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THE GENERAL STATUTES OF NORTH CAROLINA

1981 SUPPLEMENT

**Annotated, under the Supervision of the Department of
Justice, by the Editorial Staff of the Publishers**

Under the Direction of

**D. P. HARRIMAN, S. C. WILLARD, SYLVIA FAULKNER
AND D. E. SELBY, JR.**

Volume 2C

DEC 7 1981

1981 Replacement

Annotated through 302 N.C. 222 and 50 N.C. App. 567. For
complete scope of annotations, see scope of volume page.

Place in Pocket of Corresponding Volume of Main Set.

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Preface

This Supplement to Replacement Volume 2C contains the general laws of a permanent nature enacted by the General Assembly at the 1981 Session through October 10, 1981, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the chapters effected by the amendatory acts.

Chapter analyses show all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein will appear in Replacement Volumes 4B and 4C.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or the The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1981 Session of the General Assembly through October 10, 1981, affecting Chapters 63 through 96 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through volume 302, p. 222.

North Carolina Court of Appeals Reports through volume 50, p. 567.

Federal Reporter 2nd Series through volume 650, p. 292.

Federal Supplement through volume 515, p. 55.

Federal Rules Decision through volume 89, p. 719.

Bankruptcy Reporter through volume 11, p. 138.

United States Reports through volume 449, p. 410.

Supreme Court Reporter through volume 101, p. 2881.

North Carolina Law Review.

Wake Forest Law Review.

Campbell Law Review.

Duke Law Journal.

North Carolina Central Law Journal.

Opinions of the Attorney General.

The General Statutes of North Carolina

1981 Supplement

VOLUME 2C

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ARTICLE 1.

Municipal Airports.

§ 63-6. Acquisition of sites; appropriation of moneys.

Private property needed by a city, town and/or county for an airport or landing field may be acquired by gift or devise or shall be acquired by purchase if the city, town and/or county is or are able to agree with the owners on the terms thereof, and otherwise by condemnation, in the manner provided by Chapter 40A. The purchase price, or award for property acquired for an airport or landing field may be paid for by appropriation of moneys available therefor, or wholly or partly from the proceeds of the sale of bonds of the city, town and/or county, as the governing body and/or bodies of such city, town and/or county shall determine. (1929, c. 87, s. 6; 1981, c. 919, s. 7.)

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, substituted "Chapter 40A" for "law under which the city, town and/or county is or are authorized to acquire real property for public purposes, other than

street purposes, or if there be no such law, in the manner provided for and subject to the provisions of the condemnation law" at the end of the first sentence.

ARTICLE 4.

*Model Airport Zoning Act.***§ 63-33. Procedure.**

(a) Adoption of Zoning Regulations. — No airport zoning regulations shall be adopted, amended, or changed under this Article except by action of the legislative body of the political subdivision in question, or the joint board provided for in G.S. 63-31, subsection (c), after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 10 days' notice of the hearing shall be published in an official paper, or a paper of general circulation, in the political subdivision or subdivisions in which the airport is located.

(b) Administration of Zoning Regulations — Administrative Agency. — The legislative body of any political subdivision adopting airport zoning regulations under this Article may delegate the duty of administering and enforcing such regulations to any administrative agency under its jurisdiction, or may create a new administrative agency to perform such duty, but such administrative agency shall not be or include any member of the board of appeals. The duties of such administrative agency shall include that of hearing and deciding all permits under G.S. 63-32, subsection (a), but such agency shall not have or exercise any of the powers delegated to the board of appeals.

(c) Administration of Airport Zoning Regulations — Board of Appeals. — Airport zoning regulations adopted under this Article shall provide for a board of appeals to have and exercise the following powers:

- (1) To hear and decide appeals from any order, requirement, decision, or determination made by the administrative agency in the enforcement of this Article or of any ordinance adopted pursuant thereto;
- (2) To hear and decide special exceptions to the terms of the ordinance upon which such board may be required to pass under such ordinance;
- (3) To hear and decide specific variances under G.S. 63-32, subsection (b).

Where a zoning board of appeals or adjustment already exists, it may be appointed as the board of appeals. Otherwise, the board of appeals shall consist of five members, each to be appointed for a term of three years and to be removable for cause by the appointing authority upon written charges and after public hearing.

The board shall adopt rules in accordance with the provisions of any ordinance adopted under this Article. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the board and shall be a public record.

Appeals to the board may be taken by any person aggrieved, or by any officer, department, board, or bureau of the political subdivision affected, by any decision of the administrative agency. An appeal must be taken within a reasonable time, as provided by the rules of the board, by filing with the agency from which the appeal is taken and with the board, a notice of appeal specifying the grounds thereof. The agency from which the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal shall stay all proceedings in furtherance of the action appealed from, unless the agency from which the appeal is taken certifies to the board,

after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate of stay would, in its opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application on notice to the agency from which the appeal is taken and on due cause shown.

The board shall fix a reasonable time for the hearing of the appeal, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board may, in conformity with the provisions of this Article, reverse or affirm, wholly or partly, or modify, the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the administrative agency from which the appeal is taken.

The concurring vote of a majority of the members of the board shall be sufficient to reverse any order, requirement, decision, or determination of the administrative agency, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance. (1941, c. 250, s. 5; 1981, c. 891, s. 11.)

Effect of Amendments. — The 1981 amendment, effective Sept. 1, 1981, substituted "ten days'" for "fifteen days'" in the second sentence of subsection (a).

ARTICLE 6.

Public Airports and Related Facilities.

§ 63-49. Municipalities may acquire airports.

(a) Every municipality is hereby authorized, through its governing body, to acquire property, real or personal, for the purpose of establishing, constructing, and enlarging airports and other air navigation facilities and to acquire, establish, construct, enlarge, improve, maintain, equip, operate, and regulate such airports and other air navigation facilities and structures and other property incidental to their operation, either within and without the territorial limits of such municipality and within or without this State; to make, prior to any such acquisition, investigations, surveys, and plans; to construct, install, and maintain airport facilities for the servicing of aircraft and for the comfort and accommodation of air travelers; and to purchase and sell equipment and supplies as an incident to the operation of its airport properties. It may not, however, acquire or take over any airport or other air navigation facility owned or controlled by any other municipality of the State without the consent of such municipality. It may use for airport purposes any available property that is now or may at any time hereafter be owned or controlled by it. Such air navigation facilities as are established on airports shall be supplementary to and coordinated in design and operation with those established and operated by the federal government.

(b) All property needed by a municipality for an airport or restricted landing area, or for the enlargement of either, or for other airport purposes, may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of said property on the terms of such acquisition, and otherwise by condemnation in the manner provided by the Chapter entitled Eminent Domain, full power to exercise the right of eminent domain for such purposes being hereby granted every municipality both within and without its territorial limits. If but one municipality is involved and the

charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter and may be followed as to property within or without its territorial limits. The fact that the property needed has been acquired by any agency or corporation authorized to institute condemnation proceedings under power of eminent domain shall not prevent its acquisition by the municipality by the exercise of the right of eminent domain herein conferred when such right is exercised on the approach zone or on the airport site. For the purpose of making surveys and examinations relative to any condemnation proceedings, it shall be lawful to enter upon any land, doing no unnecessary damage. Provided that municipalities building airports after the ratification of this Article shall not acquire by condemnation any property of any corporation engaged in the operation of a railroad or railroad bridge in this State if such property is used in the business of such corporation.

(c) Where necessary, in order to provide unobstructed air space for the landing and taking off of aircraft utilizing airports or restricted landing areas acquired or operated under the provisions of this Article, every municipality is authorized to acquire, in the same manner as is provided for the acquisition of property for airport purposes, easements through or other interests in air space over land or water, interests in airport hazards, or airport hazards outside the boundaries of the airports or restricted landing areas and such other airport protection privileges as are necessary to insure safe approaches to the landing areas of said airports or restricted landing areas and the safe and efficient operation thereof. It is also hereby authorized to acquire, in the same manner, land for the removal of airport hazards and the right of easement for a term of years or perpetually, to place or maintain suitable marks for the daytime marking and suitable lights for the nighttime marking of airport hazards, including the right of ingress or egress to or from such airport hazards for the purpose of maintaining and repairing such lights and marks. This authority shall not be so construed as to limit any right, power or authority to zone property adjacent to airports and restricted landing areas under the provisions of any law of this State.

(d) It shall be unlawful for anyone to build, rebuild, create, or cause to be built, rebuilt, or created any object, or plant, cause to be planted, or permit to grow higher any tree or trees or other vegetation which shall encroach upon any airport protection privileges acquired pursuant to the provisions of this section. Any such encroachment is declared to be a public nuisance and may be abated in the manner prescribed by law for the abatement of public nuisances, or the municipality in charge of the airport or restricted landing area for which airport protection privileges have been acquired as in this section provided, may go upon the land of others and remove any such encroachment without being liable for damages in so doing. (1945, c. 490, s. 2; c. 810; 1981, c. 919, s. 8.)

Cross References. —

As to eminent domain, see Chapter 40A.

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, substituted "Chap-

ter entitled Eminent Domain" for "law under which such municipality is authorized to acquire like property for public purposes" in the first sentence of subsection (b).

ARTICLE 7.

*State and Federal Aid; Authority of Department of Transportation.***§ 63-68. Limitations on State financial aid.**

Grants and loans of funds authorized by this Article shall be subject to the following conditions and limitations:

- (1) Loans and grants may be for such projects, activities, or facilities as would in general be eligible for approval by the Federal Aviation Administration or its successor agency or agencies with the exception that the requirement that the airport be publicly owned shall not be applicable. Further, airport terminal and security areas, seaplane bases, and heliports are also eligible for State financial aid.
- (2) Loans and grants of State funds shall be limited to a maximum of fifty percent (50%) of the nonfederal share of the total cost of any project for which aid is requested, and shall be made only for the purpose of supplementing such other funds, public or private, as may be available from federal or local sources provided, however, using one hundred percent (100%) State funding in its discretion the Department of Transportation may purchase, install and maintain navigational aids necessary for the safe, efficient use of airspace and may conduct other projects or programs to improve the safety of the air transportation system, including but not limited to, making serviceable runways and taxiways. Further, the Department of Transportation may contract out the maintenance and installation of state-owned navigational aids when necessary and may give or transfer such aids to the Federal Aviation Administration.
- (3) Loans and grants of State funds shall be made from General Assembly appropriations specifically designated for aviation improvement, and from no other source. The Department of Transportation may utilize the State Aviation Grant Funds to cover the direct costs, other than salaries, of administering airport grant projects and the full costs of services provided by non-administrative Department of Transportation divisions or other State agencies in connection with these projects.
- (4) Notwithstanding the provisions of this section or G.S. 63-67, the Department of Transportation may allow up to ten percent (10%) of State aviation grant funds to be used for maintenance on General Aviation and Air Carrier Airports having a Department of Transportation approved maintenance plan on a seventy-five percent (75%) local — twenty-five percent (25%) State basis. (1967, c. 1006, s. 1; 1969, c. 293; 1973, c. 1262, s. 28; c. 1443, s. 3; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39.2; 1979, c. 148, ss. 3, 5; c. 149; 1981, c. 1117, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment substituted the language beginning "using one hundred percent (100%)" at the end of the first sentence of subdivision (2) for "using Department of Transportation personnel and one hundred percent (100%) State funding in its discretion, the Department of Transportation

may purchase, install and maintain navigational aids necessary for the safe, efficient use of airspace, mark serviceable runways and taxiways and correct minor safety deficiencies which are determined to be hazardous to the flying public," and added the second sentence in subdivision (3).

Chapter 65.

Cemeteries.

Article 7A.

Funeral and Burial Trust Funds.

Sec.

65-36.5. Application for license.

ARTICLE 7A.

Funeral and Burial Trust Funds.

§ 65-36.5. Application for license.

(a) No person, firm, partnership, association or corporation may, without first securing from the Department a license, accept and/or hold payments made on preneed burial contracts, except financial institutions as defined in G.S. 65-36.1(2) hereof. Application for a license shall be in writing, signed by the applicant and duly verified on forms furnished by the Department. Each application shall contain at least the following: the full names and address (both residence and place of business) of the applicant, and every member, officer and director thereof if the applicant is a firm, partnership, association or corporation. Any license issued pursuant to the application shall be valid only at the address stated in the application for the applicant or at a new address approved by the Department.

(b) Each application for a license shall be accompanied by a nonrefundable investigation fee of twenty-five dollars (\$25.00). If the license is granted, the investigation fee shall be applied to the annual license fee for the first year or part thereof. Upon receipt of the application and payment of the investigation fee, the Department shall issue a renewable license unless it determines that the applicant has made false statements or representations in the application, or is insolvent, or has conducted, or is about to conduct, his business in a fraudulent manner, or is not duly authorized to transact business in this State. Each licensee under this Article shall pay annually to the Department on or before June 30 of each year, a license fee of twenty-five dollars (\$25.00).

(c) Any person selling a preneed funeral service contract shall collect from each purchaser a service charge of ten dollars (\$10.00), and all of which fees so collected shall be remitted by the person collecting same to the State Banking Department at least once each month, and such funds shall be used by the Department in administering this Article. (1969, c. 187, s. 5; 1981, c. 671, ss. 16, 17.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the first, second and fourth sentences of subsection (b) and, in the third sentence of subsection (b), substituted "the investigation fee" for "a license fee

of twenty-five dollars (\$25.00)" and inserted "renewable" preceding "license" near the beginning of the sentence. In subsection (c), the amendment substituted "ten dollars (\$10.00)" for "two dollars (\$2.00)."

Chapter 66.

Commerce and Business.

Article 10A.

Inventions Developed by Employee.

Sec.

- 66-57.1. Employee's right to certain inventions.
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Article 11.

Government in Business.

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Article 17.

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Article 19.

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Article 22.

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ARTICLE 5.

*Sale of Phonograph Records or Electrical Transcriptions.***§ 66-28. Prohibition of rights to further restrict or to collect royalties on commercial use.**

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

ARTICLE 9B.

Motor Clubs and Associations.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

ARTICLE 9C.

Collection Agencies.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

ARTICLE 10A.

*Inventions Developed by Employee.***§ 66-57.1. Employee's right to certain inventions.**

Any provision in an employment agreement which provides that the employee shall assign or offer to assign any of his rights in an invention to his employer shall not apply to an invention that the employee developed entirely on his own time without using the employer's equipment, supplies, facility or trade secret information except for those inventions that (i) relate to the employer's business or actual or demonstrably anticipated research or development, or (ii) result from any work performed by the employee for the employer. To the extent a provision in an employment agreement purports to apply to the type of invention described, it is against the public policy of this State and is unenforceable. The employee shall bear the burden of proof in establishing that his invention qualifies under this section. (1981, c. 488, s. 1.)

Cross References. — As to larceny of secret technical processes, see § 14-75.1.

§ 66-57.2. Employer's rights.

An employer may not require a provision of an employment agreement made unenforceable under G.S. 66-57.1 as a condition of employment or continued employment. An employer, in an employment agreement, may require that the employee report all inventions developed by the employee, solely or jointly, during the term of his employment to the employer, including those asserted by the employee as nonassignable, for the purpose of determining employee or employer rights. If required by a contract between the employer and the United States or its agencies, the employer may require that full title to certain patents and inventions be in the United States. (1981, c. 488, s. 1.)

ARTICLE 11.***Government in Business.*****§ 66-58. Sale of merchandise by governmental units.**

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of any such unit, department or agency, or any individual employee or employees of any such unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to contract with any person, firm or corporation for the operation or rendering of any such businesses or services on behalf of any such unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

- (1) Counties and municipalities.
- (2) The Department of Human Resources or the Department of Agriculture for the sale of serums, vaccines, and other like products.
- (3) The Department of Administration, except that said agency shall not exceed the authority granted in the act creating the agency.
- (4) The State hospitals for the insane.
- (5) The Department of Human Resources.
- (6) The North Carolina School for the Blind at Raleigh.
- (7) The North Carolina Schools for the Deaf.
- (8) The Greater University of North Carolina with regard to its utilities and other services now operated by it nor to the sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise not exceeding twenty-five cents (25¢) in value when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students nor to the sale of meals or merchandise to persons attending meetings or conventions as invited guests nor to the operation by the University of North

Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn, nor to the hospital and Medical School of the University of North Carolina, nor to the Coliseum of North Carolina State College, and the other schools and colleges for higher education maintained or supported by the State, nor to the comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.

- (9) The Department of Natural Resources and Community Development, except that said Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.
- (10) Child-caring institutions or orphanages receiving State aid.
- (11) Highlands School in Macon County.
- (12) The North Carolina State Fair.
- (13) Rural electric memberships corporations.
- (13a) State Farm Operations Commission.
- (13b) The Department of Agriculture with regard to its lessees at farmers' markets operated by the Department.
- (14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided such leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.
- (15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for such tags shall be fixed and agreed upon by the Governor, the state Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase such supplies.

- (16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973.

Such services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by such institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by such institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.

- (c) The provisions of subsection (a) shall not prohibit:
- (1) The sale of products of experiment stations or test farms.
 - (2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.
 - (3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by public postsecondary educational institutions of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of such stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students and their immediate families, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.
 - (4) The operation of lunch counters by the Department of Human Resources as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.
 - (5) The operation of concession stands in the State Capitol during the sessions of the legislature.
 - (6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.
 - (7) The operation by penal, correctional or institutions for the care of the blind, or mentally or physically defective or by the State Department of Agriculture, of dining rooms for the inmates or patients or members of the staff while on duty and for the accommodation of persons visiting such inmates or patients, and other bona fide visitors.
 - (8) The sale by the Department of Agriculture of livestock, poultry and publications in keeping with its present livestock and farm program.
 - (9) The operation by the public schools of school cafeterias.
 - (10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.
 - (11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.
 - (12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.
 - (13) The operation by the Department of Correction of forestry management programs on state-owned lands, including the sale on the open market of timber cut as a part of such management program.
 - (14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.

(15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Correction of facilities for the manufacture of any product or the providing of any service pursuant to G.S. 148-70 not regulated by the provisions of subsection (c) hereof, shall be subject to the prior approval of the Advisory Budget Commission, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Advisory Budget Commission. (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3.)

Effect of Admendments. — The 1981 amendment, effective July 1, 1981, substituted "Schools" for "School" in subdivision (b)(7) and deleted "at Morgantown" at the end of that subdivision.

Legal Periodicals. — For a note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

CASE NOTES

Enforcement of Section. — Governmental units created by the state have no duty or authority to attempt to enforce the provisions of

this section by ad valorem taxation of state property. In re University of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

ARTICLE 16.

Unfair Trade Practices in Diamond Industry.

§ 66-73. Definitions.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 66-74. What constitutes unfair trade practice.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 66-75. Penalty for violation; each practice a separate offense.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

ARTICLE 17.

*Closing-Out Sales.***§ 66-76. Definitions.**

For the purposes of this Article, "closing-out sale" shall mean and include all sales advertised, represented or held forth under the designation of "going out of business," "discontinuance of business," "selling out," "liquidation," "lost our lease," "must vacate," "forced out," "removal," or any other designation of like meaning; "distress sale" shall mean and include all sales in which it is represented or implied that going out of business is possible or anticipated, in which closing out is referred to in any way, or in which it is implied that business conditions are so difficult that the seller is forced to conduct the sale; and "person" shall mean and include individuals, partnerships, voluntary associations and corporations. (1957, c. 1058, s. 1; 1981, c. 633, s. 1.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the definition of a distress sale.

§ 66-77. License required; contents of applications; inventory required; fees; bond; extension of licenses; records; false statements.

(a) No person shall advertise or offer for sale a stock of goods, wares or merchandise under the description of closing-out sale, or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, or a distress sale unless he shall have obtained a license to conduct such sale from the clerk of the city or town in which he proposes to conduct such a sale or from the officer designated by the Board of County Commissioners if the sale is conducted in an unincorporated area. The applicant for such a license shall make to such clerk an application therefor, in writing and under oath at least seven days prior to the opening date of sale, showing all the facts relating to the reasons and character of such sale, including the opening and terminating dates of the proposed sale, a complete inventory of the goods, wares or merchandise actually on hand in the place whereat such sale is to be conducted, and all details necessary to locate exactly and identify fully the goods, wares or merchandise to be sold. Provided, the seller in a distress sale need not file an inventory.

(b) If such clerk shall be satisfied from said application that the proposed sale is of the character which the applicant desires to advertise and conduct, the clerk shall issue a license, upon the payment of a fee of fifty dollars (\$50.00) therefor, together with a bond, payable to the city or town or county in the penal sum of five hundred dollars (\$500.00), conditioned upon compliance with this Article, to the applicant authorizing him to advertise and conduct a sale of the particular kind mentioned in the application; provided, however, that the license fee provided for herein shall be good for a period of 30 days from its date, and if the applicant shall not complete said sale within said 30-day period then the applicant shall make application to such clerk for a license for a new permit, which shall be good for an additional period of 30 days, and shall pay therefor the sum of fifty dollars (\$50.00); and provided further a second extension period of 30 days may be similarly applied for and granted by the clerk upon payment of an additional fee of fifty dollars (\$50.00) and upon the clerk being satisfied that the applicant is holding a bona fide sale of the kind

contemplated by this Article and is acting in a bona fide manner. No additional bond shall be required in the event of one or more extensions as herein provided for. Any merchant who shall have been conducting a business in the same location where the sale is to be held for a period of not less than one year, prior to the date of holding such sale, or any merchant who shall have been conducting a business in one location for such period but who shall, by reason of the building being untenable or by reason of the fact that said merchant shall have no existing lease or ownership of the building and shall be forced to hold such sale at another location, shall be exempted from the payment of the fees and the filing of the bond herein provided for.

(c) Every city or town or county to whom application is made shall endorse upon such application the date of its filing, and shall preserve the same as a record of his office, and shall make an abstract of the facts set forth in such application, and shall indicate whether the license was granted or refused.

(d) Any person making a false statement in the application provided for in this section shall, upon conviction, be deemed guilty of perjury. (1957, c. 1058, s. 2; 1981, c. 633, ss. 2-4.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or a distress sale" in the first sentence of subsection (a), added the language beginning "or from the officer" at the end of that sentence, added the proviso at the end of subsection (a), substituted

"fifty dollars (\$50.00)" for "twenty-five dollars (\$25.00)" following "payment of a fee of" in the first sentence of subsection (b), inserted "or county" in that sentence, and inserted "or county" in subsection (c).

§ 66-78. Additions to stock in contemplation of sale prohibited.

No person in contemplation of a closing-out sale shall order any goods, wares or merchandise for the purpose of selling and disposing of the same at such sale, and any unusual purchase and additions to the stock of such goods, wares or merchandise within 60 days prior to the filing of application for a license to conduct such sale shall be presumptive evidence that such purchases and additions to stock were made in contemplation of such sale. (1957, c. 1058, s. 3; 1981, c. 633, s. 5.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "under a

license as provided for in G.S. 66-77" following "closing-out sale."

§ 66-79. Replenishment of stock prohibited.

No person carrying on or conducting a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, shall, during the continuance of such sale, add any goods, wares or merchandise to the damaged stock inventoried in his original application for such license, and no good, wares or merchandise shall be sold as damaged merchandise at or during such sale, excepting the goods, wares or merchandise described and inventoried in such original application. (1957, c. 1058, s. 4; 1981, c. 633, s. 5.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "under a

license as provided in G.S. 66-79" following "water or otherwise,".

§ 66-80. Continuation of sale or business beyond termination date.

No person shall conduct a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale beyond the termination date specified for such sale, except as otherwise provided for in subsection (b) of G.S. 66-77; nor shall any person, upon conclusion of such sale, continue that business which had been represented as closing out or going out of business under the same name, or under a different name, at the same location, or elsewhere in the same city or town where the inventory for such sale was filed; nor shall any person, upon conclusion of such sale, continue business contrary to the designation of such sale. (1957, c. 1058, s. 5; 1981, c. 633, s. 6.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or a distress sale" near the beginning of the section.

§ 66-81. Advertising or conducting sale contrary to Article; penalty.

Any person who shall advertise, hold, conduct or carry on any sale of goods, wares or merchandise under the description of closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale, contrary to the provisions of this Article, or who shall violate any of the provisions of this Article shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be fined or imprisoned, or both, in the discretion of the court. (1957, c. 1058, s. 6; 1981, c. 633, s. 7.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or a distress sale" near the middle of the section.

§ 66-84: Repealed by Session Laws 1981, c. 633, s. 8, effective July 1, 1981.

ARTICLE 19.

Business Opportunity Sales.

§ 66-94. Definition.

For purposes of this Article, "business opportunity" means the sale or lease of any products, equipment, supplies or services for the purpose of enabling the purchaser to start a business, and in which the seller represents:

- (1) That the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency-operated amusement machines or devices, on premises neither owned nor leased by the purchaser or seller; or
- (2) That it may, in the ordinary course of business, purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser using in whole or in part the supplies, services or chattels sold to the purchaser; or
- (3) The seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business

opportunity; or that the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity; or

- (4) That it will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity, provided that this subsection shall not apply to the sale of a marketing program made in conjunction with the licensing of a federally registered trademark or a federally registered service mark, or when the purchaser pays less than fifty dollars (\$50.00).

Provided, that "business opportunity" does not include the sale of an on-going business when the owner of that business sells and intends to sell only that one business opportunity; nor does it include the not-for-profit sale of sales demonstration equipment, materials, or samples, for a total price of one hundred dollars (\$100.00) or less. (1977, c. 884, s. 1; 1981, c. 817, s. 1.)

Effect of Amendments. — The 1981 amendment, effective September 1, 1981, deleted "which are sold to the purchaser" following "supplies or services" in the introductory clause, inserted "neither" near the end of subdivision (1), substituted "may, in the ordinary course of business," for "will" in subdivision (2), and, in subdivision (4), substituted "it" for "upon payment by the purchaser of a fee or sum of money which exceeds fifty dollars (\$50.00) to the seller, the seller," inserted "federally" preceding "registered trademark," inserted "a federally registered" preceding "service mark,"

and added the language beginning with "or when the purchaser" at the end of the subdivision. Session Laws 1981, c. 817, s. 5 provides: "This act shall become effective September 1, 1981, provided that sellers who have filed disclosure documents before September 1, 1981, need not incorporate the changes required by this act until they next update their disclosure document as required by G.S. 66-97(a).

Legal Periodicals. —

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

Precontract Dealings Regulated. — This section is not confined to regulating the behavior of the seller at the time the contract of sale is signed, but seeks to regulate precontract dealings as well. *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

When seller guaranteed income from a

franchise, it came within statute's scope and had to comply with the act in its dealings with purchaser. Seller could not then remove the sale of the franchise from the act's requirements by later disclaiming any guarantee of profit. *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

§ 66-95. Required disclosure statement.

At least 48 hours prior to the time the purchaser signs a business opportunity contract, or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document, the cover sheet of which is entitled in at least 10-point bold face capital letters "DISCLOSURES REQUIRED BY NORTH CAROLINA LAW." Under this title shall appear the statement in at least 10-point type that "The State of North Carolina has not reviewed and does not approve, recommend, endorse or sponsor any business opportunity. The information contained in this disclosure has not been verified by the State. If you have any questions about this investment, see an attorney before you sign a contract or agreement." Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

- (1) The name of the seller, whether the seller is doing business as an individual, partnership, or corporation, the names under which the seller has done, is doing or intends to do business, and the name of any parent or affiliated company that will engage in business transactions with purchasers or who takes responsibility for statements made by the seller.
- (2) The names and addresses and titles of the seller's officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the seller's business activities relating to the sale of business opportunities. The disclosure document shall additionally contain a statement disclosing who, if any, of the above persons:
 - a. Has been the subject of any legal or administrative proceeding alleging the violation of any business opportunity or franchise law, or fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations;
 - b. Has been the subject of any bankruptcy, reorganization or receivership proceeding, or was an owner, a principal officer or a general partner of any entity which has been subject to such proceeding.

The disclosure document shall set forth the name of the person, the nature of and the parties to the action or proceeding, the court or other forum, the date, the current status of the action or proceeding, the terms and conditions of any order of decree, the penalties or damages assessed and/or terms of settlement, and any other information to enable the purchaser to assess the prior business activities of the seller.

- (3) The prior business experience of the seller relating to business opportunities including:
 - a. The name, address, and a description of any business opportunity previously offered by the seller;
 - b. The length of time the seller has offered each such business opportunity;
 - c. The length of time the seller has conducted the business opportunity currently being offered to the purchaser.
- (4) A full and detailed description of the actual services that the business opportunity seller undertakes to perform for the purchaser.
- (5) A copy of a current (not older than 13 months) financial statement of the seller, updated to reflect any material changes in the seller's financial condition.
- (6) If training of any type is promised by the seller, the disclosure statement must set forth a complete description of the training and the length of the training.
- (7) If the seller promises services to be performed in connection with the placement of the equipment, product(s) or supplies at various location(s), the disclosure statement must set forth the full nature of those services as well as the nature of the agreements to be made with the owners or managers of these location(s) where the purchaser's equipment, product(s) or supplies will be placed.
- (8) If the business opportunity seller is required to secure a bond or establish a trust deposit pursuant to G.S. 66-96, the document shall state either:
 - a. "As required by North Carolina law, the seller has secured a bond issued by a surety (name and address of surety company)"

company authorized to do business in this State. Before signing a contract to purchase this business opportunity, you should check with the surety company to determine the bond's current status," or

- b. "As required by North Carolina law, the seller has established a trust account

(number of account)

with

(name and address of bank or savings institution)

Before signing a contract to purchase his business opportunity, you should check with the bank or savings institution to determine the current status of the trust account."

- (9) The following statement:

"If the seller fails to deliver the product(s), equipment or supplies necessary to begin substantial operation of the business within 45 days of the delivery date stated in your contract, you may notify the seller in writing and demand that the contract be cancelled."

- (10) If the seller makes any statement concerning sales or earnings, or range of sales or earnings that may be made through this business opportunity, the document must disclose:

- a. The total number of purchasers of business opportunities involving the products(s), equipment, supplies or services being offered who to the seller's knowledge have actually received earnings in the amount or range specified, within three years prior to the date of the disclosure statement.
- b. The total number of purchasers of business opportunities involving the product(s), equipment, supplies or services being offered within three years prior to the date of the disclosure statement. (1977, c. 884, s. 1; 1981, c. 817, s. 2.)

Effect of Amendments. — The 1981 amendment, effective September 1, 1981, substituted "and" for a comma preceding "addresses" in the first sentence of subdivision (2), added all of the language in subdivision (2) following the first sentence, and rewrote subdivision (3). Session Laws 1981, c. 817, s. 5 provides: "This act shall become effective September 1, 1981, provided that sellers who have filed disclosure docu-

ments before September 1, 1981, need not incorporate the changes required by this act until they next update their disclosure document as required by G.S. 66-97(a).

Legal Periodicals. — For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

Purchaser's Remedies For Failure to Make Disclosures. — Where seller failed to make the disclosures required under this section, purchaser was entitled under § 66-100(a)

to void the contract and receive all sums paid to seller. *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

§ 66-96. Bond or trust account required.

Legal Periodicals. — For a comment on the business opportunity approach to regulating

the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

Stated in *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

§ 66-97. Filing with Secretary of State.

(a) The seller of every business opportunity shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-95, accompanied by a fee in the amount of ten dollars (\$10.00) made payable to the Secretary of State, prior to placing any advertisement or making any other representations to prospective purchasers in this State. The seller shall update this filing as any material change in the required information occurs, but no less than annually.

(b) Every seller shall file, in such form as the Secretary of State may prescribe, an irrevocable consent appointing the Secretary of State or his successors in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against the seller or his successor, executor or administrator which arises under this Article after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. Service may be made by leaving a copy of the process in the office of the Secretary of State, but is not effective unless (i) the plaintiff, who may be the Attorney General in a suit, action or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his address on file with the Secretary of State, and (ii) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(c) If the seller of a business opportunity is required by G.S. 66-96 to provide a bond or establish a trust account, he shall file with the Secretary of State two copies of the bond or two copies of the formal notification by the depository that the trust account is established contemporaneously with compliance with subsections (a) or (d).

(d) The Secretary of State may accept the Uniform Franchise Offering Circular (UFOC) or the Federal Trade Commission Basic Disclosure Document, provided, that the alternative disclosure document shall be accompanied by a separate sheet setting forth the caption and statement and any other information required by G.S. 66-95.

(e) Failure to so file shall be a misdemeanor. (1977, c. 884, s. 1; 1981, c. 817, s. 3.)

Effect of Amendments. — The 1981 amendment, effective September 1, 1981, substituted "two copies" for "a copy" and added "accompanied by a fee in the amount of ten dollars (\$10.00) made payable to the Secretary of State," in the first sentence of subsection (a), substituted "The seller" for "and" at the beginning of the second sentence of subsection (a), deleted the former second sentence of subsection (a), which was substantially identical to present subsection (c), and added subsections (b), (c) and (d) and redesignated former subsection (b) as subsection (e).

Session Laws 1981, c. 817, s. 5 provides: "This act shall become effective September 1, 1981, provided that sellers who have filed disclosure documents before September 1, 1981, need not incorporate the changes required by this act until they next update their disclosure document as required by G.S. 66-97(a).

Legal Periodicals. — For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 66-98. Prohibited acts.

Legal Periodicals. — For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev.

No. 4 (1981).

Stated in *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

§ 66-99. Contracts to be in writing; form; provisions.

(a) Every business opportunity contract shall be in writing and a copy shall be given to the purchaser at the time he signs the contract.

(b) Every contract for a business opportunity shall include the following:

- (1) The terms and conditions of payment;
- (2) A full and detailed description of the acts or services that the business opportunity seller undertakes to perform for the purchaser;
- (3) The seller's principal business address and the name and address of its agent in the State of North Carolina authorized to receive service of process in addition to the Secretary of State as provided in G.S. 66-95(b) [66-97(b)];
- (4) The approximate delivery date of any product(s), equipment or supplies the business opportunity seller is to deliver to the purchaser. (1977, c. 884, s. 1; 1981, c. 817, s. 4.)

Cross References. — As to contracts requiring writing, see §§ 22-1 through 22-4.

Effect of Amendments. — The 1981 amendment, effective September 1, 1981, inserted "in addition to the Secretary of State as provided in G.S. 66-95(b) at the end of subdivision (b)(3). Session Laws 1981, c. 817, s. 5 provides: "This act shall become effective September 1, 1981, provided that sellers who

have filed disclosure documents before September 1, 1981, need not incorporate the changes required by this act until they next update their disclosure document as required by G.S. 66-97(a).

Legal Periodicals. — For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 66-100. Remedies.

Legal Periodicals. — For a comment on the business opportunity approach to regulating

the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

Where seller failed to make the disclosures required under § 66-95 to purchaser, purchaser was entitled under subsection (a) of

this section to void the contract and receive all sums paid to seller. *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

ARTICLE 20.

Loan Brokers.

§ 66-106. Definitions.

For purposes of this Article the following definitions apply:

- (1) A "loan broker" is any person, firm, or corporation who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person.

- (2) A "loan" is an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, a lease or otherwise.

Provided, that this Article shall not apply to any party approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a National Mortgage Association or any federal agency; nor to any party currently designated and compensated by a North Carolina licensed insurance company as its agent to service loans it makes in this State; nor to any insurance company registered with and licensed by the North Carolina Insurance Commissioner; nor to any attorney-at-law, public accountant, or dealer registered under the North Carolina Securities Act, acting in the professional capacity for which such attorney-at-law, public accountant, or dealer is registered or licensed under the laws of the State of North Carolina. Provided further that subdivision (1)(ii) above shall not apply to any lender whose loans or advances to any person, firm or corporation in North Carolina aggregate more than one million dollars (\$1,000,000) in the preceding calendar year. (1979, c. 705, s. 1; 1981, c. 785, s. 1.)

Effect of Amendments. — The 1981 amendment, added the language beginning "nor to

any insurance company" at the end of the first proviso and added the second proviso.

§ 66-109. Filing with Secretary of State.

(a) Prior to placing any advertisement or making any other representations to prospective borrowers in this State, every loan broker shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-107, and either a copy of the bond required by G.S. 66-108, or a copy of the formal notification by the depository that the trust account required by G.S. 66-108 is established. These filings shall be updated as any material changes in the required information or the status of the bond or trust account occur, but no less than annually.

(b) Failure to comply with subsection (a) shall be a misdemeanor. (1979, c. 705, s. 1; 1981, c. 785, s. 2.)

Effect of Amendments. — The 1981 amendment, substituted "two copies" for "a copy" in the first sentence of subsection (a).

ARTICLE 21.

Prepaid Entertainment Contracts.

§§ 66-126 to 66-130: Reserved for future codification purposes.

ARTICLE 22.

Discount Buying Clubs.

§ 66-131. Definition.

For the purpose of this Article, a "discount buying club" is any person, firm or corporation, which in exchange for any valuable consideration offers to sell or to arrange the sale of goods or services to its customers at prices represented to be lower than are generally available. "Discount buying club" shall not include any cooperative buying association or other group in which no person is intended to profit or actually profits beyond the benefit that all members receive from buying at a discount; nor shall any person, firm or corporation be deemed "a discount buying club" solely by virtue of the fact that (i) for fifty dollars (\$50.00) or less it sells tickets or coupons valid for use in obtaining goods or services from a retail merchant, or (ii) as a service collateral to its principal business, and for no additional charge it arranges for its members or customers to purchase or lease directly from particular merchants at a specified discount. (1981, c. 594, s. 1.)

Editor's Note. — Session Laws 1981, c. 594, s. 2 makes this Article effective July 1, 1981.

§ 66-132. Contracts to be in writing.

Every contract between a discount buying club and its customers shall be in writing, fully completed, dated and signed by all contracting parties. A copy of the completed contract shall be given to the buyer at the time he signs it. The contract shall in clear, conspicuous and simple language:

- (1) State the duration of the contract in a definite period of years or months. If the contract calls for periodic renewal fees, the amount of such fees must be stated.
- (2) State that the buying club will maintain a trust account and bond in compliance with G.S. 66-135, and identify the location of the trust account and the name and address of the surety company.
- (3) Contain, immediately above the customer's signature in boldface type of not less than 10 points size, a statement substantially as follows:
"You, the customer, may cancel this contract at any time prior to midnight of the third business day after the date of this contract. To cancel you must notify the company in writing of your intent to cancel."
- (4) List the categories of goods and services the buying club contracts to make available.
- (5) State the procedures by which the customer can select, order, and pay for merchandise or services and state the time and manner of delivery.
- (6) State the method the discount buying club will use in setting the price customers will pay for goods or services.
- (7) List any charges, however denominated, which are incidental to the purchase of goods or services and which must be paid by the customer.

- (8) State the discount buying club's obligations with respect to warranties on goods or services ordered.
- (9) State the customer's rights and obligations with respect to the cancellation or return of ordered goods. (1981, c. 594, s. 1.)

Cross References. — As to contracts requiring writing, see §§ 22-1 through 22-4.

§ 66-133. Customer's right to cancel.

(a) In addition to any other right to revoke an offer or cancel a sale or contract, the customer has the right to cancel a contract for the services of a discount buying club until midnight of the third business day after the buyer signs a contract which complies with G.S. 66-132.

(b) Cancellation occurs when the customer gives written notice of cancellation to the discount buying club at the address stated in the contract.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed with postage prepaid.

(d) Notice of cancellation need not take any particular form and is sufficient if it indicates by any form of written expression that the customer intends or wishes not to be bound by the contract.

(e) For purposes of this Article, business days are all days other than Saturdays, Sundays, holidays, and days on which the discount buying club is not open for business. (1981, c. 594, s. 1.)

§ 66-134. Prohibited acts.

Discount buying clubs shall not:

- (1) Represent to any potential customer that his opportunity to join is limited in time or that his delay in joining may subject him to an increased price. This shall not preclude reference to a general price increase that will take effect on a specified date.
- (2) Discourage or refuse to allow potential customers to inspect all of their current merchandise catalogs and price lists during normal business hours at their place of business.
- (3) Compare their prices for goods or services with other prices unless the comparison prices are prices at which substantial sales of the same goods or services were made in the same area within the past 90 days, and unless a written copy of the comparison is given to the buyer to keep.
- (4) Fail upon the customer's request to cancel without charge any purchase order for:
 - a. Services, if such services have not been substantially performed;
 - b. Goods to be specially manufactured, if such manufacture has not been substantially performed; or
 - c. Any other goods, if they have not been delivered to the customer or consigned to a certified public carrier for delivery; within 90 days after the purchase order was received by the buying club. This provision shall not be construed to limit a customer's right to earlier performance created by contract or by any other applicable law or regulation.
- (5) Charge any amount in excess of demonstrable actual damages upon a customer's cancellation of an order. (1981, c. 594, s. 1.)

§ 66-135. Bond and trust account required.

(a) Every discount buying club shall obtain and maintain a bond from a surety company licensed to do business in North Carolina. Such bond shall be in an amount not less than twenty-five thousand dollars (\$25,000). Whenever a discount buying club has contracts with North Carolina residents, from whom it has received contract payments of fifty thousand dollars (\$50,000) or more, exclusive of renewal fees, such bond shall be in an amount not less than fifty thousand dollars (\$50,000).

(b) Every discount buying club shall hold advance payments for goods and services in trust in a separate account used solely for that purpose. The funds in such account shall be held free from all liens. Records of such account shall be kept by the buying club in the regular course of its business sufficient to identify the amount held for each customer, the dates of the receipt and withdrawal of funds, and the purpose of withdrawal. Such records must be retained for a period not less than four years following withdrawal. Funds may not be withdrawn from the trust account unless and until (i) the ordered goods have been actually delivered to the customer or consigned to a certified public carrier, or (ii) ordered services have been provided in full, or (iii) the buying club has refunded the customer's payment.

(c) Any person who is damaged by any violation of this Article, or by any breach by the discount buying club of its contract, may bring an action against the bond, provided that the aggregate liability of the surety shall not exceed the amount of the bond.

(d) Violations of subsections (a) or (b) of this section shall constitute a Class J felony. (1981, c. 594, s. 1.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

§ 66-136. Remedies.

(a) Any person injured by a violation of this Article, or breach of any obligation created by this Article or contract subject thereto, may bring an action for recovery of damages, including reasonable attorneys' fees.

(b) The violation of any provision of this Article shall constitute an unfair act or practice under G.S. 75-1.1.

(c) The remedies provided herein shall be in addition to any other remedies provided by law or equity. (1981, c. 594, s. 1.)

§§ 66-137 to 66-141: Reserved for future codification purposes.

ARTICLE 23.***Rental Referral Agencies.*****§ 66-142. Definition.**

For the purposes of this Article, a "rental referral agency" is a person or business which offers to assist any person in locating residential rental property in return for any consideration from a prospective tenant. (1981, c. 610, s. 1.)

Editor's Note. — Section Laws 1981, c. 610, s. 2, makes this Article effective July 1, 1981.

§ 66-143. Fees and deposits.

(a) A rental referral agency shall not charge or attempt to collect any fees or other consideration from any prospective tenant except where rental housing is in fact obtained by such person through the assistance of that agency. For the purposes of this Article, such housing is obtained when the prospective tenant has contracted to rent the property.

(b) Deposits to be applied toward fees may be required by a rental referral agency pursuant to a written contract which includes provisions stating:

- (1) The specifications of housing sought by the prospective tenant, including maximum rent, desired lease period, geographic area, number of bedrooms required, number of children to be housed, and number and type of pets;
- (2) That the deposit will be refunded within 10 days of the prospective tenant's request should the specified housing not be obtained through the agency's assistance within 30 days of the date of the contract;
- (3) That the rental referral agency will maintain a trust account or bond in compliance with G.S. 66-145, and identifying the depository institution or bonding company by name and address. (1981, c. 610, s. 1.)

§ 66-144. Representations of availability.

(a) A rental referral agency shall not make any representation that any property is available for rent unless availability has been verified by the agency within 48 hours prior to the representation. The availability of property described in media advertisements shall be verified within 48 hours prior to the appearance of the advertisement.

(b) Notations of the time and date of verification and the verifier's identity shall be recorded by the agency and made available for inspection by any person from whom the agency has received a deposit or a fee. (1981, c. 610, s. 1.)

§ 66-145. Bond or trust account required.

(a) Every rental referral agency before beginning business shall establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. Each deposit to be applied towards a fee collected under G.S. 66-143(b) shall be placed in the trust account and shall be withdrawn only to refund the deposit to the applicant pursuant to G.S. 66-143(b)(2) or when a fee is earned by the agency as provided in G.S. 66-143(a).

(b) A rental referral agency may elect to post a bond in lieu of the trust account required by this section. The amount of the bond shall at no time be less than the amount that would be required by this section to be held in trust. In no event, however, shall the bond be less than five thousand dollars (\$5,000). The rental referral agency shall file the bond with the clerk of the superior court of the county in which its principal place of business is located.

(c) Any person who is damaged by any violation of this Article, or by any breach by the rental referral agency of its contract, may bring an action for the remedies referred to and provided in G.S. 66-146 against the bond or trust account; provided that the aggregate liability of the surety or trustee shall not exceed the amount of the bond or trust account.

(d) Violation of subsections (a) or (b) of this section shall constitute a misdemeanor. (1981, c. 610, s. 1.)

§ 66-146. Remedies.

(a) Any person injured by a violation of this Article, or breach of any obligation created by this Article or contract subject thereto, may bring an action for recovery of damages, including reasonable attorneys' fees.

(b) The violation of any provision of this Article shall constitute an unfair act or practice under G.S. 75-1.1.

(c) The remedies provided herein shall be in addition to any other remedies provided by law or equity. (1981, c. 610, s. 1.)

§§ 66-147 to 66-151: Reserved for future codification purposes.

ARTICLE 24.***Trade Secrets Protection Act.*****§ 66-152. Definitions.**

As used in this Article, unless the context requires otherwise:

- (1) "Misappropriation" means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.
- (2) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity.
- (3) "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
 - a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
 - b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons. (1981, c. 890, s. 1.)

Editor's Note. — Session Laws 1981, c. 890, October 1, 1981 and shall apply only to causes of action arising after that date." s. 3 provides: "This act shall become effective

§ 66-153. Action for misappropriation.

The owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret. (1981, c. 890, s. 1.)

§ 66-154. Remedies.

(a) Except as provided herein, actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation for the period that the trade secret exists plus an additional period as the court

may deem necessary under the circumstances to eliminate any inequitable or unjust advantage arising from the misappropriation.

- (1) If the court determines that it would be unreasonable to enjoin use after a judgment finding misappropriation, an injunction may condition such use upon payment of a reasonable royalty for any period the court may deem just. In appropriate circumstances, affirmative acts to protect the trade secret may be compelled by order of the court.
- (2) A person who in good faith derives knowledge of a trade secret from or through misappropriation or by mistake, or any other person subsequently acquiring the trade secret therefrom or thereby, shall be enjoined from disclosing the trade secret, but no damages shall be awarded against any person for any misappropriation prior to the time the person knows or has reason to know that it is a trade secret. If the person has substantially changed his position in good faith reliance upon the availability of the trade secret for future use, he shall not be enjoined from using the trade secret but may be required to pay a reasonable royalty as deemed just by the court. If the person has acquired inventory through such knowledge or use of a trade secret, he can dispose of the inventory without payment of royalty. If his use of the trade secret has no adverse economic effect upon the owner of the trade secret, the only available remedy shall be an injunction against disclosure.
 - (b) In addition to the relief authorized by subsection (a), actual damages may be recovered, measured by the economic loss or the unjust enrichment caused by misappropriation of a trade secret, whichever is greater.
 - (c) If willful and malicious misappropriation exists, the trier of fact also may award punitive damages in its discretion.
 - (d) If a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party. (1981, c. 890, s. 1.)

§ 66-155. Burden of proof.

Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:

- (1) Knows or should have known of the trade secret; and
- (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

This prima facie evidence is rebutted by the introduction of substantial evidence that the person against whom relief is sought acquired the information comprising the trade secret by independent development, reverse engineering, or it was obtained from another person with a right to disclose the trade secret. This section shall not be construed to deprive the person against whom relief is sought of any other defenses provided under the law. (1981, c. 890, s. 1.)

§ 66-156. Preservation of secrecy.

In an action under this Article, a court shall protect an alleged trade secret by reasonable steps which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action subject to further court order, and ordering any person who gains access to an alleged trade secret during the litigation not to disclose such alleged trade secret without prior court approval. (1981, c. 890, s. 1.)

§ 66-157. Statute of limitations.

An action for misappropriation of a trade secret must be commenced within three years after the misappropriation complained of is or reasonably should have been discovered. (1981, c. 890, s. 1.)

§§ 66-158 to 66-162: Reserved for future codification purposes.

ARTICLE 25.***Regulation of Precious Metal Businesses.*****§ 66-163. Legislative finding.**

The General Assembly finds and declares that precious metal businesses in North Carolina vitally affect the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate such businesses, in order to prevent thefts, disposal of stolen property, and other abuses upon its citizens. (1981, c. 956, s. 1.)

Editor's Note. — Session Laws 1981, c. 956, s. 5, makes the act effective October 1, 1981, except for s. 4; which is made effective on the date of ratification, July 10, 1981.

Session Laws 1981, c. 956, ss. 3 and 4, provide: "Sec.3. All general or local laws governing precious metals businesses in counties or towns are repealed.

Sec.4. Local law enforcement agencies shall commence processing filed applications for permits and exemptions no later than August 1, 1981."

Session Laws 1981, c. 956, s. 2, contains a severability clause.

§ 66-164. Definitions.

Unless the context clearly indicates otherwise, the following words and phrases shall have the following meanings:

- (1) "Dealer" means a person who engages in the business of purchasing precious metals from the public in the form of jewelry, flatware, silver services or other forms and holds himself out to the public by signs, advertising or other methods as engaging in such purchases including any independent contractor purchasing precious metals under any arrangement in any department store; provided, however, that permanently located retail merchants shall be exempted insofar as they make purchases directly from manufacturers or wholesalers of precious metals for their inventories. Provided further, a permanently located retail merchant who is primarily engaged in the business of purchasing or acquiring jewelry, secondhand furniture, antique furniture, objects of art, artifacts, nonprecious metal collector items, antiquities and other used household furnishings or fixtures for resale to the public, and who purchases precious metals, articles or items from the public only incidentally to his main business, may be exempted as provided in G.S. 66-166 if his total purchases or acquisitions of precious metals from the public constituted ten percent (10%) or less in dollar volume of the total purchases or acquisitions in dollar volume made by such merchant for all such secondhand items or articles in the 12-month period next preceding the date of application for an exemption under G.S. 66-166. Provided further that pawnbrokers as defined in G.S. 91-1 shall be exempted insofar as they accept pawns or pledges of items made of precious metals under the provisions of Chapter 91 of the General Statutes.

- (2) "Local law enforcement agency" means:
- a. The county police force; or
 - b. The county sheriff's office in a county with no county police force for any business located outside the corporate limits of a municipality or inside the corporate limits of a municipality having no municipal police force. "Local law enforcement agency" means the municipal police for any business located within the corporate limits of a municipality having a police force.
- (3) "Precious metal" means gold, silver, or platinum.
- a. "Gold" is defined as any item or article containing ten (10) karat of gold or more which may be in combination or alloy with any other metal.
 - b. "Silver" is defined as any item or article containing 925 parts per thousand of silver which may be in combination or alloy with any nonprecious metal or which is marked "sterling".
 - c. "Platinum" is defined as any item or article containing 900 parts per thousand or more of platinum which may be in combination or alloy with any metal.
- For purposes of this Article, "precious metal" does not include coins, medals, medallions, tokens, numismatic items, art ingots, or art bars. (1981, c. 956, s. 1; c. 1001, s. 3.)

Effect of Amendments. — The 1981 amendment added the last proviso in subdivision (1). Session Laws 1981, c. 1001, s. 3, does not mention subdivision (1).

Session Laws 1981, c. 1001, s. 5, makes the act effective upon ratification. The act was ratified Oct. 9, 1981.

§ 66-165. Permits required.

(a) Except as provided in subsection (c), it shall be unlawful for any person to engage as a dealer in the business of purchasing precious metals either as a separate business or in connection with other business operations without first obtaining a permit for the business from the local law-enforcement agency. The form of the permit and application therefor shall be as approved by the Department of Crime Control and Public Safety. The application shall be given under oath and shall be notarized. A 30-day waiting period from the date of filing of the application is required prior to initial issuance of a permit. A separate permit shall be issued for each location, place, or premises within the jurisdiction of the local law-enforcement agency which is used for the conduction of a precious metals business, and each permit shall designate the location, place or premises to which it applies. Such business shall not be conducted in any other place than that designated in the permit, and no business shall be conducted in a mobile home, trailer, camper, or other vehicle, or structure not permanently affixed to the ground or in any room customarily used for lodging in any hotel, motel, tourist court, or tourist home as defined in G.S. 105-61. The permit shall be posted in a prominent place on the designated premises. Permits shall be valid for a period of 12 months from the date issued and may be renewed without a waiting period upon filing of an application and payment of the annual fee. The annual fee for each dealer's permits within each jurisdiction shall be ten dollars (\$10.00) to provide for the administrative costs of the local law-enforcement agency, including purchase of required forms. The fee shall not be refundable even if the permits are denied or later suspended or revoked. Such permits shall be in addition to and not in lieu of other business licenses and are not transferable.

Any dealer applying to the local law-enforcement agency for a permit shall furnish the local law-enforcement agency with the following information:

- (1) His full name, and any other names used by the applicant during the preceding five years. In the case of a partnership, association, or corporation, the applicant shall list any partnership, association, or corporate names used during the preceding five years;
- (2) Current address, and all addresses used by the applicant during the preceding five years;
- (3) Physical description;
- (4) Age;
- (5) Driver's license number, if any, and state of issuance;
- (6) Recent photograph;
- (7) Record of felony convictions; and
- (8) Record of other convictions during the preceding five years.

If the applicant for a dealer's permit is a partnership or association, all persons owning a ten percent (10%) or more interest in the partnership or association shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the partnership or association.

If the applicant for a dealer's permit is a corporation, each officer, director and stockholder owning ten percent (10%) or more of the corporation's stock, of any class, shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the corporation.

No permit shall be issued to an applicant who, within five years prior to the date of application, has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state. In the case of a partnership, association, or corporation, no permit shall be issued to any applicant with an officer, partner, or director who has, within five years prior to the date of application, been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state.

(b) Every employee engaged in the precious metal business shall, within two days of being so engaged, register his name and address with the local law-enforcement agency and have his photograph taken by the agency. The agency shall issue to him a certificate of compliance with this section upon the applicant's payment of the sum of three dollars (\$3.00) to the agency. The permit shall be posted in the work area of the permit holder.

(c) A special occasion permit authorizes the permittee to purchase precious metals as a dealer participating in any trade shows, antique shows, and crafts shows conducted within the State. A special occasion permit shall be issued by any local law-enforcement agency; provided, however, that a permittee under subsection (a) shall apply for a special occasion permit with the local law-enforcement agency which issued such dealer's permit. An application for a permit shall be on a form as approved by the Department of Crime Control and Public Safety and shall be given under oath and notarized. A 30-day waiting period from the date of filing of the application is required prior to initial issuance of a permit.

Any dealer applying to a local law-enforcement agency for a special occasion permit shall furnish the local law-enforcement agency with the information required in an application for a dealer's permit as set forth in (a).

If the applicant for a special occasion permit is a partnership or association, all persons owning a ten percent (10%) or more interest in the partnership or association shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the partnership or association.

If the applicant for a special occasion permit is a corporation, each officer, director and stockholder owning ten percent (10%) or more of the corporation's stock, of any class, shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the corporation.

No permit shall be issued to an applicant who, within five years prior to the date of application, has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state. In the case of a partnership, association, or corporation, no permit shall be issued to any applicant with an officer, partner, or director who has, within five years prior to the date of application, been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state.

The fee for an application for a special occasion permit shall be ten dollars (\$10.00) to provide for the administrative cost of the local law-enforcement agency including purchase of required forms. The fee shall not be refundable even if the permit is denied or is later suspended or revoked. Such permits shall be in addition to and not in lieu of other business licenses and are not transferable.

A special occasion permit shall be valid for 12 months from the date issued, unless earlier surrendered, suspended, or revoked. Application for renewal of a permit for an additional 12 months shall be on a form as approved by the Department of Crime Control and Public Safety and shall be accompanied by an application fee of ten dollars (\$10.00). A renewal fee shall not be refundable.

Each special occasion permit shall be posted in a prominent place on the premises of any show at which the permittee purchases precious metals. (1981, c. 956, s. 1.)

§ 66-166. Exemption from permits.

Any merchant claiming an exemption from the requirements of G.S. 66-165, 66-168, and 66-170 due to the percentage of his total business which constitutes precious metals purchases shall file an application therefor with the local law-enforcement agency at the same time as applications for dealers' permits are required to be filed under the provisions of this Article. The application shall be upon a form approved by the Department of Crime Control and Public Safety and shall contain as a minimum the following information: the name, home address and business address of the applicant; the name and location of the business at its permanent address; the primary nature of the business both as to purchases and sales; the total dollar volume of purchases of precious metals during the 12-month period next preceding the date of application; the total dollar volume of all secondhand goods purchased during the same period by the business; the percentage of precious metals purchases or acquisitions to total purchases or acquisitions of secondhand goods; and the date when the merchant commenced the business under which the exemption is claimed. Such application shall be filed under the same oath as is required for a precious metals dealer permit, shall be notarized, and shall be accompanied by a fee of five dollars (\$5.00), which fee shall be retained by the local law-enforcement agency as cost for administering claims for exemptions.

The application for exemption, if granted, shall be valid for a period of 12 months. Thereafter, if the applicant seeks an exemption for the ensuing year he shall file an application for exemption 30 days before the expiration of the prior exemption.

If in any calendar month the percentage of precious metals purchased by an exempted merchant exceeds ten percent (10%) of his total purchases, he shall file notice thereof with the local law-enforcement agency. (1981, c. 956, s. 1.)

§ 66-167. Perjury; punishment.

Any person who shall willfully commit perjury in any application for a permit or exemption filed pursuant to this Article shall be guilty of a misdemeanor. (1981, c. 956, s. 1.)

§ 66-168. Bond or trust account required.

Before any permit shall be issued to a dealer pursuant to G.S. 66-165, the dealer shall execute a satisfactory cash or surety bond or establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina in the sum of ten thousand dollars (\$10,000). The bond or trust account shall be in favor of the State of North Carolina. A surety bond is to be executed by the dealer and by two responsible sureties or a surety company licensed to do business in the State of North Carolina and shall be on a form approved by the Department of Crime Control and Public Safety. Any bond shall be kept in full force and effect and shall be delivered to the law-enforcement agency which first issued a current permit to the dealer. A bond or trust account shall be for the faithful performance of the requirements and obligations of the dealer's business in conformity with this Article. Any law-enforcement agency shall have full power and authority to revoke the permit and sue for forfeiture of the bond or trust account upon a breach thereof. Any person who shall have suffered any loss or damage by any act of the permittee that constitutes a violation of this Article shall have the right to institute an action to recover against such permittee and the surety or trust account. Upon termination of the bond or trust account the permit shall become void. (1981, c. 956, s. 1; c. 1001, s. 4.)

Effect of Amendments. — The 1981 amendment, effective Dec. 1, 1981, substituted "and shall be on a form approved by the Department

of Crime Control and Public Safety" for "and subject to the approval of the law-enforcement agency" at the end of the third sentence.

§ 66-169. Records to be kept.

Every dealer to whom a permit has been issued pursuant to G.S. 66-165 shall maintain a tightly bound book or books (not loose-leaf), with pages numbered in sequence, in which shall be recorded, at the time of any purchase of precious metal, a serially numbered account and description of the specific items purchased, including, if applicable, the manufacturer's name, the model, the model number, the serial number, and any engraved numbers or initials found on the items, the date of the transaction, and the name, sex, race, residence, telephone number and driver's license number, if any, of the person selling the items purchased. Both the dealer and the seller shall sign the record entry. In the event the seller cannot furnish his driver's license, passport, or military identification card bearing his photograph, the dealer shall require two forms of positive identification.

The record book shall be open at all reasonable times to inspection on the premises by law-enforcement agencies and shall not be destroyed until two years following the last transaction which the record book reflects. A copy of each record book entry shall be filed within 48 hours of the transaction in the office of the local law-enforcement agency. Mailing the required copy to the local law-enforcement agency within 48 hours shall constitute compliance with this section.

The files of local law-enforcement agencies which contain such copies of record book entries shall not be subject to inspection and examination as authorized by G.S. 132-6. Any public official or employee who shall knowingly and willfully permit any person to have access to or custody or possession of any

portion of such files, unless the person is one specifically authorized by the local law-enforcement agency to have access thereto for purposes of law-enforcement investigation or civil or criminal proceedings, shall be guilty of a misdemeanor and upon conviction shall be fined in the discretion of the court but not in excess of five hundred dollars (\$500.00).

Every merchant to whom an exemption has been issued pursuant to G.S. 66-166 shall maintain a book in which shall be recorded, at the time of any purchase of precious metal, a description of the specific items purchased and the date of the transaction. This book shall be open at all reasonable times to inspection on the premises by law-enforcement agencies and shall not be destroyed until two years following the last transaction which the record book reflects. (1981, c. 956, s. 1.)

§ 66-170. Items not to be modified.

No item included in a dealer purchase shall be sold, traded or otherwise disposed of, melted, cut or otherwise changed in form nor shall any such item be removed from the licensed premises for a period of five days from the date the purchase was made. (1981, c. 956, s. 1.)

§ 66-171. Purchasing from juvenile.

No dealer or employee or agent thereof shall purchase from any juvenile under 18 years of age any article made, in whole or in part, of precious metal. (1981, c. 956, s. 1.)

§ 66-172. Penalties.

Any dealer who violates the provisions of this Article shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars (\$500.00) or imprisoned for not more than six months, or both. In addition any dealer so convicted shall be ineligible for a dealer's permit for a period of three years from the date of conviction. Each and every violation shall constitute a separate and distinct offense. (1981, c. 956, s. 1.)

§ 66-173. Portable smelters prohibited.

It shall be unlawful for any person to possess or operate a smelter in any mobile home, trailer, camper, or other vehicle or structure not permanently affixed to the ground, for the purpose of refining precious metals. Violation of the provisions of this section shall constitute a misdemeanor and shall be punishable by a fine of not more than five hundred dollars (\$500.00) or imprisoned for not more than six months, or both. (1981, c. 956, s. 1.)

Chapter 67.

Dogs.

ARTICLE 1.

Owner's Liability.

§ 67-1. Liability for injury to livestock or fowls.

CASE NOTES

Applied in *Development Assocs. v. Wake County Bd. of Adjustment*, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

Chapter 69.

Fire Protection.

Article 3A.

Sec.

Rural Fire Protection Districts.

Sec.

69-25.2. Duties of county board of commis-

sioners regarding conduct of elections; cost of holding.

69-25.4. Tax to be levied and used for furnishing fire protection.

ARTICLE 3A.

Rural Fire Protection Districts.

§ 69-25.1. Election to be held upon petition of voters.

Local Modification. — By virtue of Session Laws 1981, c. 596, Granville should be stricken from the replacement volume.

§ 69-25.2. Duties of county board of commissioners regarding conduct of elections; cost of holding.

The board of county commissioners, after consulting with the county board of elections, shall set a date for the election by resolution adopted. The county board of elections shall hold and conduct the election in the district. The county board of elections shall advertise and conduct said election, in accordance with the provisions of this Article and with the procedures prescribed in Chapter 163 governing the conduct of special and general elections. No new registration of voters shall be required, but the deadline by which unregistered voters must register shall be contained in the legal advertisement to be published by the county board of elections. The cost of holding the election to establish a district shall be paid by the county, provided that if the district is established, then the county shall be reimbursed the cost of the election from the taxes levied within the district, but the cost of an election to increase the allowable tax under G.S. 69-25.1 or to abolish a fire district under G.S. 69-25.10 shall be paid from the funds of the district. (1951, c. 820, s. 2; 1975, c. 706; 1981, c. 786, s. 2.)

Effect of Amendments. — The 1981 amendment, inserted "to establish a district" in the fifth sentence and added the proviso at the end of that sentence.

§ 69-25.4. Tax to be levied and used for furnishing fire protection.

If a majority of the qualified voters voting at said election vote in favor of levying and collecting a tax in said district, then the board of county commissioners is authorized and directed to levy and collect a tax in said district in such amount as it may deem necessary, not exceeding ten cents (10¢) on the one hundred dollars (\$100.00) valuation of property in said district from year to year, and shall keep the same as a separate and special fund, to be used only for furnishing fire protection within said district, as provided in G.S. 69-25.5.

Provided, that if a majority of the qualified voters voting at such elections vote in favor of levying and collecting a tax in such district, or vote in favor of increasing the tax limit in said district, then the board of county commissioners

is authorized and directed to levy and collect a tax in such districts in such amount as it may deem necessary, not exceeding fifteen cents (15¢) on the one hundred dollars (\$100.00) valuation of property in said district from year to year.

For purposes of this Article, the term "fire protection" and the levy of a tax for that purpose may include the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within the district from injury or death; and the levy, appropriation, and expenditure of the tax to provide such services are proper, authorized and lawful. In providing these services the fire district shall be subject to G.S. 153A-250. (1951, c. 820, s. 4; 1959, c. 805, s. 4; 1981, c. 217.)

Local Modification. — By virtue of Session Laws 1981, c. 596, Granville should be stricken from the replacement volume.

Effect of Amendments. — The 1981 amendment added the third paragraph.

§ 69-25.10. Means of abolishing tax district.

Local Modification. — By virtue of Session Laws 1979, 2nd Sess., c. 1167, s. 3, Orange

County should be stricken from the replacement volume.

Chapter 70.

Indian Antiquities, Archaeological Resources and Unmarked Human Skeletal Remains Protection.

Article 1.

Indian Antiquities.

Sec.

70-5 to 70-9. [Reserved.]

Article 2.

Archaeological Resources Protection Act.

- 70-10. Short title.
- 70-11. Findings and purpose.
- 70-12. Definitions.
- 70-13. Archaeological investigations.
- 70-14. Rule-making authority; custody of resources.
- 70-15. Prohibited acts and criminal penalties.
- 70-16. Civil penalties.
- 70-17. Forfeiture.
- 70-18. Confidentiality.
- 70-19. Cooperation with private individuals.
- 70-20. Delegation of responsibilities.
- 70-21 to 70-25. [Reserved.]

Article 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

Sec.

- 70-26. Short title.
- 70-27. Findings and purpose.
- 70-28. Definitions.
- 70-29. Discovery of remains and notification of authorities.
- 70-30. Jurisdiction over remains.
- 70-31. Archaeological investigation of human skeletal remains.
- 70-32. Consultation with the Native American Community.
- 70-33. Consultation with other individuals.
- 70-34. Skeletal analysis.
- 70-35. Disposition of human skeletal remains.
- 70-36. Financial responsibility.
- 70-37. Prohibited acts.
- 70-38. Rule-making authority.
- 70-39. Exceptions.
- 70-40. Penalties.

ARTICLE 1.

Indian Antiquities.

§§ 70-5 to 70-9: Reserved for future codification purposes.

ARTICLE 2.

Archaeological Resources Protection Act.

§ 70-10. Short title.

This Article shall be known as "The Archaeological Resources Protection Act." (1981, c. 904, s. 2.)

§ 70-11. Findings and purpose.

(a) The General Assembly finds that:

- (1) Archaeological resources on State lands are an accessible and irreplaceable part of the State's heritage;
- (2) These resources are increasingly endangered because of their commercial attractiveness;
- (3) Existing State laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and

- (4) There is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.
- (b) The purpose of this Article is to secure, for the present and future benefit of the people of North Carolina, the protection of archaeological resources and sites which are on State lands, excluding highway right-of-ways, and to foster increased cooperation and exchange of information among governmental authorities, the professional archaeological community, Indian Tribal governmental authorities and private individuals having collections of archaeological resources and data. (1981, c. 904, s. 2.)

§ 70-12. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

- (1) "Archaeological investigation" means any surface collection, subsurface tests, excavation, or other activity that results in the disturbance or removal of archaeological resources.
- (2) "Archaeological resource" means any material remains of past human life or activities which are at least 50 years old and which are of archaeological interest, including pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carvings, intaglios, graves or human skeletal materials. Paleontological specimens are not to be considered archaeological resources unless found in an archaeological context.
- (3) "State lands" means any lands owned, occupied, or controlled by the State of North Carolina, with the exception of those lands under short term lease solely for archaeological purposes, excluding highway right-of-ways. (1981, c. 904, s. 2.)

§ 70-13. Archaeological investigations.

(a) Any person may apply to the Department of Administration for a permit to conduct archaeological investigations on State lands. The application shall contain information the Department of Administration, in consultation with the Department of Cultural Resources, deems necessary, including the time, scope, location and specific purpose of the proposed work.

(b) A permit shall be issued pursuant to an application under subsection (a) of this section if, after any notifications and consultations required by subsection (d) of this section, the Department of Administration, in consultation with the Department of Cultural Resources, finds that:

- (1) The applicant is qualified to carry out the permitted activity;
- (2) The proposed activity is undertaken for the purpose of furthering archaeological knowledge in the public interest;
- (3) The currently available technology and the technology the applicant proposes to use are such that the significant information contained in the archaeological resource can be retrieved;
- (4) The funds and the time the applicant proposes to commit are such that the significant information contained in the archaeological resources can be retrieved;
- (5) The archaeological resources which are collected, excavated or removed from State lands and associated records and data will remain the property of the State of North Carolina and the resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution;

- (6) The activity pursuant to the permit is not inconsistent with any management plan applicable to the State lands concerned; and
- (7) The applicant shall bear the financial responsibility for the reinterment of any human burials or human skeletal remains excavated or removed as a result of the permitted activities.

(c) A permit may contain any terms, conditions or limitations the Department of Administration, in consultation with the Department of Cultural Resources, deems necessary to achieve the intent of this Article. A permit shall identify the person responsible for carrying out the archaeological investigation.

(d) If a permit issued under G.S. 70-13(a) may result in harm to, or destruction of, any religious or cultural site, as determined by the Department of Administration, in consultation with the Department of Cultural Resources, before issuing such permit, the Department of Administration, in consultation with the Department of Cultural Resources, shall notify and consult with, insofar as possible, a local representative of an appropriate religious or cultural group. If the religious or cultural site pertains to Native Americans, the Department of Administration, in consultation with the Department of Cultural Resources, shall notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director of the North Carolina Commission of Indian Affairs shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community. Such notification shall include, but not be limited to, the following:

- (1) The location and schedule of the forthcoming investigation;
- (2) Background data concerning the nature of the study; and
- (3) The purpose of the investigation and the expected results.

(e) A permit issued under G.S. 70-13 may be suspended by the Department of Administration, in consultation with the Department of Cultural Resources, upon the determination that the permit holder has violated any provision of G.S. 70-15(a) or G.S. 70-15(b). A permit may be revoked by the Department of Administration, in consultation with the Department of Cultural Resources, upon assessment of a civil penalty under G.S. 70-16 against the permit holder or upon the permit holder's conviction under G.S. 70-15. (1981, c. 904, s. 2.)

§ 70-14. Rule-making authority; custody of resources.

The North Carolina Historical Commission, in consultation with the Department of Administration, may promulgate regulations to implement the provisions of this Article and to provide for the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from State lands pursuant to this Article, and the ultimate disposition of those resources. (1981, c. 904, s. 2.)

§ 70-15. Prohibited acts and criminal penalties.

(a) No person may excavate, remove, damage or otherwise alter or deface any archaeological resource located on State lands unless he is acting pursuant to a permit issued under G.S. 70-13.

(b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, exchange, transport or receive any archaeological resource excavated or removed from State lands in violation of the prohibition contained in G.S. 70-15(a).

(c) Any person who knowingly and willfully violates or employs any other person to violate any prohibition contained in G.S. 70-15(a) or G.S. 70-15(b) shall upon conviction, be fined not more than two thousand dollars (\$2,000) or imprisoned not more than six months, or both, in the discretion of the court.

(d) Each day on which a violation occurs shall be a separate and distinct offense. (1981, c. 904, s. 2.)

§ 70-16. Civil penalties.

A civil penalty of not more than five thousand dollars (\$5,000) may be assessed by the Department of Administration, in consultation with the Department of Cultural Resources, against any person who violates the provisions of G.S. 70-15. In determining the amount of the penalty, the Department shall consider the extent of the harm caused by the violation and the cost of rectifying the damage. Any person assessed shall be notified of the assessment by registered or certified mail. The notice shall specify the reasons for the assessment. If the person assessed fails to pay the amount of the assessment to the Department within 30 days after receipt of notice, the Department may institute a civil action in the Superior Court of Wake County to recover the amount of the assessment. In the civil action, the scope of the court's review of the Department's action, including the amount of the assessment, shall be as provided in Chapter 150A of the General Statutes.

The Department may use the assessed funds to rectify the damage to archaeological resources or to otherwise effectuate the purposes of this Article. (1981, c. 904, s. 2.)

§ 70-17. Forfeiture.

All archaeological resources with respect to which a violation of G.S. 70-15(a) or 70-15(b) occurred, and all vehicles and equipment which were used in connection with such violation shall be subject to forfeiture to the State of North Carolina in the same manner as vehicles and equipment subject to forfeiture under G.S. 90-112. (1981, c. 904, s. 2.)

§ 70-18. Confidentiality.

Information concerning the nature and location of any archaeological resource, regardless of the ownership of the property, may be made available to the public under Chapter 132 of the North Carolina General Statutes or under any other provision of law unless the Department of Cultural Resources determines that the disclosures would create a risk of harm to such resources or to the site at which such resources are located. (1981, c. 904, s. 2.)

§ 70-19. Cooperation with private individuals.

The Department of Cultural Resources shall take any action necessary, consistent with the purposes of this Article, to foster and improve the communication, cooperation, and exchange of information between:

- (1) Private individuals having collections of archaeological resources and data which were obtained through legal means, and
- (2) Professional archaeologists and associations of professional archaeologists concerned with the archaeological resources of North Carolina and of the United States. (1981, c. 904, s. 2.)

§ 70-20. Delegation of responsibilities.

If the Department of Administration and the Department of Cultural Resources agree, the responsibilities, in whole or in part, of the Department of Cultural Resources under this Article may be delegated through a memorandum of understanding to the Department of Administration. Such a memorandum of understanding will be subject to periodic review at the initiation of either party to the memorandum. (1981, c. 904, s. 2.)

§§ 70-21 to 70-25: Reserved for future codification purposes.

ARTICLE 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

§ 70-26. Short title.

This Article shall be known as "The Unmarked Human Burial and Human Skeletal Remains Protection Act." (1981, c. 853, s. 2.)

Editor's Note. — Session Laws 1981, c. 853, s. 6, makes the act effective Oct. 1, 1981.

§ 70-27. Findings and purpose.

(a) The General Assembly finds that:

- (1) Unmarked human burials and human skeletal remains are subject to vandalism and inadvertent destruction at an ever-increasing rate;
- (2) Existing State laws do not provide adequate protection to prevent damage to and destruction of these remains;
- (3) There is a great deal of scientific information to be gained from the proper excavation, study and analysis of human skeletal remains recovered from such burials; and
- (4) There has been no procedure for descendants or other interested individuals to make known their concerns regarding disposition of these remains.

(b) The purpose of this Article is (i) to provide adequate protection from vandalism for unmarked human burials and human skeletal remains, (ii) to provide adequate protection for unmarked human burials and human skeletal remains not within the jurisdiction of the medical examiner pursuant to G.S. 130-198 that are encountered during archaeological excavation, construction, or other ground disturbing activities, found anywhere within the State except on federal land, and (iii) to provide for adequate skeletal analysis of remains removed or excavated from unmarked human burials if the analysis would result in valuable scientific information. (1981, c. 853, s. 2.)

§ 70-28. Definitions.

As used in this Article:

- (1) "Chief Archaeologist" means the Chief Archaeologist, Archaeology Branch, Archaeology and Historic Preservation Section, Division of Archives and History, Department of Cultural Resources.
- (2) "Executive Director" means the Executive Director of the North Carolina Commission of Indian Affairs.
- (3) "Human skeletal remains" or "remains" means any part of the body of a deceased human being in any stage of decomposition.
- (4) "Professional archaeologist" means a person having (i) a postgraduate degree in archaeology, anthropology, history, or another related field with a specialization in archaeology, (ii) a minimum of one year's experience in conducting basic archaeological field research, including the excavation and removal of human skeletal remains, and (iii) designed and executed an archaeological study and presented the written results and interpretations of such study.

- (5) "Skeletal analyst" means any person having (i) a postgraduate degree in a field involving the study of the human skeleton such as skeletal biology, forensic osteology or other relevant aspects of physical anthropology or medicine, (ii) a minimum of one year's experience in conducting laboratory reconstruction and analysis of skeletal remains, including the differentiation of the physical characteristics denoting cultural or biological affinity, and (iii) designed and executed a skeletal analysis, and presented the written results and interpretations of such analysis.
- (6) "Unmarked human burial" means any interment of human skeletal remains for which there exists no grave marker or any other historical documentation providing information as to the identity of the deceased. (1981, c. 853, s. 2.)

§ 70-29. Discovery of remains and notification of authorities.

(a) Any person knowing or having reasonable grounds to believe that unmarked human burials or human skeletal remains are being disturbed, destroyed, defaced, mutilated, removed, or exposed, shall notify immediately the medical examiner of the county in which the remains are encountered.

(b) If the unmarked human burials or human skeletal remains are encountered as a result of construction or agricultural activities, disturbance of the remains shall cease immediately and shall not resume without authorization from either the county medical examiner or the Chief Archaeologist, under the provisions of G.S. 70-30(c) or 70-30(d).

- (c) (1) If the unmarked human burials or human skeletal remains are encountered by a professional archaeologist, as a result of survey or test excavations, the remains may be excavated and other activities may resume after notification, by telephone or registered letter, is provided to the Chief Archaeologist. The treatment, analysis and disposition of the remains shall come under the provisions of G.S. 70-34 and 70-35.

- (2) If a professional archaeologist directing long-term (research designed to continue for one or more field seasons of four or more weeks' duration) systematic archaeological research sponsored by any accredited college or university in North Carolina, as a part of his research, recovers Native American skeletal remains, he may be exempted from the provisions of G.S. 70-30, 70-31, 70-32, 70-33, 70-34 and 70-35(c) of this Article so long as he:

- a. Notifies the Executive Director within five working days of the initial discovery of Native American skeletal remains;
- b. Reports to the Executive Director, at agreed upon intervals, the status of the project;
- c. Curates the skeletal remains prior to ultimate disposition; and
- d. Conducts no destructive skeletal analysis without the express permission of the Executive Director.

Upon completion of the project fieldwork, the professional archaeologist, in consultation with the skeletal analyst and the Executive Director, shall determine the schedule for the completion of the skeletal analysis. In the event of a disagreement, the time for completion of the skeletal analysis shall not exceed four years. The Executive Director have authority concerning the ultimate disposition of the Native American skeletal remains after analysis is completed in accordance with G.S. 70-35(a) and 70-36(b) and (c).

(d) The Chief Archaeologist shall notify the Chief, Medical Examiner Section, Division of Health Services, Department of Human Resources, of any reported human skeletal remains discovered by a professional archaeologist. (1981, c. 853, s. 2.)

§ 70-30. Jurisdiction over remains.

(a) Subsequent to notification of the discovery of an unmarked human burial or human skeletal remains, the medical examiner of the county in which the remains were encountered shall determine as soon as possible whether the remains are subject to the provisions of G.S. 130-198.

(b) If the county medical examiner determines that the remains are subject to the provisions of G.S. 130-198, he will immediately proceed with his investigation.

(c) If the county medical examiner determines that the remains are not subject to the provisions of G.S. 130-198, he shall so notify the Chief Medical Examiner. The Chief Medical Examiner shall notify the Chief Archaeologist of the discovery of the human skeletal remains and the findings of the county medical examiner. The Chief Archaeologist shall immediately take charge of the remains.

(d) Subsequent to taking charge of the human skeletal remains, the Chief Archaeologist shall have 48 hours to make arrangements with the landowner for the protection or removal of the unmarked human burial or human skeletal remains. The Chief Archaeologist shall have no authority over the remains at the end of the 48-hour period and may not prohibit the resumption of the construction or agricultural activities without the permission of the landowner. (1981, c. 853, s. 2.)

§ 70-31. Archaeological investigation of human skeletal remains.

(a) If an agreement is reached with the landowner for the excavation of the human skeletal remains, the Chief Archaeologist shall either designate a member of his staff or authorize another professional archaeologist to excavate or supervise the excavation.

(b) The professional archaeologist excavating human skeletal remains shall report to the Chief Archaeologist, either in writing or by telephone, his opinion on the cultural and biological characteristics of the remains. This report shall be transmitted as soon as possible after the commencement of excavation, but no later than two full business days after the removal of a burial.

(c) The Chief Archaeologist in consultation with the professional archaeologist excavating the remains, shall determine where the remains shall be held subsequent to excavation, pending other arrangements according to G.S. 70-32 or 70-33.

(d) The Department of Cultural Resources may obtain administrative inspection warrants pursuant to the provisions of Chapter 15, Article 4A of the General Statutes to enforce the provisions of this Article, provided that prior to the requesting of the administrative warrant, the Department shall contact the affected landowners and request their consent for access to their land for the purpose of gathering such information. If consent is not granted, the Department shall give reasonable notice of the time, place and before whom the administrative warrant will be requested so that the owner or owners may have an opportunity to be heard. (1981, c. 853, s. 2.)

§ 70-32. Consultation with the Native American Community.

(a) If the professional archaeologist determines that the human skeletal remains are Native American, the Chief Archaeologist shall immediately notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community.

(b) Within four weeks of the notification, the Executive Director shall communicate in writing to the Chief Archaeologist, the concerns of the Commission of Indian Affairs and an appropriate tribal group or community with regard to the treatment and ultimate disposition of the Native American skeletal remains.

(c) Within 90 days of receipt of the concerns of the Commission of Indian Affairs, the Chief Archaeologist and the Executive Director, with the approval of the principal tribal official of an appropriate tribe, shall prepare a written agreement concerning the treatment and ultimate disposition of the Native American skeletal remains. The written agreement shall include the following:

- (1) Designation of a qualified skeletal analyst to work on the skeletal remains;
- (2) The type of analysis and the specific period of time to be provided for analysis of the skeletal remains;
- (3) The timetable for written progress reports and the final report concerning the skeletal analysis to be provided to the Chief Archaeologist and the Executive Director by the skeletal analyst; and
- (4) A plan for the ultimate disposition of the Native American remains subsequent to the completion of adequate skeletal analysis.

If no agreement is reached within 90 days, the Archaeological Advisory Committee shall determine the terms of the agreement. (1981, c. 853, s. 2.)

§ 70-33. Consultation with other individuals.

(a) If the professional archaeologist determines that the human skeletal remains are other than Native American, the Chief Archaeologist shall publish notice that excavation of the remains has occurred, at least once per week for four successive weeks in a newspaper of general circulation in the county where the burials or skeletal remains were situated, in an effort to determine the identity or next of kin or both of the deceased.

(b) If the next of kin are located, within 90 days the Chief Archaeologist in consultation with the next of kin shall prepare a written agreement concerning the treatment and ultimate disposition of the skeletal remains. The written agreement shall include:

- (1) Designation of a qualified skeletal analyst to work on the skeletal remains;
- (2) The type of analysis and the specific period of time to be provided for analysis of the skeletal remains;
- (3) The timetable for written progress reports and the final report concerning the skeletal analysis to be provided to the Chief Archaeologist and the next of kin by the skeletal analyst; and
- (4) A plan for the ultimate disposition of the skeletal remains subsequent to the completion of adequate skeletal analysis.

If no agreement is reached, the remains shall be handled according to the wishes of the next of kin. (1981, c. 853, s. 2.)

§ 70-34. Skeletal analysis.

(a) Skeletal analysis conducted under the provisions of this Article shall only be accomplished by persons having those qualifications expressed in G.S. 70-28(5).

(b) Prior to the execution of the written agreements outlined in G.S. 70-32(c) and 70-33(b), the Chief Archaeologist shall consult with both the professional archaeologist and the skeletal analyst investigating the remains.

(c) The professional archaeologist and the skeletal analyst shall submit a proposal to the Chief Archaeologist within the 90-day period set forth in G.S. 70-32(c) and 70-33(b), including:

- (1) Methodology and techniques to be utilized;
- (2) Research objectives;
- (3) Proposed time schedule for completion of the analysis; and
- (4) Proposed time intervals for written progress reports and the final report to be submitted.

(d) If the terms of the written agreement are not substantially met, the Executive Director or the next of kin, after consultation with the Chief Archaeologist, may take possession of the skeletal remains. In such case, the Chief Archaeologist may ensure that appropriate skeletal analysis is conducted by another qualified skeletal analyst prior to ultimate disposition of the skeletal remains. (1981, c. 853, s. 2.)

§ 70-35. Disposition of human skeletal remains.

(a) If the skeletal remains are Native American, the Executive Director, after consultation with an appropriate tribal group or community, shall determine the ultimate disposition of the remains after the analysis.

(b) If the skeletal remains are other than Native American and the next of kin have been identified, the next of kin shall have authority concerning the ultimate disposition of the remains after the analysis.

(c) If the Chief Archaeologist has received no information or communication concerning the identity or next of kin of the deceased, the skeletal remains shall be transferred to the Chief Archaeologist and permanently curated according to standard museum procedures after adequate skeletal analysis. (1981, c. 853, s. 2.)

§ 70-36. Financial responsibility.

(a) The provisions of this Article shall not require that the owner of the land on which the unmarked human burials or human skeletal remains are found, bear the cost of excavation, removal, analysis or disposition.

(b) If a determination is made by the Executive Director, in consultation with an appropriate tribal group or community, that Native American skeletal remains shall be reinterred following the completion of skeletal analysis, an appropriate tribal group or community may provide a suitable burial location. If it elects not to do so, it shall be the responsibility of the North Carolina Commission of Indian Affairs to provide a suitable burial location.

(c) The expense of transportation of Native American remains to the reburial location shall be borne by the party conducting the excavation and removal of the skeletal remains. The reburial ceremony may be provided by an appropriate tribal group or community. If it elects not to do so, the reburial ceremony shall be the responsibility of the Commission of Indian Affairs. (1981, c. 853, s. 2.)

§ 70-37. Prohibited acts.

(a) No person, unless acting under the provisions of G.S. 130-198 through G.S. 130-201, shall:

- (1) Knowingly acquire any human skeletal remains removed from unmarked burials in North Carolina after October 1, 1981, except in accordance with the provisions of this Article;
- (2) Knowingly exhibit or sell any human skeletal remains acquired from unmarked burials in North Carolina; or
- (3) Knowingly retain human skeletal remains acquired from unmarked burials in North Carolina after October 1, 1981, for scientific analysis beyond a period of time provided for such analysis pursuant to the provisions of G.S. 70-32, 70-33 and 70-34, with the exception of those skeletal remains curated under the provisions of G.S. 70-35.

(b) Other provisions of criminal law concerning vandalism of unmarked human burials or human skeletal remains may be found in G.S. 14-149. (1981, c. 853, s. 2.)

§ 70-38. Rule-making making authority.

The North Carolina Historical Commission may promulgate rules and regulations to implement the provisions of this Article. (1981, c. 853, s. 2.)

§ 70-39. Exceptions.

(a) Human skeletal remains acquired from commercial biological supply houses or through medical means are not subject to the provisions of G.S. 70-37(a).

(b) Human skeletal remains determined to be within the jurisdiction of the medical examiner according to the provisions of G.S. 130-198 are not subject to the prohibitions contained in this Article. (1981, c. 853, s. 2.)

§ 70-40. Penalties.

(a) Violation of the provisions of G.S. 70-29 is a misdemeanor.

(b) Violation of the provisions of G.S. 70-37(a) is a Class H felony. (1981, c. 853, s. 2.)

Chapter 73.**Mills.****Article 2.****Condemnation for Mill by Owner of One
Bank of Stream.**

Sec.

73-5 to 73-13. [Repealed.]

Article 3.**Condemnation for Races, Waterways, etc.,
by Owner of Mill or Millsite.**

Sec.

73-14 to 73-22. [Repealed.]

73-24. [Repealed.]

ARTICLE 2.***Condemnation for Mill by Owner of One Bank of Stream.***

§§ 73-5 to 73-13: Repealed by Session Laws 1981, c. 919, s. 9, effective
January 1, 1982.

Cross References. — For present provisions
as to eminent domain, see Chapter 40A.

ARTICLE 3.***Condemnation for Races, Waterways, etc., by Owner of Mill or
Millsite.***

§§ 73-14 to 73-22: Repealed by Session Laws 1981, c. 919, s. 9, effective
January 1, 1982.

Cross References. — For present provisions
as to eminent domain, see Chapter 40A.

§ 73-24: Repealed by Session Laws 1981, c. 919, s. 9, effective January 1,
1982.

Cross References. — For present provisions
as to eminent domain, see Chapter 40A.

Chapter 74.

Mines and Quarries.

Article 7.

The Mining Act of 1971.

Sec.

74-50. Permits — general.

Sec.

74-51. Permits — application, granting, conditions.

74-54. Bonds.

74-64. Penalties for violations.

ARTICLE 2A.

Mine Safety and Health Act.

§ 74-24.15. Rights and duties of miners.

Legal Periodicals. — For note on worker's compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

ARTICLE 7.

The Mining Act of 1971.

Repeal of Article. —

Session Laws 1981, c. 787, s. 9, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 74-50. Permits — general.

After July 1, 1972, no operator shall engage in mining without having first obtained from the Department an operating permit which covers the affected land and which has not terminated, been revoked, been suspended for the period in question, or otherwise become invalid. An operating permit may be modified from time to time to include land neighboring the affected land, in accordance with procedures set forth in G.S. 74-52. A separate permit shall be required for each mining operation that is not on land neighboring a mining operation for which the operator has a valid permit.

No permit shall be issued except in accordance with the procedures set forth in G.S. 74-51, nor modified or renewed except in accordance with the procedures set forth in G.S. 74-52.

An appeal from the Department's denial of a permit may be taken to the Mining Commission, as provided by G.S. 74-61.

Prior to the issuance of a new mining permit, the operator shall make a reasonable effort, satisfactory to the Department, to notify all owners of record of land adjoining the proposed site, and to notify the chief administrative officer of the county or municipality in which the site is located that he intends to conduct a mining operation on the site in question.

No permit shall become effective until the operator has deposited with the Department an acceptable performance bond or other security pursuant to G.S. 74-54. If at any time said bond or other security, or any part thereof, shall lapse

for any reason other than a release by the Department, and said lapsed bond or security is not replaced by the operator within 30 days after notice of the lapse, the permit to which it pertains shall automatically become void and of no further effect.

An operating permit shall be granted for a period not exceeding 10 years. If the mining operation terminates and the reclamation required under the approved reclamation plan is completed prior to the end of said period, the permit shall terminate. Termination of a permit shall not have the effect of relieving the operator of any obligations which he has incurred under his approved reclamation plan or otherwise. Where the mining operation itself has terminated, no permit shall be required in order to carry out reclamation measures under the reclamation plan.

An operating permit may be renewed from time to time, pursuant to procedures set forth in G.S. 74-52.

An operating permit may be suspended or revoked for cause, pursuant to procedures set forth in G.S. 74-58. (1971, c. 545, s. 5; 1973, c. 1262, s. 33; 1981, c. 787, s. 1.)

Effect of Amendments. — The 1981 amendment added the fourth paragraph.

§ 74-51. Permits — application, granting, conditions.

Any operator desiring to engage in mining shall make written application to the Department for a permit. Such application shall be upon a form furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish such other information as may be deemed necessary by the Department in order adequately to enforce this Article.

The application shall be accompanied by a reclamation plan which meets the requirements of G.S. 74-53. No permit shall be issued until such plan has been approved by the Department.

The application shall be accompanied by a signed agreement, in a form specified by the Department, that in the event a bond forfeiture is ordered pursuant to G.S. 74-59, the Department and its representatives and its contractors shall have the right to make whatever entries on the land and to take whatever actions may be necessary in order to carry out reclamation which the operator has failed to complete.

Before deciding whether to grant a new permit, the Department shall circulate copies of a notice of application for review and comment as it deems advisable. The Department shall grant or deny the permit requested as expeditiously as possible, but in no event later than 60 days after the application form and any relevant and material supplemental information reasonably required shall have been filed with the Department, or if a public hearing is held, within 30 days following the hearing and the filing of any relevant and material supplemental information reasonably required by the Department. Priority consideration shall be given to applicants who submit evidence that the mining proposed will be for the purpose of supplying materials to the Board of Transportation.

Upon its determination that significant public interest exists, the Department shall conduct a public hearing on any application for a new mining permit. Such hearing shall be held before the Department reaches a final decision on the application, and in making its determination, the Department shall give full consideration to all comments submitted at the public hearing. Such public hearing shall be held within 60 days of the filing of the application.

The Department may deny such permit upon finding:

- (1) That any requirement of this Article or any rule or regulation promulgated hereunder will be violated by the proposed operation;
- (2) That the operation will have unduly adverse effects on wildlife or fresh water, estuarine, or marine fisheries;
- (3) That the operation will violate standards of air quality, surface water quality, or groundwater quality which have been promulgated by the Department of Natural Resources and Community Development;
- (4) That the operation will constitute a substantial physical hazard to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property;
- (5) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;
- (6) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or
- (7) That the operator has not corrected all violations which he may have committed under any prior permit and which resulted in,
 - a. Revocation of his permit,
 - b. Forfeiture of part or all of his bond or other security,
 - c. Conviction of a misdemeanor under G.S. 74-64, or
 - d. Any other court order issued under G.S. 74-64.

In the absence of any such findings, a permit shall be granted.

Any permit issued shall be expressly conditioned upon compliance with all requirements of the approved reclamation plan for the operation and with such further reasonable and appropriate requirements and safeguards as may be deemed necessary by the Department to assure that the operation will comply fully with the requirements and objectives of this Article. Such conditions may, among others, include a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where the Department finds such screening to be feasible and desirable. Violation of any such conditions shall be treated as a violation of this Article and shall constitute a basis for suspension or revocation of the permit.

Any operator wishing any modification of the terms and conditions of his permit or of the approved reclamation plan shall submit a request for modification in accordance with the provisions of G.S. 74-52.

If the Department denies an application for a permit, it shall notify the operator in writing, stating the reasons for its denial and any modifications in the application which would make it acceptable. The operator may thereupon modify his application or file an appeal, as provided in G.S. 74-61, but no such appeal shall be taken more than 60 days after notice of disapproval has been mailed to him at the address shown on his application.

Upon approval of an application, the Department shall set the amount of the performance bond or other security which is to be required pursuant to G.S. 74-54. The operator shall have 60 days following the mailing of such notification in which to deposit the required bond or security with the Department. The operating permit shall not be issued until receipt of this deposit.

When one operator succeeds to the interest of another in any uncompleted mining operation, by virtue of a sale, lease, assignment, or otherwise, the Department may release the first operator from the duties imposed upon him by this Article with reference to such operation and transfer the permit to the successor operator; provided, that both operators have complied with the requirements of this Article and that the successor operator assumes the duties of the first operator with reference to reclamation of the land and posts a suitable bond or other security. (1971, c. 545, s. 6; 1973, c. 507, s. 5; 1977, c. 771, s. 4; c. 845, s. 2; 1981, c. 787, ss. 2, 3.)

Effect of Amendments. — The 1981 amendment added the first sentence in the fourth paragraph, inserted "relevant and material" following "form and any" and "reasonably" preceding "required shall have" in the second

sentence of the fourth paragraph, added the language beginning "or if a public hearing" at the end of that sentence, and added the fifth paragraph.

§ 74-54. Bonds.

Each applicant for an operating permit, or for the renewal thereof, shall file with the Department following approval of his application and shall thereafter maintain in force a bond in favor of the State of North Carolina, executed by a surety approved by the Commissioner of Insurance, in the amount set forth below. The bond herein provided for must be continuous in nature and shall remain in force until cancelled by the surety. Cancellation by the surety shall be effectuated only upon 60 days written notice thereof to the Department and to the operator.

The applicant shall have the option of filing a separate bond for each operating permit or of filing a blanket bond covering all mining operations within the State for which he holds a permit. The amount of each bond shall be based upon the area of affected land to be reclaimed under the approved reclamation plan or plans to which it pertains, less any such area where reclamation has been completed and released from coverage by the Department, pursuant to G.S. 74-56, or based on such other criteria established by the Mining Commission. The Department shall set the amount of the required bond in all cases, based upon a schedule established by the Mining Commission.

The bond shall be conditioned upon the faithful performance of the requirements set forth in this Article and of the rules and regulations adopted pursuant thereto. Liability under the bond shall be maintained as long as reclamation is not completed in compliance with the approved reclamation plan unless released only upon written notification from the Department. Notification shall be given upon completion of compliance or acceptance by the Department of a substitute bond. In no event shall the liability of the surety exceed the amount of the surety bond required by this section.

In lieu of the surety bond required by this section, the operator may file with the Department a cash deposit, negotiable securities, a mortgage of real property acceptable to the Department, or an assignment of a savings account in a North Carolina bank on an assignment form prescribed by the Department.

If the license to do business in North Carolina of any surety upon a bond filed pursuant to this Article should be suspended or revoked, the operator shall, within 60 days after receiving notice thereof, substitute for such surety a good and sufficient corporate surety authorized to do business in this State. Upon failure of the operator to make such substitution, his permit shall automatically become void and of no effect. (1971, c. 545, s. 9; 1981, c. 787, s. 4.)

Effect of Amendments. — The 1981 amendment substituted "a permit" for "permits" at the end of the first sentence of the second paragraph, substituted "where" for "whose" in the second sentence of the second paragraph, added the language beginning "or based on" at the end

of that sentence, and made minor changes in punctuation in that sentence. The amendment substituted the third sentence of the second paragraph for a former third sentence that set out the specific amount of the bonds required, based upon the area of land to be reclaimed.

§ 74-64. Penalties for violations.**(a) Civil Penalties.**

- (1) a. A civil penalty of not more than five thousand dollars (\$5,000) may be assessed by the Department against any person who fails to secure a valid operating permit prior to engaging in mining, as required by G.S. 74-50. No civil penalty shall be assessed until the operator has been given notice of the violation pursuant to G.S. 74-60. Each day of a continuing violation shall constitute a separate violation and a civil penalty of not more than five thousand dollars (\$5,000) per day may be assessed for each day the violation continues.
- b. Any permitted operator who violates any of the provisions of this Article, any rules or regulations promulgated thereunder, or any of the terms and conditions of his mining permit shall be subject to a civil penalty of not more than one hundred dollars (\$100.00). Each day of a continuing violation shall constitute a separate violation. Prior to the assessment of any such civil penalty, written notice of the violation shall be given. The notice shall describe the violation with reasonable particularity, shall specify a time period reasonably calculated to permit the violator to complete actions to correct the violation, and shall state that failure to correct the violation within that period may result in the assessment of a civil penalty.
- (2) The Department shall determine the amount of the civil penalty to be assessed pursuant to G.S. 74-64(a)(1) and shall give notice to the operator of the assessment of the civil penalty pursuant to G.S. 74-60. Said notice shall set forth in detail the violation or violations for which the civil penalty has been assessed. The operator may appeal the assessment of any civil penalty assessed pursuant to this section in accordance with the procedures set forth in G.S. 74-61.
- (3) If payment of any civil penalty assessed pursuant to this section is not received by the Department or equitable settlement reached within 30 days following notice to the operator of the assessment of the civil penalty, or within 30 days following the denial of any appeal by the operator pursuant to G.S. 74-61 and 74-62, the Department shall refer the matter to the Attorney General for the institution of a civil action in the name of the State in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the penalty.
- (4) All funds collected pursuant to this section shall be placed in the special fund created pursuant to G.S. 74-59 and shall be used to carry out the purposes of this Article.
- (5) In addition to other remedies, the Department may request the Attorney General to institute any appropriate action or proceedings to prevent, restrain, correct or abate any violation of this Article or any rules and regulations promulgated hereunder.

(b) Criminal Penalties. — In addition to other penalties provided by this Article, any operator who engages in mining in willful violation of the provisions of this Article or of any rules and regulations promulgated hereunder or who willfully misrepresents any fact in any action taken pursuant to this Article or willfully gives false information in any application or report required by this Article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000) for each offense. Each day of continued violation after written notification shall be considered a separate offense. (1971, c. 545, s. 19; 1979, c. 252, s. 2; 1981, c. 787, ss. 7, 8.)

Effect of Amendments. — The 1981 amendment redesignated the former subdivision (a)(1) as the present subdivision (a)(1)a, added subdivi-

vision (a)(1)b, and inserted "or equitable settlement reached" near the beginning of subdivision (a)(3).

Chapter 74A.

Company Police.

Sec.

74A-2. Oath and powers of company police;
exceptions as to railroad police.

§ 74A-2. Oath and powers of company police; exceptions as to railroad police.

(a) Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath.

(b) Such policemen, while in the performance of the duties of their employment, shall severally possess all the powers of municipal and county police officers to make arrests for both felonies and misdemeanors:

- (1) Upon property owned by or in the possession and control of their respective employers; or
- (2) Upon property owned by or in the possession and control of any person or persons who shall have contracted with their employer or employers to provide security for protective services for such property; or
- (3) Upon any other premises while in hot pursuit of any person or persons for any offense committed upon property vested in subdivisions (1) and (2) above.

(c) Repealed by Session Laws 1981, c. 884, s. 4.

(d) The limitations on the power to make arrests contained in subdivisions (1), (2) [and] (3) of subsection (b) shall not be applicable to policemen appointed for any railroad company. Policemen appointed for railroad companies shall be required to post a bond in the sum of five hundred dollars (\$500.00) in lieu of the bond required by subsection (c). (1871-2, c. 138, s. 53; Code, s. 1990; Rev., s. 2607; 1907, c. 128, s. 2; c. 462; C. S., s. 3485; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1943, c. 676, s. 2; 1959, c. 124, s. 1; 1963, c. 1165, s. 2; 1965, c. 872; 1969, c. 844, s. 8; 1977, c. 148, s. 4; 1981, c. 884, s. 4.)

Effect of Amendments. — The 1981 amendment, deleted subsection (c), relating to bonds of company policeman.

Chapter 74C.

Private Protective Services Act.

Sec.

74C-3. Private protective services business defined.

74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

74C-10. Bond and certificate of liability insur-

Sec.

ance required; form and approval; action on bonds; suspension for noncompliance.

74C-12. Suspension or revocation of licenses; appeal.

Cross References. — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

§ 74C-3. Private protective services business defined.

(a) As used in this Chapter, the term "private protective services business" means and includes the following:

- (1) "Armored car business" means any person, firm, association, or corporation which provides secured transportation and protection from one place or point to another place or point of money, currency, coins, bullion, securities, checks, documents, stocks, bonds, jewelry, paintings, and other valuables for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer. This definition does not include a person operating an armored car business pursuant to a motor carrier certificate or permit issued by the North Carolina Utilities Commission which grants operating rights for such business; however, armed armored car service guards shall be subject to the provisions of G.S. 74C-13.
- (2) "Alarm system business" means any person, firm, association, or corporation which installs, services, or responds to electrical, electronic, or mechanical alarm signal devices, burglar alarms, television cameras or still cameras used to detect burglary, breaking or entering or intrusion, shoplifting, pilferage, or theft, for a fee or other valuable consideration. Provided, however, it shall not include a business which merely sells or manufactures alarm systems unless such business services, installs, or responds to alarm systems at the protected premises. Provided further, this definition does not include a person, firm, association, or corporation which merely owns and installs an alarm system on property owned or leased by itself. Provided further, the regulation of alarm system businesses shall not include installation, servicing, or responding to fire alarm systems or any alarm device which is installed in a motor vehicle, aircraft, or boat. Provided further, the regulation of alarm system businesses shall be exclusive to the Board, but any city or county shall not be prevented from requiring within its jurisdiction to register the alarm system companies' names and to file copies of board certification or from adopting an ordinance to require users of alarm systems to obtain permits when

usage involves automatic signal transmission to a law enforcement agency.

- (3) "Counterintelligence service business" means any person, firm, association, or corporation which discovers, locates, or disengages by electronic, electrical, or mechanical means any listening or other monitoring equipment surreptitiously placed to gather information concerning any individual, firm, association, or corporation for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer.
- (4) "Courier service business" means any person, firm, association, or corporation which transports or offers to transport from one place or point to another place or point documents, papers, maps, stocks, bonds, checks, or other small items of value which require expeditious service for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer. This definition does not include a person operating a courier service business pursuant to a motor carrier certificate or permit issued by the North Carolina Utilities Commission which grants operating rights for such business; however, armed courier service guards shall be subject to the provisions of G.S. 74C-13.
- (5) "Detection of deception examiner" means any person, firm, association, or corporation which uses any device or instrument, regardless of its name or design, for the purpose of detection of deception.
- (6) "Security guard and patrol business" means any person, firm, association, or corporation engaging in the business of providing a private watchman, guard, or street patrol service on a contractual basis for another person, firm, association, or corporation for a fee or other valuable consideration and performing one or more of the following functions:
 - a. Prevention and/or detection of intrusion, entry, larceny, vandalism, abuse, fire, or trespass on private property;
 - b. Prevention, observation, or detection of any unauthorized activity on private property; and
 - c. Protection of patrons and persons lawfully authorized to be on the premises of the person, firm, association, or corporation for whom he contractually obligated to provide security services; and
 - d. Control, regulation, or direction of the flow or movement of the public, whether by vehicle or otherwise, only to the extent and for the time directly and specifically required to assure the protection of properties.

This definition does not include a person employed regularly and exclusively as an employee by an employer in connection with the business affairs of such employer; provided, however, that nothing in this Chapter shall be construed to prohibit a law-enforcement officer from being employed during his off-duty hours by a licensed security guard and patrol company on an employer-employee basis; provided further, that the police officer shall not wear his police officer's uniform or use police equipment while working for a security guard and patrol company. This definition does not include a law-enforcement officer who provides security guard and patrol services on an individual employer-employee basis to a person, firm, association, or corporation which is not engaged in a security guard and patrol business.

- (7) "Guard-dog service business" means any person, firm, association, or corporation which contracts with another person, firm, association, or

corporation to place, lease, rent, or sell a trained dog for the purpose of protecting lives or property for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer.

(8) "Private detective" or "private investigator" means any person who engages in the business of or accepts employment to furnish, agrees to make, or makes an investigation for the purpose of obtaining information with reference to:

- a. Crime or wrongs done or threatened against the United States or any state or territory of the United States;
- b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;
- c. The location, disposition, or recovery of lost or stolen property;
- d. The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties, provided that scientific research laboratories and consultants shall not be included in this definition;
- e. Securing evidence to be used before any court, board, officer, or investigation committee; or
- f. Protection of individuals from serious bodily harm or death.

However, the employee of a security department of a private business which conducts investigations exclusively on matters internal to the business affairs of the business shall not be required to be licensed as a private detective or investigator under this Chapter.

(b) "Private protective services" shall not mean:

- (1) Insurance adjusters legally employed as such and who engage in no other investigative activities unconnected with adjustment or claims against an insurance company;
- (2) An officer or employee of the United States, this State, or any political subdivision of either while such officer or employee is engaged in the performance of his official duties within the course and scope of his employment with the United States, this State, or any political subdivision of either;
- (3) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating or creditworthiness of persons; and a person who provides consumer reports in connection with:
 - a. Credit transactions involving the consumer on whom the information is to be furnished and involving the extensions of credit to the consumer,
 - b. Information for employment purposes,
 - c. Information for the underwriting of insurance involving the consumer,
 - d. Information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility, or
 - e. A legitimate business need for the information in connection with a business transaction involving the consumer;
- (4) An attorney at law licensed to practice in North Carolina while engaged in such practice and his agent, provided said agent is performing duties only in connection with his master's practice of law;
- (5) The legal owner or lien holder, and his agents and employees, of personal property which has been sold in a transaction wherein a

security interest in personal property has been created to secure the sales transaction, who engage in repossession of said personal property;

- (6) Company police or railroad police as defined in Chapter 74A of the General Statutes of North Carolina;
- (7) Repealed by Session Laws 1981, c. 807, s. 1.
- (8) Employees of a licensee who are employed exclusively as undercover agents; provided that for purposes of this section, undercover agent means an individual hired by another person, firm, association, or corporation to perform a job in and/or for that person, firm, association, or corporation and, while performing such job, to act as an undercover operative, employee, or independent contractor of a licensee, but under the supervision of a licensee. (1973, c. 528, s. 1; 1977, c. 481; 1979, c. 818, s. 2; 1981, c. 807, ss. 1-3.)

Effect of Amendments. — The 1981 amendment added the third sentences in both subdivision (a)(1) and subdivision (a)(4), and repealed subdivision (b)(7), which read:

"Persons, firms, associations, or corporations operating under a motor carrier permit or certificate issued by the North Carolina Utilities Commission; or."

§ 74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

(a) The Private Protective Services Board is hereby established in the Department of Justice to administer the licensing and set educational and training requirements for persons, firms, associations, and corporations engaged in the private protective services businesses within this State.

(b) The Board shall consist of 10 members: the Attorney General or his designated representative, two persons appointed by the Attorney General, one person appointed by the Governor, two persons appointed by the Lieutenant Governor, one person appointed by the President pro tem of the Senate and three persons appointed by the Speaker of the House of Representatives. Those persons appointed by the President pro tem of the Senate and the Speaker of the House of Representatives shall be licensees under this Chapter. All other persons appointed to the Board may not be licensees of the Board nor licensed by the Board while serving as a Board member. The terms of the Board members shall begin as follows: the Attorney General shall appoint two persons to serve terms of two years beginning July 1, 1979; the person appointed by the Governor shall serve a term of four years beginning July 1, 1979; the person appointed by the Lieutenant Governor shall serve a term of four years beginning July 1, 1979; the person appointed by the President pro tem of the Senate shall serve a term of two years beginning July 1, 1979, and the Speaker of the House of Representatives shall appoint one person to serve a term of four years and one person to serve a term of two years beginning July 1, 1979. No person shall be eligible for reappointment to the Board after eight years of continuous service as a member of the Board established herein. Board members may continue to serve until their successors have been appointed.

(c) Vacancies on the Board occurring for any reason shall be filled by the authority making the original appointment of the person causing the vacancy.

(d) Each member of the Board, before assuming the duties of his office, shall take an oath for the faithful performance of his duties. A Board member may be removed at the pleasure of the authority making the original appointment or by the Board for misconduct, incompetence, or neglect of duty.

(e) Members of the Board who are State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for

their expenses in accordance with G.S. 138-6. Members of the Board who are full-time salaried public officers or employees other than State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6 in the same manner as State officers or employees. All other Board members shall receive per diem compensation and reimbursement in accordance with G.S. 93B-5.

(f) The Board shall elect a chairman, vice-chairman, and other officers and committee chairmen from among its members as the Board deems necessary and desirable at the first meeting after July 1 of each year. The chairman and vice-chairman shall be selected by the members of the Board for a term of one year and shall be eligible for reelection. The Board shall meet at the call of the chairman or a majority of the members of the Board at such time, date, and location as may be decided upon by a majority of the Board.

(g) All decisions heretofore made by the Private Protective Services Board, established pursuant to Chapter 74B, shall remain in full force and effect unless and until repealed or suspended by action of the Private Protective Services Board established herein. All rules and regulations heretofore adopted pursuant to the provisions of Chapter 150A of the General Statutes by the Private Protective Services Board, established pursuant to Chapter 74B, shall remain in full force and effect until, but not later than January 1, 1980, or until repealed or suspended by action of the Private Protective Services Board established herein. (1973, c. 528, s. 1; 1975, c. 592, ss. 8, 9; 1977, c. 535; 1979, c. 818, s. 2; 1981, c. 148, s. 1; c. 807, s. 7.)

Effect of Amendments. — The first 1981 amendment substituted "10" for "eight" following "consist of" in the first sentence of subsection (b), and substituted "two" for "one" following "by the Governor" and "three" for "two" following "of the Senate and" in that sentence.

Session Laws 1981, c. 148, s. 2 provides: "The one additional appointment to be made by the Lieutenant Governor and the one additional

appointment to be made by the Speaker of the House shall be made within 10 days of the effective date of this act and in a manner prescribed by Chapter 74C. The persons initially appointed pursuant to this section shall serve until July 1, 1983, and the terms for these appointments shall be for two years thereafter." The act was ratified March 31, 1981.

The second 1981 amendment added the last sentence in subsection (b).

§ 74C-10. Bond and certificate of liability insurance required; form and approval; action on bonds; suspension for noncompliance.

(a) An applicant for a license or a trainee permit shall not be issued such license or permit unless the applicant files with the board and maintains a surety bond executed by a surety company authorized to do business in this State in a sum of not less than five thousand dollars (\$5,000) or a cash bond, in lieu of the surety bond in a sum of not less than five thousand dollars (\$5,000), to protect the public from the wrongful or illegal acts of the bond principal or his agents operating in the course and scope of his agency. Only one bond shall be required of an applicant regardless of the number of licenses or trainee permits which he is issued under this Chapter.

(b) The bond shall be taken in the name of the people of the State of North Carolina. Every person injured by wrongful or illegal acts of the principal or his agents operating in the course and the scope of his or her agency may bring an action on the bond in his or her name to recover damages suffered by reason of such wrongful act. Provided, however, the aggregate liability of the surety for all breaches of the condition of bond shall, in no event, exceed the sum of said bond.

(c) Persons registered pursuant to G.S. 74C-11 shall not be required to obtain a surety bond or certificate of liability insurance. The holder of a private detective trainee permit must satisfy the bond requirements of this section within 90 days of the issuance of said permit.

(d) The surety on said bond shall have a right to cancel such bond upon giving a 30-day notice to the Board. Provided, however, that such cancellation shall not affect any liability on the bond which accrued prior thereto. The bond shall be approved by the Board as to form, execution, and sufficiency of the sureties thereon.

(e) No license shall be issued under this Chapter unless the applicant files with the Board evidence of a policy of liability insurance which policy must provide for the following minimum coverage: fifty thousand dollars (\$50,000) because of bodily injury or death of one person as a result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his employment; subject to said limit for one person, one hundred thousand dollars (\$100,000) because of bodily injury or death of two or more persons as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency; twenty thousand dollars (\$20,000) because of injury to or destruction of property of others as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency.

(f) An insurance carrier shall have the right to cancel such policy of liability insurance upon giving a 30-day notice to the Board. Provided, however, that such cancellation shall not affect any liability on the policy which accrued prior thereto. The policy of liability shall be approved by the Board as to form, execution, and terms thereon.

(g) The holder of a private detective trainee permit and persons registered pursuant to G.S. 74C-11 shall not be required to obtain a certificate of liability insurance.

(h) Every licensee shall at all times maintain on file with the Board the surety bond and certificate of insurance required by this Chapter in full force and effect and upon failure to do so, the license of such licensee shall be automatically suspended and shall not be reinstated until an application therefor, in the form prescribed by the Board, is filed together with a proper bond, insurance certificate, or both.

No cancellation or refusal to renew by an insurer of a licensee under this Chapter shall be effective unless the insurer has given the insured licensee notice of the cancellation or refusal to renew. Upon termination of insurance coverage for said licensee, the insurer shall give notice to the Administrator of the Board.

(i) The Board may deny the application notwithstanding the applicant's compliance with this section:

- (1) For any reason which would justify refusal to issue or a suspension or revocation of a license; or
- (2) For the performance by applicant of any practice while under suspension for failure to keep this bond or insurance certificate in force, for which a license under this Chapter is required. (1973, c. 528, s. 1; 1979, c. 818, s. 2; 1981, c. 807, ss. 4, 5.)

Effect of Amendments. — The 1981 amendment substituted "An" for "No licensee or" at the beginning of the first sentence of subsection (a), and, in that sentence, substituted "or a trainee permit shall not be issued such license or permit" for "shall be licensed under this Chapter," deleted "licensee or" following

"unless the," deleted "for a license" preceding "files with the," and deleted "or her" following "scope of his." The amendment substituted "an applicant" for "a licensee" and inserted "or trainee permits" in the second sentence of subsection (a), and added the second paragraph in subsection (h).

§ 74C-12. Suspension or revocation of licenses; appeal.

(a) The Board may, after compliance with Chapter 150A of the General Statutes, suspend or revoke a license issued under this Chapter if it is determined that the licensee has:

- (1) Made any false statement or given any false information in connection with any application for a license or trainee permit or for the renewal or reinstatement of a license or trainee permit;
- (2) Violated any provision of this Chapter;
- (3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter;
- (4) Been convicted of any crime involving moral turpitude or any other crime involving violence or the illegal use, carrying, or possession of a dangerous weapon;
- (5) Impersonated or permitted or aided and abetted any other person to impersonate a law-enforcement officer of the United States, this State, or any of its political subdivisions;
- (6) Engaged in or permitted any employee to engage in a private protective services business when not lawfully in possession of a valid license issued under the provisions of this Chapter;
- (7) Willfully failed or refused to render to a client service or a report as agreed between the parties and for which compensation had been paid or tendered in accordance with the agreement of the parties;
- (8) Knowingly made any false report to the employer or client for whom information is being obtained;
- (9) Committed an unlawful breaking or entering, assault, battery, or kidnapping;
- (10) Knowingly violated or advised, encouraged, or assisted the violation of any court order or injunction in the course of business as a licensee;
- (11) Committed any other act which is a ground for the denial of an application for a license under this Chapter;
- (12) Undertaken to give legal advice or counsel or to in any way falsely represent that he is representing any attorney or he is appearing or will appear as an attorney in any legal proceeding;
- (13) To issue, deliver, or utter any simulation of process of any nature which might lead a person or persons to believe that such simulation — written, printed, or typed — may be a summons, warrant, writ or court process, or any pleading in any court proceeding;
- (14) Failure to maintain the cash bond, surety bond, or certificate of liability insurance required by this Chapter;
- (15) Violation of the firearm provisions set forth in this Chapter;
- (16) Committed any act prohibited under G.S. 74C-16;
- (17) Failure to notify the administrator by a business entity other than a sole proprietorship licensed pursuant to this Chapter of the cessation of employment of the business entity's qualifying agent within the time set forth in this Chapter;
- (18) Failure to obtain a substitute qualifying agent by a business entity within 30 days after its qualifying agent has ceased to serve as the business entity's qualifying agent;
- (19) Any judgment of incompetency by a court having jurisdiction under Chapter 35 of the General Statutes or commitment to a mental health facility for treatment of mental illness, as defined in G.S. 122-36(d), by a court having jurisdiction under Article 5A of Chapter 122 of the General Statutes.

(b) The revocation or suspension of a license by the Board as provided in subsection (a) shall be in writing, signed by the Administrator of the Board stating the grounds upon which the Board decision is based. The aggrieved

person shall have the right to appeal from such decision as provided in Chapter 150A of the General Statutes. (1979, c. 818, s. 2; 1981, c. 807, s. 6.)

Effect of Amendments.—The 1981 amendment substituted “compliance with Chapter 150A of the General Statutes” for “notice and

an opportunity for hearing" in the introductory clause of subsection (a).

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

Sec.

75-1. Combinations in restraint of trade illegal.

Sec.

75-33. Representation of eligibility to win a prize.

ARTICLE 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy shall be guilty of a Class H felony. (1913, c. 41, s. 1; C. S., s. 2559; 1981, c. 764, s. 2.)

Cross References. —

As to illegal combinations in restraint of trade by contractors, subcontractors, and suppliers in dealing with governmental agencies, see §§ 133-23 through 133-33.

Effect of Amendments. — The 1981 amendment substituted "Class H felony" for a clause making a violation of the section a misdemeanor and providing punishments therefor. Session Laws 1981, c. 764, s. 4, provides: "This act shall become effective 60 days after ratifica-

tion and shall be prospective in its application." The act was ratified July 2, 1981.

Session Laws 1981, c. 764, s. 3 contains a severability clause.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

The common law on restraint of trade, etc. —

In accord with original. See *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

Law Applying Sherman Act, etc. —

In accord with original. See *Hester v. Martindale-Hubbell, Inc.*, 493 F. Supp. 335 (E.D.N.C. 1980).

II. WHAT COMBINATIONS AND CONTRACTS ILLEGAL.

Impact on Competitive Conditions Proper Focus. — The proper focus is not

whether plaintiff-victim and defendant-conspirator were in actual competition with each other, but is upon the challenged restraint's impact on competitive conditions. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

III. PLEADING AND PRACTICE.

Burden of Proving Unreasonableness, etc. —

In accord with original. See *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

Cited in *Ratcliff v. Burney*, 505 F. Supp. 105 (W.D.N.C. 1981).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

Cross References. — As to remedies to prevent fraud and abuse by discount buying clubs, see § 66-136.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

The purpose of the statute outlined in subsection (b) of this section makes clear that the act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith at all levels of commerce in North Carolina. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

The 1977 amendments to this section constituted a substantive revision, etc. —

In accord with 1980 Int. Supp. See *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980).

The 1977 amendments to this section are not to be applied retroactively. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980).

The federal decisions construing the Federal Trade Commission Act, etc. —

Because of the similarity in language of this section and § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), it is appropriate for the Supreme Court to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of this section. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

Relation Between This Section and § 75-16. — As an essential element of a cause of action under § 75-16, plaintiff must prove not only a violation of this section by the defendants, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

II. SCOPE OF SECTION.

Trade or Commerce Context Prerequisite. — Before a practice can be declared unfair or deceptive under this section, it must first be determined that the practice or conduct which is complained of takes place within the context of this section's language pertaining to trade or commerce. *Johnson v. Phoenix Mut.*

Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980).

"Commerce" Comprehends an Exchange. — The use of the word "trade" interchangeably with the word "commerce" indicates that this section contemplated a narrower definition of commerce which would comprehend an exchange of some type. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

Rental of spaces in a mobile home park is "trade and commerce" within the meaning of this statute. *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980), modified and aff'd, — N.C. —, 276 S.E.2d 397 (1981).

The relationship of borrower and mortgage broker and the activities which are appurtenant to it are components of the larger concept of trade or commerce and therefore come within the purview of this section, though no tangible property of any kind moves through commerce because of this relationship, since an exchange of value does occur as a result of the process of securing a broker as the representative of the potential borrower. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

Unfair and deceptive acts and practices in the insurance industry are not regulated exclusively by the insurance statutes, § 58-54.1 et seq., and may constitute the basis of recovery under this section. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Misbranding Constituted Deceptive Practice As Matter of Law. — Defendant's failure properly to label drums of antifreeze constituted a misbranding under former § 106-571(2), and such misbranding was a deceptive practice within the meaning of this section as a matter of law. *State ex rel. Edmisten v. Zim Chem. Co.*, 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Intentional Breach of Contract. — In an action for breach of contract alleging unfair

competition, the trial court properly denied treble damages where the defendant's violation of its contractual obligation was an intentional breach, but there was neither unfairness nor deception in formulation of the contract; where the jury found no deception in the circumstances of its breach; where the contract was carefully negotiated and drawn by sophisticated parties; and where there was no hint of any unfairness to either party before the defendant's cessation of performance; thus, no unfairness inhered in the circumstances of the breach within the meaning of § 75-1.1 simply because the breach was intentional and not properly disclosed. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981).

Conduct Not Amounting to Unfair Trade Practice. — In an action to recover from defendant who had been given the exclusive right to negotiate a permanent loan for plaintiff partners to construct a shopping center, defendant mortgage broker did not engage in any conduct which would amount to an unfair trade practice where defendant was at all times cooperative, doing what it could as an intermediary with defendant lender so as to secure for plaintiff partnership the terms and modifications it desired to have; as a result of defendant broker's efforts there was no difficulty posed in obtaining the consent of defendant lender for substitution of tenants; there was no evidence that defendant broker exerted itself in any manner which would have contributed to the problem of securing tenants for plaintiff's shopping center; and there was no evidence that defendant broker had anything to do with the construction lender's withdrawal from the shopping center project. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

So That Summary Judgment Proper. — The trial court did not err in granting defendant mortgage broker's motion for summary judgment as to plaintiff's claim for relief based on a deceptive trade practice where nothing in the depositions or affidavits supported the view

that statements by defendant's employee were deceptive, and defendant at all times undertook to keep plaintiff partnership accurately and clearly informed of the state of affairs concerning the loan commitment from defendant lender. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

Activities Insufficient to "Surround" or "Affect" Sale. — Where the actions alleged to be unfair under this section did not change the legal obligations of the parties or cause a change in title to the assets, the activities of defendant would not "surround" or "affect" a sale. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980).

III. PLEADING AND PRACTICE.

Whether there be a causal relation between the violation of the statute and the injury complained of is an issue of fact for a jury. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Damages may be recovered either for breach of contract or for violation of this section, but not for both, where the same course of conduct gives rise to a traditionally recognized cause of action as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of this section. *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980), modified and *aff'd*, — N.C. —, 276 S.E.2d 397 (1981).

Applied in *Hester v. Martindale-Hubbell, Inc.*, 493 F. Supp. 335 (E.D.N.C. 1980).

Cited in *Shields v. Bobby Murray Chevrolet, Inc.*, 300 N.C. 366, 266 S.E.2d 658 (1980); *Twin City Apts., Inc. v. Landrum*, 45 N.C. App. 490, 263 S.E.2d 323 (1980); *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E.2d 9 (1980); *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 266 S.E.2d 14 (1980); *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980); *Vickery v. Olin Hill Constr. Co.*, 47 N.C. App. 98, 266 S.E.2d 711 (1980); *Hammers v. Lowe's Cos.*, 48 N.C. App. 150, 268 S.E.2d 257 (1980).

§ 75-2. Any restraint in violation of common law included.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

Actionable conspiracy to restrain trade must operate to the prejudice of the public, in keeping with the common law's "Rule of Reason," accordingly, public damage must be alleged and proven. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

Impact on Competitive Conditions

Proper Focus. — The proper focus is not whether plaintiff-victim and defendant-conspirator were in actual competition with each other, but is upon the challenged restraint's impact on competitive conditions. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

§ 75-4. Contracts to be in writing.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-5. Particular acts prohibited.**Legal Periodicals.** —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-6. Violation a misdemeanor; punishment.**Legal Periodicals.** —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-7. Persons encouraging violation guilty.**Legal Periodicals.** —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

Cited in *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980).

§ 75-8. Continuous violations separate offenses.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-9. Duty of Attorney General to investigate.**Legal Periodicals. —**

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-10. Power to compel examination.**Legal Periodicals. —**

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-11. Person examined exempt from prosecution.**Legal Periodicals. —**

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-12. Refusal to furnish information; false swearing.**Legal Periodicals. —**

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-13. Criminal prosecution; district attorneys to assist; expenses.**Legal Periodicals. —**

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-14. Action to obtain mandatory order.**Legal Periodicals. —**

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

§ 75-15. Actions prosecuted by Attorney General.**Legal Periodicals. —**

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 Wake Forest L. Rev. No. 4 (1981).

CASE NOTES

Applied in *State ex rel. Edmisten v. Zim Chem. Co.*, 45 N.C. App. 604, 263 S.E.2d 849 (1980).

§ 75-15.1. Restoration of property and cancellation of contract.

Legal Periodicals. — For a comment on the business opportunity approach to regulating

the sale of franchise, see 17 *Wake Forest L. Rev.* No. 4 (1981).

CASE NOTES

Unnecessary To Return Valueless Property. — It was unnecessary that the parties receiving restitution be ordered to return the drums of mislabeled and useless antifreeze to the seller, where the record clearly showed that the antifreeze had no value. *State ex rel. Edmisten v. Zim Chem. Co.*, 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Interest on Judgment. — In an action

under § 75-5 to enjoin deceptive acts and practices in the sale of antifreeze, interest on the court's judgment ordering defendant to make restoration payments to 33 customers was governed by § 24-5 and should have been awarded only from the time of entry of the judgment. *State ex rel. Edmisten v. Zim Chem. Co.*, 45 N.C. App. 604, 263 S.E.2d 849 (1980).

§ 75-15.2. Civil penalty.

Legal Periodicals. —

For a comment on the business opportunity

approach to regulating the sale of franchise, see 17 *Wake Forest L. Rev.* No. 4 (1981).

CASE NOTES

Cited in *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980).

§ 75-16. Civil action by person injured; treble damages.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 *N.C.L. Rev.* 199 (1972).

For a comment on the business opportunity approach to regulating the sale of franchise, see 17 *Wake Forest L. Rev.* No. 4 (1981).

CASE NOTES

While this section is punitive, it is not a penal statute. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980).

Intentional Breach of Contract. — In an action for breach of contract alleging unfair competition, the trial court properly denied treble damages where the defendant's violation of its contractual obligation was an intentional breach, but there was neither unfairness nor deception in formulation of the contract; where the jury found no deception in the circumstances of its breach; where the contract was

carefully negotiated and drawn by sophisticated parties; and where there was no hint of any unfairness to either party before the defendant's cessation of performance; thus, no unfairness inhered in the circumstances of the breach within the meaning of § 75-1.1 simply because the breach was intentional and not properly disclosed. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir. 1981).

Causal Relation Issue of Fact for Jury. — Whether there be a causal relation between the violation of the statute and the injury com-

plained of is an issue of fact for a jury. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Actual Injury Must Be Proved. — As an essential element of a cause of action under this section, plaintiff must prove not only a violation of § 75-1.1 by the defendants, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

State Court Antitrust Consent Decree Res Judicata in Federal Court on Identical Cause of Action. — There was a sufficient identity of causes of action between a state

court antitrust action and a federal district court antitrust action to support a finding of res judicata based on the consent judgment in the earlier state court action, where the two suits alleged the same operative facts and the same illegal price-fixing conspiracy, and the state and federal statutes upon which the actions were based were identical except for the interstate commerce requirement of the federal statute. *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981).

Applied in *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

Cited in *Hammers v. Lowe's Cos.*, 48 N.C. App. 150, 268 S.E.2d 257 (1980).

§ 75-16.1. Attorney fee.

Legal Periodicals. — For a comment on the business opportunity approach to regulating

the sale of franchise, see 17 *Wake Forest L. Rev.* No. 4 (1981).

CASE NOTES

Award of attorneys' fees pursuant to this section is not permissible where court has found that § 75-1.1 either did not apply or

was not violated. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980).

§ 75-16.2. Limitation of actions.

Legal Periodicals. — For survey of 1979 commercial law, see 58 *N.C.L. Rev.* 1290 (1980).

For a comment on the business opportunity

approach to regulating the sale of franchise, see 17 *Wake Forest L. Rev.* No. 4 (1981).

§ 75-17. Lender may not require borrower to deal with particular insurer.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 *N.C.L. Rev.* 199 (1972).

§ 75-18. Lender may require nondiscriminatory approval of insurer.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 *N.C.L. Rev.* 199 (1972).

§ 75-19. Violators subject to fine and injunction.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 *N.C.L. Rev.* 199 (1972).

§ 75-27. Unsolicited merchandise.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-28. Unauthorized disclosure of tax information; violation a misdemeanor.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-33. Representation of eligibility to win a prize.

(a) No person, firm or corporation engaged in commerce shall, in connection with the sale or lease or solicitation for sale or lease of any goods, property or service, represent that another person, firm, and/or corporation has a chance to receive any prize or item of value without clearly disclosing on whose behalf the contest or promotion is conducted, and all material conditions which a participant must meet. Additionally, each of the following must be clearly and prominently disclosed immediately adjacent to the description of the item or prize to which it relates:

- (1) The actual retail value of each item or prize (the price at which substantial sales of the item were made in the area within the last 90 days, or if no substantial sales were made, the actual cost of the item or prize to the person on whose behalf the contest or promotion is conducted);
- (2) The actual number of each item or prize to be awarded;
- (3) The odds of receiving each item or prize.

It shall be unlawful to make any representation of the type governed by this section, if it has already been determined which items will be given to the person to whom the representation is made.

(b) The provisions of this section shall not apply where (i) all that is asked of participants is that they complete and mail, or deposit at a local retail commercial establishment, an entry blank obtainable locally or by mail, or call in their entry by telephone, or (ii) at no time are participants asked to listen to a sales presentation.

(c) To the extent that representations of the type governed by this section are broadcast by radio or television or carried by cable-television, the required disclosures need not be made, if the required information is made available to interested persons on request without charge or cost to them.

(d) Nothing in this section shall create any liability for acts by the publisher, owner, agent or employee of a newspaper, periodical, radio station, television station, cable-television system or other advertising medium arising out of the publication or dissemination of any advertisement or promotion governed by this section, when the publisher, owner, agent or employee did not know that the advertisement or promotion violated the requirements of this section. (1979, c. 879, s. 1; 1981, c. 806.)

Effect of Amendments. — The 1981 amendment rewrote the former section as present subsection (a), and added subsections (b), (c), and (d).

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

CASE NOTES

Cited in *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980).

§ 75-51. Threats and coercion.

CASE NOTES

Stated in *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980).

§ 75-54. Deceptive representation.

CASE NOTES

Applied in *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980).

Chapter 75A

Boating and Water Safety.

Article 1.

Sec.

Boating Safety Act.

Sec.

75A-5. Application for numbers; fee; displaying; reciprocity; change of ownership; loss of certificate; presumption from possession of certificate; conformity with

United States regulations; award of certificates; records; renewal of certificates; transfer of interest, abandonment, etc.; change of address; unauthorized numbers.

75A-7. Exemption from numbering requirements.

ARTICLE 1.

Boating Safety Act.

§ 75A-5. Application for numbers; fee; displaying; reciprocity; change of ownership; loss of certificate; presumption from possession of certificate; conformity with United States regulations; award of certificates; records; renewal of certificates; transfer of interest, abandonment, etc.; change of address; unauthorized numbers.

(a) The owner of each motorboat requiring numbering by this State shall file an application for number with the Wildlife Resources Commission on forms approved by it. The application shall be signed by the owner of the motorboat, or his agent, and shall be accompanied by a fee of five dollars and fifty cents (\$5.50) for a one-year period or by a fee of thirteen dollars (\$13.00) for a three-year period; provided, however, there shall be no fee charged for motorboats owned and operated by nonprofit rescue squads if they are operated exclusively for rescue purposes, including rescue training. The applicant shall have the option of selecting a one-year numbering period or a three-year numbering period. Upon receipt of the application in approved form, the Commission shall have the same entered upon the records of its office and issue to the applicant a certificate of number stating the number awarded to the motorboat and the name and address of the owner, and a validation decal indicating the expiration date of the certificate of number. The owner shall paint on or attach to each side of the bow of the motorboat the identification number in such manner as may be prescribed by rules and regulations of the Commission in order that it may be clearly visible. The number shall be maintained in legible condition. The validation decal shall be displayed on the starboard bow of the motorboat immediately following the number. The certificate of number shall be pocket size and shall be available at all times for inspection on the motorboat for which issued, whenever such motorboat is in operation. Provided, however, any person charged with failing to so carry such certificate of number shall not be convicted if he produces in court a certificate of number theretofore issued to him and valid at the time of his arrest.

(b) The owner of any motorboat already covered by a number in full force and effect which has been awarded to it pursuant to then operative federal law or a federally approved numbering system of another state shall record the

number prior to operating the motorboat on the waters of this State in excess of the 90-day reciprocity period provided for in G.S. 75A-7(1). Such recordation shall be in the manner and pursuant to the procedure required for the award of a number under subsection (a) of this section, except that no additional or substitute number shall be issued.

(c) Should the ownership of a motorboat change, a new application form with fee of two dollars (\$2.00) shall be filed with the Wildlife Resources Commission and a new certificate bearing the same number shall be awarded in the manner as provided for in an original award of number. In case a certificate should become lost, a new certificate bearing the same number shall be issued upon payment of a fee of two dollars (\$2.00). Possession of the certificate shall in cases involving prosecution for violation of any provision of this Chapter be prima facie evidence that the person whose name appears therein is the owner of the boat referred to therein.

(d) In the event that an agency of the United States government shall have in force an over-all system of identification numbering for motorboats within the United States, the numbering system employed pursuant to this Chapter by the Wildlife Resources Commission shall be in conformity therewith.

(e) The Wildlife Resources Commission may award any certificate of number directly or may authorize any person to act as agent for the awarding thereof. In the event that a person accepts such authorization, he may be assigned a block of numbers and certificates therefor which upon award, in conformity with this Chapter and with any rules and regulations of the Commission, shall be valid as if awarded directly by the Commission. As compensation for his services any such agent shall be allowed to retain for his own use fifty cents (50¢). It is a misdemeanor punishable in the discretion of the court for any such agent to charge or accept any additional fee, remuneration, or other thing of value for services.

(f) All records of the Wildlife Resources Commission made or kept pursuant to this section shall be public records.

(g) Each certificate of number awarded pursuant to this Chapter, unless sooner terminated or discontinued in accordance with the provisions of this Chapter, shall continue in full force and effect to and including the last day of the same month during which the same was awarded after the lapse of one year in the case of one-year certificate or three years in the case of a three-year certificate. In addition to the year of expiration, the validation decal required by subsection (a) of this section shall indicate the last month during which the certificate is valid. No person shall willfully remove a validation decal from any vessel during the continuance of its validity or alter, counterfeit, or otherwise tamper with a validation decal attached to any vessel for the purpose of changing or obscuring the indicated date of expiration of the certificate of number of such vessel.

(h) Each certificate of number awarded pursuant to this Chapter must be renewed on or before the first day of the month next succeeding that during which the same expires; otherwise, such certificate shall lapse and be void until such time as it may thereafter be renewed. Application for renewal shall be submitted on a form approved by the Wildlife Resources Commission and shall be accompanied by a fee of five dollars and fifty cents (\$5.50) for a one-year period or by a fee of thirteen dollars (\$13.00) for a three-year period; provided, there shall be no fee required for renewal of certificates of number which have been previously issued to commercial fishing boats as defined in G.S. 75A-5.1, upon compliance with all of the requirements of that section.

(i) The owner shall furnish the Wildlife Resources Commission notice of the transfer of all or any part of his interest other than the creation of a security interest in a motorboat numbered in this State pursuant to subsections (a) and (b) of this section or of the destruction or abandonment of such motorboat, within 15 days thereof. Such transfer, destruction, or abandonment shall

terminate the certificate of number for such motorboat except that, in the case of a transfer of a part interest which does not affect the owner's right to operate such motorboat, such transfer shall not terminate the certificate of number.

(j) Any holder of a certificate of number shall notify the Wildlife Resources Commission within 15 days if his address no longer conforms to the address appearing on the certificate, and shall, as a part of such notification, furnish the Commission his new address. The Commission may provide in its rules and regulations for the surrender of the certificate bearing the former address and its replacement with a certificate bearing the new address or for the alteration of an outstanding certificate to show the new address of the holder.

(k) No number other than the number awarded to a motorboat or granted reciprocity pursuant to this Chapter shall be painted, attached, or otherwise displayed on either side of the bow of such motorboat, except the validation decal required by subsection (a) of this section.

(l) When certificates of number are to be issued by agents as provided by subsection (e) of this section, the Wildlife Resources Commission is authorized by regulation to establish the qualifications of such agents, including, but not limited to, their financial responsibility, the locations and types of business operated by them and their facilities for safekeeping of unused certificates of number, validation decals, and the monetary proceeds of certificates which have been issued; to prescribe the duties of such agents, including, but not limited to, the methods of issuing certificates of number and validation decals, the evidence of ownership of vessels to be numbered by applicants for number, the times and methods of making periodic and final reports of certificates and decals issued and remaining unissued and remittances of public moneys and unissued certificates and decals; to establish methods and procedures of ensuring accountability of such agents for the proceeds of certificates and decals issued and for certificates and decals remaining unissued; to require individual or blanket bonds of such agents in amounts sufficient to protect the State against loss of public moneys and unissued certificates and decals, the premiums for such bonds to be paid by the agents; to permit such agents to issue both original certificates of number and validation decals and renewals thereof or to limit such agents, or any of them, to the issuance of the originals only; to authorize some or all of such agents to issue temporary certificates of number for use during a limited time pending delivery of regular certificates of number and validation decals; to establish methods and procedures, including submission of the amounts and kinds of evidence which the Commission may deem sufficient, whereby any such agent may be relieved of accountability for the value of unissued certificates and validation decals, or of the monetary proceeds of those which have been issued, which have been lost or destroyed as the result of any occurrence which is beyond the control of such agent; and to prescribe such other reasonable requirements and conditions as the Commission may, in its discretion, deem necessary or desirable to expedite and control the issuance of certificates of number by such agents. In accordance with such regulations, the executive director is authorized to prepare and distribute all forms necessary or convenient for application for and the appointment and bonding of such agents and for receipts, reports and remittances by such agents; to select and appoint such agents in areas most convenient to the boating public and to limit the number of such agents in any locality; to require prompt and accurate reporting and remission of public moneys and unissued certificates and decals by such agents, and to require periodic or special audits of their accounts; to revoke or terminate any such agency for failure to make timely reports and remittances or to comply with any administrative directive or regulation of the Commission, or when he has reason to believe that State money or property is in jeopardy; and to require immediate surrender of all agency accounts, forms, certificates, decals and State moneys in the event of

such revocation or termination of any such agency. The Administrative Procedure Act as contained in Chapter 150A of the General Statutes shall not apply in any case of revocation or termination of any agency to issue certificates of boat number and validation decals. Any violation of the regulations authorized by this subsection shall be a misdemeanor punishable in the discretion of the court. If any check or draft of any agent for the issuance of certificates of boat number shall be returned by the banking facility upon which the same is drawn for lack of funds, such agent shall be liable to the Wildlife Resources Commission for a penalty of five percent (5%) of the amount of such check or draft, but in no event shall such penalty be less than five dollars (\$5.00) or more than two hundred dollars (\$200.00). (1959, c. 1064, s. 5; 1961, c. 469, s. 1; 1963, c. 470; 1975, c. 483, ss. 1, 2; 1977, c. 566; 1979, c. 761, ss. 1-7; 1981, c. 161.)

Cross References. — As to the issuance of permanent certificates of number to motorboats owned by governmental entities and nonprofit rescue squads, see § 75A-7.

Effect of Amendments. — The 1981 amendment added the proviso at the end of the second sentence of subsection (a).

§ 75A-7. Exemption from numbering requirements.

(a) A motorboat shall not be required to be numbered under this Chapter if it is:

- (1) A motorboat which is required to be awarded a number pursuant to federal law or a federally approved numbering system of another state, and for which a number has been so awarded: Provided, that any such boat shall not have been within this State for a period in excess of 90 consecutive days.
- (2) A motorboat from a country other than the United States temporarily using the waters of this State.
- (3) A motorboat whose owner is the United States, a state or a subdivision thereof.
- (4) A ship's lifeboat.

(b) The Wildlife Resources Commission is hereby empowered to permit the voluntary numbering of motorboats owned by the United States, a state or a subdivision thereof.

(c) Those motorboats owned by the United States, a state or a subdivision thereof and those owned by nonprofit rescue squads may be assigned a certificate of number bearing no expiration date but which shall be stamped with the word "permanent" and shall not be renewable so long as the vessel remains the property of the governmental entity or nonprofit rescue squad. If the ownership of any such boat is transferred from one governmental entity to another or to a nonprofit rescue squad or if a boat owned by a nonprofit rescue squad is transferred to another nonprofit rescue squad or governmental entity, a new permanent certificate may be issued without charge to the successor entity. When any such boat is sold to a private owner or is otherwise transferred to private ownership, the applicable certificate of number shall be deemed to have expired immediately prior to such transfer. Prior to further use on the waters of this State, the new owner shall obtain either a temporary certificate of number or a regular certificate pursuant to the provisions of this Chapter. The

provisions of this subsection applicable to motorboats owned by nonprofit rescue squads apply only to those operated exclusively for rescue purposes, including rescue training. (1959, c. 1064, s. 7; 1981, c. 162.)

Cross References. — As to allowing nonprofit rescue squads to apply for numbers without payment of a fee, see § 75A-5.

Effect of Amendments.—The 1981 amendment designated the former section as present subsection (a), and added subsections (b) and (c).

Chapter 76.

Navigation.

Article 1.

Cape Fear River.

Sec.

76-1 to 76-17. [Repealed.]

76-19 to 76-24. [Repealed.]

ARTICLE 1.

Cape Fear River.

§§ 76-1 to 76-17: Repealed by Session Laws 1981, c. 910, s. 2, effective July 1, 1981.

Cross References. — For present provisions as to the Cape Fear Navigation and Pilotage Commission, see Chapter 76A.

§§ 76-19 to 76-24: Repealed by Session Laws 1981, c. 910, s. 2, effective July 1, 1981.

ARTICLE 6.

Morehead City Navigation and Pilotage Commission.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

Chapter 76A.

Cape Fear River Navigation and Pilotage Commission.

Article 1.

General Provisions.

Sec.

- 76A-1. Commission established; powers generally.
- 76A-2. Membership.
- 76A-3. Term.
- 76A-4. Quorum.
- 76A-5. Duties and authority.
- 76A-6. Classes of licenses.
- 76A-7 to 76A-11. [Reserved.]

Article 2.

Pilots.

- 76A-12. Apprentices.

Sec.

- 76A-13. Pilotage association.
- 76A-14. Number of pilots.
- 76A-15. Pilot retirement.
- 76A-16. Compulsory use of pilots.
- 76A-17. Pilotage rates.
- 76A-18. Vessels not liable for pilotage.
- 76A-19 to 76A-23. [Reserved.]

Article 3.

Commission Funds.

- 76A-24. Expenses of the Commission.
- 76A-25. Widows and Orphans Fund.

ARTICLE 1.

General Provisions.

§ 76A-1. Commission established; powers generally.

In consideration of the requirement for the safe and expeditious movement of waterborne commerce on the navigable waters of the State, it is deemed necessary to establish the Cape Fear Navigation and Pilotage Commission, hereinafter referred to as the Commission. The Commission shall have the power to license and regulate a group of river pilots familiar with the waters of the Cape Fear River and Bar to best guide vessels within those waters. (1981, c. 910, s. 1.)

Editor's Note. — Session Laws 1981, c. 910, s. 3, makes this Chapter effective July 1, 1981.

§ 76A-2. Membership.

The Commission shall consist of five voting members, four appointed by the Governor, and the president of the Wilmington-Cape Fear Pilots Association who shall serve as an ex officio voting member. Of the four members appointed by the Governor three shall be from New Hanover County, one shall be from Brunswick County. One member shall represent maritime interests. The Governor shall designate a member to serve at his pleasure as Chairman. With the exception of the ex officio member, licensed pilots and members of their immediate families shall not be allowed to serve on the Commission. (1981, c. 910, s. 1.)

§ 76A-3. Term.

It shall be the duty of the Governor to make initial appointments to the Commission on July 1, 1981. Two of the initial appointees shall serve two-year terms; the other two appointees shall serve four-year terms. All appointees after the initial appointments shall serve four-year terms. Any vacancy in the membership appointed by the Governor shall be filled by the Governor. (1981, c. 910, s. 1.)

§ 76A-4. Quorum.

A simple majority of the Commission shall constitute a quorum and may act in all cases. (1981, c. 910, s. 1.)

§ 76A-5. Duties and authority.

(a) Rules and Regulations, Pilotage. — The Commission shall make and establish such rules and regulations as necessary and desirable respecting the qualifications, arrangements and station of pilots. In the development of such rules and regulations, the Commission should request the advice of the U.S. Coast Guard, the U.S. Corps of Engineers, the Pilots Association, other maritime interests and any other party that the Commission might deem beneficial.

(b) Examination and Licensing. — The Commission may examine such persons who hold a federal pilot's license as may offer themselves to be a pilot on the Cape Fear River and Bar. The examination shall consist of, but not be limited to: a personal interview before the Commission; contact by the Commission with personal references; and a physical examination by a licensed physician based on a standard established by the Commission. Licenses shall be granted for a one-year period.

(c) License Renewal. — Each license shall be renewed annually provided during the preceding year the holder thereof shall have complied with the provisions of this act and the reasonable rules and regulations as prescribed by the Commission under authority hereof. The Commission may for special considerations validate a license for less than a one-year period. Each license renewal submittal shall be accompanied with a physical examination comparable to the standards set in G.S. 76A-5(b).

(d) Fine, License Suspension and Cancellation. — The Commission shall have the power to fine or call in and suspend or cancel the license of any pilot found to be derelict of duty, in violation of the reasonable rules and regulations as set out by the Commission or for other just cause. Grounds for suspension or cancellation shall include but not be limited to: citation by the Coast Guard and/or Commission for careless or neglectful duty resulting in damage to property or personal harm; absence, neglect of duty, absence from duty for a period longer than four weeks without written submission to and written approval from the Commission chairman; other violations of regulations or in actions found by the Commission to be unduly disruptive of the pilotage and service and/or harmful to person or property.

(e) Pilots to Give Bond. — The Commission shall require of each pilot prior to granting his commission a bond with surety acceptable to the Commission in an amount not to exceed ten thousand dollars (\$10,000). Every bond taken of a pilot shall be filed with and preserved by the Commission in trust for every person, firm or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm or corporation, so injured may severally bring suit for the damage by each one sustained.

(f) Jurisdiction over Disputes as to Pilotage. — Disputes between pilots may be voluntarily appealed by one of the pilots to the Commission for resolution. If a resolution is not reached or the Commission decision is unacceptable to either party, normal legal recourse is available to resolve the dispute. (1981, c. 910, s. 1.)

§ 76A-6. Classes of licenses.

The Commission shall have general authority to issue two classes of licenses:

- (1) Limited. — A license to pilot vessels whose draft does not exceed 25 feet. Limited licenses may be issued to those who pass requirements established by statute and by the Commission to entitle such person to a limited license.

- (2) Full. — A license to pilot any vessel. Full license shall be issued to all holders of a limited license who have in the opinion of the Commission satisfactorily served at least one year under a limited license. Additionally the Commission may issue a full license to any one who in the Commission's judgment has sufficient credentials as established under G.S. 76A-5(b) to perform the pilotage task associated with a full license. (1981, c. 910, s. 1.)

§§ 76A-7 to 76A-11: Reserved for future codification purposes.

ARTICLE 2.

Pilots.

§ 76A-12. Apprentices.

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices, none of whom shall be less than 21 nor more than 30 years of age, and to make and enforce reasonable rules and regulations relating thereto. Apprentices shall serve for a minimum of one year but no longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. (1981, c. 910, s. 1.)

§ 76A-13. Pilotage association.

In consideration that a mutual association for pilots has been formed, is operational and is expedient for effective management, the Commission shall recognize such a proper pilot association formed for the smooth business transactions in the provision of services. However, the Commission may prescribe such reasonable rules and regulations for the governance of such associations in its direct relationship with the Commission as it deems necessary. Any licensed pilot refusing to become a member of such association shall be subject to suspension or have his license revoked, at the discretion of the Commission. (1981, c. 910, s. 1.)

§ 76A-14. Number of pilots.

The Commission shall govern the number of pilots necessary to maintain an efficient pilotage service. Present active pilots shall continue to serve with the Commission's power of reduction to be effective only in the case of natural attrition except as provided in G.S. 76A-15. At no time shall the number of active licensed pilots exceed 15. Docking masters shall not be deemed pilots for this section or any other section in this Chapter. (1981, c. 910, s. 1.)

§ 76A-15. Pilot retirement.

The Commission shall have and is hereby given authority in its discretion and under such reasonable rules and regulations as it may prescribe to retire from active service any pilot who shall become physically or mentally unfit to perform a pilot's duties. Provided, however, that no pilot shall be retired, except with his consent for physical or mental disability unless and until such pilots shall have first been examined by the public health officer or county physician of his respective county of residence and such public health officer

or physician shall have certified to the board the fact of such physical or mental disability. (1981, c. 910, s. 1.)

§ 76A-16. Compulsory use of pilots.

Every foreign vessel and every U.S. vessel sailing under register, including such vessels towing or being towed when underway in the Cape Fear River and Bar and over 60 gross tons, shall employ and take a State-licensed pilot, except when maneuvering during berthing or unberthing operations, shifting within the confine of ports or terminals, passing through bridges, with tug assistance and with a docking master aboard the vessel. Any master of a vessel violating this section shall be guilty of a misdemeanor except as provided for in G.S. 76A-18 and upon conviction the master shall be fined, imprisoned, or both within the discretion of the courts. (1981, c. 910, s. 1.)

§ 76A-17. Pilotage rates.

The Commission shall set charges for pilotage services on a published tariff basis to be reviewed and revised annually as necessary. The initial publication of rates and subsequent revisions shall be preceded by public notice at least 30 days prior to publication. The rates may be based on the method chosen by the Commission and may be varied on a geographic or other basis which the Commission deems appropriate. In establishing pilotage rates the Commission shall consider but not be limited to factors such as vessels' lengths, vessels' drafts, general design of vessels, distances for which pilotage services are to be provided, nature of waters to be traversed and the rates for comparable pilotage services in other ports. (1981, c. 910, s. 1.)

§ 76A-18. Vessels not liable for pilotage.

Any vessel coming in from sea for harborage without the assistance of a pilot the wind and weather being such that such assistance or service could not have been reasonably given, shall not be liable for pilotage inward from sea. (1981, c. 910, s. 1.)

§§ 76A-19 to 76A-23: Reserved for future codification purposes.

ARTICLE 3.

Commission Funds.

§ 76A-24. Expenses of the Commission.

The pilots association shall pay to the Commission according to rules prescribed by the Commission a percentage of pilotage fees not to exceed two percent (2%) per annum for the purpose of providing funds to defray the necessary expense of the Commission. The appropriate percentage shall be set on an annual basis by the Commission. The fees paid shall be deposited to a special account with the State Treasurer in the name of the Commission and shall be administered by the Secretary of Commerce. Surpluses in the account in excess of three thousand dollars (\$3,000) at the end of the fiscal year shall be returned to the pilot association on a prorated basis determined and distributed by the Commission. (1981, c. 910, s. 1.)

§ 76A-25. Widows and Orphans Fund.

The Widows and Orphans Fund established by Chapter 76, Section 7 of the General Statutes shall be dissolved at the earliest possible date under a method to be determined by the Commission. The method of dissolution should be equitable to all current recipients of benefits from the fund and should attempt to make reasonable provision for their future needs in lieu of on-going payments from the fund. Should the Commission determine that the assets of the fund are in excess of those needed to provide for the recipients, it may determine that a portion of the fund may be retained by the Commission and deposited in its operating fund. In such an event the requirement for payment referred to in G.S. 76A-24 shall be suspended until the balance of the operating fund is reduced to three thousand dollars (\$3,000) as prescribed in G.S. 76A-24. (1981, c. 910, s. 1.)

Chapter 77.

Rivers, Creeks, and Coastal Waters.

Article 1.

Commissioners for Opening and Clearing Streams.

Sec.

77-11. Public landings.

ARTICLE 1.

Commissioners for Opening and Clearing Streams.

§ 77-11. Public landings.

The board of county commissioners may establish public landings on any navigable stream or watercourse in the county upon petition in writing. Unless it shall appear to the board that the person owning the lands sought to be used for a public landing shall have had 20 days' notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof shall be posted during the same period at the courthouse door. At said meeting of the board, the allegations of the petition shall be heard, and if sufficient reason be shown, the board shall order the establishment of the public landing. The board shall at that time initiate proceedings under the Chapter entitled Eminent Domain. (1784, c. 206, s. 4; 1789, c. 303; 1790, c. 331, s. 3; 1793, c. 386; 1813, c. 862, s. 1; 1822, c. 1139, s. 2; R. C., c. 60, s. 1; c. 101, ss. 2, 4; 1869, c. 20, s. 8, subsec. 29; 1872-3, c. 189, s. 3; 1879, c. 82, s. 9; Code, ss. 2038, 2040, 2982; Rev., ss. 2684, 2685, 5308; 1917, c. 284, s. 33; 1919, c. 68; C. S., ss. 3667, 3762, 3763, 7375; 1981, c. 919, s. 10.)

Cross References. — As to eminent domain, see Chapter 40A.

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, added the present

last sentence of the section and deleted the former second and third paragraphs, specifying the procedure for the taking of land for a public landing.

Chapter 78A.

North Carolina Securities Act.

Article 3.

Exemptions.

Sec.

78A-16. Exempt securities.

78A-17. Exempt transactions.

Article 4.

Registration of Securities.

78A-26. Registration by coordination.

Sec.

78A-28. Provisions applicable to registration generally.

Article 5.

Registration of Dealers and Salesmen.

78A-36. Registration requirement.

78A-40. Alternative methods of registration.

78A-41 to 78A-44. [Reserved.]

ARTICLE 3.

Exemptions.

§ 78A-16. Exempt securities.

The following securities are exempted from G.S. 78A-24 and 78A-49(d):

- (1) Any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing; or any certificate of deposit for any of the foregoing;
- (2) Any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;
- (3) Any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution, or trust company organized and supervised under the laws of any state;
- (4) Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under the laws of any state and authorized to do business in this State;
- (5) Any security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized under the laws of any state and authorized to do business in this State; but this exemption does not apply to an annuity contract, investment contract, or similar security under which the promised payments are not fixed in dollars but are substantially dependent upon the investment results of a segregated fund or account invested in securities unless the issuing or delivering company has satisfied the Commissioner of Insurance that it is in compliance with G.S. 58-79.2;
- (6) Any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under the laws of this State;
- (7) Any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company which is (i) subject to the jurisdiction of the Interstate Commerce Commission; (ii) a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act; (iii) regulated in respect of its rates and charges by a governmental

- authority of the United States or any state; or (iv) regulated in respect of the issuance or guarantee of the security by a governmental authority of the United States, any state, Canada, or any Canadian province;
- (8) Any security listed or approved for listing upon notice of issuance on the New York Stock Exchange, the American Stock Exchange, the Midwest Stock Exchange or on any other national securities exchange registered under the Securities Exchange Act of 1934 and designated by rule of the Administrator; any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants so listed or approved; or any warrant or right to purchase or subscribe to any of the foregoing;
 - (9) Any security issued by any person organized under the laws of this State or having its principal office in this State and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association;
 - (10) Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal;
 - (11) Any interest in an employees' stock purchase, stock option, savings, pension, profit-sharing or other similar benefit plan;
 - (12) Any bond or note secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than one hundred twenty-five percent (125%) of the par amount of such bonds or notes;
 - (13) Any capital stock issued by a professional corporation organized pursuant to the provisions of the Professional Corporation Act, Chapter 55B;
 - (14) Any security issued by (i) any mutual association or agricultural marketing association organized or domesticated and existing under Subchapter IV or Subchapter V, respectively, of Chapter 54 of the General Statutes of North Carolina; or (ii) any electric or telephone membership corporation organized or domesticated and existing under Chapter 117 of the General Statutes of North Carolina. (1925, c. 190, s. 3; 1927, c. 149, s. 3; 1931, c. 243, s. 5; 1955, c. 436, s. 2; 1967, c. 1233, s. 1; 1973, c. 1380; 1981, c. 624, s. 1.)

Effect of Amendments. — The 1981 amendment rewrote subdivision (11).

§ 78A-17. Exempt transactions.

The following transactions are exempted from G.S. 78A-24 and 78A-49(d):

- (1) Any isolated nonissuer transaction, whether effected through a dealer or not;
- (2) Any nonissuer distribution other than by a controlling person of an outstanding security if
 - a. A recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or

- b. A registered dealer files with the Administrator such information relating to the issuer as the Administrator may by rule or order require, or
 - c. The security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security;
- (3) Any nonissuer transaction effected by or through a registered dealer pursuant to an unsolicited order or offer to buy; but the Administrator may by rule require that the customer acknowledge upon a specified form that the sale was unsolicited, and that a signed copy of each such form be preserved by the dealer for a specified period;
 - (4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;
 - (5) Any transaction in a bond or other evidence of indebtedness secured by a lien or security interest in real or personal property, or by an agreement for the sale of real estate or chattels, if the entire security interest or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;
 - (6) Any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;
 - (7) Any transaction executed by a person holding a bona fide security interest without any purpose of evading this Chapter;
 - (8) Any offer or sale to a corporation, bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity;
 - (9) a. Any transaction pursuant to an offer directed by the offeror to not more than 25 persons (other than those designated in subdivision (8)) in this State during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this State, if the seller reasonably believes that all the buyers in this State are purchasing for investment; provided, however, the Administrator may by rule or order as to any security or transaction, withdraw or further condition this exemption; or
 - b. Any transaction that is exempted from the provisions of section 5 of the Securities Act of 1933 by virtue of any rule, or rules, promulgated, either before or after April 1, 1975, by the Securities and Exchange Commission under section 4(2) of such act; however, the Administrator may, by rule or order as to any security or transaction, withdraw or further condition this exemption;
 - (10) Any offer or sale of preorganization certificates or subscriptions if (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, (ii) the total amount of the offering, and the total number of purchasers, both within and without this State, does not exceed five hundred thousand dollars (\$500,000) and 100, respectively, (iii) no certificate or subscription is binding on the subscriber for more than six months after the date of execution of the first certificate or subscription; provided, however, that if a registration statement relating to the securities to be issued is filed under G.S. 78A-27 within such six-month period certificates or subscriptions may continue to be binding on the subscribers until 10 days after such registration statement becomes effective or until effectiveness is denied, and (iv) no payment is made by any subscriber;

- (11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than 90 days of their issuance, if (i) no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this State, or (ii) the issuer first files a notice specifying the terms of the offer and the Administrator does not by order disallow the exemption within the next 10 full business days;
- (12) Any offer (but not a sale) of a security for which registration statements have been filed under both this Chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either act;
- (13) Any offer or sale by a domestic corporation of its own securities if (i) the corporation was organized for the purpose of promoting community, agricultural or industrial development of the area in which the principal office is located, (ii) the offer or sale has been approved by resolution of the county commissioners of the county in which its principal office is located, and, if located in a municipality or within two miles of the boundaries thereof, by resolution of the governing body of such municipality, and (iii) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this State;
- (14) Any offer, sale or issuance of securities pursuant to an investment contract or stock option plan which is exempt under the provisions of G.S. 78A-16(11) of this Chapter;
- (15) Any offer or sale of limited partnership interests in a partnership organized under the North Carolina Uniform Limited Partnership Act for the sole purpose of constructing, owning and operating a low and moderate income rental housing project located in North Carolina if the total amount of the offering and the total number of limited partners, both within and without this State for each such partnership, does not exceed five hundred thousand dollars (\$500,000) and 100 respectively. This exemption shall be allowed without limitation as to (i) the number, either in total or within any time period, of separate partnerships which may be formed by the same general partner or partners, sponsors or individuals in which partnership interests are offered; (ii) the period over which such offerings can be made; (iii) the amount of each limited partner's investment; or (iv) the period over which such investment is payable to the partnership. For purposes of this subdivision (15), the term "low and moderate rental housing project" means:
 - a. Any housing project with respect to which a mortgage is insured or guaranteed under section 221(d)(3) or 221(d)(4) or 236 of the National Housing Act, or any housing project financed or assisted by direct loan, mortgage insurance or guaranty, or tax abatement under similar provisions of federal, State or local laws, whether now existing or hereafter enacted; or
 - b. Any housing project, some or all of the units of which are available for occupancy by families or individuals eligible to receive subsidies under section 8 of the United States Housing Act of 1937, as amended, or under the provisions of other federal, State or local law authorizing similar levels of subsidy for lower income families, whether now existing or hereafter enacted; or

- c. Any housing project with respect to which a loan is made, insured or guaranteed under Title V, section 515, of the Housing Act of 1949, or under similar provisions of other federal, State or local laws, whether now existing or hereafter enacted; or
- (16) Any offer to purchase or to sell or any sale or issuance of a security pursuant to a plan approved by the Administrator after a hearing conducted pursuant to the provisions of G.S. 78A-30 of this Chapter. (1925, c. 190, s. 4; 1927, c. 149, s. 4; 1935, cc. 90, 154; 1955, c. 436, s. 3; 1959, c. 1185; 1967, c. 1233, ss. 2, 3; 1971, c. 572, s. 1; 1973, c. 1380; 1977, c. 162; c. 610, s. 1; 1979, c. 647, s. 1; 1981, c. 624, s. 2.)

Effect of Amendments. — The 1981 amendment added the language beginning "however," the Administrator" at the end of subdivision (9)b.

ARTICLE 4.

Registration of Securities.

§ 78A-26. Registration by coordination.

(a) Any security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination.

(b) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in G.S. 78A-28(c) and the consent to service of process required by G.S. 78A-63(f):

- (1) One copy of the latest form of prospectus filed under the Securities Act of 1933;
- (2) A copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered, and a specimen or copy of the security;
- (3) If the Administrator requests, any other information or copies of any other documents filed under the Securities Act of 1933; and
- (4) An undertaking to forward all future amendments to the federal prospectus, other than an amendment which merely delays the effective date of the registration statement, promptly and in any event not later than the first business day after they are forwarded to or filed with the Securities and Exchange Commission, whichever first occurs.

(c) A registration statement under this section automatically becomes effective at the moment the federal registration statement becomes effective if all the following conditions are satisfied: (i) no stop order is in effect and no proceeding is pending under G.S. 78A-29; (ii) the registration statement has been on file with the Administrator for at least 10 days; and (iii) a statement of the maximum proposed offering price and the maximum underwriting discounts and commissions expressed as a percentage of the final offering price has been on file for two full business days or such shorter period as the Administrator permits by rule or otherwise and the offering is made within those limitations. The registrant shall promptly notify the Administrator by telephone or telegram of the date and time when the federal registration statement became effective and the content of the price amendment, if any, and shall promptly file a post-effective amendment containing the information and documents in the price amendment. "Price amendment" means the final federal amendment which includes a statement of the offering price, underwriting and

selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price. Upon failure to receive the required notification and post-effective amendment with respect to the price amendment, the Administrator may enter a stop order without notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this subsection, if he promptly notifies the registrant by telephone or telegram (and promptly confirms by letter or telegram when he notifies by telephone) of the issuance of the order. If the registrant proves compliance with the requirements of this subsection as to notice and post-effective amendment, the stop order is void as of the time of its entry. The Administrator may by rule or otherwise waive either or both of the conditions specified in clauses (ii) and (iii). If the federal registration statement becomes effective before all the conditions in this subsection are satisfied and they are not waived, the registration statement automatically becomes effective as soon as all the conditions are satisfied. If the registrant advises the Administrator of the date when the federal registration statement is expected to become effective, the Administrator shall promptly advise the registrant by telephone or telegraph, at the registrant's expense, whether all the conditions are satisfied and whether he then contemplates the institution of a proceeding under G.S. 78A-29; but this advice by the Administrator does not preclude the institution of such a proceeding at any time. (1925, c. 190, s. 6; 1927, c. 149, s. 6; 1955, c. 436, s. 4; 1973, c. 1380; 1981, c. 624, s. 6.)

Effect of Amendments. — The 1981 amendment substituted "One copy" for "Three copies" at the beginning of subdivision (b)(1).

§ 78A-28. Provisions applicable to registration generally.

(a) A registration statement may be filed by the issuer, any other person on whose behalf the offering is to be made, or a registered dealer.

(b) Every person filing a registration statement shall pay a filing fee of twenty-five dollars (\$25.00), plus a registration fee of one tenth of one percent (1/10 of 1%) of the maximum aggregate offering price at which the registered securities are to be offered in this State, but the registration fee shall in no case be less than twenty-five dollars (\$25.00) or more than two hundred fifty dollars (\$250.00). When a registration statement is withdrawn before the effective date or a preeffective stop order is entered under G.S. 78A-29, the Administrator shall retain the filing fee. In the case of a registration statement relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company, unit investment trust (except a unit investment trust at least eighty percent (80%) of whose corpus consists of obligations of this State or its political subdivisions), mutual fund or limited partnership interest, the Administrator may by rule or order prescribe the maximum amount of securities, but in no event less than two hundred fifty thousand dollars (\$250,000), that may be offered upon payment of the maximum registration fee, and prescribe different amounts for different classes of issuers.

(c) Every registration statement shall specify (i) the amount of securities to be offered in this State; (ii) the states in which a registration statement or similar document in connection with the offering has been or is expected to be filed; and (iii) any adverse order, judgment, or decree entered in connection with the offering by the regulatory authorities in each state or by any court or the Securities and Exchange Commission.

(d) Any document filed under this Chapter or a predecessor law within five years preceding the filing of a registration statement may be incorporated by

reference in the registration statement to the extent that the document is currently accurate.

(e) The Administrator may by rule or otherwise permit the omission of any item of information or document from any registration statement.

(f) In the case of a nonissuer distribution, information may not be required under G.S. 78A-27 or 78A-28(i) unless it is known to the person filing the registration statement or to the persons on whose behalf the distribution is to be made, or can be furnished by them without unreasonable effort or expense.

(g) The Administrator may by rule or order require as a condition of registration by qualification or coordination (i) that any security issued within the past three years or to be issued to a promoter for a consideration substantially different from the public offering price, or to any person for a consideration other than cash, be deposited in escrow; and (ii) that the proceeds from the sale of the registered security in this State be impounded until the issuer receives a specified amount from the sale of the securities either in this State or elsewhere. The Administrator may by rule or order determine the conditions of any escrow or impounding required hereunder, but he may not reject a depository solely because of location in another state.

(h) Every registration statement is effective for one year from its effective date, or any longer period during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by any underwriter or dealer who is still offering part of an unsold allotment or subscription taken by him as a participant in the distribution, except during the time a stop order is in effect under G.S. 78A-29. All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction (i) so long as the registration statement is effective and (ii) between the thirtieth day after the entry of any stop order suspending or revoking the effectiveness of the registration statement under G.S. 78A-29 (if the registration statement did not relate in whole or in part to a nonissuer distribution) and one year from the effective date of the registration statement. A registration statement may not be withdrawn for one year from its effective date if any securities of the same class are outstanding. A registration statement may be withdrawn otherwise only in the discretion of the Administrator.

(i) So long as a registration statement is effective, the Administrator may by rule or order require the person who filed the registration statement to file reports, not more often than quarterly, to keep reasonably current the information contained in the registration statement and to disclose progress of the offering.

(j) A registration statement filed in accordance with subsection (b) of this section may be amended after its effective date to increase the securities specified as proposed to be offered. Such an amendment becomes effective when the Administrator so orders. Every person filing such an amendment shall pay a registration fee, calculated in the manner specified in subsection (b), and such filing fee not to exceed twenty-five dollars (\$25.00) as the Administrator may by rule or order require, with respect to the additional securities proposed to be offered. (1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 1; 1981, c. 452; c. 624, s. 3; c. 682, s. 14.)

Effect of Amendments. — The first 1981 amendment added the parenthetical language concerning a unit investment trust in the third sentence of subsection (b).

The second 1981 amendment, in the first sentence of subsection (j), substituted "subsection

(b)" for "subsection (j)," and deleted "so as" following "its effective date."

The third 1981 amendment, effective July 1, 1981, substituted "subsection (b)" for "subsection (j)" in the first sentence of subsection (j).

ARTICLE 5.

*Registration of Dealers and Salesmen.***§ 78A-36. Registration requirement.**

(a) It is unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter. No dealer shall be eligible for registration under this Chapter, or for renewal of registration hereunder, unless such dealer is at the time registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934; any dealer specializing in church securities may be registered to offer or sell only those securities which are issued by churches located within this State.

(b) It is unlawful for any dealer or issuer to employ a salesman unless the salesman is registered. The registration of a salesman is not effective during any period when he is not associated with a particular dealer registered under this Chapter or a particular issuer. When a salesman begins or terminates those activities which make him a salesman, the salesman as well as the dealer or issuer shall promptly notify the Administrator.

The Administrator may by rule or order require the return of a salesman's license upon the termination of those activities which make him a salesman or, if such return is impossible, require a bond or evidence satisfactory to the Administrator of such impossibility. No salesman may be registered with more than one dealer or issuer.

(c) Every registration expires on the thirty-first day of March of each year (or such other date not more than one year from its effective date as the Administrator may by rule or order provide) unless renewed. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1975, c. 144, s. 2; 1979, 2nd Sess., c. 1148, s. 2; 1981, c. 624, s. 4.)

Effect of Amendments. — The 1981 amendment added the last sentence in subsection (b).

§ 78A-40. Alternative methods of registration.

(a) The Administrator may by rule or order provide an alternative method of registration by which any dealer or salesman acting in that capacity or as a principal may satisfy the requirements of this Article by furnishing the information otherwise required to be filed pursuant to this Article. The Administrator may provide for, among other things, alternative filing periods for dealers or salesmen, elimination of the issuance of a paper license and alternative methods for the payment and collection of initial or renewal filing fees, which shall be known as "alternative filing fees". The alternative filing fees shall be the same as provided in G.S. 78A-37 (b).

(b) The Administrator may not adopt an alternative method of registration unless its purpose is to facilitate a central registration depository whereby dealers or salesmen can centrally or simultaneously register and pay fees for all states in which they plan to transact business that require registration. The Administrator may enter into an agreement with or otherwise facilitate an alternative method of registration with any national securities association registered with The Securities and Exchange Commission pursuant to Section 15A of the Securities Exchange Act of 1934, any national securities exchange registered under the Securities Exchange Act of 1934, or any national association of state securities Administrators or similar association to effectuate the provisions of this section.

(c) Nothing in this section shall be construed to prevent the denial, revocation, suspension, cancellation or withdrawal by the Administrator of a registration of a dealer or salesman as provided in G.S. 78A-39. (1981, c. 624, s. 5.)

§§ 78A-41 to 78A-44: Reserved for future codification purposes.

Chapter 80.**Trademarks, Brands, etc.****ARTICLE 1.*****Trademark Registration Act.*****§ 80-1. Definitions.****Legal Periodicals. —**

For an article on antitrust and unfair trade

practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-2. Registrability.**Legal Periodicals. —** For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-3. Application for registration.**Legal Periodicals. —** For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-4. Certificate of registration.**Legal Periodicals. —** For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-5. Duration and renewal.**Legal Periodicals. —** For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-6. Assignment.**Legal Periodicals. —** For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-7. Records.**Legal Periodicals. —** For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-8. Cancellation.**Legal Periodicals. —** For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-9. Classification.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-10. Fraudulent registration.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-11. Infringement.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-12. Civil remedies.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-13. Common-law rights.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-14. Severability of Article.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

Chapter 81A.

Weights and Measures Act of 1975.

Article 1.

Administration of Chapter.

Sec.

81A-10. Reimbursement of expenses.

81A-11 to 81A-14. [Reserved.]

Article 3.

Violations.

81A-29. Offenses and penalties.

Article 4.

Uniform Weights and Measures.

81A-37 to 81A-40. [Repealed.]

81A-43. [Repealed.]

Article 5.

Public Weighmasters.

Sec.

81A-50. [Repealed.]

81A-50.1. Purpose.

81A-51. Definitions.

81A-52. License.

81A-53. Certificates of weight.

81A-54. Official seal of the public weighmaster.

81A-55. Violations by public weighmasters; by others; penalties.

81A-56, 81A-57. [Repealed.]

81A-58. Duty of custodian of product.

81A-59. Weighing tobacco.

81A-60. [Repealed.]

81A-61. Approval of devices used.

81A-62 to 81A-64. [Repealed.]

ARTICLE 1.

Administration of Chapter.

§ 81A-10. Reimbursement of expenses.

When any manufacturer requests prototype approval of any commercial weighing or measuring device, said manufacturer shall reimburse the Department of Agriculture for expenses incurred in the prototype examination of the device before final prototype approval is granted. Travel expenses shall be at the rates established by G.S. 138-6 or any law enacted in substitution therefor. (1981, c. 495, s. 1.)

§§ 81A-11 to 81A-14: Reserved for future codification purposes.

ARTICLE 3.

Violations.

§ 81A-29. Offenses and penalties.

Any person who violates any provision of this section or any provision of this Chapter or regulations promulgated pursuant thereto for which a specific penalty has not been prescribed shall be guilty of a misdemeanor, and upon a first conviction thereof shall be punished by a fine of not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500.00), or by imprisonment for not more than three months, or both. Upon a subsequent conviction thereof, said person shall be punished by a fine of not less than one hundred dollars (\$100.00) or more than one thousand dollars (\$1,000) or by imprisonment for up to one year, or both. No person shall:

- (1) Use or have in possession for use in commerce any incorrect weight or measure.
- (2) Remove any tag, seal, or mark from any weight or measure without specific written authorization from the Commissioner or his authorized agent.

- (3) Hinder or obstruct any weights-and-measures official in the performance of his duties.
- (4) Impersonate in any way any employee of the North Carolina Department of Agriculture designated by the Commissioner to enforce any part of this Chapter.
- (5) Use in retail trade, except in the preparation of packages put up in advance of sale, a weighing or measuring device which is not so positioned so that its indications may be accurately read and the weighing or measuring operation observed from some position which may be reasonably assumed by a customer.
- (6) Manufacture, use or possess a counterfeit seal, tag, mark, certificate, label or decal representing, imitating or copying the same issued by the Commissioner under this Chapter. (1927, c. 261, ss. 14, 15, 19; 1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544; 1981, c. 607, s. 1.)

Effect of Amendments. — The 1981 amendment added subdivision (6).

ARTICLE 4.

Uniform Weights and Measures.

§§ 81A-37 to 81A-40: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-43: Repealed by Session Laws 1981, c. 607, s. 2.

ARTICLE 5.

Public Weighmasters.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 81A-50: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-50.1. Purpose.

This Article licenses and regulates public weighmasters in order to ensure accurate quantities of products upon sale to purchasers. (1981, c. 607, s. 3.)

§ 81A-51. Definitions.

For purposes of this Article, the following words, terms and phrases are defined as follows:

- (1) "Board" means North Carolina Board of Agriculture.
- (2) "Commissioner" means the North Carolina Commissioner of Agriculture or his designated agent.
- (3) "Department" means the North Carolina Department of Agriculture.

- (4) "Product" means any product, commodity or article.
- (5) "Public weighmaster" means any person who shall weigh, measure or count, or who shall ascertain from a weighing, measuring or recording device for any other person and declare the weight to be the accurate weight of the product upon which the purchase, sale or exchange is based, and receive compensation for the act.
- (6) "Weigh" means weigh, measure, count, read or record.
- (7) "Weight" means weight, measure, count, reading or recording. (1939, c. 285, s. 1; 1945, c. 1067; 1971, c. 1085, s. 1; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 81A-52. License.

All public weighmasters shall be licensed. Any person not less than 18 years of age who wishes to be a public weighmaster shall apply to the Department on a form provided by the Department. The Board may adopt rules for determining the qualifications of the applicant for a license. Public weighmasters shall be licensed for a period of one year beginning the first day of July and ending on the thirtieth day of June, and a fee of ten dollars (\$10.00) shall be paid for each person licensed at the time of the filing of the application. (1939, c. 285, s. 2; 1949, c. 983, s. 1; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 81A-53. Certificates of weight.

All public weighmasters shall issue certificates of weight, measure, count, reading or recording on forms approved by the Commissioner and shall enforce the provisions of this Chapter and all rules and regulations promulgated thereunder without compensation from the State. Each certificate issued shall indicate the date on which a product is weighed, counted, read or recorded. A certificate issued by a public weighmaster shall be considered the accurate weight of a product at the time the product is put into the natural channels of trade, with the qualification that reasonable variations or tolerances shall be permitted as established by rules and regulations enacted pursuant to this Chapter. If any person questions the accuracy of the weight of any product for which a certificate has been issued, a complaint shall be made to the public weighmaster who issued the certificate or to the Commissioner before the product is moved from the city, town or community where the certificate was issued. The product shall be reweighed by the public weighmaster issuing the certificate or by the Commissioner, if the product is kept in accordance with G.S. 81A-58. If, upon reweighing, a difference in excess of the tolerance allowed by the Chapter is found in the original weight, the cost of reweighing shall be borne by the public weighmaster responsible for issuing the faulty certificate. Otherwise, the cost shall be borne by the complainant. (1939, c. 285, s. 3; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 81A-54. Official seal of the public weighmaster.

It shall be the duty of every public weighmaster to obtain from the Department an official seal for the sum of five dollars (\$5.00), inscribed with the following words: "North Carolina Public Weighmaster" and any other design or legend the Commissioner considers necessary. The seal shall be stamped or impressed on every certificate issued pursuant to this Article. The weighers of tobacco in leaf tobacco warehouses may use, instead of the seal, their signatures in ink or other indelible substance posted in a conspicuous and accessible place in the warehouse. All seals remain the property of the State and shall be returned to the Commissioner upon termination of duties as a public weighmaster. (1939, c. 285, s. 4; 1941, c. 317, s. 1; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments. — The 1981 amendment, in the first sentence, deleted "so licensed under this Article" preceding "to obtain," substituted "Department" for "North Carolina Department of Agriculture," deleted "which seal shall have" preceding "inscribed," substituted "with" for "thereon" following "inscribed," substituted "any" for "such" preceding "other design," substituted "or" for "and/or" preceding "legend," deleted "as" following "legend," and substituted "considers

necessary" for "or his authorized agent may deem appropriate" at the end of the first sentence. The amendment rewrote the former second sentence as the present second and third sentences, and in the fourth sentence, deleted "public weighmasters" preceding "seals," deleted "shall" preceding "remain," and substituted the language beginning "and shall be returned" for "of North Carolina" at the end of the fourth sentence.

§ 81A-55. Violations by public weighmasters; by others; penalties.

(a) Any public weighmaster who refuses to issue a certificate as prescribed by this Article, or who issues a certificate giving a false weight, or who misrepresents the weight to any person, or who otherwise violates any provisions of this Article or the rules and regulations pursuant to this Article, may have his license revoked, suspended or terminated by the Commissioner.

(b) The following acts by other persons are also violations of this Article:

- (1) Requesting a public weighmaster to weigh a product inaccurately;
- (2) Requesting an inaccurate certificate prescribed by this Article;
- (3) Impersonating a public weighmaster;
- (4) Erasing, changing or altering any certificate issued by a public weighmaster;
- (5) Increasing or decreasing the weight of a product for the purpose of deception; or
- (6) Violating any other provision of this Article. (1939, c. 285, s. 5; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§§ 81A-56, 81A-57: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-58. Duty of custodian of product.

If any product is to be offered for sale, or is sold, and is weighed or measured or counted by any public weighmaster and a certificate is issued prior to sale or acceptance of the product by the purchaser, or if any product is offered for sale, sold or delivered pending the weighing, measuring or counting of the

product by any public weighmaster and the issuance of a certificate, the person who is in custody of the product shall keep, protect and prevent any increase or decrease in weight in the time intervening between the weighing and the issuance of the certificate and the sale, and the time intervening between the sale and the presentation of the product to the weighmaster for weighing, measuring or counting and the issuance of a certificate. Any loss sustained in the weight of the product while in custody shall be borne by the custodian. (1939, c. 285, s. 8; 1975, c. 544; 1981, c. 607, s. 5.)

Effect of Amendments. — The 1981 amendment rewrote the former first and second sentences as the present first sentence, and in the present second sentence, substituted "of the product" for "or measure or count of any com-

modity, product, or article," and substituted "custodian" for "person, firm or corporation in whose custody said commodity, product, or article is" at the end of the second sentence.

§ 81A-59. Weighing tobacco.

All leaf tobacco offered for sale in a leaf tobacco warehouse in North Carolina shall remain in the custody of the warehouse operator from and after the time it is weighed by the public weighmaster until it is sold or the bid is rejected by the owner. (1945, c. 1067; 1975, c. 544; 1981, c. 607, s. 5.)

Effect of Amendments. — The 1981 amendment substituted "North Carolina" for "this State," deleted "be weighed by a public weighmaster, shall be accompanied by a public

weighmaster certificate, and shall be and" preceding "remain in," inserted "the" preceding "custody," and deleted "thereof" at the end of the section.

§ 81A-60: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-61. Approval of devices used.

When making a weight determination, a public weighmaster shall use a weighing device that is of a type suitable for the weighing of the product to be weighed and that has been tested and approved for use by the Commissioner within a period of 12 months immediately preceding the date of the weighing. (1939, c. 285, s. 10; 1975, c. 544; 1981, c. 607, s. 6.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§§ 81A-62 to 81A-64: Repealed by Session Laws 1981, c. 607, s. 2.

Chapter 83A.
Architects.

§ 83A-1. Definitions.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 83A-17. Power of Board to seek injunction.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Chapter 84. Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

Sec.

84-2. Persons disqualified.

84-4. Persons other than members of State Bar prohibited from practicing law.

Article 4.

North Carolina State Bar.

84-16. Membership and privileges.

Sec.

84-17. Government.

84-18. Terms, election and appointment of councilors.

84-34. Membership fees and list of members.

ARTICLE 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-2. Persons disqualified.

No justice, judge, full-time district attorney, full-time assistant district attorney, public defender, assistant public defender, clerk, deputy or assistant clerk of the General Court of Justice, nor register of deeds, nor sheriff, shall engage in the private practice of law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars (\$200.00). (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1965, c. 418, s. 1; 1969, c. 44, s. 59; 1973, c. 47, s. 2; c. 108, s. 36; 1981, c. 788, s. 1.)

Effect of Amendments. — The 1981 amendment substituted "engage in the private practice of law" for "practice law" at the end of the first sentence.

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

It shall be unlawful for any person or association of persons, except members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding in any court in this State or before any judicial body or the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney-at-law. The provisions of this section shall be in addition to and not in lieu

of any other provisions of Chapter 84. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina. (1931, c. 157, s. 1; 1937, c. 155, s. 1; 1955, c. 526, s. 1; 1969, c. 718, s. 19; 1981, c. 762, s. 3.)

Effect of Amendments. — The 1981 amendment, inserted "or the" following "North Carolina Industrial Commission" and deleted

"or the Employment Security Commission" following "Utilities Commission" in the first sentence.

§ 84-4.1. Limited practice of out-of-state attorneys.

CASE NOTES

It is not a right but a discretionary privilege which allows out-of-state attorneys to appear pro hac vice in a state's courts without meeting the state's bar admission requirements. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Association with Local Attorney. — Subdivision (5) of this section allows courts to control out-of-state counsel and assure compliance with the duties and responsibilities of an attorney practicing in the courts of this State, and the association of out-of-state counsel with a local attorney satisfies a reasonable interest of the courts in having a member of the Bar of this State responsible for the litigation; thus, this statute is specifically designed to insure that the court has ready jurisdiction over those appearing only occasionally before it by insuring that counsel who appear regularly before it participate in the case. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Same — Requirement May Not Be

Waived. — A trial judge cannot waive the requirement of subdivision (5) of this section which states that local counsel be associated before an out-of-state attorney is admitted to limited practice in the courts of this State because unless and until subdivisions (1) through (5) are complied with, the court has no discretion whatever. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Same — Ineligible Attorney May Not Be Held In Contempt. — An out-of-state attorney could not be held in and punished for willful contempt of court for failure to comply with an order of the trial court that he appear as an attorney in a criminal case where there had been no general appearance by local counsel as required by this section and the out-of-state attorney thus never acquired eligibility to appear in the case and was never an attorney in the case admitted to limited practice in North Carolina. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument.

Legal Periodicals. — For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

CASE NOTES

Purpose of Section. — The purpose of this section was not to enlarge the number of addresses but rather to limit the number of counsel and time allowed a defendant's counsel in addressing the jury. State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

Discretion of Court. —

This section gives the court the discretion to

allow a greater number of addresses. State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

Counsel may not "travel outside the record," etc. —

The general rule is that counsel may argue all the evidence to the jury, which such inferences as may be drawn therefrom; but he may

not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Patton*, 45 N.C. App. 676, 263 S.E.2d 796 (1980).

It is proper to argue to jury to compensate at a certain amount per specific time period when there is evidence of continuous pain. *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E.2d 231 (1980).

ARTICLE 4.

North Carolina State Bar.

Repeal of Article. —

Session Laws 1981, c. 788, s. 6, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 84-16. Membership and privileges.

The membership of the North Carolina State Bar shall consist of two classes, active and inactive.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, entitling them to practice law in the State of North Carolina, who shall have paid the membership dues hereinafter specified, unless classified as an inactive member by the Council as hereinafter provided. No person other than a member of the North Carolina State Bar shall practice in any court of the State except foreign attorneys as provided by statute.

Inactive members shall be all persons found by the Council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law.

All active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina State Bar, and at all meetings of and elections held by the bar of each of the judicial districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he resides (and, after the North Carolina State Bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina State Bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district. (1933, c. 210, s. 2; 1939, c. 21, s. 1; 1941, c. 344, ss. 1, 2, 3; 1969, c. 44, s. 60; c. 1190, s. 52; 1973, c. 1152, s. 1; 1981, c. 788, s. 2.)

Effect of Amendments. — The 1981 amendment substituted "All" for "Only" at the

beginning of the first sentence of the fourth paragraph.

§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar hereinafter referred to as the "council", which shall be composed of 50 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president, whose term of office expires at the 1973 annual meeting or after. Notwithstanding any other provisions of the law, the North Carolina State Bar shall have the power and authority to acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The North Carolina State Bar Council is authorized and empowered in its discretion to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. Notwithstanding any provisions of this Article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in G.S. 84-33 provided. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 50. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years on the basis of the number of the active members of each judicial district bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

In the event a judicial district is divided after any allocation as hereinafter provided, then the total number of councilors shall be increased until the next allocation, so as to provide one councilor for each such district, unless the district has one or more councilors who are members of such judicial district.

In addition to the 50 Councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1; 1961, c. 641; 1973, c. 1152, s. 2; 1977, c. 841, s. 2; 1979, c. 570, ss. 1, 2; 1981, c. 788, s. 3.)

Effect of Amendments. —

The 1981 amendment added the third paragraph.

§ 84-18. Terms, election and appointment of councilors.

(a) The terms of councilors are fixed at three years. No councilor may serve more than three successive three-year terms but a councilor may serve an unlimited number of three successive three-year terms provided a three-year period of nonservice intervenes in each instance. This paragraph shall not apply to officers of the State Bar.

All councilors serving at the effective date of these changes shall remain in office and continue to represent their district for the remainder of their term. Those who have already served for 18 months or more shall be eligible for

election to two additional three-year terms and be ineligible for election thereafter until a period of three years has expired. Those who have served less than 18 months shall be eligible for election to three consecutive three-year terms and be ineligible for election thereafter until an intervening three-year period has expired.

When a judicial district loses a councilor or is entitled to an additional councilor by virtue of reallocation of councilors as provided in G.S. 84-17 above, or is entitled to a councilor by virtue of the creation of a new district, then the affected judicial districts shall certify to the State Bar Council the identity of that judicial district's authorized councilor or councilors. This certification shall be made within 90 days of the date the reallocation is made and reported to the judicial districts affected. Until this certification is received, the district shall have no representation on the State Bar Council. In the case of reallocation, the certification shall be made within 90 days.

Any North Carolina State Bar member, other than an inactive member, is eligible to serve as a councilor from the judicial district in which he or she is eligible to vote.

(b) The election and appointment of councilors shall be as follows:

Each judicial district bar, under rules established by the district, shall elect one eligible North Carolina State Bar member for each State Bar Council vacancy in the district. Any vacancy occurring after the election, whether caused by resignation, death or otherwise shall be filled by the judicial district bar in which the vacancy occurs, under rules established by the district. The appointment shall be for the unexpired portion of the term and shall be certified to the State Bar Council by the judicial district bar. Any appointed councilor shall be subject to the terms set forth in paragraph (a) of this section.

(c) Public members shall serve three-year terms. No public member shall serve more than two complete consecutive terms. (1933, c. 210, s. 4; 1953, c. 1310, s. 1; 1979, c. 570, s. 3; 1981, c. 788, s. 4.)

Effect of Amendments. —

The 1981 amendment added subsection (c).

§ 84-24. Admission to practice.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Purpose of Board. — The Board of Law Examiners was created for the purpose of examining applicants and providing rules and regulations for admission to the bar. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Character Evaluation and Examination Are Separate and Distinct Requirements. — In an action to obtain admission to the North Carolina Bar, it was found that the Board of Law Examiners properly advised the applicant for admission to the practice of law that he would be permitted to take the bar examination but that the result would be sealed until the board has concluded its character evaluation, and the board was not required subsequently to

divulge applicant's examination result, since the result was irrelevant to the matter of applicant's character evaluation, and even if applicant failed the examination, this appeal would not be moot since it concerned applicant's character, a separate and distinct matter. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Board's Duty to Resolve Factual Disputes. —

In determining an applicant's fitness to practice law, the Board of Law Examiners should not conduct a hearing to consider applicant's alleged commission of specific acts of misconduct and, without a finding that he committed the prior acts, use his denial that he committed

them as substantive evidence of his lack of moral character; rather, the board should first determine whether in fact the applicant committed the prior acts of misconduct and, if it determines that he did, it must then say whether these acts so reflect on the applicant's character that they are sufficient to rebut his *prima facie* showing of good character. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Burden of Proving Specific Acts of Misconduct. —

When an applicant makes a *prima facie* showing of good moral character and the board, to rebut the showing, relies on specific acts of misconduct the commission of which are denied by the applicant, the board must prove the specific acts by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

In an action to obtain admission to the North Carolina Bar, it was found that a finding of fact by the Board of Law Examiners that applicant "made false statements under oath on matters material to his fitness of character" inadequately resolved the factual issue which it addressed and was too vague to permit appropriate judicial review because the board did not indicate which statements it considered to be untruthful; consequently, neither a reviewing court nor the applicant could be certain as to the content or materiality of the false statements referred to, and the board could not meet its burden of proving specific acts of misconduct without setting out with specificity what they were and that they had been proved by the greater weight of the evidence. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Sufficiency of Findings. — Where an applicant for admission to the practice of law had been convicted of assault and murder, finding by the Board of Law Examiners that applicant did not disclose that he had been convicted of assault and battery on a female failed adequately to resolve the factual issue to which

it was addressed where the factual issue before the board was whether the omission was a mere inadvertence caused by applicant's initial failure to recall the conviction as an incident separate from the murder or was instead a purposeful omission designed to mislead the board, the later correction of which was prompted only by notice of the hearing. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

In an action to obtain admission to the North Carolina Bar, the court on appeal could not conclude that as a matter of law the Board of Law Examiners' evidence was insufficient to support findings of fact which could rebut a *prima facie* showing of good moral character by an applicant for admission to the bar where it was undisputed that applicant had committed and been convicted of murder and assault; the question before the board was whether these acts occurring 14 years ago continued to constitute evidence that applicant was presently morally unfit to practice law; and only the board through proper findings of fact and conclusions of law based thereon could answer the question as to whether events subsequent to the murder and assault demonstrated to the board that applicant had been fully rehabilitated so that the evidentiary force of the 14 year old offenses was spent or whether they led to a contrary conclusion. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Findings Not Prejudicial. — An applicant for admission to practice law was not prejudiced where the Board of Law Examiners found that applicant was paroled after serving a portion of his prison term but the board failed to find that applicant was completely discharged from parole, since the reviewing court would take into account, under a whole record review, undisputed facts which favored applicant's position including the fact of discharge from parole which applicant argued was unfairly omitted from the board's findings. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

§ 84-28. Discipline and disbarment.

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Public Censure Appropriate. — An order of public censure was not arbitrary and unreasonably harsh punishment for defendant attorney's unprofessional conduct in encouraging a potential adverse witness not to testify against his client, in a prosecution for driving under the influence of alcohol, in return

for an agreement by the client not to give any testimony which might incriminate the potential witness. North Carolina State Bar v. Graves, 50 N.C. App. 450, — S.E.2d — (1981).

And Not In Violation of Equal Protection or Due Process. — Where the evidence supported findings by the Disciplinary Hearing

Commission that defendant attorney, in representing a client charged with driving under the influence of alcohol, advised a potential State's witness that his client claimed that the potential witness was driving the car at the time in question, that defendant advised the potential witness either not to appear in court or to plead the Fifth Amendment, and that

defendant told the potential witness that his client would not testify against the witness if the witness would not testify against his client, the commission's order of public censure was proper and it did not violate the defendant's rights to due process and equal protection. *North Carolina State Bar v. Graves*, 50 N.C. App. 450, — S.E.2d — (1981).

§ 84-34. Membership fees and list of members.

Every active member of the North Carolina State Bar shall, prior to the first day of July of each year, beginning with the year 1982, pay to the secretary-treasurer an annual membership fee of ninety dollars (\$90.00), and every member shall notify the secretary-treasurer of his correct post-office address. All dues for prior years shall be as were set forth in the General Statutes then in effect. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this Article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this Article shall have gone into effect until the first day of January of the calendar year following that in which he shall have been licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The said fees shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transaction of the council in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and post-office addresses forwarded to him and from any other available sources of information a list of members of the North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this Article. The name of each of the active members who shall be in arrears in the payment of membership fees for one or more calendar years shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein said member or members reside, and the court shall thereupon take such action as is necessary and proper. The names and addresses of such attorneys so certified shall be kept available to the public. The Secretary of Revenue is hereby directed to supply the secretary-treasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement.

The said list submitted to several clerks of the superior court shall also be submitted to the council of the North Carolina State Bar at its October meeting of each year and it shall take such action thereon as is necessary and proper. (1933, c. 210, s. 17; 1939, c. 21, ss. 2, 3; 1953, c. 1310, s. 5; 1955, c. 651, s. 4; 1961, c. 760; 1971, c. 18; 1973, c. 476, s. 193; c. 1152, s. 4; 1977, c. 841, s. 2; 1981, c. 788, s. 5.)

Effect of Amendments. — The 1981 amendment substituted "1982" for "1975" and "ninety

dollars (\$90.00)" for "seventy-five dollars (\$75.00)" in the first sentence of the first para-

graph, and substituted "January of the calendar year" for "July of the second calendar year (a 'calendar year' for the purposes of this Article

being treated as the period from January 1 to December 31)" in the proviso in the fourth sentence of the first paragraph.

amended, respectively repealing this Chapter effective July 1, 1981, was held repealed by Session Laws 1981, c. 712, § 1, and Chapter 1 of the 1981 Supplement to the 1980 North Carolina General Statutes.

Cross References — As to review and final action of the provisions and functions within this Chapter, see § 14-143.2. The provision of Session Laws 1977, c. 712, as amended, repealing this Chapter.

§ 85C-7. Arrest of defendant for purpose of extradition

CASE NOTES

Codification of Common Law. — The bondsman's right of arrest under this article is simply a codification of the common-law rule that has been recognized in North Carolina for many years. *State v. Perry*, 60 N.C. App. 540, — S.E.2d — (1981).

Miranda Warnings Not Required. — When talking a defendant who is a bail jumper

into custody a bail bondsman is not acting as a law officer or as an agent for the State, and the bondsman has no obligation to give defendant the Miranda warnings in order to render admissible incriminating statements made by defendant to the bondsman. *State v. Perry*, 60 N.C. App. 540, — S.E.2d — (1981).

Chapter 85B.

Auctions and Auctioneers.

amended, tentatively repealing this Chapter effective July 1, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

Repeal of Chapter. —

The provision of Session Laws 1977, c. 712, as

Chapter 85C.

Bail Bondsmen and Runners.

Cross References. — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

Repeal of Chapter. —
The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Chapter effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 85C-7. Arrest of defendant for purpose of surrender.

CASE NOTES

Codification of Common Law. — The bondsman's right of arrest under this section is simply a codification of the common-law rule that has been recognized in North Carolina for many years. State v. Perry, 50 N.C. App. 540, — S.E.2d — (1981).

Miranda Warnings Not Required. — When taking a defendant who is a bail jumper

into custody, a bail bondsman is not acting as a law officer or as an agent for the State, and the bondsman has no obligation to give defendant the Miranda warnings in order to render admissible incriminating statements made by defendant to the bondsman. State v. Perry, 50 N.C. App. 540, — S.E.2d — (1981).

Chapter 86A.

Barbers.

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| <p>Sec.</p> <p>86A-3. Qualifications for certificate as a registered barber.</p> <p>86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.</p> <p>86A-5. Powers and duties of the Board.</p> <p>86A-6. Office; seal; officers and executive secretary; funds.</p> <p>86A-7. Salary and expenses; employees; audits; annual reports to the Governor.</p> | <p>Sec.</p> <p>86A-10. Issuance of certificates of registration.</p> <p>86A-11. Temporary permits.</p> <p>86A-12. Applicants licensed in other states.</p> <p>86A-17. Renewal or restoration of certificate.</p> <p>86A-18. Disqualifications for certificate.</p> <p>86A-20. Misdemeanors.</p> <p>86A-22. Licensing and regulating barber schools and colleges.</p> <p>86A-23. Instructors.</p> <p>86A-24. Apprenticeship.</p> <p>86A-25. Fees collectable by Board.</p> |
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Repeal of Chapter. —

Session Laws 1981, c. 457, s. 15, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Chapter. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 86A-3. Qualifications for certificate as a registered barber.

A certificate of registration as a registered barber shall be issued by the Board to any person who meets the following qualifications:

- (1) Has attended an approved barber school for at least 1528 hours;
- (2) Has completed a 12-month apprenticeship under the supervision of a licensed barber, as provided in G.S. 86A-24; and
- (3) Has passed a clinical examination conducted by the Board; and
- (4) Has submitted to the Board the signatures of three barbers registered in North Carolina, one of whom has supervised the applicant, certifying that the applicant has served the apprenticeship required by subsection (2). (1929, c. 119, ss. 3, 4, 11; 1941, c. 375, s. 3; 1961, c. 577, s. 1; 1979, c. 695, s. 1; 1981, c. 457, s. 1.)

Effect of Amendments. — The 1981 amendment rewrote subdivision (3) and added subdivision (4).

§ 86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.

(a) The State Board of Barber Examiners is established to consist of four members appointed by the Governor. Three shall be licensed barbers; the other shall be a person who is not licensed under this Chapter and who shall represent the interest of the public at large.

(b) All members serving on the Board on June 30, 1981, shall complete their respective terms. The Governor shall appoint the public member not later than July 1, 1981. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is appointed and qualifies.

(c) The Governor may remove any member for good cause shown and may appoint members to fill unexpired terms. (1929, c. 119, s. 6; 1979, c. 695, s. 1; 1981, c. 457, s. 2.)

Effect of Amendments. — The 1981 amendment rewrote the former first sentence as subsections (a) and (b), designated the former

second sentence as subsection (c), and in subsection (c) inserted "may" preceding "appoint members."

§ 86A-5. Powers and duties of the Board.

(a) The Board has the following powers and duties:

- (1) To see that inspections of barbershops and schools are conducted to determine compliance with sanitary regulations. The Board may appoint inspectors as necessary;
- (2) To adopt sanitary regulations concerning barber schools and shops and procedural rules in accordance with the guidelines established in G.S. 86A-15;
- (3) To review the barber licensing laws of other states and to determine which are the substantive equivalent of the laws of North Carolina for purposes of G.S. 86A-12;
- (4) To conduct examinations of applicants for certificate of registration as registered barber, registered apprentice and barber school instructor.

(b) The Board shall adopt regulations:

- (1) Prohibiting the use of commercial chemicals of unknown content by persons registered under this Chapter. For purposes of this section, "commercial chemicals" are those products sold only through beauty and barber supply houses and not available to the general public;
- (2) Instructing persons registered under this Chapter in the proper use and application of commercial chemicals where no manufacturer's instructions are included. In the alternative, the Board shall prohibit the use of such commercial chemicals by persons registered under this Chapter.

(c) Each Board member shall submit periodic reports to the Board concerning his activities in carrying out duties as a Board member. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4.)

Effect of Amendments. — The 1981 amendment added the subsection designation "(a)," in subdivision (a)(3) substituted "the substantive equivalent of" for "substantially similar to"

and "purposes of G.S. 86A-12" for "reciprocity purposes," added subsection (b), and substituted the subsection designation "(c)" for the subdivision designation "(5)."

§ 86A-6. Office; seal; officers and executive secretary; funds.

The Board shall maintain a suitable office in Raleigh, and shall adopt and use a common seal for the authentication of its orders and records. The Board shall elect its own officers, and in addition, may elect or appoint a full-time executive secretary who shall not be a member of the Board, and whose salary shall be fixed by the Governor with the approval of the Advisory Budget Commission. The executive secretary shall turn over to the State Treasurer to be credited to the State Board of Barber Examiners all funds collected or received by him under this Chapter, the funds to be held and expended under the supervision of the Director of the Budget, exclusively for the enforcement and administration of the provisions of this Chapter. Nothing herein shall be

construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from fees collected under the provisions of this Chapter and received by the State Treasurer pursuant to the provisions of this section. (1929, c. 119, ss. 7, 14; 1937, c. 138, s. 4; 1941, c. 375, s. 4; 1943, c. 53, s. 1; 1945, c. 830, ss. 2, 4; 1951, c. 821, s. 1; 1957, c. 813, ss. 1, 3; 1965, c. 513; 1971, c. 826, ss. 1, 2; 1973, c. 1398; 1979, c. 695, s. 1; 1981, c. 884, s. 5.)

Effect of Amendments. — The 1981 amendment deleted the former third sentence, relating to the bond of the executive secretary.

§ 86A-7. Salary and expenses; employees; audits; annual reports to the Governor.

(a) Each member of the Board of Barber Examiners shall be reimbursed for his actual expenses and shall receive compensation and travel allowance according to G.S. 93B-5 for the distance traveled in performance of his duties. The expenses, compensation and all other salaries and expenses in connection with the administration of this Chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived from fees collected and received under this Chapter.

(b) The Board shall employ such agents, assistants and attorneys as it deems necessary.

(c) Repealed by Session Laws 1981, c. 884, s. 6.

(d) A complete audit and examination of the receipts and disbursements of the State Board of Barber Examiners shall be made annually by the State Auditor.

(e) The Board shall report annually to the Governor, a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8; 1943, c. 53, s. 2; 1945, c. 830, s. 3; 1957, c. 813, s. 2; 1979, c. 695, s. 1; 1981, c. 884, s. 6.)

Effect of Amendments. — The 1981 amendment deleted subsection (c), relating to bonds of members of the Barber Examiners.

§ 86A-10. Issuance of certificates of registration.

Whenever the provisions of this Chapter have been complied with, the Board shall issue, or have issued, a certificate of registration as a registered barber or as a registered apprentice, as the case may be. (1929, c. 119, s. 11; 1979, c. 695, s. 1; 1981, c. 457, s. 5.)

Effect of Amendments. — The 1981 amendment corrected an error which had already been corrected in the replacement volume by substituting "complied" for "compiled" near the beginning of the section.

§ 86A-11. Temporary permits.

(a) The Board may grant a temporary permit to work to a graduate of a barber school in North Carolina provided application for examination has been filed and fee paid. The permit is valid only until the date of the next succeeding Board examination of applicants for apprenticeship registration except in cases of undue hardship as the Board may determine, unless it is revoked or sus-

pending earlier by the Board. The permittee may operate only under the supervision of a licensed barber.

(b) The Board may grant a temporary permit to work to one whose license has been expired for more than five years in North Carolina provided application for examination to restore has been filed and fee paid. The permit is valid only until the date of the next succeeding Board examination of applicants for barber licenses except in cases of undue hardship as the Board may determine, unless it is revoked or suspended earlier by the Board.

(c) The Board may grant a temporary permit to persons licensed in another state who come to North Carolina for the purpose of teaching or demonstrating barber skills. The Board shall also inspect and approve the area where the demonstration is to be given if it is not an already approved shop or school. This permit shall be limited to the specific days of demonstration and shall be of no validity before or after.

(d) The Board may grant a temporary permit to work to persons licensed in another state and seeking permanent licensure in North Carolina under G.S. 86A-12. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1; 1981, c. 457, ss. 6, 7.)

Effect of Amendments. — The 1981 amendment substituted "apprenticeship registration" for "barber license" in the second sentence of subsection (a), substituted "under G.S. 86A-12" for "provided application for examination has

been filed and fee paid" at the end of subsection (d), and deleted a former second sentence in subsection (d) that provided the length of time for which the temporary permits were valid.

§ 86A-12. Applicants licensed in other states.

The Board shall issue a license to applicants already licensed in another state provided the applicant presents evidence satisfactory to the Board that:

- (1) He is currently an active, competent practitioner in good standing; and
- (2) He has practiced at least three out of the five years immediately preceding his application; and
- (3) He currently holds a valid license in another state; and
- (4) There is no disciplinary proceeding or unresolved complaint pending against him at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are the substantive equivalent of those required by this State.

Any license granted pursuant to this section is subject to the same duties and obligations and entitled to the same rights and privileges as a license issued under G.S. 86A-3. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1; 1981, c. 457, s. 8.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 86A-17. Renewal or restoration of certificate.

(a) Every registered barber who continues in practice shall annually, on or before May 31 of each year, renew his certificate of registration and furnish such health certificate as the Board may require and pay the required fee. Every certificate of registration shall expire on the 31st day of May in each year.

(b) A registered barber whose certificate of registration has expired may have his certificate restored immediately upon paying the required registration fee and furnishing a health certificate if required by the Board; provided, however, a registered barber whose certificate has expired for a period

of five years shall be required to take the clinical examination prescribed by the State Board of Barber Examiners and otherwise comply with the provisions of this Chapter before engaging in the practice of barbering. No registered barber who is reissued a certificate under this subsection shall be required to serve an apprenticeship as a prerequisite to reissuance of his certificate.

(c) All persons serving in the United States armed forces and any person whose certificate of registration as a registered barber was in force one year prior to entering service may, without taking the required examination, renew his certificate within 90 days after receiving an honorable discharge, by paying the current annual license fee and furnishing the State Board of Barber Examiners with a satisfactory health certificate if required by the Board. (1929, c. 119, s. 18; 1937, c. 138, s. 5; 1945, c. 830, s. 5; 1973, c. 605; 1979, c. 695, s. 1; 1981, c. 457, s. 11.)

Effect of Amendments. — The 1981 amendment inserted "clinical" preceding "examination prescribed" in the proviso in the first

sentence of subsection (b), and added the second sentence in subsection (b).

§ 86A-18. Disqualifications for certificate.

The Board may either refuse to issue or to renew, or may suspend or revoke any certificate of registration or barbershop permit or barber school permit for any one or combination of the following causes:

- (1) Conviction of the applicant or certificate holder of a felony proved by certified copy of the record of the court conviction;
- (2) Gross malpractice or gross incompetence;
- (3) Continued practice by a person knowingly having an infectious or contagious disease after being warned in writing by the Board to cease practice;
- (4) Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs;
- (5) The commission of any of the offenses described in subdivisions (3), (5), and (6) of G.S. 86A-20;
- (6) The violation of any one or more of the sanitary rules and regulations established by statute or rule or regulation of the Board, provided that the Board has previously given two written warnings to the individual committing the violation;
- (7) The violation of the rules and regulations pertaining to barber schools, provided that the Board has previously given two written warnings to the school. (1929, c. 119, s. 19; 1941, c. 375, s. 8; 1945, c. 830, s. 6; 1961, c. 477, s. 4; 1979, c. 695, s. 1; 1981, c. 457, s. 9.)

Effect of Amendments. — The 1981 amendment inserted "applicant or" near the middle of

subdivision (1), and substituted "(6)" for "(7)" near the end of subdivision (5).

§ 86A-20. Misdemeanors.

Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine of not less than ten dollars (\$10.00), nor more than fifty dollars (\$50.00), imprisonment for 30 days in jail, or both fine and imprisonment:

- (1) Violation of any of the provisions of G.S. 86A-1;
- (2) Obtaining or attempting to obtain a certificate of registration for money other than the required fee or any other thing of value, or by fraudulent misrepresentations;
- (3) Practicing or attempting to practice by fraudulent misrepresentations;

- (4) Willful failure to display a certificate of registration as required by G.S. 86A-16;
- (5) Practicing or attempting to practice barbering during the period of suspension or revocation of any certificate of registration granted under this Chapter. Each day's operation during a period of suspension or revocation shall be deemed a separate offense;
- (6) Permitting any person in one's employ, supervision or control to practice as a barber unless that person holds a certificate as a registered barber or registered apprentice. (1929, c. 119, s. 21; 1933, c. 95, s. 1; 1937, c. 138, s. 6; 1941, c. 375, ss. 9, 10; 1951, c. 821, s. 2; 1971, c. 819; 1979, c. 695, s. 1; 1981, c. 457, s. 10.)

Effect of Amendments. — The 1981 amendment inserted "the" following "other than" in subdivision (2), and deleted a comma following "fee" near the middle of subdivision (2).

§ 86A-22. Licensing and regulating barber schools and colleges.

The North Carolina State Board of Barber Examiners may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (1) Each school shall provide a course of instruction of at least 1528 hours.
- (2) Each school shall have at least two instructors. Each instructor must hold a valid instructor's certificate issued by the Board.
- (3) An application for a student's permit and a doctor's certificate, on forms prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.
- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.
- (5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.
- (6) Each school shall comply with the sanitary requirements of G.S. 86A-15. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12.)

Effect of Amendments. — The 1981 amendment deleted "to properly instruct the number of students" at the end of the first sentence of

subdivision (2) and added the second sentence in subdivision (4).

§ 86A-23. Instructors.

(a) The Board shall issue an instructor's certificate to any currently registered barber who has passed an instructor's examination given by the Board. This examination shall cover the subjects listed in G.S. 86A-22(4) and any other subjects which the Board deems necessary for the teaching of sanitary barbering.

(b) A person desiring to take an instructor's examination must make application to the Board for examination on forms to be furnished by the Board and pay the instructor's examination fee. Each person who passes the instructor's examination shall be issued a certificate of registration as a registered instructor by paying the issuance fee and the instructor's certificate shall be renewable as of the thirty-first day of May of each year. Any person whose instructor's certificate has expired for a period of three years or more shall be required to take and pass the instructor's examination before the certificate can be renewed. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 13.)

Effect of Amendments. — The 1981 amendment substituted "86A-22(4)" for "86A-22(3)" in the second sentence of subsection (a).

§ 86A-24. Apprenticeship.

(a) Before being issued an apprentice license, an applicant must pass an examination conducted by the Board to determine his competence, including his knowledge of barbering, sanitary rules and regulations, and knowledge of diseases of the face, skin and scalp.

(b) An apprentice license may be renewed annually on the payment of the prescribed fee. The certificate of registration of an apprentice is valid only so long as he works under supervision of a registered barber. No apprentice shall operate a barbershop.

(c) On completion of at least one year's apprenticeship, evidenced by affidavit of the supervising registered licensed barber or barbers, and upon meeting the other requirements of G.S. 86A-3, the apprentice shall be issued a license as a registered barber, pursuant to G.S. 86A-10. No registered apprentice may practice for a period exceeding three years without retaking and passing the required examination to receive a certificate as a registered apprentice. (1929, c. 119, ss. 4, 5; 1941, c. 375, s. 3; 1975, c. 68, ss. 1, 2; 1979, c. 695, s. 1; 1981, c. 457, s. 14.)

Effect of Amendments. — The 1981 amendment added subsection (a), redesignated former subsection (a) as present subsection (b), substituted "he" for "the apprentice" in the second sentence of subsection (b), deleted "registered" preceding "apprentice" in the third sentence of subsection (b), deleted former subsection (b) which read "It is the responsibility of a

supervising licensed registered barber to properly supervise his apprentices," rewrote the former first two sentences of subsection (c) as the first sentence of subsection (c), in the second sentence of subsection (c) substituted "exceeding" for "of more than," inserted "retaking and," and substituted "apprentice" for "barber" at the end of that sentence.

§ 86A-25. Fees collectable by Board.

The State Board of Barber Examiners shall charge fees not to exceed the following:

Certificate of registratin or renewal as a barber	\$ 20.00
Certificate of registration or renewal as an apprentice barber	20.00
Barbershop permit or renewal	20.00
Examination to become a registered barber	40.00
Examination to become a registered apprentice barber	40.00
Restoration of an expired certificate of a registered apprentice, registered barber or barbershop permit within the first year \$10.00 plus renewal fee; after the first year \$20.00 plus lapsed fees up to 5 years	
Examination to become a barber school instructor	85.00
Student permit	10.00
Issuance of any duplicate copy of a license, certificate or permit	5.00
Barber school permit	50.00
Barber school instructor certificate or renewal	35.00
Inspection of newly established barbershop	60.00
Inspection of newly established barber school	100.00
Issuance of a registered or apprentice certificate by certification	60.00

(1929, c. 119, s. 14; 1937, c. 138, s. 4; 1945, c. 830, ss. 4, 8; 1951, c. 821, s. 1; 1957, c. 813, s. 3; 1961, c. 577, s. 5; 1965, c. 513; 1971, c. 826, ss. 1, 2; 1973, c. 1331, s. 3; c. 1398; 1979, c. 695, s. 1; 1981, c. 753.)

Effect of Amendments.—The 1981 amendment, effective Oct. 1, 1981, substituted "fees not to exceed the following" for "and collect the following fees" in the introductory clause, inserted "within the first year \$10.00 plus renewal fee; after the first year" in the fee provision concerning the restoration of an expired certificate of a registered apprentice, registered

barber or barbershop permit, and added the fee provision concerning the issuance of a registered or apprentice certificate by certification. The amendment increased all of the fees except those concerning the issuance of any duplicate copy of a license, certificate or permit, a barber school permit, or the inspection of a newly established barber school.

Chapter 87.

Contractors.

Article 1.

General Contractors.

Sec.

- 87-1. "General contractor" defined; exceptions.
 87-10. Application for license; examination; certificate; renewal.
 87-14. Regulations as to issue of building permits.

Article 2.

Plumbing and Heating Contractors.

Sec.

- 87-21. Definitions; contractors licensed by Board; examination; posting license, etc.
 87-22. License fee based on population; expiration and renewal; penalty.

ARTICLE 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or more, shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.

This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments.

This section shall not apply to any person or firm or corporation who constructs a building on land owned by that person, firm or corporation when such building is intended for use by that person, firm or corporation after completion. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1; 1949, c. 936; 1953, c. 810; 1971, c. 246, s. 1; 1975, c. 279, s. 1; 1981, c. 783, s. 1.)

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, substituted "any person or firm or corporation" for "a 'general contractor' is defined as one" near the beginning of the first paragraph, inserted the language beginning "or who undertakes" and ending "the construction of" near the middle of the first paragraph, deleted "and anyone who shall bid upon or engage in constructing any undertakings or improvements above

mentioned in the State of North Carolina costing thirty thousand dollars (\$30,000) or more" following "thirty thousand dollars (\$30,000) or more" near the end of the first paragraph, substituted "to be a 'general contractor'" for "and held to have" near the end of the first paragraph, and added the third paragraph.

Session Laws 1981, c. 783, s. 3 contains a severability clause.

CASE NOTES

The purpose of, etc. —

In accord with original. See *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

Cost of Undertaking, etc. —

In accord with original. See *Revis Sand &*

Stone, Inc. v. King, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

The cost of a building, which is usually the contract price, as opposed to the total completed cost, determines whether the \$30,000 limit of this section has been violated

and thus whether the contractor must be licensed. *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

Unlicensed Person May Not Recover, etc.—

In accord with 2nd paragraph in original. See *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

The same rule which prevents an unlicensed person from recovering damages for the breach of a construction contract has generally been held also to deny recovery where the cause of action is based on quantum meruit or unjust enrichment. To deny an unlicensed person the

right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors. The importance of deterring unlicensed persons from engaging in the construction business outweighs any harshness between the parties and precludes consideration for unjust enrichment. *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

§ 87-2. Licensing Board; organization.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 87-6. Meetings; notice; quorum.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 87-10. Application for license; examination; certificate; renewal.

Anyone seeking to be licensed as a general contractor in this State shall file an application for an examination on a form provided by the Board, at least 30 days before any regular or special meeting of the Board accompanied by an examination fee of twenty-five dollars (\$25.00) and by the sum of one hundred dollars (\$100.00) if the application is for an unlimited license, the sum of seventy-five dollars (\$75.00) if the application is for an intermediate license or the sum of fifty dollars (\$50.00) if the application is for a limited license; the fees and sum accompanying any application shall be nonrefundable. The holder of an unlimited license shall be entitled to act as general contractor without restriction as to value of any single project; the holder of an intermediate license shall be entitled to act as general contractor for any single project with a value of up to five hundred thousand dollars (\$500,000); the holder of a limited license shall be entitled to act as general contractor for any single project with a value of up to one hundred seventy-five thousand dollars (\$175,000); and the license certificate shall be classified in accordance with this section. Before being entitled to an examination an applicant must show to the satisfaction of the Board from the application and proofs furnished that the applicant is possessed of a good character and is otherwise qualified as to competency, ability and integrity, and that the applicant has not committed or done any act, which, if committed or done by any licensed contractor would be grounds under the provisions hereinafter set forth for the suspension or revocation of contractor's license, or that the applicant has not committed or done any act involving dishonesty, fraud, or deceit, or that the applicant has never been refused a license as a general contractor nor had such license revoked, either in this State or in another state, for reasons that should preclude the granting of the license applied for, and that the applicant has never been

convicted of a felony: Provided, no applicant shall be refused the right to an examination, except in accordance with the provisions of Chapter 150A of the General Statutes.

The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, under the classification contained in the application, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs, construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction and liens. If the results of the examination of the applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be limited into five classifications as the common use of the terms are known — that is,

- (1) Building contractor, which shall include private, public, commercial, industrial and residential buildings of all types;
- (1a) Residential contractor, which shall include any general contractor constructing only residences which are required to conform to the North Carolina Uniform Residential Building Code (Vol 1-B);
- (2) Highway contractor;
- (3) Public utilities contractors, which shall include those whose operations are the performance of construction work on the following subclassifications of facilities:
 - a. Water and sewer mains and water service lines and house and building sewer lines as defined in the North Carolina State Building Code, and water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations and pumping stations;
 - b. Water and wastewater treatment facilities and appurtenances thereto;
 - c. Electrical power transmission facilities, and primary and secondary distribution facilities ahead of the point of delivery of electric service to the customer;
 - d. Public communication distribution facilities; and
 - e. Natural gas and other petroleum products distribution facilities; provided the General Contractors Licensing Board may issue license to a public utilities contractor limited to any of the above subclassifications for which the general contractor qualifies, and
- (4) Specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission pursuant to the laws of the State of North Carolina.

Public utilities contractors constructing water service lines and house and building sewer lines as provided in (3)a above shall terminate said lines at a valve, box, meter, or manhole or cleanout at which the facilities from the building may be connected.

If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees, and if a copartnership or corporation, or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the personnel of the applicant, and if the person so examined shall cease to be connected with the

applicant, then in such event the license shall remain in full force and effect for a period of 30 days thereafter, and then be canceled, but the applicant shall then be entitled to a reexamination, all pursuant to the rules to be promulgated by the Board: Provided, that the holder of such license shall not bid on or undertake any additional contracts from the time such examined employee shall cease to be connected with the applicant until said applicant's license is reinstated as provided in this Article.

Anyone failing to pass this examination may be reexamined at any regular meeting of the Board upon payment of an examination fee of twenty-five dollars (\$25.00). Anyone requesting to take the examination a third or subsequent time shall submit a new application with the appropriate examination and license fees. Certificate of license shall expire on the thirty-first day of December following the issuance or renewal and shall become invalid on that day unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without reexamination, by the payment of a fee to the secretary of the Board of seventy-five dollars (\$75.00) for unlimited license, fifty dollars (\$50.00) for intermediate license and twenty-five dollars (\$25.00) for limited license. Renewal applications received by the Board after January shall be accompanied by a late payment of ten dollars (\$10.00) for each month or part after January. After a lapse of two years no renewal shall be effected and the applicant shall fulfill all requirements of a new applicant as set forth in this section. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; c. 429, s. 3; 1941, c. 257, s. 1; 1953, c. 805, s. 2; c. 1041, s. 3; 1971, c. 246, s. 3; 1973, c. 1036, ss. 1, 2; c. 1331, s. 3; 1975, c. 279, ss. 2, 3; 1979, c. 713, s. 2; 1981, c. 739, ss. 1, 2.)

Effect of Amendments. —

The 1981 amendment, substituted the first two sentences of the first paragraph for a former first sentence pertaining to the same subject matter, substituted "upon payment of an examination fee of twenty-five dollars

(\$25.00)" for "without additional fee" at the end of the first sentence of the fifth paragraph, added the second sentence in the fifth paragraph, raised the fees set out in the fifth paragraph, and added the last two sentences in the fifth paragraph.

CASE NOTES

Applied in *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

Quoted in *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

§ 87-14. Regulations as to issue of building permits.

Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or county in North Carolina charged with the duty of issuing building or other other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be thirty thousand dollars (\$30,000) or more, shall, before he be entitled to the issuance of such

permit, furnish satisfactory proof to such inspector or authority that he or another person contracting to superintend or manage the construction is duly licensed under the terms of this Article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the State of North Carolina then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied; and it shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant has furnished evidence that he is either exempt from the provisions of this Article or is duly licensed under this Article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and such building inspector, or other such authority, violating the terms of this section shall be guilty of a misdemeanor and subject to a fine of not more than fifty dollars (\$50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7; 1949, c. 934; 1953, c. 809; 1969, c. 1063, s. 6; 1971, c. 246, s. 4; 1981, c. 783, s. 2.)

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, inserted "or another person contracting to superintend or manage the construction" near the middle of the section.

Session Laws 1981, c. 783, s. 3 contains a severability clause.

ARTICLE 2.

Plumbing and Heating Contractors.

§ 87-16. Board of Examiners; appointment; term of office.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 87-21. Definitions; contractors licensed by Board; examination; posting license, etc.

(a) Definitions. — For the purpose of this Article:

- (1) The word "plumbing" is hereby defined to be the system of pipes, fixtures, apparatus and appurtenances, installed upon the premises, or in a building, to supply water thereto and to convey sewage or other waste therefrom.
- (2) The phrase "heating, group number one" shall be deemed and held to be the heating system of a building, which requires the use of high or low pressure steam, vapor or hot water, including all piping, ducts, and mechanical equipment appurtenant thereto, within, adjacent to or connected with a building, for comfort heating.
- (3) The phrase "heating, group number two" means an air conditioning system which consists of an assemblage of interacting components producing conditioned air for comfort cooling by the lowering of temperature, and having a mechanical refrigeration capacity in excess of fifteen tons, and which circulates air.
- (4) The phrase "heating, group number three" shall be deemed and held to be a direct heating system of a building which produces heat to raise the temperature of the space within the building for the purpose of

comfort in which electric heating elements or products of combustion exchange heat either directly with the building supply air or indirectly through a heat exchanger and using an air distribution system of ducts.

- (5) Any person, firm or corporation, who for a valuable consideration, installs, alters or restores, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or heating group number three, or any combination thereof, as defined in this Article, shall be deemed and held to be engaged in the business of plumbing or heating contracting.
- (6) The word "contractor" is hereby defined to be a person, firm or corporation engaged in the business of plumbing or heating contracting.
- (7) The word "heating" shall be deemed and held to mean heating group number one, heating group number two, heating group number three, or any combination thereof.
- (8) The obtaining of a license, as required by this Article, shall not of itself authorize the practice of another profession or trade for which a State qualification license is required.
- (9) The word "Board" means the State Board of Examiners of Plumbing and Heating Contractors.

(b) Classes of Licenses; Eligibility and Examination of Applicant; Necessity for License.—In order to protect the public health, comfort and safety, the Board shall establish two classes of licenses: Class I covering all structures and systems to which this Article applies, and Class II covering plumbing and heating systems in single-family detached residential dwellings. The Board shall prescribe the standard of competence and efficiency to be required of an applicant for license of each class, and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating costs, fundamentals of installation and design, fire hazards and related subjects as these subjects pertain to either plumbing or heating; and as a result of the examination, the Board shall issue a certificate of license of the appropriate class in plumbing or heating, and a license shall be obtained, in accordance with the provisions of this Article, before any person, firm or corporation shall engage in, or offer to engage in, the business of either plumbing or heating contracting, or any combination thereof. It is the purpose and intent of this section that the Board shall provide an examination for plumbing, heating group number one, or heating group number two, or heating group number three, and it is authorized to issue a certificate of license limited to either plumbing or heating group number one, or heating group number two, or heating group number three, or any combination thereof. Each application for examination shall be accompanied by a check, post-office money order, or cash, in the amount of the annual license fee required by this Article. Regular examinations shall be given in the months of April and October of each year, and additional examinations may be given at such other times as the Board may deem wise and necessary. Any person may demand in writing a special examination, and upon payment by the applicant of the cost of holding such examination and the deposit of the amount of the annual license fee, the Board in its discretion will fix a time and place for such examination. Upon satisfactory proof of the applicant's inability to write and upon demand of an applicant for a Class II plumbing or heating license six weeks prior to an examination, the Board shall conduct the examination of that applicant orally, and shall not require that applicant to take a written examination as to examination inquiries answered other than by preparation of diagrams. Signed statements from two reliable citizens resident in the home county of the applicant shall constitute satisfactory proof of an applicant's inability to write. A person who fails to pass any examination shall not be reexamined until the next regular examination.

(c) To Whom Article Applies. — The provisions of this Article shall apply to all persons, firms, or corporations who engage in, or attempt to engage in, the business of plumbing or heating contracting, or any combination thereof as defined in this Article. The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing or heating.

(d) Repealed by Session Laws 1979, c. 834, s. 7.

(e) Posting License; License Number on Contracts, etc. — The current license issued in accordance with the provisions of this Article shall be posted in the business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities.

(f) Repealed by Session Laws 1971, c. 768, s. 4.

(g) The Board may, in its discretion, grant to plumbing or heating contractors licensed by other states license of the same or equivalent classification without written examination upon receipt of satisfactory proof that the qualifications of such applicants are substantially equivalent to the qualifications of holders of similar licenses in North Carolina and upon payment of the usual license fee. (1931, c. 52, s. 6; 1939, c. 224, s. 3; 1951, c. 953, ss. 1, 2; 1953, c. 254, s. 2; 1967, c. 770, ss. 1-6; 1971, c. 768, ss. 2-4; 1973, c. 1204; 1979, c. 834, ss. 4-7; 1981, c. 332, s. 1.)

Effect of Amendments. —

The 1981 amendment added subsection (g).

§ 87-22. License fee based on population; expiration and renewal; penalty.

All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns of 10,000 inhabitants or more shall pay an annual license fee not exceeding fifty dollars (\$50.00), and in cities or towns of less than 10,000 inhabitants an annual license fee not exceeding twenty-five dollars (\$25.00). In the event the Board refuses to license an applicant, the license fee deposited shall be returned by the Board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. It shall be the duty of the secretary and treasurer to cause to be mailed to every licensee registered hereunder notice to his last known address of the amount of fee required for renewal of license, such notice to be mailed at least one month in advance of the expiration of said license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the fee therefor during the month of January in each year, the Board shall increase said license fee ten per centum (10%) for each month or fraction of a month that payment is delayed; provided that the penalty for nonpayment shall not exceed the amount of the annual fee, and provided further that the Board requires reexamination upon failure of a licensee to renew license within three years after expiration. The Board may adopt regulations requiring attendance at programs of continuing education as a condition of license renewal. (1931, c. 52, s. 7; 1939, c. 224, s. 4; 1971, c. 768, s. 5; 1979, c. 834, s. 8; 1981, c. 332, s. 2.)

Effect of Amendments. —

The 1981 amendment substituted "not exceeding" for "of" preceding "fifty dollars

(\$50.00)" in the first sentence and made the same substitution preceding "twenty-five dollars (\$25.00)" at the end of the first sentence.

§ 87-27.1. Public awareness program.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 88-4. Beauty parlor, etc.

On and after June 30, 1983, no person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered cosmetologist or as a registered esthetician, issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners hereinafter established and, except as provided in G.S. 88-7.1, the practice of cosmetic art shall not be performed by a person who is not a registered cosmetologist or registered esthetician.

As used in this Chapter, "shampooing" includes only the application of shampoo to hair and the removal of the shampoo from the hair, and does not include any other treatment of the hair, such as styling, waving, straightening, or coloring. This paragraph shall not apply to the practice of cosmetology in the following counties: Duplin, Durham, Guilford, Jones, Lenoir, Mecklenburg, Gaston, Randolph, Richmond, Sampson, Scotland.

On and after February 1, 1975, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. The shop of such applicant shall be inspected and approved by the State Board of Cos-

Chapter 88.

Cosmetic Art.

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| <p>Sec.</p> <p>88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.</p> <p>88-4. Beauty parlor, etc.</p> <p>88-6. Operator.</p> <p>88-7. [Repealed.]</p> <p>88-7.1. Practice outside a beauty parlor.</p> <p>88-9. Apprentice.</p> <p>88-10. Qualifications for registered apprentice.</p> <p>88-12. Qualifications for registered cosmetologist.</p> <p>88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause.</p> <p>88-14. Office in Raleigh; seal; officers and secretary.</p> | <p>Sec.</p> <p>88-15. Compensation and expenses of Board members; inspectors; reports; budget; audit.</p> <p>88-19. Applicants licensed in other states.</p> <p>88-21. Fees required.</p> <p>88-23. Rules and regulations of Board; inspections; granting of certificates to Board members; employment of former Board members.</p> <p>88-26. Causes for revocation of certificates.</p> <p>88-28. Acts made misdemeanors.</p> <p>88-28.1. Restraining orders against persons engaging in illegal practices.</p> <p>88-30. Registered manicurist.</p> |
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Repeal of Chapter. —

Session Laws 1981, c. 615, s. 20 amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Chapter. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

On and after June 30, 1933, no person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners hereinafter established and, except as provided in G.S. 88-7.1, the practice of cosmetic art shall not be performed outside of a licensed and regularly inspected beauty establishment.

The operator of a cosmetic art shop, beauty parlor or hairdressing establishment may employ unlicensed personnel to do shampooing only, where the shampooing is done under the supervision of a registered cosmetologist. As used in this paragraph, "shampooing" includes only the application of shampoo to hair and the removal of the shampoo from the hair, and does not include any arranging, dressing, waving, marcelling or other treatment of hair. This paragraph does not apply to barbershops. This paragraph shall not apply to the following counties: Duplin, Durham, Guilford, Jones, Lenoir, Mecklenburg, Onslow, Randolph, Richmond, Sampson, Scotland.

On and after February 1, 1976, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. The shop of such applicant shall be inspected and approved by the State Board of Cos-

metic Art by an agent designated for such purpose by the Board before such cosmetic art shop shall be opened for business. It shall be unlawful to open a new cosmetic art shop for the practice of cosmetology until such shop has been inspected, as heretofore required, and determined by the Board to be in compliance with the requirements set forth in this Chapter. Upon the determination by the Board that the applicant has complied with the requirements of this Chapter, the Board shall issue to such applicant a permit to operate a cosmetic art shop. A fee of twenty-five dollars (\$25.00) shall be paid to the Board for the inspection of a cosmetic art shop. Such fee must accompany the application for a permit to operate a cosmetic art shop at the time such application is filed with the Board.

All cosmetic art shops in operation as of February 1, 1976, shall be required to make application to the Board of Cosmetic Art, on forms supplied by the Board, for a permit to operate. The fee required for such permit shall be three dollars (\$3.00) per active booth in said shop.

Thereafter, all permits shall be renewed as of the first day of February of each and every year, and the fee for annual renewal of cosmetic art shop permits shall be as set forth in G.S. 88-21. No permit or certificate shall be transferable from one location to another or from one owner to another at the same location. Each cosmetic art shop permit shall be conspicuously posted within such cosmetic art shop for which same is issued. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment added the language beginning "and, except as provided" at the end of the first paragraph, and added "from one location to another

or from one owner to another at the same location" at the end of the second sentence of the fifth paragraph.

§ 88-4. Beauty parlor, etc.

"Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced, and a "beauty school," "beauty college," or "beauty academy" is any building or part thereof wherein cosmetic art is taught. (1933, c. 179, s. 4; 1981, c. 615, s. 3.)

Effect of Amendments. — The 1981 amendment added the language beginning "and a 'Beauty School'" at the end of the section.

§ 88-6. Operator.

"Operator" is any person who is not a manager or apprentice cosmetologist, who practices cosmetic art under the direction and supervision of a managing cosmetologist. (1933, c. 179, s. 6; 1981, c. 615, s. 4.)

Effect of Amendments. — The 1981 amendment deleted a comma and "itinerant," following "manager."

§ 88-7: Repealed by Session Laws 1981, c. 615, s. 5.

§ 88-7.1. Practice outside a beauty parlor.

A registered cosmetologist shall be allowed to attend to the cosmetic needs of persons who are sick or disabled and confined to their place of residence. Registered cosmetologists shall also be allowed to attend to the cosmetic needs of persons in hospitals, nursing homes, rest homes, retirement homes, rehabilitation facilities, mental institutions, correctional facilities, funeral establishments, and similar institutions or facilities. (1981, c. 615, s. 6.)

§ 88-9. Apprentice.

"Apprentice" is any person who is not a manager or operator, who is engaged in learning and acquiring the practice of cosmetic art under the direction and supervision of a licensed managing cosmetologist. (1933, c. 179, s. 9; 1981, c. 615, s. 7.)

Effect of Amendments. — The 1981 amendment deleted a comma and "itinerant cosmetologist," following "manager."

§ 88-10. Qualifications for registered apprentice.

No person shall be issued a certificate of registration as a registered apprentice by the State Board of Cosmetic Art Examiners unless:

- (1) The applicant has completed at least 1,200 hours in classes in a cosmetic art school or college approved by the Board and
- (2) The applicant passes a written and practical examination prescribed by the Board; applicants shall not be allowed to take an oral examination in lieu of the written portion of the examination administered by the Board.

In the alternative, applicants may be admitted under the procedures of G.S. 88-19.

Applicants shall pay the fees required by G.S. 88-21. (1933, c. 179, s. 10; 1941, c. 234, s. 1; 1953, c. 1304, ss. 1, 2; 1963, c. 1257, s. 2; 1973, c. 450, s. 1; 1981, c. 615, s. 8.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 88-12. Qualifications for registered cosmetologist.

A certificate of registration as a registered cosmetologist shall be issued by the State Board of Cosmetic Art Examiners to any person who is qualified under this Chapter or who meets the following qualifications:

- (1) Successful completion of at least 1,200 hours in classes in a cosmetic art school, college or other institution of learning approved by the Board and
 - a. Completion of an apprenticeship for a period of at least six months under direct supervision of a registered managing cosmetologist as certified by sworn affidavit of three registered cosmetologists or by other evidence satisfactory to the Board, or
 - b. Completion of an additional 300 hours of cosmetic art education in a cosmetic art school, public school, community college, technical institute, college or university approved by the Board;

- (2) Successful completion of an examination conducted by the Board to determine the applicant's fitness and skill to practice cosmetic art and whether he or she has sufficient knowledge of the diseases of the face, skin, and scalp to avoid the aggravation and spreading thereof in the practice of the profession; provided that applicants shall not be allowed to take an oral examination in lieu of the written portion of the examination administered by the Board; and
- (3) Payment of the fees required by G.S. 88-21. (1933, c. 179, s. 12; 1953, c. 1304, s. 3; 1973, c. 450, s. 2; 1977, c. 899, s. 1; 1981, c. 615, s. 9.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause.

(a) The State Board of Cosmetic Art Examiners is established to consist of four members appointed by the Governor. Three members shall be experienced, licensed cosmetologists who have practiced all branches of cosmetic art in this State for at least five years immediately preceding appointment to the Board. These members shall be free of any connection with any cosmetic art school, college, academy, or training school during their service on the Board. The other member shall be a person who is not licensed under this Chapter and who shall represent the interest of the public at large.

(b) Cosmetologist members of the Board shall serve staggered three-year terms. In order to establish a staggered term system, the terms of those members currently serving on the Board shall expire as follows: the term of the member having served the longest time on the Board shall expire on June 30, 1981; the term of the member having served the least amount of time on the Board shall expire on June 30, 1983; and the term of the remaining cosmetologist member shall expire on June 30, 1982. Thereafter, all cosmetologist members shall serve three-year terms.

The Governor shall appoint the public member not later than July 1, 1981, to serve a three-year term.

No Board member appointed on or after July 1, 1981, shall serve more than two complete consecutive terms, except that each member shall serve until his successor is appointed and qualifies.

(c) The Governor may remove any member for good cause shown and may appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2; 1973, c. 1360, s. 1; 1975, c. 857, s. 2; 1981, c. 615, s. 10.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 88-14. Office in Raleigh; seal; officers and secretary.

The Board of Cosmetic Art Examiners shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. The Board shall operate under its present structure and composure until July 1, 1977, and thereafter said Board shall elect its own officers and in addition thereto shall employ an executive secretary, who shall not be a member of the Board. The salary of such executive secretary shall be fixed by the State Personnel Department. The secretary shall keep and preserve all the records of the Board, issue all necessary notices

and perform such other duties, clerical and otherwise, as may be imposed upon such secretary by said Board of Cosmetic Art Examiners. The secretary is hereby authorized and empowered to collect in the name and on behalf of said Board the fees prescribed by this Chapter and shall turn over to the State Treasurer all funds collected or received under this Chapter, which fund shall be credited to the Board of Cosmetic Art Examiners, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this Chapter. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. Nothing in this Chapter shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer, derived from fees and fines collected under the provisions of this Chapter and received by the State Treasurer in the manner aforesaid. (1933, c. 179, s. 14; 1943, c. 354, s. 1; 1957, c. 1184, s. 1; 1969, c. 844, s. 4; 1971, c. 355, s. 1; c. 616, ss. 1, 2; 1975, c. 857, s. 3; 1981, c. 884, s. 7.)

Effect of Amendments. — The 1981 amendment deleted the former sixth sentence, relating to the bond of the secretary.

§ 88-15. Compensation and expenses of Board members; inspectors; reports; budget; audit.

Each member of the Board of Cosmetic Art Examiners shall receive compensation for his services and expenses as provided in G.S. 93B-5 but shall be limited to payment for services deemed to be official business of the Board. Official business of the Board shall include meetings called by the chairman, supervision or administering of examinations, or investigations or inspections made subject to the regulations cited in the following paragraph. No Board member shall be authorized to attend trade shows or to travel out of the State and no per diem or travel expenses shall be paid for such travel unless said Board member is an officer of the organization holding such meeting.

Said Board, with the approval of the Director of the Budget, shall appoint necessary inspectors who shall be experienced in all branches of cosmetic art. The salaries for such inspectors shall be fixed by the State Personnel Department. The inspectors or agents so appointed shall perform such duties as may be prescribed by the Board. Any inspector appointed under authority of this section or any member of the Board shall have the authority at all reasonable hours to examine cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies or training schools with respect to and in compliance with the provisions of this Chapter. No member of the Board shall exercise this authority on a routine basis but shall do so at the direction of either the Board, the chairman, the executive secretary or the inspector assigned to the territory, such direction to be governed by a complaint or problem registered with the Board of Cosmetic Art office or when an inspector deems it necessary to call in a Board member. Reimbursement for per diem and travel is subject to these provisions. Prior to reimbursement, the requesting Board member must submit a detailed written report to the Board of Cosmetic Art office for the official file. The inspectors and agents appointed under authority of this Chapter shall make such reports to the Board of Cosmetic Art Examiners as said Board may require. The said Board shall, on or before June 1 of each year, submit a budget to the Director of the Budget for the ensuing fiscal year, which shall begin July first of each year. The said budget so submitted shall include all estimated receipts and expenditures for the ensuing fiscal year including the estimated compensation and expenses of

Board members. The said budget shall be subject to the approval of the Director of the Budget and no expenditures shall be made unless the same shall have been set up in the budget adopted by the Board of Cosmetic Art Examiners, and approved by the Director of the Budget of the State of North Carolina; that all salaries and expenses in connection with the administration of this Chapter shall be paid upon a warrant drawn on the State Treasurer, said warrants to be drawn by the secretary of the Board and approved by the State Auditor.

The provisions of the Executive Budget Act and the Personnel Act shall fully apply to the administration of this Chapter.

There shall be annually made by the Auditor of the State of North Carolina a full audit and examination of the receipts and disbursements of the State Board of Cosmetic Art Examiners. The State Board shall report annually to the Governor a full statement of receipts and disbursements and also a full statement of its work during the year. (1933, c. 179, s. 15; 1935, c. 54, s. 3; 1941, c. 234, s. 2; 1943, c. 354, s. 2; 1957, c. 1184, s. 2; 1971, c. 355, ss. 2, 3; c. 616, ss. 1, 3; 1973, c. 1360, s. 2; 1975, c. 857, s. 4; 1981, c. 615, s. 11.)

Effect of Amendments. — The 1981 amendment, in the second sentence of the first paragraph, deleted "deemed to be official business of the Board" preceding "shall include meetings."

§ 88-19. Applicants licensed in other states.

The board shall issue a license to applicants already licensed as an apprentice or registered cosmetologist in another state provided the applicant presents evidence satisfactory to the board that:

- (1) He is currently an active, competent practitioner in good standing; and
- (2) He has practiced at least one out of the three years immediately preceding his application; and
- (3) He currently holds a valid license in another state; and
- (4) There is no disciplinary proceeding or unresolved complaint pending against him at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are the substantive equivalent of those required by this State.

Any license granted pursuant to this section is subject to the same duties and obligations and entitled to the same rights and privileges as a license issued under G.S. 88-10 or G.S. 88-12.

In lieu of meeting the requirements of subdivisions (1)–(5) of this section, any applicant who has been licensed to practice as an apprentice or registered cosmetologist by the examining board of another state shall be admitted to practice cosmetic art in this State under the same reciprocity or comity provisions which the state of his or her registration or licensing grants to persons licensed in this State, provided the applicant files his application on or before June 30, 1982. (1933, c. 179, s. 19; 1953, c. 1304, s. 4; 1957, c. 1184, s. 3; 1963, c. 1257, s. 3; 1973, c. 256, s. 1; 1981, c. 615, s. 12; c. 967.)

Effect of Amendments. — The first 1981 amendment rewrote the section.

The second 1981 amendment added the last paragraph.

§ 88-21. Fees required.

The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be five dollars (\$5.00). The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be ten dollars (\$10.00). The regular or annual license fee of a registered cosmetologist shall be eight dollars (\$8.00), and the renewal of the license of a registered

cosmetologist shall be eight dollars (\$8.00) if renewed before the same becomes delinquent, and if renewed after the same becomes delinquent there shall be charged a penalty of three dollars (\$3.00) in addition to the regular license fee of eight dollars (\$8.00); the annual license fee of a registered apprentice shall be four dollars (\$4.00), and all licenses, both for apprentices and for registered cosmetologists, shall be renewed as of the first day of October each and every year. All cosmetic art shops in operation shall pay an annual fee of three dollars (\$3.00) for each active booth on or before February 1, if paid before it becomes delinquent, and if renewed after the same becomes delinquent, there shall be charged a penalty of ten dollars (\$10.00) in addition to the regular permit fee. The fee for registration of an expired permit of a cosmetic art shop shall be twenty-five dollars (\$25.00). All cosmetic art schools shall pay a fee of fifty dollars (\$50.00) annually. The fees herein set out shall not be increased by the Board of Cosmetic Art Examiners, but said Board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars (\$5.00) and registration of an expired certificate of an apprentice shall be three dollars (\$3.00). Applicants for licensure under G.S. 88-19 shall pay an application fee of fifteen dollars (\$15.00) and a license fee of five dollars (\$5.00) for an apprentice or eight dollars (\$8.00) for registration as a cosmetologist; thereafter, the annual fee for renewal of licenses issued pursuant to G.S. 88-19 shall be the same as that charged registered apprentices and cosmetologists under this section. (1933, c. 179, s. 21; 1955, c. 1265; 1973, c. 256, s. 2; 1975, c. 857, s. 6; 1981, c. 615, s. 13.)

Effect of Amendments. — The 1981 amendment added the last sentence in the section.

§ 88-23. Rules and regulations of Board; inspections; granting of certificates to Board members; employment of former Board members.

- (a) (1) The State Board of Cosmetic Art Examiners shall have the authority to make a reasonable curriculum and rules for recognized schools and colleges of beauty culture and make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such curriculum and rules and the sanitary rules and regulations enforced. The duly authorized agents of said Board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the curriculum and rules and the sanitary rules and regulations shall be furnished from the office of the Board or by the above mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school, and a copy of the curriculum and rules for recognized schools and colleges of beauty culture shall be kept posted in a conspicuous place in each school and the rules and regulations complied with as required by this Chapter.
- (2) The Board shall adopt regulations prohibiting the use of commercial chemicals of unknown content by persons registered under this Chapter. For purposes of this section, "commercial chemicals" are those products sold only through beauty and barber supply houses and not available to the general public.

(3) The Board shall adopt regulations instructing persons registered under this Chapter in the proper use and application of commercial chemicals where no manufacturer's instructions are included. In the alternative, the Board shall prohibit the use of such commercial chemicals by persons registered under this Chapter.

(b) The Board of Cosmetic Art shall not hereafter be authorized to grant teacher's or instructor's certificates to board members during their term of appointment on said Board. Teacher's or instructor's certificates granted to members by official action of the Board, without prior examination, shall be rescinded upon such member's termination from the Board of Cosmetic Art.

Any person appointed to the Board shall be prohibited from being employed by the Board for a period of one year after that person's term of appointment expires, whether or not that person served his whole term. (1933, c. 179, s. 23; 1935, c. 54, s. 5; 1973, c. 476, s. 128; 1975, c. 857, s. 9; 1981, c. 614, s. 1; c. 615, s. 14.)

Effect of Amendments. — The first 1981 amendment, ratified June 18, 1981 and effective July 1, 1981, reenacted the former first sentence of the section without change, and deleted a requirement that the rules be approved by the Commission for Health Services in the third sentence of the first paragraph as it stood before the second 1981 amendment. The section as so amended read as follows: "The State Board of Cosmetic Art Examiners shall have authority to make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such rules and regulations enforced. The duly authorized agents of said Board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the rules and regulations adopted by said Board shall be furnished from the office of the Board or by the above-mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school.

The Board of Cosmetic Art shall not hereafter be authorized to grant teacher's or instructor's certificates to Board members during their term of appointment on said Board. Teacher's or instructor's certificates granted to members by official action of the Board, without prior examination, shall be rescinded upon such member's termination from the Board of Cosmetic Art.

Any person appointed to the Board of Cosmetic Art shall be prohibited from being employed by the Board for a period of one year after that person's term of appointment expires, whether or not that person served his whole term."

The second 1981 amendment, ratified June 19, 1981, and effective on ratification, designated the former first paragraph as the present subdivision (a)(1), inserted "the" preceding "authority" near the beginning of the first sentence of subdivision (a)(1), inserted "a reasonable curriculum and rules for recognized schools and colleges of beauty culture and make" near the beginning of that sentence, inserted "curriculum and rules and the sanitary" near the end of that sentence, inserted "curriculum and rules and the sanitary" near the beginning of the third sentence of subdivision (a)(1), deleted "adopted by said Board and approved by the Commission for Health Services" preceding "shall be furnished" near the beginning of that sentence, and added the language beginning "and a copy of the curriculum" at the end of subdivision (a)(1). The amendment added subdivisions (a)(2) and (a)(3), designated the former second and third paragraphs as subsection (b), and deleted "of Cosmetic Art" following "to the Board" near the beginning of the second paragraph of subsection (b).

§ 88-26. Causes for revocation of certificates.

The Board of Cosmetic Art Examiners may either refuse to issue or renew, or may suspend, or revoke any certificate of registration for any one, or combination of the following causes:

(1) Conviction of a felony shown by certified copy of the record of the court of conviction.

- (2) Gross malpractice, or gross incompetency, which shall be determined by the Board of Cosmetic Art Examiners.
- (3) Continued practice by a person knowingly having an infectious, or contagious disease.
- (4) Advertising by means of knowingly false, or deceptive statements.
- (5) Habitual drunkenness, or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.
- (6) The conviction of any of the offenses described in G.S. 88-28, subdivisions (3), (4), (6) and (7). (1933, c. 179, s. 26; 1941, c. 234, s. 4; 1981, c. 615, s. 15.)

Effect of Amendments. — The 1981 amendment substituted "conviction" for "commission" in subdivision (6).

§ 88-28. Acts made misdemeanors.

Each of the following constitutes a misdemeanor punishable upon conviction by a fine of not less than twenty-five dollars (\$25.00) and not more than one hundred dollars (\$100.00), or up to 30 days in jail, or both:

- (1) The violation of any of the provisions of G.S. 88-1.
- (2) Permitting any person in one's employ, supervision, or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.
- (3) Permitting any person in one's employ, supervision, or control, to practice as a cosmetologist unless that person has a certificate as a registered cosmetologist.
- (4) Obtaining, or attempting to obtain, a certificate of registration for money other than the required fee or any other thing of value, or by fraudulent misrepresentations.
- (5) Practicing or attempting to practice by fraudulent misrepresentations.
- (6) The willful failure to display a certificate of registration as required by G.S. 88-24.
- (7) The willful violation of the reasonable rules and regulations adopted by the State Board of Cosmetic Art Examiners. (1933, c. 179, s. 28; 1949, c. 505, s. 2; 1973, c. 476, s. 128; 1975, c. 857, s. 8; 1981, c. 614, s. 2; c. 615, s. 17.)

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, deleted "and approved by the Commission for Health Services" at the end of subdivision (7).

The second 1981 amendment, in subdivision (4), inserted "the" preceding "required fee" and deleted a comma following "required fee."

§ 88-28.1. Restraining orders against persons engaging in illegal practices.

If it is found that any licensed cosmetologist, cosmetic art shop, or other person subject to the provisions of this Chapter is violating any rules and regulations adopted by the State Board of Cosmetic Art Examiners or any provisions of G.S. 88-28, then the Department of Human Resources, any county or district health director, or the State Board of Cosmetic Art Examiners shall give notice to the person of the violation and apply to the superior court for injunctive relief to restrain such person from continuing such illegal practices. If, upon such application, it shall appear to the court that such person has violated and/or is violating any of the said rules and regulations or any provisions of Chapter 88, section 28, of the General Statutes of North Carolina [G.S.

88-28], the court may issue an order restraining any further violations thereof. All such actions for injunctive relief shall be governed by the provisions of Article 37 of Chapter 1 of the General Statutes: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this Chapter. Actions under this section shall be commenced in the county in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1949, c. 505, s. 1; 1973, c. 476, s. 128; 1975, c. 857, s. 10; 1981, c. 614, s. 3; c. 615, s. 18.)

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, deleted "The Department of Human Resources and/or any county, city or district health officer and/or the State Board of Cosmetic Art Examiners" at the beginning of the first sentence of the section, and in that first sentence, substituted "is" for "shall be" preceding "found that any," deleted "who is" preceding "subject to the," deleted "of the" following "violating any," deleted "as approved by the Commission for Health Ser-

vices" preceding "or any provisions," substituted "G.S. 88-28" for "Chapter 88, section 28, of the General Statutes of North Carolina," substituted the language beginning "then the Department" and ending "for injunctive relief" for "may, after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order," and made minor changes in punctuation.

The second 1981 amendment added the last sentence.

§ 88-30. Registered manicurist.

A person may be licensed to engage in the practice of manicuring or pedicuring in a cosmetic art shop, beauty parlor or hairdressing establishment without being a registered cosmetologist. A certificate of registration as a registered manicurist shall be issued by the Board of Cosmetic Art Examiners to any person who meets the following qualifications:

- (1) Who has completed 150 hours in classes in a cosmetic art school or college approved by the Board;
- (2) Repealed by Session Laws 1981, c. 615, s. 19.
- (3) Repealed by Session Laws 1973, c. 450, s. 4.
- (4) Who has passed a satisfactory examination, conducted by the Board, to determine his or her fitness to practice manicuring, such examination to be so prepared and conducted as to determine whether or not the applicant is possessed of the requisite skill in such trade to properly perform all the duties thereof and services incident thereto. (1963, c. 1257, s. 4; 1973, c. 450, s. 4; 1981, c. 615, s. 19.)

Effect of Amendments. — The 1981 amendment deleted subdivision (2) which read "Who is at least 17 years of age."

Chapter 89A.

Landscape Architects.

Repeal of Chapter. —

Session Laws 1979, c. 872, s. 7 which provided that this Chapter would be repealed effective

July 1, 1981, was repealed by Session Laws 1981, c. 427.

§ 89A-3. North Carolina Board of Landscape Architects; appointments; powers.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 89A-8. Violation a misdemeanor; injunction to prevent violation.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 88-28.1. Restraining orders against persons engaging in illegal practices.

If it is found that any licensed cosmetologist, cosmetic art shop, or other person subject to the provisions of this Chapter is violating any rules and regulations adopted by the State Board of Cosmetic Art Examiners or any provisions of G.S. 88-28, then the Department of Human Resources, any county or district health director, or the State Board of Cosmetic Art Examiners shall give notice to the person of the violation and apply to the superior court for injunctive relief to restrain such person from continuing such illegal practices. If, upon such application, it shall appear to the court that such person has violated and/or is violating any of the said rules and regulations or any provisions of Chapter 88, section 28, of the General Statutes of North Carolina (G.S.

Chapter 89B.

Foresters.

Cross References. — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

Repeal of Chapter.

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Chapter effective July 1, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

Chapter 89C.

Engineering and Land Surveying.

Sec.

89C-14. Application for registration; registration fees.

Sec.

89C-22. Disciplinary action — charges; procedure.

§ 89C-4. State Board of Registration; appointment; terms.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 89C-14. Application for registration; registration fees.

(a) Application for registration as a professional engineer or registered land surveyor shall be on a form prescribed and furnished by the Board. It shall contain statements made under oath, showing the applicant's education and a detailed summary of his technical and engineering or land surveying experience, and shall include the names and complete mailing addresses of the references, none of whom should be members of the Board.

The Board may accept the certified information on the copy of a current formal certificate of qualifications issued by the National Council of Engineering Examiners Committee or National Engineering Certification for Professional Engineer applicants in lieu of the same information that is required for the form prescribed and furnished by the Board.

(b) The registration fee shall be established by the Board in amounts not to exceed seventy dollars (\$70.00) for an engineer or seventy dollars (\$70.00) for registration as a land surveyor which shall accompany the applications. The fee for comity registration of engineers and land surveyors who hold unexpired certificates in another state or a territory of the United States or in Canada shall be the total current fee as fixed by the Board.

(c) The certification fee for a corporation (see G.S. 89C-24) shall be in accordance with Chapter 55B.

(d) Should the Board deny the issuance of a certificate of registration to any applicant, the unobligated portion of fees paid shall be returned by the Board to the applicant.

(e) A candidate failing an examination may apply, and be considered by the Board, for reexamination at the end of six months. The Board shall make such reexamination charge as is necessary to defray the cost of the examination provided the charge of any reexamination shall not exceed thirty dollars (\$30.00).

A candidate failing an examination three times will not be permitted to take a reexamination until he has made a written appeal to the Board and his tentative qualifications for the examination are reviewed and reaffirmed by the Board. (1921, c. 1, s. 9; C. S., s. 6055(j); 1951, c. 1084, s. 1; 1953, c. 999, s. 2; 1957, c. 1060, ss. 2, 3; 1975, c. 681, s. 1; 1981, c. 230.)

Effect of Amendments. — The 1981 amendment substituted "thirty dollars (\$30.00)" for

"twenty dollars (\$20.00)" at the end of the first paragraph of subsection (e).

§ 89C-22. Disciplinary action — charges; procedure.

(a) Any person may prefer charges of fraud, deceit, gross negligence, incompetence, misconduct, or violation of the rules of professional conduct, against any individual registrant or against any corporation holding a certificate of authorization. Such charges shall be in writing and shall be sworn to by the person or persons making them and shall be filed with the secretary of the Board.

(b) All charges, unless dismissed by the Board as unfounded or trivial, shall be heard by the Board or hearing officer as provided under the requirements of Chapter 150A of the General Statutes.

(c) If, after such hearing, a majority of the entire Board votes in favor of sustaining the charges, the Board shall reprimand, suspend, refuse to renew, or revoke the individual's certificate of registration, or a corporation's certificate of authorization.

(d) An individual registrant having a certificate of registration, or corporation holding a certificate of authorization, aggrieved by a final decision of the Board, may appeal for judicial review as provided by Article 4 of Chapter 150A.

(e) The Board may, upon petition of an individual or corporation, whose certificate has been revoked, for reasons it may deem sufficient, reissue a certificate of registration or authorization, provided that a majority of the members of the Board vote in favor of such issuance. (1921, c. 1, s. 10; C. S., s. 6055(1); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, c. 1060, s. 5; 1973, c. 1331, s. 3; 1975, c. 681, s. 1; 1981, c. 789.)

Effect of Amendments. — The 1981 amendment substituted "or hearing officer as provided under the requirements of Chapter 150A of the

General Statutes" for "within three months after the date on which they shall have been referred" at the end of subsection (b).

§ 89C-25.2. Program of licensure by discipline.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Chapter 89D.

Landscape Contractors.

Cross References. — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

Chapter 90.

Medicine and Allied Occupations.

Article 1.

Practice of Medicine.

Sec.

- 90-1. North Carolina Medical Society incorporated.
- 90-2. Board of Examiners.
- 90-3. Medical Society nominates Board.
- 90-4. Board elects officers; quorum.
- 90-5. Meetings of Board.
- 90-6. Regulations governing applicants for license, examinations, etc.; appointment of subcommittee.
- 90-9. Examination for license; scope; conditions and prerequisites.
- 90-11. Qualifications of applicant for license.
- 90-12. Limited license.
- 90-14. Revocation, suspension, annulment or denial of license.
- 90-14.4. Place of hearings for revocation or suspension of license.
- 90-14.8. Appeal from Board's decision revoking or suspending a license.
- 90-14.12. Injunctions.
- 90-14.13. Reports of disciplinary action by health care institutions; immunity from liability.
- 90-15. License fee; salaries, fees, and expenses of Board.
- 90-21. Certain offenses prosecuted in superior court; duties of Attorney General.

Article 2.

Dentistry.

- 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.
- 90-24. Quorum; adjourned meetings.
- 90-26. Annual and special meetings.
- 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses.
- 90-36. Licensing practitioners of other states.
- 90-41. Disciplinary action.

Article 4.

Pharmacy.

Part 1. Practice of Pharmacy.

- 90-55. Board of Pharmacy; selection; terms; vacancies.
- 90-57.1. [Repealed.]

Sec.

- 90-60. Fees collectible by Board.
- 90-61. Application and examination for license; prerequisites.
- 90-61.1. Pharmacist intern license.
- 90-64. Applicants licensed in other states.
- 90-65. Denial, suspension, revocation or refusal to renew pharmacist's license or drugstore permit.

Part 2. Dealing in Specific Drugs Regulated.

- 90-85.1. Enjoining illegal practices.

Article 5.

North Carolina Controlled Substances Act.

- 90-87. Definitions.
- 90-88. Authority to control.
- 90-89. Schedule I controlled substances.
- 90-90. Schedule II controlled substances.
- 90-91. Schedule III controlled substances.
- 90-92. Schedule IV controlled substances.
- 90-93. Schedule V controlled substances.
- 90-94. Schedule VI controlled substances.
- 90-95.2. Cooperation between law-enforcement agencies.
- 90-96. Conditional discharge and expunction of records for first offense.
- 90-96.01. Drug education schools; responsibilities of the Department of Human Resources; fees.
- 90-100. Rules and regulations.
- 90-101. Annual registration to manufacture, etc., controlled substances generally; effect of registration; exceptions; waiver; inspection.
- 90-103. Revocation or suspension of registration.
- 90-104. Records of registrants or practitioners.
- 90-106. Prescriptions and labeling.
- 90-109. Nonprofessional treatment.
- 90-113.2. Judicial review.
- 90-113.3. Education and research.
- 90-113.4. [Repealed.]

Article 5A.

North Carolina Toxic Vapors Act.

- 90-113.9. Definitions.
- 90-113.14. Conditional discharge and expunction of records for first offences.
- 90-113.15 to 90-113.19. [Reserved.]

Article 5B.

Drug Paraphernalia.

- 90-113.20. Title.

GENERAL STATUTES OF NORTH CAROLINA

Sec.

- 90-113.21. General provisions.
- 90-113.22. Possession of drug paraphernalia.
- 90-113.23. Manufacture or delivery of drug paraphernalia.
- 90-113.24. Advertisement of drug paraphernalia.

Article 6.

Optometry.

- 90-116. Board of Examiners in Optometry.
- 90-117.1. Quorum; adjourned meetings.
- 90-117.3. Annual and special meetings.
- 90-118. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses; educational requirements for prescription and use of pharmaceutical agents.
- 90-118.2. Displaying license and current certificate of renewal.
- 90-118.3. Refusal to grant renewal of license.
- 90-118.5. Licensing practitioners of other states.
- 90-118.8, 90-118.9. [Repealed.]
- 90-118.11. Unauthorized practice; penalty for violation of Article.
- 90-121.1. Board may enjoin illegal practices.
- 90-121.2. Rules and regulations; discipline, suspension, revocation and regrant of certificate.
- 90-123. Fees.
- 90-123.1. Continuing education courses required.
- 90-127.3. Copy of prescription furnished on request.

Article 7.

Osteopathy.

- 90-130. Board of Examiners; membership; officers; meetings.

Article 8.

Chiropractic.

- 90-139. Creation and membership of Board of Examiners.
- 90-140. Selection of chiropractic members of Board.
- 90-141. Organization; quorum.
- 90-143. Definitions of chiropractic; examinations; educational requirements.
- 90-143.1. Applicants licensed in other states.
- 90-145. Grant of license.
- 90-154. Grounds for professional discipline.
- 90-156. Pay of Board and authorized expenditures.

Article 9.

Nurse Practice Act.

- 90-158 to 90-171.18. [Recodified.]

Article 9A.

Nursing Practice Act.

Sec.

- 90-171.19. Legislative findings.
- 90-171.20. Definitions.
- 90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.
- 90-171.22. Officers.
- 90-171.23. Duties, powers, and meetings.
- 90-171.24. Executive director.
- 90-171.25. Custody and use of funds.
- 90-171.26. The Board may accept contributions, etc.
- 90-171.27. Expenses payable from fees collected by Board.
- 90-171.28. Nurses registered under previous law.
- 90-171.29. Qualifications of applicants for examination.
- 90-171.30. Licensure by examination.
- 90-171.31. Reexamination.
- 90-171.32. Qualifications for license as a registered nurse or a licensed practical nurse without examination.
- 90-171.33. Temporary license.
- 90-171.34. Licensure renewal.
- 90-171.35. Reinstatement.
- 90-171.36. Inactive list.
- 90-171.37. Revocation, suspension, or denial of licensure.
- 90-171.38. Standards for nursing programs.
- 90-171.39. Approval.
- 90-171.40. Periodic surveys.
- 90-171.41. Baccalaureate in nursing candidate credits.
- 90-171.42. Continuing education programs.
- 90-171.43. License required.
- 90-171.44. Prohibited acts.
- 90-171.45. Violation of Article.
- 90-171.46. Injunctive authority.
- 90-171.47. Reports: immunity from suit.

Article 10.

Midwives.

- 90-172. Midwives to register.

Article 11.

Veterinarians.

- 90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.
- 90-184. Compensation of the Board.
- 90-185. General powers of the Board.
- 90-186. Special powers of the Board.
- 90-187. Application for license; qualifications.
- 90-187.3. Applicants licensed in other states.
- 90-187.6. Veterinary assistants.
- 90-187.8. Discipline of licensees.
- 90-187.13. Injunctions.

Article 12A.

Podiatrists.

- Sec.
90-202.4. Board of Podiatry Examiners; terms of office; powers; duties.
90-202.5. Applicants to be examined; examination fee; requirements.
90-202.6. Examinations; subjects; certificates.
90-202.7. Applicants licensed in other states.
90-202.8. Revocation of certificate; grounds for; suspension of certificate.
90-202.13. Injunctions.

Article 13A.

Practice of Funeral Service.

- 90-210.25. Licensing.
90-210.28. Fees.

Article 16.

Dental Hygiene Act.

- 90-221. Definitions.
90-223. Practice of dental hygiene.

Article 17.

Dispensing Opticians.

- 90-236.1. Requirements for filling contact lens prescriptions.
90-237. Qualifications for dispensing opticians.
90-238. North Carolina State Board of Opticians created; appointment and qualification of members.
90-239. Organization, meetings and powers of Board.
90-240. Examination.
90-241. Waiver of written examination requirements.
90-242. [Repealed.]
90-243. Registration of places of business, apprentices.
90-244. Display, use, and renewal of license of registration.
90-245. Collection of fees.
90-246. Fees.
90-247. [Repealed.]
90-248. Compensation and expenses of Board members and secretary.
90-249. Powers of the Board.
90-252. Engaging in practice without license.
90-253. Exemptions from Article.
90-253. General penalty for violation.
90-255. Rebates.

Article 18A.

Practicing Psychologists.

- 90-270.4. Exemptions to this Article.
90-270.11. Licensing and examination.

Article 18B.

Physical Therapy.

Sec.

- 90-270.25. Board of Examiners.

Article 18C.

Marital and Family Therapy Certification Act.

- 90-270.53. Application for certificate without examination before July 1, 1982.
90-270.54. Application for certificate by examination.

Article 20.

Nursing Home Administrator Act.

- 90-276. Definitions.
90-277. Composition of Board.
90-278. Qualifications for licensure.
90-279. Licensing function.
90-282. [Repealed.]
90-283. Organization of Board; compensation; employees and services.
90-285. Functions and duties of the Board.
90-285.1. Suspension, revocation or refusal to issue a license.
90-286. Renewal of license.

Article 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

- 90-294. License required; Article not applicable to certain activities.
90-296. Examinations.
90-301. Grounds for suspension or revocation of license.
90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.
90-304. Powers and duties of Board.

Article 23.

Right to Natural Death; Brain Death.

- 90-321. Right to a natural death.
90-322. Procedures for natural death in the absence of a declaration.

ARTICLE 1.

*Practice of Medicine.***Repeal of Article. —**

Session Laws 1981, c. 573, s. 17, amended
§ 143-34.12 (codified from Session Laws 1977,

c. 712, s. 3) so as to eliminate the provisions
repealing this Article. Section 143-34.12 was
itself repealed by Session laws 1981, c. 932, s. 1.

§ 90-1. North Carolina Medical Society incorporated.

The association of regularly graduated physicians, calling themselves the State Medical Society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. The name of the society is now the North Carolina Medical Society. (1858-9, c. 258, s. 1; Code, s. 3121; Rev., s. 4491; C. S., s. 6605; 1981, c. 573, s. 1.)

Effect of Amendments. — The 1981 amendment added the second sentence.

§ 90-2. Board of Examiners.

(a) In order to properly regulate the practice of medicine and surgery, there is established a Board of Medical Examiners of the State of North Carolina. The Board shall consist of eight members. Seven of the members shall be duly licensed physicians elected and nominated to the Governor by the North Carolina Medical Society. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor the spouse of a health care provider. For purposes of board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) No member appointed to the Board on or after November 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is chosen and qualifies.

(c) In order to establish regularly overlapping terms, the terms of office of the members currently serving on the Board shall expire as follows: two on October 31, 1982; two on October 31, 1984; three on October 31, 1986. Terms of Board members shall expire in direct relation to their date of appointment by the society; the terms of the two members first appointed shall expire in 1982, and the terms of the three members last appointed shall expire in 1986. No initial physician member of the Board may serve another term until at least three years from the date of expiration of his current term.

The Governor shall appoint the public member not later than October 31, 1981.

(d) Any initial or regular member of the Board may be removed from office by the Governor for good cause shown. Any vacancy in the initial or regular physician membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of physicians submitted by the North Carolina Medical Society Executive Council. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term. (1858-9, c. 258, ss. 3, 4; Code, s. 3123; Rev., s. 4492; C. S., s. 6606; Ex. Sess. 1921, c. 44, s. 1; 1981, c. 573, s. 2.)

Effect of Amendments. — The 1981 amendment rewrote the former section as present subsection (a), and added subsections (b), (c) and (d).

§ 90-3. Medical Society nominates Board.

The Governor shall appoint as physician members of the Board physicians elected and nominated by the North Carolina Medical Society. (1858-9, c. 258, s. 9; Code, s. 3126; Rev., s. 4493; C. S., s. 6607; 1981, c. 573, s. 3.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 90-4. Board elects officers; quorum.

The Board of Medical Examiners is authorized to elect all officers and adopt all bylaws as may be necessary. A majority of the membership of the Board shall constitute a quorum for the transaction of business. (1858-9, c. 258, s. 11; Code, s. 3128; Rev., s. 4494; C. S., s. 6608; 1981, c. 573, s. 4.)

Effect of Amendments. — The 1981 amendment deleted "such" preceding "officers," substituted "adopt" for "to frame" and deleted "such" preceding "bylaws" in the first sentence, deleted "and in the event of any vacancy by death, resignation, or otherwise, of any member of said Board, the Board, or a quorum thereof, is empowered to fill such vacancy" at the end of the first sentence, and added the second sentence.

§ 90-5. Meetings of Board.

The Board of Medical Examiners shall assemble once in every year in the City of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the State if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; C. S., s. 6609; 1935, c. 363; 1981, c. 573, s. 5.)

Effect of Amendments. — The 1981 amendment substituted "shall" for "may" preceding "assemble" near the beginning of the section.

§ 90-6. Regulations governing applicants for license, examinations, etc.; appointment of subcommittee.

The Board of Medical Examiners is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper.

The Board of Medical Examiners shall appoint and maintain a subcommittee to work jointly with a subcommittee of the Board of Nursing to develop rules and regulations to govern the performance of medical acts by registered nurses, including the determination of reasonable fees to accompany an application for approval not to exceed one hundred dollars (\$100.00) and for renewal of such approval not to exceed fifty dollars (\$50.00). Rules and regulations developed by this subcommittee from time to time shall govern the performance of medical acts by registered nurses and shall become effective when adopted by both the Board of Medical Examiners and the Board of Nursing. The Board of Medical Examiners shall have responsibility for securing compliance with these regulations. (C. S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2; 1973, c. 92, s. 2; 1981, c. 665, s. 1.)

Effect of Amendments. — The 1981 amendment added the language beginning "including the determination" at the end of the first sentence of the second paragraph.

§ 90-9. Examination for license; scope; conditions and prerequisites.

It shall be the duty of the Board of Medical Examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the Board that he has an academic education equal to the entrance requirements of the University of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the State University. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college or an osteopathic college approved by the American Osteopathic Association at the time of his graduation, which time of graduation shall have been on January 1, 1960, or subsequent thereto and which medical and osteopathic schools shall require an attendance of not less than four years or for a lesser period of time approved by the Board, and supply such facilities for clinical and scientific instruction as shall meet the approval of the Board.

The examination shall cover the branches of medical science and subjects which the Board deems necessary to determine competence to practice medicine.

If the applicant successfully passes such examination as determined by the Board, and if the applicant satisfies the Board that he is of good moral character and that he has successfully completed one year of training after his graduation from medical school in a medical education program approved by the Board, the Board shall grant such applicant a license authorizing the applicant to practice medicine in any of its branches.

Applicants shall be examined by number only; names and other identifying information shall not appear on examination papers. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; C. S., s. 6613; 1921, c. 47, s. 1; 1969, c. 612, s. 1; c. 929, s. 1; 1971, c. 1150, s. 1; 1977, c. 838, s. 1; 1981, c. 573, s. 6.)

Effect of Amendments. — The 1981 amendment deleted "also" preceding "satisfies" in the third paragraph and inserted "is of good moral character and that he" near the middle of that paragraph.

§ 90-11. Qualifications of applicant for license.

Every applicant for a license to practice medicine or for approval to perform medical acts in the State shall satisfy the Board of Medical Examiners that such applicant is of good moral character and meets the other qualifications for the issuance of such a license or for such approval before any such license or approval is granted by the Board to such applicant. (C. S., s. 6615; 1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5; 1971, c. 1150, s. 3; 1981, c. 573, s. 7.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 90-12. Limited license.

The Board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make such modifications of the requirements of G.S. 90-9, 90-10, and 90-11 as in its judgment the interests of the people living in that locality may demand, and may issue to such applicant a special license, to be entitled a "Limited License," authorizing the holder thereof to practice medicine and surgery within the limits only of the districts specifically described therein. The holder of the limited license practicing medicine or surgery beyond the boundaries of the districts as laid down in said license shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than fifty dollars (\$50.00) for each and every offense; and the Board is empowered to revoke such limited license, in its discretion, after due notice. (1909, c. 218, s. 1; C. S., s. 6616; 1967, c. 691, s. 42; 1981, c. 573, s. 8.)

Effect of Amendments. — The 1981 amendment substituted "G.S. 90-9, 90-10, and 90-11" for "the preceding sections, both as to applica-

tion for examination and examination for license" near the middle of the first sentence.

§ 90-14. Revocation, suspension, annulment or denial of license.

(a) The Board shall have the power to deny, annul, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

- (1) Immoral or dishonorable conduct;
- (2) Producing or attempting to produce an abortion contrary to law;
- (3) Made false statements or representations to the Board, or who has willfully concealed from the Board material information in connection with his application for a license;
- (4) Repealed by Session Laws 1977, c. 838, s. 3.
- (5) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals, or any other type of material or by reason of any physical or mental abnormality. The Board is empowered and authorized to require a physician licensed by it to submit to a mental or physical examination by physicians designated by the Board before or after charges may be presented against him, and the results of examination shall be admissible in evidence in a hearing before the Board;
- (6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession,

irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of his practice or otherwise, and whether committed within or without North Carolina;

- (7) Conviction in any court of the commission of a crime involving moral turpitude, or of the violation of a law involving the practice of medicine or the conviction of a felony;
- (8) By false representations has obtained or attempted to obtain practice, money or anything of value;
- (9) Has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he has been educated;
- (10) Adjudication of mental incompetency, which shall automatically suspend a license unless the Board orders otherwise;
- (11) Lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients. In this connection the Board may consider repeated acts of a physician indicating his failure to properly treat a patient and may require such physician to submit to inquiries or examinations, written or oral, by members of the Board or by other physicians licensed to practice medicine in this State, as the Board deems necessary to determine the professional qualifications of such licensee;
- (12) Promotion of the sale of drugs, devices, appliances or goods provided for a patient in such a manner as to exploit the patient for financial gain of the physician;
- (13) Suspension or revocation of a license to practice medicine in any other state, or territory of the United States, or other country.

For any of the foregoing reasons, the Board may deny the issuance of a license to an applicant or revoke a license issued to him, may suspend such a license for a period of time, and may impose conditions upon the continued practice after such period of suspension as the Board may deem advisable, may limit the accused physician's practice of medicine with respect to the extent, nature or location of his practice as the Board deems advisable. The Board may, in its discretion and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked or rescinded.

(b) The Board shall refer to the State Medical Society Physician Health and Effectiveness Committee all physicians whose health and effectiveness have been significantly impaired by alcohol, drug addiction or mental illness. (C. S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2; 1969, c. 612, s. 4; c. 929, s. 6; 1975, c. 690, s. 4; 1977, c. 838, s. 3; 1981, c. 573, ss. 9, 10.)

Effect of Amendments. — The 1981 amendment added the subsection designation "(a)" at the beginning of the section, substituted "or" for a comma preceding "revoke" in the first sentence of the last paragraph of subsection (a) and

substituted "him" for "it" following "issued to" in that sentence, and added subsection (b).

Legal Periodicals. — For a note on advertising by health care professionals, see 2 Campbell L. Rev. 173 (1980).

§ 90-14.4. Place of hearings for revocation or suspension of license.

Upon written request of the accused physician to the secretary of the Board within 20 days after service of the charges or complaints against him, a hearing for the purpose of determining revocation or suspension of his license shall be conducted in the county in which such physician maintains his residence, or at the election of the Board, in any county in which the act or acts complained of

occurred. In the absence of such request, the hearing shall be held at a place designated by the Board, or as agreed upon by the physician and the Board. (1953, c. 1248, s. 3; 1981, c. 573, s. 11.)

Effect of Amendments. — The 1981 amendment deleted "given" following "accused physician" and inserted "within" preceding "20 days" in the first sentence.

§ 90-14.8. Appeal from Board's decision revoking or suspending a license.

A physician whose license is revoked or suspended by the Board may obtain a review of the decision of the Board in the Superior Court of Wake County or in the superior court in the county in which the hearing was held or upon agreement of the parties to the appeal in any other superior court of the State, upon filing with the secretary of the Board a written notice of appeal within 20 days after the date of the service of the decision of the Board, stating all exceptions taken to the decision of the Board and indicating the court in which the appeal is to be heard.

Within 30 days after the receipt of a notice of appeal as herein provided, the Board shall prepare, certify and file with the clerk of the superior court in the county to which the appeal is directed the record of the case comprising a copy of the charges, notice of hearing, transcript of testimony, and copies of documents or other written evidence produced at the hearing, decision of the Board, and notice of appeal containing exceptions to the decision of the Board. (1953, c. 1248, s. 3; 1981, c. 573, s. 12.)

Effect of Amendments. — The 1981 amendment deleted "either by an applicant or a licensee" preceding "the Board shall prepare" near the beginning of the second paragraph.

§ 90-14.12. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1953, c. 1248, s. 3; 1981, c. 573, s. 13.)

Effect of Amendments. — The 1981 amendment added the second sentence.

§ 90-14.13. Reports of disciplinary action by health care institutions; immunity from liability.

The chief administrative officer of every licensed hospital or other health care institution in the State shall, after consultation with the chief of staff of such institution, report to the Board any revocation, suspension, or limitation of a physician's privileges to practice in that institution. Each such institution shall also report to the Board resignations from practice in that institution by persons licensed under this Article. The Board shall report all violations of this subsection known to it to the licensing agency for the institution involved.

Any person making a report required by this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 573, s. 14.)

§ 90-15. License fee; salaries, fees, and expenses of Board.

Each applicant for a license by examination shall pay to the treasurer of the Board of Medical Examiners of the State of North Carolina a fee which shall be prescribed by said Board in an amount not exceeding the sum of two hundred dollars (\$200.00) before being admitted to the examination. Whenever any license is granted without examination, as authorized in G.S. 90-13, the applicant shall pay to the treasurer of the Board a fee in an amount to be prescribed by the Board not in excess of one hundred dollars (\$100.00). Whenever a limited license is granted as provided in G.S. 90-12, the applicant shall pay to the treasurer of the Board a fee of fifty dollars (\$50.00), except where a limited license to practice in a medical education and training program approved by the Board for the purpose of education or training is granted, the applicant shall pay a fee of ten dollars (\$10.00). A fee of ten dollars (\$10.00) shall be paid for the issuance of a duplicate license. All fees shall be paid in advance to the treasurer of the Board of Medical Examiners of the State of North Carolina, to be held by him as a fund for the use of said Board. The compensation and expenses of the members and officers of the said Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of said fund, upon the warrant of the said Board and all expenses proper and necessary in the opinion of the officers and members of said Board shall be fixed by the Board but shall not exceed ten dollars (\$10.00) per day per member for time spent in the performance and discharge of his duties as a member of said Board, and reimbursement for travel and other necessary expenses incurred in the performance of his duties as a member of said Board. Any unexpended sum or sums of money remaining in the treasury of said Board at the expiration of the terms of office of the members thereof shall be paid over to their successors in office.

For the initial and annual registration of an assistant to a physician, the Board may require the payment of a fee not to exceed a reasonable amount. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C. S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187; 1969, c. 929, s. 4; 1971, c. 817, s. 2; c. 1150, s. 5; 1977, c. 838, s. 4; 1979, c. 196, s. 1; 1981, c. 573, s. 15.)

Effect of Amendments. — The 1981 amendment inserted "is granted" following "education or training" near the end of the third sentence of the first paragraph.

§ 90-18. Practicing without license; practicing defined; penalties.

CASE NOTES

I. GENERAL CONSIDERATION.

Psychologist. — While not specifically exempted by this section, a psychologist who limits himself to the practice of psychology and the rendering of professional psychological ser-

vices as defined in § 90-270.2(d) and (e) is exempt from this section to that extent. *Wesley v. Greyhound Lines*, 47 N.C. App. 680, 268 S.E.2d 855 (1980).

OPINIONS OF ATTORNEY GENERAL

The determination of death is regarded as "practicing medicine or surgery" as defined in this section. See opinion of Attorney General to

Page Hudson, M.D., Chief Medical Examiner, Medical Examiner Section, Division of Health Services, 49 N.C.A.G. 206 (1980).

§ 90-21. Certain offenses prosecuted in superior court; duties of Attorney General.

In case of the violation of the criminal provisions of G.S. 90-18, the Attorney General of the State of North Carolina, upon complaint of the Board of Medical Examiners of the State of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the district attorney of the district in which the offense was committed to institute a criminal action against the offending persons. A district attorney's fee of five dollars (\$5.00) shall be allowed and collected in accordance with the provisions of G.S. 6-12. The Board of Medical Examiners may also employ, at their own expense, special counsel to assist the Attorney General or the district attorney.

Exclusive original jurisdiction of all criminal actions instituted for the violations of G.S. 90-18 shall be in the superior court, the provisions of any special or local act to the contrary notwithstanding. (1915, c. 220, s. 2; C. S., s. 6625; 1973, c. 47, s. 2; 1981, c. 573, s. 16.)

Effect of Amendments. — The 1981 amendment substituted "G.S. 90-18" for "G.S. 90-18 to 90-20" near the beginning of the first sentence

of the first paragraph and near the middle of the second paragraph.

ARTICLE 1A.

Treatment of Minors.

§ 90-21.1. When physician may treat minor without consent of parent, guardian or person in loco parentis.

Cross References. — As to application of this section to surgical operations on inmates of State penal institutions, see § 148-22.2.

OPINIONS OF ATTORNEY GENERAL

Counseling Not "Treatment". — Counseling minors for sickle cell disease and related genetic disorders does not constitute "treatment" as defined under § 90-21.2. See opinion of Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

Parental consent is required for counseling minors for sickle cell disease and related genetic disorders and such consent remains valid for later counseling if obtained at the time of testing. See opinion of Attorney

General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

To provide genetic counseling to minors without consent would appear to be a violation of the common-law principles governing the parent-child relationship and thus would leave the individual providing these services potentially vulnerable to litigation. See opinion to Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.12. Standard of health care.

CASE NOTES

This Article controls standard of care for health care providers, including the practice of nursing. Page v. Wilson Mem. Hosp., 49 N.C. App. 533, 272 S.E.2d 8 (1980).

By adopting the similar community rule in this section, it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers and not to exclude testimony where it was shown that the witness was familiar with the standards of hospitals in adjoining and nearby communities. Page v. Wilson Mem.

Hosp., 49 N.C. App. 533, 272 S.E.2d 8 (1980).

Showing Required. — In malpractice cases, plaintiff must demonstrate by the testimony of a qualified expert that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the same or similar communities and that defendant's treatment proximately caused plaintiff's injury. Tripp v. Pate, 49 N.C. App. 329, 271 S.E.2d 407 (1980).

Cited in Hart v. Warren, 46 N.C. App. 672, 266 S.E.2d 53 (1980).

§ 90-21.13. Informed consent to health care treatment or procedure.

Cross References. — As to application of this section to surgical operations on inmates of State penal institutions, see § 148-22.2. As to

application of this section to treatment of prisoners' self-inflicted injuries, see § 148-46.2.

§ 90-21.14. First aid or emergency treatment; liability limitation.

Cross References. — As to application of this section to surgical operations on inmates of State penal institutions, see § 148-22.2. As to

application of this section to treatment of prisoners' self-inflicted injuries, see § 148-46.2.

ARTICLE 2.

Dentistry.

Repeal of Article. —

Session Laws 1981, c. 751, s. 8, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.

(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled by a majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental

hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

- (1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.
- (2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental hygienists shall constitute the registration list for elections to the appropriate seats on the Board.
- (3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.
- (4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections. At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope
Signature of Voter
Address of Voter

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots

shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9) a. Where there is more than one nominee eligible for election to a single seat:

1. The nominee receiving a majority of the votes cast shall be declared elected.
2. In the event that no nominee receives a majority, a second election shall be conducted between the two nominees who receive the highest number of votes.

b. Where there are more than two nominees eligible for election to either of two seats at issue in the same election:

1. A majority shall be any excess of the sum ascertained by dividing the total number of votes cast for all nominees by four.
2. In the event that more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected.
3. In the event that only one of the nominees receives a majority, he shall be declared elected and the Board of Dental Examiners shall thereupon order a second election to be conducted between the two nominees receiving the next to highest number of votes.
4. In the event that no nominee receives a majority, a second election shall be conducted between the four candidates receiving the highest number of votes. At such second election, the two nominees receiving the highest number of votes shall be declared elected.

c. In any election, if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the

Board of Dental Examiners, after taking office, his position shall be filled for the unexpired term by the Board of Dental Examiners.

- (12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned.
- (13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.
- (14) From any decision of the Board of Dental Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150A of the General Statutes of North Carolina.
- (15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.

(d) For service on the Board of Dental Elections, the members of such Board shall receive the per diem compensation and expenses allowed by this Article for service as members of the Board of Dental Examiners. The Board of Dental Elections is authorized and empowered to expend from funds collected under the provisions of this Article such sum or sums as it may determine necessary in the performance of its duties as a Board of Dental Elections, said expenditures to be in addition to the authorization contained in G.S. 90-43 and to be disbursed as provided therein.

(e) The Board of Dental Elections is authorized to appoint such secretary or secretaries and/or assistant secretary or assistant secretaries to perform such functions in connection with such nominations and elections as said Board shall determine, provided that any protestant or contestant shall have the right to a hearing by said Board in connection with any challenge of a voter, or an envelope, or a ballot or the counting of an election. Said Board is authorized to designate an office or offices for the keeping of lists of registered dentists, for the issuance and the receipt of envelopes and ballots. (1935, c. 66, s. 1; 1957, c. 592, s. 1; 1961, c. 213, s. 1; 1971, c. 755, s. 1; 1973, c. 1331, s. 3; 1979, 2nd Sess., c. 1195, ss. 1-5; 1981, c. 751, ss. 1, 2.)

Effect of Amendments. —

The 1981 amendment substituted "by a majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process

provided for in this Article" for "for the unexpired term by a majority vote of the remaining members of the Board" in the eleventh sentence of subsection (b), and rewrote subdivision (c)(9).

§ 90-24. Quorum; adjourned meetings.

A majority of the members of said Board shall constitute a quorum for the transaction of business and at any meeting of the Board, if a majority of the members are not present at the time and the place appointed for the meeting, those members of the Board present may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2; 1981, c. 751, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "a majority of the" for "four," at the beginning of the section, and preceding "members are not present."

§ 90-26. Annual and special meetings.

The North Carolina State Board of Dental Examiners shall meet annually on the fourth Monday in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by any majority of the members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3; 1961, c. 446, s. 1; 1981, c. 751, s. 4.)

Effect of Amendments. — The 1981 amendment substituted "majority of the" for "four" near the end of the first sentence.

§ 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses.

The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this Article.

The applicant shall be of good moral character, at least 18 years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said Board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic education. The Board may employ such dentists found qualified therefor by the Board, in examining applicants for licenses as it deems appropriate.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect. (1935, c. 66, s. 7; 1971, c. 755, s. 4; 1981, c. 751, s. 5.)

Effect of Amendments. — The 1981 amendment substituted "18" for "21" preceding "years of age" in the first sentence of the second paragraph.

§ 90-36. Licensing practitioners of other states.

The North Carolina State Board of Dental Examiners may, in its discretion, issue a license to practice dentistry in this State without an examination other than clinical to a legal and ethical practitioner of dentistry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of dentistry for at least five years, next preceding his or her removal and who has not, during his period of practice, been found guilty by the state regulatory agency charged with the responsibility therefor of the violation of the ethics of his profession, nor found guilty by a court of competent jurisdiction of the violation of the laws of the state which issued license to him or of the criminal laws of the United States, nor whose license to practice dentistry has been revoked or suspended by a duly constituted authority.

Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the dental board or like board of the state from which said applicant removed, certifying that the applicant is the legal holder of a license to practice dentistry in that state, and for a period of five years immediately preceding the application has engaged in the practice of dentistry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the laws of the state or of the United States, or for the violation of the ethics of the profession of dentistry.

Application for a license under this section shall be made to the North Carolina State Board of Dental Examiners within the six months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from a reputable, recognized and approved dental college, school or dental department of a college or university.

Any license issued upon the application of any dentist from any other state or territory shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina State Board of Dental Examiners upon examination of applicants and the rights and privileges to practice the profession of dentistry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this Article on dentists originally examined by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 9; 1971, c. 755, s. 7; 1981, c. 751, s. 6.)

Effect of Amendments. — The 1981 amendment substituted "nor" for "or" preceding "whose license to practice" near the end of the first paragraph, and made minor changes in punctuation.

§ 90-41. Disciplinary action.

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to

(1) Refuse to issue a license to practice dentistry;

- (2) Refuse to issue a certificate of renewal of a license to practice dentistry;
- (3) Revoke or suspend a license to practice dentistry; and
- (4) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

- (1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
- (2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;
- (3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
- (4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
- (5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;
- (6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
- (7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall have been subsequently lawfully declared to be mentally competent;
- (8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;
- (9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;
- (10) Has engaged in such immoral conduct as to discredit the dental profession;
- (11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;
- (12) Has been negligent in the practice of dentistry;
- (13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;
- (14) Is incompetent in the practice of dentistry;
- (15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;
- (16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
- (17) Has committed any fraudulent or misleading acts in the practice of dentistry;

- (18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;
 - (19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;
 - (20) Repealed by Session Laws 1981, c. 751, s. 7.
 - (21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;
 - (22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;
 - (23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;
 - (24) Is a menace to the public health by reason of having a serious communicable disease;
 - (25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or
 - (26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.
- (b) If any person engages in or attempts to engage in the practice of dentistry while his license is suspended, his license to practice dentistry in the State of North Carolina may be permanently revoked.
- (c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article or of Article 16.
- (d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or of Article 16 or any of the rules and regulations promulgated by the Board.
- (e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.
- (f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license and intern permit. (1935, c. 66, s. 14; 1957, c. 592, s. 7; 1965, c. 163, s. 4; 1967, c. 451, s. 1; 1971, c. 755, s. 9; 1979, 2nd Sess., c. 1195, ss. 7, 8; 1981, c. 751, s. 7.)

Effect of Amendments. —

The 1981 amendment deleted subdivision (a)(20) which read "Has used or permitted another to use his name, as a dentist, in promoting the sale or advertisement of any product or service."

Legal Periodicals. — For a note on advertising by health care professionals, see 2 Campbell L. Rev. 173 (1980).

ARTICLE 4.

*Pharmacy.***Repeal of Article. —**

Session Laws 1981, c. 717, s. 10, amended
§ 143-34.12 (codified from Session Laws 1977,
c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was
itself repealed by Session Laws 1981, c. 932, s.
1.

Part 1. Practice of Pharmacy.**§ 90-55. Board of Pharmacy; selection; terms; vacancies.**

(a) The Board of Pharmacy shall consist of six persons. Five of the members shall be licensed as pharmacists within this State and shall be elected and commissioned by the Governor as hereinafter provided. Pharmacist members shall be chosen in an election held as hereinafter provided in which every person licensed to practice pharmacy in North Carolina and residing in North Carolina shall be entitled to vote. Each pharmacist member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Members chosen by election under this section shall be elected upon the expiration of the respective terms of the members of the present Board of Pharmacy. No pharmacist shall be nominated for membership on said Board, or shall be elected to membership on said Board, unless, at the time of such nomination, and at the time of such election, he is licensed to practice pharmacy in North Carolina. In case of death, resignation or removal from the State of any pharmacist member of said Board, the pharmacist members of the Board shall elect in his place a pharmacist who meets the criteria set forth in this section to fill the unexpired term.

One member of the Board shall be a person who is not a licensed pharmacist and who represents the interest of the public at large. The Governor shall appoint this member not later than July 1, 1981.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed or elected to a term on or after July 1, 1981, shall serve more than two complete consecutive three-year terms. The Governor may remove any member appointed by him for good cause shown and may appoint persons to fill unexpired terms of members appointed by him.

It shall be the duty of a member of the Board of Pharmacy, within 10 days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law.

(b) All nominations and elections of pharmacist members of the Board shall be conducted by the Board of Pharmacy, which is hereby constituted a Board of Pharmacy Elections. Every pharmacist with a current North Carolina license residing in this State shall be eligible to vote in all elections. The list of licensed pharmacists shall constitute the registration list for elections. The Board of Pharmacy Elections is authorized to make rules and regulations relative to the conduct of these elections, provided such rules and regulations are not in conflict with the provisions of this section and provided that notice shall be given to all licensed pharmacists residing in North Carolina. All such rules and regulations shall be adopted subject to the procedures of Chapter

150A of the General Statutes of North Carolina. From any decision of the Board of Pharmacy Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150A of the General Statutes.

(c) All rules, regulations, and bylaws of the North Carolina Board of Pharmacy so far as they are not inconsistent with the provisions of this Article, shall continue in effect. (1905, c. 108, ss. 5-7; Rev., s. 4473; C. S., s. 6652; 1981, c. 717, s. 1.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 90-57.1: Repealed by Session Laws 1981, c. 717, s. 2.

§ 90-60. Fees collectible by Board.

The Board of Pharmacy shall be entitled to charge and collect not more than the following fees: for the examination of an applicant for license as a pharmacist, seventy-five dollars (\$75.00); for renewing the license as a pharmacist, forty dollars (\$40.00); for renewing the license of an assistant pharmacist, ten dollars (\$10.00); for licenses without examination as provided in G.S. 90-64, original, two hundred dollars (\$200.00); for original registration of a drugstore, two hundred dollars (\$200.00), and renewal thereof, one hundred dollars (\$100.00); for issuing a permit to a physician to conduct a drugstore in a village of not more than 500 inhabitants, ten dollars (\$10.00); for the renewal of permit to a physician to conduct a drugstore in a village of not more than 500 inhabitants, five dollars (\$5.00). All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C. S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1; 1965, c. 676, s. 1; 1973, c. 1183; 1981, c. 72; c. 717, s. 3.)

Effect of Amendments. — The first 1981 amendment raised all the fees except those for renewing the license of an assistant pharmacist and those for issuing a permit to physicians in villages of not more than five hundred inhabitants.

The second 1981 amendment deleted the fee provision for the renewal of licenses without an examination.

§ 90-61. Application and examination for license; prerequisites.

Every person licensed or registered as a pharmacist on February 4, 1905, under the laws of this State shall be entitled to continue in the practice of his profession until the expiration of the term for which his certificate of registration or license was issued. Every person who shall desire to be licensed as a pharmacist shall file with the secretary of the Board of Pharmacy an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time he has spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and such applicant shall appear at a time and place designated by the Board of Pharmacy and submit to an examination as to his qualifications for registration as a licensed pharmacist. The application referred to above shall be prepared and furnished by the Board of Pharmacy.

In order to become licensed as a pharmacist within the meaning of this Article, an applicant shall present to the Board of Pharmacy satisfactory evidence that he is a graduate of a duly accredited school or college of pharmacy and that he has had practical experience in pharmacy under the supervision of a licensed pharmacist, which experience shall be approved by the Board of Pharmacy and shall not be required to exceed one year as may be determined by the Board of Pharmacy; and he shall also pass satisfactorily an examination of the Board of Pharmacy; provided, that any person who has had two years of college training, and has been filling prescriptions in a drugstore or stores in North Carolina under the supervision of a licensed pharmacist for 15 years or longer, may take the examination as provided above. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C. S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481; 1981, c. 717, s. 4.)

Effect of Amendments. — The 1981 amendment deleted "shall be not less than 21 years of age; he" following "an applicant" near the beginning of the second paragraph.

§ 90-61.1. Pharmacist intern license.

The Board of Pharmacy may license pharmacist interns with the period of such license not to exceed two years. To be licensed as a pharmacist intern, an applicant shall present to the Board of Pharmacy satisfactory evidence that he is a graduate of a duly accredited school or college of pharmacy, shall have had at least three months of practical experience in pharmacy under the instruction of a licensed pharmacist, which experience shall be approved by the Board of Pharmacy, and shall pass a satisfactory examination by the Board of Pharmacy. A licensed pharmacist intern shall be entitled to the same practice privileges and responsibilities as an assistant registered pharmacist pursuant to Article 4 of Chapter 90 of the General Statutes except that a licensed pharmacist intern may not supervise the rendering of pharmaceutical services by an unlicensed person as provided in G.S. 90-71 or manage a pharmacy as provided in G.S. 90-73. (1971, c. 482, s. 1; 1981, c. 717, s. 5.)

Effect of Amendments. — The 1981 amendment deleted "shall be not less than 20 years of age" following "an applicant" near the beginning of the second sentence.

§ 90-64. Applicants licensed in other states.

(a) If an applicant for licensure is already licensed in another state to practice pharmacy, the Board shall issue a license to practice pharmacy to the applicant upon evidence that:

- (1) The applicant is currently an active, competent practitioner in good standing, and
- (2) The applicant currently holds a valid license in another state, and
- (3) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State, and
- (4) The licensure requirements in the other state are equivalent to or higher than those required by this State.

Any license issued upon the application of any pharmacist from any other state shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina Board of Pharmacy upon examination of applicants, and the rights and privileges to practice the profession of pharmacy under any license so issued shall be subject to the same duties, obligations, restrictions and conditions as imposed by this Article on pharmacists originally examined by the North Carolina Board of Pharmacy.

(b) An applicant who has taken and failed to pass the examinations of the North Carolina Board of Pharmacy given pursuant to G.S. 90-61 after July 1, 1977, shall not be granted reciprocal licensure until at least five years of active practice in pharmacy, provided that nothing in this section nor in the rules and regulations of the Board shall prevent any person who has taken and failed to pass the examinations of the North Carolina Board of Pharmacy prior to July 1, 1977, from being licensed by reciprocity pursuant to Board rules and regular regulations. An applicant for the licensure examinations in this State after July 1, 1977, who has registered as a candidate for licensure in another state shall appear before the Board of Pharmacy for explanation and clarification of the effect of this provision on eligibility for reciprocity in the event that the candidate is unsuccessful on the North Carolina examinations. (1905, c. 108, s. 16; Rev., s. 4482; C. S., s. 6660; 1945, c. 572, s. 2; 1971, c. 468; 1977, c. 598; 1981, c. 717, ss. 6, 7.)

Effect of Amendments. — The 1981 amendment substituted the present section heading for one which read: "Pharmacists licensed by reciprocity" and rewrote subsection (a).

§ 90-65. Denial, suspension, revocation or refusal to renew pharmacist's license or drugstore permit.

(a) The Board of Pharmacy may, after due notice and hearing, refuse to grant any license, or may suspend, revoke, or refuse to renew any license issued by it to any pharmacist or assistant pharmacist, or any permit to a physician to conduct a drugstore in a village of not more than 800 inhabitants upon any of the following grounds:

- (1) Fraud or false representations made in connection with securing such license or any renewal thereof;
- (2) Being guilty of any felony or any offense involving moral turpitude if the felony or offense affects his fitness to practice pharmacy;
- (3) Habitual indulgence in the use of narcotic or other drugs or alcoholic beverages to such a degree as renders him unfit to practice pharmacy;
- (4) Fraud or false representation made in connection with the practice of pharmacy which endangers or is likely to endanger the health or safety of the public, or which defrauds the State or any person, firm or corporation;
- (5) Gross immorality;
- (6) Physical or mental disability, when shown by affidavit or sworn testimony of three physicians that such conditions exist and the Board determines that it is in the interest of the public health and safety that the license should not remain in force, or be renewed, as the case might be;
- (7) Willful failure to comply with the laws governing the practice of pharmacy and the distribution of drugs;
- (8) Willful failure to comply with the rules and regulations of the Board of Pharmacy where such failure is found to endanger or is likely to endanger the health and safety of the public;
- (9) Negligence in the practice of pharmacy.

(b) The Board of Pharmacy may, after due notice and hearing, refuse to grant any permit to any person or party for the operation of a drugstore or pharmacy, or may suspend, revoke or refuse to renew the permit of any holder for the operation of any drugstore or pharmacy upon the same grounds as stated in subsection (a).

(c) Any license or permit or renewal thereof obtained through fraud or by any fraudulent or false representations shall be void and of no effect in law. (1905, c. 108, ss. 17, 25; Rev., s. 4483; C. S., s. 6661; 1967, c. 807; 1973, c. 138; 1981, c. 412, s. 4; c. 717, s. 8; c. 747, s. 66.)

Effect of Amendments. — The 1981 amendment added subdivision (a)(9).

Part 1A. Drug Product Selection.

§ 90-76.1. Definitions.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 90-76.2. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 90-76.5. Prescriber and pharmacist liability not extended.

Legal Periodicals. For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Part 2. Dealing in Specific Drugs Regulated.

§ 90-85.1. Enjoining illegal practices.

The Board of Pharmacy may, if it shall find that any person is violating any of the provisions of this Article, and after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this Article, the court may issue an order restraining any further violations thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of Article 37 of the Chapter on "Civil Procedure" [Chapter 1]: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this Article. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business. (1947, c. 229; 1981, c. 717, s. 9.)

Effect of Amendments. — The 1981 amendment added the last sentence.

ARTICLE 5.

*North Carolina Controlled Substances Act.***§ 90-86. Title of Article.**

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 90-87. Definitions.

As used in this Article:

- (1) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by:
 - a. A practitioner (or, in his presence, by his authorized agent), or
 - b. The patient or research subject at the direction and in the presence of the practitioner.
- (2) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser but does not include a common or contract carrier, public warehouseman, or employee thereof.
- (3) "Bureau" means the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice or its successor agency.
- (3a) "Commission" means the Commission for Mental Health, Mental Retardation and Substance Abuse Services established under Part 4 of Article 3 of Chapter 143B of the General Statutes.
- (4) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor included in Schedules I through VI of this Article.
- (5) "Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through VI of this Article.
- (6) "Counterfeit controlled substance" means:
 - a. A controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports, or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser; or
 - b. Any substance which is by any means intentionally represented as a controlled substance. It is evidence that the substance has been intentionally misrepresented as a controlled substance if the following factors are established:
 1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.
 2. Money or other valuable property has been exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
 3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

- (7) "Deliver" or "delivery" means the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.
- (8) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.
- (9) "Dispenser" means a practitioner who dispenses.
- (10) "Distribute" means to deliver other than by administering or dispensing a controlled substance.
- (11) "Distributor" means a person who distributes.
- (12) "Drug" means (i) substances recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (ii) substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; (iii) substances (other than food) intended to affect the structure or any function of the body of man or other animals; and (iv) substances intended for use as a component of any article specified in a, b, or c of this subdivision; but does not include devices or their components, parts, or accessories.
- (13) "Drug dependent person" means a person who is using a controlled substance and who is in a state of psychic or physical dependence, or both, arising from use of that controlled substance on a continuous basis. Drug dependence is characterized by behavioral and other responses which include a strong compulsion to take the substance on a continuous basis in order to experience its psychic effects, or to avoid the discomfort of its absence.
- (14) "Immediate precursor" means a substance which the Commission has found to be and by regulation designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit such manufacture.
- (14a) The term "isomer" means, except as used in G.S. 90-89(c), the optical isomer. As used in G.S. 90-89(c) the term "isomer" means the optical, position, or geometric isomer.
- (15) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and "manufacture" further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:
 - a. By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or
 - b. By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to research, teaching, or chemical analysis and not for sale.
- (16) "Marijuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative,

mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

- (17) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
- Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.
 - Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause a, but not including the isoquinoline alkaloids of opium.
 - Opium poppy and poppy straw.
 - Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.
- (18) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under G.S. 90-88, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.
- (19) "Opium poppy" means the plant of the species *Papaver somniferum* L., except its seeds.
- (20) "Person" means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.
- (21) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.
- (22) "Practitioner" means:
- A physician, dentist, optometrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State.
 - A pharmacy, hospital or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State.
- (23) "Prescription" means:
- A written order or other order which is promptly reduced to writing for a controlled substance as defined in this Article, or for a preparation, combination, or mixture thereof, issued by a practitioner who is licensed in this State to administer or prescribe drugs in the course of his professional practice; or issued by a practitioner serving on active duty with the armed forces of the United States

or the United States Veterans Administration who is licensed in this or another state or Puerto Rico, provided the order is written for the benefit of eligible beneficiaries of armed services medical care; a prescription does not include an order entered in a chart or other medical record of a patient by a practitioner for the administration of a drug; or

b. A drug or preparation, or combination, or mixture thereof furnished pursuant to a prescription order.

(24) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(25) "Registrant" means a person registered by the Commission to manufacture, distribute, or dispense any controlled substance as required by this Article.

(26) "State" means the State of North Carolina.

(27) "Ultimate user" means a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household, or for administration to an animal owned by him or by a member of his household. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, ss. 2-4; c. 1358, ss. 1, 15; 1977, c. 482, s. 6; 1981, c. 51, ss. 8, 9; c. 75, s. 1; c. 732.)

Effect of Amendments. — Session Laws 1981, c. 51, s. 8, effective July 1, 1981, added subdivision (3a).

Session Laws 1981, c. 51, s. 9, effective July 1, 1981, purported to substitute "Commission" for "North Carolina Drug Commission" in subdivisions (14) and (25) of this section. Those subdivisions actually contained the phrase "North Carolina Drug Authority." However, "Commission" has been substituted for "North Carolina Drug Authority" in subdivisions (14) and (25) as set out above, in order to give effect to the obvious intent of the 1981 act.

Session Laws 1981, c. 75, s. 1, inserted the language beginning "or issued by" and ending "armed services medical care" near the middle of subdivision (23)a.

Session Laws 1981, c. 732, effective Oct. 1, 1981, inserted "controlled" in the phrase defined by subdivision (6), designated the original definition in subdivision (6) as paragraph a and added paragraph b in subdivision (6).

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 90-88. Authority to control.

(a) The Commission may add, delete, or reschedule substances within Schedules I through VI of this Article on the petition of any interested party, or its own motion. In every case the Commission shall give notice of and hold a public hearing prior to adding, deleting or rescheduling a controlled substance within Schedules I through VI of this Article. A petition by the Commission, the North Carolina Department of Justice, or the North Carolina Board of Pharmacy to add, delete, or reschedule a controlled substance within Schedules I through VI of this Article shall be placed on the agenda, for consideration, at the next regularly scheduled meeting of the Commission, as a matter of right. Notice as required by this section shall consist of notice by one publication in three newspapers of statewide circulation qualified for legal advertising in accordance with G.S. 1-597 and 1-598. In addition, the North Carolina Department of Human Resources shall mail a notice of the proposed change and the date and place of the public hearing to each registrant under this Article. In making a determination regarding a substance, the Commission shall consider the following:

(1) The actual or relative potential for abuse;

(2) The scientific evidence of its pharmacological effect, if known;

(3) The state of current scientific knowledge regarding the substance;

- (4) The history and current pattern of abuse;
- (5) The scope, duration, and significance of abuse;
- (6) The risk to the public health;
- (7) The potential of the substance to produce psychic or physiological dependence liability; and
- (8) Whether the substance is an immediate precursor of a substance already controlled under this Article.

(b) After considering the required factors, the Commission shall make findings with respect thereto and shall issue an order adding, deleting or rescheduling the substance within Schedules I through VI of this Article.

(c) If the Commission designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor.

(d) If any substance is designated, rescheduled or deleted as a controlled substance under federal law, the Commission shall similarly control, or cease control of, the substance under this Article after the expiration of 30 days from publication in the Federal Register of a final order designating a substance as a controlled substance unless, within 180 days, the Commission objects to such inclusion. In such case, the Commission shall cause to be published and made public the reason for such objection and shall afford all interested parties an opportunity to be heard. At the conclusion of such meeting, the Commission shall make public its decision, which shall be final unless specifically acted upon by the North Carolina General Assembly. Upon publication of objection to inclusion under this Article by the Commission, control under this section shall automatically be stayed until such time as the Commission makes public its decision.

(e) The Commission shall exclude any nonnarcotic substance from the provisions of this Article if such substance may, under the federal Food, Drug and Cosmetic Act, lawfully be sold over-the-counter without prescription.

(f) Authority to control under this Article does not include distilled spirits, wine, malt beverages, or tobacco.

(g) The Commission shall similarly exempt from the provisions of this Article any chemical agents and diagnostic reagents not intended for administration to humans or other animals, containing controlled substances which either (i) contain additional adulterant or denaturing agents so that the resulting mixture has no significant abuse potential, or (ii) are packaged in such a form or concentration that the particular form as packaged has no significant abuse potential, where such substance was exempted by the Federal Bureau of Narcotics and Dangerous Drugs.

(h) When any substance is designated, rescheduled or deleted as a controlled substance pursuant to this section, the North Carolina Department of Human Resources shall mail a notice of this change to each registrant, to the State Bureau of Investigation, North Carolina Board of Pharmacy and to each district attorney within 30 days of this change.

(i) The North Carolina Department of Human Resources shall maintain a list of all preparations, compounds, or mixtures which are excluded, exempted and excepted from control under any schedule of this Article by the United States Drug Enforcement Administration and/or the Commission. This list and any changes to this list shall be mailed to the North Carolina Board of Pharmacy, the State Bureau of Investigation and each district attorney of this State. (1971, c. 919, s. 1; 1973, c. 476, s. 128; cc. 524, 541; c. 1358, ss. 2, 3, 15; 1977, c. 667, s. 3; 1981 c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" throughout the section.

§ 90-89. Schedule I controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision. The following controlled substances are included in this schedule:

(a) Any of the following opiates, including the isomers, esters, ethers, salts and salts of isomers, esters, and ethers, unless specifically excepted, or listed in another schedule, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

1. Acetylmethadol.
2. Allylprodine.
3. Alphacetylmethadol.
4. Alphameprodine.
5. Alphamethadol.
6. Benzethidine.
7. Betacetylmethadol.
8. Betameprodine.
9. Betamethadol.
10. Betaprodine.
11. Clonitazene.
12. Dextromoramide.
13. Diampromide.
14. Diethylthiambutene.
15. Difenoxin.
16. Dimenoxadol.
17. Dimepheptanol.
18. Dimethylthiambutene.
19. Dioxaphetyl butyrate.
20. Dipipanone.
21. Ethylmethylthiambutene.
22. Etonitazene.
23. Etoxeridine.
24. Furethidine.
25. Hydroxypethidine.
26. Ketobemidone.
27. Levomoramide.
28. Levophenacylmorphan.
29. Morpheridine.
30. Noracetylmethadol.
31. Norlevorphanol.
32. Normethadone.
33. Norpipanone.
34. Phenadoxone.
35. Phenampromide.
36. Phenomorphan.
37. Phenoperidine.
38. Piritramide.
39. Proheptazine.
40. Properidine.
41. Propiram.
42. Racemoramide.
43. Trimeperidine.

(b) Any of the following opium derivatives, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Acetorphine.
2. Acetyldihydrocodeine.
3. Benzylmorphine.
4. Codeine methylbromide.
5. Codeine-N-Oxide.
6. Cyprenorphine.
7. Desomorphine.
8. Dihydromorphine.
9. Etorphine (except hydrochloride salt).
10. Heroin.
11. Hydromorphenol.
12. Methyl-desorphine.
13. Methylhydromorphine.
14. Morphine methylbromide.
15. Morphine methylsulfonate.
16. Morphine-N-Oxide.
17. Myrophine.
18. Nicocodeine.
19. Nicomorphine.
20. Normorphine.
21. Pholcodine.
22. Thebacon.
23. Drotebanol.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. 3, 4-methylenedioxyamphetamine.
2. 5-methoxy-3, 4-methylenedioxyamphetamine.
3. 3, 4, 5-trimethoxyamphetamine.
4. Bufotenine.
5. Diethyltryptamine.
6. Dimethyltryptamine.
7. 4-methyl-2, 5-dimethoxyamphetamine.
8. Ibogaine.
9. Lysergic acid diethylamide.
10. Mescaline.
11. Peyote, meaning all parts of the plant presently classified botanically as *Lophophora Williamsii* Lemaire, whether growing or not; the seeds thereof; any extract from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or extracts.
12. N-ethyl-3-piperidyl benzilate.
13. N-methyl-3-piperidyl benzilate.
14. Psilocybin.
15. Psilocyn.
16. 2, 5-dimethoxyamphetamine.
17. 4-bromo-2, 5-dimethoxyamphetamine.
18. 4-methoxyamphetamine.
19. Ethylamine analog of phencyclidine. Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE.

20. Pyrrolidine analog of phencyclidine. Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.

21. Thiophene analog of phencyclidine. Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.

(d) Any material compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excepted or unless listed in another schedule:

1. Mecloqualone. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 844; c. 1358, ss. 4, 5, 15; 1975, c. 443, s. 1; c. 790; 1977, c. 667, s. 3; c. 891, s. 1; 1979, c. 434, s. 1; 1981, c. 51, s. 9.)

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina

Drug Commission" in the second sentence of the introductory paragraph.

§ 90-90. Schedule II controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and the abuse of the substance may lead to severe psychic or physical dependence. The following controlled substances are included in this schedule:

(a) Any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, unless specifically excepted or unless listed in another schedule:

1. Opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate, excluding apomorphine, nalbuphine, naloxone, and naltrexone, and their respective salts, but including the following:
 - (i) Raw opium.
 - (ii) Opium extracts.
 - (iii) Opium fluid extracts.
 - (iv) Powered opium.
 - (v) Granulated opium.
 - (vi) Tincture of opium.
 - (vii) Codeine.
 - (viii) Ethylmorphine.
 - (ix) Etorphine hydrochloride.
 - (x) Hydrocodone.
 - (xi) Hydromorphone.
 - (xii) Metopon.
 - (xiii) Morphine.
 - (xiv) Oxycodone.
 - (xv) Oxymorphone.
 - (xvi) Thebaine.

2. Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph 1 of this subdivision, except that these substances shall not include the isoquinoline alkaloids of opium.

3. Opium poppy and poppy straw.
4. Coca leaves and any salts, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.
5. Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrine alkaloids of the opium poppy).

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation unless specifically exempted or listed in other schedules:

1. Alphaprodine.
2. Anileridine.
3. Bezitramide.
4. Dihydrocodeine.
5. Diphenoxylate.
6. Fentanyl.
7. Isomethadone.
8. Levomethorphan.
9. Levorphanol.
10. Metazocine.
11. Methadone.
12. Methadadone — Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
13. Moramide — Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid.
14. Pethidine.
15. Pethidine — Intermediate — A, 4-cyano-1-methyl-4-phenylpiperidine.
16. Pethidine — Intermediate — B, ethyl-4-phenylpiperidine-4-carboxylate.
17. Pethidine — Intermediate — C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
18. Phenazocine.
19. Piminodine.
20. Racemethorphan.
21. Racemorphan.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Amphetamine, its salts, optical isomers, and salts of its optical isomers.
2. Phenmetrazine and its salts.
3. Methamphetamine, including its salts, isomers, and salts of isomers.
4. Methylphenidate.

(d) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically exempted by the Commission or listed in another schedule:

1. Amobarbital
2. Methaqualone
3. Pentobarbital

4. Phencyclidine
5. Phencyclidine immediate precursors:
 - a. 1-Phenylcyclohexylamine
 - b. 1-Piperidinocyclohexanecarbonitrile (PCC)
6. Secobarbital. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 6; c. 1358, ss. 6, 15; 1975, c. 443, s. 2; 1977, c. 667, s. 3; c. 891, s. 2; 1979, c. 434, s. 2; 1981, c. 51, s. 9.)

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" in the second sentence of the

introductory paragraph. "Commission" has also been substituted for "Drug Commission" in subsection (d) in order to give effect to the obvious intent of the amendment.

CASE NOTES

Cited in *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824 (1980).

§ 90-91. Schedule III controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a potential for abuse less than the substances listed in Schedules I and II; currently accepted medical use in the United States; and abuse may lead to moderate or low physical dependence or high psychological dependence. The following controlled substances are included in this schedule:

- (a) Repealed by Session Laws 1973, c. 540, s. 5.
- (b) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system unless specifically exempted or listed in another schedule:
 1. Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
 2. Chlorhexadol.
 3. Glutethimide.
 4. Lysergic acid.
 5. Lysergic acid amide.
 6. Methypylon.
 7. Sulfondiethylmethane.
 8. Sulfonethylmethane.
 9. Sulfonmethane.
 10. Any compound, mixture or preparation containing
 - (i) Amobarbital.
 - (ii) Secobarbital.
 - (iii) Pentobarbital.
 or any salt thereof and one or more active ingredients which are not included in any other schedule.
 11. Any suppository dosage form containing
 - (i) Amobarbital.
 - (ii) Secobarbital.
 - (iii) Pentobarbital.
 or any salt of any of these drugs and approved by the federal Food and Drug Administration for marketing as a suppository.
- (c) Nalorphine.
- (d) Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof unless specifically exempted or listed in another schedule:

1. Not more than 1.80 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit with an equal or greater quantity of an isoquinoline alkaloid of opium.
2. Not more than 1.80 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
3. Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit with a four-fold or greater quantity of an isoquinoline alkaloid of opium.
4. Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
5. Not more than 1.80 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
6. Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
7. Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
8. Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Any compound, mixture or preparation containing limited quantities of the following narcotic drugs, which shall include one or more active, nonnarcotic, medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

1. Paregoric, U.S.P.; provided, that no person shall purchase or receive by any means whatsoever more than one fluid ounce of paregoric within a consecutive 24-hour period, except on prescription issued by a duly licensed physician.

(f) Paregoric, U.S.P., may be dispensed at retail as permitted by federal law or administrative regulation without a prescription only by a registered pharmacist and no other person, agency or employee may dispense paregoric, U.S.P., even if under the direct supervision of a pharmacist.

(g) Notwithstanding the provisions of G.S. 90-91(f), after the pharmacist has fulfilled his professional responsibilities and legal responsibilities required of him in this Article, the actual cash transaction, credit transaction, or delivery of paregoric, U.S.P., may be completed by a nonpharmacist. A pharmacist may refuse to dispense a paregoric, U.S.P., substance until he is satisfied that the product is being obtained for medicinal purposes only.

(h) Paregoric, U.S.P., may only be sold at retail without a prescription to a person at least 18 years of age. A pharmacist must require every retail purchaser of a paregoric, U.S.P., substance to furnish suitable identification, including proof of age when appropriate, in order to purchase paregoric, U.S.P. The name and address obtained from such identification shall be entered in the record of disposition to consumers.

(i) The Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in paragraphs (a)1 and (a)2 of this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system; and if the ingredients are included therein in such combinations, quantity, proportion, or concentration that vitiate the potential

for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

(j) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of said isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excluded or listed in some other schedule.

1. Benzphetamine.
2. Chlorphentermine.
3. Chlortermine.
4. Mazindol.
5. Phendimetrazine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 5; c. 1358, ss. 7, 15; 1975, c. 442; 1977, c. 667, s. 3; 1979, c. 434, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug

Commission" in the second sentence of the introductory paragraph and near the beginning of subsection (i).

§ 90-92. Schedule IV controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule III of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule III of this Article. The following controlled substances are included in this schedule:

(a) Depressants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Barbitol
2. Chloral betaine
3. Chloral hydrate
4. Chlorazepate
5. Chlordiazepoxide
6. Clonazepam
7. Diazepam
8. Ethchlorvynol
9. Ethinamate
10. Flurazepam
11. Lorazepam
12. Mebutamate
13. Meprobamate
14. Methohexital
15. Methylphenobarbital
16. Oxazepam
17. Paraldehyde
18. Petrichloral
19. Phenobarbital
20. Prazepam

(b) The Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active, nonnarcotic, medicinal ingredients not having a stimulant or depressant effect on the central nervous system; provided, that such admixtures shall be included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a stimulant or depressant effect on the central nervous system.

(c) Any material, compound, mixture, or preparation which contains any of the following substances, including its salts, or isomers and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible:

1. Fenfluramine.
2. Pentazocine.

(d) Stimulants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Diethylpropion.
2. Pemoline (including organometallic complexes and chelates thereof).
3. Phentermine.

(e) Other Substances. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:

1. Dextropropoxyphene (Alpha-(plus)- 4-dimethyamino-1, 2-diphenyl-3-methyl-2-propionoxybutane).

(f) Narcotic Drugs. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

1. Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 8, 15; c. 1446, s. 5; 1975, cc. 401, 819; 1977, c. 667, s. 3; c. 891, s. 3; 1979, c. 434, ss. 4-6; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug

Commission" in the second sentence of the introductory paragraph and near the beginning of subsection (b).

§ 90-93. Schedule V controlled substances.

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule IV of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule IV of this Article. The following controlled substances are included in this schedule:

1. Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation

valuable medicinal qualities other than those possessed by the narcotic alone:

- (i) Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams.
- (ii) Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 milliliters or per 100 grams.
- (iii) Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams.
- (iv) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
- (v) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.
- (vi) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

2. Loperamide.

(b) A Schedule V substance may be sold at retail without a prescription only by a registered pharmacist and no other person, agent or employee may sell a Schedule V substance even if under the direct supervision of a pharmacist.

(c) Notwithstanding the provisions of G.S. 90-93(b), after the pharmacist has fulfilled the responsibilities required of him in this Article, the actual cash transaction, credit transaction, or delivery of a Schedule V substance, may be completed by a nonpharmacist. A pharmacist may refuse to sell a Schedule V substance until he is satisfied that the product is being obtained for medicinal purposes only.

(d) A Schedule V substance may be sold at retail without a prescription only to a person at least 18 years of age. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification, including proof of age when appropriate, in order to purchase a Schedule V substance. The name and address obtained from such identification shall be entered in the record of disposition to consumers. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 9, 15; 1977, c. 667, s. 3; 1979, c. 434, ss. 7, 8; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug

Commission" in the second sentence of subsection (a).

§ 90-94. Schedule VI controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that such substance comes within this schedule, the Commission shall find: no currently accepted medical use in the United States, or a relatively low potential for abuse in terms of risk to public health and potential to produce psychic or physiological dependence liability based upon present medical knowledge, or a need for further and continuing study to develop scientific evidence of its pharmacological effects.

The following controlled substances are included in this schedule:

- 1. Marijuana.
- 2. Tetrahydrocannabinols. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, s. 15; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Com-

mission" for "North Carolina Drug Commission" in the second sentence.

§ 90-95. Violations; penalties.

Effect of Amendments. —

The amendments in Session Laws 1979, c. 760, s. 5, and Session Laws 1979, 2nd Sess., c. 1251, ss. 4-7, incorporated in the second version of this section in the replacement volume, became effective July 1, 1981, pursuant to Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981,

and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

In the first version of this section as it appears in the replacement volume, the word "involved" was inadvertently deleted following "substance" at the end of the introductory paragraph of subsection (h).

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. GENERAL CONSIDERATION.

Possession with intent to sell, etc. —

Possession of methamphetamine and sale of methamphetamine are two separate and distinct offenses, and a defendant can be convicted of both crimes and not have his constitutional rights violated. *State v. Salem*, 50 N.C. App. 419, — S.E.2d — (1981).

IV. POSSESSION.

B. Possession with Intent to Sell or Deliver.

Exemption Through Authorization. —

One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such

substances but proof of such exemption through authorization must be provided by the defendant. *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Entrapment No Defense Where Essential Elements of the Offense Denied. — Where a defendant was prosecuted for possession with intent to sell and sale and delivery of LSD, the question of entrapment did not arise from defendant's evidence since entrapment is not available as a defense when the accused denies the essential elements of the offense. *State v. Neville*, 49 N.C. App. 678, 272 S.E.2d 164 (1980), aff'd, — N.C. —, 276 S.E.2d 373 (1981).

Quoted in *State v. Cuthrell*, 50 N.C. App. 195, 272 S.E.2d 616 (1980).

Cited in *State v. Greenwood*, 47 N.C. App. 731, 268 S.E.2d 835 (1980).

§ 90-95.1. Continuing criminal enterprise.

Effect of Amendments. —

The amendment in Session Laws 1979, c. 760, s. 5, incorporated in the second version of this section in the replacement volume, became effective July 1, 1981, pursuant to Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by

Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 90-95.2. Cooperation between law-enforcement agencies.

(a) The head of any law-enforcement agency may temporarily provide assistance to another agency in enforcing the provisions of this Article if so requested in writing by the head of the other agency. The assistance may comprise allowing officers of the agency to work temporarily with officers of the other agency (including in an undercover capacity) and lending equipment and supplies. While working with another agency under the authority of this section, an officer shall have the same jurisdiction, powers, rights, privileges, and immunities (including those relating to the defense of civil actions and payment of judgments) as the officers of the requesting agency in addition to those he normally possesses. While on duty with the other agency, he shall be subject to the lawful operational commands of his superior officers in the other agency, but he shall for personnel and administrative purposes remain under the control of his own agency, including for purposes of pay. He shall fur-

thermore be entitled to workmen's compensation when acting pursuant to this section to the same extent as though he were functioning within the normal scope of his duties.

(b) As used in this section:

- (1) "Head" means any director or chief officer of a law-enforcement agency, including the chief of police of a local police department and the sheriff of a county, or an officer of the agency to whom the head of the agency has delegated authority to make or grant requests under this section, but only one officer in the agency shall have this delegated authority at any time.
- (2) "Law-enforcement agency" means any State or local agency, force, department, or unit responsible for enforcing criminal laws in this State, including any local police department or sheriff's department.

(c) This section in no way reduces the jurisdiction or authority of State law-enforcement officers. (1975, c. 782, s. 1; 1981, c. 93, s. 1.)

Editor's Note. — Section 97-1.1 provides that references to "workmen's compensation" shall be deemed to refer to "workers' compensation."

Effect of Amendments. — The 1981 amendment added the parenthetical language in the third sentence of subsection (a).

§ 90-96. Conditional discharge and expunction of records for first offense.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or is found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Human Resources. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions under this Article. Discharge and dismissal under this section or G.S. 90-113.14 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge and dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Controlled Substances Act", Article 5, Chapter 90, the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-95(a)(3) or G.S. 90-113.21 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Human Resources pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

- (1) There is no drug education school within a reasonable distance of the defendant's residence; or
- (2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subdivision (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program successfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

- (1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings

on the misdemeanor in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;

- (2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;
- (3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the period of probation following the decision to defer further proceedings on the misdemeanor in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in the file shall be disclosed only to Judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, upon dismissal by the State of the charges against him, upon entry of a nolle prosequi, or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, or trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been cancelled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to the petitioner's arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited in G.S. 90-113.21, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Human Resources, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the misdemeanor in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been cancelled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been cancelled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article. (1971, c. 919, s. 1; 1973, c. 654, s. 2; c. 1066; 1977, 2nd Sess., c. 1147, s. 11B; 1979, c. 431, ss. 3, 4; c. 550; 1981, c. 922, ss. 1-4.)

Effect of Amendments. —

The 1981 amendment substituted "those" for "controlled" following "state relating to" in the first sentence of subsection (a), substituted "Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90" for "any schedule of this Article," substituted "Schedules II through VI" for "Schedules III through VI," and inserted "or by possessing drug paraphernalia as prohibited by G.S. 90-113.21" in that sentence, added the third sentence in subsection (a), inserted "or G.S. 90-113.14" in the seventh sentence of subsection (a), inserted "to determine discharge and

dismissal" in the eighth sentence of subsection (a), added the last sentence in subsection (a), added subsection (a1), substituted "Schedules II through VI" for "Schedules III through VI" in the first sentence of subsection (d), and added subsection (e). The amendments in subsections (a) and (a1) are made effective October 1, 1981, while the amendments in subsections (d) and (e) are made effective upon ratification. The act was ratified July 10, 1981.

Legal Periodicals. — For an article entitled, "Prior Crimes As Evidence In Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

§ 90-96.01. Drug education schools; responsibilities of the Department of Human Resources; fees.

(a) The Commission for Mental Health, Mental Retardation, and Substance Abuse Services shall establish standards and guidelines for the curriculum and operation of local drug education programs. The Department of Human Resources shall oversee the development of a statewide system of schools and shall insure that schools are available in all localities of the State as soon as is practicable.

- (1) A fee of one hundred dollars (\$100.00) shall be paid by all persons enrolling in an accredited drug education school established pursuant to this section. That fee must be paid to an official designated for that purpose and at a time and place specified by the area mental health, mental retardation, and substance abuse authority providing the course of instruction in which the person is enrolled. If the clerk of court in the county in which the person is convicted agrees to collect the fees, the clerk shall collect all fees for persons convicted in that county. The clerk shall pay the fees collected to the area mental health, mental retardation and substance abuse authority for the catchment area where the clerk is located regardless of the location where the defendant attends the drug education school and that authority shall distribute the funds in accordance with the rules and regulations of the Department. The fee must be paid in full within two weeks of the date the person is convicted and before he attends any classes, unless the court, upon a showing of reasonable hardship, allows the person additional time to pay the fee or allows him to begin the course of instruction without paying the fee. If the person enrolling in the school demonstrates to the satisfaction of the court

that ordered him to enroll in the school that he is unable to pay and his inability to pay is not willful, the court may excuse him from paying the fee. Parents or guardians of persons attending drug education school shall be allowed to audit the drug education school along with their children or wards at no extra expense.

- (2) The Department of Human Resources shall have the authority to approve programs to be implemented by area mental health, mental retardation, and substance abuse authorities. Area mental health, mental retardation, and substance abuse authorities may subcontract for the delivery of drug education program services. The Department shall have the authority to approve budgets and contracts with public and private governmental and nongovernmental bodies for the operation of such schools.
 - (3) Fees collected under this section and retained by the area mental health, mental retardation and substance abuse authority shall be placed in a nonreverting fund. That fund must be used, as necessary, for the operation, evaluation and administration of the drug educational schools; excess funds may only be used to fund other drug or alcohol programs. The area mental health, mental retardation and substance abuse authority shall remit five percent (5%) of each fee collected to the Department of Human Resources on a monthly basis. Fees received by the Department as required by this section may only be used in supporting, evaluating, and administering drug education schools, and any excess funds will revert to the General Fund.
 - (4) All fees collected by any area mental health, mental retardation and substance abuse authority under the authority of this section may not be used in any manner to match other State funds or be included in any computation for State formula-funded allocations.
- (b) Willful failure to pay the fee is one ground for a finding that a person placed on probation or who may make application for expunction of all recordation of his arrest or conviction has not successfully completed the course. If the court determines the person is unable to pay, he shall not be deemed guilty of a willful failure to pay the fee. (1981, c. 922, s. 8.)

Editor's Note. — Session Laws 1981, c. 922, s. 11, makes this section effective Oct. 1, 1981.

§ 90-98. Attempt and conspiracy; penalties.

Effect of Amendments. —

The amendment in Session Laws 1979, c. 760, s. 5, incorporated in the second version of this section in the replacement volume, became effective July 1, 1981, pursuant to Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by

Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 90-100. Rules and regulations.

The Commission is authorized to promulgate rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this State. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" near the beginning of the section.

§ 90-101. Annual registration to manufacture, etc., controlled substances generally; effect of registration; exceptions; waiver; inspection.

(a) Every person who manufactures, distributes, dispenses or conducts research with any controlled substance within this State or who proposes to engage in the manufacture, distribution, dispensing of, or the conduct of research with any controlled substance within this State, shall obtain annually a registration issued by the North Carolina Department of Human Resources in accordance with rules and regulations promulgated by the Commission.

(b) Persons registered by the North Carolina Department of Human Resources under this Article (including research facilities) to manufacture, distribute, dispense or conduct research with controlled substances may possess, manufacture, distribute, dispense or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of this Article.

(c) The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article:

- (1) An agent, or an employee thereof, of any registered manufacturer, distributor, or dispenser of any controlled substance if such agent is acting in the usual course of his business or employment;
- (2) A common or contract carrier, or public warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of his business or employment;
- (3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner;
- (4) Repealed by Session Laws 1977, c. 891, s. 4.
- (5) Any law-enforcement officer acting within the course and scope of official duties, or any person employed in an official capacity by, or acting as an agent of, any law-enforcement agency or other agency charged with enforcing the provisions of this Article when acting within the course and scope of official duties.

(d) The Commission may, by regulation, waive the requirement for registration of certain classes of manufacturers, distributors, or dispensers if it finds it consistent with the public health and safety.

(e) A separate registration shall be required at each principal place of business, research or professional practice where the registrant manufactures, distributes, dispenses or uses controlled substances.

(f) The North Carolina Department of Human Resources is authorized to inspect the establishment of a registrant, applicant for registration, or practitioner in accordance with rules and regulations promulgated by the Commission.

(g) Practitioners licensed in North Carolina by their respective licensing boards may possess, dispense or administer controlled substances to the extent authorized by law and by their boards.

(h) A physician licensed by the Board of Medical Examiners pursuant to Article 1 of this Chapter may possess, dispense or administer tetrahydrocannabinols in duly constituted pharmaceutical form for human administration for treatment purposes pursuant to regulations adopted by the Commission. (1971, c. 919, s. 1; 1973, c. 1358, s. 12; 1977, c. 667, s. 3; c. 891, s. 4; 1979, c. 781; 1981, c. 51, s. 9.)

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" throughout the section.

Legal Periodicals. —

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 90-103. Revocation or suspension of registration.

(a) A registration under G.S. 90-102 to manufacture, distribute, or dispense a controlled substance, may be suspended or revoked by the Commission upon a finding that the registrant:

- (1) Has furnished false or fraudulent material information in any application filed under this Article;
- (2) Has been convicted of a felony under any State or federal law relating to any controlled substance; or
- (3) Has had his federal registration suspended or revoked to manufacture, distribute, or dispense controlled substances.

(b) The Commission may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) Before denying, suspending, or revoking a registration or refusing a renewal of registration, the Commission shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended, or why the renewal should not be refused. The order to show cause shall contain a statement of the basis therefor and shall call upon the applicant or registrant to appear before the Commission at a time and place not less than 30 days after the date of service of the order, but in the case of a denial or renewal of registration, the show cause order shall be served not later than 30 days before the expiration of the registration. These proceedings shall be conducted in accordance with rules and regulations of the Commission required by Chapter 150A of the General Statutes, and subject to judicial review as provided in Chapter 150A of the General Statutes. Such proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this Article or any law of the State.

(d) The Commission may suspend, without an order to show cause, any registration simultaneously with the institutions of proceedings under this section, or where renewal of registration is refused if it finds that there is an imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the Commission or dissolved by a court of competent jurisdiction.

(e) In the event the Commission suspends or revokes a registration granted under G.S. 90-102, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may in the discretion of the Commission be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances may be ordered forfeited to the State.

(f) The Bureau shall promptly be notified of all orders suspending or revoking registration. (1971, c. 919, s. 1; 1973, c. 1331, s. 3; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Com-

mission" for "North Carolina Drug Commission" throughout the section.

§ 90-104. Records of registrants or practitioners.

Each registrant or practitioner manufacturing, distributing, or dispensing controlled substances under this Article shall keep records and maintain inventories in conformance with the record-keeping and the inventory requirements of the federal law and shall conform to such rules and regulations as may be promulgated by the Commission. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" at the end of the section.

§ 90-106. Prescriptions and labeling.

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedule II of this Article may be dispensed without the written prescription of a practitioner.

(b) In emergency situations, as defined by rule of the Commission, Schedule II drugs may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the dispensing agent. Prescriptions shall be retained in conformity with the requirements of G.S. 90-104. No prescription for a Schedule II substance may be refilled.

(c) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedules III or IV, except paregoric, U.S.P., as provided in G.S. 90-91(e)1, may be dispensed without a prescription, and oral prescriptions shall be promptly reduced to writing and filed with the dispensing agent. Such prescription may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription.

(d) No controlled substance included in Schedule V of this Article or paregoric, U.S.P., may be distributed or dispensed other than for a medical purpose.

(e) No controlled substance included in Schedule VI of this Article may be distributed or dispensed other than for scientific or research purposes by persons registered under, or permitted by, this Article to engage in scientific or research projects.

(f) No controlled substance shall be dispensed or distributed in this State unless such substance shall be in a container clearly labeled in accord with regulations lawfully adopted and published by the federal government or the Commission.

(g) When a copy of a prescription for a controlled substance under this Article is given as required by G.S. 90-70, such copy shall be plainly marked: "Copy — for information only." Copies of prescriptions for controlled substances shall not be filled or refilled.

(h) A pharmacist dispensing a controlled substance under this Article shall enter the date of dispensing and shall write his own signature on the face of the prescription pursuant to which such controlled substance was dispensed.

(i) A manufacturer's sales representative may distribute a controlled substance as a complimentary sample only upon the written request of a practitioner. Such request must be made on each distribution and must contain the names and addresses of the supplier and the requester and the name and quantity of the specific controlled substance requested. The manufacturer shall maintain a record of each such request for a period of two years. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, s. 15; 1975, c. 572; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug

Commission" in the first sentence of subsection (b) and at the end of subsection (f).

§ 90-108. Prohibited acts; penalties.

Effect of Amendments. —

The amendment in Session Laws 1979, c. 760, s. 5, incorporated in the second version of this section in the replacement volume, became effective July 1, 1981, pursuant to Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by

Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 90-109. Nonprofessional treatment.

(a) Any person other than a practitioner, who holds himself out to the public, or any part of it, as being a drug treatment facility, or being able or available to treat, give shelter or comfort to, including telephone crisis services (hotlines), or who proposes to do any of the foregoing to or for any person using, under the influence of, or experiencing the effects of a controlled substance, included in Schedules I through VI of this Article shall first be licensed by the North Carolina Department of Human Resources as a drug treatment facility in accordance with rules and regulations adopted by the Commission.

(b) A license required by this section shall be obtained from the North Carolina Department of Human Resources and may be in the form of a letter from the North Carolina Department of Human Resources, signed by the Secretary of the North Carolina Department of Human Resources to the person applying for the license. A license as required by this section shall not be transferable, shall be prominently displayed at the place where treatment, shelter or comfort are afforded, and shall bear such reasonable restrictions, including duration, as the North Carolina Department of Human Resources may impose on it. A license application as required by this section need not be in any special form, but must disclose the essential plan of operation of the proposed drug treatment facility, the names and qualifications of all persons agreeing to provide professional medical services, paramedical or associated services, and the identity and qualifications of the supervisory and adult persons who will be available at the place of the proposed drug treatment facility.

(c) The North Carolina Department of Human Resources shall not issue a drug treatment facility license to an applicant until it shall satisfy itself that professional and competent medical services are at all times available to the applicant at the drug treatment facility, that a responsible adult will be present or immediately available to the applicant at all times at the drug treatment facility, and that the applicant will make a positive contribution toward controlling drug dependence and assisting drug dependent persons. The North Carolina Department of Human Resources may deny license applications of proposed or existing drug treatment facilities if it finds there are reasonable grounds for belief that issuance of the license would be inconsistent with the safety of the public or with the application of law. A decision of the North Carolina Department of Human Resources to deny or revoke a drug treatment facility license may be appealed to the Commission in accordance with rules and regulations adopted by the Commission.

(d) A license granted under this section shall not in any way alter or reduce the liability of the licensee, its agents or employees, voluntary or compensated, with respect to any phase of its operations.

(e) Violation of this section shall be a misdemeanor. (1971, c. 919, s. 1; 1973, c. 1361; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug

Commission" at the end of subsection (a), and near the middle of the last sentence of subsection (c).

§ 90-112. Forfeitures.

CASE NOTES

Cited in State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

§ 90-112.1. Remission or mitigation of forfeitures; possession pending trial.

CASE NOTES

Forfeiture may be defeated if claimant can show the illegal use occurred without his knowledge or consent. State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

Burden is on the claimant to prove to the fact-finder "that he had no knowledge, or reason to believe, that [the vehicle] was being or would be used in the violation of laws of this State relating to controlled substances . . ." State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

Claimant has right to have a jury pass upon his claim. State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

Claimant is entitled to have fact-finder, whether court or jury, determine the essential issue in a forfeiture proceeding, namely: Was his vehicle being used illegally to transport controlled substances without his knowledge or consent? State v. Meyers, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

§ 90-113.1. Burden of proof; liabilities.

CASE NOTES

Placing the burden of proving an exemption or exception on person claiming its benefit does not run afoul of constitutional standards, and the burden of proving that defendant possessed or sold and delivered a controlled substance is not shifted away from the State. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Exemption Through Authorization. —

One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances but proof of such exemption through authorization must be provided by the defendant. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

§ 90-113.2. Judicial review.

All final determinations, findings, and conclusions of the Commission under this Article shall be final and conclusive decisions of the matters involved, except that any person aggrieved by such decision may obtain review of the decision as provided in Chapter 105A of the General Statutes. Findings of fact by the Commission, if supported by substantial evidence, shall be conclusive. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1331, s. 3; 1977, c. 667, s. 3; c. 891, s. 5; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment for “North Carolina Drug Commission” in the first and second sentences.

§ 90-113.3. Education and research.

(a) The North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina are authorized and directed to carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with such programs, they are authorized to:

- (1) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;
- (2) Assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances; and
- (3) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them.

(b) The North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina or either of them may enter into contracts for educational activities related to controlled substances.

(c) The North Carolina Department of Human Resources is authorized and directed to encourage research on misuse and abuse of controlled substances. In connection with such research and in furtherance of the enforcement of this Article, it is authorized to:

- (1) Establish methods to assess accurately the effects of controlled substances and to identify and characterize controlled substances with potential for abuse;
- (2) Make studies and undertake programs of research to:
 - a. Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this Article;
 - b. Determine patterns of misuse and abuse of controlled substances and the social effect thereof; and
 - c. Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances.
- (3) Enter into contracts with other public agencies, any district attorney, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(d) The North Carolina Department of Human Resources may enter into contracts for research activities related to controlled substances, and the North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina or either of them may enter into contracts for educational activities related to controlled substances, without performance bonds.

(e) The North Carolina Department of Human Resources may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any State civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained.

(f) The North Carolina Department of Human Resources may authorize persons engaged in research to possess and distribute controlled substances in accordance with such restrictions as the authorization may impose. Persons who obtain this authorization shall be exempt from State prosecution for possession and distribution of controlled substances to the extent authorized by the North Carolina Department of Human Resources. (1971, c. 919, s. 1; c. 1244, s. 14; 1973, c. 476, s. 128; 1977, c. 667, s. 3; 1981, c. 218.)

Effect of Amendments. — The 1981 amendment inserted "any district attorney" in subdivision (c)(3).

CASE NOTES

Defendant Must Prove Exemption Through Authorization. — One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so

possess or sell or deliver such substances but proof of such exemption through authorization must be provided by the defendant. *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), — U.S. —, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

§ 90-113.4: Repealed by Session Laws 1981, c. 500, s. 2, effective October 1, 1981.

Editor's Note. — Session Laws 1981, c. 500, s. 4 provides that the act becomes effective October 1, 1981, and applies to acts committed on or after that date.

Session Laws 1981, c. 500, s. 3 contains a severability clause.

ARTICLE 5A.

North Carolina Toxic Vapors Act.

§ 90-113.9. Definitions.

For purposes of this Article, unless the context requires otherwise,

- (1) "Intoxication" means drunkenness, stupefaction, depression, giddiness, paralysis, irrational behavior, or other change, distortion, or disturbance of the auditory, visual, or mental processes.
- (2) "Commission" means the Commission for Mental Health, Mental Retardation and Substance Abuse Services, established under Part 4 of Article 3 of Chapter 143B of the General Statutes. (1971, c. 1208, s. 1; 1979, c. 671, s. 1; 1981, c. 51, s. 10.)

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, added subdivision (2).

§ 90-113.14. Conditional discharge and expunction of records for first offenses.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A or 5B of Chapter 90 pleads guilty to or is found guilty of inhaling or possessing any substance having the property of releasing toxic vapors or fumes in violation of Article 5A of Chapter 90, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Human Resources. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions. Discharge and dismissal under this section or G.S. 90-96 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge or dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, the "North Carolina Controlled Substances Act", Article 5, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-113.10 or 90-113.11 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Human Resources pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

- (1) There is no drug education school within a reasonable distance of the defendant's residence; or
- (2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subsection (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purpose of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S.

90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program successfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection(c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

- (1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the misdemeanor in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;
- (2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;
- (3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the period of probation following the decision to defer further proceedings on the misdemeanor in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law

to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Commission, the names of all persons convicted under such Articles, together with the offense or offenses of which such persons were convicted. The clerk shall also file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Court shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under Article 5 or 5A has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21 upon dismissal by the State of the charges against him or upon entry of a nolle prosequi or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment, or information, and trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment, or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been cancelled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file

to be retained by the Administrative Office of the Courts under subsection (c) all recordation relating to his arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited by G.S. 90-113.21, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Human Resources, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the misdemeanor in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before such arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been cancelled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been cancelled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article. (1971, c. 1078; 1975, c. 650, ss. 3, 4; 1977, c. 642, s. 3; 1979, c. 431, ss. 3, 4; 1981, c. 51, s. 11; c. 922, ss. 5-7.)

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Authority" in the first sentence of subsection (c).

The second 1981 amendment rewrote subsection (a), added subsection (al), and added subsections (d) and (e). The amendments in

subsections (d) and (e) are effective October 1, 1981, while the amendments in subsections (a) and (al) are effective upon ratification. The act was ratified July 10, 1981. Session Laws 1981, c. 922, s. 7, purported to amend § 90-13.14, but the amendment was made to this section since § 90-113.14 was obviously the intended reference.

§§ 90-113.15 to 90-113.19: Reserved for future codification purposes.

ARTICLE 5B.

Drug Paraphernalia.

§ 90-113.20. Title.

This Article shall be known and may be cited as the "North Carolina Drug Paraphernalia Act." (1981, c. 500, s. 1.)

Editor's Note. — Session Laws 1981, c. 500, s. 4 provides that this Article becomes effective October 1, 1981, and applies to acts committed on or after that date.

Session Laws 1981, c. 500, s. 3 contains a severability clause.

§ 90-113.21. General provisions.

(a) As used in this Article, "drug paraphernalia" means all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act, including planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, and concealing controlled substances and injecting, ingesting, inhaling, or otherwise introducing controlled substances into the human body. "Drug paraphernalia" includes, but is not limited to, the following:

- (1) Kits for planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;
- (2) Kits for manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
- (3) Isomerization devices for increasing the potency of any species of plant which is a controlled substance;
- (4) Testing equipment for identifying, or analyzing the strength, effectiveness, or purity of controlled substances;
- (5) Scales and balances for weighing or measuring controlled substances;
- (6) Diluents and adulterants, such as quinine, hydrochloride, mannitol, mannite, dextrose, and lactose for mixing with controlled substances;
- (7) Separation gins and sifters for removing twigs and seeds from, or otherwise cleaning or refining, marijuana;
- (8) Blenders, bowls, containers, spoons, and mixing devices for compounding controlled substances;
- (9) Capsules, balloons, envelopes and other containers for packaging small quantities of controlled substances;
- (10) Containers and other objects for storing or concealing controlled substances;
- (11) Hypodermic syringes, needles, and other objects for parenterally injecting controlled substances into the body;
- (12) Objects for ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the body, such as:
 - a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

- b. Water pipes;
- c. Carburetion tubes and devices;
- d. Smoking and carburetion masks;
- e. Objects, commonly called roach clips, for holding burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
- f. Miniature cocaine spoons and cocaine vials;
- g. Chamber pipes;
- h. Carburetor pipes;
- i. Electric pipes;
- j. Air-driven pipes;
- k. Chillums;
- l. Bongs;
- m. Ice pipes or chillers.

(b) The following, along with all other relevant evidence, may be considered in determining whether an object is drug paraphernalia:

- (1) Statements by the owner or anyone in control of the object concerning its use;
- (2) Prior convictions of the owner or other person in control of the object for violations of controlled substances law;
- (3) The proximity of the object to a violation of the Controlled Substances Act;
- (4) The proximity of the object to a controlled substance;
- (5) The existence of any residue of a controlled substance on the object;
- (6) The proximity of the object to other drug paraphernalia;
- (7) Instructions provided with the object concerning its use;
- (8) Descriptive materials accompanying the object explaining or depicting its use;
- (9) Advertising concerning its use;
- (10) The manner in which the object is displayed for sale;
- (11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a seller of tobacco products or agricultural supplies;
- (12) Possible legitimate uses of the object in the community;
- (13) Expert testimony concerning its use;
- (14) The intent of the owner or other person in control of the object to deliver it to persons whom he knows or reasonably should know intend to use the object to facilitate violations of the Controlled Substances Act. (1981, c. 500, s. 1.)

§ 90-113.22. Possession of drug paraphernalia.

(a) It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repack, store, contain, or conceal a controlled substance which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

(b) Violation of this section is a misdemeanor punishable by a fine of not more than five hundred dollars (\$500.00), imprisonment for not more than one year, or both. (1981, c. 500, s. 1.)

§ 90-113.23. Manufacture or delivery of drug paraphernalia.

(a) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repack, store, contain, or conceal a controlled substance which it would be unlawful to possess, or that it will be used to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

(b) Delivery, possession with intent to deliver, or manufacture with intent to deliver, of each separate and distinct item of drug paraphernalia is a separate offense.

(c) Violation of this section is a misdemeanor punishable by a fine of not less than one thousand dollars (\$1,000), imprisonment for not more than two years, or both. However, delivery of drug paraphernalia by a person over 18 years of age to someone under 18 years of age who is at least three years younger than the defendant shall be punishable as a Class I felony. (1981, c. 500, s. 1; c. 903, s. 1.)

Effect of Amendments. — The 1981 amendment added the second sentence in subsection (c).

§ 90-113.24. Advertisement of drug paraphernalia.

(a) It is unlawful for any person to purchase or otherwise procure an advertisement in any newspaper, magazine, handbill, or other publication, or purchase or otherwise procure an advertisement on a billboard, sign, or other outdoor display, when he knows that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia described in this Article.

(b) Violation of this section is a misdemeanor punishable by a fine of not more than five hundred dollars (\$500.00), imprisonment for not more than six months, or both. (1981, c. 500, s. 1; c. 903, s. 1.)

Effect of Amendments. — The 1981 amendment deleted a former second sentence of sub-

section (b) making the delivery of drug paraphernalia to minors a felony.

ARTICLE 6.

Optometry.

Repeal of Article. —

Session Laws 1981, c. 496, s. 15, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-116. Board of Examiners in Optometry.

In order to properly regulate the practice of optometry, there is established a North Carolina State Board of Examiners in Optometry, which shall consist of five regularly graduated optometrists who have been engaged in the practice of optometry in this State for at least five years and two members to represent the public at large.

No public member shall at any time be a health care provider, be related to or be the spouse of a health care provider, or have any pecuniary interest in the profitability of a health care provider. For purposes of this section, the term "health care provider" shall have the same meaning as provided in G.S. 58-254.20(4). The Governor shall appoint the two public members not later than July 1, 1981.

The optometric members of the Board shall be appointed by the Governor from a list provided by the North Carolina State Optometric Society. For each vacancy, the society must submit at least three names to the Governor. The society shall establish procedures for the nomination and election of optometrist members of the Board. These procedures shall be adopted under the rule-making procedures described in Article 2, Chapter 150A of the General Statutes, and notice of the proposed procedures shall be given to all licensed optometrists residing in North Carolina. Such procedures shall not conflict with the provisions of this section. Every optometrist with a current North Carolina license residing in the State shall be eligible to vote in all such elections, and the list of licensed optometrists shall constitute the registration list for elections. Any decision of the society relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the society has rendered the decision in controversy, and all such cases shall be heard de novo.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive five-year terms, except that each member shall serve until his successor is chosen and qualifies.

The Governor may remove any member for good cause shown. Any vacancy in the optometrist membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of at least three names submitted by the North Carolina State Optometric Society Executive Council. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term. (1909, c. 444, s. 3; 1915, c. 21, s. 1; C. S., s. 6689; 1935, c. 63; 1981, c. 496, s. 1.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote the section.

§ 90-117.1. Quorum; adjourned meetings.

A majority of the members of said Board shall constitute a quorum for the transaction of business. If a majority of members are not present at the time and the place appointed for a Board meeting, those members of the Board in attendance may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1973, c. 800, s. 2; 1981, c. 496, s. 2.)

Effect of Amendments. — The 1981 amendment substituted "A majority of the members" for "Three members" at the beginning of the first sentence, deleted "and at any meeting of the Board" at the end of the first sentence, sub-

stituted "a majority of members" for "three members" near the beginning of the second sentence, and substituted "a board" for "the" and "in attendance" for "present" in the second sentence.

§ 90-117.3. Annual and special meetings.

The North Carolina State Board of Examiners in Optometry shall meet annually in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by a majority of the members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1973, c. 800, s. 4; 1981, c. 496, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "any three" for "a majority of the" near the end of the first sentence.

§ 90-118. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses; educational requirements for prescription and use of pharmaceutical agents.

(a) The North Carolina State Board of Examiners in Optometry shall grant licenses to practice optometry to such applicants who are graduates of an accredited optometric institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of optometry, subject, however, to the further provisions of this section and to the provisions of this Article.

(b) The applicant shall be of good moral character and at least 18 years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character; has an academic education, the standard of which shall be determined by the said Board; and that he is a graduate of and has a diploma from an accredited optometric college or the optometric department of an accredited university or college recognized and approved as such by the said Board.

(c) The North Carolina State Board of Examiners in Optometry is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant a license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception, or fraud during such examination, or whose examination discloses, to the satisfaction of the Board, a deficiency in academic education. The Board may employ such optometrists found qualified therefor by the Board in examining applicants for licenses as it deems appropriate.

(d) Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

(e) The Board shall not license any person to practice optometry in the State of North Carolina beyond the scope of the person's educational training as determined by the Board. No optometrist presently licensed in this State shall prescribe and use pharmaceutical agents in the practice of optometry unless and until he (i) has submitted to the Board evidence of satisfactory completion of all educational requirements established by the Board to prescribe and use pharmaceutical agents in the practice of optometry and (ii) has been certified by the Board as educationally qualified to prescribe and use pharmaceutical agents.

Provided, however, that no course or courses in pharmacology shall be approved by the Board unless (i) taught by an institution having facilities for both the didactic and clinical instruction in pharmacology and which is accredited by a regional or professional accrediting organization that is recognized and approved by the Council on Postsecondary Accreditation or the United States Office of Education and (ii) transcript credit for the course or courses is certified to the Board by the institution as being equivalent in both hours and content to those courses in pharmacology required by the other licensing boards in this Chapter whose licensees or registrants are permitted the use of pharmaceutical agents in the course of their professional practice. (1909, c. 444, s. 5; 1915, c. 21, ss. 2, 3, 4; C. S., s. 6691; 1923, c. 42, ss. 2, 3; 1935, c. 63; 1949, c. 357; 1959, c. 464; 1973, c. 800, s. 7; 1975, c. 19, s. 23; 1977, c. 482, s. 2; 1981, c. 496, ss. 4, 5.)

Effect of Amendments. — The 1981 amendment, in subsection (b) inserted "and" near the middle of the first sentence, substituted "18" for

"21" in the first sentence, inserted "and" preceding "that he is" in the second sentence, and made minor punctuation changes.

§ 90-118.2. Displaying license and current certificate of renewal.

The license and the current certificate of renewal of license to practice optometry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Examiners in Optometry or to its authorized agents.

A licensee who practices in more than one office location shall make application to the Board for a duplicate license for each branch office for display as required by this section. In issuing a duplicate license, the address of the branch office location and the original certificate number shall be included. At the time of the annual renewal of licenses, those optometrists who have been issued a duplicate license for a branch office, shall make application to the North Carolina Board of Examiners in Optometry on a form provided by the Board for the renewal of the license in the same manner as provided for in G.S. 90-118.10 for the renewal of his license. The holder of a certificate for a branch office may cancel it by returning the certificate to the Secretary of the Board. (1973, c. 800, s. 9; 1981, c. 811, s. 1.)

Cross References. — As to duplicate license fees for branch offices, see § 90-123.

Effect of Amendments. — The 1981 amend-

ment added the second paragraph in the section.

§ 90-118.3. Refusal to grant renewal of license.

For nonpayment of fee or fees required by this Article, or for violation of any of the terms or provisions of G.S. 90-121.2, the North Carolina State Board of Examiners in Optometry may refuse to issue a certificate of renewal of license. (1973, c. 800, s. 10; 1981, c. 811, s. 2.)

Effect of Amendments. — The 1981 amendment deleted a former second sentence which read: "As used herein the term 'license' shall

include license, provisional license or intern permit."

§ 90-118.5. Licensing practitioners of other states.

(a) If an applicant for licensure is already licensed in another state in optometry, the North Carolina State Board of Examiners in Optometry shall issue a license to practice optometry to the applicant without examination other than a clinical practicum examination upon evidence that:

- (1) The applicant is currently an active, competent practitioner in good standing, and
- (2) The applicant has practiced at least three out of the five years immediately preceding his or her application, and
- (3) The applicant currently holds a valid license in another state, and
- (4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State, and
- (5) The licensure requirements in the other state are equivalent to or higher than those required by this State.

(b) Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the optometry board or like board of the state from which said applicant removed, certifying that the applicant is the legal holder of a license to practice optometry in that state, and for a period of at least three out of five years immediately preceding the application has engaged in the practice of optometry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the criminal laws of the state or the United States, or for the violation of the ethics of the profession of optometry.

(c) Application for a license under this section shall be made to the North Carolina State Board of Examiners in Optometry within six months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from an accredited, recognized and approved optometry college, school or optometry department of a college or university.

(d) Any license issued upon the application of any optometrist from any other state or territory shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina State Board of Examiners in Optometry upon examination of applicants and the rights and privileges to practice the profession of optometry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this Article on optometrists originally examined by the North Carolina State Board of Examiners in Optometry. (1973, c. 800, s. 12; 1981, c. 496, ss. 6, 7.)

Effect of Amendments. — The 1981 amendment rewrote subsection (a), and substituted

"at least three out of five" for "five" near the middle of subsection (b).

§ 90-118.8: Repealed by Session Laws 1981, c. 811, s. 4.

Editor's Note. — The repealed section was amended by Session Laws 1981, c. 496, s. 8.

§ 90-118.9: Repealed by Session Laws 1981, c. 811, s. 5.

Editor's Note. — The repealed section was amended by Session Laws 1981, c. 496, s. 9.

§ 90-118.11. Unauthorized practice; penalty for violation of Article.

If any person shall practice or attempt to practice optometry in this State without first having passed the examination and obtained a license from the North Carolina State Board of Examiners in Optometry; or without having obtained a provisional license from said Board; or if he shall practice optometry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-118.10; or shall practice or attempt to practice optometry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall practice or attempt to practice optometry by means or methods that the Board has determined is beyond the scope of the person's educational training; or shall violate any of the provisions of this Article for which no specific penalty has been provided; or shall practice, or attempt to practice, optometry in violation of the provisions of this Article; or shall practice optometry under any name other than his own name, said person shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or imprisonment, or both, in the discretion of the court. Each day's violation of this Article shall constitute a separate offense. (1973, c. 800, s. 18; 1977, c. 482, s. 4; 1981, c. 496, s. 10.)

Effect of Amendments. — The 1981 amendment substituted the present section heading for one which read: "Unauthorized practice; penalty."

§ 90-121.1. Board may enjoin illegal practices.

In view of the fact that the illegal practice of optometry imminently endangers the public health and welfare, and is a public nuisance, the North Carolina State Board of Examiners in Optometry may, if it shall find that any person is violating any of the provisions of this Article, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this Article, the court shall issue an order restraining any further violating thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of Article 37 of the Chapter on "Civil Procedure" [Chapter 1]: provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of G.S. 90-124. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business. (1973, c. 800, s. 19; 1981, c. 496, s. 11.)

Effect of Amendments. — The 1981 amendment added the last sentence in the section.

§ 90-121.2. Rules and regulations; discipline, suspension, revocation and regrant of certificate.

(a) The Board shall have the power to make, adopt, and promulgate such rules and regulations, including rules of ethics, as may be necessary and proper for the regulation of the practice of the profession of optometry and for the performance of its duties. The Board shall have jurisdiction and power to hear and determine all complaints, allegations, charges of malpractice, corrupt or unprofessional conduct, and of the violation of the rules and regulations, including rules of ethics, made against any optometrist licensed to practice in North Carolina. The Board shall also have the power and authority to: (i) refuse to issue a license to practice optometry; (ii) refuse to issue a certificate of renewal of a license to practice optometry; (iii) revoke or suspend a license to practice optometry; and (iv) invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper; in any instance or instances in which the Board is satisfied that such applicant or licensee:

- (1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
- (2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice optometry;
- (3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
- (4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
- (5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any State or federal narcotic or barbiturate law;
- (6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
- (7) Is mentally, emotionally, or physically unfit to practice optometry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice optometry unless or until such person shall have been subsequently lawfully declared to be mentally competent;
- (8) Repealed by Session Laws 1981, c. 496, s. 12.
- (9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of optometry or in attempting to fraudulently obtain a license to practice optometry;
- (10) Has engaged in such immoral conduct as to discredit the optometry profession;
- (11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;
- (12) Has been negligent in the practice of optometry;
- (13) Has employed a person not licensed in this State to do or perform any act of service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article can lawfully be done or performed only by an optometrist licensed in this State;

- (14) Is incompetent in the practice of optometry;
 - (15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients, including false or misleading advertising;
 - (16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
 - (17) Has committed any fraudulent or misleading acts in the practice of optometry;
 - (18) Repealed by Session Laws 1981, c. 496, s. 12.
 - (19) Has, in the practice of optometry, committed an act or acts constituting malpractice;
 - (20) Repealed by Session Laws 1981, c. 496, s. 12.
 - (21) Has permitted an optometric assistant in his employ or under his supervision to do or perform any act or acts violative to this Article or of the rules and regulations promulgated by the Board;
 - (22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of optometry;
 - (23) Has persistently maintained, in the practice of optometry, unsanitary offices, practices, or techniques;
 - (24) Is a menace to the public health by reason of having a serious communicable disease;
 - (25) Has engaged in any unprofessional conduct as the same may be from time to time defined by the rules and regulations of the Board.
- (b) If any person engages in or attempts to engage in the practice of optometry while his license is suspended, his license to practice optometry in the State of North Carolina may be permanently revoked.
- (c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article.
- (d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or any of the rules and regulations promulgated by the Board.
- (e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.
- (f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license and intern permit. (1973, c. 800, s. 20; 1981, c. 496, ss. 12, 13.)

Effect of Amendments. — The 1981 amendment inserted "including false or misleading advertising" at the end of subdivision (a)(15), and deleted subdivisions (8), (18) and (20) of

subsection (a) which prohibited the solicitation of professional patronage and the sale or advertisement of any product or services by an optometrist.

§ 90-123. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Examiners in Optometry, said Board is hereby authorized to charge and collect fees established by its rules and regulations not exceeding the following:

- (1) Each application for general optometry examination \$200.00
- (2) Each general optometry license renewal, which fee shall be annually fixed by the Board and not later than December 15

of each year it shall give written notice of the amount of the renewal fee to each optometrist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such optometrist \$125.00

- (3) Each provisional license 125.00
- (4) Each intern permit or renewal thereof 125.00
- (5) Each certificate of license to a resident optometrist desiring to change to another state or territory 100.00
- (6) Each license issued to a practitioner of another state or territory to practice in this State 125.00
- (7) Each license to resume the practice issued to an optometrist who has retired from the practice of optometry or who has removed from and returned to this State 125.00
- (8) Each application for registration as an optometric assistant or renewal thereof 25.00
- (9) Each application for registration as an optometric technician or renewal thereof 25.00
- (10) Each duplicate license fee for each branch office 25.00

(1909, c. 444, s. 12; C. S., s. 6696; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1; 1959, c. 477; 1969, c. 624; 1973, c. 1092, s. 2; 1979, c. 771, ss. 1, 2; 1981, c. 909.)

Effect of Amendments. — The 1981 amendment added subdivision (10).

§ 90-123.1. Continuing education courses required.

All registered optometrists now or hereafter licensed in the State of North Carolina are and shall be required to take annual courses of study in subjects relating to the practice of the profession of optometry to the end that the utilization and application of new techniques, scientific and clinical advances, and the achievements of research will assure expansive and comprehensive care to the public. The length of study shall be prescribed by the Board but shall not exceed 25 hours in any calendar year. Attendance must be at a course or courses approved by the Board. Attendance at any course or courses of study are to be certified to the Board upon a form approved by the Board and shall be submitted by each registered optometrist at the time he makes application to the Board for the renewal of his license and payment of his renewal fee. The Board is authorized to use up to one half of its annual renewal fees for the purposes of contracting with institutions of higher learning, professional organizations, or qualified individuals for the providing of educational programs that meet this requirement. The Board is further authorized to treat funds set aside for the purpose of continuing education as State funds for the purpose of accepting any funds made available under federal law on a matching basis for the promulgation and maintenance of programs of continuing education. In no instance may the Board require a greater number of hours of study than are available at approved courses held within the State, and shall be allowed to waive this requirement in cases of certified illness or undue hardship. (1969, c. 354; 1981, c. 811, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "approved" for "provided" near the middle of the fourth sentence.

§ 90-127.3. Copy of prescription furnished on request.

All persons licensed or registered under this Chapter shall upon request give each patient having received an eye examination a copy of his spectacle prescription. No person, firm or corporation licensed or registered under Article 17 of this Chapter shall fill a prescription or dispense lenses, other than spectacle lenses, unless the prescription specifically states on its face that the prescriber intends it to be for contact lenses and includes the type and specifications of the contact lenses being prescribed. The prescriber shall state the expiration date on the face of every prescription, and the expiration date shall be no earlier than 365 days after the examination date.

Any person, firm or corporation that dispenses contact lenses on the prescription of a practitioner licensed under Articles 1 or 6 of this Chapter shall, at the time of delivery of the lenses, inform the recipient both orally and in writing that he return to the prescriber for insertion of the lens, instruction on lens insertion and care, and to ascertain the accuracy and suitability of the prescribed lens. The statement shall also state that if the recipient does not return to the prescriber after delivery of the lens for the purposes stated above, the prescriber shall not be responsible for any damages or injury resulting from the prescribed lens, except that this sentence does not apply if the dispenser and the prescriber are the same person.

Prescriptions filled pursuant to this section shall be kept on file by the prescriber and the person filling the prescription for at least 24 months after the prescription is filled. (1981, c. 496, s. 14.)

Editor's Note. — Session Laws 1981, c. 496, s. 16, makes the act effective July 1, 1981.

ARTICLE 7.***Osteopathy.***

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Article effective July 1, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-130. Board of Examiners; membership; officers; meetings.

There shall be a State Board of Osteopathic Examination and Registration, consisting of five members appointed by the Governor, in the following manner, to wit: Within 30 days after this Article goes into effect the Governor shall appoint five persons who are reputable practitioners of osteopathy, selected from a number of not less than 10 who are recommended by the North Carolina Osteopathic Society, and this number may be increased to 15, upon the request of the Governor; the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession; and said appointees shall constitute the first Board of Osteopathic Examination and Registration. Their term of office shall be so designated by the Governor that the term of one member shall expire each year. Thereafter in each year the Governor shall in like manner appoint one person to fill the vacancy in the Board thus created, from a number of not less than five, who are recommended by the State Osteopathic Society; the term of said appointee to be for five years.

A vacancy occurring from any other cause shall be filled by the Governor for the unexpired term in the same manner as above stated. The Board shall, within 30 days after its appointment, meet in the City of Raleigh, and organize by electing a president, secretary and treasurer, each to serve for one year. Thereafter the election of said officers shall occur annually. The Board shall have a common seal, and shall formulate rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The Board shall meet in the City of Raleigh at the call of the president, in the month following the election of its officers, and in July of each succeeding year, and at such other times and places as a majority of the Board may designate. Three members of the Board shall constitute a quorum, but no certificate to practice osteopathy shall be granted on an affirmative vote of less than three. The Board shall keep a record of its proceedings, and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy, the date of his or her diploma, and also whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1; C. S., s. 6701; 1937, c. 301, s. 1; 1981, c. 884, s. 8.)

Effect of Amendments. — The 1981 amendment deleted a provision requiring the treasurer and secretary each to give bond.

ARTICLE 8.

Chiropractic.

Repeal of Article. —
Session Laws 1981, c. 766, s. 9, amended
§ 143-34.12 (codified from Session Laws 1977,
c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was
itself repealed by Session Laws 1981, c. 932, s.
1.

§ 90-139. Creation and membership of Board of Examiners.

(a) The State Board of Chiropractic Examiners is created to consist of seven members appointed by the Governor, Lieutenant Governor and Speaker of the House. Six of the members shall be practicing doctors of chiropractic, who are residents of this State and who have actively practiced chiropractic in the State for at least eight consecutive years immediately preceding their appointments; four of these six members shall be appointed by the Governor, and one each by the Lieutenant Governor and the Speaker of the House. No more than three members of the Board may be graduates of the same college or school of chiropractic. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor the spouse of a health care provider. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is chosen and qualifies. The Lieutenant Governor and Speaker of the House, respectively, shall fill the first and second vacancies in chiropractic members of the Board arising by expiration of term after July 1, 1981, and shall continue to appoint their respective successors; the Governor shall fill all other such vacancies arising by expiration of term.

(c) The Governor, Lieutenant Governor and Speaker of the House, respectively, may remove any member appointed by him for good cause shown and may appoint persons to fill unexpired terms of members appointed by him. (1917, c. 73, s. 1; C. S., s. 6710; 1979, c. 108, s. 1; 1981, c. 766, s. 1.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote the section.

§ 90-140. Selection of chiropractic members of Board.

The Governor, Lieutenant Governor and Speaker of the House shall appoint chiropractic members of the Board for terms of three years from a list provided by the Board. For each vacancy, the Board must submit at least three names to the Governor, Lieutenant Governor and Speaker of the House.

The Board shall establish procedures for the nomination and election of chiropractic members. These procedures shall be adopted under Article 2 of Chapter 150A of the General Statutes, and notice of the proposed procedures shall be given to all licensed chiropractors residing in North Carolina. These procedures shall not conflict with the provisions of this section. Every chiropractor with a current North Carolina license residing in this State shall be eligible to vote in all such elections, and the list of licensed chiropractors shall constitute the registration list for elections. Any decision of the Board relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the Board has rendered the decision in controversy, and all such cases shall be heard de novo. (1917, c. 73, s. 2; C. S., s. 6711; 1933, c. 442, s. 1; 1963, c. 646, s. 1; 1979, c. 108, s. 2; 1981, c. 766, s. 2.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote the section.

§ 90-141. Organization; quorum.

The Board of Chiropractic Examiners shall elect such officers as they may deem necessary. Four members of the Board shall constitute a quorum for the transaction of business. (1917, c. 73, s. 4; C. S., s. 6713; 1933, c. 442, s. 1; 1981, c. 766, s. 3.)

Effect of Amendments. — The 1981 amendment deleted a provision concerning the filling

of vacancies, at the end of the first sentence, and added the second sentence.

§ 90-143. Definitions of chiropractic; examinations; educational requirements.

Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the North Carolina State Board of Chiropractic Examiners (hereinafter referred to as "Board") to examine for license to practice chiropractic every applicant who complies with the following provisions: He shall, before he is admitted to examination, furnish proof of good moral character and satisfy the Board that he has completed two years of prechiropractic college education and received credits for a minimum of 60 semester hours. He shall exhibit a diploma or furnish proof of graduation from a chiropractic college accredited by the Council on Chiropractic Education or holding recognized candidate for accreditation status with the Council on Chiropractic Education or a college teaching chiropractic that, in the Board's opinion, meets the equivalent standards established by the Council on Chiropractic Education, requiring an attendance of not less than four academic years, and supplying such facilities for clinical and scientific instruction, as shall meet the approval of the Board. The examination shall include but not be limited to the following studies: neurology, chemistry, pathology, anatomy, histology, physiology, embryology, dermatology, diagnosis, microscopy, gynecology, hygiene, eye, ear, nose and throat, orthopedy, diagnostic radiology, jurisprudence, palpation, nerve tracing, chiropractic philosophy, theory, teaching and practice of chiropractic. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; C. S., s. 6715; 1933, c. 442, s. 1; 1937, c. 293, s. 1; 1963, c. 646, s. 2; 1967, c. 263, s. 3; 1977, c. 1109, s. 1; 1981, c. 766, s. 4.)

Effect of Amendments.—The 1981 amendment deleted a former second paragraph concerning the educational requirements for those chiropractics licensed by reciprocity.

§ 90-143.1. Applicants licensed in other states.

If an applicant for licensure is already licensed in another state to practice chiropractic, the Board shall issue a license to practice chiropractic to the applicant upon evidence that:

- (1) The applicant is currently an active, competent practitioner and is in good standing; and
- (2) The applicant has practiced at least one year out of the three years immediately preceding his or her application; and
- (3) The applicant currently holds a valid license in another state; and
- (4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are equivalent to or higher than those required by this State.

Any license issued upon the application of any chiropractor from any other state shall be subject to all of the provisions of this Article with reference to the license issued by the State Board of Chiropractic Examiners upon examination, and the rights and privileges to practice the profession of chiropractic under any license so issued shall be subject to the same duties, obligations, restrictions, and conditions as imposed by this Article on chiropractors originally examined by the State Board of Chiropractic Examiners. (1981, c. 766, s. 5.)

§ 90-145. Grant of license.

The Board of Chiropractic Examiners shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. (1917, c. 73, s. 7; C. S., s. 6717; 1949, c. 785, s. 2; 1981, c. 766, s. 6.)

Effect of Amendments. — The 1981 amendment substituted the present section heading for one which read: "Grant of license; temporary

license," and deleted the former second sentence concerning the granting of temporary licenses.

§ 90-154. Grounds for professional discipline.

(a) The Board of Chiropractic Examiners may impose any of the following sanctions, singly or in combination, when it finds that a practitioner or applicant is guilty of any offense described in subsection (b):

- (1) Permanently revoke a license to practice chiropractic;
- (2) Suspend a license to practice chiropractic;
- (3) Refuse to grant a license;
- (4) Censure a practitioner;
- (5) Issue a letter of reprimand;
- (6) Place a practitioner on probationary status and require him to report regularly to the Board upon the matters which are the basis of probation.

(b) The following are grounds for disciplinary action by the Board under subsection (a):

- (1) Advertising services in a false or misleading manner;
- (2) Conviction of a felony or of a crime involving moral turpitude;
- (3) Addiction or severe dependency upon alcohol or other drugs which endangers the public by impairing a chiropractor's ability to practice safely;
- (4) Unethical conduct in the practice of the profession as defined by rule or regulation of the Board;
- (5) Negligence or incompetence in the practice of chiropractic;
- (6) Committing an act or acts constituting malpractice in the practice of chiropractic;
- (7) Rendering unacceptable care according to explicit standards adopted by the Board of Chiropractic Examiners;
- (8) Engaging in a course of lewd or immoral conduct in connection with the delivery of chiropractic services to a patient. (1917, c. 73, s. 14; C. S., s. 6725; 1949, c. 785, s. 3; 1963, c. 646, s. 3; 1981, c. 766, s. 7.)

Effect of Amendments. — The 1981 amendment rewrote the section.

§ 90-156. Pay of Board and authorized expenditures.

The members of the Board of Chiropractic Examiners shall receive their actual expenses, including transportation and lodging, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this Article, such expenses to be paid by the treasurer of the Board out of the moneys received by him as license fees, or from renewal fees. The Board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, providing for programs for licensed doctors of chiropractic in North Carolina, and all other necessary expenses in connection with the duties of the Board. (1917, c. 73, s. 16; C. S., s. 6727; 1949, c. 785, s. 4; 1981, c. 766, s. 8.)

Effect of Amendments. — The 1981 amendment substituted "transportation and lodging"

for "railroad fare and hotel bills" near the beginning of the first sentence.

ARTICLE 9.

Nurse Practice Act.

Editor's Note. — This Article was rewritten by Session Laws 1981, c. 360, s. 1, effective July 1, 1981, and has been recodified as Article 9A, § 90-171.19 et seq., of this Chapter.

Repeal of Article. —

Session Laws 1981, c. 360, s. 4, amended

§ 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§§ 90-158 to 90-171.18: Recodified as §§ 90-171.19 to 90-171.47.

ARTICLE 9A.

Nursing Practice Act.

§ 90-171.19. Legislative findings.

The General Assembly of North Carolina finds that mandatory licensure of all who engage in the practice of nursing is necessary to ensure minimum standards of competency and to provide the public safe nursing care. (1981, c. 360, s. 1.)

Editor's Note. — This Article is Article 9 of this Chapter as rewritten by Session Laws 1981, c. 360, s. 1, effective July 1, 1981, and recodified. Where appropriate, the historical citations to the sections of the former Article

have been added to the corresponding sections of the new Article.

Session Laws 1981, c. 360, s. 3, contains a severability clause.

§ 90-171.20. Definitions.

As used in this Article, unless the context requires otherwise:

- (1) "Board" means the North Carolina Board of Nursing.
- (2) "Health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this Article, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider.
- (3) "License" means a permit issued by the Board to practice nursing as a registered nurse or as a licensed practical nurse, including a renewal thereof.
- (4) "Nursing" is a dynamic discipline which includes the caring, counseling, teaching, referring and implementing of prescribed treatment in the prevention and management of illness, injury, disability or the achievement of a dignified death. It is ministering to; assisting; and sustained, vigilant, and continuous care of those acutely or chronically ill; supervising patients during convalescence and rehabilitation; the supportive and restorative care given to maintain the

optimum health level of individuals and communities; the supervision, teaching, and evaluation of those who perform or are preparing to perform these functions; and the administration of nursing programs and nursing services.

- (5) "Nursing program" means any educational program in North Carolina offering to prepare persons to meet the educational requirements for licensure under this Article.
- (6) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.
- (7) The "practice of nursing by a registered nurse" consists of the following nine components:
 - a. Assessing the patient's physical and mental health, including the patient's reaction to illnesses and treatment regimens;
 - b. Recording and reporting the results of the nursing assessment;
 - c. Planning, initiating, delivering, and evaluating appropriate nursing acts;
 - d. Teaching, delegating to or supervising other personnel in implementing the treatment regimen;
 - e. Collaborating with other health care providers in determining the appropriate health care for a patient but, subject to the provisions of G.S. 90-18.2, not prescribing a medical treatment regimen or making a medical diagnosis, except under supervision of a licensed physician;
 - f. Implementing the treatment and pharmaceutical regimen prescribed by any person authorized by State law to prescribe such a regimen;
 - g. Providing teaching and counseling about the patient's health care;
 - h. Reporting and recording the plan for care, nursing care given, and the patient's response to that care; and
 - i. Supervising, teaching, and evaluating those who perform or are preparing to perform nursing functions and administering nursing programs and nursing services.
- (8) The "practice of nursing by a licensed practical nurse" consists of the following five components:
 - a. Participating in assessing the patient's physical and mental health including the patient's reaction to illnesses and treatment regimens;
 - b. Recording and reporting the results of the nursing assessment;
 - c. Participating in implementing the health care plan developed by the registered nurse and/or prescribed by any person authorized by State law to prescribe such a plan, by performing tasks delegated by and performed under the supervision or under orders or directions of a registered nurse, physician licensed to practice medicine, dentist, or other person authorized by State law to provide such supervision;
 - d. Reinforcing the teaching and counseling of a registered nurse, physician licensed to practice medicine in North Carolina, or dentist; and
 - e. Reporting and recording the nursing care rendered and the patient's response to that care. (1981, c. 360, s. 1.)

OPINIONS OF ATTORNEY GENERAL

A registered nurse may administer certain medication pursuant to standing orders to a patient in a venereal disease clinic of a local health department after it is determined that he has a gonorrhea type discharge

or has had contact with someone having gonorrhea. See opinion of Attorney General to Dwight H. Wheless, Dare County Attorney, 50 N.C.A.G. 9 (1980).

§ 90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.

(a) The Board shall consist of 15 members. Nine members shall be registered nurses. Four members shall be licensed practical nurses. Two members shall be representatives of the public.

(b) Selection. — The North Carolina Board of Nursing shall conduct an election each year to fill vacancies of nurse members of the Board scheduled to occur during the next year. Nominations of candidates for election of registered nurse members shall be made by written petition signed by not less than 10 registered nurses eligible to vote in the election. Nominations of candidates for election of licensed practical nurse members shall be made by written petition signed by not less than 10 licensed practical nurses eligible to vote in the election. Every licensed registered nurse shall be eligible to vote in the election of registered nurse board members. Every licensed practical nurse shall be eligible to vote in the election of licensed practical nurse board members. The list of nominations shall be filed with the Board after January 1 of the year in which the election is to be held and no later than midnight of the first day of April of such year. Before preparing ballots, the Board shall notify each person who has been duly nominated of his nomination and request permission to enter his name on the ballot. A member of the Board who is nominated to succeed himself and who does not withdraw his name from the ballot is disqualified to participate in conducting the election. Elected members shall begin their term of office on January 1 of the year following their election.

Nominations of persons to serve as public members of the Board may be made to the Governor by any citizen or group within the State. The Governor shall appoint the two public members to the Board.

Board members shall be commissioned by the Governor upon their election or appointment.

(c) Vacancies. — The Governor shall fill all unexpired terms on the Board within 30 days after the term is vacated. For vacancies of registered nurse or licensed practical nurse members, the Governor shall appoint the person who received the next highest number of votes to those elected members at the most recent election for board members. The Governor shall select the public member to fill any vacancy of a public member. Appointees shall serve the remainder of the unexpired term and until their successors have been duly elected or appointed and qualified.

(d) Qualifications. — Three of the registered nurse members shall hold positions with primary responsibility in nursing education and shall hold baccalaureate or advanced degrees. Six shall hold positions with primary responsibility in providing nursing care to patients. Of the six registered nurse members with primary responsibility in providing nursing care to patients, two shall be employed by a hospital and at least one shall be a hospital nursing service director; one shall be employed by a physician licensed to practice medicine in North Carolina and engaged in the private practice of medicine; one shall be employed by a skilled or intermediate care facility; one shall be a registered nurse, approved to perform medical acts; and one shall be a com-

munity health nurse. If no nurse is nominated in one of the categories, the position shall be an at-large registered nursing position. All registered nurse members shall meet the following criteria:

- (1) Hold a current license to practice as a registered nurse in North Carolina;
- (2) Have at least five years' experience in nursing practice, nursing administration, and/or nursing education; and
- (3) Have been engaged in nursing practice, nursing administration, or nursing education for at least three years immediately preceding election.

Licensed practical nurse members shall meet the following criteria:

- (1) Hold a current license to practice as a licensed practical nurse in North Carolina;
- (2) Be a graduate of a board-approved program for the preparation of practical nurses;
- (3) Have at least five years' experience as a licensed practical nurse; and
- (4) Have been engaged in practical nursing for at least three years immediately preceding election.

A public member shall not be a health care provider nor the spouse of a health care provider. Public members shall reasonably represent the population of the State.

(e) Term. — The term of office for board members shall be three years. No member shall serve more than two consecutive three-year terms after July 1, 1981.

(f) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from Board business until the charges are resolved.

(g) Reimbursement. — Board members are entitled to receive compensation and reimbursement as authorized by G.S. 93B-5. (1981, c. 360, s. 1; c. 852, s. 1.)

Editor's Note. — Session Laws 1981, c. 360, s. 2, as amended by Session Laws 1981, c. 852, s. 2, provides:

"On January 1, 1982, the terms of office of all board members shall expire and the Governor shall appoint two public members to the board as follows: one for a one-year term and one for a two-year term. The North Carolina Board of Nursing shall conduct an election in 1981 to elect:

- (1) for a one-year term: a community health nurse, a nurse educator, and two licensed practical nurses;
- (2) for a two-year term: a nurse educator, a nurse approved to perform medical acts, a hospital employed director of nursing services, and one licensed practical nurse; and

- (3) for a three-year term: one nurse educator, one nurse employed by a physician primarily engaged in the private practice of medicine, one registered nurse employed by a skilled or intermediate care facility, one registered nurse employed by a hospital and primarily engaged in providing patient care services, and one licensed practical nurse. Thereafter, members shall serve a three-year term and shall be selected as provided in G.S. 90-160 [90-171.21]."

Effect of Amendments. — The 1981 amendment deleted "immunity" from the end of the section heading.

§ 90-171.22. Officers.

The officers of the Board shall be a chairman, who shall be a registered nurse, a vice-chairman, and such other officers as the Board may deem necessary. All officers shall be elected annually by the Board for terms of one year and shall serve until their successors have been elected and qualified. (1981, c. 360, s. 1.)

§ 90-171.23. Duties, powers, and meetings.

(a) Meetings. The Board shall hold at least two meetings each year to transact its business. The Board shall adopt rules with respect to calling, holding, and conducting regular and special meetings and attendance at meetings. The majority of the Board members constitutes a quorum.

(b) Duties, powers. The Board is empowered to:

- (1) Administer this Article;
- (2) Issue its interpretations of this Article;
- (3) Adopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of this Article;
- (4) Establish qualifications of, employ, and set the compensation of an executive officer who shall be a registered nurse and who shall not be a member of the Board;
- (5) Employ and fix the compensation of other personnel that the Board determines are necessary to carry into effect this Article and incur other expenses necessary to effectuate this Article;
- (6) Examine, license, and renew the licenses of duly qualified applicants for licensure;
- (7) Cause the prosecution of all persons violating this Article;
- (8) Prescribe standards to be met by the students, and to pertain to faculty, curricula, facilities, resources, and administration for any nursing program as provided in G.S. 90-171.38;
- (9) Survey all nursing programs at least every five years or more often as deemed necessary by the Board or program director;
- (10) Grant or deny approval for nursing programs as provided in G.S. 90-171.39;
- (11) Upon request, grant or deny approval of continuing education programs for nurses as provided in G.S. 90-171.42;
- (12) Keep a record of all proceedings and make available to the Governor and licensees an annual summary of all actions taken;
- (13) Appoint, as necessary, advisory committees which may include persons other than Board members to deal with any issue under study;
- (14) Appoint and maintain a subcommittee of the Board to work jointly with the subcommittee of the Board of Medical Examiners to develop rules and regulations to govern the performance of medical acts by registered nurses and to determine reasonable fees to accompany an application for approval or renewal of such approval as provided in G.S. 90-6. The fees and rules developed by this subcommittee shall govern the performance of medical acts by registered nurses and shall become effective when they have been adopted by both Boards;
- (15) Recommend and collect such fees for licensure, license renewal, examinations and reexaminations as it deems necessary for fulfilling the purposes of this Article; and
- (16) Adopt a seal containing the name of the Board for use on all certificates, licenses, and official reports issued by it. (1981, c. 360, s. 1; c. 665, s. 2; c. 852, s. 4.)

Effect of Amendments. — The first 1981 amendment added to subdivision (b)(14) as enacted by Session Laws 1981, c. 360, a provision as to maximum fees to accompany an application for approval or renewal of approval.

The second 1981 amendment rewrote subdivision (b)(14).

§ 90-171.24. Executive director.

The executive director shall perform the duties prescribed by the Board, serve as treasurer to the Board, and furnish a surety bond as provided in G.S. 128-8. The bond shall be made payable to the Board. (1981, c. 360, s. 1.)

§ 90-171.25. Custody and use of funds.

The executive director shall deposit in financial institutions designated by the Board as official depositories all fees payable to the Board. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Article. Such funds shall be annually audited by the State Auditor (1981, c. 360, s. 1.)

§ 90-171.26. The Board may accept contributions, etc.

The Board may accept grants, contributions, devices, bequests, and gifts which shall be kept in a separate fund and shall be used by it to enhance the practice of nursing. (1981, c. 360, s. 1.)

§ 90-171.27. Expenses payable from fees collected by Board.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of carrying out this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article, or funds received from other sources. In no case shall any salary, expense, or other obligation of the Board be charged against the treasury of the State of North Carolina. All moneys and receipts shall be kept in a special fund by and for the use of the Board for the exclusive purpose of carrying out the provisions of this Article.

(b) The schedule of fees shall not exceed the following rates:	
Application for examination leading to certificate and license as registered nurse	\$45.00
Application for certificate and license as registered nurse by endorsement	45.00
Application for each re-examination leading to certificate and license as registered nurse	45.00
Renewal of license to practice as registered nurse (two-year period)	25.00
Reinstatement of lapsed license to practice as a registered nurse and renewal fee	50.00
Application for examination leading to certificate and license as licensed practical nurse by examination	45.00
Application for certificate and license as licensed practical nurse by endorsement	45.00
Application for each re-examination leading to certificate and license as licensed practical nurse	45.00
Renewal of license to practice as a licensed practical nurse (two-year period)	25.00
Reinstatement of lapsed license to practice as a licensed practical nurse and renewal fee	50.00
Reasonable charge for duplication services and materials.	

(c) No refund of fees will be made. (1947, c. 1091, s. 1; 1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, ss. 2, 3; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1971, c. 534; 1981, c. 360, s. 1; 1981, c. 661.)

Effect of Amendments.—The 1981 amendment, effective July 1, 1981, rewrote subsection (a) and raised all the fees set out in subsection (b).

§ 90-171.28. Nurses registered under previous law.

On June 30, 1981, any nurse who holds a license to practice nursing as a registered nurse or licensed practical nurse, issued by a competent authority pursuant to laws providing for the licensure of nurses in North Carolina, shall be deemed to be licensed under the provisions of this Article, but such person shall otherwise comply with the provisions of this Article including those provisions governing licensure renewal. (1953, c. 1199, s. 1; 1965, c. 578, s. 1; 1981, c. 360, s. 1.)

§ 90-171.29. Qualifications of applicants for examination.

In order to be eligible for licensure by examination, the applicant shall make a written application to the Board on forms furnished by the Board and shall submit to the Board an application fee and written evidence, verified by oath, sufficient to satisfy the Board that the applicant has graduated from a course of study approved by the Board and is mentally and physically competent to practice nursing. (1947, c. 1091, s. 1; 1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, s. 2; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1973, c. 93, s. 4; 1981, c. 360, s. 1.)

§ 90-171.30. Licensure by examination.

At least twice each year the Board shall give an examination at the time and place it determines, to applicants for licensure to practice as a registered nurse or licensed practical nurse. The Board shall give advance notice to applicants and to persons conducting approved nursing programs of the time and place of each examination. The Board shall adopt regulations, not inconsistent with this Article, governing qualifications of applicants, the conduct of applicants during the examination, and the conduct of the examination. The applicants shall be required to pass a written examination approved and administered by the Board. When the Board determines that an applicant has passed the required examination, submitted the required fee, and has demonstrated to the Board's satisfaction that he or she is mentally and physically competent to practice nursing, the Board shall issue a license to the applicant. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1965, c. 578, s. 1; 1981, c. 360, s. 1.)

§ 90-171.31. Reexamination.

Any applicant who fails to pass the first licensure examination may take subsequent examinations in accordance with the rules and regulations of the Board, provided that any person who has graduated from a nursing program after July 1, 1981, must pass the examination within three years of graduation. After this three-year period, the applicant must reenter and successfully complete a Board-approved nursing program before being allowed to take subsequent examinations. (1981, c. 360, s. 1.)

§ 90-171.32. Qualifications for license as a registered nurse or a licensed practical nurse without examination.

The Board may, without examination, issue a license to an applicant who is duly licensed as a registered nurse or licensed practical nurse under the laws of another state, territory of the United States, the District of Columbia, or foreign country when that jurisdiction's requirements for licensure as a regis-

tered nurse or a licensed practical nurse, as the case may be, are substantially equivalent to or exceed those of the State of North Carolina at the time the applicant was initially licensed, and when, in the Board's opinion, the applicant is competent to practice nursing in this State. The Board may require such applicant to prove competence and qualifications to practice as a registered nurse or licensed practical nurse in North Carolina. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1981, c. 360, s. 1.)

§ 90-171.33. Temporary license.

The Board shall issue a nonrenewable temporary license to persons applying for licensure under G.S. 90-171.30 for a period not to exceed the lesser of six months or the date of applicant's receipt of the results of the licensure examination. The Board shall revoke the temporary license of any person who has failed the examination for licensure as provided by this act. The Board shall issue a nonrenewable temporary license to persons applying for licensure under G.S. 90-171.32 for a period not to exceed the lesser of six months or until the Board determines whether the applicant is qualified to practice nursing in North Carolina. Temporary licensees may perform patient-care services within limits defined by the Board. In defining these limits, the Board shall consider the ability of the temporary licensee to safely and properly carry out patient-care services. Temporary licensees shall be held to the standard of care of a fully licensed nurse. (1981, c. 360, s. 1.)

§ 90-171.34. Licensure renewal.

Every license issued under this Article shall be renewed every two years. On or before the date the current license expires, every person who desires to continue to practice nursing shall apply for licensure renewal to the Board on forms furnished by the Board and shall also file the required fee. The Board shall provide space on the renewal form for the licensee to specify the amount of continuing education received during the renewal period. Failure to renew the license within 30 days after the expiration date shall result in automatic forfeiture of the right to practice nursing in North Carolina. (1981, c. 360, s. 1.)

§ 90-171.35. Reinstatement.

A licensee who has allowed license to lapse by failure to renew as herein provided may apply for reinstatement on a form provided by the Board. The Board shall require the applicant to return the completed application with the required fee and to furnish a statement of the reason for failure to apply for renewal prior to the deadline. If the license has lapsed for at least five years, the Board shall require the applicant to complete satisfactorily a refresher course approved by the Board. The Board may require any applicant for reinstatement to satisfy the Board that the license should be reinstated. If, in the opinion of the Board, the applicant has so satisfied the Board, it shall issue a renewal of license to practice nursing, or it shall issue a license to practice nursing for a limited time. (1981, c. 360, s. 1.)

§ 90-171.36. Inactive list.

(a) When a licensee submits a request for inactive status, the Board shall issue to the licensee a statement of inactive status and shall place the licensee's name on the inactive list. While on the inactive list, the person shall not be subjected to renewal requirements and shall not practice nursing in North Carolina.

(b) When such person desires to be removed from the inactive list and returned to the active list, an application shall be submitted to the Board on a form furnished by the Board and the fee shall be paid for license renewal. The Board shall require evidence of competency to resume the practice of nursing before returning the applicant to active status. (1981, c. 360, s. 1.)

§ 90-171.37. Revocation, suspension, or denial of licensure.

In accordance with the provisions of Chapter 150A of the General Statutes, the Board may require remedial education, issue a letter of reprimand, restrict, revoke, or suspend any license to practice nursing in North Carolina or deny any application for licensure if the Board determines that the nurse or applicant:

- (1) Has given false information or has withheld material information from the Board in procuring or attempting to procure a license to practice nursing;
- (2) Has been convicted of or pleaded guilty or nolo contendere to any crime which indicates that the nurse is unfit or incompetent to practice nursing or that the nurse has deceived or defrauded the public;
- (3) Has a mental or physical disability or uses any drug to a degree that interferes with his or her fitness to practice nursing;
- (4) Engages in conduct that endangers the public health;
- (5) Is unfit or incompetent to practice nursing by reason of deliberate or negligent acts or omissions regardless of whether actual injury to the patient is established;
- (6) Engages in conduct that deceives, defrauds, or harms the public in the course of professional activities or services; or
- (7) Has willfully violated any provision of this Article or of regulations enacted by the Board.

The Board may take any of the actions specified above in this section when a registered nurse approved to perform medical acts has violated rules governing the performance of medical acts by a registered nurse; provided this shall not interfere with the authority of the Board of Medical Examiners to enforce rules and regulations governing the performance of medical acts by a registered nurse.

The Board may reinstate a revoked license or remove licensure restrictions when it finds that the reasons for revocation or restriction no longer exist and that the nurse or applicant can reasonably be expected to safely and properly practice nursing. (1981, c. 360, s. 1; c. 852, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "above in" for "in subdivisions

(1) through (7) of" near the beginning of the second sentence.

§ 90-171.38. Standards for nursing programs.

A nursing program may be operated under the authority of a general hospital, an educational institution or agency, or any other authority satisfactory to the Board. The Board shall establish, revise, or repeal standards for nursing programs. These standards shall specify program requirements, curricula, faculty, students, facilities, resources, administration, and describe the approval process. The standards approved by the Board and in effect on June 30, 1980, shall be the prescribed standards. Before making any substantive change in the standards the Board shall hold a hearing in accordance with Chapter 150A. Any institution desiring to establish a nursing program shall apply to the Board and submit satisfactory evidence that it will meet the standards prescribed by the Board. Those standards shall be designed to ensure that

graduates of those programs have the educational training to safely and properly practice nursing. The Board shall encourage the continued operation of all present programs that meet the standards approved by the Board and the Board shall promote the establishment of additional programs. (1981, c. 360, s. 1.)

§ 90-171.39. Approval.

The Board shall designate persons to survey proposed nursing programs, including the clinical facilities. The persons designated by the Board shall submit a written report of the survey to the Board. If in the opinion of the Board the standards for approved nursing education are met, the program shall be given approval. (1981, c. 360, s. 1.)

§ 90-171.40. Periodic surveys.

The Board shall designate persons to survey all nursing programs in the State at least every five years or more often as deemed necessary. Written reports of such surveys shall be submitted to the Board. If the Board determines that any approved nursing program does not meet or maintain the standards required by the Board, notice thereof in writing specifying the deficiencies shall be given immediately to the institution responsible for the program. The Board shall withdraw approval from a program which fails to correct deficiencies within a reasonable time. The Board shall publish annually a list of nursing programs in this State showing their approval status. (1981, c. 360, s. 1.)

§ 90-171.41. Baccalaureate in nursing candidate credits.

Every graduate of a diploma or associate degree school of nursing in this State who has passed the registered nurse examination shall, upon admission to any State-supported institution of higher learning offering baccalaureate education in nursing, be granted credit for previous experience in the diploma or associate degree school of nursing on an individual basis by the utilization of the most effective method of evaluation to the end that the applicant shall receive optimum credit and that upon graduation the applicant will have earned the baccalaureate degree in nursing. (1969, c. 547, s. 1; 1981, c. 360, s. 1.)

§ 90-171.42. Continuing education programs.

(a) Upon request, the Board shall grant approval to continuing education programs upon a finding that the program offers an educational experience designed to enhance the practice of nursing.

(b) If the program offers to teach nurses to perform advance skills, the Board may grant approval for the program and the performance of the advanced skills by those successfully completing the program when it finds that the nature of the procedures taught in the program and the program facilities and faculty are such that a nurse successfully completing the program can reasonably be expected to carry out those procedures safely and properly. (1981, c. 360, s. 1.)

§ 90-171.43. License required.

No person shall practice or offer to practice as or use any card, title or abbreviation to indicate that such person is a registered nurse or licensed practical nurse unless that person is currently licensed as provided by this Article. This Article shall not, however, be construed to prohibit or limit the following:

- (1) The performance by any person of any act for which that person holds a license issued pursuant to North Carolina law;
- (2) The clinical practice by students enrolled in approved nursing programs under the supervision of qualified faculty;
- (3) The performance of nursing performed by persons who hold a temporary license issued pursuant to G.S. 90-171.33;
- (4) The delegation to any person, including a member of the patient's family, by a physician licensed to practice medicine in North Carolina, a licensed dentist or registered nurse of those patient-care services which are routine, repetitive, limited in scope that do not require the professional judgment of a registered nurse or licensed practical nurse;
- (5) Assistance by any person in the case of emergency.

Any person permitted to practice nursing without a license as provided in subdivision (2) or (3) of this section shall be held to the same standard of care as any licensed nurse. (1981, c. 360, s. 1.)

§ 90-171.44. Prohibited acts.

It shall be a violation of this Article for any person to:

- (1) Sell, fraudulently obtain, or fraudulently furnish any nursing diploma or aid or abet therein;
- (2) Practice nursing under cover of any fraudulently obtained license;
- (3) Practice nursing without a license;
- (4) Conduct a nursing program that is not approved by the Board; or
- (5) Employ unlicensed persons to practice nursing in violation of this Article. (1981, c. 360, s. 1.)

§ 90-171.45. Violation of Article.

The violation of any provision of this Article, except G.S. 90-171.47, shall be a misdemeanor punishable in the discretion of the court. (1981, c. 360, s. 1.)

§ 90-171.46. Injunctive authority.

The Board may apply to the superior court for an injunction to prevent violations of this Article or of any rules enacted pursuant thereto. The court is empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. (1981, c. 360, s. 1.)

§ 90-171.47. Reports: immunity from suit.

Any person who has reasonable cause to suspect misconduct or incapacity of a licensee or who has reasonable cause to suspect that any person is in violation of this Article, including those actions specified in G.S. 90-171.37 (1) through (7), should report the relevant facts to the Board. Upon receipt of such charge or upon its own initiative, the Board may give notice of an administrative hearing or may, after diligent investigation, dismiss unfounded charges. Any person making a report pursuant to this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 360, s. 1.)

ARTICLE 10.

Midwives.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-172. Midwives to register.

All persons, other than regularly registered physicians, desiring to practice midwifery in this State must first secure a permit from the Department of Human Resources in accordance with the provisions of Article 18 of Chapter 130 of the General Statutes of North Carolina. (1917, c. 257, ss. 8, 9; C. S., s. 6750; 1957, c. 1357, s. 6; 1973, c. 476, s. 128; 1981, c. 676, s. 3.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "or a local department of health" following "Resources."

Session Laws 1981, c. 676, s. 6, contains a severability clause.

ARTICLE 11.

*Veterinarians.***Repeal of Article.** —

Session Laws 1981, c. 767, s. 15, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.

(a) In order to properly regulate the practice of veterinary medicine and surgery, there is established a Board to be known as the North Carolina Veterinary Medical Board which shall consist of seven members.

Four members shall be appointed by the Governor. Three of these members shall have been legal residents of and licensed to practice veterinary medicine in this State for not less than five years preceding their appointment. The other member shall not be licensed or registered under the Article and shall represent the interest of the public at large.

The Lieutenant Governor and the Speaker of the House shall each appoint to the Board one member who shall have been a resident of and licensed to practice veterinary medicine in this State for not less than five years preceding his appointment.

In addition to the six members appointed as provided above, the Commissioner of Agriculture shall biennially appoint to the Board the State Veterinarian or licensed veterinarian from a staff of a North Carolina department or institution. This member shall have been a legal resident of and licensed to practice veterinary medicine in North Carolina for not less than five years preceding his appointment.

Every member shall, within 30 days after notice of appointment, appear before any person authorized to administer the oath of office and take an oath to faithfully discharge the duties of his office.

(b) No person who has been appointed to the Board shall continue his membership on the Board if during the term of his appointment he shall:

- (1) Transfer his legal residence to another state; or
- (2) Own or be employed by any wholesale or jobbing house dealing in supplies, equipment, or instruments used or useful in the practice of veterinary medicine; or
- (3) Have his license to practice veterinary medicine rescinded for any of the causes listed in G.S. 90-187.8.

(c) All members serving on the board on June 30, 1981, shall complete their respective terms. The Governor shall appoint the public member not later than July 1, 1981. No member appointed to the Board by the Governor, Lieutenant Governor or Speaker of the House of Representatives on or after July 1, 1981, shall serve more than two complete consecutive five-year terms, except that each member shall serve until his successor is appointed and qualifies.

(d) The appointing authority may remove his appointee for the reasons specified in subsection (b) or for any good cause shown and may appoint members to fill unexpired terms. (1903, c. 503, s. 2; Rev., s. 5432; C. S., s. 6755; 1961, c. 353, s. 3; 1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, s. 1.)

Effect of Amendments. — The 1981 amendment substituted subsection (a) for two former paragraphs concerning membership of the North Carolina Veterinary Medical Board, redesignated the former third paragraph as subsection (b) and substituted "to" for "a member of" following "appointed," inserted "his membership" and substituted "the" for "said"

preceding "board" in the introductory clause of that subsection. The amendment substituted "Own" for "Be or become the owner of" in subdivision (b)(2), substituted "any of the causes listed in G.S. 90-187.8" for "cause in accordance with the provisions of Chapter 150A of the General Statutes" in subdivision (b)(3), and added subsections (c) and (d).

§ 90-184. Compensation of the Board.

In addition to such reimbursement for travel and other expenses as is normally paid to State employees, each member of the Board, for each day or substantial portion thereof he is engaged in the work of the Board may receive a per diem allowance, as determined by the Board, not to exceed thirty-five dollars (\$35.00) per day. None of the expenses of the Board or of the members shall be paid by the State. (1903, c. 503, s. 9; Rev., s. 5434; C. S., s. 6757; 1961, c. 353, s. 4; 1973, c. 1106, s. 1; 1981, c. 767, s. 2.)

Effect of Amendments. — The 1981 amendment inserted "of" following "expenses" in the second sentence.

§ 90-185. General powers of the Board.

The Board shall have the power to:

- (1) Examine and determine the qualifications and fitness of applicants for a license to practice veterinary medicine in the State.
- (2) Issue, renew, deny, suspend, or revoke licenses and temporary permits to practice veterinary medicine in the State or otherwise discipline licensed veterinarians consistent with the provisions of Chapter 150A of the General Statutes and of this Article and the rules and regulations adopted thereunder.

- (3) Conduct investigations for the purpose of discovering violations of this Article or grounds for disciplining licensed veterinarians.
- (4) Employ full-time or part-time personnel — professional, clerical, or special — necessary to effectuate the provisions of this Article and to purchase or rent necessary office space, equipment and supplies.
- (5) Appoint from its own membership one or more members to act as representatives of the Board at any meeting within or without the State where such representation is deemed desirable.
- (6) Adopt, amend, or repeal all rules necessary for its government and all regulations necessary to carry into effect the provisions of this Article, including the establishment and publication of standards of professional conduct for the practice of veterinary medicine.

The powers enumerated above are granted for the purpose of enabling the Board effectively to supervise the practice of veterinary medicine and are to be construed liberally to accomplish this objective. (1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "provisions" for "provision" and inserted "to" preceding "purchase" in sub-

division (4) and substituted "provisions" for "provision" in subdivision (6).

§ 90-186. Special powers of the Board.

In addition to the powers set forth in G.S. 90-185 above, the Board shall have the power:

- (1) To fix minimum standards for continuing veterinary medical education, which standards shall be a condition precedent to the renewal of a license under this Article;
- (2) To inspect any hospitals, clinics, mobile units or other places utilized by any practicing veterinarian, either by a member of the Board or its authorized representatives, which inspection shall be for the purpose of reporting such inspection to the Board on a form prescribed by the Board or seeking disciplinary action in cases of violations of practice or reasonable health or sanitary regulations duly established and published by the Board or other duly constituted State authorities having jurisdiction in such matters;
- (3) To provide special registration for "animal technicians," "veterinary student interns" and "veterinary student preceptees" as defined in G.S. 90-181, and to adopt regulations concerning the training, registration and service limits of such assistants while employed by and acting under the supervision and responsibility of licensed veterinarians and to have exclusive jurisdiction in determining eligibility, and qualification requirements and in granting or refusing to grant, or to suspend or revoke registration, provided that any suspension or revocation of a special registration issued under this section shall be conducted under the provisions of Chapter 150A of the General Statutes. The Board shall have power to require a registration fee not to exceed five dollars (\$5.00) for original registration and not to exceed five dollars (\$5.00) for renewal. (1973, c. 1106, s. 1; 1981, c. 767, s. 4.)

Effect of Amendments. — The 1981 amendment added the proviso to the first sentence of subdivision (3).

§ 90-187. Application for license; qualifications.

(a) Any person desiring a license to practice veterinary medicine in this State shall make written application to the Board.

(b) The application shall show that the applicant is a graduate of an accredited veterinary school, a person of good moral character, and such other information and proof as the Board may require by rule. The application shall be accompanied by a fee in the amount established and published by the Board.

(c) Graduates of nonaccredited colleges of veterinary medicine outside the United States and Canada shall furnish satisfactory proof of graduation from such a college; of successful completion of a year of acceptable veterinary medical experience in a United States or Canadian college, clinic, or private practice recognized for this purpose by the Board; of having successfully passed an examination by the United States National Board of Veterinary Medical Examiners; and of comprehension of and ability to communicate in the English language.

(d) If the Board determines that the applicant possesses the proper qualifications, it shall admit the applicant to the next examination, or if the applicant is eligible for a license without examination under G.S. 90-187.3; the Board shall forthwith grant him a license. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C. S., s. 6758; 1951, c. 749; 1961, c. 353, s. 5; 1973, c. 1106, s. 1; 1981, c. 767, ss. 5, 6.)

Effect of Amendments. — The 1981 amendment deleted "18 years of age or more" following "is" in the first sentence of subsection (b)

and substituted "shall" for "may" preceding "forthwith" in subsection (d).

§ 90-187.3. Applicants licensed in other states.

(a) The Board shall issue a license without written examination to applicants already licensed in another state provided the applicant presents evidence satisfactory to the Board that:

- (1) The applicant is currently an active, competent practitioner in good standing; and
- (2) The applicant has practiced at least three of the five years immediately preceding his application; and
- (3) The applicant currently holds a valid license in another state; and
- (4) There is no disciplinary proceeding or unresolved complaint pending against the applicant at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are substantially equivalent to those required by this State.

(b) The Board may at its discretion issue a license without written examination to applicants who meet the requirements of G.S. 90-187(c).

(c) The Board may at its discretion orally or practically examine any person qualifying for licensure under this section. (1959, c. 744; 1973, c. 1106, s. 1; 1981, c. 767, s. 7.)

Effect of Amendments. — The 1981 amendment rewrote subsection (a), added subsection (b), redesignated former subsection (b) as subsection (c) and, in that subsection, substituted

"The Board may at its discretion" for "At its discretion, the Board" and substituted "licensure" for "licensing."

§ 90-187.6. Veterinary assistants.

(a) "Animal technicians," "veterinary student interns," and "veterinary student preceptees" as defined in G.S. 90-181, before performing any services otherwise prohibited to persons not licensed or registered under this Article, shall be approved by and annually registered with the Board in accordance with G.S. 90-186(3) of this Article. The Board shall be responsible for all matters pertaining to the qualifications, registration, and revocation of registration of such persons, under rules duly adopted and published by the Board.

(b) The services of a technician, intern, preceptee, or other veterinary employee shall be limited to services under the direction and supervision of a licensed veterinarian. He shall receive no fee or compensation of any kind for his services other than such salary or compensation as may be paid to him by the veterinarian, hospital or clinic by which he is employed. He may participate in the operation of a branch office, clinic, or allied establishment only to the extent allowable under and as defined [by this Article and by rules of the Board.]

(c) An employee under the supervision of a licensed veterinarian may perform such duties as are required in the physical care of animals and in carrying out medical orders as prescribed by the licensed veterinarian, requiring an understanding of animal science but not requiring the professional services as set forth in G.S. 90-181(6)a. In addition, a registered technician may assist licensed veterinarians in diagnosis, laboratory analysis, anesthesia, and surgical procedures. Neither the employee nor the technician may perform any act producing an irreversible change in the animal.

(d) Registered interns, in addition to all of the services permitted to registered technicians, may, under the direct personal supervision of a licensed veterinarian, perform surgery and administer therapeutic or prophylactic drugs.

(e) Registered preceptees, in addition to all of the services permitted to registered technicians and registered interns, may, upon the direction of the employing veterinarian, make ambulatory calls and hospital and clinic diagnoses, prescriptions and treatments.

(f) Any person registered as an animal or veterinary technician, veterinary student intern or veterinary student preceptee, who shall practice veterinary medicine except as provided herein, shall be guilty of a misdemeanor, subject to the penalties set forth in this Article and shall also be subject to revocation of registration. Any nonregistered veterinary employee employed under subsection (c) who practices veterinary medicine except as provided under that subsection shall be guilty of a misdemeanor and subject to the penalties prescribed in G.S. 90-187.12.

(g) Any veterinarian directing or permitting a registered technician, intern, preceptee or other employee to perform a task or procedure not specifically allowed under this Article and the rules of the Board shall be guilty of a misdemeanor and subject to the penalties set forth in this Article or General Statutes, or both. (1973, c. 1106, s. 1; 1981, c. 767, ss. 8-11.)

Effect of Amendments. — The 1981 amendment substituted a comma for "or" following "intern" and inserted "or other veterinary employee" in the first sentence of subsection (b), substituted "by this Article and by rules of the Board" for "in subsection (a) above" in the last sentence of subsection (b), substituted "An employee" for "A registered technician, as an assistant to and" and substituted "G.S. 90-181(6)a" for "G.S. 90-181(7) hereof" in the first sentence of subsection (c), added the second

sentence of subsection (c), substituted "Neither the employee nor the technician may" for "He may not" in the third sentence of subsection (c), deleted "but may assist the veterinarian in" at the end of that sentence and deleted former subdivisions (c)(1) through (c)(5), which listed the tasks which registered technicians could perform in assisting a veterinarian. The amendment added the second sentence of subsection (f) and, in subsection (g), substituted a comma for "or" following "intern" and inserted "or

other employee" following "preceptee." In amending subsection (b), the amendatory act directed that the "last sentence" of the subsec-

tion be rewritten to read "by this Article and by rules of the Board." The "last line" of the subsection was plainly intended.

§ 90-187.8. Discipline of licensees.

Upon complaint, and within the Board's discretion, the Board may revoke, or suspend the license of, or otherwise discipline, any licensed veterinarian under the provisions of Chapter 150A of the General Statutes of North Carolina. Grounds for disciplinary action shall include but not be limited to the following:

- (1) The employment of fraud, misrepresentation, or deception in obtaining a license.
- (2) An adjudication of insanity or incompetency.
- (3) Chronic inebriety or habitual use of drugs.
- (4) The use of advertising or solicitation which is false, misleading, or deceptive.
- (5) Conviction of a felony or other public offense involving moral turpitude.
- (6) Incompetence, gross negligence, or other malpractice in the practice of veterinary medicine.
- (7) Having professional association with or knowingly employing any person practicing veterinary medicine unlawfully.
- (8) Fraud or dishonesty in the application or reporting of any test for disease in animals.
- (9) Failure to keep veterinary premises and equipment in a clean and sanitary condition.
- (10) Failure to report, as required by the laws and regulations of the State, or making false report of, any contagious or infectious disease.
- (11) Dishonesty or gross negligence in the inspection of foodstuffs or the issuance of health or inspection certificates.
- (12) Conviction of cruelty to animals.
- (13) Revocation of a license to practice veterinary medicine by another state, territory or district of the United States only if the grounds for revocation in the other jurisdiction would also result in revocation of the practitioner's license in this State.
- (14) Unprofessional conduct as defined in regulations adopted by the Board. (1903, c. 503, s. 10; Rev., s. 5436; C. S., s. 6759; 1953, c. 1041, s. 16; 1961, c. 353, s. 7; 1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, ss. 12, 13.)

Effect of Amendments. — The 1981 amendment substituted "deceptive" for "is otherwise deemed unprofessional under regulations adopted by the Board" in subdivision (4) and inserted a comma following "State" in subdivision (10). The amendment substituted "only if the grounds for revocation in the other jurisdic-

tion would also result in revocation of the practitioner's license in this State" for "on grounds other than nonpayment of registration fee" in subdivision (13). The amendatory act referred to "G.S. 187.8(13)," but subdivision (13) of this section was plainly intended.

§ 90-187.10. Necessity for license; certain practices exempted.

Legal Periodicals. — For a comment on the statutory standard of care for North Carolina

Health Care Providers, see 1 Campbell L. Rev. 111 (1979).

§ 90-187.13. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1981, c. 767, s. 14.)

ARTICLE 12A.***Podiatrists.***

Repeal of Article. —
Session Laws 1981, c. 659, s. 11, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-202.4. Board of Podiatry Examiners; terms of office; powers; duties.

(a) There shall be established a Board of Podiatry Examiners for the State of North Carolina. This Board shall consist of four members appointed by the Governor. Three of the members shall be licensed podiatrists who have practiced podiatry in North Carolina for not less than five years immediately preceding their election and who are elected and nominated to the Governor as hereinafter provided. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor may he or she be the spouse of a health care provider. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is chosen and qualified.

(c) Podiatrist members chosen as provided for in subsection (d) shall be selected upon the expiration of the respective terms of the members of the present Board of Podiatry Examiners. Membership on the Board resulting from appointment before July 1, 1981, shall not be considered in determining the permissible length of service under subsection (b). The Governor shall appoint the public member not later than July 1, 1981.

(d) The Governor shall appoint podiatrist members of the Board from a list provided by the Board of Podiatry Examiners. For each vacancy, the Board shall submit at least three names to the Governor. All nominations of podiatrist members of the Board shall be conducted by the Board of Podiatry

Examiners, which is hereby constituted a Board of Podiatry Elections. Every podiatrist with a current North Carolina license residing in this State shall be eligible to vote in all elections. The list of licensed podiatrists shall constitute the registration list for elections. The Board of Podiatry Elections is authorized to make rules relative to the conduct of these elections, provided such rules are not in conflict with the provisions of this section and provided that notice shall be given to all licensed podiatrists residing in North Carolina. All such rules shall be adopted subject to the procedures of Chapter 150A of the General Statutes of North Carolina. From any decision of the Board of Podiatry Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner provided by Chapter 150A of the General Statutes.

(e) Any initial or regular member of the Board may be removed from office by the Governor for good cause shown. Any vacancy in the initial or regular podiatrist membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of at least three names submitted by the podiatrist members of the Board. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term.

(f) The Board is authorized to elect its own presiding and other officers.

(g) The Board, in carrying out its responsibilities, shall have authority to employ personnel, full-time or part-time, as shall be determined to be necessary in the work of the Board. The Board shall have authority to pay compensation to the member of the Board holding the position of secretary-treasurer on a basis to be determined by the Board. The Board is required to keep proper and complete records with respect to all of its activities, financial and otherwise, and shall on or before January 30 of each year submit a written report to the Governor and to such other officials and/or agencies as other sections of the General Statutes may require, said report covering the activities of the Board during the previous calendar year, which report shall include a verified financial statement. The Board is authorized to adopt rules and regulations governing its proceedings and the practice of podiatry in this State, not inconsistent with the provisions of this Article. The Board shall maintain at all times an up-to-date list of the names and addresses of each licensed podiatrist in North Carolina, which list shall be available for inspection and which shall be included in the annual report referred to above. (1919, c. 78, s. 3; C. S., s. 6765; 1963, c. 1195, s. 2; 1967, c. 1217, s. 3; 1975, c. 672, s. 1; 1981, c. 659, s. 1.)

Effect of Amendments. — The 1981 amendment substituted subsections (a) through (f) for six sentences which formerly pertained to the

same subject matter and redesignated the remainder of the section as subsection (g).

§ 90-202.5. Applicants to be examined; examination fee; requirements.

Any person not heretofore authorized to practice podiatry in this State shall file with the Board of Podiatry Examiners an application for examination accompanied by a fee not to exceed one hundred dollars (\$100.00), together with proof that the applicant is of good moral character, and has obtained a preliminary education equivalent to four years of instruction in a high school and two years of instruction in a college or university approved by the American Association of Colleges and Universities. Such applicant before presenting himself for examination must be a graduate of a college of podiatric medicine accredited by the National Council of Education of American Podiatry Association. (1919, c. 78, s. 9; C. S., s. 6766; 1963, c. 1195, ss. 1, 2; 1967, c. 1217, s. 4; 1975, c. 672, s. 1; 1981, c. 659, s. 2.)

Effect of Amendments. — The 1981 amendment deleted "is more than 18 years of age" following "applicant" in the first sentence.

§ 90-202.6. Examinations; subjects; certificates.

(a) The Board of Podiatry Examiners shall hold at least one examination annually for the purpose of examining applicants under this Article. The examination shall be at such time and place as the Board may see fit. The Board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide, preserve and keep a complete record of all its transactions. Examinations for registration under this Article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral or clinical, as the Board may determine, and may include the following subjects: anatomy, physiology, bacteriology, chemistry, dermatology, podiatry, surgery, materia medica, pharmacology and pathology. No applicant shall be granted a license certificate by the Board unless he obtains a general average of 75 or over, and not less than fifty percent (50%) in any one subject. After such examination the Board shall without unnecessary delay, act on same and issue license certificates to the successful candidates signed by each member of the Board; and the Board of Podiatry Examiners shall report annually to each licensed podiatrist in the State of North Carolina.

(b) The Board may waive the administration of a written examination prepared by it for all initial applicants who have successfully completed the National Board of Podiatry Examination. The Board may administer to such applicants and require them to complete successfully an examination to test clinical competency in the practice of podiatry.

(c) Any applicant who fails to pass his examination shall within one year be entitled to reexamination upon the payment of an amount not to exceed one hundred dollars (\$100.00), but not more than two reexaminations shall be allowed any one applicant prior to filing a new application. Should he fail to pass his third examination, he shall file a new application before he can again be examined. (1919, c. 78, s. 4; C. S., s. 6767; 1963, c. 1195, s. 2; 1967, c. 1217, s. 5; 1975, c. 672, s. 1; 1981, c. 659, ss. 3, 4.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a) and added subsections (b) and (c).

§ 90-202.7. Applicants licensed in other states.

If an applicant for licensure is already licensed in another state to practice podiatry, the Board shall issue a license to practice podiatry to the applicant upon evidence that:

- (1) The applicant is currently an active, competent practitioner in good standing; and
- (2) The applicant has practiced at least three years out of the five years immediately preceding his or her application; and
- (3) The applicant currently holds a valid license in another state; and
- (4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are equivalent to or higher than those required by this State.

Any license issued upon the application of any podiatrist from any other state shall be subject to all of the provisions of this Article with reference to

the license issued by the North Carolina State Board of Podiatry Examiners upon examination of applicants, and the rights and privileges to practice the profession of podiatry under any license so issued shall be subject to the same duties, obligations, restrictions and conditions as imposed by this Article on podiatrists originally examined by the North Carolina State Board of Podiatry Examiners. (1919, c. 78, s. 6; C. S., s. 6768; 1967, c. 1217, s. 6; 1975, c. 672, s. 1; 1981, c. 659, s. 5.)

Effect of Amendments. — The 1981 amendment rewrote this section which formerly pertained to reexamination of unsuccessful applicants.

§ 90-202.8. Revocation of certificate; grounds for; suspension of certificate.

(a) The North Carolina State Board of Podiatry Examiners, in accordance with Chapter 150A (Administrative Procedure Act) of the General Assembly, shall have the power and authority to:

- (1) Refuse to issue a license to practice podiatry;
- (2) Refuse to issue a certificate of renewal of a license to practice podiatry;
- (3) Revoke or suspend a license to practice podiatry; and
- (4) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

- (1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
- (2) Is a chronic or persistent user of alcohol intoxicants or habit-forming drugs or narcotics to the extent that the same impairs his ability to practice podiatry;
- (3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
- (4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
- (5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;
- (6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
- (7) Is mentally, emotionally, or physically unfit to practice podiatry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice podiatry unless or until such person shall have been subsequently lawfully declared to be mentally competent;
- (8) Has advertised services in a false, deceptive, or misleading manner;
- (9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of podiatry or in attempting to fraudulently obtain a license to practice podiatry;
- (10) Has engaged in such immoral conduct as to discredit the podiatry profession;

- (11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;
- (12) Has been negligent in the practice of podiatry;
- (13) Is not professionally competent in the practice of podiatry;
- (14) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;
- (15) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
- (16) Has committed any fraudulent or misleading acts in the practice of podiatry;
- (17, (18) Repealed by Session Laws 1981, c. 659, s. 7.
- (19) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of podiatry;
- (20) Has persistently maintained, in the practice of podiatry, unsanitary offices, practices, or techniques;
- (21) Is a menace to the public health by reason of having a serious communicable disease;
- (22) Has distributed or caused to be distributed any intoxicant, drug, or narcotic for any other than a lawful purpose; or
- (23) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(a1) The Board shall establish a grievance committee to receive complaints concerning a practitioner's business or professional practices. The committee shall consider all complaints and determine whether there is probable cause. After its review, the committee may dismiss any complaint when it appears that probable cause of a violation cannot be established. Complaints which are not dismissed shall be referred to the Board.

(b) If any person engages in or attempts to engage in the practice of podiatry while his license is suspended, his license to practice podiatry in the State of North Carolina may be permanently revoked.

(c) Action of the Board shall be subject to judicial review as provided by Chapter 150A (Administrative Procedure Act). (1919, c. 78, ss. 12, 13; C. S., s. 6772; 1953, c. 1041, ss. 17, 18; 1963, c. 1195, s. 2; 1967, c. 691, s. 45; 1973, c. 1331, s. 3; 1975, c. 672, ss. 1, 2; 1981, c. 659, ss. 6-8.)

Effect of Amendments. — The 1981 amendment rewrote subdivision (8) of subsection (a), which pertained to solicitation of professional patronage, deleted subdivisions (17) and (18) of subsection (a) and added subsection (a1).

§ 90-202.13. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1975, c. 672, s. 1; 1981, c. 659, s. 9.)

Effect of Amendments. — The 1981 amendment added the second sentence.

ARTICLE 13A.

Practice of Funeral Service.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-210.25. Licensing.

(a) Qualifications, Examinations, Resident Traineeship and Licensure. —

(1) To be licensed for the practice of funeral directing under this Article, a person must:

- a. Be at least 18 years of age,
- b. Be of good moral character,
- c. Have completed a minimum of 32 semester hours or 48 quarter hours of academic instruction in a duly accredited college or university, or be a graduate of a mortuary science college approved by the Board,
- d. Have completed 12 months of resident traineeship as funeral director, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and
- e. Have passed an oral or written funeral director examination on the following subjects:
 1. Basic health sciences, including microbiology, hygiene, and public health,
 2. Funeral service administration, including psychology, funeral principles and directing, and
 3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(2) To be licensed for the practice of embalming under this Article, a person must:

- a. Be at least 18 years of age,
- b. Be of good moral character,
- c. Be a graduate of a mortuary science college approved by the Board,
- d. Have completed 12 months of resident traineeship as an embalmer pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and
- e. Have passed an oral or written embalmer examination on the following subjects:
 1. Basic health sciences, including anatomy, chemistry, microbiology, pathology and forensic pathology,
 2. Funeral service sciences, including embalming and restorative art, and
 3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(3) To be licensed for the practice of funeral service under this Article, a person must:

- a. Be at least 18 years of age,
- b. Be of good moral character,
- c. Be a graduate of a mortuary science college approved by the Board,
- d. Have completed 12 months of resident traineeship as a funeral service licensee, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and
- e. Have passed an oral or written funeral service examination on the following subjects:
 1. Basic health sciences, including anatomy, chemistry, microbiology, pathology, forensic pathology hygiene and public health,
 2. Funeral service sciences, including embalming and restorative art,
 3. Funeral service, administration including psychology, funeral principles and directing, and
 4. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(4) a. A person desiring to become a resident trainee shall apply to the Board on a form provided by the Board. The application shall state that the applicant is not less than 18 years of age, of good moral character, and is the graduate of a high school or the equivalent thereof, and shall indicate the licensee under whom the applicant expects to train. A person training to become an embalmer may serve under either a licensed embalmer or a funeral service licensee. A person training to become a funeral director may serve under either a licensed funeral director or a funeral service licensee. A person training to become a funeral service licensee shall serve under a funeral service licensee. The application must be sustained by oath of the applicant and be accompanied by the appropriate fee. When the Board is satisfied as to the qualifications of an applicant it shall instruct the secretary to issue a certificate of resident traineeship.

- b. When a resident trainee leaves the proctorship of the licensee under whom the trainee has worked, the licensee shall file with the Board an affidavit showing the length of time served with the licensee by the trainee, and the affidavit shall be made a matter of record in the Board's office. The licensee shall deliver a copy of the affidavit to the trainee.
- c. A person who has not completed the traineeship and wishes to do so under a licensee other than the one whose name appears on the original certificate may reapply to the Board for approval, without payment of an additional fee.
- d. A certificate of resident traineeship shall be signed by the resident trainee and upon payment of the renewal fee shall be renewable one year after the date of original registration; but the certificate may not be renewed more than one time. The Board shall mail to each registered trainee at his last known address a notice that the renewal fee is due and that, if not paid within 30 days of the notice, the certificate will be canceled. A penalty, in addition to the renewal fee, shall be charged for a late renewal, but the renewal of the registration of any resident trainee who is engaged in the active military service of the United States at the time renewal is due may, at the discretion of the Board, be held in abeyance for the duration of that service without penalties. No credit shall be allowed for the 12-month period of resident

traineeship that shall have been completed more than three years preceding the examination for a license.

- e. All registered resident trainees shall report to the Board at least every three months during traineeship upon forms provided by the Board listing the work which has been completed during the preceding three months of resident traineeship. The data contained in the reports shall be certified as correct by the licensee under whom the trainee has served during the period and by the licensed person who is managing the funeral service establishment. Each report shall list the following:
 1. For funeral director trainees, the conduct of any funerals during the relevant time period,
 2. For embalming trainees, the embalming of any bodies during the relevant time period,
 3. For funeral service trainees, both of the activities named in 1 and 2 of this subsection, engaged in during the relevant time period.
 - f. To meet the resident traineeship requirements of G.S. 90-210.25(a)(1), G.S. 90-210.25(a)(2) and G.S. 90-210.25(a)(3) the following must be shown by the affidavit(s) of the licensee(s) under whom the trainee worked:
 1. That the funeral director trainee has, under supervision, assisted in directing at least 25 funerals during the resident traineeship,
 2. That the embalmer trainee has, under supervision, assisted in embalming at least 25 bodies during the resident traineeship,
 3. That the funeral service trainee has, under supervision assisted in directing at least 25 funerals and, under supervision, assisted in embalming at least 25 bodies during the resident traineeship.
 - g. The Board may suspend or revoke a certificate of resident traineeship for violation of any provision of this Article.
 - h. Each sponsor for a registered resident trainee must during the period of sponsorship be actively employed with a funeral establishment. The traineeship shall be a primary vocation of the trainee.
 - i. Only one resident trainee may register and serve at any one time under any one person licensed under this Article.
- (5) The Board by regulation may recognize other examinations that the Board deems equivalent to its own.

All licenses shall be signed by the president and secretary of the Board and the seal of the Board affixed thereto. All licenses shall be issued, renewed or duplicated for a period not exceeding one year upon payment of the renewal fee, and all licenses, renewals or duplicates thereof shall expire and terminate the thirty-first day of December following the date of their issue unless sooner revoked and canceled; provided, that the date of expiration may be changed by unanimous consent of the Board and upon 90 days' written notice of such change to all persons licensed for the practice of funeral directing, embalming and funeral service in this State.

The holder of any license issued by the Board who shall fail to renew same on or before January 31 of the calendar year for which such license is to be renewed shall be deemed to have forfeited and surrendered such license as of such date. No license so forfeited and surrendered shall be reinstated by the Board except upon application in writing within five years following such forfeiture and upon payment of all delinquent annual renewal fees plus a reinstatement

fee; provided, however, that the Board may waive the provisions of this section for the holder of any license during the period of service in the armed services of the United States upon application within six months of severance therefrom.

All licensees now or hereafter licensed in North Carolina shall take courses of study in subjects relating to the practice of the profession for which they are licensed, to the end that new techniques, scientific and clinical advances, the achievements of research and the benefits of learning and reviewing skills will be utilized and applied to assure proper service to the public.

As a prerequisite to the annual renewal of a license, the licensee must complete, during the year immediately preceding renewal, at least five hours of continuing education courses, approved by the Board prior to enrollment; except that for renewals for calendar year 1980 the required length of study shall be a total of 15 hours in the three years immediately preceding January 1, 1980.

The Board shall not renew a license unless fulfillment of the continuing education requirement has been certified to it on a form provided by the Board, but the Board may waive this requirement for renewal in cases of certified illness or undue hardship or where the licensee lives outside of North Carolina and does not practice in North Carolina, and the Board shall waive the requirement for all licensees who have been licensed in North Carolina for a continuous period of 25 years or more.

The Board shall cause to be established and offered to the licensees, each calendar year, at least five hours of continuing education courses in subjects encompassing the license categories of embalming, funeral directing and funeral service. The Board may charge licensees attending these courses a reasonable registration fee in order to meet the expenses thereof and may also meet those expenses from other funds received under the provisions of this Article.

Any person who having been previously licensed by the Board as a funeral director or embalmer prior to July 1, 1975, shall not be required to satisfy the requirements herein for licensure as a funeral service licensee, but shall be entitled to have such license renewed upon making proper application therefor and upon payment of the renewal fee provided by the provisions of this Article. Persons previously licensed by the Board as a funeral director may engage in funeral directing, and persons previously licensed by the Board as an embalmer may engage in embalming. Any person having been previously licensed by the Board as both a funeral director and an embalmer may upon application therefor funeral service licensee.

(b) Persons Licensed under the Laws of Other Jurisdictions. —

- (1) The Board shall grant licenses to funeral directors, embalmers and funeral service licensees, licensed in other states, territories, the District of Columbia, and foreign countries, when it is shown that the applicant holds a valid license as a funeral director, embalmer or funeral service licensee issued by the other jurisdiction, has demonstrated knowledge of the laws and regulations governing the profession in North Carolina and has submitted proof of his good moral character; and either that the applicant has continuously practiced the profession in the other jurisdiction for at least three years immediately preceding his application, or the Board has determined that the licensing requirements for the other jurisdiction are substantially similar to those of North Carolina.
- (2) The Board shall periodically review the mortuary science licensing requirements of other jurisdictions and shall determine which licens-

ing requirements are substantially similar to the requirements of North Carolina.

- (3) The Board may issue special permits, to be known as courtesy cards, permitting nonresident funeral directors, embalmers and funeral service licensees to remove bodies from and to arrange and direct funerals and embalm bodies in this State, but these privileges shall not include the right to establish a place of business in or engage generally in the business of funeral directing and embalming in this State.

(c) Registration, Filing and Transportation. — The holder of any license granted by this State for those within the funeral service profession or renewal thereof provided for in this Article shall cause registration to be filed in the office of the board of health of the county or city in which he practices his profession, or if there be no board of health in such county or city, at the office of the clerk of the superior court of such county. All such licenses, certificates, duplicates and renewals thereof shall be displayed in a conspicuous place in the funeral establishment where the holder renders service. It shall be unlawful for any railway agent, express agency, baggage master, conductor or other person acting as such, to receive the dead body of any person for shipment or transportation by railway or other public conveyance, to a point outside of this State, unless said body be accompanied by a removal or shipping permit.

(d) Establishment Permit. —

- (1) No person, firm or corporation shall conduct, maintain, manage or operate a funeral establishment unless a permit for that establishment has been issued by the Board and is conspicuously displayed in the establishment.

(2) A permit shall be issued when:

a. It is shown that the funeral establishment has in charge a person, known as a manager, licensed for the practice of funeral directing or funeral service,

b. The Board receives a list of the names of all part-time and full-time licensees employed by the establishment,

c. If embalming is to be performed on the premises, it is shown that a preparation room is maintained which satisfies the requirements set out in G.S. 90-210.27, and

d. The Board receives payment of the permit fee.

- (3) Applications for funeral establishment permits shall be made on forms provided by the Board and filed with the Board by the owner, a partner or an officer of the corporation by January 1 of each year, and shall be accompanied by the application fee or renewal fee, as the case may be. All permits shall expire on December 31 of each year.

A penalty for late renewal, in addition to the regular renewal fee, shall be charged for renewal of registration coming after the first day of February.

- (4) The Board may suspend or revoke a permit when an owner, partner or officer of the funeral establishment violates any provision of this Article or any regulations of the Board, or when any agent or employee of the funeral establishment, with the consent of any person, firm or corporation operating the funeral establishment, violates any of those provisions, rules or regulations.

(5) Funeral establishment permits are not transferable. A new application for a permit shall be made to the Board within 30 days of a change of ownership of a funeral establishment.

(e) Revocation; Suspension; Disclosure. —

- (1) Whenever the Board finds that an applicant for a license or a person to whom a license has been issued by the Board is guilty of any of the following acts or omissions and the Board also finds that the person

has thereby become unfit to practice, the Board may suspend or revoke the license or refuse to issue or renew the license, in accordance with the procedures set out in Chapter 150A:

- a. Conviction of a felony or a crime involving fraud or moral turpitude;
 - b. Fraud or misrepresentation in obtaining or renewing a license or in the practice of funeral service;
 - c. False or misleading advertising as the holder of a license;
 - d. Solicitation of dead human bodies by the licensee, his agents, assistants, or employees; but this paragraph shall not be construed to prohibit general advertising by the licensee;
 - e. Employment directly or indirectly of any resident trainee agent, assistant or other person, on a part-time or full-time basis, or on commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular licensee;
 - f. The direct or indirect giving of certificates of credit or the payment or offer of payment of a commission by the licensee, his agents, assistants or employees for the purpose of securing business;
 - g. Gross immorality, including being under the influence of alcohol or drugs while practicing funeral service;
 - h. Aiding or abetting an unlicensed person to perform services under this Article, including the use of a picture or name in connection with advertisements or other written material published or caused to be published by the licensee;
 - i. Using profane, indecent or obscene language in the presence of a dead human body, and within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of;
 - j. Violating or cooperating with others to violate any of the provisions of this Article or of the rules and regulations of the Board;
 - k. Violation of any State law or municipal or county ordinance or regulation affecting the handling, custody, care or transportation of dead human bodies;
 - l. Refusing to surrender promptly the custody of a dead human body upon the express order of the person lawfully entitled to the custody thereof;
 - m. Knowingly making any false statement on a certificate of death;
 - n. Indecent exposure or exhibition of a dead human body while in the custody or control of a licensee.
- (2) Where the Board finds that a licensee is guilty of one or more of the acts or omissions listed in subsection (e)(1) of this section but it is determined by the Board that the licensee has not thereby become unfit to practice, the Board may place the licensee on a term of probation in accordance with the procedures set out in Chapter 150A.

No person licensed under this Article shall remove or cause to be embalmed a dead human body when he has information indicating crime or violence of any sort in connection with the cause of death, nor shall a dead human body be cremated, until permission of the State or county medical examiner has first been obtained. However, nothing in this Article shall be construed to alter the duties and authority now vested in the office of the coroner.

No funeral service establishment shall accept a dead human body from any public officer (excluding the State or county medical examiner or his agent), or employee or from the official of any institution, hospital or nursing home, or from a physician or any person having a professional relationship with a decedent, without having first made due inquiry as to the desires of the next of kin and of the persons who may be chargeable with the funeral expenses of

such decedent. If any such kin be found, his or her authority and directions shall govern the disposal of the remains of such decedent. Any funeral service establishment receiving such remains in violation hereof shall make no charge for any service in connection with such remains prior to delivery of same as stipulated by such kin; provided, however, this section shall not prevent any funeral service establishment from charging and being reimbursed for services rendered in connection with the removal of the remains of any deceased person in case of accidental or violent death, and rendering necessary professional services required until the next of kin or the persons chargeable with the expenses have been notified.

When and where a licensee presents a selection of funeral merchandise to the public to be used in connection with the service to be provided by the licensee or an establishment as licensed under this Article, a card or brochure shall be directly associated with each item of merchandise setting forth the price of the service using said merchandise and listing the services and other merchandise included in the price, if any. When there are separate prices for the merchandise and services, such cards or brochures shall indicate the price of the merchandise and of the items separately priced.

At the time funeral arrangements are made and prior to the time of rendering the service and providing the merchandise, a funeral director or funeral service licensee shall give or cause to be given to the person or persons making such arrangements a written statement duly signed by a licensee of said funeral establishment showing the price of the service as selected and what services are included therein, the price of each of the supplemental items of services or merchandise requested, and the amounts involved for each of the items for which the funeral establishment will advance moneys as an accommodation to the person making arrangements, insofar as any of the above items can be specified at that time. The statement shall have printed, typed or stamped on the face thereof: "This statement of disclosure is provided pursuant to the requirements of North Carolina G.S. 90-210.25(e)."

(f) **Unlawful Practices.** — If any person shall practice or hold himself out as practicing the profession or art of embalming, funeral directing or practice of funeral service without having complied with the licensing provisions of this Article, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than five hundred dollars (\$500.00) or imprisonment for not more than six months, or both, in the discretion of the court.

Whenever it shall appear to the Board that any person, firm or corporation has violated, threatens to violate or is violating any provisions of this Article, the Board may apply to the courts of the State for a restraining order and injunction to restrain these practices. If upon application the court finds that any provision of this Article is being violated, or a violation is threatened, the court shall issue an order restraining and enjoining the violations, and this relief may be granted regardless of whether criminal prosecution is instituted under the provisions of this subsection. The venue for actions brought under this subsection shall be the superior court of any county in which the acts are alleged to have been committed or in the county where the defendant in the action resides. (1901, c. 338, ss. 9, 10, 14; Rev., ss. 3644, 4388; 1917, c. 36; 1919, c. 88; C. S., ss. 6781, 6782; 1949, c. 951, s. 4; 1951, c. 413; 1957, c. 1240, ss. 2, 2½; 1965, cc. 719, 720; 1967, c. 691, s. 48; c. 1154, s. 2; 1969, c. 584, ss. 3, 3a, 4; 1975, c. 571; 1979, c. 461, ss. 11-21; 1981, c. 619, ss. 1-4.)

Effect of Amendments. — The 1981 amendment added the last sentence of subdivision (a)(4)d, deleted "Fines" following "Suspension" in the heading of subsection (e), added "or in the practice of funeral service" in subdivision (e)(1)b and added the second paragraph of subsection (f).

Legal Periodicals. — For a comment on the statutory standard of care for North Carolina Health Care Providers, see 1 Campbell L. Rev. 111 (1979).

§ 90-210.28. Fees.

The Board may set and collect fees, not to exceed the following amounts:

Establishment permit	
Application	\$ 50.00
Annual renewal	50.00
Late renewal penalty	35.00
Courtesy card	
Application	35.00
Annual renewal	35.00
Out-of-state licensee	
Application	50.00
Embalmer, funeral director, funeral service	
Application	50.00
Annual renewal	50.00
Reinstatement fee	100.00
Resident trainee permit	
Application	35.00
Annual renewal	10.00
Late renewal penalty	5.00
Duplicate license certificate	15.00

(1979, c. 461, s. 22; 1981, c. 619, s. 5.)

Effect of Amendments. — The 1981 amendment added the fee for duplicate license certificates.

ARTICLE 15A.

Uniform Anatomical Gift Act.

§ 90-220.1. Definitions.

Cross References. — As to corneal tissue removal, see §§ 130-202.8, 130-202.9.

ARTICLE 16.

Dental Hygiene Act.

Repeal of Article. —
Session Laws 1981, c. 824, s. 4 amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-221. Definitions.

(a) "Dental hygiene" as used in this Article shall mean the performance of the following functions: complete oral prophylaxis, application of preventive agents to oral structures, exposure and processing of radiographs, administration of medicaments prescribed by a licensed dentist, preparation of diagnostic

aids, and written records of oral conditions for interpretation by the dentist, together with such other and further functions as may be permitted by rules and regulations of the Board not inconsistent herewith.

(b) "Dental hygienist" as used in this Article, shall mean any person who is a graduate of a Board-accredited school of dental hygiene, who has been licensed by the Board, and who practices dental hygiene as prescribed by the Board.

(c) "License" shall mean a certificate issued to any applicant upon completion of requirements for admission to practice dental hygiene.

(d) "Renewal certificate" shall mean the annual certificate of renewal of license to continue practice of dental hygiene in the State of North Carolina.

(e) "Board" shall mean "The North Carolina State Board of Dental Examiners" created by Chapter 139, Public Laws of 1879, and Chapter 178, Public Laws of 1915 as continued in existence by G.S. 90-22.

(f) "Supervision" as used in this Article shall mean that acts are deemed to be under the supervision of a licensed dentist when performed in a locale where a licensed dentist is physically present during the performance of such acts and such acts are being performed pursuant to the dentist's order, control and approval. (1945, c. 639, s. 1; 1971, c. 756, s. 1; 1981, c. 824, s. 1.)

Effect of Amendments. — The 1981 amendment added subsection (f).

§ 90-233. Practice of dental hygiene.

(a) A dental hygienist may practice only under the supervision of one or more licensed dentists. Provided, however, that this subsection (a) shall be deemed to be complied with in the case of dental hygienists employed by the Department of Human Resources and especially trained by said Department as public health hygienists while performing their duties in the public schools under the direction of a duly licensed dentist.

(b) A dentist in private practice may not employ more than two dental hygienists at one and the same time who are employed in clinical dental hygiene positions.

(c) Dental hygiene may be practiced only by the holder of a license provisional license currently in effect and duly issued by the Board. The following acts, practices, functions or operations, however, shall not constitute the practice of dental hygiene within the meaning of this Article:

- (1) The teaching of dental hygiene in a school or college approved by the Board in a board-approved program by an individual licensed as a dental hygienist in any state in the United States.
- (2) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of G.S. 90-29(c)(3), acting as an instructor.
- (3) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board.
- (4) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching

of dentistry pursuant to the provisions of G.S. 90-20(c)(3). (1945, c. 639, s. 12; 1971, c. 756, s. 13; 1973, c. 476, s. 128; 1981, c. 824, ss. 2, 3.)

Effect of Amendments. — The 1981 amendment deleted "direct" preceding "supervision" in the first sentence of subsection (a), deleted "dental" following "health" and substituted "in" for "within" in the second sentence of sub-

section (a) and substituted "two" for "one" and "who are employed in clinical dental hygiene positions" for "except when permitted to do so by the rules and regulations of the Board" in subsection (b).

ARTICLE 17.

Dispensing Opticians.

Repeal of Article. — Session Laws 1981, c. 600, s. 21, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-236.1. Requirements for filling contact lens prescriptions.

No person, firm or corporation licensed or registered under this Article shall fill a prescription or dispense lenses, other than spectacle lenses, unless the prescription specifically states on its face that the prescriber intends it to be for contact lenses and includes the type and specifications of the contact lenses being prescribed. No person, firm or corporation licensed under this Article shall fill a prescription beyond the expiration date stated on the face thereof.

Any person, firm or corporation that dispenses contact lenses on the prescription of a practitioner licensed under Articles 1 or 6 of this Chapter shall, at the time of delivery of the lenses, inform the recipient both orally and in writing that he return to the prescriber for insertion of the lens, instruction on lens insertion and care, and to ascertain the accuracy and suitability of the prescribed lens. The statement shall also state that if the recipient does not return to the prescriber after delivery of the lens for the purposes stated above, the prescriber shall not be responsible for any damages or injury resulting from the prescribed lens, except that this sentence does not apply if the dispenser and the prescriber are the same person.

Prescriptions filled pursuant to this section shall be kept on file by the prescriber and the person filling the prescription for at least 24 months after the prescription is filled. (1981, c. 600, s. 1.)

§ 90-237. Qualifications for dispensing opticians.

In order to be issued a license as a registered licensed optician by the North Carolina State Board of Opticians, the applicant:

- (1) Shall not have violated this Article or the rules of the Board;
- (2) Shall be at least 18 years of age and a high school graduate or equivalent;
- (3) Shall have passed an examination conducted by the Board to determine his or her fitness to engage in the business of a dispensing optician; and

- (4) Shall have completed a six-month internship by working full time under the supervision of a licensed optician, optometrist or physician trained in ophthalmology, in order to demonstrate proficiency in the areas of measurement of the face, and fitting and adjusting glasses and frames to the face, lens recognition, lens design, and prescription interpretation. (1951, c. 1089, s. 4; 1977, c. 755, s. 2; 1981, c. 600, s. 2.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-238. North Carolina State Board of Opticians created; appointment and qualification of members.

There is hereby created a North Carolina State Board of Opticians whose duty it shall be to carry out the purposes and enforce the provisions of this Article. The Board shall consist of seven members appointed by the Governor as follows:

- (1) Five licensed dispensing opticians, each of whom shall serve three-year terms;
- (2) Two residents of North Carolina who are not licensed as dispensing opticians, physicians, optometrists, who shall serve three-year terms.

Each member of the Board shall serve until his successor is appointed and qualifies; provided that no person shall serve on this Board for more than two complete consecutive terms. Each member of the Board, before entering upon his duties, shall take all oaths prescribed for other State officers in the manner provided by law, which oaths shall be filed in the office of the Secretary of State. The Governor, at his option, may remove any member of the Board for good cause shown, may appoint members to fill unexpired terms, and must make optician appointments from a list of three nominees for each vacancy submitted by the Board as a result of an election conducted by the Board in May of each year and open to all licensees. (1951, c. 1089, s. 5; 1979, c. 533; 1981, c. 600, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "seven" for "six" in the second sentence of the introductory paragraph, inserted "licensed" and substituted "three-year terms" for "a five-year term" in subdivision (1), deleted two former sentences at the end of that subdivision which provided for appointments by the Governor to fill vacancies created by expiration of terms, rewrote subdivision (2) which formerly provided for one resident of North Carolina not licensed to practice

opticianry to serve a four-year term, substituted "Each" for "The members" and "his" for "their" in the second sentence of the second paragraph, deleted "respectively" preceding "take" and "taken and" preceding "prescribed" and inserted "oaths" following "which" in the same sentence. The amendment substituted "may" for "and" following "shown" in the third sentence of the second paragraph and added the language following "terms" in that sentence.

§ 90-239. Organization, meetings and powers of Board.

Within 30 days after appointment of the Board, the Board shall hold its first regular meeting, and at said meeting and annually thereafter shall choose from among its members a chairman, vice-chairman, a secretary and a treasurer. The Board may combine the offices of secretary and treasurer. The Board shall make such rules and regulations not inconsistent with the law as may be necessary to the proper performance of its duties, may employ agents to carry out the purposes of this Article, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the Board, and a majority of the Board shall constitute a quorum. The Board shall meet at

least once a year, the time and place of meeting to be designated by the chairman. Special meetings may be called by the chairman or upon request of three members. The secretary of the Board shall keep a full and complete record of its proceedings, which shall at all reasonable times be open to public inspection. (1951, c. 1089, s. 6; 1981, c. 600, ss. 4-7.)

Effect of Amendments. — The 1981 amendment substituted "from among its members a chairman, vice-chairman, a secretary and a treasurer" for "one of its members as president and one as secretary and treasurer" in the first

sentence, added the second sentence, inserted "may employ agents to carry out the purpose of this Article" in the third sentence, substituted "chairman" for "president" in the fourth sentence and added the fifth sentence.

§ 90-240. Examination.

(a) Applicants to take the examination for dispensing opticians shall be high school graduates or the equivalent who:

- (1) Have successfully completed a two-year course of training in an accredited school of opticianry with a minimum of 1600 hours or
- (2) Have completed three and one-half years of apprenticeship while registered with the Board under a licensed dispensing optician, with time spent in a recognized school credited as part of the apprenticeship period or
- (3) Have completed three and one-half years of apprenticeship while registered with the Board under the direct supervision of an optometrist or a physician specializing in ophthalmology, provided the supervising optometrist or physician elects to operate the apprenticeship under the same requirements applicable to dispensing opticians.

(b) The examination shall be confined to such knowledge as is reasonably necessary to engage in preparation and dispensing of optical devices and shall include the following:

- (1) The skills necessary for the proper analysis of prescriptions;
- (2) The skills necessary for the dispensing of eyeglasses and contact lenses; and
- (3) The processes by which the products offered by dispensing opticians are manufactured.

(c) The examination shall be given at least twice each year at sites and on dates that are publicly announced 60 days in advance.

(d) Each applicant shall, upon request, receive his or her examination score on each section of the examination.

(e) The Board may include as part or all of the examination, any nationally prepared and recognized examination, and will periodically review and validate any exam in use by the Board. The Board will credit an applicant with the score on any national test taken in the last three years to the extent such test may be included in the North Carolina exam.

(f) An applicant for admission on the basis of apprenticeship shall have worked full time under the supervision of a licensed dispensing optician, optometrist or physician trained in ophthalmology. An apprentice shall have obtained experience in ophthalmic fabricating and manufacturing techniques and processes for no less than six months and shall have gained experience in the other activities defined as dispensing herein. (1951, c. 1089, s. 7; 1977, c. 755, s. 3; 1981, c. 600, s. 8.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-241. Waiver of written examination requirements.

(a) The Board shall grant a license without examination to any applicant who holds a currently valid license as a dispensing optician issued by another state, is in good standing in such other state, has engaged in practice in such other state as a licensee for four years immediately preceding the application in this State, is at least 18 years of age, and has not violated this Article or the rules of the Board.

(b) The Board will grant admission to the next examination and grant license upon attainment of a passing score on the examination to persons from other states who are not licensed but who have worked in opticianry for four years performing tasks equivalent to the North Carolina apprenticeship, and who meet the requirements of G.S. 90-237, subsections 1, 2 and 3.

(c) Any person desiring to secure a license under this section shall make application therefor in the manner and form prescribed by the rules and regulations of the Board and shall pay the fee prescribed in G.S. 90-246.

(d) Upon receipt of the application described in subsection (c) above, the Board may issue a temporary license to engage in opticianry in this State. Persons issued a temporary license under this subsection may engage in opticianry in this State for not more than 60 days while awaiting a final decision on licensure by the Board. The Board shall make a final decision on licensure under this subsection not later than 60 days after receipt of the initial application. If the Board does not approve licensure under this subsection, the applicant, if operating under a temporary license, shall immediately surrender it to the Board and cease the practice of opticianry in this State. (1951, c. 1089, s. 8; 1977, c. 755, s. 4; 1979, c. 166, ss. 2, 3; 1981, c. 600, s. 9.)

Effect of Amendments. — The 1981 amendment rewrote this section which formerly per-

tained to registration fees as well as to licensing of opticians from outside the State.

§ 90-242: Repealed by Session Laws 1981, c. 600, s. 10.

§ 90-243. Registration of places of business, apprentices.

The Board may adopt rules requiring, as a condition of dispensing, the registration of places of business where ophthalmic dispensing is engaged in, and for registration of apprentices and interns who are working under direct supervision of a licensed optician. The Board may also require that any information furnished to it as required by law or regulation be furnished under oath. (1951, c. 1089, s. 10; 1967, c. 691, s. 49; 1979, c. 166, s. 1; 1981, c. 600, s. 11.)

Effect of Amendments. — The 1981 amendment substituted the present first sentence for four former sentences which concerned fees for certified copies of certificates and for regis-

tering places of business and apprentices and deleted "must" following "regulation" in the last sentence.

§ 90-244. Display, use, and renewal of license of registration.

(a) Every person to whom a license has been granted under this Article shall display the same in a conspicuous part of the office or establishment wherein he is engaged as a dispensing optician. The Board may adopt regulations concerning the display of registrations of places of business and of apprentices and interns.

(b) A license issued by the Board automatically expires on the first day of January of each year. A license may be reinstated without penalty during the month following expiration. After the end of the month, a license may be reinstated by payment of a penalty of five dollars (\$5.00) per month not to exceed the license fee itself. Licenses which remain expired two years or more may not be reinstated. (1951, c. 1098, s. 11; 1981, c. 600, s. 12.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a), substituted "license" for "certificate of

registration" in the first sentence of that subsection, added the second sentence of that subsection and added subsection (b).

§ 90-245. Collection of fees.

The secretary to the Board is hereby authorized and empowered to collect in the name and on behalf of this Board the fees prescribed by this Article and shall turn over to the State Treasurer all funds collected or received under this Article, which funds shall be credited to the North Carolina State Board of Opticians, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this Article. Nothing in this Article shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from the fees collected under the provisions of this Article and received by the State Treasurer in the manner aforesaid. (1951, c. 1089, s. 12; 1981, c. 884, s. 9.)

Effect of Amendments. — The 1981 amendment deleted the former second sentence, relating to the bond of the secretary.

§ 90-246. Fees.

In order to provide the means of administering and enforcing the provisions of this Article and the other duties of the North Carolina State Board of Opticians, the Board is hereby authorized to charge and collect fees established by its rules and regulations not to exceed the following:

(1) Each examination	\$ 100.00
(2) Each initial license	10.00
(3) Each renewal of license	60.00
(4) Each license issued to a practitioner of another state to practice in this State	75.00
(5) Each registration of an optical place of business	20.00
(6) Each application for registration as an opticianry apprentice or intern, and renewals thereof	20.00
(7) Temporary license issued pursuant to G.S. 90-241(d)	20.00.

(1951, c. 1089, s. 13; 1977, c. 755, s. 5; 1981, c. 600, s. 13.)

Effect of Amendments. — The 1981 amendment rewrote this section which formerly pertained to yearly licenses.

§ 90-247: Repealed by Session Laws 1981, c. 600, s. 14.

§ 90-248. Compensation and expenses of Board members and secretary.

Each member of the Board shall receive for his or her services for time actually in attendance upon Board meetings and affairs of the Board only, the amount of per diem provided by G.S. 138-5 and shall be reimbursed for subsistence, mileage and necessary expenses incurred in the discharge of such duties at the same rates as set forth in G.S. 138-6 and G.S. 138-7. (1951, c. 1089, s. 15; 1953, c. 894; 1965, c. 730; 1969, c. 445, s. 6; 1981, c. 600, s. 15.)

Effect of Amendments. — The 1981 amendment inserted "or her", deleted "the" preceding "time", inserted "and affairs of the Board only", substituted "subsistence, mileage and" for "actual", substituted "at the same rates as set forth in G.S. 138-6 and 138-7" for "not to exceed

five dollars (\$5.00) per day for subsistence plus the actual traveling expenses or an allowance of five cents (5¢) per mile while such member uses his personally owned automobile" and deleted a second sentence which provided for compensation of the secretary.

§ 90-249. Powers of the Board.

(a) The Board shall have the power to make rules and regulations, not inconsistent with this Article and the laws of the State of North Carolina, with respect to the following areas of the business of opticianry in North Carolina:

- (1) Misrepresentation to the public;
- (2) Baiting or deceptive advertising;
- (3) Continuing education of licensees;
- (4) Location of registrants in the State;
- (5) Registration of established optical places of business, provided no rule restricting type or location of a business may be enacted;
- (6) Requiring photographs for purposes of identification of persons subject to this Article;
- (7) Content of licensure examination and re-examination;
- (8) Revocation, suspension, and reinstatement of license and reprimands;
- (9) Fees within the limits of G.S. 90-246;
- (10) Accreditation of schools of opticianry;
- (11) Registration and training of apprentices and interns;
- (12) License without examination and issuance of temporary license.

(b) The Board shall have the power to revoke, suspend or issue a reprimand with regard to any license granted by it under this Article for misconduct, gross negligence, incompetence, or violation of this Article or the rules of the Board promulgated hereunder. It shall be grounds for revocation of a license to advertise in any manner which conveys or intends to convey the impression to the public that the eyes are examined by persons licensed under this Article. Other than as expressly provided in this Article, the Board shall neither adopt nor enforce any rule, regulation or policy which prohibits advertising.

(c) Any person whose license has been revoked for any cause may, after the expiration of 90 days, and within two years from the date of revocation, apply to the Board to have the same reinstated, and upon a showing satisfactory to the Board, the license may be restored to such person.

(d) The procedure for revocation and suspension of a license or refusal to grant license or permission to sit for the examination shall be in accordance with the provisions of Chapter 150A of the General Statutes. (1951, c. 1089, s. 16; 1953, c. 1041, s. 19; 1973, c. 1331, s. 3; 1977, c. 755, s. 6; 1981, c. 600, s. 16.)

Effect of Amendments. — The 1981 amendment designated the first paragraph as subsection (a), inserted "this Article and" deleted "to empower the Board to have authority to make rules and regulations" following "Carolina" and substituted "business" for "field" in that paragraph, substituted subdivisions (a)(1) through (a)(12) for former subdivisions (1) through (14) which dealt with similar subject matter, substituted subsection (b) for two former paragraphs which pertained to the same subject matter,

designated the former fourth paragraph as subsection (c) and, in that subsection, substituted "license" for "certificate" following "whose" and substituted "the" for "and in the discretion of the Board, the certificate of registration or" preceding "license" near the end of the sentence, designated the last paragraph as subsection (d) and inserted "or refusal to grant license or permission to sit for the examination" in that subsection.

§ 90-252. Engaging in practice without license.

Any person, firm or corporation owning, managing or conducting a store, shop or place of business and not having in its employ and on duty, during all hours in which acts constituting the business of opticianry are carried on, a licensed dispensing optician engaged in supervision of such store, office, place of business or optical establishment, or representing to the public, by means of advertisement or otherwise or by using the words, "optician, licensed optician, optical establishment, optical office, ophthalmic dispenser," or any combination of such terms within or without such store representing that the same is a legally established optical place of business duly licensed as such and managed or conducted by persons holding a dispensing optician's license, when in fact such permit is not held by such person, firm or corporation, or by some person employed by such person, firm or corporation and on the premises and in charge of such optical business, shall be guilty of a misdemeanor and may, upon conviction, be fined not less than one hundred dollars (\$100.00) or be imprisoned for not more than 12 months, or both, in the discretion of the court. (1951, c. 1089, s. 19; 1981, c. 600, s. 17.)

Effect of Amendments. — The 1981 amendment inserted "and on duty, during all hours in which acts constituting the business of opticianry are carried on", substituted "engaged in" for "for the", substituted "representing to the public, by means of advertising or otherwise or by using" for "including an advertisement, whether in newspaper, radio, book, magazine or other printed matter",

inserted "ophthalmic dispenser", substituted "representing" for "as to mislead the public" following "store", substituted "and" for "or" preceding "managed", deleted "license or" preceding "permit", inserted "by" preceding "some person", substituted "employed by such person, firm or corporation and on the premises" for "in the employ" and inserted "be guilty of a misdemeanor and may."

§ 90-253. Exemptions from Article.

Nothing in this Article shall be construed to apply to optometrists, or physicians trained in ophthalmology who are authorized to practice under the laws of this State, or to an unlicensed person working within the practice and under the direct supervision of the optometrist or physician trained in ophthalmology. An apprentice or intern registered with the Board and working under direct supervision of a licensed optician, optometrist or physician trained in ophthalmology will not be deemed to have engaged in opticianry by reason of performing acts defined as preparation and dispensing, provided the apprentice is in compliance with the rules of the Board respecting the training of apprentices.

As used in this section, "supervision" means the provision of general direction and control through immediate personal on-site inspection and evaluation of all work constituting the practice of opticianry and the provision of consultation and instruction by a licensed dispensing optician, except that on-site supervision is not required for minor adjustments or repairs to eyeglasses. (1951, c. 1089, s. 20; 1981, c. 600, s. 18.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-254. General penalty for violation.

Any person, firm or corporation who shall violate any provision of this Article for which no other penalty has been provided shall, upon conviction, be fined not more than two hundred dollars (\$200.00) or imprisoned for a period of not more than 12 months, or both, in the discretion of the court.

Whenever it appears to the Board that any person, firm or corporation is violating any of the provisions of this Article or of the rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reasons of the violation. The venue for actions brought under this subsection shall be the superior court of any county in which such acts are alleged to have been committed or in the county where the defendants in such action reside. (1951, c. 1089, s. 21; 1981, c. 600, s. 19.)

Effect of Amendments. — The 1981 amendment added the second paragraph.

§ 90-255. Rebates.

It shall be unlawful for any person, firm or corporation to offer or give any gift or premium or discount, directly or indirectly, or in any form or manner participate in the division, assignment, rebate or refund of fees or parts thereof with any ophthalmologist, optometrist, or wholesaler, for the purpose of diverting or influencing the freedom of choice of the consumer in the selection of an ophthalmic dispenser. (1951, c. 1089, s. 23; 1981, c. 600, s. 20.)

Effect of Amendments. — The 1981 amendment substituted the language following "thereof" for "or to engage in advertising in any form or manner that will urge the public to seek

the services of any specific professional person or group of persons engaged in the field of refraction and visual care."

ARTICLE 18A.

Practicing Psychologists.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-270.2. Definitions.

CASE NOTES

Exemption From § 90-18. — While not specifically exempted by § 90-18, a psychologist who limits himself to the practice of psychology and the rendering of professional

psychological services as defined in subsections (d) and (e) of this section is exempt from § 90-18 to that extent. *Wesley v. Greyhound Lines*, 47 N.C. App. 680, 268 S.E.2d 855 (1980).

§ 90-270.4. Exemptions to this Article.

(a) Nothing in this Article shall be construed as limiting the activities, services, and use of official title on the part of any person in the regular employ of a federal, county or municipal government, or other political subdivision or agency thereof, or of the State Department of Public Instruction, or of a duly accredited or chartered educational institution, insofar as such activities and services are a part of the duties and responsibilities of his position. Such duties and responsibilities may include, but are not restricted to, teaching, writing, conducting research, the giving of public speeches or lectures, the giving of legal testimony, consulting with publishers, serving on boards, commissions, and review committees of public and nonprofit private agencies, with or without remuneration so long as such activities do not involve the practice of psychology as defined in this Article.

Nothing in this Article shall be construed as limiting the activities, services, and use of official titles on part of any person in the regular employ of the State of North Carolina or whose employment is included under the State Personnel Act who has served in a position of employment involving the practice of psychology as defined in this Article, provided that the person has served in this capacity prior to July 1, 1979. In addition to the requirements for licensing contained in Article 18A, an employee of a State agency or department who has served in a position involving the practice of psychology for five consecutive years by December 31, 1984, and who has graduate training in psychology and experience as the Board finds to be the equivalent of a master's degree in psychology, shall be permitted to take the examination for licensing as a psychological associate. Provided, however, that any agency or department of the State of North Carolina which employs psychologists may petition the State Personnel Commission for exemption from the requirements of this act, which exemption shall be granted upon a showing that there is an insufficient number of licensed psychologists available to fill all authorized psychologists' positions in such agency or department.

(a1) Nothing in this Article shall be construed as limiting State or local governmental programs from hiring nonlicensed applicants qualified for psychology positions, provided that the person hired makes application for a license in North Carolina within six months of being employed by the governmental program. After making application for a license, employees hired under this provision must take the first examination for a license to which they are admitted by the Board, and if the employee fails the examination, the employee must pass the examination the next time it is given to remain employed in a psychology position.

(b) Nothing in this Article shall be construed as limiting the activities, services and use of title designating training status of a student, intern, or fellow preparing for the practice of psychology under qualified supervision in an accredited educational institution or service facility, provided that such activities and services constitute a part of his course of study.

(c) Nothing in this Article shall be construed as limiting the activities and services of any persons who are salaried employees of federal, State, county, municipal or other political subdivisions, or any agencies thereof, or a duly chartered or accredited educational institution, or private business, provided

such employees are performing those duties for which they are employed by such organizations, and within the confines of such organization, and provided that they or their organization are not engaged in the practice of psychology as defined in this Article. In case the organization is a private business engaged in the practice of psychology as defined in this Article, such salaried employees shall be supervised by a licensed psychologist or a psychological associate.

(d) Nothing in this Article shall be construed as restricting the use of the term "social psychologist" by any person who has been graduated with a doctoral degree in sociology or social psychology from an institution whose credits in sociology or social psychology are acceptable by an accredited educational institution, and who has passed comprehensive examinations in the field of social psychology as part of the requirement for the doctoral degree or has had equivalent specialized training in social psychology, and who has filed with the Board a statement of the facts demonstrating his compliance with the aforesaid conditions of this subsection.

(e) Nothing in this Article shall be construed to limit or restrict physicians and surgeons or optometrists authorized to practice under the laws of North Carolina or to restrict qualified members of other professional groups who render counseling and other helping services including counselors, clergymen, social workers, and other similar professions, or to restrict qualified members of any other professional groups in the practice of their respective professions, provided they do not hold themselves out to the public by any title or description stating or implying that they are practicing psychologists or psychological associates, or are licensed to practice psychology.

(f) Nothing in this Article is to be construed as prohibiting a psychologist who is not a resident of North Carolina from rendering professional psychological services in this State for not more than five days in any calendar year. (1967, c. 910, s. 4; 1977, c. 670, s. 3; 1979, c. 670, ss. 3, 4; c. 1005, s. 1; 1981, c. 654, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "the" preceding "part", substituted "the" for "such" preceding "person" and deleted "for a continuous period of five years" preceding "prior" in the first sentence of the second paragraph of subsection (a), deleted the former second sentence of such paragraph, which provided

that State employees exempted from licensing or who were unlicensed and involved in the practice of psychology or who had not practiced for five continuous years in the field of psychology would be allowed to continue in such activities until December 31, 1984. The amendment added subsection (a1).

§ 90-270.11. Licensing and examination.

(a) Practicing Psychologist. —

(1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars (\$50.00) and an additional examination fee of sixty dollars (\$60.00), who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:

a. Is at least 21 years of age;

b. Is of good moral character;

c. Has received his doctoral degree based on a planned and directed program of studies, the content of which was psychological in nature, from an accredited educational institution; and subsequent to receiving his doctoral degree has had at least two years of acceptable and appropriate supervised experience germane to his area of practice as a psychologist;

d. Has not within the preceding six months failed an examination given by the Board.

- (2) In order for a psychological associate to be upgraded to a practicing psychologist, the applicant must comply with the requirements set forth in subdivision (1) hereof; however, a sixty dollar (\$60.00) examination fee only shall be required.
- (b) Psychological Associate. —
- (1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars (\$50.00) and an additional examination fee of sixty dollars (\$60.00), who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:
- Is at least 21 years of age;
 - Is of good moral character;
 - Has received a master's degree in psychology from an accredited educational institution;
 - Has not within the preceding six months failed an examination given by the Board.
- (2) The Board shall not prescribe any educational requirements other than the master's degree in psychology required by this subsection.
- (c) Examinations. — The examinations required by subsections (a) and (b) of this section shall be of a form and content prescribed by the Board, and may be oral, written, or both. The examinations shall be administered annually, or more frequently as the Board may prescribe, at a time and place to be determined by the Board. (1967, c. 910, s. 11; 1971, c. 889, ss. 2, 3; 1975, c. 675, ss. 1, 2; 1977, c. 620, s. 7; 1979, c. 670, ss. 5, 6; 1979, 2nd Sess., c. 1176; 1981, c. 738, ss. 1, 2.)

Effect of Amendment. — The 1981 amendment substituted "sixty dollars (\$60.00)" for "fifty dollars (\$50.00)" following "examination

fee of" in subdivisions (a)(1) and (b)(1) and substituted "sixty dollar (\$60.00)" for "fifty dollar (\$50.00)" in subdivision (a)(2).

ARTICLE 18B.

Physical Therapy.

Repeal of Article. —

Session Laws 1981, c. 765, s. 2, amended § 143-34.12 (codified from Session Laws 1977, c. 712, § 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-270.25. Board of Examiners.

The North Carolina Board of Physical Therapy Examiners is hereby created. The Board shall consist of eight members, including one medical doctor licensed and residing in North Carolina, four physical therapists, two physical therapists assistants, and one public member. The public member shall be appointed by the Governor and shall be a person who is not licensed under Chapter 90 who shall represent the interest of the public at large. The medical doctor, physical therapists, and the physical therapists assistants shall be appointed by the Governor from a list compiled by the North Carolina Physical Therapy Association, Inc., following the use of a nomination procedure made available to all physical therapists and physical therapists assistants licensed and residing in North Carolina. One physical therapist member shall be appointed by the Lieutenant Governor and one by the Speaker of the House. The Lieutenant Governor and Speaker of the House, respectively, shall fill the first and second vacancies in physical therapist members of the Board arising

by expiration of term after July 1, 1981, and shall continue to appoint their respective successors; the Governor shall fill all other vacancies arising by expiration of term. The records of the operation of the nomination procedure shall be filed with the Board, to be available for a period of six months following nomination, for reasonable inspection by any licensed practitioner. Each physical therapist member of the Board shall be licensed and reside in this State; provided that he shall have not less than three years' experience as a physical therapist immediately preceding his appointment and shall be actively engaged in the practice of physical therapy in North Carolina during his incumbency. Each physical therapist assistant member shall be licensed and reside in this State; provided that he shall have not less than three years' experience as a physical therapist assistant immediately preceding his appointment and shall be actively engaged in practice as a physical therapist assistant in North Carolina during his incumbency.

Members shall be appointed to serve three year terms, or until their successors are appointed, to commence on January 1, in respective years; provided that members of the Board on July 1, 1979, shall continue to serve for the remainder of their terms, respectively, or until their successors are appointed. In the event that a member of the Board for any reason shall become ineligible to or cannot complete his term of office, another appointment shall be made by the Governor in accordance with the procedure stated above to fill the remainder of the term. No member may serve for more than two successive three-year terms.

The Board each year shall designate one of its physical therapist members as chairman and one member as secretary-treasurer. Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing boards generally. (1951, c. 1131, s. 2; 1969, c. 445, s. 7; c. 556; 1979, c. 487; 1981, c. 765, s. 1.)

Effect of Amendments. — The 1981 amendment substituted "eight" for "seven" and inserted "and one public member" in the first sentence of the first paragraph, added the second sentence of that paragraph, substituted

"the use of a nomination procedure made available to" for "a poll of" in the third sentence of that paragraph and added the fourth, fifth, and sixth sentences of that paragraph.

ARTICLE 18C.

Marital and Family Therapy Certification Act.

§ 90-270.53. Application for certificate without examination before July 1, 1982.

Any person who applies on or before July 1, 1982, shall be issued a certificate by the Board if he meets the qualifications set forth in subdivisions (1), (2), and (3) of G.S. 90-270.52 and provides satisfactory evidence to the Board that he either:

(1) Meets educational and experience qualifications as follows:

- a. Educational requirements: Possesses a minimum of a master's degree or the equivalent from a recognized educational institution in the field of marriage or family therapy or a degree in an allied mental health field or shall be a clergyman or a physician whose official transcripts establish that he has completed an appropriate course of study in an allied mental health field. In addition, an applicant meets the educational requirements by presenting satisfactory evidence of post-master's or post-doctoral training taken in the field of marital and family therapy or coun-

seling from an educational or training institution or program recognized by the Board notwithstanding the fact that such training was taken at a nondegree granting institution or in a nondegree program, provided that such training, by itself or in combination with any training received as part of the program leading to a degree from a recognized educational institution, is the equivalent in content and quality, as defined in the duly adopted rules and regulations of the Board, of a master's or doctoral degree in marital and family therapy and counseling.

- b. Experience requirements: At least 3,000 hours of clinical experience in the practice of marital and family therapy, not more than 500 hours of which experience was obtained while the candidate was a student in a master's degree program and at least 2,500 of which experience was obtained subsequent to the granting of such degree in the field of marital and family therapy or an allied mental health field; or
- (2) Was certified prior to July 1, 1982, in this State in an allied mental health profession and satisfies the educational requirements for certification as a certified marital and family therapist set forth in (1)a., of this section. (1979, c. 697, s. 1; 1981, c. 611, s. 1.)

Effect of Amendments. — The 1981 amendment substituted "July 1, 1982" for "January 1, 1981" wherever it appears and added the last sentence of subdivision (1)a.

§ 90-270.54. Application for certificate by examination.

Any person who applies to the Board after January 1, 1981, shall be issued a certificate by the Board if he meets the qualifications set forth in subdivisions (1), (2), and (3) of G.S. 90-270.52 and provides satisfactory evidence to the Board that he:

- (1) Meets educational and experience qualifications as follows:
 - a. Educational requirements: Possesses a minimum of a master's degree or the equivalent from a recognized educational institution in the field of marital and family therapy or counseling, or a degree in an allied mental health field, which degree is evidenced by the applicant's official transcripts which establish that he has completed an appropriate course of study in an allied mental health field. In addition, an applicant meets the educational requirements by presenting satisfactory evidence of post-master's or post-doctoral training taken in the field of marital and family therapy or counseling from an educational or training institution or program recognized by the Board notwithstanding the fact that such training was taken at a nondegree granting institution or in a nondegree program, provided that such training, by itself or in combination with any training received as part of the program leading to a degree from a recognized educational institution, is the equivalent in content and quality, as defined in the duly adopted rules and regulations of the Board, of a master's or doctoral degree in marital and family therapy and counseling.
 - b. Experience requirements: At least 1,500 hours of clinical experience in the practice of marital and family therapy, not more than 500 hours of which experience was obtained while the candidate was a student in a master's degree program and at least 1,000 of which experience was obtained subsequent to the granting of such degree in the field of marital and family therapy or an allied

mental health field (with ongoing supervision consistent with standards approved by the Board); and

- (2) Passes a written and/or oral examination administered by the Board. (1979, c. 697, s. 1; 1981, c. 611, s. 2.)

Effect of Amendments. — The 1981 amendment added the last sentence of subdivision (1)a.

ARTICLE 20.

Nursing Home Administrator Act.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

Session Laws 1981, c. 722, ss. 1 and 2, transferred this Article from the list of statutes

repealed effective July 1, 1981 under § 143-34.12, to § 143-34.13, which makes the repeal effective July 1, 1983. Section 143-34.13 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-276. Definitions.

For the purposes of this Article, and as used herein:

- (1) The term "Board" means the North Carolina State Board of Examiners for Nursing Home Administrators hereinafter created.
- (2) The term "nursing home" means any institution or facility defined as such for licensing purposes under G.S. 130-9(c) [G.S. 130-9(e)] of the General Statutes, whether proprietary or nonprofit, including but not limited to, nursing homes owned or administered by the federal or state government or any agency or political subdivision thereof, and nursing homes operated in combination with a home for the aged or any other facility.
- (3) The term "nursing home administrator" means a person who administers, manages, supervises, or is in general administrative charge of a nursing home, whether such individual has an ownership interest in such home, and whether his functions and duties are shared with one or more individuals. (1969, c. 843, s. 1; 1981, c. 722, s. 3.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted the second sentence of subdivision (2) which provided that this article should not apply to institutions run by religious groups which depended solely upon

spiritual means through prayer for healing and that no license was required of individuals responsible for the organization or administration of such an institution.

§ 90-277. Composition of Board.

There is created the State Board of Examiners for Nursing Home Administrators. The Board shall consist of seven members. The seven members shall be voting members and shall meet the following criteria:

- (1) All shall be individuals representative of the professions and institutions concerned with the care and treatment of chronically ill or infirm elderly patients.

- (2) Less than a majority of the Board members shall be representative of a single profession or institutional category.
- (3) Three of the Board members shall be licensed nursing home administrators, and shall be considered as representatives of institutions in construing this section.
- (4) Four of the Board members shall be public, noninstitutional members, with no direct financial interest in nursing homes.
- (5) The terms of the Board members shall be limited to two consecutive terms.

Effective July 1, 1973, the Governor shall appoint three members, one of whom shall be a licensed nursing home administrator, for terms of three years, and four members, two of whom shall be licensed nursing home administrators, for terms of two years. Thereafter, all terms shall be three years. However, no member shall serve more than two consecutive full terms. Any vacancy occurring in the position of an appointive member shall be filled by the Governor for the unexpired term in the same manner as for new appointments. Appointive members may be removed by the Governor for cause after due notice and hearing. (1969, c. 843, s. 1; 1973, c. 728; 1981, c. 722, s. 4.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, in the first paragraph deleted "hereby" preceding "created" in the first sentence, substituted "The Board" for "which" thereby creating the second sentence and substituted "seven" for "eight" in that sentence, deleted a former second sentence which read "The Secretary of Human Resources or his designee shall be an ex officio member who shall serve as secretary for the Board and have

no vote", deleted "remaining" preceding "seven" and substituted "and shall" for "who" in the third sentence and substituted "All" for "They" in subdivision (1). The amendment redesignated former subdivision (3) as subdivision (4) and rewrote that subdivision, redesignated former subdivision (4) as subdivision (3) and added the language following "administrators" in that subdivision, and added subdivision (5).

§ 90-278. Qualifications for licensure.

The Board shall have authority to issue licenses to qualified persons as nursing home administrators, and shall establish qualification criteria for such nursing home administrators.

- (1) A license as a nursing home administrator shall be issued to any person upon the Board's determination that:
 - a. He is at least 21 years of age, of good moral character and of sound physical and mental health; and
 - b. He has satisfactorily completed a course prescribed by the Board, which course contains instruction on the services provided by nursing homes, laws governing nursing homes, protection of patient interests and nursing home administration and he has presented evidence satisfactory to the Board of sufficient education, training and experience in the foregoing fields to administer a nursing home; and
 - c. He has passed an examination administered by the Board and designed to test for competence in the subject matters referred to in paragraph b hereof.
- (2) Repealed by Session Laws 1981, c. 722, s. 6.
- (3) A temporary license may be issued under requirements and conditions prescribed by the Board to any person to act or serve as administrator of a nursing home without meeting the requirements for full licensure, but only when there are unusual circumstances preventing compliance with the procedures for licensing elsewhere provided by this Article. The temporary license shall be issued by the chairman only for the period prior to the next meeting of the Board, at which

time the Board may renew such temporary license for a further period only up to one year. (1969, c. 843, s. 1; 1973, c. 476, s. 128; 1981, c. 722, ss. 5-7.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "in instruction and training" preceding "prescribed", substituted "contains instruction on the services provided" for "shall be so designed as to content and so administered as to prevent sufficient knowledge of the needs properly to be served", deleted "the" preceding "laws" deleted "the operation of" following "governing", substituted a comma for "and the" preceding "pro-

tection", substituted "patient interests" for "the interests of patients therein", deleted "the elements of good" preceding "nursing home administration", substituted "and he has" for "or have", substituted "and" for "or" following "training", and deleted "supervise and manage" following "administer" in subdivision (1)b. The amendment also deleted subdivision (2) which concerned provisional licenses and substituted "chairman" for "secretary" in subdivision (3).

§ 90-279. Licensing function.

The Board shall license nursing home administrators in accordance with rules and regulations issued and from time to time revised by it. A nursing home administrator's license shall not be transferable and shall be valid until expiration or until suspended or revoked for violation of this Article or of the standards established by the Board pursuant to this Article. Denial of issuance or renewal, suspension or revocation by the Board shall be subject to the provisions of Chapter 150A of the General Statutes. (1969, c. 843, s. 1; 1973, c. 1331, s. 3.)

Editor's Note. — This section has been set out to correct an error in the replacement volume.

§ 90-282: Repealed by Session Laws 1981, c. 722, s. 8, effective July 1, 1981.

§ 90-283. Organization of Board; compensation; employees and services.

The Board shall elect from its membership a chairman, vice-chairman and secretary, and shall adopt rules and regulations to govern its proceedings. Board members shall be entitled to receive only such compensation and reimbursement as is prescribed by Chapter 138 of the General Statutes for State boards generally. At any meeting a majority of the voting members shall constitute a quorum. The Board may, in accordance with the State Personnel Act, employ any necessary personnel to assist it in the performance of its duties and may contract for such services as may be necessary to carry out the provisions of this Article. (1969, c. 843, s. 1; 1981, c. 722, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted a comma for "and" following "chairman" and inserted "and secretary" in the first sentence.

§ 90-285. Functions and duties of the Board.

The Board shall meet at least once annually in Raleigh or any other location designated by the chairman and shall have the following functions and duties:

- (1) Develop, impose and enforce rules and regulations setting out standards which must be met by individuals in order to receive and hold a license as a nursing home administrator, which standards shall be

designed to insure that nursing home administrators shall be individuals who are of good character and who are otherwise suitable, by education, training and experience in the field of institutional administration, to serve as nursing home administrators.

- (2) Develop and apply appropriate methods and procedures, including examination and investigations, for determining whether individuals meet such standards, and administer an examination at least twice each year at such times and places as the Board shall designate.
- (3) Issue licenses to qualified individuals.
- (4) Establish and implement procedures designed to insure that individuals licensed as nursing home administrators will, during any period that they serve as such, comply with the requirements of such standards.
- (5) Receive, investigate, and take appropriate action with respect to any charge or complaint filed with the Board to the effect that any individual licensed as a nursing home administrator has failed to comply with the requirements of such standards.
- (6) Conduct a continuing study and investigation of nursing homes and nursing home administrators within the State in order to make improvements in the standards imposed for the licensing of administrators and of procedures and methods for the enforcement of such standards, and to raise the quality of nursing home administration in such other ways as may be effective.
- (7) Conduct, or cause to be conducted by contract or otherwise, one or more courses of instruction and training sufficient to meet the requirements of this Article, and make provisions for the conduct of such courses and their accessibility to residents of this State, unless it finds that there are sufficient courses conducted by others within this State. In lieu thereof the Board may approve courses conducted within and without this State as sufficient to meet the education and training requirements of this Article.
- (8) Make rules and regulations, not inconsistent with law, as may be necessary for the proper performance of its duties, and to take such other actions as may be necessary to enable the State to meet the requirements set forth in section 1908 of the Social Security Act, the federal rules and regulations promulgated thereunder, and other pertinent federal authority.
- (9) Receive and disburse any funds appropriated or given to the Board, including any federal funds, to carry out the purposes of this Article.
- (10) Maintain a register of all applications for licensing and registration of nursing home administrators, which register shall show: the place or residence, name and age of each applicant; the name and address of employer or business connection of each applicant; the date of application; information of educational and experience qualifications; the action taken by the Board and the dates; the serial number of the license issued to the applicant; and such other pertinent information as may be deemed necessary. (1969, c. 843, s. 1; 1981, c. 722, ss. 10, 11.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "education, training and experience" for "training or experience" near the end of subdivision (1) and deleted "and for cause, after due notice and hearing, revoke, suspend, or deny renewal of licenses previously issued by the Board in any case where the individual holding such license is determined substantially to have failed to

conform to the requirements of such standards" at the end of subdivision (3).

Session Laws 1981, c. 722, s. 15, provided that "Any rules promulgated pursuant to the rule-making powers of the Board under Article 20 of Chapter 90 of the General Statutes shall be ineffective after October 1, 1981, unless readopted by the Board prior to that date."

§ 90-285.1. Suspension, revocation or refusal to issue a license.

The Board may suspend, revoke, or refuse to issue a license or may reprimand or otherwise discipline a licensee after due notice and an opportunity to be heard at a formal hearing, upon substantial evidence that a licensee:

- (1) Has violated the provisions of this Article or the rules adopted by the Board;
- (2) Has violated the provisions of G.S. 130-9(e) and rules promulgated thereunder;
- (3) Has been convicted of, or has tendered and has had accepted a plea of no contest to, a criminal offense showing professional unfitness;
- (4) Has practiced fraud, deceit, or misrepresentation in securing or procuring a nursing home administrator license;
- (5) Is incompetent to engage in the practice of nursing home administration or to act as a nursing home administrator;
- (6) Has practiced fraud, deceit, or misrepresentation in his capacity as a nursing home administrator;
- (7) Has committed acts of misconduct in the operation of a nursing home under his jurisdiction;
- (8) Is a habitual drunkard;
- (9) Is addicted or dependent upon the use of morphine, opium, cocaine, or other drugs recognized as resulting in abnormal behavior;
- (10) Has practiced without being registered biennially;
- (11) Has transferred or surrendered possession of, either temporarily or permanently, his license or certificate to any other person;
- (12) Has paid, given, has caused to be paid or given or offered to pay or to give to any person a commission or other valuable consideration for the solicitation or procurement, either directly or indirectly, of nursing home patronage;
- (13) Has been guilty of fraudulent, misleading, or deceptive advertising;
- (14) Has falsely impersonated another licensee;
- (15) Has failed to exercise regard for the safety, health or life of the patient;
- (16) Has permitted unauthorized disclosure of information relating to a patient or his records; or
- (17) Has discriminated among patients, employees, or staff on account of race, sex, religion, color, or national origin. (1981, c. 722, s. 12.)

§ 90-286. Renewal of license.

Every holder of a nursing home administrator's license shall renew it biennially, by making application to the Board. Renewals of licenses shall be granted as a matter of course, unless the Board finds that the applicant has acted or failed to act in such a manner, or under circumstances, as would constitute grounds for suspension, revocation, or denial of renewal of a license, as provided by this Article and the rules and regulations issued pursuant to this Article. The Board is without power to adopt any rule imposing a continuing education requirement for license renewal. However, the Board shall certify and administer courses in continuing education for nursing home administrators and shall keep a record of such courses completed successfully by each licensee. (1969, c. 843, s. 1; 1981, c. 722, s. 13.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the last two sentences.

Session Laws 1981, c. 722, s. 14, provided that

"Any rule promulgated pursuant to G.S. 90-286 regarding the imposition of continuing education requirements is hereby repealed."

ARTICLE 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

Repeal of Article. — Session Laws 1981, c. 572, s. 8, amended § 143-34.13 (codified from Session Laws 1977, c. 712, § 4, as amended) so as to eliminate the provision repealing this article. Section 143-34.13 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-294. License required; Article not applicable to certain activities.

(a) Licensure shall be granted in either speech and language pathology or audiology independently. A person may be licensed in both areas if he is qualified.

(b) No person may practice or hold himself out as being able to practice speech and language pathology or audiology in this State unless such person holds a current, unsuspended, unrevoked license issued by the Board as provided in this Article or holds a current, unsuspended, unrevoked license of endorsement pursuant to G.S. 90-297. The license required by this section shall be kept conspicuously posted in such person's office or place of business at all times. Nothing in this Article, however, shall be considered to prevent a qualified person licensed in this State under any other law from engaging in the profession for which such person is licensed.

(c) The provisions of this Article do not apply to:

- (1) The activities, services and use of an official title by a person employed by an agency of the federal government and solely in connection with such employment, except that an individual is not exempt from this Article who does work as a speech and language pathologist or audiologist outside the scope of such employment for which a fee may be paid directly or indirectly to such person by or for the recipient of the service.
- (2) The activities and services of a student or trainee in speech and language pathology or audiology pursuing a course of study in an accredited college or university, or working in a training center program approved by the Board, if these activities and services constitute a part of such person's course of study.
- (3) The activities and services of a person who has recently become a resident of the State whose application for licensing with or without examination has been received by the Board, pending disposition of such application, if the person was licensed to perform such services by a state with standards equivalent to or exceeding those of this State, as determined by the Board.
- (4) A person who holds a valid and current credential as a speech and language pathologist or audiologist issued by the North Carolina Department of Public Instruction or who is employed by the North Carolina Schools for the Deaf and Blind, if such person practices speech and language pathology or audiology in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction or the Department of Human Resources respectively.

(d) Nothing in this Article shall apply to a physician licensed to practice medicine, or to any person employed by such a physician in the course of his practice of medicine.

(e) This Article shall not be construed to prevent any person licensed in this State under Chapter 93D of the General Statutes of North Carolina from the practice of fitting and selling hearing aids.

(f) The provisions of this Article do not apply to registered nurses and licensed practical nurses or other certified technicians trained to perform audiometric screening tests and whose work is under the supervision of a physician, consulting physician, or licensed audiologist.

(g) The provisions of this Article do not apply to persons who are now or may become engaged in counseling or instructing laryngectomees in the methods, techniques or problems of learning to speak again.

(h) No license under this Article is required for persons originally employed by any agency of State government between October 1, 1975, and July 1, 1977, for the practice of speech and language pathology or audiology within and during the course and scope of employment with such agency. (1975, c. 773, s. 1; 1977, c. 692, s. 3; 1981, c. 572, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment substituted "G.S. 90-297" for "G.S. 90-296" in the first sentence of subsection (b)

and deleted "in industrial operations" following "tests" and "company" following "supervision of a" in subsection (f).

§ 90-296. Examinations.

(a) An applicant for registration who has satisfied the requirements of G.S. 90-295 shall appear at a time and place and before persons the Board designates, to be examined by written and/or practical tests, in order to determine such person's qualifications to practice speech and language pathology and audiology.

(b) The Board shall give at least two examinations of the type prescribed in subsection (a) of this section in each year, and additional examinations as the volume of applications makes appropriate.

(c) An examination shall not be required as a prerequisite for a license for a person who holds a certificate of clinical competence issued by the American Speech and Hearing Association in the specialized area for which such person seeks a license. (1975, c. 773, s. 1; 1981, c. 572, s. 3.)

§ 90-301. Grounds for suspension or revocation of license.

Any person licensed under this Article may have his license revoked or suspended for a fixed period by the Board under the provisions of North Carolina General Statutes, Chapter 150A, for any of the following causes:

- (1) His license has been secured by fraud or deceit practiced upon the Board.
- (2) Fraud or deceit in connection with his services rendered as an audiologist or speech pathologist.
- (3) Unprofessional conduct as defined by the rules established by the Board or violation of the code of ethics made and published by the Board.
- (4) Violation of any lawful order, rule or regulation rendered or adopted by the Board.
- (5) Any violation of the provisions of this Article. (1975, c. 773, s. 1; 1981, c. 572, s. 4.)

§ 90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.

(a) There shall be a Board of Examiners for Speech and Language Pathologists and Audiologists, which shall be composed of seven members, who shall all be residents of this State. Two members shall have a paid work experience in audiology for at least five years and hold a certificate of clinical competence in audiology of the American Speech and Hearing Association. Two members shall have paid work experience in speech pathology for at least five years and hold a certificate of clinical competence in speech pathology of the American Speech and Hearing Association. One member shall be physician who is licensed to practice medicine in the State of North Carolina. Two members shall be appointed by the Governor to represent the interest of the public at large. These two members shall be neither licensed speech and language pathologists nor audiologists. These members shall be appointed not later than July 1, 1981; one shall be initially appointed for a term of two years; the other shall be appointed for a term of three years. Thereafter all public members shall serve three-year terms.

(b) The members of the Board shall be appointed by the Governor.

(c) The initial Board shall have members appointed for terms of one year, two years, three years, four years, and five years. All board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive three-year terms.

(d) Members of the Board shall receive no compensation for their service, but shall receive the same per diem, subsistence and travel allowance as provided in G.S. 138-5. (1975, c. 773, s. 1; 1981, c. 572, ss. 5, 6.)

Effect of Amendments. — The 1981 amendment substituted "seven" for "five" in the first sentence of subsection (a), added the last four sentences of subsection (a) and substituted the

last two sentences of subsection (c) for a sentence which read "Thereafter, Board members shall be appointed for a term of five years."

§ 90-304. Powers and duties of Board.

(a) The powers and duties of the Board are as follows:

- (1) To administer, coordinate, and enforce the provisions of this Article, establish fees, evaluate the qualifications of applicants, supervise the examination of applicants, and issue subpoenas, examine witnesses, and administer oaths, and investigate persons engaging in practices which violate the provisions of this Article.
- (2) To conduct hearings and keep records and minutes as necessary to an orderly dispatch of business.
- (3) To adopt responsible rules and regulations including but not limited to regulations which establish ethical standards of practice and to amend or repeal the same.
- (4) To issue annually a list stating the names of persons currently licensed under the provisions of this Article.
- (5) To employ such personnel as determined by its needs and budget.
- (6) To adopt seals by which it shall authenticate their proceedings, copies of the proceedings, records and the acts of the Board, and licenses.

(b) The board shall not adopt or enforce any rule or regulation which prohibits advertising except for false or misleading advertising. (1975, c. 773, s. 1; 1981, c. 572, s. 7.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a) and added subsection (b).

ARTICLE 23.

Right to Natural Death; Brain Death.

§ 90-320. General purpose of Article.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 90-321. Right to a natural death.

(a) As used in this Article the term:

- (1) "Declarant" means a person who has signed a declaration in accordance with subsection (c);
- (2) "Extraordinary means" is defined as any medical procedure or intervention which in the judgment of the attending physician would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function;
- (3) "Physician" means any person licensed to practice medicine under Article 1 of Chapter 90 of the laws of the State of North Carolina.

(b) If a person has declared, in accordance with subsection (c) below, a desire that his life not be prolonged by extraordinary means; and the declaration has not been revoked in accordance with subsection (e); and

- (1) It is determined by the attending physician that the declarant's present condition is
 - a. Terminal; and
 - b. Incurable; and
- (2) There is confirmation of the declarant's present condition as set out above in subdivision (b)(1) by a physician other than the attending physician;

then extraordinary means may be withheld or discontinued upon the direction and under the supervision of the attending physician.

(c) The attending physician may rely upon a signed, witnessed, dated and proved declaration:

- (1) Which expresses a desire of the declarant that no extraordinary means be used to prolong his life if his condition is determined to be terminal and incurable; and
- (2) Which states that the declarant is aware that the declaration authorizes a physician to withhold or discontinue the extraordinary means; and
- (3) Which has been signed by the declarant in the presence of two witnesses who believe the declarant to be of sound mind and who state that they (i) are not related within the third degree to the declarant or to the declarant's spouse, (ii) do not know or have a reasonable expectation that they would be entitled to any portion of the estate of the declarant upon his death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it then provides, (iii) are not the attending physician, or an employee of the attending physician, or an employee of a health facility in which the declarant is a patient, or an employee of a nursing home or any group-care home in which the declarant resides, and (iv) do not have

a claim against any portion of the estate of the declarant at the time of the declaration; and

- (4) Which has been proved before a clerk or assistant clerk of superior court, or a notary public who certifies substantially as set out in subsection (d) below.

(d) The following form is specifically determined to meet the requirements above:

“Declaration Of A Desire For A Natural Death”

“I,, being of sound mind, desire that my life not be prolonged by extraordinary means if my condition is determined to be terminal and incurable. I am aware and understand that this writing authorizes a physician to withhold or discontinue extraordinary means.

“This the day of
Signature”

“I hereby state that the declarant,, being of sound mind signed the above declaration in my presence and that I am not related to the declarant by blood or marriage and that I do not know or have a reasonable expectation that I would be entitled to any portion of the estate of the declarant under any existing will or codicil of the declarant or as an heir under the Intestate Succession Act if the declarant died on this date without a will. I also state that I am not the declarant’s attending physician or an employee of the declarant’s attending physician, or an employee of a health facility in which the declarant is a patient or an employee of a nursing home or any group-care home where the declarant resides. I further state that I do not now have any claim against the declarant.

Witness
Witness”

The clerk or the assistant clerk, or a notary public may, upon proper proof, certify the declaration as follows:

“Certificate”

“I,, Clerk (Assistant Clerk) of Superior Court or Notary Public (circle one as appropriate) for County hereby certify that, the declarant, appeared before me and swore to me and to the witnesses in my presence that this instruments is his Declaration Of A Desire For A Natural Death, and that he had willingly and voluntarily made and executed it as his free act and deed for the purposes expressed in it.

“I further certify that and, witnesses, appeared before me and swore that they witnessed, declarant, sign the attached declaration, believing him to be of sound mind; and also swore that at the time they witnessed the declaration (i) they were not related within the third degree to the declarant or to the declarant’s spouse, and (ii) they did not know or have a reasonable expectation that they would be entitled to any portion of the estate of the declarant upon the declarant’s death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it provides at that time, and (iii) they were not a physician attending the declarant or an employee of an attending physician or an employee of a health facility in which the declarant was a patient or an employee of a nursing home or any group-care home in which the declarant resided, and (iv) they did not have a claim against the declarant. I further certify that I am satisfied as to the genuineness and due execution of the declaration.

"This the day of

Clerk (Assistant Clerk) of Superior Court
or Notary Public (circle one as appropriate) for the County of"

The above declaration may be proved by the clerk or the assistant clerk, or a notary public in the following manner:

- (1) Upon the testimony of the two witnesses; or
- (2) If the testimony of only one witness is available, then
 - a. Upon the testimony of such witness, and
 - b. Upon proof of the handwriting of the witness who is dead or whose testimony is otherwise unavailable, and
 - c. Upon proof of the handwriting of the declarant, unless he signed by his mark; or upon proof of such other circumstances as will satisfy the clerk or assistant clerk of the superior court, or a notary public as to the genuineness and due execution of the declaration.
- (3) If the testimony of none of the witnesses is available, such declaration may be proved by the clerk or assistant clerk, or a notary public
 - a. Upon proof of the handwriting of the two witnesses whose testimony is unavailable, and
 - b. Upon compliance with paragraph c of subdivision (2) above.

Due execution may be established, where the evidence required above is unavoidably lacking or inadequate, by testimony of other competent witnesses as to the requisite facts.

The testimony of a witness is unavailable within the meaning of this subsection when the witness is dead, out of the State, not to be found within the State, insane or otherwise incompetent, physically unable to testify or refuses to testify.

If the testimony of one or both of the witnesses is not available the clerk or the assistant clerk, or a notary public or superior court may, upon proper proof, certify the declaration as follows:

"Certificate"

"I, Clerk (Assistant Clerk) of Court for the Superior Court or Notary Public (circle one as appropriate) of County hereby certify that based upon the evidence before me I am satisfied as to the genuineness and due execution of the attached declaration by, declarant, and that the declarant's signature was witnessed by, and, who at the time of the declaration met the qualifications of G.S. 90-321(c)(3).

"This the day of,

Clerk (Assistant Clerk) of Superior Court
or Notary Public (circle one as appropriate) for County."

(e) The above declaration may be revoked by the declarant, in any manner by which he is able to communicate his intent to revoke, without regard to his mental or physical condition. Such revocation shall become effective only upon communication to the attending physician by the declarant or by an individual acting on behalf of the declarant.

(f) The execution and consummation of declarations made in accordance with subsection (c) shall not constitute suicide for any purpose.

(g) No person shall be required to sign a declaration in accordance with subsection (c) as a condition for becoming insured under any insurance contract or for receiving any medical treatment.

(h) The withholding or discontinuance of extraordinary means in accordance with this section shall not be considered the cause of death for any civil or criminal purposes nor shall it be considered unprofessional conduct. Any person, institution or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense.

(i) Any certificate in the form provided by this section prior to July 1, 1979, shall continue to be valid. (1977, c. 815; 1979, c. 112, ss. 1-6; 1981, c. 848, ss. 1-3.)

Effect of Amendments. — The 1981 amendment inserted "who believe the declarant to be of sound mind and" near the beginning of subdivision (c)(3), deleted "and" preceding clauses (ii) and (iii) of that subdivision, inserted "do not know or have a reasonable expectation that they" and deleted "not" following "would" in clause (ii) of the subdivision, inserted "or" following the first use of the word "physician" and inserted "an employee" preceding "of a health facility" and preceding "of a nursing home" in clause (iii) of the subdivision and substituted "do not have" for "is not a person who has" in clause (iv) of the subdivision. The amendment inserted "being of sound mind" and "that I do not know or have a reasonable expectation that" and deleted "not" following "would" in the first sentence of the "Declaration Of A Desire For A Natural Death" in subsection (d). In the first "Certificate" in subsection (d), the amendment substituted "the declarant" for

"and, witnesses", inserted the language beginning "to me" at the end of the first paragraph, created the second paragraph by inserting the language beginning "I further certify" and ending "me and swore", inserted "believing him to be of sound mind" in the introductory clause of the second paragraph, inserted "they did not know or have a reasonable expectation that" and deleted "not" following "would" in clause (ii) of that paragraph and inserted "an employee" preceding "of a health facility" and preceding "of a nursing home" in clause (iii) of that paragraph. Session Laws 1981, c. 848, s. 4 provides that the act does not affect the validity of any "Declaration Of A Desire For A Natural Death" executed prior to the effective date of the act.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 90-322. Procedures for natural death in the absence of a declaration.

(a) If a person is comatose and there is no reasonable possibility that he will return to a cognitive sapient state or is mentally incapacitated, and:

- (1) It is determined by the attending physician that the person's present condition is:
 - a. Terminal; and
 - b. Incurable; and
 - c. Irreversible; and
- (2) There is confirmation of the person's present condition as set out above in this subsection, by a majority of a committee of three physicians other than the attending physician; and
- (3) A vital function of the person could be restored by extraordinary means or a vital function of the person is being sustained by extraordinary means;

then, extraordinary means may be withheld or discontinued in accordance with subsection (b).

(b) If a person's condition has been determined to meet the conditions set forth in subsection (a) and no instrument has been executed as provided in G.S. 90-321 the extraordinary means to prolong life may be withheld or discontinued upon the direction and under the supervision of the attending physician at the request (i) of the person's spouse, or (ii) of a guardian of the person, or (iii) of a majority of the relatives of the first degree, in that order. If none of the above are available then at the discretion of the attending physician the extraordinary means may be discontinued upon the direction and under the supervision of the attending physician.

(c) Repealed by Session Laws 1979, c. 715, s. 2.

(d) The withholding or discontinuance of such extraordinary means shall not be considered the cause of death for any civil or criminal purpose nor shall it be considered unprofessional conduct. Any person, institution or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense. (1977, c. 815; 1979, c. 715, s. 2; 1981, c. 848, s. 5.)

Effect of Amendments. — The 1981 amendment inserted "or is mentally incapacitated" in the first sentence of subsection (a), inserted "could be restored by extraordinary means or a vital function of the person" in subdivision (a)(3), inserted "withheld or" in the last phrase of subsection (a) and in the first sentence of subsection (b), and inserted "withholding or" in the first sentence of subsection (d). Session

Laws 1981, c. 848, s. 4, provided that the act does not affect the validity of any "Declaration Of A Desire For A Natural Death" executed prior to the effective date of the act.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 90-323. Death; determination by physician.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Chapter 90A.

Sanitarians and Water and Wastewater Treatment Facility Operators.

Article 2.

Certification of Water Treatment Facility Operators.

Sec.

90A-21. Water Treatment Facility Operators Board of Certification.

90A-22. Classification of water treatment facilities; notification of users.

90A-25. Issuance of certificates.

90A-26. Revocation or suspension of certificate.

Sec.

90A-27. Application fee.

90A-29. Certified operators required.

90A-30. Penalties; remedies; contested cases.

90A-31 to 90A-34. [Reserved.]

Article 3.

Certification of Wastewater Treatment Plant Operators.

90A-42. Fees.

ARTICLE 1.

Sanitarians.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

ARTICLE 2.

Certification of Water Treatment Facility Operators.

Repeal of Article. —

Session Laws 1981, c. 616, s. 12, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90A-21. Water Treatment Facility Operators Board of Certification.

(a) **Board Membership.** — There is hereby established within the Department of Human Resources a Water Treatment Facility Operators Board of Certification (hereinafter termed the "Board of Certification") composed of eight members to be appointed by the Governor as follows:

- (1) One member who is currently employed as a water treatment facility operator;
- (2) One member who is manager of a North Carolina municipality using a surface water supply;
- (3) One member who is manager of a North Carolina municipality using a treated groundwater supply;
- (4) One member who is employed as a director of utilities, water superintendent, or equivalent position with a North Carolina municipality;

- (5) One member employed by a private water utility or private industry and who is responsible for the operation or supervision of a water supply and treatment facility;
- (6) One member who is a faculty member of a four-year college or university whose major field is related to water supply;
- (7) One member employed by the Department of Human Resources and working in the field of water supply;
- (8) One member not certified or regulated under this Article, who shall represent the interest of the public at large.

(b) **Terms of Office.** — All members serving on the Board on June 30, 1981, shall complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that the member employed by the Department of Human Resources may serve more than two consecutive terms, and except that each member shall serve until his successor is appointed and qualifies. The Governor may remove any member for good cause shown and shall appoint members to fill unexpired terms. The Governor shall appoint the public member not later than July 1, 1981.

(c) **Powers and Responsibilities.** — The Board of Certification shall establish all rules, regulations and procedures with respect to the certification program and advise and assist the Secretary of Human Resources in its administration.

(d) **Compensation.** — Members of the Board of Certification who are officers or employees of State agencies or institutions shall receive subsistence and travel allowances at the rates authorized by G.S. 138-5.

(e) **Officers.** — The Board shall elect a chairman and all other necessary officers to serve one-year terms. A majority of the members of the Board shall constitute a quorum for the transaction of business.

(f) **Annual Report.** — The Board shall report annually to the Governor a full statement of its disciplinary and enforcement programs and activities during the year, together with such recommendations as it may deem expedient. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, ss. 1-5.)

Effect of Amendments. — The 1981 amendment substituted "eight" for "seven" and "Governor" for "Secretary of Human Resources" in the introductory sentence of subsection (a), deleted "and" at the end of subdivision (a)(6), substituted a semi-colon for "who

shall serve as chairman of the Board of Certification" at the end of subdivision (a)(7) and added subdivision (a)(8). The amendment rewrote subsections (b) and (d) and added subsections (e) and (f).

§ 90A-22. Classification of water treatment facilities; notification of users.

(a) On or before July 1, 1982, the Board of Certification, with the advice and assistance of the Secretary of Human Resources, shall classify all surface water treatment facilities and all facilities for treating groundwater supplies that are used, or intended for use, as part of a public water supply system with due regard for the size of the facility, its type, character of water to be treated, other physical conditions affecting the treatment of the water, and with respect to the degree of skill, knowledge, and experience that the operator responsible for the water treatment facility must have to supervise successfully the operation of the facilities so as to adequately protect the public health.

(b) The Board shall notify users of such facilities when any classification of a facility by the Board would result in a certified operator's not being required to supervise the operation of that facility. Any user so notified may demand a hearing before the Board on its decision, and that hearing and any appeal therefrom shall be conducted in accordance with Articles 3 and 4 of Chapter

150A of the General Statutes. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, s. 6.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a), added "On or before July 1, 1982" at the

beginning of subsection (a), and added subsection (b).

§ 90A-25. Issuance of certificates.

(a) An applicant, upon meeting satisfactorily the appropriate requirements shall be issued a suitable certificate by the Board of Certification designating the level of his competency. Certificates shall be permanent unless revoked for cause or replaced by one of a higher grade.

(b) Certificates may be issued, without examination, in a comparable grade to any person who holds a certificate in any state, territory or possession of the United States, if in the judgment of the Board of Certification the requirements for operators under which the person's certificate was issued do not conflict with the provisions of this Article, and are of a standard not lower than that specified under rules and regulations adopted under this Article.

(c) Certificates in an appropriate grade will be issued to operators who, on July 1, 1969, hold certificates of competency issued under the voluntary certification program now being administered through the Division of Sanitary Engineering of the Department of Human Resources with the cooperation of the North Carolina Water Works Operators Association, the North Carolina Section of the American Water Works Association, and the North Carolina League of Municipalities.

(d) Certificates in an appropriate grade will be issued without examination to any person or persons certified by the governing board in the case of a city, town, county, sanitary district, or other political subdivision, or by the owner in the case of a private utility or industry, to have been in responsible charge of its water treatment facilities on the date the Board of Certification notifies the governing board, or owner, of the classification of its water treatment facility, provided the facility was classified before July 1, 1981, and provided the application for such certification is made within one year of the date of notification. A certificate so issued will be valid for use by the holder only in the water treatment facility in which he was employed at the time of his certification. No certificate shall be issued under this subsection to any operator of any water treatment facility classified by the board on or after July 1, 1981.

(e) Temporary certificates in any grade may be issued without examination to any person employed as a water treatment facility operator when the Board of Certification finds that the supply of certified operators, or persons with training necessary to certification, is inadequate. Temporary certificates shall be valid for only one year. Temporary certificates may be issued with such special conditions or requirements relating to the place of employment of the person holding the certificate, his supervision on a consulting or advisory basis, or other matters as the Board of Certification may deem necessary to protect the public health. No temporary certificate may be renewed more than one time either by any operator at the same grade level or by any operator for employment at the same water treatment facility. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, ss. 7, 8.)

Effect of Amendments. — The 1981 amendment, in subsection (d), substituted "provided the facility was classified before July 1, 1981 and provided" for "and if" in the first sentence

and added the last sentence. In subsection (e), the amendment deleted "but may be renewed" at the end of the second sentence and added the last sentence.

§ 90A-26. Revocation or suspension of certificate.

The Board of Certification, in accordance with the procedure set forth in Chapter 150A of the General Statutes of North Carolina, may singly or in combination, issue a reprimand to, or revoke or suspend the certificate of an operator when it is found that the operator has practiced fraud or deception; that reasonable care, judgment, or the application of his knowledge or ability was not used in the performance of his duties; or that the operator is incompetent or unable to properly perform his duties. (1969, c. 1059, s. 2; 1973, c. 1331, s. 3; 1981, c. 616, s. 9.)

Effect of Amendments. — The 1981 amendment substituted the language beginning “singly” and ending “certificate of” for the words “revoke the certificate of.”

§ 90A-27. Application fee.

(a) The Board of Certification, in establishing procedures for receiving applications for certification, shall impose fees, or schedules of fees, adequate to meet the anticipated costs of administering the classification and certification programs.

(b) In establishing procedures for receiving renewal applications, the Board of Certification may establish fees or a schedule of fees, adequate to meet the anticipated costs of renewal of certification, not to exceed fifty dollars (\$50.00) per license. (1969, c. 1059, s. 2; 1981, c. 562, s. 1.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a) and added subsection (b). Session Laws 1981, c. 562, s. 10, contains a severability clause.

§ 90A-29. Certified operators required.

(a) On and after July 1, 1971, every person, firm, or corporation, municipal or private, owning or having control of a water treatment facility shall have the obligation of assuring that the operator in responsible charge of such facility is duly certified by the Board of Certification under the provisions of this Article.

(b) No person, after July 1, 1971, shall perform the duties of an operator, in responsible charge of a water treatment facility, without being duly certified under the provisions of this Article. (1969, c. 1059, s. 2; 1981, c. 616, s. 10.)

Effect of Amendments. — The 1981 amendment added the subsection designations (a) and (b).

§ 90A-30. Penalties; remedies; contested cases.

(a) Upon the recommendation of the Board of Certification, the Secretary of Human Resources or a delegated representative may impose an administrative, civil penalty on any person, firm or corporation who violates G.S. 90A-29(a). Each day of a continued violation shall constitute a separate violation. The penalty shall not exceed one hundred dollars (\$100.00) for each day such violation continues. No penalty shall be assessed until the person alleged to be in violation has been notified of the violation.

(b) Any person wishing to contest a penalty issued under this section shall be entitled to an administrative hearing and judicial review conducted according to the procedures outlined in G.S. 150A-23 through G.S. 150A-52.

(c) The Secretary may bring a civil action in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the administrative penalty whenever an owner or person in control of a water treatment facility

- (1) Who has not requested an administrative hearing fails to pay the penalty within 60 days after being notified of such penalty, or
- (2) Who has requested an administrative hearing fails to pay the penalty within 60 days after service of a written copy of the decision as provided in G.S. 150-36.

(d) Notwithstanding any other provision of law, this section imposes the only penalty or sanction, civil or criminal, for violations of G.S. 90A-29(a) or for the failure to meet any other legal requirement for a water system to have a certified operator in responsible charge. (1981, c. 616, s. 11.)

§§ 90A-31 to 90A-34: Reserved for future codification purposes.

ARTICLE 3.

Certification of Wastewater Treatment Plant Operators.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90A-42. Fees.

The Wastewater Treatment Plant Operators Certification Commission, in establishing procedures or implementing the requirements of this Article, shall impose the following schedule of fees:

- (1) Examination including Certificate, fifteen dollars (\$15.00);
- (2) Temporary Certificate, twenty-five dollars (\$25.00);
- (3) Temporary Certification Renewal, fifty dollars (\$50.00);
- (4) Conditional Certificate, twenty-five dollars (\$25.00);
- (5) Voluntary Conversion Certificate, ten dollars (\$10.00);
- (6) Reciprocity Certificate, twenty-five dollars (\$25.00);
- (7) Annual Fee, five dollars (\$5.00);
- (8) Replacement of Certificate, five dollars (\$5.00);
- (9) Late Payment of Annual Fee, five dollars (\$5.00), in addition to the regular fee called for in (7) hereinabove; and
- (10) Mailing List Fees, upon request for mailing lists of wastewater treatment plant operators and/or plants, shall be made available upon payment of fees at a rate of five dollars (\$5.00) per 100 names of certified operators and/or facilities, with a minimum payment of fifty dollars (\$50.00).

(1969, c. 1059, s. 3; 1979, c. 554, s. 5; 1981, c. 361, ss. 1-4.)

Effect of Amendments. — The 1981 amendment, deleted "Renewal" preceding "Fee" in subdivision (7), deleted "and" at the end of subdivision (8), substituted "Late Payment" for

"Reinstatement of Operator Certification after lapse for nonpayment" and deleted "Renewal" following "Annual" and "regular" in subdivision (9) and added subdivision (10).

Chapter 93.

Public Accountants.

Sec.

93-12. Board of Certified Public Accountant
Examiners.

§ 93-12. Board of Certified Public Accountant Examiners.

The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in Chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of seven members to be appointed by the Governor, five persons to be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this Chapter and two persons who are not certified public accountants who shall represent the interest of the public at large. Members of the Board shall hold office for the term of three years and until their successors are appointed. Appointments to the Board shall be made under the provisions of this Chapter as and when the terms of the members of the present State Board of Accountancy expire; provided, that all future appointments to said Board shall be made for a term of three years expiring on the thirtieth day of June. All Board members serving on June 30, 1980, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1980, shall serve more than two complete consecutive terms. The powers and duties of the Board shall be as follows:

- (1) To elect from its members a president, vice-president and secretary-treasurer. The members of the Board shall be paid, for the time actually expended in pursuance of the duties imposed upon them by this Chapter, an amount not exceeding ten dollars (\$10.00) per day, and they shall be entitled to necessary traveling expenses.
- (2) To employ legal counsel, clerical and technical assistance and to fix the compensation therefor, and to incur such other expenses as may be deemed necessary in the performance of its duties and the enforcement of the provisions of this Chapter. Upon request the Attorney General of North Carolina will advise the Board with respect to the performance of its duties and will assign a member of his staff, or approve the employment of counsel, to represent the Board in any hearing or litigation arising under this Chapter. The Board may, in the exercise of its discretion, cooperate with similar boards of other states, territories and the District of Columbia in activities designed to bring about uniformity in standards of admission to the public practice of accountancy by certified public accountants, and may employ a uniform system of preparation of examinations to be given to candidates for certificates as certified public accountants, including the services and facilities of the American Institute of Certified Public Accountants, or of any other persons or organizations of recognized skill in the field of accountancy, in the preparation of examinations and assistance in establishing and maintaining a uniform system of grading of examination papers, provided however, that all examinations given by said Board shall be adopted and approved by the Board and that the grade or grades given to all persons taking said examinations shall be determined and approved by the Board.

- (3) To formulate rules for the government of the Board and for the examination of applicants for certificates of qualification admitting such applicants to practice as certified public accountants.
- (4) To hold written or oral examinations of applicants for certificates of qualification at least once a year, or oftener, as may be deemed necessary by the Board.
- (5) To issue certificates of qualification admitting to practice as certified public accountants, each applicant who, having the qualifications herein specified, shall have passed an examination to the satisfaction of the Board, in "accounting theory," "accounting practice," "auditing," "business law," and other related subjects.

From and after July 1, 1961, any person shall be eligible to take the examination given by the Board who is a citizen of the United States or has declared his intention of becoming such a citizen or is a resident alien, and has resided for at least four months within the State of North Carolina, is 18 years of age or over, and is of good moral character, and submits evidence satisfactory to the Board that:

- a. He holds a bachelor's degree from a college or university accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution, and
- b. His degree studies included a concentration in accounting as defined by the Board or that he supplemented his degree studies with courses that the Board determines to be substantially equivalent to a concentration in accounting, and
- c. Satisfactory evidence of the completion of two years in an accredited college or university or its equivalent with a concentration in accounting as defined by the Board and two years experience in the practice of public accountancy under the direct supervision of a certified public accountant, in addition to other experience requirements in this section, may be substituted for a bachelor's degree.

Provided, however, the Board may, in its discretion, waive the education requirement of any candidate if the Board is satisfied from the result of a special written examination given the candidate by the Board to test his educational qualifications that he is as well equipped, educationally, as if he met the education requirements specified above. The Board may provide by regulation for the general scope of such examinations and may obtain such advice and assistance as it deems appropriate to assist it in preparing, administering and grading such special examinations.

Such applicant, in addition to passing satisfactorily the examination given by the Board, shall have the endorsement of three certified public accountants as to his eligibility, and shall have had either:

- a. Two years experience in the field of accounting under the direct supervision of a certified public accountant; or
- b. Five years experience teaching accounting in a four-year college or university accredited by one of the regional accrediting associations or in a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution; or
- c. Five years experience in the field of accounting; or five years experience teaching college transfer accounting courses at a community college or technical institute accredited by one of the regional accrediting associations; or

- d. Any combination of such experience determined by the Board to be substantially equivalent to the foregoing.

A Master's or more advanced degree in accounting, tax law, economics or business administration from an accredited college or university may be substituted for one year of experience. The Board may permit persons otherwise eligible to take its examinations and withhold certificates until such person shall have had the required experience.

- (6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or the equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia, when in the judgment of the Board the requirements for the issuing or granting of such certificates or degrees are substantially equivalent to the requirements established by this Chapter: Provided, however, that such applicant has been a bona fide resident of this State for not less than four months or, if a nonresident, he has maintained or has been a member of a firm that has maintained for not less than four months a bona fide office within this State for the public practice of accounting and, provided further, that the state or political subdivision of the United States upon whose certificate the reciprocal action is based grants the same privileges to holders of certificates as certified public accountants issued pursuant to the provisions of this Chapter. The Board, by general rule, may grant temporary permits to applicants under this subsection pending their qualification for reciprocal certificates.
- (7) To charge for each examination and certificate provided for in this Chapter a fee not exceeding seventy-five dollars (\$75.00). This fee shall be payable to the secretary-treasurer of the Board by the applicant at the time of filing application. In no case shall the examination fee be refunded, unless in the discretion of the Board the applicant shall be deemed ineligible for examination.
- (8a) To require the registration of certified public accountant firms which have offices both within and outside of North Carolina, and the payment by such firms of an annual registration fee based on the total number of partners in each such firm, but not to exceed two thousand five hundred dollars (\$2,500) per firm per year.
- (8b) To formulate rules and regulations for the continuing professional education of all persons holding the certificate of certified public accountant, subject to the following provisions:
- a. After January 1, 1983, any person desiring to obtain or renew a certificate as a certified public accountant must offer evidence satisfactory to the Board that such person has complied with the continuing professional education requirement approved by the Board. The Board may grant a conditional license for not more than 12 months for persons who are being licensed for the first time, or moving into North Carolina, or for other good cause, in order that such person may comply with the continuing professional education requirement.
 - b. The Board shall promulgate rules and regulations for the administration of the continuing professional education requirement with a minimum number of hours of 20 and a maximum number of hours of 40 per year, and the Board may exempt persons who are retired or inactive from said continuing professional education requirement. The Board may also permit any certified public accountant to accumulate hours of continuing professional educa-

tion in any calendar year of as much as two additional years annual requirement in advance of or subsequent to the required calendar year.

- c. Any applicant who offers satisfactory evidence on forms promulgated by the Board that he has participated in a continuing professional education program of the type required by the Board shall be deemed to have complied with this section.
- (9) Adoption of Rules of Professional Conduct; Disciplinary Action. — The Board shall have the power to adopt rules of professional ethics and conduct to be observed by certified public accountants and public accountants engaged in the public practice of accountancy in this State. The rules so adopted shall be publicized and filed in the office of the Attorney General as provided by Chapter 150A. The Board shall have the power to revoke, either permanently or for a specified period, any certificate issued under the provisions of this Chapter to a certified public accountant or public accountant or to censure the holder of any such certificate for any one or combination of the following causes:
- a. Conviction of a felony under the laws of the United States or of any state of the United States.
 - b. Conviction of any crime, an essential element of which is dishonesty, deceit or fraud.
 - c. Fraud or deceit in obtaining a certificate as a certified public accountant.
 - d. Dishonesty, fraud or gross negligence in the public practice of accountancy.
 - e. Violation of any rule of professional ethics and professional conduct adopted by the Board.
- Any disciplinary action taken shall be in accordance with the provisions of Chapter 150A of the General Statutes.
- (10) Within 60 days after March 10, 1925, the Board shall formulate rules for the registration of those persons, firms, copartnerships, associations or corporations who, not being holders of valid and unrevoked certificates as certified public accountants issued under the provisions of Chapter 157 of the Public Laws of 1913, and who, having on March 10, 1925, been engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, shall, under the provisions of G.S. 93-7 apply to the Board for registration as public accountants. The Board shall maintain a register of all persons, firms, copartnerships, associations or corporations who have made application for such registration and have complied with the rules of registration adopted by the Board.
- (11) Within 60 days after March 10, 1925, the Board shall formulate rules for registration of these public accountants who are qualified to practice under this Chapter and who under the provisions of G.S. 93-10 are permitted to engage in work within the State of North Carolina. The Board shall have the power to deny or withdraw the privilege herein referred to for good and sufficient reasons.
- (12) To submit annually on or before the first day of May to the Secretary of Revenue the names of all persons who have qualified under this Chapter as certified public accountants or public accountants. Privilege license issued under G.S. 105-41 shall designate whether such license is issued to a certified public accountant, a public accountant, or an accountant.
- (13) The Board shall keep a complete record of all its proceedings and shall annually submit a full report to the Governor.

- (14) All fees collected on behalf of the Board and all receipts of every kind and nature, as well as the compensation paid the members of the Board and the necessary expenses incurred by them in the performance of the duties imposed upon them, shall be reported annually to the State Treasurer. All fees and other moneys received by the Board pursuant to the provisions of the General Statutes shall be kept in a separate fund by the treasurer of the Board, to be held and expended only for such purposes as are proper and necessary to the discharge of the duties of the Board and to enforce the provisions of this Chapter. No expense incurred by the Board shall be charged against the State.
- (15) Any certificate of qualification issued under the provisions of this Chapter, or issued under the provisions of Chapter 157 of the Public Laws of 1913, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within 30 days after demand for such renewal fee shall have been made by the State Board of Accountancy. (1925, c. 261, s. 11; 1939, c. 218, s. 1; 1951, c. 844, ss. 4-9; 1953, c. 1041, s. 20; 1959, c. 1188; 1961, c. 1010; 1971, c. 738, ss. 1-3; 1973, c. 476, s. 193; c. 1331, s. 3; 1975, c. 107; 1975, 2nd Sess., c. 983, s. 69; 1977, c. 804, ss. 1, 2; 1979, c. 750, ss. 6-10; 1979, 2nd Sess., c. 1087, ss. 1, 2; 1981, c. 10.)

Effect of Amendments. — The 1981 amendment, in the first sentence of subdivision (6) deleted a clause providing that certificates of

qualification could be granted to those holding valid certificates as certified public accountants issued by a foreign nation.

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salesmen.

Sec.

93A-6. Revocation or suspension of licenses by Board.

ARTICLE 1.

Real Estate Brokers and Salesmen.

§ 93A-2. Definitions and exceptions.

CASE NOTES

Owner exemption clauses of Chapter 93A have been effectively eliminated from this section insofar as licensed real estate brokers and salesmen are concerned. Section 6 of Chapter 616 of the 1979 Session Laws, effective May 21, 1979 and compiled in § 93A-6, has expressly provided that, notwithstanding anything to the contrary in Chapter 93A, the board shall have the power to suspend or revoke the license of a real estate broker or real estate salesman who violates any of the provisions of Chapter 93A when selling or

leasing his own property. *Cox v. North Carolina Real Estate Licensing Bd.*, 47 N.C. App. 135, 266 S.E.2d 851, cert. denied, 301 N.C. 87, 273 S.E.2d 296 (1980).

Shareholder is not an owner of realty of the corporation in which the shares are held so as to bring the shareholder within the "owner" exemption provisions of this section. *Cox v. North Carolina Real Estate Licensing Bd.*, 47 N.C. App. 135, 266 S.E.2d 851, cert. denied, 301 N.C. 87, 273 S.E.2d 296 (1980).

§ 93A-6. Revocation or suspension of licenses by Board.

(a) The Board shall have power to revoke or suspend licenses as herein provided. The Board may upon its own motion, and shall upon the verified complaint in writing of any persons, provided such complaint with the evidence, documentary or otherwise, presented in connection therewith, shall make out a prima facie case, hold a hearing as hereinafter provided and investigate the actions of any real estate broker or real estate salesman, or any person who shall assume to act in either such capacity, and shall have power to suspend or revoke any license issued under the provisions of this Chapter at any time where the licensee has by false or fraudulent representations obtained a license or has been convicted or has entered a plea of nolo contendere upon which a finding of guilty and final judgment has been entered in a court of competent jurisdiction in this State or in any other state of the criminal offense of embezzlement, obtaining money under false pretenses, forgery, conspiracy to defraud or any similar offense or offenses involving moral turpitude or where the licensee in performing or attempting to perform any of the acts mentioned herein is deemed to be guilty of:

- (1) Making any substantial and willful misrepresentations, or
- (2) Making any false promises of a character likely to influence, persuade, or induce, or
- (3) Pursuing a course of misrepresentation or making of false promises through agents or salesmen or advertising or otherwise, or
- (4) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts, or

- (5) Accepting a commission or valuable consideration as a real estate salesman for the performances of any of the acts specified in this Chapter, from any person, except the licensed broker by whom he is employed, or
 - (6) Representing or attempting to represent a real estate broker other than the broker by whom he is engaged or associated, without the express knowledge and consent of the broker with whom he is associated, or
 - (7) Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others, or
 - (8) Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public, or
 - (9) Paying a commission or valuable consideration to any person for acts or services performed in violation of this Chapter, or
 - (10) Any other conduct whether of the same or a different character from that hereinbefore specified which constitutes improper, fraudulent or dishonest dealing.
 - (11) For performing or undertaking to perform any legal service as set forth in G.S. 84-2.1 or any other such acts not specifically set forth in said section.
 - (12) Commingling the money or other property of his principals with his own or failure to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association in North Carolina all money received by a real estate broker acting in said capacity, or as escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; provided, such accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest-bearing account and also provide for the disbursement of the interest thereon.
 - (13) Failure to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real estate to the buyer and to the seller.
 - (14) Failure by a broker to deliver to the seller in every real estate transaction wherein he acts as a real estate broker, at the time such transaction is consummated, a complete detailed closing statement showing all of the receipts and disbursements handled by such broker for the seller; also failure to deliver to the buyer a complete statement showing all money received in the transaction from such buyer and how and for what the same were disbursed.
 - (15) Violating any rule or regulation duly promulgated by the Board.
- (a1) Anything in this Chapter to the contrary notwithstanding, the Board shall have the power to suspend or revoke the license of a real estate broker or real estate salesman:
- (1) Who violates any of the provisions of G.S. 93A-6(a) when selling or leasing his own property; or
 - (2) Who is convicted or who enters a plea of no contest upon which a finding of guilty and final judgment is entered by a court of competent jurisdiction, of an offense involving moral turpitude which is outside the scope of the real estate business, but would reasonably affect the licensee's performance in such business.
- (a2) The Board may appear in its own name in the superior courts in actions for injunctive relief to prevent violation by any person of the provisions of this Chapter or regulations promulgated hereunder, and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations, or regardless of whether the person is a licensee of the Board.

(b) Each broker shall maintain complete records showing the deposit, maintenance, and withdrawal of money or other property owned by his principals or held in escrow or trust for his principals. The Board may inspect these records of each broker periodically without prior notice and may also inspect the records whenever the Board determines that the records are pertinent to the conduct of the investigation of any specific complaint against a licensee.

(c) Records relative to the deposit, maintenance, and withdrawal of the money or other property of his principals shall be properly maintained by a broker and made available to the Board or its authorized representative when the Board determines such records are pertinent to the conduct of the investigation of any specific complaint against a licensee.

(d) In all proceedings under this section for the revocation or suspension of licenses, the provisions of Chapter 150A of the General Statutes shall be applicable. (1957, c. 744, s. 6; 1967, c. 281, s. 4; c. 853, s. 3; 1969, c. 191, s. 5; 1971, c. 86, s. 2; 1973, c. 1112; c. 1331, s. 3; 1975, c. 28; 1979, c. 616, ss. 6, 7; 1981, c. 682, s. 15.)

Effect of Amendments.

The 1981 amendment, effective July 1, 1981, substituted "of" for "or" preceding "an offense

involving moral turpitude" near the middle of subdivision (2) of subsection (a1), and added subsection (d).

Chapter 93B.

Occupational Licensing Boards.

Sec.

93B-5. Compensation and employment of board members.

§ 93B-5. Compensation and employment of board members.

(a) Board members shall receive as compensation for their services per diem not to exceed thirty-five dollars (\$35.00) for each day during which they are engaged in the official business of the board.

(b) Board members shall be reimbursed for all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a) for officers and employees of State departments. Actual expenditures of board members in excess of the maximum amounts set forth in G.S. 138-6(a) for travel and subsistence may be reimbursed if the prior approval of the State Director of Budget is obtained and such approved expenditures are within the established and published uniform standards and criteria of the State Director of Budget authorized under G.S. 138-7 for extraordinary charges for hotels, meals, and convention registration for State officers and employees, whenever such charges are the result of required official business of the Board.

(c) Repealed by Session Laws 1981, c. 757, s. 2.

(d) Except as provided herein board members shall not be paid a salary or receive any additional compensation for services rendered as members of the board.

(e) Board members shall not be permanent, salaried employees of said board.

(f) Repealed by Session Laws 1975, c. 765, s. 1, effective July 1, 1975. (1957, c. 1377, s. 5; 1973, c. 1303, s. 1; c. 1342, s. 1; 1975, c. 765, s. 1; 1981, c. 757, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment deleted a reference to subdivisions (1), (2) and (3) of § 138-6(a) in the first sentence of subsection (b), added the second sentence of

subsection (b), and deleted subsection (c), which authorized reimbursement for convention registration fees.

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

Sec.

93D-2. Fitting and selling without license unlawful.

93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

93D-4. Board may enjoin illegal practices.

93D-5. Requirements for registration; examinations; apprentice licenses.

93D-6. Persons selling in other jurisdictions.

93D-8. Examination of applicants; issue of license certificate.

Sec.

93D-9. Registration of apprentices.

93D-10. Registration and notice.

93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.

93D-12. License to be displayed at office.

93D-13. Discipline, suspension, revocation of licenses.

93D-15. Violation of Chapter.

Repeal of Chapter. —

Session Laws 1981, c. 601, s. 21, amended § 143-34.13 (codified from Session Laws 1977, c. 712, s. 4, as amended) so as to eliminate the

provision repealing this Chapter. Section 143-34.13 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 93D-2. Fitting and selling without license unlawful.

It shall be unlawful for any person to fit or sell hearing aids unless he has first obtained a license from the North Carolina State Hearing Aid Dealers and Fitters Board or is an apprentice working under the supervision of a board licensee. (1969, c. 999; 1981, c. 601, s. 1.)

Effect of Amendments. — The 1981 amendment deleted "or apprentice license" following "license" and added "or is an apprentice

working under the supervision of a board licensee."

§ 93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

(a) There is hereby created a board whose duty it shall be to carry out the purposes and enforce the provisions of this Chapter, and which shall be known as the "North Carolina State Hearing Aid Dealers and Fitters Board." The Board shall be composed of seven members. Four members who have been actively engaged in the fitting and selling of hearing aids for three years shall be appointed by the Governor. These initial appointments are for the following terms: one for one year, one for two years, one for three years and one for four years. All appointments made on or after July 1, 1981, shall be for terms of three years.

One member shall be appointed by the Governor who shall be a physician practicing in North Carolina, preferably specializing in the field of otolaryngology. All appointments shall be for terms of three years.

One member shall be appointed by the Governor from a list of two audiologists residing in North Carolina, which list shall be compiled by the North Carolina Speech and Hearing Association. This initial appointment shall be for a term of three years. All appointments made on or after July 1, 1981, shall be for a term of three years.

One member shall be appointed by the Governor to represent the interest of the public at large. This member shall have no ties to the hearing aid business nor shall he be an audiologist. The Governor shall appoint the public member not later than July 1, 1981, to serve a term of three years.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive terms.

Vacancies on the Board shall be filled by appointment of the Governor. Appointees shall serve the unexpired term of their predecessor in office and must be appointed from the same category as their predecessor in office. The members of the Board, before entering their duties, shall respectively take all oaths taken and prescribed for other State officers, in the manner provided by law, which oaths shall be filed in the office of the Secretary of State, and the Board shall have a common seal.

(b) The Board shall choose, at the first regular meeting and annually thereafter, one of its members to serve as president and one as secretary and treasurer. A majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of the annual meeting and any special meetings to be designated by the president. The secretary and treasurer of the Board shall keep a full record of its proceedings, including a current list of all licensees, which shall at all reasonable times be open to public inspection. The Board is authorized to employ an executive secretary and to provide such assistance as may be required to enable said Board to properly perform its duties.

(c) The Board shall:

- (1) Authorize all disbursements necessary to carry out the provisions of this Chapter;
- (2) Supervise and administer qualifying examinations to test and determine the knowledge and proficiency of applicants for licenses;
- (3) Issue licenses to qualified persons who apply to the Board;
- (4) Obtain audiometric equipment and facilities necessary to carry out the examination of applicants for licenses;
- (5) Suspend or revoke licenses pursuant to this Chapter;
- (6) Make and publish rules and regulations (including a code of ethics) which are necessary and proper to regulate the fitting and selling of hearing aids and to carry out the provisions of this Chapter;
- (7) Exercise jurisdiction over the hearing of complaints, charges of malpractice including corrupt or unprofessional conduct, and allegations of violations of the Board's rules or regulations, which are made against any fitter and seller of hearing aids in North Carolina;
- (8) Require the periodic inspection and calibration of audiometric testing equipment of persons who are fitting and selling hearing aids;
- (9) In connection with any matter within the jurisdiction of the Board, summon and subpoena and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by the Board to be necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary and treasurer or the president of the Board and shall have the force and effect of a summons or subpoena issued by a court of record. Any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to contempt charges in the manner set forth in Chapter 150A of the General Statutes. The Board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held;

- (10) Inform the Attorney General of any information or knowledge it acquires regarding any "price-fixing" activity whatsoever in connection with the sales and service of hearing aids;
- (11) Establish and enforce regulations which will guarantee that a full refund will be made by the seller of a hearing aid to the purchaser when presented with a written medical opinion of an otolaryngologist that the purchaser's hearing cannot be improved by the use of a hearing aid;
- (12) Fund, establish, conduct, approve and sponsor instructional programs for registered apprentices and for persons who hold a license as well as for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to the extent that the Board deems such instructional programs to be beneficial or necessary;
- (13) Register persons serving as apprentices as set forth in G.S. 93D-9.

(d) Out of the funds coming into the possession of said Board, each member thereof may receive as reimbursement for each day he is actually engaged in the assigned duties of his office, the sum of eight cents (8¢) per mile for travel plus the actual costs of meals and public lodging while away from home, which costs of meals and lodging may not exceed twenty dollars (\$20.00) per day. Such expenses shall be paid from the fees and assessments received by the Board under the provisions of this Chapter. No part of these expenses or any other expenses of the Board, in any manner whatsoever, shall be paid out of the State treasury. All moneys received in excess of expense allowance and mileage, as above provided, shall be held by the secretary-treasurer as a special fund for meeting other expenses of the Board and carrying out the provisions of this Chapter.

The secretary-treasurer shall give a bond to the Board to be approved by the Board, in the sum of five thousand dollars (\$5,000) conditioned upon the faithful performance of the duties of his office.

The Board shall make an annual report of its proceedings to the Governor on the first Monday in June of each year, which report shall contain an account of all moneys received and disbursed by the Board and a complete listing of names and addresses of all licensees and apprentices. Copies of the report and list of licensees and apprentices shall be filed in the office of the State Auditor, the Secretary of State, and Attorney General. (1969, c. 999; 1973, c. 1331, s. 3; c. 1345, ss. 1, 2; 1975, c. 550, s. 1; 1981, c. 601, ss. 2-5.)

Effect of Amendments. — The 1981 amendment, in the last sentence of the first paragraph of subsection (a), deleted "subsequent" preceding "appointments," inserted "made on or after July 1, 1981" and substituted "three" for "four." In the second paragraph of subsection (a), the amendment substituted "One member" for "Two members" and "a physician" for "physicians" in the first sentence and substituted "three" for "four" in the second sentence. The amendment deleted "subsequent" preceding "appointment," added "made on or after July 1, 1981" and substituted "three" for "two" in the last sentence of the third paragraph of subsection (a), added the fourth and

fifth paragraphs of subsection (a), and, in the first sentence of the last paragraph of subsection (a), deleted "physician, or hearing aid dealer or audiologist" following "category." The amendment added the final sentence in subsection (b), deleted "and apprentice licensees" following "licenses" in subdivision (c)(5), deleted "an apprentice license and" following "hold" and inserted "for registered apprentices and" in subdivision (c)(12), substituted a semi-colon for a period at the end of subdivision (c)(12), added subdivision (c)(13) and, in the last paragraph of subsection (d), inserted "and apprentices" following "licensees" in both places it appears in the first sentence.

§ 93D-4. Board may enjoin illegal practices.

The Board may, if it finds that any person is violating any of the provisions of this Chapter, apply to superior court for a temporary or permanent restraining order or injunction to restrain such persons from continuing such illegal practices. If upon application, it appears to the court that such person has violated or is violating the provisions of this Chapter, the court shall issue an order restraining the sale or fitting of hearing aids or other conduct in violation of this Chapter. All such actions by the Board for injunctive relief shall be governed by the Rules of Civil Procedure and Article 37, Chapter 1 of the General Statutes; provided, that injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of this Chapter. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business. (1969, c. 999; 1981, c. 601, s. 6.)

Effect of Amendments. — The 1981 amendment added the last sentence.

§ 93D-5. Requirements for registration; examinations; apprentice licenses.

(a) No person shall begin the fitting and selling of hearing aids in this State after the effective date of this Chapter until he is issued a license by the Board or is an apprentice working under the supervision of a licensee. Except as hereinafter provided, each applicant for a license shall pay a fee of one hundred dollars (\$100.00) and shall show to the satisfaction of the Board that he:

- (1) Is a person of good moral character,
- (2) Is 18 years of age or older,
- (3) Has an education equivalent to a four-year course in an accredited high school,
- (4) Is free of contagious or infectious disease.

(b) Except as hereinafter provided, no license shall be issued to a person until he has successfully passed a qualifying examination administered by the Board.

(c) No license shall be issued to any person until he has served as an apprentice as set forth in G.S. 93D-9 for a period of at least one year; provided, that this subsection shall not apply to those persons qualified under G.S. 93D-6 nor to those persons holding masters degrees in Audiology who have undergone 250 hours of supervised activity fitting and selling hearing aids under the direct supervision of a licensed hearing aid dealer approved by the Board, or have met the licensure requirements under Article 22 of Chapter 90 of the General Statutes and have worked full time for one year fitting and selling hearing aids in the office of and under the direct supervision of an otolaryngologist and have participated in 250 hours of Board-supervised, continuing professional education in fitting hearing aids. (1969, c. 999; 1975, c. 550, s. 2; 1981, c. 601, ss. 7, 8; 1981, 2nd Sess., c. 990, s. 1.)

Effect of Amendments. — The first 1981 amendment, in the first sentence of the introductory paragraph of subsection (a), deleted "or apprentice license" following "license" and added the language following "Board" and, in subdivision (a)(2), substituted "18" for "21" and deleted "provided that, a person who has reached the age of 19 years or more may be awarded an apprentice license" at the

end of the subdivision. In subsection (c), the amendment substituted "served as" for "first held," deleted "license" following "apprentice" and added the language following "93D-6" at the end of the sentence.

The second 1981 amendment substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" in the second sentence of the introductory paragraph of subsection (a).

§ 93D-6. Persons selling in other jurisdictions.

Whenever the Board determines that another state or jurisdiction has requirements at least equivalent to those in effect pursuant to this Chapter for the fitting and selling of hearing aids, and that such state or jurisdiction has a program at least equivalent to the program for determining whether applicants pursuant to this Article [Chapter] are qualified to sell and fit hearing aids, the Board may issue, but is not compelled to issue, licenses to applicants therefor who hold current, unsuspended and unrevoked certificates or licenses to fit and sell hearing aids in such other state or jurisdiction. No such applicant shall be required to submit to any examination or other procedure required by G.S. 93D-5, except that he shall pay a fee of one hundred dollars (\$100.00) to the Board upon application. Such applicant must have one full year of experience satisfactory to the Board before issuance of the license. (1969, c. 999; 1971, c. 1093, s. 2; 1981, 2nd Sess., c. 990, s. 2.)

Effect of Amendments. — The 1981 amendment substituted "one hundred dollars (\$100.00) for "fifty dollars (\$50.00) " in the second sentence.

§ 93D-8. Examination of applicants; issue of license certificate.

(a) Every applicant for a license who is notified by the Board that he has fulfilled the requirements of G.S. 93D-5(a), except those making application pursuant to G.S. 93D-6, shall appear at a time, place and before such persons as the Board may designate, to be examined by written and practical tests in order to demonstrate that he is qualified for the fitting and selling of hearing aids. The Board shall give one examination of the type prescribed herein each year at a duly prescribed time and place, which shall be publicized for at least 90 days in advance. Additional examinations may be given at the discretion of the Board. The examination provided in this section shall not include questions requiring a medical or surgical education but shall consist of:

- (1) Tests of knowledge in the following areas as they pertain to the fitting of hearing aids:
 - a. The basic physics of sound,
 - b. The human hearing mechanism, including the science of hearing and the cause and rehabilitation of abnormal hearing and hearing disorders, and
 - c. The structure and function of hearing aids.
- (2) Tests of proficiency in the following techniques as they pertain to the fitting of hearing aids:
 - a. Pure tone audiometry, including air conduction testing and bone conduction testing,
 - b. Live voice and recorded voice speech audiometry, including speech reception threshold testing and speech discrimination testing,
 - c. Effective masking,
 - d. Recording and evaluation of audiograms and speech audiometry to determine hearing aid candidacy,
 - e. Selection and adaption of hearing aids and testing of hearing aids,
 - f. Taking earmold impressions, and
 - g. Such other skills as may be required for the fitting of hearing aids in the opinion of the Board.

(b) Upon payment of five dollars (\$5.00) the Board shall issue a license certificate to each applicant who successfully passes the examination. (1969, c. 999; 1981, c. 601, s. 9.)

Effect of Amendments. — The 1981 amendment, in the first sentence of the introductory paragraph of subsection (a), inserted a comma

after "93D-5(a)" substituted "except" for "excepting" and deleted "and 93D-7" following "93D-6."

§ 93D-9. Registration of apprentices.

(a) Any person age 17 or older may apply to the Board for registration as an apprentice. Each such applicant must be sponsored by a hearing aid dealer and fitter licensed by the Board.

(b) Upon receiving an application accompanied by a fee of fifty-five dollars (\$55.00), the Board may register the applicant as an apprentice, which shall entitle the applicant to fit and sell hearing aids under the supervision of a holder of a regular license.

(c) No apprentice shall be registered by the Board under this section unless the applicant shows to the satisfaction of the Board that he is or will be supervised and trained by a hearing aid fitter and seller who holds a license.

(d) If a person 18 years of age or older who is registered as an apprentice under this section does not take the next succeeding examination given after a minimum of one full year of apprenticeship, his registration shall not be renewed, except for good cause shown to the satisfaction of the Board.

(e) If a person who is registered as an apprentice takes and fails to pass the next succeeding examination given after one full year of apprenticeship, the Board may renew the apprenticeship license for a period of time to end 30 days after the results of the examination given next after the date of renewal of said registration. The fee for renewal of apprenticeship registration shall be one hundred dollars (\$100.00).

(f) The Board shall adopt rules and regulations implementing initial and renewal registration of apprentices. (1969, c. 999; 1973, c. 1345, s. 4; 1981, c. 601, ss. 10-15; 1981, 2nd Sess., c. 990, s. 3.)

Effect of Amendments. — The first 1981 amendment rewrote subsections (a) and (f) and, in subsection (b), deleted "as provided under G.S. 93D-5(a)" following "application," substituted "fifty-five dollars (\$55.00)" for "five dollars (\$5.00)" and substituted "register the applicant as an apprentice for" "issue an apprenticeship license." The amendment substituted "apprentice shall be registered" for "apprenticeship license shall be issued" in subsection (c) and, in subsection (d), substituted "18" for "21", substituted "is registered as an apprentice" for "holds an apprenticeship license issued" and substituted "registration" for

"apprenticeship license." In subsection (e), the amendment substituted "is registered as an apprentice" for "holds an apprenticeship license" and "registration" for "apprenticeship license" in the first sentence and, in the second sentence, substituted "renewal of apprenticeship registration" for "apprenticeship license renewal" and "fifty dollars (\$50.00)" for "twenty-five dollars (\$25.00)."

The second amendment substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" at the end of the second sentence of subsection (e).

§ 93D-10. Registration and notice.

The Board shall register each apprentice and each person to whom it grants a license. The secretary-treasurer of the Board shall keep a record of the place of business of all licensees and apprentices. Any notice required to be given by the Board to a person holding a license or apprenticeship registration may be given by mailing to him at the last address received by the Board from him. (1969, c. 999; 1981, c. 601, s. 16.)

Effect of Amendments. — The 1981 amendment, in the first sentence, inserted "each apprentice and" and deleted "or apprentice license" at the end of the sentence, in the second

sentence substituted "apprentices" for "apprentice licensees" and, in the third sentence, substituted "apprenticeship registration" for "apprentice license."

§ 93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.

Every licensed person who engages in the fitting and selling of hearing aids shall pay to the Board an annual license renewal fee of one hundred dollars (\$100.00). Such payment shall be made prior to the first day of April in each year. In case of default in payment the license shall expire 30 days after notice by the secretary-treasurer to the last known address of the licensee by registered mail. The Board may reinstate an expired license upon the showing of good cause for late payment of fees, upon payment of said fees within 60 days after expiration of the license, and upon the further payment of a late penalty of ten dollars (\$10.00). After 60 days after the expiration date, the Board may reinstate the license for good cause shown upon application for reinstatement and payment of the late penalty of ten dollars (\$10.00) and renewal fee. The Board may require all licensees to successfully attend and complete a course or courses of occupational instruction funded, conducted or approved or sponsored by the Board on an annual basis as a condition to any license renewal and evidence of satisfactory attendance and completion of any such course or courses shall be provided the Board by the licensee. (1969, c. 999; 1975, c. 550, s. 3; 1979, c. 848; 1981, c. 601, s. 17; 1981, 2nd Sess., c. 990, s. 4.)

Effect of Amendments. — The first 1981 amendment, in the first sentence, inserted "licensed" preceding "person."

The second 1981 amendment substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" at the end of the first sentence.

§ 93D-12. License to be displayed at office.

Every person to whom a license or apprenticeship registration is granted shall display the same in a conspicuous part of his office wherein the fitting and selling of hearing aids is conducted, or shall have a copy of such license or apprenticeship registration on his person and exhibit the same upon request when fitting or selling hearing aids outside of his office. (1969, c. 999; 1981, c. 601, s. 18.)

Effect of Amendments. — The 1981 amendment substituted "apprenticeship registration"

for "apprentice license" in both places in which those words appear.

§ 93D-13. Discipline, suspension, revocation of licenses.

(a) The Board may in its discretion administer the punishment of private reprimand, suspension of license for a fixed period or revocation of license as the case may warrant in their judgment for any violation of the rules and regulations of the Board or for any of the following causes:

- (1) Habitual drunkenness
- (2) Gross incompetence
- (3) Knowingly fitting and selling hearing aids while suffering with a contagious or infectious disease
- (4) Commission of a criminal offense indicating professional unfitness
- (5) The use of a false name or alias in his business
- (6) Conduct involving willful deceit
- (7) Conduct involving fraud or any other business conduct involving moral turpitude
- (8) Advertising of a character or nature tending to deceive or mislead the public
- (9) Advertising declared to be unethical by the Board or prohibited by the code of ethics established by the Board

(10) Permitting another person to use his license,

(10a) Failure by a licensee to properly supervise an apprentice under his supervision, and

(11) For violating any of the provisions of this Chapter.

(b) Board action in revoking or suspending a license shall be in accordance with the provisions of Chapter 150A of the General Statutes. Any person whose license has been suspended for any of the grounds or reasons herein set forth, may, after the expiration of 90 days but within two years, apply to the Board to have the same reissued; upon a showing satisfactory to the Board that such reissuance will not endanger the public health and welfare, the Board may reissue a license to such person for a fee of one hundred dollars (\$100.00) plus five dollars (\$5.00) for a certificate of license. If application is made subsequent to two years from date of suspension, reissuance shall be in accordance with the provisions of G.S. 93D-8. (1969, c. 999; 1973, c. 1331, s. 3; 1981, c. 601, s. 19; 1981, 2nd Sess., c. 990, s. 5.)

Effect of Amendments. — The first 1981 amendment, in subsection (a), deleted the words "or apprentice license" following "license" both places it appears in the introductory clause, deleted "or apprentice license, and" at the end of subdivision (10) and added subdivision (10a).

The second 1981 amendment substituted

"one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" near the end of the second sentence of subsection (b).

Legal Periodicals. — For an article entitled, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

§ 93D-15. Violation of Chapter.

Any person who violates any of the provisions of this Chapter and any person who holds himself out to the public as a fitter and seller of hearing aids without having first obtained a license or apprenticeship registration as provided for herein shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars (\$1,000) nor less than five hundred dollars (\$500.00) or imprisonment for not more than six months, or both, in the discretion of the court. (1969, c. 999; 1981, c. 601, s. 20.)

Effect of Amendments. — The 1981 amendment substituted "apprenticeship registration" for "apprentice license."

Chapter 95.

Department of Labor and Labor Regulations.

Article 2A.

Wage and Hour Act.

Sec.

- 95-25.2. Definitions.
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- 95-98.1. Strikes by public employees prohibited.
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ARTICLE 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

Legal Periodicals. — For note on worker's compensation and retaliatory discharge, see 58 N.C. L. Rev. 629 (1980).

§ 95-25.2. Definitions.

In this Article, unless the context otherwise requires:

- (1) "Agriculture" includes farming in all its branches performed by a farmer or on a farm as an incident to or in conjunction with farming operations.
- (2) "Commissioner" means the Commissioner of Labor.
- (3) "Employ" means to suffer or permit to work.
- (4) "Employee" includes any individual employed by an employer.
- (5) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.
- (6) "Establishment" means a physical location where business is conducted.
- (7) "The Fair Labor Standards Act" means the Fair Labor Standards Act of 1938, as amended and as the same may be amended from time to time by the United States Congress.
- (8) "Hours worked" includes all time an employee is employed.
- (9) "Payday" means that day designated for payment of wages due by virtue of the employment relationship.
- (10) "Pay period" means a period of seven or 14 calendar days, or a calendar month.
- (11) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. For the purposes of G.S. 95-25.2, G.S. 95-25.3, G.S. 95-25.14, and G.S. 95-25.20, it also means the State of North Carolina, any city,

town, county, or municipality, or any State or local agency or instrumentality of government. The Government of the United States and any agency of the United States (including the United States Postal Service and Postal Rate Commission) are not included as persons for any purpose under this Article.

- (12) "Seasonal food service establishment" means a restaurant, food and drink stand or other establishment generally recognized as a commercial food service establishment, preparing and serving food to the public but operating 180 days or less per year.
- (13) "Seasonal religious assembly or a seasonal amusement or recreational establishment" means an establishment which does not operate for more than seven months in any calendar year, or during the preceding calendar year had average receipts for any six months of such year of not more than thirty-three and one-third percent ($33\frac{1}{3}\%$) of its average receipts for the other six months of that year.
- (14) "Tipped employee" means any employee who customarily receives more than twenty dollars (\$20.00) a month in tips.
- (15) "Tip" shall mean any money or part thereof over and above the actual amount due a business for goods, food, drink, services or articles sold which is paid in cash or by credit card, or is given to or left for an employee by a patron or patrons of the business where the employee is employed.
- (16) "Wage" paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities. For the purposes of G.S. 95-25.6 through G.S. 95-25.12, "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.
- (17) "Workweek" means any period of 168 consecutive hours.
- (18) "Enterprise" means the related activities performed either through unified operations or common control by any person or persons for a common business purpose and includes all such activities whether performed in one or more establishments or by one or more corporate units but shall not include the related activities performed for such enterprise by an independent contractor or franchisee. (1959, c. 475; 1961, c. 652; 1969, c. 34, s. 2; c. 218; 1971, c. 1231, s. 1; 1975, c. 413, s. 1; c. 605; 1977, c. 653; c. 672, s. 1; c. 826, s. 1; 1979, c. 839, s. 1; 1981, c. 663, ss. 10, 11.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, in the second sentence of subdivision (11), inserted "G.S. 95-25.2" and "G.S. 95-25.14, and G.S. 95-25.20," substituted "any" for "a" preceding "city,"

deleted "other" preceding "municipality," and inserted "any State or local," added the third sentence of subdivision (11) and added subdivision (18).

§ 95-25.3. Minimum wage.

(a) Every employer shall pay to each employee who in any workweek performs any work, wages of at least two dollars and seventy-five cents (\$2.75) per hour effective July 1, 1979, two dollars and ninety cents (\$2.90) per hour effective July 1, 1980, three dollars and ten cents (\$3.10) per hour effective January 1, 1982 and three dollars and thirty-five cents (\$3.35) per hour effective January 1, 1983 except as authorized below.

(b) In order to prevent curtailment of opportunities for employment, the wage rate for full-time students, learners, apprentices, and messengers, as defined under the Fair Labor Standards Act, shall be ninety percent (90%) of the rate in effect under subsection (a) above, rounded to the lowest nickel.

(c) The Commissioner, in order to prevent curtailment of opportunities for employment, may, by regulation, establish a wage rate less than the wage rate in effect under subsection (a) which may apply to persons whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, as such persons are defined under the Fair Labor Standards Act.

(d) The Commissioner, in order to prevent curtailment of opportunities for employment of the economically disadvantaged and the unemployed, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to all persons (i) who have been unemployed for at least 15 weeks and who are economically disadvantaged, or (ii) who are, or whose families are, receiving aid to families with dependent children provided under Part A of Title IV of the Social Security Act, or who are receiving supplemental security benefits under Title XVI of the Social Security Act.

Pursuant to regulations issued by the Commissioner, certificates establishing eligibility for such subminimum wage shall be issued by the Employment Security Commission.

The regulation issued by the Commissioner shall not permit employment at the subminimum rate for a period in excess of 52 weeks.

(e) The Commissioner, in order to prevent curtailment of opportunities for employment, and to not adversely affect the viability of seasonal establishments, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to any employee unemployed by an establishment which is a seasonal religious assembly, a seasonal amusement or recreational establishment, or a seasonal food service establishment.

(f) Tips earned by a tipped employee may be counted as wages only up to fifty percent (50%) of the applicable minimum wage for each hour worked if the tipped employee is notified in advance, is permitted to retain all tips and the employer maintains accurate and complete records of tips received by each employee as such tips are certified by the employee monthly or for each pay period. Tip pooling shall also be permissible among employees who customarily and regularly receive tips; however, no employee's tips may be reduced by more than fifteen percent (15%) under a tip pooling arrangement. (1959, c. 475; 1963, c. 816; 1965, c. 229; 1969, c. 34, s. 1; 1971, c. 138; 1973, c. 802; 1975, c. 256, s. 1; 1977, c. 519; 1979, c. 839, s. 1; 1981, c. 493, s. 1; c. 663, s. 13.)

Effect of Amendments. — The first 1981 amendment, effective January 1, 1982, in subsection (a), deleted "and" following "1979" and inserted the language beginning "three dollars" and ending "January 1, 1983."

The second 1981 amendment, effective October 1, 1981, in subsection (b), substituted

the language following "shall be" for "two dollars and forty-five cents (\$2.45) per hour, except that the commissioner may vary the amount after publishing notice, holding a public hearing, and following the other requirements of Chapter 150A (Administrative Procedure Act)."

§ 95-25.5. Youth employment.

(a) No youth under 18 years of age shall be employed by any employer in any occupation without a youth employment certificate unless specifically exempted. The Commissioner of Labor shall prescribe regulations for youths and employers concerning the issuance, maintenance and revocation of certificates. Certificates will be issued by county directors of social services, subject to review by the Department of Labor; provided, the Commissioner may by

regulation require that the Department of Labor issue certificates for occupations with unusual or unique characteristics.

(b) No youth under 18 years of age may be employed by an employer in any occupation which the United States Department of Labor shall find and by order declare to be hazardous and without exemption under the Fair Labor Standards Act, or in any occupation which the Commissioner of Labor after public hearing shall find and declare to be detrimental to the health and well-being of youths.

(c) No youth 14 or 15 years of age may be employed by an employer in any occupation except those determined by the United States Department of Labor to be permitted occupations under the Fair Labor Standards Act; provided, such youths may be employed by employers:

- (1) No more than three hours on a day when school is in session for the youth, except that the youth may work up to six hours on the last day of the school week;
- (2) No more than eight hours on a day when school is not in session for the youth;
- (3) Only between 7 A.M. and 7 P.M., except to 9 P.M. when there is no school for the youth the next day; and
- (4) No more hours per week than the following:

Days school in session for the youth	Weekly hours
5	18
4	26
3	34
2 or less	40

(d) No youth 13 years of age or less may be employed by an employer, except youths 12 and 13 years of age may be employed outside school hours in the distribution of newspapers to the consumer but not more than three hours per day. An employment certificate shall not be required for any youth under 18 years of age engaged in the distribution of newspapers to the consumer outside of school hours.

(e) No youth under 16 years of age shall be employed for more than five consecutive hours without an interval of at least 30 minutes for rest. No period of less than 30 minutes shall be deemed to interrupt a continuous period of work.

(f) For any youth 13 years of age or older, the Commissioner may waive any provision of this section and authorize the issuance of an employment certificate when:

- (1) He receives a letter from a social worker, court, probation officer, county department of social services, a letter from the North Carolina Alcohol Beverage Control Commission or school official stating those factors which create a hardship situation and how the best interest of the youth is served by allowing a waiver; and
- (2) He determines that the health or safety of the youth would not be adversely affected; and
- (3) The parent, guardian, or other person standing in loco parentis consents in writing to the proposed employment.

(g) Youths employed as models, or as actors or performers in motion pictures or theatrical productions, or in radio or television productions are exempt from all provisions of this section except the certificate requirements of subsection (a).

(h) Youths employed by an outdoor drama directly in production-related positions such as stagehands, lighting, costumes, properties and special effects are exempt from all provisions of this section except the certificate require-

ments of subsection (a). Positions such as office workers, ticket takers, ushers and parking lot attendants have no exemption and are subject to all provisions of this section.

(i) Youths under 16 years of age employed by their parents are exempt from all provisions of this section, except the certificate requirements of subsection (a), the prohibition from hazardous or detrimental occupations of subsections (b), and the prohibitions of subsection (j).

(j) No person who holds any ABC permit issued pursuant to the provisions of Chapter 18B of the General Statutes for the on-premises sale or consumption of intoxicating liquors, including any mixed beverages, shall employ a youth:

(1) Under 16 years of age on the premises for any purpose;

(2) Under 18 years of age to prepare, serve, dispense or sell any intoxicating liquors, including mixed beverages.

(k) Persons and establishments required to comply with or subject to regulation of child labor under the Fair Labor Standards Act are exempt from all provisions of this section, except the certificate requirements of subsection (a), the prohibition from occupations found and declared to be detrimental by the Commissioner of Labor pursuant to subsection (b), and the prohibitions of subsection (j). In addition, employment certificates will not be issued if such person's employment will be in violation of the applicable child labor provisions of the Fair Labor Standards Act. Such employers may also be assessed civil penalties pursuant to G.S. 95-25.23 for each violation of the provisions of this section or any regulation issued hereunder from which there is no exemption. (1937, c. 317, ss. 1-3, 6, 9, 18; 1943, c. 670; 1951, c. 1187, s. 1; 1967, cc. 173, 764; 1969, c. 962; 1973, c. 649, s. 1; c. 758, s. 1; 1977, c. 551, ss. 1-4; 1979, c. 839, s. 1; 1981, c. 412, s. 3; c. 489, ss. 1-7.)

Effect of Amendments.

The 1981 amendment, effective July 1, 1981, rewrote subsections (a) and (b), substituted the present introductory clause of subsection (c) for one which read "An employer may employ minors 14 and 15 years old," substituted "youth" for "minor" wherever it appears in subdivisions (c)(1) through (c)(4) and, in subsection (d), substituted the language beginning "No youth" and ending "employed" for "An employer may employ minors 12 and 13 years of age" in the first sentence and substituted "youth" for "person" in the second sentence. The amendment substituted "youth" for "minor" in the first sentence of subsection (e) and, in subsection (f), substituted "For any youth 13 years of age or older, the Commissioner may waive" for "The Commissioner may waive for any minor over 12 years of age" in the introductory clause, inserted "a letter from the North

Carolina Alcohol Beverage Control Commission" and substituted "and how the best interest of the youth is served by allowing a waiver" for "when the best interests of a minor 12 years of age or older are served by allowing him to work" in subdivision (1) and substituted "youth" for "minor" in subdivision (2). Subsections (g) through (k) were added by the amendment.

Pursuant to Session Laws 1981, c. 412, s. 3, "Chapter 18B" has been substituted for "Chapter 18A" in subsection (j).

Legal Periodicals. — For an article entitled, "A History of Liquor-By-The-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

For note on worker's compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

§ 95-25.7. Payment to separated employees.

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture. (1975, c. 413, s. 4; 1979, c. 839, s. 1; 1981, c. 663, s. 1.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, added the second though fourth sentences.

§ 95-25.8. Withholding of wages.

An employer may withhold or divert any portion of an employee's wages when:

- (1) The employer is required or empowered to do so by State or federal law, or
- (2) The employer has a written authorization from the employee which is signed on or before the payday for the pay period from which the deduction is to be made indicating the reason for the deduction. Two types of authorization are permitted:
 - a. When the amount or rate of the proposed deduction is known and agreed upon in advance, the authorization shall specify the dollar amount or percentage of wages which shall be deducted from one or more paychecks, provided that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization;
 - b. When the amount of the proposed deduction is not known and agreed upon in advance, the authorization need not specify a dollar amount which can be deducted from one or more paychecks, provided that the employee receives advance notice of the specific amount of any proposed deduction and is given a reasonable opportunity to withdraw the authorization before the deduction is made. (1975, c. 413, s. 6; 1979, c. 839, s. 1; 1981, c. 663, s. 2.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, added the language beginning "indicating" at the end of the

first sentence of subdivision (2), added the second sentence of subdivision (2) and added subdivisions (2)a and (2)b.

§ 95-25.9. Certain claims not to be deducted immediately.

Cash shortages, inventory shortages, or loss or damage to an employer's property may not be deducted from an employee's wages unless the employee receives notice of the amount to be deducted at least seven days prior to the payday on which the deduction is to be made, except when a separation occurs the seven-day notice is not required. (1979, c. 839, s. 1; 1981, c. 663, s. 3.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, deleted "Except as otherwise provided in this Article" at the beginning of the sentence, inserted "or loss"

and substituted the language following "wages" for "due on the payday immediately following the occurrence of the shortage or damage."

§ 95-25.10. Combined amounts of certain deductions and recoupments limited.

Cash shortages, inventory shortages, loss or damage to an employer's property, and deposits by the employee for the use of the employer's property may be deducted by an employer from an employee's paycheck in accordance with the requirements of G.S. 95-25.8 and G.S. 95-25.9 or may be recouped by methods other than payroll deductions, provided that the combined amount of such deductions or recoupments shall not reduce wages for the pay period during which the deduction or recoupment occurs below:

- (1) Eighty-five percent (85%) of the minimum and overtime wages required under this Article when such wages for the employee are determined under this Article, or
- (2) The minimum and overtime wages required under the Fair Labor Standards Act when such wages for the employee are determined under that Act, or
- (3) An amount equivalent to the amount of minimum and overtime wages which would be required under this Article when the wages for an employee are determined neither by this Article nor by the Fair Labor Standards Act.

Nothing in this section shall prohibit the voluntary repayment of any amount owed by an employee to an employer. (1979, c. 839, s. 1; 1981, c. 663, s. 4.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, rewrote this section which formerly limited the combined

amounts of certain deductions to fifteen percent of gross pay.

§ 95-25.11. Employers' remedies preserved.

(a) The provisions of G.S. 95-25.8, G.S. 95-25.9, and G.S. 95-25.10 do not apply if criminal process has issued against the employee, if the employee has been indicted, or if the employee has been arrested pursuant to Articles 17, 20, 32 of Chapter 15A of the General Statutes for a charge incident to a cash shortage, inventory shortage, or damage to an employer's property.

If the employee is not found guilty, then the amount deducted shall be reimbursed to the employee by the employer.

(b) Nothing in this Article shall preclude an employer from bringing a civil action in the General Court of Justice to collect any amounts due the employer from the employee. (1979, c. 839, s. 1; 1981, c. 663, s. 5.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, substituted subsection (a) for a former first paragraph which concerned applicability of a fifteen

percent limitation on amounts of certain deductions, designated the second paragraph as subsection (b), and substituted "a civil" for "an" in subsection (b).

§ 95-25.12. Vacation pay.

No employer is required to provide vacation for employees. However, if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees shall be notified in accordance with G.S. 95-25.13 of any policy or practice which requires or results in loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss or forfeiture. (1979, c. 839, s. 1; 1981, c. 663, s. 6.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, in the first sentence, substituted "No" for "An", deleted "not" preceding "required" and substituted "vacation" for "vacations" and, in the second sentence, inserted "However", substituted "an" for "the" following "if", substituted "vacation for"

for "vacations to", substituted "give all vacation time off" for "pay all vacation pay", substituted "in accordance with the" for "as required by" and deleted "past" preceding "practice." The amendment added the third and fourth sentences and deleted former second and third paragraphs which concerned accrual policies.

§ 95-25.13. Notification, posting, and records.

Every employer shall:

- (1) Notify his employees, orally or in writing at the time of hiring, of the rate of pay, policies on vacation time and pay, sick leave and comparable matters, and the day, and place for payment of wages;
- (2) Make available to his employees, in writing or through a posted notice maintained in a place accessible to his employees, employment practices and policies with regard to vacation pay, sick leave, and comparable matters;
- (3) Notify his employees, in writing or through a posted notice maintained in a place accessible to his employees, of any changes in the arrangements specified in (2) above prior to the time of such changes except that wages and benefits may be retroactively increased without the prior notice required by this subsection; and
- (4) Furnish each employee with an itemized statement of deductions made from his wages under G.S. 95-25.8 for each pay period such deductions are made. (1975, c. 413, s. 7; 1979, c. 839, s. 1; 1981, c. 663, s. 12.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, substituted "(2)" for "(b)" in subdivision (3).

§ 95-25.14. Exemptions.

(a) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), G.S. 95-25.5 (Youth Employment), and G.S. 95-25.15(b) (Record Keeping) as it relates to these exemptions do not apply to:

- (1) Any person or establishment required to comply with or subject to the regulation of wages, overtime, child labor and related record keeping under the Fair Labor Standards Act, except as otherwise specifically provided in G.S. 95-25.5;
- (2) Any person employed in agriculture, as defined under the Fair Labor Standards Act;
- (3) Any person employed as a domestic, including baby sitters and companions, as defined under the Fair Labor Standards Act;
- (4) Any person employed as a page in the North Carolina General Assembly or in the Governor's Office;
- (5) Bona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist;
- (6) Persons confined in and working for any penal, correctional or mental institution of the State or local government;
- (7) Any person employed as a model, or as an actor or performer in motion pictures or theatrical, radio or television productions, as defined under the Fair Labor Standards Act, except as otherwise specifically provided in G.S. 95-25.5;
- (8) Any person employed by an outdoor drama in a production role, including lighting, costumes, properties and special effects, except as otherwise specifically provided in G.S. 95-25.5; but this exemption does not include such positions as office workers, ticket takers, ushers and parking lot attendants.

(b) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.15(b) (Record Keeping) as it relates to these exemptions do not apply to:

- (1) Any employee of a boys' or girls' summer camp;
 - (2) Any person employed in the catching, processing or first sale of seafood, as defined under the Fair Labor Standards Act;
 - (3) The spouse, child, or parent of the employer or any person qualifying as a dependent of the employer under the income tax laws of North Carolina;
 - (4) Any person employed in a bona fide executive, administrative, professional or outside sales capacity, as defined under the Fair Labor Standards Act;
 - (5) Any person employed in an enterprise that does not have three or more employees in any workweek;
 - (6) Any person while participating in a ridesharing arrangement as defined in G.S. 136-44.21.
- (c) The provisions of G.S. 95-25.4 (Overtime) and G.S. 95-25.15(b) (Record Keeping) as it relates to this exemption do not apply to:
- (1) Drivers, drivers' helpers, loaders and mechanics, as defined under the Fair Labor Standards Act;
 - (2) Taxicab drivers;
 - (3) Seamen, employees of railroads, and employees of air carriers, as defined under the Fair Labor Standards Act;
 - (4) Salespersons, mechanics and partsmen employed by automotive, truck, and farm implement dealers, as defined under the Fair Labor Standards Act;
 - (5) Salespersons employed by trailer, boat, and aircraft dealers, as defined under the Fair Labor Standards Act;
 - (6) Live-in child care workers or other live-in employees in homes for dependent children;
 - (7) Radio and television announcers, news editors, and chief engineers, as defined under the Fair Labor Standards Act.
- (d) The provisions of this Article do not apply to the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, except for the following provisions, which do apply:
- (1) The minimum wage provisions of G.S. 95-25.3;
 - (2) The definition provisions of G.S. 95-25.2 necessary to interpret the applicable provisions;
 - (3) The exemptions of subsections (a) and (b) of this section;
 - (4) The complainant protection provisions of G.S. 95-25.20.
- (e) Employment in a seasonal recreation program by the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, is exempt from all provisions of this Article, including G.S. 95-25.3 (Minimum Wage). (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057; 1959, cc. 475, 629; 1961, cc. 602, 1070; 1963, c. 1123; 1965, c. 724; 1967, c. 998; 1973, c. 600, s. 1; 1975, c. 19, s. 26; c. 413, s. 2; 1977, c. 146; 1979, c. 839, s. 1; 1981, c. 493, s. 2, c. 606, s. 2; c. 663, s. 7.)

Effect of Amendments. — The first 1981 amendment, effective Jan. 1, 1982, substituted "three" for "four" in subdivision (a)(6) as it stood before the third 1981 amendment, which was similar to subdivision (b) (5) in the section as set out above.

The second 1981 amendment added to subsection

(b) as it stood before the third 1981 amendment a new subdivision (5), identical to subdivision (6) in subsection (b) as set out above.

The third 1981 amendment, effective Oct. 1, 1981, rewrote the section to read as set out above.

§ 95-25.20. Complainants protected.

(a) No employer shall discharge or in any manner discriminate against any employee because the employee files a complaint or participates in any investigation or proceeding under this Article. Any employee who believes that he has been discharged or otherwise discriminated against in violation of this section may, within 60 days after such violation occurs, file a complaint with the Commissioner alleging such discrimination. If the Commissioner determines that the provisions of this section have been violated, he shall bring an action against the employer in the superior court division of the General Court of Justice in the county wherein the discharge or discrimination occurred. In any such action, the superior court shall have jurisdiction, for cause shown, to restrain violations of this section and order all appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay.

(b) Files and other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G.S. 132-6 while such investigations and proceedings are pending. (1979, c. 839, s. 1; 1981, c. 663, s. 8.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, designated the former section as subsection (a), substituted

"60" for "30" in the second sentence thereof and added subsection (b).

§ 95-25.23. Violation of youth employment; civil penalty.

(a) Any employer who violates the provisions of G.S. 95-25.5 (Youth Employment) or any regulation issued thereunder, shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250.00) for each violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The determination by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding pursuant to Article 3 of Chapter 150A and in a judicial proceeding pursuant to Article 4 of Chapter 150A.

(b) The amount of such penalty when finally determined may be recovered in a civil action brought by the Commissioner in the General Court of Justice.

(c) Sums collected under this section by the Commissioner shall be paid into the General Fund of the State Treasury.

(d) Assessment of penalties under this section shall be subject to a two-year statute of limitations commencing at the time of the occurrence of the violation. (1979, c. 839, s. 1; 1981, c. 663, s. 9.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, added subsection (d).

ARTICLE 4A.

*Voluntary Arbitration of Labor Disputes.***§ 95-36.8. Enforcement of arbitration agreement and award.**

CASE NOTES

Stated in *Tucker v. General Tel. Co.*, 50 N.C. App. 112, 272 S.E.2d 911 (1980).

ARTICLE 7A.

*Uniform Boiler and Pressure Vessel Act.***§ 95-69.10. Application of Article; exemptions.**

(a) This Article shall apply to all boilers and pressure vessels constructed, used, or designed for operation in this State including all new and existing installations which are operated in connection with business buildings, institutional buildings, industrial buildings, assembly buildings, educational buildings, public residential buildings, recreation buildings, and other public buildings. This Article shall also apply to boilers and hot water supply tanks, and heaters located in hotels, motels, tourist courts, camps, cottages, resort lodges, and similar places whenever the owner or operator advertises in any manner for transit patronage, or solicits such business for temporary abode by transit patrons.

(b) This Article shall not apply to:

- (1) Boilers and pressure vessels owned and/or operated by the federal government;
- (2) Pressure vessels used for transportation or storage of compressed gases when constructed in compliance with the specifications of the U.S. Department of Transportation and when charged with gas marked, maintained, and periodically requalified for use, as required by appropriate regulations of the U.S. Department of Transportation;
- (3) To portable boilers and pressure vessels used for agricultural purposes only or for pumping or drilling in an open field for water, gas or coal, gold, talc or other minerals and metals;
- (4) Boilers and pressure vessels which are located in private residences or in apartment houses of less than six families;
- (5) Pressure vessels used for transportation or storage of liquefied petroleum gas;
- (6) Air tanks located on vehicles licensed under the rules and regulations of other state authorities operating under rules and regulations substantially similar to those of this State and used for carrying passengers or freight within interstate commerce;
- (7) Air tanks installed on right-of-way of railroads and used directly in the operation of trains;
- (8) Pressure vessels that do not exceed five cubic feet in volume and 250 PSIG pressure; or one and one-half cubic feet in volume and 600 PSIG pressure; or an inside diameter of six inches with no limitations on pressure;

(9) Pressure vessels operating at a working pressure not exceeding 15 PSIG pressure;

(10) Pressure vessels with a nominal water capacity of 120 gallons or less and containing water under pressure at ambient temperature, including those containing air, the compression of which serves as a cushion;

(11) Boilers and pressure vessels on railroad steam locomotives that are subject to federal safety regulations.

(c) The construction and inspection requirements established by the Department of Labor shall not apply to hot water supply boilers which are directly fired with oil, gas or electricity, or hot water supply tanks heated by steam or any other indirect means, which do not exceed any of the following limitations:

(1) Heat input of 200,000 BTU HR;

(2) Water temperature of 200 degrees F;

(3) Nominal water capacity of 120 gallons;

provided that they are equipped with ASME Code and National Board certified safety relief valves.

(d) The construction requirements established by the Department of Labor shall not apply to pressure vessels installed in this State prior to December 31, 1981, that:

(1) Are of one-piece, forged construction and have no weldments;

(2) Are constructed before January 1, 1981, and operating or could be operated, under the laws of any state that has adopted one or more sections of the ASME Code;

(3) Are transferred into this State without a change of ownership; and

(4) Are determined by the director to be constructed under standards substantially equivalent to those established by the department at the time of transfer;

provided that they are equipped with ASME Code and National Board certified safety relief valves. (1975, c. 895, s. 3; 1979, c. 920, ss. 1, 2; 1981, c. 591.)

Effect of Amendments. — The 1981 amendment added subsection (d).

ARTICLE 10.

Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy.

Legal Periodicals. — For an article entitled, "Right-To-Work Laws in the Southern States," see 59 N.C.L. Rev. 29 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

CASE NOTES

Quoted in National Right to Work Legal Defense & Educ. Foundation, Inc. v. United States, 487 F. Supp. 801 (E.D.N.C. 1979).

§ 95-81. Nonmembership as condition of employment prohibited.

Legal Periodicals. — For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

§ 95-83. Recovery of damages by persons denied employment.

Legal Periodicals. — For note on worker's compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

ARTICLE 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-97. Employees of units of government prohibited from becoming members of trade unions or labor unions.

Legal Periodicals. — For an article entitled, "Public Employee Labor Relations in the Southeast — An Historical Perspective," see 59 N.C.L. Rev. 71 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Legal Periodicals. — For an article entitled, "Public Employee Labor Relations in the Southeast — An Historical Perspective," see 59 N.C.L. Rev. 71 (1980).

For an article entitled, "The Southern Public Employee Unions' Constitutional Card:

Utilization of the Equal Protection Clause," see 59 N.C.L. Rev. 85 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

§ 95-98.1. Strikes by public employees prohibited.

Strikes by public employees are hereby declared illegal and against the public policy of this State. No person holding a position either full- or part-time by appointment or employment with the State of North Carolina or in any county, city, town or other political subdivision of the State of North Carolina, or in any agency of any of them, shall willfully participate in a strike by public employees. (1981, c. 958, s. 1.)

Editor's Note. — Session Laws 1981, c. 958, s. 2, contains a severability clause.

§ 95-98.2. Strike defined.

The word "strike" as used herein shall mean a cessation or deliberate slowing down of work by a combination of persons as a means of enforcing compliance with a demand upon the employer, but shall not include protected activity under Article 16 of this Chapter: Provided, however, that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to the conditions of public employment so long as the same is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment. (1981, c. 958, s. 1.)

Editor's Note. — Session Laws 1981, c. 958, s. 2, contains a severability clause.

§ 95-99. Penalty for violation of Article.

Legal Periodicals. — For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

§ 95-100. No provisions of Article 10 of Chapter 95 applicable to units of government or their employees.

Legal Periodicals. — For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

ARTICLE 15.

Passenger Tramway Safety.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 95-116. Declaration of policy.

Cross References. — As to actions relating to skier safety and skiing accidents, see §§ 99C-1 through 99C-5.

§ 95-120. Powers and duties of the Commissioner.

Cross References. — As to duties of ski operators and skiers, see § 99C-2.

ARTICLE 16.

Occupational Safety and Health Act of North Carolina.

§ 95-126. Short title and legislative purpose.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

§ 95-127. Definitions.

CASE NOTES

Serious Violation. — The evidence supported a determination by the Safety and Health Review Board that respondent was guilty of a serious and repeated Occupational Safety and Health Act violation in failing to slope to adequate angle of repose or provide adequate shoring for sewer line trench in hard or compact soil more than five feet in depth at job site on April 21, 1977, where it showed that the trench in question was eight feet deep and

at least eight feet in length; there was no sloping or shoring or wall support of any kind; and respondent had paid a fine for failing properly to shore, slope or otherwise protect the sides of a trench in 1974, although the 1974 violation was for work in soft or unstable soil rather than in hard or compact soil. *Brooks v. McWhirter Grading Co.*, 49 N.C. App. 352, 271 S.E.2d 568 (1980).

§ 95-130. Rights and duties of employees.

Legal Periodicals. — For note on worker's compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

§ 95-135. Safety and Health Review Board.

CASE NOTES

Board Complied with Authority. — In an appeal from a decision of a hearing examiner that respondent's violation of the Occupational Safety and Health Act was not repeated and serious and merited no penalty, the Safety and Health Review Board complied with its function and authority to adopt, modify or vacate the order of the hearing examiner where the board's order restated the findings of fact made

by the hearing examiner almost verbatim, narrated some of the evidence, and made additional findings, and where the decision portion of the order modified the order of the hearing examiner so as to conclude that the cited violation was repeated and serious and justified a penalty of \$2,500. *Brooks v. McWhirter Grading Co.*, 49 N.C. App. 352, 271 S.E.2d 568 (1980).

§ 95-136. Inspections.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

(c) Salaries. — The North Carolina Employment Security Commission shall determine the salaries of its members and its employees who receive compensation for services rendered in traveling to and from the place of meeting while engaged in the discharge of their duties and his actual traveling expenses.

(d) Quorum. — The chairman and three members of the Commission shall constitute a quorum.

Effect of Amendment to 1981. — This act shall take effect on July 1, 1981.

§ 95-136. Inspections. — The North Carolina Employment Security Commission shall determine the salaries of its members and its employees who receive compensation for services rendered in traveling to and from the place of meeting while engaged in the discharge of their duties and his actual traveling expenses.

Effect of Amendment to 1981. — This act shall take effect on July 1, 1981.

§ 95-136. Declaration of State Public Policy

(a) Duties and Powers. — The North Carolina Employment Security Commission shall have the duty and power to make such investigations and examinations as may be necessary to carry out its functions.

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

Sec.

96-3. Employment Security Commission.

96-4. Administration.

96-5. Employment Security Administration Fund.

Article 2.

Unemployment Insurance Division.

96-8. Definitions.

Sec.

96-9. Contributions.

96-10. Collection of contributions.

96-12. Benefits.

96-13. Benefit eligibility conditions.

96-14. Disqualification for benefits.

96-15. Claims for benefits.

96-17. Protection of rights and benefits.

96-18. Penalties.

ARTICLE 1.

Employment Security Commission.

§ 96-1. Title.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

§ 96-2. Declaration of State public policy.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

§ 96-3. Employment Security Commission.

(a) Organization. — There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The Commission shall consist of seven members to be appointed by the Governor on or before July 1, 1941. The Governor shall have the power to designate the member of said Commission who shall act as the chairman thereof. The chairman of the Commission shall not engage in any other business, vocation or employment. Three members of the Commission shall be appointed by the Governor to serve for a term of two years. Three members shall be appointed to serve for a term of four years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four years each, thereafter, and the member of said Commission designated by the Governor as chairman shall serve at the pleasure of the Governor. Any member appointed to fill a vacancy occurring in any of the appointments made by the Governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The Governor may at any time after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions. — The Commission shall establish two coordinate divisions: the North Carolina State Employment Service Division, created pursuant to G.S. 96-20, and the Unemployment Insurance Division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be

a separate administrative unit with respect to personnel and duties, except insofar as the Commission may find that such separation is impracticable. Notwithstanding any other provision of this Chapter, administrative organization of the agency shall be in accordance with that which the Commission finds most desirable in order to perform the duties and functions of the agency.

(c) **Salaries.** — The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the Governor subject to the approval of the Advisory Budget Commission; and the members of the Commission, other than the chairman, shall each receive the same amount per diem for their services as is provided for the members of other State boards, commissions, and committees who receive compensation for their services as such, including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) **Quorum.** — The chairman and three members of the Commission shall constitute a quorum. (Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1; 1953, c. 401, s. 1; 1957, c. 541, s. 5; 1965, c. 795, s. 1; 1977, c. 727, s. 7; 1979, c. 660, s. 1; 1981, c. 354.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, in the sixth sentence of subsection (a), substituted "serve at the

pleasure of the Governor" for "be appointed for a term of four years from and after his appointment."

§ 96-4. Administration.

(a) **Duties and Powers of Commission.** — It shall be the duty of the Commission to administer this Chapter. The Commission shall meet at least once in each 60 days and may hold special meetings at any time at the call of the chairman or any three members of the Commission, and the Commission shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of this Chapter. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this Chapter, which the Commission shall prescribe. The Commission shall determine its own organization and methods of procedure in accordance with the provisions of this Chapter, and shall have an official seal which shall be judicially noticed. The chairman of said Commission shall, except as otherwise provided by the Commission, be vested with all authority of the Commission, including the authority to conduct hearings and make decisions and determinations, when the Commission is not in session and shall execute all orders, rules and regulations established by said Commission. Not later than November 20 preceding the meeting of the General Assembly, the Commission shall submit to the Governor a report covering the administration and operation of this Chapter during the preceding biennium, and shall make such recommendation for amendments to this Chapter as the Commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the Commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the Commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the

Governor and the legislature, and make recommendations with respect thereto.

(b) Regulations and General and Special Rules. — General and special rules may be adopted, amended, or rescinded by the Commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given by mail to the last known address in cases of special rules, or by publication as herein provided, and by one publication as herein provided as to general rules. General rules shall become effective 10 days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective 10 days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission.

(c) Publication. — The Commission shall cause to be printed for distribution to the public the text of this Chapter, the Commission's regulations and general rules, its biennial reports to the Governor, and any other material the Commission deems relevant and suitable, and shall furnish the same to any person upon application therefor.

(d) Personnel. — Subject to other provisions of this Chapter, the Commission is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. It shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and except for temporary appointments not to exceed six months in duration, shall appoint its personnel on the basis of efficiency and fitness as determined in such examinations. All positions shall be filled by persons selected and appointed on a nonpartisan merit basis. The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this Chapter, and may, in its discretion, bond any person handling moneys or signing checks hereunder.

(e) Advisory Councils. — The Governor shall appoint a State Advisory Council and local advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations, and have such members representing the general public as the Governor may designate. Such councils shall aid the Commission in formulating policies and discussing problems related to the administration of this Chapter, and in assuring impartiality and freedom from political influence in the solution of such problems. Such local advisory councils shall serve without compensation, but shall be reimbursed for any necessary expenses. Each member of the State Advisory Council attending actual meetings of such Council shall be paid the same amount per diem for his services as is provided for the members of other State boards, commissions and committees, who receive compensation for their services, including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office, and his actual mileage and subsistence as allowed to State officials.

(f) Employment Stabilization. — The Commission, with the advice and aid of its advisory councils, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the State, of reserves for public works to be used in times of business depression and unemployment; to promote the reemployment of unemployed workers

throughout the State in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.

(g) Records and Reports. —

(1) Each employing unit shall keep true and accurate employment records containing such information as the Commission may prescribe. Such records shall be open to inspection and be subject to being copied by the Commission or its authorized representatives at any reasonable time and as often as may be necessary. Any employing unit doing business in North Carolina shall make available in this State to the Commission, such information with respect to persons, firms, or other employing units performing services for it which the Commission deems necessary in connection with the administration of this Chapter. The Commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the Commission deems necessary for the effective administration of this Chapter. Information thus obtained shall not be published or be open to public inspection (other than to public employees in the performance of their public duties including the information required to be obtained pursuant to G.S. 128-27(e), G.S. 135-5(e), and G.S. 143-166(y)) in any manner revealing the employing unit's identity, but any claimant at a hearing before an appeal tribunal or the Commission shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. Any individual may be supplied with information as to his potential benefit rights from such records. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200.00), or imprisoned for not longer than 90 days, or both. All reports, statements, information and communications of every character so made or given to the Commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the Commission from the employing unit's books and records shall be absolute privileged communications in any civil or criminal proceedings other than proceedings instituted pursuant to this Chapter and proceedings involving the administration of this Chapter: Provided, nothing herein contained shall operate to relieve any employing unit from disclosing any information required by this Chapter or as prescribed by the Commission involving the administration of this Chapter.

(2) If the Commission finds that any employer has failed to file any report or return required by this Chapter or any regulation made pursuant hereto, or has filed a report which the Commission finds incorrect or insufficient, the Commission may make an estimate of the information required from such employer on the basis of the best evidence reasonably available to it at the time, and make, upon the basis of such estimate, a report or return on behalf of such employer, and the report or return so made shall be deemed to be prima facie correct, and the Commission may make an assessment based upon such report and proceed to collect contributions due thereon in the manner as set forth in G.S. 96-10(b) of this Chapter: Provided, however, that no such report or return shall be made until the employer has first been given at least 10 days' notice by registered mail to the last known address of such employer: Provided further, that no such report or return shall be used as a basis in determining whether such employing unit is an employer within the meaning of this Chapter.

(h) Oaths and Witnesses. — In the discharge of the duties imposed by this Chapter, the chairman and any duly authorized representative or member of

the Commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this Chapter.

(i) Subpoenas. — In case of contumacy by, or refusal to obey a subpoena issued to any person by the Commission or its authorized representative, any clerk of a superior court of this State within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Commission, or its duly authorized representatives, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission, or its duly authorized representatives, there to produce evidence if so ordered, or there to give testimony touching upon the matter under investigation or in question; and any failure to obey such order of the said clerk of superior court may be punished by the said clerk of superior court as a contempt of said court. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, or other records in obedience to a subpoena of the Commission, shall be punished by a fine of not more than fifty dollars (\$50.00) or by imprisonment for not longer than 30 days.

(j) Protection against Self-Incrimination. — No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the Commission or in obedience to the subpoena of the Commission or any member thereof, or any duly authorized representative of the Commission, in any cause or proceeding before the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(k) State-Federal Cooperation. — In the administration of this Chapter, the Commission shall cooperate, to the fullest extent consistent with the provisions of this Chapter, with the federal agency, official, or bureau fully authorized and empowered to administer the provisions of the Social Security Act approved August 14, 1935, as amended, shall make such reports, in such form and containing such information as such federal agency, official, or bureau may from time to time require, and shall comply with such provisions as such federal agency, official, or bureau may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by such agency, official, or bureau governing the expenditures of such sums as may be allotted and paid to this State under Title III of the Social Security Act for the purpose of assisting in the administration of this Chapter. The Commission shall further make its records available to the Railroad Retirement Board, created by the Railroad Retirement Act and the Railroad Unemployment Insurance Act, and shall furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board, such copies thereof as the Board shall deem necessary for its purposes in accordance with the provisions of section 303 (c) of the Social Security Act as amended.

Upon request therefor, the Commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits, and such recipient's rights to further benefits under this Chapter.

The Commission is authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of this Chapter as it deems necessary or appropriate to facilitate the administration of any employment security or public employment service law, and in like manner, to accept and utilize information, services and facilities made available to this State by the agency charged with the administration of such other employment security or public employment service law.

The Commission shall fully cooperate with the agencies of other states and shall make every proper effort within its means to oppose and prevent any further action which would, in its judgment, tend to effect complete or substantial federalization of State unemployment insurance funds or State employment security programs.

(1) Reciprocal Arrangements. —

(1) The Commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

a. Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states

1. In which any part of such individual's service is performed or

2. In which such individual has his residence or

3. In which the employing unit maintains a place of business, provided there is in effect, as to such services, an election by the employing unit, approved by the agency charged with the administration of such state's employment security law, pursuant to which the services performed by such individual for such employing unit are deemed to be performed entirely within such state.

b. Combining wage credits. — The Commission shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under this Chapter with his wages and employment covered under one or more laws of the federal government and the unemployment compensation laws of other states which are approved by the United States Secretary of Labor in consultation with the state unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations and which include provisions for (1) applying the base period of a single state law to a claim involving the combining of an individual's wages and employment covered under two or more state unemployment compensation laws, and (2) avoiding the duplicate use of wages and employment by reason of such combining.

c. The services of the Commission as agent may be made available to other states in taking interstate claims for such states.

d. Contributions due under this Chapter with respect to wages for insured work shall for the purposes of G.S. 96-10 be deemed to have been paid to the fund as of the date payment was made as contributions therefor under another state or federal employment security law, but no such arrangement shall be entered into unless it contains provisions for such reimbursement to the fund of such contributions as the Commission finds will be fair and reasonable as to all affected interests.

e. The services of the Commission may be made available to such other agencies to assist in the enforcement and collection of judgments of such other agencies.

- f. The services on vessels engaged in interstate or foreign commerce for a single employer, wherever performed, shall be deemed performed within this State or within such other state.
 - g. Benefits paid by agencies of other states may be reimbursed to such agencies in cases where services of the claimant were "employment" under this Chapter and contributions have been paid by the employer to this agency on remuneration paid for such services; provided the amount of such reimbursement shall not exceed the amount of benefits such claimant would have been entitled to receive under the provisions of this Chapter.
- (2) Reimbursements paid from the fund pursuant to subparagraphs b and c of subdivision (1) of this subsection shall be deemed to be benefits for the purpose of G.S. 96-6, 96-9 and 96-12. The Commission is authorized to make to other states or federal agencies and to receive from such other state or federal agencies, reimbursements from or to the fund, in accordance with arrangements entered into pursuant to subdivision (1) of this subsection.
- (3) To the extent permissible under the laws and Constitution of the United States, the Commission is authorized to enter into or cooperate in arrangements whereby facilities and services provided under this Chapter and facilities and services provided under the employment security law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the Employment Security Law of this State or under a similar law of such government.
- (m) The Commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by G.S. 96-8(4) and 96-8(5) and subdivisions thereunder. The Commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Employment Security Law including the right to determine the amount of contributions, if any, which may be due the Commission by any employer. Hearings may be before the Commission or a Deputy Commissioner and shall be held in the central office of the Commission or at any other designated place within the State. They shall be open to the public and shall consist of a review of the evidence taken by a hearing officer designated by the Commission and a determination of the law applicable to that evidence. The Commission shall provide for the taking of evidence by a hearing officer who shall be a member of the legal staff of the Commission. Such hearing officer shall have the same power to issue subpoenas, administer oaths, conduct hearings and take evidence as is possessed by the Commission and such hearings shall be recorded, and he shall transmit all testimony and records of such hearings to the Commission for its determination. All such hearings conducted by such hearing officer shall be scheduled and held in any county in this State in which the employing unit or employer either resides, maintains a place of business, or conducts business; however, the Commission may require additional testimony at any hearings held by it at its office. From all decisions or determinations made by the Commission or a Deputy Commissioner any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within 10 days after notice of such decision or determination, file with the Commission exceptions to the decision or the determination of the Commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within 10 days after the decision overruling the exceptions, give notice of his appeal. When an exception is made

to the facts as found by the Commission, the appeal shall be to the superior court in term time but the decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the Commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within 10 days after the notice of appeal has been served, file with the Commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the Commission shall, within 30 days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business, or, unless the appellant objects after being given reasonable opportunity to object, to a judge of the Superior Court of Wake County: Provided, however, the 30-day period specified herein may be extended by agreement of parties. If there be no exceptions to any facts as found by the Commission the facts so found shall be binding upon the court and it shall be heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have 10 days' notice.

(n) The cause shall be entitled "State of North Carolina on Relationship of the Employment Security Commission of North Carolina against (here insert name of appellant)," and if there are exceptions to any facts found by the Commission it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions except those described in G.S. 96-10(b), and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes. By consent of all parties the appeal may be held and determined at chambers before any judge of a district in which the appellant either resides, maintains a place of business or conducts business, or said appeal may be heard before any judge holding court therein, or in any district in which the appellant either resides, maintains a place of business or conducts business. Either party may appeal to the appellate division from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that if an appeal shall be taken on behalf of the Employment Security Commission of North Carolina it shall not be required to give any undertaking or make any deposit to secure the cost of such appeal and such court may advance the cause on its docket so as to give the same a speedy hearing.

(o) The decision or determination of the Commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross-indexed shall have the same force and effect as a judgment rendered by the superior court, and if it shall be adjudged in the decision or determination of the Commission that any employer is indebted to the Commission for contributions, penalties and interest or either of the same, then said judgment shall constitute a lien upon any realty owned by said employer in the county only from the date of docketing of such decision or determination in the office of the clerk of the superior court and upon personalty owned by said employer in said county only from the date of levy on such personalty, and upon the execution thereon no homestead or personal property exemptions shall be allowed; provided, that nothing herein shall affect any rights accruing to the Commission under G.S. 96-10. The provisions of this section, however, shall not have the effect of releasing any liens for contributions, penalties or interest, or either of the same, imposed by other law, nor shall they have the effect of postponing the payment of said contributions, penalties or interest, or depriving the said Employment Security Commission of North Carolina of any priority in order of payment provided in any other statute under which

payment of the said contributions, penalties and interest or either of the same may be required. The superior court or any appellate court shall have full power and authority to issue any and all executions, orders, decrees, or writs that may be necessary to carry out the terms of said decision or determination of the Commission or to collect any amount of contribution, penalty or interest adjudged to be due the Commission by said decision or determination. In case of an appeal from any decision or determination of the Commission to the superior court or from any judgment of the superior court to the appellate division all proceedings to enforce said judgment, decision, or determination shall be stayed until final determination of such appeal but no proceedings for the collection of any amount of contribution, penalty or interest due on same shall be suspended or stayed unless the employer or party adjudged to pay the same shall file with the clerk of the superior court a bond in such amount not exceeding double the amount of contribution, penalty, interest or amount due and with such sureties as the clerk of the superior court deems necessary conditioned upon the payment of the contribution, penalty, interest or amount due when the appeal shall be finally decided or terminated.

(p) The conduct of hearings shall be governed by suitable rules and regulations established by the Commission. The manner in which appeals and hearings shall be presented and conducted before the Commission shall be governed by suitable rules and regulations established by it. The Commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties.

(q) Notices of hearing shall be issued by the Commission or its authorized representative and sent by registered mail, return receipt requested, to the last known address of any employing unit, employers, persons, or firms involved. The notice shall be sent at least 10 days prior to the hearing date and shall contain notification of the place, date, hour, and purpose of the hearing. Subpoenas for witnesses to appear at any hearing shall be issued by the Commission or its authorized representative and shall order him to appear at the time, date and place shown thereon. Any bond or other undertaking required to be given in order to suspend or stay any execution shall be given payable to the Employment Security Commission of North Carolina. Any such bond or other undertaking may be forfeited or sued upon as are any other undertakings payable to the State.

(r) None of the provisions or sections herein set forth in subsections (m)-(q) shall have the force and effect nor shall the same be construed or interpreted as repealing any of the provisions of G.S. 96-15 which provide for the procedure and determination of all claims for benefits and such claims for benefits shall be prosecuted and determined as provided by said G.S. 96-15. (Ex. Sess. 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1; 1951, c. 332, ss. 1, 18; 1953, c. 401, ss. 1-4; 1955, c. 385, ss. 1, 2; c. 479; 1957, c. 1059, s. 1; 1969, c. 44, s. 63; c. 575, ss. 1, 2; 1971, c. 673, ss. 1, 2; 1977, c. 727, ss. 8-10; 1979, c. 660, s. 2; 1979, 2nd Sess., c. 1212, s. 2; 1981, c. 160, s. 1.)

Effect of Amendments. — The 1981 amendment, in the fourteenth sentence of subsection

(m), substituted "appellant" for "appellee" preceding "objects."

§ 96-5. Employment Security Administration Fund.

(a) Special Fund. — There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this Chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this State for the purpose described in G.S. 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of this Chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Secretary of Labor, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this Chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this Chapter shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(b) Replacement of Funds Lost or Improperly Expended. — If any moneys received from the Secretary of Labor under Title III of the Social Security Act, or any unencumbered balances in the Employment Security Administration Fund or any moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions and matched by such moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, are found by the Secretary of Labor, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Secretary of Labor for the proper administration of this Chapter, it is the policy of this State that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds of this State to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Secretary of Labor, the Commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in

such fund; if not available, it shall promptly report the amount required for such replacement to the Governor and the Governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount.

(c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and shall also be used by the Commission for: (i) extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (ii) the acquisition of real estate, buildings and equipment required for the expeditious handling of Commission business; and (iii) the temporary stabilization of federal funds cash flow. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(d) The other provisions of this section and G.S. 96-6, to the contrary notwithstanding, the Commission is authorized to requisition and receive from its account in the unemployment trust fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this Chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The State Treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State treasury.

(e) Reed Bill Fund Authorization. — Subject to a specific appropriation by the General Assembly of North Carolina to the Employment Security Commis-

sion out of funds credited to and held in this State's account in the Unemployment Trust Fund by the Secretary of the Treasury of the United States pursuant to and in accordance with section 903 of the Social Security Act, the Commission is authorized to utilize such funds for the administration of the Employment Security Law, including personal services, operating and other expenses incurred in the administration of said law, as well as for the purchase or rental, either or both, of offices, lands, buildings or parts of buildings, fixtures, furnishings, equipment, supplies and the construction of buildings or parts of buildings, suitable for use in this State by the Employment Security Commission, and for the payment of expenses incurred for the construction, maintenance, improvements or repair of, or alterations to, such real or personal property. Provided, that any such funds appropriated by the General Assembly shall not exceed the amount in the Unemployment Trust Fund which may be obligated for expenditure for such purposes; and provided that said funds shall not be obligated for expenditure, as herein provided, after the close of the two-year period which begins on the effective date of the appropriation. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5; 1977, c. 727, ss. 11-13; 1981, c. 160, s. 2.)

Effect of Amendments. — The 1981 amendment, in the fourth sentence of subsection (c), substituted "shall also" for "also shall" and sub-

stituted clauses (i) through (iii) for "incidental extensions, repairs, enlargements or improvements."

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

As used in this Chapter, unless the context clearly requires otherwise:

- (1) "Benefits" means the money payments payable to an individual, as provided in this Chapter, with respect to his unemployment.
- (2) "Commission" means the Employment Security Commission established by this Chapter.
- (3) "Contributions" means the money payments to the State Unemployment Insurance Fund required by this Chapter.
- (4) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has or had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this Chapter. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this Chapter unless such agent or employee is an employer subject to the tax imposed by the Federal Unemployment Tax Act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: Provided, however, that nothing herein, on or after July 1, 1939, shall be construed to apply to that part

of the business of such "employers" as may come within the meaning of that term as it is defined in section one (a) of the Railroad Unemployment Insurance Act.

(5) "Employer" means:

- a. Any employing unit which (a) within the current or preceding calendar year, and which for some portion of a day in each of 20 different calendar weeks within such calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week); or (b) in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars (\$1,500) or more. Provided further, for the purpose of this paragraph, "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the Commission pursuant to subsection (l) of G.S. 96-4, and an agency charged with the administration of any other state or federal employment security law. Provided further, for the purpose of this paragraph, "week" means a period of seven consecutive calendar days, and when a calendar week falls partly within each of two calendar years, the days of that week up to January 1 shall be deemed one calendar week, and the days beginning January 1, another such week.
- b. Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this Chapter; provided, such other would have been an employer under paragraph a of this subdivision if such part had constituted its entire organization, trade, or business; provided further, that G.S. 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade or business. The provisions of G.S. 96-11(a) to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this Chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this Chapter. A successor by total acquisition under the provisions of this paragraph may be relieved from coverage hereunder by making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and provided the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in G.S. 96-11 of this Chapter. A successor under the provisions of this paragraph who becomes an employer by virtue of having acquired a part of the organization, trade or business of the predecessor hereunder may be

relieved from coverage upon making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and the Commission finds that the predecessor could have terminated by making the application under G.S. 96-11 if the part acquired had constituted all of the predecessor's business.

- c. Any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph a of this subdivision, provided the acquiring employing unit is owned, or controlled (by legally enforceable means or otherwise), directly or indirectly, by the same interests which own, or control (by legally enforceable means or otherwise), directly or indirectly, the employing unit from which the organization, trade, or business, or substantially all the assets were acquired.
- d. Any employing unit which, having become an employer under paragraphs a, b, or c, has not, under G.S. 96-11, ceased to be an employer subject to this Chapter; or
- e. For the effective period of its election pursuant to G.S. 96-11(c) any other employing unit which has elected to become fully subject to this Chapter.
- f. Any employing unit not an employer by reason of any other paragraph of this subdivision, for which within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Insurance Fund; or which as a condition for approval of this Chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required, pursuant to such act, to be an "employer" under this Chapter; or any employing unit required to be covered by the Federal Unemployment Tax Act; provided, that such employer, notwithstanding the provisions of G.S. 96-11, shall cease to be subject to the provisions of this Chapter during any calendar year if the Commission finds that during such period the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this Chapter.
- g. Any employing unit with its principal place of business located outside the State of North Carolina which engages in business within the State of North Carolina and which employing unit has in employment one or more individuals for some portion of a day in as many as 20 different calendar weeks in any period of 12 consecutive months or has had in employment and paid for service wages in any quarter in 12 consecutive calendar months in the amount of one thousand five hundred dollars (\$1,500) or more shall be deemed to be an employer subject to the other provisions of this Chapter.
- h. Any employing unit which maintains an operating office within this State from which the operations of an American vessel operating on navigable waters within or within and without the United States or ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be an employer by reason of any other paragraph of this subdivision.
- i. Any employing unit which acquired a part of the organization, trade or business of another which if treated as a single unit which such part acquired would be an employer under paragraph

a of this subdivision if such part acquired had constituted all of the organization, trade or business of the predecessor, provided the acquiring employing unit is owned, or controlled (by legally enforceable means or otherwise), directly or indirectly, by the same interests which own, or control (by legally enforceable means or otherwise), directly or indirectly, the employing unit from which such part of the organization, trade, or business was acquired.

- j. Prior to January 1, 1978, any institution of higher education or State hospital located in this State which is an agency or instrumentality of this State, or which is owned or operated by the State or an instrumentality of this State (or by this State and one or more states or their instrumentalities), provided such employing unit, in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), or in any calendar quarter in either the current or preceding calendar year paid for services in employment wages of one thousand five hundred dollars (\$1,500) or more.

For purposes of this Chapter, "institution of higher education" means an educational institution in this State which: (i) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such certificate; (ii) is legally authorized in this State to provide a program of education beyond high school; (iii) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for credit toward such a degree or a program of training to prepare students for gainful employment in a recognized occupation; (iv) is a public or other nonprofit institution; and (v) notwithstanding any of the foregoing provisions of this subdivision, is a university, college, community college, or technical institute in the State.

For purposes of this Chapter, "State hospital" means any institution licensed by the Department of Human Resources under Chapter 22 [Chapter 122] or Chapter 131 of the General Statutes.

- k. Notwithstanding any other provision of this Chapter, any nonprofit organization or a group of organizations (hereafter, where the words "nonprofit organization" are used in this Chapter, it shall include a group of nonprofit organizations), corporations, any community chest, fund, or foundation which are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals and which is exempt or may be exempted from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, provided such employing unit for some portion of a day in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment four or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week).
- l. Repealed by Session Laws 1981, c. 160, s. 5.
- m. Repealed by Session Laws 1981, c. 160, s. 6.
- n. With respect to employment on and after January 1, 1978, any person or employing unit who (a) during any calendar quarter in

the current calendar year or the preceding calendar year paid wages of twenty thousand dollars (\$20,000) or more for agricultural labor, or (b) on each of some 20 days during the current or preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day. Provided, that with respect to agricultural labor performed by a crew on and after January 1, 1978, the crew leader shall be deemed an employer if (1) either of the requirements set forth in the first sentence of this paragraph are met; and (2) the crew members are not employed by another person within the meaning of the first sentence of this paragraph; (3) and if the crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963; or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop dusting equipment, or any other mechanized equipment, which is provided by the crew leader. For purposes of this paragraph, the term "crew leader" means an individual who (1) furnishes individuals to perform agricultural labor for any other person, (2) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and (3) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person. The farm operator shall be deemed to be the employer of any worker hired by the farm operator; any assignment to work with a crew or under a crew leader notwithstanding. All the workers shall be deemed the employees of the farm operator when the crew leader does not qualify as the employer under the provisions set out in this paragraph.

- o. With respect to employment on and after January 1, 1978, any person who during any calendar quarter in the current calendar year or the preceding calendar year paid wages in cash of one thousand dollars (\$1,000) or more for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.
- p. With respect to employment on and after January 1, 1978, any state and local governmental employing unit, including the State of North Carolina, a county board of education, a city board of education, the State Board of Education, the Board of Trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, any other agency of and within the State by which a teacher or other employee is paid, and any county, incorporated city or town, the light and water board or commission of any incorporated city or town, the board of alcoholic control of any county or incorporated city or town, county and/or city airport authorities, housing authorities created and operated under and by virtue of Chapter 157 of the General Statutes, redevelopment commissions created and operated under and by virtue of Article 37, Chapter 160 of the General Statutes, county and/or city or regional libraries, county and/or city boards of health, district boards of health, any other separate, local governmental entity, jointly owned or operated governmental entities, and the Retirement System.
- q. With respect to employment on and after January 1, 1978, any nonprofit elementary and secondary school. For purposes of this Chapter, "secondary school" means any school not an institution of higher education as defined in G.S. 96-8(5)j.

- (6) a. "Employment" means service performed including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules. An employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period.
- b. The term "employment" shall include an individual's entire service, performed within or both within and without this State if:
1. The service is localized in this State; or
 2. The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.
 3. The service, wherever performed, is within the United States, or Canada; such service is not covered under the unemployment compensation law of any other state or Canada; and the place from which the service is directed or controlled is in this State.
- c. Services performed within this State but not covered under paragraph b of this subdivision shall be deemed to be employment subject to this Chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.
- d. Services not covered under paragraph b of this subdivision, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this Chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this Chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (1) of G.S. 96-4 shall be deemed to be employment during the effective period of such election.
- e. Service shall be deemed to be localized within a state if:
1. The service is performed entirely within such state; or
 2. The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the State, for example, is tem-

porary or transitory in nature or consists of isolated transactions.

f. The term "employment" shall include:

1. Services covered by an election pursuant to G.S. 96-11, subsection (c), of this Chapter; and
2. Services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to G.S. 96-4, subsection (l), of this Chapter during the effective period of such election.
3. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an American vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State: Provided further, that this subparagraph shall not be applicable to those services excluded in subdivision (6), paragraph k, subparagraph 6 of this section.
4. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the aircraft it touches at a port in the United States, if such individual is employed on and in connection with such aircraft when outside the United States; provided such service is performed on or in connection with the operations of an American aircraft and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State.
5. Notwithstanding any other provision of this Chapter, "employment" shall include any individual who performs services irrespective of whether the master-servant relationship exists, for remuneration for any employing unit:
 - (a) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk) or laundry or dry-cleaning services, for his principal;
 - (b) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations if the contract of services contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employment" under

the provisions of this subsection if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

6. Service of an individual who is a citizen of the United States, performed outside of the United States (except in Canada), in the employ of an American employer (other than service which is deemed "employment" under the provisions of paragraph (b) or (e) of this subsection or the parallel provisions of another state's law), if:

- (i) The employer's principal place of business in the United States is located in this State; or

- (ii) The employer has no place of business in the United States, but

- (I) The employer is an individual who is a resident of this State; or

- (II) The employer is a corporation which is organized under the laws of this State; or

- (III) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any other state; or

- (iii) None of the criteria of divisions (i) and (ii) of this subparagraph is met but the employer has elected coverage in this State, or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this State.

- (iv) An "American employer," for the purposes of this paragraph, means a person who is:

- (I) An individual who is a resident of the United States; or

- (II) A partnership if two thirds or more of the partners are residents of the United States; or

- (III) A trust, if all of the trustees are residents of the United States; or

- (IV) A corporation organized under the laws of the United States or of any state;

- (V) For the purposes of this subparagraph, United States includes all the states, the District of Columbia, and the Commonwealth of Puerto Rico.

7. Services with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment insurance fund, or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this Chapter.

- g. On and after January 1, 1978, the term "employment" includes services performed in agricultural labor when a person or employing unit (a) during any calendar quarter in the current calendar year or the preceding calendar year pays wages of twenty thousand dollars (\$20,000) or more for agricultural labor, or (b) on each of some 20 days during the preceding calendar year,

each day being in a different calendar week, employs at least 10 individuals in employment in agricultural labor for some portion of the day. For purposes of this Chapter, the term "agricultural labor" includes all services performed: (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife; (2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm; (3) in connection with the production or harvesting of crude gum (oleoresin) from a living tree, and the following products if processed by the original producer of crude gum from which derived; gum spirits of turpentine and gum resin, or in connection with the ginning of cotton or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes; or (4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one half of the commodity with respect to which such service is performed; (B) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in performance of service described in subparagraph (A), but only if such operators produced more than one half of the commodity with respect to which such service is performed. (C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; (D) on a farm operated for profit if such service is not in the course of the employer's trade or business. As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. Provided, such labor is not agricultural labor performed before January 1, 1980, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act.

- h. On and after January 1, 1978, the term "employment" includes domestic service in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who pays cash remuneration of one thousand dollars (\$1,000) or more on or after January 1, 1978, in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

- i. On and after January 1, 1978, the term "employment" includes service performed for any State and local governmental employing unit. Provided, however, that employment shall not include service performed (a) as an elected official; (b) as a member of a legislative body or a member of the judiciary, of a State or political subdivision thereof; (c) as a member of the State National Guard or Air National Guard; (d) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or (e) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.
- j. On and after January 1, 1978, the term "employment" includes services performed in any calendar year by employees of nonprofit elementary and secondary schools.
- k. The term "employment" shall not include:
 1. Prior to January 1, 1978, services performed in the employ of this State, or of any political subdivision thereof, or any instrumentality of this State or its political subdivisions except from and after January 1, 1972, services performed for employers as defined in G.S. 96-8(5)j, and 96-11(c)(3), and except as otherwise provided in this Chapter.
 2. Except with respect to service performed for an employer as defined in G.S. 96-8(5)j, service performed prior to January 1, 1978, in the employ of any other state or its political subdivisions, or of the United States Government, or of an instrumentality of any other state or states or their political subdivisions or of the United States and service performed in the employ of the United States Government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this Chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state employment security law, all of the provisions of this Chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this State shall not be certified for any year by the Secretary of Labor under section 3304 of the Federal Internal Revenue Code of 1954, the payments required for such instrumentalities with respect to such year shall be refunded by the Commission from the fund in the same manner and within the same period as is provided in G.S. 96-10(e) with respect to contributions erroneously collected.
 3. Service with respect to which unemployment insurance is payable under an employment security system established by an act of Congress: Provided, that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof in the manner provided in G.S. 96-4(b) for general rules, to provide potential rights to benefits under this Chapter, acquired rights to unemployment insurance under act of Congress, or who have, after acquiring potential rights to unemployment insurance, under such act of Congress, acquired rights to benefits under this Chapter.

4. Prior to January 1, 1978, service performed in agricultural labor as defined in G.S. 96-8(6)g.
5. Prior to January 1, 1978, domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.
6. Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft by an individual if the individual is performing services on and in connection with such vessel or aircraft when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shell fish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States).
7. Services performed by an individual in the employ of a son, daughter, or spouse; services performed by a child under the age of 21 in the employ of his father or mother or of a partnership consisting only of parents of the child.
8. Service performed by an individual during any calendar quarter for any employing unit or an employer as an insurance agent or as an insurance solicitor, or as a securities salesman if all such service performed during such calendar quarter by such individual for such employing unit or employer is performed for remuneration solely by way of commission; service performed by an individual for an employing unit as a real estate agent or a real estate salesman as defined in G.S. 93A-2, provided, that such real estate agent or salesman is compensated solely by way of commission and is authorized to exercise independent judgment and control over the performance of his work.
9. Services performed in employment as a newsboy or newsgirl selling or distributing newspapers or magazines on the street or from house to house.
10. Except as provided in G.S. 96-8(6)f5(a), service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to subdivision (1) of G.S. 96-4 during the effective period of such election.
11. Casual labor not in the course of the employing unit's trade or business.
12. Service in any calendar quarter in the employ of any organization exempt from income tax under the provisions of section 501(a) of the Internal Revenue Code of 1954 (other than an organization described in section 401(a) of said Internal Revenue Code of 1954) or under section 521 of the Internal Revenue Code of 1954, if the remuneration for such service is less than fifty dollars (\$50.00).
13. Service in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and

is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance.

14. Service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers.
15. Services performed (i) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or (ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or (iii) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or (iv) as a part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training, unless a federal law, rule or regulation mandates unemployment insurance coverage to individuals in a particular work-relief or work-training program; (v) after December 31, 1971, by an inmate for a hospital in a State prison or other State correctional institution or by a patient in any other State-operated hospital, and services performed by patients in a hospital operated by a nonprofit organization shall be exempt; (vi) after December 31, 1971, in the employ of a hospital, if such service is performed by a patient of such hospital; (vii) after December 31, 1971, by an inmate of a custodial or penal institution.
16. Notwithstanding the provisions of G.S. 96-8(6)f3 and 96-8(6)k6, service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under the arrangement with the owner or operator of such boat pursuant to which:
 - (A) Such individual does not receive any cash remuneration (other than as provided in subparagraph (b)),

(B) Such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and

(C) The amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals. In order to preserve the State's right to collect State unemployment taxes for which a credit against federal unemployment taxes may be taken for contributions paid into a State unemployment insurance fund, this paragraph 16 shall not apply, with respect to any individual, to service during any period for which an assessment for federal unemployment taxes is made by the Internal Revenue Service pursuant to the Federal Unemployment Tax Act which assessment becomes a final determination (as defined by section 1313 of the Internal Revenue Code of 1954 as amended).

(7) "Employment office" means a free public employment office, or branch thereof, operated by this State or maintained as a part of a state-controlled system of public employment offices.

(8) "Fund" means the Unemployment Insurance Fund established by this Chapter, to which all contributions required and from which all benefits provided under this Chapter shall be paid.

(9) "State" includes, in addition to the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(10) Total and partial unemployment.

a. For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed:

1. If he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.

2. If he has no payroll attachment on the date he reports to apply for unemployment insurance. If a benefit year is established, it shall begin on the Sunday of the calendar week with respect to which the claimant met the reporting requirements provided by Commission regulation.

b. For benefit weeks within an established benefit year, a claimant shall be deemed to be:

1. Totally unemployed, irrespective of job attachment, if his earnings for such week, including payments defined in subparagraph c below, would not reduce his weekly benefit amount as prescribed by G.S. 96-12(c).

2. Partially unemployed, if he has payroll attachment but because of lack of work during the payroll week for which he is requesting benefits he worked less than three customary

scheduled full-time days in the establishment, plant, or industry in which he is employed and whose earnings from such employment (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

3. Part-totally unemployed, if the claimant had no job attachment during all or part of such week and whose earnings from odd jobs or subsidiary work (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

c. No individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name. Provided, however, if such payment is applicable to less than the entire week, the claimant may be considered to be unemployed as defined in subsections a and b of this paragraph.

d. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may be regulation otherwise prescribe.

(11) "Employment Security Administration Fund" means the Employment Security Administration Fund established by this Chapter, from which administrative expenses under this Chapter shall be paid.

(12) "Wages" means all remuneration for services from whatever source.

(13) a. "Wages" shall include commissions and bonuses and any sums paid to an employee by an employer pursuant to an order of the National Labor Relations Board or by private agreement, consent or arbitration for loss of pay by reason of discharge and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities, including tips which an employee receives directly from a customer and reports to the employer and which the employer considers as salary for the purpose of meeting minimum wage requirements, shall be estimated and determined in accordance with rules prescribed by the Commission: Provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may be authorized regulations be prescribed. Such regulations shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals: Provided further, that the term "wages" shall not include the amount of any payment with respect to services to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (i) retirement, or (ii) sickness or accident disability, or (iii) medical and hospitalization expenses in connection with sickness or accident disability, or (iv) death: Provided, further,

wages shall not include payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under the Federal Insurance Contributions Act.

- b. "Wages" shall not include any payment made to, or on behalf of, an employee or his beneficiary from or to a trust which qualifies under the conditions set forth in section 401(a)(1) and (2) of the Internal Revenue Code of 1954 or under or to an annuity plan which at the time of such payment meets the requirements of section 401(a)(3), (4), (5) and (6) of such code and exempt from tax under section 501(a) of such code at the time of such payment, unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as beneficiary of the trust.
- (14) "Week" means such period of seven consecutive calendar days as the Commission may by regulations prescribe.
- (15) "Calendar quarter" means the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31.
- (16) "Weekly benefit amount." An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total unemployment.
- (17) a. Repealed by Session Laws 1977, c. 727, s. 33.
b. Repealed by Session Laws 1977, c. 727, s. 33.
c. As to claims filed on or after October 1, 1974, for claimants who do not have a benefit year in progress, "benefit year" shall mean the one-year period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least five hundred sixty-five dollars and fifty cents (\$565.50), and equal to at least one and one-half times his high-quarter wages, which high-quarter wages must equal at least one hundred and fifty dollars (\$150.00). As to claims filed on or after August 1, 1981, for claimants who do not have a benefit year in progress, "benefit year" shall mean the 52 week period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. Provided, however, if the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits is either (i) the first day of a calendar quarter, or (ii) the second day of a calendar quarter followed by a February 29 within one year thereof, "benefit year" shall mean the one-year period beginning with that first day of the week with respect to which the individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least six times the average weekly insured wage, obtained in accordance with G.S. 96-8(22) and equal to at least one and one-half times his high-quarter wages, which high-quarter wages must equal at least one and one-half times the average weekly insured wage, obtained in accordance with G.S. 96-8(22).
d. Repealed by Session Laws, 1981, c. 160, s. 11.
- (18) For benefit years established on and after July 1, 1953, the term "base period" shall mean the first four of the last six completed calendar quarters immediately preceding the first day of an individual's benefit

year as defined in subdivision (17) of this section. For benefit years established on and after January 1, 1978, the term "base period" shall mean the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year as defined in G.S. 96-8(17).

(19) Repealed by Session Laws 1977, c. 727, s. 35.

(20) The term "American vessel," as used in this Chapter, means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is performing service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state and the term "American aircraft" means an aircraft registered under the laws of the United States.

(21) The words "Employment Security Law" as used in this Chapter mean any law enacted by this State or any other state or territory or by the federal government provided for the payment of unemployment insurance benefits.

(22) Average Weekly Insured Wage. — "Average weekly insured wage" is the quotient obtained by dividing the total of the wages, as defined in G.S. 96-8(12) and (13), reported by all insured employers by the monthly average in insured employment under this Chapter during the immediately preceding calendar year and further dividing the quotient obtained by 52 to obtain a weekly rate. (For this computation the data as released annually in the Employment Security Commission's publication "North Carolina Insured Employment and Wage Payment" shall be used). The quotient thus obtained shall be deemed to be the average weekly wage for such year.

(23) With respect to weeks of unemployment beginning on or after January 1, 1978, wages for insured work shall include wages paid for previously uncovered services. For the purposes of this subdivision, the term "previously uncovered services" means services (a) which were not employment as defined in G.S. 96-8(6) and were not services covered pursuant to G.S. 96-11(c) at any time during the one-year period ending December 31, 1977; and (b) which (1) are agricultural labor as provided in G.S. 96-8(5)n and G.S. 96-8(6)g or domestic service as provided in G.S. 96-8(5)o and G.S. 96-8(6)h, or (2) are services performed by an employee of this State or of a local governmental unit, as provided in G.S. 96-8(5)p and G.S. 96-8(6)i or by an employee of a nonprofit educational institution which is not an institution of higher education, as provided in G.S. 96-8(5)r [G.S. 96-8(5)q] and G.S. 96-8(6)j; except to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 was paid on the basis of such services.

(24) Work, for purposes of this Chapter, means any performance or effort, physical or mental, done for remuneration or in expectation of remuneration, whether or not the one for whom such work is performed is a covered employer under this Chapter.

(25) Repealed by Session Laws 1981, c. 160, s. 12. (Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; c. 552, ss. 1, 2; 1945, c. 522, ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-8½; cc. 523, 863; 1951, c. 322, s. 1; c. 332, ss. 2, 3, 18; 1953, c. 401, ss. 1, 7-11; 1955, c. 385, ss. 3, 4; 1957, c. 1059, ss. 2-4; 1959, c. 362, ss. 2-6; 1961, c. 454, ss. 4-15; 1965, c. 795, ss. 2-5; 1969, c. 575, ss. 4-6, 15; 1971, c. 367; c. 673, ss. 5-13; c. 863; c. 1231, s. 1; 1973, c. 172, s. 1; c.

476, ss. 133, 152; c. 740, s. 2; c. 1138, ss. 1, 2; 1975, c. 226, s. 3; 1977, c. 727, ss. 14-36; 1979, c. 660, ss. 3-12; 1981, c. 160, ss. 3-12; c. 774, s. 1.)

Effect of Amendments. — The first 1981 amendment, in subdivision (5)j substituted "Prior to January 1, 1978" for "Notwithstanding any other provision of this Chapter, 'employer' means "at the beginning of the subdivision, added the second and third paragraphs of subdivision (5)j and deleted "'employer' means" preceding "any nonprofit" near the beginning of subdivision (5)k. The amendment deleted subdivision (5)l, which defined "institution of higher education" and "hospital," and subdivision (5)m, which defined "secondary school," added the second sentence of subdivision (5)q, inserted "because of lack of work" in the first sentence of subdivision (10)a1, and, in the last sentence of subdivision (10)a1, substituted "preceding" for "of the calendar week within which" and deleted "falls" following "date." The amendment inserted "because of lack of work" in subdivision (10)b2, added the second paragraph of subdivision (17)c, deleted subdivision (17)d which defined "benefit year" for claims filed after January 1, 1978 and deleted subdivision (25) which defined an implied contract for purposes of G.S. 96-13(a)3.

The second 1981 amendment added subdivision (6)k16. Session Laws 1981, c. 774, s. 2 provides:

"This amendment made by Section 1 of this act shall be effective as to all services rendered after December 31, 1954; provided, however, that the amendment made by Section 1 of this act shall not apply with respect to such services performed by such individual (and the share of the catch, or proceeds therefrom received by him for such services) if and only for so long as the owner or operator of any boat treated a share of the boat's catch of fish or other aquatic animal life (or a share of the proceeds therefrom) received by an individual after December 31, 1954, and before the date of the enactment of this act for services performed by an individual after December 31, 1954, on such boat, as being subject to the unemployment tax under the Federal Unemployment Tax Act, or the Employment Security Law of North Carolina. This act shall not be construed to entitle any person to a refund."

CASE NOTES

I. GENERAL CONSIDERATION.

Subdivision (6)k.15 Construed. — The enactment in 1977 of subdivisions (5)q and (6)j of this section, which deleted a previous exemption from unemployment tax liability for nonprofit elementary and secondary schools, did not change the effect of the exemption in subdivision (6)(k)(15) of this section for persons performing services in the employ of a church organization operated primarily for religious purposes. *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, — S.E.2d — (1981).

The United States Secretary of Labor was not a necessary party to an action to determine whether the unemployment tax statutes applied to employees of schools operated by the Roman Catholic Church in North Carolina on the grounds that State unemployment laws must follow federal statutes in order for the State to gain a credit against the federal unemployment tax and thus obtain funds to operate State employment offices and that the United States Secretary of Labor has interpreted the federal statutes to include parochial and parish schools within the scope of the federal unem-

ployment tax provisions, since that action in no way involved an interpretation of the Federal Unemployment Tax Act. *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, — S.E.2d — (1981).

III. "EMPLOYMENT" — EXAMPLES.

This section requires employment security contributions from church-related schools, and they are obligated to pay the appropriate taxes. *Ascension Lutheran Church v. Employment Security Comm'n*, 501 F. Supp. 843 (W.D.N.C. 1980). But see *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, — S.E.2d — (1981).

Employees of schools operated by the Roman Catholic Church are exempt from the unemployment tax provisions of Chapter 96 pursuant to subdivision (6)(k)(15) of this section. *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, — S.E.2d — (1981). But see *Ascension Lutheran Church v. Employment Security Comm'n*, 501 F. Supp. 843 (W.D.N.C. 1980).

§ 96-9. Contributions.**(a) Payment. —**

- (1) Except as provided in subsection (d) hereof, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Chapter, with respect to wages for employment (as defined in G.S. 96-8(6)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this Chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by G.S. 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.
- (2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.
- (3) Benefits paid employees of this State shall be financed and administered in accordance with the provisions and conditions of G.S. 96-9(d) required for nonprofit organizations; except as provided by suitable regulations which may be adopted by the Commission. The Department of Administration shall make an election with respect to financing all such benefits.
- (4) Political subdivisions of this State may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(d). Any election made shall be binding upon the political subdivision so electing for a period of four years.
- (5) Prior to January 1, 1978, the term "wages" shall not include for the purposes of this section any remuneration in excess of four thousand two hundred dollars (\$4,200) paid to any individual in a single calendar year by an employer with respect to employment.

For purposes of this section, the term "wages" shall not include any remuneration paid to any employee in this State in excess of the FUTA tax base paid to an individual by a single employer if the employer of that individual made contributions in another state or states upon the wages paid to such individual during the applicable

calendar year, because of work performed in another state or states.

Any successor employer as defined in G.S. 96-8(5)b for the purposes of this section shall pay no contributions on that part of remuneration earned by any individual in the employ of the successor employer which, when added to the remuneration previously paid by the predecessor employer exceeded the FUTA tax base in a single calendar year, provided the individual was an employee of the predecessor and was taken over as an employee by the successor as a part of the organization acquired and, provided further, that the predecessor employer has paid contributions on the wages paid to such individual while in his employ during the year of acquisition and the account of the predecessor is transferred to the successor in accordance with G.S. 96-9(c)(4)a.

Beginning January 1, 1978, and thereafter, the taxable wage base of any employee whose wages are subject to taxation, whether totally or partially, by the State of North Carolina under any provision of this Chapter shall be the federally required tax base.

(b) Rate of Contributions. —

(1) Except as provided in subsection (d) hereof, each employer shall pay contributions with respect to employment during any calendar year prior to January 1, 1955, as required by this Chapter prior to such January 1, 1955, and each employer shall pay contributions equal to two and seven-tenths percent (2.7%) of wages paid by him during the calendar year 1955 and each year thereafter with respect to employment occurring after December 31, 1954, which shall be deemed the standard rate of contributions payable by each employer except as provided herein.

(2) a. No employer's contribution rate shall be reduced below the standard rate for any calendar year unless and until his account has been chargeable with benefits throughout more than thirteen consecutive calendar months ending July 31 immediately preceding the computation date and his credit reserve ratio meets the requirements of that schedule used in the computation.

b. The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance and has been chargeable with benefits as set forth in G.S. 96-9(b)(2)a of this Chapter. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.

c. The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all his contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to his account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and

credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

For purposes of this subsection, the first date on which an account shall be chargeable with benefits shall be the first date with respect to which a benefit year (as defined in G.S. 96-8(17)) can be established, based solely on wages paid by that employer.

No employer's contribution rate shall be reduced below the standard rate for any calendar year unless his liability extends over a period of all or part of three consecutive calendar years and, as of August 1 of the third year, his credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and his predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing said rate below the standard rate for any period in which the account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, any entity which is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, said five years to run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This paragraph shall apply to all cases arising hereunder, the question of good faith notwithstanding.

- (3) a. Repealed by Session Laws 1977, c. 727, s. 39.
- b. Repealed by Session Laws 1977, c. 727, s. 39.
- c. Repealed by Session Laws 1977, c. 727, s. 39.
- d. The applicable schedule of rates for the calendar year 1972 and thereafter shall be determined by the fund ratio resulting when the total amount available for benefits in the unemployment insurance fund, as of the computation date, August 1, is divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding such computation date. Schedule A,B,C,D,E,F,G,H, or I appearing on the line opposite such fund ratio in the table below shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is:		Applicable Schedule
As Much As	But Less Than	
	2.5%	A
2.5%	3.5%	B
3.5%	4.5%	C
4.5%	5.5%	D
5.5%	6.5%	E
6.5%	7.5%	F
7.5%	8.5%	G
8.5%	9.5%	H
9.5% and in excess thereof		I

Variations from the standard rate of contributions shall be determined and assigned with respect to the calendar year 1972 and thereafter, to employers whose accounts have a credit balance and who are eligible therefor according to each such employer's credit reserve ratio, and each such employer shall be assigned the contribution rate appearing in the applicable Schedule A,B,C,D,E,F,G,H, or I on the line opposite his credit reserve ratio as set forth in the Experience Rating Formula below:

EXPERIENCE RATING FORMULA

When The Credit Reserve Ratio Is:		Rate Schedules (%)								
As Much As	But Less Than	A	B	C	D	E	F	G	H	I
	0.8%	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5
0.8%	1.0	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3
1.0	1.2	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1
1.2	1.4	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9
1.4	1.6	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7
1.6	1.8	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5
1.8	2.0	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3
2.0	2.2	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1
2.2	2.4	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9
2.4	2.6	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7
2.6	2.8	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5
2.8	3.0	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4
3.0	3.2	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3
3.2	3.4	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2
3.4	3.6	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1
3.6	3.8	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1
3.8	4.0	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1	0.1
4.0	4.2	0.7	0.5	0.4	0.3	0.2	0.1	0.1	0.1	0.1
4.2	4.4	0.5	0.4	0.3	0.2	0.1	0.1	0.1	0.1	0.1
4.4	4.6	0.4	0.3	0.2	0.1	0.1	0.1	0.1	0.1	0.1
4.6	4.8	0.3	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1
4.8	5.0	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
5.0 and in excess thereof		0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1

New rates shall be assigned to eligible employers effective January 1, 1972, and each January 1 thereafter in accordance with the foregoing Fund Ratio Schedule and Experience Rating Formula.

The Experience Rating Formula table in force in any particular year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

- e. Each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite his debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

**RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING
WITH THE CALENDAR YEAR 1978**

When The Debit Ratio Is:		Assigned Rate
As Much As	But Less Than	
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3
0.9	1.2	3.5
1.2	1.5	3.7
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

- f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.
- g. Any employer may at any time make a voluntary contribution, additional to the contributions required under this Chapter, to the fund to be credited to his account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) herein, of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to his account as of the previous July 31.

Provided, however, any voluntary contribution made as provided herein after July 31 of any year shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.

h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

(c) (1) Except as provided in subsection (d) hereof, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his own behalf, provided that any voluntary contribution made by an employer under the provisions of G.S. 96-9(b)(3)c(d) [96-9(b)(3)g] and credited to his account, shall be credited to such account in an amount equal to eighty percent (80%) of the amount of such voluntary contribution. The Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all contributions which he has paid or is paid on his own behalf with respect to employment occurring subsequent to June 30, 1965. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments. —

a. Benefits paid shall be charged against the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12(e)G. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the voluntary leaving of work by the claimant without good cause attributable to the employer, or (ii) the discharge of claimant for misconduct in connection with his work, shall not be charged to the account of the employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished part-time work to an individual who, because of the loss of employment with one or more other employers becomes eligible for partial benefits while still being furnished part-time work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13[(a)](3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):

1. The benefits are paid for unemployment due directly to a major natural disaster, and
2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e. 1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.

2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

(4) Transfer of account. —

a. Whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires substantially all or a distinct and severable portion of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, the account or that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision.

b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, his rate of contribution for the period from such date to the end of the then current contribution year shall be the same as his rate in effect on the date of such acquisition. If the successor was not an employer prior to the date of the acquisition of the business he shall be assigned a standard rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which he acquired the business of the predecessor; however, if such successor makes application for the transfer of the account within 60 days after notification by the Commission of his right to do so and the account is transferred, he shall be assigned for the remainder of such year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, provided there was only one predecessor or if more than one and the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a suc-

cessor, the transferring employer shall thereafter pay the standard rate of contributions of two and seven-tenths percent (2.7%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.

(d) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this paragraph. For the purposes of this paragraph, a nonprofit organization is an organization (or group of organizations) described in section 501(c)(3) of the United States Internal Revenue Code of 1954 which is exempt from income tax under section 501(a) of said Code.

(1) a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1.

d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later

than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:

1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;
2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;
3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.

e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review.

(2) Payments in lieu of contributions shall be made in accordance with the provisions of this subparagraph and shall be processed as provided herein.

a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on such reports; provided that such advance payments shall become effective only with respect to the first four thousand two hundred dollars (\$4,200) in wages paid in a calendar year until January 1, 1978. On and after that date advance payments shall be effective with respect to the federally required wage base. Collection of such advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Beginning January 1, 1978, any employer making quarterly reports of employment to the Commission and if such employer is a newly electing reimbursement employer he shall pay contributions of one percent (1%) of taxable wages entered on such reports.

Any employer paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

- b. The Commission shall establish a separate account for each such employer and such account shall be charged, credited, and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full and voluntary contributions are not applicable.
- c. Benefits paid shall be charged to the employer's account in accordance with G.S. 96-9(c)(2)a and no benefits shall be noncharged except amounts equal to fifty percent (50%) of extended benefits paid and amounts equal to one hundred percent (100%) of benefits paid through error.
- d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

As of the second computation date (August 1) following the effective date of liability and as of each computation date thereafter, any credit balance remaining in the employer's account (after all applicable postings) in excess of whichever is the greater (a) benefits charged to such account during the 12 months ending on such computation date, or (b) one percent (1%) of taxable wages for the 12 months ending on June 30 preceding such computation date shall be refunded. Any such refund shall be made prior to February 1 following such computation date.

Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for a refund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid prior to such change in election or termination of coverage have been charged, any credit balance in such account shall be refunded to the employer.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and

payment will be due within 25 days from the date of mailing of the statement of amount due.

- e. The Commission may make necessary rules and regulations with respect to coverage of a group of nonprofit organizations and with respect to the reimbursement of benefits payments by such group of nonprofit organizations.

(3) a. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to a nonprofit organization which makes payments to the State Unemployment Insurance Fund in lieu of contributions.

- b. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(e) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made.

(f) (1) On and after January 1, 1978, all benefits charged to a State or local governmental employing unit shall be paid to the Commission within 25 days from the date a list of benefit charges is mailed to the State or local governmental employing agency and the appropriate account(s) shall be credited with such payment(s).

(2) In lieu of paying for benefits by reimbursement as provided in subdivision (1) hereof, any State or local governmental employing unit may elect pursuant to rules and regulations established by the Commission to pay contributions on an experience rating basis as provided in G.S. 96-9(a), (b), and (c).

(3) State or local governmental employing units paying for benefits as provided in subdivision (1) herein may establish pool accounts; provided, that such pool accounts are established and maintained according to the rules and regulations of the Commission.

(4) Any governmental entity paying by reimbursement shall not have any benefits paid against its account noncharged or forgiven except as provided in G.S. 96-9(d)(2)c. (Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534.)

Effect of Amendments. — The first 1981 amendment, in the second paragraph of subdivision (c)(2)b, substituted "individual" for "work" preceding "during" and added the proviso, in subdivision (d)(2)c, deleted "provided that the noncharging of benefits set forth in

G.S. 96-9(c)(2)b shall not apply; provided further, irrespective of any other provisions of this Chapter, all benefits paid shall be charged to the employer's account as provided herein" preceding "and no," substituted "amounts" for "an amount," added the language beginning

"and amounts" and ending "error," and deleted a second sentence which read: "Any such benefits paid and later determined to be overpayments shall be credited to the employer's account only if recovered." In subdivision (f)(4), the amendment added "except as provided in G.S. 96-9(d)(2)c."

The second 1981 amendment added the proviso to subdivision (d)(1)d.

Legal Periodicals. — For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

CASE NOTES

Application of this section to church-related schools does not violate free exercise and establishment clauses of the First Amendment to the United States

Constitution. Ascension Lutheran Church v. Employment Security Comm'n, 501 F. Supp. 843 (W.P.N.C. 1980).

§ 96-10. Collection of contributions.

(a) Interest on Past-Due Contributions. — Contributions unpaid on the date on which they are due and payable, as prescribed by the Commission, shall bear interest at the rate of one half of one percent (0.5%) per month from and after such date until payment plus accrued interest is received by the Commission. An additional penalty in the amount of ten percent (10%) of the taxes due shall be added, but said penalty shall in no event be less than five dollars (\$5.00). Penalties and interest collected pursuant to this subsection shall be paid into the Special Employment Security Administration Fund. If any employer, in good faith, pays contributions to another state or to the United States under the Federal Unemployment Tax Act, prior to a determination of liability by this Commission, which contributions were legally payable to this State, such contributions, when paid to this State, shall be deemed to have been paid by the due date under the law of this State if paid by the due date of such other state or the United States.

(b) Collection. —

(1) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the Commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other civil actions, except petitions for judicial review under this Chapter and cases arising under the Workmen's Compensation Law of this State; or, if any contribution imposed by this Chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within 30 days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the Commission, under the hand of its chairman, may certify the same to the clerk of the superior court of the county in which the delinquent resides or has property, and additional copies of said certificate for each county in which the Commission has reason to believe such delinquent has property located; such certificate and/or copies thereof so forwarded to the clerk of the superior court shall immediately be docketed and indexed on the cross index of judgment, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court. The Commission shall forward a copy of said certificate to the sheriff or sheriffs of such county or counties, or to a duly authorized

agent of the Commission, and when so forwarded and in the hands of such sheriff or agent of the Commission, shall have all the force and effect of an execution issued to such sheriff or agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, the Commission may in its discretion withhold the issuance of said certificate or execution to the sheriff or agent of the Commission for a period not exceeding 180 days from the date upon which the original certificate is certified to the clerk of superior court. The Commission is further authorized and empowered to issue alias copies of said certificate or execution to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission in all cases in which the sheriff or duly authorized agent has returned an execution or certificate unsatisfied; when so issued and in the hands of the sheriff or duly authorized agent of the Commission, such alias shall have all the force and effect of an alias execution issued to such sheriff or duly authorized agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the Commission, the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case no agent of the Commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution, or alias execution, shall be made to the Commission, together with all moneys collected thereunder, and when such order, execution, or alias is referred to the agent of the Commission for service the said agent of the Commission shall be vested with all the powers of the sheriff to the extent of serving such order, execution or alias and levying or collecting thereunder. The agent of the Commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars (\$3,000) approved by the Commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of executions. If any sheriff of this State or any agent of the Commission who is charged with the duty of serving executions shall willfully fail, refuse, or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

- (2) Any representative of the Employment Security Commission may examine and copy the county tax listings, detailed inventories, statements of assets or similar information required under General Statutes, Chapter 105, to be filed with the tax supervisor of any county in this State by any person, firm, partnership, or corporation, domestic or foreign, engaged in operating any business enterprise in such county. Any such information obtained by an agent or employee of the Commission shall not be divulged, published, or open to public inspection other than to the Commission's employees in the performance of their public duties. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars (\$20.00), nor more than two hundred dollars (\$200.00), or imprisoned for not longer than 90 days, or both.
- (3) When the Commission furnishes the clerk of superior court of any county in this State a written statement or certificate to the effect that any judgment docketed by the Commission against any firm or indi-

vidual has been satisfied and paid in full, and said statement or certificate is signed by the chairman of the Commission and attested by its secretary, with the seal of the Commission affixed, it shall be the duty of the clerk of superior court to file said certificate and enter a notation thereof on the margin of the judgment docket to the effect that said judgment has been paid and satisfied in full, and is in consequence canceled of record. Such cancellation shall have the full force and effect of a cancellation entered by an attorney of record for the Commission. It shall also be the duty of such clerk, when any such certificate is furnished him by the Commission showing that a judgment has been paid in part, to make a notation on the margin of the judgment docket showing the amount of such payment so certified and to file said certificate. This paragraph shall apply to judgments already docketed, as well as to the future judgments docketed by the Commission. For the filing of said statement or certificate and making new notations on the record, the clerk of superior court shall be paid a fee of fifty cents (50¢) by the Commission.

(c) Priorities under Legal Dissolution or Distributions. — In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this State, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes, and claims for remuneration of not more than two hundred and fifty dollars (\$250.00) to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of 1898, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section 64(a) of that act (U.S.C., Title 11, section 104(a)), as amended.

A receiver of any covered employer placed into an operating receivership pursuant to an order of any court of this State shall pay to the Commission any contributions, penalties or interest then due out of moneys or assets on hand or coming into his possession before any such moneys or assets may be used in any manner to continue the operation of the business of the employer while it is in receivership.

(d) Collections of Contributions upon Transfer or Cessation of Business. — The contribution or tax imposed by G.S. 96-9, and subsections thereunder, of this Chapter shall be a lien upon the assets of the business of any employer subject to the provisions hereof who shall lease, transfer or sell out his business, or shall cease to do business and such employer shall be required, by the next reporting date as prescribed by the Commission, to file with the Commission all reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business and such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due and unpaid until such time as the former owner or employer shall produce a receipt from the Commission showing that the contributions have been paid, or a certificate that no contributions are due. If the purchaser of a business or a successor of such employer shall fail to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, as above set forth, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner or employer.

(e) Refunds. — If not later than five years from the last day of the calendar year with respect to which a payment of any contributions or interest thereon

was made, or one year from the date on which such payment was made, whichever shall be the later, an employer or employing unit who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund, and the Commission shall determine that such contributions or any portion thereof was erroneously collected, the Commission shall allow such employer or employing unit to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such an adjustment cannot be made in the next succeeding calendar quarter after such application for such refund is received, a cash refund may be made, without interest, from the fund: Provided, that any interest refunded under this subsection, which has been paid into the Special Employment Security Administration Fund established pursuant to G.S. 96-5(c), shall be paid out of such fund. For like cause and within the same period, adjustment or refund may be so made on the Commission's own initiative. Provided further, that nothing in this section or in any other section of this Chapter shall be construed as permitting the refund of moneys due and payable under the law and regulations in effect at the time such moneys were paid. In any case, where the Commission finds that any employing unit has erroneously paid to this State contributions or interest upon wages earned by individuals in employment in another state, refund or adjustment thereof shall be made, without interest, irrespective of any other provisions of this subsection, upon satisfactory proof to the Commission that such other state has determined the employing unit liable under its law for such contributions or interest.

(f) No injunction shall be granted by any court or judge to restrain the collection of any tax or contribution or any part thereof levied under the provisions of this Chapter nor to restrain the sale of any property under writ of execution, judgment, decree or order of court for the nonpayment thereof. Whenever any employer, person, firm or corporation against whom taxes or contributions provided for in this Chapter have been assessed, shall claim to have a valid defense to the enforcement of the tax or contribution so assessed or charged, such employer, person, firm or corporation shall pay the tax or contribution so assessed to the Commission; but if at the time of such payment he shall notify the Commission in writing that the same is paid under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Commission; and if the same shall not be refunded within 90 days thereafter, he may sue the Commission for the amount so demanded; such suit against the Employment Security Commission of North Carolina must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides, or in the county where the taxpayer conducts his principal place of business; and if, upon the trial it shall be determined that such tax or contribution or any part thereof was for any reason invalid, excessive or contrary to the provisions of this Chapter, the amount paid shall be refunded by the Commission accordingly. The remedy provided by this subsection shall be deemed to be cumulative and in addition to such other remedies as are provided by other subsections of this Chapter. No suit, action or proceeding for refund or to recover contributions or payroll taxes paid under protest according to the provisions of this subsection shall be maintained unless such suit, action or proceeding is commenced within one year after the expiration of the 90 days mentioned in this subsection, or within one year from the date of the refusal of said Commission to make refund should such refusal be made before the expiration of said 90 days above mentioned. The one-year limitation here imposed shall not be retroactive in its effect, shall not apply to pending litigation nor shall the same be construed as repealing, abridging or extending any other limitation or condition imposed by this Chapter.

(g) Upon the motion of the Commission, any employer refusing to submit any report required under this Chapter, after 10 days' written notice sent by the Commission by registered or certified mail to the employer's last known address, may be enjoined by any court of competent jurisdiction from hiring and continuing in employment any employees until such report is properly submitted. When an execution has been returned to the Commission unsatisfied, and the employer, after 10 days' written notice sent by the Commission by registered mail to the employer's last known address, refuses to pay the contributions covered by the execution, such employer shall upon the motion of the Commission be enjoined by any court of competent jurisdiction from hiring and continuing in employment any employees until such contributions have been paid.

There shall be added to the amount required to be shown as tax in the reports a penalty of five percent (5%) of the amount of such tax if the failure is not for more than one month with an additional five percent (5%) for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent (25%) of the aggregate or five dollars (\$5.00), whichever is greater.

(h) When any uncertified check is tendered in payment of any contributions to the Commission and such check shall have been returned unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, a penalty shall be payable to the Commission, equal to ten percent (10%) of the amount of said check, and in no case shall such penalty be less than one dollar (\$1.00) nor more than two hundred dollars (\$200.00).

(i) No suit or proceedings for the collection of unpaid contributions may be begun under this Chapter after five years from the date on which such contributions become due, and no suit or proceeding for the purpose of establishing liability and/or status may be begun with respect to any period occurring more than five years prior to the first day of January of the year within which such suit or proceeding is instituted; provided, that this subsection shall not apply in any case of willful attempt in any manner to defeat or evade the payment of any contributions becoming due under this Chapter: Provided, further, that a proceeding shall be deemed to have been instituted or begun upon the date of issuance of an order by the chairman of the Commission directing a hearing to be held to determine liability or nonliability, and/or status under this Chapter of an employing unit, or upon the date notice and demand for payment is mailed by registered mail to the last known address of the employing unit: Provided, further, that the order mentioned herein shall be deemed to have been issued on the date such order is mailed by registered mail to the last known address of the employing unit.

(j) The Commission shall have the power to reduce or waive any penalty provided in G.S. 96-10(a) or 96-10(g). The reason for any such reduction or waiver shall be made a part of the permanent records of the employing unit to which it applies. (Ex. Sess. 1936, c. 1, s. 14; 1939, c. 27, ss. 9, 10; 1941, c. 108, ss. 14-16; 1943, c. 377, ss. 24-28; 1945, c. 221, s. 1; c. 288, s. 1; c. 522, ss. 17-20; 1947, c. 326, ss. 18-20; c. 598, s. 9; 1949, c. 424, ss. 14-16; 1951, c. 332, ss. 8, 20; 1953, c. 401, s. 15; 1959, c. 362, s. 9; 1965, c. 795, s. 11; 1971, c. 673, s. 21; 1973, c. 108, s. 43; c. 172, s. 4; 1977, c. 727, s. 50; 1979, c. 660, s. 16; 1981, c. 160, s. 16.)

Effect of Amendments. — The 1981 amendment, in the first sentence of the first paragraph of subsection (g), added "upon the motion of the Commission," substituted "submit any report" for "make reports," inserted "by registered or certified mail," deleted "by registered mail" following "address," substituted "by" for

"from operating in violation of the provisions of this Chapter upon the complaint of the Commission, in" following "enjoined," substituted "from hiring and continuing in employment any employees" for a comma and substituted "is properly submitted" for "shall have been made." In the second sentence of the same para-

graph, the amendment inserted "by registered mail" following "Commission" and deleted "by registered mail" following "address," inserted "the" preceding "contributions," substituted "shall upon the motion of the Commission be enjoined by" for "may be enjoined from operating in violation of the provisions of this

Chapter upon motion of the Commission, in" and inserted "from hiring and continuing in employment any employees."

Legal Periodicals. — For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

CASE NOTES

Section provides adequate remedy to sue Employment Security Commission in state superior court for refund of unemployment taxes paid under protest. *Ascension Lutheran Church v. Employment Security Comm'n*, 501 F. Supp. 843 (W.D.N.C. 1980).

The trial court can properly award

prejudgment interest on protested unemployment compensation tax payments recovered in actions against the Employment Security Commission brought under this section. *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, — S.E.2d — (1981).

§ 96-12. Benefits.

(a) **Payment of Benefits.** — Twenty-four months after the date when contributions first accrue under this Chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the Commission may prescribe.

(b) (1) a. Repealed by Session Laws 1977, c. 727, s. 52.

b. Each eligible individual whose benefit year begins on or after the first day of October, 1974, who is totally unemployed as defined by G.S. 96-8(10)a, and who files a valid claim, shall be paid benefits with respect to such week or weeks at a rate per week equal to the amount obtained by dividing such individual's high-quarter wages paid during his base period by 26, rounded to the nearest dollar, but shall not be less than fifteen dollars (\$15.00).

c. Repealed by Session Laws 1981, c. 160, s. 17.

(2) Each August 1, a maximum weekly benefit amount available to an eligible individual whose benefit year begins on October 1, 1974, or thereafter, shall be determined by multiplying the average weekly insured wage, obtained in accordance with G.S. 96-8(22), by two thirds rounded to the nearest dollar. The maximum rate applicable to each claimant shall be that rate in effect during the time the claimant's benefit year is established.

(3) Repealed by Session Laws 1981, c. 160, s. 18.

(4) **Qualifying Wages for Second Benefit Year.** — Any individual whose prior benefit year has expired and who files a claim for benefits on and after January 1, 1972, shall not be entitled to benefits unless he has been paid qualifying wages required by G.S. 96-12(b)(1), and since the beginning date of his last established previous benefit year and before the date upon which he files his new benefit claim has been paid wages equal to at least 10 times the weekly benefit amount of the new benefit year claim. Such wages must have been earned with an employer subject to the provisions of this Chapter or some other state employment security law or in federal service as defined in Chapter 85, Title 5, United States Code.

(c) **Partial Weekly Benefit.** — Each eligible individual whose benefit year begins after December 31, 1977, who is "partially unemployed" or "part totally unemployed" as defined in G.S. 96-8(10)b and c respectively, and who files a valid claim, shall be paid benefits with respect to such week or weeks in an

amount figured to the nearest multiple of one dollar (\$1.00) which is equal to the difference between his weekly benefit amount and that part of the remuneration payable to him for such week which is in excess of ten percent (10%) of the average weekly wage in the high quarter of his base period.

(d) Duration of Benefits. — The maximum amount of benefits payable to any eligible individual, whose benefit year begins on and after March 22, 1951, shall be 26 times his weekly benefit amount during any benefit year, except as such benefits may be further extended by G.S. 96-12(e) of this Chapter. On and after October 1, 1974, the maximum benefit amount available to eligible individuals shall be determined by dividing the individual's base-period wages by his high-quarter wages and multiplying that quotient by eight and two thirds, rounding the result to the nearest whole number, and then multiplying the figure so derived by the weekly benefit amount available to that individual; provided the minimum total amount of benefits available to eligible individuals shall not be less than 13 times his weekly benefit amount, nor shall any eligible individual be entitled to more than 26 times his weekly benefit amount during any benefit year, except that such benefits may be extended further in accordance with the provisions of G.S. 96-12(e). The Commission shall establish and maintain individual wage record accounts for each individual who earns wages in covered employment, until such time as such wages would not be necessary for benefit purposes.

(e) Extended Benefits. — Effective January 1, 1972, extended benefits shall be paid under this Chapter as herein specified:

A. Definitions. — As used in this subsection, unless the context clearly requires otherwise —

- (1) "Extended benefit period" means a period which
 - (a) Begins with the third week after whichever of the following weeks occurs first:
 - (I) A week for which there is a national "on" indicator, or
 - (II) A week for which there is a State "on" indicator; and
 - (b) Ends with either of the following weeks, whichever occurs later:
 - (I) The third week after the first week for which there is both a national "off" indicator and a State "off" indicator; or
 - (II) The thirteenth consecutive week of such period.

Provided, that no extended benefit period may begin by reason of a State "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this State.

- (2) Beginning January 1, 1975, through December 31, 1976, there is a "national 'on' indicator" for a week if the United States Secretary of Labor determines that for each of the three most recent completed calendar months ending before such week, the rate of insured unemployment (seasonally adjusted) for all states equalled or exceeded four percent (4%). On and after January 1, 1977, there is a national "on" indicator for a week if, for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (seasonally adjusted) for all states equalled or exceeded four and five-tenths per centum (4.5%). The rate of insured unemployment, for purposes of this paragraph, shall be determined by the Secretary of Labor by reference to the average monthly covered employment for the first four of the most recent six calendar quarters ending before the close of such period.
- (3) Beginning January 1, 1975, through December 31, 1976, there is a "national 'off' indicator" for a week if the United States Secretary of Labor determines that for each of the three most recent

completed calendar months ending before such week, the rate of insured unemployment (seasonally adjusted) for all states was less than four percent (4%). On and after January 1, 1977, there is a national "off" indicator for a week if, for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (seasonally adjusted) for all states was less than four and five-tenths per centum (4.5%). The rate of insured unemployment, for purposes of this paragraph, shall be determined by the Secretary of Labor by reference to the average monthly covered employment for the first four of the most recent six calendar quarters ending before the close of such period.

- (4) There is a "State 'on' indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter —

a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded four percent (4%), or

b. Equalled or exceeded five percent (5%).

G.S. 96-12(e)A(4)a is hereby inoperative for the period between January 1, 1975 through December 31, 1976.

- (5) There is a "State 'off' indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter —

a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, or was less than four percent (4%), or

b. Was less than five percent (5%).

G.S. 96-12(e)A(5)a is hereby inoperative for the period between January 1, 1975 through December 31, 1976.

- (6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing

a. The average weekly number of individuals filing claims in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by

b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

- (7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.

- (8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

- a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

- b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and

- c. (1) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

- (2) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

(11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code of 1954.

B. Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

C. Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

1. He is an "exhaustee" as defined in subsection A(10).
2. He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's

capabilities to perform if: (i) the gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501 (C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is offered to the individual in writing and is listed with the State employment service; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific requirements of this subdivision; and (v) the individual cannot furnish evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.

3. After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12(e)C.2., to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineligible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.

D. Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts.

E. Total Extended Benefit Amount. — The total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or
2. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

F. Beginning and Termination of Extended Benefit Period. —

1. Whenever an extended benefit period is to become effective in this State (or in all states) as a result of a State or a national "on" indicator, or an extended benefit period is to be terminated in this State as a result of State and national "off" indicators, the Commission shall make an appropriate public announcement.
2. Computations required by the provisions of subsection A(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

G. Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12(e) shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2)a (except that G.S. 96-9(c)(2)b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be charged to the account of such employer. All State portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

H. Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12(e)G, or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

I. For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is a State "off" indicator in the state where the claimant files.

(f) Any amount payable under any provision of this Chapter when applicable is subject to the retirement reduction required by G.S. 96-14(9). (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23.)

Effect of Amendments. — The 1981 amendment deleted subdivision (b)(1)c, which concerned benefits for partially unemployed persons whose benefit year began on or after October 1, 1974, and subdivision (b)(3), which concerned qualifying wages for exhaustees,

and, in subsection (c), inserted "whose benefit year begins after December 31, 1977," deleted "either" preceding "partially," substituted "respectively, and who files a valid claim" for "in any week," inserted "benefits" following "paid," substituted "or weeks in" for "a partial

benefit. Such partial benefit shall be," and substituted "ten percent (10%) of the average weekly wage in the high quarter of his base period" for "one half of his weekly benefit amount." In subsection (e), the amendment added the provisos to subdivision (e) (C)2, added subdivisions (e)(C)3 and (e)(I), substituted "taxes" for "contributions" throughout subdivision (e)(G) and, in the second paragraph of subdivision (e)(G) deleted "base period" preceding "employer who," merged two sentences into one by substituting "but the" for

"All," substituted "portion" for "portions," substituted "such" for "the" preceding "extended," deleted "paid" following "benefits" near the end of the sentence and substituted "such employer" for "governmental entities or other employers not liable for FUTA taxes who are the base period employers."

Legal Periodicals. — For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

§ 96-13. Benefit eligibility conditions.

(a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that —

- (1) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe;
- (2) He has made a claim for benefits in accordance with the provisions of G.S. 96-15(a);
- (3) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work: Provided further, that an individual customarily employed in seasonal employment shall, during the period of nonseasonal operations, show to the satisfaction of the Commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period: Provided further, however, that no individual shall be considered available for work for any week not to exceed two in any calendar year in which the Commission finds that his unemployment is due to a vacation. In administering this proviso, benefits shall be paid or denied on a payroll-week basis as established by the employing unit. A week of unemployment due to a vacation as provided herein means any payroll week within which the equivalent of three customary full-time working days consist of a vacation period. For the purpose of this subdivision, any unemployment which is caused by a vacation period and which occurs in the calendar year following that within which the vacation period begins shall be deemed to have occurred in the calendar year within which such vacation period begins. For the purposes of this subdivision, no individual shall be deemed available for work during any week in which he is registered at and attending an established school, or is on vacation during or between successive quarters or semesters of such school attendance, or on vacation between yearly terms of such school attendance. Except: (i) Any person who was engaged in full-time employment concurrent with his school attendance, who is otherwise eligible, shall not be denied benefits because of school enrollment and attendance. (ii) An unemployed individual who is attending a vocational school or training program which has been approved by the Commission for such individual shall be deemed available for work. However, any unemployment insurance benefits payable with respect to any week for which a training allowance is payable pursuant to the provisions of a federal or State law, shall be reduced by the amount of such allowance. The Commission may approve such training course for an individual only if:

- a. Reasonable employment opportunities for which the individual is fitted by training and experience do not exist in the locality or are severely curtailed;
 - b. The training course relates to an occupation or skill for which there are expected to be reasonable opportunities for employment; and
 - c. The individual, within the judgment of the Commission, has the required qualifications and the aptitude to complete the course successfully.
- (b) (1) The payment of benefits to any individual based on services for nonprofit organizations, hospitals, or State hospitals and State institutions of higher education and other institutions of higher education subject to this Chapter shall be in the same manner and under the same conditions of the laws of this Chapter as applied to individuals whose benefit rights are based on other services subject to this Chapter. Except that with respect to services in instructional, research, or principal administrative capacity in an institution of higher education which meets the requirements of G.S. 96-8(5)1, shall not be payable based on such services for any week commencing during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual has a contract or contracts or a reasonable assurance to perform services in any such capacity for any institution or institutions of higher education for both such academic years or both such terms.
- (2) The payment of benefits to any individual based on services for secondary schools, or subdivisions of said secondary schools, subject to this Chapter, or administered under the provisions of this Chapter, shall be in the same manner and under the same conditions of the laws of the Chapter as apply to individuals whose benefit rights are based on other services subject to this Chapter. Except that with respect to services in instructional, research or principal administrative capacity in a secondary school, or subdivision thereof, benefits shall be payable based on such services for any week commencing during the period between two successive academic years or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, only if the individual does not have a contract or contracts, written, oral, or implied or a reasonable assurance to perform services in any such capacity for any secondary school for both such academic years or both such terms. Except with respect to services in a secondary school or subdivision thereof, in any capacity other than instructional, research or principal administrative, benefits shall be payable based on such services for any week commencing during the period between two successive academic years or during a similar period between two regular terms, only if the individual does not have a contract or contracts, written, oral, or implied or a reasonable assurance to perform services in any such capacity for any secondary school for both such academic years or both such terms. The provisions of this subsection relating to the denial of benefits for any week of unemployment commencing during the period between two successive academic years or during a similar period between two regular terms shall apply to an individual who performs services on a part-time or substitute basis.
- (c) From January 29, 1975, through February 15, 1977, no week of unemployment for waiting-period credit shall be required of any claimant. Beginning February 16, 1977, an unemployed individual shall be eligible to

receive benefits with respect to any week only if the Commission finds that he has been totally, partially, or part-totally unemployed for a waiting period of one week with respect to each benefit year. No week shall be counted as a week of unemployment for waiting-period credit under this provision unless the claimant except for the provisions of this subdivision was otherwise eligible for benefits.

(d) Benefit entitlement based on services for governmental entities that become subject to Employment Security Commission law effective January 1, 1978, will be administered in the same manner and under the same conditions of the laws of this Chapter as are applicable to individuals whose benefit rights are based on other service subject to this Chapter.

(e) Benefits shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons (or similar periods) if such individual performs such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the latter of such seasons (or similar periods).

(f) Benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in the United States under color of law or was lawfully present for purposes of performing such services (including an alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act). Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits. In the case of an individual whose application for benefits would otherwise be approved, no determination that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5; c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5; 1945, c. 522, ss. 27-28; 1947, c. 326, s. 22; 1949, c. 424, s. 22; 1951, c. 332, s. 13; 1961, c. 454, s. 19; 1965, c. 795, ss. 17, 18; 1969, c. 575, ss. 10, 11; 1971, c. 673, ss. 27, 28; 1973, c. 172, s. 6; 1975, c. 2, s. 6; c. 8, ss. 1, 2; c. 226, ss. 1, 2; 1977, c. 727, s. 53; 1979, c. 660, ss. 20, 21, 29-31; 1981, c. 160, ss. 24, 25; c. 883.)

Effect of Amendments. — The first 1981 amendment deleted a proviso near the middle of the introductory paragraph of subdivision (a)(3) which stated that secondary school employees could only be considered available for work during a vacation between academic terms only if the employee did not have a contract to perform services for both terms and,

in subdivision (b)(2), substituted "or a reasonable assurance" for a comma near the end of the second sentence.

The second 1981 amendment added the last sentence of subdivision (b)(2).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 96-14. Disqualification for benefits.

An individual shall be disqualified for benefits:

- (1) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer.
- (2) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which

week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work.

- (3) For the duration of his unemployment beginning with the first day of the first week in which the disqualifying act occurs if it is determined by the Commission that such individual has failed without good cause (i) to apply for available suitable work when so directed by the employment office of the Commission; or (ii) to accept suitable work when offered him; or (iii) to return to his customary self-employment (if any) when so directed by the Commission. Provided further, an otherwise eligible individual who is attending a vocational school or training program which has been approved by the Commission for such individual shall not be denied benefits because he refuses to apply for or accept suitable work during such period of training.

In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

Notwithstanding any other provisions of this Chapter, no work shall be deemed suitable and benefits shall not be denied under this Chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- a. If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
 - b. If the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
 - c. If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.
- (4) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that:
- a. Such individual has failed without good cause to attend a vocational school or training program when so directed by the Commission;
 - b. Such individual has discontinued his training course without good cause; or
 - c. If the individual is separated from his training course or vocational school due to misconduct.
- (5) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and

required to physically resume operations in the method of operating in use at the plant, factory, or establishment of the employing unit.

- (6) If the Commission finds he is customarily self-employed and can reasonably return to self-employment.
- (7) For any week after June 30, 1939, with respect to which he shall have and assert any right to unemployment benefits under an employment security law of either the federal or a state government, other than the State of North Carolina.
- (8) For any week with respect to which he has received any sum from the employer pursuant to an order of the National Labor Relations Board or by private agreement, consent or arbitration for loss of pay by reason of discharge. When the amount so paid by the employer is in a lump sum and covers a period of more than one week, such amount shall be allocated to the weeks in the period on a pro rata basis; provided further that if the amount so prorated to a particular week is less than the benefits which would otherwise be due under this Chapter, he shall be entitled to receive for such week, if otherwise eligible, benefits as provided under G.S. 96-12 of this Chapter.
- (9) The amount of compensation payable to an individual for any week which begins after July 2, 1977, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount rounded to the nearest dollar equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week.

The amount of benefits payable to an individual for any week which begins after July 1, 1981, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by the amounts of any such pension, retirement or retired pay, annuity, or other payment contributed to in part or in total by the individual's base period employers; provided, however, that the amount of all payments received by an individual under the Social Security Act and the Railroad Retirement Act shall be deducted from the individual's benefit amount.

- (10) Any employee disqualified for the duration of his unemployment due to the provisions of (1), (2), (3) or (4) above may have that permanent disqualification removed if he meets the following three conditions:
 - a. Returns to work for at least five weeks and is paid cumulative wages of at least 10 times his weekly benefit amount;
 - b. Subsequently becomes unemployed through no fault of his own; and
 - c. Meets the availability requirements of the law.

Provided for good cause shown the Commission in its discretion may as to any permanent disqualification provided in this Chapter reduce the disqualification period to a time certain but not less than five weeks. The maximum amount of benefits due any individual whose permanent disqualification is changed to a time certain shall be reduced by an amount determined by multiplying the number of weeks of disqualification by the weekly benefit amount. (Ex. Sess. 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8; 1945, c. 522, s. 29; 1947, c. 598, s. 10; c. 881, ss. 1, 2; 1949, c. 424, ss. 23-25; 1951, c. 332, s. 14; 1955, c. 385, ss. 7,

8; 1961, c. 454, s. 20; 1965, c. 795, s. 19; 1969, c. 575, s. 12; 1971, c. 673, s. 29; 1977, c. 26; 1981, c. 160, s. 26; c. 593.)

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, added the second paragraph of subdivision (9).

The second 1981 amendment substituted "in which" for "after" and deleted "with respect to which week an individual files a claim for benefits" following "occurs" near the beginning of

the first paragraph of subdivision (3).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

CASE NOTES

II. LEAVING WORK VOLUNTARILY WITHOUT GOOD CAUSE.

"Good cause" is a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. In re Clark, 47 N.C. App. 163, 266 S.E.2d 854 (1980).

Claimant voluntarily left work as a county social worker for good cause attributable to her employer and was thus entitled to unemployment compensation where she resigned her position because she was instructed by her supervisor to initiate custody proceedings for certain children after she had secured voluntarily, revocable Board Home Agreements from

the mothers to place their children in the temporary custody of others upon her assurances to the mothers that the children would be returned to the mothers upon request, and because she felt that the actions she was required to take violated the ethical standards of her profession. In re Clark, 47 N.C. App. 163, 266 S.E.2d 854 (1980).

Had claimant left her job because of racial discrimination practice against her by her employer, she would have had good cause attributable to her employer and so would not have been disqualified for unemployment compensation benefits. In re Boulden, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

§ 96-15. Claims for benefits.

(a) Filing. — Claims for benefits shall be made in accordance with such regulations as the Commission may prescribe. Each employing unit shall post and maintain in places readily accessible to individuals performing services for it printed statements, concerning benefit rights, claims for benefits, and such other matters relating to the administration of this Chapter as the Commission may direct. Each employing unit shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits as the Commission may direct. Such printed statements and other materials shall be supplied by the Commission to each employing unit without cost to the employing unit.

(b) (1) Initial Determination. — A representative designated by the Commission shall promptly examine the claim and shall determine whether or not the claim is valid, and if valid, the week with respect to when benefits shall commence, the weekly benefit amount payable, and the potential maximum duration thereof. The claimant shall be furnished a copy of such initial or monetary determination showing the amount of wages paid him by each employer during his base period and the employers by whom such wages were paid, his benefit year, weekly benefit amount, and the maximum amount of benefits that may be paid to him for unemployment during the benefit year. When a claimant is ineligible due to lack of earnings in his base period, the determination shall so designate. The claimant shall be allowed 10 days from the delivery of his initial determination to him within which to protest his initial or monetary determination and upon the filing of such protest, unless said protest be satisfactorily resolved, the claim shall be referred to an adjudicator for a decision as to the issues presented. All base period employers, as well as the most recent employer of a claimant on a temporary layoff, shall be notified upon

the filing of a claim which establishes a benefit year or an ineligible amount.

At any time within one year from the date of the making of an initial determination, the Commission on its own initiative may reconsider such determination if it finds that an error in computation or identity has occurred in connection therewith or that additional wages pertinent to the claimant's benefit status have become available, or if such determination of benefit status was made as a result of a nondisclosure or misrepresentation of a material fact.

- (2) **Adjudication.** — When a protest is made by the claimant to the initial or monetary determination, or a question or issue is raised or presented as to the eligibility of a claimant under G.S. 96-13, or whether any disqualification should be imposed under G.S. 96-14, or benefits denied or adjusted pursuant to G.S. 96-18, the matter shall be referred to an adjudicator. The adjudicator may consider any matter, document or statement deemed to be pertinent to the issues, including telephone conversations, and after such consideration shall render a conclusion as to the claimant's benefit entitlements. The adjudicator shall notify the claimant and all other interested parties of the conclusion reached. The conclusion of the adjudicator shall be deemed the final decision of the Commission unless within 10 days after the date of notification or mailing of the conclusion, whichever is earlier, an appeal is initiated. The Commission shall be deemed an interested party for such purposes and may remove to itself or transfer to an appeals referee the proceedings involving any claim pending before an adjudicator.

(c) **Appeals.** — Unless an appeal from the adjudicator is withdrawn, an appeals referee shall set a hearing in which the parties are given reasonable opportunity to be heard. The appeals referee may affirm or modify the conclusion of the adjudicator or issue a new decision in which findings of fact and conclusions of law will be set out or dismiss an appeal when the appellant fails to appear at the appeals hearing to prosecute the appeal after having been duly notified of the appeals hearing. The evidence taken at the hearings before the appeals referee shall be recorded and the decision of the appeals referee shall be deemed to be the final decision of the Commission unless within 10 days after the date of notification or mailing of the decision, whichever is earlier further appeal is initiated. Should the appeals referee uphold the conclusion of the adjudicator, any benefits paid as the result of that decision shall not be charged to any employer's account if that decision is ultimately reversed. Whenever an appeal is taken from a decision of the appeals referee, the appealing party shall submit a clear written statement containing the grounds for the appeal within the time allowed by law for taking the appeal, and if such timely statement is not submitted, an appeals referee may dismiss the appeal.

- (d) Repealed by Session Laws 1977, c. 727, s. 54.

(e) **Review by the Commission.** — The Commission or Deputy Commissioner may on its own motion affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the Commission or Deputy Commissioner may deem proper. The Commission or Deputy Commissioner may remove to itself or transfer to another appeals referee the proceedings on any claim pending before an appeals referee. The Commission shall promptly notify the interested parties of its findings and the decision. In all Commission matters heard by a Deputy Commissioner, the decision of the Deputy Commissioner shall constitute the decision of the Commission; except, the Commission may remove unto itself,

upon its own motion, any claim pending for rehearing and redetermination, provided such removal is done prior to the expiration of appeal period applicable to the decision of the Deputy Commissioner.

(f) Procedure. — The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the Commission for determining the rights of the parties, whether or not such regulations conform to common-law or statutory rules of evidence and other technical rules of procedure. All testimony at any hearing before an appeals referee upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness Fees. — Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the Commission. Such fees and all expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering this Chapter.

(h) Appeal to Courts. — Any decision of the Commission, in the absence of an appeal therefrom as herein provided, shall become final 10 days after the date of notification or mailing thereof, whichever is earlier, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has filed notice of appeal with the Commission within such 10-day period and exhausted his remedies before the Commission as provided by this Chapter. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney who has been designated by it for that purpose. If a notice of appeal is filed but not in a timely fashion, the Commission may dismiss the appeal.

(i) Appeal Proceedings. — The decision of the Commission shall be final, subject to appeal as herein provided. If a timely notice of appeal has been filed as provided in G.S. 96-15(h), the appeal shall be filed and heard in the Superior Court of Wake County, unless the appellant objects in writing to such venue, after being afforded a reasonable opportunity to do so, in which case the appeal shall be transferred to the superior court in the county of the appellant's residence or principal place of business. In case of such appeal, the court shall have power to make party-defendant any other party which it may deem necessary or proper to a just and fair determination of the case. In every case in which appeal is demanded, the appealing party shall file a statement with the Commission within the time allowed for appeal, in which shall be plainly stated the grounds upon which a review is sought and the particulars in which it is claimed the Commission is in error with respect to its decision. If such statement is not filed in a timely fashion, the Commission may dismiss the appeal. The Commission shall make a return to the notice of appeal, which shall consist of all documents and papers necessary to an understanding of the appeal, and a transcript of all testimony taken in the matter, together with its findings of fact and decision thereon, which shall be certified and filed with the superior court to which appeal is taken within 30 days from the time the appeal is perfected. The Commission may also, in its discretion, certify to such court questions of law involved in any decision by it. In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support them, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner, and shall be given precedence over all civil cases, except cases arising under the Workmen's Compensation Law of this State. An appeal may be taken from the judgment of the superior court, as provided in civil cases. The Commission shall have the right of appeal to the appellate division from a decision or judgment of the superior court and for such purpose shall be deemed to be an aggrieved party.

No bond shall be required upon such appeal. Upon the final determination of the case or proceeding the Commission shall enter an order in accordance with such determination. When an appeal has been entered to any judgment, order, or decision of the court below, no benefits shall be paid pending a final determination of the cause, except in those cases in which the court below has affirmed a decision of the Commission allowing benefits or benefits are payable under the provisions of G.S. 96-15(b)(2).

(j) Information obtained by any employee of the Commission from an employer or the claimant with respect to a claim for benefits shall not be published or opened to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the claimant's identity or his rights to potential benefits or the amount of benefits paid except as provided below. Any individual, as well as any interested employer(s) may be supplied with information as to the individual's potential benefit rights from such claim records. Any claimant at a hearing before a claims adjudicator, or an appeals referee or the Commission or Deputy Commissioner shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. All reports, statements, information, and communications of every character with respect to a claim for benefits so made or given to the Commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the Commission from the claimant or the employer or the employer's books and records, shall be absolute privileged communications in any civil or criminal proceedings except proceedings involving the administration of this Chapter: Provided, nothing herein contained shall operate to relieve any claimant or employing unit from disclosing any information required by this Chapter or as prescribed by the Commission involving the administration of this Chapter. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200.00), or imprisoned for not longer than 90 days, or both.

(k) Irrespective of any other provision of this Chapter, the Commission may adopt minimum regulations necessary to provide for the payment of benefits to individuals promptly when due as required by section 303(a)(1) of the Social Security Act as amended (42 U.S.C.A., section 503(a)(1)). (Ex. Sess. 1936, c. 1, s. 6; 1937, c. 150; c. 448, s. 4; 1941, c. 108, s. 5; 1943, c. 377, ss. 9, 10; 1945, c. 522, ss. 30-32; 1947, c. 326, s. 23; 1951, c. 332, s. 15; 1953, c. 401, s. 19; 1959, c. 362, ss. 16, 17; 1961, c. 454, s. 21; 1965, c. 795, ss. 20-22; 1969, c. 575, ss. 13, 14; 1971, c. 673, ss. 30, 30.1; 1977, c. 727, s. 54; 1981, c. 160, ss. 27-32.)

Effect of Amendments. — The 1981 amendment, in subdivision (b)(2), substituted the heading "Adjudication" for "Hearings before Adjudicator," and, in the first sentence, substituted "to the" for "his" preceding "initial," inserted "or monetary" preceding "determination," substituted "raised or presented" for "presented or raised," deleted "for benefits" preceding "under G.S. 96-13," deleted "herein" following "G.S. 96-13," substituted "should" for "shall," substituted "under" for "by virtue of" preceding "G.S. 96-14," deleted "of this Chapter" following "G.S. 96-14" and "G.S. 96-18," substituted "matter" for "claim" and deleted "who shall afford the parties an opportunity to present their positions at an informal conference" at the end of the sentence. In the second sentence of subdivision (b)(2), the amendment substituted "may" for "can," "document" for

"material," and "conversations" for "inquiries when desirable", inserted "such" preceding "consideration", inserted "claimant's" preceding "benefit" and deleted "of the claimant involved" following "entitlements." The amendment substituted "all" for "any" and "parties" for "party" in the third sentence of subdivision (b)(2), substituted the fourth sentence of the subdivision for a sentence which pertained to the same subject, merged the former fifth and sixth sentences of the subdivision by substituting "for such purposes and" for "The Commission," substituted "to" for "unto" preceding "itself," deleted "it" preceding "an Appeals" and substituted "involving" for "of" in the fifth sentence and deleted a final paragraph of subdivision (b)(2) which pertained to notice on out-of-state claims. In subsection (c), the amendment added the language

beginning "or dismiss" in the second sentence, deleted "of" following "notification" and inserted "whichever is earlier" in the third sentence, substituted "ultimately" for "finally" in the fourth sentence and substituted the last sentence for one which read "Any reference to 'appeals deputy' or 'appeals tribunal' in this Chapter shall be deemed to mean 'appeals referee.'" The amendment substituted "regulations" for "rules" in two places in the first sentence of subsection (f), substituted "referee" for "tribunal" in the second sentence of subsection (f), and, in subsection (h), inserted "whichever is earlier" in the first sentence and

added the last sentence. In subsection (i), the amendment substituted the second sentence for two former sentences which pertained to the same subject matter, added the fifth sentence, substituted "from the time the appeal is perfected" for "of said notice of appeal" in the sixth sentence and substituted "them" for "it" in the eighth sentence. In subsection (j), the amendment substituted "the individual's" for "his" in the second sentence and, in the third sentence, substituted "adjudicator" for "deputy" and "referee" for "tribunal" and inserted "or Deputy Commissioner."

CASE NOTES

Scope of Superior Court's Jurisdiction.—

In accord with 3rd paragraph in 1979 Cum. Supp. See *In re Boulden*, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

Conclusiveness of Findings of Fact on Appeal. —

The reviewing court under subsection (i) of this section may determine upon proper exceptions whether the facts found by the commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but in no event may the reviewing court consider the evi-

dence for the purpose of finding the facts for itself. *In re Boulden*, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

Remand Where Findings of Fact Supported But Insufficient. — If the findings of fact made by the commission, even though supported by competent evidence in the record, are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding should be remanded to the end that the commission make proper findings. *In re Boulden*, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

§ 96-17. Protection of rights and benefits.

(a) **Waiver of Rights Void.** — Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this Chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this Chapter from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from the remuneration of individuals in his employ to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by any individual in his employ. Any employer or officer or agent of an employer who violates any provision of this subsection shall, for each offense, be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000) or be imprisoned for not more than six months, or both.

(b) **Representation.** — Any claimant or employer who is a party to any proceeding before the Commission may be represented by (1) an attorney; or (2) any person who is supervised by an attorney, however, the attorney need not be present at any proceeding before the Commission.

(b1) **Fees Prohibited.** — No individual claiming benefits in any proceeding under this Chapter shall be charged fees of any kind by the Commission or its representative or by any court or any employee thereof.

(c) **No Assignment of Benefits; Exemptions.** — Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this Chapter shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debts; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for

necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this subsection shall be void. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150; 1979, c. 660, s. 22; 1981, c. 762, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment rewrote subsection (b), which formerly pertained to limitation of fees, and added subsection (b1).

§ 96-18. Penalties.

(a) Any person who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact to obtain or increase any benefit under this Chapter or under an employment security law of any other state, the federal government, or of a foreign government, either for himself or any other person, shall be guilty of a misdemeanor, and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

Records, with any necessary authentication thereof, required in the prosecution of any criminal action brought by another state or foreign government for misrepresentation to obtain benefits under the law of this State shall be made available to the agency administering the employment security law of any such state or foreign government for the purpose of such prosecution. Photostatic copies of all records of agencies of other states or foreign governments required in the prosecution of any criminal action under this section shall be as competent evidence as the originals when certified under the seal of such agency, or when there is no seal, under the hand of the keeper of such records.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contributions or other payment required from an employing unit under this Chapter, or who willfully fails or refuses to furnish any reports required hereunder, or to produce or permit the inspection or copying of records as required hereunder, shall be guilty of a misdemeanor; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who shall willfully violate any provisions of this Chapter or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this Chapter, or for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be guilty of a misdemeanor, and each day such violation continues shall be deemed to be a separate offense.

(d) Any person who, by reason of the nondisclosure or misrepresentation by him or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received any sum as benefits under this Chapter while any conditions for the receipt of benefits imposed by this Chapter were not fulfilled in his case, or while he was disqualified from receiving benefits, shall, in the discretion of the Commission, either be liable to have such sum deducted from any future benefits payable to him under this Chapter, or shall be liable to repay to the Commission for the Unemployment Insurance Fund a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in G.S. 96-10(b) for the collection of past-due contributions; provided "this Chapter" and "Unemployment Insurance Fund" shall also be deemed to mean the employment security law and the unemployment insurance fund of any other state or the federal government, or

a foreign government for purposes of this subsection, when an interstate claim is involved.

(e) An individual shall not be entitled to receive benefits for one year beginning with the first day following the last benefit week for which he received benefits, or one year from the date upon which the act was committed, whichever is the later, if he, or another in his behalf with his knowledge, has been found to have knowingly made a false statement or misrepresentation, or who has knowingly failed to disclose a material fact to obtain or increase any benefit or other payment under this Chapter.

(f) Any individual who has received any sum as benefits to which he was not entitled, such sum having been paid to him as the result of error on the part of any representative of the Commission, shall be liable to have such sum deducted from any future benefits payable to him under this Chapter, or shall be liable to repay to the Commission for the Unemployment Insurance Fund a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in G.S. 96-10(b) for the collection of past-due contributions; provided, this "Chapter" and "Unemployment Insurance Fund" shall also be deemed to mean the employment security law and the unemployment insurance fund of any other state or the federal government, or a foreign government for the purposes of this subsection, when an interstate claim is involved.

- (g) (1) Any person who, by reason of his fraud, has received any sum as benefits under this Chapter to which he was not entitled shall be liable to repay such sum to the Commission for and on behalf of the trust fund, or, in the discretion of the Commission, to have such sum deducted from future benefits payable to him under this Chapter, provided a finding of the existence of such fraud has been made by a decision pursuant to this Chapter within two years from the commission of such fraud.
- (2) If any person, other than by reason of his fraud, has received any sum as benefits under this Chapter to which he has been found not entitled, he shall be liable to repay such sum to the Commission for and on behalf of the trust fund or, in the discretion of the Commission, shall have such sum deducted from any future benefits payable to him under this Chapter. No such recovery or recoupment of such sum may be initiated after three years from the last day of the year in which the overpayment occurred. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; c. 377, ss. 29, 30; 1945, c. 552, s. 34; 1949, c. 424, s. 26; 1951, c. 332, s. 16; 1953, c. 401, ss. 1, 22; 1955, c. 385, s. 9; 1959, c. 362, ss. 19, 20; 1965, c. 795, ss. 23, 24; 1971, c. 673, s. 31; 1977, c. 727, s. 55; 1979, c. 660, ss. 23-25; 1981, c. 160, s. 33.)

Effect of Amendments. — The 1981 amendment, in the last sentence of subdivision (g)(2), substituted "initiated" for "effected" and "three" for "10."

ARTICLE 3.

Employment Service Division.

§ 96-29. Openings listed by State agencies.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

1981 SUPPLEMENT

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

October 15, 1981

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1981 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Rufus L. Edmisten
Attorney General of North Carolina

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