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TITLE 3

Accountancy, Board of Public

JULY 1991

3-01-01-01. Organization of the state board of public accountancy.

1. **History.** The state board of public accountancy was created in 1913 and originally supervised certified public accountants. The 1975 Public Accountancy Act, codified as North Dakota Century Code chapter 43-02.1, completely revamped the accountancy laws and added licensed public accountants to the board's jurisdiction.

2. **Legislative intent.** The 1975 legislative assembly, in passing the Public Accountancy Act, declared it to be the state's policy to promote the dependability of financial and accounting information used for private or public purposes, and further declared it to be in the public's interest that persons claiming expertness in accountancy meet certain standards and qualifications. A person's ability and fitness to observe and apply the standards of the accounting profession are to be judged by the board of public accountancy.

3. **Board membership.** The board consists of five members appointed by the governor from lists of qualified nominees submitted by the certified public accountants and the licensed public accountants in North Dakota. There are four certified public accountants and one licensed public accountant on the board. If there are fewer than twenty-five licensed public accountants in the state, they shall lose representation on the board. Board terms are five years.

4. **Compensation of board members.** Pursuant to subsection 3 of North Dakota Century Code section 43-02.1-02, each member of the state board of public accountancy shall receive annual compensation determined by the board of twelve hundred dollars

as compensation for the days, or portions thereof, spent in the discharge of the member's duties. In addition, each member shall receive sixty-two dollars and fifty cents for each day or portion thereof spent at the exam site in the role of overseeing the administration of the uniform certified public accountant examination.

5. Executive director. Subsection 6 of North Dakota Century Code section 43-02.1-02 authorizes the board to employ an executive director. The executive director is responsible for keeping the board's records, and administering the board's activities, ~~and filing the board's biennial reports.~~

The board's executive director ~~is~~ may be contacted at:

~~Mr. Daryl J. Hill~~
Board of Public Accountancy
Box 8104 University Station
Grand Forks, North Dakota 58202

History: Amended effective August 1, 1981; September 1, 1983; October 1, 1983; July 1, 1991.
General Authority: NDCC 28-32-02.1, 43-02.1-02(6)(d)
Law Implemented: NDCC 28-32-02.1, 43-02.1-02(3)

3-01-02-01. Definitions. Unless specifically stated otherwise, the following definitions are applicable throughout this title:

1. "Accountant" means either a certified public accountant or a licensed public accountant certified to practice under North Dakota Century Code chapter 43-02.1.

2. "AICPA" means the American institute of certified public accountants.

3. "Board" means the state board of public accountancy.

~~3.~~ 4. "Bookkeeping" means the maintaining of financial records and preparation of tax returns. Bookkeeping does not include the preparation of any financial statement or similar such documents on which language similar to that utilized by certified public accountants or licensed public accountants is placed including compilation and review language.

~~4.~~ 5. "Client" means the person, persons, or entity that retains an accountant or an accountant's firm, engaged in public accounting, for the performance of professional services.

~~5.~~ 6. "Council" means the council of the American institute of certified public accountants.

~~6.~~ 7. "Enterprise" means any person, persons, or entity, whether or not organized for profit, for which an accountant provides services.

8. "Financial statements" means statements, and footnotes related thereto, that purport to show financial position that relates to a point in time or changes in financial position that relate to a period of time, and statements that use a cash or other incomplete basis of accounting. Balance sheets, statements of income, statements of retained earnings, statements of changes in financial position, and statements of changes in owners' equity are financial statements. Incidental financial data included in management advisory services, reports to support recommendations to a client, and tax returns and supporting schedules do not, for these purposes, constitute financial statements. The statement, affidavit, or signature of preparers required on tax returns neither constitutes an opinion on financial statements nor requires a disclaimer of such opinion.

~~7.~~ 9. "Firm" means a proprietorship, partnership, corporation, or professional corporation or association engaged in the practice of public accounting, including individual partners or shareholders thereof.

~~9.~~ 10. "Institute" means the American institute of certified public accountants.

11. "Licensee" means a certified public accountant or a licensed public accountant licensed by this board.

12. "NSPA" means the national society of public accountants.

~~10.~~ 13. "Practice of public accounting" means ~~holding~~ any of the following:

a. Holding oneself out to ~~be an accountant or performing~~ the public as a provider of public accounting services.

b. Performing or giving the appearance of performing any form of reporting or attest functions of the type generally rendered by certified public accountants or licensed public accountants ~~including the~~.

c. The rendering of any report or intimating that a report is being given with respect to any financial statements whether audited, reviewed, or compiled ~~including~~.

d. Using a reference to the fact that ~~the~~ financial statements or other documents were prepared in accordance with generally accepted accounting principals or similar language indicating that the standards of the accounting profession have been followed.

Practice of public accounting does not include mere bookkeeping as defined by this section, nor does it include reviews conducted under the American institute of certified public accountants or national society of public accountants peer review programs or the American institute of certified public accountants quality review program or the board's positive review program, or any other similar program approved by this board.

The terms "public practice", "practice", and "practice public accounting" shall be synonymous with the term "practice of public accounting".

The terms shall not be limited by a more restrictive definition that might be found in the accountancy law under which a ~~member~~ licensee practices.

~~11.~~ 14. "Professional services" means one or more types of services performed in the practice of public accounting.

History: Amended effective January 1, 1987; July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-02-02-01. Examination fees. The following examination fees have been established by the board for the certified public accountants examination:

1. ~~Not to exceed one~~ One hundred twenty-five dollars at the time an applicant files an application to take the examination.

2. Sixty dollars for each reexamination in accounting practice.

3. Thirty dollars for each reexamination in the other subjects provided the applicant has already passed accounting practice or two other parts of the examination.

History: Amended effective July 1, 1981; July 1, 1985; July 1, 1987; July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-03(3)

3-02-02-03. Licensed public accountants' fees. ~~For those licensed public accountants qualifying for licensure under the provisions of North Dakota Century Code section 43-02.1-04, the following fees shall be in effect:~~ Repealed effective July 1, 1991.

~~1. One hundred dollars for licensure under subsection 1 of North Dakota Century Code section 43-02.1-04.~~

~~2. Ten dollars for registration and one hundred dollars licensure under subsection 2 of North Dakota Century Code section 43-02.1-04.~~

~~3. One hundred dollars for licensure for a nonresident under subdivision c of subsection 3 of North Dakota Century Code section 43-02.1-04.~~

General Authority: ~~NDCC 43-02.1-02(6)(d)~~
Law Implemented: ~~NDCC 43-02.1-04(1), 43-02.1-04(2), 43-02.1-04(3)~~

3-02-02-04. Fee for annual licensure. The annual fee for every person legally certified to practice as a certified public accountant and every person legally licensed to practice as a licensed public accountant within this state, whether in actual practice or not, shall be ~~fifty~~ forty dollars. ~~The fee for nonresidents shall be forty dollars~~ Each licensee that fails to register or pay the annual license fee by July thirty-first of the board's current fiscal year shall pay a late filing fee of twenty dollars in addition to the annual license fee.

History: Amended effective August 1, 1981; October 1, 1982; July 1, 1987; June 1, 1988; July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC ~~43-02.1-03(3), 43-02.1-04(1)~~ 43-02.1-06

3-02-02-05. Inactive or retired accountants.

1. Any certified public accountant or licensed public accountant who is no longer ~~practicing or~~ employed because of disability or ~~other~~ retirement may notify the board of that status. In that event a certificate to practice as a certified public accountant or license to practice as a licensed public accountant shall be designated "inactive" and shall remain effective as such without payment of the annual registration fee required by North Dakota Century Code section 42-02.1-06 and this chapter. Such an inactive certificate holder or licenseholder may not practice as a certified public accountant or a licensed public accountant in this state but may continue to use the title "certified public accountant" or "licensed public accountant" or the abbreviation "CPA" or "LPA", as applicable. Such an inactive certificate holder or licenseholder must adhere to the code of professional ethics set forth in article 3-04, but is not required to comply with continuing professional education regulations set forth in article 3-03.

2. An inactive certificate holder or licenseholder may apply for reinstatement to practice as a certified public accountant or licensed public accountant at any time and will be reinstated to "active" practice as a certified public accountant or licensed public accountant by paying the annual registration fee required for the year of application, and by satisfying

the board that all current requirements for continuing education have been met.

History: Effective October 1, 1982; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-06

3-02-02-06. Suspension or revocation of certified public accountant's certificate or licensed public accountant's license for nonpayment of registration fee.

1. The holder of a certificate to practice as a certified public accountant may have that certificate suspended or revoked for nonpayment of a registration fee. The holder of a license to practice as a licensed public accountant may have that license suspended or revoked for nonpayment of the registration fee. In the event the board notifies a holder of a certificate to practice as a certified public accountant or license to practice as a licensed public accountant that said fees are in default, and payment is not received by the board for a period of ~~six months~~ sixty days thereafter, the board shall proceed pursuant to North Dakota Century Code section 43-02.1-05 to suspend or revoke the certified public accountant's certificate or licensed public accountant's license.

2. Licensees are required to notify the board of address changes within thirty days of such change. Should a certificate holder or licenseholder fail to inform the board of a change of address, the board shall make reasonable efforts to obtain the address, but in the event that ~~those efforts fail for a period of six months~~ the address is not found by sixty days from the time when a certified public accountant's or licensed public accountant's registration fee is due, the board shall proceed to suspend or revoke the certified public accountant's certificate or licensed public accountant's license pursuant to North Dakota Century Code section 43-02.1-05.

History: Effective October 1, 1982; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-06

3-02-02-07. Return of suspended or revoked certified public accountant's certificate or licensed public accountant's license. Should a certificate ~~holder have his~~ holder's certificate be suspended or revoked or a ~~licenseholder have his~~ licenseholder's license be suspended or revoked ~~pursuant to North Dakota Century Code section 43-02.1-07~~, the certificate holder or licenseholder shall return ~~his~~ the certificate or license to the North Dakota state board of public accountancy state office within thirty days after receipt of notice of said suspension or revocation. The certificate or license returned under this section must be the original document issued by the board.

A licensee who voluntarily relinquishes the certificate or license must return the original certificate or license to the board within thirty days after notifying the board of the intent to relinquish.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-05

3-02-02-08. Reinstatement fee. Should a certificate ~~holder have his~~ holder's certificate be suspended or revoked, or a ~~licenseholder have his~~ licenseholder's license be suspended or revoked ~~because of nonpayment of his annual fee~~, the certificate holder or licenseholder is required to pay in addition to ~~his~~ the annual fee, as provided in section 3-02-02-04, ~~a reinstatement fee determined by the board not to exceed one hundred dollars~~ all annual registration fees that would have been payable had suspension or revocation not occurred. The certificate holder or licenseholder must also ~~be required to~~ satisfy the state board that all current requirements to hold a certificate or license in good standing have been met.

A licensee who voluntarily relinquishes the certificate or license may be subsequently reinstated upon payment of the current annual registration fee. The licensee must also satisfy the board that all current requirements to hold a certificate or license in good standing have been met.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC ~~43-02.1-03(3), 43-02.1-04(1)~~ 43-02.1-05(2)

3-02-03-01. Registration of sole practitioners and partnerships. Each partnership consisting of one or more partners, and each sole practitioner holding unrevoked North Dakota certificates ~~and~~ or licenses which engage or intend to engage in the practice of public accounting within North Dakota during all or part of the state board of public accountancy's fiscal year, is required to register for that year. The completed registration form and the appropriate fee shall be submitted to the board within thirty days prior to engaging in ~~public practice~~ the practice of public accounting in any year.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-02-03-04. Untimely registration - Sole practitioner or partnership. Each sole practitioner or partnership that fails to register by July thirty-first of each year shall pay a late filing fee of twenty dollars, in addition to the annual registration fee required in section 3-02-02-04.1. In the event the board notifies a sole practitioner or partnership that said fees and registration are in

default, and payment is not received by the board for a period of ~~six months~~ sixty days after such notice, the board shall proceed pursuant to North Dakota Century Code section 43-02.1-05 to suspend or revoke the certificate or license of each sole practitioner or individual partner.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-02-03-05. Sole practitioner's or partnership's failure to register or pay fee. Failure to register and pay the appropriate fee as provided in section 3-02-02-04.1 by July thirty-first of each year shall be deemed unprofessional conduct and may be cause for suspension or revocation of the certificates ~~and~~ or licenses of the sole practitioner or of each individual partner.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-02-03-06. Registration of corporations. Each professional corporation consisting of one or more shareholders holding unrevoked North Dakota certificates ~~and~~ or licenses which engages or intends to engage in the practice of public accounting within North Dakota during all or part of the state board's fiscal year is required to register with the board ~~annually~~ for that year. The completed registration form and appropriate fee~~, accompanied by a copy of the articles of incorporation and its annual report,~~ shall be submitted to the board within thirty days prior to engaging in ~~public~~ the practice of public accounting in any year.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-02-03-09. Untimely registration - Corporation. Each corporation that fails to register by July thirty-first of each year shall pay a late filing fee of twenty dollars, in addition to the annual registration fee required in section 3-02-02-04.1. In the event the board notifies a corporation that said fees and registration are in default, and payment is not received by the board for a period of ~~six months~~ sixty days after such notice, the board shall proceed pursuant to North Dakota Century Code section 43-02.1-05 to suspend or revoke the certificate or license of each officer, director, or shareholder of the corporation.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-02-03-10. Corporation's failure to register or pay fee. Failure to register and pay the appropriate fees as provided in section 3-02-02-04.1 by July thirty-first of each year is deemed unprofessional conduct and may be cause for suspension or revocation of the certificate ~~and~~ or license of the corporation's officers, directors, and stockholders licensed to practice in this state.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-03-01-01. Hours or days required. ~~On December 31, 1985, each licensee required to do so must have completed one hundred forty hours of acceptable continuing professional education in the immediate preceding three and one-half year period and have a minimum of thirty-six hours for the period July 1, 1984, to December 31, 1985. All subsequent continuing~~ Continuing professional education reporting dates must be on December thirty-first of each year and the hours submitted must be for that previous twelve months, January first through December thirty-first. At the end of ~~the continuing professional education reporting year January 1, 1986, to December 31, 1986, and all subsequent~~ each continuing professional education reporting years, each ~~applicant~~ licensee required to do so by section 3-03-03-01 must have completed one hundred twenty hours of acceptable continuing professional education in the immediate preceding three reporting periods and have completed a minimum of twenty-four credit hours each year. ~~A late filing fee of twenty dollars will be imposed on any licensee whose continuing professional education reports are not received by the date indicated.~~

History: Amended effective August 1, 1984; October 1, 1984; July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-03-01-02. How credits determined.

1. Continuing professional education programs are measured in full-hour increments only, with one hour of credit awarded for each full fifty minutes of instruction.

2. Only class hours or self-study equivalents, and not preparation hours, are to be counted.

3. Service as a lecturer or discussion leader will receive credit to the extent that it contributes to the individual's professional competence, to a total credit limit equal to twice the program's credit allowance for enrolled participants. Credit for lecturer or discussion leader service is further limited to not more than half the total of all hours claimed for any one reporting year. Repetitious presentations are not to be counted.

History: Amended effective July 1, 1987; July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-03-02-03. Programs deemed approved. Provided the criteria listed in sections 3-03-02-01 and 3-03-02-02 are met, the following are deemed to qualify for continuing professional education:

1. Professional development programs of the American institute of certified public accountants, the national society of public accountants, the national association of state boards of accountancy, and state certified public accountant and licensed public accountant societies.

2. Technical sessions at meetings of the American institute of certified public accountants, the national society of public accountants, the national association of state boards of accountancy, state societies, and local chapters.

3. University or college courses.

   a. Courses taken for university or college credit may receive continuing professional education credit at the rate of fifteen hours per semester hour of institutional credit, or ten hours per quarter hour of institutional credit, subject to a total limit of not more than half the total of all hours claimed for any one reporting year.

   b. Licensees teaching a specific university or college level accounting course for the first time may be granted credit for preparation and instruction to the extent that it contributes to the individual's professional competence, up to a limit of twice the continuing professional education course credit available for licensees taking the course. No credit is available for repetitious teaching of the course or for subsequent teaching of courses with similar content. Total credit for these activities ~~during any one reporting year~~ is limited to not more than half the total of all hours claimed for any one reporting year.

   c. Noncredit short courses.

4. Formal, organized in-firm educational programs.

5. Programs in other organizations (accounting, professional, industrial, etc.).

History: Amended effective July 1, 1987; July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-03-02-04. Self-study programs. Provided the criteria listed in sections 3-03-02-01 and 3-03-02-02 are met, formal correspondence courses or other self-study programs will be deemed to qualify for continuing professional education. Total credit for self-study program hours ~~during any one reporting year~~ is limited to not more than half the total of all hours claimed for any one reporting year.

History: Amended effective July 1, 1987; July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-03-03-01. Coverage of requirement. The continuing professional education requirements promulgated by the board will apply to all certified public accountants and licensed public accountants in public practice either full-time or part-time, whether or not on their own account, in North Dakota. Licensees not in public practice full-time or part-time in North Dakota are not required to meet continuing professional education requirements except that they must file annual continuing professional education reports but they need not list any education credits. In the event they decide to enter public practice either full-time or part-time in North Dakota, they must at that time meet the continuing professional education requirements and furnish evidence of familiarity with current accounting and auditing procedures and practices.

A late filing fee of twenty dollars will be imposed on any licensee whose continuing professional education reports are not received by the date indicated on the reporting form.

History: Amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-03-03-02. Nonpractice. ~~Certificate holders not in public practice full time or part time in North Dakota are not required to meet continuing professional education requirements. However, in the event they decide to enter public practice either full time or part time in North Dakota, they must at that time furnish evidence of familiarity with current accounting and auditing procedures and practices.~~ Repealed effective July 1, 1991.

General Authority: ~~NDCC 43-02.1-02(6)(d)~~
Law Implemented: ~~NDCC 43-02.1-02(6)(d)~~

3-03-03-02.1. Temporary license. The board may allow a licensee to practice public accounting under a temporary license if the licensee has acquired at least sixty hours of approved continuing professional education within the preceding three years and agrees in writing to complete, within one hundred eighty days of commencing public practice, the remaining continuing professional education hours necessary to total

one hundred twenty hours. If the licensee completes the remaining continuing professional education hours within the one hundred eighty days, the licensee will be granted a regular license to practice public accounting. If the licensee does not complete the remaining continuing professional education hours within the one hundred eighty days, the licensee must immediately cease practicing public accounting and return the temporary license to the board. Temporary licenses may not be renewed.

History: Effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-03-03-03. Nonresidents. ~~Certified public accountants holding North Dakota certificates but not residing or practicing in North Dakota are not required to meet North Dakota's continuing professional education standards.~~ Repealed effective July 1, 1991.

General Authority: ~~NDCC 43-02.1-02(6)(d)~~
Law Implemented: ~~NDCC 43-02.1-02(6)(d)~~

3-04-01-01. Suspension and revocation. The state board of public accountancy derives its authority from North Dakota Century Code chapter 43-02.1, the Public Accountancy Act of 1975 as amended, which provides that the board may, after a hearing, suspend, or revoke the certificate or license of an accountant found guilty of violating any provisions of this code of ethics.

History: Amended effective November 1, 1982; July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e), 43-02.1-05(1)(d)

3-04-01-02. Applicability. This code of ethics applies to all services performed in the practice of public accounting, including tax and management advisory services, except where specifically stated otherwise. An accountant practicing outside of North Dakota will not be subject to discipline for departing from any of the provisions of the code of ethics so long as the accountant's conduct is in accord with the rules of the organized accounting profession in the state in which the accountant is practicing~~.~~ ~~However, where an accountant's name is associated with financial statements in such a manner as to imply that the accountant is acting as an independent public accountant and under circumstances that would entitle the reader to assume that North Dakota practices were followed, the accountant must comply with the requirements of sections 3-04-03-02 and 3-04-03-03~~, as interpreted by the accountancy board of that state.

History: Amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-04-01-04. **Nonpractitioners.** An accountant engaged in the practice of public accounting must observe all of the provisions of the code of ethics. An accountant not engaged in the practice of public accounting must observe only sections 3-04-01-05, 3-04-01-06, 3-04-02-02, and 3-04-06-01 since all other provisions of the code of ethics relate solely to the practice of public accounting.

History: Amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-04-02-02. **Integrity and objectivity.** An accountant shall not knowingly misrepresent facts, and when engaged in the practice of public accounting, including the rendering of tax and management advisory services, shall not subordinate the accountant's judgment to that of others. ~~In tax practice, an accountant may resolve doubt in favor of the accountant's client as long as there is reasonable support for the position.~~

History: Amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-04-03-01. General standards. An accountant in public practice shall comply with the following ~~general~~ standards as interpreted by the board ~~and must justify any departures therefrom~~.

1. **Professional competence.** An accountant shall undertake only those ~~engagements~~ professional services which the accountant or the accountant's firm can reasonably expect to complete with professional competence.

2. **Due professional care.** An accountant shall exercise due professional care in the performance of ~~an engagement~~ professional services.

3. **Planning and supervision.** An accountant shall adequately plan and supervise ~~an engagement~~ the performance of professional services.

4. **Sufficient relevant data.** An accountant shall obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to ~~an engagement~~ any professional services performed.

5. **Forecasts.** An accountant shall not permit the accountant's name to be used in conjunction with any forecast of future transactions in a manner which may lend to the belief that the ~~member~~ licensee vouches for the achievability of the forecast.

History: Amended effective November 1, 1982; July 1, 1991.

General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-04-04-01. Confidential client information. An accountant shall not disclose any confidential information ~~obtained in the course of a professional engagement except with the~~ without the specific consent of the client.

1. This section shall not be construed:

   a. To relieve an accountant of the accountant's obligations under sections 3-04-03-02 and 3-04-03-03.

   b. To affect in any way the accountant's ~~compliance~~ obligation to comply with a validly issued and enforceable subpoena or summons ~~enforceable by court order~~.

   c. To prohibit review of an accountant's professional ~~practices as a part of voluntary quality review~~ work under institute or board authorization.

   d. To preclude an accountant from initiating a complaint with, or responding to any inquiry made by, the board or its designee or ~~by~~ a duly constituted investigative or disciplinary body ~~of the North Dakota society of certified public accountants or the North Dakota society of licensed public accountants~~.

2. Board members, members of a recognized investigative or disciplinary body, and ~~professional~~ practice reviewers shall not use to their own advantage or disclose any confidential client information that comes to their attention ~~from accountants in disciplinary proceedings or otherwise~~ in carrying out their official responsibilities. However, this prohibition shall not restrict the exchange of information ~~between duly constituted~~ with recognized investigative or disciplinary bodies or affect in any way compliance with a validly issued and enforceable subpoena or summons.

History: Amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-04-04-02. Contingent fees. ~~Professional services shall not be offered or rendered under an arrangement whereby no fee will be charged unless a specified finding or result is attained, or where the fee is otherwise contingent upon the findings or results of such services. An accountant's fees may vary depending, for example, on the complexity of the service rendered. Fees are not regarded as being contingent if fixed by courts or other public authorities or, in tax matters, if~~

~~determined based on the results of judicial proceedings or the findings of governmental agencies.~~ A licensee in public practice may not perform for a contingent fee any professional services for, or receive such a fee from, a client for whom the licensee or licensee's firm also performs:

1. An audit or review of a financial statement;

2. A compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence; or

3. An examination of prospective financial information.

This prohibition applies during the period in which the licensee or the licensee's firm is engaged to perform any of the services listed above as well as the period covered by any historical financial statements involved in any such listed services.

For purposes of this section, a contingent fee is a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service.

A member's fees may vary depending, for example, on the complexity of services rendered. Fees are not regarded as being contingent if fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies. The preparation of original or amended tax returns or claims for refunds does not fall within these exceptions.

History: Amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-04-06-03. ~~Commissions. An accountant shall not pay a commission to obtain a client, nor shall an accountant accept a commission for a referral to a client of products or services of others. This section shall not prohibit payments for the purchase of an accounting practice, or retirement payments to individuals formerly engaged in the practice of public accounting or payments to their heirs or estates.~~ Commission and referral fees. A licensee in public practice may not for a commission recommend or refer to a client any product or service, or for a commission recommend or refer any product or service to be supplied by a client, or receive a commission, when the licensee or the licensee's firm also performs for that client:

1. An audit or review of a financial statement;

2. A compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence; or

3. An examination of prospective financial information.

This prohibition applies during the period in which the licensee is engaged to perform any of the services listed above and the period covered by any historical financial statements involved in such listed services.

A licensee in public practice who is not prohibited by this section from performing services for or receiving a commission and who is paid or expects to be paid a commission shall disclose that fact to any person or entity to whom the licensee recommends or refers a product or service to which the commission relates.

Any licensee who accepts a referral fee for recommending or referring any service of a certified public accountant or licensed public accountant to any person or entity or who pays a referral fee to obtain a client shall disclose such acceptance or payment to the client.

History: Amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-04-06-05. Form of practice - Name. An accountant may practice public accounting, whether as an owner or as an employee, only in the form of a proprietorship, a partnership, or a professional corporation or a business corporation formed for such purposes and in existence on July 1, 1975. An accountant shall not practice public accounting under a firm name ~~which includes any fictitious name, indicated specialization, or~~ that is misleading ~~as to the type of organization (proprietorship, partnership, or corporation). However, names~~ . Names of one or more past partners or shareholders may be included in the firm name of a successor partnership or corporation. Also, a partner or shareholder surviving the death ~~of~~ or withdrawal of all other partners or shareholders may continue to practice public accounting under ~~the partnership name~~ a name which includes the name of past partners or shareholders for up to two years after becoming a sole practitioner.

History: Amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(e)

3-05-02-01. Submission of reports. ~~On or after July first of each year, beginning on July 1, 1988~~ When so directed by the board, each sole practitioner, partnership, or professional corporation required to register under chapter 3-02-03 and which performs compilation or review services but no audit services, shall furnish to the board in connection

with its registration, with respect to each office maintained by the applicant in this state, one copy of each of the following kinds of reports issued by that office during the twelve-month period ~~next~~ preceding the date of ~~application~~ registration, if any report of such kind was issued during such period:

1. A compilation report (including accompanying financial statements); and

2. A review report (including accompanying financial statements)~~; and~~.

~~3. An audit report (including accompanying financial statements).~~

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-05-02-01.1. Onsite practice review. Beginning July 1, 1992, and when directed by the board, a sole practitioner, partnership, or professional corporation required to register under chapter 3-02-03, and which performs audit services, is required to undergo an onsite practice review conforming to the standards of the American institute of certified public accountants quality review program or peer review program, or a program deemed comparable in the opinion of the board. A copy of the report of such review and the letter of comments, if any, are to be submitted to the board as directed.

History: Effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-05-02-02. Exception to submission of report. The ~~requirement~~ requirements of ~~section~~ sections 3-05-02-01 and 3-05-02-01.1 may not apply with respect to any office which within the three years immediately preceding the registration had been subjected to a ~~quality~~ review ~~conforming to this chapter~~ program as defined in section 3-05-02-01.1; provided, that a copy of the report of such ~~quality~~ review and the letter of comments, if any, is submitted with the registration renewal ~~application~~ and such report of the registrant reflected an unqualified opinion.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-05-02-05. Confidentiality of information in report. The identities of the sources of financial statements and reports received by the board or the positive review program committee from other than the registrants who issued the reports must be preserved in confidence.

Reports and other materials submitted to the board or the positive review program committee pursuant to ~~section~~ sections 3-05-02-01, 3-05-02-01.1, and 3-05-02-02 and comments of reviewers, the positive review program committee, and the board on such reports or ~~workpapers~~ other materials relating thereto, must also be preserved in confidence except to the extent that they are communicated by the board to the registrant who issued the reports, and except to the extent that ~~they do not violate~~ the open records law of North Dakota is not violated.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-05-03-01. Review of reports. ~~The positive review program committee shall annually review approximately one third of the~~ Each year, reviewers shall review those reports submitted in accordance with ~~section~~ sections 3-05-02-01~~,~~ and ~~in addition such reports as it receives pursuant to section~~ 3-05-02-04 and such reports as may be referred ~~to it~~ by the board.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-05-03-02. Scope of review. The positive review program committee shall determine, with respect to each report ~~that it reviews~~:

1. Whether the report is in general conformity with applicable professional standards;

2. If not, in what respect the report is substandard (meaning materially inaccurate or misleading) or ~~seriously questionable~~ marginal (meaning containing serious deficiencies but not materially inaccurate or misleading); and

3. Any recommendations it may have concerning improvement of the quality of the report.

The positive review program committee shall report its determinations and recommendations to the board.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-05-03-03. Appointment of reviewer by board. If the positive review program committee reports to the board that a report is substandard or ~~seriously questionable~~ marginal pursuant to section 3-05-03-02, the board may direct that a review of the workpapers be conducted by a reviewer designated by the positive review program

committee. The review of the workpapers must be conducted by a person other than the person who performed the review of the report. The findings of any such review of the workpapers must be transmitted by the reviewer to the positive review program committee; and, with such changes or additions as the positive review program committee may deem appropriate, by the positive review program committee to the board.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-05-03-04. Board review of committee's determinations. The board shall review the determinations and recommendations ~~regarding reviews~~ of ~~reports~~ ~~by~~ the positive review program committee pursuant to section 3-05-03-02; and in any case where the positive review program committee has determined, and the board concurs, that a report is in general conformity with applicable professional standards, the board shall forward the positive review program committee's determination and recommendations, if any, to the person in charge of the office which submitted the report.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

3-05-03-05. Review of onsite practice reviews. Reports and letters of comments submitted in accordance with section 3-05-02-01.1 must be reviewed, and resultant findings and recommendations must be given to the board and the board shall take appropriate action, which may include similar actions to those in section 3-05-04-01.

History: Effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-01.1-02(6)(d)

3-05-04-01. ~~Substandard~~ Deficient reports and board action. If the board determines that a report referred to the board by the positive review program committee is ~~substandard~~ deficient or ~~seriously questionable~~ marginal with respect to applicable professional standards, the board may take any one of the following actions:

1. The board may submit to the registrant firm a letter of comment detailing the deficiencies noted in connection with the review and requiring the registrant to ~~develop a set of planned control procedures~~ detail the steps which the registrant will take to ensure that similar occurrences will not be present in the future. A response from the registrant will be required within forty-five days of the mailing of the board's letter and will be subject to followup review by the board.

2. The board may require any individual who had responsibility for issuance of the report or who substantially participated in preparation of the report or the related workpapers, or both, to successfully complete specific courses or types of continuing education as specified by the board. The cost of the course or courses must be borne by such registrant.

3. The board may require that the office responsible for the ~~substandard~~ deficient report submit all or specified categories of its reports for a preissuance review in a manner and for a duration prescribed by the board.

4 If it appears that the professional conduct reflected in the ~~substandard~~ deficient report is so serious as to warrant consideration of possible disciplinary action, the board may initiate an investigation pursuant to subdivision b of subsection 6 of North Dakota Century Code section 43-02.1-02 and subdivision g of subsection 1 of North Dakota Century Code section 43-02.1-05.

History: Effective June 1, 1988; amended effective July 1, 1991.
General Authority: NDCC 43-02.1-02(6)(d)
Law Implemented: NDCC 43-02.1-02(6)(d)

TITLE 4

Management and Budget, Office of

MARCH 1991

STAFF COMMENT: Article 4-07 contains all new material but is not underscored so as to improve readability.

ARTICLE 4-07

ORGANIZATION OF CENTRAL PERSONNEL DIVISION

CHAPTER 4-07-01
ORGANIZATION OF CENTRAL PERSONNEL DIVISION

4-07-01-01. History, functions, organization of the central personnel division.

1. History of the central personnel division.

   a. The 1975 legislative assembly passed a Central Personnel System Act, codified as North Dakota Century Code chapter

54-44.3. The Act created the central personnel division as well as the state personnel board. The division was to establish and maintain classification and compensation plans as well as establish general policies and rules, which were to be binding on the affected agencies, relating to a unified system of personnel administration for the employees in the classified service of the state.

b. From its beginning in 1975, the central personnel division developed general personnel policies in response to: the requirements for a unified system of personnel administration, requests from the state personnel board, requests from agencies or other officials in the executive branch, changed requirements in state or federal laws, and various decisions of the courts. These policies were discussed at meetings of the state personnel board. If a particular policy was approved by the board, the division would then act to include it within the North Dakota personnel policies manual. Policies approved and adopted in this way were then distributed to all state agencies.

c. The policies included in the North Dakota personnel policies manual were to be followed by all agencies with classified employees. More specifically, merit system agencies were to strictly follow the policies, but nonmerit system agencies were advised that the policies formed a "base" for the development of the agencies own policies and procedures.

d. In July of 1981 then Governor Allen Olson issued executive order number 1981-10. That executive order portrayed the North Dakota personnel policies manual as providing the assurance that classified employees would be treated fairly and uniformly if the policies were followed. The executive order identified the state personnel board as the agency which would hold public meetings to receive comments and approve revisions to the policies. Governor Olson also ordered that agencies headed by a gubernatorial appointee adhere to and follow the policies, including the statewide appeal mechanism.

e. However, by late 1986 that manner of personnel policy implementation and its "legality" and effect on various agencies had been challenged before the North Dakota supreme court. By 1990 in order for the division to carry out its statutory purpose of establishing a unified system of personnel administration for the classified service of the state, it was apparent that certain policies had to be adopted as rules in accordance with North Dakota Century Code section 28-32-02.

2. **Functions of the central personnel division.** The division establishes, maintains, and revises, classification and

compensation plans. It assigns position classifications and pay grades, hears various appeals according to rules of and as directed by the board, establishes and maintains required records for all employees in the classified service of the state. It assists appointing authorities and agencies with selection procedures, grievance procedures, and training programs. It ensures salaries are paid consistent with the state's classification system, compensation plan, and salary administration policy, and consults with state agencies regarding salary administration. The division provides services to the merit system agencies regarding recruitment and referral, and it provides information and technical advice to all state agencies and institutions, as appropriate, concerning equal employment opportunity and affirmative action. The division also serves as secretariat to the state personnel board.

3. Organization of the central personnel division.

   a. The central personnel division is a division of the office of management and budget. The division is separate from the state personnel board, although the division and board work closely together. The division adopts its own rules and the board reviews them. The board may disapprove a rule or policy adopted by the division.

   b. The central personnel division has a director and a staff. The director is appointed by the director of the office of management and budget from among persons certified by the state personnel board. The director may hold no other public office or employment. The director may be removed for cause, and may appeal removal to the state personnel board for a hearing. The director is responsible for the performance of the division as it exercises its duties and functions. The director is assisted by a staff of professional, administrative, and clerical employees. The staff are assigned to one of the following areas: administration, classification and compensation, merit system operations, employee relations and equal employment opportunity, and training and development.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-01, 54-44.3-12

4-07-01-02. Organization and functions subject to chapter 28-32. The portions of the central personnel division's organization and functions that are subject to North Dakota Century Code chapter 28-32 are those that involve its authority to adopt policies and rules relating to a unified system of personnel administration which impose requirements on other agencies. The central personnel division has the authority to adopt policies, rules, and procedures in three areas:

1. Subsection 1 of North Dakota Century Code section 54-44.3-12 provides the authority to establish general policies, rules, and regulations which are binding on the agencies affected once they are approved by the state personnel board. The rules referred to in this regard must include rules on establishing and maintaining the classification and compensation plans.

2. Subsection 7 of North Dakota Century Code section 54-44.3-12 provides the authority to develop procedures that must be followed by all state agencies and institutions regarding salary administration for all employees in the classified service.

3. North Dakota Century Code section 54-42-03 provides the authority for the North Dakota merit system council, of which the division is a part, to adopt general policies, rules, and regulations which are binding on the agencies affected. Those agencies are commonly known as the merit system agencies. The rules referred to in this regard cover many aspects of personnel administration for those grant-aided agencies which receive federal funds.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12(7), 54-42-03

4-07-01-03. Methods the public may use to obtain information. The public may obtain information, furnish information, or make requests to the central personnel division concerning any of its functions or rules by writing to:

Central Personnel Division
Capitol Building 14th Floor
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0120

Telephone inquires may be made by calling 701-224-3290 between 8 a.m. through 5 p.m. Monday through Friday.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12
Law Implemented: NDCC 54-44.3-01, 54-44.3-12

STAFF COMMENT: Chapter 4-07-02 contains all new material but is not underscored so as to improve readability.

CHAPTER 4-07-02
SALARY ADMINISTRATION PROCEDURES

4-07-02-01. Definitions. The terms used throughout this title have the same meaning as in North Dakota Century Code chapter 54-44.3, except:

1. "Class" means a group of positions, regardless of location, which are alike enough in duties and responsibilities to be called by the same descriptive title, to be given the same pay range under similar conditions, and to require substantially the same qualifications.

2. "Classification plan" means the listing of all the classes that have been established, the specification for those classes, and the process and procedures developed to maintain the plan.

3. "Equity increase" means a salary increase provided to a classified employee to mitigate either a serious internal agency inequity or a documented, proven, external inequity.

4. "General salary increase" means a salary increase provided to classified employees by specific legislative appropriation.

5. "Hiring rate" means the salary level assigned to an employee upon initial employment with an agency.

6. "Pay grade" means the number assigned to a classification which corresponds with one specific range of pay rates.

7. "Performance increase" means a salary increase provided to a classified employee in recognition of documented performance which is consistently superior or which consistently exceeds performance standards.

8. Probationary increase" means a salary increase provided to a classified employee upon the successful completion of their applicable probationary period.

9. "Promotional increase" means a salary increase provided to a classified employee when the employee is assigned to a position in a different class which has a higher pay grade than the employee's previous position, and the assignment is not a result of a reclassification of the employee's position.

10. "Reclassification adjustment" means a salary change applied to a classified employee when the employee's position is reallocated to a different classification which has a different pay grade.

11. "Responsibility level or workload increase" means a salary increase provided to a classified employee when either of the following conditions are met:

    a. The level of duties and responsibilities assigned to the employee is permanently changed, is documented, and is independent of any change in classification.

    b. A substantial, documented, increase in workload is assigned to a position.

12. "Salary range" means the range of pay rates, from minimum to maximum that are assigned to a pay grade, and which are often divided into quartiles for reference.

13. "Temporary increase" means a salary increase provided to a classified employee when the employee is assigned temporarily to perform a higher level of responsibilities on an acting or interim basis.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(1), 54-44.3-12(7)

4-07-02-02. Scope of chapter. This chapter applies to all agencies, departments, institutions, and boards and commissions which employ classified employees, except those agencies headed by an elected official, and except those institutions in the university system. Elected officials and institutions in the university system may, at their option, agree to the application of chapter 4-07-02 to their specific agency.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(1), 54-44.3-12(7)

4-07-02-03. Purpose of chapter. The purpose of this chapter is to ensure that the salaries of classified employees are paid in a manner consistent with the state's classification plan, its compensation plan, and its salary administration policy.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(1), 54-44.3-12(7)

4-07-02-04. Relationship to available funds. All salary actions under this chapter are subject to the availability of appropriated funds. No person may take a salary action under this chapter if it were to cause an agency to exceed its budget authorization.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(1), 54-44.3-12(7), 54-44.3-12.1, 54-44.3-15

4-07-02-05. Salaries must be within the assigned salary range. The central personnel division shall assign a pay grade and a salary range to each approved class in the classification plan. Unless otherwise provided by the central personnel division, the salary level of a classified employee must be within the assigned salary range.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(1), 54-44.3-12(7), 54-44.3-15

4-07-02-06. Exceptions. Exceptions to the requirements of chapter 4-07-02 normally require prior written approval from the director of the central personnel division. In emergency situations exceptions may be provided verbally. Appointing authorities shall describe their justification for the exception and the impact that denying the exception would have on the agency. Written documentation in justification of the exception must be provided by the appointing authority at the earliest practical time following a verbal approval.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-12(1), 54-44.3-12(7)

4-07-02-07. General salary increase. A general salary increase must be provided in accordance with any specific guidelines or requirements as appropriated by the legislative assembly.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-08. Hiring rate. The hiring rate for newly hired employees must be within the first quartile of the salary range, except that an appointing authority may assign a hiring rate up to the midpoint of the salary range if either of the following requirements are met:

1. The employee's job-related qualifications exceed the established minimum qualifications.

2. The agency is unable to recruit qualified candidates who would accept a salary within the first quartile of the salary range.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-09. Documents needed for hiring rate above the first quartile. If an appointing authority offers a hiring rate above the first quartile of the salary range, documentation must be maintained on the factors used to determine that rate and on the consideration given to existing salary relationships within an agency.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-10. Probationary increase. An appointing authority may grant an increase of up to five percent, or up to fifty dollars if the hiring rate was less than one thousand dollars, upon an employee's successful completion of a probationary period. The size of the increase may vary depending on factors that include: performance, internal equity, and budget appropriations.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-11. Responsibility level or workload increase. An appointing authority may grant a responsibility level or workload salary increase if all of the following requirements are met:

1. The increase does not exceed ten percent per biennium for an employee.

2. Consideration is given to the effect granting the increase would have on internal equity.

3. The change in workload or responsibility is documented and on file.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-12. Reclassification adjustment. An appointing authority may make an adjustment to a salary as a result of a reclassification according to the following:

1. If the pay grade is higher following a reclassification action, then an increase up to five percent above the minimum of the new salary range may be provided. The salary must be at least equivalent to the minimum of the new salary range.

2. If the pay grade is lower following a reclassification action, then either of the following apply:

   a. The employee's salary may remain the same if it is within the lower salary range.

   b. The employee's salary may be reduced to within the lower range to equitably relate to the salaries of other employees in the same or related classes.

3. If the employee's salary is above the maximum of the salary range for the new job grade, then either of the following apply:

   a. The salary of the employee may remain above the new maximum when the reclassification is a result of a program change, a reorganization, or is a result of a management need not associated with the employee's performance. The salary may remain above the maximum as long as the employee remains in the classification. No further increases in salary may be granted the employee as long as the salary remains above the maximum.

   b. The salary must be reduced at least to the maximum of the new range if the lower classification results from the removal of duties and responsibilities from the employee

as a result of substandard performance or for disciplinary reasons.

4. If the pay grade is not changed, no salary adjustment shall be made.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-07, 54-44.3-12(7)

4-07-02-13. Promotional increase. An appointing authority may grant a salary increase when an employee is promoted, if all of the following requirements are met:

1. The employee must be paid at least the minimum of the new salary range.

2. Consideration must be given to the internal salary relationships that would exist in the agency if the increase were to be given.

3. The magnitude of the change in jobs is considered.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-14. Performance increase. An appointing authority may grant an increase for performance if all of the following requirements are met:

1. A proper performance appraisal process is used by the agency.

2. The increase does not exceed five percent in any twelve-month period for an employee.

3. Consideration is given to internal salary equity of other agency employees.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-15. Equity increase. An appointing authority may grant an equity increase if all of the following requirements are met:

1. The increase must not exceed ten percent in a biennium.

2. At the time the increase is granted, documentation must be submitted to the central personnel division that includes all of the following:

   a. A definition of the inequity.

   b. An explanation of what created the inequity.

   c. A statement that an additional inequity will not result.

   d. A statement of what nonmonetary alternatives were considered.

   e. The relevant available market data in cases of external equity.

3. The agency must consider the overall relationship of state employees' salaries to market salaries and avoid creating internal inequities.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-16. Temporary increase. An appointing authority may grant a temporary increase if all of the following requirements are met:

1. An increase may not be given for a temporary situation of less than thirty days.

2. An employee may not continue to receive a temporary increase for more than thirty days after the special circumstances ceased to exist.

3. Consideration is given to the magnitude of the change in responsibility level.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

4-07-02-17. Adjustment following assignment to a lower pay grade. When an employee is assigned to a position at a lower pay grade, and the employee's salary is above the maximum of the new grade, then either of the following may result:

1. The salary may remain above the new maximum when the assignment results from a program change, reorganization, or other management need not associated with the employee's performance. No further increases may be granted as long as the salary remains above the maximum.

2. The salary may be reduced to at least the maximum of the new range if the assignment resulted from substandard performance or other disciplinary reasons.

History: Effective March 1, 1991.
General Authority: NDCC 54-44.3-12(1)
Law Implemented: NDCC 54-44.3-01, 54-44.3-12(7)

TITLE 7

Agriculture, Commissioner of

JULY 1991

7-03.1-10-01. Standards for the composition of milk products and certain nonmilkfat products. The standards for the composition of milk products and certain nonmilkfat products are attached in tabular form as appendix to this chapter.

History: Effective August 1, 1986; amended effective July 1, 1991.
General Authority: NDCC 4-29-03, 4-29-04, 4-30-55.1
Law Implemented: NDCC 4-30-35~~, 4-30-36~~

STANDARDS FOR THE COMPOSITION OF MILK PRODUCTS AND CERTAIN NONMILKFAT PRODUCTS
(Appendix)

Product	Milkfat Content		Moisture Content Not More Than	Milk Solids Content not Less Than		Miscellaneous Requirements
	Min.	Max.		Total Solids	S.N.F.	
ADDITIONAL.						
1. Whole Milk	3.25%				8.5	Vitamin A -- 2000 IU/qt. Vitamin D -- 400 IU/qt. Vitamin B_1 -- 1.0 mg/qt. Vitamin B_2 -- 2.0 mg/qt. Niacin -- 10.0 mg/qt. Iron -- 10.0 mg/qt. Iodine .1 mg/qt. -- All Optional -- Other additives may be used if approved by dairy commissioner
2. Low Fat Milk	0.5 %	2.0 %			8.5	Vitamin A -- 2000 IU/qt. -- Required -- Vitamin D -- 400 IU/qt. Vitamin B_1 -- 1.0 mg/qt. Vitamin B_2 -- 2.0 mg/qt. Niacin -- 10.0 mg/qt. Iron -- 10.0 mg/qt. Iodine -- .1 mg/qt. -- Optional -- Other additives may be used if approved by dairy commissioner

Product	Milkfat Content		Moisture Content Not More Than	Milk Solids Content not Less Than		Miscellaneous Requirements
	Min.	Max.		Total Solids	S.N.F.	
3. Skim Milk		0.5 %			8.5	Same requirements as low fat
4. Acidified or Cultured Milk	3.25%				8.5	Not less than .5% acidity expressed as Lactic Acid
5. Lowfat Acidified or Cultured Milk	0.5 %	2.0 %			8.5	Not less than .5% acidity expressed as Lactic Acid
6. Skim Acidified or Cultured Milk		0.5 %			8.5	Not less than .5% acidity expressed as Lactic Acid
7. ½ & ½	10.5 %	18.0 %				
8. Sour ½ & ½	10.5 %	18.0 %				Not less than .5% acidity expressed as Lactic Acid
9. Dry Cream	40.0 %	75.0 %	5.0 %			
10. Heavy Cream	36.0 %					
11. Light Cream	18.0 %	30.0 %				
12. Light Whipping Cream	30.0 %	36.0 %				

Product	Milkfat Content		Moisture Content Not More Than	Milk Solids Content not Less Than		Miscellaneous Requirements
	Min.	Max.		Total Solids	S.N.F.	
13. Sour Cream	18.0 %					When the food is characterized by the addition of bulky flavoring ingredients, the weight of the milkfat is not less than 18% of the remainder obtained by subtracting the weight of such optional ingredients from the weight of the food. In no case does the food contain less than 14.4% milkfat.
14. Acidified Sour Cream	18.0 %					Same as above, but also add not less than .5% acidity expressed as Lactic Acid
15. Yogurt	3.25%				8.5	Not less than 1.9% acidity expressed as Lactic Acid
16. Low Fat Yogurt	0.5 %	2.0 %			8.5	Nor less than 0.9% acidity expressed as Lactic Acid
17. Non Fat Yogurt		0.5 %			8.5	Not less than 0.9% acidity expressed as Lactic Acid
18. Frozen Yogurt						Not less than 0.9% acidity expressed as Lactic Acid

Product	Milkfat Content		Moisture Content Not More Than	Milk Solids Content not Less Than		Miscellaneous Requirements
	Min.	Max.		Total Solids	S.N.F.	
19. Frozen Yogurt Mixes						Not less than 0.9% acidity expressed as Lactic Acid
20. Egg Nog	6.0 %				8.5	Not less than 1% egg yolk solids
21. Dry Curd Cottage Cheese	0.5 %		80.0 %			Calcium Chloride may be added in a quantity of not more than .02% calculated as Anhydrous Calcium Chloride of the weight of the mix.
22. Creamed Cottage Cheese	4.0 %		80.0 %			
23. Low Fat Partially Creamed Cottage Cheese	0.5 %	2.0 %	82.5 %			Legal if properly labeled, "Low Fat" Cottage Cheese. 2% butterfat required on label
CONCENTRATED MILK PRODUCTS						
24. Evaporated Milk and Concentrated Milk	7.5 %			25.5 %		If Vitamin D is added, at least 25 USP units per fluid ounce must be added

Product	Milkfat Content		Moisture Content Not More Than	Milk Solids Content not Less Than		Miscellaneous Requirements
	Min.	Max.		Total Solids	S.N.F.	
25. Plain Condensed Skim Milk Evaporated and Concentrated		0.5 %		20.0 %		
26. Sweetened Condensed Whole Milk	8.0 %			28.0 %		
27. Sweetened Condensed Skim Milk		0.5 %		24.0 %		
28. Whole Milk Powder or Dry Whole Milk	26.0 %	40.0 %	5.0%			Max. Moisture -- premium grade 2.25% extra grade 2.50% standard grade 3.00%
29. Skim Milk Powder, Dry Skim Milk or Non Fat Dry Milk		Extra grade 1.25% Stand. grade 1.5%	Extra grade 4.0% Standard grade 5.0%			

Product	Milkfat Content		Moisture Content Not More Than	Milk Solids Content not Less Than		Miscellaneous Requirements
	Min.	Max.		Total Solids	S.N.F.	
MANUFACTURED MILK PRODUCTS						
30. Ice Cream - Plain Fruit, Nut, Chocolate, and Bulky Flavors	10.0 % 8.0 %			20.0 % 16.0 %		Not more than 0.5% stabilizer Not less than 4.5 lbs. per gal. Not less than 1.6 lbs. food solids per gallon
31. Artificially Sweetened: Ice Cream - Plain - Also Fruit, Nuts or Chocolate Ice Milk - Plain - With Fruit and Nuts	10.0 % 8.0 % 6.0 % 6.0 %					Permitted if not made from milk products. Label must bear a statement of percent of weight of protein, fat, and available carbohydrates in such food and the number of available calories supplied by a specified quantity of such foods. The label must also indicate the following: Contains "_____," a non-nutritive, artificial sweetener, which should be used only by persons who must restrict their intake of ordinary sweets (blank to be filled with the name and percent of weight the non-nutritive sweetener in such food, and state on carton "Imitation Ice Cream" or "Ice Milk".)
32. Ice Milk - Plain	2.0 %	7.0 %		11.0 %		Not more than 0.5% stabilizer (Max 0.2% emulsifier) Not less than 4.5 lbs./gal. Not less than 1.3 lbs. food solids/gallon
Ice Milk - Fruit, Nut, or Chocolate and [illegible] Flavors					6.0% min	Same as above

Product	Milkfat Content		Moisture Content Not More Than	Milk Solids Content not Less Than		Miscellaneous Requirements
	Min.	Max.		Total Solids	S.N.F.	
33. Sherbet	1.0 %	2.0 %		5.0 % Max.		Min. Acid .35% - weight/gal. 6.0#
34. Frozen Custard				20.0 %		0.5% stabilizer - weight/gal. 4.5# food solids/gal. 1.6# Flavors - same as for ice cream with fruit, nuts
35. Egg Yolks				1.4 %		Per 90 pounds
36. Butter or Whipped Butter Light Butter or reduced fat butter	80.0% 52.0%					1. The label must include a comparative statement expressing the reduction in calories and fat relative to butter. 2. Optional ingredients include partially skimmed milk, skim milk, butter milk, whey, whey-derived ingredients, water, salt or salt substitutes, bacterial culture, nutritive sweetners, emulsifiers and stabilizers, safe and suitable color additives, natural flavors, and safe and suitable ingredients to improve texture, prevent syneresis, and extend shelf life. 3. Vitamin A may be added to provide 15,000 international units per pound.
37. Margarine						Follow federal standards

Product	Milkfat Content		Moisture Content Not More Than	Milk Solids Content not Less Than		Miscellaneous Requirements
	Min.	Max.		Total Solids	S.N.F.	
38. Fluid filled milk products, evaporated, dry, fat, animal or vegetable cheese, frozen desserts (Mellorine Type), low fat frozen desserts (Mellorine Type), dessert topping, and filled dairy products						See NDCC sections: 4-30-41 4-30-41.1 4-30-41.2 4-30-41.3
39. Imitation Sour Cream						Same as above.

CHEESES	Minimum Milkfat in Solids	Maximum Moisture	Milkfat Content Minimum	Milkfat Content Maximum
40. Asiago Cheese Fresh Medium Old	 50.0% 45.0% 42.0%	 45.0% 35.0% 32.0%		
41. Blue Cheese	50.0%	46.0%		
42. Brick cheese	50.0%	44.0%		
43. Caciocavallo Siciliano Cheese	42.0%	40.0%		
44. Camembert Cheese	50.0%			
45. Cheddar Cheese	50.0%	39.0%		
46. Colby Cheese	50.0%	40.0%		
47. Cook Cheese		80.0%		
48. Cream Cheese		55.0%	33.0%	
49. Edam Cheese	40.0%	45.0%		
50. Gammelost Cheese		52.0%		
51. Gorgonzola Cheese	50.0%	42.0%		

CHEESES	Minimum Milkfat in Solids	Maximum Moisture	Milkfat Content Minimum	Milkfat Content Maximum
52. Gouda Cheese	46.0%	45.0%		
53. Granular Cheese	50.0%	39.0%		
54. Gruyere Cheese	45.0%	39.0%		
55. Hard Cheese	50.0%	39.0%		
56. Hard Grating Cheese	32.0%	34.0%		
57. High Moisture Jack Cheese	50.0%	Min. +44.0% Max. 50.0%		
58. Limburger Cheese	50.0%	50.0%		
59. Monterey Cheese	50.0%	44.0%		
60. Munster Cheese	50.0%	46.0%		
61. Neufchatel Cheese		65.0%	20.0%	Less than 33.0%
62. Nuworld Cheese	50.0%	46.0%		
63. Parmesan Cheese	32.0%	32.0%	Minimum curing time -- not less than 10 months	

CHEESES	Minimum Milkfat in Solids	Maximum Moisture	Milkfat Content Minimum	Milkfat Content Maximum
64. Pineapple Cheese	50.0%			
65. Provolone Cheese	45.0%	45.0%		
66. Ricotta		80.0%	11.0%	
67. Part-Skim Ricotta		80.0%	6.0%	11.0%
68. Romano Cheese	38.0%	34.0%		
69. Roquefort Cheese	50.0%	45.0%		
70. Samsoe Cheese	45.0%	41.0%		
71. Sap Sago Cheese		38.0%		
72. Semi-Soft Cheese	50.0%	Min. +39.0% Max. 50.0%		
73. Semi-Soft Part-Skim Cheese	Min. 45.0% Max. 50.0%	50.0%		
74. Soft Ripened Cheese	50.0%			
75. Spiced Cheese	50.0%			

CHEESES	Minimum Milkfat in Solids	Maximum Moisture	Milkfat Content Minimum	Milkfat Content Maximum
76. Part-Skim Spice Cheese	Min. 20.0% Max. 50.0%			
77. Swiss Cheese and Emmentalen	43.0%	41.0%		
78. Washed Curd Cheese and Soaked Curd	50.0%	42.0%		
79. Mozzarella Scamorza Cheese	45.0%	Min. 52.0% Max. 60.0%		
80. Low Moisture Mozarella Scamorza Cheese	45.0%	Min. 45.0% Max. 52.0%		
81. Part-Skim Mozarella	30.0% 45.0%			
82. Low Moisture Part-Skim Mozarella and Acamorza	30.0 - 45.0%			

Stabilizers may be used in cream cheese, but the amount shall not exceed 0.5% by weight of the cheese.

Non Dairy Fluid Beverage -- must be designated a "Dressing Product," must follow federal food and drug standards, must not contain milk as milk products, and must meet state standards for general foods.

Non Dairy Coffee Whiteners -- are legal with no standards for composition, must follow federal food and drug standards, must not contain milk as milk products, and must meet state standards for general foods.

TITLE 10

Attorney General

DECEMBER 1990

STAFF COMMENT: Chapter 10-04.1-18 contains all new material but is not underscored so as to improve readability.

CHAPTER 10-04.1-18
WORK PERMITS

10-04.1-18-01. Definitions.

1. "Gaming employee" - refer to subsection 40 of section 10-04.1-01-01.

2. "Local work permit" means a document issued to a person by a city or county governing body that authorizes the person to work as a gaming employee for a licensed organization or distributor in that city or county.

3. "Operating" in the phrase "engaged in operating games of chance" includes, but is not limited to, a person who sells charitable gaming tickets, deals twenty-one or poker, or conducts bingo as a bingo caller, floorworker, or cashier. See subsection 5 of section 10-04.1-18-03.

4. "Temporary work permit" means a document issued to a person by a licensed organization or distributor that when validated by the organization or distributor authorizes the person to work as a gaming employee for that organization or distributor in the state.

5. "Volunteer" for the application of this chapter, means a person who provides not more than twenty hours of personal service per month for a licensed organization or distributor without compensation. However, a volunteer may receive a gratuity or stipend not exceeding a total current retail value of ten dollars for a consecutive twenty-four-hour period, cash tips, and reimbursement for documented out-of-pocket expenses. No gratuity or stipend may be cash, be convertible into cash, or be a gift certificate redeemable for merchandise.

6. "Work permit" (state work permit) means a document issued to a person by the attorney general that authorizes the person to work as a gaming employee for a licensed organization or distributor in the state.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-02. Work permit.

1. Except as exempted by section 10-04.1-18-03 or unless a person has a temporary work permit, no person may be employed as a gaming employee for a licensed organization or distributor until the person has been issued a work permit, and a local work permit, if required by a city or county governing body. If a person is employed by more than one organization or distributor, the person must have a separate work permit for each employer.

2. The definition of gaming employee includes a permanent or temporary employee who is at any time directly or indirectly operating games of chance on the gaming site and a person employed by a distributor, except a person hired temporarily by a distributor to only unload freight. A salesperson of a distributor who is working as an independent contractor is classified as a gaming employee for the purpose of this rule.

3. A work permit is nontransferable.

4. Unless a work permit expires, is suspended or revoked, a work permit is valid for a period not to exceed two years beginning January 1, 1991, or the effective date, whichever date is later, and ending on December thirty-first of the year following the year in which the work permit was effective.

5. A work permit is valid for any gaming site of the employing organization.

6. A work permit is automatically suspended when a person resigns or involuntarily separates from employment.

7. A work permit expires when any of the following conditions first occurs:

   a. The end of the period for which the work permit was issued.

   b. If a person is not employed as a gaming employee by a licensed organization or distributor for more than ninety days.

8. A work permit supersedes a gaming employee's identification tag required by section 10-04.1-04-17. A gaming employee who is required to register with the attorney general's office in accordance with subsection 5 of section 10-04.1-18-03 is still required to wear the identification tag.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-03. Work permit exemptions. The following persons are exempted from needing a work permit:

1. A volunteer.

2. A person who is involved only in raffle or sports pool activity of an organization.

3. A person employed by an organization which conducts games of chance on no more than seven calendar days during a calendar year.

4. A person referenced by the definitions of gaming employee (see subsection 40 of section 10-04.1-01-01) and conduct of games of chance (see subsection 21 of section 10-04.1-01-01) who exclusively promotes games of chance, purchases equipment and supplies, or pays expenses or eligible use contributions.

5. A person, employed by an organization, who is not at any time directly or indirectly operating games of chance on the gaming site, but is primarily or secondarily responsible for any of the following duties and has registered with the attorney general's office as prescribed by the attorney general:

   a. Indirect control or management of an organization's gaming operation.

   b. Bookkeeping, cash count, analysis or audit of games of chance activity, preparation and reconciliation of bank deposits, and carrier of bank deposits to a financial institution.

   c. Inventory control and security.

   If a person does not register with the attorney general's office as required by this subsection, the person may not perform the duties referenced by subdivisions a, b, and c.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-04. Qualifications of an applicant.

1. An applicant for a work permit must be at least twenty-one years of age, except:

   a. An employee of a distributor must be at least eighteen years of age.

   b. An employee hired only for the conduct of bingo at a gaming site must be at least sixteen years of age provided that:

      (1) The primary game of chance is bingo.

      (2) No alcoholic drink is offered for sale, sold, or served.

2. An applicant must be a United States citizen or eligible to work in the United States.

3. No person who has pled guilty or been convicted of a felony criminal offense, or been released from parole, incarceration, or probation due to a felony offense, within two years of the work permit application date, may be issued a work permit. If the felony conviction is for a crime that has a direct bearing on the applicant's fitness to be involved in gaming, the attorney general may deny a work permit for up to five years.

4. No person who has pled guilty or been convicted of an offense contained in North Dakota Century Code chapters 12.1-06 (criminal attempt, facilitation, solicitation, or conspiracy), 12.1-08 (obstruction of law enforcement or escape), 12.1-09 (tampering and unlawful influence), 12.1-10 (contempt or obstruction of judicial proceedings), 12.1-11 (perjury, falsification, or breach of duty), 12.1-12 (bribery or unlawful influence of public servants), 12.1-22 (robbery or breaking and entering offenses), 12.1-23 (theft and related offenses), 12.1-24 (forgery and counterfeiting), 12.1-28 (gambling and related offenses), 53-06.1 (games of chance), 53-06.2 (parimutuel horse racing), and section 6-08-16 (insufficient funds), or who has committed any crime that has a direct bearing on the applicant's fitness to be involved in gaming, within two years of the work permit application date, may be issued a work permit unless the attorney general determines that the person is sufficiently rehabilitated according to subsection 2 of North Dakota Century Code section 12.1-33-03.1.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06, 53-06.1-17

10-04.1-18-05. Work permit application.

1. A person applying for a work permit must first be employed or have a written promise of employment by an organization or distributor.

2. The application for a work permit must be on a form prescribed by the attorney general. The applicant shall provide such necessary and reasonable information as the attorney general requires.

3. An applicant shall submit a fingerprint card of the applicant's fingerprint impressions taken by a local law enforcement official or a person authorized by the attorney general to take fingerprint impressions. A fingerprint card is required for only the first application.

4. If an applicant is employed by more than one licensed organization or distributor, the applicant shall submit a separate application for each employer.

5. A person obtaining employment with a former organization or distributor shall apply for a new work permit unless the reemployment occurs within ninety days of the date of the former employment with that organization or distributor and the reemployment occurs within the same period in which the work permit was issued.

6. An application for a work permit authorizes the attorney general to investigate the applicant's general character, integrity, reputation, honesty, habits, associations, criminal record, and ability to participate or engage in, or be associated with, gaming. The applicant shall provide proof of the qualifications described in the application.

7. The fee required by section 10-04.1-18-10 must be remitted with the application.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-06. Work permit issuance. When the attorney general determines that an applicant qualifies for a work permit, the attorney general shall mail or otherwise provide a work permit data card to the applicant. The applicant shall then present the work permit data card at a North Dakota department of transportation driver's license and traffic safety division photo site to enable the applicant to have two photographs taken. The department of transportation shall affix one photograph to a facsimile of the data card (work permit), laminate the work permit, provide the work permit to the applicant, and transmit the second photograph along with the original work permit data card to the attorney general. The applicant shall pay the department of transportation's fee for the photographs.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-07. Local work permit.

1. A city or county governing body may require a person to obtain a local work permit.

2. Unless a person is exempted by section 10-04.1-18-03, no local work permit may be issued by a city or county governing body until the person first has a validated temporary work permit or has been issued a work permit.

3. A person who desires to work in a city or county that requires a local work permit shall obtain the local work permit prior to working in the city or county.

4. A city or county governing body may require certain qualifications of an applicant for a local work permit in addition to the qualifications stated in section 10-04.1-18-04.

5. A local work permit is nontransferable.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-08. Temporary work permit.

1. A person may obtain a temporary work permit prior to being issued a work permit provided the person:

   a. Completes an application for a work permit.

   b. Obtains the signature and date of an authorized representative of the employing organization or distributor on the temporary work permit.

   c. Submits the work permit application and a copy of the temporary work permit to the attorney general.

2. The licensed organization or distributor shall:

   a. Validate a temporary work permit by signing and dating the temporary work permit.

   b. Notify the attorney general immediately upon issuing a temporary work permit. The notification must include:

      (1) Temporary work permit number.

      (2) Employee's name, complete address, date of birth, and social security number.

      (3) Name of organization or distributor and license number.

      (4) City or county and name of gaming site where the gaming employee will work.

      (5) Reason for issuing a temporary work permit.

   c. Assure that the gaming employee submits the work permit application, application fee, fingerprint card, and a copy

of the temporary work permit to the attorney general within seven days of receiving a temporary work permit.

3. The attorney general shall provide temporary work permit forms to each licensed organization and distributor.

4. A temporary work permit is valid for thirty days from the date of issuance, unless it is revoked. It is nonrenewable.

5. A temporary work permit must be surrendered by a gaming employee on demand by the organization or distributor that had issued it. A temporary work permit may be revoked on demand by the attorney general or local law enforcement official. If the attorney general or local law enforcement official revokes a temporary work permit, the attorney general or local law enforcement official shall provide reasons, in writing, for the revocation of the temporary work permit and provide the gaming employee an opportunity to refute the reasons after the temporary work permit has been revoked.

6. A city or county that has a local work permit system may honor a temporary work permit at the city's or county's discretion and may decline to issue a local work permit to a person who has a temporary work permit.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-09. Duty to disclose information and cooperate, and confidentiality of information.

1. Refusal by an applicant to comply with a request for information may be a basis for denying, suspending, or revoking a work permit or temporary work permit, or disqualifying the applicant.

2. Failure to provide all information, documentation, assurances, consents, waivers, photographs, fingerprint impressions, or other material requested by the attorney general, or to pay the required fees will be a basis for denying a work permit.

3. All records acquired or compiled by the attorney general about a work permit are confidential and may not be disclosed except in the proper administration of article 10-04.1 and North Dakota Century Code chapter 53-06.1. The attorney general may provide to a law enforcement agency:

   a. Information concerning any item contained in a gaming employee's work permit file or disclosed by any investigation of a gaming employee who has been issued a work permit.

b. A listing of persons who have been issued and denied a work permit, and whose work permit has been suspended or revoked.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-10. Fees.

1. The initial work permit application fee is ten dollars. The subsequent biannual reapplication fee is five dollars. For each change of employment, name change, or replacement of a lost or destroyed work permit, the fee is five dollars. If a person is employed by more than one organization or distributor, no additional fee is required.

2. The fee for the registration of certain class A gaming employees required by subsection 5 of section 10-04.1-18-03 is ten dollars. The subsequent biannual reregistration fee is five dollars.

3. No fee may be prorated.

4. No fee may be refunded due to withdrawal, denial, suspension, or revocation of an initial application, subsequent reapplication, or work permit. No fee related to the registration of certain class A gaming employees may be refunded.

5. There is no fee for reissuing a work permit to a gaming employee who is reemployed with a former employing organization or distributor within ninety days of the separation of employment in the same period in which the work permit was issued.

6. A local law enforcement agency may charge a fee for taking fingerprint impressions.

7. The department of transportation may charge a fee for taking the work permit photographs.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-11. Gaming employee required to display the work permit.

1. A gaming employee shall wear a work permit at all times while on duty in the gaming area at a gaming site. A gaming

employee taking a temporary break is still considered on duty. The work permit must be worn on the upper one-third of the employee's body and must be clearly visible to the general public.

2. If a gaming employee has a temporary work permit but has not been issued a work permit, the gaming employee shall display the temporary work permit in the same manner required for a work permit.

3. A gaming employee working at a business premise of an organization, other than the gaming area at a gaming site, shall have a work permit in the employee's immediate possession.

4. A gaming employee of a distributor shall have a work permit in the employee's immediate possession while working at a business premise of the distributor, or while offering for sale, selling, delivering, or otherwise providing gaming equipment to an organization or distributor.

5. No gaming employee may wear a work permit or temporary work permit issued for a designated employing organization at any other organization's gaming site.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-12. Work permit expired, lost, or destroyed, and return of a work permit or temporary work permit to the attorney general due to a suspension or revocation of a work permit, or separation of employment.

1. Upon the expiration of a work permit or temporary work permit, notification of suspension or revocation of a work permit, notification of revocation of a temporary work permit, or resignation or involuntary separation of employment, a gaming employee shall relinquish the work permit or temporary work permit to the organization or distributor, or directly to the attorney general. If the organization or distributor has recovered the gaming employee's work permit or temporary work permit, the organization or distributor shall immediately submit the work permit or temporary work permit to the attorney general. Failure by the gaming employee to immediately relinquish a work permit or temporary work permit as required may result in a delay in issuance, reissuance, denial, or revocation of a current or future work permit.

2. If a work permit is lost or destroyed, a gaming employee shall immediately report the loss or destruction in writing to the attorney general and apply for a replacement work permit.

3. If a work permit is lost or destroyed, and if a gaming employee desires to continue working for an organization or distributor, the gaming employee shall obtain a temporary work permit as provided by section 10-04.1-18-08.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-13. Notification of resignation or involuntary separation of employment. Immediately following a gaming employee's resignation or involuntary separation of employment, the employing organization or distributor shall notify the attorney general of such action on a form prescribed by the attorney general and shall provide a general reason for the separation of employment.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

10-04.1-18-14. Denial, suspension, or revocation of a work permit.

1. The attorney general may deny, suspend, or revoke a work permit if a person:

   a. Supplied false or misleading information to the attorney general.

   b. Obtained a work permit by fraud, trick, misrepresentation, or concealment.

   c. Is disqualified due to the application of subsections 3 or 4, or both, of section 10-04.1-18-04, or due to criteria contained in North Dakota Century Code chapter 53-06.1, including a violation of any rule adopted pursuant to that chapter.

2. If the attorney general seeks to suspend or revoke a work permit, the attorney general shall mail a complaint to the gaming employee, at the last known address provided to the attorney general, and notify the employing organization or distributor. The complaint must state the reason for the pending suspension or revocation of the work permit. The gaming employee may provide an explanation in writing refuting the complaint for suspension or revocation of the work permit. The explanation must be postmarked or otherwise received by the attorney general within ten days of the date of the attorney general's complaint. If the attorney general or the attorney general's designee determines there is a reasonable basis to believe the reasons in the complaint are true and

support a suspension or revocation, the attorney general shall notify the gaming employee and the employing organization or distributor of the suspension or revocation in writing.

3. When an application for a work permit is denied, or a work permit is suspended or revoked, the notice of the denial, suspension, or revocation must include a statement of the facts upon which the attorney general based the decision. A suspension period will begin on the date specified by the attorney general.

4. Any person whose application for a work permit has been denied, or whose work permit has been suspended or revoked may apply for a hearing within twenty days following receipt of the notice of the denial, suspension, or revocation. The hearing must be at a time and location determined by the attorney general as prescribed by North Dakota Century Code chapter 28-32.

5. No person whose application for a work permit has been denied, or whose work permit has been suspended or revoked within the last two years may be volunteer for a licensed organization or distributor unless written permission is first requested and obtained from the attorney general.

History: Effective December 1, 1990.
General Authority: NDCC 53-06.1-17
Law Implemented: NDCC 53-06.1-06.1, 53-06.1-17

JUNE 1991

10-09-01-01. Definitions.

1. "Business office" means the office or location where the licensee can be contacted and where the financial transactions, bookkeeping, etc., for the business are carried on.

2. "Machines primarily designed for gambling" mean games or devices, other than games or devices designed, marketed, and intended for noncommercial in-home use, which may or may not operate by insertion of coins, tokens, currency, or similar objects in which success of play involves the application of the element of chance with inability of a player to extend play by application of skill rather than chance and which may have one or more of the following features:

   a. Retention of a set percentage of credits played or scores earned, such set percentage also known as a "retention ratio" or "house percentage".

   b. Knockoff switch or switches or a computerized programmed feature to erase credits, scores, or plays which would otherwise permit replay of the game or device, with such erasure being activated by mechanical, electrical, remote control, or other means.

   c. Knockoff or coin-out meter or meters or a computerized programmed feature which maintains a record of the number of coins, tokens, currency, or similar objects inserted, number of plays, credits, or scores and the number of credits, scores, or plays "knocked off" or erased.

3. "Person" means person as defined by North Dakota Century Code section 1-01-28.

History: Effective March 1, 1984; amended effective June 1, 1991.
General Authority: NDCC 53-04-05
Law Implemented: NDCC 53-04-02, 53-04-05

10-09-01-02. Prohibited machines. ~~A coin-operated machine or device which pays cash or gives credits redeemable for cash or prizes is illegal and therefore is prohibited within this state.~~ The following games or devices are illegal and therefore prohibited in this state:

1. Games or devices which pay cash or give credits, tokens, or other items redeemable for cash.

2. Games or devices operated or displayed to the public in violation of this article.

3. Machines primarily designed for gambling.

4. Games or devices used or intended for use in violation of North Dakota Century Code chapter 12.1-28.

History: Effective March 1, 1984; amended effective June 1, 1991.
General Authority: NDCC 53-04-05
Law Implemented: NDCC 53-04-05

10-09-01-03. Application for license.

1. An application for an annual operator or location amusement game or device license must be submitted on a form or forms as prescribed by the attorney general. The applicant shall provide such information as may be required by the attorney general and is under a continuing duty to disclose to the attorney general any material change in the information provided in the application.

2. The application must include verification by the applicant that the amusement games or devices owned or possessed, or thereafter acquired or possessed by the applicant, are not, and will not, be used or designed for use for gambling purposes or to violate North Dakota Century Code chapter 12.1-28.

3. All licenses issued are effective for the period of July first through June thirtieth of the next year.

History: Effective June 1, 1991.
General Authority: NDCC 53-04-05
Law Implemented: NDCC 53-04-02, 54-04-05

10-09-01-04. Revocation, suspension, or denial of application for license.

1. The attorney general may revoke, suspend, or refuse to issue a license to an applicant if the applicant or licensee, or an agent or employee of the applicant or licensee:

   a. Has committed an offense determined by the attorney general to have a direct bearing on the applicant's or licensee's fitness to be involved in the operation, leasing, or distribution of an amusement game or device, unless the attorney general determines that the offender is sufficiently rehabilitated under North Dakota Century Code section 12.1-33-02.1.

   b. Has violated the provisions of North Dakota Century Code chapter 53-04 or the rules adopted thereunder.

   c. Has made or caused to be made any false entry or written statement of fact in an application for license, reports, or other information submitted to the attorney general.

   d. Has refused or failed to provide information as required by law, these rules, or the attorney general.

   e. Has violated the provisions of North Dakota Century Code chapter 12.1-28 or 53-06.1.

2. A revocation, suspension, or refusal to issue a license may be ordered by the attorney general after a hearing conducted pursuant to the provisions of North Dakota Century Code chapter 28-32.

3. An appeal of the decision of the attorney general revoking, suspending, or refusing to issue a license shall be conducted in the manner and subject to the time periods set forth, as prescribed by North Dakota Century Code chapter 28-32.

History: Effective June 1, 1991.
General Authority: NDCC 53-04-05
Law Implemented: NDCC 53-04-02, 53-04-05

10-09-01-05. Merchandise prizes.

1. An amusement game or device may reward the player with only merchandise limited to prizes, toys, or novelties.

2. The merchandise prize, toy, or novelty may not be repurchased for cash or for credits redeemable for cash.

3. Subject to subsection 3 of North Dakota Century Code section 10-09-01-06, the merchandise prize, toy, or novelty may not

have a wholesale value or cost exceeding sixteen times the cost of play and if any prize consists of more than one item, unit, or part, the aggregate wholesale value or cost of all items, units, or parts may not exceed sixteen times the cost of play.

4. Merchandise prizes may not consist of gift certificates, discount coupons or certificates, or other like items which may be equivalent to a cash prize or which may be redeemed or otherwise used to obtain merchandise, products, or services at either no cost or at a reduced cost. However, prizes or complimentary or promotional discount certificates may be given to a player when receipt of such items is not dependent upon the success of the player in the play of the game or device.

5. Any merchandise prizes, toys, or novelties awarded to a player as a result of operation of the amusement game or device must be contained with the amusement game or device or located on the premises and within the immediate proximity of the amusement game or device and may be awarded only by the owner, operator, possessor, or lessee of the game or device.

History: Effective June 1, 1991.
General Authority: NDCC 53-04-05
Law Implemented: NDCC 53-04-05

10-09-01-06. General rules for operation of amusement game or device. In addition to other requirements of law or this article, all amusement games or devices are subject to the following rules of play:

1. The cost to play the game or device does not exceed the sum of two dollars if a merchandise prize, toy, or novelty is awarded for play of the game or device.

2. A prize may not be displayed which cannot be won.

3. The game or device is not operated on a buildup or pyramid basis except that a trade-up of a merchandise prize, toy, or novelty is allowed with the trade-up item having a wholesale value or cost not to exceed one hundred fifty dollars.

4. The game or device does not contain features which would prevent it from being operated in a fair and honest manner.

5. The game or device contains no features which could permit the owner, possessor, or lessee of the game or device to permit manipulation of the game during play, to prevent a player from winning, or to predetermine who the winner will be.

6. The game or device may reward a player with the right to replay the device or game at no additional cost if the game or

device is not allowed to accumulate more than fifteen replays at one time.

7. Such other rules of play as required by the attorney general by written directive or order.

History: Effective June 1, 1991.
General Authority: NDCC 53-04-05
Law Implemented: NDCC 53-04-05

TITLE 20.5

Dietetic Practice, Board of

20.5-02-02-02. Unacceptable professional conduct. The following constitute unacceptable professional conduct by a licensed registered dietitian or nutritionist and shall subject such licensee or potential licensee to sanction:

1. Taking financial advantage of a client, or using one's position within an agency to enhance one's private practice or the private practice of others for personal gain.

2. Entering into any illegal acts with a client.

3. Participating in, condoning, or being an accessory to dishonesty, fraud, deceit, or misrepresentation in the practice of dietetics.

4. Not providing clients with accurate and complete information regarding the extent and nature of the services available to them.

5. Convicted of a criminal act which affects the practice of the profession. (North Dakota Century Code section 12.1-33-02.1).

6. Violating any federal or state confidentiality client care regulation statutes.

7. Violating any federal or state discrimination statutes or regulations.

8. Refusal to seek adequate and appropriate treatment for any illness or disorder which interferes with professional functioning or ability to perform the basic expected functions, or both, of a dietitian or a nutritionist.

9. Using misrepresentation in the procurement of licensing as a dietitian or nutritionist or knowingly assisting another in the procurement of licensing through misrepresentation. Misrepresentation of professional qualifications, certifications, accreditations, affiliation, and employment experiences.

10. Failure to report through the proper channels the incompetent, unethical, or illegal practice of any licensed dietitian or nutritionist who is providing such service.

11. Participating in activities that constitute a conflict of professional interest and adversely affect the licensee's ability to provide dietetic services.

12. Violating any of the principles of ethics as listed in the code of ethics of the American dietetic association as revised January 1, 1985.

13. Providing any inaccurate, misleading, or false information to the board regarding a licensure action.

History: Effective June 1, 1991.
General Authority: NDCC 43-44-03
Law Implemented: NDCC 43-44-03

TITLE 27

Job Service North Dakota

JANUARY 1991

STAFF COMMENT: Chapters 27-02-13, 27-02-14, and 27-02-15 contain all new material but are not underscored so as to improve readability.

CHAPTER 27-02-13
INCREMENTAL BOND PROCEDURES

27-02-13-01. Incremental bond procedures.

1. A project will be subject to the provisions of North Dakota Century Code section 52-04-06.1 if the bureau determines that:

   a. The total of the contracts awarded on the project are at least twenty-five million dollars excluding contracts awarded solely for design and engineering;

   b. More than one-half of the work will be completed within seven years of the date work begins;

   c. The total number of individuals performing services in employment on the project total two hundred fifty or more in the aggregate; and

   d. The estimated total benefits attributable to services performed on the project will exceed the estimated contributions to be paid for services performed on the project.

   The total amount of benefits will be estimated assuming that half of the workers will receive benefits equal to the maximum

weekly benefit amount times the average duration of benefits paid to all claimants during the most recently completed calendar year. The estimate of contributions to be paid will be made by multiplying the average tax rate for the most recently completed calendar year times the estimated amount of taxable wages to be reported by employers on the project. The estimated taxable wages must be determined by multiplying the number of workers projected to be employed on the project times the maximum taxable wage base in effect for the current year.

2. Determinations, with respect to whether a project is subject to the provisions of North Dakota Century Code section 52-04-06.1, must be made in the same manner as provided for in North Dakota Century Code section 52-04-17.

3. The owner of any projects determined to be subject to the provisions of North Dakota Century Code section 52-04-06.1 must notify the bureau in writing within thirty days of the award of any contract to any employing unit for work on the project. Any contractor for such project who, in turn, subcontracts to another must also notify the bureau in writing of such contract award within thirty days of the issuance of the contract.

4. Each employing unit having employees working on any project subject to the provisions of North Dakota Century Code section 52-04-06.1 shall maintain separate records for all employment on such project showing the individuals' names, social security numbers, and wages paid. Such employers must be required to report such employment and wages separate from other employment subject to the North Dakota Unemployment Compensation Law under a separate reporting account established for the project.

5. Each report must also indicate which workers were North Dakota residents at the time of their hire and the date of their hire. Job service North Dakota will notify the employer in writing which workers identified as North Dakota residents do not meet the two thousand dollars earnings test provided for in subsection 4. The employer will then have thirty days to submit proof of North Dakota residence for the workers so identified. Proof of residence must include copies of state income tax returns, drivers' licenses, vehicle registrations, or other public documents and records showing a North Dakota residence and dated more than one year prior to the date of hire. Failure by the employer to identify workers as North Dakota residents or furnishing acceptable proof of residence within the time specified will result in loss of refund credit for wages paid to the workers in question.

6. Refunds of bond payments with regard to subsection 4 of North Dakota Century Code section 52-04-06.1 may be made by the

bureau only after the employing unit has submitted a written request for such refund. Such request must show for each worker claimed to be a North Dakota resident at the time of their hire, the worker's name, social security number, and total wages paid for work on the project. The request must also show the total wages paid for all work on the project, the percent of the total wages paid to North Dakota residents, the total amount of the employer's bond payments, and the amount of the refund requested. Applications for refund must be made within ninety days after completion of the employer's portion of the work on the contract or the refund will not be allowed.

7. If an employer's request for refund is reduced or denied, the employer must be notified promptly in writing of such determination. Such determination will become final unless, within fifteen days from the date of mailing to the employer's last known address, the employer files a request for redetermination. Proceedings on such request must be in the same manner as requests for redeterminations on rates of contributions as provided for in chapter 27-02-10 and North Dakota Century Code section 52-04-10.

History: Effective January 1, 1991.
General Authority: NDCC 52-02-02
Law Implemented: NDCC 52-04-06.1

CHAPTER 27-02-14
DEFINITION OF EMPLOYMENT

27-02-14-01. Employment defined.

1. Subdivision a of subsection 17 of North Dakota Century Code section 52-01-01 contains three separate and independent tests for determining if the service is employment.

2. Paragraph 1 of subdivision a of subsection 17 of North Dakota Century Code section 52-01-01 relates to the test for determining whether the service of an officer of a corporation is employment with respect to service performed for the corporation. Paragraph 2 of subdivision a of subsection 17 of North Dakota Century Code section 52-01-01 relates to the test for determining whether an individual's service is employment with regard to the test provided for in subdivision e of subsection 17 of North Dakota Century Code section 52-01-01. Paragraph 3 of subdivision a of subsection 17 of North Dakota Century Code section 52-01-01 relates to the test for

determining if an individual's service in certain occupational groups is employment if such service is not employment under the test. If an individual's service is employment under any one of these tests, it is to be considered employment for purposes of this section.

3. If the service is employment under one of the tests in subsection 2, the designation or description of the relationship by the parties as anything other than that of employment or of employer and employee is immaterial.

4. Generally, an officer of a corporation is an employee of the corporation and the service performed for the corporation is employment. However, an officer of a corporation who does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not an employee of the corporation. A director of a corporation, in the director's capacity as such, is not an employee and such service is not employment.

5. Any service performed for another for wages or under any contract of hire is deemed to be employment unless it is shown that all three of the following tests are met:

   a. The firm or person for whom the services are being performed does not have the right to direct or control the worker's performance.

      The service is considered employment when the firm for whom the services are performed has the right to control or direct the individual performing the services not only as to the result to be accomplished but also as to the details and the means by which the work is accomplished. In connection with this test, it is not necessary that the firm actually exercise direction or control. The test fails if the firm has the right to do so.

      The right of the firm to discharge a worker without incurring a contractual liability is a strong indicator of the right to control, particularly if the arrangement contemplates continuing or reoccurring work.

   b. The service performed must be outside the usual course of business or outside all places of business of the firm for which the services are performed.

      The service must not be directly related to the principal business activity of the firm or the service must be performed outside of the firm's places of business. The firm's places of business are not limited to its building or premises, but may include the customer's premises or

geographical areas where the firm normally performs its services.

c. The individual performing the service must be customarily engaged in an independently established trade, occupation, profession, or business.

The individual performing the service must do so as a part of a business established independently of the relationship with the firm for whom the services are being performed.

Indicators of independence are a significant investment by the worker in facilities used in performance of the service. The possibility of a profit or loss as a result of the service. Working for a number of persons at the same time, the hiring of assistants, and the availability of the services to the general public are also indicators. In this connection, it is not sufficient that a worker be free to engage in such activities, the worker must actually be so engaged.

6. In addition to service which is employment under paragraphs 1 and 2 of subdivision a of subsection 17 of North Dakota Century Code section 52-01-01, other service is employment if it is performed under certain circumstances in the following occupational groups:

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 sideline sales activities on behalf of some other 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.

The fact that the service falls within one of the enumerated occupational groups, however, does not make such service employment under this subsection unless the contract of service contemplates that substantially all of the services are to be performed personally by such individual; the individual does not have a substantial investment in facilities used in connection with the performance of the services (other than in facilities for transportation); and the services are not in the nature of a single transaction

that is not part of a continuing relationship with the person for whom the services are performed.

History: Effective January 1, 1991.
General Authority: NDCC 52-02-02
Law Implemented: NDCC 52-01-01(17)

CHAPTER 27-02-15
EMPLOYER LIABILITY DETERMINATION PROCEEDINGS AND APPEALS

27-02-15-01. Employer liability determination proceedings and appeals.

1. The director of the job insurance division or the director's designee may, after a notice and opportunity for hearing, make findings of fact and, on the basis thereof, determine whether an individual or organization is an employing unit, whether the service performed for an employing unit is employment, and whether an employing unit is an employer.

2. An interested party to a determination must be notified in writing of the division's intent to make such a determination. The parties shall have fifteen days from the date of the mailing of such notice to request a hearing prior to such determination. If no hearing is requested, the division may make a determination on the basis of reasonably available information.

3. If a hearing is requested, it must be conducted in the same manner as hearings on claims for benefits as provided for in chapter 27-03-06 except when North Dakota Century Code section 52-04-17 or the subject matter may otherwise require.

4. The director of the job insurance division or the director's designee shall promptly set forth in writing the division's findings of fact, the determination, and the reasons for such determination. Copies of such findings of fact and determination must be mailed to all interested parties and are final unless an appeal to the bureau is filed within fifteen days of the date of mailing.

History: Effective January 1, 1991.
General Authority: NDCC 52-02-02
Law Implemented: NDCC 52-04-17

TITLE 30

Game and Fish Department

JANUARY 1991

30-03-01-01. License required. No person shall sell, at retail or at wholesale, any live bait without first obtaining the appropriate annual license authorizing the person to do so. All licenses must be displayed on the business premises. Vendor license numbers and business names must be displayed on any vehicle used to transport bait.

History: Amended effective January 1, 1991.
General Authority: NDCC 20.1-06-14
Law Implemented: NDCC 20.1-06-14

30-03-01-06. Equipment. Persons commercializing in or transporting live bait shall use equipment capable of maintaining such live bait in a healthy and lively condition at all times. The premises and equipment of all persons commercializing in live bait shall be open to the inspection of the game and fish commissioner or any of the commissioner's duly appointed agents at any time. Upon inspection, if equipment is found to be inadequate for these purposes, the vendor will be notified in writing. Upon written notification, the vendor shall make the necessary corrections within thirty days. Failure to make those corrections within thirty days of notification is a noncriminal offense and the vendor will be assessed a penalty of two hundred fifty dollars. In addition, the commissioner may revoke the vendor's license.

History: Amended effective January 1, 1991.
General Authority: NDCC 20.1-06-14
Law Implemented: NDCC 20.1-06-14

30-03-01-08. Interstate transport. It shall be illegal to transport minnows or other live ~~bait~~ baitfish and amphibians into or out of the state except with written permission of the game and fish commissioner and only with equipment approved by the commissioner. Shipments of legal baitfish and amphibians into or out of North Dakota

are subject to periodic inspection by a duly appointed agent of the game and fish commissioner. Failure of the vendor to secure the proper permission is a noncriminal offense and will result in the revocation of the vendor's license and assessment of a penalty of two hundred fifty dollars.

History: Amended effective June 1, 1985; January 1, 1991.
General Authority: NDCC 20.1-06-14
Law Implemented: NDCC 20.1-06-14

30-03-01-09. Records. Each ~~retail and wholesale bait dealer~~ licensee shall keep accurate and up-to-date records, on forms furnished by the department, of location, species, and numbers of minnow or live bait seined or trapped by the dealer from public or private waters. A bait dealer purchasing live bait or minnows for resale must record, on forms furnished by the department, the species and number as well as the name and address of the person from whom the dealer purchased them. This record must be open to inspection by an employee of the department at any reasonable hour. The record must be kept intact for a period of two years after the expiration of any license issued under this section.

History: Amended effective January 1, 1991.
General Authority: NDCC 20.1-06-14
Law Implemented: NDCC 20.1-06-14

30-03-01-14. Violations are noncriminal. Any person who violates any section of this chapter for which a penalty is not specifically provided is guilty of a noncriminal offense and shall pay a fifty dollar fee.

History: Effective April 1, 1986; amended effective January 1, 1991.
General Authority: NDCC 20.1-02-05(24)
Law Implemented: NDCC 20.1-02-05(24)

TITLE 33

Health and Consolidated Laboratories, Department of

DECEMBER 1990

STAFF COMMMENT: Chapter 33-03-24 contains all new material but is not underscored so as to improve readability.

CHAPTER 33-03-24
BASIC CARE FACILITIES

33-03-24-01. Definitions.

1. "Abuse" means verbal or nonverbal actions which constitute harassment or negligent treatment or maltreatment, an act of omission which evinces disregard of consequences of such a magnitude as to constitute a clear and present danger to a resident's health, well-being, or safety.

2. "Activities of daily living" means those personal functional activities required by an individual for continued well-being, including eating, nutrition, dressing, personal hygiene, mobility, toileting, and behavior management.

   a. "Assistance" means the resident is able to help with most of an activity, but cannot do it entirely alone. The resident may need prompting, encouragement, or the minimal hands-on assistance of the personal care aide.

   b. "Independent" means the resident can perform the activities of daily living without help.

3. "Activity staff" means an employee who is qualified and responsible for providing an activity program.

4. "Administrator" means the individual person who is in general administrative charge of a facility.

5. "Ambulatory" means a person who is able to walk independently, without mechanical devices.

6. "Basic care facility" means a social-model facility whose focus is to provide an atmosphere conducive to improving, maintaining, or overcoming an individual's physical, psychological, and emotional or mental incapacities in an effort to achieve the highest level of self-sufficiency and quality of life for which the resident is capable. Any facility, place, or building in which there is provided for a period exceeding twenty-four consecutive hours and whose primary purpose is to furnish room, board, laundry, and personal care assistance when necessary with activities of daily living to five or more persons nonrelated to the manager or owner of the facility who by reason of age or disability are incapable of living independently or managing their own affairs but who are ambulatory or mobile nonambulatory is considered a basic care facility.

7. "Capable of self-preservation" means physically and mentally capable of making one's way from the facility within an acceptable period of time to a place of safety in case of fire or other emergency as documented in the basic care facility fire drill reports.

8. "Department" means the North Dakota state department of health and consolidated laboratories.

9. "Dietary staff" means any employee who is responsible for the preparation and cooking of meals for residents.

10. "Environmental support staff" means employees whose services are directed towards the resident's surroundings and includes assistance with such instrumental activities of daily living as household cleaning, meal preparation, shopping, transportation, and laundry.

11. "Governing body" means the entity legally responsible for the operation of a basic care facility.

12. "Housekeeping staff" means any employee who is responsible for cleaning and doing laundry.

13. "Inspection" means an examination in order to evaluate compliance with this chapter.

14. "Instrumental activities of daily living" are considered more complex than activities of daily living. Performance of these tasks requires mental or cognitive (memory, judgment, intellectual ability) or physical ability, or both. Instrumental activities of daily living includes preparing meals, shopping, managing money, housework, laundry, taking medicine, transportation, use of telephone, and mobility outside the basic care facility.

15. "Investigation" means an inquiry into a basic care facility whenever the department has reason to believe a violation of the law or rules has occurred.

16. "Licensed nurse" means one who is licensed by the North Dakota board of nursing to practice nursing consistent with the North Dakota nurse practice act, North Dakota Century Code chapter 43-12.1.

17. "Licensee" means the person, institution, or organization to whom the license is issued.

18. "Medication administration" means an act in which a single dose of a prescribed drug or biological is given to a resident by an authorized person in accordance with laws and regulations governing such acts. The complete act of administration entails the removal of an individual dose from

a previously dispensed, properly labeled container (including a unit dose container), verifying the drug and dosage with the practitioner's orders, administering dose to the proper resident, and immediately recording the time and amount given.

19. "Mobile nonambulatory" means unable to ambulate without another's assistance, but able to move from place to place, and self-exit the building, with the use of a device such as a walker, crutches, or a wheelchair, and capable of independent bed-to-chair transfer.

20. "Nursing care" means the performance of services necessary in caring for the sick or injured and which require specialized knowledge, judgment, and skill, and meet the standards of nursing regimen as defined in the North Dakota nurse practice act, North Dakota Century Code chapter 43-12.1.

21. "Personal care" means assistance with meals, dressing, movement, bathing, grooming, medication, or other personal needs, or general supervision of physical or mental well-being.

22. "Personal care attendant" means an employee who has appropriate training and is responsible for provision of resident care.

23. "Plan of correction" means a specific, time-limited plan of action, approved by the department, which states how and when a violation will be corrected in a manner which assures continued compliance.

24. "Resident" means any individual who is admitted to a basic care facility in order to receive room, board, and personal care.

25. "Staff" means any individual other than a resident, who must be at least sixteen years old, and who is either the licensee or is an agent or employee of the licensee, and who performs any service or carries out any duties at the basic care facility which are subject to this chapter.

26. "Supervision and protective oversight" means to provide guidance and direction. Generally this care is provided to persons who are disoriented or suffer from some form of dementia.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3

33-03-24-02. Certificate of need.

1. A new basic care facility shall obtain a certificate of need from the department prior to applying for a license.

2. An existing basic care facility shall obtain a certificate of need from the department prior to remodeling or expansion of its current facility.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-17.2

33-03-24-03. Application for license. Applications for a license to operate a basic care facility must be made to the department prior to opening a facility, making alterations which increase or decrease the resident bed capacity, or prior to a change in ownership and annually. Facilities meeting the definition of basic care facility as outlined in

North Dakota Century Code chapter 23-09.3 must obtain a license by the department in order to operate in North Dakota.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-05

33-03-24-04. Inspection and issuance of license.

1. Upon receipt of an application for license, the department shall schedule an inspection of the basic care facility.

2. The department shall request the assistance of the state fire marshal in the inspection.

3. Upon completion of the inspection and consideration of the findings, the department may issue an unrestricted, restricted, or provisional license, or deny the application, as the facts and circumstances warrant.

4. Once issued, the facility shall display the license in a conspicuous place. A license is valid only in the hands of the person to whom it is issued and not subject to sale, assignment, or other transfer, voluntary or involuntary. A license is not valid for any premises other than those for which originally issued.

5. The department may inspect any facilities which the department determines meet the definition of a basic care facility as described in chapter 33-03-24 and North Dakota Century Code chapter 23-09.3.

6. The department will perform, at least annually and as deemed necessary by the department, unannounced on-site visits at all basic care facilities to determine compliance with chapter 33-03-24, or to investigate complaints.

7. The department shall send a quarterly list of all facilities currently licensed to county social service offices.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-05

33-03-24-05. Unrestricted license. An unrestricted license is valid for a period not to exceed one year from the date of issuance and must state the maximum number of persons who may reside in the basic care facility as well as the classifications specified in sections 33-03-24-19 and 33-03-24-20. The license for each classification must be color coded.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-07

33-03-24-06. Provisional license.

1. A provisional license may be issued to a basic care facility which does not comply with this chapter if practices in the basic care facility do not pose a danger to the health and safety of the residents as determined by the department.

2. A provisional license must be prominently stamped and state that the basic care facility has failed to comply with applicable rules of the department and be accompanied by a written statement of the specific rule or statute violated and the factual basis of the alleged violation, or expire at a set date, not to exceed ninety days from the date of issuance.

3. A provisional license is revoked by the department at the end of ninety days if compliance is not achieved or an acceptable plan of correction is not approved, or the provisional license will be exchanged for an unrestricted license, which must bear the same date as the date on which the facility was found by the department to be in compliance with the licensure rules.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-05

33-03-24-07. Denial or revocation of license.

1. Application for renewal of a license of a basic care facility must be denied and the license of the basic care facility will be terminated or allowed to expire when the department finds that a condition, occurrence, or situation in the basic care facility meets any of the criteria specified in subsection 2 of section 33-03-24-09.

2. When the department determines that an application for renewal of a license is to be denied, or that a license is to be revoked, the department shall notify the basic care facility. The notice to the basic care facility must be in writing and must include:

   a. A clear and concise statement of the basis of the denial or revocation. The statement must include a citation to the provisions of this chapter on which the application for renewal is being denied, or the process for licensure revocation is being implemented as per North Dakota Century Code chapter 23-16.

   b. A statement of the date on which the current license of the basic care facility will expire must be included.

   c. A description of the right of the applicant to appeal the denial or revocation of the application for renewal of license and the right to a hearing will be mailed to the licensee upon request.

3. The current license of the basic care facility may be extended by the department when it finds that such extension is necessary to permit relocation of residents.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-05

33-03-24-08. Denial of initial license.

1. A determination by the department through a suitability review to deny the issuance of a license must be based on a finding that one or more of the criteria outlined in section 33-03-24-09 or the following criteria are met:

   a. The applicant, any member of the firm, partnership, or association which is the applicant, any officer or stockholder of the corporation which is the applicant, or the person designated to manage or supervise the basic care facility has been convicted of a crime during the previous five years. A conviction must be verified by a certified copy of the record of the court of conviction.

b. The applicant has had a prior license revocation in the past five years and both of the following conditions are met:

(1) The basic care facility in question was owned or operated by the applicant, by a controlling owner of the applicant, by a controlling combination of owners of the applicant, or by an affiliate who is a controlling owner of the applicant. Operated for the purposes of section 33-03-24-08 means exercising overall management, direction, or supervision of the basic care facility; and

(2) The basis of the prior revocation renders the applicant unqualified or incapable of operating a basic care facility in accordance with the minimum standards set forth in chapter 33-03-24. This determination will be based on the applicant's qualifications and ability to meet the criteria outlined in section 33-03-24-09 as evidenced by the application and the applicant's prior history.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-05

33-03-24-09. Criteria for adverse licensure actions.

1. Adverse licensure actions are determinations to deny the issuance of an initial license, to deny the issuance of a renewal of a license, or to revoke the current license of a basic care facility.

2. A determination by the department to take adverse licensure action against a basic care facility must be based on a finding that one or more of the following criteria are met:

a. The basic care facility has failed to meet the minimum standards specified in chapter 33-03-24.

b. The existing basic care facility is operating, or the initial applicant intends to operate, with personnel which are insufficient in number or unqualified by training or experience to properly care for the number and type of residents in the basic care facility.

c. The basic care facility is not under the direct supervision of an administrator or an individual assigned to carry out the administrative responsibilities.

d. The basic care facility has committed either of the following actions:

(1) The basic care facility has inappropriately converted for its own use the property of a resident.

(2) The basic care facility has secured property, or a bequest of property, from a resident by undue influence.

e. The basic care facility submitted false information either on the licensure or renewal application forms or during the course of an inspection or survey of the basic care facility.

f. The basic care facility has refused to allow an inspection or survey of the basic care facility by agents of the department.

3. The department shall consider all available evidence at the time of the determination, including the history of the basic care facility and the applicant in complying with this chapter, notices of violations which have been issued to the basic care facility and the applicant, findings of surveys and inspections, and any evidence provided by the basic care facility, residents, law enforcement officials, and other interested individuals.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3

33-03-24-10. Restriction or limitation of admissions.

1. The department reserves the right to restrict or limit admissions to a basic care facility under the following conditions:

a. One or more complaints of resident abuse in the basic care facility have been reported, investigated, and substantiated by the department. The restriction will be in effect for a minimum of six months or until the condition leading to the abuse has been corrected as substantiated by the department.

b. The department has surveyed the facility and found rules related to health or safety are not being met or the facility is in the process of correction and placing additional residents in the facility would adversely affect the health or safety of a resident. The restriction will be in effect for six months or until the facility demonstrates to the department's satisfaction that the corrections have been made and the facility is in compliance with the licensure rules.

2. The department shall notify the facility in writing when a decision is made to restrict or limit admissions. The restriction or limitation takes effect ninety days from the date at which the onsite survey or complaint investigation visit was completed.

   a. The notice must include the basis of the department's decision and must advise the facility of the right to request review through an onsite revisit by the department. The request must be made in writing within forty-five days of the survey or complaint investigation completion date.

   b. If a request for review is made, the department will review all material relating to the allegation and to the limitation and restriction on admissions. The department shall determine, based on review of the material and an onsite revisit, whether or not to sustain the decision to limit or restrict placement of residents and shall notify the facility in writing of the decision within ten days of completion of the onsite revisit.

   c. If the department determines not to sustain the decision, the limitation or restriction may not be implemented. If imposed, the restriction or limitation on admissions will remain in effect until the department determines that the conditions leading to the restriction or limitation have been corrected.

   d. When the department sustains the decision, a public notice must be published by the department in the local newspaper fifteen days prior to the imposition of the restriction stating the name of the facility, the restriction or limitation to be imposed, the date on which the restriction or limitation will be effective, and the length of time for which it will be imposed.

      (1) County social service departments whose territory lies within a one hundred mile radius of the facility will be notified in writing by the department regarding the restriction or limit of admissions.

      (2) Information regarding basic care facilities is public information and is available upon request through this department.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-11. Plan of correction.

1. A basic care facility shall submit a plan of correction within ten days of receipt of the deficiency list if a violation has been cited pursuant to this chapter.

2. The plan of correction must address all violations identified in the deficiency list and submit a date upon which the corrective action will be completed, not to exceed sixty days from the date the inspection was completed unless the department approves.

3. The department may accept, reject, or negotiate modifications to the plan of correction.

4. In appropriate circumstances the department may, upon acceptance of a plan of correction, issue a provisional license to a basic care facility which has had its application denied or license revoked.

5. The department shall notify the basic care facility in writing of a decision on a plan of correction or relicensure within ten days of receipt of the plan.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-12. Personnel policies and procedures. The basic care facility shall have written personnel policies and procedures for the basic care facility which specify:

1. Duty hours.

2. Sick leave.

3. Vacations.

4. Holidays.

5. Dress code.

6. Conduct.

7. Job description.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-13. Operating policies and procedures.

1. The basic care facility shall have operating policies which include policies and procedures for all services provided by the basic care facility including admission, discharge, and transfer.

2. The operating policies must be prepared to meet the needs of the residents and updated as necessary.

3. Basic care facilities that admit persons who are confined to a wheelchair or use a walker shall:

   a. Provide hallways, doorways, exits, and toilet and bathing facilities which will accommodate a wheelchair or walker.

   b. Provide a minimum of one exit ramp accessible to residents requiring wheelchairs or have an acceptable means to provide regular access to the outdoors as approved in writing by the department.

   c. Provide placement of those residents who require the use of a walker or who are blind on a floor which has direct exit at grade, a ramp or no more than two steps to grade with a handrail.

   d. Provide placement of those residents who use a wheelchair near an exit and there must be a direct exit at grade or a ramp.

   e. Be in compliance with the fire code as certified in writing by the state fire marshal.

4. A typewritten or printed copy of any rules, routines, and regulations for the resident must be provided at the time of application for admission and be available upon request.

5. Copies of all rules, routines, regulations, policies, or procedures affecting the operation of the basic care facility must be available in the administrator's office.

6. It is the responsibility of the governing body and the administrator to see that these policies are carried out.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04, 23-09.3-05

33-03-24-14. Residents' rights. All basic care facilities shall comply with North Dakota Century Code chapter 50-10.2 regarding rights of health care facility residents.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-15. Administrator.

1. The administrator must be an employee of good mental and physical health, possessing knowledge and experience in administration and personnel management. The administrator is a person who:

   a. Has a bachelors degree in a health-related or human services-related field; or

   b. Has a minimum of a high school diploma or its equivalent and at least three years' experience in a health-related or human services-related field.

2. Whenever the administrator leaves the premises, a responsible employee must be designated, in writing, to act in the administrator's absence. At no time may the home be left without the onsite presence of the administrator or the designee.

3. The administrator shall attend at least twelve continuing education hours per year relating to care and services for the elderly.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-16. Staffing and training. The governing body or its designee shall employ sufficient staff to meet the residents' needs.

1. Sufficient, trained, personal care staff must be in the basic care facility awake and prepared to assist residents at all times, twenty-four hours per day. This staff may not have simultaneous duties on other units in a basic care facility that is part of a nursing home or other health care facility.

2. There must be sufficient staff to insure that each resident receives daily personal care as needed to keep skin, nails, hair, mouth, clothing, and body clean and healthy.

3. Sufficient activity staff must be provided to meet the needs of the residents.

   a. The basic care facility shall provide for a qualified activity person who will provide activities suited to the needs and interests of residents. Individual activity

programs must encourage maintenance of self-care and continuity of normal activities.

b. The basic care facility shall employ a qualified activity person who is responsible for the direction and supervision of the activities program. A qualified activity person:

(1) Is a qualified therapeutic recreation specialist who is eligible for registration as a therapeutic recreation specialist by the national therapeutic recreation society (branch of national recreation and park association) under its requirements;

(2) Is a qualified occupational therapist as defined in North Dakota Century Code chapter 43-40 or certified occupational therapist assistant; or

(3) Has at least two years of full-time experience within the last five years as an employee in an activities program in a health care setting or other activity-related experience in another setting. Activity persons not having this experience will be required to attend a minimum of four activity-related inservices in the first year of employment.

4. The basic care facility shall provide for social services consistent with the needs of the residents.

5. The basic care facility shall provide a planned orientation program commensurate with job requirements for each new staff member.

6. An ongoing educational program must be planned and conducted for the development and improvement of staff skills for all basic care facility personnel including training related to the problems and needs of the aged, physically ill, mentally ill, and disabled. Inservice training must be conducted at least quarterly for all personnel. On an annual basis, all employees shall receive inservice training in at least the following:

a. Fire and accident prevention and safety.

b. Mental and physical health needs of the residents.

c. Prevention and control of infections.

d. Resident personal and property rights.

e. Confidentiality of resident information.

f. Open admission policy.

7. A record must be maintained of all orientation and inservice training provided to employees of the basic care facility. This record must include a notation of type of training, length of training, names of employees attending, date of training, and signature of person providing the training.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-17. Employee records. The basic care facility shall provide and maintain employee records including the following information:

1. An identification sheet containing:

   a. An initial physical.

   b. An initial mantoux, or in the case of a significant tuberculin reactor, a negative chest x-ray that was taken not more than six months prior to employment.

   c. The basic care facility shall establish a policy identifying which diagnostic procedures, in addition to those for tuberculosis, will be included in preemployment medical evaluations. The policy must include the interval of employee medical evaluations and a clinical surveillance program for evidence of contagious diseases and infected skin lesions.

2. Work assignment records which reflect the employee's designation as personal care, dietary, activity, social service, or environmental support staff, and notations of any changes in responsibilities.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-18. Classification of basic care facilities. A class I or class II license will be issued by the department based upon the qualifications and utilization of the staff (licensed personnel), and the functional abilities of the persons who reside at or are being admitted to the facility.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-19. Class I license. The facility shall comply with the following provisions to obtain a class I license:

1. The facility may not admit or retain persons whose needs cannot be met by class I licensed facilities.

   a. All residents residing in a class I facility must be physically and mentally capable of negotiating a normal path to safety unassisted by staff but may use assistive devices such as canes or walkers and must be able to open doors, transfer from bed to chair, get out of a chair, follow directions, know where exits are, and respond to a fire alarm without staff assistance.

   b. For purposes of a class I facility, a licensed professional is not required for the following diets: regular, soft, bland, low fat, low fiber, high fiber, high potassium, low sodium, low salt, no added salt, low carbohydrate, and diabetic diet if they are self-monitored by the resident.

   c. Persons who require the ongoing or regularly scheduled intermittent services of a licensed nurse may not be admitted or retained in a class I facility.

   d. Persons requiring use of physical or chemical restraints may not be admitted or retained.

   e. Persons who are subject to attacks of epilepsy or other seizures which are not controllable by self-administered medications may not be admitted or retained.

   f. Persons who require active treatment for mental illness, unless the illness is controlled by self-administered medication, may not be admitted or retained.

   g. Persons who require active treatment for mental retardation or who have been receiving active treatment within the previous ninety days may not be admitted or retained.

   h. Persons may be admitted who are in need of environmental support and supervision and protective oversight because of psychosocial factors.

   i. Persons may be admitted who require assistance with application and removal of braces or other prosthetic devices except when the absence of assistance with such devices makes the resident incapable of self-preservation.

   j. Blindness or total deafness does not disqualify persons for admission to a class I facility if the resident needs only personal care assistance in not more than two activities of daily living.

k. Persons who require the use of a wheelchair for mobility must be able to demonstrate the ability to transfer to and from the wheelchair unassisted.

2. A class I facility shall admit or retain only persons who are capable of self-administration of all medications as follows:

   a. All medications taken by residents in a class I facility must be self-administered. Facility staff may not administer medications to residents.

   b. No person may be admitted to this type of facility who is not capable of taking their own medications or biologicals (such as serums, vaccines, antigens, and antitoxins) as documented in writing by the resident's personal physician or the licensed nurse completing the resident assessments. Class I facility staff may remind a resident when to take medications.

3. Persons admitted to a class I facility must be at least mobile nonambulatory and require assistance in no more than two activities of daily living.

4. Each facility shall have a current signed written agreement with a licensed nurse to provide services consistent with North Dakota Century Code chapter 43-12.1. Nursing assessment is required for each resident prior to or within seven days of admission and, at a minimum, semiannually thereafter. Included in the services, the licensed nurse or physician shall establish protocol for use by the facility in the event of a serious health threatening condition or in cases of temporary illness.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-20. Class II license. The facility shall comply with the following provisions to obtain a class II license:

1. The facility may not admit or retain persons whose needs cannot be met by a class II licensed facility.

   a. All residents residing in a class II facility must be physically and mentally capable of negotiating a normal path to safety with minimal staff assistance such as prompting.

   b. A class II facility may admit and retain persons who require the ongoing intermittent services of a licensed nurse or physician.

c. Facility administration of as-needed (prn) controlled prescription drugs, such as narcotics, tranquilizers, or psychotropic medications, requires nursing judgment and a fluctuating medication regimen and must therefore be administered by appropriate health care professionals consistent with applicable state practice acts.

d. A class II facility may not admit or retain persons requiring use of physical or chemical restraints.

e. A class II facility may admit and retain persons who are subject to attacks of epilepsy or other seizures which are controlled through administration of medication as delegated to staff persons by the licensed nurse consistent with the North Dakota Nurse Practices Act, North Dakota Century Code chapter 43-12.1.

f. A class II facility may not admit or retain persons who require active treatment as provided by qualified mental health professionals, unless the illness is controlled by medication.

g. A class II facility may not admit or retain persons who require active treatment for mental retardation.

h. Persons who require universal precautions for communicable diseases may be admitted if the facility provides the staff and expertise necessary.

i. Persons who require the use of a wheelchair for mobility must be able to demonstrate the ability to transfer to and from the wheelchair unassisted.

j. The facility may admit or retain persons who require assistance with administration of medications, or require nursing assessment or oversight, or both. Based on the nursing assessment of residents, the licensed nurse may delegate, consistent with North Dakota Century Code chapter 43-12.1, to unlicensed caregivers, within the limitations of the unlicensed caregivers' knowledge and skills under the following conditions:

(1) There is a physician's order, if necessary.

(2) The licensed nurse has assessed the resident's condition to determine there is not a significant risk to the resident if an unlicensed caregiver performs the task.

(3) The licensed nurse has determined the unlicensed caregiver is capable of performing the task.

(4) The licensed nurse has taught the unlicensed caregiver how to do the task.

(5) The unlicensed caregiver has satisfactorily demonstrated to the licensed nurse the ability to perform the task safely.

(6) The licensed nurse provides written instructions for the unlicensed caregiver to use as a reference.

(7) The unlicensed caregiver has been instructed that the task is delegated for this specific person only and is not transferable to other residents or taught to other caregivers.

(8) The licensed nurse has determined the frequency for monitoring, based upon each resident's health status.

(9) The licensed nurse documents in the resident's record the delegation procedures, evaluation of the process, frequency of the licensed nurse followup visits, condition of the resident, date, and signature of the licensed nurse doing the delegating.

(10) The licensed nurse retains all responsibility and accountability for the delegation of nursing tasks to unlicensed caregivers.

2. Persons admitted or retained in a class II facility may not be dependent in any activities of daily living, but may require assistance in activities of daily living.

3. Nursing assessment is required for each resident within seven days of admission and as determined by the licensed nurse thereafter, but no less frequently than quarterly.

4. Each class II facility shall employ or have a contract for the provision of nursing services under the direction of a licensed nurse. As part of the services, the licensed nurse or physician shall establish protocol for use by the facility in the event of a serious health threatening condition or in cases of temporary illness.

5. A class II facility may not admit or retain persons whose needs cannot be met by the nursing oversight as outlined under subdivision j of subsection 1.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-21. Change of status for care requirements.

1. If a resident's care needs change, after continued residence in the facility, resulting in care requirements greater than the facility's license classification allows, the facility shall assist the resident in transferring to an appropriate setting, or the facility shall notify the department in writing and request:

   a. A reclassification of the facility's license; or

   b. An exception consistent with department procedures which allows the resident to remain in the facility. An exception may be granted if:

      (1) The best interests of the resident are served by remaining in the facility;

      (2) The facility is able to provide appropriate staff and expertise to supply the services necessary to meet the resident's needs; and

      (3) The facility is able to provide structural or equipment changes as necessary in meeting the health and safety needs of the resident.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-22. Medical care for residents.

1. Each resident shall designate a physician to be called in case of emergency. The basic care facility shall make necessary arrangements to secure the services of a licensed physician if the resident's own physician is not available.

2. In the event of an illness or the injury of a resident, the consulting licensed nurse or physician must be notified.

3. Within seven days of admission for all facilities and each year thereafter for a class II facility, or more frequently if there is a change in health status, each resident shall submit to the basic care facility the results of a physical examination by a physician, physician assistant, nurse practitioner, or other authorized health care professional. The examination must include an evaluation of ambulatory status and an examination for contagious and infectious diseases, as well as a medication review. The examination results must be placed in the resident's file.

4. A first-aid kit containing, but not limited to, gauze, tape, adhesive, antiseptic, and bandages must be provided for emergencies and kept in an accessible, well-identified place within the facility.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-23. Care plan.

1. An initial assessment by the licensed nurse and care plan based on the resident's functional, psychosocial, and activity levels must be developed for each resident within seven days of admission and updated at least quarterly thereafter for a class II facility and semiannually for a class I facility. The care plan must state the resident's problems or needs and how the basic care facility will address these needs.

2. A social history must be completed within seven days of admission which includes family involvement and previous social interactions.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-24. Resident records.

1. The basic care facility shall provide for secure maintenance and storage of all resident records.

2. All staff with access to resident records must be provided instruction in confidentiality in the use of sensitive and private records.

3. The basic care facility shall establish guidelines for release of information from resident records.

4. All resident records must be made available for inspection by authorized representatives of the department.

5. Resident records must include:

   a. Resident's name, social security number, marital status, age, sex, last previous address, and religion; personal physician, dentist, and designated representative or other responsible person and social history.

   b. Admission and discharge data and report of the physician's orders and admission physical examination of the resident.

c. A copy of an initial assessment by the licensed nurse or appropriate health care professional and care plan based on the resident's functional, psychosocial, and activity levels.

d. Observations by personnel, licensed nurses, physician, or others authorized to care for the resident.

e. A list of clothing and personal possessions of the resident for identification purposes.

f. Documentation of death, including cause and disposition of the resident's personal effects and money or valuables deposited with the basic care facility.

g. A written record of all accidents, injuries, and illnesses of the resident which occur while in the care of the basic care facility must be kept in the resident's file. A copy of this record must accompany the resident if transferred to another facility.

h. A quarterly progress note for each resident documenting the resident's current condition, level of functioning, activity involvement, social interactions and problems, to be part of the care plan review.

i. Transfer forms to be completed, signed, and sent with the resident when going to a hospital or transferring to another health care facility.

j. A medication sheet for each resident who takes medications, documenting medications currently being used or ordered, the time and how often the resident takes them, or the time and how often the resident is supposed to take them, and the initials of the individual who assists the resident in taking medications.

k. A written report of any funds kept at a resident's request which is available for inspection by the resident and the department's representative. Such record must show deposits to and withdrawals from the fund.

l. All agreements or contracts entered into between the operator or basic care facility and the resident.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-03, 23-09.3-04

33-03-24-25. Medications.

1. Every basic care facility shall adopt written policies and procedures, which are consistent with the purpose of this chapter, and which must be followed in the operation of the basic care facility, for assisting residents in obtaining individually prescribed medication and for disposing of outdated medications prescribed by the attending physicians or other health care professionals, consistent with applicable state practice acts.

   a. These policies and procedures must be developed in consultation with a licensed nurse and a registered pharmacist. These policies and procedures must be part of the written program of care and services for the basic care facility.

   b. All prescription medications taken by residents in a basic care facility must be ordered by the attending physician or other appropriate health care professional consistent with applicable state practice acts.

   c. The policies of the basic care facility shall permit residents upon request to be totally responsible for their own medication; the attending physician, the consulting licensed nurse, or other appropriate health care professional shall have assessed the resident's capabilities with respect to this function.

2. The attending physician, or other health care professional consistent with applicable state practice acts, or a consulting pharmacist shall review the medication regimen of each resident as needed, but at least annually. Documentation of this review must be entered in the resident's record.

3. All medications used by residents must be properly recorded by basic care facility staff at time of use. A medication record need not be kept for those residents for whom authorization has been given by the attending physician or licensed nurse to keep their medication in their room and to be fully responsible for taking the medication in the correct dosage and at the proper times.

4. Bottled oxygen may not be administered in a basic care facility, except in an emergency. Not more than one four hundred fifteen liter (E-cylinder) portable size tank of oxygen for such emergency use may be kept in the facility. However, the use of an oxygen concentrator is permitted when prescribed by a physician for a resident if the resident can manage self-care. The basic care facility must be in compliance with directions for use of such equipment as established by the manufacturer.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-26. Labeling and storage of medications.

1. The basic care facility shall provide residents with a secure area for medication storage. This area may be a drawer, cabinet, closet, or room.

   a. All controlled medication must be stored under lock and key.

   b. Noncontrolled medication must be stored in areas restricted from the public and residents and may be locked at the discretion of the facility.

   c. The facility shall have a specific system for the accountability of keys issued for locked drug storage areas.

2. Residents' medications must be properly labeled.

3. The facility shall provide each resident with a secure storage place for their medications.

4. The facility shall provide assistance to the resident in obtaining the necessary medications and medical supplies.

5. The class I facility staff may not remove a medication from its original container. The responsibility for control for administration of medications must remain with the resident.

6. Medications no longer in use must be disposed of or destroyed in accordance with federal and state laws and rules.

7. Medications having an expiration date must be removed from use and properly disposed of after the expiration date.

8. The medications of each resident must be kept and stored in the original containers. Medications may not be transferred between containers.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-27. Required services. The following services must be provided to residents:

1. Personal care services.

a. Basic care facilities shall provide personal care including, but not limited to:

(1) Assistance as needed with activities of daily living and instrumental activities of daily living and observation and documentation of changes in physical, mental, and emotional functioning.

(2) Assistance with arrangements for appropriate transfer and transport as needed.

(3) Assisting each resident to maintain the highest level of functioning possible, compatible with individual safety and welfare and providing general supervision if required by the resident, including encouraging and assisting the resident:

(a) To self-administer medically prescribed drugs and treatment and to follow any planned diet, rest, or activity regimen.

(b) With arrangements to seek health care when the resident shows signs or describes symptoms of an illness or abnormality for which treatment may be indicated.

(c) With functional aids or equipment, such as glasses, hearing aids, canes, crutches, walkers, or wheelchairs.

(d) With clothing and other personal effects as well as personal living quarters in a manner conducive to safety and comfort.

2. Social services must be made available to the resident either by the basic care facility or by an appropriate agency offering social services.

3. Dietary services.

a. A minimum of three meals must be provided each day. Meals must be nutritious and well-balanced in accordance with the recommended dietary allowances of the food and nutrition board of the national research council, national academy of sciences.

b. There must be provision of therapeutic diets when required in a class II facility.

c. If the class II facility accepts or retains individuals in need of therapeutic diets, the diets must be medically prescribed diets. Menus for such diets must be planned and reviewed as needed by a professional consistent with

North Dakota Century Code chapter 43-44. These reviews must be documented in the resident's record. The basic care facility shall provide the supervision for preparing and serving the special diets.

d. A record of the menu served must be kept for at least three months. These are subject to inspection by the department.

e. No more than a fourteen-hour span may exist between a substantial evening meal and breakfast and appropriate snacks must be made available between meals and in the evening and must be listed on the daily menu. Vending machines may not be the only source of snacks.

f. There must be a sufficient number of food service personnel employed and on duty to meet the dietary needs of all persons eating meals in the facility. Staff hours must be scheduled to meet the total dietary needs of the residents.

g. Dietary staff responsible for food preparation shall attend at a minimum two dietary workshops per year given by a licensed dietitian.

h. Food service personnel must be in good health, practice hygienic food-handling techniques and good personal grooming.

i. Food must be prepared by appropriate methods that will conserve nutritive value and enhance flavor and appearance and served at the proper temperatures and in a form to meet individual needs.

j. All residents must be served in a dining room except for residents with a temporary illness or a documented specific personal preference.

4. Housekeeping services. The basic care facility shall provide sufficient environmental support staff to maintain the interior and exterior of the facility in a safe, clean, orderly, and attractive manner and assist, as needed, with other instrumental activities of daily living.

5. Laundry services. The basic care facility shall provide laundry services to meet the needs of the residents.

6. Activity services. There must be a planned and meaningful activity program to meet the needs of the residents, which is coordinated by a qualified staff member. Volunteers may assist, but not replace salaried activity employees. This qualified staff person shall:

a. Encourage, guide, or assist residents with arrangements to participate in social, recreational, diversional, vocational, religious, or other activities within the facility and the community in accordance with individual interests, tolerance, and abilities.

b. Basic care facilities shall post a monthly calendar which lists social and recreational activities and events for residents.

c. Appropriate activities must be provided to all residents during the day, in the evening, and on the weekend.

d. An initial assessment of the interests and social activities of each resident must be developed within seven days of admission and updated at least annually.

e. The activity service shall have a well-organized plan for using community resources.

f. Space must be provided for privacy during visits when the resident requests privacy.

g. The qualified activity person shall attend a minimum of two activity-related workshops per year.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-28. General building requirements. The basic are facility must be operated in conformance with all state and local laws, rules, and ordinances concerning fire safety and sanitation, including, but not limited to, the North Dakota sanitary requirements for food establishments effective October 1, 1979.

1. Lounge and activity area space must be provided with a minimum of fifteen square feet [1.39 square meters] per licensed bed of the facility for recreation, and visiting, and an activity program. The lounge and activity area must be separate areas and may be used to accommodate religious services and activities. Each lounge area for residents' use must be provided with an adequate number of reading lamps, tables, and chairs or couches. These furnishings must be well-constructed and of satisfactory design for the residents.

2. All corridors and stairways used by residents shall have sturdy handrails to provide for safety with ambulation.

3. Dining area.

a. A minimum of fifteen square feet [1.39 square meters] per licensed bed must be provided for dining. Activity and dining areas must be separate.

b. Dining room furnishings which are well-constructed, comfortable, in good repair, and of satisfactory design for the residents must be provided for each resident. There must be a sufficient number of tables that can be used by wheelchair residents to accommodate all such residents in the basic care facility.

4. Resident bedrooms.

a. All bedrooms used for residents must be dry, well ventilated, naturally lighted, and otherwise suitable for occupancy. Each room must have direct access to a hall and have an outside wall. Resident bedrooms in new (initial license after January 1, 1991) basic care facilities must be at or above grade level.

b. The glazed area of the window may not be less than one-tenth of the floor area of the room. Windows must be easily opened and must be provided with screens.

c. Room size will vary depending on number of beds, but minimum floor dimension may not be less than ten feet [3.05 meters]. In computing floor area, only usable floor space may be included. Single rooms must provide at least one hundred square feet [9.29 square meters] per bed. Double rooms shall provide at least eighty square feet [7.43 square meters] per bed. Rooms for three or more persons must provide at least seventy square feet [6.50 square meters] per bed.

d. Each resident must be provided with a bed. Cots, rollaways, or folding beds may not be used. Double beds may be used if requested by the resident. Each bed must be provided with satisfactory springs in good repair and a clean, firm, comfortable mattress of appropriate size for the bed as well as a minimum of one clean, comfortable pillow.

e. Each bedroom must have window shades, or an equivalent, in good repair.

f. A lamp, or an equivalent, must be provided for each bed to assure adequate lighting levels to provide for reading and safety.

g. Each bedroom must be provided with a mirror unless there is a mirror in a bathroom opening into the bedroom. Each lavatory must be provided with a mirror.

h. For each bed there must be furnished a minimum of two adequately sized dresser drawers, a comfortable chair, a bedside table or stand, an individual towel rack, and adequate closet, locker, or wardrobe space for hanging clothing within the room.

5. Toilet rooms and bathing facilities.

   a. An ample number of lavatories and toilets must be provided in accordance with the number of residents. At least one toilet for every four residents or fraction thereof must be provided. Toilets for public use must be provided.

   b. Facilities housing wheelchair residents shall provide at least one toilet room that is in compliance with the guidelines developed by the American national standards institute, inc., or the uniform federal accessibility standards for every four wheelchair residents.

   c. A bathtub or shower equipped with grab bars must be available in a ratio of one for each fifteen residents.

   d. Each bath and toilet room must be well lighted and have a light switch just inside the door.

6. The basic care facility shall provide for adequate ventilation throughout to assure an odor-free, comfortable environment.

7. Office spaces and other areas must be satisfactorily furnished with desks, chairs, lamps, cabinets, benches, worktables, and other furnishings essential to the proper use of the area.

8. Kitchen.

   a. If a conventional food preparation system is used, the following facilities must be provided:

      (1) Food preparation center and serving facilities.

      (2) Dishwashing room with potwashing and sanitizing facilities.

      (3) Refrigerated storage, medium temperature and freezer units as well as dry food storage areas.

      (4) Equipment storage areas.

      (5) Waste disposal and can washing facilities.

      (6) Dining facilities for visitors and staff.

      (7) Janitor's closet. Storage for housekeeping supplies and equipment.

b. Effective procedures for cleaning all equipment and work areas must be developed and followed.

c. If a convenience food system is used, dietary areas and equipment must be designed to accommodate the requirements for sanitary storage, processing, and handling.

9. Laundry services.

a. The basic care facility shall supply an adequate amount of clean linen for operation, either through an in-house laundry or a contract with an outside service. An adequate supply of clean linen must include sheets, towels, pillowcases, etc. Additional changes of linen must be available to meet residents' and facility's needs. If an in-house laundry service is provided, the following conditions must exist:

(1) The laundry area must be maintained and operated in a clean, safe, and sanitary manner. Bed linens must be changed as needed, but at least weekly.

(2) Written operating procedures must be developed, posted, and implemented which provide for the handling, transporting, and storage of clean and soiled linens.

(3) Personnel doing laundry must be in good health and practice good personal grooming. Employees shall thoroughly wash hands and exposed portions of arms with soap and warm water before starting work; after smoking, eating, drinking, using the toilet, and handling soiled linens.

(4) Clean linen must be protected from contamination during handling, transporting, and storage.

(5) Soiled linen must be handled, transported, and stored in areas separate from other laundry spaces to protect residents and personnel from contamination.

(6) Soiled linen may not be sorted, laundered, rinsed, or stored in bathrooms, residents' rooms, kitchens, or food storage areas.

(7) The laundry and its accessory storage and handling areas may not be used as a storage area for supplies not directly connected with the operation of the laundry.

b. If an outside laundry service is used, it shall provide for protection of clean linens during transportation back to the basic care facility.

c. The basic care facility shall provide laundry service for residents' personal clothing. It must be handled, transported, and stored in a manner that will prevent contamination of clean linen.

10. Fire safety.

a. The basic care facility shall comply with the national fire protection association life safety code, 1988 edition, chapter twenty-one, residential board and care occupancy or a greater level of fire safety.

b. Fire drills must be held monthly with a minimum of twelve per year, alternating with all of the different work shifts. Residents and staff as a group shall either evacuate the building or relocate from the point of occupancy to a point of safety.

c. Fire evacuation plans must be posted in a conspicuous place in the facility.

d. Written records of fire drills must be maintained. These records must include dates, times, and names of staff and residents participating and those absent and why, and a brief description of the drill.

e. Each resident shall receive an individual fire drill walk through documented in the resident's record within five days of admission.

f. Any variation to compliance with the fire code must be coordinated with the department and approved in writing by the state fire marshal.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-09, 28-32-02(1)
Law Implemented: NDCC 23-09.3-04

33-03-24-29. Appeals. The applicants, owners, or operators of a basic care facility have the right to appeal decisions to deny or revoke a license, issuance of a provisional license, or rejection of a written plan of correction.

1. A notice of appeal must be filed with the department in writing within ten days of receipt of written notice of the decision for denial, revocation, provisional license, or rejection of a plan of correction.

2. A notice of appeal under this section must be accompanied by written documents including all of the following information:

a. A copy of the notice received from the department;

b. The reason or basis in fact for the dispute and appeal;

c. The statute or rule relied upon with respect to each disputed issue; and

d. The name, address, and telephone number of the person upon whom all notices will be mailed or delivered regarding the appeal.

3. Within ten days of receipt of the notice of appeal, the appeal must be decided by the department. A party who has appealed must be notified of the right to request reconsideration at an informal hearing. A party has ten days from receipt of notice to make written request for an informal reconsideration.

4. If an informal reconsideration is requested, the department will conduct the hearing at the capitol in Bismarck, North Dakota, within ten days of the receipt of the request.

5. Within ten days after the informal reconsideration, the department will notify the provider in writing of the decision.

6. The appeals process does not delay the implementation of the denial, revocation, issuance of a provisional license, or the rejection of the plan of correction process. The date of the initial decision by the department regarding this issue is effective unless otherwise determined.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-19
Law Implemented: NDCC 23-09.3-09

33-03-24-30. Complaints. The basic care facility shall develop written policies and procedures regarding the process for handling complaints. This policy shall be available to residents or their families upon request.

History: Effective December 1, 1990.
General Authority: NDCC 23-09.3-19
Law Implemented: NDCC 23-09.3-09

33-03-24-31. Waiver provision. For facilities operating as a basic care facility on December 1, 1990, the health officer may grandfather facilities with respect to these rules for a specified period in specific instances, provided compliance with the requirement would result in an unreasonable hardship upon the facility and lack of compliance does not adversely affect the health and safety of the residents.

History: Effective December 1, 1990.

General Authority: NDCC 23-09.3-19
Law Implemented: NDCC 23-09.3-09

33-17-01-02. Definitions. For the purpose of this chapter the following definitions shall apply:

1. "Best available technology" or "BAT" means the best technology, treatment techniques, or other means which the department finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available (taking cost into consideration). For the purposes of setting maximum contaminant levels for synthetic organic chemicals, any best available technology must be at least as effective as granular activated carbon.

2. "Community water system" means a public water system which serves at least fifteen service connections used by year-round residents or regularly serves at least twenty-five year-round residents.

3. "Confluent growth" means a continuous bacterial growth covering the entire filtration area of a membrane filter, or a portion thereof, in which bacterial colonies are not discrete.

~~3.~~ 4. "Contaminant" means any physical, chemical, biological, or radiological substance or matter in water.

~~4.~~ 5. "Cross connection" means any connection or arrangement between two otherwise separate piping systems, one of which contains potable water and the other either water of unknown or questionable safety or steam, gas, or chemical whereby there may be a flow from one system to the other, the direction of flow depending on the pressure differential between the two systems.

~~5.~~ 6. "Department" means the North Dakota state department of health and consolidated laboratories.

~~6.~~ 7. "Disinfectant" means any oxidant, including, but not limited to, chlorine, chlorine dioxide, chloramines, and ozone added to water in any part of the treatment or distribution process, that is intended to kill or inactivate pathogenic micro-organisms.

8. "Domestic or other nondistribution system plumbing problem" means a coliform contamination problem in a public water system with more than one service connection that is limited to the specific service connection from which the coliform-positive sample was taken.

9. "Ground water under the direct influence of surface water" means any water beneath the surface of the ground with

significant occurrence of insects or other macroorganisms, algae, or large-diameter pathogens such as Giarda lamblia, or significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity, or pH which closely correlate to climatological or surface water conditions.

~~7.~~ 10. "Gross alpha particle activity" means the total radioactivity due to alpha particle emission as inferred from measurements on a dry sample.

~~8.~~ 11. "Halogen" means one of the chemical elements chlorine, bromine, or iodine.

~~9.~~ 12. "Maximum contaminant level" means the maximum permissible level of a contaminant in water which is delivered to the free flowing outlet of the ultimate user of a public water system, except in the case of turbidity where the maximum permissible level is measured at the point of entry to the distribution system. Contaminants added to the water under circumstances controlled by the user except those resulting from corrosion of piping and plumbing caused by water quality are excluded from this definition.

~~10.~~ 13. "Maximum total trihalomethane potential" means the maximum concentration of total trihalomethanes produced in a given water containing a disinfectant residual after seven days at a temperature of twenty-five degrees Celsius [77 degrees Fahrenheit] or above.

14. "Near the first service connection" means at one of the twenty percent of all service connections in the entire system that are nearest the water supply treatment facility as measured by water transport time within the distribution system.

~~11.~~ 15. "Noncommunity water system" means a public water system that is not a community system and primarily provides service to transients.

~~12.~~ 16. "Nontransient noncommunity water system" means a public water system that is not a community water system and that regularly serves at least twenty-five of the same persons over six months per year.

~~13.~~ 17. "Person" means an individual, corporation, company, association, partnership, municipality, or any other entity.

~~14.~~ 18. "Potable water" means water free from impurities in amounts sufficient to cause disease or harmful physiological effects, with the physical, chemical, biological, or radiological quality conforming to applicable maximum permissible contaminant levels.

~~15.~~ 19. "Public water system" means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. A public water system is either a "community", a "nontransient noncommunity", or a "noncommunity" water system.

~~16.~~ 20. "Sampling schedule" means the frequency required for submitting drinking water samples to a certified laboratory for examination.

~~17.~~ 21. "Sanitary survey" means an onsite review of the water source, facilities, equipment, operation, and maintenance of a public water system for the purpose of evaluating the adequacy of such source, facilities, equipment, operation, and maintenance for producing and distributing safe drinking water.

~~18.~~ 22. "Supplier of water" means any person who owns or operates a public water system.

23. "System with a single service connection" means a system which supplies drinking water to consumers with a single service line.

24. "Too numerous to count" means that the total number of bacterial colonies exceeds two hundred on a forty-seven millimeter membrane filter used for coliform detection.

~~19.~~ 25. "Total trihalomethanes" means the sum of the concentration in milligrams per liter of the trihalomethane compounds (trichloromethane [chloroform], dibromochloromethane, bromodichloromethane and tribromomethane [bromoform]), rounded to two significant figures.

~~20.~~ 26. "Trihalomethane" means one of the family of organic compounds, named as derivatives of methane, wherein three of the four hydrogen atoms in methane are each substituted by a halogen atom in the molecular structure.

~~21.~~ 27. "Water system" means all sources of water and their surroundings and shall include all structures, conducts, and appurtenances by means of which the water is collected, treated, stored, or delivered.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-02, 61-28.1-03

33-17-01-05. Approved laboratories and analytical procedures. All samples shall be examined by the department or by any other laboratory certified by the department for drinking water purposes,

except that measurements for turbidity and free chlorine may be performed by any person acceptable to the department. All methods of sample preservation and analyses shall be as prescribed by the department and set forth under title 40, Code of Federal Regulations, part 141.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03, 61-28.1-07

33-17-01-06. Maximum contaminant levels.

1. Inorganic chemicals. The maximum contaminant levels for inorganic chemical contaminants are as follows:

CONTAMINANT	LEVEL MILLIGRAM(S) PER LITER
Arsenic	0.05
Barium	1
Cadmium	0.010
Chromium	0.05
Lead	0.05
Mercury	0.002
Nitrate (as N)	10
Selenium	0.01
Silver	0.05
Fluoride	4.0

At the discretion of the department, nitrate levels not to exceed twenty milligrams per liter may be allowed in a noncommunity water system if the supplier of water demonstrates to the satisfaction of the department that:

a. Such water will not be available to children under six months of age;

b. There will be continuous posting of the fact that nitrate levels exceed ten milligrams per liter and the potential health effect of exposure;

c. Local and state public health authorities will be notified annually of nitrate levels that exceed ten milligrams per liter; and

d. No adverse health effects shall result.

2. Organic chemicals. The maximum contaminant levels for organic chemical contaminants are as follows:

	LEVEL

CONTAMINANT	MILLIGRAM PER LITER
Chlorinated hydrocarbons:	
Endrin (1,2,3,4,10, 10-hexachloro-6,7-epoxy-1,4,4a,5,6,7,8,8a-octahydro-1,4-endo,endo-5,8-dimethanonaphthalene)	0.0002
Lindane (1,2,3,4,5,6-hexachlorocyclohexane, gamma isomer)	0.004
Methoxychlor (1,1,1-Trichloro-2,2-bis [p-methoxyphenyl] ethane)	0.1
Toxaphene ($C_{10}H_{10}Cl_8$ -Technical chlorinated camphene, 67-69% chlorine)	0.005
Chlorophenoxys:	
2,4-D (2,4-Dichlorophenoxyacetic acid)	0.1
2,4,5-TP Silvex (2,4,5-Trichlorophenoxypropionic acid)	0.01
Total trihalomethanes. The sum of the concentrations of:	
Bromodichloromethane, Dibromochloromethane, Tribromomethane (bromoform) and Trichloromethane (chloroform)	0.10
Volatile synthetic organic chemicals:	
Benzene	0.005
Vinyl chloride	0.002
Carbon tetrachloride	0.005
1,2-Dichloroethane	0.005
Trichloroethylene	0.005
1,1-Dichloroethylene	0.007
1,1,1-Trichloroethane	0.20
para-Dichlorobenzene	0.075

3. **Turbidity.** The maximum contaminant levels for turbidity in drinking water, measured at a representative entry point to the distribution system, are as follows:

   a. One turbidity unit as determined by a monthly average except that five or fewer turbidity units may be allowed

if the system can demonstrate to the department that the higher turbidity does not:

(1) Interfere with disinfection;

(2) Prevent maintenance of an effective disinfectant agent throughout the distribution system; or

(3) Interfere with microbiological determinations.

b. Five turbidity units based on an average for two consecutive days.

4. Radioactivity. The maximum contaminant levels for radioactivity are as follows:

CONTAMINANT	LEVEL PICOCURIES PER LITER
Combined radium-226 and radium-228	5
Gross alpha particle activity, including radium-226, but excluding radon and uranium	15

5. Microbiological. The maximum contaminant levels for coliform bacteria are as follows:

~~a. Membrane filter method. When the membrane filter method is used, the number of coliform bacterial colonies shall not exceed:~~

~~(1) One per one hundred milliliters as the arithmetic mean of all routine samples examined per month.~~

~~(2) (a) Four per one hundred milliliters in more than one sample when less than twenty are examined per month; or~~

~~(b) Four per one hundred milliliters in more than five percent of the samples when twenty or more are examined per month.~~

~~b. Fermentation tube method. When the fermentation tube method and ten milliliter standard portions are used, coliform bacteria shall not be present in:~~

~~(1) More than ten percent of the portions from routine samples examined in any month.~~

(2) (a) Three or more portions in more than one sample when less than twenty samples are examined during the sampling period; or

(b) Three or more portions in more than five percent of the samples when twenty or more samples are examined per month.

c. For community or noncommunity water systems that are required to sample at a rate of less than four per month, compliance of this section shall be based upon sampling during a three month period except that, at the discretion of the department, compliance may be based upon sampling during a one month period.

d. At the discretion of the department, systems required to take ten or fewer samples per month may be authorized to exclude one positive routine sample per month from the monthly calculation if:

(1) On a case by case basis the department determines and indicates in writing to the public water system that no unreasonable risk to health existed. The determination should be based on a number of factors not limited to the following:

(a) The system had provided and maintained an active disinfectant residual in the distribution system;

(b) The potential for contamination as indicated by a sanitary survey; and

(c) The history of the water quality of the public water system.

(2) The supplier submits, within twenty four hours after notification, a check sample collected on each of two consecutive days from the same sampling point and each of these check samples shall be negative.

(3) The original positive routine sample be reported and recorded by the supplier.

The supplier shall report to the department compliance with conditions specified in this section and summarize the corrective action taken to resolve the problem. If a positive routine sample is not used for the monthly calculation, another routine sample must be analyzed for compliance purpose. This provision may be used only once during two consecutive compliance periods.

~~e. If an average maximum contaminant level violation is caused by a single sample maximum contaminant level violation, the case shall be treated as one violation with respect to public notification requirements.~~

a. Monthly maximum contaminant level violations.

(1) No more than one sample per month may be total coliform-positive for systems collecting less than forty samples per month.

(2) No more than five percent of the monthly samples may be total coliform-positive for systems collecting forty or more samples per month.

All routine and repeat total coliform samples must be used to determine compliance. Special purpose samples, such as those taken to determine whether disinfection practices following pipe placement, replacement, or repair are sufficient, and samples invalidated by the department, may not be used to determine compliance.

b. Acute maximum contaminant level violations.

(1) No repeat sample may be fecal coliform or E.coli-positive.

(2) No repeat sample may be total coliform-positive following a fecal coliform or E.coli-positive routine sample.

c. Compliance must be determined each month that a system is required to monitor. The department hereby identifies the following as the best technology, treatment techniques, or other means generally available for achieving compliance with the maximum contaminant levels for total coliform bacteria: protection of wells from contamination by appropriate placement and construction; maintenance of a disinfection residual throughout the distribution system; proper maintenance of the distribution system including appropriate pipe replacement and repair procedures, cross-connection control programs, main flushing programs, proper operation and maintenance of storage tanks and reservoirs, and continual maintenance of a positive water pressure in all parts of the distribution system; filtration and disinfection or disinfection of surface water and disinfection of ground water using strong oxidants such as chlorine, chlorine dioxide, or ozone; the development and implementation of a department-approved wellhead protection program.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990.

General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03

33-17-01-08. Organic chemical sampling and monitoring requirements.

1. Chlorinated hydrocarbons and chlorophenoxys.

   a. Sampling frequency for community water systems.

      (1) Surface water supplies. Community water systems shall sample at intervals specified by the department, but in no event less frequently than at three-year intervals. Samples analyzed shall be collected during the period of the year designated by the department as the period when contamination is most likely to occur.

      (2) Ground water supplies. Community water systems shall sample when specified by the department.

   b. Sampling frequency for check samples. If the result of an analysis indicates that the level of any contaminant exceeds the maximum contaminant level, the system shall report to the department within seven days and initiate three additional analyses at the same sampling point within one month. When the average of four analyses exceeds the maximum contaminant level, the system shall notify the department and give notice to the public. Monitoring after public notification shall be at a frequency designated by the department and shall continue until the maximum contaminant level has not been exceeded in two successive samples or until a monitoring schedule as a condition to a variance or enforcement action shall become effective.

2. Total trihalomethanes.

   a. Coverage. Community water systems which serve a population of ten thousand or more individuals and which add a disinfectant to the water in any part of the drinking water treatment process shall collect samples for the purpose of analysis for total trihalomethanes.

   b. Sampling frequency. The minimum number of samples required to be taken by the system shall be based on the number of treatment plants used by the system. Multiple wells drawing raw water from a single aquifer may, with the department's approval, be considered one treatment plant.

All samples taken within an established frequency shall be collected within a twenty-four-hour period.

(1) Routine sampling. Analyses for total trihalomethanes shall be performed at quarterly intervals on at least four water samples for each treatment plant used by the system. At least twenty-five percent of the samples shall be taken at locations within the distribution system reflecting the maximum residence time of the water in the system. The remaining seventy-five percent shall be taken at representative locations in the distribution system, taking into account number of persons served, different sources of water, and different treatment methods employed.

(2) Reduced sampling frequency.

(a) Systems utilizing surface water or a combination of surface and ground water. The sampling frequency may be reduced to a minimum of one sample analyzed per quarter taken at a point in the distribution system reflecting the maximum residence time of the water in the system.

The system's sampling frequency may only be reduced upon written request by the system and upon a determination by the department that data from at least one year of sampling at a frequency of four samples collected per calendar quarter per water treatment plant used by the system and local conditions demonstrate that total trihalomethane concentrations will be consistently below the maximum contaminant level.

If at any time during which the reduced sampling frequency is in effect, the result from any analysis exceeds the maximum contaminant level and such results are confirmed by at least one check sample taken promptly after such results are received, or if the system makes any significant change to its source of water or treatment program, the system shall immediately resume sampling on a routine basis of four samples per quarter per treatment plant used by the system. Such increased sampling shall continue for at least one year before the frequency may be reduced again.

(b) Systems utilizing only ground water. The sampling frequency may be reduced to a minimum of one sample analyzed per year per water treatment plant taken at a point in the

distribution system reflecting the maximum residence time of the water in the system.

The system's sampling frequency may only be reduced upon written request by the system and upon a determination by the department that the system has a maximum total trihalomethane potential of less than the maximum contaminant level and local conditions demonstrate that the system is not likely to approach or exceed the maximum contaminant level.

If at any time during which the reduced sampling frequency is in effect, the result from any analysis for maximum total trihalomethane potential is equal to or exceeds the maximum contaminant level and such results are confirmed by at least one check sample, the system shall immediately resume sampling on a routine basis of four samples per quarter per treatment plant used by the system. Such increased sampling shall continue for at least one year before the frequency may be reduced again.

In the event of any significant change to the system's source of water or treatment program, the system shall immediately analyze an additional sample for maximum total trihalomethane potential taken at a point in the distribution system reflecting maximum residence time of the water in the system for the purpose of determining whether the system must begin sampling on a routine basis of four samples per quarter per treatment plant used by the system.

(3) Increased sampling frequency. At the option of the department, sampling frequencies may be increased above the minimum in those cases where it is necessary to detect variations of total trihalomethane levels within the distribution system.

c. Compliance. Compliance with the maximum contaminant level shall be determined based on a running annual average of quarterly analyses.

If the average of analyses covering any twelve-month period exceeds the maximum contaminant level, sampling shall be at a frequency designated by the department and shall continue until a monitoring schedule as a condition to a variance or enforcement action becomes effective.

If the average of analyses covering any twelve-month period exceeds the maximum contaminant level, or if the

system fails to monitor, the system shall notify the department and give notice to the public.

d. Reporting. All analyses shall be reported to the department within thirty days of the system's receipt of such results.

e. Modification of treatment methods for reduction of total trihalomethanes. Before a system makes any significant modification to its existing treatment process for the purpose of achieving compliance with the trihalomethane regulations, the system must submit and obtain department approval of a detailed plan setting forth its proposed modification and those safeguards that it will implement to ensure that the water will not be adversely affected by such modification. Each system shall comply with the provisions set forth in the department-approved plan. At a minimum, the department-approved plan shall require the system modifying its disinfection practice to:

(1) Evaluate the water system for sanitary defects and evaluate the source water for biological quality;

(2) Evaluate its existing treatment practices and consider improvements that will minimize disinfectant demand and optimize finished water quality throughout the distribution system;

(3) Provide baseline water quality survey data of the distribution system as the department may require;

(4) Conduct additional monitoring to assure continued maintenance of optimal microbiological quality in finished water; and

(5) Demonstrate an active disinfectant residual throughout the distribution system at all times during and after the modification.

3. Volatile synthetic organic chemicals.

a. Coverage and effective dates. Community and nontransient noncommunity water systems serving more than ten thousand people shall analyze samples, as appropriate, beginning no later than January 1, 1988. Community and nontransient noncommunity water systems serving from three thousand three hundred to ten thousand people shall analyze samples, as appropriate, no later than January 1, 1989. Other community and nontransient noncommunity water systems shall analyze samples, as appropriate, no later than January 1, 1991.

b. Sampling frequency.

(1) Ground water systems. Systems shall sample at points of entry to the distribution system representative of each source unless the sources are combined before distribution, then the system must sample at an entry point to the distribution system during periods of normal operating conditions. Systems must sample every three months if volatile synthetic organic chemicals are detected in the initial sample or in any subsequent sample. Sampling must be conducted at the same location or a more representative location each quarter. Systems must sample every three years if volatile synthetic organic chemicals are not detected in the initial sample or in any subsequent sample but the system is vulnerable and has more than five hundred service connections. Systems must sample every five years if volatile synthetic organic chemicals are not detected in the initial sample or in any subsequent sample and the system is not vulnerable or is vulnerable but has five hundred or less service connections.

Analysis for vinyl chloride is required only for systems that have detected one or more of the following two-carbon organic compounds: trichloroethylene; tetrachloroethylene; 1,2-dichloroethane; 1,1,1-trichloroethane; cis-1,2-dichloroethylene; trans-1,2-dichloroethylene; or 1,1-dichloroethylene. The analysis for vinyl chloride is required at each distribution or entry point at which one or more of the two-carbon organic compounds were found. If the first analysis does not detect vinyl chloride, the department may reduce the frequency of vinyl chloride monitoring to once every three years for that sample location or other sample locations which are more representative of the same source.

(2) Surface water systems. Systems shall sample at points of entry to the distribution system representative of each source unless the sources are combined before distribution, then the system must sample at an entry point to the distribution system after any application of treatment during periods of normal operating conditions. Systems must sample every three months if volatile synthetic organic chemicals are detected in the initial sample or in any subsequent sample. Sampling must be conducted at the same location or a more representative location each quarter. Systems must sample quarterly for the first year and every three years thereafter if volatile synthetic organic chemicals are not detected but the system is vulnerable and has more than five hundred service connections. Systems must sample

quarterly for the first year and every five years thereafter if volatile synthetic organic chemicals are not detected but the system is vulnerable and has five hundred or less service connections. Systems may be required to monitor at department discretion if volatile synthetic organic chemicals are not detected in the first year of quarterly sampling and the system is not vulnerable.

Systems may be required to analyze for vinyl chloride at the discretion of the department.

c. Reduced sampling frequency. The department may reduce the frequency of monitoring to once per year for a system detecting volatile synthetic organic chemicals at levels consistently less than the maximum contaminant level for three consecutive years.

d. Vulnerability. Vulnerability of systems shall be determined by the department based upon an assessment of the following:

(1) Previous monitoring results;

(2) Number of persons served by the system;

(3) Proximity of a smaller system to a larger system;

(4) Proximity to commercial or industrial use, disposal, or storage of volatile synthetic organic chemicals; and

(5) Protection of the water source.

A system is deemed to be vulnerable for a period of three years after any volatile synthetic organic chemical or unregulated contaminant, except for disinfection byproducts, is detected.

e. Reporting. The results of all analyses must be reported to the department within thirty days of the system's receipt of such results.

f. Compliance. Compliance must be determined based on the results of running annual average of quarterly sampling for each sampling location. If one location's average is greater than the maximum contaminant level, then the system must be deemed to be out of compliance. For systems that only take one sample per location, compliance must be based on that one sample.

The department has the authority to allow the use of monitoring data collected after January 1, 1983, for

purposes of monitoring compliance. If the data is consistent with the other requirements of these rules, the department may use that data to represent the initial monitoring if the system is determined by the department not to be vulnerable.

The department has the authority to determine compliance or initiate enforcement action based upon analytical results and other information compiled by a sanctioned representative or agency.

g. Public notification. If a system fails to monitor or comply with a maximum contaminant level, the system shall notify the department and give notice to the public.

4. Unregulated contaminants.

a. Coverage and effective dates. Community and nontransient noncommunity water systems serving more than ten thousand people shall analyze samples, as appropriate, beginning no later than January 1, 1988. Community and nontransient noncommunity water systems serving from three thousand three hundred to ten thousand people shall analyze samples, as appropriate, no later than January 1, 1989. Other community and nontransient noncommunity water systems shall analyze samples, as appropriate, no later than January 1, 1991. Systems may use monitoring data collected any time after January 1, 1983, to meet the requirements for unregulated contaminants; provided, that the monitoring program was consistent with the requirements of these rules.

b. Sampling frequency.

(1) Ground water systems. Systems shall sample at points of entry to the distribution system representative of each source unless the sources are combined before distribution, then the system must sample at an entry point to the distribution system during periods of normal operating conditions. The minimum number of samples is one sample per entry point to the distribution system.

(2) Surface water systems. Systems shall sample quarterly for one year at points of entry to the distribution system representative of each source unless the sources are combined before distribution, then the system must sample at an entry point to the distribution system during periods of normal operating conditions. The minimum number of samples is one year of quarterly samples per water source.

(3) Repeat monitoring. Systems shall repeat the monitoring for unregulated contaminants every five years from the effective dates.

c. Monitoring requirements. Systems shall monitor for the following unregulated contaminants:

(1) Chloroform.

(2) Bromodichloromethane.

(3) Chlorodibromomethane.

(4) Bromoform.

(5) trans-1,2-Dichloroethylene.

(6) Chlorobenzene.

(7) m-Dichlorobenzene.

(8) Dichloromethane.

(9) cis-1,2-Dichloroethylene.

(10) o-Dichlorobenzene.

(11) Dibromomethane.

(12) 1,1-Dichloropropene.

(13) Tetrachloroethylene.

(14) Toluene.

(15) p-Xylene.

(16) o-Xylene.

(17) m-Xylene.

(18) 1,1-Dichloroethane.

(19) 1,2-Dichloropropane.

(20) 1,1,2,2-Tetrachloroethane.

(21) Ethylbenzene.

(22) 1,3-Dichloropropane.

(23) Styrene.

(24) Chloromethane.

(25) Bromomethane.

(26) 1,2,3-Trichloropropane.

(27) 1,1,1,2-Tetrachloroethane.

(28) Chloroethane.

(29) 1,1,2-Trichloroethane.

(30) 2,2-Dichloropropane.

(31) o-Chlorotoluene.

(32) p-Chlorotoluene.

(33) Bromobenzene.

(34) 1,3-Dichloropropene.

Systems must monitor for ethylene dibromide ~~(EDB)~~ and 1,2-dibromo-3-chloropropane ~~(DBCP)~~ only if the department determines they are vulnerable to contamination by either or both of these substances. A vulnerable system is defined as a system which is potentially contaminated by ethylene dibromide and 1,2-dibromo-3-chloropropane, including surface water systems where these two compounds are applied, manufactured, stored, disposed of, or shipped upstream, and for ground water systems in areas where the compounds are applied, manufactured, stored, disposed of, or shipped in the ground water recharge basin, or for ground water systems that are in proximity to underground storage tanks that contain leaded gasoline.

Monitoring for the following unregulated contaminants is required at the discretion of the department:

(1) 1,2,4-Trimethylbenzene.

(2) 1,2,4-Trichlorobenzene.

(3) 1,2,3-Trichlorobenzene.

(4) n-Propylbenzene.

(5) n-Butylbenzene.

(6) Naphthalene.

(7) Hexachlorobutadiene.

(8) 1,3,5-Trimethylbenzene.

(9) p-Isopropyltoluene.

(10) Isopropylbenzene.

(11) Tert-butylbenzene.

(12) Sec-butylbenzene.

(13) Fluorotrichloromethane.

(14) Dichlorodifluoromethane.

(15) Bromochloromethane.

Instead of performing the monitoring for unregulated contaminants, a system serving fewer than one hundred fifty service connections may send a letter to the department stating that its system is available for sampling. This letter must be sent to the department no later than January 1, 1991.

d. Reporting. The results of all analyses must be reported to the department within thirty days of the system's receipt of such results.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03

33-17-01-11. Microbiological sampling and monitoring requirements.

~~1. Sampling frequency for community water systems. Suppliers of water for community water systems shall collect samples of water from representative points on the water distribution system and analyze for coliform bacteria at a frequency established by the department. The number of samples required shall be determined by the population served by the system and in no event shall the frequency be less than as set forth below:~~

~~POPULATION SERVED~~	~~MINIMUM NUMBER OF SAMPLES PER MONTH~~
~~25 to 1,000~~	~~1~~
~~1,001 to 2,500~~	~~2~~
~~2,501 to 3,300~~	~~3~~
~~3,301 to 4,100~~	~~4~~
~~4,101 to 4,900~~	~~5~~

4,901	to	5,800	6
5,801	to	6,700	7
6,701	to	7,600	8
7,601	to	8,500	9
8,501	to	9,400	10
9,401	to	10,300	11
10,301	to	11,100	12
11,101	to	12,000	13
12,001	to	12,900	14
12,901	to	13,700	15
13,701	to	14,600	16
14,601	to	15,500	17
15,501	to	16,300	18
16,301	to	17,200	19
17,201	to	18,100	20
18,101	to	18,900	21
18,901	to	19,800	22
19,801	to	20,700	23
20,701	to	21,500	24
21,501	to	22,300	25
22,301	to	23,200	26
23,201	to	24,000	27
24,001	to	24,900	28
24,901	to	25,000	29
25,001	to	28,000	30
28,001	to	33,000	35
33,001	to	37,000	40
37,001	to	41,000	45
41,001	to	46,000	50
46,001	to	50,000	55
50,001	to	54,000	60
54,001	to	59,000	65
59,001	to	64,000	70
64,001	to	70,000	75
70,001	to	76,000	80
76,001	to	83,000	85
83,001	to	90,000	90
90,001	to	96,000	95
96,001	to	111,000	100

Community water systems with ground water supplies serving twenty-five to one thousand persons may, with written permission from the department, reduce this sampling frequency to one sample per calendar quarter provided that:

a. A sanitary survey by the department shows the ground water supply to be adequately protected.

b. The water supply has a history of no coliform contamination.

2. Sampling frequency for noncommunity water systems. The supplier of water for a noncommunity water system shall sample

for coliform bacteria in each calendar quarter during which the system provides water to the public. If the department, on the basis of a sanitary survey, the existence of additional safeguards such as a protective and enforced well code, or accumulated analytical data, determines that some other frequency is more appropriate, that frequency shall be the frequency required under this chapter. Such frequency shall be confirmed or changed on the basis of subsequent surveys or data. The frequency shall not be reduced until the noncommunity water system has performed at least one coliform analysis of its drinking water and found to be in compliance with maximum microbiological contaminant levels.

3. Sampling frequency for check samples. When the coliform bacteria colonies in a single sample, as determined by the membrane filter procedure, exceeds four per one hundred milliliters, at least two consecutive daily check samples shall be collected and examined from the same sampling point. Additional check samples shall be collected daily or at a frequency established by the department until the results obtained from at least two consecutive check samples show less than one coliform bacteria colony per one hundred milliliters.

When coliform bacteria, as determined by the fermentation tube method, occur in three or more ten milliliter portions of a single sample, at least two consecutive daily check samples shall be collected and examined from the same sampling point. Additional check samples shall be collected daily or at a frequency established by the department until the results obtained from at least two consecutive check samples show no positive tubes.

The location at which the check samples were taken shall not be eliminated from future sampling without approval of the department. The results from all coliform bacterial analyses performed except those obtained from check samples and special purpose samples shall be used to determine compliance with the maximum contaminant level for coliform bacteria. Check samples shall not be included in calculating the total number of samples taken each month to determine compliance.

When the presence of coliform bacteria in water taken from a particular sampling point has been confirmed by any check samples, the supplier of water shall report to the department within forty-eight hours.

When a maximum contaminant level is exceeded, the supplier of water shall report to the department and notify the public.

Special purpose samples, such as those taken to determine whether disinfection practices following pipe placement, replacement, or repair have been sufficient, shall not be used to determine compliance.

~~4. Substitution of chlorine residuals. A supplier of water of a public water system may, with the approval of the department and based upon a sanitary survey, substitute the use of chlorine residual monitoring for not more than seventy-five percent of the required microbiological samples, provided, that the supplier of water takes chlorine residual samples at points which are representative of the conditions within the distribution system. Four samples for chlorine analysis shall be substituted for each microbiological sample.~~

~~There shall be at least daily determinations of chlorine residual. The supplier of water shall maintain no less than two-tenths milligram per liter free chlorine at the extremities of the public water distribution system. When a particular sampling point has been shown to have a free chlorine residual less than two-tenths milligram per liter, the water at the location shall be retested as soon as practicable and in any event, within one hour.~~

~~If the original analysis is confirmed, this fact shall be reported to the department within forty-eight hours. Also, if the analysis is confirmed, a sample for coliform bacterial analysis must be collected from that sampling point as soon as practicable and preferably within one hour, and the results of such analysis reported to the department within forty-eight hours after the results are known to the supplier of water.~~

~~Compliance with the maximum contaminant levels for coliform bacteria shall be determined on the monthly mean or quarterly mean basis, including those samples taken as a result of failure to maintain the required chlorine residual level. The department may withdraw its approval of the use of chlorine residual substitution at any time.~~

~~If the department determines that some higher residual chlorine level is more appropriate, that level shall be the level required under these regulations.~~

~~The measurements for chlorine shall be made by a method approved by the department.~~

~~5. Sampling frequency for the replacement samples. When the coliform bacterial colonies in a single sample, as determined by the membrane filter procedure, cannot be determined, the department at its discretion may require one or more replacement samples to be collected from the same sampling point for analysis. The sample or samples which were replaced shall not be used to determine compliance.~~

1. Routine monitoring.

   a. General. Suppliers of water for public water systems shall collect routine samples for total coliform bacteria

analysis at sites which are representative of the water throughout the distribution system according to a written sample siting plan. The plan is subject to department review and revision.

The routine samples must be collected at regular time intervals throughout the month except that systems using ground water not under the direct influence of surface water, as determined by the department, serving four thousand nine hundred people or less may collect all of the required samples on a single day if the samples are collected from different sites.

At the discretion of the department, systems that use surface water or ground water under the direct influence of surface water that do not filter shall collect at least one sample for total coliform bacteria analysis each day that the turbidity level of the source water exceeds one nephlelometric turbidity unit. The sample must be collected near the first service connection within twenty-four hours of the first exceedance unless the department determines that the system, due to logistical or other problems beyond its control, cannot have the sample analyzed within thirty hours of collection. The sample results must be included in determining compliance with the maximum contaminant levels for total coliform bacteria.

b. Community water systems. Suppliers of water for community water systems shall sample for total coliform bacteria at a frequency established by the department. The number of samples required must be determined by the population served by the system and in no event may the frequency be less than that set forth below:

POPULATION SERVED	MINIMUM NUMBER OF SAMPLES PER MONTH
25 to 1,000	1
1,001 to 2,500	2
2,501 to 3,300	3
3,301 to 4,100	4
4,101 to 4,900	5
4,901 to 5,800	6
5,801 to 6,700	7
6,701 to 7,600	8
7,601 to 8,500	9
8,501 to 12,900	10
12,901 to 17,200	15
17,201 to 21,500	20
21,501 to 25,000	25
25,001 to 33,000	30
33,001 to 41,000	40

41,001 to 50,000	50
50,001 to 59,000	60
59,001 to 70,000	70
70,001 to 83,000	80
83,001 to 96,000	90
96,001 to 130,000	100

Community water systems using a ground water source serving twenty-five to one thousand persons may, with written permission from the department, reduce this sampling frequency to one sample per quarter provided that:

(1) The system has no history of total coliform contamination in its current configuration; and

(2) A sanitary survey conducted by the department in the past five years shows that the system is supplied solely by a protected ground water source that is free of sanitary defects.

c. Noncommunity water systems. Suppliers of water for noncommunity water systems using only ground water, and not ground water under the direct influence of surface water, serving one thousand people or less shall sample for total coliform bacteria in each calendar quarter that the system provides water to the public. The department may, in writing, reduce this routine monitoring frequency to no less than once per year based on sanitary survey results, accumulated analytical data, or the existence of additional safeguards such as a protective and enforced well code, disinfection, or an approved wellhead protection program. The frequency must be confirmed or changed based on subsequent sanitary surveys or data. The frequency may not be reduced until:

(1) A sanitary survey conducted by the department shows that the system is free of sanitary defects; and

(2) The system has performed at least one total coliform bacteria analysis of its drinking water and is in compliance with the microbiological maximum contaminant levels.

Suppliers of water for noncommunity water systems using only ground water, and not ground water under the direct influence of surface water, serving more than one thousand people during any month, shall sample for total coliform bacteria at the same frequency as like-sized community water systems. With written permission from the department, noncommunity water systems may reduce this monitoring frequency for any quarter that one thousand people or less are served. The reduced frequency must be

one total coliform bacteria sample in each calendar quarter that water is provided to the public.

Suppliers of water for noncommunity water systems using ground water under the direct influence of surface water shall sample for total coliform bacteria at the same frequency as like-sized community water systems. Monitoring must begin within six months after the department determines that the ground water is under the direct influence of surface water.

Suppliers of water for noncommunity water systems using surface water, in total or in part, shall sample for total coliform bacteria at the same frequency as like-sized community water systems regardless of the number of people served.

2. Repeat monitoring.

a. General. Suppliers of water for public water systems shall collect a set of repeat samples for total coliform bacteria analysis for each total coliform-positive routine sample.

Systems which collect more than one routine sample per month shall collect at least three repeat samples for each routine sample that is total coliform-positive. Systems which collect one routine sample per month or less shall collect at least four repeat samples for each routine sample that is total coliform-positive.

Systems may, with the approval of the department, count routine samples as repeat samples rather than routine samples provided that:

(1) The routine samples are collected within five service connections of the initial total coliform-positive sample; and

(2) The routine samples are collected before the system learns that the initial sample was total coliform-positive.

b. Repeat monitoring time period. The required set of repeat samples must be collected within twenty-four hours of notification by the department of the total coliform-positive result. The department may specify a longer time limit if it determines that the system cannot collect the repeat samples within twenty-four hours due to logistical or other problems beyond its control.

The repeat samples must be collected on the same day except that the department may allow systems with a single service connection to:

(1) Collect the required set of repeat samples over a four-day period; or

(2) Collect a larger volume repeat sample in one or more sample containers of any size as long as the total volume collected is at least four hundred milliliters for systems that collect one or less routine sample per month and three hundred milliliters for systems that collect more than one routine sample per month.

c. Repeat monitoring location. The repeat samples must be collected at the following locations:

(1) At least one repeat sample must be collected from the original sampling tap that was total coliform-positive.

(2) At least one repeat sample must be collected from a tap within five service connections upstream of the original total coliform-positive sampling tap.

(3) At least one repeat sample must be collected from a tap within five service connections downstream of the original total coliform-positive sampling tap.

(4) Systems required to collect four repeat samples shall collect the fourth repeat sample within five service connections upstream or downstream of the original total coliform-positive sampling tap.

The department may waive the requirement to collect at least one repeat sample upstream and downstream of the original total coliform-positive sampling site and specify alternate sampling locations if the original sampling site is at or one away from the end of the distribution system.

d. Additional sets of repeat samples. If one or more samples in the set of required repeat samples is total coliform-positive, an additional set of repeat samples must be collected meeting the same time and location requirements as for the original set of repeat samples.

Additional sets of repeat samples must be collected until no total coliform bacteria are detected in one complete set or the department determines that the maximum contaminant level for total coliform bacteria has been exceeded. The supplier of water shall report to the department and notify the public when a maximum contaminant level is exceeded.

3. Next-month samples. Suppliers of water for public water systems that collect four or fewer routine samples per month that have one or more total coliform-positive routine or repeat samples shall collect at least five routine samples the next month that water is provided to the public. The department may waive this requirement only if one of the following conditions are met:

   a. The department or an agent approved by the department, but not an employee of the system, conducts an onsite visit before the end of the next month that the system serves water to the public and determines that additional monitoring or corrective action is not warranted.

   b. The department, in a written decision made available to the public, determines why total coliform-positive samples occurred and establishes that the system has corrected or will correct the problem before the end of the next month that water is served to the public.

   c. The department invalidates the original total coliform-positive routine sample.

   Routine total coliform bacteria samples normally collected the next month that water is provided to the public may be counted towards the set of five routine samples required the next month.

4. Fecal coliform or E.coli analysis. Suppliers of water for public water systems shall analyze each total coliform-positive routine or repeat sample for either fecal coliform bacteria or E.coli.

   Systems shall notify the department by the end of the business day, or by the end of the next business day if the department offices are closed, once notified of a positive fecal coliform bacteria or E.coli result.

5. Invalidation of total coliform samples.

   a. Invalidation by the department. The department may invalidate a total coliform-positive sample only if one of the following conditions are met:

      (1) The laboratory establishes that the total coliform-positive result was caused by improper sample analysis.

      (2) The department determines, based upon the results of the required repeat samples, that the total coliform-positive sample resulted from a domestic or other nondistribution system problem. This provision

applies only to systems that have more than one service connection if:

(a) All repeat samples collected at the same tap as the original total coliform-positive sample are also total coliform-positive; and

(b) All repeat samples collected within five service connections of the original total coliform-positive sample tap are total coliform-negative.

(3) The department, in a written decision made available to the public, determines that substantial grounds exist to indicate that the coliform-positive result was due to a circumstance or condition not reflective of the water quality in the distribution system. Invalidation must be based on the absence of total coliform-positive repeat samples and other factors as determined by the department. Invalidation may not be based solely on the grounds that all required repeat samples are total coliform-negative.

Total coliform-positive samples invalidated by the department may not count towards meeting the minimum monitoring requirements. Department invalidation of a total coliform-positive sample nullifies subsequent fecal coliform or E.coli results for the same sample.

b. Invalidation by the laboratory. All total coliform bacteria samples examined by the department or by any other laboratory certified by the department must be invalidated, unless total coliform bacteria are detected, if:

(1) The sample produces a turbid culture in the absence of gas production using an analytical technique where gas formation is examined;

(2) The sample produces a turbid culture in the absence of an acid reaction in the presence-absence coliform test; or

(3) The sample exhibits confluent growth or produces colonies too numerous to count with an analytical technique using a membrane filter.

Suppliers of water for public water systems shall collect a replacement sample for total coliform bacteria analysis from the same location as the original sample if the original sample is invalidated by the department or any other laboratory certified by the department. Replacement samples must be collected within twenty-four hours of

notification by the department and submitted for analysis until a valid result is obtained. The department may waive the twenty-four-hour time limit on a case-by-case basis.

6. Sanitary surveys.

a. Coverage and effective dates. Community and noncommunity water systems that collect four or less routine total coliform bacteria samples per month shall undergo an initial sanitary survey by June 29, 1994, and June 29, 1999, respectively.

b. Repeat frequency. Community and noncommunity water systems shall undergo an additional sanitary survey every five years following the initial sanitary survey, except that noncommunity water systems using only protected and disinfected ground water, as determined by the department, shall undergo subsequent sanitary surveys at least every ten years following the initial sanitary survey.

c. Responsibilities. Sanitary surveys must be performed by the department or an agent approved by the department. Information collected on sources of contamination within a delineated wellhead protection area during the development and implementation of an approved wellhead protection program, if available, must be considered when conducting sanitary surveys.

The department shall review the sanitary survey results to determine if increased monitoring for total coliform bacteria or other measures are needed to protect or improve drinking water quality.

Community and noncommunity water systems are responsible for ensuring that the required sanitary surveys are conducted.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03

33-17-01-13. Reporting and public notification.

1. Reporting requirements. Except where a shorter reporting period is specified, the system shall report to the department the result of any test, measurement, or analysis required within the first ten days following the month in which the results are received or the first ten days following the end of the required monitoring period as stipulated by the department, whichever of these is shorter.

The system shall notify the department within forty-eight hours of the failure to comply with any primary drinking water regulations including failure to comply with monitoring requirements, except that failure to comply with the maximum contaminant levels for total coliform bacteria must be reported to the department no later than the end of the next business day after the system learns of the violation.

The system is not required to report analytical results to the department in cases where the department performed the analysis.

The system shall, within ten days of completion of each public notification required, submit to the department a representative copy of each type of notice distributed, published, posted, or made available to the persons served by the system or to the media.

The system shall submit to the department, within the time stated in the request, copies of any records required to be maintained by the department or copies of any documents then in existence which the department is entitled to inspect under the provisions of state law.

2. Public notification.

a. Maximum contaminant level ~~(MCL)~~, treatment technique, and variance and exemption schedule violations. A public water system which fails to comply with an applicable maximum contaminant level or an established treatment technique or which fails to comply with the requirements of any schedule prescribed pursuant to a variance or exemption shall notify persons served by the system as follows:

(1) By publication in a daily newspaper of general circulation in the area served by the system as soon as possible, but in no case later than fourteen days after notification of the violation or failure. If the area served by the system is not served by a daily newspaper of general circulation, notice must instead be given by publication in a weekly newspaper of general circulation serving the area;

(2) By mail delivery, or by hand delivery, not later than forty-five days after the violation or failure. The department may waive mail or hand delivery if it determines that the system has corrected the violation or failure within the forty-five-day period; and

(3) For violations of the maximum contaminant levels of contaminants that may pose an acute risk to human

health, by furnishing a copy of the notice to the radio and television stations serving the area served by the system as soon as possible, but in no case later than seventy-two hours after receiving notification of the violation or failure.

A public water system must give notice at least once every three months by mail delivery or by hand delivery for as long as the violation or failure exists.

A community water system in an area that is not served by a daily or weekly newspaper of general circulation or a noncommunity water system must give notice within fourteen days after notification of the violation or failure by hand delivery or by continuous posting in conspicuous places within the area served by the system. Posting must continue for as long as the violation or failure exists.

b. Other violations, variances, and exemptions. A public water system which fails to perform required monitoring, fails to complete required sanitary surveys, fails to comply with an established testing procedure, is granted a variance, or is granted an exemption~~,~~ shall notify persons served by the system as follows:

(1) By publication in a daily newspaper of general circulation in the area served by the system within three months after notification of the violation or grant. If the area served by the system is not served by a daily newspaper of general circulation, notice shall instead be given by publication in a weekly newspaper of general circulation serving the area.

(2) A public water system must give notice at least once every three months by mail delivery or by hand delivery for as long as the violation exists or the variance or exemption is in existence.

(3) A community water system in an area that is not served by a daily or weekly newspaper of general circulation or a noncommunity water system must give notice within three months after notification of the violation or grant by hand delivery or by continuous posting in conspicuous places within the area served by the system. Posting must continue for as long as the violation exists or the variance or exemption remains in effect.

c. Notice to new billing units. A community water system must give a copy of the most recent public notice for any

outstanding violation of any maximum contaminant level, or any treatment technique requirement, or any variance or exemption schedule to all new billing units or new hookups prior to or at the time service begins.

d. General notice content. Each notice must provide a clear and readily understandable explanation of the violation, any potential adverse health effects, the population at risk, the steps that the public water system is taking to correct such violation, the necessity for seeking alternative water supplies, if any, and any preventive measures the consumer should take until the violation is corrected. Each notice must be conspicuous and may not contain unduly technical language, unduly small print, or similar problems that frustrate the purpose of the notice. Each notice must include the telephone number of a designee of the public water system as a source of additional information concerning the notice.

e. Mandatory health effects language. When providing the information on potential adverse health effects required in notices of violations of maximum contaminant levels or treatment technique requirements, or notices of the granting or the continued existence of variances or exemptions, or notices of failure to comply with a variance or exemption schedule, the public water system shall include specific contaminant language available from the department for the following contaminants:

(1) Trichloroethylene.

(2) Carbon tetrachloride.

(3) 1,2-Dichloroethane.

(4) Vinyl chloride.

(5) Benzene.

(6) 1,1-Dichloroethylene.

(7) para-Dichlorobenzene.

(8) 1,1,1-Trichloroethane.

(9) Fluoride.

(10) Total coliform bacteria.

(11) Fecal coliform bacteria or E.coli.

f. Notification by the department. Notice to the public required by this section may be given by the department on behalf of the system.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03, 61-28.1-05

33-17-01-14. Record maintenance. Any public water system shall retain on its premises or at a convenient location near its premises, the following records:

1. Bacteriological and chemical analyses. Records of bacteriological analyses shall be kept for not less than five years. Records of chemical analyses shall be kept for not less than ten years. Actual laboratory reports may be kept, or data may be transferred to tabular summaries, provided that the following information is included:

   a. The date, place, and time of sampling and the name of the person who collected the sample;

   b. Identification of the sample as to whether it was a routine distribution system sample, check sample, raw or other special purpose sample;

   c. Date of analysis;

   d. Laboratory and person responsible for performing analysis;

   e. The analytical technique~~,~~ or method used; and

   f. The result of the analysis.

2. Corrective actions taken. Records of action taken by the system to correct violations shall be kept for a period of not less than three years after the last action taken with respect to the particular violation involved.

3. Reports and communications. Copies of any written reports, summaries, or communications relating to sanitary surveys of the system conducted by the system itself, by a private consultant, or by any local, state, or federal agency, shall be kept for a period not less than ten years after completion of the sanitary survey involved.

4. Variances and exemptions. Records concerning a variance or exemption granted to the system shall be kept for a period ending not less than five years following the expiration of such variance or exemption.

History: Amended effective July 1, 1988; December 1, 1990.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03, 61-28.1-05

33-17-01-15. Variance and exemption.

1. Variance. The department may authorize a variance ~~from any maximum contaminant level to a public water system when~~ to a public water system from any maximum contaminant level except the microbiological maximum contaminant levels when:

   a. The raw water sources which are available to a system cannot meet the maximum contaminant level despite application of the best technology, treatment techniques, or other means which the department finds are generally and reasonably available, taking cost into consideration. The department hereby identifies the following as the best technology, treatment techniques, or other means generally available for achieving compliance with the maximum contaminant level for volatile synthetic organic chemicals: central treatment using packed tower aeration; central treatment using granular activated carbon for all these chemicals except vinyl chloride;

   b. The concentration of the contaminant will not result in unreasonable risk to health; and

   c. Within one year of the date of variance authorization, a schedule for compliance is issued and under which the system agrees to implement such schedule.

2. Exemption. The department may not exempt a public water system from the microbiological maximum contaminant level requirements. The department may exempt a public water system from any other maximum contaminant level or treatment technique requirement, or from both, upon finding that:

   a. Due to compelling factors, including economic, the system is unable to comply with such maximum contaminant level or treatment technique;

   b. The system was in operation on the effective date of such maximum contaminant level or treatment technique regulation;

   c. The granting of the exemption will not result in an unreasonable risk to health; and

   d. Within one year of the date of exemption authorization, a schedule for compliance is issued and the system agrees to implement such schedule.

3. Procedure.

   a. Action to consider a variance or exemption may be initiated by the department or by the system through a written request submitted to the department.

   b. Prior to authorization of a variance or a compliance schedule for a variance, the department shall provide notice and opportunity for a public hearing on that proposed variance or compliance schedule for a variance.

   c. Prior to authorization of a compliance schedule for an exemption, the department shall provide notice and opportunity for a public hearing on the proposed compliance schedule for an exemption.

History: Amended effective December 1, 1982; July 1, 1988; December 1, 1990.
General Authority: NDCC 61-28.1-03
Law Implemented: NDCC 61-28.1-03, 61-28.1-05

JANUARY 1991

33-06-01-01. Reportable diseases. All reportable diseases shall be confidential and not open to inspection. The following diseases are hereby declared to be reportable in this state.

1. Acquired immune deficiency syndrome (A.I.D.S.).
2. Amebiasis.
3. Anthrax.
4. Blastomycosis.
5. Botulism.
6. Brucellosis.
7. Campylobacter enteritis.
8. Chancroid.
9. Chickenpox (varicella).
10. Chlamydial infections.
11. Cholera.
12. Diphtheria.
13. E. coli 0157:H7 infection.
14. Encephalitis (specify etiology).
~~14.~~ 15. Foodborne or waterborne outbreaks.

~~15.~~ 16. Giardiasis.

~~16.~~ 17. Gonorrhea.

~~17.~~ 18. Granuloma inguinale.

~~18.~~ 19. Haemophilus influenzae b.

20. Hemolytic uremic syndrome.

~~19.~~ 21. Hepatitis (specify type).

~~20.~~ 22. Herpes simplex (genital).

~~21.~~ 23. Histoplasmosis.

~~22.~~ 24. Human immunodeficiency virus infection.

~~23.~~ 25. Influenza.

~~24.~~ 26. Legionellosis.

~~25.~~ 27. Leprosy.

~~26.~~ 28. Leptospirosis.

~~27.~~ 29. Lyme disease.

~~28.~~ 30. Lymphogranuloma venereum.

~~29.~~ 31. Malaria.

~~30.~~ 32. Measles (rubeola).

~~31.~~ 33. Meningitis (specify etiology).

~~32.~~ 34. Mumps.

~~33.~~ 35. Nosocomial infections.

~~34.~~ 36. Ornithosis (Psittacosis).

~~35.~~ 37. Pertussis.

~~36.~~ 38. Plague.

~~37.~~ 39. Poliomyelitis.

~~38.~~ 40. Rabies.

~~39.~~ 41. Reye's syndrome.

~~40.~~ 42. Rocky Mountain spotted fever.

~~41.~~ 43. Rubella.

~~42.~~ 44. Salmonellosis.

~~43.~~ 45. Scabies (in institutions).

~~44.~~ 46. Shigellosis.

~~45.~~ 47. Syphilis.

~~46.~~ 48. Tetanus.

~~47.~~ 49. Toxic-shock syndrome.

~~48.~~ 50. Trichinosis.

~~49.~~ 51. Tuberculosis.

~~50.~~ 52. Tularemia.

~~51.~~ 53. Typhoid fever.

History: Amended effective May 1, 1984; December 1, 1986; January 1, 1988; January 1, 1989; October 1, 1990; January 1, 1991.
General Authority: NDCC 23-07-01
Law Implemented: NDCC 23-07-01

STAFF COMMENT: Chapters 33-06-05.1, 33-06-05.2, 33-06-05.3, 33-06-05.4, 33-06-05.5, and 33-06-05.6 contain all new material but are not underscored so as to improve readability.

CHAPTER 33-06-05.1
GENERAL PROVISIONS

33-06-05.1-01. Purpose. Chapters 33-06-05.1 through 33-06-05.6 establish guidelines for adoption of policies and procedures for the governing body of an institution to follow in the event the institution obtains knowledge that an employee, independent contractor, or student contracts a significant contagious disease. The rules should be interpreted to assure consideration of the rights of all involved under 29 United States Code section 794, section 504 Rehabilitation Act of 1973 and North Dakota Century Code chapter 14-02.4. It is recognized that each institution may have individual situations to address; therefore, each institution may adopt policies to fit their individual requirements which are not inconsistent with chapters 33-06-05.1 through

33-06-05.6. In adopting policies to implement chapters 33-06-05.1 through 33-06-05.6, an institution may be guided by "Recommended Policies for School Boards and Boards of Health Regarding School-age Children and School Employees" if the policies contained therein are not inconsistent with chapters 33-06-05.1 through 33-06-05.6.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

33-06-05.1-02. Definitions. When used in chapters 33-06-05.1 through 33-06-05.6, unless the context or subject matter otherwise requires:

1. "Affected person", "affected individual", or "affected student" means an individual who has been diagnosed by a physician as having contracted a significant contagious disease.

2. "Decisionmaker" is the affected person's personal physician. However, whenever an affected student is also disabled as defined under the Education For All Handicapped Children Act, 20 U.S.C. 1401(a)(1) or North Dakota Century Code chapter 15-59, the decisionmaker is the multidisciplinary team provided for under subsection 4 of North Dakota Century Code section 15-34.1-03.

3. "Employee" means all persons employed by the institution including faculty, maintenance, and administrative personnel.

4. "Governing body" means a board of directors, a school board, or other entity vested with authority to make binding decisions on behalf of an institution.

5. "Independent contractor" means any person or entity who is free of control or direction over performance of the service provided both under the contract and in fact, who renders service outside the ordinary course of business or outside of the place of business of the contractor and who is engaged in an independently established trade, organization, profession, or business.

6. "Individualized education program" denotes a specialized education plan created in compliance with 20 U.S.C. 1401(a)(19).

7. "Institution" includes all public kindergartens, elementary, junior high, and high schools operating within all school districts in North Dakota.

8. "Reasonable accommodations" is as defined by subsection 16 of North Dakota Century Code section 14-02.4-02 or U.S.C. 794.

9. "Significant contagious disease" includes cytomegalovirus (CMV), hepatitis B (HBV) and human immunodeficiency (HIV) infection. The local board of health or the state health officer may determine that other diseases are significant contagious diseases.

10. "Special provisions" are individually tailored education decisions designed to meet the needs of students requiring unique accommodations to ensure an educational opportunity. Special provisions are directed to students not covered by an individualized education program.

11. "Universal precautions" means protecting one's self from exposure to blood or body fluids, through the use of latex gloves, masks, or eye goggles, cleaning blood and body fluid spills with soap and water and then disinfecting and incineration or decontaminating infective waste before disposing in a sanitary landfill.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 14-02.4, 23-01-03, 23-07-16, 23-07-16.1

33-06-05.1-03. Adoption of policy by governing body. In accordance with the guidelines set out in chapters 33-06-05.1 through 33-06-05.6, the governing body of each institution shall adopt policies:

1. For education of student, employees, and independent contractors concerning significant contagious disease;

2. To protect the identity of affected individuals;

3. To protect the health of students, employees, independent contractors, and the public;

4. To provide to the public only that information which is essential for protection of public health;

5. To provide for attendance, employment, or contracts regarding affected individuals and to establish procedures for the development of special provisions and reasonable accommodations;

6. To protect affected individuals from harassment and discrimination within the institutional setting; and

7. To receive information concerning the status of students, employees, and independent contractors from their physicians.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

CHAPTER 33-06-05.2
STUDENTS WITH SIGNIFICANT CONTAGIOUS DISEASES

33-06-05.2-01. Student attendance. No student may be prohibited from attending the institution solely because they have, or they are perceived to have, a significant contagious disease. If the student is well enough to attend the institution, and does not constitute a public health threat, as determined by the decisionmaker, the student must be permitted to attend the institution. If the student is unable to attend regular class instruction or requires special consideration, then special provisions or individualized education programs must be provided for the student.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 15-34.1-03, 23-01-03, 23-07-16, 23-07-16.1

33-06-05.2-02. Confidentiality. Unless disclosed by the affected person, their parent or guardian, or their personal physician, no individual may be informed of an affected individual's infection. In order to eliminate discrimination, the local governing body should develop policies concerning the comprehensive application of universal precautions throughout the institution.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

33-06-05.2-03. Individual student needs. If an affected student is unable to participate in regular classroom instruction, either reasonable accommodations, special provisions, or an individualized education program will be provided.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 15-47-38, 15-47-38.1, 23-01-03, 23-07-16, 23-07-16.1

CHAPTER 33-06-05.3
EMPLOYEES WITH SIGNIFICANT CONTAGIOUS DISEASES

33-06-05.3-01. Standards for employment. No employee or potential employee may be terminated or prevented from becoming employed at the institution solely because they have or they are perceived to have a significant contagious disease. If the employee is well enough to perform their job and does not constitute a public health threat to others, as determined by a personal physician, the employee must be permitted to perform the duties.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 14-02.4, 23-01-03, 23-07-16, 23-07-16.1

33-06-05.3-02. Confidentiality. Unless disclosed by the affected person, or their personal physician, no disclosure of an affected individual's condition may be made. In order to eliminate discrimination, the local governing body should develop policies concerning the comprehensive application of universal precautions throughout the institution.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

33-06-05.3-03. Reasonable accommodations. The institution shall consider and implement reasonable accommodations to allow the affected individual to become an employee or continue as an employee.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 14-02.4; 29 USC 794

CHAPTER 33-06-05.4
TREATMENT OF INDEPENDENT CONTRACTORS WITH SIGNIFICANT CONTAGIOUS DISEASES

33-06-05.4-03 Reasonable Accommodations

33-06-05.4-01. Standards of contracting for independent contractors. No independent contractor may be terminated or prohibited from contracting with the institution solely because they have or they are perceived to have a significant contagious disease. If the independent contractor is capable of performing the work, or reasonable accommodations can be made to allow the independent contractor to perform the work, and the independent contractor does not constitute a public health threat to others, as determined by a personal physician, the independent contractor must be permitted to contract with the institution.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

33-06-05.4-02. Confidentiality. Unless disclosed by the affected person, or their personal physician, no individual may be informed of an affected individual's infection. In order to eliminate discrimination, the local governing body should develop policies concerning the comprehensive application of universal precautions throughout the institution.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

33-06-05.4-03. Reasonable accommodations. The institution shall consider and implement reasonable accommodations to allow the affected individual to contract as an independent contractor or to continue an existing contract as an independent contractor.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

CHAPTER 33-06-05.5
RELATIONS WITH THE PUBLIC

33-06-05.5-01. Dissemination of information. Except as required by law, information concerning the identity and status of an affected

individual may not be released to the public. No release may be made of any information either confirming or denying the presence within the institution setting of a person who has contracted a significant contagious disease.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

33-06-05.5-02. Procedure for addressing public knowledge of affected individuals at an institution. The institution shall develop a procedure for addressing situations when information concerning an affected individual becomes public. The procedure adopted under this section must include the identification of a single spokesperson for the institution, a means of protecting against possible breeches of confidentiality, and a plan for conflict resolution which may include a request for assistance from an appropriate consultant.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

CHAPTER 33-06-05.6
EDUCATION

Section
33-06-05.6-01 Education Concerning Significant Contagious Diseases Required

33-06-05.6-01. Education concerning significant contagious diseases required. Each institution shall adopt and implement a policy requiring the education of all students, employees, and independent contractors. The policy adopted must include information concerning the means of transmission of significant contagious diseases in an institutional setting, the means of protecting against contracting the disease in an institutional setting, and the use of universal precautions.

History: Effective January 1, 1991.
General Authority: NDCC 23-07-16.1
Law Implemented: NDCC 23-01-03, 23-07-16, 23-07-16.1

33-07-03.1-23. Minimum data set. Nursing facilities shall complete and maintain an up-to-date comprehensive assessment for each resident by utilizing the resident assessment instrument, the utilization guidelines, the minimum data set of core elements and common definitions, and the resident assessment protocol summary with triggers

as specified by the health care financing administration and published in the state operations manual.

History: Effective September 28, 1990.
General Authority: NDCC 28-32-02(1)
Law Implemented: NDCC 23-01-03

33-07-03.1-24. Complaint appeals process for nurse aides on the state registry.

1. Nurse aides against whom allegations of abuse, neglect, or theft of resident funds or property are made must be:

   a. Informed by the department of the allegations;

   b. Informed of the investigation results; and

   c. Provided the opportunity to request a hearing to rebut the charges.

2. If a hearing is requested, the department will apply to the North Dakota attorney general's office for appointment of a hearing officer. The department will notify the complainant and the accused of the date set for the hearing. If no hearing is requested, the department will submit information specific to validated allegations to the registry.

3. The hearing officer will conduct the hearing and prepare recommended findings of fact and conclusions of law, as well as a recommended order. If, through the department's investigation process, there is evidence abuse, neglect, or theft of resident funds or property has occurred, the department shall notify appropriate law enforcement officials.

4. Allegations validated by the department or through the hearing process of abuse, neglect, or theft of resident funds or property by a nurse aide, must:

   a. Be identified in the nurse aide registry within thirty days of the finding; and

   b. Remain in the registry for a minimum of five years.

5. The department shall provide the nurse aid against whom an allegation has been validated, with a copy of all information which will be maintained in the registry within thirty days following the addition of the information to the registry.

6. Within thirty days of mailing the notification of a finding adverse to a nurse aide, the nurse aide may contact the department and correct any misstatements or inaccuracies in

the information being maintained by the registry on that individual.

7. Any medicare or medicaid participating nursing facility, home health agency, hospital, ombudsman, or any other representative of an official agency with a need to know may receive information contained in the registry by making a written request.

History: Effective January 1, 1991.
General Authority: NDCC 28-32-02(1)
Law Implemented: NDCC 23-01-03

FEBRUARY 1991

33-16-02-01. Antidegradation policy. The state of North Dakota, in accordance with the 1972 Federal Water Pollution Control Act, as amended, declares that state and public policy is to maintain or improve, or both, the quality and purity of the waters of this state. These standards are established for the protection of public health and enjoyment of these waters, to ensure the propagation and well-being of fish, wildlife, and all biota associated or dependent upon said waters, and to safeguard social, economical, and industrial development associated with this resource. The waters of the state include all surface and ground waters of the state as defined in North Dakota Century Code section 61-28-01 and those rivers, streams, and lakes forming boundaries between this state and other states or Canada. All known and reasonable methods to control and prevent pollution of the waters of this state are required, including improvement in water quality, when feasible.

The portion of the statement of policy contained in North Dakota Century Code section 61-28-01 which reads as follows, is a part of this chapter:

> It is hereby declared to be the policy of the state of North Dakota to act in the public interest to protect, maintain, and improve the quality of the waters in the state for continued use as public and private water supplies, propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial, recreational, and other legitimate beneficial uses, to require necessary and reasonable treatment of sewage, industrial, or other wastes.

It is the purpose of this chapter to maintain and improve the quality of waters in the state and to maintain and protect existing water uses. The "quality of the waters" shall be the quality of record existing at the time the first standards were established in 1967, or later records if these indicate an improved quality in certain waters.

Waters whose existing quality is higher than the established standards will be maintained at the higher quality unless it can be affirmatively demonstrated, after full satisfaction of the intergovernmental coordination and public participation provisions of the continuing planning process, that a change in quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing the lowering of water quality, the department shall assure existing uses are fully protected and that the highest statutory and regulatory requirements for all point sources and all cost effective and reasonable best management practices for nonpoint sources are achieved.

Waters of unique or high quality characteristics that may constitute an outstanding national resource must be maintained and protected.

Any industrial, public, or private project or development other than municipal which constitutes a source of pollution shall provide the best degree of treatment as designated by the department in the North Dakota pollutant discharge elimination system. Municipal wastes are required to meet the effluent requirements as noted in subsection 3 of section 33-16-02-04. If review of data and public input indicates any detrimental water quality changes, appropriate actions will be taken by this department following procedures approved by the environmental protection agency. The environmental protection agency will be kept advised and provided with the information needed to perform its responsibilities under the Federal Water Pollution Control Act, as amended.

History: Amended effective March 1, 1985; May 1, 1989; February 1, 1991.
General Authority: NDCC 61-28-04, 61-28-05
Law Implemented: NDCC 61-28-04

33-16-02-06. Specific standards of quality for designated classes of surface waters of the state. The following standards are prescribed as specific water quality for designated classes of surface waters to protect beneficial water uses as set forth in the following water use descriptions and classifications.

It is recognized that during certain periods of the year, some waters may contain certain natural chemical, physical, and biological characteristics or properties equaling or exceeding the limits set forth in these standards. The department may use the natural background level as the standard for any particular parameters and as a base for controlling the addition of wastes from controllable sources. When the flow in the stream is less than the ten-year, seven-day low flow level, the department reserves the right to make a case-by-case evaluation of application of these standards. However, no substances shall be present in concentrations or combinations that materially interfere with, or that prove hazardous to, the intended water usage.

The magnitude of any specific parameter violation or the intrinsic nature and potential damage caused by any specific parameter violation will be considered by the department in evaluating whether a single parameter violation shall result in administrative action.

1. Class I streams. The quality of waters in this class shall be such as to permit the propagation or life, or both, of resident fish species and other aquatic biota and shall be suitable for boating, swimming, and other water recreation. The quality shall be such that after treatment consisting of coagulation, settling, filtration, and chlorination, or equivalent treatment processes, the treated water shall meet the bacteriological, physical, and chemical requirements of the department for municipal use. The quality of water shall be such as to permit its use for irrigation, stock watering, and wildlife use without injurious effects.

   The following substances, unless stated otherwise, are maximum limits not to be exceeded. The requirements of this class of water shall be as follows:

Storet Code	Substance or Characteristic	Maximum Limit
~~39330~~	~~Aldrin (Total)~~	~~Acute 3.0 ug/l~~
00612	Ammonia (un-ionized) as (N) (Diss.) **	The NH_3-N in mg/l concentration resulting from intermittent waste discharges cannot exceed the numerical value given by .427/FT/FPH/2 where:

$$FT = \begin{cases} 10^{0.03(20-TCAP)}; & TCAP \leq T \leq 30 \\ 10^{0.03(20-T)}; & 0 \leq T \leq TCAP \end{cases}$$

$$FPH = \begin{cases} 1; & 8 \leq pH \leq 9 \\ \dfrac{1 + 10^{7.4-pH}}{1.25}; & 6.5 \leq pH \leq 8 \end{cases}$$

TCAP = 20 C; salmonids or other sensitive cold water species present

= 25 C; salmonids and other sensitive cold water species absent

The NH_3-N in mg/l concentration from a continuous waste discharge cannot exceed the numerical value given by .658/FT/FPH/Ratio where:

		Ratio = 16 ; $7.7 \leq pH \leq 9$
		$= 24 \cdot \frac{10^{7.7-pH}}{1+10^{7.4-pH}}$; $6.5 \leq pH \leq 7.7$
		TCAP = 15 C; salmonids or other sensitive cold water species present
		= 20 C; salmonids and other sensitive cold water species absent
~~01002~~	~~Arsenic (Total)~~	~~.05 mg/l~~
01007	Barium (Total)	1.0 mg/l
01022	Boron (Total)	.75 mg/l
~~01027~~	~~Cadmium (Total)~~ **	~~The one-hour average concentration in ug/l cannot exceed the numerical value given by $e^{(1.128[\ln(\text{hardness as mg/l})]-3.828)}$ more than once every 3 years on the average.~~ ~~The four-day average concentration in ug/l cannot exceed the numerical value given by $e^{(.7852[\ln(\text{hardness as mg/l})]-3.490)}$ more than once every 3 years on the average.~~
00940	Chlorides (Total)	100 mg/l
~~39350~~	~~Chlordane (Total)~~	~~Acute 2.4 ug/l~~ ~~Chronic .0043 ug/l~~
50060	Chlorine Residual (Total)	Acute .019 mg/l Chronic .011 mg/l
01034	Chromium (Total) **	.05 mg/l
~~01042~~	~~Copper (Total)~~ **	~~The one-hour average concentration in ug/l cannot exceed the numerical value given by $e^{(.9422[\ln(\text{hardness as mg/l})]-1.464)}$ more than once every 3 years on the average.~~ ~~The four-day average concentration in ug/l cannot exceed the numerical value given by $e^{(.8545[\ln(\text{hardness as mg/l})]-1.465)}$ more than once every 3 years on the average.~~

~~00720~~	~~Cyanides (Total)~~	~~.005 mg/l~~
00300	Dissolved Oxygen	not less than 5 mg/l
~~39380~~	~~Dieldrin (Total)~~	~~Acute 2.5 ug/l~~ ~~Chronic .002 ug/l~~
39388	Endosulfan (Total)	Acute .22 ug/l Chronic .06 ug/l
~~39390~~	~~Endrin (Total)~~	~~Acute .18 ug/l~~ ~~Chronic .0023 ug/l~~
31616	Fecal Coliform	200 fecal coliforms per 100 ml. This standard shall apply only during the recreation season May 1 to September 30.
~~39410~~	~~Heptachlor (Total)~~	~~Acute .52 ug/l~~ ~~Chronic .004 ug/l~~
~~01051~~	~~Lead (Total)~~ ~~**~~	~~The one hour average concentration in ug/l cannot exceed the numerical value given by e$^{(1.266[\ln(\text{hardness as mg/l})]-1.416)}$ more than once every 3 years on the average.~~ ~~The four-day average concentration in ug/l cannot exceed the numerical value given by e$^{(1.266[\ln(\text{hardness as mg/l})]-4.661)}$ more than once every 3 years on the average.~~
39782	Lindane (Hexachloro-cyclohexane)	Acute 2.0 ug/l Chronic .06 ug/l
~~71900~~	~~Mercury (Total)~~	~~Acute 2.4 ug/l~~ ~~Chronic .012 ug/l~~
00618	Nitrates (N) (Diss.) *	1.0 mg/l
~~39032~~	~~Pentachlorophenol~~ ~~***~~	~~Acute 20.0 ug/l~~ ~~Chronic 13.0 ug/l~~
00400	pH	7.0-9.0
32730	Phenols (Total)	.01 mg/l
00665	Phosphorus (P) (Total) *	0.1 mg/l
39516	Polychlorinated	Acute 2.0 ug/l

	Biphenyls (Total)	Chronic .014 ug/l
~~01147~~	~~Selenium (Total)~~	~~.01 mg/l~~
~~01077~~	~~Silver (Total) **~~	~~The one-hour average concentration in ug/l cannot exceed the numerical value given by e$^{(1.72[\ln(\text{hardness as mg/l})]-6.52)}$ more than once every 3 years on the average.~~
00932	Sodium	50 percent of total cations as mEq/l
00945	Sulfates (Total) as SO_4	250 mg/l
00010	Temperature	Eighty-five degrees Fahrenheit [29.44 degrees Celsius]. The maximum increase shall not be greater than five degrees Fahrenheit [2.78 degrees Celsius] above natural background conditions.
~~50060~~	~~Total Chlorine Residual~~	~~Acute .019 mg/l~~ ~~Chronic .011 mg/l~~
39400	Toxaphene (Total)	Acute .73 ug/l Chronic .0002 ug/l
~~01092~~	~~Zinc (Total) **~~	~~The one-hour average concentration in ug/l cannot exceed the numerical value given by e$^{(.8473[\ln(\text{hardness as mg/l})]+.8604)}$ more than once every 3 years on the average.~~ ~~The four-day average concentration in ug/l cannot exceed the numerical value given by e$^{(.8473[\ln(\text{hardness as mg/l})]+.7614)}$ more than once every 3 years on the average.~~
11503	Combined radium 226 and radium 228 (Total)	5 pCi/L
01519	Gross alpha particle activity including radium 226 but excluding radon and uranium	15 pCi/L

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* The standards for nitrates (N) and phosphorus (P) are intended as interim guideline limits. Since each stream or lake has unique characteristics which determine the

levels of these constituents that will cause excessive plant growth (eutrophication), the department reserves the right to review these standards after additional study and to set specific limitations on any waters of the state. However, in no case shall the standard for nitrates (N) exceed ten milligrams per liter for any waters used as a municipal or domestic drinking water supply.

** More restrictive criteria than specified may be necessary to protect fish and aquatic biota. These criteria will be developed according to the procedures in subdivision b of subsection 2 of section 33-16-02-07.

*** Limitation is a pH dependent calculated value using the formula $e^{[1.005(pH)-5.29]}$; pH = 7.8 was used for listed value as an example. For exact limitation, receiving water pH value must be used.

Water Quality Criteria[1]

Priority Pollutants (ug/l)

STORET #	Pollutant	Aquatic Life Value Classes I,IA,II,III Acute	Aquatic Life Value Classes I,IA,II,III Chronic	Human Health Value Classes I,IA,II[2]	Human Health Value Class III[3]
34200	Acenaphthene			20	
34210	Acrolein			320	780
34215	Acrylonitrile[4]			0.059	0.66
34030	Benzene[4]			1.2	71
39120	Benzidine[4]			0.00012	0.00054
32102	Carbon tetrachloride[4] (Tetrachloromethane)			0.25	4.4
34302	Chlorobenzene (Monochlorobenzene)			680	21000
34401	Hexachlorobenzene[4]			0.00072	0.00074
81680	1,2-Dichloroethane[4]			0.38	99
34507	1,1,1-Trichloroethane			200	170000
34397	Hexachloroethane[4]			1.9	8.9
34512	1,1,2-Trichloroethane[4]			0.61	42.0
81549	1,1,2,2-Tetrachloroethane[4]			0.17	11.0
	Bis(2-chloroethyl) ether[4]			0.031	1.40
81848	2,4,6-Trichlorophenol[4]			2.1	6.5
	p-Chloro-m-cresol (4-Chloro-3-methylphenol)			3000	
34316	Chloroform (HM)[4] (Trichloromethane)			5.7	470
77966	2-Chlorophenol			120	400
34537	1,2-Dichlorobenzene			2700	17000

34567	1,3-Dichlorobenzene	400	2600
34572	1,4-Dichlorobenzene	75	2600
34632	3,3'-Dichlorobenzidine[4]	0.039	0.077
34502	1,1-Dichloroethylene[4]	0.057	3.2
	1,2-trans-Dichloroethylene	700	140000
81847	2,4-Dichlorophenol	93	790
	1,3-Dichloropropylene (1,3-Dichloropropene) (cis and trans isomers)	10	1700
34607	2,4-Dimethylphenol	400	
81533	2,4-Dinitrotoluene[4]	0.11	9.1
34347	1,2-Diphenylhydrazine[4]	0.040	0.54
78113	Ethylbenzene	3100	29000
34376	Fluoranthene	42	54
	Bis(2-chloroisopropyl) ether	1400	170000
81575	Methylene chloride (HM)[4] (Dichloromethane)	4.7	1600
	Methyl chloride (HM)[5] (Chloromethane)	5.7	470
	Methyl bromide (HM) (Bromomethane)	48	4000
34288	Bromoform (HM)[5] (Tribromomethane)	5.7	470
	Dichlorobromomethane (HM)[5]	5.7	470
34306	Chlorodibromomethane (HM)[5]	5.7	470
39702	Hexachlorobutadiene[4]	0.44	50
70017	Hexachlorocyclopentadiene	240	17000

34409	Isophorone[4]			8.4	600
	Nitrobenzene			17	1900
34617	2,4-Dinitrophenol			70	14000
	4,6-Dinitro-o-cresol (4,6-Dinitro-2-methylphenol)			13.4	765
	N-Nitrosodimethylamine[4]			0.00069	8.1
	N-Nitrosodiphenylamine[4]			5.0	16
	N-Nitrosodi-n-propylamine[4]			0.005	8.5
	Pentachlorophenol	20[7]	13[7]	1000	29000
	Phenol			21000	4600000
	Bis(2-ethylhexyl)phthalate[4]			1.8	5.9
	Butyl benzyl phthalate			3000	5200
	Di-n-butyl phthlate			2700	12000
77750	Diethyl phthalate			23000	120000
	Dimethyl phthlate			313000	2900000
34527	Benzo(a)anthracene (PAH)[4] (1,2-Benzanthracene)			0.0028	0.0311
	Benzo(a)pyrene (PAH)[4] (3,4-Benzopyrene)			0.0028	0.0311
	Benzo(b)fluoranthene (PAH)[4] (3,4-Benzofluoranthene)			0.0028	0.0311
	Benzo(k)fluoranthene (PAH)[4] (11,12-Benzofluoranthene)			0.0028	0.0311
34320	Chrysene (PAH)[4]			0.0028	0.0311
34205	Acenaphthylene (PAH)[5]			0.0028	0.0311
34220	Anthracene (PAH)[5]			0.0028	0.0311
34521	Benzo(g,h,i)perylene (PAH)[5] (1,12-Benzoperylene)			0.0028	0.0311
34381	Fluorene (PAH)[5]			0.0028	0.0311
34461	Phenanthrene (PAH)[5]			0.0028	0.0311
34557	Dibenzo(a,h)anthracene (PAH)[4] (1,2,5,6-Dibenzanthracene)			0.0028	0.0311

34403	Indeno(1,2,3-cd)pyrene (PAH)[4]			0.0028	0.0311
34469	Pyrene (PAH)[5]			0.0028	0.0311
34475	Tetrachloroethylene[4]			0.8	8.85
78131	Toluene			6800	200000
39180	Trichloroethylene[4]			2.7	80.7
39175	Vinyl chloride[4] (Cloroethylene)			2	525
39330	Aldrin[4]	1.5		0.00013	0.00014
39380	Dieldrin[4]	1.25	0.0019	0.00014	0.00014
39350	Chlordane[4]	1.2	0.0043	0.00058	0.00059
39370	4,4'-DDT[4]	0.55	0.001	0.00059	0.00059
39365	4,4'-DDE[4]			0.00059	0.00059
39360	4,4'-DDD[4]			0.00083	0.00083
34361	alpha-Endosulfan	0.11	0.056	0.93	2.0
82624	beta-Endosulfan	0.11	0.056	0.93	2.0
82623	Endosulfan sulfate			0.93	2.0
38926	Endrin	0.09	0.0023	0.2	0.81
82622	Endrin aldehyde			0.2	0.81
	Heptachlor[4]	0.26	0.0038	0.00021	0.00021
	Heptachlor epoxide[4]	0.26	0.0038	0.0001	0.00011
39336	alpha-BHC[4] (Hexachlorocyclohexane-alpha)			0.0039	0.013
	beta-BHC[4] (Hexachlorocyclohexane-beta)			0.014	0.046
39344	gamma-BHC (Lindane)[4] (Hexachlorocyclohexane-gamma)	1.0	0.08	0.019	0.063

34198	delta-BHC[4] (Hexachlorocyclohexane-delta)				
39496	PCB 1242 (Arochlor 1242)[4]		0.014	0.000044	0.000045
39506	PCB-1254 (Arochlor 1254)[4]		0.014	0.000044	0.000045
39488	PCB-1221 (Arochlor 1221)[4]		0.014	0.000044	0.000045
39492	PCB-1232 (Arochlor 1232)[4]		0.014	0.000044	0.000045
39500	PCB-1248 (Arochlor 1248)[4]		0.014	0.000044	0.000045
39508	PCB-1260 (Arochlor 1260)[4]		0.014	0.000044	0.000045
34671	PCB-1016 (Arochlor 1016)[4]		0.014	0.000044	0.000045
39400	Toxaphene[4]	0.73	0.0002	0.00073	0.00075
01268	Antimony			14	4300
01002	Arsenic[4]	360	190	0.018	0.14
34225	Asbestos[4]			30000 fibers/l	
01012	Beryllium[4]			0.0077	0.13
01027	Cadmium	3.9[6]	1.1[6]	10	170
	Chromium (III)	1700[6]	210[6]	50	670000
	Chromium (VI)	16	11	50	3400
01042	Copper		18[6]	12[6]	1000
00158	Cyanide (total)	22	5.2	200	220000
01051	Lead	82[6]	3.2[6]	50	
71901	Mercury	2.4	0.012	0.144	0.146
01074	Nickel	1400[6]	160[6]	610	4600
01147	Selenium	20	5	10	65000
01079	Silver	4.1[6]		50	
00982	Thallium			13	48
01092	Zinc	120[6]	110[6]	5000	
	Dioxin (2,3,7,8-TCDD)[4]			0.000000013	0.000000014

[1]Except for the aquatic life values for metals, the values given in this appendix refer to the total (dissolved plus suspended) amount of each substance. For the aquatic life values for metals, the values refer to the acid soluble portion which is derived as the fraction that passes through a 0.45 um membrane filter after the sample is acidified to pH 1.5-2.0 with nitric acid.

[2]Based on two routes of exposure - ingestion of contaminated aquatic organisims and drinking water.

[3]Based on one route of exposure - ingestion of contaminated aquatic organisms only.

[4]Substance classified as a carcinogen, with the value based on an incremental risk of one additional instance of cancer in one million persons.

[5]Chemicals which are not individually classified as carcinogens but which are contained within a class of chemicals, with carcinogenicity as the basis for the criteria derivation for that class of chemicals; an individual carcinogenicity assessment for these chemicals is pending.

[6]Hardness dependent criteria. Value given is an example only and is based on a $caco_3$ hardness of 100 mg/l. Criteria for each case must be calculated using the following formula:

CMC = exp (ma [ln (hardness)] + ba)

	ma	ba
Cadmium	1.128	-3.828
Copper	0.9422	-1.464
Chromium (111)	0.8190	3.688
Lead	1.273	-1.460
Nickel	0.8460	3.3612
Silver	1.72	-6.52
Zinc	0.8473	0.8604

CMC = Criterion Maximum Concentration (acute exposure valve). The threshold valve at or below which there should be no unacceptable effects to freshwater aquatic organisms and their uses if the one-hour concentration does not exceed that CMC value more than once every three years on the average.

CCC = exp (MC [ln (hardness)] + bc)

	ma	ba
Cadmium	0.7852	-3.490
Copper	8.8545	-1.465
Chromium	0.8190	1.561
Lead	1.273	-4.705
Nickel	0.8460	1.1645
Silver	------	------
Zinc	0.8473	0.7614

CCC = Criterion Continuous Concentration (chronic exposure valve). The threshold valve at or below which there should be no unacceptable effects to freshwater aquatic organisms and their uses if the four-day concentration does not exceed that CCC valve more than once every three years on the average.

[7]pH dependent criteria. Value given is an example only and is based on a pH of 7.8. Criteria for each case must be calculated using the following formula:

Freshwater aquatic life criteria for pentachlorophenol are expressed as a function of pH. Valves displayed in the table correspond to a pH of 7.8 and are calculated as follows:

CMC = exp [1.005 (pH) - 4.830] CCC = exp [1.005 (pH) - 5.290]

2. Class IA streams. The quality of this class of waters shall be such that its uses shall be the same as those identified for class I, except that treatment for municipal use may also require softening to meet the chemical requirements of the department. The physical and chemical criteria shall be those for class I, with the following exceptions:

Storet Code	Substance or Characteristic	Maximum Limit
00940	Chlorides (Total)	175 mg/l
00932	Sodium	60% of total cations as mEq/l
00945	Sulfates (Total)	450 mg/l

3. Class II streams. The quality of this class of waters shall be such that its uses shall be the same as those identified for class I, except that additional treatment may be required over that noted in class IA to meet the drinking water requirements of the department.

Streams in this classification may be intermittent in nature which would make some of these waters of questionable value for beneficial uses, such as irrigation, municipal water supplies, or fish life. The physical and chemical criteria shall be those for class IA, with the following exceptions:

Storet Code	Substance or Characteristic	Maximum Limit
00940	Chlorides (Total)	250 mg/l
00400	pH	6.0-9.0

4. Class III streams. The quality of this class of waters shall be suitable for industrial and agricultural uses, i.e. cooling, washing, irrigation, and stock watering. These

streams all have low average flows, and generally, prolonged periods of no flow and are of marginal or seasonal value for immersion recreation and fish aquatic biota. The quality of the water must be maintained to protect recreation, fish, and aquatic biota. The physical and chemical criteria shall be those for class II, with the following exceptions:

Storet Code	Substance or Characteristic	Maximum Limit	
00945	Sulfate (Total)	750	mg/l

5. Wetlands. These water bodies are to be considered waters of the state and will be protected under section 33-16-02-05.

History: Amended effective March 1, 1985; May 1, 1989; February 1, 1991.
General Authority: NDCC 61-28-04, 61-28-05
Law Implemented: NDCC 61-28-04

JUNE 1991

33-11-01-01. Definitions. Words defined in North Dakota Century Code chapter 23-27 shall have the same meaning in this chapter.

1. "An ambulance driver" means an individual who operates a vehicle.

2. "An ambulance run" means the response of an ambulance vehicle and personnel to an emergency or nonemergency for the purpose of rendering medical care or transportation or both to someone sick or incapacitated.

3. "An attendant" means a qualified individual responsible for the care of the patient while on an ambulance run.

4. "Department" means the state department of health and consolidated laboratories as defined in North Dakota Century Code chapter 23-01.

5. "Driver's license" means the license as required under North Dakota Century Code section 39-06-01.

6. "Emergency care technician" means a person who meets the requirements of the state emergency care technician program and is certified by the department.

7. "Emergency medical technician-ambulance" means a person who meets the requirements of the national emergency medical technician-ambulance program and is certified by the national registry of emergency medical technicians.

8. "Emergency medical technician-paramedic" means a person who meets the requirements of the national emergency medical technician-paramedic program and is certified by the national registry of emergency medical technicians.

9. "Equivalent" means training of equal or greater value which accomplishes the same results as determined by the department.

10. "Personnel" means qualified attendants, or drivers, or both, within an ambulance service.

11. "Separate location" means separate town, city, or municipality.

12. "State health council" means the council as defined in North Dakota Century Code title 23.

13. "Nonemergency health transportation" means health care transportation provided on a scheduled basis by licensed health care facilities to their own patients or residents whose impaired health condition requires special transportation considerations, supervision, or handling but does not indicate a need for medical treatment during transit or emergency medical treatment upon arrival at the final destination.

14. "Licensed health care facilities" means facilities licensed under North Dakota Century Code chapter 23-16.

History: Effective September 25, 1979; amended effective March 1, 1985; January 1, 1986; June 1, 1991.
General Authority: NDCC 23-27-04
Law Implemented: NDCC 23-27-04

33-11-01-02. License required - Fees.

1. No surface ambulance services, as defined in North Dakota Century Code chapter 23-27, shall be advertised or offered to the public or any person unless the operator of such service shall be licensed by the state health council.

2. The license shall expire midnight on June thirtieth of the year following issuance. License renewal shall be on an annual basis. For special licenses, the expiration date shall be in accordance with the time period specified.

3. A license is valid only for the service for which it is issued. A license may not be sold, assigned, or transferred.

4. The license shall be displayed in a conspicuous place inside the patient compartment of the ambulance vehicle. An operator operating more than one ambulance unit out of a town, city, or municipality will be issued duplicate licenses for each unit at no additional charge.

5. The annual license fee, including special licenses, shall be twenty-five dollars for each ambulance service operated.

6. ~~From January 1, 1986, until June 30, 1986, the ambulance services shall operate under the authority of the 1985 calendar year license~~ Nonemergency health transportation services may not be required to obtain a license under North Dakota Century Code chapter 23-27 as long as they do not advertise or offer services to the general public.

History: Effective September 25, 1979; amended effective January 1, 1986; June 1, 1991.
General Authority: NDCC 23-27-01
Law Implemented: NDCC 23-27-01

33-33-01-03. Lot sizing and spacing requirements.

1. The occupied area of a mobile home lot may not exceed seventy-five percent of the lot area.

2. Mobile home parks constructed after July 1, 1977, must be constructed so that no mobile home, attachment, or ~~other structure~~ detached garage or carport may be located within fifteen feet [4.57 meters] of any other mobile home, attachment, or structure on a bordering lot. Other detached structures, in mobile home parks constructed after July 1, 1977, must be located to comply with the requirements of the appropriate local entity or jurisdiction, but must be located no less than five feet [1.53 meters] from the bordering lots or the boundary of the mobile home park. However, for mobile home parks constructed after July 1, 1977, the minimum distance between mobile homes end to end must be ten feet [3.05 meters].

3. No mobile home, attachment, or structure may be located so as to create hazard to the mobile home or park occupants or restrict emergency vehicles and personnel from performing necessary services.

4. Mobile home parks constructed after August 1, 1984, must be constructed so that no mobile home, attachment, or structure is located closer than within fifteen feet [4.57 meters] of the right-of-way line of any street, nor within ten feet [3.05 meters] of any boundary of the mobile home park.

5. Streets must be of adequate widths to accommodate the contemplated parking and traffic load in accordance with the type of street. In all cases, streets must meet the following minimum requirements:

   a. Two-way streets with parking on both sides . . . . . 34 feet [10.36 meters]

   b. Two-way streets with parking on one side only . . . . . 27 feet [8.23 meters]

c. Two-way streets without parking . . 24 feet [7.32 meters]

d. One-way streets with parking on both sides . . . . . 27 feet [8.23 meters]

e. One-way streets with parking on one side only . . . . . 18 feet [5.49 meters]

f. One-way streets without parking . . 14 feet [4.27 meters]

6. The street system must give an unobstructed access to the public street, highway, or access road.

History: Effective August 1, 1988; amended effective October 1, 1990; June 1, 1991.
General Authority: NDCC 23-01-03(3), 23-10-02
Law Implemented: NDCC 23-10-02, 23-10-07

33-33-04-01. (1101) Definitions. For the purpose of this chapter:

1. "Commissary" means a catering establishment, restaurant, or any other place in which food, containers, or supplies are kept, handled, prepared, packaged, or stored.

2. "Corrosion-resistant materials" means those materials that maintain their original surface characteristics under prolonged influence of the food to be contacted, normal use of cleaning compounds and bactericidal solutions, and other conditions-of-use environment.

3. "Department" means the state department of health and consolidated laboratories or its designated agent.

4. "Easily cleanable" means that surfaces are readily accessible and made of such materials and finish and so fabricated that residue may be removed effectively by normal cleaning methods.

5. "Employee" means the permitholder, individuals having supervisory or management duties and any other person working in a food service establishment.

6. "Equipment" means stoves, ovens, ranges, hoods, slicers, mixers, meatblocks, tables, counters, refrigerators, sinks, dishwashing machines, steamtables, and similar items other than utensils, used in the operation of a food service establishment.

7. "Food" means any raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale, in whole or in part, for human consumption.

8. "Food-contact surface" means those surfaces of equipment and utensils with which food normally comes in contact, and those surfaces from which food may drain, drip, or splash back onto surfaces normally in contact with food.

9. "Food processing establishment" means a commercial establishment in which food is manufactured or packaged for human consumption. The term does not include a food service establishment, retail food store, or commissary operation.

10. "Food service establishment" means any place where food is prepared and intended for individual portion service, and includes the site at which individual portions are provided. The term includes any such place regardless of whether consumption is on or off the premises and regardless of whether there is a charge for the food. The term also includes delicatessen-type operations that prepare sandwiches intended for individual portion service. The term does not include private homes where food is prepared or served for individual family consumption, retail food stores, the location of food vending machines, and supply vehicles.

11. "Hermetically sealed container" means a container designed and intended to be secure against the entry of micro-organisms and to maintain the commercial sterility of its content after processing.

12. "Kitchenware" means all multiuse utensils other than tableware.

13. "Law" includes federal, state, and local statutes, ordinances, and regulations.

14. "Mobile food unit" means a vehicle-mounted food service establishment designed to be readily movable.

15. "Packaged" means bottled, canned, cartoned, or securely wrapped.

16. "Person" includes any individual, partnership, corporation, association, or other legal entity.

17. "Person in charge" means the individual present in a food service establishment who is the apparent supervisor of the food service establishment at the time of inspection. If no individual is the apparent supervisor, then any employee present is the person in charge.

18. "Potentially dangerous food" means any food that consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, edible crustacea, or other ingredients, including synthetic ingredients, in a form capable of supporting rapid and progressive growth of

infectious or toxigenic micro-organisms. The term does not include ~~clean, whole, uncracked, odor-free shell eggs or~~ foods which have a pH level of 4.6 or below or a water activity (a_w) value of 0.85 or less.

19. "Pushcart" means a non-self-propelled vehicle limited to serving potentially hazardous foods or commissary-wrapped food maintained at proper temperatures, or limited to the preparation and service of frankfurters.

20. "Reconstituted" means dehydrated food products recombined with water or other liquids.

21. "Regulatory authority" means the state and local enforcement authority or authorities having jurisdiction over the food service establishment.

22. "Safe materials" means articles manufactured from or composed of materials that may not reasonably be expected to result, directly or indirectly, in their becoming a component or otherwise affecting the characteristics of any food. If materials used are food additives or color additives as defined in section 201(s) or (t) of the Federal Food, Drug, and Cosmetic Act [Pub. L. 75-717; 52 Stat. 1040; 21 U.S.C. 301 et seq.], they are "safe" only if they are used in conformity with regulations established pursuant to section 409 or section 706 of the Act. Other materials are "safe" only if, as used, they are not food additives or color additives as defined in section 201(s) or (t) of the Federal Food, Drug, and Cosmetic Act and are used in conformity with all applicable regulations of the food and drug administration.

23. "Sanitization" means effective bactericidal treatment by a process that provides enough accumulated heat or concentration of chemicals for enough time to reduce the bacterial count, including pathogens, to a safe level on utensils and equipment.

24. "Sealed" means free of cracks or other openings that permit the entry or passage of moisture.

25. "Single-service articles" means cups, containers, lids, closures, plates, knives, forks, spoons, stirrers, paddles, straws, napkins, wrapping materials, toothpicks and similar articles intended for one-time, one-person use and then discarded.

26. "Tableware" means multiuse eating and drinking utensils.

27. "Temporary food service establishment" means a food service establishment that operates at a fixed location for a period of time of not more than fourteen consecutive days in conjunction with a single event or celebration.

28. "Utensil" means any implement used in the storage, preparation, transportation, or service of food.

History: Effective August 1, 1988; amended effective June 1, 1991.
General Authority: NDCC 19-02.1-20, 23-01-03(3)
Law Implemented: NDCC 19-02.1-09

33-33-04-03. (2102) Special requirements.

1. Fluid milk and fluid milk products used or served shall be pasteurized and shall meet the grade A quality standards established by law. Dry milk and dry milk products shall be made from pasteurized milk and milk products.

2. Fresh and frozen shucked shellfish (oysters, clams, or mussels) shall be packed in nonreturnable packages identified with the name and address of the original shell stock processor, shucker-packer, or repacker, and the interstate certification number issued according to law. Shell stock and shucked shellfish shall be kept in the container in which they were received until they are used. Each container of unshucked shell stock (oysters, clams, or mussels) shall be identified by an attached tag or label that states the name and address of the original shell stock processor, the kind and quantity of shell stock, and an interstate certification number issued by the state or foreign shellfish control agency.

3. Only clean whole eggs, with shell intact and without cracks or checks, or pasteurized liquids, frozen, or dry eggs or pasteurized dry egg products shall be used, except that hard-boiled, peeled eggs, commercially prepared and packaged, may be used.

4. Raw eggs may not be used as an ingredient in the preparation of uncooked, ready-to-eat menu items. Commercially pasteurized eggs and egg products may be substituted for shell eggs in such items. Pasteurized eggs are also potentially hazardous and must also be protected against contamination and time or temperature abuses.

5. Shell eggs may not be pooled if the pooled eggs are to be held before or after cooking. Shell eggs may be pooled for immediate cooking followed by immediate service.

History: Effective August 1, 1988; amended effective June 1, 1991.
General Authority: NDCC 19-02.1-20, 23-01-03(3)
Law Implemented: NDCC 19-02.1-09

33-33-04-11. (2403) Cooking potentially hazardous foods. Potentially hazardous foods requiring cooking shall be cooked to heat

all parts of the food to a temperature of at least one hundred forty degrees Fahrenheit [60 degrees Celsius], except that:

1. Poultry, poultry stuffing, stuffed meats, and stuffing containing meat shall be cooked to heat all parts of the food to at least one hundred sixty-five degrees Fahrenheit [73.88 degrees Celsius] with no interruption of the cooking process.

2. Pork and any food containing pork shall be cooked to heat all parts of the food to at least one hundred fifty degrees Fahrenheit [65.55 degrees Celsius].

3. Rare roast beef shall be cooked to an internal temperature of at least one hundred thirty degrees Fahrenheit [54.4 degrees Celsius], and rare beefsteak shall be cooked to a temperature of one hundred thirty degrees Fahrenheit [54.4 degrees Celsius] unless otherwise ordered by the immediate consumer.

4. Individually prepared eggs and pooled eggs must be cooked to heat all parts to one hundred forty degrees Fahrenheit [60 degrees Celsius] or above.

5. Cooked eggs requiring holding before service must be held at an internal temperature of one hundred forty degrees Fahrenheit [60 degrees Celsius] or above.

History: Effective August 1, 1988; amended effective June 1, 1991.
General Authority: NDCC 19-02.1-20, 23-01-03(3)
Law Implemented: NDCC 19-02.1-09

TITLE 40

Historical Board

DECEMBER 1990

40-02-03-01. Definitions. ~~As used in this chapter, unless the context otherwise requires~~ The terms used throughout this chapter have the same meaning as in North Dakota Century Code section 23-06-27, except:

1. ~~"Burial mound" means a raised or mounded earthen structure which was placed over a prehistoric interment of human remains or which contains prehistoric human remains, or both~~ "Department" means the state department of health and consolidated laboratories.

2. ~~"Grave goods" means all artifacts and any other items deliberately interred with human remains, including projectile points, knives, scrapers, articles of clothing, ornaments, or religious items~~ "Duly designated representative" means any person who is so appointed by the respective tribal government and can provide written documentation of such appointment.

3. ~~"Prehistoric cemetery" means any area which contains burial mounds or prehistoric graves~~ "In situ" means in the human burial site per se or in the proximate area or vicinity of the human burial site.

4. ~~"Prehistoric grave" means any interment, deliberate or accidental, which was made of human remains by prehistoric persons or events~~ "Intertribal reinterment committee" means that committee comprised of representatives appointed by each tribal government to represent their respective tribe in matters related to the deaccession and reinterment of human remains and burial goods.

5. "Qualified archaeologist" means an individual who meets the minimum qualifications defined in subsection 1 of section 40-02-02-05.

6. ~~"Research design" means a written statement which provides organization and structure to theoretical concepts related to solving problems, and a listing and justification of problems to be solved~~ "Society" means the state historical society of North Dakota.

7. ~~"Scope of work" means a written statement describing activities which will be completed to provide solutions to problems presented in a research design~~ "Study" means the examination by a qualified archaeologist, with assistance from specialist, as necessary, of human burial sites, human remains, and burial goods, which examination is conducted in situ, when feasible, and consists exclusively of the following activities under the following circumstances:

   a. In all instances, the taking of soil and flora samples as may be appropriate.

   b. In those instances wherein the burial can be restored by backfilling, stabilization, and protection from further disturbance, the measurement and visual observation in place and written description of those visible human remains and burial goods uncovered by the disturbance of the burial to be completed as soon as practicable.

   c. In those instances wherein the burial cannot feasibly be restored but must be disinterred completely and reinterred in another location and the examination can feasibly be conducted in situ, the visual observation and written description of the human burial site, the measurement and weighing of the human remains and burial goods after disinterment from the burial and the limited photographing of the burial site, human remains, and burial goods. Such photography is undertaken for the exclusive purposes of visual recording and research, and publication of these photographs is generally prohibited. The only exception to this general prohibition is the publication of closeup photographs of any physical anomalies present in the human remains.

   d. In those instances wherein in situ examination is not feasible because certain contents of a human burial have been physically separated from the original burial site, those human remains and any burial goods that have been so separated are delivered to the society. Upon their delivery, such human remains and burial goods are examined within the applicable scope of study as defined herein. As soon as practicable, a reasonable effort is made to locate the human burial site in which such human remains and any burial goods were originally interred. In the event that the original burial site is located, examination of such burial site, within the applicable

scope of study as defined herein, is conducted as soon as practicable.

e. In those instances wherein in situ examination is not feasible because the immediate excavation of a human burial site is necessary and there is insufficient time for in situ examination, those human remains and burial goods that have been archaeologically excavated are delivered to and maintained at the society until the completion of the examination thereof within the applicable scope of study as defined herein. The excavation and study of a multiple burial is completed within a period of ninety days from the date on which the decision to excavate the human burial site is made by the department staff and the society staff. The excavation and study of a single burial is completed within a period of sixty days from the date on which the decision to excavate the human burial site is made by the department staff and the society staff. Extensions of such time periods may be granted with the consent of the intertribal reinterment committee in certain cases of Indian burials, including, but not limited to, those instances wherein weather conditions prevent completion of the work within the specified time period.

8. "Superintendent" means the superintendent of the state historical board as set forth in North Dakota Century Code section 55-02-01, or the superintendent's designated representative.

History: Effective December 1, 1984; amended effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-06-27

40-02-03-02. Inadvertent disinterment - Protection of site. ~~When a burial mound, prehistoric grave, or prehistoric cemetery is inadvertently opened by a person, the grave, human remains, and any grave goods noted must be left in place and protected from further disturbance by activities of the person who opened the grave until the state department of health and the superintendent have been notified by the person who opened the grave, and clearance to proceed has been granted by the superintendent. When a burial mound, prehistoric grave, or prehistoric cemetery is discovered by a person to have been inadvertently opened by natural processes such as erosion or stream bank collapse, the grave, human remains, and any grave goods noted must be left in place and the state department of health and superintendent must be notified. This provision is not applicable when evaluation and mitigation of adverse effects to such resources are provided for by other state or federal laws or regulations.~~ Repealed effective December 1, 1990.

History: ~~Effective December 1, 1984.~~
General Authority: ~~NDCC 28-32-02~~
Law Implemented: ~~NDCC 23-06-27~~

40-02-03-03. Inadvertent disinterment - Notification. ~~When a burial mound, prehistoric grave, or prehistoric cemetery is inadvertently opened, noted, and protected as specified in section 40-02-03-02, one of the following must be done by the person who opened the grave, or discovered the grave to have been opened by natural processes, to provide adequate notification to the state department of health and the superintendent:~~

~~1. If the grave or remains are in danger or imminent destruction or loss through human or natural actions, contact both the state department of health and the superintendent as soon as possible. Verbal permission from the superintendent to proceed with the activity which caused the disinterment, or an onsite inspection, may result from this contact. If verbal permission to proceed without further consideration of the prehistoric human remains is given, written confirmation of this permission will be provided to the caller within ten days.~~

~~2. If the grave or remains noted are not imminently endangered by destruction or loss, contact the state department of health and the superintendent in writing providing a complete description of the remains noted, the circumstances surrounding the opening and the present status of protection provided to the grave or remains.~~

Upon having received notification of the actual or potential disturbance or the discovery of a human burial site, human remains, or burial goods pursuant to either subsection 4 or subsection 5 of North Dakota Century Code section 23-06-27, the local law enforcement agency so notified shall, as soon as practicable, report the receipt of such notification to the society and to the department. Based upon the information received by the law enforcement agency from the person providing such notification, the agency shall additionally inform the society and the department of the exact location and state of the human burial site, human remains, or burial goods of which notification was received.

History: Effective December 1, 1984; amended effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-06-27

40-02-03-04. Inadvertent disinterment - Study. ~~If graves or remains reported as specified in section 40-02-03-03 are confirmed to be prehistoric, either through documentation provided by the finder or an~~

onsite inspection by a qualified archaeologist, one of the following must be done:

1. Where feasible, and after basic recording by a qualified archaeologist, the grave will be filled back in, stabilized and protected from further disturbance by the activity or action which caused the disinterment. Data recorded in this process will be filed with the superintendent. The grave will then be considered to be recorded with the state historical board.

2. Where backfilling and protection of the grave is not feasible, and the grave is in imminent danger of loss or destruction of its context through natural processes, the superintendent may salvage the remains and such contextual data and grave goods as can be retrieved immediately through excavation and recording. In such cases a report of the work completed and data recovered will be filed with the superintendent, and a reasonable effort will be made to secure appropriate analysis of the remains by a physical anthropologist.

3. Where backfilling and protection of the grave is not feasible, and the disinterment is the result of natural processes, but the grave is not in imminent danger of loss of context or destruction, the superintendent may develop a research design and scope of work for the completion of disinterment and allocate sufficient funding and staffing to excavate the grave, analyze the materials recovered, secure the analysis of the human remains by a physical anthropologist, and complete a report describing the results of the work completed. Alternatively, the superintendent may provide information regarding the location, nature, and present status of the site to the professional or a vocational, or both, archaeological community in North Dakota so that they may arrange to perform, at their own expense under a research design and scope of work approved by the superintendent, the excavation of the site, analysis of the materials recovered and completion of a report for filing with the superintendent.

4. Where backfilling and protection of the grave is not feasible, the disinterment is the result of a development such as those listed in North Dakota Century Code section 23-06-27, and is not otherwise regulated regarding the evaluation and mitigation of adverse effects to such sites, the superintendent may do one of the following:

   a. Salvage the remains and such contextual data and grave goods as can be retrieved through excavation and recording during an initial inspection. In this case a report of the work completed will be retained by the superintendent, and a reasonable effort will be made to secure appropriate

~~analysis of the human remains by a physical anthropologist.~~

~~b. Negotiate with the developer, or landowner as appropriate, for a specific period of time to be allocated prior to the continuation of the activity which caused the disinterment to allow the superintendent to either seek alternative funding and staffing sources to develop a research design and scope of work for the completion of the disinterment, analysis and report preparation, and complete those excavations, or to notify the professional or a vocational, or both, archaeological community in North Dakota of the site's impending destruction so that they may arrange to perform at their own expense under a research design and scope of work approved by the superintendent the excavations, analysis and preparation of a report to be filed with the superintendent. Alternative funding and staffing sources may include, but are not limited to, regular biennial appropriations, special appropriations, private grants, and donated labor and expertise.~~

Within a period of twenty-four hours, or as soon thereafter as practicable, from the time the department or the society has received notification from a local law enforcement agency pursuant to section 40-02-03-03, the department staff and the society staff, or a qualified archaeologist designated thereby, or in the case of a historic burial, the specialist appointed by the department, shall commence the initial examination of any human remains which are the subject of the notification and undertake the following activities:

1. The human remains must be initially examined by the department and the society staff, or by a qualified archaeologist designated thereby, to determine the race and age of the remains, if possible, using relevant available and solicited information, e.g., plats, maps, records, interviews with landowners, and associated burial goods.

2. If a presumption as to race and age can be made based upon location, historical data and any associated burial goods, this information must be used to determine the disposition of the human remains by the staff of the department and the society. Disposition must be in accordance with applicable society and department statutes and rules.

3. In those instances wherein a burial site, human remains, and burial goods may constitute evidence in a potential criminal prosecution other than those described in North Dakota Century Code section 23-06-27, the burial site, human remains, and burial goods may be studied by any criminal forensic examination methods as may be required in the process of criminal investigation.

4. If it is determined by initial examination that the human remains are non-Indian, the remains may be further examined within the applicable scope of study as defined in section 40-02-03-01.

5. If it is determined by initial examination that the human remains are Indian, the remains may be further examined within the applicable scope of study as defined in section 40-02-03-01.

6. If it cannot be determined by means of such initial examination that the human remains are either Indian or non-Indian, it must be presumed that the human remains are Indian, based upon experience of the staff of the department and the society.

History: Effective December 1, 1984; amended effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-06-27

40-02-03-05. Inadvertent disinterment - ~~Reinterment~~ Restoration or reinterment. ~~When graves or remains are excavated pursuant to section 40-02-03-04, the human remains, following analysis, will be permanently stored at a facility approved by the superintendent or at the request of the developer or landowner, as appropriate, returned to the developer or landowner for reinterment at the developer's or landowner's expense pursuant to existing regulations of the state department of health related to the interment of human remains. If reinterment of the human remains is the selected disposition, and the remains have been identified as those of a prehistoric native American, the North Dakota Indian affairs commission must be offered an opportunity to arrange an appropriate memorial service.~~

~~Any grave goods recovered must, following analysis, be returned to the landowner, or if the landowner wishes, permanently stored at a facility designated by the superintendent.~~

Whether or not the society intends to study a disturbed Indian burial site and its contents, the superintendent shall provide timely notification of the disturbed burial to the duly designated representative of the intertribal reinterment committee. Within a period of twenty-four hours, or as soon thereafter as practicable, from the time of receipt of such notification, the representative shall make an inspection of the burial site. The representative shall then make a determination as to whether the burial can be adequately and safely restored and protected in situ or, in the alternative, the contents of the burial should be disinterred completely and reinterred in another location. Archaeological testing of a disturbed human burial site to determine its spatial limits and integrity is an acceptable activity under this section to reach such determination regarding restoration in place or disinterment of human remains and burial goods. Prior to the

restoration or disinterment of the burial, the intertribal reinterment committee shall attempt to determine the tribal identity or affiliation of the human remains and any burial goods interred in the burial site.

If it is determined that the disturbed burial can be adequately and safely restored and protected in situ and any requisite consent of the private landowner has been secured, the intertribal reinterment committee shall, as soon as practicable and subsequent to the completion of any study conducted on the contents of the burial at the direction of the society, cause the burial to be backfilled, stabilized, and protected from further disturbance by the human activities or natural processes which caused the disturbance in the first instance.

If, on the other hand, it is determined that the in situ restoration of the burial is not feasible and any requisite consent of the private landowner has been secured, the intertribal reinterment committee shall, as soon as practicable and subsequent to the completion of any study conducted on the contents of the burial at the direction of the society, cause the disinterred human remains and any and all burial goods to be reinterred on Indian lands within the boundaries of the appropriate Indian reservation, as determined by the intertribal reinterment committee.

Each such restoration and reinterment shall provide an opportunity for appropriate tribal religious ceremony or ceremonies. The expenses inherent in each such restoration and reinterment activity must be exclusively and fully incurred by the appropriate tribal government, as determined by the intertribal reinterment committee.

The disinterment of the contents of a burial must be conducted under the supervision of a qualified archaeologist in accordance with the procedures inherent in a standard archaeological and contextual analysis within the applicable scope of study as defined in section 40-02-03-01.

History: Effective December 1, 1984; amended effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-06-27

40-02-03-06. Planned disinterment - Notification. ~~If a developer desires to disinter and move prehistoric human remains which are recorded with the state historical board all of the following must be provided in writing to the state department of health and the superintendent:~~

~~1. A description of the burial site for which the disinterment action is proposed, including the site number, if any.~~

~~2. Copies of all site forms, descriptions, and technical reports related to the burial site unless already on file with the superintendent.~~

~~3. A description of the development which necessitates the proposed disinterment.~~

~~4. A statement justifying the need to disinter rather than avoid the remains.~~

~~5. A research design and scope of work for the proposed disinterment, including coverage of excavation, analyses, expertise to be employed, and report preparation and dissemination considerations.~~

~~6. The current credentials of a qualified archaeologist who has agreed to conduct the work described in the research design and scope of work submitted, if not already on file with the superintendent, or a commitment to obtain the services of such an individual and to submit that individual's credentials for approval by the superintendent if not already on file with the superintendent.~~

~~7. A plan for storage of reinterment of the human remains and all grave goods which are recovered from the burial site.~~

~~The information and notification must be given to the superintendent at least thirty days prior to the initiation of disinterment or the developer will be in violation of North Dakota Century Code section 23-06-27. This provision is not applicable when evaluation and mitigation of adverse effects to cultural resources are provided for by other state and federal laws or regulations.~~

If a person, who plans to undertake any of the development activities enumerated in subsection 7 of North Dakota Century Code section 23-06-27, knows or has reason to believe that a human burial site may be disturbed by a development activity but does not have sufficient information to design the development to preserve the site or to prepare a scope-of-work for disinterment of human remains and burial goods, the person shall conduct archaeological tests. All of the following documentation must be filed with and approved by the department and the superintendent prior to initiating such tests:

1. Description and location of the human burial site, including the site number, if any.

2. Copies of all site forms, descriptions, and technical reports related to the human burial site, unless already on file with the superintendent or the department.

3. Description of the development activity which necessitates the proposed archaeological test.

4. A research design and scope-of-work for the proposed archaeological test.

5. The current credentials of a qualified archaeologist who has agreed to conduct the archaeological test.

6. A copy of a report describing the results of the test and an updated site form must be filed with the superintendent and department before the development activity proceeds.

If any human remains or burial goods are discovered during the archaeological test, the testing must cease immediately and the superintendent and the department must be notified of such discovery. The superintendent and department, in consultation with the intertribal reinterment committee, will determine whether the test continues or is terminated.

If a person, who plans to undertake any of the development activities enumerated in subsection 7 of North Dakota Century Code section 23-06-27, desires to disinter and move human remains and any burial goods interred in a human burial site which is recorded with the state historical board or with the department, all of the following documentation must be provided to the department and to the superintendent:

1. A description of the human burial site for which the disinterment action is proposed, including the site number, if any.

2. Copies of all site forms, descriptions, and technical reports related to the human burial site, unless already on file with the superintendent or the department.

3. A description of the development activity which necessitates the proposed disinterment.

4. A statement justifying the need to disinter rather than avoid the human burial.

5. A research design and scope of work for the proposed disinterment, including coverage of excavation, study, expertise to be employed, and report preparation and dissemination considerations. All costs of excavation, disinterment, study and reinterment must be borne by the proposed developer. The intertribal reinterment committee shall arrange for and incur the costs inherent in the conduct of the appropriate tribal religious ceremony or ceremonies.

6. The current credentials of a qualified archaeologist who has agreed to conduct the work described in the research design and scope-of-work submitted, if not already on file with the superintendent, or a commitment to obtain the services of such an individual and to submit that individual's credentials for approval by the superintendent if not already on file with the superintendent.

The information and notification must be provided to the superintendent and to the department at least sixty days prior to the intended date of disinterment or the person will be deemed to be in violation of subdivision a of subsection 3 of North Dakota Century Code section 23-06-27.

This section is not applicable when evaluation and mitigation of adverse effects to cultural resources are provided for by other state and federal laws or regulations.

History: Effective December 1, 1984; amended effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-06-27

40-02-03-07. Planned disinterment - Study. ~~Any disinterment made as specified in section 40-02-03-06 will be conducted by or under the direct supervision of a qualified archaeologist and in conformance with a research design and scope of work approved by the superintendent. The disinterment may not be initiated until the superintendent has indicated in writing the superintendent's satisfaction that preservation of the scientific values of the remains and reasonable and respectful treatment of the deceased is provided for adequately. The superintendent will provide written response to the developer within thirty days of receipt of notice of intent to disinter, either approving the disinterment or listing the deficiencies in the notice. Any developer who proceeds with disinterment of recorded prehistoric graves or remains under a research design or scope of work which has been deemed deficient by the superintendent, or who proceeds to cause a disinterment to happen without proper notification having been completed, is in violation of North Dakota Century Code section 23-06-27.~~

Within a period of twenty-four hours, or as soon thereafter as practicable, from the time each such notification of a planned disinterment of an Indian burial site is received by the superintendent pursuant to section 40-02-03-06, the superintendent shall contact the intertribal reinterment committee for the purpose of giving notice to the committee of the planned disinterment and shall direct to the committee a copy of all documentation received pursuant to section 40-02-03-06.

As soon as practicable after receipt by the superintendent of each such notification pursuant to section 40-02-03-06, the society, in conformity with the applicable requirement prescribed by subsection 7 of North Dakota Century Code section 23-06-27, shall cause the appropriate representatives of the society to commence negotiations with the person proposing disinterment in an effort to achieve the avoidance altogether of the human burial site at issue by the proposed development activity. Such negotiations must be conducted during a period no greater than sixty days from the date on which the superintendent received notification pursuant to section 40-02-03-06. The superintendent shall give to the intertribal reinterment committee reasonable notice of the

prospective negotiations and said committee shall have the opportunity to consult with the superintendent regarding such negotiations through appropriate representatives. Should negotiations fail within the sixty-day period and should the state historical board not choose to seek alternative judicial relief to enjoin the proposed disturbance of the burial at issue, the superintendent, upon having determined that the documentation provided by the person pursuant to section 40-02-03-06 is sufficient, shall direct written notification to the person that the proposed development through the location of the human burial at issue may proceed as planned; provided, however, that the development may not actually proceed through the location of such burial, until such time as the human remains and any and all burial goods interred in the burial site have been disinterred. Any person who otherwise proceeds to cause the disinterment of the burial at issue will be deemed to be in violation of subdivision a of subsection 3 of North Dakota Century Code section 23-06-27.

In those instances wherein such written notification has been directed by the superintendent to the person proposing disinterment, the superintendent shall thereafter notify the intertribal reinterment committee of any intent of the society to direct a qualified archaeologist to conduct a study of the human burial site and its contents. Should such intent be expressed by the superintendent, the intertribal reinterment committee may make arrangements for the appropriate duly designated representative to accompany the representative of the society to the human burial site at the earliest practicable time.

Such duly designated representative may be present at the site of the burial throughout the course of the conduct of the study by the qualified archaeologist and may provide any necessary assistance in conjunction with the conduct of the study.

Subsequent to the completion of the conduct of any study, the qualified archaeologist who performed the study shall file a written report of the work completed and data recovered with the superintendent, who shall direct a copy of said report to the intertribal reinterment committee.

History: Effective December 1, 1984; amended effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-06-27

40-02-03-08. Planned disinterment - Reinterment. ~~When graves or remains are excavated pursuant to section 40-02-03-07, the human remains, following analysis, will be permanently stored at a facility approved by the superintendent or at the request of the developer or landowner, as appropriate, returned to the developer or landowner for reinterment at the developer's or landowner's own expense pursuant to existing regulations of the state department of health related to the interment of human remains. If reinterment is the selected disposition,~~

~~and the remains have been identified as those of a prehistoric native American, the North Dakota Indian affairs commission must be offered an opportunity to arrange an appropriate memorial service. Any grave goods recovered must, after analysis, be returned to the landowner, or if the landowner wishes, permanently stored at a facility designated by the superintendent.~~ In those instances wherein a person has been authorized by the superintendent to proceed with the proposed development as planned, as provided in section 40-02-03-07, the intertribal reinterment committee shall attempt to determine the tribal identity or affiliation of the human remains and any burial goods interred in the burial site at issue.

Thereafter, the intertribal reinterment committee shall, as soon as practicable and subsequent to the completion of any study conducted on the contents of the burial at the direction of the society, cause the disinterred human remains and any and all burial goods to be reinterred on Indian lands within the boundaries of the appropriate Indian reservation, as determined by the intertribal reinterment committee.

Each such reinterment shall provide an opportunity for appropriate tribal religious ceremony or ceremonies.

The disinterment of the contents of a burial must be conducted under the supervision of a qualified archaeologist in accordance with the procedures inherent in a standard archaeological and contextual analysis within the applicable scope of study as defined in section 40-02-03-01.

History: Effective December 1, 1984; amended effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-06-27

40-02-03-09. Conflict with federal law. If any of the rules of this chapter conflict with controlling federal law, the controlling federal law will prevail and be applied in place of the conflicting rule.

History: Effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 23-06-27

40-01-02-04. Transfer of membership. In lieu of a membership program established under sections 40-01-02-01, 40-01-02-02, and 40-01-02-03, the state historical society may transfer its public membership program to the North Dakota heritage foundation by cooperative agreement.

History: Effective May 1, 1991.
General Authority: NDCC 55-01-02
Law Implemented: NDCC 55-01-02; S.L. 1987, ch. 663

TITLE 43

Industrial Commission

DECEMBER 1990

43-02-07-13. Records to be kept. All producers of geothermal energy within this state shall make and keep appropriate books and records for a period not less than ~~five~~ ten years, from which they may be able to make and substantiate the reports required by this chapter.

History: Effective March 1, 1984; amended effective October 1, 1990.
General Authority: NDCC 38-19-03
Law Implemented: NDCC 38-19-03

MARCH 1991

43-02-01-12. Basic data. Basic data developed by or for the person conducting the coal exploration or evaluation, consisting of testhole locations, testhole elevations, total depths, driller's logs, radioactivity, resistivity, or other types of electrical or mechanical logs shall be delivered free of charge to the state geologist within six months of the expiration date of the permit covering the exploration or evaluation.

Sample cuts, portions of cores not required for analysis, or core analyses developed by or for the person conducting the coal exploration or evaluation shall also be submitted free of cost to the state geologist if requested.

History: Amended effective March 1, 1991.
General Authority: NDCC 38-12.1-04
Law Implemented: NDCC 38-12.1-04

43-02-01-18.1. Notice of environmental data gathering activities. So that the state geologist can decide if a permit is required:

1. Notice of all planned environmental data gathering activities on lands designated as unsuitable for mining under North Dakota Century Code section 38-14.1-05 must be provided to the state geologist before beginning any such activities. The notice must include:

   a. The name, address, and telephone number of the person seeking to conduct environmental data gathering activities.

   b. The name, address, and telephone number of the person's representative who will be present at and will supervise the activities.

c. A narrative describing the activities or a map at a scale of one to twenty-four thousand, or greater, showing the proposed area of activities and the general location of drill holes and trenches, existing and proposed roads, occupied dwellings, topographic features, bodies of surface water, and pipelines.

d. A statement of the period of the planned activities.

e. A description of all the environmental data gathering activities and the practices that will be followed to protect the environment and to reclaim the area from adverse impacts of the activities as required by this chapter.

2. Notice of all planned environmental data gathering activities on lands other than those designated as unsuitable for mining under North Dakota Century Code section 38-14.1-05 must be provided to the state geologist before beginning any such activities. The notice must include the same requirements as set forth in subsection 1. The notice required by this section is not required for the following activities: fish and wildlife surveys, premine land use determinations, vegetation surveys, collection of climatological data, topographical surveys, and walk-through cultural resource surveys.

History: Effective March 1, 1991.
General Authority: NDCC 38-12.1-05
Law Implemented: NDCC 38-12.1-05

43-02-01-20. Performance standards for coal exploration. The performance standards in this section are applicable to coal exploration which substantially disturbs land surface and on land designated unsuitable for mining under North Dakota Century Code section 38-14.1-05. Whether the land surface will be substantially disturbed shall be determined by the state geologist.

1. For purposes of this section, "substantially disturb" means, for purposes of coal exploration, to impact significantly upon land, air, or water resources by such activities as blasting, mechanical excavation, drilling or altering coal or water exploratory holes or wells, construction of roads and other access routes, and the placement of structures, excavated earth, or other debris on the surface of land.

2. Coal exploration activities which will substantially disturb land surface shall not be allowed to affect the following:

   a. Habitats of unique value for fish, wildlife, and other related environmental values.

b. Threatened or endangered species of plants or animals listed by the Endangered Species Act of 1973, as amended [16 U.S.C. 1531 et seq.] and their critical habitats.

c. Species such as eagles, migrating birds or other animals protected by state or federal law, and their habitats.

d. Habitats of unusually high value for fish and wildlife, such as wetlands, riparian areas, cliffs, supporting raptors, areas offering special shelter or protection, reproduction and nursery areas, and wintering areas.

3. The person who conducts coal exploration shall, to the extent practicable, measure important environmental characteristics of the exploration area during the operations, to minimize environmental damage to the area and to provide supportive information for any permit application that person may submit as part of the permit application.

a. Vehicular travel on other than established graded and surfaced roads shall be limited by the person who conducts coal exploration to that absolutely necessary to conduct the exploration. Travel shall be confined to graded and surface roads during periods when excessive damage to vegetation or rutting of the land surface could result.

b. Any new road in the exploration area shall comply with the provisions of chapter 69-05.2-24.

c. Existing roads may be used for exploration in accordance with the following:

(1) All applicable federal, state, and local requirements shall be met.

(2) If the road is significantly altered for exploration, including, but not limited to, change of grade, widening, or change of route, or if use of the road for exploration contributes additional suspended solids to streamflow or runoff, then subsection 7 and subsections 1 and 2 of section 69-05.2-24-01 shall apply to all areas of the road which are altered or which result in such additional contributions.

(3) If the road is significantly altered for exploration activities and will remain as a permanent road after exploration activities are completed, the person conducting exploration shall ensure that the requirements of chapter 69-05.2-24, as appropriate, are met for the design, construction, alteration, and maintenance of the road.

d. Promptly after exploration activities are completed, existing roads used during exploration shall be reclaimed either:

(1) To a condition equal to or better than their preexploration condition; or

(2) To the condition required for permanent roads under chapter 69-05.2-24, as appropriate.

4. If excavations, artificial flat areas, or embankments are created during exploration, these areas shall be returned to the approximate original contour promptly after such features are no longer needed for coal exploration.

5. Suitable plant growth material, as defined in subsection 31 of North Dakota Century Code section 38-14.1-02 shall be removed, stored, and redistributed on disturbed areas as necessary to assure successful revegetation or as required by the commission.

6. Revegetation of areas disturbed by coal exploration shall be performed by the person who conducts the exploration or the person's agent. All revegetation shall be in compliance with the plan approved by the commission and carried out in a manner that encourages prompt vegetative cover and recovery of productivity levels compatible with approved postexploration land use and in accordance with the following:

a. All disturbed lands shall be seeded or planted to the same seasonal variety native to the disturbed area or to some suitable, commercially available mixture approved by the state geologist. If both the preexploration and postexploration land uses are intensive agriculture, planting of the crops normally grown will meet the requirements of this section.

b. The vegetative cover shall be capable of stabilizing the soil surface in regards to erosion.

7. With the exception of small and temporary diversions of overland flow of water around new roads, drill pads, and support facilities, no ephemeral, intermittent or perennial stream shall be diverted during coal exploration activities. Overland flow of water shall be diverted in a manner that:

a. Prevents erosion.

b. To the extent possible using the best technology currently available, prevents additional contributions of suspended solids to streamflow or runoff outside the exploration area.

c. Complies with all other applicable state or federal requirements.

8. Each exploration hole, borehole, well, or other exposed underground opening created during exploration must be cased or sealed to meet the requirements of chapter 69-05.2-14 and section 43-02-01-14.

9. All facilities and equipment shall be removed from the exploration area promptly when they are no longer needed for exploration, except for those facilities and equipment that the state geologist determines may remain to:

   a. Provide additional environmental quality data.

   b. Reduce or control the onsite or offsite effects of the exploration activities.

   c. Facilitate future surface mining and reclamation operations by the person conducting the exploration, under an approved permit.

10. Coal exploration shall be conducted in a manner which minimizes disturbance of the prevailing hydrologic balance, and shall include appropriate sediment control measures such as those specified in section 69-05.2-16-08. The commission may specify additional measures which shall be adopted by the person engaged in coal exploration.

11. Toxic-forming materials shall be handled and disposed of in accordance with sections 69-05.2-16-11 and 69-05.2-21-03. If specified by the commission, additional measures shall be adopted by the person engaged in coal exploration.

History: Effective August 1, 1980; amended effective March 1, 1991.
General Authority: NDCC 38-12.1-04
Law Implemented: NDCC 38-12.1-04

TITLE 46

Labor, Commissioner of

JULY 1991

46-01-01-01. Organization of department of labor.

1. History. The 1965 legislative assembly established the department of labor. The department is headed by a commissioner of labor elected on the no-party ballot for a term of four years, with the first election being held in 1966. Prior to this time agriculture and labor were one department under the commissioner of agriculture and labor.

2. Deputy commissioner of labor. The deputy commissioner is appointed by the commissioner and is responsible to the commissioner for administering labor laws.

3. Regulations and enforcement concerning labor matters. Inquiries regarding wage payment, child labor, minimum wage, employment agencies, equal pay for equal work, discrimination because of age, race, color, religion, sex, or national origin, the presence of any mental or physical disability, or status with regard to marriage or public assistance, and labor disputes may be addressed to the commissioner:

~~Mr. Byron Knutson~~
Commissioner of Labor
State Capitol
Bismarck, North Dakota 58505

History: Amended effective November 1, 1981; October 1, 1987; November 1, 1989; August 1, 1991.
General Authority: NDCC 28-32-02.1
Law Implemented: NDCC 28-32-02.1

STAFF COMMENT: Article 46-02 contains all new material but is not underscored so as to improve readability.

ARTICLE 46-02

OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDERS

CHAPTER 46-02-01
PUBLIC HOUSKEEPING OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER ONE

46-02-01-01. Definitions.

1. "Public housekeeping occupation" includes employees in such related occupations as, but not exclusive to, bartenders, bellhops, bus boys or girls, cashiers, chefs, cooks, desk clerks, elevator operators, gaming attendants, hosts, hostesses, housekeepers, housemen, kitchen helpers, janitors or custodians, waiters and waitresses in bars, boarding houses, clubs, dining rooms, fast food businesses, hotels, motels, restaurants, taverns and theaters, attendants employed at ice cream, light lunch and refreshment stands, steamtables and counter work in cafeterias and delicatessens, and other such related occupations. A "tipped employee" means any employee engaged in an occupation where the employee customarily and regularly receives more than thirty dollars a month in tips.

2. Administrative. The term "employee employed in a bona fide administrative capacity" means but is not exclusive to any employee whose primary duty consists of:

a. The performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customer; or

b. Who customarily and regularly exercises discretion and independent judgment.

3. Professional. The term "employee employed in a bona fide professional capacity" means but is not exclusive to any employee whose primary duty consists of:

a. Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

b. Work requiring the consistent exercise of discretion and judgment in its performance; and

c. Work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

4. Executive. The term "employee employed in a bona fide executive capacity" means but is not exclusive to any employee whose primary duty consists of:

a. The management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof;

b. Directing and work of two or more other employees therein; and

c. The authority to hire or fire other employees or whose suggestions as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

46-02-01-02. Standards that apply.

1. The North Dakota minimum wage shall be no less than four dollars and twenty-five cents per house effective August 1, 1991.

2. A tip credit of thirty-three percent may be allowed for tipped employees of any occupation. The employer may consider tips as part of wages, but such a wage credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined. Employees must retain all of their tips, except to the extent that they participate in a valid tip pooling or sharing arrangement.

3. A training wage may be paid to employees seventeen years of age or younger at a rate of eighty-five percent of the minimum wage for sixty days or two hundred forty hours whichever comes first. No individual may be employed at the training wage, in any number of jobs, for more than a total of sixty days. An employee hired at the training wage may not displace an employee earning a regular rate of pay.

4. Overtime must be paid at one and one-half times the regular rate of pay to any employee who works in excess of forty hours in any one week. Hospitals and residential care establishments may adopt, by agreement with the employees, a fourteen-day overtime period in lieu of the usual seven-day workweek, if the employees are paid at least time and one-half their regular rate for hours worked over eight in a day or eighty in a fourteen-day work period, whichever is the greater number of overtime hours. The following are completely exempt from the overtime provisions of the law:

   a. Any employee employed in a bona fide executive, administrative, or professional capacity.

   b. Any employee in technical and clerical occupations who earns more than two hundred fifty dollars per week and spends more than fifty percent of the employee's time supervising two or more employees.

   c. Any employee engaged in an agricultural occupation.

   d. Employees of shelters or other such related establishments whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship.

   e. Employees employed in domestic service who reside in the household in which they are employed.

f. Straight commission salespersons in retail automobile, trailer, boat, aircraft, truck, or farm implement dealerships unless that salesperson is required to be on the premises for more than forty hours per week.

5. A minimum thirty-minute meal break must be provided to employees, if such is desired, in each shift exceeding five hours when there are two or more employees on duty. Collectively bargained agreements will prevail over this provision. Employees not allowed to leave the business location during the break period must be compensated at the regular rate of pay or provided with in-kind compensation, such as a meal, equal to or greater than the minimum wage.

6. Mandatory meetings and training; standby time on the premises; or "on call" as in an engaged to wait manner, as when the employee is required to remain at a specified location, available to the employer at all times, and unable to carry out day-to-day activities available to the employee when not on call; and traveltime from jobsite to jobsite, or from business to jobsite, are times to be compensated at the regular rate of pay.

7. Every employer must furnish to an employee each pay period a check stub or pay voucher which indicates hours worked, the rate of pay, and required state and federal deductions.

8. An employer may require an employee to purchase uniforms if the cost of such uniform does not bring that employee's wage below the hourly minimum wage for all hours worked during that pay period.

9. Vacation pay must be treated the same as wages after one year of employment and are due the same as other wages upon termination of employment.

10. Tip pooling is allowed if fifty percent plus one of the employees request such.

11. The commissioner may grant subminimum wages for students enrolled in vocational education or related programs as long as the wage is not below three dollars and sixty cents per hour.

12. Any employee employed on a casual basis in domestic service employment to provide babysitting services is exempt from minimum wage and overtime provisions.

13. The reasonable cost or fair value of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be considered part of the wages, up to a minimum of fifteen dollars per day and accompanied by a

written agreement, if acceptance of facilities is voluntary on the part of the employee.

14. An employer may not discharge, discipline, threaten, discriminate, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:

    a. The employee, in good faith, reports a violation or suspected violation of any state or federal law to any governmental agency.

    b. The employee is requested by a governmental agency to participate in an investigation, hearing, or inquiry.

    c. The employee informs the employer that the employee is refusing an order to perform an activity that the employee knows violates any state or federal law.

    d. The employee has or may seek assistance of the department of labor pursuant to the provisions of North Dakota Century Code chapters 34-06 and 34-14.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

CHAPTER 46-02-02
MANUFACTURING AND PROCESSING OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER TWO

46-02-02-01. Definitions.

1. "Manufacturing and processing occupation" includes employees in industries, businesses, or establishments operated for preparing, producing, making, altering, repairing, finishing, processing, inspecting, handling, assembling, wrapping, bottling, or packaging goods, articles, agricultural produce or commodities, in whole or in part, trucking and pick up and delivery, and other such related occupations. A "tipped employee" means any employee engaged in an occupation where the employee customarily and regularly receives more than thirty dollars a month in tips.

2. Administrative. The term "employee employed in a bona fide administrative capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. The performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customer; or

   b. Who customarily and regularly exercises discretion and independent judgment.

3. Professional. The term "employee employed in a bona fide professional capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

   b. Work requiring the consistent exercise of discretion and judgment in its performance; and

   c. Work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

4. Executive. The term "employee employed in a bona fide executive capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. The management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof;

   b. Directing the work of two or more other employees therein; and

   c. The authority to hire or fire other employees or whose suggestions as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

46-02-02-02. Standards that apply.

1. The North Dakota minimum wage shall be no less than four dollars and twenty-five cents per hour effective August 1, 1991.

2. A tip credit of thirty-three percent may be allowed for tipped employees of any occupation. The employer may consider tips as part of wages, but such a wage credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined. Employees must retain all of their tips, except to the extent that they participate in a valid tip pooling or sharing arrangement.

3. A training wage may be paid to employees seventeen years of age or younger at a rate of eighty-five percent of the minimum wage for sixty days or two hundred forty hours whichever comes first. No individual may be employed at the training wage, in any number of jobs, for more than a total of sixty days. An employee hired at the training wage may not displace an employee earning a regular rate of pay.

4. Overtime must be paid at one and one-half times the regular rate of pay to any employee who works in excess of forty hours in any one week. Hospitals and residential care establishments may adopt, by agreement with the employees, a fourteen-day overtime period in lieu of the usual seven-day workweek, if the employees are paid at least time and one-half their regular rate for hours worked over eight in a day or eighty in a fourteen-day work period, whichever is the greater number of overtime hours. The following are completely exempt from the overtime provisions of the law:

   a. Any employee employed in a bona fide executive, administrative, or professional capacity.

   b. Any employee in technical and clerical occupations who earn more than two hundred fifty dollars per week and spend more than fifty percent of the employee's time supervising two or more employees.

   c. Any employee engaged in an agricultural occupation.

   d. Employees of shelters or other such related establishments whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship.

   e. Employees employed in domestic service who reside in the household in which they are employed.

f. Straight commission salespersons in retail automobile, trailer, boat, aircraft, truck, or farm implement dealerships unless that salesperson is required to be on the premises for more than forty hours per week.

5. A minimum thirty-minute meal break must be provided to employees, if such is desired, in each shift exceeding five hours when there are two or more employees on duty. Collectively bargained agreements will prevail over this provision. Employees not allowed to leave the business location during the break period must be compensated at the regular rate of pay or provided with in-kind compensation, such as a meal, equal to or greater than the minimum wage.

6. Mandatory meetings and training; standby time on the premises; or "on call" as in an engaged to wait manner, as when the employee is required to remain at a specified location, available to the employer at all times, and unable to carry out day-to-day activities available to the employee when not on call; and traveltime from jobsite to jobsite, or from business to jobsite, are times to be compensated at the regular rate of pay.

7. Every employer must furnish to an employee each pay period a check stub or pay voucher which indicates hours worked, the rate of the pay, and required state and federal deductions.

8. An employer may require an employee to purchase uniforms if the cost of such uniform does not bring that employee's wage below the hourly minimum wage for all hours worked during that pay period.

9. Vacation pay must be treated the same as wages after one year of employment and are due the same as other wages upon termination of employment.

10. Tip pooling is allowed if fifty percent plus one of the employees request such.

11. The commissioner may grant subminimum wages for students enrolled in vocational education or related programs as long as the wage is not below three dollars and sixty cents per hour.

12. Any employee employed on a casual basis in domestic service employment to provide babysitting services is exempt from minimum wage and overtime provisions.

13. The reasonable cost or fair value of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be considered part of the wages, up to a maximum of fifteen dollars per day and accompanied by a

written agreement, if acceptance of facilities is voluntary on the part of the employee.

14. An employer may not discharge, discipline, threaten, discriminate, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:

    a. The employee, in good faith, reports a violation or suspected violation of any state or federal law to any governmental agency.

    b. The employee is requested by a governmental agency to participate in an investigation, hearing, or inquiry.

    c. The employee informs the employer that the employee is refusing an order to perform an activity that the employee knows violates any state or federal law.

    d. The employee has or may seek assistance of the department of labor pursuant to the provisions of North Dakota Century Code chapters 34-06 and 34-14.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

CHAPTER 46-02-03
MERCANTILE OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER THREE

46-02-03-01. Definitions.

1. "Mercantile occupation" includes employees in establishments operated to trade in the purchase or sale of any goods or merchandise. The employees include the sales force, wrappers, checkers, shippers in the mail order department, telemarketers, markers and stockroom employees, parking lot attendants, laundromat employees, tour guides, recreational and amusement employees, and all other mercantile employees except those performing office duties solely. A "tipped employee" means any employee engaged in an occupation where the employee customarily and regularly receives more than thirty dollars a month in tips.

2. Administrative. The term "employee employed in a bona fide administrative capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. The performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customer; or

   b. Who customarily and regularly exercises discretion and independent judgment.

3. Professional. The term "employee employed in a bona fide professional capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

   b. Work requiring the consistent exercise of discretion and judgment in its performance; and

   c. Work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

4. Executive. The term "employee employed in a bona fide executive capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. The management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof;

   b. Directing the work of two or more other employees therein; and

   c. The authority to hire or fire other employees or whose suggestions as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

46-02-03-02. Standards that apply.

1. The North Dakota minimum wage shall be no less than four dollars and twenty-five cents per hour effective August 1, 1991.

2. A tip credit of thirty-three percent may be allowed for tipped employees of any occupation. The employer may consider tips as part of wages, but such a wage credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined. Employees must retain all of their tips, except to the extent that they participate in a valid tip pooling or sharing arrangement.

3. A training wage may be paid to employees seventeen years of age or younger at a rate of eighty-five percent of the minimum wage for sixty days or two hundred forty hours whichever comes first. No individual may be employed at the training wage, in any number of jobs, for more than a total of sixty days. An employee hired at the training wage may not displace an employee earning a regular rate of pay.

4. Overtime must be paid at one and one-half times the regular rate of pay to any employee who works in excess of forty hours in any one week. Hospitals and residential care establishments may adopt, by agreement with the employees, a fourteen-day overtime period in lieu of the usual seven-day work week, if the employees are paid at least time and one-half their regular rate for hours worked over eight in a day or eighty in a fourteen-day work period, whichever is the greater number of overtime hours. The following are completely exempt from the overtime provisions of the law:

   a. Any employee employed in a bona fide executive, administrative, or professional capacity.

   b. Any employee in technical and clerical occupations who earn more than two hundred fifty dollars per week and spend more than fifty percent of the employee's time supervising two or more employees.

   c. Any employee engaged in an agricultural occupation.

   d. Employees of shelters or other such related establishments whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship.

   e. Employees employed in domestic service who reside in the household in which they are employed.

f. Straight commission salespersons in retail automobile, trailer, boat, aircraft, truck, or farm implement dealerships unless that salesperson is required to be on the premises for more than forty hours per week.

5. A minimum thirty-minute meal break must be provided to employees, if such is desired, in each shift exceeding five hours when there are two or more employees on duty. Collectively bargained agreements will prevail over this provision. Employees not allowed to leave the business location during the break period must be compensated at the regular rate of pay or provided with in-kind compensation, such as a meal, equal to or greater than the minimum wage.

6. Mandatory meetings and training; standby time on the premises; or "on call" as in an engaged to wait manner, as when the employee is required to remain at a specified location, available to the employer at all times, and unable to carry out day-to-day activities available to the employee when not on call; and traveltime from jobsite to jobsite, or from business to jobsite, are times to be compensated at the regular rate of pay.

7. Every employer must furnish to an employee each pay period a check stub or pay voucher which indicates hours worked, the rate of pay, and required state and federal deductions.

8. An employer may require an employee to purchase uniforms if the cost of such uniform does not bring that employee's wage below the hourly minimum wage for all hours worked during that pay period.

9. Vacation pay must be treated the same as wages after one year of employment and are due the same as other wages upon termination of employment.

10. Tip pooling is allowed if fifty percent plus one of the employees request such.

11. The commissioner may grant subminimum wages for students enrolled in vocational education or related programs as long as the wage is not below three dollars and sixty cents per hour.

12. Any employee employed on a casual basis in domestic service employment to provide babysitting services is exempt from minimum wage and overtime provisions.

13. The reasonable cost or fair value of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be considered part of the wages, up to a maximum of fifteen dollars per day and accompanied by a

written agreement, if acceptance of facilities is voluntary on the part of the employee.

14. An employer may not discharge, discipline, threaten, discriminate, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:

    a. The employee, in good faith, reports a violation or suspected violation of any state or federal law to any governmental agency.

    b. The employee is requested by a governmental agency to participate in an investigation, hearing, or inquiry.

    c. The employee informs the employer that the employee is refusing an order to perform an activity that the employee knows violates any state or federal law.

    d. The employee has or may seek assistance of the department of labor pursuant to the provisions of North Dakota Century Code chapters 34-06 and 34-14.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

CHAPTER 46-02-04
PROFESSIONAL, TECHNICAL, CLERICAL, AND SIMILAR OCCUPATIONS MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER FOUR

46-02-04-01. Definitions.

1. "Professional, technical, clerical, and similar occupations" includes employees in professional, semiprofessional, laboratory, research, clerical, technical, and office occupations. The occupations include accountants, accounting clerks, appraisers, armored vehicle service employees, board markers bookkeepers, canvassers, checkers, checkroom attendants, circulation clerks, claim adjusters, classified advertising salespersons, collectors, compilers, computers, computer operators, dentists' assistants and attendants, developmentally disabled group home employees, instructors, interviewers, laboratory technicians, librarians and librarian assistants, lifeguards, licensed practical nurses, nurses and nurses aids, optometrists' and physicians' assistants and

attendants, pharmacists, physical and respiratory therapists, patrollers, pet groomers, secretaries, security guards, social workers, statisticians, stenographers, teachers and teachers' assistants, telephone, teletype, and telegraph operators, tellers, and typists. A "tipped employee" means any employee engaged in an occupation where the employee customarily and regularly receives more than thirty dollars a month in tips.

2. Administrative. The term "employee" employed in a bona fide administrative capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. The performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customer; or

   b. Who customarily and regularly exercises discretion and independent judgment.

3. Professional. The term "employee employed in a bona fide professional capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

   b. Work requiring the consistent exercise of discretion and judgment in its performance; and

   c. Work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

4. Executive. The term "employee employed in a bona fide executive capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. The management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof;

   b. Directing the work of two or more other employees therein; and

   c. The authority to hire or fire other employees or whose suggestions as to the hiring or firing and as to the

advancement and promotion or any other change of status of other employees will be given particular weight.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

46-02-04-02. Standards that apply.

1. The North Dakota minimum wage shall be no less than four dollars and twenty-five cents per hour effective August 1, 1991.

2. A tip credit of thirty-three percent may be allowed for tipped employees of any occupation. The employer may consider tips as part of wages, but such a wage credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined. Employees must retain all of their tips, except to the extent that they participate in a valid tip pooling or sharing arrangement.

3. A training wage may be paid to employees seventeen years of age or younger at a rate of eighty-five percent of the minimum wage for sixty days or two hundred forty hours whichever comes first. No individual may be employed at the training wage, in any number of jobs, for more than a total of sixty days. An employee hired at the training wage may not displace an employee earning a regular rate of pay.

4. Overtime must be paid at one and one-half times the regular rate of pay to any employees who work in excess of forty hours in any one week. Hospitals and residential care establishments may adopt, by agreement with the employees, a fourteen-day overtime period in lieu of the usual seven-day workweek, if the employees are paid at least time and one-half their regular rate for hours worked over eight in a day or eighty in a fourteen-day work period, whichever is the greater number of overtime hours. The following are completely exempt from the overtime provisions of the law:

   a. Any employee employed in a bona fide executive, administrative, or professional capacity.

   b. Any employee in technical and clerical occupations who earn more than two hundred fifty dollars per week and spend more than fifty percent of their time supervising two or more employees.

   c. Any employee engaged in an agricultural occupation.

d. Employees of shelters or other such related establishments whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship.

e. Employees employed in domestic service who reside in the household in which they are employed.

f. Straight commission salespersons in retail automobile, trailer, boat, aircraft, truck, or farm implement dealerships unless that salesperson is required to be on the premises for more than forty hours per week.

5. A minimum thirty-minute meal break must be provided to employees, if such is desired, in each shift exceeding five hours when there are two or more employees on duty. Collectively bargained agreements will prevail over this provision. Employees not allowed to leave the business location during the break period must be compensated at the regular rate of pay or provided with in-kind compensation, such as a meal, equal to or greater than the minimum wage.

6. Mandatory meetings and training; standby time on the premises; or "on call" as in an engaged to wait manner, as when the employee is required to remain at a specified location, available to the employer at all times, and unable to carry out day-to-day activities available to the employee when not on call; and traveltime from jobsite to jobsite, or from business to jobsite, are times to be compensated at the regular rate of pay.

7. Every employer must furnish to an employee each pay period a check stub or pay voucher which indicates hours worked, the rate of pay, and required state and federal deductions.

8. An employer may require an employee to purchase uniforms if the cost of such uniform does not bring that employee's wage below the hourly minimum wage for all hours worked during that pay period.

9. Vacation pay must be treated the same as wages after one year of employment and are due the same as other wages upon termination of employment.

10. Tip pooling is allowed if fifty percent plus one of the employees request such.

11. The commissioner may grant subminimum wages for students enrolled in vocational education or related programs as long as the wage is not below three dollars and sixty cents per hour.

12. Any employee employed on a casual basis in domestic service employment to provide babysitting services is exempt from minimum wage and overtime provisions.

13. The reasonable cost or fair value of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be considered part of the wages, up to a maximum of fifteen dollars per day and accompanied by a written agreement, if acceptance of facilities is voluntary on the part of the employee.

14. An employer may not discharge, discipline, threaten, discriminate, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:

    a. The employee, in good faith, reports a violation or suspected violation of any state or federal law to any governmental agency.

    b. The employee is requested by a governmental agency to participate in an investigation, hearing, or inquiry.

    c. The employee informs the employer that the employee is refusing an order to perform an activity that the employee knows violates any state or federal law.

    d. The employee has or may seek assistance of the department of labor pursuant to the provisions of North Dakota Century Code chapters 34-06 and 34-14.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

CHAPTER 46-02-05
AGRICULTURAL OCCUPATION MINIMUM WAGE AND WORK CONDITIONS ORDER NUMBER FIVE

46-02-05-01. Definitions.

1. "Agricultural occupation" includes employees in all branches of farming, meaning cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of agricultural and horticultural commodities, and raising of livestock, bees, fur-bearing animals, and poultry.

Agricultural employment includes construction, maintenance, and repair work incidental to the farm operation, and the cleaning, processing, preservation, loading, and transporting to market or storage of the farmer's own agricultural products. Industrial operations that are more akin to manufacturing than to agriculture are not included. Greenhouse work is not included. Service performed to others, including, but not limited to, boarding or training of animals, lawn care, and landscaping, are not included. A "tipped employee" means any employee engaged in an occupation where the employee customarily and regularly receives more than thirty dollars a month in tips.

2. Administrative. The term "employee" employed in a bona fide administrative capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. The performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customer; or

   b. Who customarily and regularly exercises discretion and independent judgment.

3. Professional. The term "employee employed in a bona fide professional capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

   b. Work requiring the consistent exercise of discretion and judgment in its performance; and

   c. Work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

4. Executive. The term "employee employed in a bona fide executive capacity" means but is not exclusive to any employee whose primary duty consists of:

   a. The management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof;

b. Directing the work of two or more other employees therein; and

c. The authority to hire or fire other employees or whose suggestions as to the hiring or firing and and as to the advancement and promotion or any other change of status of other employees will be given particular weight.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

46-02-05-02. Standards that apply.

1. The North Dakota minimum wage shall be no less than four dollars and twenty-five cents per hour effective August 1, 1991.

2. A tip credit of thirty-three percent may be allowed for tipped employees of any occupation. The employer may consider tips as part of wages, but such a wage credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must be able to show that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined. Employees must retain all of their tips, except to the extent that they participate in a valid tip pooling or sharing arrangement.

3. A training wage may be paid to employees seventeen years of age or younger at a rate of eighty-five percent of the minimum wage for sixty days or two hundred forty hours whichever comes first. No individual may be employed at the training wage, in any number of jobs, for more than a total of sixty days. An employee hired at the training wage may not displace an employee earning a regular rate of pay.

4. Overtime must be paid at one and one-half times the regular rate of pay to any employees who work in excess of forty hours in any one week. Hospitals and residential care establishments may adopt, by agreement with the employees, a fourteen-day overtime period in lieu of the usual seven-day workweek, if the employees are paid at least time and one-half their regular rate for hours worked over eight in a day or eighty in a fourteen-day work period, whichever is the greater number of overtime hours. The following are completely exempt from the overtime provisions of the law:

   a. Any employee employed in a bona fide executive, administrative, or professional capacity.

b. Any employee in technical and clerical occupations who earn more than two hundred fifty dollars per week and spend more than fifty percent of the employee's time supervising two or more employees.

c. Any employee engaged in an agricultural occupation.

d. Employees of shelters or other such related establishments whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship.

e. Employees employed in domestic service who reside in the household in which they are employed.

f. Straight commission salespersons in retail automobile, trailer, boat, aircraft, truck, or farm implement dealerships unless that salesperson is required to be on the premises for more than forty hours per week.

5. A minimum thirty-minute meal break must be provided to employees, if such is desired, in each shift exceeding five hours when there are two or more employees on duty. Collectively bargained agreements will prevail over this provision. Employees not allowed to leave the business location during the break period must be compensated at the regular rate of pay or provided with in-kind compensation, such as a meal, equal to or greater than the minimum wage.

6. Mandatory meetings and training; standby time on the premises; or "on call" as in an engaged to wait manner, as when the employee is required to remain at a specified location, available to the employer at all times, and unable to carry out day-to-day activities available to the employee when not on call; and traveltime from jobsite to jobsite, or from business to jobsite, are times to be compensated at the regular rate of pay.

7. Every employer must furnish to an employee each pay period a check stub or pay voucher which indicates hours worked, the rate of pay, and required state and federal deductions.

8. An employer may require an employee to purchase uniforms if the cost of such uniform does not bring that employee's wage below the hourly minimum wage for all hours worked during that pay period.

9. Vacation pay must be treated the same as wages after one year of employment and are due the same as other wages upon termination of employment.

10. Tip pooling is allowed if fifty percent plus one of the employees request such.

11. The commissioner may grant subminimum wages for students enrolled in vocational education or related programs as long as the wage is not below three dollars and sixty cents per hour.

12. Any employee employed on a casual basis in domestic service employment to provide babysitting services is exempt from minimum wage and overtime provisions.

13. The reasonable cost or fair value of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be considered part of the wages, up to a maximum of fifteen dollars per day and accompanied by a written agreement, if acceptance of facilities is voluntary on the part of the employee.

14. An employer may not discharge, discipline, threaten, discriminate, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:

    a. The employee, in good faith, reports a violation or suspected violation of any state or federal law to any governmental agency.

    b. The employee is requested by a governmental agency to participate in an investigation, hearing, or inquiry.

    c. The employee informs the employer that the employee is refusing an order to perform an activity that the employee knows violates any state or federal law.

    d. The employee has or may seek assistance of the department of labor pursuant to the provisions of North Dakota Century Code chapters 34-06 and 34-14.

History: Effective August 1, 1991.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-11, 34-06-12

TITLE 48

Board of Animal Health

JANUARY 1991

48-02-01-03. Cattle.

1. Tuberculosis. No test is required.

2. Brucellosis. Tests for brucellosis must be conducted by a state or federal laboratory or by a veterinarian approved in the state of origin. "Brucellosis test" means the blood agglutination test conducted at the state-federal laboratory in Bismarck. Vaccination is required. No female cattle over twelve months (three hundred sixty-five days) of age may be imported unless officially calfhood vaccinated against brucellosis and properly identified. Exempted from this requirement are cattle entering licensed monitored feedlots~~.~~ or when, in the estimation of the board, the following conditions exist:

   a. Drought conditions render pasture and feed supplies inadequate for North Dakota producers to maintain their breeding herds;

   b. It is necessary that North Dakota cattle producers secure out-of-state grazing or feeding facilities for their breeding herds; and

   c. The cattle are owned by legitimate North Dakota cattle producers with the intent to return the cattle to the North Dakota producers' premises upon completion of the grazing or feeding period.

3. Permits. Permits shall be required on all female cattle over twelve months (three hundred sixty-five days) of age. Permits shall be required on all cattle originating from any state where scabies may be introduced in shipments originating from such state at the discretion of the board.

4. **Dipping.** Dipping in a solution approved by the board shall be required on all cattle originating from states where scabies permits are required. Two dippings, ten to fourteen days apart, may be required on cattle originating from states determined by the board to have a large number of infested herds. In lieu of dipping, treatment with ivermectin administered by a licensed accredited veterinarian in accordance with the United States department of agriculture, guidelines for veterinary services, found in 9 CFR Part 73, is acceptable.

5. **Calves.** Calf permits are required on all imported calves under four months of age. Imported calves are not to be resold in less than sixty days. Purchasers must pick up imported calves at the sellers' premises. Calves accompanying dams are excluded from the requirements of this section.

History: Amended effective April 1, 1980; June 1, 1983; September 1, 1984; September 1, 1988; May 16, 1990.
General Authority: NDCC 36-01-08
Law Implemented: NDCC 36-01-08

TITLE 51

Milk Stabilization Board

51-03-02-12.1. Authorized discounts on milk products - Market area 1. The following authorized maximum volume discounts are authorized on sales of milk products. Said discounts must be based upon the average total monthly purchases of milk products from all suppliers for the preceding year.

	Discount Rate	
Monthly Volume	Full Service	Limited Service
0 gal. to 799 gal.	0 %	3 %
800 gal. to 1600 gal.	2 %	5 %
1601 gal. to 2400 gal.	3 %	6 %
2401 gal. to 3200 gal.	4 %	7 %
3201 gal. to 8000 gal.	5 %	9 %
8001 gal. and over	7 %	11%

A limited service program should be authorized in market areas nos. 1, 2, 3, 4, 5, 6, 7, and 8 for grocery store retailers. This limited service program should consist of the following:

1. Maximum delivery of three times per week to store cooler.

2. All orders preordered prior to delivery.

3. No in-store service, i.e., cleaning cases, stamping products, etc.

4. Personnel for store resets will be limited to dairy case setting only.

5. No returns on merchandise, except when product is found to be damaged or defective at time of delivery check-in.

6. No callback on delivery days.

A full service program should be authorized in market areas nos. 1, 2, 3, 4, 5, 6, 7, and 8 for retailers whose total monthly purchases of milk products from all suppliers for the preceding year exceed eight hundred gallons [3028.33 liters] per month. This full service program should consist of the following: Supplier will be responsible for maintaining adequate supply of product; product will be stocked and displayed on delivery days; product will be sold on a guaranteed sales basis; and personnel for store resets will be limited to dairy case resets only.

History: Effective June 1, 1990.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-02-13. Price filings on frozen dairy products. On or before ~~August 1, 1987~~ June 1, 1990, all dealers in all market areas shall file the uniform wholesale price at which ice cream, frozen malt ice cream (frost malt ice cream), flavored ice cream, fruit ice cream, nut ice cream, french ice cream, ice milk, fruit sherbet, fruit sherbines, and the mix from which any such product is made, will be sold by each dealer to retailers within the market area. New prices and amended prices must be filed at the office of the North Dakota milk stabilization board at Bismarck, North Dakota, at least ten days in advance of the effective date of any new price or amended price together with the date on which such filing becomes effective. Placing a price schedule in the mail shall constitute a filing.

Any dealer may meet competition without delay in connection with the sale of any such frozen dairy product provided such dealer shall file an amended price specifically stating that such amended price is for the purpose of meeting lawful competition before actually meeting such competition. A dealer desiring to meet the lower prices of a competitor may do so in such portions of the marketing area as are specified in such dealer's amended price filing for the purpose of meeting competition. The wholesale prices filed by a processor for the marketing area shall automatically be applicable to sales by distributors of that processor's products within such area unless said distributors file their own schedule of prices.

All price filings must be available at the office of the milk board for inspection and copying and may be disclosed by the board upon the written request of any person.

History: Amended effective November 1, 1980; July 1, 1981; November 1, 1983; April 1, 1984; August 1, 1987; June 1, 1990.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-02-15. Formula to determine changes in the class I wholesale and retail prices. Based upon the class I formula as ordered in section 51-03-02-06, for each hundredweight price change to dairy farmers for raw milk of ~~fifteen~~ sixty-nine cents per hundredweight

increase or decrease above ~~the thirteen dollars and fifty one cents hundredweight level,~~ or ~~twenty three cents per hundredweight price increase or decrease~~ below the ~~thirteen dollars and fifty one cents~~ thirteen dollars and twenty-eight cents base hundredweight ~~level, there will be a respective automatic price increase or decrease of one cent per half gallon at the retail and wholesale levels~~ price or an increase or decrease of $.001 in the federal market order number 68 butterfat differential based on $.118, the following factors will be used in determining adjustments in the class I wholesale and retail prices. Respective price changes will take effect the first Monday of the month in which they occur. Minimum wholesale and retail prices in effect December shall remain in effect until March first.

Item	Hundredweight Factor	B.F. Factor
Whole Milk 1/2 Gallon	$.0098900	$(.0001075)
2 % Milk	.0099130	(.0006465)
1 % Milk	.0099130	(.0010775)
Skim Milk	.0099245	(.0012945)
Buttermilk	.0099245	(.0012945)
Whole Chocolate	.0094645	(.0001029)
2 % Chocolate	.0094875	(.0006188)
1 % Chocolate	.0094875	(.0010313)
Skim Chocolate	.0094990	(.0012390)

All price adjustments at the retail level should be made to the nearest one cent per unit: wholesale to the nearest $.001 per unit. The foregoing Class I formula price changes shall be automatically adjusted without further amendment to this stabilization plan.

History: Amended effective November 1, 1983; June 26, 1989; June 1, 1990.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-03-14. Price filings on frozen dairy products. On or before ~~August 1, 1987~~ June 1, 1990, all dealers in all market areas shall file the uniform wholesale price at which ice cream, frozen malt ice cream (frost malt ice cream), flavored ice cream, fruit ice cream, nut ice cream, french ice cream, ice milk, fruit sherbet, fruit sherbines, and the mix from which any such product is made, will be sold by each dealer to retailers within the market area. New prices and amended prices must by filed at the office of the North Dakota milk stabilization board at Bismarck, North Dakota, at least ten days in advance of the effective date of any new price or amended price together with the date on which such filing becomes effective. Placing a price schedule in the mail shall constitute a filing.

Any dealer may meet competition without delay in connection with the sale of any such frozen dairy product provided such dealer shall file an amended price specifically stating that such amended price is for the purpose of meeting lawful competition before actually meeting such competition. A dealer desiring to meet the lower prices of a

competitor may do so in such portions of the marketing area as are specified in such dealer's amended price filing for the purpose of meeting competition. The wholesale prices filed by a processor for the marketing area shall automatically be applicable to sales by distributors of that processor's products within such area unless said distributors file their own schedule of prices.

All price filings shall be available at the office of the milk board for inspection and copying and may be disclosed by the board upon the written request of any person.

History: Amended effective November 1, 1983; April 1, 1984; August 1, 1987; June 1, 1990.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-03-16. Formula to determine changes in the class I wholesale and retail prices. Based upon the class I formula as ordered in section 51-03-03-06, for each hundredweight price change to dairy farmers for raw milk of ~~fifteen~~ sixty-nine cents per hundredweight increase or decrease above ~~the thirteen dollars and fifty one cents hundredweight level,~~ or ~~twenty three cents per hundredweight price increase or decrease~~ below the ~~thirteen dollars and fifty one cents~~ thirteen dollars and twenty-eight cents base hundredweight ~~level there will be a respective automatic price increase or decrease of one cent per half gallon at the retail and wholesale levels~~ price or an increase or decrease of $.001 in the federal market order number 68 butterfat differential based on $.118, the following factors will be used in determining adjustments in the class I wholesale and retail prices. Respective price changes will take effect the first Monday of the month in which they occur. Minimum wholesale and retail prices in effect December shall remain in effect until March first.

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Skim Milk	.0099245	(.0012945)
Buttermilk	.0099245	(.0012945)
Whole Chocolate	.0094645	(.0001029)
2 % Chocolate	.0094875	(.0006188)
1 % Chocolate	.0094875	(.0010313)
Skim Chocolate	.0094990	(.0012390)

All price adjustments at the retail level should be made to the nearest one cent per unit: wholesale to the nearest $.001 per unit. The foregoing class I formula price changes shall be automatically adjusted without further amendment to this stabilization plan.

History: Amended effective November 1, 1983; June 26, 1989; June 1, 1990.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)

Law Implemented: NDCC 4-18.1-07

51-03-04-14. Price filings on frozen dairy products. On or before ~~August 1, 1987~~ June 1, 1990, all dealers in all market areas shall file the uniform wholesale price at which ice cream, frozen malt ice cream (frost malt ice cream), flavored ice cream, fruit ice cream, nut ice cream, french ice cream, ice milk, fruit sherbet, fruit sherbines, and the mix from which any such product is made, will be sold by each dealer to retailers within the market area. New prices and amended prices must be filed at the office of the North Dakota milk stabilization board at Bismarck, North Dakota, at least ten days in advance of the effective date of any new price or amended price together with the date on which such filing becomes effective. Placing a price schedule in the mail shall constitute a filing.

Any dealer may meet competition without delay in connection with the sale of any such frozen dairy product provided such dealer shall file an amended price specifically stating that such amended price is for the purpose of meeting lawful competition before actually meeting such competition. A dealer desiring to meet the lower prices of a competitor may do so in such portions of the marketing area as are specified in such dealer's amended price filing for the purpose of meeting competition. The wholesale prices filed by a processor for the marketing area shall automatically be applicable to sales by distributors of that processor's products within such area unless said distributors file their own schedule of prices.

All price filings must be available at the office of the milk board for inspection and copying and may be disclosed by the board upon the written request of any person.

History: Amended effective November 1, 1983; April 1, 1984; August 1, 1987; June 26, 1989; June 1, 1990.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

51-03-04-16. Formula to determine changes in the class I wholesale and retail prices. Based upon the class I formula as ordered in section 51-03-04-06, for each hundredweight price change to dairy farmers for raw milk of ~~fifteen~~ sixty-nine cents per hundredweight increase or decrease above ~~the thirteen dollars and fifty one cents hundredweight level,~~ or ~~twenty three cents per hundredweight price increase or decrease~~ below the ~~thirteen dollars and fifty one~~ thirteen dollars and twenty-eight cents base hundredweight ~~level, there will be a respective automatic price increase or decrease of one cent per half gallon at the retail and wholesale levels~~ price or an increase or decrease of $.001 in the federal market order number 68 butterfat differential based on $.118, the following factors will be used in determining adjustments in the class I wholesale and retail prices. Respective price changes will take effect the first Monday of the month

in which they occur. Minimum wholesale and retail prices in effect December shall remain ineffect until March first.

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Whole Milk 1/2 Gallon	$.0098900	$(.0001075)
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2 % Chocolate	.0094875	(.0006188)
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Skim Chocolate	.0094990	(.0012390)

All price adjustments at the retail level should be made to the nearest one cent per unit: wholesale to the nearest $.001 per unit. The foregoing class I formula price changes shall be automatically adjusted without further amendment to this stabilization plan.

History: Amended effective November 1, 1983; June 26, 1989; June 1, 1990.
General Authority: NDCC 4-18.1-03, 4-18.1-07, 4-18.1-20, 28-32-03.1(3)
Law Implemented: NDCC 4-18.1-07

TITLE 59.5

State Personnel Board

FEBRUARY 1991

59.5-01-01-01. Organization of state personnel board.

1. History and functions. The 1975 legislative assembly passed a Central Personnel System Act, codified as North Dakota Century Code chapter 54-44.3. The Act created the state personnel board which oversees the development and administration of a unified system of personnel administration for the classified service of the state.

   The board is an administrative agency separate from the central personnel division of the office of management and budget, although the board and the division work closely together. The board promulgates ~~it's~~ its own rules, but also reviews the division's policies, procedures and plans, and may modify or repeal them. Additionally, the board can review and change pay ranges and classifications assigned to classified employee positions and hear appeals from classified employees who have satisfactorily completed their probationary period on employee grievances relating to demotion, suspension without pay, reduction-in-force, forced relocation, reprisal action, discrimination, and dismissal from state employment. The board may approve positions not to be included in the classified service. The board also hears discrimination appeals from job applicants and classified employees regardless of their status, as well as appeals from disqualified applicants for positions in the merit system.

   The state personnel board also serves as the North Dakota merit system council. In this capacity the board regulates the personnel policies and practices of the state agencies which are by statute subject to the merit system. The board's regulation of merit system agencies includes promulgating rules, approving policies and procedures, and conducting

hearings on complaints arising from those rules, policies, and procedures.

2. Board membership. The board is composed of a constitutionally elected official who is the chairman, a member appointed by the board of higher education, one member appointed by the governor, and two members elected by classified employees. The term of the constitutionally elected official is four years or the remainder of the official's term of office, whichever is shorter. Constitutionally elected officials meet at the expiration of the term of the elected member and select by a majority vote the constitutionally elected official who serves on the board. The terms of all other members are six years. Any vacancy in office is filled for the unexpired term in the same manner as the selection of the person vacating the office.

3. Meetings. The board organizes annually at its first meeting of each fiscal year. It elects a vice chairman to serve for a term of one year. The board meets at least six times a year and at such times and places as are specified by call of the chairman or any three members of the board. All meetings are open to the public with reasonable notice provided by the central personnel division. Three members constitute a quorum for the transaction of business. Three favorable votes are necessary for the passage of any resolution or taking of any official action by the board at any meeting.

4. Delegation of authority. The director, central personnel division, as secretary to the board, may issue a notice of hearing and specification of issues and appoint a hearing officer, other than the director, for evidentiary grievance hearings. The hearing officer, upon completion of the hearing, prepares ~~a summary of the facts and conclusions and~~ the findings of fact, conclusions of law, and a recommendation for the board's action. The hearing officer may issue a proposed order of dismissal prior to a hearing.

5. ~~Rule suspension. The board may suspend its rules whenever the public interest or the interest of any party to a procedure is not substantially prejudiced by such suspension.~~

~~6.~~ Board office. All requests for information or forms required by the rules and all submissions of appeal materials must be mailed to this address postage prepaid:

State Personnel Board
c/o Director, Central Personnel Division
~~State Capitol Building~~ 600 East Boulevard Avenue
Bismarck, North Dakota 58505-0120

History: Effective December 1, 1985; amended effective February 1, 1991.

General Authority: NDCC 54-42-03, 54-44.3
Law Implemented: NDCC 54-44.3

59.5-02-01-02. Requirements for internal agency grievance procedure. Each agency, department, institution, board, and commission which employs classified employees shall establish an internal grievance procedure which meets the following requirements:

1. A standard grievance form is used throughout the agency.

2. The agency define and enumerate the steps to be followed in processing the grievance, establish appropriate cutoff dates, and set reasonable time limitations to be followed by all parties.

3. The method of counting time shall be in working days.

4. Parties to the grievance are obligated to respond.

5. The employee is allowed a reasonable time during regular working hours, without loss of pay or benefits, to process a grievance.

6. ~~Prior to the termination of employment~~ When demotion, dismissal, or suspension without pay of a classified employee who has successfully completed the probationary period is being considered, the employer shall give a written notice of the reasons for such action, an explanation of the evidence, and provide an opportunity for the employee to respond in writing. After consideration of the information included or referenced in the written notice and the employee's response to the notice, if any, the employer may take the proposed action.

History: Effective December 1, 1985; amended effective February 1, 1991.
General Authority: NDCC 54-44.3
Law Implemented: NDCC 54-44.3-12.2

59.5-03-01-02. Appeal procedure.

1. The central personnel division must notify an applicant who fails to meet the minimum qualifications for a position of their disqualification and right to appeal by letter mailed to the applicant's last known address. If an applicant wishes to appeal the disqualification, the applicant shall file a written appeal to the director, central personnel division. The appeal must be postmarked no later than fifteen working days from the date ~~of mailing of~~ on the letter of notification of rejection by the central personnel division. The letter of appeal must specify the basis upon which the applicant relies

to assert that the applicant meets the minimum qualifications for the position.

2. The director, central personnel division, has thirty working days from the receipt of the appeal to review the appeal and provide a written response to the applicant.

3. If the applicant does not agree with the response of the director, central personnel division, the applicant may appeal to the state personnel board. The letter of appeal must be ~~commenced by the applicant with a written complaint~~ addressed to the State Personnel Board, care of Director, Central Personnel Division, 600 East Boulevard Avenue, Bismarck, ND 58505-0120, and must be postmarked no later than fifteen working days from the date of the director's response to the appeal. ~~The complaint must specify the basis upon which the applicant relies to assert that the applicant meets the minimum qualifications for the position.~~

4. Upon receipt of a ~~written complaint~~ letter of appeal, the director, central personnel division, in the capacity of secretary to the board shall schedule the appeal for hearing before the board. The director shall give ~~adequate~~ notice to the applicant of the hearing date ~~within~~ at least ten working days ~~from receipt of the request~~ prior to the meeting date.

5. The central personnel division shall provide to each member of the state personnel board and the applicant a copy of each document to become a part of the appeal file. The appeal file must consist of, but is not limited to, copies of the following:

   a. The original application form.

   b. The letter of appeal to the director, central personnel division.

   c. All written correspondence relating to the original application and appeal.

   d. The written complaint commencing the appeal before the state personnel board.

   e. Other relevant documents submitted by the applicant or the central personnel division.

6. The appeal file must be disseminated to all participating parties at least ten working days prior to the board hearing date. Documents submitted by any participant after the appeal file is disseminated may cause the board to delay the hearing, generally to the next scheduled board meeting date.

7. The applicant and a representative may appear at the board meeting for the hearing of the disqualification complaint. The central personnel division shall first make an oral presentation relative to the matter under appeal. The applicant or representative shall make an oral presentation relative to the matter under appeal following the presentation of the central personnel division. Such presentations should be limited to ten minutes and directly relate to the issues of the appeal. The board may ask questions of those making oral presentations.

8. The central personnel division shall notify the applicant, appointing authority, and respective agency in writing of the board's decision within five working days following the board's hearing of the appeal. Notification must be in writing and must be delivered in person or sent by certified mail. The appointing authority and the respective agency shall implement the state personnel board's decision within the time period specified by the board.

9. An agency or applicant who is dissatisfied with the decision of the state personnel board may petition the board for a rehearing. The petition must be commenced with a written request to the board postmarked no later than fifteen working days from the date the board's decision was mailed. The request must specify the reason for the rehearing. The state personnel board may grant or deny the request based on the board's determination whether the reason specified has significant merit.

History: Effective December 1, 1985; amended effective February 1, 1991.
General Authority: NDCC 54-42-03, 54-44.3-07
Law Implemented: NDCC 54-42-03, 54-44.3-07

59.5-03-03-12. Appeals procedure.

1. Unless the employee and appointing authority have agreed to waive the requirements of the internal agency grievance procedure as provided for in section 59.5-03-03-10, an employee shall complete the employing agency's internal grievance procedure prior to submitting an appeal to the board for an appeal hearing.

2. An employee shall submit ~~the properly completed prescribed grievance form~~ a written notification of their intent to appeal to the state personnel board in care of the director, central personnel division, within ~~ten~~ fifteen working days of receipt of the results of the final step of the agency grievance procedure. The director, central personnel division, serving as secretary to the state personnel board,

shall appoint a hearing officer who may conduct an evidentiary hearing on behalf of the state personnel board.

3. The hearing officer shall initially determine whether the state personnel board has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed prior to activating the final step in the grievance process. If it is initially determined that the board does not have jurisdiction in the matter of the appeal, within ten working days from receipt of the appeal, a written proposed order dismissing the complaint submitted to the state personnel board must be provided to the appellant and the state personnel board. The state personnel board shall consider each proposed order of dismissal at its next regularly scheduled meeting, hear comments from the hearing officer and the appellant, and decide whether to proceed with a hearing or issue an order of dismissal. The board shall provide a copy of its order to all parties. If it is initially determined that the board has jurisdiction over the appeal matter, the hearing officer shall arrange a hearing.

4. After the hearing officer has conducted the hearing and investigated and gathered all pertinent facts, the hearing officer shall make and present a summary of the facts and conclusions and a recommendation to the state personnel board for a decision.

5. The central personnel division shall provide to each member of the state personnel board, the appellant, and the agency appointing authority a copy of each document to become a part of the appeal file. The appeal file must consist of, but is not limited to, copies of the following:

   a. The written complaint commencing the appeal before the state personnel board.

   b. The grievance form and all attachments.

   c. All written correspondence relating to the original grievance including written requests for extension of time frames and notices of extensions granted.

   d. The hearing officer's summary of facts, conclusions, and recommendation.

   e. Any written briefs or statements by the parties concerned submitted after the hearing.

6. The appeal file must be disseminated to all participating parties at least ten working days prior to the board hearing date. ~~Documents submitted by any participant after the appeal file is disseminated may cause the board to delay the hearing, generally to the next regularly scheduled board meeting date.~~

7. At the scheduled meeting of the board, the board shall ~~review the appeal file~~ consider the appeal based on the content of the appeal file and no other documents or testimony will be taken during the board proceedings. Oral presentations relative to the matter under appeal may be made by the appellant, appointing authority, or their representative. Such presentations must be limited to summarizing their written briefs or ~~statements submitted after~~ testimony and evidence presented at the hearing and may not exceed ten minutes in length. The employee's agency shall reimburse the appealing employee for the required time, travel, meals, and lodging expenses to appear before the board. The reimbursement may not exceed the amounts allowed state employees. Reimbursement may not be made to a dismissed employee unless the employee is reinstated.

8. The central personnel division shall notify the employee and the appointing authority in writing of the board's decision within fifteen working days of the board's hearing of the appeal by mailing them the findings of fact, conclusions of law, and order of the board. The appointing authority and the respective agency shall implement the board's decision within the time period specified by the board.

9. An agency or appellant who is dissatisfied with the decision of the state personnel board may petition the board for a rehearing. The petition must be commenced with a written request to the board postmarked no later than fifteen working days from the date the board's decision was mailed. The request must specify the reason for the rehearing. The state personnel board may grant or deny the request based on the board's determination whether the reason specified has significant merit.

History: Effective December 1, 1985; amended effective February 1, 1991.
General Authority: NDCC 54-44.3, 54-44.3-07
Law Implemented: NDCC 54-44.3, 54-44.3-07, 54-44.3-12

59.5-03-04-02. Appeals procedure.

1. An employee shall complete the employing agency's internal grievance procedure prior to submitting an appeal to the board for an appeal hearing. Job applicants may appeal directly to the board.

2. An employee shall submit the properly completed prescribed grievance form to the state personnel board in care of the director, central personnel division, within ten working days of receipt of the notice of the final step of the agency grievance procedure. Job applicants shall submit a complaint to the state personnel board in care of the director, central

personnel division, within ten working days of their knowledge of the discriminatory action. Job applicants and classified employees may also file a complaint directly with the North Dakota department of labor. The complaint must state the basis upon which the applicant maintains discrimination occurred. The director, central personnel division, serving as secretary to the state personnel board, shall appoint a hearing officer who may conduct an evidentiary hearing on behalf of the state personnel board.

3. The hearing officer shall initially determine whether the state personnel board has jurisdiction over the subject matter of the appeal, and in the case of an employee, whether all rules were followed prior to activating the final step in the grievance process. If the hearing officer is unable to determine whether the state personnel board has jurisdiction over the subject matter of the appeal, a hearing may be conducted which is limited to ascertaining the facts needed to determine jurisdiction. If it is ~~initially~~ determined that the board does not have jurisdiction in the matter of the appeal, ~~within ten working days from receipt of the appeal,~~ a written proposed order dismissing the ~~complaint submitted to the state personnel board~~ appeal must be provided to the appellant and the state personnel board. The state personnel board shall consider each proposed order of dismissal at its next regularly scheduled meeting and hear comments from the hearing officer and the appellant and decide whether to proceed with a hearing or issue an order of dismissal. The board shall provide a copy of its order to all parties. If it is ~~initially~~ determined that the board has jurisdiction over the appeal matter, the hearing officer shall arrange a hearing.

4. After the hearing officer has conducted the hearing and investigated and gathered all pertinent facts, the hearing officer shall make and present ~~a summary of the facts and conclusions~~ the findings of fact, conclusions of law, and a recommendation to the state personnel board for a final administrative decision.

5. The central personnel division shall provide to each member of the state personnel board, the appellant, and the agency appointing authority a copy of each document to become a part of the appeal file. The appeal file must consist of, but is not limited to, copies of the following:

   a. The ~~written complaint commencing the appeal before~~ letter of appeal to the state personnel board.

   b. The grievance appeal form ~~or complaint~~ and all attachments.

c. All written correspondence relating to the original ~~grievance/complaint~~ grievance including written requests for extension of time frames and notices of extensions granted.

d. The hearing officer's ~~summary of the facts~~ findings of fact, conclusions of law, and recommendation.

e. All exhibits presented at the hearing.

f. Any written briefs or statements submitted after the hearing.

6. The appeal file must be disseminated to all participating parties at least ten working days prior to the board hearing date. ~~Documents submitted by any participant after the appeal file is disseminated may cause the board to delay the hearing, generally to the next scheduled board meeting date.~~

7. At the scheduled meeting of the board, the board shall ~~review the appeal file~~ consider the appeal based on the content of the appeal file and no other documents or testimony will be taken during the board proceedings. Oral presentations relative to the matter under appeal may be made by the appellant, appointing authority, or their representative. Such presentations must be limited to summarizing their written briefs or ~~statements submitted after~~ testimony and evidence presented at the hearing and may not exceed ten minutes in length. The employee's agency shall reimburse the appealing employee for the required time, travel, meals, and lodging expenses to appear before the board. The reimbursement may not exceed the amounts allowed state employees. Reimbursements may not be made to a dismissed employee unless the employee is reinstated.

8. The central personnel division shall notify the employee and the appointing authority in writing of the board's decision within fifteen working days of the board's hearing of the appeal by ~~mailing~~ sending them the findings of fact, conclusions of law, and order of the board. Notification must be delivered in person or sent by certified mail. The appointing authority and the respective agency shall implement the board's decision within the time period specified by the board.

9. An agency or appellant who is dissatisfied with the decision of the state personnel board may petition the board for a rehearing. The petition must be commenced with a written request to the board postmarked no later than fifteen working days from the date the board's decision was mailed. The request must specify the reason for the rehearing. The state personnel board may grant or deny the request based on the

board's determination whether the reason specified has significant merit.

History: Effective December 1, 1985; amended effective February 1, 1991.
General Authority: NDCC 54-44.3, 54-44.3-07
Law Implemented: NDCC 54-44.3, 54-44.3-07, 54-44.3-12

TITLE 65.5

Committee on Protection and Advocacy

DECEMBER 1990

STAFF COMMENT: Title 65.5 contains all new material but is not underscored so as to improve readability.

ARTICLE 65.5-01

COMMITTEE ON PROTECTION AND ADVOCACY

CHAPTER 65.5-01-01
ORGANIZATION OF COMMITTEE

65.5-01-01-01. Organization and functions of the committee on protection and advocacy.

1. Organization of committee.

   a. History. The protection and advocacy project was created in 1977 as the result of a federal mandate. On August 31, 1982, the United States federal district court of the

district of North Dakota issued a permanent injunction in Association for Retarded Citizens of North Dakota v. Olson, 561 F.Supp. 470 (D.N.D. 1982) affirmed 713 F.2d 1384 (8th Cir. 1983) addressing the responsibilities of the state of North Dakota with respect to individuals with developmental disabilities. On August 8, 1984, Governor Olson issued executive order 1984-9 which placed the administrative supervision and direction of the statewide protection and advocacy program under the executive committee of the governor's council on human resources. Following passage by Congress of the Protection and Advocacy for Mentally Ill Individuals Act on May 23, 1986, the project started providing advocacy services for individuals with mental illness. In 1989, the legislative assembly passed House Bill No. 1205 which provided that the governor shall appoint a committee on protection and advocacy to be responsible for the administrative supervision of the project. The bill also provided that the committee on protection and advocacy must operate independently of the governor or any state agency that provides treatment, services, or habilitation to persons with developmental disabilities or mental illness.

b. Membership of the committee on protection and advocacy must consist of seven persons appointed by the governor. Initially, four members must be appointed for two-year terms and three members must be appointed for one-year terms. Future appointments must be for two-year terms unless the appointee is filling an uncompleted term. Vacancies must be filled by appointment of the governor. Four members constitute a quorum for the transaction of business. A majority of the members present is required for any committee action.

c. Executive director. The committee shall employ an executive director. The executive director shall perform the duties specified by statute and as delegated by the committee.

2. Committee officers - Functions and duties. The committee shall adopt bylaws providing for the election from its membership of a chairperson, vice chairperson, or other officers. The terms and duties of the officers must be established by the bylaws.

History: Effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 25-01.3-02; S.L. 1989, Ch. 333, § 2

CHAPTER 65.5-01-02
DEFINITIONS

Section
65.5-01-02-01 Definitions

65.5-01-02-01. Definitions. As used in this article, unless the context otherwise requires:

1. "Access to records" means the right of inspection of records pertaining to a client or group of clients, including the right to make copies of such records.

2. "Caretaker" means the person identified in subsection 4 of North Dakota Century Code section 25-01.3-01.

3. "Client" means a person identified in subsection 8 of North Dakota Century Code section 25-01.3-01 as being eligible for services including an individual who is deceased or whose whereabouts are unknown.

4. "Consent" means voluntary permission which is based upon full disclosure of facts necessary to make the decision, given by an individual who has the ability to understand such facts. Consent by an adult with developmental disabilities or mental illness, who is not subject to a decree of incapacity affecting competency to enter into a legal contract under North Dakota Century Code chapter 30.1-28, given to a representative of the project is presumptively a proper consent, unless there is clear indication of the absence of full disclosure, voluntariness, or requisite mental ability.

5. "Guardian" means a person appointed to represent a ward pursuant to North Dakota Century Code chapter 30.1-27 or 30.1-28.

6. "Monitoring" means the review of habilitation or treatment plans, program plans, educational plans, facilities and programs, and all other services and care provided to persons with developmental disabilities or mental illness, including implementation of such plans.

7. "Probable cause" means reasonable grounds for the belief that a fact is more likely true than not true.

8. "Project" is as defined in subsection 14 of North Dakota Century Code section 25-01.3-01.

9. "Records" means all records including those identifying specific clients, including staff notes and logs maintained by a facility; all individual records of treatment or care

facilities including reports prepared by any staff of a facility rendering care or treatment; reports by an agency investigating incidents of abuse, neglect, exploitation, and injury occurring at such facility; discharge planning records; hospital, psychiatric, psychological, medical care records; school or education records; and records otherwise maintained by facilities regarding general care of clients, including facility policies and regulations, staff ratios, staff training records, and employee records.

History: Effective December 1, 1990.
General Authority: NDCC 25-01.3-07
Law Implemented: NDCC 25-01.3-07; S.L. 1989, Ch. 333, § 7

CHAPTER 65.5-01-03
ACCESS TO RECORDS

65.5-01-03-01. Access to records - Client representation - Investigation of reports of abuse, neglect, or exploitation and complaints.

1. The project will have access to records of a client for representation of the client or for investigation of reports of abuse, neglect, exploitation, or complaints, when those records are subject to confidentiality requirements imposed by statute, administrative regulation, or court order, consistent with such statute, administrative regulation, or court order, if:

   a. For an adult, release is consented to by a client, or a client's guardian.

   b. For a minor, release is consented to by a parent or guardian.

   c. The client is unable to provide consent by reason of mental or physical condition, does not have a guardian or other legal representative, and either:

      (1) The project has received a report or complaint as defined in North Dakota Century Code section 25-01.3-01; or

      (2) There is probable cause to believe:

(a) The client has been subjected to abuse, neglect, or exploitation; or

(b) There is a lack of compliance with federal or state laws or rules with respect to the client's habilitation or treatment plans, program plans, educational plans, or other services and care.

d. A client's guardian has refused to consent, the project has probable cause to believe the guardian is not acting in the best interest of the client, and either:

(1) The project has received a report or complaint as defined in North Dakota Century Code section 25-01.3-01; or

(2) There is probable cause to believe:

(a) The client has been subjected to abuse, neglect, or exploitation; or

(b) There is a lack of compliance with federal or state laws or rules with respect to the client's habilitation or treatment plans, program plans, educational plans, or other services and care.

2. The project will have access to records maintained by a facility for representation of a client or for investigation of reports of abuse, neglect, exploitation, or complaints, when those records are not subject to confidentiality requirements imposed by statute, administrative regulation, or court order.

History: Effective December 1, 1990.
General Authority: NDCC 25-01.3-07
Law Implemented: NDCC 25-01.3-07; S.L. 1989, Ch. 333, § 7

CHAPTER 65.5-01-04
AUTHORITY OF THE PROJECT

65.5-01-04-01. Authority of the project - Representation.

1. Representation for specific clients may be provided by the project consistent with North Dakota Century Code section 25-01.3-11 if:

a. For an adult, services are consented to by the client or the client's guardian.

b. For a minor, services are consented to by the client's parent or the client's guardian.

c. The client is unable to provide consent by reason of mental or physical condition, does not have a guardian or other legal representative, and either:

(1) The project has received a report or complaint as defined in North Dakota Century Code section 25-01.3-01; or

(2) There is probable cause to believe:

(a) The client has been subjected to abuse, neglect, or exploitation; or

(b) There is a lack of compliance with federal or state laws or rules with respect to the client's habilitation or treatment plans, program plans, educational plans, or other services and care.

d. A client's guardian has refused to consent, the project has probable cause to believe the guardian is not acting in the best interest of the client, and either:

(1) The project has received a report or complaint as defined in North Dakota Century Code section 25-01.3-01; or

(2) There is probable cause to believe:

(a) The client has been subjected to abuse, neglect, or exploitation; or

(b) There is a lack of compliance with federal or state laws or rules with respect to the client's habilitation or treatment plans, program plans, educational plans, or other services and care.

2. The project shall attempt to obtain a signed authorization from each client to whom representation is offered. A copy of such signed authorization, if received, must be provided to the client and the client's guardian.

3. This section does not limit the ability of the project to represent clients under 42 U.S.C. 6042, 42 U.S.C. 10805, or North Dakota Century Code section 25-01.3-06 to the extent authority is granted to the project thereunder.

History: Effective December 1, 1990.

General Authority: NDCC 25-01.3-06
Law Implemented: NDCC 25-01.3-06

65.5-01-04-02. Authority of the project - Investigation. The project may investigate incidents of possible abuse, neglect, or exploitation reported to the project or which the project has probable cause to believe have occurred, pursuant to North Dakota Century Code chapter 25-01.3. If the project determines that a client is unable to protect himself or herself from abuse, neglect, or exploitation, the project may take such action as is necessary to provide for protection of the client through essential services, subject to the limitations of North Dakota Century Code section 25-01.3-11.

History: Effective December 1, 1990.
General Authority: NDCC 25-01.3-06
Law Implemented: NDCC 25-01.3-06

TITLE 69

Public Service Commission

DECEMBER 1990

69-02-07-01. Generally. An application for the promulgation, amendment, repeal, or adoption of any commission rule or regulation shall state the precise wording of the proposed rule and regulation and shall state briefly the reasons for such promulgation, amendment, repeal, or adoption. The commission may, at any time, propose adoption, amendment, or repeal of any rule or regulation. Hearings will be held on all proposed substantive rules and may also be held on proposed procedural rules.

History: Amended effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 49-01-07

69-02-07-02. Notice.

1. The commission will issue a notice that the rules are proposed and set for hearing which will:

   a. Furnish a brief explanation of the purpose of the proposed rule.

   b. Specify a location where the text of the proposed rule may be reviewed.

   c. Advise all interested persons of the opportunity to submit written comments and to appear and testify at the hearing to offer oral testimony.

   d. Provide the address to which written comments may be sent.

   e. Specify the date, time, and place of the hearing.

2. The commission will publish notice of hearing twice in each daily newspaper of general circulation in the state. The commission will file the notice of hearing with the legislative council. The commission will cause the first publication and the filing with the legislative council to occur at least thirty days before the hearing.

3. The public comment period on the proposed adoption, amendment, or repeal of any rule under this article will close at the end of the public hearing, unless extended by the commission.

4. The commission will consider all written comments and oral testimony received before adoption, amendment, or repeal of any rule under this article and make a written record of its consideration.

History: Effective December 1, 1990.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-02, 49-01-07

69-09-02-35. Installation and maintenance - Conformance to National Electrical Safety Code. The installation and maintenance of electric supply and communication lines shall conform to rules and regulations established in the ~~1987~~ 1990 edition of the National Electrical Safety Code, issued August 1, ~~1986~~ 1989, which is adopted by reference. Copies of these regulations may be obtained from the public service commission, state capitol, Bismarck, North Dakota 58505-0480.

History: Amended effective September 1, 1984; January 1, 1988; December 1, 1990.
General Authority: NDCC 49-02-04
Law Implemented: NDCC 49-02-04, 49-20-02

69-10-03-01. National ~~bureau~~ institute of standards and technology handbook 44. Except as modified in this article, the specifications, tolerances, and other technical requirements for commercial weighing and measuring devices in North Dakota shall conform to the requirements of the ~~1988~~ 1990 edition of the National ~~Bureau~~ Institute of Standards and Technology Handbook 44, issued September ~~1987~~ 1989, which is adopted by reference. Copies of the handbook may be obtained from the public service commission, state capitol, Bismarck, North Dakota 58505-0480.

History: Amended effective October 1, 1988; December 1, 1990.
General Authority: NDCC 64-02-03
Law Implemented: NDCC 64-02-07

FEBRUARY 1991

69-04-03-01. ~~Standards for rail carrier rates.~~

~~1. Except as provided in subsections 2 and 3 and unless a rate would be prohibited by title 49 of the United States Code for transportation performed in interstate commerce, a rail carrier may establish any rate for transportation or other service provided by the carrier.~~

~~2. If the commission determines, under section 69-04-03-07, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by the carrier for the transportation must be reasonable. In determining if a rate is reasonable, the commission will recognize the policy of 49 U.S.C. 10101a that rail carriers shall earn adequate revenues as established by the interstate commerce commission under 49 U.S.C. 10704.~~

~~3. A rate for transportation or other service provided by a rail carrier may not be established below a reasonable minimum. Any rate for transportation by a rail carrier that does not contribute to the going concern value of the carrier is presumed to be below a reasonable minimum. A rate that contributes to the going concern value of the carrier is conclusively presumed not to be below a reasonable minimum.~~

Intrastate regulatory standards. Intrastate rail rates will be regulated in accordance with federal standards in effect as of May 22, 1990, prescribed in the Interstate Commerce Act [Title 49, United States Code], corresponding Interstate Commerce Commission rules [Title 49, Code of Federal Regulations], the interstate commerce commission decision In the Matter of Ex Parte 388 A, State Intrastate Rail Rates Authority, Public Law 96-448, Recertification Process, 5 I.C.C. 2d 680 (1989). Copies of the laws and rules are available in the public service commission or the supreme court law library.

History: Effective September 1, 1982; amended effective February 1, 1991.
General Authority: NDCC 49-10.1-03
Law Implemented: NDCC 49-10.1-01

69-04-03-02. Burden of proof. ~~In any proceeding to determine the reasonableness of a rate under subsection 2 of section 69-04-03-01:~~

~~1. The shipper challenging the rate shall have the burden of proving that the rate is not reasonable if:~~

~~a. The rate is authorized under section 69-04-03-06, and results in a revenue-variable cost percentage for the transportation to which the rate applies that is less than the lesser of the percentages described in paragraph 1 of subdivision c of subsection 5 of section 69-04-03-06; or~~

~~b. The rate does not meet the description set forth in subdivision a of this subsection, but the commission does not begin an investigation proceeding under section 69-04-03-05 to determine if the rate is reasonable.~~

~~2. The rail carrier establishing the challenged rate shall have the burden of proving that the rate is reasonable if:~~

~~a. The rate is greater than that authorized under section 69-04-03-06, or results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in paragraph 1 of subdivision c of subsection 5 of section 69-04-03-06; and~~

~~b. The commission begins an investigation proceeding under section 69-04-03-05 to determine if such rate is reasonable.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982; amended effective July 1, 1984.~~

General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-03. Minimum rates.

~~1. The objective of the provisions of this section is to accord rail carriers maximum flexibility to lower rates in order to meet competition or otherwise attract traffic. A rate that does not contribute to the going concern value of the proponent carrier is presumed not to be reasonable while a rate that does contribute to the going concern value is conclusively presumed reasonable.~~

a. The presumptive cost floor is the sum of the line haul cost of lading, applicable switching costs, and station clerical costs. A rate that does not equal or exceed the presumptive cost floor is presumed unreasonable.

b. The sum of the presumptive cost floor and any other costs that are proven by a protestant to vary directly with the particular movement to which a challenged rate is applicable is the directly variable cost of providing the service.

c. A rate that equals or exceeds the directly variable cost of providing the service is conclusively presumed to contribute to the going concern value and is thus reasonable.

d. A party wishing to challenge the minimum reasonableness of a rate must prove either that it is not at least equal to the presumptive cost floor or that it is equal to the presumptive cost floor but that there are other specific expenses that vary directly with the level of the particular movement. In either case, available cost data from Rail Form A or other acceptable costing systems may be used to show that the challenged rate is unlikely to cover either presumptive cost floor or directly variable cost. This showing can be rebutted through the use of actual movement cost data.

2. Upon the filing of a complaint alleging that a rate is below a reasonable minimum, the commission will take final action on the complaint by the ninetieth day after the date the complaint is filed.

3. If the commission determines, based on the record after opportunity for a hearing, that a rate is below a reasonable minimum, the commission will order the rate to be raised but only to the minimum level required by section 69-04-03-01. The complainant shall have the burden of proving that the rate is below a reasonable minimum.

4. In the determination of variable costs for purposes of minimum rate regulation, the commission will, on application of the rail carrier proposing the rate, determine only the costs of the carrier and only those costs of the specific service in question unless the specific information is not available.

Repealed effective February 1, 1991.

History: Effective September 1, 1982; amended effective July 1, 1984.
General Authority: NDCC 49-10.1-03
Law Implemented: NDCC 49-10.1-01

69-04-03-04. Rate prescription.

~~1. When the commission, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation, or that a classification rule or practice of that carrier, would violate subtitle IV of title 49 of the United States Code for transportation performed in interstate commerce, the commission may prescribe the rate (including a maximum or minimum rate or both), classification, rule, or practice to be followed. The commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the commission.~~

~~2. The commission will make an adequate and continuing effort to assist rail carriers in attaining revenue levels prescribed by the interstate commerce commission that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. However, a rate, classification, rule, or practice of a rail carrier may be maintained at a particular level to protect the traffic of another carrier or mode of transportation only if the commission finds that the rate or classification, or rule or practice related to it, reduces or would reduce the going concern value of the carrier charging the rate.~~

~~3. In a proceeding involving a proposed increase or decrease in rail carrier rates, the commission will specifically consider allegations that the increase or decrease would change the rate relationships between commodities, ports, places, regions, areas, or other particular descriptions of traffic, and have a significant adverse effect on the competitive position of shippers or consignees served by the rail carrier proposing the increase or decrease. The commission will investigate to determine if the change or effect would violate subtitle IV of title 49 of the United States Code for transportation performed in interstate commerce when it finds that those allegations are substantially supported on the record. The investigation may be made either before or after the proposed increase or decrease becomes effective and either in that proceeding or in another proceeding.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~

General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-05. Investigation and suspension.

1. When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate is filed with the commission by a rail carrier, the commission may begin a proceeding to determine if the proposed rate, classification, rule, or practice would violate subtitle IV of title 49 of the United States Code for transportation performed in interstate commerce. The commission will give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading in response to its decision to begin the proceeding.

2. If the commission does not complete a proceeding under this section and make its final decision by the end of the fifth month after the rate, classification, rule, or practice was to become effective, the rate, classification, rule, or practice is effective at the end of that time period, or if already in effect at the end of that time period, remains in effect unless the commission determines a final decision cannot be made within five months, in which instance it may take an additional three months to complete the proceeding and make its final decision, except that if a rail carrier files a change in a rate, or a change in a classification, rule, or practice that has the effect of changing a rate, that adjusts the rate to the rate charged on similar traffic in interstate or foreign commerce, and the commission does not act finally on the change by the one hundred twentieth day after it was filed, the interstate commerce commission will have exclusive jurisdiction to prescribe a rate for the transportation affected by the change.

3. If an interested party has filed a complaint under subsection 1, the commission may set aside a rate, classification, rule, or practice that has become effective under this section if the commission finds it would be in violation of chapter 107 of title 49 of the United States Code for transportation performed in interstate commerce.

4. a. The commission will not suspend a proposed rate, classification, rule, or practice during the course of a commission proceeding under this section unless it appears from the specific facts shown by the verified statement of a person that:

   (1) It is substantially likely that the protestant will prevail on the merits;

   (2) Without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and

(3) Because of the peculiar economic circumstances of the protestant, the provisions of subsection 5 do not protect the protestant.

b. The burden shall be on the protestant to prove the matters described in subdivision a.

5. If the commission does not suspend a proposed rate increase under subsection 4, the rail carrier shall account for all amounts received under the increase until the commission completes its proceedings under subsection 2. The accounting shall specify by whom and for whom the amounts are paid. When the commission takes final action, the carrier shall refund to the person for whom the amounts were paid that part of the increased rate found to be unreasonable, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States government having a duration of ninety days.

6. If a rate is suspended under subsection 4 and any portion of such rate is later found to be reasonable under this chapter the carrier shall collect from each person using the transportation to which the rate applies the difference between the original rate and the portion of the suspended rate found to be reasonable for any services performed during the period of suspension, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States government having a duration of ninety days.

7. If any portion of a proposed rate decrease is suspended under subsection 4 and later found to be reasonable under this chapter the rail carrier may refund any part of the portion of the decrease found to comply with this chapter if the carrier makes the refund available to each shipper who participated in the rate, in accordance with the relative amount of such shipper's traffic transported at such rate.

8. a. Notwithstanding the provisions of sections 69-04-03-11 and 69-04-03-14, a rail carrier may waive the collection of amounts due under subsection 6 of this section if the amounts are not significant.

b. If a rail carrier wishes to waive collection of amounts due under subsection 6, which are more than two thousand dollars, a petition for appropriate authority should be filed by the carrier by submitting a Petition to Waive Insignificant Amounts. These petitions should contain the following information:

(1) The name and address of the customer for whom the carrier wishes to waive collection.

~~(2) The name and addresses of the carriers involved in the intended waiver and a statement certifying that all carriers concur in the action.~~

~~(3) The amount intended to be waived.~~

~~(4) The number of the investigation and suspension case involved, the beginning and ending dates of the suspension period, and any other pertinent tariff information.~~

~~(5) The points of origin and destination of the shipments and the routes of movement, if relevant.~~

~~c. If a rail carrier wishes to waive collection of amounts due under subsection 6 which are two thousand dollars or less, no petition need be filed prior to waiver, provided that this exemption may be invoked by a carrier only once for any person who uses the suspended rate during the suspension period. A Letter of Disposition informing the commission of the action taken, the date of the action, and the amount waived shall be submitted to the commission within thirty days of the waiver.~~

~~d. Any interested person may protest the granting of a Petition to Waive Insignificant Amounts by filing a letter of objection within thirty days of commission receipt of the petition. Letters of objection shall clearly state the reasons for the objection, and shall certify that a copy of the letter of objection has been served on all parties named in the petition. A period of fifteen days will be allowed for reply.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982, amended effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-06. Rate flexibility zone.

~~1. In this section:~~

~~a. "Adjusted base rate" means the base rate for the transportation of a particular commodity multiplied by the latest rail cost adjustment factor published by the interstate commerce commission pursuant to 49 U.S.C. 10707a(a)(2).~~

~~b. "Base rate" means, with respect to the transportation of a particular commodity:~~

(1) For the twenty-four-month period beginning on October 1, 1980, the rate in effect on October 1, 1980;

(2) For the twenty-four-month period beginning on October 1, 1982, the rate in effect on October 1, 1982, and

(3) For the five-year period beginning on October 1, 1984, and for each subsequent five-year period, the rate in effect on the first day of the applicable five-year period.

If no rate exists for the transportation of a particular commodity on October 1, 1980, the base rate for the transportation of such commodity shall be the rate established by the rail carrier (divided by the latest rail cost adjustment factor published by the interstate commerce commission), unless such rate is found to be unreasonable by the commission, in which case the base rate shall be the rate authorized by the commission (divided by the latest rail cost adjustment factor published by the interstate commerce commission).

2. a. Except as provided in subdivision b, a rail carrier may increase any rate for transportation over which the carrier has market dominance under section 69-04-03-07, so long as the increased rate is not greater than the adjusted base rate for the transportation involved, plus any rate increases implemented under subsection 3 or 4 of this section.

b. A rate increase authorized under this subsection will not be found to exceed a reasonable maximum for the transportation involved.

c. A rail carrier may not increase a rate under this subsection to the extent that the cost increases to the carrier due to inflation are recovered through general rate increases pursuant to 49 U.S.C. 10706, or inflation-based rate increases under 49 U.S.C. 10712 applicable to that rate.

3. a. During the twelve-month period beginning October 1, 1980, and during each of the three succeeding twelve-month periods, a rail carrier may, in addition to rate increases authorized under subsection 2, increase any rate over which the rail carrier has market dominance under section 69-04-03-07, by an annual amount of not more than six percent of the adjusted base rate, except that in no event shall the total increase under the subsection result in a rate which is more than one hundred eighteen percent of the adjusted base rate.

b. (1) If any portion of a rate increase under this subsection is not implemented in the year in which it is authorized, such portion may, except as provided in paragraph 2, be implemented only in the next succeeding year.

(2) If any portion of the total rate increase authorized under this subsection is not implemented by September 30, 1984, such portion may be implemented in the next two succeeding years, except that in no event may a rail carrier increase a rate under this subsection or under subsection 4 in either of such two succeeding years by an annual amount of more than ten percent of the adjusted base rate.

4. a. Except as provided in subdivision c, during the twelve-month period beginning on October 1, 1984, and during each succeeding twelve-month period, a rail carrier may, in addition to rate increases under subsection 2, increase any rate for transportation over which the rail carrier has market dominance under section 69-04-03-07 by an annual amount of not more than four percent of the adjusted base rate.

b. No portion of any rate increase under this subsection which is not implemented in the year in which it is authorized may be implemented in any other year.

c. (1) The provision of this subsection shall not apply to a rail carrier proposing to increase a single line rate if the carrier earns adequate revenues, as determined by the interstate commerce commission under 49 U.S.C. 10704(a)(2).

(2) The commission will, after a hearing on the record, prescribe rules or take whatever other action is necessary with respect to joint rates to ensure that rail carriers which earn adequate revenues, as determined by the interstate commerce commission under 49 U.S.C. 10704(a)(2), do not receive the rate increases authorized by this subsection unless the commission determines that it is unable to prescribe such rules without precluding rail carriers not earning adequate revenues from receiving the rate increases authorized under this subsection.

5. a. Notwithstanding the provisions of section 69-04-03-05, in the case of any rate increase that is authorized under subsection 3 or 4 of this section, the commission will not suspend the rate increase pending final commission action, and except as provided in subdivision b, the commission will not begin an investigation proceeding under section 69-04-03-05 with respect to the reasonableness of the rate

~~increase; but an interested party may file a complaint alleging that such rate increase would violate the provisions of subtitle IV of title 49 of the United States Code for transportation performed in interstate commerce.~~

~~b. In considering any complaint challenging a rate increase that is authorized under subsection 3 and that results in a revenue-variable cost percentage that is less than the lesser of the percentages described in paragraph 1 of subdivision c of this subsection, the commission will, in determining the reasonableness of the rate increase, give due consideration to whether the carrier proposing the rate increase has attained adequate revenues, as determined by the interstate commerce commission under 49 U.S.C. 10704(a)(2), giving regard to preventing a carrier with adequate revenues from realizing excessive profits on the traffic involved and also the policy of bringing to an adequate level the revenues of carriers not having an adequate revenue level.~~

~~c. (1) If a rate increase authorized under this section in any year results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than twenty percentage points above the revenue-variable cost percentage applicable in that year under subsection 4 of section 69-04-03-07, or a revenue-variable cost percentage of one hundred ninety percent, whichever is less, the commission may, on its own initiative, or on complaint of an interested party, begin an investigation proceeding to determine if the proposed rate increase would violate subtitle IV of title 49 of the United States Code for transportation performed in interstate commerce.~~

~~(2) In determining whether to investigate or not to investigate any proposed rate increase that results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in paragraph 1 (without regard to whether such rate increase is authorized under this section), the commission will set forth its reasons therefor, giving due consideration to the following factors:~~

~~(a) The amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;~~

~~(b) The amount of traffic which contributes only marginally to fixed costs and the extent to~~

~~which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and~~

~~(c) The impact of the proposed rate or rate increase on the attainment of the national energy goals and the rail transportation policy under 49 U.S.C. 10101a, taking into account the railroads' role as a primary source of energy transportation and the need for a sound rail transportation system in accordance with the revenue adequacy goals of 49 U.S.C. 10704.~~

~~This paragraph shall not be construed to change existing law with regard to the nonreviewability of such determination.~~

~~(3) In determining whether a rate is reasonable, the commission will consider, among other factors, evidence of the following:~~

~~(a) The amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;~~

~~(b) The amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and~~

~~(c) The carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.~~

~~6. In any proceeding under this section, evidence of the underlying rail carrier rate is admissible.~~

~~7. A finding by the commission that a rate increase exceeds the increase authorized under this section does not establish a presumption that the rail carrier proposing such rate increase has or does not have market dominance over the transportation to which the rate applies, or that the proposed rate exceeds or does not exceed a reasonable maximum.~~

~~8. The authority of the commission to determine and prescribe reasonable rules, classifications, and practices will not be used, directly or indirectly, to limit the rates which rail carriers would otherwise be authorized to establish under subtitle IV of title 49 of the United States Code for transportation performed in interstate commerce.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982; amended effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-07. Market dominance.

~~1. In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.~~

~~2. When a rate for transportation by a rail carrier is challenged as being unreasonably high, the commission will determine, within ninety days after the start of a proceeding under section 69-04-03-05 to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The commission may make that determination on its own initiative or on complaint. A finding by the commission that the carrier does not have market dominance is determinative in a proceeding under this chapter related to that rate or transportation unless changed or set aside by the commission or set aside by a court of competent jurisdiction.~~

~~3. When the commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power of the commission to suspend a rate under subsection 4 of section 69-04-03-05. However, if the commission has found that a carrier does not have market dominance over the transportation to which the rate applies, the commission will suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.~~

~~4. a. In this subsection:~~

~~(1) "Cost recovery percentage" means the cost recovery percentage as annually determined by the interstate commerce commission pursuant to 49 U.S.C. 10709.~~

~~(2) "Fixed and variable cost" means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.~~

b. In making a determination under this section, the commission will find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than:

(1) One hundred sixty-five percent during the period beginning October 1, 1981, and ending September 30, 1982;

(2) One hundred seventy percent during the period beginning October 1, 1982, and ending September 30, 1983;

(3) One hundred seventy-five percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

(4) The cost recovery percentage, during each twelve-month period beginning on or after October 1, 1984.

For purposes of paragraphs 3 and 4, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of one hundred seventy percent or more than a revenue-variable cost percentage of one hundred eighty percent.

c. For purposes of determining the revenue-variable cost percentage for a particular transportation, variable costs shall be determined by using the carrier's costs, calculated using a cost finding methodology adopted by the interstate commerce commission and indexed quarterly to account for current wage and price levels in the region in which the carrier operates, and with adjustments accepted by the commission. A rail carrier may meet its burden of proof under this subsection by establishing its variable costs using a cost finding methodology adopted by the interstate commerce commission and indexed quarterly to account for current wage and price levels in the region in which the carrier operates, but a shipper may rebut that showing by evidence of cost adjustments to reflect individual movement costs.

d. A finding by the commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under subdivision b does not establish a presumption that the rail carrier has or does not have market dominance over

such transportation, or that the proposed rate exceeds or does not exceed a reasonable maximum.

5. For purposes of determining if a rail carrier has market dominance under this section, the commission will consider evidence pertaining to the presence or absence of effective competition for the traffic to which a challenged rate applies in accordance with such evidentiary guidelines or standards adopted by the interstate commerce commission. The protestant bears the burden of demonstrating that there exists no effective intramodal or intermodal competition for the transportation to which the rate applies. Respondent railroad may rebut the protestant's showing with evidence that effective intramodal or intermodal competition exists. If intramodal and intermodal competition is shown not to exist, the respondent railroad has the burden of proving that either product or geographic competition for the involved transportation does exist. The protestant then has the burden of proving that such competition is not effective. Repealed effective February 1, 1991.

History: Effective September 1, 1982; amended effective July 1, 1984.
General Authority: NDCC 49-10.1-03
Law Implemented: NDCC 49-10.1-01

69-04-03-08. Base rates.

1. Any rate in effect on October 1, 1980, which was not challenged during the one-hundred-eighty-day period following that date by a complaint filed with the commission by an interested party alleging that the rail carrier has market dominance over the transportation to which the rate applies, as determined under section 69-04-03-07, and that the rate is not reasonable under section 69-04-03-01; or which was challenged in such a complaint, but the rail carrier is found not to have market dominance over the transportation to which the rate applies; or the rate is found reasonable shall be deemed to be reasonable and may not thereafter be challenged on ground of reasonableness in the commission or in any court other than on appeal from a decision of the commission.

2. The provisions of this section shall not apply to any rate under which the volume of traffic moved during the twelve-month period immediately preceding October 1, 1980, did not exceed five hundred net tons [453.59 metric tons] and has increased tenfold within the three-year period immediately preceding the bringing of a challenge to the reasonableness of such rate.

3. The burden of proof in a proceeding under this section shall be on the complainant. Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-09. Contract rates.

~~1. A rail carrier may not enter into a contract with purchasers of rail service except as provided in this section. A contract subject to this section is a written agreement, including any amendment, entered into by one or more rail carriers with one or more purchasers of rail services, to provide specified services under specified rates, charges, and conditions. A contract filed under this section must specify that it is made pursuant to this section and must be signed by duly authorized parties. An amendment includes written contract modifications signed by the parties. An amendment is treated as a new contract. An amendment is lawful only if it is filed and approved in the same manner as a contract. To the extent terms affecting the lawfulness of the underlying contract are changed, remedies are revived and review is again available.~~

~~2. Each contract entered into under this section shall be filed with the commission, together with a summary of the contract containing the nonconfidential elements of the contract in the format specified in section 69-04-03-22.1. A contract and contract summary (and amendments and supplements) may be rejected for noncompliance with applicable statutes and rules.~~

~~3. A contract filed under this section will be approved by the commission, as provided in subsection 5, unless the commission determines in a proceeding under subsection 4 that the contract is in violation of this section.~~

~~4. a. No later than thirty days after the date of filing of a contract under this section, the commission may, on its own initiative or on complaint, begin a proceeding to review the contract only on the grounds described in this subsection.~~

~~b. (1) In the case of a contract other than a contract for the transportation of agricultural commodities (including forest products and paper), a complaint may be filed:~~

~~(a) By a shipper only on the grounds that the shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet their common carrier obligations to the complainant under section 69-04-03-10; or~~

(b) By a port only on the grounds that the port individually will be harmed because the proposed contract will result in unreasonable discrimination against the port.

(2) In the case of a contract for the transportation of agricultural commodities (including forest products and paper), in addition to the grounds for a complaint described in paragraph 1, a complaint may be filed by a shipper on the grounds that the shipper individually will be harmed because:

(a) The rail carrier has unreasonably discriminated by refusing to enter into a contract with the shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

(b) The proposed contract would constitute a destructive competitive practice under subtitle IV of title 49 of the United States Code for transportation performed in interstate commerce.

In making a determination under subparagraph b, the commission shall consider the difference between contract rates and published single car rates.

(3) For purposes of this subdivision, the term "unreasonable discrimination" has the same meaning as such term has under section 69-04-03-11.

c. (1) Within thirty days after the date a proceeding is commenced under subdivision a the commission shall determine if the contract that is the subject of such proceeding is in violation of this section.

(2) If the commission finds that the contract is in violation of this section, it will disapprove the contract; or in the case of agricultural contracts where the commission finds unreasonable discrimination by a carrier in accordance with subparagraph a of paragraph 2 of subdivision b, allow the carriers the option to provide rates and services substantially similar to the contract at issue, with such differences in terms and conditions as are justified by the evidence, or to cancel the contract.

5. If the commission does not institute a proceeding to review the contract, it is approved on the thirtieth day after the filing of the contract and is considered "expressly approved" by the commission. If the commission institutes a proceeding to review a contract, the contract is approved:

   a. On the date the commission approves the contract if the date of approval is thirty or more days after the filing date of the contract;

   b. On the thirtieth day after the filing date of the contract if the commission denies the complaint against the contract prior to the thirtieth day after the filing date of the contract; or

   c. On the sixtieth day after the filing date of a contract, if the commission fails to disapprove the contract.

6. The commission may limit the right of a rail carrier to enter into future contracts under this section following a determination that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under section 69-04-03-10.

7. The commission will not require a rail carrier to violate the terms of a contract that has been approved under this section, except under the circumstances set forth in 49 U.S.C. 11128.

8. A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

9. a. A contract that is approved by the commission under this section, and transportation under such contract, shall not be subject to the provisions of this chapter, and may not be subsequently challenged before the commission or in any court on the grounds that such contract violates a provision of this chapter.

   b. The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate state court or United States district court, unless the parties otherwise agree.

10. The provisions of this section shall not affect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that was in effect on October 1, 1980. Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section. Nothing in this section shall affect the rights of the parties to challenge the existence of such a contract.

11. a. Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities, including forest products, but not including woodpulp, woodchips, pulpwood, or paper, involving the utilization of carrier owned or leased equipment not in excess of forty percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC), except that in the case of a proposed contract between a class I carrier (as defined by the interstate commerce commission) and a shipper originating an average of one thousand cars or more per year during the prior three-year period by major car type on a particular carrier, not more than forty percent of carrier owned or leased equipment utilized on the average during the prior three-year period may be used for such contract without prior authorization by the commission.

b. The commission may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of subdivision a of this subsection as the commission considers appropriate, if it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 69-04-03-10.

12. Service under a contract approved under this section will be deemed to be a separate and distinct class of service, and the equipment used in the fulfillment of such a contract shall not be subject to car service decisions.

13. Transportation or service performed under a contract or amendment may begin, without specific commission authorization, on or after the date the contract and contract summary or contract amendment and supplement are filed and before commission approval as defined in subsection 5, subject to the following conditions:

a. The contract or contract amendment must specifically state that the transportation or service may begin on the date of filing and that performance is subject to the conditions of subsection 13 of section 69-04-03-09 of the North Dakota Administrative Code. The contract summary or supplement must separately reflect the date of commencement of service under this provision under "duration of contract", as required by paragraph 4 of subdivision a of subsection 4 of section 69-04-03-22.1.

b. If the rail equipment standards of subsection 11 are exceeded, prior relief must be obtained from the

~~commission and must be specifically identified in the contract summary.~~

~~c. If the commission disapproves or rejects the contract or amendment, the appropriate noncontract tariffs or the contract provisions otherwise in effect under previously approved contracts and amendments will be applicable.~~

~~d. Before commission approval, the contract or amendment and transportation are subject to commission jurisdiction.~~

~~e. Transportation or service may not begin under a contract or an amendment to a contract before the filing date of either the contract or the amendment, respectively.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982; amended effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-10. Common carrier obligation. ~~The intrastate common carrier obligations of a rail carrier shall be the same as those prescribed by the interstate commerce commission for rail carriers engaged in interstate commerce.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-11. Discrimination.

~~1. A rail carrier may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under North Dakota Century Code section 49-10.1-01, than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.~~

~~2. A rail carrier may not subject a person, place, or type of traffic to unreasonable discrimination. However, subject to subsection 3, this subsection does not apply to discrimination against the traffic of another carrier providing transportation by any mode.~~

~~3. A rail carrier may not subject a freight forwarder (as defined in 49 U.S.C. 10102(9)) to unreasonable discrimination whether or not the freight forwarder is controlled by that carrier.~~

~~4. Differences between rates, classifications, rules, and practices of rail carriers do not constitute a violation of this section if such differences result from different services provided by rail carriers.~~

~~5. This section shall not apply to:~~

~~a. Contracts approved under section 69-04-03-09, other than as provided in subparagraph b of paragraph 1 of subdivision b of subsection 4 and paragraph 2 of subdivision b of subsection 4 of such section.~~

~~b. Surcharges or cancellations under section 69-04-03-20.~~

~~c. Separate rates for distinct rail services under section 69-04-03-12.~~

~~d. Rail rates applicable to different routes.~~

~~e. Expenses authorized under section 69-04-03-13.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982, amended effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-12. Separate rates for distinct services.

~~1. A rail carrier may, on its own initiative or at the request of a shipper or receiver of property, establish separate rates for distinct rail services to:~~

~~a. Encourage competition;~~

~~b. Promote increased reinvestment by rail carriers; and~~

~~c. Encourage and make easier increased nonrailroad investment in the production of rail services.~~

~~2. The commission will exercise expeditious action to permit separate rates for distinct rail services to:~~

~~a. Encourage those services to be priced in accordance with the cash outlay incurred by the carrier and the demand for them; and~~

~~b. Enable shippers and receivers to evaluate transportation and related rates and alternatives.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~

Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-13. Business entertainment expenses.

~~1. Any business entertainment expense incurred by a rail carrier shall not constitute a violation of section 69-04-03-11 or 69-04-03-14 if such expense would not be unlawful if incurred by a person or corporation not subject to the jurisdiction of the commission.~~

~~2. Any business entertainment expense authorized under this section that is paid or incurred by a rail carrier shall not be taken into account in determining the cost of service or the rate base for purposes of this chapter.~~

~~3. Any business entertainment expense authorized under this section may be paid or incurred only in accordance with the standards and guidelines prescribed by the interstate commerce commission pursuant to 49 U.S.C. 10751.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-14. Tariff required. ~~Except as provided in this chapter, a rail carrier shall provide a transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this chapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-15. Exemption of rail transportation.

~~1. The commission will exempt a person, class of persons, or a transaction or service when the commission finds that the application of a provision of this chapter:~~

~~a. Is not necessary to carry out the transportation policy set forth in 49 U.S.C. 10101a, and~~

b. Either the transportation or service is of limited scope, or the application of a provision of this chapter is not needed to protect shippers from the abuse of market power.

The commission may, where appropriate, begin a proceeding under this subsection on its own initiative or on application by an interested party.

The commission may specify the period of time during which an exemption granted under this subsection is effective.

The commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this chapter to the person, class, or transportation is necessary to carry out the transportation policy set forth in 49 U.S.C. 10101a.

2. A person, class of persons, or a transportation or service is exempt from a provision of this chapter if the interstate commerce commission has exempted the same person, class of persons, or transportation or service in interstate commerce from the application of a corresponding provision of subtitle IV of title 49 of the United States Code. An exemption under this subsection is revoked, to the extent specified, if the interstate commerce commission finds that application of a provision of this chapter to the person, class, or transportation is necessary to carry out the transportation policy set forth in 49 U.S.C. 10101a.

3. No exemption order issued pursuant to this section will operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims. Nothing in this subsection shall prevent rail carriers from offering alternative terms nor give the commission the authority to require any specific level of rates or services based upon the carrier's obligation to provide contractual terms for liability and claims. Repealed effective February 1, 1991.

History: Effective September 1, 1982; amended effective July 1, 1984.
General Authority: NDCC 49-10.1-03
Law Implemented: NDCC 49-10.1-01

69-04-03-16. Rates and liability based on value. A rail carrier may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property. Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-17. Rates for recyclable materials.

~~1. In this section:~~

~~a. "Recyclable material" means material collected or recovered from waste for a commercial or industrial use whether the collection or recovery follows end usage as a product.~~

~~b. "Virgin material" means raw material, including previously unused metal or metal ore, woodpulp or pulpwood, textile fiber or material, or other resource that, through the application of technology, is or will become a source of raw material for commercial or industrial use.~~

~~2. Notwithstanding any other provision of this chapter, all rail carriers shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio as established by the interstate commerce commission, such rate shall not be required to bear any further rate increase.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982, amended effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-18. Through routes and joint rates.

~~1. A through route established by rail carriers must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.~~

~~2. A rail carrier may not discriminate in its rates against a connecting line of another rail carrier providing~~

~~transportation subject to the jurisdiction of the commission or unreasonably discriminate against that line in the distribution of traffic that is not routed specifically by the shipper.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-19. Through routes and joint rates prescribed by the commission.

~~1. The commission will when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates (including maximum or minimum rates or both), the division of joint rates and the conditions under which those routes must be operated, for a rail carrier.~~

~~2. The commission will prescribe through routes, joint classifications, joint rates, the division of joint rates and the conditions under which those routes must be operated, in accordance with the standards and procedures set forth in 49 U.S.C. 10705 for the prescription of such rates, routes, and conditions for rail carriers providing interstate transportation.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-20. Joint rate surcharges and cancellations.

~~1. A rail carrier may publish and apply a surcharge increasing or decreasing the through charge applicable to any movement between points designated by the surcharging carrier subject to a joint rate only in accordance with the standards and procedures set forth in 49 U.S.C. 10705a for application of such surcharges by rail carriers providing interstate transportation.~~

~~2. Any other carrier that participates in any movement subject to a surcharge, or the commission, may cancel the application of such surcharge or a portion of such surcharge only in accordance with the standards and procedures set forth in 49 U.S.C. 10705a for the cancellation of such charges applied to interstate transportation.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-21. General and inflation increases and fuel surcharges. ~~Notwithstanding any other provision of this chapter, the commission will not exercise jurisdiction over any of the following:~~

~~1. General rail rate increases implemented under 49 U.S.C. 10706.~~

~~2. Inflation-based rate increases implemented under 49 U.S.C. 10712.~~

~~3. Fuel adjustment surcharges approved by interstate commerce commission.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-22. General tariff requirements.

~~1. A rail carrier shall publish and file with the commission tariffs containing the rates, and classifications, rules, and practices related to those rates, established under this chapter. Such tariffs shall be kept open for public inspection.~~

~~2. a. Tariffs must identify plainly:~~

~~(1) The places between which property will be transported;~~

~~(2) Terminal, storage, and icing charges (stated separately);~~

~~(3) Privileges given and facilities allowed; and~~

~~(4) Any rules that change, affect, or determine any part of the published rate.~~

~~b. A joint tariff filed by a carrier shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the commission but are not required to file a copy of the tariff.~~

~~3. a. When a rail carrier proposes to change a rate, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections 1 and 2.~~

~~b. A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. Except with regard~~

~~to contract rates filed under section 69-04-03-09, the notice period for tariff publications shall be:~~

~~(1) Twenty days for rates or provisions published by rail carriers in connection with new services or changes resulting in increased rates or decreased value of service; and~~

~~(2) Ten days for changes published by rail carriers resulting in decreased rates or increased value of service, or changes resulting in neither increases nor reductions.~~

~~4. a. The commission may reduce the notice periods of this section if cause exists. The commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.~~

~~b. All rates of rail carriers and rail ratemaking associations shall be incorporated in their individual tariffs by the end of the second year after initial publication of the rate, or by the end of the second year after a change in a rate becomes effective, whichever is later. The commission may extend these periods if cause exists. A rate not incorporated in an individual tariff as required by the commission is void.~~

~~5. The commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982; amended effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-22.1. Contract tariff requirements.

~~1. A railroad or railroads entering into a contract for railroad transportation services with one or more purchasers of rail service shall file with the commission the original and one copy of the contract and two copies of the contract summary in the following manner:~~

~~a. Contracts and contract summaries may not be filed in the same packages with standard tariff filings.~~

~~b. The confidential contract may not be attached to the contract summary.~~

~~c. The envelope or wrapper containing the contract and summary must be marked "Confidential, Rail Contract".~~

d. A contract and summary must be accompanied by a transmittal letter identifying the submitted documents and the name and telephone number of a contact person.

The contract filed under this section will not be available for inspection by persons other than the parties to the contract and authorized commission personnel, except by petition demonstrating a likelihood of succeeding on the merits of the complaint and that the matter complained of could not be proven without access to additional contract information. The commission's action in any contract disclosure matter, including a petition filed under this subsection is subject to the limitations imposed by 5 U.S.C. 552(b) and the United States Trade Secrets Act [18 U.S.C. 1905]. A contract and its summary filed under section 69-04-03-09 may be labeled "Nonconfidential". Such a designation will permit the general public to inspect the entire contract. The contract summary filed under this section will be made available for inspection by the general public. The contract summary filed under these rules is not required to be posted in any stations, but will be made available from carriers participating in the contract upon reasonable request.

2. a. The title page of every contract and amendment must contain only the following information:

(1) In the upper right corner, the contract number (see subsection 3).

(2) In the center of the page, the issuing carrier's name, followed by the word "CONTRACT" in large print.

(3) Amendments to contracts must also show, in the upper right corner, the amendment number (see subsection 3).

(4) A solid one-inch [2.54 centimeter] black border down the right side of the title page.

(5) Date of issue and date to be effective.

b. The title page of every contract summary and supplement must contain only the following information:

(1) In the upper right corner, the contract summary number (see subsection 3).

(2) In the center of the page, the issuing carrier's name, followed by the words "CONTRACT SUMMARY" in large print.

(3) Date of issue and date to be effective.

(4) In the center lower portion, the issuing individual's name and address.

(5) Supplements to contract summaries must also show, in the upper right corner, the supplement number (see subsection 3).

3. Each issuing carrier shall sequentially number the contract and contract summary it issues. The contract and contract summary identification number must include the letters "NDPSC", the industry standard alphabet code for the issuing railroad (limited to four letters), the letter "C", and the sequential number, with each separated by a hyphen. Any amendment to a contract must be reflected in a corresponding supplement to the contract summary. If the change in the contract is only in confidential matter, a statement to that effect must be made in the supplement. At the carrier's option, the carrier's tariff publishing officers may reserve blocks of numbers if tariffs are issued from different departments. An index to the blocks of reserved numbers must be filed with the commission. Contract amendments and contract summary supplements must be sequentially numbered.

4. a. Contract summaries for agricultural commodities, forest products, or paper must contain the following terms in the order named:

(1) A list alphabetically arranged, of the corporate names of all carriers that are parties to the contract plus their addresses for service of complaints.

(2) The commodity or commodities to be transported under the contract.

(3) The origin stations and destination stations.

(4) The duration of the contract.

(5) Railcar data by number of dedicated cars, or, at the carrier's option, car days by major car type used to fulfill the contract or contract options:

(a) Available and owned by the carriers listed pursuant to paragraph 1 with average number of bad-order cars identified;

(b) Available and leased by the carriers listed pursuant to paragraph 1 with average number of bad-order cars identified;

(c) [Optional] On order (for ownership or lease) along with delivery dates; and

(d) In the event a complaint is filed involving common carrier obligation and carrier furnished cars, the carrier shall immediately submit to the commission and the complainant additional data on cars used to fulfill the challenged contract. Data must include (by major car type used to fulfill the contract) the total bad car orders, the assigned car obligations, and free running cars.

In addition to subparagraph a, if agricultural commodities, including forest products, but not including woodpulp, woodchips, pulpwood, or paper, a certified statement by the participating rail carriers that the cumulative equipment total for all contracts does not exceed forty percent of the capacity of the rail carrier's owned and leased cars by applicable major car type, and in the case of an agricultural shipper which originated an average of one thousand cars or more per year during the prior three-year period by major car type, that the equipment used does not exceed forty percent of the rail carrier's owned or leased cars used on the average by that shipper during the previous three years. Railcar data need not be submitted if the shipper furnishes the railcars, unless the cars are leased from the carrier, or the contract is restricted to certain services which do not entail car supply.

(6) Identification of base rates or charges and movement type (e.g. single car, multiple car, unit train), the minimum annual volume, and a summary of escalation provisions.

(7) Identification of existence (but not terms or amount) of special features such as transit time commitments, guaranteed car supply, minimum percentage of traffic requirements, credit terms, discount, et cetera.

b. Contract summaries for other commodities or services shall contain the information contained in paragraphs 1, 2, 4, and 5 of subdivision a of this subsection. Paragraph 7 of subdivision a is applicable to the extent that service requirements are placed in the contract.

c. The contract summary and supplements must enumerate and have each item completed. Where the item does not pertain to the contract or amendment, the term "Not applicable" ("NA") must be used.

5. Copies of contract summaries will be available from the commission's traffic division. Copies of contract summaries

~~will also be available from carriers participating in the contract.~~

~~6.~~ ~~All filed contracts, and amendments, and contract summaries, and supplements, must provide thirty days' notice to the public as required by subsection 5 of section 69-04-03-09.~~ Repealed effective February 1, 1991.

History: ~~Effective July 1, 1984; amended effective September 1, 1985.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-23. National transportation policy.

~~1.~~ ~~The commission will exercise its jurisdiction over rail carrier rates in a manner consistent with the rail transportation policy of the United States set forth at 49 U.S.C. 10101a.~~

~~2.~~ ~~Where standards and procedures for the regulation of rail carrier rates are not specifically set forth in this chapter, the commission will exercise its jurisdiction over rail carrier rates under the standards and procedures for rail carrier rates prescribed in subtitle IV of title 49 of the United States Code.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-24. Rail rate proceedings. ~~Rail carrier rate proceedings will be conducted in accordance with the provisions of North Dakota Century Code chapters 49-05 and 28-32 and North Dakota Administrative Code article 69-02 except to the extent they are inconsistent with the provisions of this chapter or subtitle IV of title 49 of the United States Code in which case the latter provisions will control.~~ Repealed effective February 1, 1991.

History: ~~Effective September 1, 1982.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-25. Limitations in rulemaking proceedings relating to rates of rail carriers. ~~When an interested person petitions the commission to begin a rulemaking proceeding in a matter related to rates of a rail carrier providing transportation, the commission shall grant or deny that petition by one hundred twenty days after receiving it. If the petition is granted, the commission shall begin an appropriate proceeding as soon as practicable. If the petition is denied, the~~

~~reasons for the denial must be so stated in the order denying the petition.~~ Repealed effective February 1, 1991.

History: ~~Effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-26. Commission action in rail carrier rate proceedings.

~~1. This section applies to matters before the commission involving a rate of a rail carrier providing transportation; however, other sections of this chapter related to actions of the commission in proceedings involving rates of rail carriers supersede this section to the extent they are inconsistent with the provisions of this section related to deadlines.~~

~~2. In a proceeding under this section, all evidentiary proceedings related to the matter must be completed within one hundred eighty days after the matter is docketed. The commission shall reach a decision within one hundred twenty days after completion of all evidentiary proceedings and shall include specific findings of fact, specific and separate conclusions of law, an order, and justification of the findings of fact, conclusions of law, and order.~~

~~3. In a proceeding under this section, after the parties have had at least an opportunity to submit evidence in written form, the commission shall give them an opportunity for briefs, written statements, or conferences of the parties. A conference of the parties must be chaired by an individual commissioner or an employee designated by the commission.~~

~~4. The commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances:~~

~~a. Reopen a proceeding;~~

~~b. Grant rehearing, reargument, or reconsideration of an action of the commission; and~~

~~c. Change an action of the commission.~~

~~An interested party may petition to reopen and reconsider an action of the commission under rules of the commission.~~

~~5. An action of the commission under this section is effective on the thirtieth day after service on the parties to the proceeding unless the commission provides for it to become effective on an earlier date.~~

~~6. An action of the commission under this section is final on the date on which it is served.~~

~~7. The commission may extend a time period established by this section by a period of not more than ninety days. The extension must be granted if a majority of the commissioners agree to it by public vote.~~

~~8. If an extension granted under subsection 7 is not sufficient to allow for completion of necessary proceedings, the commission may grant a further extension in an extraordinary situation if:~~

~~a. A majority of the commissioners agree to the further extension by public vote; and~~

~~b. Not later than the fifteenth day before expiration of the extension granted under subsection 7, the commission completes and adopts a written report which includes:~~

~~(1) A full explanation of the reasons for the further extension;~~

~~(2) The anticipated duration of the further extension;~~

~~(3) The issues involved in the matter before the commission; and~~

~~(4) The names of commission personnel working on the matter.~~ Repealed effective February 1, 1991.

History: ~~Effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-04-03-27. Procedures for requesting surcharge costs and revenues from rail carriers applying a commodity oriented surcharge or canceling the application of a joint rate.

~~1. A rail carrier applying a commodity oriented surcharge or canceling the application of a joint rate shall provide a shipper with its division of revenue within three working days of receipt of a request.~~

~~2. If a request for a division of revenues is not timely honored, the tariff will be suspended and investigated by the commission, and ultimately disapproved.~~

~~3. The commission will furnish within five working days of a request, determinations of the variable cost of service and revenue of a rail carrier applying a surcharge or canceling the application of a joint rate. A request must be route~~

~~specific and must include, for each surcharged rate or route to be canceled:~~

~~a. The amount of the surcharge.~~

~~b. The tariff minimum weight.~~

~~c. The tariff rate applicable at the minimum weight, tariff reference, unit, e.g., per hundredweight.~~

~~d. The relevant territorial division and the relevant intraterritorial subdivision, where applicable, as percentages. Surcharging carriers must supply this information within three working days of request.~~

~~e. The car type or types in which the traffic normally moves.~~

~~f. The commodity description - STCC code.~~

~~g. The class of traffic.~~

~~h. The number of intertrain and intratrain switches, if known.~~

~~i. The origin, destination, interchanges, carriers used, and the short line distance of the surcharging or canceling carrier's line (from the published distance tables) from or to the interchange points at which the traffic is tendered.~~

~~4. Along with any request for variable cost and revenue information, shippers must certify to the commission that they have no feasible transportation alternatives to the surcharged or canceled routes.~~ Repealed effective February 1, 1991.

History: ~~Effective July 1, 1984.~~
General Authority: ~~NDCC 49-10.1-03~~
Law Implemented: ~~NDCC 49-10.1-01~~

69-07-01-02. Change of commission firms. ~~When a warehouseman changes commission firms, the warehouseman must file with the commission an acknowledged itemized statement showing warehouse receipts, advances on stored grain, grain inventories, and grain in transit, name of firm dropped, and name of new firm.~~ Repealed effective February 1, 1991.

History: ~~Amended effective May 1, 1984.~~
General Authority: ~~NDCC 60-02-03~~
Law Implemented: ~~NDCC 60-02-03~~

69-07-01-07. Modified business hours. Warehousemen wanting to maintain less than normal business hours shall first receive commission

approval. Requests must be in writing and must state the reason for the request. Upon receipt of commission approval, a notice showing the warehouse's new hours and stating when and where the manager can be reached must be posted conspicuously at the warehouse.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-02-39

69-07-01-08. Adequate bond and insurance coverage - Suspension. Warehousemen shall provide the commission with proof of adequate insurance and bond coverage. Failure to maintain adequate insurance and bond coverage will result in the automatic suspension of the warehouse license. Suspended licenses must be surrendered to the commission and suspension notices posted conspicuously at the warehouse.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-02-09, 60-02-09.1, 60-02-10.1, 60-02-35, 60-02-35.1

69-07-01-09. Changes in capacity. Warehouses desiring to change their physical capacity shall receive prior commission approval. Requests to decrease capacity must be in writing, must state that the space being deleted is physically disconnected from the rest of the facility, and must be accompanied by a diagram showing the warehouse's remaining capacity as well as that being deleted. Requests to increase capacity must be accompanied by a diagram showing the warehouse's entire capacity and specifically identifying the space being added; such requests will be granted only upon receipt of notification of adequate bond coverage.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-02-09

69-07-01-10. Warehouse license suspension. When a warehouse license has been suspended by law or by order of the commission, the warehouseman shall:

1. Notify all receiptholders that its warehouse license is suspended and that grain must be removed from the warehouse or it will be priced and redeemed in cash in accordance with North Dakota Century Code section 60-02-41.

2. Keep the commission's suspension notice conspicuously posted in the office window or on the front driveway door of the elevator.

3. Surrender the warehouse license to the commission.

4. Not receive additional grain for purchase, storage, shipping, or processing.

5. Not sell or ship any grain without submitting a written request to the commission and receiving commission authorization to do so.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-02-09.1, 60-02-10.1, 60-02-35.1

69-07-01-11. Request to discontinue business. All warehouses that cease to operate as a licensed public warehouse shall file a request to discontinue business with the commission. Requests must be made on forms provided by the commission.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-02-41

69-07-01-12. Assumption of liability for transfer of grain. Warehousemen intending to acquire a facility operated by another licensed public warehouseman and containing purchased or stored grain shall notify the commission that it is assuming responsibility for grain being transferred. Notices must be submitted on forms provided by the commission.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-02-40

69-07-01-13. Delivery policy on dry edible beans. Warehousemen handling dry edible beans shall, during July of each year, publish and post in a conspicuous place in their warehouses, their policy for delivery of beans to warehouse receiptholders. The policy must remain in effect at least through the following June and must outline how the warehouseman will charge or compensate receiptholders for differences in quantity, kind, quality, and grade that exist between the beans described in the scale ticket and the beans that are actually delivered back to the receiptholder. A copy of the warehouse's policy for delivery must be provided to the commission as a part of its annual warehouse license application. A copy of the policy must also be attached to warehouse receipts issued to owners of beans.

History: Effective February 1, 1991.
General Authority: NDCC 28-32-02, 60-02-03
Law Implemented: NDCC 60-02-17, 60-02-22

69-07-02-01. ~~Procedure for licensing. Before a license is granted, an application for the license (on blanks which will be furnished), accompanied by the corporate surety company bond as provided by law and the license fee required by North Dakota Century Code section 60-02-07 for each elevator or warehouse to be licensed and a copy of the scale ticket, warehouse receipt, and credit-sale contracts used by the warehouseman, must be filed with the public service commission. All corporate surety bonds must be countersigned by an authorized agent who is a resident of North Dakota.~~ Warehouse license applications. Applications for a warehouseman's license must be submitted on forms provided by the commission. Corporations, limited partnerships, and general partnerships using a fictitious name must be registered and in good standing with the secretary of state. Applications must provide all the information requested on the application form and must be accompanied by:

1. The license fee required by North Dakota Century Code section 60-02-07.

2. An appropriate corporate surety bond as required by section 69-07-02-02. Corporate surety bonds must be countersigned by an authorized resident agent unless the bonding company is based in a state having reciprocity with North Dakota.

3. A copy of the scale ticket, warehouse receipt, and credit-sale contract to be used by the warehouseman.

4. Certificate of continuous insurance in an amount required by North Dakota Century Code section 60-02-35.

5. Partnerships applicants shall file a copy of their partnership agreement with their application.

History: Amended effective May 1, 1984; February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC ~~60-02-03~~ 60-02-07

69-07-02-03. License renewal. Warehouse licenses expire on July thirty-first of each year. The commission shall mail license renewal forms to warehouseman by June first. Warehousemen desiring to renew their license shall complete and return these forms to the commission by July fifteenth. These forms must fully state the company's legal name. Corporations and partnerships must be registered and in good standing with the secretary of state. Applications that are not received in a timely manner will result in the automatic closure of the warehouse on August first.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-02-07

69-07-02-04. Business documents - Revisions. Warehousemen shall notify the commission of any changes in the warehouse's ownership, name, corporate structure, scale tickets, warehouse receipts, and credit-sale contracts.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-02-03

69-07-03-07. Roving grain or hay buyers. Roving grain or hay buyers are required to issue receipts, certificates, and contracts and to maintain records as described in this chapter. They may not, however, be required to adhere to rules that specifically involve physical warehouse facilities.

History: Effective February 1, 1991.
General Authority: NDCC 60-02-03
Law Implemented: NDCC 60-03-01.1

69-07-03-08. Bean scale tickets - Contents. Scale tickets for dry edible beans must contain the following information:

1. The date and place where the beans were received.

2. The name and address of the owner of the beans.

3. A description of the beans including the kind of beans, foreign material, splits, check seed coats, total pick, moisture, and the gross weight, total dockage, and net weight of the load.

4. A notation that, "All storage contracts on dry edible beans terminate on April thirtieth of each year".

5. A notation that, "This warehouse is not responsible for returning an identical percentage of check seed coats back to receiptholder in the event of redelivery".

6. A space for comments and other information.

History: Effective February 1, 1991.
General Authority: NDCC 28-32-02, 60-02-03
Law Implemented: NDCC 60-02-11

69-09-07-09. Rates for purchases.

1. Rates for purchases ~~shall~~ must:

   a. Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

   b. Not discriminate against qualifying cogeneration and small power production facilities.

2. ~~Nothing in this chapter requires any electric utility to pay more than the avoided costs for purchases.~~

~~3.~~ Relationship to avoided costs.

   a. For purposes of this subsection, "new capacity" means any purchase from capacity of a qualifying facility, construction of which ~~was commenced~~ began on or after November 9, 1978.

   b. Subject to subdivision c of this subsection and subdivision a of subsection 3, a rate for purchases satisfies the requirements of ~~subsections~~ subsection 1 ~~and 2~~ if the rate equals the avoided costs determined after consideration of the factors set forth in ~~subsection~~ subsections 5 and 6.

   c. A rate for purchases (other than from new capacity) may be less than the avoided cost if the commission determines ~~that~~ a lower rate is consistent with ~~subsections~~ subsection 1 ~~and 2~~, and is sufficient to encourage cogeneration and small power production.

d. Rates for purchases from new capacity ~~shall~~ must be in accordance with subdivision b, regardless of whether the electric utility making ~~such~~ the purchase is simultaneously making sales to the qualifying facility.

e. ~~In the case in which the~~ When rates for purchases are based ~~upon~~ on estimates of avoided costs over the ~~specific~~ term of ~~the~~ a contract or other legally enforceable obligation, the rates for ~~such~~ the purchases do not violate this chapter if the rates for ~~such~~ the purchases differ from avoided costs at the time of delivery.

~~4.~~ 3. Standard rates for purchases.

a. ~~There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying~~ Qualifying facilities with a design capacity of one hundred kilowatts or less are entitled to net energy billing where the output from the qualifying facility reverses the electric meter used to measure sales from the electric utility to the qualifying facility. For each qualifying facility opting for net energy billing:

(1) The purchasing electric utility shall file an annual report of total monthly energy produced with the commission.

(2) The purchasing electric utility may recover metering costs associated with production monitoring from the qualifying facility.

b. Each electric utility must have standard offer contracts for capacity payments, when required by subsection 6, to qualifying facilities operating as peaking units with a design capacity of one megawatt or less. These standard offer contracts:

(1) Must base payments for avoided capacity on the projected cost per kilowatt of a new peaking facility, and adjust the amount of payment to reflect the length of contract overlap into the projected lifetime of the new facility.

(2) Must be accompanied by an annually updated table of capacity payment per kilowatt as a function of contract length.

(3) Must be dependant upon the following capacity factor adjustment for determining capacity payment amounts:

Payment = (Qualifying facility's capacity factor/Projected capacity factor of the facility to be avoided) (Contracted capacity payment price)

"Capacity factor" means the average on peak period metered capacity delivered to the utility for the billing period divided by the greatest fifteen-minute metered capacity delivered for the on peak period of the same billing period.

~~b.~~ c. ~~There may be put into effect~~ Each electric utility may have standard rates for purchases from qualifying facilities with a design capacity ~~of more than one hundred kilowatts~~ greater than in subdivisions a and b.

~~c.~~ d. The standard rates for purchases under subdivisions b and c of this subsection:

(1) ~~Shall~~ Must be consistent with subsections 1, ~~2~~ 5, and 6; and

(2) May ~~differentiate among qualifying facilities using various technologies~~ differ based on the ~~basis of the~~ supply characteristics of ~~the different~~ various technologies.

~~5.~~ 4. Purchases "as available" or ~~pursuant to~~ under a legally enforceable obligation. Each qualifying facility ~~shall have the option~~ may either:

a. ~~To provide~~ Provide energy ~~as~~ the qualifying facility determines ~~such energy~~ to be available ~~for such purchases~~, in which case the rates for ~~such~~ the purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

b. ~~To provide~~ Provide energy or capacity ~~pursuant to~~ under a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for ~~such~~ the purchases ~~shall~~ must, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(1) The avoided costs calculated at the time of delivery; or

(2) The avoided costs calculated at the time the obligation is incurred.

~~6.~~ 5. Factors affecting rates for purchases. In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

a. The data provided ~~pursuant to~~ under 18 CFR 292.302, including commission review of ~~any such~~ the data;

b. The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(1) The ability of the utility to dispatch the qualifying facility;

(2) The expected or demonstrated reliability of the qualifying facility;

(3) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirements and sanctions for noncompliance;

(4) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(5) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(6) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(7) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities.

c. The relationship of the availability of energy or capacity from the qualifying facility, as derived in subdivision b, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; ~~and~~

d. The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity~~.~~ ; and

e. The costs or savings resulting from variations in total air polluting emissions from those that would have existed in the absence of purchases from a qualifying facility.

6. Qualifying facilities are entitled to payment for avoided capacity when utility load forecasts project capacity deficits within ten years and the qualifying facility has entered into

a power supply contract with the utility that extends into projected deficit period.

7. Periods during which purchases not required.

   a. Any electric utility which gives notice ~~pursuant to~~ under subdivision b will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

   b. Any electric utility seeking to invoke subdivision a of this subsection must notify, in writing, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility, and must also send a copy of the notice to the commission.

   c. Any electric utility which fails to comply with the provisions of subdivision b will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in subdivision a ~~of this subsection~~ not occurred.

   d. A claim by an electric utility that such a period has occurred or will occur is subject to ~~such~~ verification ~~by the commission as~~ the commission determines ~~necessary or~~ appropriate, either before or after the occurrence.

   e. This subsection does not apply to purchases made under subdivision a of subsection 3.

History: Effective June 1, 1981; amended effective May 1, 1991.
General Authority: NDCC 49-02-02
Law Implemented: NDCC 49-02-02

TITLE 75

Department of Human Services

JANUARY 1991

AGENCY SYNOPSIS: Section 75-02-02-08 of the North Dakota Administrative Code describes the amount, duration, and scope of medical assistance. Subsection 2 of that section establishes limitations. These amendments remove, from subdivision d of that subsection, a requirement that a recipient be responsible for a copayment of three dollars for the replacement of eyeglasses when the replacement is occasioned by loss or breakage. The amendment also creates a new subdivision e as a limit to coverage and payment for home health care services and private duty nursing services. A limit is established as a monthly amount equal to the most intensive level of nursing care in the most expensive nursing home in the state. The amendment provides that this limitation may be exceeded if the medical provider submits and secures approval of a prior treatment authorization request which describes the medical necessity of the services and explains why a less costly alternative treatment will not afford necessary medical care.

75-02-02-08. Amount, duration, and scope of medical assistance.

1. Within any limitations which may be established by rule, regulation, or statute and within the limits of legislative appropriations, eligible recipients may obtain the medical and remedial care and services which are described in the approved state plan for medical assistance in effect at the time the service is rendered and which may include:

   a. Inpatient hospital services (other than services in an institution for mental diseases). "Inpatient hospital services" are those items and services ordinarily furnished by the hospital for the care and treatment of inpatients provided under the direction of a physician or dentist in an institution maintained primarily for treatment and care of patients with disorders other than tuberculosis or mental diseases and which is licensed or formally approved as a hospital by an officially

designated state standard-setting authority and is qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation; and which has in effect a hospital utilization review plan applicable to all patients who receive medical assistance under title XIX of the Act.

b. Outpatient hospital services. "Outpatient hospital services" are those preventive, diagnostic, therapeutic, rehabilitative, or palliative items or services furnished by or under the direction of a physician or dentist to an outpatient by an institution which is licensed or formally approved as a hospital by an officially designated state standard-setting authority and is qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation.

c. Other laboratory and x-ray services. "Other laboratory and x-ray services" means professional and technical laboratory and radiological services ordered by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law, and provided to a patient by, or under the direction of, a physician or licensed practitioner, in an office or similar facility other than a hospital outpatient department or a clinic, and provided to a patient by a laboratory that is qualified to participate under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation.

d. Skilled nursing home services (other than services in an institution for mental diseases) for individuals twenty-one years of age or older. "Skilled nursing home services" means those items and services furnished by a licensed and otherwise eligible skilled nursing home or swing-bed hospital maintained primarily for the care and treatment of inpatients with disorders other than mental diseases which are provided under the direction of a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law.

e. Intermediate nursing care (other than services in an institution for mental diseases). "Intermediate nursing care" means those items and services furnished by a currently licensed intermediate care facility or swing-bed hospital maintained for the care and treatment of inpatients with disorders other than mental diseases which are provided under the direction of a physician or other licensed practitioner of the healing arts within the scope

of the physician's or practitioner's practice as defined by state law.

f. Early and periodic screening and diagnosis of individuals under twenty-one years of age, and treatment of conditions found. Early and periodic screening and diagnosis of individuals under the age of twenty-one who are eligible under the plan to ascertain their physical or mental defects, and health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby. Federal financial participation is available for any item of medical or remedial care and services included under this subsection for individuals under the age of twenty-one. Such care and services may be provided under the plan to individuals under the age of twenty-one, even if such care and services are not provided, or are provided in lesser amount, duration, or scope to individuals twenty-one years of age or older.

g. Physician's services, whether furnished in the office, the patient's home, a hospital, a skilled nursing home or elsewhere. "Physician's services" are those services provided, within the scope of practice of the physician's profession as defined by state law, by or under the personal supervision of an individual licensed under state law to practice medicine or osteopathy.

h. Medical care and any other type of remedial care recognized under state law, furnished by licensed practitioners within the scope of their practice as defined by state law. This term means any medical or remedial care or services other than physicians' services, provided within the scope of practice as defined by state law, by an individual licensed as a practitioner under state law.

i. Home health care services. "Home health care services" in addition to the services of physicians, dentists, physical therapists, and other services and items available to patients in their homes and described elsewhere in these definitions, are any of the following items and services when they are provided on recommendation of a licensed physician to a patient in the patient's place of residence, but not including as a residence a hospital or a skilled nursing home:

   (1) Intermittent or part-time nursing services furnished by a home health agency.

   (2) Intermittent or part-time nursing services of a professional registered nurse or a licensed practical nurse when under the direction of the patient's

physician, when no home health agency is available to provide nursing services.

(3) Medical supplies, equipment, and appliances recommended by the physician as required in the care of the patient and suitable for use in the home.

(4) Services of a home health aide who is an individual assigned to give personal care services to a patient in accordance with the plan of treatment outlined for the patient by the attending physician and the home health agency which assigns a professional registered nurse to provide continuing supervision of the aide on the aide's assignment. "Home health agency" means a public or private agency or organization, or a subdivision of such an agency or organization, which is qualified to participate as a home health agency under title XVIII of the Social Security Act, or is determined currently to meet the requirements for such participation.

j. Private duty nursing services. "Private duty nursing services" are nursing services provided by a professional registered nurse or a licensed practical nurse, under the general direction of the patient's physician, to a patient in the patient's own home or extended care facility when the patient requires individual and continuous care beyond that available from a visiting nurse or that routinely provided by the nursing staff of the hospital, nursing home, or extended care facility.

k. Dental services. "Dental services" are any diagnostic, preventive, or corrective procedures administered by or under the supervision of a dentist in the practice of the dentist's profession and not excluded from coverage. Such services include treatment of the teeth and associated structures of the oral cavity, and of disease, injury, or impairment which may affect the oral or general health of the individual. "Dentist" means a person licensed to practice dentistry or dental surgery. Any procedure related to the preparation of "fixed bridgework" which involves the use of crowns and bridgework materials in concert with one another, but not including single crowns, is excluded from coverage unless a prior treatment authorization request, submitted by the attending dentist and approved by the department's dental consultant, describes a condition or combination of conditions which render the use of dentures impracticable or which may be more economically ameliorated by fixed bridgework than by dentures.

l. Physical therapy and related services. "Physical therapy and related services" means physical therapy, occupational

therapy, and services for individuals with speech, hearing, and language disorders, and the use of such supplies and equipment as are necessary.

(1) "Physical therapy" means those services prescribed by a physician and provided to a patient by or under the supervision of a qualified physical therapist. A qualified physical therapist is a graduate of a program of physical therapy approved by the council on medical education of the American medical association in collaboration with the American physical therapy association, or its equivalent, and where applicable, is licensed by the state.

(2) "Occupational therapy" means those services prescribed by a physician and provided to a patient and given by or under the supervision of a qualified occupational therapist. A qualified occupational therapist is registered by the American occupational therapy association or is a graduate of a program in occupational therapy approved by the council on medical education of the American medical association and is engaged in the required supplemental clinical experience prerequisite to registration by the American occupational therapy association.

(3) "Services for individuals with speech, hearing, and language disorders" are those diagnostic, screening, preventive or corrective services provided by or under the supervision of a speech pathologist or audiologist in the practice of the pathologist's or audiologist's profession for which a patient is referred by a physician. A speech pathologist or audiologist is one who has been granted the certificate of clinical competence in the American speech and hearing association, or who has completed the equivalent educational requirements and work experience necessary for such a certificate, or who has completed the academic program and is in the process of accumulating the necessary supervised work experience required to qualify for such a certificate.

m. Prescribed drugs, prosthetic devices, and dentures where a request is submitted by the attending dentist and granted prior approval by the department's dental consultant; and eyeglasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select.

(1) "Prescribed drugs" are any simple or compounded substance or mixture of substances prescribed as such or in other acceptable dosage forms for the cure,

mitigation, or prevention of disease, or for health maintenance, by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's professional practice as defined and limited by federal and state law. With respect to "prescribed drugs" federal financial participation is available in expenditures for drugs dispensed by licensed pharmacists and licensed authorized practitioners in accordance with North Dakota Century Code chapter 43-17. When dispensing, the practitioner must do so on the practitioner's written prescription and maintain records thereof.

(2) "Dentures" means artificial structures prescribed by a dentist to replace a full or partial set of teeth and made by, or according to the directions of, a dentist. The term does not mean those artificial structures, commonly referred to as "fixed bridgework", which involve the use of crowns and bridgework materials in concert with one another.

(3) "Prosthetic devices" means replacement, corrective, or supportive devices prescribed for a patient by a physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law for the purpose of artificially replacing a missing portion of the body, or to prevent or correct physical deformity or malfunction, or to support a weak or deformed portion of the body.

(4) "Eyeglasses" are lenses, including frames when necessary, and other aids to vision prescribed by a physician skilled in diseases of the eye, or by an optometrist, whichever the patient may select, to aid or improve vision.

n. Other diagnostic, screening, preventive, and rehabilitative services.

(1) "Diagnostic services" other than those for which provision is made elsewhere in these definitions, include any medical procedures or supplies recommended for a patient by the patient's physician or other licensed practitioner of the healing arts within the scope of the physician's or practitioner's practice as defined by state law, as necessary to enable the physician or practitioner to identify the existence, nature, or extent of illness, injury, or other health deviation in the patient.

(2) "Screening services" consist of the use of standardized tests performed under medical direction in the mass examination of a designated population to detect the existence of one or more particular diseases or health deviations or to identify suspects for more definitive studies.

(3) "Preventive services" are those provided by a physician or other licensed practitioner of the healing arts, within the scope of the physician's or practitioner's practice as defined by state law, to prevent illness, disease, disability and other health deviations or their progression, prolong life and promote physical and mental health and efficiency.

(4) "Rehabilitative services" in addition to those for which provision is made elsewhere in these definitions, include any medical remedial items or services prescribed for a patient by the patient's physician or other licensed practitioner of the healing arts, within the scope of the physician's or practitioner's practice as defined by state law, for the purpose of maximum reduction of physical or mental disability and restoration of the patient to the patient's best possible functional level.

o. Care and services in a certified mental institution for individuals under twenty-one years of age or sixty-five years of age or over.

p. Any other medical care and any other type of remedial care recognized under state law, specified by the secretary. This term includes but is not limited to the following items:

(1) Transportation, including expenses for transportation and other related travel expenses, necessary to securing medical examinations or treatment when determined by the agency to be necessary in the individual case. "Travel expenses" are defined to include the cost of transportation for the individual by ambulance, taxicab, common carrier or other appropriate means; the cost of outside meals and lodging en route to, while receiving medical care, and returning from a medical resource; and the cost of an attendant may include transportation, meals, lodging, and salary of the attendant, except that no salary may be paid a member of the patient's family.

(2) Family planning services, including drugs, supplies, and devices, when such services are under the supervision of a physician. There will be freedom from coercion or pressure of mind and conscience and

freedom of choice of method, so that individuals can choose in accordance with the dictates of their consciences.

(3) Whole blood, including items and services required in collection, storage, and administration, when it has been recommended by a physician and when it is not available to the patient from other sources.

(4) Skilled nursing home services, as defined in subdivision d, provided to patients under twenty-one years of age.

(5) Emergency hospital services which are necessary to prevent the death or serious impairment of the health of the individual and which, because of the threat to the life or health of the individual, necessitate the use of the most accessible hospital available which is equipped to furnish such services, even though the hospital does not currently meet the conditions for participation under title XVIII of the Social Security Act, or definitions of inpatient or outpatient hospital services set forth in subdivisions a and b.

2. The following limitations exist with respect to medical and remedial care and services covered or provided under the medical assistance program.

a. Coverage will not be extended and payment will not be made for diet remedies prescribed for eligible recipients.

b. Coverage will not be extended and payment will not be made for alcoholic beverages prescribed for eligible recipients.

c. Coverage will not be extended and payment will not be made for orthodontia prescribed for eligible recipients, except for orthodontia necessary to correct serious functional problems.

d. Coverage and payment for eye examinations and eyeglasses for eligible recipients shall be limited to examinations and eyeglass replacements necessitated because of visual impairment. Coverage and payment for eyeglass frames is available for a reasonable number of frames, and in a reasonable amount, not to exceed limits set by the department. The department shall make available to all practitioners dispensing eyeglass frames, and to anyone else who may make inquiry, information concerning established limits. No coverage exists, and no payment will be made, for eyeglass frames which exceed the limits. ~~A recipient is responsible for copayment of three dollars~~

~~for the replacement of eyeglasses when the replacement is occasioned by loss or breakage.~~

e. Coverage and payment for home health care services and private duty nursing services must be limited to a monthly amount determined by taking the monthly charge, to the medical assistance program, for the most intensive level of nursing care in the most expensive nursing home in the state and subtracting therefrom the cost, in that month, of all medical and remedial services furnished to the recipient (except physician services and prescribed drugs). For the purposes of determining this limit, remedial services include, but are not limited to, home-based and community-based services, service payments to the elderly and disabled, homemaker and home health aide services, and rehabilitative services, regardless of the source of payment for such services. This limit may be exceeded, in unusual and complex cases, if the provider has submitted a prior treatment authorization request describing each medical and remedial service to be received by the recipient, stating the cost of that service, describing the medical necessity for the provision of the home health care services or private duty nursing services, and explaining why less costly alternative treatment will not afford necessary medical care; and has had the request approved.

3. Remedial services provided by residential facilities such as licensed homes for the aged and infirm, licensed foster care homes or facilities, and specialized facilities are not covered services but expenses incurred in securing such services must be deducted from countable income in determining financial eligibility. For the purposes of this chapter, "remedial services" means those services, provided in the above-identified facilities, which produce the maximum reduction of physical or mental disability and restoration of a recipient to the recipient's best possible functional level.

4. The department may refuse payment for any covered service or procedure for which a prior treatment authorization request is required but not secured, but shall consider making payment if the vendor demonstrates that the failure to secure the required prior treatment authorization request was the result of oversight and the vendor has not failed to secure a required prior treatment authorization request within the twelve months prior to the month in which the services or procedures were furnished.

5. A vendor of medical services which provides a covered service but fails to receive payment due to the operation of subsection 4, and which attempts to collect from the eligible recipient or the eligible recipient's responsible relatives any amounts which would have been paid by the department but

for the operation of subsection 4, has by so doing breached the agreement referred to in subsection 4 of section 75-02-02-10.

History: Amended effective September 1, 1978; September 2, 1980; February 1, 1981; November 1, 1983; May 1, 1986; November 1, 1986; November 1, 1987; January 1, 1991.
General Authority: NDCC 50-24.1-04
Law Implemented: NDCC 50-24.1-04; 42 CFR 431.53, 42 CFR 431.110, 42 CFR 435.1009, 42 CFR Part 440, 42 CFR Part 441, subparts A, B, & D, 45 CFR 435.732

FEBRUARY 1991

AGENCY SYNOPSIS: Regarding proposed new North Dakota Administrative Code chapter 75-02-04.1, Child Support Guidelines.

75-02-04.1-01 - Definitions: Defines eight terms used in the chapter. As required by section 14-09-09.7(1)(a) and (b), defines gross income and net income.

75-02-04.1-02 - Determination of support amount - General instructions: Provides general instructions for the application of the chapter.

75-02-04.1-03 - Determination of support amount - Split custody: Describes the proper treatment of cases where the parents have more than one child in common and where each parent has sole custody of at least one child.

75-02-04.1-04 - Minimum support level: Provides for the establishment of a support obligation in all cases, even where the obligor's income is very limited. Those minimal support awards are intended to assure that all parents understand the parental duty to support children to the extent of the parents' ability. The requirement also is intended to foster relationships between parents and children which may arise out of a recognition of this parental duty.

75-02-04.1-05 - Determination of net income from self-employment: Describes the process for determining the income of self-employed obligors.

75-02-04.1-06 - Consideration of hardship: Specifies the circumstances which should be considered in reducing support obligations on the basis of hardship, as required by section 14-09-09.7(1)(d).

75-02-04.1-07 - Imputing income from assets: Imputes annual net property income equal to six percent of the parent's equity interest in

property other than the homestead, necessary household goods and furnishings, and one motor vehicle.

75-02-04.1-08 - Income of spouse: Precludes consideration of the income of an obligor's spouse except in circumstances where the spouse's income and financial circumstances are, to a significant extent, subject to control by the obligor; and with respect to in-kind income contributed by the spouse to the obligor.

75-02-04.1-09 - Factors considered - Not considered: In two subsections, identifies factors which are considered in arriving at the child support obligation and factors which are not considered. This provision is intended to assist courts in determining if a ponderance of the evidence establishes that factors not considered by the guidelines will result in an undue hardship to the obligor or a child for whom support is sought, as required by section 14-09-09.7(3).

75-02-04.1-10 - Child support amount: Establishes a schedule of support payments amounts based upon the obligor's net monthly income and the number of children for whom support is being sought in the matter before the court. The highest child support obligation established is with respect to obligors with a monthly income of $10,000. No higher support obligation would be imposed unless a court makes a determination that factors not considered by the guidelines would result in an undue hardship to an obligor or to a child for whom support is sought.

75-02-04.1-11 - Parental responsibility for children in foster care: Describes the manner of calculating child support obligations in circumstances where both parents often reside together and where there are usually two parents, neither of whom is a custodial parent and both of whom are potentially obligors.

75-02-04.1-12 - Uncontested proceedings: In cases where there is no dispute as to the amount of child support, requires the presentation of credible evidence describing the obligor's income and financial circumstances to demonstrate that the uncontested or agreed amount of child support conforms to the requirements of chapter 75-02-04.1.

75-02-04.1-13 - Application: Requires the use of the child support guidelines in all cases where an amount of child support must be determined.

STAFF COMMENT: Chapter 75-02-04.1 contains all new material but is not underscored so as to improve readability.

CHAPTER 75-02-04.1
CHILD SUPPORT GUIDELINES

75-02-04.1-01. Definitions.

1. "Custodial parent" means a parent who acts as the primary caregiver on a regular basis for a proportion of time greater than the obligor, regardless of custody descriptions such as "shared" or "joint" custody given in relevant judgments, decrees, or orders.

2. "Gross income" means income from any source, including salaries, wages, overtime wages, commissions, bonuses, deferred income, dividends, severance pay, pensions, interest, trust income, annuities income, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, retirement benefits, veterans' benefits (including gratuitous benefits), gifts and prizes to the extent each exceeds one thousand dollars in value, spousal support payments received, cash value of in-kind income received on a regular basis, income imputed from assets, and net income from self-employment, but excluding benefits received from means tested public assistance programs such as aid to families with dependent children, supplemental security income, and food stamps.

3. "In-kind income" means the receipt of any valuable right, property or property interest, other than money or money's worth, including, but not limited to, forgiveness of debt (other than through bankruptcy), use of property, including living quarters at no charge or less than the customary charge, and the use of consumable property at no charge or less than the customary charge.

4. "Net income" means total gross monthly income less:

   a. Federal income tax obligation based on application of standard deductions and tax tables.

   b. State income tax obligation based on application of standard deductions and tax tables.

c. Federal Insurance Contributions Act (FICA) deductions or obligations, whichever is less.

d. That portion of premium payments for health insurance policies or health service contracts intended to afford coverage for the child or children for whom support is being sought, and payments made on actual medical expenses of the child or children for whom support is being sought.

e. Payments actually made pursuant to a child support order, issued by a court or other governmental agency with authority to issue such orders, with respect to a child for whom support is not being sought in the proceeding before the court.

f. Union dues where required as a condition of employment.

g. Employee retirement contributions, other than FICA, where required as a condition of employment.

h. Employee expenses, incurred on a regular basis, but not reimbursed by the employer, for special equipment or clothing required as a condition of employment.

5. "Net income from self-employment" means gross income of any organization or entity which employs the obligor, but which the obligor is to a significant extent able to control, less actual expenditures attributable to the cost of producing income to that organization or entity.

6. "Obligee" includes, for purposes of this chapter, an obligee as defined in subsection 8 of North Dakota Century Code section 14-09-09.10 and a person who is alleged to be owed a duty of support.

7. "Obligor" includes, for purposes of this chapter, an obligor as defined in subsection 9 of North Dakota Century Code section 14-09-09.10 and a person who is alleged to owe a duty of support.

8. "Split custody" means a situation where the parents have more than one child in common, and where each parent has sole custody of at least one child.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

75-02-04.1-02. Determination of support amount - General instructions.

1. Calculations of child support obligations provided for under this chapter consider and assume that one parent acts as a primary caregiver and the other parent contributes a payment of child support to the child's care.

2. Calculations assume that the care given to the child during temporary periods when the child resides with the obligor or the obligor's relatives do not substitute for the child support obligation.

3. Net income received by an obligor from all sources must be considered in the determination of available money for child support.

4. The result of all calculations which determine a monetary amount ending in fifty cents or more must be rounded up to the nearest whole dollar, and must otherwise be rounded down to the nearest whole dollar.

5. In applying the child support guidelines, and obligor's monthly net income amount ending in fifty dollars or more must be rounded up to the nearest one hundred dollars, and must otherwise be rounded down to the nearest one hundred dollars.

6. The annual total of all income considered in determining a child support obligation must be determined and then divided by twelve in order to determine the obligor's monthly net income.

7. Income must be documented through the use of tax returns, current wage statements, and other information sufficiently to fully apprise the court of all gross income. Where gross income is subject to fluctuation, particularly in instances involving self-employment, information reflecting and covering a period of time sufficient to reveal the likely extent of fluctuations must be provided.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

75-02-04.1-03. Determination of support amount - Split custody. A support amount must be determined for the child or children in each parent's sole custody. The lesser amount is then subtracted from the greater. The difference is the child support amount owed by the parent with the greater obligation.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

75-02-04.1-04. Minimum support level. A support obligation should be established in each case where the obligor has any income. Even though the obligor's payment is far from sufficient to meet the child's needs, considerations of policy require that all parents understand the parental duty to support children to the extent of the parent's ability. Equally important considerations of policy require the fostering of relationships between parents and children which may arise out of the recognition of parental duty.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-02(12); 42 USC 667

75-02-04.1-05. Determination of net income from self-employment.

1. Expenses attributable to the cost of producing income vary from business to business. Deducting expenses from the gross income of the business determines the adjusted gross income, according to internal revenue service terminology. Business expenses may include: rent on business property, taxes, repairs, insurance, legal and professional fees, interest on borrowing, real estate taxes, insurance, utilities such as gas and electricity, heating costs, repairs and maintenance, and salaries or wages paid to employees. If the latest tax return is not available or does not reasonably reflect the income from the business because the business has not been in operation for a full year, because the business has been substantially reduced because of economic hardship, sale of assets, or termination of part of the business, or because the business has been substantially increased because of economic boom, increased assets, or expansion of business operation, a profit and loss statement which will most accurately reflect the current status of the business must be used.

2. After adjusted gross income from self-employment is determined, all business expenses which may be allowed for taxation purposes, but which do not require actual expenditures, such as depreciation and net operating losses, must be added to determine net income from self-employment. Business costs which are actually incurred and paid, but which may not be expensed for internal revenue service purposes, such as principal payments on business loans, may be deducted to determine net income from self-employment.

3. Farm businesses experience significant changes in production and income over time. To the extent that information is reasonably available, the average of the most recent five years of farm operations, undertaken on a scale substantially similar to farm operations of a party to the child support proceeding, should be used to determine farm income.

4. Landcosts are a significant part of farm expenses. Because farmlands are used both for the production of income and for investment purposes, for the purpose of making determinations under this section, deduction of business costs relating to the purchase of land is limited to the lesser of:

   a. The fair rental value of the land being purchased; or

   b. The total principal and interest payments actually made toward the purchase of the land.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-04.1-06. Consideration of hardship. Situations occur over which the obligor has little or no control, and which may substantially reduce the ability to pay child support for a prolonged time. If a continued or fixed expense, other than the obligor's living expenses, is actually incurred and paid, such as payments to restore a major casualty loss of property essential to living or to earning a livelihood, the amounts paid may be deducted from gross income to arrive at net income.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-04.1-07. Imputing income from assets. All assets, other than property claimable as a homestead under North Dakota Century Code section 47-18-01, necessary household goods and furnishings, and one motor vehicle in which the parent owns an equity not in excess of fifteen thousand dollars must be considered for the purpose of imputing income. Annual net property income equal to six percent of the parent's equity interest in all such property which does not produce at least six percent return on equity, reduced by the actual net property income, must be imputed.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-04.1-08. Income of spouse. The income and financial circumstances of the spouse of an obligor should not be considered as income for child support purposes unless the spouse's income and financial circumstances are, to a significant extent, subject to control by the obligor as, for instance, where the obligor is a principal in a business employing the spouse. The value of in-kind income contributed by the spouse to the obligor must be considered, as where the obligor's spouse meets the cost of providing living quarters or transportation

used by the obligor, or otherwise allows the obligor to avoid ordinary living expenses.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-04.1-09. Factors considered - Not considered.

1. The child support amount and the calculations provided for under this chapter consider all factors described or applied in this chapter, except those described in subsection 2 and, in addition, consider:

   a. The subsistence needs, work expenses, and daily living expenses of the obligor; and

   b. The income of the obligee, which is reflected in a substantial monetary and nonmonetary contribution to the child's basic care and needs by virtue of being a custodial parent.

2. The child support guidelines schedule and the calculations provided for under this chapter do not consider:

   a. The increased need in cases where support for more than six children is sought in the matter before the court;

   b. The increased ability of an obligor, with a monthly net income which exceeds ten thousand dollars, to provide child support;

   c. The increased educational costs voluntarily incurred at private schools;

   d. The increased needs of children with handicapping conditions or chronic illness;

   e. The increased needs of children age twelve and older;

   f. The full cost of child care purchased by the obligee;

   g. The value of the income tax exemption for supported children; and

   h. The reduced ability of the obligor to provide support due to travel expenses incurred solely for the purpose of visiting a child who is the subject of the order.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-04.1-10. Child support amount. The amount of child support payable by the obligor is determined by the application of the following schedule to the obligor's monthly net income and the number of children for whom support is being sought in the matter before the court.

Obligor's Monthly Net Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
below $400	a reasonable amount greater than $10					
400	56	68	80	88	96	104
500	75	90	105	120	130	140
600	102	126	144	162	174	192
700	133	161	189	210	231	252
800	168	200	232	264	288	320
900	207	252	288	324	360	387
1000	250	300	350	390	430	470
1100	266	328	384	428	470	511
1200	282	356	418	465	510	553
1300	298	385	452	503	550	594
1400	314	412	486	540	590	635
1500	330	441	520	578	630	677
1600	346	469	554	616	669	718
1700	362	497	588	653	709	759
1800	378	526	622	691	749	800
1900	394	554	656	728	789	842
2000	411	582	690	766	829	883
2100	427	610	724	804	869	924
2200	443	638	758	841	909	966
2300	459	667	792	879	949	1007
2400	475	695	826	916	989	1048
2500	492	723	860	954	1029	1090
2600	508	751	893	992	1068	1131
2700	524	779	927	1029	1108	1172
2800	540	808	961	1067	1148	1213
2900	556	836	995	1104	1188	1255
3000	572	864	1029	1142	1228	1296
3100	588	892	1063	1180	1268	1337
3200	604	920	1097	1217	1308	1379
3300	620	949	1131	1255	1348	1420
3400	636	977	1165	1292	1388	1461

Obligor's Monthly Net Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
3500	653	1005	1199	1330	1428	1503
3600	669	1033	1232	1368	1467	1544
3700	685	1061	1266	1405	1507	1585
3800	701	1090	1300	1443	1547	1626
3900	717	1118	1334	1480	1587	1668
4000	733	1146	1368	1518	1627	1709
4100	749	1174	1402	1556	1667	1750
4200	765	1202	1436	1593	1707	1792
4300	781	1231	1470	1631	1747	1833
4400	797	1259	1504	1668	1787	1874
4500	814	1287	1538	1706	1827	1916
4600	830	1315	1571	1744	1866	1957
4700	846	1343	1605	1781	1906	1998
4800	862	1372	1639	1819	1946	2039
4900	878	1400	1673	1856	1986	2081
5000	894	1428	1707	1894	2026	2122
5100	910	1456	1741	1932	2066	2163
5200	926	1484	1775	1969	2116	2205
5300	942	1513	1809	2007	2146	2246
5400	958	1541	1843	2044	2186	2287
5500	975	1519	1877	2082	2226	2329
5600	991	1597	1910	2120	2265	2370
5700	1007	1625	1944	2157	2305	2411
5800	1023	1654	1978	2195	2345	2453
5900	1039	1682	2012	2232	2385	2494
6000	1055	1710	2046	2270	2425	2535
6100	1071	1738	2080	2308	2465	2576
6200	1087	1766	2114	2345	2505	2618
6300	1103	1795	2148	2383	2545	2659
6400	1119	1823	2182	2420	2585	2700
6500	1136	1851	2216	2458	2625	2742
6600	1152	1879	2249	2496	2664	2783
6700	1168	1907	2283	2533	2704	2824
6800	1184	1936	2317	2571	2744	2865
6900	1200	1964	2351	2608	2784	2907
7000	1216	1992	2385	2646	2824	2948
7100	1232	2020	2419	2684	2864	2989

Obligor's Monthly Net Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
7200	1248	2048	2453	2721	2904	3031
7300	1264	2077	2487	2759	2944	3072
7400	1280	2105	2521	2796	2984	3113
7500	1297	2133	2555	2834	3024	3155
7600	1313	2161	2588	2872	3063	3196
7700	1329	2189	2322	2909	3103	3237
7800	1345	2218	2656	2947	3143	3278
7900	1361	2246	2690	2984	3183	3320
8000	1377	2274	2724	3022	3223	3361
8100	1393	2302	2758	3060	3263	3402
8200	1409	2330	2792	3097	3303	3444
8300	1425	2359	2826	3185	3343	3485
8400	1441	2387	2860	3172	3383	3526
8500	1458	2415	2894	3210	3423	3568
8600	1474	2443	2927	3248	3462	3609
8700	1490	2471	2961	3285	3502	3650
8800	1506	2500	2995	3323	3542	3691
8900	1522	2528	3029	3360	3582	3733
9000	1538	2556	3063	3398	3622	3774
9100	1554	2584	3097	3436	3662	3815
9200	1570	2612	3131	3473	3702	3857
9300	1586	2641	3165	3511	3742	3898
9400	1602	2669	3199	3548	3782	3939
9500	1619	2697	3233	3586	3822	3981
9600	1635	2725	3266	3624	3861	4022
9700	1651	2733	3300	3661	3901	4063
9800	1667	2782	3334	3699	3941	4104
9900	1683	2809	3368	3736	3981	4146
10000	1699	2838	3402	3774	4021	4187

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-04.1-11. Parental responsibility for children in foster care. It is important that parents maintain a tie to and responsibility for their child when that child is in foster care. Financial responsibility for the support of that child is one component of the maintenance of the relationship of parent and child.

1. In order to determine monthly net income, it is first necessary to identify the parent or parents who have financial

responsibility for any child entering foster care, and to determine the net income of those financially responsible parents. If the child's parents live in separate households, each parent's financial responsibility must be separately determined. Net income for each parent must be adjusted upward to reflect any income, not received from that parent, which is directly attributable to and furnished on behalf of a child for whom that parent is financially responsible.

2. The number of children to be counted, when applying section 75-02-04.1-10, is the number of children under age eighteen, including the child or children entering foster care, who are living in the household of a parent of a child entering foster care, and for whom that parent is financially responsible.

3. The net income and number of children are applied to section 75-02-04.1-10 to determine the amount of net income available for child support. That amount is divided by the number of children in the household, for whom the parent is financially responsible, to determine the amount of child support per child in foster care.

4. If a child in foster care is entitled to receive income or benefits in his or her own right, such as social security or supplemental security income, the full amount of the child's income or benefits must be applied to the cost of foster care. The amount of payment required from the responsible parents may not exceed the cost of foster care less the amount of the child's income or benefits.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-04.1-12. Uncontested proceedings. In a proceeding where the obligor appears, but does not resist the child support amount sought by the obligee, and in proceedings where the parties agree or stipulate to a child support amount, credible evidence describing the obligor's income and financial circumstances, which demonstrates that the uncontested or agreed amount of child support conforms to the requirements of this chapter, must be presented.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-04.1-13. Application. The child support guideline schedule amount is rebuttedly presumed to be the correct amount of child support in all child support determinations, including both temporary and permanent determinations, and including determinations necessitated by actions for the support of children of married persons, actions seeking

domestic violence protection orders, actions arriving out of divorce, actions arising out of paternity determinations, actions based upon a claim for necessaries, actions arising out of juvenile court proceedings, and actions seeking the reciprocal enforcement of support.

History: Effective February 1, 1991.
General Authority: NDCC 50-06-16, 50-09-25
Law Implemented: NDCC 14-09-09.7, 50-09-09(12); 42 USC 667

75-02-07-17. Ratesetting.

1. The department shall establish reasonable rates for facilities for the care and maintenance of individuals dependent in whole or in part upon state or county supplementation of supplemental security income benefits.

2. The department shall annually determine the allowable costs and shall adjust those costs to reflect changes projected in operational and labor costs for the year, beginning on July first and ending on June thirtieth of the following year. The rate thereby established must be called the audit rate.

3. The department shall rank all licensed beds, in facilities for which an audit rate is established, by the respective audit rate set for the bed, and determine position in the ranking below which lie seventy percent of the ranked beds. The reasonable rate established for each facility must be the lesser of the facility's audit rate or the audit rate which has been established for the facility in which the bed thus determined is located. The reasonable rate shall be effective from July first through June thirtieth of the following year.

4. A county social service board shall determine the payable rate for any resident whose care is, in whole or in part, paid for by that county social service board. The payable rate shall be an amount equal to forty-five dollars plus the least of:

   a. The reasonable rate;

   b. The rate charged by the facility to residents not dependent upon state or county supplementation of supplemental security income benefits; or

c. A rate voluntarily agreed to by the facility.

5. In the event a county social service board establishes a payable rate less than that required by subsection 4, any county social service board expenditures made pursuant to that rate will ~~not~~ nonetheless be considered by the department in determining that county social service board's expenditures for poor relief pursuant to North Dakota Century Code section 50-01-09.2.

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NOTICE

5. In the event a county social service board establishes a payable rate less than that required by subsection 4, any county social service board expenditures made pursuant to that rate will ~~nonetheless~~ not be considered by the department in determining that county social service board's expenditures for poor relief pursuant to North Dakota Century Code section 50-01-09.2. The amendment made under this subsection becomes effective with respect to rates paid for services furnished on and after July 1, 1991.

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6. The payable rate shall include a forty-five dollar per month clothing and personal needs allowance which must be reserved for each individual. Facilities shall ensure that this monthly clothing and personal needs allowance is reserved for its intended purpose.

7. Partial year.

   a. For facilities changing ownership during the rate period, the rate established for the previous owner will be retained.

   b. For existing facilities adding beds, the rate for the new beds will be the same as for the other similarly licensed beds in the facility.

   c. New facilities will submit, for departmental approval, a proposed budget for operations for the period, at least three months but not more than fifteen months in duration, which ends on June thirtieth. The rate established based upon the approved budget shall be final and shall continue in effect until the beginning of the rate period next following after the end of the report period which coincides with the end of the budget period.

8. Adjustments and reconsideration procedures.

a. Rate adjustments may be made to correct errors subsequently determined and shall also be retroactive to the beginning of the facility's rate period.

b. An adjustment must be made for a facility which has terminated participation in the program and has disposed of its depreciable assets or which has changed ownership. In this case, the regulations pertaining to gains and losses on disposable assets will be effective.

c. Any requests for reconsideration of the rate must be filed with the department for administrative consideration within thirty days of the date of the rate notification.

History: Effective July 1, 1989; amended effective April 1, 1991.
General Authority: NDCC 50-06-16
Law Implemented: NDCC 50-06-14.2

JULY 1991

AGENCY SYNOPSIS: Regarding proposed amendments to North Dakota Administrative Code chapter 75-04-04 Family Subsidy Program.

A preamble was deleted because it was outdated and no longer accurate.

75-04-04-01 - Authority: Repeals the section referring to the 1979 appropriation measure which originated the family subsidy program.

75-04-04-02 - Objective: Restates the objective using new definitions and describes a child as eligible with reference to eligibility to participate in the family subsidy program.

75-04-04-03 - Definitions: Deletes some definitions and defines new terms.

75-04-04-04 - Application Process and Priority for Assistance: Revises the basis for determining priority for participation in the program. A determination is based on the severity of need of a family.

75-04-04-05 - Eligibility for Family Subsidy Program: Substitutes new terms and revises the basis of eligibility of a child. The basis is having been found eligible for developmental disabilities case management. Deletes a reference to income levels and resources which may be earned and owned by a family, and describes what resources will be considered with reference to the impact of having an eligible child reside in the home.

75-04-04-06 - Certification Process: Restates the procedure for certification for eligibility with respect to the new criteria for eligibility. Specifies that a family subsidy contract to be offered a parent will be within the funds available and maximum dollar limits set by the developmental disabilities division.

75-04-04-07 - Appeal from Denial or Discontinuance: Provides that upon denial of acceptance for or discontinuance from the family subsidy program, a parent can utilize an informal grievance procedure in addition to the formal appeal process.

75-04-04-08 - Reimbursement to Eligible Parents: Eliminates the $15 per week basic care subsidy and the $35 per week limit with respect to the expense of services, and provides for reimbursement of a contracted amount for services. Itemized service costs eligible for reimbursement are redefined as excess costs and some specific costs are redefined.

75-04-04-09 - Responsibilities of Parents Participating in the Family Subsidy Program: Responsibilities of a parent to participate in the program are restated to require signing an individual service plan and a family subsidy contract and participating in the developmental disabilities case management system.

75-04-04-10 - Discontinuance of Participation in the Family Subsidy Program: The basis for discontinuance in the family subsidy program is restated to include that the child is no longer eligible for developmental disabilities case management, the family withdraws, or the family does not maintain an accounting of costs of the family pursuant to the family subsidy contract.

75-04-04-01. Authority. ~~Under the authority vested in the department of human services pursuant to section 4 of chapter 10 of the 1979 Session Laws, the department of human services is empowered to prescribe, promulgate, and adopt rules and regulations as are necessary for the purpose of establishing a pilot program for home care and deinstitutionalization aid for the care, custody, and control of developmentally disabled persons who are retained in the home or are deinstitutionalized, by providing financial assistance to parents, guardians, or legal custodians who apply for aid under the law and qualify under the rules and regulations established by the department.~~ Repealed effective July 1, 1991.

History: ~~Effective January 1, 1980; amended effective December 1, 1981.~~
General Authority: ~~S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1~~
Law Implemented: ~~S.L. 1979, Ch. 10, § 4~~

75-04-04-02. Objective. The objective of the family subsidy program is to enable ~~developmentally disabled children~~ an eligible child to remain in or return to ~~their~~ the family ~~homes~~ home, thus avoiding or reducing the necessity of ~~placement in a more restrictive institutional setting~~ an out-of-home placement. The program recognizes that ~~families~~ parents who maintain ~~a developmentally disabled~~ an eligible child in ~~their~~ the home often incur extraordinary financial obligations. The program provides financial resources directly to the ~~family~~ parent to assist ~~them~~ in meeting ~~their~~ an eligible child's special needs.

History: Effective January 1, 1980; amended effective July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1

Law Implemented: S.L. 1979, Ch. 10, § 4

75-04-04-03. Definitions. As used in this chapter unless the context requires otherwise:

~~1. "Agency" means the department of human services.~~

~~2. "Deinstitutionalization" means the provision of appropriate alternative living arrangements to developmentally disabled individuals currently served in institutions, or who may qualify for admission to institutions.~~

~~3. "Developmental disability" means a severe, chronic disability which:~~

~~a. Is attributable to a mental or physical impairment or combination of mental and physical impairments;~~

~~b. Is manifested before an affected individual attains age twenty-two;~~

~~c. Is likely to continue indefinitely;~~

~~d. Results in substantial functional limitations in three or more of the following areas of major life activity:~~

~~(1) Self-care;~~

~~(2) Receptive and expressive language;~~

~~(3) Learning;~~

~~(4) Mobility;~~

~~(5) Self-direction;~~

~~(6) Capacity for independent living; and~~

~~(7) Economic self-sufficiency; and~~

~~e. Reflects an affected individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are individually planned and coordinated.~~

~~4. "Individual habilitation plan (IHP)" means a written document describing the skills and abilities of a developmentally disabled child and specifying the program of services or treatment required to effect positive change, or to prevent or reduce negative change, in specific areas of disability.~~

~~5. "Institution" means any public or private residential facility housing twenty or more residents, that provides treatment and care to the developmentally disabled on a twenty-four hour a day basis.~~

1. "Family" means a parent and an eligible child.

2. "Individual service plan" (ISP) means a document which describes service needs of the eligible child and the scope of services to be provided. The individual service plan, in conjunction with an individual program plan (IPP) prepared by each provider, provides a comprehensive plan of care. This comprehensive plan of care identifies the services to be provided, the persons who will provide services, the time period of service provision, and the frequency of the service.

3. "Out-of-home placement" means a setting more restrictive than a family home, such as in an institution, a group residential facility or group home, or a part-time to full-time placement in another family or foster home.

~~6.~~ 4. "Parent" means the natural or adoptive parent, guardian, person who stands in loco parentis to the child, attorney in fact of a parent or guardian, or a person to whom legal custody of the child has been given by order of a court.

History: Effective January 1, 1980; amended effective December 1, 1981; July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1
Law Implemented: S.L. 1979, Ch. 10, § 4

75-04-04-04. Application process and priority for assistance.

1. Any parent who desires to apply for ~~a~~ family subsidy to maintain ~~a developmentally disabled~~ an eligible child in the home, or return ~~a developmentally disabled~~ the child home from an ~~institution~~ out-of-home placement, shall make application to do so. Applications shall be available at the regional human service centers ~~and at county social service board offices~~.

2. ~~All families~~ Any parent participating in the family subsidy program on ~~June 30, 1981,~~ June thirtieth of the previous fiscal year who desires to continue in the program must reapply each year. ~~First priority will be given to those reapplications. Second priority will be given to eligible applicants who are on a current waiting list maintained by the agency. Third priority will be given to new applicants with children who are currently institutionalized. Fourth priority will be given to applicants with children who are determined, by the individual habilitation plan team, to have multiple~~

~~handicaps~~ Priority will be determined by severity of need of the family.

3. A waiting list of families with eligible children ~~certified eligible~~, but for whom funding is not immediately available, shall be established. The waiting list shall be maintained on a priority basis.

History: Effective January 1, 1980; amended effective December 1, 1981; July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1
Law Implemented: S.L. 1979, Ch. 10, § 4

75-04-04-05. Eligibility for family subsidy program.

1. ~~Parents~~ A parent applying for financial assistance under this program must:

   a. Reside within the state of North Dakota;

   b. Desire to maintain the eligible child within ~~their~~ the parent's home, or return the child to ~~their~~ the parent's home from an ~~institutional setting, their developmentally disabled child~~ out-of-home placement; and

   c. Provide the agency with the necessary medical, psychological, or educational evaluations relating to their child for agency determination of eligibility.

2. ~~Individuals~~ A child on whose behalf a family subsidy will be provided upon application must:

   a. ~~Be developmentally disabled~~ Have been found eligible for developmental disabilities case management; and

   b. Be twenty-one years of age or under.

3. ~~The maximum levels of income and resources which may be earned and owned by the family unit will be established by the agency. Family resources will be evaluated in the manner provided in subdivisions c, d, e, f, g, h, i, and j of subsection 2 of section 75-02-02-07~~ Supplemental security income, social security disability income, medical assistance, and other payments made to or on behalf of the child will be considered as family resources. All family resources will be evaluated as to their effectiveness in lessening the impact of the disability on the family.

History: Effective January 1, 1980; amended effective December 1, 1981; July 1, 1982; July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1
Law Implemented: S.L. 1979, Ch. 10, § 4

75-04-04-06. Certification process. Certification of eligibility for the family subsidy program will use the following procedure:

1. An application for developmental disabilities case management will be completed by ~~the family~~ a parent and ~~sent~~ submitted to the regional human service center where ~~it~~, upon a determination of eligibility, the child will be assigned to a developmental disabilities case manager.

2. The regional developmental disabilities case manager will:

   a. Assess the functional level of ~~client~~ the child;

   b. Gather all available, pertinent evaluation data; and

   c. Organize an interagency individual ~~habilitation~~ service plan team consisting of the referral source, potential service providers, the ~~client~~ child, ~~parent/guardian~~ parent, and whomever else is necessary to develop an individual ~~habilitation~~ service plan.

3. The interagency individual ~~habilitation~~ service plan team will:

   a. Determine if evaluation data available is adequate to make program decisions;

   b. Serve as the service evaluation team for the child;

   c. Recommend appropriate services, service settings, and treatment; and

   ~~c.~~ d. Certify program eligibility by signing the individual ~~habilitation~~ service plan~~;~~

   ~~d. Serve as the service evaluation team for client; and~~

   ~~e. Recommend changes in program, level of service, service setting, or eligibility status~~.

4. The ~~agency~~ department of human services will, within the limits of available funding, offer a family subsidy contract to an eligible ~~parents~~ parent, with the level of funding ~~commensurate~~ set in accordance with the recommendations of the individual ~~habilitation~~ service plan team and the developmental disabilities case manager; provided, however, that the amounts available for any individual contract must be within the maximum dollar limits set by the developmental disabilities division, department of human services, for individual contracts.

5. ~~Recertification~~ Redetermination of the families' eligibility and the contract amount must be accomplished ~~for~~ each state fiscal year (July first through June thirtieth).

History: Effective January 1, 1980; amended effective December 1, 1981; July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1
Law Implemented: S.L. 1979, Ch. 10, § 4

75-04-04-07. Appeal from denial or discontinuance. ~~Parents~~ A parent denied acceptance into the program or discontinued from the program shall be informed in writing of the reasons for the denial or discontinuance and, if appeal is made within ten days of the receipt of such notice, shall be afforded the right to an administrative hearing in the manner prescribed by chapter 75-01-03. Such parent may elect to utilize the informal human service center client grievance procedures contained in department of human services manual chapter 120-45. If such an informal grievance is filed in a timely fashion, such parents may, if dissatisfied with the outcome of the grievance, appeal the denial of acceptance or discontinuance from the program as provided for in manual chapter 120-45.

History: Effective January 1, 1980; amended effective July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1
Law Implemented: S.L. 1979, Ch. 10, § 4

75-04-04-08. ~~Subsidy payments~~ Reimbursement to eligible parents. ~~Two types of financial assistance are available through the family subsidy program:~~

~~1. Fifteen dollars per week will be paid to the parents for the basic care of their developmentally disabled child. Families receiving supplemental security income benefits for their child will not be eligible for the basic care supplement.~~

~~a. Payments will be issued on a monthly basis.~~

~~b. Payments will begin the week in which the director of the appropriate institution certifies the child into the program.~~

~~c. The basic care subsidy will be available even if the family chooses not to participate in the services subsidy.~~

~~2.~~ ~~An amount~~ Reimbursement not to exceed ~~thirty-five dollars per week~~ the contracted amount will be paid to the ~~family~~ parent for services or treatment which the child receives in accordance with the individual ~~habilitation~~ service plan.

~~a.~~ 1. ~~Service~~ Excess costs reimbursed monthly ~~through the services subsidy~~, in whole or part, by the family subsidy contract include, but are not limited to, the following:

~~(1)~~ a. Purchase of special equipment.

~~(2)~~ b. Specialized therapy, e.g., speech, occupational or physical therapy.

~~(3)~~ c. Special diets.

~~(4)~~ d. Medical or dental care not covered under the family's health insurance or a federally funded program such as medical assistance or crippled children's services.

~~(5)~~ e. Home health care.

~~(6)~~ f. Counseling for the child or family, including behavior management.

~~(7) Respite care (if used in conjunction with parental employment, only extraordinary costs may be reimbursed).~~

g. Extraordinary expense for child care by a person other than a parent of the child.

~~(8)~~ h. Special clothing.

~~(9) Educational programs not provided without charge by the public schools.~~

~~(10) Child care facility.~~

~~(11)~~ i. Recreational services as related to the child's disability.

~~(12)~~ j. Related transportation.

~~(13)~~ k. Housing ~~rehabilitation~~ modification.

~~(14)~~ l. Excess cost of health insurance.

~~b.~~ 2. ~~Payment~~ Reimbursement will begin following the signing of a ~~habilitation~~ family subsidy contract between the ~~parents~~ parent and the ~~agency~~ department of human services. ~~Payment up to an average of thirty-five dollars per week~~ Reimbursement of a contracted amount will be based upon the case manager's receipt of a written statement and receipts from the parent itemizing the expenditures or obligations in carrying out the individual ~~habilitation~~ service plan incurred following execution of the contract.

History: Effective January 1, 1980; amended effective December 1, 1981; July 1, 1982; July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4, S.L. 1989, Ch. 68, § 4; 50-06-05.1
Law Implemented: S.L. 1979, Ch. 10, § 4, S.L. 1989, Ch. 68, § 4

75-04-04-09. Responsibilities of parents participating in ~~services subsidy~~ the family subsidy program. The responsibilities of a parent who desires to participate in the ~~services~~ family subsidy program include:

1. Participation with the ~~agency~~ department of human services in the development of an individual ~~habilitation~~ service plan for the child.

2. Signing the ~~habilitation contract~~ individual service plan agreeing to the plan of services, and the contract referred to in subsection 4 of section 75-04-04-06.

3. Obtaining the agreed-upon services for the child.

4. Maintaining an accounting of the funds expended for the agreed-upon services.

5. Participating in ~~a behavioral assessment of the child at the beginning of the program and on a semiannual basis thereafter~~ the developmental disabilities case management system.

History: Effective January 1, 1980; amended effective December 1, 1981; July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1
Law Implemented: S.L. 1979, Ch. 10, § 4

75-04-04-10. Discontinuance of ~~subsidy~~ participation in the family subsidy program. Participation in the ~~basic care~~ family subsidy program will be terminated under any of the following conditions:

1. The family requests termination.

2. Death of the child.

3. Voluntary or court-ordered out-of-home placement of the child.

4. The child reaches age twenty-two.

5. The family moves out of state.

6. The child no longer is ~~developmentally disabled~~ eligible for developmental disabilities case management services.

7. The individual ~~habilitation~~ service plan team recommends certification be discontinued.

8. Unavailability of funds.

9. The family ~~does not cooperate in the annual assessment of the child's functioning~~ withdraws from developmental disabilities case management.

10. The family does not implement the care and treatment program agreed upon in the individual ~~habilitation~~ service plan.

11. The family does not maintain adequate accounting of the ~~funds for the agreed upon services~~ costs paid by them pursuant to the contract required by this chapter.

History: Effective January 1, 1980; amended effective December 1, 1981; July 1, 1991.
General Authority: S.L. 1979, Ch. 10, § 4; NDCC 50-06-05.1
Law Implemented: S.L. 1979, Ch. 10, § 4

AGENCY SYNOPSIS: Regarding proposed new North Dakota Administrative Code chapter 75-04-06 Eligibility for Mental Retardation-Developmental Disabilities Case Management Services.

75-04-06-01 - Principles of Eligibility: Generally describes requirement that professional judgment be used to determine whether a person is appropriate for or entitled to case management services, and describes minimum requirements for a team of professionals who are to make the eligibility determination.

75-04-06-02 - Criteria for Service Eligibility - Class Member: Describes the process for determining if a person is a member of the plaintiff class in Association of Retarded Citizens v. Sinner.

75-04-06-03 - Criteria for Service Eligibility - Applicants who are not Members of the Plaintiff Class: Describes the requirements for eligibility for services secured by the Developmental Disabilities Division. Requires that the person be able to benefit from services and that the person have a condition of mental retardation, properly diagnosed, or a condition which is closely related. Also requires that eligibility determinations be made through the application of professional judgment, and states factors to be considered in the application of professional judgment. Limits services to those which may be provided within the limits of legislative appropriation.

75-04-06-04 - Criteria for Service Eligibility - Children Birth Through Age Two: Describes the criteria for determining eligibility for persons in this age category. Defines the terms "high risk" and "developmentally disabled infant."

STAFF COMMENT: Chapter 75-04-06 contains all new material but is not underscored so as to improve readability.

CHAPTER 75-04-06
ELIGIBILITY FOR MENTAL RETARDATION-DEVELOPMENTAL DISABILITIES CASE MANAGEMENT SERVICES

75-04-06-01. Principles of eligibility.

1. The process of determining whether a person should receive services coordinated through mental retardation-developmental disabilities case management involves the recognition of several criteria and an understanding of expected outcomes as each criterion is applied. Professional judgment is appropriately applied to answer two questions:

   a. Whether a person is a class member and, therefore, entitled to mental retardation-developmental disabilities case management services; and

   b. Whether a person is appropriate for mental retardation-developmental disabilities case management services even though not a class member.

2. These questions must be used as the frame of reference for a team of at least three professionals in the human service center, led by the developmental disabilities program administrator or the administrator's designee, for the determination of whether a person should be served through services coordinated by a mental retardation-developmental disabilities case manager. For purposes of this chapter, "the team" refers to such a team.

History: Effective July 1, 1991.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-01.2-02, 50-06-05.3

75-04-06-02. Criteria for service eligibility - Class member.

1. The order of the federal district court in Association of Retarded Citizens v. Sinner makes a specific group of persons

with disabilities eligible for services. These persons are "members of the plaintiff class". The team's initial task is to determine whether the applicant for services is a member of the plaintiff class. The terms "members of the plaintiff class" or "class members" refer to the class of persons who, as of September 26, 1980, and at any time subsequent, have been or may become residents of the developmental center at Grafton, North Dakota, and san haven, located near Dunseith, North Dakota. This language creates, in effect, three separate groups:

a. Those persons who, as of September 26, 1980, were residents of the developmental center or san haven.

b. Those persons who, subsequent to September 26, 1980, became residents of developmental center or san haven.

c. Those persons who, subsequent to September 26, 1980, would have become residents of the developmental center or san haven were it not for the community alternatives created or expanded as a result of this litigation.

2. Class membership for subdivisions a and b of subsection 1 will be determined by reference to facility records. The team must use recognized evaluation criteria to identify persons eligible for services under subdivision c of subsection 1. The court has eliminated persons with a sole condition of mental illness from this group. In determining whether a person would have been served by the developmental center and, consequently, is eligible under subdivision c of subsection 1, the following criteria must be met:

   a. The person must have a diagnosis of mental retardation which is so severe as to constitute a developmental disability; or

   b. The person must have a combination of conditions, one of which must be any level of mental retardation, which together are so severe as to constitute a developmental disability.

3. A diagnosis of the condition of mental retardation must be made by an appropriately licensed professional using diagnostic criteria accepted by the American psychiatric association.

4. Determination of whether the manifestation of the conditions is so severe as to constitute a developmental disability must be done in accordance with the definition of developmental disability in North Dakota Century Code section 25-01.2-01.

5. If the team determines that the person requesting services meets the criteria of subdivision c of subsection 1, the

person is eligible for mental retardation-developmental disabilities case management services.

History: Effective July 1, 1991.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-01.2-02, 50-06-05.3

75-04-06-03. Criteria for service eligibility - Applicants who are not members of the plaintiff class.

1. A person who is not a class member may be eligible for services which the department, through the developmental disabilities division, purchases on behalf of persons whose needs are similar to those of class members. Such a person must:

   a. Have a condition of mental retardation, diagnosed by an appropriately licensed professional using diagnostic criteria accepted by the American psychiatric association, which is not so severe as to constitute a developmental disability, but be able to benefit from treatment and services; or

   b. Have a condition, other than mental illness, so severe as to constitute a developmental disability, which results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and must be able to benefit from services and intervention techniques which are so closely related to those applied to persons with the condition of mental retardation that provision is appropriate.

2. Determination of eligibility for persons described in subdivision b of subsection 1 requires the application of professional judgment in a two-step process:

   a. The team must first determine whether the condition is so severe as to constitute a developmental disability. North Dakota Century Code section 25-01.2-01 must be applied in order to determine if a developmental disability is present. The presence of a developmental disability does not establish eligibility for services through the mental retardation-developmental disabilities case management system, but does require the team to consider all assessment data and apply professional judgment in the second step.

   b. The team must next determine whether appropriate services can be provided to a person determined to have a condition, other than mental illness, so severe as to constitute a developmental disability. The team must have a thorough knowledge of the condition and service needs of

the applicant, as well as a thorough knowledge of services that would be appropriate through the developmental disabilities system. When considering if mental retardation-developmental disabilities case management is appropriate, the team must consider factors, including:

(1) Whether the person would meet criteria appropriately used to determine the need for services in an intermediate care facility for the mentally retarded.

(2) Whether appropriate services are available in the existing developmental disabilities service delivery system.

(3) Whether a service, which uses intervention techniques designed to apply to persons with mental retardation, delivered by staff trained specifically in the field of mental retardation, would benefit the person.

(4) Whether a service, designed for the mentally retarded, could be furnished to the person without any significant detriment to the person or others receiving the service.

3. If the team concludes, through the application of professional judgment, that a person's needs can be appropriately met through specific services purchased by the department for class members, a mental retardation-developmental disabilities case manager may be assigned to coordinate services. Services may be provided subject to the limits of legislative appropriation. New services need not be developed on behalf of the individual.

History: Effective July 1, 1991.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-01.2-02, 50-06-05.3

75-04-06-04. Criteria for service eligibility - Children birth through age two.

1. Service eligibility for children from birth through age two is based on distinct and separate criteria designed to enable preventive services to be delivered. Young children may have conditions which could result in substantial functional limitations if early and appropriate intervention is not provided. The collective professional judgment of the team must be exercised to determine whether the child is high risk or developmentally delayed, and may need early intervention services. If a child, age birth through two, is either high risk or developmentally delayed, he or she may be included on the caseload of a mental retardation-developmental disabilities case manager and considered for those services

designed to meet specific needs. Eligibility for continued service inclusion through mental retardation-developmental disabilities case management must be redetermined at age three using criteria specified in sections 75-04-06-02 and 75-04-06-03.

2. For purposes of this section:

   a. "High risk" means a child, age birth through two, whose development is related to diagnosed disorders of known etiology and which have relatively well-known expectancies for developmental outcome within specified ranges of developmental delay.

   b. "Developmentally delayed infant" means:

      (1) An infant who is performing twenty-five percent below age norms in two or more of the following areas:

         (a) Cognitive development;

         (b) Gross motor development;

         (c) Fine motor development;

         (d) Sensory processing (hearing, vision, haptic);

         (e) Language development (expressive or receptive);

         (f) Psychosocial development; or

         (g) Self-help skills; or

      (2) An infant who is performing at fifty percent below age norms in one or more of the following areas:

         (a) Cognitive development;

         (b) Physical development, including vision and hearing;

         (c) Language and speech development (expressive and receptive);

         (d) Psychosocial development; or

         (e) Self-help skills.

History: Effective July 1, 1991.
General Authority: NDCC 25-01.2-18, 50-06-16
Law Implemented: NDCC 25-01.2-02, 50-06-05.3

TITLE 75.5

Social Work Examiners, Board of

JUNE 1991

75.5-02-01-02. Accredited college or university. With regard to the statutory requirement set forth in North Dakota Century Code section 43-41-04, that an applicant for a social work license have a degree from a college or university accredited by the council on social work education:

1. The following statutes shall be defined as meeting the accreditation requirement:

   a. Programs currently accredited.

   b. Programs in initial ~~accredited~~ accreditation review status.

   c. Programs in approved candidacy status.

   d. Programs in conditional ~~accredited~~ accreditation status.

2. The following statutes shall be defined as not meeting the accreditation requirements:

   a. Programs that have been rejected for candidacy status.

   b. Programs that have been denied candidacy status.

   c. Programs that have been denied initial accreditation.

   d. Programs that have been denied reaccreditation.

History: Effective January 1, 1987; amended effective June 1, 1991.
General Authority: NDCC 43-41-09
Law Implemented: NDCC 43-41-04

75.5-02-03-02. License examination.

1. The license examination must be the examination approved by the board. The examination must be administered in North Dakota at least two times a year. The board shall certify the eligibility of all applicants to take the examination and shall determine uniform passing and failing cutoff points. Students currently enrolled in accredited social work programs may apply for and take the examination during the semester or quarter in which they will graduate; however, a license may not be granted until satisfactory proof of graduation is received by the board.

2. Only those applicants who meet the educational requirements of a bachelor's or master's degree in social work or social welfare from an accredited school of social work or who satisfy the waiver conditions with respect to such requirement, may be permitted to take the qualifying examination.

3. Applicants are entitled to written notification of the results of the examination. Written notification must be sent to the applicant within fourteen days of the date on which the board receives the examination results. If the examination results are delayed for longer than ninety days after the examination date, the applicant is entitled to written notification from the board regarding the reason for the delay.

4. An applicant who is denied a license is entitled to notification that includes the specific reason the applicant was denied, the right to request reconsideration of the application, and an explanation of appeal procedures.

5. An applicant may request, in writing to the executive secretary, reconsideration of the application if the board has determined that the applicant does not meet the board requirements for licensure or relicensure. The request for reconsideration must be received by the executive secretary within thirty days of the date on the denial notice. The applicant is entitled to notification in writing of the board's decision on reconsideration of the application.

6. An applicant who fails an examination may take the examination again at the next scheduled examination date upon tender of the examination fee.

7. Licensees who received their license during the grandparenting period or who were registered for private practice and who did not take the licensing examination may take such examination as is appropriate to their level of practice. Licensing status will not be affected by the results of this examination but such results will be filed in the licensee's record.

History: Effective January 1, 1987; amended effective June 1, 1991.
General Authority: NDCC 43-41-09
Law Implemented: NDCC 43-41-04, 43-41-09

75.5-02-03-03. License fees. All applicants for a license shall submit a one hundred dollar initial licensure fee. Applicants who are denied a license or withdraw their application for a license prior to issuance of the license ~~must~~ will be refunded all but twenty-five dollars of that fee, which must be retained to cover the costs of processing. The board shall have the discretion of refunding the full amount in those instances where it is determined that no administrative costs were incurred.

All licensees applying for a renewal of the license shall submit a renewal fee of ~~twenty~~ forty dollars.

Licensees requesting a change in name on a license or upgrading a license as a licensed social worker or licensed certified social worker shall pay a fee of twenty-five dollars.

All licensees applying for registration for private practice shall submit a fifty dollar application fee. Applicants who are denied registration for private practice or withdraw their application for registration prior to issuance of the registration must be refunded all but twenty-five dollars of that fee, which must be retained to cover the costs of processing. The board shall have the discretion of refunding the full amount in those instances where it is determined that no administrative costs were incurred.

All licensees submitting an application for program approval (board form 1) to record continuing education hours shall submit a processing fee of ten dollars.

Increases in fees will be subject to a public hearing prior to implementation. Notice of the hearing will be made through the board's publication at least thirty days prior to the hearing.

History: Effective January 1, 1987; amended effective June 1, 1991.
General Authority: NDCC 43-41-09
Law Implemented: NDCC 43-41-09

75.5-02-03-06. Procedure for inactive licenses. A licensee who is no longer residing in the state of North Dakota and who is not involved, or can be reasonably expected to not be involved, in the practice of social work with residents of the state of North Dakota will be placed on inactive status. The following procedures will be followed:

1. Applicants for license renewal will indicate their place of professional practice and whether that practice involves clients residing in the state of North Dakota.

2. Applicants for license renewal who meet the criteria for license renewal and inactive status set out in this section will be granted a license renewal of an inactive status as noted by the seal that will be returned to them with their renewal notice.

3. During the licensing period for which an inactive status license has been issued, a return to active status will be granted upon proof that the licensee either resides in the state of North Dakota or is involved in the practice of social work with clients residing in the state of North Dakota.

Renewal of licenses for licensees under inactive status will occur under the same criteria as other licensees in good standing.

History: Effective June 1, 1991.
General Authority: NDCC 43-41-09
Law Implemented: NDCC 43-41-12

TITLE 81

Tax Commissioner

MAY 1991

81-01.1-01-02. Definitions. As used in this article and in the provisions of North Dakota Century Code title 57, unless otherwise required, all terms and phrases have the same meaning as defined in the North Dakota Century Code, and, in addition:

1. "Assessment" means the determination and imposition of tax by the tax commissioner of any state tax due and owing based upon information on a tax return, upon information obtained through an audit, or upon the best information available. The term does not include a self-assessment made by a taxpayer on a tax return, a calculation of tax made by a taxpayer with the assistance of the tax commissioner, or an adjustment made due to a mathematical or clerical error on a tax return.

2. "Audit" means an examination or investigation by the tax commissioner to determine the accuracy of information on a tax return or to determine whether a tax liability exists.

3. "Determination" means a decision by the tax commissioner on a refund or an assessment of tax. The term does not include a self-assessment made by a taxpayer on a tax return, a calculation of tax made by a taxpayer with the assistance of the tax commissioner, or an adjustment made due to a mathematical or clerical error on a tax return.

4. "Field audit" means any audit where taxpayer's books and records are examined at the taxpayer's place of business.

5. "Mathematical error" or "clerical error" means:

   a. An error in addition, subtraction, multiplication, or division shown on any tax return.

b. An incorrect use of any table provided by the tax commissioner with respect to any tax return if such incorrect use is apparent from the existence of other information on the tax return.

c. An entry on a tax return of an item that is inconsistent with another entry of the same or another item on such tax return.

d. An omission of information that is required to be supplied on the tax return to substantiate an entry on the tax return.

e. An entry on a tax return of a deduction or credit in an amount that exceeds a statutory limit.

~~5.~~ 6. "Notice" means a communication in writing issued by the tax commissioner or the taxpayer.

~~6.~~ 7. "Notice of determination" means notice provided by the tax commissioner to the taxpayer, pursuant to subsection 3 of North Dakota Century Code section 57-38-39, North Dakota Century Code sections 57-39.2-15, 57-40.2-13, and 57-40.3-12, and subsection 3 of section 81-09-02-02.

8. "Notice of reconsideration" means notice to taxpayer pursuant to subsection 5 of North Dakota Century Code section 57-38-39, subsection 8 of North Dakota Century Code section 57-38-40, subsection 6 of section 81-09-02-02, and subsection 7 of section 81-09-02-03.

9. "Notice of refund change" means notice provided to the taxpayer, as provided in subsection 5 of North Dakota Century Code section 57-38-40, North Dakota Century Code section 57-39.2-25, and subsection 3 of section 81-09-02-03, that all or part of the requested refund is denied.

10. "Office audit" means any audit where a taxpayer's books and records are examined in the tax commissioner's office.

11. "Tax form" means a document prescribed by the tax commissioner requesting specific information.

~~7.~~ 12. "Tax return" means a tax form containing facts required and sufficient information from which the tax commissioner can determine a tax liability and includes information returns. The terms "tax form" and "tax return" are not synonymous.

~~8.~~ 13. "Taxpayer" means an individual, partnership, firm, corporation, joint venture, association, estate, fiduciary, trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number who is or

may be required to file a tax return under North Dakota Century Code title 57.

History: Effective July 1, 1985; amended effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-02.1. Computation of time for response - Service by mail - Effect of mail refusal.

1. In computing any period of time prescribed or allowed by this title, the day of the act, event, or default from which the designated period of time begins to run may not be included. The last day of the period so computed must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays must be excluded in the computation.

2. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days must be added to the prescribed period, or six days if mailed out of state.

3. If a notice or other process is mailed with delivery restricted and requiring a receipt signed by the addressee, the addressee's refusal to accept the mail constitutes delivery. Return of the mail bearing an official indication on the cover that delivery was refused by the addressee is prima facie evidence of the refusal.

4. Any notice or statement will be considered as mailed if sent by facsimile transmission or common carrier delivery service, including, but not limited to, united parcel service or federal express.

5. The date of any notice or statement will be considered the date of mailing as evidenced by date of certified mail, affidavit of mailing, or postmark.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-03. Examination or investigation for purposes of an audit. In order to determine the accuracy of a tax return, the correct tax liability, or whether a filing requirement exists, the tax

commissioner may investigate or examine material including, but not limited to, a taxpayer's books, records, memoranda, computer printouts, accounts, vouchers, corporate or committee minutes, any other pertinent documents, tangible personal property, equipment, computer systems, business facilities, plants, and shops. If retained in an automated fashion, the tax commissioner may require computer data be made available on computer disk, diskette, or tape.

A taxpayer must make all items and places available to the tax commissioner upon request. The tax commissioner may require the taxpayer to be present to answer questions, provide testimony, and submit proof of material or information examined. The taxpayer must answer all questions to the best of that taxpayer's information and ability.

An examination or investigation by the tax commissioner may extend to any person having access to information which may be relevant to an audit of a taxpayer.

History: Effective July 1, 1985; amended effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-04. Audit requests - Enforcement.

1. When the tax commissioner requests audit information be sent to the tax commissioner's office, such request must be in writing and the taxpayer has thirty days to respond.

2. If, within thirty days, a taxpayer fails to respond, or fails to request and receive a written extension, the tax commissioner shall issue another written request, second notice, and allow the taxpayer thirty days to respond. If an extension has been granted, no second notice is required.

3. If, within thirty days, the taxpayer fails to respond to the second notice, or fails to respond within the extension deadline, the tax commissioner shall issue a final notice. The final notice must inform the taxpayer that if the taxpayer fails to respond within thirty days, the tax commissioner may serve the taxpayer with a subpoena, issue a notice of determination based on the best information available, or, in the case of income tax, issue a nonreviewable determination. The notice must also specify that the taxpayer may, within thirty days after the final notice, request in writing that the tax commissioner issue a subpoena for the audit information. If the taxpayer requests a subpoena and the taxpayer has signed an extension of time for making an assessment, the tax commissioner shall issue the subpoena in lieu of issuing a notice of determination.

History: Effective May 1, 1991.

General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-05. Time for completion of an audit.

1. The tax commissioner shall notify the taxpayer in writing if the tax commissioner is unable to complete a field or office audit within twelve months of the commencement of such audit. For purposes of this section, an office audit is commenced on the date the tax commissioner first makes written request for information. A field audit is commenced on the date the auditor begins the review of taxpayer's records at the taxpayer's place of business.

2. If the tax commissioner issues a notice of determination later than twelve months after the commencement of a field or office audit, subsection 2 of section 81-01.1-01-09 applies. The twelve-month period is extended by any agreed upon extensions of time and by the time expended after the second notice provided for in section 81-01.1-01-04.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-06. Protest of notice of determination or refund change.

1. A taxpayer has the right to protest any notice of determination or notice of refund change only if a protest is perfected in full and timely compliance with the requirements contained in subsections 2 and 3.

2. The taxpayer has thirty days, or ninety days if the taxpayer is outside the United States, after the notice of determination or refund change to file a notice of protest. This notice of protest must be signed by the taxpayer or a duly authorized agent and must contain the following information:

   a. Taxpayer's name, address, telephone and social security number, or federal identification number, and sales tax permit number, if applicable.

   b. Name, address, and telephone number of taxpayer's agent, if any, for the purpose of the protest.

   c. Type of tax and tax periods under protest.

   d. Amount under protest.

The taxpayer may file an oral protest provided the oral protest is made within the thirty days and is confirmed in writing.

3. The taxpayer has up to ninety days after the notice of determination or refund change within which to file a written statement of grounds for protest setting forth the taxpayer's specific reasons for opposing the determination or refund change.

4. If the notice of protest or the statement of grounds for protest is served by mail, certified mail is recommended.

5. If the taxpayer fails to timely file either the notice of protest or statement of grounds, the notice of determination or the notice of refund change becomes finally and irrevocably fixed.

6. The tax commissioner shall acknowledge receipt of the statement of grounds within fifteen days. If the taxpayer fails to specifically state the reasons and facts for opposing the determination or refund change, the tax commissioner shall give the taxpayer thirty days to perfect the statement of grounds. The tax commissioner shall state specifically the additional information required.

7. Amounts of tax not protested are irrevocably fixed and must be paid.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-07. Response to statement of grounds. Within ninety days of the final statement of grounds, the tax commissioner shall provide a detailed response. The tax commissioner's response shall address each objection raised by the statement of grounds. The taxpayer may request a more specific statement within fifteen days of the tax commissioner's detailed response. The tax commissioner shall respond to the request for a more specific statement within thirty days. If the tax commissioner fails to meet the deadlines specified in this section, subsection 2 of section 81-01.1-01-09 applies.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-08. Notice of reconsideration. In reference to notices sent pursuant to North Dakota Century Code sections 57-38-39 and 57-38-40 and sections 81-09-02-02 and 81-09-02-03, the tax commissioner shall issue a notice of reconsideration within nine months of the final

statement of grounds, plus any mutually agreed extensions. If a notice of reconsideration is sent later than nine months, plus agreed extensions, after the statement of grounds, subsection 2 of section 81-01.1-01-09 applies.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02, 57-01-11

81-01.1-01-09. Waiver of interest and penalty - Waiver of interest in certain circumstances.

1. All or part of the penalty and interest may be waived for good cause upon request. "Good cause" means that a taxpayer has been cooperative during the audit process and has a history of correct filing. Penalties and interest may be waived at any time before payment.

2. If the tax commissioner fails to meet the deadlines specified in sections 81-01.1-01-05, 81-01.1-01-07, or 81-01.1-01-08, good cause will be shown for waiver of interest. The waiver must equal the pro rata amount of interest accrued from the deadline date to the date the tax commissioner actually issues the notice of determination or refund change, response to the statement of grounds, or the notice of reconsideration. For example, if the notice of determination is due the fifteenth of November and the tax commissioner issues the notice of determination the thirtieth of December, interest equal to one and one-half percent will be waived.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-10. Waiver of penalty and interest based on written opinion signed by a division director or section supervisor. An opinion signed by the division director or section supervisor, as identified in article 81-01, is not binding. However, if the taxpayer can produce the letter requesting the opinion and the written opinion and can demonstrate detrimental reliance on such advice, good cause will exist to waive one hundred percent of the penalty and two-thirds of the interest on the assessment.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-11. Opinion of the tax commissioner.

1. An "opinion of the tax commissioner" means an opinion issued under this section with respect to prospective tax liability. It does not include ordinary correspondence of the commissioner or a final determination of the commissioner arising from a request for administrative review of an assessment or a claim for refund.

2. If a taxpayer requests in writing an opinion from the tax commissioner as to whether or how certain property, income, source of income, or a certain activity or transaction will be taxed, the commissioner's written response is an "opinion of the tax commissioner" and binds the commissioner, in accordance with subsections 3, 7, and 8, provided all of the following conditions are satisfied:

   a. The taxpayer's request fully discloses the specific facts or circumstances relevant to a determination of the taxability of the property, income, source of income, activity, or transaction, and if an activity or transaction, all parties involved in the activity or transaction are clearly identified by name, location, or other pertinent facts.

   b. The commissioner's response is signed by the commissioner and designated as an "opinion of the tax commissioner".

3. An opinion of the tax commissioner remains in effect and protects the taxpayer for whom the opinion was prepared and who reasonably relies on it from liability for any taxes, penalty, or interest for any tax year that may be specified in the opinion or until the earliest of the following dates:

   a. The effective date of a written revocation by the commissioner sent to the taxpayer by certified mail, return receipt requested. The effective date of the revocation is the taxpayer's date of receipt.

   b. The effective date of any legislative amendment or enactment that is inconsistent with the opinion.

   c. The date on which a court issues an opinion which establishes or changes relevant case law that is inconsistent with the opinion.

   d. If the opinion of the commissioner was based on the interpretation of federal law, the effective date of any change in the relevant federal statutes or regulations, or the date on which a court issues an opinion establishing or changing relevant case law with respect to federal statutes or regulations inconsistent with the opinion.

e. The effective date of any change in the taxpayer's material facts or circumstances.

f. The effective date of the expiration of the opinion, if specified, in the opinion.

4. A taxpayer is not relieved of liability for any activity or transaction related to a request for an opinion that contained any misrepresentation or omission of one or more material facts.

5. If the commissioner provides written advice under this section, the opinion must include a statement that:

a. The tax consequences stated in the opinion may be subject to change for any of the reasons stated in subsection 3.

b. It is the duty of the taxpayer to be aware of such changes.

6. The commissioner may refuse to offer an opinion on any request received under this section.

7. This section binds the commissioner only with respect to opinions of the commissioner issued on or after January 1, 1991.

8. An opinion of the commissioner binds the commissioner only with respect to the taxpayer for whom the opinion was prepared.

9. If a commissioner rescinds a written opinion of a previous commissioner, the commissioner shall, by certified mail, notify the taxpayer of the intent to rescind the opinion at least thirty days before the effective date of the rescission. The rescission is effective prospectively only.

10. The commissioner shall make available the text of all opinions issued under this section, except those opinions prepared for a taxpayer who has requested that the text of the opinion remain confidential. In no event may the text of an opinion be made available until the commissioner has removed all information that identifies the taxpayer and any other parties involved in the activity or transaction.

11. An opinion of the commissioner issued under this section is not a final determination of the commissioner and may not be appealed to the North Dakota district court.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-12. Tape recordings. A taxpayer or the tax department may record, electronically or otherwise, any audit conference or meeting. However, prior to such recording, advance notice must be given of the intent to record.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-01-13. Reaudit.

1. Provided the statute of limitations remains open, the tax commissioner may reaudit years that were previously audited. Such reaudit is limited to issues and facts not previously audited. Documents previously supplied by the taxpayer may not be requested in future audits of the same year unless the taxpayer utilizes those documents as relevant to the new audit or the tax commissioner and taxpayer have otherwise agreed.

2. The tax commissioner may not audit tax years previously audited if the purpose of that reaudit is to examine issues resolved in the previous audit.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-02-02.1. Complaint - Time for filing - Extensions granted.

1. When a taxpayer is required to file an administrative complaint in response to a notice of reconsideration, the taxpayer shall file the complaint within thirty days of the notice. The taxpayer will be granted an automatic extension of thirty days to file a complaint, provided the taxpayer makes a request for extension within thirty days of the notice. Further extensions are available at the discretion of the tax commissioner.

2. When a representative of the tax commissioner files an administrative complaint pursuant to North Dakota Century Code section 57-39.2-15, the tax commissioner shall file the administrative complaint within nine months of the statement of grounds, plus mutually agreed extensions.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-05

81-01.1-02-03. Notice of hearing - Answer - Time for filing.

1. When a taxpayer files a complaint and requests a hearing, the tax commissioner must serve a notice of hearing upon the taxpayer and upon a designated representative of the tax commissioner ~~within a reasonable time~~ thirty days from the date of service of the complaint. The designated representative of the tax commissioner must file an answer to the complaint within twenty days of receipt of the complaint and the notice of hearing.

2. When a representative of the tax commissioner ~~files~~ elects to file a complaint and requests a hearing, the tax commissioner must serve a notice of hearing together with a copy of the complaint upon the taxpayer ~~and the designated representative of the tax commissioner within a reasonable time from the service of the complaint~~. The taxpayer must file an answer to the complaint within twenty days of service of the notice of hearing and complaint.

History: Effective July 1, 1985; amended effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-05, 57-01-02

81-01.1-02-05. Appointment of hearing officer - Powers ~~of hearing officer~~. A taxpayer may, within thirty days of the filing of a complaint, request that the tax commissioner appoint an independent hearing officer. Upon receipt of such request, the tax commissioner shall appoint an independent hearing officer and shall so notify the taxpayer and a representative of the tax commissioner. If the request is made after thirty days of the filing of the complaint, appointment of an independent hearing officer is discretionary with the tax commissioner.

A person appointed as a hearing officer may:

1. Issue notice of hearing and specifications of issues.

2. Issue subpoenas.

3. Administer oaths.

4. Regulate the course of the hearing to assure that it proceeds in an orderly fashion.

5. Rule on offers of proof and receive relevant evidence.

6. Elicit all facts necessary to clearly present the issues. The hearing officer may examine or cross-examine witnesses in order to develop and clarify the facts and issues.

7. Exclude evidence which is cumulative or repetitious.

8. Order or allow discovery proceedings and set and regulate time limits for obtaining and exchanging information.

9. Hold appropriate conferences before or during hearing. A summary of the conference must be made by the hearing officer either in writing or orally as part of the hearing record.

10. Dispose of procedural matters and rule upon procedural motions.

11. Authorize any party to furnish and serve designated late filed exhibits within thirty days after the hearing is adjourned.

12. Request or allow the filing of briefs by the parties and set a time limit during which the briefs must be filed.

    a. The hearing officer, at that officer's discretion, may extend the due date of the briefs for good cause. An extension must be requested and responded to in writing.

    b. Any party who does not file a brief on or before the initial or extended due date forfeits the right to do so.

13. Allow any party to the proceedings to file proposed findings of fact, conclusions of law, and decision. The proposal must be filed with the tax commissioner within a reasonable time after the date of the formal hearing.

14. Grant or deny continuances or postponements.

15. Take any other action necessary to discharge the duties vested in the tax commissioner and the appointed hearing officer and which is consistent with the statutes and rules under which the tax commissioner operates.

16. Issue proposed findings of fact and conclusions of law.

History: Effective July 1, 1985; amended effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-02-06. Time for hearing. A hearing date must be scheduled for not more than eighteen months from receipt of the complaint. However, reasonable extensions shall be available from the hearing officer.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-01.1-02-07. Persons authorized to represent taxpayer.

1. Taxpayer in own interest. An individual taxpayer may appear before the hearing officer in the taxpayer's own interest. A corporate taxpayer may be represented by a corporate officer, and a partnership may be represented by any general partner.

2. Attorneys. An attorney admitted and licensed to practice law in North Dakota may represent a taxpayer before the hearing officer. An attorney, admitted and licensed to practice law in a foreign state or country, but not licensed to practice law in North Dakota, may represent a taxpayer before the hearing officer if that attorney first designates as an associate a resident attorney admitted and licensed to practice law in this state. The name and address of the associate must appear on all documents filed with the office of state tax commissioner. The associate shall appear personally and, unless excused by the hearing officer, shall remain in attendance with the nonresident attorney in all appearances before the hearing officer.

3. Rules of conduct. All persons appearing before the hearing officer shall conform to the standard of ethical conduct required of practitioners before the courts of the state of North Dakota.

History: Effective May 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 57-01-02

81-02.1-01-15.1. Priority for delinquent taxes. When payment is made for any mobile home tax, the payment must be applied first to the oldest unpaid delinquent tax due, if any, shown to exist upon the property for which the tax payment is made, including any penalty and interest.

History: Effective May 1, 1991.
General Authority: NDCC 57-55-09
Law Implemented: NDCC 57-55-01.1, 57-55-04, 57-55-11

81-03-01.1-01. Reaudit and reassessment. ~~After auditing an income tax return and making an assessment of tax, the tax commissioner may reaudit that return and assess or reassess any additional tax found due provided the reaudit relates to matters of law or matters of fact which do not require a redetermination of facts determined in a prior audit.~~ Repealed effective May 1, 1991.

History: ~~Effective July 1, 1985.~~
General Authority: ~~NDCC 57-38-56~~
Law Implemented: ~~NDCC 57-38-33, 57-38-38, 57-38-39, 57-38-40~~

81-03-01.1-08. Tax credits. Tax credits must be taken in the following order:

1. Tax credits with no carryback or carryforward provisions.

2. Tax credits with carryback provisions.

3. Tax credits with carryforward provisions.

If there is more than one tax credit having the same priority, the tax credits must be allowed in the order that is most beneficial to the taxpayer.

History: Effective May 1, 1991.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-01.8, 57-38-01.16, 57-38-01.17, 57-38-30.1, 57-38-30.4, 57-38-30.5, 57-38.1-07

81-03-02.1-02. ~~Federal income tax adjustment to taxable income~~ Deduction for federal income tax liability - Limitation. ~~An individual who files North Dakota individual income tax return form 37 is subject to the following limitations:~~

~~1. Only that portion of the individual's federal income tax deduction relating to income assignable to this state may be deducted from income taxable in this state.~~

~~2. The federal income tax deduction reported on the nonresident individual's income tax return for this state may not include any credit for taxes paid to foreign countries. That is, the credit may not be added into the federal income tax deduction for North Dakota income tax purposes.~~

~~3. The deduction for the alternative minimum tax must be limited to the percentage of tax preference items in this state as compared to the total tax preference items reported on the individual's federal income tax return.~~

~~4. The deduction for the alternative minimum tax must also be limited to the amount that the alternative minimum tax exceeds the investment tax credit reported on the individual's federal income tax return.~~

The federal alternative minimum tax may not be deducted in computing North Dakota taxable income.

History: Effective July 1, 1985; amended effective May 1, 1991.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-01.2~~, 57-38-06~~

81-03-02.2-04. Deduction for federal income tax liability - Limitation. In determining the North Dakota taxable income of a nonresident, the deduction for the federal income tax liability must be adjusted as follows:

1. The federal foreign income tax credit must be subtracted.

2. After subtracting the federal foreign income tax credit, the result must be multiplied by a fraction where the numerator is the amount of the federal adjusted gross income allocated and apportioned to North Dakota reduced by the amount of income that is excludable from North Dakota taxable income due to North Dakota statutes, federal statutes, or constitutional provisions, and the denominator is federal adjusted gross income.

History: Effective May 1, 1991.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38-01.2, 57-38-06

81-03-05.1-02. Computation of unitary business income subject to apportionment.

~~1. Method one:~~

~~a. Begin with federal taxable income of those corporations included in the combined report which are required to file a federal income tax return, allowing for intercompany transactions.~~

~~b. Add book income adjusted to conform to the provisions of the Internal Revenue Code of those corporations included in the combined report which are not required to file a federal income tax return.~~

~~c. Add or deduct North Dakota statutory adjustments.~~

~~d. Add or deduct nonbusiness income and nonbusiness losses and related expenses.~~

~~2. Method two:~~

~~a. Begin with federal taxable income of those corporations included in the combined report which are required to file a federal income tax return, allowing for intercompany transactions.~~

~~b. Add book income of those corporations included in the combined report which are not required to file a federal income tax return.~~

~~c. Add or deduct North Dakota statutory adjustments.~~

~~d. Add or deduct nonbusiness income and nonbusiness losses and related expenses.~~ Repealed effective May 1, 1991.

History: ~~Effective July 1, 1985.~~
General Authority: ~~NDCC 57-38-56~~
Law Implemented: ~~NDCC 57-38-12, 57-38-13, 57-38-14, 57-38.1-01, 57-38.1-02, 57-38.1-09, 57-59-01~~

81-03-05.1-05. Subchapter S corporation tax credits.

1. The following tax credits may not be claimed by a subchapter S corporation required to pay state income tax pursuant to subsection 1 of North Dakota Century Code section 57-38-01.4:

   a. Credit for contributions to nonprofit private colleges.

   b. Credit for contributions to nonprofit private high schools.

   c. Geothermal, solar, or wind energy device credit.

   d. Venture capital corporation credit.

   e. Myron G. Nelson Fund, Incorporated credit.

   f. Credit for employment of the developmentally disabled or chronically mentally ill.

   g. Credit for purchase of memberships, payment of dues, or contributions to certified nonprofit development corporations.

2. These tax credits may only be claimed by an individual shareholder on form 37 individual income tax return (long form), or a fiduciary shareholder on form 38 fiduciary income tax return (long method).

3. The tax credit claimed by each shareholder must be computed by using the shareholder's distributive share ratio. The computed credit is subject to the limitations imposed by North Dakota Century Code chapters 10-30.1, 10-30.2, and 57-38.

4. The following tax credits may be claimed only by a subchapter S corporation required to pay state income tax pursuant to subsection 1 of North Dakota Century Code section 57-38-01.4:

   a. Corporate tax credit for new industry.

   b. Corporate tax credit for research and experimental expenditures.

5. Tax credits claimed by the subchapter S corporation may not be claimed by the shareholders.

History: Effective March 1, 1988; amended effective March 1, 1990; May 1, 1991.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 10-30.1-05, 10-30.2-11, 10-30.2-12, 57-38-01.4, 57-38-01.7, 57-38-01.8, 57-38-01.16, 57-38-01.17

81-03-05.2-05. Domestic disclosure spreadsheet.

1. A taxpayer electing to use the water's edge method shall file a domestic disclosure spreadsheet if the affiliated corporations as a group have:

   a. Property, payroll, or sales in foreign countries exceeding ten million dollars.

   b. Assets exceeding two hundred fifty million dollars.

2. A domestic disclosure spreadsheet must include the following:

   a. A list of the corporations in the water's edge group and any corporation in which more than twenty percent of the voting stock is, either directly or indirectly, owned or controlled by a member of the water's edge group.

   b. The following identifying information for each corporation listed in subdivision a:

      (1) Federal identification number.

      (2) Address.

      (3) Percentage of voting stock, that is either directly or indirectly owned or controlled by each member of the water's edge group.

   c. The following information for each corporation in the water's edge group:

      (1) Primary business locations.

      (2) Primary business activities.

      (3) Country of incorporation.

      (4) Dates of acquisition or disposition of the ownership interest.

      (5) For each state which assesses a tax on, according to, or measured by net income, a schedule detailing the

tax liability and the computations used to allocate or apportion the corporation's income to each state in which the corporation is taxable. The details which must be disclosed on the aforementioned schedule include:

(a) Whether the liability was computed on a single entity basis or pursuant to a combined report.

(b) The entities included in the combined report.

(c) The federal taxable income for each entity whose income was included in determining the amount of income that was allocated and apportioned to the state.

(d) The amount of income apportioned to the state, the formula used to apportion the income, and the amount of property, payroll, and sales included in the formula used to apportion the income.

(e) The amount of income allocated to the state.

(f) The total amount of income not subject to apportionment by formula under the rules of the state.

(g) The amount of tangible personal property sales made or delivered to customers within the state.

(6) For each state which does not assess a tax on, according to, or measured by income, a schedule disclosing the following information for each corporation which has a taxable presence in the state:

(a) The federal taxable income for the corporation or for the federal consolidated filing group of which the corporation is a member.

(b) The amount of property, payroll, and sales that would be assigned to the state under North Dakota Century Code chapter 57-38.1 and the rules adopted pursuant thereto.

(c) The amount of tangible personal property sales made or delivered to customers within the state.

d. A copy of pages one through four of the federal income tax return that was filed with the Internal Revenue Service for each corporation listed in subdivision c.

3. The spreadsheet information must be filed on the forms provided by the commissioner. Data not submitted on the preapproved forms will be deemed incomplete.

4. The spreadsheet must be filed in the first year of the election period and every third year thereafter that the election remains in effect.

5. If the information required to be reported on the spreadsheet is not available when the return is filed, a taxpayer may file the spreadsheet within six months after the due date of the return, including any extensions. If the aforementioned time deadlines cannot be met, a taxpayer shall file a written request for an extension of time with the commissioner within six months after the due date of the return, including any extensions. This request which will be deemed filed on the date it is sent by certified mail must state the grounds for the request. Within a reasonable time after receiving the request, the commissioner shall notify the taxpayer as to whether the request for additional time is granted. However, the commissioner will not grant an extension of time that exceeds one hundred twenty days.

~~5.~~ 6. A spreadsheet will be deemed complete when filed unless the commissioner notifies the taxpayer, within one hundred eighty days after the spreadsheet was filed, that the spreadsheet requirements have not been met. This notice must be sent by certified mail and it must inform the taxpayer as to why the spreadsheet was not properly completed. A taxpayer shall correct the deficiencies in its spreadsheet within ninety days after receiving the aforementioned notice of deficiency. If the ninety-day deadline cannot be met, a taxpayer shall file a written request for an extension of time with the commissioner within ninety days after receiving the notice of deficiency. This request which will be deemed filed on the date it is sent by certified mail must state the grounds for the request. Within a reasonable time after receiving the request, the commissioner shall notify the taxpayer as to whether the request for additional time is granted.

History: Effective July 1, 1989; amended effective March 1, 1990; May 1, 1991.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38.4-02

81-03-05.4-01. Definitions. The following definitions are only applicable in computing a taxpayer's federal income tax deduction pursuant to subdivision c of subsection 1 of North Dakota Century Code section 57-38-01.3:

1. "Apportionment factor" means a fraction, computed pursuant to North Dakota Century Code chapter 57-38 or 57-38.1, used to divide business income of a multistate taxpayer among states.

2. "Federal" means the United States.

3. "Federal income tax deduction" means the adjustment provided for in subdivision c of subsection 1 of North Dakota Century Code section 57-38-01.3.

~~3.~~ 4. "Federal income tax paid" means the amount of federal income tax that was either paid or accrued.

~~4.~~ 5. "Federal income tax ratio" means North Dakota taxable income divided by income relating to federal income tax paid.

~~5.~~ 6. "Income relating to federal income tax paid" means total income less income relating to foreign tax credit.

~~6.~~ 7. "Income relating to foreign tax credit" means income directly attributable to either the foreign tax credit or the possessions credit.

~~7.~~ 8. "North Dakota taxable income" means income which has been apportioned to North Dakota pursuant to North Dakota Century Code chapters 57-38, 57-38.1, and 57-59; provided, however, that no adjustment should be made for the federal income tax deduction.

~~8.~~ 9. "Taxpayer" means a corporation that is required to file an income tax return in North Dakota.

~~9.~~ 10. "Total income" means the federal taxable income of those entities in the unitary group that are required to file a federal income tax return during the period in question, plus or minus the adjustments provided for in North Dakota Century Code section 57-38-01.3, with the exception of subdivisions c and f of subsection 1 of North Dakota Century Code section 57-38-01.3.

History: Effective July 1, 1989; amended effective May 1, 1991.
General Authority: NDCC 57-38-57
Law Implemented: NDCC 57-38-01.3

81-03-05.4-02. Use of this rule. Any taxpayer entitled to claim a federal income tax deduction shall compute the deduction in accordance with this chapter.

History: Effective July 1, 1989; amended effective May 1, 1991.
General Authority: NDCC 57-38-57
Law Implemented: NDCC 57-38-01.3

81-03-05.4-03. Computation ~~of federal income tax deduction~~ - Part I. ~~A taxpayer filing a federal consolidated return and qualifying to use this method under section 81-03-05.4-02 shall compute the taxpayer's federal income tax deduction in the following manner~~ Any taxpayer claiming a federal income tax deduction shall compute federal income tax paid on income which is taxable in North Dakota in the following manner:

1.	Consolidated federal income tax paid.		XXX
2.	Separate company pro forma federal income tax liability for all of the profit companies that are on the consolidated return and included in the unitary group. Use the method described in Internal Revenue Code section 1.1552-1(a)(2).	XXX	
3.	Separate company pro forma federal income tax liability for all of the profit companies that are included on the consolidated return.	XXX	
4.	Line 2 divided by line 3.		XXX
5.	Unitary companies' share of consolidated federal income tax paid (line 1 multiplied by line 4).		XXX
6.	Federal taxable income of the unitary companies which are included on the consolidated return.	XXX	
7.	Amount of federal taxable income reported on line 6 that is not taxable in North Dakota.	XXX	
8.	Federal taxable income attributable to North Dakota (line 6 minus line 7).	XXX	
9.	Line 8 divided by line 6.		XXX
10.	Consolidated federal income tax paid on income which is taxable in North Dakota (line 5 multiplied by line 9).		XXX
~~11.~~	~~Federal income tax ratio~~	~~XXX~~	
~~12.~~	~~Federal income tax deduction (line 10 multiplied by line 11)~~	~~XXX~~	

History: Effective July 1, 1989; amended effective May 1, 1991.
General Authority: NDCC 57-38-57

Law Implemented: NDCC 57-38-01.3

81-03-05.4-04. ~~Additional provisions~~ Computation - Part II. ~~A taxpayer shall compute the taxpayer's federal income tax deduction in the following manner if the members of the unitary group filed more than one federal income tax return:~~

1. ~~Steps 1 through 10 in section 81-03-05.4-03 must be repeated for each federal income tax return filed by the members of the worldwide group.~~ Any taxpayer that is filing as a member of a worldwide unitary group and claiming a foreign tax credit on its federal return shall compute its federal income tax deduction by multiplying the result of subsection 10 of section 81-03-05.4-03 by the federal income tax ratio. However, this subsection cannot be used if either or both North Dakota taxable income or income relating to federal income tax paid is less than zero.

2. ~~The sum of subsection 1 hereof must be multiplied by the federal income tax ratio.~~ Any taxpayer not described in subsection 1 shall compute its federal income tax deduction by multiplying the result of subsection 10 of section 81-03-05.4-03 by the apportionment factor.

History: Effective July 1, 1989; amended effective May 1, 1991.
General Authority: NDCC 57-38-57
Law Implemented: NDCC 57-38-01.3

81-03-05.4-05. Additional provisions.

1. If members of a unitary group filed more than one federal income tax return, subsections 1 through 10 of section 81-03-05.4-03 must be repeated for each federal income tax return and the result totaled before application of the income tax ratio or apportionment factor in section 81-03-05.4-04.

2. A taxpayer may exclude subsections 1 through 4 of section 81-03-05.4-03 when:

   a. A North Dakota return is filed using the combined report method and all corporations included in the federal consolidated return are included in the combined report.

   b. A corporation does not file a federal consolidated return.

3. If federal alternative minimum tax is paid and state alternative minimum tax is not, the federal minimum tax must be excluded from subsections 1 through 5 of section 81-03-05.4-03.

4. If a taxpayer elects to compute its federal income tax deduction on the cash basis, it must do so on the return as originally filed. The cash basis election is not available to a taxpayer that files as a member of a federal consolidated return.

History: Effective May 1, 1991.
General Authority: NDCC 57-38-57
Law Implemented: NDCC 57-38-01.3

81-03-09-37. Special rules - Trucking companies.

The following special rules are established with respect to trucking companies:

1. In general. As used in this section, the term "trucking company" means a motor common carrier, a motor contract carrier, or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation. Where a trucking company has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to this section. In such cases, the first step is to determine what portion of the trucking company's income constitutes business income and what portion constitutes nonbusiness under North Dakota Century Code sections 57-38.1-01 and 57-59-01, article IV(1), and section 81-03-09-03. Nonbusiness income is directly allocable to specific states pursuant to the provisions of North Dakota Century Code sections 57-38.1-05 through 57-38.1-08, and section 57-59-01, article IV(5) through (8). Business income is apportioned among the states in which the business is conducted and pursuant to the property, payroll, and sales apportionment factors set forth in this section. The sum of the items of nonbusiness income directly allocated to this state plus the amount of business income attributable to the state constitutes the amount of the taxpayer's entire net income which is subject to taxing in this state.

2. Business and nonbusiness income. For definitions, rules, and examples for determining business and nonbusiness income, see sections 81-03-09-03 through 81-03-09-06.

3. Apportionment of business income.

   a. In general. The property factor must be determined in accordance with sections 81-03-09-15 through 81-03-09-21, the payroll factor in accordance with sections 81-03-09-22 through 81-03-09-25, and the sales factor in accordance with sections 81-03-09-26 through 81-03-09-31, except as modified by this section.

(1) Property valuation. Owned property must be valued at its original cost and property rented from others~~, including purchased transportation,~~ must be valued at eight times the net annual rental rate in accordance with North Dakota Century Code sections 57-38.1-11 and 57-59-01, article IV(11), and sections 81-03-09-19 and 81-03-09-20. ~~To the extent that the taxpayer's records reflect a separate charge incurred for the use of purchased transportation attributable to the property so used, such separate charge must be used in calculating the value of rented property. If such a charge is not separated from that attributable to the compensation paid for the operator of the purchased transportation, the total combined charge must be reduced by twenty percent to determine that portion of the charge attributable solely to the value of the rented property. Mobile property, other than purchased transportation, which is owned by other trucking companies and temporarily used by the taxpayer in its business and for which a per diem or mileage charge is made may not be included in the property factor as rented property. Mobile property which is owned by the taxpayer and temporarily used by other trucking companies in their business and for which a per diem or mileage charge is made by the taxpayer must be included in the property factor of the taxpayer.~~

(2) General definitions. The following definitions are applicable to the numerator and denominator of the property factor, as well as other apportionment factor descriptions:

(a) "Average value" of property means the amount determined by averaging the values at the beginning and end of the income tax year, but the tax commissioner may require the averaging of monthly values during the income year or such averaging as is necessary to reflect properly the average value of the trucking company's property, in accordance with North Dakota Century Code sections 57-38.1-12 and 57-59-01, article IV(12), and section 81-03-09-21.

(b) "Mobile property" means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property~~, other than support vehicles used predominantly in a local capacity. Mobile property includes purchased transportation~~.

(c) "Mobile property mile" is the movement of a unit of mobile property a distance of one mile whether loaded or unloaded.

(d) "Original cost" is deemed to be the basis of the property for federal income tax purposes prior to any federal income tax adjustments, except for subsequent capital additions, improvements thereto, or partial dispositions, or, if the property has no such basis, the valuation of such property for interstate commerce commission purposes. If the original cost of property is ascertainable under the foregoing valuation standards, the property is included in the property factor at its fair market value as of the date of acquisition by the taxpayer. ~~In~~ in accordance with section 81-03-09-19.

(e) "Property used during the course of the income year" includes property which is available for use in the taxpayer's trade or business during the income year.

(f) "Purchased transportation" means the taxpayer's use of a motor vehicle owned and operated by another for the purpose of transporting tangible personal property for which a charge, whether based upon a per diem, mileage, or other basis is incurred.

(g) ~~"Temporarily used" means the use of any mobile property owned by another for a period not to exceed a total of thirty days during any income year.~~

~~(h)~~ The "value" of owned real and tangible personal property means its original cost, in accordance with North Dakota Century Code sections 57-38.1-11 and 57-59-01, article IV(11), and section 81-03-09-19.

~~(i)~~ (h) The "value" or rented real and tangible personal property means the product of eight times the net annual rental rate, in accordance with North Dakota Century Code sections 57-38.1-11 and 57-59-01, article IV(11), and section 81-03-09-20.

(3) The denominator and numerator of the property factor. The denominator of the property factor must be the average value of all the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor

must be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the income year. In the determination of the numerator of the property factor, all property, except mobile property as defined in this section, must be included in the numerator of the property factor in accordance with North Dakota Century Code sections 57-38.1-10 through 57-38.1-12 and 57-59-01, article IV(10)(11)(12), and sections 81-03-09-15 through 81-03-09-21.

Mobile property, as defined in this section, which is located within and without this state during the income year must be included in the numerator of the property factor in the ratio which mobile property miles in the state bear to the total mobile property miles. Mobile property located solely within this state during the income year must be included in the numerator of the property factor. A trucking company's property factor may be modified to include a portion of purchased transportation to more fairly represent the company's in-state activities. Absent clear and convincing evidence to show otherwise, forty percent of the purchased transportation contract must be included in the property factor as rental property and capitalized in accordance with section 81-03-09-20. In addition, the mileage related to the purchased transportation contract must be included in the mobile property miles.

b. The payroll factor. The denominator of the payroll factor is the compensation paid everywhere by the taxpayer during the income year for the production of business income, in accordance with North Dakota Century Code sections 57-38.1-13, 57-38.1-14, and 57-59-01, article IV(13)(14), and sections 81-03-09-22 through 81-03-09-25.

With respect to personnel performing services within and without this state, compensation paid to such employees must be included in the numerator of the payroll factor in the ratio which their services performed in this state bear to their services performed everywhere based on mobile property miles.

c. The sales factor.

(1) In general. All revenue derived from transactions and activities in the regular course of the taxpayer's trade or business which produce business income must be included in the denominator of the revenue factor, in accordance with North Dakota Century Code sections 57-38.1-01 and 57-59-01,

article IV(1), and sections 81-03-09-03 through 81-03-09-06.

The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total state revenue of the taxpayer, other than revenue from hauling freight, mail, and express, shall be attributable to this state in accordance with North Dakota Century Code sections 57-38.1-15 through 57-38.1-17, 57-59-01, article IV(15)(16)(17), and sections 81-03-09-26 through 81-03-09-31.

(2) The total revenue of the taxpayer attributable to this state during the income year from hauling freight, mail, and express shall be:

(a) Intrastate. All receipts from any shipment which both originates and terminates within this state.

(b) Interstate. That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.

d. Records. The taxpayer shall maintain the records necessary to identify mobile property and to enumerate by state the mobile property miles traveled by such mobile property as those terms are used in this section. Such records are subject to review by the tax department or its agents.

e. De minimus nexus standard. Notwithstanding any provision contained herein, this section does not apply to require the apportionment of income to this state if the trucking company during the course of the income tax year neither:

(1) Owns nor rents any real or personal property in this state, except mobile property.

(2) Makes any pickups or deliveries within this state.

(3) Travels more than twenty-five thousand mobile property miles within this state provided that the total mobile property miles traveled within this state during the income tax year does not exceed three percent of the total mobile property miles traveled in all states by the trucking company during that period.

(4) Makes more than twelve trips into this state.

History: Effective November 1, 1987; amended effective May 1, 1991.
General Authority: NDCC 57-38-56
Law Implemented: NDCC 57-38, 57-38.1, 57-59

81-09-02-02. Procedure for review of commissioner's determination of additional tax, penalty, and interest.

1. The commissioner will review or audit the returns filed pursuant to North Dakota Century Code chapter 57-51.

2. If it is determined that additional tax is due, the commissioner shall notify the taxpayer of this determination within six years of the due date for payment of the tax. The notice of determination must be sent by certified mail with a return receipt requested and it must state the statutory basis for the determination, the reasons for the determination, and the amount of additional tax due along with the applicable penalty and interest.

3. The notice of determination becomes final and irrevocable ~~thirty days after the date the notice is received by the taxpayer,~~ unless~~, within this thirty day period,~~ the taxpayer files a ~~written~~ protest and statement of grounds with the commissioner pursuant to section 81-01.1-01-06. ~~The protest which will be deemed filed the date it is sent by certified mail must state the grounds upon which the protest is based along with any additional information required by the commissioner.~~ If a taxpayer protests only a portion of the commissioner's determination, the portion which is not protested becomes finally and irrevocably fixed. The commissioner shall provide a detailed response to the statement of grounds pursuant to section 81-01.1-01-07.

4. Upon ~~written~~ request, the commissioner may grant the taxpayer an informal conference.

5. If a protest ~~is~~ and statement of grounds are filed, the commissioner shall reconsider the notice of determination. This reconsideration may include further examination by the commissioner of the taxpayer's books, papers, records, or memoranda, pursuant to section 81-01.1-01-03 and North Dakota Century Code sections 57-01-02 and 57-51-07.

6. ~~Within a reasonable time after receiving the protest~~ Pursuant to section 81-01.1-01-08, the commissioner shall send a notice of reconsideration to the taxpayer by certified mail with a return receipt requested~~. This notice must respond to the taxpayer's protest and must state~~ stating the amount of additional tax due, along with the applicable penalty and interest.

7. The notice of reconsideration becomes final and irrevocable ~~thirty days after the date the notice is received by the taxpayer,~~ unless ~~within this thirty-day period,~~ the taxpayer seeks formal administrative review of the notice by filing a complaint and requesting an administrative hearing pursuant to sections 81-01.1-02-01 and 81-01.1-02-03. The complaint must be served personally or by certified mail. The provisions of North Dakota Century Code chapter 28-32 apply to and govern the filing of the complaint and the administrative hearing, including any appeal from a decision rendered by the commissioner.

~~8. Upon written request, the commissioner may grant an extension of time to file a protest or a complaint.~~

History: Effective July 1, 1982; amended effective August 1, 1986; July 1, 1989; May 1, 1991.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 28-01-16, 57-01-02, 57-01-11, 57-51-07, 57-51-09

81-09-02-03. Procedure for refund of overpayments, duplicate payments, and erroneous payments of tax.

1. For purposes of this section, "taxpayer" means the party who has actually remitted an overpayment, duplicate payment, or erroneous payment of tax.

2. A claim for credit or refund must be made by filing with the commissioner, within six years of the due date for payment of the tax, an amended return, or other report as prescribed by the commissioner, accompanied by a statement outlining the specific grounds upon which the claim for credit or refund is based.

3. ~~Within a reasonable time after receiving the claim for credit or refund, the commissioner shall notify the taxpayer as to whether the claim will be granted or denied. This notice~~ Within thirty days of the claim for refund or credit, the commissioner shall acknowledge receipt of the claim and request additional information if needed. The commissioner shall notify the taxpayer as to the amount of refund or credit granted within a reasonable time of the claim. If the commissioner decides to deny the taxpayer's claim for refund or credit, in part or in full, a notice of refund change must be sent by certified mail with a return receipt requested, and it must state the reasons for the decision. ~~If the commissioner decides to deny the taxpayer's claim for credit or refund, in part or in full, the decision becomes final and irrevocable thirty days after the date the notice of denial is received by the taxpayer unless, within this thirty-day period, the taxpayer files a written protest with the commissioner. The protest, which will be deemed filed the~~

~~date it is sent by certified mail, must state the grounds upon which the protest is based along with any additional information required by the commissioner.~~

4. The notice of refund change becomes final and irrevocable unless the taxpayer files a protest and statement of grounds with the commissioner pursuant to section 81-01.1-01-06. If a taxpayer protests only a portion of the commissioner's decision, the portion which is not protested becomes finally and irrevocably fixed. The commissioner shall provide a detailed response to the statement of grounds pursuant to section 81-01.1-01-07.

~~4.~~ 5. Upon ~~written~~ request, the commissioner may grant the taxpayer an informal conference.

~~5.~~ 6. If a protest ~~is~~ and statement of grounds are filed, the commissioner shall reconsider the ~~denial of the claim for credit or refund~~ notice of refund change. This reconsideration may include further examination by the commissioner of the taxpayer's books, papers, records, or memoranda, pursuant to section 81-01.1-01-03 and North Dakota Century Code sections 57-01-02 and 57-01-07.

~~6.~~ 7. ~~Within a reasonable time after receiving the protest, the commissioner shall notify the taxpayer of the reconsideration of the claim for credit or refund. This notice must be sent by certified mail with a return receipt requested, and it must respond to the taxpayer's protests. If the commissioner's decision is to deny the claim for credit or refund, in part or in full, the decision becomes final and irrevocable thirty days after the date the notice of denial is received by the taxpayer unless, within this thirty-day period, the taxpayer seeks formal administrative review of the reconsideration of claim for credit or refund by filing a complaint and requesting an administrative hearing.~~ Pursuant to section 81-01.1-01-08, the commissioner shall send a notice of reconsideration to the taxpayer by certified mail with a return receipt requested stating the amount of refund or credit denied.

8. The notice of reconsideration becomes final and irrevocable unless the taxpayer seeks formal administrative review of the notice by filing a complaint and requesting an administrative hearing pursuant to sections 81-01.1-02-01 and 81-01.1-02-03. The complaint must be served personally or by certified mail. The provisions of North Dakota Century Code chapter 28-32 apply to and govern the filing of the complaint and the administrative hearing procedure, including an appeal from any decision rendered by the commissioner.

~~7. Upon written request, the commissioner may grant an extension of time to file a protest or complaint.~~

History: Effective October 1, 1987; amended effective July 1, 1989; May 1, 1991.
General Authority: NDCC 57-51-21
Law Implemented: NDCC 57-01-02, 57-01-07, 57-51-19

TITLE 92

Workers Compensation Bureau

JULY 1991

92-04-01-01. Definitions. As used in this article:

1. "Alteration" means a structural modification of or a departure from an original or existing construction.

~~2.1.~~ 2. "Apartments" means all multiple dwellings, which include condominiums.

~~3.~~ 2.1. "Approved" means approved by the bureau.

~~2.~~ 3. "A.S.M.E. Code" means the Boiler Pressure Vessel Construction Code of the American society of mechanical engineers of which sections I, II, IV, VIII (divisions I and II), and IX ~~as of July 1, 1978~~, 1989 edition, are hereby adopted by the bureau and incorporated by reference as a part of this article. A copy of the American Society of Mechanical Engineers Code is on file at the office of the bureau. The American Society of Mechanical Engineers Code may be obtained from the American society of mechanical engineers headquarters at 345 East Forty-seventh Street, New York City, New York 10017.

4. "Boiler" means a closed vessel in which water is heated, steam is generated, steam is superheated, or any combination thereof, under pressure or vacuum for use externally to itself by the direct application of heat from the combustion of fuels or from electricity or nuclear energy. The term boiler includes fired units for heating or vaporizing liquids other than water where these units are separate from processing systems and are complete within themselves, as per North Dakota Century Code section 65-12-04.

5. "Bureau" means the North Dakota workers compensation bureau.

6. "Certificate of competency" means a certificate issued by a jurisdiction indicating that a person has passed an examination prescribed by the national board of boiler and pressure vessel inspectors.

7. "Certificate inspection" means an inspection, the report of which is used by the chief boiler inspector to decide whether a certificate, as provided for in North Dakota Century Code section 65-12-06 may be issued.

8. "Chief inspector" means the chief boiler inspector appointed by the bureau to serve in the capacity as stated by law.

9. "Condemned boiler" means a boiler that has been inspected and declared unsafe or disqualified by legal requirements by an inspector qualified to take such action who has applied a stamping or marking designating its rejection.

10. "Deputy inspector" means a boiler inspector or inspectors employed by the bureau to assist the chief inspector in making inspections of boilers.

11. "Existing installations" includes any boiler constructed, installed, or placed in operation before July 1, 1973.

12. "External inspection" means an inspection made when a boiler is in operation.

13. "Fusion welding" means a process of welding metals in a molten or molten and vaporous state, without the application of mechanical pressure or blows. Such welding may be accomplished by the oxyacetylene or oxyhydrogen flame or by the electric arc. Thermit welding is also classed as fusion.

14. "High pressure, high temperature water boiler" means a water boiler operating at pressures exceeding one hundred sixty pounds per square inch gauge [1103.17 kilopascals] or temperatures exceeding two hundred fifty degrees Fahrenheit [121.16 degrees Celsius]. For practical purposes it shall be deemed the same as a power boiler.

15. "Hot water supply boiler" means a fired boiler used exclusively to supply hot water for purposes other than space heating and shall include all service and domestic type water heaters not otherwise exempt by North Dakota Century Code section 65-12-04.1.

16. "Inspector" means the chief boiler inspector or any deputy inspector or special inspector.

17. "Internal inspection" means an inspection made when a boiler is ~~shutdown~~ shut down and handholes or manholes are opened for inspection of the interior.

18. "Low pressure and heating boiler" means a boiler operated at pressures not exceeding fifteen pounds per square inch gauge [1.03 kilopascals] for steam or at pressures not exceeding one hundred sixty pounds per square inch gauge [1103.17 kilopascals] and temperatures not exceeding two hundred fifty degrees Fahrenheit [121.1 degrees Celsius], for water.

19. "Major repair" shall be considered as a repair upon which the strength of a boiler would depend. Major repairs are those that are not of a routine nature as described in Chapter III of the National Board Inspection Code. Chapter III of the National Board Inspection Code, ~~1987~~ 1989 edition, is hereby adopted by the bureau and incorporated by reference as a part of this article.

20. "Miniature boiler" means any boiler which does not exceed any of the following limits:

    a. Sixteen-inch [40.64-centimeter] inside diameter of shell.

    b. Twenty square feet [1.86 square meter] heating surface.

    c. Five cubic feet [.142 cubic meter] gross volume, exclusive of casing and insulation.

    d. One hundred per square inch gauge [689.48 kilopascals] maximum allowable working pressure.

21. "National board" means the national board of boiler and pressure vessel inspectors, 1055 Crupper Avenue, Columbus, Ohio 43229, whose membership is composed of the chief inspectors of government jurisdictions who are charged with the enforcement of the provisions of the American Society of Mechanical Engineers Code.

22. "National Board Inspection Code" means the manual for boiler and pressure vessel inspectors supplied by the national board. Copies of this code may be obtained from the national board at 1055 Crupper Avenue, Columbus, Ohio 43229.

23. "New boiler installations" includes all boilers constructed, installed, or placed in operation after July 1, 1973.

24. "Nonstandard boiler" means a boiler that does not bear the state stamp, the national board stamp, the American society of mechanical engineers stamp or the stamp of any state or political subdivision which has adopted a standard of construction equivalent to that required by this article.

25. "Owner or user" means any person, firm, corporation, state, or political subdivision owning or operating any boiler which is not specifically exempt under North Dakota Century Code section 65-12-04.1 within North Dakota.

26. "Power boiler" means a closed vessel in which steam or other vapor (to be used externally to itself) is generated at a pressure of more than fifteen pounds per square inch gauge [1.03 kilopascals] by the direct application of heat.

27. "Reciprocal commission" means a commission issued by the bureau to persons who have passed a written examination prescribed by the national board and who hold a national board commission issued by the national board, or to persons who have passed the written examination prescribed by the national board and are employed by a self-insured corporation making their own inspections.

28. "Reinstalled boiler" means a boiler removed from its original setting and reerected at the same location or erected at a new location without change of ownership.

29. "Repair" is a restoration of any damaged or impaired part to an effective and safe condition.

30. "Secondhand boiler" means a boiler of which both the location and ownership have been changed after primary use.

31. "~~Service~~ Service-type or ~~domestic type~~ domestic-type water heater" means a fired water heater of either instantaneous or storage type, used for heating or combined heating and storage of hot water to be used for domestic or sanitary purposes, with temperatures not exceeding two hundred fifty degrees Fahrenheit [121.1 degrees Celsius], and a heat input not in excess of two hundred thousand British thermal units [2.11 x 10 to the 8th power joules] per hour, and pressure not to exceed one hundred sixty pounds per square inch [1103.17 kilopascals].

32. "Special inspector" means an inspector regularly employed by an insurance company authorized to insure against loss from explosion of boilers in this state or an inspector who has passed the national board examination and is employed by self-insured corporations.

33. "Standard boiler" means a boiler which bears the stamp of North Dakota or of another state which has adopted a standard of construction equivalent to that required by this article or a boiler which bears the national board stamp or American society of mechanical engineers stamp.

34. "State of North Dakota Boiler Construction Code" is used to designate the accepted reference for construction, installation, operation, and inspection of boilers and will be referred to as this article. Anything not amended or specifically covered in this article shall be considered the same as the American Society of Mechanical Engineers Code~~, as of July 1, 1978~~.

35. "Steam traction engines" means boilers on wheels which are used solely for show at state fairs and other exhibitions in which the public is invited to attend.

History: Amended effective October 1, 1980; August 1, 1987; June 1, 1990; July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

92-04-03-01.1. Boiler inspection fees. The following will be charged for boiler inspections:

1. High pressure boilers.

a. Internal inspections.		Fee
- 50 square feet or less of heating surface	~~$25.00~~	$40.00
- Over 50 square feet and not over 500 square feet	~~35.00~~	50.00
- Over 500 square feet and not over 4,000 square feet	~~45.00~~	60.00
- Over 4,000 square feet of heating surface	~~55.00~~	70.00

b. External inspections.		
- 50 square feet of heating surface or less; 100 KW or less	~~$20.00~~	$30.00
- Over 50 square feet of heating surface, over 100 KW	~~25.00~~	40.00

2. Low pressure boilers.

a. Internal inspections.		
- Without manway	~~$25.00~~	$40.00
- With manway	~~35.00~~	50.00

b. External inspections.		
- Hot water heat and low pressure steam	~~$20.00~~	$30.00
- Hot water supply	~~10.00~~	15.00
- Additional boilers at same account for same day inspection. (Account = same owner, management firm, user, etc.)		15.00

3. ~~"Show" boilers~~ Steam traction engines.

- Internal	~~$35.00~~	$40.00
- External	~~30.00~~	35.00
- Hydrostatic test	~~40.00~~	45.00
- Ultrasonic survey	~~40.00~~	30.00
		per hour

4. ~~The charge cannot exceed one hundred eighty-five dollars per day plus expenses for inspections of boilers for the same account, per inspector.~~ Multiple boiler fee cap. Inspection fees for the same account, per day, must be as stated in this fee schedule, or at the rate of thirty dollars per hour for time spent in travel, conducting the inspections, and completing reports, plus expenses, whichever is less. This is in addition to the state certificate fee noted in subsection 5.

5. State certificate fee. $10.00 per certificate

History: Effective June 1, 1990; amended effective July 1, 1991.
General Authority: NDCC 65-02-08, 65-12-11
Law Implemented: NDCC 65-12-11

92-04-03-25. Conditions not covered by this article.

1. In any conditions not covered by this article, the American Society of Mechanical Engineers Code for new installations ~~as of July 1, 1978,~~ shall apply.

2. Should any section, subsection, sentence, clause, phrase, provision, or exemption of this article be declared unconstitutional or invalid for any reason, such invalidity shall not affect the remaining portion hereof.

History: Amended effective July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

92-04-05-08. Safety valves and safety relief valves.

1. Each boiler shall have at least one American society of mechanical engineers approved safety valve and if it has more than five hundred square feet [46.45 square meters] of water heating surface, or if an electric boiler it has a power input of more than ~~five~~ eleven hundred kilowatts, it shall have two or more American society of mechanical engineers approved safety valves.

2. The safety valve capacity for each boiler shall be such that the safety valve, or valves will discharge all the steam that can be generated by the boiler without allowing the pressure to rise more than six percent above the highest pressure at which any valve is set and in no case to more than six percent above the maximum allowable working pressure. The safety valve capacity of new units shall not be less than the maximum designed steaming capacity as determined by the manufacturer.

The required steam relieving capacity in pounds per hour, of the safety relief valves on a high temperature water boiler shall be determined by dividing the maximum output in British thermal units at the boiler nozzle obtained by the firing of any fuel for which the unit is designed by one thousand (one British thermal unit equals 1.055 x 10 to the 3rd power joules).

3. One or more safety valves on the boiler proper shall be set at or below the maximum allowable working pressure. If additional valves are used, the highest pressure setting shall not exceed the maximum allowable working pressure by more than three percent. The complete range of pressure settings of all the saturated steam safety valves on a boiler shall not exceed ten percent of the highest pressure to which any valve is set. Pressure setting of safety relief valves on high temperature water boilers may exceed this ten percent range.

4. For a forced-flow steam generator with no fixed ~~steam~~ steamline and waterline, equipped with automatic controls and protective interlocks responsive to steam pressure, safety valves may be installed in accordance with the following, as an alternative:

   a. One or more power-actuated pressure-relieving valves shall be provided in direct communication with the boiler when the boiler is under pressure and shall receive a control impulse to open when the maximum allowable working pressure at the superheater outlet is exceeded. The total combined relieving capacity of the power-actuated ~~relieving~~ pressure-relieving valves shall be not less than ten percent of the maximum design steaming capacity of the boiler under any operating condition as determined by the manufacturer. The valves shall be located in the pressure part system where they will relieve the overpressure.

      An isolating stop valve of the outside screw and yoke type may be installed between the power-actuating pressure-relieving valve and the boiler to permit repairs provided an alternate power-actuated pressure-relieving valve of the same capacity is so installed as to be in direct communications with the boiler.

   b. Spring-loaded safety valves shall be provided, having a total combined relieving capacity, including that of the power-actuated pressure-relieving valve installed under ~~subsection 4,~~ subdivision a, of not less than one hundred percent of the maximum designed steaming capacity of the boiler, as determined by the manufacturer. In this total no credit in excess of thirty percent of the total relieving capacity shall be allowed for the power-actuated pressure relieving valves actually installed. Any or all of the spring-loaded safety valves may be set above the

maximum allowable working pressure of the parts to which they are connected but the set pressures shall be such that when all these valves (together with the power-actuated pressure-relieving valves) are in operation the pressure will not rise more than twenty percent above the maximum allowable working pressure of any part of the boiler, except for the steam piping between the boiler and the prime mover.

c. When stop valves are installed in the water-steam flow path between any two sections of a forced-flow steam generator with no fixed ~~steam~~ steamline and waterline.

(1) The power-actuated pressure relieving valve required by ~~subsection 4,~~ subdivision a shall also receive a control impulse to open when the maximum allowable working pressure of the component, having the lowest pressure level upstream to the stop valve, is exceeded.

(2) The spring-loaded safety valve shall be located to provide the pressure protection requirements of ~~subsection 4, subdivisions~~ subdivision b or c.

(3) A reliable pressure-recording device shall always be in service and records kept to provide evidence of conformity to the above requirements.

5. All safety valves or safety relief valves shall be so constructed that the failure of any part cannot obstruct the free and full discharge of steam, and water from the valve. Safety valves shall be of the direct spring-loaded pop type, with seat inclined at any angle between forty-five and ninety degrees, inclusive to the centerline of the spindle. The coefficient of discharge of safety valves shall be determined by actual steam flow measurements at a pressure not more than three percent above the pressure at which the valve is set to blow.

6. Safety valves or safety relief valves may be used which give any opening up to the full discharge capacity of the area of the opening of the inlet of the valve, provided the movement of the valve is such as not to induce lifting of water in the boiler.

7. Deadweight or weighted-lever safety valves or safety relief valves shall not be used.

8. For high temperature water boilers safety relief valves shall be used. Such valves shall have a closed bonnet. For purposes of selection, the capacity rating of such safety relief valves shall be expressed in terms of actual steam flow determined on the same basis as for safety valves. In

addition, the safety relief valves shall be capable of satisfactory operation when relieving water at the saturation temperature corresponding to the pressure at which the valve is set to blow.

9. A safety valve or safety relief valve over three inches [76.20 ~~millimeter~~ millimeters] in size, used for pressure greater the fifteen pounds per square inch gauge [1.03 kilopascals], shall have a flanged inlet connection or a welding-end inlet connection. The dimensions of flanges subjected to boiler pressure shall conform to the applicable American standards.

History: Amended effective July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

92-04-05-14. Feedwater valves and piping.

1. Except for high temperature water boilers, the feed pipe shall be provided with a check valve near the boiler and a valve or cock between the check valve and the boiler. When two or more boilers are fed from a common source, there shall also be a globe or regulating valve on the branch to each boiler located between the check valve and the source of supply. Whenever globe valves are used on feed piping, the inlet shall be under the disc of the valve. On single boiler-turbine unit installations, the boiler feed shutoff valve may be located upstream from the boiler feed check valve.

2. When the supply line to a boiler is divided into branch feed connections and all such connections are equipped with stop and check valves, the stop and check valves in the common source may be omitted.

3. If a boiler is equipped with duplicate feed arrangements, each such arrangement shall be equipped as required by these rules.

4. A combination stop-and-check valve in which there is only one seat and disc and a valve stem is provided to close the valve when the stem is screwed down, shall be considered only as a stop valve, and a check valve shall be installed as otherwise provided.

5. Where an economizer or other feedwater-heating device is connected directly to the boiler without intervening valves, the feed valves and check valves required shall be placed on the inlet of the economizer or feedwater-heating device.

6. The recirculating return line for a high temperature water boiler shall be provided with the same stop valve, or valves, required by section 92-04-05-13, subsection 1 for the main

boiler and the required stop valve or valves is optional. A check valve shall not be a substitute for a stop valve.

7. Except as provided for in subsections 8 and 10, boilers having more than five hundred square feet [46.45 square meters] of water-heating surface shall have at least two means of feeding water. Each source of feeding shall be capable of supplying water to the boiler at a pressure of six percent higher than the highest setting of any safety valve on the boiler. For boilers that are fired with solid fuel not in suspension, and for boilers whose setting or heat source can continue to supply sufficient heat to cause damage to the boiler if the feed supply is interrupted, one such means of feeding shall ~~be steam operated~~ not be subject to the same interruption as the first method.

8. Except as provided for in subsection 7, boilers fired by gaseous, liquid, or solid fuel in suspension may be equipped with a single means of feeding water provided means are furnished for the immediate shut off of heat input if the water feed is interrupted.

9. For boilers having a water-heating surface of not more than one hundred square feet [9.29 square meters], the feed piping and connection to the boiler shall not be smaller than one-half-inch [12.7-millimeter] pipe size. For boilers having a water-heating surface more than one hundred square feet [9.29 square meters], the feed piping and connection to the boiler shall not be less than three-quarter-inch [19.05-millimeter] pipe size.

10. High temperature water boilers shall be provided with means of adding water to the boiler or system while under pressure.

    The feedwater shall be introduced into a boiler in such a manner that the water will not be discharged directly against surfaces exposed to gases of high temperature or to direct radiation from the fire or close to any riveted joints of the furnace sheets or of the shell. For pressures of four hundred pounds [2757.92 kilopascals] or over, the feedwater inlet through the drum shall be fitted with shields, sleeves, or other suitable means to reduce the effects of temperature differentials in the shell or head. If necessary, the discharge end of a feed pipe shall be fitted with a baffle to divert the flow from riveted joints. Feedwater shall not be introduced through the blowoff.

History: Amended effective July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

92-04-06-01. Requirements.

1. No miniature boiler, except reinstalled boilers and those exempt by this article, shall hereinafter be installed in North Dakota unless it has been constructed, inspected, and stamped in conformity with section 1 of the American Society of Mechanical Engineers Code and is approved, registered, and inspected in accordance with this article or complies with the requirements of section 92-04-07-03.

2. A miniature boiler having the standard stamping of another state that has adopted a standard of construction equivalent to the standard of North Dakota may be accepted by the inspector; provided, however, that the person desiring to install the same shall make application for the installation and shall file with this application the manufacturer's data report covering the construction of the boiler in question.

3. All new installation boilers, including reinstalled boilers, must be installed in accordance with the requirements of the American Society of Mechanical Engineers Code ~~as of July 1, 1973,~~ and chapters 92-04-04, 92-04-05, 92-04-06, 92-04-07, 92-04-08, and 92-04-09.

History: Amended effective July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

92-04-07-03. Maximum allowable working pressure for nonstandard boilers. Nonstandard miniature boilers:

1. Shall conform to all requirements of this chapter but shall be exempt from section 92-04-07-02.

2. Shall have a factor of safety as given in subsection 5 of section 92-04-05-02~~, subsection 5~~. The factor given for "existing" shall apply to new construction also.

3. Shall be given an initial inspection which shall include a hydrostatic pressure test ~~at eighty-five percent of factor of safety times maximum allowable working pressure~~.

4. Shall not have solder or silver solder as a method of attachment of any pressure part of the entire assembled unit.

5. May have a plate for the North Dakota stamp and registration number~~,~~ to be welded to boiler proper. The plate must be placed in a conspicuous and accessible location. Minimum size thickness one-sixteenth inch [1.59 ~~millimeter~~ millimeters], length two inches [50.8 ~~millimeter~~ millimeters], and width one inch [25.4 ~~millimeter~~ millimeters].

6. Shall not exceed the design criteria limits as defined in subsection 21 of section 92-04-01-01~~, subsection 21~~.

7. Of the water tube, fired coil, fired radiator, and electric type, shall be considered as not meeting the requirements of this section.

8. Exceeding twelve inches [304.80 ~~millimeter~~ millimeters] internal diameter shall have at least one, one-inch [25.4 ~~millimeters~~ -millimeter] opening in bottom of shell and one, one-inch [25.4 ~~millimeters~~ -millimeter] opening in each water leg. Boilers not exceeding twelve inches [304.80 millimeters] internal diameter shall have one, one-half-inch [12.7 ~~millimeters~~ -millimeter] opening in shell and one, one-half-inch [12.7 ~~millimeters~~ -millimeter] opening in each water leg.

9. Construction material used for fabrication of the shell shall be steel of at least fifty-five thousand pounds per square inch [386.11 megapascals] tensile strength. Material of tubes may be steel, or brass, or copper with a rating equal to materials from section II of the American Society of Mechanical Engineers Code.

History: Amended effective July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

92-04-08-01. Requirements.

1. No heating or low pressure boiler, except those exempt by this article, shall hereinafter be installed in this state unless it has been constructed, inspected, and stamped ~~in conformity~~ to conform with section IV of the American society of Mechanical Engineers Boiler and Pressure Vessel Code ~~as of July 1, 1973,~~ and is approved, registered, and inspected in accordance with the requirements of this article.

2. All new installation boilers, including reinstalled boilers, must be installed in accordance with the requirements of the American Society of Mechanical Engineers Code ~~as of July 1, 1973,~~ and this article.

3. Hot water supply boilers shall not be installed unless constructed and approved in accordance with the American gas association, the American national standard institute, or the American society of mechanical engineers.

History: Amended effective October 1, 1980; July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

92-04-09-03. Nonstandard welded boilers. The maximum allowable working pressure of a noncode steel or wrought iron heating boiler of welded construction shall not exceed fifteen pounds [1.03 kilopascals]. For other than steam service, the maximum allowable working pressure shall be calculated in accordance with section IV of the American Society of Mechanical Engineers Code ~~as of July 1, 1973~~.

History: Amended effective July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

92-04-09-15. Provisions for thermal expansion in hot water systems.

1. All hot water heating systems incorporating hot water tanks or fluid relief columns shall be so installed as to prevent freezing under normal operating conditions.

2. Systems with open expansion tank. If the system is equipped with an open expansion tank, an indoor overflow from the upper portion of the expansion tank shall be provided in addition to an open vent, the indoor overflow to be carried within the building to a suitable plumbing fixture or to the basement.

3. Closed type systems. If the system is of the closed type, an airtight tank or other suitable air cushion shall be installed that will be consistent with the volume and capacity of the system, and shall be suitably designed for a hydrostatic test pressure of two and one-half times the allowable working pressure of the system. Expansion tanks for systems designed to operate at or above fifty pounds per square inch [344.74 kilopascals] shall be constructed in accordance with American Society of Mechanical Engineers Code, section VIII ~~as of July 1, 1973~~, division 1. Provisions shall be made for draining the tank without emptying the system.

4. Expansion tank capacities for gravity hot water systems. Based on two-pipe system with average operating water temperature one hundred seventy degrees Fahrenheit [76.7 degrees Celsius], using cast iron column radiation with heat emission rate one hundred fifty British thermal units per hour per square foot [158.25 x 10 to the 3rd power joules per .0929 square meter] equivalent direct radiation.

Square Feet of Installed Equivalent Direct Radiation	Tank Capacity, Gallons
Up to 350	18
Up to 450	21
Up to 650	24
Up to 900	30
Up to 1100	35
Up to 1400	40
Up to 1600	2-30
Up to 1800	2-30
Up to 2000	2-35
Up to 2400	2-40

5. Expansion tank capacities for forced hot water systems. Based on average operating water temperature one hundred ninety-five degrees Fahrenheit [90 degrees Celsius], a fill pressure twelve pounds per square inch gauge [82.74 kilopascals] and a maximum operating pressure thirty pounds per square inch gauge [206.84 kilopascals].

System Volume Gallons	Tank Capacity Gallons
100	15
200	30
300	45
400	60
500	75
1000	150
2000	300

History: Amended effective July 1, 1991.
General Authority: NDCC 65-12-08
Law Implemented: NDCC 65-12-08

TITLE 96

Board of Clinical Laboratory Practice

JUNE 1991

STAFF COMMENT: Title 96 contains all new material but is not underscored so as to improve readability.

ARTICLE 96-01

GENERAL ADMINISTRATION

CHAPTER 96-01-01
ORGANIZATION OF BOARD

96-01-01-01. Organization of the board of clinical laboratory practice.

1. **History and function.** The 1989 legislative assembly passed legislation to license clinical laboratory personnel, codified as North Dakota Century Code chapter 43-48.

   This chapter requires the governor to appoint a state board of clinical laboratory practice. It is the responsibility of this board to license laboratory personnel.

2. **Board membership.** The board consists of six members appointed by the governor for a term of three years:

   a. One physician chosen from a list of at least three qualified physicians recommended by the North Dakota pathology organization.

   b. The following laboratory persons chosen from a list of at least three qualified persons for each vacancy submitted by the North Dakota society for medical technology or other interested parties:

      (1) One administrative nonphysician clinical laboratory director;

      (2) One clinical laboratory scientist; and

      (3) One clinical laboratory technician.

   c. Two consumer members, each of whom must be a citizen of the United States, a resident of North Dakota for at least two years before the date of appointment, and a current resident of North Dakota.

   d. The state health officer or state health officer's designee is an ex officio member of this board.

   Terms of board members must be staggered.

3. **Meetings.** The board shall meet at least once during the first three months of each calendar year and at least one additional meeting must be held before the end of each calendar year. Other meetings may be convened at the call of the board chairperson or the written request of any three board members.

4. **Compensation.** In addition to the expenses incurred while engaged in the performance of their duties, each board member shall receive a per diem fee set by the board, not to exceed the fee established by law for the legislative assembly.

5. **Staff.** The board is authorized to employ an executive director and such other professional and secretarial staff as may be necessary.

6. **Inquiries.** Inquires regarding the board may be addressed to:

   Board of Clinical Laboratory Practice
   Bureau of Education Services
   P.O. Box 8158
   University Station
   Grand Forks, ND 58202-8158

History: Effective June 1, 1991.

General Authority: NDCC 28-32-02.1
Law Implemented: NDCC 43-48-04

ARTICLE 96-02

CLINICAL LABORATORY PERSONNEL LICENSURE

CHAPTER 96-02-01
DEFINITIONS

96-02-01-01. Definitions. Definitions of terms used in these rules must be the same as those listed in North Dakota Century Code section 43-48-01.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04

CHAPTER 96-02-02
REGISTRATION AND FEES

96-02-02-01. General registration requirements. The following requirements apply to all applicants seeking licensure by the board:

1. A completed application form.

2. Payment of the appropriate application fee as set by the board.

3. Evidence that the applicant is credentialed by a national certifying agency approved by the board or evidence of graduation from a curricula approved by the board.

4. All applications must be signed and notarized.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04, 43-48-06, 43-48-07, 43-48-08, 43-48-09

96-02-02-02. Types of registration.

1. Medical technologist (clinical laboratory scientist) has graduated with a bachelor of science or a bachelor of arts degree in a science-related discipline and has passed a national certifying examination approved by the board. Upon receipt of documentation that all necessary educational qualifications for a medical technologist have been met, or upon successful completion of an examination approved by the board, the board shall issue a clinical medical technologist license to any person meeting the above qualifications.

2. A clinical laboratory specialist is educated in chemical, physical, or biological science and performs in a clinical laboratory only functions directly related to such person's particular specialty. Upon successful completion of an examination covering only those fields in which an applicant is eligible to be examined, and documentation of competency by a nationally recognized certifying agency, the board shall issue a clinical laboratory specialist license to any person meeting the following minimum qualifications:

   a. A baccalaureate or higher degree with a major in one of the chemical, physical, or biological sciences.

   b. Certification resulting from passing a national certifying examination in a specialty area.

   A license is issued as a clinical laboratory specialist followed by designation of area of specialty.

3. A clinical laboratory technician has successfully completed the academic requirements of a structured clinical educational

program recognized by the board and has passed a national certifying examination approved by the board.

4. The board shall issue a provisional permit to a person who has applied for registration and is eligible to take a board recognized national certifying examination.

   The provisional permit may not exceed one year. At the board's discretion, the permit may be renewed only once for a period of six months.

   When all requirements have been met, an official registration shall be issued giving the registrant a permanent registration number.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04, 43-48-07, 43-48-08, 43-48-09,

96-02-02-03. Reciprocity. The board will evaluate the submission of requests for reciprocity for licensure on an individual basis and grant such only upon a finding that the requirements for licensure in another state are equal to or more stringent than those of North Dakota.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04

96-02-02-04. Licensure renewal - Licenses are renewable biennially.

1. Applications for renewal of license will be mailed by the board in May of even-numbered years to all licenseholders. Fees are payable to the board on or before the first of July of the renewal year.

2. Proof of the required continued education is submitted with renewals.

3. If a registrant fails to receive the renewal notice, it is the responsibility of the registrant to contact the board before the first of July deadline.

4. License fees are considered delinquent and a late charge is assessed if the renewal application is not postmarked on or before the first of July of the renewal year.

5. Licenses will be revoked if the renewal form and fees are not received within ninety days from the first of July of the renewal year. To reapply for licensure, an applicant must submit:

a. An application form.

b. The initial license fee - not the renewal fee.

c. Late charges as assessed by the board.

d. Proof of continued education.

Revoked licenses will not be reissued to those licensed under the grandfather provision.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04, 43-48-06, 43-48-14

96-02-02-05. Registration refused, revoked, or suspended. The board may refuse, suspend, or revoke a registration on the grounds stated in North Dakota Century Code section 43-48-15.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04, 43-48-11, 43-48-15

96-02-02-06. Inactive status. Upon request, the board shall grant inactive status to a licensee who (a) does not practice as a laboratory professional, and (b) maintains any continuing competency requirements established by the board. The board may establish additional requirements for license renewal which provide evidence of continuing competency.

Inactive status is only granted to an individual who has held a license previously and who provides a written request for inactive status. No fee will be charged for inactive status.

To apply for reinstatement of active status, the applicant must provide a copy of previous license, the renewal fee, and must meet any other reentry requirements established by the board.

The maximum time to be carried on inactive status is four years.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04

CHAPTER 96-02-03
FEES

Section
96-02-03-01 Fees

96-02-03-01. Fees. The board shall set fees in such an amount as to reimburse the operational cost of licensure services rendered.

1. Application fee	
Category MT (CLS) and Specialists	$45.00
Category CLT, MLT	$35.00
2. Biennial renewal fee	
Category MT (CLS) and Specialists	$30.00
Category CLT, MLT	$20.00
3. Late fees - $5.00 per month	
4. Duplicate license fee	$10.00

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04, 43-48-06

CHAPTER 96-02-04
CONTINUING EDUCATION

Section
96-02-04-01 Continuing Education

96-02-04-01. Continuing education.

1. To renew a license a person must present proof of having attained at least two continuing education units of continuing education in the field of laboratory medicine. Continuing education for licensure renewal must be completed in the biennium preceding the biennium for which licensure is sought.

2. One tenth continuing education units is one contact hour.

3. Twelve hours of the required twenty per biennium can be accrued within the employment facility; eight hours are required to be external. External programs are open to the medical community.

4. Applicants who take the national exam will have the continuing education requirements waived for that licensure period.

5. A curriculum review committee, composed of the advisory board members or their agent, shall meet at timely intervals to

review applications for curriculum accreditation for external continuing education. Continuing education units must be assigned as one continuing education unit per ten hours of instruction. Curricula must have laboratory orientation.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04

CHAPTER 96-02-05
ADDRESS AND HOME CHANGES

Section
96-02-05-01 Information Changes

96-02-05-01. Address and home changes. Any licensee must report a change of address, home, or educational degree to the board. Proof of any educational degree change must also be submitted.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04

CHAPTER 96-02-06
VIOLATIONS

Section
96-02-06-01 Violations

96-02-06-01. Violations. It is unlawful to employ an unregistered laboratory professional.

No person may practice as a clinical laboratory scientist or a clinical laboratory technician unless the person is the holder of a current license issued by the board or is exempt from licensure.

Complaints and problems about alleged violations of North Dakota Century Code chapter 43-48 must be forwarded to the board for its consideration. The board shall review and, if necessary, investigate all complaints and allegations that come before it concerning North Dakota Century Code chapter 43-48 violations. The board may seek the advice and assistance of legal counsel in this review and investigation process. The board may direct its secretary, or other personnel, to act either directly, on its behalf, or to assist others, in filing complaints of North Dakota Century Code chapter 43-48 violations with state's attorneys. The board may seek the advice of legal counsel concerning the use of injunctions as a means of preventing or stopping

North Dakota Century Code chapter 43-48 violations and may direct legal counsel on its behalf to use such remedies.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04, 43-48-15, 43-48-16

CHAPTER 96-02-07
GRIEVANCES

Section
96-02-07-01 Grievance Procedure

96-02-07-01. Grievance procedure. Grievances must be processed in accordance with North Dakota Century Code chapter 28-32.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 28-32-05, 43-48-04

CHAPTER 96-02-08
BOARD ACTION

Section
96-02-08-01 Board Action

96-02-08-01. Board action. The board recognizes the following certifying exams: those exam programs which accept applicants from clinical education programs accredited by the committee on allied health education and accreditation of the American medical association in collaboration with the national accrediting agency for clinical laboratory science.

The board recognizes a structural laboratory education program as one accredited by the national accrediting agency for clinical laboratory science a function of the committee on allied health, education, and accreditation of the American medical association.

The board recognizes that the qualifications of individuals with a bachelor of science degree or above in an applied science, are qualified for licensure as a laboratory specialist after a year of training or experience in their area of specialization, regardless of whether they take the specialist examination.

History: Effective June 1, 1991.
General Authority: NDCC 43-48-04
Law Implemented: NDCC 43-48-04

TITLE 97

North Dakota Board of Councelor Examiners

JUNE 1991

STAFF COMMENT: Title 97 contains all new material but is not underscored so as to improve readability.

ARTICLE 97-01

GENERAL ORGANIZATION

ARTICLE 97-02

LICENSING REQUIREMENTS

CHAPTER 97-02-01
LICENSING REQUIREMENTS

97-02-01-01. Requirements to become a licensed professional counselor. In order for an applicant to become a licensed professional counselor, an individual must make application to the board, supplying, at a minimum, the following information:

1. A copy of a masters degree transcript from an accredited school or college that meets the academic standards set forth in section 97-02-01-02.

2. Three recommendations as follows:

   a. One from the counselor educator who provided direct supervision in the applicant's counseling practicum;

   b. One from an employer who provided general supervision of the applicant's work since receipt of the masters degree; and

   c. One from the professional who provided direct supervision of the applicant's counseling experience.

3. Certification that the individual has a minimum of two years of supervised experience under a licensed professional counselor or its equivalent. Equivalency has been determined to be a duly credentialed human service professional or other individual approval approved by the board for supervision. The supervision must include individual, face-to-face meetings that occur at regular intervals over a two-year period. Supervision in a group setting may also be provided, such as in the case of a conference among members of a professional staff or other arrangement. A total of one hundred hours over the two-year period of supervision through individual and group methods must be documented.

4. Provides a statement of intent to practice, describing proposed use of the license, the intended client population, and the counseling procedures that the applicant intends to use in serving the client population.

5. Showing successful completion of the national counselor examination as distributed and administered under the auspices of the national board of certified counselors.

History: Effective June 1, 1991.
General Authority: NDCC 43-47-03

Law Implemented: NDCC 43-47-06

97-02-01-02. Academic programs. Academic programs are programs identified specifically as counseling programs in the graduate bulletin of the accredited school or college. These programs include counseling, counselor education, counseling and guidance, and counseling and development. In addition to the masters degree in counseling, the applicant's graduate transcript must indicate coursework in the following areas: counseling methods, group counseling, counseling theories, counseling practicum, individual appraisal or testing, and statistics or research methods.

Graduates from masters degree programs in other human services fields may also meet the academic and training standards for licensure. In addition to the masters degree, the applicant's transfer must indicate coursework that is equivalent to the coursework in the following areas: counseling methods, group counseling, counseling theories, counseling practicum, individual appraisal or testing, and statistics or research methods.

History: Effective June 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-47-06

97-02-01-03. Requirements to become a licensed associated counselor. In order for an applicant to become a licensed professional counselor, an individual must make application to the board, supplying, at a minimum, the following information:

1. A copy of a masters degree from an accredited school or college that meets the academic standards set forth in section 97-02-01-02.

2. Three recommendations as follows:

   a. One from the practicum agency contact person;

   b. One from the counselor educator who provided the direct supervision in the applicant's counseling practicum; and

   c. One from the applicant's masters degree program advisor.

3. A written plan which at a minimum must include an estimated number of client contact hours per week and must specify the supervision received. The supervision must include individual, face-to-face meetings that occur at regular intervals over the two-year period. Supervision in a group setting may also be provided such as in case conference among members of a professional staff or other arrangement. A total of one hundred hours over the two-year period of supervision through individual and group methods must be documented.

4. Showing successful completion of the national counselor examination as distributed and administered under the auspices of the national board of certified counselors.

History: Effective June 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-47-06

97-02-01-04. Waiving formal examination. The board may grant a license without examination to a person who holds, at the time of the application, a license issued by another state if the person was licensed on the basis of the national counselor examination testing. Applicants not meeting this requirement are required to successfully complete this examination. An applicant for license by reciprocity shall also submit the following items to the board:

1. An application form completed in a manner prescribed by the board accompanied by the required fee.

2. A photostatic copy of the license from the other state.

3. A copy of the licensing statute and rules of the state issuing the license in the other state.

4. The name and address of the licensing committee, agency, or board of the other state.

5. Verified score of the national counselor examination that meets or exceeds the passing score determined by the board.

The board or its designee shall verify that the licensing state imposes substantially the same requirements as North Dakota, and that there is no other reason constituting good cause for refusing to issue such license.

History: Effective June 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-47-03, 43-47-06

97-02-01-05. Renewal of license. A professional counselor may renew his license every two years by use of the prescribed form and documentation of thirty hours of continuing education requirements for a two-year period. One continuing education hour will be based upon a fifty-minute hour. Notification of renewals will be made in the month prior to the anniversary date of each license and each applicant will be given thirty days to respond.

In the case of a lapse of license, the applicant must apply for a new license.

History: Effective June 1, 1991.

General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-47-03, 43-47-06

97-02-01-06. Continued professional education. Examples of items meeting continuing professional educational requirements include attending professional meetings, conferences, and workshops or taking graduate courses in counseling or human service fields.

History: Effective June 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-47-06

97-02-01-07. Grandfather provisions. The board shall issue, upon the application submitted prior to July 6, 1991, a license as a licensed professional counselor, if the applicant:

1. Supplies a copy of a masters degree from an accredited school or college and which meets all the other requirements as listed in section 97-02-01-02.

2. Documents work in the counseling field for pay, for two of the last five years. This documentation must show employment for a minimum of four thousand one hundred and sixty hours in the previous five years.

3. Supplies documentation of supervision or continued professional growth as listed in sections 97-02-01-01 and 97-02-01-06.

4. Successfully completes the examination as required in section 97-02-01-01. The examination approved by the board is the national counselor examination. This examination is waived for national certified counselors, national certified career counselors, certified clinical mental health counselors, and holder of the doctorate in counseling. These applicants must submit proof of their certificate of degree.

History: Effective June 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-47-06

CHAPTER 97-02-02
DISCIPLINARY PROCEDURES

97-02-02-01. Disciplinary actions. All actions for disciplinary procedures must be in accordance with North Dakota Century Code chapter 28-32.

1. Action by the board to revoke, suspend, or decline to renew a license must be taken in accord with the following procedures for the situation to which they apply:

   a. Conviction of a felony.

      (1) Maximum action: Revocation.

      (2) Minimum action: Stayed revocation with two years probation under approved supervision. The board may condition the probation based upon the nature of the conviction and tailor it to educate the offender to avoid a recurrence. The conditions imposed may include a rehabilitation program tailored to the violation. In appropriate cases, treatment by a qualified professional and approved by the board may be required.

   b. Procuring of license by fraud or misrepresentation.

      (1) Action: Revocation.

   c. Misuse of drugs or alcohol.

      (1) Maximum action: Revocation.

      (2) Minimum action: Stayed revocation with two years probation under approved supervision.

      (3) Conditions of probation:

         (a) Misuse of drugs or alcohol:

            [1] An evaluation by qualified professionals as approved by the board.

            [2] Abstention from use of drugs or alcohol.

            [3] Treatment as recommended by a qualified professional approved by the board and a statement from the professional that the licensee is ready to resume professional responsibility.

            [4] Successful completion of an oral examination administered by the board or its designees.

d. Negligence in professional conduct or nonconformance with the code of ethics as adopted by the board.

(1) Maximum action: Revocation.

(2) Minimum action: One year suspension, stayed, with two years probation with approved supervision.

(3) Conditions of probation:

(a) Successful completion of a continuing education program related to the worker client relationship and approved by the board.

(b) Successful completion of an oral examination administered by the board or its designees.

(c) If deemed appropriate by the trier of fact, practice only in a supervised, structured environment that is approved by the board.

e. Performance of functions outside the demonstrable areas of competency.

(1) Maximum action: One year suspension with two years probation with approved supervision.

(2) Minimum action: One year suspension, stayed, with three years probation.

(3) Conditions of probation:

(a) Successful completion of a continuing education program approved by the board which bears a meaningful relationship to the violation.

(b) If deemed appropriate by the trier of fact practice only in a supervised, structured environment that is approved by the board.

(c) Successful completion of an oral examination administered by the board or its designees.

f. Mental, emotional, or physical incompetence to practice the profession.

(1) Maximum action: Revocation.

(2) Minimum action: Suspension. Application for reinstatement may be made after:

(a) Proof of termination of disability to the satisfaction of the board.

(b) Successful completion of an oral examination administered by the board or its designees.

(3) Upon reinstatement, if deemed appropriate by the board, practice only in a supervised, structured environment that is approved by the board.

g. Violation of or aid to another in violating any provision of North Dakota Century Code chapter 43-47, any other statute applicable to the practice of professional counseling, or any provision of this title.

(1) Maximum action: Revocation.

(2) Minimum action: One year suspension, stayed, with two years probation with approved supervision.

2. Petition for rehearing. A petition may be made to the board for reinstatement upon good cause or as a result of additional evidence being obtained that would alter the determination reached in subsection 1.

History: Effective June 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 28-32-14, 43-47-07

97-02-02-02. Reinstatement following disciplinary action.

1. Any person whose license has been revoked or whose renewal application has been denied renewal under section 97-02-02-01 may submit a new application to the board for licensure two years after the date of the revocation or denial.

2. The board may, after a hearing, grant or deny the reinstatement sought in subdivision a of subsection 1 of this section based upon the evidence presented.

3. If an application for reinstatement is approved, the applicant must be licensed upon payment of the appropriate fees applicable at the time of reinstatement.

History: Effective June 1, 1991.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 43-47-07, 43-47-08