STATE OF NORTH CAROLINA **COUNTY OF WAKE**	**IN THE OFFICE OF** **ADMINISTRATIVE HEARINGS** **14 OSP 04286**

KARIS FITCH, Petitioner, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Respondent.	)))))))))	**FINAL DECISION ORDER ENFORCING SETTLEMENT AGREEMENT**

HAVING HEARD and reviewed the Petitioner's Motion to Enforce Settlement Agreement, and having considered the governing law, the filings, and the arguments of counsel for both parties, the Court finds as follows:

FINDINGS OF FACT

1. On July 2, 2014, counsel for Petitioner Michael C. Byrne sent the following communication to Assistant Attorney General Tamika Henderson, counsel for the Respondent, upon Ms. Henderson informing the undersigned that she was counsel for the Respondent:

> *Dear Tamika:*
>
> *Thank you. Please note that I have been authorized to make the following settlement offer on this case:*
>
> *1. Ms. Fitch's termination is changed to a resignation dated the day of her separation. The termination documents are removed from her personnel file in lieu of a resignation letter; the AG may retain a copy.*
> *2. No payment of back pay or attorney's fees.*
> *3. Release of claims.*
>
> *Please let me know if this is agreeable to your client.*
>
> *Thank you,*
>
> *Michael Byrne*

2. On July 21, 2014, Mr. Byrne followed up to Ms. Henderson as follows:

Dear Tamika:

Some days ago I communicated a settlement offer in this case, which was a resignation and clearing of my client's file. Does your client have a response?

Thank you,

Michael Byrne

3. Ms. Henderson responded as follows:

I just got authority to accept the offer. *However, because of the underlying issue with the death of the prisoner and an order to retain any and all documents related to it; DPS will need to retain a copy of all those documents including the dismissal letter in the General Counsel's office. However, everything will be removed from her personnel file. If that is acceptable, I will send you a settlement agreement to review. Thanks.*

4. Mr. Byrne responded:

I have no objection to that caveat. Please send the settlement agreement.

5. Approximately two hours later, Ms. Henderson emailed Mr. Byrne as follows:

Michael:

Unfortunately, I was premature in communicating with you. Apparently, there was miscommunication within DPS. They do not intend to settle this matter. I am in my office, please feel free to call if you would like to discuss. Again, I apologize for the miscommunication.

6. Mr. Byrne responded:

This is most distressing. I have already communicated this to my client and our position is that an offer was made and accepted through you as their representative.

Please tell your client that if they try to back out at this point that I will seek to enforce the agreement in the OAH.

7. Ms. Henderson answered:

Ok. We are clear on your position.

8. The following day, July 23, 2014, Ms. Henderson wrote to Mr. Byrne:

My client does not intend to settle this case.

9. Mr. Byrne replied:

Your client HAS settled this case, and I intend to hold them to it – just as your client did in the Jimmy Carter matter.

See you in OAH.[1]

10. Ms. Henderson did not reply. On July 24, 2014, Respondent filed a Motion to Dismiss Petitioner's case. In that motion, Respondent made no reference to the discussions above.

11. These facts as found were not materially disputed by either party.

Based upon these Finding of Facts, the Court makes the following:

CONCLUSIONS OF LAW

1. The public policy of this state and the Office of Administrative Hearings (OAH) is set forth in N.C.G.S 150B-22:

§ 150B-22. Settlement; contested case

It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, **should be settled through informal procedures**. In trying to

[1] As is explained below, the "Jimmy Carter matter" is 13 OSP 09785, *Carter v. Department of Public Safety*. This involved the same agency, and indeed the same attorneys, as this case. In it, Judge Gray enforced an oral agreement by the Petitioner to settle his case for a resignation and a clearing of his file – again, almost identical to this case. When the Petitioner refused to sign a written settlement agreement confirming his oral agreement, the Court ruled to enforce it on motion of DPS, ordering that Petitioner must sign the agreement or his case would be dismissed with prejudice.

> reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

2. Moreover, OAH Rules, which have the force of law in these cases, specifically authorize settlement of a case by "informal disposition," such as was the case here. Those rules also specifically call for settlements made between the parties "by agreement":

> **.0106 CONSENT ORDER: SETTLEMENT: STIPULATION**
> **Informal disposition may be made of a contested case** or an issue in a contested case **by** stipulation, **agreement**, or consent order at any time during the proceedings. **Parties may enter into such agreements on their own** or may ask for a settlement conference with an administrative law judge to promote consensual disposition of the case.

3. Here, a settlement agreement was reached between the duly authorized representatives of the parties. The settlement agreement terms were clear and unambiguous: Petitioner's resignation and cleaning up the Petitioner's file.[2] The offer was made, and was accepted following Petitioner's acceptance of one additional term proposed by DPS. Ms. Henderson stated specifically that her client had authorized her to accept the offer. When an attorney representing a state agency has authorization from a client to settle a case, that attorney has authority to bind the agency to a settlement. *Tice v. DOT*, 67 N.C. App. 48, 312 S.E.2d 241(1984).

4. The settlement did not have to be reduced to a formal settlement agreement to be binding. The parties committed to the agreement and its terms, in writing, via electronic mail. This is more than enough to satisfy the Statute of Frauds. OAH and state policy favor settlement agreements.

5. An analogous situation arose in *Currituck Associates v. Hollowell*, 166 N.C. App. 17, 601 S.E.2d 256 (2004). In that case, counsel for the parties agreed by letter and email to settle a case. On 28 August 2002, appellants' counsel extended a settlement offer to appellee. On 30 August 2002, appellants' counsel sent appellee's counsel a letter accepting appellee's proposal. Appellants suggested that the only issue preventing the parties from settling their claims was the marketing of the condominiums after purchase. On 3 September 2002, **appellee's**

[2] The Court notes the lack of financial harm to the Respondent through enforcement of this agreement, as under its terms there is no payment from the public purse and Petitioner absorbs her own attorney's fees.

counsel confirmed via email that an agreement between the parties had been reached regarding appellants' marketing of Windswept Ridge. The email also stated that 'in view of our settlement, please permit this e-mail to confirm [that] the depositions scheduled for later this week will not take place.' On 6 September 2002, appellee's counsel sent an email to appellants' counsel, attaching a "Mutual Release and Settlement Agreement" that outlined the parties' agreement.

Id. at. 19-20.

6. Note that at this point in *Currituck*, no additional formal, written settlement agreement had been executed and the clients themselves had signed nothing. In the following days, one of the parties attempted to back out of the agreement. Counsel for the non-breaching party responded: "The parties have a settlement. [Appellants] cannot now come up with some "issues" to try to back out of the agreement. I hope we're not getting to this point, but I do want to make sure your client realizes that this agreement will be enforced." *Id.* at 21.[3]

7. When the breaching party refused to honor the settlement agreement, the other filed a Motion to Enforce Settlement Agreement, which was heard in the Dare County Superior Court. The Superior Court granted the motion, dismissed the breaching party's case, and (as requested here) taxed the breaching party with the opposing party's attorney's fees and costs. *Id.* at 21. The breaching party appealed.

8. The Court of Appeals affirmed the Superior Court and enforced the settlement agreement. This was the case even though a reading of the communications between counsels in the *Currituck* case showed that there were additional terms left to be discussed. *Id.* at 26. The Court rejected the breaching party's contention that there had not been a "meeting of the minds" with respect to the essential settlement terms: "Mutual assent and the effectuation of the parties, intent is normally accomplished through the mechanism of offer and acceptance." *Id.* at 27, citing *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980).

9. The Court of Appeals also rejected the breaching party's argument that the settlement agreement violated the Statute of Frauds because it was not signed "by the party to be charged", here the client. "However, there is a presumption in North Carolina in favor of an attorney's authority to act for the client he professes to represent. Thus, one who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption and proving lack of authority to the satisfaction of the court." *Id.* at 28, citing *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 655 (2000).

10. The Court of Appeals thus ruled in *Currituck* that the trial court was correct in enforcing the settlement and taxing the breaching party with fees and costs. Notably, this was in the absence of a statute, such as in this case, making settlement of contested cases the public policy of this State and, again, as here, a specific rule of the court holding that the parties may resolve cases by informal agreement.

[3] This is very similar to the undersigned's response to the Respondent in this case, though the undersigned was not aware of this case at the time he made those statements.

11. Administrative Law Judge Gray some months ago heard the contested case of 13 OSP 09785, *Carter v. Department of Public Safety*. Following the presentation of the evidence, Judge Gray spoke to both counsel (the same counsel as in the present case on both sides) and proposed that the parties settle the matter by Mr. Carter resigning from DPS and having DPS clean up Mr. Carter's file. Mr. Carter and DPS agreed to do this. None of these discussions were in writing.

12. When presented with a written settlement agreement, Mr. Carter refused to sign it. On his instruction, the undersigned filed a motion seeking to allow Mr. Carter to simply submit his resignation. DPS vigorously opposed this motion, contending that the parties had agreed to settle the case and arguing that Mr. Carter should he held to the terms of his agreement. Judge Gray agreed with DPS and ruled that Mr. Carter either had to sign the agreement or have his case dismissed.

13. Ms. Henderson had apparent authority to settle this case. *See Purcell Intern. Textile Group, Inc. v. Algemene AFW N.V.*, 185 N.C. App. 135, 647 S.E.2d 667, *review denied*, 362 N.C. 88, 655 S.E.2d 840 (2007). However, a more senior official countermanded that decision. The parties agreed to a settlement through an offer and acceptance, and then Respondent attempted to renege on that settlement. Grounds do not exist for refusing to enforce a very specific and simple agreement reached between the duly authorized representatives of each side of the case.

ORDER

1. Respondent is ordered with all due expediency to follow the terms of the settlement agreement which includes changing Petitioner's termination to a resignation and removing the disciplinary documents from Petitioner's personnel file. As agreed between the parties, DPS may retain copies of these documents in its General Counsel's office. The parties shall bear their own fees and costs.

2. Upon Respondent's compliance with this Order, which should be communicated to the Undersigned upon completion, this case shall be dismissed with prejudice.

3. Respondent's Motion to Dismiss is hereby DENIED as moot.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing." In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it

was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of the Court of Appeals within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 9th day of December, 2014.

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Hon. Craig Croom
Administrative Law Judge

STATE OF NORTH CAROLINA **COUNTY OF WAKE**	**IN THE OFFICE OF** **ADMINISTRATIVE HEARINGS** **14 OSP 04286**

KARIS FITCH, Petitioner, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Respondent.	)	**AMENDED FINAL DECISION ORDER ENFORCING SETTLEMENT AGREEMENT**

HAVING HEARD and reviewed the Petitioner's Motion to Enforce Settlement Agreement, and having considered the governing law, the filings, and the arguments of counsel for both parties, the Court finds as follows:

FINDINGS OF FACT

12. On July 2, 2014, counsel for Petitioner Michael C. Byrne sent the following communication to Assistant Attorney General Tamika Henderson, counsel for the Respondent, upon Ms. Henderson informing the undersigned that she was counsel for the Respondent:

> *Dear Tamika:*
>
> *Thank you. Please note that I have been authorized to make the following settlement offer on this case:*
>
> *1. Ms. Fitch's termination is changed to a resignation dated the day of her separation. The termination documents are removed from her personnel file in lieu of a resignation letter; the AG may retain a copy.*
> *2. No payment of back pay or attorney's fees.*
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> *Please let me know if this is agreeable to your client.*
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> *Thank you,*
>
> *Michael Byrne*

13. On July 21, 2014, Mr. Byrne followed up to Ms. Henderson as follows:

Dear Tamika:

Some days ago I communicated a settlement offer in this case, which was a resignation and clearing of my client's file. Does your client have a response?

Thank you,

Michael Byrne

14. Ms. Henderson responded as follows:

I just got authority to accept the offer. *However, because of the underlying issue with the death of the prisoner and an order to retain any and all documents related to it; DPS will need to retain a copy of all those documents including the dismissal letter in the General Counsel's office. However, everything will be removed from her personnel file. If that is acceptable, I will send you a settlement agreement to review. Thanks.*

15. Mr. Byrne responded:

I have no objection to that caveat. Please send the settlement agreement.

16. Approximately two hours later, Ms. Henderson emailed Mr. Byrne as follows:

Michael:

Unfortunately, I was premature in communicating with you. Apparently, there was miscommunication within DPS. They do not intend to settle this matter. I am in my office, please feel free to call if you would like to discuss. Again, I apologize for the miscommunication.

17. Mr. Byrne responded:

This is most distressing. I have already communicated this to my client and our position is that an offer was made and accepted through you as their representative.

> *Please tell your client that if they try to back out at this point that I will seek to enforce the agreement in the OAH.*

18. Ms. Henderson answered:

> *Ok. We are clear on your position.*

19. The following day, July 23, 2014, Ms. Henderson wrote to Mr. Byrne:

> *My client does not intend to settle this case.*

20. Mr. Byrne replied:

> *Your client HAS settled this case, and I intend to hold them to it – just as your client did in the Jimmy Carter matter.*
>
> *See you in OAH.*[4]

21. Ms. Henderson did not reply. On July 24, 2014, Respondent filed a Motion to Dismiss Petitioner's case. In that motion, Respondent made no reference to the discussions above.

22. These facts as found were not materially disputed by either party.

Based upon these Finding of Facts, the Court makes the following:

CONCLUSIONS OF LAW

14. The public policy of this state and the Office of Administrative Hearings (OAH) is set forth in N.C.G.S 150B-22:

> **§ 150B-22. Settlement; contested case**
>
> **It is the policy of this State** that any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, **should be settled through informal procedures**. In trying to

[4] As is explained below, the "Jimmy Carter matter" is 13 OSP 09785, *Carter v. Department of Public Safety*. This involved the same agency, and indeed the same attorneys, as this case. In it, Judge Gray enforced an oral agreement by the Petitioner to settle his case for a resignation and a clearing of his file – again, almost identical to this case. When the Petitioner refused to sign a written settlement agreement confirming his oral agreement, the Court ruled to enforce it on motion of DPS, ordering that Petitioner must sign the agreement or his case would be dismissed with prejudice.

> reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

15. Moreover, OAH Rules, which have the force of law in these cases, specifically authorize settlement of a case by "informal disposition," such as was the case here. Those rules also specifically call for settlements made between the parties "by agreement":

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16. Here, a settlement agreement was reached between the duly authorized representatives of the parties. The settlement agreement terms were clear and unambiguous: Petitioner's resignation and cleaning up the Petitioner's file.[5] The offer was made, and was accepted following Petitioner's acceptance of one additional term proposed by DPS. Ms. Henderson stated specifically that her client had authorized her to accept the offer. When an attorney representing a state agency has authorization from a client to settle a case, that attorney has authority to bind the agency to a settlement. *Tice v. DOT*, 67 N.C. App. 48, 312 S.E.2d 241(1984).

17. The settlement did not have to be reduced to a formal settlement agreement to be binding. The parties committed to the agreement and its terms, in writing, via electronic mail. This is more than enough to satisfy the Statute of Frauds. OAH and state policy favor settlement agreements.

18. An analogous situation arose in *Currituck Associates v. Hollowell*, 166 N.C. App. 17, 601 S.E.2d 256 (2004). In that case, counsel for the parties agreed by letter and email to settle a case. On 28 August 2002, appellants' counsel extended a settlement offer to appellee. On 30 August 2002, appellants' counsel sent appellee's counsel a letter accepting appellee's proposal. Appellants suggested that the only issue preventing the parties from settling their claims was the marketing of the condominiums after purchase. On 3 September 2002, **appellee's**

[5] The Court notes the lack of financial harm to the Respondent through enforcement of this agreement, as under its terms there is no payment from the public purse and Petitioner absorbs her own attorney's fees.

counsel confirmed via email that an agreement between the parties had been reached regarding appellants' marketing of Windswept Ridge. The email also stated that 'in view of our settlement, please permit this e-mail to confirm [that] the depositions scheduled for later this week will not take place.' On 6 September 2002, appellee's counsel sent an email to appellants' counsel, attaching a "Mutual Release and Settlement Agreement" that outlined the parties' agreement.

Id. at. 19-20.

19. Note that at this point in *Currituck*, no additional formal, written settlement agreement had been executed and the clients themselves had signed nothing. In the following days, one of the parties attempted to back out of the agreement. Counsel for the non-breaching party responded: "The parties have a settlement. [Appellants] cannot now come up with some "issues" to try to back out of the agreement. I hope we're not getting to this point, but I do want to make sure your client realizes that this agreement will be enforced." *Id.* at 21.[6]

20. When the breaching party refused to honor the settlement agreement, the other filed a Motion to Enforce Settlement Agreement, which was heard in the Dare County Superior Court. The Superior Court granted the motion, dismissed the breaching party's case, and (as requested here) taxed the breaching party with the opposing party's attorney's fees and costs. *Id.* at 21. The breaching party appealed.

21. The Court of Appeals affirmed the Superior Court and enforced the settlement agreement. This was the case even though a reading of the communications between counsels in the *Currituck* case showed that there were additional terms left to be discussed. *Id.* at 26. The Court rejected the breaching party's contention that there had not been a "meeting of the minds" with respect to the essential settlement terms: "Mutual assent and the effectuation of the parties, intent is normally accomplished through the mechanism of offer and acceptance." *Id.* at 27, citing *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980).

22. The Court of Appeals also rejected the breaching party's argument that the settlement agreement violated the Statute of Frauds because it was not signed "by the party to be charged", here the client. "However, there is a presumption in North Carolina in favor of an attorney's authority to act for the client he professes to represent. Thus, one who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption and proving lack of authority to the satisfaction of the court." *Id.* at 28, citing *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 655 (2000).

23. The Court of Appeals thus ruled in *Currituck* that the trial court was correct in enforcing the settlement and taxing the breaching party with fees and costs. Notably, this was in the absence of a statute, such as in this case, making settlement of contested cases the public policy of this State and, again, as here, a specific rule of the court holding that the parties may resolve cases by informal agreement.

[6] This is very similar to the undersigned's response to the Respondent in this case, though the undersigned was not aware of this case at the time he made those statements.

24. Administrative Law Judge Gray some months ago heard the contested case of 13 OSP 09785, *Carter v. Department of Public Safety*. Following the presentation of the evidence, Judge Gray spoke to both counsel and proposed that the parties settle the matter by Mr. Carter resigning from DPS and having DPS clean up Mr. Carter's file. Mr. Carter and DPS agreed to do this. None of these discussions were in writing.

25. When presented with a written settlement agreement, Mr. Carter refused to sign it. On his instruction, the undersigned filed a motion seeking to allow Mr. Carter to simply submit his resignation. DPS vigorously opposed this motion, contending that the parties had agreed to settle the case and arguing that Mr. Carter should he held to the terms of his agreement. Judge Gray agreed with DPS and ruled that Mr. Carter either had to sign the agreement or have his case dismissed.

26. Ms. Henderson had apparent authority to settle this case. *See Purcell Intern. Textile Group, Inc. v. Algemene AFW N.V.*, 185 N.C. App. 135, 647 S.E.2d 667, *review denied*, 362 N.C. 88, 655 S.E.2d 840 (2007). However, a more senior official countermanded that decision. The parties agreed to a settlement through an offer and acceptance, and then Respondent attempted to renege on that settlement. Grounds do not exist for refusing to enforce a very specific and simple agreement reached between the duly authorized representatives of each side of the case.

ORDER

4. Respondent is ordered with all due expediency to follow the terms of the settlement agreement which includes changing Petitioner's termination to a resignation and removing the disciplinary documents from Petitioner's personnel file. As agreed between the parties, DPS may retain copies of these documents in its General Counsel's office. The parties shall bear their own fees and costs.

5. Upon Respondent's compliance with this Order, which should be communicated to the Undersigned upon completion, this case shall be dismissed with prejudice.

6. Respondent's Motion to Dismiss is hereby DENIED as moot.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 126-34.02(a): "An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing." In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it

was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of the Court of Appeals within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 12th day of December, 2014.

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Hon. Craig Croom
Administrative Law Judge