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The North Carolina Administrative Code (NCAC) has four major classifications of rules. Three of these, titles, chapters, and sections are mandatory. The major classification 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. Subchapters are optional classifications to be used by agencies when appropriate.

### NCAC TITLES

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### TITLE 21 LICENSING BOARDS

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<td>6 Barber Examiners</td>
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<td>8 Certified Public Accountant Examiners</td>
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<td>12 General Contractors</td>
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<td>14 Cosmetic Art Examiners</td>
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<td>26 Landscape Architects</td>
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<td>28 Landscape Contractors</td>
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<td>29 Locksmith Licensing</td>
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<td>30 Massage &amp; Bodywork Therapy</td>
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<td>32 Medical Examiners</td>
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<td>64 Speech &amp; Language Pathologists &amp; Audiolists</td>
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<td>65 Therapeutic Recreation Certification</td>
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<td>68 Substance Abuse Professionals</td>
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Note: Title 21 contains the chapters of the various occupational licensing boards and Title 24 contains the chapters of independent agencies.
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EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.
EXECUTIVE ORDER NO. 71
PROCLAMATION OF STATE OF EMERGENCY
BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA

Section 1. I have determined that a state of emergency, as defined in N.C.G.S. § 14-288.1(10), exists in Wake County, North Carolina, due to snow and ice, which began on January 19, 2005, and which has produced hazardous travel conditions.

Section 2. Pursuant to N.C.G.S. § 14-288.15, I, therefore, proclaim the existence of a state of emergency in Wake County.

Section 3. I hereby order all state and local government entities and agencies to cooperate in the implementation of the provisions of this proclamation and the provisions of the North Carolina Emergency Operations Plan.

Section 4. I hereby delegate to Bryan E. Beatty, Secretary of Crime Control and Public Safety, and/or his designee, all power and authority granted to me and required of me by Chapter 166A, and Article 36A of Chapter 14 of the General Statutes for the purpose of implementing the said Emergency Operations Plan and to take such further action as is necessary to promote and secure the safety and protection of the populace in the county.

Section 5. Further, Bryan E. Beatty, Secretary of Crime Control and Public Safety, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in N.C.G.S. § 143B-476.

Section 6. I hereby order this proclamation: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the circumstances of the state of emergency prevent or impede, to be promptly filed with the Secretary of Crime Control and Public Safety, the Secretary of State, and the clerks of superior court in the county to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this proclamation.

Section 7. This proclamation shall become effective immediately and shall continue until it is terminated in writing.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of North Carolina at the Capitol in Raleigh this 19th day of January in the year of our Lord two thousand and five.

MICHAEL F. EASLEY
GOVERNOR

ATTEST:

ELAINE MARSHALL
SECRETARY OF STATE
Title 21 – Occupational Licensing Boards

Chapter 29 – Locksmith Licensing Board

Notice is hereby given in accordance with G.S. 150B-21.2 that the Locksmith Licensing Board intends to adopt the rules cited as 21 NCAC 29 .0702-.0703 with changes from the proposed text noticed in the Register, Volume 19, Issue 6, page 617.

Proposed Effective Date: June 1, 2005

Reason for Proposed Action: First 3 year licenses were issued in September 2005. Renewals will begin in Summer 2005. These rules set late and reinstatement fees.

Procedure by which a person can object to the agency on a proposed rule: Write to Board or attend Board meeting.

Written comments may be submitted to: Jim Scarborough, P.O. Box 10572, Raleigh, NC 27605, phone (919)838-8782.

Comment period ends: April 18, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written objections 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 21 NCAC 29 .0702 DUE DATE

Applications for license renewal shall be submitted at least 90 days prior to the date of license expiration. Applications submitted after the due date shall be subject to a late fee as specified in G.S. 74F-9, of one hundred fifty dollars ($150.00) in addition to the license renewal fee specified in Rule .0404 of this chapter. Applications shall be deemed submitted on the date of their postmark or upon receipt by staff at the Board's offices, whichever is earlier.

Authority G.S. 74F-6; 74F-9; 74F-10.

Section 21 NCAC 29 .0703 REINSTATEMENT OF EXPIRED LICENSE

A former licensee may apply for reinstatement of an expired license only if he has completed at least eight contact-hours of continuing education within one year preceding the application. Applicants for reinstatement must pay license renewal, reinstatement and late fees in accordance with G.S. 74F-9 along with the following fees:

1. License renewal fee as specified in Rule .0404 of this chapter;
2. Late fee as specified in Rule .0702 of this chapter; and
3. A reinstatement fee of one hundred fifty dollars ($150.00).

Authority G.S. 74F-6; 74F-9; 74F-10.

* * * * * * * * * * * * * * * * * * * *

Chapter 32 – Board of Medical Examiners

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Board intends to amend the rule cited as 21 NCAC 32M .0106.

Proposed Effective Date: June 1, 2005

Public Hearing:
Date: March 16, 2004
Time: 12:00 p.m.
Location: NC Medical Board, 1203 Front St., Raleigh, NC

Reason for Proposed Action: To adopt a registration late fee for Nurse Practitioners. This late fee is necessary to provide additional revenue to the North Carolina Medical Board to help offset processing costs and to balance annual revenues with...
expenditures. This late fee is similar to the late fee charged to Physician Assistants and Physicians.

Procedure by which a person can object to the agency on a proposed rule: Objections may be submitted via e-mail to Brian Blankenship and at the public hearing.

Written comments may be submitted to: Brian L. Blankenship, 1203 Front St., Raleigh, NC 27609, email brian.blankenship@ncmedboard.org.

Comment period ends: April 18, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

| State | Local | Substantive (>$3,000,000) | None |

SUBCHAPTER 32M - APPROVAL OF NURSE PRACTITIONERS

SECTION .0100 – GENERAL

21 NCAC 32M .0106 ANNUAL RENEWALS

(a) Each registered nurse who is approved to practice as a nurse practitioner in this state shall annually renew each approval to practice with the Medical Board no later than 30 days after the nurse practitioner’s birthday by:

1. Maintaining current RN licensure;
2. Submitting the fee required in Rule .0115 of this Subchapter; and
3. Completing the renewal form.

(b) A nurse practitioner who fails to register as required by this Section shall pay an additional fee of twenty dollars ($20.00) to the Board.

(c) A nurse practitioner with first-time approval to practice after January 1, 2000, shall provide evidence of certification or recertification by a national credentialing body.

(d) If the nurse practitioner has not renewed within 60 days of her/his birthday, the approval to practice as a nurse practitioner shall lapse.

Authority G.S. 90-6; 90-18(14); 90-171.23(b).

CHAPTER 36 - BOARD OF NURSING

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Nursing intends to amend the rules cited as 21 NCAC 36 .0803 and .0806.

Proposed Effective Date: July 1, 2005

Public Hearing:

Date: March 16, 2005
Time: 12:00 noon
Location: NC Medical Board, 1203 Front Street, Raleigh, NC

Reason for Proposed Action:

21 NCAC 36 .0803 - A technical change to accurately identify the type of national body that accredits nursing education programs.

21 NCAC 36 .0806 – Add a reinstatement fee to the annual renewal for the nurse practitioner who fails to register within the timeframe as required, consistent with the rules established by North Carolina Medical Board.

Procedure by which a person can object to the agency on a proposed rule: Persons may submit objections to this Rule by contacting Jean H. Stanley, APA Coordinator, North Carolina Board of Nursing, P.O. Box 2129, Raleigh, NC 27602, voicemail (919)782-3211, ext. 252, fax (919)781-9461 and email jeans@ncbon.com.

Written comments may be submitted to: Jean H. Stanley, North Carolina Board of Nursing, P.O. Box 2129, Raleigh, NC 27602, voicemail (919)782-3211, ext. 252, fax (919)781-9461 and email jeans@ncbon.com.

Comment period ends: April 18, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact
SECTION .0800 – APPROVAL AND PRACTICE PARAMETERS FOR NURSE PRACTITIONERS

21 NCAC 36 .0803 NURSE PRACTITIONER REGISTRATION

(a) The Board of Nursing shall register an applicant who:

1. has an unrestricted license to practice as a registered nurse in North Carolina and, when applicable, an unrestricted approval, registration or license as a nurse practitioner in another state, territory, or possession of the United States;

2. has successfully completed a nurse practitioner education program as outlined in Rule .0805 of this Section; and

3. has supplied information necessary to evaluate the application.

(b) Beginning January 1, 2005 all registered nurses seeking first-time nurse practitioner registration in North Carolina shall:

1. hold a Master's Degree in Nursing or related field with primary focus on Nursing;

2. have successfully completed a graduate level nurse practitioner education program accredited by a national credentialing body, and in addition have met the criteria as outlined in Rule .0805(a) and (c) of this Section; and

3. provide documentation of certification by a national credentialing body.

Authority G.S. 90-18(13); 90-18.2; 90-171.20(7); 90-171.23(b); 90-171.83.

21 NCAC 36 .0806 ANNUAL RENEWAL

(a) Each registered nurse who is approved to practice as a nurse practitioner in this state shall annually renew each approval to practice with the Medical Board no later than 30 days after the nurse practitioner's birthday by:

1. Maintaining current RN licensure;

2. Submitting the fee required in Rule .0813 of this Section; and

3. Completing the renewal form.

(b) A nurse practitioner who fails to register as required by this Section shall pay an additional fee of twenty dollars ($20.00) to the Board.

(c) A nurse practitioner with first-time approval to practice after January 1, 2000, shall provide evidence of certification or recertification by a national credentialing body.

(d) If the nurse practitioner has not renewed within 60 days of her/his birthday, the approval to practice as a nurse practitioner shall lapse.

Authority G.S. 90-6; 90-18(14) 90-171.23(b); 90-171.83.

CHAPTER 61 - NORTH CAROLINA RESPIRATORY CARE BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Respiratory Care Board intends to amend the rules cited as 21 NCAC 61 .0305, .0308.

Proposed Effective Date: June 1, 2005

Public Hearing:
Date: March 3, 2005
Time: 1:00 p.m.
Location: NC Respiratory Care Board, 1100 Navaho Drive, Suite 242, Raleigh, NC 27609

Reason for Proposed Action:
21 NCAC 61 .0305 – To extend the period a licensee may be on inactive status and provide the continuing education requirements to change from inactive to active status.

21 NCAC 61 .0308 – To provide clarification of reporting requirements for licensees.

Procedure by which a person can object to the agency on a proposed rule: A person may object to the Board on proposed rule by sending a written objection addressed to Floyd Boyer, RRT RCP Executive Director, North Carolina Respiratory Care Board, 1100 Navaho Drive, Suite 242, Raleigh, NC 27609. Phone (919)878-5595, Fax (919)878-5565, email fboyer@ncrcb.org.

Written comments may be submitted to: Floyd Boyer, RRT RCP, 1100 Navaho Drive, Suite 242, Raleigh, NC 27609. Phone (919)878-5595, Fax (919)878-5565, email fboyer@ncrcb.org.

Comment period ends: April 20, 2005

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

State
SECTION .0300 – LICENSING

21 NCAC 61 .0305 INACTIVE STATUS
(a) A licensee who wishes to retain a license but who will not be practicing respiratory care may obtain inactive status by indicating this intention on the annual renewal and payment of a fee of twenty dollars ($20.00). An individual licensed on inactive status may not practice respiratory care during the period in which he or she remains on inactive status.
(b) An individual licensed on inactive status may convert his or her license to active status by submission of a renewal application and payment of the renewal fee and late fee. The renewal application must contain evidence of the following: completion of a minimum of 10 hours of continuing education that meets the requirements of 21 NCAC 61 .0401 for each full year of inactivity.
(c) In no case may an individual remain on inactive status for more than 24 60 months.

21 NCAC 61 .0308 CONTINUING DUTY TO REPORT
(a) All licensed respiratory care practitioners and provisional licensees are under a continuing duty to report to the Board any and all:
   (1) convictions of, or pleas of guilty or nolo contendere to, a felony or any crime, such as fraud, that involves moral turpitude; and
   (2) involvement in a civil suit arising out of or related to the licensee's practice of respiratory care.
(b) All supervising respiratory care practitioners are under a continuing duty to report to the Board any and all:
   (1) terminations of any respiratory care practitioner; and
   (2) violations of the practice act and/or Board rules by any respiratory care practitioner under his/her supervision.
(b)(c) A licensee or a provisional licensee must report a conviction, plea, or involvement in a civil suit The reports required by this Rule must be made within 30 15 days after it occurs of the occurrence.

Authority G.S 90-652(1),(2),(4).
TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: Commission for Health Services

Rule Citation: 10A NCAC 41A .0201

Effective Date: January 24, 2005

Findings Reviewed and Approved by the Codifier: January 13, 2005

Reason for Action: The period of high influenza activity in North Carolina normally occurs each year during the January – March. Consequently, available vaccines should be utilized without delay if they are to be of any use. Adherence to notice and hearing requirements of temporary or permanent rulemaking would delay the effective date of this change to the point that the period of heavy influenza activity would be past before the expanded vaccinations would be authorized.

CHAPTER 41 – HEALTH: EPIDEMIOLOGY

SUBCHAPTER 41A – COMMUNICABLE DISEASE CONTROL

SECTION .0200 - CONTROL MEASURES FOR COMMUNICABLE DISEASES

10A NCAC 41A .0201 CONTROL MEASURES – GENERAL

(a) Except as provided in Rules of this Section, the recommendations and guidelines for testing, diagnosis, treatment, follow-up, and prevention of transmission for each disease and condition specified by the American Public Health Association in its publication, Control of Communicable Diseases Manual shall be the required control measures. Control of Communicable Diseases Manual is hereby incorporated by reference including subsequent amendments and editions. Guidelines and recommended actions published by the Centers for Disease Control and Prevention shall supersede those contained in the Control of Communicable Disease Manual and are likewise incorporated by reference, including subsequent amendments and editions. Copies of the Control of Communicable Diseases Manual may be purchased from the American Public Health Association, Publication Sales Department, Post Office Box 753, Waldora, MD 20604 for a cost of twenty-two dollars ($22.00) each plus five dollars ($5.00) shipping and handling. Copies of Centers for Disease Control and Prevention guidelines contained in the Morbidity and Mortality Weekly Report may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 for a total cost of three dollars and fifty cents ($3.50) each. Copies of both publications are available for inspection in the Division of Public Health, 1915 Mail Service Center, Raleigh, North Carolina 27699-1915.

(b) In interpreting and implementing the specific control measures adopted in Paragraph (a) of this Rule, and in devising control measures for outbreaks designated by the State Health Director and for communicable diseases and conditions for which a specific control measure is not provided by this Rule, the following principles shall be used:

1. control measures shall be those which can reasonably be expected to decrease the risk of transmission and which are consistent with recent scientific and public health information;
2. for diseases or conditions transmitted by the airborne route, the control measures shall require physical isolation for the duration of infectivity;
3. for diseases or conditions transmitted by the fecal-oral route, the control measures shall require exclusions from situations in which transmission can be reasonably expected to occur, such as work as a paid or voluntary food handler or attendance or work in a day care center for the duration of infectivity;
4. for diseases or conditions transmitted by sexual or the blood-borne route, control measures shall require prohibition of donation of blood, tissue, organs, or semen, needle-sharing, and sexual contact in a manner likely to result in transmission for the duration of infectivity.

(c) Persons with congenital rubella syndrome, tuberculosis, and carriers of Salmonella typhi and hepatitis B who change residence to a different local health department jurisdiction shall notify the local health director in both jurisdictions.

(d) Isolation and quarantine orders for communicable diseases and communicable conditions for which control measures have been established shall require compliance with applicable control measures and shall state penalties for failure to comply. These isolation and quarantine orders may be no more restrictive than the applicable control measures.

(e) An individual enrolled in an epidemiologic or clinical study shall not be required to meet the provisions of 10A NCAC 41A .0201 - .0209 which conflict with the study protocol if:

1. the protocol is approved for this purpose by the State Health Director because of the...
scientific and public health value of the study, and
(2) the individual fully participates in and completes the study.

(f) A determination of significant risk of transmission under this Subchapter shall be made only after consideration of the following factors, if known:
   (1) The type of body fluid or tissue;
   (2) The volume of body fluid or tissue;
   (3) The concentration of pathogen;
   (4) The virulence of the pathogen; and
   (5) The type of exposure, ranging from intact skin to non-intact skin, or mucous membrane.

(g) The term "household contacts" as used in this Subchapter means any person residing in the same domicile as the infected person.

(h) Notwithstanding the provisions of Paragraph (a) of this Rule, Influenza Vaccination Recommendations for the 2004-05 Influenza Season published by the Centers for Disease Control and Prevention are not incorporated by reference as required control measures.

History Note: Authority G.S. 130A-135; 130A-144; Temporary Rule Eff. February 1, 1988, for a period of 180 days to expire on July 29, 1988; Eff. March 1, 1988; Amended Eff. February 1, 1990; November 1, 1989; August 1, 1988; Recodified Paragraphs (d), (e) to Rule .0202; Paragraph (i) to Rule .0203 Eff. June 11, 1991; Amended Eff. April 1, 2003; October 1, 1992; December 1, 1991; August 1, 1998; Emergency Amendment Eff. January 24, 2005.
This Section contains information for the meeting of the Rules Review Commission on Thursday February 17, 2005, 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 Monday, February 14, 2005 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

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<td>Jim R. Funderburke - 1st Vice Chair</td>
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<td>Robert Saunders</td>
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<td>Jeffrey P. Gray</td>
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RULES REVIEW COMMISSION MEETING DATES

- March 17, 2005
- April 21, 2005
- June 16, 2005
- May 19, 2005
- July 21, 2005

RULES REVIEW COMMISSION

JANUARY 19, 2004

MINUTES

The Rules Review Commission met on Wednesday, January 19, 2005, in the Assembly Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were: Jennie Hayman, Thomas Hilliard, Jeffrey Gray, Robert Saunders, Lee Settle, Dana Simpson, John Tart and David Twiddy.

Staff members present were: Joseph De Luca, Staff Counsel; Bobby Bryan, Rules Review Specialist; and Lisa Johnson, Administrative Assistant.

The following people attended:

- John Hoomani: Department of Labor
- Diane Miller: Department of Justice
- Barry Gupton: NCDOI
- Ron Chilton: NCDOI
- Nancy Pate: DENR
- Thomas Allen: DENR/DAQ
- Denise Stanford: Board of Pharmacy
- John Barkley: Department of Justice
- Lisa Martin: NC Home Builders Association
- Dana Sholes: OAH
- Molly Masich: OAH
- Julian Mann: OAH

APPROVAL OF MINUTES

The meeting was called to order at 10:06 a.m. with Chairman Hayman presiding.

She reminded the Commissioners of their obligations under the governor’s Executive Order #1 to refrain from taking part in consideration of any rules for which they have or may appear to have a conflict of interest.
Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the December 16, 2004 meeting. The minutes were approved as written.

FOLLOW-UP MATTERS

10A NCAC 22G .0106: DHHS/Medical Assistance – The Commission approved the rewritten rules submitted by the agency.

13 NCAC 7F .0606: Department of Labor – No response was received from the agency and no action was taken.

13 NCAC 15 .0429: Department of Labor – The Commission approved the rewritten rule submitted by the agency.

15A NCAC 2Q .0102: Environmental Management Commission – No response was received from the agency and no action was taken.

21 NCAC 46 .1414; .1814; .2502; .2702-.2704; .3301: Board of Pharmacy – The Commission approved these rules. Rule .1814 was rewritten by the agency, at the request of the RRC, as several rules. They are to be recodified as rules .3401-.3408.

21 NCAC 46 .1602; .1612: Board of Pharmacy – The Commission approved the rewritten rules submitted by the agency.

LOG OF FILINGS

Chairman Hayman presided over the review of the log of permanent rules. All rules were approved unanimously with the following exceptions:

11 NCAC 08 .1101; .1103; .1105-.1115; .1203; .1204: Home Inspector Licensure Board – These rules were withdrawn by the agency.

COMMISSION PROCEDURES AND OTHER BUSINESS

Mr. DeLuca updated the Commission with information concerning the Environmental Management Commission lawsuit. An April 11, 2005 court date has been scheduled with a tentative deadline of February 25, 2005 for motions and supporting briefs and a March 25, 2005 deadline for response briefs.

Mr. DeLuca mentioned that we have received several letters in response to 15A NCAC 2L .0202, a rule that has not been filed with the Commission (and which could not have even been adopted by the agency at the time the letters were written). He suggested that the Commission return these letters. He also asked the Commission for general guidance on receiving this type of letter of objection and a request for legislative review on rules we have not yet received. Chairman Hayman asked Mr. DeLuca to respond to the persons who sent the letters in writing and instruct them on what they should do. Mr. DeLuca indicated he would also prepare draft rules on how the Commission should handle this situation in the future.

Commissioner Simpson asked whether any hearing date has been scheduled in the Pharmacy Board lawsuit. Neither Mr. DeLuca nor Denise Stanford, attorney for the Pharmacy Board, had any information to report.

The meeting adjourned at 10:49 a.m.

The next meeting of the Commission is Thursday, February 17, 2005 at 10:00 a.m.

Respectfully submitted,
Lisa Johnson

Commission Review/Permanent Rules
Log of Filings #218
December 21, 2004 through January 20, 2005

COMMERCE, DEPARTMENT OF

The rules in Chapter 01 are departmental rules including rulemaking, personnel, revenue bonds, loan programs, and tax credit programs provisions.
The rules in Subchapter 01E deal with industrial and pollution control revenue bonds including purpose and definitions (.0100), application procedures (.0200), and review criteria (.0300).

Manufacturing Wage Test
Repeal/*

04 NCAC 01E .0303

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

Rules in Subchapter 10B are from the N. C. Sheriffs' Education and Training Standards Commission. These rules govern the commission organization and procedure (.0100); enforcement rules (.0200); minimum standards for employment as a justice officer (deputy or jailer) (.0300); certification of justice officers (.0400); standards and accreditation for justice officers schools, training programs, and the instructors (.0500-.0900); certificate and awards programs for sheriffs, deputies, justice officers, jailers, reserve officers, and telecommunicators (.1000-.1600); in-service training (.2000), and firearms in-service training and re-qualification (.2100).

Suspension: Revocation: or Denial of Certification
Amend/*

12 NCAC 10B .0204

Period of Suspension: Revocation: or Denial
Amend/*

12 NCAC 10B .0205

Summary Suspensions: or Denials
Amend/*

12 NCAC 10B .0206

Sheriff Responsibilities
Adopt/*

12 NCAC 10B .1701

Instructors
Adopt/*

12 NCAC 10B .1702

Minimum Training Requirements
Adopt/*

12 NCAC 10B .1703

Domestic Violence In-Service Training Program Specifications
Adopt/*

12 NCAC 10B .1704

Failure to Complete in-Service Domestic Violence Training...
Adopt/*

12 NCAC 10B .1705

Topical Areas
Amend/*

12 NCAC 10B .2002

EDUCATION, BOARD OF

The rules in Chapter 06 cover elementary and secondary education including transportation, personnel, curriculum, textbooks, testing, students, public relations, and federal programs.

The rules in Subchapter 06B cover the student transportation system.

Purchasing Flexibility Exemption
Repeal/*

16 NCAC 06B .0108

The rules in Subchapter 06D cover instruction including curriculum (.0100), textbooks (.0200), testing programs (.0300), and accountability standards and graduation requirements (.0500).

Definitions
Amend/*

16 NCAC 06D .0501

State Graduation Requirements
Amend/*

16 NCAC 06D .0503

Local Accountability Procedures
Amend/*

16 NCAC 06D .0505

Students with Disabilities
Amend/*

16 NCAC 06D .0506

Students with Limited English Proficiency
Amend/*

16 NCAC 06D .0507
The rules in Subchapter 06G cover education agency relations including private business, trade, and correspondence schools (.0100); accreditation of local school boards (.0200); local school board improvement plans and accountability (.0300); how to deal with low performing schools (.0400); and charter schools (.0500).

Annual Performance Standards, Grades K-12
Amend/* 16 NCAC 06G .0305

Liability Insurance
Amend/* 16 NCAC 06G .0501

GENERAL CONTRACTORS, LICENSING BOARD FOR

The rules of the Licensing Board for General Contractors include the board's organization (.0100); licensing requirements (.0200); application procedures (.0300); examinations (.0400); licenses (.0500); disciplinary procedures (.0700); contested cases (.0800); and home-owners recovery fund (.0900).

Eligibility
Amend/* 21 NCAC 12 .0204

Application for Payment
Amend/* 21 NCAC 12 .0903

PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS, BOARD OF EXAMINERS FOR

The rules in Chapter 50 cover plumbing, heating, and fire sprinkler contractors. They include the board's organization (.0100); forms (.0200); examinations (.0300); general procedures (.0400); policy statements and interpretive rules (.0500); contested case hearings (.1000); fees (.1100); petitions for rulemaking (.1200); and declaratory rulings (.1300).

Qualifications Determined by Examination
Amend/* 21 NCAC 50 .0301

Issuance of License
Amend/* 21 NCAC 50 .0306

General Supervision and Standard of Competence
Amend/* 21 NCAC 50 .0505

Heating: Group 3 License Required
Amend/* 21 NCAC 50 .0508

Limited Fire Sprinkler Inspection
Amend/* 21 NCAC 50 .0513

Limited Fire Sprinkler Inspection Contractor License
Amend/* 21 NCAC 50 .0514

Limited Fire Sprinkler Maintenance Technician License
Amend/* 21 NCAC 50 .0515

Examination Fees
Amend/* 21 NCAC 50 .1101

License Fees
Amend/* 21 NCAC 50 .1102

STATE PERSONNEL COMMISSION

The rules in Title 25 are from the Office of State Personnel and cover all aspects of regulation of state employment under the State Personnel Act.

The rules in Subchapter 01C are personnel administration rules including general employment policies (.0200); personnel records and reports (.0300); appointment (.0400); work schedule (.0500); competitive service (.0600); secondary employment (.0700); requirements for teleworking programs (.0800); employee recognition programs (.0900); and separation (.1000).

Reduction in Force
Amend/* 25 NCAC 01C .1004
The rules in Subchapter 01D are the rules dealing with compensation and include administration of the pay plan (.0100); new appointments (.0200); promotion (.0300); demotions or reassignments (.0400); separation (.0500); reallocation (.0600); salary range revision (.0700); initial classification (.0800); transfer (.0900); reinstatement (.1000); performance salary increases (.1100); longevity pay (.1200); holiday premium pay (.1300); shift premium pay (.1400); emergency call-back pay (.1500); foreign service pay (.1600); employment of physicians for extended duty (.1800); hours of work and overtime compensation (.1900); unemployment insurance (.2000); special salary adjustments (.2100); payment of salary (.2200); accelerated pay plan (.2300); comprehensive compensation system (.2500); and in range salary adjustments (.2600).

State Employees Subject to the Fair Labor Standards Act

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The rules in Subchapter 01J cover employee grievances (.0500), disciplinary actions including suspensions and dismissals (.0600), Governor's Award for Excellence (.0800); internal performance pay dispute resolution procedures (.0900); state employees assistance program (.1000); unlawful workplace harassment (.1100); employee grievances (.1200); employee appeals and grievance process (.1300); and employee mediation and grievance process (.1400).

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Agency Procedural Requirements for Employee Mediation and... 25 NCAC 01J .1411
Office of State Personnel Responsibilities for Employee m... 25 NCAC 01J .1412

The rules in Subchapter 01K are human resource development rules including general provisions (.0100); North Carolina State Personnel Development Center rules (.0200); the educational assistance program (.0300); use of non-State government education and training sources (.0400); apprenticeship training (.0500); work planning/performance review (.0600); and the North Carolina certified public manage program (.0700).

State Human Resource Development Policy 25 NCAC 01K .0104
Centers of Responsibility 25 NCAC 01K .0105
Cost of Training 25 NCAC 01K .0106
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Location and Hours of Operation 25 NCAC 01K .0214
Determination of Need for Training 25 NCAC 01K .0402
Selection of Non-Government Sources 25 NCAC 01K .0403
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NC Certified Public Manager Program 25 NCAC 01K .0701
NC Certified Public Manager Program Purpose 25 NCAC 01K .0702
NC Certified Public Manager Program Accreditation 25 NCAC 01K .0703
NC Certified Public Manager Program Participation 25 NCAC 01K .0705
Certificate of Completion of NC Certified Public Manager ... 25 NCAC 01K .0706
Funding for NC Certified Public Manager Program 25 NCAC 01K .0708
The rules in Subchapter 01O are rules dealing with the performance management system.

Policy
Amend/*

Performance Management Process
Amend/*

Components of an Operative System
Amend/*

Relationship/Performance Management and Other Human Resources
Amend/*

Responsibilities of the State Personnel Commission
Amend/*

Responsibilities of the Office of State Personnel
Amend/*

Responsibilities of Agencies
Amend/*

In General
Repeal/*

Benefits
Repeal/*

The Performance Management Process
Repeal/*

Components of an Operative System
Repeal/*

LIST OF APPROVED PERMANENT RULES
January 19, 2005 Meeting

HHS-MEDICAL ASSISTANCE
Reconsideration Reviews

MENTAL HEALTH, COMMISSION OF
Definitions
Persons Required to Register
Separate Registration for Independent Activities
Training and Qualification Requirements for Dog Handlers
Approval of Canine Certification Associations by the Department
Exemption of Law Enforcement Officials
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LABOR, DEPARTMENT OF
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ENVIRONMENTAL MANAGEMENT COMMISSION
Purpose and Scope
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**HEALTH SERVICES, COMMISSION FOR**
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**PHARMACY, BOARD OF**
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Reinstatement of Licenses and Permits
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Registration
Automated Dispensing or Drug Supply Devices
General requirements for the use of automated medication ...
Multidisciplinary committee for decentralized automated m...
Stocking or restocking of an automated medication system
Centralized automated medication systems
Quality Assurance Program
Record Keeping
Compliance

**AGENDA**
February 17, 2005, 10:00 A.M.

I. Call to Order and Opening Remarks
II. Review of minutes of last meeting
III. Follow Up Matters
   A. Department of Labor – 13 NCAC 07F .0606 (Bryan)
   B. Environmental Management Commission – 15A NCAC 02Q .0102 (Bryan)
IV. Review of Rules (Log Report #218)
V. Review of Temporary Rules (if any)
VI. Commission Business
VII. Next meeting: March 17, 2005
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 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

RULES DECLARED VOID

04 NCAC 02S .0212 CONSUMPTION: INTOXICATION BY PERMITTEE PROHIBITED
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge James L. Conner, II declared 04 NCAC 02S .0212(b) void as applied in NC Alcoholic Beverage Control Commission v. Midnight Sun Investments, Inc. t/a Tiki Cabaret (03 ABC 1732).

20 NCAC 02B .0508 FAILURE TO RESPOND
Pursuant to G.S. 150B-33(b)(9), Administrative Law Judge Melissa Owens Lassiter declared 20 NCAC 02B .0508 void as applied in Burton L. Russell v. Department of State Treasurer, Retirement Systems Division (03 DST 1715).

CASE DATE OF PUBLISHED DECISION AGENCY NUMBER ALJ DECISION REGISTER CITATION

ABC COMMISSION
ABC Commission v. Pantry, Inc. T/A Pantry 355 03 ABC 1094 Gray 09/01/04
ABC Commission v. Richard Martin Falls, Jr., T/A Falls Quick Stop 04 ABC 0341 Mann 07/16/04
ABC Commission v. Nichos, Inc., T/A Mexican Store 04 ABC 0626 Gray 10/15/04
ABC Commission v. Red Lion Manestream, Inc., T/A Red Lion Manestream 04 ABC 0695 Wade 07/20/04
ABC Commission v. KOL, Inc, T/A Wards Grocery 04 ABC 0872 Wade 09/21/04
ABC Commission v. Carlos Salas, T/A Boom Boom Room Night Club 04 ABC 0938 Chess 10/19/04

VICTIMS COMPENSATION
Lonnie Jones v. Dept. Crime Control & Public Safety, Victims Compensation 03 CPS 2320 Conner 07/23/04
Angelique M. Jones on behalf of a juvenile victim, her son, Jaquial Jones v. Victims Compensation Commission 03 CPS 2353 Conner 07/12/04

Jean Stevens on Behalf of Amber Nichole Sewell v. Victim and Justice Services 04 CPS 0399 Chess 09/16/04
Krista Chmiel v. Crime Victims Compensation Commission Case #CV-65-04-0020899 04 CPS 0992 Gray 09/31/04
Isaac Cornell Mitchell v. Victim and Justice Services 04 CPS 1529 Gray 01/13/05

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NC Spring Water Assoc, Inc., Wiley Fogleman (President) v. DOA, David McLeod and Table Rock Spring Water Co. 04 DAG 0110 Gray 07/21/04

DEPARTMENT OF ADMINISTRATION
Larry Yancey v. GACP, DOA 04 DOA 0896 Morrison 07/28/04

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Margaret Bollo v. DHHS, Broughton Hospital 03 DHR 0444 Gray 07/21/04
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1 Combined Cases
2 Combined Cases
This matter was initiated by a Request for Administrative Hearing filed by Petitioner EDS Information Services, LLC (“EDS”) with the Office of Information Technology Services (“ITS”) on June 10, 2004. EDS protests the contract award by the North Carolina Department of Health and Human Services (“DHHS”), as approved by ITS, of the North Carolina Medicaid Management Information System (“NCMMIS+”) pursuant to Request for Proposal No. 30-DHHS-736-04 (the “RFP”). At the request of ITS pursuant to N.C. Gen. Stat. § 150B-40(e), an agency governed by Article 3A of the Administrative Procedure Act (“Act”), the undersigned was assigned to preside in this case. ACS State Healthcare, LLC (“ACS”) and ACS State HealthCare, LLC, the putative awardee of the contract, has been permitted to intervene.

This matter came on for decision before the undersigned on the motion of EDS for summary judgment. The motion was supported by exhibits and deposition transcripts, and responses were filed by ITS/DHHS (the “State” or “Respondents”) and ACS, including exhibits and affidavits. A hearing on EDS’ motion for summary judgment was held before the undersigned on December 29, 2004. J. Mitchell Armbruster and B. Davis Horne, Jr. appeared on behalf of Petitioner; James Wellons appeared on behalf of the Respondents; and Renee Montgomery appeared on behalf of the Intervenor. Based on the pleadings, the materials presented in favor and in opposition to EDS’ motion, the arguments of counsel and memoranda submitted, and all other relevant material, the undersigned PROPOSES that summary judgment be granted in favor of Petitioner for the following reasons:

1. Through a series of contracts over the past twenty-seven (27) years, the State of North Carolina has contracted the Fiscal Agent duties of the State’s Medicaid Program, including the operation of its federally certified Medicaid Management Information System (MMIS), to an outside entity.

2. On September 5, 2003, DHHS issued an RFP soliciting proposals for “replacement of the certified NCMMIS+, with the provision for ongoing maintenance and modification of a certified system with newer technology that emphasizes more efficient and effective processing.” NCMMIS+ Initiative Selection Committee Summary Report and Recommendation for Award (“Recommendation for Award”) at 3. The procurement was required to be a “best value” procurement under North Carolina law. N.C. Gen. Stat. § 147.3395(b)(1) (2004) (stating that ITS procurements are governed by best value standards); 09 NCAC 06B.0301 (same).

3. On December 10, 2003, DHHS received proposals from three bidders: EDS, ACS, and Unisys Corporation (Unisys).

4. Section 4.1 of the RFP required that proposed solutions conform to North Carolina Statewide Technical Architecture (“STA”):
The State requires a new, technologically advanced system and operational solution that supports the State’s requirements detailed throughout RFP Section 4. The solution shall conform to North Carolina’s Statewide Technical Architecture Standards as identified on http://ets.state.nc.us/NCSTA/ets_index.html, the Web site for the State’s Enterprise Technology Strategies, formerly known as Information Resource Management.

5. Immediately following the requirement that the operational solution “shall conform to North Carolina’s Statewide Technical Architecture Standards”, RFP Section 4.1 also specifically stated that:

The NCMMIS+ Replacement System shall support the following NCMMIS+ multi-payer functions:

- Recipient Subsystem,
- Eligibility Verification Subsystem (EVS),
- Automated Voice Response Subsystem (AVRS),
- Provider Subsystem,
- Reference Subsystem,
- Prior Approval Function,
- Claims Processing Subsystem,
- Managed Care Subsystem,
- Health Check Subsystem,
- Drug Rebate Subsystem,
- Third-Party Liability Subsystem,
- Management and Administrative Reporting Subsystem (MARS), and
- Financial Management and Accounting Subsystem.

6. Compliance with the Statewide Technical Architecture was a mandatory requirement of the RFP. No exceptions to this requirement are identified by the RFP. Moreover, State agencies are required to adhere to the Statewide Technical Architecture “when designing, purchasing, upgrading, or enhancing information technology.” STA, Roles and Responsibilities, at 5. All information technology (“IT”) projects in State Government must obtain the approval of ITS, [Sligh Aff. ¶ 11], and IT procurements are conducted under the auspices of ITS.

7. Standard 2.01.02 of the Statewide Technical Architecture requires new applications acquired by the State to be “3-tier or N-tier.” “3-tier” application architecture means the logical separation of the user interface, business rules, and data access code of an application. [Griffith Aff. ¶ 23.] This division “allows for simple, straightforward additions to each of the three tiers without undue impacts on the others.” Standard 2.01.02, Rationale. Thus, “all new agency applications should be developed using 3-tier or N-tier architecture in order to maximize flexibility and scalability.”

8. A “draft” position paper issued by ITS staff on or about March 1, 2004, is consistent with the plain text of Standard 2.01.02: “[T]he proper separation of an application’s presentation logic, business logic, and data is a fundamental principle that must be followed. . . . Separation of these applications components is required by the current principles, practices, and standards specified in the North Carolina Statewide Technical Architecture.” (emphasis added). No position papers contrary to this statement have been introduced by the State.

9. A vendor question was asked prior to the deadline for submitting proposals regarding whether the State’s current and older COBOL language-based MMIS system complied with the Statewide Technical Architecture. The State’s answer was “no.”

10. The RFP did not have any exceptions to the requirement that proposals “shall conform” to the Statewide Technical Architecture. In other RFPs, the State at times has limited the mandatory application of the Statewide Technical Architecture. In early 2004, DHHS let an RFP for a statewide Immunization Registry which states that the project “does not fully conform to the STA. For bug fixes and basic maintenance, the current programming language and approach can remain the same. For other changes and enhancements the Vendor must be in conformance to the STA. . . . .” RFP No. 30-DIRM-170-04, at 31 (emphasis added).

11. In a draft report evaluating the technical architecture of the ACS proposal, dated February 11, 2004, the State’s own reviewers reiterated that “the Statewide Technical Architecture (Standard 2.01.02) requires that applications be developed using a 3-tier or N-tier architecture.” The report further stated that “the following application systems do not satisfy the STA architecture standard,” citing three components of the ACS solution: DRAMS, OmniTrack, and the Claims Adjudication System (“CAS”).
12. As to DRAMS and OmniTrack, the February 11 report concluded that these components of the ACS proposal were “2-tier” systems and that “[t]he business rules, in this configuration, must reside in the presentation and/or data tiers, both of which are not consistent with the North Carolina STA.” As to CAS, the report concluded that this system had mainframe applications with a “monolithic design” which “typically possesses intertwined presentation, business, and data access logic.”

13. The DRAMS component of the ACS proposal was intended to provide the drug rebate functionality required by the RFP. Because the federal government, through Medicaid, is a large purchaser of prescription drugs, it is able to negotiate substantial discounts with pharmaceutical manufacturers. These discounts take the form of rebates, and are administered by each individual state Medicaid Program. Between 1998 and 2002, North Carolina recovered over $700 million through its drug rebate program. Section 4.1 of the RFP specifically identified the functionality of the “Drug Rebate Subsystem” as part of the new NCMMIS system.

14. The OmniTrack component of the ACS proposal was intended to track all interactions and correspondence between service providers (e.g., doctors, hospitals, etc.) and the NCMMIS system. ACS’s proposal described OmniTrack as “the centerpiece of the provider Customer Service Center.” ACS Proposal § G.6 (Provider Subsystem), at p.11. Section 4.1 of the RFP specifically identified the functionality of the “Provider Subsystem” as part of the new NCMMIS system.

15. Each of the bidders gave an oral presentation to the State regarding the technical architecture of its proposed solution. ACS’s oral presentation was on February 16, 2004.

16. Section 1.6 of the RFP (“Oral Presentation”) stated that in the event oral presentations were held, the “presentation proceedings shall be tape recorded.” The purpose of the presentations was “to provide an opportunity for the Offeror to clarify its Proposal. Original submissions shall not be supplemented, changed, or corrected in any way.” The oral presentations made by EDS, ACS, and Unisys were not tape recorded by the State.

17. The Proposal Evaluation Plan (“PEP”) developed by the State for the evaluation of Proposals required that if oral presentations were conducted, a written report be made substantiating what occurred at such proceedings. No written reports were created regarding the oral presentations made by EDS, ACS, and Unisys.

18. ITS Procurement Regulation 4.0 requires that all clarifications made by vendors during a procurement be memorialized in writing. There is no written substantiation of any clarifications ACS may or may not have made at its oral presentation to the State. One of the reviewer’s handwritten notes from the ACS oral presentation indicates that ACS did make a “CHG FROM PROPOSAL,” though the specifics of that change were not noted.

19. The final report reviewing the technical architecture of the ACS proposal was completed on March 3, 2004.

20. This final report concluded that the DRAMS and OmniTrack components of the ACS proposed solution, as well as the Pharmacy POS system, were of “2 tier design” and were “not consistent with the NCSTA.” The State concedes that the DRAMS and OmniTrack components are 2-tier subsystems.

21. The final report concluded that the CAS component of the ACS proposed solution was “n tier” in conformance with the Statewide Technical Architecture. This is a change from the February 11 draft report. The State claims that the architecture review team changed its conclusion from the prior draft based on information provided by ACS during its oral presentation. There was no report created describing that information.

22. The Recommendation for Award, which incorporated the findings of the technical architecture reviewers, concluded that the EDS and Unisys proposals had “the essential characteristics of an N-tier design” without exception. In contrast, the report found that only the “core solution” of the ACS proposal “has an n-tier design,” and that the 3 subsystems identified above (DRAMS, OmniTrack, and PharmacyPOS) “have a 2-tier design.” Recommendation for Award at 18. The RFP does not define any particular part of the vendor’s solutions as the “core solution.”

23. Neither Unisys nor EDS were informed of the possibility or given an opportunity by reviewers to amend their proposals to offer components that did not comply with the 3-tier requirement of the Statewide Technical Architecture.

24. Based on the point scoring evaluation scheme developed by the State for evaluating proposals, ACS received the most points out of any of the bidders. EDS received the second highest total of points, followed by Unisys.
CONCLUSIONS OF LAW

1. This proceeding is governed by Article 3A of the Administrative Procedure Act. Homoly v. State Bd. of Dental Examiners, 121 N.C. App. 695, 699, 468 S.E.2d 481, 484 ("[T]he contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely."); review denied, 343 N.C. 306, 471 S.E.2d 71 (1996).

2. To withstand the scrutiny of judicial review, the decision of an agency cannot be supported “if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

   (1) In violation of constitutional provisions;

   (2) In excess of the statutory authority or jurisdiction of the agency;

   (3) Made upon unlawful procedure;

   (4) Affected by other error of law;

   (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

   (6) Arbitrary, capricious, or an abuse of discretion.”

   N.C. Gen. Stat. § 150B-51(b); cf. N.C. Gen. Stat. § 150B-23(a) (pleading requirements for Article 3 proceedings).

3. Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. R. Civ. P. 56(c); see also 09 NCAC 06B .1015 (granting the undersigned authority to recommend summary dispositions in this proceeding). In opposing a motion for summary judgment, the non-moving party may not rely on conclusory allegations unsupported by facts. Lowe v. Bradford, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). Rather, the non-moving party “must set forth specific facts showing that there is a genuine issue for trial.” Id.

4. Under ITS regulations and the general precepts requiring fair competition in bidding, the State is not permitted to award a contract to a non-responsive bidder. 9 NCAC 06B.0302(1)(h). “Indeed, it is the duty of the public authorities to reject all bids that do not comply substantially with the terms of the proposal, for any other rule would destroy free competition.” 64 Am Jur. 2d Public Works and Contracts § 57 (2001). A disappointed bidder is prejudiced by the failure to reject a non-responsive bid if there was a substantial chance it would have received the contract award. See, e.g., Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999); see also Professional Food Services Mgmt., Inc. v. N.C. Dep’t of Admin., 109 N.C. App. 265, 270, 426 S.E.2d 447, 451 (1993) (bidder found to be prejudiced by improper rejection of conforming bid).

5. Section 4.1 of the RFP required that the bidders’ proposed solutions shall conform to the Statewide Technical Architecture. The ACS solution did not comply with the 3-tier requirement of the Statewide Technical Architecture. It is undisputed that DRAMS and OmniTrack are 2-tier subsystems and simply do not comply.

6. The State chose not to make any exceptions in the RFP to its own requirement that solutions shall conform to the Statewide Technical Architecture. Even if the RFP required construction on this point, it would be construed against the State as the drafter. WellPath Select, Inc. v. N.C. Teachers’ and State Employees’ Comprehensive Major Medical Plan, 2001 WL 34055817 (OAH 2001); Novacare Orthotics & Prosthetics Fast, Inc. v. Speelman, 137 N.C. App. 471, 528 S.E.2d 918 (2000) (“when an ambiguity is present in a written instrument, the court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language.”).

7. The State was permitted to exercise substantial discretion in the development of the RFP. But the State cannot, as it suggests, exercise “professional judgment” after proposals are submitted to determine whether parts of the Statewide Technical Architecture do not need to be followed. [Fenton Aff. ¶ 8.] In order to preserve the requirement of fair competition, bidders need to be informed prior to bid submission if their entire solution does not need to conform to RFP specifications. Otherwise, a level playing field cannot be maintained and the right of bidders to a fair competition is prejudiced. Here, for example, Section 4.1 of the RFP specifically listed the “Drug Rebate System” and “Provider Subsystem” as a part of the requested NCMMIS solution, and required a “solution” that “shall conform” to the Statewide Technical Architecture.
8. EDS was prejudiced under N.C. Gen. Stat. § 150B-51(b) because, as the highest rated proposal among the remaining two bidders, there was a substantial chance it would have received the contract award but for the failure of the State to disqualify the ACS proposal.

9. The State violated the RFP by failing to tape the vendor oral presentations pursuant to RFP § 1.6.

10. The State violated the PEP by failing to create a written report substantiating what occurred at the oral presentations.

11. The State violated ITP Procurement Regulation 4.0 to the extent the State claims that ACS made any clarifications at its oral presentation upon which it relies, because those clarifications were not memorialized in writing.

12. The failure to preserve an adequate record of the oral presentations in violation of the procedures set forth in the RFP, PEP, and ITS regulations also prejudiced the rights of EDS. The State asserts that it concluded the CAS component of the ACS solution was found to comply with the 3-tier requirement of the Statewide Technical Architecture based on the ACS oral presentation. The ability of the public, including EDS, to investigate what occurred at the oral presentations, as well as the State’s ability to introduce a record of what occurred without resorting to post-award litigation affidavits, are destroyed by the failure to abide by these requirements. As noted by the Court of Appeals in Watkins v. Board of Dental Examiners, 358 N.C. 190, 198, 593 S.E.2d 764, 768 (2004), “the preservation of a record for judicial review [is] a cornerstone of the Administrative Procedure Act in that it enables a reviewing court to determine whether an agency . . . has engaged in a reasoned evaluation and analysis of [the] evidence presented.” If agencies were permitted to violate their own rules for preservation of the record with impunity, and thus impede the ability of citizens to question decisions, agencies would undermine this “cornerstone” of the Act.

PROPOSED DECISION

Based on the foregoing, it is HEREBY PROPOSED that:

1. EDS’s motion for summary judgment be GRANTED on the grounds that the State erred by failing to find ACS’s bid nonresponsive to the RFP’s mandatory requirement of compliance with the Statewide Technical Architecture because it is undisputed that the DRAMS and OmniTrack components of the ACS proposal did not comply with the 3-tier requirement of the Statewide Technical Architecture.

2. DHHS officials shall disqualify the ACS bid, cancel this procurement, issue a new RFP with any exceptions noted about fully complying with the STA, seek new proposals for award, and record all oral presentations made by offerors prior to making a decision on awarding a new contract for the North Carolina Medicaid Management Information System.

NOTICE

The agency making the final decision in this proceeding is required to give each party an opportunity to file exceptions and proposals and to present oral and written arguments to it before the decision is made. The Final Agency Decision is to be made by the State Chief Information Officer, Office of Information Technology Services. N.C. Gen. Stat. § 150B-40(e).

This the 11th day of January, 2005

Fred G. Morrison Jr.
Senior Administrative Law Judge