

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
NO. 15 EDC 06344

TPS PUBLISHING INC

Petitioner,

v.

NC STATE BOARD OF EDUCATION

Respondents

FINAL DECISION

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Donald W. Overby, on February 3 and 4, 2016, at the Office of Administrative Hearings in Raleigh, North Carolina.

**APPEARANCES**

For the Petitioner:

Andrew Norris  
TPS Publishing Inc.  
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Valencia, CA 91355

For the Respondent:

Tiffany Lucas  
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**APPLICABLE STATUTES**

N.C. Gen. Stat. § 115C-85 *et seq*; N.C. Gen. Stat. § 150B-23; 16 N.C.A.C. 6D.0205, .0206, .0207.

**ISSUE**

Did the State Board of Education act erroneously and/or fail to use proper procedure in determining that Petitioner's textbook for Grade 7 Science was not recommended for approval for inclusion on the North Carolina public schools' approved state textbook list, and thereby deprive Petitioner of property.

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge (ALJ) makes the following Findings

of Fact. In making these findings of fact, the ALJ has weighed all the evidence and has assessed the credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

### **FINDINGS OF FACT**

1. North Carolina has a well-established process for adopting textbooks for use in the public schools. For more than 40 years, the General Statutes have set forth very specific mandates and guidelines for the adoption of textbooks, which adoption is under the general jurisdiction of the State Board of Education. N.C. Gen. Stat. § 115C-85 *et seq.*

2. The State Board of Education is charged with adopting standards for each subject taught in the public schools. Textbooks must align with those adopted standards. Soon after a set of standards is adopted for a new subject, the State Board of Education must engage in the selection of textbooks that align with those standards. N.C. Gen. Stat. § 115C-85

3. The applicable statutes provide for a Textbook Commission to ensure impartiality with regard to textbook selection. The Textbook Commission is a 23-member commission that is responsible for evaluating textbooks and recommending to the State Board of Education which textbooks should be included on the state textbook list. The members must represent various segments of the education community and are appointed for four-year terms by the Governor. N.C. Gen. Stat. § 115C-87 & 88

4. Textbook Commission members receive training by members of the Department of Public Instruction (“DPI”) who are well-versed in standards, curriculum, the bidding process, and the overall needs of the education community. The State Board of Education further defines a comprehensive, detailed process for requesting bids, ensuring that there are no conflicts of interest, ensuring that publishers comply with requirements, adhering to stringent timelines, and providing the most impartial review of textbooks possible. *See* N.C. Gen. Stat. § 115C-89.

5. In addition to Textbook Commission members, the Commission appoints textbook evaluation advisors (“advisors”) who are assigned the task of reviewing in depth every textbook that is submitted for bid. N.C. Gen. Stat. § 115C-88; 16 NCAC 6D .0206

6. In the fall of 2014, there was some reorganization at the Department of Public Instruction which brought changes to the textbook adoption cycle. Among the changes for the 2015-2016 cycle was shortened time lines compared to previous years, in order to allow the teacher’s to receive the books in a more timely fashion. Another change was a switch to using “Google forms.” In implementing these and other changes, there were some problems and “glitches” in the process. One glitch was a mathematical error in an automatic calculation. None of the identified problems or glitches were fatal to the integrity of the process, and none affected the outcome of this consideration.

7. For the 2015-2016 textbook adoption cycle, the content area focus was K-12 Science. As part of the adoption cycle, on or about November 17, 2014, there was a Textbook Commission planning meeting at which Textbook Commissioners were provided initial training for the upcoming adoption cycle. (Respondent's Ex. 6, p. 5)

8. On or about December 5, 2014, textbook publishers were invited by DPI to submit textbooks/programs on a bid proposal form in response to the *2015 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina* ("*Invitation to Submit*") developed by the agency and approved by the State Board of Education. (Respondent's Ex. 6, p. 5)

9. TPS Publishing was one of several textbook publishers that received the invitation from DPI.

10. The *Invitation to Submit* issued by DPI and sent to TPS Publishing and other textbook publishers included a page entitled "Tentative Schedule for 2015-2016 Adoption Process." Among other things, the page with the tentative schedule set forth that all publishers that would be submitting bids in response to the *Invitation to Submit* were encouraged to attend a preliminary publishers' meeting that was scheduled for January 23, 2015. (Respondent's Ex. 6, p. 5)

11. The deadline for textbook publishers to submit bid submissions was initially February 17, 2015, which was extended to February 23, 2015, due to weather-related concerns. (Respondent's Ex.(s) 6 & 8)

12. On or about January 23, 2015, DPI hosted a preliminary publishers meeting at which publishers received additional information and explanation about the 2015-2016 adoption process. Publishers were given the opportunity to ask questions about the process – including about the instructions and information provided in the *Invitation to Submit* – prior to submitting their bid proposal forms and bid submission samples and correlations.

13. Also on or about January 23, 2015, the members of the Textbook Commission attended a meeting at which they were trained on K-12 Science content standards by curriculum consultants at DPI. Also, prior to conducting the review and evaluation of textbooks, members of the Textbook Commission also received comprehensive training on the textbook selection and adoption process including specific training on the evaluation rubrics to be used in evaluating the textbook materials submitted by publishers for consideration by the Textbook Commission, the legal requirements for being a Textbook Commission member, and the ethics requirements imposed on all State commission or board members. (Petitioner's Ex. 6)

14. Following the February 23, 2015 deadline for textbook publishers to submit sealed bid proposals, the bids were opened in the Purchasing and Contracts Office at DPI. (Respondent's Ex. 8) A Bid ID Number was then assigned to each textbook or set of textbook materials identified by the publishers on the bid proposal forms.

15. Thereafter, the Textbook Commission began the process of hiring and assigning advisors to review and evaluate textbooks. In hiring advisors to review and evaluate textbooks,

the Textbook Commission took into account the credentials of the prospective advisors, the total number of textbooks identified on the bid proposal forms submitted by the textbook publishers, the number of textbooks that had been designated for a particular grade or course as set forth on the bid proposal forms submitted by textbook publishers, as well as the content area expertise of the Textbook Commission members.

16. As part of the 2015-2016 textbook adoption cycle, TPS Publishing responded to the *Invitation to Submit* by submitting a response that included a bid proposal form which identified the following sets of textbook materials to be considered for adoption by the State Board of Education for use at grade levels kindergarten through eight: 1) Grade K Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5079); 2) Grade 1 Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5080); 3) Grade 2 Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5081); 4) Grade 3 Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5082); 5) Grade 4 Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5083); 6) Grade 5 Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5084); 7) Grade 6 Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5085); 8) Grade 7 Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5086); and, 9) Grade 8 Creative Science Curriculum PBL Toolbox with STEM Literacy and Arts (Bid No. 5087).

17. After it submitted its sealed bid proposal, TPS Publishing timely submitted its textbook sample materials for review by the Textbook Commission and the advisors.

18. Thereafter, the advisors assigned to review the textbook materials submitted by publishers thoroughly considered those materials. At issue in this dispute are TPS Publishing's Grade 7 Science textbook materials, which textbook materials were assigned Bid ID No. 5086.

19. Relative to the textbook materials at issue in this contested case, the advisors and Textbook Commission members considered and evaluated the materials against the standards adopted in North Carolina for grade 7 Science. The advisors that reviewed the materials were certified in the content area of science. In addition, the advisors and Textbook Commission members that reviewed and evaluated science textbook materials as part of the 2015-2016 textbook selection and adoption cycle were trained by Beverly Vance, K-12 Science Section Chief, or by her staff regarding the evaluation instrument to be used in evaluating textbook submissions.

20. With respect to the Grade 7 textbook materials submitted under Bid ID No. 5086, five advisors reviewed and evaluated the materials. Three of the five evaluators voted not to recommend the materials for inclusion on the State-approved list. Three of the five advisors determined that the textbook materials did not sufficiently cover at least 80% of the Essential Standards and the Clarifying Objectives for Grade 7 Science, which was required in order to be recommended for use. The advisors' findings and concerns regarding the materials were documented on the evaluation instruments that they completed. The findings reported by the advisors clearly show that Bid No. 5086 was very close to receiving a positive recommendation; however, even though the vote was very close, the decision to not recommend was upheld. (Respondent's Ex.(s) 11 & 12)

21. Textbook Commission members, too, reviewed the materials submitted by TPS Publishing. Several of the Textbook Commission members commented upon the failure of the textbook materials submitted under Bid ID No. 5086 to sufficiently cover at least 80% of the standards and objectives adopted by the State Board of Education for Grade 7 Science. (*See e.g.* Respondent's Ex. 15, pp. 83, 118, 159)

22. The omission of one of the Textbook Commission member's report from the packet of materials presented to the State Board of Education at its May 2015 meeting does not demonstrate a failure to follow proper procedure as contemplated in § 150B-23. Substantial evidence was presented at the hearing that each Textbook Commission member and advisor who reviewed and evaluated the materials at issue in this dispute completed a report for those materials. (Respondent's Ex.(s) 11, 15, 18-22) Substantial evidence was presented at the hearing that the evaluation reports prepared by the Textbook Commission members were made available to the SBE by the submission of those signed reports by the Textbook Commission members to DPI staff in April 2015, approximately two weeks before the SBE's May 2015 meeting. There was no evidence presented at the hearing that the evaluation reports prepared by the Textbook Commissioner members were not filed with the State Board of Education, only that one Textbook Commission member's report was not included in the packet of materials that were presented by Dr. Novey to the SBE at the May 6, 2015 meeting.

23. Following their review of the textbook materials, the advisors and Textbook Commission members discussed the merits and deficiencies of the textbooks that had been submitted for consideration. After discussion and debriefing with the evaluators and after deliberating, a quorum of the Textbook Commission met to vote on whether to recommend the textbook materials associated with Bid ID No. 5086 to the State Board of Education for inclusion on the "approved" textbooks list. (Respondent's Ex. 13) With respect to those textbook materials, the Textbook Commission voted 13-1 not to recommend the materials for adoption. Of the nine bids submitted by TPS Publishing, only one bid was recommended and the other eight were not recommended for approval at this stage. (Respondent's Ex. 13 and Respondent's Exhibit 21)

24. All textbook publishers for whom the Textbook Commission voted to not recommend textbook materials for adoption were notified of the Textbook Commission's decision and given the opportunity to participate in a "reconsideration" process as set forth in the *Invitation to Submit*. (Respondent's Ex. 6, p. 16)

25. TPS Publishing, which had been notified that multiple textbook materials that it had submitted were not going to be recommended to the State Board of Education for adoption, participated in the reconsideration process. At the reconsideration process, a representative of TPS Publishing was given an opportunity to make a brief presentation to the Textbook Commission. The presentation was to last no more than twenty minutes. At the conclusion of the reconsideration process, the Textbook Commission voted again and all but one of TPS Publishing's textbook materials that the Textbook Commission had initially voted not to recommend for adoption, were moved to the "recommended" list. It is not unusual to have significant vote changes after the reconsideration reviews. (*See* Respondent's Ex. 15, p. 9 and Respondent's Ex. 16, pp. 20-22)

26. TPS Publishing participated in the reconsideration process with respect to the textbooks materials associated with Bid ID No. 5086 – the textbooks at issue in this contested case. At the conclusion of the presentation to the Textbook Commission, a vote was taken on those materials. After reconsideration, the Textbook Commission voted 7-6 not to recommend the Bid ID No. 5086 textbook materials for adoption. Dr. Dan Novey, the Chairman of the Textbook Commission, stated that this was the only time during his service on the commission that there was a tie in the vote of the commissioners and that tie was decided by the Chairman’s vote. (Respondent’s Ex. 14)

27. On or around April 16, 2015, the Textbook Commission compiled a final list of recommended textbooks/instructional materials for Science K-12 for adoption by the State Board of Education. Those recommendations were then submitted to the State Board of Education as required by law. (Respondent’s Ex. 15)

28. At its regularly scheduled meeting in May 2015, the State Board of Education heard a presentation by Dr. Novey, Chairman of the Textbook Commission, concerning the 2015-2016 textbook selection and adoption cycle, and the SBE was presented with the list of recommended titles for its consideration. At the conclusion of the presentation and after discussion by the State Board of Education, the SBE voted in open session to approve the list of textbooks and instructional materials recommended by the Textbook Commission. Textbook publishers were notified directly in writing if any of their textbook materials did not make it on to the list of recommended materials on or around June 19, 2015. (Respondents’ Ex. 17)

29. A benefit of a textbook being on the State’s “adopted” list is that it is an endorsement by the State that the textbook was vetted by content area specialists in the field and education professionals who ultimately concluded that the textbook was appropriate for teaching the Standard Course of Study for the particular subject and grade for which it was offered; however, for the materials at issue here, that did not happen. The Respondent in this case found that the textbook materials at issue did not sufficiently align with the standards for science in grade 7, and as such, could not endorse them by putting them on the “approved” list.

30. It must be noted that the Textbook Commission’s decision to non-recommend TPS Publishing’s grade 7 Science textbooks for adoption and the State Board of Education’s decision not to adopt those textbooks do not preclude TPS Publishing from selling the textbooks at issue to schools and school districts in the state. Schools and school districts are free to purchase materials that are not on the State-approved list, and they are free to do so with State dollars.

31. TPS Publishing filed a Petition for Contested Case Hearing in the Office of Administrative Hearings, challenging the Textbook Commission’s decision not to recommend its Grade 7 science textbook materials for adoption, and the State Board of Education’s decision not to adopt those materials. The Petition alleges that the State Board of Education deprived Petitioner of property and that the State Board of Education acted erroneously and failed to use proper procedure.

## CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in this matter. To the extent the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to their given labels.

2. The relevant inquiry for the undersigned is to determine the applicability of N.C. Gen. Stat. § 150B-23 to the facts herein.

3. The Petitioner bears the burden of proof by a greater weight or preponderance of the evidence of showing that by not including Petitioner's Grade 7 Science textbook materials on the approved list, the Agency has substantially prejudiced its rights and that the agency's decision was erroneous in one or more of the ways enumerated in N.C. Gen. Stat. § N.C. Gen. Stat. § 150B-23. *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section*, 762 S.E.2d 468, 474-75 (N.C. Ct. App. 2014), *review denied*, 768 S.E.2d 564 (N.C. 2015).

4. [A]gency action is considered 'arbitrary and capricious' only if it indicates a 'lack of fair and careful consideration' and fails 'to indicate 'any course of reasoning and the exercise of judgment.'" *Watson v. N.C. Real Estate Com'n*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987), quoting *State ex rel. Comm'r of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980).

5. An administrative law judge shall decide a contested case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. N.C. Gen. Stat. § 150B-34(a).

6. Respondent is entitled to a presumption that it acted in good faith in not adopting the science textbook materials at issue for inclusion on the State-approved list. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." *See also Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619.

7. The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E. 2d 285, 289 (1995), *aff'd*, 343 N.C. 119, 468 S.E.2d 57 (1996); *Comm'r of Ins. V. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982).

8. N.C. Gen. Stat. § 115C-85 *et seq.* expressly authorizes the State Board of Education to select and adopt textbooks needed for instructional purposes at each instructional level on all subject matters required by law to be taught in elementary and secondary schools of North Carolina. The State Board of Education is also authorized by statute to prescribe criteria against which proposed textbooks shall be evaluated.

9. Textbook publishers were invited by DPI to submit textbook materials on a bid proposal form in response to the *2015 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina*, which *Invitation to Submit* had previously been approved by the State Board of Education. The evaluation instrument to be used by the evaluators of the textbook materials submitted by textbook publishers was included in the *Invitation to Submit*.

10. For the textbook materials at issue in this contested case, the advisors and Textbook Commission members considered and evaluated the materials against the standards adopted in North Carolina for grade 7 Science. The advisors that reviewed the materials were certified in the content area of science. The advisors and Textbook Commission members that reviewed and evaluated math textbook materials as part of the 2015-2016 textbook selection and adoption cycle were properly trained.

11. Although the vote was very close, the majority of the advisors and Textbook Commission members that reviewed the textbook materials associated with Bid ID No. 5086 found substantive deficiencies in the materials, and concluded that the materials did not sufficiently conform to the Standard Course of Study and approved objectives for the specific grade and course for which they were offered.

12. Although Petitioner did demonstrate that there were mathematical miscalculations reflected on the evaluation documents completed by the advisors who reviewed and evaluated the textbook materials, when the advisors' evaluation documents are considered in their totality along with all of the information and data provided by the advisors to the Textbook Commission members, the weight of the evidence supports the finding that three of the five advisors who evaluated the materials determined that the materials did not sufficiently cover 80% of the Essential Standards and Clarifying Objectives for Grade 7 Science. Accordingly, the miscalculations identified by the Petitioner and reflected in the evaluation documents did not substantively affect the outcome of the case.

13. In implementing changes for this textbook review cycle, there were problems and glitches identified in the process; however, the procedure and process set out in both statute and rule were followed. Although a "perfect" system was not in place for this review, none of the identified problems were fatal to the integrity of the process, and none have affected the outcome of this consideration.

14. The problems identified by Petitioner would have been the same problems for every publisher who submitted bids. Petitioner was not treated any differently.

15. TPS Publishing's contention that the Respondent failed to use proper procedure in evaluating the textbook materials at issue in this dispute is not persuasive.



16. The omission of one of the Textbook Commission member's report from the materials presented to the State Board of Education at its May 2015 meeting does not demonstrate a failure to follow proper procedure as contemplated in § 150B-23. There was no evidence presented at the hearing that the evaluation reports prepared by the Textbook Commission members were not filed with the State Board of Education, only that one Textbook Commission member's report was not included in the packet of materials that were presented by Dr. Novey to the SBE at the May 6, 2015 meeting.

17. Likewise, Petitioner's contention that the fact that there was a considerable change in the numbers of approved textbooks offered by TPS Publishing after the reconsideration is reflective of procedural error is not persuasive and not supported by the evidence.

18. In light of the substantial evidence presented at the hearing regarding the Respondent's compliance with N.C. Gen. Stat. §§ 115C-88 & 89 and NCAC 16 NCAC 6D .0207, the undersigned concludes as a matter of law that the Petitioner has failed to carry its burden of proving that the Respondent acted erroneously or did not follow proper procedure in its consideration of the Petitioner's textbook materials at issue in this dispute.

19. Respondent's actions were not arbitrary or capricious. Respondent did not act erroneously, exceed its authority or jurisdiction, fail to use proper procedure, or fail to act as required by law or rule.

20. Petitioner has failed to carry the burden of proof assigned to it by law, and the Petitioner's claims should be denied.

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

### **FINAL DECISION**

As the Textbook Commission and the State Board of Education exercised their authority lawfully and with due deliberation, the decision to not adopt Petitioner's Grade 7 Science textbook materials for inclusion on the State Board of Education's "approved" list, must be, and hereby is, **AFFIRMED**.

### **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 § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule 26 N.C. Admin. Code 03.0102, 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.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. 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 Superior Court 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.

IT IS SO ORDERED.

This the 29th day of April, 2016.

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Donald W Overby  
Administrative Law Judge