

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 INS 06682

N.C. Code Officials Qualification Board, Petitioner, v. Christian M Noles, Respondent.	PROPOSAL FOR DECISION
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THIS MATTER came on for hearing before Hon. J. Randolph Ward on November 20, 2015 in Raleigh, North Carolina, upon Respondent’s request, pursuant to N.C. Gen. Stat. § 150B-40(e), for designation of an Administrative Law Judge to preside at a hearing on this issue, arising from a contested case, pursuant to Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: David W. Boone, Special Deputy Attorney General
LaShawn S. Piquant, Assistant Attorney General
North Carolina Department of Justice
Raleigh, N.C.

Respondent: Anthony A. Klish, Attorney at Law
Klish & Eldreth, PLLC
Raleigh, N.C.

EXHIBITS

Four (4) “Voluntary Settlement Agreements” resolving allegations against individual building inspectors of “willful misconduct, gross negligence, or gross incompetence” in the conduct of their duties were admitted into evidence as Petitioner’s Exhibits 2, 3, 4 and 5, and a chart summarizing these agreements was admitted as Exhibit 1.

ISSUE

Whether the proposed voluntary settlement agreement negotiated by the parties’ counsel to resolve complaints lodged against the Respondent should be approved and adopted by the Petitioner N.C. Code Officials Qualification Board.

MOTION

After the hearing, but prior to the parties' post-hearing submissions, Susan B. Gentry filed a Motion to Intervene in this matter. It appearing from the allegations of the Motion, and the record as a whole, that the movant is not a "person aggrieved," within the meaning of N.C. Gen. Stat. § 150B-2(6), and in light of all the circumstances, would not be an appropriate party for the issue of whether to approve the proposed settlement agreement, the motion should be, and hereby is, DENIED. N.C. Gen. Stat. §§ 150B-23(d); 1A-1, N.C. Rules of Civil Procedure, Rule 24; 26 NCAC 03 .0117(a); *In re Complaint*, 146 N.C.App. 258, 552 S.E.2d 230 (2001), disc. rev. den., 354 N.C. 573, 558 S.E.2d 867 (2001).

It is also noted that, to the degree, if any, that the allegations and the voluminous package of documents filed with the Motion brought to their attention new facts or theories about the pertinent events, these were not considered significant enough to change the position of the proponents of the proposed settlement.

UPON DUE CONSIDERATION of the arguments and stipulations of counsel; the exhibits admitted; and the sworn testimony of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interest they may have in the outcome, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

FINDINGS

1. The Petitioner North Carolina Code Officials Qualification Board (hereinafter "Board" or "Petitioner"), sometimes referred to in the testimony as "the Q Board," certifies all the building, fire, electrical, mechanical and plumbing inspectors employed by North Carolina local governments to enforce their respective codes. N.C. Gen. Stat. § 143-151.13. It is administratively housed and staffed by the N.C. Department of Insurance ("NCDOI"). This Department's Engineering Division investigates complaints against the Code Enforcement Officials ("CEOs") certified by the board. N.C. Gen. Stat. § 143-151.19. If a complaint is substantiated, the Board may conduct a disciplinary hearing. N.C. Gen. Stat. § 143-151.17. Alternatively, the Board's staff may negotiate a "voluntary settlement agreement" with the CEO to present to the Board for its approval, modification, or rejection. Such an agreement may impose a period of probation, the issuance of a letter of reprimand, or suspend or revoke the CEOs certificates, and require the inspector to take training or educational courses as a condition of future certification.

2. The Respondent Christian M. Noles has been employed with the North Carolina Department of Insurance's Office of State Fire Marshal since September, 2003. Respondent became a member of the Petitioner Board on January 22, 2013. He was issued a Probationary Level III Fire Certificate and a Probationary Level III Building Certificate pertaining to the North Carolina Building Code in 2003. He currently holds a Standard Level III Fire Certificate issued in 2005 and a Standard Level III Building Certificate issued in 2006. Prior to working for the NCDOI, Petitioner was a fire safety consultant, and was not as conversant with building codes as he

subsequently became.

3. Petitioner moved to North Carolina in 2000, and purchased a home in Granville County. At some point in time during either 2000 or 2001, Respondent constructed a storage building at this residence without first securing a permit from the local inspection department. He testified that he spoke with someone there, and concluded that a permit was not required. At some point during 2004 or 2005, Respondent built free-standing decks at his residence in Granville County, North Carolina without first securing a permit from the local inspection department. Respondent disputes that the permits were required for either of these projects, but he subsequently obtained the permits for these improvements before selling the property to a third party.

4. A complaint was filed with Petitioner against Respondent on July 31, 2013 by a former Department of Insurance employee citing Respondent's failure to obtain permits before building structures on his property. Petitioner twice investigated these complaints. The first investigation concluded that there was no violation of Petitioner's rules sufficient to take further action. When a second complaint was filed, an outside attorney was engaged to review the matter, and he concluded that Respondent's conduct might constitute willful misconduct. As a result of the second investigation report, Petitioner issued a Notice of Hearing to consider the allegations against Respondent. Since Petitioner was a sitting member of the Board, the Board voted to refer this matter for hearing to the Office of Administrative Hearings ("OAH").

5. On September 15, 2015, the Petitioner filed a request for designation of an Administrative Law Judge to hear the matter. The above-named counsel for Petitioner were designated as Special Counsel for the prosecution of this case, so that the Board's regular attorney could continue to advise it on the matter. Special Counsel were given the authority to negotiate a settlement, and a contact with the board to keep it informed of the status of negotiations, but the Board's consideration of whether to accept the settlement proposed by Special Counsel awaits this Proposed Decision. The undersigned requested that the parties produce evidence at hearing of "how like cases are normally handled."

6. Mr. Mike Hejduk, Director of the Board, testified at the hearing concerning disciplinary action taken by Petitioner against four other code enforcement officials in cases somewhat similar to the present matter. Prior to his employment with NCDOI, Mr. Hejduk was a local code enforcement official who frequently dealt with Code inspection issues. Mr. Hejduk is supervised at NCDOI by Respondent, but his testimony indicated that he consciously tried not to allow this to influence his testimony. Mr. Hejduk creditably testified about the four disciplinary cases, discussing facts which were largely documented by the "voluntary settlement agreements" entered into evidence.

7. In each of the four cases presented by Mr. Hejduk, the Code enforcement official was accused of failing to recognize Code violations in the construction of structures built on property of others that his job required him to inspect. In each case, there was potential harm to members of the general public, and the Engineering Division determined that the allegation that the code official was "guilty of willful misconduct, gross negligence or gross incompetence in violation of in CGS 143 – 151.17" was substantiated by the facts. In each of the four cases, the code officials were required by the settlement agreement to complete varying amounts of

additional training in their respective fields. In one instance, the code official's certification was reduced from Level II to Level I for a year. In another case, the code official agreed to accept a letter of reprimand, in addition to remedial training. None of these cases resulted in permanent suspension or demotion in the grade of the certificates held by the code official.

8. Mr. Hejduk did not find a case in which a code official was alleged to have failed to obtain permit when building a structure for his own use and property. There is no credible evidence in the record that Mr. Noles' conduct offended the ultimate purpose of the inspections statutes, i.e., preventing harm to the public from substandard or unsafe buildings. From the circumstances, it is also apparent that he did not neglect to get a permit with a motive to do substandard work. After personally using the structures at issue at his residence for 8 to 13 years, he was granted permits for them before selling the house.

9. The terms of the disciplinary action in the proposed Voluntary Settlement Agreement are as follows:

DISCIPLINARY ACTION

1. The parties have agreed upon disciplinary action to be taken upon approval of the settlement agreement as follows:

(a) Upon approval of this Proposed Decision and Settlement, a formal public letter of reprimand shall be issued to Respondent by the North Carolina Code Officials Qualification Board; and,

(b) Within sixty days of the final approval of this Proposed Decision and Settlement, Respondent shall complete an approved fifteen (15) hour Continuing Education course in Law and Administration for Code enforcement officials and prospective applicants for certificates under N.C. Gen. Stat. § 143-151.13.

10. The remedial education requirement of the proposed settlement is understandably somewhat shorter than the four cases Petitioner put in evidence, in which the technical knowledge of the code officials to perform their required duties was put in question. In sharper contrast, the reprimand proposed, in the absence of an actual threat of harm to the public, is a markedly more stringent punishment. However, it reasonably accounts for the higher expectations of persons of Mr. Noles' position, and personal accomplishment. The proposed discipline is reasonably calculated to fit the alleged offenses.

Upon consideration of the foregoing, the undersigned respectfully offers the following:

PROPOSAL FOR DECISION

The proposed settlement should be approved and adopted by the Code Officials Qualification Board as the final resolution of the allegations that Respondent committed violations

of N.C. Gen. Stat. §§ 143-151.17 and 153A-357.

NOTICE AND ORDER

The North Carolina Code Officials Qualification Board is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e).

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

IT IS SO ORDERED.

This the 29th day of January, 2016.

J Randolph Ward
Administrative Law Judge