

NORTH CAROLINA

IN THIS ISSUE



REGISTER

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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

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NORTH CAROLINA REGISTER
Publication Schedule for July 2003 – December 2003

FILING DEADLINES

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

END OF REQUIRED COMMENT PERIOD

(1) RULE WITH NON-SUBSTANTIAL ECONOMIC IMPACT: An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

(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.

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**

Alberdingk Boley, Inc.

Pursuant to N.C.G.S. § 130A-310.34, Alberdingk Boley, 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 Jamestown Township, Guilford County, North Carolina. The Property is owned by Alberdingk Boley, Inc., and consists of approximately 27 acres located at 6008 High Point Road in Jamestown Township, Guilford County, North Carolina. Environmental contamination, resulting from operations by previous Property owners/operators, exists on the Property in soil and groundwater. Alberdingk Boley, Inc. has committed itself to redevelop the property as offices, laboratories, a distribution center and an industrial facility for the manufacture of polymer emulsions, dispersions and solutions. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Alberdingk Boley, 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 the Jamestown Public Library located at 200 W Main Street in Jamestown, NC 27282 by contacting David Teague at (336) 454-4815; 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
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

STATE OF NORTH CAROLINA
ENVIRONMENTAL MANAGEMENT COMMISSION
1617 MAIL SERVICE CENTER
RALEIGH, NORTH CAROLINA 27699-1617
PUBLIC NOTICE OF INTENT TO ISSUE STATE GENERAL
NPDES PERMIT

Public notice of intent to reissue an expiring State National Pollutant Discharge Elimination System (NPDES) General Permit for Point Source Discharges of Stormwater for the following types of discharges:

NPDES General Permit No NCG220000 for stormwater point source discharges associated with Wood Chip Mills [a part of standard industrial classification (SIC) Major Group 24] who were covered by NPDES General Stormwater Permit NCG040000 on August 30, 1997 and by the previous version of this General Permit NCG220000 which was originally issued on November 20, 2000.

The following activities are specifically excluded from coverage under this General Permit: those chip mills not previously permitted, expansion of existing chip mills as described above and discharges of non-stormwater, such as wet decking.

On the basis of preliminary staff review and application of Article 21 of Chapter 143 of the General Statutes of North Carolina, Public Law 92-500 and other lawful standards and regulations, the North Carolina Environmental Management Commission proposes to reissue State NPDES General Permit for the discharges as described above.

INFORMATION: Copies of the draft NPDES General Permit and Fact Sheet concerning the draft Permit are available by writing or calling:

Valery Stephens
Water Quality Section
N.C. Division of Water Quality
1617 Mail Service Center
Raleigh, North Carolina 27699-1617
Telephone (919) 733-5083 ext. 520

Persons wishing to comment upon or object to the proposed determinations are invited to submit their comments in writing to the above address no later than October 15, 2003. All comments received prior to that date will be considered in the final determination regarding permit issuance. A public meeting may be held where the Director of the Division of Water Quality finds a significant degree of public interest in any proposed permit issuance. The draft Permit, Fact Sheet and other information are on file at the Division of Water Quality, 512 N. Salisbury Street, Room 925, Archdale Building, Raleigh, North Carolina. They may be inspected during normal office hours. Copies of the information of file are available upon request and payment of the costs of reproduction. All such comments and requests regarding these matters should make reference to the draft Permit Numbers, NCG220000.

Date: August 20, 2003

Alan Klimek, PE, Director
N.C. Division of Water Quality

U.S. Department of Justice

Civil Rights Division

JDR:JBG:NT:nj
DJ 166-012-3
2003-1571
2003-1645
2003-1789
2003-2011

Voting Section – NWB.
950 Pennsylvania Ave., NW
Washington, DC 20530

August 7, 2003

David A. Holec, Esq.
City Attorney
P.O. Box 7207
Greenville, North Carolina 27835-7207

Dear Mr. Holec:

This refers to 14 annexations (adopted between November 14, 2002, and April 10, 2003) to 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, 27, and June 16, 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 changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Sincerely,

Joseph D. Rich
Chief, Voting Section

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 20 - DEPARTMENT OF STATE TREASURER

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

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of State Treasurer - State and Local Government Finance Division - Local Government Commission intends to amend the rule cited as 20 NCAC 03 .0112.

Proposed Effective Date: January 1, 2004

Public Hearing:

Date: November 4, 2003

Time: 2:30 p.m.

Location: State Treasurer's Conference Room, Room 100, Albemarle Building, 325 North Salisbury Street, Raleigh, NC

Reason for Proposed Action: *The Local Government Commission (LGC) is charged with approving applications for certain state and local financing issues and participating in the sale, award or delivery of such issues. The recently enacted North Carolina Capital Facilities Finance Act and the growth of tax exempt financing for state and local agencies and nonprofit organizations have increased the review and approval workload of the LGC staff. At the same time, budgetary policies of the State have prevented increased funding that is necessary to meet the new and more complex duties and growing needs. The changes in fees are required to adjust for increased costs and to take into account the greater complexity and range of transactions that are now within the scope of the LGC's statutory responsibilities.*

Comment Procedures: *Written comments should be submitted to Janice Burke, Deputy Treasurer, State and Local Government Finance Division, Seaboard Building, 325 North Salisbury Street, Raleigh, NC 27603. Phone: (919) 807-2351, fax: (919) 807-2352, email: janice.burke@treasurer.state.nc.us. Comments should be submitted through November 14, 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

CHAPTER 03 - LOCAL GOVERNMENT COMMISSION

SECTION .0100 - GENERAL PROVISIONS

20 NCAC 03 .0112 FEES

(a) The following fees shall be charged for services rendered or to be rendered for each category of bonds and notes set forth:

- (1) Bonds sold pursuant to G.S. ~~115E~~ Chapter 159D, Article 2 ~~\$2,500.00~~ \$5,000.00
- (2) Bonds sold pursuant to G.S. Chapter 131A ~~\$2,500.00~~ \$3,500.00
- (3) Bonds sold pursuant to G.S. ~~Chapters~~ Chapter 159B ~~\$5,000.00~~
- (4) Bonds sold pursuant to G.S. Chapter 159C ~~\$1,000.00~~ \$2,500.00
(Except for bonds for industrial development or pollution control for which the fee shall be \$1,000.00.)
- (5) Bonds sold by ~~for the North Carolina Industrial Facilities and Pollution Control Financing projects, pursuant to G.S. Chapter 159D, Article 1 Authority pursuant to G.S. Chapter 159D~~ (per participant) ~~\$400.00~~ \$1,000.00
- (6) All other bonds sold pursuant to G.S. Chapter ~~G.S.~~ 159D ~~\$1,000.00~~
- (7) Bonds sold pursuant to G.S. Chapter 159I ~~\$2,500.00~~ \$5,000.00
- (8) All notes issued in anticipation of issuance of a bond for which a fee is set forth herein ~~\$500.00~~
- (9) ~~Other issues of debt receiving commission approval~~ Revenue bonds sold pursuant to G.S. Chapter 159, Article 5 and all other approvals and issues of debt receiving Local Government Commission approval, other than general obligation bonds. ~~\$2,500.00~~ \$5,000.00

(b) In addition to the fees set forth in this Rule, all travel and ~~subsistence~~ subsistence incurred, and all ~~material~~ amounts of other expenses, ~~e.g.~~ including telephone and postage, incurred shall be for the account of the issuer. When paid by the state, they shall be billed to the issuer.

(c) In addition to expenses pursuant to Paragraph (b) of this Rule, the following fees shall be charged for the services set forth herein:

- (1) Approvals to counties pursuant to G.S. 105-487(c) ~~\$250.00~~
- (2) Approvals to municipalities pursuant to G.S. 105-487(c) ~~\$250.00~~

PROPOSED RULES

- (3) Approvals of installment purchase contracts under G.S. 160A-20 where no public offering is proposed ~~\$250.00~~ \$500.00
- (4) Approvals of installment purchase contracts under G.S. 160A-20 where a public offering, including but not limited to certificates of participation, is proposed ~~\$2,500.00~~ \$5,000.00

Authority G.S. 159-3(f); 159-6.

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.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 10 - BOARD OF CHIROPRACTIC EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Chiropractic Examiners intends to adopt the rules cited as 21 NCAC 10 .0207-.0208 and amend the rules cited as 21 NCAC 10 .0202, .0206.

Proposed Effective Date: January 1, 2004

Public Hearing:

Date: October 10, 2003

Time: 10:30 a.m.

Location: NCSBCE Office, 174 Church St., Concord, NC

Reason for Proposed Action:

21 NCAC 10 .0202 – The purpose of the amended rule is to increase Board revenues in order to cover the cost of administering the Board's licensure examination.

21 NCAC 10 .0206 – The purpose of the amended rule is to make certain that all chiropractic assistants who take X-rays obtain the required six-hour continuing education bloc in radiology each year.

21 NCAC 10 .0207 – Within the last few years, a number of for-profit private companies have entered the continuing education marketplace, and their offerings have varied with respect to course content, instructor credentials and seminar administration. The Board believes a rule describing the criteria for seminar approval has become necessary.

21 NCAC 10 .0208 – The proposed rule is intended to enhance public health and safety by restricting the use of acupuncture by chiropractic physicians to those practitioners who have adequate training. The proposed minimum educational standards were developed in consultation with recognized chiropractic colleges and the Acupuncture Council of the NC Chiropractic Assn.

Comment Procedures: Comments from the public shall be directed to Carol Hall, Executive Secretary of the Board of Examiners, 174 Church St., Concord, NC 28025, phone (704) 793-1342, fax (704) 793-1385, and email www.ncchiroboard.com. Comment period ends November 14, 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

Fiscal Impact

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

SECTION .0200 – PRACTICE OF CHIROPRACTIC

21 NCAC 10 .0202 APPLICATION FOR LICENSURE

(a) General. Application for licensure shall be made in writing upon forms prescribed by the Board. The secretary shall furnish the necessary forms to prospective applicants upon request.

(b) Description of Forms. The written application shall consist of two forms, the Application Form and the Character Reference Form. The following information shall be required to complete each form:

- (1) Application Form: personal background of the applicant; his educational history; a recent photograph; and a statement confirming that he has read, understands and will abide by the General Statutes and administrative rules governing chiropractic.
- (2) Character Reference Form: the statements of three persons not related to the applicant attesting to his good moral character. Two of the three persons providing references must be licensed chiropractors.

(c) Deadlines for Filing Applications. Applications for the June examination must be received at the office of the Board on or before the third Tuesday in April. Applications for the November examination must be received at the office of the Board on or before the third Tuesday in September. These deadlines will not be waived except for compelling reasons, and any waiver shall be within the discretion of the Board.

(d) Application Fee. An application fee of ~~one-three~~ three hundred dollars (~~\$100.00~~) (\$300.00) must accompany each application. This fee shall be paid in cash, or by certified check, cashier's check or money order made payable to the North Carolina Board of Chiropractic Examiners. Personal checks will not be accepted.

Authority G.S. 90-142; 90-143; 90-143.1; 90-145; 90-146.

21 NCAC 10 .0206 CERTIFICATION OF RADIOLOGIC TECHNOLOGISTS

(a) In order to be certified competent pursuant to G.S. 90-143.2, a person employed in a chiropractic office whose duties include the production of x-rays or other diagnostic images must:

- (1) Complete a Board-approved course in radiologic technology at least 50 hours in length and taught by an instructor who is a member of the radiology faculty at a college accredited by the Council on Chiropractic Education; and
- (2) Pass a proficiency examination administered by or under the authority of the Board of Examiners.

(b) Any person registered as "active" with the American Chiropractic Registry of Radiologic Technologists shall be deemed to have satisfied the educational requirements of Paragraph (a) of this Rule.

(c) A certificate of competency issued pursuant to G.S. 90-143.2 shall expire at the end of the calendar year in which it was issued but may be renewed upon a showing that the certificate holder completed six hours of Board-approved continuing education in radiologic technology during the year. Any person whose initial certificate expires less than 12 months after issuance shall not be required to obtain continuing education until entering the second year of certification.

(d) Any person seeking to renew a certificate of competency shall complete and submit the renewal application form provided by the Board of Examiners and pay to the Board a renewal fee in the amount of twenty dollars (\$20.00).

(e) The holder of a certificate issued pursuant to this Rule must display the certificate in the x-ray room of the chiropractic clinic in which the holder is employed in a location where the certificate may be easily viewed by patients.

(f) Other than licensed doctors of chiropractic, only those persons maintaining current certifications of competency in conformity with this Rule may produce x-rays or other diagnostic images in chiropractic offices. A chiropractor who permits the production of x-rays or other diagnostic images by a non-certified employee or an employee whose certification has expired shall be deemed in violation of G.S. 90-154.3.

Authority G.S. 90-143.2; 90-154.3.

21 NCAC 10 .0207 CONTINUING EDUCATION SEMINARS

(a) Approval of Seminars. Only continuing education seminars approved in advance by the Board shall count towards satisfying the requirements for license renewal. The sponsor and co-sponsors of any proposed seminar shall be responsible for submitting to the Board all the information the Board deems necessary to evaluate the seminar in accordance with this Rule. An application for approval shall be in writing and shall be submitted at least 30 days prior to the date of the proposed seminar.

(b) Duration of Approval. A seminar approval issued by the Board shall expire one year after the date of issuance. If the sponsor or co-sponsors of an approved seminar wish to repeat the seminar on a date beyond the approval period, a new application shall be submitted to the Board.

(c) Criteria for Approval. The Board's criteria for approving continuing education seminars is as follows:

- (1) No practice-building or motivational seminars shall be approved;
- (2) No seminar shall be approved that requires attendees, in order to be able to utilize the information presented at the seminar, to purchase equipment or clinical supplies available only through the seminar's instructors, sponsors or co-sponsors;
- (3) Each seminar subject shall fall within the extent and limitation of chiropractic licensure in this State; and
- (4) Each instructor shall submit a curriculum vitae and satisfy the Board that he is competent to teach the subject or subjects he is scheduled to teach.

(d) Duties of Seminar Sponsor. A proposed seminar having been approved by the Board, its sponsor and co-sponsors shall:

- (1) Disclose on all brochures and advertising materials the name and address of each sponsor and co-sponsor and whether each sponsor and co-sponsor is a for-profit or not-for-profit entity;
- (2) Be liable for all expenses incurred in holding the seminar;
- (3) Give timely notice to the Board of any material changes in the seminar, including date, location, subject matter or instructors; and
- (4) Provide an agent at the seminar site who shall:
 - (A) Monitor and report the attendance of each person attending the seminar, using a method approved by the Board;
 - (B) Provide for the safety and comfort of attendees;
 - (C) Supervise the agenda and disallow the presentation of any subject not approved by the Board; and
 - (D) Complete and submit to the Board a post-seminar review summarizing any problems experienced and any variance between the application for approval and the seminar as actually presented.

(e) Sanction for Non-Compliance. By applying for seminar approval, each sponsor and co-sponsor agrees to admit to the seminar at no charge a representative of the Board for the purpose of observing compliance with this Rule. If the Board determines that a sponsor or co-sponsor has willfully or negligently falsified the application for approval, or has failed to keep attendance accurately, or has allowed the seminar as actually presented to vary materially from the agenda as set forth in the application, or has willfully failed to adhere to any other provision of this Rule, the Board, in its discretion, may refuse to approve future seminar applications from the offending sponsor or co-sponsor or from any principal who is a partner or shareholder in the offending sponsor or co-sponsor.

Authority G.S. 90-142; 90-155.

21 NCAC 10 .0208 ACCEPTABLE CARE

PROPOSED RULES

(a) Standards set by the Board. The following standards of acceptable care in the practice of chiropractic have been established and defined by the Board of Examiners: - Acupuncture. In order to perform acupuncture, a licentiate shall first certify to the Board that he or she has completed a minimum of 100 hours' coursework offered or sponsored by a recognized chiropractic college in acupuncture-meridian therapy, including sterile needle technique, theory of acupuncture and differential diagnosis of clinical indications.

(b) Standards set by the Colleges. For any aspect of chiropractic practice, if the standard of acceptable care is not defined in Paragraph (a) of this Rule, then the standard of acceptable care shall be the usual method of practice as taught in the majority of recognized chiropractic colleges.

Authority G.S. 90-142; 90-154.3.

CHAPTER 12 - LICENSING BOARD FOR GENERAL CONTRACTORS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Licensing Board for General Contractors intends to adopt the rule cited as 21 NCAC 12 .0210, amend the rule cited as 21 NCAC 12 .0202, and repeal the rule cited as 21 NCAC 12 .0409.

Proposed Effective Date: January 1, 2004

Public Hearing:

Date: October 8, 2003

Time: 10:00 a.m.

Location: North Carolina Licensing Board for General Contractors, 3739 National Dr., Suite 225, Raleigh, NC

Reason for Proposed Action:

21 NCAC 12 .0202 – The amendment to this Rule is a clarification that the primary licensure classification encompasses the specialty classification.

21 NCAC 12 .0210 – The adoption of this Rule is to allow an entity building as a single prime to subcontract with a general contractor for 25% or less of the project which should reduce the amounts of the bids for public building projects.

21 NCAC 12 .0409 – The Board is repealing this Rule because the Board no longer handles the fee. The fee is paid directly to the vendor conducting the review.

Comment Procedures: *Comments from the public shall be directed to Mark Selph, PO Box 17187, Raleigh, NC 27619. Comment period ends November 14, 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

SECTION .0200 - LICENSING REQUIREMENTS

21 NCAC 12 .0202 CLASSIFICATION

(a) A general contractor must be certified in one of five classifications. These classifications are:

- (1) Building Contractor. This classification covers all building construction activity including but not limited to: commercial, industrial, institutional, and all residential building construction; parking decks; all site work, grading and paving of parking lots, driveways, sidewalks, curbs, gutters, and water and wastewater systems which are ancillary to the aforementioned structures and improvements; and covers the work done under the specialty classifications of S(Concrete Construction), S(Insulation), S(Interior Construction), S(Marine Construction), S(Masonry Construction), S(Roofing), S(Metal Erection), ~~and S(Swimming Pools)~~, S(Swimming Pools), and S(Asbestos).
- (2) Residential Contractor. This classification covers all construction activity pertaining to the construction of residential units which are required to conform to the residential building code adopted by the Building Code Council pursuant to G.S. 143-138; all site work, driveways, sidewalks, and water and wastewater systems ancillary to the aforementioned structures and improvements; and the work done as part of such residential units under the specialty classifications of S(Insulation), S(Interior Construction), S(Masonry Construction), S(Roofing), ~~and S(Swimming Pools)~~, S(Swimming Pools), and S(Asbestos).
- (3) Highway Contractor. This classification covers all highway construction activity including but not limited to: grading, paving of all types, installation of exterior artificial athletic surfaces, relocation of public and private utility lines ancillary to the principal project, bridge construction and repair, culvert construction and repair, parking decks, sidewalks, curbs, gutters and storm drainage. Includes installation and erection of guard

- rails, fencing, signage and ancillary highway hardware; covers paving and grading of airport and airfield runways, taxiways, and aprons, including the installation of fencing, signage, runway lighting and marking; and covers work done under the specialty classifications of S(Boring and Tunneling), S(Concrete Construction), S(Marine Construction), S(Railroad Construction), and H(Grading and Excavating).
- (4) Public Utilities Contractor. This classification includes those whose operations are the performance of construction work on water and wastewater systems and on the subclassifications of facilities set forth in G.S. 87- 10(3). The Board may issue a license to a public utilities contractor that is limited to any of the subclassifications set forth in G.S. 87- 10(3) for which the contractor qualifies. A public utilities contractor license covers work done under the specialty classifications of S(Boring and Tunneling), PU(Communications), PU(Fuel Distribution), PU(Electrical-Ahead of Point of Delivery), PU(Water Lines and Sewer Lines), PU(Water Purification and Sewage Disposal), and S(Swimming Pools).
- (5) Specialty Contractor. This classification covers all construction operation and performance of contract work outlined as follows:
- (A) H(Grading and Excavating). Covers the digging, moving and placing of materials forming the surface of the earth, excluding air and water, in such a manner that the cut, fill, excavation, grade, trench, backfill, or any similar operation can be executed with the use of hand and power tools and machines commonly used for these types of digging, moving and material placing. Covers work on earthen dams and the use of explosives used in connection with all or any part of the activities described in this Subparagraph. Also includes clearing and grubbing, and erosion control activities.
- (B) S(Boring and Tunneling). Covers the construction of underground or underwater passageways by digging or boring through and under the earth's surface including the bracing and compacting of such passageways to make them safe for the purpose intended. Includes preparation of the ground surfaces at points of ingress and egress.
- (C) PU(Communications). Covers the installation of the following:
- (i) All types of pole lines, and aerial and underground distribution cable for telephone systems;
- (ii) Aerial and underground distribution cable for Cable TV and Master Antenna TV Systems capable of transmitting R.F. signals;
- (iii) Underground conduit and communication cable including fiber optic cable; and
- (iv) Microwave systems and towers, including foundations and excavations where required, when the microwave systems are being used for the purpose of transmitting R.F. signals; and installation of PCS or cellular telephone towers and sites.
- (D) S(Concrete Construction). Covers the construction and installation of foundations, pre-cast silos and other concrete tanks or receptacles, prestressed components, and gunite applications, but excludes bridges, streets, sidewalks, curbs, gutters, driveways, parking lots and highways.
- (E) PU(Electrical-Ahead of Point of Delivery). Covers the construction, installation, alteration, maintenance or repair of an electrical wiring system, including sub-stations or components thereof, which is or is intended to be owned, operated and maintained by an electric power supplier, such as a public or private utility, a utility cooperative, or any other properly franchised electric power supplier, for the purpose of furnishing electrical services to one or more customers.
- (F) PU(Fuel Distribution). Covers the construction, installation, alteration, maintenance or repair of systems for distribution of petroleum fuels, petroleum distillates, natural gas, chemicals and slurries through pipeline from one station to another. Includes all excavating, trenching and backfilling in connection therewith. Covers the installation, replacement and removal of above ground and below ground fuel storage tanks.
- (G) PU(Water Lines and Sewer Lines). Covers construction work on water and sewer mains, water service lines,

PROPOSED RULES

- and house and building sewer lines as defined in the North Carolina State Building Code, and covers water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations and pumping stations. Includes pavement patching, backfill and erosion control as part of such construction.
- (H) PU(Water Purification and Sewage Disposal). Covers the performance of construction work on water and wastewater systems, water and wastewater treatment facilities and all site work, grading, and paving of parking lots, driveways, sidewalks, and curbs and gutters which are ancillary to such construction of water and wastewater treatment facilities. Covers the work done under the specialty classifications of S(Concrete Construction), S(Insulation), S(Interior Construction), S(Masonry Construction), S(Roofing), and S(Metal Erection) as part of such work on water and wastewater treatment facilities.
- (I) S(Insulation). Covers the installation, alteration or repair of materials classified as insulating media used for the non-mechanical control of temperatures in the construction of residential and commercial buildings. Does not include the insulation of mechanical equipment and ancillary lines and piping.
- (J) S(Interior Construction). Covers the installation of acoustical ceiling systems and panels; drywall partitions (load bearing and non-load bearing), lathing and plastering, flooring and finishing, interior recreational surfaces, window and door installation, and installation of fixtures, cabinets and millwork. Includes the removal of asbestos and replacement with non-toxic substances.
- (K) S(Marine Construction). Covers all marine construction and repair activities and all types of marine construction in deep-water installations and in harbors, inlets, sounds, bays, and channels; covers dredging, construction and installation of pilings, piers, decks, slips, docks, and bulkheads. Does not include structures required on docks, slips and piers.
- (L) S(Masonry Construction). Covers the installation, with or without the use of mortar or adhesives, of the following:
- (i) Brick, concrete block, gypsum partition tile, pumice block or other lightweight and facsimile units and products common to the masonry industry;
 - (ii) Installation of fire clay products and refractory construction; and
 - (iii) Installation of rough cut and dressed stone, marble panels and slate units, and installation of structural glazed tile or block, glass brick or block, and solar screen tile or block.
- (M) S(Railroad Construction). Covers the building, construction and repair of railroad lines including:
- (i) The clearing and filling of rights-of-way;
 - (ii) Shaping, compacting, setting and stabilizing of road beds;
 - (iii) Setting ties, tie plates, rails, rail connectors, frogs, switch plates, switches, signal markers, retaining walls, dikes, fences and gates; and
 - (iv) Construction and repair of tool sheds and platforms.
- (N) S(Roofing). Covers the installation and repair of roofs and decks on residential, commercial, industrial, and institutional structures requiring materials that form a water-tight and weather-resistant surface. The term "materials" shall be defined for purposes of this Subparagraph to include, among other things, cedar, cement, asbestos, clay tile and composition shingles, all types of metal coverings, wood shakes, single ply and built-up roofing, protective and reflective roof and deck coatings, sheet metal valleys, flashings, gravel stops, gutters and downspouts, and bituminous waterproofing.
- (O) S(Metal Erection). Covers:
- (i) The field fabrication, erection, repair and alteration of architectural and structural shapes, plates, tubing, pipe and bars, not limited to steel or aluminum, that are or may be used as structural members for buildings, equipment and structure; and

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(ii) The layout, assembly and erection by welding, bolting or riveting such metal products as, but not limited to, curtain walls, tanks of all types, hoppers, structural members for buildings, towers, stairs, conveyor frames, cranes and crane runways, canopies, carports, guard rails, signs, steel scaffolding as a permanent structure, rigging, flagpoles, fences, steel and aluminum siding, bleachers, fire escapes, and seating for stadiums, arenas, and auditoriums.

(P) S(Swimming Pools). Covers the construction, service and repair of all swimming pools. Includes:
(i) Excavation and grading;
(ii) Construction of concrete, gunite, and plastic-type pools, pool decks, and walkways, and tiling and coping; and
(iii) Installation of all equipment including pumps, filters and chemical feeders. Does not include direct connections to a sanitary sewer system or to portable water lines, nor the grounding and bonding of any metal surfaces or the making of any electrical connections.

(Q) S(Asbestos). This classification covers renovation or demolition activities involving the repair, maintenance, removal, isolation, encapsulation, or enclosure of Regulated Asbestos Containing Materials (RACM) for any commercial, industrial, or institutional building, whether public or private. It also covers all types of residential building construction involving RACM during renovation or demolition activities.

(b) An applicant may be licensed in more than one classification of general contracting provided the applicant meets the qualifications for the classifications, which includes passing the examination for the classifications in question. The license granted to an applicant who meets the qualifications for all classifications will carry with it a designation of "unclassified."

Authority G.S. 87-1; 87-4; 87-10.

21 NCAC 12 .0210 PUBLIC BUILDING PROJECTS

If a public building project is performed pursuant G.S. 87-1.1, the total amount of work to be performed by the licensed general contractor shall not exceed 25% of the total bid price. The licensed general contractor shall hold the applicable classifications and limitation for the work undertaken by the licensed general contractor. For the purpose of this Rule, a public building project is a building project that is governed by G.S. 143, Article 8.

Authority G.S. 87-1.1; 87-4.

21 NCAC 12 .0409 REVIEW WORKSHOP CHARGE

~~Each applicant who fails an examination may attend a group workshop conducted by the staff of the Board, in which examinations and examination results are made available to the applicant. The workshop shall be self taught. The Board shall charge a fee of twenty dollars (\$20.00) per person attending such workshop. Should the actual cost of the workshop be less than twenty dollars (\$20.00) per person, the Board may not charge more than the actual cost, which shall include the cost of renting conference space, materials, and labor.~~

Authority G.S. 87-10; 150B-19(5)d.

CHAPTER 29 – LOCKSMITH LICENSING BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Locksmith Licensing Board intends to adopt the rules cited as 21 NCAC 29 .0601-.0616.

Proposed Effective Date: March 1, 2004

Public Hearing:

Date: October 29, 2003

Time: 11:00 a.m.

Location: NC Psychological Association, Conference Room, 1004 Dresser Court, Raleigh, NC

Reason for Proposed Action: Routine rule-making proceedings by a new Occupational Licensing Board.

Comment Procedures: Comments should be submitted to Jim Scarborough, PO Box 10972, Raleigh, NC 27605. Phone: (919) 838-8782, fax: (919) 833-5743. Comments should be submitted through November 14, 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

SECTION .0600 - ADMINISTRATIVE LAW PROCEDURES

21 NCAC 29 .0601 PETITIONS FOR ADOPTION, AMENDMENT OR REPEAL OF RULES

(a) Any person may petition the Board under G.S. 150B-20 to adopt a new rule or to amend or repeal an existing rule by sending a written petition for rulemaking to the Chair at the Board's address. The petition shall be entitled "Petition for Rulemaking" and shall include the following information:

- (1) the name and address of the person submitting the petition;
- (2) a citation to any rule for which an amendment or repeal is requested;
- (3) a draft of the proposed new rule or amended rule;
- (4) the reason for the proposal, with any information the petitioner believes is relevant and wishes the Board to consider;
- (5) the effect of the proposed new rule or amendment on existing rules or decisions;
- (6) practices likely to be affected by the proposed new rule or amendment; and
- (7) an identification of the persons or class of persons most likely to be affected by the proposal.

(b) The Board may request additional information before making its decision.

Authority G.S. 74F-6; 150B-20.

21 NCAC 29 .0602 DECLARATORY RULINGS

(a) A person seeking a declaratory ruling from the Board under G.S. 150B-4 shall file a petition for a declaratory ruling that meets the requirements of this Rule.

(b) All petitions for declaratory rulings shall be in writing and shall be sent to the Chair at the Board's address. Each petition shall be entitled "Petition for Declaratory Ruling" and shall include the following information:

- (1) the name and address of the petitioner;
- (2) the statute or rule to which the petition relates;
- (3) a statement of the manner in which the petitioner has been or may be aggrieved by the statute or rule; and
- (4) if the petitioner wishes to make an oral presentation to the Board on the petition, a statement clearly requesting an opportunity to appear and be heard.

(c) The Board may refuse to issue a declaratory ruling when:

- (1) the petition does not comply with this Rule;

- (2) the petitioner is not a "person" or a "person aggrieved" as defined in G.S. 150B-2;
- (3) the Board has previously issued a declaratory ruling on substantially similar facts;
- (4) the Board has previously issued a final agency decision in a contested case on substantially similar facts;
- (5) the facts underlying the request for a declaratory ruling were specifically considered at the time the rule was adopted;
- (6) the subject matter of the petition is involved in pending litigation; or
- (7) the Board determines for good cause not listed in this Paragraph that issuance of a declaratory ruling is undesirable.

Authority G.S. 74F-6; 150B-4.

21 NCAC 29 .0603 RIGHT TO HEARING

When the Board acts or proposes to act, other than in rule-making or declaratory ruling proceedings, in a manner which will affect the rights, duties, privileges or a license of a specific, identifiable person, such person has the right to an administrative hearing. When the Board proposes to act in such a manner, it shall give such person notice of their right to a hearing by mailing by certified mail to them at their last known address a notice of the proposed action and a notice of a right to a hearing.

Authority G.S. 74F-6; 150B-11; 150B-38.

21 NCAC 29 .0604 REQUEST FOR HEARING

(a) Any time an individual believes their rights, duties, or privileges have been affected by the Board's administrative action, but has not received notice of a right to an administrative hearing pursuant to Rule .0817 of this Chapter, that individual may file a formal request for a hearing.

(b) Before an individual may file a request he must first exhaust all reasonable efforts to resolve the issue informally with the Board.

(c) Subsequent to such informal action, if still dissatisfied, the individual shall submit a request to the Board's office, with the request bearing the notation: REQUEST FOR ADMINISTRATIVE HEARING. The request shall contain the following information:

- (1) Name and address of the Petitioner;
- (2) A concise statement of the action taken by the Board which is challenged;
- (3) A concise statement of the way in which the Petitioner has been aggrieved; and
- (4) A clear and specific statement of request for a hearing.

(d) A request for administrative hearing must be submitted to the Board's office within 60 days of receipt of notice of the action taken by the Board which is challenged. The request will be acknowledged promptly and, if Petitioner is a person aggrieved, a hearing will be scheduled.

Authority G.S. 74F-6; 150B-11; 150B-38.

21 NCAC 29 .0605 GRANTING OR DENYING

HEARING REQUEST

- (a) The Board will decide whether to grant a request for a hearing.
- (b) The denial of request for a hearing will be issued immediately upon decision, and in no case later than 60 days after the submission of the request. Such denial shall contain a statement of the reasons leading the Board to deny the request.
- (c) Approval of a request for a hearing will be signified by the issuing of a notice as required by G.S. 150B-38(b) and explained in Rule .0606 of this Section.

Authority G.S.74F-6; 150B-11; 150B-38.

21 NCAC 29 .0606 NOTICE OF HEARING

- (a) The Board shall give the party or parties in a contested case a notice of hearing not less than 15 days before the hearing. Said notice shall contain the following information, in addition to the items specified in G.S. 150B-38(b):
 - (1) the name, position, address and telephone number of a person at the offices of the Board to contact for further information or discussion;
 - (2) the date, time, and place for a pre-hearing conference, if any; and
 - (3) any other information deemed relevant to informing the parties as to the procedure of the hearing.

(b) If the Board determines that the public health, safety or welfare requires such action, it may issue an order summarily suspending a license or permit. Upon service of the order, the licensee or permit holder to whom the order is directed shall immediately cease the practice of locksmithing in North Carolina. The Board shall promptly give notice of hearing pursuant to G.S. 150B-38 following service of the order. The suspension shall remain in effect pending issuance by the Board of a final agency decision pursuant to G.S. 150B-42.

Authority G.S.74F-6; 150B-3(c); 150B-11; 150B-38.

21 NCAC 29 .0607 WHO SHALL HEAR CONTESTED CASES

All administrative hearings will be conducted by the Board, a panel consisting of a majority of the members of the Board, or an administrative law judge designated to hear the case pursuant to G.S. 150B-40(e).

Authority G.S.74F-6; 150B-11; 150B-38; 150B-40.

21 NCAC 29 .0608 INFORMAL PROCEDURES

The Board and the party or parties may agree in advance to simplify the hearing by decreasing the number of issues to be contested at the hearing; accepting the validity of certain proposed evidence; accepting the findings in some other case with relevance to the case at hand; or agreeing to such other matters as may expedite the hearing.

Authority 74F-6; 150B-11; 150B-41.

21 NCAC 29 .0609 PETITION FOR INTERVENTION

(a) A person desiring to intervene in a contested case must file a written petition with the Board's office. The request should bear the notation: PETITION TO INTERVENE IN THE CASE OF (Name of case).

(b) The petition must include the following information:

- (1) The name and address of petitioner;
- (2) The business or occupation of petitioner, where relevant;
- (3) A full identification of the hearing in which petitioner is seeking to intervene;
- (4) The statutory or non-statutory grounds for intervention;
- (5) Any claim or defense in respect of which intervention is sought; and
- (6) A summary of the arguments of evidence petitioner seeks to present.

(c) The person desiring to intervene shall serve copies of the petition on all parties to the case.

(d) If the Board determines to allow intervention, notice of that decision will be issued promptly to all parties, and to the petitioner. In cases of discretionary intervention, such notification will include a statement of any limitations of time, subject matter, evidence or whatever else is deemed necessary, which are imposed on the intervenor.

(e) If the Board's decision is to deny intervention, the petitioner will be notified promptly. Such notice will be in writing, identifying the reasons for the denial, and will be issued to the petitioner and all parties.

Authority G.S.74F-6; 150B-11; 150B-38.

21 NCAC 29 .0610 TYPES OF INTERVENTION

(a) Intervention of Right. A petition to intervene as of right, as provided in the North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of that rule and the petition is timely.

(b) Permissive Intervention. A petition to intervene permissibly as provided in the North Carolina Rules of Civil Procedure, Rule 24, will be granted if the petitioner meets the criteria of that rule and the Board determines that:

- (1) There is sufficient legal or factual similarity between the petitioner's claimed rights, privileges, or duties and those of the parties to the hearing; and
- (2) Permitting intervention by the petitioner as a party would aid the purpose of the hearing.

(c) The Board may allow discretionary intervention, with whatever limits and restrictions are deemed appropriate.

Authority G.S.74F-6; 150B-11; 150B-38.

21 NCAC 29 .0611 DISQUALIFICATION OF BOARD MEMBERS

(a) Self-disqualification. If for any reason a board member determines that personal bias or other factors render that member unable to hear a contested case and perform all duties in an impartial manner, that board member shall voluntarily decline to participate in the hearing or decision.

(b) Petition for Disqualification. If for any reason any party in a contested case believes that a board member is personally biased or otherwise unable to hear a contested case and perform all

duties in an impartial manner, the party may file a sworn, notarized affidavit with the Board. The title of such affidavit should bear the notation: AFFIDAVIT OF DISQUALIFICATION OF BOARD MEMBER IN THE CASE OF (Name of case).

(c) Contents of Affidavit. The affidavit must state all facts the party deems to be relevant to the disqualification of the Board member.

(d) Timeliness of Affidavit. An affidavit of disqualification will be considered timely if filed 10 days before commencement of the hearing. Any other affidavit will be considered timely provided it is filed at the first opportunity after the party becomes aware of facts which give rise to a reasonable belief that a board member may be disqualified under this Rule. Where a petition for disqualification is filed less than 10 days before or during the course of a hearing, the hearing shall continue with the challenged board member sitting. Petitioner shall have the opportunity to present evidence supporting his petition, and the petition and any evidence relative thereto presented at the hearing shall be made a part of the record. The Board, before rendering its decision, shall decide whether the evidence justifies disqualification. In the event of disqualification, the disqualified member will not participate in further deliberation or decision of the case.

Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40.

21 NCAC 29 .0612 FAILURE TO APPEAR

Should a party fail to appear at a scheduled hearing, the Board, or the designated administrative law judge, may proceed with the hearing and make its decision in the absence of the party, provided that the party has been given proper notice. The Board or the administrative law judge may order a continuance in order to give the party another opportunity to appear.

Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40.

21 NCAC 29 .0613 SUBPOENAS

(a) Requests for subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be made in writing to the Board and shall identify any document sought with specificity, and shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena. The Board shall issue the requested subpoenas within three days of receipt of the request.

(b) Subpoenas shall contain the caption of the case; the name and address of the person subpoenaed; the date, hour and location of the hearing in which the witness is commanded to appear; a particularized description of the books, papers, records or objects the witness is directed to bring with him to the hearing, if any; the identity of the party on whose application the subpoena was issued; the date of issue; the signature of the presiding officer or his designee; and a "return of service." The "return of service" form as filled out, shows the name and capacity of the person serving the subpoena, the date on which the subpoena was delivered to the person directed to make service, the date on which service was made, the person on whom service was made, the manner in which service was made, and the signature of the person making service.

(e) Procedure for Determining Disqualification:

- (1) The Board will appoint a board member to investigate the allegations of the affidavit.
- (2) The investigator will report their findings and recommendations to the Board.
- (3) The Board shall decide whether to disqualify the challenged individual.
- (4) The person whose disqualification is to be determined will not participate in the decision but may be called upon to furnish information to the other members of the Board.
- (5) When a board member is disqualified prior to the commencement of the hearing or after the hearing has begun, such hearing will continue with the remaining members sitting provided that the remaining members still constitute a majority of the Board.
- (6) If three or more members of the Board are disqualified pursuant to this Rule, the Board shall petition the Office of Administrative Hearings to appoint an administrative law judge to hear the contested case pursuant to G.S. 150B-40(e).

(c) Subpoenas shall be served by the sheriff of the county in which the person subpoenaed resides, when the party requesting such subpoena prepays the sheriff's service fee. The subpoena shall be issued in duplicate, with a "return of service" form attached to each copy. A person serving the subpoena shall fill out the "return of service" form for each copy and properly return one copy of the subpoena, with the attached "return of service" form completed, to the Board.

(d) Any person receiving a subpoena from the Board may object thereto by filing a written objection to the subpoena with the Board's office.

(e) Such objection shall include a concise, but complete, statement of reasons why the subpoena should be revoked or modified. These reasons may include lack of relevancy of the evidence sought, or any other reason sufficient in law for holding the subpoena invalid, such as that the evidence is privileged, that appearance or production would be so disruptive as to be unreasonable in light of the significance of the evidence sought, or other undue hardship.

(f) Any such objection to a subpoena must be served on the party who requested the subpoena simultaneously with the filing of the objection with the Board.

(g) The party who requested the subpoena, in such time as may be granted by the Board, may file a written response to the objection. The written response shall be served by the requesting party on the objecting witness simultaneously with filing the response with the Board.(h) After receipt of the objection and response thereto, if any, the Board shall issue a notice to the party who requested the subpoena and the party challenging the subpoena, and may notify any other party or parties of an open hearing, to be scheduled as soon as practicable, at which time evidence and testimony may be presented, limited to the narrow questions raised by the objection and response.

(i) Promptly after the close of such hearing, a majority of the Board members with voting authority, or an administrative law judge assigned to the case pursuant to G.S. 150B-40(e), will rule

on the challenge and issue a written decision. A copy of the decision will be issued to all parties and made a part of the record.

Authority G.S.74F-6; 150B-11; 150B-38; 150B-40.

21 NCAC 29 .0614 WITNESSES

Any party may be a witness and may present witnesses on the party's behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation and shall be recorded. At the request of a party or upon the Board's own motion, the presiding officer may exclude witnesses from the hearing room so that they cannot hear the testimony of other witnesses.

Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40.

21 NCAC 29 .0615 FINAL DECISION

In all cases heard by the Board, the Board will issue its decision within 60 days after its next regularly scheduled meeting following the close of the hearing. This decision will be the prerequisite "final agency decision" for the right to judicial review.

Authority G.S.74F-6; 150B-11; 150B-38; 150B-42.

21 NCAC 29 .0616 PROPOSALS FOR DECISIONS

(a) When an administrative law judge conducts a hearing pursuant to G.S. 150B-40(e), a "proposal for decision" shall be rendered within 45 days of the hearing pursuant to the rules of the Office of Administrative Hearings, 26 NCAC 03 .0026. Any party may file written exceptions to this "proposal for decision" and submit their own proposed findings of fact and conclusions of law. The exceptions and alternative proposals must be received within 10 days after the party has received the

"proposal for decision" as drafted by the administrative law judge.

(b) Any exceptions to the procedure during the hearing, the handling of the hearing by the administrative law judge, rulings on evidence, or any other matter, must be written and refer specifically to pages of the record or otherwise precisely identify the occurrence to which exception is taken. The exceptions must be filed with the Board within 10 days of the receipt of the proposal for decision. The written exceptions should bear the notation: EXCEPTIONS TO THE PROCEEDINGS IN THE CASE OF (Name of case).

(c) Any party may present oral argument to the Board upon request. The request must be included with the written exceptions.

(d) Upon receipt of request for further oral argument, notice will be issued promptly to all parties designating time and place for such oral argument.

(e) Giving due consideration to the proposal for decision and the exceptions and arguments of the parties, the Board may adopt the proposal for decision or may modify it as the Board deems necessary. The decision rendered will be a part of the record and a copy thereof given to all parties. The decision as adopted or modified becomes the "final agency decision" for the right to judicial review. Said decision will be rendered by the Board within 60 days of the next regularly scheduled meeting following the oral arguments, if any. If there are no oral arguments presented, the decision will be rendered within 60 days of the next regularly scheduled board meeting following receipt of the written exceptions.

Authority G.S. 74F-6; 150B-11; 150B-38; 150B-40.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on Thursday, September 18, 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, September 12, 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

September 18, 2003 October 16, 2003
November 20, 2003 December 18, 2003

RULES REVIEW COMMISSION

August 21, 2003
MINUTES

The Rules Review Commission met on Thursday morning, August 21, 2003, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present: Graham Bell, Jim Funderburk, Walter Futch, Jennie Hayman; Thomas Hilliard, Robert Saunders; 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:

Bill Sturges	Attorney
Chuck Kitchen	Durham County
Rhonda McLamb	DHHS/DSS
Talicia Neal	Hutton and Williams
Teresa Marcella	Criminal Justice Education & Training Standards
Scott Perry	Criminal Justice Education & Training Standards
Trip Van Noppen	Southern Environmental Law Center
Mike Carpenter	NCHSA
Paul Weems	NCHSA
Margaret Eagles	AG's Office
Brooks Skinner	Department of Administration
Sandra Johnson	SECC
Lisa Martin	NC Home Builders Association
Paul Meyer	NC Association of County Comm.
Jeff Manning	DENR/DWQ
Vandella Bradley	DHHS/DSS
Emily Lee	Department of Transportation
Denise Stanford	Dental Board
Rick Zechini	NC Association of Realtors
Dedra Alston	DENR
Darron England	DWQ
Anita Watkins	League of Municipalities

APPROVAL OF MINUTES

RULES REVIEW COMMISSION

The meeting was called to order at 10:05 a.m. with Commissioner Hayman presiding. Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the July 17, 2003, meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

- 1 NCAC 30H .0102; .0201-.0205; .0301; .0303; .0305; .0404; .0701; .0801; .1001: Department of Administration – There was no response from the agency. The Commission took no action on these rules.
- 1 NCAC 35 .0101: Department of Administration – .0101; .0103; .0201-.0205; .0301; .0302; .0304; .0305; .0306; .0308; .0309 – Commissioner Twiddy made a motion to accept staff recommendation and approve rules, seconded by Commissioner Tart upon vote motion failed. Commissioner Futch made a motion to object to the rules based on ambiguity upon vote motion passed with Commissioner Funderburk opposed. The Commission objected to the submitted rules based on numerous typographical or other errors scattered throughout the rules of which three examples were cited at the meeting.
- 2 NCAC 52B .0204: Department of Agriculture – The Commission took no action on this rule at the request of the agency.
- 10A 71U .0206; .0213: DHHS/Social Services – The Commission approved the rewritten rules submitted by the agency.
- 12 NCAC 9C .0401: Criminal Justice Education and Training Standards Commission – The Commission approved the rewritten rule submitted by the agency.
- 12 NCAC 9E .0103: Criminal Justice Education and Training Standards Commission – The Commission approved the rewritten rule submitted by the agency.
- 15A NCAC 10C .0211: Wildlife Resources Commission – The Commission approved the rewritten rule submitted by the agency.
- 21 NCAC 29 .0102; .0202; .0203; .0204; .0504: Locksmith Licensing Board – The commission approved the rewritten rules submitted by the agency.
- 21 NCAC 29 .0401: Locksmith Licensing Board – The Commission objected to rule .0401 due to ambiguity. It is not clear what supporting documents are required by the Board.
- 21 NCAC 29 .0402: Locksmith Licensing Board – The Commission objected to rule .0402 due to ambiguity. In (a), it is not clear what type criminal history report will satisfy the Board as to its completeness. In (b), it is not clear what information the Board is seeking on the applications. Throughout (d), each place you use “including but not limited to,” it is not clear what other offenses are included in the categories. There were also technical changes requested that have not been made. Please make them.
- 21 NCAC 29 .0502: Locksmith Licensing Board – The Commission objected to rule .0502 due to lack of authority and ambiguity. In (c), there is no authority cited for requiring a warranty. That does not appear to be an ethical requirement. In (f)(5), it is not clear what is meant by “implied” direct solicitation in violation of a non-compete agreement.
- 21 NCAC 29 .0503: Locksmith Licensing Board – The Commission objected to rule .0503 due to ambiguity. In (h), it is not clear what would constitute “secure storage.” There were also technical changes requested that have not been made. Please make them.

LOG OF FILINGS

Chairman Funderburk presided over the review of the log and all rules were approved unanimously with the following exceptions:

- 15A NCAC 2B .0243: Environmental Management Commission – The Commission objected to the rule based on ambiguity and lack of authority. In (2)(k), page 3 line 13, the rule specifies that “hard engineering” shall not be considered restoration or enhancement “in most cases.” The rule does not specify any standards for determining when or under what conditions an exception might be made and that hard engineering could be restoration or enhancement, and thus the standards are not clear. If this is an exception or waiver, then G.S. 150B-19(6) requires that there be specific guidelines for determining whether to grant the exception. There is no authority to have a waiver provision without specific guidelines for granting it. The rule is also unclear as to what constitutes “enhancement.” In (3)(a), page 4 line 3, the rule specifies that the rule does not apply to certain uses that are “existing and ongoing.” The next two paragraphs, (i) and (ii), define what constitute “existing” uses. However there does not appear to be any definition of what constitutes an “ongoing” use and thus the term is unclear. In (3)(a)(ii)(E), page 5 lines 7 through 14, the rule states that certain projects meeting the criteria in (E) are “considered as existing” and opens the possibility that these projects are exempt from the application of the rule. It then further lists (I) – (IV) under (E) that presumably further define or otherwise explain (E). However, those are all preceded by the word “or” and it is unclear precisely how those four sub-items operate in the context. They appear to be definitions of terms used within (E), but that is not clear. In addition there are further technical change requests by the staff and Commissioner Futch. These need to be completed and the rule presented to the Commission to determine that all problems with the rules have been satisfied.
- 15A NCAC 2B .0243: Environmental Management Commission – The Commission objected to the rule based on ambiguity. The rule refers in item (9) to buffer restoration or “enhancement.” The term “enhancement” is undefined. In addition there are further technical change requests by the staff and Commissioner Futch. These need to be completed and the rule presented to the Commission to determine that all problems with the rules have been satisfied.
- 15A NCAC 2H .0126: Environmental Management Commission – The Commission voted to extend the period of review and inquire whether the EMC would wish to restore the language concerning “existing development” and “vested rights” as it was originally proposed and published in the NCR. If it did take this action, the RRC would then consider whether to act on that version of the rule at its next meeting.
- 15A NCAC 2H .1014: Environmental Management Commission – The Commission voted to extend the period of review and inquire whether the EMC would wish to restore the language concerning “existing development” and “vested rights” as it was originally

proposed and published in the NCR. If it did take this action, the RRC would then consider whether to act on that version of the rule at its next meeting.

15A NCAC 2I .0601: Environmental Management Commission – The Commission objected to the rule based on ambiguity and lack of authority. In one respect this rule is unnecessary since the cited statute already specifies what an agency shall do when an aggrieved person requests a declaratory ruling. It states that they shall, not may, but “shall,” issue it “except when the agency finds issuance of a ruling undesirable.” And it goes on to state that the agency shall, not may, prescribe the circumstances in which rulings shall or shall not be issued. So this rule is already going over the same grounds as the statute. And since it appears that it is altering the requirements of the statute by making the issuance of a ruling discretionary, they exceed their authority and the rule is objectionable on that basis as well.

15A NCAC 2I .0602: Environmental Management Commission –The Commission objected to the rule based on ambiguity and lack of authority. In (d), page 2 lines 9 – 11, it is unclear what is meant or required by “contain a statement of agreement with the given state of facts agreed upon by the parties.” To the extent that the rule requires both the proponents and opponents of a declaratory ruling to agree upon a set of facts it seems unlikely that would happen if simply disagreeing would keep the ruling from being issued. It is difficult to conceive that is what is meant by the rule. If that is what is meant, then it seems that the agency has exceeded its authority in specifying the contents of a request for declaratory ruling. It should not require “agreed” facts to issue a ruling. A ruling should be issued on stated facts. If the agency wishes to sanction the applicant, all they would have to do is show that the applicant either deviated from the facts as presented in the ruling or that material facts were not presented in the request for a ruling.

15A NCAC 2I .0603: Environmental Management Commission – The Commission objected to the rule based on ambiguity and lack of authority. For the same reasons as cited in the previous rule, staff recommends objection to the last sentence of (c), page 1 lines 15 and 16, and (e)(1), line 22. In addition this rule makes clear in (f)(3) that a ruling is given on certain stated facts. Presumably if those facts do not exist later, then the ruling does not apply. Also in (e)(6) it is unclear what constitutes “other good cause.”

19A NCAC 2E .1204: Department of Transportation – The Commission objected to the rule due to ambiguity. Item (3) in paragraph (b) is not clear. Apparently the second sentence is meant to define what is meant by “reasonable notice” but it is not clear what is meant by “outside of right of way for areas with adjacent non-public vehicular access.”

Commissioner Futch did not vote on the following Dental Board rules.

21 NCAC 16Q .0101: Board of Dental Examiners – The Commission objected to the rule based on ambiguity. It is unclear in (9) and (18) why the language used to define “conscious sedation” is repeated in those two items immediately after the reference to conscious sedation. The precise relationship of the level of sedation between the two items is also unclear.

21 NCAC 16Q .0201: Board of Dental Examiners – The Commission objected to the rule based on ambiguity. In (a), line 6, it is unclear whether the reference to employing a CRNA also includes supervising the person. In line 10 it is unclear what is meant by the reference to a dentist being “subject to review.” In (e), line 4 it is unclear whether and under what conditions an applicant shall be inspected, reviewed, or evaluated.

21 NCAC 16Q .0301: Board of Dental Examiners –The Commission objected to rule .0301 based on ambiguity. In (a), line 9, it is unclear whether the reference to employing a CRNA also includes supervising the person. In (b), especially items (4) and (5), it is unclear that the criteria cited as grounds for obtaining a permit must also be complied with in order to keep the permit, i.e., that it must be complied with on a continuing basis. In (d), lines 25 and 26, it is unclear that a dentist grandfathered in must meet all the requirements of the rule and not just the cited ones. In (e), lines 29 and 30, it is unclear whether and under what conditions an applicant shall be inspected, reviewed, or evaluated.

21 NCAC 16Q .0302: Board of Dental Examiners – The Commission objected to the rule based on ambiguity. In (a) it is unclear whether the rule applies to a dentist who employs or supervises a CRNA. That language was included in rules .0201 and .0401, but not in this one. In (b), line 26, it is unclear whether and under what conditions an applicant shall be inspected, reviewed, or evaluated. Also in (b), lines 26 – 28, it is unclear who, whether the dentist, or another person who would actually administer the sedation, or both must be the one to “demonstrate.” It is also unclear whether this demonstration must be on a live person or patient. In (b)(4) it is unclear how one demonstrates the state of “sterilization” or whether some particular aspect, such as sterile technique or equipment, or sterilization methods or equipment, is being referred to.

21 NCAC 16Q .0303: Board of Dental Examiners –The Commission objected to the rule based on ambiguity. The scope of this rule is unclear. In (a), it is unclear whether and under what conditions an applicant shall be inspected, reviewed, or evaluated before being granted temporary approval to administer parenteral conscious sedation.

21 NCAC 16Q .0401: Board of Dental Examiners – The Commission objected to rule .0401 based on ambiguity. In (a), line 9, it is unclear whether the reference to employing a CRNA also includes supervising the person. At line 20 it is unclear that a person who holds an enteral conscious sedation permit may administer deep sedation or general anesthesia if the person holds a permit for such sedation. In (b)(3) it is unclear whether and under what conditions an applicant shall be inspected, reviewed, or evaluated. Also in (b)(4), line 9, change “will” to “shall.” In (c)(2), line 5, delete “minor.”

COMMISSION PROCEDURES AND OTHER BUSINESS

The meeting adjourned at 12:50 p.m.

The next meeting of the Commission is Thursday, September 18, 2003 at 10:00 a.m.

RULES REVIEW COMMISSION

Respectfully submitted,
Lisa Johnson

RULES REVIEW COMMISSION
Commission Review/Administrative Rules

Log of Filings (Log #200)
July 22, 2003 through August 20, 2003

COMMISSION FOR HEALTH SERVICES

Reportable Diseases and Conditions	10A NCAC 41A .0101	Amend
Control Measures Smallpox Vaccinia Disease	10A NCAC 41A .0208	Adopt
Control Measures SARS	10A NCAC 41A .0213	Adopt
Screening Requirements	10A NCAC 43F .1203	Amend

DEPARTMENT OF INSURANCE/CODE OFFICIALS QUALIFICATION BOARD

Nature of Standard Certificate	11 NCAC 08 .0702	Amend
Required Qualifications Types and Levels	11 NCAC 08 .0706	Amend

CRIMINAL JUSTICE EDUCATION & TRAINING STANDARDS COMMISSION

Scope and Applicability of Subchapter	12 NCAC 09G .0101	Amend
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DENR/COASTAL RESOURCES COMMISSION

Purpose	15A NCAC 07H .1401	Amend
Approval Procedures	15A NCAC 07H .1402	Amend
General Conditions	15A NCAC 07H .1404	Amend
Specific Conditions	15A NCAC 07H .1405	Amend
Variance Petitions	15A NCAC 07J .0701	Amend
Staff Review of Variance Petitions	15A NCAC 07J .0702	Amend
Procedures for Deciding Variance Petitions	15A NCAC 07J .0703	Amend

NC DEPARTMENT OF THE SECRETARY OF STATE

Limited Offerings Pursuant to G.S. 78A-17(9)	18 NCAC 06 .1205	Amend
Transactions Exempt Under Rule .1206	18 NCAC 06 .1208	Amend
Notice Filing Procedures for Rule 506 Offerings	18 NCAC 06 .1211	Amend
Application for Registration of Dealers	18 NCAC 06 .1401	Amend
Application for Registration of Salesmen	18 NCAC 06 .1402	Amend
Application for Limited Registration of Canadian Securities	18 NCAC 06 .1417	Amend

NC MEDICAL BOARD

Criminal Background Check	21 NCAC 32B .0104	Adopt
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OFFICE OF ADMINISTRATIVE HEARINGS

Return Copy	26 NCAC 02C .0104	Amend
Availability of The North Carolina Register	26 NCAC 02C .0303	Amend
Publication of Notice of Text	26 NCAC 02C .0306	Amend
Agency Final Copy of Permanent Rules	26 NCAC 02C .0410	Amend

AGENDA
RULES REVIEW COMMISSION
September 18, 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)

RULES REVIEW COMMISSION

- D. Board of Elections – 8 NCAC Chapter 1-12 (DeLuca)
- E. Environmental Management Commission – 15A NCAC 2B .0243 (DeLuca)
- F. Environmental Management Commission – 15A NCAC 2H .0126; .1014 (DeLuca)
- G. Environmental Management Commission – 15A NCAC 2I .0601; .0602; .0603 (DeLuca)
- H. Department of Transportation – 19A NCAC 2E .1204 (Bryan)
- I. Dental Board Examiners – 21 NCAC 16Q .0101; .0201; .0301; .0302; .0303; .0401 (DeLuca)
- J. Locksmith Licensing Board - 21 NCAC 29 .0401; .0402; .0502; .0503 (Bryan)
 - Cultural Resources Commission – 7 NCAC 4S .0104 (DeLuca)
 - Board of Pharmacy – 21 NCAC 46 .1812 (DeLuca)
 - Board of Pharmacy – 21 NCAC 46 .2502 (DeLuca)
- IV. Review of rules (Log Report #201)
- V. Commission Business
- VI. Next meeting: October 16, 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	
Oncology Svcs Corp & Mountainside Holdings LLC v. DHHS, Div of Fac Svcs, Cert of Need Section & Scotland Mem Hospital, Inc.	02 DHR 1983	Wade	08/13/03	18:06 NCR 439
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	
Krystal Hyatt v. Broughton Hospital	03 DHR 0316	Chess	07/07/03	
Cahterine Williams v. DHHS	03 DHR 0320	Mann	07/17/03	
Rachel Peek, Yancey Co. DSS v. DHHS	03 DHR 0330	Chess	07/24/03	
Lisa Mendez v. Health Care Personnel Registry	03 DHR 0351	Gary	06/27/03	
Yolanda Covington v. RHA Health Svcs, DHS	03 DHR 0360	Lassiter	07/17/03	
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	
Edmund Bond Small v. DHHS, Walter B Jones, ADATC	03 DHR 0445	Lassiter	07/21/03	
Gerry Dwayne Cashwell v. DHHS	03 DHR 0469	Gray	07/28/03	

CONTESTED CASE DECISIONS

Andrea Ford v DHHS, Div. of Facility Services	03 DHR 0609	Morrison	06/04/03	
Wallace C Levi v. Div. of Medical Assistance	03 DHR 0633	Wade	08/12/03	
Bestway Food's, Osama M Dari v. DOH WIC, Cory Menees, Unit Super.	03 DHR 0662	Morrison	07/28/03	
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	
Patti L Cain Small Fries by Patti v. Nutrition Services	03 DHR 0768	Morrison	07/31/03	
Brian Keith Heilig v. DHHS, Div. of Medical Assistance	03 DHR 0779	Mann	07/17/03	
Mrs Soon Ja An v. DHHS	03 DHR 0780	Morrison	07/28/03	
Kimberly Roberts v. DHHS< Div. of Facility Services	03 DHR 0927	Gray	08/15/03	
Michael Hillis v. Department of Revenue	03 DHR 0935	Conner	07/28/03	
Alvin Paulk v. DHHS, Div. of Child Development	03 DHR 0971	Conner	07/25/03	

JUSTICE

Alarm Systems Licensing Board

Gregory L Swicegood, Jr. v. Alarm System Licensing Board	03 DOJ 0503	Morrison	05/16/03	
Alan Bradford Foehner v. Alarm System Licensing Board	03 DOJ 0709	Morrison	08/05/03	

Private Protective Services Board

Anthony Lamont Henderson v. Private Protective Services Board	03 DOJ 0502	Morrison	07/08/03	
John Lee Powell v. Private Protective Services Board	03 DOJ 0694	Morrison	07/09/03	
Howard Leon Fisher v. Private Protective Services Board	03 DOJ 0898	Morrison	08/14/03	18:06 NCR 444
William Houston King Jr v. Private Protective Services Board	03 DOJ 0899	Morrison	07/11/03	
Derrick Lee McDonald v. Private Protective Services Board	03 DOJ 0946	Morrison	08/05/03	

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	
Fred Hines, Jr v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 0428	Conner	07/29/03	
Harvey Levale Cook v. Criminal Justice Educ & Trng Stds. Comm.	03 DOJ 0515	Lassiter	07/09/03	
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	
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DEPARTMENT OF PUBLIC INSTRUCTION

Robert Andrew Bartlett Sr. v. Dept. of Public Instruction	00 EDC 1306	Gray	08/04/03	
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 ^f	Chess	05/14/03	
Rosa & Eddie Brame v. DENR	02 EHR 0319	Wade	06/27/03	
Trafalgar Properties LLC v. County of Durham	03 EHR 0630	Wade	07/18/03	
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 ^l	Chess	05/14/03	
Former Center Mart, Joe Fred Ledbetter v. DENR, Div. of Waste Mgmt.	02 EHR 1302	Conner	05/29/03	
Murphy's All Land Dev Inc d/b/a Emerald Cove Town homes at Wells Lake v. DENR	02 EHR 1735	Conner	07/22/03	
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	
Robert Calvin Wyatt Jr, Calvin Wyatt v. DENR	03 EHR 0535	Wade	07/31/03	
Curtis Carney v. Pitt Co Health Dept., Env. Health Div.	03 EHR 0766	Conner	07/25/03	
Danny L Ottaway v. DENR, Div. of Air Quality	03 EHR 0948	Gray	08/15/03	
Robert L Shepard v. Alamance Co. Health Board	03 EHR 0949	Gray	07/30/03	
Redditt Alexander, Ida L Alexander v. Co. of Durham, Eng. Dept.	03 EHR 1074	Morrison	07/31/03	

HUMAN RELATIONS FAIR HOUSING

Sara E. Parker v. Human Relations Fair Housing	02 HRC 0621	Gray	05/16/03	
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TEACHERS' & STATE EMPLOYEES COMP. MAJOR MED PLAN

Alma Louise Triplett v. Teachers' & St Emp Comp Maj Med Plan	02 INS 0268	Gray	07/15/03	18:04 NCR 338
Shawna J Talley v. Teachers' & St. Emp. Comp. Maj. Med. Plan	02 INS 1257	Conner	08/06/03	18:05 NCR 405

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
Edward Allen Hughes, Jr v. Department of Correction	01 OSP 1011	Gray	08/01/03	
Wanda Gore v. Department of Correction	01 OSP 1286	Gray	05/16/03	
James F Pridgen Jr v. NC A&T State University	01 OSP 2182	Gray	08/08/03	

CONTESTED CASE DECISIONS

Carolyn Davis v. Durham MH/DD/SA Area Authority d/b/a The Durham Ctr	02 OSP 1001	Lassiter	08/06/03	18:05 NCR 410
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	
Gregory M Lewis v. DMV, Enforcement Section	02 OSP 1624 ³	Gray	07/23/03	
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	
Gregory M Lewis v. DMV, Enforcement Section	02 OSP 1695 ³	Gray	07/23/03	
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Monica Lynn Johnson v. NC School of the Arts	03 OSP 0180	Conner	07/29/03	
Jeffrey W Byrd v. Fayetteville State University	03 OSP 0204	Chess	06/04/03	
Lisa C Banks v. Craven Co Child Support Enforcement Office	03 OSP 0268	Conner	07/31/03	
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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	
Larry S Height v. NC Utilities Commission	03 OSP 0507	Conner	07/17/03	
Gary Melvin Moore v. Western Piedmont Community College	03 OSP 0548	Wade	07/29/03	
Joan Milligan, Patricia Flanigan, Pauletta Highsmith, Edna Cummings v. Fayetteville State University	03 OSP 0562	Conner	06/06/03	
Lisa D Barrett v. East Carolina University	03 OSP 0597	Mann	08/05/03	
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William Harold Maready Jr v. DOC, Pasquotank Correctional Inst.	03 OSP 0644	Conner	08/01/03	
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	
Priscilla Sledge v. Department of Correction	03 OSP 0675	Conner	08/13/03	
Jerry B Davis v. Dorothea Dix Hospital/DHHS	03 OSP 0678	Gray	07/14/03	
Cathy S Carson v. NC School for the Deaf	03 OSP 0715	Wade	07/22/03	
Edwin E Kirton III v. DOC, Warren Correctional	03 OSP 0769	Conner	07/17/03	
David L McMurray Jr. v. Highway Patrol	03 OSP 0801	Lassiter	06/19/03	
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UNIVERSITY OF NORTH CAROLINA HOSPITALS

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- 2 Combined Cases
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
02 DHR 1983

ONCOLOGY SERVICES CORPORATION and)
MOUNTAINSIDE HOLDINGS LLC,)
Petitioners,)
v.)
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES,)
DIVISION OF FACILITY SERVICES, CERTIFICATE OF)
NEED SECTION,)
Respondent,)
and)
SCOTLAND MEMORIAL HOSPITAL, INC.,)
Respondent-Intervenor.)

**FINAL DECISION
ORDER OF DISMISSAL**

THIS MATTER was heard on July 16, 2003 by the undersigned Administrative Law Judge on the Motion to Dismiss filed on June 27, 2003 by Respondent-Intervenor Scotland Memorial Hospital, Inc. ("Scotland Memorial"), which was neither supported nor opposed by Respondent North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section ("CON Section"), and the Motion for Summary Disposition filed on June 27, 2003 by Petitioners Oncology Services Corporation and Mountainside Holdings LLC. The undersigned having considered Petitioners' Petition for Contested Case Hearing, Scotland Memorial's Motion to Dismiss, Petitioners' Response filed on July 8, 2003, Petitioners' Motion for Summary Disposition, Scotland Memorial's Response filed July 8, 2003, and all affidavits, memoranda and supporting documents filed by the parties as well as oral argument by all parties, I hereby affirm the CON Section's October 14, 2002 no review determination. Taking the facts in the light most favorable to the Petitioners, this Court lacks subject matter jurisdiction and grants Scotland Memorial's Motion to Dismiss. Accordingly, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. In this appeal, Petitioners challenge a decision by the CON Section that Scotland Memorial's proposed acquisition of a linear accelerator and renovations to the Hospital to house the linear accelerator and expand the medical oncology program were not subject to certificate of need review and did not require a certificate of need because the cost of acquiring and making operational the linear accelerator would be less than \$750,000 and the cost of the entire project would be less than \$2,000,000.
2. Scotland Memorial is located at 500 Lauchwood Drive, Laurinburg, Scotland County, North Carolina.
3. Petitioners allege in their petition that Oncology Services Corporation is the "owner and licensed operator of a radiation oncology facility located at 503 Lauchwood Drive, Laurinburg, North Carolina, which has previously provided and shall in the future provide radiation oncology services."
4. Petitioners further allege that Mountainside Holdings LLC is the current owner of the building and real estate located at 503 Lauchwood Drive and is willing to lease the building to Oncology Services Corporation for a radiation oncology facility.
5. According to the Affidavit of Marcy Colkitt, co-counsel for Petitioners, Oncology Services Corporation acquired the land at 503 Lauchwood Drive and a linear accelerator in 1992.
6. At the time Oncology Services Corporation acquired the linear accelerator, it was not required to obtain a certificate of need, and no certificate of need was ever issued for an oncology treatment center at 503 Lauchwood Drive.
7. Oncology Services Corporation constructed a building in which to offer radiation oncology services, and Sandhills Radiation Cancer Treatment Center opened on July 1, 1993.
8. The original license for the linear accelerator was issued in the name Sandhills Radiation Cancer Treatment Center.

9. In February 1994, Oncology Services Corporation transferred the real property at 503 Lauchwood Drive to George Washington Real Estate Corporation. Also in February 1994, George Washington Real Estate Corporation leased the real property to Sandhills Radiation Cancer Treatment Center, Inc. ("Sandhills") for seven years.
10. Sandhills operated a radiation oncology treatment facility from February 1994 through March 1995, when it subleased the building and equipment to Laurinburg Cancer Center, P.A.
11. Laurinburg Cancer Center, P.A., owned by John Gyves, M.D., operated an oncology treatment center from March 1995 through February 2000, pursuant to the sublease.
12. Laurinburg Cancer Center, P.A., stopped providing radiation oncology treatment services in December 1999.
13. On January 6, 2000, Dr. Gyves' attorney corresponded with the CON Section regarding Dr. Gyves' intention to close the center and was advised that if the center closed, the center would no longer be considered an oncology treatment center under the CON Act.
14. In January 2000, Dr. Gyves' wife advised Marcy L. Colkitt that Dr. Gyves did not intend to renew the sublease.
15. Dr. Gyves terminated the sublease with Sandhills and closed the center on February 29, 2000. He ceased offering radiation oncology services in December 1999.
16. George Washington became a wholly owned subsidiary of EquiMed, Inc. in 1997. On February 4, 2000, an involuntary bankruptcy petition was filed with regard to EquiMed. By virtue of its status as a subsidiary of EquiMed, George Washington became a party to the involuntary bankruptcy proceeding.
17. Ms. Colkitt on behalf of Oncology Services Corporation wrote to the EquiMed bankruptcy trustee in April 2000 to advise him that the equipment and operations at 503 Lauchwood Drive were not owned or associated in any way with EquiMed and asked to make arrangements to lease the building to generate money for the EquiMed estate.
18. No services have been provided at 503 Lauchwood Drive since December 1999, and the residents of Scotland County have had to travel out of the county for radiation oncology services since that time.
19. In April 2000, Scotland Memorial began offering medical oncology services, including chemotherapy, to residents of Scotland County after the center located at 503 Lauchwood Drive closed leaving no provider of oncology services in Scotland County.
20. On November 1, 2001, the Equimed bankruptcy court approved the sale of the real property at 503 Lauchwood Drive by George Washington Real Estate Corporation to Mountainside Holdings LLC, and a deed was executed on December 28, 2001.
21. Still, no services were provided at the 503 Lauchwood Drive location.
22. According to Ms. Colkitt's affidavit, mold problems from a water leak prevented Petitioners from reopening in the first half of 2002.
23. There is no written lease between Oncology Services Corporation and Mountainside Holdings LLC.
24. In August 2002, after much due diligence and because no radiation oncology services were being provided in Scotland County, Scotland Memorial requested confirmation from the CON Section that its proposed acquisition of a linear accelerator and renovations to the Hospital to house the linear accelerator and expand the medical oncology program did not require certificate of need review.
25. On September 20, 2002, the CON Section wrote to Ms. Colkitt stating that it had recently received information from the Medical Facilities Planning Section that her client intended to begin providing radiation oncology treatment services at 503 Lauchwood Drive in the near future. The CON Section went on to state that since radiation oncology treatment services were terminated as of December 10, 1999 and the center was closed as of February 29, 2000, no facility existed at the 503 Lauchwood Drive location that met the definition of oncology treatment center in the CON Act. The letter went on to request information about the ownership of the building and equipment, the value of the equipment, and the cost of making the equipment operational. According to the letter, if these costs were less than \$250,000, the center would not qualify as an oncology treatment center or health service facility under the CON Act and no certificate of need would be required to open. According to the letter, if the costs were greater than \$250,000, the facility would need a certificate of need to open.

26. Oncology Services Corporation and Mountainside Holdings LLC have provided information to the CON Section in response to this request in November 2002, and the CON Section requested additional information in February 2003 regarding the costs related to opening a center. No response has been provided to the February 2003 request.
27. On October 14, 2002, after Scotland Memorial responded to multiple requests for additional information regarding its no review request, the CON Section issued a determination that Scotland Memorial's proposed acquisition of a linear accelerator and renovations to the Hospital to house the linear accelerator and expand the medical oncology program were not subject to certificate of need review and did not require a certificate of need.
28. Based on the quotes it obtained and the no review determination, Scotland Memorial proceeded to acquire the linear accelerator, is in the process of making the necessary renovations to the Hospital to offer these services, and believes it will soon complete the project under the applicable CON thresholds.
29. At the time Petitioners filed their petition to challenge the October 14, 2002 determination by the Agency, neither Oncology Services Corporation nor Mountainside Holdings LLC had a certificate of authority to do business in North Carolina.
30. At the time Petitioners filed their petition and as of June 23, 2003, the Scotland County real estate records had no record of Mountainside Holdings LLC, and the deed executed on December 28, 2001 had not been recorded in Scotland County.
31. At the time Petitioners filed their petition, neither held a license for the linear accelerator. There was a license in effect for the linear accelerator in the name of Laurinburg Regional Oncology Center, but it authorized "receipt, set up, and initial testing only."
32. At the time Petitioners filed their petition, neither was offering any services or doing business in Laurinburg, Scotland County, and no services had been offered at 503 Lauchwood Drive since February 2000.
33. Only after Scotland Memorial filed its motion to dismiss did Mountainside Holdings LLC obtain from the North Carolina Secretary of State a Certificate of Authority for Mountainside Holdings LLC authorizing it to do business in North Carolina for first time, and did Oncology Services Corporation obtain a Certificate of Authority authorizing it to do business in North Carolina.
34. Only after Scotland Memorial filed its motion to dismiss did Oncology Services Corporation apply for a change in the license for the linear accelerator to reflect that it was the licensee. The amended license, issued on July 8, 2003, shows the name of Oncology Services Corporation d/b/a Laurinburg Regional Oncology Center. However, it authorizes "receipt, set up, and initial testing only" and does not authorize use on humans.
35. Only after Scotland Memorial filed its motion to dismiss did Mountainside Holdings LLC record the deed for the property at 503 Lauchwood Drive in Scotland County. The deed had to be re-executed, which was done on June 30, 2003, and it was recorded on July 1, 2003.

CONCLUSIONS OF LAW

1. To file a petition for contested case hearing pursuant to the Certificate of Need Act ("CON Act"), N.C. Gen. Stat. § 131E-188, a petitioner must be an "affected person" in connection with an agency decision.
2. An "affected person" is defined in N.C. Gen. Stat. § 131E-188(c) as follows:
- (c) the applicant; any person residing within the geographic area served or to be served by the applicant; any person who regularly uses health service facilities within that geographic area; health service facilities and health maintenance organizations (HMOs) located in the health service area in which the project is proposed to be located, which provide services similar to the services of the facility under review; health service facilities and HMOs which, prior to the receipt by the agency of the proposal being reviewed, have formally indicated an intention to provide similar services in the future; third party payors who reimburse health service facilities for services in the health service area in which the project is proposed to be located; and any agency which establishes rates for health service facilities or HMOs located in the health service area in which the project is proposed to be located.
- (emphasis added).
3. The CON Act defines a health service facility as follows:
- a hospital; psychiatric facility; rehabilitation facility; long term care facility; kidney disease treatment center, including freestanding hemodialysis units; intermediate care facility for the mentally retarded; home health agency

office; chemical dependency treatment facility; diagnostic center; oncology treatment center; hospice, hospice inpatient facility, hospice residential care facility; and ambulatory surgical facility.

N.C. Gen. Stat. § 131E-176(9b).

4. “The definition of “affected person” in N.C. Gen. Stat. 131E-188(c) contains two requirements applicable in this case: (1) the petitioner must be a “health service facility” and (2) must be providing services similar to the services under review or must have formally indicated an intention to provide similar services in the future. Petitioners do not satisfy these requirements.

5. Petitioners do not allege in the petition that Mountainside Holdings LLC is a health service facility, and Mountainside Holdings LLC is not a health service facility as defined in N.C. Gen. Stat. §131E-176(9b). It is merely the owner of the real estate at 503 Lauchwood Drive.

6. At the time the petition was filed and at the current time, Mountainside Holdings LLC is not licensed to possess or operate a linear accelerator, is not licensed to operate an oncology treatment center, and is not providing services similar to the services proposed by Scotland Memorial or doing business at 503 Lauchwood Drive.

7. Oncology Services Corporation contends that it was and is an oncology treatment center, but it no longer qualifies as an oncology treatment center because it has not provided oncology treatment services at 503 Lauchwood Drive since 1995 and no oncology treatment services have been provided at 503 Lauchwood Drive since December 1999.

8. Oncology Services Corporation does not meet the following definition of an oncology treatment center: “a facility, program, or provider, other than an existing health service facility that provides services for diagnosis, evaluation, or treatment of cancer and its aftereffects or secondary results and for which the total cost of all the medical equipment utilized by the center, exceeds two hundred fifty thousand dollars (250,000).” N.C. Gen. Stat. §131E-176(18a). Therefore, it is not a health service facility.

9. Oncology Services Corporation also is not providing services similar to the services proposed by Scotland Memorial.

10. The EquiMed bankruptcy did not prevent reopening the center at 503 Lauchwood Drive after November 1, 2001.

11. Oncology Services Corporation is not licensed to operate a linear accelerator or an oncology treatment center.

12. Although Oncology Services Corporation has advised the Division of Facility Services that it wants to operate an oncology treatment center at 503 Lauchwood Drive, this does not qualify Oncology Services Corporation as a health service facility at this time.

13. The applicable portions of the definition of affected person in N.C. Gen. Stat. § 131E-188(c) contemplate that only existing health service facilities with competing services or with competing services under development have a right to challenge a competitor’s project. Since it is not now a health service facility and is not currently offering radiation oncology treatment services in Scotland County, it is irrelevant that Oncology Services Corporation has sought permission from the CON Section to offer such services without a certificate of need in the future.

14. Neither Oncology Services Corporation nor Mountainside Holdings is a North Carolina corporation and neither currently has a place of business in Laurinburg or Scotland County. Therefore, neither resides within the geographic area served by Scotland Memorial.

15. Oncology Services Corporation is not an affected person pursuant to N.C. Gen. Stat. §131E-188.

16. Mountainside Holdings LLC is not an affected person pursuant to N.C. Gen. Stat. §131E-188.

17. To request a contested case hearing under the Administrative Procedure Act, a petitioner must qualify as a “person aggrieved.” N.C. Gen. Stat. § 150B-2(6) defines “person aggrieved” as “any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.”

18. The North Carolina Supreme Court has held that “person aggrieved” means “adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.” See *In re Wheeler*, 85 N.C. App. 150, 153, 354 S.E.2d 374, 376 (1987) quoting *In re Halifax Paper Company, Inc.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963).

19. Petitioners do not qualify as “persons aggrieved” because they are not currently and were not at the time of filing their petition health service facilities, and they are not currently and were not at the time of filing their petition doing business in Laurinburg, Scotland County, North Carolina. Therefore, they cannot be “affected substantially” in their “person, property or employment” by the agency decision that Scotland Memorial does not need a certificate of need to acquire a linear accelerator and

CONTESTED CASE DECISIONS

offer radiation oncology treatment services. Petitioners currently have no cognizable legal right to operate an oncology treatment center or offer radiation oncology treatment services.

20. Oncology Services Corporation is not a person aggrieved pursuant to N.C. Gen. Stat. §150B-2.

21. Mountainside Holdings LLC is not a person aggrieved pursuant to N.C. Gen. Stat. §150B-2.

22. Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *See Bryant v. Hogarth*, 127 N.C. App. 79, 83, 488 S.E.2d 269, 271, *cert. denied*, 347 N.C. 396, 494 S.E.2d 406 (1997). The Office of Administrative Hearings (“OAH”) does not have subject matter jurisdiction in this case because petitioners are not “affected persons” under the Certificate of Need Act or “persons aggrieved” under the Administrative Procedure Act.

23. Because OAH does not have subject matter jurisdiction, the case must be dismissed.

24. Pursuant to N.C. Gen. Stat. §150B-36(c), a determination by an Administrative Law Judge that OAH lacks jurisdiction is a final agency decision.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Scotland Memorial’s Motion to Dismiss is granted, and this contested case proceeding is dismissed for lack of subject matter jurisdiction. Each party shall pay its own costs. This is the final decision under the authority of N.C. Gen. Stat. §150B-36(c).

NOTICE

Pursuant to N.C. Gen. Stat. §150B-45, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Decision and Order. Pursuant to N.C. Gen. Stat. §150B-47, OAH is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to OAH at the time the appeal is filed to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 13th day of August, 2003.

Beryl E. Wade
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 DOJ 0898

HOWARD LEON FISHER,
Petitioner,
v.
NORTH CAROLINA PRIVATE PROTECTIVE SERVICES
BOARD,
Respondent.

PROPOSAL FOR DECISION

This contested case was heard before Senior Administrative Law Judge Fred G. Morrison Jr. on July 29, 2003, in Raleigh, North Carolina.

APPEARANCES

Petitioner appeared pro se.

Respondent Board was represented by attorney Benjamin R. Kuhn and third-year law student David J. Neill. Mr. Neill conducted the hearing on behalf of Respondent in accordance with the rules governing practical training of law students under N.C. Admin. Code tit. 27, r. 1C.0201 et seq. enacted pursuant to the authority granted by N.C. Gen. Stat. § 84-23.

WITNESSES

Petitioner - Petitioner testified on his own behalf.
Respondent – Investigator Lisa Britton testified for Respondent Board.

ISSUE

Whether grounds exist for Respondent Board to deny Petitioner a Private Investigator License for lack of good moral character?

BURDEN OF PROOF

Respondent Board has the burden of showing by a preponderance of the evidence that Petitioner lacks good moral character.

STATUTES AND RULES APPLICABLE TO THE CONTESTED CASE

Official notice is taken of the following statutes and rule applicable to this case:

- 18 U.S.C. § 4;
N.C. Gen. Stat. § 74C-1;
N.C. Gen. Stat. § 74C-5;
N.C. Gen. Stat. § 74C-8;
N.C. Admin. Code tit. 12, r. 7D .0703.

FINDINGS OF FACT

- 1. Respondent Board is established pursuant to N.C. Gen. Stat. § 74C-1 et seq., and is charged with the duty of licensing and registering individuals engaged in the private protective services profession, including private investigators.
2. On or about August 29, 2002, Petitioner applied to Respondent Board for a Private Investigator License.
3. Petitioner was born and raised in Vance County, North Carolina. He is forty three years of age and is a high school graduate

who has completed many hours of justice courses.

4. Petitioner was a sheriff's deputy with the Durham County Sheriff's Department from 1980 to 1982, at which time he secured employment as a deputy with the Vance County Sheriff's Department and worked there until 1994.
5. During the tenure of Petitioner's employment with the Vance County Sheriff's Department, he rose to the rank of Lieutenant, but later, following an election, was demoted to Detective Sergeant. On August 22, 1994, Petitioner was involuntarily terminated from his employment with the Vance County Sheriff's Department. He has not held a law enforcement position since 1994 and has been encouraged by friends to get back into the field as a private investigator.
6. Petitioner was terminated as a consequence of accusations lodged by the U.S. Attorney's Office regarding the alleged actions of Petitioner while serving in an official capacity as a sheriff's deputy for the Vance County Sheriff's Department. Petitioner submitted a letter from his attorney, Mr. George B. Currin, tending to show that these accusations included:
 - a. Petitioner had revealed "'sensitive,' 'confidential' or 'secret' information" regarding an undercover agent to the brother of an alleged drug dealer, which Petitioner through his attorney denied and explained.
 - b. Petitioner had provided to the same individual confidential information regarding state or federal indictments being considered by a seated grand jury, but that a member of the drug conspiracy served on the grand jury.
7. On January 22, 1996, as part of a plea bargain arrangement, Petitioner pleaded guilty in the U.S. District Court of the Eastern District of North Carolina to the federal charge of Misprision of Felony.
8. Petitioner was sentenced to six months custody with the U.S. Bureau of Prisons to be followed by one year supervised release as part of his plea agreement.
9. The United States Probation Office for the Eastern District of North Carolina has certified that Petitioner satisfied the terms of his incarceration and supervised release as of August 25, 1997.
10. On cross examination, Petitioner testified that he had been convicted of a Worthless Check misdemeanor violation concerning an engagement ring. An order for restitution in the amount of \$1,294.00 was issued April 26, 1994, by the Vance County District Court. This conviction occurred while Petitioner was still a sheriff's deputy with the Vance County Sheriff's Department.
11. Petitioner testified in his defense that he accepted a plea bargain arrangement only to spare his parents the financial strain of a long, drawn-out court process. He also explained that the check charge did not involve an arrest and that he made restitution. Further, Petitioner testified that letters of recommendation submitted with his application package were evidence of his good moral character. On cross examination, Petitioner acknowledged that these reference letters did not include a recommendation from the Sheriff of Vance County, but that his references did include retired police officers. Petitioner loved working in the field of law enforcement and would like to reenter it in the area of private investigations.
12. Respondent Board denied Petitioner's license on the grounds that he lacked good moral character. Respondent's investigator found that Petitioner's references spoke very highly of him and recommended that his application be approved. She also got an outstanding recommendation from Petitioner's current employer at an automobile dealership.

CONCLUSIONS OF LAW

Pursuant to N.C. Gen. Stat. § 74C-8(d)(2), all applicants for a Private Investigator License shall be of good moral character and temperate habits. Prima facie evidence of a lack of good moral character includes the conviction by any local, State, or federal court of any offense involving moral turpitude. The North Carolina Supreme Court has defined moral turpitude as follows: "Generally speaking . . . moral turpitude involves an act of inherent baseness in the private, social, or public duties which one owes to his fellowmen or to society, or to his country, her institutions and her government." State v. Mann, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986) (quoting Kurtz v. Farrington, 132 A. 540, 541 (Conn. 1926)).

Pursuant to N.C. Gen. Stat. § 74C-5(6), Respondent Board has the power to deny licenses to any applicant who fails to satisfy any of the requirements of Chapter 74C – including the provisions of § 74C-8(d)(2) for lack of good moral character.

Misprision of Felony is a federal crime. "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States shall be fined under this title or imprisoned not more than three years, or both." 18 U.S.C. § 4 (2003). Petitioner's conviction for Misprision of Felony, arising from Petitioner's acts while serving in his official capacity as a sheriff's deputy, is evidence reflecting negatively upon the moral character of Petitioner.

CONTESTED CASE DECISIONS

It is well-settled that law enforcement officers occupy a position of public trust. United States v. Williams, 25 Fed. Appx. 175, 179 (4th Cir. 2002). “The policeman’s function as a public officer, duty bound in law and oath to uphold and enforce the law, persists throughout all stages of a criminal proceeding until final adjudication thereof in the courts.” State v. Stanley, 19 N.C. App. 684, 688, 200 S.E.2d 223, 226 (1973) (quoting Washington v. Austin, 400 P.2d 603, 608 (Wash. 1965)). Petitioner’s actions in concealing and failing to make known to an authority of the United States government a federal felony was a betrayal of this public trust as an officer. These actions constitute a betrayal of the public duties Petitioner owed to his fellow law enforcement officers, to society, and to his country. Petitioner’s crime was an offense involving moral turpitude and therefore the conviction is prima facie evidence of a lack of good moral character.

Petitioner’s conviction for the misdemeanor passing of a worthless check is also relevant to Petitioner’s moral character. “Worthless Checks” is codified at N.C. Gen. Stat. § 14-107 and states that it is unlawful for a person to tender a check or draft “knowing” at the time of the drawing that the maker or drawer of the check or draft has insufficient funds to cover the amount tendered. The North Carolina Supreme Court has recognized that such an act is also a crime of moral turpitude if done with intent to defraud. See Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 16,169 S.E. 869, 870 (1933). Petitioner’s tendering of a check for nearly \$1,300, knowing that there were insufficient funds to cover such a draft, is some evidence of Petitioner’s lack of good moral character, but no intent to defraud was proved at this hearing.

Petitioner, on the other hand, has presented evidence showing that his lack of good moral character arising from the subject convictions has been rehabilitated. He successfully fulfilled the requirements of his sentences in both instances. He has maintained a good reputation for more than six years. His current references highly recommend that his application be approved.

Furthermore, pursuant to General Statutes 13-1(4), Petitioner’s citizenship’s rights were automatically restored on August 26, 1997, when he was issued the Certificate of Unconditional Discharge by his U. S. Probation Officer. One of these rights, in my opinion, is to be able to pursue a chosen field when he has sufficiently indicated that he has paid his debt to society and reformed his ways, which Petitioner has done. We can trace this right back to our Declaration of Independence and Article 1, Section 1, of the Constitution of North Carolina--the right to “the pursuit of happiness” and “the enjoyment of the fruits of their own labor.” This opinion is in no way excusing his prior behavior, rather it is recognizing that some people with determination can overcome impediments against employment which arise as the result of criminal behavior. The purpose of the statute in question was no doubt to encourage offenders to change their behavior and become productive members of society upon release rather than repeat offenders and future prison inmates, which is in accord with Article XI, Section 2 of the Constitution of North Carolina which states that “The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime --.” Petitioner has shown that he has been reformed and now meets the requirements to be licensed as a private investigator.

Based on the foregoing, the undersigned makes the following:

PROPOSAL FOR DECISION

The North Carolina Private Protective Services Board will make the final decision in this contested case. It is proposed that the Board **reverse** its initial decision to deny Petitioner’s application for a Private Investigator License.

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 G.S. 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to G.S. 150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Private Protective Services Board.

This the 14th day of August, 2003.

Fred G. Morrison Jr.
Senior Administrative Law Judge