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Contact List for Rulemaking Questions or Concerns

For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

Rule Notices, Filings, Register, Deadlines, Copies of Proposed Rules, etc.

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1711 New Hope Church Road — (919) 431-3000
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Raleigh, North Carolina 27609 — (919) 431-3104 FAX

contact:	Joe DeLuca Jr., Commission Counsel	joe.deluca@oah.nc.gov	(919) 431-3081
	Bobby Bryan, Commission Counsel	bobby.bryan@oah.nc.gov	(919) 431-3079

Fiscal Notes & Economic Analysis

Office of State Budget and Management
116 West Jones Street — (919) 807-4700
Raleigh, North Carolina 27603-8005 — (919) 733-0640 FAX

contact:	William Crumbley, Economic Analyst	william.crumbley@ncmail.net	(919) 807-4740

Governor's Review

Eddie Speas — eddie.speas@nc.gov
Legal Counsel to the Governor — (919) 733-5811
116 West Jones Street
Raleigh, North Carolina 27603

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee
545 Legislative Office Building
300 North Salisbury Street — (919) 733-2578
Raleigh, North Carolina 27611 — (919) 715-5460 FAX

contact:	Karen Cochrane-Brown, Staff Attorney	karenc@ncleg.net
	Jeff Hudson, Staff Attorney	jeffreyh@ncleg.net

County and Municipality Government Questions or Notification

NC Association of County Commissioners
215 North Dawson Street — (919) 715-2893
Raleigh, North Carolina 27603

contact:	Jim Blackburn	jim.blackburn@ncacc.org
	Rebecca Troutman	rebecca.troutman@ncacc.org

NC League of Municipalities — (919) 715-4000
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Raleigh, North Carolina 27603

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NORTH CAROLINA REGISTER
Publication Schedule for January 2009 – December 2009

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270th day from publication in the Register
23:13	01/02/09	12/08/08	01/17/09	03/03/09	03/20/09	05/01/09	05/2010	09/29/09
23:14	01/15/09	12/19/08	01/30/09	03/16/09	03/20/09	05/01/09	05/2010	10/12/09
23:15	02/02/09	01/09/09	02/17/09	04/03/09	04/20/09	06/01/09	05/2010	10/30/09
23:16	02/16/09	01/26/09	03/03/09	04/17/09	04/20/09	06/01/09	05/2010	11/13/09
23:17	03/02/09	02/09/09	03/17/09	05/01/09	05/20/09	07/01/09	05/2010	11/27/09
23:18	03/16/09	02/23/09	03/31/09	05/15/09	05/20/09	07/01/09	05/2010	12/11/09
23:19	04/01/09	03/11/09	04/16/09	06/01/09	06/22/09	08/01/09	05/2010	12/27/09
23:20	04/15/09	03/24/09	04/30/09	06/15/09	06/22/09	08/01/09	05/2010	01/10/10
23:21	05/01/09	04/09/09	05/16/09	06/30/09	07/20/09	09/01/09	05/2010	01/26/10
23:22	05/15/09	04/24/09	05/30/09	07/14/09	07/20/09	09/01/09	05/2010	02/09/10
23:23	06/01/09	05/08/09	06/16/09	07/31/09	08/20/09	10/01/09	05/2010	02/26/10
23:24	06/15/09	05/22/09	06/30/09	08/14/09	08/20/09	10/01/09	05/2010	03/12/10
24:01	07/01/09	06/10/09	07/16/09	08/31/09	09/21/09	11/01/09	05/2010	03/28/10
24:02	07/15/09	06/23/09	07/30/09	09/14/09	09/21/09	11/01/09	05/2010	04/11/10
24:03	08/03/09	07/13/09	08/18/09	10/02/09	10/20/09	12/01/09	05/2010	04/30/10
24:04	08/17/09	07/27/09	09/01/09	10/16/09	10/20/09	12/01/09	05/2010	05/14/10
24:05	09/01/09	08/11/09	09/16/09	11/02/09	11/20/09	01/01/10	05/2010	05/29/10
24:06	09/15/09	08/24/09	09/30/09	11/16/09	11/20/09	01/01/10	05/2010	06/12/10
24:07	10/01/09	09/10/09	10/16/09	11/30/09	12/21/09	02/01/10	05/2010	06/28/10
24:08	10/15/09	09/24/09	10/30/09	12/14/09	12/21/09	02/01/10	05/2010	07/12/10
24:09	11/02/09	10/12/09	11/17/09	01/02/10	01/20/10	03/01/10	05/2010	07/30/10
24:10	11/16/09	10/23/09	12/01/09	01/15/10	01/20/10	03/01/10	05/2010	08/13/10
24:11	12/01/09	11/05/09	12/16/09	02/01/10	02/22/10	04/01/10	05/2010	08/28/10
24:12	12/15/09	11/20/09	12/30/09	02/15/10	02/22/10	04/01/10	05/2010	09/11/10

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EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

(1) temporary rules;
(2) notices of rule-making proceedings;
(3) text of proposed rules;
(4) text of permanent rules approved by the Rules Review Commission;
(5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
(6) Executive Orders of the Governor;
(7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
(8) orders of the Tax Review Board issued under G.S. 105-241.2; and
(9) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

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NOTICE OF EXTENDED COMMENT PERIOD
Triennial Review of Groundwater Quality Standards
Rule 15A NCAC 02L .0202

A Notice of Text was previously published in the April 1, 2009 issue (Volume 23: Issue 19) of the NC Register for this proposed rule, and it included notice of three public hearings, which were held on April 21, April 23 and April 30, 2009, as well as a comment period, which ended on June 1, 2009. Subsequent to that notice, the Division of Water Quality (DWQ) received a request for additional time in order for local governments to provide comments. Based on this request, DWQ will extend the comment period for 21 days until June 22, 2009 in order to provide further opportunity for comments on the proposed groundwater rule to be submitted. Comments already received during the April 1, 2009 – June 1, 2009 comment period will remain in the hearing record.

The EMC is interested in all comments pertaining to these proposed rule changes. It is very important that all interested and potentially affected persons or parties make their views known to the EMC whether in favor of or opposed to any or all of the proposed amendments. Written comments may be submitted to Sandra Moore of the Division of Water Quality Planning Section at the postal address, e-mail address, or fax number listed in this notice. The comment period ends June 22, 2009, and this proposed rule is scheduled to appear on the agenda of the September 2009 EMC meeting.

Address: Sandra Moore
DENR/DWQ Planning Section,
1617 Mail Service Center
Raleigh, N.C. 27699-1617
Phone: (919) 807-6417
Fax: (919) 807-6497
E-mail: Sandra.moore@ncdenr.gov

SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
Gastonia CRS Investments, LLC

"Please take notice that the full Notice of Intent to Redevelop a Brownfields Property for the property located at 1224 Isley Drive, Gastonia, North Carolina and owned by Gastonia CRS Investments, LLC, may also be reviewed at the Gaston County Public Library, 1555 East Garrison Blvd, Gastonia, NC 28202 by contacting Cindy Moose at that address, at 704-868-2164 or at celler@co.gaston.nc.us, in addition to locations noted in the June 1, 2009 edition of the North Carolina Register."

Note from the Codifier: *The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.*
Statutory reference: G.S. 150B-21.2.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Environment and Natural Resources intends to adopt the rules cited as 15A NCAC 09C .1228 - .1260 and repeal the rules cited as 15A NCAC 09C .0701, .0703, .0705, .0707 - .0713, .0721, .0726 - .0727, .0802 - .0805, .0814 - .0823, .0825, .0827 - .0828, and .1201 - .1227.*

Proposed Effective Date: *October 1, 2009*

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice): *If you demand a public hearing, please forward a typed or handwritten letter indicating your specific reasons to the following address: NC Division of Forest Resources, Attention: Chris Carlson, 1616 Mail Service Center, Raleigh, NC 27699-1616.*

Reason for Proposed Action: *This action will consolidate the three separate Administrative Codes (Educational State Forests, Dupont State Forest, Bladen Lakes State Forest) into one code for all "State Forests."*

Procedure by which a person can object to the agency on a proposed rule: *If you have any objections to the proposed rules, please forward a typed or handwritten letter indicating your specific reasons for your objections to the following address: NC Division of Forest Resources, Attention: Chris Carlson, 1616 Mail Service Center, Raleigh, NC 27699-1616.*

Comments may be submitted to: *Chris Carlson, 1616 Mail Service Center, Raleigh, NC 27699-1616, phone (919) 857-4819, fax (919) 857-4806, email chris.carlson@ncdenr.gov*

Comment period ends: *August 14, 2009*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 09 - DIVISION OF FOREST RESOURCES

SUBCHAPTER 09C - DIVISION PROGRAMS

SECTION .0700 - BLADEN LAKES STATE FOREST

NOTE: Pursuant to G.S. 150B-21.17, the Codifier has determined that publication of the complete text of the rules proposed for repeal is impractical. The text of the repealed rules is accessible on the OAH Website: http//www.ncoah.com.

15A NCAC 09C .0701	**PURPOSE**
15A NCAC 09C .0703	**CONTRUCTION**
15A NCAC 09C .0705	**PERMITS**
15A NCAC 09C .0707	**HUNTING**
15A NCAC 09C .0708	**FISHING**
15A NCAC 09C .0709	**TRESPASS**
15A NCAC 09C .0710	**FIREARMS**
15A NCAC 09C .0711	**EXPLOSIVES**
15A NCAC 09C .0712	**DISPOSAL OF REFUSE: GARBAGE: ETC.**
15A NCAC 09C .0713	**FLOWERS: PLANTS: MINERALS: ETC.**
15A NCAC 09C .0721	**WARMING FIRES**
15A NCAC 09C .0726	**ENFORCEMENT**
15A NCAC 09C .0727	**EXPULSION**

Authority G.S. 113-8; 113-34; 113-35; 113-55.1.

SECTION .0800 - EDUCATIONAL STATE FORESTS

15A NCAC 09C .0802	**DEFINITIONS**
15A NCAC 09C .0803	**CONTRUCTION**
15A NCAC 09C .0804	**TERRITORIAL SCOPE**
15A NCAC 09C .0805	**PERMITS**
15A NCAC 09C .0814	**ANIMALS AT LARGE**
15A NCAC 09C .0815	**BOATING**
15A NCAC 09C .0816	**CAMPING**
15A NCAC 09C .0817	**SPORTING AND GAME**
15A NCAC 09C .0818	**HORSES**

15A NCAC 09C .0819 BICYCLES
15A NCAC 09C .0820 HUNTING AND FISHING
15A NCAC 09C .0821 EXPLOSIVES
15A NCAC 09C .0822 FIREARMS
15A NCAC 09C .0823 FIRES
15A NCAC 09C .0825 DISORDERLY CONDUCT
15A NCAC 09C .0827 INTOXICATING BEVERAGES AND DRUGS
15A NCAC 09C .0828 COMMERCIAL ENTERPRISES

Authority G.S. 113-22; 113-34; 113-35.

SECTION .1200 - DUPONT STATE FOREST

15A NCAC 09C .1201 PURPOSE
15A NCAC 09C .1202 DEFINITION OF TERMS
15A NCAC 09C .1203 PERMITS
15A NCAC 09C .1204 ROCK OR CLIFF CLIMBING AND RAPPELLING
15A NCAC 09C .1205 BATHING OR SWIMMING
15A NCAC 09C .1206 HUNTING
15A NCAC 09C .1207 FISHING
15A NCAC 09C .1208 ANIMALS AT LARGE
15A NCAC 09C .1209 BOATING
15A NCAC 09C .1210 CAMPING
15A NCAC 09C .1211 SPORTING AND GAMES
15A NCAC 09C .1213 BICYCLES
15A NCAC 09C .1214 EXPLOSIVES
15A NCAC 09C .1215 FIREARMS
15A NCAC 09C .1216 FIRES
15A NCAC 09C .1217 DISORDERLY CONDUCT
15A NCAC 09C .1218 INTOXICATING BEVERAGES
15A NCAC 09C .1219 COMMERCIAL ENTERPRISES
15A NCAC 09C .1220 NOISE REGULATIONS
15A NCAC 09C .1221 MEETINGS AND EXHIBITIONS
15A NCAC 09C .1222 ALMS AND CONTRIBUTIONS
15A NCAC 09C .1223 AVIATION
15A NCAC 09C .1224 EXPULSION
15A NCAC 09C .1225 MOTORIZED VEHICLES: WHERE PROHIBITED
15A NCAC 09C .1226 FLOWERS: PLANTS: MINERALS: ETC.
15A NCAC 09C .1227 FEES AND CHARGES

Authority G.S. 113-8; 113-34; 113-35.

15A NCAC 09C .1228 SCOPE

(a) This section coordinates the use of all North Carolina's State Forests and Educational State Forests into one combined set of rules. This is in keeping with the Division of Forest Resources mission to develop, protect and manage the multiple resources of North Carolina's forests through professional stewardship, enhancing the quality of life for our citizens while ensuring the continuity of these vital resources. Educational State Forests and other State Forests will each have a mission statement and will be sustainably managed under a State Forest Management Plan.

(b) All North Carolina Educational State Forests and State Forest rules are effective within and upon the properties defined as Educational State Forests and State Forests under the jurisdiction of the Department.

Authority G.S. 113-8; 113-34; 113-35.

15A NCAC 09C .1229 DEFINITIONS OF TERMS

(a) "Bike Trail" means any road or trail maintained for bicycles.

(b) "Bridle Trail" means any road or trail maintained for persons riding on horseback.

(c) "Department" means the NC Department of Environment and Natural Resources.

(d) "Division" means the NC Division of Forest Resources.

(e) "Educational State Forest" refers to any state forest property operated by the Division of Forest Resources for the purpose of educating schoolchildren and the public.

(f) "Forest Supervisor" means an employee of the Division of Forest Resources who is a forest ranger and provides supervision to other DFR employees of the forest.

(g) "Group" means a number of individuals related by a common factor, having structured organization, defined leadership, and whose activities are directed by a charter or written bylaws.

(h) "Hiking Trail" means any road or trail maintained for pedestrians.

(i) "Multi-use Trail" means any trail maintained for use by two or more of the following: horseback riding, bicycle; or pedestrian.

(j) "Hunting" means the lawful hunting of game animals as defined by the NC Wildlife Resources Commission.

(k) "Motorized vehicle" means every vehicle which is self-propelled or which is pulled by a self-propelled vehicle (such as a camping trailer, fifth-wheel travel trailer, motor home, travel trailer, and truck camper). A self-propelled vehicle shall include, but is not limited to passenger automobiles, mopeds, off-road vehicles (ORV), golf carts, motorcycles, mini-bikes, all-terrain vehicles, Segways, and go-carts. This does not include motorized wheel chairs or other similar vehicles designed for and used by persons with disabilities. (G.S. 20-4.01)

(l) "Permit" means any written license issued by or under the authority of the Division or Department permitting the performance of a specified act or acts.

(m) "Permittee" means any person, corporation, company or association in possession of a valid permit.

(n) "Person" means any individual, firm, partnership, corporation, association, public or private institution, political subdivision, or government agency. (G.S. 113-60.22(4))

(o) "Public building" means a climate-controlled structure primarily for human habitation or use, and does not include barns, shelters or sheds.

(p) "Public nudity" means a person's intentional failure to cover with a fully opaque covering the person's genitals, pubic area, anal area, or female breasts below a point from the top of the areola while in a public place.

(q) "Rock climbing" means traversing a rock face that is steep enough to require the use of hands and feet to get up or down.
(r) "Secretary" means the Secretary of the Department.
(s) "State Forest" means any land owned by the State of North Carolina, under the jurisdiction of the Division of Forest Resources, that is sustainably managed under a State Forest Management Plan approved by the Division Director, for the purposes of education, demonstration, training, forest research, wildlife habitat, forest products and recreation as identified in the approved forest management plan.
(t) "State Forest Management Plan" is a plan prepared by a forester of the N.C. Division of Forest Resources and approved by the Division director. Such plan shall include management practices to ensure forest productivity and environmental protection of the land to be treated under the management plan.
(u) "Swimming area" means any beach or water area designated by the Division as a swimming, wading and bathing area.

Authority G.S. 113-35; 113-28.1; 113-55.1.

15A NCAC 09C .1230 PERMITS
(a) A permit authorizes an act only when that act strictly conforms with the terms contained on the permit, or in applicable rules, and to existing state laws.
(b) Any violation of the permit constitutes grounds for its revocation, by the Department. In case of revocation, the permit holder shall forfeit to the Department all money for the permit. Furthermore, the department shall consider the permit holder, together with his agents and employees who violated such terms, jointly and severally liable to the Department for all damages suffered in excess of money so forfeited. However, neither the forfeiture of such money, nor the recovery of such damages, nor both, in any manner relieves such person from statutory punishment for any violation of a provision of any State Forest or Educational State Forest rule.
(c) Applications for permits shall be made through the State Forest or Educational State Forest Office during business hours and approved by the Forest Supervisor or his/her designee in advance of the act permitted.

Authority G.S. 113-8; 113-22; 113-34; 113-35.

15A NCAC 09C .1231 ROCK OR CLIFF CLIMBING AND REPELLING
A person shall not engage in rock climbing, cliff climbing or rappelling within the boundaries of a State Forest, except at designated areas and only after obtaining a permit.

Authority G.S. 113-35.

15A NCAC 09C .1232 BATHING OR SWIMMING
(a) A person shall not dive or jump from any waterfalls or rocks or overhangs into any body of water.
(b) A person shall not wade, bathe or swim in any body of water in an Educational State Forest, except in designated swimming areas.
(c) A person may wade, bathe or swim at his/her own risk in any body of water in any State Forest, except within 300 feet upstream of the top of a waterfall, and in other designated non-swimming areas.
(d) Public Nudity:
(1) Public nudity is prohibited in all State Forest and Educational State Forest lands or waters. This Rule does not apply to the enclosed portions of bathhouses, restrooms, tents and recreational vehicles.
(2) Children under the age of five are exempt from this restriction.

Authority G.S. 14-190.9; 113-35.

15A NCAC 09C .1233 HUNTING
(a) A person shall not hunt on any Educational State Forest lands without obtaining a permit from the Forest Supervisor's office and must obey all state hunting laws and rules currently in effect.
(b) A person may hunt on a State Forest that is in the Game Land program if the person obtains a Game Land permit from a NC Wildlife Resources Commission designated licensing agent and obeys all state hunting laws and rules currently in effect for the applicable Game Land.
(c) Hunters shall not discharge a firearm or bow and arrow within, into or across a posted safety zone.
(d) Hunters shall not erect or occupy any tree stand attached to any tree, unless it is a portable stand that leaves no metal in the tree.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1234 FISHING
(a) A person may fish in any waters in State Forests if the person obeys all state fishing laws and rules.
(b) A person may fish in any waters of any Educational State Forest if the person first obtains a permit from the Forest Supervisor's office and obeys all state fishing laws and rules.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1235 ANIMALS AT LARGE
(a) Except in designated areas, no person shall have any dog, cat or other pet upon a State Forest or Educational State Forest unless the animal is on a leash and under the control of the owner or some other person. Hunting dogs used in accordance with NC Wildlife Commission Game Land Rules pertaining to State Forests are exempt from this rule.
(b) No dog, cat or other pet shall be allowed to enter any public building on State Forests, except assistance animals for persons with disabilities.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1236 BOATING
(a) A person shall not operate a boat, canoe, kayak or other watercraft in any waters on Educational State Forests without obtaining a permit from the Forest Supervisor.

(b) Boats, canoes, kayaks or other watercraft may be operated on the waters of State Forests, provided they are manually operated or propelled by means of oars, paddles or electric trolling motors. Boats with gas motors attached are prohibited on any waters of State Forests, except for use by rescue squads, diving teams, or similar organizations conducting training or emergency operations or forest staff conducting maintenance operations.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1237 CAMPING

(a) No person shall spend the night or maintain a camp in an Educational State Forests or State Forest except under permit, and at such places and for such periods as may be designated.
(b) Unless otherwise provided in this Rule, the number of persons camping at a particular site may be limited by the forest supervisor depending upon the size of the group and the size and nature of the campsite.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1238 SPORTS AND GAMES

No games or athletic contests shall be allowed except in places as may be designated or under permit, and at such places and for such periods as may be designated.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1239 HORSES

(a) No person shall use, ride or drive a horse except to, from, or along a designated bridle path; multi-use trail designated for horses or designated watering point.
(b) Each equestrian user shall remove from designated parking areas all residues (including manure) generated by his/her horse.
(c) When dismounted, horses shall be tied in such a manner as to prevent damage to trees and other plants.
(d) Horses shall cross rivers and streams using bridges or culverts if available.
(e) Horses shall not wade in lakes.
(f) Users shall possess valid Coggins papers for each horse and make them available for inspection upon request.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1240 BICYCLES

(a) No person shall use or ride a bicycle except on a road or trail authorized for use by motor vehicles or specifically designated as a bicycle or multi-use trail.
(b) When crossing rivers or streams, bicycle use shall be confined to bridges or culverts if available.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1241 SKATES, BLADES AND BOARDS

No person shall use or ride roller skates, in-line skates, roller blades, skate boards, or any similar device on any Educational State Forest or State Forest road or trail or other maintained surface.

Authority G.S. 113-35.

15A NCAC 09C .1242 EXPLOSIVES

No person shall carry or possess any explosives or explosive substance including fireworks upon Educational State Forests or State Forests. This does not apply to employees of the department when they engage in construction or maintenance activities.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1243 FIREARMS

No person except authorized forest law enforcement officers of the department, or any other sworn law enforcement officer shall carry or possess firearms of any description, or air guns or pellet guns, on or upon an Educational State Forest or State Forest. Properly licensed hunters that meet the requirements of Rule .1233 of this Section, or persons meeting the requirements of the NC Wildlife Resources Commission Rules applicable to Educational State Forests or State Forests, are exempt from this Rule.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1244 FIRES

(a) No person shall build or start a fire in any area of an Educational State Forest or State Forest unless that area is designated for such purpose.
(b) Tree planters and logging crews may build warming fires if they obtain a permit and confine the fire to an area temporarily designated for such purpose.
(c) Fires ignited for forest management purposes under the provisions of a prescribed burning plan, approved by the Forest Supervisor or his designee, are exempt from this Rule.

Authority G.S. 113-22; 113-34; 113-35; 113-60.40; 113-60.41.

15A NCAC 09C .1245 DISORDERLY CONDUCT

(a) No person visiting on an Educational State Forest or State Forest shall disobey a lawful order of a Division employee, law enforcement officer, or any other Department official, or endanger him/herself, or endanger or disrupt others.
(b) No person shall use, walk or run on or along a road or trail that is designated closed for maintenance, tree removal or any other purpose, or enter an area that is designated "No Entry", "Do Not Enter" or "Authorized Personnel Only", except for Division employees, or contractors working under the direction of a Division employee, volunteers or individuals or groups under permit, and at such places and for such periods as may be designated.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1246 INTOXICATING BEVERAGES AND DRUGS

No person shall use, or be under the influences of intoxicants, marijuana, or non-prescribed narcotic drugs as defined in G.S. 90-87, while on an Educational State Forest or State Forest. The public display or use of alcoholic beverages, marijuana or non-prescribed narcotic drugs is hereby prohibited.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1247 DAMAGE TO BUILDINGS, STUCTURES AND SIGNS

No person shall in any manner injure, deface, disturb, destroy or disfigure any Educational State Forest or State Forest building, structure, sign, fence, vehicle, machine or any equipment found therein.

Authority G.S 113-35.

15A NCAC 09C .1248 COMMERCIAL ENTERPRISES

No person shall while in or on an Educational State Forest or State Forest, sell or offer for sale, hire, or lease, any object or merchandise, property, privilege, service or any other thing, or engage in any business except under permit , and at such places and for such periods as may be designated. Sales from which proceeds are used in direct support of the forest, or sales conducted or contracted by the Department, are exempt from this Rule.

Authority G.S. 113-22; 113-34; 113-35.

15A NCAC 09C .1249 NOISE REGULATIONS

The production or emission of noises, amplified speech, music or other sounds that annoy, disturb or frighten forest users in an Educational State Forest or State Forest by any person, is prohibited, except as permitted by the Forest Supervisor.

Authority G.S. 113-34; 113-35; 113-264(a).

15A NCAC 09C .1250 MEETINGS AND EXHIBITIONS

A person, except for Department employees in performance of official duties, shall not hold any meetings or exhibitions, perform any ceremony, or make any speech, on an Educational State Forest or State Forest without a permit

Authority G.S. 113-35.

15A NCAC 09C .1251 ALMS AND CONTRIBUTIONS

A person shall not solicit alms or contributions for any purpose within an Educational State Forest or State Forest, unless approved by the Division, and such contributions are used to benefit the State Forest or Educational State Forest.

Authority G.S. 113-35.

15A NCAC 09C .1252 AVIATION

(a) Except as noted in Paragraphs (b) and (c) of this Rule, a person shall not voluntarily bring, land or cause to descend or alight, ascend or take off within or upon any Educational State Forest or State Forest area, any airplane, flying machine, balloon, parachute, glider, hang glider, or other apparatus for aviation. Voluntarily in this connection shall mean anything other than a forced landing.

(b) In forest areas where aviation activities are part of the planned forest activities or military, law enforcement or rescue training, a permit shall be required. Application for permits may be made as provided by Rule .1230 of this Section.

(c) Emergency aircraft such as air ambulances and aerial search helicopters, and Division aircraft are exempt from this Rule.

Authority G.S. 113-35;

15A NCAC 09C .1253 EXPULSION

For violation of any rule in this Section, the Division may withdraw the right of a person or persons to remain on an Educational State Forest or State Forest.

Authority G.S. 113-8; 113-34; 113-35.

15A NCAC 09C .1254 MOTORIZED VEHICLES

(a) A person shall not drive a motorized vehicle in an Educational State Forest or State Forest within or, upon a safety zone, hiking trail, bridle trail, multi-use trail, fire trail, service road, or any part of the forest not designated for such purposes, except by permit.

(b) Motor bikes, mini-bikes, all terrain vehicles, and any other unlicensed motor vehicle are prohibited within the forest except by permit.

(c) A person shall not park a motorized vehicle in a manner that blocks forest roads or gates.

(d) Unless otherwise posted, the speed limit on graveled forest roads is 20 miles per hour, and on dirt roads is 10 miles per hour.

(e) Vehicles exempt from this Rule are: Department vehicles; authorized vendors; vehicles used in conjunction with forest and emergency operations; vehicles of dependant employees and resident family members.

Authority G.S. 113-35.

15A NCAC 09C .1255 FLOWERS, PLANTS, MINERALS, ETC.

(a) A person shall not remove, destroy, cut down, scar, mutilate, take, gather or injure any tree, flower, artifact, fern, shrub, rock or other plant or mineral in any Educational State Forest or State Forest area. Silvicultural activities performed in accordance with an approved State Forest Management Plan are exempt from this Rule.

(b) A person shall not collect plants, animals, minerals or other artifacts from any Educational State Forest or State Forest area without first having obtained a permit.

Authority G.S. 113-8; 113-34; 113-35.

15A NCAC 09C .1256 TRASH AND DEBRIS

A person shall not deposit paper products, bottles, cans or any other trash or debris in an Educational State Forest or State Forest, except in receptacles designated for such materials. Where trash receptacles are not provided persons shall pack their trash out of the forest and dispose of it in a lawful manner.

Authority G.S. 113-8; 113-34; 113-35.

15A NCAC 09C .1257 FEES AND CHARGES

(a) Payment of the appropriate fee shall be a prerequisite for the use of the public service facility or convenience provided.
(b) Reservations must be canceled 30 days prior to the event in order to receive a refund.
(c) Use Permit fees are non-refundable.
(d) The forest supervisor may waive fees for persons or groups performing volunteer trail maintenance or other activities providing benefit to the forest and for law enforcement and military personnel involved in training.
(e) After review and recommendations from the Division, the Secretary may set prices annually. Prices shall be listed in a printed price list and made available to the public at the forest office or through the Division's web site.

Authority G.S. 113-8; 113-34; 113-35.

15A NCAC 09C .1258 HOURS OF OPERATION

(a) Hours of operation may vary for individual forests. Hours of operation for each State Forest or Educational State Forest will be posted at the forest entrance, the forest office, and on the Division's web site.
(b) No person except forest employees and authorized persons shall be allowed within the forest between closing and opening hours except under permit.

Authority G.S. 113-35.

15A NCAC 09C .1259 ENFORCEMENT

Departmental forest law enforcement officers, Forest Rangers, and sworn law enforcement shall enforce these Rules.

Authority G.S. 113-8; 113-34; 113-35; 113-55.1.

15A NCAC 09C .1260 CONSTRUCTION

Construe these Rules as follows:

(1) Any terms in the singular include the plural, and any terms in the masculine include the feminine and the neuter.
(2) Any requirement or prohibition of any act, includes the causing or procuring directly or indirectly of such act.
(3) These Rules do not make unlawful any act necessarily performed by any department employee in line of work, or by any person in the necessary execution of any agreement with the department.

Authority G.S. 113-8; 113-34; 113-35.

TITLE 21 – OCCUPATIONAL AND LICENSING BOARDS AND COMMISSIONS

CHAPTER 38 - BOARD OF OCCUPATIONAL THERAPY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Occupational Therapy intends to adopt, the rule cited as 21 NCAC 38 .0308 and amend the rule cited as 21 NCAC 38 .0905.*

Proposed Effective Date: *November 1, 2009*

Public Hearing:
Date: *July 20, 2009*
Time: *11:00 a.m.*
Location: *150 Fayetteville Street, 13th Floor Conference Room, Raleigh, NC 27601*

Reason for Proposed Action: *To further clarify the rules of the North Carolina Board of Occupational Therapy*

Procedure by which a person can object to the agency on a proposed rule: *Any person may object to either of these proposed rule changes by submitting a written statement to Charles P. Wilkins at P.O. Box 2280, Raleigh, NC 27602, postmarked on or before September 4, 2009.*

Comments may be submitted to: *Charles P. Wilkins, P. O. Box 2280, Raleigh, NC 27602, phone (919) 833-2752, fax (919) 833-1059, email cwilkins@bws-law.com*

Comment period ends: *September 4, 2009*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantive (≥$3,000,000)**
☒ **None**

SECTION .0300 - LICENSING

21 NCAC 38 .0308 CODE OF ETHICS

Pursuant to G.S. 90-270.76(a)(2) the Board adopts by reference the Occupational Therapy Code of Ethics (2005) of the American Occupational Therapy Association, including subsequent amendments and editions. Copies of the American Occupational Therapy Association Code of Ethics may be obtained online at http://www.aota.org at no cost. To the extent the Occupational Therapy Code of Ethics might conflict with the North Carolina Occupational Therapy Practice Act or the rules of the North Carolina Board of Occupational Therapy, the North Carolina Occupational Therapy Practice Act or the rules of the North Carolina Board of Occupational Therapy shall take precedent.

Authority G.S. 90-270.69(4).

SECTION .0900 - SUPERVISION, SUPERVISORY ROLES, AND CLINICAL RESPONSIBILITIES OF OCCUPATIONAL THERAPIST AND OCCUPATIONAL THERAPY ASSISTANTS

21 NCAC 38 .0905 DELINEATION OF CLINICAL RESPONSIBILITIES

Regardless of the setting in which occupational therapy services are delivered, the occupational therapist and the occupational therapy assistant have the following responsibilities during evaluation, intervention, and outcomes evaluation:

(1) Evaluations:
  (a) The occupational therapist shall;
    (i) Direct the evaluation process;
    (ii) Determine the need for services;
    (iii) Define the problems within the domain of occupational therapy that need to be addressed;
    (iv) Determine the client's goals and priorities in collaboration with the occupational therapy assistant and the client or caregiver;
    (v) Interpret the information provided by the occupational therapy assistant and integrate that information into the evaluation decision-making process;
    (vi) Establish intervention priorities;
    (vii) Determine specific future assessment needs;
    (viii) Determine specific assessment tasks that can be delegated to the occupational therapy assistant; and
    (ix) Initiate and complete the evaluation, interpret the data, and develop the intervention plan in collaboration with the occupational therapy assistant.
  (b) The occupational therapy assistant may contribute to the evaluation process by implementing specifically delegated assessments for which service competency has been established.
(2) Intervention Planning:
  (a) The occupational therapist shall develop the occupational therapy intervention plan. The plan shall be developed collaboratively with the occupational therapy assistant and the client or caregiver; and
  (b) The occupational therapy assistant may provide input into the intervention plan.
(3) Intervention implementation:
  (a) The occupational therapist:
    (i) Is responsible for implementing the occupational therapy intervention;
    (ii) May delegate aspects of the occupational therapy intervention to the occupational therapy assistant depending on the occupational therapy assistant's service competency; and
    (iii) Is responsible for supervising all aspects of intervention delegated to the occupational therapy assistant.
  (b) The occupational therapy assistant shall implement delegated aspects of intervention in which the occupational therapy assistant has established service competency; and
  (c) Occupational therapists or occupational therapy assistants shall not be subject to disciplinary action by the Board for refusing to delegate or refusing to provide the required training for delegation, if the occupational therapist or occupational therapy assistant

determines that delegation may compromise client safety.

(4) Intervention; review:

(a) The occupational therapist shall meet with each client who has been assigned to an occupational therapy assistant, to further assess the client, evaluate intervention, and, if necessary, to modify the individual's intervention plan. The occupational therapy assistant may be present at this meeting.

(b) The occupational therapist shall determine the need for continuing or discontinuing services; and

(c) The occupational therapy assistant shall contribute to the process of determining continuing or discontinuing services by providing information about the client's response to intervention to assist with the occupational therapist's decision making.

(5) Documentation:

(a) The occupational therapy practitioner shall document each evaluation, intervention and discharge plan and include the following elements:

(i) Client name or identifiable information;

(ii) Signature with occupational therapist or occupational therapy assistant designation of the occupational therapy practitioner who performed the service;

(iii) Date of the evaluation or intervention;

(iv) Objective and measurable description of contact or intervention and client response; and

(v) Length of time of intervention session or evaluation.

~~(a)~~(b) The occupational therapist shall determine the overall completion of the evaluation, intervention, or discharge plan; and

~~(b)~~(c) The occupational therapy assistant shall;

(i) Document intervention, intervention response and outcome; and

(ii) Document client's level of function at discharge.

(6) Discharge:

(a) The occupational therapist shall determine the client's discharge from occupational therapy services; and

(b) The occupational therapy assistant;

(i) Reports data for discharge summary; and

(ii) Formulates discharge and/or follow-up plans under the supervision of the occupational therapist.

(7) Outcome evaluation:

(a) The occupational therapist is responsible for the selection, measurement, and interpretation of outcomes that are related to the client's ability to engage in occupations; and

(b) The occupational therapy assistant must be knowledgeable about the client's targeted occupational therapy outcome and provide information relating to outcome achievement.

(8) Supervision of occupational therapy students:

(a) An occupational therapy practitioner shall comply with Accreditation Council for Occupational Therapy Education (ACOTE) requirements for experience when supervising Level II fieldwork occupational therapist and occupational therapy assistant students, which ACOTE requirements, including subsequent amendments and editions, are incorporated by reference. Copies of the incorporated material are available for inspection at the Board office and are available for purchase for five dollars ($5.00);

(b) The occupational therapist may supervise Level I and Level II fieldwork occupational therapist and occupational therapy assistant students; and

(c) The occupational therapy assistant may:

(i) Supervise Level I occupational therapist or occupational therapy assistant students;

(ii) Supervise Level II occupational therapy assistant students; and

(iii) Participate in the supervision of Level II occupational therapist

students under the direction and guidance of the supervising occupational therapist.

(9) Supervision of unlicensed personnel and volunteers. Unlicensed personnel or volunteers may be supervised by occupational therapists or occupational therapy assistants.

Authority G.S. 90-270.69.

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARINGS

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Office of Administrative Hearings intends to adopt the rule cited as 26 NCAC 01 .0105.*

Proposed Effective Date: *October 1, 2009*

Public Hearing:
Date: *August 14, 2009*
Time: *9:00 a.m.*
Location: *1711 New Hope Church Road, Raleigh, NC 27609*

Reason for Proposed Action: *To adopt a rule to facilitate agency response to pandemic and other disasters.*

Procedure by which a person can object to the agency on a proposed rule: *Written objections to the rule should be sent to David Guilford, Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714 and postmarked no later than August 14, 2009. The objection letter should clearly state the reason for the objection.*

Comments may be submitted to: *David Guilford, 1711 New Hope Church Road, Raleigh, NC 27609, email david.guilford@oah.nc.gov*

Comment period ends: *August 14, 2009*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 01 - GENERAL

SECTION .0100 - GENERAL

26 NCAC 01 .0105 EMERGENCY WAIVER

The Director of the Office of Administrative Hearings shall waive any rule adopted by the Office of Administrative Hearings that is not statutorily required if the Director finds that the waiver is necessary to protect the public health and safety at any time:

(1) the President of the United States, the Governor, the General Assembly, or a mayor or board of county commissioners, declares a state of emergency or state of disaster;

(2) the State Health Director or a local health director issues an isolation or quarantine order; or

(3) the business and disaster recovery plan required by G.S. 147-33.89 is implemented by the OAH Business Continuity Management Team.

Authority G.S. 7A-751(a).

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Office of Administrative Hearings intends to amend the rules cited as 26 NCAC 03 .0201-.0202 and .0204-.0207.*

Proposed Effective Date: *October 1, 2009*

Public Hearing:
Date: *August 14, 2009*
Time: *9:00 a.m.*
Location: *1711 New Hope Church Road, Raleigh, NC 27609*

Reason for Proposed Action: *To update OAH rules to comply with the Supreme Court rules for Superior Court mediations.*

Procedure by which a person can object to the agency on a proposed rule: *Written objections to the rules should be sent to Don Overby, Administrative Law Judge, Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714 and postmarked no later than August 14, 2009. The objection letter should clearly state which rule the objection is to and the reason for the objection.*

Comments may be submitted to: *Don Overby, Administrative Law Judge, 1711 New Hope Church Road, Raleigh, NC 27609, email Don.Overby@oah.nc.gov*

Comment period ends: *August 14, 2009*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal Impact:
☐ **State**
☐ **Local**
☐ **Substantive (**≥$3,000,000**)**
☒ **None**

CHAPTER 03 - HEARINGS DIVISION

SECTION .0200 - MEDIATION SETTLEMENT CONFERENCE

26 NCAC 03 .0201 ORDER FOR MEDIATED SETTLEMENT CONFERENCE

(a) Order by Chief Administrative Law Judge. The Chief Administrative Law Judge may, by written order, require parties and their representatives to attend a pre-hearing mediated settlement conference in any contested case.

(b) Timing of the Order. The Chief Administrative Law Judge may issue the order within 10 days of the filing of the contested case petition. Paragraph (c) of this Rule and Paragraph (b) of Rule .0203 of this Section shall govern the content of the order and the date of completion of the conference.

(c) Content of Order. The Chief Administrative Law Judge's order shall:

(1) require the mediated settlement conference be held in the contested case;

(2) establish a deadline for the completion of the conference;

(3) state ~~clearly~~ that the parties have the right to select their own mediator as provided in ~~Paragraphs~~ Paragraph (a) ~~and (b)~~ of Rule .0202 of this Section;

(4) state the rate of compensation of the mediator appointed by the presiding Administrative Law Judge pursuant to Paragraph (c) of Rule .0202 of this Section in the event that the parties do not exercise their right to select a mediator; and

(5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise apportioned by the presiding Administrative Law Judge.

(d) Motion to Dispense with Mediated Settlement Conference. A party may move the presiding Administrative Law Judge, within 10 days after the date of the Chief Administrative Law Judge's order, to dispense with the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the presiding Administrative Law Judge may grant the motion.

(e) Motion for Mediated Settlement Conference. In contested cases not ordered to mediated settlement conference, any party may move the presiding Administrative Law Judge to order such a conference. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections may be filed in writing with the presiding Administrative Law Judge within 10 days after the date of the service of the motion. Thereafter, the presiding Administrative Law Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling. In the event that mediation is ordered, the parties may select a mediator by agreement as provided in ~~Paragraphs~~ Paragraph (a) ~~and (b)~~ of Rule .0202 of this Section within 21 days of the date of the presiding Administrative Law Judge's order. If the parties cannot agree or have failed to select a mediator within the 21 days, the presiding Administrative Law Judge shall appoint a certified mediator pursuant to Paragraph (c) of Rule .0202 of this Section.

Authority G.S. 150B-23.1.

26 NCAC 03 .0202 SELECTION OF MEDIATOR

(a) Selection of Certified Mediator by Agreement of Parties. The parties may select a certified mediator by agreement within 21 days of the Chief Administrative Law Judge's order. The petitioner's attorney shall file with the Office of Administrative Hearings a Notice of Selection of Mediator by Agreement within 21 days of the Chief Administrative Law Judge's ~~order.~~ order, however, any party may file the notice. Such notice shall include: the name, address and telephone number of the mediator selected; the rate of compensation of the mediator; the agreement of the parties as to the selection of the mediator and rate of compensation; and ~~whether or not~~ that the mediator is ~~certified.~~ certified pursuant to these Rules.

~~(b) Nomination and the Office of Administrative Hearings Approval of a Non-Certified Mediator. The parties may select a mediator who is not certified but who, in the opinion of the parties and the presiding Administrative Law Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action and who agrees to mediate indigent cases without pay. If the parties select a non-certified mediator, the petitioner's attorney shall file with the presiding Administrative Law Judge a Nomination of Non-Certified Mediator within 21 days of the Chief Administrative Law Judge's order. Such nomination shall include: the name, address and telephone number of the mediator; the training, experience or other qualifications of the mediator; the rate of compensation of the mediator; and the agreement of the parties as to the selection of the mediator and rate of~~

~~compensation. The presiding Administrative Law Judge shall rule on the nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the presiding Administrative Law Judge's decision.~~

(b) The presiding Administrative Law Judge shall appoint mediators certified by the Dispute Resolution Commission pursuant to Paragraph (c) of this Rule.

(c) Appointment of Mediator by the presiding Administrative Law Judge. If the parties cannot agree upon the selection of a mediator, the petitioner or petitioner's attorney shall so notify the presiding Administrative Law Judge and ~~request,~~ request by motion, on behalf of all parties, that the presiding Administrative Law Judge appoint a mediator. The motion must be filed within 21 days of the date of the Chief Administrative Law Judge's order and shall state that the ~~attorneys for the~~ parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. ~~The motion shall state whether any party prefers a certified attorney mediator, and if so, the presiding Administrative Law Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified non-attorney mediator, and if so, the presiding Administrative Law Judge shall appoint a certified non-attorney mediator. If no preference is expressed, the presiding Administrative Law Judge may appoint a certified attorney mediator or a certified non-attorney mediator.~~ Upon receipt of a motion to appoint a mediator, or ~~in the event the petitioner's attorney has not filed~~ failure of the parties to file a Notice of Selection ~~or Nomination of Non-Certified Mediator~~ with the presiding Administrative Law Judge within 21 days of the Chief Administrative Law Judge's order, the presiding Administrative Law Judge shall appoint a ~~certified mediator.~~ mediator, certified pursuant to these Rules, who has expressed a willingness to mediate contested cases. ~~Only mediators who agree to mediate indigent cases without pay shall be appointed.~~

(d) Mediator Information Directory. To assist the parties in the selection of a mediator by agreement, the Office of Administrative Hearings shall prepare and keep current a list of certified mediators who wish to mediate contested cases. The list shall be kept in the Office of Administrative Hearings and made available to the parties upon request.

(e) Disqualification of Mediator. Any party may move for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected by the parties or appointed by the presiding Administrative Law Judge pursuant to this Rule. Nothing in this Paragraph shall preclude mediators from disqualifying themselves.

Authority G.S. 7A-751(a); 150B-23.1.

26 NCAC 03 .0204 DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

(a) Attendance. The following persons shall physically attend a mediated settlement conference:

(1) All individual ~~parties; or an officer, employee of a party who is not a natural person or agent~~ parties, or an officer or employee or agent of a party who is not a natural person who is not ~~such~~ the party's outside counsel and who has been authorized to decide on behalf of ~~such~~ the party whether and ~~or~~ on what terms to settle the contested case; or in the case of a governmental entity, an employee or agent who is not ~~such~~ the party's outside counsel and who has authority to decide on behalf of ~~such~~ the party whether and what terms to settle the contested case; provided if under law proposed settlement terms can be approved only by a Board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that Board;

(2) At least one counsel of record for each party or other participant whose counsel has appeared in the contested case; and

(3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not ~~such~~ the carrier's outside counsel and who has authority to make a decision on behalf of ~~such~~ the carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have ~~such~~ the decision-making authority.

(b) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Paragraph (c) of this Rule or an impasse has been declared. ~~Such~~ The party or person may have the attendance requirement excused or modified including the allowance of that party's or person's participation without physical attendance by order of the presiding Administrative Law Judge, upon motion of a party and notice to all parties and persons required to attend and the ~~mediator.~~ mediator, or by agreement of all parties and persons required to attend and the mediator.

(c) Finalizing Agreement. If an agreement is reached in the conference parties shall reduce its terms to writing and sign it along with their counsel. By stipulation of one or more of the parties and at their expense, the agreement may be electronically ~~or stenographically~~ recorded. A consent judgment, voluntary dismissals, or withdrawal of petition shall be filed with the Office of Administrative Hearings by ~~such~~ the persons ~~as~~ the parties ~~shall~~ designate.

(d) Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule .0207 of this Section.

Authority G.S.7A-751(a); 150B-23.1.

26 NCAC 03 .0205 SANCTIONS FOR FAILURE TO ATTEND

If a party or other person required to attend a mediated settlement conference fails to ~~attend,~~ attend without good cause, the presiding Administrative Law Judge may impose upon the party or person any appropriate monetary sanction

including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference as authorized by G.S. 150B-33(b)(8) or (10). A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and on any person against whom sanctions are being sought. If the presiding Administrative Law Judge imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

History Note: *Authority G.S. 7A-751(a); 150B-23.1.*

26 NCAC 03 .0206 AUTHORITY AND DUTIES OF MEDIATORS

(a) Authority of Mediator.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) Private Consultation. The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) Duties of Mediator.

(1) The mediator shall define and describe the following at the beginning of the conference:

(A) The process of mediation;

(B) The differences between mediation and other forms of conflict resolution;

(C) The costs of the mediated settlement conference;

(D) The fact that the mediated settlement conference is not a hearing, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;

(E) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(F) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(G) The inadmissibility of conduct and statements as provided by Rule 408 of the North Carolina Rules of Evidence;

(H) The duties and responsibilities of the mediator and the participants; and

(I) The fact that any agreement reached will be reached by mutual consent.

(2) Disclosure. The mediator shall be impartial and advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to determine that an impasse exists, and that the conference should end.

(4) Reporting Results of Conference. The mediator shall file a written report with the parties and presiding Administrative Law Judge within 10 days as to whether or not agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment, voluntary dismissal, or withdrawal of petition and shall identify the persons designated to file such pleadings. The mediator's report shall inform the presiding Administrative Law Judge of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. ~~A copy of the Mediator's report shall also be provided to the Attorney General of North Carolina or his designee responsible for evaluating the mediation program pursuant to the 1993 N.C. Session Laws, c. 363, s. 2.~~

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Chief Administrative Law Judge's order. Deadlines for completion of the conference shall be ~~strictly~~ observed by the mediator unless said time limit is changed by a written order of the presiding Administrative Law Judge.

Authority G.S. 7A-751(a); 150B-23.1.

26 NCAC 03 .0207 COMPENSATION OF THE MEDIATOR

(a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) By Order. When the mediator is appointed by the Office of Administrative Hearings, the mediator shall be compensated by the parties at the uniform hourly rate and a one-time, per contested case, administrative fee, due upon appointment, as set by the Chief Administrative Law ~~Judge.~~ Judge except as provided by Paragraph (d) of this Rule. The Chief Administrative Law Judge shall set the rate at the same rate set by Rule 7 of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.

(c) Change of Appointed Mediator. Pursuant to Rule .0202 of this Section, the parties have 21 days to select a mediator. Parties who fail to select a mediator within that time frame and then desire a substitution after the presiding Administrative Law Judge has appointed a mediator, shall obtain approval from the presiding Administrative Law Judge for the substitution. If the presiding Administrative Law Judge approves the substitution, the parties shall pay the presiding Administrative Law Judge's original appointee the one time, per case administrative fee provided for in Paragraph (b) of this Rule.

(d) Indigent Cases. No party found to be indigent by the presiding Administrative Law Judge shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these Rules shall waive the payment of fees from parties found by the presiding Administrative Law Judge to be indigent. Any party may move the presiding Administrative Law Judge for a finding of indigence and to be relieved of the obligation to pay that party's share of the mediator's fee. Such motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their contested case, subsequent to the conclusion of the contested case hearing but prior to the issuance of the Administrative Law Judge's decision. In ruling upon such motions, the presiding Administrative Law Judge shall apply the criteria enumerated in G.S. 1-110(a), but ~~The presiding Administrative Law Judge may~~ shall take into consideration the outcome of the contested case, and whether a decision was rendered in movant's favor. The presiding Administrative Law Judge shall enter an order granting or denying a party's request.

(e) Postponement Fees. As used in this Paragraph, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for the settlement conference has been ~~agreed upon and~~ scheduled by the ~~parties and the~~ mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reason for the postponement, ~~payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney.~~ and a finding of good cause by the mediator. Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. ~~If a mediation is postponed within seven business days of the scheduled date, the fee shall be set at a rate established by the Chief Administrative Law Judge.~~ Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Paragraph (b) of this Rule. The Chief Administrative Law Judge will set the rate at the same rate set by Rule 7 of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions.

(f) Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the presiding Administrative Law Judge, mediator's fee shall be paid in equal shares by the parties. For purposes of this Rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the costs shall pay them equally. Payment shall be due upon completion of the conference unless there is a pending motion for determination of indigency. In such case, payment shall be due upon a ruling on the motion.

Authority G.S. 7A-751(a); 150B-23.1.

Note from the Codifier: *The rules published in this Section of the NC Register are emergency rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code. The agency must subsequently publish a proposed temporary rule on the OAH website (www.ncoah.com/rules) and submit that adopted temporary rule to the Rules Review Commission within 60 days from publication of the emergency rule or the emergency rule will expire on the 60th day from publication.*
This section of the Register may also include, from time to time, a listing of emergency rules that have expired. See G.S. 150B-21.1A and 26 NCAC 02C .0600 for adoption and filing requirements.

TITLE 16 – DEPARTMENT OF PUBLIC INSTRUCTION

Rule-making Agency: *State Board of Education*

Rule Citation: *16 NCAC 06C .0407*

Effective Date: *June 4, 2009*

Findings Reviewed and Approved by the Codifier: *May 27, 2009*

Reason for Action: *Per Session Law 2209-26, effective May 18, 2009: "[A]s soon as practicable, and no more than 10 calendar days from the effective date of this act, the Office of State Budget and Management, the State Personnel Commission, the State Board of Community Colleges, the State Board of Education, and the University of North Carolina shall adopt emergency rules for the implementation of the new Executive Order and this act in accordance with G.S. 150B-21.1A, except that notwithstanding G.S. 150B-21.1A(d), those emergency rules may remain in effect until the expiration of this section. This section does not require any rule making if not otherwise required by law."*

CHAPTER 06 – ELEMENTARY AND SECONDARY EDUCATION

SUBCHAPTER 06C - PERSONNEL

SECTION .0400 – ANNUITIES AND PENSIONS

16 NCAC 06C .0407 FLEXIBLE FURLOUGH LEAVE

(a) As part of the flexible furlough plan authorized in the Governor's Executive Order Number Eleven signed on April 28, 2009 and Session Law 2009-26, full-time public school employees shall receive ten hours of flexible furlough leave to be taken between May 1 and December 31, 2009, in return for the 0.5 percent reduction in salary required under the Order. Non full-time employees will receive a proportional number of flexible furlough leave hours based on their employment term.

(b) Use of Flexible Furlough Leave shall be defined as follows:

(1) Employees using flexible furlough leave shall coordinate the leave times with their immediate supervisor or principal. Additional levels of approval are not required.

(2) Flexible furlough leave may be taken in any increment.

(3) Classroom teachers, media specialists, and teacher assistants who require substitutes and bus drivers shall not use flexible furlough leave at any time that students are scheduled to be in attendance (an instructional day). Employees who do not require substitutes may, after coordinating with their immediate supervisor or principal, use flexible furlough leave on any day school is in session.

(4) Employees may use flexible furlough leave beginning May 1, 2009. Flexible furlough leave shall be taken by December 31, 2009.

(5) Flexible furlough leave cannot be paid out when separating from service for any reason.

History Note: *Authority Executive Order Number Eleven, April 28, 2009;*
Session Law 2009-26, Sec. 6, May 18, 2009;
Emergency Adoption Eff. June 4, 2009 to expire on January 1, 2010 (see S.L. 2009-26).

TITLE 23 – DEPARTMENT OF COMMUNITY COLLEGES

Rule-making Agency: *State Board of Community Colleges*

Rule Citation: *23 NCAC 02C .0212*

Effective Date: *June 3, 2009*

Findings Reviewed and Approved by the Codifier: *May 26, 2009*

Reason for Action: *Governor Perdue issued Executive Order 11 on 28 April 2009. Amongst various directives, Governor Perdue's Executive Order directed the State Board of Community Colleges to "adopt rules to be applied by boards of trustees of community colleges in designating the times community college employees will be furloughed." To implement Governor Perdue's Executive Order, the General Assembly has adopted Session Law 2009-26 which specifically directs the State Board of Community Colleges to adopt emergency rules for the implementation of Executive Order 11. The State Board of Community Colleges is required to adopt emergency rules within ten (10) calendar days from the Act's effective date. The effective date of Session Law 2009-26*

was 18 May 2009. The State Board of Community Colleges adopted the emergency rule on 21 May 2009.

CHAPTER 02 – COMMUNITY COLLEGES

SUBCHAPTER 02C - COLLEGES: ORGANIZATION AND OPERATIONS

SECTION .0200 – PERSONNEL

23 NCAC 02C.0212 FLEXIBLE FURLOUGH TIME

Each local board of trustees shall have the discretion to establish the times community college employees will be furloughed in accordance with Executive Order Number 11 issued April 28, 2009. The furlough shall not impact longevity pay, payouts for unused leave, service credit, or health and retirement benefits. This section shall be effective for the duration of Executive Order Number 11 issued April 28, 2009.

History Note: Authority G.S. 115D-5;
Emergency Adoption Eff. June 3, 2009 to expire on January 1, 2010 (see S.L. 2009-26).

This Section contains information for the meeting of the Rules Review Commission on Thursday, May 21, 2009 9:00 a.m. at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3100. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate
Jim R. Funderburke - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Keith O. Gregory
Jerry R. Crisp
Jeffrey P. Gray

Appointed by House
Jennie J. Hayman - Chairman
John B. Lewis
Clarence E. Horton, Jr.
Daniel F. McLawhorn
Curtis Venable

COMMISSION COUNSEL

Joe Deluca (919)431-3081
Bobby Bryan (919)431-3079

RULES REVIEW COMMISSION MEETING DATES

June 18, 2009 July 16, 2009
August 20, 2009 September 17, 2009

RULES REVIEW COMMISSION
May 21, 2009
MINUTES

The Rules Review Commission met on Thursday, May 21, 2009, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Jennie Hayman, Clarence Horton, and Dan McLawhorn.

Staff members present were: Joseph DeLuca and Bobby Bryan, Commission Counsel; Tammara Chalmers and Dana Vojtko.

The following people were among those attending the meeting:

Amanda Reeder	DHHS/Division of Mental Health, Developmental Disabilities and Substance Abuse Services
Andrea Borden	DHHS/Division of Mental Health, Developmental Disabilities and Substance Abuse Services
Joan Troy	Wildlife Resources Commission
Susan Gentry	Department of Insurance
Barry Gupton	DOI/Building Code Council
Jansen Averett	OAH Extern

APPROVAL OF MINUTES

The meeting was called to order at 9:08 a.m. with Ms. Hayman presiding. She reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e). Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the April 16, 2009 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

01 NCAC 44A .0202, .0204, .0301 – Department of Administration. Rule .0202 was returned to the agency at the agency's request. The rewritten rules for .0204 and .0301 were approved by the Commission.

10A NCAC 28F .0101 – Commission for Mental Health. The Commission approved the rewritten rule submitted by the agency.

Prior to the review of the rules from the Private Protective Services Board, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because he teaches for the Private Protective Services Board on a contract basis.

12 NCAC 07D .0402, .0501 – Private Protective Services Board. The Commission approved the rewritten rules submitted by the agency.

12 NCAC 09B .0301 – Criminal Justice Education and Training Standards Commission. No rewritten rule has been submitted and no action was taken.

15A NCAC 02D .1205, .1212 – Environmental Management Commission. These rules were returned to the agency at the agency's request.

15A NCAC 10B .0105 – Wildlife Resources Commission. This rule was returned to the agency at the agency's request.

15A NCAC 10C .0211, .0216 – Wildlife Resources Commission. The Commission approved the rewritten rules submitted by the agency.

15A NCAC 10H .0102 – Wildlife Resources Commission. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 12 .0202 – Licensing Board for General Contractors. No rewritten rule has been submitted and no action was taken.

21 NCAC 14H .0105 – Board of Cosmetic Art Examiners. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 58C .0105, .0218, .0608 – Real Estate Commission. The Commission approved the rewritten rules submitted by the agency.

23 NCAC 02E .0101, .0401 – Board of Community Colleges. The Commission approved the rewritten rule for .0101 submitted by the agency. No rewritten rule has been submitted for .0401 and no action was taken.

LOG OF FILINGS

Chairman Hayman presided over the review of the log of permanent rules.

All permanent rules were approved unanimously with the following exceptions:

Prior to the review of the rules from the Private Protective Services Board, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because he teaches for the Private Protective Services Board on a contract basis.

12 NCAC 07D .0112: Private Protective Services Board - The Commission objected to this rule based on lack of statutory authority. Paragraph (b) of this Rule is not consistent with G.S. 74C-13(g). That statute allows the Board to suspend a firearm registration permit for various reasons, but it only allows it to summarily suspend the permit pending resolution of charges involving the illegal use, carrying or possession of a firearm lodged against the owner of a permit. This rule goes beyond that in summarily suspending the permit any time a firearm is discharged, whether or not there is any allegation of the commission of a crime. This seems to be beyond what the statute allows.

12 NCAC 07D .0806: Private Protective Services Board - The Commission objected to this rule based on lack of statutory authority. There is no authority cited for Subparagraph (a)(5) that requires an applicant for renewal of an armed security guard firearm registration permit identification card to be at least 21 years of age. This amounts to an occupational license and G.S. 93B-9 prohibits occupational licensing boards from requiring an individual be more than 18 years of age as a requirement for receiving a license.

N.C. Fire/Building Code – Group A-2 Sprinklers: Thursday afternoon after the meeting we received one letter of objection to the above rule and we received 7 more Friday. In the opinion of Commission Counsel three of those letters did not "clearly request[ing] review by the legislature." However, since there were a total of only 8 letters, the contents of the letters is not an issue.

G.S. 150B-21.3(b2) states "[i]f the Commission receives written objections from 10 or more persons, no later than 5:00 P.M. of the day following the day the Commission approves the rule…." It was 5:05 P.M. when Counsel checked the fax machine and confirmed that there were no letters downstairs at the front desk either. The sprinkler rule has a delayed effective date of January 1, 2011. The lack of sufficient objection letters will not make any difference in the rule's effective date.

COMMISSION PROCEDURES AND OTHER BUSINESS

The meeting adjourned at 9:48 a.m.

The next scheduled meeting of the Commission is Thursday, June 18, 2009 at 9:00 a.m.

Respectfully Submitted,

_____
Dana Vojtko
Publications Coordinator

LIST OF APPROVED PERMANENT RULES
May 21, 2009 Meeting

ADMINISTRATION, DEPARTMENT OF	
Duration of Certification	01 NCAC 44A .0204
Required Documentation	01 NCAC 44A .0301
MENTAL HEALTH, COMMISSION FOR	
Schedule II	10A NCAC 26F .0103
Schedule III	10A NCAC 26F .0104
Regions for Division Institutional Admissions	10A NCAC 28F .0101
PRIVATE PROTECTIVE SERVICES BOARD	
Fees for Licenses and Trainee Permits	12 NCAC 07D .0202
Experience Requirements for Counterintelligence License	12 NCAC 07D .0402
Experience Requirements for Polygraph License	12 NCAC 07D .0501
Training Requirements for Unarmed Security Guards	12 NCAC 07D .0707
Training Requirements for Armed Security Guards	12 NCAC 07D .0807
Renewal of Firearms Trainer Certificate	12 NCAC 07D .0904
WILDLIFE RESOURCES COMMISSION	
Possession of Certain Fishes	15A NCAC 10C .0211
State Inland Fishing License Exemptions	15A NCAC 10C .0216
Establishment and Operation	15A NCAC 10H .0102
COSMETIC ART EXAMINERS, BOARD OF	
Sanitary Ratings and Posting of Ratings	21 NCAC 14H .0105
DENTAL EXAMINERS, BOARD OF	
Board Approved Examinations	21 NCAC 16B .0303
Board Approved Examinations	21 NCAC 16C .0303
REAL ESTATE COMMISSION	
Withdrawal or Denial of Approval	21 NCAC 58C .0105
Licensing Exam Confidentiality: School Perform/Licensing	21 NCAC 58C .0218

Denial or Withdrawal of Approval	21 NCAC 58C .0608

COMMUNITY COLLEGES, BOARD OF

Program Classification	23 NCAC 02E .0101

BUILDING CODE COUNCIL

NC Building Code - Entrapment Avoidance	3109.5
NC Fire/Building Code - Group A-2 Sprinklers	903.2.1.2
NC Plumbing Code - Rain Water Recycling Systems	Appendix C-1
NC Plumbing Code - Connections to the Sanitary Drainage S...	301.3
NC Plumbing Code - Strainers	1105.1
NC Residential Code - Entrapment Avoidance	AG106
NC Residential Code - Sunroom Addition	R202
NC Residential Code - Under Stair Protection	R311.2.2
NC Residential Code - Special Stairways	R311.5.8
NC Residential Code - Retaining Walls	R404.5
NC Residential Code - Concrete and Masonry Foundation Dam...	R406.1
NC Residential Code - Thermally Isolated Sunroom Addition...	N1102.2.10
NC Residential Code - Thermally Isolated Sunroom Addition...	N1102.3.5

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 431-3000. Also, the Contested Case Decisions are available on the Internet at http://www.ncoah.com/hearings.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Beecher R. Gray
Selina Brooks
Melissa Owens Lassiter
Don Overby
Randall May
A. B. Elkins II
Joe Webster

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
ALCOHOL BEVERAGE CONTROL COMMISSION				
Partnership T/A C Js Lounge v. ABC Commission	07 ABC 0201	Overby	03/11/08	
Michael Daniel Clair v. T/A Par 3 Bistro v. ABC Commission	07 ABC 1289	Lassiter	10/07/08	
ABC Commission v. Rainbow Enterprises, Inc T/A Club N Motion	07 ABC 1532	Gray	06/20/08	23:05 NCR 489
Benita, Inc., T/A Pantana Bob's v. ABC Commission	07 ABC 1584	Overby	04/21/08	23:01 NCR 141
Original Grad, Inc/ T/A Graduate Food and Pub	07 ABC 1648	Joseph	02/25/08	
N.C. Alcoholic Beverage Control Commission v. Feest Inc. T/A Spankys Sports Bar and Grill	07 ABC 2135	Gray	09/12/08	
Don Mariachi Ventures, T/A EL Mariachi Gordo	07 ABC 2155	Webster	11/05/08	
N.C. Alcoholic Beverage Control Commission v. Jenny S. Chanthalacksa T/A JB Food Mart	08 ABC 0097	May	09/03/08	
N.C. Alcoholic Beverage Control Commission v. Jenny S. Chanthalacksa T/A JB Food Mart	08 ABC 0351	May	09/03/08	
AM Enterprises of Fayetteville, Inc., T/A Izzy's Sports Bar v. ABC Commission	08 ABC 0371	Lassiter	06/13/08	
Bhavesh Corporation, T/A K&B Foomart v. ABC Commission	08 ABC 0508	Overby	05/19/08	
Downtown Event Center, Inc. T/A Downtown Event Center v. ABC Commission	08 ABC 0937	May	09/16/08	
CRIME VICTIMS COMPENSATION				
Patricia Ginyard v. Crime Victim Compensation Commission	06 CPS 1720	Gray	05/27/08	
Carrie R. McDougal v. Victims Compensation Services Division	07 CPS 1970	Elkins	05/23/08	
Hillary Holt v. Crime Victims Compensation Commission	07 CPS 2292	Brooks	09/18/08	
Taereka S Johnson v. NC Crime Victims Compensation Commission	08 CPS 0402	Morrison	08/08/08	
Rich's Towing and Service Inc. v. NC Department of Crime Control And Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 0698	May	08/13/08	
Steel Supply and Erection Co., Department of Crime Control and Public Safety, Division of State Highway Patrol and Department of Revenue	08 CPS 0777	Overby	05/29/08	
ATS Specialized, Inc, v. Dept. of Crime Control and Public Safety, Div. Of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 0864	May	09/11/08	
Willie Trucking, Inc d/b/a Allstate Transport Co v. Dept. of Crime Control & Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 0897	May	09/11/08	
Randy S. Griffin v. NC Crime Victims Compensation Commission	08 CPS 0995	May	09/11/08	
Kenneth Lee Moore v. Dept. of Crime Control and Public Safety	08 CPS 1093	Webster	10/27/08	
Interstate Crushing Inc. v. NC Dept. of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1086	Overby	09/29/08	

Sterett Equipment Company LLC v. N.C. Dept. of Crime Control And Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1206	Overby	09/29/08
Bertrand E. Dupuis d/b/a New England Heavy Hauling v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1207	Overby	09/29/08
Bulldog Erectors, Inc v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1208	Overby	09/29/08
Continental Machinery Movers Inc. v. N.C. Department of Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	08 CPS 1209	Overby	09/29/08
Michael Alan Moore v. Crime Victims Compensation Commission	08 CPS 1478	Lassiter	09/08/08
TNT of York County, Inc., Tony McMillan v. State Highway Patrol Motor Carrier Enforcement	08 CPS 1508	Joseph	12/11/08
SOOF Trucking, Ray Charles Solomon v. Secretary of Crime Control And Public Safety	08 CPS 1526	Overby	09/09/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1800	Brooks	12/15/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1801	Brooks	12/15/08
Dickinson Hauling and Grading., Inc, Tony E. Dickinson, 3134016-9 v. Dept. of Crime Control and Public Safety, Division of State Highway Patrol	08 CPS 1802	Brooks	12/15/08
Kayonna Goodwin Pollard c/o Chad Lopez Pollard v. Crime Control & Victim Compensation Services	08 CPS 1850	Gray	10/24/08
John D. Lane v. Diversified Drilling Corp v. Office of Admin Svc, Sec. of Crime Control and Public Safety	08 CPS 2049	Joseph	11/06/08
Richard Pratt v. Dept. of Crime Control and Public Safety	08 CPS 2417	Lassiter	01/15/08
Robert D. Reinhold v. Dept. of Transportation, Division of Motor Vehicles	08 CPS 2501	Gray	12/10/08

A list of Child Support Decisions may be obtained by accessing the OAH Website: http://www.ncoah.com/hearings/decisions/

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Gloria McNair Jean's Jewels v. Div. of Child Development, DHHS	06 DHR 0633	Lassiter	07/11/08
Gloria McNair Jean's Jewels v. Div. of Child Development, DHHS	06 DHR 1350	Lassiter	07/11/08
Character Builders, Inc., Clavon Leonard v. DMA, Developmental Disabilities and Substance Abuse Services	07 DHR 0124	Elkins	08/07/08
Character Builders, Inc., Clavon Leonard v. DMA, Developmental Disabilities and Substance Abuse Services	07 DHR 0125	Elkins	08/07/08
Arthur Burch and Margaret and Burch v. Department of Health and Human Services	07 DHR 0242	Brooks	04/30/08
The "M" Company LLC, v. DHHS, DMA, Program Integrity	07 DHR 0429	Webster	05/29/08
Brenda F. Ervin v. DHHS, DFS, Health Care Personnel Registry	07 DHR 0493	Gray	12/08/08
Judy E. Pettus v. Office of Chief Medical Examiner, Thomas B. Clark, Iii, Md, Pathologist	07 DHR 0535	Webster	05/05/08
Clorie Bivens Owen on Behalf of Williams Baxter Bivens – Estate of Leroy A. Bivens v. DHHS	07 DHR 0701	Elkins	12/08/08
Alterra Clare Bridge of Asheville v. DHHS, DFS, Adult Care Licensure Section	07 DHR 0914	Gray	06/06/08
Shirley Brooks Dial v. Health Care Personnel Registry	07 DHR 0931	Webster	02/27/08
Midtown Food Mart #2, Kerab Giebrehiwot, Mehreteab Wooldeghebibel and Fesseha Zeru	07 DHR 1044	Webster	04/25/08
Midtown Food Mart III, Chenet Haileslassi and Fesseha Zeru v. DHHS	07 DHR 1045	Webster	04/28/08
Kelly Schofield MD, Clinical Director, Youth Quest, Inc. v. DHHS, DFS Mental Health Licensure and Certification	07 DHR 1064	Joseph	10/17/08
Carolyn E. Reed v. DHHS, Division of Social Services Program Integrity AFDC/Work First	07 DHR 1214	Webster	07/21/08
Mrs. Elizabeth Futrell v. Value Options	07 DHR 1331	Lassiter	06/09/08
Cornell Jones v. DHHS, Division of Health Services Regulation	07 DHR 1399	Joseph	04/22/08
Dianetta Foye v. Division of Child Development, DHHS, Services	07 DHR 1440	Joseph	05/07/08
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David Alan Moore v. North Carolina Private Protective Services Board	08 DOJ 1264	Morrison	07/21/08
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Henry S. Cowell, III and Carolyn Dressler v. DENR, Div. of Coastal Management	06 EHR 1185	Brooks	05/30/08	23:05 NCR 501
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George Bess, Sr., v. DENR, Div. of Air Quality	08 EHR 1000	Overby	10/28/08	
U.S. Department of the Interior (DOD), Fish and Wildlife Service (FWS), v. DENR, Div. of Air Quality and PCS Phosphate Company, Inc, (PCS Phosphate)	08 EHR 1067	Morrison	03/05/09	23:24 NCR 2511
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Michael Chapman FV Productions v. Stanly County Environmental Health Dennis R. Joyner, Health Director Division of Environment Health Terry Pierce, Director	08 EHR 1986	Lassiter	11/03/08	

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Judith Kay Klink v. State Health Plan Teachers' Comprehensive Health Plan	08 INS 0846	Overby	10/20/08	
Michelle Patton v. Blue Cross Blue Shield State Health Plan	08 INS 1039	Joseph	12/04/08	
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Promise Land Ministries Inc., Joel K. Wilson v. Mitchell County Tax Assessor and Board of Equalization	08 MIS 1447	May	09/17/08	
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Michael Phillips v. A&T State University	07 OSP 0833	Overby	11/12/08	
Pam Moses v. Macon County Health Department	07 OSP 0945	Overby	06/30/08	
Cassandra F. Barner v . Halifax County Department of Social Serv.	07 OSP 1186	Joseph	05/16/08	23:05 NCR 528
Michael Shelton Woody v. DENR, Division of Forest Resources	07 OSP 1255	Brooks	05/13/08	
Kellee M. Buck v. Dare County Department of Social Services	07 OSP 1385	Overby	05/27/08	
Dennis E. Hrynkow v. Dept. of Insurance	07 OSP 1400	Joseph	04/03/08	
Stacey M. Gasgue v. N.C. Department of Corrections	07 OSP 1479	Overby	06/09/08	
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Charles Jones v. Bryan Beatty, Secretary of Crime Control & Public Safety and The Dept. of Crime Control & Public Safety (NC Highway Patrol)	07 OSP 2222	Morrison	06/05/08	23:01 NCR 147
Norman K. Goering v. Crime Control and Public Safety, Highway Patrol	07 OSP 2256	Joseph	07/29/08	23:05 NCR 547
Brenda S. Williamson v. DHHS	08 OSP 0058	Gray	10/15/08	

Kimberly James v. UNC-Charlotte	08 OSP 0146	Webster	05/08/08	
John Baker Warren v. Dept. of Crime Control & Public Safety; NC Highway Patrol	08 OSP 0212	Overby	04/17/09	23:24 NCR 2524
Nancy Hester v. Guilford County AOC Pretrial Services	08 OSP 0224	Overby	06/19/08	
Elizabeth Frazier v. Western Carolina University	08 OSP 0246	Brooks	12/09/08	23:16 NCR 1722
Ray Stanford Williams Jr. v. NC Department of Cultural Resources	08 OSP 0529	Morrison	08/19/08	
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Kenyatta Burrus v. Craven County Clerk of Superior Court	08 OSP 1089	Overby	06/12/08	
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Vincent Morton v. Cherry Hospital	08 OSP 1497	Webster	09/16/08	
Kyla Solomon v. Office of Citizen Services	08 OSP 1547	Lassiter	07/22/08	
Larry Campbell v. OSP	08 OSP 1558	Webster	01/06/09	
Richard Manson v. NC A&T State University	08 OSP 1561	Brooks	09/25/08	
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Richard T Ward v. NC DOT Ferry Division	08 OSP 1617	Lassiter	08/27/08	
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Karen E. Browder v. Forsyth County Department of Social Services Robert Sanchez-Langston or Joe Raymond	08 OSP 1771	Gray	11/17/08	
JoAnn C. Walker v. DOA	08 OSP 1976	Brooks	12/23/08	
Lakeshia A. Jones v. DOC	08 OSP 2229	Webster	01/07/09	
Prudentia Ngwainmbi v. Elizabeth Sate University	08 OSP 2240	Joseph	12/08/08	
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Josephine Hood v. Dorothea Dix Hospital Food and Nutrition	08 OSP 2276	Webster	12/23/08	
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Jackie L. Eley v. DHHS, Hearing Office	08 OSP 2286	Gray	01/06/09	
Charles V. Nichols v. DOC	08 OSP 2314	Brooks	01/08/09	
James C. Bailey, Jr v. Cherry Hospital, DHHS	08 OSP 2432	Gray	01/16/09	
Tony Chambers v. Dept. of Juvenile Justice and Delinquency Prevention	08 OSP 2692	Brooks	01/05/09	

RESPIRATORY CARE BOARD

Angelique Thompson v. Respiratory Care Board	07 RCB 1176	Gray	03/13/08	23:01 NCR 153

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Richard C Garrard Jr. v. NC Department of Secretary of State	07 SOS 2080	Brooks	09/12/08	
Bennett Jeffrey Packer v. North Carolina Department of The Secretary of State	07 SOS 2241	May	06/09/08	
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Lisa F. Jarvis v. SOS, Notary Division	08 SOS 0074	Webster	11/06/08	
Robert C Garrard Jr. v. NC Department of Secretary of State	08 SOS 0523	Brooks	09/12/08	
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Bobby and Robin Wilson v. UNC Hospitals	08 UNC 0595	May	09/11/08	
Christine Gwyn v. UNC Hospitals	08 UNC 0734	May	09/11/08	
Barbara C. King v. UNC Hospitals	08 UNC 0805	May	07/29/08	
Eva Kali Green v. UNC Hospitals	08 UNC 0841	May	09/22/08	
Kaprina Wells v. UNC Hospitals	08 UNC 0860	Gray	07/28/08	
Rolie Adrienne Webb "Andi" v. UNC Hospitals	08 UNC 0881	Gray	06/11/08	
Marcus M. McCullers v. UNC Hospitals	08 UNC 0928	Gray	07/30/08	
Satarah K. Latiker v. UNC Hospitals	08 UNC 0952	May	08/21/08	
Mary C. Gessell v. UNC Hospitals	08 UNC 0981	Joseph	09/18/08	
Richard and Amy Whitt v. UNC Hospitals	08 UNC 1048	May	08/15/08	
John G Sell v. UNC Hospitals	08 UNC 1334	Joseph	08/26/08	

WELL CONTRACTORS CERTIFICATION COMMISSION

Charles P. Pool v. Well Contractors Certification Commission	08 WCC 0514	Gray	07/15/08

WILDLIFE RESOURCES COMMISSION

Lisa Roddy v. Wildlife Resources Commission	08 WRC 0970	Brooks	06/24/08
Rickey Dale Logan	08 WRC 1229	Lassiter	07/28/08

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF GUILFORD	07 DHR 2009
Meriweather Home Nursing Inc., Petitioner	
vs.	**DECISION**
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, Respondent	

THIS CAUSE came on to be heard before Beecher R. Gray, Administrative Law Judge, on February 12, 2009, at 9:00 a.m., in the Martin Courtroom, Guilford County Courthouse, High Point, North Carolina. Counsel for Respondent objected to jurisdiction at the outset of the proceeding and announced that Respondent would not produce any evidence at the hearing. The Court makes the following Findings of Fact and Conclusions of Law:

THE JURISDICTION ISSUE

Petitioner filed its original petition for contested case hearing pro se. Respondent's motion to dismiss as untimely was allowed. Petitioner then moved for a reconsideration hearing regarding the dismissal and provided additional information about the date that it received the second and last Notice of Decision from Respondent. Respondent objected to the motion to reconsider.

Petitioner retained High Point Attorney James F. Morgan and the motion to reconsider was argued and allowed under the provisions of G.S. 1A-1, Rule 60(b)(1) and (6), made applicable to contested cases by 26 NCAC 03.0101. North Carolina Office of Administrative Hearings Rule 26 NCAC 03.0129 provides that the presiding judge loses jurisdiction to amend a decision after its issuance, except for clerical or mathematical errors. Rule 26 NCAC 03.0129 does not prohibit the application of G.S. 1A-1 Rule 60 (Relief from Judgment or Order) and Rule 26 NCAC 03.0101 provides that the Rules of Civil Procedure apply unless a specific statute or rule provides otherwise. To the extent that 26 NCAC 03.0129 conflicts with 26 NCAC 03.0101 in this contested case, it is void as applied in this case under the authority of G.S. 150B-33(b)(9). The following ORDER was entered after the reconsideration hearing and is set forth herein for clarity as to the factual basis supporting the reconsideration.

STATE OF NORTH CAROLINA COUNTY OF GUILFORD	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 07 DHR 2009
MERIWEATHER HOME NURSING, INC., Petitioner vs. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, Respondent	**ORDER**

THIS CAUSE coming on to be heard and being heard before Beecher R. Gray, Administrative Law Judge, on Motion of Petitioner to reconsider the final Order of Dismissal for failure to file a timely appeal. The hearing was held on September 16, 2008, at 9:00 a.m., Martin Courtroom, Guilford County Courthouse, High Point, North Carolina. The Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the Office of Administrative Hearings has, by rule, adopted the North Carolina Rules of Civil Procedure, G.S. 1A-1.

2. That the Court has authority to hear this Motion to reconsider the Final Decision issued April 7, 2008, under G.S. 1A-1, Rule 60, of the Rules of Civil Procedure.

3. That Petitioner was not represented by legal counsel when the original contested case appeal was filed.

4. That Petitioner received a letter dated September 5, 2007, entitled *Notice of Decision*. The final paragraph indicated that a Petition form for a formal contested case was enclosed.

5. That in fact the Petition form was not enclosed. That Petitioner called the Department of Health and Human Services and advised that the Petition form was not received with the September 5, 2007 Notice of Decision as represented. The Department of Health and Human Resources sent out another letter dated September 12, 2007, received by Petitioner on September 14, 2007, entitled *Notice of Decision*, including the petition form, with the notation, "Please pardon any inconvenience that this has caused you."

6. That the Petitioner filed by Fax on November 8, 2007, with the Office of Administrative Hearings.

7. That the Office of Administrative Hearings acknowledged that the Fax was received.

8. That the original was mailed to the Department of Health and Human Services and to the Office of Administrative Hearings on November 8, 2007.

9. That the Respondent already is in possession of the funds at issue, funds sought from Petitioner by means of recoupment.

10. That Petitioner's understanding was that the time began to run from September 12, 2007, since that was when the petition form and a final NOTICE OF DECISION was mailed to Petitioner.

11. That §150B-23 (f) requires that Notice be given in writing setting forth the 60 day allowable time period in which to file an appeal. Section 150B-23(f) also provides that the time period begins to run upon mailing by Respondent of the document which triggers the right of appeal.

CONCLUSIONS OF LAW

1. That the 60 day time period began running on September 12, 2007, the day the NOTICE OF DECISION letter, with petition form enclosed, was mailed by Respondent to Petitioner.

2. Although G.S. 150B-23(f) does not explicitly require that a petition form be mailed to potential petitioners, it does require that Respondent inform the Petitioner in writing of the right, the procedure, and the time limit in which to file a contested case petition. Justice and equity would require no less in a case such as this one where Petitioner relied upon representations made by Respondent in its first Notice of Decision and then filed a timely appeal in response to Respondent's second Notice of Decision, issued after request by Petitioner for the form(s) promised in the first Notice of Decision issued by Respondent.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, THAT:

The Motion of the Petitioner for reconsideration of the decision to dismiss her contested case appeal should be, and the same hereby is, ALLOWED; the April 08, 2008 Final Decision dismissing this contested case is VACATED. The parties are directed to submit agreeable hearing dates to the undersigned not later than October 17, 2008.

This the _____ day of September, 2008.

_____
Beecher R. Gray
Administrative Law Judge

FINDINGS OF FACT

1. Petitioner was represented by Attorney James F. Morgan and the Respondent was represented by Ellen Newby, Associate Attorney General, North Carolina Department of Justice. Both counsel advised that they were ready for the hearing.

2. Counsel for Respondent advised that Respondent would present no evidence on the basis that a Final Decision was entered on April 7, 2008 and that the Office of Administrative Hearings lacked jurisdiction. Respondent's counsel declined to cross-examine any witnesses.

3. Petitioner presented evidence which showed that Respondent was conducting two (2) audits at the same time for two (2) different establishments owned or operated by Petitioner and that this was contrary to rules and regulations.

4. Following Respondent's acceptance of or seizure of funds recouped from Petitioner, a reconsideration hearing request before Respondent Department was made and granted with a hearing being held in Raleigh, North Carolina. At the beginning of the reconsideration hearing, Petitioner told Respondent's hearing officer that her key witness, Rita Doran, RN, who was carrying the nine (9) records in issue to prove that Petitioner had met all requirements cited by Respondent as improper, was stuck in an unexpected traffic tie-up on I-40 and requested that the Department wait a reasonable amount of time to allow employee Rita Doran, RN to arrive. The Department, declining to wait, conducted a reconsideration hearing without the records Petitioner stated that she needed to prove her case.

Petitioner soon thereafter forwarded to Respondent those nine (9) records which showed that all of the requirements of Medicaid, cited by Respondent as improper during its audits, in fact properly had been documented as of the time of the audits.

5. Fran Meriweather, RN, BSN and Rita Doran, RN, BSN, MSN, testified that all nine (9) files cited by Respondent in this recoupment action as incomplete were in fact complete as regulations required. It is found as undisputed fact that the nine (9) files brought into question by Respondent's audits and recoupment action were proper and in compliance with Respondent's rules and policies at the time of the audits; Respondent produced no evidence to the contrary.

6. All of Petitioner's evidence, both oral testimony and exhibits, clearly demonstrated that the applicable rules and regulations of the Department were complied with.

7. Respondent has recouped funds from Petitioner which includes amounts due as well as penalties and interest in the total amount of $33,089.53. The parties, by and through counsel, stipulated to this figure showing total recoupment plus interest and penalties.

CONCLUSIONS OF LAW

1. There is substantial evidence that Petitioner has complied with the applicable rules of the Department and Medicaid as regards the records of the nine (9) patients whose records were audited by Respondent during the audits at issue in this contested case.

2. Under the evidence produced in this case, Petitioner is entitled to receive a refund from Respondent in the amount of $33,089.53, inclusive of penalties and interest, which have been recouped from Petitioner

DECISION

Respondent shall refund to Petitioner monies taken in the stipulated amount of $33,089.53, inclusive of penalties and interest, recouped by Respondent from Petitioner.

ORDER

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, NC 27699-6714, in accordance with G.S. § 150B-36(b3).

NOTICE

The decision issued by the undersigned Administrative Law Judge hereby disposes of all issues in this contested case. The parties have the right to file exceptions and to present written arguments to the agency making the final decision. G.S. § 150B-36(a). The agency making the final decision in this contested case is the North Carolina Department of Health and Human Services, Division of Public Health. The agency is required to serve a copy of the final decision upon each party and to furnish a copy to each party's attorney of record and the Office of Administrative Hearings. G.S. § 150B-36(b3). In accordance with G.S. § 150B-36(d), if the agency making the final decision does not adopt the Administrative Law Judge's decision, it shall set forth the basis for failing to adopt the decision and shall remand the case to the Administrative Law Judge for hearing.

This the 27 of February, 2009.

Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

James F. Morgan
Morgan Herring Morgan Green and
Rosenblutt LLP
PO Box 2756
High Point, NC 27261
ATTORNEY FOR PETITIONER

Ellen A. Newby
Associate Attorney General
N.C. Dept. of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 2nd day of March, 2009.

Denise M. Hall
Office of Administrative Hearings
6714 Mail Service Center
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(919) 431 3000
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STATE OF NORTH CAROLINA		IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE		08 DHR 1441
WHOLISTIC HEALTH, LAURA HOLLOWAY, Petitioner,	)	
v.	)	DECISION
N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIV. OF PUBLIC HEALTH Respondent.	)	

This matter came on for hearing before the Honorable Joe L. Webster, Administrative Law Judge, on December 4, 2008, in Raleigh, North Carolina. Samuel Roberti, Attorney at Law, represented the Petitioner. Mabel Y. Bullock, Special Deputy Attorney General, represented the Respondent.

ISSUE

Whether Respondent properly denied Petitioner's re-certification application for HIV Case Management Services (HIV CMS)?

EXHIBITS

Petitioner's Exhibits 1 through 4 were admitted into evidence.

Respondent's Exhibit Books 1, 2, 3 and 4 and separate Exhibits 6, 7, 8 and 9 were admitted into evidence.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, along with documents and exhibits received and admitted in evidence and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging 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. Pursuant to an Memorandum of Understanding (MOU) the AIDS Care Unit, Division of Public Health, North Carolina Department of Health and Human Services has been

delegated whatever authority the Division of Medical Assistance had with respect to has the role to certifying, decertifying or re-certifying agencies or organizations that are interested in becoming providers of HIV case management services to Medicaid-eligible clients. Petitioner is not a party to this MOU. This is not a direct service program. The case manager does not get reimbursed for direct services.

2. HIV case management is a client-focused strategy for coordinating care. It involves assessing a client's need for specific health, psychological, and social services and facilitating access to these services that will address those needs.

3. The North Carolina Division of Public Health (NCDPH) has entered into a Memorandum of Understanding (MOU) with the Division of Medical Assistance (DMA) for the AIDS Care Unit (ACU) to act as the agent for DMA in overseeing the HIV Case Management Program. (T. p. 173) The MOU provides that the ACU must carry out a provider recertification process every three years. (T. p. 215, Respondent's Exhibit 7 and 9)

4. Those entities wanting to be providers of case management services must file an application for certification with the AIDS Care Unit. The application is used to determine whether or not the agency or entity meets the criteria for providing those services. Wholistic Health Integration of Services for Humanity (WHISH), Petitioner, submitted an application on December 14, 2000 to obtain certification to participate in the case management program. (Respondent's Exhibit Notebook 1, Tab 1)

5. WHISH, the Petitioner, was certified in 2001 as an HIV case management agency. (Respondent's Exhibit Notebook 1, Tab 1) Once an entity is certified, the DMA is notified so that the process for enrollment as a Medicaid provider may be initiated. The Petitioner, WHISH, signed a Medicaid Participation Agreement, which is a contract whereby the Petitioner agreed to the conditions set out in the agreement. (Respondent's Exhibit 8)

Item A.1. of the Agreement requires that the provider "Comply with the federal and state laws, regulations, state reimbursement plan and policies governing the services authorized under the Medicaid Program and this Agreement (including, but not limited to, Medicaid provider manuals and Medicaid bulletins published by the Division of Medical Assistance and/or its fiscal agent).

Item A.5. of the Agreement requires that the provider "Maintain for a period of five (5) years from the date of service: (a)accounting records in accordance with generally accepted accounting principles and Medicaid record-keeping requirements; and (b) other records as necessary to disclose and document fully the nature and extent of services provided and billed to the Medicaid Program. For providers who are required to submit annual cost reports, "records" include, but are not limited to, invoices, checks, ledgers, contracts, personnel records, worksheets, schedules, etc. Such records are subject to audit and review by Federal and State representatives."

Item B.5. of the Agreement provides in part "That federal and/or State officials and their contractual agents may make certification and compliance surveys, inspections...Such visits must be allowed at any time during hours of operation, including unannounced visits."

6. Item B.6. of the Agreement provides that "That billings and reports related to services to Medicaid patients and the cost of that care must be submitted in the ***format and frequency specified by DMA and/or its fiscal agent.*** (Emphasis added)

7. The Medicaid Participation Agreement also provides that it is subject to renewal on a periodic basis.

8. The recertification process is as follows: If recertification is due in 2009, the recertification application package is mailed to the provider between September and December of 2008. A site visit would be scheduled as soon as possible after January 1, 2009. The recertification is not tied to the month in which a provider is initially certified, but such that the recertification will be completed in the calendar year for which recertification is due. (T. p. 177).

9. WHISH had four technical assistance visits after certification. The ACU can visit a provider at any time to review records and the services provided. (T. p. 175)

10. Upon application, an entity is provided with a HIV Case Management Provider Manual. (Respondent Exhibit 9) In the HIV Case Management Provider Manual, pages II-1 through II-2 list the eight core components that are required for HIV case management. Requirements for monitoring progress notes, are listed on II-17 of the Manual. A sample form for a progress note is also included in the appendix of the Manual. II-13 subsection 4(f) also requires signed and dated progress notes (Appendix C-10 of the Manual). III-16 of the Manual requires certain documents to be maintained by a provider for a minimum of five years from the dates of service. Those documents include assessments of service plans; documentation of the case manager's HIV case management activities; description of HIV case management activities; dates of service; amount of time involved in HIV case management activities, in minutes; records of referrals to providers and programs; records of service monitoring and evaluations; and claims for reimbursement.

11. Four technical assistance visits were made to WHISH, the Petitioner, by consultants for Respondent. (Respondent's Exhibit Notebook 1, Tab 3) The purpose of technical assistance visits is for the AIDS Care Unit to provide an opportunity for the consultant and case management staff to discuss and resolve concerns and issues related to the Medicaid HIV/CMS program. With each technical assistance visit, problems with progress notes and inconsistencies were found, but the problems were not severe enough to warrant decertification.

12. On the February 7, 2002 technical site visit, it was noted in the consultant's report that one file was missing documentation of Medicaid eligibility, intakes had no disposition section and the Intake/Assessment forms were not signed and dated by the case manager. (Respondent's Exhibit Notebook 1, Tab 3)

13. On the May 30, 2002 technical site visit, it was noted in the consultant's report that in some charts (19 charts were reviewed) the intake form was either missing or was incomplete. In some charts a new intake form was being used which was missing the disposition and problem/needs section. The progress note entries for the intake were not signed. Some files were missing HIV documentation or Medicaid eligibility documentation. Other problems were also noted in the report. It was also noted that progress notes were both typed and hand written.

All typed progress notes were missing signatures and also missing the amount of time designated in minutes, although units were designated. A few progress notes reflected direct services, which are not billable to Medicaid HIV/CMS. Some progress notes were insufficient to support the amount of time billed to Medicaid. Medicaid violations were noted and Ms. Holloway, director/case manager, was informed that she needed to make appropriate adjustments. Petitioner repaid Medicaid $205.00 in January 2003. Petitioner was advised in the report to create a policy manual and to ensure that the supervisor meets with the case manager and that the logs reflect a minimum of two (2) hours of monthly supervision. The report also indicated that documentation was missing. Ms. Holloway explained that they had transferred current charts from previous old charts and that some of the papers became missing in the process. (Respondent's Exhibit Notebook 1, Tab 3)

14. The third technical assistant visit on July 17, 2002 indicated that the intake forms were completed and signed by the case manager; the assessment forms, contact sheets and medications sheets were complete and signed. The progress notes were signed and dated and also contained the time designated in minutes and units. Petitioner was again reminded to create a policy manual and to ensure that the supervisor meets with the case manager and that the logs should reflect a minimum of two (2) hours of supervision monthly. (Respondent's Exhibit Notebook 1, Tab 3)

15. The report from the February 13, 2003 technical assistance visit indicated that on some progress notes the time spent was omitted and that the case manager had signed the progress notes but had not dated the signature. Ms. Holloway explained that the notes had been redone for the files and that the time had not yet been added to the new progress notes. (Respondent's Exhibit Notebook 1, Tab 3)

16. Petitioner never contacted Respondent with any questions concerning progress notes or any other aspect of the case management provider program. Petitioner had been informed that the AIDS Care Unit was available as needed to provide assistance as needed. (T. p. 190)

17. Case management agencies are certified as providers of case management services for a period of up to three years to provide HIV case management services.(Respondent's Exhibit 7 and 9)

18. Case managers are required to attend basic HIV case management training and to obtain twelve additional continuing education units in courses or in training related to HIV disease each year. (T. pp. 180-181, Application - Respondent's Exhibit Notebook 1 - Tab 1)

19. Progress notes must include the date of service, activity time in minutes and should also include the number of units that are being billed as well as the number of units not being billed because some of the activity a case manager does throughout the course of the day may not be an allowable billable activity. The progress note must also include the signature of the case manager and the date of service. The progress note must also have the client ID on it. The providers are informed of these requirements by the HIV Case Management Provider Manual and also in training. (T. pp. 184-185, Manual - Respondent's Exhibit 9)

20. The progress note is important because it is how the provider is able to bill Medicaid for the services provided and also to show that adequate service is being provided to the client. (T. pp. 185-186)

21. All certified providers were mailed a memorandum dated June 22, 2005 by Beth Karr, ACU Supervisor. (Respondent's Exhibit 6) This memo sets out some problems with progress notes that ACU consultants had observed in reviews conducted of various providers. The memo set out specific requirements of progress notes and also gave information on required supervision and continuing education.

22. If a provider decides to type their progress notes in a computer, those progress notes must still be printed and signed by the case manager doing the work. The Respondent does not require one particular form to be used for a progress note. But, the progress note must contain particular information. (T. pp. 189-190)

23. A Quality Assurance Review was conducted of Petitioner on December 1, 2005. The review found that case managers had not received the required two (2) hours of monthly supervision. The review also found that one case manager had not received the required twelve hours of continuing education credit for 2004, one had not received the training for 2002 and 2003 and Petitioner Laura Holloway had not received the twelve hours of credit for 2002 and 2003.(T. p. 197) Petitioner was notified by Respondent in a letter (concerning the December 1, 2005 quality assurance visit) dated December 29, 2005 that in order to retain their certification Petitioner had to meet the requirements set out in the report of the quality assurance visit. (Respondent's Notebook 1, Tab 3) Petitioner was recertified.

24. The four technical assistance visits and the 2005 quality assurance site visit were not the basis for the 2008 decertification of the Petitioner as a provider of HIV case management services. But the exhibits and testimony given by Respondent did show that inconsistencies had been found at the previous visits and that Petitioner had been advised of how improvements should be made. Testimony from Ms. Holloway at the administrative hearing was that client charts reviewed on these previous visits were fine, when in fact the exhibits and reports showed that there were problems. (T. pp. 226-228, Exhibit Notebook 1 - Tab 3)

25. A Quality Assurance visit was conducted April 9, 2008 to review Petitioner's re-certification application. (Respondent's Exhibit Notebook 3)

26. A Medicaid billing profile is a document generated by the Division of Medical Assistance which shows by provider number all of the activity that a provider has billed a program (here it would be HIV case management program) for specific clients and the amount that was paid for a specific date of service. (T. p. 201)

27. Providers are required to confirm monthly that clients are Medicaid eligible. This confirmation may be accomplished by telephone, but it must be documented in the client's file. (T. p. 202)

28. The decision to decertify a provider is based on what is found at a site visit, whether or not the agency billed and did not have proper documentation for billing, assessments, care plans - the ultimate goal is to make sure the client is receiving adequate service. Incomplete

paperwork or incomplete chart documentation gives cause for concern that the client may not be receiving proper services. The decision to decertify is a joint decision between the consultants, their supervisor, the liaison with Medicaid and often the AIDS Care Unit Manager. (T. pp.205-208)

29. The exit interview is a recap of what was found at the site visit, it is not all-inclusive. A brief synopsis of what was found at the site visit is given to the provider and then the provider is informed that they will receive a comprehensive report. During the site visit, if the consultants are reviewing charts and they see a date of service that was billed and they do not see a corresponding progress note, the provider is given the opportunity throughout the site visit process to provide the missing information. If the decision to decertify is made, the provider is notified of the decision and given notice of appeal rights. (T. pp. 209-212) Petitioner Holloway testified that she did not receive an exit interview. (T. p. 133) Respondent's witness, Detra Purcell, testified that she and the other consultant, Jim Bradley, did discuss what problems had been found at the quality assurance visit with Petitioner Holloway at the exit interview when the review was completed. (T. p. 246) Petitioner was informed of the findings of the quality assurance visit.

30. Client files are pulled randomly by the ACU consultants for review during a site visit. Normally a percentage of both active and closed files are reviewed. A particular client file may be reviewed if a complaint has been received concerning that client. In the April 2008 site visit of Petitioner, one client file was reviewed in particular because a complaint was received concerning that client file. The complaint was received several weeks after the site visit had been scheduled. The particular client file was pulled during the Quality Assurance site visit and the ACU consultant that reviewed it, Detra Purcell, did not find anything in the file to warrant a follow-up on the complaint. (T. pp. 212-213) Petitioner testified and Petitioner's counsel argued that the only reason Petitioner was not re-certified was because of the complaint from Piedmont Consortium, not for the reasons cited in the intent to decertify letters. (T. p. 88; Respondent's Notebook 1, Tab 6) Based on the testimony and evidence presented, the decision not to recertify the petitioner was not based on the complaint made by Piedmont Consortium.

31. Respondent's Exhibit Notebook 2 contains a report of the April 2008 Quality Assurance visit. The report cites a lack of signatures and dates on progress notes. There were also dates of service on the Medicaid billing profile for which there were no corresponding progress notes in the client's file. The Petitioner had not billed Medicaid for those services and presented additional information. The report also cited that assessment forms did not have required information which is to be collected when conducting a reassessment and an assessment. The report also cited that Ms. Laura Holloway did not provide any documentation that she had completed twelve hours of training approved by the AIDS Care Unit for 2005, 2006 and 2007. There also was no documentation to indicate that Ms. Holloway received two hours of monthly supervision. The case management supervisor must provide two hours of individualized case management supervision to each case manager. (T. pp. 241-242, Respondent's Exhibit Notebook 2) The staff of Petitioner met with the Respondent's consultants at the end of the Quality Assurance visit and was informed of the problems that were found. (T. p 246)

32. A progress note provides documentation for a billable contact. It is not the progress note that is billable, but the activity or service. In order to be Medicaid billable, the

progress note must have written and signed documentation that the service was done. There is no required form for the progress notes, but they must contain certain basic information and be kept in the individual file of the client. At the April 2008 Quality Assurance Visit, the AIDS Care Unit consultants compared the Medicaid billing profile with the progress notes to make sure that a progress note was actually generated and signed by the case manager for that date of service and that the activity billed matched the time that was billed to Medicaid. They found that there were progress notes that were not signed or dated. They also found that there were dates of service on the Medicaid billing profile for which there were no corresponding progress notes in the client's charts. (T. p. 242, Respondent's Exhibit Notebook 2, Quality Assurance Visit report) The AIDS Care Unit made a decision to decertify based upon an informal vote at the conclusion of the meeting of the Respondent. The Agency admitted that no set criteria were used, but only a "majority vote" by unnamed individuals.

33. N.C.G.S. § 108A-25(b) provides that "The program of medical assistance is established as a program of public assistance and shall be administered by the county departments of social services under rules adopted by the Department of Health and Human Services."

34. 10 NCAC 26B .0124 provides rules for case management services. (Respondent's Exhibit Notebook 1 - Tab 7). However, nothing in these rules defines the "decertification" process.

35. The Case Management Provider Manual (Respondent's Exhibit 9) provides details about the case management program. Every program certified as a case management provider receives a manual. However, no Rules for the case HIV case management services program have been adopted pursuant to the N.C. Administrative Procedures Act with respect to the authority of the Respondent to decertify case management providers.

36. Training provides the requirements for progress notes and other requirements of the case management program.

CONCLUSIONS OF LAW

1. At the time the AIDS Care Unit entered into the MOU with the Division of Medical Assistance, the AIDS Care Unit was delegated whatever authority the Division of Medical Assistance had with respect to certifying, decertifying or re-certifying agencies or organizations that are interested in becoming providers of HIV case management services to Medicaid-eligible clients.

2. The HIV Case Management Provider Manual is not law and does not give the AIDS Care Unit legal authority to decertify Petitioner.

3. Petitioner signed a Medicaid Participation Agreement with the Division of Medical Assistance and Petitioner was obligated to comply with the conditions of this contract and with the terms and conditions of certification as an HIV case management agency under the supervision of the Respondent's AIDS Care Unit and its HIV Case Management Program. While the Petitioner failed to comply with all of the requirements of it's certification for HIV Case Management Services and the Medicaid Participation Agreement, nevertheless, as

hereinafter set forth, the undersigned finds as a matter of fact and as a matter of law, that Petitioner carried the burden of proving the inadequacy or nonexistence of properly promulgated standards for "decertification," a process that is not mentioned in the Medicaid Participation Agreement.

4. A preponderance of the evidence did show that during the process for recertification, Respondent found that Petitioner had failed to properly document and sign progress notes, a few progress notes that some were deficient to support the amount of time billed to Medicaid and a few progress notes reflected direct services. Also some documentation was missing from the files.

5. The number of files reviewed by ACU was within the authority of the consultants of the QA visit and the number of files selected by ACU did not violate any policy, regulation or statute in choosing to review the files that it reviewed.

6. During the process for re-certification, Respondent found that Petitioner had not complied with all of the eight core components of HIV Case Management, 10 NCAC 22O.0124. Respondent found that Petitioner had failed to properly document and sign progress notes.

7. The undersigned finds as a matter of law that the Medicaid Policy Manual is not law and it was not promulgated through the Rule Making procedures of 150B-2-(2a) of North Carolina's Administrative Procedure Act.

8. The Medicaid Participation Agreement is a binding contract between Petitioner and Division of Medical Assistance. Pursuant to 10A N.C.A.C. 22F.0605, the Division of Medical Assistant through an interagency agreement (MOU) has delegated whatever authority it had to the North Carolina Department of Public Health (AIDS Care Unit) to "decertify" participants in the HIV Program **if** the grounds exist to do so. The Medicaid Participation Agreement does not mention the word "decertification." The undersigned finds as a matter of law that the Division of Medical Assistance and its agent, AIDS Care Unit, do not have the authority to "decertify," not because the word "decertify is not mentioned in the Medicaid Participation Agreement, but because neither this Agreement nor the MOU which gives the DPH Aids Care Unit derivative authority to "decertify", defines or clarifies what the term "substantially out of compliance" means.

9. The undersigned finds as a matter of law that Respondent does not have the authority to decertify or terminate the Agreement pursuant to generally accepted principals of contract law. In construing the terms of the Agreement between Petitioner and the Division of Medical Assistance and the MOU between Respondent and the Division of Medical Assistance, one of the essential terms of the Agreement between Respondent and the Division of Medical Assistance contained within the Section M of the MOU, is that DPH's AIDS Care Unit "will decertify agencies found to be substantially out of compliance with policies and procedures …" The undersigned finds as a matter of law that absent duly promulgated rules pursuant North Carolina's Administrative Procedure Act and clearly defined standards, similar to those that have already been promulgated clearly defining the standards for "certifying" agencies," an essential term of the Agreement is left to being defined on a case by case basis within the sole discretion

of the Respondent. As such the undersigned finds that the decision to "decertify" Petitioner by the AIDS Care Unit, is arbitrary and capricious as defined in N.C. Gen. Stat. Section 150B-23(a)(4). At a minimum, Respondent's process for "decertifying" participants violates the fundamental principal of due process which affords participants in the HIV Aids Management Program the right to know when and under what circumstances the AIDS Care Unit will choose to exercise its authority. Defining exactly what constitutes "substantially out of compliance" is left to the whim of each Quality Assurance team. Under Respondent's existing decertification process, the number of chances each participant such as Petitioner is given to correct any deficiencies is discretionary with each Quality Assurance team and ultimately the decision maker, the AIDS Care Unit.

10. The North Carolina Court of Appeals has recognized that statements appearing in a Medicaid Manual can meet the definition of a "rule" requiring procedures consistent with North Carolina's Administrative Procedure Act, N.C. Gen. Stat. Chpt. 150B, and Article 2A. See Surgeon v. Division of Social Services, 86 N.C. App. 252, 357 S.E. 2d 388, disc. review denied, 320 N.C. 797, 361 S.E. 2d 88 (1987) See also Dillingham v. N.C. Dep't of Human Res., 132 N.C. App. 704, 513 S.E. 2d 823 (1999); Duke Univ. Med. Ctr. V. Bruton, 134 N.C. App. 39, 51-52, 5166 S.E. 2d 633; 640-41 (1999). In attempting to act upon this unpromulgated "rule," Respondent has acted erroneously and upon unlawful procedure, in violation of the standards of N.C. Gen. Stat. § 150B-23(a)(2) and (5).

11. In failing to promulgate its decision with respect to duly promulgated standards for decertifying participants under the rule-making provisions of North Carolina's Administrative Procedures Act, N.C. Gen Stat. § 150B, Article 2A, Respondent has exceeded its authority, failed to use proper procedure, and has failed to act as required by law, in violation of the standards of N.C. Gen. Stat. §150B-23(a), (1), (3) and (5).

12. The Respondent acted improperly in decertifying the Petitioner.

13. The decision of the Respondent should be reversed.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to deny the Petitioner, WHOLISTIC HEALTH, LAURA HOLLOWAY, re-certification as a HIV case management service provider should be **REVERSED**.

ORDER AND NOTICE

The agency making the final decision in this contested case is the North Carolina Department of Health and Human Services. The agency is required to serve a copy of the final decision upon each party and to furnish a copy to each party's attorney of record and the Office of Administrative Hearings. G.S. § 150B-36(b3). It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with G.S. § 150B-36(b3).

The parties have the right to file exceptions and to present written arguments to the agency making the final decision. G.S. § 150B-36(a).

This the 9th day of April, 2009.

Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

Samuel Roberti
Roberti Wittenberg Lauffer
& Wicker PA
PO Box 1852
Durham, NC 27701
ATTORNEY FOR PETITIONER

Mabel Y. Bullock
Special Deputy Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 9th day of April, 2009.

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 431 3000
Fax: (919) 431-3100

STATE OF NORTH CAROLINA		IN THE OFFICE OF
COUNTY OF VANCE		ADMINISTRATIVE HEARINGS 08 DHR 1671
Agape, Petitioner,	)	
v.	)	DECISION
N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIV. OF PUBLIC HEALTH Respondent.	)	

This matter came on for hearing before the Honorable Joe L. Webster, Administrative Law Judge, on December 8 and 9, 2008, in Raleigh, North Carolina. Robert A. Leandro and Kathryn Ross, Attorneys at Law, represented the Petitioner. Mabel Y. Bullock, Special Deputy Attorney General, represented the Respondent. Additionally, pursuant to notice to the parties oral arguments were held in Raleigh, North Carolina on April 6, 2009 relating to certain legal issues arising in the case.

ISSUE

Whether Respondent properly denied Petitioner's re-certification application for HIV Case Management Services?

EXHIBITS

Petitioner's Exhibit Notebook 1 was admitted into evidence.

Respondent's Exhibit Notebooks 1, 2 and separate Exhibit M (November 14, 2000 letter) were admitted into evidence.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, along with documents and exhibits received and admitted in evidence and the

entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging 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. The AIDS Care Unit, Division of Public Health, North Carolina Department of Health and Human Services has been delegated whatever authority the Division of Medical Assistance had with respect to certifying, decertifying or re-certifying agencies or organizations that are interested in becoming providers of HIV case management services to Medicaid-eligible clients. This is not a direct service program. The case manager does not get reimbursed for direct services.

2. HIV case management is a client-focused strategy for coordinating care. It involves assessing a client's need for specific health, psychological, and social services and facilitating access to these services that will address those needs.

3. The North Carolina Division of Public Health (NCDPH) has entered into a Memorandum of Understanding (MOU) with the Division of Medical Assistance (DMA) whereby the AIDS Care Unit (ACU) acts as the agent for DMA in overseeing the HIV Case Management Program. (T. p. 173) The MOU provides that the ACU must carry out a provider recertification process every three years. (T. p. 151, Respondent's Exhibit Notebook 1 - Tab L)

4. Those entities wanting to be providers of case management services must file an application for certification with the AIDS Care Unit. The application is used to determine whether or not the agency or entity meets the criteria for providing those services. AGAPE, Petitioner, submitted an application to obtain certification to participate in the case management program. (Respondent's Exhibit Notebook 1 - Tab A)

5. AGAPE, the Petitioner, was certified in September 1999 as an HIV case management agency. (Respondent's Exhibit Notebook 1, Tab A) Once an entity is certified, the DMA is notified so that the process for enrollment as a Medicaid provider may be initiated. All case management providers are required to sign a Medicaid participation agreement before claiming reimbursement from Medicaid for services rendered to clients. In October 1999, the Petitioner, AGAPE, signed a Medicaid Participation Agreement, which is a contract whereby the Petitioner agreed to the conditions set out in the agreement. The agreement includes requirements for proper record keeping - as a condition of maintaining certification and receipt of reimbursement by Medicaid. Paragraph 10 of the Agreement provides as follows: DMA may terminate this agreement upon giving prior written notice or refuse to enter into an agreement when: a. The provider fails to meet conditions for participation, including the terms and conditions stated in the provider agreement; or b. The provider is determined to have violated Medicaid rules or regulations.... (Respondent's Exhibit Notebook 1, Tab B)

Item A.1. of the Agreement requires that the provider "Comply with the federal and state laws, regulations, state reimbursement plan and policies governing the services authorized under the Medicaid Program and this Agreement (including, but not limited to, Medicaid provider manuals and Medicaid bulletins published by the Division of Medical Assistance and/or its fiscal agent).

Item A.5. of the Agreement requires that the provider "Maintain for a period of five (5) years from the date of service: (a) accounting records in accordance with generally accepted accounting principles and Medicaid record-keeping requirements; and (b) other records as necessary to disclose and document fully the nature and extent of services provided and billed to the Medicaid Program. For providers who are required to submit annual cost reports, "records" include, but are not limited to, invoices, checks, ledgers, contracts, personnel records, worksheets, schedules, etc. Such records are subject to audit and review by Federal and State representatives."

Item B.5. of the Agreement provides in part "That federal and/or State officials and their contractual agents may make certification and compliance surveys, inspections...Such visits must be allowed at any time during hours of operation, including unannounced visits."

Item B.6. of the Agreement provides that "That billings and reports related to services to Medicaid patients and the cost of that care must be submitted in the ***format and frequency specified by DMA and/or its fiscal agent***. (Emphasis added)

The Medicaid Participation Agreement also provides that it is subject to renewal on a periodic basis.

6. The recertification process is as follows: If recertification is due in 2009, the recertification application package is mailed to the provider between September and December of 2008. A site visit would be scheduled as soon as possible after January 1, 2009. The recertification is not tied to the month in which a provider is initially certified, but such that the recertification will be completed in the calendar year for which recertification is due.

7. Upon application, an entity is provided with a HIV Case Management Provider Manual. (Respondent Exhibit Notebook 2) In the HIV Case Management Provider Manual,

pages II-1 through II-2 list the eight core components that are required for HIV case management. Requirements for monitoring progress notes, are listed on II-17 of the Manual. A sample form for a progress note is also included in the appendix of the Manual. II-13 subsection 4(f) also requires signed and dated progress notes (Appendix C-10 of the Manual). III-16 of the Manual requires certain documents to be maintained by a provider for a minimum of five years from the dates of service. Those documents include assessments of service plans; documentation of the case manager's HIV case management activities; description of HIV case management activities; dates of service; amount of time involved in HIV case management activities, in minutes; records of referrals to providers and programs; records of service monitoring and evaluations; and claims for reimbursement.

8. Four technical assistance visits were made to AGAPE, the Petitioner, by consultants for Respondent after certification. (Respondent's Exhibit M) The ACU can visit a provider at any time, during business hours, to review records and the services provided. A provider can request a technical assistance visit at any time they would like additional assistance. Petitioner AGAPE also had technical assistance visit in 2007. (T. pp. 335-336, Respondent's Exhibit M - Letter dated November 14, 2000 to AGAPE from ACU) The purpose of technical assistance visits is for the AIDS Care Unit to provide an opportunity for the consultant and case management staff to discuss and resolve concerns and issues related to the Medicaid HIV/CMS program. With each technical assistance visit, problems with progress notes and inconsistencies were found, but the problems were not severe enough to warrant decertification, but corrective action plans were required.

9. Petitioner AGAPE never contacted Respondent with any questions concerning progress notes or any other aspect of the case management provider program. Petitioner had

been informed that the AIDS Care Unit was available as needed to provide assistance as needed. (T. pp. 336, 342). The findings indicate that AGAPE's progress Notes were "wordy" (Petitioner's Ex. 4). AGAPE provided testimony that it had received conflicting directions form the Agency previously that its Progress Notes were either not descriptive enough or that they contained too much detail. Testimony from AGAPE witnesses indicated that it had attempted to adjust the manner it documents case management activities based on the Agency's direction. (Bullock, Vo. 1, p. 74; Smith, Vol. 1, pp. 196-198). The undersigned finds as a fact and as matter of law that the Agency's findings on the wordiness of the Progress notes do not substantiate justification for decertifying Petitioner, especially in light of the conflicting information Petitioner received about the level of detail required in Progress Notes.

10 Case management agencies are certified as providers of case management services for a period of up to three years to provide HIV case management services. (Respondent's Exhibit Notebook 1 - Tab L; T. pp. 128-129)

11. A technical assistance site visit was conducted of AGAPE on February 20, 2007 and AGAPE was notified that they would be contacted in early 2008 to schedule a Quality Assurance Site review and that if problems were identified during that 2008 visit that should have been addressed as Corrective Actions from the February 2007 TA review, the agency would be decertified. (Respondent's Exhibit Notebook 1, Tab H - TA Site Review Letter-dated April 16, 2007) As a result of the technical assistance site visit of February 20, 2007, Petitioner AGAPE was notified that they were required to submit a Corrective Action Plan to the ACU to address problems found at the site visit. Based on the February 20, 2007 technical site visit, a referral was made to Program Integrity regarding Petitioner AGAPE's HIV Case Management Medicaid billing. Some of the problems noted in the 2007 TA site visit were: billing for direct

services; billing multiple clients for same general resource development; insufficient number of continuing education and required number hours of supervision of case managers. (T. p. 133, Respondent's Exhibit Notebook 1, Tab H) Respondent informed Petitioner by letter dated May 21, 2007 that the AIDS Care Unit had received and reviewed the supplemental information that Petitioner had submitted May 7, 2007 to address the Corrective Action Requirements resulting from the Technical Assistance Visit on February 27, 2007. The Agency found Petitioner had addressed all but one of the Corrective Action Requirements. The only remaining issue was whether Ms. Bullock was qualified to provide Medicaid Reimbursable HIV Case Management.

12. Case managers are required to attend basic HIV case management training and to obtain twelve additional continuing education units in courses or in training related to HIV disease each year. (T. pp. 79-80, 133, 224-225, Application - Respondent's Exhibit Notebook 1 - Tab A) Petitioner and its case managers had attended some training for HIV case management services. (Respondent's Exhibit Book 1, Tab J) This training contained specific guidelines of what information is to be contained in progress notes and sample forms of progress notes. No one specific form is required to be used for progress notes, but the specific information required to be contained in the progress notes was clearly stated verbally at the training sessions and was given in written format in handouts during training. Petitioner AGAPE's witness, Tarsha Bullock, testified that ACU had an incorrect email address for AGAPE and that they received no information of training. Petitioner AGAPE was aware that twelve (12) hours of continuing education is required annually but case managers did not always obtain the required number of hours of training. Petitioner AGAPE did not call requesting information about annual training. (T. pp. 44, 79-80, 92, 225-227, 358)

13. Progress notes must include the date of service, activity time in minutes and also include the number of units that are being billed as well as the number of units not being billed because some of the activity a case manager does throughout the course of the day may not be an allowable billable activity. The progress note must also include the signature of the case manager and the date of service. The progress note must also have the client ID on it. The Respondent does not require one particular form to be used for a progress note. The providers are informed of these requirements by the HIV Case Management Provider Manual and also in training. (T. pp. 225-226, Manual-Respondent's Exhibit Notebook 2)

14. The progress note is important because it is how the provider is able to bill Medicaid for the services provided and also to show that adequate service is being provided to the client. A progress note provides documentation for a billable contact. It is not the progress note that is billable, but the activity or service. (T. pp. 185-186)

15. All certified providers were mailed a memorandum dated June 22, 2005 by Beth Karr, ACU Supervisor. (Respondent's Exhibit Notebook 1, Tab D-the last 7 page document behind Tab D) This memo sets out some problems with progress notes that ACU consultants had observed in reviews conducted of various providers. The memo also set out specific requirements of progress notes and also gave information on required supervision and continuing education.

16. A Quality Assurance Review was conducted of Petitioner on May 29, 2008. Some of the problems found were: (a) Billing for case management activities for which there were no signed Progress Notes in client charts; (b) Inappropriate billing for general resource development that was not specific to client problems documented in the Assessments and Care Plans. A comparison of Progress Note documentation with the referenced Care Plan goals revealed that

the documented case management activity was not related to the referenced Care Plan goals. Case Management must be related to a specific client need. General resource development is non-billable; (c) Documentation in client Progress Notes did not substantiate the time billed. The content of many of the Progress Notes were unclear as to the activities being conducted or services being provided; and (d) Progress Note documentation revealed that the case managers often billed for more than eight hours of activity time for the same dates of service in client charts reviewed. The ACU consultants also found that Petitioner had failed to document Medicaid eligibility on a monthly basis. (T. pp. 340-341, 345-346

17. Progress Note documentation revealed during the Quality Assurance site visit in May 2008 that a case manager billed for more than 8 hours of activity time for the same date of service in the 8 client charts reviewed as follows: 2/29/08 - 9.4 hours billed for charts F1, K1, G1, J1 M1 and L1; 3/3/08 - 8.6 hours billed for charts F1, J1, L1 and M1; 4/1/08 - 10.2 hours billed for charts G1, H1, F1, J1 L1 and M1; 4/15/08 - 9.5 hours billed for charts M1, L1, K1, H1, G1 and F1; 4/17/08 - 11.7 hours billed for charts M1, L1, K1, J1, H1, G1 and F1; 4/29/08 - 14 hours billed for charts F1, J1, L1, N1, M1, K1, H1 and G1; 5/1/09 - 13.5 hours billed for charts F1, H1, K1, M1, N1 L1 and TUJNO115641; and 5/6/08 - 8.9 hours billed for charts N1, M1, K1, J1 and F1. Petitioner produced evidence through Respondent's witness that there were no regulations that prohibited billing more than eight hours of activity for the same date of service. Progress Note documentation in these charts did not support the activities or activity times documented. A review of the Medicaid Billing Profile revealed that the following dates of service were billed to Medicaid when a corresponding Progress Note was not found in the client chart: Chart F1 - 3/3/08 - 4 units; 3/4/08 - 9 units,; 3/6/08 - 7 units; 3/7/08 - 6 units and 4/29/08 - 9 units (Progress Note for 4/29/08 documents only 5 units of activity time). (Respondent's

Exhibit Notebook 1, Tab C - Chart Review by Bob Winstead of Linda Smith, Case Manager) When the ACU consultants were conducting the May 2008 Quality Assurance site visit, they did ask Petitioner AGAPE about missing documentation. Petitioner AGAPE's representative's explanation was that a clerical person had the notes and the person's filing cabinet was locked. Petitioner AGAPE had been aware of the scheduled date of the quality assurance visit three weeks in advance of the visit. (T. pp. 87-89, 161-162, 168, 235, 245, 237, 266-267, 325; Respondent's Notebook 1 - Tab C - Pink Tab, letter dated May 8, 2008 from ACU to AGAPE)

18. Petitioner AGAPE had also been notified of the Division of Medical Assistance' (DMA) concern about what DMA felt was an excessive billing pattern. Victoria Landes, a DMA consultant, mailed Petitioner a letter dated June 21, 2006 describing these concerns. Petitioner's case management program had been identified as one that was billing an average of one thousand dollars ($1,000.00) a month per client. Ms. Landes continued in her letter by stating that there were multiple entries where the case manager was spending large amounts of time conducting Internet searches for information on HIV and then sharing the results with the client which was not appropriate because it represented health education rather than case management, health education would be considered a direct service which would not be billable. Respondent had received complaints from DMA that Petitioner AGAPE was billing an exorbitant amount of money. AGAPE had been billing in excess of sixty-eight thousand dollars ($68,000) a month, which averaged over one thousand dollars per client per month. (T. pp. 81-82, 92-93, 236, 246-250, Respondent's Exhibit Notebook 1 - Tab D, June 21, 2006 letter and accompanying report, also Tab D - *March 2007 HIV Case Management Providers and Payments* and *Claims Paid by Medicaid to AGAPE Life Changing Ministries January 2007-May 2007*)

19. The exhibits and testimony given by Respondent in reference to the four technical assistance visits, the 2005 quality assurance site visit and the 2007 technical assistance visit did show that inconsistencies had been found at the previous visits and that Petitioner AGAPE had been advised of how improvements should be made.

20. A Medicaid billing profile is a document generated by the Division of Medical Assistance which shows by provider number all of the activity that a provider has billed a program (here it would be HIV case management program) for specific clients and the amount that was paid for a specific date of service. (T. pp. 162, 234-235)

21. Providers are required to confirm monthly that clients are Medicaid eligible. This confirmation may be accomplished by telephone, but it must be documented in the client's file.

22. The decision to decertify a provider is based on what is found at a site visit, whether or not the agency billed and did not have proper documentation for billing, assessments, care plans - the ultimate goal is to make sure the client is receiving adequate service. Incomplete paperwork or incomplete chart documentation gives cause for concern that the client may not be receiving proper services. The decision to decertify is a joint decision between the consultants, their supervisor, the liaison with Medicaid and often the AIDS Care Unit Manager.

23. The exit interview is a recap of what was found at the site visit, it is not all-inclusive. A brief synopsis of what was found at the site visit is given to the provider and then the provider is informed that they will receive a comprehensive report. During the site visit, if the consultants are reviewing charts and they see a date of service that was billed and they do not see a corresponding progress note, the provider is given the opportunity throughout the site visit process to provide the missing information. If the decision to decertify is made, the provider is notified of the decision and given notice of appeal rights. (T. pp. 239-240, 342-343) Petitioner's

witness testified that an exit interview was not conducted, Respondent's witness, Detra Purcell, testified that she and the other consultant, Jim Bradley, did discuss what problems had been found at the quality assurance visit with Petitioner at the exit interview when the review was completed. Petitioner was informed of the findings of the quality assurance visit.

24. Client files are pulled randomly by the ACU consultants for review during a site visit. Normally a percentage of both active and closed files are reviewed. During the QA site visit, twenty records of the twenty nine Medicaid clients served by AGAPE were reviewed by Respondent's reviewers. (Petitioner's Ex. 10) There are no limitations on what percentage of files may be reviewed. Also, a particular client file may be reviewed if a complaint has been received concerning that client. Petitioner sought to submit additional missing documentation after the May 29 quality assurance visit by Respondent, but was not allowed to do so in contrast to Respondent's policy on allowing additional documentation to be submitted by other providers.

25. N.C.G.S. § 108A-25(b) provides that "The program of medical assistance is established as a program of public assistance and shall be administered by the county departments of social services under rules adopted by the Department of Health and Human Services."

26. 10 NCAC 26B .0124 provides rules for case management services. (Respondent's Exhibit Notebook 1 Tab K)

27. The Case Management Provider Manual (Respondent's Exhibit Notebook 2) provides details about the case management program. Every program certified as a case management provider receives a manual.

28. Required training provides information on the requirements for progress notes and other requirements of the case management program.

29. Petitioner AGAPE is conducting a business in providing case management services. Petitioner AGAPE signed a contract, the Medicaid Participation Agreement, in order to be reimbursed by Medicaid for their services. A denial of re-certification of Petitioner AGAPE does not deny services to the client.

30. The undersigned finds as a fact and as a matter of law that the AIDS Care Unit Provider Manual is not law and does not give the AIDS Care Unit legal authority to decertify Petitioner.

CONCLUSIONS OF LAW

1. The undersigned finds as a matter of law that the AIDS Care Unit was delegated whatever authority the Division of Medical Assistance had with respect to certifying, decertifying or recertifying DMA had at the time the MOU was agreed by DMA and DPH's AIDS Care Unit.

2. The HIV Case Management Provider Manual is not law and does not give the AIDS Care Unit legal authority to decertify Petitioner.

3. Petitioner signed a Medicaid Participation Agreement with the Division of Medical Assistance and Petitioner was obligated to comply with the conditions of this contract and with the terms and conditions of certification as an HIV case management agency under the supervision of the Respondent's AIDS Care Unit and its HIV Case Management Program. While the Petitioner failed to comply with all of the requirements of it's certification for HIV Case Management Services and the Medicaid Participation Agreement, nevertheless, as hereinafter set forth, the undersigned finds as a matter of fact and as a matter of law, that Petitioner carried the burden of proving the inadequacy or nonexistence of properly promulgated

standards for "decertification," a process that is not mentioned in the Medicaid Participation Agreement.

4. A preponderance of the evidence did show that during the process for recertification, Respondent found that Petitioner had failed to properly document and sign progress notes, failed to document the required twelve (12) hours of continuing education and failed to document Medicaid eligibility of clients on a monthly basis.

5. The number of files reviewed by ACU was within the authority of the consultants of the QA visit and the number of files selected by ACU did not violate any policy, regulation or statute in choosing to review the files that it reviewed.

6. During the process for re-certification, Respondent found that Petitioner had not complied with all of the eight core components of HIV Case Management, 10 NCAC 22O.0124. Respondent found that Petitioner had failed to properly document and sign progress notes.

7. The undersigned finds as a matter of law that the Medicaid Policy Manual is not law and it was not promulgated through the Rule Making procedures of 150B-2-(2a) of North Carolina's Administrative Procedure Act.

8. The Medicaid Participation Agreement is a binding contract between Petitioner and Division of Medical Assistance. Pursuant to 10A N.C.A.C. 22F.0605, the Division of Medical Assistant through an interagency agreement (MOU) has delegated whatever authority it had to the North Carolina Department of Public Health (AIDS Care Unit) to "decertify" participants in the HIV Program **if** the grounds exist to do so. The Medicaid Participation Agreement does not mention the word "decertification." The undersigned finds as a matter of law that the Division of Medical Assistance and its agent, AIDS Care Unit, does not have the authority to "decertify," not because the word "decertify is not mentioned in the Medicaid Participation Agreement, but

because neither this Agreement nor the MOU which gives the DPH Aids Care Unit derivative authority to "decertify", defines or clarifies what the term "substantially out of compliance" means.

9. The undersigned finds as a matter of law that Respondent does not have the authority to decertify or terminate the Agreement pursuant to generally accepted principals of contract law. In construing the terms of the Agreement between Petitioner and the Division of Medical Assistance and the MOU between Respondent and the Division of Medical Assistance, one of the essential terms of the Agreement between Respondent and the Division of Medical Assistance contained within the Section M of the MOU, is that DPH's AIDS Care Unit "will decertify agencies found to be substantially out of compliance with policies and procedures …" The undersigned finds as a matter of law that absent duly promulgated rules pursuant North Carolina's Administrative Procedure Act and clearly defined standards, similar to those that have already been promulgated clearly defining the standards for "certifying" agencies," an essential term of the Agreement is left to being defined on a case by case basis within the sole discretion of the Respondent. As such the undersigned finds that the decision to "decertify" Petitioner by the AIDS Care Unit, is arbitrary and capricious as defined in N.C. Gen. Stat. Section 150B-23(a)(4). At a minimum, Respondent's process for "decertifying" participants violates the fundamental principal of due process which affords participants in the HIV Aids Management Program the right to know when and under what circumstances the AIDS Care Unit will choose to exercise its authority. Defining exactly what constitutes "substantially out of compliance" is left to the whim of each Quality Assurance team. Under Respondent's existing decertification process, the number of chances each participant such as Petitioner is given to correct any

deficiencies is discretionary with each Quality Assurance team and ultimately the decision maker, AIDS Care Unit.

9. The North Carolina Court of Appeals has recognized that statements appearing in a Medicaid Manual can meet the definition of a "rule" requiring procedures consistent with North Carolina's Administrative Procedure Act, N.C. Gen. Stat. Chpt. 150B, and Article 2A. See Surgeon v. Division of Social Services, 86 N.C. App. 252, 357 S.E. 2d 388, disc. review denied, 320 N.C. 797, 361 S.E. 2d 88 (1987) See also Dillingham v. N.C. Dep't of Human Res., 132 N.C. App. 704, 513 S.E. 2d 823 (1999); Duke Univ. Med. Ctr. V. Bruton, 134 N.C. App. 39, 51-52, 5166 S.E. 2d 633; 640-41 (1999). In attempting to act upon this unpromulgated "rule," Respondent has acted erroneously and upon unlawful procedure, in violation of the standards of N.C. Gen. Stat. § 150B-23(a)(2) and (5).

10. In failing to promulgate its decision with respect to duly promulgated standards for decertifying participants under the rule-making provisions of North Carolina's Administrative Procedures Act, N.C. Gen Stat. § 150B, Article 2A, Respondent has exceeded its authority, failed to use proper procedure, and has failed to act as required by law, in violation of the standards of N.C. Gen. Stat. § 150B-23(a), (1), (3) and (5).

11. The Respondent acted improperly in decertifying the Petitioner.

12. The decision of the Respondent should be reversed.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to deny the Petitioner, AGAPE, re-certification as a HIV case management service provider should be **REVERSED**.

ORDER AND NOTICE

The agency making the final decision in this contested case is the North Carolina Department of Health and Human Services. The agency is required to serve a copy of the final decision upon each party and to furnish a copy to each party's attorney of record and the Office of Administrative Hearings. G.S. § 150B-36(b3). It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with G.S. § 150B-36(b3).

The parties have the right to file exceptions and to present written arguments to the agency making the final decision. G.S. § 150B-36(a).

This the 8th day of April, 2009.

Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

Renee J Montgomery
Parker Poe Adams and Bernstein
PO Box 389
Raleigh, NC 27602-0389
ATTORNEY FOR PETITIONER

Mabel Y. Bullock
Special Deputy Attorney General
NC Department of Justice
9001 Mail Service Center
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ATTORNEY FOR RESPONDENT

This the 9th day of April, 2009.

Anita M. Wright

Office of Administrative Hearings
6714 Mail Service Center
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Filed

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF PENDER	05 EHR 1205

HENDERSON FARMS, LLC, Petitioner, v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, Respondent.	**DECISION**

THIS CONTESTED CASE was brought on for hearing before the undersigned Administrative Law Judge on October 22, 2007, and it appearing to the Court that this matter arose out of the assessment by the Land Quality Section Chief of a civil penalty against Petitioner in the sum of $100,450.00 (DENR No. LQS 04-058), which civil penalty was assessed on June 27, 2005, for violations of the Sedimentation Pollution Control Act of 1973 ("SPCA"), and the relevant rules promulgated thereunder. Petitioner timely appealed the civil penalty assessment and contests the same. Petitioner was represented in court by its attorney, C. Wes Hodges, II, of Hodges & Coxe, P.C., of Wilmington, North Carolina. Respondent was represented by its attorney, Nancy Reed Dunn, Assistant Attorney General, of the North Carolina Department of Justice, Raleigh, North Carolina. The parties attempted to settle this contested case post-hearing by exchange of proposed consent judgments and other negotiations. The undersigned confirmed by email exchanges with both parties on March 15, 2009 that a consent judgment or other settlement no longer is under discussion or is viable.

ISSUES

1. Whether from 14 May 2004 through 8 November 2004, Petitioner violated the SPCA or the rules adopted thereunder by failing to maintain on graded slopes and fills an angle which can be retained by vegetative cover or other adequate erosion control devices or structures as required by N.C.G.S. §113A-57(2).

2. Whether from 14 May 2004 through 8 November 2004, Petitioner violated the SPCA or the rules adopted thereunder by failing, on exposed slopes within 15 working days or 30 calendar days of completion of any phase of grading, to plant or otherwise provide ground cover, devices, or structures sufficient to restrain erosion as required by N.C.G.S. §113A-57(2).

3. Whether from 14 May 2004 through 8 November 2004, Petitioner violated the SPCA or the rules adopted thereunder by failing to maintain all temporary and permanent erosion and sedimentation control measures and facilities during the development of a site as required by 15A N.C.A.C. §04B .0113.

4. Whether from 28 July 2004 through 8 November 2004, Petitioner violated the SPCA or the rules adopted thereunder by failing on a tract of more than one acre, where more than one acre is uncovered, to install such sedimentation and erosion control devices and practices as are sufficient to retain sediment generated by land-disturbing activity within the boundaries of the tract during construction.

5. Whether from 28 July 2004 through 8 November 2004, Petitioner violated the SPCA or the rules adopted thereunder for failing to provide in proximity to a lake or natural watercourse, a buffer zone as defined in 15A N.C.A.C. §04A .0105(4).

6. Whether the civil penalty against Petitioner in the amount of $230.00 per day for the 179-day period from 13 May 2004 through 8 November 2004, for a penalty of $41,170.00 for the Notice of Violation (NOV), and the civil penalty against Petitioner in the amount of $570.00 per day for the 104-day period from 28 July 2004 through 8 November 2004, for a penalty of $59,270.00 for the Notice of Additional Violation (NOAV), for a total civil penalty of $100,450.00 is appropriate and lawful and in accordance with the provisions of N.C.G.S. §113A-64(a)(3) and 15A N.C.A.C. §4C .0006.

7. Whether, in assessing the foregoing civil penalties, Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.

WITNESSES

For Petitioner: W. Haddon Allen, III

For Respondent: Francis M. Nevils, Jr.
Daniel Sams
Trentt James, Environmental Specialist

EXHIBITS RECEIVED INTO EVIDENCE

Petitioner:

1. Notice of Violation (July 1, 2004)
2. Notice of Additional Violation (July 29, 2004)
3. Sedimentation Inspection Reports (May 13 – November 8, 2004)
4. Civil Penalty Assessment Guidelines and Worksheet
5. Norris Letter (August 16, 2004)
6. Revised Plan (August 16, 2004)
7. Letter of Disapproval (August 25, 2004)
8. Norris Letter (September 16, 2004)
9. Revised Plan (September 17, 2004)
10. Letter of Disapproval (September 27, 2004)
11. Norris Letter (October 6, 2004)
12. Revised Plan (October 21, 2004) (sent on October 6, 2004)
13. Letter of Approval (October 25, 2004)
14. Civil Penalty Assessment (June 27, 2005)
15. Initial Civil Penalty Assessment (August 9, 2004)
16. Worksheet of Initial Civil Penalty Assessment
17. Hampstead Pines Subdivision Map
18. Contract with U.S. Environmental Protection Services, LLC
19. Mackovic Letter (August 16, 2004)
20. Statement from U.S. Environmental Protection Services, LLC
21. Estimate from EcoExpress, LLC
22. Statement from EcoExpress, LLC

Respondent:

Respondent's 1:	07/08/02 -07/29/04 Chronological History Henderson Farms, aka Hampstead Pines, Pender County
Respondent's 2:	06/28/02 Financial Responsibility/Ownership Form Sedimentation Pollution Control Act
Respondent's 3:	07/09/02 Notice of Receipt of Erosion & Sedimentation Control Plan
Respondent's 4:	07/22/02 Letter of Disapproval From DENR to Henderson Farms, LLC, W. Haddon Allen, III, President
Respondent's 5:	11/12/02 Letter in response to the July 22 letter from DENR From: Andrew & Kuske Consulting Engineers, Inc.
Respondent's 6:	11/25/02 Letter of Approval From DENR to Henderson Farms, LLC, W. Haddon Allen, III, President with Approval Comments and Conditions
Respondent's 7:	03/04/03 North Carolina General Warranty Deed - Unofficial
Respondent's 8:	05/14/03 Sedimentation Inspection Report
Respondent's 9:	05/15/03 Notice of Violations of the Sedimentation Pollution Control Act ("SPCA") to Henderson Farms, LLC, W. Haddon Allen, III, President From DENR
Respondent's 10:	04/14/04 Sedimentation Inspection Report with Photos - 2
Respondent's 11:	05/13/04 Sedimentation Inspection Report with Photos - 2
Respondent's 12:	05/17/04 to 11/08/04 Chronological list of events from 5/17/04 to 1/08/04

Respondent's 13:	05/17/04 Notice of Violations of the SPCA to Henderson Farms W. Haddon Allen, III, President (FIRST ATTEMPT) Undeliverable by United States Postal Service
	06/15/04 Notice of Violations of the SPCA to Henderson Farms W. Haddon Allen, III, President (SECOND ATTEMPT) Undeliverable by United States Postal Service
	07/01/04 Notice of Violations of the SPCA to Henderson Farms W. Haddon Allen, III, President (THIRD ATTEMPT) Delivered on July 9, 2004 BY THE SHERIFF)
Respondent's 14:	07/02/04 Sedimentation Inspection Report dated 07/02/04 Photos - 2
Respondent's 15:	07/23/04 Notice of Violation to Henderson Farms, Stormwater ViolationsW. Haddon Allen, III, President From DENR
Respondent's 16:	07/27/04 Sedimentation Inspection Report/with attachment and Photos - 2
Respondent's 17:	07/28/04 Sedimentation Inspection Report/with attachment and Photo - 1
Respondent's 18:	07/29/04 Notice of Additional Violations
Respondent's 19:	07/30/04 Guidelines for Assessing Civil Penalties for Violations of SPCA
Respondent's 20:	07/30/04 Notice of Violations/delivered by Sheriff on 08/02/04
Respondent's 21:	08/09/04 Civil Penalty Assessment for Violations of the NC SPCA LQS 04-028
Respondent's 22:	08/16/04 Letter from Norris, Kuski & Tunstall Consulting Engineers Re: Corrections to existing erosion control problems on site.
Respondent's 23:	08/17/04 Letter from Wilmington Regional Office: Notice of Receipt of Revised Erosion & Sedimentation Plan
Respondent's 24:	08/19/04 Sedimentation Inspection Report
Respondent's 25:	08/25/04 Letter of Disapproval/with copy of green card
Respondent's 26:	09/02/04 Sedimentation Inspection Report with Photos - 4
Respondent's 27:	09/14/04 Sedimentation Inspection Report with Photos - 3
Respondent's 28:	09/16/04 Letter to: Dan Sams Letter from: Norris Kuske & Tunstall Consulting Engineers Re: Responding to Comments of August 25, 2004
Respondent's 29:	09/17/04 Notice of Receipt of Revised Erosion & Sedimentation Control Plan
Respondent's 30:	09/27/04 Letter of Disapproval/with proof of delivery of 09/28/04
Respondent's 31:	09/29/04 Sedimentation Inspection Report with Photos - 6
Respondent's 32:	10/06/04 Letter to: Dan Sams Letter from: Norris Kuske & Tunstall Consulting Engineers Re: Responding to Letter of Disapproval dated 09/27/04
Respondent's 33:	10/12/04 Sedimentation Inspection Report
Respondent's 34:	10/20/04 Sedimentation Inspection Report
Respondent's 35:	10/22/04 Sedimentation Inspection Report
Respondent's 36:	10/25/04 Letter of Approval/Service by Sheriff on October 27, 2004
Respondent's 37:	10/25/04 Notice of Continuing Violations of the SPCA
Respondent's 38:	10/27/04 Sedimentation Inspection Report with Photos - 5

Respondent's 39:	11/08/04 Sedimentation Inspection Report with Photos - 4
Respondent's 40:	01/05/05 Guidelines for Assessing CPA for violations of SPCA
Respondent's 41:	03/15/05 Worksheet Civil penalty assessment for SPCA Violations
Respondent's 42:	06/14/05 Withdrawal of Civil Penalty Assessment
Respondent's 43:	06/27/05 Worksheet Civil penalty assessment for SPCA Violations
Respondent's 44:	06/27/05 Civil Penalty Assessment for Violations of the SPCA
Respondent's 45:	Resume of Trentt James, Environmental Specialist, NC DENR
Respondent's 46:	Resume of Dan Sams, NC DENR
Respondent's 47:	Resume of Francis M. Nevils, Jr., NC DENR

FINDINGS OF FACT

1. Petitioner Henderson Farms, LLC (herein "Petitioner") is a North Carolina limited liability company with its principal office and place of business located in New Hanover County, North Carolina. Both parties received notice of hearing by certified mail more than 15 days prior to the hearing.

2. Respondent N.C. Department of Environment and Natural Resources (herein "Respondent"), is the North Carolina state agency that administers the Sedimentation Pollution Control Act of 1973 (herein "SPCA") through its Division of Land Resources, Land Quality Section. Respondent is a State agency established under N.C. Gen. Stat. §§ 143B-279.1 through 143B-344.33 and vested with statutory authority to enforce the State's environmental pollution laws, including laws enacted to regulate sedimentation pollution.

3. N.C. Gen. Stat. § 113A-52(6) defines "land-disturbing activity" to include any "use of the land by any person in residential, industrial, educational, institutional, or commercial development, highway and road construction and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation." N.C. Gen. Stat. § 113A-57 prohibits land-disturbing activity unless it is undertaken in accordance with certain mandatory requirements. The mandatory requirements include (1) a buffer zone along natural watercourses, (2) an angle for graded slopes and fills sufficient to retain vegetative cover or other control devices as well as installation of ground cover or other adequate erosion-control devices or structures within 15 working days or 30 calendar days, whichever is shorter, of completion of any phase of grading (3) for disturbed areas more than one acre in size, installation of erosion and sedimentation control devices sufficient to retain the generated sediment on site as well as installation of a permanent ground cover upon completion of the activity, (4) for disturbed areas more than one acre in size, submittal of an erosion and sedimentation control plan 30 or more days prior to initiating the activity.

4. Petitioner is the developer of a residential subdivision known as Hampstead Pines and located on a 35 acre (+/-) tract in Pender County, North Carolina (herein "Project").

5. The subject matter of this contested case is alleged erosion and sedimentation damage and land-disturbing activity in violation of the SPCA at the Project, resulting in the

issuance of a Civil Penalty Assessment in the total amount of $100,450.00 on June 27, 2005, and covering the time period from May 14, 2004, to November 8, 2004.

6. After service of the subject Civil Penalty Assessment, Petitioner timely filed a Petition for a Contested Case Hearing, in which Petitioner contended that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by law or rule.

7. In connection with the development of Hampstead Pines, Petitioner retained the engineering firm of Andrew & Kuske Consulting Engineers, Inc. (renamed Norris, Kuske & Tunstall Consulting Engineers, Inc.) (herein "A&K"), to prepare an erosion control plan and the other required civil plans for Hampstead Pines. A&K is a civil engineering firm in Wilmington, North Carolina, with a long-standing reputation of excellence, and which previously had worked on projects for Petitioner's owners. J. Phillip Norris, P.E. (herein "Norris") was the engineer assigned to the Hampstead Pines project.

8. On behalf of Petitioner, A&K submitted an erosion control plan for the Project to Respondent, which was received on July 8, 2002, and was disapproved on July 22, 2002 (herein "Plan"). Petitioner thereafter submitted a revised Plan, which was received by Respondent on November 14, 2002, and approved on November 25, 2002.

9. The Plan was a development plan for grading, drainage, and erosion control. The erosion control measures outlined on the Plan were designed to be undertaken during the course of development.

10. The land disturbing activity was conducted for residential purposes and covered approximately 35 acres.

11. Petitioner is the party financially responsible for the land disturbance.

12. After Respondent approved the Plan, Petitioner hired Heath Construction, Inc. (herein "Heath"), to perform the approved development activities, including implementation of the approved erosion control measures. Heath was a reputable civil contractor in the area and was highly recommended by A&K. Petitioner was aware of Heath's reputation, as Heath had been hired by the City of Wilmington to install all water lines and taps in conjunction with an extension of the municipal water system.

13. Heath was hired to construct all water and sewer lines, construct all roads, curbing and gutters, and implement all erosion control measures shown on the approved Plan.

14. Petitioner also hired Skipper's Well Drilling (herein "Skipper") to install the community water system. Petitioner was aware of the good reputation of Skipper, which had been in business in the Wilmington area for more than 30 years.

15. All of the work to be done by Heath and Skipper was based on A&K's designs, as approved by Respondent. Based on its knowledge at the time, Petitioner believed that it had a good team in terms of both plan design and site work.

16. On May 15, 2003, Daniel Sams, the Regional Engineer from the Wilmington Regional Office of the Division of Land Resources (DLR) of the North Carolina Department of Environment and Natural Resources (DENR) inspected the site and found that land disturbance activities had begun at the site. Mr. Sams noted on a Sedimentation Inspection Report, which was sent to Petitioner, that "Sediment traps from the plan are not installed. The ditches on site have large amounts of accumulated sediment. No effort has been made to revegetate the ditch banks. That Sedimentation Inspection Report was accompanied by a Notice of Violations of the Sedimentation Pollution Control Act informing Petitioner that it was in violation of the Sedimentation Pollution Control Act, describing the violations, and describing the corrective action required to correct the violations.

17. In 2004, Petitioner began having erosion control issues with a perimeter ditch running approximately along the northern and western boundaries of the property. In an effort to understand this issue, Petitioner met on site with both Heath and Mr. Norris of A&K. Based on these discussions, efforts were made to contain the erosion. Despite these initial efforts, Petitioner was unable to contain the erosion around the ditch. Ultimately, it was determined that the source of the problem was a gross miscalculation of water coming from off-site in the Plan prepared by A&K and approved by Respondent, specifically from the area of a firestation and other properties to the north of the Project (and abutting N.C. Highway 17). This flow of excess water resulted in rapid erosion of the perimeter ditch in both directions.

18. Despite measures to contain the problem, Petitioner continued to experience erosion control problems at this perimeter ditch. These problems, in terms of Respondent's involvement, reached a head in the spring of 2004.

19. From May 13th to November 18th, 2004, the period covered by the Civil Penalty Assessment, Respondent conducted thirteen (13) inspections of the Project, as documented in Respondent's Sedimentation Inspection Reports (herein "Report(s)"). The inspections were conducted on behalf of Respondent by Trentt James, Environmental Specialist (herein "James"), and he prepared the Reports.

20. The Reports were sent to Petitioner via Haddon Allen, a member/manager of Petitioner and the individual who executed the Financial Responsibility / Ownership Form on behalf of Petitioner.

21. In addition to the miscalculation of run-off from adjacent properties in the Plan prepared by A&K and approved by Respondent, heavy rainfall during the relevant period of 2004 contributed to the erosion control problems at the perimeter ditch. The area of southeastern North Carolina experienced above-normal rainfall during 2004, primarily as a result of an active hurricane season, including but not limited to Hurricane Charley and

Tropical Storm Bonnie, which caused heavy precipitation in the area of the Project. According to Petitioner, it constantly was raining during the relevant time period in 2004.

22. The Reports document the wetness of the Project during the relevant periods of 2004. The 13 May 2004 Report shows the weather and soil conditions as "rainy and somewhat wet." The 2 July 2004 Report shows "cloudy and wet." The 27 July 2004 Report shows "cloudy and wet." The 18 July 2004 Report shows "rain and wet." The 19 August 2004 Report shows "sunny and somewhat wet." The 2 September 2004 Report shows "sunny and wet." The 14 September 2004 Report shows "rain and wet." The 29 September 2004 Report shows "sunny and wet." The 12 October 2004 Report shows "sunny and wet." The 20 October 2004 Report shows "light rain and wet." The 22 October 2004 Report shows "sunny and somewhat wet." The 27 October 2004 Report shows "cloudy and somewhat wet." Only the last Report during the relevant time period shows any dry soil conditions: The 8 November 2004 Report indicates that the weather and soil conditions are "sunny and mostly dry." According to James, Environmental Specialist, most inspections of the Project were conducted either during or shortly after rain events.

23. On August 09, 2008, a $5,000 initial, one day penalty was assessed for the violations observed by Trentt James, Environmental Specialist on May 17, 2008. That penalty assessment never was appealed.

24. Heavy rain events can damage erosion control measures, and one would expect to see the most erosion either during or shortly after a heavy rain event. Furthermore, it is difficult to work on the site during rain events, and more specifically it is difficult to install or maintain erosion control measures during heavy rain events.

25. The frequent and heavy rainfall at the Project during the relevant time period of 2004 exacerbated the erosion control problems at the perimeter ditch. Additionally, the rainfall washed away measures taken to control erosion and prevented work from being done to curb the erosion around the perimeter ditch.

26. The 13 May 2004 Report notes "severely eroded [sic] still exist especially around the drainage easement adjacent to lots 8, 9, 10 and 13." This Report identifies violations of the SPCA for graded slopes and fills too steep, unprotected exposed slopes, and failure to maintain erosion control measures. These violations principally pertained to the perimeter ditch. The Report provides only general corrective measures: (1) reshape severely eroded or steep slopes, (2) provide groundcover on exposed slopes, and (3) maintain, repair and restore erosion control measures. Finally, this Report indicates "a Notice of Violation will be issued with this report."

27. Upon receipt of the 13 May 2004 Report, Petitioner immediately forwarded the Report to Heath. At this point, Petitioner was beginning to have problems with Heath, including Heath not showing up on the site and otherwise neglecting the Project. Eventually, Heath completely abandoned the Project and filed bankruptcy. At the time of the 13 May 2004 Report, however, Heath still was on the Project.

28. Based on the 13 May 2004 Report, Respondent issued a Notice of Violation to Petitioner (herein "NOV"). The NOV identifies the violations that were found as: (1) failure to maintain on graded slopes and fills an angle which can be retained by vegetative cover or other adequate erosion control devices or structures per N.C.G.S. §113A-57(2) (severely eroded swale slopes have resulted in excessively steep or vertical slopes in various locations throughout the project); (2) failure within 15 working days or 30 calendar days (whichever period is shorter) of completion of any phase of grading to plant or otherwise provide exposed, graded slopes or fills with ground cover, devices, or structures sufficient to restrain erosion per N.C.G.S. §113A-57(2) (groundcover sufficient to restrain erosion has not been established on various swale slopes); and (3) failure to maintain all temporary and permanent erosion and sedimentation control measures and facilities during the development of a site per 15 N.C.A.C. §4B.0113 (erosion and sedimentation control measures have not been maintained properly). The violations set forth in the NOV generally related to the condition of the perimeter ditch.

29. The NOV set forth general corrective action required, including: (1) reshape excessively steep or eroded slopes; (2) provide groundcover sufficient to restrain erosion on exposed slopes; and (3) maintain, repair, and restore erosion control measures. The NOV gave Petitioner only 20 days in which to implement corrective action.

30. Environmental Specialist James next inspected the Project on 2 July 2004, noting that the Project still was in violation of the SPCA. The 2 July 2004 Report further indicates that additional land clearing had taken place at the 404 wetlands.

31. Petitioner received the NOV on 17 July 2004. Upon receipt of the NOV, Petitioner immediately forwarded the same to Heath. Petitioner also hired Jim Milne, from whom Petitioner purchased the property, to oversee the implementation of corrective action to address the violations set forth in the NOV. Heath and Mr. Milne were instructed to remedy the violations.

32. Environmental Specialist James next inspected the Project on 27 July 2004. At Petitioner's direction, Heath and Mr. Milne were present for this inspection. Leo Urban also was present. Mr. Urban was the owner of Suburban Homes, the general contractor which had purchased lots in the Project and was building single family homes. The 27 July 2004 Report indicates the same violations and same corrective actions as earlier noted.

33. Environmental Specialist James next inspected the Project on 28 July 2004. During this inspection, He determined that the Project still was in violation of the SPCA, and that additional violations were occurring at the site. Specifically, the 28 July 2004 Report indicated that a Notice of Additional Violation would be issued because off-site sedimentation at the 404 wetlands where a corrugated plastic pipe intersected the wetlands boundary.

34. When designing the Plan for the Project, which was approved by Respondent, A&K relied on a wetlands designation prepared by the U.S. Army Corps of Engineers. The

nature of the 404 wetlands on the Project essentially was wet ground and did not include a "lake or natural watercourse" as defined by 15A N.C.A.C. §4A.0105(6).

35. During development of the Project, Skipper installed the water system where designed, however, it ultimately was determined that the site included more wetlands than shown on the wetlands delineation prepared by the U.S. Army Corps of Engineers. The 28 July 2004 Report instructed Petitioner to submit a revised plan showing this additional clearing in the area of the spray field.

36. On 29 July 2004, based upon the site inspection of 28 July 2004, Respondent issued a Notice of Additional Violations (herein "NOAV"). The NOAV identifies the additional violations as follows: (1) Failure to file an acceptable, revised plan after being notified of the need to do so per N.C.G.S. §113A-54.1(d) and 15A N.C.A.C. §4B.0018(a) (a Revised Plan has not been received to show additional land disturbing activity on the southern portion of the tract as requested in the inspection report dated July 2, 2004); (2) Failure on a tract of more than one acre, when more than one acre is uncovered, to install sedimentation and erosion control devices sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction in accordance with N.C.G.S. §113A-57(3) (off-site sedimentation was observed at wetland on the southwest portion of the tract where the corrugated plastic pipe intersects the wetland); and (3) failure to retain along a lake or natural watercourse a buffer zone of sufficient width to confine a visible siltation by natural or artificial means within the 25 percent of that portion of the buffer zone nearest the land-disturbing activity per N.C.G.S. §113A-57(1) (buffer zone between the wetland/watercourse and the area cleared to install the corrugated plastic pipe is either inadequate or eliminated).

37. The NOAV includes general corrective action necessary to address the additional violations: (1) submit a revised plan to include land disturbing activity in the southern portion of the tract; (2) install sufficient measures to retain sediment on site; and (3) restore the buffer zone utilizing mechanical and vegetative measures. The NOAV gave Petitioner only a 7-day time period in which to implement the necessary corrective action.

38. Petitioner received copies of the 27 July 2004 Report, 28 July 2004 Report, and NOAV at or around the beginning of August, 2004. Petitioner took immediate action to address the violations and get the Project back into compliance. Petitioner instructed A & K Engineering (A & K) to submit a revised Plan to address violations cited in the NOAV. Petitioner also began the process of locating a qualified, experienced environmental remediation company to take over the sedimentation and erosion control measures for the Project. By this time, Heath had abandoned the Project.

39. On 11 August 2004, Petitioner received a proposal from EcoExpress, LLC, an environmental remediation company located in Wilmington, North Carolina, to remediate the sedimentation and erosion control problems at the Project. The total amount of the proposal was $44,750.00.

40. Petitioner also obtained a quote from U.S. Environmental Protection Service, L.L.C. (herein "USEPS"), an environmental remediation company located in Greensboro, North Carolina, to remediate the sedimentation and erosion control problems at the Project. USEPS first submitted a contract proposal by email on 9 August 2004, which was revised on 13 August 2004 based on discussions between Petitioner and USEPS. The total amount of the revised proposal from USEPS was $54,100.00.

41. Petitioner contacted both EcoExpress and USEPS within a week of receiving the NOAV. Despite the higher quote, Petitioner decided to hire USEPS. Ken Mackovic, the Manager of Field Operations for USEPS, had flown down from Greensboro in a helicopter to meet with Petitioner, his experts, and Respondent. Petitioner was impressed both by the credentials and immediate response of USEPS. Consequently, by 13 August 2004, Petitioner had contracted with USEPS for remediation services. By that time, Petitioner had provided USEPS with copies of the Reports, the NOV and the NOAV, had discussed the situation in detail with Mr. Mackovic, and Mr. Mackovic personally had visited the Project. All of this was concluded prior to 13 August 2004. Thus, less than two weeks after receipt of the NOAV, Petitioner had hired an experienced environmental remediation company to take over the sedimentation and erosion control measures for the Project.

42. On 16 August 2004, Mr. Mackovic sent correspondence to Respondent setting forth USEPS's involvement with the project and its plan to bring the site back into compliance, also stating that "[Petitioner's representative] Mr. Allen has expressed to me personally his commitment and willingness to turn this situation around 180 degrees as expeditiously as possible." USEPS began work on the Project on or about 16 August 2004.

43. Also on 16 August 2004, A & K submitted a Revised Plan to Respondent and a check in the amount of $200.00 to cover the additional four acres of disturbance, as set forth in the NOAV. The exclusion of this 4 acres in the original approved Plan was a permitting error, based on a miscalculation of the wetlands on site in the U.S. Army Corps of Engineers wetlands delineation, and would have been approved had it been included within the initial Plan. It only cost Petitioners the sum of $200.00 to include this area in the land-disturbing activity for the Project.

44. Upon the issuance of the NOAV and the abandonment of the Project by Heath, Petitioner was diligent in getting an environmental remediation company on site to address the sedimentation and erosion control problems on the Project, and in getting A & K to prepare and submit a revised Plan. Within two weeks of receipt of the NOAV, Petitioner had hired USEPS and A & K had submitted a revised Plan to Respondent.

45. Environmental Specialist James next inspected the Project on 19 August 2004. By this time, Petitioner had submitted a revised Plan and USEPS was engaged and on the site. The 19 August 2004 Report indicates that Mr. Mackovic of USEPS was present for the site inspection. The Report expressly provides that a "significant effort has been made to

bring the site into compliance." The Report also states that a revised plan should be submitted detailing plans to accommodate the amount of water entering the site from upland areas. This refers to the miscalculation of the amount of water entering the site from adjacent properties, as previously referenced. By the date of this Report, Petitioner already had submitted a proposed revised Plan, as required by the NOAV, to deal with the additional land clearing activity in the southern portion of the property. This Report, for the first time during the relevant period, requested that Petitioner submit a Plan revision regarding the perimeter ditch.

46. On 25 August 2004, Respondent sent a Letter of Disapproval to Petitioner in response to Petitioner's proposed Revised Plan. This Letter of Disapproval referenced the need to reflect the stormwater runoff adversely affecting the perimeter ditch, as first requested in the 19 August 2004 Report. The Letter of Disapproval also referenced 3 issues previously not adressed in any prior inspection report: (1) requesting the outfall velocity and vertical drop of a drain pipe below the stormwater retention pond and spray field; (2) clarification of the temporary turnaround of Firefly Drive; and (3) requesting a 10-year stormwater analysis for a steep section of the drainage ditch between lot 3 and lots 4 and 5. None of these reasons for disapproval had been raised prior to Petitioner's submission of the proposed Revised Plan. These issues were being raised for the first time, but Petitioner was not afforded a reasonable amount of time to consider these issues and to prepare a responsive Revised Plan.

47. Environmental Specialist James next inspected the Project on 2 September 2004, noting that heavy rains had washed out erosion control measures. Given the inordinate rainfall throughout the relevant time period, this was a constant battle during the remediation process. Despite the heavy rains, the 2 September 2004 Report indicates that maintenance and reseeding were taking place. The Report also indicates a violation for failure to submit a revised plan, despite the fact that the site inspection took place only 7 days after the Letter of Disapproval was mailed out and which set forth new issues not addressed on any previous inspection report.

48. Environmental Specialist James next inspected the Project on 14 September 2004, noting that the site was rainy and wet at the time of the inspection. The 14 September 2004 Report indicates that the ditch still was in non-compliance. The perimeter, however, could not be remediated until the approval of a Revised Plan that addressed the excessive water entering from off-site, as first addressed in the 19 August 2004 Report.

49. On 16 September 2004, A & K submitted to Respondent a letter and a proposed Revised Plan responding to the issues raised for the first time in the Letter of Disapproval mailed to Petitioner on 25 August 2004, including a proposal for the installation of an 8-inch sock pipe in the area of the perimeter ditch. Given the issues raised for the first time in the Letter of Disapproval, the time within which Petitioner submitted a 2nd proposed Revised Plan was not unreasonable. The proposed Revised Plan submitted by Petitioner shows the revisions to the area of the perimeter ditch, including the proposed sock pipe. Petitioner understood that it could not implement the proposed corrective action until the Revised Plan was approved by Respondent.

50. On 27 September 2004, Respondent issued a 2nd Letter of Disapproval to Petitioner, again rejecting Petitioner's proposed Revised Plan. The reasons for disapproval included requests for additional data regarding the perimeter ditch, additional details regarding the revisions to the perimeter ditch, and more specific details for the swale between lot 3 and lots 4 and 5. The Letter of Disapproval also requestd additional details regarding a proposed rip-rap pad in the area of the stormwater retention pond and spray field.

51. Environmental Specialist James next inspected the Project on 29 September 2004. The 29 September 2004 Report identifies a violation for failure to submit a revised plan, although the site inspection was conducted only 2 days after the 2nd Letter of Disapproval was mailed to Petitioner.

52. On 6 October 2004, A & K hand-delivered to Respondent correspondence and a proposed Revised Plan in response to the reasons for disapproval set forth in the 2nd Letter of Disapproval dated 29 September 2004. Although the proposed Revised Plan is stamped as being received on 21 October 2004, it was hand-delivered along with the A & K letter on 6 October 2004. The proposed Revised Plan depicts the revisions referenced in the A & K letter dated 6 October 2004.

53. Environmental Specialist James next inspected the Project on 12 October 2004. Haddon Allen, a member and manager of Petitioner, and Ken Mackovic (of USEPS), and Jim Milne, both of whom Petitioner had hired to address the sedimentation and erosion control issues, were present on site for the inspection. During the site meeting, Petitioner again was informed that an approved Revised Plan was needed to continue work on the perimeter ditch, as expressly stated in the 12 October 2004 Report. This is consistent with what Petitioner previously had been told; to wit, that remediation of the perimeter ditch could not occur until Respondent had approved a Revised Plan.

54. Environmental Specialist James next inspected the Project on 20 October 2004, where he met with A & K, Mr. Milne, and Mr. Urban to discuss the most recently submitted Revised Plan. [The 20 October 2004 Report confirms that Respondent received the Revised Plan prior to 21 October 2004, the date on which it was stamped as "received" by Respondent.]

55. Environmental Specialist James next inspected the Project on 22 October 2004. During this site inspection, he noted an additional land disturbance behind the well house down toward and *potentially* into the 404 wetland.

56. On 25 October 2004, Respondent issued a Letter of Approval, approving the proposed Revised Plan submitted by Petitioner on 6 October 2004. The Letter of Approval set forth a list of approval comments and conditions related to sedimentation and erosion control at the Project. Once the proposed Revised Plan was approved, Petitioner finally was allowed to continue remediation in the area of the perimeter ditch.

57. The history of the Plan revision efforts during the relevant time period indicates that Respondent would raise issues requiring a Plan revision, Petitioner would submit a proposed Revised Plan responding to the general conditions raised by Respondent, then Respondent would reject the proposed Revised Plan by raising issues not previously addressed in site inspections or by requiring more specific information, and Petitioner would then attempt to address the additional requirements of Respondent. Petitioner acted in good faith and with reasonable diligence in attempting to revise the approved Plan to meet the requirements of Respondent.

58. Environmental Specialist James next inspected the Project on 27 October 2004, two (2) days after the Letter of Approval was mailed out to Petitioner. Mr. Mackovic of USEPS was present for the site inspection, along with a representative of Suburban Homes. The 27 October 2004 Report states that sedimentation and erosion control measures should be installed per the approved Plan. The Report also indicates that the remediation contractor was shaping the conveyance swales, but that the perimeter ditch had not been addressed. The perimeter ditch, however, could not be repaired until receipt of the Letter of Approval of the Revised Plan, which was sent to Petitioner only 2 days prior to the site inspection.

59. Environmental Specialist James next inspected the Project on 8 November 2004 – the last site inspection of the civil penalty period. The 8 November 2004 Report indicates, for the first time, that the site was "mostly dry," the conveyance swales had been reshaped and reseeded, and the maintenance issues had been corrected. The areas behind the well house and the perimeter ditch yet had to be addressed.

60. Petitioner paid USEPS in full in the amount of $54,000.00, although USEPS failed to implement all the sedimentation and erosion control measures on the Revised Plan. Petitioner was required to hire EcoExpress, LLC, to finish the remediation of the Project. Petitioner paid EcoExpress the total sum of $39,800, to complete the required remediation of the sedimentation and erosion control issues at the Project. Consequently, Petitioner paid the total amount of $93,800 to remediation contractors in an effort to correct the sedimentation and erosion control problems with the Project. These efforts ultimately were successful in correcting the erosion and sedimentation problems at the Project.

61. On 10 November 2004, Dan Sams, Regional Engineer for the Wilmington office of the Land Quality Section of the Division of Land Resources of DENR, reviewed the file for the Project and prepared a form entitled "Guidelines for Assessing Civil Penalties for Violations of the Sedimentation Pollution Control Act" (herein "Guideline"). The Guideline indicates, *inter alia*, that the degree of off-site damage ranged from none to moderate during various inspections ("slight"); that there appeared to have been more wetlands on site than previously designated on the initial plan; that Petitioner probably saved no money by its noncompliance, as numerous attempts were made to correct the site's problems; and that it was difficult for Petitioner to maintain compliance based on

the circumstances of the site. Regional Engineer Sams only visited the Project on two (2) occasions during the civil penalty period, on 19 August 2004 and 22 October 2004.

62. The Guideline was reviewed by a Sedimentation Specialist for Respondent on 5 January 2005.

63. Thereafter, on 27 June 2005, Francis M. Nevils, Jr., Land Quality Chief for the Division of Land Resources, based upon a review of the file for the Project, prepared a document entitled "Worksheet – Civil Penalty Assessment for SPCA Violation" (herein "Worksheet"). Mr. Nevils did not visit the Project during the period for which the civil penalty was assessed. For the NOV, Mr. Nevils assessed a penalty of $30.00 per day for the types of violations (h, i, and j) and $200.00 per day for adherence to plan / effectiveness of plan submitted by violator, for a total civil penalty of $230.00 per day from 14 May 2004 to 8 November 2004 – for a total civil penalty for the NOV of $41,170.00.

64. For the NOAV, Mr. Nevils assessed a penalty of $20.00 per day for the types of violations (e and g), $100.00 per day for the degree and extent of harm caused by the violation, $200.00 per day for adherence to plan / effectiveness of plan submitted by violator, and $250.00 per day for a willful violation, for a total civil penalty of $570.00 per day from 28 July 2004 to 8 November 2004 – for a total civil penalty for the NOAV of $59,280.00.

65. Thus, the total civil penalty assessment against Petitioner for the NOV and the NOAV combined was $100,450.00.

Based upon the foregoing Findings of Fact, and the other documentary evidence and oral testimony presented by the parties, the Court makes the following:

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings ("OAH"), and the OAH has jurisdiction of the parties and of the subject matter.

2. All parties correctly have been designated, and there is no question as to misjoinder or nonjoinder of parties. Petitioner has the burden of proof.

3. Petitioner is a "person" as defined by N.C.G.S. §113A-52(8), who may be assessed a civil penalty under N.C.G.S. §113A-64(a) for violations of the SPCA on the Project.

4. From 14 May 2004 through 8 November 2004, Petitioner was in violation of the SPCA or the rules adopted thereunder where Petitioner failed to maintain on graded slopes and fills an angle which can be retained by vegetative cover or other adequate erosion control devices or structures as required by N.C.G.S. §113A-57(2).

5. From 14 May 2004 through 8 November 2004, Petitioner was in violation of the SPCA or the rules adopted thereunder where Petitioner failed on exposed slopes within 15 working days or 30 calendar days of completion of any phase of grading to plant or otherwise provide ground cover, devices or structures sufficient to restrain erosion as required by N.C.G.S. §113A-57(2).

6. From 14 May 2004 through 8 November 2004, Petitioner was in violation of the SPCA or the rules adopted thereunder where Petitioner failed to maintain all temporary and permanent erosion and sedimentation control measures and facilities during the development of a site as required by 15A N.C.A.C. §04B .0113.

7. From 28 July 2004 through 8 November 2004, Petitioner was in violation of the SPCA or the rules adopted thereunder where Petitioner failed on a tract of more than one acre, where more than one acre is uncovered, to install such sedimentation and erosion control devices and practices as are sufficient to retain sediment generated by land-disturbing activity within the boundaries of the tract during construction.

8. From 28 July 2004 through 8 November 2004, Petitioner was not in violation of SPCA or the rules adopted thereunder for a failure to provide, in proximity to a lake or natural watercourse, a buffer zone as defined in 15A N.C.A.C. §04A .0105(4), as there was no "lake or natural watercourse" as defined by 15A N.C.A.C. §04A .0105(6) in the area of the 404 wetlands on the Project, and thus no buffer zone was required.

9. Petitioner installed sedimentation and erosion control devices as directed by the approved Plan, but many of those measures and devices failed.

10. Respondent's agents inspected the site on 13 May 2004, 2 July 2004, 27 July 2004, 18 July 2004, 19 August 2004, 2 September 2004, 14 September 2004, 29 September 2004, 12 October 2004, 20 October 2004, 22 October 2004, 27 October 2004, and 8 November 2004. The timing of these inspections generally coincided with heavy rains and storm events, and resulted in observed and documented, unrepaired damage without allowing Petitioner a reasonable time to make repairs following the rain event. The area of the Project experienced above-normal rainfall during the relevant time period, which condition was outside the control of Petitioner. The photographic evidence taken by Respondent during the site inspections consisted of the alleged violative conditions, and Respondent did not take photographs of the corrective work performed by Petitioner.

11. The Guidelines prepared by Mr. Sams on behalf of Respondent indicated that the damage caused by the violations ranged from none to moderate, and so he indicated "slight" on the Guidelines. On the Worksheet, Mr. Nevils assessed Petitioner the sum of $100.00 per day for degree and extent of harm. An assessment of $100.00 per day is the top assessment for "slight" harm and the bottom assessment for "moderate" harm. There was no rational basis for assessing Petitioner $100.00 per day for the degree and extent of the harm, especially where Respondent's inspections typically took place following a heavy rain event, when one would expect to see the most damage. Under the circumstances, a

more appropriate penalty for degree and extent of harm would be between "none" ($0.00) and the lowest assessment for "moderate" ($100.00), or $50.00 per day.

12. From and after the issuance of the NOV and the NOAV, Petitioner cooperated with Respondent and expended considerable resources in attempts to take all reasonable steps to prevent damage and to submit effective Revised Plans.

13. During the time period when Petitioner and its professionals were attempting to submit an effective Revised Plan, Petitioner was unable to take necessary corrective action until the approval of the Revised Plan. During this time period, however, the Reports indicate that Petitioner's environmental remediation contractor, USEPS, was on the site cooperating with Respondent and implementing maintenance procedures. Furthermore, Petitioner's civil engineer acted timely and with reasonable diligence in preparing and submitting revised Plans in an effort to address the issues raised by Respondent.

14. Petitioner's violations of the SPCA were not willful, as the erosion around the perimeter ditch resulted, in part, because of a miscalculation of the amount of run-off from adjacent properties; the unauthorized land disturbance and sedimentation in the area of the spray field resulted from a miscalculation of the amount of 404 wetlands on site in the wetlands delineation prepared by the U.S. Army Corps of Engineers; the situation was exacerbated when Petitioner's contractor, Heath, abandoned the Project and filed bankruptcy; Petitioner made numerous efforts to correct the problems with the site, including hiring Mr. Milne, hiring USEPS, and ultimately hiring EcoExpress, and expending considerable funds ($93,800.00) to remediate the sedimentation and erosion control problems at the Project; Petitioner saved no money as a result of the non-compliance; the nature of the site made compliance difficult; and there was no evidence presented regarding the willfullness of the violations set forth in the NOAV.

15. Given Petitioner's good faith efforts to submit an effective Revised Plan, Petitioner should have been allowed a reasonable time to prepare, submit, and implement an effective Plan for responding to the issues raised by Respondent, including those raised for the first time during the plan submittal process, especially where Petitioner could not implement corrective action regarding the perimeter ditch until approval of a Revised Plan. Respondent assessed Petitioner the sum of $200.00 per day under both the NOV and the NOAV for adherence to and effectiveness of plan submitted by the violator. The Revised Plan ultimately approved by Respondent eventually was effective in correcting the sedimentation and erosion problems with the Project.

16. As Respondent's site inspections, NOV, and NOAV only gave general forms of corrective measures, Petitioner had to rely on the expertise of its professionals, including A & K Engineering and USEPS, to devise specific corrective actions. For each revised plan submitted by Petitioners, including responses to new issues raised for the first time by Respondent in each Letter of Disapproval, Petitioner was entitled to a reasonable time to prepare, submit, and implement a Revised Plan.

17. While not a defense to any sedimentation and erosion control problems, and the failure of control devices, Petitioner should be credited with its good faith efforts to address its problems during the relevant time period through paid professional consultants. Respondent gave petitioner no credit for the $92,980 it expended in the eventually successful remediation of deficiencies at the Project, although State law permits such credit.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court makes the following:

DECISION

Respondent's imposition of a civil penalty of $100,450.00 for violations of the SPCA is supported by the evidence in this contested case but should be reduced by $92,980.00, the amount expended by Petitioner to successfully remediate the deficiencies, in view of all of the evidence produced in this case, including the rainy, wet conditions, the difficulty represented by the topographic dynamics of the site itself, and the numerous and varied professionals required to complete needed remediation. The final civil penalty supported by all of the evidence should be, and the same hereby is, ORDERED to be $7,470.00.

ORDER

It hereby is ordered that the Secretary serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6417, in accordance with the provisions of N.C.G.S. §150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards in N.C.G.S. §150B-36(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision. N.C.G.S. §150B-36(a).

This the 15 day of March, 2009.

Beecher R. Gray

BEECHER R. GRAY
ADMINISTRATIVE LAW JUDGE PRESIDING

A copy of the foregoing was mailed to:

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Nancy Reed Dunn
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ATTORNEY FOR RESPONDENT

This the 17th day of March, 2009.

Denise M. Hall

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STATE OF NORTH CAROLINA

COUNTY OF HYDE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
08 EHR 1067

U.S. Department of the Interior (DOI), Fish and Wildlife Service (FWS)
Petitioner,

v.

N.C. Department of Environment and Natural Resources, Division of Air Quality (NCDENR)
Respondent,

and

PCS Phosphate Company, Inc. (PCS Phosphate)
Respondent Intervenor.

DECISION

In this contested case, the United States Department of the Interior (DOI), Fish and Wildlife Service (FWS) has appealed the January 4, 2008 decision by the North Carolina Department of Environment and Natural Resources, Division of Air Quality (NCDENR) to issue PSD Air Permit No. 04176T37 to the PCS Phosphate Company, Inc. (PCS Phosphate). The permit was issued under North Carolina's Prevention of Significant Deterioration (PSD) regulatory program, and authorized PCS Phosphate to make major modifications to its phosphatic fertilizer manufacturing facility located near Aurora, North Carolina.

On January 22, 2009, an administrative hearing on cross-motions for summary judgment was held in Raleigh, North Carolina. After hearing oral argument and

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considering the motions, evidence and briefing previously submitted, the administrative law judge offered the parties the opportunity to file proposed decisions.

ISSUES

1. Whether the NCDENR violated North Carolina's law and regulations by failing to notify the FWS of the PCS Phosphate pre-application meeting and of the filing of PCS Phosphate's permit application?
2. Whether the NCDENR violated North Carolina's law and regulations by failing to timely furnish the Federal Land Manager with a copy of all information relevant to the permit application, including an analysis provided by the source of the potential impact of the proposed source on visibility at the Swanquarter Wilderness Area?
3. Whether the NCDENR violated North Carolina's law and regulations by failing to provide or require PCS Phosphate to provide the Federal Land Manager (FLM) with an appropriate and meaningful analysis of the potential impact of the proposed source on visibility at the Swanquarter Wilderness Area?
4. Whether the NCDENR violated North Carolina's law and regulations by issuing the permit without giving the FLM a valid opportunity to make a determination of whether the emissions from the proposed source would have an adverse effect on Swanquarter?

STATUTES AND REGULATIONS AT ISSUE

The federal Clean Air Act, 42 U.S.C. §7401, et seq. (CAA); EPA regulations, 40 C.F.R. Part 51, and Appendix W.

North Carolina regulations at 15A N.C.A.C. 2D.0530.

CASE CITATIONS

American Corn Growers Ass'n v. EPA, 351 U.S. App. D.C. 351; 291 F.3d 1 (D.C. Cir. 2000) (Corn Growers); *Util. Air Regulatory Group v. EPA,*471 F.3d 1333 (2006); *Center for Energy and Economic Development v. EPA,* 398 F.3d 653 (2005); *In re: Prairie State Generating Company PSD Permit No. 189808AAB,* PSD Appeal No. 05-05, slip op. at 147 – 161(EAB Aug. 24, 2006) (Prairie State); *aff'd sub nom, Sierra Club v. U.S. EPA,* 499F.3d 653 (7th Cir. 2007); *In re Knauf Fiber Glass, GmbH,* 8 E.A.D. 121, 155 (EAB 1999) (In re Knauf);

FINDINGS OF FACT

1. The PCS Phosphate manufacturing facility at issue is located 32 km west of the Swanquarter Wilderness Area, a federal Class I air quality area.
2. The DOI's agency, the FWS, manages Swanquarter, and the Assistant Secretary for Fish and Wildlife and Parks is the Federal Land Manager (FLM).
3. At its manufacturing facility near Aurora, North Carolina, PCS Phosphate conducts a phosphate ore mining operation, refines the ore and mixes it with sulfuric acid to produce phosphoric acid.
4. The phosphoric acid is used to produce phosphate fertilizer, fertilizer grade phosphoric acid, technical and food grade phosphoric acid and other products.
5. The Aurora plant produces over 1.3 million tons of phosphoric acid a year. .
6. The sulfuric acid used in the manufacturing process is produced on-site by a process that involves burning sulfur.

7. The subject permit will allow PCS Phosphate to construct a new sulfuric acid plant to replace two existing on-site plants.
8. The new plant will produce over 4,500 tons of sulfuric acid a day, an increase of over 1,000 tons a day over the present output of the existing plants.
9. The new plant will emit pollutants into the air, including sulfur dioxide, nitrogen oxides, and sulfuric acid mist. PCS Phosphate has proposed a modification to the facility resulting in a significant net increase in air quality emissions. The proposed increase in air quality emissions qualifies as a major modification under PSD permitting requirements. The FWS reviews and evaluates all PSD permits that may affect air quality related values (AQRVs) at Federal Class I areas managed by the Agency.
10. Due to the close proximity of the PCS Phosphate facility and the frequency of the west to east wind direction, air emissions from the PCS Phosphate facility have the potential to greatly affect the visibility at Swanquarter.
11. The EPA has addressed situations when notice to FLMs should be made and under what circumstances a proposed site "may affect" a Class I area. In a memo dated March 19, 1979, the EPA advised its Regional Offices that notice to FLMs should be given whenever an application was made for a permit for a site that was within 100 km of a Class I area, and on a case-by-case basis for very large sources to be located more than 100 km from the Class I area.
12. On August 25, 2005, a pre-application meeting was held between PCS Phosphate and the NCDENR, regarding PSD permitting methodology and

requirements.

13. At the pre-application meeting an air quality modeling protocol, dated August 25, 2005, was submitted to the NCDENR.

14. The Modeling Protocol was approved by the NCDENR by letter dated September 15, 2005.

15. The FWS was not notified that either the pre-application meeting occurred or that the air quality modeling protocol was agreed to.

16. The FWS was not consulted about the air quality modeling protocol and had no input into it.

17. On October 31, 2005, PCS Phosphate submitted the subject permit application to the NCDENR.

18. The NCDENR did not properly/timely notify the FWS that the permit application had been submitted.

19. On August 23, 2006, and June 28, 2007, the URS Corporation (URS), an environmental consulting firm representing PCS Phosphate, submitted additional information for the subject permit application to the NCDENR.

20. The NCDENR did not notify the FWS that the additional information had been submitted.

21. The NCDENR did not furnish the FWS with a copy of all information relevant to the permit application, including an analysis provided by the source of the potential impact of the proposed source on visibility at Swanquarter, either at the time of the pre-application meeting or at the time the permit

application was submitted.

22. On November 5, 2007, when NCDENR gave public notice of the PCS Phosphate permit action and issued its preliminary determination and draft permit, it did send FWS copies of the preliminary determination and permit.

23. The FWS was not furnished with a copy of the permit application and the modeling results until after the FWS requested them on November 26, 2007.

24. The PCS Phosphate permit was issued on January 4, 2008.

25. The NCDENR did not notify the FWS that the permit had been issued until February 28, 2008, when the FWS inquired about the status of the review.

26. The modeling protocol submitted at the pre-application meeting addressed visibility modeling for impacts at Class I areas and used a baseline of current conditions, rather than natural conditions.

27. In 2000, after requests from both industry and state regulatory authorities for uniformity and clarity concerning the methods used by the Federal Land Managers to determine whether a proposed new source or major modification would have adverse effects on Class I areas, the FLMs agreed to and published a document know as FLAG, in which they set out the methods which they would use nationwide in making Class I adverse impact determinations. The FWS's review of PSD permits (as established in FLAG2000) uses natural visibility conditions as a visibility baseline for all visibility impact analysis. This standard is consistent with and was established by the EPA for its visibility protection program at all Federal Class I areas. The Clean Air Act

established a national goal for all Class I areas to be at natural visibility conditions by the year 2064.

28. FLAG is a guidance document, in that it informs the industry, state regulatory authorities and the public what methods and analytical processes the FLMs will use to evaluate the predicted effects that emissions from proposed sources will have on Class I areas. FLAG is also a binding agreement between the FLMs and requires them to use the methods and processes that it contains.

29. In FLAG, the FLMs agreed to use natural conditions as the baseline for determining whether emissions from a proposed source would have adverse impacts on visibility at Class I areas.

30. The FWS first became aware that current conditions had been used as the baseline for visibility modeling in the PCS Phosphate permit application, when it was sent a copy of the permit application and associated materials on November 26, 2007.

31. The FWS submitted comments on December 5, 2007, the comment period deadline, after having only nine days in which to review the permit application.

32. One of the FWS comments was that natural conditions should have been used as the baseline for visibility modeling.

33. For proposed sources located within 50 km of a Class I area, the VISCREEN plume model is the modeling tool initially used to furnish the FLMs the data needed to estimate the impact on visibility predicted from the source's emissions.

34. Use of the VISCREEN model to produce data useful to the FLM for an analysis of visibility impacts to a Class I area requires emissions data specific to the proposed facility and an estimation of natural background at that location.

35. Because the FWS was not furnished with the visibility analysis until November 26, 2007, and the analysis furnished used a baseline that the Federal Land Managers had not agreed to use, the FWS was unable to make a determination of whether the emissions from the proposed source would have an adverse impact on visibility at Swanquarter.

36. From communications between the FWS and NCDENR, the FWS understood that PCS Phosphate would revise its modeling to address the FWS concerns; however, revised materials were not received before the permit was issued.

37. On February 27, 2008, the FWS inquired of the NCDENR concerning the status of the PCS Phosphate permit and was told that it had been issued.

38. Subsequent to the permit being issued and the filing of the subject appeal by the FWS, PCS Phosphate submitted to the FWS visibility modeling using natural conditions as a baseline.

39. After reviewing the visibility analysis which used natural conditions, the FWS determined that the emissions expected to be produced as a result of the subject permit would not cause an adverse impact on visibility at Swanquarter.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this matter. To the extent that 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 the given labels.
2. The U.S. Environmental protection Agency (EPA) has the authority under the CAA to publish governing regulations and to approve and oversee state regulatory PSD programs.
3. The North Carolina PSD permitting program is implemented by regulations at 15A N.C.A.C. 2D.0530 and is modeled after and incorporates by reference EPA regulations, including at 15A N.C.A.C. 2D.0530(q).
4. The "purpose" of North Carolina's rule, 15A N.C.A.C. 2D.0530, "is to implement a program for the prevention of significant deterioration of air quality as required by 40 CFR 51.166."
5. North Carolina's regulations at 15A N.C.A.C. 2D.0530(t) require the NCDENR to "provide written notification to all affected Federal Land Managers within 30 days of receiving the permit application or within 30 days of receiving advance notification of an application" when a proposed source or major modification "may affect" a Class I area.
6. The term "may affect" in 15A N.C.A.C. 2D.0530(t) is not otherwise defined in North Carolina's regulations; therefore, the interpretation given that term by the

EPA for its counterpart regulation governs. EPA's position is that a proposed source "may affect" a Class I area if it will be located within 100km of the area, or, on a case-by-case basis, if it is over 100km but is a very large source. Prairie State p. 148; In re Knauf p. 155(lexis p. 78), citing EPA's New Source Review Manual at E.16.

7. The notification required by 15A N.C.A.C. 2D.0530(t) and the visibility determination made by the FLM under the authority of 15A N.C.A.C. 2D.0530(t)(2) is not related to or contingent upon the analysis performed to determine whether the proposed source will consume a Class I increment.

8. The NCDENR failed to notify the FWS as required by 15A N.C.A.C. 2D.0530(t) of the pre-application meeting and of the filing of the permit application.

9. The NCDENR failed to comply with 15A N.C.A.C. 2D.0530(t) by failing to timely furnish the FWS a copy of all information relevant to the permit application, including a proper analysis provided by the source of the potential impact of the proposed source on visibility at Swanquarter.

10. The visibility analysis required by 15A N.C.A.C. 2D.0530(t) is for the FLM to use in making a determination of whether or not emissions from the proposed source will have an adverse impact on visibility at the Class I area.

11. The FLMs are bound by FLAG to use "natural conditions" as the baseline for making an adverse impact on visibility determination.

12. North Carolina's PSD regulations do not address what baseline to use for the visibility analysis required by 15A N.C.A.C. 2D.0530(t). The NCDENR has

decided to implement a policy of using "current conditions" as the baseline instead of the baseline of "natural conditions" agreed to by the FLMs in FLAG.

13. Because the visibility analysis required by 15A N.C.A.C. 2D.0530(t) is for the use of the FLMs and the FLMs are bound by FLAG to use "natural conditions" as a baseline for visibility determinations, the decision by the NCDENR to implement a policy that "current conditions" should be used as the baseline for the visibility analysis required by 15A N.C.A.C. 2D.0530(t) is erroneous.

14. Subsequent to the issuing of the subject permit and to the FWS being furnished by PCS Phosphate with visibility modeling using natural conditions as the baseline, the FWS exercised its authority under 15A N.C.A.C. 2D.0530(t) and determined that the emissions from the proposed source would not have an adverse impact on visibility at Swanquarter, which validated the issuance of the permit.

DECISION

Based on the forgoing Findings of Fact and Conclusions of Law, it is hereby decided that the Motion for Summary Judgment filed by the Petitioner be granted as to sources in the future being required to use "natural conditions" as a baseline for the visibility analysis required by 15A N.C.A.C. 2D .0503(t). It is also decided that the subject permit not be suspended or revoked because the FWS has determined that emissions from the proposed source will not have an adverse impact on the Class I area.

NOTICE

The agency that will make the final decision in this contested case is the North Carolina Environmental Management Commission. The Agency is required to give

each party an opportunity to file exceptions to and written arguments concerning this Decision. The Agency is further required to serve a copy of the Final Agency Decision on all parties or their attorneys of record and on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina 27699-6714.

This the 5th day of March, 2009.

Fred G. Morrison Jr.
Senior Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEY FOR RESPONDENT INTERVENOR

This the 5th day of March, 2009.

Debra Q. Gray
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STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINSTRATIVE HEARINGS
COUNTY OF WILSON	08 OSP 0212

John Baker Warren, Petitioner, v. N. C. Department of Crime Control & Public Safety; N. C. Highway Patrol Respondent.	**DECISION**

This contested case was heard before the undersigned Administrative Law Judge on December 3 and 4, 2008, in Raleigh, North Carolina.

APPEARANCES

PETITIONER: J. Michael McGuinness
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Elizabethtown, NC 28337-0952

RESPONDENT: Ashby T. Ray
Assistant Attorney General
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ISSUE

Whether the Respondent had just cause to dismiss the Petitioner for violating Respondent's Directives on Unbecoming Conduct and Conformance to Laws.

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 makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, 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. Petitioner began his employment with the North Carolina Highway Patrol in May of 1998. He was promoted to Sergeant in 2001 and to First Sergeant in February of 2004. At the time of his dismissal he was serving as a First Sergeant, assigned to Communications and Logistics where he oversaw 33 civilian employees.

2. He was terminated from that employment as a result of the events occurring on September 9, 2007. Petitioner properly followed grievance procedure and appealed his dismissal to the Office of Administrative Hearings as being without just cause.

3. Petitioner was customarily assigned a patrol car to drive to and from work with some latitude for limited personal use. However, on the early morning hours of September 9, 2007 Petitioner was driving a "spare" State Highway Patrol car. This vehicle was an unmarked and stripped down vehicle. The only way to identify the vehicle as one belonging to the Highway Patrol was the license plate, which read, "SHP-2067."

4. The facts at issue in this contested case occur on September 9, 2007 and revolve around Petitioner's operation and use of the vehicle owned by the Highway Patrol while he was off duty.

5. Petitioner admits and there is no dispute that on or about September 9, 2007 he willfully and intentionally drove his assigned Highway Patrol car while he was off duty to a private residence for the purpose of drinking and "hanging out." Petitioner further admits that he willfully and intentionally placed an open bottle of vodka in the trunk of his State issued Highway Patrol car. Petitioner admits that these actions were against Highway Patrol policy.

6. According to the Petitioner, he was living at the residence with his mother and aunt in September, 2007. On September 8, 2007, Petitioner went to the residence of Cindy Potts approximately 6:30 p.m. but found the dinner plans with Ms. Potts had been canceled by Ms. Potts with no prior notice given to Mr. Warren. Petitioner Warren had dinner at approximately 6:30 p.m. or 7:00 p.m. and he stayed at his home for some period of time thereafter.

7. After watching a movie, he decided to go to the residence of an acquaintance Cheryl Ellis. Petitioner admitted he was aware there was a possibility that his ex-fiancée, Cindy Potts, would be present at Ms. Ellis' residence that evening.

8. According to Petitioner, he planned on leaving in his personal truck. In order to leave, he had to walk through the area where his aunt was sleeping. His aunt's dog barked, waking her, and he had a brief discussion with his aunt. When outside, he realized that he had grabbed the set of keys for his Highway Patrol car instead of his truck keys. Rather than going back into the house and bothering his aunt again, he just drove the State Highway Patrol vehicle. As he was leaving the house, he took a bottle of liquor with him. He placed the bottle of liquor in the trunk of the Highway Patrol vehicle to conform to the current law for transporting an open bottle of liquor of North Carolina in order to drive approximately 12 miles to Ms. Ellis' residence.

9. According to Mr. Warren, he did not drink any alcohol out of the bottle of liquor that he placed in the trunk at home or any time earlier that day. He also contends that he did not drink any alcohol in travel from his residence to the Ellis residence that night, as the alcohol was in the trunk of the car.

10. There had never been any alcohol in either one of the two cups inside his vehicle. The two cups had been left in the car from earlier in the week.

11. There are differing accounts as to when Petitioner arrived at Ms. Ellis' residence, but the credible evidence is that Petitioner arrived at Ms. Ellis' residence at approximately 12:30 a.m. on September 9, 2007.

12. Once Petitioner arrived at Ms. Ellis' residence he parked the Highway Patrol vehicle and was greeted by Ms. Ellis and another individual who were drinking shots of vodka under a carport. They asked Petitioner if he wanted to drink with them, to which he responded yes, and he began to drink shots of vodka with them.

13. Petitioner's ex-fiancée with whom he had been in a dating relationship for several years, Ms. Cindy Potts, was at Ms. Ellis' residence when Petitioner arrived. She was in a building across the driveway and approximately fifty (50) feet from where Petitioner was located under the carport. Ms. Potts' daughter and other children were in that building socializing.

14. Ms. Potts observed the Petitioner when he arrived and saw nothing unusual about his demeanor. She was approximately fifty (50) feet away, the area was well lit and she had an unobstructed view of Petitioner. She was standing on a deck outside the building and observed as Petitioner took eight (8) shots of vodka within 45 – 50 minutes of the time he arrived. She observed him with a plastic drink cup but did not see him drink anything from that cup.

15. Earlier in the evening, Ms. Potts had observed Ms. Ellis get out a bottle of vodka and a "regular small shot glass."

16. She decided to leave at approximately 1:15 p.m. She did not want to have any contact with Petitioner so she sent her daughter to get her keys and then walked behind the building where she had been standing to get to her car so Petitioner would not see her.

17. As Ms. Potts was getting into her car she was confronted by Ms. Ellis, who did not want her to leave. Ms. Potts and Ms. Ellis became engaged in an argument, which escalated to Ms. Ellis attempting to physically restrain Ms. Potts from leaving.

18. Petitioner heard the altercation and went over to where the noise was coming from. It was at that time that he observed Ms. Ellis and Ms. Potts in the midst of an altercation. Ms. Ellis was intoxicated at the time and Ms. Potts had only had one drink of alcohol with dinner at approximately 7:30 p.m. The Petitioner was not an active participant in the altercation between the two women and did not in any way have an altercation with Ms. Potts.

19. Ms. Potts spoke with Petitioner the morning after he was arrested and before she spoke with Lt. Lisenby, the Internal Affairs investigator.

20. In response to the 9-1-1 call, several members of the Nash County Sheriff's Officer responded to Ms. Ellis' residence. When they arrived, Ms. Potts had already left, but Petitioner was still there.

21. According to the CAD Operations Report introduced by Respondent as part of its Exhibit 1, the first officer on the scene was Sgt. Ricks, identified as "Unit 50", who arrived at 1:51:28 a.m. Sgt Ricks did not testify.

22. Deputy Charles E. Baker responded to a call of a domestic disturbance in the early morning hours of September 9, 2007. Deputy Baker has worked as a Deputy Sheriff with Nash County Sheriff's Office for over 5 years.

23. The time of dispatch on the CAD Report is 1:47 a.m. From the report it is indistinguishable as to whether or not the dispatch was only to unit 50, or to the entire department; however, Deputy Baker testified and his report states that he was dispatched at 1:42 a.m. Sgt. Ricks arrived on scene at 1:51 a.m. according to the CAD and he was already on the scene when Deputy Baker arrived. Deputy Baker testified that it took him approximately twenty five minutes to arrive at the Ellis residence. The earliest Deputy Baker would have arrived would have been around 2:10 a.m. or thereafter. The only recording for Deputy Baker on the CAD Report is that he was on the scene at 3:55 a.m.

24. After he arrived at the residence of Ms. Ellis he observed the silver Crown Victoria with an "SHP" license plate that had been driven to the scene by Petitioner. Deputy Baker knew that all cars with an "SHP" prefix on the North Carolina license plates are Highway Patrol vehicles.

25. When Deputy Baker arrived at Ms. Ellis' residence, there were a number of persons there who had apparently been drinking. His initial interaction with Petitioner was when he observed Ms. Ellis had grabbed Petitioner by the collar and had raised her hands as if she was going to strike him. Deputy Baker's focus was to separate the two. During this confrontation, Respondent had his hands in his pocket and was in no manner being confrontational with Ms. Ellis. At this point Deputy Baker did not have any conversation with Mr. Warren.

26. Deputy Baker stated that he was at the residence for approximately an hour and half and the CAD Report shows that he was on the scene at 3:55 a.m. At a time later in the evening after he initially saw the interaction between Ms. Ellis and Mr. Warren, Deputy Baker had a conversation with Mr. Warren and noticed a strong odor of alcohol. Initially Deputy Baker's opinion was only that Mr. Warren had consumed alcohol. As time progressed while he was on the scene, Deputy Baker observed slurred speech and red, glassy eyes and formed the opinion that Mr. Warren was extremely intoxicated.

27. Petitioner told Deputy Baker that he had consumed one beer and two shots. Deputy Baker was 100% confident that Petitioner told him that he had consumed one beer and two shots.

28. During the entire interaction between Deputy Baker and Petitioner, Petitioner was courteous and did not cause any problems.

29. Lt. Steve Saunders has been employed with the Nash County Sheriff's Office for 14 years and was previously a Rocky Mount Police Officer for six (6) years.

30. Lt. Saunders responded to Ms. Ellis' residence on September 9, 2007 and encountered Petitioner there.

31. Lt. Saunders does not recall when he arrived but estimates around 2:00 a.m. on September 9. He and Lt. Wells arrived at the same time since they were following one another. According to the CAD Report, it would have been no earlier than 2:12 a.m. when they were en route. There is no notation of the time they are on the scene. Lt. Saunders observed that Petitioner was swaying slightly, was glassy eyed and a little slurred in his speech. He did not form the opinion that Mr. Warren was impaired, but only that he had been consuming alcohol.

32. Petitioner told Lt. Saunders that he had consumed either two (2) shots and one (1) beer or one (1) beer and two (2) shots.

33. Lt. Todd Wells has been with the Nash County Sheriff's Office for fifteen (15) years and previously worked for the Rocky Mount Police Department for two (2) years.

34. Lt. Wells also responded to Ms. Ellis' residence on September 9, 2007. He does not recall when he arrived but in looking at the CAD Report he observes that he was en route at 2:12 a.m., but does not say how long it took for him to get to the residence from the traffic stop in which he was engaged. Lt. Wells does not know what the notation of "REM" on the CAD Report means, indicating a time of 3:39 a.m. relating to this incident.

35. Although Lt. Wells never had a conversation with Petitioner and never got closer than five to ten (5-10) feet from him, he observed Petitioner was not steady on his feet and had slurred speech as he spoke with Lt. Saunders, who observed "little" slur. Lt. Wells believed Petitioner to be obviously impaired. Lt. Wells overheard Petitioner tell Lt. Saunders that he had consumed one (1) shot and one (1) beer.

36. Lt. Allen Wilson has been employed with the North Carolina Highway Patrol since 1987.

37. Lt. Wilson was "on call" for the weekend of September 8th and 9th of 2007. As the on call officer, he received the call about Petitioner and an incident at Ms. Ellis' residence. Pursuant to Patrol Policy, he notified the State On-Duty Trooper, who was Major Walter Wilson.

38. Lt. Wilson arrived at Ms. Ellis' residence and encountered Petitioner at approximately 3:00 a.m. on September 9, 2007. Lt. Wilson observed that Petitioner had an odor of alcohol, red glassy eyes and slow than normal speech. He asked Petitioner to sit in his Patrol car almost immediately after first speaking with him.

39. While in Lt. Wilson's Patrol vehicle, Petitioner told Lt. Wilson that he had three to four (3-4) shots of vodka when he arrived, then 15 to 20 minutes later there was a disturbance between Ms. Potts and Ms. Ellis and 15 to 20 minutes after that members of the Nash County Sheriff's Office arrived. Petitioner told Lt. Wilson that he didn't know why he had driven the Highway Patrol vehicle to Ms. Ellis' residence.

40. His estimations of time are not in keeping with the credible evidence in that it was approximately 45 – 50 minutes at least before the altercation between Ms. Potts and Ms. Ellis and approximately an additional 35 - 45 minutes at least before the first deputy arrived.

41. Based on the Petitioner's statement that he had had only 3 – 4 shots of vodka, Lt. Wilson's observations of the Petitioner and the alco-sensor tests, Lt. Wilson formed the opinion that Petitioner was impaired and that he had been impaired when he arrived at Ms. Ellis' residence.

42. Lt. Wilson placed Petitioner under arrest, handcuffed him and placed him back in his Patrol car to transport him to the magistrate's office.

43. Lt. Wilson checked Petitioner's Highway Patrol vehicle to ensure there was not an unsecured weapon in it, finding that there was no unsecured weapon. He did not notice any odor of alcohol inside the vehicle. He did not check the trunk. Lt. Wilson observed a picnic table with a bottle of vodka and a shot glass on it, close to where Petitioner's Highway Patrol vehicle was parked. Lt. Wilson walked up to and shined his flashlight on the shot glass. It was a small, one ounce shot glass, with no writing or markings on it. Neither the shot glass nor the vodka was taken into custody for evidence.

44. Lt. Wilson then transported Petitioner to the magistrate's office. While in the car, Petitioner asked Lt. Wilson why he was being arrested. Lt. Wilson explained his arrest was based on Lt. Wilson's opinion that Petitioner had not consumed enough alcohol after arriving at Ms. Ellis' residence to explain his level of impairment.

45. At that time Petitioner said that Lt. Wilson had misunderstood and changed his story, telling Lt. Wilson that he had consumed 5, 6, 7, 8 shots of vodka. On the way to the Magistrate's office, Petitioner also told Lt. Wilson that he had arrived at the residence at approximately 11:00 p.m., clearly not correct.

46. Once at the Magistrate's office, Petitioner was read his Intoxilyzer rights at 4:17 a.m. on September 9, 2007. He submitted to a breath test at 4:46 a.m. and again at 4:47 a.m. The results of both tests were a .13 blood alcohol content (BAC).

47. Lt. Wilson read Petitioner his Miranda rights at 4:53 a.m. and then questioned him. On his Driving While Impaired Report form, Lt. Wilson noted that Mr. Warren's "speech was ok but slow." At that time Petitioner told Lt. Wilson that he had consumed 5, 6, 7 shots and then 3 or 4 more. Petitioner told the Magistrate that he had 7 or 8 shots and was impaired, but that he had not had any alcohol prior to arriving at the Ellis residence. Lt. Wilson acknowledges that the

characterization by the Petitioner of the number of shots that he had—"5, 6, 7 shots"—was an estimate of what Petitioner thought he had consumed.

48. A vodka bottle was found in the trunk of the car that Petitioner Warren had been driving on Sunday afternoon around 12:00 p.m. by an uninvolved sergeant of the Highway Patrol. The bottle of vodka was first observed by Lt. Wilson approximately 10:45 a.m. on Monday, September 10, 2007. Lt. Wilson also observed two cups inside the vehicle, one of which smelled of alcohol in his opinion. Although he took custody of the cup, it was not submitted for any testing to determine if alcohol was present.

49. Lt. Wilson did not ask Mr. Warren to submit to any psycho-physical tests as customary in driving while impaired arrests. No one told Lt. Wilson how to conduct his investigation, or what course of action to take.

50. Lt. Wilson interviewed several witnesses the next day, along with Lt. Lisenby with the Internal Affairs Division of the Highway Patrol. Lt. Wilson was not present when Internal Affairs conducted the interview of Petitioner. His only contact with Petitioner was the morning of the events when he placed Petitioner under arrest. Lt. Wilson did not have access to, or knowledge of, any of the statements made by Petitioner during his Internal Affairs interview. Lt. Wilson's investigation was separate and apart from the Internal Affairs investigation.

51. Lt. Wilson had had a good working relationship with Petitioner, and the Petitioner was professional and respectful during the events at issue.

52. Capt. Ben Lee Parham was Petitioner's supervisor at the time of Petitioner's termination. Captain Parham had been with the Patrol for twenty four and a half years.

53. Captain Parham has evaluated Petitioner Warren's performance and conduct as a Patrol officer under his command. Petitioner was an excellent employee and was not a "clock watcher". Captain Parham found him to be a productive and efficient employee for the Patrol, and Petitioner Warren was very honest and very trustworthy. Petitioner Warren was a conscientious and respectful employee.

54. Capt. Parham admitted that, while Petitioner worked for him, he had investigated a complaint about Petitioner relating to an alleged domestic disturbance. Petitioner was exonerated in that matter.

55. Retired First Sergeant Ervin Dwight Marshmon was Petitioner's supervisor from 2002 to 2004. He testified that Petitioner was an outstanding subordinate and an asset to the district. Mr. Marshmon had a complaint about Petitioner during that time frame that he referred to Internal Affairs for investigation. Mr. Marshmon also testified that it is important for all members of the Highway Patrol, including supervisors, to behave in such a manner so as to set a good example for others.

56. Lt. Brian Lisenby has been with the North Carolina Highway Patrol for eighteen (18) years. In September of 2007 he was assigned as a lead investigator with the Internal Affairs

Division of the Highway Patrol. As part of the internal investigation into Petitioner's actions, Lt. Lisenby conducted an interview with Petitioner. During that interview Petitioner told Internal Affairs that he arrived at Ms. Ellis' residence around 12:30 a.m. on September 9, 2007. Petitioner told Lt. Lisenby that he took six (6) shots of vodka and then another two to four (2-4) shots of vodka.

57. Lt. Lisenby asked Petitioner if he was drinking from a standard one ounce shot glass and Petitioner said he thought that he was, but was somewhat equivocal about it. The glass was described as approximately one and one half (1 ½) inches high. Throughout the course of the interview Lt. Lisenby referred to the amount consumed interchangeably as either as shots or ounces. Petitioner never disputed that the shots he said he took equaled one ounce. Lt. Lisenby assumed that the shot glass was full each time Petitioner drank from it. At no point during the interview with Internal Affairs, or during his initial conversation with Lt. Wilson, did Petitioner ever tell anyone that he was drinking vodka out of anything but a shot glass.

58. Petitioner admitted to Lt. Lisenby that he drove his Highway Patrol vehicle off duty, without permission, after placing an open bottle of vodka in the trunk. Petitioner told Internal Affairs that he drove his Highway Patrol vehicle because he accidentally picked up the wrong set of car keys and didn't want to go back into the house and disturb his aunt. This statement contradicts his earlier statement to Lt. Wilson that he didn't know why he had driven his Highway Patrol vehicle.

59. Petitioner admitted that he drove his Highway Patrol vehicle to Ms. Ellis' residence, with an open bottle of vodka in the trunk, for the purpose of drinking and hanging out. (T-280)

60. Lt. Lisenby also interviewed several of the people who were present the night of Petitioner's arrest, including Ms. Potts. Lt. Lisenby characterized Ms. Potts' demeanor as reluctant. Lt. Lisenby also interviewed Ms. Ellis and learned from Ms. Ellis that she was very impaired the previous night during the time of the incident. Lt. Lisenby also learned that Mr. Braswell, with whom Petitioner had been drinking under the carport, admitted that he was drinking heavily. Lt. Lisenby was conducting the internal affairs investigation while Lt. Wilson was conducting a separate criminal investigation.

61. Lt. Lisenby's role as the lead investigator was to gather facts and compile a Report of Investigation and submit it to the Director of Internal Affairs, which was separate and apart from the criminal investigation being conducted by Lt. Wilson. His job was not to make any sort of evaluation or recommendation; he served merely as a fact finder.

62. Paul Glover is the Branch Head for the Forensic Tests for Alcohol Branch of Department of Health and Human Services. He has been the Branch head for the last year and a half. Prior to that, he worked there for 10 years as a research scientist. He has also worked as a Research Scientist in Oak Ridge for seven (7) years; the National Institute of Environmental Health Sciences for five (5) years; and Burroughs Wellcome Pharmaceuticals for seven (7) years. Mr. Glover has qualified as an expert witness between 220 and 230 times. Of those times approximately 40 of them were specific to his expertise on retrograde extrapolation. Mr. Glover was tendered and admitted as an expert in the field of retrograde extrapolation. Retrograde

extrapolation is the scientific study and analysis of the rate at which alcohol metabolizes or is eliminated by the human body. There is no certification or licensure for this field.

63. Mr. Glover was given specific data by Lt. Lisenby and asked to calculate what the alcohol content would have been at a given time. Mr. Glover was asked to give his opinion in two different scenarios with a male weighing 215 pounds—one with the subject having consumed one shot of vodka and one beer and the other with the subject having consumed between eight and 10 shots of vodka.

64. Mr. Glover used the rate of 0.0165 per hour as the rate of elimination of alcohol from the human body for his calculations. That rate of elimination has been accepted in trials in North Carolina courts.

65. According to Mr. Glover, an individual's weight does not impact the rate of elimination; however, he goes on to say that "their size will impact on their ultimate alcohol concentration." This is because the alcohol goes into the water containing tissues of the individual. The calculations are based upon an assumption of a male having sixty-five percent water in his body and a female having fifty-five percent water in her body.

66. An individuals experience with alcohol may affect the rate of elimination, potentially as much as three times the assumed rate. The rate used by Mr. Glover is the same as one would expect from inexperienced drinkers.

67. Ingestion of food only slightly impacts the rate of elimination and may cause the peaking of the alcohol concentration to be slower. Petitioner had eaten between 6:30 and 7:00 p.m.

68. The information provided to Mr. Glover by Lt. Lisenby was information that Petitioner had provided during his internal affairs interview. Specifically, that he arrived around 12:30 a.m. and consumed a total eight to ten (8-10) ounces of vodka and that he blew a .13 at 4:47 a.m. According to Mr. Glover's expert opinion, based on the facts he was given, Petitioner would have had a blood alcohol content of 0.10 or higher at 12:30 a.m., when he arrived at Ms. Ellis' residence in his Highway Patrol vehicle.

69. In the information provided to Mr. Glover, he states that the subject was "obviously impaired at 1:00." Mr. Glover states that this piece of information is as important as the report of the alcohol concentration. He does not know where the information came from but assumes and believes that is when the deputies arrived at the residence and the drinking stopped.

70. This is an erroneous assumption in that the earliest any deputy arrived would have been approximately 1:51 a.m. when Sgt. Ricks arrived. Sgt. Ricks did not testify. The only information about obvious impairment at 1:00 is an oblique reference to Mr. Cliff Braswell who was also impaired and did not testify. Mr. Glover makes the erroneous assumption that the reporter of the "obvious impairment" was someone trained to make such observations; i.e., law enforcement officers.

71. Deputy Baker arrived at the residence after 2:00 a.m. and after being there for some period of time observed the Petitioner to be extremely impaired. Lt. Saunders arrived sometime after 2:00 a.m. and has no opinion of the Petitioner's impairment. Lt. Wells arrived after 2:00 a.m. and after some time determined the Petitioner to be obviously impaired.

72. There is no credible evidence that the drinking stopped at 1:00 or that the Petitioner was obviously impaired at 1:00 a.m. To the contrary, the evidence indicates that the drinking continued until 2:00 a.m.

73. When questioned about different scenarios that would have made a significant difference in his opinion, Mr. Glover continually referred back to the erroneous assertion that Mr. Warren was obviously impaired at 1:00 a.m.

74. Mr. Glover assumes that the amount of alcohol ingested was in one ounce shots. He acknowledges that his calculations could be significantly different depending on the size of the shot glass or the amount alcohol in any shot glass. Mr. Glover concedes that had Mr. Warren ingested 20 ounces of alcohol, the reading of .13 on the Intoxilyzer would be consistent with zero alcohol at 12:30 a.m. when Mr. Warren arrived at the residence. He again qualifies it with the assumption of obvious impairment at 1:00. There is no calculation as to BAC if Mr. Warren drank until 2:00 a.m., especially if he drank 20 ounces of alcohol.

75. Mr. Glover's opinion that if Petitioner had consumed twenty (20) ounces of alcohol it would justify the .13 that Petitioner blew on the Intoxilyzer was not consistent with the version of events told by Petitioner during his interaction with Lt. Wilson or Lt. Lisenby. He was making his calculations based upon the information provided.

76. Mr. Glover testified that the proof or alcohol content of the vodka would have an impact on his calculations or opinion.

77. Ken Castelloe is employed as a Captain with the North Carolina Highway Patrol. He has been a member of the Highway Patrol for twenty-four (24) years. In early September of 2007, Capt. Castelloe was assigned as the Director of Internal Affairs for the Highway Patrol. It was his job to oversee the investigators and, once an investigation was complete, to make a recommendation on discipline.

78. Capt. Castelloe, reviewed the Report of Investigation and supporting documents in Petitioner's case and recommended that Petitioner be terminated from the Highway Patrol for violating two of the Highway Patrol's written directives. Capt. Castelloe was familiar with Petitioner's employment history with the Patrol at the time he made the recommendation.

79. The first directive alleged to have been violated is Directive H.1, § III Conformance to Laws, in that Petitioner: "Operated an unmarked Highway Patrol vehicle while subject to an impairing substance and was subsequently arrested and charged with DWI. First Sergeant Warren submitted to an intoxilyzer test and registered .13. On this occasion, First Sergeant Warren operated a motor vehicle while subject to an impairing substance, in violation of G.S. 20-138.1. First Sergeant Warren failed to obey the laws of the State of North Carolina."

80. The District Court driving while impaired criminal case against Petitioner Warren was dismissed at the close of the State's evidence, viewing the evidence in the light most favorable to the State.

81. The second grounds for termination was violation of Highway Patrol Directive H.1, § V Unbecoming Conduct, in that Petitioner: "By his own admission, left his residence in a state owned vehicle without permission, to travel to a friend's residence while off-duty. First Sergeant Warren admits that his intent was 'for the purpose of drinking and hanging out.' Furthermore, prior to leaving his residence, he placed an opened one-half gallon of vodka in the trunk of the vehicle. Upon arrival at the friend's residence, First Sergeant Warren engaged in a verbal altercation with his ex-girlfriend, whom [sic] was attempting to leave the residence. The altercation escalated to the point that 911 was called and deputies from the Nash County Sheriff's Office responded to the call. On these occasions, First Sergeant Warren failed to conduct himself, while off duty, in a manner that reflects most favorably upon the Highway Patrol and in keeping with the high standards of professional law enforcement. Furthermore, his conduct has brought the Highway Patrol into disrepute and reflected discredit upon the Patrol and himself."

82. Petitioner Warren admits that he drove the state owned vehicle to Ms. Ellis' residence for the purpose of drinking and hanging out and that he placed an opened bottle of vodka in the trunk of that vehicle. It is true that 9-1-1 was called and it was reported that Petitioner was involved in an altercation with Ms. Potts, and as a result of that call the Nash County Sheriff's Office responded. There is no evidence to substantiate that Mr. Warren was involved in a confrontation with Ms. Potts other than being present when Ms. Ellis and Ms. Potts had their confrontation. Ms. Ellis confronted Petitioner, but he remained under control throughout that event which was witnessed, at least partially, by the responding deputies.

83. Capt. Castelloe served in Internal Affairs as Director or as an investigator for a total of seven (7) years. According to the best of his memory and knowledge, no member of the Highway Patrol has ever been arrested for suspicion of driving while impaired and remained employed by the highway patrol.

84. According to the best of Capt. Castelloe's memory and knowledge that while there have been other instances of members transporting alcohol in their vehicles, none of them are consistent with, or the same as, Petitioner's actions as he understood the facts to be. Captain George Gray had alcohol in his patrol vehicle and was not terminated.

85. Capt. Castelloe articulated his opinion that Petitioner's actions were particularly egregious in that he made the conscious decision to drive his patrol car, when he had a clear option. He made a conscious decision to place an open bottle of Vodka in the trunk of his patrol car and then drive it without permission or authorization and that he drove his patrol car, off duty, for unauthorized personal business, specifically, for the purposes of getting to a party with the specific intent to drink and hang out. Additionally, when he was discovered at the party he had consumed such a significant amount of alcohol that he was noticeably impaired, even by his

own admission. Capt. Castelloe testified that such behavior is not consistent with the image and operation of the North Carolina Highway Patrol.

86. Capt. Castelloe stated that during his tenure with Internal Affairs an arrest for DWI always resulted in a termination or a resignation. Capt. Castelloe explained further that no one has ever done what Petitioner admits to having done, and kept his job with the Patrol.

87. The interviews of the witnesses in this matter were tape recorded by Internal Affairs investigators. Capt. Castelloe testified that it was a standard practice to record all internal affairs interviews. However, the interviews for this case were not transcribed.

88. Capt. Castelloe did not listen to the tapes of the interviews. The tape recorded evidence of all of the witness interviews was not provided to Colonel Fletcher Clay, the Patrol Commander.

89. Petitioner Warren requested that the cups in his vehicle be tested to determine whether or not there was alcohol in the cups. Capt. Castelloe smelled the cups that were left in Petitioner Warren's vehicle, and they smelled like tea to him. Capt. Castelloe made the decision to not have the cups tested.

90. There was no polygraph examination administered by Internal Affairs to Petitioner Warren.

91. The person who has the exclusive authority and responsibility to terminate a member of the Highway Patrol is the Colonel of the Highway Patrol. Capt. Castelloe's authority was to make a recommendation, not the decision for termination. Colonel Fletcher Clay made the decision to terminate Petitioner Warren's employment.

92. Petitioner joined the Highway Patrol in May of 1988 and was terminated from employment in September of 2007.

93. Petitioner testified that he has no idea how much alcohol he drank after he arrived and that he started drinking from a shot glass. During his testimony Petitioner was evasive about the size of the shot glass, even though there had been testimony that the glass used was a "standard" or "regular" or "small" shot glass. There is no evidence how much even a "regular" one ounce shot glass would hold if completely filled, beyond the markings for once ounce.

94. Petitioner contends that, at some point during the evening he began to drink vodka from a large cup and that he is not certain how much alcohol he consumed. Petitioner did not communicate this to Lt. Wilson during the criminal investigation or during the Internal Affairs investigation. He did not mention it in his written Member's statement. Petitioner admits that his contention that he switched from a shot glass to a big cup would be an important fact in the investigation. Ms. Potts stated that she saw Petitioner with a large plastic cup but that she never saw him drink from it.

95. Petitioner also stated that he drank a beer after arriving at the Ellis residence, a factor not considered in Mr. Glover's second calculation.

96. Petitioner had been a Trooper for almost twenty (20) years at the time of this incident and had made, by his own estimation, approximately one thousand five hundred (1,500) arrests for driving while impaired. Petitioner was aware that during an investigation into whether an individual was driving while impaired that the suspect's answers will be used against them and it is important to be precise and accurate when answering all questions. Petitioner was particularly aware that this would be the case if he was being investigated by Internal Affairs.

97. Petitioner recognizes that, as a member of the Highway Patrol, it is important to set a good example and that is especially true for someone in his position. At the time of his termination Petitioner was a First Sergeant who supervised thirty three (33) civilian employees.

98. Petitioner had never spent the night at Ms. Ellis' residence before. Ms. Potts testified that she and Petitioner had only been to Ms. Ellis' residence a few times and that she didn't know if Petitioner had never been there without her.

99. This was not Petitioner's first time consuming alcohol. When he drinks, vodka is his drink of choice.

100. Petitioner was aware of the Highway Patrol's various directives and policies and even testified that he knew he could "not survive" a DWI conviction as a Trooper. Petitioner testified that he "screwed up," but was not acknowledging that he drove while impaired on that evening.

101. Petitioner introduced into evidence transcripts of interviews with several witnesses who were at Ms. Ellis' residence on the morning of the September 9, 2007. These interviews were conducted by a private investigator and were submitted to the Employee Advisory Committee. Although these documents are relevant because they were submitted to the Employee Advisory Committee, they are given little to no weight because no one who was a part of the transcribed conversations testified that they were true an accurate copies of the conversations. The private investigator did not testify. Ms. Potts was interviewed and did testify but did not review or authenticate the transcript. Others interviewed were not subject to cross-examination.

102. Likewise, interviews conducted by Respondent and introduced into evidence of people who were not subject to cross examination are given little to no weight.

103. Petitioner offered some evidence of selective enforcement and disparate treatment in discipline. Other troopers committed egregious offenses and were not terminated. Lt. Lisenby's statement to the Employee Advisory Committee revealed that the Respondent's position was that transporting alcohol in the trunk of a state vehicle while off duty may have resulted in a warning or suspension.

104. There is no evidence that Col. Clay considered factors in mitigation or in aggravation.

BASED UPON the foregoing Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. To the extent that 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 the given labels.

2. Petitioner was continuously employed as a State Trooper for over 19 years. At the time of his dismissal, he was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

3. Because Petitioner has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal.

4. Pursuant to N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that "just cause" existed for the disciplinary action.

5. N.C.G.S. § 126-35(a) provides, in pertinent part, that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." Although the statute does not define "just cause," the words are to be accorded their ordinary meaning. *Amanini v. Dep't of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining "just cause" as, among other things, good or adequate reason).

6. While just cause is not susceptible of precise definition, our courts have held that it is "a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." *NC DENR v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

7. In *Carroll*, the Supreme Court enunciated the applicable tests for determining just cause in personnel cases. The Supreme Court explained that the fundamental question is whether

> "the disciplinary action taken was 'just'." Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." 358 N.C. at 669.

The Supreme Court concluded that "not every violation of law gives rise to 'just cause' for employee discipline." 358 N.C. at 669.

8. Further the Supreme Court held that; "Determining whether a public employee had just cause to discipline its employee requires two separate inquires: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just

cause for the disciplinary action taken." *NC DENR v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

9. Highway Patrol Directive H.1, § III, Conformance to Laws, states:

> Each member shall obey the laws of the United States, the State of North Carolina and of local jurisdiction. If facts revealed by a thorough investigation indicate there is substantial evidence that a member has committed acts which constitute a violation of a civil or criminal law, ordinance, or infraction other than a parking ordinance, then the member may be deemed to have violated this subsection, even if the member is not prosecuted or is found not guilty in court.

10. Highway Patrol Directive H.1, § V, Unbecoming Conduct, states:

> Members shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably upon the Highway Patrol and in keeping with the high standards of professional law enforcement. Unbecoming conduct shall include any conduct which tends to bring the Patrol into disrepute, or which reflects discredit upon any member(s) of the Patrol, or which tends to impair the operation and efficiency of the Patrol or of a member, or which violates Patrol policy.

11. Based on the totality of the evidence presented at the contested case hearing, having weighed the credibility of the witnesses who testified, the Respondent did not have sufficient evidence to terminate Petitioner for violation of Highway Patrol Directive H.1, §III, Conformance to Laws,

12. In this case, the retrograde extrapolation theory was not proven as being sufficiently reliable to establish that Petitioner Warren was in violation of the Patrol policy requiring conformance to laws. Respondent failed to provide sufficient and correct specific information to enable Mr. Glover to have a precise basis for his opinions. Mr. Glover's erroneous fixation on Petitioner's "obvious impairment" at 1:00 a.m. and reluctance to consider other factors which could have significantly altered his calculations renders the retrograde extrapolation conclusions of little or no value in determining whether or not Petitioner had alcohol in his body at the time he drove the State Highway Patrol automobile.

13. Any inferences from the retrograde extrapolation opinions by Mr. Glover were substantially and materially outweighed by the other admitted evidence. The inferences from Mr. Glover's opinions are insufficient to constitute credible and reliable proof by a preponderance of the evidence. The credible evidence presented does not support a conclusion that Mr. Warren had alcohol in his system when he arrived at the Ellis residence.

14. In order to substantiate a violation of the Respondent's conformance to laws policy, Respondent had the burden of proving the elements of driving while impaired. Respondent's

proof failed to prove the required elements including that the Petitioner had driven while impaired, or even that he drove the State Highway Patrol vehicle with any alcohol in his system.

15. Based on the totality of the evidence presented at the contested case hearing, and the credibility of the witnesses who testified, it is clear that Petitioner violated Highway Patrol Directive H.1, § V, Unbecoming Conduct, in that Respondent has shown by a preponderance of the evidence presented, based on its investigation and statements made by Petitioner that: By Petitioner's own admission, left his residence in a state owned vehicle without permission, to travel to a friend's residence while off-duty and that his intent was 'for the purpose of drinking and hanging out.' Prior to leaving his residence, Petitioner placed an opened one-half gallon of vodka in the trunk of the vehicle. There was altercation at the residence which escalated to the point that 9-1-1 was called reporting that Petitioner was involved. Deputies from the Nash County Sheriff's Office responded to the call. There is no evidence to substantiate that Mr. Warren was involved in a confrontation with Ms. Potts other than being present when Ms. Ellis and Ms. Potts had a confrontation. Ms. Ellis later confronted Petitioner, but he remained under control throughout that event which was witnessed, at least partially, by the responding deputies.

16. All procedural requirements for terminating Petitioner were followed pursuant to the North Carolina General Statutes, North Carolina State Personnel Manual, and the rules and policies of the North Carolina Department of Crime Control and Public Safety.

17. Petitioner was afforded all procedural and substantive due process rights during the investigation, application of discipline and appeal procedures. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L. Ed. 2d 494 (1985).

18. To terminate Petitioner based on findings that he drove a state owned vehicle while impaired would not have been treating him disparately from other members of the Highway Patrol. In that the allegation of driving while impaired is not substantiated, this Court finds and concludes as a matter of law that to terminate the Petitioner based on the allegations that are sustained would constitute disparate treatment.

19. Factors in mitigation are the Petitioner's excellent work history, his tenure of service with the Highway Patrol, his cooperation in the investigation, his candor, his acceptance of responsibility for the matters sustained herein and the likelihood that there will be no recurrence of matters alleged herein.

20. The Respondent did not call the agency decision-maker to testify at trial. The failure to provide evidence from the decision-maker is problematic in fully examining the agency's compliance with *Carroll* and other authorities. The Colonel of the Patrol is the only person with decision-making authority to terminate. A proper just cause determination requires fair consideration of the totality of all evidence. The failure to consider evidence adduced demonstrates arbitrariness.

21. Respondent has not met its burden and shown that it had just cause to terminate Petitioner from his employment with the North Carolina Highway Patrol.

DECISION

Based upon the foregoing findings of fact and conclusions of law, the termination of employment of Petitioner Warren should be REVERSED and overruled; there was no just cause for the termination of Petitioner's employment, that Petitioner shall be reinstated but that Respondent may impose commensurate discipline less than termination upon Sgt. Warren; that Petitioner be awarded back pay, reimbursement of all lost back benefits, and that counsel fees and costs be awarded to Petitioner.

ORDER

It is hereby ordered that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with North Carolina General Statute § 150B-36(b).

NOTICE

Before the agency makes its FINAL DECISION, it is required by N.C.G.S. § 150B-36(a) to give each party an opportunity to file exceptions to this DECISION, and to present written arguments to those in the agency who will make the final decision.

The agency that will make the final decision in this contested case is the State Personnel Commission.

The agency is required by N.C.G.S. § 150B-36(b) to serve a copy of the Final Decision to all parties and to furnish a copy to the Parties' attorney of record.

This the 17 day of April, 2009.

Donald W. Overby

Donald Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

J. Michael McGuinness
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PO Box 952
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ATTORNEY FOR PETITIONER

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This the 17th day of April, 2009.

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STATE OF NORTH CAROLINA		IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF NASH		08 OSP 0984
ROBERT ANTHONY COATS Petitioner,	)	
v.	)	**DECISION**
O'BERRY NEURO-MEDICAL TREATMENT CENTER Respondent.	)	

This matter came before Administrative Law Judge Shannon R. Joseph on November 21, 2008 in Raleigh, North Carolina. Judge Joseph having resigned her position, the case was reassigned to the undersigned to file the decision.

APPEARANCES

For Petitioner: Michael C. Byrne
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Suite 1130
150 Fayetteville Street
Raleigh, NC 27601

For Respondent: Dorothy Powers
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
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WITNESSES

For Petitioner:
Connie Anderson
Sandra Swain
Frank Farrell
Tracie Wilson
Glenda Potts
Robert Anthony Coats, Petitioner

For Respondent:
Robert Dively

STATEMENT OF THE CASE

On April 16, 2008, Petitioner, *pro se* filed a Petition for a Contested Case Hearing against Frank Farrell, Glenda Potts, O'BC alleging a violation of posting procedure. Petitioner further alleged that as a career state employee, he was denied the opportunity for a MRUD ("Mental Retardation Unit Director") position.

On or about May 12, 2008, Michael C. Byrne filed a Counsel's Notice of Appearance on behalf of the Petitioner.

On May 14, 2008, Respondent filed a Motion to Dismiss alleging lack of personal and subject matter jurisdiction. Respondent specifically argued that Frank Farrell and Glenda Potts were not an "agency" pursuant to N.C.G.S. 150B-22 and that the Petition was filed untimely. Petitioner received an extension of time in which to respond to Respondent's Motion to Dismiss and responded on July 1, 2008. In his response, Petitioner agreed that Frank Farrell and Glenda Potts should be removed from the caption and filed a Motion to Amend the Petition to reflect the proper name of the Respondent. In support of Petitioner's response to Respondent's Motion, Petitioner also filed an affidavit testifying that he filed his Petition within 30 days of his knowledge of facts alleged in his Petition.

On July 3, 2008, the Administrative Law Judge ("ALJ") entered an Order Granting in Part and Denying in Part Respondent's Motion to Dismiss. The Motion to Dismiss Frank Farrell and Glenda Potts was granted and their names were omitted from the caption. Respondent's Motion to Dismiss based on untimeliness resulting in lack of subject matter jurisdiction was denied.

On July 16, 2008, the ALJ entered an Order Amending the Petition's caption to: *Robert Anthony Coats, Petitioner v. O'Berry Neuro-Medical Treatment Center, Respondent.*

Also on July 16, 2008, Respondent filed a Motion for Summary Judgment alleging, in pertinent part, that the Mental Retardation Unit Director ("MRUD") was a reallocated position and therefore was not required to be posted. Respondent further alleged that since the position in question was a reallocation and not required to be posted, Petitioner failed to invoke the Office of Administrative Hearings subject matter jurisdiction pursuant to N.C. G.S. 126-34.1.

After Petitioner pursued discovery and pursuant to extensions of time, Petitioner responded to Respondent's Motion for Summary Judgment on October 27, 2008. On November 7, 2008, the ALJ denied Respondent's Motion for Summary Judgment.

ISSUE

Whether the Mental Retardation Habilitation Coordinator II ("MRHC II") position which was reallocated to a Mental Retardation Unit Director position was a vacant position and therefore required to be posted pursuant to N.C.G.S. § 126-7.1(a)?

EXHIBITS

Exhibits admitted on behalf of Petitioner:

1. deposition of Robert Dively
2. deposition of Glenda Potts
14. performance summary, 2007-2008

Petitioner's Exhibits 3 through 13 were not admitted as evidence, but were to be considered as legal authority:

3. 25 NCAC 1H .0637, Credentials Verification Procedures
4. 25 NCAC 1F .0104, Definitions
5. 25 NCAC 1H .0630, Recruitment and Selection Policy
6. 25 NCAC 1H .0631, Posting and Announcement of Vacancies
7. 25 NCAC 1H .0632, Applicant Information and Application
8. 25 NCAC 1H .0634, Selection of Applicants
9. 25 NCAC 1F .0307, Reallocation of a Position
10. 25 NCAC 1F .0303, Reallocation of an Established Position to Another Class
11. 25 NCAC 1D .0608, Reallocation
12. 25 NCAC 1F .0201, Classification Method
13. 25 NCAC 1D .0301, Promotion Definition and Policy

Exhibits admitted on behalf of Respondent:

1. Robert Dively's PD 107 (application) and resume
2. Position Posting Staff Psychologist II
3. Position Posting Mental Retardation Habilitation Coordinator II
4. Robert Dively's Position Description
5. Analyst Notes
6. DHHS Website "Applying For a Job"
7. DHHS Policy Section V "Merit-Based Selection Program Plan
8. State Personnel Manual Section 4, Page 20 "Reallocation"
9. State Personnel Manual Section 4, Page 12 "Promotion"

FINDINGS OF FACT

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 of the witnesses by taking into account the appropriate factors for judging 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.

1. The parties received notice of the scheduled hearing at least 15 days in advance of the hearing.

2. At all times material, Petitioner Robert Anthony Coats ("Petitioner") was a career state employee and was subject to the provisions of the State Personnel Act.

Dr. Frank Farrell, Director of O'Berry Center/ O'Berry Neuro-Medical Treatment Center

3. Dr. Frank Farrell ("Dr. Farrell") has a doctorate from the University of North Carolina at Chapel Hill. His bachelor's degree is from Mars Hill College in Mars Hill, North Carolina and he completed graduate work at the University of Texas at Austin. (T p 57)

4. Dr. Farrell is the Director of O'Berry Neuro-Medical Treatment Center ("O'Berry"). He began work at O'Berry on August 15th, 1975 in the activity program. Over the years he held a variety of different positions at O'Berry, including a Mental Retardation Unit Director ("MRUD") position. He was in charge of staff development and was in charge of a program where they did training and provided technical assistance in the 17 counties that O'Berry served. He has been the Director of O'Berry since July 1, 2005. (T pp 19, 57- 58).

5. In August of 1986, Dr. Farrell left the State and went to work for a private nonprofit group developing and operating programs in the community. He stayed there for two and a half years and then came back to O'Berry Center. He was a MRUD for a few months and then became the assistant director of O'Berry Center in 1989. He remained in that position until July 2005, when he became director of the center. He has a total of thirty-three years of State service. (T p 58)

6. As the Director of O'Berry, Dr. Farrell is responsible for the overall operation and management of the center. Approximately 290 individuals reside at O'Berry and there are 973 full-time positions. Dr. Farrell is responsible for the overall operation of the center. (T p 57)

History and Transition of O'Berry Center/ O'Berry Neuro-Medical Treatment Center

7. The population of O'Berry has changed dramatically over the years. The average age of residents is now over 50, and over 75 percent of the individuals at O'Berry are deemed medically fragile. They are more in need of nursing care than training and treatment. (T p 61)

8. O'Berry continued to be an ICF/MR until several years ago when it was announced that its role would change toward a neuromedical treatment center. In this new role, O'Berry would provide specialized services for people with developmental disabilities such as skilled nursing care, traumatic brain injury and Alzheimer's care. This plan for O'Berry was

proposed to the General Assembly and passed in 2005. (T pp 60-61, 63; Petitioner's exhibit 2, page 36)

9. An ICF/MR is focused on providing intensive training and treatment to individuals who are in the program. The focus is on learning and acquiring new skills. The focus of a skilled nursing facility is specialized services for people with developmental disabilities such as skilled nursing care, traumatic brain injury, and Alzheimer's care. (T pp 60-61, 63; Petitioner's exhibit 2, pages 30, 36)

10. In order for O'Berry to become certified as a skilled nursing facility, the first step that had to occur was to make the buildings on the O'Berry campus meet the life safety code for the new ICF/MR regulations. This required sprinklers, call bells in each unit, backup generators, and some physical plant things that they did not have. The process of trying to obtain the funds and put the architectural plans in place so that O'Berry could meet the life safety code requirements began in 2005. The plan of transition has continued taking place from 2005 on. (T pp 61-62; 234-235; Petitioner's exhibit 1, pages 30-31; Petitioner's exhibit 2, pages 35- 36, 43)

11. Mr. Neal Enevoldsen was the contact person between O'Berry Center and the Division of Property and Construction regarding the repair and renovation projects needed for O'Berry to become certified as a skilled nursing facility. Mr. Enevoldsen works with the architects and the contractors, and works with the division to find funds for these various projects. (T p 76)

12. As a result of O'Berry's changing mission, has there been a reorganization. The direct care staff are being trained to become certified nursing assistants. The previous focus on training required more teachers. Now, as teachers are vacating, the positions are not being filled. There is a need for more nursing staff. (T p 62; Petitioner's exhibit 2, page 48)

13. The Omnibus Budget Reconciliation Act, ("OBRA") 1997 includes regulations regarding nursing home issues. These regulations are applicable to O'Berry's transition from an intermediate care facility for individuals with mental retardation ("ICF/MR") to a skilled nursing facility. (T pp 40-41; Petitioner's exhibit 2, page 30)

14. Neither Dr. Farrell nor any of his staff have experience with nursing home regulations. (T p 63)

15. The name of O'Berry has changed from O'Berry Developmental Center to O'Berry Neuro-Medical Treatment Center. The General Assembly approved the name change in 2007. (T pp 61, 91)

The "Assistant to the Director" position

16. When Dr Farrell was the assistant director at O'Berry, he supervised the residential services, professional departments, and a number of different departments directly. As director, he wanted more hands-on contact with those departments and decided not to have an

interim between himself and those major divisions. So, Dr Farrell reclassified the role of the "assistant director" to an "assistant *to the* director, who would not have administrative responsibility over the other primary divisions. Because Dr. Farrell changed the role of the assistant director position, it was reallocated/reclassified to an assistant *to the* director position. (T pp 58-59)

17. Robert Dively, who had previously worked at O'Berry from 1979 to 1986, applied for the newly reclassified position of assistant to the director at O'Berry. (T pp 21, 59-60, 220-222; Respondent's exhibit 1; Petitioner's exhibit 1, pages 6-7, 13)

18. Mr. Dively was interviewed for the assistant to the director position by an interview panel. The panel consisted of Dr. Farrell, Dr. Scott McConnaughey, Ms. Glenda Potts, and Ms. Carolyn Davis. The interview panel felt that Mr. Dively and Ms. Deborah Exum, an internal candidate, were both excellent candidates. They both had skills that could be used to move the organization forward. Ms. Exum's skills and experience were more in administrative areas, policy development, and administrative investigations. The interview panel felt that there was an administrative need, so they selected Ms. Exum for the assistant to the director position. (T pp 22, 65, 227-228; Petitioner's exhibit 1, pages 13-14; Petitioner's exhibit 2, page 7)

19. At the end of the interview process, Dr. Farrell took Mr. Dively for a tour of the campus. (T p 229; Petitioner's exhibit 1, page 15)

Robert Dively - Background; training and experience

20. Robert Dively has a Bachelor's and Master's degrees in psychology. He has worked in the mental health field for 26 years. In 1979 he began his career as a staff psychologist in Petersburg, Virginia at the Southside Virginia Training Center, which was a 900 bed state facility for the mentally retarded. He had a caseload of approximately 180 individuals and provided behavior management services including development of treatment plans and intellectual testing for those clients. At the end of 1979, Mr. Dively applied for and received a job at the O'Berry Center as a staff psychologist. (T pp 218-221, 226)

21. Six months after Mr. Dively arrived at O'Berry, his supervisor left and he was asked to take an acting role as the coordinator of psychological services. A few months later he was given that role permanently, and he remained in that position, leading a group of approximately 12 staff psychologists and assistants until 1986. (T p 221)

22. In 1986 Mr. Dively accepted a position at an Ohio State facility, the Broadview Developmental Center in Cleveland. He became the assistant superintendent of program services and supervised approximately 300 staff. He was responsible for a $12 million budget. He supervised psychologists, occupational therapists, physical therapists, speech pathologists, and all the direct care staff at that facility. (T p 222; Petitioner's exhibit 1, page 8)

23. Mr. Dively stayed at the Broadview Developmental Center until the State of Ohio closed the facility and moved the individuals into approximately 50 group homes in the

community. He left the Broadview Developmental Center in 1988. He then did private practice in some of those group homes for approximately a year. During that time, one of the agencies he was working with, offered him an executive director position to run their agency. He accepted that role and was responsible for their total budget, all activities, and approximately 100 staff. He did that for 2 years until 1991. (T p 222; Petitioner's exhibit 1, page 8)

24. In 1991, the Cuyahoga County Board of Mental Retardation in Cleveland, Ohio developed a specialty position called Residential Program Specialist. Mr. Dively accepted that position, where he continued to do behavior management training, and development of treatment plans. While he was there, he was asked to chair a committee to develop a crisis team in Cleveland. He did that and then later supervised that service for the remainder of his tenure there. He was also the liaison with the mental health board. There, he developed expertise in autism, traumatic brain injury, borderline personality disorder, Lesh-Nyhan syndrome, Prader-Willi, and several very intense behavioral issues and self-injurious behaviors. (T pp 222-223; Petitioner's exhibit 1, page 9)

25. In 2002 Mr. Dively's father had a second bout of cancer. His father had a private business in Williamsburg, Virginia and asked his son to join the business. Mr. Dively joined his father's business and moved to Williamsburg, Virginia. He operated as a manager of a division of that business for four years. In early 2006, Mr. Dively's father sold his company to the Eaton Corporation. Eaton Corporation asked Mr. Dively to stay on as a consultant during the transition period. Mr. Dively had a series of three and six month contracts that he could extend. (T pp 223-224; Petitioner's exhibit 1, pages 10-12)

26. After his father sold his business, Mr. Dively desired to return to his profession in the mental health field. This led to his finding a position at O'Berry on the Internet. (T p 224; Petitioner's exhibit 1, pages 12- 13; Petitioner's exhibit 1, page 13)

27. Mr. Dively applied to O'Berry's Human Resources Department. (T pp 224-225; Respondent's exhibit 1; Petitioner's exhibit 1, page 14)

28. When Mr. Dively was making job applications he had arranged for several individuals, one of which was Dr. Farrell, to act as references for him. Mr. Dively called Dr. Farrell to let him know that he had been sending out several job applications and that he had listed him as a reference in North Carolina, South Carolina, and Virginia. (T pp 226-227; Petitioner's exhibit 1, page 15)

29. At no time prior to Mr. Dively applying for the Assistant to the Director position did Dr. Farrell have any discussions with Mr. Dively about the prospect of his returning to O'Berry. It was when Mr. Dively applied for Assistant to Director position that Dr. Farrell learned that Mr. Dively had an interest in returning to O'Berry. (T pp 21, 59-60; Respondent's Exhibit 1; Petitioner's exhibit 1, page 13-14).

30. When Robert Dively first worked at O'Berry as a psychologist and later as the director of the psychology department in the 1980's, Dr. Farrell worked with him on a regular basis. (T pp 19-20, 190; Petitioner's exhibit 1, page 14)

31. Mr. Dively left O'Berry when he moved to Ohio in 1986. In the 20 years between the time Mr. Dively left O"Berry and when he reapplied at O'Berry, Dr Farrell spoke with him less that a half dozen times. (T pp 20, 227; Petitioner's exhibit 1, page 14)

32. Mr. Dively told Dr. Farrell that if he did not get the Assistant to the Director position, he was interested in other positions at the O'Berry. After the interview panel concluded the interviews and chose Ms. Deborah Exum as their selection for the Assistant to the Director position, Dr. Farrell asked Mr. Dively whether he was interested in a staff psychologist position, which was on continuous recruitment. (T pp 23-24, 227-229; Petitioner's exhibit 1, page 15)

Continuous Postings

33. The North Carolina Department of Health and Human Services ("DHHS") has implemented a policy and procedure regarding recruitment and selection of employees. Included in that policy is a section on continuous recruitment. Continuous recruitment is a mechanism whereby an agency can post a position that is either a critical need or one that has frequent turnover so that it can be posted on a continual basis. There is no requirement that each individual position be posted. Typically classifications are posted. Continuous postings are used routinely. Nursing staff, health care staff, and many professional positions like psychology, and speech and language pathologists are on continuous recruitment. A continuous recruitment posting does not have a closing date and is not given a specific position number. (T pp 67-68, 135-137; Respondent's exhibit 7; Petitioner's exhibit 2, page 11)

34. Positions which have been on continuous recruitment at O'Berry include Health Care Assistant II's, Health Care Tech I's, Health Care Tech II's, RN's, LPN's, physicians, pharmacists, teachers, Mental Retardation Habilitation Coordinator II's ("MRHC II") and Staff Psychologists. (T pp 138-139)

35. Job postings do not include every single duty for the position and the posting never includes all the specific tasks. (T pp 37, 73, 142)

O'Berry's Human Resources ("HR") Staff

36. Ms. Glenda Potts is the Human Resources ("HR") director at O'Berry. She reports to Rickie Collie, who is the Department of Health and Human Services Director over facilities at the Division of Human Resources in Raleigh. As the HR director, Ms. Potts oversees all of the personnel programs, including classification, compensation, employee relations, safety, benefits, and all other matters involving HR. She consults with management and employees on policies and procedures. She first worked at O'Berry in 1992 as a temporary analyst for about ten months. In 2004 she began a full-time position as an analyst at O'Berry. She has also worked at

Cherry Hospital and as an analyst at East Carolina University. She has 16 years total State service. (T pp 148-149; Petitioner's exhibit 2, pages 6-7)

37. Ms. Tracie Wilson is a personnel analyst at O'Berry. She has had this position since October 2006. She oversees recruitment, salary administration, and conducts classification studies. She works under the supervision of the HR manager, Glenda Potts. Previously, she was a recruiter at O'Berry . Ms. Wilson has a B.S. degree in office administration. She has 23 years of State service. Since 1989 she has been in some type of human resource field or position. Since 2003 she has served as a benefits representative, a recruiter, a salary administrator and most recently as a personnel analyst. (T pp 30, 56, 113, 132)

38. Ms. Wilson has been to the Office of State Personnel's training for classification, and the Department of Health and Human Services training for classification and merit based hiring training. (T p 132)

39. Ms. Wilson became aware of Robert Dively through an application when he applied for the Assistant to the Director Position. (T p 115; Respondent's exhibit 1)

The Staff Psychologist II Position

40. The Staff Psychologist II position was on continuous posting beginning August 10, 2006. There was no closing date. (T pp 74; Respondent's exhibit 2; Petitioner's exhibit 1, page 23)

41. The North Carolina Application for Employment (PD-107) includes space for up to three jobs applied for to be filled in. (Respondent's exhibit 1)

42. Mr. Dively intended that his application for the Assistant to the Director positionbe accepted for other positions at O'Berry that he was considered for (the Staff Psychologist II and Mental Retardation Habilitation Coordinator II positions). (T pp 25, 115-116, 127-128, 230-231; Respondent's exhibit 1; Petitioner's exhibit 1, page 16; Petitioner's exhibit 2, pages 15-16)

43. Dr. Farrell asked Ms. Wilson about the possibility of the Staff Psychologist II position for Mr. Dively. Mr. Dively had served as a staff psychologist and director of psychology at O'Berry Center in his previous employment there. Ms. Wilson told Dr. Farrell that Mr. Dively would qualify at the maximum salary for a Staff Psychologist based upon her review of his credentials as appeared on his application. (T pp 30, 118; Respondent's Exhibit 1l; Petitioner's exhibit 1, pages 6-7)

44. Dr. Farrell offered and Mr. Dively accepted a salary for a staff psychologist II position. (T pp 23-24, 28, 155, 229; Petitioner's exhibit 1, pages 22; Petitioner's exhibit 2, page 22)

45. The Staff Psychologist II position that Dr. Farrell offered Mr. Dively was the same position that Mr. Dively had held previously in the 1980's. (T pp 69-70)

46. HR has 90 days from the date that a person is hired to complete a credentials verification process. (T pp 116, 132-134; Respondent's exhibit 1)

47. Ms. Wilson did not check on Mr. Dively's credentials before telling Dr. Farrell a salary for him because Mr. Dively had been employed with O'Berry previously as a Staff Psychologist II and as a coordinator of psychology programs. Ms. Wilson assumed he had a North Carolina psychology license. Ms. Wilson or someone in HR should have verified Mr. Dively's status before he was offered the Staff Psychologist II position. (T pp 121, 139, 153; Petitioner's exhibit 2, pages 17-18)

48. Other than Mr. Dively, there were no other applicants for the Staff Psychologist II position that was on continuous posting. There were two Staff Psychologist vacancies at the time. (T pp 31, 67, 70, 118)

49. The North Carolina Psychology Board's licensing regulations would allow Mr. Dively to practice as a psychologist in private practice in the community. However, the Office of State Personnel took the position that in order to work for the State, Mr.Dively must be licensed. He was not eligible to be "grandfathered in" because he had a lapse in his State employment. Mr. Dively did, in fact, qualify as a staff psychologist. However, he did not qualify without going through the trainee progression. The North Carolina Psychology Board requires that a Staff Psychologist obtain an associate psychology license within 18 months of employment. Ultimately, it was determined that Mr. Dively qualified as a Staff Psychologist II trainee because he was not licensed in North Carolina and could not be grandfathered in. As such, the salary that could be offered to Mr. Dively was only that of a trainee psychologist, which is a substantially lower salary than that which was offered by Dr. Farrell. (T pp 26-27, 120, 123-124, 230; Petitioner's exhibit 1, pages 6-7, 16-17; Petitioner's exhibit 2, pages 18-20)

50. As a result of Mr. Dively's lack of an appropriate license and failure to be grandfathered in by the Psychology Board, the salary offer made to Mr. Dively had to be modified.

51. The salary offer made to Mr. Dively for the Staff Psychologist position II was at least $20,000 more than the maximum that a trainee could have been paid. (T pp 28, 154; Petitioner's exhibit 2, pages 19-22)

52. Ms. Wilson went to Glenda Potts, the HR manager, and made her aware that she had made a mistake on the salary for Mr. Dively and that Dr. Farrell had made an offer already. Dr. Farrell asked Ms. Potts and Ms. Wilson if there was anything that could be done to make good on the offer made to Mr. Dively. Ms. Potts felt that the offer made to Mr. Dively, while not being legally binding, was morally binding. Ms. Potts and Ms. Wilson discussed what other options they had. Ms. Wilson and Ms. Potts suggested to Dr. Farrell that Mr. Dively be considered as a candidate for a Mental Retardation Habilitation Coordinator II ("MRHC II") position which was on continuous recruit. (T pp 125, 155-156; Petitioner's exhibit 2, pages 17-19, 22, 23)

53. Dr. Farrell and Ms. Potts readily admit that mistakes were made in assessing Mr. Dively's credentials regarding the Staff Psychologist II position. (T p 105; Petitioner's exhibit 2, pages 19- 22)

54. Mr. Dively was waiting for a formal offer letter from Human Resources for the Staff Psychologist II position. Dr. Farrell called Mr. Dively to advise him that he had learned that there was a problem with a licensor issue that Dr. Farrell and Ms. Wilson were unaware of when Dr. Farrell made the offer. Dr. Farrell asked Mr. Dively if he was licensed in the State of North Carolina. Mr. Dively told Dr. Farrell that he was not. Dr. Farrell told Mr. Dively that it was his understanding that the licensing rules of the North Carolina Psychology Board had changed in the interim period since Mr. Dively had originally been hired at O'Berry. Dr. Farrell was unaware of that and his HR department did not realize it until after he offered Mr. Dively the position. (T pp 32, 230; Petitioner's exhibit 1, page 21)

55. At first, Mr. Dively was not concerned about the licensor issue. It was his understanding that if a person had worked for the State of North Carolina prior to December 31, 1979 that person would be grandfathered into the State psychology board licensing requirements. Mr. Dively had been employed prior to that time, so he was not concerned. (T p 230; Petitioner's exhibit 1, pages 16-17)

56. It became clear that Dr. Farrell was not able to place Mr. Dively in the Staff Psychologist position at the salary as originally offered because he lacked the appropriate license that was required for that position. (T pp 28-29, 124)

57. Prior to calling Mr. Dively, Dr. Farrell had discussed the situation with Ms. Glenda Potts, the HR director. Ms. Potts determined that Mr. Dively would qualify for a Mental Retardation Habilitation Coordinator II ("MRHC II") position that was on continuous recruitment. Ms. Potts recommended that, rather than offering Mr. Dively the Staff Psychology position at a trainee level, offering him a MRHC II position. Dr. Farrell offered that position to Mr. Dively. Dr. Farrell told Mr. Dively that this salary was less than that offered for the staff psychologist II position. Mr. Dively was disappointed, but accepted it. Dr. Farrell discussed with Mr. Dively the problem of the Staff Psychologist II position and the possibility of the MRHC II position at the same time, in the same conversation.(T pp 33, 35, 124, 230; Petitioner's exhibit 1, pages 21-24; Petitioner's exhibit 2, pages 23, 32-33)

58. Mr. Dively did not submit a new application for the MRHC II position and did not need to. HR is permitted to make copies of applications to be considered for other open positions. DHHS allows its divisions to make copies of applications and use the same application for subsequent different positions. (T pp 127-128; Respondent's exhibit 1; Petitioner's exhibit 1, pages 21-24; Petitioner's exhibit 2, pages 15-16)

Mental Retardation Habilitation Coordinator II ("MRHC II") positions

59. The MRHC II positions are hard to fill and there is a critical need for them. As such, two MRHC II positions were on continuous posting beginning August 17, 2006. There was no closing date. The MRHC II positions were posted during the same time frame as the Staff Psychologist II position. (T pp 67-68, 75)

60. Being continuous postings, the MRHC II positions were posted until enough applications to fill the position were received. It was up to the hiring manager to let HR know when interviews were completed and a selection made. Here, where O'Berry had multiple applicants for the two positions, if another application had come in, it would that have gone to the hiring manager. (T pp 143-144)

61. On Mr. Dively's application for employment in the section titled "Jobs Applied For," Ms. Wilson crossed out "Asst. Dir. For Program Administration" in column number 1 and wrote in "Staff psy II" in column number 2. Ms. Wilson later added "MRHC II" in column number 3. She did this after discussions with Dr. Farrell and Mr. Dively. (T pp 115- 116, 134; Respondent's exhibit 1)

62. Submitting a copy of an application for several positions is not prohibited. DHHS's web site "Applying for a Job" indicates that "Completing one application and copying it for several openings is usually not the best idea ..." However, it does not prohibit the copying of an application for multiple positions. The web site goes on to say that the reason for not using multiple copies of one application is because each job posting has different knowledge, skills, and abilities and management preferences. The web site suggests writing separate descriptions of the applicant's experience for each position. (T pp 139-140; Respondent's exhibit 6)

63. There have been other instances in Ms. Wilson's experience at the O'Berry Center where an application was photocopied to be considered for additional positions. For example, if they have two office assistants positions that are posted at the same time. They are not critical care positions so they cannot be on continuous recruitment. If an applicant applies for only one of the positions, Ms. Wilson will copy the application and have them considered for both positions. (T p 134)

64. Mr. Dively was considered for the MRHC II position because both it, and theStaff Psychologist II position, were posted continuously. The qualifications for a MRHC II and a Staff Psychologist II are similar. They are both posted as classifications and are very broad. Mr. Dively met those same qualifications for the MRHC II in addition to the qualifications for a Staff Psychologist II. Differences between the positions is the licensor requirement for a psychologist and the salary range is one pay grade lower for a MRHC II. (T pp 43, 75, 124-125; Petitioner's exhibit 1, pages 26-27; Petitioner's exhibit 2, pages 31-32)

65 Mr. Dively begin working as a MRHC II at O'Berry on December 1, 2006. (Tpp 36, 233; Petitioner's exhibit 1, page 25; Petitioner's exhibit 2, page 34)

66. When Mr. Dively accepted the MRHC II position, it was several thousand dollars less than Dr. Farrell originally offered him for the Staff Psychologist II position. The Staff

psychologist II position is a salary grade 73. The MRHC II position is a salary grade 72. (T pp 43, 75, 233, Respondent's exhibits 2, 3; Petitioner's exhibit 1, page 24; Petitioner's exhibit 2, pages 19- 22)

67. Mr. Dively accepted the MRHC II position without the promise of any additional funds. At the time Dr. Farrell and Mr. Dively spoke about this position, Dr. Farrell did not mention to or promise Mr. Dively a reclassification or a reallocation of the position. (T p 233; Petitioner's exhibit 1, pages 25-26)

68. Dr. Farrell considered the telephone call that he had with Mr. Dively as an interview for both the Staff Psychologist II position and the MRHC II position. He did not see a need for another in person interview because the panel had interviewed Mr. Dively in person sometime in September. They had closed out the applications and interview process for the Assistant to the Director. It was the following week that Dr. Farrell called Mr. Dively to tell him that he was not selected for the Assistant to the Director position, but would be considered for the Staff Psychologist II position if he wished. (T p 68)

69. Additionally, Dr. Farrell felt that since Mr. Dively is visually impaired, it would have been a hardship for him to return from Virginia for a second face to face interview. Dr. Farrell did not see the need because the panel had already interviewed him and he could discuss the specifics of the roles with him over the phone. (T p 69)

70. Dr. Farrell thought that Mr. Dively was appropriate for both the Staff Psychologist II position and the MRHC II position because Mr. Dively had extensive experience working in facilities and in the community in a variety of different settings with a variety of different types of individuals who were developmentally disabled. Dr. Farrell had observed his work when he was previously at O'Berry and his application expanded upon the variety of experience he had. Dr. Farrell was well aware of Mr. Dively's depth of experience working in a variety of settings with people with developmental disabilities and working with individuals with traumatic brain injury, not just at O'Berry, but at other facilities. Also, the interview panel was very impressed with his scope of knowledge. (T pp 70, 102; Respondent's exhibit 1)

71. Dr. Farrell did not interview anybody else for the MRHC II positions that were on continuous recruitment because he had offered Mr. Dively the position as a Staff Psychologist II with the understanding that he qualified at a certain salary. In Dr. Farrell's view, they were fixing a mistake. Mr. Divley also qualified for an MRHC II, and Dr. Farrell thought it would be disingenuous to interview someone else for the MRHC II when he was trying to fix a mistake he had made with the Staff Psychologist II position. (T pp 109, 174-175)

72. O'Berry had made an offer to Mr. Dively in good faith, and he had accepted it. Dr. Farrell, Ms. Potts and Ms. Wilson felt an obligation to honor the original offer of employment. The offer of employment was not just for a job; it was for a certain salary. (T pp 124, 174-175; Petitioner's exhibit 2, page 22)

73. The second MRHC II position that was posted at the same time, was competitively filled. The other individuals that applied for that were considered for that position. Lucy Boykin was the hiring manager for that position. (T pp 109, 126,127; Petitioner's exhibit 2, pages 24-25)

74. The duties of the MRHC II position that Mr. Dively filled included helping the center to implement person centered planning across all the facility. There were also tasks involving clinical reviews that Dr. Farrell asked Mr. Dively to do. When an individual had unusual behaviors and the behavior intervention plans did not seem to be working, or if there was a spike in behaviors, Dr. Farrell would ask Mr. Dively to make recommendations. It was helpful to Dr. Farrell to have another set of eyes from outside to come in and look at the behaviors. (T pp 70-72, 231-232)

Person Centered Planning

75. There is a mandate by the State that all facilities in North Carolina transition to using person centered planning approaches. Person centered planning is a way of developing services for an individual that respects the individual's interests and rights and provides them with more self-determination. It is a philosophy. Traditionally people would be evaluated and their deficits identified. Programs were designed to remediate those deficits. Person centered planning focuses on what the person wants to do with their life and what their strengths are and tries to develop supports to help them lead a better life and improve their quality of life. It is a different approach to determining how to work with someone. (T pp 70-71, 106, 232-233 Petitioner's exhibit 1, pages 18-19)

76. Mr. Dively is a certified essential lifestyle planning instructor. Essential lifestyle planning is the technique that O'Berry Center chose to use to implement person centered planning. O'Berry Center has a couple of other people who are essential lifestyle planning certified instructors. Approximately two people other than Mr. Dively out of 1000 at O'Berry are certified in person centered planning. (T pp 71, 108-109; Petitioner's exhibit 1, pages 19-21, 25)

77. Petitioner Robert Anthony Coats has experience with person centered planning. However, he is not certified in it. All of the MRHC II's at O'Berry have experience in person centered planning, as it is implemented campus-wide. (T p 106)

Reallocation/Reclassification

78. At O'Berry, tasks are assigned to a position, not to a person. At times, a request is made that a position be studied to see if it is appropriately classed. (T p 104)

79. The process of studying an individual position to determine its appropriate classification is a quick process if the reviewer has knowledge of the classification. It will usually take a couple of days to study a specific position for classification. Ms. Potts has classified quite a few of MRHC II's and MRUDs. On the other hand, studying an entire class of positions can be time consuming, taking up to months. (T pp 83-84, 181; Petitioner's exhibit 2, pages 7, 35)

80. Dr. Farrell had been thinking through how he was going to handle the transition from a MR/ICF to a skilled nursing facility. The transition was a daunting task that Dr. Farrell was facing. His concern was that O'Berry be able to maintain the present level of services while being prepared to move towards the new requirements and the new regulations. Several weeks after Dr. Farrell spoke with Mr. Enevoldsen, he spoke with Mr. Dively and asked him if he would consider taking on additional responsibilities associated with the transition. Mr. Dively agreed. At that time Dr. Farrell asked Mr. Dively to write a new job description. (T pp 54, 77; Petitioner's exhibit 1, pages 29-32)

81. Dr. Farrell and Mr. Dively discussed the specific tasks that would be assigned to Mr. Dively. Dr. Farrell asked him to incorporate those tasks into a formal job description. Mr. Dively, as most people do, used a template of an existing job description to develop this specific form. (T pp 77- 78, 233-234, 236-237; Respondent's exhibit 4; Petitioner's exhibit 1, pages 29-32)

82. The additional duties that Mr. Dively included in his new job description were not identified to him before he accepted the MRHC II position. Dr. Farrell discussed the possibility of Mr. Dively taking on new, additional duties a day or so before Christmas break in December 2006. Mr. Dively had been on the job a little less than a month at that time. (T pp 46, 54, 233-234; Petitioner's exhibit 1, pages 29-32)

83. Dr. Farrell did not evaluate whether any of the existing employees had the required skill set that he was looking for to assist with the transition. Mr. Dively was hired into the position of a MRHC II for the specific duties of helping the center to implement person centered planning across all the facility and help with clinical issues, among other tasks. Dr. Farrell felt that Mr. Dively's position was the natural position to assign other duties to regarding the transition because the Mr. Dively's MRHC II position was not assigned to a particular group home. Dr. Farrell thought it was a natural outgrowth of development for that position to assist with the transition. Dr. Farrell wasn't looking at the qualifications of the person, he was looking at the tasks assigned to the position. Dr. Farrell believes that is what the State personnel system says he should do. (T pp 56-57, 70-72, 104-105; Petitioner's exhibit 1, pages 28-29)

84. A job description is revised only when significant changes have occurred to the duties of that position. Normally the supervisor and the employee discuss the changes. The employee normally will write that job description and present it to the supervisor. (T pp 141-142)

85. It is very common for an employee to write their own job description. HR staff are trained by DHHS and OSP that employees write the job description in conjunction with the supervisor. There are also DHHS internal policies that provide for that. Employees know the nuances of their role and more of the details of what they do. Dr. Farrell typically would meet with an employee to discuss the direction, and the general focus of the position, but would ask the employee to write the job description to flesh out all the details. (T pp 81, 184)

86. Dr. Farrell typically does not sign job descriptions as they are filed electronically. (T pp 78, 142; Petitioner's exhibit 2, page 52)

87. The new job description that Mr. Dively wrote included the initial duties for the MRHC II position that he was hired for, which included helping O'Berry with the movement toward the implementation of person centered planning. There were many specifics with that including helping with clinical issues and doing investigations of client issues that may have arose; helping with the quality assurance program; participating in a center wide review committee; and other types of quality assurance activities. It also included an additional responsibility that Dr. Farrell asked Mr. Dively to do relating to O'Berry's transition from an ICF/MR facility to a skilled nursing facility certified under a different set of regulations. Mr. Dively was to keep all of his original duties and take on the additional leadership role of overseeing the center's transformation to a skilled nursing care facility. (T pp 39-40; 233-235; Petitioner's exhibit 1, pages 31- 33)

89. When Dr. Farrell asked Mr. Dively to assist with the transition process in addition to his other duties, O'Berry was operating as an ICF/MR facility. The individuals who were managing the day-to-day operations faced the challenge of learning a new set of tasks and adapting to a new set of regulations. Dr. Farrell was concerned that the transition would diminish their capability of providing the normal day-to-day activities. Dr. Farrell decided he needed a person who would help with that transition by working directly with the cluster administrator and the staff of that unit to make sure that they were transitioning properly towards the new role. The O'Berry Center was learning the OBRA regulations as a center. It was not a prerequisite that the person assisting with the transition be an expert in that role to start with, as the center was learning as a whole. As of the date of this hearing O'Berry had not been required to follow OBRA regulations. (T pp 41-42)

90. When Dr. Farrell asked Mr. Dively to take on additional duties, Dr. Farrell did not discuss the possibility that those duties might affect his paygrade. (T pp 85; 237; Petitioner's exhibit 1, pages 25-26, 31- 33)

91. After Mr. Dively gave Dr. Farrell his proposed new job description, Dr. Farrell gave it to Ms. Potts, the HR director, and asked her to study the position to see if it was appropriately classified. This was around Christmas 2006. Dr. Farrell did not suggest any specific classification because he didn't know what the appropriate classification would be. The purpose of the study was to determine the appropriate classification. (T pp 44-46, 79, 159-160, 182-183; Respondent's exhibit 4; Petitioner's exhibit 1, pages 21-24; Petitioner's exhibit 2, pages 35-38, 42)

92. Dr. Farrell did not tell Ms. Potts that he wanted her to upgrade Mr. Dively's position. He did not tell her that she had to make some type of a change in the position. He did not suggest any level or classification. (T pp 80-81, 159-161, 182; Petitioner's exhibit 2, pages 35-38)

93. Dr. Farrell did not tell Mr. Dively that he asked HR study his position because he did not know what the outcome of the study was going to be. In the past, with other employees, when Dr. Farrell asked them to redo their job description, he did not tell them that their position was going to be studied. The intent is to make sure that the person is appropriately classed for the duties that they are doing, and that can go up or down depending upon the outcome of the study. (T pp 83, 160; Petitioner's exhibit 1, pages 31-32)

94. Dr. Farrell's asking Mr. Dively to write a job description based upon him to take on new tasks did not have anything to do with the hiring process of the Staff Psychologist II and/or the MRHC II. They were separate events. (T p 77)

95. Dr. Farrell has asked HR to study other positions and it is not uncommon to have 40 or 50 positions at O'Berry studied for reclassification each year. In the year that Ms. Potts studied Mr. Dively's position, 56 positions were reclassified. (T pp 45, 79, 181)

96. Ms. Potts interviewed Dr. Farrell to try to understand better how the transition role was going to impact on Mr. Dively's current responsibilities including the person centered planning and everything else that he had given him. Ms. Potts also spoke with Mr. Dively to clarify the scope of his additional duties. (T p 184; Petitioner's exhibit 2, pages 38-39)

97. Mr. Dively's position kept all of his duties as a MRHC II including person centered planning and clinical review issues. He did not give up any duties and has steadily accumulated more responsibilities since he entered the job. (Petitioner's exhibit 1, page 33)

98. HR's study of Mr. Dively's revised job duties and tasks determined that the appropriate classification was a Mental Retardation Unit Director ("MRUD") position. Upon completion of the study, Ms. Potts made the recommendation that Mr. Dively's position be reallocated to a MRUD. (T pp 45-46, 79-80, 163)

99. After Ms. Potts completed her study of Mr. Dively's new job duties, she prepared analyst's notes. Ms. Potts and Dr. Farrell discussed the analyst's notes to make sure they were an accurate reflection of the job. Dr. Farrell and Ms. Potts agreed that the notes were an accurate description of the role Mr. Dively was taking on. (T pp 80, 168-169, 183-184; Respondent's exhibit 5; Petitioner's exhibit 2, page 39)

100. Ms. Potts studied Mr. Dively's position in January 2007. When a position is studied, HR can make the effective date of any action proposed, the first of the month in which the study takes place. Ms. Potts studied Mr. Dively's position in January and she made the reclassification effective the 1st of January. It is standard procedure to make the action effective the first day of the month that a determination is made to reclassify a position. (T pp 47-48; Petitioner's exhibit 2, pages 34-35)

101. The reclassification study of Mr. Dively's position resulted in the position being upgraded from a pay grade 72 to a pay grade 74. Mr. Dively received a 5% salary increase. (T pp 48, 164)

102. In 1989 the Office of State Personnel delegated some of its authority relating classification, pay, and policy actions to the Department of Health and Human Services (DHHS). DHHS in turn delegated some of its authority to O'Berry. Ms. Potts, after proving that she had the knowledge, skills and abilities to make proper calls as an classification analyst, received delegated classification authority on December 29, 2005. (T pp 176-178).

103. The Mental Retardation Unit Director ("MRUD") position that Mr. Dively's Mental Retardation Habilitation Coordinator ("MRHC II") position was reclassified to was not posted or made available for competition by other potential applicants because it was not a vacant position. It was not a vacancy; it was a reallocation. (T p 51; Petitioner's exhibit 2, pages 45-46)

104. When a position is reallocated/reclassified, it does not get a new position number. The employee stays in the same position. The reclassification reflects an addition or a change in duties. The original duties may remain, but there is some of change in the duties. The primary distinction between a promotion and a reallocation is that in a reallocation the employee never leaves the position he is in. The employee is taking on additional duties, lesser duties or different duties. (T pp 180, 189-190)

105. Pursuant to the Office of State Personnel, Personnel Manual, a promotion is moving from one position number to another different position number. In a reallocation, the position is not changed; I remains the same position number. (T p 132)

106. The State Personnel Manual defines promotion as "a change in status upward resulting from an assignment to a position assigned a higher salary grade." A reallocation does not always result in a change upward. (T pp 176, 181- 182; State Personnel Manual Section 4, page 12- Respondent's exhibit 9)

107. In the case of a promotion, a position is vacant and employees apply for the position. When an employee receives a promotion, they leave their old job position number and old duties and go directly to a new position number with new duties, typically with a new supervisor. With a promotion there is always an increase in salary grade. (T pp 175-176)

108. The State Personnel Manual defines "reallocation" as "the assignment of a position to a different classification, documented through data collection and analysis according to customary professional procedure and approved by the State Personnel Director." (T p 179; State Personnel Manual Section 4, page 20- Respondent's exhibit 8)

109. In the case of a reallocation, there is not always an increase in the salary grade. A position can be reallocated to a lower salary grade. Additionally, it can be determined that the actual salary grade and classification is appropriate. (T p 176)

110. Mr. Dively was not promoted from a MRHC II to a MRUD. Rather, his MRHC II position was reallocated to a different classification, a MRUD. (T pp 173-174)

Petitioner Robert Anthony Coats

111. Petitioner Robert Anthony Coats is no longer employed at the O'Berry Center. Effective September 1, 2008, he received a promotion to the Division of Health Services Regulation, a division in the Department of Health and Human Services. He went from a pay grade 72 to pay grade 74. (T pp 142-143)

112. Petitioner has a doctorate degree from a non-accredited university. He is not a licensed psychologist. In the last 20 years, other than Petitioner's current position at the Division of Health Services Regulation since September 2008, he has held only two positions: a behavioral program specialist and a MRHC II. He has held the behavioral program specialist position two times, and the MRHC II position three times. (T p 210)

113. On September 5, 2008, Petitioner re-applied for his old position as an MRHC II, pay grade 72. He withdrew his application before interviews were scheduled. It was two weeks after he left his old position as a MRHC II at O'Berry that he re-applied for it. (T pp 185-186)

114. The position at issue that Mr. Dively presently holds is a Mental Retardation Unit Director, pay grade 74. As of September 1, 2008, Petitioner is also at a pay grade 74, the same pay grade as Mr. Dively. (T p 143)

115. Petitioner applied for two Mental Retardation Unit Director (MRUD) positions in May 2005 and did not get an interview for either. (T pp 211, 213)

116. Petitioner applied for an administrative standards management position in March 2005 and did not get an interview. (T pp 211-212)

117. Petitioner applied for another Mental Retardation Unit Director (MRUD) position, in May 2007. He was interviewed, but did not get offered the position. (T p 213)

118. There was a Mental Health Unit Director (MRUD) position that came open at O'Berry after Petitioner left, for which he did not apply. (T pp 203-204)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes and has the authority to issue a Decision to the State Personnel Commission ("SPC"), which shall make the final decision. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be so considered without regard to the given labels.

2. The parties have been given proper notice of the hearing.

3. Promotion is a change in status upward, documented according to customary professional procedure and approved by the State Personnel Director, resulting from assignment to a position assigned a higher salary grade. When it is practical and feasible, a vacancy shall be filled from among eligible employees ... 25 N.C.A.C. 1D.0301 (in pertinent part), State Personnel Manual Section 4, page 12.

4. Robert Dively was not promoted from a Mental Retardation Habilitation Coordinator II (MRHC II) to a Mental Retardation Unit Director (MRUD).

5. Reallocation is the assignment of a position from one class to another as the result of a change in assigned duties and responsibilities. 25 N.C.A.C. 1F.0303.

6. Reallocation is the assignment of a position to a different classification, documented through data collection and analysis according to customary professional procedure and approved by the State Personnel Director. 25 N.C.A.C. 1D.0608, State Personnel Manual Section 4, page 20.

7. The purpose of reallocation pay is to reward the employee for more responsibility and more difficult duties than those in the current classification. State Personnel Manual Section 4, page 20.

8. Because Ms. Potts has delegated authority, after proving that she has the knowledge, skills and abilities to make proper calls as a classification analyst, her reallocation decisions are not required to be approved by the State Personnel Director.

9. Robert Dively's MRHC II position underwent changes in assigned duties and responsibilities effective January 1, 2007 when he undertook the additional responsibilities relating to O'Berry's transition from an ICF/MR facility for individuals with mental retardation, to a skilled nursing facility certified under a different set of regulations. Mr. Dively kept all of his original duties and took on the additional leadership role of overseeing the center's transformation from an ICF to a skilled nursing care facility. He did not give up any duties and has steadily accumulated more responsibilities since he entered the job.

10. Robert Dively's position, which was classified as a Mental Retardation Habilitation Coordinator II (MRHC II, was reallocated to a different classification, that of a Mental Retardation Unit Director (MRUD).

11. Ms. Potts correctly reallocated Mr. Dively's MRHC II position to the MRUD classification based upon her data collection and analysis according to customary professional procedure.

12. An employing authority shall verify the status of credentials and the accuracy of statements contained in the application of each new employee within 90 days from the date of the employees employment. N.C.G.S. § 126-30(b).

13. It was not illegal or improper for Dr. Farrell to make an offer of the Staff Psychologist II position to Mr. Dively prior to verifying the status of his credentials. However, the failure to verify the status of Mr. Dively's credentials prior to an offer being made resulted in Dr. Farrell and the HR department attempting to come up with a solution to correct the problem. The solution was to offer Mr. Dively a MRHC II position which was on continuous posting.

14. There are no laws or policies that prohibit a position from being reallocated within short time after being filled; there is no applicable time period.

15. N.C.G.S. § 126-7.1(a) provides in pertinent part:

> (a) All **vacancies** for which any State agency, department, or institution openly recruit shall be posted within at least the following:
>
> (1) The personnel office of the agency, department, or institution having the vacancy; and
>
> (2) The particular work unit of the agency, department, or institution having the vacancy in a location readily accessible to employees. If the decision is made, initially or at any time while the vacancy remains open, to receive applicants from outside the recruiting agency, department, or institution, the vacancy shall be listed with the Office of State Personnel for the purpose of informing current State employees of such vacancy. The State agency, department, or institution may not receive approval from the Office of State Personnel to fill a job vacancy if the agency, department, or institution cannot prove to the satisfaction of the Office of State Personnel that it complied with these posting requirements. The agency, department, or institution which hires any person in violation of these posting requirements shall pay such person when employment is discontinued as a result of such violation for the work performed during the period of time between his initial employment and separation.
>
> N.C.G.S. § 126-7.1(a)

16. Petitioner has the burden of proof to show that the Respondent violated the posting requirements under N.C.G.S. § 126-7.1(a) by a preponderance of the evidence.

17. The Mental Retardation Unit Director (MRUD) position held by Robert Dively was not a vacancy and therefore was not required to be posted under N.C.G.S. § 126-7.1(a) and 25 N.C.A.C. 1H.0631.

18. Petitioner has not met his burden in proving that the Respondent violated the posting requirements under N.C.G.S. § 126-7.1(a).

19. Assuming for this issue that the MRUD position in question was required to be posted, Petitioner has not proved by a preponderance of the evidence that he would have been selected to fill that position.

20. **BASED UPON** the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge makes the following:

DECISION

The undersigned Administrative Law Judge finds that the MRUD position was not a vacant position; it was not required to be posted; and the Respondent did not violate N.C.G.S. § 126-7.1(a)'s posting procedure. Petitioner failed to carry his burden of proof by a preponderance of the evidence that the MRUD position was a vacant position which was required to be posted. The undersigned determines that the State Personnel Commission should UPHOLD and AFFIRM Respondent's action in reallocating the MRHC II position to a MRUD, without posting the MRUD position.

NOTICE

The Decision of the Administrative Law Judge in this Contested Case will be reviewed by the agency making the final decision according to standards found in N.C. G.S. §150B-36(b)(b1) and (b2). The agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this Decision and to present written arguments to those in the agency who will make the final decision, in accordance with N.C.G.S.§ 150B-36(a).

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

The State Personnel Commission is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

This the 17th day of March, 2009.

John B. Lewis, Jr.
Temporary Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 17th day of March, 2009.

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