

# NORTH CAROLINA REGISTER

VOLUME 21 • ISSUE 06 • Pages 462 - 546

September 15, 2006

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**PUBLISHED BY**

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## **Contact List for Rulemaking Questions or Concerns**

For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

### **Rule Notices, Filings, Register, Deadlines, Copies of Proposed Rules, etc.**

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contact: Joe DeLuca Jr., Staff Director Counsel joe.deluca@ncmail.net  
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### **Fiscal Notes & Economic Analysis**

Office of State Budget and Management  
116 West Jones Street (919) 733-7061  
Raleigh, North Carolina 27603-8005 (919) 733-0640 FAX

contact: Nathan Knuffman nathan.knuffman@ncmail.net

### **Governor's Review**

Reuben Young reuben.young@ncmail.net  
Legal Counsel to the Governor (919) 733-5811  
116 West Jones Street  
Raleigh, North Carolina 27603

### **Legislative Process Concerning Rule-making**

Joint Legislative Administrative Procedure Oversight Committee  
545 Legislative Office Building  
300 North Salisbury Street (919) 733-2578  
Raleigh, North Carolina 27611 (919) 715-5460 FAX

contact: Karen Cochrane-Brown, Staff Attorney karenc@ncleg.net  
Jeff Hudson, Staff Attorney jeffreyh@ncleg.net

### **County and Municipality Government Questions or Notification**

NC Association of County Commissioners  
215 North Dawson Street (919) 715-2893  
Raleigh, North Carolina 27603

contact: Jim Blackburn or Rebecca Troutman jim.blackburn@ncacc.org  
Rebecca Troutman rebecca.troutman@ncacc.org

NC League of Municipalities (919) 715-4000  
215 North Dawson Street  
Raleigh, North Carolina 27603

contact: Anita Watkins awatkins@nclm.org

**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 <sup>th</sup> 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
21:12	12/15/06	11/22/06	12/30/06	02/13/07	02/20/07	04/01/07	05/08	09/11/07

## 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. 105**

**TO FACILITATE GOVERNMENT EMPLOYEE ACCESS**

**WHEREAS**, all citizens have the right under both the U.S. Constitution and the Constitution of North Carolina to assemble peaceably, to speak freely, and to petition their government, either individually or through their chosen representatives; and,

**WHEREAS**, the public interest in efficient and informed state government is served by consultation with persons affected by those functions, including state employees, and

**WHEREAS**, the public interest is served by ensuring reasonable access for members of employee organizations to their chosen representatives and by providing a fair opportunity for employees to choose their representatives.

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

- (1) That all state institutions, departments, bureaus, agencies, or commissions subject to the authority of the Governor shall permit reasonable access to its facilities for the purposes of membership recruitment and consultation with representatives of a domiciled employees' association that has at least 2,000 members in the state, 500 of whom are employees of the State, a political subdivision of the State, or are public school employees;
- (2) That reasonable access shall include requirements that the employee association submit its request for use of state facilities in a timely manner, that requests for use of the same facility be limited to a reasonable number of times each year, that public health and safety not be jeopardized, and that the access be held to the extent possible at the beginning or end of the workday or shift changes or at the lunch hour;
- (3) That representatives of such a domiciled employees' association, who are state employees, shall meet annually with representatives of the Governor regarding issues of mutual concern prior to the annual convening of the General Assembly;
- (4) That any such domiciled employees' association desiring to be included by the provisions of this Order provide to the representatives of the Governor evidence that it meets all of the criteria under this Order; and
- (5) That the provisions of this Order shall not diminish or infringe upon any rights, responsibilities, powers, or duties conferred upon any entity by the Constitution of the State of North Carolina or the North Carolina General Statutes.

The Board of Governors of the University of North Carolina System, the State Board of Community Colleges, local boards of education, and each of heads of the Council of State agencies are encouraged and invited to participate in this Executive Order.

This Executive Order shall take effect immediately and remain in effect until rescinded.

**IN WITNESS WHEREOF**, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this eighteenth day of August in the year of our Lord two thousand and six, and of the Independence of the United States of America the two hundred and thirtieth.

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Michael F. Easley  
Governor

**ATTEST:**

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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.*

**U.S. Department of Justice**

**Civil Rights Division**

JKT:MSR:SMC:jdh  
DJ 166-012-3  
2006-5391

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

August 10, 2006

Karen M. McDonald, Esq.  
City Attorney  
P.O. Box 1513  
Fayetteville, NC 28302-1513

Dear Ms. McDonald:

This refers to the increase in compensation for the offices of mayor, mayor pro tem and city council, for the City of Fayetteville in Cumberland County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on August 2, 2006.

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

Sincerely,

John Tanner  
Chief, Voting Section

**NOTICE OF PUBLIC MEETING  
TO BE HELD BY  
THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION  
ON INTENT TO ISSUE NPDES GENERAL PERMITS FOR ANIMAL OPERATIONS**

**SUBJECT:** Public meetings have been scheduled concerning the issuance of animal waste NPDES general permits for the following types of animal operations:

NPDES General Permit NCA200000 - Swine Operations  
NPDES General Permit NCA300000 - Cattle and Dairy Operations NPDES General Permit NCA400000 - Poultry Operations

**PURPOSE:** On the basis of preliminary staff review and application of Article 21 of Chapter 143, General Statutes of North Carolina, and other lawful standards and regulations, the North Carolina Environmental Management Commission proposes to issue NPDES general permits for animal waste operations subject to specific limitations and special conditions. The Director of the Division of Water Quality pursuant to NCGS 143-215.4(b)(1) and (2) and Regulation 15A NCAC 2H, Section .0127 has determined that it is in the public's interest that meetings be held to receive all pertinent public comment on whether to issue the draft permits.

All information received by October 9, 2006 will be taken into consideration in finalizing the permitting decisions. Written comments may be submitted to the address in the Information section listed below.

**MEETINGS:** The meetings will be conducted in the following manner:

1. Explanation of the NC Environmental Management Commission's Permit Procedure and the proposed permit conditions by the Division of Water Quality staff;
2. Public Comment - The public meetings are a forum for obtaining water quality information that was either overlooked or unavailable to the Division at the time the permits were drafted. **INFORMATION PRESENTED SHOULD SPECIFICALLY ADDRESS ISSUES RELATED TO WATER QUALITY IMPACTS RESULTING FROM WASTE MANAGEMENT.** Comments, statements, data and other information may be submitted in writing or may be presented orally at the meeting. Persons desiring to speak will indicate this intent at the time of registration at the meeting. So that all persons desiring to speak may do so, lengthy statements may be limited at the discretion of the meeting officer. Oral presentations, which exceed three minutes, must be accompanied by three (3) written copies that will be filed with the meeting clerk at the time of registration.
3. Cross-examination of persons presenting testimony will not be allowed; however, the meeting officer may ask questions for clarification.
4. The meeting record will be closed on October 9, 2006.

**WHEN:** September 25, 26, and 28, 2006 at 7:00 p.m. (Registration will begin at 6:30 p.m. at each facility listed below)

**WHERE:** September 25, 2006  
James Sprunt Community College  
Highway 11 South  
Kenansville, North Carolina

September 26, 2006  
Martin Community College  
Highway 64 West  
Williamston, North Carolina

September 28, 2006  
Iredell County Center  
444 Bristol Drive  
Statesville, North Carolina

INFORMATION: A copy of the draft animal waste NPDES general permits and fact sheets are available at <http://h2o.enr.state.nc.us/aps/afou/downloads.htm> or by writing or calling:

Todd A. Bennett  
Aquifer Protection Section  
NC Division of Water Quality  
1636 Mail Service Center  
Raleigh, North Carolina 27699-1636  
Telephone number: (919) 715-6627

The fact sheets and general permits are on file at the Division of Water Quality, 2728 Capital Boulevard, Room 1C 211, Raleigh, North Carolina. They may be inspected during normal office hours. All such comments and request regarding this matter should make reference to Permit Numbers NCA200000, NCA300000 and/or NCA400000.



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**IN ADDITION**

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North Carolina Department of Labor  
Division of Occupational Safety and Health  
4 West Edenton Street  
Raleigh, NC 27601

(919) 807-2875

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**NOTICE OF VERBATIM ADOPTION OF FEDERAL STANDARDS**

In consideration of G.S. 150-B-21.5(c) the Occupational Safety and Health Division of the Department of Labor hereby gives notice that:

- rule changes have been submitted to update the *North Carolina Administrative Code* at 13 NCAC 07F .0201 and 13 NCAC 07F.0301 to incorporate by reference the occupational safety and health related provisions of Title 29 of the *Code of Federal Regulations* Part 1926 and Part 1928 promulgated as of July 20, 2006, except as specifically described, and
- the *North Carolina Administrative Code* at 13 NCAC 07A.0301 automatically includes amendments to certain parts of the *Code of Federal Regulations*, including Title 29, Part 1904—Recording and Reporting Occupational Injuries and Illnesses.

This update encompasses recent verbatim adoptions concerning:

- Roll Over Protective Structures  
(70 FR 41127 - 41161, July 20, 2006)

The *Federal Register* (FR), as cited above, contains both technical and economic discussions that explain the basis for each change.

For additional information, please contact:

Bureau of Education, Training and Technical Assistance  
Occupational Safety and Health Division  
North Carolina Department of Labor  
1101 Mail Service Center  
Raleigh, North Carolina 27699-1101

For additional information regarding North Carolina's process of adopting federal OSHA Standards verbatim, please contact:

A. John Hoomani, General Counsel  
North Carolina Department of Labor  
Legal Affairs Division  
1101 Mail Service Center  
Raleigh, NC 27699-1101

**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 11– DEPARTMENT OF INSURANCE**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Insurance intends to amend the rules cited as 11 NCAC 06A .0802 - .0803, .0806 - .0807, and .0811.*

**Proposed Effective Date:** January 1, 2007

**Public Hearing:**

**Date:** October 3, 2006

**Time:** 10:00 a.m.

**Location:** 3<sup>rd</sup> Floor Hearing Room, Dobbs Building, 430 N. Salisbury Street, Raleigh, NC

**Reason for Proposed Action:** Amend continuing education requirements for licensees and course instructors.

**Procedure by which a person can object to the agency on a proposed rule:** The Department of Insurance will accept written objections to these rules until the expiration of the comment period on November 14, 2006.

**Comments may be submitted to:** Ellen K. Sprenkel, 1201 Mail Service Center, Raleigh, NC 27699-1201, phone (919) 733-4529, fax (919) 733-6495, email [esprenke@ncdoi.net](mailto:esprenke@ncdoi.net).

**Comment period ends:** November 14, 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 (≥\$3,000,000)

None

**CHAPTER 06 - AGENT SERVICES DIVISION**

**SUBCHAPTER 06A - AGENT SERVICES DIVISION**

**SECTION .0800 - CONTINUING EDUCATION**

**11 NCAC 06A .0802 LICENSEE REQUIREMENTS**

(a) Life and health licensees shall obtain 12 ICECs during each calendar year in approved life and health courses. Each person holding a life and health license shall complete a continuing education course on ethics within two years after January 1, 2008, and every two years thereafter. The course shall comprise three ICECs and shall be approved by the Commissioner.

(b) Property and liability licensees shall obtain 12 ICECs during each calendar year in approved property and liability courses. Each person holding a property and liability license shall complete a continuing education course on ethics within two years after January 1, 2008, and every two years thereafter. The course shall comprise three ICECs and shall be approved by the Commissioner.

(c) Any person holding more than one license to which this Section applies shall obtain 18 ICECs during each calendar year, including a minimum of six ICECs for each kind of license.

(d) An instructor shall receive the maximum ICECs awarded to a student for the course.

(e) Licensees shall not receive ICECs for the same course more often than one time in any three calendar year period.

(f) Licensees do not have to obtain ICECs for the calendar year in which they are initially licensed.

(g) Licensees shall receive ICECs for a course only for the calendar year in which the course is completed. Any course requiring an examination shall not be considered completed until the licensee passes the examination.

(h) Licensees shall maintain records of all ICECs for three years following the obtaining of such ICECs, which records shall be available for inspection upon the Commissioner's request.

(i) Nonresident licensees who meet continuing education requirements in their home states meet the continuing education requirements of this Section. Nonresident licensees whose home states have no continuing education requirements shall meet the requirements of this Section.

(j) Licensees are exempt from the requirements of this Section if they:

- (1) are age 65 or older; and
- (2) have been continuously licensed in the line of insurance for at least 25 years; and
  - (A) either hold a nationally recognized professional designation for the line

of insurance. Acceptable designations include those listed in 11 NCAC 06A .0803(a) and (b); or  
(B) certify to the Department of Insurance annually they are inactive agents agency owners who neither solicit applications for insurance nor take part in the day to day operation of the agency.

(k) Any licensee holding more than one license to which this Section applies and qualifies for exemption under Paragraph (j) of this Rule for one license type must shall obtain a minimum of six ICECs in each calendar year for the license type not exempted.

(l) Courses completed prior to before the issue date of a new license do not meet the requirements of this Section for that new license.

(m) No credit will be given for courses taken before they have been approved by the Department.

(n) Persons who hold adjuster licenses shall obtain 12 ICECs during each calendar year in approved property and liability courses. As used in this Section, "licensee" includes a person who holds an adjuster license and who is required to comply with this Section.

~~(o) Each agent holding an active surplus lines license with an effective date before January 1, 1994, must take a surplus lines course as part of the agent's 1994 property and liability continuing education requirement. Each agent issued a surplus lines license in 1994 must take a surplus lines course as part of the agent's 1995 property and liability continuing education requirement.~~

(o) Each person holding a property and liability, personal lines, or adjuster license shall complete a continuing education course on flood insurance and the National Flood Insurance Program within two years after January 1, 2008, and every four years thereafter. The course shall comprise three ICECs and shall be approved by the Commissioner.

Authority G.S. 58-2-40; 58-33-130.

**11 NCAC 06A .0803 COURSES SPECIFICALLY APPROVED**

(a) Courses that are necessary to obtain the following nationally recognized designations are approved as they exist on December 1, 1990, for 18 ICECs upon successful completion of the national examination for each part:

- (1) Accredited Advisor in Insurance (AAI);
- (2) Associate in Claims (AIC);
- (3) Associate in Loss Control Management (ALCM);
- (4) Associate in Risk Management (ARM);
- (5) Associate in Underwriting (AU);
- (6) Certified Employees Benefit Specialist (CEBS);
- (7) Chartered Financial Consultant (ChFC);
- (8) Chartered Life Underwriter (CLU);
- (9) Chartered Property and Casualty Underwriter (CPCU);
- (10) Fellow Life Management Institute (FLMI);

- (11) General Insurance (INS);
- (12) Life Underwriter Training Council Fellow, 26 week (LUTCF);
- (13) Certified Financial Planner (CFP).

(b) Courses that are necessary to obtain the following nationally recognized designations are approved as they exist on December 1, 1990, for an amount of ICECs to be determined by the Commissioner's evaluation process: Commissioner under this Section.

- (1) Agency Management Training Course Graduate;
- (2) Certified Insurance Counselor (CIC);
- (3) Certified Insurance Service Representative (CISR);
- (4) Certified Professional Service Representative (CPSR);
- (5) Fraternal Insurance Counselor (FIC);
- (6) Health Insurance Associate (HIA);
- (7) Life Underwriter Training Council Fellow, 13 weeks (LUTCF);
- (8) Registered Health Underwriter (RHU).

(c) Courses that are taught by a college or university that is accredited by the Southern Association of Colleges and Schools are approved as they exist on December 1, 1990, for a number of ICECs to be determined by the Commissioner's evaluation process. Commissioner under this Section.

~~(d) Each course provider or designee shall submit a fee of one dollar (\$1.00) per approved ICEC per individual that successfully completes the course.~~

~~(e)~~(d) Any course prepared by the Commissioner is approved as a component of each resident licensee's continuing education requirement for a number of ICECs to be determined by the Commissioner's evaluation process. Commissioner under this Section.

Authority G.S. 58-2-40; 58-33-130.

**11 NCAC 06A .0806 ATTENDANCE**

(a) If six or fewer ICECs or less are assigned to a course, the licensee must shall attend 100 percent of the course to receive any ICECs.

(b) If more than six ICECs are assigned to a course, and the licensee passes the exam and attends at least 80 percent of the course, the licensee shall receive 100 percent of the ICECs assigned to the course.

(c) If more than six ICECs are assigned to a course, and the licensee does not pass the exam but attends at least 80 percent of the course, the licensee shall receive 80 percent of the ICECs assigned to the course.

(d) An instructor may conduct a class with up to 30 students with no additional assistance. For classes with attendance exceeding 30 students, one assistant to the instructor is required for each additional 50 students or any portion thereof. Each assistant shall be physically present in the classroom during the instructor's presentation.

~~(e) Providers conducting classes outside of North Carolina or bordering states where at least 25% of the students are requesting North Carolina ICECs shall make arrangements and~~

~~pay all expenses for a Department continuing education monitor to attend.~~

*Authority G.S. 58-2-40; 58-33-130.*

**11 NCAC 06A .0807      HARDSHIP**

~~A licensee may appeal for relief to the Commissioner by Licensees shall make appeals for extensions of time under G.S. 58-33-130(c) on or before January 15<sup>30</sup> of the year immediately following the calendar year for in which the minimum required ICECs were not obtained. Upon a finding of reasonable cause, the Commissioner may extend the time for the licensee to complete the requirement.~~

*Authority G.S. 58-2-40; 58-33-130.*

**11 NCAC 06A .0811      SANCTIONS FOR NONCOMPLIANCE**

(a) This Rule establishes sanctions for licensees who fail to complete their annual continuing education requirements and for licensees, course providers, course provider personnel, course presenters, course presenter personnel, and course instructors who falsify any records or documents in connection with the continuing education program or who do not comply with G.S. 58-33-125-58-33-130, G.S. 58-33-132, or this Section.

~~(b) The failure of a licensee to meet the annual continuing education requirement shall result in the cancellation of his or her license for the subsequent calendar year. The license will be reinstated upon proof that the licensee has completed the continuing education requirements, and subsequently passed the agent's licensing examination by July 1 of each year of cancellation. If requirements for reinstatement are not completed by July 1, the licensee will be required to complete the full pre licensing education requirement and pass the agent's licensing examination before the license will be reinstated. If the license of any person lapses under G.S. 58-33-130(c), the Commissioner shall reinstate the license when the person has completed the continuing education requirements. If the person does not satisfy the requirements for licensure reinstatement by July 1 of that year, the person shall complete the appropriate prelicensing education requirement and pass the appropriate licensing examination, at which time the Commissioner shall reinstate the person's license.~~

(c) The Commissioner may suspend, revoke, or refuse to renew a license for any of the following causes:

- (1) ~~Failure~~ Failing to timely respond to insurance department Department inquiries, including continuing education audit requests, requests, within seven calendar days after the receipt of the inquiry or request.
- (2) Requesting an extension or waiver under false pretenses.
- (3) Refusing to cooperate with ~~insurance department~~ Department employees in an investigation or inquiry.

(d) The Commissioner may suspend, revoke, or refuse to renew a course provider's, presenter's or instructor's authority to offer courses for any of the following causes:

- (1) Advertising that a course is approved before the Commissioner has granted such approval in writing.
- (2) Submitting a course outline with material inaccuracies, either in length, presentation time, or topic content.
- (3) Presenting or using unapproved material in providing an approved course.
- (4) Failing to conduct a course for the full time specified in the approval request submitted to the Commissioner.
- (5) Preparing and distributing certificates of attendance or completion before the course has been approved.
- (6) Issuing certificates of attendance or completion ~~prior to~~ before the completion of the course.
- (7) Failing to issue certificates of attendance or completion to any licensee who satisfactorily completes a course.
- (8) Failing to ~~promptly~~ notify the Commissioner in writing of suspected or known improper activities including attendance and attention irregularities in writing, violations of the North Carolina General Statutes or Administrative Code within 30 days after suspecting or knowing about the violations.
- (9) ~~Any violation of~~ Violating the North Carolina General Statutes or Administrative Code.
- (10) Failing to ~~diligently~~ monitor attendance and attention of attendees.

(e) Course providers and presenters are responsible for the activities of persons conducting, supervising, instructing, proctoring, monitoring, moderating, facilitating, or in any way responsible for the conduct of any of the activities associated with the course.

(f) In addition, the Commissioner may require any one of the following upon a finding of a violation of this Section:

- (1) Refunding all course tuition and fees to licensees.
- (2) Providing licensees with a ~~suitable~~ course to replace the course that was found in violation.
- (3) Withdrawal of approval of courses offered by ~~such the~~ provider, presenter, or ~~instructor for a period determined by the Commissioner.~~ instructor.

(g) Each nonresident licensee shall certify to the Commissioner that the licensee has complied with the continuing education requirements in the licensee's home state and pay a recertification fee by March 1 of each year. If the license lapses under G.S. 58-33-125(c) and an extension of time is not sought, the Commissioner shall reinstate the license when the licensee has completed the home state continuing education requirements and paid a recertification fee.

*Authority G.S. 58-2-40; 58-33-130; 58-33-132; 58-33-125(a).*

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Private Protective Services Board intends to amend the rules cited as 12 NCAC 07D .0203, .0601.

Proposed Effective Date: January 1, 2007

Public Hearing:

Date: September 30, 2006

Time: 2:00 p.m.

Location: Conference Room, 1631 Midtown Place, Suite 104, Raleigh, NC 27609

Reason for Proposed Action:

12 NCAC 07D .0203 - The Board has determined that if a licensee is in good standing and has maintained a license at least two years and then allows the license to expire, the license may be reissued if application is made within three years of the expiration date.

12 NCAC 07D .0601 - The Board has determined that P.S.E Training Schools have altered their training curriculum such that few schools provide more than 160 hours training.

Procedure by which a person can object to the agency on a proposed rule: Comments and objections to the proposed rule will be accepted through November 14, 2006. Comments and objections must be mailed to Terry Wright, Director, Private Protective Services Board, 1631 Midtown Place, Suite 104, Raleigh, NC 27609.

Comments may be submitted to: Terry Wright, Director, 1631 Midtown, Suite 104, Raleigh, NC 27609, phone (919)875-3611

Comment period ends: November 14, 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 (>=\$3,000,000)
None

12 NCAC 07D .0203 RENEWAL OR RE-ISSUE OF

LICENSES AND TRAINEE PERMITS

(a) Each applicant for a license or trainee permit renewal shall submit an original and one copy of a renewal form. This form shall be submitted to the administrator not less than 30 days prior to expiration of the applicant's current license or trainee permit and shall be accompanied by:

- (1) a head and shoulders color photograph of the applicant of a quality sufficient for identification, one inch by one inch in size and taken within six months of the application;
(2) statements of the result of a local criminal history records search by the city-county identification bureau or clerk of superior court in each county where the applicant has resided within the immediate preceding 12 months; and
(3) the applicant's renewal fee; and
(4) proof of liability insurance as set out in G.S. 74C-10(e).

(b) If a licensee in good standing with the Board has maintained a license at least two years and then allows the license to expire, the license may be re-issued if application is made within three years of the expiration date and the following documentation is submitted to the Board:

- (1) an Application For Reinstatement of an Expired License;
(2) one set of classifiable fingerprints on an applicant fingerprint card;
(3) one head and shoulders photograph(s) of the applicant of a quality sufficient for identification, one inch by one inch in size and taken within six months of the application;
(4) statements of the result of a local criminal history records search by the city-county identification bureau or clerk of superior court in each county where the applicant has resided within the immediate preceding 60 months;
(5) the applicant's non-refundable application fee;
(6) proof of liability insurance as set out in G.S. 74C-10(e); and
(7) a separate check or money order made payable to the State Bureau of Investigations to cover criminal record checks performed by the State Bureau of Investigations.

Authority G.S. 74C-5; 74C-8; 74C-9.

12 NCAC 07D .0601 EXPERIENCE REQUIREMENTS FOR A P.S.E. LICENSE

(a) In addition to the requirements of 12 NCAC 07D .0200, applicants for a P.S.E. license shall successfully complete a course of formal instruction at any P.S.E. school approved by the Board.

(b) A P.S.E. school must consist of not less than 160 hours of actual classroom instruction in psychological stress evaluation.

Authority G.S. 74C-5.

TITLE 13 – DEPARTMENT OF LABOR

Notice is hereby given in accordance with G.S. 150B-21.2 that the N.C. Department of Labor/ Wage and Hour Bureau intends to amend the rules cited as 13 NCAC 12 .0202, .0304 - .0307, .0402 - .0405, .0601, .0703, .0804 and repeal the rule cited as 13 NCAC 12 .0409.

Proposed Effective Date: January 1, 2007

Public Hearing:

Date: October 4, 2006

Time: 10:00 a.m.

Location: 4 W. Edenton Street, Raleigh, NC 27699 (Room 205)

Reason for Proposed Action: Due to changes made during the 2005 Session of the North Carolina General Assembly, certain administrative rule changes are needed in order to ensure that the North Carolina Administrative Code remains consistent with the Wage and Hour Act.

Procedure by which a person can object to the agency on a proposed rule: Objections to the proposed rules may be submitted, in writing, to Erin T. Gould, Assistant Rulemaking Coordinator, via United States mail at the following address: 1101 Mail Service Center, Raleigh, North Carolina 27699-1101; or via facsimile at (919) 733-4235. Objections may also be submitted during the public hearings conducted on these rules, which are noticed above. Objections shall include the specific rule citation(s) for the objectionable rule(s), the nature of the objection(s), and the complete name(s) and contact information for the individual(s) submitting the objection. Objections must be received by 5:00 p.m. on November 14, 2006.

Comments may be submitted to: Erin T. Gould, Assistant Rulemaking Coordinator, 1101 Mail Service Center, Raleigh, North Carolina 27699-1101, phone (919) 733-0368, fax (919) 733-4235, email erin.gould@nclabor.com

Comment period ends: November 14, 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 (>=\$3,000,000)
None

CHAPTER 12 – WAGE AND HOUR

SECTION .0200 - SUBMINIMUM WAGES

13 NCAC 12 .0202 HANDICAPPED WORKER CERTIFICATION

(a) A "handicapped worker" means an individual whose earning capacity is impaired by age or physical or mental deficiency or injury for the work he is to perform.

(b) An application for the issuance of a handicapped worker certificate establishing a subminimum wage rate for an individual for a particular job may be made by an employer with the Director/Administrator of the Wage and Hour Division, Bureau and must include:

- (1) the name, address and nature of the business of the employer;
(2) a description of the occupation at which the worker is to be employed;
(3) the nature of the worker's disability and its relation to his work;
(4) the wage the employer proposes to pay the worker (as a percentage of the State minimum wage);
(5) signatures of the employer and the worker; and
(6) certification of the applicant's handicap by the Division of Vocational Rehabilitation Services of the Department of Human Resources, Health and Human Services.

(c) If the proposed subminimum wage is less than 50 percent of the applicable minimum wage, the application and evidence must establish that the individual is multi-handicapped or so severely impaired that his earning or productive capacity would not yield wages equal to at least 50 percent of the minimum wage if compensated at wage rates which are commensurate with those for nonhandicapped non-handicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(d) To determine whether the facts justify the issuance of a certificate, the Director/Administrator may require the submission of additional information and may require the worker to take a medical examination.

(e) A Handicapped Worker Certificate will be issued by the Director/Administrator only if a proper application has been made and the facts show:

- (1) A special subminimum wage is necessary to prevent curtailment of the worker's opportunities for employment.
(2) The earning or productive capacity of the worker for the work he is to perform is impaired by age or physical or mental deficiency or injury.
(3) The wage rate requested reflects adequately the individual worker's earning or productive capacity and is not less than 50 percent of the applicable minimum wage, unless a lower rate

is clearly justified in accordance with (c) of this Rule.

- (4) In an establishment or a vicinity where ~~nonhandicapped~~non-handicapped employees are employed at piece rates in the same occupation, the handicapped worker will be paid at least the same piece rates or at the hourly rate specified in the certificate, whichever is greater.

(f) When a certificate is issued, the subminimum wage rate will be established as a percentage of the State minimum wage, so that the handicapped worker's wage rate will adjust automatically with changes in the State minimum wage without reissuance of a new certificate. Copies of the certificate shall be transmitted to the employer and the worker. The employer shall keep, maintain and have available for inspection a copy of the certificate.

(g) A certificate may not be issued retroactively and will be issued for a period of three years, subject to renewal by the ~~Director~~Administrator. The terms of a certificate, including wage rate, may be amended by the ~~Director~~Administrator upon written notice to the parties concerned, if the facts justify such an amendment. A certificate expires automatically when there is a substantial change in the job description, employment is terminated, or due to a change in circumstances the ~~Director~~Administrator determines that the certificate or the subminimum wage rate set by the certificate no longer complies with the requirements of this Rule.

(h) Any person aggrieved by an action of the ~~Director~~Administrator pursuant to this Rule may, within 15 days after such action, file with the ~~Director~~Administrator a written petition for review setting forth the grounds. The Commissioner of Labor or his designated hearing officer may conduct a hearing and offer aggrieved persons the opportunity to present data and views pursuant to ~~13 NCAC Subchapter 1B, Chapter 150B, Article 3 of the North Carolina General Statutes.~~ Any person adversely affected by the decision of the Commissioner or his designee may appeal by filing a written petition for a contested case hearing with the Office of Administrative Hearings (OAH) under Chapter 150B, Article 3 of the North Carolina General Statutes.

(i) Certificates providing subminimum wage rates for sheltered workshops for the handicapped may be issued in accordance with the rules and regulations promulgated under the F.L.S.A. regulating and allowing for the issuance of such certificates.

*Authority G.S. 95-25.3; 95-25.15; 95-25.17; 95-25.19.*

**SECTION .0300 – WAGES**

**13 NCAC 12 .0304 WITHHOLDING OF WAGES**

(a) The employer shall furnish the employee an itemized statement indicating the amount and purpose of all deductions, diversions, payments or withholding of wages for each pay period in which deductions or recoupments are made.

(b) A repayment in excess of the statutory limitation prescribed in G.S. 95-25.10, is permitted if the repayment is voluntary. A repayment is voluntary if it is made without fraud, misrepresentation, undue influence, duress, or coercion.

~~(e) In the case of employees for whom there is no hourly record keeping requirement, an average number of hours worked per pay period may be agreed upon in writing in advance by the employer and each employee and may be used for calculating the amount of protected wages each pay period. Such agreements are subject to modification as necessary to reflect permanent and substantial changes in the average number of hours worked per pay period.~~

(b) "Criminal process," as that term is used in G.S. 95-25.8(e), means any citation, criminal summons, warrant for arrest, or order for arrest, issued by a justice, judge, magistrate, clerk of court, or law enforcement officer for the purpose of requiring a person to appear in court and answer to allegations of a cash shortage, inventory shortage, or damage to an employer's property based upon a showing of probable cause supported by oath or affirmation.

*Authority G.S. 95-25.8; 95-25.11; 95-25.13; 95-25.19.*

**13 NCAC 12 .0305 AUTHORIZATION FOR WITHHOLDING OF WAGES**

~~(a) An employer may withhold or divert a portion of an employee's wages without the employee's authorization only when the employer is required or empowered to do so by North Carolina or federal law. A valid authorization by an employee is required in all other circumstances for an employer to make a deduction from an employee's wages. Two types of authorization are permitted:~~

- ~~(1) A specific authorization shall be used when the amount or rate of the proposed deduction is known and agreed to at the time the employee signs the authorization.~~
- ~~(2) A blanket authorization shall be used when the amount of the proposed deduction is not known and agreed to at the time the employee signs the authorization.~~

~~(b) An authorization by an employee, to be valid, shall:~~

- ~~(1) be written;~~
- ~~(2) be signed by the employee on or before the payday for the pay period for which the deduction is being made;~~
- ~~(3) show the date of signing by the employee;~~
- ~~(4) state the reason for the deduction; and~~
- ~~(5) if it is a specific authorization, state the specific dollar amount or percentage of wages to be deducted from each paycheck and the number of paychecks or length of time for which the deduction is authorized.~~

~~(c) A specific authorization may be for one or more paychecks and shall state the dollar amount or percentage of wages which the employee agrees may be deducted from each paycheck. Employers shall give employees a reasonable opportunity to withdraw specific authorizations if such deductions are for their convenience. Deductions for the convenience of the employees include, but are not limited to, such things as savings plans, credit union installments, savings bonds, union or club dues, uniform rental, uniform cleaning, parking and charitable contributions.~~

~~(d) An employer shall not make a deduction under a blanket authorization until the employee has been given:~~

- ~~(1) Advance notice of the specific amount of the proposed deduction. For purposes of deductions involving cash shortages, inventory shortages, or loss or damage to an employer's property, advance notice shall be at least the seven-day period prescribed in G.S. 95-25.9.~~
- ~~(2) A "reasonable opportunity to withdraw" the authorization before the deduction is made. A reasonable opportunity to withdraw a blanket authorization shall be at least three calendar days from the date of the employer's notice of the specific amount of the deduction to be taken.~~

~~(e)(a) When an authorization is required by the Act, the monetary limitations and time requirements specified in G.S. 95-25.8, 95-25.9 and 95-25.10-95-25.8 of the Wage and Hour Act apply and shall not be waived.~~

~~(b) Deductions for the convenience of the employee, as that term is used in G.S. 95-25.8, include savings plans, credit union installments, savings bonds, union or club dues, uniform rental or cleaning not required by the employer, parking and charitable contributions.~~

~~(c) A "reasonable opportunity to withdraw," as that term is used in G.S. 95-25.8(a), shall be at least three calendar days from the date of the employer's notice of the actual amount to be deducted or the employee's written notice of withdrawal of the authorization.~~

~~(f)(d) In accordance with G.S. 95-25.8(d), Advances-advances of wages to the employee or to a third party at the employee's request are considered to be prepayment of wages. Advances of wages to a third party at the employee's request are also considered to be prepayment of wages. A dated receipt, signed by the employee, for the advance of wages, shall be sufficient to show that the advance was requested and made. No withholding authorizations are required by G.S. 95-25.8(2) when the employer deducts for the advanced wages.~~

~~(g)(e) In the absence of an executed loan document, the principal of a loan Loans from an employer to an employee is that are considered to be an advance of wages-wages pursuant to G.S. 95-25.8(d) Such loans may include credit advanced by the employer to an employee at the employee's request for purchasing from the employer items not primarily for the benefit of the employer, employer and personal usage of the employer's property when designated for business use only. Deductions for interest and other related charges require written authorization in accordance with these rules. Personal loans from a supervisor to a subordinate or loans made by third parties to an employee with payroll deduction arrangements are not an advance of wages.~~

~~(h)(f) An overpayment of wages to an employee as a result of a miscalculation of wages or other bona fide error may be treated as an advance of wages by the employer. If the an employer underpays wages to an employee as a result of a miscalculation of wages or other bona fide error, the employer shall pay any such underpayment owed as soon as possible upon the discovery of the error and no later than the next regularly scheduled pay day, along with accrued interest at the legal rate set forth in G.S. 24-1 from the date the wages first became due.~~

~~(i)(g) Authorizations for deductions that are not permitted by law are invalid. For example:~~

- ~~(1) G.S. 97-21 invalidates agreements by an employee to pay any portion of a premium paid by his or her employer to a workers' compensation insurance carrier;~~
- ~~(2) 13 NCAC 07F .0101(a)(2) requires the employer to provide, at no cost to the employee, all personal protective equipment which the employee does not wear off the jobsite for use off the job.~~

~~If an employer withholds or diverts wages for purposes not permitted by law, the employer shall be in violation of G.S. 95-25.6 or G.S. 95-25.7, or both, even if the employee authorizes the withholding in writing pursuant to G.S. 95-25.8(2), 95-25.8(a), because that authorization is invalid.~~

~~(j)(h) An employer may obtain a written authorization pursuant to G.S. 95-25.8(2)(a) 95-25.8(a) and include in the authorization a provision for deducting the balance of the unpaid amount from the employee's paycheck in the event the employee separates before the full amount has been collected. If the employer obtains such an authorization, the employer may deduct as much of the balance possible from the final paycheck without having to give the employee notice of the amount and a reasonable opportunity to withdraw his or her authorization as required by G.S. 95-25.8(2)(b), 95-25.8(a), subject to the withholding limitations of G.S. 95-25.10-95-25.8(b).~~

~~(k)(i) A wage credit in the form of tips in accordance with Rule .0303 of this Section, or the reasonable costs of meals, lodging or other facilities in accordance with Rule .0301 of this Section, is not a withholding of wages and does not require written authorization pursuant to G.S. 95-25.8(2), 95-25.8(a). If the employer does not include in the specific authorization an express provision to deduct the balance upon an employee's separation, then an employer shall not deduct from the final paycheck an unpaid balance which is greater than the specific amount or percentage authorized unless an additional authorization is obtained.~~

~~(l) An employer is permitted to establish an escrow or bond account funded by an employee's wages to recover amounts owed to the employer, as long as the employer obtains a valid authorization from the employee pursuant to G.S. 95-25.8(2) before diverting wages to such an account. An employer must also obtain a valid authorization from the employee before making a deduction from the account. Upon discontinuance of employment for any reason, remaining funds shall be returned to the employee.~~

*Authority G.S. 95-25.8; 95-25.11; 95-25.13; 95-25.19.*

**13 NCAC 12 .0306 VACATION PAY**

~~(a) Employers shall notify employees of the employer's policies and practices concerning vacation pay as follows:~~

- ~~(1) Orally or in writing at the time of hiring;~~
- ~~(2) By making a copy of the policies and practices available to them in writing or through a posted notice maintained in a place accessible to the employees; and~~



~~(3) Before the effective date of any changes, in writing or through a posted notice maintained in a place accessible to the employees.~~

~~(b)(a)~~ All vacation policies and practices shall address:

- (1) How and when vacation is earned so that the employees know the amount of vacation to which they are entitled;
- (2) Whether or not vacation time may be carried forward from one year to another, and if so, in what amount;
- (3) When vacation time must be taken;
- (4) When and if vacation pay may be paid in lieu of time off; and
- (5) Under what conditions ~~and in what amount~~ vacation pay will be ~~paid/forfeited~~ upon discontinuation of ~~employment.~~ employment for any reason.

~~(e)(b)~~ Ambiguous policies and practices shall be construed against the employer and in favor of employees.

~~(d)(c)~~ Vacation benefits granted under a policy which does not establish an earning period cannot be reduced or eliminated as a result of a change in policy. An example of such a policy is: "Employees are entitled to one week of vacation per calendar year." If a policy which establishes an earning period or accrual rate is changed, employees are entitled to a pro rata share of the benefits earned under the original policy through the effective date of the change and of the benefits earned under the new policy from the effective date forward, so long as the earning criteria are met under both policies.

*Authority G.S. 95-25.2; 95-25.12; 95-25.13; 95-25.19.*

**13 NCAC 12 .0307 BONUSES, COMMISSIONS AND OTHER FORMS OF WAGE CALCULATION**

(a) Employers may pay wages based on bonuses, commissions or other forms of calculation as infrequently as annually, if the employees are so notified before earning such wages.

(b) Employers shall notify employees of the employers' policies and practices concerning pay, wages based on bonuses, commissions, or other forms of ~~calculation as follows and in accordance with Rule .0801 of this Chapter:~~

- ~~(1) Orally or in writing at the time of hiring;~~
- ~~(2) By making a copy of the policies and practices available to them in writing or through a posted notice maintained in a place accessible to the employees; and,~~
- ~~(3) Before the effective date of any changes, in writing or through a posted notice maintained in a place accessible to the employees.~~ wage calculation.

(c) Ambiguous policies and practices shall be construed against the employer and in favor of employees.

(d) All policies or practices relating to bonuses, commissions, or other forms of calculation wages shall address:

- (1) How and when bonuses, commissions or other forms of calculation wages are earned so that the employees know the amount of bonuses, commissions or other forms of calculation wages to which they are entitled; and

(2) Under what conditions and in what amount bonuses, commissions or other forms of calculation wages will be paid upon discontinuation of employment.

(e) Wages computed under a bonus, commission, or other forms of calculation policy or practice which does not establish specific earning criteria cannot be reduced or eliminated as a result of a change in policy or practice. An example of such a policy is: "Employees earn commissions of xx% on all 'sales' (where sales are not defined by the employer)." If the employer changes a policy or practice which establishes specific earning criteria, the employee is entitled to the bonus, commission or other forms of calculation wages earned under the original policy through the effective date of the change and is entitled to the bonus, commission or other forms of calculation wages earned under the new policy from the effective date forward, so long as the earning criteria are met under both policies.

*Authority G.S. 95-25.6; 95-25.7; 95-25.13; 95-25.19.*

**SECTION .0400 - YOUTH EMPLOYMENT**

**13 NCAC 12 .0402 APPLICATION FOR A YOUTH EMPLOYMENT CERTIFICATE**

(a) ~~A youth may obtain a~~ youth employment certificate may be obtained from

- (1) electronically from the Department of Labor;  
or
- (2) from the county director of social services' office in the county in which the youth resides or the county in which the youth intends to work, or from a designee outside the social services' office in the county in which the youth resides or the county in which the youth intends to work who has been approved to issue youth employment certificates pursuant to 13 NCAC 12 .0407.

(b) Proof of Age.

- (1) If the youth employment certificate is obtained electronically, the employer shall verify the age of the youth.
- (2) If the youth employment certificate is not obtained electronically, The youth must provide proof of age by means of one of the following:
  - ~~(1)(A)~~ A birth certificate;
  - ~~(2)(B)~~ Evidence from the bureau of vital statistics in the state in which the youth was born;
  - ~~(3)(C)~~ Any state driver's license, learner's permit, or state-issued identification card;
  - ~~(4)(D)~~ Passport;
  - ~~(5)(E)~~ School records or insurance records; or
  - ~~(6)(F)~~ Other documentary evidence determined as equivalent by the Wage and Hour ~~Office.~~ Bureau.

(c) ~~The youth shall obtain a youth employment certificate form on which the youth and the employer must supply the following information:~~

- (1) ~~Youth's name, address, phone number, sex, age and birth date;~~
- (2) ~~Employer's company name, type of business, address and phone number; and~~
- (3) ~~Job description.~~

(d) ~~The A youth employment certificate obtained pursuant to Paragraph (a) of this Rule shall not be valid unless it is must be signed by the youth, youth and by a parent, guardian, custodian, or other person standing in place of a parent as defined in 29 CFR 570.126, loco parentis and by the employer. In the event that a final decree of emancipation has been issued for the youth by a court of competent jurisdiction pursuant to G.S. 7B, Article 35, the youth may sign the certificate without the approval of a parent, guardian or custodian, or other person standing in place of a parent as defined in 29 CFR 570.126 loco parentis.~~

(e) ~~A youth may obtain a youth employment certificate electronically from the Department of Labor, if available. The Department shall use electronic means to verify the age and permissibility of employment based on type of employment and prohibitions in G.S. 95-25.5 and the child labor provisions of the F.L.S.A. Electronically issued youth employment certificates shall not be valid until signed as set forth in Paragraph (d) of this Rule.~~

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

**13 NCAC 12 .0403 REVIEW: ISSUANCE AND MAINTENANCE OF CERTIFICATES**

(a) The county director of social services, approved designee or the Department of Labor shall review the youth employment certificate to see that it is complete and shall ascertain the age of the youth by the means prescribed in Rule .0402 of this Section and the permissibility of employment based on type of employment and prohibitions in G.S. 95-25.5 and the child labor provisions of the F.L.S.A.

(b) The county director of social services, approved designee or Department of Labor shall sign, date and issue the certificate. The employer's copy of the certificate shall be given to the youth. Certificates shall not be issued if:

- (1) The proposed employment does not comply with all statutory requirements and prohibitions, and all rules and regulations promulgated under this Section; or
- (2) The proposed employment will be in violation of the F.L.S.A. and all rules promulgated thereunder.

(c) ~~The county director of social services or Department of Labor shall send one copy of each certificate to the Wage and Hour Bureau within one week of issuance, and shall maintain one copy of the each certificate on file for two years following the date of issuance, and shall send one copy to the Wage and Hour Office at the end of each week.~~

(d) The employer's copy of the youth employment certificate must be given to the employer by the youth on or before the first day of employment. The employer shall not employ a youth until the employer has received its copy of the issued certificate.

The employer shall maintain the certificate on record where it is readily accessible to any person authorized to inspect or investigate youth employment. The employer shall maintain the certificate on record so long as the youth is employed thereunder and for two years after the employment terminates.

(e) The employer or youth may request a review of the denial of a certificate by written or oral request to the Wage and Hour Office. Bureau. Appeals of the review decisions rendered must be made in writing within 15 days to the Wage and Hour Administrator who shall issue a written decision. ~~Requests for appeal of the Administrator's decision must be addressed to the Office of Administrative Hearings in accordance with G.S. 150B, Article 3. Any person adversely affected by the Administrator's decision may appeal by filing a written petition for a contested case hearing with the Office of Administrative Hearings (OAH) under Chapter 150B, Article 3 of the North Carolina General Statutes.~~

*Authority G.S. 95-25.5; 95-25.14; 95-25.15.*

**13 NCAC 12 .0404 WAIVER**

(a) When a proper application for a waiver of any youth employment provision is received, if the proposed employment is in the best interest of the youth and his health and safety will not be adversely affected, the ~~Director-Administrator~~ of the Wage and Hour ~~Division-Bureau~~ shall recommend that the Chief Deputy Commissioner of the Department of Labor issue a waiver for the youth. Absent a contrary determination by the Chief Deputy Commissioner on the hardship to the youth or the effect on the health and safety of the youth, the Chief Deputy Commissioner shall issue the waiver for the youth.

(b) Any person adversely affected by a decision of the ~~director Administrator~~ or Chief Deputy Commissioner may appeal ~~the decision~~ by filing a written petition for a contested case hearing with the Office of Administrative Hearings (OAH) pursuant to the procedures contained in Article 3 of G.S. 150B, under Chapter 150B, Article 3 of the North Carolina General Statutes.

*Authority G.S. 95-25.5; 95-25.17.*

**13 NCAC 12 .0405 REVOCATION**

(a) ~~The Director-Administrator~~ of the Wage and Hour ~~Division Bureau~~ or his designated representative shall review the issuance of all youth employment certificates by county social services directors. If upon review, or because of any other circumstance, the ~~Director-Administrator~~ determines a certificate has been issued in violation of the youth employment provisions or the rules and regulations promulgated thereunder, he shall notify the youth, the county social service director and the employer of the youth that the certificate is being revoked and shall specify the reasons for the revocation.

(b) If the certificate is revoked, the employer shall cease to employ the youth and shall return the certificate to the ~~Director Administrator~~ of the Wage and Hour ~~Division Bureau~~ or to the county social service director, who shall forward it to the Wage and Hour ~~Director-Administrator.~~

(c) The employer or youth may object to the revocation by filing a written petition for a contested case hearing with the Office of Administrative Hearings (OAH) pursuant to the

procedures contained in Article 3 of Chapter 150B of the General Statutes under Chapter 150B, Article 3 of the North Carolina General Statutes. Even if a petition for a hearing is filed, the certificate must be returned and the employment must cease pursuant to Paragraph (b) of this Rule.

Authority G.S. 95-25.5; 95-25.17.

**13 NCAC 12 .0409 PARENTAL EXEMPTION**

For purposes of the exemption listed in G.S. 95-25.5(i), a parent is deemed to be a natural or adoptive parent.

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

**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rules cited as 15A NCAC 02D .0902, .0909, .1402, .1403.

Proposed Effective Date: January 1, 2007

**Public Hearing:**

Date: October 4, 2006

Time: 7:00 p.m.

Location: Charlotte-Mecklenburg Government Center, Chamber Room CH-14, 600 East 14<sup>th</sup> Street, Charlotte, NC 28202

Reason for Proposed Action: To require reasonable available control technology for volatile organic compounds and nitrogen oxides in the counties in the Charlotte ozone nonattainment area to meet EPA requirements for a complete State Implementation Plan (SIP) submittal for the Charlotte ozone nonattainment SIP.

Procedure by which a person can object to the agency on a proposed rule: Any person desiring to comment is requested to submit a written statement for inclusion in the record of proceedings at the public hearing. The hearing officer may limit oral presentation lengths if many people want to speak. The hearing record will remain open until November 14, 2006, to receive additional written statements. To be included, the statement must be received by the Division by November 14, 2006.

Comments may be submitted to: Thomas Allen, 1641 Mail Service Center, Raleigh, NC 27699-1641, phone (919) 733-1489, fax (919) 715-7476, email thom.allen@ncmail.net

Comment period ends: November 14, 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: A copy of the fiscal note can be obtained from the agency.

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

**CHAPTER 02 - ENVIRONMENTAL MANAGEMENT**

**SUBCHAPTER 02D - AIR POLLUTION CONTROL REQUIREMENTS**

**SECTION .0900 - VOLATILE ORGANIC COMPOUNDS**

**15A NCAC 02D .0902 APPLICABILITY**

(a) The rules in this Section do not apply except as specifically set out in this Rule.

(b) Regardless of any other statement of applicability of this Section, this Section does not apply to:

- (1) sources whose emissions of volatile organic compounds are not more than 15 pounds per day, except that this Section does apply to the manufacture and use of cutback asphalt and to gasoline service stations or gasoline dispensing facilities regardless of levels of emissions of volatile organic compounds;
- (2) sources whose emissions do not exceed 800 pounds of volatile organic compounds per calendar month and that are:
  - (A) bench-scale, on-site equipment used exclusively for chemical or physical analysis for quality control purposes, staff instruction, water or wastewater analyses, or non-production environmental compliance assessments;
  - (B) bench-scale experimentation, chemical or physical analyses, training or instruction from not-for-profit, non-production educational laboratories;
  - (C) bench-scale experimentation, chemical or physical analyses, training or instruction from hospitals or health laboratories pursuant to the determination or diagnoses of illness; or

(D) research and development laboratory activities provided the activity produces no commercial product or feedstock material; or

(3) emissions of volatile organic compounds during startup or shutdown operations from sources which use incineration or other types of combustion to control emissions of volatile organic compounds whenever the off-gas contains an explosive mixture during the startup or shutdown operation if the exemption is approved by the Director as meeting the requirements of this Subparagraph.

(c) The following rules of this Section apply statewide:

- (1) .0925, Petroleum Liquid Storage in Fixed Roof Tanks, for fixed roof tanks at gasoline bulk plants and gasoline bulk terminals;
- (2) .0926, Bulk Gasoline Plants;
- (3) .0927, Bulk Gasoline Terminals;
- (4) .0928, Gasoline Service Stations Stage I;
- (5) .0932, Gasoline Truck Tanks and Vapor Collection Systems;
- (6) .0933, Petroleum Liquid Storage in External Floating Roof Tanks, for external floating roof tanks at bulk gasoline plants and bulk gasoline terminals;
- (7) .0948, VOC Emissions from Transfer Operations;
- (8) .0949, Storage of Miscellaneous Volatile Organic Compounds; and
- (9) .0958, Work Practices for Sources of Volatile Organic Compounds.

(d) Rule .0953, Vapor Return Piping for Stage II Vapor Recovery, of this Section applies in Davidson, Durham, Forsyth, ~~Gaston, Guilford, Mecklenburg, Wake~~, Dutchville Township in Granville County, and that part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway 801, Fulton Creek and back to Yadkin River in accordance with provisions set out in that Rule.

(e) All sources located in Mecklenburg County that were required to comply with any of these ~~Rules~~ Rules before July 5, 1995:

- (1) .0917 through .0937 of this Section, or
- (2) .0943 through .0945 of this Section, ~~before July 5, 1995, shall continue to comply with those Rules.~~

shall continue to comply with those Rules.

(f) The rules in this Section apply to sources with the potential to emit 100 tons or more volatile organic compounds per year in the following areas:

- (1) Cabarrus County
- (2) Gaston County
- (3) Lincoln County
- (4) Mecklenburg County
- (5) Rowan County
- (6) Union County
- (7) Davidson Township and Coddle Creek Township in Iredell County

~~(f) If a violation of the ambient air quality standard for ozone is measured in accordance with 40 CFR 50.9 in Cabarrus, Gaston, Iredell, Lincoln, Mecklenburg, Rowan, or Union County, North Carolina or York County, South Carolina, the Director shall initiate analysis to determine the control measures needed to attain and maintain the ambient air quality standard for ozone. By the following May 1, the Director shall implement the specific stationary source control measures contained in this Section that are required as part of the control strategy necessary to bring the area into compliance and to maintain compliance with the ambient air quality standard for ozone. The Director shall implement the rules in this Section identified as being necessary by the analysis by notice in the North Carolina Register. The notice shall identify the rules that are to be implemented and shall identify whether the rules implemented are to apply in Gaston or Mecklenburg County or in both counties. At least one week before the scheduled publication date of the North Carolina Register containing the Director's notice implementing rules in this Section, the Director shall send written notification to all permitted facilities within the county in which the rules are being implemented that are or may be subject to the requirements of this Section informing them that they are or may be subject to the requirements of this Section. (For Mecklenburg County, "Director" means for the purpose of notifying permitted facilities in Mecklenburg County, the Director of the Mecklenburg County local air pollution control program.) Compliance shall be in accordance with Rule .0909 of this Section.~~

(g) If a violation of the ambient air quality standard for ozone is measured in accordance with 40 CFR 50.9 in Davidson, Forsyth, or Guilford County or that part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway 801, Fulton Creek and back to Yadkin River, the Director shall initiate analysis to determine the control measures needed to attain and maintain the ambient air quality standard for ozone. By the following May 1, the Director shall implement the specific stationary source control measures contained in this Section that are required as part of the control strategy necessary to bring the area into compliance and to maintain compliance with the ambient air quality standard for ozone. The Director shall implement the rules in this Section identified as being necessary by the analysis by notice in the North Carolina Register. The notice shall identify the rules that are to be implemented and shall identify whether the rules implemented are to apply in Davidson, Forsyth, or Guilford County or that part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway 801, Fulton Creek and back to Yadkin River or any combination thereof. At least one week before the scheduled publication date of the North Carolina Register containing the Director's notice implementing rules in this Section, the Director shall send written notification to all permitted facilities within the county in which the rules are being implemented that are or may be subject to the requirements of this Section informing them that they are or may be subject to the requirements of this Section. (For Forsyth County, "Director" means for the purpose of notifying permitted facilities in Forsyth County, the Director of the Forsyth County local air pollution control program.) Compliance shall be in accordance with Rule .0909 of this Section.

(h) If a violation of the ambient air quality standard for ozone is measured in accordance with 40 CFR 50.9 in Durham or Wake County or Dutchville Township in Granville County, the Director shall initiate analysis to determine the control measures needed to attain and maintain the ambient air quality standard for ozone. By the following May 1, the Director shall implement the specific stationary source control measures contained in this Section that are required as part of the control strategy necessary to bring the area into compliance and to maintain compliance with the ambient air quality standard for ozone. The Director shall implement the rules in this Section identified as being necessary by the analysis by notice in the North Carolina Register. The notice shall identify the rules that are to be implemented and shall identify whether the rules implemented are to apply in Durham or Wake County or Dutchville Township in Granville County or any combination thereof. At least one week before the scheduled publication date of the North Carolina Register containing the Director's notice implementing rules in this Section, the Director shall send written notification to all permitted facilities within the county in which the rules are being implemented that are or may be subject to the requirements of this Section informing them that they are or may be subject to the requirements of this Section. Compliance shall be in accordance with Rule .0909 of this Section.

(i) Sources whose emissions of volatile organic compounds are not subject to limitation under this Section may still be subject to emission limits on volatile organic compounds in Rules, .0524, .1110, or .1111 of this Subchapter.

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

**15A NCAC 02D .0909 COMPLIANCE SCHEDULES FOR SOURCES IN NEW NONATTAINMENT AREAS**

(a) Applicability. With the exceptions in Paragraph (b) of this Rule, this Rule applies to all sources covered by Paragraphs (f), (g) or (h) ~~(e), (f), or (g)~~ of Rule .0902 of this Section.

(b) Exceptions. This Rule does not apply to:

- (1) sources in Mecklenburg County required to comply with the requirements of this Section under Rule ~~.0902(e)~~ .0902(e) of this Section;
- (2) sources covered under Rule .0953 or .0954 of this Section; or
- (3) sources required to comply with the requirements of this Section under Rule ~~.0902(a)~~ .0902(c) of this Section.

(c) Maintenance areas. The owner or operator of any source subject to this Rule because of the application of Paragraphs (g) or (h) ~~(e), (f), or (g)~~ of Rule .0902 of this Section shall adhere to the following increments of progress and schedules:

- (1) if compliance is to be achieved by installing emission control equipment, replacing process equipment, or modifying existing process equipment:
  - (A) ~~A-The owner or operator shall submit a permit application and a compliance schedule shall be submitted~~ within six months after the Director notices in the North Carolina Register that an

area is in violation of the ambient air quality standard for ozone;

(B) The compliance schedule shall contain the following increments of progress:

- (i) a date by which contracts for the emission control system and process equipment shall be awarded or orders shall be issued for purchase of component parts;
- (ii) a date by which on-site construction or installation of the emission control and process equipment shall begin; and
- (iii) a date by which on-site construction or installation of the emission control and process equipment shall be completed;

(C) Final compliance shall be achieved within three years after the Director notices in the North Carolina Register that the area is in violation of the ambient air quality standard for ozone.

(2) if compliance is to be achieved by using low solvent content coating technology:

(A) ~~A-The owner or operator shall submit a permit application and a compliance schedule shall be submitted~~ within six months after the Director notices in the North Carolina Register that an area is in violation of the ambient air quality standard for ozone;

(B) The compliance schedule shall contain the following increments:

- (i) a date by which research and development of low solvent content coating shall be completed if the Director determines that low solvent content coating technology has not been sufficiently researched and developed;
- (ii) a date by which evaluation of product quality and commercial acceptance shall be completed;
- (iii) a date by which purchase orders shall be issued for low solvent content coatings and process modifications;
- (iv) a date by which process modifications shall be initiated; and
- (v) a date by which process modifications shall be

completed and use of low solvent content coatings shall begin;

- (C) Final compliance shall be achieved within three years after the Director notices in the North Carolina Register that the area is in violation of the ambient air quality standard for ozone.

- (3) The owner or operator shall certify to the Director within five days after each increment deadline of progress in this Paragraph, whether the required increment of progress has been met.

(d) Nonattainment areas. The owner or operator of any source subject to this Rule because of the application of Paragraph (f) of Rule .0902 of this Section shall adhere to the following increments of progress and schedules:

- (1) if compliance is to be achieved by installing emission control equipment, replacing process equipment, or modifying existing process equipment:

(A) The owner or operator shall submit a permit application and a compliance schedule by August 1, 2007;

(B) The compliance schedule shall contain the following increments of progress:

(i) a date by which contracts for the emission control system and process equipment shall be awarded or orders shall be issued for purchase of component parts;

(ii) a date by which on-site construction or installation of the emission control and process equipment shall begin; and

(iii) a date by which on-site construction or installation of the emission control and process equipment shall be completed;

(C) Final compliance shall be achieved no later than October 1, 2009.

- (2) if compliance is to be achieved by using low solvent content coating technology:

(A) The owner or operator shall submit a permit application and a compliance schedule by August 1, 2007;

(B) The compliance schedule shall contain the following increments:

(i) a date by which research and development of low solvent content coating shall be completed if the Director determines that low solvent content coating technology

has not been sufficiently researched and developed;

(ii) a date by which evaluation of product quality and commercial acceptance shall be completed;

(iii) a date by which purchase orders shall be issued for low solvent content coatings and process modifications;

(iv) a date by which process modifications shall be initiated; and

(v) a date by which process modifications shall be completed and use of low solvent content coatings shall begin;

(C) Final compliance shall be achieved no later than October 1, 2009.

- (3) The owner or operator shall certify to the Director within five days after the deadline, for each increment of progress in this Paragraph, whether the required increment of progress has been met.

~~(d) The owner or operator shall certify to the Director within five days after the deadline, for each increment of progress in Paragraph (c) of this Rule, whether the required increment of progress has been met.~~

~~(e) If the Director requires a test to demonstrate that compliance has been achieved, the owner or operator of sources subject to this Rule shall conduct a test and submit a final test report within six months after the stated date of final compliance.~~

~~(f) The owner or operator of any new source of volatile organic compounds not in existence or under construction as of the date that the Director notices in the North Carolina Register in accordance with Paragraphs (e), (f), or (g) of Rule .0902 of this Section that the area is in violation of the ambient air quality standard for ozone, shall comply with all applicable rules in this Section upon start-up of the source.~~

~~(g)~~ (f) Sources already in compliance.

(1) Maintenance Areas. Paragraphs (c) and (d) of this Rule shall not apply to sources that are in compliance with applicable rules of this Section when the Director notices in the North Carolina Register that the area is in violation of the ambient air quality standard for ozone and that have determined and certified compliance to the satisfaction of the Director within six months after the Director notices in the North Carolina Register that the area is in violation.

(2) Nonattainment areas. Paragraphs (d) of this Rule shall not apply to sources in an area named in Paragraph (f) of Rule .0902 of this Section that are in compliance with applicable rules of this Section on January 1, 2007.

(g) New sources.

- (1) Maintenance areas. The owner or operator of any new source of volatile organic compounds not in existence or under construction before the date that the Director notices in the North Carolina Register in accordance with Paragraphs (g) or (h) of Rule .0902 of this Section that the area is in violation of the ambient air quality standard for ozone, shall comply with all applicable rules in this Section upon start-up of the source.
- (2) Nonattainment areas. The owner or operator of any new source of volatile organic compounds not in existence or under construction before January 1, 2007 shall comply with all applicable rules in this Section upon start-up of the source.

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

**SECTION .1400 – NITROGEN OXIDES**

**15A NCAC 02D .1402 APPLICABILITY**

(a) The rules in this Section do not apply except as specifically set out in this Rule.

~~(a)(b)~~ The requirements of this Section shall apply to all sources May 1 through September 30 of each year.

~~(b)(c)~~ Rules .1409(b) and .1416 through .1423 of this Section apply statewide.

(d) The Rules .1407 through .1409 and .1413 of this Section apply to sources with the potential to emit 100 ton or more nitrogen oxides per year in the following areas:

- (1) Cabarrus County
- (2) Gaston County
- (3) Lincoln County
- (4) Mecklenburg County
- (5) Rowan County
- (6) Union County
- (7) Davidson Township and Coddle Creek Township in Iredell County

~~(e) Rules .1407, .1408, .1409(a), and .1413 of this Section apply to sources identified according to Paragraph (d) of this Rule.~~

~~(d) With the exceptions stated in Paragraph (h) of this Rule, this Section shall apply to:~~

- ~~(1) Charlotte/Gastonia, consisting of Mecklenburg and Gaston Counties according to Paragraph (e) of this Rule;~~
- ~~(2) Greensboro/Winston-Salem/High Point, consisting of Davidson, Forsyth, and Guilford Counties and the part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway 801, Fulton Creek and back to Yadkin River according to Paragraph (f) of this Rule; or~~
- ~~(3) Raleigh/Durham, consisting of Durham and Wake Counties and Dutchville Township in Granville County according to Paragraph (g) of this Rule.~~

~~(e) If a violation of the ambient air quality standard for ozone is measured according to 40 CFR 50.9 in Cabarrus, Gaston, Iredell,~~

~~Lincoln, Mecklenburg, Rowan, or Union County, North Carolina or York County, South Carolina, the Director shall initiate analysis to determine the control measures needed to attain and maintain the ambient air quality standard for ozone. By the following May 1, the Director shall implement the specific stationary source control measures contained in this Section that are required as part of the control strategy necessary to bring the area into compliance and to maintain compliance with the ambient air quality standard for ozone. The Director shall implement the rules in this Section identified as necessary by the analysis by notice in the North Carolina Register. The notice shall identify the rules that are to be implemented and shall identify whether the rules implemented are to apply in Gaston or Mecklenburg County or in both counties. At least one week before the scheduled publication date of the North Carolina Register containing the Director's notice implementing rules in this Section, the Director shall send written notification to all permitted facilities within the county in which the rules are being implemented that are or may be subject to the requirements of this Section informing them that they are or may be subject to the requirements of this Section. (For Mecklenburg County, "Director" means for the purpose of notifying permitted facilities in Mecklenburg County, the Director of the Mecklenburg County local air pollution control program.) Compliance shall be according to Rule .1403 of this Section.~~

~~(f)(e) If a violation of the ambient air quality standard for ozone is measured according to 40 CFR 50.9 in Davidson, Forsyth, or Guilford County or that part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway 801, Fulton Creek and back to Yadkin River, the Director shall initiate analysis to determine the control measures needed to attain and maintain the ambient air quality standard for ozone. By the following May 1, the Director shall implement the specific stationary source control measures contained in this Section that are required as part of the control strategy necessary to bring the area into compliance and to maintain compliance with the ambient air quality standard for ozone. The Director shall implement the rules in this Section identified as necessary by the analysis by notice in the North Carolina Register. The notice shall identify the rules that are to be implemented and shall identify whether the rules implemented are to apply in Davidson, Forsyth, or Guilford County or that part of Davie County bounded by the Yadkin River, Dutchmans Creek, North Carolina Highway 801, Fulton Creek and back to Yadkin River or any combination thereof. At least one week before the scheduled publication date of the North Carolina Register containing the Director's notice implementing rules in this Section, the Director shall send written notification to all permitted facilities within the county in which the rules are being implemented that are or may be subject to the requirements of this Section informing them that they are or may be subject to the requirements of this Section. (For Forsyth County, "Director" means for the purpose of notifying permitted facilities in Forsyth County, the Director of the Forsyth County local air pollution control program.) Compliance shall be according to Rule .1403 of this Section.~~

~~(g)(f) If a violation of the ambient air quality standard for ozone is measured according to 40 CFR 50.9 in Durham or Wake County or Dutchville Township in Granville County, the~~

Director shall initiate analysis to determine the control measures needed to attain and maintain the ambient air quality standard for ozone. By the following May 1, the Director shall implement the specific stationary source control measures contained in this Section that are required as part of the control strategy necessary to bring the area into compliance and to maintain compliance with the ambient air quality standard for ozone. The Director shall implement the rules in this Section identified as necessary by the analysis by notice in the North Carolina Register. The notice shall identify the rules that are to be implemented and shall identify whether the rules implemented are to apply in Durham or Wake County or Dutchville Township in Granville County or any combination thereof. At least one week before the scheduled publication date of the North Carolina Register containing the Director's notice implementing rules in this Section, the Director shall send written notification to all permitted facilities within the county in which the rules are being implemented that are or may be subject to the requirements of this Section informing them that they are or may be subject to the requirements of this Section. Compliance shall be in according to Rule .1403 of this Section.

~~(h)(g)~~ Regardless of any other statement of applicability of this Section, this Section does not apply to any:

- (1) source not required to obtain an air permit under 15A NCAC 02Q .0102 or is an insignificant activity as defined at 15A NCAC 02Q .0103(19);
- (2) incinerator or thermal or catalytic oxidizer used primarily for the control of air pollution;
- (3) emergency generator;
- (4) emergency use internal combustion engine;
- (5) source that is not covered under Rules .1416, .1417, or .1418, and that is at a facility with a federally enforceable potential to emit nitrogen oxides of:
  - (A) less than 100 tons per year; and
  - (B) less than 560 pounds per calendar day beginning May 1 through September 30 of any year.
- (6) stationary internal combustion engine less than 2400 brake horsepower that operates no more than the following hours between May 1 and September 30:
  - (A) for diesel engines:  
 $t = 833,333 / ES$
  - (B) for natural gas-fired engines:  
 $t = 700,280 / ES$

where  $t$  equals time in hours and  $ES$  equals engine size in horsepower.

This exemption shall not apply to any of the sources listed in Rules .1417(a)(1) or (2) or .1417(b) of this Section except that it shall apply to:
- (7) stationary combustion turbine constructed before January 1, 1979, that has a federally enforceable permit that restricts:

- (A) its potential emissions of nitrogen oxides to no more than 25 tons between May 1 and September 30;
- (B) it to burning only natural gas or oil; and
- (C) its hours of operation as described in 40 CFR 96.4 (b) (1)(ii) and (iii).

*Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5), (7), (10).*

**15A NCAC 02D .1403 COMPLIANCE SCHEDULES**

(a) Applicability. This Rule applies to sources as set out in covered by Paragraph (d), (f), or (g) of Rule .1402 of this Section.

(b) Maintenance areas. The owner or operator of a source subject to this Rule because of the applicability of Paragraphs (e), (f), Paragraph (f) or (g) of Rule .1402 of this Section, shall adhere to the following: following increments of progress and schedules:

- (1) If compliance with this Section is to be achieved through a demonstration to certify compliance without source modification:
  - (A) The owner or operator shall notify the Director in writing within six months after the Director's notice in the North Carolina Register that the source is in compliance with the applicable limitation or standard;
  - (B) The owner or operator shall perform any required testing, according to Rule .1415 of this Section, within 12 months after the Director's notice in the North Carolina Register to demonstrate compliance with the applicable limitation; and
  - (C) The owner or operator shall implement any required recordkeeping and reporting requirements, according to Rule .1404 of this Section, within 12 months after the Director's notice in the North Carolina Register to demonstrate compliance with the applicable limitation.
- (2) If compliance with this Section is to be achieved through the installation of combustion modification technology or other source modification:
  - (A) The owner or operator shall submit a permit application and a compliance schedule within six months after the Director's notice in the North Carolina Register.
  - (B) The compliance schedule shall contain the following increments of progress:
    - (i) a date by which contracts for installation of the modification shall be



- awarded or orders shall be issued for purchase of component parts;
- (ii) a date by which installation of the modification shall begin;
  - (iii) a date by which installation of the modification shall be completed; and
  - (iv) if the source is subject to a limitation, a date by which compliance testing shall be completed.
- (C) Final compliance shall be achieved within three years after the Director's notice in the North Carolina Register unless the owner or operator of the source petitions the Director for an alternative limitation according to Rule .1412 of this Section. If such a petition is made, final compliance shall be achieved within four years after the Director's notice in the North Carolina Register.
- (3) If compliance with this Section is to be achieved through the implementation of an emissions averaging plan as provided for in Rule .1410 of this Section:
- (A) The owner or operator shall abide by the applicable requirements of Subparagraphs (b)(1) or (b)(2) of this Rule for certification or modification of each source to be included under the averaging plan;
  - (B) The owner or operator shall submit a plan to implement an emissions averaging plan according to Rule .1410 of this Section within six months after the Director's notice in the North Carolina Register.
  - (C) Final compliance shall be achieved within one year after the Director's notice in the North Carolina Register unless implementation of the emissions averaging plan requires the modification of one or more of the averaging sources. If modification of one or more of the averaging sources is required, final compliance shall be achieved within three years.
- (4) If compliance with this Section is to be achieved through the implementation of a seasonal fuel switching program as provided for in Rule .1411 of this Section:
- (A) The owner or operator shall make all necessary modifications according to Subparagraph (b)(2) of this Rule.
  - (B) The owner or operator shall include a plan for complying with the requirements of Rule .1411 of this Section with the permit application required under Part (A) of this Subparagraph.
- (C) Final compliance shall be achieved within three years after the Director's notice in the North Carolina Register.
- (5) Increments of progress certification. The owner or operator shall certify to the Director, within five days after the ~~deadline for each increment~~ deadline of progress in this Paragraph, whether the required increment of progress has been met.
- ~~(e) Schedule for utility companies. The owner or operator of a source subject to this Rule because of Rule .1416 of this Section shall:~~
- ~~(1) submit to the Director before October 1, 2003, a description of how the source will comply, which shall include an estimate of the number of tons of nitrogen oxides per ozone season, which may be a range, that will be obtained from the nitrogen oxide budget trading program under Rule .1419 of this Section to show compliance;~~
  - ~~(2) submit to the Director a permit application, following the schedules in 15A NCAC 02Q .0312, .0313, .0525, or .0527, as applicable, to receive a permit and make the modification or construct and begin operating the control device before the final compliance dates in Rule .1416 of this Section if a permit is needed for source modifications or control device installation or modification; and~~
  - ~~(3) install and implement any required monitoring, recordkeeping, and reporting requirements before May 1, 2004; if a permit application is necessary to install and operate the monitor, the permit application shall be submitted by October 1, 2003; if a permit application is not submitted, the Director shall modify the source's permit by January 1, 2004, to insert the monitoring, recordkeeping, and reporting requirements necessary to show compliance with this Section.~~
- ~~(d) Schedule for large combustion sources. The owner or operator of a source subject to this Rule because of Rules .1409(b) or .1417 of this Section shall:~~
- ~~(1) submit to the Director before October 1, 2003, a description of how the source will comply, which shall include an estimate of the number of tons of nitrogen oxides per ozone season, which may be a range, that will be obtained from the nitrogen oxide budget trading program under Rule .1419 of this Section to show compliance;~~
  - ~~(2) submit to the Director a permit application, following the schedules in 15A NCAC 02Q .0312, .0313, .0525, or .0527, as applicable, to receive a permit and make the modification or~~

~~construct and begin operating the control device before the final compliance dates in Rules .1409(b) or .1417 of this Section if a permit is needed for source modifications or control device installation or modification;~~

- (3) ~~install and implement any required monitoring, recordkeeping, and reporting requirements before May 1, 2004; if a permit application is necessary to install and operate the monitor, the permit application shall be submitted by October 1, 2003; if a permit application is not submitted, the Director shall modify the source's permit by January 1, 2004, to insert the monitoring, recordkeeping, and reporting requirements necessary to show compliance with this Section.~~

(c) Nonattainment areas. The owner or operator of a source subject to this Rule because of the applicability of Paragraph (d) of Rule .1402 of this Section, shall adhere to the following:

- (1) If compliance with this Section is to be achieved through a demonstration to certify compliance without source modification:
- (A) The owner or operator shall notify the Director in writing by August 1, 2007;
  - (B) The owner or operator shall perform any required testing, according to Rule .1415 of this Section, by January 1, 2008; and
  - (C) The owner or operator shall implement any required recordkeeping and reporting requirements, according to Rule .1404 of this Section, by January 1, 2008.
- (2) If compliance with this Section is to be achieved through the installation of combustion modification technology or other source modification:
- (A) The owner or operator shall submit a permit application and a compliance schedule by August 1, 2007;
  - (B) The compliance schedule shall contain the following increments of progress:
    - (i) a date by which contracts for installation of the modification shall be awarded or orders shall be issued for purchase of component parts;
    - (ii) a date by which installation of the modification shall begin;
    - (iii) a date by which installation of the modification shall be completed; and
    - (iv) if the source is subject to a limitation, a date by which

compliance testing shall be completed.

- (C) Final compliance shall be achieved no later than October 1, 2009.

- (3) If compliance with this Section is to be achieved through the implementation of an emissions averaging plan as provided for in Rule .1410 of this Section:

(A) The owner or operator shall abide by the applicable requirements of Subparagraphs (c)(1) or (c)(2) of this Rule for certification or modification of each source to be included under the averaging plan;

(B) The owner or operator shall submit a plan to implement an emissions averaging plan according to Rule .1410 of this Section by August 1, 2007;

(C) Final compliance shall be achieved within one year no later than January 1, 2008.

- (4) If compliance with this Section is to be achieved through the implementation of a seasonal fuel switching program as provided for in Rule .1411 of this Section:

(A) The owner or operator shall make all necessary modifications according to Subparagraph (c)(2) of this Rule;

(B) The owner or operator shall include a plan for complying with the requirements of Rule .1411 of this Section with the permit application required under Part (A) of this Subparagraph;

(C) Final compliance shall be achieved no later than October 1, 2009.

- (5) Increments of progress certification. The owner or operator shall certify to the Director, within five days after the deadline for each increment of progress in this Paragraph, whether the required increment of progress has been met.

(d) Sources already in compliance.

- (1) Maintenance Areas. Paragraph (b) of this Rule shall not apply to sources that are in compliance with applicable rules of this Section when the Director notices in the North Carolina Register that the area is in violation of the ambient air quality standard for ozone and that have determined and certified compliance to the satisfaction of the Director within six months after the Director notices in the North Carolina Register that the area is in violation.

- (2) Nonattainment areas. Paragraph (c) of this Rule shall not apply to sources in an area named in Paragraph (d) of Rule .1402 of this

Section that are in compliance with applicable rules of this Section on January 1, 2007.

(e) New sources.

(1) Maintenance areas. The owner or operator of any new source of nitrogen oxides not permitted ~~as of~~ before the date the Director notices in the North Carolina Register according to ~~Paragraphs (e), (f),~~ Paragraph (f) or (g) of Rule .1402 of this Section, shall comply with all applicable rules in this Section upon start-up of the source. The owner or operator of any new source covered under Rules .1407, .1408, .1409, .1413, or .1418 of this Section shall comply with all applicable rules in this Section upon start-up of the source.

(2) Nonattainment areas. The owner or operator of any new source of nitrogen oxides not permitted before January 1, 2008 in an area identified in Paragraph (d) of Rule .1402 of this Section, shall comply with all applicable rules in this Section upon start-up of the source.

Authority G.S. 143-215.3(a)(1); 143-215.65; 143-215.107(a)(5), (7), (10).

TITLE 16 – DEPARTMENT OF PUBLIC EDUCATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Board of Education intends to adopt the rule cited as 16 NCAC 06H .0112.

Proposed Effective Date: January 2, 2007

Public Hearing:

Date: October 6, 2006

Time: 1:00 p.m.

Location: Room 224 South, Education Bldg., 301 S. Wilmington St., Raleigh, NC

Reason for Proposed Action: Rule is needed to comply with the McKinney-Vento Homeless Education Assistance Improvements Act of 2001.

Procedure by which a person can object to the agency on a proposed rule: Persons may submit objections regarding the proposed rule to Harry E. Wilson, Staff Attorney, State Board of Education, 6302 Mail Service Center, Raleigh, NC 27699-6302.

Comments may be submitted to: Harry E. Wilson, 6302 Mail Service Center, Raleigh, NC 27699-6302, phone (919) 807-3406, fax (919) 807-3198, email hwilson@dpi.state.nc.us

Comment period ends: November 14, 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 (≥\$3,000,000)
 None

CHAPTER 06 - ELEMENTARY AND SECONDARY EDUCATION

SUBCHAPTER 06H - FEDERAL PROGRAMS

16 NCAC 06H .0112 DISPUTE RESOLUTION PROCESS FOR HOMELESS STUDENTS

(a) As used in this Rule:

(1) The terms "homeless," "homeless child," and "homeless student" shall mean the same as the term "homeless children and youth" as defined by 42 U.S.C. § 11435(2). These terms shall also be deemed to include the term "unaccompanied youth."

(2) The term "unaccompanied youth" shall mean the same as defined by 42 U.S.C. § 11435(6).

(b) Each LEA shall appoint a liaison for homeless students. The LEA shall train the LEA liaison to carry out and mediate the dispute resolution process as expeditiously as possible and to ensure that each school and the LEA meets the requirements of the McKinney-Vento Homeless Education Assistance Improvements Act of 2001. The LEA liaison shall also ensure that each unaccompanied youth and any student who meets the definition of "homeless children and youth" as defined by 42 U.S.C. § 11435(2) is enrolled immediately in the school pending resolution of the dispute. The burden shall be on the school or LEA to show that the student is not a homeless student or unaccompanied youth.

(c) Each LEA shall develop and implement a process for parents, guardians, or unaccompanied youth who have complaints about enrollment to file an appeal to the LEA liaison upon registering, or attempting or register, at the school. Enrollment shall be deemed to include attending classes and participating fully in school activities. The appeal process shall provide that:

(1) faculty and staff of the school who know about the complaint must refer the child, youth, parent, or guardian to the LEA liaison;

- (2) the LEA liaison shall expeditiously carry out the dispute resolution process;
  - (3) pending resolution of any complaint between the school or LEA and the parent, guardian, or unaccompanied youth over school enrollment, the LEA shall enroll the child or youth immediately in the school in which the child or youth seeks enrollment;
  - (4) the LEA shall provide the student with all the services for which the student is eligible and shall permit the student to participate fully in school activities while the dispute is being resolved;
  - (5) the LEA shall provide the parent, guardian, or unaccompanied youth who makes a complaint to the LEA liaison with a written statement of the rights and procedures, in language the parent, guardian, or unaccompanied youth can understand, that informs them of:
    - (A) contact information including telephone number and address of the LEA liaison and of the State coordinator for homeless education, with a brief description of their roles;
    - (B) the right to initiate the dispute resolution process either orally or in writing;
    - (C) a simple form that parents, guardians, or unaccompanied youth can complete and submit to the LEA liaison to initiate the dispute resolution process;
    - (D) a step-by-step description of how to dispute the school's decision;
    - (E) notice of the right to enroll immediately in the school of choice or remain in the school of origin with transportation provided pending resolution of the dispute;
    - (F) notice that immediate enrollment includes full participation in all school activities; and
    - (G) notice of the right to obtain assistance of advocates or attorneys.
  - (6) provides the parent, guardian, or unaccompanied youth with the name and contact information of the State coordinator for homeless education; and
  - (7) informs the parent, guardian, or unaccompanied youth about the right to appeal any decision regarding the student's enrollment to the State coordinator.
- (d) Each LEA shall include in the dispute resolution process the following components:
- (1) The LEA shall allow the parent, guardian, or unaccompanied youth to initiate the dispute resolution process at the school at which enrollment is sought or at the LEA liaison's office.
  - (2) The LEA shall inform the parent, guardian, or unaccompanied youth of the right to provide supporting written or oral documentation.
  - (3) The LEA shall inform the parent, guardian, or unaccompanied youth of the right to seek the assistance of advocates or attorneys.
  - (4) The LEA shall provide the parent, guardian, or unaccompanied youth with a written statement of the final LEA decision.
  - (5) The LEA shall inform the parent, guardian, or unaccompanied youth of the right to appeal the final LEA decision to the State coordinator.
- (e) The Superintendent of Public Instruction shall designate a State coordinator for homeless education.
- (f) Any parent, guardian, or unaccompanied youth who is not satisfied with the final LEA decision regarding enrollment may appeal the decision to the State coordinator. In addition, any interested person who believes that grounds for an appeal exist may present an oral or written appeal to the State coordinator, including:
- (1) the name, address, and telephone number of the person filing the appeal;
  - (2) the relationship or connection of the person to the child in question;
  - (3) the name of the school system and the specific school in question;
  - (4) the federal requirement alleged to have been violated;
  - (5) how the requirement has been violated; and
  - (6) the relief the person is seeking.
- (g) If the State coordinator receives an appeal that is not complete, the coordinator shall contact the person making the appeal, explain the deficiency, and offer the person the opportunity to complete the appeal.
- (h) Upon request of the State coordinator, the LEA liaison shall provide the State coordinator with the record of the complaint and the LEA's actions. If the matter involves more than one LEA, then the LEA liaisons shall cooperate to provide the State coordinator with a complete record. In either event, the liaison or liaisons shall provide the complete record within five school days following the State coordinator's request.
- (i) The LEA shall provide the State coordinator with any information that the State coordinator requests regarding the issues presented in the appeal.
- (j) The State coordinator shall provide the LEA and the parent, guardian, or unaccompanied youth with the opportunity to respond to the LEA decision and to provide any additional evidence they deem relevant.
- (k) The State Coordinator shall issue a final written decision to the parent, guardian, or unaccompanied youth and the LEA involved within 10 school days following receipt of the complete appeal.
- (l) The State coordinator's decision shall include:
- (1) a summary of the issue appealed;
  - (2) the federal requirement at issue; and
  - (3) a description of the State coordinator's decision in plain language.
- (m) Nothing contained in this Rule shall prohibit the State coordinator from investigating whether the parent, guardian, or

unaccompanied youth knowingly and voluntarily entered into any agreement affecting their rights under McKinney-Vento Homeless Education Assistance Improvements Act of 2001. If the coordinator determines that the parent, guardian, or unaccompanied youth did not knowingly and voluntarily enter into the agreement, then the coordinator may void the agreement and enter a decision consistent with the applicable facts and law.

Authority G.S. 150B-21; 115C-12; 42 U.S.C. § 11432.

**TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS**

**CHAPTER 57 – REAL ESTATE APPRAISAL BOARD**

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Appraisal Board intends to adopt the rule cited as 21 NCAC 57A .0211 and amend the rules cited as 21 NCAC 57A .0201, .0203 - .0204, .0206, .0209 - .0210, .0302, .0405, .0407; 57B .0102 - .0103, .0210, .0304, .0306, .0603 - .0604, .0606, .0611.

**Proposed Effective Date:** March 1, 2007

**Public Hearing:**

**Date:** November 14, 2006

**Time:** 9:00 a.m.

**Location:** 5830 Six Forks Road, Raleigh, NC 27609

**Reason for Proposed Action:** Most changes are clarifications of existing rules to reflect current practice. 21 NCAC 57A .0211 is proposed for adoption to establish a process for nonresident licensing through reciprocity with other states or by application if North Carolina does not have a reciprocal agreement with the applicant's resident state.

**Procedure by which a person can object to the agency on a proposed rule:** File written comments before November 15, 2006. Attend the public hearing on November 14, 2006. Email the rulemaking coordinator at Roberta@ncab.org.

**Comments may be submitted to:** Roberta Ouellette, 5830 Six Forks Road, Raleigh, NC 27609, phone (919) 870-4854, fax (919) 870-4859, email roberta@ncab.org

**Comment period ends:** November 15, 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 (≥\$3,000,000)
- None

**SUBCHAPTER 57A - REGISTRATION LICENSING, CERTIFICATION AND PRACTICE**

**SECTION .0200 – TRAINEE REGISTRATION, APPRAISER LICENSING AND CERTIFICATION**

**21 NCAC 57A .0201 QUALIFICATIONS FOR TRAINEE REGISTRATION, APPRAISER LICENSURE AND CERTIFICATION**

(a) Applicants for trainee registration, licensure as a licensed residential real estate appraiser and certification as a certified real estate appraiser must satisfy the qualification requirements stated in G.S. 93E-1-6 as further set forth in Subparagraphs (a)(1), (a)(2), (a)(3), and (a)(4) of this Rule, provided however that registration as a trainee or licensure as a licensed residential real estate appraiser is not prerequisite for certification as a certified residential or general real estate appraiser. Appraiser. All prelicensing or precertification education must have been obtained in a classroom setting. No credit will be given for courses taken by any other method, such as correspondence school courses or computer based courses.

- (1) Applicants for trainee registration shall have completed, within the five-year period immediately preceding the date application is made, 90 hours of education in the areas of Introduction to Real Estate Appraisal, Valuation Principles and Practices, Applied Residential Property Valuation, ~~and, effective January 1, 2003, and~~ the Uniform Standards of Professional Appraisal Practice (USPAP) or appraisal education found by the Board to be equivalent to such courses.
- (2) Applicants for licensure as a licensed residential real estate appraiser shall have completed, within the five-year period immediately preceding the date application is made, 90 hours of education as set forth in Subparagraph (a)(1) of this Rule, and shall have obtained at least 2,000 hours of appraisal experience acquired within the five-year period immediately preceding the date application is made and over a minimum period of 18 calendar months. Applicants must have been actively engaged in real estate appraising for at least 18 months prior to the date application is made.

- (3) Applicants for certification as a certified residential real estate appraiser shall have completed those courses required for registration as a trainee or licensure as a licensed residential real estate appraiser or equivalent education and, in addition, within the five-year period immediately preceding the date application is made, a course in Introduction to Income Property Appraisal consisting of at least 30 classroom hours of instruction or equivalent ~~education; education,~~ and the 15 hour National USPAP course; and shall have obtained at least 2,500 hours of appraisal experience acquired within the five-year period immediately preceding the date application is made and over a minimum period of two calendar years. Applicants must have been actively engaged in real estate appraising for at least two calendar years prior to the date application is made. At least 50 percent of this appraisal experience must have been of one to four family residential properties in which the sales comparison approach was utilized in the appraisal process.
- (4) Applicants for certification as a certified general real estate appraiser shall have completed those courses required for certification as a certified residential real estate appraiser or equivalent education and, in addition, within the five-year period immediately preceding the date application is made, courses in Advanced Income Capitalization Procedures and Applied Income Property Valuation each consisting of at least 30 classroom hours of instruction or equivalent ~~education; education, and the 15 hour National USPAP course;~~ and shall have obtained at least 3,000 hours of appraisal experience acquired within the five-year period immediately preceding the date application is made and over a minimum period of two and a half calendar years of which at least 50 percent must have been in appraising non-residential real estate. Applicants must have been actively engaged in real estate appraising for at least two and one-half calendar years prior to the date application is made. At least 50 percent of the non-residential appraisal experience must have been of complex properties or of improved properties in which the income approach was utilized in the appraisal process.
- (b) Applicants for licensure or certification must submit a complete copy of their appraisal log and may be required to provide to the Board copies of appraisal reports in support of experience credit. ~~All appraisals submitted in support of experience credit.~~ In order for an appraisal to be given experience credit, it must comply with the Uniform Standards of

- Professional Appraisal Practice (USPAP) and with any applicable state statutes or rules.
- (c) When a trainee becomes a licensed or certified real estate appraiser or when a licensed real estate appraiser becomes certified as a real estate appraiser, his registration or licensure shall be immediately canceled by the Board. When a certified residential real estate appraiser becomes certified as a general real estate appraiser, his previous certification shall be immediately canceled by the Board.
- (d) In the event that the Board asks an applicant to submit updated information or provide further information necessary to complete the application and the applicant fails to submit such information within 90 days following the Board's request, the Board shall cancel the applicant's application and the application fee will be retained by the Board. An applicant whose application has been cancelled and who wishes to obtain a registration, license or certificate must start the licensing process over by filing a complete application with the Board and paying all required fees.
- (e) An applicant may request that his or her application be withdrawn at any time before final action is taken by the Appraisal Board on the application.
- (f) If an application is withdrawn, cancelled or denied, the applicant must wait six months from the date the application is withdrawn, cancelled or denied to file a new application.
- (g) If an applicant has a current open complaint before the North Carolina Appraisal Board or an appraiser licensing board from any other state, or if the applicant has pending criminal charges in this or any state, the application will be accepted but no further action will be taken on the application until the complaint and/or criminal charges are resolved. For the purposes of this Section, criminal charges do not include speeding tickets or traffic infractions.
- Authority G.S. 93E-1-6(a); 93E-1-10.*
- 21 NCAC 57A .0203 REGISTRATION, LICENSE AND CERTIFICATE RENEWAL**
- (a) All registrations, licenses and certificates expire on June 30 of each year unless renewed before that time.
- (b) A holder of a trainee registration, an appraiser license or certificate desiring the renewal of such registration, license or certificate shall apply for same in writing upon the form approved by the Board and shall forward the required fee of two-hundred dollars (\$200.00). Forms are available upon request to the Board. The renewal fee is not refundable under any circumstances.
- (c) All trainees, licensees and certificate holders, ~~either active or inactive,~~ either resident or non-resident, who are required by G.S 93E-1-7 to complete continuing education as a condition of renewal, shall be required to satisfy the continuing education requirements set forth in Rule .0204 of this Section.
- (d) An applicant for renewal who initially obtained his license or certificate by reciprocity may keep that license or certificate even if the applicant has moved to a different state, as long as the North Carolina license or certificate is continuously renewed pursuant to this Section. Such an applicant for renewal does not have to maintain licensure with the appraiser regulatory authority of the state upon whose qualification requirements the

~~reciprocal license or certificate was granted. An applicant applying for renewal of a registration, license or certificate obtained by reciprocity must submit with the renewal application a current license history from the appraiser regulatory authority of the state upon whose qualification requirements the reciprocal registration, license or certificate was granted showing that the applicant is currently registered, licensed or certified in good standing. A holder of a trainee registration, an appraiser license or certificate that was originally obtained by examination in North Carolina and who resides out of state must, if currently licensed by the appraiser certification board of that state, supply a current license history from the appraiser regulatory authority of the state of residence showing that the applicant is currently registered, licensed or certified in good standing in the resident state. Submission of false or misleading information to the Board in connection with registration, license or certificate renewal shall constitute grounds for disciplinary action.~~

(e) Any person who acts or holds himself out as a registered trainee, ~~state licensed~~ licensed or ~~state certified~~ certified real estate appraiser while his trainee registration, appraiser license or certificate is expired shall be subject to disciplinary action and penalties as prescribed in Chapter 93E of the North Carolina General Statutes.

*Authority G.S. 93E-1-7(a),(b); 93E-1-10.*

#### **21 NCAC 57A .0204 CONTINUING EDUCATION**

(a) All registered trainees, real estate appraiser licensees and certificate holders shall, upon the renewal of their registration, license or certificate in every odd-numbered year, present evidence satisfactory to the Board of having obtained continuing education as required by this Section. ~~Registered trainees~~ Trainees and appraisers who were initially registered with the Board after January 1 of an odd numbered year will not be required to show continuing education credit for renewal of their registration in that odd numbered year.

(b) Each trainee, licensee and certificate holder who is required to complete continuing education pursuant to .0204(a) must complete 28 hours of continuing education by June 1 of every odd numbered year. Except as provided in Paragraphs (g) and (h) of this Rule, such education must have been obtained by taking courses approved by the Board for continuing education purposes, at schools approved by the Board to offer such courses. Such education must relate to real estate appraisal and must contribute to the goal of improving the knowledge, skill and competence of trainees, and licensed and certified real estate appraisers. There is no exemption from the continuing education requirement for trainees or appraisers whose registered, licensed or certified status has been upgraded to the level of licensed residential, certified residential or certified general appraiser since the issuance or most recent renewal of their registration, license or certificate, and courses taken to satisfy the requirements of a higher level of certification may not be applied toward the ~~annual~~ continuing education requirement. Trainees, licensees and certificate holders may not take the same continuing education course more than once during the two year continuing education cycle. The 7 hour National Uniform Standards of Professional Appraisal Practice (USPAP) update course may be taken once for each edition of USPAP.

(c) Each appraisal continuing education course must involve a minimum of three and one-half classroom hours of instruction on real estate appraisal or related topics such as the application of appraisal concepts and methodology to the appraisal of various types of property; specialized appraisal techniques; laws, rules or guidelines relating to appraisal; standards of practice and ethics; building construction; financial or investment analysis; land use planning or controls; feasibility analysis; statistics; accounting; or similar topics. The trainee, license or certificate holder must have attended at least 90 percent of the scheduled classroom hours for the course in order to receive credit for the course.

(d) Each trainee, licensee and certificate holder who is required to complete continuing education pursuant to .0204(a) must, as part of the 28 hours of continuing education required in .0204(b) of this section, complete the seven hour National USPAP update course, as required by the Appraiser Qualifications Board of the Appraisal Foundation, or its equivalent, prior to June 1 of every odd numbered year.

(e) A licensee who elects to take approved continuing education courses in excess of the requirement shall not carry over into the subsequent years any continuing education credit.

(f) Course sponsors must provide a prescribed certificate of course completion to each trainee, licensee and certificate holder satisfactorily completing a course. In addition, course sponsors must send directly to the Board a certified roster of all who successfully completed the course. This roster must be ~~sent~~ mailed within 15 days of completion of the course, but not later than June 15 of each year. In order to renew a registration, license or certificate in a timely manner, the Board must receive proper proof of satisfaction of the continuing education requirement prior to processing a registration, license or certificate renewal application. If proper proof of having satisfied the continuing education requirement is not provided, the registration, license or certificate shall expire and the trainee, licensee or certificate holder shall be subject to the provisions of Rules .0203(e) and .0206 of this Section.

(g) A current or former trainee, licensee or certificate holder may request that the Board grant continuing education credit for a course taken by the trainee, licensee or certificate holder that is not approved by the Board, or for appraisal education activity equivalent to a Board-approved course, by making such request and submitting a non-refundable fee of fifty dollars (\$50.00) for each course or type of appraisal education activity to be evaluated. Continuing education credit for a non-approved course shall be granted only if the trainee, licensee or certificate holder provides satisfactory proof of course completion and the Board finds that the course satisfies the requirements for approval of appraisal continuing education courses with regard to subject matter, course length, instructor qualifications, and student attendance. Appraisal education activities for which credit may be awarded include, but are not limited to, teaching appraisal courses, authorship of appraisal textbooks, and development of instructional materials on appraisal subjects. Trainees or licensed or certified appraisers who have taught an appraisal course or courses approved by the Board for continuing education credit shall be deemed to have taken an equivalent course and shall not be subject to the fifty (\$50.00) fee, provided they submit verification satisfactory to the Board

of having taught the course(s). A trainee, licensee or certificate holder who teaches a Board-approved continuing education course may not receive continuing education credit for the same course more than once every three years, regardless of how often he teaches the course. Requests for equivalent approval for continuing education credit must be received by June 15 of an odd-numbered year to be credited towards the continuing education requirement for that odd-numbered year.

(h) A trainee, licensee or certificate holder may receive continuing education credit by taking any of the Board-approved prelicensing or precertification courses or their approved equivalents. These courses cannot be used for both continuing education credit and for credit for licensing purposes. In order to receive continuing education credit for these courses, the examination must be taken. Trainee, licensees and certificate holders who wish to use a prelicensing course for continuing education credit must comply with the provisions of 21 NCAC 57B .0604.

(i) A trainee, licensee or certificate holder who resides in another state and is currently licensed by the appraiser certification board of that state may satisfy the requirements of this section by providing a current letter of good standing from the resident state showing that the licensee has met all continuing education requirements in the resident state. A trainee, licensee or certificate holder who resides in North Carolina must comply with the requirements of this section regardless of how the registration, license or certificate was obtained.

(j) A trainee, licensee or certificate holder who is returning from active military duty will be allowed to renew his or her registration, license or certificate in an odd-numbered year even if the required continuing education is not completed. All required continuing education must be completed within 180 days of when the trainee, licensee or certificate holder returns from active duty, or the registration, license or certificate will expire.

Authority G.S. 93E-1-7(a); 93E-1-10.

**21 NCAC 57A .0206 EXPIRED REGISTRATION, LICENSE OR CERTIFICATE**

(a) Expired registrations, licenses and certificates may be reinstated within 12 months after expiration upon proper application, payment to the Board of the two-hundred dollar (\$200.00) renewal fee plus a late filing fee of five dollars (\$5.00) per month for each month or part thereof that such registration, license or certificate is lapsed, and provision of proof of having obtained the continuing education that would have been required had the registration, license or certificate been continuously renewed.

(b) If the registration, license or certificate has been expired for more than 12 months, but less than 24 months, an applicant may apply for reinstatement. a request for reinstatement shall be treated as an original application. In order to be considered for reinstatement, the applicant must pay the one-hundred fifty dollar (\$150.00) original registration, license or certificate fee and include in the application a description of the applicant's education and experience during the period of registration, licensure or certification and during the time of expiration. Such

~~applications shall be reviewed by the Board to determine whether proof that the applicant has obtained the continuing education that would have been required had the registration, license or certificate been continuously renewed, an applicant examination, additional real estate appraisal education or additional appraisal experience shall be required.~~ In addition, the Board may consider whether the applicant for reinstatement has any prior or current disciplinary actions, and may examine the applicant's fitness for registration, licensure or certification before granting the request for reinstatement.

(c) ~~A request~~ An application for reinstatement shall not be granted if the registration, license or certificate has been expired for more than 24 months.

(d) Reinstatement is effective the date it is issued by the Board. It is not retroactive.

(e) A trainee or appraiser whose registration, license or certification has expired and who is returning from active military duty will be allowed to renew his or her registration, license or certificate when the trainee or appraiser returns from active duty without payment of a late filing fee as long as the trainee, licensee or certificate holder renews the registration, license or certificate within 180 days of when the trainee, licensee or certificate holder returns from active duty.

Authority G.S. 93E-1-6(b); 93E-1-7; 93E-1-10.

**21 NCAC 57A .0209 NATIONAL APPRAISER REGISTRY**

Licensees and certificate holders who are qualified for enrollment in the national roster or registry of ~~state-licensed~~ licensed and ~~state-certified~~ certified real estate appraisers may apply for enrollment or for the renewal or reinstatement of such enrollment upon a Board form. The application form must be accompanied by a fee of twenty dollars (\$20.00) plus any additional fee that may be required by the appropriate federal agency or instrumentality.

Authority G.S. 93E-1-10; 93E-1-11(d).

**21 NCAC 57A .0210 TEMPORARY PRACTICE**

(a) A real estate appraiser who does not reside in North Carolina and who is licensed or certified by the appraiser licensing or certifying agency in another state may apply to receive temporary appraiser licensing or certification privileges in this State by filing a notarized application with the Board.

(b) Upon filing a completed application accompanied by a fee of one hundred fifty dollars (\$150.00) and otherwise satisfying the Appraisal Board as to his or her qualifications, eligibility and moral fitness for temporary licensing or certification privileges, an applicant shall be granted a temporary practice permit by the Board authorizing the applicant to perform in this State the appraisal assignment described in such application, provided that the length of time projected by the applicant for completion of the assignment is reasonable given the scope and complexity of the assignment. The fee must be paid by money order, certified check or cashier's check. As part of the examination for moral fitness, the Board may consider whether an applicant's trainee registration or appraiser license or certification is or has been subject to discipline in their resident state or any other state, and



may consider all other information outlined in Rule .0202 of this Section.

(c) Privileges granted under the provisions of this Rule shall expire upon the expiration date set forth in the temporary practice permit. However, upon a showing by the permittee satisfactory to the Appraisal Board that, notwithstanding the permittee's diligent attention to the appraisal assignment, additional time is needed to complete the assignment, the Board shall extend the temporary practice privileges granted under the permittee's temporary practice permit to afford him additional time to complete the appraisal assignment.

(d) Persons granted temporary practice privileges under this Rule shall not advertise or otherwise hold themselves out as being a North Carolina trainee or ~~state licensed-licensed~~ or ~~state-certified-certified~~ appraiser.

(e) A trainee may apply for a temporary practice permit and the provisions of Sections (a), ~~(b)~~ and ~~(c)~~, (c) and (d) above shall apply. The supervising appraiser for the trainee must be a North Carolina licensed or certified appraiser. If not, the supervising appraiser must be licensed or certified as a real estate appraiser in another state and must also receive a temporary practice permit for the same assignment as the trainee. The term "trainee" shall include apprentices and others who are licensed and regulated by a state agency to perform real estate appraisals under the supervision of a licensed or certified appraiser.

(f) An applicant for a temporary practice permit shall not begin performing any appraisal work in this State until the temporary practice permit has been issued by the Board.

Authority G.S. 93E-1-9(c) and (d); 93E-1-10; Title XI, Section 1122(a); 12 U.S.C. 3351(a).

**21 NCAC 57A .0211 NONRESIDENT TRAINEE REGISTRATION, APPRAISER LICENSURE AND CERTIFICATION**

(a) Applicants for registration, licensure or certification who are not residents of North Carolina must file an application as stated in Rule .0101 of this Subchapter. In addition, nonresident applicants must also consent to service of process in this state and file an affidavit of residency with the application. If the applicant is licensed by the appraiser licensing board of the applicant's resident state, the applicant must also file with the application a letter of good standing from the appraiser licensing board of the resident state, which was issued under seal by that licensing board no later than 30 days prior to the date application is made in this state

(b) Applicants who are licensed by and reside in a state with which the Appraisal Board has entered into a formal agreement of reciprocity and who are applying for the same level of licensure as they hold in their resident state will not have to complete an experience log, take further education or take an examination provided the applicant is in good standing in the reciprocal state as evidenced by the letter of good standing from the appraiser licensing board of the resident state.

(c) Applicants for registration, licensure or certification who are not residents of a reciprocal state but who are in good standing in their resident state and who are applying for the same level of licensure as they hold in their resident state will not be required to take additional education or show an experience log. They

will be required to take the requisite examination for their level of licensure.

(d) Applicants for registration, licensure or certification who have been residents of another state but have moved to North Carolina may apply for registration, licensure or certification under this section within 90 days of the date they moved to North Carolina.

Authority G.S. 93E-1-9(a) and (b); 93E-1-10; Title XI, Section 1122(a); 12 U.S.C. 3351(a).

**SECTION .0300 - APPRAISER EXAMINATIONS**

**21 NCAC 57A .0302 SUBJECT MATTER AND PASSING SCORES**

(a) The examination for trainee registration, licensure as a ~~state-licensed-licensed~~ real estate appraiser and for certification as a ~~state-certified-certified~~ residential real estate appraiser shall test applicants on the following subject areas:

- (1) Influences on Real Estate Value;
- (2) Legal Considerations in Appraisal;
- (3) Types of Value;
- (4) Economic Principles;
- (5) Real Estate Markets and Analysis;
- (6) Valuation Process;
- (7) Property Description;
- (8) Highest and Best Use Analysis;
- (9) Appraisal Statistical Concepts;
- (10) Sales Comparison approach;
- (11) Site Value;
- (12) Cost Approach;
- (13) Income Approach (Gross Rent Multipliers, Estimation of Income and Expenses, Operating Expense ratios);
- (14) Valuation of Partial Interests; and
- (15) Appraisal Standards and Ethics.

(b) In addition to the subject areas listed in Paragraph (a) of this Rule, the examination for certification as a ~~state-certified-certified~~ general real estate appraiser shall test applicants on the following subject areas:

- (1) Direct Capitalization;
- (2) Cash Flow Estimates;
- (3) Measures of Cash Flow; and
- (4) Discounted Cash Flow Analysis.

(c) Prior to taking the examination, applicants will be informed of the score required to pass. Applicants who pass the examination will only be notified that they have passed. Applicants who have failed will be informed of their actual score.

Authority G.S. 93E-1-6(c); 93E-1-10.

**SECTION .0400 – GENERAL APPRAISAL PRACTICE**

**21 NCAC 57A .0405 APPRAISAL REPORTS**

(a) Each written appraisal report prepared by or under the supervision of a licensed or certified real estate appraiser shall bear the signature of the licensed or certified appraiser, the license or certificate number of the licensee or certificate holder

in whose name the appraisal report is issued, and the designation "licensed residential real estate appraiser", "certified residential real estate appraiser", or the designation "certified general real estate appraiser", or "certified residential/general real estate appraiser", as applicable. Each such appraisal report shall also indicate whether or not the licensed or certified appraiser has personally inspected the property, and shall identify any other person who assists in the appraisal process other than by providing clerical assistance.

(b) Every licensed and certified real estate appraiser shall affix or stamp to all appraisal reports a seal which shall set forth the name and license or certificate number of the appraiser in whose name the appraisal report is issued and shall identify the appraiser as a "licensed residential real estate appraiser", a "certified residential real estate appraiser", or as a "certified general real estate appraiser" or "certified residential/general real estate appraiser", as applicable. The seal must be legible, must conform to the seal authorized by the Board at time of initial licensure or certification, and must be a minimum of one inch in diameter. Appraisers shall personally affix their seal to their appraisal reports and shall not allow any other person or entity to affix their seal. Registered trainees are prohibited from using a seal on appraisal reports.

(c) A licensed or certified real estate appraiser who signs an appraisal report prepared by another person, in any capacity, shall be fully responsible for the content and conclusions of the report.

(d) A written appraisal report shall be issued on all real estate appraisals performed in connection with federally related transactions.

(e) Appraisers shall keep a record of all appraisals performed. The record shall contain, at a minimum, the appraiser's license or certificate number, the street address of the subject property, the date the report was signed, the name of anyone assisting in the preparation of the report and the name of the client. These records shall be updated at least every 30 days.

(f) Trainees and appraisers shall personally affix their signature to their appraisal reports and shall not allow any other person or entity to affix the trainee's or appraiser's signature.

*Authority G.S. 93E-1-10.*

**21 NCAC 57A .0407 SUPERVISION OF TRAINEES**

(a) A licensed or certified real estate appraiser may engage a registered trainee to assist in the performance of real estate appraisals, provided that the licensed or certified real estate appraiser:

- (1) has been licensed or certified for at least two years;
- (2) has no more than one trainee working under his or her supervision at any one time, if the supervisor is a licensed real estate appraiser, or two trainees if the supervisor is a certified real estate appraiser. Prior to the date any trainee begins performing appraisals under his or her supervision, the supervisor must inform the Board of the name of the trainee. The supervisor must also inform the Board when a

trainee is no longer working under his or her supervision.

- (3) actively and personally supervises the trainee. The supervisor must accompany the trainee on the inspections of the subject property on the first 50 appraisal assignments ~~performed after the effective date of this Rule~~ for which the trainee will perform more than 75% of the work. After that point, the trainee may perform the inspections without the presence of the supervisor provided that the trainee is competent to perform those inspections, and provided that the subject property is less than 50 miles from the supervisor's primary business location. The supervisor must accompany the trainee on all inspections of subject properties that are located more than 50 miles from the supervisor's primary business location;
- (4) reviews all appraisal reports and supporting data used in connection with appraisals in which the services of a trainee is utilized;
- (5) complies with all provisions of Rule .0405 of this Section regarding appraisal reports;
- (6) prepares and furnishes to each trainee, whose services were utilized in connection with the appraisal, a report describing the nature and extent of assistance rendered by the trainee in connection with the appraisal, and places a copy of such report in the supporting file for the appraisal ~~appraisal~~ within 30 days of the date the appraisal report was signed. In addition, the supervisor must make available to the trainee a copy of every appraisal report to the trainee where the trainee performs more than 75% of the work on the appraisal; and
- (7) has not received any disciplinary action regarding his or her appraisal license or certificate from the State of North Carolina or any other state within the previous two years. For the purposes of this Section, disciplinary action means ~~only~~ an active suspension or a revocation.

(b) The trainee must maintain a log on a form prescribed by the Board that includes, but is not limited to, each appraisal performed by the trainee, the type of property appraised, type of appraisal performed, complete street address of the subject property, the date the report was signed, the points claimed, the name of the supervisor for that appraisal, the supervisor's license or certificate number, and whether the supervisor accompanied the trainee on the inspection of the subject. The log must show all appraisals performed by the trainee and must be updated at least every 30 days.

(c) An appraiser A license or certificate holder who wishes to supervise a ~~trainee~~ trainee, and the trainee, must attend an education program offered by the Appraisal Board regarding the role of a supervisor either before such supervision may begin, begins, or within 90 days after such supervision begins. If the supervisor does not take the class within 90 days after the

supervision begins, the trainee may no longer work under the supervision of that supervisor until the class is taken. If the trainee fails to take the class, the supervisor shall notify the Appraisal Board and the trainee may no longer work under the appraiser's supervision.

(d) Trainees must assure that the supervisor has properly completed and sent the Supervisor Declaration Form to the Appraisal Board on or before the trainee begins assisting the supervising appraiser. Trainees shall not receive appraisal experience credit for appraisals performed in violation of this Section.

(e) Supervising appraisers shall not be employed by a trainee or by a company, firm or partnership in which the trainee has a controlling interest.

Authority G.S. 93E-1-3(b); 93E-1-10.

**SUBCHAPTER 57B – REAL ESTATE APPRAISAL EDUCATION**

**SECTION .0100 – COURSES REQUIRED FOR REGISTRATION, LICENSURE AND CERTIFICATION**

**21 NCAC 57B .0102 CERTIFIED RESIDENTIAL REAL ESTATE APPRAISER COURSE REQUIREMENTS**

(a) In addition to the courses specified in Rule .0101 of this Section, an applicant for certification as a ~~state-certified-certified~~ residential real estate appraiser shall complete a minimum of 30 hours in Introduction to Income Property Appraisal (G-1). This course must be taken after the applicant's successful completion of the preclicensing courses specified in Rule .0101 of this Section. Credit for this course must be earned from a Board-approved course sponsor or school.

(b) An applicant who is not a trainee or a ~~state-licensed-licensed~~ residential real estate appraiser must have completed all required courses within the five-year period immediately preceding the date application is made to the Board.

(c) An applicant who is a trainee or ~~state-licensed-licensed~~ residential real estate appraiser must have completed the required course in Introduction to Income Property Appraisal (G-1) within the five-year period immediately preceding the date application is made to the Board.

Authority G.S. 93E-1-6(b); 93E-1-8(a); 93E-1-10.

**21 NCAC 57B .0103 CERTIFIED GENERAL REAL ESTATE APPRAISER COURSE REQUIREMENTS**

(a) In addition to the courses specified in Rules .0101 and .0102 of this Section, an application for certification as a ~~state-certified-certified~~ general real estate appraiser is required to complete the following precertification courses, each involving a minimum of 30 classroom hours:

- (1) Advanced Income Capitalization (G-2); and
- (2) Applied Income Property Valuation (G-3).

These courses must be commenced and completed after the applicant's successful completion of the courses specified in Rules .0101 and .0102 of this Section. Income Property Appraisal (G-1) shall be a prerequisite for Advanced Income Capitalization (G-2), and Advanced Income Capitalization (G-

2), shall be a prerequisite to Applied Income property Valuation (G-3). Credit for all courses must be earned from a Board-approved course sponsor or school, and all courses shall comply with the course content standards prescribed in Rule .0302 of this Subchapter.

(b) An applicant who is not a trainee, or a ~~state-licensed-licensed~~ or ~~state-certified-certified~~ residential real estate appraiser must have completed all the required courses within the five-year period immediately preceding the date application is made to the Board.

(c) An applicant who is a trainee or a ~~state-licensed-licensed~~ or ~~state-certified-certified~~ residential real estate appraiser must have completed all courses required beyond those required for his current licensure or certification within the five-year period immediately preceding the date application is made to the Board.

Authority G.S. 93E-1-6(c); 93E-1-8(a); 93E-1-10.

**SECTION .0200 - COURSE SPONSOR STANDARDS FOR PRELICENSING AND PRECERTIFICATION EDUCATION**

**21 NCAC 57B .0210 COURSE RECORDS**

Schools and course sponsors must:

- (1) retain on file for five years copies of all grade and attendance records for each approved course and must make such records available to the Board upon request;
- (2) retain on file for two years a master copy of each final course examination, and such file copy shall indicate the answer key, course title, course dates and name of instructor. Examination file copies shall be made available to the Board upon request;
- (3) within 15 days of course completion, but not later than ~~June 30~~ June 15 of each year, submit to the Board a roster of all students who satisfactorily completed the course along with the course evaluations. Rosters and evaluations must be sent together by mail, not by fax or other electronic means; and
- (4) participate in the Board's course and instructor evaluation program. Schools and course sponsors shall provide each student with a course evaluation form upon completion of the course, and shall tally the results of the evaluation forms onto one form. Schools and course sponsors shall send the completed course evaluation forms and the tally to the Board together with the roster required pursuant to Item (3) of this Rule.

Authority G.S. 93E-1-8(a); 93E-1-10.

**SECTION .0300 - COURSE STANDARDS FOR PRELICENSING AND PRECERTIFICATION EDUCATION**

**21 NCAC 57B .0304 COURSE SCHEDULING**

(a) All courses must have fixed beginning and ending dates, and schools and course sponsors may not utilize a scheduling system that allows students to enroll late for a course and then complete their course work in a subsequently scheduled course. Late enrollment is permitted only if the enrolling student can satisfy the minimum attendance requirement set forth in Paragraphs (c) and (d) of Rule .0303 of this Section.

(b) Courses may be scheduled in a manner that provides for class meetings of up to eight classroom hours in any given day; however credit for courses shall be limited to 30 classroom hours per seven-day period.

(c) A classroom hour consists of 50 minutes of classroom instruction and ten minutes of break time. For any class meeting that exceeds 50 minutes in duration, breaks at the rate of 10 minutes per hour must be scheduled and taken at reasonable times.

(d) Instruction must be given for a minimum of 30 classroom hours for R-1, R-2, G-1, G-2 and G-3, and a minimum of 15 hours for R-3 and USPAP. Instructors shall not accumulate unused break time to end the class early. The time for the final examination shall not be included in the credit hours.

(e) Students may not take more than 30 hours of any prelicensing or precertification course in one consecutive 14 day period.

*Authority G.S. 93E-1-8(a); 93E-1-10.*

**21 NCAC 57B .0306 INSTRUCTOR REQUIREMENTS**

(a) Except as indicated in Paragraph (b) of this Rule, all appraisal prelicensing and precertification courses or courses deemed equivalent by the Board shall be taught by instructors who possess the fitness for licensure required of applicants for trainee registration or real estate appraiser licensure or certification and either the minimum appraisal education and experience qualifications listed in this Rule or other qualifications that are found by the Board to be equivalent to those listed. These qualification requirements shall be met on a continuing basis. The minimum qualifications are as follows:

- (1) Residential appraiser courses: 120 classroom hours of real estate appraisal education equivalent to the residential appraiser education courses prescribed in Rules .0101 and .0102 of this Subchapter and ~~either two years' full-time experience as a certified residential or general real estate appraiser within the previous five years or three years full-time experience as a general real estate appraiser within the previous five years.~~ At with at least one-half of such experience being must be in residential property appraising. Instructors must also be a certified residential appraiser and have been so certified for at least three years.
- (2) General appraiser courses: 180 classroom hours of real estate appraisal education equivalent to the general appraiser education courses prescribed in Rules .0101, .0102 and .0103 of this Subchapter and three years' full-

time experience as a general real estate appraiser within the previous five years, ~~with at years.~~ At least one-third one-half of such experience being must be in income property appraising. Instructors must also be a certified general real estate appraiser and have been so certified for at least five years.

(3) USPAP: certification by the Appraiser Qualifications Board of the Appraisal Foundation as an instructor for the National USPAP Course.

(b) Guest lecturers who do not possess the qualifications stated in Paragraph (a) of this Rule may be utilized to teach collectively up to one-fourth of any course, provided that each guest lecturer possesses education and experience directly related to the particular subject area the lecturer is teaching.

(c) Instructors shall conduct themselves in a professional manner when performing their instructional duties and shall conduct their classes in a manner that demonstrates knowledge of the subject matter being taught and mastery of the following basic teaching skills:

- (1) The ability to communicate effectively through speech, including the ability to speak clearly at an appropriate rate of speed and with appropriate grammar and vocabulary;
- (2) The ability to present instruction in a thorough, accurate, logical, orderly, and understandable manner, to utilize illustrative examples as appropriate, and to respond appropriately to questions from students;
- (3) The ability to effectively utilize varied instructive techniques other than straight lecture, such as class discussion or other techniques;
- (4) The ability to effectively utilize instructional aids to enhance learning;
- (5) The ability to maintain an effective learning environment and control of a class; and
- (6) The ability to interact with adult students in a manner that encourages students to learn, that demonstrates an understanding of students' backgrounds, that avoids offending the sensibilities of students, and that avoids personal criticism of any other person, agency or organization.

(d) Upon request of the Board, an instructor or proposed instructor must submit to the Board a videotape or DVD in a manner and format which depicts the instructor teaching portions of a prelicensing course specified by the Board and which demonstrates that the instructor possesses the basic teaching skills described in Rule .0306(c) of this Section.

(e) The inquiry into fitness shall include consideration of whether the instructor has ever had any disciplinary action taken on his or her appraisal license or certificate or any other professional license or certificate in North Carolina or any other state, or whether the instructor has ever been convicted of or pleaded guilty to any criminal act. This inquiry may include consideration of whether disciplinary action or criminal charges are pending.

(f) Instructors shall not have received any disciplinary action regarding his or her appraisal license or certificate from the State of North Carolina or any other state within the previous two years. For the purposes of this Section, disciplinary action means a reprimand, suspension (whether active or inactive) or a revocation.

(g) Proposed prelicensing or precertification instructors who do not meet the minimum appraisal education and experience qualifications listed in Paragraph (a) of this Rule, and who seek to have their qualifications determined by the Board to be equivalent to the qualifications listed in Paragraph (a) of this Rule, must supply the Board with copies of sample appraisal ~~reports, reports or other evidence of experience.~~

(h) Persons desiring to become instructors for prelicensing and precertification courses must file an application for approval with the Board. Board approval of instructors expires on the next December 31 following the date of issuance. Instructors who wish to renew their approval must file an application for renewal of approval annually on or before December 1. There is no fee for application for or renewal of instructor approval. Once an instructor has been approved to teach a specific prelicensing or precertification course, that person may teach the course at any school or for any course sponsor approved by the Appraisal Board to offer prelicensing and precertification courses.

Authority G.S. 93E-1-8(a); 93E-1-10.

**SECTION .0600 - CONTINUING EDUCATION COURSES**

**21 NCAC 57B .0603 CRITERIA FOR COURSE APPROVAL**

The following requirements must be satisfied in order for course sponsors to obtain approval of a course for appraiser continuing education credit:

- (1) The subject matter of the course must comply with the requirements of Rule .0204 of Subchapter 57A and the information to be provided in the course must be both accurate and current.
- (2) The course must involve a minimum of three and one-half classroom hours of instruction on acceptable subject matter. A classroom hour consists of 50 minutes of classroom instruction and 10 minutes of break time. Instruction must be given for the full number of hours for which credit is given. Instructors may not accumulate unused break time to end the class early.
- (3) The course instructor(s) must:
  - (a) possess the fitness for licensure required of applicants for trainee registration, real estate appraiser licensure or certification; and
  - (b) either:
    - (i) two years' full-time experience that is directly related to the subject matter to be taught;

- (ii) a baccalaureate or higher degree in a field that is directly related to the subject matter to be taught;
- (iii) two years' full-time experience teaching the subject matter to be taught; or
- (iv) an equivalent combination of such education and experience.

- (4) If two or more instructors shall be utilized to teach a course during the approval period and the course shall be taught in states other than North Carolina, it is sufficient for the course sponsor to show that it has minimum instructor requirements comparable to these requirements. The inquiry into fitness shall include consideration of whether the instructor has had any disciplinary action taken on his or her appraisal license or any other professional license in North Carolina or any other state, or whether the instructor has been convicted of or pleaded guilty to any criminal act.
- (5) The course must be one involving a qualified instructor who, except as noted in Item (6) of this Rule, shall be physically present in the classroom at all times and who shall personally provide the instruction for the course. The course instructor may utilize videotape instruction, remote television instruction or similar types of instruction by other persons to enhance or supplement his personal instruction; however, such other persons shall not be considered to be the official course instructor and the official course instructor must be physically present when such indirect instruction by other persons is being utilized. No portion of the course may consist of correspondence instruction. The instructor must comply with Rule .0306(c) of this Subchapter. Instructors for the National USPAP courses must be certified by the Appraiser Qualifications Board of the Appraisal Foundation.
- (6) A trainee or appraiser may receive up to 14 hours of credit every two years in the period ending on June 1 of each odd numbered year for participation in a course on a computer disk or on-line via the Internet. A sponsor seeking approval of a computer-based education course must submit a complete copy of the course on the medium that is to be utilized and, must make available at the sponsor's expense, all hardware and software necessary for the Board to review the submitted course. In the case of an internet-based course, the Board must be provided access to the course via the internet at a date

and time satisfactory to the Board and shall not be charged any fee for such access. To be approved for credit, a computer-based continuing education course must meet all of the conditions imposed by the Rules in this Subchapter in advance, except where otherwise noted. The course must be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and other participants. The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a course on a computer disk must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based continuing education course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. The course design and delivery mechanism for an on-line course offered on the Internet must have received approval from the International Distance Education Certification Center (IDECC). A course completion certificate must be forwarded to the student as stated in Rule .0607 of this Section, and a course roster must be sent to the Appraisal Board in accordance with Rule .0608 of this Section.

- (7) The course must be an educational program intended to improve the knowledge, skill and competence of trainees, licensed and certified real estate appraisers. Activities not eligible for approval as a continuing education course include in-house training programs of a firm, organization or agency, trade conferences or similar activities.
- (8) The course sponsor must certify that the course shall be conducted in accordance with the operational requirements stated in Rule .0606 of this Section and that the course sponsor will comply with all other applicable rules contained in this Section.
- (9) The course title may not include the words "Uniform Standards of Professional Appraisal Practice" or "USPAP" unless the course is either the 15 hour National USPAP course or the 7 hour National USPAP update course. If the course is the 7 hour National USPAP course, the course title must state which edition of USPAP will be taught in that specific course.
- (10) Each course must utilize a textbook or course materials that have been approved by the Board.

**21 NCAC 57B .0604 PRELICENSING AND PRECERTIFICATION COURSES**

(a) Appraisal prelicensing or precertification courses conducted by North Carolina approved schools or by appraisal trade organizations which are approved as equivalent to the North Carolina prelicensing and precertification courses may be separately approved as appraisal continuing education courses. Trainees, licensed and certified appraisers may obtain continuing education credit for these courses only to the extent permitted by Rule .0204 of Subchapter 57A. Appraisal trade organizations must at all times assure compliance with Rules .0606, .0607, and .0608 of this Section in order to retain such approval for these courses.

(b) It is presumed that any person taking any of the prelicensing or precertification courses is doing so for registration, licensure or certification purposes. If the person wishes to obtain continuing education credit for the course, he or she must request such credit in writing and must send the original course completion certificate or course attendance certificate with the request.

*Authority G.S. 93E-1-8(c); 93E-1-10.*

**21 NCAC 57B .0606 COURSE OPERATIONAL REQUIREMENTS**

Course sponsors must at all times assure compliance with the criteria for course approval stated in Rule .0603 of this Section and must also comply with the following requirements relating to scheduling, advertising and conducting approved appraisal continuing education courses:

- (1) Courses must be scheduled and conducted in a manner that limits class sessions to a maximum of eight classroom hours in any given day and that includes appropriate breaks for each class session. A classroom hour consists of 50 minutes of classroom instruction and ten minutes of break time. For any class meeting that exceeds 50 minutes in duration, breaks at the rate of ten minutes per hour must be scheduled and taken at reasonable times.
- (2) Course sponsors must not utilize advertising of any type that is false or misleading in any respect. If the number of continuing education credit hours awarded by the Board for a course is less than the number of scheduled classroom hours for the course, any course advertisement or promotional materials which indicate that the course is approved for appraiser continuing education credit in North Carolina must specify the number of continuing education credit hours awarded by the Board for the course.
- (3) Course sponsors must, upon request, provide any prospective student a description of the course content sufficient to give the prospective student a general understanding of the instruction to be provided in the course.

*Authority G.S. 93E-1-8(c); 93E-1-10.*

- (4) Courses must be conducted in a facility that provides an appropriate learning environment. At a minimum, the classroom must be of sufficient size to accommodate comfortably all enrolled students, must contain a student desk or sufficient worktable space for each student, must have adequate light, heat, cooling and ventilation, and must be free of distractions that would disrupt class sessions. Sponsors are required to comply with all applicable local, state and federal laws and regulations regarding safety, health and sanitation. Sponsors shall furnish the Board with inspection reports from appropriate local building, health and fire inspectors upon the request of the Board.
- (5) The course sponsor must require students to attend at least 90 percent of the scheduled classroom hours in order to satisfactorily complete the course, even if the number of continuing education credit hours awarded by the Board for the course is less than the number of scheduled classroom hours. Attendance must be monitored during all class sessions to assure compliance with the attendance requirement. Instruction must be given for the number of hours for which credit is given. Instructors may not accumulate unused break time to end the class early.
- (6) Instructors must require reasonable student attentiveness during class sessions. Students must not be permitted to engage in activities that are not related to the instruction being provided.
- (7) Course sponsors for which an application fee is required by Rules .0602(b) and .0611(b) of this Section must fairly administer course cancellation and fee refund policies. In the event a scheduled course is canceled, reasonable efforts must be made to notify preregistered students of the cancellation and all prepaid fees received from such preregistered students must be refunded within 30 days of the date of cancellation or, with the student's permission, applied toward the fees for another course.
- (8) Upon request of the Board, the course sponsor must submit to the Board a videotape in a manner and format which depicts the instructor teaching portions of any continuing education course specified by the Board and which demonstrates that the instructor possesses the basic teaching skills described in Rule .0306(c) of this Section.
- (9) Course sponsors shall provide the Board with the dates and locations of all classes the sponsor is or will be offering in the State of North Carolina at least 30 calendar days before such class is offered, unless circumstances

beyond the control of the course sponsor require that the course be rescheduled. If the dates or location of the classes change after such information is provided to the Board, the course sponsor must notify the Board of such changes.

- (10) Course sponsors must participate in the Board's course and instructor evaluation program. Course sponsors must require that students complete a course evaluation form ~~prior to or upon completion of the course.~~ course, and shall tally the results of the evaluations onto one form. Course sponsors must also send the completed course evaluation forms and the tally to the Board together with the roster required pursuant to 21 NCAC 57B .0608.
- (11) Persons desiring to become instructors for continuing education courses must file an application for approval with the Board. Board approval of instructors expires on the next ~~June 30~~ December 31 following the date of issuance. Instructors who wish to renew their approval must file an application for renewal of approval annually on or before ~~June 1~~ December 1. There is no fee for application for or renewal of instructor approval. Once an instructor has been approved to teach a specific course, that person may teach the course for any course sponsor approved by the Appraisal Board to offer continuing education courses.

*Authority G.S. 93E-1-8(c); 93E-1-10.*

**21 NCAC 57B .0611 RENEWAL OF APPROVAL AND FEES**

(a) Board approval of appraisal continuing education courses expires on the next ~~June 30~~ December 31 following the date of issuance. In order to assure continuous approval, applications for renewal of Board approval, accompanied by the prescribed renewal fee, must be filed with the Board annually on or before ~~June 1~~ December 1. ~~Applications for renewal that are complete and that are received between June 1 and June 30 will be processed after processing applications received by the due date.~~ All applications for renewal of course approval received on or before ~~June 30~~ December 1, which are incomplete as of that date, as well as all applications for renewal of course approval submitted after ~~June 30~~ December 1, shall be treated as original applications for approval of continuing education courses.

(b) The annual fee for renewal of Board approval shall be fifty dollars (\$50.00) for each course for which renewal of approval is requested, provided that no fee is required for course sponsors that are exempted from original application fees by Rule .0602(b) of this Section. The fee is non-refundable.

*Authority G.S. 93E-1-8(c),(d); 93E-1-10.*

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**RULES REVIEW COMMISSION**

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*This Section contains information for the meetings of the Rules Review Commission on Thursday September 21, 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  
John B. Lewis  
Mary Beach Shuping  
Judson A. Welborn  
John Tart

**RULES REVIEW COMMISSION MEETING DATES**

October 19, 2006                      November 16, 2006  
December 14, 2006                      January 18, 2007

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**RULES REVIEW COMMISSION  
AUGUST 17, 2006  
MINUTES**

The Rules Review Commission met on Thursday, August 17, 2006, in the Cabinet Room of the Methodist Building, 1307 Glenwood Avenue, Raleigh, North Carolina. Commissioners present were: Jim Funderburk, Jeffrey Gray, Jennie Hayman; Thomas Hilliard; John Lewis, Robert Saunders, Mary Shuping, John Tart, David Twiddy and Judson Welborn. Staff members present were: Joseph DeLuca, Staff Counsel; Bobby Bryan, Rules Review Specialist; Lisa Johnson and Barbara Townsend, Administrative Assistants.

The following people attended:

Larry Michael    DENR  
Bert Fields        Department of Justice  
Dean Horkavy     DENR/DWR  
Linwood Peele    DENR/DWR  
Don Rayno        DENR/DWR  
Kim Colson        DENR/DWR  
Nadine Pfeiffer   Division Facility Services  
Jeff Horton        Division Facility Services  
Sharon Agresta   Parent  
Ha Nguyen        Banking Commission  
Nancy Pate        DENR  
Dennis Ramsey   DENR  
Dana Sholes       OAH  
Julie Edwards    OAH  
Felicia Williams OAH  
Molly Masich     OAH  
Barry Gupton     Department of Insurance  
Elizabeth Kuntis DENR  
Sid Harrell        DENR  
Steve Cline        DHHS/DPH  
Chris Hoke        DHHS/DPH  
Angela Ellis      Board of Nursing  
David Kalbacker Board of Nursing  
Erin Kimrey        NC Conservation Network



Henry Jones Attorney  
Bruce Thompson Attorney  
Bob Slocum NC Forestry Assoc.  
Thom Allen DENR/DAQ  
Mike Brandon DENR/DAQ  
Luanne Williams DHHS  
Don Evans DENR/DWQ  
David McLeod Department of Agriculture  
Andrea Miles Department of Agriculture  
Ed Strickland Department of Revenue  
Flo Moses NCBATE  
Jennie Dorsett Attorney  
CamilleWinston OAH

### **APPROVAL OF MINUTES**

The meeting was called to order at 10:18 a.m. with Chairman Hayman presiding. Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the June 29, 2006 meetings. The minutes were approved as written. Chairman Hayman introduced new commission members, John Lewis, Mary Shuping and Judson Welborn.

### **FOLLOW-UP MATTERS**

12 NCAC 11 .0201: Alarm Systems Licensing Board - The Commission approved this rule contingent on receiving a technical change at the last meeting and the technical change was not received. The technical change has now been made and the Commission approved this rule.

15A NCAC 2T .0305; .0504; .0604; .0704; .0904; .0905; .1004; .1104; .1204; .1504; .1604: Environmental Management Commission – The Commission approved the rewritten rules submitted by the agency.

15A NCAC 18A .2831: Commission for Health Services – The Commission approved the rewritten rule submitted by the agency. After the meeting more than ten letters were received requesting that this rule be subject to legislative review.

21 NCAC 14J .0502: Cosmetic Art Examiners – The Commission did not receive any response from the agency therefore no action was taken.

21 NCAC 14P .0105: Cosmetic Art Examiners – The Commission approved the rule because the General Assembly has now granted the agency the authority for the rule.

21 NCAC 32M .0106: Medical Board – The Commission returned this rule to the agency at the agency's request.

21 NCAC 36 .0403; .0406: Board of Nursing – The Commission approved the rewritten rules submitted by the agency.

21 NCAC 53 .0402: Board of Licensed Professional Counselors – The Commission approved the repeal submitted by the agency.

23 NCAC 3A .0113: Board of Community Colleges - The Commission did not receive any response from the agency therefore no action was taken.

25 NCAC 1D .0115: State Personnel Commission – The Commission approved the rewritten rule submitted by the agency. Commissioners Lewis, Saunders and Shuping did not vote nor participate in the discussion concerning this rule.

### **LOG OF FILINGS**

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

2 NCAC 52K .0702: Commissioner of Agriculture – This rule was withdrawn at the request of the agency.

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**RULES REVIEW COMMISSION**

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Commissioner Twiddy did not participate in either the discussion or vote concerning rules from the Office of the Commissioner of Banks.

15A NCAC 1J .1402: Department of Environment and Natural Resources – Staff recommended objecting to this rule. Upon a motion by Commissioner Gray the Commission approved this rule contingent upon receiving a technical change by the end of the business day. The technical change was received.

15A NCAC 1J .2102: Department of Environment and Natural Resources – This rule was withdrawn at the request of the agency.

15A NCAC 2E .0611: Environmental Management Commission – The Commission objected to the rule due to ambiguity. It is not clear what the plan required in paragraph (a) is to be consistent with. It is not clear if the rule is saying the same documents are available from all the listed organizations or if they all have different documents. If the documents are different, it is not clear if the plan has to be consistent with all in existence and what happens if they are inconsistent. If the rule means that the plan has to be consistent with documents prepared by DENR, then those documents must be adopted by rule.

23 NCAC 2C .0209: Board of Community Colleges – This rule was withdrawn at the request of the agency.

23 NCAC 2E .0204: Board of Community Colleges – This rule was withdrawn at the request of the agency.

**COMMISSION PROCEDURES AND OTHER BUSINESS**

Mr. DeLuca asked the Commission to consider changing the December 21, 2006, meeting due to the timing of the Christmas holiday. The Commission voted to change the meeting to December 14, 2006.

Chairman Hayman informed the Commission that they are required by the Board of Ethics to attend an ethics education presentation and that they must complete a long form.

Commission members were informed about the APA training session on August 29, 2006 and invited to attend at no charge.

The meeting adjourned at 11:16 a.m.

The next scheduled meeting of the Commission is Thursday, September 21, 2006 at 10:00 a.m.

Respectfully submitted,  
Lisa Johnson

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**AGENDA**  
**RULES REVIEW COMMISSION**  
**September 21, 2006, 10:00 A.M.**

- I. Reminder of Governor's Executive Order #1
- II. Review of minutes of last meeting
- III. Follow-Up Matters
  - A. Environmental Management Commission – 15A NCAC 2E .0611 (Bryan)
  - B. Cosmetic Art Examiners – 21 NCAC 14J .0502 (DeLuca)
  - C. Board of Community Colleges – 23 NCAC 3A .0113 (DeLuca)

- IV. Review of Rules (Log Report)
- V. Review of Temporary Rules (If any)
- VI. Commission Business
- VII. Next meeting: October 19, 2006

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**Commission Review/Permanent Rules**  
**Log of Filings**  
**July 21, 2006 through August 21, 2006**

\* Approval Recommended, \*\* Objection Recommended, \*\*\* Other

**MEDICAL CARE COMMISSION**

The rules in chapter 13 are from the NC Medical Care Commission.

The rules in Subchapter 13D are rules from the licensing of nursing homes including general information (.2000); licensure (.2100); general standards of administration (.2200); patient and resident care and services (.2300); medical records (.2400); physician's services (.2500); pharmaceutical services (.2600); dietary services (.2700); activities, recreation and social services (.2800); special requirements (.2900); specially designated units (.3000); design and construction (.3100); functional requirements (.3200); fire and safety requirements (.3300); and mechanical electrical plumbing (.3400).

Cardio-Pulmonary Resuscitation 10A NCAC 13D .2309  
Adopt/\*

The rules in Chapter 13 are from the Medical Care Commission.

The rules in Subchapter 13J deal with the licensing of home care agencies including general provisions (.0900); administration (.1000); scope of services (.1100), case review and plan of care (.1200); pharmaceuticals and medical treatment orders (.1300); and service records (.1400).

Application for and Issuance of License 10A NCAC 13J .0903  
Amend/\*\*

Compliance with Laws 10A NCAC 13J .0906  
Amend/\*

Agency Management and Supervision 10A NCAC 13J .1001  
Amend/\*

Personnel 10A NCAC 13J .1003  
Amend/\*

In-Home Aide Services 10A NCAC 13J .1107  
Amend/\*

Supervision and Competency of In-Home Aides or Other In-H... 10A NCAC 13J .1110  
Amend/\*\*

The rules in Subchapter 13O deal with the registries maintained by the Department of Health and Human Services including the healthcare personnel registry (.1000) and medication aide registry (.2000).

Medication Aide Competency Evaluation 10A NCAC 13O .2001  
Adopt/\*

Registry of Medication Aides 10A NCAC 13O .2002  
Adopt/\*

**MENTAL HEALTH, COMMISSION OF**

The rules in Chapter 26 are general mental health rules.

The rules in Subchapter 26E concern the manufacture, distribution, and dispensing of controlled substances including general provisions and registration (.0100); labeling, packaging, and record keeping (.0200); prescriptions (.0300); some miscellaneous provisions (.0400); administrative functions, practices, and procedures (.0500); and controlled substance reporting system (.0600).

<u>Scope</u>	10A NCAC 26E .0601
Adopt/*	
<u>Definitions</u>	10A NCAC 26E .0602
Adopt/*	
<u>Required Reporting Requirements</u>	10A NCAC 26E .0603
Adopt/**	
<u>Requirements for Transmission of Data</u>	10A NCAC 26E .0604
Adopt/*	

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); intensive residential treatment for children or adolescents (.1800); 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); substance abuse intensive outpatient programs (.4400); substance abuse comprehensive outpatient treatment programs (.4500); 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>Alcohol and Drug Education Traffic Schools</u>	10A NCAC 27G .3803
Amend/*	

The rules in Subchapter 27I are the area authority or county program requirements including the non-medicaid appeal process (.0600).

<u>Scope</u>	10A NCAC 27I .0601
Adopt/*	

<u>Definitions</u>	10A NCAC 27I .0602
Adopt/*	
<u>Filing</u>	10A NCAC 27I .0603
Adopt/*	
<u>Change in Client</u>	10A NCAC 27I .0604
Adopt/*	
<u>Initial Response</u>	10A NCAC 27I .0605
Adopt/*	
<u>Hearing Schedule and Composition of the Panel</u>	10A NCAC 27I .0606
Adopt/*	
<u>Panel Hearing Procedures</u>	10A NCAC 27I .0607
Adopt/*	
<u>Panel Decision Findings</u>	10A NCAC 27I .0608
Adopt/*	
<u>Final Written Decision</u>	10A NCAC 27I .0609
Adopt/*	

**HEALTH SERVICES, COMMISSION FOR**

The rules in Chapter 39 are adult health rules.

The rules in Subchapter 39A deal with chronic disease issues including migrant health (.0100); home health services (.0200); chronic renal disease control program (.0300); adult health promotion and disease prevention program (.0500); medication assistance program for the disabled (.0600); health care services in the home demonstration program (.0700); home and community-based HIV health services program (.0800), Ryan White HIV care program (.0900), HIV medications program (.1000), cancer diagnostic and treatment program (.1100); breast cervical cancer screening and follow-up program (.1200); and prescription drug assistance program (.1300).

<u>Covered Services</u>	10A NCAC 39A .0109
Amend/*	

The rules in Chapter 41 concern epidemiology health.

The rules in Subchapter 41A deal with communicable disease control and include reporting of communicable diseases (.0100); control measures for communicable diseases (.0200); special control measures (.0300); immunization (.0400); purchase and distribution of vaccine (.0500); special program/project funding (.0600); licensed nursing home services (.0700); communicable disease grants and contracts (.0800); and biological agent registry (.0900).

<u>Reportable Diseases and Conditions</u>	10A NCAC 41A .0101
Amend/*	

The rules in Chapter 43 are personal health rules.

The rules in Subchapter 43H are rules of the Sickle Cell Syndrome, genetic counseling and children and youth section including rules about the sickle cell syndrome program (.0100); sickle cell contract funds (.0200); and genetic health care (.0300).

<u>Medical Services Covered</u>	10A NCAC 43H .0111
Amend/*	

The rules in Chapter 45 are general procedures for public health programs.

The rules in Subchapter 45A are rules about payment programs including general provisions (.0100); eligibility determinations (.0200); eligibility procedures (.0300); reimbursement (.0400); and quality control (.0500).

<u>Reimbursement for Professional Outpatient Other Services</u>	10A NCAC 45A .0403
Amend/*	

The rules in Chapter 48 establish the procedures and standards for local health department accreditation.

The rules in Subchapter 48A establish the process for local health departments to become accredited including general provisions (.0100); and the accreditation process (.0200).

<u>Purpose</u>	10A NCAC 48A .0101
Adopt/*	
<u>Definitions</u>	10A NCAC 48A .0102
Adopt/*	
<u>Self-Assessment</u>	10A NCAC 48A .0201
Adopt/*	
<u>Site Visit</u>	10A NCAC 48A .0202
Adopt/*	
<u>Board Action</u>	10A NCAC 48A .0203
Adopt/*	
<u>Informal Review Procedures</u>	10A NCAC 48A .0204
Adopt/*	
<u>Re-Accreditation</u>	10A NCAC 48A .0205
Adopt/*	

The rules in Subchapter 48B establish the accreditation standards for local health departments including general provision (.0100); the standards or benchmarks: monitor health status (.0200); diagnose and investigate health problems and health hazards in the community (.0300); inform, educate and empower people about health issues (.0400); mobilize community partnerships to identify and solve health problems (.0500); develop policies and plans that support individual and community health efforts (.0600); enforce laws and regulations that protect health and ensure safety (.0700); link people to personal health services to assure the provision of health care when otherwise unavailable (.0800); assure a competent public health workforce and personal health workforce (.0900); evaluate effectiveness, accessibility and quality of personal and population based health services (.1000); research for new insights and innovative solutions to health problems (.1100); provide facilities and administrative services (.1200) and governance (.1300).

<u>Purpose</u>	10A NCAC 48B .0101
Adopt/*	
<u>Definitions</u>	10A NCAC 48B .0102
Adopt/*	
<u>Accreditation Requirements</u>	10A NCAC 48B .0103
Adopt/*	
<u>Benchmark 1</u>	10A NCAC 48B .0201
Adopt/*	
<u>Benchmark 2</u>	10A NCAC 48B .0202
Adopt/*	
<u>Benchmark 3</u>	10A NCAC 48B .0203
Adopt/*	
<u>Benchmark 4</u>	10A NCAC 48B .0301
Adopt/*	
<u>Benchmark 5</u>	10A NCAC 48B .0302
Adopt/*	
<u>Benchmark 6</u>	10A NCAC 48B .0303
Adopt/*	
<u>Benchmark 7</u>	10A NCAC 48B .0304
Adopt/*	
<u>Benchmark 8</u>	10A NCAC 48B .0305
Adopt/*	
<u>Benchmark 9</u>	10A NCAC 48B .0401
Adopt/*	

<u>Benchmark 10</u> Adopt/*	10A NCAC 48B .0402
<u>Benchmark 11</u> Adopt/*	10A NCAC 48B .0501
<u>Benchmark 12</u> Adopt/*	10A NCAC 48B .0502
<u>Benchmark 13</u> Adopt/*	10A NCAC 48B .0503
<u>Benchmark 14</u> Adopt/*	10A NCAC 48B .0601
<u>Benchmark 15</u> Adopt/*	10A NCAC 48B .0602
<u>Benchmark 16</u> Adopt/*	10A NCAC 48B .0701
<u>Benchmark 17</u> Adopt/*	10A NCAC 48B .0702
<u>Benchmark 18</u> Adopt/*	10A NCAC 48B .0703
<u>Benchmark 19</u> Adopt/*	10A NCAC 48B .0801
<u>Benchmark 20</u> Adopt/*	10A NCAC 48B .0802
<u>Benchmark 21</u> Adopt/*	10A NCAC 48B .0803
<u>Benchmark 22</u> Adopt/*	10A NCAC 48B .0804
<u>Benchmark 23</u> Adopt/*	10A NCAC 48B .0901
<u>Benchmark 24</u> Adopt/*	10A NCAC 48B .0902
<u>Benchmark 25</u> Adopt/*	10A NCAC 48B .0903
<u>Benchmark 26</u> Adopt/*	10A NCAC 48B .0904
<u>Benchmark 27</u> Adopt/*	10A NCAC 48B .1001
<u>Benchmark 28</u> Adopt/*	10A NCAC 48B .1101
<u>Benchmark 29</u> Adopt/*	10A NCAC 48B .1102
<u>Benchmark 30</u> Adopt/*	10A NCAC 48B .1201
<u>Benchmark 31</u> Adopt/*	10A NCAC 48B .1202
<u>Benchmark 32</u> Adopt/*	10A NCAC 48B .1203
<u>Benchmark 33</u> Adopt/*	10A NCAC 48B .1204
<u>Benchmark 34</u> Adopt/*	10A NCAC 48B .1301
<u>Benchmark 35</u> Adopt/*	10A NCAC 48B .1302

<u>Benchmark 36</u> Adopt/*	10A NCAC 48B .1303
<u>Benchmark 37</u> Adopt/*	10A NCAC 48B .1304
<u>Benchmark 38</u> Adopt/*	10A NCAC 48B .1305
<u>Benchmark 39</u> Adopt/*	10A NCAC 48B .1306
<u>Benchmark 40</u> Adopt/*	10A NCAC 48B .1307
<u>Benchmark 41</u> Adopt/*	10A NCAC 48B .1308

**INSURANCE, DEPARTMENT OF**

The rules in Chapter 5 deal with fire and rescue services division.

The rules in Subchapter 5A include general provisions (.0100); state volunteer fire department (.0200); firemen's relief fund (.0300); administration of other funds (.0400); initial certification/re-inspection fire departments (.0500); volunteer fire department fund (.0600); and volunteer rescue/ems fund (.0700).

<u>Definitions</u> Amend/*	11 NCAC 05A .0101
<u>Mailing Address</u> Amend/*	11 NCAC 05A .0103
<u>Eligible Members</u> Amend/*	11 NCAC 05A .0301
<u>Certification of Eligibility</u> Amend/*	11 NCAC 05A .0302
<u>Purpose</u> Amend/*	11 NCAC 05A .0501
<u>Establishment of Fire Department</u> Amend/*	11 NCAC 05A .0503
<u>Personnel</u> Amend/*	11 NCAC 05A .0504
<u>Training Requirements</u> Amend/*	11 NCAC 05A .0505
<u>Alarm and Communications</u> Amend/*	11 NCAC 05A .0506
<u>Records and Documents</u> Amend/*	11 NCAC 05A .0507
<u>Apparatus</u> Amend/*	11 NCAC 05A .0508
<u>Inspection</u> Repeal/*	11 NCAC 05A .0510
<u>Six Mile Insurance District</u> Adopt/*	11 NCAC 05A .0511
<u>Standards and Policies</u> Adopt/*	11 NCAC 05A .0512

The rules in Chapter 10 are from the property and casualty division and include general provisions (.0100); interpretations (.0300); fire and casualty rating organizations (.0400); consent to rate (.0600); insurance in unlicensed foreign and alien companies (.0700); licensing of rating organizations (.0800); licensing of advisory organizations (.0900); licensing of joint underwriting organizations



(.1000); rate filings (.1100); forms filings (.1200); NC Joint Underwriting Association (.1300); NC Insurance Underwriting Association (.1400); and prospective loss costs filings (.1600).

<u>General Information</u> Repeal/*	11 NCAC 10 .0801
<u>Procedure for Application for New License</u> Repeal/*	11 NCAC 10 .0802
<u>Renewal License Fee for Rating Organizations</u> Repeal/*	11 NCAC 10 .0803
<u>Form License Certificate</u> Repeal/*	11 NCAC 10 .0804
<u>Changes in Filed Information</u> Repeal/*	11 NCAC 10 .0806
<u>General Information</u> Repeal/*	11 NCAC 10 .0901
<u>Procedure for Application of New License</u> Repeal/*	11 NCAC 10 .0902
<u>Changes in Filed Information</u> Repeal/*	11 NCAC 10 .0903
<u>Form License Certificate</u> Repeal/*	11 NCAC 10 .0906
<u>Renewal License Fee for Licensed Organizations</u> Repeal/*	11 NCAC 10 .0907
<u>General Requirements</u> Adopt/*	11 NCAC 10 .1701
<u>Procedure for Application of New License</u> Adopt/*	11 NCAC 10 .1702

**PRIVATE PROTECTIVE SERVICES BOARD**

The rules in Chapter 7 are the rules of the private protective services board.

The rules in Subchapter 7D are from the N. C. Private Protective Services Board and cover general provisions (.0100); licenses and trainee permits (.0200); guard dog services (.0300); counterintelligence (.0400); polygraphs (.0500); psychological stress evaluators (PSE) (.0600); unarmed and armed security guards (.0700-.0800); firearms certificate (.0900); recovery funds (.1000); private investigator associates (.1100); firearms instructor trainers (.1200); and continuing education (.1300).

<u>Training Requirements for Unarmed Security Guards</u> Amend/*	12 NCAC 07D .0707
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**WILDLIFE RESOURCES COMMISSION**

The rules in Chapter 10 are promulgated by the Wildlife Resources Commission and concern wildlife resources and water safety.

The rules in Subchapter 10D are game lands rules.

<u>Hunting and Game Lands</u> Amend/*	15A NCAC 10D .0103
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**HEALTH SERVICES, COMMISSION FOR**

The rules in Chapter 13 concern Solid Waste Management.

The rules in Subchapter 13B concern Solid Waste Management including general provisions (.0100); permits for solid waste

management facilities (.0200); treatment and processing facilities (.0300); transfer facilities (.0400); disposal sites (.0500); monitoring requirements (.0600); administrative penalty procedures (.0700); septage management (.0800); yard waste facilities (.0900); solid waste management loan program (.1000); scrap tire management (.1100); medical waste management (.1200); disposition of remains of terminated pregnancies (.1300); municipal solid waste compost facilities (.1400); standards for special tax treatment of recycling and resource recovery equipment and facilities (.1500); requirements for municipal solid waste landfill facilities (.1600); and requirements for beneficial use of coal combustion by-products (.1700).

<u>Purpose Scope and Applicability for Construction and Dem...</u> Adopt/*	15A NCAC 13B .0531
<u>Definitions for C&amp;DLF Facilities</u> Adopt/*	15A NCAC 13B .0532
<u>General Application Requirements and Processing for C&amp;DLF...</u> Adopt/**	15A NCAC 13B .0533
<u>General Requirements for C&amp;DLF Facilities and Units</u> Adopt/**	15A NCAC 13B .0534
<u>Application Requirements for C&amp;DLF Facilities</u> Adopt/*	15A NCAC 13B .0535
<u>Site Study for C&amp;DLF Facilities</u> Adopt/**	15A NCAC 13B .0536
<u>Facility Plan for C&amp;DLFs</u> Adopt/*	15A NCAC 13B .0537
<u>Geologic and Hydrogeologic Investigations for C&amp;DLF Facil...</u> Adopt/*	15A NCAC 13B .0538
<u>Engineering Plan for C&amp;DLF Facilities</u> Adopt/*	15A NCAC 13B .0539
<u>Construction Requirements for C&amp;DLF Facilities</u> Adopt/*	15A NCAC 13B .0540
<u>Construction Quality Assurance for C&amp;DLF Facilities</u> Adopt/*	15A NCAC 13B .0541
<u>Operation Plan and Requirements for C&amp; DLF Facilities</u> Adopt/*	15A NCAC 13B .0542
<u>Closure and Post-Closure Requirements for C&amp;DLF Facilities</u> Adopt/*	15A NCAC 13B .0543
<u>Monitoring Plans and Requirements for C&amp;DLF Facilities</u> Adopt/*	15A NCAC 13B .0544
<u>Assessment and Corrective Action Program for C&amp;DLF Facili...</u> Adopt/*	15A NCAC 13B .0545
<u>Financial Assurance Requirements for C&amp;DLF Facilities and...</u> Adopt/*	15A NCAC 13B .0546
<u>Existing C&amp;DLF Units as of January 1, 2007</u> Adopt/*	15A NCAC 13B .0547

The rules in Chapter 18 are from the Commission for Health Services and cover environmental aspects of health such as sanitation (18A), mosquito control (18B), water supplies (18C), and water treatment facility operators (18D). The rules in Subchapter 18C are water supply rules including their protection and location (.0100-.0200), submission of plans, etc. (.0300), design criteria (.0400-.0500), raw surface water facilities (.0600), surface water treatment facilities (.0700), hydropneumatic storage tanks (.0800), distribution systems (.0900), disinfection (.1000), protection of unfiltered and filtered supplies (.1100-.1200), variances (.1300), fluoridation (.1400), water quality standards and variances (.1500-.1600), systems grants (.1700), local plan approval (.1800), administrative penalties (.1900), filtration and disinfection (.2000) and operating permits (.2100).

<u>Public Notification Requirements</u> Amend/*	15A NCAC 18C .1523
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**EDUCATION, STATE BOARD OF**

The rules in Subchapter 6D cover instruction including curriculum (.0100), textbooks (.0200), testing programs (.0300), and accountability standards and graduation requirements (.0500).

End-of-Course Assessments 16 NCAC 06D .0305  
Amend/\*

**COSMETIC ART EXAMINERS, BOARD OF**

The rules in Chapter 14 are from the Cosmetic Art Examiners.

The rules in Subchapter 14H are from the Cosmetic Art Examiners and cover sanitation for both operators and facilities.

Cleanliness of Clinic Area: Supplies: Combs and Brushes 21 NCAC 14H .0112  
Amend/\*

Cleanliness of Scissors Shears Razors and Other Equipment 21 NCAC 14H .0113  
Amend/\*

Footspa Sanitation 21 NCAC 14H .0120  
Amend/\*

**DENTAL EXAMINERS, BOARD OF**

The rules in Subchapter 16M are fee setting rules.

Dental Hygienists 21 NCAC 16M .0102  
Amend/\*

**MEDICAL BOARD**

The rules in Chapter 32 are from the Board of Medical Examiners.

The rules in Subchapter 32B concern license to practice medicine including general (.0100); license by written examination (.0200); license by endorsement (.0300); temporary license by endorsement of credentials (.0400); resident's training license (.0500); special limited license (.0600); certificate of registration for visiting professors (.0700); medical school facility license (.0800); and special volunteer license (.0900).

Federation's Credential Verification Service Profile 21 NCAC 32B .0105  
Adopt/\*

Data Bank Reports 21 NCAC 32B .0106  
Adopt/\*

Routine Inquiries 21 NCAC 32B .0312  
Amend/\*

Passing Exam Score 21 NCAC 32B .0314  
Amend/\*

**PSYCHOLOGY BOARD**

The rules in Chapter 54 are from the Board of Psychology and cover general provisions (.1600); application for licensure (.1700); education (.1800); examination (.1900); supervision (.2200); renewal (.2100); professional corporations (.2200); administrative hearing procedures (.2300); rulemaking procedures (.2400); rulemaking hearings (.2500); declaratory rulings, (.2600); health services provider certification (.2700); and ancillary services (.2800).

Psychological Associate Activities 21 NCAC 54 .2006  
Amend/\*

**COMMUNITY COLLEGES, BOARD OF**

The rules in Chapter 2 concern Community Colleges.

Evaluation of Presidents 23 NCAC 02C .0209  
Amend/\*

The rules in Subchapter 2E cover educational programs including program classification (.0100); curriculum programs (.0200); adult, extension, and community service programs (.0300); industrial services (.0400); articulation (.0500); and vocational curriculum (.0600).

Courses and Standards for Curriculum Programs 23 NCAC 02E .0204  
Amend/\*

**STATE PERSONNEL COMMISSION**

The rules in Chapter 1 are from the Office of State Personnel.

The rules in Subchapter 1C concern personnel administration including employment (.0100); general employment policies (.0200); personnel records and reports (.0300); appointment (.0400); work schedule (.0500); competitive service (.0600); secondary employment (.0700); requirements for teleworking programs (.0800); employee recognition programs (.0900); and separation (.1000).

Standards for a Merit System of Personnel Administration 25 NCAC 01C .0601  
Repeal/\*

Eligibility Requirements 25 NCAC 01C .0903  
Amend/\*

The rules in Subchapter 1I concern service to local government including general provisions (.0100); local government employment policies (.0200); local government position analysis (.0300); local government position classification services (.0400); positions in local government (.0500); recruitment and selection (.0600); appointment and separation (.0700); probationary period and permanent status (.0800); transfer promotion demotion and separation (.0900); compensation (.1000); hours of work and overtime pay (.1100); attendance and leave (.1200); disciplinary action suspension and dismissal (.1300); actions by local governing body (.1400); forms (.1500); personnel advisory service to local government (.1600); local government employment policies (.1700); general provisions (.1800); recruitment and selection (.1900); appointment and separation (.2000); compensation (.2100); hours of work and overtime compensation (.2200); disciplinary action suspension dismissal and appeals (.2300); and basic requirements for a substantially equivalent personnel system (.2400).

System Portion IV: Employee Relations 25 NCAC 01I .2404  
Amend/\*

The rules in Subchapter 1J cover employee grievances (.0500), disciplinary actions including suspensions and dismissals (.0600), Governor's Award for Excellence (.0800); internal performance pay dispute resolution procedures (.0900); state employees assistance program (.1000); unlawful workplace harassment (.1100); employee grievances (.1200); employee appeals and grievance process (.1300); and employee mediation and grievance process (.1400).

Purpose 25 NCAC 01J .0801  
Repeal/\*

Awards Committee 25 NCAC 01J .0802  
Repeal/\*

Agency Department or University Responsibility 25 NCAC 01J .0805  
Repeal/\*

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**CONTESTED CASE DECISIONS**

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*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.*

*Beryl E. Wade*

*Melissa Owens Lassiter*

*Beecher R. Gray*

*A. B. Elkins II*

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<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOL BEVERAGE CONTROL COMMISSION</u></b>				
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Carlos Salas T/A Boom Boom Boom Night Club, 1205 Elgin Avenue Hight Point, NC 27262 v. ABC Commission	06 ABC 0719	Chess	08/07/06	
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Sharron Smith v. Crime Control and Public Safety	06 CPS 0708	Gray	07/12/06	
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A list of Child Support Decisions may be obtained by accessing the OAH Website: <a href="http://www.ncoah.com/decisions">www.ncoah.com/decisions</a> .				
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Total Care Home Health of NC, INC., v. DHHS, DFS, CON Section and Liberty Home , Care II, LLC, Total Care Home Health of NC, INC.,	05 DHR 1464	Wade	06/19/06
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Jeanette Clark v. State Board of Nursing, Raleigh, NC	05 DHR 2076	Gray	07/10/06
Yavonka Renee Vann v. DHHS, DFS	05 DHR 2108	Gray	07/12/06
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Lisa A. Forbes v. Dorothea Dix Hospital	06 OSP 0135	Gray	03/29/06		
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Caria Faulk v. Columbus Co. Dept. of Social Services	06 OSP 0546	Lassiter	07/06/06		
Robin D. Long v. UNC Greensboro	06 OSP 0684	Lassiter	06/27/06		
Rena Coltraine McLeod v. Guilford Co. Dept. of Public Health	06 OSP 0703	Wade	06/28/06		
Jan-Lee Wells v. Fayetteville Sate	06 OSP 0731	Gray	08/10/06		
Timothy Scott Reynolds v. Morrison Correctional Institution	06 OSP 0803	Lassiter	07/26/06		
Geraldine Blackston-Ramos v. Maurice Boswell, Mary Washun, Cynthia Chamblee, Phyllis Sharpe, Dennis Davis, Bill McNeal, Wake County Public Schools/Human Resource Department/Preventive Services/Partnership for Educational Success	06 OSP 0831	Morrison	07/12/06		
Rick Van Kerkhove v. DOC	06 OSP 0851	Gray	08/25/06		
Juliana W. Smith v. Alamance-Caswell Area Mental Health, Developmental Disabilities, and Substance Abuse Authority	06 OSP 1059	Lassiter	08/09/06		
Dr. Mirian W. McIntosh v. Durham Co. Health Department	06 OSP 1060	Lassiter	08/09/06		
<b><u>SECRETARY OF STATE</u></b>					
Tisha L. Jones v. Dept. of Secretary of State	05 SOS 1987	Gray	05/19/06		
Temeka A. Brooks v. Dept of Secretary of State	06 SOS 0276	Mann	05/26/06		
Brendalyn D. Blackmon v. Dept. of Secretary of State	06 SOS 0701	Wade	08/11/06		
<b><u>UNC HOSPITALS</u></b>					
Linda Sisco v. UNC Hospitals	05 UNC 0781	Gray	05/09/06		
Karen H. Moore v. UNC Hospitals	06 UNC 0351	Elkins	06/08/06		
Larry E. Rogers v. UNC Hospitals	06 UNC 0697	Elkins	07/31/06		
Cynthia Lodestro v. UNC Hospitals	06 UNC 0707	Wade	08/11/067		



**CONTESTED CASE DECISIONS**

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
06 DOJ 0228

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Angela Renee Lail	)	
Petitioner	)	
	)	
vs.	)	<b>PROPOSAL FOR DECISION</b>
	)	
N. C. Sheriffs' Education and Training	)	
Standards Commission	)	
Respondent	)	

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On July 11, 2006, Administrative Law Judge Beecher R. Gray heard this case in Lenoir, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

**APPEARANCES**

James M. Harrington, of The Harrington Practice PLLC, Charlotte, NC, for Petitioner.

John J. Aldridge, III, Special Deputy Attorney General, for Respondent.

**ISSUES**

1. Does probable cause exist to believe that Petitioner knowingly made a material misrepresentation of information required for certification as a justice officer by the North Carolina Sheriff's Education and Training Standards Commission regarding past use of illicit drugs?
2. Does probable cause exist to believe that Petitioner committed the Class B misdemeanor of "harassing telephone calls" on August 26 and 27, 2004?

**FINDINGS OF FACT**

1. The parties properly are before this Administrative Law Judge, in that jurisdiction and venue is proper, that both parties received Notice of Hearing, and that Petitioner received by certified mail the Proposed Denial of Justice Office Certification letter mailed by Respondent Sheriff's Commission on or about December 24, 2005.
2. The North Carolina Sheriff's Education and Training Standards Commission (hereinafter referred to as the Commission) has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke or suspend such certification.
3. 12 NCAC 10B.0204(d) (1) states that the Commission may deny certification as a justice officer when the Commission finds that the applicant knowingly has 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.
4. 12 NCAC 10B .0204(d)(1) provides that 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 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. 12 NCAC 10B .0103(16) defines "commission", as it pertains to criminal offenses, as 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.
5. The criminal offense of "harassing by repeated telephoning," in violation of N.C.G.S. § 14-196, constitutes a Class B misdemeanor under 12 NCAC 10B .0103(10)(b) and the Class B misdemeanor manual, as promulgated under the Commission's rules.

6. Petitioner was appointed as a police officer in the Lenoir Police Department in April 2003. She resigned from that position in July 2005. She was appointed a Deputy Sheriff of the Alexander County Sheriff's Department on September 1, 2005.
7. At the hearing, Richard Squires, Diane Konopka, Lt. Sid Pope, Jennifer Kidwell, and Amy Carlton testified on behalf of Respondent. Petitioner Angela Lail and Misty Ashley testified on behalf of Petitioner.

**I. Allegations of Falsification of Personal History Statement**

**A. Background**

8. On or about April 25, 2003, Petitioner completed a Personal History Statement (Form F-3) as part of her application for employment with the Lenoir Police Department, in order to obtain certification as a criminal justice officer from the North Carolina Criminal Justice Education and Training Standards Commission. Respondent's Exhibit 2.

9. Questions 44-46 of Form F-3 asks the applicant to provide information about any past drug use. Specifically, the questions are:

44. Have you ever used marijuana? (Check YES or NO) If, yes what were the circumstances? When was the last time?

45. Have you ever used any other illegal drugs, including but not limited to opiates, pills, heroin, cocaine, crack, LSD, etc.? (Check YES or NO) If yes, what were the circumstances? When was the last time?

46. Have you ever used prescription drugs other than under the supervision or prescribed by a physician? (Check YES or NO) If yes, what were the circumstances?

10. Petitioner's response to Question 44 was to check the box for YES, and to indicate that the circumstances were "As a teenager." She stated that the last time she had used marijuana was in high school. A separate addendum to her answer reads:

44. Yes. When I was in 11<sup>th</sup> grade at Alexander Central I went to a party after my prom where there was marijuana. I did smoke marijuana that night. I've never sold marijuana or any other drug. I experienced [sic] marijuana that night to see what it was like. I knew then I wouldn't do it again.

11. Petitioner's responses to Questions 45 and 46 were to check the boxes for NO.

12. Between April 29, 2003, and May 21, 2003, Lt. Sid Pope of the Lenoir Police Department conducted a background investigation on Petitioner in furtherance of Petitioner's application for certification, and filed Form F-8 as a record of that investigation.

13. Form F-8 specifies a series of "Applicant Interview Questions," to which Petitioner gave written answers. Questions 48-56 relate to the applicant's use, possession, and knowledge of illicit drugs, including marijuana, cocaine, crack cocaine, and ecstasy.

14. Petitioner's substantive responses to these questions were to deny all use, other than the use previously admitted on Form F-3.

15. On or about August 22, 2005, Petitioner completed a Personal History Statement (Form F-3) as part of her application for employment with the Alexander County Sheriff's Department, in order to obtain certification as a criminal justice officer from the Commission. Respondent's Exhibit 10.

16. Questions 44 through 46 of the Commission's version of Form F-3 are substantively identical to the version previously completed by Petitioner. Petitioner's answers conform to her prior answers to those questions.

**B. Allegations of Past Drug Use by Petitioner**

17. According to Ms. Konopka's testimony, on October 10, 2005, Ms. Konopka conducted an interview with Ms. Carlton as part of the Commission's investigation of the allegations at issue in this case, and produced a summary record of that

interview. Respondent's Exhibit 12. During the interview, Ms. Carlton stated, in pertinent part, that she and Petitioner dated for a period of four years, ending in 2004; that Petitioner had lied on her applications regarding past drug use; that Petitioner was a regular user of cocaine until 2002; that Ms. Carlton had assisted Petitioner in passing drug tests for employment at a private employer; that Ms. Carlton had used ecstasy with Petitioner on two occasions in 2000; and that Petitioner had also evaded positive drug test results by using "some substance to help flush drugs out of her system."

18. Ms. Konopka testified that on October 12, 2005, she conducted an interview with Mrs. Jennifer Kidwell as part of the same investigation and produced a summary record of that interview. Respondent's Exhibit 13. During the interview, Mrs. Kidwell stated, in pertinent part, that she and her husband had "hung out" with Petitioner and Ms. Carlton in summer 2004; that she never witnessed Petitioner using drugs, but that Petitioner had told her of extensive past drug use, including cocaine, ecstasy, and marijuana; that Petitioner had told her about "sweats and DTs" as a part of getting off drugs; that Petitioner admitted to lying on her application about drug use; and that her supplier was a well-known drug dealer in Caldwell County.
19. Ms. Carlton previously had made allegations regarding drug use by Petitioner, in connection with a complaint Ms. Carlton filed August 27, 2004, with the Lenoir Police Department alleging that Petitioner was harassing and threatening Ms. Carlton, with whom Petitioner was in an intimate relationship at the time. Respondent's Exhibit 5. Ms. Carlton alleged that Petitioner had used cocaine at a work party in 2000; that Ms. Carlton had witnessed Petitioner possessing cocaine (wrapped in Goody's headache powder wrappers), crack cocaine (described as "tan-brown rock squares"), and a crack pipe in her car; that Ms. Carlton had used ecstasy with Petitioner on one occasion in 2000, and that Ms. Carlton had used and had witnessed Petitioner using marijuana at least fifteen times after work.
20. Ms. Carlton testified at the hearing and repeated her allegations regarding drug use by Petitioner, with additional details. For instance, Ms. Carlton testified that Petitioner kept cocaine in a jewelry box. She described an alleged incident when Petitioner took ecstasy during a party at Petitioner's home, with Petitioner rubbing herself against the bathtub while cleaning it. Ms. Carlton also stated that she supplied a urine sample to Petitioner, so that Petitioner might pass a drug test to work at Corning Cable Systems; Ms. Carlton alleged that Petitioner placed the sample in a prescription pill bottle, then inserted the bottle into her vagina to keep the sample warm and thereby defeat one of the security protocols of the drug test.
21. Mrs. Kidwell also testified at the hearing, largely confirming her statement as provided to Ms. Konopka. Mrs. Kidwell also admitted that she, her husband (then a Lenoir police officer), and Petitioner had together had an affair in summer 2004, and that she had broken off contact with Petitioner when she discovered that Petitioner and Mrs. Kidwell's husband were having a separate affair.
22. Mrs. Kidwell contends that Petitioner told her on numerous occasions in 2004 that Petitioner had been a habitual user of drugs including marijuana, cocaine, and LSD, and that she had taken careful steps to hide her drug use. Mrs. Kidwell also alleged that her husband did not go to the Lenoir Police Department with the information at the time because the exposure of his affair with Petitioner would end his career.

### **C. Petitioner's Position**

23. Other than the prom-night incident in high school, during which Petitioner admits having smoked three marijuana cigarettes, Petitioner denies ever using or possessing illicit drugs.
24. Petitioner states that she has never tested positive for drugs of any type, despite being tested numerous times for private-sector work and law enforcement employment. The only drug test results placed on the record in this case or inferred from Petitioner's employment record were negative.
25. Petitioner denies the entirety of Ms. Carlton's and Mrs. Kidwell's allegations regarding drug use, and she contends that they have fabricated these allegations in order to inflict harm upon Petitioner by denying her the ability to work in law enforcement.

## **II. Allegations of Commission of a Class B Misdemeanor.**

### **A. Allegations by Ms. Carlton**

26. Ms. Carlton and Petitioner were in an intimate relationship in August 2004, which relationship was in the process of being ended at the time of the alleged conduct in question.

27. As part of a complaint she filed with the Lenoir Police Department, Ms. Carlton alleged that on August 26, 2004, Petitioner telephoned Ms. Carlton at work, saying that “as long as we have ties I will never leave you alone” and indicating that the “ties” were Ms. Carlton’s son, Avery; that the same day Petitioner sought to contact Avery at home; that upon Ms. Carlton’s returning Petitioner’s call to Avery, Petitioner said she would show up at Avery’s football practice; and that Ms. Carlton told Petitioner not to call again.
28. As part of the same complaint, Ms. Carlton alleged that Petitioner telephoned Ms. Carlton numerous times on August 27, 2004, beginning at 5 a.m., accusing Ms. Carlton of sexual promiscuity, threatening to follow Ms. Carlton around, and refusing to leave her alone. At least some of these alleged calls were intercepted by Ms. Carlton’s answering machine.
29. Ms. Carlton’s testimony at the hearing generally conformed to her prior statement in connection with the police department complaint.
30. Ms. Carlton also filed an application for an ex parte Domestic Violence Order of Protection (DVO) in the Caldwell County District Court on August 27, 2004. Ex parte relief was denied, and a hearing on the matter was set for August 31, 2004.
31. The DVO was denied because Ms. Carlton failed to appear at the scheduled hearing. Ms. Carlton contends that she telephoned the clerk’s office because her son was sick and she was unable to attend the hearing, and that she was denied a continuance.
32. Lt. Sid Pope conducted an investigation of the alleged events. His statement in the investigation file contends that Ms. Carlton consented to the dismissal, that Ms. Carlton did not want Petitioner to lose her job, and that Ms. Carlton believed that Petitioner would leave her alone.
33. Lt. Pope’s statement also contends that he followed up with Ms. Carlton, who advised him on October 3, 2004, that she and Petitioner had made amends.
34. Neither Ms. Carlton nor the Commission was able to produce telephone records to substantiate the claims regarding harassing telephone calls.

**B. Petitioner’s Position**

35. Petitioner admits to having telephoned Ms. Carlton on the days in question, but denies that her telephone calls were harassing in nature. Petitioner contends that during that time it was typical for her and Ms. Carlton to speak by telephone ten to twelve times daily, with calls originating from both parties, and that it was her practice to telephone Ms. Carlton at about 5 a.m. each day to wake her in time for work.
36. Petitioner contends that Ms. Carlton’s actions on August 27, 2004, arose from anger and spite because of Petitioner’s affair with Misty Ashley, while Petitioner and Ms. Carlton were still in an intimate relationship.
37. Petitioner contends that Ms. Carlton fabricated her contentions regarding Petitioner’s alleged misconduct in order to hurt Petitioner by denying her the ability to work in her chosen profession. Petitioner contends that Ms. Carlton is an accomplished liar.
38. At the hearing, Petitioner introduced a letter from Ms. Carlton, dated August 22, 2004, which Ms. Carlton described on the stand as a “love letter,” and which reflects that their relationship was ending, that Ms. Carlton continued to have substantial feelings for Petitioner, and that Ms. Carlton was enduring heartbreak at the loss of their relationship.

**III. Evaluations of Credibility**

39. Having reviewed the demeanor and testimony of Ms. Carlton, Mrs. Kidwell, and Petitioner, the undersigned concludes that Ms. Carlton’s and Mrs. Kidwell’s credibility are undermined by their status as former, and perhaps jilted, lovers of Petitioner. Because of the nature of the allegations, the complete absence of corroborating evidence, (such as telephone records, positive drug screening tests, or testimony of disinterested witnesses), further weighs against crediting Ms. Carlton’s and Mrs. Kidwell’s testimony.
40. By contrast, Petitioner’s statements regarding drug use have been consistent for the entire relevant period; she admitted to the use of marijuana one night while in high school. The available records of her drug tests reflect a lack of drug use. The

lack of evidence supporting Ms. Carlton's allegations regarding harassing phone calls weighs in favor of crediting Petitioner's testimony regarding that matter.

41. The North Carolina Sheriff's Education and Training Standards Commission (hereinafter referred to as the Commission) has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke or suspend such certification.
42. 12 NCAC 10B.0204(d) (1) states that the Commission may deny certification as a justice officer when the Commission finds that the applicant 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.
43. 12 NCAC 10B .0204(d)(1) provides that 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 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. 12 NCAC 10B .0103(16) defines "commission", as it pertains to criminal offenses, as 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.

**CONCLUSIONS OF LAW**

1. The parties properly are before the undersigned Administrative Law Judge and jurisdiction and venue are proper.
2. The criminal offense of "harassing by repeated telephoning," in violation of N.C.G.S. § 14-196, constitutes a Class B misdemeanor pursuant to 12 NCAC 10B .0103(10)(b) and the Class B misdemeanor manual, as promulgated under the Commission's rules.
3. The preponderance of the evidence in this case supports Petitioner's position regarding alleged past drug use. As a result, no probable cause exists to believe that Petitioner knowingly made any material misrepresentation of any information required for certification as a law enforcement officer.
4. The preponderance of the evidence in this case also supports Petitioner's position regarding the alleged crime of harassing by repeated telephoning. As a result, no probable cause exists to believe that Petitioner committed a Class B misdemeanor.

**PROPOSAL FOR DECISION**

Based on the foregoing Findings of Fact and Conclusion of Law, the undersigned proposes that Respondent uphold Petitioner's justice office certification and dismiss this matter for insufficient evidence.

**NOTICE**

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file Exceptions to this Proposal for Decision, to submit Proposed Findings of Fact and to present oral and written arguments to the Agency. N.C.G.S. §150B-40(e).

The Agency that will make the final decision in this contested case is the North Carolina Sheriff's Education and Training Standards Commission.

This the 4<sup>th</sup> day of August, 2006.

\_\_\_\_\_  
Beecher R. Gray  
Administrative Law Judge

**CONTESTED CASE DECISIONS**

STATE OF NORTH CAROLINA  
COUNTY OF SURRY

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
05 EHR 2120

SAMUEL BUCK KISER )  
Petitioner, )  
 )  
 v. )  
NC DENR )  
DIVISION OF WASTE MANAGEMENT )  
Respondent. )

**DECISION**

The above entitled matter was heard before the Honorable Sammie Chess, Jr., Administrative Law Judge, on May 24, 2006 in High Point, North Carolina.

**APPEARANCES**

The Petitioner, Samuel Buck Kiser, was represented by Gary J. Mills.

The Respondent, North Carolina Department of Environment and Natural Resources (DENR), Division of Waste Management (DWM), was represented by Jay L. Osborne, Assistant Attorney General.

**ISSUE**

Whether Petitioner has met his burden of proof by establishing that Respondent acted erroneously or otherwise violated N.C. Gen. Stat. § 150B-23 when Respondent assessed Petitioner a civil penalty and investigative costs in the total amount of \$3,856.54 for violation of 15A NCAC 2L .0115(c)(4), failure to submit a Limited Site Assessment (LSA) report?

**TESTIFYING WITNESSES**

For Respondent:

1. Karen J. Hall
2. Rob B. Krebs

For Petitioner:

1. Samuel Buck Kiser

**EXHIBITS RECEIVED INTO EVIDENCE**

For Respondent:

- July 24, 1974 Deed (Surry County, Deed Book 300 Page 675).....Exhibit 1
- December 29, 1989 Notification for Underground Storage Tank.....Exhibit 2
- August 5, 1991 Notice of Intent (UST Permanent Closure).....Exhibit 3
- October 12, 1991 Site Investigation Report for Permanent Closure.....Exhibit 4
- August 5, 1991 Notice of Intent to Install UST.....Exhibit 5
- November 7, 1991 Notification for UST.....Exhibit 6
- August 13, 2001 UST Operating Permit Application.....Exhibit 7
- March 27, 2002 Hall's Letter to Kiser Re: Closure Guidelines.....Exhibit 8

April 14, 2002 Notice of Intent (UST Permanent Closure).....Exhibit 9

May 7, 2002 Site Investigation report for Permanent Closure.....Exhibit 10

May 17, 2002 Hall’s Letter to Kiser Re: Additional Information Requirement.....Exhibit 11

July 26, 2002 Notice of Violation (15A NCAC 2N .0805).....Exhibit 12

November 20, 2002 Recommendation for Enforcement Action.....Exhibit 13

December 30, 2002 Notice of Violation (15A NCAC 2N .0803).....Exhibit 14

February 10, 2003 Recommendation for Enforcement Action .....Exhibit 15

March 11, 2003 Woessner Test Report.....Exhibit 16

March 17, 2003 24-Hour Release and UST Leak Report.....Exhibit 17

March 17, 2003 Notice of Regulatory Requirement (15A NCAC 2L .0115 (c)).....Exhibit 18

July 20, 2004 Corrective Action Branch Inspection Report.....Exhibit 19

January 14, 2005 Notice of Violation (15A NCAC 2L .0115(c)).....Exhibit 20

January 27, 2005 Corrective Action Branch Inspection Report.....Exhibit 21

May 27, 2005 Recommendation for Enforcement Action.....Exhibit 22

September 16, 2005 Corrective Action Branch Enforcement Case Cover Memo.....Exhibit 23

November 14, 2004 Assessment of Civil Penalty (15A NCAC 2L .0115(c)(4)).....Exhibit 24

November 14, 2005 Incident Penalty Matrix.....Exhibit 25

November 18, 2005 Hall’s Letter to Rudo Re: Request for Health Risk.....Exhibit 26

November 30, 2005 Hall’s Letters to Kiser, Simmons, Hughes and Moore.....Exhibit 27

Topographic map of the Site.....Exhibit 28

N.C. Division of Epidemiology Health Evaluation of Well Water Usage.....Exhibit 29

Petitioner did not offer any exhibits into evidence at the hearing.

Based upon careful consideration of the applicable law, testimony and evidence received during the contested case hearing as well as the entire record of this proceeding, the undersigned makes the following:

**FINDINGS OF FACT**

1. On December 29, 1988, Petitioner certified to Respondent that he was owner of three underground storage tank systems (USTs). These USTs were located at 870 Old Highway 52 South Bypass, Pinnacle, North Carolina (the “site”). (See Resp. Exhs. 2, 10)
2. On October 12, 1991, Petitioner certified to Respondent that he closed these three USTs on September 30, 1991. (See Resp. Exhs. 3-4)
3. Petitioner further certified that he owned three additional USTs installed at the site on October 1, 2001, after the closure of the three previous USTs located at the site. (See Resp. Exh. 6)

4. Petitioner operated all USTs at the site for the commercial sale of petroleum products to the public. (See, e.g., Resp. Exh. 7)

5. On April 23, 2002, Petitioner closed the three remaining USTs located at the site. (See Resp. Exh. 10) On May 9, 2002, Respondent received a Closure Report for the closure of these USTs. (See Resp. Exh. 11) On May 17, 2002, Respondent's inspector Karen J. Hall sent a letter to Petitioner informing him that additional information was required in order to determine whether or not the closure was performed with State and Federal regulations. (Id.) Petitioner was required, among other things, to sample the soil under the associated dispensers, including one sample beneath each coupling joint location and one additional sample for every ten feet of dispenser island. (Id.)

6. On December 30, 2002, Respondent sent petitioner a Notice of Violation (NOV) which was received by Petitioner on December 31, 2002. (See Resp. Exh. 14) Petitioner failed to adequately assess the site at the permanent closure of the USTs. In the December 30, 2002 NOV, the Respondent gave the Petitioner thirty days to complete the assessment. Petitioner did not submit the required assessment and on February 10, 2003, Respondent sent to Petitioner a Recommendation of Enforcement Action (REA), received by Petitioner on February 19, 2003. (See Resp. Exh. 15)

7. On March 11, 2003 (received by the Respondent on March 17, 2003) Petitioner submitted, through his consultant, an addendum to the original UST Closure Report. (See Resp. Exh. 16) The addendum included the analysis of a soil sample taken from the UST dispenser area. The chemical analysis of the soil indicated that total petroleum hydrocarbons (TPH) exceed state regulatory standards at the site. (Id.) In response to the soil analysis, Respondent filed a 24-Hour Release and UST Leak Reporting Form, noting confirmed soil contamination at the site. (See Resp. Exh. 17)

8. On March 17, 2003, Respondent sent to Petitioner a Notice of Regulatory Requirements (NORR) requiring Petitioner to comply with 15A NCAC 2L .0115. (See Resp. Exh. 18) Among other things, Respondent directed Petitioner to comply with 15A NCAC 2L .0115(c)(3) or (c)(4), whichever was applicable. (Id.)

9. 15A NCAC 2L .0115(c)(3) gives the Petitioner the option to submit a Soil Contamination Report demonstrating that the contamination was localized and that the soil contamination was cleaned up to standards at the time of tank removal. If Petitioner could not make the required showing for a Soil Contamination Report within 90 days of receipt of the NORR, a Limited Site Assessment (LSA) would be required pursuant to 15A NCAC 2L .0115(c)(4).

10. Petitioner submitted neither a Soil Contamination Report nor a LSA. On July 24, 2004, Respondent reinspected the site and observed an on site water supply well. (See Resp. Exh. 19) On January 14, 2005, Respondent sent Petitioner an NOV ordering him to sample the on site well and include the results of the sampling in the LSA report. (See Resp. Exh. 20). Petitioner did not sample the well.

11. Respondent reinspected the site on January 27, 2005 and observed other residential water supply wells near the site. (See Resp. Exh. 21) Having received no LSA report, Respondent sent to Petitioner a Recommendation of Enforcement Action on May 27, 2005, which was received by Petitioner on June 1, 2005. (See Resp. Exh. 22)

12. On August 22, 2005, Respondent sampled three water supply wells near the site. Two of the wells showed MTBE contamination, which is a constituent of gasoline. (See Resp. Exh. 27) The North Carolina Division of Public Health, Occupational and Environmental Epidemiology Branch (Epidemiology Branch) reviewed the well sampling results. The Epidemiology Branch determined that the closest well down-gradient of the site had been contaminated since at least December 2005 with MTBE levels in excess of the North Carolina recommended limit. (See Resp. Exh. 29) The Epidemiology Branch warned the resident users that continued consumption from this well may pose an increased health risk over time and to please limit bathing and shower times to under ten minutes. (Id.) Petitioner's site is the closest site containing known petroleum contamination to the impacted wells. No evidence was offered at the hearing demonstrating that contamination exists on any other site in the area.

13. On November 14, 2005, Respondent assessed Petitioner a penalty and investigative costs totaling \$3,856.54 for failure to submit a LSA report as required by 15A NCAC 2L .0115(c)(4) from January 19, 2005 through at least September 16, 2005.

#### CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, I make the following Conclusions of Law:

1. This matter is properly before the Office of Administrative Hearings and the Office of Administrative Hearings has jurisdiction of the subject matter and the parties herein.



2. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder.
3. The burden of proof is upon the Petitioner to show that the Respondent either acted erroneously or otherwise violated N.C. Gen. Stat. § 150B-23 when Respondent assessed civil penalties against Petitioner.
4. Petitioner is a “person” within the meaning of N.C. Gen. Stat. § 143-215.6A pursuant to N.C. Gen. Stat. § 143-212(4).
5. Respondent is a State agency established pursuant to N.C. Gen. Stat. § 143B-275 *et. seq.* and vested with the statutory authority to enforce the State’s environmental pollution laws, including laws enacted to regulate underground storage tank systems and to protect the groundwater quality of the State.
6. The UST rules at 15A NCAC 2N and 2L have been adopted by the Environmental Management Commission pursuant to N.C. Gen. Stat. § 143-215.3(a)(15).
7. Pursuant to N.C. Gen. Stat. § 143-215.94A(9) and 15A NCAC 2N .0203 as incorporating 40 CFR § 280.12, owner means any person who owns a UST system for storage, use or dispensing of regulating substances.
8. Respondent has the discretion and authority to assess a civil penalty against Petitioner in this matter pursuant to N.C. Gen. Stat. § 143-215.6A and § 143-215.94W. They propose that a civil penalty of not more than ten thousand dollars (\$10,000) per violation may be assessed against any person who fails to act in accordance with the applicable law and regulations. Each day that a violation continues may be considered a separate violation.
9. Respondent has the authority to assess enforcement costs against Petitioner in this matter pursuant to N.C. Gen. Stat. § 143-215.3(a)(9) and N.C. Gen. Stat. § 143B-282.1(b)(8).
10. Petitioner is the owner of the USTs located at the site. Because Petitioner is the owner of the USTs at these sites, he must comply with, among other laws and regulations, the requirements of 15A NCAC 2L .0115.
11. 15A NCAC 2N .0115(c)(3) affords the Petitioner the opportunity to demonstrate that any discovered soil contamination is localized and that all discovered soil contamination has been removed to standards. 15A NCAC .0115(c)(3) allows 90 days to make this showing. Petitioner did not show within 90 days, and still has not shown, that discovered soil contamination at the dispenser island has been removed. Due to contaminants within nearby water supply wells, Petitioner also cannot show that contamination from his site is localized.
12. Because the requirements of 15A NCAC 2N .0115(c)(3) cannot be met, Petitioner is required to submit a LSA report. As of the contested case hearing in this matter, Petitioner still has not submitted the LSA report. Petitioner first received notification of his duties under 15A NCAC 2L .0115 from Respondent on March 19, 2003.
13. Respondent has provided sufficient evidence of violations of 15A NCAC 2L .0115(c)(4) at the site. Petitioner is under a legal duty to comply with these regulations as he was the owner and the operator of the USTs at this site.
15. In determining the amount of the civil penalty, Respondent properly considered the factors set forth in N.C. Gen. Stat. § 143B-282.1 as required by N.C. Gen. Stat. § 143-215.6A.
16. In assessing this civil penalty, Respondent did not act or exercise its discretion erroneously or otherwise violate N.C. Gen. Stat. § 150B-23.

**DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is the Decision of the undersigned Administrative Law Judge that the Respondent’s civil penalty assessment dated November 14, 2005 be AFFIRMED.

**ORDER**

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

**NOTICE**

The agency that will make the final decision in this contested case is the Department of Environment and Natural Resources (DENR).

DENR is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a). DENR 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' attorneys of record and to the Office of Administrative Hearings.

This the 25<sup>th</sup> day of July, 2006.

\_\_\_\_\_  
Sammie Chess, Jr.  
Administrative Law Judge



enrolled in Medicare Parts A and B, with benefits beginning April 2005.

5. On May 19, 2005, Petitioner faxed notification of his Medicare eligibility to the State Health Plan and on June 4, 2005, notified them by mail.

6. Petitioner was not given earlier medical insurance under Medicare because SSA did not process it timely. However, SSA offered Petitioner the option of purchasing Part B benefits, backdated to December 2003, at a cost of \$1,092.50. Petitioner was given 30 days beginning May 11, 2005, to decide. Petitioner requested clarification of state policy regarding this option through telephone calls to the State Health Plan. Petitioner contends that he received no response to his requests for information and consequently did not purchase the retroactive Medicare Part B coverage. Respondent provided no evidence to counter Petitioner's claim.

7. The State Health Plan coordinates benefits with Medicare. According to the State Health Plan Benefits Booklet, "if you are not an active employee, or if you have end stage renal disease (ESRD), and are eligible for Medicare Part B, it is recommended that you enroll. If you choose not to enroll in Medicare Part B, the Plan estimates the amount that Medicare would have paid for covered services, and considers for Plan payment only the remaining balance just as if Medicare had paid."

8. The parties disagree on the actual date Petitioner became eligible for Medicare Part B.

9. Petitioner's Medicare card shows a date of December 1, 2003, for Part A, and a date of April 1, 2005, for Part B. Petitioner contacted Medicare on June 2, 2006, to confirm the dates on the card and was told that they were correct.

10. According to Respondent, Petitioner was eligible for Medicare Part B beginning in December of 2003 and opted not to purchase those benefits. The Plan held Petitioner accountable for choosing not to purchase the backdated Part B benefits and sought reimbursement from Petitioner's providers for payments made as the primary coverage from December 2003 through March 2005. Medicare was not available when these claims were filed.

11. Petitioner received copies of letters that the State Health Plan sent to his providers requesting reimbursement for alleged overpayments.

12. All of Petitioner's requests for appeal and grievance review were denied.

13. The amount currently in dispute is \$3,623.62.

**BASED UPON** the foregoing Findings of Fact, the undersigned Senior Administrative Law Judge makes the following:

**CONCLUSIONS OF LAW**

1. Petitioner's letter from SSA informed him that he was "entitled to medical insurance under Medicare **beginning April 2005.**" He was automatically enrolled in Medicare Part B, but provided the option of declining enrollment. "An eligible individual who is automatically enrolled in the Medicare Part B supplementary medical insurance program is granted a specified period, at least two months after the month in which the SSA mails notice of the enrollment, in which to decline enrollment. Enrollment is declined by submitting to the SSA a signed statement that he or she does not want supplementary medical insurance." 42 C.F.R. §407.17(b)(2).

2. Petitioner never submitted a signed statement declining enrollment in Medicare Part B. In fact, Petitioner stated that he was aware that he needed to be enrolled in Part B to maintain full benefits, and that was why he did not submit the form declining enrollment. Petitioner stated that he did not purchase retroactive benefits because he thought that his past claims had already been covered by the State Health Plan. Since neither the statutes nor the State Health Plan's benefit booklet address the issue of retroactive benefits, and Petitioner did contact both Medicare and the State Health Plan regarding this issue, it is concluded that Petitioner acted as a reasonable person in good faith.

3. Petitioner's letter from SSA clearly states "**we did not give you earlier medical insurance** because we did not process it timely." Thus, Petitioner was not covered under Medicare between December 2003 and April 2005. The mere fact that SSA provided Petitioner with the option to purchase backdated Medicare coverage does not equate to the enrollment or eligibility standards as prescribed by relevant statutes and regulations.

4. Although Respondent provided an accurate interpretation of the State Plan's benefit limitations, described in Chapter 135 of the North Carolina General Statutes, such limitations are contingent on the existence of Medicare coverage. Since Petitioner did not have Medicare when claims were filed between December 2003 and April 2005, the State Health Plan served as primary coverage.

During that time, there was no indication that Medicare was, or would be, a liable option for coverage, so these claims were properly paid by the State Health Plan.

5. Probable liability is established at the time claim is filed. 42 C.F.R. § 433.139 (b).

6. Here, even assuming that the State Health Plan correctly determined the probable existence of future Medicare coverage by inferring potential liability from Petitioner's disability, the Plan would still be unable to confirm the actual existence or amount of Medicare liability, as required by the regulation, because at the time the claims at issue were filed, no such Medicare liability existed.

7. "Under the federal statutes and regulations, the mere existence of possible Medicare eligibility does not create third party Medicare liability." 42 C.F.R. 433.139.

8. The establishment of third party liability takes place when the agency receives confirmation from the provider or a third party resource indicating the extent of third party liability. 42 C.F.R. § 433.139 (b)(1). In this case, confirmation was not available until SSA notified Petitioner of his Medicare entitlement in May of 2005.

9. "If third party benefits are not available to pay the recipient's medical expenses **at the time the claim is filed**, the agency must pay the full amount allowed under the agency's payment schedule." *Duke University Medical Center v. Bruton*, 134 N.C. App. 39, 516 S.E.2d 633 (1999). Petitioner was entitled to have the contested claims paid by the State Health Plan.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned has jurisdiction to render the following:

**DECISION**

Respondent acted improperly by seeking reimbursement from Petitioner's providers and therefore must repay any refunded claims.

**NOTICE AND ORDER**

The Board of Trustees of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan will make the final decision in this contested case.

The Board is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Board 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' attorneys of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Board 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 Board, the Board 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 Board in not adopting the finding of fact. For each new finding of fact made by the Board that is not contained in the Administrative Law Judge's Decision, the Board shall set forth separately and in detail the evidence in the record relied upon by the Board in making the finding of fact.

This the 7th day of August, 2006.

\_\_\_\_\_  
Fred G. Morrison Jr.  
Senior Administrative Law Judge

STATE OF NORTH CAROLINA  
COUNTY OF DUPLIN

IN THE OFFICE  
OF ADMINISTRATIVE HEARINGS  
05 OSP 1012

JEFFREY MICHAEL QUINN, )  
Petitioner, )  
 )  
v. )  
 )  
NORTH CAROLINA DEPARTMENT of )  
CRIME CONTROL and PUBLIC SAFETY, )  
STATE HIGHWAY PATROL, )  
Respondent. )

**DECISION**

**THIS MATTER** came on for hearing before the undersigned Administrative Law Judge, Augustus B. Elkins II, on March 14, 2006, in Bolivia, North Carolina. A post hearing motion was made and considered in June 2006 which is addressed later in this opinion. This was a joint hearing with 05 DOJ 1406. Two separate opinions have been issued.

**APPEARANCES**

**For Petitioner:** J. Michael McGuinness  
P.O. Box 952  
Elizabethtown, North Carolina 28337

**For Respondent:** Joseph P. Dugdale  
General Counsel  
NC State Highway Patrol  
4702 Mail Service Center  
Raleigh, NC 27699-4702

(John J. Aldridge, III, Special Deputy Attorney General, represented the Criminal Justice Commission)

**EXHIBITS**

**For Petitioner:** Exhibit one (1)

**For Respondent:** Exhibits one (1) through twenty (20);  
Exhibits twenty-two (22) through thirty A and B (30A & 30B);  
Exhibits thirty-one (31) through thirty-nine (39).

**WITNESSES**

**Called by Petitioner:**

1. Petitioner Jeffrey Michael Quinn
2. Gary Sholar

**Called by Respondent:**

1. DEA Special Agent Hal Jordan
2. Captain Ken Castelloe
3. Petitioner Jeffrey Michael Quinn
4. Thomas Junior Bell
5. Dr. Thomas Griggs, M.D.
6. SBI Special Agent Ann C. Hamlin
7. Richard Squires

ISSUE

**Did Respondent, NC Department of Crime Control and Public Safety, State Highway Patrol, have just cause under N.C.G.S. §126-35 to terminate Petitioner based upon unacceptable personal conduct?**

This issue includes analyzing: (1) whether Jeffrey Michael Quinn knowingly and willfully ingested illegal drugs; and, (2) whether there was properly admissible evidence of reasonable suspicion to administer a drug test to Petitioner.

BURDEN OF PROOF

Pursuant to N.C.G.S. § 126-35, Respondent has the burden of proof to show that Respondent had just cause to terminate Petitioner

STIPULATION OF FACTS

(Joint Exhibit 1)

1. On February 25, 2005, the Petitioner deposited a urine sample with the North Carolina State Highway Patrol Medical Office in Raleigh, North Carolina as part of an employment drug screen with the North Carolina State Highway Patrol. This untampered sample was delivered to Laboratory Corporation of America in Research Triangle Park, North Carolina, for testing on February 26, 2005. The chain of custody for this urine sample was untainted and untampered.

2. Laboratory Corporation of America in Research Triangle Park, North Carolina, reported the Petitioner's urine sample to be positive for the presence of amphetamines and methamphetamines on February 28, 2005. The Petitioner produced a positive result on a drug screen for amphetamines and methamphetamines administered in accordance with the procedures authorized and mandated by the United States Department of Health and Human Services for Federal Workplace Drug Testing Programs. This positive result for amphetamines and methamphetamines revealed a level of amphetamines and methamphetamines above the threshold established for a screen and confirmation test conducted in accordance with the standards established by the United States Department of Health and Human Services for Federal Workplace Drug Testing Programs.

3. The Petitioner's drug test consisted of an initial screening test using an immunoassay method and a confirmatory test on the initial positive result using a gas chromatography/mass spectrometry (GC/MS).

4. The chain of custody on Petitioner's urine sample has been maintained from collection to the present.

5. The drugs tested for included cannabis, cocaine, phencyclidine (PCP), opiates and amphetamines or their metabolites.

6. The test threshold values used were those established by the Department of Health and Human Services for Federal Workplace Drug Testing Programs.

7. The confirmation cutoff for amphetamines and methamphetamines is 500 ng/ml. The Petitioner's urine sample tested positive for amphetamines at a level of 990 ng/ml and methamphetamines at a level of 2236 ng/ml.

8. Laboratory Corporations of America is a laboratory certified for Federal Workplace Drug Testing Programs. Dr. Thomas Griggs was under contract with the North Carolina State Highway Patrol to conduct medical review officer functions on urine samples reported as positive by Laboratory Corporation of America. Dr. Griggs determined the Petitioner's positive drug screen was proper in form and testing procedures and was not related to a medically indicated cause.

**BASED UPON** careful consideration of the stipulations of fact, 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, Jeffrey Michael Quinn, was employed by Respondent, North Carolina State Highway Patrol, as a State Trooper. At the time of his dismissal. Petitioner was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina (the State Personnel Act.) Respondent North Carolina State Highway Patrol is subject to Chapter 126.
2. The Petitioner was appointed as a patrolman with the North Carolina State Highway Patrol on October 27, 2000. The Petitioner was dismissed from the service of the North Carolina State Highway Patrol on April 6, 2005.
3. Harold Jordan is a Special Agent (SA) with the United States Drug Enforcement Administration (DEA). He has been so employed for approximately 15 years. He has been stationed in the Wilmington, North Carolina office since 1997. He has previously had the occasion to use information from an informant named Thomas Junior Bell.
4. Thomas Junior Bell, who had a criminal history related to methamphetamine, became a confidential informant for the Drug Enforcement Agency (DEA) in January 2001. Although Bell had provided credible information to the DEA, his contract as an informant was terminated in July 2001 when it was discovered that he was again using methamphetamine. On or about February 2003, Bell was suspected to be operating a methamphetamine laboratory in Cumberland County, North Carolina. He was manufacturing methamphetamine and selling it to truck drivers in and around this area. He was arrested by the State Bureau of Investigation on February 20, 2003.
5. After the arrest of Bell, North Carolina State Bureau of Investigation SA Mitch Diever and Sergeant Terry Ray of the Cumberland County Bureau of Narcotics, spoke with him. Information received from Bell included allegations that Bell had previously been to the Duplin County area of North Carolina and used methamphetamine with a North Carolina State Trooper in his patrol car. That information was placed in a report which was reviewed later by SA Jordan. Bell was eventually brought from State custody to Federal custody where SA Jordan charged him on federal charges of manufacturing methamphetamine and possession of a firearm. He pled guilty to conspiracy to distribute and manufacture methamphetamine and carrying a gun during a drug deal on March 15, 2004. As a part of Thomas Bell's plea agreement, there was a cooperation agreement, which required complete cooperation with the government. The cooperation agreement allowed for an opportunity for Bell to cut his potential sentence. The sentence imposed on Thomas Bell was between eight and ten years. Mr. Bell was exposed to a much greater prison sentence than eight to ten years. The State criminal charges were dropped.
6. After Bell became SA Jordan's defendant and under an agreement with the US Attorney's office, SA Jordan interviewed Bell with regard to his allegations of using methamphetamine with a North Carolina State Trooper. Bell reaffirmed these allegations. As a result, SA Jordan contacted Captain Castelloe of the North Carolina State Highway Patrol. Captain Castelloe and SA Jordan met with Bell on or about May 2004.
7. Based on the information provided by Agent Jordan at that time, Capt. Castelloe was able to determine that the unidentified Trooper had to be assigned to the Duplin and Pender County. Accordingly, he compiled a photographic lineup consisting of two Highway Patrol annuals and mixed them up without any names being identified. For that reason, there were a total of 52 photographs. (R.E. 30A & B)
8. On May 28, 2004, Agent Jordan and then Lieutenant Ken Castelloe, (hereinafter referred to as Capt. Castelloe) Commander of Inspections and Internal Affairs Unit of the Highway Patrol Director of Internal Affairs for the Highway Patrol, interviewed Bell at the Pitt County jail. Bell was asked to describe the incident involving the state trooper. Bell stated, in relevant part, that he and Jerome Thigpen, and the trooper's brother Dwain and the trooper sat in a marked patrol vehicle, parked on the side of the trooper's residence, and each snorted one line of methamphetamine sometime during the winter of 2002.
9. Bell was unable to identify Petitioner from a photographic lineup consisting of a total of fifty-two (52) official Highway Patrol Trooper photographs (R.E. 30A & B). Bell identified a number of troopers that looked like the person that he had used methamphetamine with. Capt. Castelloe testified that Mr. Bell described the trooper in question "as being kinda of fat faced, short haired." Castelloe testified that "Michael Quinn...is not fat faced..." Mr. Bell could not positively identify the Petitioner at that time as the same trooper he had used methamphetamine with because, in the words of Bell, they all look alike in their hats and uniforms. (Tpp. 65-76) Bell did provide the investigators with detailed driving directions to the Loop Road where Petitioner resided, a description of the exterior of Petitioner's residence and the residence's proximity to Petitioner's brother's trailer. Additionally, Bell provided accurate physical descriptions of Petitioner's brother Dwain and his friend, Jerome.
10. At the conclusion of the interview, Agent Jordan, following the driving directions provided by Bell, traveled to Potters Hill Loop Road and found a house matching the description given by Bell. Agent Jordan observed a marked Highway Patrol Car sitting parked at the residence. He called Capt. Castelloe and gave him the identifying numbers from the back window of the



Patrol car and Capt. Castelloe identified the vehicle as having been issued to Petitioner. The residence was identified at the hearing as being the residence of Petitioner. Agent Jordan's observations on Potters Loop Road were consistent with the information that was provided to him by Bell. (R.E. 28)

11. Thomas Junior Bell, who is currently serving a ten (10) year sentence in a federal correctional facility, as a result of his guilty plea on March 15, 2004, testified at the hearing of this contested case. Bell testified that he began using methamphetamine at the age of 15, began selling at age 16, and manufactured methamphetamine from approximately 1998 or 99 until he was arrested in February 2003. Bell identified photographs of Petitioner's brother Dwain and Jerome Thigpen. (R.E. 25& 26) Bell testified that he met Jerome Thigpen sometime in 2000 and they "started dealing meth together," and that and that Petitioner's brother Dwain had been to his house "bunches of times" but that he only met Petitioner on that one occasion in the winter of 2002 and was only in his presence for a total of ten or fifteen minutes. (T. pp 145-46, 163)
12. Mr. Bell was unable to identify the Petitioner from a photographic array of state troopers in uniform with their hats on. Mr. Bell testified, however that the photographs appeared to be the same "because I remember the one that I picked..." (Tp. 152) The Undersigned inquired about whether Mr. Bell said he picked somebody out of the group and Mr. Bell responded that yes, he did. The Undersigned observed that the record would reflect that Mr. Bell was pointing to the second to the bottom row, the fifth one. (Tp. 153) Mr. Bell identified the Petitioner in civilian clothes in open court as the individual with whom he had previously used methamphetamine in the patrol car. At the conclusion of Petitioner Quinn's testimony, Petitioner placed an objection on the record. The Undersigned takes official notice of the fact that Thomas Junior Bell was brought into the courtroom during Petitioner Quinn's testimony approximately 15 or 20 minutes before the conclusion of his testimony, whereby Mr. Bell had an opportunity to observe Mr. Quinn. (Tpp. 140-142)
13. Bell's testimony at trial, as it related to Petitioner's use of methamphetamine in the winter of 2002 was substantially consistent with what he previously related to Agent Jordan and Capt. Castelloe in May 2004. Pursuant to an agreement with the U.S. Attorney, Bell is required to cooperate with the government. Bell has provided information to the DEA since the time of his plea agreement, which has proven to be credible. There was no evidence introduced to establish that Bell had, on any occasion, provided false or fabricated information or testified falsely in any case.
14. Although Bell provided information in May, 2004, in support of his allegation that he ingested methamphetamine with Petitioner, Petitioner's brother and Jerome Thigpen, Capt. Castelloe did not recommend, and the Patrol Commander did not require Petitioner to submit to a reasonable suspicion drug screen at that time. Capt. Castelloe testified that this decision was reached, in part, based on Bell's inability to positively identify Petitioner from the photographic lineup and in part because he "wanted to give our member every benefit of the doubt" and "we just didn't want to believe it." (Tp. 76)
15. On or about February 25, 2005, Capt. Castelloe discovered that an unknown person published a report on an Internet website, [www.ripoffreport.com](http://www.ripoffreport.com), accusing Trooper Michael Quinn, of Kenansville, of buying and using methamphetamine. (T. pp 77-78; R.E. 1). Upon discovering this article, and in light of the earlier allegation that also involved an allegation that Petitioner was using methamphetamine, Capt. Castelloe determined that sufficient reasonable suspicion existed to require Petitioner to be drug tested for methamphetamine pursuant to the Highway Patrol drug testing policy. The Patrol Commander, Colonel W. Fletcher Clay, concurred and directed that Petitioner submit to a drug screen. (R.E. 2) The additional allegation published on the public internet web site corroborated and strengthened the reasonable suspicion that already existed based on the information provided by Bell.
16. Petitioner reported to the Highway Patrol Medical Office, located in Garner, North Carolina, on Friday, February 25, 2005. Upon his arrival, he was met by Capt. Castelloe, who asked him to have a seat in his vehicle. While still seated in the vehicle, Capt. Castelloe showed him a copy of the internet posting accusing him of using methamphetamine (R.E. 1) and also described, in detail, the allegations that were made against him by Bell. At that time, Petitioner told Capt. Castelloe that his brother and sister were "meth heads." Petitioner denied that he had ever used methamphetamine and the allegations were false. Capt. Castelloe explained to Petitioner that if he never used Methamphetamine, then he had nothing to worry about. Petitioner was emotional at this time and had tears in his eyes.
17. Following the discussion in the vehicle, Capt. Castelloe accompanied Petitioner into the medical office where Petitioner provided a sample of his urine for the purpose of submitting to a reasonable suspicion drug screen. (R.E. 18, 19, 20, 23)
18. Immediately following the submission of his urine sample, Petitioner again spoke with Capt. Castelloe. Petitioner was "shedding tears" at this time and stated "this is going to kill my mom and dad." (T. p 212) Petitioner, then told Capt. Castelloe that he had met his brother earlier in the week. He explained that the meeting took place in Warsaw and that he sat in his brother's truck and had a brief conversation. Petitioner stated that when he met him, his brother was jittery. Petitioner

stated he thought that was the case because he (Petitioner) was a law enforcement officer and he supposed that his brother had meth in his truck.

19. On Monday, February 28, 2005, Laboratory Corporation of America (LabCorp) reported Petitioner's drug screen as positive for methamphetamine and amphetamine. (R.E. 24) As indicated by the above-stated stipulation of facts, Petitioner entered into a written stipulation of fact as to the chain of custody and accuracy of the drug screen and resultant positive result. Petitioner's urine was positive for amphetamine and methamphetamine.
20. Upon being notified that Petitioner's drug screen was positive for methamphetamine and amphetamine, Dr. Thomas Griggs, the Highway Patrol Medical Director, contacted Petitioner and asked him if he had any idea why he tested positive. Petitioner stated that he did not know why the result was positive although he stated he had taken Tavest-D the day of the drug screen and had taken Sudafed within 30 days prior to the test. Dr. Griggs informed him that neither of these over the counter medications would result in a positive drug screen. Dr. Griggs then informed Petitioner that he was declaring his drug screen to be positive and that he would report his conclusion to the Patrol Commander and/or Internal Affairs.
21. Special Agent Ann Hamlin, who has a Masters Degree in forensic drug chemistry, is a seventeen (17) year veteran of the N.C. State Bureau of Investigation and is a chemist assigned to the Drug Chemistry Section of the SBI Crime Laboratory. Agent Hamlin has, for approximately the past five (5) years, devoted her career with the SBI to methamphetamine and clandestine laboratories. Agent Hamlin was proffered and accepted by the Undersigned as an expert in forensic drug chemistry. (T. pp 192-95; R.E. 32) Special Agent Hamlin explained that while pseudo ephedrine (Sudafed) and methamphetamine are close compounds, there are identifiable differences and Sudafed will not test positive for methamphetamine when using the gas chromatography/mass spectrometry (GC/MS) screening test.
22. On Monday, February 28, 2005, Dr. Griggs informed Petitioner that he had a right to have the split sample of his urine tested at the same or another LabCorp facility or at any certified facility of his choice, but that the test would be at Petitioner's expense. Dr. Griggs also informed Petitioner that he would help him arrange for the second test if that was what he wanted to do. Petitioner did not request a re-test. Dr. Griggs reported the positive test result to Capt. Castelloe on that same date.
23. On Tuesday, March 1, 2005, Petitioner's brother left several telephone messages for Capt. Castelloe to call him. Capt. Castelloe tried, unsuccessfully, to call him over the next few days. Capt. Castelloe finally spoke with Dwain, by telephone, on Friday, March 4, 2005, at which time Dwain related to him that he was upset that he had gotten Petitioner in trouble. According to Dwain, he met Petitioner at a Wilco station in Warsaw, and got in Petitioner's patrol car, and left a bottle of water mixed with methamphetamine in the car. (R.E. 9)
24. Capt. Castelloe initiated a Personnel Complaint (HP-307) against Petitioner, and a copy of that complaint and accompanying documents was served on Petitioner on Friday, March 4, 2005, one week after he submitted to the drug screen. (R.E. 3, 4, 5 and 6).
25. Petitioner submitted a written statement on March 4, 2005, in which he stated that he had met his brother Dwain in a parking lot of a Wilco station in Warsaw on Thursday, February 24, 2005. He stated: "I learned last night [March 3, 2005] that the bottle of water I got from him had drugs in it. That is why I tested positive on the drug test. Dwain came to my house and told me about it last night. I had no idea there was anything in the bottle. I have never and will never take any kind of methamphetamine." (R.E. 7)
26. Petitioner was interviewed by Internal Affairs on March 4, 2005, the same date he submitted his written statement. During that interview, Petitioner admitted that he knew Jerome Thigpen and that Jerome and Dwain had been friends. Petitioner denied that he knew Thomas Junior Bell. (R.E. 8)
27. Although Petitioner told Capt. Castelloe, on February 28, 2005, that his brother and sister were both "meth heads," he told the Internal Affairs investigators that he did not know for sure until the night before (March 3, 2005) that his brother Dwain was a meth user and that he just assumed his sister used methamphetamine. (R.E. 8)
28. Although Petitioner told Capt. Castelloe, on the day of his drug screen (February 25, 2005), that he met his brother in Warsaw "earlier in the week" he told the Internal Affairs investigators on March 4, 2005, that he met his brother in Warsaw "the day before his drug screen" (February 24, 2005). (R.E. 8, Tp 6, 19-20).
29. Although Petitioner told Capt. Castelloe that he talked with his brother Dwain while they were seated in Dwain's truck, he told the Internal Affairs investigators, just one week later, that his brother got out of his truck with the bottle of water and got in his (Petitioner's) patrol car and that he (Dwain) left the water in the patrol car when he left. Petitioner stated he later

- finished his bottle of water and then drank his brother's bottle of water, which he claimed had the methamphetamine in it. (R.E. 8). Petitioner told Internal Affairs that although he did not remember what brand of water his brother left in his patrol car, he did remember that the water did not have any unusual taste. (R.E. 8) He also stated he did not detect any noticeable affect of the methamphetamine after drinking the bottle of water. (R.E. 8)
30. Although Petitioner previously told Capt. Castelloe that his brother was very nervous and jittery, he told the Internal Affairs investigators that his brother did not appear to be under the influence of anything. (R.E. 8).
31. Petitioner told Internal Affairs that although he normally goes to bed around 10 pm, he did not go to bed until "around midnight or 1:00 P.M. I guess" (sic) on the day he inadvertently consumed the methamphetamine. Petitioner told Internal Affairs that there was no particular reason why he went to bed late that night. He stated further that he did not feel sick or irritable or otherwise feel any effect of the methamphetamine. (R.E. 8, T. pp 19-20).
32. Petitioner testified at the hearing and admitted that he resided at Potters Hill Loop Road in the winter of 2002 and identified Respondent's Exhibit 28 as being a photo of that residence. He also admitted that he drove a marked Highway Patrol car in 2002, that it would have been parked on the side of his residence as described by Bell and Special Agent Jordan, and that he kept his patrol car locked, and only he had access to it. Petitioner further admitted that his brother Dwain did, at one time drive a white Kenworth truck as described by Bell, that his brother lived in the single wide trailer as described by Bell, and that Dwain and Jerome Thigpen were friends, as described by Bell. Petitioner also identified Respondent's Exhibits 25 and 26 as photographs of Jerome Thigpen and Petitioner's brother, Dwain.
33. Petitioner testified at the hearing that he was advised by Dr. Griggs of his right to have the split sample of his urine sample tested at another lab of his choice and, although, it is his contention that he did not know he ingested methamphetamine until four (4) days after learning of the positive result, he, nonetheless, chose not to request a retest. When asked if it was true that on February 28, 2005, he would have had no reason to believe that the test should have been correct [positive], Petitioner responded: "That's absolutely correct." When later asked why he did not request a retest, however, Petitioner responded, in part: "I didn't think the lab would make a mistake."
34. Petitioner told Capt. Castelloe that he sat in his brother's truck, and he told the investigators that his brother sat in his patrol car. When asked about this discrepancy, Petitioner testified that both were true; he sat in his brother's truck and then they exited the truck and went to the patrol car. This explanation is not credible, particularly in light of the fact that it contradicts what he told the Internal Affairs. On March 4, 2005, he stated: "He got out of his truck and got into my car when I pulled up." Accordingly, this testimony is inconsistent with each of his two earlier statements.
35. Petitioner reiterated in his testimony that the water his brother Dwain left in his patrol car did not have any taste; he testified it tasted like regular water. This testimony is not credible. Bell, who admits to a long history of using, selling and manufacturing methamphetamine, testified that he did not like to mix methamphetamine in water because "the taste is awful." (T. p 180) Special Agent Hamlin testified that, if mixed in water, methamphetamine "would produce a very bitter taste." (T. p 198) She testified further that somebody that is ingesting meth for its effect is going to put a quantity in that would provide or exhibit a bitter taste.
36. Petitioner reiterated in his testimony that he did not feel any adverse effects of the methamphetamine whatsoever, other than not being hungry and not sleeping. This testimony is not credible. Bell, who admits to a long history of using, selling and manufacturing methamphetamine, testified that methamphetamine "speeds your central nervous system up . . . it just takes over your body. It's in control of you." (T. p 176) Bell testified further that if you mix methamphetamine in water "it gets you off better that way." Special Agent Hamlin testified that methamphetamine is a stimulant that would stimulate certain things in the body. Special Agent Hamlin testified that when you ingest methamphetamine mixed with water "it doesn't produce that intense rush but it does produce a longer-lasting euphoria. (T. pp 196-99) An amount that would be sufficient to produce the desired effect for a regular user (Dwain) would produce an effect that is a much greater effect on a first time user who has not built up any tolerance. Petitioner's contention that he unknowingly ingested methamphetamine the day before he was requested by Respondent to submit to a reasonable suspicion drug screen for methamphetamine is not credible.
37. The Highway Patrol's investigation was summarized in a four (4) page Report of Investigation consisting of the interview of Petitioner and Capt. Castelloe. (R.E. 9) That report was forwarded to the Patrol Commander, along with a recommendation that Petitioner be dismissed from the Highway Patrol on March 18, 2005. (R.E. 8). The Patrol Commander directed that a pre-dismissal conference be conducted. Notice of the conference was prepared on March 23, 2005, and it was scheduled for March 31, 2005. Petitioner received notice of the conference on March 30, 2005. (R.E. 10, 11, 12).

38. The Policies and Procedures Manual of the State Highway Patrol provides that a trooper be provided as much time as is practical under the circumstances to prepare for a pre-dismissal conference. Petitioner was informed of the positive drug screen result on February 28, 2005 and was afforded an opportunity to provide an explanation at that time. Petitioner was interviewed by Internal Affairs on March 4, 2005 and again had an opportunity to provide any evidence or explanation on his behalf. The evidence against Petitioner was a single positive drug screen and Petitioner has never challenged its accuracy. Petitioner knew, at the time of his Internal Affairs interview on March 4, 2005 that the positive drug test was going to result in dismissal; (R.E. 8) Captain Castelloe stated that, in light of the straightforward facts and short investigation, 24 hours notice of the pre-dismissal conference was a reasonable period of time for the Petitioner.
39. On March 31, 2005, Captain Castelloe conducted a pre-dismissal conference with the Petitioner. The Petitioner attended the pre-dismissal conference wearing a T-shirt and slacks. When the Petitioner was given the opportunity to produce additional evidence, refute any evidence and provide information for the Colonel's consideration, the Petitioner stated, "I have nothing to say." (R.E. 13) The Petitioner at no point in time requested a continuance of the pre-dismissal conference in order to further prepare his presentation. Captain Castelloe did not review Trooper Quinn's performance and conduct evaluations and his 360s. To his knowledge, Colonel Clay did not review Trooper Quinn's performance evaluations and 360s. Capt. Castelloe acknowledged that Trooper Quinn's transcribed internal interview was not provided to the Colonel at the time of the decision to terminate. At the time the Colonel made his decision to impose the disciplinary action that he did, he had not had an opportunity to review the transcript of Trooper Quinn's interview.
40. On April 5, 2005, the Petitioner was dismissed from the North Carolina State Highway Patrol for violation of State Highway Patrol Directive H.1, § XII (Use of Drugs).
41. The Petitioner is 29 years of age and lives on Potter's Hill Road in Duplin County, North Carolina. He has been married since 1998. The Petitioner denied ever using methamphetamine.
42. Following high school, Petitioner Quinn pursued further education in the criminal justice field at James Sprunt Community College and he completed basic law enforcement training in 1996. Quinn has been continuously certified by the Commission. There has never been any adverse action against his certification. He has never had any record of criminal convictions other than minor speeding charges.
43. Petitioner Quinn previously served with the Wallace Police Department from 1997 until 2000. He did not have any significant disciplinary action taken against him there. There is no allegation against Petitioner Quinn of improper drug use while at the Wallace Police Department. Petitioner Quinn left employment with the Wallace Police Department because he accepted employment with the Highway Patrol. Petitioner Quinn had to take previous drug tests and there has never been a positive finding of illegal drugs previously.
44. David Sholar testified on behalf of the Petitioner. Sholar has lived in Duplin County for thirty years. Sholar and Petitioner Quinn were employed by the Wallace Police Department from 1996 until Sholar left in 1999. Sholar testified that other Patrol officers have spoken highly of Petitioner Quinn and that Sholar had never heard anything derogatory whatsoever about Petitioner Quinn. Sholar testified that he did not think that Mr. Quinn's integrity was ever compromised. Sholar testified that Petitioner Quinn was consistently professional and respectful of his superiors. Sholar never observed anything about Petitioner Quinn that would have been consistent with any type of drug use. Sholar has never known Petitioner Quinn to be untruthful. He believes that a sworn officer's use of unlawful controlled substance is inconsistent with holding that office.
45. It is specifically found that the Petitioner's testimony in several regards is not credible. The Petitioner's assertion that he inadvertently consumed methamphetamines in a quantity sufficient to test positive on a urinalysis drug screen from a bottle of water without a bitter taste is not plausible. The consistent testimony is that the Petitioner would have tasted this drug in the water bottle and reason leads the Undersigned to find that Petitioner would have halted his drinking of the water or inquired of his brother what was in the water.
46. Further, the Petitioner provided inconsistent versions of how the methamphetamines came to be in his system. The Petitioner told Captain Castelloe he met his brother the day before the urine test and they sat in his brother's truck. However, he told other investigators they sat in his patrol car. At trial, Petitioner said he sat in both vehicles. The Petitioner's actions on February 25, 2005 in appearing nervous, crying, and disclosing that his brother and sister were methamphetamines users, as well as revealing that these actions were "going to kill" his parents, to Captain Castelloe lead the Undersigned to find that Petitioner knew or suspected that his urine was going to test positive for methamphetamines.
47. The Petitioner's positive urinalysis test result for amphetamines and methamphetamines is not due to a medically indicated cause.

**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 jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in the matter. To the extent that the findings of facts 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 Petitioner was a career state employee, as defined in N.C.G.S. § 126 and is subject to the State Personnel Act. N.C.G.S. § 126-35 provides that no career State employee subject to the State Personnel Act shall be discharged, suspended or demoted for disciplinary reasons, except for just cause.
3. "Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *Alabama v. White*, 496 U.S. 325 (1990); *Garrison v Dept. of Justice*, 72 F. 3d 1569 (Fed. Cir. 1995) (reasonable suspicion existed where petitioner's mentally ill brother stated he had seen him smoke marijuana several times in last few years); *Copeland v Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988) (upholding drug-testing based on allegations of police officer's ex-girlfriend, made after a "heated altercation" with him, that he had used illegal drugs in her presence); *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987) (upholding the finding of reasonable suspicion based on drug dealer's identification of plaintiff as one of his customers.
4. Based on the facts known by the Highway Patrol following the interview of Thomas Junior Bell in May, 2004, the Highway Patrol had sufficient reasonable suspicion to require Petitioner to submit to a drug screen for methamphetamine in May, 2002. Accordingly, Respondent had reasonable suspicion to require Petitioner submit to a drug screen in May 2004.
5. On or about February 25, 2005, Capt. Castelloe discovered that an unknown person published a report on an Internet website, [www.ripoffreport.com](http://www.ripoffreport.com), accusing (among others) Trooper Michael Quinn, of Kenansville, of buying and using methamphetamine. The additional allegation published on the public internet web site corroborated and strengthened the reasonable suspicion that already existed based on the information provided by Bell. Accordingly, Respondent had reasonable suspicion to require Petitioner submit to a drug screen at the time the Patrol Commander directed him to do so on February 25, 2005.
6. State personnel policy states that advance notice of a pre-dismissal conference should be as much as practical under the circumstances. (State Personnel Policy, Section 7, p 18). State Highway Patrol Policy (SHP Directive H.4) is identical to State Personnel Policy. In this case, the Petitioner was given approximately 24 hours notice of the pre-dismissal conference. The entire Report of Investigation prepared in this case was four pages in length and consisted of the interviews with Petitioner and with Capt. Castelloe. Petitioner did not request additional time to prepare for the pre-dismissal conference and when afforded an opportunity to produce additional evidence or to refute evidence at that conference he responded: that he had nothing to say.
7. In order to determine what "process" is "due," the United States Supreme Court, in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), sets forth a balancing test. The Court in *Mathews* described due process as a flexible process that "calls for such procedural protections as the particular situation demands," and sets out three factors to consider in determining what process is due in a given situation: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved.
8. The Supreme Court has stated that retaining employment is an important private interest. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494. And the North Carolina Courts have continually stated that substantial weight must be accorded an employee's interest in retaining the employment in which he or she possesses a constitutionally protected property right. However, an employee's interest in retaining employment is not absolute and must be tempered by public interest (as well as the balancing of other interests as cited above). See *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). In this case, involving a State Highway Patrol trooper and the use of illegal drugs, 24 hours notice of the pre-dismissal conference was neither unreasonable nor prejudicial. The Respondent's dismissal circumstances pass the prevailing case law requirements and the requirements of due process afforded the Petitioner by Federal and State law.

9. N.C.G.S. § 126 states that in contested cases pursuant to Chapter 150B of the General Statutes, the burden of showing that a career State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.
10. The Respondent has the burden of proof by a greater weight or preponderance of the evidence that its dismissal of Petitioner was for just cause. 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.
11. A preponderance of the evidence exists to conclude the Petitioner knowingly ingested methamphetamine, an illegal controlled substance, resulting in a positive urinalysis drug test from the sample he rendered on February 25, 2005. This conduct constituted unacceptable personal conduct, sufficient to justify Respondent's dismissal of Petitioner pursuant to 25 NCAC 1J.0614(i)(4).

**POST HEARING MATTERS**

On June 8, 2006, the Respondent filed a Motion to Hold Record Open or in the alternative, moved the Undersigned to reopen the record to allow presentation of additional relevant, newly discovered evidence involving the credibility of Petitioner. Petitioner responded in opposition to the Motion, citing that the record was closed, that Respondent's motion was not supported by any affidavit, and that evidence received after Respondent made its decision could not have been a cause or basis for its decision. After careful consideration of the applicable law, the Undersigned concludes that Respondent's Motion is denied.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

**DECISION**

There is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned finds and holds that Petitioner was terminated for unacceptable personal conduct which is just cause for termination. The Respondent has carried its burden of proof by a greater weight of the evidence that the termination of Petitioner was lawful and in accordance with the applicable State laws and standards.

**NOTICE**

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and to present written arguments regarding this Decision issued by the Undersigned in accordance with N. C. Gen. Stat. § 150B-36.

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 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. 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 is the 4th day of August, 2006.

\_\_\_\_\_  
Augustus B. Elkins II  
Administrative Law Judge

**CONTESTED CASE DECISIONS**

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
05 OSP 1771

W. Frank Etheridge )  
Petitioner, )  
 )  
vs. )  
 )  
North Carolina Department of )  
Administration & State Capital Police )  
Respondents. )

**DECISION**

On March 29 and 30, 2006, Administrative Law Judge, Melissa Owens Lassiter, heard this contested case in Raleigh, North Carolina. At the beginning of the hearing, the undersigned granted Petitioner's Motion to Sequester all witnesses, except the parties and/or their representatives.

On May 5, 2006, the undersigned requested the parties submit proposed Decisions on or before June 1, 2006. On May 30, 2006, the undersigned granted Petitioner's request to extend the decision filing deadline, and extended that deadline for both parties until June 12, 2006. On June 12, 2006, both parties filed their respective proposed Decisions.

**APPEARANCES**

For Petitioner: Anthony M. Brannon  
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For Respondents: Ann Stone  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, North Carolina 27699-9001

**STATUTES, RULES & POLICIES AT ISSUE**

N.C. Gen. Stat. § 126-34.1  
N.C. Gen. Stat. § 126-35  
N.C. Gen. Stat. § 126-36  
N.C. Gen. Stat. Section 126-37  
Office of State Personnel, Personnel Manual  
N.C. Department of Administration, Personnel Manual

**ISSUES**

1. Did Respondents meet their burden of proving that they had just cause to demote Petitioner, in accordance with N.C. Gen. Stat. Section 126-35, from the position of Deputy Director to a Police Officer I position?
2. Did Petitioner meet his burden of proving that Respondents discriminated and retaliated against him, based on his age and/or a handicapping condition, when Respondents demoted him from the position of Deputy Director to a Police Officer I position?

**WITNESSES**

For Petitioner: Deborah Mitchell, Thomas Fowler, Rob Smith, Debra Atkins,  
Denise Reading, Will Smith, Jeff Honeycutt, Shannon Prevo,  
Matt Davis, Christine Ragan, John Massey, Debra Hargett,  
and Petitioner.

For Respondents: Jimmy Greene, Chief Scott Hunter, Valerie Ford, and Cathy Green.

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner: 1 – 23

For Respondents: 1 – 19

**FINDINGS OF FACT**

1. Petitioner is a career State employee who has been employed as a law enforcement officer for over 27 years. In 1974, Petitioner began his employment with Respondent Department of Administration. On June 1, 1980, Respondent transferred Petitioner to the State Capitol Police Division (“SCP”) as a Police Officer I. In 1987, Petitioner left State employment for private employment, but returned to SCP in 1996. Since 1996, Petitioner has been continuously employed by the SCP.

2. On January 1, 2003, Respondent SCP promoted Petitioner to Deputy Director of the SCP, rank of Major, reporting to the Chief of SCP. As Deputy Director, Petitioner was in charge of Police and Public Safety, supervising sixteen police officer positions, including Police Officers I, II, and III, and four telecommunicator positions.

3. In July of 2003, W. Scott Hunter (“Chief Hunter”) was assigned Interim Chief of the SCP. In December of 2003, Chief Hunter became the permanent Chief of the SCP. Chief Hunter directly supervised Petitioner and Deputy Director Lenora Mitchell. While Petitioner was Deputy Director, he supervised sixteen police officers on patrol and four telecommunicators. Deputy Director Mitchell supervised the buildings in the State Government Complex. (Res Exh 7).

4. A preponderance of the evidence at hearing established that Chief Hunter issued Petitioner a written warning on August 29, 2003. However, since there was no evidence presented at hearing that Respondents considered that warning as a basis for Petitioner’s demotion on July 8, 2005, the undersigned will not consider that warning in this case to bolster Respondents’ reasons for demoting Petitioner.

February 21, 2004 Written Counseling

5. On February 23, 2004, Chief Hunter issued a Job Performance Commendation to Petitioner for the outstanding job Petitioner performed in organizing and supervising the National Socialist Movement rally that occurred on State Capitol grounds on February 21, 2004. That event occurred without incident. In that Commendation, Hunter praised Petitioner for his professionalism, dedication to duty, and level of job performance in supervising the Nazi rally. (Pet Exh 10)

6. On February 24, 2004, Chief Hunter issued Petitioner a written counseling for failure to follow standard operating procedures and failure to contact the On-Call Watch Commander and his supervisor, Chief Scott Hunter, of a critical incident when graffiti was spray-painted on numerous buildings in the State Government Complex. In that counseling, Hunter reminded Petitioner that he was Petitioner’s “direct supervisor and that occurrences and actions of a critical nature should be forwarded to me without delay.” (Resp Exh 2).

7. Between 1:00 a.m. and 2:00 a.m. on February 21, 2004, several individuals spray-painted anti-Nazi and anti-racism graffiti on numerous state buildings in the State Capitol complex in Raleigh. Raleigh Police notified SCP Sgt. Jeff Honeycutt, who was working dispatch for SCP. Honeycutt dispatched two SCP officers to the scene.

8. At approximately 2:00 a.m., Honeycutt notified Petitioner of the incident. Petitioner was Honeycutt’s next chain-of-command and supervisor. Honeycutt told Petitioner that the SCP had arrested two of the individuals, had delivered those persons to the Raleigh Police Officers, and those persons had confessed to the crime.

9. Sgt. Jeff Honeycutt also asked Petitioner if he needed to call Chief Hunter. Petitioner advised Honeycutt that Chief Hunter was coming in early the next morning, and he could evaluate the incident then. Petitioner advised Honeycutt that he would come in and assess the incident first.



10. Petitioner responded to the call by coordinating the clean-up effort with the City of Raleigh police officers, city officials, and Facility Management. Removal of the graffiti was important, because a National Socialist Movement rally was planned for 2:00 p.m. on February 21, 2004 on State Capitol grounds.

11. Between 5:30 a.m. and 6:00 a.m. on February 21, 2004, Petitioner notified Chief Hunter of the graffiti incident.

12. The preponderance of the evidence showed that Chief Hunter was very upset and angry that the graffiti incident had occurred. Hunter was also upset with Petitioner and his patrol officers for not notifying him of the graffiti incident immediately after learning of the incident.

13. The preponderance of the evidence showed that Petitioner assessed the graffiti matter, and coordinated the clean-up effort, so that all graffiti was removed from the State buildings within a few hours. Petitioner contacted Chief Hunter within 3-4 hours of the incident occurred. Petitioner exercised his discretion as Deputy Director not to inform Chief Hunter of the incident immediately, because the matter was under control. In Petitioner's opinion, the matter was not so critical to require waking the Chief. In addition, Petitioner knew the Chief would have a long day starting at 6:00 a.m. that morning.

14. No graffiti remained on the Capitol grounds when the Nazi rally occurred, and the Nazi rally occurred without incident, violence, or injury. At hearing, Chief Hunter acknowledged that Petitioner did an outstanding job in organizing clean up of the graffiti on State grounds. However, Hunter was dissatisfied that Petitioner did not notify him about the graffiti incident immediately.

15. Chief Hunter also reprimanded Officer Thomas Fowler for not preventing the graffiti incident. Fowler was confused why Hunter reprimanded him when Fowler helped apprehend two of the offenders.

16. Chief Hunter issued a written reprimand to Sgt. Honeycutt for not following the on-call procedure and calling Chief Hunter, the on-call watch commander, on February 21, 2004. Honeycutt rarely worked dispatch, but did so on February 21, 2004 because SCP was short-staffed. He was stunned to receive the written reprimand from Hunter, because Honeycutt felt he acted reasonably and in good faith by calling Petitioner, his next in command. Honeycutt did not know about the on-call procedure requiring him to call the on-call watch commander first.

Petitioner's injury

17. On July 10, 2004, Petitioner sustained a shoulder injury on the job. Petitioner was out of work for approximately 25 days, and returned to work on light duty, working when he physically could. Petitioner's doctor dictated Petitioner's work schedule. Petitioner advised Chief Hunter of his doctor's recommendations for Petitioner's work schedule, and Chief Hunter accommodated Petitioner.

August 2, 2004 On-Call Watch Commander System Instituted

18. By memorandum dated August 2, 2004, Chief Hunter implemented a Watch Commander System. Under this system, personnel should continue to adhere to the established chain-of-command, however, ultimate supervision and decision-making was the responsibility of the On-Call Watch Commander. This new system required personnel to notify On-Call Watch Commander on **"issues requiring senior staff attention."** (Pet Exh 11, Emphasis added; Resp Exh 8)

(a) Specifically, the new on-call system established a day and night shift watch commander for the SCP. In this memo, Chief Hunter noted that the night shift Watch Commander was Petitioner, with night shift hours being from 4:00 p.m. until 6:00 a.m. Hunter attached a Watch Commander Assignment Roster to this memo, listing the watch commander for each weekend from August 7, 2004 through January 2, 2005. (Pet Exh 11)

19. Before the August 2004 Watch Commander system, SCP officers followed the policy of calling their immediate supervisor on issues requiring senior staff attention.

20. The preponderance of the evidence established that on August 2, 2004, Petitioner was still recovering from his shoulder injury and only working day shift.

November 22, 2004 Written Counseling

21. On November 22, 2004, Chief Hunter conducted a Counseling Session with Petitioner for failing to notify Chief Hunter about the November 20, 2004 Raleigh Christmas parade, failing to properly staff the parade, and failing to file a SCP action plan. Chief Hunter admonished Petitioner because Petitioner:

failed to perform every aspect of your required duties which placed the entire agency and the safety and security of the State Government Complex in jeopardy. . . . This failure to perform placed the State Capitol Police Division in an awkward position and resulted in a lack of proper planning and necessary participation by our agency.

(Resp Exh 3)

22. However, a preponderance of the evidence showed that on Monday, November 15, 2004, Petitioner briefed Chief Hunter on the upcoming 2004 Christmas parade. Petitioner notified Chief Hunter that: (1) Sergeant Smith, Officer Kates, and Officer Davis would be working the Capitol lawn for the Raleigh event; and (2) the parade was the responsibility of the Raleigh Police Department. Petitioner asked Chief Hunter whether he thought more officers would be needed for the west side of the Capitol grounds. Chief Hunter informed Petitioner that no additional officers were necessary.

23. Petitioner assigned the on-duty patrol squad to work the Christmas parade. Officers Kates, Davis, and Sgt. Robert Smith worked the 2004 Christmas parade for the SCP. Petitioner instructed Sgt. Robert Smith to “be seen” on the west side of the Capitol during the parade, along with Officers Kates and Davis. One of their duties was to keep people off the Confederate Monument.

24. According to Petitioner's November time sheet, Petitioner was not scheduled to work, and did not work on November 18, 19, 20, and 21, 2004. On Saturday, November 20, 2004, Chief Hunter was the watch commander on call. Petitioner was not the watch commander, or the officer on call for that event.

25. Chief Hunter never instructed Petitioner to prepare an action plan. Respondents did not offer any evidence at hearing that a State Capitol Police Action Plan was ever used for planning the Christmas parade in preceding years.

26. On the morning of November 20, 2004, Petitioner called the on-duty squad that was working the parade to make sure the squad was in place. This was despite the fact that Petitioner was not working. Petitioner also called Smith after the parade was over. Smith reported to Petitioner that all had gone smoothly, and without incident.

27. Chief Hunter and others received recognition for their fine work supervising the Capitol grounds during the Christmas parade. At hearing, Chief Hunter acknowledged that the principal issue with Petitioner's performance was Petitioner's failure to notify the Chief about the event.

Petitioner's Surgery

28. On January 27, 2005, Petitioner underwent surgery for continued shoulder and neck problems. Petitioner was on approved medical leave until May 19, 2005. On May 19, 2005, Petitioner returned to work under “light-duty” work restrictions. Petitioner's doctor mandated that Petitioner not work for more than eight hours per day, or if he experienced any pain or discomfort.

29. Petitioner advised Hunter of his work restrictions, and Chief Hunter accommodated Petitioner's restrictions with the exception of the facts in this case. Around May or June 2005, Chief Hunter called Petitioner's case manager, Paula Howard, and told her he needed to get Petitioner off light duty and back to work full-time.

30. On June 20, 2005, Petitioner advised Chief Hunter that a recent MRI showed Petitioner had a tumor in his right arm.

31. In July 2005, Petitioner's usual work hours were 8:00 a.m. until 5:00 p.m. with an hour for lunch. Petitioner was still under a doctor's order not to work more than 8 hours per day, and not to work if he felt ill or was in pain.

32. On July 5, 2005, Petitioner advised Chief Hunter that he would report to work at 6:00 a.m. the next day to discuss a matter with Officer T.C. Robeson.

July 6, 2005 Written Warning

33. On July 6, 2005, Chief Hunter issued Petitioner a Written Warning for Unsatisfactory Job Performance for preparing and administering a written warning to Telecommunicator Deborah Mitchell on June 23, 2005 “without the mandated review and approval of your immediate supervisor (Chief of Police) or the DOA Human Resources Management Office.” (Resp Exh 4)

(a) A preponderance of the evidence at hearing established that before June 23, 2005, Petitioner had discussed with Chief Hunter, the need to reprimand Telecommunicator Mitchell for failing to answer an officer's call for assistance. Chief Hunter talked with Petitioner about his matter, and recommended a written warning be issued to Mitchell for her conduct. Hunter asked

Petitioner to prepare a written warning for Mitchell. He also gave Petitioner an example of a warning to assist Petitioner in preparing the written warning. During that discussion, Chief Hunter also informed Petitioner to include the appropriate “cc” references.

(b) Petitioner used the warning form provided by Chief Hunter to prepare a written warning for Telecommunicator Mitchell, and cc’ed all proper parties.

(c) Based on his conversation with Hunter, Petitioner believed that Chief Hunter had signed off on the written warning, and issued the written warning to Telecommunicator Mitchell on June 23, 2005, pursuant to Chief Hunter’s instruction. Petitioner did not submit the written warning to either Chief Hunter or Respondents’ Human Resources Division before he gave the written warning to Mitchell.

(d) On June 23, 2005, Chief Hunter learned that Petitioner had issued the warning to Mitchell, and directed Petitioner to withdraw the warning. Pursuant to Hunter’s request, Petitioner withdrew the warning later day. Later, Hunter issued a heavier disciplinary action to Telecommunicator Mitchell for the same matter by suspending Mitchell from employment.

34. Petitioner admitted that he received Law Enforcement Supervisory Training through the N.C. Justice Academy. Yet, Respondents presented no evidence at hearing proving that either Chief Hunter, SCP management, or Respondents’ Human Resources had advised or trained Petitioner on the Respondents’ disciplinary procedures for SCP personnel. Mitchell’s warning was the first written warning Petitioner had issued.

35. Chief Hunter acknowledged at hearing that he “took for granted” that Petitioner knew how to issue a written warning when talking with Petitioner about issuing a warning to subordinate Mitchell. Hunter also conceded that did not ensure Petitioner had the required knowledge about Respondents’ policy requirement that either Hunter or Human Resources Director must review any disciplinary action before it is implemented.

36. According to Johnny Massey, former SCP police until January 31, 2001, it is ultimately the Chief’s responsibility that all his employees are trained. When Massey was promoted to Lt, Major, and then Chief of SCP, he was given a certain amount of leave to attend supervisory training for his job. Routinely, the personnel department notified the SCP of available training courses for its personnel.

Demotion

37. At 8:00 a.m. on July 7, 2005, Chief Hunter conducted a pre-disciplinary conference with Petitioner. Hunter gave Petitioner written notice of his conference, which advised Petitioner that he was being considered for dismissal based on unacceptable personal conduct and unsatisfactory job performance, continuing between February 2004 through June 2005, despite verbal and written counseling to help him improve. (Resp Exh 5)

38. On July 8, 2005, Chief Hunter notified Petitioner that he was demoting him to the position of Police Officer I for violations of unacceptable personal conduct and unsatisfactory job performance from February 2004 through June 2005. Effective August 1, 2005, Hunter demoted Petitioner for:

- (a) Making inappropriate menopausal comments on June 24, 2005 about female employees he supervised,
- (b) Discussing a confidential matter with SCP employees on June 28, 2005, in contradiction to Hunter’s order not to discuss such matter with subordinate employees,
- (c) Failing to notify the On-Call Watch Commander and Chief Hunter that Special Agent Jimmy Greene was not fit for duty on June 28, 2005, and
- (d) Leaving work early on July 6, 2005 without proper authorization from Chief Hunter.

(Resp Exh 6)

39. In demoting Petitioner, Chief Hunter relied upon the following documents as supporting reasons for demoting Petitioner: (1) Hunter’s February 21, 2004 Written Counseling to Petitioner for failing to notify Hunter of the graffiti damage to state property, (2) Hunter’s November 20, 2004 Written Counseling to Petitioner for failing to notify Chief Hunter of Petitioner’s staffing plans for the 2004 Raleigh Christmas Parade, and (3) Hunter’s July 6, 2005 Written Warning to Petitioner for failing to use proper procedure in issuing a written warning to Telecommunicator Mitchell on June 23, 2005.

Ground 1 for Demotion - Making inappropriate menopausal comments on June 24, 2005 about female employees he supervised,

40. After a Service Awards Ceremony on June 24, 2004, Petitioner talked with Valerie Ford, Ms. Connie Cook, Employee Relations Manager, and Ms. Elaine Barnes, Assistant Human Resources Director. Ms. Ford asked Petitioner how he liked being back at work. Petitioner said it was great except Chief Hunter had dropped communications under him and all four of the telecommunicators were going through menopause. Petitioner said when they [the telecommunicators] came in to talk; he ran out of tissue and had to use Bounty towels.

41. Ms. Ford told Chief Hunter about the comment because she felt it was extremely inappropriate for Petitioner to make a menopausal comment, especially about employees he supervised. Ms. Ford was offended by the comment because it suggested that women were quite emotional.

Ground 2 of Demotion - Discussing a confidential matter with SCP employees

42. On June 20, 2005, Chief Hunter met with Deputy Director Mitchell and Petitioner to discuss the possible transfer of the Dorothea Dix Police ("Dix Police") to the SCP. They made the decision that if the transfer occurred, the Dix Police would be under Petitioner on patrol. Chief Hunter instructed Deputy Director Mitchell and Petitioner not to discuss the possible transfer. Petitioner and Mitchell agreed with Hunter.

43. On June 28, 2005, Sgt. Bennie Pender, Sgt. Christine Ragan, and Petitioner were sitting on the back deck of the police station during a break. Pender asked Petitioner if the rumors were true that the Dorothea Dix Police was going fall to under the SCP command, and if the officers were going to the building division. Petitioner responded that that "he could neither confirm nor deny the rumor. But if they did, they would fall under his patrol." (Pet Exh 1; Resp Exhs 11, 12). Chief Hunter was walking by when he overheard Petitioner say something like, "They'll all fall under me." Once inside the office, Hunter asked Petitioner what he told Pender. Petitioner advised Hunter that exactly what he had said. Hunter did not ask Petitioner any further questions about the details of that conversation.

44. Chief Hunter overheard only a portion of the conversation between Petitioner, Pender, and Ragan. Chief Hunter never questioned Pender or Ragan about their June 28, 2005 conversation with Petitioner on the Dix issue.

Ground 3 for Demotion - Failing to notify the On-Call Watch Commander and Chief Hunter about Special Agent Jimmy Greene

45. On June 28, 2005, Agent Greene was working late. Around 7:00 p.m., Lt. Will Smith called Petitioner at home, because he thought Agent Greene was too fatigued to be working and unfit for duty. Smith wanted to relieve Agent Greene of duty. Petitioner did not instruct Smith to notify the On-Call Watch Commander or Hunter. Deputy Director Mitchell was the On-Call Watch Commander. Chief Hunter was Greene's immediate supervisor. Instead of calling Chief Hunter or Deputy Director Mitchell about Lt. Smith's call, Petitioner came back to the SCP Office between 7:10 p.m. and 7:15 p.m. to check on Agent Greene. Petitioner stayed at work with Agent Greene for at least one hour while Petitioner and Greene worked. Petitioner planned to follow Greene home to ensure that Greene arrived safely.

(a) Around 9:30 p.m., Chief Hunter observed Petitioner departing the office in his personal car, and Greene leaving in his patrol vehicle. Petitioner informed Chief Hunter, via Nextel radio, of what had occurred.

(b) Before relieving an officer of duty, Petitioner was required to should first contact Greene's immediate supervisor, the on-duty watch commander, and Chief Hunter. (State Capitol Police Division, 2004 Policy and Procedures Manual, Chapter One – Rules of Conduct, Section 7 (Attention to Duty), Subsection D (Leave Requests)) Agent Greene's immediate supervisor, Chief Hunter, was the only person that could relieve him of duty. Because relieving an officer from duty is an action taken just before dismissing the officer, relieving a police officer of duty can have a serious affect on the officer's career.

Ground 4 of Demotion

Leaving work early on July 6, 2005 without proper authorization

46. At 2:00 p.m. on July 6, 2005, Petitioner attempted to contact Chief Hunter by Nextel radio, but was unsuccessful. Petitioner informed Shannon Prevo, Hunter's administrative assistant that he was leaving, and left his leave slip with Prevo for Hunter's signature. On that slip, Petitioner requested one hour of compensatory leave because he was in pain.

(a) At approximately 3:30 p.m. that afternoon, Chief Hunter called Petitioner to discuss Petitioner's work hours for that day. Petitioner advised Hunter that he had worked from 6:00 a.m. until 2:00 p.m., and "signed out" for one of compensatory leave. Hunter knew that Petitioner had begun work at 6:00 a.m., and he expected Petitioner to be at work until 3:00 p.m. Hunter was upset, because Petitioner had not received prior approval from Hunter before leaving work, so he hung up the phone.

(b) Petitioner immediately called Hunter back, and asked Hunter if he needed to do work because he had his laptop with him. Hunter told Petitioner, "No." Hunter advised Petitioner to report for a pre-disciplinary conference the next morning. Hunter advised Petitioner of some, but not all, the reasons for the pre-disciplinary conference. Chief Hunter told Petitioner that he was "going after your [Petitioner's] job."

Internal Appeal

47. On August 5, 2005, Petitioner appealed his demotion through Respondents' internal grievance process. On September 9, 2005, Respondents conducted a Step 2 grievance hearing.

48. On October 3, 2005, Respondents issued a Final Agency Decision, upholding the Petitioner's demotion. In that letter, Respondents stated:

Your actions were evidence of your continuous defiance of law enforcement norms of behavior. Your insubordination, disregard for known and established policies and protocols, as well as articulated standards for managerial behavior and reasonable orders **placed the State Government Complex, state employees, and the general public in jeopardy.** Your behavior required your removal as Deputy Director of the State Capitol Police.

(Resp Exh 17, p 6)

Evidence at Hearing

49. At hearing, Petitioner withdrew his claim that Respondents discriminated against him due to his political affiliation.

50. Petitioner is 56 years old, while Chief Hunter is 42 years old. Petitioner has suffered from job-related injuries since 2004, and has worked with medical restrictions since then. Approximately two weeks before this hearing began, Petitioner was placed on worker's compensation for his continued injuries. Petitioner has continued receiving medical treatment and supervision for ongoing medical conditions since 2004, and continued such at the time of this hearing.

51. Many SCP officers and telecommunicators respected Petitioner because Petitioner always treated employees with respect, assisted employees with job issues, and encouraged them in their abilities to perform their jobs. Petitioner acted professional and appropriate at all times. (Testimony of Deborah Mitchell, Denise Reading)

52. In demoting Petitioner to Police Officer I, Respondents reduced Petitioner's salary from pay grade 70T, earning \$49,883 per year to pay grade 63, earning \$38,297 per year. At hearing, Chief Hunter demoted Petitioner to Police Officer I position, because that was the only officer position that does not include management responsibilities.

53. A preponderance of the evidence at hearing established that Chief Hunter had a different management style than the former Chief, Chief Crudup. Hunter acknowledged that he was more of a "hands-on" Chief, and expected his employees to keep him informed of details of the daily SCP operations. Petitioner and other employees were aware of Hunter's management style.

54. Hunter's legitimate nondiscriminatory reason for demoting Petitioner was that Petitioner repeatedly failed to perform up to the standard required of a Deputy Director. That is, Petitioner failed to notify Hunter of critical issues, and failed to keep Hunter informed.

(a) Specifically, in issuing Petitioner the February 21, 2004 written counseling, Hunter claimed that Petitioner failed to follow the standard operating procedure to contact the On-Call Watch Commander. However, at that time, Chief Hunter had not implemented the new On-Call Watch Commander system. Hunter did not implement that system until August 2, 2004. Even so, Petitioner contacted Chief Hunter within 3-4 hours of the incident occurring. Given the volatility of the rally scheduled the next day, Hunter felt the seriousness of the event required Petitioner notify Hunter immediately. At hearing, Chief Hunter acknowledged that as Deputy Director, Petitioner was authorized to exercise his discretion in overseeing SCP operations. Petitioner's evidence proved that Petitioner exercised that discretion as Deputy Director not to inform Chief Hunter of the incident immediately, because the matter was under control.

(b) In the November 22, 2004 written counseling, Hunter admonished Petitioner for not briefing the Chief about the Christmas parade, not briefing the on-duty squad of their duties, and not filing a SCP Action Plan. Yet, the preponderance of the evidence cited above, showed that Petitioner had notified Chief Hunter on Monday, November 15, 2004 of the SCP plans for the

Christmas parade, and briefed the on-duty squad of their responsibilities for the parade. Respondents did not offer any evidence at hearing that a State Capitol Police Action Plan was ever used for planning the Christmas parade in preceding years.

55. Chief Hunter demoted Petitioner because of his menopausal statement about the four telecommunicators, because Petitioner's remark was inappropriate. Yet, a preponderance of the evidence at hearing showed that all SCP officers and personnel, including Chief Hunter, joked about how cold the female telecommunicators kept the temperature of the Communications Center. There was a standing joke among all the female telecommunicators and officers about the telecommunicators going through menopause, their emotional swings, hot flashes, and the necessity for cold temperatures in the office.

(a) Both men and women officers joked about menopausal related hot flashes and mood swings. There was nothing offensive about the menopausal-related jokes. Chief Hunter did not reprimand any other SCP personnel for their participation and comments regarding menopausal-related jokes.

(b) Hunter did not investigate whether Petitioner's comment affected the working environment at the Communications Center or Petitioner's working relationship with the telecommunicators.

56. In demoting Petitioner for discussing the proposed Dix Police transfer, Hunter advised Petitioner that his statements to Pender and Ragan:

[g]reatly jeopardized the confidentiality of the issues relating to the proposed transfer, provided premature information for officers to spread throughout both agencies, jeopardized the level of trust shared between the DOA and DHHS Human Resources Offices, and irreparably damaged the level of trust and confidence shared in the State Capitol Police Divisions' Chief's Office and Command Staff. Your actions in this matter result in unacceptable personal conduct (insubordination) for failing to act as I directed you.

(Resp Exh 6) Hunter was concerned about the effect Petitioner's statement would have on the actual transfer of Dix personnel to SCP.

(a) However, Chief Hunter failed to identify any direct or indirect problems or rumors caused by Petitioner's statement to Pender and Ragan. Specifically, Respondents failed to present any evidence how Petitioner's statement to Sgt. Pender and Sgt. Ragan greatly jeopardized the confidentiality of the issues relating to the proposed transfer, jeopardized the level of trust shared between the DOA and DHHS Human Resources Offices, and irreparably damaged the level of trust and confidence shared in the State Capitol Police Divisions' Chief's Office and Command Staff.

(b) Petitioner's statement in and of itself did not divulge any confidential information that Hunter had disclosed to Petitioner. Petitioner merely offered his opinion if the Dix transfer occurred.

(c) The preponderance of evidence at hearing showed that many SCP officers knew about the rumors and general information regarding the Dorothea Dix issue.

(d) In addition, the evidence at hearing established that Deputy Director Mitchell discussed the Dix transfer in the SCP Communications Center over the telephone with Secretary Swinson, when others could hear her. Hunter only issued Mitchell a written counseling, not a written warning for her conduct.

57. Chief Hunter also demoted Petitioner, because he failed to notify Hunter about Lt. Smith threatening to relieve Hunter's subordinate, Special Agent Greene, from duty. At hearing, Hunter explained that he thought Lt. Smith and Petitioner were acting as "cohorts" to relieve Greene from duty.

(a) However, Hunter acknowledged at hearing that he had no evidence that Petitioner and Smith were acting as cohorts. Instead, the preponderance of the evidence showed that Petitioner did not order or "relieve" Agent Greene from duty on June 28, 2005. Respondents produced no evidence that Petitioner dismissed Green from duty that night. Green decided to go home on his own. Petitioner followed him home, while off duty, as a friend and concerned person.

(b) Although Agent Greene was not in Petitioner's direct chain of command, as Deputy Director, Petitioner was authorized to send any officer home for the day if he determined that the officer was tired, depressed, or otherwise unfit for duty on any particular day. Petitioner would then be required to notify the Chief at the earliest opportunity. Petitioner communicated with Hunter by radio as Petitioner and Greene were leaving the office. At hearing, Chief Hunter recognized that Petitioner had such discretion. Hunter still felt Petitioner should have notified him before "sending" Greene home, even though Agent Greene decided on his own, when he was going home.

58. Chief Hunter demoted Petitioner for leaving work on July 6, 2005 without first obtaining Hunter's prior authorization. Petitioner knew that SCP policy required all personnel to obtain prior approval before taking leave. However, Petitioner was in pain that day. Since he was still working under restrictions, per his doctor's orders, Petitioner left for the day, taking compensatory time.

(a) Chief Hunter knew that Petitioner continued to work under restrictions per Petitioner's doctor's orders. In other words, Chief Hunter knew that Petitioner could go home without obtaining prior approval, if he was in pain. Petitioner had done that many times. Even though Hunter was upset with Petitioner, he still signed Petitioner's leave request slip for taking one hour of compensatory time on July 6, 2005.

(b) Many times Chief Hunter signed Petitioner's leave slip after Petitioner had already left work for the day.

59. Chief Hunter thought his differences with Petitioner were managerial differences. At hearing, Hunter acknowledged that Hunter like to hire "new" officers whom he could train. Whereas Petitioner liked to hire persons as "new" officers who were more experienced. Hunter thought that more experienced officers were difficult to train, because they had preconceived notions of the job.

(a) Petitioner established by a preponderance of the evidence that Chief Hunter treated Petitioner differently because of Petitioner's age and his injuries. The evidence showed that Chief Hunter talked down to Petitioner, and displayed dissatisfaction with Petitioner all the time. (Reading Testimony) Chief Hunter seemed harder on Petitioner than Deputy Director Mitchell, and the tension "built from there." (Lt. William Smith Testimony)

(b) On one occasion, Lt. Smith heard the Chief talking to Petitioner in very short and rude manner over the Nextel radio. Hunter was very demeaning and critical of Petitioner. Smith heard Hunter call Petitioner "incompetent" over the Nextel radio. Lt. Smith opined that you could see where Chief's treatment of Petitioner was going, and he thought Chief Hunter was pushing Petitioner out of SCP because of Petitioner's age and their different viewpoints. Once Petitioner was injured, the Chief's mentality was that Petitioner was working on the Chief's time. (Smith Testimony)

(c) Chief Hunter and several lieutenants called Petitioner an "old man." Petitioner thought these comments were directed at him to belittle him, not to tease.

(d) After Petitioner was demoted, Chief Hunter changed the work structure at SCP, and hired Ben Franklin, a male in his thirties, to replace Petitioner.

60. There was no dispute that at least 10 SCP officers left SCP after Petitioner was demoted. Many officers were upset that Petitioner was demoted. Many officers left because they were tired of being admonished for following policy, then being written up by management because policy had changed and the officer's actions did not comply with the new policy. Many officers were tired of being micromanaged by Chief Hunter and Deputy Director Mitchell through intimidation.

61. Sgt. Christine Ragan thought there was some correlation between Petitioner's demotion and the high turnover rate of officers leaving SCP. In her opinion, Chief Hunter and Deputy Director Mitchell treat employees differently, and that treatment was not based on managerial differences.

62. Several SCP employees were worried about Chief Hunter retaliating against them for testifying on Petitioner's behalf at this administrative hearing. (Smith, Ragan, Hargett, and Reading) Sgt. Christine Ragan "has no doubt" there would be consequences by Chief Hunter because she testified on Petitioner's behalf at this hearing. Petitioner had told Chief Hunter that he was afraid of what Hunter would do to him. Each time Chief Hunter was asked about this issue at hearing, he opined that his employees' fear of him retaliating against them was "unfounded."

63. Petitioner proved by a preponderance of the evidence that Chief Hunter expected Petitioner to exercise his discretion. Yet, when Petitioner exercised his discretion, Chief Hunter reprimanded Petitioner for that exercise without fully investigating the facts surrounding Petitioner's decision, and without fully investigating whether Petitioner's exercise of discretion negatively affected the personnel and operation of SCP. Petitioner did not make any discretionary decisions with the intent to usurp Chief Hunter's authority.

64. Petitioner proved Respondents discriminated against Petitioner based upon his age and medical condition. Respondents offered evidence of a non-discriminatory reason for its demotion of Petitioner. However, Respondents failed to prove how Petitioner's conduct and performance in each above-cited scenario placed the State Government Complex, state employees, and the public in jeopardy.

65. Petitioner proved by a preponderance of the evidence that Respondents' non-discriminatory explanation for the demotion was pretextual.
66. Respondents failed to offer sufficient evidence to support the Respondents' Final Agency decision that Petitioner engaged in unsatisfactory job performance or unacceptable personal misconduct, which is detrimental to the State of North Carolina.
67. Respondents failed to show that Petitioner's action, as complained of by Chief Hunter, were "willful" misconduct. Instead, evidence showed that Petitioner's actions were reasonable and taken with good cause under the totality of the circumstances. Respondents' job requirements of Petitioner were not always reasonable. Yet, Petitioner made reasonable efforts to comply with all of his job requirements.

**CONCLUSIONS OF LAW**

1. The parties are properly before the Office of Administrative Hearings and the Office of Administrative Hearings has subject matter jurisdiction over this case.
2. Petitioner was a career State employee at the time of his demotion, and thus is subject to the provisions of Chapter 126 of the North Carolina General Statutes.
3. N.C. Gen. Stat. Section 126-35 provides, in part:
- No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.
4. Pursuant to N.C. Gen. Stat § 126-35(d), Respondents have the burden of proving that they had just cause to demote Petitioner. Petitioner has the burden of proving that he was demoted because of discrimination and retaliation based on age and/or a handicapping condition.
5. State Personnel Manual, "Disciplinary Action, Suspension, and Dismissal," Section 7, Page 3 - 4, provides, in part:
- Insubordination - The willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning.
- Unacceptable Personal Conduct - an act that is:
- conduct for which no reasonable person should expect to receive prior warning; or  
.....  
the willful violation of known or written work rules; or
- conduct unbecoming a State employee that is detrimental to State Service.  
.....
- Unsatisfactory Job Performance - Work-related performance that fails to satisfactorily meet job requirements as set out in the relevant job description, work plan, or as directed by the management of the work unit or agency.
6. NCDOA "Disciplinary Action and Dismissal Policy," p. 2, provides, in part:
- DOA provides that any disciplinary action taken in accordance with this policy must be for just cause under one of the two following categories: Unsatisfactory job performance, including gross inefficiency and Unacceptable personal conduct. (Resp Exh 9).
7. NCDOA "Disciplinary Action and Dismissal Policy," p. 6, provides, in part:
- An employee may be demoted for either unsatisfactory job performance, grossly inefficient job performance, or unacceptable personal conduct. An employee can be demoted for a current incident of unsatisfactory job performance after the employee has received at least one prior warning or disciplinary action. An employee can be demoted for grossly inefficient job performance or unacceptable personal conduct without any prior warning or disciplinary action.



(Resp Exh 9).

8. Pursuant to McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) and N.C. Dept. Of Correction v. Gibson, 308 N.C. 131 (1983), the US Supreme Court and the NC Supreme Court respectively have adopted the standards to be applied when unlawful discrimination is alleged. Petitioner first carries the initial burden of establishing a prima facie case of discrimination. If a prima facie case of discrimination is established, the burden shifts to the employer to articulate some legitimate non-discriminatory reason for the alleged discriminatory act. If a legitimate non-discriminatory reason for the alleged discriminatory act has been articulated, the Petitioner has the opportunity to show that the stated reason for the act was, in fact, a pretext for discrimination.

9. In this case, Petitioner proved by a preponderance of the evidence that Respondents demoted Petitioner because of his age and medical condition under the standards of McDonnell, *supra*, and Gibson, *supra*.

10. Respondents' offered evidence of a non-discriminatory reason for its demotion of Petitioner.

11. However, Petitioner proved by a preponderance of the evidence that Respondents' explanation for the demotion was mere pretext for its unlawful and discriminatory reasons, and that Respondents' demoted Petitioner because of his age and medical condition in violation of state and federal law.

12. The preponderance of the evidence showed that Respondents lacked just cause to demote Petitioner to the position of Police Officer I based on unsatisfactory job performance and unacceptable personal conduct.

**DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondents lacked just cause to demote Petitioner from Deputy Director to Police Officer I. As such, Respondents' decision to suspend Petitioner should be **REVERSED**.

Pursuant to N.C. Gen. Stat. § 126-37a), Petitioner is entitled to reinstatement as Deputy Director, awarded all back pay, front pay, and any salaries increases instituted by the General Assembly during this contested case. Respondents shall remove all references to such demotion from Petitioner's personnel file. Pursuant to 25 N.C.A.C. 1B.0414, Petitioner should be awarded reasonable attorney fees, based upon Petitioner's attorney's submitting an itemized statement of the fees and costs incurred in representing the Petitioner, in a Petition to the North Carolina State Personnel Commission.

**ORDER AND NOTICE**

The North Carolina State Personnel Commission 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 3<sup>rd</sup> day of August, 2006,

\_\_\_\_\_  
Melissa Owens Lassiter  
Administrative Law Judge

**STATEMENT OF OWNERSHIP, MANAGEMENT, AND CIRCULATION**

1. Publication Title NORTH CAROLINA REGISTER		2. Publication Number 0 1 6 - 7 2 7						3. Filing Date 09/15/06
4. Issue Frequency TWICE A MONTH		Number of Issues Published Annually 24						6. Annual Subscription Price \$ 195.00
7. Complete Mailing Address of Known Office of Publication (not printer) (Street, city, county, state and ZIP+4) OFFICE OF ADMINISTRATIVE HEARINGS, RULES DIVISION 424 N. BLOUNT STREET, 6714 MAIL SERVICE CENTER RALEIGH, NC 27601 RALIEGH, NC, 27699-6714							Contact Person Molly Masich	
							Telephone 733-3367	
8. Complete Mailing Address of Headquarters or General Business Office of Publisher (not printer) SAME AS #7								
9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)								
Publisher <i>(Name and complete mailing address)</i> OFFICE OF ADMINISTRATIVE HEARINGS RULES DIVISION 6714 MAIL SERVICE CENTER RALEIGH, NC 27699-6714								
Editor <i>(Name and complete mailing address)</i> SAME AS ABOVE								
Managing Editor <i>(Name and complete mailing address)</i>								
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15. <b>Extent and Nature of Circulation</b>		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date	
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b. Paid and/or Requested Circulation	(1)	Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. ( <i>Include advertiser's proof and exchange copies</i> )	57	57
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h. Copies not Distributed		5	5	
i. Total ( <i>Sum of 15g. and h.</i> ) ▶		120	120	
j. Percent Paid and/or Requested Circulation ( <i>15c. divided by 15g. times 100</i> )		100	100	
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