

NORTH CAROLINA

IN THIS ISSUE



REGISTER

Volume 18, Issue 3
Pages 124 - 237

August 1, 2003

This issue contains documents officially filed through July 11, 2003.

Office of Administrative Hearings
Rules Division
424 North Blount Street (27601)
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2678
FAX (919) 733-3462

Julian Mann III, Director
Camille Winston, Deputy Director
Molly Masich, Director of APA Services
Ruby Creech, Publications Coordinator
Linda Dupree, Editorial Assistant
Dana Sholes, Editorial Assistant
Rhonda Wright, Editorial Assistant

I. EXECUTIVE ORDER	
Executive Order No. 51	124
II. IN ADDITION	
EMC – Notice of Intent to Redevelop a Brownfields	
Property - R.G. Automation, Inc.	125
Voting Rights Letters	126 - 129
III. PROPOSED RULES	
Elections, Board of	
Departmental Rules	142
Environment and Natural Resources	
Coastal Resources Commission	156 - 158
Environmental Management	148 - 156
Health and Human Services	
Medical Assistance	130 - 142
Justice	
Private Protective Services Board	142 - 145
Labor	
Elevator and Amusement Device Division	148
Mine and Quarry	145 - 146
OSHA	146 - 147
Wage & Hour	147 - 148
State Personnel	
State Personnel Commission	159 - 164
Transportation	
Highways, Division of	158 - 159
IV. TEMPORARY RULES	
Administration	
State Energy Office	165 - 169
Administrative Hearings, Office of	
Rules Division	205 - 209
Building Code Council	165
Elections, Board of	
Departmental Rules	169 - 170
Health and Human Services	
Medical Assistance	196 - 198
Medical Care Commission	170 - 196
State Personnel	
State Personnel Commission	204 - 205
Transportation	
Highways, Division of	198 - 204
V. RULES REVIEW COMMISSION	210 - 214
VI. CONTESTED CASE DECISIONS	
Index to ALJ Decisions	215 - 216
Text of Selected Decisions	
02 DAG 0560	217 - 221
02 DOJ 1202	222 - 228
02 DOJ 1263	229 - 237

For the **CUMULATIVE INDEX to the NC Register** go to:
<http://oahnt.oah.state.nc.us/register/CI.pdf>

North Carolina Register is published semi-monthly for \$195 per year by the Office of Administrative Hearings, 424 North Blount Street, Raleigh, NC 27601. *North Carolina Register* (ISSN 15200604) to mail at Periodicals Rates is paid at Raleigh, NC. POSTMASTER: Send Address changes to the *North Carolina Register*, 6714 Mail Service Center, Raleigh, NC 27699-6714.

NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

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	Acupuncture	1
2	Agriculture	Architecture	2
3	Auditor	Athletic Trainer Examiners	3
4	Commerce	Auctioneers	4
5	Correction	Barber Examiners	6
6	Council of State	Certified Public Accountant Examiners	8
7	Cultural Resources	Chiropractic Examiners	10
8	Elections	Employee Assistance Professionals	11
9	Governor	General Contractors	12
10	Health and Human Services	Cosmetic Art Examiners	14
11	Insurance	Dental Examiners	16
12	Justice	Dietetics/Nutrition	17
13	Labor	Electrical Contractors	18
14A	Crime Control & Public Safety	Electrolysis	19
15A	Environment and Natural Resources	Foresters	20
16	Public Education	Geologists	21
17	Revenue	Hearing Aid Dealers and Fitters	22
18	Secretary of State	Landscape Architects	26
19A	Transportation	Landscape Contractors	28
20	Treasurer	Locksmith Licensing Board	29
*21	Occupational Licensing Boards	Massage & Bodywork Therapy	30
22	Administrative Procedures (Repealed)	Marital and Family Therapy	31
23	Community Colleges	Medical Examiners	32
24	Independent Agencies	Midwifery Joint Committee	33
25	State Personnel	Mortuary Science	34
26	Administrative Hearings	Nursing	36
27	NC State Bar	Nursing Home Administrators	37
28	Juvenile Justice and Delinquency Prevention	Occupational Therapists	38
		Opticians	40
		Optometry	42
		Osteopathic Examination & Reg. (Repealed)	44
		Pastoral Counselors, Fee-Based Practicing	45
		Pharmacy	46
		Physical Therapy Examiners	48
		Plumbing, Heating & Fire Sprinkler Contractors	50
		Podiatry Examiners	52
		Professional Counselors	53
		Psychology Board	54
		Professional Engineers & Land Surveyors	56
		Real Estate Appraisal Board	57
		Real Estate Commission	58
		Refrigeration Examiners	60
		Respiratory Care Board	61
		Sanitarian Examiners	62
		Social Work Certification	63
		Soil Scientists	69
		Speech & Language Pathologists & Audiologists	64
		Substance Abuse Professionals	68
		Therapeutic Recreation Certification	65
		Veterinary Medical Board	66

Note: Title 21 contains the chapters of the various occupational licensing boards.

NORTH CAROLINA REGISTER
 Publication Schedule for January 2003 – December 2003

Filing Deadlines			Notice of Rule-Making Proceedings	Notice of Text							Temporary Rule
volume & issue number	issue date	last day for filing	earliest register issue for publication of text	earliest date for public hearing	non-substantial economic impact			substantial economic impact			270 th day from issue date
					end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	end of required comment period	deadline to submit to RRC for review at next meeting	first legislative day of the next regular session	
17:13	01/02/03	12/06/02	03/03/03	01/17/03	02/03/03	02/20/03	05/00/04	03/03/03	03/20/03	05/00/04	09/29/03
17:14	01/15/03	12/19/02	03/17/03	01/30/03	02/14/03	02/20/03	05/00/04	03/17/03	03/20/03	05/00/04	10/12/03
17:15	02/03/03	01/10/03	04/15/03	02/18/03	03/05/03	03/20/03	05/00/04	04/04/03	04/21/03	05/00/04	10/31/03
17:16	02/17/03	01/27/03	05/01/03	03/04/03	03/19/03	03/20/03	05/00/04	04/21/03	04/21/03	05/00/04	11/14/03
17:17	03/03/03	02/10/03	05/15/03	03/18/03	04/02/03	04/21/03	05/00/04	05/02/03	05/20/03	05/00/04	11/28/03
17:18	03/17/03	02/24/03	06/02/03	04/01/03	04/16/03	04/21/03	05/00/04	05/16/03	05/20/03	05/00/04	12/12/03
17:19	04/01/03	03/11/03	06/02/03	04/16/03	05/01/03	05/20/03	05/00/04	06/02/03	06/20/03	05/00/04	12/27/03
17:20	04/15/03	03/25/03	06/16/03	04/30/03	05/15/03	05/20/03	05/00/04	06/16/03	06/20/03	05/00/04	01/10/04
17:21	05/01/03	04/09/03	07/01/03	05/16/03	06/02/03	06/20/03	05/00/04	06/30/03	07/21/03	05/00/04	01/26/04
17:22	05/15/03	04/24/03	07/15/03	05/30/03	06/16/03	06/20/03	05/00/04	07/14/03	07/21/03	05/00/04	02/09/04
17:23	06/02/03	05/09/03	08/01/03	06/17/03	07/02/03	07/21/03	05/00/04	08/01/03	08/20/03	05/00/04	02/27/04
17:24	06/16/03	05/23/03	08/15/03	07/01/03	07/16/03	07/21/03	05/00/04	08/15/03	08/20/03	05/00/04	03/12/04
18:01	07/01/03	06/10/03	09/02/03	07/16/03	07/31/03	08/20/03	05/00/04	09/02/03	09/22/03	05/00/04	03/27/04
18:02	07/15/03	06/23/03	09/15/03	07/30/03	08/14/03	08/20/03	05/00/04	09/15/03	09/22/03	05/00/04	04/10/04
18:03	08/01/03	07/11/03	10/01/03	08/16/03	09/02/03	09/22/03	05/00/04	09/30/03	10/20/03	05/00/04	04/27/04
18:04	08/15/03	07/25/03	10/15/03	08/30/03	09/15/03	09/22/03	05/00/04	10/14/03	10/20/03	05/00/04	05/11/04
18:05	09/02/03	08/11/03	11/03/03	09/17/03	10/02/03	10/20/03	05/00/04	11/03/03	11/20/03	05/00/04	05/29/04
18:06	09/15/03	08/22/03	11/17/03	09/30/03	10/15/03	10/20/03	05/00/04	11/14/03	11/20/03	05/00/04	06/11/04
18:07	10/01/03	09/10/03	12/01/03	10/16/03	10/31/03	11/20/03	05/00/04	12/01/03	12/22/03	05/00/04	06/27/04
18:08	10/15/03	09/24/03	12/15/03	10/30/03	11/14/03	11/20/03	05/00/04	12/15/03	12/22/03	05/00/04	07/11/04
18:09	11/03/03	10/13/03	01/02/04	11/18/03	12/03/03	12/22/03	05/00/04	01/02/04	01/20/04	05/00/04	07/30/04
18:10	11/17/03	10/24/03	02/02/04	12/02/03	12/17/03	12/22/03	05/00/04	01/16/04	01/20/04	05/00/04	08/13/04
18:11	12/01/03	11/05/03	02/02/04	12/16/03	12/31/03	01/20/04	05/00/04	01/30/04	02/20/04	05/00/04	08/27/04
18:12	12/15/03	11/20/03	02/16/04	12/30/03	01/14/04	01/20/04	05/00/04	02/13/04	02/20/04	05/00/04	09/10/04

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF RULE-MAKING PROCEEDINGS

END OF COMMENT PERIOD TO A NOTICE OF RULE-MAKING PROCEEDINGS: This date is 60 days from the issue date. An agency shall accept comments on the notice of rule-making proceeding until the text of the proposed rules is published, and the text of the proposed rule shall not be published until at least 60 days after the notice of rule-making proceedings was published.

EARLIEST REGISTER ISSUE FOR PUBLICATION OF TEXT: The date of the next issue following the end of the comment period.

NOTICE OF TEXT

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

END OF REQUIRED COMMENT PERIOD
(1) RULE WITH NON-SUBSTANTIAL ECONOMIC IMPACT: An agency shall accept comments on the text of a proposed rule for at least 30 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

(2) RULE WITH SUBSTANTIAL ECONOMIC IMPACT: An agency shall accept comments on the text of a proposed rule published in the Register and that has a substantial economic impact requiring a fiscal note under G.S. 150B-21.4(b1) for at least 60 days after publication or until the date of any public hearing held on the rule, whichever is longer.

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

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

**EXECUTIVE ORDER NO. 51
EXTENDING EXECUTIVE ORDER NO. 1**

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

Executive Order No. 1 regarding the North Carolina Board of Ethics, hereby is extended.

This order is effective immediately.

Done in the Capitol City of Raleigh, North Carolina, this 16th day of June 2003.

MICHAEL F. EASLEY
GOVERNOR

ATTEST:

ELAINE F. MARSHALL
SECRETARY OF STATE

This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY**

R.G. Automation, Inc.

Pursuant to G.S. 130A-310.34, R.G. Automation, Inc. has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Charlotte, Mecklenburg County, North Carolina. The Property consists of a 2.089-acre parcel and is located at 2213 Toomey Avenue. Environmental contamination exists on the Property in soil and groundwater. R.G. Automation, Inc. has committed itself to use of the Property only for the production of parts for new commercial trucks or other industrial, or commercial, uses. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and R.G. Automation, Inc., which in turn includes (a) a legal description of the Property, (b) a map showing the location of the Property, (c) a description of the contaminants involved and their concentrations in the media of the Property, (d) the above-stated description of the intended future use of the Property, and (e) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at 600 East Trade Street, Neighborhood Development Key Business, Charlotte, NC, 28217 by contacting Carolyn Minnich at that address, at carolyn.minnich@ncmail.net or at (704) 336-3499; or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Scott Ross at that address, at scott.ross@ncmail.net, or at (919)733-2801, ext. 328. Written public comments may be submitted to DENR within 60 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Head, Special Remediation Branch
Superfund Section
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

U.S. Department of Justice

Civil Rights Division

JDR:JBG:CEI:par
DJ 166-012-3
2003-1987

*Voting Section – NWB.
950 Pennsylvania Ave., NW
Washington, D.C. 20530*

July 2, 2003

Michael Crowell, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, NC 27602

Dear Mr. Crowell:

This refers to Session Law 2003-163, which provides the redistricting plan for the Town of Enfield in Halifax County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on June 13, 2003.

The Attorney General does not interpose any objection to the specified change. 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 change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

Joseph D. Rich
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:GS:NT:nj
DJ 166-012-3
2003-1571
2003-1645
2003-1789

*Voting Section – NWB.
950 Pennsylvania Ave., NW
Washington, D.C. 20530*

June 24, 2003

David A. Holec, Esq.
City Attorney
P.O. Box 7207
Greenville, NC 27835

Dear Mr. Holec:

This refers to seven annexations (adopted between November 14, 2002 and February 13, 2003) and their designation to districts of the City of Greenville in Pitt County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submissions on May 5, 13, and 27, 2003.

On June 16, 2003, we received seven additional annexations and their designation to districts of the city for Section 5 review (our File No. 2003-2001). Since they are directly related to the other annexations now before us, these submissions must be reviewed simultaneously. Accordingly, the sixty-day review period for all annexations now before us will run concurrently with your most recent submission. Therefore, by August 15, 2003, we will either make a determination on these annexations or request from you any specific items of additional information necessary to complete our review under Section 5. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

Joseph D. Rich
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:RPL:NVR:par
DJ 166-012-3
2003-1807

*Voting Section – NWB.
950 Pennsylvania Ave., NW
Washington, D.C. 20530*

June 18, 2003

Mr. Gary O. Bartlett
Executive Director
State Board of Elections
P.O. Box 27255
Raleigh, NC 27611-7255

Dear Mr. Bartlett:

This refers to the Spanish translation of the North Carolina Voter Registration Application/Update Form adopted in part to comply with the Help America Vote Act of 2002, 42 U.S.C. 15301-15545, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 29, 2003.

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 change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

Joseph D. Rich
Chief, Voting Section

U.S. Department of Justice

Civil Rights Division

JDR:MSR:NT:par
DJ 166-012-3
2003-1434

*Voting Section – NWB.
950 Pennsylvania Ave., NW
Washington, D.C. 20530*

May 21, 2003

Michael Crowell, Esq.
Tharrington Smith
P.O. Box 1151
Raleigh, NC 27602

Dear Mr. Crowell:

This refers to the 2003 redistricting plan for the City of Reidsville in Rockingham County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on April 22, 2003.

The Attorney General does not interpose any objection to the specified change. 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 change. In addition, as authorized by Section 5, we reserve the right to reexamine this submission if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41 and 51.43).

Sincerely,

Joseph D. Rich
Chief, Voting Section

This Section contains the text of proposed rules. At least 60 days prior to the publication of text, the agency published a Notice of Rule-making Proceedings. The agency must accept comments on the proposed rule for at least 30 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. The required comment period is 60 days for a rule that has a substantial economic impact of at least five million dollars (\$5,000,000). Statutory reference: G.S. 150B-21.2.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHHS – Division of Medical Assistance intends to adopt the rules cited as 10A NCAC 21A .0605-.0608; 21B .0209 and amend the rules cited as 10A NCAC 21A .0201, .0602-.0603; 21B .0201-.0204, .0206-.0207, .0310-.0311. Notice of Rule-making Proceedings was published in the Register on March 17, 2003.

Proposed Effective Date: August 1, 2004

Public Hearing:

Date: August 19, 2003

Time: 10:00 am. – 11:15 a.m.

Location: Kirby Building, Room 132, 1985 Umstead Dr., Raleigh, NC

Reason for Proposed Action:

10A NCAC 21A .0201, .0602-.0603, .0605-.0608; 21B .0201-.0204, .0206-.0207, .0209 – Once the Alexander vs. Bruton Exit Plan was adopted by the federal court, the Division of Medical Assistance worked with other state agencies (Social Services, Vocational Rehabilitation and Information Resource Management) and six county departments of social services (Catawba, Duplin, Forsyth, Johnston, Martin and Sampson) to determine how best to implement the required actions of the Exit Plan. Based on the agreements of the workgroup, the changes were implemented into Medicaid Eligibility Policy October 1, 2002. The proposed permanent changes to the rules are to make them consistent with the Exit Plan and the federal regulations cited under the Exit Plan. The rules implement the federal court order adopting the Exit Plan.

The 2002 Continuation Budget Bill contained several items designed to reduce expenditures in the Medicaid program, in order to help balance the budget of this State. The proposed rules revise Medicaid eligibility policy for Medically Needy Aged, Blind, and Disabled individuals to conform to Medicaid cost-containment provisions of S.L. 2002-126, Section 10.11(a). 10A NCAC 21B .0310 – This Rule is amended to adopt the Supplemental Security Income (SSI) methodology for counting the value of income producing property and property used to provide goods and services for personal use. Policy in effect prior to this change excluded the equity of all income producing property. It was an optional policy allowed under Section 1902 (2) of the Social Security Act. The change in the law requires that we follow SSI policy, which excludes up to \$6,000 in income producing property and property used to produce goods and services for personal use.

10A NCAC 21B .0311 – This Rule is amended to sanction the transfer of tenancy-in-common interest in real property. Policy in effect prior to this change did not sanction the transfer of tenancy-in-common interest in real property. Additionally, this

Rule is amended to address transfer of resources for persons desiring to receive in-home health services; thereby bringing this policy in line with that which is applied to persons seeking nursing facility services. This change alone is anticipated to save \$833,933 in the 2004 State Fiscal Year.

Comment Procedures: *Comments from the public shall be directed to Kris M. Horton, 1985 Umstead Dr., 2405 Mail Service Center, Raleigh, NC 27699-2405 and fax (919) 733-6608. Comments will be received through 5:00 P.M. September 2, 2003 for 10A NCAC 21A .0201, .0602-.0603, .0605-.0608; 21B .0201-.0204, .0206-.0207, .0209 and through 5:00 P.M. September 30, 2003 for 10A NCAC 21B .0310-.0311.*

Fiscal Impact

- State** 10A NCAC 21B .0311-.0312
- Local** 10A NCAC 21B .0311-.0312
- Substantive** (\geq \$5,000,000) 10A NCAC 21B .0310-.0311
- None** 10A NCAC 21A .0201, .0602-.0603, .0605-.0608; 21B .0201-.0204, .0206-.0207, .0209

CHAPTER 21 – MEDICAL ASSISTANCE ADMINISTRATION

SUBCHAPTER 21A – GENERAL PROGRAM ADMINISTRATION

SECTION .0200 – DEFINITIONS

10A NCAC 21A .0201 DEFINITIONS

For purposes of this Chapter, the following definitions apply:

- (1) "M-AA" means a program of medical assistance to persons 65 years of age and older, and also means the assistance itself.
- (2) "M-AB" means a program of medical assistance to blind persons, and also means the assistance itself.
- (3) "M-AD" means a program of medical assistance to disabled persons less than 65 years of age, and also means the assistance itself.
- (4) "M-AF" means a program of medical assistance for families and children, and also means the assistance itself.
- (5) "M-IC" means a program of medical assistance for infants and children, and also means the assistance itself.
- (6) "M-PW" means a program of medical assistance for pregnant women, and also means the assistance itself.
- (7) "~~M-OB~~"-"M-QB" means a program of medical assistance for qualified medicare beneficiaries described at 42 U.S.C. 1396d(p), and also means the assistance itself.

PROPOSED RULES

- (8) "AFDC" means a program of assistance for families with dependent children, and also means the assistance itself.
- (9) "AFDC-MA" has the same meaning as "M-AF".
- (10) "Adequate Notice" means a written notice to inform the client of intended action. The client must receive this notice no later than the effective date of the action.
- (11) "Advance Notice" means a written notice to inform the client at least 10 work days prior to terminating assistance, beginning or increasing a deductible, or beginning or increasing patient monthly liability.
- (12) "Agency" means the Division of Medical Assistance and the county departments of social services, unless separately identified.
- (13) "Appeal" means an oral or written request from a client for a hearing to review the action of a county department of social services or the disability decision when the client is dissatisfied with the decision in his case.
- (14) "Application" means a written request for assistance on a form prescribed by the state which is signed under penalty of perjury by a client or an individual authorized by the client to be his representative for establishing his eligibility for medical assistance.
- (15) "Authorization Period" means the period for which all conditions of eligibility have been established and for which the client is authorized to receive a Medicaid card and benefits.
- (16) "Award Letter" means a statement to an individual from a governmental or private agency indicating benefits for which he is eligible.
- (17) "BENDEX" means Beneficiary Data Exchange with the Social Security Administration for social security status and amount of benefits.
- (18) "Budget Unit" means all persons whose income and needs are considered in the determination of eligibility for Medicaid.
- (19) "Caretaker Relative" means a parent or a person in one of the following groups with whom a child lives:
 - (a) any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great;
 - (b) stepfather, stepmother, stepbrother, and stepsister;
 - (c) persons who legally adopt a child, their parents as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with state law;
 - (d) spouses of any persons named in the groups in (19) (a) - (c) of this Rule even after the marriage is terminated by death or divorce.
- (20) "Certification Period" means the months for which eligibility is being established.
- (21) "Client" means any applicant for or recipient of Medicaid, or someone who makes inquiries, is interviewed, or has been otherwise served or someone acting responsibly for the client in accordance with agency policy.
- (22) "Client Information" or "Client Record" means any information, including information stored in computer data banks or computer files relating to a client, which was received in connection with the performance of any function of the agency.
- (23) "Collateral" means a person or agency who can substantiate or verify information necessary to establish eligibility.
- (24) "Contiguous Property" means real property with boundaries joining the homesite of the client.
- (25) "Court Order" means any written order from a judge or a written document from a judicial official which explicitly directs the release of client information.
- (26) "Deductible" means the amount which the client or budget unit member must personally spend or incur for medical expenses before he can be authorized to receive a Medicaid card and services which may be billed to the Medicaid program.
- (27) "Delegated Representative" means a staff member designated by the director to carry out the responsibilities established by the rules in this Subchapter. Designation is implied when the assigned duties of an employee require access to confidential information.
- (28) "Deprivation" means the lack of support or care from one or both parents (including adoptive parents) of a dependent child, as a result of the absence, incapacity, unemployment or death of either parent.
- (29) "Director" means the head of the Division of Medical Assistance or the county department of social services.
- (30) "Disregard of Earned Income" means the procedure for exempting certain portions of earned income as a resource when determining the amount of payment.
- (31) "Documentary Evidence" means information or records which can be relied on to prove the client's statements of fact.
- (32) "Effective Date" means the date on which an action will take effect.
- (33) "Equity" means the tax value of a resource less the amount of debts, liens, or other encumbrances.
- (34) "Excluded Income" means money received by a member of the budget unit which is not

PROPOSED RULES

- counted in determining eligibility for assistance.
- (35) "Foster Care Resource" means any private home or facility licensed to provide full time care to children.
- (36) "Fraud" means an act in which a client makes false statements or withholds information willfully and knowingly with the intent to deceive, or both, and as a result obtains assistance for which he is not eligible.
- (37) "Full-Time Student" means a student so designated by the school in which he is enrolled.
- (38) "Good Cause" means an acceptable reason for failure to comply with a regulation.
- (39) "Grandfathered Status" means Medicaid eligibility based on the individual's status as a blind or disabled client or as an essential spouse of aged, blind, or disabled client in December, 1973.
- (40) "Greater Weight of Evidence" means evidence of such quality as to persuade an ordinary and prudent person of the truth or falsity of a statement.
- (41) "Guardian" means an individual, corporation, or disinterested public agent appointed by the clerk of superior court to replace an individual's authority to make decisions about his person, family, or property when the individual does not have adequate capacity to make such decisions and has been adjudicated incompetent. A guardian can be a guardian of the person, a guardian of the estate, or a general guardian which is guardian of both the person and the estate.
- (42) "HCT (Healthy Children and Teens)" means a program which provides health screenings and treatment for clients from birth through age 20.
- (43) "Incapacity" means a physical or mental defect, illness or impairment which substantially reduces or eliminates a persons's ability to support or care for an otherwise eligible child, and which is expected to last at least 30 days.
- (44) "Income" means money which is available to members of the budget unit for their needs.
- (45) "Income, Earned" means money received as a result of employment.
- (46) "Income, Gross" means total income before allowable deductions.
- (47) "Income, Net" means income after all allowable deductions.
- (48) "Income, Unearned" means money received from any source other than employment.
- (49) "Incompetent Adult" means an adult who lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, senility, disease, injury, or similar cause or condition.
- (50) "Inmate of a Public Institution" means a person who lives in an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control and which provides treatment or services, food and shelter.
- (51) "Institutionalized Spouse" means an individual who:
- (a) is in a medical institution or nursing facility or who is described under 42 U.S.C. 1396a (a) (10) (A) (ii) (VI); and ~~(b) is married to an individual who is not in a medical institution or nursing facility;~~
 - (b) is married to an individual who is not in a medical institution or nursing facility;
- but does not include any such individual who is not likely to meet the requirements of subparagraph (a) for at least 30 consecutive days.
- (52) "Life Estate Interest" means the right to use property and receive income from the property for the remainder of one's life.
- (53) "Long Term Care" means care in:
- (a) a general or specialty hospital in excess of 30 continuous days,
 - (b) a state mental hospital,
 - (c) a skilled nursing facility, or
 - (d) an intermediate care facility.
- (54) "Patient Monthly Liability" means the amount of a long term care patient's income that must be paid towards his cost of care.
- (55) "Remainder Interest" means ownership interest in property which will be inherited in full or jointly with other remainder interest holders at a life interest holder's death.
- (56) "Representative" means a person who is authorized by the client to act on behalf of the client.
- (57) "Reserve" means assets owned by members of the budget unit and which have a market value.
- (58) "Residence" means the county where a client lives with intent to remain for an indefinite time as governed by Rule .0303 of Subchapter 50B. Also, an individual under age 21 has the residence of the person with whom he resides unless he is in the custody of a social services agency, in which case he is a resident of the county of the custodial agency.
- (59) "Revocable Trust" means funds held in trust which are available for the client's use.
- (60) "RSDI (Retirement, Survivors, Disability Insurance)" means social security benefits.
- (61) "SDX" means State Data Exchange with the Social Security Administration for the purpose of providing a listing of all persons receiving supplemental security income, their current

- payment status and amount of SSI and other sources of income.
- (62) "SSI" means Supplemental Security Income - A federal assistance payment for aged, blind and disabled persons administered by the Social Security Administration.
- (63) "Stepparent" means a person legally married to the parent of a child in the Medicaid budget unit.
- (64) "Timely Notice" means the same as "Advance Notice".
- (65) "Time Standard" means the requirement to process an application within 45 or ~~60~~ 90 days from the date of ~~application unless there is client or collateral delay in providing information.~~ application.
- (66) "Verification" means the confirmation of facts and information used in determining eligibility.

Authority G.S. 108A-25(b); 108A-54; P.L. 99-509; P.L. 100-360; P.L. 100-485; 42 C.F.R. 431.211; 42 C.F.R. 431.214; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;

SECTION .0600 - CORRECTIVE ACTIONS IN MEDICAID CASES

10A NCAC 21A .0602 CORRECTIVE ACTIONS

- (a) Corrections in an applicant's or recipient's case shall be made by the county department of social services when:
- (1) An individual was discouraged from filing an application; or
 - (2) An appeal or court decision overturns an earlier adverse decision; or
 - (3) The certification periods of financially responsible persons need to be adjusted to coincide; or
 - (4) Information received from any source is verified and is found to change the amount of the recipient's deductible, patient liability, authorized period or otherwise affect the recipient's eligibility status; or
 - (5) Additional medical bills or verified medical expenses establish an earlier Medicaid effective date; or
 - (6) The agency made an administrative error due to:
 - (A) Assistance was terminated or denied in error; or
 - (B) Failure to act properly on information received; or
 - (C) Incorrect determination of the authorization period, Medicaid effective date, or erroneous data entry; or
 - (7) Monitoring under "Alexander vs. Hill" application processing requirements determines an application was pending without ~~good cause and a penalty is due; an error due to assistance denied in error or county failure~~

- to act properly on information received. Monitors or other state staff may find errors due to improperly treated denials, withdrawals, inquiries and for discouragement; or
- (8) Any other action deemed by the Medicaid Eligibility Section to be appropriate and with good cause.
- (b) Corrections in an applicant's or recipient's case shall be made by the Division of Medical Assistance when:
- (1) Verified information is received showing that a terminated case has errors in the Medicaid eligibility segments, Buy-In effective date, eligible case members, CAP or HMO indicators and effective dates or other data that is causing valid claims to deny; or
 - (2) The county department of social services refuses to take required corrective actions; or
 - (3) An audit report shows verified errors in the Medicaid eligibility history or recipient identification number.

Authority G.S. 108A-54; 42 C.F.R. 431.246; 42 C.F.R. 435.904; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;

10A NCAC 21A .0603 TIME LIMITS FOR CORRECTIONS

- (a) The county department of social services and Division of Medical Assistance shall make necessary corrections promptly, but within 30 days after discovery of the need for action unless good cause exists for failure to act timely.
- (b) Good cause is limited to:
- (1) Need to verify other conditions of eligibility before authorizing eligibility; or
 - (2) The county department of social services is unable to locate the applicant or recipient; or
 - (3) The county department of social services disagrees with a decision requiring corrective action and has requested administrative review by the Medicaid Eligibility Section;
- (c) To receive state and federal financial participation in any benefits authorized retroactively by corrective actions, the effective date of the correction must correspond with the date assistance would have been effective had the decision not been adverse or had the error not occurred, but may be no earlier than the following dates:
- (1) Retroactive to the date ordered by the appeal or court decision if all eligibility conditions are met, including any legal retroactive coverage period associated with the adverse action; or
 - (2) If a reported change is beneficial to the recipient effective:
 - (A) The first of the calendar month following adequate notice; or
 - (B) Retroactive to the beginning of the current certification period; or
 - (C) Retroactive to the month within the current certification period in which the change occurred; or
 - (D) Retroactive to the original date of application for denials based on

adoption of Title II or XVI decisions that have subsequently been reversed; or

- (3) The earliest date in the current certification period on which additional medical expenses are sufficient to meet the case deductible; or
- (4) For administrative errors up to 12 months immediately preceding the month the error was discovered; or
- (5) Retroactive to the date of error for "Alexander vs. Hill" penalties, required for corrective action due to errors cited from monitoring under application processing standards.

(d) If the change is adverse to the recipient, it must be effective with the first calendar month "following" expiration of the ten work day advance notice period.

Authority G.S. 108A-54; 42 C.F.R. 431.246; 42 C.F.R. 431.250; 42 C.F.R. 435.904; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;

10A NCAC 21A .0605 MONITORING THRESHOLDS AND CORRECTIVE ACTION

- (a) For all county departments of social services and the Disability Determination Section (DDS), the monitoring threshold for denials, withdrawals, inquires and discouragement is 80%.
- (b) If the agency falls below the 80% threshold, the agency must analyze why it fell below 80% and implement a corrective action plan if determined necessary by the Medicaid Program Representative.
- (c) The agency or DDS may dispute monitoring findings within 10 workdays of receipt of findings.
- (d) The agency must take corrective action to reopen cited cases within 30 calendar days of the final monitoring results.

Authority G.S. 108A-54; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;

10A NCAC 21A .0606 TIMELINESS

- (a) Each county department of social services and disability determination section (DDS) shall be expected to process applications as follows:
 - (1) The average processing time (APT) standard for the county department of social services is 90 days for MAD and 45 days for all other aid/program categories.
 - (2) APT standard for DDS is 70 days.
 - (3) The percentage processed timely (PPT) standard for county departments of social services: Level I counties must process 85% of applications within the 45/90 day time standard. Level II and III counties must process 90% of applications within the 45/90 day time standard.
 - (4) PPT standard for DDS: DDS must render a decision within 70 days on 85% of cases for Level I counties and 90% of cases for Level II and III counties.

(b) The county will analyze the reason for failure, document findings and work with the Medicaid Program Representative to achieve corrective action.

(c) Failure to meet these time standards on the Adjusted Application Report Card may result in corrective action to alleviate problems as outlined in 10 NCAC 21A .0607 and .0608.

Authority G.S. 108A-54; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;

10A NCAC 21A .0607 LOCAL CORRECTIVE ACTION TEAM

- (a) A Local Corrective Action Team may be convened when the county department of social services (DSS) is out of compliance with APT or PPT processing thresholds in any category for three consecutive months, or, five months out of any 12 consecutive months.
- (b) A Local Corrective Action Team will not be held when:
 - (1) All failures are attributable to DDS.
 - (2) It is determined by DMA Recipient and Provider Services that the reasons for non-compliance have been or are being corrected.
 - (3) Budgetary constraints do not allow travel for the purpose of convening a corrective action team. Conference calls will be considered.

- (c) The Local Corrective Action Team may design any remedy reasonable and necessary to bring the DSS into compliance with application processing requirements.
- (d) The Team shall establish a corrective action plan within 40 calendar days of notice that a local corrective action team was required, and a date for compliance with the plan shall be set. Report card compliance must be achieved within three months after the date the compliance plan was required to be established.
- (e) Failure to take corrective action, or meet compliance thresholds shall result in a referral to a State Corrective Action Team, unless the State Corrective Action Team grants an extension, not to exceed three months.

Authority G.S. 108A-54; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;

10A NCAC 21A .0608 STATE CORRECTIVE ACTION TEAM

- (a) A State Corrective Action Team will be convened by the Chairperson within 10 days when:
 - (1) The county department of social services (DSS) has failed to meet the compliance thresholds by the date established by the local corrective action team.
 - (2) A local corrective action team requests an extension of time, not to exceed three months, to meet the compliance thresholds.
 - (3) DDS fails to meet its compliance thresholds for three consecutive or five out of 12 consecutive months.
- (b) The State Corrective Action Team has broad powers and may design any remedy reasonable and necessary to bring the DSS or DDS into compliance with application processing requirements. This includes but is not limited to employing

additional staff, altering office procedures (such procedures must be consistent with federal and state regulations, laws and Departmental rules and policies), purchasing office equipment, retaining private consultants, reopening of cases, ordering retroactive relief to applicants harmed by violation of application processing requirements, and ordering the State to assist in the operation of a county department.

(c) The State Corrective Action Team shall establish a corrective action plan for the DSS or DDS within 45 calendar days of convening. A date for compliance shall be established. For report card issues, compliance must be achieved within three months after the date the team was convened.

(d) Failure to achieve compliance may result in a request to the Local Government Commission to assess and determine the capacity of the county to expend resources to bring the county into compliance. The Commission may take enforcement action pursuant to G.S. 159 as appropriate. The various state agencies shall be available to assist in this review.

Authority G.S. 108A-54; Alexander v. Bruton, U.S.D.C., File No. C-C-74-183-M, Consent Order dismissed effective February 1, 2002;

SUBCHAPTER 21B - ELIGIBILITY DETERMINATION

SECTION .0200 - APPLICATION PROCESS

10A NCAC 21B .0201 ACCEPTANCE OF APPLICATION

(a) A client shall be allowed to apply without delay. Without delay is the same day the client appears at the county department of social services expressing a financial or medical need.

(b) The county department of social services shall not act to discourage any individual from applying for Medicaid. It shall be considered discouragement if any employee of the county department of social services:

- (1) requires or suggests the individual wait to apply until he applies for other benefits or until an application for other benefits has been approved or denied; or
- (2) incorrectly states or suggests the individual is not eligible-ineligible for Medicaid; or
- (3) gives incorrect or incomplete information about Medicaid programs; or
- (4) ~~requires the individual provide or obtain any information needed to establish eligibility prior to signing an application; or~~
- (5) ~~any other fact which proves to the satisfaction of the county agency or a hearing officer that the client was discouraged from applying.~~
- (4) Suggests that the individual make an appointment to apply when he appears at the agency;
- (5) Suggests that the individual complete a mail-in application when he appears at the agency;
- (6) Fails to explain the date of application when he appears at the agency and requests a mail-in application; or.
- (7) Fails to explain and offer Medicaid to individuals requesting Work First Employment Services.

(c) The client shall be informed verbally and in writing, that:

- (1) he can apply without delay;
- (2) a decision shall be made concerning his eligibility within 45 calendar days from the date of application for Medicaid, except for M-AD. For M-AD the application processing standard shall be ~~60 calendar days from the date of application for applications which do not require a disability determination, and 90 calendar days for applications which require a disability determination; or 90 calendar days from the date of application; and~~
- (3) he shall receive a written decision concerning his eligibility.

(d) The client shall apply in his county of residence.

(e) ~~The date of the application shall be the date the client or his representative signs the state prescribed application form under penalty of perjury. The date of the application shall be:~~

- (1) The date the client or his representative signs the state prescribed application form for Medicaid, including Work First, under penalty of perjury at the county department of social services; or
- (2) The date a signed complete state prescribed mail-in application form is received by the county department of social services in the county of residence. Complete is defined as information is legible, signed, submitted to correct county of residence, and has identifying information for the person applying, including but not limited to name, mailing address, date of birth and gender.

(f) If an individual requests assistance by mail, the letter shall be considered a request for information. Within three workdays following receipt of the request, the county agency shall mail follow-up information to the individual. The county agency shall advise the individual to come to the agency to apply and be interviewed, or if he is unable to come in person, to contact the agency so other arrangements can be made to take his application.

(g) If an individual requests assistance by telephone, he shall be advised to come to the county agency to sign an application and be interviewed; or, if he is unable to come to the agency in person other arrangements shall be made to take his application.

(h) If an individual sends in a complete state prescribed mail-in application form, the county department of social services shall use this application to determine eligibility for Medicaid. A mail-in application form may be picked up at a local county department of social services or other outstation locations as determined by the State and county.

~~(i)~~ (i) An individual or his representative must request a determination for retroactive SSI Medicaid no later than 60 days from the date of the SSI Medicaid disposition notice or 90 days if good cause is established. Good cause exists when:

- (1) the applicant does not receive the SSI Medicaid notice;
- (2) the applicant or his representative dies;
- (3) the applicant is incapacitated, incompetent, or unconscious and there is no representative acting on his behalf;

- (4) the applicant or spouse, child, ~~or parent parent,~~ or representative of applicant is hospitalized ~~for an extended period of time; time.~~
- ~~(5) the applicant's representative fails to meet the required time frame.~~

Authority G.S. 108A-54; 42 C.F.R. 435.906; 42 C.F.R. 435.907; 42 C.F.R. 435.911; Alexander v. Flaherty, U.S.D.C., W.D.N.C., File No. C-C-74-183, Consent Order filed 15 December 1989; Alexander v. Flaherty Consent Order filed February 14, 1992; Alexander v. Bruton Consent Order dismissed Effective February 1, 2002;

10A NCAC 21B .0202 FACE-TO-FACE INTERVIEW

- (a) The county department of social services shall conduct ~~an a~~ face-to-face interview with the client or his ~~representative.~~ representative who appears at the agency requesting financial or medical assistance. The client may have any person or persons of his choice participate in the interview. During the interview, the Income Maintenance Caseworker shall explain the application process, the client's rights and responsibilities, the programs of public assistance and the eligibility conditions.
- (b) The applicant shall be advised of his right to apply in more than one program category for which he qualifies and the advantages and disadvantages of the choices shall be explained.
- (c) The client shall be informed of the following:

- (1) ~~That information he provides shall be checked for accuracy.~~ The client shall be told what information he shall provide, and what third party sources the agency shall contact to check the information. ~~Collateral sources of information shall include knowledgeable individuals, business organizations, public records, and documentary evidence. If the client does not wish necessary collateral contacts to be made, he can withdraw his application. If he denies permission to contact necessary collaterals and all alternative sources of verification, the application shall be denied due to failure to cooperate in establishing eligibility. Third party sources are entities, other than the client, they can provide verification of information to determine eligibility.~~
- (2) The client has the right to:
 - (A) Receive assistance if found eligible;
 - (B) Be protected against discrimination on the grounds of race, creed, or national origin by Title VI of the Civil Rights Act of 1964. He may appeal such discrimination;
 - ~~(C) If eligible for Medicaid and Medicare Part B, have the monthly premium paid in his behalf under an agreement between the state and SSA;~~
 - ~~(D)(C)~~ Have any information given to the agency kept in confidence;
 - ~~(E)(D)~~ Appeal, if he believes the agency's action to deny, change, or terminate assistance is incorrect, or his request

is not acted on with reasonable promptness;

- ~~(F)(E)~~ Reapply at any time, if found ineligible;
- ~~(G)(F)~~ Withdraw from the program at any time;
- ~~(H)(G)~~ Request the agency's help in obtaining third party information which he is responsible to provide;
- ~~(I)(H)~~ Be informed of all information he must provide and all alternative sources of ~~verification for the information he is responsible to provide.~~ the information.

- (3) The client shall be responsible for the following:
 - (A) Provide the county department, state and federal officials, the necessary sources from which to locate and obtain information needed to determine eligibility;
 - (B) Report to the county department of social services any change in situation that may affect eligibility within 10 calendar days after it happens. The meaning of fraud shall be explained. The applicant shall be informed that he may be suspected of fraud if he fails to report a change in situation and that in such situations, he may have to repay assistance received in error and that he may also be tried by the courts for fraud;
 - (C) Inform the county department of social services of any persons or organization against whom he has a right to recovery. When he accepts medical assistance, the applicant assigns his rights to third party insurance benefits to the state. He shall be informed that it is a misdemeanor to fail to disclose the identity of any person or organization against whom he has a right to recovery;
 - (D) Immediately report to the county department the receipt of an I.D. card which he knows to be erroneous. If he does not report such and uses the I.D. card, he may be required to repay any medical expenses paid in error.

Authority G.S. 108A-25(b); 108A-57; 42 C.F.R. 435.908; Alexander v. Flaherty, U.S.D.C., W.D.N.C., File No. C-C-74-183, Consent Order Filed 15 December 1989; Alexander v. Flaherty Consent Order filed February 14, 1992; Alexander v. Bruton Consent Order dismissed Effective February 1, 2002;

10A NCAC 21B .0203 APPLICATION PROCESSING STANDARDS

PROPOSED RULES

(a) The county department of social services shall comply with the following standards in processing applications:

- (1) A decision on an individual's eligibility for Medicaid shall be made within 45 calendar days from the date of application for Medicaid except for applications in which a disability determination has already been made or is needed. For those applications, a decision on an individual's eligibility shall be made within 90 days from the date of application. There may be unusual circumstances in which the decision on an application cannot be made in the specified timeframes. These circumstances may include when the applicant delays or fails to take a required action or when there is an emergency beyond the agency's control.
(2) Only require information or verification necessary to establish eligibility for assistance;
(3) Make at least two requests for all necessary information from the applicant or third party;
(4) Allow at least 10 12 calendar days between the initial request and a follow-up request and at least 10 12 calendar days between the follow-up request and denial of the application;
(5) Inform the client in writing, and verbally when possible, of the right to request help in obtaining information requested from the client. The county department of social services shall not discourage any client from requesting such help;
(6) An application may pend up to six months for verification that the deductible has been met or disability established.
(7) When a hearing decision reverses the decision of the county department of social services on an application, the application shall be reopened within five working days from the date the final appeal decision is received by the county department of social services or within five working days after the date the last piece of information is received by the county department of social services.

(b) Except as provided in Subparagraphs (1) through (8) of this Paragraph, the The county department of social services shall accept the applicant's statement as verification for all factors of eligibility that have not otherwise been verified when the application is processed: obtain verification other than the applicant's statement for the following:

- (1) Any medical verification;
(2) Proof a deductible has been met;
(3) Legal alien status;
(4) Proof of the rebuttal value for motor vehicles, salability of remainder interest, and transfer of assets; resources and of the rebuttal of intent to transfer resources to become eligible for Medicaid.
(5) Proof of designation of liquid assets for burial;
(6) Proof of legally binding agreement limiting resource availability;
(7) Proof of valid social security number or application for a social security number;

- (8) Reserve—Proof of reserve reduction when resources exceed the allowable reserve limit for adult applicants if the stated reserve exceeds one thousand two hundred dollars (\$1,200) and the applicant has taken no steps to obtain the missing reserve verification;
(9) Any information which the applicant does not know and for which the applicant cannot give a reasonable verification.
(9) Proof of earned and unearned income, including deductions, exclusions, and operational expenses.
(10) Any other information for which the applicant does not know or cannot give an estimate.

(c) The county department of social services is responsible for verification of an item of information when:

- (1) A fee must be paid to obtain the verification;
(2) It is available within the agency;
(3) The applicant or any assistant unit member must be enumerated; The county department of social services is required by federal law to assist or to use interagency or intra-agency verification aids.
(4) The applicant requests assistance;
(5) The applicant is blind, deaf, mentally ill or retarded, unable to speak English, unable to read and write, housebound, hospitalized, institutionalized, or clearly unable to obtain the requested verification. physically, mentally, or otherwise incapable of obtaining the information, or is unable to speak English or read and write, or is housebound, hospitalized, or institutionalized, and a representative does not accept responsibility for obtaining the information.

Authority G.S. 108A-54; 42 C.F.R. 435.911; Alexander v. Flaherty, V.S.D.C., W.D.N.C., File No. GC-74-183, Consent Order Filed 15 December 1989; Alexander v. Flaherty Consent Order filed February 14, 1992; Alexander v. Bruton Consent Order dismissed Effective February 1, 2002;

10A NCAC 21B .0204 EFFECTIVE DATE OF ASSISTANCE

(a) Medicaid coverage shall be effective as follows: The first month of Medicaid coverage shall be:

- (1) The month of application, or for SSI recipients, the month of application for SSI; or
(2) As much as three months prior to the month of application when the client received medical services covered by the program and was eligible during the month or months of medical need; or
(3) If the client applies prior to meeting a non-financial requirement, Medicaid shall begin no earlier than the calendar month in which all non-financial requirements are met; or met.
(4) For pregnancy related services under MPW, the month of application or as much as three months prior to the month of application in

~~which all eligibility requirements are met in the month or months.~~

(b) Assistance shall be authorized beginning on the first day of the month except when:

- (1) The client's income exceeds the income level and he must spenddown the excess income for medical care. The client shall be authorized on the day his incurred medical care costs equal the amount of the excess income.
- (2) ~~The assets of AFDC related cases, or cases protected by grandfather provisions, and all Medically Needy cases are reduced to the assets limit during the month. The For groups identified in Rule 21B .0310, Sub-Item (3)(a), the client shall be authorized on the day the assets resources are reduced, or incurred medical care costs equal the amount of the excess income, whichever occurs later.~~

(c) Medicaid coverage shall end on the last day of the last month of eligibility except for those individuals eligible for emergency conditions only as described in Rule .0302 of this Subchapter. The last month of eligibility shall be:

- (1) The month in which timely notice of termination expires; or
- (2) The month in which adequate notice of termination expires; ~~or, expires.~~
- (3) ~~The last month of the certification period.~~

Authority G.S. 108A-54; 42 C.F.R. 435.914; 42 C.F.R. 435.919; Alexander v. Bruton Consent Order dismissed Effective February 1, 2002;

10A NCAC 21B .0206 DISPOSITION

(a) Disposition of the application shall complete the application process and shall consist of one of the following actions:

- (1) Approval of assistance; ~~or~~
- (2) Denial of assistance; ~~or~~
- (3) Denial of assistance for ineligible month or months of the certification period and approval for eligible month or months of the certification period; or
- (4) Voluntary withdrawal of the application by the client. The Income Maintenance Caseworker shall not suggest to the client that he withdraw his application and shall explain alternatives to withdrawal. The Income Maintenance Caseworker shall explain the client's right to reapply at anytime.

(b) The county department of social services shall not deny an application prior to ~~three months from the date of application for missing information except in the following instances: 45 days, or for M-AD, 90 days, when:~~

- (1) It is established the applicant will not be able to meet the deductible; ~~or~~
- (2) The applicant cannot be located; ~~or~~
- (3) ~~On or after the 45th day propose denial with a 30 day suspense period before denial becomes final when the applicant has no contact with the agency, provides no information and has not requested help. It is established the~~

~~applicant is ineligible under any Medicaid program;~~

- (4) ~~The applicant refuses or fails to cooperate or fails to provide information to establish eligibility; or~~
- (5) ~~An application was taken but the applicant was not interviewed and two interview appointments were scheduled and the applicant failed to keep the appointments.~~

Authority G.S. 108A-54; 42 C.F.R. 435.912; 42 C.F.R. 435.913; Alexander v. Flaherty, U.S.D.C., W.D.N.C., File No. C-C-74-183, Consent Order filed 15 December 1989; Alexander v. Bruton Consent Order dismissed Effective February 1, 2002;

10A NCAC 21B .0207 REFERRALS AT A FACE-TO-FACE INTERVIEW

For all Medicaid applicants ~~and recipients for whom who have a face-to-face interview at the county department of social services determines eligibility, services,~~ the Income Maintenance Caseworker shall explain and make referrals for:

- (1) ~~Healthy Children and Teen Program;~~ Health Check;
- (2) Family planning services;
- (3) Food stamps;
- (4) Governmental benefits including RSDI, SSI, VA;
- (5) ~~Vocational rehabilitation services;~~
- (6) ~~Protective services if the client has reason to believe a child receiving assistance has been neglected, abused, or exploited;~~
- (7)(5) ~~Women, Infants and Children Program (WIC).~~ (WIC);
- (6) Carolina ACCESS;
- (7) Medicaid Transportation;
- (8) Life Line/Link-up;
- (9) Health Insurance Premium Payment program; and
- (10) Voter Registration.

Authority G.S. 108A-54; 42 C.F.R. 441.56; 42 U.S.C. 1396a(a); Alexander v. Bruton Consent Order dismissed Effective February 1, 2002.

10A NCAC 21B .0209 HOURS FOR ACCEPTING FINANCIAL AND MEDICAL ASSISTANCE APPLICATIONS

The county department of social services must maintain the same number of operating hours as in February of 2002. Provisions must be made for acceptance of financial and medical assistance applications if the agency elects to close for lunch or for other reasons during the week.

Authority G.S. 108A-54; Alexander v. Bruton Consent Order dismissed Effective February 1, 2002.

SECTION .0300 - CONDITIONS FOR ELIGIBILITY

10A NCAC 21B .0310 RESERVE

North Carolina has contracted with the Social Security Administration under Section 1634 of the Social Security Act to

provide Medicaid to all SSI recipients. Resource eligibility for individuals under any Aged, Blind, and Disabled coverage group is determined based on standards and methodologies in Title XVI of the Social Security Act except as specified in Items (4) and (5) of this Rule. Applicants for and recipients of Medicaid shall use their own resources to meet their needs for living costs and medical care to the extent that such resources can be made available. Certain resources shall be protected to meet specific needs such as burial and transportation and a limited amount of resources shall be protected for emergencies.

(1) The value of resources currently available to any budget unit member shall be considered in determining financial eligibility. A resource shall be considered available when it is actually available and when the budget unit member has a legal interest in the resource and he, or someone acting in his behalf, can take any necessary action to make it available.

(a) Resources shall be excluded in determining financial eligibility when the budget unit member having a legal interest in the resources is incompetent unless:

(i) A guardian of the estate, a general guardian or an interim guardian has been lawfully appointed and is able to act on behalf of his ward in North Carolina and in any state in which such resources are located; or

(ii) A durable power of attorney, valid in North Carolina and in any state in which such resource is located, has been granted to a person who is authorized and able to exercise such power.

(b) When there is a guardian, an interim guardian, or a person holding a valid, durable power of attorney for a budget unit member, but such person is unable, fails, or refuses to act promptly to make the resources actually available to meet the needs of the budget unit member, a referral shall be made to the county department of social services for a determination of whether the guardian or attorney in fact is acting in the best interests of the member and if not, the county department of social services shall contact the clerk of court for intervention. The resources shall be excluded in determining financial eligibility pending action by the clerk of court.

(c) When a Medicaid application is filed on behalf of an individual who:

(i) is alleged to be mentally incompetent,

(ii) has or may have a legal interest in a resource that affects the individual's eligibility, and

(iii) does not have a representative with legal authority to use or dispose of the individual's resources, the individual's representative or family member shall be instructed to file within 30 calendar days a judicial proceeding under G.S. 35A to declare the individual incompetent and appoint a guardian. If the representative or family member either fails to file such a proceeding within 30 calendar days or fails to timely conclude the proceeding, a referral shall be made to the services unit of the county department of social services for guardianship services. If the allegation of incompetence which has lasted, or is expected to last 30 consecutive days or more, or until the individual's death, is supported by competent evidence, as specified in Sub-item (1)(f) of this Rule, the resources shall be excluded beginning with the date that such evidence indicates that he became incompetent, except as provided in Sub-items (1)(d) or (1)(e) of this Rule.

(d) The budget unit member's resources shall be counted in determining his eligibility for Medicaid beginning the first day of the month following the month a guardian of the estate, general guardian or interim guardian is appointed, provided that after the appointment, property which cannot be disposed of or used except by order of the court shall continue to be excluded until completion of the applicable procedures for disposition specified in G.S. 1 or G.S. 35A.

(e) When the court rules that the budget unit member is competent or no ruling is made because of the death or recovery of the member, his resources shall be counted except for periods of time for which it can be established by competent evidence specified in

PROPOSED RULES

- Sub-item (1)(f) of this Rule, that the member was in fact incompetent for at least 30 consecutive days, or until his death. Any such showing of incompetence is subject to rebuttal by competent evidence as specified in Sub-item (1)(f) of this Rule.
- (f) For purposes of this Rule, competent evidence is limited to the written statement or testimony at a competency hearing of a physician, psychologist, nurse, or social worker with knowledge of the condition of the individual, the basis of that knowledge, the beginning date of incompetence, the reason the individual is incompetent, and if no longer incompetent, when the individual recovered competence.
- (2) The limitation of resources held for reserve for the budget unit shall be as follows:
 - (a) for Family and Children's related categorically and medically needy cases, three thousand dollars (\$3,000.00) per budget unit;
 - (b) for aged, blind, and disabled cases, two thousand dollars (\$2000.00) for a budget unit of one and three thousand dollars (\$3000.00) for a budget unit of two.
- (3) If the value of countable resources of the budget unit exceeds the reserve allowance for the unit, the case shall be ineligible:
 - (a) For Family and Children's related cases and aged, blind or disabled cases protected by grandfathered provisions, and medically needy cases not protected by grandfathered provision, eligibility shall begin on the day countable resources are reduced to allowable limits or excess income is spent down, whichever occurs later;
 - (b) For categorically needy aged, blind or disabled cases not protected by grandfathered provisions, eligibility shall begin no earlier than the month countable resources are reduced to allowable limits as of the first moment of the first day of the month.
- (4) Resources counted in the determination of financial eligibility for categorically needy aged, blind and disabled cases, and Qualified Medicare Beneficiaries, Specified Low-Income Medicare Beneficiaries, Qualifying Individual and Qualified Disabled Working Individual cases is based on resource standards and methodologies in Title XVI of the Social Security Act except for the following methodologies:
 - (a) The value of personal effects and household goods are not counted.
 - (b) Value of tenancy in common interest in real property is not counted.
 - (c) Value of life estate interest in real property is not counted.
 - (d) Value of burial plots are not counted.
 - (e) The cash value of life insurance when the total face value of all cash value bearing life insurance policies does not exceed ten thousand dollars (\$10,000.00) is not counted.
- (5) Resources counted in the determination of financial eligibility for medically needy aged, blind and disabled cases is based on resource standards and methodologies in Title XVI of the Social Security Act except for the following methodologies:
 - (a) The value of personal effects and household goods are not counted.
 - ~~(b) Personal property is not a countable resource if it:

 - ~~(i) is used in a trade or a business; or~~
 - ~~(ii) is used to produce goods and services for personal use; or~~
 - ~~(iii) produces a net annual income.~~~~
 - ~~(c) Real property not exempted under homesite rules is not a countable resource if it:

 - ~~(i) is used in a trade or business; or~~
 - ~~(ii) is used to produce goods and services for personal use; or~~
 - ~~(iii) is non-business income producing property that produces net annual income after operational expenses of at least six percent of equity value per methodologies under Title XVI of the Social Security Act. For purposes of this Sub-item equity of agricultural land, horticultural land, and forestland is the present use value of the land, as defined by G.S. 105-277.1A. et seq., less the amount of debts, liens or other encumbrances.~~~~
 - ~~(d)(b)~~ Value of tenancy in common interest in real property is not counted.
 - ~~(e)(c)~~ Value of life estate interest in real property is not counted.
 - ~~(f)(d)~~ Individuals with resources in excess of the resource limit at the first moment of the month may become eligible at the point that resources are reduced to the allowable limit.
 - ~~(g)(e)~~ Value of burial plots are not counted.

- (f) The cash value of life insurance when the total face value of all cash value bearing life insurance policies does not exceed ten thousand dollars (\$10,000.00) is not counted.
- (6) Resources counted in the determination of financial eligibility for categorically needy Family and Children's related cases are:
 - (a) Cash on hand;
 - (b) The balance of savings accounts, including savings of a student saving his earnings for school expenses;
 - (c) The balance of checking accounts less the current monthly income which had been deposited to meet the budget unit's monthly needs when reserve was verified;
 - (d) The portion of lump sum payments remaining after the month of receipt;
 - (e) Cash value of life insurance policies owned by the budget unit;
 - (f) Stocks, bonds, mutual fund shares, certificates of deposit and other liquid assets;
 - (g) Patient accounts in long term care facilities;
 - (h) Equity in non-essential personal property limited to:
 - (i) Mobile homes not used as home,
 - (ii) Boats, boat trailers and boat motors,
 - (iii) Campers,
 - (iv) Farm and business equipment;
 - (v) Equity in vehicles in excess of one motor vehicle per adult;
- (7) Resources counted in the determination of financial eligibility for medically needy Family and Children's related cases are:
 - (a) Cash on hand;
 - (b) The balance of savings accounts, including savings of a student saving his earnings for school expenses;
 - (c) The balance of checking accounts less the current monthly income which had been deposited to meet the budget unit's monthly needs when reserve was verified or lump sum income from self-employment deposited to pay annual expenses;
 - (d) Cash value of life insurance policies when the total face value of all policies that accrue cash value exceeds one thousand five hundred dollars (\$1,500.00);
 - (e) Stocks, bonds, mutual fund shares, certificates of deposit and other liquid assets;

- (f) Patient accounts in long term care facilities;
- (g) Equity in non-essential, non-income producing personal property limited to:
 - (i) Mobile home not used as home,
 - (ii) Boats, boat trailers and boat motors,
 - (iii) Campers,
 - (iv) Farm and business equipment,
 - (v) Equity in motor vehicles in excess of one vehicle per adult if not income-producing.

Authority G.S. 108A-54; 108A-55; 108A-58; 42 U.S.C. 703, 704 1396; 42 C.F.R. 435.121; 42 C.F.R. 435.210; 42 C.F.R. 435.711; 42 C.F.R. 435.712; 42 C.F.R. 435.734; 42 C.F.R. 435.823; 42 C.F.R. 435.840; 42 C.F.R. 435.841; 42 C.F.R. 435-845; 42 C.F.R. 445.850; 42 C.F.R. 435.851; 45 C.F.R. 233.20; 45 C.F.R. 233.51; S.L. 2002-126.

10A NCAC 21B .0311 TRANSFER OF RESOURCES

In accordance with 42 U.S.C. 1396p(c), an individual who transfers resources and receives compensation that is less than the fair market value may be ineligible to receive nursing facility ~~services.~~ services or in-home health services and supplies.

- (1) As provided for by P.L. 100-360, Section 303(g) amended by P.L. 100-485, Section 608(d)(16)(D), the provisions of 42 U.S.C. 1396p(c) shall be effective for all transfers of resources, including transfers of tenancy-in-common interest in real property, when requesting nursing facility services, for a level of care in a medical institution equivalent to that of a nursing facility services, or for home and community-based services, except transfers between spouses, occurring on or after July 1, 1988. The provisions of 42 U.S.C. 1396p(c) shall be effective for transfers between spouses, occurring on or after October 1, 1989.
- (2) As allowed under 42 U.S.C. 1396p(c)(2)(D), the provisions of 42 U.S.C. 1396p(c) for ineligibility for nursing services due to transfer of resources shall not be applied:
 - (a) To individuals who transferred resources after July 1, 1988 and before March 15, 1989 and were found eligible prior to March 15, 1989;
 - (b) When it is determined by the agency's judgment that the applicant or recipient is a victim of fraud and did not take the action with the intent of becoming eligible for Medicaid.
- (3) In accordance with 42 USC 1396p (c), an Aged, Blind, or Disabled individual (42 CFR 435.120) or Qualified Medicare Beneficiary as

PROPOSED RULES

described in (1905(p)(1) in a private living arrangement who transfers resources and receives compensation that is less than fair market value may be ineligible to receive in-home health services and supplies (1905(a)(7) and 1905(a)(24). These provisions do not apply to optional State Supplements (42 CFR 435.130). The provisions of 42 USC 1396p (c) shall be effective for all transfers occurring on or after February 1, 2003. As allowed under 42 USC 1396p (c), the provisions for ineligibility for these services due to transfer of resources shall not be applied;

- (a) To the referenced individuals in this Paragraph who transferred resources prior to February 1, 2003, and were found eligible either before or after February 1, 2003.
- (b) When it is determined by the agency's judgment that the applicant/recipient is a victim of fraud.

Authority G.S. 108A-54; 108A-58; P.L. 100-360; P.L. 100-485; 42 U.S.C. 1396p(c); 42 C.F.R. 435.121; 42 C.F.R. 435.840; 42 C.F.R. 435.841; 42 C.F.R. 435.845; S.L. 2002-126;

This Section contains the text of proposed rules. The agency must accept comments on the proposed rule for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. Statutory reference: G.S. 150B-21.

TITLE 08 – STATE BOARD OF ELECTIONS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Elections intends to adopt the rule cited as 08 NCAC 01 .0105.

Proposed Effective Date: December 1, 2003

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): Contact Don Wright, General Counsel of the State Board of Elections, PO Box 27255, Raleigh, NC 27611-7255, Phone: (919) 715-5333.*

Reason for Proposed Action: *This was a temporary rule enacted June 30, 2003 by the State Board of Elections under its authority under G.S. 150B-21.1(a5)(3). Filing for the 2003 municipal elections are set to start on July 4, 2003, and the rule was needed to protect the integrity of those elections.*

Comment Procedures: *Written comments should be sent to Don Wright, General Counsel, P.O. Box 27255, Raleigh, NC 27611-7255. Phone: (919) 715-5333, fax: (919) 715-0135, email: don.wright@ncmail.net.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$5,000,000)
- None

CHAPTER 01 - DEPARTMENTAL RULES

08 NCAC 01 .0105 MUNICIPAL FINANCING OF ELECTION CAMPAIGNS

A municipal corporation is a corporation subject to the requirements and prohibitions of G.S. 163-278.19 and does not fall within the exception set forth in G.S. 163-278.19(f).

Authority G.S. 163-278.19; 163-278.21.

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Private Protective Services Board intends to adopt the rules cited as 12 NCAC 07D .0907-.0908 and amend rules cited as 12 NCAC 07D .0202, .0204, .0401, .0702, .0802, .0903.

Proposed Effective Date: December 1, 2003

Public Hearing:

Date: August 18, 2003

Time: 2:00 p.m.

Location: PPSB Conference Room, 1631 Midtown Place, Suite 104, Raleigh, NC

Reason for Proposed Action:

12 NCAC 07D .0202, .0702, .0802, .0903 – The Board's expenses are exceeding revenues. It is the board's desire to raise fees by amendment to this Rule. The Board is completely fee-funded and has not raised its fees in over 10 years.

12 NCAC 07D .0204 – The Board is amending the licensing requirements for licensees by increasing the number of hours of previous experience needed to obtain a license. This amendment sets forth the formula for calculating the hourly requirements.

12 NCAC 07D .0401 – The Board has determined that the minimum experience required to obtain a license for a Private

PROPOSED RULES

Investigator needs to be increased. Further, experience should be varied among several disciplines. The Board has determined that requiring applicants to prove not only a greater amount of experience but also more varied experience will result in greater protection to the public health, safety and welfare.

12 NCAC 07D .0907-.0908 – *Recently several industry members have informed the Board that many Certified Firearms Trainers are not following the armed security officer training curriculum as set forth in the Board's rules and the Board's training manual. Presently, the Board has no means of monitoring on-site training as there is no notification of training being given nor any follow-up report of training being provided to the Board.*

Comment Procedures: *Comments from the public shall be directed to W. Wayne Woodard, 1631 Midtown Place, Suite 104, Raleigh, NC 27609. Comments shall be received through September 30, 2003.*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 07 – PRIVATE PROTECTIVE SERVICES

SUBCHAPTER 07D - PRIVATE PROTECTIVE SERVICES BOARD

SECTION .0200 - LICENSES: TRAINEE PERMITS

12 NCAC 07D .0202 FEES FOR LICENSES AND TRAINEE PERMITS

- (a) Application, license and trainee permit fees are as follows:
- (1) one hundred and fifty dollars (\$150.00) non-refundable application fee;
 - (2) two hundred twenty-five dollars ~~(\$200.00)~~ (\$225.00) annual fee for a new or renewal license;
 - (3) two hundred twenty-five dollars ~~(\$200.00)~~ (\$225.00) annual trainee permit fee;
 - (4) fifty dollars (\$50.00) new or renewal fee for each license in addition to the basic license;

- (5) twenty five dollars (\$25.00) duplicate license fee;
- (6) one hundred dollars (\$100.00) late renewal fee in addition to the renewal fee;
- (7) one hundred dollars (\$100.00) temporary license fee;
- (8) fifty dollars (\$50.00) branch office license fee; and
- (9) fifty dollars (\$50.00) special limited guard and patrol licensee fee.

(b) Fees may be paid in the form of a check or money order made payable to the Private Protective Services Board.

Authority G.S. 74C-9.

12 NCAC 07D .0204 DETERMINATION OF EXPERIENCE

(a) Experience requirements shall be determined in the following manner:

- (1) one year experience = 1,000 hours;
- (2) two years experience = 2,000 hours;
- (3) three years experience = 3,000 ~~hours~~ hours;
- (4) four years experience = 4,000 hours;
- (5) five years experience = 5,000 hours;
- (6) six years experience = 6,000 hours.

(b) Applicants must be prepared to make available upon request written documentation to verify experience.

(c) When applying for a license, registration or trainee permit, the Board shall not consider any experience claimed by the applicant if:

- (1) gained by contracting private protective services to another person, firm, association, or corporation while not in possession of a valid private protective services license; or
- (2) gained when employed by a company contracting private protective services to another person, firm, association, or corporation while the company is not in possession of a valid private protective services license.

The Board may consider formal classroom training which is directly related to the private protective services industry. The Board may grant one half hour of credit for each hour of formal training, but shall grant no more than 200 hours. Paragraph (c) of this Rule is to be considered in addition to any other formal training credits. No credit shall be given for formal training required pursuant to these Rules.

Authority G.S. 74C-5; 74C-8.

SECTION .0400 - PRIVATE INVESTIGATOR: COUNTERINTELLIGENCE

12 NCAC 07D .0401 EXPERIENCE REQUIREMENTS FOR A PRIVATE INVESTIGATOR LICENSE

(a) In addition to the requirements of G.S. 74C-8 and 12 NCAC 7D .0200, applicants for a private investigator license shall:

- (1) establish to the Board's satisfaction ~~three years~~ 6,000 hours of verifiable experience within the past 10 years while conducting investigations as defined in G.S. 74C-3(a)(8) with a contract

- (2) security company or with a private person, firm, association or corporation; or
- (2) establish to the Board's satisfaction ~~three years~~ 6,000 hours of verifiable experience within the past 10 years while conducting investigations as defined in G.S. 74C-3(a)(8) while serving in an investigative capacity as defined in 12 NCAC 07D .0104(9) with any Federal, U.S. Armed Forces, state, county, municipal law enforcement agency or other governmental agency.
- (3) In considering the 6,000 hours required in 12 NCAC 07D .0401(a)(1) and (2), an applicant for a private investigator's license shall show at least 1,000 hours in each of three or more of the following subject areas:
- (A) Crimes or wrongs done or threatened against the United States or any state or territory of the United States;
 - (B) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;
 - (C) The location, disposition, or recovery of lost or stolen property;
 - (D) The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties;
 - (E) Securing evidence to be used before any court, board, officer, or investigative committee; or
 - (F) Protection of individuals from serious bodily harm or death, designs or operates electronic security (camera systems, alarm systems, or electronic counter measures), assesses threat & protective vulnerability, coordinates protective detail operations, threat analysis, abduction and assassination analysis, surveillance, terrorists techniques, intelligence gathering, security advance preparation, command post operations, vehicle movement operations, airline travel operations, deportment in specific environments and social settings.

This Subparagraph shall not apply to applicants who apply for a Private Investigator's License prior to the effective date of this Rule.

- (b) The Board shall give credit toward the experience requirements set forth in Paragraph (a) of this Rule as follows:
- (1) An applicant shall receive a minimum of 400 hours of experience credit for an associate's degree. The Administrator or the Board may grant up to 100 additional hours if the applicant can demonstrate that further training or course-work related to the private protective

- services industry was received while obtaining the associate's degree.
- (2) An applicant shall receive 800 hours of experience credit for a bachelor's degree. The Administrator or the Board may grant up to 200 additional hours if the applicant can demonstrate that further training or course-work related to the private protective services industry was received while obtaining the bachelor's degree.
 - (3) An applicant shall receive 1,200 hours of experience credit for a graduate degree. The Administrator or the Board may grant an additional 300 additional hours if the applicant can demonstrate that further training or course-work related to the private protective services industry was received while obtaining the graduate degree.
- (c) Time spent teaching police science subjects at a post-secondary educational institution (such as a community college, college or university) shall toll the time for the minimum year requirements in 12 NCAC 07D .0401(a). For the purposes of this Section, "toll" means that the experience gained by an applicant immediately prior to beginning teaching shall not be discredited. "Toll" shall not mean that credit is given for teaching police science subjects.

Authority G.S. 74C-5(2).

SECTION .0700 - SECURITY GUARD REGISTRATION (UNARMED)

12 NCAC 07D .0702 FEES FOR UNARMED SECURITY GUARD REGISTRATION

(a) Registration fees are as follows:

- (1) twenty five dollars ~~(\$20.00)~~ (\$25.00) non-refundable initial registration fee;
- (2) twenty five dollars ~~(\$20.00)~~ (\$25.00) annual renewal, or reissue fee; and
- (3) ten dollars (\$10.00) transfer fee.

(b) Fees shall be paid in the form of a check or money order made payable to the Private Protective Services Board.

Authority G.S. 74C-9.

SECTION .0800 - ARMED SECURITY GUARD FIREARM REGISTRATION PERMIT

12 NCAC 07D .0802 FEES FOR ARMED SECURITY GUARD FIREARM REGISTRATION PERMIT

(a) Registration fees are as follows:

- (1) thirty dollars (\$30.00) non-refundable initial registration fee; ~~and~~
- (2) thirty dollars (\$30.00) annual renewal, or reissue ~~fee-~~ fee; and
- (3) ten dollar (\$10.00) application fee.

(b) Fees shall be paid in the form of a check or money order made payable to the Private Protective Services Board.

Authority G.S. 74C-9.

SECTION .0900 - FIREARMS TRAINER CERTIFICATE

12 NCAC 07D .0903 FEES FOR FIREARMS TRAINER CERTIFICATE

- (a) Firearms trainer fees are as follows:
(1) twenty-five forty dollar (\$25.00) (\$40.00) non-refundable initial application fee; and
(2) twenty-five forty dollar (\$25.00) (\$40.00) biennial fee for a new or renewal firearms trainer certificate.
(b) Fees shall be paid in the form of a check or money order made payable to the Private Protective Services Board.

Authority G.S. 74C-9.

12 NCAC 07D .0907 PRE-DELIVERY REPORT FOR FIREARMS TRAINING COURSES

Firearms Trainers shall submit to the Board, a pre-delivery report for all firearms training courses required by 12 NCAC 07D .0807 not less than five days prior to commencing any firearms training course. This report shall be submitted on a Board approved form and shall contain the following information:

- (1) Certified Firearms Trainer's name, address, and contact telephone number;
(2) Date, time, and location of classroom training;
(3) Date, time, and location of range qualification;
(4) Classroom and range telephone number(s);
(5) Number of students anticipated; and
(6) Certified Firearms Trainer's signature.

Authority G.S. 74C-5; 74C-13.

12 NCAC 07D .0908 POST-DELIVERY REPORT FOR FIREARMS TRAINING COURSES

Firearms Trainers shall submit to the Board a post-delivery report for all firearms training courses required by 12 NCAC 07D .0807 not less than 20 days after completion of the firearms training. The report shall be submitted on a Board approved form and shall contain the following information:

- (1) Certified Firearms Trainer's name;
(2) Date, time, and location of classroom training;
(3) Date, time, and location of range qualification;
(4) Full name of the students who completed the firearms training course;
(5) Classroom exam score for each student completing the firearms training course;
(6) Range score for each student completing the firearms training course; and
(7) Certified Firearms Trainer's signature.

Authority G.S. 74C-5; 74C-13.

TITLE 13 – DEPARTMENT OF LABOR

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Labor Mine & Quarry Division intends amend the rule cited as 13 NCAC 06 .0309.

Proposed Effective Date: December 1, 2003

Public Hearing:

Date: August 26, 2003

Time: 2:00 p.m.

Location: 4 West Edenton Street, Room 249, Raleigh, NC

Reason for Proposed Action: Any miner or representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of the provision of the Mine, Safety and Health Act may, within 30 days after such violation occurs, apply to the Commissioner of Labor for review of the alleged discharge or discrimination. The Department of Labor proposes to amend the time period from 30 to 60 days so that the rule reflects the amount of time provided for appeal under The Retaliatory Employment Discrimination Act, (REDA).

Comment Procedures: Written comments should be submitted to Barbara A. Jackson, General Counsel, NC Department of Labor, 4 West Edenton Street, Raleigh, NC 27601. Phone: (919) 733-0368, fax: (919) 733-4235, email: bjackson@mail.dol.state.nc.us. Comments should be submitted by September 30, 2003.

Procedure for Subjecting a Proposed Rule to Legislative Review:

Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 06 - MINE AND QUARRY

SECTION .0300 - PROCEDURES

13 NCAC 06 .0309 DISCRIMINATION AGAINST MINERS

Any miner or representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of the provisions of the act may, within 30 60 days after such violation occurs, apply to the commissioner for a review of such alleged discharge or discrimination. Such application shall be in writing and shall contain the respondent's name, address, title, when employed, the company name, the mine name, and the mine address. The application also shall

specify the date the alleged discharge or discrimination took place and shall set forth in specific detail the reason why the miner or representative of miners believes he has been discharged or discriminated against in violation of the provisions of the act.

Authority G.S. 74-24.15.

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Labor intends to amend the rule cited as 13 NCAC 07A .0301.

Proposed Effective Date: December 1, 2003

Public Hearing:

Date: August 26, 2003

Time: 1:00 p.m.

Location: 4 West Edenton Street, Room 249, Raleigh, NC

Reason for Proposed Action: The Department of Labor proposes to eliminate 13 NCAC 07A .0301 (12), Parts (A), (B), and (C) because they duplicate 29 C.F.R. 1908 regulations as revised effective October 26, 2000.

Comment Procedures: Written comments should be submitted to Barbara A. Jackson, General Counsel, NC Department of Labor, 4 West Edenton Street, Raleigh, NC 27601. Phone: (919) 733-0368, fax: (919) 733-4235, email: bjackson@mail.dol.state.nc.us. Comments should be submitted through September 30, 2003.

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 07 - OSHA

SUBCHAPTER 07A - GENERAL RULES AND OPERATIONAL PROCEDURES

SECTION .0300 - PROCEDURES

13 NCAC 07A .0301 INCORPORATION BY REFERENCE

(a) The provisions for Occupational Safety and Health Act Operational Procedures - Inspections, Citations and Proposed Penalties - contained in 29 CFR 1903; Recording and Reporting Occupational Injuries and Illnesses - contained in 29 CFR 1904; Consultative Agreements - contained in 29 CFR 1908; and Rules Concerning OSHA Access to Employee Medical Records - contained in 29 CFR 1913.10, have been incorporated by reference in accordance with G.S. 150B-21.6 except that where applicable:

- (1) All references to the Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1590 et seq., 29 U.S.C. 651 et seq) shall mean the Occupational Safety and Health Act of North Carolina, G.S. 95, Article 16;
(2) All references to the Occupational Safety and Health Review Commission shall mean the Safety and Health Review Board as established in G.S. 95-135;
(3) All references to Area Offices of the Occupational Safety and Health Administration, U.S. Department of Labor, shall mean the North Carolina Department of Labor, Division of Occupational Safety and Health (or OSHA), the name used to denote the office of occupational safety and health;
(4) All references to the Secretary or Assistant Secretary shall mean the Commissioner of the North Carolina Department of Labor or his authorized representative;
(5) All references to Area Director, Regional Administrator, or Assistant Regional Director shall mean the Director of the Division of Occupational Safety and Health (North Carolina Department of Labor) or his authorized representative;
(6) All references to Regional Solicitor or Solicitor of Labor shall mean the Attorney General, Labor Division, North Carolina Department of Justice;
(7) All references to Compliance Officers shall mean State compliance safety and health officers;
(8) All references to the Federal Rules of Civil Procedure shall mean the North Carolina Rules of Civil Procedure;
(9) Within 29 CFR 1903.14, "Citations; notices of de minimis violations", any reference to a notice of de minimis violations is deleted as North Carolina does not have a procedure for issuance of a notice with respect to de minimis violations which have no direct or immediate relationship to safety or health;
(10) 29 CFR 1903.14a(c)(1) which requires the posting of a petition for modification for a period of 10 working days shall be for a period of 15 working days, and 29 CFR 1903.14a(c)(2) which refers to the failure to

file an objection within 10 working days of the date of posting shall be 15 working days of the posting;

(11) 29 CFR 1903.22, "Definitions", is not incorporated;

(12) 29 CFR 1908 shall be applicable to private sector consultations, and shall be used as guidance for consultations to state and local governments in North Carolina under the State Plan; Plan.

(A) ~~All references to OSHA enforcement authority shall mean State OSHA compliance;~~

(B) ~~All references in 29 CFR 1908 which allow employers exemption from general schedule OSHA enforcement inspections shall mean programmed safety inspections; employers shall be exempt from programmed safety inspections for one year from the satisfactory completion of abatement of all hazards identified by the Consultant if the required elements of an effective safety and health program are in place. Applicable to 29 CFR 1908.5(a)(3) and 29 CFR 1908.7(b)(4);~~

(C) ~~In 29 CFR 1908.7(b)(1) the second sentence shall read: "An on site consultative visit shall be considered in progress in relation to the working conditions, hazards, or situations covered by the request from the beginning of the opening conference through the end of the closing conference and completion of abatement for hazards identified, except that for periods which exceed 30 days from the initiation of the opening conference, the Director may determine that the inspection will proceed."~~

(b) The Code of Federal Regulations incorporated by reference in this Subchapter shall automatically include any subsequent amendments thereto as allowed by G.S. 150B-21.6.

Authority G.S. 95-133; 150B-21.6.

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Labor intends to amend the rule cited as 13 NCAC 12 .0408.

Proposed Effective Date: December 1, 2003

Public Hearing:

Date: August 26, 2003

Time: 4:00 p.m.

Location: 4 West Edenton Street, Room 249, Raleigh, NC

Reason for Proposed Action: On December 5, 2001, the NC General Assembly ratified House Bill 948 amending G.S. 95-25.5 to allow NC Youths to be employed by establishments holding ABC Permits provided certain conditions are met. Governor Easley signed House Bill 948 on January 4, 2002 (S.L. 2001-515). This action proposes to make permanent those amendments.

Comment Procedures: Written comments should be submitted to Barbara A. Jackson, General Counsel, NC Department of Labor, 4 West Edenton Street, Raleigh, NC 27601. Phone: (919) 733-0368, fax: (919) 733-4235, email: bjackson@mail.dol.state.nc.us. Comments should be submitted by September 30, 2003.

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 12 - WAGE AND HOUR

SECTION .0400 - YOUTH EMPLOYMENT

13 NCAC 12 .0408 DEFINITIONS RELATIVE TO ABC RESTRICTIONS

(a) For purposes of G.S. 95-25.5(j) and the Rules in this Chapter, the following terms are defined:

- (1) Prepare: To make ready; or to put together by combining various elements or ingredients.
- (2) Serve: To supply; or to place before the customer.
- (3) Dispense: To pour; or to draw from a tap.
- (4) Sell: To offer; to accept the order for; to exchange or deliver for money or equivalent; or to handle payment.
- (5) Premises: The land, building, or combination of these as described in the permit issued for the sale or consumption of alcoholic beverages.
- (6) ABC Permit for On-Premises Sale or Consumption: Permit which allows the

PROPOSED RULES

consumption of alcoholic beverages on the premises where the sale occurred.

Authority G.S. 95-25.5; 95-25.19.

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Labor intends to amend the rule cited as 13 NCAC 15 .0704.

Proposed Effective Date: December 1, 2003

Public Hearing:

Date: August 26, 2003

Time: 3:00 p.m.

Location: Room 249, 4 West Edenton St., Raleigh, NC

Reason for Proposed Action: The North Carolina Department of Labor proposes to amend this Rule in order to clarify the amount of the amusement device inspection fee for inspections conducted after North Carolina Department of Labor business hours from \$250 per amusement device to \$250 per inspection plus the per device inspection fee as delineated in 13 NCAC 15 .0703.

Comment Procedures: Comments from the public shall be directed to Barbara A. Jackson, General Counsel, North Carolina Department of Labor, 4 West Edenton St., Raleigh, NC 27601, phone (919) 733-0368, fax (919) 733-4235, and email bjackson@mail.dol.state.nc.us. Comments shall be received through September 30, 2003.

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 15 - ELEVATOR AND AMUSEMENT DEVICE DIVISION

SECTION .0700 - FEES

13 NCAC 15 .0704 AMUSEMENT DEVICE INSPECTION FEE SCHEDULE

(a) In the event that an inspection is scheduled and the amusement device operator or owner fails to have all amusement devices scheduled for inspection ready for inspection, any follow up inspection visits requested by the operator or owner shall be charged at two hundred fifty dollars (\$250.00) per amusement device, notwithstanding the provisions of 13 NCAC 15 .0703.

(b) All inspections conducted outside normal business hours for the North Carolina Department of Labor (7:00 a.m. to 7:00 p.m. Monday through Friday, exclusive of State government holidays) shall be charged at the rate of two hundred fifty dollars (\$250.00) per amusement device, inspection, plus the amusement device inspection fee, notwithstanding the provisions of 13 NCAC 15 .0703.

Authority G.S. 95-107; 95-111.4(19).

TITLE 15A - DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rules cited as 15A NCAC 02D .1109; 02Q .0526.

Proposed Effective Date: December 1, 2003

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Requests for a public hearing must be made in writing. Written requests for a public hearing should be postmarked no later than August 16, 2003 and addressed to Mr. Thomas Allen, Division of Air Quality, 1641 Mail Service Center, Raleigh, NC 27699-1641, phone (919) 733-1489, fax (919) 715-7476, and email thom.allen@ncmail.net.

Reason for Proposed Action: To receive comments on revised timing of permit application submittal deadlines incorporated to make the rules consistent with recent changes to the underlying federal requirements the rules implement.

Comment Procedures: Comments from the public shall be directed to Thomas Allen, 1641 Mail Service Center, Raleigh, NC 27699-1641, phone (919) 733-1489, fax (919) 715-7476, and email thom.allen@ncmail.net. Comments shall be received through September 30, 2003.

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile

transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02D - AIR POLLUTION CONTROL REQUIREMENTS

SECTION .1100 - CONTROL OF TOXIC AIR POLLUTANTS

15A NCAC 02D .1109 112(J) CASE-BY-CASE

MAXIMUM ACHIEVABLE CONTROL TECHNOLOGY

(a) Applicability. This Rule applies only to sources of hazardous air pollutants required to have a permit under 15A NCAC 02Q .0500 and as described in 40 CFR 63.50. This Rule does not apply to research or laboratory activities as defined in Paragraph (b) of this Rule.

(b) Effective. This Rule shall apply only after it and 15A NCAC 2Q .0500 have been approved by the EPA.

(c)(b) Definitions. For the purposes of this Rule, the definitions in 40 CFR 63.2, 63.51, 15A NCAC 02Q .0526, and the following definitions apply:

- (1) "Affected source" means the collection of equipment, activities, or both within a single contiguous area and under common control that is in a Section 112(c) source category or subcategory for which the Administrator has failed to promulgate an emission standard by the Section 112(j) deadline, and that is addressed by an applicable MACT emission limitation established pursuant to 40 CFR Part 63 Subpart B;
- (2) "Control technology" means measures, processes, methods, systems, or techniques to limit the emission of hazardous air pollutants including measures that:
 - (A) reduce the quantity, or eliminate emissions, of such pollutants through process changes, substitution of materials, or other modifications;
 - (B) enclose systems or processes to eliminate emissions;
 - (C) collect, capture, or treat such pollutants when released from a process, stack, storage, or fugitive emission point;
 - (D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in 42 USC 7412(h); or
 - (E) are a combination of Parts (A) through (D) of this definition.

- (2) "Emission point" means any part or activity of a facility that emits or has the potential to emit, under current operation design, any hazardous air pollutants.
- (3) "Emission unit" means any building, structure, facility, or installation. This could include an emission point or collection of emission points, within a major source, which the Director determines is the appropriate entity for making a MACT determination under Section 112 (j) of the federal Clean Air Act, i.e., any of the following:
 - (A) an emission point that can be individually controlled;
 - (B) the smallest grouping of emission points, that when collected together can be commonly controlled by a single control device or work practice;
 - (C) any grouping of emission points, that, when collected together can be commonly controlled by a single control device or work practice;
 - (D) a grouping of emission points that are functionally related. Equipment is functionally related if the operation or action for which the equipment was specifically designed could not occur without being connected with or without relying on the operation of another piece of equipment.
 - (E) the entire geographical entity comprising a major source in a source category subject to a MACT determination under Section 112(j) of the federal Clean Air Act.
- (4)(3) "EPA" means the United States Environmental Protection Agency or the Administrator of U.S. Environmental Protection Agency.
- (5) "Existing facility" means a facility for which construction is commenced before EPOA proposed a standard, applicable to the facility, under Section 112(d) or (h) of the federal Clean Air Act, or if no proposal was published, then on or before the Section 112(j) deadline.
- (6) "Existing source" means a source, construction or reconstruction of which is commenced before EPA proposed a standard, applicable to the source, under Section 112(d) or (h) of the federal Clean Air Act, or if no proposal was published, then on or before the Section 112(j) deadline.
- (7)(4) "Hazardous air pollutant" means any pollutant listed under Section 112(b) of the federal Clean Air Act.
- (8)(5) "MACT" means maximum achievable control technology.
- (9)(6) "Maximum achievable control technology" means:
 - (A) for existing sources,

- (i) a MACT standard that EPA has proposed or promulgated for a particular category of facility or source,
 - (ii) the average emission limitation achieved by the best performing 12 percent of the existing facilities or sources for which EPA has emissions information if the particular category of source contains 30 or more sources, or
 - (iii) the average emission limitation achieved by the best performing five facilities or sources for which EPA has emissions information if the particular category of source contains fewer than 30 sources, or
- (B) for new sources, the maximum degree of reduction in emissions that is deemed achievable but not less stringent than the emission control that is achieved in practice by the best controlled similar source.
- (10)(7) "MACT floor" means:
- (A) for existing sources:
 - (i) the average emission limitation achieved by the best performing 12 percent of the existing sources ~~in the United States~~ (for which EPA has emissions information) excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined in Section 171 of the federal Clean Air Act) applicable to the source category or subcategory for categories and subcategories with 30 or more sources, or
 - (ii) the average emission limitation achieved by the best performing five sources ~~in the United States~~ (for which EPA has emissions or ~~reasonably could reasonably~~ obtain emissions information), ~~emission information~~ in the category or ~~subcategory~~ subcategory, ~~of sources for categories or subcategories~~ with fewer than 30 sources;
- (B) for new sources, the emission limitation achieved in practice by the best controlled similar source.
- (8) "New affected source" means the collection of equipment, activities, or both, that constructed after the issuance of a Section 112(j) permit for the source pursuant to 40 CFR 63.52, is subject to the applicable MACT emission limitation for new sources. Each permit shall define the term "new affected source," which will be the same as the "affected source" unless a different collection is warranted based on consideration of factors including:
- (A) Emission reduction impacts of controlling individual sources versus groups of sources;
 - (B) Cost effectiveness of controlling individual equipment;
 - (C) Flexibility to accommodate common control strategies;
 - (D) Cost/benefits of emissions averaging;
 - (E) Incentives for pollution prevention;
 - (F) Feasibility and cost of controlling processes that share common equipment (e.g., product recovery devices);
 - (G) Feasibility and cost of monitoring; and
 - (H) Other relevant factors.
- (11) ~~"New emission unit" means an emission unit for which construction or reconstruction is commenced after the section 112(j) of the federal Clean Air Act deadline, or after proposal of a relevant standard under section 112(d) or section 112(h) of the federal Clean Air Act (as amended in 1990), whichever comes first, except that, as provided by 40 CFR 63.52(f)(1), an emission unit, at a major source, for which construction or reconstruction is commenced before the date upon which the area source becomes a major source, shall not be considered a new emission unit if, after the addition of such emission unit, the source is still an area source.~~
- (12)(9) "New facility" means a facility for which construction is commenced after the Section 112(j) deadline, or after proposal of a relevant standard under Section 112(d) or (h) of the federal Clean Air Act, whichever comes first.
- (13) ~~"New source" means a source for which construction or reconstruction is commenced after the Section 112(j) deadline, or after proposal of a relevant standard under Section~~

112(d) or (h) of the federal Clean Air Act, whichever comes first.

(10) "Research or laboratory activities" means activities whose primary purpose is to conduct research and development into new processes and products; where such activities are operated under the close supervision of technically trained personnel and are not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner; and where the source is not in a source category specifically addressing research or laboratory activities, that is listed pursuant to Section 112(c)(7) of the Clean Air Act.

(14)(11) "Section 112(j) deadline" means the date occurring 18 months after the scheduled promulgation date for which a relevant standard is scheduled to be promulgated under 40 CFR Part 63, except that for all major sources listed in the source category schedule for which a relevant standard is scheduled to be promulgated by November 15, 1994, the Section 112(j) deadline is November 15, 1996, and for all major sources listed in the source category schedule for which a relevant standard is scheduled to be promulgated by November 15, 1997, the Section 112(j) deadline is December 15, 1999, under Section 112(e)(1) and (3) of the federal Clean Air Act. The applicable date for categories of sources is contained in the source category schedule for standards.

(15)(12) "Similar source" means a source that has comparable emissions and is structurally similar in design and capacity to other sources such that the source could be controlled using the same control technology, that equipment or collection of equipment that, by virtue of its structure, operability, type of emissions and volume and concentration of emissions, is substantially equivalent to the new affected source and employs control technology for control of emissions of hazardous air pollutants that is practical for use on the new affected source.

(16) "United States" means the United States, their possessions and territories.

(d)(c) Missed promulgation dates: 112(j). If EPA fails to promulgate a standard for a category of source under Section 112 of the federal Clean Air Act by the date established pursuant to Sections 112(e)(1) or (3) of the federal Clean Air Act, the owner or operator of any source in such category shall submit, within 18 months after such date, a permit application, in accordance with the procedures in 15A NCAC 02Q .0526, to the Director and to EPA to apply MACT to such sources. Sources subject to this Paragraph shall be in compliance with this Rule within three years from the date that the permit is issued.

(e)(d) New facilities. The owner or operator of any new facility that is a major source of hazardous air pollutants (HAP) that is subject to this Rule shall apply MACT in accordance with the

provisions of Rule .1112 of this Section, 15A NCAC 02Q .0528, and 02Q .0526(e)(2), to the new facility before beginning construction and operation.

(f)(e) Case-by-case MACT determination. The owner or operator of the source-Director shall determine MACT according to 40 CFR 63.55(a).

(g)(f) Monitoring and recordkeeping. The owner or operator of a source subject to this Rule shall install, operate, and maintain monitoring capable of detecting deviations from each applicable emission limitation or other standards with sufficient reliability and timeliness to determine continuous compliance over the applicable reporting period. Such monitoring data may be used as a basis for enforcing emissions limitations established under this Rule.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5), (10).

SUBCHAPTER 02Q - AIR QUALITY PERMIT PROCEDURES

SECTION .0500 - TITLE V PROCEDURES

15A NCAC 02Q .0526 112(J) CASE-BY-CASE MACT PROCEDURES

(a) The owner or operator of a source required to apply maximum achievable control technology (MACT) under 15A NCAC 02D .1109 shall follow the permit procedures set out in this Rule.

(b) For the purposes of this Rule, the definitions in 15A NCAC 02D .1109, 40 CFR 63.51, 40 CFR 63.2, and the following definitions apply:

- (1) "Equivalent emission limitation" means an emission limitation, established under Section 112(j) of the federal Clean Air Act, which is at least as stringent as equivalent to the MACT standard that EPA would have promulgated under Section 112(d) or (h) of the federal Clean Air Act.
- (2) "Source category schedule for standards" means the schedule for promulgating MACT standards issued pursuant to Section 112(e) of the federal Clean Air Act.
- (3) "Title V permit" means a permit issued under this Section.

(c) Except as provided for in Paragraph (d) or (e) of this Rule, the owner or operator of a source required to apply MACT under 15A NCAC 02D .1109 shall submit an application for a permit or for a significant permit revision under this Section, whichever is applicable.

(d) Approval process for new and existing affected sources.

- (1) Sources subject to Section 112(j) as of the Section 112(j) deadline. The requirements of Subparagraphs (d)(1)(A) and (B) of this Paragraph shall apply to major sources that include, as of the Section 112(j) deadline, one or more sources in a category or subcategory for which the EPA has failed to promulgate an emission standard under 40 CFR Part 63 on or before an applicable Section 112(j) deadline. Existing source MACT requirements (including relevant compliance deadlines), as

specified in a Title V permit issued to the facility pursuant to the requirements of 40 CFR Part 63, Subpart B, shall apply to such sources.

(A) The owner or operator shall submit an application for a permit or for a revision to an existing Title V permit issued or a pending Title V permit meeting the requirements of Subparagraph (m)(1) of this Rule by the Section 112(j) deadline if the owner or operator can reasonably determine that one or more sources at the facility belong in a category or subcategory subject to Section 112(j) of the federal Clean Air Act.

(B) The owner or operator of a source that does not submit an application under Subparagraph (d)(1)(A) of this Rule and that is notified in writing by the Division that one or more sources at the facility belong to a category or subcategory subject to Section 112(j) of the federal Clean Air Act shall submit an application for a Title V permit or for a revision to an existing Title V permit meeting the requirements of Paragraph (m)(1) of this Rule within 30 days after being notified in writing by the Division. The Division is not required to make such notification.

(C) The requirements in Parts (i) and (ii) of this Subparagraph shall apply when the owner or operator has obtained a Title V permit that incorporates a Section 112(g) case-by-case MACT determination by the Division under 15A NCAC 02D .1112, but has not submitted an application for a Title V permit revision that addresses the emission limitation requirements of Section 112(j) of the federal Clean Air Act.

(i) When the owner or operator has a Title V permit that incorporates a Section 112(g) case-by-case MACT determination under 15A NCAC 02D .1112, the owner or operator shall submit an application meeting the requirements of Paragraph (m)(1) of this Rule for a Title V permit revision within 30 days of the Section 112(j) deadline or within 30 days of being notified that in writing by the Division that one or more sources at the major

facility belong in such category or subcategory. The Division shall use the procedures in 40 CFR 63.52(e) to determine whether the emission limitations adopted pursuant to the prior 112(g) case-by-case MACT determination are substantially as effective as the emission limitations which Division would otherwise adopt pursuant to Section 112(j) of the federal Clean Air Act for the source in question. If the Division determines the previously adopted 112(g) emission limitations are substantially as effective, then the Division shall retain the existing limitations in the permit to effectuate Section 112(j) of the federal Clean Air Act. If the Division does not retain the previously adopted 112(g) emission limitations, the MACT requirements of this Rule are satisfied upon issuance of a revised Title V permit incorporating any additional Section 112 (j) requirements.

(ii) When the owner or operator that has submitted a Title V permit application that incorporates a Section 112(g) case-by-case MACT determination by the Division under 15A NCAC 02D .1112, but has not received the permit incorporating the Section 112(g) requirements, the owner or operator shall continue to pursue a Title V permit that addresses the requirements of Section 112(g) of the federal Clean Air Act. The owner or operator shall submit a permit application meeting the requirements of Paragraph (m)(1) of this Rule within 30 days of issuance of that Title V permit. The Division shall use the procedures in 40 CFR 63.52(e) to determine whether the emissions limitations adopted pursuant

to the prior 112(g) case-by-case MACT determination are substantially as effective as the emission limitations that the Division would otherwise adopt pursuant to Section 112(j) of the federal Clean Air Act for the source in question. If the Division determines the previously adopted 112(g) emission limitations are substantially as effective, then the Director shall retain the existing emission limitations to effectuate Section 112(j) of the federal Clean Air Act and revise the permit accordingly. If the Division does not retain the previously adopted 112(g) emission limitations, the MACT requirements of this Rule are satisfied upon issuance of a revised Title V permit incorporating any additional Section 112 (j) requirements.

(e) Sources that become subject to Section 112(j) of the federal Clean Air Act after the Section 112(j) deadline and that do not have a Title V permit addressing Section 112(j) requirements. The requirements of this Paragraph apply to sources that do not meet the criteria in Paragraph (d) of this Rule on the Section 112(j) deadline and are therefore not subject to Section 112(j) of the federal Clean Air Act on that date, but where events occur subsequent to the Section 112 (j) deadline that would bring the source under the requirements of this Rule, and the source does not have a Title V permit that addresses the requirements of Section 112(j) of the federal Clean Air Act.

(1) When one or more sources in a category or subcategory subject to the requirements of this rule are installed at a major source, or result in the source becoming a major source due to the installation, and the installation does not invoke Section 112(g) requirements in 15A NCAC 02D .1112, the owner or operator shall submit an application meeting the requirements of Paragraph (m)(1) of this Rule within 30 days of startup of the source. Existing source MACT requirements (including relevant compliance deadlines), as specified in a Title V permit issued pursuant to the requirements of this Rule, shall apply to such sources. The Division shall use the procedures in 40 CFR 63.52(e) to determine whether the emissions limitations adopted pursuant to the prior 112(g) case-by-case MACT determination are substantially as effective as the emission limitations which the Division would otherwise adopt pursuant to Section 112(j) of the federal Clean Air Act for

the source in question. If the Division determines the previously adopted 112(g) emission limitations are substantially as effective, then the Division shall retain the existing emission limitations to effectuate Section 112(j) of the federal Clean Air Act and revise the permit accordingly. If the Division does not retain the previously adopted 112(g) emission limitations, the MACT requirements of this Rule are satisfied upon issuance of a revised Title V permit incorporating any additional Section 112 (j) requirements.

(2) When one or more sources in a category or subcategory subject to 112(j) requirements are installed at a major source or result in the source becoming a major source due to the installation, and the installation requires 112(g) emission limitations to be established and permitted under 15A NCAC 02Q .0528, and the owner or operator has not submitted an application for a Title V permit revision that addresses the emission limitation requirements of Section 112(j) of the federal Clean Air Act, the owner or operator shall apply for and obtain a Title V permit that addresses the emission limitation requirements of Section 112(g) of the federal Clean Air Act. Within 30 days of issuance of that Title V permit, the owner or operator shall submit an application meeting the requirements of Paragraph (m)(1) of this Rule for a revision to the existing Title V permit. The Division shall determine whether the emissions limitations adopted pursuant to the prior 112(g) case-by-case MACT determination are substantially as effective as the emission limitations which the Division would otherwise adopt pursuant to Section 112(j) of the federal Clean Air Act for the source in question. If the Division determines the previously adopted 112(g) emission limitations are substantially as effective, then the Division shall retain the existing emission limitations to effectuate Section 112(j) of the federal Clean Air Act and revise the permit accordingly. If the Division does not retain the previously adopted 112(g) emission limitations, the permit shall be revised to incorporate any additional Section 112(j) requirements.

(3) The owner or operator of an area source that, due to a relaxation in any federally enforceable emission limitation (such as a restriction on hours of operation), increases its potential to emit hazardous air pollutants such that the source becomes a major source that is subject to this Rule, shall submit an application meeting the requirements of Paragraph (m)(1) of this Rule within 30 days after the date that such source becomes a major source. The Director shall use the procedures in Paragraph (n) of this Rule in reviewing the application.

The existing source MACT requirements (including relevant compliance deadlines), shall apply to such sources.

- (4) If EPA establishes a lesser quantity emission rate under Section 112(a)(1) of the federal Clean Air Act that results in an area source becoming a major source that is subject to this Rule, then the owner or operator of such a major source shall submit an application meeting the requirements of Paragraph (m)(1) of this Rule on or before the date six months after the date that such source becomes a major source. Existing source MACT requirements (including relevant compliance deadlines), as specified in a Title V permit issued pursuant to the requirements of this Rule, shall apply to such sources.

(f) Sources that have a Title V permit addressing Section 112(j) requirements. The requirements of this Paragraph apply to major sources that include one or more sources in a category or subcategory for which EPA fails to promulgate an emission standard on or before the Section 112(j) deadline, and the owner or operator has a permit meeting the Section 112(j) requirements, and where changes occur at the major source to equipment, activities, or both, subsequent to the Section 112(j) deadline.

- (1) If the Title V permit already provides the appropriate requirements that address the events that occur under this Paragraph subsequent to the Section 112(j) deadline, then the source shall comply with the applicable new source MACT or existing source MACT requirements as specified in the permit, and the Section 112(j) requirements are thus satisfied.
- (2) If the Title V permit does not contain the appropriate requirements that address the events that occur under this Paragraph subsequent to the Section 112(j) deadline, then the owner operator shall submit an application for a revision to the existing Title V permit that meets the requirements of Paragraph (m)(1) of this Rule within 30 days of beginning construction. Existing source MACT requirements (including relevant compliance deadlines), as specified in a Title V permit issued pursuant to the requirements of this Rule shall apply to such sources.

(g) Requests for applicability determination. An owner or operator who is unsure of whether one or more sources at a major source belong in a category or subcategory for which EPA has failed to promulgate an emission standard under this 40 CFR Part 63 may, on or before an applicable Section 112(j) deadline, request an applicability determination from the Division by submitting an application meeting the requirements of Paragraph (m)(1) of this Rule by the applicable deadlines specified in Paragraphs (d), (e), or (f) of this Rule.

(h) An owner or operator who submits a Part 1 MACT application meeting the requirements of Paragraph (m)(1) of this Rule shall submit a Part 2 MACT application meeting the requirements of Paragraph (m)(2) of this Rule no later than the

applicable date specified in 40 CFR 63 Subpart B Table 1. The submission date specified in 40 CFR 63 Subpart B Table 1 for Miscellaneous Organic Chemical Manufacturing shall apply to sources in each of the source categories listed in 40 CFR 63 Subpart B Table 2. When an owner or operator is required by 15A NCAC 02D .1109 and this Rule to submit an application meeting the requirements of Paragraph (m)(1) of this Rule by a date which is after the date for a Part 2 MACT application for sources in the category or subcategory in question established by 40 CFR 63 Subpart B Table 1, the owner or operator shall submit a Part 2 MACT application meeting the requirements of Paragraph (m)(2) of this Rule within 60 additional days after the applicable deadline for submission of the Part 1 MACT application. The Part 2 applications shall be reviewed by the Division according to the procedures established in 40 CFR 63.55.

- (1) Any owner or operator who submitted a request for an applicability determination on or before May 15, 2002, which remains pending as of May 30, 2003, and who still wishes to obtain such a determination must resubmit that request by July 29, 2003 or by the date which is 60 days after the Administrator publishes in the Federal Register a proposed standard under Section 112(d) or 112(h) of the Clean Air Act for the category or subcategory in question, whichever is later. Such a resubmitted request must be supplemented to discuss the relation between the source(s) in question and the applicability provision in the proposed standard for the category or subcategory in question, and to explain why there may still be uncertainties that require a determination of applicability. The Director shall take action on each supplemented and resubmitted request within an additional 60 days after the applicable deadline for the resubmitted request. If more than three years remain on the current Title V permit, the owner or operator shall submit an application for a Title V permit revision to make any conforming changes in the permit required to adopt the existing emission limitations as the Section 112(j) MACT emission limitations. If less than three years remain on the current Title V permit, any required conforming changes shall be made when the permit is renewed. If the applicability determination is positive, the owner or operator shall submit a Part 2 MACT application meeting the requirements of Paragraph (m)(2) of this Rule by the date specified for the category or subcategory in question in 40 CFR 63 Subpart B Table 1. If the applicability determination is negative, no further action by the owner or operator is necessary.
- (2) An owner or operator who has submitted an application meeting the requirements of Paragraph (m)(1) of this Rule may request a determination of whether emission limitations adopted pursuant to a prior case-by-case

MACT determination under Section 112(g) that apply to one or more sources in a relevant category or subcategory are substantially as effective as the emission limitations which the Division would otherwise adopt pursuant to this Rule for the source in question. Such a request must be submitted by the date for the category or subcategory in question specified in 40 CFR 63 Subpart B Table 1. Each request for a determination under this Paragraph shall be construed as a complete application for an equivalent emission limitation under this Rule. If the Director determines that the emission limitations in the prior case-by-case MACT determination are substantially as effective as the emission limitations the Director would otherwise adopt under this Rule, then the Director must adopt the existing emission limitations in the permit as the emission limitations to effectuate Section 112(j) for the source in question. If the Director determines that the emission limitations in the prior case-by-case MACT determination under Section 112(g) are not substantially as effective as the emission limitations which the Director would otherwise adopt for the source in question under this Rule, the Director must make a new MACT determination and adopt a Title V permit incorporating an appropriate equivalent emission limitation under this Rule. The Division shall use the procedures in 40 CFR 63.52(e) to determine whether the emission limitations adopted pursuant to the prior 112(g) case-by-case MACT determination are substantially as effective as the emission limitations which Division would otherwise adopt pursuant to Section 112(j) of the federal Clean Air Act for the source in question.

~~(d) The owner or operator of an existing source required to apply MACT under 15A NCAC 2D .1109 that already has received a permit under this Section requiring compliance with a limit that would meet the requirements of 15A NCAC 2D .1109 shall submit an application for an administrative permit amendment.~~

~~(e) The owner or operator of a new source required to apply MACT under 15A NCAC 2D .1109 that currently complies with a federally enforceable alternative emission limitation, or has received a permit under this Section that already contains emission limitations substantively meeting the requirements of 15A NCAC 2D .1109, shall submit an application for an administrative permit amendment confirming compliance with the requirements of 15A NCAC 2D .1109 within 30 days after the date construction or reconstruction is commenced.~~

~~(f)(i) If the Director disapproves a permit application submitted under this Rule or determines that the application is incomplete, the owner or operator shall revise and resubmit the application to meet the Director's objections not later than six months after first receiving notification that the application has been disapproved or is incomplete.~~

~~(g)(j) If the owner or operator of a source subject to this Rule has submitted a timely and complete application for a permit,~~

significant permit revision, or administrative amendment required by this Rule, any failure to have this permit will not be a violation of the requirements of this Rule unless the delay in final action is due to the failure of the applicant to submit, in a timely manner, information required or requested to process the application.

~~(h)(k) The permit shall contain:~~ contain the items specified in 40 CFR 63.52 including:

- ~~(1)~~ (1) specification of the affected source and the new affected source
- ~~(4)(2)~~ (2) an equivalent—emission limitation (or limitations) or emission standard equivalent to existing source MACT and an emission limitation (or limitations) equivalent to new source MACT to for control the of emissions of hazardous air pollutant pollutants for that category or subcategory determined by the Director according to 40 CFR 63.55(a) on a case-by-case basis;
- ~~(2)(3)~~ (3) any emission limits, production limits, operational limits or other terms and conditions necessary to ensure federal practicable enforceability of the MACT emission limitation;
- ~~(3)(4)~~ (4) any notification, operation and maintenance, performance testing, monitoring, reporting, and recordkeeping requirements; and
- ~~(4)(5)~~ (5) a compliance date(s) by which the owner or operator of an existing source shall be in compliance with the MACT emission limitation and all other applicable terms and conditions of the permit not to exceed three years from the date of issuance of the permit (The owner or operator of a new affected source shall comply with a new source MACT level of control immediately upon startup.) issuance of a permit under this Section).

~~(i)(l) Early reductions made pursuant to Section 112(i)(5)(A) of the federal Clean Air Act shall be achieved not later than the date on which the relevant standard should have been promulgated according to the source category schedule for standards.~~

~~(j)(m) A permit application for a MACT determination shall consist of two parts:~~

- ~~(1) The Part 1 application shall contain the information required under 40 CFR 63.53(a) and shall be submitted by the applicable deadline specified in Paragraph (d), (e), or (f) of this Rule; and~~
- ~~(2) The Part 2 application shall contain the information required under 40 CFR 63.53(b) and shall be submitted no later than the deadline in 40 CFR 63 Subpart B Table 1. demonstrate how the source will obtain the degree of emission reduction that would have been obtained had the relevant emission standard been promulgated according to the source category schedule for standards for the source category of which the source is a member and all the other pertinent information required under 40 CFR 63.53.~~

PROPOSED RULES

~~(k)~~(n) Permit application review. The Director shall follow 40 CFR 63.55~~(b)~~ (a) in reviewing permit applications for MACT. The resulting MACT determination shall be incorporated into the facility's Title V permit according to the procedures established under this Section. Following submittal of a Part 1 or Part 2 MACT application, the Director may request, pursuant to 15A NCAC 02Q .0507(c) and .0525(a), additional information from the owner or operator; and the owner or operator shall submit the requested information within 30 days. A Part 2 MACT application is complete if it is sufficient to begin processing the application for a Title V permit addressing Section 112(j) requirements. If the Division disapproves a permit application or determines that the application is incomplete, the owner or operator shall revise and resubmit the application to meet the objections of the Division within the time period specified by the Division. Such time period is not to exceed six months from the date that the owner or operator is first notified that the application has been disapproved or is incomplete. The Director shall issue a Title V permit meeting Section 112(j) requirements after receipt of a complete Part 2 MACT application following the schedule in 15A NCAC 02Q .0525.

~~(l)~~(o) The following requirements apply to case-by-case determinations of equivalent emission limitations when a MACT standard is subsequently promulgated:

- (1) If EPA promulgates an emission standard that is applicable to one or more sources within a major facility before the date a proposed permit under this Rule is approved, the permit shall contain the promulgated standard rather than the emission limitation determined under 15A NCAC 02D .1109, and the owner or operator of the source shall comply with the promulgated standard by the compliance date in the promulgated standard.
- (2) If EPA promulgates an emission standard that is applicable to a source after the date that a permit is issued under this Rule, the Director shall revise the permit on its next renewal to reflect the promulgated standard. (Subparagraph (a)(1) of Rule .0517 of this Section does not apply to requirements established under this Rule.) The Director shall establish a compliance date in the revised permit that assures that the owner or operator shall comply with the promulgated standard within a reasonable time, but no longer than eight years after such standard is promulgated or eight years after the date by which the owner or operator was first required to comply with the emission limitation established by permit, whichever is earlier. However, in no event shall the period for compliance for existing sources be shorter than that provided for existing sources in the promulgated standard.
- (3) Notwithstanding the requirements of Subparagraphs (1) or (2) of this Paragraph, if EPA promulgates an emission standard that is applicable to a source after the date a proposed permit is approved, the Director need not change the emission limitation in the permit to

reflect the promulgated standard if the level of control required by the emission limitation in the permit is ~~at least as stringent as~~ as effective as that required by the promulgated standard. If EPA promulgates an emission standard that is applicable to an affected source after the date a permit application is approved, and the level of control required by the promulgated standard is less stringent than the level of control required by any emission limitation in the prior MACT determination, the Division is not required to incorporate any less stringent emission limitation of the promulgated standard and may consider any more stringent provisions of the MACT determination to be applicable legal requirements when issuing or revising such a Title V permit.

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to amend the rules cited as 15A NCAC 07H .0104 and .0304.

Proposed Effective Date: January 1, 2004

Public Hearing:

Date: August 19, 2003

Time: 7:00 p.m.

Location: Ocracoke School, S.R. 1325, Ocracoke Village

Date: August 20, 2003

Time: 7:00 p.m.

Location: Duke University Marine Lab, 135 Duke Marine Lab Rd., Beaufort

Date: August 26, 2003

Time: 7:00 p.m.

Location: Dare Co. Administrative Annex, 204 Ananias Dare St., Manteo

Date: August 27, 2003

Time: 7:00 p.m.

Location: Currituck Co. Satellite Office, 1123 Ocean Trail, Corolla

Date: September 9, 2003

Time: 7:00 p.m.

Location: Town Hall, 214 N. River Dr., Surf City

Date: September 10, 2003

Time: 7:00 p.m.

Location: Town Hall, 2008 Loggerhead Ct., North Topsail Beach

Date: September 16, 2003

Time: 7:00 p.m.

PROPOSED RULES

Location: Brunswick Co. Courthouse, 310 Government Center Dr., Bolivia

Date: September 17, 2003

Time: 7:00 p.m.

Location: DENR/DCM Office, 127 Cardinal Dr. Ext., Wilmington

Reason for Proposed Action: Development on oceanfront lots must comply with the shoreline erosion rates as adopted by the Coastal Resources Commission. These erosion rates are updated by the Division of Coastal Management on a 5 year cycle. Development must comply with current rates to the maximum extent feasible and have a minimum setback equal to the rates in effect at the time the lots were created, or, those rates in effect at the time of issuance. The Division of Coastal Management has completed an update of the erosion rates and needs to adjust the language in 15A NCAC 07H .0104 and .0304 - that reference the new erosion rates.

Comment Procedures: Written comments should be submitted to Charles Jones, 151-B Hwy 24, Hestron Plaza II, Morehead City, NC 28557. Phone (252) 808-2808, fax: (252) 247-3330, email: Charles.S.Jones@ncmail.net. Comments should be submitted through September 30, 2003.

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 07 - COASTAL MANAGEMENT

SUBCHAPTER 07H - STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .0100 - INTRODUCTION AND GENERAL COMMENTS

15A NCAC 07H .0104 DEVELOPMENT INITIATED PRIOR TO ADOPTION BY THE CRC

Development on lots created after September 27, 1996-October 23rd, 2003 shall comply with the current erosion rates established

pursuant to 15A NCAC 07H .0304. Development on lots created between June 1, 1979 and September 27, 1996 October 23rd, 2003 must comply with the current rates to the maximum extent feasible and have a minimum setback equal to the rates in effect at the time the lots were created, or, those rates in effect at the time of issuance of any active CAMA permit for development on those lots, whichever is more restrictive. Development on lots created prior to June 1, 1979 shall comply with the provisions of 15A NCAC 07H .0309(b) and (c).

Authority G.S. 113A-107; 113A-113; 113A-124.

SECTION .0300 - OCEAN HAZARD AREAS

15A NCAC 07H .0304 AECS WITHIN OCEAN HAZARD AREAS

The ocean hazard system of AECs contains all of the following areas:

- (1) Ocean Erodible Area. This is the area in which there exists a substantial possibility of excessive erosion and significant shoreline fluctuation. The seaward boundary of this area is the mean low water line. The landward extent of this area is determined as follows:
(a) a distance landward from the first line of stable natural vegetation to the recession line that would be established by multiplying the long-term annual erosion rate times 60, provided that, where there has been no long-term erosion or the rate is less than two feet per year, this distance shall be set at 120 feet landward from the first line of stable natural vegetation. For the purposes of this Rule, the erosion rates shall be the long-term average based on available historical data. The current long-term average erosion rate data for each segment of the North Carolina coast is depicted on maps entitled "Long Term Annual Shoreline Change Rates updated through 1992-1998" and approved by the Coastal Resources Commission on September 27, 1996-October 23, 2003 (except as such rates may be varied in individual contested cases, declaratory or interpretive rulings). The maps are available without cost from any local permit officer or the Division of Coastal Management; and
(b) a distance landward from the recession line established in Sub-Item (1)(a) of this Rule to the recession line that would be generated by a storm having a one percent chance of being equaled or exceeded in any given year.
(2) The High Hazard Flood Area. This is the area subject to high velocity waters (including, but

not limited to, hurricane wave wash) in a storm having a one percent chance of being equaled or exceeded in any given year, as identified as zone V1-30 on the flood insurance rate maps of the Federal Insurance Administration, U.S. Department of Housing and Urban Development.

(3) Inlet Hazard Area. The inlet hazard areas are natural-hazard areas that are especially vulnerable to erosion, flooding and other adverse effects of sand, wind, and water because of their proximity to dynamic ocean inlets. This area shall extend landward from the mean low water line a distance sufficient to encompass that area within which the inlet will, based on statistical analysis, migrate, and shall consider such factors as previous inlet territory, structurally weak areas near the inlet (such as an unusually narrow barrier island, an unusually long channel feeding the inlet, or an overwash area), and external influences such as jetties and channelization. The areas identified as suggested Inlet Hazard Areas included in the report entitled INLET HAZARD AREAS, The Final Report and Recommendations to the Coastal Resources Commission, 1978, as amended in 1981, by Loie J. Priddy and Rick Carraway are incorporated by reference without future changes are hereby designated as Inlet Hazard Areas except that the Cape Fear Inlet Hazard Area as shown on said map shall not extend northeast of the Baldhead Island marina entrance channel. In all cases, this area shall be an extension of the adjacent ocean erodible area and in no case shall the width of the inlet hazard area be less than the width of the adjacent ocean erodible area. This report is available for inspection at the Department of Environment and Natural Resources, Division of Coastal Management, 1638 Mail Service Center, 2728 Capital Boulevard, Raleigh, North Carolina. Small scaled photo copies are available at no charge.

(4) Unvegetated Beach Area. Beach areas within the Ocean Hazard Area where no stable natural vegetation is present may be designated as an unvegetated beach area on either a permanent or temporary basis:

(a) An area appropriate for permanent designation as an unvegetated beach area is a dynamic area that is subject to rapid unpredictable landform change from wind and wave action. The areas in this category shall be designated following detailed studies by the Coastal Resources Commission. These areas shall be designated on maps approved by the Commission and available without

(b) cost from any local permit officer or the Division of Coastal Management. An area that is suddenly unvegetated as a result of a hurricane or other major storm event may be designated as an unvegetated beach area for a specific period of time. At the expiration of the time specified by the Commission, the area shall return to its pre-storm designation. Areas appropriate for such designation are those in which vegetation has been lost over such a large land area that extrapolation of the vegetation line under the procedure set out in Rule .0305(e) of this Section is inappropriate.

The Commission designates as temporary unvegetated beach areas those oceanfront areas in New Hanover, Pender, Carteret and Onslow Counties in which the vegetation line as shown on aerial photography dated August 8, 9, and 17, 1996, was destroyed as a result of Hurricane Fran on September 5, 1996. This designation shall continue until such time as stable, natural vegetation has reestablished or until the area is permanently designated as an unvegetated beach area pursuant to Sub-Item 4(a) of this Rule.

Authority G.S. 113A-107; 113A-113; 113A-124.

TITLE 19A – DEPARTMENT OF TRANSPORTATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Transportation intends to amend the rule cited as 19A NCAC 02C .0108.

Proposed Effective Date: December 1, 2003

Public Hearing:

Date: August 18, 2003

Time: 10:00 a.m.

Location: Room 150 – Highway Bldg., 1 S. Wilmington St., Raleigh, NC

Reason for Proposed Action: The proposed amendments will allow the Department of Transportation to acquire right of way by purchase, donation, or condemnation on paved or unpaved secondary roads for the benefit of the traveling public. The safety improvements include widening, improving alignment and sight distance, constructing turn lanes, and replacing structures and other improvements which enhance highway safety.

Comment Procedures: Written comments should be submitted to Emily B. Lee, NC DOT, 1501 Mail Service Center, Raleigh, NC 27699. Phone: (919) 733-2520, fax: (919) 733-9150, email: elee@dot.state.nc.us. Comments should be submitted by October 1, 2003.

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may

also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 02 - DIVISION OF HIGHWAYS

SUBCHAPTER 02C - SECONDARY ROADS SECTION

SECTION .0100 - SECONDARY ROADS

19A NCAC 02C .0108 ACQUISITION OF RIGHT OF WAY FOR SECONDARY ROADS

(a) For the ~~addition, improvement, improvement~~ or paving of unpaved secondary roads, the property owners shall dedicate, at no cost to the Department of Transportation, adequate right of way for construction and maintenance. As an exception, the Department of Transportation may acquire by purchase, donation or condemnation, such right of way as may be, in its sole discretion, determined necessary to make safety improvements to unpaved secondary roads, or to construct, improve, or replace structures thereon, to protect the safety of the traveling public. This Section shall not be construed to limit the authority of the Department of Transportation to exercise its power of eminent domain.

(b) With respect to paved roads on the state maintained secondary road system, Where a state maintained secondary road intersects a major highway, the Department of Transportation may acquire by purchase, donation, or condemnation, such right of way as may be, in its sole discretion, determined necessary to make improvements to protect purchase sight distance, which is the distance required for motorists to determine if another vehicle is approaching the intersection, for the safety of the traveling public. The terms of Paragraphs (d) and (e) of this rule shall not apply to Paragraph (b).

(c) On existing secondary roads which are part of the state highway system and have been approved for paving or general improvement, the Department of Transportation may defray the cost of moving any existing fences or buildings within the rights of way.

(d) If one or more property owners refuse to dedicate the necessary right of way in order to pave a secondary road, the Department of Transportation may allow the remaining property owners to post a bond to cover condemnation costs incurred by the Department of Transportation. The Department of

Transportation may then condemn the right of way necessary for paving the road.

(e) The amount of the bond to be posted by the property owners that are willing to give the right of way free of cost to the Department of Transportation may be determined in the following manner: The Department of Transportation may require up to two thousand five hundred dollars (\$2,500) for each parcel to be condemned based upon costs incurred for such condemnations during the previous one-year period in the county involved. If no condemnation precedents have occurred in the previous one-year period in that county, the department shall use the latest condemnation cost for the county involved. In addition, the Department of Transportation may require that the estimated amount of funds for appraised damages, if any, be posted along with the amount to cover court costs. For example, if in a previous one-year period, cost incurred in a particular county for condemning one parcel of property is two thousand one hundred dollars (\$2,100), the amount of two thousand one hundred dollars (\$2,100) may be required per parcel. If cost incurred is three thousand dollars (\$3,000) per parcel, two thousand five hundred dollars (\$2,500) may be required for each parcel to be condemned. If the damages for a parcel are one thousand dollars (\$1,000), a total of three thousand one hundred dollars (\$3,100) may be required for that one parcel. If there are two parcels, one having one thousand dollars (\$1,000) damages and the other having two hundred dollars (\$200.00) damages, three thousand one hundred dollars (\$3,100) may be required for one parcel and two thousand three hundred dollars (\$2,300) may be required for the other.

Authority G.S. 136-18(26); 136-44.1; 136-44.8; 136-44.16; 136-182.

TITLE 25 – OFFICE OF STATE PERSONNEL

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to adopt the rule cited as 25 NCAC 01E .1412, amend the rules cited as 25 NCAC 01E .1402; 01K .0311-.0314, .0316-.0317, .0320-.0324 and repeal the rules cited as 25 NCAC 01K .0315, .0318-.0319.

Proposed Effective Date: *December 1, 2003*

Public Hearing:

Date: *August 20, 2003*

Time: *10:30 a.m.*

Location: *Administration Building, Third Floor Conference Room, 116 West Jones St., Raleigh, NC*

Reason for Proposed Action:

25 NCAC 01E .1402, .1412 – Actions are being proposed for these Rules due to the modified Appropriations Act of 2001, Senate Bill 115, which included section 28.3b which provided for 52 weeks of leave without pay during a five-year period to care for a child, spouse or parent who has a serious health condition.

25 NCAC 01K .0311-.0324 – Actions are proposed in order to clarify and update provisions for use of academic assistance as a work force planning and development tool. The revised academic assistance rules give specific guidance on eligible

academic sources, reimbursable expenses, and implementation strategies during a time of government budgetary constraints. In conformance with recent legislation, the rules also address taxability of reimbursements, as well as selective service registration for academic assistance recipients.

Comment Procedures: Comments from the public shall be directed to Ms. Peggy Oliver, 1331 Mail Service Center, Raleigh, NC 27699-1331, phone (919) 733-7108 and fax (919) 715-9750. Comments shall be accepted through September 30, 2003.

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

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

CHAPTER 01 – OFFICE OF STATE PERSONNEL

SUBCHAPTER 01E - EMPLOYEE BENEFITS

SECTION .1400 - FAMILY AND MEDICAL LEAVE

25 NCAC 01E .1402 ELIGIBLE EMPLOYEES

(a) Determining Eligibility - An employee's eligibility for Family and Medical Leave shall be made based on the employee's months of service and hours of work as of the date leave is to commence.

(b) Permanent, Probationary, Trainee, and Time-Limited - An employee who has been employed with State government for at least 12 months and who has been in pay status at least 1040 hours (half-time) during the previous 12 month period is entitled to a total of 12 workweeks, paid or unpaid, leave during any 12 month period for one or more of the reasons listed in this Paragraph.

- (1) For the birth of a child and to care for the newborn child after birth, provided the leave is taken within a 12-month period following birth; (An expectant mother may also take Family and Medical Leave pursuant to Paragraph (b)(4) of this Rule before the birth of the child for prenatal care or if her condition makes her unable to work.)

- (2) For the placement of or to care for a child placed with the employee for adoption or foster care, provided the leave is taken within a 12-month period following adoption; (Family and Medical Leave must also be granted before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed.)
- (3) For the employee to care for the employee's child, spouse, or parent, where that child, spouse, or parent has a serious health condition; or
- (4) Because the employee has a serious health condition that makes the employee unable to perform one or more of the functions of the employee's position.

Additional leave without pay is provided for employees to care for the employee's child, spouse or parent who has a serious health condition. See Rule 25 NCAC 01E .1412 Family Illness Leave. Leave without pay for other reasons beyond the 12-week period for employees not covered under this Section shall be administered under 25 NCAC 01E .1100 Other Leave Without Pay. Under these provisions, employees must pay for health benefits coverage.

(c) Temporary Employees - This Section does not cover temporary employees since the maximum length of a temporary employees' appointment is one year. The employee shall be covered if the employee has worked at least 1250 hours during the past 12-month period. Any leave granted to a temporary employee shall be without pay. This also applies to intermittent appointments.

Authority G.S. 126-4(5); P.L. 103-3.

25 NCAC 01E .1412 FAMILY ILLNESS LEAVE

In addition to the 12 weeks of leave per year provided by the Family and Medical Leave Act as outlined in 25 NCAC 01E .1401-.1411, an employee is entitled to up to 52 weeks of leave without pay during a five-year period in order to care for the employee's child, spouse, or parent, where that child, spouse, or parent has a serious health condition.

- (1) This leave is available to employees who qualify for Family and Medical Leave.
- (2) The same provisions and procedures apply to this additional leave that apply to the 12 weeks except the following:
 - (a) A part-time employee is entitled to 52 weeks regardless of their work schedule.
 - (b) During this period of leave without pay, the employees must pay the health plan premiums if they choose to maintain coverage.
 - (c) This period of leave may be accounted for separate from the 12 weeks. It will not affect the method used to determine the 12-month period. The 5-year period will begin on the date that the employee uses the 52-week provision.

Authority G.S. 126-4(5); S.L. 2002-126, s. 28.3B.

SUBCHAPTER 01K - PERSONNEL TRAINING

SECTION .0300 – ACADEMIC ASSISTANCE PROGRAM

25 NCAC 01K .0311 PURPOSE

The purpose of the educational assistance program is for workforce planning and development. The educational assistance program provides management with a means to support educational activities which are deemed beneficial to both the agency/university and employee, and which serve to develop the employee's knowledge, skills and abilities directly related to their current classification on the classification series in which they are working. The educational academic assistance program provides reimbursement of academic costs if funds are available at the agency/university level, and/or time off the job if the course is available only during working hours.

Authority G.S. 126-4.

25 NCAC 01K .0312 ELIGIBILITY

(a) Eligible Employees.—Full-time or part-time employees who have a permanent appointment are eligible for the Academic Educational Assistance Program. Trainees may be determined as eligible by management after satisfactory performance for a period of not less than three months.

(b) Ineligible Employees.—Employees with a temporary or probationary appointment or who do not meet the minimum educational and experience requirements for the job are not eligible for educational assistance. Work study requirements for trainees shall be administered in accordance with Rule .0322 of this Section (extended educational leave).

(c) Eligible Sources. Any accredited high school, business school, community college, technical institute, college, university, or correspondence school is eligible for selection. Academic courses/degrees from accredited community colleges, colleges, universities via traditional classroom, video-based, distance learning, web-based, e-learning and certain correspondence courses are eligible for approval. The State Personnel Director shall also approve any other educational source which is accredited by a national accrediting agency. Accreditation must be via an accrediting agency authorized by the US Department of Education or the American Council on Education/CREDIT.

(d) Academic courses which are audited are eligible for educational academic assistance; however, an employee may be reimbursed for the same course or course equivalent only once. Reimbursement requires a statement written on school letterhead and signed by the instructor that the employee attended at least 85 percent of the scheduled class meetings during the academic term.

Authority G.S. 126-4.

25 NCAC 01K .0313 APPROVED COURSES

Management, when making the determination, by management, whether to provide assistance to take a specific course, is based on the principle: "Deemed must determine that it is beneficial to both the agency/university and the employee's

knowledge, skills and abilities to do the job"-fulfill current and potential job duties. Examples of this are courses which are offered at the junior college, undergraduate, or graduate level such as the following:

- (1) Courses which provide knowledge and skills directly related to maintaining or improving current job skills ("current job" means same status and pay); courses mandated by law or regulation or which are required by the employer in order for the employee to retain the job;
- (2) Courses directly related to the profession in which the employee is currently working, current classification or classification series, other than course for incumbent employees who do not meet the minimum educational and experience requirements for the job;
- (3) Courses included in an academic program directly related to the job or current classification or classification series, and which are necessary to complete a degree program other than courses for incumbent employees who do not meet the minimum educational and experience requirements for the job.

Academic Assistance assistance should shall not be granted approved in cases for courses where management has determined that neither the course, nor the degree pursued, is of sufficient benefit to the agency/university. Exceptions to the approved courses policy shall be approved by the agency/university head or their designee.

Authority G.S. 126-4.

25 NCAC 01K .0314 ACADEMIC LEAVE

An approved course should be taken on the employee's own time. If a course can be taken only during working hours, eligible employees must request leave prior to the beginning of the course allowing sufficient time for the normal approval process. Educational If a course can be taken only during working hours, the leave during work hours may be approved shall not to exceed one course up to five hours academic credit per academic term. (a semester, quarter or summer session) up to five semester hours or eight quarter hours credit. (Use class/laboratory contact hours per week to compute equivalency.) Reasonable travel time as determined by the supervisor may be permitted to attend approved courses.

Authority G.S. 126-4.

25 NCAC 01K .0315 THESIS/DISSERTATION RESEARCH COURSES

Job related thesis/dissertation research courses at the masters/doctoral level are restricted as follows:

- (1) All required written examinations for the degree shall be successfully completed before the course is approved.
- (2) A maximum of 15 hours leave may be approved for each academic credit hour. All leave hours must be used during the academic term and may not be accumulated.

~~(3) — A maximum total of nine academic credit hours is allowed for any one employee.~~

Authority G.S. 126-4.

25 NCAC 01K .0316 ACADEMIC COSTS

~~Academic costs are defined as charges assessed by an eligible source to every person enrolling for the course. These charges must be required of everyone and are neither negotiable nor discretionary for the individual enrolling in the course. Academic costs include tuition, fees and required, itemized course/lab fees. Course/lab fees must always be itemized. Reimbursement of course/lab fees may require a written statement from the eligible source justifying the fee as a required fee in addition to other fees. Agencies/universities may reimburse academic costs in accordance with the guidelines established by the Office of State Personnel.~~

Authority G.S. 126-4.

25 NCAC 01K .0317 REIMBURSEMENT OF ACADEMIC COSTS

Agencies/universities may reimburse all academic costs as specified in 25 NCAC 01K .0316, or reimburse only tuition and other academic related fees, but not fees unrelated to registering for a course or a degree program, such as dorm, student union construction, athletic fees, etc. Agencies may also, with a bona fide business justification, reduce the amount of reimbursement per employee to a set amount less than the tuition and fees and/or limit the number of courses for which any one employee may be reimbursed in an academic term. Agencies/universities choosing to reimburse an amount less than the academic costs specified in 25 NCAC 01K .0316 shall make this information available to all employees at the beginning of the fiscal year and apply this limitation in a fair and equitable manner to all employees requesting academic assistance in that fiscal year.

~~(a) Eligible employees may be reimbursed academic costs charged by the eligible source attended (but note the exceptions as listed below):~~

- ~~(1) — University of North Carolina institutions. 100 percent of academic costs for up to 10 semester hours or 16 quarter hours credit per academic term. Employees may be reimbursed each fiscal year for a maximum of 20 semester hours or 32 quarter hours credit, but not for more than four courses.~~
- ~~(2) — North Carolina Community/Technical Colleges (state funded). 100 percent of academic costs for all courses per quarter up to a maximum of four quarters per fiscal year.~~
- ~~(3) — All other eligible sources. Up to the maximum academic cost charged by institutions of the University of North Carolina. This amount will be determined by the Office of State Personnel and published within 10 working days of the end of the annual session of the N.C. General Assembly. Reimbursement is limited to 10 semester hours or 16 quarter hours credit per academic term. Employees may be reimbursed each fiscal year for a maximum of 20 semester hours or 32 quarter~~

~~hours credit, but not for more than four courses.~~

~~(b) Exceptions. Graduate professional programs (medicine, veterinary medicine, etc.) with unusual course/lab fees, tuition or other fees will be considered on a course by course basis. Agency heads may approve payment of these academic costs.~~

~~(c) Reimbursement shall not be made for charges, other than academic costs, specifically related to processing or receiving CEUs (continuing education units).~~

~~(d) Reimbursement shall not be authorized for transportation costs, graduation fees, examination fees, textbooks and supplies.~~

~~(e) Financial assistance from any other financial aid program shall not be duplicated under this program. However, the difference, if any, between such aid and the allowable costs under the state's plan may be reimbursed.~~

~~(f) When employees of an educational institution or any other state agency are granted free tuition, the value of this tuition must be considered as part of the allowable academic costs.~~

~~(g) The applicant employee shall receive reimbursement of approved academic costs upon submitting evidence of satisfactory completion of the course, and documenting academic costs. Requests for reimbursement should be submitted within 30 days of completion of the course.~~

~~(h) If an employee transfers to another state agency/university, and subsequently completes an approved course, the employee should submit a request for reimbursement to the employing agency/university. The employing agency/university is responsible for processing the request per the provisions of this policy, and providing reimbursement if funds are available. Employees who separate from state service, except by reduction in force, are not eligible for reimbursement.~~

Authority G.S. 126-4.

25 NCAC 01K .0318 TAX STATUS

~~The U.S. Internal Revenue Service Code (IRS) requires payment of all withholding taxes on educational assistance reimbursements unless there is a specific exemption in the IRS Code for educational assistance.~~

~~University tuition waiver programs are different from educational assistance in both state law and the IRS Code. However, the withholding provisions of the IRS Code are applicable to tuition waiver programs.~~

Authority G.S. 126-4.

25 NCAC 01K .0319 APPLICATION PROCEDURES

~~(a) To receive Educational Assistance, an employee shall make application with his immediate supervisor. The application should include:~~

- ~~(1) — The course title(s), institution and location, class schedule, and whether the course is for credit or non credit, or for certification/licensing.~~
- ~~(2) — A description of the course(s), demonstrating how the course(s) meet criteria for the approved courses, or for certification/licensing.~~
- ~~(3) — The amount of academic cost reimbursement, specifying tuition and/or fees, and any course/lab fees requested.~~

- ~~(4) A specification of requested time off from work for educational leave including all travel time.~~
- ~~(5) If time off from work is requested, a statement demonstrating unavailability of the course except during work hours.~~
- ~~(6) Employees applying for educational assistance should receive a written response from management regarding approval/disapproval of educational assistance requests, which notes any changes in the application or conditions of approval. The response must also indicate whether the reimbursement for the course is subject to withholding taxes or not.~~

~~(b) The application must be submitted in advance in accordance with schedules established by the agency/university to allow time for appropriate review, approval and notification of the employee. Agency/university heads, or a designee, may approve an application received after class begins if circumstances warrant.~~

Authority G.S. 126-4.

25 NCAC 01K .0320 EXCEPTIONAL SITUATIONS

~~Courses taken at agency/university request require approval of the agency head (at Departmental/University level), or his/her designee, and courses~~ Courses taken under the Extended Educational Leave policy require ~~prior written~~ approval of the Office of State Personnel unless included in the ~~agency/university agency's/university's head or their designee~~ delegation agreement.

Authority G.S. 126-4.

25 NCAC 01K .0321 COURSES TAKEN AT AGENCY/UNIVERSITY REQUEST

(a) Because of specific high priority skill needs of the agency/university, employees may be requested by management to take specific courses or degree programs. Under these circumstances, all limitations under the provisions of this policy are waived, except requirements for withholding taxes and FICA. ~~All expenses to the individual should be reimbursed, to include: transportation costs; examinations and administrative fees; textbooks and other course materials. (Any books or materials paid for by the agency/university become the property of the agency/university.)~~

(b) ~~If courses taken at agency request the hours or number of courses involved exceed the credit hour per fiscal year limits of the educational-academic assistance program, then the situation shall be administered under the policy provisions for Extended Educational Leave. Courses specified as part of an employee's improvement/development plan are not considered to be at agency request unless approved by the agency/university head or designee.~~

(c) ~~The designation, "At Agency/University Request", can only be determined with the approval of the agency/university head (at Departmental/University level), or designee.~~

Authority G.S. 126-4.

25 NCAC 01K .0322 EXTENDED ACADEMIC LEAVE

(a) State agencies/universities may consider any employee (permanent, probationary, ~~or~~ trainee or time-limited) for extended ~~educational-academic~~ leave to participate in job or career-related work study, scholarship or fellowship programs based upon the following criteria:

- (1) Verification that both labor market and organizational needs exist for development in program requested.
- (2) Equal opportunity provided in selection of candidate(s).
- (3) Employees are informed of agency/university policies and procedures regarding:
 - (A) Announcement and application procedures;
 - (B) Screening and selection of employees;
 - (C) Limitations and restrictions on courses;
 - (D) Leave, salary and benefit conditions and any withholding taxes and FICA;
 - (E) Employment agreement.

~~(b) Agency/university policies and procedures must be submitted to the Office of State Personnel for review and approval prior to implementation or upon subsequent updates and revisions.~~ Requests for extended ~~educational-academic~~ leave initiated by the employee and which do not meet with the criteria in this Rule will be administered according to the State Personnel policy on leave without pay.

Authority G.S. 126-4.

25 NCAC 01K .0323 CERTIFICATION/LICENSING

(a) Incumbent employees who meet minimum educational and experience requirements and for whom certification/licensing is ~~required-mandated~~ after employment or is ~~deemed desirable by management-a~~ policy requirement of the employing agency and approved by the agency/university head or their designee are eligible for ~~educational-academic assistance, assistance under the following conditions:~~

- ~~(1) certification/licensing is mandated by act of the General Assembly, or~~
- ~~(2) certification/licensing is a policy requirement of the employing agency/university.~~

~~(b) Educational leave is authorized for courses and examinations required for initial certification/license and renewal of the certification/license. Reimbursement is authorized for 100 percent of the academic costs, less any applicable withholding taxes and FICA.~~

~~(c) Certification/licenses resulting solely from attainment of academic degrees shall be considered under educational assistance for academic course work.~~

Authority G.S. 126-4.

25 NCAC 01K .0324 ADMINISTRATION RESPONSIBILITY

(a) The Office of State Personnel is responsible for the interpretation of this ~~policy-Rule, and approval of agency policy and procedures, and all subsequent agency revisions.~~

(b) Each state agency or university is delegated responsibility for, and authority to, administer the program within the

provisions of this policy. Rule in a fair and equitable manner. This includes retaining on a fiscal year basis records of academic assistance activity and reporting such information annually to the Office of State Personnel. This delegation is contingent on the prior submission of a written policy, outlining procedures to implement the program, and the written approval of the State Personnel Director. Any subsequent policy, procedures, or practice which either liberalizes or restricts any rule in this Section, likewise requires prior written approval of the State Personnel Director. State Equal Employment Opportunity and Affirmative Action policies, procedures and rules in this Chapter, including those pertaining to statistical data, are applicable to all rules in this Section.

(c) Each state agency/university is responsible for retaining records of educational assistance activity. This information shall be reported annually to the Office of State Personnel upon request and shall include the following data:

- (1) Total number of employees participating in the Educational Assistance Program;

- (2) Total amount reimbursed;
- (3) Total number of employees granted Educational Leave;
- (4) Total number of employees taking courses at agency's request;
- (5) Total number of employees granted Extended Educational Leave;
- (6) Total number of employees taking audited courses;
- (7) Total number of employees taking courses for purposes of mandated/required certification/licensing.

(d) Statistical information should be kept on a fiscal year basis, beginning on July 1 and ending on June 30. All information should be available to the Office of State Personnel as requested.

Authority G.S. 126-4.

This Section includes temporary rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code and includes, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements. Pursuant to G.S. 150B-21.1(e), publication of a temporary rule in the North Carolina Register serves as a notice of rule-making proceedings unless this notice has been previously published by the agency.

NORTH CAROLINA BUILDING CODE COUNCIL

Rule-making Agency: North Carolina Building Code Council

Rule Citation: Section 1616.3 of the North Carolina Building Code

Effective Date: July 1, 2003

Findings Reviewed and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 143-138

Public Hearing:

Date: December 8, 2003

Time: 1:00 p.m.

Location: Wake County Commons, 4011 Carya Dr., Raleigh, NC

Reason for Proposed Action: *The impact of Section 1616.3 is that many structures will be over-built for the next few years until the next edition of the code becomes effective. This section of the code creates a significant economic impact on projects being constructed in the next few years, and will offer no additional protection in the low to moderate seismic risk categories.*

Comment Procedures: *Comments from the public shall be directed to Wanda D. Edwards, PE, 322 Chapanoke Rd., Suite 200, Raleigh, NC 27603 and phone (919) 661-5880. Comment period ends December 9, 2003.*

Section 1616.3 Determination of seismic design category.

All structures shall be assigned to a seismic design category based on their seismic use group and the design spectral response acceleration coefficients, S_D and S_{D1} , determined in accordance with Section 1615.1.3 or 1615.2.5. Each building and structure shall be assigned to the most severe seismic design category in accordance with Table 1616.3(1) or 1616.3(2) irrespective of the fundamental period of vibration of the structure, T.

Exception: The seismic design category is permitted to be determined from Table 1616.3(1) alone when all of the following apply:

1. the approximate fundamental period of the structure T_a , in each of the two orthogonal directions determined in accordance with Section 1617.4.2.1 is less than $0.8T_s$, determined in accordance with Section 1615.1.4, and

2. equation 16-35 is used to determine the seismic response coefficient, C_s and
3. the diaphragms are rigid as defined in Section 1602.

TITLE 01 – DEPARTMENT OF ADMINISTRATION

Rule-making Agency: Department of Administration

Rule Citation: 01 NCAC 41B .0101-.0104, .0301-.0307, .0401-.0405, .0501-.0511, .0701-.0702, .0901

Effective Date: August 1, 2003

Findings Reviewed and Approved by: Julian Mann, III

Authority for the rulemaking: G.S. 143-64.17A; 143-64.17F; 143-17H

Reason for Proposed Action: *Working rules are necessary to enable energy savings contracts to be implemented. The State budgetary crisis is such that any and all savings must be realized without administrative delay.*

Comment Procedures: *Any written comments on these temporary rules may be sent to the NC Department of Administration, George Millsaps, 1301 Mail Service Center, Raleigh, NC 27699-1301, phone (919) 807-2425, fax (919) 733-9571, and email gmillsaps@ncmail.net.*

CHAPTER 41 – STATE ENERGY OFFICE

SUBCHAPTER 41B – GUARANTEED ENERGY SAVINGS CONTRACTS

SECTION .0100 – GENERAL PROVISIONS

01 NCAC 41B .0101 RESPONSIBILITY

The Department of Administration is responsible for adopting rules as specified in G.S. 143-64.17F as well as compiling data and providing information as specified in G.S. 143-64.17H.

History Note: Authority G.S. 143-64.17A (c1); 143-64.17F; 143-64.17H; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0102 SCOPE

This Subchapter shall apply to State governmental units engaging in guaranteed energy savings contracts as defined in G.S. 143-64.17(7).

History Note: Authority G.S. 143-64.17A (c1); 143-64.17F;

143-64.17H;

Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0103 RULE MAKING AUTHORITY

Authority for these Rules is G.S. 143-64.17F.

History Note: Authority G.S. 143-64.17A (c1); 143-64.17F; 143-64.17H;

Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0104 DEFINITIONS

For the purposes of this Chapter, the following definitions apply:

- (1) Terms used herewithin that are defined in G.S. 143-64-17 shall assume the definition in G.S. 143-64-17.
- (2) "Agency." A North Carolina State governmental unit that is soliciting, through a Request for Proposals (RFP), to enter into a guaranteed energy savings contract.
- (3) "Annual reconciliation statement." A report disclosing shortfalls or surplus between guaranteed energy and operational savings specified in the guaranteed energy savings contract and actual energy and operational savings incurred during each 12 month term commencing from the time that the energy conservation measures became fully operational.
- (4) "Contract." A guaranteed energy savings contract.
- (5) "Offer." The response to an RFP. Coterminous to a "bid" or "proposal."
- (6) "Investment grade audit" or "investment grade analysis." A detailed cost-benefit analysis of energy efficiency investments including a review of potential cost savings through operation and/or maintenance changes.
- (7) "Life-cycle cost analysis." A method for estimating the total cost of an energy-using component or building over its useful life, including cost factors such as purchase price, or construction, renovation, or leasing costs, energy use, maintenance, interest, and inflation.
- (8) "Measurement and verification review." An examination of energy measures installed under each contract, using specific methodology to measure the operation of energy-using systems before and after change, to verify the performance and savings of the installed equipment.
- (9) "Qualified provider." A person, business, or organization experienced in the design, implementation, and installation of energy conservation measures and determined by the administering and contracting agencies to have the capability in all respects to fully perform the contract requirements.

History Note: Authority G.S. 143-64.17A(c1); 143-64.17F; 143-64.17H;

Temporary Adoption Eff. August 1, 2003.

SECTION .0300 – SOLICITATIONS

01 NCAC 41B .0301 NORTH CAROLINA PRODUCTS

Where quality and availability allow, specifications shall be based on products manufactured and services available in North Carolina. This special interest in North Carolina products is intended to encourage and promote their use, but shall not be exercised to the exclusion of other products or to prevent fair and open competition.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0302 SOLICITATION DOCUMENTS

- (a) Agencies shall solicit for guaranteed energy savings contracts through a Request for Proposal (RFP).
- (b) Agencies may use the RFP template available on the home page of the State Energy Office.
- (c) Solicitation documents shall include a Treasurer's estimated cost of financing.
- (d) Solicitation documents may allow for qualified provider or third party financing.
- (e) Solicitation documents may include a copy of the Facilities Condition Assessment Program (FCAP) report covering part or all of the facilities subject to the solicitation.
- (f) Solicitation documents shall state the evaluation criteria specified by G.S. 143-64.17A (b) and (d) as well as those in this Chapter. The documents shall also state the criteria weighting defined by the agency for each particular project. Weighting may change from one RFP to another RFP from an agency based upon the particular needs of that agency.
- (g) Solicitation documents shall stipulate that employee or time savings cannot be included in the offer unless a position is eliminated as a result of contract implementation.
- (h) Solicitation documents shall stipulate that the qualified provider is responsible for all costs incurred in preparing the initial proposal.
- (i) Solicitation documents shall stipulate that the contractor cannot include costs or allowances for contingencies in the contract.
- (j) Solicitation documents may include a three-year history of usage and billing for all utilities for the facilities subject to the proposal.

History Note: Authority G.S. 143-64.17F; 143-64.17H; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0303 TREASURER'S COST ESTIMATE OF FINANCING

Agencies shall obtain an estimate of financing cost from the Director of Debt Management, Office of the Treasurer. This estimate shall not be binding upon the State and is subject to change by the Office of the Treasurer. The Office of the Treasurer may reject any potential contract if the actual cost of financing has exceeded the estimated cost of financing when the contract is submitted to the Office of the Treasurer for approval.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0304 GENERAL FUND PREFERENCE

(a) The agency shall give preference to projects where the energy costs are paid through General Fund appropriations as compared to receipts or federal funds. This preference shall be stipulated in the solicitation documents.

(b) Solicitation documents shall include, when feasible, a breakdown of the source of funds for energy costs and shall direct the vendors to break down savings by source of funds if the aforementioned information is included in the solicitation document.

(c) The Council of State may give preference to projects where the energy costs are paid through General Fund Appropriations as compared to receipts or federal funds.

History Note: Authority G.S. 143-64.17F; 143-64.17H; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0305 PROHIBITION ON FEDERAL FUNDS

The agency shall not solicit proposals for projects that include payment from federal funds unless the agency has obtained, and includes in both the solicitation and contract, documentation from the Federal Government or the Office of State Controller stating that the use of federal funds for payment of the contract is authorized.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0306 ADVERTISEMENT REQUIREMENTS

In addition to advertising requirements stated in G.S. 143-64.17A (a), agencies shall list notification of the solicitation on the State Energy Office's home page and shall include in the notification instructions on how to obtain the complete solicitation.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0307 CONFERENCES/SITE VISITS

Agencies may conduct vendor conferences and site visits before the Request for Proposals closing date.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

SECTION .0400 - PRECERTIFICATION OF PROVIDERS

01 NCAC 41B .0401 INFORMATION REQUIRED FOR PRECERTIFICATION

Organizations may establish capability to provide services under performance contracts with state agencies by providing, as a minimum, the following information to the State Energy Office:

- (1) past experience with energy performance contracting with a minimum of three years operation and completed installation of a minimum of three projects;
- (2) performance contracting experience and resumes of key individuals expected to work

on North Carolina projects including a minimum of one professional engineer licensed in North Carolina;

(3) summary information, with client contact information, on all performance contracting projects in North Carolina during the previous five years;

(4) summary information, with client contact information, on all performance contracts with any state government agencies in the United States during the previous five years;

(5) summary information, with client contact information, on any performance contracting projects which resulted in the company paying energy costs to clients;

(6) summary of the history and operation of the business and organization, including volume and type of clients; and

(7) financial statements of the performance contracting organization and (if applicable) parent company for the previous two years.

Additional information may be required for specific project needs or at the later discretion of the State Energy Office. Other factors including integrity, reliability, and working relationship may be considered.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0402 PRECERTIFICATION EVALUATION

Organizations may present information required for precertification to the State Energy Office at any time with a request for consideration for inclusion as a precertified entity. The State Energy Office will advise the organization within 60 days on acceptance or denial of precertification.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0403 CONTESTING PRECERTIFICATION

If the State Energy Office denies an organization's request for precertification, a written appeal from the organization may be provided by the organization within 60 days after date of notification of the denial. A letter appealing the decision may be filed with:

Director, State Energy Office
North Carolina Department of Administration
1830A Tillery Place MSC 1340
Raleigh, North Carolina 27699-1340

In the event that an organization wishes to contest the case further, contested case hearings are available as provided in G.S. 150B, and petitions for contested case hearings shall be filed in accordance with the provisions of that Chapter.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0404 PUBLISHED LIST OF PRECERTIFIED ENTITIES

Organizations precertified by the State Energy Office to provide services under performance contracts may be included on a list available on the Website <http://www.energync.net>.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0405 PRECERTIFIED ENTITY RESTRICTION

Only precertified organizations may enter into a performance contract with a state governmental agency.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

SECTION .0500 - EVALUATION, SELECTION, AND AWARD

01 NCAC 41B .0501 LATE OFFERS, MODIFICATIONS, OR WITHDRAWALS

No late offer, late modification, or late withdrawal shall be considered unless received before contract award, and the offer, modification, or withdrawal would have been timely but for the action or inaction of agency personnel directly serving the bid process. The offeror shall have his offer delivered on time, regardless of the mode of delivery used, including the U.S. Postal Service or any other delivery services available.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0502 EXTENSION OF ACCEPTANCE TIME

When in the public interest, companies may be requested to extend the time offered for the acceptance of offers.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0503 ERROR/CLARIFICATION

When an offer contains an obvious error or otherwise where an error is suspected, the circumstances may be investigated and then may be considered and acted upon. Any action taken shall not prejudice the rights of the public or other offering companies. Where offers are submitted substantially in accordance with the request for bid document but are not entirely clear as to intent or to some particular fact or where there are other ambiguities, clarification may be sought and accepted provided that, in doing so, no change is permitted in prices.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0504 BASIS FOR REJECTION

In soliciting offers, any and all offers received may be rejected. Basis for rejection shall include, but are not limited to, the offer being deemed unsatisfactory as to the quantity, quality, delivery, price or service offered; the offer not complying with conditions in the RFP or with the intent of the proposed contract; lack of competitiveness by reason of collusion or knowledge that

reasonable available competition was not received; error(s) in specifications or indication that revision(s) would be to the state's advantage; cancellation of or changes in the intended project or other determination that the proposed requirement is no longer needed; limitation or lack of available funds; circumstances which prevent determination of the lowest responsible or most advantageous offer; or any determination that rejection would be to the best interest of the state.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0505 PUBLIC RECORD

Action in rejecting offers shall be made a matter of record.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0506 RECIPROCAL PREFERENCE

(a) 01 NCAC 05B .1522(a), (b), (c), (d), and (g) shall apply to this Subchapter.

(b) If the use of the reciprocal preference changes which bidder is the low bidder, the agency may waive the use of the reciprocal preference, after consultation with the Council of State, and after taking into consideration such factors as, competition, price, product origination, and available resources.

History Note: Authority G.S. 143-64.17F; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0507 PROPOSAL EVALUATION

(a) Evaluation criteria shall include those specified by G.S. 143-64.17A(b) and (d).

(b) Evaluation criteria shall also include the following:

- (1) Life cycle cost analysis as defined in GS 143-64-15;
- (2) Certification by a registered engineer that the measurement and verification protocol presented in the proposal is capable of measuring actual versus projected savings;
- (3) The contract shall include a process of annual third party measurement and verification of savings in accordance with the pre-defined and certified protocol found in 01 NCAC 41B .0510. The cost of this process shall be included in the total cost of the contract; and
- (4) The contract shall include the total cost based on Office of Treasurer cost of financing estimate in bid and may allow the Qualified Provider to submit cost based on Qualified Provider or third party financing in the bid. The lowest price of all financing options provided by a single vendor shall be used as the basis for any price analysis for that vendor.

History Note: Authority G.S. 143-64.17F; 143-64.17H; Temporary Adoption Eff. August 1, 2003.

01 NCAC 41B .0508 PRE-AWARD REPORTS

(a) Before the award of a guaranteed energy savings contract, the qualified provider shall provide a report, as part of its

TEMPORARY RULES

proposal, which shall be available for public inspection, summarizing estimates of all costs of installation, maintenance, repairs and debt service and estimates of the amounts by which energy or operating costs will be reduced.

(b) The report shall contain a listing of contractors and subcontractors to be used by the qualified provider with respect to the energy conservation measures.

*History Note: Authority G.S. 143-64.17F;
Temporary Adoption Eff. August 1, 2003.*

01 NCAC 41B .0509 TABULATIONS AND ABSTRACTS

Telephone, electronic, and written requests for detailed or written tabulations and abstracts of offers shall not be honored.

*History Note: Authority G.S. 143-64.17F;
Temporary Adoption Eff. August 1, 2003.*

01 NCAC 41B .0510 MEASUREMENT AND VERIFICATION

Any guaranteed energy and operational savings shall be determined by using one of the measurement and verification methodologies listed in the United States Department of Energy's "Measurement and Verification Guideline for Energy Savings Performance Contracting," the "International Performance Measurement and Verification Protocol," or "ASHRAE 14-2002." If due to existing data limitations or the nonconformance of specific project characteristics, none of the methods listed in either the United States Department of Energy's "Measurement and Verification Guideline for Energy Savings Performance Contracting," the "International Performance Measurement and Verification Protocol," or "ASHRAE 14-2002" is sufficient for measuring guaranteed savings, the qualified provider shall develop an alternate method that is compatible with one of the three and mutually agreeable with the agency.

*History Note: Authority G.S. 143-64.17F; 143-64.17H;
Temporary Adoption Eff. August 1, 2003.*

01 NCAC 41B .0511 CONTRACT EXECUTION

Contract execution by the successful companies shall occur upon contract award and before the agency sends the documents to the Office of State Budget and Management. Contracts shall stipulate that the execution is contingent upon approval and financing. Upon execution, the agency shall forward the documents to the Capital Improvement Section of the Office of State Budget and Management with a copy to the Director of the State Energy Office.

*History Note: Authority G.S. 143-64.17F;
Temporary Adoption Eff. August 1, 2003.*

SECTION .0700 – APPROVAL

01 NCAC 41B .0701 OFFICE OF STATE BUDGET AND MANAGEMENT CERTIFICATION

The Office of State Budget and Management (OSBM) shall certify, within 10 business days of receipt, expected availability of resources and set up appropriate reserve accounts or other

accounting procedures to transfer funds from the agency to the Office of the Treasurer for payment. Upon certification, the OSBM shall forward the documentation to the Office of the Treasurer's Director of Debt Management.

*History Note: Authority G.S. 143-64.17F;
Temporary Adoption Eff. August 1, 2003.*

01 NCAC 41B .0702 OFFICE OF THE TREASURER APPROVAL

The Office of the Treasurer shall, within 10 business days of receipt, review the documentation and select the desired financing option. Upon review and selection, the Treasurer shall forward the documentation to the Secretary of the Department of Administration.

*History Note: Authority G.S. 143-64.17F;
Temporary Adoption Eff. August 1, 2003.*

SECTION .0900 - POST-APPROVAL PROCEDURES

01 NCAC 41B .0901 ANNUAL REPORTS AND INSPECTIONS

(a) The State Energy Office may inspect any and all documentation and facilities it deems appropriate at the agency to determine the effectiveness of the guaranteed energy savings contract and to provide information to the Council of State and the General Assembly on the effectiveness of the contract.

(b) Agencies failing to provide documentation to the State Energy Office as requested, shall be reported to the Council of State and shall be prohibited from engaging in further energy savings contracts until the deficient documentation is provided to the State Energy Office.

(c) Requested information, by definition, includes timely submission of the "Annual Report of Savings Report" located on the State Energy Office homepage.

*History Note: Authority G.S. 143-64.17F; 143-64.17H;
Temporary Adoption Eff. August 1, 2003.*

TITLE 08 - STATE BOARD OF ELECTIONS

Rule-making Agency: *NC State Board of Elections*

Rule Citation: *08 NCAC 01 .0105*

Effective Date: *July 3, 2003*

Findings Reviewed and Approved by: *Julian Mann*

Authority for the rulemaking: *G.S. 163-278.19; 163-278.21*

Reason for Proposed Action: *The State Board of Elections has authority under G.S. 150B-21.1(a5) to enact temporary rules. The Board found that in order to preserve the integrity of the upcoming elections and elections process it should enact a temporary rule as per G.S. 150B-21.1(a5)(3). Filing for municipal elections start July 4, 2003.*

Comment Procedures: *Written comments should be submitted to Don Wright, General Counsel, P.O. Box 27255, Raleigh, NC 27611-7255, Phone: (919) 715-5333, fax: (919) 715-0135, email: don.wright@ncmail.net.*

CHAPTER 01 - DEPARTMENTAL RULES

08 NCAC 01 .0105 MUNICIPAL FINANCING OF ELECTION CAMPAIGNS

A municipal corporation is a corporation subject to the requirements and prohibitions of G.S. 163-278.19 and does not fall within the exception set forth in G.S. 163-278.19(f).

History Note: Authority G.S. 163-278.19; 163-278.21; Temporary Adoption Eff. July 3, 2003.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *NC Medical Care Commission*

Rule Citation: *10A NCAC 13F .0204-.0205, .0207, .0210-.0211, .0302, .0304, .0406-.0407, .0501-.0502, .0504-.0508, .0512, .0703, .0801-.0802, .0902-.0903, .1204; 13G .0204-.0205, .0207, .0211, .0302, .0405-.0406, .0504-.0508, .0512, .0702, .0801-.0802, .0902-.0903, .1007, .1205*

Effective Date: *September 1, 2003*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 131D-2; 131D-4.5; 143B-165; S.L. 2002-260*

Reason for Proposed Action: *This temporary rule-making action applies to rules that govern large and small adult care homes. These facilities provide care to frail and aging citizens of this state. Temporary rule-making is necessary to assure that safe and quality care is provided in these facilities.*

Comment Procedures: *Comments from the public shall be directed to Mark Benton, Chief of Budget & Planning/Rule-making Coordinator, 2701 Mail Service Center, Raleigh, NC 27699-2701, phone (919) 855-3750 and email mark.benton@ncmail.net.*

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13F - LICENSING OF HOMES FOR THE AGED AND INFIRM

SECTION .0200 – LICENSING

10A NCAC 13F .0204 APPLICATION TO LICENSE AN EXISTING BUILDING

The requirements in 10 NCAC 42C .3301 shall control for this Subchapter, except that:

- (1) ~~Three sets of schematic floor plans or blueprints of the building are to be sent to the Division of Facility Services;~~

- (2) ~~Form DSS 1514 (Fire and Building Safety Inspection Report) must be used; and~~
- (3) ~~Form DHS 1213 (Sanitation Report) must be used with facilities licensed for 13 or more residents.~~

(a) An application for a license to operate an adult care home in an existing building where no alterations are necessary shall be made at the county department of social services.

(b) The following forms and reports shall be submitted through the county department of social services to the Division of Facility Services:

- (1) the Initial License Application;
- (2) a photograph of each side of the existing structure and two sets of schematic floor plans or blueprints of the building showing the floor plan; type of construction; location, size and height of windows; location and type of heating system; the use of basement and attic; location of doors and closets; and other requested details;
- (3) the Fire and Building Safety Inspection Report to be submitted with completion of construction or renovation; and
- (4) the Sanitation Report or a permit to begin operation from the sanitary division of the county health department.

(c) If it does not appear that the licensure requirements for the home can be met, the county department of social services shall so inform the applicant, indicating in writing the reason, and give the applicant an opportunity to withdraw the application. Upon the applicant's request, the application shall be completed and submitted to the Division of Facility Services for consideration.

(d) The Division of Facility Services shall notify the applicant and the county department of social services of any required changes.

(e) Following review of application, references and all forms, a pre-licensing visit shall be made by a consultant of the Division of Facility Services.

(f) The consultant shall report his findings and recommendations to the Division of Facility Services which shall promptly notify, in writing, the applicant and the county department of social services of the action taken.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1984; Temporary Amendment Eff. September 1, 2003.

10A NCAC 13F .0205 APPLICATION TO LICENSE A NEWLY CONSTRUCTED OR RENOVATED BUILDING

(a) The requirements in 10A NCAC 13G .0205 shall control for this Subchapter, except that:

- (1) ~~Three sets of schematic floor plans or blueprints are to be sent to the Division of Facility Services; and~~
- (2) ~~A pre-licensing visit and subsequent recommendation will be made by a program consultant and a construction consultant of the~~

~~Division of Facility Services in all cases involving a home for the aged and disabled.~~

~~(b) In addition to the requirements in Rule .0205 of this Subchapter, all new construction, additions and renovations to existing buildings must meet the full requirements of the North Carolina Building Code for institutions and the sanitation requirements of the Division of Environmental Health as well as the rules of this Subchapter.~~

~~(a) An application for a license to operate a home which is to be constructed, added to or renovated shall be made at the county department of social services where the home is to be located.~~

~~(b) For information on the forms and reports to be submitted by the county department of social services to the Division of Facility Services, see Rule .0204(b) of this Subchapter. All of these forms and reports apply to a home which is to be constructed, added to or renovated, including two sets of schematic floor plans or blueprints, and photographs of each side of the building for renovations or additions.~~

~~(c) If it does not appear that the licensure requirements for the home can be met, the county department of social services shall so inform the applicant, indicating in writing the reason, and give the applicant an opportunity to withdraw the application. Upon the applicant's request, the application shall be completed and submitted to the Division of Facility Services for consideration.~~

~~(d) Upon receipt of copies of approval letters from the Department of Insurance and the Division of Environmental Health in the North Carolina Department of Environment and Natural Resources, indicating the applicant's plans are in full compliance with the applicable requirements of the North Carolina State Building Code and the sanitation requirements of the Division of Environmental Health, the Division of Facility Services shall make the final determination as to whether the rules of this Subchapter have been met and, if so, shall give written approval and authorization to begin construction.~~

~~(e) Any changes made during construction shall require the approval of the Division of Facility Services to assure that licensing requirements are maintained.~~

~~(f) A pre-licensing visit and subsequent recommendation shall be made by a program consultant and a construction consultant of the Division of Facility Services in conjunction with the adult homes specialist of the county department of social services.~~

~~(g) All new construction, additions and renovations to existing buildings shall meet the requirements of the North Carolina Building Code for institutions and the sanitation requirements of the Division of Environmental Health as well as the rules of this Subchapter.~~

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1984; Temporary Amendment Eff. September 1, 2003.

10A NCAC 13F .0207 CHANGE OF LICENSEE

When a ~~currently licensed administrator-licensee~~ wishes to sell or lease the home to another, the following procedure is required:

- (1) The ~~administrator must~~-licensee shall notify the county department of social services that a

change is desired. When there is a plan for a change of ~~administrator-licensee~~ and another person applies to operate the home immediately, the ~~administrator must~~-licensee shall notify the county department and the residents or their responsible persons. It is the responsibility of the county department to talk with the residents, giving them the opportunity to make other plans if they so desire.

~~(2) The applicant must meet the qualifications for administrator as specified in Rule .2001 of this Subchapter.~~

~~(3)(2) The county department of social services will submit all forms and reports specified in Rule .0204(e) .0204(b) of this Subchapter, with the exception of Subparagraph (2), (4), to the Division of Facility Services.~~

~~(4)(3) The Division of Facility Services will review the records of the facility and, if necessary, visit the home.~~

~~(5)(4) The administrator-licensee and prospective applicant-licensee will be advised by the Division of Facility Services of any changes which must be made to the building before licensing to a new licensee can be recommended.~~

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1984; Temporary Amendment Eff. September 1, 2003; July 1, 2003.

10A NCAC 13F .0210 TERMINATION OF LICENSE

The requirements in 10A NCAC 13G .0210 shall control for this Subchapter. In addition, the license of a home for the aged and disabled will automatically terminate when the home is licensed to provide a higher level of care or a combination of a higher level of care and domiciliary home care.

(a) The Division of Facility Services shall take action to terminate the license when one of the following situations exist:

- (1) change of ownership of the adult care home business; or
- (2) change of location of home.

(b) The license is not transferable or assignable.

(c) The unexpired license shall be returned to the state Division of Facility Services by the county department of social services with the following information:

- (1) reason for closing;
- (2) date of closing; and
- (3) plans made for residents.

(d) When the licensee voluntarily closes the home, a signed statement to this effect shall be submitted to the county department of social services who shall immediately forward the statement to the Division of Facility Services. The licensee or his designee shall give at least 30 days prior notice of the closing to the county department of social services and the residents or their responsible persons.

(e) The license of an adult care home shall be terminated when the home is licensed to provide a higher level of care or a

combination of a higher level of care and adult care home level of care.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. April 1, 1984; Temporary Amendment Eff. September 1, 2003.

10A NCAC 13F .0211 NOTIFICATION ABOUT CLOSING OF HOME

~~The rules stated in 10A NCAC 13G .0211 and .1202 shall control for this Subchapter.~~

If a licensee plans to close a home, the licensee shall provide written notification of the planned closing to the Division of Facility Services, the county department of social services and the residents or their responsible persons at least 30 days prior to the planned closing. Written notification shall include reason for closing, date of closing and plans made for the move of the residents.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977. Temporary Amendment Eff. September 1, 2003.

SECTION .0300 - PHYSICAL PLANT

10A NCAC 13F .0302 CONSTRUCTION

(a) Any building licensed for the first time ~~must~~ shall meet the requirements of the North Carolina State Building Code for new construction as well as all of the rules of this Section. No horizontal exits shall be permitted in newly constructed facilities or new additions to existing facilities.

(b) In a facility licensed before April 1, 1984, the building ~~must~~ shall meet and be maintained to meet all the requirements for new construction required by the North Carolina State Building Code in effect at the time the building was constructed. Where code requirements require a modification of the building's structural system, an alternative method may be used to meet the intent of the code.

(c) In a facility licensed before April 1, 1984 and constructed prior to January 1, 1975, the building, in addition to meeting the requirements of the North Carolina State Building Code in effect at the time the building was constructed, shall be provided with the following:

- (1) A fire alarm system with pull stations near each exit and sounding devices which are audible throughout the building must be provided.
- (2) Products of combustion (smoke) U/L listed detectors in all corridors. The detectors must be no more than 60 feet from each other and no more than 30 feet from any end wall.
- (3) Heat detectors or products of combustion detectors in all storage rooms, kitchens, living rooms, dining rooms and laundries.
- (4) All detection systems interconnected with the fire alarm system.

(5) Emergency power for the fire alarm system, heat detection system, and products of combustion detection system. The emergency power for these systems may be a manual start system capable of monitoring the building for 24 hours and sound the alarm for five minutes at the end of that time. The emergency power for the emergency lights shall be a manual start generator or a U/L approved trickle charge battery system capable of providing light for 1-1/2 hours when normal power fails.

(d) The building ~~must~~ shall meet ~~sanitary~~ sanitation requirements as determined by the North Carolina Division of Health Services ~~Environmental Health~~.

(e) Effective July 1, 1987, resident bedrooms and resident services shall not be permitted on the second floor of any facility licensed prior to April 1, 1984 and classified as two-story wood frame construction by the North Carolina State Building Code.

(f) The facility shall have current sanitation and fire and building safety inspection reports which shall be maintained in the facility and available for review.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. July 1, 1990; September 1, 1986; April 1, 1984; Temporary Amendment Eff. September 1, 2003.

10A NCAC 13F .0304 HOUSEKEEPING AND FURNISHINGS

~~(a) The requirements in 10A NCAC 13G .0314 shall control for this Subchapter, except that a home for the aged and disabled must have an approved sanitary classification at all times in a home with twelve beds or less and must have a sanitary grade of ninety or above at all times in a home with thirteen beds or more.~~

~~(b) In addition to the requirements in 10A NCAC 13G .0314, the dining room in homes for the aged and disabled must have small tables serving from two to eight persons.~~

(a) Facilities shall:

- (1) have walls, ceilings, and floors or floor coverings kept clean and in good repair;
- (2) have no chronic unpleasant odors;
- (3) have furniture clean and in good repair;
- (4) have an approved sanitation classification at all times in facilities with 12 beds or less and sanitation scores of 85 or above at all times in facilities with 13 beds or more;
- (5) be maintained in an uncluttered, clean and orderly manner, free of all obstructions and hazards;
- (6) have an adequate supply of bath soap, clean towels, washcloths, sheets, pillow cases, blankets, and additional coverings on hand at all times;
- (7) make available the following items as needed through any means other than charge to the personal funds of recipients of State-County Special Assistance:

TEMPORARY RULES

- (A) protective sheets and clean, absorbent, soft and smooth pads;
- (B) bedpans, urinals, hot water bottles, and ice caps; and
- (C) bedside commodes, walkers, and wheelchairs;
- (8) have television and radio, each in good working order; and
- (9) have curtains, draperies or blinds, where appropriate.

(b) Residents will be allowed to bring their own furniture and personal belongings if permitted by the home.

(c) Each bedroom shall have the following furnishings in good repair and clean for each resident:

- (1) Single bed equipped with box springs and mattress or solid link springs and no-sag innerspring or foam mattress. Hospital bed appropriately equipped shall be arranged for as needed. A double bed is allowed if used only for single occupancy, unless occupied by husband and wife. A water bed is allowed if requested by a resident and permitted by the home. Each bed is to have the following:
 - (A) at least one pillow with clean pillow case;
 - (B) clean top and bottom sheets on the bed, with bed changed as often as necessary but at least once a week; and
 - (C) clean bedspread and other clean coverings as needed;
- (2) a bedside type table;
- (3) chest of drawers or bureau when not provided as built-ins, or a double chest of drawers or double dresser for two residents;
- (4) a wall or dresser mirror that can be used by each resident;
- (5) a minimum of one comfortable chair (rocker or straight, arm or without arms, as preferred by resident), high enough from floor for easy rising;
- (6) additional chairs available, as needed, for use by visitors;
- (7) individual clean towel and wash cloth, and towel bar; and
- (8) a light overhead of bed with a switch within reach of person lying on bed; or a lamp. The light shall be of 30 foot-candle power for reading.

(d) The living room shall have the following furnishings:

- (1) functional living room furnishings for the comfort of aged and disabled persons, with coverings easily cleanable;
- (2) recreational equipment, supplies for games, books, and reasonably current magazines;
- (3) an easily readable clock; and
- (4) a newspaper.

(e) The dining room shall have the following furnishings:

- (1) small tables serving from two to eight persons and chairs to seat all residents eating in the dining room; tables and chairs equal to the

resident capacity of the home shall be on the premises; and

- (2) movable, non-folding chairs designed to minimize tilting.

History Note: Authority G.S. 131D-2; 143B-153; Eff. January 1, 1977;

Readopted Eff. October 31, 1977;

Amended Eff. April 1, 1987; April 1, 1984;

Temporary Amendment Eff. September 1, 2003.

SECTION .0400 - STAFF QUALIFICATIONS

10A NCAC 13F .0406 TEST FOR TUBERCULOSIS

~~(a) The administrator shall be tested for tuberculosis disease within 90 days before employment and annually thereafter. There shall be documentation on file in the home that the administrator is free of tuberculosis disease that poses a direct threat to the health or safety of others.~~

~~(b)(a) Upon employment or living in the facility, the administrator and all other staff and any live-in non-residents shall be tested for tuberculosis disease within 90 days before or seven days after employment or living in the home, and annually thereafter, in compliance with control measures adopted by the Commission for Health Services as specified in 10A NCAC 41A .0205 including subsequent amendments and editions. Copies of the rule are available at no charge by contacting the Department of Health and Human Services, Tuberculosis Control Program, 1902 Mail Service Center, Raleigh, NC 27699-1902. There shall be documentation on file in the home that each person is free of tuberculosis disease that poses a direct threat to the health or safety of others.~~

~~(b) There shall be documentation on file in the home that each staff person is free of tuberculosis disease that poses a direct threat to the health or safety of others.~~

~~(c) Tests for tuberculosis disease shall comply with the control measures adopted by the Commission for Health Services as specified in 15A NCAC 19A .0205 including subsequent amendments and editions. Copies of the rule are available at no charge by contacting the Department of Environment, Health, and Natural Resources Tuberculosis Control Branch, Post Office Box 27687, Raleigh, North Carolina 27611-7687.~~

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160;

Eff. January 1, 1977;

Readopted Eff. October 31, 1977;

Temporary Amendment Eff. September 1, 2003.

10A NCAC 13F .0407 OTHER STAFF QUALIFICATIONS

~~(a) In addition to the personnel requirements set forth in Rules .0401, .0402, and .0404 of this Subchapter, additional competent staff shall be employed, as needed, to assure good housekeeping, supervision and personal care of the residents.~~

~~(b) In homes where there are minor children, aged or infirm relatives of the administrator or other management staff residing, the number of extra staff shall be determined by the capacity for which the home is licensed plus the minors and relatives who require care and supervision.~~

TEMPORARY RULES

~~(c) The Division of Facility Services shall make the final determination of the need for additional staff, based on the home's licensed capacity; the number of live-in minors and relatives requiring care; the condition, needs and ambulation capacity of the residents; and the layout of the building.~~

~~(d) Each staff member shall have a well defined job description that reflects actual duties and responsibilities, signed by the administrator and the employee.~~

~~(e) Each staff member shall be able to apply all of the home's accident, fire safety and emergency procedures for the protection of the residents.~~

~~(f) Each staff member authorized by the administrator to have access to confidential resident information shall be informed of the confidential nature of the information and shall protect and preserve such information from unauthorized use and disclosure. G.S. 131D-2(b)(4), G.S. 131D-21(6), and G.S. 131D-21.1 govern the disclosure of such information.~~

~~(g) Each staff member shall encourage and assist the residents in the exercise of the rights guaranteed under the Adult Care Home Residents' Bill of Rights. No staff member shall hinder or interfere with the proper performance of duty of a lawfully appointed Adult Care Home Community Advisory Committee.~~

~~(h) Each staff member left alone with the residents shall be 18 years or older.~~

~~(i) By January 1, 2001, each facility shall have at least one staff person on the premises at all times who has successfully completed within the last 24 months a course on cardiopulmonary resuscitation (CPR) and choking management, including Heimlich maneuver, provided by the American Heart Association, the American Red Cross or a trainer with documented certification as a trainer in these procedures unless the only staff person on site has been deemed physically incapable of performing these procedures by a licensed physician. For the purpose of this Rule, successfully completed means demonstrating competency, as evaluated by the instructor, in performing the Heimlich maneuver and cardiopulmonary resuscitation. Documentation of successful completion of the course shall be on file and available for review in the facility. The facility shall not have a policy prohibiting staff from administering CPR to residents except those residents with physician orders for no resuscitation or no CPR.~~

~~(j) Staff who transport residents shall maintain a valid driver's license.~~

(a) Each staff person shall:

(1) have a well-defined job description that reflects actual duties and responsibilities and is signed by the administrator and the employee;

(2) be able to apply all of the home's accident, fire safety and emergency procedures for the protection of the residents;

(3) be informed of the confidential nature of resident information and shall protect and preserve such information from unauthorized use and disclosure.

Note: G.S. 131D-2(b)(4), 131D-21(6), and 131D-21.1 govern the disclosure of such information;

(4) not hinder or interfere with the exercise of the rights guaranteed under the Declaration of Residents' Rights in G.S. 131D-21;

(5) be 18 years or older;

(6) have no substantiated findings of abuse or neglect listed on the North Carolina Health Care Personnel Registry;

(7) have a criminal background check in accordance with G.S. 114-19.10 and 131D-40; and

(8) maintain a valid driver's license if responsible for transportation of residents.

~~(k)(b) If licensed practical nurses are employed by the facility and practicing in their licensed capacity as governed by their practice act and occupational licensing laws, there shall be continuous availability of a registered nurse consistent with Rules 21 NCAC 36 .0224(I) and 21 NCAC 36 .0225.~~

Note: The practice of licensed practical nurses is governed by their occupational licensing laws.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-153; 143B-165 S.L. 1999-334; 2002-160;

Eff. January 1, 1977;

Readopted Eff. October 31, 1977;

Amended Eff. April 1, 1984;

Temporary Amendment Eff. September 1, 2003; July 1, 2003.

SECTION .0500 - STAFF ORIENTATION, TRAINING, COMPETENCY AND CONTINUING EDUCATION

10A NCAC 13F .0501 PERSONAL CARE TRAINING AND COMPETENCY

~~(a) The facility shall assure that staff who perform or directly supervise staff who perform personal care tasks listed in Paragraph (h) of this Rule successfully complete a 45-hour training program, including competency evaluation, approved by the Department according to Rule .1411 of this Section. Directly supervise means being on duty in the facility to oversee or direct the performance of staff duties.~~

~~(b) The facility shall assure that staff who perform or directly supervise staff who perform personal care tasks listed in Paragraph (i) of this Rule successfully complete a 80-hour training program, including competency evaluation, approved by the Department according to Rule .1411 of this Section and comparable to the State approved Nurse Aide I training.~~

~~(c) The facility shall assure that training specified in Paragraphs (a) and (b) of this Rule is successfully completed within six months after hiring for staff hired after July 1, 2000. Staff hired prior to July 1, 2000, shall have completed at least a 40-hour training program for the performance or supervision of tasks listed in Paragraph (i) of this Rule or a 75-hour training program for the performance or supervision of tasks listed in Paragraph (j) of this Rule. The 40 and 75-hour training shall meet all the requirements of this Rule except for the interpersonal skills and behavioral interventions listed in Paragraph (j) of this Rule.~~

~~(d) The Department shall have the authority to extend the six-month time frame specified in Paragraph (c) of this Rule up to six additional months for a maximum allowance of 12 months for completion of training upon submittal of documentation to the Department by the facility showing good cause for not meeting the six-month time frame.~~

~~(e) Exemptions from the training requirements of this Rule are as follows:~~

TEMPORARY RULES

- (1) ~~The Department shall exempt staff from the 45-hour training requirement upon successful completion of a competency evaluation approved by the Department according to Rule .1411 of this Section if staff have been employed to perform or directly supervise personal care tasks listed in Paragraph (h) and the interpersonal skills and behavioral interventions listed in Paragraph (j) of this Rule in a comparable long-term care setting for a total of at least 12 months during the three years prior to January 1, 1996, or the date they are hired, whichever is later.~~
 - (2) ~~The Department shall exempt staff from the 80-hour training requirement upon successful completion of a 15-hour refresher training and competency evaluation program or a competency evaluation program approved by the Department according to Rule .1411 of this Section if staff have been employed to perform or directly supervise personal care tasks listed in Paragraph (i) and the interpersonal skills and behavioral interventions listed in Paragraph (j) of this Rule in a comparable long-term care setting for a total of at least 12 months during the three years prior to January 1, 1996, or the date they are hired, whichever is later.~~
 - (3) ~~The Department shall exempt staff from the 45 and 80-hour training and competency evaluation who are licensed health professionals or listed on the N.C. Nurse Aide Registry.~~
- (f) ~~The facility shall maintain documentation of the training and competency evaluations of staff required by the rules of this Subchapter. The documentation shall be filed in an orderly manner and made available for review by representatives of the Department.~~
- (g) ~~The facility shall assure that staff who perform or directly supervise staff who perform personal care tasks listed in Paragraphs (h) and (i) and the interpersonal skills and behavioral interventions listed in Paragraph (j) of this Rule receive on-the-job training and supervision as necessary for the performance of individual job assignments prior to meeting the training and competency requirements of this Rule.~~
- (h) ~~For the purposes of this Rule, personal care tasks which require a 45-hour training program include, but are not limited to the following:~~
- (1) ~~assist residents with toileting and maintaining bowel and bladder continence;~~
 - (2) ~~assist residents with mobility and transferring;~~
 - (3) ~~provide care for normal, unbroken skin;~~
 - (4) ~~assist with personal hygiene to include mouth care, hair and scalp grooming, care of fingernails, and bathing in shower, tub, bed basin;~~
 - (5) ~~trim hair;~~
 - (6) ~~shave resident;~~
 - (7) ~~provide basic first aid;~~
 - (8) ~~assist residents with dressing;~~
 - (9) ~~assist with feeding residents with special conditions but no swallowing difficulties;~~
 - (10) ~~assist and encourage physical activity;~~
 - (11) ~~take and record temperature, pulse, respiration, routine height and weight;~~
 - (12) ~~trim toenails for residents without diabetes or peripheral vascular disease;~~
 - (13) ~~perineal care;~~
 - (14) ~~apply condom catheters;~~
 - (15) ~~turn and position;~~
 - (16) ~~collect urine or fecal specimens;~~
 - (17) ~~take and record blood pressure if a registered nurse has determined and documented staff to be competent to perform this task;~~
 - (18) ~~apply and remove or assist with applying and removing prosthetic devices for stable residents if a registered nurse, licensed physical therapist or licensed occupational therapist has determined and documented staff to be competent to perform the task; and~~
 - (19) ~~apply or assist with applying ace bandages, TED's and binders for stable residents if a registered nurse has determined and documented staff to be competent to perform the task.~~
- (i) ~~For the purposes of this Rule, personal care tasks which require a 80 hour training program are as follows:~~
- (1) ~~assist with feeding residents with swallowing difficulty;~~
 - (2) ~~assist with gait training using assistive devices;~~
 - (3) ~~assist with or perform range of motion exercises;~~
 - (4) ~~empty and record drainage of catheter bag;~~
 - (5) ~~administer enemas;~~
 - (6) ~~bowel and bladder retraining to regain continence;~~
 - (7) ~~test urine or fecal specimens;~~
 - (8) ~~use of physical or mechanical devices attached to or adjacent to the resident which restrict movement or access to one's own body used to restrict movement or enable or enhance functional abilities;~~
 - (9) ~~non-sterile dressing procedures;~~
 - (10) ~~force and restrict fluids;~~
 - (11) ~~apply prescribed heat therapy;~~
 - (12) ~~care for non-infected pressure ulcers; and~~
 - (13) ~~vaginal douches.~~
- (j) ~~For purposes of this Rule, the interpersonal skills and behavioral interventions include, but are not limited to the following:~~
- (1) ~~recognition of residents' usual patterns of responding to other people;~~
 - (2) ~~individualization of appropriate interpersonal interactions with residents;~~
 - (3) ~~interpersonal distress and behavior problems;~~
 - (4) ~~knowledge of and use of techniques, as alternatives to the use of restraints, to decrease residents' intrapersonal and interpersonal distress and behavior problems;~~
 - (5) ~~knowledge of procedures for obtaining consultation and assistance regarding safe,~~

~~humane management of residents' behavioral problems.~~

~~(a) The facility shall assure that staff who provide or directly supervise staff who provide personal care to residents successfully complete an 80-hour personal care training and competency evaluation program, established by the Department. Directly supervise means being on duty in the facility to oversee or direct the performance of staff duties. Copies of the 80-hour training and competency evaluation program are available at the cost of printing and mailing by contacting the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708.~~

~~(b) The facility shall assure that training specified in Paragraph (a) of this Rule is successfully completed within six months after hiring for staff hired after September 1, 2003. Documentation of the successful completion of the 80-hour training and competency evaluation program shall be maintained in the facility and available for review.~~

~~(c) The Department shall exempt staff from the 80-hour training and competency evaluation program who are:~~

- ~~(1) licensed health professionals;~~
- ~~(2) listed on the Nurse Aide Registry; or~~
- ~~(3) documented as having successfully completed a 40-45 hour or 75-80 hour training program or competency evaluation program approved by the Department since January 1, 1996.~~

~~(d) The facility shall assure that staff, who perform or directly supervise staff who perform personal care, receive on-the-job training and supervision as necessary for the performance of individual job assignments prior to meeting the training and competency requirements of this Rule. Documentation of the on-the-job training shall be maintained in the facility and available for review.~~

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-334; Temporary Adoption Eff. January 1, 1996; Eff. May 1, 1997; Temporary Amendment Eff. December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. September 1, 2003.

10A NCAC 13F .0502 PERSONAL CARE TRAINING CONTENT AND INSTRUCTORS

~~(a) The 45-hour training specified in Rule .0501 of this Section shall consist of at least 24 hours of classroom instruction, and the remaining hours shall be supervised practical experience. Competency evaluation shall be conducted in each of the following areas:~~

- ~~(1) personal care skills;~~
- ~~(2) cognitive, behavioral and social care for all residents and including interventions to reduce behavioral problems for residents with mental disabilities; and~~
- ~~(3) residents' rights as established by G.S. 131D-21.~~

~~(b)(a) The 80-hour training specified in Rule .0501 of this Section shall consist of at least 34 hours of classroom instruction and at least 34 hours of supervised practical experience. Competency evaluation shall be conducted in each of the following areas:~~

- (1) observation and documentation;
- (2) basic nursing skills, including special health-related tasks;
- (3) personal care skills;
- (4) cognitive, behavioral and social care for all residents and, including interventions to reduce behavioral problems for residents with mental disabilities;
- (5) basic restorative services; and
- (6) residents' rights as established by G.S. 131D-21.

~~(e)(b) The following requirements shall apply to the 45- and 80-hour training specified in Rule .0501 of this Section:~~

- (1) The training shall be conducted by an individual or a team of instructors with a coordinator. The supervisor of practical experience and instructor of content having to do with personal care tasks or basic nursing skills shall be a registered nurse with a current, unencumbered license in North Carolina and with two years of clinical or direct patient care experience working in a health care, home care or long term care setting. The program coordinator and any instructor of content that does not include instruction on personal care tasks or basic nursing skills shall be a registered nurse, licensed practical nurse, physician, gerontologist, social worker, psychologist, mental health professional or other health professional with two years of work experience in adult education or in a long term care setting; or a four-year college graduate with four years of experience working in the field of aging or long term care for adults.
- (2) A trainee participating in the classroom instruction and supervised practical experience in the setting of the trainee's employment shall not be considered on duty and counted in the staff-to-resident ratio.
- (3) Training shall not be offered without a qualified instructor on site.
- (4) Classroom instruction shall include the opportunity for demonstration and practice of skills.
- (5) Supervised practical experience shall be conducted in a licensed adult care home or in a facility or laboratory setting comparable to the work setting in which the trainee will be performing or supervising the personal care skills.
- (6) All skills shall be performed on humans except for intimate care skills, such as perineal and catheter care, which may be conducted on a mannequin.
- (7) There shall be no more than 10 trainees for each instructor for the supervised practical experience.
- (8) A written examination prepared by the instructor shall be used to evaluate the trainee's knowledge of the content portion of the

classroom training. The trainee shall score at least 70 on the written examination. Oral testing shall be provided in the place of a written examination for trainees lacking reading or writing ability.

- (9) The trainee shall satisfactorily perform all of the personal care skills required in the training programs specified in Rule .0501(h) and the skills specified in Rule .0501(j) of this Section for the 45-hour training and in Rules .0501(h), (i) and (j) of this Section for the 80-hour training. The instructor shall use a skills performance checklist for this competency evaluation evaluation, that includes, at least, all those skills specified in Rules .0501(h) and (j) of this Section for the 45-hour training and all those skills specified in Rules .0501(h), (i) and (j) of this Section for the 80-hour training. Satisfactory performance of the personal care skills and interpersonal and behavioral intervention skills means that the trainee performed the skill unassisted; explained the procedure to the resident; explained to the instructor, prior to or after the procedure, what was being done and why it was being done in that way; and incorporated the principles of good body mechanics, medical asepsis and resident safety and privacy.
- (10) The training provider shall issue to all trainees who successfully complete the training a certificate, signed by the registered nurse who conducted the skills competency evaluation, stating that the trainee successfully completed the 45 or 80-hour training. The trainee's name shall be on the certificate. The training provider shall maintain copies of the certificates and the skills evaluation checklists for a minimum of five years.

~~(d)~~(c) An individual, agency or organization seeking to provide the 45 or 80-hour training and competency evaluation specified in Rule .0501 of this Section shall submit the following information to the Adult Care Licensure Section of the Division of Facility Services:

- (1) an application which is available at no charge by contacting the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center Raleigh, North Carolina 27699-2708; 27699-2708.
- (2) a statement of training program philosophy;
- (3) a statement of training program objectives for each content area;
- (4) a curriculum outline with specific hours for each content area;
- (5) teaching methodologies, a list of texts or other instructional materials and a copy of the written exam or testing instrument with an established passing grade;
- (6) a list of equipment and supplies to be used in the training;

- (7) ~~procedures or steps to be completed in the performance of the personal care and basic nursing skills;~~
- (8) ~~sites for classroom and supervised practical experience, including the specific settings or rooms within each site;~~
- (9) ~~resumes of all instructors and the program coordinator, including current RN certificate numbers as applicable;~~
- (10) ~~policy statements that address the role of the registered nurse, instructor to trainee ratio for the supervised practical experience, retention of trainee records and attendance requirements;~~
- (11) ~~a skills performance checklist as specified in Subparagraph (c)(9) of this Rule; and~~
- (12) ~~a certificate of successful completion of the training program.~~

~~(e)~~ The following requirements shall apply to the competency evaluation for purposes of exempting adult care home staff from the 45 or 80-hour training as required in Rule .1410 of this Section:

- (1) ~~The competency evaluation for purposes of exempting adult care home staff from the 45 or 80-hour training shall consist of the satisfactory performance of personal care skills according to the requirement in Subparagraph (c)(9) of this Rule.~~
- (2) ~~Any person who conducts the competency evaluation for exemption from the 45 or 80-hour training shall be a registered nurse with the same qualifications specified in Subparagraph (c)(1) of this Rule.~~
- (3) ~~The competency evaluation shall be conducted in a licensed adult care home or in a facility or laboratory setting comparable to the work setting in which the participant will be performing or supervising the personal care skills.~~
- (4) ~~All skills being evaluated shall be performed on humans except for intimate care skills such as perineal and catheter care, which may be performed on a mannequin.~~
- (5) ~~The person being competency evaluated in the setting of the person's employment shall not be considered on duty and counted in the staff to resident ratio.~~
- (6) ~~An individual, agency or organization seeking to provide the competency evaluation for training exemption purposes shall complete an application available at no charge from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, North Carolina 27699-2708 and submit it to the Adult Care Licensure Section along with the following information:~~
 - (A) ~~resume of the person performing the competency evaluation, including the current RN certificate number;~~
 - (B) ~~a certificate, with the signature of the evaluating registered nurse and the~~

participant's name, to be issued to the person successfully completing the competency evaluation;

- (C) procedures or steps to be completed in the performance of the personal care and basic nursing skills;
- (D) skills performance checklist as specified in Subparagraph (c)(9) of this Rule;
- (E) a site for the competency evaluation; and
- (F) a list of equipment, materials and supplies.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-334; 2002-160; Temporary Adoption Eff. January 1, 1996; Eff. May 1, 1997; Temporary Amendment Eff. December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. September 1, 2003.

10A NCAC 13F .0504 COMPETENCY VALIDATION FOR LICENSED HEALTH PROFESSIONAL SUPPORT TASKS

(a) The facility shall assure that non-licensed personnel and licensed personnel not practicing in their licensed capacity as governed by their practice act and occupational licensing laws are competency validated by return demonstration for any personal care task specified in Paragraphs (a)(1)-(28) of Rule .0903 of this Subchapter prior to staff performing the task and that their ongoing competency is assured through facility staff oversight and supervision.

(b) Competency validation shall be performed by the following licensed health professionals:

- (1) A registered nurse shall validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(1)-(28) of Rule .0903 of this Subchapter.
- (2) In lieu of a registered nurse, a respiratory care practitioner licensed under G.S. 90, Article 38, may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(6), (a)(11), (a)(16), (a)(18), (a)(19) and (a)(21) of Rule .0903 of this Subchapter.
- (3) In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform the personal care task specified in Subparagraph (a)(8) of Rule .0903 of this Subchapter.
- (4) In lieu of a registered nurse, an occupational therapist or physical therapist may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(17) and (a)(22)-(27) of Rule .0903 of this Subchapter.

(c) Competency validation of staff, according to Paragraph (a) of this Rule, for the licensed health professional support tasks specified in Paragraph (a) of Rule .0903 of this Subchapter and

the performance of these tasks is limited exclusively to these tasks.

History Note: Authority 131D-2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13F .0505 TRAINING ON CARE OF DIABETIC RESIDENTS

The facility shall assure that training on the care of residents with diabetes is provided to unlicensed staff prior to the administration of insulin as follows:

- (1) Training shall be provided by a registered nurse, registered pharmacist or prescribing practitioner.
- (2) Training shall include at least the following:
 - (a) basic facts about diabetes and care involved in the management of diabetes;
 - (b) insulin action;
 - (c) insulin storage;
 - (d) mixing, measuring and injection techniques for insulin administration;
 - (e) treatment and prevention of hypoglycemia and hyperglycemia, including signs and symptoms;
 - (f) blood glucose monitoring; universal precautions;
 - (g) appropriate administration times; and
 - (h) sliding scale insulin administration.

History Note: Authority 131D -2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13F .0506 TRAINING ON PHYSICAL RESTRAINTS

(a) The facility shall assure that all staff responsible for caring for residents with medical symptoms that warrant restraints are trained on the use of alternatives to physical restraint use and on the care of residents who are physically restrained.

(b) Training shall be provided by a registered nurse and shall include the following:

- (1) alternatives to physical restraints;
- (2) types of physical restraints;
- (3) medical symptoms that warrant physical restraint;
- (4) negative outcomes from using physical restraints;
- (5) correct application of physical restraints;
- (6) monitoring and caring for residents who are restrained; and
- (7) the process of reducing restraint time by using alternatives.

History Note: Authority 131D -2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13F .0507 TRAINING ON CPR

Each facility shall have at least one staff person on the premises at all times who has completed within the last 24 months a course on cardio-pulmonary resuscitation and choking management, including the Heimlich maneuver, provided by an

organization that has a nationally recognized course or program in cardio-pulmonary resuscitation, including the American Heart Association, American Red Cross, National Safety Council, American Safety and Health Institute and Medic First Aid, or by a trainer with documented certification as a trainer on these procedures from one of these organizations.

History Note: Authority 131D-2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13F .0508 ASSESSMENT TRAINING

The person or persons designated by the administrator to perform resident assessments as required by Rule .0801 of this Subchapter shall successfully complete training according to an instruction manual on resident assessment established by the Department before performing the required assessments. Registered nurses are exempt from the assessment training. The instruction manual on resident assessment is available on the internet website, <http://facility-services.state.nc.us/gcpage.htm>, or it is available at the cost of printing and mailing from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L.2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13F .0509 RESERVED FOR FUTURE CODIFICATION

10A NCAC 13F .0510 RESERVED FOR FUTURE CODIFICATION

10A NCAC 13F .0511 RESERVED FOR FUTURE CODIFICATION

10A NCAC 13F .0512 DOCUMENTATION OF TRAINING AND COMPETENCY VALIDATION

The facility shall maintain documentation of the training and competency validation of staff required by the rules of this Section in the facility and available for review.

History Note: Authority 131D-2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

SECTION .0700 - ADMISSION AND DISCHARGE

10A NCAC 13F .0703 TUBERCULOSIS TEST AND MEDICAL EXAMINATION

(a) Upon admission to the facility, each resident shall be tested for tuberculosis disease in compliance with the control measures adopted by the Commission for Health Services as specified in 10A NCAC 41A .0205 including subsequent amendments and editions. Copies of the rule are available at no charge by contacting the Department of Health and Human Services, Tuberculosis Control Program, 1902 Mail Service Center, Raleigh, North Carolina 27699-1902.

(b) Each resident shall have a medical examination prior to admission to the facility and annually thereafter.

(c) The results of the complete examination required in Paragraph (b) of this Rule are to be entered on the FL-2 or MR-2 which shall comply with the following:

- (1) The examining date recorded on the FL-2 or MR-2 shall be no more than 90 days prior to the person's admission to the home;
- (2) The FL-2 or MR-2 shall be in the facility before admission or accompany the resident upon admission and be reviewed by the facility before admission except for emergency admissions;
- (3) In the case of an emergency admission, the medical examination and completion of the FL-2 or MR-2 shall be within 72 hours of admission;
- (4) If the information on the FL-2 or MR-2 is not clear or is insufficient, the facility shall contact the physician for clarification in order to determine if the services of the facility can meet the individual's needs;
- (5) The completed FL-2 or MR-2 shall be filed in the resident's record in the home; and
- (6) If a resident has been hospitalized, the facility shall have a completed FL-2 or MR-2 or a transfer form or discharge summary with signed prescribing practitioner orders upon the resident's return to the facility from the hospital.

(d) The facility shall make arrangements for any resident, who has been an inpatient of a psychiatric facility within 12 months before entering the home and who does not have a current plan for psychiatric care, to be examined by a local physician or a physician in a mental health center within 30 days after admission and to have a plan for psychiatric follow-up care when indicated.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Temporary Adoption Eff. September 1, 2003.

SECTION .0800 - RESIDENT ASSESSMENT AND CARE PLAN

10A NCAC 13F .0801 RESIDENT ASSESSMENT

(a) The facility shall assure that an admission-initial assessment of each resident is completed within 72 hours of admitting the resident using an assessment instrument approved by the Department, admission using the Resident Register.

(b) The facility shall assure an assessment of each resident is completed within 30 days following admission and at least annually thereafter using an assessment instrument established by the Department or an instrument approved by the Department based on it containing at least the same information as required on the established instrument. Effective January 1, 2002, in addition to the admission assessment within 72 hours, an evaluation of each resident shall be completed within 30 calendar days from the date of admission and annually thereafter using the Resident Assessment Instrument as approved by the Department. The evaluation within 30 calendar days of admission and annually thereafter. The assessment to be completed within 30 days following admission and annually

TEMPORARY RULES

~~thereafter~~ is a functional assessment to determine a resident's level of functioning to include ~~routines, preferences, needs, mood and~~ psychosocial well-being, cognitive status and physical functioning in activities of daily living. Activities of daily living are personal functions essential for the health and well-being of the resident which are bathing, dressing, personal hygiene, ambulation or locomotion, transferring, toileting and eating. The ~~evaluation assessment within 30 calendar days of admission and annually thereafter~~ shall indicate if the resident requires referral to the resident's physician or other appropriate licensed health care professional or community resource.

~~(b)(c)~~ The facility shall assure ~~a reassessment an assessment~~ of a resident is completed within 10 days ~~of following~~ a significant change in the resident's condition using the assessment instrument required in Paragraph (b) of this Rule to be completed within 72 hours of resident admission prior to January 1, 2002 and the Resident Assessment Instrument thereafter. For the purposes of this Subchapter, significant change in the resident's condition is defined as follows:

- (1) Significant change is one or more of the following:
 - (A) deterioration in two or more activities of daily living;
 - (B) change in ability to walk or transfer;
 - (C) change in the ability to use one's hands to grasp small objects;
 - (D) deterioration in behavior or mood to the point where daily problems arise or relationships have become problematic;
 - (E) no response by the resident to the treatment for an identified problem;
 - (F) initial onset of unplanned weight loss or gain of five percent of body weight within a 30-day period or 10 percent weight loss or gain within a six-month period;
 - (G) threat to life such as stroke, heart condition, or metastatic cancer;
 - (H) emergence of a pressure ulcer at Stage II or higher;
 - (I) a new diagnosis of a condition likely to affect the resident's physical, mental, or psychosocial well-being over a prolonged period of time such as initial diagnosis of Alzheimer's disease or diabetes;
 - (J) improved behavior, mood or functional health status to the extent that the established plan of care no longer matches what is needed;
 - (K) new onset of impaired decision-making;
 - (L) continence to incontinence or indwelling catheter; or
 - (M) the resident's condition indicates there may be a need to use a restraint and there is no current restraint order for the resident.
- (2) Significant change is not any of the following:

- (A) changes that suggest slight upward or downward movement in the resident's status;
- (B) short-term changes that resolve with or without intervention;
- (C) changes that arise from easily reversible causes;
- (D) a short-term acute illness or episodic event;
- (E) a well-established, predictive, cyclical pattern; or
- (F) steady improvement under the current course of care.

~~(e)(d)~~ If a resident experiences a significant change as defined in Paragraph ~~(b)(c)~~ of this Rule, the facility shall refer the resident to the resident's physician or other appropriate licensed health professional such as a mental health professional, nurse practitioner, physician assistant or registered nurse in a timely manner consistent with the resident's condition but no longer than 10 days from the significant change, and document the referral in the resident's record.

~~(d)(e)~~ The ~~assessment to be completed within 72 hours and the evaluation to be completed within 30 calendar days of admission and annually thereafter as required in Paragraph (a) of this Rule assessments and any reassessment as required in Paragraph (a) Paragraphs (b) and (c) of this Rule and any reassessment as required in Paragraph (b) of this Rule~~ shall be completed and signed by the administrator or a person designated by the administrator to perform resident ~~assessments, assessments or reassessments.~~

~~(e)~~ The facility administrator or a person designated by the administrator to perform resident assessments and reassessments using the Resident Assessment Instrument shall successfully complete training provided by the Department on assessing residents before performing the required assessments or reassessments, using the Resident Assessment Instrument as required in Paragraph (a) of this Rule. Registered nurses are exempt from the assessment training. Documentation of assessment training shall be maintained in the facility and available for review.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-334;

Temporary Adoption Eff. January 1, 1996;

Eff. May 1, 1997;

Temporary Amendment Eff. September 1, 2003; July 1, 2003.

10A NCAC 13F .0802 RESIDENT CARE PLAN

(a) The facility shall assure a care plan is developed for each resident in conjunction with the ~~initial~~ resident assessment to be completed within 30 days following admission according to Rule .0801 of this Section, and revised as needed based on annual assessments and any reassessments of the resident. ~~For the purposes of this Subchapter,~~ The care plan is an individualized, written program of personal care for each resident.

(b) The care plan shall be revised as needed based on further assessments of the resident according to Rule .0801 of this Subchapter.

~~(b)(c)~~ The care plan shall include the following:

- (1) a statement of the care or service to be provided based on the assessment or reassessment; and
- (2) frequency of the service provision.

~~(c)~~(d) The assessor shall sign the care plan upon its completion.
~~(4)~~(e) The facility shall assure that the resident's physician authorizes personal care services and certifies the following by signing and dating the care plan within 15 calendar days of completion of the assessment:

- (1) the resident is under the physician's care; and
- (2) the resident has a medical diagnosis with associated physical or mental limitations that justify the personal care services specified in the care plan.

History Note: Authority G.S. 131D-2; 131D-4.3; 131D-4.5; 143B-153; 143B-165; S.L. 1999-334; S.L. 2002-160; Temporary Adoption Eff. January 1, 1996; Eff. May 1, 1997; Temporary Amendment Eff. July 1, 2003; Temporary Amendment Eff. September 1, 2003.

SECTION .0900 - RESIDENT CARE AND SERVICES

10A NCAC 13F .0902 HEALTH CARE

(a) The administrator is responsible for providing occasional or incidental medical care, such as providing therapeutic diets, rotating positions of residents confined to bed, and applying heat pads.

(b) The resident or his responsible person shall be allowed to choose a physician to attend to him.

(c) Immediate arrangements shall be made by the administrator with the resident or his responsible person for the resident to secure another physician when he cannot remain under the care of his own physician. The name, address and telephone number of the resident's physician shall be recorded on the Resident Register.

(d) If a resident is hospitalized, a completed FL-2 or patient transfer form shall be obtained before the resident can be readmitted to the facility.

(e) Between annual medical examinations there may be a need for a physician's care. The resident's health services record is to be used by the physician to report any drugs prescribed and any treatment given or recommended for minor illnesses.

(f) All contacts (office, home or telephone) with the resident's physician shall be recorded on the resident's health services record which is to be retained in the resident's record in the home. The physician's orders shall be included in the resident's health services record including telephone orders initialed by staff and signed by the physician within 15 days from the date the order is given.

~~(g) Until January 1, 2001, the following restraint requirements shall apply. The use of a physical restraint refers to the application of a mechanical device to a person to limit movement for therapeutic or protective reasons, excluding siderails for safety reasons. Residents shall be physically restrained only as provided for in the Declaration of Residents' Rights, G.S. 131D-21(5), and in accordance with the following:~~

- ~~(1) The use of physical restraints is allowed only with a written order from a licensed physician. If the order is obtained from a physician other~~

~~than the resident's attending physician, the attending physician shall be notified of the order within seven days.~~

~~(2) In emergency situations the administrator or supervisor in charge shall make the determination relative to necessity for the type and duration of the physical restraint to use until a physician is contacted. Contact shall be made within 24 hours.~~

~~(3) The physician shall specify in the restraint order the medical need for the physical restraint, the type to be used, the period of time it is to be used, and the time intervals it is to be checked, loosened, or removed.~~

~~(4) The current order for the physical restraint shall be on or attached to Form FL-2 or Form MR-2 (upon entering the home) or the Report of Health Services to Residents Form, or approved equivalent (for subsequent orders).~~

~~(5) The physician ordering the physical restraint shall update the restraint order at a minimum of every six months.~~

~~(6) If the resident's physician changes after admission to the home, the physician who is to attend the resident shall update and sign the existing restraint order.~~

~~(h)~~(g) Effective January 1, 2001, the following restraint requirements shall apply. The use of physical restraints refers to the application of a physical or mechanical device attached to or adjacent to the resident's body that the resident cannot remove easily which restricts freedom of movement or normal access to one's body and includes bed rails when used to keep the resident from voluntarily getting out of bed as opposed to enhancing mobility of the resident while in bed. Residents shall be physically restrained only in accordance with the following:

(1) The facility shall prohibit the use of physical restraints for discipline or convenience and limit restraint use to circumstances in which the resident has medical symptoms that warrant the use of restraints. Medical symptoms may include, but are not limited to, the following: confusion with risk of falls; and risk of abusive or injurious behaviors to self or others.

(2) Alternatives to physical restraints that would provide safety to the resident and prevent a potential for decline in the resident's functioning shall be provided prior to restraining the resident and documented in the medical record. Alternatives may include, but are not limited to, the following: providing restorative care to enhance abilities to stand safely and to walk, providing a device that monitors attempts to rise from chair or bed, placing the bed lower to the floor, providing frequent staff monitoring with periodic assistance in toileting and ambulation and offering fluids, providing activities, providing supportive devices such as wedge cushions, controlling pain and providing a calm relaxing

- environment with minimal noise and confusion.
- (3) If alternatives to physical restraints have failed and the resident's medical symptoms warrant the use of physical restraints, the facility shall assure that the resident is restrained with the least restrictive restraint that would provide safety.
- (4) When physical restraints are used, the facility shall engage in a systemic and gradual process towards reducing restraint time by using alternatives.
- (5) The administrator shall assure the development and implementation of written policies and procedures in the use of alternatives to physical restraints and in the care of residents who are physically restrained.
- (A) The administrator shall consult with a registered nurse in developing policies and procedures for alternatives to physical restraints and in the care of residents who are physically restrained.
- (B) Policies and procedures for alternatives to physical restraints and the use of physical restraints shall comply with requirements of this section. Orientation of these policies and procedures shall be provided to staff responsible for the care of residents who are restrained or require alternatives to restraints. This orientation shall be provided as part of the training required prior to staff providing care to residents who are restrained or require alternatives to restraints.
- (6) The administrator shall assure that each resident with medical symptoms that warrant the use of physical restraints is assessed and a care plan is developed. This assessment and care planning shall be completed prior to the resident being restrained; except in emergency situations. This assessment and care planning must meet any additional requirements in Section .0800 of this Subchapter.
- (A) The assessment shall include consideration of the following:
- (i) Medical symptoms that warrant the use of a physical restraint;
 - (ii) How the medical symptoms affect the resident;
 - (iii) When the medical symptoms were first observed;
 - (iv) How often the medical symptoms occur; and
 - (v) Alternatives that have been provided and the resident's response.
- (B) The care plan shall be individualized and indicate specific care to be given to the resident. The care plan shall include consideration of the following:
- (i) Alternatives and how the alternatives will be used;
 - (ii) The least restrictive type of physical restraint that would provide safety; and
 - (iii) Care to be provided to the resident during the time the resident is restrained.
- (C) The assessment and care planning shall be completed through a team process. The team must consist of, but is not limited to, the following: the supervisor or a personal care aide, a registered nurse and the resident's representative. If the resident's representative is not present, there must be documented evidence that the resident's representative was notified and declined an invitation to attend.
- (7) The resident's right to participate in his or her care and to refuse treatment includes the right to accept or refuse restraints. For the resident to make an informed choice about the use of physical restraints, negative outcomes, benefits and alternatives to restraint use shall be explained to the resident. Potential negative outcomes include incontinence, decreased range of motion, decreased ability to ambulate, increased risk of pressure ulcers, symptoms of withdrawal or depression and reduced social contact. In the case of a resident who is incapable of making a decision, the resident's representative shall exercise this right based on the same information that would have been provided to the resident. However, the resident's representative cannot give permission to use restraints for the sake of discipline or staff convenience or when the restraint is not necessary to treat the resident's medical symptoms.
- (8) The resident or the resident representative involvement in the restraint decision shall be documented in the resident's medical record. Documentation shall include the following:
- (A) The resident or the resident's representative shall sign and date a statement indicating they have been informed as required above.
 - (B) The statement shall indicate the resident's or the resident's representative's decision in restraint use, either consent for or a desire not to use restraints.

- (9) When a physical restraint is warranted and consent has been given, a physician's order shall be written. The following requirements apply to the physician's order:
- (A) The use of physical restraints is allowed only with a written order from a licensed physician. If the order is obtained from a physician other than the resident's attending physician, the attending physician shall be notified of the order within seven days.
 - (B) In emergency situations, the administrator or supervisor-in-charge shall make the determination relative to necessity for the type and duration of the physical restraint to use until a physician is contacted. Contact shall be made within 24 hours.
 - (C) The physician shall specify in the restraint order the medical need for the physical restraint, the type to be used, the period of time it is to be used, and the time intervals it is to be checked and removed.
 - (D) The current order for the physical restraint shall be on or attached to Form FL-2 or Form MR-2 (upon entering the home) or the Report of Health Services to Residents Form, or approved equivalent (for subsequent orders).
 - (E) The physician ordering the physical restraint shall update the restraint order at a minimum of every three months.
 - (F) If the resident's physician changes after admission to the home, the physician who is to attend the resident shall update and sign the existing restraint order.
- (10) The physical restraint shall be applied correctly according to manufacturer's instructions and the physician's order.
- (11) The resident shall be checked and released from the physical restraint and care provided as stated in the care plan; at least every 15 minutes for checks and at least every 2 hours for release.
- (12) Alternatives shall be provided in an effort to reduce restraint time.
- (13) All instances of physical restraint use shall be documented and shall include at least the following:
- (A) Alternatives to physical restraints that were provided and the resident's response;
 - (B) Type of physical restraint that was used;
 - (C) Medical symptoms warranting the use of the physical restraint;
 - (D) Time and duration of the physical restraint;
 - (E) Care that was provided to the resident during the restraint use; and
 - (F) Behaviors of the resident during the restraint use.
- (14) Physical restraints shall be applied only by staff who have received training and who have been validated for competency by a registered nurse on the proper use of restraints. Training and competency validation on restraints shall occur before staff members apply restraints. ~~Competency validation of restraint use by a registered nurse shall be completed annually. This Rule is consistent with the requirements in Rules .0501 and .0903 of this Subchapter.~~
- ~~(15) The administrator shall assure that training in the use of alternatives to physical restraints and in the care of residents who are physically restrained is provided to all staff responsible for caring for residents with medical symptoms that warrant restraints. Training shall be provided by a registered nurse and shall include the following:~~
- ~~(A) Alternatives to physical restraints;~~
 - ~~(B) Types of physical restraints;~~
 - ~~(C) Medical symptoms that warrant physical restraints;~~
 - ~~(D) Negative outcomes from using physical restraints;~~
 - ~~(E) Correct application of physical restraints;~~
 - ~~(F) Monitoring and caring for residents who are restrained; and~~
 - ~~(G) Process of reducing restraint time by using alternatives.~~
- (i)(h) The administrator shall have specific written instructions recorded as to what to do in case of sudden illness, accident, or death of a resident.
- (j)(i) There shall be an adequate supply of first aid supplies available in the home for immediate use.
- ~~(k)(j) The administrator shall make arrangements with the resident, his responsible person, the county department of social services or other appropriate party for appropriate health care as needed to enable the resident to be in the best possible health condition.~~

History Note: Authority G.S. 131D-2; 143B-165; S.L. 1999-334; 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. September 1, 2003; July 1, 2003.

10A NCAC 13F .0903 LICENSED HEALTH PROFESSIONAL SUPPORT

(a) The facility shall assure that an appropriate licensed health professional a registered nurse, licensed under G.S. 90, Article

TEMPORARY RULES

9A, participates in the on-site review and evaluation of the residents' health status, care plan and care provided for residents requiring, but not limited to, one or more of the following personal care tasks: ~~The review and evaluation shall be completed within the first 30 days of admission or within 30 days from the date a resident develops the need for the task and at least quarterly thereafter.~~

- (1) applying and removing ace bandages, ted hose, ~~and binders, and braces and splints;~~
- (2) feeding techniques for residents with swallowing problems;
- (3) bowel or bladder training programs to regain continence;
- (4) enemas, suppositories and vaginal douches;
- (5) positioning and emptying of the urinary catheter bag and cleaning around the urinary catheter;
- (6) chest physiotherapy or postural drainage;
- (7) clean dressing changes, ~~excluding packing wounds and application of prescribed enzymatic debriding agents;~~
- (8) collecting and testing of fingerstick blood samples;
- (9) care of well-established colostomy or ileostomy (having a healed surgical site without sutures or drainage);
- (10) care for pressure ulcers up to and including a Stage II pressure ulcer which is a superficial ulcer presenting as an abrasion, blister or shallow crater;
- (11) inhalation medication by machine;
- (12) forcing and restricting fluids;
- ~~(12)(13)~~ maintaining accurate intake and output data;
- ~~(13)(14)~~ medication administration through a well-established gastrostomy feeding tube (having a healed surgical site without sutures or drainage and through which a feeding regimen has been successfully established);
- ~~(14)(15)~~ medication administration through injection;
Note: Unlicensed staff may only administer subcutaneous injections as stated in Rule ~~.3804(q)~~ .1004(q) of this Subchapter;
- ~~(15)(16)~~ oxygen administration and monitoring;
- ~~(16)(17)~~ the care of residents who are physically restrained and the use of care practices as alternatives to restraints;
- ~~(17)(18)~~ oral suctioning;
- ~~(18)(19)~~ care of well-established tracheostomy, not to include indo-tracheal suctioning;~~or~~
- ~~(19)(20)~~ administering and monitoring of ~~gastrostomy-tube feedings through a well-established gastrostomy tube (see description in Subparagraph (14) of this Paragraph;~~
- (21) the monitoring of continuous positive air pressure devices (CPAP and BIPAP);
- (22) application of prescribed heat therapy;
- (23) application and removal of prosthetic devices except as used in early post-operative treatment for shaping of the extremity;
- (24) ambulation using assistive devices that requires physical assistance;

- ~~(25) range of motion exercises;~~
- ~~(26) any other prescribed physical or occupational therapy;~~
- ~~(27) transferring semi-ambulatory or non-ambulatory residents; or~~
- ~~(28) tasks performed by a nurse aide II according to the scope of practice as established in the Nursing Practice Act and rules promulgated under that act in 21 NCAC 36.~~

~~(b) The appropriate licensed health professional, as required in Paragraph (a) of this Rule, is:~~

- ~~(1) a registered nurse licensed under G.S. 90, Article 9A, for tasks listed in Subparagraphs (a)(1)-(28) of this Rule;~~
- ~~(2) an occupational therapist licensed under G.S. 90, Article 18D or physical therapist licensed under G.S. 90-270.24, Article 18B for tasks listed in Subparagraphs (a)(17) and (22)-(27) of this Rule;~~
- ~~(3) a respiratory care practitioner licensed under G.S. 90, Article 38, for tasks listed in Subparagraphs (a)(6), (11), (16), (18), (19) and (21) of this Rule; or~~
- ~~(4) a registered nurse licensed under G.S. 90, Article 9A, for tasks that can be performed by a nurse aide II according to the scope of practice as established in the Nursing Practice Act and rules promulgated under that act in 21 NCAC 36;~~

~~(b) The facility shall assure that a registered nurse, occupational therapist licensed under G.S. 90, Article 18D or physical therapist licensed under G.S. 90-270.24, Article 18B, participates in the on-site review and evaluation of the residents' health status, care plan and care provided within the time frames specified in Paragraph (a) of this Rule for those residents who require one or more of the following personal care tasks:~~

- ~~(1) application of prescribed heat therapy;~~
- ~~(2) application and removal of prosthetic devices except as used in early post-operative treatment for shaping of the extremity;~~
- ~~(3) ambulation using assistive devices;~~
- ~~(4) range of motion exercises;~~
- ~~(5) any other prescribed physical or occupational therapy; or~~
- ~~(6) transferring semi-ambulatory or non-ambulatory residents.~~

~~(c) The facility shall not provide care to residents with conditions or care needs as stated in G.S. 131D 2(a1).~~

~~(d)(c) The facility shall assure that participation by a registered nurse, occupational therapist or physical therapist in the on-site review and evaluation of the residents' health status, care plan and care provided, as required in Paragraph (a) of this Rule, is completed within the first 30 days of admission or within 30 days from the date a resident develops the need for the task and at least quarterly thereafter, and includes the following:~~

- ~~(1) assuring that licensed practical nurses and non-licensed personnel providing care and performing the tasks are competency validated according to Paragraph (e) of this Rule;~~
- ~~(2)(1) performing a physical assessment of the residents as related to their diagnosis and their~~

TEMPORARY RULES

~~the resident's diagnosis and or current condition requiring one or more of the tasks specified in Paragraph (a) of this Rule;~~

- ~~(3)(2) evaluating the resident's progress to care being provided;~~
- ~~(4)(3) recommending changes in the care of the resident as needed; needed based on the physical assessment and evaluation of the progress of the resident; and~~
- ~~(5)(4) documenting the activities in Subparagraphs (1) through (3) of this Paragraph.~~

~~(d) The facility shall assure action is taken in response to the licensed health professional review and documented, and that the physician or appropriate health professional is informed of the recommendations when necessary.~~

~~The facility shall assure that licensed practical nurses and non-licensed personnel are trained and competency validated for personal care tasks specified in Paragraphs (a) and (b) of this Rule. Competency validation shall be completed prior to staff performing the personal care task and documentation shall be in the facility and readily available. Staff shall be competency validated by the following health professionals:~~

- ~~(1) A registered nurse shall validate the competency of staff who perform personal care tasks specified in Paragraph (a) of this Rule. In lieu of a registered nurse, a registered respiratory therapist may validate the competency of staff who perform personal care tasks (6), (11), (15), (17), and (18), specified in Paragraph (a) of this Rule. In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform personal care task (8) specified in Paragraph (a) of this Rule.~~
- ~~(2) A registered nurse, occupational therapist or physical therapist shall validate the competency of staff who perform personal care tasks specified in Paragraph (b) of this Rule.~~

~~(f) The facility shall assure that training on the care of residents with diabetes is provided to unlicensed staff prior to the administration of insulin as follows and documented:~~

- ~~(1) Training shall be provided by a registered nurse or registered pharmacist.~~
- ~~(2) Training shall include at least the following:
 - ~~(A) basic facts about diabetes and care involved in the management of diabetes;~~
 - ~~(B) insulin action;~~
 - ~~(C) insulin storage;~~
 - ~~(D) mixing, measuring and injection techniques for insulin administration;~~
 - ~~(E) treatment and prevention of hypoglycemia and hyperglycemia, including signs and symptoms;~~
 - ~~(F) blood glucose monitoring; and~~
 - ~~(G) universal precautions; and~~~~

~~(g) The facility shall assure that staff who perform personal care tasks listed in Paragraphs (a) and (b) of this Rule are at least annually observed providing care to residents by a licensed~~

~~registered nurse or other appropriate licensed health professional, as specified in Paragraph (d) of this Rule, who is employed by the facility or under contract or agreement, individually or through an agency, with the facility. Annual competency validation shall be documented and readily available for review.~~

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-334; 2002-160; Temporary Adoption Eff. January 1, 1996; Eff. May 1, 1997; Temporary Amendment Eff. September 1, 2003; July 1, 2003.

SECTION .1200 - POLICIES, RECORDS AND REPORTS

10A NCAC 13F .1204 POPULATION REPORT

~~The administrator or supervisor in charge shall submit by January 31 of each year an annual population report for the previous calendar year to the county department of social services. If the home closes during the year, the administrator or supervisor in charge shall report for the previous calendar year to date of closing.~~

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Temporary Amendment Eff. July 1, 2003; Temporary Repeal Eff. September 1, 2003.

SUBCHAPTER 13G - LICENSING OF FAMILY CARE HOMES

SECTION .0200 - LICENSING

10A NCAC 13G .0204 APPLICATION TO LICENSE AN EXISTING BUILDING

~~(a) An application for a license to operate a family care home for adults in an existing building where no alterations are necessary shall be made at the county department of social services.~~

~~(b) A designated social worker will discuss the county's need for homes, the applicant's interest, qualifications, and plan of operation, and make a study of the administrator and home.~~

~~(c)(b) The following forms and reports shall be submitted through the county department of social services to the state Division of Facility Services:~~

- ~~(1) the Initial License Application;~~
- ~~(2) Form DSS 1861 (Recommendation for License);~~
- ~~(3) Form DSS 1864 (Request for Medical Information);~~
- ~~(4)(2) a photograph of each side of an the existing structure and one set of schematic floor plans or blueprints of the building showing the floor plan; type of construction; location, size and height of windows; location and type of heating system; the use of basement and attic; location of doors and closets; and other requested details;~~

TEMPORARY RULES

~~(5)(3)~~ Form DSS 6191 or DSS 1451 (~~Fire the Fire and Building Safety Inspection Report~~) Report to be submitted with completion of construction or renovation; and

~~(6)(4)~~ Form DHS 2094 (~~Sanitation Report~~) the Sanitation Report or a permit to begin operation from the sanitary division of the county health department.

~~(4)(c)~~ If during the study of the administrator and the home it does not appear that qualifications of the administrator or requirements for the home can be met, the county department of social services ~~will~~ shall so inform the applicant, indicating in writing the reason, and give the applicant an opportunity to withdraw the application. Upon the applicant's request, the application ~~will~~ shall be completed and submitted to the Division of Facility Services for consideration.

~~(e)(d)~~ The Division of Facility Services ~~will~~ shall notify the applicant and the county department of social services of ~~approval or disapproval of the materials outlined in Subparagraph (e)(4) of this Rule and of any required changes.~~

~~(f)(e)~~ Following review of application, references and all forms, a pre-licensing visit ~~will~~ shall be made by a consultant of the ~~state~~ Division of Facility Services.

~~(g)(f)~~ The consultant ~~will~~ shall report his findings and recommendations to the Division of Facility Services which shall promptly notify, in writing, the applicant and the county department of social services of the action taken.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. July 1, 1990; April 1, 1987; April 1, 1984;
ARRC Objection Lodged November 14, 1990;
Amended Eff. May 1, 1991;
Temporary Amendment Eff. September 1, 2003.

10A NCAC 13G .0205 APPLICATION TO LICENSE A NEWLY CONSTRUCTED OR RENOVATED BUILDING

(a) An application for a license to operate a home which is to be constructed, added to or renovated must be made at the county department of social services where the home is to be located.

(b) For information on the forms and reports to be submitted by the county department of social services to the Division of Facility Services, see Rule .0204(b) of this Subchapter. All of these forms and reports apply to a home which is to be constructed, added to or renovated, including one set of schematic floor plans or blueprints, and photographs of each side of the building for renovations or additions.

(c) If ~~during the study of the administrator and the home~~ it does not appear that ~~qualifications of the administrator or the licensure~~ requirements for the home can be met, the county department of social services will so inform the applicant, indicating in writing the reason, and give the applicant an opportunity to withdraw the application. Upon the applicant's request, the application will be completed and submitted to the Division of Facility Services for consideration.

(d) Upon receipt of copies of approval letters from the Department of Insurance and the Division of Environmental Health in the North Carolina Department of Environment and Natural Resources, indicating the applicant's plans are in full

compliance with the applicable requirements of the North Carolina State Building Code and the ~~sanitary~~ sanitation requirements of the Division of Environmental Health, the Division of Facility Services will make the final determination as to whether the rules of this Subchapter have been met and, if so, will give written approval and authorization to begin construction.

(e) Any changes made during construction shall require the approval of the Division of Facility Services to assure that licensing requirements are maintained.

(f) A pre-licensing visit and subsequent recommendation will be made by a program consultant, and in some cases a construction consultant, of the Division of Facility Services, in conjunction with the adult homes specialist of the county department of social services.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. July 1, 1990; April 1, 1984;
Temporary Amendment Eff. September 1, 2003.

10A NCAC 13G .0207 CHANGE OF LICENSEE

When a ~~currently licensed administrator~~ licensee wishes to sell or lease the home to another, the following procedure is required:

(1) The ~~administrator~~ licensee ~~must~~ shall notify the county department of social services that a change is desired. When there is a plan for a change of ~~administrator~~ licensee and another person applies to operate the home immediately, the ~~administrator~~ licensee ~~must~~ shall notify the county department and the residents or their responsible persons. It is the responsibility of the county department to talk with the residents, giving them the opportunity to make other plans if they so desire.

~~(2) The applicant must meet the qualifications for administrator as specified in Rule .2001 of this Subchapter.~~

~~(3)(2)~~ The county department of social services will submit all forms and reports specified in Rule .0204~~(e)(b)~~ of this Subchapter to the Division of Facility Services.

~~(4)(3)~~ The Division of Facility Services will review the records of the facility and, if necessary, visit the home.

~~(5)(4)~~ The ~~administrator~~ licensee and prospective ~~applicant~~ licensee will be advised by the Division of Facility Services of any changes which must be made to the building before licensing to a new licensee can be recommended.

~~(6)(5)~~ Frame or brick veneer buildings over one story in height with resident services and accommodations on the second floor will not be considered for re-licensure.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-0160;

Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. July 1, 1990; April 1, 1984;
Temporary Amendment Eff. September 1, 2003.

10A NCAC 13G .0211 NOTIFICATION ABOUT CLOSING OF HOME

- ~~(a) When there is a planned change of administrator and the home is to continue operating without interruption, the administrator must notify the county department of social services and the residents or their responsible persons. It is the responsibility of the county department of social services to discuss the change with the residents and offer assistance to any residents who wish to leave the home.~~
- ~~(b) If the home a licensee plans to terminate its the license close a home, the administrator licensee must shall provide written notification of the planned closing at least 30 days prior notice to the Division of Facility Services, the county department of social services and the residents or their responsible persons at least 30 days prior to the planned closing. Written notification shall include reason for closing, date of closing and plans made for the move of the residents.~~
- ~~(c) If the home's license is revoked or terminated, the county department of social services will notify the residents and provide them with assistance in moving to licensed homes or other living arrangements.~~

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. July 1, 1990; April 1, 1984;
Temporary Amendment Eff. September 1, 2003.

SECTION .0300 - THE BUILDING

10A NCAC 13G .0302 CONSTRUCTION

- (a) The home ~~must shall~~ meet applicable requirements of ~~Volume I and I-B~~ of the North Carolina State Building Code in force at the time of initial licensure.
- (b) The home ~~must shall~~ be one story in height, or two stories in height and meet the following requirements:
- (1) Each floor ~~must shall~~ be less than 1800 square feet in area;
 - (2) Aged or disabled persons are not to be housed on the second floor;
 - (3) Required resident facilities are not to be located on the second floor;
 - (4) A complete fire alarm system with pull stations on each floor and sounding devices which are audible throughout the building ~~must shall~~ be provided. The fire alarm system ~~must shall~~ be able to transmit an automatic signal to the local fire department where possible; and
 - (5) Interconnected U.L. approved products of combustion detectors directly wired to the house current ~~must shall~~ be installed on each floor.
- (c) The basement is not to be used for residents' storage or sleeping.

- (d) The attic is not to be used for storage or sleeping.
- (e) The ceiling ~~must shall~~ be at least seven and one-half feet from the floor.
- (f) In facilities licensed on or after April 1, 1984, all required resident areas ~~must shall~~ be on the same floor level. Steps between levels will not be permitted.
- (g) The door width ~~must shall~~ be a minimum of two feet and six inches in the kitchen, dining room, living rooms, bedrooms and bathrooms.
- (h) The building ~~must shall~~ meet sanitary requirements as determined by the North Carolina Department of Environment and Natural Resources; Division of Environmental Health.
- (i) All windows ~~must shall~~ be maintained operable.
- (j) The home shall have current sanitation and fire and building safety inspection reports which shall be maintained in the home and available for review.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160;
Eff. January 1, 1977;
Readopted Eff. October 31, 1977;
Amended Eff. July 1, 1990; April 1, 1984; January 1, 1983;
Temporary Amendment Eff. September 1, 2003.

SECTION .0400 - STAFF QUALIFICATIONS

10A NCAC 13G .0405 TEST FOR TUBERCULOSIS

- ~~(a) The administrator shall be tested for tuberculosis disease within 90 days before employment and annually thereafter. There shall be documentation on file in the home that the administrator is free of tuberculosis disease that poses a direct threat to the health or safety of others.~~
- ~~(b)(a) Upon employment or living in the facility, the administrator and all other staff and any live-in non-residents shall be tested for tuberculosis disease within 90 days before or seven days after employment or living in the home, and annually thereafter, in compliance with control measures adopted by the Commission for Health Services as specified in 10A NCAC 41A .0205 including subsequent amendments and editions. Copies of the rule are available at no charge by contacting the Department of Health and Human Services, Tuberculosis Control Program, 1902 Mail Service Center, Raleigh, NC 27699-1902. There shall be documentation on file in the home that each person is free of tuberculosis disease that poses a direct threat to the health or safety of others.~~
- ~~(b) There shall be documentation on file in the home that each staff person is free of tuberculosis disease that poses a direct threat to the health or safety of others.~~
- ~~(c) Tests for tuberculosis disease shall comply with the control measures adopted by the Commission for Health Services as specified in 15A NCAC 19A .0205 including subsequent amendments and editions. Copies of the rule are available at no charge by contacting the Department of Environment, Health, and Natural Resources Tuberculosis Control Branch, Post Office Box 27687, Raleigh, North Carolina 27611-7687.~~

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160;
Eff. January 1, 1977;
Amended Eff. October 1, 1977; April 22, 1977;
Readopted Eff. October 31, 1977;

*Amended Eff. December 1, 1993; April 1, 1984;
Temporary Amendment Eff. September 1, 2003.*

10A NCAC 13G .0406 OTHER STAFF

QUALIFICATIONS

~~(a) In addition to the personnel requirements set forth in Rules .0401, .0402, and .0404 of this Subchapter, additional competent staff shall be employed, as needed, to assure good housekeeping, supervision and personal care of the residents.~~

~~(b) In homes where there are minor children, aged or infirm relatives of the administrator or other management staff residing, the number of extra staff shall be determined by the capacity for which the home is licensed plus the minors and relatives who require care and supervision.~~

~~(d) The Division of Facility Services shall make the final determination of the need for additional staff,~~

~~based on the home's licensed capacity; the number of live in minors and relatives requiring care; the condition, needs and ambulation capacity of the residents; and the layout of the building.~~

~~(d) Each staff member shall have a well defined job description that reflects actual duties and responsibilities, signed by the administrator and the employee.~~

~~(e) Each staff member shall be able to apply all of the home's accident, fire safety and emergency procedures for the protection of the residents.~~

~~(f) Each staff member authorized by the administrator to have access to confidential resident information shall be informed of the confidential nature of the information and shall protect and preserve such information from unauthorized use and disclosure. G.S. 131D-2(b)(4), G.S. 131D-21(6), and G.S. 131D-21.1 govern the disclosure of such information.~~

~~(g) Each staff member shall encourage and assist the residents in the exercise of the rights guaranteed under the Adult Care Home Residents' Bill of Rights. No staff member shall hinder or interfere with the proper performance of duty of a lawfully appointed Adult Care Home Community Advisory Committee.~~

~~(h) Each staff member left alone with the residents shall be 18 years or older.~~

~~(i) By January 1, 2001, each facility shall have at least one staff person on the premises at all times who has successfully completed within the last 24 months a course on cardiopulmonary resuscitation (CPR) and choking management, including Heimlich maneuver, provided by the American Heart Association, the American Red Cross or a trainer with documented certification as a trainer in these procedures unless the only staff person on-site has been deemed physically incapable of performing these procedures by a licensed physician. For the purpose of this Rule, successfully completed means demonstrating competency, as evaluated by the instructor, in performing the Heimlich maneuver and cardiopulmonary resuscitation. Documentation of successful completion of the course shall be on file and available for review in the facility. The facility shall not have a policy prohibiting staff from administering CPR to residents except those residents with physician orders for no resuscitation or no CPR.~~

~~(j) Staff who transport residents shall maintain a valid driver's license.~~

~~(a) Each staff person shall:~~

- ~~(1) have a well-defined job description that reflects actual duties and responsibilities and is signed by the administrator and the employee;~~
- ~~(2) be able to apply all of the home's accident, fire safety and emergency procedures for the protection of the residents;~~
- ~~(3) be informed of the confidential nature of resident information and shall protect and preserve such information from unauthorized use and disclosure.~~
Note: G.S. 131D-2(b)(4), G.S. 131D-21(6), and G.S. 131D-21.1 govern the disclosure of such information;
- ~~(4) not hinder or interfere with the exercise of the rights guaranteed under the Declaration of Residents' Rights in G.S. 131D-21.~~
- ~~(5) be 18 years or older;~~
- ~~(6) have no substantiated findings of abuse or neglect listed on the North Carolina Health Care Personnel Registry;~~
- ~~(7) have a criminal background check in accordance with G.S. 114-19.10 and G.S. 131D-40; and~~
- ~~(8) maintain a valid driver's license if responsible for transportation of residents.~~

~~(b) If licensed practical nurses are employed by the facility and practicing in their licensed capacity as governed by their practice act and occupational licensing laws, there shall be continuous availability of a registered nurse consistent with Rules 21 NCAC 36 .0224(I) and 21 NCAC 36 .0225.~~

~~Note: The practice of licensed practical nurses is governed by their occupational licensing laws.~~

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-153; 143B-165; S.L. 1999-334; 2002-160;

Eff. January 1, 1977;

Readopted Eff. October 31, 1977;

Amended Eff. April 1, 1984;

Temporary Amendment Eff. December 1, 1999;

Amended Eff. July 1, 2000;

Temporary Amendment Eff. September 1, 2003.

SECTION .0500 - STAFF ORIENTATION, TRAINING, COMPETENCY AND CONTINUING EDUCATION

10A NCAC 13G .0504 COMPETENCY VALIDATION FOR LICENSED HEALTH PROFESSIONAL SUPPORT TASKS

(a) The facility shall assure that non-licensed personnel and licensed personnel not practicing in their licensed capacity as governed by their practice act and occupational licensing laws are competency validated by return demonstration for any personal care task specified in Paragraphs (a)(1)-(28) of Rule .0903 of this Subchapter prior to staff performing the task and that their ongoing competency is assured through facility staff oversight and supervision.

(b) Competency validation shall be performed by the following licensed health professionals:

- (1) A registered nurse shall validate the competency of staff who perform personal

TEMPORARY RULES

care tasks specified in Subparagraphs (a)(1)-(28) of Rule .0903 of this Subchapter.

- (2) In lieu of a registered nurse, a respiratory care practitioner licensed under G.S. 90, Article 38, may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(6), (11), (16), (18), (19) and (21) of Rule .0903 of this Subchapter.
- (3) In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform the personal care task specified in Subparagraph (a)(8) of Rule .0903 of this Subchapter.
- (4) In lieu of a registered nurse, an occupational therapist or physical therapist may validate the competency of staff who perform personal care tasks specified in Subparagraphs (a)(17) and (a)(22)-(27) of Rule .0903 of this Subchapter.

(c) Competency validation of staff, according to Paragraph (a) of this Rule, for the licensed health professional support tasks specified in Paragraph (a) of Rule .0903 of this Subchapter and the performance of these tasks is limited exclusively to these tasks.

History Note: Authority 131D-2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13G .0505 TRAINING ON CARE OF DIABETIC RESIDENTS

The facility shall assure that training on the care of residents with diabetes is provided to unlicensed staff prior to the administration of insulin as follows:

- (1) Training shall be provided by a registered nurse, registered pharmacist or prescribing practitioner.
- (2) Training shall include at least the following:
 - (a) basic facts about diabetes and care involved in the management of diabetes;
 - (b) insulin action;
 - (c) insulin storage;
 - (d) mixing, measuring and injection techniques for insulin administration;
 - (e) treatment and prevention of hypoglycemia and hyperglycemia, including signs and symptoms;
 - (f) blood glucose monitoring;
 - (g) universal precautions;
 - (h) appropriate administration times; and
 - (i) sliding scale insulin administration.

History Note: Authority 131D -2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13G .0506 TRAINING ON PHYSICAL RESTRAINTS

(a) The facility shall assure that all staff responsible for caring for residents with medical symptoms that warrant restraints are trained on the use of alternatives to physical restraint use and on the care of residents who are physically restrained.

(b) Training shall be provided by a registered nurse and shall include the following:

- (1) alternatives to physical restraints;
- (2) types of physical restraints;
- (3) medical symptoms that warrant physical restraint;
- (4) negative outcomes from using physical restraints;
- (5) correct application of physical restraints;
- (6) monitoring and caring for residents who are restrained; and
- (7) the process of reducing restraint time by using alternatives.

History Note: Authority 131D -2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13G .0507 TRAINING ON CPR

Each facility shall have at least one staff person on the premises at all times who has completed, within the last 24 months, a course on cardio-pulmonary resuscitation and choking management, including the Heimlich maneuver, provided by an organization that has a nationally recognized course or program in cardio-pulmonary resuscitation, including the American Heart Association, American Red Cross, National Safety Council, American Safety and Health Institute and Medic First Aid, or by a trainer with documented certification as a trainer on these procedures from one of these organizations. If the only staff person on site has been deemed physically incapable of performing these procedures by a licensed physician, that person is exempt from the training.

History Note: Authority 131D -2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13G .0508 ASSESSMENT TRAINING

The person or persons designated by the administrator to perform resident assessments as required by Rule .0801 of this Subchapter shall successfully complete training according to an instruction manual on resident assessment established by the Department before performing the required assessments. Registered nurses are exempt from the assessment training. The instruction manual on resident assessment is available on the internet website, <http://facility-services.state.nc.us/gcpage.htm>, or it is available at the cost of printing and mailing from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L.2002-160; Temporary Adoption Eff. September 1, 2003.

10A NCAC 13G .0509 RESERVED FOR FUTURE CODIFICATION

10A NCAC 13G .0510 RESERVED FOR FUTURE CODIFICATION

10A NCAC 13G .0511 RESERVED FOR FUTURE CODIFICATION

10A NCAC 13G .0512 DOCUMENTATION OF TRAINING AND COMPETENCY VALIDATION

The facility shall maintain documentation of the training and competency validation of staff required by the rules of this Section in the facility and available for review.

History Note: Authority 131D-2; 143B-165; S.L. 2002-160; Temporary Adoption Eff. September 1, 2003.

SECTION .0700 - ADMISSION AND DISCHARGE

10A NCAC 13G .0702 TUBERCULOSIS TEST AND MEDICAL EXAMINATION

(a) ~~Upon admission to the home each~~ Each resident shall ~~have a medical examination and~~ be tested for tuberculosis disease ~~before admission and annually thereafter.~~ Tests for tuberculosis disease shall ~~comply in compliance~~ with the control measures adopted by the Commission for Health Services as specified in 10A NCAC 41A .0205 including subsequent amendments and editions. Copies of the rule are available at no charge by contacting the Department of Health and Human Services, Tuberculosis Control Program, 1902 Mail Service Center, Raleigh, North Carolina 27699-1902.

(b) Each resident shall have a medical examination prior to admission to the home and annually thereafter.

~~(b)(c)~~ (c) The results of the complete examination are to be entered on ~~Form~~ the FL-2 or MR-2 which shall comply with the following:

- (1) The examining date recorded on the FL-2 or MR-2 ~~must shall~~ be no more than 90 days prior to the person's admission ~~or readmission~~ to the home.
- (2) The FL-2 or MR-2 ~~must shall~~ be in the facility before admission ~~or readmission~~ or accompany the resident upon admission ~~or readmission~~ and be reviewed by the administrator or supervisor-in-charge before admission ~~or readmission~~. except for emergency admissions.
- (3) In the case of an emergency admission, the medical examination and completion of the FL-2 or MR-2 shall be within 72 hours of admission.
- (4) If the information on the ~~form~~ FL-2 or MR-2 is not clear or is insufficient, the administrator or supervisor-in-charge ~~must shall~~ contact the physician for clarification in order to determine if the services of the facility can meet the individual's needs.
- (5) The completed ~~Form~~ FL-2 or MR-2 ~~must shall~~ be filed in the resident's record in the home.
- (6) If a resident has been hospitalized, the facility shall have a completed FL-2 or MR-2 or a transfer form or discharge summary with signed prescribing practitioner orders upon the resident's return to the facility from the hospital.

~~(c)(d)~~ (d) The ~~administrator home must shall~~ make arrangements for any resident, who has been an inpatient of a psychiatric facility within 12 months before entering the home and who does not have a current plan for psychiatric care, to be examined by a

local physician or a physician in a mental health center within 30 days after admission and to have a plan for psychiatric follow-up care when indicated. ~~indicated, using Form DSS-1867 or an equivalent record.~~

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. December 1, 1993; July 1, 1990; April 1, 1987; April 1, 1984; Temporary Amendment Eff. September 1, 2003.

SECTION .0800 - RESIDENT ASSESSMENT AND CARE PLAN

10A NCAC 13G .0801 RESIDENT ASSESSMENT

(a) The facility shall assure that an ~~admission initial~~ assessment of each resident is completed within 72 hours of admitting the resident using an assessment instrument approved by the Department admission using the Resident Register.

(b) The facility shall assure an assessment of each resident is completed within 30 days following admission and at least annually thereafter using an assessment instrument established by the Department or an instrument approved by the Department based on it containing at least the same information as required on the established instrument. ~~Effective January 1, 2002, in addition to the admission assessment within 72 hours, an evaluation of each resident shall be completed within 30 calendar days from the date of admission and annually thereafter using the Resident Assessment Instrument as approved by the Department. The evaluation within 30 calendar days of admission and annually thereafter. The assessment to be completed within 30 days following admission and annually thereafter is a functional assessment to determine a resident's level of functioning to include routines, preferences, needs, mood and psychosocial well-being, cognitive status and physical functioning in activities of daily living. Activities of daily living are personal functions essential for the health and well-being of the resident which are bathing, dressing, personal hygiene, ambulation or locomotion, transferring, toileting and eating. The evaluation assessment within 30 calendar days of admission and annually thereafter shall indicate if the resident requires referral to the resident's physician or other appropriate licensed health care professional or community resource.~~

~~(b)(c)~~ (c) The facility shall assure ~~a reassessment an~~ assessment of a resident is completed within 10 days ~~of following~~ a significant change in the resident's condition using the assessment instrument required in Paragraph (b) of this Rule. ~~to be completed within 72 hours of resident admission prior to January 1, 2002 and the Resident Assessment Instrument thereafter.~~ For the purposes of this Subchapter, significant change in the resident's condition is defined as follows:

- (1) Significant change is one or more of the following:
 - (A) deterioration in two or more activities of daily living;
 - (B) change in ability to walk or transfer;
 - (C) change in the ability to use one's hands to grasp small objects;

TEMPORARY RULES

- (D) deterioration in behavior or mood to the point where daily problems arise or relationships have become problematic;
 - (E) no response by the resident to the treatment for an identified problem;
 - (F) initial onset of unplanned weight loss or gain of five percent of body weight within a 30-day period or 10 percent weight loss or gain within a six-month period;
 - (G) threat to life such as stroke, heart condition, or metastatic cancer;
 - (H) emergence of a pressure ulcer at Stage II or higher;
 - (I) a new diagnosis of a condition likely to affect the resident's physical, mental, or psychosocial well-being over a prolonged period of time such as initial diagnosis of Alzheimer's disease or diabetes;
 - (J) improved behavior, mood or functional health status to the extent that the established plan of care no longer matches what is needed;
 - (K) new onset of impaired decision-making;
 - (L) continence to incontinence or indwelling catheter; or
 - (M) the resident's condition indicates there may be a need to use a restraint and there is no current restraint order for the resident.
- (2) Significant change is not any of the following:
- (A) changes that suggest slight upward or downward movement in the resident's status;
 - (B) short-term changes that resolve with or without intervention;
 - (C) changes that arise from easily reversible causes;
 - (D) a short-term acute illness or episodic event;
 - (E) a well-established, predictive, cyclical pattern; or
 - (F) steady improvement under the current course of care.

~~(e)(d)~~ If a resident experiences a significant change as defined in Paragraph ~~(b)(c)~~ of this Rule, the facility shall refer the resident to the resident's physician or other appropriate licensed health professional such as a mental health professional, nurse practitioner, physician assistant or registered nurse in a timely manner consistent with the resident's condition but no longer than 10 days from the significant change, and document the referral in the resident's record.

~~(d)(e)~~ The assessment to be completed within 72 hours and the evaluation to be completed within 30 calendar days of admission and annually thereafter as required in Paragraph (a) of this Rule ~~assessments and any reassessment as required in Paragraph (a) Paragraphs (b) and (c) of this Rule and any reassessment as required in Paragraph (b) of this Rule~~ shall be completed and

signed by the administrator or a person designated by the administrator to perform resident assessments. ~~or reassessments.~~
~~(e) The facility administrator or a person designated by the administrator to perform resident assessments and reassessments using the Resident Assessment Instrument shall successfully complete training provided by the Department on assessing residents before performing the required assessments or reassessments using the Resident Assessment Instrument as required in Paragraph (a) of this Rule. Registered nurses are exempt from the assessment training. Documentation of assessment training shall be maintained in the facility and available for review.~~

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-334;

Temporary Adoption Eff. January 1, 1996

Temporary Amendment Eff. December 1, 1999;

Amended Eff. July 1, 2000;

Temporary Amendment Eff. September 1, 2003.

10A NCAC 13G .0802 RESIDENT CARE PLAN

(a) The facility shall assure a care plan is developed for each resident in conjunction with the ~~initial~~ resident assessment to be completed within 30 days following admission according to Rule .0801 of this Section and revised as needed based on annual assessments and any reassessments of the resident. ~~For the purposes of this Subchapter,~~ The care plan is an individualized, written program of personal care for each resident.

(b) The care plan shall be revised as needed based on further assessments of the resident according to Rule .0801 of this Subchapter.

~~(b)(c)~~ The care plan shall include the following:

- (1) a statement of the care or service to be provided based on the assessment or reassessment; and
- (2) frequency of the service provision.

~~(e)(d)~~ The assessor shall sign the care plan upon its completion.

~~(d)(e)~~ The facility shall assure that the resident's physician authorizes personal care services and certifies the following by signing and dating the care plan within 15 calendar days of completion of the assessment:

- (1) the resident is under the physician's care; and
- (2) the resident has a medical diagnosis with associated physical or mental limitations that justify the personal care services specified in the care plan.

History Note: Authority G.S. 131D-2; 131D-4.3; 131D-4.5; 143B-153; 143B-165; S.L. 1999-334; S.L. 2002-160;

Temporary Adoption Eff. January 1, 1996;

Eff. May 1, 1997;

Temporary Amendment Eff. January 1, 2001;

Temporary Amendment Expired October 13, 2001;

Temporary Amendment Eff. September 1, 2003.

SECTION .0900 - RESIDENT CARE AND SERVICES

10A NCAC 13G .0902 HEALTH CARE

(a) The administrator is responsible for providing occasional or incidental medical care, such as providing therapeutic diets,

rotating positions of residents confined to bed, and applying heat pads.

(b) The resident or his responsible person shall be allowed to choose a physician to attend to him.

(c) Immediate arrangements shall be made by the administrator with the resident or his responsible person for the resident to secure another physician when he cannot remain under the care of his own physician. The name, address and telephone number of the resident's physician shall be recorded on the Resident Register.

(d) If a resident is hospitalized, a completed FL-2 or patient transfer form shall be obtained before the resident can be readmitted to the facility.

(e) Between annual medical examinations there may be a need for a physician's care. The resident's health services record is to be used by the physician to report any drugs prescribed and any treatment given or recommended for minor illnesses.

(f) All contacts (office, home or telephone) with the resident's physician shall be recorded on the resident's health services record which is to be retained in the resident's record in the home. The physician's orders shall be included in the resident's health services record including telephone orders initialed by staff and signed by the physician within 15 days from the date the order is given.

~~(g) Until January 1, 2001, the following restraint requirements shall apply. The use of a physical restraint refers to the application of a mechanical device to a person to limit movement for therapeutic or protective reasons, excluding siderails for safety reasons. Residents shall be physically restrained only as provided for in the Declaration of Residents' Rights, G.S. 131D-21(5), and in accordance with the following:~~

- ~~(1) The use of physical restraints is allowed only with a written order from a licensed physician. If the order is obtained from a physician other than the resident's attending physician, the attending physician shall be notified of the order within seven days.~~
- ~~(2) In emergency situations the administrator or supervisor in charge shall make the determination relative to necessity for the type and duration of the physical restraint to use until a physician is contacted. Contact shall be made within 24 hours.~~
- ~~(3) The physician shall specify in the restraint order the medical need for the physical restraint, the type to be used, the period of time it is to be used, and the time intervals it is to be checked, loosened, or removed.~~
- ~~(4) The current order for the physical restraint shall be on or attached to Form FL-2 or Form MR-2 (upon entering the home) or the Report of Health Services to Residents Form, or approved equivalent (for subsequent orders).~~
- ~~(5) The physician ordering the physical restraint shall update the restraint order at a minimum of every six months.~~
- ~~(6) If the resident's physician changes after admission to the home, the physician who is to attend the resident shall update and sign the existing restraint order.~~

~~(h)(g)~~ Effective January 1, 2001, the following restraint requirements shall apply. The use of physical restraints refers to the application of a physical or mechanical device attached to or adjacent to the resident's body that the resident cannot remove easily which restricts freedom of movement or normal access to one's body and includes bed rails when used to keep the resident from voluntarily getting out of bed as opposed to enhancing mobility of the resident while in bed. Residents shall be physically restrained only in accordance with the following:

- (1) The facility shall prohibit the use of physical restraints for discipline or convenience and limit restraint use to circumstances in which the resident has medical symptoms that warrant the use of restraints. Medical symptoms may include, but are not limited to, the following: confusion with risk of falls; and risk of abusive or injurious behaviors to self or others.
- (2) Alternatives to physical restraints that would provide safety to the resident and prevent a potential for decline in the resident's functioning shall be provided prior to restraining the resident and documented in the medical record. Alternatives may include, but are not limited to, the following: providing restorative care to enhance abilities to stand safely and to walk, providing a device that monitors attempts to rise from chair or bed, placing the bed lower to the floor, providing frequent staff monitoring with periodic assistance in toileting and ambulation and offering fluids, providing activities, providing supportive devices such as wedge cushions, controlling pain and providing a calm relaxing environment with minimal noise and confusion.
- (3) If alternatives to physical restraints have failed and the resident's medical symptoms warrant the use of physical restraints, the facility shall assure that the resident is restrained with the least restrictive restraint that would provide safety.
- (4) When physical restraints are used, the facility shall engage in a systemic and gradual process towards reducing restraint time by using alternatives.
- (5) The administrator shall assure the development and implementation of written policies and procedures in the use of alternatives to physical restraints and in the care of residents who are physically restrained.
 - (A) The administrator shall consult with a registered nurse in developing policies and procedures for alternatives to physical restraints and in the care of residents who are physically restrained.
 - (B) Policies and procedures for alternatives to physical restraints and the use of physical restraints shall comply with requirements of this

section. Orientation of these policies and procedures shall be provided to staff responsible for the care of residents who are restrained or require alternatives to restraints. This orientation shall be provided as part of the training required prior to staff providing care to residents who are restrained or require alternatives to restraints.

- (6) The administrator shall assure that each resident with medical symptoms that warrant the use of physical restraints is assessed and a care plan is developed. This assessment and care planning shall be completed prior to the resident being restrained; except in emergency situations. This assessment and care planning must meet any additional requirements in Section .0800 of this Subchapter.
 - (A) The assessment shall include consideration of the following:
 - (i) Medical symptoms that warrant the use of a physical restraint;
 - (ii) How the medical symptoms affect the resident;
 - (iii) When the medical symptoms were first observed;
 - (iv) How often the medical symptoms occur; and
 - (v) Alternatives that have been provided and the resident's response.
 - (B) The care plan shall be individualized and indicate specific care to be given to the resident. The care plan shall include consideration of the following:
 - (i) Alternatives and how the alternatives will be used;
 - (ii) The least restrictive type of physical restraint that would provide safety; and
 - (iii) Care to be provided to the resident during the time the resident is restrained.
 - (C) The assessment and care planning shall be completed through a team process. The team must consist of, but is not limited to, the following: the supervisor or a personal care aide, a registered nurse and the resident's representative. If the resident's representative is not present, there must be documented evidence that the resident's representative was notified and declined an invitation to attend.
- (7) The resident's right to participate in his or her care and to refuse treatment includes the right to accept or refuse restraints. For the resident

to make an informed choice about the use of physical restraints, negative outcomes, benefits and alternatives to restraint use shall be explained to the resident. Potential negative outcomes include incontinence, decreased range of motion, decreased ability to ambulate, increased risk of pressure ulcers, symptoms of withdrawal or depression and reduced social contact. In the case of a resident who is incapable of making a decision, the resident's representative shall exercise this right based on the same information that would have been provided to the resident. However, the resident's representative cannot give permission to use restraints for the sake of discipline or staff convenience or when the restraint is not necessary to treat the resident's medical symptoms.

- (8) The resident or the resident representative involvement in the restraint decision shall be documented in the resident's medical record. Documentation shall include the following:
 - (A) The resident or the resident's representative shall sign and date a statement indicating they have been informed as required above.
 - (B) The statement shall indicate the resident's or the resident's representative's decision in restraint use, either consent for or a desire not to use restraints.
 - (C) The consent shall include the type of restraint to be used and the medical symptoms for use.
- (9) When a physical restraint is warranted and consent has been given, a physician's order shall be written. The following requirements apply to the physician's order:
 - (A) The use of physical restraints is allowed only with a written order from a licensed physician. If the order is obtained from a physician other than the resident's attending physician, the attending physician shall be notified of the order within seven days.
 - (B) In emergency situations, the administrator or supervisor-in-charge shall make the determination relative to necessity for the type and duration of the physical restraint to use until a physician is contacted. Contact shall be made within 24 hours.
 - (C) The physician shall specify in the restraint order the medical need for the physical restraint, the type to be used, the period of time it is to be used, and the time intervals it is to be checked and removed.
 - (D) The current order for the physical restraint shall be on or attached to

TEMPORARY RULES

- (E) Form FL-2 or Form MR-2 (upon entering the home) or the Report of Health Services to Residents Form, or approved equivalent (for subsequent orders).
- (E) The physician ordering the physical restraint shall update the restraint order at a minimum of every three months.
- (F) If the resident's physician changes after admission to the home, the physician who is to attend the resident shall update and sign the existing restraint order.
- (10) The physical restraint shall be applied correctly according to manufacturer's instructions and the physician's order.
- (11) The resident shall be checked and released from the physical restraint and care provided as stated in the care plan; at least every 15 minutes for checks and at least every 2 hours for release.
- (12) Alternatives shall be provided in an effort to reduce restraint time.
- (13) All instances of physical restraint use shall be documented and shall include at least the following:
 - (A) Alternatives to physical restraints that were provided and the resident's response;
 - (B) Type of physical restraint that was used;
 - (C) Medical symptoms warranting the use of the physical restraint;
 - (D) Time and duration of the physical restraint;
 - (E) Care that was provided to the resident during the restraint use; and
 - (F) Behaviors of the resident during the restraint use.
- (14) Physical restraints shall be applied only by staff who have received training and who have been validated for competency by a registered nurse on the proper use of restraints. Training and competency validation on restraints shall occur before staff members apply restraints. ~~Competency validation of restraint use by a registered nurse shall be completed annually. This Rule is consistent with the requirements in Rules .0501 and .0903 of this Subchapter.~~
- (15) ~~The administrator shall assure that training in the use of alternatives to physical restraints and in the care of residents who are physically restrained is provided to all staff responsible for caring for residents with medical symptoms that warrant restraints. Training shall be provided by a registered nurse and shall include the following:

 - (A) Alternatives to physical restraints;
 - (B) Types of physical restraints;~~

- (C) ~~Medical symptoms that warrant physical restraints;~~
- (D) ~~Negative outcomes from using physical restraints;~~
- (E) ~~Correct application of physical restraints;~~
- (F) ~~Monitoring and caring for residents who are restrained; and~~
- (G) ~~Process of reducing restraint time by using alternatives.~~
- (+)(h) The administrator shall have specific written instructions recorded as to what to do in case of sudden illness, accident, or death of a resident.
- (+)(i) There shall be an adequate supply of first aid supplies available in the home for immediate use.
- (+)(j) The administrator shall make arrangements with the resident, his responsible person, the county department of social services or other appropriate party for appropriate health care as needed to enable the resident to be in the best possible health condition.

History Note: Authority G.S. 131D-2; 143B-165; S.L. 1999-334; 2002-160; Eff. January 1, 1977; Readopted Eff. October 31, 1977; Amended Eff. December 1, 1993; May 1, 1992; July 1, 1990; September 1, 1987; Temporary Amendment Eff. December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. September 1, 2003.

10A NCAC 13G .0903 LICENSED HEALTH PROFESSIONAL SUPPORT

(a) The facility shall assure that an appropriate licensed health professional ~~a registered nurse, licensed under G.S. 90, Article 9A,~~ participates in the on-site review and evaluation of the residents' health status, care plan and care provided for residents requiring, but not limited to, one or more of the following personal care ~~tasks.~~ tasks. ~~The review and evaluation shall be completed within the first 30 days of admission or within 30 days from the date a resident develops the need for the task and at least quarterly thereafter.~~

- (1) applying and removing ace bandages, ted hose, ~~and binders;~~ binders, and braces and splints;
- (2) feeding techniques for residents with swallowing problems;
- (3) bowel or bladder training programs to regain continence;
- (4) enemas, suppositories and vaginal douches;
- (5) positioning and emptying of the urinary catheter bag and cleaning around the urinary catheter;
- (6) chest physiotherapy or postural drainage;
- (7) clean dressing changes, excluding packing wounds and application of prescribed enzymatic debriding agents;
- (8) collecting and testing of fingerstick blood samples;
- (9) care of well-established colostomy or ileostomy (having a healed surgical site without sutures or drainage);

- (10) care for pressure ulcers; ulcers up to and including a Stage II pressure ulcer which is a superficial ulcer presenting as an abrasion, blister or shallow crater;
- (11) inhalation medication by machine;
- (12) forcing and restricting fluids;
- ~~(12)~~(13) maintaining accurate intake and output data;
- ~~(13)~~(14) medication administration through a well-established gastrostomy feeding tube (having a healed surgical site without sutures or drainage and through which a feeding regimen has been successfully established);
- ~~(14)~~(15) medication administration through injection;
- (16) oxygen administration and monitoring;
- ~~(16)~~(17) the care of residents who are physically restrained and the use of care practices as alternatives to restraints;
- ~~(17)~~(18) oral suctioning;
- ~~(18)~~(19) care of well-established tracheostomy, not to include indo-tracheal suctioning;
- ~~(19)~~(20) administering and monitoring of gastrostomy tube feedings through a well-established gastrostomy tube (see description in Subparagraph (14) of this Paragraph);
- (21) the monitoring of continuous positive air pressure devices (CPAP and BIPAP);
- (22) application of prescribed heat therapy;
- (23) application and removal of prosthetic devices except as used in early post-operative treatment for shaping of the extremity;
- (24) ambulation using assistive devices that requires physical assistance;
- (25) range of motion exercises;
- (26) any other prescribed physical or occupational therapy;
- (27) transferring semi-ambulatory or non-ambulatory residents; or
- (28) tasks performed by a nurse aide II according to the scope of practice as established in the Nursing Practice Act and rules promulgated under that act in 21 NCAC 36.

(b) The appropriate licensed health professional, as required in Paragraph (a) of this Rule, is:

- (1) a registered nurse licensed under G.S. 90, Article 9A, for tasks listed in Subparagraphs (a)(1)-(28) of this Rule;
- (2) an occupational therapist licensed under G.S. 90, Article 18D or physical therapist licensed under G.S. 90-270.24, Article 18B for tasks listed in Subparagraphs (a)(17) and (22)-(27) of this Rule;
- (3) a respiratory care practitioner licensed under G.S. 90, Article 38, for tasks listed in Subparagraphs (a)(6), (11), (16), (18), (19) and (21) of this Rule; or
- (4) a registered nurse licensed under G.S. 90, Article 9A, for tasks that can be performed by a nurse aide II according to the scope of practice as established in the Nursing Practice

Act and rules promulgated under that act in 21 NCAC 36;

~~(b) The facility shall assure that a registered nurse, occupational therapist licensed under G.S. 90, Article 18D or physical therapist licensed under G.S. 90-270.24, Article 18B, participates in the on-site review and evaluation of the residents' health status, care plan and care provided within the time frames specified in Paragraph (a) of this Rule for those residents who require one or more of the following personal care tasks:~~

- ~~(1) application of prescribed heat therapy;~~
- ~~(2) application and removal of prosthetic devices except as used in early post-operative treatment for shaping of the extremity;~~
- ~~(3) ambulation using assistive devices;~~
- ~~(4) range of motion exercises;~~
- ~~(5) any other prescribed physical or occupational therapy; or~~
- ~~(6) transferring semi-ambulatory or non-ambulatory residents.~~

~~(d) The facility shall not provide care to residents with conditions or care needs as stated in G.S. 131D 2(a1).~~

~~(d)~~(c) The facility shall assure that participation by a registered nurse, occupational therapist or physical therapist in the on-site review and evaluation of the residents' health status, care plan and care provided, as required in Paragraph (a) of this Rule, is completed within the first 30 days of admission or within 30 days from the date a resident develops the need for the task and at least quarterly thereafter, and includes the following:

- ~~(1) assuring that licensed practical nurses and non-licensed personnel providing care and performing the tasks are competency validated according to Paragraph (e) of this Rule;~~
- ~~(2)~~(1) performing a physical assessment of the residents as related to their diagnosis and their the resident's diagnosis and or current condition requiring one or more of the tasks specified in Paragraph (a) of this Rule;
- ~~(3)~~(2) evaluating the resident's progress to care being provided;
- ~~(4)~~(3) recommending changes in the care of the resident as needed based on the physical assessment and evaluation of the progress of the resident; and
- ~~(5)~~(4) documenting the activities in Subparagraphs (1) through (3) of this Paragraph.

(d) The facility shall assure action is taken in response to the licensed health professional review and documented, and that the physician or appropriate health professional is informed of the recommendations when necessary.

~~(e) The facility shall assure that licensed practical nurses and non-licensed personnel are trained and competency validated for personal care tasks specified in Paragraphs (a) and (b) of this Rule. Competency validation shall be completed prior to staff performing the personal care task and documentation shall be in the facility and readily available. Staff shall be competency validated by the following health professionals:~~

- ~~(1) A registered nurse shall validate the competency of staff who perform personal care tasks specified in Paragraph (a) of this Rule. In lieu of a registered nurse, a registered respiratory therapist may validate the~~

TEMPORARY RULES

competency of staff who perform personal care tasks (6), (11), (15), (17), and (18), specified in Paragraph (a) of this Rule. In lieu of a registered nurse, a registered pharmacist may validate the competency of staff who perform personal care task (8) specified in Paragraph (a) of this Rule.

(2) A registered nurse, occupational therapist or physical therapist shall validate the competency of staff who perform personal care tasks specified in Paragraph (b) of this Rule.

(f) The facility shall assure that training on the care of residents with diabetes is provided to unlicensed staff prior to the administration of insulin as follows and documented:

- (1) Training shall be provided by a registered nurse or registered pharmacist.
(2) Training shall include at least the following:
(A) basic facts about diabetes and care involved in the management of diabetes;
(B) insulin action;
(C) insulin storage;
(D) mixing, measuring and injection techniques for insulin administration;
(E) treatment and prevention of hypoglycemia and hyperglycemia, including signs and symptoms;
(F) blood glucose monitoring; and
(H) universal precautions; and

(g) The facility shall assure that staff who perform personal care tasks listed in Paragraphs (a) and (b) of this Rule are at least annually observed providing care to residents by a licensed registered nurse or other appropriate licensed health professional, as specified in Paragraph (d) of this Rule, who is employed by the facility or under contract or agreement, individually or through an agency, with the facility. Annual competency validation shall be documented and readily available for review.

History Note: Authority G.S. 131D-2; 131D-4.5; 143B-165; S.L. 1999-334; Temporary Adoption Eff. January 1, 1996; Eff. May 1, 1997; Temporary Amendment Eff. December 1, 1999; Amended Eff. July 1, 2000; Temporary Amendment Eff. September 1, 2003.

SECTION .1200 - POLICIES, RECORDS AND REPORTS

10A NCAC 13G .1205 POPULATION REPORT

The administrator or supervisor in charge shall submit by January 31 of each year an annual population report for the previous calendar year to the county department of social services. If the home closes during the year, the administrator or supervisor in charge shall report for the previous calendar year to date of closing.

History Note: Authority G.S. 131D-2; 143B-153; 143B-165; S.L. 2002-160; Eff. January 1, 1977;

Readopted Eff. October 31, 1977; Amended Eff. May 1, 1992; April 1, 1984; Temporary Repeal Eff. September 1, 2003.

Rule-making Agency: DHHS – Division of Medical Assistance

Rule Citation: 10A NCAC 21B .0410

Effective Date: July 3, 2003

Findings Reviewe d and Approved by: Beecher R. Gray

Authority for the rulemaking: G.S. 108A-25(b); 108A-54; 108A-55

Reason for Proposed Action: Adherence to notice and hearing requirements would prevent this agency from complying with federal laws/regulations and allow for timely implementation of the policy. The changes in federal law were effective December 19, 2002. We must comply with the public law that allows a 6-month implementation date. Delay in implementation would be contrary to public interest because states are now required to count a sponsor's income and resources when determining an alien's eligibility for Medicaid. Medicaid expenditures will marginally be reduced because aliens who were eligible for Medicaid without counting the sponsor's income and/or resources will now be ineligible due to counting a sponsor's income and/or resources.

Comment Procedures: Written comments should be submitted to Portia R. Rochelle, Division of Medical Assistance, 1985 Umstead Drive, 2405 Mail Service Center, Raleigh, NC 27699-2405. Phone: (919) 857-4016, fax: (919) 733-6608, email: Portia.rochelle@ncmail.net.

CHAPTER 21 - MEDICAL ASSISTANCE ADMINISTRATION

SUBCHAPTER 21B – BUDGETING PRINCIPALS

SECTION .0400 - BUDGETING PRINCIPALS

10A NCAC 21B .0410 ALIEN SPONSOR DEEMING

(a) A sponsored alien is an alien lawfully admitted for permanent residence sponsored by an individual who has signed an Affidavit of Support required by the Bureau of Citizenship and Immigration Services.

(b) A sponsor is a person who signed an Affidavit of Support on behalf of an alien as a condition of the alien's entry or admission to the United States.

(c) An indigent alien is exempt from sponsor deeming. An alien is indigent if:

- (1) the sum of the sponsored alien's own income;
(2) the cash contributions of the sponsor and others; and
(3) the value of any in-kind assistance the sponsor and others provide the alien does not exceed 130 percent of the poverty income guidelines.

(d) The sponsor is financially responsible for the alien by deeming his income to the alien.

(e) The countable income of a sponsor is determined in accordance with Rules .0312 and .0404 of this Subchapter. Apply Rule .0402 of this Subchapter for situations in which the sponsor is the spouse or a parent.

(f) The countable resources of a sponsor are determined in accordance with Rules .0311 and .0403 of this Subchapter.

(g) Third party verification of the following is required for:

- (1) sponsorship;
- (2) a sponsor's income; and
- (3) a sponsor's resources.

The application shall be denied if verification is not received by the processing deadline.

History Note: Authority G.S. 108A-25(b); 108A-54; 108A-55; The Personal Responsibility Work Opportunity and Reconciliation Act of 1996 (PRWORA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, and the Balanced Budget Act of 1997 (BBA), P.L. 105-33; Temporary Adoption Eff. July 3, 2003.

Rule-making Agency: *DHHS – Division of Medical Assistance*

Rule Citation: *10A NCAC 22G .0101, .0307*

Effective Date: *June 26, 2003*

Findings Reviewed and Approved by: *Julian Mann, III*

Authority for the rulemaking: *G.S. 108A-25(b); 108A-54; 108A-55; S.L. 1985, c. 479, s. 86; 42 C.F.R. 447 Subpart C*

Reason for Proposed Action: *Adherence to notice and hearing requirements would prevent this agency from collecting additional federal revenue effective May 23, 2003. This change is necessary to maximize receipt of federal funds. SB 1005, Section 21.19(t) allows DHHS to adopt temporary rules when it is necessary to maximize federal receipts within existing State appropriations. These Rules allow the State of North Carolina to potentially receive an additional \$125 million per year in federal dollars without any additional cost to the State or counties. Given North Carolina's revenue forecast for the biennium, obtaining these federal funds will better enable the state to meet its needs. If the state must wait until a permanent rule is enacted before maximizing these federal funds, the state stands to lose \$125 million in the next SFY. It is unreasonable to delay this benefit to the state.*

Comment Procedures: *Comments from the public shall be directed to Portia R. Rochelle, Division of Medical Assistance, 1985 Umstead Dr., 2405 Mail Service Center, Raleigh, NC 27699-2405, phone (919) 857-4016, fax (919) 733-6608, and email portia.rochelle@ncmail.net.*

CHAPTER 22 – MEDICAL ASSISTANCE ELIGIBILITY

SUBCHAPTER 22G – REIMBURSEMENT PLANS

SECTION .0100 – REIMBURSEMENT FOR NURSING FACILITY SERVICES

10A NCAC 22G .0101 REIMBURSEMENT PRINCIPLES

(a) All certified nursing facilities participating in the North Carolina Medicaid Program are reimbursed on a prospective basis as set forth hereunder, except that state-operated facilities will be reimbursed their reasonable and allowable costs in accordance with the Medicare principles of reimbursement and with the provisions of Rules .0103 and .0104 of this plan. This plan is developed in accordance with the requirements of 42 CFR 447 Subpart C - Payment for Inpatient Hospital and Long-Term Care Facility Services. Providers must comply with all federal regulations and with the provisions of this plan.

(b) Subject to the availability of funds, supplemental payments shall be made to state government-owned or operated nursing facilities in accordance with North Carolina's federally approved Medicaid State Plan at Attachment 4.19-D, Page 1, Section .0101(b). This Attachment is hereby incorporated by reference, including subsequent amendments and editions. This Attachment is available for inspection and copies may be obtained from the Division of Medical Assistance, 1985 Umstead Drive, Raleigh, North Carolina 27603 at a cost of twenty cents (\$.20) per page.

History Note: Authority G.S. 108A-25(b); 108A-54; 108A-55; S.L. 1985, c. 479, s. 86; 42 C.F.R. 447, Subpart C; Eff. January 1, 1978; Amended Eff. March 22, 1978; Emergency Amendment [(a), (b), (c), (g), (m), (o), (p), (q)] Eff. April 1, 1978 for a Period of 120 Days to Expire on July 30, 1978; Emergency Amendment [(a), (b), (c), (g), (m), (o), (p), (q)] Expired Eff. July 30, 1978; Amended Eff. August 1, 1982; Temporary Amendment Eff. October 1, 1984 for a Period of 120 Days to Expire on January 28, 1985; Amended Eff. April 1, 1992; October 1, 1991; January 28, 1985; Temporary Amendment Eff. June 26, 2003.

SECTION .0300 – ICF-MR PROSPECTIVE RATE PLAN

10A NCAC 22G .0307 REIMBURSEMENT METHODS FOR STATE-OPERATED FACILITIES

(a) A certified State-operated ICF-MR facility is reimbursed for the reasonable costs that are necessary to efficiently meet the needs of its clients and to comply with federal and state laws and regulations. Payments shall be suspended if annual reports are not filed. The Division of Medical Assistance may extend the deadline for filing the report if in its view good cause exists for the delay. The reasonableness and allowability of costs incurred by state-operated facilities shall be determined by the Division of Medical Assistance.

(b) A per diem rate based on the provider's estimated annual cost divided by patient days shall be used to make interim payments. A tentative settlement shall be issued based on the desk audit performed on each annual cost report to determine the amount of Medicaid reasonable cost and the amount of interim payments received by the provider.

SUBCHAPTER 02E - MISCELLANEOUS OPERATIONS

SECTION .0200 - OUTDOOR ADVERTISING

19A NCAC 02E .0216 SPECIFIC SERVICE SIGNING (LOGO) PROGRAM

The Specific ~~Service Information~~ Signing Program, hereinafter "Program", provides eligible businesses with the opportunity to be listed on official signs within the right-of-way of fully controlled access highways. The Traffic Engineering Branch is responsible for administering the program and receiving requests for information concerning the Program. Requests for information may be directed to the State Traffic Engineer, Division of Highways, Department of Transportation, ~~P.O. Box 25201, Raleigh, N. C. 27611.~~ 1561 Mail Service Center, Raleigh, NC 27699-1561. Division Engineers for the division in which the interchange is located are responsible for receiving and distributing applications and copies of policies and procedures, executing agreements and administering the agreements.

Authority G.S. 136-89.56; 136-137; 136-139; 143B-346; 143B-348; 143B-350(f); 23 C.F.R. 750, Subpart A; 23 U.S.C. 131(f).

19A NCAC 02E .0217 SPECIFIC INFORMATION PROGRAM DEFINITIONS

The following definitions apply to 19A NCAC 2E .0216 through .0223:

- (1) ~~"Specific Information Panel", or "panel"~~ means a panel, rectangular in shape, located within the highway right of way and consisting of:
 - (a) ~~the words "GAS", "FOOD", "LODGING", or "CAMPING" and directional information;~~
 - (b) ~~space for one or more individual business (logo) signs to be mounted on the panel.~~
- (2) ~~"Business Sign" or "Logo Sign"~~ means a separately attached sign, furnished and owned by a participating business, mounted on the rectangular panel or mounted separately for trailblazing to show the brand, symbol, trademark, or name, or combination of these, for the motorist service available on the crossroad at or near the interchange.
- (3) ~~"Public Telephone"~~ means a coin operated telephone or a business telephone which is available for public use during all business hours. If there is an outside coin operated telephone in the immediate vicinity of the business (within the intersection area, at an adjacent business or across the road), the business is in compliance. A business phone at an adjacent business is not a public telephone for a particular applicant business.
- (4) ~~"Supplemental Service Sign"~~ means a panel, rectangular in shape, white legend and border on a blue background, with the words "GAS",

(c) Any payments in excess of costs shall be refunded to the Division of Medical Assistance. Any reasonable costs in excess of payments shall be paid to the provider. An annual field audit may be performed by a qualified independent auditor to determine the final settlement amounts.

(d) Subject to the availability of funds, supplemental payments shall be made to state government-owned or operated ICF-MR facilities in accordance with North Carolina's federally approved Medicaid State Plan at Attachment 4.19-D, Addendum ICF-MR, Page 30, Section .0307(d). This Attachment is hereby incorporated by reference, including subsequent amendments and editions. This Attachment is available for inspection and copies may be obtained from the Division of Medical Assistance, 1985 Umstead Drive, Raleigh, North Carolina 27603 at a cost of twenty cents (\$.20) per page.

History Note: Authority G.S. 108A-25(b); 108A-54; 108A-55; S.L. 1985, c. 479, s. 86; 42 C.F.R. 447, Subpart C; Temporary Adoption Eff. July 8, 1993 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Eff. November 1, 1993; Temporary Amendment Eff. June 26, 2003.

TITLE 19A – DEPARTMENT OF TRANSPORTATION

Editor's Note: This publication will serve as Notice of Proposed Temporary Rules pursuant to Senate Bill 38.

Rule-making Agency: NC Department of Transportation – Division of Highways

Rule Citation: 19A NCAC 02E .0216-.0222

Reason for Proposed Action for Temporary Rule: Senate Bill 38, S.L. 2003-184, was ratified June 12, 2003. Section 3 of SB 38 directed the Department of Transportation to submit Proposed Temporary Rules to the Codifier of Rules for publication in the North Carolina Register. Requests for changes in the Logo Sign Program requirements and simplification of the fee structure came from private citizens, current Logo Program participants, and members of the North Carolina General Assembly. The proposed rules streamline the Logo program, clarify existing language, and make Attractions eligible for participation.

Public Hearing:

Date: August 5, 2003

Time: 10:00 a.m.

Location: Room 150, Highway Building, 1 S. Wilmington St., Raleigh, NC

Comment Procedures: Written comments should be submitted to Emily B. Lee, NC DOT, 1501 Mail Service Center, Raleigh, NC 27699. Phone: (919) 733-2520, fax: (919) 733-9150, email: elee@dot.state.nc.us. Comments should be submitted through September 10, 2003.

CHAPTER 02 – DIVISION OF HIGHWAYS

"FOOD", "LODGING", "CAMPING" or any combination thereof.

- (5) ~~"Tire Repair (by an employee)" means on premise tire repair by an employee or a contract between the subject business and another business to do tire repair for them.~~
- (6) ~~"Fully Controlled Access Highway" means a highway on which the authority to control access is exercised to give preference to through traffic by providing access connections with selected public roads only by prohibiting crossings at grade or direct private driveway connections.~~
- (7) ~~"Mainline" means fully controlled access highway.~~

Authority G.S. 136-89.56; 136-137; 136-139; 143B-346; 143B-348; 143B-350(f); 24 C.F.R. 750, Subpart A; 23 U.S.C. 131(f).

19A NCAC 02E .0218 LOCATION OF PANELS

The department shall control the erection and maintenance of official signs giving specific information of interest to the traveling public in accordance with following criteria:

- (1) ~~The department may erect panels at interchanges.~~
- (2) ~~Panels shall be fabricated and located as detailed on the signing plans for the interchanges and shall be located in a manner to take advantage of natural terrain and to have the least impact on the scenic environment.~~
- (3) ~~A separate mainline panel shall be provided on the interchange approach for each qualified type of motorist service except as provided in Item (4) of this Rule. No more than one panel shall be erected for a type of service in each direction approaching an interchange. Panels shall be required in each direction on the mainline when lateral spacing is available, except a panel may not be required in the direction from a non-controlled access facility to a fully controlled access freeway. Where a qualified type of motorist service is not available at an interchange, the panel may not be erected. A maximum number of six specific business (logo) signs may be installed on any logo panel for each service type at an interchange.~~
- (4) ~~The mainline panels shall be erected between the previous interchange and 800 feet in advance of the exit direction sign for the interchange from which the services are available. There shall be at least 800 feet spacing between the panels and other signs. In the direction of traffic, the successive panels shall be those for "CAMPING", "LODGING", "FOOD", and "GAS" in that order. A combination type panel may be used in remote rural areas of a fully controlled access highway and when space does not permit all signs and only two of each type of service is~~

available at the location. A maximum of three business signs may appear below each respective service on a combination type panel. If all four services are available, "GAS" and "FOOD" shall be combined on one sign, and "LODGING" and "CAMPING" shall be combined on one sign. When the number of business facilities at an interchange are increased to more than three for one or more services, existing combination service business signing must be removed and replaced with sign panels, dedicated to each service. If the spacing limitations prohibit the erection of Specific Information Panels for all of the types of services available, preference shall be given to "GAS", "FOOD", "LODGING" or "CAMPING" services in that order. No panels shall be erected where minimum spacing limitations cannot be met.

If a panel(s) cannot be erected due to spacing limitations, a supplemental service sign, which lists the additional services available, may be erected below existing sign(s). Not more than three services may be erected below an existing sign.

- (5) ~~On each exit ramp, a ramp panel for the qualified type of motorist service may be erected. Panels shall be required in each direction on the ramps when lateral spacing is available, except where a panel may not be required in the direction from a non-controlled access facility to a fully controlled access freeway or if all of the qualified services are visible from the exit ramp terminal, ramp panels are not required.~~
- (6) ~~The ramp panel shall be erected as detailed on the signing plans for the interchange. If conditions permit, the successive panels along the ramp in the direction of traffic shall be those for "CAMPING", "LODGING", "FOOD", and "GAS" in that order.~~
- (7) ~~If there is insufficient space on the ramp or the mainline for all the panels, priority shall be given to "GAS", "FOOD", "LODGING", then "CAMPING" services in that order. If panel(s) cannot be erected on a ramp due to spacing limitations, a supplemental service sign, which lists the additional services available, shall be installed.~~
- (8) ~~Where supplemental service signing is on the mainline due to space limitations, a business may purchase logo panels on ramps.~~
- (9) ~~Panels shall not be erected at an interchange where the motorist cannot conveniently re-enter the freeway and continue in the same direction of travel.~~

Authority G.S. 136-89.56; 136-137; 136-139; 143B-346; 143B-348; 143B-350(f); 23 C.F.R. 750, Subpart A; 23 U.S.C. 131(f).

19A NCAC 02E .0219 ELIGIBILITY FOR PROGRAM

~~Business~~ Businesses signs may be permitted, may participate in the program provided said businesses comply with the following criteria: ~~criteria and have a public telephone:~~

- (1) The individual business installation whose name, symbol or trademark appears on a business panel sign shall give written assurance of the business's conformity with all applicable laws concerning the provision of public accommodations without regard to race, religion, color, sex, age, disability, or national origin. ~~An individual business may apply for additional sign positions on a sign panel provided no qualified applicant is denied space on the sign panel. An individual business, under construction, may participate in the program by giving written assurance of the business's conformity with all applicable laws and requirements for that type of service, by a specified date of opening to be within one year of the date of application.~~
- (2) An individual business, under construction, may apply to participate in the program by giving written assurance of the business's conformity with all applicable laws and requirements for that type of service, by a specified date of opening to be within one year of the date of application. No business panel shall be displayed for a business which is not open for business and in full compliance with the standards required by the program. A business under construction shall not be allowed to apply for participation in the program if its participation would prevent an existing open business application from participating.
- (3) Businesses may apply for participation in the program on a first-come, first-served basis until the maximum number of panels on the logo sign for that service are reached. If a business's panels are removed and space is available on the sign, the first business to contact the Department shall be allowed priority for the vacant space.
- (2)(4) The maximum distance that a "GAS", "FOOD", or "LODGING" service may be located from the fully controlled access highway shall not exceed three miles at rural interchange approaches and one mile at urban interchange approaches in either direction via an all-weather road. Where no qualifying services exist within three miles, miles/one mile, provisional contracts are permitted where the maximum distance may be increased to six miles, miles at rural interchange approaches and three miles at urban interchange approaches, provided the total travel distance to the business and return to the interchange does not exceed twelve miles. Provisional contracts shall be written with the understanding that if a closer business applies, qualifies, and is within the three miles/one

mile radius as applicable, and there is not otherwise room on the sign for the new business, then the provisional contract of the furthest business from the intersection shall be cancelled and the business panels shall be removed at the annual contract renewal date. The maximum distance for a "CAMPING" service shall not exceed ten 15 miles in either direction via an all-weather road, road, and the maximum distance for an "ATTRACTION" service shall not exceed 15 miles in either direction via an all-weather road. Said distances shall be measured from the point on the interchange crossroad, coincident with the centerline of a fully controlled access highway route median, along the roadways to the respective motorist service. The point to be measured to for each business is a point on the roadway that is perpendicular to the corner of the nearest wall of the business to the interchange. The wall to be measured to shall be that of the main building or office. Walls of sheds (concession stands, storage buildings, separate restrooms, etc.) whether or not attached to the main building shall not be used for the purposes of measuring. If the office (main building) of a business is located more than .2 mile from a public road on a private road or drive, the distance to the office along the said drive/road shall be included in the overall distance measured to determine whether or not the business qualifies for business signing. The office shall be presumed to be at the place where the services are provided.

- (3)(5) "GAS" and associated services. Criteria for erection of a business sign panel on a panel sign shall include:
 - (a) appropriate licensing as required by law;
 - (b) vehicle services for fuel, fuel (gas, diesel, or alternative fuels), motor oil, tire repair (by an employee) and water;
 - (c) on premise restroom facilities and drinking water suitable for public use;
 - (d) an on-premise on premise attendant to collect monies, make change, and make or arrange for tire repairs;
 - (e) year-round operation at least 16 continuous hours per day, seven days a week, week;
 - (f) on premise telephone available for emergency use by the public.
- (4)(6) "FOOD". Criteria for erection of a business sign panel on a panel sign shall include:
 - (a) appropriate licensing as required by law, and a permit to operate by the health department;
 - (b) businesses shall meet at least one of the following criteria: operate year

round at least eight continuous hours per day six days per week;

~~(i) year round operation at least 12 continuous hours per day to serve three meals a day (sandwich type entrees may be considered a meal) (breakfast, lunch, supper), seven days a week;~~

~~(ii) year round operation at least 12 continuous hours per day to serve three meals a day (sandwich type entrees may be considered a meal) (breakfast, lunch, supper) six days a week;~~

~~(iii) year round operation at least eight continuous hours per day, open by at least 6:00 a.m. or open later than 11:00 p.m. and with a drive up window to serve at least two meals a day (sandwich type entrees may be considered a meal) (breakfast, lunch, supper), seven days a week. If a business qualifies under (ii) or (iii) then it must be stated on each mainline, each ramp, and each trailblazer business sign the day closed or the hours of operation.~~

- (c) indoor seating for at least 20 persons;
- (d) on premise public restroom facilities;
- (e) on premise telephone available for emergency use by the public.

~~(5)(7)~~ "LODGING". Criteria for erection of a business panel sign on a panel sign shall include:

- (a) appropriate licensing as required by law, and a permit to operate by the health department;
- (b) overnight sleeping accommodations consisting of a minimum of 10 units each, including bathroom and sleeping room, except a Lodging business operating as a "Bed and Breakfast" establishment with less than 10 units may participate. "Bed and Breakfast" businesses shall be identified on the Logo signs by a standard message specified by the Department. "Bed and Breakfast" businesses shall only be allowed to participate in the program if the maximum number of qualified Lodging businesses do not request participation in the program and

occupy spaces on the Logo sign panels;

- (c) off-street vehicle parking for each lodging room for rent;
- (d) ~~year-round operation.~~ operation;
- (e) on premise telephone available for emergency use by the public.

~~(6)(8)~~ "CAMPING". Criteria for erection of a business sign panel on a panel sign shall include:

- (a) appropriate licensing as required by law, including meeting all state and county health and sanitation codes and having water and sewer systems which have been duly inspected and approved by the local health authority (the operator shall present evidence of such inspection and approval);
- (b) at least 10 campsites with accommodations (including public restroom facilities) for all types of travel-trailers, tents and camping vehicles;
- (c) parking accommodations;
- (d) continuous operation, seven days a week during business season;
- (e) removal or masking of said business sign panel by the department during off seasons, if operated on a seasonal basis. basis;
- (f) on premise telephone available for emergency use by the public.

~~(9)~~ "ATTRACTION". Criteria for erection of a sign on a panel for any business or establishment other than an agricultural facility shall include:

- (a) appropriate licensing as required by law;
- (b) full private ownership;
- (c) on premise public restroom facilities;
- (d) continuously open to the motoring public without appointment at least eight hours per day, five days per week during its normal operating season or the normal operating season for the type of business;
- (e) adequate parking accommodations for a minimum of 10 motor vehicles (cars);
- (f) only facilities which have the primary purpose of providing amusement, historical, cultural, or leisure activities to the public;
- (g) on premise telephone available for emergency use by the public.

Authority G.S. 136-89.56; 136-137; 136-139; 143B-346; 143B-348; 143B-350(f); 23 C.F.R. 750, Subpart A; 23 U.S.C. 131(f).

No business sign panel shall be displayed which would mislead or misinform the traveling public. Any message, trademarks, or brand symbols which interfere with, imitate, or resemble any official warning or regulatory traffic sign, signal or device is prohibited. Each specific service business sign panel shall include only information that is related to that specific service. No business sign shall be displayed for a business which is not open for business and in full compliance with the standards required by the program. Signs with more than one specific service may be allowed if approved by the Department. Provisional contracts for the businesses on these signs may be required.

Authority G.S. 136-89.56; 136-137; 136-139; 143B-346; 143B-348; 143B-350(f); 23 C.F.R. 750, Subpart A; 23 U.S.C. 131(f).

19A NCAC 02E .0221 FEES

All logo signs shall be constructed and maintained by the Department. These logo signs shall be owned by the Department. The participating logo business shall pay an annual fee established by the Board of Transportation. All logo contracts existing under prior administrative code provisions are terminated in accordance with the terms of those contracts. However, existing participants shall not be required to reapply, but shall be required to sign an appropriate contract in accordance with the new regulations in order to continue their participation.

(a)(1) The fees for participation in the Logo program are as follows:

(1)(a) ~~Mainline and Ramp~~ Mainline, ramp, and trailblazer panels are billed Construction Payback Fee consists of three options as listed in Parts (A), (B) and (C) in this Subparagraph:

(A) ~~Option A is a one-year contract fee of two hundred twenty five dollars (\$225) three hundred dollars (\$300) per each mainline and mainline, ramp, and trailblazer panel. ramp sign. Contracts shall be renewed annually and every participating business that meets program requirements, has a valid contract and pays all required fees shall be automatically renewed. The annual fee shall be paid prior to initial installation, every November 1.~~

(B) ~~Option B is a 10-year contract fee of two thousand two hundred fifty dollars (\$2,250.00) per each mainline and ramp sign. Contracts shall be renewed by decade every November 1.~~

~~(C) Option C is a lifetime contract fee of the design and complete installation cost for all required mainline, ramp, trailblazer and supplemental service panels. The participating business shall be subject to a credit to be determined by the Department at the time the Department receives any fee from a business which later qualifies and elects to participate in the program on the subject panel. Businesses participating in the program under Paragraph (c) of this Rule shall not have lifetime rights.~~

(2) ~~Trailblazer Fee is a one time charge of two hundred fifty dollars (\$250.00) per each trailblazer business sign.~~

(3) ~~Maintenance Fee is an annual fee of seventy five dollars (\$75.00) per each mainline, per each ramp, and per each trailblazer business sign.~~

(4) ~~Prorated Fee is a prorated portion of the construction payback fee. This fee shall be charged for that period of time between placement and acceptance of the business sign by the Department and the following November 1. This construction payback prorated fee shall be charged on the first November 1 of the contract. This applies for both one-year and 10-year contracts, but not for lifetime contracts as stated in Subparagraph (a)(1) Option C of this Rule.~~

(5)(2) ~~Service Charge Fee of sixty dollars (\$60.00) per each business sign shall be charged when a business requests replacement of their business sign, or when the Department requires replacement due to damages to the business sign caused by acts of vandalism, accidents, or natural causes including natural deterioration. The business shall provide a new or renovated business panel when necessary due to damages to the business sign caused by acts of vandalism, accidents, or natural causes including natural deterioration sign with the service charge fee per each business sign to the Department. If the Department replaces a business panel on a logo sign or removes or masks a business panel sign because of seasonal operation, there shall be no additional charge to the business.~~

(6) ~~Supplemental Service Signs shall not be subject to fees except as stated in Subparagraph (a)(1) Option C of this Rule.~~

(b)(3) ~~Fees may be paid by check, cash check or money order and are due in advance of the period of service covered by said fee. Failure~~

to pay a charge when due is ground grounds for removal of the business signs and termination of the contract. All participating businesses shall be allowed to change contract options only at the renewal date.

(c) Any business located more than three miles from a fully controlled access highway participating under Subparagraph (a)(1) Option C of this Rule shall be allowed a reimbursement if dislocated by another qualifying participating business. This reimbursement amount shall be determined by the Department, based on life-cycle costs of the logo signs and in-service time the business logo was displayed.

Authority G.S. 136-89.56; 136-137; 136-139; 143B-346; 143B-348; 143B-350(f); 23 C.F.R. 750, Subpart A; 23 U.S.C. 131(f).

19A NCAC 02E .0222 CONTRACTS WITH THE DEPARTMENT

(a) The Department shall perform all required installation, maintenance, removal and replacement of all business signs upon panels.

(b) Individual businesses requesting placement of business signs on panels shall apply by submitting to the Department of Transportation a completed Agreement form. As a condition of said Agreement, the applicant must agree to submit the required initial fee within 30 days after the business is approved by the Department. The Department shall provide a statement(s) to the applicant at the time agreements are provided that itemize the number of business signs required, their fee(s) and remittance requirements.

(c) Businesses must submit a layout of their proposed business sign for approval by the Department before the business sign is fabricated.

(d) No business sign shall be displayed which, in the opinion of the Department, is unsightly, badly faded, or in a state of dilapidation. The Department shall remove, replace, or mask any such business signs as appropriate. Ordinary initial installation and maintenance services shall be performed by the Department at such necessary times upon payment of the annual renewal fee, and removal shall be performed upon failure to pay any fee or for violation of any provision of the rules in this Section and the business sign shall be removed. The business shall furnish all business signs.

(e) When a business sign is removed, it shall be taken to the division traffic services shop of the division in which the business is located. The business shall be notified of such removal and given 30 days in which to retrieve their business sign(s). After 30 days, the business sign shall become the property of the Department and shall be disposed of as the Department shall see fit.

(f) Should the Department determine that trailblazing to a business that is signed for at the interchange is desirable, it shall be done with an assembly (or series of assemblies) consisting of a ramp size business sign and a white on blue arrow. The business shall furnish all business sign(s) required and deemed

necessary by the Department. If several different services are located on the same business site, duplicate type logo signs shall not be erected in a single logo trailblazer installation. In such trailblazer installations, only one logo sign and one directional arrow sign shall be used. The business may submit, subject to approval by the Department, different logo signs to identify different services which may be located on the same business site.

(g) Should a business qualify for business signs at two interchanges, the business sign(s) shall be erected at the nearest interchange. If the business desires signing at the other interchange also, it may be so signed provided it does not prevent another business from being signed.

(h) A business under construction shall not be allowed to apply for participation in the program if its participation would prevent an existing open business applicant from participating, unless the open business has turned down a previous opportunity offered by the Department to participate in the program as provided in Paragraph (i) of this Rule. After approval of an application to participate, a business under construction shall be allowed priority participation over another business, which qualifies and becomes open for business prior to the time specified for opening in the application by the business under construction.

(i) Should the number of businesses of a particular service at an interchange increase to more than the maximum number of business signs allowed on a panel, and a closer business, as measured as described in 19A NCAC 02E .0219(2) of this Section, qualifies and requests installation of its business signs, the business sign(s) of the farthest business shall be removed at the renewal date, provided that any business which has previously paid the lifetime contract fee as described in 19A NCAC 02E .0221(a)(1) Option C of this Section shall not be removed under this Rule. A business with more than one sign displayed on any panel shall have the additional sign(s) removed at the end of a contract period when other qualifying business(es) applies for space on the panels. A business which has turned down a previous opportunity offered by the Department to participate in the program may not qualify as a closer business under this Rule. If the existing panel is designed to hold less than the maximum allowed number of business signs, then the new business must pay the full cost of upgrading the panel to the maximum size such that displacements of participating businesses shall not take place until the panel is at maximum size.

A business closed for reconstruction or renovation, or for restoration of damages caused by fire or storm shall notify the division engineer's office immediately upon closing. The business shall be granted one year to complete the construction, renovation, or restoration, provided all logo fees are maintained and the same type of qualifying service is provided after reopening, even if under a different business name. The business signs shall be removed from the panels and stored by the Department until notice of reopening is received. The signs shall then be reinstalled upon payment of a Service Charge fee as described in 19A NCAC 02E .0221(a)(5) of this Section per each business sign.

(j) When it comes to the attention of the Department that a participating business is not in compliance with the minimum state criteria, the division engineer's office shall promptly verify the information and if a breach of agreement is ascertained, inform the business that it shall be given 30 days to correct any

deficiencies or its business signs shall be removed. If the business is removed and later applies for reinstatement, this request shall be handled in the same manner as a request from a new applicant. When a participating business is determined not to be in compliance with the minimum state criteria for a second time within two years of the first determination of non-compliance, its business signs shall be permanently removed.

At the time specified for opening, if a business under construction is found to not be in compliance, or not open for business, the Division Engineer shall promptly verify the information. If a breach of agreement is ascertained, the Division Engineer shall inform the business that it shall be given 30 days to correct any deficiencies or its business signs shall not be erected. If the business later applies for reinstatement, this request shall be handled in the same manner as a request from a new applicant.

(k) The Department may cover or remove any or all business signs in the conduct of maintenance or construction operations, or for research studies, or whenever deemed by the Department to be in the best interest of the Department or the traveling public, without advance notice thereof.

(l) The transfer of ownership of a business for which an agreement has been lawfully executed with the original owner shall not in any way affect the validity of the agreement for the business sign(s) of the business, provided that the appropriate division engineer is given notice in writing of the transfer of ownership within 30 days of the actual transfer.

(m) No new contracts shall be accepted by the Department during the month of October. The renewal date for all contracts shall be on November 1.

(n) The Department shall not maintain waiting lists for the program.

Authority G.S. 136-89.56; 136-137; 136-139; 143B-346; 143B-348; 143B-350(f); 23 C.F.R. 750, Subpart A; 23 U.S.C. 131(f).

TITLE 25 – OFFICE OF STATE PERSONNEL

Rule-making Agency: *State Personnel Commission*

Rule Citation: *25 NCAC 01E .1305*

Effective Date: *June 26, 2003*

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 126-4*

Reason for Proposed Action: *House Bill 432 was signed into law by Governor Michael Easley on April 10, 2003. This adds community colleges to the entities required to allow the sharing of leave between immediate family members. The change will provide the same shared leave policy for community colleges as is in effect for state agencies and public schools.*

Comment Procedures: *Written comments should be sent to Ms. Peggy Oliver, 1331 Mail Service Center, Raleigh, NC 27699-1331. Phone: (919) 733-7108, fax: (919) 715-9750, email: poliver@ncosp.net.*

CHAPTER 01 - OFFICE OF STATE PERSONNEL

SUBCHAPTER 01E - EMPLOYEE BENEFITS

SECTION .1300 - VOLUNTARY SHARED LEAVE PROGRAM

25 NCAC 01E .1305 DONOR GUIDELINES

(a) A non-family member donor may contribute vacation leave to another employee in any agency. An immediate family member may contribute vacation or sick leave to another immediate family member in any ~~agency~~ agency, ~~or public school, school, or community college.~~ Immediate family is defined as spouse, parents, children, ~~brother~~ brothers, ~~sister~~ sisters, grandparents, grandchildren, great grandparents and great grandchildren. Also included are the step, half, and in-law relationships. For detailed definitions of immediate family see 25 NCAC 01E .0317 DEFINITIONS.

(b) Minimum amount to be donated is four hours. An employee family member donating sick leave to a qualified family member under the Voluntary Shared Leave program may donate up to a maximum of 1040 hours but may not reduce the sick leave account below 40 hours.

(c) The maximum amount of vacation leave allowed to be donated by one individual is to be no more than the amount of the individual's annual accrual rate. However, the amount donated shall not reduce the donor's vacation leave balance below one-half of the annual vacation leave accrual rate.

(d) An employee may not directly or indirectly intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with any right which such employee may have with respect to donating, receiving, or using annual leave under this program. Such action by an employee shall be grounds for disciplinary action up to and including dismissal on the basis of personal conduct. Individual leave records are confidential and only individual employees may reveal their donation or receipt of leave. The employee donating leave cannot receive remuneration for the leave donated.

History Note: Authority G.S. 126-4; 126-8.3; Eff. May 1, 1990; Amended Eff. July 1, 1995; September 1, 1992; July 1, 1991; Temporary Amendment Eff. June 26, 2003.

Rule-making Agency: *State Personnel Commission*

Rule Citation: *25 NCAC 01E .1701-.1702*

Effective Date:
25 NCAC 01E .1701 - June 26, 2003
25 NCAC 01E .1702 – July 1, 2003

Findings Reviewed and Approved by: *Beecher R. Gray*

Authority for the rulemaking: *G.S. 126-4; 126-8.4*

Reason for Proposed Action: H.B. 273 was signed into law on June 6, 2003. This bill ensures that employees who receive vaccination against smallpox incident to the Administration of Smallpox Countermeasures by Health Professionals under Section 304 of the Federal Homeland Security Act of 2002 will be covered for adverse medical reactions due to the vaccination. Among other things, the bill added a new section to the State Personnel Act. G.S. 126-84, to provide leave with pay in certain instances of an adverse reaction. Also, the recent occurrence of SARS in Chapel Hill prompted the necessity to have provisions to require employees who may be exposed to a contagious disease to be away from the worksite. Our current rules do not provide for administrative leave; therefore, we are filing temporary rules to allow time away from work to be charged to administrative leave in order to implement the provisions of HB 273 which became effective June 6, 2003 and provide leave for employees exposed to a contagious disease in order to protect the health of others.

Comment Procedures: Comments from the public shall be directed to Peggy Oliver, 1331 Mail Service Center, Raleigh, NC 27699-1331, phone (919) 733-7108, fax (919) 715-9750, email poliver@ncosp.net.

CHAPTER 01 - OFFICE OF STATE PERSONNEL

SUBCHAPTER 01E - EMPLOYEE BENEFITS

SECTION .1700 - LEAVE: ADMINISTRATIVE

25 NCAC 01E .1701 SMALLPOX VACCINATION

When absence from work is due to an adverse medical reaction resulting from a smallpox vaccination, the absence shall be charged to administrative leave in accordance with the provisions of G. S. 126-8.4(a) and (b).

History Note: Authority G.S. 126-4; 126-8.4; Temporary Adoption Eff. June 26, 2003.

25 NCAC 01E .1702 OTHER CONTAGIOUS DISEASES

When state public health authorities determine the potential for significant risk to the general population for infectious diseases such that an employee's presence at the worksite could endanger the health of coworkers, the Office of State Personnel shall develop guidelines for the use of administrative leave by those employees whose involuntary absence from work is deemed necessary by public health authorities.

History Note: Authority G.S. 126-4(5); Temporary Adoption Eff. July 1, 2003.

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARINGS

Rule-making Agency: Office of Administrative Hearings

Rule Citation: 26 NCAC 02C .0101-.0102, .0106, .0108, .0112, .0114, .0304-.0305, .0501-.0504, .0601-.0604, .0701-.0703

Effective Date: July 1, 2003

Findings Reviewed and Approved by: Jeffrey P. Gray

Authority for the rulemaking: G.S. 150B-21.19

Reason for Proposed Action: S.L. 2003-229 changes the rulemaking process for agencies in adopting temporary rules and permanent rules and creates the new provisions for adopting an emergency rule effective July 1, 2003. OAH must adopt temporary rules to be effective July 1 in order that the requirements for agencies to file rules for publication with OAH comply or are compatible with the rulemaking process required by S.L. 2003-229. Adherence to the notice and hearing requirements would not provide sufficient time to implement the newly legislated procedures prior to July 1 and therefore would be contrary to the public interest.

Comment Procedures: Comments from the public shall be directed to Molly Masich, 6714 Mail Service Center, Raleigh, NC 27699-6714, phone (919) 733-3367, and email molly.masich@ncmail.net.

CHAPTER 02 – RULES DIVISION

SUBCHAPTER 02C - SUBMISSION PROCEDURES FOR RULES AND OTHER DOCUMENTS TO BE PUBLISHED IN THE NORTH CAROLINA REGISTER AND THE NORTH CAROLINA ADMINISTRATIVE CODE

SECTION .0100 - GENERAL

26 NCAC 02C .0101 SCOPE

(a) The rules in this Section set forth the general requirements for agencies to submit rules and documents for publication in the North Carolina Register and the North Carolina Administrative Code.

(b) For notices and rules submitted for publication in the Register, the agency shall also comply with the requirements set out in Sections .0200 - .0300 of this Subchapter.

(c) For a rule submitted for inclusion in the Code that was noticed in the Register, the agency shall also comply with the requirements set out in Section .0400 of this Subchapter.

(d) For a rule submitted for inclusion in the Code and the rule was not noticed in the Register, the agency shall also comply with the requirements set out in Sections .0200 and .0400 of this Subchapter.

(e) For a temporary rule submitted for review and publication in the Register and the Code, the agency shall also comply with the requirements set out in Sections ~~.0200~~ ~~-.0400~~ .0200 - .0500 of this Subchapter.

(f) For a rule submitted for publication on the OAH website, the agency shall also comply with the requirements set out in Sections .0200 and .0700 of this Subchapter.

(g) For an emergency rule submitted for review and publication in the Register and Code, the agency shall also comply with the requirements set out in Sections .0200 and .0600 of this Subchapter.

History Note: Authority G.S. 150B-21.17; 150B-21.18; 150B-21.19; Eff. April 1, 1996;

TEMPORARY RULES

Temporary Amendment Eff. July 1, 2003.

26 NCAC 02C .0102 DEFINITIONS

The following definitions shall apply throughout this Chapter and to all forms prescribed pursuant to this Chapter unless the context indicates otherwise:

- (1) "Action" means the adoption, amendment, or repeal of a rule.
- (2) "Adoption" means a new rule with a new rule number.
- (3) "Adoption by agency" means the date that an agency takes final action on a rule.
- (4) "Amendment" means an existing rule with a deletion, addition or other change to that existing rule.
- (5) "Citation" means a reference to a rule by Title, Chapter or Subchapter, and Section or Rule number.
- (6) "Code" means the North Carolina Administrative Code.
- (7) "Commission" means the Rules Review Commission.
- (8) "Form" means an original form provided by OAH; a computer generated form from the OAH website, a CD or a diskette provided by OAH; a clear legible photocopy of an original OAH form; or an agency generated form identical to the OAH form.
- (9) "OAH" means the Codifier of Rules at the Office of Administrative Hearings.
- (10) "Original" means a printed copy of the document, not a photocopy.
- ~~(11) "Recent Act" or "Recent change" as used in G.S. 150B-21.1(a)(2) and (a)(3) means an act or change that was effective no more than 180 days before the submission date of the temporary rule to OAH.~~
- ~~(12)(11)~~ "Register" means the North Carolina Register.
- ~~(13)(12)~~ "Repeal" means the deletion of the entire text of a rule. When a rule is repealed, that rule number shall not be used again. The number, rule name, and final history note shall remain in the Code permanently for publication and reference purposes.

*History Note: Authority G.S. 150B-21.17; 150B-21.18;
Temporary Adoption Eff. November 1, 1995;
Eff. April 1, 1996;
Amended Eff. April 1, 1997;
Temporary Amendment Eff. July 1, 2003.*

26 NCAC 02C .0106 REFUSAL OF PUBLICATION

- (a) OAH may refuse to publish any document submitted for publication on the OAH website or in the Register or Code which does not meet its requirements.
- (b) OAH shall return any such document to the agency with an indication of the changes needed.
- (c) The agency may resubmit such document for ~~inclusion~~ publication on the OAH website or in the Register, but the date that OAH receives such resubmission shall govern the publication date.

(d) If the returned rule is for inclusion in the Code, the agency shall resubmit such rule to OAH within 48 hours. ~~the Commission for review.~~

*History Note: Authority G.S. 150B-21.19;
Temporary Adoption Eff. November 1, 1995;
Eff. April 1, 1996;
Temporary Amendment Eff. July 1, 2003.*

26 NCAC 02C .0108 GENERAL FORMAT INSTRUCTIONS

The agency shall format each rule submitted to OAH for publication in the Register or Code as follows:

- (1) Paper Specifications:
 - (a) an 8½ by 11 inch sheet of plain white paper, 16 to 32 lb.;
 - (b) one side of the sheet only;
 - (c) black ink;
 - (d) print font size shall be 10 point;
 - (e) portrait print (8½ x 11), no landscape printing (11 x 8½);
 - (f) numbered lines on the left margin with each page starting with line 1;
 - (g) 1.5 line spacing;
 - (h) each rule that has more than one page of text shall have page numbers appearing at the bottom of the page; and
 - (i) no staples.
- (2) Tab and Margin Settings:
 - (a) tab settings for all rules shall be set relative from the left margin at increments of .5;
 - (b) text shall be with a one inch margin on all sides.
- (3) The Introductory Statement shall start on page 1, line 1 of each rule.
- (4) When a new chapter, subchapter, or section of rules is adopted, the Chapter, Subchapter, and Section names shall be provided in bold print with the first rule following the introductory statement. One line shall be skipped between the introductory statement and each chapter, subchapter, and section name.
- (5) One line shall be skipped before starting the line that provides the rule number and rule name. The decimal in the rule number shall be placed in position 1. One tab shall be between the rule number and rule name. The rule name shall be in capital letters and the rule number and name shall be in bold print.
- (6) Body of the Rule:
 - (a) the body of the rule shall start on the line immediately following the rule name with the following markings:
 - (i) adoptions - new text shall be underlined;
 - (ii) amendments - any text to be deleted shall be struck through and new text shall be underlined;

TEMPORARY RULES

- (iii) repeals - text of the rule shall not be included;
 - (b) there shall be no lines skipped in the body of the rule except before and in tables;
 - (c) the first level of text shall be flush left and with two spaces after parenthesis if the paragraph is identified by a letter;
 - (d) the second level of text shall start with one tab and one hanging indent after parenthesis;
 - (e) the third level of text shall start with two tabs and one hanging indent after parenthesis;
 - (f) the fourth level of text shall start with three tabs and one hanging indent after parenthesis;
 - (g) the fifth level of text shall start with four tabs and one hanging indent after parenthesis;
 - (h) the sixth level of text shall start with five tabs and one hanging indent after parenthesis.
- (7) Punctuation shall be considered part of the previous word when underlining or striking through text, such as:
- (a) when the previous word is deleted, the punctuation shall also be struck through with the previous word; and
 - (b) when punctuation is added after an existing word, the existing word shall be struck through and followed by the word and punctuation underlined.
- The smallest unit of text to be struck through or underlined shall be an entire word or block of characters separated from other text by spaces.
- (8) Charts or Tables shall be in a format that is accommodated by the most recent version of Word for Windows.
- (9) History Note:
- (a) shall be in italic font;
 - (b) start on the second line following the body of the rule;
 - (c) the first line of the History Note shall start in the first position; all lines following shall be two tabs;
 - (d) the first line shall start with the words "History Note:", followed by one tab and the word "Authority". The agency shall then cite the authority(ies) in numerical order for that rule;
 - (e) the effective date of the original adoption of the rule shall be the next line following the authority. The abbreviation "Eff." shall be followed by this date;
 - (f) on the line following the "Eff." date, the amended dates shall be preceded

with the words "Amended Eff." and the dates shall be listed in chronological order, with the most recent amended date listed first;

(g) a temporary rule shall be listed as a separate item in the history note with the following words: "Temporary (Adoption, Amendment, or Repeal) Eff. (date)";

(h) an emergency rule shall be listed as a separate item in the history note with the following words: "Emergency (Adoption, Amendment, or Repeal) Eff. (date)";

~~(i)~~ the repealed date of a rule shall be the last line of the history note and start with the words "Repealed Eff." followed by the date;

~~(j)~~ all items in the history note shall be separated by semicolons with the last line ending with a period;

~~(k)~~ all history of a rule shall be in chronological order following the authority for the rule;

~~(l)~~ all dates in the history note shall be complete with the month spelled out, and shall not contain any abbreviations.

- (10) Numbers within the text shall be as follows:
- (a) numbers from one to nine shall be spelled out;
 - (b) figures shall be used for numbers over nine;
 - (c) if a phrase contains two numbers, only one of which is over nine, figures shall represent both.

- (11) Monetary figures within the text shall be spelled out followed by the numerical figure in parenthesis. Decimal and zeros shall be used only for even dollar amounts of sums less than one thousand dollars (\$1,000).

Note: Examples of proper formatting can be found on the OAH website located at www.oah.state.nc.us.

History Note: Authority G.S. 150B-21.17; 150B-21.18; 150B-21.19; Temporary Adoption Eff. November 1, 1995; Eff. April 1, 1996; Amended Eff. August 1, 2000; Temporary Amendment Eff. July 1, 2003.

26 NCAC 02C .0112 AGENCY FINAL COPY

~~(a) OAH shall send a final draft of an adopted temporary or permanent rule to the agency's rule-making coordinator after the rule is filed with OAH.~~

~~(b) If within 10 working days of receipt by the agency OAH receives written notification from the agency of any typographical errors made by OAH, OAH shall correct the errors.~~

TEMPORARY RULES

~~(e) OAH shall send final drafts electronically to the rule-making coordinator.~~

History Note: Authority G.S. 150B-21.5; 150B-21.20; Temporary Adoption Eff. January 1, 2003; Temporary Repeal Eff. July 1, 2003.

26 NCAC 02C .0114 AGENCY FINAL COPY

- ~~(a) OAH shall send electronically a final draft of an adopted emergency, temporary or permanent rule to the agency's rule-making coordinator after the rule is filed with OAH.~~
- ~~(b) The agency shall notify OAH of any error made in the draft within 10 business days of notification by OAH.~~
- ~~(c) If OAH receives written notification from the agency of any error made by OAH, OAH shall correct the error.~~
- ~~(d) If OAH receives written notification from the agency of any error in the content of the rule not made by OAH, OAH shall return the rule to the Commission.~~

History Note: Authority G.S. 150B-21.5; 150B-21.20; Temporary Adoption Eff. July 1, 2003.

26 NCAC 02C .0304 NOTICE OF PERMANENT RULE-MAKING PROCEEDINGS

- ~~(a) The agency shall make its Notice of Rule-Making Proceedings on an OAH Notice of Rule-Making Proceedings form.~~
- ~~(b) If the information contained in the notice exceeds the space provided on the form, the agency shall also submit an electronic version of the information.~~

History Note: Authority G.S. 150B-21.17; Temporary Adoption Eff. November 1, 1995; Eff. April 1, 1996; Temporary Repeal Eff. July 1, 2003.

26 NCAC 02C .0305 PUBLICATION OF RULE-MAKING AGENDA

~~If an agency publishes a rule-making agenda, the agency shall submit the agenda, the submission form, and an electronic version of the agenda.~~

History Note: Authority G.S. 150B-21.17; Temporary Adoption Eff. November 1, 1995; Eff. April 1, 1996; Temporary Amendment Eff. January 1, 2003; Temporary Repeal Eff. July 1, 2003.

SECTION .0500 - TEMPORARY RULES

26 NCAC 02C .0501 SCOPE

The rules in this Section govern the requirements for submitting temporary rules to be reviewed by the Codifier, for publication published in the Register, and for inclusion in the Code. The agency shall also comply with the requirements in Sections .0100 - .0400 of this Subchapter.

History Note: Authority G.S. 150B-21.17; 150B-21.18; 150B-21.19; Eff. April 1, 1996; Temporary Amendment Eff. July 1, 2003.

26 NCAC 02C .0502 PUBLICATION OF A TEMPORARY RULE

The agency shall submit ~~a each~~ temporary rule for ~~review by OAH and~~ publication in the Code with the following:

- (1) An original Temporary Rule Certification form and copy (Rule .0503 of this Section).
- (2) An original and copies of the temporary rule (Rule .0103 of this Subchapter) prepared in accordance with Rule .0108 of this Subchapter, containing:
 - (a) an introductory statement (Rule .0404 of this Subchapter);
 - (b) the body of the rule (Rule .0405 of this Subchapter);
 - (c) the history note (Rule .0406 of this Subchapter).
- (3) A return copy, if desired (Rule .0104 of this Subchapter).
- ~~(4) An original Notice of Text or Notice of Text and Hearing form with copy if publication in the Register shall serve as Notice of Text.~~
- (4) An electronic version of the rule (Rule .0105 of this Subchapter).

History Note: Authority G.S. 150B-21.19; Temporary Adoption Eff. November 1, 1995; Eff. April 1, 1996; Amended Eff. April 1, 1997; Temporary Amendment Eff. July 1, 2003.

26 NCAC 02C .0503 TEMPORARY RULE CERTIFICATION FORM

~~(a) The agency shall submit a completed typed Temporary Rule Certification form for a rule to be submitted for publication in the Code. The agency shall submit a single Temporary Rule Certification form for temporary rules when:~~

- ~~(1) the rules are codified within the same chapter in the Code;~~
- ~~(2) the finding for the action is the same;~~
- ~~(3) the proposed effective date is the same; and~~
- ~~(4) the rules are submitted at the same time for review by the Codifier of Rules.~~

~~(b) The agency head shall sign the Temporary Rule Certification form. If the agency head has designated this authority to another pursuant to G.S. 143B-10(a), then the agency shall submit a copy of such designation.~~

History Note: Authority G.S. 150B-21.19; Temporary Adoption Eff. November 1, 1995; Eff. April 1, 1996; Temporary Amendment Eff. July 1, 2003.

26 NCAC 02C .0504 APPEARANCE BY AGENCY

~~The Codifier may request that a representative of the agency appear before him during the review to clarify the agency's finding of need or to consider additional information submitted by the agency or any interested person.~~

History Note: Authority G.S. 150B-21.1; Temporary Adoption Eff. November 1, 1995;

Eff. April 1, 1996;

Temporary Repeal Eff. July 1, 2003.

SECTION .0600 - EMERGENCY RULES

26 NCAC 02C .0601 SCOPE

The rules in this Section govern the requirements for submitting emergency rules to be reviewed by the Codifier, for publication in the Register, and for inclusion in the Code. The agency shall also comply with the requirements in Sections .0100 - .0400 of this Subchapter.

History Note: Authority G.S. 150B-21.17; 150B-21.18; 150B-21.19;

Temporary Adoption Eff. July 1, 2003.

26 NCAC 02C .0602 PUBLICATION OF AN EMERGENCY RULE

The agency shall submit an emergency rule for review by OAH and publication in the Register and inclusion in the Code with the following:

- (1) An original Emergency Rule Findings of Need form and copy (Rule .0603 of this Section).
- (2) An original and copies of the emergency rule (Rule .0103 of this Subchapter) prepared in accordance with Rule .0108 of this Subchapter, containing:
 - (a) an introductory statement (Rule .0404 of this Subchapter);
 - (b) the body of the rule (Rule .0405 of this Subchapter); and
 - (c) the history note (Rule .0406 of this Subchapter);
- (3) A return copy, if desired (Rule .0104 of this Subchapter); and
- (4) An electronic version of the rule (Rule .0105 of this Subchapter).

History Note: Authority G.S. 150B-21.19;
Temporary Adoption Eff. July 1, 2003.

26 NCAC 02C .0603 EMERGENCY RULE FINDINGS OF NEED FORM

(a) The agency shall submit a completed typed Emergency Rule Findings of Need form for a rule to be submitted for publication in the Code. The agency shall submit a single Emergency Rule Findings of Need form for emergency rules when:

- (1) the rules are codified within the same chapter in the Code;
- (2) the finding for the action is the same;
- (3) the proposed effective date is the same; and
- (4) the rules are submitted at the same time for review by the Codifier of Rules.

(b) The agency head shall sign the Emergency Rule Findings of Need form. If the agency head has designated this authority to another pursuant to G.S. 143B-10(a), then the agency shall submit a copy of such designation.

History Note: Authority G.S. 150B-21.19;
Temporary Adoption Eff. July 1, 2003.

26 NCAC 02C .0604 APPEARANCE BY AGENCY

The Codifier may request that a representative of the agency appear before him during the review to clarify the agency's finding of need or to consider additional information submitted by the agency or any interested person.

History Note: Authority G.S. 150B-21.1A;
Temporary Adoption Eff. July 1, 2003.

SECTION .0700 – PUBLICATION ON THE OAH WEBSITE

26 NCAC 02C .0701 SCOPE

The rules in this Section govern the requirement for submitting rules that are required by state or federal law to be published on the OAH website.

History Note: Authority G.S. 150B-21.1;
Temporary Adoption Eff. July 1, 2003.

26 NCAC 02C .0702 PUBLICATION OF A RULE ON THE OAH WEBSITE

The agency shall submit a rule to be published on the OAH website with the following:

- (1) An original Publication on the OAH Website form and copy (Rule .0703 of this Section).
- (2) An original and copies of the rule (Rule .0103 of this Subchapter) prepared in accordance with Rule .0108 of this Subchapter, containing:
 - (a) an introductory statement (Rule .0404 of this Subchapter);
 - (b) the body of the rule (Rule .0405 of this Subchapter);
 - (c) the history note (Rule .0406 of this Subchapter).
- (3) A return copy, if desired (Rule .0104 of this Subchapter).
- (4) An electronic version of the rule (Rule .0105 of this Subchapter).

History Note: Authority G.S. 150B-21.19;
Temporary Adoption Eff. July 1, 2003.

26 NCAC 02C .0703 PUBLICATION FORM

(a) The agency shall submit a completed typed Publication of the OAH Website form for a rule to be submitted for publication in the OAH website.

(b) The agency shall submit a single form for each permanent rule submitted for publication.

(c) The agency head or rulemaking coordinator shall sign the Publication form. If the agency head has designated this authority to another pursuant to G.S. 143B-10(a), then the agency shall submit a copy of such designation.

History Note: Authority G.S. 150B-21.19;
Temporary Adoption Eff. July 1, 2003.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on Thursday, August 21, 2003, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments by Friday, August 15, 2003 to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Jim R. Funderburke - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Thomas Hilliard, III
Robert Saunders

Appointed by House

Jennie J. Hayman - Chairman
Graham Bell
Dr. Walter Futch
Dr. John Tart

RULES REVIEW COMMISSION MEETING DATES

August 21, 2003 September 18, 2003
October 16, 2003

RULES REVIEW COMMISSION

July 17, 2003

MINUTES

The Rules Review Commission met on Thursday morning, July 17, 2003, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present: Graham Bell, Jim Funderburk, Walter Futch, Thomas Hilliard, John Tart and David Twiddy.

Staff members present were: Joseph DeLuca, Staff Director; Bobby Bryan, Rules Review Specialist; and Lisa Johnson.

The following people attended:

Mark Benton	DHHS/DFS
Kris Horton	DHHS/DMA
Torrey McLean	DHHS
Sherry Thomas	NC Association for Home & Hospice Care
David Cobb	Wildlife Resources Commission
Joan Troy	Wildlife Resources Commission
Nadine Pfeiffer	DHHS/DFS
Vandella Bradley	DHHS
Sheila Green	DENR/Coastal Resources Commission
Melissa Trippe	Attorney General's Office
Marjorie Donaldson	DHHS/Vocational Rehabilitation Services
Elizabeth Bishop	DHHS/Vocational Rehabilitation Services
Suzanne Marshall	DHHS/DSS
Tom Taaffe	Medical Care Commission
Jeff Manning	DENR/DWQ
Teresa Marrella	Criminal Justice Education & Training Standards Comm.
Scott Perry	Criminal Justice Education & Training Standards Comm.
Lonnie Freeman	Attorney General's Office
Satana Deberry	DHHS
Dedra Alston	DENR
Thomas Allen	DENR
Michael King	DHHS
Jenny McArthur	DHHS

APPROVAL OF MINUTES

RULES REVIEW COMMISSION

The meeting was called to order at 10:02 a.m. with Commissioner Funderburk presiding. Chairman Funderburk asked for any discussion, comments, or corrections concerning the minutes of the June 19, 2003, meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

10 NCAC 1M .0102-.0106: DHHS – The Commission voted to return the rules because they have never been properly filed. There have been numerous attempts on the staff’s part over the last two months to allow the agency to correct the filing but no corrections have been received by the office.

10 NCAC 1N .0102-.0106: DHHS – The Commission voted to return the rules because they have never been properly filed. There have been numerous attempts on the staff’s part over the last two months to allow the agency to correct the filing but no corrections have been received by the office.

10 NCAC 1O .0103: DHHS – The Commission voted to return the rule because it has never been properly filed. There have been numerous attempts on the staff’s part over the last two months to allow the agency to correct the filing but no corrections have been received by the office.

10 NCAC 20A .0102: DHHS/Division of Vocational Rehabilitation Services – The Commission approved the rewritten rule submitted by the agency.

10 NCAC 20C .0119; .0206; .0606: DHHS/Division of Vocational Rehabilitation Services – The Commission approved the rewritten rules submitted by the agency.

LOG OF FILINGS

Chairman Funderburk presided over the review of the log and all rules were approved unanimously with the following exceptions:

10A NCAC 71U .0206: DHHS/Social Services – The Commission objected to the rule due to lack of statutory authority and ambiguity. It is not clear what method has been developed for establishing simplified utility allowances. There is no authority cited for developing it outside the rulemaking process. This objection applies to existing language in the rule.

10A NCAC 71U .0213: DHHS/Social Services – The Commission objected to the rule due to ambiguity. In (c)(2), it is not clear when information about a household’s circumstances would be considered verified upon receipt. This objection applies to existing language in the rule.

12 NCAC 9C .0401: Criminal Justice Education and Training Standards Commission – The Commission objected to the rule due to ambiguity. In (d), it is not clear what constitutes “just cause” for suspension or revocation of accreditation. In (f), it is not clear what makes changes “major.” This objection applies to existing language in the rule.

12 NCAC 9E .0103: Criminal Justice Education and Training Standards Commission – The Commission objected to the rule due to ambiguity. In (6), it is not clear what is meant by “normally accepted practices and procedures.” This objection applies to existing language in the rule.

12 NCAC 9G .0102; .0202-.0206; .0301-.0304; .0306; .0310; .0315; .0411-.0413; .0415; .0416; .0504; .0602: Criminal Justice Education and Training Standards Commission – These rules were withdrawn and resubmitted for the consideration at the next month’s meeting.

15A NCAC 2D .0506: Environmental Management Commission – Commissioner Bell voted against the motion to approve this rule.

15A NCAC 7K .0209: Coastal Resources Commission – The Commission voted to return the rule to the agency for failure to comply with the Administrative Procedure Act. This rule is purportedly being amended to correct a typographical error and no public notice or comment period has been given. In fact, it does not appear that the agency knows what its current rule is and there is nothing in the material sent that looks like any “typographical” error has been made. The first underlined sentence is already a part of the rule and the struck through language is not currently part of the rule. The current Subparagraph (d)(6) is totally missing from the submitted rule. The second underlined sentence (which is new language) was not in the Notice of Text published in the Register when this rule was last amended. The rule is being returned to the agency to be adopted in accordance with the APA or to be properly submitted if this is truly the correction of a typographical error.

15A NCAC 10C .0211: Wildlife Resources Commission – The Commission objected to the rule due to ambiguity. It is not clear what standards the Executive Director is to use in determining what conditions and limitations are necessary or advisable for the purchase, possessing and stocking of sterile triploid grass carp. This objection applies to existing language in the rule.

21 NCAC 29 .0102: Locksmith Licensing Board – The Commission objected to the rule due to lack of statutory authority and ambiguity. G.S. 74F-5(g) requires the Board to adopt rules governing the calling, holding, and conducting of regular and special meetings. This rule purports to implement that provision but it leaves open more questions than it answers. It is not clear when regular meetings will be held, how many per year will be held, where they will be held, or at what time they will be held. Giving the chair an absolute free hand in calling meetings does not appear to fulfill the statutory requirement to adopt rules governing the calling of meetings. Paragraph (b) contains a modification provision without specific guidelines which is prohibited by G.S. 150B-19(6). Since the Board has to agree on the time and location, it is not clear what is meant by “shall be notified.”

21 NCAC 29 .0202: Locksmith Licensing Board – The Commission objected to the rule due to ambiguity. It is not clear how the published deadline for the submittal of requests for examination is determined. It is also not clear what is meant by “published deadline.”

RULES REVIEW COMMISSION

21 NCAC 29 .0203: Locksmith Licensing Board – The Commission objected to the rule due to ambiguity. It is not clear what the passing score is nor when nor where it will be published.

21 NCAC 29 .0204: Locksmith Licensing Board – The Commission objected to the rule due to ambiguity. It is not clear what standards the Board will use in determining whether to invalidate exam results based on an applicant’s failure to follow all instructions given by proctors.

21 NCAC 29 .0401: Locksmith Licensing Board – The Commission objected to the rule due to ambiguity. It is not clear what documents are listed as required in the application package.

21 NCAC 29 .0402: Locksmith Licensing Board – The Commission objected to the rule due to ambiguity. In (a), it is not clear what is meant by a “full criminal history report.” It is not clear what type information is being sought in (b). In (d)(1), the use of “but not limited to” leaves open exactly what felonies are included in the category. There is the same problem in (d)(5). In (h)(2) through (5), it is not clear what is meant by “reinstatement of license upon the same standards listed above.”

21 NCAC 29 .0502: Locksmith Licensing Board – The Commission objected to the rule due to lack of statutory authority and ambiguity. In the first sentence, it is not clear what would constitute a “spirit of fairness” or, more importantly, what the Board would consider a violation of that standard. In (2), it is not clear what constitutes a “professional manner” and a “reasonable warranty.” In (3), it is not clear what bonding and insurance is necessary. This provision may also be beyond the authority of the Board to adopt since it does not appear to be an ethical requirement. In (4), it is not clear what is meant by an “enterprise of questionable character.” In (6), besides the listed items, it is not clear what means of soliciting business would be considered “improper or questionable.”

21 NCAC 29 .0503: Locksmith Licensing Board – The Commission objected to the rule due to ambiguity. In (5), it is not clear what codes, besides those listed, are “relevant.” In (8), it is not clear what is meant by “appropriate caution.” In (8)(A), it is not clear what would constitute a “secure and confidential manner.”

21 NCAC 29 .0504: Locksmith Licensing Board – The Commission objected to the rule due to ambiguity. In (3), it is not clear what is meant by a “qualified recombination.”

COMMISSION PROCEDURES AND OTHER BUSINESS

The Commission discussed issues on how the Rules Review Commission will be handling temporary rules and the change of the permanent rule making process.

On motions initiated by Mr. Bell, the Commission did specify that any objections pursuant to G.S. 150B-21.3(b2) must be received prior to 5:00 p.m. on the sixth business day preceding the end of the month in which a rule is approved. Those objections may be delivered by mail, delivery service, hand delivery, or facsimile transmission. Email delivery is not included in that list.

The meeting adjourned at 11:55 a.m.

The next meeting of the Commission is Thursday, August 21, 2003 at 10:00 a.m.

Respectfully submitted,
Lisa Johnson

Commission Review/Administrative Rules

Log of Filings (Log #200)
June 23, 2003 through July 21, 2003

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

Definitions	12 NCAC 09G .0102	Amend
Citizenship	12 NCAC 09G .0202	Amend
Age	12 NCAC 09G .0203	Amend
Education	12 NCAC 09G .0204	Amend
Physical and Mental Standards	12 NCAC 09G .0205	Amend
Moral Character	12 NCAC 09G .0206	Amend
Certification of Correctional Officers Probation/	12 NCAC 09G .0301	Amend
Notification of Charges/Convictions	12 NCAC 09G .0302	Amend
Probationary Certification	12 NCAC 09G .0303	Amend
General Certification	12 NCAC 09G .0304	Amend
Retention of Records of Certifications	12 NCAC 09G .0306	Amend
Specialized Instructor Certification	12 NCAC 09G .0310	Amend
Comprehensive Written Exam-Specialized Instructor	12 NCAC 09G .0315	Amend
Basic Training for Correctional Officers	12 NCAC 09G .0411	Amend
Corrections Specialized Instructor Training-Firearm	12 NCAC 09G .0412	Amend

RULES REVIEW COMMISSION

Basic Training for Probation/Parole Officers-Survey	12 NCAC 09G .0413	Amend
Corrections Specialized Instructor Training-Firearm	12 NCAC 09G .0415	Amend
Corrections Specialized Instructor-unarmed self	12 NCAC 09G .0416	Amend
Suspension Revocation or denial of certification	12 NCAC 09G .0504	Amend
General Provisions	12 NCAC 09G .0602	Amend
DENR/ENVIRONMENTAL MANAGEMENT COMMISSION		
Catawba River Basin Protection and Maintenance	15A NCAC 02B .0243	Adopt
Mitigation Program for Protection and Maintenance	15A NCAC 02B .0244	Adopt
DENR		
Stormwater Discharges	15A NCAC 02H .0126	Amend
State RPE Stormwater Management Program	15A NCAC 02H .1014	Amend
DENR/ENVIRONMENTAL MANAGEMENT COMMISSION		
Issuance of Declaratory Ruling	15A NCAC 02I .0601	Adopt
Procedure for Submission of Petition	15A NCAC 02I .0602	Adopt
Disposition of Request	15A NCAC 02I .0603	Adopt
TRANSPORTATION, DEPARTMENT OF/DIVISION OF MOTOR VEHICLES		
Purpose	19 NCAC 02E .1201	Adopt
Definitions	19 NCAC 02E .1202	Adopt
Participation	19 NCAC 02E .1203	Adopt
Responsibilities of Participants	19 NCAC 02E .1204	Adopt
Termination of the Agreement	19 NCAC 02E .1205	Adopt
STATE BOARDS/BOARD OF DENTAL EXAMINERS		
General Anesthesia and Sedation Definitions	21 NCAC 16Q .0101	Amend
Credentials and Permits	21 NCAC 16Q .0201	Amend
Parenteral Conscious Sedation Credentials and Perm	21 NCAC 16Q .0301	Amend
Clinical Requirements and Equipment	21 NCAC 16Q .0302	Amend
Temporary Approval Prior to Site Inspection	21 NCAC 16Q .0303	Amend
Enteral Conscious Sedation Credentials and Permit	21 NCAC 16Q .0401	Adopt
Permit Requirements, Clinical Provisions and Equip	21 NCAC 16Q .0402	Adopt
Temporary Approval Prior to Site Inspection	21 NCAC 16Q .0403	Adopt
Annual Renewal Required	21 NCAC 16Q .0501	Amend
Inspection Authorized	21 NCAC 16Q .0503	Amend
Failure to Report	21 NCAC 16Q .0602	Amend

**AGENDA
RULES REVIEW COMMISSION**

August 21, 2003

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow Up Matters
 - A. Department of Administration – 1 NCAC 30H .0102; .0201-.0205; .0301; .0303; .0305; .0404; .0701; .0801; .1001 (DeLuca)
 - B. Department of Administration – 1 NCAC 35 .0101; .0103; .0201-.0205; .0301; .0302; .0304-.0306; .0308; .0309 (DeLuca)
 - C. Department of Agriculture – 2 NCAC 52B .0204 (Bryan)
 - D. DHHS/Social Services – 10A NCAC 71U .0206; .0213 (Bryan)
 - E. Criminal Justice Education & Training Standards Commission – 12 NCAC 9C .0401 (Bryan)
 - F. Criminal Justice Education & Training Standards Commission – 12 NCAC 9E .0103 (Bryan)
 - G. Wildlife Resources Commission – 15A NCAC 10C .0211 (Bryan)

RULES REVIEW COMMISSION

- H. Locksmith Licensing Board - 21 NCAC 29 .0102; .0202-.0204; .0401; .0402; .0502-.0504 (Bryan)
 - Cultural Resources Commission – 7 NCAC 4S .0104 (DeLuca)
 - Board of Elections – 8 NCAC Chapter 1-12 (DeLuca) To be considered at October Meeting
 - Board of Pharmacy – 21 NCAC 46 .1812 (DeLuca)
 - Board of Pharmacy – 21 NCAC 46 .2502 (DeLuca)
- IV. Review of rules (Log Report #200)
- V. Commission Business
- VI. Next meeting: September 18, 2003

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. Also, the Contested Case Decisions are available on the Internet at the following address: <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge

JULIAN MANN, III

Senior Administrative Law Judge

FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Sammie Chess Jr.

Beecher R. Gray

Melissa Owens Lassiter

James L. Conner, II

Beryl E. Wade

A. B. Elkins II

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>				
Ki Young Kim v. Ann H. Johnson, ABC Commission in Raleigh	03 ABC 0177	Mann	06/17/03	
<u>AGRICULTURE</u>				
Phoenix Ski Corp. v. Dept. of Ag. & Cons. Svcs. & Dept. of Admin. & Carolina Cable Lift, LLC.	02 DAG 0560	Lewis	06/30/03	18:03 NCR 217
<u>CRIME CONTROL AND PUBLIC SAFETY</u>				
Myrtle J. Price v. Crime Victims Comp. Comm, Dept. of Crime Control & Public Safety, Victims Compensation Services Division	03 CPS 0173	Wade	06/27/03	
<u>HEALTH AND HUMAN SERVICES</u>				
A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions .				
Robbie Cummings v. DHHS	02 DHR 0815	Conner	06/09/03	
Linda Ann Tyson v. Div. of Facility Services, Health Care Personnel Registry Section	02 DHR 1103	Lassiter	05/12/03	
Ricky Roberts for Angela Roberts v. DHHS, Div. of Med. Assistance	02 DHR 1138	Lassiter	04/25/03	18:01 NCR 52
Wanda J. Vanhook v. DHHS, Div. of Med. Assistance	02 DHR 1459	Gray	04/24/03	
Elaine B. Shelton v. DHHS, Div. of Facility Services	02 DHR 1489	Conner	05/28/03	
Jones Hill Day Care, Ola M Jones v. (CACPP) Child & Adult Care Food Program	02 DHR 1601	Lassiter	05/16/03	
Michelle's Lullaby Day Care, Jerri Howell v. Div. of Child Development June Locklear	02 DHR 1672	Wade	06/10/03	
Joanne F Ranta v. DHHS, Div. of Facility Services	02 DHR 1752	Mann	05/15/03	
Gregory Tabron v. DHHS, Div. of Facility Services	02 DHR 1789	Elkins	05/16/03	
Doretha Leonard v. DHHS, Div. of Medical Assistance	02 DHR 2183	Lassiter	06/13/03	
Veronica Walker, Ph.D v. DHHS, Div. of Facility Services	02 DHR 2246	Chess	06/20/03	
Latrese Sherell Harris v. Nurse Aide Registry	02 DHR 2290	Chess	06/16/03	
James E Hill v. DHHS, Div. of Facility Services	03 DHR 0028	Wade	05/30/03	
Duffie G Hunt v. Medicaid	03 DHR 0085	Conner	06/06/03	
Sarah P Jordan v. DHHS, Div. of Facility Services	03 DHR 0155	Gray	06/18/03	
Martha Banks (ID #72000027) v. Div. of Child Dev., Child Abuse/Neglect Dept., Perquimans Co. DSS	03 DHR 0168	Wade	06/12/03	
Nakeisha Shawon Leak v. DHHS, Office of Legal Affairs	03 DHR 0308	Wade	06/25/03	
Lisa Mendez v. Health Care Personnel Registry	03 DHR 0351	Gary	06/27/03	
Constance Basnight v. Pasquotank County DSS	03 DHR 0385	Lassiter	05/29/03	
Dorothy Ann Bell v. DHHS, Div. of Facility Services	03 DHR 0437	Morrison	06/30/03	
Andrea Ford v DHHS, Div. of Facility Services	03 DHR 0609	Morrison	06/04/03	
Wake Radiology Services, LLC, Wake Radiology Consultants, P.A., Raleigh MR Imaging Center Ltd Partnership & Wake Radiology Diagnostic Imaging, Inc. v. DHHS, Div. of Facility Svcs., CON Sec., Robert J. Fitzgerald, Dir, Lee B Hoffman, Chief of CON Sec. & Mobile Imaging of North Carolina, LLC	03 DHR 0676	Gray	07/07/03	
Samantha Jacobs v. DHHS, Div. of Facility Services	03 DHR 0697	Lassiter	06/19/03	
Jane McMillan v. DHHS, Div. of Facility Services	03 DHR 0698	Lassiter	06/19/03	

CONTESTED CASE DECISIONS

JUSTICE

Alarm Systems Licensing Board

Gregory L. Swicegood, Jr. v. Alarm System Licensing Board 03 DOJ 0503 Morrison 05/16/03

Sheriffs' Education & Training Standards Commission

Harvey Clinton Blanton v. Sheriffs' Educ. & Trng. Stds. Comm.	02 DOJ 1202	Gray	06/05/03	18:03 NCR	222
Jonathan Mims v. Sheriffs' Education & Training Standards. Comm.	02 DOJ 1263	Gray	06/03/03	18:03 NCR	229
Laura Dawn Watts v. Sheriffs' Education & Training Standards Comm.	02 DOJ 1926	Lassiter	05/22/03		
Allen Wilson York v. Sheriffs' Education & Training Standards Comm.	02 DOJ 2042	Elkins	05/16/03		
Cynthia Darlene Harris v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 0516	Lassiter	06/06/03		

DEPARTMENT OF STATE TREASURER

Shirlyn D. Brickhouse v. Dept. of St. Treasurer, Ret. Sys. Div. 02 DST 2315 Chess 06/03/03

DEPARTMENT OF PUBLIC INSTRUCTION

Charles Eugene Smith v. Department of Public Instruction 02 EDC 1082 Mann 05/26/03

ENVIRONMENT AND NATURAL RESOURCES

Larry E. Sadler v. DENR	00 EHR 1322	Gray	07/02/03		
Lester Hill v. Person Co. Health Dept., DENR	00 EHR 1392	Gray	05/29/03		
John Burr v. Health Department, Mecklenburg County	01 EHR 1204	Gray	05/28/03		
Richard S Pacula v. CAMA-Coastal Area Mgmt. Assoc.	01 EHR 2269 ¹	Chess	05/14/03		
Rosa & Eddie Brame v. DENR	02 EHR 0319	Wade	06/27/03		
Gerald Max Toney and Lynn N. Toney v. DENR (McDowell Co.)	02 EHR 0887	Mann	05/28/03		
Forest Sound Homeowners Assoc, James P Hynes, Pres. V. DENR, Div. of Coastal Management	02 EHR 1078	Wade	06/09/03		
Richard S Pacula v. CAMA-Coastal Area Mgmt. Assoc.	02 EHR 1119 ¹	Chess	05/14/03		
Former Center Mart, Joe Fred Ledbetter v. DENR, Div. of Waste Mgmt.	02 EHR 1302	Conner	05/29/03		
Michael E Hendrix v. Caldwell Co. Dept of Environmental Health	03 EHR 0006	Gray	07/02/03		
Lawndale Service Ctr, Inc. C Valley v. DENR	03 EHR 0016	Lassiter	06/05/03		

HUMAN RELATIONS FAIR HOUSING

Sara E. Parker v. Human Relations Fair Housing 02 HRC 0621 Gray 05/16/03

OFFICE OF STATE PERSONNEL

Dorris D Wright v. Cabarrus Co. Dept. of Social Services	00 OSP 1506	Gray	04/22/03		
Robert Banks Hinceman v. DHHS/Broughton Hospital	01 OSP 0827	Elkins	05/01/03	18:01 NCR	45
Wanda Gore v. Department of Correction	01 OSP 1286	Gray	05/16/03		
Terence G Westry v NC A & T State University	02 OSP 1019	Conner	06/30/03		
Robert L. Swinney v. Department of Transportation	02 OSP 1109	Gray	05/07/03		
Norman Burton v. Chatham County	02 OSP 1483 ²	Gray	05/12/03		
Jonah Uduagbomen v. Department of Transportation	02 OSP 1597	Gray	06/19/03		
Charles M Alexander v. ESC of NC	02 OSP 1613	Chess	07/01/03		
Norman Burton v. Chatham County	02 OSP 1625 ²	Gray	05/12/03		
Edward K Royal v. Dept. of Crime Control & Public Safety, Div. of State Highway Patrol	02 OSP 1631	Lassiter	06/25/03		
Patricia A Mabry v. Department of Corrections	02 OSP 1774	Chess	06/27/03		
Chester Michael Martin v. Cumberland Co. Dept. of Social Services	02 OSP 1797	Conner	05/09/03		
Steven Wayne McCartney v. Lumberton Correctional Institution	03 OSP 0026	Conner	05/29/03		
Eric M Petree v. Department of Corrections	03 OSP 0116	Lassiter	06/24/03		
Jeffrey W Byrd v. Fayetteville State University	03 OSP 0204	Chess	06/04/03		
Maranda Sharpe v. Department of Transportation	03 OSP 0412	Chess	06/03/03		
James E. Sharpe v Department of Transportation, Div. 14 (Graham Co.)	03 OSP 0413	Chess	06/03/03		
Joan Milligan, Patricia Flanigan, Pauletta Highsmith, Edna Cummings v. Fayetteville State University	03 OSP 0562	Conner	06/06/03		
Derwin D Johnson v. Department of Correction	03 OSP 0660	Lassiter	06/24/03		
Wanda Steward-Medley v. Department of Corrections, Div. of Prisons	03 OSP 0656	Conner	06/20/03		
David L McMurray Jr. v. Highway Patrol	03 OSP 0801	Lassiter	06/19/03		
LaWanda J Abeguunrin v. Franklin Correctional Center	03 OSP 0825	Gray	06/18/03		
Lazona Gale Spears v. Employment Security Commission	03 OSP 0859	Lassiter	06/26/03		
Jeffrey J Medley v. Department of Correction	03 OSP 0879	Gray	06/30/03		

UNIVERSITY OF NORTH CAROLINA HOSPITALS

Donald R. Smith v. UNC Hospitals	02 UNC 1361	Conner	06/05/03		
Alfred Tilden Ward, Jr. v. UNC Hospitals & UNC Physicians & Assoc.	03 UNC 0723	Gray	06/23/03		

1 Combined Cases
2 Combined Cases

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 DAG 0560

PHOENIX SKI CORPORATION,
Petitioner,

vs.

NORTH CAROLINA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES and NORTH CAROLINA
DEPARTMENT OF ADMINISTRATION,
Respondents.

and

CAROLINA CABLE LIFT, LLC,
Intervenor.

DECISION

THIS MATTER, pursuant to notice, came on for hearing before the undersigned Temporary Administrative Law Judge of the Office of Administrative Hearings on March 18 – 19, 2003 upon the issue of whether the award of certain leases of State property to the Intervenor Carolina Cable Lift, LLC, rather than Petitioner Phoenix Ski Corporation, for the erection and operation of aerial cable lift rides at the Western North Carolina Agricultural Center and the North Carolina State Fair comported with law. William H. Gammon, Esq. appeared on behalf of the Petitioner; Teresa L. White, Esq. appeared on behalf of the Respondents; and Michael E. Weddington, Esq. appeared on behalf of the Intervenor. The court having received evidence from the parties in the form of testimony direct and by cross examination, affidavits and documentary exhibits makes the following Findings of Fact, Conclusions of Law and Decision, which is tendered to the Secretary of the Department of Administration in accordance with G.S. § 150B-34 for final decision pursuant to G.S. § 150B-36.

FINDINGS OF FACT

1. The North Carolina Department of Agriculture has responsibility for and authority over the two State Fairs; North Carolina State Fair, Raleigh and the Mountain State Fair, Western North Carolina Agriculture Center, Fletcher, North Carolina.
2. In or about January, 2001, Mr. James H. Drew, Jr. of Drew Amusement Operators, Inc. (also known as “Drew Exposition”) of Augusta, Georgia attended the North Carolina State Fair Convention in Greensboro, North Carolina.
3. At that time, Drew Exposition had been under contract for several years with the State of North Carolina to operate the midway at the fair conducted at the Western North Carolina Agricultural Center (otherwise known as the “Mountain State Fair”). These contracts were awarded for terms of one year.
4. While there, Mr. Drew spoke to both Bill Edmondson, Manager of the Mountain State Fair, and Wesley Wyatt, Manager of the North Carolina State Fair (otherwise known as the “State Fair”), about the possibility of erecting and operating at both fairs an aerial cable lift ride.
5. Prior to this time, Drew Exposition had erected and operated an aerial cable lift ride at the Georgia National Fair, Perry, Georgia (Georgia National), and Mr. Drew provided to Mr. Edmondson and Mr. Wyatt general information, photographs and blueprints regarding that cable lift ride.
6. Mr. Drew voluntarily prepared and submitted draft leases for the installation and operation of aerial cable lifts at the two fairs calling for, among other things, a rental term of 25 years at the Mountain State Fair and 15 years plus 2 possible 5 year extensions at the State Fair, with flat annual rentals of \$15,000 for the Mountain State Fair and \$40,000 for the State Fair with escalator clauses providing that should the price of a ticket to ride these aerial cable lifts exceed \$4.00, then the annual rentals would increase by the same percentage as the increase of the ticket price over \$4.00.

7. In or about May, 2001, Mr. Drew privately sought and received permission from officials of the Mountain State Fair to enter upon the premises of that fair for the purpose of conducting some surveying work at his own expense intended for the location of support tower positions for the aerial cable lift Mr. Drew had suggested for that fair. No similar opportunity was given to others.

8. In August, 2001, Mr. Weldon Denny, then Chief Deputy Commissioner of Agriculture for the State of North Carolina, having become aware of Mr. Drew's proposals, informed Mr. Kent Yelverton, the Director of the Property and Construction Division of the Department of Agriculture and Consumer Services ("Department of Agriculture") and who is a North Carolina registered professional engineer, about Mr. Drew's suggestions. He inquired of Mr. Yelverton as to how such a project might be accomplished. Mr. Yelverton had no prior experience with such a project and informed Mr. Denny that he would need to research the matter.

9. Subsequently, Mr. Yelverton spoke with Mr. Tommy Cline, Manager of the Leasing Section in the State Property Office of the Department of Administration of the State of North Carolina, as such projects would necessarily involve the lease of State property.

10. On September 12, 2001, there was a meeting among employees of the Departments of Agriculture and Administration at which Mr. Drew's idea for aerial cable lift rides at the Mountain State Fair and the State Fair was discussed at some length. As a result of this meeting, it was decided that having such rides at the fairs was something that the State should pursue. Since aerial cable lifts at the fairs was a new concept for North Carolina, it was determined that the best way to initiate such a project was to publicly advertise a request for proposals ("RFP") inviting all interested, qualified parties to submit proposals for how such a project would be accomplished.

11. Thereafter, Mr. Yelverton for the Department of Agriculture, Mr. Cline for the Department of Administration, and Mr. Wyatt for the State Fair, were appointed as a committee to draft the RFP, which they did.

12. At or about the same time this process was taking place, Mr. A.E. "Tony" Waddell of Phoenix Ski Corporation ("Phoenix"), which operated the ski lifts at the Cataloochee ski area in the western North Carolina mountains in Haywood County and who had extensive experience with other ski and cable lifts, had become interested in the possibility of installing and operating aerial cable lifts in venues other than mountain snow-skiing venues, or scenic or summer rides, and had begun investigating and observing the operation of aerial cable lifts at fairs.

13. He met Mr. Frank Neeld who was working on a proposed cable lift survey for the Mountain State Fair in North Carolina for Mr. Drew. With him, Mr. Waddell visited the Georgia National Fair, Perry, Georgia, where Mr. Drew's company had installed and was operating a cable lift. This operation had begun two months or so before Mr. Drew's initial proposal to the North Carolina Department of Agriculture. The Perry Georgia installation was the only cable lift in a fair site operated by Mr. Drew and his organization.

14. Mr. Waddell learned that surveys had already been done or were being done for Mr. Drew at the Mountain State Fair site. Mr. Waddell testified that he conversed with a Mr. Matt Buchanan, the Assistant Manager of the Mountain State Fair where Mr. Drew had operated the midway for several years, and that Mr. Buchanan told him the aerial cable lift ride concession was going to Mr. Drew's company. Mr. Buchanan denied that he had such a conversation. Mr. Waddell did nothing further as he believed the deal was done.

15. In early Dec 2001, Messrs. Yelverton, Cline and Wyatt completed the draft of the RFP and caused notices thereof to be published in The News and Observer, Raleigh, North Carolina and the Citizen Times, Asheville, North Carolina from 3 through 7 December and in an amusement ride trade journal on 10 December only. The RFP was as follows; "State of North Carolina will receive sealed proposals from qualified firms to design, construct and operate Cable Lifts at the WNC Agricultural Center, Fletcher, North Carolina and North Carolina State Fairgrounds, Raleigh, North Carolina. Proposals will be received until 2:00 p.m., December 20, 2001. For specifications, proposal forms and additional information contact Kent Yelverton, Director, Property & Construction Division, PO Box 27647, Raleigh North Carolina 27611, (919) 733-7912. These were approximately 1/4" classified ads in two papers of general circulation in North Carolina and one trade journal.

16. The RFP specifics put together by the committee were remarkably similar to the proposal originally submitted by Mr. Drew. The Drew Proposal would award the contract to Carolina Cable Lift Corporation, an entity he had just created. The period of the leases of state land for the projects would be 25 years for the Fair at Fletcher, with no extensions and 15 years at the Raleigh State Fair with two 5 year extensions at the option of both parties. The minimum annual compensation to the state in both documents was a flat fee of \$40,000 for the Fair at Raleigh and \$15,000 for the Fair at Fletcher with a proviso for each that should the base costs of a one-way cable lift ticket at either or both locations exceed four dollars per person, then the rental fee for that location or locations shall increase by the same percentage as the increase in the cable lift ticket price above four dollars.

17. Unusual, indeed virtually unknown in a state RFP, was the proviso that the selected proposal would be that deemed "...to provide the best value to the state". This term as a standard is used in N.C.G.S. 143-135.9 (a)(1).

- 1) "Best Value" procurement means the selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor. The award decision is made based on multiple factors, including: total cost of ownership, meaning the cost of acquiring, operating, maintaining, and supporting a product or service over its projected lifetime; the evaluated technical merit of the vendor's proposal; the vendor's past performance; and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the stated business objectives and maintains industry standards compliance.

17A. "Procurement" does not fit standards for leases.

18. The requirements for experience were not for state fair cable lifts but experience on "similar cable lifts". Cable lifts at ski resorts, scenic rides, and summer rides are all similar in that they use equipment very much alike, may be alike in moving over fairly level ground though could be over inclined areas. No credible evidence was adduced indicating notably dissimilar situations at those sites. There was no minimum safety standard stated in the RFP.

19. The selection committee of Mr. Denny, Mr. Cline, and Mr. Yelverton wrote, (Exhibit 7) over the signature of Mr. Yelverton to Mr. Joe Henderson regarding their selection of Carolina Cable Lifts, LLC. All agreed Carolina represents the best value to the state, though probably, they said, it would not result in the most rental income over the term period. Mr. Yelverton later testified he no longer believed that was the case but that was not stated by the other two members.

He continued, "It", the proposal, "represents the 'best value for the state' because Carolina Cable Lift LLC is the only proposer that has installed and operated a permanent cable lift on a fairground":. that experience was but one season in one place. No evidence could establish more than a brief record relative to safety and none was produced. While Mr. Denny testified that Drew had the best safety record in this country, he later admitted he did not know their record.

20. All three proposals, Drew's, Phoenix' and Strates' were found acceptable; therefore, all were qualified as far as the committee was concerned. While Mr. Denny said Drew was the only company proposing not to use used parts, this was not supported by the evidence.

21. Drew, who had the lease for the cable lift at the Georgia National Fair, paid 15% of the income, after tax, to Georgia. This arrangement was not suggested by Mr. Drew for his proposed lease with North Carolina. The Georgia lease was described as "continuing" but could be ended after one year at the option of either, so was really an annual lease. An annual lease was not proposed by Mr. Drew in his initial proposal to North Carolina.

22. All midway rides at both fairs in North Carolina were leased for one year, only. The Georgia National Fair cable lift was leased for one year at a percentage. The RFP's, like the proposed Drew lease were 25 and 15 years (+ 2 extensions of 5 years) for flat fees without possible increases in revenue unless the price of a ticket exceeded four dollars. There was no evidence as to the price of a ticket when the rides were to begin except Mr. Waddell projected \$2.50 per ride at both fairs.

23. N.C.G.S. 146-29.1 mandates that state owned property "...may not be...leased at less than fair market value".

24. No evidence was introduced as to what the fair market lease for the cable lift projects would be at either site based on possible revenue to be generated or any other measure.

CONCLUSIONS OF LAW

This action began, officially, on a Request for Proposals. It involves integrally, a lease of state property. The Petitioner has the burden of proof, which is the greater weight of the evidence.

Pursuant to G.S. 150B-23 legal guidelines are:

1. Did the State agency exceed its authority or jurisdiction?
2. Did the State agency act erroneously?
3. Did the agency fail to use proper procedure?

4. Was the action of the agency arbitrary or capricious?
5. Did the agency fail to act as required by law or applicable rule?

1. N.C.G.S. 143-135.9 (a) (1) defines “best value” in terms of procurement. Here, the state was not acquiring or procuring anything, but rather leasing real estate and access to a lucrative market of citizens attracted to state property with the prospect of being entertained or informed. The “elevated technical merit” referred to in the statute, “vendors past performance”, and “high quality” are relevant but they were not specified as matters to be considered. This choice of Carolina Cable Lift was arbitrary and capricious.

2. The term “best value to the State” and the statement that “the State may reject this proposal for any reason it deems warranted” cannot nullify the requirement that leases of state property may not be made for less than fair market value.

3. Because there was no evidence of what fair market value would be for the state property leased for the cable lift sites, there is no basis for comparison; only speculation of an arbitrary and capricious award. The complete absence of any negotiations by the State, though clearly permitted by the RFP and law, provides sufficient basis to overcome the presumption in favor of the agency and to find, by the greater weight of the evidence, that the leases were not fairly awarded.

4. Pursuant to N.C.G.S. 150B-23:

a. The State agency did not exceed its authority or jurisdiction.

b. The State agency acted erroneously in advertising an exceptionally complex engineering project for a very brief period when one known interested party had undertaken actual surveys for the project with the state’s knowledge and permission.

c. Technically the agency used proper procedure. It is questionable that the agency was fair in accepting the preliminary proposal of one of the proposers in exact measure as to the length of both leases and precise compensation to the State without negotiations after selection.

d. The action of the agency was arbitrary and capricious.

e. The agency failed to act as required by law in that the leases for state property were not for fair market value. No such measure was ever shown by the evidence except as to a comparison to the Georgia National Fair lease; further, no negotiations were ever attempted. The Petitioner has shown that the Carolina Cable proposal was not the best financially, and nothing in “best value” could overrule the absolute requirement that fair market value be received for state property, as here. These leases must be for “not less than fair market value”. The rides on the midways of both the Mountain Fair and the State Fair were for one year and for percentages. The Georgia National Fair was terminable annually and payment to the state was 15% after taxes. No term leases for flat fees with no hope of increases except through inflation were presented in evidence as “fair market” leases in any jurisdiction.

5. “Best value to the State” must, in this case, include the two leases which must have been at “no less than fair market value”. Fair market value for state property is mandated by statute; best value to the state is not. The State, ie, the committee to select the proposal had no meaningful evidence of the fair market value of these two leases for cable lifts at North Carolina fairs.

6. How is fair market value to be determined for a lease where no such lease has ever been made in North Carolina? It cannot simply be “the best value to the state” as found by a committee of two agencies based, not on revenue, but on the experience of one of the proposers. Fair market value is to be determined by comparables, an analysis of the projected revenue and returns to the proposer and the state, including profits.

7. Since no comparables exist in North Carolina, as there are not cable lifts, such evidence must come from the many other state fairs which do operate such lifts. Similarly, revenue can be projected using both out of state comparables and an analysis of the midway rides already operating at North Carolina state fairs with the differences inherent in a cable lift ride, ie, the cable lift would be a more nearly permanent installation whereas the midway rides are highly mobile. There may be many other differences and analyses which could or should be made, but these basic considerations are requisite. No expert testimony was adduced as to a fair market value of such a lease. Such testimony would have been highly relevant since there were no North Carolina comparables. They were not done by the State and therefore no meaningful consideration was given to the “fair market value” of the leases the state was giving.

8. The Petitioner failed to provide affirmative evidence of fair market value except as to the position that their financial proposal was better than Carolina Cable, which I find to be true. Even so, the State failed at the onset to even consider what the “fair

CONTESTED CASE DECISIONS

market value” of the leases would be and on that basis alone, the leases must be set aside. The fact that the Governor and Council of State approved these leases cannot make them legal. Fair market value cannot be equated to best value to the state.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned renders the following:

DECISION

These leases should be terminated. New RFPs should be advertised widely with all proposers being given the opportunity to go on State property and make surveys prior to their submitting a proposal, if desired. The decisive factors to be considered should be set out clearly. Fair market value of the leases should be stated as a necessary part of the determination. Fair market value should be comprehensively considered in order to insure a reasonable return to the State and to the proposer to whom the lease is awarded.

NOTICE

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

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision.

ORDER

N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party’s attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 30th day of June 2003.

John B. Lewis, Jr.
Temporary Administrative Law Judge

8. Petitioner Blanton was alleged to have a lack of sufficient good moral character to serve as a law enforcement officer. There is no written definition as to what constitutes either good moral character or lack thereof under the Commission's regulation requiring good moral character.

9. Petitioner Blanton was called as a witness. T42. Mr. Blanton was employed for twenty-one and one-half years with the North Carolina State Highway Patrol and retired in 1999. T43. Petitioner Blanton explained how there were two items of evidence that were in question, numbers 96-04 and 97-04. T44. Item No. 97-04 was a marijuana roach that was seized by Trooper Mims. T45-46.

10. Petitioner Blanton described how evidence in 97-04 was destroyed by mistake. T46. Trooper Lightshoe brought a disposition order to have marijuana destroyed. T46. Petitioner Blanton remembered that the date that the mistake was discovered was July 1, 1997. T46. Petitioner Blanton was put in charge of the evidence locker in May 1997. T46. Mr. Blanton did an inventory of the evidence locker and realized that he had destroyed the evidence contained in the evidence envelope marked 97-04. T47. Mr. Blanton determined that the evidence in 97-04 had been destroyed by mistake. T47.

11. Petitioner Blanton was getting ready for an inspection, and he called Trooper Mims to the Patrol office to let him know that the marijuana evidence in his case No. 97-04 had been destroyed by mistake and he could not use the evidence in court because it was gone. T47. Petitioner Mims explained that he would not need the evidence in court because the defendant was going to take a plea. It was a DWI arrest, and the District Attorney was going to dismiss the marijuana charge. T47-48. Respondent's Exhibit 9a, admitted in this contested case, reflects that the marijuana from case 97-04 purportedly was flushed away on February 3, 1998, when actually it had been destroyed prior to that date.

12. Petitioner Blanton told Trooper Mims to put the small quantity of marijuana (a marijuana cigarette roach) in a new evidence envelope number and to number it 97-04, as well as to get a disposition order as soon as possible. T49.

13. The destroyed marijuana never would have been used as evidence since the defendant entered a plea to DWI, and the State chose not to proceed with the simple marijuana possession charge. T64.

14. Petitioner Blanton was trying to get his paperwork correct. T65. He acknowledged that he made a mistake in creating an evidence log which did not reveal the full and true picture. T66.

15. The evidence locker was nothing more than a metal frame cabinet in which, along with confiscated evidence, office supplies and ammunition were kept. The evidence was put in a pasteboard box inside the metal cabinet. T-71.

16. Trooper Sarsfield witnessed Petitioner Blanton flush the evidence of 97-04 when he thought he was flushing evidence contained in envelope 96-04. That both amounts of marijuana contained in evidence envelopes 97-04 and 96-04 were merely marijuana roaches. T72.

17. Petitioner Blanton testified that First Sergeant Glover was sitting at his desk two or three feet away when Petitioner Blanton and Petitioner Mims discussed the evidence mix up and that the evidence in 97-04 would not be needed in court. At no time did Petitioner Blanton or Mims lower their voices or whisper in an effort to conceal their actions from First Sergeant Glover. T74. There is no evidence, beyond that bare fact, to show that Sergeant Glover was aware of what was done in the matter of the evidence log regarding cases 96-04 and 97-04.

18. Sergeant Webb, Sergeant Glover, and the office secretary had keys to the evidence locker. Petitioner Blanton testified that he could have just thrown away 97-04. T76.

19. Friction had developed in the work place between Petitioner Blanton and Petitioner Mims which led to Trooper Mims telling First Sergeant Glover about the evidence mix-up. That First Sergeant Glover confronted Petitioner Blanton about the evidence mix-up. That Petitioner Blanton testified he told First Sergeant Glover that "Sarge, you were right there." And that Glover responded, "Yeah, I was probably sitting right here at this desk." T76-78.

20. Petitioner Blanton's Exhibit 1, a notebook of 24 items comprised of awards, commendations, certificates and letters of appreciation, as well as supervisory evaluations, was admitted into evidence with the second paragraph of item 4 redacted. T90.

21. Petitioner Blanton, upon discovering his mistake, restructured the evidence locker by installing another shelf so that the evidence could be properly divided by year, in an effort to keep what happened from happening again. T90.

22. The recorded interviews of Petitioner Blanton conducted by Internal Affairs were not fully transcribed, and Petitioner Blanton only received one transcribed interview entitled "Second Interview" conducted on March 19, 1999. T107-108.

23. Petitioner Blanton testified that obtaining an Order of Disposition to correct the paperwork was a mistake and that he “just didn’t think it through”, and that his actions were a result of his desire to have a “clean inspection.” T110.

24. Petitioner Blanton currently is not performing any duties for the Pender County Sheriff’s office but wishes to keep his certification as a reserve deputy. T116.

25. Petitioner Blanton further testified that until the early 1990’s, State Highway Patrolmen maintained their own evidence; that it was not until the early 1990s that the State Highway Patrol District Offices started maintaining evidence lockers, and that at no time was he given any written guidelines or procedures concerning evidence maintenance. Each district had its own way of maintaining evidence lockers. T117-118.

26. Petitioner Blanton’s Exhibits Nos. 2, 3 and 4 were entered into evidence. These exhibits consisted of plaques and/or awards for saving a woman's life who had set herself on fire during a suicide attempt, as well as an award for saving a man’s life when Petitioner Blanton retrieved the trapped man from a burning vehicle shortly before the vehicle blew up. T119-121.

27. It was not the intent of Petitioner Blanton to instruct or order anyone to do anything illegal. T123. Neither Petitioner Blanton nor Petitioner Mims were charged with any violation of the law because of the inadvertent destruction or mix-up of evidence. T124.

28. Petitioner Mims testified that Sgt. Blanton called him into First Sgt. Glover's Office and told him about the evidence mix up. Sgt. Blanton instructed Trooper Mims to use marijuana from the other case and re-label the evidence envelope. Trooper Mims felt the order to re-label the evidence to have it disposed of was improper, but that he was not too concerned since both cases were adjudicated. Trooper Mims testified that First Sergeant Glover was present when he and Line Sgt. Blanton had “that first discussion.” T131-135.

29. Trooper Mims testified that Respondent’s Exhibit No. 13 represented his notes or log of the conversation with Line Sgt. Blanton, and that the first page of notes documented or confirmed First Sergeant Glover was present in the office when Sergeant Blanton told Trooper Mims that his evidence was destroyed by mistake. T147.

30. Petitioner Mims estimated the value of the destroyed evidence in question to be roaches, burnt ends of marijuana cigarettes, that have a value of \$1.00. T161.

31. Petitioner Mims testified that when Line Sgt. Blanton told him of the mistake and his correcting the paperwork, Trooper Mims wasn’t concerned that Blanton was plotting or planning anything illegal. He knew Petitioner Blanton for three years and in that time, had never heard anyone say anything negative about Petitioner Blanton and that Petitioner Blanton had always been honest with Trooper Mims. T162-163.

32. Petitioner Mims explained that normally when a law enforcement officer presents an Order of Disposition to the District Court Judge for signature, it does not have a name or case number on it, but that perhaps the shuck or citation would be presented to keep it together with that particular case. Mims testified that it was his practice to fill out his Orders of Disposition. T164.

33. Petitioner Mims corroborated Petitioner Blanton’s testimony that First Sergeant Glover was present during the discussion between he and Blanton regarding the evidence mix-up, and that they did not lower their voices or try to disguise the topic of their conversation. T169.

34. That Petitioner Mims testified that after being terminated from the State Highway Patrol, he filed a contested case petition with the Office of Administrative Hearings and that Petitioner Mims achieved a favorable settlement with Colonel Holden of the North Carolina State Highway Patrol. T189.

35. That Trooper Mims described Sergeant Glover’s supervisory style as that of one who tries to “pacify a situation on both sides instead of dealing with it directly”, and that he delegated the disciplinary actions to Sergeant Webb and Sergeant Blanton. T198.

36. Lieutenant William Randy Glover testified in this hearing. Lt. Glover had been promoted since the time of the incident in question. At the time of the incident in question, he was Sgt. Blanton’s and Trooper Mims’ First Sergeant. Lieutenant Glover corroborated that Blanton and Mims were having difficulties working together. During a conversation with Trooper Mims in January of 1999, Trooper Mims mentioned something to the effect that Line Sgt. Blanton had Trooper Mims hide evidence and to re-label the evidence. T204-205.

37. Lieutenant Glover had spoken with Petitioner Blanton during this time frame and Line Sgt. Blanton told him exactly what had taken place. T209.

38. Lieutenant Glover explained that it was customary for the First Sergeant, or someone he designates, to be the evidence custodian and that he did not give formal training to Petitioner Blanton on how to be an evidence custodian. T218.

39. Lieutenant Glover further testified that Petitioner Blanton did a good job and was a hard worker and trustworthy. Otherwise, Petitioner Blanton would not have been a Line Sergeant. T223.

40. Lieutenant Glover testified that he never saw Petitioner Blanton do anything illegal, and that the only thing Petitioner Blanton ever did to make him question his character was the incident which is the subject of this action. T227-228.

41. Petitioner Blanton's Exhibit No. 5 was admitted into evidence. The exhibit was a supervisory report signed by First Sergeant Glover commending Blanton for his efforts in the reduction of alcohol-related accidents. That report was prepared after his knowledge of the incident which is the subject of this administrative action. T226-227.

42. Captain Charles Moody of the Highway Patrol described the Patrol's inquiry into this matter. He testified that Petitioner Blanton admitted accidentally destroying evidence because he got the numbers confused on the evidence log. T241.

43. Captain Moody testified that the amounts of evidence in 97-04 and 96-04 were small quantities of marijuana and that the underlying criminal cases were not adjudicated, but rather were guilty pleas. T253.

44. Captain Moody did not feel that Petitioner Blanton was trying to deceive him during his investigation into the matter and that he was totally forthright. T254.

45. Sergeant Ken Castelloe, a First Sergeant with the North Carolina Highway Patrol, testified in this hearing. Sergeant Castelloe had been involved in training with the Highway Patrol, which included a pilot program concerning ethics training beginning in 1998. T269.

46. Sergeant Castelloe stated that there are six components to good moral character of a law enforcement officer: trustworthiness, respect, responsibility, fairness, citizenship, and being a caring individual. T272.

47. Sergeant Castelloe acknowledged that people have differences of opinion about what constitutes a violation of ethics and what does not constitute a violation. T286.

48. Sergeant Castelloe believes that Petitioners Blanton and Mims breached the character trait of trustworthiness as a result of the incident which is the subject of this action. T277. Sergeant Castelloe based his opinion on his training and the probable cause notification to revoke Justice Officer Certification for Sergeant Blanton. He had not read the case, did not know where Petitioner Blanton grew up, his age, or of any church Petitioner Blanton may attend. T281-282.

49. Sergeant Castelloe testified that a law enforcement officer has a duty to the community when he is on the clock, as well as off the clock, and that saving a lady's life who set herself on fire during a suicide attempt and saving a man from a burning vehicle showed responsibility to the law enforcement profession and showed that Petitioner Blanton was a caring person. T285.

50. Sergeant Castelloe has not had any occasion or opportunity to analyze the Sheriffs' Commission's good moral character rule or any interpretation of it. T291. Sergeant Castelloe acknowledged that he did not know what the Sheriffs' Commission's good moral character rule provides for or what it prohibits. T292. Sergeant Castelloe acknowledged that he was not familiar with the Sheriffs' Commission's rules. T292.

51. Sergeant Castelloe agreed that the term good moral character is "a very difficult concept at best". T292. Sergeant Castelloe acknowledged that interpreting the term moral character would involve subjective opinions. T292.

52. Sergeant Castelloe, in this case, has not attempted to apply the Sheriffs' Commission's good moral character rule. T293.

53. Colonel Wilson M. Autry, Executive Officer of the Highway Patrol and Director of Support Operations, testified in this hearing. T302. Colonel Autry and Petitioner Blanton served together from October 1991 until February 1991. Colonel Autry characterized Petitioner Blanton as an "excellent Trooper" and that "he had an outstanding reputation for truthfulness when he knew him". Colonel Autry's opinion as to Petitioner Blanton's truthfulness has not changed, but he was not familiar with the circumstances of the case. Once the circumstances were explained to Colonel Autry, he characterized Petitioner Blanton's actions as a mistake and

that Petitioner Blanton had made a wrong choice. T303-304. Colonel Autry further testified that he still would be willing to serve with Petitioner Blanton. T306.

54. Pastor Joseph Ratcliff of the Macedonia Free Will Baptist Church located in Ernul, North Carolina testified as to his knowledge of the destruction of evidence and Petitioner Blanton's church involvement. He further testified that Petitioner Blanton had a reputation of fairness and respected the rights of others. T311.

55. Sheriff Jerry Monette of the Craven County Sheriff's Department testified that while Petitioner Blanton was on active duty with the Highway Patrol, he had an opportunity to interact with him on a professional basis for two to three years. T314-15.

56. During this time, Sheriff Monette found Petitioner Blanton to be a "very truthful man." Sheriff Monette was familiar with the circumstances of this administrative action, and this action did not change his opinion of Petitioner Blanton. T317. He further testified that Petitioner Blanton had a reputation of being cordial, friendly, and respectful of the rights of others, as well as having a "good" respect for the laws of the State of North Carolina. T319. Sheriff Monette also indicated he would gladly hire Petitioner Blanton as a Craven County Deputy Sheriff and would have no reservation about Petitioner Blanton handling evidence.

57. Joe Lynch is retired from the Highway Patrol and currently is employed with the Franklin County Sheriff's Department. He served with Petitioner Blanton from February 1991 until March 1993. T331. Joe Lynch testified that Petitioner Blanton was truthful and dependable. T332. He was familiar with the circumstances of this case, and that such did not change his opinion of Petitioner Blanton's truthfulness and good moral character. Mr. Lynch indicated he would serve with Petitioner Blanton again. T333-335.

58. Joe Lynch further testified about a similar situation involving marijuana evidence which was inadvertently destroyed and that he followed an order from a supervisor to obtain an Order for Disposition and that he did not feel he was violating patrol policy. T336-338.

59. Michael Harvell, former Sheriff of the Pender County Sheriff's Department, testified in this hearing. He had known Petitioner Blanton for over twenty years. T341. He had hired Petitioner as a Deputy Sheriff after his retirement from the Highway Patrol. He testified that Petitioner Blanton had dealt with him honestly and had a "great reputation" in the community. Mr. Harvell was also aware of the circumstances of this case. T342-343.

60. Sergeant Gary Webb testified in this hearing. T345. Sergeant Webb was assigned to the same district as Troopers Mims and Blanton. T3346. He testified that he and Petitioner Blanton were under the "old system" and there was very little training regarding the duties of an Evidence Custodian. T347. He testified as to the location of the evidence locker in relation to First Sergeant Glover's desk in the New Bern Patrol Station, as well as Petitioner Mims' problems working under Petitioner Blanton. T349-350. Gary Webb testified that Petitioner Blanton was a truthful and fair person and that Petitioner Blanton respected the rights of others and the laws of the State of North Carolina. He believed Petitioner Blanton still has good moral character. T354. He further testified that if he should get elected Sheriff, he would want Petitioner Blanton to hold an administrative position in his department. T355.

61. Jeffery Holmes, Janice Noe, and Line Sergeant Fred Hughes of the Highway Patrol testified as character witnesses. They attested to Petitioner Blanton's good character.

62. Dale Dixon, a retired State Highway Patrolman, testified that Petitioner Blanton's was a hard worker and the most honest Trooper or Sergeant that ever worked with him. Mr. Dixon worked with Petitioner Blanton from 1981 until 1990. He was aware of the circumstances of this case. He further described the handling of evidence while he was a Patrolman and the destruction of evidence when cases were disposed of. It was his experience that the First Sergeant is ultimately responsible for evidence maintenance. T385-387.

63. Gene Ennett testified in this hearing. He began his career with the State Highway Patrol in 1974, but only worked adjoining counties with the Petitioner. T406. He also testified as to Petitioner Blanton's good moral character. T408-410. He further testified to the lack of a uniform policy within the State Highway Patrol regarding the maintenance of evidence. T411-415.

64. Trooper Michael Shannon Whaley testified that Petitioner Blanton was his training officer and was a "father figure to him." He testified as to Petitioner Blanton's good character and expounded on Petitioner Blanton's good reputation in the community. He also was aware of the circumstances of this case and would gladly serve with Petitioner Blanton again. T434-T439.

65. James B. Merritt, a native of Duplin County, was tendered and accepted as an expert on law enforcement officer conduct. T444 Mr. Merritt initially entered the law enforcement profession in 1950 and has been involved in law enforcement work in related academic and research work in the law enforcement profession since 1950. T444 Mr. Merritt served in the military police,

as a special agent with the Southern Pacific Railroad Police, entered active duty law enforcement work for the City of Alameda California, and served from the mid 50's to late 1968 there. T445 Mr. Merritt served as patrol officer, investigator, and later as a management official. T445

66. Mr. Merritt returned to North Carolina and became Chairman of the Department of Criminal Justice at Davidson County Community College, from 1968-1973. T445 Mr. Merritt served as the Director of Staff Development and Training for the North Carolina Department of Corrections for about five years in the early 1970's.

67. While serving with the Department of Corrections, Mr. Merritt was designated by the Secretary to be his representative on the North Carolina Criminal Justice Education, Training, and Standards Commission. T446

68. Mr. Merritt later served with the Georgia Police Academy for 10 years or so where he designed, implemented, and managed training seminars for persons in the criminal justice and law enforcement community. T446 Mr. Merritt has published over 87 articles and four books mostly in the criminal justice management area. T447 He served as a consultant for the American Correctional Association, and was involved in programs at the North Carolina Justice Academy. T447

69. Mr. Merritt earned undergraduate and graduate degrees and has served as a consultant on various types of law enforcement matters. T448-49 Mr. Merritt has been engaged in conducting studies and analyses of officer conduct and law enforcement behavior. T449 Mr. Merritt has served as an expert witness in cases involving officer conduct issues, law enforcement policy and procedure issues, use of force issues, incident scene reconstruction and analyses, and disciplinary and other issues; he has testified as an expert witness in both North Carolina District and Superior Courts. T449

70. Mr. Merritt was present and observed the totality of the evidence in the trial of this case. T450

71. Mr. Merritt testified that it was very difficult for anyone to predict with reasonable certainty as to what is or is not a violation of a good moral character standard. T453 Mr. Merritt observed that there is vagueness with the good moral character concept which causes problems. T454

72. Mr. Merritt observed that in determining whether an officer has sufficient good moral character, one should examine the totality of his life history. An instance of isolated conduct or a single incident of conduct generally is not appropriate as a base for the determination of whether a person possesses good moral character. It is necessary to examine whether there is a pattern or practice of behavior rather than an isolated or single incident in analyzing issues of officer conduct and good moral character. T455

73. That Mr. Merritt testified he thought Petitioner Blanton had good moral character and that he did not think "there is a mean bone in his body". Further, having listened to all the testimony in this case, Mr. Merritt was not of the opinion that Petitioner Blanton had a lack of good moral character. T476. He further testified that he did not believe that Petitioner Blanton's actions were intentional or willful.

74. That the witnesses who attested to the good moral character and professionalism of Petitioner Blanton were credible and believable.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.

2. Respondent's good moral character rule must be considered in deciding this case. Lack of clarity and definition of the rule are factors that must be considered in properly interpreting the rule.

3. Moral character is an extremely vague and broad concept.¹ Police administrators, officers and others may have considerable differences of opinion as to what constitutes good moral character.

¹ The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In Konigsberg v. State, 353 U.S. 252, 262-63 (1957), the court explained:

The term good moral character...is by itself...unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial....

See City of Chicago v. Morales, 119 S. Ct. 1849 (1999)(holding anti-loitering ordinance unconstitutionally vague by failing to provide fair notice of prohibited conduct as well as impermissibly vague for failing to establish minimal guidelines for enforcement).

CONTESTED CASE DECISIONS

4. While good moral character is an ideal objective for everyone to follow, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult.²

5. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or denial of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. See *In Re Rogers*, 297 N.C. 48, 58 (1979) ("whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.") However, if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in cases of clear and especially severe misconduct. The incident alleged in this case, under the particular facts of this case, is not of that magnitude.

6. Respondent's case against Petitioner Blanton focused on an isolated instance of conduct that he engaged in. The conduct of Petitioner Blanton does not rise to the level of conduct warranting a finding of lack of good moral character.

7. The totality of the circumstances surrounding this isolated incident of conduct by Petitioner Blanton, in light of his otherwise exemplary history of good moral character and professionalism in law enforcement, do not warrant revoking Petitioner Blanton's law enforcement certification based on or because of an isolated incident wherein he made a quick, improper, and ill-advised, but not illegal, decision. Petitioner knew that the \$1.00 marijuana roach would not be used against a defendant in a court of law because Trooper Mims' DWI case was being plea bargained with the marijuana charge dismissed. The judge who entered the disposition order at Trooper Mims' request was not told that the marijuana roach already inadvertently had been destroyed, but no one in the criminal justice system was injured or harmed by this failure to disclose all the facts. This was a mistake, a lapse in judgment, but not one of sufficient import to demonstrate a lack of good moral character on the part of Petitioner Blanton.

PROPOSED DECISION

Based upon the foregoing findings of fact and conclusions of law, it hereby is proposed that the North Carolina Sheriffs' Education, Training, and Standards Commission find that Petitioner Harvey Clint Blanton has demonstrated a history of good moral character which has not been overcome by an isolated incident of inappropriate judgment under the facts of this case and that his law enforcement certification should not be revoked for lack of good moral character.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute 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 and proposed findings of fact and to present oral and written arguments to the agency. G.S. 150B-40(e).

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. G.S. 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Sheriffs' Education, Training, and Standards Commission.

This 2nd day of June, 2003.

Beecher R. Gray
Administrative Law Judge

² Recent cases demonstrate and reaffirm fundamental requirements that there must be uniform rules for consistent application to everyone including law enforcement officers. See, e.g., *Toomer v. Garrett*, 574 S.E.2d 76 (N.C. App. 2002)(government agencies may not engage in disparate treatment or arbitrariness in treating law enforcement officers; constitutional claims stated); *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000)(requiring that government conduct be non-arbitrary); *Bush v. Gore*, 531 U.S. ____, 2000 WL 1811418 (2000)(requiring the adoption and use of uniform rules and standards; Court found violation of Equal Protection Clause based on the lack of uniform standards); *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). See *Reno v. Bossier Parish School Board*, 120 S. Ct. 866 (2000) (explaining how imposition of good moral character requirement for voting impermissible).

6. Petitioner Mims was alleged to have a lack of sufficient good moral character to serve as a law enforcement officer under the Commission's good moral character rule. There is no written statutory or administrative rule definition as to what constitutes either good moral character or lack thereof under the Commission's regulation requiring good moral character. T41

7. Harvey Clint Blanton was called as a witness. T42 Mr. Blanton was employed for twenty-one and one half years with the North Carolina Highway Patrol and retired in 1999. T43 Mr. Blanton explained how there were two items of evidence that were in question, numbers 9604 and 9704. T44 Item No. 9704 was marijuana that was seized by Trooper Mims. T45-46

8. Petitioner Blanton described how evidence in 9704 was destroyed by mistake. T46 Trooper Lightshoe brought a disposition order to have marijuana destroyed. T46 Petitioner Blanton remembered that the date that the mistake was discovered was July 1, 1997. T46 Petitioner Blanton was put in charge of the evidence locker in May, 1997. T46 Mr. Blanton did an inventory of the evidence locker and realized that he had evidence in 9704 and his records showed that it was destroyed. T47 Mr. Blanton determined that the evidence in 9704 had been destroyed by mistake. T47

9. Petitioner Blanton was getting ready for an inspection, and he called Trooper Mims to the Patrol office to let him know that the marijuana evidence in his case 9704 had been destroyed by mistake and could not be used in court because it was gone. T47 Petitioner Mims explained that he would not need the evidence in court because they were going to take a plea; it was a DWI arrest and they were going to dismiss the marijuana charge. T47-48 Respondent's exhibit 9a, admitted in this contested case, reflects that the marijuana from case 9704 purportedly was flushed away on February 3, 1998, when actually it had been destroyed prior to that date.

10. Petitioner Blanton testified that he said to Petitioner Mims: "well, lets change the number...put in another envelope..." and that "you need to get a disposition from the court." T48

11. Petitioner Blanton testified that he had Petitioner Mims put the marijuana in a manila envelope and mark it 9704. T48 Petitioner Blanton indicated that he instructed Trooper Mims to get a disposition order when he took the plea. T49

12. Petitioner Blanton testified that he instructed Petitioner Mims to change it on July 1, 1997. T51 Petitioner Blanton testified that the process corrected the paperwork and all the evidence was properly destroyed. T54 Petitioner Mims informed Petitioner Blanton that the evidence would not be needed in court because they were going to take a plea on it. T61 The case involving the destroyed marijuana would never have been used because it would not have been presented in court. T64

13. Petitioner Blanton was trying to get his paperwork correct. T64 Petitioner Blanton acknowledged that he made a mistake in creating an evidence log which did not reveal the full and true picture. T66

14. When Petitioner Blanton called Trooper Mims to the office regarding the marijuana, First Sergeant Glover was present. T73 Sergeant Glover was present at his desk, some two or three feet in the office from where Petitioner Blanton had the conversation with Mims. T73-74 There is no evidence, beyond that bare fact, to show that Sergeant Glover was aware of what was done in the matter of the evidence log regarding cases 9604 and 9704.

15. Petitioner Blanton instructed Trooper Mims, once Mims explained that 9704 was going to take a DWI plea and that the evidence would not be needed in court, to create a new envelope. T74 There is no evidence that Petitioner Blanton closely monitored the process of the criminal case in 9704 thereafter.

16. First Sergeant Glover later acknowledged to Petitioner Blanton that he was probably setting right at his desk when Blanton and Mims had the conversation about changing the numbers, although there is no evidence that First Sergeant Glover was aware of the substance of their conversation. T78

17. There had been some degree of friction between Petitioner Blanton and Petitioner Mims on the job, and there had been a discussion about transferring Trooper Mims from District A6. T81-82

18. When Petitioner Blanton initially was assigned to New Bern, that was his first experience as a Line Sergeant. T91 One of the primary responsibilities of a Line Sergeant is to carry out the day to day supervision over the troopers. T93 The line sergeant would provide supervision to troopers, and the Line Sergeant would be responsible for imposing certain types of disciplinary action if appropriate and warranted up to the 360's. T93 A 360 is a supervisory contact which can be either positive or negative to record the behavior of a trooper. T94 The 360 forms are used in connection with promotion decisions. T94

19. The North Carolina Highway Patrol is a paramilitary organization and has an anti-insubordination rule. T95 The anti-insubordination rule is taught in patrol school and troopers are reminded of that principle very frequently. T96 The patrol's anti-insubordination rule is to be enforced by supervisors as a part of their job. T97 The patrol expects supervisors to enforce the anti-

insubordination rule strictly. T97 The strict enforcement of the anti-insubordination rule is something that both supervisors and troopers and all other employees would have known. T97 The anti-insubordination rule is considered a very important principle. T97 The substance of the rule is that troopers must carry out all lawful orders.

20. Petitioner Blanton indicated that he ordered Petitioner Mims to come and confer with him, that Petitioner Mims cooperated and immediately appeared in response to his order and Petitioner Mims was appropriately respectful of him. T98 Petitioner Blanton testified that as a trooper under his supervision, Trooper Mims was expected and required to comply with his directives. T100

21. The mistake that was made in destroying the evidence was a mistake made by Petitioner Blanton and not by Petitioner Mims. T100-101

22. It is well known in the Highway Patrol that failure to obey a lawful order of a supervisor is grounds for potential serious discipline including termination. T102

23. Petitioner Blanton specifically instructed Mims to obtain the disposition order. T105

24. Petitioner Blanton explained that the reason that he did what he did is because he wanted a clean inspection, that he did not want to get gigged on an inspection. T110 He also admitted that he made a quick judgment call to create the incorrect log entry which was a mistake on his part.

25. Petitioner Blanton described that the actual practice of the Highway Patrol, the day to day operation, is sometimes different than what the rules actually say. T122 The actual practice in the Highway Patrol has been that if a line sergeant tells a trooper to do something, that the trooper had better do it. T122 That was the case during 1996-1999. T122-23 Even though this may describe the practical reality, it does not supplant the obligation of a trooper to carry out only lawful orders.

26. Petitioner Blanton testified that it was not his intent to instruct or order anybody to do anything illegal. T123

27. Petitioner Jonathan Mims testified in this contested case hearing. Petitioner Mims has been employed with Gold's Gym since 2000, and had his own private business before that. T126 Petitioner Mims had been employed with the North Carolina Highway Patrol for nine and one half years. T126

28. Petitioner Mims was attempting to gain certification from the Sheriffs' Commission to serve with the Craven County Sheriff's Office as a special deputy. T127

29. Petitioner Mims explained that on July 1, 1997, Petitioner Blanton called him in and told him that he found out that he had mistakenly destroyed the marijuana in one of Mims' cases.

30. When Petitioner Blanton told Petitioner Mims that he had other marijuana from another case and to put it into the other envelope, Petitioner Mims's reaction was that it was not right and it was improper. T132

31. In response to what Petitioner Blanton told Trooper Mims to do, Trooper Mims sought clarification of the order given, as required by Highway Patrol policy and procedure if a trooper receives an improper order. T132-33 Petitioner Mims requested clarification of the order because he did not want to take responsibility for doing that because it was improper. T133 Trooper Mims made a note about this incident on his personal calendar.

32. Petitioner Mims did not believe what he was ordered to do was illegal. T133-34 He explained that it was not illegal in his mind, but if the evidence were to be presented in court, that would be illegal. T134 Petitioner Mims knew that the evidence would not be used in court.

33. Petitioner Mims relayed to First Sergeant Glover some of the difficulties that he was experiencing with Petitioner Blanton. T137 Sergeant Glover called Trooper Mims and told him he had 30 days to transfer; Sergeant Glover called him back later and told him that he could stay but that if the Line Sergeant told Trooper Mims to do something, that Trooper Mims was to do it, no questions asked. T138 Sergeant Glover stated: "if my line sergeant tells you to do something, you're to do it, no questions asked. I don't care what it is." "If you don't you're gone." T138

34. Petitioner Mims had a conversation with Sergeant Glover about various issues and he mentioned the instructions from Sergeant Blanton to replace evidence. T149 Petitioner Mims had been thinking about filing a grievance and that is what caused him to recall the incident because it was not something that he thought about. T151 Petitioner Mims had communicated with the First Sergeant for other things, to no avail. T152 Petitioner Mims explained how this was not the first wrong thing that happened; when

such things had happened, he went to Sergeant Glover and they continued on and nothing was done about it. When the instructions from Sergeant Blanton were given involving this incident, Trooper Mims did not observe any illegal action. T153

35. The estimated value of the marijuana in issue was one dollar (\$1.00). T161

36. When Petitioner Blanton approached Petitioner Mims, Petitioner Mims did not have the impression that Sergeant Blanton wanted him to engage in illegal activity. T162

37. Petitioner Mims is 35 years old and lives in Southern Pines. After leaving employment with the patrol, he started a small business called "Affordable Tents." T174 He began working at a body shop so that he could run his business and work both jobs. T174 He subsequently became employed by Gold's Gym in September of 2000 and has continued to work with Gold's Gym since then; he is now the General Manager at the Southern Pines Gold's Gym. T174-75 Petitioner Mims began serving with the patrol in 1990 and earned the rank of Master Trooper. T176 Petitioner Mims began serving in New Bern in 1993. T176 After Petitioner Mims had worked under the supervision of Petitioner Blanton for some time, the working relationship changed with an increasing degree of friction. T177

38. Petitioner Mims had a discussion with the First Sergeant about some of the difficulties that he was having with Petitioner Blanton. T178 Petitioner Mims was instructed by the First Sergeant to document anything that was done that he didn't feel was appropriate. T179 More friction developed between Petitioners Blanton and Mims. T179 Petitioner Mims was continuing to have discussions with First Sergeant Glover about the problems with Sergeant Blanton. T179

39. Petitioner Mims had a discussion with First Sergeant Glover about a 360 that Sergeant Blanton had issued that Trooper Mims felt was unfair; there were back and forth discussions which led to a discussion with Petitioner Mims identifying for Sergeant Glover things that he had been asked to do that were wrong. T180-81 First Sergeant Glover had instructed Trooper Mims to follow the directives and instructions of Sergeant Blanton, which also was Highway Patrol policy and practice. T182

40. Petitioner Mims was aware of what had happened to other troopers who did not obey all of the directives and orders of supervisors. T183 Petitioner Mims explained how he referred to patrol policy regarding asking a supervising officer for clarification of the order when you are given an improper order, which Petitioner Mims did. T187 Petitioner Mims was attempting to see if there might have been some misunderstanding or miscommunication when he sought clarification of the order in order to comply with Highway Patrol policy. T187

41. Petitioner Mims intends at some point in the future to attempt to return to law enforcement in a full time capacity. T188 The Criminal Justice Education, Training, and Standards Commission has not taken any action or attempted action in connection with Petitioner Mims law enforcement certification. T188

42. After Trooper Mims left the Patrol, he worked out a resolution among himself, Colonel Holden, and the Patrol, whereby Colonel Holden saw fit to rescind the adverse employment action, allow Trooper Mims to resign and even to provide favorable F-5 form. T189 Petitioner Mims's exhibit No.1 was the settlement agreement and revised F5 form. T191

43. Lieutenant William Randy Glover of the Highway Patrol testified in this contested case hearing. T204 Lieutenant Glover explained the conversation that he had with Petitioner Mims in January, 1999 when Trooper Mims was talking about problems he was having with Sergeant Blanton. T205 Trooper Mims informed (then) Sergeant Glover that some evidence was taken from one case and put into another envelope. T206

44. Lieutenant Glover described the developing friction between Troopers Mims and Blanton and the several conversations that Glover had with Mims whereby Mims was venting with him about the problems. T229 A transfer of Petitioner Mims was being considered as a means of resolving the issues. T231

45. Lieutenant Glover made it clear to Trooper Mims that he was going to have be obedient to the directives and orders of his Line Sergeant. T231 That is both Highway Patrol policy and practice. T232

46. Trooper Charles Moody of the Highway Patrol testified in this contested case hearing. T240 Trooper Moody described the Patrol's inquiry into this matter.

47. First Sergeant Ken Castelloe with the Highway Patrol testified in this contested case hearing. T268 Sergeant Castelloe has been involved in training by the Highway Patrol, specifically, a pilot program with ethics training beginning in 1998. T269

48. Sergeant Castelloe opined that there are six components to good moral character of law enforcement officer, which

include trustworthiness, respect, responsibility, fairness, citizenship and being a caring individual. T272

49. Sergeant Castelloe acknowledged that he had read materials involved in this case as provided by the Attorney General's Office, a June 14, 2002 probable cause notification. T281 Sergeant Castelloe acknowledged that he has not read all of the available documents in this case. T282

50. Sergeant Castelloe acknowledged that people have differences of opinion about what constitutes a violation of ethics and what does not constitute a violation. T286

51. Sergeant Castelloe acknowledged that Petitioner Mims had not had the benefit of the ethics course that Sergeant Castelloe set up for the Patrol. T286

52. Sergeant Castelloe knew Petitioner Mims when Petitioner Mims was with the Roanoke Rapids Police Department and Sergeant Castelloe was then assigned to Northampton County as a trooper for the Highway Patrol. T288 Sergeant Castelloe got to know Petitioner Mims on a limited basis. T288 Sergeant Castelloe acknowledged that Petitioner Mims always was professional and ethical in his dealings with him. T288-89

53. Sergeant Castelloe has not had any occasion or opportunity to analyze the Sheriffs' Education, Training, and Standards Commission's good moral character rule or any interpretation of it. T291 Sergeant Castelloe acknowledged that he did not know what the Sheriffs' Commission's good moral character rule provides for or what it prohibits. T292 Sergeant Castelloe acknowledged that he was not familiar with the Sheriffs' Commission's rules. T292

54. Sergeant Castelloe testified that the term good moral character is "a very difficult concept at best." T292 Sergeant Castelloe acknowledged that when interpreting the term moral character, it would involve subjective opinions. T292

55. Sergeant Castelloe, in this case, has not attempted to apply the Sheriffs' Commission's good moral character rule. T293

56. Trooper Wilson Autry of the Highway Patrol testified in this contested case hearing. T302 Mr. Autry was a witness relating to Petitioner Blanton, but not Petitioner Mims.

57. Reverend Joseph Ratcliff testified on behalf of Petitioner Blanton in this contested case hearing. T309

58. Craven County Sheriff Jerry Monette testified in this contested case hearing. T314 Sheriff Monette has known Petitioner Mims since Trooper Mims first was stationed in New Bern for several years. T320 Sheriff Monette enjoyed a good professional relationship with Petitioner Mims. T320 Sheriff Monette observed Petitioner Mims' conduct to be appropriate. T320 Sheriff Monette observed Petitioner Mims to be active in the community and being a good citizen. T321

59. Sheriff Monette testified that Petitioner Mims enjoyed a good reputation in the law enforcement and criminal justice community. T321 Sheriff Monette testified that he has heard other law enforcement officers speak highly of Petitioner Mims. T321

60. Sheriff Monette testified that Petitioner Mims' "moral character is good... and that he was a good person." T322

61. Petitioner Mims has served as a special deputy in Sheriff Monette's department since he left the Patrol and continues to serve in that capacity. T322 Sheriff Monette hopes that Petitioner Mims will be able to continue to support him and the Craven County Sheriff's Department in the capacity of special deputy. T322

62. Sheriff Monette testified that if Petitioner Mims is able to return to full-time work in law enforcement, that Sheriff Monette would favorably consider his application for full-time employment and would support him in any way that he could. T322

63. The next witness called was Joe Lynch, who is retired from the Highway Patrol. T331 Mr. Lynch was a character witness for Petitioner Blanton.

64. Former Pender County Sheriff Michael Harvell testified on behalf of Petitioner Blanton. T341

65. Sergeant Gary Webb of the Highway Patrol testified in this contested case hearing. He knows both petitioners and used to work with them. T346 Mr. Webb testified that Trooper Mims did an outstanding job when working under his supervision. T353 Sergeant Webb testified that Trooper Mims had a good reputation in the law enforcement community and worked well with other law enforcement officers. T356

66. Sergeant Webb observed that there was some personality conflict between Petitioners Blanton and Mims. T357

67. Sergeant Webb testified that he believes Petitioner Mims has good morals, that Sergeant Webb trusted him and still trusts him. T358-59

68. The next witness called was Jeffery Holmes, a First Sergeant on the Highway Patrol, in charge of the governor's security detail. T363-64 First Sergeant Holmes is the highest ranking officer at the governor's mansion. T364 He has known Petitioner Mims since Trooper Mims initially came to New Bern. T364 They served together for three or four years as troopers before Sergeant Holmes transferred. T365

69. First Sergeant Holmes testified that Petitioner Mims "was a very hard worker. Never sloughed any of his calls. He always answered and took his calls and worked very hard on the enforcement end of the job. And very fair. Even though he wrote a lot of tickets, they were all very legitimate tickets." T365-66

70. First Sergeant Holmes testified about how Petitioner Mims presented himself in a professional manner and how other troopers similarly thought highly of Petitioner Mims. T366 First Sergeant Holmes testified that Petitioner Mims "was just always a very moral and honest person." T367

71. Janice Noe, a nurse who has served in the profession for 25 years, testified in this contested case hearing. T371 Ms. Noe has two sons who are highway patrolmen and has known Petitioner Mims since 1991 through his friendship with one of her sons.

72. Ms. Noe testified that Petitioner Mims' reputation is "beyond reproach" and that she trusts Petitioner Mims absolutely. T372 Ms. Noe testified that Petitioner Mims "has excellent moral character. He's an upstanding citizen." T374

73. The next witness called was Fred Hughs, III, a Highway Patrol line sergeant. T377 He has know Petitioner Mims since 1991. T377 Sergeant Hughs described how he often had looked to Petitioner Mims for advice and that Petitioner Mims always had given him good advice. T378-79 Sergeant Hughs testified that Petitioner Mims is well respected in the law enforcement community. T379

74. When asked about Petitioner Mims's moral character, Sergeant Hughs explained that the community thinks of Petitioner Mims as being very reliable and that he dedicates time to helping people and that he has "very moral standards." T379-80 Petitioner Mims was "by far the best shift partner I've ever had since I have been on the patrol." T380

75. The second day of the hearing began with the offering of affidavits on behalf of Petitioner Mims. T400 Affidavits from Scott Thomas, a former Assistant District Attorney and current State Senator from Craven County was introduced, which addressed Petitioner Mims' good moral character and overall good conduct. Exhibit 3 was an affidavit of Attorney Mark Chestnut of New Bern demonstrating good moral character of Petitioner Mims. T400

76. The parties addressed the prospective affidavit of Judge Kenneth Crow, which was subsequently submitted to the court for consideration following the close of the evidentiary hearing. T402

77. Gene Ennett, formerly of the Highway Patrol testified in this contested case hearing. T406

78. Trooper M.S. Whaley of the Highway Patrol testified in this hearing. T432 Trooper Whaley testified that Petitioner Mims enjoyed a good reputation amongst troopers on the Patrol and still does. T440

79. James B. Merritt, a native of Duplin County was tendered and accepted as a expert on law enforcement officer conduct. T444 Mr. Merritt initially entered the law enforcement profession in 1950 and has been involved in law enforcement work in related academic and research work in the law enforcement profession since 1950. T444 Mr. Merritt served in the military police as a special agent with the Southern Pacific Railroad Police, entered active duty law enforcement work for the City of Alameda California and served from the mid 50's to late 1968 there. T445 Mr. Merritt served as patrol officer, investigator and later as a management official. T445

80. Mr. Merritt returned to North Carolina and became Chairman of the Department of Criminal Justice at Davidson County Community College, from 1968-1973. T445 Mr. Merritt served as the Director of Staff Development and Training for the North Carolina Department of Corrections for about five years in the early 1970's.

81. While serving with the Department of Corrections, Mr. Merritt was designated by the Secretary to be his representative on the North Carolina Criminal Justice Training and Standards Commission. T446

82. Mr. Merritt later served with the Georgia Police Academy for 10 years or so where he designed, implemented and managed training seminars for persons in the criminal justice and law enforcement community. T446 Mr. Merritt has published over 87 articles and four books mostly in the criminal justice management area. T447 He served as a consultant for the American Correctional Association, and was involved in programs at the North Carolina Justice Academy. T447

83. Mr. Merritt earned undergraduate and graduate degrees and has served as a consultant on various types of law enforcement matters. T448-49 Mr. Merritt has been engaged in conducting studies and analyses of officer conduct and law enforcement behavior. T449 Mr. Merritt has served as an expert witness in cases involving officer conduct issues, law enforcement policy and procedure issues, use of force issues, incident scene reconstruction and analyses and disciplinary issues and other issues; he has testified as an expert witness in both North Carolina District and Superior Courts. T449

84. Mr. Merritt was present and observed the totality of the evidence in the trial of this case. T450

85. Mr. Merritt testified that it was very difficult for anyone to predict with reasonable certainty as to what is or is not a violation of a good moral character standard. T453 Mr. Merritt observed that there is vagueness with the good moral character concept which causes problems. T454

86. Mr. Merritt observed that in determining whether an officer has sufficient good moral character, one should examine the totality of his life history. T455 An instance of isolated conduct or a single incident of conduct generally is not appropriate as a base for the determination of whether a person possesses good moral character. T455 It is necessary to examine whether there is a pattern or practice of behavior rather than an isolated or a single incident in analyzing issues of officer conduct and good moral character. T455

87. The North Carolina Highway Patrol rigidly enforces its anti-insubordination rule, and that is well known. T470

88. A copy of the Highway Patrol anti-insubordination policy was marked as exhibit 7 and introduced. T500

89. Judge Kenneth Crow has known and worked with Petitioner Mims for approximately eight years. Judge Crow has testified through an affidavit that Petitioner Mims enjoys a reputation for being honest and truthful. Judge Crow knew Petitioner to be a "first rate" trooper. Judge Crow always found Petitioner Mims' testimony to be completely honest and forthright. Judge Crow always has trusted Petitioner and continues to trust Petitioner Mims. Judge Crow stated that others in the community shared his sentiments of Petitioner Mims' moral character and fitness. Judge Crow provided an excellent overall character reference for Petitioner Mims.

90. State Senator Scott Thomas came to know Petitioner Mims through his work as an Assistant District Attorney, and since has known him as an attorney in private practice. Senator Thomas has testified by affidavit and has described Petitioner Mims as follows: "I always found him to be a very hard working, conscientious and straightforward law enforcement officer. He was highly motivated and had excellent work ethic. His cases were prepared fully and he was recognized for providing truthful testimony and honest assessments of his court cases."

91. Attorney Marc Chestnutt testified through his affidavit that Petitioner Mims "has exhibited the highest moral character..." Attorney Chestnutt stated that Petitioner Mims was hardworking and "exhibited a degree of professionalism as a law enforcement officer that was among the highest that I have seen during my 20+ years practicing law." Attorney Chestnutt provides an overall excellent character reference for Petitioner Mims.

92. Petitioner Mims was a credible and believable witness at the hearing of this matter, who presented himself professionally and candidly at the hearing.

93. The witnesses who attested to the good moral character and professionalism of Petitioner Mims were credible and believable.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.

2. Respondent's good moral character rule has to be considered in deciding this case. Lack of clarity and definition of the rule are factors that have to be considered in properly interpreting the rule.

3. Moral character is an extremely vague and broad concept.^{3[1]} Police administrators, officers and others may have considerable differences of opinion as to what constitutes good moral character.

4. While good moral character is an ideal objective for everyone to follow, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult.^{4[2]}

5. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or denial of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. See In Re Rogers, 297 N.C. 48, 58 (1979) ("whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.") However, if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in cases of clear and especially severe misconduct. The incident alleged in this case, under the particular facts of this case, is not of that magnitude.

6. Respondent's case against Petitioner Mims focused on an isolated instance of conduct that he was ordered to engage in. The conduct of Mr. Mims does not rise to the level of conduct warranting a finding of lack of good moral character.

7. The fact that Petitioner Mims was ordered to engage in the pertinent conduct mitigates in his favor. Under policy and practice, North Carolina Highway Patrol Troopers are required to adhere to all lawful orders by superior officers; if they fail to do so, they are insubordinate and subject to discipline, including termination. Because there were no indications that the conduct engaged in by Petitioner Mims was illegal, even though he had misgivings about its propriety, he was subject to the Patrol's anti-insubordination rule and subject to compliance. Petitioner Mims sought clarification of the order given him, as required by the Highway Patrol policy, which demonstrates professionalism on his part.

8. The totality of the circumstances surrounding this isolated incidence of conduct by Petitioner Mims, in light of his otherwise exemplary history of good moral character and professionalism in law enforcement, do not warrant denying Petitioner Mims a law enforcement certification based on or because of an isolated incident wherein he acted as ordered, even seeking clarification of what he thought was an improper, but not illegal, order. Petitioner Mims knew and informed Petitioner Blanton that the \$1.00 marijuana roach would not be used against a defendant in a court of law because the DWI case was being plea bargained with the marijuana charge dismissed. The judge who entered the disposition order at Trooper Mims' request was not told that the marijuana roach already inadvertently had been destroyed but no one in the criminal justice system was injured or harmed by this failure to disclose all the facts. This was a mistake, a lapse in judgment, but not one of sufficient import to demonstrate a lack of good moral character on the part of Petitioner Mims.

PROPOSED DECISION

Based upon the foregoing findings of fact and conclusions of law, it hereby is proposed that the North Carolina Sheriffs Training and Standards Commission find that Petitioner Jonathan Mims has demonstrated a history of good moral character which has not been removed by an isolated incidence of inappropriate judgment under the facts of this case and that he should be approved for certification as a law enforcement officer.

^{3[1]} The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In Konigsberg v. State, 353 U.S. 252, 262-63 (1957), the court explained:

The term good moral character...is by itself...unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial...

See City of Chicago v. Morales, 119 S. Ct. 1849 (1999)(holding anti-loitering ordinance unconstitutionally vague by failing to provide fair notice of prohibited conduct as well as impermissibly vague for failing to establish minimal guidelines for enforcement).

^{4[2]} Recent cases demonstrate and reaffirm fundamental requirements that there must be uniform rules for consistent application to everyone including law enforcement officers. See, e.g., Toomer v. Garrett, 574 S.E.2d 76 (N.C. App. 2002)(government agencies may not engage in disparate treatment or arbitrariness in treating law enforcement officers; constitutional claims stated); Village of Willowbrook v. Olech, 120 S. Ct. 1073, 1074 (2000)(requiring that government conduct be non-arbitrary); Bush v. Gore, 531 U.S. ____, 2000 WL 1811418 (2000)(requiring the adoption and use of uniform rules and standards; Court found violation of Equal Protection Clause based on the lack of uniform standards); Dobrowolska v. Wall, 138 N.C. App. 1, 530 S.E.2d 590 (2000). See Reno v. Bossier Parrish School Board, 120 S. Ct. 866 (2000) (explaining how imposition of good moral character requirement for voting impermissible).

CONTESTED CASE DECISIONS

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute 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 and proposed findings of fact and to present oral and written arguments to the agency. G.S. 150B-40(e).

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. G.S. 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Sheriff's Education and Training Standards Commission.

This 3rd day of June, 2003.

Beecher R. Gray
Administrative Law Judge