

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 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		TITLE 21 LICENSING BOARDS	TITLE 24 INDEPENDENT AGENCIES
1	ADMINISTRATION	1 Acupuncture	1 Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2 Architecture	2 Agricultural Finance Authority
3	AUDITOR	3 Athletic Trainer Examiners	3 Safety & Health Review Board
4	COMMERCE	4 Auctioneers	4 Reserved
5	CORRECTION	6 Barber Examiners	5 State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8 Certified Public Accountant Examiners	
7	CULTURAL RESOURCES	10 Chiropractic Examiners	
8	ELECTIONS	11 Employee Assistance Professionals	
9	GOVERNOR	12 General Contractors	
10A	HEALTH AND HUMAN SERVICES	14 Cosmetic Art Examiners	
11	INSURANCE	16 Dental Examiners	
12	JUSTICE	17 Dietetics/Nutrition	
13	LABOR	18 Electrical Contractors	
14A	CRIME CONTROL & PUBLIC SAFETY	19 Electrolysis	
15A	ENVIRONMENT & NATURAL RESOURCES	20 Foresters	
16	PUBLIC EDUCATION	21 Geologists	
17	REVENUE	22 Hearing Aid Dealers and Fitters	
18	SECRETARY OF STATE	25 Interpreter/Transliterator	
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		56 Professional Engineers & Land Surveyors	
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		61 Respiratory Care	
		62 Sanitarian Examiners	
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		66 Veterinary Medical	
		68 Substance Abuse Professionals	
		69 Soil Scientists	

Note: Title 21 contains the chapters of the various occupational licensing boards and Title 24 contains the chapters of independent agencies.

NORTH CAROLINA REGISTER
 Publication Schedule for January 2006 – December 2006

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule (first legislative day of the next regular session)	270 th day from publication in the Register
20:13	01/03/06	12/08/05	01/18/06	03/06/06	03/20/06	05/01/06	05/09/06	09/30/06
20:14	01/17/06	12/21/05	02/01/06	03/20/06	04/20/06	06/01/06	01/07	10/14/06
20:15	02/01/06	01/10/06	02/16/06	04/03/06	04/20/06	06/01/06	01/07	10/29/06
20:16	02/15/06	01/25/06	03/02/06	04/17/06	04/20/06	06/01/06	01/07	11/12/06
20:17	03/01/06	02/08/06	03/16/06	05/01/06	05/22/06	07/01/06	01/07	11/26/06
20:18	03/15/06	02/22/06	03/30/06	05/15/06	05/22/06	07/01/06	01/07	12/10/06
20:19	04/03/06	03/13/06	04/18/06	06/02/06	06/20/06	08/01/06	01/07	12/29/06
20:20	04/17/06	03/24/06	05/02/06	06/16/06	06/20/06	08/01/06	01/07	01/12/07
20:21	05/01/06	04/07/06	05/16/06	06/30/06	07/20/06	09/01/06	01/07	01/26/07
20:22	05/15/06	04/24/06	05/30/06	07/14/06	07/20/06	09/01/06	01/07	02/09/07
20:23	06/01/06	05/10/06	06/16/06	07/31/06	08/21/06	10/01/06	01/07	02/26/07
20:24	06/15/06	05/24/06	06/30/06	08/14/06	08/21/06	10/01/06	01/07	03/12/07
21:01	07/03/06	06/12/06	07/18/06	09/01/06	09/20/06	11/01/06	01/07	03/30/07
21:02	07/17/06	06/23/06	08/01/06	09/15/06	09/20/06	11/01/06	01/07	04/13/07
21:03	08/01/06	07/11/06	08/16/06	10/02/06	10/20/06	12/01/06	01/07	04/28/07
21:04	08/15/06	07/25/06	08/30/06	10/16/06	10/20/06	12/01/06	01/07	05/12/07
21:05	09/01/06	08/11/06	09/16/06	10/31/06	11/20/06	01/01/07	01/07	05/29/07
21:06	09/15/06	08/24/06	09/30/06	11/14/06	11/20/06	01/01/07	01/07	06/12/07
21:07	10/02/06	09/11/06	10/17/06	12/01/06	12/20/06	02/01/07	05/08	06/29/07
21:08	10/16/06	09/25/06	10/31/06	12/15/06	12/20/06	02/01/07	05/08	07/13/07
21:09	11/01/06	10/11/06	11/16/06	01/01/07	01/22/07	03/01/07	05/08	07/29/07
21:10	11/15/06	10/24/06	11/30/06	01/15/07	01/22/07	03/01/07	05/08	08/12/07
21:11	12/01/06	11/07/06	12/16/06	01/30/07	02/20/07	04/01/07	05/08	08/28/07
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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. 97

**EXTENDING EXECUTIVE ORDER NO. 95
EMERGENCY RELIEF FOR DAMAGE CAUSED BY HURRICANE KATRINA**

Executive Order No. 95 and 87, which amended Executive Order No. 81 pertaining to emergency relief for damage caused by Hurricane Katrina and amended to apply only to the transport of mobile homes under contract with the Federal Emergency Management Agency (FEMA) as part of the disaster relief effort is hereby extended until January 31, 2006.

This executive order is effective immediately.

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 the 5th day of January 2006.

Michael F. Easley
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

Note from the Codifier: 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**

QUB Studios LLC

Pursuant to N.C.G.S. § 130A-310.34, QUB Studios LLC has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Greensboro, Guilford County, North Carolina. The Property consists of 0.5 acres and is located at 120 West Lewis Street. Environmental contamination exists on the Property in groundwater. QUB Studios LLC has committed itself to commercial and residential uses on the Property. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and QUB Studios LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) 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 Greensboro City Manager's office by contacting Mr. Mitchell Johnson, Greensboro City Manager at P.O. Box 3136, Greensboro, NC 27402, at mitchell.johnson@greensboro-nc.gov, or at 336-373-2002; or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 733-2801, ext. 336, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents. Written public comments may be submitted to DENR within 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

The effective date of this Notice is February 1, 2006.

Notice of Application for Innovative Approval of a Wastewater System for On-site Subsurface Use

Pursuant to NCGS 130A-343(g), the North Carolina Department of Environment and Natural Resources (DENR) shall publish a Notice in the NC Register that a manufacturer has submitted a request for approval of a wastewater system, component, or device for on-site subsurface use. The following applications have been submitted to DENR:

Application by: Dick Bachelder.
PSA, Inc.
P.O. Box 3000
Hilliard, Ohio 43026

For: Revised Innovative Approval for "BioDiffuser" chambered subsurface wastewater systems

And:

Application by: Paul Beauregard
Septi Tech, Inc.
220 Lewiston Road
Gray, Maine 04039

For: Innovative Approval for "SeptiTech" advanced wastewater pretreatment systems

DENR Contact: Dr. Robert Uebler
1-252-946-6481
FAX 252-975-3716
bob.uebler@ncmail.net

These applications may be reviewed by contacting the applicant or at 2728 Capital Blvd., Raleigh, NC, On-Site Wastewater Section, Division of Environmental Health. Draft proposed innovative approvals and proposed final action on the application by DENR can be viewed on the On-Site Wastewater Section web site: www.deh.enr.state.nc/oww/.

Written public comments may be submitted to DENR within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Mr. Andy Adams, Chief, On-site Wastewater Section, 1642 Mail Service Center, Raleigh, NC 27699-1642, or andy.adams@ncmail.net, or Fax 919.715.3227. Written comments received by DENR in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

**Public Notice
Commission for Health Services**

Proposed rule to exempt precious metal recyclers from requirement to have a permit in NC while remaining in compliance with the Rule to restrict the on-site accumulation of waste for more than 90 days without obtaining a permit or acquiring interim status.

15A NCAC 13A .0111 and .0113

This notice extends the comment period and provides a second opportunity for comments, with comment period ending on February 10, 2006. A Notice of Text was previously published in the 19:23, 1893-1898 issue of the NC Register for a proposed exemption to precious metal recyclers rules. The Public Hearing was held on July 7, 2005. Comments were received and considered. Each proposed revision to the published Rule is listed.

Rule .0111(b); (*line 9*)

Added, "precious metal" after off-site and before, "recycling facilities must".

We removed the legitimacy criteria in Rule .0113 proposal:

Rule .0113(n)(2) - deleted last part of sentence, "when they meet the following legitimacy criteria:"

Paragraph (n)(2) removed Subparagraphs (A) through (D).

Rule .0113(n)(3) – removed, "and meet the criteria in Subparagraph (2) of Paragraph (n)".

Written comments or requests must be submitted to Elizabeth Cannon, Chief, Hazardous Waste Section, 1646 Mail Service Center, Raleigh, NC 27699-1646 by February 10, 2006. Mailed written requests must be postmarked no later than February 8, 2006. All persons interested and potentially affected by the proposal are strongly encouraged to make comments.

**Address: Elizabeth Cannon
DENR/Division of Waste Management-Hazardous Waste Section
1646 Mail Service Center
Raleigh, N.C. 27699-1646
Phone (optional) (919) 508-8534
Fax (optional): (919) 715-3605
E-Mail (optional): Elizabeth.Cannon@ncmail.net**

Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.

Statutory reference: G.S. 150B-21.2.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Marine Fisheries Commission intends to adopt the rule cited as 15A NCAC 03R .0114 and amend the rules cited as 15A NCAC 03J .0202; 03L .0103; 03M .0101, .0502; 03O .0302-.0303; 03R .0106.

Proposed Effective Date: July 1, 2006

Public Hearing:

Date: April 4, 2006

Time: 7:00 p.m.

Location: DENR, Regional Office, 943 Washington Square Mall, Washington, NC

Reason for Proposed Action:

15A NCAC 03J .0202 - includes 2 options that will help alleviate user conflicts in the Atlantic Ocean striped mullet beach seine fishery that have existed along Bogue Banks since the mid 1980s. These user conflicts involve allocation issues between commercial gill netters and stop net crews and between the ocean fishing pier owners and patrons and the stop net crews. The proposed rule amendment will restrict gill net use in the Bogue Banks area.

15A NCAC 03L .0103(c) - establishes a 90-foot headrope restriction in all internal waters except Pamlico Sound and the lower portions of Pamlico and Neuse rivers. This will reduce user conflicts between large and small shrimping operations in the smaller water bodies of the state, reduce bycatch and decrease the negative impact of trawling operations.

15A NCAC 03L .0103(d) - establishes no shrimp trawl areas in the Pungo, Pamlico and Neuse rivers which will reduce the harvest of southern flounder in those areas. The areas are defined in 03R.0114 (1) through (3).

15A NCAC 03M .0101 - would allow fishermen to use cut up mullet for bait by exempting them from the mutilated finfish restriction.

15A NCAC 03M .0502 - would help alleviate prevent the excessive harvest of striped mullet by out-of-state persons for use as bait by restricting the recreational harvest of striped mullet to 200 per person per day.

15A NCAC 03O .0302(a)(7) - adds skimmer trawls to the gear allowed under a Recreational Commercial Gear License.

15A NCAC 03O .0303(e) - establishes a limit of 48 quarts, heads-on, 30 quarts, heads-off, for shrimp catches by a RCGL holder. (f) of the same rule establishes a 96 quart heads-on 60 quart heads-off limit for RCGL shrimp catches if more than one RCGL holder is present.

15A NCAC 03R .0106 - establishes additional trawl nets prohibited areas in Core Sound (1), Newport River (7), White Oak River (8), a portion of the Intracoastal Waterway in New Hanover County (9), bays on the east side of the Cape Fear River (10), Cape Creek (11) and Bald Head Creek (12). These closures protect grass beds and soft bottom habitat, decrease by catch of small finfish and shrimp and address user conflicts.

15A NCAC 03R .0114 - defines water bodies where only shrimp trawling is prohibited. Other types of trawling, such as for crabs will still be allowed. The prohibition on shrimp trawling is to protect habitat and juvenile southern flounder from being caught in shrimp trawls.

Procedure by which a person can object to the agency on a proposed rule: If you have any objections to the proposed rules, please forward a typed or handwritten letter indicating your specific reasons for your objections to the following address: Belinda Loftin, P.O. Box 769, Morehead City, NC 28557.

Comments may be submitted to: Belinda Loftin, P.O. Box 769, Morehead City, NC 28557, phone (252)726-7021, (252)726-0254, email Belinda.loftin@ncmail.net.

Comment period ends: April 26, 2006

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 (\geq \$3,000,000)
- None

CHAPTER 3 - MARINE FISHERIES

SUBCHAPTER 03J - NETS, POTS, DREDGES, AND OTHER FISHING DEVICES

SECTION .0200 - NET RULES, SPECIFIC AREAS

15A NCAC 03J .0202 ATLANTIC OCEAN

OPTION 1:

In the Atlantic Ocean:

- (1) It is unlawful to use nets from June 15 through August 15 in the waters of Masonboro Inlet or in the ocean within 300 yards of the beach between Masonboro Inlet and a line running southeasterly through the water tank 34° 13.1500'N - 77° 47.300' W on the northern end of Wrightsville Beach, a distance of 4400 yards parallel with the beach.
- (2) It is unlawful to use trawls within one-half mile of the beach between the Virginia line and Oregon Inlet.
- (3) It is unlawful to use a trawl with a mesh length less than four inches in the main body, three inches in the extension, and one and three-fourths inches in the cod end or tail bag inshore of a line beginning on the western side of Beaufort Inlet Channel at a point 34° 41.3000' N - 76° 40.1333' W; running westerly parallel to and one-half miles from the shore off Salter Path to a point 34° 40.5333' N - 76° 53.7500' W.
- (4) It is unlawful to use trawl nets, including flynets, southwest of the 9960-Y chain 40250 LORAN C line (running offshore in a southeasterly direction) from Cape Hatteras to the North Carolina/South Carolina line except:
 - (a) Shrimp trawls as defined in 15A NCAC 03L .0103;
 - (b) Crab trawls as defined in 15A NCAC 03L .0202; or
 - (c) Flounder trawls as defined in 15A NCAC 03M .0503.
- (5) Finfish taken with shrimp or crab trawls:
 - (a) It is unlawful to possess finfish (including pursuant to 15A NCAC 03M .0102) incidental to shrimp or crab trawl operations from December 1 through March 31 unless the weight of the combined catch of shrimp and crabs exceeds the weight of finfish except as provided in Sub-Item (5)(b) of this Rule;
 - (b) It is unlawful to possess more than 300 pounds of kingfish (*Menticirrhus*, sp.) taken south of Bogue Inlet regardless of the amount of shrimp, crabs or finfish taken.
- (6) It is unlawful to use unattended gill nets or block or stop nets in the Atlantic Ocean within 300 yards of the beach from Beaufort Inlet to the South Carolina line from sunset Friday to

sunrise Monday from Memorial Day through Labor Day.

- (7) It is unlawful to use gill nets in the Atlantic Ocean with a mesh length greater than seven inches from April 15 through December 15.
- (8) It is unlawful to use shrimp trawls in all waters west of a line beginning at the southeastern tip of Baldhead Island at a point 33° 50.4833' N - 77° 57.4667' W; running southerly in the Atlantic Ocean to a point 33° 46.2667' N - 77° 56.4000' W; from 9:00 P.M. through 5:00 A.M.
- (9) It is unlawful to use gill nets from September 1 through November 15 in the Atlantic Ocean within 350 yards south of the ocean beach of Bogue Banks west of 76° 42.0653'W (Fort Macon State Park) and east of 76° 44.5351'W (Raleigh Street) unless such nets are used in accordance with the following conditions:
 - (a) Gill net length shall not exceed 160 yards;
 - (b) No stationary gill nets shall be used beyond 150 yards from the mean low water mark extending offshore in a southerly direction;
 - (c) No gill nets shall be set within 750 feet of an ocean fishing pier; and
 - (d) No gill nets shall be set within 450 yards east of a deployed stop net, as measured from where each net connects with the shore.

OPTION 2:

In the Atlantic Ocean:

- (1) It is unlawful to use nets from June 15 through August 15 in the waters of Masonboro Inlet or in the ocean within 300 yards of the beach between Masonboro Inlet and a line running southeasterly through the water tank 34° 13.1500'N - 77° 47.300' W on the northern end of Wrightsville Beach, a distance of 4400 yards parallel with the beach.
- (2) It is unlawful to use trawls within one-half mile of the beach between the Virginia line and Oregon Inlet.
- (3) It is unlawful to use a trawl with a mesh length less than four inches in the main body, three inches in the extension, and one and three-fourths inches in the cod end or tail bag inshore of a line beginning on the western side of Beaufort Inlet Channel at a point 34° 41.3000' N - 76° 40.1333' W; running westerly parallel to and one-half miles from the shore off Salter Path to a point 34° 40.5333' N - 76° 53.7500' W.
- (4) It is unlawful to use trawl nets, including flynets, southwest of the 9960-Y chain 40250 LORAN C line (running offshore in a southeasterly direction) from Cape Hatteras to the North Carolina/South Carolina line except:

- (a) Shrimp trawls as defined in 15A NCAC 03L .0103;
 - (b) Crab trawls as defined in 15A NCAC 03L .0202; or
 - (c) Flounder trawls as defined in 15A NCAC 03M .0503.
- (5) Finfish taken with shrimp or crab trawls:
- (a) It is unlawful to possess finfish (including pursuant to 15A NCAC 03M .0102) incidental to shrimp or crab trawl operations from December 1 through March 31 unless the weight of the combined catch of shrimp and crabs exceeds the weight of finfish except as provided in Sub-Item (5)(b) of this Rule;
 - (b) It is unlawful to possess more than 300 pounds of kingfish (*Menticirrhus*, sp.) taken south of Bogue Inlet regardless of the amount of shrimp, crabs or finfish taken.
- (6) It is unlawful to use unattended gill nets or block or stop nets in the Atlantic Ocean within 300 yards of the beach from Beaufort Inlet to the South Carolina line from sunset Friday to sunrise Monday from Memorial Day through Labor Day.
- (7) It is unlawful to use gill nets in the Atlantic Ocean with a mesh length greater than seven inches from April 15 through December 15.
- It is unlawful to use shrimp trawls in all waters west of a line beginning at the southeastern tip of Baldhead Island at a point 33° 50.4833' N - 77° 57.4667' W; running southerly in the Atlantic Ocean to a point 33° 46.2667' N - 77° 56.4000' W; from 9:00 P.M. through 5:00 A.M.
- (9) It is unlawful to use gill nets from September 1 through November 15 in the Atlantic Ocean within 350 yards south of the ocean beach of Bogue Banks west of 76° 42.0653'W (Fort Macon State Park) and east of 76° 44.5351'W (Raleigh Street) unless such nets are used in accordance with the following conditions:

- (a) Gill nets with one end attached to shore shall not exceed 160 yards in length;
- (b) Gill nets not exceeding 200 yards in length may be used within the 350-yard zone;
- (c) No gill nets shall be set within 750 feet of an ocean fishing pier; and
- (d) No gill nets shall be set within 450 yards east of a deployed stop net, as measured from where each net connects with the shore.

Authority G.S. 113-134; 113-182; 143B-289.52.

SUBCHAPTER 3L - SHRIMP, CRABS, AND LOBSTER

SECTION .0100 - SHRIMP

15A NCAC 03L .0103 PROHIBITED NETS, MESH SIZES AND AREAS

(a) It is unlawful to take shrimp with nets with mesh lengths less than the following:

- (1) Trawl net - one and one-half inches;
- (2) Fixed nets, channel nets, float nets, butterfly nets, and hand seines - one and one-fourth inches; and
- (3) Cast net - no restriction.

(b) It is unlawful to take shrimp with a net constructed in such a manner as to contain an inner or outer liner of any mesh size. Net material used as chafing gear shall be no less than four inches mesh length except that chafing gear with ~~small~~ smaller mesh may be used only on the bottom one-half of the tailbag. Such chafing gear shall not be tied in a manner that forms an additional tailbag.

(c) It is unlawful to take shrimp with trawls which have a combined headrope of greater than 90 feet in internal coastal waters except:

- (1) Pamlico Sound;
- (2) Pamlico River downstream of a line from a point 35° 18.5882'N – 76° 28.9625'W at Pamlico Point; running northerly to a point 35° 22.3741'N – 76° 28.6905'W at Willow Point;
- (3) Neuse River northeast of a line from a point 34° 58.2000'N – 76° 40.5167'W at Winthrop Point on the eastern shore of the entrance to Adam's Creek running northerly to a point 35° 01.0744' N – 76° 42.1550' W at Windmill Point at the entrance of Greens Creek at Oriental.

(d) It is unlawful to use a shrimp trawl in the areas described in 03R .0114.

Authority G.S. 113-134; 113-182; 143B-289.52.

SUBCHAPTER 03M - FINFISH

SECTION .0100 – FINFISH, GENERAL

15A NCAC 03M .0101 MUTILATED FINFISH

It is unlawful to possess aboard a vessel or while engaged in fishing from the shore or a pier any species of finfish ~~which~~ that is subject to a size or harvest restriction without having head and tail ~~attached~~ attached, except for mullet when used for bait. Blueback herring, hickory shad and alewife shall be exempt from this Rule when used for bait provided that not more than two fish per boat or fishing operation may be cut for bait at any one time.

Authority G.S. 113-134; 113-185; 143B-289.52.

SECTION .0500 – OTHER FINFISH

15A NCAC 03M .0502 MULLET

(a) The Fisheries Director may, by proclamation, impose any or all of the following restrictions on the taking of mullet:

- (1) Specify season,
- (2) Specify areas,
- (3) Specify quantity,
- (4) Specify means/methods,
- (5) Specify size.

(b) It is unlawful to possess more than 200 mullet per person per day for recreational purposes.

Authority G.S. 113-134; 113-182; 113-221; 143B-289.52.

SUBCHAPTER 030 – LICENSES, LEASES AND FRANCHISES

SECTION .0300 – RECREATIONAL COMMERCIAL GEAR LICENSES

15A NCAC 030 .0302 AUTHORIZED GEAR

(a) The following are the only commercial fishing gear authorized (including restrictions) for use under a valid Recreational Commercial Gear License:

- (1) One seine 30 feet or over in length but not greater than 100 feet with a mesh length less than 2 ½ inches when deployed or retrieved without the use of a vessel or any other mechanical methods. A vessel may only be used to transport the seine;
- (2) One shrimp trawl with a headrope not exceeding 26 feet in length per vessel. Mechanical methods for retrieving ~~the trawl~~ otter trawls are not authorized for recreational purposes.
- (3) With or without a vessel, five eel, fish, shrimp, or crab pots in any combination, except only two pots of the five may be eel pots. Peeler pots are not authorized for recreational purposes;
- (4) One multiple hook or multiple bait trotline up to 100 feet in length;
- (5) Gill Nets:
 - (A) Not more than 100 yards of gill nets with a mesh length equal to or greater than 2 ½ inches except as provided in (C) of this Subparagraph. Attendance shall be required at all times;
 - (B) Not more than 100 yards of gill nets with a mesh length equal to or greater than 5 ½ inches except as provided in (C) of this Subparagraph. Attendance shall be required when used from one hour after sunrise through one hour before sunset in internal coastal fishing waters east and north of the Highway 58 Bridge at Emerald Isle and in the Atlantic Ocean east and north of 77° 04.0000' W. Attendance shall be required at all times in

internal coastal fishing waters west and south of the Highway 58 Bridge at Emerald Isle and in the Atlantic Ocean west and south of 77° 04.0000' W; and

(C) Not more than 100 yards of gill net may be used at any one time, except that when two or more Recreational Commercial Gear License holders are on board, a maximum of 200 yards may be used from a vessel;

(D) It is unlawful to possess aboard a vessel more than 100 yards of gill nets with a mesh length less than 5 ½ inches and more than 100 yards of gill nets with a mesh length equal to or greater than 5 ½ inches identified as recreational commercial fishing equipment when only one Recreational Commercial Gear License holder is on board. It is unlawful to possess aboard a vessel more than 200 yards of gill nets with a mesh length less than 5 ½ inches and more than 200 yards of gill nets with a mesh length equal to or greater than 5 ½ inches identified as recreational commercial fishing equipment when two or more Recreational Commercial Gear License holders are on board; ~~and~~

(6) A hand-operated device generating pulsating electrical current for the taking of catfish in the area described in 15A NCAC 03J .0304. ~~.0304; and~~

(7) Skimmer trawls not exceeding 26 feet in total combined width.

(b) It is unlawful to use more than the quantity of authorized gear specified in Subparagraphs (a)(1) through (a)(6) of this Rule, regardless of the number of individuals aboard a vessel possessing a valid Recreational Commercial Gear License.

(c) It is unlawful for a person to violate the restrictions of or use gear other than that authorized by Paragraph (a) of this Rule.

(d) Unless otherwise provided, this Rule does not exempt Recreational Commercial Gear License holders from the provisions of other applicable rules of the Marine Fisheries Commission or provisions of proclamations issued by the Fisheries Director as authorized by the Marine Fisheries Commission.

Authority G.S. 113-134; 113-173.

15A NCAC 030 .0303 RECREATIONAL COMMERCIAL GEAR LICENSE POSSESSION LIMITS

(a) It is unlawful to possess more than a single recreational possession limit when only one person aboard a vessel possesses a valid Recreational Commercial Gear License and recreational commercial fishing equipment as defined in 15A NCAC 030 .0302(a) is used, regardless of the number of persons on board.

(b) It is unlawful to possess individual recreational possession limits in excess of the number of individuals aboard a vessel holding valid Recreational Commercial Gear Licenses. Licences except as provided in Paragraph (f) of this Rule.

(c) It is unlawful for any person who holds both a Recreational Commercial Gear License and a Standard or Retired Standard Commercial Fishing License and who is in possession of identified recreational commercial fishing equipment as defined in 15A NCAC 03O .0302(a), to exceed the single recreational possession limit.

(d) It is unlawful for persons aboard a vessel collectively holding only one Recreational Commercial Gear License and any Standard Commercial Fishing License or Retired Standard Commercial Fishing License and who are in possession of any identified recreational commercial fishing equipment as defined in 15A NCAC 03O .0302(a), to exceed one recreational possession limit.

(e) It is unlawful to possess more than 48 quarts, heads on, or 30 quarts, heads off, of shrimp when only one person aboard a vessel possesses a valid Recreational Commercial Gear License and recreational commercial fishing equipment as defined in 15A NCAC 03O .0302(a) is used.

(f) It is unlawful to possess more than 96 quarts, heads on or 60 quarts, heads off, of shrimp if more than one person aboard a vessel possesses a valid Recreational Commercial Gear License and recreational commercial fishing equipment as defined in 15A NCAC 03O .0302(a) is used.

Authority G.S. 113-134; 113-170.4; 113-173; 143B-289.52.

SUBCHAPTER 03R - DESCRIPTIVE BOUNDARIES

SECTION .0100 - DESCRIPTIVE BOUNDARIES

15A NCAC 03R .0106 TRAWL NETS PROHIBITED

The trawl net prohibited areas referenced in 15A NCAC 03R .0104 (b)(4) are delineated in the following coastal water areas:

- (1) In Pamlico, ~~Sound~~ Core and Back sounds - within the area described by a line beginning at a point 35° 43.7457' N - 75° 30.7014' W on the south shore of Eagles Nest Bay on Pea Island; running westerly to a point 35° 42.9500' N - 75° 34.1500' W; running southerly to a point 35° 39.3500' N - 75° 34.4000' W; running southeasterly to a point 35° 35.8931' N - 75° 31.1514' W in Chicamacomico Channel near Beacon "ICC"; running southerly to a point 35° 28.5610' N - 75° 31.5825' W on Gull Island; running southwest to a point 35° 22.8671' N - 75° 33.5851' W in Avon Channel near Beacon "1"; running southwest to a point 35° 18.9603' N - 75° 36.0817' W in Cape Channel near Beacon "2"; running westerly to a point 35° 16.7588' N - 75° 44.2554' W in Rollinson Channel near Beacon "42RC"; running southwest to a point 35° 14.0337' N - 75° 45.9643' W southwest of Oliver Reef near the quick-flashing beacon; running westerly to a

point 35° 09.3650' N - 76° 00.6377' W in Big Foot Slough Channel near Beacon "14BF"; running southwest to a point 35° 08.4523' N - 76° 02.6651' W in Nine Foot Shoal Channel near Beacon "9"; running westerly to a point 35° 07.1000' N - 76° 06.9000' W; running southwest to a point 35° 01.4985' N - 76° 11.4353' W near Beacon "HL"; running southwest to a point 35° 00.2728' N - 76° 12.1903' W near Beacon "2CS"; running southerly to a point 34° 59.5027' N - 76° 12.3204' W in Wainwright Channel immediately east of the northern tip of Wainwright Island; running easterly to a point 34° 58.8333' N - 76° 09.2167' W on Core Banks; ~~running northerly along the shoreline and across the inlets following the COLREGS Demarcation lines to the point of beginning;~~ 34° 58.6760' N - 76° 12.4164' W; running southerly to a point 34° 56.6697' N - 76° 13.6052' W near Marker "15"; running southwest to a point 34° 54.1584' N - 76° 16.9016' W; running southwest to a point 34° 52.1484' N - 76° 19.2607' W; running southwest to a point 34° 51.0617' N - 76° 21.0449' W; running southwest to a point 34° 48.3137' N - 76° 24.3717' W; running southwest to a point 34° 46.3739' N - 76° 26.1526' W; running southwest to a point 34° 44.5795' N - 76° 27.5136' W; running southwest to a point 34° 43.4895' N - 76° 28.9411' W near Beacon "37A"; running southwest to a point 34° 40.4500' N - 76° 30.6833' W; running westerly to a point 34° 40.7061' N - 76° 31.5893' W near Beacon "35" in Back Sound; running westerly to a point 34° 41.3178' N - 76° 33.8092' W near Buoy "3"; running southwest to a point 34° 39.6601' N - 76° 34.4078' W on Shackelford Banks; running easterly and northeasterly along the shoreline and across Barden Inlet following the COLREGS Demarcation line; then running northerly along the shoreline across the inlets following the COLREGS Demarcation line up the Outer Banks to Eagles Nest Bay at the point of beginning;

- (2) In Northern Pamlico Sound, Stumpy Point Bay - north of a line beginning at a point 35° 40.9719' N - 75° 44.4213' W on Drain Point; running westerly to a point 35° 40.6550' N - 75° 45.6869' W on Kazer Point;
- (3) In the Pamlico River area, lower Goose Creek - south of a line beginning at a point 35° 18.2676' N - 76° 37.4706' W on the north shore of Snode Creek; running easterly to a point 35° 18.1660' N - 76° 36.9095' W on Store Point;
- (4) In the Bay River Area:

- (a) In Dump Creek - north of a line beginning at a point 35° 11.6666' N - 76° 33.4207' W on the west shore; running southeasterly to a point 35° 11.3926' N - 76° 32.8993' W on the east shore;
- (b) In Rockhole Bay - north of a line beginning at a point 35° 11.3926' N - 76° 32.8993' W on the west shore; running southeasterly to a point 35° 11.1321' N - 76° 32.1360' W on the east shore;
- (c) In Vandemere Creek - north of a line beginning at a point 35° 11.2681' N - 76° 39.5220' W on the west shore; running southerly to a point 35° 11.0879' N - 76° 39.3200' W on the east shore;
- (d) In Cedar Creek - west of a line beginning at a point 35° 11.2681' N - 76° 39.5220' W on the north shore; running southwesterly to a point 35° 11.1033' N - 76° 39.7321' W on the south shore of an unnamed tributary;
- (e) In Chapel Creek - north of a line beginning at a point 35° 08.6768' N - 76° 42.7985' W on the west shore; running easterly to a point 35° 08.7677' N - 76° 42.3604' W on the east shore;
- (f) In Upper Bay River - west of a line beginning at a point 35° 08.6704' N - 76° 43.0836' W on the north shore; running southwesterly to a point 35° 08.4590' N - 76° 43.1930' W on the south shore;
- (5) In the Neuse River Area, Pierce Creek - west of a line beginning at a point 35° 02.4336' N - 76° 39.7653' W on the north shore; running southerly to a point 35° 02.3767' N - 76° 39.7876' W on the south shore;
- ~~(6) In Core and Back sounds beginning at a point 34° 50.4333' N - 76° 20.2000' W on Core Banks near Drum Inlet; running northwesterly to a point 34° 51.0617' N - 76° 21.0449' W; running southwesterly to a point 34° 48.3137' N - 76° 24.3717' W; running southwesterly to a point 34° 46.3739' N - 76° 26.1526' W; running southwesterly to a point 34° 44.5795' N - 76° 27.5136' W; running southwesterly to a point 34° 43.4895' N - 76° 28.9411' W near Beacon "37A"; running southwesterly to a point 34° 40.4500' N - 76° 30.6833' W; running westerly to a point 34° 40.7061' N - 76° 31.5893' W near Beacon "35" in Back Sound; running westerly to a point 34° 41.3178' N - 76° 33.8092' W near Buoy "3"; running southwesterly to a point 34° 39.6601' N - 76° 34.4078' W on Shackleford Banks;~~
- ~~running easterly and northeasterly along the shoreline and across Barden Inlet following the COLREGS Demarcation line to the point of beginning.~~
- ~~(7)(6) In Cape Lookout Bight, all of Cape Lookout Bight - southwest of the COLREGS Demarcation line at Barden Inlet to the northeastern most point of Power Squadron Spit; running northeasterly to a point 34° 38.6150' N - 76° 32.7434' W on Shackleford Banks. Banks;~~
- (7) Newport River - all waters upstream of a line beginning at a point 34° 45.6960' N - 76° 43.5180' W near Penn Point; running northeasterly to a point 34° 46.5733' N - 76° 42.6350' W at Hardesty Farms subdivision;
- (8) White Oak River - all waters upstream of a line beginning at a point on the west side of the river 34° 43.3425' N - 77° 07.2209' W; running northerly to a point 34° 43.6445' N - 77° 07.3177' W in the river above Cahoon's Slough; running easterly to a point 34° 43.5588' N - 77° 06.6206' W at Hancock Point;
- (9) Intracoastal Waterway - all waters in the maintained channel from a point near Marker #105 34° 18.8167' N - 77° 42.8833' W running southerly to a point at the Wrightsville Beach Drawbridge 34° 12.9500' N - 77° 47.9833' W;
- (10) Cape Fear River - all waters bounded by a line beginning at a point near Fort Fisher 33° 57.5333' N - 77° 56.9333' W running southwesterly along The Rocks to a point 33° 55.1833' N - 77° 58.0833' W running southeasterly and southerly along the shorelines of Second and Buzzard's Bays to a point 33° 53.0333' N - 57.9333' W running northeastly and northwestly along the barrier island shorelines of Buzzard's Bay, Second Bay and The Basin back to the point of origin.
- (11) Cape Creek - all waters upstream of a line beginning at a point on the north shore 33° 53.6167' N - 77° 59.3333' W running southwesterly to a point on the south shore 33° 53.3667' N - 77° 59.4667' W;
- (12) Bald Head Creek - all waters upstream of a line beginning at a point on the west shore 33° 52.8667' N - 77° 59.8000' W running easterly to a point on the east shore 33° 52.8667' N - 77° 59.7167' W.

Authority G.S. 113-134; 113-182; 143B-289.52.

15A NCAC 03R .0114 SHRIMP TRAWL PROHIBITED AREAS
 The shrimp trawl prohibited areas referenced in 15A NCAC 03L .0103(d) are delineated in the following coastal water areas:

PROPOSED RULES

- (1) Pungo River- all waters upstream of a line from a point 35° 23.3166'N – 76° 34.4833'W at Wades Point; running westerly to a point 35° 23.6463'N – 76° 31.0003'W on the north shore of the entrance to Abels Bay.
- (2) Pamlico River- all waters upstream of a line from a point 35° 20.5108'N – 76° 37.7218'W on the western shore of the entrance to Goose Creek; running northeasterly to a point 35° 23.3166'N – 76° 34.4833'W at Wades Point.
- (3) Neuse River- all waters upstream of a line from a point 34° 56.3658'N – 76° 48.7110'W at Cherry Point; running northerly to a point 34° 57.9116'N – 76° 48.2240'W at Wilkerson Point.

Authority G.S. 113-134; 113-182; 143B-289.52.

APPROVED RULES

*This Section includes the Register Notice citation to rules approved by the Rules Review Commission (RRC) at its meeting December 15, 2005 and reported to the Joint Legislative Administrative Procedure Oversight Committee pursuant to G.S. 150B-21.16. The full text of rules are published below when the rules have been approved by RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register. The rules published in full text are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

These rules have been entered into the North Carolina Administrative Code.

APPROVED RULE CITATION				REGISTER CITATION TO THE NOTICE OF TEXT
01	NCAC	06B	.0307*	20:05 NCR
04	NCAC	01N	.0101-.0103	20:06 NCR
04	NCAC	01N	.0104*	20:06 NCR
04	NCAC	01N	.0105	20:06 NCR
04	NCAC	01N	.0106*	20:06 NCR
04	NCAC	01N	.0107	20:06 NCR
10A	NCAC	09	.0301*	20:02 NCR
10A	NCAC	09	.0707*	20:02 NCR
10A	NCAC	09	.0712-.0713*	20:02 NCR
10A	NCAC	09	.1606*	20:02 NCR
10A	NCAC	09	.2201*	20:02 NCR
10A	NCAC	09	.2803*	20:02 NCR
10A	NCAC	67B	.0201-.0204	20:05 NCR
10A	NCAC	67B	.0301-.0302	20:05 NCR
10A	NCAC	67B	.0401-.0404	20:05 NCR
10A	NCAC	67B	.0501-.0505	20:05 NCR
12	NCAC	10B	.0103*	20:04 NCR
12	NCAC	10B	.0204-.0205*	20:04 NCR
12	NCAC	10B	.0301*	20:04 NCR
12	NCAC	10B	.0502-.0504*	20:04 NCR
12	NCAC	10B	.0601*	20:04 NCR
12	NCAC	10B	.0603*	20:04 NCR
12	NCAC	10B	.0703-.0704*	20:04 NCR
12	NCAC	10B	.0709*	20:04 NCR
12	NCAC	10B	.0907-.0909*	20:04 NCR
12	NCAC	10B	.0917	20:04 NCR
12	NCAC	10B	.1002	20:04 NCR
12	NCAC	10B	.1102*	20:04 NCR
12	NCAC	10B	.1202	20:04 NCR
12	NCAC	10B	.1402*	20:04 NCR
12	NCAC	10B	.1502*	20:04 NCR
12	NCAC	10B	.1701*	20:04 NCR
12	NCAC	10B	.1704*	20:04 NCR
12	NCAC	10B	.1705	20:04 NCR
12	NCAC	10B	.1801-.1805*	20:04 NCR
12	NCAC	10B	.1806	20:04 NCR
12	NCAC	10B	.2002	20:04 NCR
12	NCAC	10B	.2104*	20:04 NCR
15A	NCAC	01R	.0101	20:03 NCR
16	NCAC	06C	.0304*	20:03 NCR
16	NCAC	06C	.0305*	20:02 NCR
16	NCAC	06C	.0307*	20:02 NCR
16	NCAC	06D	.0301*	20:02 NCR
16	NCAC	06D	.0305*	20:02 NCR
16	NCAC	06D	.0501-.0502*	20:02 NCR

APPROVED RULES

16	NCAC	06D	.0503	20:02 NCR
16	NCAC	06G	.0305*	20:02 NCR
16	NCAC	06G	.0312*	20:02 NCR
21	NCAC	08A	.0301*	20:04 NCR
21	NCAC	08A	.0308*	20:04 NCR
21	NCAC	08A	.0311	20:04 NCR
21	NCAC	08F	.0103*	20:04 NCR
21	NCAC	08F	.0105*	20:04 NCR
21	NCAC	08F	.0106-.0107	20:04 NCR
21	NCAC	08F	.0110	20:04 NCR
21	NCAC	08F	.0112	20:04 NCR
21	NCAC	08F	.0304*	20:04 NCR
21	NCAC	08F	.0401*	20:04 NCR
21	NCAC	08F	.0409	20:04 NCR
21	NCAC	08F	.0410*	20:04 NCR
21	NCAC	08G	.0410*	20:04 NCR
21	NCAC	08H	.0101	20:04 NCR
21	NCAC	08H	.0105	20:04 NCR
21	NCAC	08M	.0105*	20:04 NCR
21	NCAC	08M	.0106	20:04 NCR
21	NCAC	08N	.0103*	20:04 NCR
21	NCAC	08N	.0204*	20:04 NCR
21	NCAC	08N	.0208	20:04 NCR
21	NCAC	08N	.0213-.0214*	20:04 NCR
21	NCAC	08N	.0302-.0305*	20:04 NCR
21	NCAC	08N	.0307-.0308*	20:04 NCR
21	NCAC	08N	.0401*	20:04 NCR
21	NCAC	08N	.0408*	20:04 NCR
21	NCAC	14M	.0101-.0134	19:17 NCR
21	NCAC	14N	.0101	19:17 NCR
21	NCAC	14N	.0102-.0103*	19:17 NCR
21	NCAC	14N	.0104-.0105	19:17 NCR
21	NCAC	14N	.0108-.0109	19:17 NCR
21	NCAC	14N	.0111-.0112	19:17 NCR
21	NCAC	14N	.0113*	19:17 NCR
21	NCAC	14N	.0114	19:17 NCR
21	NCAC	14N	.0201-.0202	19:17 NCR
21	NCAC	14N	.0301-.0302	19:17 NCR
21	NCAC	14N	.0401-.0402	19:17 NCR
21	NCAC	14N	.0501-.0502	19:17 NCR
21	NCAC	14N	.0601-.0602	19:17 NCR
21	NCAC	14N	.0701-.0702	19:17 NCR
21	NCAC	14P	.0108*	19:17 NCR
21	NCAC	14R	.0101	19:17 NCR
21	NCAC	14R	.0103	19:17 NCR
21	NCAC	18B	.0101	20:04 NCR
21	NCAC	18B	.0204*	20:04 NCR
21	NCAC	18B	.0211*	20:04 NCR
21	NCAC	18B	.1101	20:04 NCR
21	NCAC	18B	.1102-.1103*	20:04 NCR
21	NCAC	18B	.1105	20:04 NCR
21	NCAC	18B	.1106*	20:04 NCR
21	NCAC	36	.0320*	20:01 NCR
21	NCAC	66	.0101*	n/a G.S. 150B-21.5(a)(2)
26	NCAC	02C	.0105	20:05 NCR
26	NCAC	02C	.0108	20:05 NCR
26	NCAC	02C	.0308	20:05 NCR
26	NCAC	02C	.0405	20:05 NCR
26	NCAC	03	.0101	20:05 NCR

TITLE 01 – DEPARTMENT OF ADMINISTRATION

**01 NCAC 06B .0307 LEASES AT STATE
FAIRGROUNDS AND WNC AG CENTER**

The Department of Agriculture and Consumer Services, without prior approval of the Council of State, may enter into leases of buildings or land, and contracts for the furnishing of rides, shows and other related services on the State Fairgrounds and the Western North Carolina Agricultural Center, provided that the duration of each lease, rental agreement or contract shall not exceed 20 days per year for up to three years, plus up to 10 days before and after an event for move-in and move-out. A lease, rental agreement or contract for more than one year, which provides for a payment to the State of more than one hundred thousand dollars (\$100,000) per year, shall be awarded to the highest qualified bidder, as determined by the Department.

*History Note: Authority G.S. 143-341(4)d,f; Council of State Resolution of July 1, 1975;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. January 1, 2006.*

TITLE 04 – DEPARTMENT OF COMMERCE

**04 NCAC 01N .0104 BENEFITS UNDER THE
BUSINESS RECOVERY LOAN PROGRAM**

- (a) A loan shall be for a period of eight years. All payments shall be deferred for the first three years and the loan shall accrue no interest during that period. During the final five-year period, interest shall accrue at three percent and principal shall be amortized through regular monthly payments of principal and interest. There shall be no penalty for early repayment.
- (b) Maximum funding under this program shall be one hundred thousand dollars. The minimum loan amount shall be five thousand dollars. Regardless of the maximum funding for which the business might otherwise qualify, funding shall not exceed the actual physical damage and economic injury sustained by the business from the hurricane(s).
- (c) The Secretary of Commerce or his delegee may approve exceptions to these minimum and maximum loan amounts after determining that a compelling economic need would be served, such as preservation of jobs and investment in the disaster affected counties. Collateral shall be required in the case of exceptions to the specified maximum loan amount.
- (d) Payments for economic losses shall be limited to documented business expenses necessary for the continued operation of the business.

*History Note: Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1;
Emergency Adoption Eff. April 25, 2005;
Temporary Adoption Eff. July 29, 2005;
Eff. January 1, 2006.*

04 NCAC 01N .0106 PROCEDURES FOR THE

BUSINESS RECOVERY LOAN PROGRAM

- (a) Applicants shall apply for loans through the BRAC administered by the SBTDC in cooperation with the Department of Commerce.
- (b) The SBTDC shall work with applicants to assist them in preparing the needed documentation to apply for a disaster assistance loan.
- (c) Loan applications shall be accepted at all of the regional offices maintained by the SBTDC across North Carolina.
- (d) Applicants must meet the eligibility requirements set forth in Paragraphs 04 NCAC 01N .0102(a) and (c), must show cash flow coverage of at least 80 percent, must agree to quarterly business counseling, must document losses that resulted from the hurricane(s) by providing SBA loss verification forms or insurance adjuster forms and photographs, as applicable, must provide such other documents as are requested by the SBTDC for evaluation of the application, and must provide loan guarantees from parties that own more than 20 percent of the applicant. The SBTDC shall consider an applicant's responsible credit history evidenced by credit reports showing repayment on previous loans.
- (e) Upon receipt of a completed application, a loan decision shall be made by the senior management team of the SBTDC within three business days. If approved, the decision shall be transmitted to the disbursing bank. The bank shall disburse the loan after the bank receives the properly executed note and loan package.
- (f) Should the SBA approve a loan upon reconsideration, the borrower shall repay the principal amount of the loan provided by the State of North Carolina pursuant to the rules in this Subchapter.

*History Note: Authority G.S. 143B-430(c); 143B-431(a)(1); S.L. 2005-1;
Emergency Adoption Eff. April 25, 2005;
Temporary Adoption Eff. July 29, 2005;
Eff. January 1, 2006.*

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

**10A NCAC 09 .0301 PRE-LICENSING
REQUIREMENTS**

- (a) Anyone who wishes to obtain a license to operate a child care center shall first request pre-licensing consultation from the Division.
- (b) Upon receiving a request a representative of the Division shall schedule a visit with the person requesting consultation, unless the person requesting consultation meets the criteria described in Rule .0302(g) of this Section. The Division shall furnish the forms required to be completed and submitted in order to apply for a license.
- (c) The Division shall provide regularly scheduled licensing workshops for new and existing child care centers. A schedule of these workshops may be obtained from the Division at the address given in Rule .0102 of this Chapter. The operator of a child care center shall complete the licensing workshop provided

by the Division prior to the Division issuing an initial license or an initial Notice of Compliance to the child care center.

History Note: Authority G.S. 110-88(1); 110-88(5); 143B-168.3; Eff. January 1, 1986; Amended Eff. January 1, 2006; July 1, 1998.

10A NCAC 09 .0707 IN-SERVICE TRAINING REQUIREMENTS

(a) Each center shall assure that each new employee who is expected to have contact with children receives a minimum of 16 clock hours of on-site training and orientation within the first six weeks of employment. This training and orientation shall include:

- (1) training in the recognition of the signs and symptoms of child abuse or neglect and in the employee's duty to report suspected abuse and neglect;
- (2) review of the center's operational policies, including the center's safe sleep policy for infants;
- (3) adequate supervision of children, taking into account their age, emotional, physical, and cognitive development;
- (4) first-hand observation of the center's daily operations;
- (5) instruction in the employee's assigned duties;
- (6) instruction in the maintenance of a safe and healthy environment;
- (7) review of the center's purposes and goals;
- (8) review of the center's personnel policies;
- (9) review of the child care licensing law and rules;
- (10) an explanation of the role of State and local government agencies in the regulation of child care, their impact on the operation of the center, and their availability as a resource; and
- (11) an explanation of the employee's obligation to cooperate with representatives of State and local government agencies during visits and investigations.

(b) As part of the training required in Paragraph (a) of this Rule, each new employee shall complete, within the first two weeks of employment, six clock hours of the training referenced in Subparagraphs (a)(1), (a)(2), and (a)(3) of this Rule.

(c) The child care administrator and any staff who have responsibility for planning and supervising a child care program, as well as staff who work directly with children, shall participate in in-service training activities annually, according to the individual's needs as assessed by the child care administrator. Staff shall choose one of the following options for meeting the in-service requirement:

10A NCAC 09 .0712 STAFF/CHILD RATIOS FOR CENTERS WITH A LICENSED CAPACITY OF LESS THAN 30 CHILDREN

- (1) persons with a four year degree or higher advanced degree in a child care related field of study from a regionally accredited college or university may complete five clock hours of training annually.
- (2) persons with a two year degree in a child care related field of study from a regionally accredited college or university, or persons with a North Carolina Early Childhood Administration Credential or its equivalent may complete eight clock hours of training annually.
- (3) persons with a certificate or diploma in a child care related field of study from a regionally accredited college or university, or persons with a North Carolina Early Childhood Credential or its equivalent may complete 10 clock hours of training annually.
- (4) persons with at least 10 years documented, professional experience as a teacher, director, or caregiver in a licensed child care arrangement may complete 15 clock hours of training annually.
- (5) complete 20 clock hours of training annually.

(d) For staff listed in Subparagraphs (c)(1), (c)(2), (c)(3) and (c)(4) of this Rule, basic cardiopulmonary resuscitation (CPR) training required in Rule .0705 of this Section shall not be counted toward meeting annual in-service training. First aid training may be counted once every three years.

(e) If a child care administrator or lead teacher is currently enrolled in coursework to meet the staff qualification requirements in G.S. 110-91(8), the coursework may be counted toward meeting the annual in-service training requirement.

(f) For staff working less than 40 hours per week on a regular basis and choosing the option for 20 hours of in-service training, the training requirement may be prorated as follows:

WORKING HOURS PER WEEK	CLOCK HOURS REQUIRED
0-10	5
11-20	10
21-30	15
31-40	20

History Note: Authority G.S. 110-91(11); 143B-168.3; Eff. January 1, 1986; Amended Eff. January 1, 2006; May 1, 2004; October 29, 1998; October 1, 1991; November 1, 1989; July 1, 1988; January 1, 1987.

(a) The staff/child ratios and group sizes for a child care center with a licensed capacity of less than 30 children are as follows:

<u>Age of Children</u>	<u>RatioStaff/Children</u>	<u>Maximum Group Size</u>
0 to 12 Months	1/5	10

APPROVED RULES

12 to 24 Months	1/6	12
2 to 3 Years	1/10	20
3 to 5 Years	1/15	25
5 Years and Older	1/25	25

- (1) When only one caregiver is required to meet the staff/child ratio, and children under two years of age are in care, that person shall not concurrently perform food preparation or other duties which are not direct child care responsibilities.
- (2) When only one caregiver is required to meet the staff/child ratio, the operator shall select one of the following options for emergency relief:
 - (A) The center shall post the name, address, and telephone number of an adult who has agreed in writing to be available to provide emergency relief and who can respond within a reasonable period of time; or
 - (B) There shall be a second adult on the premises who is available to provide emergency relief.

(b) The staff/child ratios for a center located in a residence with a licensed capacity of three to 12 children when any preschool aged child is enrolled, or with a licensed capacity of three to 15 children when only school-aged children are enrolled are as follows:

<u>Age of Children</u>	<u>Staff/Children</u>	<u>Ratio</u>
0 to 12 Months	1/5	preschool children plus three additional school-aged children
12 to 24 Months	1/6	preschool children plus two additional school-aged children
2 to 13 Years	1/10	
3 to 13 Years	1/12	
All school-aged	1/15	

(c) The staff/child ratio applicable to a classroom shall be posted in that classroom in an area that parents are able to view at all times.

History Note: Authority G.S. 110-91(7); 143B-168.3; Eff. December 1, 1988; Amended Eff. January 1, 2006; July 1, 1998; July 1, 1994; January 1, 1992; August 1, 1990.

10A NCAC 09 .0713 STAFF/CHILD RATIOS FOR CENTERS WITH A LICENSED CAPACITY OF 30 OR MORE CHILDREN

<u>Age of Children</u>	<u>Ratio</u>	<u>Staff/Children</u>
<u>Maximum Group Size</u>		
0 to 12 Months	1/5	
10		
12 to 24 Months	1/6	
12		

- (b) In any multi-age group situation, the staff/child ratio for the youngest child in the group shall be maintained for the entire group.
- (c) Children younger than two years old may be cared for in groups with older children for the first and last operating hour of the day provided the staff/child ratio for the youngest child in the group is maintained.
- (d) A child two years of age and older may be placed with children under one year of age when a physician certifies that the developmental age of the child makes this placement appropriate.
- (e) When determined to be developmentally appropriate by the operator and parent, a child age two or older may be placed one age level above his or her chronological age without affecting the staff/child ratio for that group. This provision shall be limited to one child per group.
- (f) Except as provided in Paragraphs (c) and (d) of this Rule, children under one year of age shall be kept separate from children two years of age and over.
- (g) Children between the ages of 12 months and 24 months shall not be grouped with older children unless all children in the group are less than three years old.

(a) The staff/child ratios and group sizes for single-age groups of children in centers with a licensed capacity of 30 or more children shall be as follows:

2 to 3 Years	1/10
20	
3 to 4 Years	1/15
25	
4 to 5 Years	1/20
25	
5 Years and Older	1/25
25	

- (h) When only one caregiver is required to meet the staff/child ratio, and no children under two years of age are in care, that person may concurrently perform food preparation or other duties which are not direct child care responsibilities as long as supervision of the children as specified in Rule .0714(f) of this Section is maintained.
- (i) When only one caregiver is required to meet the staff/child ratio, the operator shall select one of the following options for emergency relief:
 - (1) The center shall post the name, address, and telephone number of an adult who has agreed in writing to be available to provide emergency relief and who can respond within a reasonable period of time; or
 - (2) There shall be a second adult on the premises who is available to provide emergency relief.
- (j) Except as provided in Paragraph (h) of this Rule, staff members and administrators who are counted in meeting the staff/child ratios as stated in this Rule shall not concurrently perform food preparation or other duties which are not direct child care responsibilities.

(k) The staff/child ratio applicable to a classroom shall be posted in that classroom in an area that parents are able to view at all times.

History Note: Authority G.S. 110-91(7); 143B-168.3; Eff. December 1, 1988;

<u>Age of Children</u>	<u>Ratio Staff/Children</u>	<u>Maximum Group Size</u>
0 to 12 Months	1/5	10
1 to 2 Years	1/6	12
2 to 3 Years	1/9	18
3 to 4 Years	1/10	20
4 to 5 Years	1/13	25
5 to 6 Years	1/15	25
6 Years and Older	1/20	25

(b) All provisions, excluding staff/child ratios and group sizes of Rules .0712 and .0713 of this Chapter shall apply.

(c) To achieve two points for program standards, centers shall meet all requirements for voluntary enhanced program standards in Section .1600 of this Chapter, except that centers may meet either the staff/child ratios required in Paragraph (a) of this Rule or the space requirements in Rule .1604(a) of this Section.

(d) The staff/child ratio applicable to a classroom shall be posted in that classroom in an area that parents are able to view at all times.

History Note: Authority G.S. 110-88(7); 143B-168.3; Eff. January 1, 1986; Amended Eff. January 1, 2006; April 1, 2001; April 1, 1999; August 1, 1990; July 1, 1988.

10A NCAC 09 .2201 ADMINISTRATIVE PENALTIES: GENERAL PROVISIONS

(a) Pursuant to G.S. 110-102.2, the secretary or designee may order one or more administrative penalties against any operator who violates any provision of Article 7 of Chapter 110 of the General Statutes or of this Chapter.

(b) Nothing in this Section shall restrict the Secretary from using any other statutory or civil penalty available. A civil penalty in accordance with G.S. 110-103.1 and Section .2200 of

Amended Eff. January 1, 2006; July 1, 1998; July 1, 1994; January 1, 1992; August 1, 1990; November 1, 1989.

10A NCAC 09 .1606 STAFF/CHILD RATIOS

(a) The center shall comply with the staff-child ratios and maximum group sizes set in this Rule.

this Chapter may be imposed in conjunction with any other administrative activity.

(c) The issuance of an administrative penalty may be appealed pursuant to G.S. 150B-23.

(d) Following the substantiation of any abuse or neglect complaint or the issuance of any administrative action against a child care facility, the operator shall notify the parents of the children currently enrolled that a complaint was substantiated or that an administrative action was taken against the facility, including administrative actions that may be stayed pending appeal. The notification shall be in writing and shall include information on the nature of the substantiated complaint or the type of administrative action taken. The operator shall maintain copies of documentation of the substantiated complaint investigation or the administrative action issued against the facility for the past three years in a binder, which shall be accessible to parents. The written notice shall state where the binder containing copies of the substantiated complaint investigation or administrative action may be found on site for review by the parents. The operator shall document the date that the written notice was given to all parents.

History Note: Authority G.S. 110-102.2; 110-103.1; 143B-168.3; 150B-23; Eff. July 1, 1988; Amended Eff. January 1, 2006; April 1, 2001; November 1, 1989.

10A NCAC 09 .2803 PROGRAM STANDARDS FOR A RATED LICENSE FOR CHILD CARE CENTERS

(a) To achieve two points for program standards for a star rating, the center shall meet all requirements for voluntary enhanced program standards in Section .1600 of this Chapter, except that either the space requirements in Rule .1604 of this Chapter or the staff/child ratio requirements in Rule .1606 of this Chapter shall be met.

(b) To achieve three points for program standards for a star rating, the center shall:

- (1) Meet all requirements for voluntary enhanced program standards in Section .1600 of this Chapter; and
- (2) Have an average score of 4.0 on the appropriate environment rating scale referenced in Rule .2802(e) of this Section in each classroom evaluated.

(c) To achieve four points for program standards for a star rating, the center shall:

- (1) Meet all the requirements for voluntary enhanced program standards in Section .1600 of this Chapter; and
- (2) Have an average score of 4.5 on the appropriate environment rating scale referenced in Rule .2802(e) of this Section in each classroom evaluated.

(d) To achieve five points for program standards for a star rating, the center shall:

- (1) Meet all the requirements for voluntary enhanced program standards in Section .1600 of this Chapter, except for staff/child ratio requirements in Rule .1606 of this Chapter; and
- (2) Meet the staff/child ratios and group sizes set below:

<u>Age of Children</u>	<u>Ratio Staff/Children</u>	<u>Maximum Group Size</u>
0 to 12 Months	1/4	8
1 to 2 Years	1/5	10
2 to 3 Years	1/8	16
3 to 4 Years	1/9	18
4 to 5 Years	1/12	24
5 to 6 Years	1/14	25
6 Years and Older	1/19	25; and

- (3) The staff/child ratio applicable to a classroom shall be posted in that classroom in an area that parents are able to view at all times; and
- (4) Have an average score of 5.0 on the appropriate environment rating scale referenced in Rule .2802(e) of this Section in each classroom evaluated.

(e) For centers with a licensed capacity of three to twelve children located in a residence, a Family Day Care Rating Scale shall be the rating scale used in Subparagraphs (b)(2), (c)(2), and (d)(3) of this Rule.

History Note: Authority G.S. 110-88(7); 110-90(4); 143B-168.3; Eff. April 1, 1999; Amended Eff. January 1, 2006.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 10B .0103 DEFINITIONS

In addition to the definitions set forth in G.S. 17E-2, the following definitions apply throughout this Chapter, unless the context requires otherwise:

- (1) "Appointment" as it applies to a deputy sheriff means the date the deputy's oath of office is administered; and as it applies to a detention officer means either the date the detention officer's oath of office was administered, if applicable, or the detention officer's actual date of employment as reported on the Report of Appointment (Form F-4) by the employing agency, whichever is earlier; and as it applies to a telecommunicator, the telecommunicator's actual date of employment as reported on the Report of Appointment (Form F-4T).
- (2) "Convicted" or "Conviction" means and includes, for purposes of this Chapter, the entry of:
 - (a) a plea of guilty;
 - (b) a verdict or finding of guilt by a jury, judge, magistrate, or other adjudicating body, tribunal, or official, either civilian or military; or
 - (c) a plea of no contest, nolo contendere, or the equivalent.
- (3) "Department Head" means the chief administrator of any criminal justice agency or communications center. Department head includes the sheriff or a designee appointed in writing by the Department head.
- (4) "Director" means the Director of the Sheriffs' Standards Division of the North Carolina Department of Justice.

- (5) "Division" means the Sheriffs' Standards Division.
- (6) "High School" means graduation from a high school that meets the compulsory attendance requirements in the jurisdiction in which the school is located.
- (7) "Enrolled" means that an individual is currently participating in an on-going presentation of a commission-certified basic training course which has not been concluded on the day probationary certification expires.
- (8) "Essential Job Functions" means those tasks deemed by the agency head to be necessary for the proper performance of a justice officer.
- (9) "Lateral Transfer" means certification of a justice officer when the applicant for certification has previously held general or grandfather certification as a justice officer or a criminal justice officer as defined in G.S. 17C-2(c), excluding state correctional officers, state probation/parole officers, and state youth services officers, provided the applicant has been separated from a sworn law enforcement position for no more than one year, or has had no break in service.
- (10) "Misdemeanor" means those criminal offenses not classified by the North Carolina General Statutes, the United States Code, the common law, or the courts as felonies. Misdemeanor offenses are classified by the Commission as follows:
 - (a) "Class A Misdemeanor" means:
 - (i) an act committed or omitted in violation of any common law, duly enacted ordinance or criminal statute of this state which is not classified as a Class B Misdemeanor

pursuant to Sub-item (10)(b) of this Rule. Also specifically included herein as a Class A Misdemeanor is the offense of driving while impaired, if the offender was sentenced under punishment level three [G.S. 20-179(i)], level four [G.S. 20-179(j)], or level five [G.S. 20-179(k)]. All other traffic offenses under Chapter 20 (motor vehicles) are not classified as Class A Misdemeanors.

(ii) acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ordinance or criminal statute, of this state for which the maximum punishment allowable for the designated offense included imprisonment for a term of not more than six months. Also specifically included herein as a Class A Misdemeanor is the offense of driving while impaired, if the offender was sentenced under punishment level three [G.S. 20-179(i)], level four [G.S. 20-179(j)], or level five [G.S. 20-179(k)]. All other traffic offenses under Chapter 20 (motor vehicles) are not classified as Class A Misdemeanors.

(iii) any act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of not more than six months. Specifically excluded from this grouping of "Class A Misdemeanor" criminal offenses for jurisdictions other than North Carolina,

are motor vehicle or traffic offenses designated as misdemeanors under the laws of other jurisdictions, or duly enacted ordinances of an authorized governmental entity with the exception of the offense of driving while impaired which is expressly included herein as a class A misdemeanor, if the offender could have been sentenced for a term of not more than six months.

(b) "Class B Misdemeanor" means:

(i) an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this state which is classified as a Class B Misdemeanor as set forth in the "Class B Misdemeanor Manual" as published by the North Carolina Department of Justice and shall automatically include any later amendments and editions of the incorporated material as provided by G.S. 150B-21.6. Copies of the publication may be obtained from the North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602. There is no cost per manual at the time of adoption of this Rule. "

(ii) acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ordinance, or criminal statute, of this state for which the maximum punishment allowable for the designated offense included imprisonment for a term of more than six months but not more than two years. Specifically excluded from the grouping of "Class B misdemeanors" committed or omitted in North Carolina prior to October 1, 1994 are motor vehicle or traffic offenses designated as being

- misdemeanors under G.S. 20 (motor vehicles), with the following exceptions: "Class B misdemeanors" committed or omitted in North Carolina prior to October 1, 1994 expressly include, either first or subsequent offenses of G.S. 20-138(a) or (b), G.S. 20-166 (duty to stop in the event of an accident), G.S. 20-138.1 (impaired driving) if the defendant was sentenced under punishment level one [G.S. 20-179(g)] or punishment level two [G.S. 20-179(h)] for the offense, and shall also include a violation of G.S. 20-28(b) [driving while license permanently revoked or suspended].
- (iii) any act committed or omitted in violation of any common law, duly enacted ordinance, or criminal statute of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of more than six months but not more than two years. Specifically excluded from this grouping of "Class B Misdemeanor" criminal offenses for jurisdictions other than North Carolina, are motor vehicle or traffic offenses designated as being misdemeanors under the laws of other jurisdictions with the following exceptions: Class B Misdemeanor does expressly include, either first or subsequent offenses of driving while impaired if the maximum allowable punishment is for a term of more than six months but not more than two years, and driving while license permanently revoked or permanently suspended.
- (11) "Felony" means any offense designated a felony by the laws, statutes, or ordinances of the jurisdiction in which the offense occurred.
- (12) "Dual Certification" means that a justice officer holds probationary, general, or grandfather certification in two or more of the following positions with the same agency:
- (a) deputy sheriff;
 - (b) detention officer;
 - (c) telecommunicator.
- (13) "Detention Officer" means any person performing responsibilities, either on a full-time, part-time, permanent or temporary basis, which includes the control, care, and supervision of any inmates incarcerated in a county jail or other confinement facility under the direct supervision and management of the sheriff. "Detention Officer" shall also mean the administrator and the other custodial personnel of district confinement facilities as defined in G.S. 153A-219.
- (14) "Deputy Sheriff" means any person who has been duly appointed and sworn by the sheriff and who is authorized to exercise the powers of arrest in accordance with the laws of North Carolina.
- (15) "Telecommunicator" means any person performing responsibilities, either on a full-time, part-time, permanent or temporary basis, for communication functions to include receiving calls or dispatching for emergency and law enforcement services.
- (16) "Commission" as it pertains to criminal offenses shall mean a finding by the North Carolina Sheriffs' Education and Training Standards Commission or an administrative body, pursuant to the provisions of G.S. 150B, that a person performed the acts necessary to satisfy the elements of a specified criminal offense.
- (17) "Sworn Law Enforcement Position" means a position with a criminal justice agency of the United States, any state, or a political subdivision of any state which, by law, has general power of arrest and requires each of the following:
- (a) successful completion of the Basic Law Enforcement Training curriculum offered by the respective state or federal entity; and
 - (b) an independent oath of office providing for the execution of the laws of the respective state or federal jurisdiction.
- (18) "General Powers of Arrest" shall mean the authority to enforce the state or federal laws within the officer's territorial and subject

matter jurisdiction to include the authority to arrest and cite offenders under the laws of the jurisdiction. These powers must be conferred on the officer by virtue of occupying a sworn law enforcement position. General powers of arrest shall mean those powers, even though limited by subject matter jurisdiction, which may be exercised as a routine responsibility of the office. General powers of arrest shall not mean those powers of arrest conferred by virtue of a special appointment or those granted as an incidental, as opposed to a primary, function of the office.

- (19) "In-Service Training Coordinator" means the person designated by the Department Head to administer the agency's in-service training program.

History Note: Authority G.S. 17E-7; Eff. January 1, 1989; Amended Eff. January 1, 1994; January 1, 1993; Temporary October 1, 1994 for a period of 180 days or until the permanent rule become effective whichever is sooner; Amended Eff. January 1, 1996; March 1, 1995; Temporary Amendment Eff. March 1, 1998; Amended Eff. January 1, 2006; August 1, 2000; August 1, 1998.

12 NCAC 10B .0204 SUSPENSION: REVOCATION: OR DENIAL OF CERTIFICATION

(a) The Commission shall revoke or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of:

- (1) a felony; or
- (2) a crime for which the authorized punishment could have been imprisonment for more than two years.

(b) The Commission shall revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer:

- (1) has not enrolled in and satisfactorily completed the required basic training course in its entirety within a one year time period as specified by the rules in this Subchapter; or
- (2) fails to meet or maintain any of the employment or certification standards required by 12 NCAC 10B .0300; or
- (3) fails to satisfactorily complete the in-service training requirements as presented in 12 NCAC 10B .1700, .1800, .2000 and .2100; or
- (4) has refused to submit to the drug screen as required in 12 NCAC 10B .0306(a)(6) or .0410(a) or in connection with an application for or certification as a justice officer or a criminal justice officer as defined in 12 NCAC 09A .0103(6); or
- (5) has produced a positive result on any drug screen reported to the Commission as specified in 12 NCAC 10B .0410 or reported to any

commission, agency, or board established to certify, pursuant to said commission, agency, or boards' standards, a person as a justice officer or a criminal justice officer as defined in 12 NCAC 09A .0103(6), unless the positive result is due to a medically indicated cause.

(c) The Commission may revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or certified justice officer:

- (1) has knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Rule shall also apply to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100; or
- (2) has knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Rule shall also apply to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100; or
- (3) has knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, aided another in obtaining or attempting to obtain credit, training, or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Rule shall also apply to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100; or
- (4) has been removed from office by decree of the Superior Court in accordance with the provisions of G.S. 128-16 or has been removed from office by sentence of the court in accord with the provisions of G.S. 14-230; or
- (5) has been denied certification or had such certification suspended or revoked by the North Carolina Criminal Justice Education and Training Standards Commission, or a similar North Carolina, out-of-state or federal approving, certifying or licensing agency.

(d) The Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of:

- (1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of initial certification; or

- (2) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor within the five-year period prior to the date of appointment; or
- (3) four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(b) as Class B misdemeanors regardless of the date of commission or conviction; or
- (4) an accumulation of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor, regardless of the date of commission or conviction except the applicant shall be certified if the last conviction or commission occurred more than two years prior to the date of appointment; or
- (5) any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

(e) Without limiting the application of G.S. 17E, a person who has had his certification suspended or revoked shall not exercise the authority or perform the duties of a justice officer during the period of suspension or revocation.

(f) Without limiting the application of G.S. 17E, a person who has been denied certification revoked shall not be employed or appointed as a justice officer or exercise the authority or perform the duties of a justice officer.

(g) If the Commission does revoke, suspend, or deny the certification of a justice officer pursuant to this Rule, the period of such sanction shall be as set out in 12 NCAC 10B .0205.

History Note: Authority G.S. 17E-7; Eff. January 1, 1990; Amended Eff. July 1, 1990; Recodified from 12 NCAC 10B .0204 Eff. January 1, 1991; Amended Eff. April 1, 1991; January 1, 1991; Recodified from 12 NCAC 10B .0207 Eff. January 1, 1992; Amended Eff. January 1, 2006; March 1, 2005; January 1, 2005; August 1, 1998; January 1, 1996; January 1, 1995; January 1, 1994; January 1, 1993.

12 NCAC 10B .0205 PERIOD OF SUSPENSION: REVOCATION: OR DENIAL

When the Commission suspends, revokes, or denies the certification of a justice officer, the period of sanction shall be:

- (1) permanent where the cause of sanction is:
 - (a) commission or conviction of a felony; or
 - (b) commission or conviction of a crime for which authorized punishment included imprisonment for more than two years; or
 - (c) the second revocation, suspension, or denial of an officer's certification for any of the causes requiring a five-year period of revocation, suspension,

or denial as set out in Item (2) of this Rule.

(2) not less than five years where the cause of sanction is:

- (a) commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(1) and (4).
- (b) material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.
- (c) knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission.
- (d) knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, aiding another in obtaining or attempting to obtain credit, training, or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Rule shall also apply to obtaining or attempting to obtain credit for in-service training as required by 12 NCAC 10B .1700, .1800, .2000, or .2100.
- (e) failure to make either of the notifications as required by 12 NCAC 10B .0301(a)(7); or
- (f) removal from office under the provisions of G.S. 128-16 or the provisions of G.S. 14-230.
- (g) a positive result on a drug screen, or a refusal to submit to drug testing both pursuant to 12 NCAC 10B .0301 and 12 NCAC 10B .0406, or in connection with an application for certification as a criminal justice officer as defined in 12 NCAC 09A .0103(6).

The Commission may either reduce or suspend the periods of sanction under this Item or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension, in the discretion of the Commission.

- (3) for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is:
- (a) failure to meet or satisfy relevant basic training requirements.
 - (b) failure to meet or maintain the minimum standards of employment or certification;
 - (c) failure to meet or satisfy the in-service training requirements as prescribed in 12 NCAC 10B .1700 or .2100.
 - (d) commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(2), (3), (4) and (5).
 - (e) denial, suspension, or revocation of certification pursuant to 12 NCAC 10B .0204(c)(5).

The Commission may either reduce or suspend the periods of sanction where revocation, denial or suspension of certification is based upon Subparagraphs .0204(d)(3), (d)(4), and (d)(5) or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension, in the discretion of the Commission.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 1991; Recodified from 12 NCAC 10B .0208 Eff. January 1, 1992; Amended Eff. January 1, 2006; March 1, 2005; January 1, 1995; January 1, 1994; January 1, 1993; January 1, 1992.

12 NCAC 10B .0301 MINIMUM STANDARDS FOR JUSTICE OFFICERS

- (a) Every Justice Officer employed or certified in North Carolina shall:
- (1) be a citizen of the United States;
 - (2) be at least 21 years of age;
 - (3) be a high school graduate, or the equivalent (GED);
 - (4) have been fingerprinted by the employing agency;
 - (5) have had a medical examination by a licensed physician;
 - (6) have produced a negative result on a drug screen administered according to the following specifications:
 - (A) the drug screen shall be a urine test consisting of an initial screening test using an immunoassay method and a confirmatory test on an initial positive result using a gas chromatography/mass spectrometry (GC/MS) or other reliable initial and

- (B) confirmatory tests as may, from time to time, be authorized or mandated by the Department of Health and Human Services for Federal Workplace Drug Testing Programs; and
- (B) a chain of custody shall be maintained on the specimen from collection to the eventual discarding of the specimen; and
- (C) the drugs whose use shall be tested for shall include at least cannabis, cocaine, phencyclidine (PCP), opiates and amphetamines or their metabolites; and
- (D) the test threshold values established by the Department of Health and Human Services for Federal Workplace Drug Testing Programs are hereby incorporated by reference, and shall automatically include any later amendments and editions of the referenced materials. Copies of this information may be obtained from the National Institute on Drug Abuse, 5600 Fisher Lane, Rockville, Maryland 20857 at no cost at the time of adoption of this Rule; and
- (E) the test conducted shall be not more than 60 days old, calculated from the time when the laboratory reports the results to the date of employment; and
- (F) the laboratory conducting the test must be certified for federal workplace drug testing programs, and must adhere to applicable federal rules, regulations and guidelines pertaining to the handling, testing, storage and preservation of samples, except that individual agencies may specify other drugs to be tested for in addition to those drugs set out in Part (C) of this Subparagraph; and
- (G) every agency head shall make arrangements for the services of a medical review officer (MRO) for the purpose of review of drug tests reported by the laboratory and such officer shall be a licensed physician;
- (7) within five working days notify the Standards Division and the appointing department head in writing of all criminal offenses with which the officer is charged and all Domestic Violence Orders (50B) and Civil No Contact Orders (50C) which are issued by a judicial official and which provide an opportunity for both parties to be present; and shall also give notification, in writing, to the Standards Division and the appointing department head

following the adjudication of these criminal charges and Domestic Violence Orders (50B). This shall include all criminal offenses except minor traffic offenses. A minor traffic offense is defined for purposes of this Subparagraph as any offense under G.S. 20 or similar laws of other jurisdictions; except those Chapter 20 offenses published in the Class B Misdemeanor Manual. The initial notification required must specify the nature of the offense, the date of offense, and the arresting agency. The notifications of adjudication required must specify the nature of the offense, the court in which the case was handled and the date of disposition, and must include a certified copy of the final disposition from the Clerk of Court in the county of adjudication. The notifications of adjudication must be received by the Standards Division within 30 days of the date the case was disposed of in court. Officers required to notify the Standards Division under this Subparagraph shall also make the same notification to their employing or appointing department head within 20 days of the date the case was disposed of in court. The department head, provided he has knowledge of the officer's charge(s), Civil No Contact Orders (50C) and Domestic Violence Orders (50B) shall also notify the Division within 30 days of the date the case or order was disposed of in court. Receipt by the Standards Division of timely notification of the initial offenses charged and of adjudication of those offenses, from either the officer or the department head, is sufficient notice for compliance with this Subparagraph;

- (8) be of good moral as defined in: In re Willis, 299 N.C. 1, 215 S.E.2d 771 appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); In re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); and their progeny;
- (9) have a background investigation conducted by the employing agency, to include a personal interview prior to employment;
- (10) not have committed or been convicted of a crime or crimes as specified in 12 NCAC 10B .0307.

(b) The requirements of this Rule shall apply to all applications for certification and shall also be applicable at all times during which the justice officer is certified by the Commission.

History Note: Authority G.S. 17E-7; 95-230; 95-231; 95-232; 95-233; 95-234; 95-235; Eff. January 1, 1989; Amended Eff. January 1, 2006; January 1, 2005; August 1, 2002; January 1, 1996; January 1, 1994; January 1, 1993; January 1, 1992; July 1, 1990; January 1, 1990.

12 NCAC 10B .0502 BASIC LAW ENFORCEMENT TRAINING COURSE FOR DEPUTIES

(a) The basic training course for deputy sheriffs consists of instruction designed to provide the trainee with the skills and knowledge to perform those tasks essential to function in law enforcement.

(b) The course entitled "Basic Law Enforcement Training" shall consist of a minimum of 618 hours of instruction and shall include the following identified topical areas and minimum instructional hours for each:

(1)	LEGAL UNIT	
	(A) Motor Vehicle Laws	20 hours
	(B) Preparing for Court and Testifying in Court	12 hours
	(C) Elements of Criminal Law	24 hours
	(D) Juvenile Laws and Procedures	8 hours
	(E) Arrest, Search and Seizure/Constitutional Law	28 hours
	(F) ABC Laws and Procedures	4 hours
	UNIT TOTAL	96 Hours
(2)	PATROL DUTIES UNIT	
	(A) Techniques of Traffic Law Enforcement	24 hours
	(B) Explosives and Hazardous Materials Emergencies	12 hours
	(C) Traffic Accident Investigation	20 hours
	(D) In-Custody Transportation	8 hours
	(E) Crowd Management	12 hours
	(F) Patrol Techniques	20 hours
	(G) Law Enforcement Communication and Information Systems	8 hours
	(H) Anti-Terrorism	4 hours
	(I) Rapid Deployment	8 hours
	UNIT TOTAL	116 hours
(3)	LAW ENFORCEMENT COMMUNICATION UNIT	
	(A) Dealing with Victims and the Public	10 hours

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(B)	Domestic Violence Response	12 hours
(C)	Ethics for Professional Law Enforcement	4 hours
(D)	Individuals with Mental Illness and Mental Retardation	8 hours
(E)	Crime Prevention Techniques	6 hours
(F)	Communication Skills for Law Enforcement Officers	8 hours
	UNIT TOTAL	48 hours
(4)	INVESTIGATION UNIT	
(A)	Fingerprinting and Photographing Arrestee	6 hours
(B)	Field Note-taking and Report Writing	12 hours
(C)	Criminal Investigation	34 hours
(D)	Interviews: Field and In-Custody	16 hours
(E)	Controlled Substances	12 hours
	UNIT TOTAL	80 hours
(5)	PRACTICAL APPLICATION UNIT	
(A)	First Responder	40 hours
(B)	Firearms	48 hours
(C)	Law Enforcement Driver Training	40 hours
(D)	Physical Fitness	8 hours
	(i) Fitness Assessment and Testing	12 hours
	(ii) 1 hour - 3 days a week	34 hours
(E)	Subject Control Arrest Techniques	40 hours
	UNIT TOTAL	222 hours
(6)	SHERIFF-SPECIFIC UNIT	
(A)	Civil Process	24 hours
(B)	Sheriffs' Responsibilities: Detention Duties	4 hours
(C)	Sheriffs' Responsibilities: Court Duties	6 hours
	UNIT TOTAL	34 hours
(7)	COURSE ORIENTATION	2 hours
(8)	TESTING	20 hours
	TOTAL COURSE HOURS	618 HOURS

(c) The "Basic Law Enforcement Training Manual" as published by the North Carolina Justice Academy shall be used as the as basic curriculum for this Basic Law Enforcement Training Course. Copies of this manual may be obtained at cost by contacting the North Carolina Justice Academy, Post Office Box 99, Salemburg, North Carolina 28385-0099.

(d) The Commission shall designate the developer of the Basic Law Enforcement Training Course curricula and such designation shall be deemed by the Commission as approval for the developer to conduct pilot Basic Law Enforcement Training Courses. Individuals who successfully complete such a pilot Basic Law Enforcement Training Course offering shall be deemed to have successfully complied with and satisfied the minimum training requirement.

(e) The rules governing Minimum Standards for Completion of Training, codified as Title 12, Subchapter 9B, Section .0400 of the North Carolina Administrative Code, and previously incorporated by the North Carolina Criminal Justice Education and Training Standards Commission, are hereby adopted by reference, and shall, automatically include any later amendments and editions of the adopted matter to apply to actions of the North Carolina Sheriffs' Education and Training Standards Commission. Copies of the incorporated materials may be obtained at no cost from the Criminal Justice Standards Division, North Carolina Department of Justice, 114 West Edenton Street, Post Office Drawer 149, Raleigh, North Carolina 27602.

History Note: Authority G.S. 17E-4(a);

Eff. January 1, 1989;

Amended Eff. January 1, 2006; August 1, 2000; January 1, 1996; January 1, 1995; February 1, 1991; January 1, 1990.

**12 NCAC 10B .0503 TIME
REQ/COMPLETION/BASIC LAW ENFORCEMENT
TRAINING COURSE**

(a) Each deputy sheriff holding temporary or probationary certification shall satisfactorily complete a commission-certified basic training course. The deputy shall complete such course within one year from the date of his/her Oath of Office. Any deputy sheriff who does not comply with this Rule or other training provisions of this Chapter shall not be authorized to exercise the powers of a deputy sheriff and shall not be authorized to exercise the power of arrest. If, however, an officer has enrolled in a commission-certified basic law enforcement training program that concludes later than the end of the officer's probationary period, the Commission shall extend the probationary period for a period not to exceed 12 months.

(b) Persons having completed a commission-certified basic law enforcement training program and not having been duly appointed and certified in a sworn law enforcement position as defined in 12 NCAC 10B .0103(17) within one year of completion of the basic law enforcement training course shall complete a subsequent commission-certified basic recruit training program in its entirety and successfully pass the State Comprehensive Examination within the 12 month probationary period as prescribed in 12 NCAC 10B .0402, unless the Director

determines that a delay in applying for certification was due to simple negligence on the part of the applicant or employing agency, in which case the Director shall accept a commission-certified basic training program which is over one year old. Such extension of the one year period shall not exceed 30 days from the expiration date of a commission-certified basic training program.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 1989; Amended Eff. January 1, 2006; January 1, 1996; January 1, 1994; January 1, 1991.

12 NCAC 10B .0504 WAIVER OF COMPLETION OF TRAINING

- (a) The Commission shall waive a deputy sheriff's completion of the Commission-certified law enforcement training course upon receiving documentary evidence from the employing agency that the deputy has satisfactorily completed equivalent training. All such deputies, however, shall serve a one year period of probation.
- (b) Training received in states with laws governing or regulating law enforcement training shall, if subject to such review, have been approved or certified by the appropriate agency of the state in which the training was received.
- (c) The Commission shall prescribe as a condition of certification, supplementary or remedial training deemed necessary to equate previous training with current standards.

(1)	Orientation	2 hours
(2)	Criminal Justice System	3 hours
(3)	Legal Aspects of Management & Supervision	19 hours
(4)	Contraband/Searches	6 hours
(5)	Processing Inmates	7 hours
(6)	First Aid & CPR	10 hours
(7)	Medical Care in the Jail	6 hours
(8)	Patrol & Security Functions of the Jail	5 hours
(9)	Key and Tool Control	2 hours
(10)	Supervision & Management of Inmates	5 hours
(11)	Suicides & Crisis Management	5 hours
(12)	Introduction to Rules & Regulations Governing Jails	2 hours
(13)	Stress	2 hours
(14)	Investigative Process in the Jail	9 hours
(15)	Subject Control Techniques	24 hours
(16)	Aspects of Mental Illness	6 hours
(17)	Transportation of Inmates	7 hours
(18)	Fire Emergencies	4 hours
(19)	Physical Fitness for Detention Officers	20 hours
(20)	Communication Skills	5 hours
(21)	Ethics	3 hours
(22)	Review/Testing	7 hours
(23)	State Comprehensive Examination	3 hours
	TOTAL HOURS	162 hours

(c) Consistent with the curriculum development policy of the Commission as published in the "Detention Officer Certification Course Management Guide", the Commission shall designate the developer of the Detention Officer Certification Course curricula and such designation shall be deemed by the Commission as approval for the developer to conduct pilot Detention Officer

(d) The Commission may require satisfactory performance on a written examination as proof of equivalent training; however, such examination is in addition to the required equivalent training and not in lieu of said training.

(e) In considering whether a deputy sheriff's prior service in a sworn law enforcement position is creditable service, the individual must have been duly appointed and certified or licensed in a sworn law enforcement position as defined in 12 NCAC 10B .0103(17).

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 1989; Amended Eff. January 1, 2006.

12 NCAC 10B .0601 DETENTION OFFICER CERTIFICATION COURSE

- (a) This Section establishes the current standard by which Sheriffs' Office and district confinement personnel shall receive detention officer training. The Detention Officer Certification Course shall consist of a minimum of 162 hours of instruction designed to provide the trainee with the skills and knowledge necessary to perform those tasks considered essential to the administration and operation of a confinement facility.
- (b) Each Detention Officer Certification Course shall include the following identified topic areas and approximate minimum instructional hours for each area:

(1)	Orientation	2 hours
(2)	Criminal Justice System	3 hours
(3)	Legal Aspects of Management & Supervision	19 hours
(4)	Contraband/Searches	6 hours
(5)	Processing Inmates	7 hours
(6)	First Aid & CPR	10 hours
(7)	Medical Care in the Jail	6 hours
(8)	Patrol & Security Functions of the Jail	5 hours
(9)	Key and Tool Control	2 hours
(10)	Supervision & Management of Inmates	5 hours
(11)	Suicides & Crisis Management	5 hours
(12)	Introduction to Rules & Regulations Governing Jails	2 hours
(13)	Stress	2 hours
(14)	Investigative Process in the Jail	9 hours
(15)	Subject Control Techniques	24 hours
(16)	Aspects of Mental Illness	6 hours
(17)	Transportation of Inmates	7 hours
(18)	Fire Emergencies	4 hours
(19)	Physical Fitness for Detention Officers	20 hours
(20)	Communication Skills	5 hours
(21)	Ethics	3 hours
(22)	Review/Testing	7 hours
(23)	State Comprehensive Examination	3 hours
	TOTAL HOURS	162 hours

Certification Courses. Individuals who complete such a pilot Detention Officer Certification Course offering shall be deemed to have complied with and satisfied the minimum training requirement.

(d) The "Detention Officer Certification Training Manual" as published by the North Carolina Justice Academy shall be used

as the basic curriculum for the Detention Officer Certification Course. Copies of this manual may be obtained by contacting the North Carolina Justice Academy, Post Office Box 99, Salemburg, North Carolina 28385-0099. The cost of this manual is forty dollars (\$40.00) at the time of adoption of this Rule.

(e) The "Detention Officer Certification Course Management Guide" as published by the North Carolina Justice Academy is hereby incorporated by reference and shall automatically include any later amendments, editions of the incorporated matter to be used by school directors in planning, implementing and delivering basic detention officer training. The standards and requirements established by the "Detention Officer Certification Course Management Guide" must be adhered to by the school director. Each certified school director shall be issued a copy of the guide at the time of certification at no cost to the certified school.

*History Note: Authority G.S. 17E-4(a);
Eff. January 1, 1989;
Amended Eff. January 1, 2006; August 2, 2002; August 1, 2000;
August 1, 1998; February 1, 1998; January 1, 1996; June 1,
1992; January 1, 1992; January 1, 1991.*

**12 NCAC 10B .0603 EVALUATION FOR TRAINING
WAIVER**

Applicants for certification with prior detention or correctional officer experience shall have been employed and certified as a detention or correctional officer in order to be considered for a training evaluation under this Rule. The following rules shall be used by division staff in evaluating a detention officer's training and experience to determine eligibility for a waiver of training:

- (1) Persons who have separated from a detention officer position during the probationary period after having completed a commission-certified detention officer training course and who have been separated from a detention officer position for more than one year shall complete a subsequent commission-certified detention officer training course in its entirety and pass the State Comprehensive Examination within the 12 month probationary period as described in 12 NCAC 10B .0602(a).
- (2) Persons who separated from a detention officer position during their probationary period after having completed a commission-certified detention officer training course and who have been separated from a detention officer position for one year or less shall serve the remainder of the initial probationary period in accordance with G.S. 17E-7(b), but need not complete an additional training program.
- (3) Persons who separated from a detention officer position during the probationary period without having completed a detention officer training course or whose certification was suspended pursuant to 12 NCAC 10B .0204(b)(1) and who have remained separated or suspended for over one year shall complete

- (4) Persons holding General Detention Officer Certification who have completed a commission-certified detention officer training course and who have separated from a detention officer position for more than one year shall complete a subsequent commission-certified detention officer training course in its entirety and pass the State Comprehensive Examination within the 12 month probationary period as prescribed in 12 NCAC 10B .0602(a).
- (5) Persons holding Grandfather Detention Officer Certification who separate from a detention officer position and remain separated from a detention officer position for more than one year shall complete a commission-certified detention officer training program in its entirety and pass the State Comprehensive Examination within the 12 month probationary period as prescribed in 12 NCAC 10B .0602(a).
- (6) Persons transferring to a sheriff's office from another law enforcement agency who hold a detention officer certification issued by the North Carolina Criminal Justice Education and Training Standards Commission shall be subject to evaluation of their prior training and experience on an individual basis. The Division staff shall determine the amount of training, which is comparable to that received by detention officers pursuant to 12 NCAC 10B .0601(b), required of these applicants.
- (7) Persons holding general certification as a correctional officer issued by the North Carolina Criminal Justice Education and Training Standards Commission and who:
 - (a) completed training as a correctional officer between January 1, 1981 and August 1, 2002; and
 - (b) transfer to a sheriff's office or a district confinement facility in a detention officer position; and
 - (c) have had less than a one year break in service, or no break in service, shall serve a 12-month probationary period as prescribed in 12 NCAC 10B .0602(a) and shall complete the following topic areas in a commission-certified detention officer certification course and take the state examination in its entirety during that probationary period:

(i)	Orientation	2 hours
(ii)	Legal Aspects of Management & Supervision	19 hours
(iii)	Medical Care in the Jail	6 hours
(iv)	Investigative Process in the Jail	9 hours
(v)	Criminal Justice System	3 hours
(vi)	Introduction to Rules and Regulations Governing Jails	2 hours
(vii)	Subject Control Techniques	24 hours
	TOTAL HOURS	(65) hours

(8) Persons holding general certification as a correctional officer issued by the North Carolina Criminal Justice Education and Training Standards Commission and who: available at all times during course delivery as specified in 12 NCAC 10B .0704(b).

- (c) The executive officers of the institution or agency sponsoring the Detention Officer Certification Course shall:
- (1) acquire and allocate sufficient financial resources to provide commission-certified instructors and to meet other necessary program expenses;
 - (2) provide adequate secretarial, clerical, and other supportive staff assistance as required by the school director;
 - (3) provide or make available suitable facilities, equipment, materials, and supplies for comprehensive and qualitative course delivery, as required in the "Detention Officer Certification Course Management Guide" and specifically including the following:
 - (A) a comfortable, well-lighted and ventilated classroom with a seating capacity sufficient to accommodate all attending trainees;
 - (B) audio-visual equipment and other instructional devices and aids necessary and beneficial to the delivery of effective training;
 - (C) a library for trainees' use covering the subject matter areas relevant to the training course, maintained in current status and having sufficient copies for convenient trainee access; and
 - (D) an area designated for instruction of subject control techniques which enables the safe execution of the basic detention officer subject control techniques topic area, with the following specifications:
 - (i) 30 square feet of floor space per student during the practical exercise portion of this topic area and while testing trainees' proficiency in performing the required maneuvers;
 - (ii) one instructor for every 10 students during the practical exercise portion of this topic area and while testing trainees' proficiency in performing the required maneuvers;

Division staff shall compare the completed correctional officer training to the existing Detention Officer Certification Course and determine whether any of the Detention Officer Certification Course blocks of instruction can be waived. The Division shall notify the employing agency of the resulting training requirements. The detention officer and shall complete the required training in a commission-certified Detention Officer Certification Course and take the state examination in its entirety during the probationary period.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 1989; Amended Eff. January 1, 2006; August 1, 2002; August 1, 1998; February 1, 1998; January 1, 1996; January 1, 1993; January 1, 1992; January 1, 1991.

12 NCAC 10B .0703 ADMINISTRATION OF DETENTION OFFICER CERTIFICATION COURSE

- (a) The executive officer or officers of the institution or agency sponsoring a Detention Officer Certification Course shall have primary responsibility for implementation of the rules in this Section and for administration of the school.
- (b) The executive officers shall designate a compensated staff member who may apply to the Commission to be the school director. No more than two school directors shall be designated at each certified institution/agency to deliver a Detention Officer Certification Course. The school director shall have administrative responsibility for planning scheduling, presenting, coordinating, reporting, and generally managing each sponsored detention officer certification course and shall be readily

- (iii) restrooms and drinking water within 100 yards of the training site; and
 - (iv) telephone or radio communication immediately available on site.
- (E) an area designated for use as a jail cell for performing the practical exercises in the topic area entitled "Contraband Searches". If a county jail cell is unavailable, a simulated jail cell is acceptable provided it is built to the same specifications required by the Department of Human Resources with regards to size;
- (F) an area designated for fire emergencies instruction which enables the safe execution of the lesson plan as follows:
- (i) a well-ventilated, open area which allows for the setting and putting out of a fire;
 - (ii) restrooms and drinking water within 100 yards of the training site; and
 - (iii) telephone or radio communication immediately available on site.
- (G) an area designated for physical fitness for detention officer trainees to include:
- (i) an area for running, weight lifting and other exercises performed during the physical fitness topic area which provides a minimum of 20 square feet per trainee during the performance of the exercises required in the physical fitness topic area;
 - (ii) restrooms and drinking water within 100 yards of the training site;
 - (iii) telephone or radio communication immediately available on site;
 - (iv) shower facilities, if physical fitness is performed prior to classroom training; and
 - (v) one instructor for every 10 students during the physical assessment portion of this block of instruction;
 - (vi) sufficient instructors as needed to maintain visual contact with students while performing any physical exercise.
- (H) an area designated for instruction in first aid and CPR techniques which provides a minimum of 20 square feet per trainee during the practical exercise portion and testing for proficiency in administering CPR. There must also be one instructor for every 10 students during the practical exercise portion and proficiency testing in administering CPR.
- (d) In the event that an institution or agency does not own a facility as required in this Section, written agreements with other entities must be made to assure use of and timely access to such facilities. A copy of such agreement must accompany the originating institution or agency "Pre-Delivery Report" (Form F7-A) when submitted to the Division.

History Note: Authority G.S. 17E-4; Eff. January 1, 1989; Amended Eff. January 1, 2006; January 1, 2005; August 1, 2000; August 1, 1998; January 1, 1996; January 1, 1992.

12 NCAC 10B .0704 RESPONSIBILITIES: SCHOOL DIRECTORS, DETENTION OFFICER COURSE

(a) In planning, developing, coordinating, and delivering each commission-certified Detention Officer Certification Course, the school director shall:

- (1) Formalize and schedule the course curriculum in accordance with the curriculum standards established by the rules in this Chapter.
 - (A) The Detention Officer Certification Course shall be presented with a minimum of 40 hours of instruction each week during consecutive calendar weeks until course requirements are completed.
 - (B) In the event of exceptional or emergency circumstances, the Director shall upon written finding of justification, grant a waiver of the minimum hours requirement.
- (2) Select and schedule instructors who are properly certified by the Commission. The selecting and scheduling of instructors is subject to special requirements as follows:
 - (A) No single individual may be scheduled to instruct more than 35 percent of the total hours of the curriculum during any one delivery except as set forth in Part (a)(2)(B) of this Rule.
 - (B) Where the school director shows exceptional or emergency circumstances and the school director documents that an instructor is properly certified to instruct more than 35 percent of the total hours of the curriculum, the Director of the Division shall grant written approval

- for the expansion of the individual instructional limitation.
- (C) The appropriate number of instructors for specific topic areas shall be scheduled as required in 12 NCAC 10B .0703.
- (3) Provide each instructor with a commission-approved course outline and all necessary additional information concerning the instructor's duties and responsibilities.
- (4) Review each instructor's lesson plans and other instructional materials for conformance to the rules in this Chapter and to minimize repetition and duplication of subject matter.
- (5) Arrange for the timely availability of appropriate audiovisual aids and materials, publications, facilities and equipment for training in all topic areas as required in the "Detention Officer Certification Course Management Guide".
- (6) Develop, adopt, reproduce, and distribute any supplemental rules, regulations, and requirements determined by the school to be necessary or appropriate for:
- (A) Effective course delivery;
- (B) Establishing responsibilities and obligations of agencies or departments employing course trainees; and
- (C) Regulating trainee participation and demeanor and ensuring trainee attendance and maintaining performance records.
- A copy of such rules, regulations and requirements shall be submitted to the Director as an attachment to the Pre-Delivery Report of Training Course Presentation, Form F-7A. A copy of such rules shall also be given to each trainee and to the sheriff of each trainee's employing agency at the time the trainee enrolls in the course.
- (7) If appropriate, recommend housing and dining facilities for trainees.
- (8) Not less than 30 days before commencing delivery of the course, submit to the Commission a Pre-Delivery Report of Training Course Presentation (Form F-7A) along with the following attachments:
- (A) A comprehensive course schedule showing arrangement of topical presentations and proposed instructional assignments;
- (B) A copy of any rules, regulations, and requirements for the school and, when appropriate, completed applications for certification of instructors. The Director shall review the submitted Pre-Delivery Report together with all attachments to ensure that the school is in compliance with all commission rules; if school's rules are found to be in violation, the Director shall notify the school director of deficiency, and approval shall be withheld until all matters are in compliance with the Commissions' rules.
- (9) Administer the course delivery in accordance with the rules in this Chapter and ensure that the training offered is as effective as possible.
- (10) Monitor or designate a certified instructor to monitor the presentations of all probationary instructors during course delivery and prepare written evaluations on their performance and suitability for subsequent instructional assignments. These evaluations shall be prepared on commission forms and forwarded to the Division at the conclusion of each delivery. Based on this evaluation the school director shall recommend approval or denial of requests for Detention Officer Instructor Certification, Limited Lecturer Certification or Professional Lecturer Certification. The observations shall be of sufficient duration to ensure the instructor is using the Instructional System Development model, as taught in Criminal Justice Instructor Training set out in 12 NCAC 09B .0209, and that the delivery is objective based, documented by and consistent with a Commission-approved lesson plan. For each topic area, the school director's or designee's evaluation shall be based on the course delivery observations, the instructor's use of the approved lesson plan, and the results of the students evaluations of the instructor.
- (11) Monitor or designate a certified instructor to monitor the presentations of all other instructors during course delivery and prepare written evaluations on their performance and suitability for subsequent instructional assignments. Instructor evaluations shall be prepared on commission forms in accordance with the rules in this Chapter. These evaluations shall be kept on file by the school for a period of three years and shall be made available for inspection by a representative of the Commission upon request. The observations shall be of sufficient duration to ensure the instructor is using the Instructional System Development model, as taught in Criminal Justice Instructor Training set out in 12 NCAC 09B .0209, and that the delivery is objective based, documented by and consistent with a Commission-approved lesson plan. For each topic area, the school director's or designee's evaluation shall be based on the course delivery observations, the instructor's

- (12) Ensure that any designated certified instructor who is evaluating the instructional presentation of another shall hold certification in the same instructional topic area as that being taught.
- (13) Administer or designate a person to administer appropriate tests as determined necessary at various intervals during course delivery.
- (14) Maintain direct supervision, direction, and control over the performance of all persons to whom any portion of the planning, development, presentation, or administration of a course has been delegated.
- (15) During a delivery of the Detention Officer Certification Course, make available to authorized representatives of the Commission three hours of scheduled class time and classroom facilities for the administration of a written examination to those trainees who have satisfactorily completed all course work.
- (16) Not more than ten days after receiving from the Commission's representative the Report of Examination Scores, submit to the Commission a Post-Delivery Report of Training Course Presentation (Form 7-B).

(b) In addition to the requirements in 12 NCAC 10B .0704(a), the school director shall be readily available to students and Division staff at all times during course delivery by telephone, pager, or other means. The means, and applicable numbers, shall be filed with the commission-certified training delivery site and the Division prior to the beginning of a scheduled course delivery.

History Note: Authority G.S. 17E-4; Eff. January 1, 1989; Amended Eff. January 1, 2006; January 1, 2005; August 1, 1998; January 1, 1996; January 1, 1994; January 1, 1992.

12 NCAC 10B .0709 RESPONSIBILITIES: SCHOOL DIRECTORS, TELECOMMUNICATOR CERTIFICATION COURSE

(a) In planning, developing, coordinating, and delivering each commission-certified Telecommunicator Certification Course, the school director shall:

- (1) Formalize and schedule the course curriculum in accordance with the curriculum standards established by the rules in this Chapter;
- (2) Select and schedule instructors who are properly certified by the Commission;
- (3) Provide each instructor with a commission-approved course outline and all necessary additional information concerning the instructor's duties and responsibilities;
- (4) Review each instructor's lesson plans and other instructional materials for conformance to the rules in this Chapter and to minimize repetition and duplication of subject matter;

- (5) Arrange for the timely availability of appropriate audiovisual aids and materials, publications, facilities and equipment for training in all topic areas as required in the "Telecommunicator Certification Course Management Guide";
- (6) Develop, adopt, reproduce, and distribute any supplemental rules, regulations, and requirements determined by the school to be necessary or appropriate for:
 - (A) Effective course delivery;
 - (B) Instruction on the responsibilities and obligations of agencies or departments employing course trainees; and
 - (C) Regulating trainee participation and demeanor and ensuring trainee attendance and maintaining performance records.

A copy of such rules, regulations and requirements shall be submitted to the Director as an attachment to the Pre-Delivery Report of Training Course Presentation, Form F-7A-T. A copy of such rules shall also be given to each trainee and to the sheriff or agency head of each trainee's employing agency at the time the trainee enrolls in the course;

- (7) If appropriate, recommend housing and dining facilities for trainees;
- (8) Not less than 30 days before commencing delivery of the course, submit to the Commission a Pre-Delivery Report of Training Course Presentation (Form F-7A-T) along with the following attachments:
 - (A) A comprehensive course schedule showing arrangement of topical presentations and proposed instructional assignments;
 - (B) A copy of any rules, regulations, and requirements for the school and, when appropriate, completed applications for certification of instructors. The Director shall review the submitted Pre-Delivery Report together with all attachments to ensure that the school is in compliance with all commission rules; if school's rules are found to be in violation, the Director shall notify the school director of deficiency, and approval shall be withheld until all matters are in compliance with the Commissions' rules;
- (9) Administer the course delivery in accordance with the rules in this Chapter and ensure that the training offered is as effective as possible;
- (10) Monitor or designate a certified instructor to monitor the presentations of all probationary instructors during course delivery and prepare

written evaluations on their performance and suitability for subsequent instructional assignments. These evaluations shall be prepared on commission forms and forwarded to the Division at the conclusion of each delivery. Based on this evaluation the school director shall recommend approval or denial of requests for Telecommunicator Instructor Certification or Professional Lecturer Certification; The observations shall be of sufficient duration to ensure the instructor is using the Instructional System Development model as taught in Criminal Justice Instructor Training set out in 12 NCAC 09B .0209, and that the delivery is objective based, documented by and consistent with a Commission-approved lesson plan. For each topic area, the school director's or designee's evaluation shall be based on the course delivery observations, the instructor's use of the approved lesson plan, and the results of the students evaluations of the instructor;

- (11) Monitor or designate a certified instructor to monitor the presentations of all other instructors during course delivery and prepare written evaluations on their performance and suitability for subsequent instructional assignments. Instructor evaluations shall be prepared on commission-approved forms in accordance with the rules in this Chapter. The observations shall be of sufficient duration to ensure the instructor is using the Instructional System Development model as taught in Criminal Justice Instructor Training set out in 12 NCAC 09B .0209, and that the delivery is objective based, documented by and consistent with a Commission-approved lesson plan. For each topic area, the school director's or designee's evaluation shall be based on the course delivery observations, the instructor's use of the approved lesson plan, and the results of the students evaluations of the instructor. These evaluations shall be kept on file by the school for a period of three years and shall be made available for inspection by a representative of the Commission upon request;
- (12) Ensure that any designated certified instructor who is evaluating the instructional presentation of another shall hold certification in the same instructional topic area as that being taught;
- (13) Administer or designate a person to administer appropriate tests as determined necessary at various intervals during course delivery;
- (14) Maintain direct supervision, direction, and control over the performance of all persons to whom any portion of the planning,

- (15) development, presentation, or administration of a course has been delegated;
- (15) During a delivery of the Telecommunicator Certification Course, make available to authorized representatives of the Commission two hours of scheduled class time and classroom facilities for the administration of a written examination to those trainees who have satisfactorily completed all course work; and
- (16) Not more than 10 days after receiving from the Commission's representative the Report of Examination Scores, submit to the Commission a Post-Delivery Report of Training Course Presentation (Form 7-B-T).

(b) The school director shall be readily available to students and Division staff at all times during course delivery by telephone, pager, or other means. The means, and applicable numbers, shall be filed with the commission-certified training delivery site and the Division prior to the beginning of a scheduled course delivery.

History Note: Authority G.S. 17E-4; Eff. April 1, 2001; Amended Eff. January 1, 2006; January 1, 2005.

12 NCAC 10B .0907 TERMS AND CONDITIONS OF PROFESSIONAL LECTURER CERT

The expiration dates of any existing commission-issued Professional Lecturer Certifications, where the individual also holds another instructor certification(s) issued through this Commission, shall be set to expire concurrently with the other instructor certification(s) issued by this Commission. In the event such instructor does not hold another instructor certification under this Commission, but holds an instructor certification under the North Carolina Criminal Justice Education and Training Standards Commission, the expiration date shall be set to expire concurrently with the other instructor certification(s) issued by the North Carolina Criminal Justice Education and Training Standards Commission. Where the instructor holds no certification through either Commission, certification as a professional lecturer shall remain effective for three years from the date of issuance. The lecturer shall apply for recertification at or before the expiration date.

History Note: Authority G.S. 17E-4; Eff. January 1, 1989; Amended Eff. January 1, 2006; August 1, 2002.

12 NCAC 10B .0908 LIMITED LECTURER CERTIFICATION

(a) The Commission may issue a Limited Lecturer Certification to an applicant who has developed specific or special skills by virtue of specific or special training. Limited Lecturer Certification may be issued in the following topical areas:

- (1) First Aid and CPR;
- (2) Subject Control Techniques;
- (3) Fire Emergencies in the Jail;
- (4) Medical Care in the Jail;
- (5) Physical Fitness for Detention Officers.

(b) To be eligible for a Limited Lecturer Certificate for topic areas set forth in Rule .0908(a), the applicant must meet the qualifications as follows:

- (1) First Aid and CPR: first aid and CPR instructor with the American Red Cross, American Heart Association (AHA), American Safety and Health Institute (ASHI), or National Safety Council (NSC); or a licensed physician, Family Nurse Practitioner, Licensed Practical Nurse (LPN), Registered Nurse (RN), Physician's Assistant, or EMT;
- (2) Subject Control Techniques: certified by N.C. Criminal Justice Education and Training Standards Commission as Defensive Tactics Instructor and compliance with Rule .0903(c) of this Section;
- (3) Fire Emergencies in the Jail: Certified Fire Instructor through the North Carolina Department of Insurance Office of State Fire Marshal;
- (4) Medical Care in a Jail: A Licensed Physician, Family Nurse Practitioner, LPN, RN, or EMT, or Physician's Assistant;
- (5) Physical Fitness for Detention Officer: certified as a Physical Fitness Instructor by the North Carolina Criminal Justice Education and Training Standards Commission.

(c) In addition to the requirements set out in Paragraph (b) of this Rule, applicants for Limited Lecturer Certification must possess current certification to perform CPR and which was obtained through the applicant having shown proficiency both cognitively and through skills testing.

History Note: Authority G.S. 17E-4; Eff. January 1, 1989;

Amended Eff. January 1, 2006; August 1, 2002; August 1, 2000; August 1, 1998; January 1, 1996; January 1, 1992; January 1, 1991; January 1, 1990.

12 NCAC 10B .0909 TERMS AND CONDITIONS OF A LIMITED LECTURER CERTIFICATION

(a) An applicant meeting the requirements for certification as a Limited Lecturer shall serve a probationary period. The expiration dates of any existing commission-issued Limited Lecturer Certifications, where the individual holds instructor certification under the North Carolina Criminal Justice Education and Training Standards Commission, shall be set to expire concurrently with the other instructor certification(s) issued by the North Carolina Criminal Justice Education and Training Standards Commission. In the event such instructor does not hold instructor certification under the North Carolina Criminal Justice Education and Training Standards Commission, but holds another instructor certification(s) issued through this Commission, the expiration date shall be set to expire concurrently with the other instructor certification(s) issued by this Commission. Where the instructor holds no certification through either Commission, certification as a Limited Lecturer shall remain effective for 12 months from the date of issuance. The lecturer shall apply for Full Limited Lecturer Certification at

or before the expiration date. If the time-period before the expiration date is less than one year, then the four hours of instruction shall be waived for this shortened term and Full Limited Lecturer Certification shall be issued provided all other conditions for Full status as set out in this Section are met.

(b) The probationary instructor shall be eligible for full Limited Lecturer status at the end of the probationary period if the instructor, through application, submits to the Commission:

- (1) documentation on a commission Form LL1 of at least four hours of instruction occurring within the probationary period in an area of the instructor's expertise related to each topic for which Limited Lecturer Certification was granted; and
- (2) documentation that all other certifications required in 12 NCAC 10B .0908 remain valid.

(c) The expiration dates of any existing commission-issued Full Limited Lecturer Certifications shall be set to expire concurrently with the expiration of the corresponding instructors' certification issued by the North Carolina Criminal Justice Education and Training Standards Commission. In the event such instructor does not hold instructor certification under the North Carolina Criminal Justice Education and Training Standards Commission, but holds another instructor certification(s) issued through this Commission, the expiration date shall be set to expire concurrently with the other instructor certification(s) issued by this Commission. The lecturer shall apply for recertification at or before the expiration date. If the time period before the expiration date is less than three years, then the six hours of instruction shall be waived for this shortened term and Full Limited Lecturer Instructor Certification will be renewed provided all other conditions for Full status as set out in Subparagraph (2) of this Paragraph are met. Full Limited Lecturer Certification shall be continuous so long as the lecturer submits to the Division every two years:

- (1) documentation on a commission Form LL1 of at least six hours of instruction occurring within the three-year certification period in an area of the instructor's expertise related to each topic for which Limited Lecturer Certification was granted; and
- (2) a renewal application to include documentation that all other certifications required in 12 NCAC 10B .0908 remain valid.

(d) In the event a Limited Lecturer Instructor Certification (either Probationary or Full) is terminated for failure to have provided documentation of the minimum number of hours of instruction occurring within the respective certification periods in an area of the instructor's expertise related to each topic for which Limited Lecturer Certification was granted, the individual may re-apply for certification meeting the initial conditions for such certification, but must also provide documentation on a commission Form LL2 that he/she has audited the number of hours of instruction he/she failed to teach in the topic area for which Limited Lecturer Certification was granted in the respective area of expertise.

(e) Individuals may, for just cause, be granted an extension to successfully teach the required minimum number of hours instruction on a one-time basis only not to exceed 12 months.

For purposes of this Rule, just cause means accident, illness, emergency, course cancellation, or other exceptional circumstances which precluded the instructor from fulfilling the teaching requirement.

History Note: Authority G.S. 17E-4; Eff. January 1, 1989; Amended Eff. January 1, 2006; August 1, 2002; August 1, 2000; August 1, 1998; January 1, 1996; January 1, 1994; January 1, 1992; January 1, 1991.

12 NCAC 10B .1102 GENERAL PROVISIONS

(a) In order to be eligible for one or more of the service awards, a Deputy Sheriff, Detention Officer, Telecommunicator, or Sheriff shall first meet the following preliminary qualifications:

- (1) Be an elected or appointed sheriff or be a deputy sheriff, detention officer, or telecommunicator that holds a valid general or grandfather certification. An officer serving under a probationary certification is not eligible for consideration. Any justice officer subject to suspension or revocation proceedings or under investigation for possible decertification action by the Commission or the North Carolina Criminal Justice Education and Training Standards Commission shall not be eligible for a service award for the pendency of the proceedings;
- (2) Be familiar with and subscribe to the Law Enforcement Code of Ethics as promulgated by the International Association of Chiefs of Police or Telecommunicator Code of Ethics as published by APCO and NENA to include any subsequent editions or modifications thereto. A copy of either Code of Ethics may be obtained at no cost from the Sheriffs' Standards Division, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629; and
- (3) Also, employees of a North Carolina Sheriff's Office who have previously held certification, but are presently, by virtue of promotion or transfer, serving in positions not subject to certification are eligible to participate in the service award program. Eligibility for this exception requires continuous employment with a sheriff's office from the date of promotion or transfer from a certified position to the date of application for a service award as certified in writing by the Sheriff.

(b) Only experience as a full-time justice officer gained while holding certification through the Commission or while certified as a law enforcement officer through the North Carolina Criminal Justice Education and Training Standards Commission or experience as an elected or appointed Sheriff shall be acceptable for consideration.

History Note: Authority G.S. 17E-4; Eff. January 1, 1989;

Amended Eff. February 1, 1998; January 1, 1990; Temporary Amendment Eff. March 1, 1998; Amended Eff. January 1, 2006; April 1, 2001; August 1, 1998.

12 NCAC 10B .1402 GENERAL PROVISIONS

(a) In order to be eligible for one or more of the professional certificates, a reserve deputy sheriff shall first meet the following preliminary qualifications:

- (1) be an appointed reserve deputy sheriff who holds valid General or Grandfather Certification. A reserve deputy sheriff serving under a probationary certification is not eligible for consideration. Any deputy sheriff subject to suspension or revocation proceedings or under investigation for possible decertification action by the Commission or the North Carolina Criminal Justice Education and Training Standards Commission shall not be eligible for any deputy sheriff professional awards for the pendency of the proceeding;
- (2) be familiar with and subscribe to the Law Enforcement Code of Ethics as promulgated by the International Association of Chiefs of Police to include any subsequent editions or modifications thereto. A copy of the Code of Ethics may be obtained at no cost from the Sheriffs' Standards Division, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629;
- (3) the applicant shall be a sworn law enforcement officer of a North Carolina Sheriff's Office, as certified in writing by the sheriff; or be a sworn law enforcement officer of an agency who must be appointed by the sheriff in order to perform his duties as certified in writing by the Sheriff; and
- (4) only training or experience gained in an officer's area of expertise will be eligible for application to this program. All training must be completed during the time of service as a sworn law enforcement officer, with the exception of Basic Law Enforcement Training.

(b) Certificates are awarded based upon a formula which combines law enforcement training and actual participation as a reserve deputy sheriff in law enforcement functions. Points are computed in the following manner:

- (1) a minimum of ninety-six (96) hours achieved over a one-year period of participation in law enforcement functions, by having been called into reserve duty by the appointing sheriff, shall equal one year of reserve service;
- (2) twenty hours of commission-approved law enforcement training shall equal one law enforcement training point; and
- (3) service as a reserve deputy sheriff shall be acceptable for consideration. An officer who is otherwise ineligible to receive an equivalent certificate through the Professional Certificate Program for Sheriffs and Deputy Sheriffs as

set out in 12 NCAC 10B .1000 may receive a certificate under this program, in which case one year of full-time service may be substituted for one year of reserve service in computing eligibility under this Section.

*History Note: Authority G.S. 17E;
Eff. August 1, 2000;
Amended Eff. January 1, 2006.*

12 NCAC 10B .1502 GENERAL PROVISIONS

(a) In order to qualify for one or more of the service awards, a Reserve Justice Officer shall first meet the following preliminary qualifications:

- (1) be an appointed reserve deputy sheriff, detention officer, or telecommunicator who holds a valid general or grandfather certification. A reserve officer serving under a probationary certification is not eligible for consideration. Any person subject to suspension or revocation proceedings or under investigation for possible decertification action by the Commission or the North Carolina Criminal Justice Education and Training Standards Commission shall not be eligible for any service awards for the pendency of the proceeding.
- (2) be familiar with and subscribe to the Law Enforcement Code of Ethics as promulgated by the International Association of Chiefs of Police or Telecommunicator Code of Ethics as published by APCO and NENA to include any subsequent editions or modifications thereto. A copy of either Code of Ethics may be obtained at no cost from the Sheriffs' Standards Division, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629.

(b) Service Awards are based on a formula which calculates reserve service by actual participation as a reserve deputy sheriff, detention officer, or telecommunicator in law enforcement, detention, or telecommunications functions respectively. A minimum of 96 hours achieved over a one-year period of participation in law enforcement, detention or telecommunications functions by having been called into reserve duty by the appointing sheriff, shall equal one year of reserve service. Service as a reserve deputy sheriff, detention officer, or telecommunicator shall be acceptable for consideration or, an officer who is otherwise ineligible to receive an equivalent service award through the Sheriffs' and Justice Officers' Service Award Program as set out in 12 NCAC 10B .1100 may receive a service award under this program, in which one year of full-time service may be substituted for one year of reserve service, provided that the officer in question is currently employed by a sheriff's office in North Carolina in the capacity of a reserve officer.

(c) Only experience as a justice officer gained while holding certification through the Commission or while certified as a law enforcement officer through the North Carolina Criminal Justice

Education and Training Standards Commission or experience as an elected or appointed Sheriff shall be acceptable for consideration.

*History Note: Authority G.S. 17E;
Eff. April 1, 2001;
Amended Eff. January 1, 2006.*

12 NCAC 10B .1701 SHERIFF RESPONSIBILITIES

The sheriff shall ensure that the Domestic Violence In-Service Training Program for Deputy Sheriffs is conducted using the lesson plan developed by the North Carolina Justice Academy. In addition, the Sheriff shall:

- (1) report to the Division those deputy sheriffs who are considered "special deputy sheriffs" in accordance with G.S. 17E-2(3)(a);
- (2) maintain a roster of each deputy sheriff who successfully completes the Domestic Violence In-Service Training Program; and
- (3) report to the Division by January 15th of, 2006, those deputy sheriffs who fail to complete the Domestic Violence In-Service Training Program in accordance with 12 NCAC 10B .1704. Such reporting shall be on a Commission form.

*History Note: Authority G.S. 17E-4; 17E-7;
Eff. March 1, 2005;
Amended Eff. January 1, 2006.*

12 NCAC 10B .1704 DOMESTIC VIOLENCE IN-SERVICE TRAINING PROGRAM SPECIFICATIONS

Full-time and reserve deputy sheriffs must complete the Domestic Violence In-Service Training Program by the end of 2005.

*History Note: Authority G.S. 17E-4; 17E-7;
Eff. March 1, 2005;
Amended Eff. January 1, 2006.*

12 NCAC 10B .1801 SHERIFF RESPONSIBILITIES

Each sheriff shall ensure that the Law Enforcement In-Service Training Program for Deputy Sheriffs established by this Section is conducted. In addition, the Sheriff shall:

- (1) report to the Division those deputy sheriffs who are inactive;
- (2) maintain a roster of each deputy sheriff who successfully completes the Law Enforcement In-Service Training Program; and
- (3) report to the Division by January 15th, 2007, those active deputy sheriffs who fail to complete the Law Enforcement In-Service Training Program in accordance with 12 NCAC 10B .1804. Such reporting shall be on a Commission form.

*History Note: Authority G.S. 17E-4; 17E-7;
Eff. January 1, 2006.*

12 NCAC 10B .1802 INSTRUCTORS

The following requirements and responsibilities are hereby established for instructors who conduct the Law Enforcement In-Service Training Program:

- (1) The instructor shall hold General Instructor Certification as issued by the North Carolina Criminal Justice Education and Training Standards Commission as set out in 12 NCAC 09B .0302, .0304, and .0306. In addition, each instructor certified by the Criminal Justice Commission to teach in a Commission-certified course shall remain competent in his/her specific or specialty areas. Such competence includes remaining current in the instructor's area of expertise, which may be demonstrated by attending and successfully completing all instructor updates issued by the Commission.
- (2) The instructor shall deliver the training consistent with the specifications as established in the rules in this Section.
- (3) The instructor shall document the successful or unsuccessful completion of training for each deputy sheriff attending a training program and forward a record of their completion to each deputy's Sheriff.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 2006.

12 NCAC 10B .1803 MINIMUM TRAINING REQUIREMENTS

(a) A Sheriff may choose to use lesson plan developed by the North Carolina Justice Academy, or may opt to use a lesson plan for any of the topical areas developed by another entity. The Sheriff may also opt to use a lesson plan developed by a certified instructor, provided that the instructor develops the lesson plan, in accordance with the Instructional Systems Development model as taught in Criminal Justice Instructor Training in 12 NCAC 09B .0209,

(b) The Law Enforcement In-Service Training Program requires a minimum of 24 hours of training in the following topical areas:

- (1) Legal Update;
- (2) Ethics;
- (3) Juvenile Minority Sensitivity Training;
- (4) Methamphetamine Awareness or Methamphetamine Investigative Issues;
- (5) Firearms Training and Requalification for deputy sheriffs and detention officers as set out in Section .2100 of this Subchapter; and
- (6) Any topic areas of the Sheriff's choosing.

(c) Domestic Violence Training shall not be required in 2006, but shall be required in 2007.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 2006.

12 NCAC 10B .1804 LAW ENFORCEMENT IN-SERVICE TRAINING PROGRAM SPECIFICATIONS

Active deputy sheriffs must complete the In-Service Training Program established by this Section by December 31, 2006. A deputy sheriff who is changed from an inactive to active status on or between January 1, 2006 and June 30, 2006, must complete the required 2006 In-Service Law Enforcement Training requirement. A deputy who is sworn on or between January 1, 2006 and June 30, 2006, must complete the required 2006 In-Service Law Enforcement Training requirement.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 2006.

12 NCAC 10B .1805 FAILURE TO COMPLETE LAW ENFORCEMENT IN-SERVICE TRAINING PROGRAM

(a) Failure to complete the Law Enforcement In-Service Training Program, except as set forth in Paragraph (c) herein, in accordance with this Section shall result in the summary suspension of the active deputy sheriff's certification by the Commission.

(b) Certification may be reinstated at the request of the deputy's Sheriff provided:

- (1) the deputy completes the Law Enforcement In-Service Training Program within six months of the end of the calendar year in which the deputy failed to comply; and
- (2) the appointing agency submits to the Division, along with a Report of Appointment, the documents required in 12 NCAC 10B .0305.

An In-Service Training Program completed under this provision shall be credited to the prior year of non-compliance; and shall not be credited toward the current year of completion.

(c) Failure to qualify a justice officer in accordance with Section .2100 of these Rules shall be governed by 12 NCAC 10B .2105.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 2006.

12 NCAC 10B .2104 IN-SERVICE FIREARMS REQUALIFICATION SPECIFICATIONS

(a) All deputy sheriffs and detention officers who are authorized by the sheriff to carry a handgun shall qualify a minimum of once each year with their individual and department-approved service handgun. The course of fire shall not be less stringent than the "Basic Law Enforcement Training Course" requirements for firearms qualification.

(b) All deputy sheriffs and detention officers who are issued, or otherwise authorized by the sheriff to carry a shotgun, rifle, or automatic weapon shall qualify with each weapon respectively a minimum of once each year. The course of fire shall not be less stringent than the "Basic Law Enforcement Training Course" requirements for firearms qualification.

(c) Qualifications conducted pursuant to Paragraphs (a) and (b) of this Rule shall be completed with duty equipment and duty ammunition or ballistic equivalent ammunition to include lead free ammunition that meets the same point of aim, point of impact, and felt recoil of the duty ammunition, for all weapons.

(d) All deputy sheriffs and detention officers who are authorized by the sheriff to carry off duty handguns shall qualify with their off duty handgun a minimum of once each year pursuant to 12

NCAC 10B .2103 and .2104(a) and (b) with each handgun the officer carries off duty using ammunition approved by the sheriff.

(e) All deputy sheriffs and detention officers who are issued or have access to any weapons not stated in this Rule must qualify with these weapons once each year using ammunition approved by the sheriff.

(f) In cases where reduced-sized targets are used to simulate actual distances, a modified course of fire may be used.

(g) To satisfy the training requirements for all in-service firearms requalifications, a deputy sheriff or detention officer shall attain a minimum qualification score of 70 percent accuracy with each weapon once in three attempts with no more than three attempts on each course of fire per day.

(h) The "In-Service Firearms Qualification Manual" as published by the North Carolina Justice Academy is hereby incorporated by reference, and shall automatically include any later amendments or editions of the referenced materials to apply as a minimum guide for conducting the annual in-service firearms qualification. Copies of the publication may be obtained from the North Carolina Justice Academy, Post Office Drawer 99, Salemburg, North Carolina 28385. There is no cost per manual at the time of adoption of this Rule.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 1989;

Amended Eff. January 1, 1994; January 1, 1993; January 1, 1992; January 1, 1991;

Temporary Amendment Eff. March 1, 1998;

Amended Eff. January 1, 2006; August 1, 2002; August 1, 1998.

TITLE 16 – DEPARTMENT OF PUBLIC EDUCATION

16 NCAC 06C .0304 LICENSE PATTERNS

(a) Licenses shall indicate grade levels, content areas and specializations for which the professional shall be eligible for employment.

(b) Licenses shall be of the following types:

(1) Teacher. The license shall entitle the holder to teach in some designated area of specialization at the elementary, middle, or secondary level. There shall be four levels of preparation:

- (A) bachelor's degree (A level);
- (B) master's degree (G level);
- (C) sixth-year (AG level); and
- (D) doctorate (DG level).

The teacher license shall further be categorized as prekindergarten B-K, elementary K-6, middle grades 6-9, secondary 9-12, special subjects K-12, or work force development.

(2) Administrator/supervisor. The holder may serve in generalist and program administrator roles such as superintendent, assistant or associate superintendent, principal, assistant principal or curriculum-instructional specialist. There shall be three levels of preparation:

- (A) master's degree;
- (B) sixth-year; and

(C) doctorate.

A person shall be eligible to serve as a superintendent without qualifying for or holding a license as long as the person has earned at least a bachelor's degree from a regionally accredited college or university and has a minimum of five years leadership or managerial experience that the employing local board of education considers relevant to the position of superintendent.

(3) Student services area. The holder may provide specialized assistance to the learner, the teacher, the administrator and the education program in general. This category shall include school counseling, school social work, school psychology, audiology, speech language pathology, and media. There shall be three levels of preparation as in the case of the administrator/supervisor, except that school psychology shall be restricted to the sixth-year or doctorate levels and school social work may be earned at the bachelor's level.

(c) The department shall base license classification on the level and degree of career development and competence. There shall be two classifications of licenses:

(1) The Standard Professional License I, which shall be valid for three years, shall allow the holder to begin practicing the profession on an independent basis in North Carolina. To be issued a Standard Professional License I, the individual must complete a teacher education program approved in accordance with these Rules and meet the federal requirement to be designated "highly qualified."

(2) The Standard Professional License II shall authorize professional school service on an ongoing basis, subject to renewal every five years.

History Note: Authority G.S. 115C-12(9)a; 115C-271(a); N.C. Constitution, Article IX, s. 5;

Eff. July 1, 1986;

Amended Eff. August 1, 2000; March 1, 1990;

Temporary Amendment Eff. December 17, 2001;

Amended Eff. January 2, 2006; April 1, 2003.

16 NCAC 06C .0305 LICENSES FOR NON-TEACHER EDUCATION GRADUATES

(a) A person who has not graduated from a teacher education program that has been approved under Rule .0202 of this Subchapter who later desires to teach shall have his/her credentials evaluated by an IHE approved in accordance with these Rules or regional alternative licensing center ("RALC"). The person shall satisfy the assessment of his/her needs and be recommended by the IHE or RALC for a license.

(b) Persons who have been selected for employment by a LEA under the lateral entry provisions of G.S. 115C-296(c) may obtain a license as follows:

- (1) To be eligible for a lateral entry license, a person shall:
- (A) have attained a bachelor's degree in the license area from a regionally-accredited IHE;
 - (B) be recommended for a lateral entry license by the employing LEA; and
 - (C) have had a minimum cumulative grade point average of at least a 2.5, have five years of experience considered relevant by the employing LEA, or have passed the NTE PRAXIS 1 exams (Preprofessional Skills Tests in Reading, Writing, and Mathematics) and have attained one of the following:
 - (i) a grade point average of at least 3.0 on all work completed in the senior year;
 - (ii) a grade point average of at least 3.0 in the major; or
 - (iii) a grade point average of at least 3.0 on a minimum of 15 semester hours of coursework completed within the last 5 years.
- (2) A person who holds a lateral entry license shall complete a program that includes the following components:
- (A) completion of an approved teacher education program in the area of licensure at a college or university or completion of a program of study outlined by the RALC;
 - (B) attaining a passing score on the PRAXIS subject exam(s) during the first two school years of holding the lateral entry license if the exam was not the basis of qualifying for the license;
 - (C) completion of a staff development program that includes a two-week training course prior to beginning the work assignment;
 - (D) completion of six semester hours of course work in the approved program each school year;
 - (E) successful completion of at least a three-year initial licensure program in the lateral entry license area; and
 - (F) completion of all the requirements of this Subparagraph within three years of becoming eligible for a lateral entry license and the recommendation of the IHE or RALC for a non-provisional (clear) license.
- (3) Individuals who possess five or more years of experience considered relevant by the employing LEA and who satisfy testing requirements for the licensure area within the first year of teaching shall be issued an initial license upon:
- (A) completion of the NC TEACH modules or the equivalent through an approved teacher education program: 1) The Teacher, The Learner, and The School; 2) Diversity; 3) Content Area Pedagogy;
NOTE: The NC TEACH modules are offered and administered through North Carolina colleges and universities that have approved teacher education preparation programs.
 - (B) completion of the NC TEACH module on Instructional Technology or its equivalent through an approved teacher education program, community college, or through professional development offered by the employing LEA; and
 - (C) completion of one year of successful teaching as verified by the employing LEA.
- (4) The employing LEA shall commit in writing to:
- (A) provide a two-week pre-work orientation that includes lesson planning, classroom organization, classroom management, and an overview of the ABCs Program including the standard course of study and end-of-grade and end-of-course testing;
 - (B) assign the person a mentor on or before the first day on the job;
 - (C) provide working conditions that are similar to those for novice teachers;
 - (D) give regular focused feedback to the person for improving instruction; and
 - (E) assist the person in accessing prescribed course work and professional development opportunities.
- (c) A person who is qualified to hold at least a class "A" teaching license may be issued additional areas of licensure on a provisional basis as needed by LEAs. The person must satisfy deficiencies for full licensure at the rate of six semester hours per year. The person must complete this yearly credit before the beginning of the following school year and the credit must be directly applicable to the provisional area(s). The person must complete all credit requirements by the end of the fifth year of provisional licensure.
- (d) The Department shall issue an emergency license to persons who hold at least a baccalaureate degree but who do not qualify for a lateral entry license. The emergency license shall be valid for one year and may not be renewed. When it requests an emergency license for a person, the LEA must document that no

appropriately licensed professionals or persons who are eligible for a lateral entry license are available to accept the position.

- (1) To be eligible for an emergency license, the person must have attained a bachelor's degree from a regionally-accredited IHE and be recommended by the employing LEA.
- (2) A person who holds an emergency license shall complete a program that includes the following components:
 - (A) The employing LEA shall commit in writing to:
 - (i) provide a two-week pre-work orientation that includes lesson planning, classroom organization, classroom management, and an overview of the ABCs Program including the standard course of study and end-of-grade and end-of-course testing;
 - (ii) assign the person a mentor on or before the first day on the job;
 - (iii) provide working conditions that are similar to those for novice teachers;
 - (iv) give regular focused feedback to the person for improving instruction; and
 - (v) assist the person in obtaining a teaching license.
 - (B) The person shall complete a staff development program that includes a two-week training course prior to beginning the work assignment.
 - (C) The LEA shall provide the person with on-going support designed to enhance the person's classroom teaching performance.

History Note: Authority G.S. 115C-12(9)a; N.C. Constitution, Article IX, s. 5; Eff. July 1, 1986; Amended Eff. January 2, 2006; August 1, 2000; March 1, 1990.

16 NCAC 06C .0307 LICENSE RENEWAL

- (a) Licenses shall be valid for a period of five years from the effective date of issuance. Holders must renew their licenses within each five-year period. The Department shall apply license renewal credit to the person's license field(s) and professional duties.
- (b) The Department shall base renewal or reinstatement of a license on 15 units of renewal credit. A unit of credit shall be equal to one quarter hour or two-thirds of a semester hour of IHE college or university credit, 10 hours of professional development, or one school year of teaching experience.
- (c) Effective July 1, 2007, school administrators shall earn at least five renewal credits during each renewal cycle that focus on

the principal's role in teacher effectiveness, teacher evaluations, teacher support programs, teacher leadership, teacher empowerment, and teacher retention.

(d) Currently employed personnel shall maintain an individual growth plan. These persons may obtain renewal credit for the following activities:

- (1) college or university credit;
- (2) teaching experience (one unit for each year);
- (3) earning National Board for Professional Teaching Standards certification or completion of the National Board for Professional Teaching Standards certification process, which shall result in fifteen units of renewal credit;
- (4) completing National Board for Professional Teaching Standards certification renewal, which shall result in five units of renewal credit;
- (5) completion of activities that meet the following criteria based upon one unit of renewal credit per 10 clock hours:
 - (A) the activity shall be delivered in a minimum of 10 clock hours over time with on-the-job application, feedback, and follow-up;
 - (B) the activity shall have identified goals and objectives that are designed to increase knowledge or skills in the person's license area or job assignment;
 - (C) the activity shall include focused content and instruction that are sequenced to develop specified competencies of a specific population;
 - (D) the activity shall be conducted by instructional personnel approved by the sponsoring school unit or employer; and
 - (E) the activity shall include a focused evaluation designed to gauge the change in learner knowledge or skill and to guide the development of future programs;
- (6) independent study of no more than five units of renewal credit per five-year renewal period which meets the following criteria:
 - (A) teachers and other licensed personnel help to develop local independent study procedures which the superintendent shall keep on file and periodically send to each licensed employee; and
 - (B) the employee and the superintendent or his or her designee shall plan the experience in advance, including identification of competencies to be acquired and an evaluation to

determine satisfactory achievement of those competencies.

(e) LEAs and governing boards of schools shall assure that all local courses, workshops and independent study activities which do not carry IHE credit meet the standards contained in this Rule.

(f) LEAs may develop an alternative license renewal plan that is competency-based and results-oriented. The plan must describe the connection among professional development, the school improvement plan, and the individual's license area or job responsibilities through processes such as peer review and annual evaluation. The plan may waive specific hour requirements that a licensed employee must meet and focus instead on knowledge and skill acquired by participants. The plan must include outcome measures and must be submitted to the Department for review in advance of its implementation.

(g) LEAs must adopt a procedure to determine the appropriateness of credit in advance of renewal activities. In determining appropriateness the LEA must consider direct relationship to critical job responsibilities, school improvement plans, and SBE strategic priorities to properly establish credit for the activity. Each LEA must report on participation in and effectiveness of professional development to the North Carolina Professional Teaching Standards Commission on an annual basis.

(h) Persons who hold a North Carolina license but who are not currently employed in the public schools or by governing boards of nonpublic schools may earn renewal credit in college or university credit activities, or local courses and workshops on the same basis as currently employed persons. The Department shall evaluate the appropriateness of the credits based on their direct relationship to the license field, the suitability of the content level, and the requirements set out in Paragraph (d) of this Rule.

History Note: Authority G.S. 115C-12(9)(a); N.C. Constitution, Article IX, s. 5; Eff. July 1, 1986; Amended Eff. January 2, 2006; August 1, 2000; January 2, 1998; July 1, 1994; December 1, 1991.

16 NCAC 06D .0301 TESTING REQUIREMENTS AND OPPORTUNITIES

(a) All public school students enrolled in the grades for which the SBE adopts a test, including every child with disabilities, shall participate in the testing program.

(b) Each LEA shall develop plans to provide and shall provide remedial services to students enrolled in Grade 9 or above who fail any of the competency reading or mathematics tests or a portion of the multiple choice or performance computer skills tests, or who are identified as having a high risk of failing. The LEA shall design the plan to meet the needs of individual students. The LEA shall provide these students at least one opportunity each school year up to and including the last month of the twelfth grade to take any part of the tests that the student has not yet passed. A student who attains a passing score, as defined in 16 NCAC 06D .0503, on a portion of the tests shall not be required to retake that portion of the test.

History Note: Authority G.S. 115C-12(9)c.; Eff. July 1, 1986;

Amended Eff. January 2, 2006; August 1, 1999; January 2, 1998; June 1, 1996.

16 NCAC 06D .0305 END-OF-COURSE ASSESSMENTS

(a) The LEA shall include each student's end-of-course assessment results in the student's permanent records and high school transcript.

(b) The LEA shall give each end-of-course assessment within the final 10 days of the course.

(c) LEAs shall use results from all operational end-of-course assessments as at least 25% of the student's final grade for each respective course. LEAs shall adopt policies regarding the use of end-of-course assessment results in assigning final grades.

(d) Students who are enrolled for credit in courses in which end-of-course assessments are required shall take the appropriate end-of-course assessment.

(e) Students who are exempt from final exams by local board of education policy shall not be exempt from end-of-course assessments.

(f) Each student shall take the appropriate end-of-course assessment the first time the student takes the course even if the course is an honors or advanced placement course.

(g) Students shall take the appropriate end-of-course assessment at the end of the course or an alternate assessment regardless of the grade level in which the course is offered.

(h) Students who are identified as failing a course for which an end-of-course assessment is required shall take the appropriate end-of-course assessment.

(i) Students may drop a course with an end-of-course assessment within the first 10 days of a block schedule or within the first 20 days of a traditional schedule.

History Note: Authority G.S. 115C-12(9)c.; 115C-81(b)(4); Eff. November 1, 1997; Amended Eff. January 2, 2006; April 1, 2002; September 1, 2001; August 1, 2000; August 1, 1999.

16 NCAC 06D .0501 DEFINITIONS

As used in this Subchapter:

(1) "adequate progress" shall mean student performance at or near grade level as indicated by student work, assessment data, and other evaluation information.

(2) "focused intervention" shall mean help for students in attaining competency goals and objectives. The help or assistance shall be based on a diagnosis of what the student knows and is able to do. The strategies for helping the student shall be based on the diagnosis of the student's work.

(3) "grade level proficiency" shall mean Level III or above on end-of-grade assessments in reading and mathematics in grades 3-8. In grades K-2, teachers shall identify those students who are not performing at grade-level

expectations. The levels of student performance shall be defined as follows:

- (a) "Level I" shall mean that the student fails to achieve at a basic level. Students performing at this level do not have sufficient mastery of knowledge and skills in this subject area to be successful at the next grade level.
 - (b) "Level II" shall mean that the student achieves at a basic level. Students performing at this level demonstrate inconsistent mastery of knowledge and skills in this subject area and are minimally prepared to be successful at the next grade level.
 - (c) "Level III" shall mean that the student achieves at a proficient level. Students performing at this level consistently demonstrate mastery of grade level subject matter and skills and are well prepared for the next grade level.
 - (d) "Level IV" shall mean that the student achieves at an advanced level. Students performing at this level consistently perform in a superior manner clearly beyond that required to be proficient at grade level work.
- (4) "instructionally sound" shall mean a practice or strategy that reflects research findings and the achievement needs of students. The practice shall take into account student learning styles, effective delivery of content and skills, diagnosis, monitoring, and evaluation.

History Note: Authority G.S. 115C-12(9b); 115C-81(b)(4); N.C. Constitution, Article IX, Sec. 5; Eff. December 1, 1999; Amended Eff. January 2, 2006; April 1, 2005.

16 NCAC 06D .0502 STUDENT ACCOUNTABILITY STANDARDS

- (a) Gateway 1—Grade 3. In addition to meeting local promotion requirements, students in grade 3 shall demonstrate proficiency by having assessment scores at Level III or above on end-of-grade assessments in both reading and mathematics. Students who score at Level III or above and who meet all local promotion requirements shall be promoted to grade 4 unless the school principal shall determine otherwise in consultation with teacher(s). These requirements shall become effective with the 2001-02 school year.
- (b) Gateway 2—Grade 5. In addition to meeting local promotion requirements, students in grade 5 shall demonstrate proficiency by having assessment scores at Level III or above on end-of-grade assessments in both reading and mathematics. Additionally, LEAs shall use the grade 4 writing assessment as a screen to determine whether students are making adequate

progress in developing writing skills. If a student has not scored at or above grade level proficiency as defined in Rule .0501(3) of this Section on the grade 4 writing assessment, the school shall provide intervention and assistance to develop writing skills. The principal and teacher(s) shall use locally developed and scored writing samples during grade 5 to determine if students have made adequate progress in order to be promoted to grade 6. Students who score at Level III or above on reading and mathematics, who meet all local promotion standards, and who make adequate progress in writing shall be promoted to grade 6, unless the school principal shall determine otherwise in consultation with teacher(s).

(c) Gateway 3—Grade 8. In addition to meeting local promotion requirements, students in grade 8 shall demonstrate proficiency by having assessment scores at Level III or above on an end-of-grade assessment in both reading and mathematics. Additionally, the LEA shall use the grade 7 writing assessment as a screen to determine whether students are making adequate progress in developing writing skills. If a student has not scored at or above grade level proficiency as defined in Rule .0501(3) of this Section on the grade 7 writing assessment, the school shall provide intervention and assistance to develop writing skills. The principal and teacher(s) shall use locally developed and scored writing samples during grade 8 to determine if students have made adequate progress to be promoted to grade 9. Students who score at Level III or above on reading and mathematics, who meet all local promotion standards, and who make adequate progress in writing shall be promoted to grade 9 unless the school principal shall determine otherwise in consultation with teacher(s).

(d) Gateway 4—Grade 12. Students shall meet state graduation requirements as defined by Rule .0503 of this Section and local school board requirements to receive a North Carolina high school diploma.

History Note: Authority G.S. 115C-12(9b); 115C-81(b)(4); N.C. Constitution, Article IX, Sec. 5; Eff. December 1, 1999; Amended Eff. January 2, 2006; August 1, 2001.

16 NCAC 06G .0305 DEFINITIONS

For purposes of this Section, the following definitions shall apply:

- (1) "Accountability measures" are SBE-adopted tests designed to gauge student performance and achievement.
- (2) "Adequate yearly progress" or "AYP" shall have the same definition as set out in P.L. 107-110, section 1111(b)(2)(C).
- (3) "Compliance commission" means that group of persons selected by the SBE to advise the SBE on testing and other issues related to school accountability and improvement. The commission shall be composed of teachers, principals, central office staff representatives, local school board representatives, a charter schools representative, and at-large members who represent parents, business, and the community.

- (4) "C-scale" means change scale, which is a standardized scale to measure student performance across the years and content areas. To convert the developmental scale scores to c-scale scores, subtract the state mean for the standard setting year from the developmental scale score, and then divide by the standard deviation for the standard setting year.
- (5) "C-ratio" means the ratio of student scores that achieve an academic change of "0.00" or greater to those with an academic change of less than "0.00", including in the numerator for high schools when used for calculating high growth, the factor for change in college tech prep and college university prep graduation rate and the change in competency test pass rate and including in the denominator, the factor for change in drop out rate.
- (6) "Eligible students" means the total number of students in membership in the respective grades or enrolled in the respective EOC courses at the time the assessments are administered in a statewide assessment.
- (7) "Expected growth" means having met the standard defined by students on average performing as well in their current grade or content as is typical for the same student in previous grades and contents when using the change scale to compare and allowing for a factor of regression to the mean as defined in this policy.
- (8) "High growth" means the school has met the standard of having a c-ratio of 1.50 or greater.
- (9) "Growth standards" means and includes collectively all the factors defined in this Rule that are used in the calculations described in Paragraph (h) of Rule .0312 of this Section to determine a school's growth/gain composite.
- (10) "Performance Composite" is the percent of scores of students in a school that are at or above Achievement Level III, are at a passing level on the North Carolina Computer Skills Test (students in eighth grade only) as specified by 16 NCAC 06D .0503(f), and at proficiency level or above on the state alternate assessments to the extent that any apply in a given school and consistent with United States Department of Education regulations concerning alternate assessments. The SBE shall:
- (a) determine the number of scores that are at Level III or IV in reading, or mathematics, or writing across grades 3 through 8, or on all EOC assessments administered as a part of the statewide testing program; add the number of scores that are at a passing level on the North Carolina Computer Skills Test (students in eighth grade only); add the number of scores that are proficient or above on the state alternate assessments and use the total of these numbers as the numerator;
- (b) determine the number of student scores in reading, or mathematics, or writing (starting in the 2004-05 school year), across grades 3 through 8, or on all EOC assessments administered as part of the statewide testing program; add the number of students in grade 8; add the number of student scores on the state alternate assessments and use the total of these numbers as the denominator; and
- (c) total the numerators for each content area and subject, total the denominators for each content area and subject, and divide the denominator into the numerator and multiply the quotient by 100 to compute the performance composite.
- (11) "Regression coefficient" means an adjustment factored into the expected growth formula for the purpose of making a prediction about expected student performance. For the purposes of figuring student growth (academic change) the factor shall be 0.08 when using the average of two previous assessments and 0.18 when using a single assessment.
- (12) "Standard setting year" means the first year of the test edition implementation.
- (13) "Students with the most significant cognitive disabilities" means students with disabilities whose IEP has determined shall be assessed using an alternate assessment based on alternate achievement standards as determined by their IEP.
- (14) "Students with persistent academic disabilities" means students with disabilities assessed using an alternate assessment based on modified grade-level achievement standards as determined by their IEP.
- (15) "Weight" means the number of students used in the calculation of the amount of growth for a subject or content area, and the College University Prep/College Tech Prep, the Competency Passing Rate, and the ABCs Dropout Rate components.

History Note: Authority G.S. 115C-12(9)c4.; Eff. January 1, 1998; Amended Eff. December 1, 2000; Temporary Amendment Eff. March 5, 2001; Amended Eff. January 2, 2006; April 1, 2005; April 1, 2002; September 1, 2001.

16 NCAC 06G .0312 ANNUAL PERFORMANCE STANDARDS

(a) In carrying out its duty under G.S. 115C-105.35 to establish annual performance goals for each school, the SBE shall use both growth standards and performance standards. (NOTE: see SBE policy HSP-C-020, which lists the components of the ABCs Accountability Program including Adequate Yearly Progress (AYP).)

- (1) In grades 3-8, when two previous assessments are available, the expectation for student performance in the change scale shall be the average of the two previous assessments minus the results of multiplying the average by the factor for regression to the mean. When only one previous assessment is available, the expectation for student performance shall be the previous assessment score on the change scale minus the result of multiplying the previous score by the factor for regression to the mean as defined in 16 NCAC 06G .0305.
- (2) The expectation for EOC scores shall be the average of the two previous assessments as specified below (should they be available) or the one assessment specified below minus the result of multiplying the regression to the mean as defined in 16 NCAC 06G .0305 by either the average of the two previous assessments or the previous assessment. The expected performance for each EOC subject shall be based upon previous performance on the EOG or EOC scores as follows:
 - (A) For Biology, use EOG Reading Grade 8 and English I, if available, or EOG Reading Grade 8 if English I is not available.
 - (B) For Physical Science, use EOG Mathematics Grade 8.
 - (C) For Physics, use Chemistry and Geometry score.
 - (D) For Chemistry, use Biology score.
 - (E) For Algebra II, use Algebra I score.
 - (F) For Algebra I, use EOG Mathematics Grade 8.
 - (G) For Geometry, use Algebra I and EOG Mathematics Grade 8 if available, or Algebra I only, if EOG Mathematics Grade 8 is not available.
 - (H) For English I, use EOG Reading Grade 8.
- (3) To be included in accountability measures for the growth standard, a student must:
 - (A) have a pre-test score and a post-test score as listed in Subparagraph (2) of this Paragraph or the previous two years EOG assessments if available, or last year's assessment if two years are not available.
 - (B) have been in membership for the full academic year, which is defined as

140 of 180 days as of the time of EOG or EOC testing in a school on traditional schedule, or 70 of 90 days as of the time of EOC testing in a school on block schedule.

- (4) Students shall be included in the performance composite without reference to pretest scores or length of membership.
 - (b) All eligible students shall take the SBE-adopted tests. If a school fails to test at least 95 percent of its eligible students for two consecutive school years, the SBE may designate the school as low-performing and may target the school for assistance and intervention. Each school shall make public the percent of eligible students that the school tests.
 - (c) Demographic information from the state student information management system shall be used for each student. In the case of disagreement between the information coded on an answer document and the state student information system used by the LEA, the information in the student information management system shall be used. In the event that required demographic information is not a part of the state student information management system, the LEA shall comply with data requests, in electronic format or by coding on answer documents as required by the SBE.
 - (d) Students identified as limited English proficient shall be included in the statewide testing program as follows: standard test administration, standard test administration with accommodations, or the state-designated alternate assessments.
 - (1) Students identified as limited English proficient who have been assessed on the state identified English language proficiency tests as below Intermediate High in reading and who have been enrolled in United States schools for less than two years may participate in the state designated alternate assessment in the areas of reading and mathematics at grades 3-8 and 10, writing at grades 4, 7, and 10, and in high school courses in which an end-of-course assessment is administered. Students identified as limited English proficient who have been assessed on the state identified English language proficiency tests (SBE policy HSP-A-011) as below Superior in writing and who have been enrolled in U.S. schools for less than two years may participate in the state designated alternate assessment in writing for grades 4, 7, and 10.
 - (2) To be identified as limited English proficient students must be assessed using the state identified English language proficiency tests at initial enrollment. All students identified as limited English proficient must be assessed using the state identified English language proficiency test annually thereafter during the window of February 1 to April 30. A student who enrolls after January 1 does not have to be retested during the same school year.
 - (3) Schools shall:

- (A) continue to administer state reading, mathematics, EOC assessments, and writing assessments for students identified as LEP who score at or above Intermediate High on the state English language proficiency reading test during their first year in US schools. Results from these assessments shall be included in the ABCs and AYP.
- (B) not require students identified as LEP who score below Intermediate High on the state English language proficiency reading test in their first year in US schools to be assessed on the reading end-of-grade assessments, high school comprehensive test in reading, the writing assessment, the state designated alternate assessment for reading, or the state designated alternate assessment for writing.
- (i) Scores from students who are in their first year in U.S. schools and who have scored below Intermediate High on the reading section of the state identified English language proficiency test shall not be included in either growth, the performance composite or AYP determinations for reading or mathematics.
- (ii) For purposes of determining participation, the state identified English language proficiency reading test will be used as reading participation for the students identified in this section and participation in the state identified English language proficiency writing test will be used as writing participation for students identified in this section.
- (C) include students previously identified as LEP, who have exited LEP identification during the last two years, in the calculations for determining the status of the LEP subgroup for AYP only if that subgroup already met the minimum number of 40 students required for a subgroup.
- (e) All students with disabilities including those identified under Section 504 in membership in grades 3-8 and 10 and in high school courses in which an end-of-course assessment is administered shall be included in the statewide testing program through the use of state assessments with or without accommodations or an alternate assessment.
- (1) The student's IEP team shall determine whether a student can access the assessment without accommodations, with one or more accommodations, or whether the student should be assessed using a state-designed alternate assessment.
- (2) Students with disabilities in grades 3-8 and 10 with the most significant cognitive disabilities may participate in a state designated alternate assessment based on alternate achievement standards.
- (A) For the purposes of ABCs performance composite and AYP these students shall be evaluated by alternate achievement standards.
- (B) Only students with the most significant cognitive disabilities may be deemed proficient against alternate achievement standards. LEAs shall be held to having a maximum of one percent of their total number of students in the assessed grades (3 through 8 and 10) deemed proficient based on alternate achievement standards for AYP and ABCs purposes. This prohibition shall not apply to student level accountability. If an LEA finds that greater than one percent of its students in these grades are proficient based on alternate achievement standards, the LEA superintendent may apply to the state superintendent for an exception as prescribed in the Federal Register Vol. 68 No. 236 page 68703 RIN 1810-AA95.
- (C) If an LEA does not receive an exception to the one percent limit and it has exceeded this limit, the state shall randomly reassign enough proficient student scores for students held to alternate achievement standards to non-proficient such that the LEA will fall within the one percent limitation. This process shall be done using a statistically random process across schools in the LEA and shall apply to AYP and ABCs statuses but not to students.
- (3) Students with disabilities in grades 3-8 and 10 with persistent academic disabilities as referenced in the NC Accountability Workbook (as accepted by the US Department of Education) may participate in a state designated alternate assessment.
- (A) For the purposes of ABCs performance composite and AYP

- these students shall be evaluated by modified achievement standards.
- (B) LEAs shall be held to having a maximum of two percent of their total number of students in the assessed grades deemed proficient based on modified achievement standards for AYP and ABCs purposes. This prohibition shall not apply to student level accountability. If an LEA finds that greater than two percent of its students in these grades are proficient based on modified achievement standards, the LEA superintendent may apply to the state superintendent for an exception as prescribed in the Federal Register Vol. 68 No. 236 page 68703 RIN 1810-AA95.
- (C) If an LEA does not receive an exception to the two percent limit and it has exceeded this limit, the state shall randomly reassign enough proficient student scores for students held to modified achievement standards to non-proficient such that the LEA will fall within the two percent limitation. This process shall be done using a statistically random process across schools in the LEA and shall apply to AYP and ABCs statuses but not to students.
- (f) The SBE shall calculate a school's attainment of growth in student performance using the following process:
- (1) Convert all student scores to the change scale.
 - (2) Calculate the difference between the expectation for each student using the previous assessments as outlined in this policy (including the factor for regression to the mean) and the student's actual performance in the current year's assessments.
 - (3) Average together all differences from all grades and subjects encompassed in the school. This is the Academic Change term.
 - (4) The SBE shall calculate a school's growth component in college university prep/college tech prep using the following process:
 - (A) Compute the percent of graduates who receive diplomas (minus the diploma recipients who completed the Occupational Course of Study) who completed either course of study in the current accountability year. Students shall be counted only once if they complete more than one course of study.
 - (B) Find the baseline, which is the average of the two prior school years' percent of graduates who received diplomas and who completed a course of study (except for the Occupational Course of Study).
 - (C) Subtract the baseline from the current year's percentage.
 - (D) Subtract 0.1, unless the percentages are both 100. If both percentages are 100, the gain is zero.
 - (E) Divide by 10.0, which is the associated standard deviation. The result is the standard growth for college university prep/college tech prep. This number is then multiplied by the number of graduates for inclusion in the growth standards.
 - (5) The SBE shall calculate a school's growth component in the competency passing rate by comparing the grade 10 competency passing rate to the grade 8 passing rate for the group of students in grade 10 who also took the 8th grade end-of-grade assessment.
 - (A) Subtract the grade 8 rate from the grade 10 rate.
 - (B) Subtract 0.1.
 - (C) Divide by 12.8, which is the standard deviation. The result is the standard growth in competency passing rate. Multiply this number by the number of 10th graders included in the calculation for inclusion in the growth standards.
 - (6) The SBE shall calculate a school's growth component in the drop-out rate by comparing the average percent of dropouts from the two most recent years prior to the current drop-out rate to the current drop out rate for the school.
 - (A) Subtract the current year drop-out rate from the average of the two previous years' drop-out rate.
 - (B) Divide by 2.1 (the standard deviation). The result is the standard growth in drop-out rate. Multiply this number by ¼ the school ADM for inclusion in the growth standards.
 - (7) For expected growth, multiply the Academic Change for the school by the number of scores used in 2 and 3 above, add to that the results from 4, 5 and 6 above. Divide by the number of students included in 2 and 3 above plus the number of graduates, plus the number of 10th graders from 5 above plus the ¼ ADM from 6 above. If the resulting number is "0.00" or above, the school has met the expected growth standard.
 - (8) The SBE shall compute high growth using as the high growth standard a c-ratio of 1.50 or greater when the school has already met the expected growth standard.
 - (g) If school officials believe that the school's growth standards were unreasonable due to specific, compelling reasons, the

school may appeal its growth standards to the SBE. The SBE shall appoint the compliance commission to review written appeals from schools. The school officials must document the circumstances that made the goals unrealistic and must submit its appeal to the SBE within 30 days of receipt of notice from the Department of the school's performance. The appeals committee shall review all appeals and shall make recommendations to the SBE. The SBE shall make the final decision on the reasonableness of the growth goals.

(h) In compliance with the No Child Left Behind Act of 2001 (P.L. 107-110), its subsequent final regulations (34 CFR Part 200) released November 26, 2002, and pursuant to GS 115C-105.35 the SBE shall incorporate adequate yearly progress (AYP) as the "closing the achievement gap" component of the ABCs. The calculations shall use forty (40) students' scores as the minimum number of scores for a group to be statistically reliable and valid for AYP purposes along with the use of a confidence interval around the percentage of students scoring proficient on the assessments.

(i) Upon written request by the Department, the SBE may waive specific factors in the accountability measures used to set growth expectations in this Rule upon consideration of:

- (1) the need for the waiver;
- (2) the degree of public benefit; and
- (3) whether the Department had control over the circumstances that required the requested waiver.

History Note: Authority G.S. 115C-12(9)c4.; Eff. April 1, 2005; Amended Eff. January 2, 2006.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 8 - BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS

21 NCAC 08A .0301 DEFINITIONS

(a) The definitions set out in G.S. 93-1(a) shall apply when those defined terms are used in 21 NCAC 08.

(b) In addition to the definitions set out in G.S. 93-1(a), the following definitions and other definitions in this Section apply when these terms are used in 21 NCAC 08:

- (1) "Active," when used to refer to the status of a person, describes a person who possesses a North Carolina certificate of qualification and who has not otherwise been granted "Retired," "Inactive," or "Conditional" status;
- (2) "Agreed upon procedures" means a professional service whereby a CPA is engaged to issue a report of findings based on specific procedures performed on financial information prepared by a responsible party;
- (3) "AICPA" means the American Institute of Certified Public Accountants;

(4) "Applicant" means a person who has applied to take the CPA examination or applied for a certificate of qualification;

- (5) "Attest service or assurance service" means:
- (A) any audit or engagement to be performed in accordance with the Statements on Auditing Standards, Statements on Generally Accepted Governmental Auditing Standards, and Public Company Accounting Oversight Board Auditing Standards;
 - (B) any review or engagement to be performed in accordance with the Statements on Standards for Accounting and Review Services;
 - (C) any compilation or engagement to be performed in accordance with the Statements on Standards for Accounting and Review Services; or
 - (D) any agreed-upon procedure or engagement to be performed in accordance with the Statements on Standards for Attestation Engagements;

(6) "Audit" means a professional service whereby a CPA is engaged to examine financial statements, items, accounts, or elements of a financial statement, prepared by management, in order to express an opinion on whether the financial statements, items, accounts, or elements of a financial statement are presented in conformity with generally accepted accounting principles or other comprehensive basis of accounting;

(7) "Calendar year" means the 12 months beginning January 1 and ending December 31;

(8) "Candidate" means a person whose application to take the CPA examination has been accepted and who may sit for the CPA examination;

(9) "Client" means a person who orally or in writing agrees with a licensee to receive any professional services;

(10) "Commission" means compensation, except a referral fee, for recommending or referring any product or service to be supplied by another person;

(11) "Compilation" means a professional service whereby a CPA is engaged to present, in the form of financial statements, information that is the representation of management without undertaking to express any assurance on the statements;

(12) "Conditional," when used to refer to the status of a person, describes a person who holds a North Carolina certificate of qualification under certain conditions as imposed by the Board, such as additional requirements for failure to complete the required CPE hours in a

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- calendar year, for failure to comply with CPA firm registration, or for failure to comply with peer review reporting and or participation in peer review;
- (13) "Contingent fee" means a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service;
- (14) "CPA" means certified public accountant;
- (15) "CPA firm" means a sole proprietorship, a partnership, a professional corporation, a professional limited liability company, or a registered limited liability partnership which uses "certified public accountant(s) " or "CPA(s) " in or with its name or offers to or renders any attest services in the public practice of accountancy;
- (16) "CPE" means continuing professional education;
- (17) "Disciplinary action" means revocation or suspension of, or refusal to grant, membership, or the imposition of a reprimand, probation, constructive comment, or any other penalty or condition;
- (18) "FASB" means the Financial Accounting Standards Board;
- (19) "Forecast" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions the entity expects to exist and the course of action the entity expects to take;
- (20) "GASB" means the Governmental Accounting Standards Board;
- (21) "Inactive," when used to refer to the status of a person, describes one who has requested inactive status and been approved by the Board and who does not use the title "certified public accountant" nor does he or she allow anyone to refer to him or her as a "certified public accountant," and neither he nor she nor anyone else refers to him or her in any representation as described in 21 NCAC 08A .0308(b).
- (22) "IRS" means the Internal Revenue Service;
- (23) "Jurisdiction" means any state or territory of the United States or the District of Columbia;
- (24) "License year" means the 12 months beginning July 1 and ending June 30;
- (25) "Member of a CPA firm" means any CPA who has an equity ownership interest in a CPA firm;
- (26) "NASBA" means the National Association of State Boards of Accountancy;
- (27) "NCACPA" means the North Carolina Association of Certified Public Accountants;
- (28) "North Carolina office" means any office physically located in North Carolina;
- (29) "Person" means any natural person, corporation, partnership, professional limited liability company, registered limited liability partnership, unincorporated association, or other entity;
- (30) "Professional" means arising out of or related to the particular knowledge or skills associated with CPAs;
- (31) "Projection" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, given one or more hypothetical assumptions, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions it expects would exist and the course of action it expects would be taken given such hypothetical assumptions;
- (32) "Referral fee" means compensation for recommending or referring any service of a CPA to any person;
- (33) "Retired," when used to refer to the status of a person, describes one possessing a North Carolina certificate of qualification who verifies to the Board that the applicant does not receive or intend to receive in the future any earned compensation for current personal services in any job whatsoever and will not return to active status. However, retired status does not preclude volunteer services for which the retired CPA receives no direct or indirect compensation so long as the retired CPA does not sign any documents, related to such services, as a CPA;
- (34) "Revenue Department" means the North Carolina Department of Revenue;
- (35) "Review" means a professional service whereby a CPA is engaged to perform procedures, limited to analytical procedures and inquiries, to obtain a reasonable basis for expressing limited assurance on whether any material modifications should be made to the financial statements for them to be in conformity with generally accepted accounting principles or other comprehensive basis of accounting;
- (36) "Reviewer" means a member of a review team including the review team captain;
- (37) "Suspension" means a revocation for a specified period of time. A CPA may be reinstated after a specific period of time if the

CPA has met all conditions imposed by the Board at the time of suspension;

- (38) "Trade name" means a name used to designate a business enterprise;
- (39) "Work papers" mean the CPA's records of the procedures applied, the tests performed, the information obtained, and the conclusions reached in attest services, tax, consulting, special report, or other engagement. Work papers include, but are not limited to, programs used to perform professional services, analyses, memoranda, letters of confirmation and representation, checklists, copies or abstracts of company documents, and schedules of commentaries prepared or obtained by the CPA. The forms include, but are not limited to, handwritten, typed, printed, word processed, photocopied, photographed, computerized data, or any other form of letters, words, pictures, sounds or symbols;
- (40) "Work product" means the end result of the engagement for the client which may include, but is not limited to a tax return, attest or assurance report, consulting report, and financial plan. The forms include, but are not limited to, handwritten, typed, word processed, photocopied, photographed, computerized data, or in any other form of letters, words, pictures, sounds, or symbols.

(c) Any requirement to comply by a specific date to the Board that falls on a weekend or federal holiday shall be received as in compliance if postmarked by U.S. Postal Service cancellation or received in the Board office on the next business day.

History Note: Authority G.S. 93-1; 93-12(8c); Eff. February 1, 1976; Readopted Eff. September 26, 1977; Amended Eff. January 1, 2006; January 1, 2004; April 1, 1999; August 1, 1998; February 1, 1996; April 1, 1994; September 1, 1992.

21 NCAC 08A .0308 HOLDING OUT TO THE PUBLIC

- (a) The phrase "holds himself out to the public as a certified public accountant," as used in defining "public practice of accountancy" in G.S. 93-1(a)(5) and in these rules, means any representation that a person holds a certificate of qualification, if that representation is made in connection with an offer to perform or the performance of accountancy services for the public, regardless of whether that representation is made by the person, someone associated with that person, or someone serving as that person's agent. Any such representation is presumed to invite the public to rely upon the professional skills implied by the certificate in connection with the professional services offered to be performed or performed by the person.
- (b) For purposes of this Rule, a representation shall be deemed to include any oral, electronic, or written communication indicating that the person holds a certificate, including without limitation the use of titles or legends on letterheads, reports,

business cards, brochures, resumes, office signs, telephone directories, websites, the Internet, or any other advertisements, news articles, publications, listings, tax return signatures, signatures on experience or character affidavits for exam or certificate applicants, displayed membership in CPA associations, displayed CPA licenses from this or any other jurisdiction, and displayed certificates or licenses from other organizations which have the designation "CPA" or "Certified Public Accountant" by the person's name.

History Note: Authority G.S. 93-1(a)(5); 93-12; Eff. September 1, 1988; Amended Eff. January 1, 2006; April 1, 1999; April 1, 1994; May 1, 1989.

21 NCAC 08F .0103 FILING OF EXAMINATION APPLICATIONS AND FEES

(a) All applications for CPA examinations shall be filed with the Board, accompanied by the examination fee. The Board sets the fee for each examination at the amount that enables the Board to recover its actual costs of examination services. If a check or credit card authorization fails to clear the bank, the application shall be deemed incomplete and returned.

(b) The initial application filed to take the examination shall include supporting documentation demonstrating that all legal requirements have been met, such as:

- (1) minimum legal age;
- (2) education;
- (3) experience, if required in order to qualify for the examination; and
- (4) good moral character.
- (5) Any person born outside the United States shall furnish to the Board office evidence of citizenship; evidence of resident alien status; or
 - (A) other bona fide evidence that the applicant is legally allowed to remain in the United States for the purposes of becoming a U.S. citizen; or
 - (B) a notarized affidavit of intention to become a U.S. citizen; or
 - (C) evidence that the applicant is a citizen of a foreign jurisdiction which extends to citizens of this state like or similar privileges to be examined.

(c) Official transcripts (originals – not photocopies) signed by the college registrar and bearing the college seal are required to prove education and degree requirements. A letter from the college registrar of the school may be filed as documentation that the applicant has met the graduation requirements if the degree has not been awarded and posted to the transcript. However, no examination grades shall be released until an official transcript is filed confirming the information supplied in the college registrar's letter. All applicants submitting transcripts from foreign schools for consideration of degree and of meeting accountancy course requirements shall have had the transcript(s) evaluated by Foreign Academic Credential Service, Inc. (FACS) or a comparable educational evaluation service. Applicants shall

determine that their transcripts contain all information required by these Rules.

(d) If experience is required to qualify for examination, affidavits shall be prepared and signed by employers on forms supplied by the Board.

(e) In order to document good moral character as required by G.S. 93-12(5) of this Rule, three certificates of good moral character signed by persons not related by blood or marriage to the applicant shall accompany the application.

(f) No additional statements and affidavits regarding experience and education shall be required for applications for re-examination.

(g) An applicant shall include as part of any application for the CPA examination a statement of explanation and a certified copy of the final disposition if the applicant has been arrested, charged, convicted or found guilty of, received a prayer for judgment continued or pleaded *nolo contendere* to any criminal offense.

(h) If an applicant has been denied any license by any state or federal agency, the applicant shall include as part of the application for the CPA examination a statement explaining such denial. An applicant shall include a statement of explanation and a certified copy of applicable license records if the applicant has been registered with or licensed by a state or federal agency and has been disciplined by that agency.

(i) Two recent identical photographs shall accompany the application for the CPA examination. These photographs shall have been taken within the last six months. The photographs shall be of the applicant alone, 2x2 inches in size, with an image size from the bottom of the chin to the top of the head, including hair, of between 1 and 1-3/8 inches. Photographs shall be clear, front view, full face, taken in normal street attire without a hat or dark glasses, and printed on thin paper with a plain light background. They shall be capable of withstanding a mounting temperature of 225 degrees Fahrenheit (107 degrees Celsius). They may be in black and white or in color. Snapshots, most vending-machine prints, and magazine or full-length photographs are unacceptable. Photographs retouched so that the applicant's appearance is changed are unacceptable. Applicants shall write their names on the back of their photos.

(j) If an applicant's name has legally changed and is different from the name on any transcript or other document supplied to the Board, the applicant shall furnish copies of the documents legally authorizing the name change.

(k) Candidates shall file initial and re-exam applications to sit for the CPA Examination on forms provided by the Board.

(l) Examination fees will be valid for a six-month period from the date of the Notice To Schedule (NTS).

History Note: Authority G.S. 93-12(3); 93-12(4); 93-12(5); 93-12(7);

Eff. February 1, 1976;

Readopted Eff. September 26, 1977;

Amended Eff. January 1, 2006; January 1, 2004; August 1, 1998; February 1, 1996; April 1, 1994; March 1, 1990; May 1, 1989.

**21 NCAC 08F .0105 CONDITIONING
REQUIREMENTS**

(a) Passing Grades. A candidate shall be required to pass all sections of the examination with a grade of 75 or higher on each section.

(b) Military Service. A candidate who is on active military service shall not have the time on active military service counted against Subparagraph (d)(1) of this Rule unless the candidate applies to take the examination during the active military service in which case each month a candidate sits shall be counted toward Subparagraph (d)(1) of this Rule.

(c) A candidate who has conditional credit prior to January 1, 1997, may continue to apply to sit for the examination as long as the conditional credit is valid. A candidate who no longer has valid conditional credit after January 1, 1997, shall be required to meet all education requirements in effect at the time of their subsequent application.

(d) A candidate is subject to the following conditioning requirements:

- (1) A candidate shall be required to obtain a passing grade on all sections of the examination within an 18-month period;
- (2) A candidate may sit for any section of the examination individually;
- (3) A candidate may sit for each section of the examination up to four times during a one-year period but not more than one time in a three-month testing window as defined by the examination vendors(s);
- (4) A candidate shall receive credit on the passage of his or her section(s) of the examination; such credit(s) shall be valid for an 18-month period which begins on the date the section(s) passed is (are) taken; and
- (5) A candidate having earned conditional credits on the paper-and-pencil CPA Examination has until October 31, 2005, or 18 months after administration of the last paper-and-pencil examination to pass the remaining sections(s) before the credits earned under the paper-and-pencil examination expire.

History Note: Authority G.S. 93-12(3); 93-12(5);

Eff. February 1, 1976;

Readopted Eff. September 26, 1977;

Amended Eff. January 1, 2006; January 1, 2004; August 1, 1998; April 1, 1994; April 1, 1991; March 1, 1990.

**21 NCAC 08F .0304 WAIVER OF EDUCATION
REQUIRED PRIOR TO EXAMINATION**

The Board shall waive the education requirements specified in 21 NCAC 08F .0302(a)(1) upon receipt of proof acceptable to the Board that the applicant has scored:

- (1) in the 50th percentile rank or higher on each part of either the Graduate Record Examination or the Graduate Management Admission Test; and
- (2) the applicant has enrolled for an advanced degree at a regionally accredited school and, prior to filing an application with the Board, has satisfactorily completed ten semester

hours, or the equivalent, of graduate courses, including six semester hours in graduate accounting courses.

History Note: Authority G.S. 93-12(5); 93-12(7); Eff. June 16, 1980; Amended Eff. September 1, 1983; Recodified from 8F .0406 Eff. October 1, 1984; Amended Eff. January 1, 2006; May 1, 1989; January 1, 1988; July 1, 1987.

21 NCAC 08F .0401 WORK EXPERIENCE REQUIRED OF CANDIDATES FOR CPA CERTIFICATION

(a) G.S. 93-12(5)c sets forth work experience alternatives, one of which is required of candidates applying for CPA certification. In connection with those requirements, the following provisions apply:

- (1) The work experience shall be acquired prior to the date a candidate applies for certification.
- (2) All experience which is required to be under the direct supervision of a CPA shall be under the direct supervision of a CPA on active status.
- (3) A candidate who applied for the CPA examination under the special examination exception set out in G.S. 93-12(5), and further described in 21 NCAC 08F .0302(a)(2) and (d) shall meet the work experience requirement prior to applying to take the CPA examination.

(b) The following provisions apply to all candidates seeking to meet the work experience requirement of G.S. 93-12(5)c.3 by working in the field of accounting.

- (1) One year of work experience is 52 weeks of full-time employment. The candidate is employed full-time when the candidate is expected by the employer to work for the employer at least 30 hours each week for an indefinite period or for a set period of at least one year. Any other work is working part-time.
- (2) All weeks of actual full-time employment are added to all full-time equivalent weeks in order to calculate how much work experience a candidate has acquired. Dividing that number by 52 results in the years of work experience the candidate has acquired.
- (3) Full-time-equivalent weeks are determined by the number of actual part-time hours the candidate has worked. Actual part-time hours do not include hours paid for sick leave, vacation leave, attending continuing education courses or other time not spent directly performing accounting services. For each calendar week during which the candidate worked actual part-time hours of 30 hours or more, the candidate receives one full-time-equivalent week. The actual part-time hours worked in the remaining

calendar weeks are added together and divided by 30. The resulting number is the additional number of full-time-equivalent weeks to which the candidate is entitled.

- (4) The candidate shall submit experience affidavits on a form provided by the Board from all of the relevant employers; provided that when such experience was not acquired while employed with a CPA firm, the candidate shall also submit details of the work experience and supervision on a form provided by the Board. Experience affidavits for part-time work shall contain a record of the actual part-time hours the candidate has worked for each week of part-time employment. Both the experience affidavit and the form for additional detail shall be certified by the employer's office supervisor or an owner of the firm who is a certificate holder.

(c) 21 NCAC 08F .0409 applies to teaching experience acquired pursuant to G.S. 93-12(5)c.2 and 4.

History Note: Authority G.S. 93-12(3); 93-12(5); Eff. February 1, 1976; Readopted Eff. September 26, 1977; Temporary Amendment Eff. June 17, 1982 for a period of 120 days to expire on October 12, 1982; Legislative Objection Lodged Eff. July 20, 1982; Amended Eff. January 1, 2006; August 1, 1998; March 1, 1990; July 1, 1989; December 1, 1988; September 1, 1988.

21 NCAC 08F .0410 EDUCATION REQUIRED OF CANDIDATES FOR CPA CERTIFICATION

(a) G.S. 93-12(5)a sets forth the education required of candidates applying for CPA certification. The 150 semester hours required shall include a concentration in accounting, as defined by 21 NCAC 08A .0309, and other courses as required by the Board as follows: 24 semester hours of coursework which shall include one three semester hour course from at least eight of the following 10 fields of study:

- (1) communications;
- (2) computer technology;
- (3) economics;
- (4) ethics;
- (5) finance;
- (6) humanities/social science;
- (7) international environment;
- (8) law;
- (9) management; or
- (10) statistics.

(b) Anyone applying for CPA certification who holds a Master's or more advanced degree in accounting, tax law, economics, finance, business administration, or a law degree with an emphasis in taxation or accounting from an accredited college or university or the equivalent thereof shall be in compliance with the above.

History Note: Authority G.S. 93-12(5); Eff. January 1, 2001;

Amended Eff. January 1, 2006.

21 NCAC 08G .0410 PROFESSIONAL ETHICS AND CONDUCT CPE

(a) As part of the annual CPE requirement, all active CPAs shall complete CPE on professional ethics and conduct as set out in 21 NCAC 08N. They shall complete either two hours in a group study format or four hours in a self-study format. These courses shall be approved by the Board pursuant to 21 NCAC 08G .0400. This CPE shall be offered by a CPE sponsor registered with the Board pursuant to 21 NCAC 08G .0403(a) or (b).

(b) A non-resident licensee who maintains an office in North Carolina must comply with Paragraph (a) of this Rule. All other non-resident licensees may satisfy Paragraph (a) of this Rule by completing the ethics requirements in the jurisdiction in which he or she resides. If there is no ethics CPE requirement in the jurisdiction where he or she currently resides, he or she must comply with Paragraph (a) of this Rule.

*History Note: Authority G.S. 93-12(8b);
Eff. January 1, 2005;
Amended Eff. January 1, 2006.*

21 NCAC 08M .0105 PEER REVIEW REQUIREMENTS

(a) A CPA or CPA firm providing any of the following services to the public shall participate in a peer review program:

- (1) audits;
- (2) reviews of financial statements;
- (3) compilations of financial statements; and
- (4) agreed-upon procedures.

(b) A CPA or CPA firm not providing any of the services listed in Paragraph (a) of this Rule is exempt from peer review until the issuance of the first report provided to a client.

(c) A CPA, a new CPA firm or a CPA firm exempt from peer review now providing any of the services in Paragraph (a) of this Rule shall furnish to the peer review program their first peer review report, the letter of comments, the letter of response, and any work papers required for the peer review program within 24 months of the issuance of the first report provided to a client.

(d) Participation in and completion of one of the following peer review programs is required:

- (1) AICPA Center for Public Company Audit Firms;
- (2) AICPA Peer Review Program; or
- (3) Any other peer review program found to be substantially equivalent to Subparagraph (1) or (2) of this Paragraph in advance by the Board.

(e) CPA firms shall not rearrange their structure or act in any manner with the intent to avoid participation in peer review.

(f) A CPA firm which does not have offices in North Carolina and which has not provided any services as listed in Paragraph (a) of this Rule to North Carolina clients is not required to participate in a peer review program.

(g) Subsequent peer reviews of a CPA firm are due three years and six months from the year end of the 12 month period of the first peer review unless granted an extension by the peer review program.

*History Note: Authority G.S. 93-12(7b); 93-12(8c);
Eff. January 1, 2004;
Amended Eff. January 1, 2006.*

21 NCAC 08N .0103 RESPONSIBILITY FOR COMPLIANCE BY OTHERS

A CPA and CPA firm shall be responsible for assuring compliance with the rules in this Subchapter by anyone who is the CPA's partner, fellow shareholder, member, officer, director, licensed employee, unlicensed employee or agent or unlicensed principal, or by anyone whom the CPA supervises. A CPA or CPA firm shall not permit others (including affiliated entities) to carry out on the CPA's behalf, with or without compensation, acts which if carried out by the CPA would be a violation of these Rules.

*History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9);
Eff. April 1, 1994;
Amended Eff. January 1, 2006.*

21 NCAC 08N .0204 DISCIPLINE BY FEDERAL AND STATE AUTHORITIES

(a) Violations of Other Authorities' Laws or Rules. A CPA shall not act in a way that would cause said CPA to be disciplined by federal or state agencies or boards for violations of laws or rules on ethics. CPAs who engage in activities regulated by other federal or state authorities (including but not limited to the following agencies: IRS, Department of Revenue, SEC, State Bar, North Carolina Secretary of State, PCAOB, NASD, Department of Insurance, GAO, HUD, State Auditor, State Treasurer, or Local Government Commission) must comply with all such authorities' ethics laws and rules.

(b) Prima Facie Evidence. A conviction or final finding of unethical conduct by a competent authority is prima facie evidence of a violation of this Rule.

(c) Notice to the Board Required. A CPA shall notify the Board in writing within 30 days of any conviction or finding against him or her of unlawful conduct by any federal or state court or regulatory authority.

*History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9);
Eff. April 1, 1994;
Amended Eff. January 1, 2006.*

21 NCAC 08N .0213 OTHER RULES

A CPA shall not willfully violate any other rule in this Chapter nor any other provision of the Accountancy Statutes, the Professional Corporation Act, the Partnership Act, the Taxation Act, or the North Carolina Limited Liability Company Act.

*History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9);
Eff. April 1, 1994;
Amended Eff. January 1, 2006.*

21 NCAC 08N .0214 OUTSOURCING TO THIRD-PARTY SERVICE PROVIDERS

(a) A CPA shall provide a written disclosure to the client that he or she is using a third-party provider to assist the CPA in providing any professional services to the client.

(b) A CPA shall provide annual disclosure in a written statement of the services to be rendered by the third-party provider as well as the third-party provider's name, address, and phone number. The written statement shall be dated, signed by both the CPA and client in advance of the outsourcing, and a copy provided to the client.

(c) A CPA outsourcing professional services to a third-party provider is responsible for insuring a third-party provider is in compliance with all rules of Professional of Conduct and Ethics in 21 NCAC 08N.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. January 1, 2006.

21 NCAC 08N .0302 FORMS OF PRACTICE

(a) Authorized Forms of Practice. A CPA who uses CPA in or with the name of the business or offers or renders attest or assurance services in the public practice of accountancy to clients shall do so only through a registered sole proprietorship, partnership, Professional Corporation, Professional Limited Liability Company, or Registered Limited Liability Partnership.

(b) Authorized Ownership. A CPA firm may have an ownership of up to 49 percent by non-CPAs. A CPA firm shall have ownership of at least 51 percent and be controlled in law and fact by holders of valid CPA certificates who have the unrestricted privilege to use the CPA title and to practice public accountancy in a jurisdiction and at least one of whom shall be licensed by this Board.

(c) CPA Firm Registration Required. A CPA shall not offer or render professional services through a CPA firm which is in violation of the registration requirements of 21 NCAC 08J .0108, 08J .0110, or 08M .0101.

(d) Supervision of CPA Firms. Every North Carolina office of a CPA firm registered in North Carolina shall be actively and locally supervised by a designated actively licensed North Carolina CPA whose primary responsibility and a corresponding amount of time shall be work performed in that office.

(e) CPA Firm Requirements for CPA Ownership. A CPA firm and its designated supervising CPA shall be held accountable for the following in regard to a CPA owner:

- (1) A CPA owner shall be a natural person or a general partnership or a limited liability partnership directly owned by natural persons.
- (2) A CPA owner shall actively participate in the business of the CPA firm.
- (3) A CPA owner who, prior to January 1, 2006, is not actively participating in the CPA firm may continue as an owner until such time as his or her ownership is terminated.

(f) CPA Firm Requirements for Non-CPA Ownership. A CPA firm and its designated supervising CPA partner shall be held accountable for the following in regard to a non-CPA owner:

- (1) a non-CPA owner shall be a natural person or a general partnership or limited liability partnership directly owned by natural persons;
- (2) a non-CPA owner shall actively participate in the business of the firm or an affiliated entity as his or her principal occupation;

(3) a non-CPA owner shall comply with all applicable accountancy statutes and the administrative code;

(4) a non-CPA owner shall be of good moral character and shall be dismissed and disqualified from ownership for any conduct that, if committed by a licensee, would result in a discipline pursuant to G.S. 93-12(9);

(5) a non-CPA owner shall report his or her name, home address, phone number, social security number and Federal Tax ID number (if any) on the CPA firm's registration; and

(6) a non-CPA owner's name may not be used in the name of the CPA firm or held out to clients or the public that implies the non-CPA owner is a CPA.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. April 1, 1994; Amended Eff. January 1, 2006; April 1, 2003; April 1, 1999; August 1, 1995.

21 NCAC 08N .0303 OBJECTIVITY AND CONFLICTS OF INTEREST

(a) Personal Financial Interest in Advice. When offering or rendering accounting or related financial, tax, or management advice, a CPA shall be objective and shall not place the CPA's own financial interests nor the financial interests of a third party ahead of the legitimate financial interests of the CPA's client or the public in any context in which a client or the public can reasonably expect objectivity from one using the CPA title.

(b) Expectation of Objectivity Presumed. If the CPA uses the CPA title in any way to obtain or maintain a client relationship, the Board will presume the reasonable expectation of objectivity.

(c) Acceptance of a Commission or Referral Fee. A CPA shall not for a commission recommend or refer to a client any product or service, or for a commission recommend or refer any product or service to be supplied by a client, or receive a commission, when the CPA also performs for that client:

- (1) an audit or review of a financial statement; or
- (2) a compilation of a financial statement when the CPA expects, or reasonably might expect, that a third party will use the financial statement and the CPA's compilation report does not disclose a lack of independence; or
- (3) an examination of prospective financial information.

This prohibition applies during the period in which the CPA is engaged to perform any of the services listed in Subparagraph (c)(2) of this Rule and the period covered by any historical financial statements involved in such listed services.

(d) Acceptance of a Contingent Fee.

- (1) The offering or rendering of professional services for, or the receipt of, a contingent fee by a CPA is not prohibited except for engaging to render or rendering by a CPA:
 - (A) of professional services for any person for whom the CPA also performs attest services, during the

period of the attest services engagement and the period covered by any historical financial statements involved in such attest services; and

(B) for the preparation of original or amended tax returns or claims for tax refunds.

(2) Fees are not regarded as being contingent if fixed by courts or other public authorities or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies.

(e) A CPA shall communicate in advance to a client the scope of services or products to be rendered or referred for which the CPA will receive a commission, referral, or contingent fee. A CPA shall provide disclosure in a written statement within ten business days of the service or product to be rendered or referred with the commission, referral, or contingent fee to be charged or received by the CPA.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. April 1, 1994; Amended Eff. January 1, 2006; April 1, 1999.

21 NCAC 08N .0304 CONSULTING SERVICES STANDARDS

(a) Standards for Consulting Services. A CPA shall not render consulting services unless the CPA has complied with the standards for consulting services.

(b) Statements on Standards for Consulting Services. The Statements on Standards for Consulting Services (including the definition of such services) issued by the AICPA, including subsequent amendments and editions, are hereby adopted by reference, as provided by G.S. 150B-21.6, and shall be considered as the approved standards for consulting services for the purposes of Paragraph (a) of this Rule.

(c) Departures. Departures from the statements listed in Paragraph (b) of this Rule must be justified by those who do not follow them as set out in the statements.

(d) Copies of Statements. Copies of the Statements on Standards for Consulting Services may be inspected in the offices of the Board, as described in 21 NCAC 8A .0102. Copies may be obtained from the AICPA, 1211 Avenue of the Americas, New York, NY 10036 as part of the "AICPA Professional Standards." They are available at cost, which is approximately ten dollars (\$10.00) in paperback form or two hundred dollars (\$200.00) in looseleaf subscription form.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. April 1, 1994; Amended Eff. January 1, 2006.

21 NCAC 08N .0305 RETENTION OF CLIENT RECORDS

(a) Return upon Demand. A CPA must return client records in his or her possession to the client after a demand is made for their return. The records must be returned immediately upon demand unless circumstances make some delay reasonable in order to retrieve a closed file or to extract the CPA's work papers

described in Paragraph (f) of this Rule. If the records cannot be returned immediately upon demand, the CPA shall immediately notify the client of the date the records will be returned. Nothing in this Rule shall be interpreted to require a CPA to pay delivery costs when the records are returned to the client.

(b) Who may Demand Client Records. If the client is a partnership, records shall be returned upon request to any of its general partners. If the client is a limited partnership or a registered limited liability partnership, records shall be returned upon request to its general partner(s) and the managing partner or his or her designated individual respectively. If the client is a corporation, records shall be returned upon request to its president. If the client is a limited liability company, records shall be returned upon request to the manager. Joint records shall be returned upon request to any party.

(c) Return of Original Records. If the engagement is terminated prior to completion or the CPA's work product has neither been received nor paid for by the client, the CPA is only required to return those records originally given to the CPA by the client.

(d) Retention to Force Payment. A CPA shall not retain a client's records in order to force payment of any kind.

(e) Work Papers Included in Client Records. Work papers are usually the CPA's property and need not be surrendered to the client. However, in some instances work papers will contain data which should properly be reflected in the client's books and records but for convenience have not been duplicated therein with the result that the client's records are incomplete. In such instances, the portion of the work papers containing such data constitutes part of the client's records, and copies shall be given to the client along with the rest of the client's records. Work papers considered part of the client's records include but are not limited to:

- (1) Worksheets in lieu of original entry (e.g., listings and distributions of cash receipts or cash disbursements on columnar work paper);
- (2) Worksheets in lieu of general ledger or subsidiary ledgers, such as accounts receivable, job cost and equipment ledgers, or similar types of depreciation records;
- (3) All adjusting and closing journal entries and supporting details not fully set forth in the journal entry; and
- (4) Consolidating or combining journal entries and worksheets and supporting detail used in arriving at final figures incorporated in an end product such as financial statements or tax returns.

(f) Work Papers Belonging to the CPA. Work papers developed by the CPA incident to the performance of an engagement which do not result in changes to the client's records, or are not in themselves part of the records ordinarily maintained by such clients, are solely the CPA's work papers and are not the property of the client. For example, the CPA may make extensive analyses of inventory or other accounts as part of the selective audit procedures. These analyses are considered to be a part of the CPA's work papers, even if the analyses have been prepared by client personnel at the request of the CPA. Only to the extent these analyses result in changes to the client's records would the CPA be required to furnish the details from the work

papers in support of the journal entries recording the changes, unless the journal entries themselves contain all necessary details.

(g) Reasonable Fees for Copies. Nothing in this Rule shall be construed to require the CPA to furnish a client with copies of the client's records already in the client's possession. However, if the client asserts that such records have been lost, or are otherwise not in the client's possession, the CPA shall furnish copies of the records and may charge a reasonable fee.

(h) Retention of Work product and Work papers. A CPA shall ensure that the work product and the work papers created in the performance of an engagement for a client are retained for a minimum of five years after the date of issuance of the work product unless the CPA is required by law to retain such records for a longer period.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. April 1, 1994; Amended Eff. January 1, 2006; April 1, 2003.

21 NCAC 08N .0307 CPA FIRM NAMES

(a) Deceptive Names Prohibited. A CPA or CPA firm shall not trade upon the CPA title through use of any name that would have the capacity or tendency to deceive. The name of one or more former members of the CPA firm, as defined in 21 NCAC 08A .0301, may be included in the CPA firm name. The name of a non-CPA owner in a CPA firm name is prohibited.

(b) Style of Practice. It is considered misleading if a CPA firm practices under a name or style which would tend to imply the existence of a partnership or registered limited liability partnership or a professional corporation or professional limited liability company of more than one CPA shareholder or CPA member or an association when in fact there is no partnership nor is there more than one CPA shareholder or CPA member of a CPA firm. For example, no CPA firm having just one CPA owner may have as a part of its name the words "associates", "group", or "company" or their abbreviations. It is also considered misleading if a CPA renders non-attest professional services through a non-CPA firm using a name that implies any non-licensees are CPAs.

(c) Any CPA firm that has continuously used an assumed name approved by the Board prior to April 1, 1999, may continue to use the assumed name, so long as the CPA firm is owned only by the individual practitioner, partners, or shareholders who obtained Board approval for the assumed name. A CPA firm (or a successor firm by sale, merger, or operation of law) may continue to use the surname of a retired or deceased partner or shareholder in the CPA firm's name so long as that use is not deceptive.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. April 1, 1994; Amended Eff. January 1, 2006; April 1, 1999; August 1, 1995.

21 NCAC 08N .0308 VALUATION SERVICES STANDARDS

(a) Standards for Valuation Services. A CPA shall not render valuation services of a business, a business ownership interest,

security, or intangible asset unless the CPA has complied with the standards for valuation services.

(b) Statements on Standards for Valuation Services. The Statements on Standards for Valuation Services (including the definition of such services) issued by the AICPA, including amendments and editions, are hereby adopted by reference, as provided by G.S. 150B-21.6, and shall be considered as the approved standards for valuation services for the purposes of Paragraph (a) of this Rule.

(c) Departures. Departures from the standards listed in Paragraph (b) of this Rule must be justified by those who do not follow them as set out in the statements.

(d) Copies of Statements. Copies of the statements on standards for valuation services may be inspected in the offices of the Board, as described in 21 NCAC 08A .0102. Copies may be obtained from the AICPA, 1211 Avenue of the Americas, New York, NY 10036 as part of the "AICPA Professional Standards." They are available at cost, which is approximately ten dollars (\$10.00) in paperback form or two hundred dollars (\$200.00) in loose leaf subscription form.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. January 1, 2006.

21 NCAC 08N .0401 PUBLIC RELIANCE

The rules in this Section apply to any CPA who engages in the attest or assurance services as defined in 21 NCAC 08A .0301(b). CPAs who engage in such services are also subject to the Peer Review requirements of Subchapter 08M.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. April 1, 1994; Amended Eff. January 1, 2006.

21 NCAC 08N .0408 PEER REVIEW STANDARDS

A CPA who is engaged to perform a peer review shall not violate the rules or standards as set in Subchapter 08M of the peer review program under which the review is made or the engagement contract connected with that peer review.

History Note: Authority G.S. 55B-12; 57C-2-01; 93-12(9); Eff. April 1, 1994; Amended Eff. January 1, 2006.

CHAPTER 14 – COSMETIC ART EXAMINERS

21 NCAC 14N .0102 INITIAL APPLICATIONS AND FEES

(a) All applications for examination must be on a form provided by the Board.

(b) If special arrangements are required, the initial application or request for re-examination must include an application for special arrangements pursuant to 21 NCAC 14N .0107.

History Note: Authority G.S. 88B-4; 88B-7(1); 88B-8(1); 88B-18; 88B-20(a); Eff. June 1, 1992;

Amended Eff. December 1, 2005; August 1, 2000; August 1, 1998.

21 NCAC 14N .0103 GENERAL EXAMINATION INSTRUCTIONS

(a) All candidates scheduled for an examination, conducted by Promissor, Inc., must bring:

- (1) two forms of signature identification, one of which must be photo bearing;
- (2) your Promissor confirmation number; and
- (3) practical exam only: tools and supplies (as required by Promissor), and a mannequin or live model (esthetics exam only).

(b) No briefcases, bags, books, papers, or study materials are allowed in the examination room. Promissor is not responsible for lost or misplaced items.

(c) No cell phones, calculators or other electronic devices are permitted during the examination.

(d) No eating, drinking, smoking or gum-chewing is permitted during the examination.

(e) No visitors (with the exception of models), children, pets or guests are allowed at the test center.

(f) No extra time for the examination will be permitted.

(g) No leaving the test center is permitted during the examination. Candidates may visit the restroom without the proctor's permission, but will not receive any additional time for the examination.

(h) No giving or receiving assistance during the examination. If a candidate gives or receives assistance during the examination, the test center manager will stop the examination and the candidate will be dismissed from the test center. Promissor will not score the examination and will report the candidate to the Board, which will make any decisions regarding discipline.

(i) Candidates must maintain silence during the examination, and shall not mention the name of the school attended or the names of instructors. Candidates shall not wear or carry any school identification on uniforms or equipment.

History Note: Authority G.S. 88B-4; 88B-7; 88B-9; 88B-10; 88B-11; 88B-18; Eff. June 1, 1992; Temporary Amendment Eff. April 1, 1999; January 1, 1999; Amended Eff. January 1, 2006; August 1, 2000.

21 NCAC 14N .0113 RE-EXAMINATION

(a) Notwithstanding any other provision of the rules in this Subchapter, pursuant to G.S. 88B-18(d) a cosmetology candidate who has failed either section of the examination three times, shall complete an additional 200 hours of study at an approved cosmetic art school before another application for re-examination shall be accepted by the Board.

(b) The school in which the student has enrolled pursuant to G.S. 88B-18(d) shall design a course of study for that student in order to correct the student's deficiencies.

(c) A candidate for licensure as an apprentice cosmetologist who

- (1) passes the examination with a score of 75 percent or more on both sections; and

- (2) subsequently completes an additional 300 hours of cosmetology curriculum within one year of the examination date may be licensed as a cosmetologist under G.S. 88B-7 without retaking the examination.

History Note: Authority G.S. 88B-4; 88B-18; Eff. June 1, 1992; Amended Eff. August 1, 1998; June 1, 1993; Temporary Amendment Eff. January 1, 1999; Amended Eff. January 1, 2006; February 1, 2004; August 1, 2000.

21 NCAC 14P .0108 REVOCATION OF LICENSES AND OTHER DISCIPLINARY MEASURES

(a) The presumptive civil penalty for allowing unlicensed practitioners to practice in a licensed cosmetic art shop is:

- (1) 1st offense \$250.00
- (2) 2nd offense \$500.00
- (3) 3rd offense \$1,000.00

(b) The presumptive civil penalty for practicing cosmetology, manicuring or esthetics with a license issued to another person is:

- (1) 1st offense \$300.00
- (2) 2nd offense \$500.00
- (3) 3rd offense \$1,000.00

(c) The presumptive civil penalty for altering a license, permit or authorization issued by the Board is:

- (1) 1st offense \$300.00
- (2) 2nd offense \$400.00
- (3) 3rd offense \$500.00

(d) The presumptive civil penalty for submitting false or fraudulent documents is:

- (1) 1st offense \$500.00
- (2) 2nd offense \$800.00
- (3) 3rd offense \$1,000.00

(e) The presumptive civil penalty for refusing to present photographic identification is:

- (1) 1st offense \$100.00
- (2) 2nd offense \$250.00
- (3) 3rd offense \$500.00

(f) The presumptive civil penalty for advertising by means of knowingly false or deceptive statement is:

- (1) 1st offense warning (\$300.00)
- (2) 2nd offense \$400.00
- (3) 3rd offense \$500.00

(g) The presumptive civil penalty for permitting an individual to practice cosmetic art with an expired license is:

- (1) 1st offense warning (\$300.00)
- (2) 2nd offense \$400.00
- (3) 3rd offense \$500.00

(h) The presumptive civil penalty for practicing or attempting to practice by fraudulent misrepresentation is:

- (1) 1st offense \$500.00
- (2) 2nd offense \$800.00
- (3) 3rd offense \$1000.00

(i) The presumptive civil penalty for the illegal use or possession of equipment or Methyl Methacrylate Monomer (MMA) in a cosmetic art shop or school is:

- (1) 1st offense \$300.00
- (2) 2nd offense \$500.00
- (3) 3rd offense \$1000.00

History Note: Authority G.S. 88B-4; 88B-24; 88B-29; Temporary Adoption Eff. January 1, 1999; Eff. August 1, 2000; Amended Eff. January 1, 2006; April 1, 2004; August 1, 2002; April 1, 2001.

CHAPTER 18 - BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS

21 NCAC 18B .0204 EXAMINATIONS

- (a) All qualifying examinations administered by the Board for each license classification shall be written or computer-based examinations and must be taken personally by the approved applicant.
- (b) Approved applicants shall be provided a notice of examination eligibility that shall be valid for a period of three months and for a single administration of the qualifying examination. Upon receipt of a notice of examination eligibility from the Board, the applicant shall schedule the examination by contacting the Board or the authorized testing service. The applicant will be scheduled for the examination and will be notified of the date, time and place.

History Note: Authority GS 87-42; 87-43.3; 87-43.4; Eff. October 31, 1988; Temporary Amendment Eff. August 31, 2001; Amended Eff. January 1, 2006; July 18, 2002.

21 NCAC 18B .0211 WAITING PERIOD BETWEEN EXAMINATIONS

- (a) A person who fails a regular qualifying examination must wait before being eligible to take another regular examination in the same classification. The waiting period depends on the score on the failed examination, as follows:

Failed Examination Grade	Waiting Period
74-65	3 months
64 and below	6 months

- (b) A person who fails an examination in the same license classification three times must satisfactorily complete a minimum of 16 hours classroom education on the electrical code provided by a board-approved continuing education sponsor before retaking the examination.

- (c) A person shall be considered a new applicant each time he applies to take an examination and must file an application on the standard application form and pay the required examination fee.

History Note: Authority G.S. 87-42; 87-43.3; 87-43.4; Eff. October 1, 1988; Amended Eff. January 1, 2006.

21 NCAC 18B .1102 MINIMUM REQUIREMENTS FOR COURSE SPONSOR APPROVAL

- (a) Each course sponsor shall submit an application for continuing education course sponsor approval to the Board on a form provided by the Board by March 1 prior to the fiscal year (July 1 - June 30) in which the course will be offered. The application shall include:

- (1) the name of the sponsor;
- (2) sponsor contact person, address and telephone number;
- (3) course title and outline;
- (4) course contact hours;
- (5) schedule of courses, if established, including dates, time and locations;
- (6) course fee; and
- (7) name(s) of instructor(s).

- (b) To qualify as an approved continuing education course sponsor:

- (1) all courses offered by the sponsor shall last no fewer than two contact hours required for the license classification pursuant to Rule .1101(b) of this Section; and
- (2) all courses offered by the sponsor shall cover articles of the current National Electrical Code; G.S. 87, Article 4; Title 21 North Carolina Administrative Code Chapter 18B; or other subject matter satisfying the requirements in G.S. 87-44.1 as approved by the Board.

- (c) The course offered shall be presented by one or more instructors approved by the Board.

- (d) The course sponsor or instructor shall provide the Board with a certified class roster of all attending qualified individuals within 30 days after the completion of each course.

- (e) The course sponsor or instructor shall provide each attending qualified individual with a certificate of completion within 30 days after completion of each course.

- (f) The Board shall approve or deny applications at its April meeting.

- (g) Upon approval of the application, each approved sponsor shall agree to conduct courses in accordance with this Section and shall indicate its agreement by signing a continuing education sponsor agreement form provided by the Board.

History Note: Authority G.S. 87-42; 87-44.1; Eff. October 1, 1990; Amended Eff. January 1, 2006; March 1, 1999.

21 NCAC 18B .1103 MINIMUM REQUIREMENTS FOR COURSE INSTRUCTOR APPROVAL

- (a) Each course instructor shall submit an application for continuing education course instructor approval to the Board on a form provided by the Board by March 1 prior to the fiscal year (July 1 - June 30) in which the course will be offered. The application shall include:

- (1) The name of the instructor;
- (2) Instructor's address and telephone number;
- (3) The name of the course sponsor;

- (4) Course title;
 - (5) Course contact hours; and
 - (6) Qualifications of instructor.
- (b) Beginning March 1, 1994, no applicant shall be considered for approval as a continuing education course instructor unless the applicant satisfies at least one of the following:
- (1) Be a "qualified individual" as defined in G.S. 87-41.1(1) and certified as such by the Board pursuant to G.S. 87-42. This applicant will be considered for approval as a continuing education instructor to teach courses in the same or lower license classification in which the applicant is certified as a "qualified individual" as follows:
 Unlimited - Any License Classification
 Intermediate - Intermediate, Limited, SP-SFD and any SP-Restricted Classification
 Limited - Limited, SP-SFD and any SP-Restricted Classification
 SP-Restricted - Only in same SP-Restricted Classification
 - (2) Have passed the Continuing Education Instructor Examination prescribed and conducted by the Board. This applicant will be considered for approval as a continuing education instructor to teach courses in any license classification.
 - (3) Be a "qualified code-enforcement official" as defined in G.S. 143-151.8(a)(5) and certified as such by the North Carolina Code Officials Qualification Board as holding qualifications for an electrical inspector in Standard Level III, Standard Level II or Standard Level I categories. This applicant will be considered for approval as a continuing education instructor to teach courses in license classifications as follows:
 Standard Level III - Any License Classification
 Standard Level II - Intermediate, Limited, SP-SFD and any SP-Restricted Classification
 Standard Level I - Limited, SP-SFD and any SP-Restricted Classification.
 - (4) Be found by the Board to have professional or trade experience or other special qualifications qualifying him to teach courses in the license classification or classifications determined by the Board.
- (c) The Board may deny an application if it finds that the applicant has failed to comply with the terms of any agreement as provided in Paragraph (g) of this Rule or the rules of the Board.
- (d) The course instructor application shall be submitted together with the application for continuing education course sponsor approval as prescribed in Rule .1102 of this Section.
- (e) The Board shall approve or deny applications at its April meeting.
- (f) Appeals from denials shall be heard by the Board at a scheduled meeting in May.

(g) Upon approval of the application, each approved instructor shall agree to conduct courses in accordance with this Section and shall indicate his agreement by signing a continuing education instructor agreement form provided by the Board.

History Note: Authority G.S. 87-42; 87-44.1; Eff. October 1, 1990; Amended Eff. January 1, 2006; April 1, 1993.

21 NCAC 18B .1106 LIST OF APPROVED COURSE SPONSORS AND INSTRUCTORS

In July of each year the Board shall post a link on the Board website that shall include:

- (1) All approved course sponsors and instructors for that fiscal year; and
- (2) Contact information for all approved course sponsors and instructors.

History Note: Authority G.S. 87-42; 87-44.1; Eff. October 1, 1990; Amended Eff. January 1, 2006.

CHAPTER 36 - BOARD OF NURSING

21 NCAC 36 .0320 STUDENTS

(a) Students in nursing programs shall meet requirements established by the controlling institution. Additional requirements may be stipulated by the nursing program for students because of the nature and legal responsibilities of nursing education and nursing practice.

(b) Admission requirements and practices shall be stated and published in the controlling institution's publications and shall include assessment of:

- (1) record of high school graduation, high-school equivalent, or earned credits from a post-secondary institution;
- (2) achievement potential through the use of previous academic records and pre-entrance examination cut-off scores that are consistent with curriculum demands and scholastic expectations; and
- (3) physical and emotional health that would provide evidence that is indicative of the applicant's ability to provide safe nursing care to the public.

(c) The number of students enrolled in nursing courses shall not exceed the maximum number approved by the Board as defined in 21 NCAC 36 .0302(f) and 21 NCAC 36 .0321(k) by more than 10 students.

(d) The nursing program shall publish policies in nursing student handbook and college catalog that provide for identification and dismissal of students who:

- (1) present physical or emotional problems which conflict with safety essential to nursing practice and do not respond to treatment or counseling within a timeframe that enables meeting program objectives.

(2) demonstrate behavior which conflicts with safety essential to nursing practice.

(e) The nursing program shall maintain a three year average at or above 95 percent of the national pass rate for licensure level pass rate on first writing of the licensure examination for calendar years ending December 31.

(f) The controlling institution shall publish policies in nursing student handbook and college catalog for transfer of credits or for admission to advanced placement and the nursing program shall determine the total number of nursing courses or credits awarded for advanced placement.

History Note: Authority G.S. 90-171.23(b)(8); 90-171.38; 90-171.43; Eff. February 1, 1976; Amended Eff. January 1, 2006; August 1, 1998; January 1, 1996; June 1, 1992; January 1, 1989; January 1, 1984.

CHAPTER 66 - VETERINARY MEDICAL BOARD

SECTION .0100 - STATUTORY AND ADMINISTRATIVE PROVISIONS

21 NCAC 66 .0101 AUTHORITY: NAME AND LOCATION OF BOARD

The "North Carolina Veterinary Practice Act," Article 11, Chapter 90, of the General Statutes of North Carolina, establishes and authorizes the "North Carolina Veterinary Medical Board," hereafter referred to as the "Board." Unless otherwise directed, all communications shall be addressed to the Board at Office of the Executive Director, P.O. Box 37549, Raleigh, North Carolina 27627, 1611 Jones Franklin Road, Suite 106, Raleigh, North Carolina 27606.

History Note: Authority G.S. 90-185(6); 90-182; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. January 1, 2006; May 1, 1996; May 1, 1989.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on Thursday February 16, 2006, 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 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
Jeffrey P. Gray

Appointed by House

Jennie J. Hayman - Chairman
Graham Bell
Lee Settle
Dana E. Simpson
John Tart

RULES REVIEW COMMISSION MEETING DATES

February 16, 2006 March 16, 2006
April 20, 2006 May 18, 2006

**LIST OF APPROVED PERMANENT RULES
January 19, 2006 Meeting**

INDIAN AFFAIRS, COMMISSION OF

<u>Authorization</u>	01	NCAC	15	.0201
<u>Definitions</u>	01	NCAC	15	.0202
<u>Groups Eligible for Petitioning Process</u>	01	NCAC	15	.0203
<u>Groups Ineligible for Recognition</u>	01	NCAC	15	.0204
<u>Commission Assistance to Petitioner</u>	01	NCAC	15	.0205
<u>Notice of Intent to Petition for Recognition</u>	01	NCAC	15	.0207
<u>Recognition Committee</u>	01	NCAC	15	.0208
<u>Procedure for Recognition</u>	01	NCAC	15	.0209
<u>Recognition Requirement</u>	01	NCAC	15	.0211
<u>Criteria for Recognition as an American Indian Tribe</u>	01	NCAC	15	.0212
<u>Special Committee on Recognition</u>	01	NCAC	15	.0213
<u>Tribal Roll</u>	01	NCAC	15	.0214

ADMINISTRATION, DEPARTMENT OF

<u>Scope</u>	01	NCAC	30I	.0301
<u>Definitions</u>	01	NCAC	30I	.0302
<u>Adjustments to Goal</u>	01	NCAC	30I	.0303
<u>Office for Historically Underutilized Businesses Responsi...</u>	01	NCAC	30I	.0304
<u>State Construction Office Responsibilities</u>	01	NCAC	30I	.0305
<u>Owner Requirements</u>	01	NCAC	30I	.0306
<u>Designer Requirements</u>	01	NCAC	30I	.0307
<u>Contractor Requirements</u>	01	NCAC	30I	.0308
<u>Dispute Procedures</u>	01	NCAC	30I	.0310

INSURANCE, DEPARTMENT OF

<u>Definitions</u>	11	NCAC	06A	.0901
<u>Transactions With Insureds</u>	11	NCAC	06A	.0902
<u>Regulatory Matters</u>	11	NCAC	06A	.0904
<u>Catastrophic Disasters</u>	11	NCAC	06A	.0905

CODE OFFICIALS QUALIFICATION BOARD

<u>Renewal</u>	11	NCAC	08	.0507
<u>Renewal</u>	11	NCAC	08	.0709
<u>Continuing Education General</u>	11	NCAC	08	.0712
<u>Inactive Code Enforcement Officials</u>	11	NCAC	08	.0714
<u>Failure to Complete Continuing Education</u>	11	NCAC	08	.0715
<u>Compliance</u>	11	NCAC	08	.0716
<u>Extensions of Time</u>	11	NCAC	08	.0717
<u>Continuing Education Coordinator</u>	11	NCAC	08	.0719
<u>Approved Courses</u>	11	NCAC	08	.0720
<u>Course Accreditation Requirements</u>	11	NCAC	08	.0721
<u>Distance Education Courses</u>	11	NCAC	08	.0722
<u>Denial or Withdrawal of Approval of Sponsor or Course</u>	11	NCAC	08	.0723
<u>Sponsor and Course Changes</u>	11	NCAC	08	.0724
<u>Scheduled Courses</u>	11	NCAC	08	.0725
<u>Advertising and Providing Course Information</u>	11	NCAC	08	.0726
<u>Fee for CE Courses</u>	11	NCAC	08	.0727
<u>Cancellation and Refund Policies</u>	11	NCAC	08	.0728
<u>Course Attendance</u>	11	NCAC	08	.0729
<u>Accommodations for Person With Disabilities</u>	11	NCAC	08	.0730
<u>Course Completion Reporting</u>	11	NCAC	08	.0731
<u>Retention of Course Records</u>	11	NCAC	08	.0732
<u>Board Monitors</u>	11	NCAC	08	.0733

MANUFACTURED HOUSING BOARD

<u>Forms</u>	11	NCAC	08	.0904
<u>Salesman Exam; Temporary License; License Transfer; Fees</u>	11	NCAC	08	.0911

PRIVATE PROTECTIVE SERVICES BOARD

<u>Training Requirements for Armed Security Guards</u>	12	NCAC	07D	.0807
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CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Suspension: Denial: or Revocation of Certification</u>	12	NCAC	09A	.0204
<u>Period of Suspension: Revocation: or Denial</u>	12	NCAC	09A	.0205
<u>Specialized Driver Instructor Training</u>	12	NCAC	09B	.0227
<u>Trainee Attendance</u>	12	NCAC	09B	.0404
<u>Speed Measurement Instrument (SMI) Operators Certificatio...</u>	12	NCAC	09C	.0308
<u>Basic Training for Probation/Parole Officers</u>	12	NCAC	09G	.0412

RULES REVIEW COMMISSION

Corrections Specialized Instructor Training-Firearms 12 NCAC 09G .0415

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

Terms and Conditions of Detention Officer Instructor Cert... 12 NCAC 10B .0905

Terms and Conditions of Telecommunicator Instructor Certi... 12 NCAC 10B .0915

COASTAL RESOURCES COMMISSION

Public Hearing and Local Adoption Requirements 15A NCAC 07B .0801

Cama Land Use Plan Amendments 15A NCAC 07B .0901

Public Trust Areas 15A NCAC 07H .0207

AECS Within Ocean Hazard Areas 15A NCAC 07H .0304

Specific Use Standards for Ocean Hazard Areas 15A NCAC 07H .0308

Use Standards for Ocean Hazard Areas: Exceptions 15A NCAC 07H .0309

Reserve Components 15A NCAC 07O .0105

WILDLIFE RESOURCES COMMISSION

Hunting on Game Lands 15A NCAC 10D .0103

Belews Lake 15A NCAC 10F .0371

CERTIFIED PUBLIC ACCOUNTANT EXAMINERS, BOARD OF

Forecasts 21 NCAC 08N .0210

Responsibilities in Tax Practice 21 NCAC 08N .0211

Auditing Standards 21 NCAC 08N .0403

Accounting and Review Services Standards 21 NCAC 08N .0404

Governmental Accounting Standards 21 NCAC 08N .0405

Attestation Standards 21 NCAC 08N .0406

COSMETIC ART EXAMINERS, BOARD OF

Sanitation Floor Coverings 21 NCAC 14H .0108

Sanitary Ratings and Posting of Ratings 21 NCAC 14P .0112

ELECTRICAL CONTRACTORS, BOARD OF EXAMINERS OF

Authorized Legal Action by Staff 21 NCAC 18B .0104

Contact Hours 21 NCAC 18B .1104

PHARMACY, BOARD OF

Remote Medication Order Processing Services 21 NCAC 46 .1417

License by Reciprocity 21 NCAC 46 .1602

Charge for Verification for Reinstatement 21 NCAC 46 .1605

Fee for Submittal of Dishonored and Returned Check 21 NCAC 46 .1611

Anti-Neoplastic Agents 21 NCAC 46 .2807

Registration 21 NCAC 46 .3301

VETERINARY MEDICAL BOARD

Special Registration of Veterinary Technicians, Interns 21 NCAC 66 .0303

STATE PERSONNEL COMMISSION

<u>Program Administration</u>	25	NCAC	01N	.0104
<u>State Agency Responsibilities</u>	25	NCAC	01N	.0105
<u>Committee Responsibilities</u>	25	NCAC	01N	.0106
<u>State Employees' Responsibilities</u>	25	NCAC	01N	.0107
<u>Equipment</u>	25	NCAC	01N	.0203
<u>Personal Protective Equipment Guide</u>	25	NCAC	01N	.0206

**LIST OF APPROVED TEMPORARY RULES
January 19, 2006 Meeting**

HHS-FACILITY SERVICES

<u>Filing Applications</u>	10A	NCAC	14C	.0203
<u>Definitions</u>	10A	NCAC	14C	.1501
<u>Information Required of Applicant</u>	10A	NCAC	14C	.1502
<u>Performance Standards</u>	10A	NCAC	14C	.1503
<u>Support Services</u>	10A	NCAC	14C	.1504
<u>Staffing and Staff Training</u>	10A	NCAC	14C	.1505
<u>Definitions</u>	10A	NCAC	14C	.1601
<u>Information Required of Applicant</u>	10A	NCAC	14C	.1602
<u>Performancy Standards</u>	10A	NCAC	14C	.1603
<u>Staffing and Staff Training</u>	10A	NCAC	14C	.1605
<u>Definitions</u>	10A	NCAC	14C	.1901
<u>Definitions</u>	10A	NCAC	14C	.2101
<u>Performance Standards</u>	10A	NCAC	14C	.2103
<u>Performance Standards</u>	10A	NCAC	14C	.2203
<u>Information Required of Applicant</u>	10A	NCAC	14C	.2502
<u>Performance Standards</u>	10A	NCAC	14C	.2503
<u>Staffing and Staff Training</u>	10A	NCAC	14C	.2505
<u>Information Required of Applicant</u>	10A	NCAC	14C	.2602
<u>Definitions</u>	10A	NCAC	14C	.2701
<u>Information Required of Applicant</u>	10A	NCAC	14C	.2702
<u>Performance Standards</u>	10A	NCAC	14C	.2703
<u>Support Services</u>	10A	NCAC	14C	.2704
<u>Staffing and Staff Training</u>	10A	NCAC	14C	.2705
<u>Definitions</u>	10A	NCAC	14C	.2801
<u>Quality of Services</u>	10A	NCAC	14C	.2806
<u>Definitions</u>	10A	NCAC	14C	.3501
<u>Information Required of Applicant</u>	10A	NCAC	14C	.3502
<u>Support Services</u>	10A	NCAC	14C	.3504
<u>Staffing and Staff Training</u>	10A	NCAC	14C	.3505
<u>Information Required of Applicant</u>	10A	NCAC	14C	.3702
<u>Performance Standards</u>	10A	NCAC	14C	.3703
<u>Support Services</u>	10A	NCAC	14C	.3704

RULES REVIEW COMMISSION

<u>Definitions</u>	10A NCAC 14C .3901
<u>Information Required of Applicant</u>	10A NCAC 14C .3902
<u>Performance Standards</u>	10A NCAC 14C .3903
<u>Support Services</u>	10A NCAC 14C .3904
<u>Staffing and Staff Training</u>	10A NCAC 14C .3905
<u>Facility</u>	10A NCAC 14C .3906
<u>Definitions</u>	10A NCAC 14C .4001
<u>Information Required of Applicant</u>	10A NCAC 14C .4002
<u>Performance Standards</u>	10A NCAC 14C .4003
<u>Support Services</u>	10A NCAC 14C .4004
<u>Staffing and Staff Training</u>	10A NCAC 14C .4005

AGENDA
RULES REVIEW COMMISSION
February 16, 2006, 10:00 A.M.

- I. Reminder of Governor's Executive Order #1
- II. Communications from Board of Ethics
- III. Review of minutes of last meeting
- IV. Follow-Up Matters
 - A. Department of Administration – 1 NCAC 30I .0309 (Bryan)
 - B. Child Care Commission – 10A NCAC 09 .1701 and .1718 (Bryan)
 - C. Code Officials Qualification Board – 11 NCAC 8 .0713; .0718 (Bryan)
 - D. Private Protective Services Board – 12 NCAC 7D .0405 (DeLuca)
 - E. Wildlife Resources Commission – 15A NCAC 10D .0103 (DeLuca)
 - F. Cosmetic Art Examiners Board – 21 NCAC 14O .0101 (DeLuca)
 - G. Cosmetic Art Examiners Board – 21 NCAC 14P .0105 (DeLuca)
 - H. Board of Landscape Architects – 21 NCAC 26 .0207 (DeLuca)
 - I. Board of Nursing – 21 NCAC 36 .0303 and .0317 (Bryan)
 - J. Board of Pharmacy – 21 NCAC 46 .1607; .1612; .2511; .2601 (DeLuca)
 - K. Board of Pharmacy – 21 NCAC 46 .2502 (DeLuca)
 - L. Building Code Council – 041214 Items B-2, B-1, B-2D1 903.2.7
 - M. Building Code Council – 051213 Item D-3 10.10 and Article 100 (Bryan)

- V. Review of Rules (Log Report)
 - VI. Review of Temporary Rules (If Any)
 - VII. Commission Business
 - VIII. Next meeting: March 16, 2006
-

Generated 1/26/2006 at 9:02 AM

Commission Review/Permanent Rules
Log of Filings
December 21, 2005 through January 20, 2006

ADMINISTRATION, DEPARTMENT OF

The rules in Chapter 35 implement the State Employees Combined Campaign including the purpose and organization (.0100); application process and schedule (.0200); and general provisions (.0300).

<u>Organization of the Campaign</u>	01	NCAC	35	.0103
Amend/*				
<u>Applications</u>	01	NCAC	35	.0201
Amend/*				
<u>Content of Applications</u>	01	NCAC	35	.0202
Amend/*				
<u>Review and Schedule</u>	01	NCAC	35	.0203
Amend/*				
<u>Response</u>	01	NCAC	35	.0204
Amend/*				
<u>Agreements</u>	01	NCAC	35	.0205
Amend/*				
<u>Other Solicitation Prohibited</u>	01	NCAC	35	.0301
Amend/*				
<u>Coercive Activities Prohibited</u>	01	NCAC	35	.0302
Amend/*				
<u>Methods of Giving and Terms of Contribution</u>	01	NCAC	35	.0304
Amend/*				
<u>Campaign Literature</u>	01	NCAC	35	.0305
Amend/*				
<u>Distribution of Undesignated Funds</u>	01	NCAC	35	.0307
Amend/*				

USS NORTH CAROLINA BATTLESHIP COMMISSION

The rules in Chapter 5 are from the USS NC Battleship Commission and include rulemaking and adjudication (.0100); and specific use regulations (.0200).

<u>Address</u>	07	NCAC	05	.0103
Amend/*				

MENTAL HEALTH, COMMISSION OF

The rules in Chapter 27 are mental health rules about community facilities and services.

The rules in Subchapter 27G are from either the department or the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services including general information (.0100); operation and management rules (.0200); physical plant rules (.0300); licensing procedures (.0400); area program requirements; over-authority on county program monitoring of facilities and services (.0600); accreditation of area programs and services (.0700); waivers and appeals (.0800); general rules for infants and toddlers (.0900); partial hospitalization for individuals who are mentally ill (.1100); psychological rehabilitation facilities for individuals with severe and persistent mental illness (.1200); residential treatment for children and adolescents who are emotionally disturbed or who have a mental illness (.1300); day treatment for children and adolescents with emotional or behavioral disturbances (.1400); intensive residential treatment for children and adolescents who are emotionally disturbed or who have a mental illness (.1500); residential treatment staff secure facilities for children or adolescents (.1700); psychiatric residential treatment facilities for children and adolescents (.1900); specialized community residential centers for individuals with developmental disabilities (.2100); before/after school and summer developmental day services for children with or at risk for developmental delays or disabilities, or atypical development (.2200); adult developmental and vocational programs for individuals with developmental disabilities (.2300); developmental day services for children with or at risk for developmental delays, or disabilities, or atypical development (.2400); early childhood intervention services (ECIS) for children with an at risk for developmental delays, or disabilities, or atypical development and their families (.2500); nonhospital medical detoxification for individuals who are substance abusers (.3100); social setting detoxification for substance abuse (.3200); outpatient detoxification for substance abuse (.3300); residential treatment/rehabilitation for individuals with substance abuse disorders (.3400); outpatient facilities for individuals with substance abuse disorders (.3500); outpatient opioid treatment (.3600); day treatment facilities for individuals with substance abuse disorders (.3700); substance abuse services for DWI offenders (.3800); drug education schools (DES) (.3900); treatment alternatives to street crimes (TASC) (.4000); substance abuse primary prevention services (.4200); therapeutic community (.4300); facility based crises services for individual of all disability groups (.5000); community respite services for individuals of all disability groups (.5100); residential therapeutic (habilitative) camps for children and adolescents of all disability groups (.5200); day activity for individuals of all disability groups (.5400); sheltered workshops for individuals of all disability groups (.5500); supervised living for individuals of all disability groups (.5600); assertive community treatment service (.5700); supportive employment for individuals of all disability groups (.5800); case management for individuals of all disability groups (.5900); inpatient hospital treatment for individuals who have mental illness or substance abuse disorders (.6000); emergency services for individuals of all disability groups (.6100); outpatient services for individuals of all disability groups (.6200); companion respite services for individuals of all disability groups (.6300); personal assistants for individuals of all disabilities groups (.6400); employment assistance programs (.6500); specialized foster care services (.6600); forensic screening and evaluation services for individuals of all disability groups (.6700); prevention services (.6800); and consultation and education services (.6900).

<u>Scope</u> Amend/*	10A	NCAC	27G	.1301
<u>Scope</u> Adopt/*	10A	NCAC	27G	.1701
<u>Requirements of Qualified Professionals</u> Adopt/*	10A	NCAC	27G	.1702
<u>Requirements for Associate Professionals</u> Adopt/*	10A	NCAC	27G	.1703
<u>Minimum Staffing Requirements</u> Adopt/*	10A	NCAC	27G	.1704
<u>Requirements of Licensed Professionals</u> Adopt/*	10A	NCAC	27G	.1705
<u>Operations</u> Adopt/*	10A	NCAC	27G	.1706
<u>Persons Permitted in the Facility</u> Adopt/*	10A	NCAC	27G	.1707
<u>Transfer or Discharge</u> Adopt/*	10A	NCAC	27G	.1708

ALARM SYSTEMS LICENSING BOARD

The rules in Chapter 11 are from the N.C Alarm Systems Licensing Board and cover the organization and general provisions (.0100); license applications and requirements (.0200); registration of employees of licensees (.0300); the recovery fund (.0400); and continuing education for licensees (.0500).

Recording and Reporting Continuing Education Credits 12 NCAC 11 .0505
Amend/*

LABOR, DEPARTMENT OF

The rules in Chapter 13 implement the Uniform Boiler and Pressure Vessel Act of North Carolina including definitions (.0100); administration (.0200); enforcement of standards (.0300); general requirements (.0400); non-standard boilers and pressure vessels (.0500); hot water vessels used for supply or storage (.0600); nuclear energy systems (.0700); and forms (.0800).

Certificate and Inspection Fees 13 NCAC 13 .0213
Amend/*

ENVIRONMENTAL MANAGEMENT COMMISSION

The rules in Chapter 2 concern environmental management and are promulgated by the Environmental Management Commission.

The rules in Subchapter 2B pertain to surface water standards and monitoring including procedures for assignment of water quality standards (.0100); the standards and classifications themselves (.0200); stream classifications (.0300); effluent limitations (.0400); and monitoring and reporting requirements (.0500).

Nutrient Offset Payments 15A NCAC 02B .0240
Amend/*

COASTAL RESOURCES COMMISSION

The rules in Chapter 7 pertain to coastal management and are promulgated by the Division of Coastal Management or the Coastal Resources Commission.

The rules in Subchapter 7K set out activities in areas of environmental concern (AECs) which do not require a Coastal Area Management Act (CAMA) permit. These include activities that are not considered development (.0100); exempt minor maintenance and improvement (.0200); and exempt federal agency activities (.0400).

Exemption/Accessory Uses/Maintenance Repair 15A NCAC 07K .0209
Amend/*

REVENUE, DEPARTMENT OF

The rules in Chapter 1 are the departmental rules of the Department of Revenue.

The rules in Subchapter 1C rules deal with general administration and contain definitions (.0100), hearing procedures (.0200), forms (.0300), interest requirements (.0400), and form of payment (.0500).

Electronic Filing of Returns 17 NCAC 01C .0701
Adopt/*

Electronic Signature 17 NCAC 01C .0702
Adopt/*

The rules in Chapter 5 are the rules dealing with the corporate income tax and franchise tax.

The rules in 5B deal with general information about the franchise tax (.0100); the form to be used in filing the franchise tax for pullman, sleeping, chair and dinner cars (.0400); the form to be used by express companies for filing the franchise tax (.0500); capital stocks surplus and individual profits base (.1100); investment in tangibles property in N.C. (.1300); appraised valuation of tangible and intangible property base (.1400); procedures when there has been a change of income year (.1500); and corporations conditionally or partially exempt (.1700).

Electronic Filing of General Business Franchise Tax 17 NCAC 05B .0108
Adopt/*

The rules in Subchapter 5C are corporate income tax rules and include corporations subject to the tax (.0100), computation of income (.0300), interest income on government obligations (.0400), taxable in another state (.0600), business and nonbusiness income (.0700), property factor (.0800), payroll factor (.0900), sales factor (.1000), amortization of bond premiums (.1400), net economic loans carry over (.1500), partnerships and the corporate partner (.1700), computing taxable percentages on dividends (.1800), extension of time for filing return (.2000), dissolutions and withdrawals (.2100), domestic international sales corporation (.2400) and reinstatement of corporate charter (.2600).

Overpayments Applied to Next Year 17 NCAC 05C .1904
Adopt/*

Electronic Filing of Corporation Income Tax Returns 17 NCAC 05C .1905
Adopt/*

DENTAL EXAMINERS, BOARD OF

The rules in Chapter 16 cover the licensing of dentists and dental hygienists.

The rules in Subchapter 16B concern licensure examination for dentists including examination required (.0100); qualifications (.0200); application (.0300); and Board conducted examinations (.0400).

Examination Required 21 NCAC 16B .0101
Amend/*

In General 21 NCAC 16B .0201
Amend/*

Student May Apply 21 NCAC 16B .0202
Amend/*

Transcripts Required 21 NCAC 16B .0203
Repeal/*

Application for Licensure 21 NCAC 16B .0301
Amend/*

Board Approved Examinations 21 NCAC 16B .0303
Amend/*

Other Requirements 21 NCAC 16B .0304
Repeal/*

Time for Filing 21 NCAC 16B .0305
Repeal/*

Foreign Graduates 21 NCAC 16B .0306
Repeal/*

Examinations 21 NCAC 16B .0307
Repeal/*

Patients and Supplies for Clinical Exam 21 NCAC 16B .0308
Repeal/*

Scope of Clinical Examination 21 NCAC 16B .0309

Repeal/*				
<u>Reexamination</u>	21	NCAC	16B	.0315
Repeal/*				
<u>Application for Board Conducted Examination</u>	21	NCAC	16B	.0401
Adopt/*				
<u>Time for Filing</u>	21	NCAC	16B	.0402
Adopt/*				
<u>Examination Conducted by the Board</u>	21	NCAC	16B	.0403
Adopt/*				
<u>Patients and Supplies for Board Conducted Clinical Examin...</u>	21	NCAC	16B	.0404
Adopt/*				
<u>Scope of Board Conducted Clinical Examination</u>	21	NCAC	16B	.0405
Adopt/*				
<u>Board Conducted Reexamination</u>	21	NCAC	16B	.0406
Adopt/*				

The rules in Subchapter 16M are fee setting rules.

<u>Dentists</u>	21	NCAC	16M	.0101
Amend/*				

PODIATRY EXAMINERS, BOARD OF

The rules in Chapter 52 concern Board of Podiatry Examiners including organization of the Board (.0100); examination and licensing (.0200); professional corporations (.0300); revocation or suspension of license (.0400); certification of podiatric assistants (.0500); forms used by the Board (.0600); petitions for rules (.0700); notice of rulemaking hearings (.0800); rulemaking hearings (.0900); declaratory rulings (.1000); administrative hearing procedures (.1100); administrative hearings decisions related rights and procedures (.1200); nominations for podiatrist members of the board of podiatry examiners; and board of podiatry examiners constituting a board of podiatry elections; and procedures for holding an election (.1300); and scope of practice (.1400).

<u>Practice Orientation</u>	21	NCAC	52	.0205
Amend/*				

APPRAISAL BOARD

The rules in Chapter 57 are from the North Carolina Appraisal Board.

The rules in Subchapter 57A cover licensing, certification and practice rules for appraisers including application procedures (.0100); licensing and certification (.0200); examination (.0300); general practice requirements (.0400); and appraisal standards (.0500).

<u>Qualifications for Trainee Registration</u>	21	NCAC	57A	.0201
Amend/*				
<u>Registration, License and Certificate Renewal</u>	21	NCAC	57A	.0203
Amend/*				
<u>Continuing Education</u>	21	NCAC	57A	.0204
Amend/*				
<u>Time and Place</u>	21	NCAC	57A	.0301
Amend/*				
<u>Display of Registration, Licenses and Certificates</u>	21	NCAC	57A	.0402
Amend/*				
<u>Appraisal Reports</u>	21	NCAC	57A	.0405
Amend/*				

RULES REVIEW COMMISSION

Supervision of Trainees 21 NCAC 57A .0407
Amend/*

The rules in Subchapter 57B cover real estate appraisal education including the courses required for licensure or certification (.0100); course sponsor standards for pre-licensing or pre-certification courses (.0200); pre-licensing and pre-certification course standards (.0300); course sponsor fees (.0400); fees for private real estate appraisal education schools (.0500); and continuing education course standards (.0600).

Program Changes 21 NCAC 57B .0211
Amend/*

Instructor Requirements 21 NCAC 57B .0306
Amend/*

Fee for Renewal of Course Approval 21 NCAC 57B .0403
Amend/*

Fee for Renewal of Course Approval 21 NCAC 57B .0503
Amend/*

Application and Fee 21 NCAC 57B .0602
Amend/*

Criteria for Course Approval 21 NCAC 57B .0603
Amend/*

Changes During the Approval Period 21 NCAC 57B .0609
Amend/*

Withdrawal or Denial of Approval 21 NCAC 57B .0612
Amend/*

REAL ESTATE COMMISSION

The rules in Chapter 58 are from the North Carolina Real Estate Commission.

The rules in Subchapter 58A are rules relating to real estate brokers and salesmen including rules dealing with general brokerage (.0100); application for license (.0300); examinations (.0400); licensing (.0500); real estate commission hearings (.0600); petitions for rules (.0700); rulemaking (.0800); declaratory rulings (.0900); real estate recovery fund (.1400); forms (.1500); discriminating practices prohibited (.1600); mandatory continuing education (.1700); limited nonresident commercial licensing (.1800); and post-licensure education (.1900).

Agency Agreements and Disclosure 21 NCAC 58A .0104
Amend/*

Advertising 21 NCAC 58A .0105
Amend/*

Delivery of Instruments 21 NCAC 58A .0106
Amend/*

Handling and Accounting of Funds 21 NCAC 58A .0107
Amend/*

Brokerage Fees and Compensation 21 NCAC 58A .0109
Amend/*

Broker-In-Charge 21 NCAC 58A .0110
Amend/*

Drafting Legal Instruments 21 NCAC 58A .0111
Amend/*

Offers and Sales Contracts 21 NCAC 58A .0112
Amend/*

Reporting Criminal Convictions and Disciplinary Actions 21 NCAC 58A .0113
Amend/*

RULES REVIEW COMMISSION

<u>Residential Property Disclosure Statement</u> Amend/*	21	NCAC	58A	.0114
<u>Form</u> Amend/*	21	NCAC	58A	.0301
<u>Filing and Fees</u> Amend/*	21	NCAC	58A	.0302
<u>Experience Qualifications for Applicants</u> Amend/*	21	NCAC	58A	.0304
<u>Subject Matter and Passing Scores</u> Amend/*	21	NCAC	58A	.0402
<u>Cheating and Related Misconduct</u> Amend/*	21	NCAC	58A	.0404
<u>Examination Review</u> Amend/*	21	NCAC	58A	.0406
<u>Business Entities</u> Amend/*	21	NCAC	58A	.0502
<u>License Renewal Penalty for Operating While License Expired</u> Amend/*	21	NCAC	58A	.0503
<u>Active and Inactive License Status</u> Amend/*	21	NCAC	58A	.0504
<u>Salesperson to be Supervised by Broker</u> Amend/*	21	NCAC	58A	.0506
<u>Cancellation of Salesperson License Upon Broker Licensure</u> Repeal/*	21	NCAC	58A	.0510
<u>Procedures for Requesting Hearings When Applicant's Cha...</u> Amend/*	21	NCAC	58A	.0616
<u>Requests for Rulings Disposition of Requests</u> Amend/*	21	NCAC	58A	.0902
<u>Purpose and Applicability</u> Amend/*	21	NCAC	58A	.1701
<u>Continuing Education Requirement</u> Amend/*	21	NCAC	58A	.1702
<u>Continuing Education for License Activation</u> Amend/*	21	NCAC	58A	.1703
<u>No Credit for Prelicensing Courses</u> Amend/*	21	NCAC	58A	.1704
<u>Equivalent Credit</u> Amend/*	21	NCAC	58A	.1708
<u>Continuing Education Required of Nonresident Licensees</u> Amend/*	21	NCAC	58A	.1711
<u>General Provisions</u> Amend/*	21	NCAC	58A	.1801
<u>Requirements for Licensure Application and Fee</u> Amend/*	21	NCAC	58A	.1803
<u>Active Status</u> Amend/*	21	NCAC	58A	.1804
<u>Limitations</u> Amend/*	21	NCAC	58A	.1806
<u>Affiliation with Resident Broker</u> Amend/*	21	NCAC	58A	.1807
<u>Trust Monies</u> Amend/*	21	NCAC	58A	.1808

RULES REVIEW COMMISSION

<u>Advertising</u>	21	NCAC	58A	.1809
Amend/*				
<u>Purpose and Applicability</u>	21	NCAC	58A	.1901
Adopt/*				
<u>Postlicensing Education Requirement</u>	21	NCAC	58A	.1902
Adopt/*				
<u>Extensions of Time to Complete Postlicensing Education</u>	21	NCAC	58A	.1903
Adopt/*				
<u>Denial or Withdrawal of Postlicensing Education Credit</u>	21	NCAC	58A	.1904
Adopt/*				

The rules in Subchapter 58B deal with time shares including time share project registration (.0100); public offering statement (.0200); cancellation (.0300); time share sales operation (.0400); handling and accounting of funds (.0500); project broker (.0600); and time share forms (.0700)

<u>Public Offering Statement Summary</u>	21	NCAC	58B	.0202
Amend/*				
<u>Time Share Trust Funds</u>	21	NCAC	58B	.0501
Amend/*				
<u>Designation of Project Broker</u>	21	NCAC	58B	.0601
Amend/*				
<u>Duties of the Project Broker</u>	21	NCAC	58B	.0602
Amend/*				

The rules in Subchapter 58C deal with real estate prelicensing education schools including rules dealing with the licensing of all schools except private real estate schools (.0100); private real estate schools (.0200); prelicensing courses (.0300); and pre-licensing course instructors (.0600).

<u>Applicability Requirement for Approval</u>	21	NCAC	58C	.0101
Amend/*				
<u>Application for Approval</u>	21	NCAC	58C	.0102
Amend/*				
<u>Criteria for Approval</u>	21	NCAC	58C	.0103
Amend/*				
<u>Scope Duration and Renewal of Approval</u>	21	NCAC	58C	.0104
Amend/*				
<u>Withdrawal or Denial of Approval</u>	21	NCAC	58C	.0105
Amend/*				
<u>Original Application Fee</u>	21	NCAC	58C	.0202
Amend/*				
<u>School Name</u>	21	NCAC	58C	.0203
Amend/*				
<u>Courses</u>	21	NCAC	58C	.0204
Amend/*				
<u>Administration</u>	21	NCAC	58C	.0206
Amend/*				
<u>Enrollment Contracts</u>	21	NCAC	58C	.0209
Amend/*				
<u>Changes During the Licensing Period</u>	21	NCAC	58C	.0216
Amend/*				
<u>License Renewal and Fees</u>	21	NCAC	58C	.0217
Amend/*				

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<u>Purpose and Applicability</u> Amend/*	21	NCAC	58C	.0301
<u>Program Structuring</u> Amend/*	21	NCAC	58C	.0302
<u>Course Completion Standards</u> Amend/*	21	NCAC	58C	.0304
<u>Course Scheduling</u> Amend/*	21	NCAC	58C	.0305
<u>Real Estate Instructors</u> Amend/*	21	NCAC	58C	.0307
<u>Certification of Course Completion</u> Amend/*	21	NCAC	58C	.0309
<u>Instructional Delivery Methods</u> Amend/*	21	NCAC	58C	.0311
<u>Purpose and Applicability</u> Amend/*	21	NCAC	58C	.0601
<u>Nature and Scope of Instructor Approval</u> Amend/*	21	NCAC	58C	.0602
<u>Application and Criteria for Original Approval</u> Amend/*	21	NCAC	58C	.0603
<u>Instructor Performance</u> Amend/*	21	NCAC	58C	.0604
<u>Request for Examinations and Video Recordings</u> Amend/*	21	NCAC	58C	.0605
<u>Broker course Reports</u> Amend/*	21	NCAC	58C	.0606
<u>Expiration Renewal and Reinstatement of Approval</u> Amend/*	21	NCAC	58C	.0607
<u>Denial or Withdrawal of Approval</u> Amend/*	21	NCAC	58C	.0608

The rules in Subchapter 58E are the real estate continuing education rules both update and elective course components including rules dealing with update courses (.0100); update course instructors (.0200); elective courses, sponsors, and instructors (.0300); general sponsor requirements (.0400); and course operational requirements (.0500).

<u>Update Course Component</u> Amend/*	21	NCAC	58E	.0102
<u>Elective Course Component</u> Amend/*	21	NCAC	58E	.0302
<u>Course Completion Reporting</u> Amend/*	21	NCAC	58E	.0406
<u>Per Student Fee</u> Repeal/*	21	NCAC	58E	.0407

The rules in Subchapter 58F set the standards for the broker transition course.

<u>Basic Requirement</u> Adopt/*	21	NCAC	58F	.0101
<u>Course Content</u> Adopt/*	21	NCAC	58F	.0102
<u>Course Sponsors and Instructors</u> Adopt/*	21	NCAC	58F	.0103

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<u>Course Operational Requirements</u> Adopt/*	21	NCAC	58F	.0104
<u>Course Completion Reporting and Per Student Fee</u> Adopt/*	21	NCAC	58F	.0105
<u>Withdrawal of Sponsor and Instructor Approval</u> Adopt/*	21	NCAC	58F	.0106

The rules in Subchapter 58G deal with service on the North Carolina Real Estate Commission.

<u>Per Diem</u> Adopt/*	21	NCAC	58G	.0101
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RESPIRATORY CARE BOARD

The rules in Chapter 61 are from the Respiratory Care Board and concern organization and general provisions (.0100); application for license (.0200); licensing (.0300); continuing education requirements for license holders (.0400); general (.0500); rules (.0600); and administrative hearing procedures (.0700).

<u>Definitions</u> Amend/*	21	NCAC	61	.0103
<u>Exemptions</u> Amend/*	21	NCAC	61	.0202

SOCIAL WORK CERTIFICATION AND LICENSURE BOARD

The rules in Chapter 63 deal with Social Work Certification including general rules (.0100); certification (.0200); examinations (.0300); renewal of certification (.0400); ethical guidelines (.0500) disciplinary procedures (.0600); and adoption of rules (.0700).

<u>Social Work Certification Renewal Fees</u> Amend/*	21	NCAC	63	.0403
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BUILDING CODE COUNCIL

<u>Administrative Code</u> Adopt/*	041214		Item B-2A1	
<u>Service Utilities</u> Amend/*	041214		Item B-2A2	10.7
<u>Temporary Power</u> Amend/*	041214		Item B-2A1	10.8

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 <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>
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ABC Comm. & City of Asheville v. Elijah Ulysses Jones T/A Jones Convenience Store	98 ABC 0962	Gray	07/12/05	
ABC Comm v. Rudean Robinson Harris T/A Rudean's Diner & Lounge 3	03 ABC 1214	Conner	06/28/05	
ABC Comm v. Desperado's Inc T/A Desperado's	04 ABC 1192	Wade	07/20/05	
ABC Comm. v Nuntia Ester Davis T/A N and R Grocery 2	05 ABC 0209	Lassiter	09/13/05	
Cameron's One Stop, Sank Cameron v. ALE Agent B Haynes, Ann H. Johnson, Permit Comm Mgr.	05 ABC 0799	Elkins	07/28/05	
ABC Commission v Carlos Salas, T/A Boom Room Night Club	05 ABC 1831	Conner	01/11/06	
ABC Commission v. Loeffler Enterprises, Inc.,	05 ABC 1842	Conner	01/11/06	
ABC Commission v. Partnership, T/A John Boys County Store	05 ABC 1843	Conner	01/11/06	
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<u>BOARD OF MEDICAL EXAMINERS</u>				
Ricky E. Townsend v. Medical Board	05 BME 1435	Morrison	12/12/05	
<u>AUCTIONEERS LICENSING BOARD</u>				
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<u>CRIME VICTIMS COMPENSATION</u>				
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Moreno Edoardo Lovejoy v. Crime Control & Public Safety, Victime Comp. Services Division, Crime Victims Compensation Commission	04 CPS 1176	Wade	09/22/05	
Myrtle Perry v. Crime Victims Compensation Commission	04 CPS 1190	Chess	06/21/05	
Marion A Liles v Dept. of Crime Control & Public Safety, Victims Compensation Service Division	05 CPS 0150	DeLuca	07/29/05	
Cecelia Reid v DCCPS, Div of Vic Comp Svcs, Crime Vic Comp Comm	05 CPS 0220	Lassiter	08/08/05	
Rhonda Lynnette Rhodes v. Crime Victims Compensation Program	05 CPS 0484	Gray	06/23/05	
Brenda Edwards, d/b/a B&H Wrecker Service v. Dept. of Crime Control & Public Safety, Div. of State Highway Patrol	05 CPS 0510	Lassiter	10/19/05	
Terry Ramey, d/b/a Ramey Wrecker Service v. Dept. of Crime Control & Public Safety, Division Of State Highway Patrol	05 CPS 0511	Lassiter	10/18/05	
Curtis Glenn Davis v. Crime Control and Public Safety Crime Victims Compensation Commission	05 CPS 0529	Bryan	10/10/05	
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Sandra A. Tinsley v. Crime Victims Compensation Services	05 CPS 0850	Lassiter	12/02/05	
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Trena S McDaniel & Small World DC II v. DHHS, Div of Child Dev.	01 DHR 0321 ²	Gray	08/08/05	
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Jeffrey D. Cannon v. DHHS, Walter B Jones ADACT	03 DHR 0488	Conner	06/29/05	
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A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions.

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CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF ONSLOW

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 DHR 0768

Onslow County Behavioral Healthcare Services, Daniel M. Jones, Area Director)
)
Petitioner,)
)
v.)
)
Division of Facility Services)
Stephanie Alexander, Chief)
Respondent.)

DECISION

THIS MATTER came on for hearing before the undersigned, James L. Conner, II, Administrative Law Judge, on August 18-19, 2005, in Carolina Beach, North Carolina. Respondent submitted its Proposed Findings of Fact and Conclusions of Law on October 20, 2005.

APPEARANCES

For Petitioner: Andrew D. Jones
Attorney at Law
Post Office Box 188
811 Arendell Street
Morehead City, NC 28557

For Respondent: Amy Y. Bason
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

ISSUE

Whether Respondent acted erroneously when Respondent assessed two Type A administrative penalties, each in the amount of \$750.00, against Petitioner's facility located at 215 Memorial Drive, Jacksonville, North Carolina.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 122C-21, *et. seq.*
N.C. Gen. Stat. §150B-23, *et. seq.*
10A N.C.A.C. 27D.0304

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. Onslow County Behavioral Healthcare Services ("Petitioner" or "Facility") is licensed by Division of Facility Services ("Respondent") to operate a non-hospital medical detoxification facility pursuant to N.C. Gen. Stat. §§ 122C-21, *et. seq.* and 10A N.C.A.C. Subchapter 27G.

2. On March 24, 2004, surveyors employed by Respondent, including Facility Consultant Delores Armstrong, completed a survey of Petitioner's facility located at 215 Memorial Drive in Jacksonville, North Carolina. The survey lasted approximately one week. (Resp. Ex. 7, T. p. 234, p. 236, lines 12-16, p. 239, line 15).

3. The surveyors identified themselves, entered the Facility, and followed a standard protocol that included an entrance conference in which Facility administrators Susan Taggart and Daniel Jones were told the general nature of the complaint that prompted the survey. (T. p. 237, lines 4-19, p. 239, lines 10-11).

4. The surveyors requested and obtained a listing of all staff working at the Facility. The surveyors also requested and obtained incident reports from the Facility. (T. p. 239, lines 22-24).

Suicide Policies and Procedures

5. While reviewing incident reports provided by Petitioner, Ms. Armstrong discovered an incident report involving supervision of a Facility client, "CJ". (T. p. 245, lines 13-20, p. 247, lines 10-11).

6. CJ was involuntarily committed to Petitioner's Facility. (T. p. 29, line 18). He was brought to the Facility by the Onslow County Sheriff's Department at approximately 5:30 p.m. on June 27, 2003. (T. p. 31, lines 19-20, T. p. 157, line 18). At 6:00 p.m. he was admitted to the Detoxification Unit and was fully identified as being suicidal and at risk. (T. p. 31, lines 22-24).

7. Petitioner recognized that CJ needed to be watched very closely. (T. p. 33, lines 21-23). However, CJ was placed in a patient room that was not adjacent to the nurses' station and he remained there until approximately 9:10 p.m. (T. p. 38, lines 1-8).

8. Facility staff contacted the Jacksonville Police Department ("JPD") for assistance with CJ and the police arrived at approximately 9:10 p.m. and encouraged CJ to move to Patient Room 7, which was closer to the nurses' station. (T. p. 38, lines 16-19). Patient Room 7 had a window. (T. p. 80, line 8).

9. At approximately 10:00 p.m., Whitney Jacobi, the qualified professional on call, was called to the Facility and attempted to secure placement for CJ in an inpatient facility. When unable to do so, she asked the paraprofessionals on staff if they were comfortable with the situation and then left. Ms. Jacobi did not return to the Facility that night. (T. p. 80, lines 15-20, p. 140, lines 14-24, p. 141, lines 1-4, p. 306, lines 3-8, 10A N.C.A.C. 27G .0104(18)).

10. At approximately 10:55, Facility staff entered CJ's room and found that CJ had torn a hole in a blanket and had the blanket over the door trying to hang himself. (Resp. Ex. 1, T. p. 82, lines 20-24). Facility Staff took the blanket from CJ and left the door to Patient Room 7 open so that CJ could be observed. (Resp. Ex. 1).

11. Visual contact was not maintained with CJ. He was able to close and barricade the door to Patient Room 7 and crawl out of the window. A security guard at the Facility had to go outside and look for CJ. (T. p. 312, lines 10-21).

12. At approximately 2:45 a.m. on June 28, 2003, after being returned to Patient Room 7, CJ cut his arm with an unknown object, causing his arm to bleed. Emergency Medical Services ("EMS") and the Jacksonville Police Department ("JPD") were called to the Facility. When JPD arrived, CJ's door was barricaded and an officer had to force the door open. CJ was uncooperative with JPD and EMS and they were unable to treat CJ. EMS and JPD left the Unit and CJ was returned to Patient Room 7. (T. p. 88, lines 17-24, p. 89, lines 1-24, Resp. Ex. 2).

13. At approximately 3:30 a.m. on June 28, 2003, CJ went to the nurses' station and was bleeding profusely from a new self-inflicted cut on his arm. JPD returned to the Facility and assisted in moving CJ to Patient Room 5. Until that time, CJ had been allowed to remain in possession of his metal jewelry. When JPD arrived and moved CJ to Room 5, his metal jewelry was removed. (T. p. 90, lines 1-17, Resp. Ex. 3).

14. EMS returned to the Facility and treated CJ's wound. (T. p. 91, lines 2-7, Resp. Ex. 3).

15. CJ was discharged to Cherry Hospital on June 29, 2003. (Pet. Ex. 2).

16. Dr. Murali Jonnalagadda, offered by Petitioner and qualified by the Court as an expert in Psychiatry and Health Policy and Administration, testified that at the time of the incident involving CJ, the Facility's "suicide procedures were fuzzy." (T. p. 192, lines 20-24, p. 218, lines 1-8). He further acknowledged that the Facility accepted CJ but "that adequate treatment was not possible." (T. p. 218, line 20-23).

17. On July 22, 2003, Dr. Carl Cordoni, Ph.D., Director of Psychological Services, reviewed the incident reports regarding CJ and notified Susan Taggart that there was definitely a problem with Detoxification policies and procedures. He informed Ms. Taggart that he was unable to find a definition of Suicide Watch in any policies or procedures, nor any reference to how suicidal clients were to be handled during the time they remained in Detoxification. (Resp. Ex. 4).

18. Facility staff were interviewed by Surveyor Delores Armstrong and kept giving different answers as to the level of supervision that should have been provided for CJ, as well as different answers to what suicide watch meant. However, all of these staff members indicated that they had worked with clients at the Facility who required suicide watch. (T. p. 249, lines 15-24, p. 250, lines 1-2). The policies and procedures with regard to suicidal patients were not as clear as they should have been. (T. p. 183, lines 1-5).

19. A facility that knowingly and willingly accepts suicidal patients must have policies and procedures in place to provide services effectively for those individuals. (T. p. 432, lines 6-13).

20. Based on the information discovered about the supervision of CJ and lack of proper suicide policies and procedures in place, Respondent prepared a Statement of Deficiencies and cited Petitioner with a violation of 10A NCAC 27D .0304 – "Client Rights, Protection From Harm, Abuse Neglect or Exploitation." This violation was classified as a Type A Violation pursuant to N.C.G.S. § 122C-24.1(a)(1) and Petitioner was assessed a penalty in the amount of \$750.00. (Resp. Ex. 7, Ex. 10).

Armed Security Guards

21. In reviewing incident reports from the Facility, Ms. Armstrong also discovered that armed security guards working at the Facility were not included on the staff list, but were providing care to clients, including observing clients and assisting in physically restraining clients. (T p. 240, p. 241, lines 1-10).

22. Ms. Armstrong had conducted a previous survey at Petitioner's Facility approximately two years earlier. (T. p. 238, lines 18-21). During that survey she noted that the security guards at the Facility had firearms, but the security guards were observed in a locked nurses' station or at the entrance gate, and were not interacting with clients. (T., p. 240, lines 10-19). During that survey, the Facility was not cited for any violations involving the security guards carrying firearms.

23. Ms. Armstrong informed Facility administrators that having loaded firearms on-site and accessible to clients was not viewed as safe. Respondent prepared a Statement of Deficiencies and cited Petitioner with a violation of 10A NCAC 27D .0304 – "Client Rights, Protection From Harm, Abuse Neglect or Exploitation." This violation was classified as a Type A Violation pursuant to N.C.G.S. § 122C-24.1(a)(1) and Petitioner was assessed a penalty in the amount of \$750.00. (Resp. Ex. 7, Ex. 10).

24. When informed of the violation regarding having armed security guards on-site with weapons accessible to clients, Petitioner immediately disarmed the guards. As of March 25, 2004, security guards at the Facility were no longer carrying loaded firearms. (Resp. Ex. 7).

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to chapters 122C and 150B of the North Carolina General Statutes.

2. Respondent shall impose an administrative penalty on any facility licensed pursuant to N.C.G.S. Chapter 122C which is found to be in violation of Article 2 or 3 of Chapter 122C or applicable State and federal laws and regulations. N.C.G.S. § 122C-24.1(a).

3. Employees of facilities licensed pursuant to N.C.G.S Chapter 122C "shall protect clients from harm, abuse, neglect and exploitation in accordance with N.C.G.S. § 122C-66." 10A N.C.A.C. 27D .0304(a).

4. "Employees shall not subject a client to any sort of abuse or neglect as defined in 10A N.C.A.C. 27C .0102." 10A N.C.A.C. 27D .0304(b).

5. "Neglect means the failure to provide care or services necessary to maintain the mental or physical health and well-being of the client." 10A N.C.A.C. 27C .0102(17).

6. "A 'Type A Violation' means a violation by a facility of the regulations, standards, and requirements set forth in Article 2 or 3 of Chapter 122C or applicable State or federal laws and regulations governing the licensure or certification of a facility which results in death or serious physical harm, or results in substantial risk that death or serious physical harm will occur." N.C.G.S. § 122C-24.1(a)(1).

7. By failing to have clear policies and procedures in place for protecting suicidal clients from harm, Petitioner committed a violation of 10A N.C.A.C. 27D .0304. This was a Type A Violation because it placed Client CJ in substantial risk of death or serious harm.

8. Respondent shall impose a civil penalty in an amount not less the five hundred dollars (\$500.00) nor more than ten thousand dollars (\$10,000) for each Type A Violation in facilities or programs that serve 10 or more persons. N.C.G.S. § 122C-24.1.

9. Respondent did not err in assessing a Type A Administrative Penalty against Petitioner and imposing a fine in the amount of \$750.00, as substantial evidence was presented to show that Petitioner failed to have clear policies and procedures in place for protecting suicidal clients from substantial risk of death or serious harm, in violation of 10A N.C.A.C. 27D .0304.

10. Respondent was reasonable in its belief that it was unsafe for security guards at the Facility to carry loaded firearms while trying to subdue suicidal or homicidal patients. However, Respondent did not cite Petitioner for a violation of this practice at a previous survey, and Petitioner immediately disarmed the security guards once informed of the violation. Therefore, the Agency should not have assessed a Type A Administrative Penalty against Petitioner for the armed security guard violation.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to cite Petitioner for a Type A Violation and assess a penalty in the amount of \$750.00 for placing Client CJ in substantial risk of death or serious harm is **UPHELD**. Respondent's decision to cite Petitioner for a Type A Violation and assess a penalty in the amount of \$750.00 for having armed security guards interacting with clients is **REVERSED** for the reasons set forth herein.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Resources, Division of Facility Services.

The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the 29th day of November 2005.

James L. Conner, II
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF BURKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

04 OSP 1360

Melvin G. Cline, Jr.,)
Petitioner,)
)
v.)
)
J. Iverson Riddle Developmental Center and the)
NC Department of Health and Human)
Services,)
Respondents.)

DECISION

THIS MATTER came on for hearing before Fred G. Morrison Jr., Senior Administrative Law Judge, on September 26, 2005, in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Howard Kramer, Attorney at Law

For Respondent: The Honorable Roy A. Cooper III, Attorney General
North Carolina Department of Justice
Raleigh, North Carolina
Iain M. Stauffer, Assistant Attorney General, appearing

ISSUE

Whether the Respondent acted properly and followed proper procedure in issuing a Notice of Proposed Termination and Proposed Disqualification to the Petitioner.

STIPULATIONS

The parties stipulate to the admission in evidence of Respondent's Exhibits 1-31.

BASED UPON careful consideration of the testimony and evidence presented at the hearing, and the arguments and briefs of the parties, the undersigned makes the following:

FINDINGS OF FACT

1. The Child and Adult Care Food Program ("CACFP") is a federally funded program administered in North Carolina by the North Carolina Department of Health and Human Services, Division of Public Health ("Respondent").
2. The purpose of the CACFP is to reimburse child care centers, day care homes or adult care centers for providing nutritious meals to qualified participants.
3. The Petitioner, Peachstate Nutrition Services, Inc., is a corporation incorporated in the state of Georgia.
4. Petitioner operates as a sponsoring organization in the CACFP.
5. A sponsoring organization is an institution that oversees the operation of the CACFP in its sponsored facilities, and it accepts final financial and administrative responsibilities for its sponsored facilities.
6. A sponsoring organization performs administrative responsibilities and files claims for its sponsored centers.

7. A sponsoring organization is entitled to retain up to 15% of its sponsored centers' reimbursements for meals served as an administrative fee, provided it has documentation to support expenses incurred.
8. Petitioner sponsors child care centers located in North Carolina.
9. The Petitioner first participated in the CACFP in North Carolina in 2000 or 2001.
10. The Respondent approved the Petitioner's most recent application and agreement for participation in the CACFP on December 13, 2002. This agreement was effective until September 30, 2003.
11. In its agreement with the Respondent, the Petitioner agreed to comply with the terms of the agreement and all applicable federal and state laws, regulations, and policies governing the CACFP. The Petitioner also agreed to take corrective action on matters of noncompliance with CACFP laws, regulations, and policies within the timeframes specified by the Respondent.
12. Karen Riner signed the Agreement on behalf of Peachstate Nutrition Services, Inc. and is the Chairperson of Peachstate Nutrition Services, Inc.
13. Floyd Smith is the President of Peachstate Nutrition Services, Inc.
14. The Respondent conducted an Agreed Upon Procedures of the Petitioner on or about May 2003. An agreed upon procedures is an audit of a non-profit entity.
15. During the Agreed Upon Procedures, the Respondent discovered areas of program noncompliance and program violations.
16. The lead auditor, Vicki Johnson, issued the Agreed Upon Procedures Report in August 2003 that detailed the discovered program violations.
17. Violations that were found included: failure to operate the program in conformance with the performance standards, 7 C.F.R. § 226.6(c)(3)(ii)(C); failure to return to the state agency any advance payments that exceed the amount earned for serving eligible meals, 7 C.F.R. § 226.6(c)(3)(ii)(E); failure to maintain adequate records, 7 C.F.R. § 226.6(c)(3)(ii)(F); claiming reimbursement for meals served by a proprietary Title XX child care center during a calendar month in which less than 25 percent of its enrolled children, or 25 percent of its licensed capacity, whichever is less, were Title XX beneficiaries, 7 C.F.R. § 226.6(c)(3)(ii)(L); and failure by a sponsoring organization to properly train or monitor sponsored facilities, 7 C.F.R. § 226.6(c)(3)(ii)(O).
18. The Respondent determined that the discovered program violations were serious.
19. A serious deficiency is a violation that causes an institution to be out of compliance with the federal regulations that govern the CACFP.
20. Pursuant to 7 C.F.R. § 226.6(c)(3)(ii)(C), one serious deficiency for a participating institution is failure to operate the program in conformance with the performance standards.
21. A claim for reimbursement is paid according to an institution's claiming percentage. The claiming percentage is "the ratio of the number of enrolled participants in an institution in each reimbursement category to the total of enrolled participants." C.F.R. § 226.2.
22. The Affidavit of Enrollment is a form completed by the sponsoring organization which provides the number of enrolled participants classified as Free, Reduced, Denied, or no application, which is classified as Denied. These figures establish the claiming percentage or rate of reimbursement
23. The claiming percentage is multiplied by the number of meals that are claimed for reimbursement to calculate the total number of meals paid at the free, reduced or denied rate. That figure is then multiplied by the applicable free, reduced, or denied rate, which results in the amount the Respondent will pay for the claim.
24. A participant classified as free receives the highest reimbursement from the Respondent, while a participant classified as denied receives the lowest.

25. The Petitioner completed an Affidavit of Enrollment to establish its claiming percentage for the 2002-2003 CACFP year. The Petitioner used a date of July 1, 2002 and only fourteen of its centers to determine enrolled participants. The Affidavit of Enrollment completed and submitted by the Petitioner provided 298 participants classified as free, 90 classified as reduced, and 46 classified as denied. This established a claiming percentage of 68.66% for free, 20.74% for reduced, and 10.60% for denied.

26. Karen Riner signed the Affidavit of Enrollment on September 26, 2002.

27. Petitioner used the Affidavit of Enrollment to establish the claiming percentage for October 2002, the first month of the 2002-2003 CACFP year.

28. The Petitioner had signed agreements with approximately thirty-eight additional centers between July 1, 2002, and September 26, 2002. The enrolled participants from these centers were not included in the Affidavit of Enrollment.

29. The Petitioner sponsored approximately 50 centers in August and September 2002. The Petitioner only sponsored 14 centers for October 2002. The Petitioner sponsored approximately 45 to 54 centers from November 2002 through September 2003.

30. These thirty-eight centers were then added in November 2002, one month after the first month of the 2002-2003 program year. If the figures from the thirty-eight additional centers were included in the Affidavit of Enrollment, the correct figures would be: 564 participants classified as free, 226 classified as reduced, and 1,933 classified as denied. The claiming percentages then would have been: 20.71% for free, 8.30% for reduced, and 70.99% for denied.

31. The Petitioner did not adjust its claiming percentage in November when it added the additional centers. The Petitioner continued to use the favorable claiming percentage established in October 2002 for the 2002-2003 CACFP year.

32. This increased the amount of reimbursement the Petitioner was able to receive by approximately \$500,000.00.

33. The Petitioner was not using a method to reconcile milk purchases with meals claimed for reimbursement, in accordance with the procedure established by USDA.

34. 7 C.F.R. § 226.6(b)(18)(i)(2003) requires that program funds be expended and accounted for in accordance with the requirements of 7 C.F.R. § 226 and FNS Instruction 796-2, Rev. 3, Financial Management in the CACFP. (Presently at 7 C.F.R. § 226.6(b)(vii)(A)).

35. Institutions are required to have a financial system in place with management controls specified in writing. 7 C.F.R. § 226.6(b)(18)(iii)(B)(2003)(Presently at 7 C.F.R. § 226.6(b)(2)(vii)(C)(2)).

36. FNS Instruction 796-2, Rev. 3 provides, among other things, procedures for costs (allowable and unallowable) and travel expenses.

37. During the Agreed Upon Procedures, the Respondent found that the Petitioner did not have a written compensation policy; did not have accounting records to provide an audit trail; that salaries exceeded budgeted amounts; that Petitioner did not maintain timesheets for employees; that checks were made payable to cash without documentation; that payments were made to AMSouth with CACFP funds for a vehicle that was not in the budget; that payments were made to a Capital One visa card with CACFP funds for unallowable or personal expenses; that checks were made payable to individuals indicating repayment of a loan without any evidence of a loan ; that payments were made for fuel without any invoices to support the expense; and that the Petitioner claimed the 15% administrative fee while not maintaining a ledger or schedule to reconcile the administrative costs to those costs that were claimed.

38. The Petitioner only had documentation to support \$11,504.92 in administrative costs when it retained \$190,529.93 in administrative costs from its sponsored centers.

39. Pursuant to 7 C.F.R. § 226.6(c)(3)(ii)(E), one serious deficiency for a participating institution is failure to return to the state agency any advance payments that exceed the amount earned for serving eligible meals.

40. The Petitioner applied for and received an advance for its sponsored centers from the Respondent in the amount of \$122,801.00 after its 2002 - 2003 Agreement was approved in December 2002.

41. The Petitioner did not distribute the advance to its sponsored centers in accordance with the federal regulations.

42. Pursuant to 7 C.F.R. § 226.6(c)(3)(ii)(F), one serious deficiency for a participating institution is failure to maintain adequate records.

43. Institutions are required to collect and maintain all CACFP records required by the federal regulations. 7 C.F.R. § 226.15(e).

44. "In submitting a Claim for Reimbursement, each institution shall certify that the claim is correct and that records are available to support that claim." 7 C.F.R. § 226.10(c).

45. During the Agreed Upon Procedures, the Respondent discovered that five of the Petitioner's sponsored centers did not maintain adequate records to justify and support the claims filed for reimbursement. The required records included menus and cost documentation.

46. Pursuant to 7 C.F.R. § 226.6(c)(3)(ii)(L), one serious deficiency for a participating institution is claiming reimbursement for meals served by a proprietary Title XX child care center during a calendar month in which less than 25 percent of its enrolled children, or 25 percent of its licensed capacity, whichever is less, were Title XX beneficiaries.

47. Sponsoring organizations "shall not submit claims for child care centers in which less than 25 percent of the enrolled children and licensed capacity were title XX beneficiaries for the month claimed." 7 C.F.R. § 226.10(c).

48. During the Agreed Upon Procedures, the Respondent examined claims for the month of March 2003. The Petitioner was using February Title XX data to support March's claim for reimbursement. One sponsored center did not make a claim for one month but the Petitioner submitted a claim for that month for the center.

49. Pursuant to 7 C.F.R. § 226.6(c)(3)(ii)(O), one serious deficiency for a participating institution is failure by a sponsoring organization to properly train or monitor sponsored facilities.

50. Sponsoring organizations must perform reviews of their sponsored centers three times per year and must not allow more than six months to elapse between reviews. 7 C.F.R. § 226.16(d)(4)(iii).

51. As of May 2003, the Petitioner had only conducted 34 monitoring visits out of a total of 159 (53 centers x 3 visits) required visits for the year.

52. As follow up for the Agreed Upon Procedures, the Petitioner submitted additional documentation regarding monitoring of its sponsored centers.

53. The Petitioner submitted monitoring review forms for February 10, 2003, for child care centers in Knightdale and Raleigh. Ms. Riner signed these forms as the monitor conducting the visits, yet the times she indicated she was at both centers overlap. The same conflict exists for two visits conducted by Ms. Riner on March 13, 2003, at Betty's Day Care Center and Creative Corner Child Care.

54. The Petitioner submitted monitoring review forms for March 13, 2003. Ms. Riner signed a review form stating that she was at Immanuel Baptist Daycare in Clemmons until 2:00 p.m., yet began another visit at Betty's Day Care at 2:15 p.m. in Dallas, approximately 80 miles away. A similar inconsistency arises for visits on April 1, 2003.

55. The Petitioner provided a monitoring review form for February 27, 2003. Ms. Riner signed the monitoring review form stating that she conducted a visit at a child care center in Apex from 2:50 p.m. until 3:43 p.m.. Yet, the Petitioner submitted a receipt to justify its administrative costs which showed that a credit card issued to Karen Riner was used to purchase gas at 3:40 p.m. on Glenwood Avenue in Raleigh on February 27, 2003.

56. For a February 10, 2003, visit to the Growing Child in Knightdale, Ms. Riner signed the review form indicating she was at the center from 10:45 am until 11:15 am, yet submitted a receipt showing a meal was purchased at IHOP in Raleigh at 10:49 am.

57. Petitioner submitted monitoring review forms for the Pumpkin Patch at various times during the follow-up process. One form was dated April 1, 2003, on the top, but signed and dated by Ms. Riner on April 1, 2002. The other form is purportedly dated and signed April 1, 2003. These forms contain exactly the same handwritten information about the monitoring visit. In the year on the form, the "2" in "2002" was changed to a "3".

58. Arnette Cowan, Head of the Special Nutrition Programs Unit, issued a Notice of Serious Deficiencies to the Petitioner, Karen Riner, and Floyd Smith, on September 8, 2003, which provided that the Respondent would propose to terminate the Petitioner's agreement to participate in the CACFP and could propose to disqualify the Petitioner, Karen Riner, and Floyd Smith, if the Petitioner did not fully and permanently correct the serious deficiencies.

59. The Serious Deficiencies which were identified in the Serious Deficiency Notice included: failure to operate the program in conformance with the performance standards; failure to return to the state agency any advance payments that exceed the amount earned for serving eligible meals; failure to maintain adequate records; claiming reimbursement for meals served by a proprietary Title XX child care center during a calendar month in which less than 25 percent of its enrolled children, or 25 percent of its licensed capacity, whichever is less, were Title XX beneficiaries; and failure of a sponsoring organization to properly train or monitor its facilities.

60. The Notice of Serious Deficiencies provided corrective actions for each serious deficiency that Respondent was to complete within 30 days of receipt of the notice.

61. Petitioner submitted corrective actions to the Respondent in response to the Notice.

62. Amy Evans, a Child Nutrition Program Consultant for the Respondent, was the consultant for the region in which the Petitioner was located. She reviewed the Petitioner's first Corrective Action submission and determined that the Petitioner had not fully and permanently corrected its serious deficiencies.

63. Ms. Cowan reviewed the corrective action and determined that the Petitioner had not fully and permanently corrected all the serious deficiencies.

64. The Respondent sent a letter to the Petitioner dated January 12, 2004, addressing the corrective actions. The Respondent advised the Petitioner that it had corrected the serious deficiencies with respect to milk documentation and the recoupment of the advance. The Respondent advised that the corrective actions submitted did not fully and permanently correct the remaining serious deficiencies. The Respondent provided the Petitioner an additional fourteen days from receipt of the letter to submit corrective action to fully and permanently correct the outstanding serious deficiencies.

65. In response to the January 12, 2004, letter, the Petitioner submitted a second set of corrective actions.

66. On May 3, 2004, Alice Lenihan, Head of the Nutrition Services Branch; Vicki Johnson; Arnette Cowan, Head of the Special Nutrition Programs Unit; Karen Riner and Bill Riner, met in Raleigh, North Carolina, to discuss the outstanding serious deficiencies. The Petitioner had requested the meeting.

67. After the meeting, Respondent sent a letter to Petitioner dated May 4, 2004, detailing the outstanding serious deficiencies. Petitioner was allowed until May 12, 2004, to provide another set of corrective actions for the outstanding serious deficiencies.

68. Petitioner requested an extension of time to respond with corrective actions. The Respondent agreed to allow more time for Petitioner to respond.

69. The Respondent received corrective action plans from the Petitioner on May 14 and 17, 2004. The Respondent reviewed the corrective actions and determined that it did not fully and permanently correct the outstanding serious deficiencies.

70. The Respondent issued a Notice of Proposed Termination and Proposed Disqualification to Petitioner, Karen Riner, and Floyd Smith, on April 11, 2005. This notice was not issued until April 11, 2005, at the request of the United States Department of Agriculture, Office of Inspector General, which was investigating Petitioner.

71. The Petitioner's 2003 agreement to participate in the CACFP was extended by the Respondent for years 2004 and 2005. The Respondent issued notices of extension to the Petitioner on September 8, 2003, and July 29, 2004, respectively.

72. Karen Riner performed monitoring visits for the Petitioner.

73. Ms. Evans saw Karen Riner in attendance at a CACFP integrity training in Sylva, a record keeping training in Hickory, and a financial management training in Asheville.

74. Karen Riner attended a CACFP renewal training on August 20, 2002.

75. Records show Karen Riner registered for approximately 20 other CACFP training courses from 2002 through 2005.

76. The Petitioner received the Agreed Upon Procedures Report.

77. The Petitioner, Karen Riner, and Floyd Smith, received the Notice of Serious Deficiencies and the Notice of Proposed Termination and Proposed Disqualification.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The North Carolina Department of Health and Human Services, Division of Public Health, Women's and Children's Health Section, Nutrition Services Branch, is vested with the authority to administer the CACFP in North Carolina.

2. The regulations for the operation of the CACFP are contained within 7 C.F.R. § 226. 7 C.F.R. § 226.1.

3. The North Carolina Department of Health and Human Services, in its rules, incorporated by reference 7 C.F.R. § 226 along with all its subsequent amendments and editions. N.C. Admin. Code tit. 10A, r. 43J.0101.

4. A sponsoring organization accepts final administrative and financial responsibility for CACFP operations at its sponsored centers. 7 C.F.R. § 226.16(c)

5. The Petitioner committed a serious deficiency by failing to operate the program in conformance with the performance standards, 7 C.F.R. § 226.6(c)(3)(ii)(C). The Petitioner manipulated its claiming percentage by not including all of its sponsored centers in its Affidavit of Enrollment, resulting in an increase in the amount of reimbursement. The Petitioner also failed to operate the program in conformance with the accounting and cost standards set out in 7 C.F.R. § 226 and FNS Instruction 796-2, Rev. 3, Financial Management in the CACFP.

6. The Petitioner committed a serious deficiency by claiming reimbursement for meals served by a proprietary Title XX child care center during a calendar month in which less than 25 percent of its enrolled children, or 25 percent of its licensed capacity, whichever is less, were Title XX beneficiaries, 7 C.F.R. § 226.6(c)(3)(ii)(L).

7. The Petitioner committed a serious deficiency in failing to properly train or monitor its sponsored facilities, 7 C.F.R. § 226.6(c)(3)(ii)(O).

8. Pursuant to 7 C.F.R. § 226.6(c)(3)(i), "[i]f the State agency determines that a participating institution has committed one or more serious deficiencies listed in paragraph (c)(3)(ii) of this section, the State agency must *initiate* action to terminate the agreement of a participating institution and *initiate* action to disqualify the institution and any responsible principals and responsible individuals." (Emphasis in original).

9. Pursuant to 7 C.F.R. § 226.6(c)(3)(iii)(A)(1-6), a Notice of Serious Deficiency must specify: the serious deficiency(ies); the corrective actions; the time allotted to correct the serious deficiencies; that the serious deficiency is not subject to an administrative review; the failure to fully and permanently correct the serious deficiencies will result in the proposed termination of the institution's agreement and the proposed disqualification of the institution and any responsible principals and responsible individuals; and that the institution's voluntary termination of its agreement without implementing successful corrective action will still result in a termination of the institution's agreement and disqualification.

10. The Respondent properly issued a Notice of Serious Deficiencies to the Petitioner.

11. The Petitioner did not fully and permanently correct the following serious deficiencies within the time allotted by the Respondent: failure to operate the program in conformance with the performance standards; claiming reimbursement for meals served by a proprietary Title XX child care center during a calendar month in which less than 25 percent of its enrolled children, or 25 percent of its licensed capacity, whichever is less, were Title XX beneficiaries; and failure by a sponsoring organization to properly train or monitor sponsored facilities.

12. Pursuant to 7 C.F.R. § 226.6(c)(3)(iii)(C), if corrective action is not timely or does not fully and permanently correct the serious deficiencies, the State agency must propose to terminate the institution's agreement and disqualify the institution and any responsible principals and individuals.

13. Pursuant to 7 C.F.R. § 226.6(c)(3)(iii)(C)(1-5), a Notice of Proposed Termination and Disqualification must specify: that the State agency is proposing to terminate the institution's agreement and to disqualify the institution and any responsible principals and individuals; the basis for the action; that if the institution voluntarily terminates its agreement after it receives this notice, that the institution and responsible principals and individuals will be disqualified; the institution's appeal rights; and that the institution may continue to participate in the CACFP and receive reimbursement for eligible meals and administrative costs until an appeal is completed.

14. The Respondent properly issued a Notice of Proposed Termination and Proposed Disqualification to the Respondent.

15. A principal is an "individual who holds a management position within, or is an officer of, an institution or a sponsored center, including all members of the institution's board of directors or the sponsored center's board of directors." 7 C.F.R. § 226.2.

16. A responsible principal is a principal who the State agency determines to be responsible for an institution's serious deficiency. 7 C.F.R. § 226.2.

17. Karen Riner is a responsible principal who filed a petition for contested case hearing.

18. Floyd Smith is a responsible principal who did not file a petition for contested case hearing.

19. Pursuant to 7 C.F.R. § 226.6(c)(3)(iii)(C), the Respondent properly issued a Notice of Disqualification to Karen Riner as a responsible principal.

20. Pursuant to 7 C.F.R. § 226.6(c)(3)(iii)(C), the Respondent properly issued a Notice of Disqualification to Floyd Smith as a responsible principal.

21. 7 C.F.R. § 226.6(k)(2)(iv) provides that a notice of proposed disqualification of a responsible principal is an action subject to administrative review.

22. A responsible principal has fifteen days from the date the notice of the proposed action is received to request an administrative review. 7 C.F.R. § 226.6(k)(5)(ii).

23. The Respondent acted properly and did not fail to use proper procedure.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Based on the preponderance of the evidence and applicable law, the Respondent's Notice of Proposed Termination and Proposed Disqualification of Peachstate Nutrition Services, Inc., Karen Riner, and Floyd Smith, should be affirmed.

NOTICE

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

In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina Department of Health and Human Services.

ORDER

It is hereby ordered that the agency making the final decision in this matter serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b).

IT IS SO ORDERED.

This the 28th day of December, 2005.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE OFFICE
OF ADMINISTRATIVE HEARINGS
05 DHR 0719

FELICIA BOYKIN, RHIA,)
MOSES CONE HOSPITAL,)
Petitioner,)
v.)
NORTH CAROLINA DEPARTMENT of)
HEALTH and HUMAN SERVICES,)
DIVISION OF MEDICAL ASSISTANCE,)
Respondent.)

DECISION

THIS MATTER came on for hearing before the undersigned Administrative Law Judge, Augustus B. Elkins II, on September 1, 2005 in High Point, North Carolina.

APPEARANCES

For Petitioner: Melanie M. Hamilton
Ott Cone & Redpath, P.A.
1501 Highwoods Boulevard, Suite 101
Greensboro, North Carolina 27410

For Respondent: Brenda Eaddy
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Whether Petitioner improperly coded the medical stay of a medical recipient and whether Respondent acted correctly when it issued its letter notifying Petitioner of its proposed recoupment based on its amended diagnosis, resulting in a lesser allowed payment.

EXHIBITS

The record on this case was sealed at the request of the parties to protect the patient's confidentiality

Petitioner's exhibit 1 which is the lengthy patient medical record was admitted.

Respondent's exhibits 1 through 14 were admitted.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judgment of credibility, including but not limited to the demeanor of the witnesses, any interests, bias, or prejudice a witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witness is reasonable, whether the testimony is consistent with all other believable evidence in the case, and the qualifications of the witness as an expert.

FINDINGS OF FACT

1. Petitioner is a hospital and provider of medical services to Medicaid recipients. The Respondent (DMA) is the state agency responsible for administering and managing the State Medicaid Plan and Program.

2. This matter is before the Undersigned due to a recoupment action. Respondent has requested Petitioner re-pay \$10,802.68 back to Respondent for improper coding of the hospital stay of a Medicaid recipient.
3. On September 29, 2004, the Medicaid recipient in this action was transported to Petitioner's hospital facility via ambulance. This Medicaid recipient remained in the hospital until October 4, 2004. The discharge summary listed the final diagnosis according to the primary care physician. The final discharge diagnosis shows "ventilator-dependent respiratory failure" as the first listed diagnosis. Respondent initially made payment to Petitioner in the amount of \$14,431.23 for the care and treatment of the patient.
4. The claim as submitted by Petitioner with the assigned DRG of 475 (Respiratory System Diagnosis with Ventilator Support) was based on the following diagnosis and procedure codes: PDX1 - 51881 Acute Respiratory Failure; DX1 - 481 Pneumococcal Pneumonia; DX2 - 496 Chronic Airway Obstruction NEC; DX3 - 07030 Hepatitis B Acute without Coma; DX4 - 4169 Chronic Pulmonary Heart Disease NOS; DX5 - 4019 Hypertension NOC; DX6 - 41400 Coronary Atherosclerosis Unspecified Vessel Native/Graft; DX7 - V4581 Aortocoronary Bypass; DX8 - 412 Old Myocardial Infarct; and PX1 - 9671 Continuous Mechanical Ventilation for less than 96 hours.
5. In a post payment review, Respondent coded this hospital stay showing poisoning by benzodiazepine as the primary diagnosis. By letter dated January 18, 2005, Respondent, by and through its agent Medical Review of North Carolina (MRNC), issued a request for recoupment contending Petitioner had been overpaid in the amount of \$10,802.68 due to an inappropriate principal diagnosis code on the claim submitted for payment. Respondent's letter dated January 18, 2005, notified Petitioner of its proposed recoupment based on amended diagnosis coding of PDX 9694 Poisoning- Benzodiazepine Tranquilizers and DX 1 96509 Poisoning - Opiates NEC, with all subsequent diagnoses following those listed by Petitioner. Under the 'amended coding' made by Respondent, the resultant DRG changed to 449 - Poisoning and Toxic Effects of Drugs Age Greater Than 17 With Comorbid Conditions, and a lesser allowed payment
6. Shawnee Gatling is an expert in health information administration with expertise in coding. Ms. Gatling is an employee of Medical Review of North Carolina (MRNC). One of MRNC's responsibilities is to perform post-payment reviews of the payment records of Medicaid providers in order to determine if the hospital stays of Medicaid recipients have been coded correctly for payment. Ms. Gatling testified as to her review of the coding in this matter. Coding Clinic issue 2002, 4th quarter states that if a diagnosis at the time of discharge is probable or not ruled out, the condition should be coded as if it existed or was established. Coding Clinic issue 1991, 2nd quarter sets forth the sequencing of respiratory failure when a non-respiratory condition presents also. Sub paragraph 3 states that when a patient is admitted with respiratory failure due to or associated with an acute non respiratory condition, the acute condition is sequenced as the principal diagnosis. In this case, Ms. Gatling found that the overdose should be coded first since she did not find that it had been specifically ruled out, and should be coded as a poisoning.
7. The stated reason for the recipient's admission to the hospital as noted in the Petitioner's Health History/Assessment was: respiratory failure; "took too many pills" - accident. In addition, the diagnosis listed in the physician's orders for that day, included the words "respiratory failure - overdose". Under 'Assessment and Plan' in the Addendum to the H & P dated September 30, 2004, the doctor noted that one of the causes of this patient's respiratory depression was drug overdose, and one of the likely causes of his respiratory pressure was drug induced respiratory depression. However, the final discharge summary did not list "overdose" or "poisoning" as a diagnosis.
8. Respondent contends that two additional diagnoses (9694 Poisoning - Benzodiazepine Tranquilizers and 96509 Poisoning - OPICS NEC), should be added and listed as the principal and first diagnosis for this patient.
9. Carolyn Bennett is an in-patient coder for Moses Cone Hospital where she has been for over 18 years. Testimony from Ms. Bennett is consistent with Dr. Samuel Cykert, the attending physician. She testified that she interpreted the doctor's decision not to list overdose or poisoning as the doctor having ruled out poisoning or overdose as the cause of the patient's admission to the hospital. She further stated it was the finding from the discharge summary that it had been ruled out based upon a discussion in the discharge summary that the patient adamantly denied taking an overdose, that only two pills were missing from his prescription bottle, and that overdose had not been confirmed as a diagnosis. Furthermore, as of the time of the patient's discharge, the whole record did not indicate that poisoning was "probable, suspected, likely, questionable, possible or still to be ruled out."
10. Ms. Bennett testified that one of the primary reasons for coding an uncertain diagnosis is in cases where no diagnosis could otherwise be coded. She testified that there are circumstances (either because a patient leaves against medical advice, the patient dies or for other reasons) where no confirmed diagnosis can be made at the time of discharge. In those circumstances, uncertain

diagnoses must be coded in order to obtain any payment. That is very different from this case where there were multiple identified diagnoses at the time of the patient's discharge.

11. The oral testimony of Carolyn Bennett and Shawnee Gatling establishes that individual coders will code in different ways. Both women testified that they code their claims differently from other coders. Some individuals may code from the beginning of the patient's treatment to the end of their treatment, while others may look primarily to the patient's discharge summary for diagnoses, with further support based on the entirety of the medical record. Ultimately, the primary purpose of coding is to list the reasons the patient was in the hospital.
12. Dr. Samuel Cykert testified for the Petitioner. He was the attending physician of the patient. He is Board certified and has been at Moses Cone for approximately 14 years. It is undisputed that the treating physicians did not list poisoning as a diagnosis for this patient upon his discharge. It is further undisputed that this patient was never diagnosed with having overdosed or been poisoned. When the patient was first admitted to the hospital a question arose as to whether he may have overdosed, partly because the patient was unable to speak for himself. By the time of his discharge, there was insufficient evidence to justify a diagnosis of overdosing or poisoning. To the contrary, Dr. Cykert testified that the treatment and testing provided to the patient proved that it wasn't just that he couldn't breathe because he was unconscious, but the testing also proved that he had intrinsic lung disease causing his respiratory failure.
13. Dr. Cykert testified that the diagnosis listed first on the discharge summary is the patient's principal diagnosis and the true reason the patient was hospitalized in the first place. In this case, the principal diagnosis assigned for the patient was ventilator dependent respiratory failure. When questioned whether he believed poisoning to be an appropriate diagnosis, Dr. Cykert stated that while the patient had benzodiazepines in his urine, no level was indicated, and the patient was taking benzodiazepines under his regular prescription.
14. After the patient had been taken off of the ventilator, he denied taking any extra medicine that would indicate an overdose. Further, his wife claimed that she knew how many pills were in his prescription bottle and that the patient had not taken any extra medication.
15. The patient's physicians consciously "dropped intoxication as a diagnosis" in the discharge summary because of the history from both the person who presented unconscious and from the wife who lived with him. Dr. Cykert stated that even if poisoning were a diagnosis, it should not have been the principal diagnosis because even if it had contributed to his admission, it was not the only thing and not the primary reason that caused his respiratory failure.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The N.C. Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C.G.S. 150B-23, *et. seq.*, and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in the matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.
2. The Respondent has not raised any issue regarding the appropriateness of the diagnosis and other codes that were submitted by the Petitioner. Respondent contends that two additional diagnoses (9694 Poisoning - Benzodiazepine Tranquilizers and 96509 Poisoning - OPICS NEC), should be added and listed as the principal and first diagnosis for this patient. Because it is undisputed that if one of these "additional" diagnoses had not been listed as the principal diagnosis, the payment made to Petitioner would not have changed, the ultimate issue is not whether these codes should have been coded on this patient's claim to Medicaid, but whether one of them should have been listed as the principal diagnosis.
3. The language of the guideline requiring uncertain diagnoses to be coded as though they existed does not apply to this patient in that, at the time of his discharge it was not "probable, suspected, likely, questionable, possible, or still to be ruled out." Moreover, even if it were coded as an uncertain diagnosis under a guideline, there is no guideline requiring that a "possible" or "uncertain diagnosis" be coded higher in the hierarchy than a confirmed diagnosis.

4. The evidence does not support that coding guidelines require that if poisoning had been coded, because it had not been “ruled out,” that it would carry the same weight as the patient’s actual diagnoses reached by the physician and medically trained personnel.
5. The purpose of coding a claim for Medicaid is to identify the true reason a patient was admitted because it impacts the type of treatment provided to the patient, and further determines the payment Medicaid will make to the hospital. Coding Clinic, Fourth Quarter 2002, Principal Diagnosis For Inpatient, Short Term, Acute Care 2002, specifically states that the principal diagnosis is defined in the Uniform Hospital Discharge Data Set (UHDDS) as “that established after study to be chiefly responsible for occasioning the admission of the patient to the hospital for care.” Subsection A states that “Codes for symptoms, signs, and ill-defined conditions from Chapter 16 are not to be used as the principal diagnosis when a related definitive diagnosis has been established.”
6. Respondent relies upon Subsection H regarding Uncertain Diagnoses, which states: “if the diagnosis documented at the time of discharge is qualified as “probable,” “suspected,” “likely,” “questionable,” “possible,” or “still to be ruled out,” code the condition as if it existed or was established. In this case, a “diagnosis” of overdose or poisoning was not qualified by the physician in the record as probable, suspected, likely, questionable, possible, or still to be ruled out at the time of the patient’s discharge. Rather, the treating physician consciously chose not to list poisoning or overdose in the discharge summary. Instead, the treating physicians identified the diagnoses which in their medical opinion were chiefly responsible for occasioning the patient’s admission to the hospital for care.
7. Section 3 of the February, 2004 Coding Guidelines and the 2005 ICD-9-CM relate to the reporting of Additional Diagnoses For Inpatient, Short Term, Acute Care And Long Term Care Hospital Records. Under the section regarding General Rules for Other (Additional) Diagnoses it states that for reporting purposes the definition for “other diagnoses” is interpreted as additional conditions that affect patient care in terms of requiring clinical evaluation, or therapeutic treatment; or diagnostic procedure; or extended length of hospital stay, or increased nursing care and/or monitoring. The evidence in this case established that no additional resources were expended related to any “suspected” poisoning.
8. The primary coding clinic relied on by Respondent to state that poisoning should have been listed as the principal diagnosis for this patient is the Second Quarter 1991 “Respiratory Failure With Non-Respiratory Conditions - Guidelines.” However, the “question” and all of the examples identified in that coding clinic presuppose that a patient has actually been diagnosed as having a specific condition. In this case, the patient was never diagnosed as having overdosed or been poisoned, nor was any finding made that the benzodiazepines in his system led in anyway to his respiratory condition which brought him to the hospital. Therefore this guideline does not mandate that poisoning be listed as the principal diagnosis for this patient.
9. Respondent also relied upon the Coding Guidelines identified in the ICD-9-CM Expert Manual for 2005 set forth on page 9, paragraph 2 regarding poisoning. However, the weight of the evidence shows that each of the situations identified therein do not apply to this patient. Subsection A applies when an error is made in a drug prescription or in the administration of the drug, but there is no evidence that an error was made in either the prescription or administration of benzodiazepines for this patient. Subsection B applies when an overdose of a drug was intentionally taken or administered, of which there is no evidence in this case. Subsection C relates to a non-prescribed drug or medicinal agent, yet it is clear that this patient was prescribed benzodiazepine. The last Section D “states when coding a poisoning or reaction to the improper use of a medication (e.g., wrong dose, wrong substance, wrong route of administration) the poisoning code is sequenced first, followed by a code for the manifestation.” In this case, there was no definitive basis to code a poisoning because none of the matters set forth in A through C were present, nor was it identified to have been a reaction to an improper use of a medication.
10. Respondent replied upon Coding Clinic 1993 First Quarter for Overdose which had a question asking “how do you code the patient who is diagnosed as overdosing on crack and found to be in respiratory failure, then placed on ventilation? Wouldn’t the poisoning code be the principal diagnosis?” The example set forth in the question and answer both presupposes that the patient has been diagnosed as overdosing. Such is not the case in this matter and therefore this coding clinic does not serve to mandate that the principal diagnosis for this patient be poisoning.
11. The evidence does not support finding that an unconfirmed or uncertain diagnosis should be put on equal or higher position with confirmed diagnoses. The evidence of this record does not support a mandate that a suspected diagnosis initially set forth when the patient was unconscious and first admitted, be coded as the primary reason the patient was admitted to the hospital, when, after full and thorough testing and review of the patient, the true diagnosis and reason for admission has been revealed.
12. The preponderance of the evidence in this case supports and holds that the reason the patient was admitted to the hospital was respiratory failure. If and to the extent poisoning was related at all, it did not occasion the patient’s admission and therefore should not be listed as the principal diagnosis for this patient.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

There is sufficient evidence to properly and lawfully support that the diagnoses assigned by Petitioner were proper and appropriate. Applicable coding guidelines do not require that Petitioner have coded poisoning as a diagnosis for this patient when in fact the preponderance of the evidence shows that the reason the patient was admitted to the hospital was respiratory failure. If and to the extent it was appropriate to code poisoning as a diagnosis for this patient under the theory that poisoning had not been "ruled out" by the patient's physician at the time of his discharge, such codes should not have been listed as the patient's principal diagnosis since the physician had documented actual diagnoses for the patient as having caused his admission to the hospital. The Respondent's Notice of Recoupment was in error, and Petitioner is entitled to an additional \$10,802.68 in reimbursement for the services rendered to this patient.

NOTICE

The agency making the final decision in this contested case shall adopt the Decision of the Administrative Law Judge unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency is required to give each party an opportunity to file exceptions to this Decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision. N. C. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 150B-36, the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The agency that will make the final decision in this case is the North Carolina Department of Health and Human Services. The agency is required by N.C.G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

IT IS SO ORDERED.

This the 20th day of December, 2005.

Augustus B. Elkins II
Administrative Law Judge

STATE OF NORTH CAROLINA
WAYNE COUNTY

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 DST 2069**

W. Harrell Everett, Jr.)	
Petitioner)	
)	
v.)	
)	
Board of Trustees of the)	
Local Governmental Employees')	
Retirement System, Department of)	
State Treasurer)	
Respondent)	

DECISION

On June 14, 2005, Administrative Law Judge Melissa Owens Lassiter conducted an administrative hearing in this contested case in Goldsboro, North Carolina. On June 28, 2005, Petitioner filed a proposed Decision with the Office of Administrative Hearings. On August 4, 2005, Respondent filed a proposed Decision with the Office of Administrative Hearings.

APPEARANCES

For Petitioner: Tommy W. Jarrett, Esq.
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For Respondent: Robert M. Curran
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 Raleigh, N. C. 27699-9001

ISSUES

1. Whether Petitioner was an employee or independent contractor in connection with his status as City Attorney with the City of Goldsboro?
2. Is the Respondent estopped to deny that the Petitioner is an employee of the City of Goldsboro and therefore entitled to fully participate in the Respondent's retirement plan through the date of Petitioner's retirement?
3. Has the Respondent ratified the Petitioner's status (quasi-estoppel) as an employee of the City of Goldsboro, and therefore, entitled Petitioner to fully participate in the Respondent's retirement plan through the date of Petitioner's retirement?

STATUTE AND REGULATION AT ISSUE

N.C. Gen. Stat. § 128-21(10)
20 NCAC 2C .0802

EXHIBITS

For Petitioner:	1 – 24
For Respondent:	10

FINDINGS OF FACT

1. Both Petitioner and Respondent are proper parties before the Office of Administrative Hearings (“OAH”), and both parties are within the jurisdiction of the OAH.
2. The parties stipulated that the caption of all pleadings shall be deemed amended to read: Board of Trustees of the Local Governmental Employees’ Retirement System, Department of State Treasurer (“the Retirement System”).
3. On August 1972, the Goldsboro Board of Aldermen adopted a resolution appointing Petitioner as an Associate City Attorney for the City of Goldsboro (“City”) at a salary of \$200.00 per month.
4. In January 1974, the Goldsboro Board of Aldermen adopted a resolution appointing Petitioner as the City Attorney for the City of Goldsboro effective January 16, 1974, at an annual salary of \$12,918.00 per year.
5. Petitioner remained the City Attorney for the City of Goldsboro until he retired on June 30, 2004.
6. The City and Petitioner did not have any further written employment agreement. However, during the course of Petitioner’s employment with the City, the City adjusted Petitioner’s salary from time to time after the Petitioner and the City Manager discussed the matter. Petitioner and the City Manager projected the City’s legal needs for the upcoming year, and then submitted a salary figure for approval by the City Council.
7. While Petitioner did not have a written employment agreement, the City Attorney’s duties were described, in general, by the City Charter. The City Charter also specifically stated that the City Attorney serves at the pleasure of the Board of Aldermen (now City Council). The City Manager and the City Attorney were the only City personnel who worked directly under the City Council. They were not subject to the City’s Personnel Manual, and therefore, they negotiated their own salary and benefits with the City Council. Petitioner declined participation in the City’s health insurance plan. The City carried and paid employee personal liability insurance on Petitioner, as it did with every City employee. (T p 45)
8. From 1991 - 2000, Petitioner’s salary from the City was \$46,000 per year. During the last four and one-half years of Petitioner’s employment, Petitioner’s annual salary from the City was \$60,000.
9. On August 13, 1976, Petitioner enrolled in the Local Governmental Employees’ Retirement System (“Retirement System”), and the City began making employer and employee contributions to the Retirement System on Petitioner’s behalf.
10. During Petitioner’s employment with the City, the City paid Petitioner a base salary every bi-weekly pay period. The City deducted state and federal income taxes, Social Security taxes, and the Petitioner’s portion of his contribution to the Retirement System from Petitioner’s base salary every pay period. The City, likewise, also made a bi-weekly contribution to the Retirement System on Petitioner’s behalf, as with all other City employees.
11. Since 1976, at least once monthly, the City sent to the Retirement System, a list of its employees, including Petitioner, who were participating in the Retirement System. Along with this list of names, the City submitted each City employee’s Social Security numbers, the employee’s contribution, and the City’s contribution to the Retirement System for the respective period.
12. For almost 28 years, Respondent received the Petitioner’s and the City’s retirement contributions. During those 28 years, Respondent annually sent to Petitioner, a form indicating the number of years of creditable service that the Petitioner had earned in the Retirement System. That statement also reflected the Petitioner’s fund balance at the beginning and at the end of the immediately preceding year.
13. From 1976 up through 2004, the City followed the usual budget process. As a part of that process, the City published the proposed budget for inspection, review, and comment by the public, the media, and City employees. Each proposed budget clearly noted Petitioner’s base salary as City Attorney. Further, each proposed budget noted that the City was going to contribute to the North Carolina Local Governmental Employees’ Retirement System on Petitioner’s behalf, and the City was going to withhold state and federal income taxes and Social Security taxes from Petitioner’s base salary. Each year the City issued a Form W-2 to the Petitioner, listing the income Petitioner earned as a base salary.
14. At all relevant times, Petitioner maintained a private law practice, and had an office which he personally, or his law firm maintained. Petitioner primarily utilized his law office to perform legal services for the City. However, on a regular basis, Petitioner met either at City Hall or on the City’s premises, for meetings with the City Manager, department heads, other City employees, Council meetings, and Board of Adjustment meetings. During a portion of this time, the City provided an office for Petitioner until space became unavailable.

15. In addition to his base salary, Petitioner submitted monthly statements to the City for the additional hours that he and other members of his firm spent on the City's business. Petitioner's law firm billed the City at an hourly rate that was less than the hourly rate the firm charged other clients. The City paid the Petitioner's law firm a monthly check for the time which exceeded the number of billable hours encompassed by Petitioner's monthly salary. No withholding was taken from the checks issued to the law firm. From 1989 through 2004, these payments ranged from \$63,209.80 in one year to \$193,521.88 for the year 2004.

16. For the years 1993 through 2004, Petitioner earned an average in excess of \$200,000 per year from the practice of law, including the salary the City paid him.

17. On or about April 21, 1989, Al King, the City's Personnel Director, sent a letter to Mr. Jack Pruitt, then Chief of Member Services of the Retirement System. In this letter, Mr. King opined that Petitioner was employed on a "retainer basis," and that he did not receive health insurance benefits, vacation/sick leave, or longevity pay. King asked Pruitt to determine whether Petitioner was eligible to participate in the Retirement System. Neither the City Manager nor the Petitioner was aware that King sent this letter to Chief Pruitt. (Pet Exh 11)

18. By letter dated May 10, 1989, Mr. Pruitt opined that based upon King's description of Petitioner's employment, Petitioner was not a City employee, and therefore, was not qualified to participate in the Retirement System. Mr. Pruitt instructed the City to stop making any retirement contributions to the Retirement System on Petitioner's behalf, and to cease reporting Petitioner as a member of the Retirement System after May of 1989. (Pet Exh 12)

19. In a separate letter dated on June 2, 1989, Mr. E. T. Barnes, then Director of the Retirement System, advised the City's Personnel Department that he agreed with Mr. Pruitt's decision and analysis. In that same letter, Barnes stated, "Mr. Everett has inquired through your office of his right to appeal. He should address his request to the Office of Administrative Hearings . . ." (Pet Exh 13)

20. In late August or early September of 1989, Petitioner learned of Barnes' June 2, 1989 correspondence. On September 7, 1989, Petitioner wrote Mr. Barnes and Petitioner requested Barnes to reconsider the Respondent's finding that he was not a City employee, and not eligible to participate in the Retirement System.

(a) In this letter, Petitioner stated that although he continued to have a private law practice, he worked at least 25 hours per week on City business, the City paid him a \$36,000 annual salary, the City withheld federal and State withholdings from his bi-weekly paycheck, and he charged the City "for additional services based upon additional hours spent in that capacity."

(b) Petitioner further argued that it would be unfair to disallow him participation in the Retirement System after he had already participated in the system for some 13 years. The Petitioner listed his law firm's mailing address and phone number (PO Drawer 10809, Goldsboro) as the place where he could be contacted, and indicated his willingness to discuss the matter further. (Pet Exh 14)

21. By letter dated October 20, 1989, Mr. Barnes responded to Petitioner's September 7, 1989 letter. Barnes reiterated Respondent's prior determination that Petitioner was not an "employee" as that term is defined by statute. Barnes indicated that since Petitioner was paid "on a retainer basis," and not afforded other benefits, then it appeared that Petitioner was an independent contractor, not an "employee," despite being paid through the City's payroll process. Mr. Barnes addressed and mailed this letter to "Mr. W. Harrell Everett, Jr., City Attorney, City of Goldsboro, Goldsboro, North Carolina 27530." (Pet Exh 15)

22. Petitioner never received Mr. Barnes' October 20, 1989. Mr. Barnes did not address his letter to the Petitioner's Post Office box address as Petitioner had requested in his September 7, 1989 letter. In addition, no employee from the City advised Petitioner that his or she had received Barnes' letter or discussed the information in such letter with Petitioner.

23. Both the Petitioner and the City continued to make retirement contributions for Petitioner into the Retirement System at least on a monthly basis until Petitioner's retirement on June 30, 2004. Respondent continued to send Petitioner an annual statement noting the number of creditable years of service the Petitioner had earned within the Retirement System, and indicating what his fund balance was at the beginning and the end of the immediately preceding year.

24. Respondent kept those monies contributed by Petitioner and the City each year through Petitioner's June 30, 2004 retirement. Respondent did not take any steps to ensure that these contributions for Petitioner had ceased.

25. At least monthly, the City continued sending a list of City employees' names and Social Security numbers to the Retirement System with the Petitioner's name and Social Security number listed thereon.

26. Not having received the Barnes' letter of October 20, 1989, Petitioner reasonably believed that Respondent had reconsidered its decision, and deemed him eligible to participate in the Retirement System.
27. The Respondent's conduct and the City's conduct lead Petitioner to believe that he was a member of the Retirement System.
28. Because Petitioner did not receive Barnes' October 20, 1989 letter, and because Respondent's and the City's conduct caused Petitioner to reasonably believe that he was still eligible to participate in the Retirement System, Petitioner was denied his right of appeal at that time.
29. Moreover, Petitioner was not given the opportunity to pursue other retirement alternatives with the City, such as an Individual Retirement Account or a 401(k) retirement account, which Petitioner might reasonably have then received from the City in lieu of participation in the Retirement System.
30. In March 2004, a question again arose as to whether the Petitioner was eligible to participate in the Retirement System. Respondent's Director, Michael Williamson, called the City Manager, Richard Slozak, and asked why Petitioner was still on the Retirement System when Respondent had told them to remove Petitioner from the System.
31. Slozak had been the City Manager since 1986. In his capacity as City Manager, Slozak was the chief administrative officer of the City. Mr. Slozak had not received any correspondence from Respondent about this matter, and had no other knowledge of this matter. Mr. Williamson faxed Mr. Slozak copies of correspondence regarding the matter, including Mr. Barnes' October 20, 1989 letter. Slozak then investigated the matter by talking with Petitioner, reviewing Petitioner's personnel file kept by the City, and talking with employees of the City's finance department.
32. During this investigation, Slozak learned that Petitioner had neither received nor seen Barnes' December 20, 1989 letter. (Pet Exh 15) When Slozak reviewed Petitioner's personnel file kept by the City, he did not find a copy of Barnes' December 20th letter in Petitioner's personnel file. To the best of Slozak's knowledge, the City's finance department employees informed Slozak that they had not seen any information from the State relative to Petitioner's ineligibility for retirement. (T pp 199-201)
33. By letter dated March 24, 2005, Director Williamson asked Mr. Slozak to comment on Petitioner's employment relationship with the City since May 1989. (Pet Exh 16)
34. By letter dated April 5, 2004, Slozak advised Williamson that he and Petitioner were the only City employees not covered by the City's personnel manual, and therefore, they had to negotiate their benefits with the City Council. He explained how The City paid Petitioner on a bi-weekly basis, and deducted all normal withholdings deducted from Petitioner's check. His opinion of the employment relationship between the City and Petitioner was based on his close working relationship with Petitioner since he became City Manager in 1986. He opined that Petitioner was not on retainer with the City, but was a City employee. (T pp 203-206) He also stated that Petitioner should be afforded retirement system eligibility. (Pet Exh 17)
35. By letter dated September 8, 2004, Director Williamson informed Petitioner that Petitioner was ineligible to participate in the Retirement System, and that retirement contributions were inappropriately made on Petitioner's behalf. He advised Petitioner that he was taking the necessary steps to refund Petitioner's contributions, plus interest, for the time dated June 1989 through June 30, 2004. Williamson's determination was based upon (1) an opinion from the Attorney General's Office, (2) Mr. Barnes' 1989 determination, and (3) discussion of the matter with his staff. Williamson indicated that Respondent would honor its prior offer in 1989 to allow Petitioner to receive retirement benefits from the Retirement System based on the contributions made to the Retirement System from 1976 to February 1989.
36. Thereafter, the Petitioner elected to receive retirement benefits based on his service from 1976 through February of 1989 for \$665.92 per month.
37. Petitioner and Respondent agreed that the payment and receipt of these benefits was without prejudice to the Petitioner's rights to seek, in this case, the full benefits to which he contends he is entitled.
38. 20 NCAC 2C .0403 does not allow Respondent to refund the City's contributions made to the Retirement System on behalf of the Petitioner.
39. On November 15, 2004, Petitioner timely filed his Petition for a Contested Case with the Office of Administrative Hearings.

Analysis

40. At the administrative hearing, Gloria Daniels, the City's payroll clerk in 1989, recalled receiving "something" from the City's personnel office in 1989 that said Petitioner "was ineligible for retirement benefits," (T p 232) and to "take Mr. Everett off of it." (T p 233) Daniels asserted that whomever she gave the information to, advised her to leave Petitioner's status regarding the retirement benefits unchanged. (T pp 235-241) Ms. Daniels did not discuss the document or information with Petitioner.

41. Nonetheless, Ms. Daniels could not describe what document she had seen, who had sent the document, or any other specifics about the matter. She could not say that Petitioner's Exhibit 12 was the document she received from the personnel department. (T p 236) At hearing, Ms. Daniels first thought that she either showed that "document" or communicated its contents to Richard Durham (Finance Director) or Sheila Stafford (Assistant Finance Director). (T pp 235-241) However, later, she believed she gave the information to Ms. Stafford, her immediate supervisor at the time. (T p 235) Yet, Ms. Daniels still could not "remember good enough to be able to say it was Sheila." When Mr. Slozak asked the finance department employees to write a statement about what they recalled about the matter, Ms. Daniels did not submit any statement to City Manager Slozak.

42. In contrast to Daniels, neither City Manager Slozak, Finance Director Richard Dunham, Assistant Finance Director Sheila Stafford, nor finance clerk Kaye Scott saw any correspondence from the State questioning Petitioner's retirement eligibility.

43. Even assuming Daniels received "something" from the State regarding Petitioner's retirement eligibility, the preponderance of the evidence at hearing proved that neither the Respondent nor the City informed Petitioner about Barnes' Final Decision on Petitioner's retirement eligibility.

44. A preponderance of the evidence presented at hearing showed that City had the right to control how Petitioner performed his job, and the order and sequence in which the Petitioner performed his job. The City set the Petitioner's hours and schedule. For the most part, the work of the Petitioner had to be personally performed by him. The City provided training, which the Petitioner had to attend.

45. The City, principally through the City Manager, supervised the Petitioner. The City Manager required Petitioner to submit written and oral reports to the City. The Petitioner could be terminated at will by the City. Likewise, the Petitioner could quit his job at will without incurring any liability to the City. The City paid Petitioner a base salary by the hour, as opposed to paying him after the successful completion of a particular job. The City reimbursed the Petitioner for expenses and travel. The relationship between the City and the Petitioner was a continuing relationship. The services performed by the Petitioner were an essential part of the day-to-day operations of the City. The work relationship between the Petitioner and the City was the same for the periods August 1976 to February 1989, and February 1989 to June 2004.

46. According to Director Williamson, Respondent relies on the employer to determine the eligibility of its employees to participate in the Retirement System. Then, the employer submits the required paperwork to Respondent, and Respondent enters such information into its computer system. (T p 263) Respondent does not conduct any sort of investigation as to whom the employer is enrolling in the system. (T p 263).

47. In this case, however, the City specifically asked Respondent to make a determination if Petitioner was eligible to participate in the Retirement System. Respondent failed to implement the necessary steps to insure that Petitioner and the City knew of Respondent's decision about Petitioner's retirement eligibility, that all parties ceased in making retirement contributions for Petitioner, and that any future contributions were returned to Petitioner.

48. There was no evidence presented at hearing that in 1989, Respondent verified, through the City Manager or the City Council, that the City paid Petitioner on a "retainer basis" for his job as the City Attorney. Barnes' May 10, 1989 and December 20, 1989 decisions were based solely on Al King's April 21, 1989 opinion that the City paid Petitioner on a "retainer basis," and that Petitioner was not afforded any employee benefits.

49. Respondent is ready, willing, and able to refund to Petitioner that portion of his retirement fund that was withheld from his pay since February of 1989, with said amount being \$57,322.76, including interest. This balance is arrived at by calculating the Petitioner's actual contributions since that date, and paying him only an additional 4% interest. Respondent earned more than 4% interest on the funds that have been contributed by the Petitioner. (T p 268) Yet, according to its policies, Respondent will not pay the actual amount earned to the Petitioner.

50. If the Respondent were to refund the lump sum of \$57,322.76 to Petitioner, Petitioner would be taxed on the full amount as ordinary income. Petitioner would be unable to "roll" these funds tax-free into another account such as an Individual Retirement Account (IRA) or a 401(k) account.

51. The amount of Petitioner's monthly retirement benefit is based in part of Petitioner's years of creditable service. By declaring Petitioner ineligible for retirement benefits from 1989 to 2004, Respondent also reduces the monthly amount of retirement Petitioner is already receiving for service from 1976 to 1989. (T p 265-66).

CONCLUSIONS OF LAW

1. The Petitioner and the Respondent are proper parties before the OAH, and the OAH has jurisdiction over the parties and the subject matter of this case.

2. N.C. Gen. Stat. § 128-23 provides that:

Pursuant to the favorable vote of a majority of the employees of any incorporated city or town, the governing body may, by resolution legally adopted and approved by the Board of Trustees, elect to have its employees become eligible to participate in the Retirement System, and the said municipal governing body may make the necessary appropriation therefore and if necessary levy annually taxes for payment of the same.

(Emphasis added)

3. N.C. Gen. Stat. § 128-21(10) defines the term "employee" as:

any person who is regularly employed in the service of and whose salary or compensation is paid by the employer as defined in subdivision (11) of this section, whether employed or appointed for stated terms or otherwise, . . . In all cases of doubt [,] the Board of Trustees shall decide who is an employee.

4. N.C. Gen. Stat. § 128-21(11) defines the term "employer" as:

shall mean any county, incorporated city or town, the board of alcoholic control of any county or incorporated city or town, . . .

5. N.C. Gen. Stat. § 128 et seq does not define the terms "regularly employed" as these terms are used in Chapter 128, except in 20 NCAC 2C .0802.

6. 20 NCAC 2C .0802 provides that:

An officer or employee in a regular position, the duties of which require not less than 1,000 hours of service per year[,] shall be an employee as defined in G.S. 128-21(10).

7. One thousand (1,000) hours per year would roughly equate to twenty (20) hours per week. Reading 20 NCAC 2C .0802, it would be possible for a person to work enough hours to be eligible for the Retirement System, yet hold a separate job as well.

8. The North Carolina Courts are instructive on determining whether a person is an employee or independent contractor. The Court in Lassiter v. Cline, 222 N.C. 271, 22 S.E.2d 558 (1942), held that:

The most important test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work. . . .

It is not, however, the fact of actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. The employer may leave to the contractor the details of the work but if the employer has the absolute power to control the work, the contractor is not independent. The power of an employer to terminate a contract at any time, irrespective of whether there is or is not a good cause for so doing, is indisputably an evidential element which tends strongly to show that the person employed is not an independent contractor". (Citing 27 Am.Jur., Independent Contractors, Par. 21, p. 501).

Lassiter v. Cline, 222 N.C. 271, 22 S.E.2d 558 (1942)

9. In this case, Petitioner is an employee within the meaning of N.C. Gen. Stat. § 128-21(10) and 20 NCAC 2C .0802. The City voted for its employees to become eligible to participate in the Retirement System. Pursuant to 20 NCAC 2C .0802, Petitioner

personally worked more than one thousand (1,000) hours per year during his time as City Attorney, and the City paid Petitioner a salary for such work. The City deducted state and federal income taxes, Social Security taxes, and the Petitioner's portion of his contribution to the Retirement System from Petitioner's base salary every pay period. The City paid personal liability insurance on Petitioner as it did with all City employees.

(a) A preponderance of the evidence showed that at all times, Petitioner was under the control of the Board of Alderman/City Council, and worked under the supervision of the City Manager. The City Manager required Petitioner to submit written and oral reports to the City. The Petitioner could be terminated at will by the City. Likewise, the Petitioner could quit his job at will without incurring any liability to the City.

10. Assuming arguendo that Petitioner is not an employee within the meaning of N.C. Gen. Stat. § 128-21(10), Respondent is nevertheless estopped to deny Petitioner retirement benefits. Equitable estoppel is defined as:

The effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy.

Washington v. McLawhorn, 237 N.C. 449, 454, 75 S.E.2d 402, 405 (1953).

11. The essential elements of estoppel are:

(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts.

State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 703, 535 S.E.2d 84, 92 (2000)

12. A governmental entity may be estopped if it is necessary to prevent loss to another and if such estoppel will not impair the exercise of its governmental powers. Meachan v. Montgomery County Bd. of Ed., 47 N.C.App. 271, 267 S.E.2d 349 (1980); Fike v. Board of Trustees, Teachers' and State Emp. Retirement System, 53 N.C.App. 78, 279 S.E.2d 910 (1981).

13. In the case sub judice, Petitioner had a right to rely, and did rely upon, Respondent's conduct in accepting his and the City's monthly contributions into the Retirement System for approximately 29 years. Petitioner reasonably relied on Respondent's conduct to plan his retirement. Because Respondent failed to sufficiently notify Petitioner of its decision regarding his retirement eligibility, Petitioner was prevented from choosing alternate ways to save and plan for his retirement. Further, Petitioner will suffer a monetary loss if he is required to pay income taxes on 13 years of retirement contributions that are paid back to him in one lump sum payment. Therefore, because Petitioner reasonably relied upon the conduct of the Respondent to his detriment, Respondent should be estopped from denying that the Petitioner is an employee.

14. In the alternative, Petitioner is entitled to retirement benefits from the Retirement System under the doctrine of quasi-estoppel. Quasi-estoppel is based upon the acceptance of benefits, and provides that where one having the right to accept or reject a transaction or instrument, takes and retains benefits there under, he ratifies it, and cannot avoid its obligations or effect by taking a position inconsistent with it. Redevelopment Commission of City of Greenville v. Hannaford, 29 N.C.App. 1, 222 S.E.2d 752 (1976).

15. In 1989, Respondent knew there was a question about Petitioner's retirement eligibility as an "employee." Yet, for 14 years after issuing a decision regarding Petitioner's retirement eligibility, Respondent continued to accept payments from the City and Petitioner, and provided yearly statements to Petitioner confirming his eligibility in the Retirement System. By doing so, Respondent ratified Petitioner's status as an "employee" who was participating in the Retirement System, and is therefore barred from denying Petitioner full retirement benefits under the principles of quasi-estoppel.

16. Respondent's argument that it was "unaware" the City and Petitioner had continued making retirement contributions on Petitioner's behalf, is without merit. N.C. Gen. Stat. § 128-21(10) explicitly states that, "In all cases of doubt[,] the Board of Trustees shall decide who is an employee." 20 NCAC 02A .0103, entitled "DELEGATION OF AUTHORITY TO DIRECTOR," provides that:

Whenever the statutes specify that the board of trustees itself will make specific findings in specific matters relating to specific persons, **the director may make the decisions administratively** in accordance with law and the rules,

regulations and previous decisions of this board. Appeals may be made from the decision of the director under the same procedures used for contested cases.

(Emphasis added)

17. Given that Respondent's Director Barnes was directly involved and issued a decision on this issue in 1989, Respondent knew through Director Barnes that there was a question about Petitioner's retirement eligibility. Yet, Respondent failed to ensure that Petitioner and the City knew of Respondent's decision, that any future contributions on Petitioner's behalf had ceased, and that any continuing contributions had been returned to Petitioner. As such, Respondent's own failure to ensure its decision was implemented was the only reason that Respondent could have been "unaware" of the City and Petitioner's continued contributions.

18. Based upon the foregoing reasons, Respondent substantially prejudiced Petitioner's rights, acted erroneously, and deprived Respondent of property when it deny Petitioner eligibility to participate in the Retirement System from May 1989 until June 30, 2004, the date of Petitioner's retirement as City Attorney.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent should REVERSE its decision to deny Petitioner eligibility to participate in the Retirement System from May 1989 until June 30, 2004. Based upon this determination, Respondent should recalculate the amount of Petitioner's monthly retirement benefit for 1976 through 1989 to reflect Petitioner's creditable years of service from May 1989 through June 30, 2004.

NOTICE AND ORDER

The Board of Trustees of the Local Governmental Employees' Retirement System, Department of State Treasurer is the agency that will make the final decision in this contested case. N.C. Gen. Stat. § 150B-36(b),(b1),(b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

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

This the 30th day of August, 2005.

Melissa Owens Lassiter
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05 EHR 0328

Clegg's Termite and Pest Control, Inc.,)
Petitioner,)
v.)
North Carolina Department of Environment)
and Natural Resources, Division of Waste)
Management,)
Respondent.)

DECISION

On July 28, 2005, Administrative Law Judge Melissa Owens Lassiter conducted an administrative hearing in this contested case in Raleigh, North Carolina. At the beginning of the administrative hearing, Respondent withdrew its pending Motion for Summary Judgment. On September 19, 2005, the parties submitted proposed Decisions. On October 31, 2005, Chief Administrative Law Judge Julian Mann, II extended the time for filing the Decision in this case until December 15, 2005.

APPEARANCES

For Petitioners: James H. Hughes, Esq.
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For Respondent: W. Wallace Finlator, Jr.
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ISSUES

1. Is Respondent's January 28, 2005 Order to Conduct Site Assessment to Petitioner, issued pursuant to N.C. Gen. Stat. 130A-310.1(c), an impermissible retroactive application of the Inactive Hazardous Sites Response Act of 1987, as amended, N.C.Gen. Stat. § 130A-310 *et seq.*?
2. Is the Petitioner a responsible party under N.C. Gen. Stat. § 130A-310.7?
3. Is the Respondent barred from enforcing its January 28, 2005 Site Assessment Order by Section 107(i) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended, (CERCLA/SARA), 42 U.S.C.S. § 9607(i)?

STATUTES AT ISSUE

N.C. Gen. Stat. § 130A-310 *et seq.*
N.C. Gen. Stat. § 143-215.77(4)
Chapter 574 of the 1987 North Carolina Sessions Laws
CERCLA/SARA, as amended, 42 U.S.C.S. § 9601 *et seq.*

ADMITTED EXHIBITS

For Petitioner: 1 - 9
For Respondent: 1 (including additional Robbins' affidavit), 2

FINDINGS OF FACTS

1. On January 3, 1983, Petitioner applied approximately 150 gallons of liquid pesticide solution to the home of Mr. and Mrs. Earl Gett, 404 Riverdale Drive, Durham, North Carolina ("Riverdale Site").
2. The pesticide Petitioner applied at the Gett's home was commercially known as Termide. Termide was widely used and accepted termiticide at the time, and contained, among other substances, chlordane, and heptachlor.
3. The Gett's water supply well was located approximately ten to twelve feet from one corner of the home, and located underneath the Gett's cement driveway.
4. Petitioners' employee who treated the Gett's home knew the approximate location of the well. With such knowledge, that employee took extra precautions in applying the Termide in the area close to the well by not applying the Termide near the vent pipe, and by applying the Termide by means of rodding the soil, instead of trenching it. Some portion of the liquid pesticide solution applied by Petitioner's employee entered the Gett's drinking water well and, from there, entered the groundwater aquifer.
5. At that time, application of Termide by trenching the soil was an approved method of treating a home.
6. On January 4, 1983, the Durham County Health Department sampled the Gett's water supply well. On January 5, 1983, a chemical analysis of the Gett's water indicated contamination of 2,300 parts per billion heptachlor and 5,000 parts per billion chlordane.
7. On January 10, 1983, a reading of this sample also showed traces of lindane at .05 parts per million. Subsequent readings showed a consistent decrease in the levels of these chemicals. On April 12, 1983, a chemical analysis showed traces of aldrin.
8. Because the pesticides used by Petitioner contaminated the groundwater aquifer, these pesticides also contaminated the private drinking water wells of at least six other residences in the Riverdale Site area. Durham County Health Department took water samples from the wells of those neighboring homes. The laboratory analysis of those samples showed high levels of chlordane, heptachlor, and lindane in the water at the Gifford residence at 321 Riverdale Drive, and at the Raney residence at 409 Riverdale Drive. Tests run on the Gifford well also showed traces of aldrin.
9. Chlordane and heptachlor are listed as hazardous substances at 40 CFR, Chapter 1, Subchapter J, 302.4.
10. Pursuant to 15A NCAC 2L .0202, the maximum allowable concentration which may be tolerated without creating a threat to human health or which would otherwise render the groundwater unsuitable for its intended best usage (the "2L Standard") is 0.0078 parts per billion for heptachlor. For chlordane, the 2L standard is 0.1 parts per billion.
11. Respondent uses the standards in 15A NCAC 2L et seq. to determine whether cleanup is required by the State.
12. Applying Respondent's standards to the facts of this case, on January 4, 1983, heptachlor in the Gett's water supply well was 294,871 times higher than the 2L standard, and chlordane was 50,000 times higher than the 2L standard.
13. On February 16, 1983, the Structural Pest Control Division ("Pest Control Division") of the North Carolina Department of Agriculture conducted an investigation into Petitioner's application of pesticides to the Gett's residence. The Pest Control Division determined that Petitioner (1) had treated the Gett's home in accordance with the pesticide directions and applicable rules, (2) had not violated any law in such application, and (3) had not misused Termide. The Division found only one minor discrepancy, which the Petitioner corrected. (Resp Exh 2; Pet Exhs 1, 2, 8)
14. During its investigation, the Pest Control Division also determined that the connection between the Gett's house and well was out of compliance with the building code required by Durham County, as the well had been installed in a way that permitted surface water to drain into the well. (T p. 122-123) Thus, when the termiticide was applied, it drained back along the line from the home, and into the well, contaminating the well. (Resp Exh 8; T p. 122-123) As a result of its investigative findings, the Pest Control Division took no action against Petitioner. (Resp Exh 8; Pet Exh 1)
15. Following the contamination of the Gett well, Petitioner hired Environmental Services, Inc., of Edison, New Jersey to clean up the contamination of the well water. Environmental Services, Inc., obtained approval of a clean-up plan from the North Carolina Department of Natural Resources. Pursuant to the approved plan, Environmental Services, Inc. pumped water out of the Gett's well and other wells in the area, and distributed the well on a farm in Wake County, North Carolina. In addition, the Gett's well was sealed

off, and a new well was drilled for Mr. and Mrs. Gett. Thereafter, activated charcoal filters were placed at a number of homes including the Gett's home.

16. Subsequent tests of the Gett's well in October and November of 1983 showed very little traces of chlordane, heptachlor and lindane in the Gett's new well. In fact, a number of these tests showed that the chemicals were not detectable. (Pet Exhs No. 1, 4; T pp 38 - 39).

17. On August 3, 1984, the United States Environmental Protection Agency ("EPA") ordered the Petitioner to install water lines connecting fifteen residences in the Riverdale Site area to the City of Durham City public drinking water system. On August 1, 1984, Petitioner responded to the EPA Order, asserting, among other things, that Section 42 U.S.C.S. 9607(i) was a bar to Petitioner being responsible for any costs or damages resulting from its application of pesticide products, because Termide was a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C.S. § 136 et seq), EPA Registration No. 876-233AA.

18. The U. S. Environmental Protection Agency did not pursue any further remedies from Petitioner on this matter, and the EPA installed the city water lines to the fifteen residences in the Riverdale area. (Pet Exhs 1 & 5; T p 47-50)

19. In 1987, the North Carolina General Assembly enacted the Inactive Hazardous Sites Act in N.C. Gen. Stat. § 130A-290 et seq. This act authorized Respondent to develop and implement a program for locating, cataloguing, and monitoring all inactive hazardous substance or waste disposal sites in North Carolina. In creating this Act, the General Assembly noted that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and the Superfund Amendments and Reauthorization Act of 1986 "are intended to address and clean up only those few sites with high scores on the National Priority List." It also provided:

Such federal acts [CERCLA and Superfund] contemplate that the states will take an active and central role in the cleanup of those sites not placed on such National Priority List.

(Resp Exh 2)

20. Pursuant to N.C. Gen. Stat. § 130A-290 et seq, Respondent established an Inactive Hazardous Sites priority list of all such waste disposal sites in existing in North Carolina. The sites are prioritized based on factors such as potential threats to human health and environment, and residential status.

21. Respondent classified the Riverdale Site as an inactive hazardous site, and listed it on the Inactive Hazardous Sites Priority List.

22. Pursuant to N.C. Gen. Stat. § 130-310.1(c), on December 22, 2003, Respondent issued a request for Petitioner to prepare and submit a Site Assessment Plan for the Riverdale site. On December 31, 2003, Petitioner's attorney advised Respondent that Petitioner did not believe it was necessary to voluntarily submit a Site Assessment. On June 17, 2004, Respondent again requested that Petitioner prepare a Site Assessment. On July 7, 2004, Petitioner's attorney indicated that Petitioner declined to conduct a site assessment. (January 28, 2005 Site Assessment Order, p. 2)

23. On January 28, 2005, Respondent issued a final Site Assessment Order to Petitioner, ordering Petitioner to undertake:

such monitoring, testing, analysis and reporting as the Division deems reasonable and necessary to ascertain the nature and extent of any hazard posed by the inactive hazardous substance or waste disposal by the site (the Site). **The extent of contamination has not been defined at the site and testing is needed to assess the presence and extent of the contamination.**

24. In its Site Assessment Order, Respondent stated that:

. . . Although the immediate risk posed by the contaminated water supply wells was lowered following the installation of water lines by the US EPA, contaminated soils and groundwater at the Site remain a threat to residents and to the environment.

(Emphasis added) In determining that "contaminated soils and groundwater at the Site remains a threat to residents and to the environment," Respondent relied upon the last samplings taken from the water supply wells at the Riverdale Site from January through June of 1984. According to Respondent, those groundwater samples showed concentrations of heptachlor and chlordane in the groundwater aquifer that exceeded Respondent's current 2L standards. (Resp Exh 1; T p 92)

25. In May of 2005, Sue Robbins, a Hydrogeologist II for Respondent, collected one grab sample of water from the water supply well of the Gett's (former) residence. A chemical analysis of that grab sample showed no detectable pesticide contamination in the Gett's well. (Pet Exh 4; T pp 44, 96)

26. According to Ms. Robbins, this one grab sample did not conclusively show the non-existence of hazardous substances in groundwater at the Riverdale Site above 2L standards. Pursuant to Respondent's guidelines, to show the existence or non-existence of hazardous substances in the groundwater at the Riverdale Site, three to five well volumes must be purged, i.e. withdrawn, from the well before collecting samples. Since Respondent is not equipped to purge the quantity of water required to properly assess the groundwater at the Riverdale Site, (T p 96-103) and the extent of contamination has not been defined at the site, Respondent issued the Site and testing is needed to assess the presence and extent of the contamination.

27. On March 1, 2005, Petitioner filed a contested case petition with the Office of Administrative Hearings. In the petition, Petitioner alleged that Respondent cannot retroactively apply the 1987 Inactive Hazardous Sites Act to a release that occurred in 1984. Petitioner states:

9. . . . There has been no release into the environment since the initial treatment of the Gett's home in 1983, nor is there any threat of a release of the pesticides used at the Gett's home in 1983 into the environment, due to the clean-up efforts by Clegg's as well as the installation of city water lined to the houses affected by the United States Environmental Protection Agency. In fact, the chemical analysis of the Gett well in the latter part of 1983 showed that levels of chlordane and heptachlor were either non-detectable or well below the EPA standards.

10. Any subsequent contamination problems would be the result of a contamination occurring after 1983 and not as a result of the pesticide treatment of the Gett's home in January of 1983.

(Petition, p 4) Based on the facts cited in the petition, Petitioner alleged that Respondent had substantially prejudiced its rights, exceeded its authority of jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule. (Petition, p 4)

Analysis

28. Petitioner does not deny that its pesticides contaminated the Gett's private water supply well. Instead, Petitioner contends, among other things, that the contamination of the Gett's drinking water resulted from the fact that the Gett's well was defective and not in compliance with applicable laws.

29. In contrast, Respondent asserts that the January – June 1984 water samples indicating contamination (set out in Respondent's Exhibit No. 1) and the inconclusiveness of the May 5, 2005 sampling, support why Petitioner needs to conduct a Site Assessment of the Riverdale Site. However, Respondent failed to present sufficient evidence at the administrative hearing to support this finding.

30. First, Respondent's Exhibit 1 consisted of a summary of the lab analysis of the well samples taken from the Riverdale homes, and copies of the actual lab results performed on each well's sample. A closer examination of this Exhibit revealed that 25% of the actual lab analysis reports on the water well samplings taken are missing from Respondent's files. (T p 80) Respondent could not produce these lab reports or explain why they were missing from their files on this case. Neither could Respondent produce the actual test reports for the two homes which Respondent's summary showed an elevated reading on the last test performed on their wells. (Pet Exh 4; T pp 44, p 96). In addition, Ms. Robbins acknowledged that she could not identify who prepared the summary of these reports upon which Respondent relied in issuing its Site Assessment Order.

31. Second, Ms. Robbins' acceptance or non-acceptance of the lab results of the 1983-1984 water samples varies depending on whether the result showed contamination or did not show contamination. On the one hand, Respondent accepted and relied upon the lab analysis showing contamination in the January-June 1984 water samples, to justify why it should issue a Site Assessment Order to Petitioner. (See Resp Exh 1) Yet, Robbins acknowledged that she did not know if those samples were grab samples, purged samples, or how those samples were taken. (T pp 124-127). Robbins also admitted that the lab analysis of the 1984 samples showing contamination did not indicate what type of samples they were, or in other words, how the samples were taken.

(a) On the other hand, Respondent questioned the validity of the October and November 1983 samples that indicated no contamination was detected at the Riverdale site. In questioning the samples not detecting contamination, Robbins explained that:

some of samples were and may have been collected after the water had passed through the filter [in the new well]. . . . so if an analysis had been done after passing through the filter, it is only indicating the effectiveness of the filter.

(T p 93) Further, in questioning the results of her May 5, 2005 sample, Robbins explained that a grab sample was insufficient to show the existence or nonexistence of contamination in the Riverdale aquifer. (T p 108)

(b) Therefore, the fact that Respondent would accept the validity of samples indicating contamination, but question the validity of samples indicating no contamination, when Respondent did not know how any of the 1983-1984 samples were taken, raises serious doubts about the reasonableness and basis of Respondent's decision to issue a Site Assessment Order.

32. Third, Respondent contends that Petitioner was at fault for the contamination of the wells in the Riverdale area. Respondent asserts this even though (1) the Gett's well was set back only ten to twelve feet from the house, and (2) such setback violated the applicable law in January 1983 that required drinking water wells to be set back 50 feet from a residence. At hearing, Ms. Robbins asserted that since Petitioner's technician who applied the Termide knew approximately the location of the Gett's well, he should have taken extra measures to protect the Gett's drinking water well from contamination. (T p 103-104) Based on that information, Ms. Robbins contended that there is evidence that a "release" occurred, that there is contamination in the aquifer in the groundwater, and that Respondent wants to assess if contamination still exists in the aquifer. (T p 108)

33. However, a preponderance of the evidence established that Respondent knew before it issued its January 28, 2005, that the Structural Pest Control Division had determined the Gett's well was defective and not in compliance with the building code, and that Petitioner had properly applied its pesticides at the Gett's home.

(a) Petitioner's Exhibits 7 and 8 prove that 3 months before Respondent issued its Final Site Assessment Order, Respondent knew about the Structural Pest Control Division's finding. One of Respondent's employee specifically discussed the Pest Control Division's finding with a Division employee. (Pet Exh 8) Ms. Robbins also knew about the Pest Control Division's findings, because she received a copy of that specific email on October 14, 2004. Even so, Ms. Robbins stated that she was unaware of the Pest Control Division's finding until she was cross-examined by Petitioner's attorney regarding Petitioner's Exhibit 8. (T p 103).

(b) Next, Robbins acknowledged that she did not give any credible weight to the Structural Pest Control Division's determinations. Instead, Robbins made her own determination regarding the appropriateness of Petitioner's application of its pesticide. Evidence at hearing showed that Robbins was not qualified to make such a determination. Due to the inconsistencies in Respondent's evidence, and the preponderance of the evidence that contradicted Respondent's reasoning, Respondent failed to present sufficient evidence to support its basis for issuing the Site Assessment to Petitioner.

34. As noted in the Site Assessment, Respondent has no recent evidence that there is any threat of a release of the pesticides that Petitioner applied in 1983. It is undisputed that since 1984, neither the State nor EPA has undertaken any further sampling of groundwater at the Riverdale Site until May 5, 2005.

35. EPA Safe Drinking Water Standards for Chlordane and Heptachlor are as follows:

	Mg/l	PPB
Chlordane	.002	2.0
Heptachlor	.0004	.4

36. Nine of the eleven homes affected by the contamination had either non detectable levels of Chlordane and Heptachlor or levels below the EPA Safe Drinking Water Standards when the last samples were taken from their wells in 1983 and 1984.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings ("OAH"), and OAH has subject matter jurisdiction over this contested case.

2. Respondent has the burden of proving by a preponderance of the evidence that:

(a) It can retroactively apply the Inactive Hazardous Sites Response Act of 1987, as amended, N.C.Gen. Stat. § 130A-310 *et seq.* to an incident that occurred in 1984, and order Petitioner to conduct a Site Assessment pursuant to N.C. Gen. Stat. 130A-310.1(c), and

(b) Petitioner is a responsible party under N.C.Gen. Stat. § 130A-310.7, and

- (c) Respondent is not barred from enforcing its January 28, 2005 Site Assessment Order by Section 107(i) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended, (CERCLA/SARA), 42 U.S.C.S. § 9607(i).

3. The 1987 Inactive Hazardous Sites Act authorizes Respondent to develop and implement a program for locating, cataloguing, and monitoring all inactive hazardous substance or waste disposal sites in North Carolina. In creating this Act, the General Assembly noted that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) and the Superfund Amendments and Reauthorization Act of 1986 “are intended to address and clean up only those few sites with high scores on the National Priority List.” It also provided:

Such federal acts [CERCLA and Superfund] contemplate that the states will take an active and central role in the cleanup of those sites not placed on such National Priority List.
(Resp Exh 2)

4. Pursuant to N.C. Gen. Stat. § 130A-290 et seq, in 1987 Respondent established an Inactive Hazardous Sites priority list of all such waste disposal sites existing in North Carolina. The sites are prioritized based on factors such as potential threats to human health and environment, and residential status.

5. It is undisputed that the North Carolina General Assembly enacted the 1987 Inactive Hazardous Sites Act in N.C. Gen. Stat. § 130A-290 et seq, four years after the Petitioner treated the Gett’s home with pesticides. It is also undisputed that the Inactive Hazardous Sites Act does not expressly provide for retrospective application of its provisions.

6. Here, Respondent admits that the Hazardous Sites Act does not expressly provide for retrospective application of its provision, but argues that because some Federal Courts have inferred congressional intent to generally apply, the provisions of CERCLA retrospectively the same should be done with the Inactive Hazardous Sites Act. However, such argument contradicts the North Carolina legal precedent that provides that no such intent should be inferred. Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110 (1999).

7. In Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110 (1999), the North Carolina Court of Appeals stated that it is generally held that an intention to give a statute a retroactive operation will not be inferred, and will be regarded as operating prospectively only, especially where the effect of giving it a retroactive operation would be to destroy a vested right, or create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed.

8. Our Courts have also held that the question is not whether a statute applies to the facts in existence at the time of the statute’s enactment; rather a statute is impermissibly retrospective when it interferes with rights which had vested liabilities which had accrued prior to its passage. Carolina Holdings, Inc. v. Housing Appeals Bd. of City of Charlotte, 149 N.C. App. 579, 561 S.E. 2d 541 (2002) For example, in White v. American Motors Sales Corp., 550 F.Supp. 1287 (W.D. Va. 1987, *aff’d*, 714 F.2d 135 (4th Cir. 1983), the Court held that North Carolina’s products liability statute, which abolished the defense of lack of privity, could not apply retroactively to accidents occurring prior to its effective date, regardless of whether an action was pending on its effective date or filed thereafter. The Court observed that retrospective application would “create liability for the defendant where none existed at the time of the accident” by virtue of the elimination of an existing defense. Id. at 1293.

9. In the case at bar, retroactively applying the Inactive Hazardous Sites Act to the facts in this case is an impermissible application, because it eliminates defenses against liability that existed for Petitioner, under Federal and North Carolina law, when it treated the Gett’s home in 1983. In 1983, when Petitioner treated the Gett’s home, two statutes governed potential liability for anyone who discharged hazardous substances into the environment: (1) CERCLA and (2) the North Carolina Oil Pollution and Hazardous Substances Control Act of 1978, N.C. Gen. Stat. § 143-215.75 et. seq. (“Hazardous Substances Control Act”). Both Acts gave relief from liability for the discharge of hazardous substances into the environment when the discharge was caused by an act or omission of a third party, whether any such act or omission was or was not negligent. (See CERCLA, 42 USCS § 9607(b)(3) and Hazardous Substances Control Act, § 143-215.83(b)(2)(d)).

(a) The Pest Control Division’s findings showed that the 1983 contamination of the Gett’s well occurred due to a defective well, and thus, proved that Petitioner had a valid defense to any liability under CERCLA and the Hazardous Substances Control Act.

(b) Petitioner also had a valid defense to liability under CERCLA and the Hazardous Substances Control Act in that both CERCLA and the Hazardous Substances Control Act grant immunity from liability for discharges by pest control companies regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (CERCLA 42 USCS § 9607(I)) or the North Carolina

Pesticide Board (Hazardous Substances Control Act, NCGS § 143-215.77(4)). The Pest Control Division's finding that Petitioner properly applied its pesticide at the Gett's home made this defense available to Petitioner.

10. A reading of the 1987 NC Session Law that explains the 1987 Inactive Hazardous Sites Act demonstrates that the NC 1987 Act was intended to be an extension of the Superfund and CERCLA. That Session Law specifically stated:

Such federal acts [CERCLA and Superfund] contemplate that the states will take an active and central role in the cleanup of those sites not placed on such National Priority List.

(Resp Exh 2) Therefore, since the 1987 Inactive Hazardous Sites Act is an extension of CERCLA, then the defenses for liability from CERCLA should also apply in North Carolina's application of CERCLA in its 1987 Inactive Hazardous Sites Act.

11. Nevertheless, even if one does not accept that proposition, equity and fairness mandate that if a law is applied retroactively, then so are the defenses in effective before the law was enacted. Therefore, those defenses in CERCLA and the NC Hazardous Substances Control Act that existed before 1987 for persons who properly applied pesticides, are also available and effective for Petitioner in this case.

12. Based upon the foregoing reasons, Respondent's retroactive application of the Inactive Hazardous Sites Act to the Petitioner and the facts in this case, and issuance of its January 2005 Site Assessment Order substantially prejudiced Petitioner's rights, and Respondent's actions exceeded Respondent's authority of jurisdiction.

13. Specifically, N.C. Gen. Stat. § 130A-310.7 provides:

(c) Whenever the Secretary determines that there is a **release, or substantial threat of a release**, into the environment of a hazardous substance from an inactive hazardous substance or waste disposal site, the Secretary may, in addition to any other powers he may have, order any **responsible party** to conduct any monitoring, testing, analysis, and reporting that the **Secretary deems reasonable and necessary** to ascertain the nature and extent of any hazard posed by the site. Written notice of any order issued pursuant to this section shall be given to all persons subject to the order as set out in G.S. 130A-310.3(c). The Secretary, prior to the entry of any order, shall solicit the cooperation of the responsible party.

(Emphasis added)

14. N.C. Gen. Stat. § 130A-310.7 defines a "responsible party" for liability under the Inactive Hazardous Sites Act, as any person who:

- (1) Discharges or deposits; or
- (2) Contracts or arranges for any discharge or deposit; or
- (3) Accepts for discharge or deposit; or
- (4) Transports or arranges for transport for the purpose of discharge or deposit

any hazardous substance, the result of which discharge or deposit is the existence of an inactive hazardous substance or waste disposal site, shall be considered a responsible party.

15. The Inactive Hazardous Sites Act does not define the word "Discharge." However, "discharge" is defined in the Hazardous Control Act in N.C. Gen. Stat. § 143-215.77(4). That statute defines "discharge" to include, "any emission, spillage, leakage, pumping, pouring, emptying, or dumping of oil or other hazardous substances into waters of the State . . ." The definition of "discharge" explicitly states that "the use of a pesticide regulated by the North Carolina Pesticide Board in a manner consistent with the labeling required by the North Carolina Pesticide Law" shall not constitute a "discharge" for purposes of this Article.

16. Under the definition of the word "Discharge" set forth in N.C. Gen. Stat. § 143-215.77(4), Petitioner did not discharge a hazardous substance into the environment when it treated the Gett's home with chlordane and heptachlor in 1983, and is therefore not a responsible party under the Inactive Hazardous Sites Act.

17. Respondent acted erroneously when it issued a Site Assessment Order finding that Petitioner was a "responsible party" under N.C. Gen. Stat. § 130A-310.7.

18. Section 42 U.S.C.S. §9607(I) of CERCLA provides in part that:

no person (including the United States or any state) may recover under the authority of this section for any response, costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C.S. §§ 136 et seq.)

19. "Response cost" as defined by CERCLA would include the monitoring activities required of Petitioner by its Site Assessment Order. Under this statute, Respondent is barred from seeking response cost from Petitioner, pursuant to its Site Assessment Order, as a result of Petitioner's treatment of the Gett home.

20. By entering the Site Assessment Order without regard to 42 U.S.C.S. §9607(I) of CERCLA, Respondent failed to act as required by law.

21. Respondent failed to present sufficient evidence that there has been a release or any substantial threat of a release of the pesticides Petitioner applied in 1983 to so remain a continuing threat to the environment or human health at the Riverdale Site. In addition, the residents at the Riverdale area have been connected to city water since the EPA made such connection in 1984. As such, Respondent has failed to prove the existence of all of the elements of N.C. Gen. Stat. § 130A-2130.7.

22. For the foregoing reasons, Respondent failed to meet its burden of proving by a preponderance of evidence that it was justified in retroactively applying the 1987 Inactive Hazardous Sites Act to Petitioner, and in finding it is reasonable and necessary to make Petitioner conduct a Site Assessment to determine the nature and extent of any hazard posed by groundwater at the Riverdale Site.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's January 28, 2005 Site Assessment Order should be **VACATED**.

ORDER AND NOTICE

The Secretary of the Department of Environment and Natural Resources will make the Final Decision in this contested case. N.C.G.S. § 150B-36(b), (b1), (b2) and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

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

This the 13th day of December, 2005.

Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 0711

COUNTY OF WAKE

EDWARD TODD SUTTLES,)
 Petitioner,)
)
 v.)
)
 N.C. DEPARTMENT OF CRIME)
 CONTROL AND PUBLIC SAFETY,)
 STATE HIGHWAY PATROL,)
 Respondent,)

DECISION

THIS MATTER came on to be heard before the Honorable Beryl E. Wade, Administrative Law Judge, on 21 April 2005 at 9:30 a.m., in the Lee House Hearing Room, 422 North Blount Street, Raleigh, North Carolina.

APPEARANCES

For Petitioner: J. Michael McGuinness, Esq.
The McGuinness Law Firm
Post Office Box 952
Elizabethtown, North Carolina 28337-0952

For Respondent: Stacey T. Carter-Coley
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

WITNESSES CALLED BY PETITIONER

1. Petitioner, Edward Todd Suttles.
2. Charles Barrett.
3. Steve Brian Rietvelt.

WITNESSES CALLED BY RESPONDENT

1. Petitioner, Edward Todd Suttles.
2. James Williams Jr.

EXHIBITS

The following exhibits were admitted into evidence on behalf of Petitioner and are briefly identified as follows:

1. A one-page copy of a North Carolina Uniform Citation issued by Petitioner to Justiniano David Mendez Cruz on 26 October 2002.
2. A one-page copy of Petitioner's Charging Officer/Chemical Analyst Affidavit (Form AOC-CVR-1/DHHS 3907) completed on 26 October 2002 related to the arrest of Justiniano David Mendez Cruz.
3. A one-page copy of the Driving While Impaired Report Form (Form HP-327), known as an "A.I.R." form, completed by Petitioner on 26 October 2002 following the arrest of Justiniano David Mendez Cruz.
4. A one-page copy of a Personnel Charge Sheet/Disposition (Form HP-343), dated 3 March 2004, documenting Petitioner's Personal Conduct Violation of violating SHP policy Directive J.1 and the imposition of a five day disciplinary suspension without pay.
5. A seventeen-page copy of State Highway Patrol Directive J.1 (Evidence/Property Collection, Analysis, and Disposal) from the Patrol's Policy Manual.
6. A one-page copy of a computer printout titled "HP-201 District Totals 01/25/05" for calendar year 2004.

7. A seventy-seven page copy of sixty-eight of Petitioner's Trooper Performance Records (Form HP-360) received by the Patrol during his career.
8. 1) A one-page copy of a memorandum dated 13 January 2004 from Captain M.R. Johnson to First Sergeant J. Williams, Jr. regarding Petitioner's promotion from Senior Trooper to Master Trooper; 2) a ten-page copy of Petitioner's 2004-2005 Trooper Performance Appraisal (Form HP-362); 3) a fifteen-page copy of Petitioner's 2003-2004 Trooper Performance Appraisal (Form HP-362); 4) a sixteen-page copy of Petitioner's 2002-2003 Trooper Performance Appraisal (Form HP-362); and 5) a fifteen-page copy of Petitioner's 2001-2002 Trooper Performance Appraisal (Form HP-362).
9. A twenty-one page copy of various letters and other correspondence from citizens and others concerning the Petitioner.
- 10A. A copy of a photograph taken by Petitioner of the secure entrance door to the temporary evidence lockers located at Troop C, District 3 headquarters.
- 10B. A copy of a photograph taken by Petitioner of some of the temporary evidence lockers located at Troop C, District 3 headquarters.
- 10C. A copy of a photograph taken by Petitioner of an individual temporary evidence locker located at Troop C, District 3 headquarters.

The following exhibits were admitted into evidence on behalf of Respondent and are briefly identified as follows:

1. A one-page copy of Personnel Complaint (Form HP-307) initiated by Officer Scott Allison of the Apex Police Department concerning Ms. Kathryn Kerr and Petitioner; received by First Sergeant James Williams on 22 November 2002.
2. A one-page copy of Member Statement (Form HP-326B1) dated 30 December 2002 wherein Petitioner responded to allegations contained in Personnel Complaint.
3. A copy of a 104 page Internal Affairs Report of Investigation (Form HP-721) interview transcript dated 25 April 2003 of 1) Officer Scott Allison of the Apex Police Department, 2) Sergeant Jacques Gilbert of the Apex Police Department, 3) Kenneth N. Kerr, 4) Kathryn Kerr, 5) Joseph King Suttles, 6) John Evan Booth, and 7) Petitioner by Lieutenant W. S. Martin and First Sergeant J. L. Rowell of the Patrol's Internal Affairs Section. (Submitted as an Offer of Proof).
4. A one-page memorandum dated 28 January 2004 from Captain C. E. Moody of Patrol Internal Affairs to Major W. D. Munday of Patrol Professional Standards regarding the complaint of Officer Scott Allison and Captain Moody's recommendation of Petitioner's suspension.
5. A one-page memorandum dated 29 January 2004 from Major W. D. Munday of Patrol Professional Standards to Colonel R. W. Holden, Patrol Commander, regarding the complaint of Officer Scott Allison and Major Munday's concurrence with Captain Moody's recommendation of Petitioner's suspension.
6. A one-page memorandum dated 30 January 2004 from Colonel R. W. Holden, Patrol Commander, to Major W. D. Munday of Patrol Professional Standards regarding the complaint of Officer Scott Allison and Colonel Holden's considerations and request for scheduling of a Pre-Suspension Conference.
7. A one-page memorandum dated 16 February 2004 from Captain C. E. Moody of Patrol Internal Affairs to Colonel R. W. Holden, Patrol Commander, regarding the Pre-Suspension Conference held with Petitioner on 11 February 2004.
8. A four-page transcript of the Petitioner's Pre-Suspension Conference conducted on 11 February 2004 by Captain C. E. Moody of the Patrol Internal Affairs Section.
9. A one-page memorandum dated 17 February 2004 from Colonel R. W. Holden, Patrol Commander, to Major W. D. Munday of Patrol Professional Standards regarding the complaint of Officer Scott Allison, the investigation, and Colonel Holden's determination to suspend Petitioner for five days without pay.
10. A two-page copy of a Personnel Charge Sheet/Disposition (Form HP-343), dated 3 March 2004, documenting Petitioner's Personal Conduct Violation of violating SHP policy Directive J.1 and the imposition of a five day disciplinary suspension without pay.
11. A one-page copy of Grievance (Form CCPS Form 61) submitted to Secretary Bryan E. Beatty by Petitioner on 3 March 2004.
12. A one-page memorandum dated 8 March 2004, from Major C. E. Lockley of Patrol Administrative Services, to Captain W. R. Glover regarding notification of Petitioner's suspension and request for deduction of pay for five days.
13. A two-page copy of Employee Advisory Committee Report (Form CCPS Form 169) to Secretary Bryan E. Beatty dated 8 April 2004 regarding Petitioner's grievance, the Committee's 6 April 2004 hearing, and the Committee's recommendations.
14. A one-page copy of Secretary Bryan E. Beatty's Decision of Secretary in Appeal of Grievance (Final Decision) (Form CCPS Form 62-A) dated 22 April 2004 wherein Secretary Beatty reduced Petitioner's suspension from five days to three days.
15. A one-page memorandum dated 22 April 2004, from Major C. E. Lockley of Patrol Administrative Services, to Captain W. R. Glover revising the 8 March 2004 memorandum and notifying of Petitioner's reduction of suspension to three days, and the request for modifying Petitioner's pay to add two days of full pay.
16. A seventeen-page copy of the Patrol's Policy and Procedures Manual Directive J. 1 (Evidence/Property Collection, Analysis, and Disposal) which is initialed by Petitioner.

ISSUES PRESENTED

1. Did the Respondent have “just cause” to suspend the Petitioner without pay pursuant to N.C.G.S. § 126-35, 25 NCAC 1J.0604, 25 NCAC 1J.0608, and 25 NCAC 1J.0611 for unacceptable personal conduct?

STATUTES, RULES, POLICIES, AND LEGAL PRECEDENTS INVOLVED

1. **Statutes:** Chapter 126 of the North Carolina General Statutes
Chapter 15 of the North Carolina General Statutes
Chapter 14 of the North Carolina General Statutes;
2. **Rules:** Title 25, Chapter 1, Subchapter 1J of the North Carolina Administrative Code;
Title 14A, Chapter 9 of the North Carolina Administrative Code;
3. **Policies:** Official Policy and Procedures Manual of the North Carolina State Highway Patrol.
4. **Legal Precedents:** Those decided under the statutes, rules and/or regulations set forth above;

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearings, the documents and exhibits received and admitted into evidence, the undersigned makes the following findings of fact.

FINDINGS OF FACT

1. Petitioner, Edward Todd Suttles (hereinafter “Petitioner”) is employed as a Trooper with the North Carolina Department of Crime Control and Public Safety (hereinafter individually CC&PS), State Highway Patrol Division (hereinafter “Respondent” or “Patrol”). (T pp. 10-11)

2. Petitioner began his employment with the Respondent on 6 September 1997 and achieved the rank of Master Trooper on 13 January 2004. (T pp. 11, 37) Prior to his employment with the Respondent, Petitioner served two and one-half years as a Deputy Sheriff with the Chatham County Sheriff’s Department. (T p. 11)

3. Petitioner’s assigned duty station is Troop C, District 3, which is Wake County, (hereinafter “the District”). (T pp. 11, 12) Petitioner has been assigned to the District for his entire career as a Trooper. (T pp. 11, 12) Petitioner serves with approximately thirty-seven other Troopers in the District. (T p. 84)

4. One of the priorities of the Patrol is to investigate alcohol-related offenses so as to promote highway safety. (T p. 49) There were 1,001 total Driving While Impaired charges reported in the District in 2004. (T pp. 61-62; Pet’r’s Ex. 6) This total does not include the number of open container-type charges that have been charged. (T p. 64)

5. On 26 October 2002, at approximately 7:46 p.m., Petitioner while on duty initiated a traffic stop of a vehicle driven and owned by twenty-one year old Justiniano David Mendez Cruz on Interstate 40 in Wake County. (Pet’r’s Exs. 1, 2, and 3; T pp. 15-16, 42-46, 66) Mr. Cruz was operating his vehicle with two other male passengers. (T p. 16) Based on his observations, training, and experience, Petitioner determined that all three occupants were impaired. (T pp. 16, 43-45)

6. During the traffic stop and investigation, Petitioner noticed one open container of Bud Light beer in the passenger area and two twelve pack cartons of Bud Light beer, which actually contained 23 unopened containers of beer. (T pp. 16, 44-45, 53) Following an investigation and based upon his observations of Mr. Cruz, Petitioner arrested Mr. Cruz for Driving While Impaired in violation of N.C.G.S. § 20-138.1 and also cited Mr. Cruz for driving a motor vehicle on a highway while possessing an opened container of alcoholic beverage in the passenger area of the vehicle while alcohol remains in the driver’s body in violation of N.C.G.S. § 20-138.7. (Pet’r’s Exs.1 and 2; T pp. 16, 45)

7. During the traffic stop, and upon arresting Mr. Cruz, Petitioner removed the 23 unopened containers of Bud Light beer from Mr. Cruz’s vehicle and placed them in his State issued Patrol vehicle. (T p. 22) Petitioner took the beer because he “didn’t want [the passengers] to have it with the possibility of them having a key to his vehicle and then driving off.” (T. p. 16, 22, 45)

8. Petitioner locked and secured Mr. Cruz’s vehicle and watched as Mr. Cruz’s two passengers began walking eastbound along the interstate before transporting Mr. Cruz to the magistrate’s office for processing. (T pp. 46, 67)

9. The next night, 27 October 2002, was assigned to work the night shift from 6:00 p.m. to 3:00 a.m. (T p. 54) Before going on duty, but while in uniform, Petitioner went outside of his residence and began putting his personal items in his Patrol car to

prepare to go on duty. (T p. 54) While placing items in his Patrol car, Petitioner saw the beer on the backseat which he took from Mr. Cruz's vehicle the night before. (T p. 54)

10. Petitioner removed the 23 unopened containers of beer from his Patrol car and began to walk to his outdoor trash can when he saw his next door neighbor, Mr. Kenneth Kerr (hereinafter "Mr. Kerr"). When asked what he did with the 23 containers of beer, Petitioner responded as follows:

I was going to throw it into my trash can and my neighbor—our yards butted together because I lived in a cluster development. Our yards actually met, and we made eye contact. And I could tell he was going to get it out of my trash can. So I thought I would be nice. "Do you have any use of this at all?" This was the next day, I'm thinking, close to five or six o'clock in the afternoon.

(T p. 23-24) Petitioner gave the beer to Mr. Kerr. (T pp. 16, 17, 18)

11. On or about 22 November 2002, Officer Scott Allison of the Apex Police Department was on duty at Apex High School when Mr. Kerr's daughter, Kathryn Kerr, came into his office and told him that Petitioner had given beer to her father (Resp't's Ex. 1) Ms. Kerr alleged that Petitioner "gives her father beer that he confiscates from motorists." (T p. 14; Resp't's Ex. 1)

12. Based upon Ms. Kerr's statements, Officer Allison telephoned Patrol First Sergeant James Williams and notified him. Sgt. Williams initiated a Personnel Complaint against Petitioner. (T pp. 12, 29; Resp't's Ex. 1) Ms. Kerr reported four separate allegations against Petitioner, which First Sergeant Williams documented in the HP-307. (T p. 12; Resp't's Ex. 1)

13. The Patrol's Internal Affairs Section (hereinafter "Internal Affairs") initiated an investigation concerning all four allegations contained in the HP-307. On 30 December 2002, the Petitioner was allowed the opportunity to provide a written statement. (T p. 14; Resp't's Ex. 2) Patrol Internal Affairs also began an investigation of Troop C, District 3 into the practices of the District related to alcohol seizure, analysis, and disposition. (T p. 59)

14. In his statement, Petitioner denied the first three of Ms. Kerr's allegations but admitted to the fourth allegation (T p. 27; Resp't's Ex. 2) specifically, in response to the fourth accusation that Petitioner gave Ms. Kerr's father beer that Petitioner confiscated from motorists, Petitioner responded as follows:

About three months ago, Mr. Kerr was in his yard and I was about to check 10-41. As I was putting personal items into the passenger area of my patrol car, I noticed two twelve-packs of Bud Light that I had removed from a 10-55 intoxicated driver stop from the night before on my backseat. I removed the beer from my patrol car and proceeded to my trash can. I asked Mr. Kerr did he have any use for this. He said, "Sure. Someone will drink it." This happened on one occasion only.

(T p. 15; Resp't's Ex. 2)

15. In addition to his admission in his statement, during the Internal Affairs investigation, Petitioner again admitted to the fourth allegation concerning the giving of alcohol to Mr. Kerr and admitted to investigators that in doing so he violated the North Carolina State Highway Patrol Policy and Procedures Manual (hereinafter "Patrol Policy"). (T pp. 26-27)

16. The Internal Affairs Division found inconclusive the evidence concerning three of the allegations raised by Ms. Kerr. Therefore, based upon the investigation by Internal Affairs, the first three of Ms. Kerr's allegations were determined to be "unsubstantiated." (T p. 12) The fourth allegation concerning a violation of Patrol Policy Directive J.1, Evidence/Property Collection, Analysis, and Disposition, was "substantiated." (T p. 12; Resp't's Ex. 4). Captain Moody of the Internal Affairs Division recommended based on this outcome of the investigation that Petitioner receives a five workday suspension without pay. (Resp't's Ex. 4).

17. On 29 January 2004, following a review of the Internal Affairs investigation and Captain Moody's memorandum, Major Munday sent Colonel R. W. Holden, Patrol Commander, a memorandum supporting Captain Moody's findings and recommendations regarding Petitioner. (T p. 12; Resp't's Ex. 5).

18. On 30 January 2004, following a review of the Internal Affairs investigation, Colonel Holden sent Major Munday a memorandum concurring that a violation of Patrol Policy Directive J.1, Evidence/Property Collection, Analysis, and Disposition, had occurred and notifying him that he was considering suspending Petitioner for five workdays without pay. (Resp't's Ex. 6)

19. On 11 February 2004, Captain Moody conducted a Pre-Suspension Conference with Petitioner. (Resp't's Ex. 8) During his Pre-Suspension Conference with Captain Moody, Petitioner made a further admission to his Patrol Policy violation: "I don't want to take away the fact that I did wrong. I did give away two twelve-packs of Bud Light." (T p. 28; Resp't's Ex. 8)

20. On 3 March 2004, a disciplinary conference was held and a Personnel Charge Sheet/Disposition (Patrol form number "HP-343") was issued to Petitioner notifying him of the Patrol's disciplinary action against him; suspension for five days without pay for engaging in a Personal Conduct Violation of the Patrol's Policy and Procedures Manual; specifically, Patrol Policy Directive H.1, Section III (Violation of Rules) to wit: Directive J.1 (Evidence/Property Collection, Analysis, and Disposal). (T p. 32; Pet'r's Ex. 4; Resp't's Ex.10; Resp't's Prehearing Statement and Documents Constituting Agency Action)

21. Later on 3 March 2004, Petitioner submitted an "Appeal of Grievance to Secretary" (CC&PS form number "CCPS Form 61") to Bryan E. Beatty, Secretary of CC&PS. (T p. 32; Resp't's Ex. 11).

22. Petitioner's five day suspension took place from 8 March 2004 to 12 March 2004. (T p. 33)

23. Following a hearing by the Employee Advisory Committee on April 6, 2004 in which the Committee concurred with the Patrol's disciplinary action, Secretary Beatty issued a Decision of Secretary in Appeal of Grievance (Final Decision) (CC&PS form number "CCPS Form 62-A") reducing Petitioner's disciplinary action from a suspension of five workdays off without pay to a suspension of three workdays off without pay. (T p. 34; Resp't's Ex. 14)

24. On or about 22 April 2004, because Petitioner had already served five days off without pay from 8 March to 12 March 2004, the Patrol made a readjustment in Petitioner's pay and two days of full pay was added to Petitioner's paycheck. (Resp't's Ex. 15) Essentially then, following Secretary Beatty's modification of suspension and adjustment of Petitioner's pay, Petitioner received two days of paid leave and only three days of suspension during the five days of 8 March 2004 to 12 March 2004. (T p. 35)

25. On 30 April 2004, Petitioner initiated the case sub judice by filing a form Petition for a Contested Case Hearing (form "H-06A") in the Office of Administrative Hearings (hereinafter the "OAH").

26. Petitioner underwent extensive field training and additional training by supervisors when he initially began his employment in the District as a trooper. (T p. 52) During this training Petitioner maintains that he was taught that notwithstanding Patrol Policy, it would be appropriate to act consistent with the "District practice" as it relates to alcohol. (T p. 52) (hereinafter this alleged Troop C, District 3 practice or custom is referred to "the District practice").

27. Sergeant Bullock, who at the time of hearing was assigned to the District, was Petitioner's primary field training officer. (T p. 56) Petitioner had conversations with Sergeant Bullock while Bullock was Petitioner's Field Training Officer (hereinafter "FTO") and also while Bullock was a supervisor regarding confiscation of alcohol and what a trooper can do in connection with discarding alcohol or disposing of alcohol. (T p. 57)

28. Petitioner asserts that he was trained and taught the District practice, which currently exists in the District as it did in October 2002. First, according to the District practice, troopers are instructed "not to treat alcohol as evidence." (T p. 23) Second, pursuant to the District practice, troopers are not expected to store alcohol or alcohol containers in District evidence lockers. (T. p. 50) The only time a trooper is supposed to place alcohol into evidence, however, is if there was a fatality or "something really major that could possibly need to be viewed later." (T p. 52) Otherwise, without deviation, a trooper is supposed to throw the alcohol away or pour it out. (T pp. 52)

29. Petitioner was never taught to give alcohol away. (T p. 68)

30. The District maintains several different evidence lockers for Troopers to use in cases where a trooper in the District seizes evidence related to a case or to be held for some type of judicial proceeding. (T. pp. 47, 67, 78, 91) For instance, there are at least five individual "temporary" evidence lockers encased in a cabinet which stand vertically a total of 5' 8" from the floor. (T pp. 48, 67, 78; Pet'r's Ex. 10A, 10B, and 10C) Beside the five individual temporary lockers is a vertical locker, which extends the entire length of the cabinet. (T pp. 48; Pet'r's Ex. 10A, 10B, and 10C) Each of the five lockers has an outside width of 22" and the depth of 14 1/2". (T p. 48; Pet'r's Ex. 10A, 10B, and 10C) Once opened, the inside height of each temporary locker is 12", the inside width is 14", and the inside depth is also 14". (T pp. 48; Pet'r's Ex. 10A, 10B, and 10C).

31. An assigned sergeant acts as the evidence department supervisor or evidence custodian. (T pp. 78, 92) Once a trooper seizes evidence, he or she is required to deposit the evidence in a "temporary locker." (T pp. 78, 91-92; Pet'r's Ex. 10A, 10B, and 10C) The assigned sergeant then removes the evidence from the temporary locker and places the evidence into a permanent storage locker located in the same facility. (T pp. 78, 91-92) All troopers should know where the storage lockers are. (T p 78) If a

trooper needs the evidence for judicial proceedings, then he or she is required to contact the assigned sergeant, who in turn removes the requested evidence from the permanent locker and gives it to the requesting trooper. (T pp. 78, 92)

32. Given the volume of alcohol-related offenses in Wake County, Petitioner believes it would be impossible for all of the Troopers assigned to Wake County to store alcohol seized or taken into custody in the temporary storage lockers. (T pp. 50-51)

33. During his employment with the Patrol following his initial training, Petitioner has also received extensive academic and field training in the areas of traffic stops and handling of evidence. (T pp. 11-12) Petitioner has also received Patrol In-Service classes on a variety of topics including law and Patrol Policy. (T p. 19)

34. Petitioner recognizes and admits that as a trooper he is governed and bound by state and federal law, and the provisions contained in the Patrol Policy. (T pp. 18-19) Petitioner has a copy of the Patrol Policy. (T p. 19) Additionally, Petitioner has read the Patrol Policy, signed a form certifying that he has read it, knows the Patrol Policy, and understands its contents. (T pp. 19-20) Accordingly, Petitioner is familiar with Patrol Policy Directive J.1, (Evidence/Property Collection, Analysis, and Disposal) and freely admits that he was bound by this Directive in 2002, including Section II entitled "Handling Seized Property." (T p. 20; Resp't's Ex. 16)

35. Petitioner admits that Patrol Policy requires that if a trooper seizes beer or any evidence from a traffic stop, the trooper is required to fill out an HP-52, thereby documenting the seizure of the evidence. (T pp. 16-17, 20-21) Petitioner also admits that Patrol Policy does not authorize or allow a trooper to throw seized items from a motor vehicle stop away in a trooper's personal trash can. (T p. 25)

36. Although fully and freely admitting, both during the Internal Affairs investigation and at the hearing, to violating Patrol Policy, Petitioner states he was instead attempting to comply with established District practice. (T pp. 28, 51)

37. Petitioner argues that there exists a conflict between the written Patrol Policy as found in the Patrol manual and the unwritten "District practice" of alcohol handling and disposal. (T pp. 21, 68) Although Petitioner claims that he has never seen it, the Patrol maintains a policy and procedure to deal with conflicting orders; Patrol Policy Directive H.1 (Rules of Personal Conduct and Job Performance). (T pp. 68-69)

38. During his career, Petitioner has received numerous Trooper Performance Records, which bear Patrol form number "HP-360" (hereinafter "HP-360"). (T pp. 37-40; Petitioner's Ex. 7) Patrol supervisors issue HP-360s to troopers to document either positive or negative observations about a particular trooper's job performance and/or conduct based upon a specific observation. (T pp. 38-39, 40)

39. Petitioner submitted several of his performance records and performance appraisals at trial. He established that based on his knowledge, training, and experience, he "[knew] how to collect evidence." (T p. 53) Furthermore, up until the time of Petitioner's violation of Patrol Policy Directive H.1, Section III (Violation of Rules) to wit: Directive J.1 (Evidence/Property Collection, Analysis, and Disposal), Petitioner has never been charged with an evidence collection or storage personal conduct violation.

40. Petitioner contends that he did not seize the 23 unopened containers of Bud Light beer as evidence. (T pp. 18, 22, 23, 25) Petitioner did not complete any form or documentation, such as an HP-52, related to the confiscation of the 23 unopened containers of Bud Light beer. (T p. 17)

41. Instead, Petitioner considered taking the beer a safety precaution to prevent the two passengers of the vehicle from driving the vehicle while consuming the alcohol. (T pp. 18, 23) Petitioner maintains that his "... number-one objective was to get that beer away from those two guys." (T p. 52)

42. Notwithstanding whether the alcohol taken from Mr. Cruz's vehicle was "seized" and was "evidence," Petitioner maintains that per District practice, "... I was told to pour it out or throw it away." (T p. 53) Petitioner asserts that he did not plan or intend to violate any Patrol policy, practice, or custom. (T pp. 52, 53) Although the District practice is to either pour the alcohol out or throw it away, Petitioner admits that he did neither but was "going to throw it out—throw it in the trashcan." (T p. 26)

43. Lieutenant James Williams, Jr. (hereinafter "Lt. Williams") testified at the hearing. Lt. Williams has been employed with the SHP as a Trooper since November 1988 and has served in a supervisory capacity since April 1998. (T pp. 72, 84) Lt. Williams served as First Sergeant of Wake County, Troop C, District 3 ("the District") in 2002. (T p. 74) As a First Sergeant assigned to the District, Lt. Williams's was responsible for the daily operations within the district. (T p. 75)

44. Lt. Williams has enjoyed a very good working relationship with the Petitioner and not only considers Petitioner as a trusted colleague but a friend as well. (T p. 81) Lt. Williams has generally found Petitioner to be an asset to the Patrol and to the District. (T p. 82) Lt. Williams has observed Petitioner's job performance and conduct to be appropriate and good. (T p. 82) It has been Lt. Williams's observation that others within the Patrol similarly hold Petitioner in high respect and regard. (T pp. 83-84).

45. When asked if he would seize alcohol if he had a fear of the passengers having access to it, Lt. Williams responded as follows:

. . . if I felt like the passenger had access to the vehicle after I locked it [], I would probably tow the vehicle instead of just taking the alcohol out. I'd be more concerned with them driving away in the vehicle than getting alcohol out of the vehicle.

(T p. 77)

46. When asked his opinion as a supervisor if it was proper for Petitioner to dispose of the alcohol in the manner in which he did, Lt. Williams replied that he did not think Petitioner should have disposed of the alcohol in that manner. (T pp. 78-79)

47. Furthermore, in his opinion as a supervisor with the Patrol, Petitioner's conduct was a violation of Patrol Policy "because it just goes completely against the policy." (T p. 79) "The policy says if you confiscate evidence, then you have to deposit it into the evidence locker and then you have to get an order signed by a judge for disposal." (T p. 79-80) Therefore, in a case such as Petitioner's, if a judge asked for the evidence it could not be brought before the court. (T p. 80) Such conduct by a trooper could create a problem for a supervisor such as a first sergeant because ultimately the first sergeant is responsible. (T p. 80)

48. Lt. Williams was not aware of a District practice of seizing and disposing of alcohol that went against the Patrol policy. (T p. 77) Furthermore, Lt. Williams did not expect that the troopers under his supervision in October 2002 were ever participating in a custom of throwing out or otherwise destroying seized alcohol. (T p. 77) Lt. Williams has never heard from any of the District's sergeants or other troopers about any other trooper pouring out or discarding any alcohol and not using evidence lockers. (T p. 93)

49. According to Lt. Williams, a trooper does not have to seize alcohol in every alcohol related case. (T p. 97) If, however, a trooper arrests a suspect, observes an open container of alcohol, and then seizes the alcohol, then according to Patrol Policy, the trooper would be expected to preserve the open container and enter it into evidence. (T p. 95)

50. Lt. Williams did admit that given the size of the District's jurisdiction and the number of troopers assigned, it may be possible that there might be some informal practices or customs that troopers use "on the street" of which a supervisor, such as a first sergeant might not be aware. (T p. 89).

51. Lt. Williams believes that it is the duty of all troopers, all management officials, and everybody associated with the Patrol to employ their best good faith effort to comply with policy wherever they can. (T p. 85) Moreover, to Lt. Williams "It's expected." (T p. 85)

52. Lt. Williams agreed that when assigned to the scene of a fatality or major incident, a trooper or a management official may sometimes take items that technically do not become "evidence." (T p. 88) Further, there may be a safety reason to remove something from the scene. (T p. 88) According to Lt. Williams, however, the Patrol has a policy for the taking of such property. (T p. 88) "If you take something for safekeeping, you still have to enter that into evidence according to the policy." (T p. 88) Whether taking the items for evidence in the case or for safekeeping, the Patrol Policy addresses how to properly handle both. (T p. 88) Alcohol, however, is not allowed to be seized and kept pursuant to the safekeeping directive of Patrol policy. (T pp. 97-98)

53. Lt. Williams testified that the appropriate action for Petitioner to take regarding the alcohol would have been to leave the alcohol in the vehicle and lock the doors. (T p. 98-99)

54. Trooper Charles Barrett (hereinafter "Trooper Barrett) testified at the hearing. Trooper Barrett has been a Trooper with the SHP for seven years. (T p. 118) Trooper Barrett is currently stationed in Richmond County but previously served in Wake County for four years. (T p. 118) During his time in Wake County, Trooper Barrett served as a FTO, which involves working with either new or relatively inexperienced troopers to try to give them practical guidance. (T p. 118)

55. During his assignment in Wake County, Lt. Williams served as Trooper Barrett's First Sergeant. (T p. 123)

56. During his assignment in Wake County, Trooper Barrett became aware of a certain District practice among troopers as to what to do with alcoholic beverages seized by troopers. (T p. 119) According to Trooper Barrett, when he was stationed in Wake

County “generally we would mark, if open containers or cups and so forth—make note of the amount that’s in the container and type and size of container, and then generally pour the contents out on the side of the road.” (T p. 119) Discarding alcohol in this manner was Trooper Barrett’s practice. (T pp. 119-120) According to Trooper Barrett, after the contents were poured out, Trooper Barrett would put the empty can or bottle back in the violator’s vehicle. (T p. 121)

57. Trooper Barrett never discussed this “practice” with Lt. Williams. (T p. 123) Trooper Barrett only trained one Trooper while stationed in Wake County and this “practice” is the way Trooper Barrett trained his assigned trainee. (T pp. 120, 122) Trooper Barrett did not train Petitioner. (T pp. 118-19)

58. Although he does not know if this practice was authorized or not, Trooper Barrett knew of other troopers that would operate “along the same lines of” his personal practice of taking notes and pouring the open contents out. (T p. 120) Trooper Barrett considered such practice the “norm.” (T. p. 120).

59. As for closed or unopened containers of alcohol, Trooper Barrett’s practice, is and was, to make notes of the alcoholic beverage container’s temperature (whether hot or cold), how many are in a pack, or whether it is in a container. (T p. 124). Then Trooper Barrett’s practice is to leave the closed or unopened containers of alcohol in the violator’s car. (T p. 124)

60. Trooper Steve Brian Rietvelt (hereinafter “Trooper Rietvelt”) testified at the hearing. Trooper Rietvelt has been a Trooper with the Patrol for sixteen years. (T p. 125) Trooper Rietvelt served twelve years as a Trooper stationed in the District (Wake County). (T. p. 126) Like Trooper Barrett, Trooper Rietvelt also served as a FTO in the District. (T p. 126) Trooper Rietvelt served as a FTO for Petitioner. (T pp. 128-29)

61. According to Trooper Rietvelt, during his time in the District, how a trooper decided to handle alcohol which he or she seized or confiscated and how he or she disposed of or kept the alcohol “would depend on the individual traffic stop, on what you obtained and how you obtained it, and the circumstances surrounding the stop.” (T pp. 126-27)

62. Trooper Rietvelt stated that there are circumstances when troopers would be expected to discard or pour the alcohol out or throw the alcohol away. (T p. 127) Furthermore, there were troopers within the District at that time who knew that the discarding of alcohol by pouring it out or throwing it away was acceptable under the District practice. (T p. 127)

63. Trooper Rietvelt admitted that while he was a FTO in the District, he sometimes instructed trainees that pouring alcohol out or discarding it would be appropriate depending on the circumstances of the particular stop. (T pp. 127-28) According to Trooper Rietvelt, such action was known throughout the District and was a standard District practice. (T p. 128) This practice did not provide for giving the alcohol to a third party.

64. Trooper Rietvelt stated that the issue of alcohol handling in this manner “probably arose” or “probably would have arose” while training Petitioner. (T. p. 129) Trooper Rietvelt never taught Petitioner or any other trainee to give alcohol away to a next door neighbor. (T p. 129) Furthermore, Trooper Rietvelt has never given alcohol to a next door neighbor. (T p. 130) When asked whether giving alcohol away to a next door neighbor after taking it during a traffic stop would be a violation of Patrol Policy, Trooper Rietvelt answered, “Yes.” (T. p. 130)

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The parties received proper notice of hearing in this contested case and the OAH has jurisdiction over the parties and the subject matter of Petitioner’s just cause action pursuant to Chapter 126 and Chapters 150B of the North Carolina General Statutes.

2. Pursuant to N.C.G.S. § 150B-34, the Office of Administrative Hearings has the authority to issue a Decision to the State Personnel Commission (“SPC”) which will make a final decision.

3. The Petitioner is a career state employee, as defined by Chapter 126 of the North Carolina General Statutes.

4. Prior to filing this contested case, all internal grievance procedures and necessary procedural requirements were properly followed.

5. Petitioner received two days of paid leave without having to make the paid time up and only three days of suspension for giving seized evidence in a criminal investigation to his next door neighbor. Pursuant to N.C.G.S. 126-34.1(a)(1),

Petitioner is challenging his suspension of three days for unacceptable personal conduct without pay as being without “just cause” in violation of N.C.G.S. § 126-35. See also 25 NCAC 1J.0603, 0604, .0611, and .0614. Respondent does not dispute Petitioner’s right to question whether he engaged in the wrongful conduct as alleged or whether the misconduct, if proved, constitutes “just cause” under N.C.G.S. § 126-35.

6. North Carolina General Statute § 126-35(a) provides in pertinent part that “No career State employee subject to the State Personnel Act shall be discharged, **suspended**, or demoted for disciplinary reasons, except for **just cause**.” (Emphasis added).

7. Pursuant to N.C.G.S. § 126-35(d), in a career state employee’s appeal of a disciplinary action, the department or agency employer bears the burden of proving that “just cause” existed for the disciplinary action. Therefore, the Patrol bears the burden of proving that just cause existed to suspend Petitioner without pay.

8. Although the statute does not define “just cause,” the words are to be accorded their ordinary meaning. Amanini v. Dep’t of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining “just cause” as, among other things, good or adequate reason).

9. By statute, “just cause” for the dismissal, suspension, or demotion of a career state employee may be established only on the basis of “unsatisfactory or grossly inefficient job performance” or “unacceptable personal conduct.” N.C.G.S. § 126-35(a), (b); see also 25 NCAC 1J.0604, .0605, .0606, .0607, .0608, .0611, .0612, and .0614.

10. “Unacceptable personal conduct” is defined by 25 NCAC 1J.0614 (i) as:

- (1) conduct for which no reasonable person should expect to receive prior warning; or
- (2) job-related conduct which constitutes a violation of state or federal law; or
- (3) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee’s service to the State; or
- (4) the willful violation of known or written work rules; or
- (5) conduct unbecoming a state employee that is detrimental to state service; or
- (6) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State; or
- (7) absence from work after all authorized leave credits and benefits have been exhausted; or
- (8) falsification of a state application or in other employment documentation.

11. Pursuant to 14A NCAC 9I.0102 (Violations of Manual), a violation of the Patrol Policy Manual can be the sole basis for the agency to impose discipline.

12. Respondent has proven by a preponderance of the evidence that Petitioner gave 23 unopened containers of Bud Light beer that he had seized while on duty during a traffic stop to his next door neighbor and that these actions constituted unacceptable personal conduct. Respondent had just cause to discipline Petitioner for this conduct. However, based on a review of all the evidence and in consideration of mitigating factors that exist, the appropriate sanction is a one day suspension without pay.

13. Contrary to Petitioner’s assertion, as a governmental actor, when he chose to interfere with another’s possessory interests in the Bud Light, which did not belong to him, by physically taking and otherwise exercising care, custody, and control of the 23 unopened containers of beer from Mr. Cruz’s vehicle, this was clearly a “seizure.” See United States v. Jacobsen, 466 U.S. 109; 113-14, 104 S. Ct. 1652, 1656 (1984).

14. The North Carolina General Assembly has established clear legislation related to seizing evidence and the appropriate custody and disposition of that evidence. See N.C.G.S. § 15-11.1. Petitioner did not follow these statutory mandates.

15. Petitioner violated Patrol Policy Directive H.1, Section III (Violation of Rules) to wit: Directive J.1 (Evidence/Property Collection, Analysis, and Disposal) when he: 1) arrested a driver for DWI and cited him for an “open container” violation; 2) seized 23 unopened containers of Bud Light beer otherwise lawfully in possession of the vehicle’s occupants; 3) placed the containers of alcohol in his assigned Patrol vehicle under his care and custody; 4) retrieved the alcohol from his assigned Patrol vehicle while in full Patrol uniform; and 8) gave the 23 unopened containers of Bud Light beer to his next door neighbor.

16. Petitioner’s actions amount to “unacceptable personal conduct” as defined by 25 NCAC 1J.0614 (i). No State employee can reasonably expect to receive a prior warning that he or she should not give alcohol that he or she has seized in a criminal investigation to his or her next door neighbor. This conduct was in violation of known and written work rules. Finally, giving

away alcohol, whether seized properly or taken and stored improperly, and disposing of it by giving it away to a neighbor is conduct unbecoming a state employee and is conduct that is detrimental to state service as a sworn law enforcement officer.

DECISION

Based upon the foregoing findings of fact and conclusions of law, it is hereby determined that the Respondent did have just cause to suspend the Petitioner without pay. However, based on the evidence presented at hearing, it is recommended that Petitioner's suspension without pay be reduced to one day. Furthermore, it is hereby recommended that the State Personnel Commission **AFFIRM** Respondent's decision to discipline Petitioner for unacceptable personal conduct.

ORDER

It is hereby ordered that the agency making the final decision in this matter serve a copy of the final decision to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-36.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision issued by the undersigned, and to present written arguments to those in the agency who will make the final decision. N.C.G.S. § 150B-36(a). In accordance with N.C.G.S. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact. The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina State Personnel Commission.

IT IS SO ORDERED.

This the 3rd day of January, 2006.

Beryl E. Wade
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF BURKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 1360

Melvin G. Cline, Jr.,)
Petitioner,)
)
v.)
)
J. Iverson Riddle Developmental Center and the)
NC Department of Health and Human)
Services,)
Respondents.)

DECISION

This matter was heard by the Honorable Beryl E. Wade, Administrative Law Judge, on March 29, 30, and 31, 2005, in the Broughton Hospital Hearing Room, Morganton, North Carolina.

APPEARANCES

FOR PETITIONER: Warren T. Daniel
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FOR RESPONDENTS: Elizabeth Guzman
Assistant Attorney General
North Carolina Department of Justice
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STATEMENT OF THE CASE

In August of 2003, Petitioner, a career State employee and Clinical Pharmacist, salary grade 79, applied for the position of Pharmacy Manager II, salary grade 82. Respondents selected a non-State employee for the position. Petitioner timely filed a Step I grievance alleging that Respondents failed to provide priority consideration for promotion to Petitioner in violation of N.C. G.S. §126-7.1(c). Respondents denied Petitioner's grievance at Step I. At Step II, Respondents did not deny the Petitioner's grievance but instead issued a decision letter wherein Respondents offered Petitioner certain relief in settlement of his claims which Petitioner accepted based on representations made by Respondents' agent. Based on these representations, Petitioner did not appeal. Approximately five (5) months following the offer and acceptance of relief set forth in the December 11, 2003 settlement letter, Respondents refused to provide Petitioner with all provisions of the offer. Respondents' notified Petitioner on or about May 26, 2004, that he would no longer continue receiving the monetary consideration provided in the December 11, 2003 settlement. Thereafter, Petitioner timely filed a Step III Grievance alleging failure to receive promotional priority consideration, and for breach of the settlement agreement. By letter dated July 16, 2004, Respondents denied Petitioner's Step III Grievance. On August 16, 2004, Petitioner timely filed a contested case petition with the Office of Administrative Hearings alleging failure to receive promotional priority consideration, and for breach of the December 11, 2003 settlement agreement, as it was initially represented to Petitioner by Respondents. Pursuant to Article 3 of Chapter 150B of the North Carolina General Statutes, G.S. §§150B-22, 150B-136(a),(b); §126-34.1(5); §126-36.2; §126-7.1(c); §126-37(a); §126-38; §126-4(4),(9) and the North Carolina State Personnel Manual, Discipline/Appeals/Grievances, Section 7, pp.36-45, State Personnel Commission of Contested Cases/Remedies, Petitioner seeks relief for the violation of N.C.G.S. §126-7.1(c), provision of all such relief to which he is entitled by law, and such further relief as this court deems just and proper.

ISSUES

1. Does the Office of Administrative Hearings have jurisdiction over Petitioner's claim?

2. Is Petitioner entitled to receive career State employee priority consideration for promotion, pursuant to G.S. 126-7.1(c), over the non-State employee applicant who was selected for the position of Pharmacy Manager II, and if so, has Petitioner met his burden of establishing that Respondents wrongfully denied him a promotion to the position of Pharmacy Manager II ?
3. If Respondents wrongfully denied Petitioner a priority consideration for promotion, what is the remedy for which Petitioner is eligible as a result of Respondents' violation of G.S. 126-7.1(c)?
4. Is the December 11, 2003, letter from Dr. Riddle to Petitioner an enforceable agreement and/or an enforceable Step II decision, and if so, did Respondents breach the agreement or fail to comply with the decision letter?
5. If Respondents breached the agreement with Petitioner, as memorialized in the December 11, 2003, letter, or failed to comply with the Step II decision, what is the remedy for which Petitioner is eligible?

WITNESSES

For Petitioner: Melvin G. Cline, Jr.; Sara Deal; Trossie Watkins Wall, III; Melodie Garrison; and Janice Swearingen; Melvin G. Cline, Jr. (recalled).
For Respondents: Bill Guy; Drake Maynard, Nancy Hunter; Steven L. Mahorney; Joseph Iverson Riddle; Jerry McKee.

EXHIBITS

Stipulated Exhibits 1-24, and 26-31 were offered and received at hearing. Petitioner offered Exhibits 32-34, which were admitted into evidence at hearing. Respondents' Exhibit 1 was offered and received at hearing.

EVIDENTIARY MATTERS

On or about June 6, 2005, Petitioner filed a post-trial Motion for Judicial Notice and moved the Court to take judicial notice of the Job Description for Pharmacy Manager II, dated October 1, 2004, as published by the Office of State Personnel on its official website. Petitioner's Motion is hereby ALLOWED, and this document is received into evidence.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record of this proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Findings of Fact. In making these Findings of Fact, the ALJ has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other credible evidence in the case.

FINDINGS OF FACT

1. Petitioner Melvin G. Cline was employed as a Clinical Pharmacist at the Western Carolina Center, now the J. Iverson Riddle Developmental Center (JIRDC), since February 12, 1990, a period in excess of twenty-four (24) months and is therefore a career State employee. Stipulated Exhibit 4; Stipulated Exhibit 18; T 32, 41, 42, 358.
2. The Pharmacy Manager II was a salary grade 82 at the time of Petitioner's application which would have been a promotion for the Petitioner. Stipulated Exhibit 1; Stipulated Exhibit 8.
3. From on or about August 15, 2003 through November 6, 2003, Respondents posted a vacancy for the position of Pharmacy Manager II, (position 10010); pay grade 82T; with an original closing date of August 28, 2003. Stipulated Exhibit 8; Stipulated Exhibit 22.
4. Petitioner is entitled to priority consideration for promotion, pursuant to G.S. §126-7.1(c).
5. Respondents selected a non-State employee, Janice Swearingen, for the position of Pharmacy Manager II. Stipulated Exhibit 19.
6. Petitioner timely filed a contested case petition in the Office of Administrative Hearings alleging denial of his priority promotion rights, breach of the settlement agreement of December 11, 2003 and requesting review by the Office of State Personnel..
7. Petitioner has a right to review of the denial of priority promotion rights before the State Personnel Commission pursuant to G.S. §126-34.1(5); G.S. § 126-36.2; G.S. § 126-38; G.S. § 126-4(4) and (5); G.S. §§150B-22 and 150B-36(a)(b) and the North Carolina State Personnel Manual Section 7, pp. 39-41, 43-45. Dr. Steven Mahorney, Director of Medical Services, was the hiring manager for

- the Pharmacy Manager II position. T 59. Dr. Mahorney drafted portions of the posting for Pharmacy Manager II and directed which knowledge, skills, and abilities would be included. T 341.
8. Dr. Mahorney filled out the knowledge, skills, and abilities section of the posting. T 343.
9. The posting for Pharmacy Manager II, Stipulated Exhibit 8, included the following :
- a) Description of the work:
Exciting position as head of dynamic clinical pharmacy department. Research, presentation, and publishing opportunities. Active teaching program.
 - b) All applicants must complete & submit a state application form PD-107 for employment. Resumes' in lieu of State applications are not acceptable. A separate application is necessary for each vacancy. Please include vacancy number on all applications. If faxed, original application must be mailed or brought to the HR Office at WCC. Applications must be received in the human resources office at Western Carolina Center by 5p.m. on the closing date.
 - c) Knowledge, Skills and Abilities: Previous supervisory experience and high level of interpersonal skills required.
 - d) Training and Experience: Graduation from a recognized school of pharmacy and four years of professional experience as a licensed pharmacist; or an equivalent combination of education and experience. Necessary special qualifications: Must be licensed to practice pharmacy in the State of North Carolina.
10. There were three applicants for the position of Pharmacy Manager II: Petitioner, a career state employee; Trossie F. Wall, a non-State employee; and the selected candidate, Ms. Janice Swearingen, a non- State employee. Stipulated Exhibit 22, Applicant Selection Log and attached DHHS Applicant Selection Codes, dated 11/21/03.
11. Ms. Swearingen, the selected candidate, submitted her application on or about October 8, 2003 and was interviewed on or about October 23, 2003. Stipulated Exhibits 19 and 31.
12. Trossie F. Wall submitted his application on or about August 17, 2003 and was interviewed by Dr. Mahorney on or about September 2, 2003. Stipulated Exhibit 31.
13. Mr. Wall was interviewed but not selected for the Pharmacy Manager II position because Dr. Mahorney believed Mr. Wall's application had been withdrawn, although Mr. Wall testified that at hearing that he had not withdrawn his application. T 180, 181.
14. Mr. Wall's application was considered withdrawn by Dr. Mahorney, leaving only Petitioner, a career state employee, and Ms. Swearingen, a non-state employee, as applicants for the job. Exhibit 22, Applicant Selection Log.
15. Petitioner submitted his application on or about August 25, 2003, and was interviewed for the position on October 14, 2003. Stipulated Exhibit 18; Stipulated Exhibit 31; T 58, 59.
16. Dr. Mahorney, the hiring manager, testified that selection of Ms. Swearingen was primarily his decision. No one else had any input into his decision and no one was required to sign off on Dr. Mahorney's selection for the pharmacy manager position. Dr. Mahorney did not have to consult with Dr. Joseph Iverson Riddle, Director of the J. Iverson Riddle Developmental Center or obtain permission from Dr. Riddle in the hiring decision. T 380, 399, 400.
17. The selection codes entered in the comments section of the Applicant Selection Log, showed a code B-8 for Petitioner, indicating that Petitioner had sufficient experience but less than the selected candidate, and a code H-33 for Ms. Swearingen indicating that she was the applicant selected for the position. Stipulated Exhibit 22, Applicant Selection Log.
18. Dr. Mahorney wrote the job description and the knowledge, skill, and abilities; education and experience are standards determined by personnel. T 372, 373, 374.
19. Dr. Mahorney testified that he was primarily looking for someone who understood the technical aspects of operating a pharmacy, particularly from a professional stand point, and secondly, he was looking for a person "who had person skills." T 373.
20. Dr. Mahorney testified that the skills were evaluated subjectively; the most important issue to Dr. Mahorney in the selection process was his need for a collegial relationship and his need to be comfortable. T 377, 378, 379.

21. Dr. Mahorney and his office assistant, Ms. Sara Deal, discussed the candidates briefly following the interviews. T 162. Ms. Deal testified that Dr. Mahorney told her that he thought Petitioner was too hyper-analytical. While Dr. Mahorney did not discuss Petitioner's personality, he told Ms. Deal that he felt that he could not get along with Petitioner in that position. T 163. After Ms. Swearingen's interview, Dr. Mahorney remarked that Ms. Swearingen was willing to learn and she was a very pleasant person. T 163.
22. At the time of her application, Ms. Swearingen had been a licensed pharmacist in the retail sector for approximately 27 years. Ms. Swearingen was a non-State employee at the time of her interview, and had no State, clinical or hospital pharmacy experience. Ms. Swearingen's experience was in retail pharmacy. Stipulated Exhibit 19, Application of Janice Swearingen, p.2, dated October 8, 2003; p. 3, dated 12/17/03.
23. Based on the information in Ms. Swearingen's application, her depositions and her testimony at hearing, Ms. Swearingen's experience supervising pharmacists was in the supervision of two pharmacists at Drug World in North Wilkesboro, North Carolina for a period of approximately thirteen months from 1985-1986. Ms. Swearingen testified at hearing that her supervisory duties at Eckerd Drugs in North Wilkesboro consisted of supervising technicians and clerks. T 230-244; Stipulated Exhibit 19, Application of Janice Swearingen, p. 2, dated October 8, 2003, p. 3, dated 12/17/03.
24. According to Dr. Mahorney's office assistant, Sara Deal, Dr. Mahorney recorded in his handwritten interview notes that Ms. Swearingen asked good questions; she did not like confrontation, and he gave her a B+ on the interview. T 167, 168.
25. By letter dated December 18, 2003, Steven L. Mahorney, M.D., thanked Petitioner for his application for the position of Pharmacy Director, stating that while we have filled this position at this time, we welcome your application for other positions in the future. Dr. Mahorney did not advise Petitioner of grievance or appeal rights of any kind. Stipulated Exhibit 23, Letter from Dr. Mahorney to Petitioner, dated December 18, 2003.
26. Dr. Mahorney selected Ms. Swearingen over Petitioner on the basis that she had more supervisory experience than Petitioner. Exhibit 20, Denial of Step One Grievance signed by Steven. L. Mahorney, M.D., dated November 25, 2003. Dr. Mahorney advised petitioner only that Petitioner had 10 calendar days from the notice to proceed to a Step II appeal. Stipulated Exhibit 20
27. Dr. Mahorney testified that Petitioner is a really good pharmacist, and is excellent in coming up with information when it is needed, and with the technical aspects of pharmacology. (T 371). However, Dr. Mahorney felt that Ms. Swearingen was a "better personality fit" for the job than petitioner. (T 64, 381, 382).
28. The Step I denial letter signed by Dr. Mahorney advised Petitioner of his internal grievance rights in but did not advise Petitioner of his right pursuant to G.S. 126-36.2 to proceed directly to the State Personnel Commission for redress of a violation of G.S.126- 7.1,
29. On or about November 25, 2003, Petitioner timely filed a Step I grievance seeking relief for the denial of priority consideration pursuant to 126-7.1. Stipulated Exhibit 27. Petitioner's grievance was denied by Dr. Mahorney based on the selected applicant's superior supervisory experience. Stipulated Exhibit 20.
30. Petitioner timely appealed the Step I grievance decision to Dr. J. Iverson Riddle, the director of the institution, on November 26, 2003. Petitioner requested a conference with the Division/Institution Director and wrote that the grounds for his grievance were the denial of promotion. Exhibit 29.
31. Following a meeting with the Petitioner, Dr. Riddle, as a compromise, issued a Step II settlement agreement by letter dated December 11, 2003, providing Petitioner with the certain relief. Exhibit 1.
32. The settlement letter of December 11, 2003 set out appeal rights only in terms of JIRDC's internal grievance procedure. The settlement letter of December 11, 2003 did not advise Petitioner that the Office of State Personnel has the authority to review a settlement of a grievance reached during the internal grievance procedure and dispute arising there from. At no time was Petitioner advised of his right to appeal the denial of priority promotion directly to the State Personnel Commission or to seek review and enforcement of the settlement agreement before the State Personnel Commission. G.S. §§12-36.2, 126-38, 150B-22, 150B-36 (a)(b) and State Personnel Manual, Section 7, pp. 36-45.
33. With regard to the terms set forth in the December 11, 2003, letter, the undersigned finds as fact that the letter by its terms provided that Petitioner would receive the following relief:

- 1) Petitioner would be offered the job of Pharmacy Manager II if it became vacant between December 15, 2003 and December 14, 2004; and
- 2) Petitioner would be compensated at a pay rate identical to that of the Pharmacy Director II for a period of one year, between December 15, 2003 and December 14, 2004, including any pay raises or range revisions.

34. Dr. Riddle testified that he made the offer to achieve closure. Dr. Riddle also confirmed that when he accepted and approved the range revision for the pharmacy department, he intended the range revision to apply to the entire department, including Petitioner. Dr. Riddle testified that he regarded the Step II decision letter as a reasonable compromise between the two parties. T 211, 407, 408, 418.

35. Respondents referred variously to the December 11, 2003 decision letter as a settlement and a decision. Exhibits 2,14, 15, 16; T 194,195,196, 280, 281, 282, 283, 284, 292, 293, 303, 304, 310, 318, 319, 322, 323. The Respondents' representatives conceded that the decision letter was the provision of a remedy. T 202, 211, 212, 217, 282, 283, 287, 288, 299, 309, 310, 314, 315.

36. Ms. Melodie Garrison testified that the remedy was easier for everyone and that she had no reason to believe the offer would change. T 211, 212, 217. Ms. Garrison further testified that it is part of her job duties to discuss the terms and provisions of decision letters with State employees. Ms. Garrison also testified that she has been trained as a mediator by the State of North Carolina. T 192, 193, 200, 201.

37. Based on the representations made to him by Respondents' agent, Melodie Garrison (as named in the settlement in the letter of December 11, 2003), Petitioner did not appeal the Step II decision, thereby accepting the relief contained in the December 11, 2003 letter. Stipulated Exhibits 4, 5.

38. On or about December 15, 2003, a PD-105 was prepared for the Department of Health and Human Services, Riddle Development Center, for a salary adjustment for Petitioner Melvin G. Cline Jr., raising his salary from the maximum for a 79T to the maximum for a salary grade 82. Attached to the PD -105 is the statement:

“This permanent salary adjustment is the result of a settlement reached during a Step 2 Appeal of the denial of a promotional opportunity for this long-term state employee.” Stipulated Exhibit 14, PD 105, date prepared 12-15-03, approved for the department by Dianne Hoffman (NHH), emphasis added.

39. On or about February 2, 2004, a Longevity Pay Request authorizing longevity payment to Petitioner was submitted to the Office of State Personnel and approved by the OSP designee. Stipulated Exhibit 16, PD 135, dated 02-02-04.

40. Petitioner did not sign and was not provided copies of the PD 105 and/or the PD 135 represented by Stipulated Exhibits 14 and 16 respectively.

41. Petitioner was not advised by the Settlement Letter of December 11, 2003 or at any other time that the submission of Forms PD 105 and PD 135, which were submitted to the Office of State Personnel and signed by the designee of the Office of State Personnel, invoked the jurisdiction of the State Personnel Commission over the matters contained in the respective PD's and any disputes arising there from. Stipulated Exhibits 14 and 16, PD 105 and PDF 135; State Personnel Manual, Section 7, pp. 36-45.

42. In May 2004, a range revision was authorized across the board by the salary administrator, Nancy Hunter, and Dr. Riddle. T 359, 361. When the range revision was approved, it was retroactive to January 2004 and was approved for all pharmacy staff, including Petitioner and Ms. Swearingen. T 407, 408. Exhibit 26, Special Entry Rate Inventory Effective July 1, 2004.

43. However, on or about May 20, 2004 Susan Scroggs, Personnel Analyst, sent a memorandum to Janice Swearingen, Director of Pharmacy, stating that Petitioner was not eligible for the range revision, contrary to the settlement letter, the representations of Ms. Garrison to the Petitioner, and the statements on the PD 105. Stipulated Exhibits 4, 5, 14, and 15.

44. On or about May 26, 2004, Petitioner was notified that the range revision had resulted in an adjustment to the salary grade of pharmacy manager, Janice Swearingen, from an 82 to an 85, and that the range revision was retroactive to January 1, 2004. (Exhibits 4, 15.) Petitioner inquired with the human resources department as to why he was not allowed to participate in the range revision pursuant to the terms of the December 11, 2003 decision letter awarding him relief. On or about May 26, 2004, Susan Scroggs, Personnel Analyst at J. Iverson Riddle Center, sent a memorandum to Petitioner stating that he was not eligible for the range revision. Stipulated Exhibit 2.

45. By the memorandum of May 26, 2004, and the refusal to adhere to the relief Petitioner was granted in the decision letter of December 11, 2003, respondents substantially altered the relief offered Petitioner, breached the settlement agreement, and refused to honor the approved PD 105.

46. Respondents' failure to compensate Petitioner at the same pay grade as Ms. Swearingen for the one year period from December 15, 2003 to December 14, 2004 constitutes a breach of the agreement and a failure to comply with the Step II decision letter issued by Dr. Riddle.

47. As a result of this breach of the agreement, and the Respondents' failure to comply with the terms of Dr. Riddle's decision, Petitioner is entitled to receive back pay at the top of the range of pay grade 85 for the period December 15, 2003, through December 14, 2004 and for such further relief as set out in the PD 105.

48. Petitioner's acceptance of the settlement offer, and decision not to appeal Dr. Riddle's decision letter did not waive Petitioner's future grievance rights and subsequent right to challenge Respondents' failure to provide the remedy and/or misrepresentation of the nature of the remedy. G.S. 150B-22; 126-4(4)(9)(11); State Personnel Manual, Section 7, pp. 36-45.

49. Petitioner had no knowledge within the five day appeal period that the relief was altered or revoked. As the December 11, 2003 decision letter appeared to resolve the grievance, Petitioner was only required to accept the relief within five days. The terms of the decision letter provided relief up to a year after the decision letter; and the five day appeal period did not protect Petitioner from any subsequent revocation of relief.

50. The May 26, 2004, memorandum from Susan Scroggs to Petitioner, stating that he was not eligible for the range revision, failed to inform petitioner of his right to contest the Center's non-compliance with the December 11, 2003, agreement. Failure to provide an employee with written notification of his rights, the procedure, and the time limits for filing a contested case hearing stays the 30-day limitation period until notice is provided in accordance with G.S. §§126-36, and 126-38. *Jordan v. N.C. Dept. of Transp.*, 140 N.C. App. 771, 774, 538 S.E.2d 623 (2000), *disc. rev. denied*, 353 N.C. 376, 547 S.E.2d 412 (2001)(citing *Luck v. ESC*, 50 N.C. App. 192, 272 S.E.2d 607 (1980)); State Personnel Manual, Section 7, pp. 36-45.

51. When he was notified of Respondents' intent to breach the agreement for relief provided in the Step II decision letter, and Respondents' failure to raise Petitioner to a salary grade 85, Petitioner timely filed a Step 3 grievance alleging denial of priority consideration for promotion and breach of the settlement agreement.

52. Respondents' denied Petitioner's Step III grievance by decision issued on July 16, 2004. The decision dismissed Petitioner's appeal as untimely. However, Petitioner's Step III grievance was timely filed because 1) Respondents' breach of the Step II agreement and decision letter by Dr. Riddle was a second grievable action; 2) the May 26, 2004 memorandum advising Petitioner that he would not receive the range revision did not contain a written notification of Petitioner's rights; and 3) At no point in the grievance process did the Respondents advise Petitioner of his right to appeal directly to the State Personnel Commission.

53. The failure to provide procedural rights of appeal to the Petitioner tolls applicable statutes of limitations. State Personnel Manual; *Edwards v. UNCH*, 107 App. 606, 421 SE2d 383, cert. denied 333 NC 167, 424 SE2d 909(1992).

54. After receiving the Step III decision, Petitioner timely filed his contested case petition in the Office of Administrative Hearings within thirty (30) days of the July 16, 2004 action, alleging denial of State employee priority consideration for promotion and seeking enforcement of the relief offered in the decision letter of December 11, 2003.

55. The decision letter of December 11, 2003 intended to offer relief for the denial of priority consideration for promotion and is part of that grievance; any issues related to that agreement or the relief it purported to provide may be raised within the context of Petitioner's grievance and heard by the OAH and reviewed by the OSP pursuant to G.S. §§126-4(4)(9); 126-7.1(c); 126-34.1(5); 126-36.2; and 126-38.

56. When PD's are presented and signed by a designee of the OSP as part of any settlement agreement, the OSP has authority to review, enforce, and resolve any disputes arising there from. The right to review of settlement agreements by the OSP is an appeal right of which the Petitioner must be appraised and may be invoked at any time a dispute arises. State Personnel Manual, Section 7, pp. 36-45.

57. Petitioner's claim in his contested case petition is not for a "salary increase" as Respondents allege, but is clearly for review of the Respondents' failure to provide priority consideration for promotion; and seeks appropriate relief for that violation, including but not limited to, placement in the salary grade to which he would have ascended had Respondents adhered to the State policy in G.S. §126-7.1(c).

58. Petitioner utilized the State employee website to assist him in estimating and calculating his economic loss as a result of the Respondents' failure to comply with the December 11, 2003, decision letter. Respondents' failure to compensate Petitioner at the same pay grade as the Pharmacy Manager II from December 15, 2003 through December 14, 2004, resulted in a salary loss to Petitioner of \$13, 472.00. T 83-89; Exhibit 32; Exhibit 33.

59. Pursuant to 126-34.1, which allows the OAH to review denials of promotional priority, and 126- 36.2 which allows immediate appeal to the OAH of denials, Petitioner filed a contested case petition within the 30 days of the last action by the respondents as required by 126-38 alleging violation of the State employee priority consideration for promotion and seeking enforcement of the decision awarding him relief for Respondents' violation of North Carolina law protecting the interests of career employees.

60. "It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties or privileges... should be settled through informal procedures... If the agency and the other person do not agree to a resolution of the dispute through informal procedures either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time their dispute becomes a "contested case" N.C.G.S. § 150B-22. In keeping with State policy, at the Step II level, Respondent JIRDC and Petitioner resolved the grievance by entering into an agreement which was mutually beneficial to both parties, and which purported to settle the grievance but subsequent events showed that the petitioner's rights, duties, and privileges were in continued dispute.

61. While the December 11, 2003, letter by Dr. Riddle was not drafted in a format which is typically used in settlement agreements, based on the testimony proffered at the hearing, the court finds that an agreement did exist and that it was the intent of the parties to settle Petitioner's grievance based on the terms set forth in the December 11, 2003 decision letter. In addition, the decision letter is signed by Dr. Riddle, the director of the JIRDC, and therefore, the decision letter itself constitutes an enforceable decree, similar to a judicial order. In making this finding of fact, the court notes that during the Step I and Step II grievance process, State employees are not allowed to have counsel present during the proceedings.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings and the Office of State Personnel have jurisdiction of the parties and subject matter pursuant to G.S. §126-34.1(5), G.S. §126-36.2, G.S. §126-38, G.S. §126-7.1(c), G.S. §126-4(4) and (9) where the Petitioner's grievance and appeal seek relief from the Respondents' denial of promotional priority; where salary grade, front pay and back pay are elements of relief provided in 126-7.1(c) cases; and the relief offered by the Respondents and accepted by the Petitioner is contested. Dunn v. North Carolina Department of Human Resources, 124 N.C. App. 158, 160, 476 S.E.2d 383 (1996); Harrell v. North Carolina Department of Correction, 142 N.C. App. 212, 543 S.E.2d 535 (2001)(Unpublished opinion cited and accepted pursuant to Rule 30e of the North Carolina Rules of Appellate Procedure).

2. The Office of Administrative Hearings and the Office of State Personnel have jurisdiction over the parties and the subject matter and authority to review contested cases and remedies , award attorney's fees as a result of a settlement in the grievance procedure, either in the agency internal procedure or at the Personnel Commission level; pursuant to Chapters 126 and 150B of the North Carolina General Statutes and have the authority to review the issues presented, to issue a decision to the State Personnel Commission ("SPC") which will make a final decision.

3. The Rules of Civil Procedure as contained in G.S. 1A-A, The General Rules of Practice for Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules volume of the North Carolina General Statute shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides other wise. Rule .0101, Rules of the Office of Administrative Hearings, Hearing Procedures.

4. Attorney's fees may be awarded by the State Personnel Commission when the grievant is reinstated to the same or similar position from whether a demotion or a dismissal; the grievant is awarded back pay from either a demotion or dismissal, without regard to whether the grievant has been reinstated; the grievant is awarded back pay as the result of a successful grievance alleging a violation of G.S. 126-7.1, the grievant is the prevailing party in the final appeal of a Commission decision, or any combination of the above situations. Attorney's fees may be awarded when any of the above situations occur, within the agency internal grievance procedure, in an appeal to the State Personnel Commission or in an appeal of a Commission decision. State Personnel Commission Review of Contested Cases/Remedies, Section 7, p. 39.

5. Attorney's fees may be awarded as the result of settlement in the grievance procedure, whether in the agency internal procedure or at the Personnel Commission level. State Personnel Manual, Discipline/Appeals/Grievances, section 7, Page 39, 40.
6. Pursuant to §NCAC 01B.0421 the Office of State Personnel has the authority to award full or partial back pay in all cases in which back pay is a requested or possible remedy. 25 NCAC 01B.0421(a)-(b); State Personnel Manual, Section 7, p. 43 However, the State shall not be required to pay interest on any back pay award. State Personnel Manual, Section 7, p. 43.
7. Pursuant to Section 7 of the State Personnel Manual, State Personnel Commission Review of Contested Cases/Remedies, the State Personnel Commission has authority to award attorney's fees; has jurisdiction to enforce settlement agreements reached during the grievance process; and to enforce decisions issued during the grievance process.
8. At the time of his application for a promotion to Pharmacy Manager II, Petitioner was a career employee as defined by G.S. 126-1.1 and G.S. §126-7.1(c) at the J. Iverson Riddle Developmental Center. Petitioner is entitled to State employee preference in the hiring decision under G.S. 126-7.1.
9. The position of Pharmacy Manager II, which is the focus of this action, is superior to that of Clinical Pharmacist and would have been a promotion for Petitioner.
10. Petitioner has the burden of proof.
11. Petitioner is entitled to receive priority consideration in the hiring decision under G.S. §126-7.1(c); however, Petitioner must show by the greater weight of the evidence that the Petitioner's qualifications were substantially equal to the applicant who was selected.
12. Petitioner's Petition for a contested case hearing is timely filed and respondents Motion to Dismiss for failure to file appeal within five days of step II decision letter is DENIED where:
- a) Petitioner was not advised of his right to file his direct appeal to the State Personnel Commission within thirty (30) days of receipt of the decision or action which triggers the right of appeal, pursuant to G.S. §126-36.2 and G.S. §126-38;
 - b) Respondents failed to inform Petitioner of his full grievance rights at Step I, Step II, and Step III by eliminating all reference to Petitioner's right to direct appeal to the Office of State Personnel pursuant to G.S. §126-36.2 and therefore Petitioner's grievance rights are tolled until Petitioner is provided with full information. State Personnel Manual, Discipline/Appeals/Grievances, Section 7, p. 4.
 - c) Evidence of record demonstrates that Respondents refer to the decision letter as a settlement and as relief, denying that it is a settlement only because the grievance rights albeit incomplete are attached and there is no signature by the Petitioner;
 - d) Respondents admit that the Step II decision was an attempt to obtain closure thereby avoiding review as demonstrated in Respondents decision in Step III of the grievance and failure to provide full disclosure of grievance rights.
13. Petitioner's grievance rights are not waived when:
- a) The remedy which induced Petitioner to abandon grievance was altered or revised;
 - b) Because of the confusing and misleading nature of the decision letter and the Respondents' admission that the structure is unusual for a decision letter, the decision letter is deemed an offer of settlement which Petitioner accepted by not filing a Step III grievance;
14. Petitioner did not waive his right to further grieve the denial of promotional priority and or appropriate relief therefore where Petitioner reasonably believed, based on the decision letter and the representations of Respondents' agents, that he was provided a raise to salary grade 82, and that he would be eligible for future pay raises and range revisions.
15. Petitioner did not waive his grievance rights where he filed his contested case petition in the Office of Administrative Hearings exercising his right to review under 126-36.2 within 30 days from Respondents' last action as required by G.S. §126-38.

16. Petitioner did not waive his grievance rights where Respondents failed to adhere to the terms of the settlement and when it became apparent that the terms of the settlement were not entirely revealed to the Petitioner, Petitioner rightly filed a Step III action and a contested case petition in accordance with the North Carolina Court of Appeals decision; and

- a) Respondents' own expert witness testified that he was uncertain as to how an employee would proceed to enforce an agreement or obtain review of settlement relief; and
- b) Petitioner requires the protection of his right to priority consideration for promotion pursuant to the power of this court.

17. Respondents are collaterally estopped from barring a grievance or contested case on the basis of timeliness where Respondents' Step II decision letter purported to provide appropriate relief; Respondents' relief was less than that to which Petitioner is entitled and Respondents failed to adhere to the relief set out in their decision.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

1. That for all of the foregoing reasons, Respondents Motion to Dismiss is denied;
2. That the Respondents' decision to compensate Petitioner at Step II for a period of twelve months be left undisturbed and that the Petitioner be awarded the relief set forth in the December 11, 2003, decision letter.
3. That it is recommended that the Respondents pay the Petitioner back pay equal to the top of the salary range of a pay grade 85 for the period from December 15, 2003 through December 14, 2004, with interest at the legal rate; and pay the Petitioner's attorney's fees and costs.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute's section 150B-36(b).

NOTICE

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

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

This the 15th day of December, 2005.

Beryl E. Wade
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 1572

MICHAEL A. KELLY,)
 Petitioner)
))
v.))
))
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES,)
 Respondent.)

DECISION

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 1573

STEVEN WAYNE MOBLEY,)
 Petitioner)
))
v.))
))
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES,)
 Respondent.)

DECISION

This matter was heard before Beecher R. Gray, Administrative Law Judge, on November 14, 2005 in the Administrative Law Court located at Office of Administrative Hearings, Lee House, 422 N. Blount Street, in Raleigh, North Carolina, commencing at 9:00 a.m. Respondents submitted a draft proposed decision on December 5, 2005.

APPEARANCES

For Petitioners:

Reef C. Ivey, II, Esq.
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For Respondent:

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ISSUE

1. Whether Respondent meet its burden under N.C.G.S. §126-35 to show “just cause” to suspend Petitioners without pay for their personal conduct.
2. Whether Respondent’s procedures in these cases were erroneous, creating a denial of due process rights of Petitioners.

Based on the official documents in the file, sworn testimony of the witnesses and other competent, admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner Steven Wayne Mobley (“Mobley”) is employed by Respondent as Chief of the Shellfish Sanitation Section in the Division of Environmental Health, a Division within the North Carolina Department of Environment and Natural Resources (“NCDENR”). He continuously has been employed by the State of North Carolina in a position subject to the State Personnel Act for thirty-one (31) years.

2. Petitioner Michael A. Kelly (“Kelly”) is employed by Respondent as Deputy Director of the Division of Environmental Health, a Division within the NCDENR. He continuously has been employed by the State of North Carolina in a position subject to the State Personnel Act for more than fourteen (14) years.

3. Neither Petitioner Mobley nor Petitioner Kelly (collectively “Petitioners”) nor the specific Division they work in, Environmental Health, enforce laws or regulations regarding fin fish.

4. On the evening of June 14 and into the early hours of June 15, 2004, Petitioners were fishing in the White Oak River. Over the course of the evening Petitioner Mobley and Petitioner Kelly gilled 17 flounder and two Red Drum fish.

5. While they were preparing to head inland at approximately 12:30 am, a Division of Marine Fisheries (“DMF”) patrol boat pulled over Petitioners’ boat.

6. After talking with Petitioners about their catch that night, the DMF Officers asked to inspect their fishing coolers and Petitioners consented to the inspection.

7. The DMF Officers asked Petitioners if they knew the flounder size limit and Petitioners replied that they thought it was either 13 or 13 ½ inches.

8. In fact, the applicable flounder size regulation recently had changed from 13 inches to 14 inches. The DMF Officers informed Petitioners that the size limit for the recreational taking of flounder was 14 inches.

9. Upon inspecting Petitioners’ fishing coolers, the DMF officers determined that twelve of the 17 flounder were less than 14 inches. This was a violation of the applicable fishing laws and a class 1 (one) misdemeanor.

10. Additionally, the DMF officers determined that the two Red Drum fish had been gilled. Gilling is not a permitted technique for taking Red Drum; it is a violation of the applicable fishing laws and a class 1 (one) misdemeanor.

11. Petitioners each were issued citations for taking 6 undersize flounder and possessing one gilled Red Drum.

12. Petitioners were very cooperative and polite to the DMF Officers, and later were complimentary of the DMF officers for issuing the citations.

13. The following day, Petitioners immediately notified their supervisors about their fishing tickets.

14. Petitioners admitted that they were mistaken in their understanding of the applicable fishing laws and that they should have known the rules. Petitioners were careless in their violation of the fishing laws; their violations were not intentional. Petitioners were apologetic, both privately within NCDENR and in public; they promptly acknowledged responsibility for their actions and promptly paid their \$50.00 fines plus \$100.00 in court costs.

15. Only a few articles and commentaries were written about the incident in newspapers and a sporting publication. In general those articles demonstrated both the fact that two NCDENR employees violated fishing regulations, and the fact that NCDENR actually enforces those fishing regulations – even against its own employees. The impact of these articles and commentaries in the public, on balance, is neutral but certainly not negative. The articles show that the law is being enforced evenhandedly against anyone who violates the law, even unintentionally.

16. No lasting negative effects have arisen from the conduct giving rise to the fishing tickets.

17. Given the circumstances surrounding this case, a recurrence of the conduct giving rise to the fishing tickets is unlikely.

18. At no point were Petitioners, as a consequence of the conduct giving rise to their fishing tickets, impaired to any extent in performing their job duties with NCDENR’s Division of Environmental Health, or in interacting with their respective staffs,

or in interacting with other Divisions within NCDENR, nor was there ever a potential threat of any adverse impact on their future ability to perform for the agency. There was no adverse impact on Petitioners' colleagues or on the quality of Petitioners' work.

19. NCDENR conducted an investigation of the fishing incident to determine whether any disciplinary action was warranted.

20. During the investigation Petitioners were informed that Respondent was considering disciplinary action up to a week of leave without pay and that lesser action also was being considered because Petitioners allegedly had engaged in "unacceptable personal conduct" that further is described in the NCDENR Disciplinary Action Guidelines as "conduct unbecoming a state employee that is detrimental to state service."

21. In considering what disciplinary action to implement against Petitioners, Director Terry Pierce wanted to consider the option of implementing a two-day unpaid suspension, but was informed by the departmental Human Resources office that, because Petitioners were salaried employees exempt from the overtime compensation provisions of the FLSA, they only could be given either a written warning, a five-day suspension without pay, or a ten-day suspension without pay, under to 25 NCAC 01J.0611.

22. A predisiplinary conference for Petitioners was held by Director Terry Pierce on July 27, 2004. Each conference also was attended by Anne Waddell of the Human Resources Department.

23. Director Terry Pierce issued disciplinary action forms against each Petitioner on July 29, 2004, giving them disciplinary suspensions without pay for five days for "personal conduct." An attachment to the disciplinary action form provided that "[t]his disciplinary action is in response to unacceptable conduct, as defined in the NCDENR Disciplinary Guidelines. Specifically, this action is in reference to page 6 of the Procedures document which states, '...conduct unbecoming a state employee that is detrimental to state service'."

24. On appeal, a hearing for Petitioners was conducted on August 23, 2004 by William Ross, the Secretary of NCDENR, who acted as the hearing officer.

25. On September 7, 2004, Secretary William Ross affirmed Terry Pierce's disciplinary action against Petitioners, giving them each a disciplinary suspension of five days without pay.

26. On September 27, 2004 Petitioners timely filed petitions for contested case hearings with the Office of Administrative Hearings.

Based upon the Findings of Fact above the Court makes the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioners are career state employees subject to the provisions of N.C.G.S. Chapter 126, the State Personnel Act. N.C.G.S. § 126-1.1, -5(c)(1).
3. This contested case is based upon N.C.G.S. § 126-35 and has the single issue of whether Petitioners were disciplined with five-day disciplinary suspensions for "just cause" because of unacceptable personal conduct unbecoming a state employee that is detrimental to state service. 25 NCAC 1J.0604.
4. Where off-duty conduct that violates the law is the basis for Respondent's contested disciplinary action, to satisfy the "just cause" standard, Respondent has the burden of demonstrating that its disciplinary action against Petitioners is supported by the existence of a "rational nexus" between the type of personal conduct at issue – here, conduct giving rise to the fishing tickets – and the potential adverse impact on Petitioners' future ability to perform for Respondent. *Eury v. N.C. Employment Security Commission*, 115 N.C. App. 590, 446 S.E.2d 383 (1994).
5. A "rational nexus" analysis considers several factors, including: the degree to which, if any, the conduct may have adversely affected colleagues; the relationship between the type of work performed by the employee for the agency and the type of criminal conduct committed; the likelihood of recurrence of the questioned conduct; the degree to which the conduct may affect work performance, work quality, and the agency's goodwill and interests; and, the existence of mitigating factors. *Id. supra*.

6. A “rational nexus” does not exist in this matter between the off-duty criminal conduct at issue – conduct giving rise to the fishing tickets – and the potential adverse impact on Petitioners’ future ability to perform for Respondent. Petitioners’ conduct did not adversely affect their job duties nor did it adversely affect their colleagues. Moreover, Petitioners’ job duties did not include enforcing fishing regulations for fin fish, and there is, therefore, not a close relationship between the conduct at issue and the type of work performed by Petitioners. Further, the likelihood of recurrence of the conduct at issue is extremely low and the conduct did not affect Petitioners’ work performance or work quality. Additionally, the agency’s goodwill was not impaired by the articles and commentaries that were circulated. Mitigating factors also exist in that Petitioners were careless rather than intentional in their violation of the fishing laws; they promptly acknowledged both publicly and privately their responsibility, apologized publicly and privately for their actions; and were polite and respectful to the DMF Officers who issued the citations.

7. Accordingly, Petitioners have not, by virtue of receiving fishing tickets, engaged in unacceptable personal conduct that is detrimental to state service and, therefore, “just cause” did not exist to support their five-day disciplinary suspensions without pay.

8. Further, as a separate and independent basis for overruling the disciplinary actions at issue in this case, the Court finds that 25 NCAC 01J.0611 is void as applied on the particular facts in this case because it did not permit the exercise of discretion in determining appropriate disciplinary action. While Director Terry Pierce wished to consider implementing a disciplinary suspension of less than five days in light of the particular circumstances in this case, he was informed that 25 NCAC 01J.0611 stripped Respondent of the discretion to implement such disciplinary action and that disciplinary suspensions in this case only could be issued in five-day blocks. Only a written warning, a five-day suspension, or a ten-day suspension could be issued. Accordingly, on these specific facts, the disciplinary actions in this matter were arbitrary and capricious and not the product of reasoned decision-making.

9. As “prevailing parties” in this contested case, and in light of the foregoing findings of facts and conclusions of law, it is this Court’s discretionary determination that Petitioners are entitled to reasonable attorney’s fees. Respondent acted without substantial justification in this matter and there are no special circumstances that would make the award of attorney’s fees unjust.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court makes the following:

DECISION

Respondent’s disciplinary action against Petitioners for unacceptable personal conduct unbecoming a state employee that is detrimental to state service is not supported by the evidence, “just cause” does not exist to support such disciplinary action, and Respondent’s disciplinary action is overruled. Respondent is ordered to make restitution to Petitioners for the five days of salary withheld from Petitioners during their respective suspensions, and further, to remove any and all references to the five-day disciplinary suspensions from Petitioners’ personnel files. Further, as prevailing parties in this contested case, Petitioners shall receive reasonable attorney’s fees and shall have five days from the date of this Decision to submit materials and an affidavit further supporting and updating their pending motion for attorney’s fees in this matter.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B-36(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. G.S. 150B-36(a).

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

This the 28th day of December 2005.

Beecher R. Gray
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 1639

JAMES O. MITCHELL,)
Petitioner,)
v.)
NORTH CAROLINA DEPARTMENT)
OF TRANSPORTATION,)
Respondent.)

DECISION

THIS MATTER came on for hearing before the undersigned Augustus B. Elkins II, Administrative Law Judge (ALJ), on June 14-15, 2005 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Alan McSurely
Attorney and Counselor at Law
Post Office Box 1290
Chapel Hill, North Carolina 27514

For Respondent: Alexandra M. Hightower
Assistant Attorney General
North Carolina Department of Justice
1505 Mail Service Center
Raleigh, North Carolina 27699-1505

EXHIBITS

Admitted for Petitioner:
Exhibit 1 -News & Observer Article dated September 3, 2004
Exhibit 2-Employee Skills Development Sheet for Waymon Chavis

Admitted for Respondent:
Exhibit 1-Employment History for James Oscar Mitchell
Exhibit 2-Skill Block Profile for James Mitchell

Official Notice is taken of the Verdict Form in Case No. 5:03-CV-137-BR, US District Court, Eastern District of North Carolina, Western Division, filed May 18, 2005.

WITNESSES

For Petitioner: James O. Mitchell, Waymon D. Chavis and Alvin Williams

For Respondent: Dan Domico and Jerry Bagwell

ISSUES

Did Respondent discriminate against Petitioner because of his race by not selecting him for training as an on the job (OJT) instructor?

Did Respondent retaliate against Petitioner for filing prior complaints of race discrimination by not selecting him for training as an OJT instructor?

POST HEARING MATTERS

After submission of each of the parties' proposed findings of fact, Respondent filed its objection to Petitioner's proposal and moved that such be stricken. By order dated September 15, 2005, the Undersigned directed Respondent to provide a list of Petitioner's errors and upon receipt by Petitioner; the Undersigned allowed Petitioner 21 days in which to respond. Respondent filed their more detailed objections on October 12, 2005, citing some fourteen of Petitioner's proposed findings of fact as in error and unsupported by any testimony or evidence. As of the expiration of the 21 days (approximately November 7, 2005), Petitioner did not file any response. The Undersigned is refraining from striking the whole of Petitioner's proposal, but is now made aware of Respondent's position and is alerted to those specific objections by Respondent.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner, James Mitchell, was employed at Respondent's Beryl Road Equipment Depot in Raleigh, North Carolina, as a Transportation Equipment Technician (TET). He objected to the hanging of a rope that had been tied like a noose in his shop in February 2002. He and others subsequently filed a charge of discrimination with the Office of Administrative Hearings (OAH), Civil Rights Division, who found that there was a racially hostile work environment and issued a right to sue letter. In December 2002, Petitioner and six other African-American employees at DOT's Equipment Depot sued Respondent in state court alleging that the employees were subjected to a racially hostile work environment. The suit was removed to federal court. In accordance with the Verdict Form in the US District Court, Eastern District of NC case of *James Isaac, William Stewart, Alvin Williams, Gerald Agnew, Waymond Chavis, James Mitchell, and Lydell Landrum, v. NC Department of Transportation*, the jury of 12 found that each Plaintiff was subjected to a hostile work environment that resulted from racial harassment; but that Defendant DOT was not liable to any of the Plaintiffs for the creation of the racially hostile work environment. No compensatory money damages were awarded. Petitioner stated they had appealed the verdict. T. p. 231.

2. The seven employees also filed a complaint with the Federal Highway Administration, who sent a team to North Carolina to investigate. T. pp. 178-179, 181. In September of 2004, these employees delivered a letter to the Governor's Office with a copy of the Federal Highway report which had been issued in June 2004. T. p. 181. A subsequent article in the News & Observer discussing the report did not mention the employees delivering a copy of the report to the Governor's Office. T. p. 206. Pet. Ex. 1. Petitioner did not tell anyone in management at the Depot that he had delivered the report. A news conference was held in front of the Governor's Office on or about September 2, 2004, and the DOT Personnel Director, Herb Henderson was present. Petitioner recalled Mr. Henderson being interviewed in front of T.V. cameras. T. pp. 181-182.

3. On September 23, 2004, Petitioner met with his immediate supervisor, Jerry Bagwell, to review his Employee Skills Development Sheet. Res. Ex. 2, T. p. 207. Petitioner had attended training earlier in September, which discussed the skill block development plan which the Department of Transportation (DOT) had instituted. T. pp. 207-208. The skill block development plan was part of a skill based pay system developed by DOT in conjunction with the Office of State Personnel (OSP). This was part of a larger program developed by OSP to be implemented in state government in general. T. pp. 301-302.

4. Dan Domico is the classification and compensation manager for Respondent. T. p. 300. He formerly worked for OSP in position management. T. p. 300. In his position as personnel supervisor for Respondent, he began coordinating with OSP in 1996 on a pilot broad banding classification program for employees. T. p. 301. Respondent instituted a Skill Based Pay Program within the broad banding program, approved by OSP, for which Dan Domico is the project leader. The steering committee for the Skill Based Pay Program identified three levels of skill: Contributing, Journey and Advanced, within 46 mechanical systems using an international standard called vehicle maintenance reporting standards (VMRS). The base pay rate for each banded class was determined by the committee. Moving into each level within a mechanical system by a Transportation Equipment Technician (TET) was to result in additional pay being added to the base salary of the employee. T. pp. 305-306.

5. Each DOT equipment shop statewide enters work records into its computers daily. In order to determine what skills each TET had at the start of the Skill Based Pay Program, all of the work that each TET performed was analyzed by computer. The profile established by that database determined which skills an individual needed to be compensated for (the value of all the skill

blocks added to the base rate basically revealed the market rate). T. pp. 306, 363-364. TETs were assessed for skill levels in 2003, and each employee's pay was adjusted accordingly. Because of a 10% annual cap on raises, some employees received part of their salary adjustment in March 2003 and the remainder of the raise in March 2004.

6. Although it was expected that a significant number of employees would receive a raise because state employees in general were paid below market rate, not all TETs received raises. Many of the TETs were underpaid relative to the market, and this was true regardless of race. T. p. 348. Petitioner received a 10% raise in March 2003 and a 6.97% raise in March 2004. T. pp. 307-310.

7. Within the Skill Based Pay Program, On the Job Training (OJT) was developed to allow employees (OJT instructors) to train their fellow employees to develop the skills needed by an individual shop. The OJT concept was presented to the steering committee in October of 2004. T. p. 311-312. Under the OJT training program, a skilled employee would be selected to attend classes to learn the concepts necessary to train others. T. p. 312. If that employee completed the class work and demonstrated his or her training capabilities, he or she would then be certified as a trainer. After a trainer had trained people in various systems, they would be given a point value for the corresponding level. Once they accumulated five points or a set (as well as continuing to perform their own work), the working group recommended to the steering committee at the October 2004 meeting, that the trainer have \$253.00 added to his or her base pay. There were five sets, so the most anyone would ever be able to earn would be \$253.00 times five which would be roughly 5% of the TETs base pay of \$25,279, exclusive of other skill blocks. There was no increase in compensation for being chosen for OJT training, and no increase in compensation for being certified as an OJT trainer. T. pp. 314-316. The steering committee did not represent to employees in the field that being selected for an OJT instructor would result in a five percent pay increase. T. p. 319.

8. To be selected as an OJT instructor there had to be a need for the level of on the job training within a unit, and the person to be selected had to be certified at a level high enough to train others on the system. T. p. 314. Possible selection also includes the employee showing a willingness in being an OJT trainer. T. pp 357-358. An OJT trainer could only train employees who had a lower skill level in a particular system unless the trainee was himself at the advanced level, or unless journey level was the highest level offered in a system. T. p. 402.

9. Each division determined, based upon its needs, how many OJT instructors it needed and would submit its determination of needs through a process to make sure the determination was correct. T. p. 321. Subject to the needs of the shop, there was no upper limit on the number of trainers which could be identified. T. 359-360.

10. After an employee was identified as a potential trainer, his name was submitted to the regional trainer, who conducted the training course and tested the employee further. The supervisor, in this case Jerry Bagwell, had no further involvement in the process. T. pp. 371, 376.

11. Longevity was not a factor in the OJT instructor program because the State already has a program in place recognizing longevity. T. p. 320.

12. Jerry Bagwell is the Central Fleet Maintenance Engineer in the Equipment Depot. In that capacity he managed the Skill Based Pay Program for Petitioner's work site, the Equipment Depot. Mr. Bagwell used the profiles determined by OSP to determine which TETs needed skill blocks in the various systems in which the Depot worked, based upon the shop's needs. In order to do this, he pulled information from the computer which indicated what systems each TET worked on and the percentage of time each spent on a particular system. T. pp. 364-365, 372. He ran a comparison of time working on a particular area versus the skill blocks individuals did not have for every TET in the depot. If a TET was spending more than 3.5% of his time in a particular area in which he did not already have a skill block in his profile, then he was asked to pursue that skill block. T. pp. 365-366.

13. Petitioner's profile indicated that he had credit for 17 skill blocks. Of the remaining skill blocks, four were at the 3.5% level that had been determined to justify further training in that area. Tires was one of the VMRS systems in which Petitioner participated more than 3.5% of the time.

14. In September 2004, Jerry Bagwell and Depot Superintendent Randy Hoyle met with each TET to review his profile and to discuss the skill blocks that Mr. Bagwell wanted each TET to pursue during the start-up period. T. 366, 375. Petitioner met with Bagwell and Hoyle on September 23, 2004, and reviewed the readout of his skill block profile. T. pp. 207, 210. Petitioner remembered reviewing his skill block profile. Petitioner's witnesses, Williams and Chavis, denied seeing their skills block profile sheets. Petitioner signed his skills development sheet which indicated that he was to pursue a skill block in tires. T. p. 209. In the space for comments, Petitioner did not record any comment or complaint. T. p. 211, 367, 373. He testified that he was satisfied with Mr. Bagwell's request that he pursue a tire skill block, knowing it meant more money. T. p. 374.

15. Mr. Bagwell and Mr. Hoyle met with Petitioner again a day or two after the initial meeting. At that time Petitioner indicated that he did not want to pursue any further skill blocks and did not wish to participate in the Skill Based Pay Program. Petitioner asked why he wasn't chosen for OJT training and did not receive a direct answer. Mr. Bagwell did not recall Petitioner questioning why he had not been selected for OJT training. T. p. 378. It was Petitioner's recollection that he said "you profiled me as being one of the highest persons in the shop at the time." T. p. 212-13. Mitchell recalled asking, "Since you told me I was profiled one of the highest, why didn't you select me being a trainer?" And he recalled they said, "In the next two or three years, a little further down the road." T. p. 213. Mr. Bagwell recalled asking Mr. Mitchell at the September 23 meeting whether he would be interested in being an OJT instructor in the future, and Petitioner indicated he would. Petitioner testified that he was angry, but didn't indicate that he refused to participate in the skills program because he was not chosen for OJT training. T. p. 470. Petitioner acknowledged that Hoyle and Bagwell asked him to reconsider participating in the program. T. pp. 215-216.

16. Petitioner heard from three white co-workers that they would be taking OJT training. T. p. 186-187. These men had not been with DOT as long as Petitioner. Petitioner was not sure, but believed that OJT trainers were to get a five or ten percent pay raise, based upon what a fellow TET said. He did not ask Mr. Hoyle or Mr. Bagwell if that was true. T. pp. 146, 222. Mr. Bagwell told everyone that if they became OJT trainers they would be compensated. Mr. Bagwell did not know how much or even when any money would come in. T. p. 395. Personnel did not represent to anyone that an OJT trainer would receive a five percent or ten percent pay increase, and Mr. Bagwell did not make such a representation to the TETs. T. pp. 319, 378.

17. Petitioner's witness Waymon Chavis, a TET, was unaware of any money to be associated with the Skill Based Pay Program. T. p. 116. Mr. Chavis was also not sure what additional pay an OJT trainer was to receive. T. p. 146. He acknowledged that he did not understand the difference between OJT trainers and skill block training. He believed it was simply a way to allocate money to people they (management) wished to give money to. T. p. 121. Mr. Chavis was of the opinion that his supervisor, Joe Lee, was unable to train him in the skill blocks he was assigned to pursue. T. p. 117. He did not want anyone looking over his shoulder while he was trying to work. T. p. 120. Mr. Chavis testified that OJT training was not discussed with him. T. p. 453. He testified that he signed his skill block training sheet showing that he was to obtain two skill blocks in alternator/generator at the advanced level and in lighting at the advanced level. He provided no comment on the Employee Skills Development Sheet. T. pp. 454-456. Pet. Ex. 2.

18. Alvin Williams is also a TET at the Depot. T. p. 57. Mr. Williams was a plaintiff in the lawsuit and participated in the Federal Highway complaint as well. Mr. Williams remembered Bagwell stating that he (Williams) "might could be a trainer down the road," and did not remember anything about any money. T. p. 450. He testified that he remembered that acquiring skill blocks resulted in more money. Mr. Williams rejected skill block training because he "felt like, seemed like that I am somebody, and I felt like that I have been discriminated against because it looked like a man been there this long a period of time, look like that they would give them first priority or something." T. p. 67. Although Mr. Williams testified that he wanted to be a skill block trainer, he told Mr. Hoyle and Mr. Bagwell he did not want to participate in skill block training because people who had been with DOT longer were not given first priority. T. p. 68. He did not tell them he wanted to be in OJT training. T. p. 92. His supervisor asked him to take the test for a skill block but he declined, saying getting more money was not the point. T. p. 86. He testified he opted out of the skill block training and additional money because it involved testing, but later stated that skill block training would not result in more money. T. p. 98, 100. He also stated that everyone in the depot received a 10% raise, but he didn't have any personal knowledge of what raises other people got. T. p. 79. He testified that he got a 10% raise in March 2003 and might have gotten an additional raise in 2004.

19. Petitioner filed a Petition in the Office of Administrative Hearings in October of 2004 alleging that promotion and training had been denied him.

20. Mr. Bagwell was aware of the lawsuit that Petitioner and others had filed against Respondent DOT, as well as the Federal Highway Administration complaint. T. pp. 376-377. Bagwell's decision as to what training Petitioner was to pursue was based on the results of the computer printout. T. p. 377. Mr. Bagwell agreed that the lawsuit brought by the Petitioner and other employees created tension for him. Petitioner had stated that he saw Raymond Powell hang a noose. Raymond Powell is Bagwell's brother-in-law. T. p. 176. Mr. Bagwell did not believe that his brother-in-law ever hung a noose in the equipment shop. T. pp. 388-391.

21. Bagwell attempted to "let the computer make all the decisions" for him. T. p. 434. The computer program used by Mr. Bagwell to determine which skill blocks each TET should pursue is in use in the other highway divisions as well. T. p. 378. Where two employees had the same skill level, Bagwell looked to the computer printouts to determine who spent more time working in the system. T. p. 369. All employees selected for OJT were either already at the advanced level, were training at the advanced level, or were at journey level and the journey level was the highest level possible for that skill. T. p. 430. TETs pursuing advanced level blocks which would qualify to them for OJT training at the time of the hearing included Petitioner's witness Waymon Chavis. T. p. 429.

22. Several new employees, including Tim Yauch, John Washington and Bobby Ezzell (white males Petitioner alleged were in OJT training) approached Jerry Bagwell about receiving OJT training. He told them that they would be considered for training in the future, based upon shop needs. T. pp. 419, 420, 423. Washington was told his skill blocks were not high enough to qualify currently. T. p. 419-420. Washington and Ezzell are no longer with DOT. It was Mr. Bagwell's recollection that Tim Yauch might be in OJT training currently. Bagwell testified that Charles Harp, a white man, was not chosen for OJT training. Upon questioning by the Undersigned, Mr. Bagwell also identified Mike Lyman and Gibbs as OJT trainees. No evidence was presented as to the race of these two employees. T. pp. 421-422, 426, 429, 433. Petitioner acknowledged that Terry Baldwin, a black TET, told him that he (Baldwin) was training to be an OJT trainer. Mr. Chavis confirmed that Terry Baldwin was taking OJT training, from his observation of the training manuals Mr. Baldwin had. T. pp. 59, 83, 218-219.

23. Although Petitioner's skill blocks were not high enough currently to take OJT training, Mr. Bagwell believed Petitioner had the communication skills to be a trainer. T. pp. 420, 424. Petitioner believed that based upon his years in the shop, his high skill profile and the fact that he did other projects around the shop; he should have been selected for OJT training. T. p. 216. Petitioner was of the opinion that he had more training than all three of the white men he believed were in OJT training and that the new people coming in did not have the experience he had. Petitioner acknowledged that he didn't have personal knowledge, other than what dealerships they came from, of the type of work the new people had done. T. pp. 122, 218.

24. Petitioner testified that a team leader would be in a position, if he handled his project well, to be in line to be a supervisor. Petitioner testified that being a team leader and being an OJT trainer were not the same thing, and team leaders did not get more money. T. pp. 224-225. A team leader, in Petitioner's witness, Alvin Williams' opinion, was someone who had passed two or three skill blocks. While Mr. Williams believed that three white men who had only been with DOT a year were made team leaders and received raises, he acknowledged that he had no personal knowledge of whether they received raises. T. pp. 65, 80. He also acknowledged that OJT training and being a team leader were not the same thing. T. p. 81

25. Petitioner, Mr. Williams, and Mr. Chavis all believed that Mr. Hoyle and Mr. Bagwell could not be trusted. Although Petitioner believed Mr. Hoyle had to have seen the noose hung in his shop in his lawsuit, he was unable to recall any information in an SBI report to that effect. T. p. 473. Mr. Williams testified that Mr. Hoyle was at work the day that the noose was cut down and that he "definitely saw the rope that day." T. p. 199. Mr. Bagwell took pictures of some knots that were tied in Randy's (Hoyle) office. T. p. 383. Bagwell believed the knots represented different knots that Raymond Powell "used in pulling rope, pulling hoses and things like that." T. p. 384

26. Mr. Bagwell is married to Raymond Powell's sister. Mr. Bagwell and his wife try not to talk about work at all. They try not to talk about the discrimination allegations "no more than what we could help it." T. p. 385. Mr. Bagwell does not believe that Mr. Powell hung any noose. Mr. Bagwell attended meetings about the lawsuit that Mitchell and six of his co-workers filed and were told that management was to continue managing and to try to put "things like that back to the back shelf somewhere." T. p. 391. It was probably mentioned in those meetings that somebody snuck in there on weekends and hung the noose and took pictures of it. T. p. 391-392. Bagwell heard a rumor that Mitchell had worked at the Department of Correction and that guys over there had sued and won some money.

27. Mr. Williams believed that Mr. Hoyle should have asked him what could be done to resolve the lawsuit the plaintiffs brought alleging the hanging of a noose. T. p. 75. Mr. Williams noticed that after the lawsuit was filed, other people in the shop avoided him, and called him a troublemaker. T. p. 76. When asked about Mr. Bagwell's attitude toward African Americans, Mr. Williams said that Mr. Bagwell kept a low profile.

28. Mr. Chavis was written up for not showing up to work when he attended a press conference about the lawsuit by Jerry Bagwell. T. p. 112. Mr. Chavis would not sign the warning because, he told Mr. Bagwell that he (Chavis) had told his supervisor, Joe Lee, that he was not going to be at work. Mr. Bagwell was Mr. Lee's supervisor. Mr. Chavis testified that Randy Hoyle had never done anything that he (Chavis) believed displayed a racially discriminatory attitude or action. Mr. Chavis believed that, even though he himself had not seen the noose, Mr. Hoyle must have seen it and could not be trusted. T. pp. 123-124. Mr. Chavis talked to the men in his shop and believed every man in the shop other than himself and a recent hire had been chosen as an OJT trainer. Four men in Mr. Chavis' shop were chosen for OJT training, including Terry Baldwin, who is a black male. Two of these men had been with DOT somewhere between 10 and 16 years, according to Mr. Chavis. T. pp. 143, 144, 148.

29. Being selected to participate in OJT training did not affect an employee's performance evaluation because there is no specific key responsibility for OJT training. T. pp. 320, 341-342, 344. Selection for OJT training was not a component of the performance management system and did not determine an employee's ability to be promoted, although it was one of many considerations to be looked at when assessing who was most qualified for a position. T. pp. 320, 345, 347.

30. Because the Office of State Personnel later changed all state employees to a different program of pay called career

banding, no one in DOT was ever compensated, either for additional skill blocks or for OJT work. T. p. 308. Under the program instituted by OSP, the competencies to be trained for may change, and therefore the OJT program may change. T. p. 324. At the time of this hearing, there were no qualified OJT trainers at the depot because the program had gotten off to a slow start for various reasons. T. V. II p. 425.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes. The parties received proper notice of the hearing in the matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. N.C.G.S. § 126-16 requires all State departments and agencies to provide for equal opportunity for employment without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition. N.C.G.S. § 126-36 states: Any State employee or former State Employee who has reason to believe that employment, promotion, training, or transfer was denied the employee or that demotion, layoff, transfer, or termination of employment was forced upon the employee in retaliation for opposition to alleged discrimination or because of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapped [handicapping] condition as defined by G.S. 168A-3 . . . shall have the right to appeal directly to the State Personnel Commission. In accordance with N.C. G. S. § 126-17, no State department or agency shall retaliate against an employee for protesting alleged violations of N.C. Gen. Stat. §126-16.

3. The responsible party for the burden of proof must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioner has the burden of proof by a preponderance of the evidence as to his claims against Respondent regarding discrimination and retaliation based on discrimination.

4. North Carolina courts look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases. *North Carolina Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). It is appropriate for the court to consult federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases. *North Carolina Department of Correction v. Hodge*, 99 N.C.App. 602, 610, 394 S.E. 2d 285, 288 (1990). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401.

5. Promotion is defined as "A change in status upward, documented according to customary professional procedure and approved by the State Personnel Director, resulting from assignment to a position assigned a higher salary grade. When it is practical and feasible, a vacancy shall be filled from among eligible employees; a vacancy must be filled by an applying employee if required by 25 NCAC, Subchapter 1H, Recruitment and Selection, Section .0600 General Provisions, Rule .0625, Promotion Priority Consideration for Current Employees. Selection shall be based upon demonstrated capacity, quality and length of service." 25 NCAC 01D. 0301 (2005)

6. In analyzing cases of discrimination under the State Personnel Act, North Carolina courts have historically adopted the burden shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). The ultimate burden of persuasion remains with the Petitioner. *Enoch v. Alamance County Department of Social Services*, 164 N.C. App. 233, 241-242, 595 S.E. 2d 744, 751-752 (2004).

7. Employment discrimination law recognizes that discrimination in employment cases fall within one of two categories: 'pretext' cases and 'mixed-motives' cases. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Pretext cases represent the typical disparate treatment action under *McDonnell Douglas*. In pretext cases, the plaintiff seeks to prove that the defendant's proffered non-racial reason for an adverse employment action was, in reality, a pretext for a racially motivated decision. Once the parties satisfy their obligations the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven that the defendant discriminated against him because of his race. By contrast, if plaintiff can present sufficient evidence of discrimination, they qualify for the standards of liability applicable in mixed-motive cases. The Civil Rights Act of 1991 modified the *Price Waterhouse* scheme. Under the Act, liability attaches whenever race "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C § 2000e-2(m).

8. Many Courts, including the Fourth Circuit held that a mixed motive analysis did not apply unless the Petitioner had produced direct evidence of discrimination. *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995). The U.S. Supreme Court addressed this issue in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003), holding that an employee is entitled to a mixed motive analysis without regard to whether the evidence presented is direct or circumstantial and thus overruled *Fuller*. The Fourth Circuit now appears to be analyzing Title VII actions by applying both a pretext analysis (*McDonnell Douglas*) and a mixed motive analysis (*Desert Palace*). See *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d. 277 (4th Cir. 2004) Under the pretext analysis, an employee may establish a claim by presenting sufficient evidence that the protected trait “actually motivated the employer’s decision.” *Murray v. United Food & Commercial Worker’s Union*, 100 Fed. Appex. 165, 2004 WL 1254979 (4th Cir. 2004). Under the mixed motive analysis, an unlawful employment practice is established when the complaining party establishes that race, color, national origin, or sex was a motivating factor for any employment practice, even though other factors also motivated the practice. Under the mixed motive analysis there are, however, limited remedies available if the Petitioner prevails.

9. As quoted from *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d. 277 (4th Cir. 2004): “Regardless of the type of evidence offered by a plaintiff as support for her (his in this case) discrimination claim (direct, circumstantial, or evidence of pretext), or whether (s)he proceeds under a mixed-motive or single-motive theory, “[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.” [Reeves, 530 U.S. at 153, 120 S.Ct. 2097 \(2000\)](#); see [Burdine, 450 U.S. at 256, 101 S.Ct. 1089](#). To demonstrate such an intent to discriminate on the part of the employer, an individual alleging disparate treatment based upon a protected trait must produce sufficient evidence upon which one could find that “the protected trait · actually motivated the employer’s decision.” [Reeves, 530 U.S. at 141, 120 S.Ct. 2097](#) (internal quotation marks omitted). The protected trait “must have actually played a role in the employer’s decisionmaking process and had a determinative influence on the outcome.” *Id.* (internal quotation marks and alterations omitted); cf. [Price Waterhouse, 490 U.S. at 277, 109 S.Ct. 1775](#)

10. In order to establish a prima facie case of race discrimination regarding promotion, the Petitioner must establish that:

- (1) he is a member of a minority group;
- (2) was qualified and applied for a promotion;
- (3) was rejected for the promotion; and
- (4) those who were promoted had similar or lesser qualifications, or other evidence from which one can infer that the plaintiff was denied promotion for a discriminatory reason (or under circumstances giving rise to an inference of unlawful discrimination)

Pafford v. Herman, 148 F. 3d 658, 669 (7th Cir. 1998), *Carter v. Ball*, 33 F. 3d 450, 458 (4th Cir. 1994)

11. Regarding a failure to train, Petitioner must show that he was a member of a protected class that the Respondent provided training to its employees, the Petitioner was eligible for the training; and the Petitioner was not provided training under circumstances giving rise to an inference of discrimination. *Thompson v. Potomac Electric Power Co.*, 312 F. 3d 645, 649-650 (2002). Specifically, he must prove that he was denied training given to other similarly situated employees who were not members of the protected group in order to raise an inference of discrimination. *Pafford*, 148 F. 3d at 668.

12. If the Petitioner meets his burden of establishing a prima facie case of discrimination, the Respondent then has the burden of production to clearly explain the nondiscriminatory reasons for rejection. The explanation must be legally sufficient to support a judgment for the employer. The employer need only raise a genuine issue of fact to rebut the presumption of discrimination. *Enoch*, 164 N.C. App. at 242. If the employer raises the issue of fact then the employee must show that the employer’s reason is a pretext for discrimination. *Id* at 244.

13. To prove pretext in a failure to promote case, a petitioner must show that he was more qualified for the position than the person selected, or, that as between his race and the proffered explanation, his race was more likely the reason for Respondent’s failure to promote him. *Cutshall v. Potter*, 347 F. Supp 2d 228, 233 (W.D.N.C. 2004). “In order to prove that a reason for an employer’s action is a pretext for discrimination an employee must prove ‘both that the reason was false and that discrimination was the real reason.’” *North Carolina Department of Crime Control and Public Safety v. Greene*, _ N.C.App._, _ S.E. 2d _, (August 7, 2005). “In other words, ‘it is not enough... to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.’” *Enoch*, 164 N.C. App.at 242, 595 S.E. 2d 751.(internal citations omitted) Further, where the petitioner insists that the explanation is obviously pretextual because the petitioner believes he was well qualified, the argument is not persuasive since petitioner’s own opinion of his qualifications is irrelevant. *Bius v. Thompson*, 2004 U.S. Dist. WL 1348221 (M.D.N.C. June 14, 2004). *Smith v. Flax*, 618 F.3d 1062, 1067 (4th Cir. 1980). The employer’s evaluation of a petitioner’s qualifications is relevant. *Bius v. Thompson*, 2004 U.S. Dist. WL 1348221 (M.D.N.C. June 14, 2004).

14. Petitioner has not established that the opportunity to train for OJT trainer, or in fact the OJT trainer position itself, was a promotion as that is defined by the North Carolina Administrative Code. Petitioner has offered insufficient evidence that it was a change in status upward, documented according to customary professional procedure and approved by the State Personnel Director, resulting from assignment to a position assigned a higher salary grade. The evidence is therefore analyzed to determine whether Respondent is liable for a failure in offering OJT instructor training to Petitioner. Petitioner has established that he is a member of a protected class and that training was offered by Respondent.

15. An employee who alleges discrimination must show that he suffered an adverse employment action. "A typical adverse employment action includes discharge, demotion, decrease in compensation, loss of job title or supervisory responsibility, reduced opportunities for promotion or other conduct that had a significant detrimental effect." *Boone v. Goldin*, 178 F. 3d 253, 255 (4th Cir. 1999).

16. Petitioner has failed in his burden of proof to show he suffered an adverse employment action. Petitioner was offered training as part of the Skill Based Pay Program in tires which would have resulted in a \$253 increase in pay as soon as he had finished training. He was not offered training in a different component of the Skill Based Pay Program as an OJT trainer, which, had it been completed, offered no increase in pay unless and until Petitioner also passed a test administered by the regional trainer, and then trained other TETs. Had Petitioner not subsequently declined to participate in the program, he would have suffered no adverse employment action by training to receive a skill block in tires. Further, at some point, the evidence indicates, Petitioner would have been eligible to participate as an OJT instructor. Moreover, because the Office of State Personnel later changed all state employees to a different program of pay called career banding, no one in DOT was ever compensated, either for additional skill blocks or for OJT work. Under the program instituted by OSP, the competencies to be trained for may change, and therefore the OJT program may change.

17. Regarding increased opportunity for promotion, while the evidence tended to show that being an OJT trainer would have been a favorable factor if Petitioner had subsequently applied for a promotion, it also showed that being an OJT trainer was only one of a number of factors that a supervisor would have considered in filling a position. Moreover, because annual performance evaluations do not include a key responsibility measuring whether one is an OJT trainer, receipt of that designation would have had no effect on performance reviews. The evidence shows that being a lead on projects, which Petitioner had been, would just as likely if not more so be a factor in promotion.

18. Regarding statements or actions by Respondent which may give rise to racially motivated decisions, none of the witnesses attributed to management any behavior which was based upon witnesses' race. Mr. Chavis specifically admitted he could not recall anything the superintendent Randy Hoyle had ever done which would show a discriminatory attitude on his part. Although Jerry Bagwell was characterized as "keeping a low profile", this in itself is not discriminatory behavior.

19. Petitioner presented insufficient evidence that other similarly situated employees were chosen for OJT training based upon their race. There is conflicting evidence about which persons were offered OJT training. While Petitioner and his witnesses believed that three white men, Washington, Yauch and Ezzell, were either offered team leader positions or OJT training, the evidence tended to show that two of the men (Yauch and Ezzell) were told, as Petitioner was, that they would be considered in the future. Washington was told that he did not have the skill blocks at that time to take OJT training. Two of the men are no longer employed by Respondent. The evidence shows that Terry Baldwin, a black employee, was being trained for an OJT position. Of the three other employees mentioned, Charles Harp, a white man, was not offered OJT training. There is no evidence of the race of two other men who were made trainees.

20. Based on the evidence presented and under the current case law regarding both a pretext analysis and mixed motive analysis, Petitioner failed in his burden of proof regarding discrimination based on race.

21. Even if Petitioner had established the *prima facie* elements of race discrimination, Respondent's reason for choosing other TETs rather than Petitioner for OJT training is a legitimate non-discriminatory reason. While Petitioner had a number of skill blocks in his profile, other TETs had higher level skill blocks than Petitioner. Petitioner did not bring forth evidence to challenge the accuracy of his skill block profile or present evidence which would indicate that he had the highest skill levels in the shop in any one particular VMRS system. He does not challenge the validity of the system used by Respondent to produce these profiles. Although Petitioner and his witnesses articulated their belief that, having been in the shop longer, they had a right to be chosen first for OJT training, Petitioner does not contest the validity of the assessment of the needs of the shop or the computerized assessment of his skills.

22. Petitioner's evidence taken in whole, under current case law analysis, do not overcome Respondent's non-discriminatory reasons for its OJT selection; and Petitioner has failed to carry his legally required burden of proof under a racial based discrimination analysis discomfiting Respondent's proffered reasons for its employment decision.

23. A *prima facie* case of retaliation is established when an employee shows: (1) the employee engaged in protected activity; (2) he suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543 (4th Cir. 2003); *King v. Rumsfeld*, 328 F.3d 145, 150-51 (4th Cir. 2003). The element of a causal link requires Petitioner to provide sufficient evidence "to raise the inference that [the] protected activity was the likely reason for the adverse action." *Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990).

24. After a *prima facie* showing is made, a presumption arises that the State unlawfully discriminated or retaliated against the employee. To rebut the presumption of discrimination or retaliation, the employer must produce a legitimate, non-discriminatory reason for its actions. Thereafter, the employee may prevail by showing that the proffered reason was not the true reason for the employment decision, but is merely a pretext for discrimination or retaliation. *Enoch v. Alamance County Dep't of Soc. Servs.*, 164 N.C. App. 233, 595 S.E.2d 744, (2004); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). "Mere knowledge on the part of an employer that an employee ... has [engaged in protected activity] is not sufficient evidence of retaliation to counter substantial evidence of legitimate reasons for adverse personnel action against that employee." *Carter*, 33 F. 3d at 459. (internal citation omitted)

25. Oppositional activities are not protected unless they are proportionate and reasonable under the circumstances. Courts must balance the purpose of protecting opposition to discrimination against Congress's "manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Laughlin v. Metropolitan Washington Airports Auth.*, 149 F.3d 253, (4th Cir.1998) (addressing Title VII retaliation)

26. Protected activities may include utilizing informal grievance procedures as well as staging informal protests and voicing one's opinion in order to bring attention to an employer's discriminatory activities. *Laughlin v. Metropolitan Washington Airports Auth.*, 149 F. 3d 253, 259 (4th Cir. 1998). The protected act Petitioner alleges precipitated the retaliation is twofold being, Petitioner's filing prior complaints of race discrimination and/or delivery to the Governor's office of a letter accompanying a report by the Federal Highway Administration. He alleges that the adverse employment action was the failure to promote and/or train him, and that a causal connection existed between the two.

27. Petitioner alleges that he would have become an OJT trainer and received a 5% pay raise if he had received training. Respondent's evidence shows that, at the time Petitioner filed his action, no money had been allocated to the OJT trainer duties. There is no evidence beyond Petitioner's speculation that, had he been offered the OJT training immediately, he would have finished, trained the requisite number of people and received any additional compensation at all. The evidence shows that Petitioner was offered training which would have increased his paycheck right away had he finished it and he chose not to participate.

28. While reduced opportunity for promotion may qualify as an adverse employment action, Petitioner has not shown that lack of selection for OJT training reduced his chances for promotion, or that there was any job for which he had applied and been rejected. Any adverse effect of not participating in OJT training is speculative.

29. Although the Petitioner engaged in a protected activity by filing prior complaints of race discrimination and/or delivering the FHWA report to the Governor's Office in September 2004, Petitioner cannot show a causal link between his prior complaints and/or the delivery of this letter with his non-selection for training for the OJT position. Petitioner received raises under the Skill Based Pay Program while employed by DOT, after he filed his earlier lawsuit alleging a hostile work environment and his complaint with FHWA. Petitioner was selected to train for a skill block under the Skill Based Pay Program but subsequently rejected training, in spite of encouragement from his superiors to train.

30. Petitioner has not met his burden of proof with respect to the causal connection between Respondent's not offering him an OJT training spot at start-up and his earlier protected act(s). Evidence presented tended to show that the OJT training program had just begun and was in fact so new that at the time no amount of compensation had been fixed for being a trainer. While management, particularly Mr. Bagwell was affected by the Petitioner's earlier lawsuit accusing his brother-in-law of creating a hostile work environment, the preponderance of the evidence presented shows that management decisions regarding the Skill Based Pay Program, both as to skill blocks and OJT training, were made by using computer profiles, the validity of which Petitioner does not dispute.

31. Petitioner's evidence taken in whole, under current case law analysis for both 'pretext' cases and 'mixed-motives' cases, does not overcome Respondent's non-discriminatory evidence and reasoning; and Petitioner has failed to carry his legally required burden of proof under a racial based discrimination and retaliation analysis discomfiting Respondent's reasoning for its employment decisions. Petitioner's evidence in this matter is insufficient to show that the protected activities he engaged in, actually and ultimately motivated the employer's decision regarding OJT training.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

Petitioner failed to carry his burden of proof by a preponderance of the evidence that the Respondent discriminated against him on the basis of his race. Petitioner failed to carry his burden of proof by a greater weight of the evidence that he suffered discriminatory retaliation by Respondent or agents of Respondent. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioner's evidence does not overbear in that degree required by law the weight of evidence of Respondent.

Besides issuance of the final decision, the State Personnel Commission has authority to order an investigation of personnel practices. Because the Office of State Personnel changed employees to a different program of pay called career banding, no one in DOT was ever compensated, either for additional skill blocks or for OJT work. Under the program instituted by OSP, the competencies to be trained for may change, and consequently the OJT program may change. Though the Undersigned did not find discrimination in this case, the Undersigned does find that there exists confusion by both management and staff as to the skill block (now switched to career banding) program and the OJT training program. As such, the Undersigned suggests that the Commission consider an inquiry and review of the OJT training program at DOT.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the final decision. N. C. Gen. Stat. § 150B-36(a). In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency that will make the final decision in this case is the North Carolina State Personnel Commission. State Personnel Commission procedures and time frames regarding appeal to the Commission are in accordance with Appeal to Commission, Section 0.0400 *et seq.* of Title 25, Chapter 1, SubChapter B of the North Carolina Administrative Code (25 NCAC 01B .0400 *et seq.*).

IT IS SO ORDERED.

This the 28th day of November, 2005.

Augustus B. Elkins II
Administrative Law Judge