section	92 DHR 0071	Becton	08/19/92
Fred Jennings Moody Jr. v. Sheriffs' Education & Training Stds. Commission	92 DOJ 0084	Chess	07/17/92
Ronnie Lamont Donaldson v. Sheriffs' Education & Training Standards Commission	92 DOJ 0092	Reilly	07/27/92
Marvin Helton, Jean Helton v. DHR, Division of Facility Services	92 DHR 0102	Chess	08/14/92
Peggy N. Barber v. The University of North Carolina at Chapel Hill	92 OSP 0120	Reilly	07/13/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Alcoholic Beverage Control Commission v. John Wade Lewis, t/a Tasty Grill	92 ABC 0145	Nesnow	07/15/92
Licensing Board for General Contractors v. Wright's Construction, Inc. (Lic. No. 23065)	92 LBC 0172	Gray	07/31/92
Ray Bryant v. Department of Labor, OSHA	92 DOL 0187	Nesnow	08/07/92
Herbert Hines Jr., H & H v. Alcoholic Beverage Control Commission	92 ABC 0189	Becton	07/22/92
Frances B. Billingsley v. Bd. of Trustees/Teachers & St Employees Retirement Sys	92 DST 0205	Morgan	08/18/92
Lawrence Neal Murrill T/A Knox, 507 1st St SW, Hickory, NC 28602 v. Alcoholic Beverage Control Commission	92 ABC 0220	Chess	08/03/92
Town of Denton v. Department of Environment, Health, & Natural Resources	92 EHR 0241	Reilly	07/30/92
Alcoholic Beverage Control Commission v. Byrum's of Park Road, Inc., T/A Byrum's Restaurant	92 ABC 0252	Gray	07/30/92
Alcoholic Beverage Control Commission v. Leo's Delicatessen #2, Inc., T/A Leo's #2	92 ABC 0255	Gray	07/30/92
North Topsail Water & Sewer, Inc. v. Department of Environment, Health, & Natural Resources	92 EHR 0266	Morrison	08/12/92
Jonathan L. Fann v. U.N.C. Physical Plant, Herb Paul, Louis Herndon, Dean Justice, Bruce Jones	92 OSP 0363	Becton	08/19/92
Douglas A. Bordeaux v. Department of Correction	92 OSP 0378	Chess	07/10/92
Clifton R. Johnson v. O'Berry Center, Department of Human Resources	92 OSP 0381	West	07/08/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Southeastern Machine & Tool Company, Inc. v. Department of Environment, Health, & Natural Resources	92 EHR 0386	Becton	07/20/92
Louvenia Clark v. Edgecombe County Department of Social Services	92 OSP 0402	Reilly	08/21/92
Mr. & Mrs. James C. Stanton v. Charlotte-Mecklenburg School System	92 EDC 0430	Nesnow	08/04/92
Northview Mobile Home Park v. Department of Environment, Health, & Natural Resources	92 EHR 0507	Reilly	07/13/92
Yolanda Lynn Bethea v. DHR, Division of Social Services, CSE	92 DCS 0513	Becton	08/14/92
Alice Hunt Davis v. Department of Human Resources	92 OSP 0526	West	07/16/92
Jimmy F. Bailey Sr. v. Department of State Treasurer, Retirement Systems Div	92 DST 0536	Morgan	08/18/92
Bramar, Inc., t/a Spike's v. Alcoholic Beverage Control Commission	92 ABC 0554	Mann	08/13/92
Ralph J. Ogburn v. Private Protective Services Board	92 DOJ 0571	Nesnow	08/07/92
Gilbert Todd Sr. v. Public Water Supply Section	92 EHR 0586	Morrison	08/06/92
John W. Surles v. N.C. Crime Victims Compensation Commission	92 CPS 0595	Reilly	07/13/92
Pamela Jean Gass v. DHR, Division of Social Services, CSE	92 DCS 0623	Morrison	08/14/92
J.W. Reed v. Department of Correction	92 OSP 0638	Morrison	08/11/92
Carson Davis v. Department of Correction	92 OSP 0650	Reilly	08/10/92

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Stauffer Information Systems v. Department of Community Colleges and the N.C. Department of Administration and The University of Southern California	92 DOA 0666	West	07/08/92
Nancy J. Tice v. Administrative Off of the Courts, Guardian Ad Litem Svcs	92 OSP 0674	Morrison	08/11/92
L. Stan Bailey v. Chancellor Moran and UNC-Greensboro	92 OSP 0679	West	07/10/92
Arnold McCloud T/A Club Castle v. Alcoholic Beverage Control Commission	92 ABC 0681	Morrison	07/25/92
Joyce Faircloth, T/A Showcase Lounge v. Alcoholic Beverage Control Commission	92 ABC 0713	Morrison	07/25/92

Petitioner,

y.

**N.C. DEPARTMENT OF ENVIRONMENT,
HEALTH, AND NATURAL RESOURCES,**

Respondent.

RECOMMENDED DECISION

THIS MATTER was heard before the undersigned administrative law judge on April 15, 1992 pursuant to Petitioner's Motion for Separate Trial on the Issue of Federal Preemption. Petitioner introduced eight exhibits. The Court heard testimony from Petitioner's witness, Mr. William J. Griffin (hereinafter "Griffin"). Mr. Griffin was offered by Petitioner and, without objection by Respondent, accepted by the undersigned as an expert in the field of railroad right-of-way maintenance and federal railroad safety requirements pertaining thereto.¹ Respondent introduced no exhibits and called no witness.

PETITIONER: Frank H. Sheffield, Jr., Esquire
Amos C. Dawson, III, Esquire

RESPONDENT: Donald W. Laton, Esquire
Kathryn Jones Cooper, Esquire

1. Are the provisions of the North Carolina Sedimentation Pollution Control Act, N.C. Gen. Stat. §113A-50, et seq., ("SPCA") as applied to Petitioner's railroad maintenance activities preempted by the Federal Railroad Safety Act, 45 U.S.C. 421, et seq., ("FRSA") and the Commerce Clause, U.S. Const., Art. I, sec. 8, cl. 3?

2. Are railroad right-of-way maintenance activities a "land-disturbing activity" as defined in N.C.G.S. § 113A-52 (6) of the SPCA?

A. CSX Transportation, Inc. ("CSXT") is a Virginia corporation duly registered and doing

¹References to supporting evidence are made by reference to the relevant exhibit number and page number of the transcript of the witness' testimony.

business in the State of North Carolina.

B. CSXT owns and operates an interstate railroad system in 20 states and Canada. Such system includes a segment of railroad line which runs from Hamlet, North Carolina to Laurel Hill, North Carolina (hereinafter "site"), a distance of approximately 10 miles.

C. Railroad right-of-way maintenance activity was carried out on the site by CSXT in 1989 for the purpose of reshaping and rehabilitating the roadbed and drainage features of that segment of track. Approximately 121 acres were affected by such activity.

D. Respondent sent to CSXT a Notice of Violation dated June 16, 1989, a Notice of Violation dated June 27, 1989, a Notice of Continuing Violations dated August 1, 1989, and a Notice of Additional Violations dated October 25, 1989 alleging CSXT's failure to comply with various provisions of the SPCA with respect to such maintenance activities.

E. CSXT submitted erosion control plans for the subject activities on December 13 and 21, 1989 and received approval of such plans from the Land Quality Section by letter dated December 22, 1989. Based on an inspection conducted by the Land Quality Section on May 15, 1990, the site was determined to meet all requirements of the SPCA alleged by Respondent to apply to such activities.

F. The Director of the Division of Land Resources of Respondent issued a FINDINGS AND DECISION AND ASSESSMENT OF CIVIL PENALTIES to CSXT on March 29, 1990, which was received by Petitioner on April 27, 1990, assessing the Petitioner civil penalties and investigation costs totaling \$17,350.00 for various alleged violations of the SPCA.

G. CSXT timely filed a Petition for a Contested Case Hearing on June 25, 1990, initiating the above-referenced contested case.

H. CSXT filed a Prehearing Statement dated July 27, 1990 in which Petitioner contended, inter alia, that the definition of "land-disturbing activity" contained in N.C.G.S. § 113A-52 (6) did not apply to railroad right-of-way maintenance activities.

I. On February 1, 1991, CSXT filed a Motion for Summary Judgment averring that no genuine issue as to any material fact existed and Petitioner was entitled to judgment as a matter of law because, inter alia, the SPCA does not apply to railroad right-of-way maintenance activities. In support of its motion, Petitioner contended that such activities are not a "land-disturbing activity" within the meaning of N.C.G.S. § 113A-52 (6) and that the SPCA is preempted by the FRSA. On the same date, Respondent filed a Motion for Summary Judgment averring no disputed issue as to any material fact existed and that railroad right-of-way maintenance activities are a land-disturbing activity as defined in the SPCA. A hearing was held on the Motions on February 22, 1991.

J. By order dated March 8, 1991, Judge Julian Mann, III denied both Motions, stating that he could not conclude as a matter of law that CSXT was not engaged in "road maintenance" activities as defined in N.C.G.S. § 113A-52 (6) or was not otherwise engaged in "land-disturbing" activity, and concluding that there were material issues of fact in contention between the parties.

K. Railroads are required to perform specific maintenance activities in order to comply with Federal Railroad Administration ("FRA") rules promulgated under the FRSA. (Griffin Tr. p. 31). The FRA rules are broad, regulating all aspects of track and roadbed safety, including track geometry, rail defect, fasteners, track structure, drainage, and everything else that relates to roadbed and track structure. (Griffin Tr. p. 32). The FRA rules are reprinted in a small booklet called Track Safety Standards, which is used by railroad field personnel as the railroad safety "bible." (Ex. No. 9; Griffin Tr. p. 32). Included as Appendix

"C" of the booklet is a list of "Defect Codes," which are referenced by FRA inspectors when citations are issued. (Ex. No. 9, p. 40; Griffin Tr. p. 34).

L. The FRA has specific requirements concerning vegetation (Ex. No. 9, pp. 13-14; Griffin Tr. p. 36). FRA Rule 40 CFR 213.37 requires that vegetation on or immediately adjacent to roadbeds be controlled for safety reasons. (Ex. No. 7; Griffin Tr. p. 47). For example, the FRA requires that brush and weeds be kept free from the walking area so a train man can safely "walk the train" to check for problems at night. (Griffin Tr. pp. 39-40). FRA rules also restrict vegetation in the walkway around switches, any vegetation that would obstruct railroad signs and signals, and any vegetation that could pose a fire hazard to track-carrying structures. (Ex. No. 9, pp. 13-14; Griffin Tr. p. 36).

M. No specific distance is set out in FRA rules to define "the area immediately adjacent" to the roadbed (Ex. No. 9, p. 13). The area between the track structure and the back side of the drainage ditch running parallel to the track is considered "immediately adjacent" in all cases. (Ex. No. 7; Griffin Tr. p. 48). Where it is necessary to keep vegetation from obstructing safety equipment such as a signal or whistle post located on a curve, the area "immediately adjacent" to the roadbed can include a greater distance. (Griffin Tr. pp. 48-51) For FRA purposes, any area within the right-of-way is "immediately adjacent" if signals or other safety equipment are obstructed from view. (Griffin Tr. pp. 48-51).

N. FRA Rule 40 CFR 213.33 requires railroads to maintain the drainage and other water-carrying facilities under or immediately adjacent to the roadbed. (Ex. No. 9, p. 13). For example, railroads must keep ditches clear of obstructions and vegetation to ensure the free flow of water away from the roadbed. (Ex. No. 9, p. 13; Griffin Tr. pp. 57-59). A typical problem can be debris, appliances, roofing shingles and other wastes dumped by others on railroad property. (Griffin Tr. pp. 75-76). Such obstructions are normally removed by use of ditch-clearing machinery such as a Gradall or Jordan spreader. Vegetation is also cleared from ditches in the same manner. (Griffin Tr. pp. 38, 39, 44).

O. FRA rules also specify in Defect Code 33.05 that water-carrying facilities, such as pipes, culverts, and drainage ditches alongside tracks, shall not be obstructed by silting which could obstruct the flow of water away from the tracks and roadbed. (Ex. No. 9, p. 42; Griffin Tr. p. 59). The FRA Defect Code uses the term "silting" whereas the SPCA rules use the essentially synonymous term "sediment." (Ex. No. 9, p. 42; Griffin Tr. p. 60).

P. Railroads are subject to substantial federal penalties if they fail to comply with FRA safety requirements (Ex. No. 9, pp. 37-39; Griffin Tr. pp. 65-66). For serious problems, an FRA inspector may issue a Code 1 citation, which requires either suspension of operation or immediate compliance. For Code 2 violations, the railroad has 30 days in which to comply. (Griffin Tr. pp. 64-65). Failure to comply can result in an immediate shutdown of operations or civil penalties of, for example, \$2,500.00 per violation for drainage problems and \$1,000.00 per violation for vegetation problems. (Ex. No. 9, p. 37; Griffin Tr. p. 66).

Q. Railroads presently have no effective way to control vegetation except by use of rail-mounted equipment. (Ex. No. 7; Griffin Tr. pp. 69, 77-78). An estimated 98% of railroad rights-of-way are maintained by such rail-mounted equipment as Jordan spreaders and Gradalls. (Griffin Tr. p. 78). Unlike the Department of Transportation, railroads generally do not have conditions where use of tractor mowers is practical (e.g., gentler slopes) (Ex. No. 4; Griffin Tr. p. 75). Because of these limitations, it would be difficult for railroads to maintain areas where vegetation is required to be planted to meet SPCA requirements. (Griffin Tr. pp. 70-71). Reseeding areas alongside tracks pursuant to SPCA requirements could negate the remedial work just performed pursuant to FRA requirements. (Griffin Tr. p. 74).

R. Railroads are also constrained by the narrow width of their rights-of-way in many places. Railroad rights-of-way were established in many areas in the late 1800s (Griffin Tr. p. 52). An estimated

99% of railroad rights-of-way have been in place for decades. (Griffin Tr. pp. 53, 70). Such rights-of-way can vary greatly in width from one location to another. (Griffin Tr. pp. 41-42). Consequently, it would be impractical for railroads to meet the 25-foot buffer zone requirement of § 113A-57 (1) of the SPCA in many places. (Griffin Tr. pp. 54-56). Furthermore, it would be impractical and prohibitively expensive to acquire additional rights-of-way. (Griffin Tr. p. 138).

S. With respect to routine maintenance, substantial practical problems exist for railroads to comply with the vegetation, slope, buffer zone, plan submittal and other SPCA requirements. (Griffin Tr. pp. 73-76). For example, establishment of vegetative ground cover would accelerate vegetative obstruction of drainage features and safety signals, be difficult to mow because of a lack of tractor mowers, and conflict with the FRA requirement to keep ditches free from debris. Other forms of ground cover (e.g., aggregate-lining or paving) would be economically infeasible, considering the many miles of railroad right-of-way. (Griffin Tr. pp. 140-141). Also, the narrow rights-of-way in some places pose practical limitations on a railroad's ability to cut back steeper slopes. (Ex. Nos. 5, 6; Griffin Tr. pp. 75, 89). Finally, scheduling problems caused by interruptions in scheduled maintenance projects to respond to FRA citations and by CSXT's commitment to assist short-line railroads on short notice with their urgent maintenance problems would make compliance with the SPCA's erosion control requirement difficult even for routine maintenance. (Griffin Tr. pp. 72-73).

T. During emergencies, such as washouts and derailments, a railroad's primary objective is to reopen the track. (Griffin Tr. p. 79). Emergency repairs frequently require clearance of access to the scene, cleanup of chemical or commodity spills, removal of damaged rail cars, and repair of track and roadbed structures. Frequently such emergency activities involve disturbance of more than one (1) acre of natural cover or topography. (Griffin Tr. p. 83). Complying with the SPCA requirement to prepare an erosion control plan and await approval by Respondent before proceeding with emergency repairs would seriously disrupt railroad operations and impede the free flow of goods in interstate commerce. (Griffin Tr. pp. 85-86). Lengthy interruptions in service due to SPCA requirements could result in plant shutdowns by railroad customers, causing a serious disruption of interstate commerce. (Griffin Tr. pp. 80-81). The SPCA contains no provision for exempting emergency repairs of any kind. (Griffin Tr. p. 87).

U. Based on the uncontroverted evidence presented at the hearing held on April 15, 1992 before the undersigned, substantial actual conflicts exist between the SPCA and FRSA with respect to railroad right-of-way maintenance activities.

CONCLUSIONS OF LAW

A. Pursuant to N.C.G.S. § 150B-33, undersigned is of the opinion that an administrative law judge may not have the authority to declare a state law unconstitutional. Accordingly, it is unclear whether the undersigned has authority and jurisdiction to rule on Petitioner's contention that the SPCA violates the Commerce Clause of the U.S. Constitution by imposing an undue burden on interstate commerce. Likewise, it is unclear whether the undersigned has authority and jurisdiction to rule on Petitioner's contention that the SPCA is preempted by the FRSA with respect to railroad maintenance and, thus, violates the Supremacy Clause of the U.S. Constitution.

B. Pursuant to N.C.G.S. § 150B-33, the undersigned is of the opinion that an administrative law judge does have authority and jurisdiction to consider evidence and arguments presented at the hearing on the Federal Preemption Issue in interpreting the provisions of the SPCA.

C. Judge Mann's order dated March 8, 1991 left open the issue of whether railroad right-of-way maintenance activities fall within the scope of the term "road maintenance" found in N.C.G.S. § 113A-52 (6), pending further hearing on the matter.

D. The SPCA and FRSA clearly address the same subject matter, such subject matter being "railroad right-of-way maintenance activities." Specifically, the SPCA and FRSA both address, *inter alia*, the subjects of drainage and vegetation within railroad rights-of-way.

E. The SPCA applies statewide and is not limited in its coverage to the area outside "the area immediately adjacent to the roadbed." Accordingly, the SPCA purports to apply to the same area as the FRSA with respect to railroad rights-of-way. Therefore, the geographic coverage of the SPCA and FRSA overlap.

F. If required to comply with the SPCA, the ability of Petitioner to respond to emergencies such as derailments and washouts would be seriously impaired due to the lack of any exemption in the SPCA and implementing rules for railroad maintenance activities or emergency repairs.

G. CSXT cannot comply with both the SPCA and FRSA for many routine and emergency maintenance and repair activities. Furthermore, the requirement for advance approval of an erosion control plan conflicts with CSXT's ability to respond to FRA citations in a timely fashion. Therefore, as a matter of law, the SPCA substantially conflicts with the FRSA with respect to railroad maintenance activities.

H. If this case were heard in a court of competent jurisdiction with respect to the Federal Preemption Issue, it is the conclusion of the undersigned that such a court would hold that the SPCA is preempted by the provisions of the FRSA with respect to railroad maintenance activities.

I. In light of the uncontroverted evidence presented at the hearing on April 15, 1992, the undersigned has concluded that the term "road maintenance" does not include railroad right-of-way maintenance activities. To conclude otherwise would present significant preemption problems under the SPCA and result in substantial conflicts for Petitioner and other railroad companies operating in North Carolina in attempting to comply with both the SPCA and FRSA.

J. Because "land-disturbing" activity as defined in N.C.G.S. § 113A-52 (6) does not encompass railroad right-of-way maintenance activities, the Division of Land Resources exceeded its authority or jurisdiction, acted erroneously, acted arbitrarily or capriciously, and failed to act as required by law in assessing the subject civil penalty plus investigation costs.

RECOMMENDED DECISION

Based on the foregoing findings of fact and conclusions of law, it is recommended that the Secretary of the North Carolina Department of Environment, Health and Natural Resources rescind Respondent's assessment of a \$17,350.00 civil penalty, including investigative costs, under the SPCA against Petitioner in this matter.²

It is further recommended that the Division of Land Resources refrain from initiating any further enforcement action against CSXT for any alleged violations of the SPCA at the site occurring after March 6, 1990.²

ORDER

It is hereby ordered that the Respondent serve a copy of the Final Decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, North Carolina 27611-7447, in accordance with N.C.G.S. § 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C.G.S. § 150B-36(a).

²See pp. 6-7 of FINDINGS AND DECISION AND ASSESSMENT OF CIVIL PENALTIES dated March 29, 1990.

The agency is required by N.C.G.S. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Department of Environment, Health and Natural Resources.

This the 17th day of July, 1992.

Robert Roosevelt Reilly, Jr.
Administrative Law Judge

STATE OF NORTH CAROLINA

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
91 OSP 0729**

COUNTY OF BUNCOMBE

KENNETH HELMS,
Petitioner,

v.

**NORTH CAROLINA DEPARTMENT
OF HUMAN RESOURCES,**
Respondent.

RECOMMENDED DECISION

This contested case came on to be heard before Sammie Chess, Jr., Administrative Law Judge, Office of Administrative Hearings, on February 24, 1992, on a petition filed by Petitioner on August 5, 1991, pursuant to North Carolina General Statute Section 150B-23(a). The Petitioner seeks review of the decision of the Respondent's Hearing Officer, William H. Guy, dated July 10, 1991, affirming the Petitioner's dismissal from his position of employment as a Health Care Technician I at the Alcohol and Drug Abuse Treatment Center, Black Mountain, North Carolina.

APPEARANCES

FOR PETITIONER: John A. Dusenbury, Jr.
Attorney at Law

FOR RESPONDENT: David Parker, Deputy
Assistant Attorney General

Kathleen U. Baldwin,
Associate Attorney General

Having heard and considered the testimony and exhibits offered into evidence by Petitioner and the Respondent, and the arguments and contentions of counsel for both parties, the undersigned makes the following:

FINDINGS OF FACT

1. The Petitioner was employed by the Alcohol and Drug Abuse Treatment Center, Black Mountain, North Carolina, from April 1, 1986 until April 17, 1991, as a Health Care Technician I.

2. During the period from April 1, 1986, until April 17, 1991, the Respondent agency provided inpatient rehabilitative therapy and counselling to persons suffering from addiction to alcohol and other controlled substances.

3. The Petitioner's duties as a Health Care Technician I included monitoring the activities and behavior of clients at the Respondent agency, enforcing rules and regulations of the Respondent agency, assisting clients from time to time and recording information concerning clients in client charts.

4. On October 17, 1990, Molly C. was admitted to the Respondent agency. She remained at

the agency until November 14, 1990, when she was discharged.

5. During the time that Molly C. was a client at the Respondent Center she lived in the women's dormitory.

6. During the time that Molly C. was a client at the Center the Petitioner's primary work assignment was the men's dormitory numbers 3, 4, 5. From time to time the Petitioner was assigned duties in other areas in the Center including the women's dormitory.

7. Prior to Molly C.'s discharge from the Center she was asked on two (2) different occasions by Cheryl Rutherford if she had had sexual intercourse with the Petitioner at the Center. On both occasions Molly C. denied any acts of sexual intercourse between her and the Petitioner.

8. In January of 1991, Cheryl Rutherford and two (2) other employees from the Respondent Center again interviewed Molly C. concerning allegations of sexual intercourse between Molly and the Petitioner during Molly C.'s stay at the Center. On this occasion Molly C. stated that she had, in fact, had sexual intercourse with the Petitioner on a weekend in November of 1990.

9. Prior to the hearing in this case the deposition of Molly C. was taken upon oral examination by counsel for the Petitioner. During her deposition testimony Molly C. testified that the alleged act of sexual intercourse between her and the Petitioner occurred two (2) weekends prior to her discharge from the Center on Wednesday, November 14, 1990.

10. During the hearing, Molly C. testified that the alleged act of sexual intercourse between her and the Petitioner occurred at approximately 8:30 p.m. in the evening during the weekend of November 9, 1990, through November 11, 1990, while the Petitioner was on duty.

11. The Petitioner, testified and presented uncontradicted documentary evidence that he did not work at the Center on either Saturday, November 10, 1990, nor November 11, 1990, which was the weekend immediately before her release.

12. The Petitioner and the Petitioner's wife also testified, without contradiction, that the Petitioner's wife's birthday was on the 9th of November, and that on November 9, 1990, the Petitioner was present at a birthday party for his wife at their home at approximately 7:00 p.m. and lasting a considerable time beyond the beginning of the time of the alleged occurrence.

13. The Petitioner and then Nursing Supervisor (second shift) at the Respondent agency, Darlene Wilkins, testified that on November 9, 1990, the Petitioner requested permission from Wilkins to leave work early so that he could attend a birthday party scheduled for later that evening for his wife, and that Wilkins granted the Petitioner permission to leave work early that evening.

14. Copies of Petitioner's time records for Friday, November 9, 1990, indicate that the Petitioner left work early that evening.

15. On or about November 19, 1990, the Petitioner was informed by his supervisor, Marcia Floyd, that an investigation of the facts and circumstances surrounding the allegations of sexual intercourse between the Petitioner and Molly C. had disclosed no evidence to substantiate the allegations.

16. During the period from November of 1990 through March of 1991 an official of the Respondent agency had further discussions with the Petitioner concerning the facts and circumstances surrounding allegations of sexual intercourse with Molly C.

17. On or about March 10, 1991, the Petitioner was summarily suspended from his position on the basis of allegations involving Molly C.

18. During the conference prior to the Petitioner's suspension on March 10, 1991, he was not informed of the date on which the alleged act of intercourse with Molly C. was supposed to have taken place.

19. The Petitioner remained on suspension from March 12, 1991 until April 17, 1991.

20. On April 17, 1991, the Petitioner was summoned to the office of Mr. William Rafter, the Director of the Respondent agency.

21. Prior to the meeting on April 17, 1991, the Petitioner had not been informed by any agent or employee of the Respondent of the date on which the alleged act of intercourse involving Molly C. was supposed to have occurred.

22. Prior to the April 17, 1991 meeting, the Petitioner was not informed that the nature of the meeting was that of a predismissal conference.

23. The Petitioner was summarily dismissed from his position during the conference on April 17, 1991.

24. Molly C. was and continued to be in love with Petitioner in April 1991.

25. Molly C. testified in April 1991, that her counselor, Cheryl Rutherford, told her that Petitioner was having affairs with other women at the Center, and that there had been other women in the past and would probably be more in the future. It was after that meeting in April 1991 with Cheryl Rutherford and others from the Center, that Molly C. made her first allegation of sexual intercourse and signed a statement alleging that Petitioner had sex with her while she was at the Center being treated.

26. Molly C. said the counselors told her that Petitioner was separated from his wife and had free run of all the women at the Center.

27. Molly C. testified that she was a serious alcohol and drug abuser, that was what caused her to be at the Center. Molly C. has served active sentences in several counties and had done felony time in Women's Prison in Raleigh, North Carolina.

28. According to Molly C. there were plenty of witnesses to the undue attention she was receiving from Petitioner, and she gave their names to Respondent.

29. There was not one witness presented to corroborate Molly C.'s testimony regarding the alleged single act of sexual intercourse with Petitioner.

30. There were major contradictions between the testimony of Molly C. and other witnesses for Respondent in that the witnesses deny saying things Molly C. attributed to them.

31. That these accusations are very, very serious and ought to be dealt with severely if proven by a preponderance of the evidence, the burden of proof being on the Respondent.

32. The Petitioner denies having engaged in an act of sexual intercourse with Molly C.

Based upon the foregoing Findings of Facts, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The agency has jurisdiction of the parties and of the subject matter of this proceeding.

2. At the time of his dismissal on April 17, 1991, the Petitioner was a permanent employee of

the State of North Carolina and thus entitled to due process of law in proceedings affecting his interest in his continued employment.

3. The Respondent's decision to terminate the Petitioner's employment on April 17, 1991, on the basis of alleged sexual intercourse between Petitioner and Molly C. during the month of November 1990, was not supported by substantial evidence.

4. The Respondent has failed to establish by a clear preponderance of the evidence that there was sufficient evidence tending to establish with reasonable certainty that the Petitioner committed the acts of sexual intercourse with Molly C. as alleged as the basis for his dismissal.

5. The Respondent failed to give the Petitioner adequate notice prior to his suspension on March 10, 1991, of the nature of the proceeding so as to enable the Petitioner to prepare a meaningful defense to the allegations against him.

6. The Respondent failed to give the Petitioner sufficient advance notice of his predissmissal conference on April 17, 1991, to enable the Petitioner to prepare an adequate defense to the charges against him.

7. The failure of the Respondent to give the Petitioner adequate notice of the proceedings at which the Petitioner's interest in his employment were adversely affected deprived the Petitioner of due process of law in his suspension and dismissal from employment with the Respondent agency.

RECOMMENDATION

The undersigned Administrative Law Judge makes the following recommendations:

1. That Petitioner be immediately reinstated to his position as a Health Care Technician I with the Respondent agency, and that the Petitioner receive back pay and benefits from April 17, 1991 until the present;
2. That the Respondent pay to the Petitioner's attorney reasonable attorney's fees;
3. That the allegation which formed the basis of the Respondent's action against the Petitioner in this instance, and all references thereto, be expunged from the Petitioner's personnel file;
4. That the costs of this action be taxed to the Respondent.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, North Carolina, 27611-7447, in accordance with North Carolina General Statute Section 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the State Personnel Commission.

This the 15 day of July, 1992.

Sammie Chess, Jr.
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF BRUNSWICK

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
91 OSP 0804

A BABSON,)
Petitioner,)
v.)
BRUNSWICK COUNTY HEALTH)
DEPARTMENT,)
Respondent.)

RECOMMENDED DECISION

This matter was heard before Beecher R. Gray, administrative law judge, on March 30-31, 1992 in Bolivia, North Carolina. As a preliminary matter, Respondent's pending motion for summary judgment was denied.

Respondent had the burden of proof in this case as to whether it had just cause to terminate the employment of Petitioner. Respondent accordingly put on its evidence first. During the presentation of Respondent's evidence, Petitioner obtained an agreement from Respondent that Petitioner could call two present or former Brunswick County Commissioners during the presentation of Respondent's evidence for the sake of convenience of those witnesses.

Upon Respondent's completion of its evidence and resting of its case in chief, Petitioner moved to dismiss the charges against her on the grounds that Respondent had failed to produce sufficient evidence as a matter of law. Respondent moved that Petitioner's motion to dismiss be considered improper because she had already begun to put on her evidence by virtue of the two witnesses called out of order for convenience. Respondent's motion was denied.

Petitioner's motion to dismiss the several allegations against her for insufficiency of the evidence was denied in part and allowed in part as follows:

1. April 30, 1990 warning for failure in performance of duties by using a county vehicle for personal business on county time: **ALLOWED**;
2. September 11, 1990 warning for failure in performance of duties by violating the Brunswick County Board of Health Animal Control After Hours Call Policy: **ALLOWED**;
3. April 15, 1991 warning for failure in performance of duties by not completing quality assurance work directives issued on January 31, 1991 for the month of February, 1991: **DENIED**; and
4. June 11, 1991 warning for failure in performance of duties by
 - a. discourtesy to employees by use of profanity: **DENIED**;
 - b. intimidation of employees by stating that they were being watched: **ALLOWED**; and
 - c. failure to respond to two (2) service calls within a reasonable time: **ALLOWED**.

Following announcement of the above rulings on the record during the course of the hearing, Petitioner elected to produce no further evidence.

APPEARANCES

Petitioner: Sheila K. McLamb, Esq.
Respondent: Guy F. Driver, Jr., Esq.

ISSUE

Whether Respondent's dismissal of Petitioner from its employment on grounds of poor job performance is proper.

FINDINGS OF FACT

1. The parties received notices of hearing by certified mail fifteen or more days prior to the hearing and so stipulated.
2. At the time of her dismissal on June 25, 1991, Petitioner was employed as Respondent's Animal Control Supervisor, a position she had occupied for more than six (6) years. As Animal Control Supervisor, Petitioner supervised five subordinates.
3. All of Petitioner's performance evaluations during her work with Respondent reflect average or above average performance. The last evaluation Petitioner received was accomplished in September, 1988. Petitioner was not given performance evaluations for 1989 and 1990, even though Respondent's applicable personnel system required that performance evaluations be done annually.
4. On April 24, 1990, Petitioner was enroute to an animal control visit to a home in the town of Ash in Brunswick County when she stopped at the Waccamaw Baseball Park to meet Respondent's sanitarian Sonja Remington. The Waccamaw Baseball Park is on the route from the Animal Control Shelter to Ash. The purpose of the meeting at Waccamaw Park was for Petitioner to unlock the concession stand and have Sanitarian Remington inspect it so that it could be used for a baseball game occurring that night. Petitioner was involved in little league baseball and had a key to the concession stand. On April 24, 1990, Health Director Michael Rhodes accompanied Sonja Remington to Waccamaw Park when she went there to inspect the concession stand. Health Director Rhodes was making a routine visit with Sanitarian Remington on that day.
5. Health Director Rhodes and Sanitarian Remington left the Health Department at about 10:00 a.m., arriving at the park around 10:30-10:45 a.m. Upon arriving at Waccamaw Park, Health Director Rhodes observed Petitioner there in uniform driving a county animal control vehicle. Health Director Rhodes was with Sanitarian Remington and Petitioner while the concession stand inspection was conducted, a period of 30-45 minutes. Health Director Rhodes did not ask Petitioner what she was doing at the park or whether she was on duty or off duty. Upon returning to the Health Department, Health Director Rhodes reported to Petitioner's supervisor, John Crowder, that Petitioner was at the park using a county vehicle for personal business and on county time. Health Director Rhodes required that Petitioner take 30 minutes of annual leave for the time she spent at Waccamaw Park on April 24, 1990.
6. When confronted with the charges of misusing a county vehicle and misusing county time, Petitioner informed Supervisor John Crowder that she had stopped enroute to an animal control visit in Ash and had elected to take her lunch break early in order to assist Sanitarian Remington in getting the concession stand inspected for use that night. At the time of this occurrence on April 30, 1990, there were no guidelines applicable to Brunswick County Health Department employees as to when or where lunch breaks could be taken.
7. On April 30, 1990, Supervisor John Crowder gave Petitioner an oral warning, documented by a memo of the same date, for failure in the performance of duties. Supervisor Crowder found that Petitioner had violated Article VII, Section 8(b) of the Brunswick County Personnel Manual by

improper use of county property and had violated Article VII, Section 8(e) of the Manual by being absent without approved leave. Supervisor Crowder further instructed Petitioner that she henceforth would be required to obtain his prior approval for the use of personal time to conduct personal business.

8. On or about September 1, 1990, Petitioner received an after-hours service call regarding an injured animal in or along highway 17 near Supply, North Carolina. Petitioner sought approval for an after-hours service call by attempting to contact Supervisor John Crowder, Health Director Rhodes, Board of Health Chairman Ricky Parker, and Interim County Manager and County Attorney David Clegg. Being unsuccessful in these attempts to get approval, Petitioner contacted County Commissioner Benny Ludlum, in whose district the injured dog was located. Commissioner Ludlum instructed Petitioner to respond to the service call, which she did.
9. On September 4, 1990, Supervisor John Crowder issued a written second warning regarding Petitioner's performance of duties on the grounds that she violated Board of Health policy embodied in a May, 1988 policy statement enacted by the Board of Health when she made or caused to be made an after hours animal control visit to Highway 17 near Supply without the approval of himself or Health Director Rhodes. The May, 1988 Board of Health policy for after hours animal control calls provides, in pertinent part:

1. FIRST PUBLIC HEALTH PRIORITY (EMERGENCY SERVICE CALL)

The following service will be handled on a 24 hour basis seven days a week.

- A. Animal bites on humans
- B. Other investigations relating to rabies by the direction of the Local or State Health Director or Head of the Environmental Epidemiological Services Branch of the Division of Health Services.

10. Supervisor Crowder's written warning of September 11, 1990 contained the following statements regarding her attempts to get approval for the after hours animal control call and finally making the call upon instructions to do so by County Commissioner Ludlum:

This procedure does not constitute following Board of Health policy regarding response to calls after hours.

You have called on similar situations regarding after hours emergency calls response in the past and I have denied permission due to the fact that on May 9, 1988, the Brunswick County Board of Health adopted a policy which revised after hour emergency calls (see attached). There have been response calls in the past approved after hours, but only with Sheriff's Department request and "Life threatening" situations.

This injured dog incident of September 1, 1990 did not constitute a "life threatening" situation.

11. Supervisor Crowder admits to having told Petitioner at some time prior to September 1, 1990 that "we would be hard pressed to refuse an after hours animal control call from a county commissioner." Supervisor Crowder contends that he meant that he or Health Director Rhodes would be hard pressed to refuse permission to Petitioner to make such a call. Petitioner interpreted this statement as some license to make an after hours animal control call if requested to do so by a county commissioner. On September 1, 1990 Petitioner held a reasonable, good faith belief that if she could not obtain permission from Supervisor Crowder, Health Director Rhodes, Board of Health Chairman Parker, or County Manager/County Attorney Clegg, that it was proper to make the after hours call to Supply

if approved or requested by a county commissioner.

12. On January 31, 1991, Supervisor Crowder issued a memorandum to Petitioner entitled: "Follow up of January 24, 1991 and January 31, 1991 Discussion Regarding Time Management and Other Animal Control Supervisory Quality Control Measures." This memorandum required that Petitioner conduct bi-monthly staff conferences with her subordinates in the Animal Control Office and prepare minutes at each such staff conference which would be shared with Supervisor Crowder and all animal control employees. In addition to bi-monthly staff conferences, Petitioner was directed by this memorandum to begin a regular schedule of working with her subordinates on a one to one basis according to the following schedule:

1. animal control officers: bi-monthly visits totalling not less than eight (8) hours each or 16 hours per month and
2. animal control clerk: spend not less than 4 hours per week with the animal control clerk and not less than 16 hours per month.

13. During the month of February, 1991, Petitioner spent the following time with the animal control officers under her supervision:

J. Brewer	11.50 hours
R. Grissette	13.25 hours
J. Hagler	4.00 hours

On April 15, 1991 Health Director Rhodes wrote Petitioner a letter entitled: "Failure in Performance of Duties 3rd Step. Disciplinary Procedures." Health Director Rhodes cited Petitioner under Brunswick County Personnel Manual Article VII, Section 8(a) for failure to perform her duties as assigned by Supervisor Crowder in the January 31, 1991 directive regarding time management and quality assurance.

14. Following Supervisor Crowder's issuance of time management and other animal control supervisory quality control measures in his letter to Petitioner dated January 31, 1991, Petitioner called a staff meeting of all animal control personnel. At that meeting on approximately February 1, 1991, Petitioner told her subordinates in animal control that "when shit hits upstream it runs downstream and I will see to that." She also told the staff that what she did or her personal business was "none of their damn business." Profanity was routinely used in and around the animal control office by the staff, including Petitioner.
15. On April 30, 1991, all five of Petitioner's subordinates in the animal control office signed a 34 item complaint (Respondent's Exhibit 9) against Petitioner and filed it with the Health Director, Michael Rhodes. Only items 9, 22, and 29 of Exhibit R-9 were admitted into evidence in this contested case hearing. Item 9 is the complaint regarding Petitioner's use of profanity toward the staff during the staff meeting of February 1, 1991.
16. Item 22 of the complaint alleged that Petitioner had stated that employees and their families were being watched and that she would sue them. Supervisor John Crowder concluded in a letter of June 5, 1991 to Health Director Rhodes that at least one (1) employee felt threatened by Petitioner's remarks. No evidence was produced during the hearing of this contested case that Petitioner's remarks intimidated or threatened any employee. All five of Petitioner's subordinate employees in animal control testified during the hearing.
17. Item 29 of the employee complaint alleged that Petitioner had received two animal control service requests, one on June 25, 1990 and the other on September 20, 1990, and had given them to animal control officer James Hagler to service on December 20, 1990. The evidence in this contested case is that Petitioner turned the June 25, 1990 complaint over to the Shallotte Police Department for

investigation because it was located within that municipality. The evidence concerning the September 20, 1990 complaint is that Petitioner personally investigated the complaint. When Officer Hagler contacted the complaining citizen, he found that the citizen knew nothing about having a current animal control problem or service request pending.

18. In his June 5, 1991 letter to Health Director Rhodes, Supervisor Crowder concluded that Petitioner had violated Article VII, Section 8(d) of the Brunswick County Personnel Manual by being discourteous toward her subordinate employees during the February 1, 1991 staff meeting. Supervisor Crowder also concluded in this letter that Petitioner had been inefficient and negligent in the performance of her duties as a result of her handling of the June 25, 1990 and September 20, 1990 animal control complaints which she assigned to a subordinate on December 20, 1990 for further investigation.
19. Following the June 5, 1990 letter from Supervisor Crowder, Health Director Rhodes, in a letter dated June 11, 1991, placed Petitioner on investigatory/ disciplinary suspension on the basis that the June 11, 1991 letter constituted a fourth warning. Reiterating the grounds for the first three warnings, Health Director Rhodes stated:

On or about April 30, 1990 you were orally warned regarding the use of a county vehicle for personal business.

On September 11, 1990 you were warned in writing regarding violation of the Brunswick County Board of Health Animal Control After Hour Call Policy. On April 15, 1991 you received a third step disciplinary procedure letter for failure to complete work assignments. On April 30, 1991, staff of the Animal Control Program filed a grievance against you. After investigation of this grievance, John Crowder, Environmental Health Supervisor, found violations of the Brunswick County Personnel Policy, Section 8(a) and (d).

20. In a letter to Petitioner dated and effective June 25, 1991, Health Director Rhodes terminated her employment on the grounds of unacceptable performance of duties as evidenced by the events discussed in prior letters to Petitioner dated September 11, 1990, April 15, 1991, and June 11, 1991.
21. The Brunswick County Personnel Manual, Article VII, Section 8 provides as follows:

Failure in Performance of Duties

An employee whose work is unsatisfactory over a period of time shall be notified by the supervisor in what way the employee's work is deficient, and what must be done if the work is to be satisfactory.

An employee who is suspended, demoted or dismissed for unsatisfactory performance of duties shall receive at least three warnings before disciplinary action is taken. First, one or more oral warnings must be issued by the employee's supervisor; second, an oral warning with a follow-up letter to the employee which sets forth the points covered in their discussion must be issued by the supervisor; and third, a written warning must be issued by the department head serving notice upon the employee that corrective action must be taken immediately in order to avoid disciplinary actions. The supervisor and the department head must record the dates of their discussions with the employee, the performance deficiencies discussed and the corrective actions recommended, and must file the information in the employee's personnel folder.

The employee must be allowed at least ten (10) workdays to respond to the charges

before any determination is made by the department head concerning a suspension or a demotion or a determination is made by the appointing authority concerning dismissal.

The following cause relating to failure in the performance of duties are representative of those considered to be adequate grounds for suspension, demotion or, dismissal:

- (a) inefficiency, negligence or incompetence in the performance of duties;
- (b) careless, negligent or improper use of county property or equipment;
- (c) physical or mental incapacity to perform duties;
- (d) discourteous treatment of the public or other employees;
- (e) absence without approve leave;
- (f) habitual improper use of leave privileges; and
- (g) habitual pattern of failure to report for duty at the assigned time and place.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings.
2. Petitioner failed in the performance of her assigned duties within the meaning of Article VII, Section 8 of the Brunswick County Personnel Manual when she failed, during the month of February, 1991, to accomplish the quality assurance directives given to her by her supervisor, John Crowder, on January 31, 1991.
3. Petitioner failed in the performance of her assigned duties within the meaning of Article VII, Section 8 of the Brunswick County Personnel Manual when she used profanity during her conduct of a staff meeting with her subordinate staff on or about February 1, 1991. Petitioner specifically failed to exercise proper supervisory demeanor by using profanity toward her subordinate staff which set the tone for the routine use of profanity by the entire staff and made it impossible for Petitioner to correct.
4. Under the terms of the Brunswick County Personnel Manual, Respondent is not entitled to dismiss Petitioner based upon the evidence produced in this contested case hearing. Respondent has issued two (2) written warnings, supported by the evidence in this case, concerning performance of duties to Petitioner. The Brunswick County Personnel Manual Article VII, Section 8 requires that Petitioner receive three (3) warnings regarding failure in performance of duties before any disciplinary action is taken.
5. Based upon the evidence produced in this contested case, Respondent's decision to terminate Petitioner's employment on June 25, 1991 was erroneous as a matter of law under the Brunswick County Personnel Manual and should be reversed.
6. Petitioner is entitled to reinstatement to her former position or to a comparable position, back pay from the date of termination, and reasonable attorney's fees.

RECOMMENDED DECISION

Based upon the foregoing findings of fact and conclusions of law it is hereby recommended that Respondent's decision to terminate Petitioner's employment effective June 25, 1991 on the grounds of failure in the performance of duties under the Brunswick County Personnel Manual Article VII, Section 8 be reversed as not supported by the evidence and erroneous as a matter of law. It is further recommended that Petitioner be reinstated to the position she held on June 25, 1991; that she receive back pay from that date; that she receive reasonable attorney's fees and costs; and that she receive all other benefits to which she would have become entitled but for her involuntary separation on June 15, 1991.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The State Personnel Commission will issue an advisory opinion to the Brunswick County Health Department. G.S. 150B-23(a). The agency that will make the final decision in this contested case is the Brunswick County Health Department.

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

This the 14th day August, 1992.

Beecher R. Gray
Administrative Law Judge

The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

TITLE/MAJOR DIVISIONS OF THE NORTH CAROLINA ADMINISTRATIVE CODE

TITLE	DEPARTMENT	LICENSING BOARDS	CHAPTER
1	Administration	Architecture	2
2	Agriculture	Auctioneers	4
3	Auditor	Barber Examiners	6
4	Economic & Community Development	Certified Public Accountant Examiners	8
5	Correction	Chiropractic Examiners	10
6	Council of State	General Contractors	12
7	Cultural Resources	Cosmetic Art Examiners	14
8	Elections	Dental Examiners	16
9	Governor	Dietetics/Nutrition	17
10	Human Resources	Electrical Contractors	18
11	Insurance	Electrolysis	19
12	Justice	Foresters	20
13	Labor	Geologists	21
14A	Crime Control & Public Safety	Hearing Aid Dealers and Fitters	22
15A	Environment, Health, and Natural Resources	Landscape Architects	26
		Landscape Contractors	28
16	Public Education	Marital and Family Therapy	31
17	Revenue	Medical Examiners	32
18	Secretary of State	Midwifery Joint Committee	33
19A	Transportation	Mortuary Science	34
20	Treasurer	Nursing	36
*21	Occupational Licensing Boards	Nursing Home Administrators	37
22	Administrative Procedures	Occupational Therapists	38
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