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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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Rules Review Commission
1711 New Hope Church Road — (919) 431-3000
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: Anca Grozav, Economic Analyst — osbmruleanalysis@osbm.nc.gov — (919)807-4740

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
215 North Dawson Street
Raleigh, North Carolina 27603
contact: Erin L. Wynia — ewynia@nclm.org

Governor's Review

Edwin M. Speas, Jr. — edwin.speas@nc.gov
General Counsel to the Governor — (919) 733-5811
116 West Jones Street
20301 Mail Service Center
Raleigh, North Carolina 27699-0301

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	Karen.cochrane-brown@ncleg.net
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NORTH CAROLINA REGISTER
Publication Schedule for January 2010 – December 2010

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
24:13	01/04/10	12/09/09	01/19/10	03/05/10	03/22/10	05/01/10	05/12/10	10/01/10
24:14	01/15/10	12/22/09	01/30/10	03/16/10	03/22/10	05/01/10	05/12/10	10/12/10
24:15	02/01/10	01/08/10	02/16/10	04/05/10	04/20/10	06/01/10	01/26/11	10/29/10
24:16	02/15/10	01/25/10	03/02/10	04/16/10	04/20/10	06/01/10	01/26/11	11/12/10
24:17	03/01/10	02/08/10	03/16/10	04/30/10	05/20/10	07/01/10	01/26/11	11/26109
24:18	03/15/10	02/22/10	03/30/10	05/14/10	05/20/10	07/01/10	01/26/11	12/10/10
24:19	04/01/10	03/11/10	04/16/10	06/01/10	06/21/10	08/01/10	01/26/11	12/27/10
24:20	04/15/10	03/24/10	04/30/10	06/14/10	06/21/10	08/01/10	01/26/11	01/10/11
24:21	05/03/10	04/12/10	05/18/10	07/02/10	07/20/10	09/01/10	01/26/11	01/28/11
24:22	05/17/10	04/26/10	06/01/10	07/16/10	07/20/10	09/01/10	01/26/11	02/11/11
24:23	06/01/10	05/10/10	06/16/10	08/02/10	08/20/10	10/01/10	01/26/11	02/26/11
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25:02	07/15/10	06/23/10	07/30/10	09/13/10	09/20/10	11/01/10	01/26/11	04/11/11
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25:04	08/16/10	07/26/10	08/31/10	10/15/10	10/20/10	12/01/10	01/26/11	05/13/11
25:05	09/01/10	08/11/10	09/16/10	11/01/10	11/22/10	01/01/11	01/26/11	05/29/11
25:06	09/15/10	08/24/10	09/30/10	11/15/10	11/22/10	01/01/11	01/26/11	06/12/11
25:07	10/01/10	09/10/10	10/16/10	11/30/10	12/20/10	02/01/11	05/2012	06/28/11
25:08	10/15/10	09/24/10	10/30/10	12/14/10	12/20/10	02/01/11	05/2012	07/12/11
25:09	11/01/10	10/11/10	11/16/10	01/03/11	01/20/11	03/01/11	05/2012	07/29/11
25:10	11/15/10	10/22/10	11/30/10	01/14/11	01/20/11	03/01/11	05/2012	08/12/11
25:11	12/01/10	11/05/10	12/16/10	01/31/11	02/21/11	04/01/11	05/2012	08/28/11
25:12	12/15/10	11/22/10	12/30/10	02/14/11	02/21/11	04/01/11	05/2012	09/11/11

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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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State of North Carolina

BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 53

PROCLAMATION OF A STATE OF DISASTER FOR TOWNS OF NAGS HEAD AND KITTY HAWK

WHEREAS, the North Carolina Emergency Management Act, Chapter 166A of the North Carolina General Statutes, N.C.G.S. § 166A-6, authorizes the issuance of a proclamation defining an area subject to a state of disaster and categorizing the disaster as a Type I, Type II or Type III disaster; and

WHEREAS, on November 12, 2009, Kitty Hawk and Nags Head proclaimed local states of emergency; and

WHEREAS, on November 16, 2009, I proclaimed the existence of a state of emergency in Dare County, North Carolina which includes the towns of Kitty Hawk and Nags Head; and

WHEREAS, I have determined that a state of a disaster, as defined in G.S. §166A-6, existed in the State of North Carolina, specifically for the Town of Nags Head and the Town of Kitty Hawk as a result of the remnants of Tropical Storm Ida, coupled with a nor'easter system over several days starting on November 12, 2009; and

WHEREAS, pursuant to N.C.G.S. § 166A-6, the criteria for a Type I disaster are met if: (1) the Secretary of Crime Control and Public Safety has provided a preliminary damage assessment to the Governor and the General Assembly; (2) the Town of Nags Head and the Town of Kitty Hawk have declared a local state of emergency pursuant to N.C.G.S. § 166A-8; (3) the preliminary damage assessment has met or exceeded the criteria established for the Small Business Disaster Loan Program pursuant to 13 C.F.R. Part 123, or has met or exceeded the State infrastructure criteria set out in N.C.G.S. § 166A-6.01(b)(2)a; and (4) a major disaster declaration by the President of the United States pursuant to the Stafford Act has not been declared.

WHEREAS, pursuant to N.C.G.S. § 166A-6A, if a state of disaster is proclaimed, the Governor may make State funds available for disaster assistance in the form of individual assistance and public assistance for recovery from those disasters for which federal assistance under the Stafford Act is either not available or does not adequately meet the needs of the citizens of the State in the disaster area.

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED:**

Section 1. Pursuant to N.C.G.S. § 166A-6, a Type I state of disaster is hereby declared for the Town of Nags Head and the Town of Kitty Hawk.

Section 2. I authorize state disaster assistance in the form of public assistance grants to eligible entities located within the disaster area that meet the terms and conditions under N.C.G.S. § 166A-6.01(b)(2)(c) for costs incurred for the following purposes only:

1. Debris clearance
2. Emergency protective measures
3. Repairs to roads and bridges

Section 3. I hereby order this proclamation: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) to be promptly filed with the Secretary of Crime Control and Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to ensure proper implementation of this proclamation.

Section 4. This Type I Disaster Declaration shall expire 30 days after issuance unless renewed by the Governor or the General Assembly. Such renewals may be made in increments of 30 days each, not to exceed a total of 120 days from the date of first issuance.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 24th day of March in the year of our Lord two thousand and ten, and of the Independence of the United States of America the two hundred and thirty-fourth.

Beverly Eaves Perdue
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

2

Notice of Application for Innovative Approval of a Wastewater System for On-site Subsurface Use

Pursuant to NCGS 130A-343(g), the North Carolina Department of Environment and Natural Resources (DENR) shall publish a Notice in the NC Register that a manufacturer has submitted a request for approval of a wastewater system, component, or device for on-site subsurface use. The following applications have been submitted to DENR:

Application by: David Lentz
Infiltrator Systems, Inc
PO Box 768
Old Saybrook, CT 06475

For: Modification to Innovative Approval with Modification to Approved Chamber

And

Application by: Mike Stidham
E-Z Treat Company
PO Box 176
Haymarket, VA 20168

For: Modification to Innovative Approval for E-Z Treat Subsurface Wastewater Drip System

DENR Contact: Ted Lyon
1-919-715-3274
Fax: 919-715-3227
ted.lyon@ncmail.net

These applications may be reviewed by contacting the applicant or at 2728 Capital Blvd., Raleigh, NC, On-Site Water Protection Section, Division of Environmental Health. Draft proposed innovative approvals and proposed final action on the application by DENR can be viewed on the On-Site Water Protection Section web site: http://www.deh.enr.state.nc.us/osww_new/new1//index.htm.

Written public comments may be submitted to DENR within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Mr. Ted Lyon, Chief, On-site Water Protection Section, 1642 Mail Service Center, Raleigh, NC 27699-1642, or ted.lyon@ncdenr.gov, or fax 919.715.3227. Written comments received by DENR in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

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 12 – DEPARTMENT OF JUSTICE

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC Alarm Systems Licensing Board intends to amend the rule cited as 12 NCAC 11 .0106.*

Proposed Effective Date: *August 1, 2010*

Public Hearing:
Date: *April 30, 2010*
Time: *2:00 p.m.*
Location: *1631 Midtown Place, Suite 104, Raleigh, NC 27609*

Reason for Proposed Action: *The Board proposes to adopt a rule that makes it clear to applicants for a license that they will not receive experience credit if they have been working in the industry unlicensed.*

Procedure by which a person can object to the agency on a proposed rule: *Written comments should be submitted on or before the end of the comment period and should be submitted to Terry Wright, ASLB Director, 1631 Midtown Place, Suite 104, Raleigh, NC 27609.*

Comments may be submitted to: *Terry Wright, ASLB Director, 1631 Midtown Place, Suite 104, Raleigh, NC 27609*

Comment period ends: *June 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

CHAPTER 11 - NORTH CAROLINA ALARM SYSTEMS LICENSING BOARD

SECTION .0100 - ORGANIZATION AND GENERAL PROVISIONS

12 NCAC 11 .0106 DETERMINATION OF EXPERIENCE
(a) Experience requirements shall be determined in the following manner: one year's experience = 1,000 hours.
(b) The Board ~~may~~ shall not consider any experience claimed by the applicant if gained while not in possession of a valid license or registration while such license was required by existing or previously existing laws of the United States, any State, or any political subdivision thereof.

Authority G.S. 74D-5.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 20 - BOARD OF REGISTRATION FOR FORESTERS

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Registration for Foresters intends to amend the rules cited as 21 NCAC 20 .0103-.0104, .0106, .0108-.0109, .0115, .0117, and .0122-.0123; and adopt the rules cited as 21 NCAC 20 .0124-.0126.*

Proposed Effective Date: *August 1, 2010*

Public Hearing:
Date: *June 1, 2010*
Time: *9:00 a.m. – 11:00 a.m.*
Location: *512 North Salisbury Street, Ground Floor Hearing Room, Archdale Building, Raleigh, NC 27604*

Reason for Proposed Action: *These rule changes and adoptions are being made to bring the rules up to date and make administrative changes in the rules.*

Procedure by which a person can object to the agency on a proposed rule: *Any person who objects to one or more of these proposed rules should send a letter to the Chairman of the Board. The letter should specify the objection and provide alternative language.*

Comments may be submitted to: *Steve McKeand, P.O. Box 27393, Raleigh, NC 27611; email info@ncbrf.org*

Comment period ends: *June 14, 2010*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☒ **None**

SECTION .0100 - PURPOSE

21 NCAC 20 .0103 QUALIFICATIONS FOR REGISTRATION

(a) An application may be obtained from the Secretary of the Board.

(b) An applicant shall submit an application to the Secretary which shall include:

(1) Legible official college transcripts, if applicable;
(2) Five references as required in Rule .0105 of this Section;
(3) Proof of professional work ~~experience;~~ experience in forestry; and
(4) Payment of application fee as set out in Rule .0107 of this Section.

~~(c) A school of Forestry accredited by the Society of American Foresters is an approved school or college for purposes of G.S. 89B-9. An applicant who holds a forestry degree from a university outside of the United States may qualify for registration if he/she provides verification to the Board which demonstrates that the degree is equivalent to SAF accreditation standards.~~

~~(d)~~(c) For purposes of ~~G.S. 89B~~ G.S. 89B-9(a)(1) a forestry curriculum ~~means a major in forestry.~~ is a curriculum that satisfies the Education Requirements used by the Society of American Foresters (SAF) to become a Certified Forester.

(d) An applicant who holds a forestry degree from a university outside of the United States may qualify for registration if he/she provides verification to the Board which demonstrates that the degree is equivalent to SAF accreditation standards.

(e) The Board may issue a forester-in-training certificate to an applicant who has completed the education requirement in G.S. 89B-9(a)(1). The certificate ~~shall be~~ is valid for ~~up to~~ 4 years. The time period ~~may~~ shall be extended by the Board in case of hardship beyond the control of the applicant.

Authority G.S. 89B-6; 89B-9.

21 NCAC 20 .0104 EXAMINATIONS

(a) ~~Examinations~~ The comprehensive written exam required by G.S. 89B-9(a)(1), called a Level 2 examination, focuses on the practice of forestry in North Carolina and shall be offered twice annually. There is no limit to the number of times that ~~An~~ an applicant may attempt the examination. ~~examination no more than three times within any six year period.~~

(b) For applicants not meeting the education requirements in G.S. 89B-9(a)(1), a comprehensive written exam, called the Level 1 examination is required. The exam will test the applicants knowledge of forestry approximating that obtained through graduation from a four-year curriculum in forestry and will also focus on the practice of forestry in North Carolina. The exam shall be offered twice annually. There is no limit to the number of times that an applicant may attempt the examination.

~~(b)~~(c) Applicants shall be notified by certified mail, return receipt requested, not less than 30 days before the examination, as to the time and place of the examination. If the applicant fails to respond at least ten days prior to the date of the exam, it ~~shall be~~ is assumed that the applicant does not plan to take the examination. The applicant's file shall then be considered inactive and no further action shall be initiated by the Board. The application fee shall be forfeited.

~~(c)~~(d) The passing grade for registration shall be 70 percent on any exam. The determination by the Board as to the score on each exam shall be final.

~~(d)~~(e) Re-examination fees shall be forty dollars ($40.00) per examination.

Authority G.S. 89B-6; 80B-9; 89B-12.

21 NCAC 20 .0106 REGISTRATION FEES

Fees sent to the Board for any segment of the registration process ~~may~~ shall be ~~in the form of money orders, bank drafts, or checks~~ payable to the Secretary, Board of Registration for Foresters. The application fee for registration is fifty dollars ($50.00), which shall be submitted by the applicant at the time of application. An approved applicant shall submit an additional fee of forty dollars ($40.00) to receive a certificate of registration. Annual renewal fee is forty dollars ($40.00). The Board shall waive renewal fees for Registered Foresters for hardship circumstances, such as military deployment, extended illness, or other similar circumstances, upon written petition by the Registered Forester for this exemption.

Authority G.S. 89B-6; 89B-10; 89B-11; 93B-15(b).

21 NCAC 20 .0108 DELINQUENT FEES

The Board shall notify by mail or email all foresters registered by the Board for the previous year when they become 30 days in arrears in payment of renewal fees for the ensuing year. The

notifications ~~will~~ shall remind the delinquents of the required penalty fees.

Authority G.S. 89B-6.

21 NCAC 20 .0109 REGISTRATION CARD

In addition to the certificate prescribed by G.S. 89B-10, upon request and receipt of required fees, the Board shall furnish each registered forester ~~shall be furnished annually, upon the Board's receipt of required fees,~~ with a card impressed with the seal of the Board indicating that the individual is a registered forester for the period indicated.

Authority G.S. 89B-6.

21 NCAC 20 .0115 CODE OF ETHICS

~~The Board hereby incorporates by reference the code of ethics adopted by the Society of American Foresters on June 23, 1976 and amended November 2, 1992 as the professional code to be followed by registered foresters in their forestry practice and their conduct with clients and professional colleagues. This incorporation does not include subsequent amendments and editions. Copies may be obtained from the Board of Registration at no charge. In each individual canon the title Registered Forester (RF) shall be substituted for the word "member". The canons in the code of ethics are part of the registration application, and~~ In their signed affidavits, all applicants shall indicate their agreement to ~~conform~~ adhere to the following Code of Ethics. ~~with them in their signed affidavits.~~ ~~They~~ The code shall be used by the Board to help govern its decisions in adjudicating flagrant misconduct in the practice of forestry under G.S. 89B-13.

Code of Ethics

(1) A Registered Forester shall practice forestry consistent with ecologically sound principles and all applicable laws.

(2) A Registered Forester shall not engage in unlawful acts or business practices.

(3) A Registered Forester shall present truthful, accurate, and complete information while practicing forestry.

(4) A Registered Forester shall practice forest management in accordance with landowner objectives and Forestry Best Management Practices, and will advise landowners of the consequences of deviating from such standards.

(5) A Registered Forester will advertise and perform only those services for which the Registered Forester is qualified.

(6) A Registered Forester will indicate on whose behalf any public statements are made, and keep proprietary information confidential unless the appropriate person authorizes its disclosure.

(7) A Registered Forester must avoid conflicts of interest or even the appearance of such conflicts. If, despite such precaution, a conflict of interest is discovered, it must be disclosed to the Registered Forester's employer or client, and the Registered Forester must attempt to resolve the conflict.

(8) A Registered Forester will: act in a civil and professional manner; respect the needs, contributions, and viewpoints of others, and; give credit to others for their methods, ideas, or assistance.

Authority G.S. 89B-6; 89B-9; 89B-13.

21 NCAC 20 .0117 RECIPROCITY

(a) ~~Non-residents and~~ For residence of North Carolina, within one year of establishing residency for voting purposes in North Carolina, individuals ~~who have moved to North Carolina~~ who are legally registered or licensed as foresters in another state, shall submit evidence of such registration or licensing to the Board. A statement from the Board of registration or licensing in the state in which they are legally registered or licensed attesting that they are legally registered or licensed to practice forestry in that state, and indicating the final date on which their registration or license remains valid, shall be accepted by the Board as adequate evidence. This provision shall not apply unless the state in which the applicant is registered or licensed observes similar rules of reciprocity in regard to persons registered under the provisions of G.S. 89B.

(b) If the Board determines that the reciprocity applicant is qualified to practice as a registered forester in North Carolina, the Board shall issue a letter conveying this approval.

(c) The fee for obtaining such reciprocity shall be the same as is charged a North Carolina resident seeking to obtain registration in the state of North Carolina. (See Rule .0106 of this Section).

Authority G.S. 89B-6; 89B-9.

21 NCAC 20 .0122 HANDLING OF COMPLAINTS

(a) The Board, upon receipt of a notarized letter identifying specific complaints of gross negligence, fraud, deceit or flagrant misconduct in the practice of forestry or incompetence by a registered forester, shall follow-up by written correspondence to the accused requesting a response to the accusation. The Board may request the complainant, the accused registrant, or both to personally appear before the Board.

(b) Following a review of the facts and verification of the violation, the Board may choose appropriate action, which may include:

(1) revocation or suspension of the registered forester status of the individual ~~as a registered forester~~ as outlined in Rule .0106 of this Section; and

(2) warning to the registrant outlining the violation and directing that it be stopped.

Authority G.S. 89B-2; 89B-6; 89B-13; 89B-15; 150B-3; 150B-38.

21 NCAC 20 .0123 CONTINUING EDUCATION

(a) All registered foresters shall attend continuing education courses annually to maintain their registration. Ten CFE

(Continuing ~~Forester~~ Forestry Education) credits approved by the Society of American Foresters ~~Foresters' CFE Coordinator shall be~~ are required each year, ~~beginning with the fiscal year July 1, 1999 through June 30, 2000,~~ except as outlined in ~~paragraph (c) of~~ this Rule. CFE's must be SAF category 1, 2, or 3, ~~3 or 4,~~ with at least six being from category 1.

(b) Registered foresters shall verify CFE compliance to the Board with each annual renewal.

(c) Those registered foresters who provide information to the Board ~~which~~ that verifies that they are ~~fully~~ retired from a career in forestry may qualify to continue their registration by earning a minimum of three category 1, 2, or 3 ~~3, or 4~~ CFE's annually.

(d) Upon request, the Board shall approve hardship cases, such as military deployment, extended illness or other circumstances that prevent the Registered Forester from obtaining the required CFE's.

Authority G.S. 89B-6; 89B-11.

21 NCAC 20 .0124 COMPLIANCE WITH ANNUAL REPORTS REQUIRMENTS

In the event the board's authority to expend funds is suspended pursuant to G.S. 93B-2, the board shall continue to issue and renew licenses and all fees tendered shall be placed in the escrow account maintained by the board for this purpose.

Authority G.S. 93B-2.

21 NCAC 20 .0125 PETITION FOR RULE-MAKING – DECLARATORY RULINGS

(a) Any person may petition the State Board of Registration for Foresters (NCBRF) to adopt a new rule, or amend or repeal an existing rule by submitting a rule-making petition to NCBRF. The petition must be titled "Petition for Rule-making" and must include the following information:

(1) the name and address of the person submitting the petition;

(2) a citation to any rule for which an amendment or repeal is requested;

(3) a draft of any proposed rule or amended rule;

(4) an explanation of why the new rule or amendment or repeal of an existing rule is requested and the effect of the new rule, amendment, or repeal on the procedures of NCBRF;

(5) any other information the person submitting the petition considers relevant.

(b) The Chairman of the State Board of Registration for Foresters (Chairman) must decide whether to grant or deny a petition for rule-making within 30 days of receiving the petition. In making the decision, the Chairman will consider the information submitted with the petition and any other relevant information.

(c) When the Chairman denies a petition for rule-making, he/she must send written notice of the denial to the person who submitted the request. The notice must state the reason for the denial. When the Chairman grants a rule-making petition, he/she must initiate rule-making proceedings and send written notice of the proceedings to the person who submitted the request.

Authority G.S. 150B-16.

21 NCAC 20 .0126 DECLARATORY RULINGS: AVAIABILITY

Declaratory rulings pursuant to G.S. 150B-4 will be issued by the State Board of Registration for Foresters (NCBRF) upon request only on the validity of a rule of the NCBRF or on the applicability of a rule or order of the NCBRF to stipulated facts. A declaratory ruling will not be issued on a matter requiring an evidentiary proceeding.

Authority G.S. 150B-4.

This Section contains information for the meeting of the Rules Review Commission on Thursday, November 19, 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	**Appointed by House**
Jim R. Funderburk - 1st Vice Chair	Jennie J. Hayman - Chairman
David Twiddy - 2nd Vice Chair	John B. Lewis
Ralph A. Walker	Clarence E. Horton, Jr.
Jerry R. Crisp	Daniel F. McLawhorn
Jeffrey P. Gray	Curtis Venable

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

April 15, 2010 May 20, 2010
June 17, 2010 July 15, 2010

RULES REVIEW COMMISSION
March 18, 2010
MINUTES

The Rules Review Commission met on Thursday, March 18, 2010, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Clarence Horton, John Lewis, Dan McLawhorn, and Ralph Walker.

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

The following people were among those attending the meeting:

Nancy Pate	Department of Environment and Natural Resources
Karen Waddell	Department of Insurance
Jeff Babb	NC State Highway Patrol
Kelly Braam	Board of Barber Examiners
Jane Gilchrist	Department of Justice
Joy Strickland	Department of Justice
Sam Tracy	Department of Justice
Paul Pope	Department of Justice
Bryan Dowdy	DENR/Division of Parks and Recreation
Mike Lambert	DENR/Division of Parks and Recreation
Barry Gupton	DOI/Building Code Council
Roberta Ouellette	NC Appraisal Board
Phil Joyner	DOI/Home Inspector Licensure Board
David Griffin	Department of Environment and Natural Resources
Eric David	Board of Pharmacy
Wayne Woodard	Department of Justice
Ellen Lorscheider	Department of Environment and Natural Resources
Michael Scott	Department of Environment and Natural Resources
Kim Dove	Board of Dietetics/Nutrition
Denise Stanford	Licensing Board for General Contractors

Carol Tingley	DENR/Division of Parks and Recreation
Helen Cotton	DENR/Hazardous Waste Section
Will Corbett	NC Commissioner of Banks
Gail Bledsoe	DENR/Division of Forest Resources
Jon Carr	Board of Dietetics/Nutrition
Allison Cooper	RRW Attorneys

APPROVAL OF MINUTES

The meeting was called to order at 9:03 a.m. with Mr. Funderburk presiding. He 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). Vice Chairman Funderburk asked for any discussion, comments, or corrections concerning the minutes of the February 18, 2010 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

10A NCAC 22M .0102 – Division of Medical Assistance. The Commission approved the rewritten rule submitted by the agency.

10A NCAC 22O .0118 – Division of Medical Assistance. No rewritten rule has been submitted and no action was taken.

11 NCAC 08 .1004 – Home Inspector Licensure Board. The Commission approved the rewritten rule submitted by the agency.

11 NCAC 12 .1901 – Department of Insurance. The Commission approved the rewritten rule submitted by the agency.

12 NCAC 09B .0203 – Criminal Justice Education and Training Standards Commission. The Commission approved the rewritten rule submitted by the agency.

14A NCAC 09H .0321 – Department of Crime Control and Public Safety. The Commission approved the rewritten rule submitted by the agency.

15A NCAC 13B .0835, .0836, .0841, .0842 – Commission for Public Health. The Commission approved the rewritten rules submitted by the agency.

Prior to the review of the rules from the Board of Barber Examiners, Commissioner Gray recused himself and did not participate in any discussion or vote concerning these rules because he represents the Board as its legal counsel.

21 NCAC 06L .0111, .0116 – Board of Barber Examiners. The Commission approved the rewritten rules submitted by the agency.

21 NCAC 06N .0101 – Board of Barber Examiners. The Commission approved the rewritten rule submitted by the agency.

2009 Residential Code R313 – Building Code Council. The Commission approved the rewritten rule submitted by the agency.

LOG OF FILINGS

Vice Chairman Funderburk presided over the review of the log of permanent rules.

Department of Insurance
All permanent rules were approved unanimously with the following exception:
11 NCAC 22 .0108 – This rule was withdrawn by the agency.

Private Protective Services Board
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 Board pursuant to a contract.

12 NCAC 07D .0405 - The Commission objected to this rule based on a failure to comply with the Administrative Procedure Act, G.S. 150B-21.10, by not making the requested technical changes. In addition the Commission was concerned by the fact the seal pictured in the rule is not the official state seal.

12 NCAC 07D .0702 - The Commission objected to this rule based on lack of statutory authority and ambiguity. The rule is either unclear or beyond the agency's authority. The agency has the statutory authority to charge a late fee of not more than $100.00 and charge it "to be paid within 90 days from the date the … registration … expires." Both the fee and the time limit appear to be within the statutory limits. G.S 74C-9(e)(5). However, adding the "to be paid within 30 days from the date the registration expires" is outside the agency's authority if they intend to restrict the ability to pay a late fee to only 30 days since the statute authorizes it to be paid within 90 days. It is unclear what the agency would charge, expect to charge, or enforce if a registrant applied for renewal after the registration has been expired for more than 30 days but less than 91 days. Given the statutory language in (e)(5) the agency would not be justified in refusing to renew a license within that time frame for failure to make the late fee payment within 30 days.

Coastal Resources Commission
15A NCAC 07H .0208 - The Commission objected to this rule based on lack of statutory authority and ambiguity. 1.) The rule in (b)(2)(G) page 5 lines 6 and 7 is unclear or is outside the agency's authority. The "case-by-case" review for "publicly funded projects" does not specify what review standards shall be applied, making these standards unclear. There is no authority to apply standards of review outside the standards found in existing rules. 2.) It is unclear what is meant or required by the standard in (b)(5)(P) page 8 lines 18 and 19 to "consider the cumulative impacts of marina development" in reviewing marina applications. It is unclear in that it mistakenly implies that a permit may be issued even though G.S. 113A-120(a)(10) sets out conditions where the "cumulative impacts" require that a permit be denied. 3.) In (b)(5)(Q), page 8 lines 20 - 23 it is unclear what the level of compliance with current standards – "to the maximum extent possible" – actually requires in determining whether to allow replacement of existing marinas and what is meant by the requirement in (b)(5)(Q) lines 22 and 23 to give "consideration … to replacement costs and service needs" in deciding whether to allow replacements of existing marinas and how to determine the level of compliance with the current standards.

15A NCAC 07H .0309, .1704, .1705 - The Commission objected to these rules based on failure to comply with the Administrative Procedure Act, G.S. 150B-21.10, by not making the requested technical changes.

The Commission also requests the following additional technical changes. In Rule .0208(a)(2)(G) page 2 line 3 change "or" in "public trust areas or estuarine waters" to "including" or delete "or estuarine waters" since estuarine waters are public trust areas. The same change is also needed in Rule .1704(c) line 30.

Department of Environment and Natural Resources/Division of Parks and Recreation
All permanent rules were approved unanimously with the following exceptions:

15A NCAC 12A .0105 - The Commission objected to this rule based on ambiguity. It is not clear that all the terms in this Chapter that need defining are defined in this rule.

15A NCAC 12B .0104 - The Commission objected to this rule based on ambiguity. It is not clear what standards the agency will use in granting permits pursuant to this Chapter.

15A NCAC 12B .0203 - The Commission objected to this rule based on ambiguity. It is not clear what standards the agency will use in determining whether to grant a special activities permit.

15A NCAC 12B .0204 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (b), it is not clear what standards the Park Superintendent is to use in deciding whether to grant permission to install permanent or fixed rock climbing anchors. As written, this paragraph contains a waiver provision without specific guidelines as prohibited by G.S. 150B-19(6). In (a), (d) and (e), it is not clear what standards the Department will use in determining whether to grant a permit or in setting the terms and conditions in a permit.

15A NCAC 12B .0501 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (d), it is not clear what standards the Department will use in determining whether to issue a vehicle beach use permit. The paragraph amounts to a waiver provision without specific guidelines.

15A NCAC 12B .0502 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (b) and (c), it is not clear what standards the Department will use in determining whether to grant permits. The paragraphs are waiver provisions without specific guidelines. This objection applies to existing language in the rule.

15A NCAC 12B .0601 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (b), it is not clear what standards the Department will use in limiting or prohibiting motor powered boats on lakes. In (e), it is not clear what standards the Department will use in granting a specific activity permit. As written this amounts to a waiver provision without specific guidelines. This objection applies to existing language in the rule.

15A NCAC 12B .0602 - The Commission objected to this rule based on ambiguity. In (e), it is not clear what is meant by permanent or semipermanent camping.

15A NCAC 12B .0701 - The Commission objected to this rule based on ambiguity. In (a), it is not clear what standards the Department will use in granting a special activity permit.
15A NCAC 12B .0802 - The Commission objected to this rule based on ambiguity. In (b), it is not clear what restrictions exist in addition to State laws. This objection applies to existing language in the rule.

15A NCAC 12B .1001 - The Commission objected to this rule based on ambiguity. In (b), it is not clear what would amount to unreasonable noise.

15A NCAC 12B .1003 - The Commission objected to this rule based on ambiguity. In (a) and (c), it is not clear what is meant by "a long term operating lease." It is not clear if this is an existing agreement or one anyone can still get. In (c), it is not clear what parks are designated. In (f), it is not clear what other information is pertinent and may be required.

15A NCAC 12B .1004 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (f), it is not clear when a Specialty Activity Permit will be granted. As written, this is a waiver provision without specific guidelines.

15A NCAC 12B 1101 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (a) and (b), it is not clear when a special activity permit will be granted. This is a waiver provision without specific guidelines. This objection applies to existing language in the rule.

15A NCAC 12B .1105 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (c), it is not clear what other information is required on the application form. There is no authority to set requirements by form. It is also not clear what constitutes "good cause." Good cause is not specific guidelines as required by G.S. 150B-19(6).

15A NCAC 12B .1201 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (a), it is not clear when a permit will be granted. This provision is a waiver without specific guidelines. This objection applies to existing language in the rule.

15A NCAC 12B .1205 - The Commission objected to this rule based on lack of statutory authority and ambiguity. In (f), it is not clear when there will be an otherwise posted service charge, nor what that charge shall be. This is a modification provision without specific guidelines prohibited by G.S. 152B-19(6).

15A NCAC 12B .1206 - The Commission objected to this rule based on lack of statutory authority and ambiguity. It is not clear the amount of the reservation service charge. There is no authority to change a fee not set by rule. In (10), it is not clear what the other appropriate charges are. This objection applies to existing language in the rule.

Commission for Public Health
The permanent rule was approved unanimously.

Department of Environment and Natural Resources/Aquarium Division
15A NCAC 28 .0301 - The Commission objected to this rule based on lack of statutory authority and ambiguity. It is not clear what standards the Aquarium Director will use in giving permission to others to enter or remain on Aquarium Property other than when the facility is open to the public. This amounts to a waiver provision without specific guidelines as required by G.S. 150B-19(6). This objection applies to existing language in the rule.
15A NCAC 28 .0502 – The Commission objected to this rule based on ambiguity. It is not clear what standards the Divisions Director will use in approving the sale of beer and wine.

15A NCAC 28 .0503 - The Commission objected to this rule based on ambiguity. It is not clear what standards the Division Director will use in approving the serving and consumption of alcohol. This objection applies to existing language in the rule.

15A NCAC 28 .0504 - The Commission objected to this rule based on ambiguity. It is not clear if local ordinances apply on State-owned property.

15A NCAC 28 .0602 - The Commission objected to this rule based on ambiguity. It is not clear what standards the Aquarium Director will use in granting permission for the erection and display of notices and advertisements. This objection applies to existing language in the rule.

15A NCAC 28 .0603 - The Commission objected to this rule based on lack of statutory authority and ambiguity. It is not clear what standards the Aquarium Director will use in granting permission to take photographs, etc., for commercial purposes. This amounts to a waiver provision prohibited by G.S. 150B-19(6). This objection applies to existing language in the rule.

15A NCAC 28 .0604 - The Commission objected to this rule based on lack of statutory authority and ambiguity. It is not clear what standards the Division Director will use in granting permission for the use or modification of logos, names, or slogans. This is a waiver provision without specific guidelines as prohibited by G.S. 150B-19(6). This objection applies to existing language in the rule.

15A NCAC 28 .0605 - The Commission objected to this rule based on ambiguity. It is not clear what standards the Aquarium Director will use in granting permission to engage in fundraising activities.

15A NCAC 28 .0701 - The Commission objected to this rule based on lack of statutory authority and ambiguity. It is not clear what standards employees or agents will use in authorizing the activities listed in this rule. The rule is a wavier provision without specific guidelines. This objection applies to existing language in the rule.

Licensing Board for General Contractors
21 NCAC 12 .0208 - The Commission objected to this rule based on lack of statutory authority. In (b)(3)(B), there does not appear to be authority for the Board to determine liability issues pursuant to a contract. There is no authority to tell a court what it can and cannot do.

21 NCAC 12 .0211 was approved unanimously.

Board of Dental Examiners
All permanent rules were approved unanimously.

Board of Dietetics/Nutrition
All permanent rules were approved unanimously with the following exception:

21 NCAC 17 .0401 - The Commission objected to this rule based on lack of statutory authority. There does not appear to be authority for paragraphs (b) and (c) limiting the application of G.S. 90-368(4) to persons meeting certain requirements. The statute exempts everyone form the requirements of the Dietetics/Nutrition Practice Act, not just those the Board chooses to exempt. As written, the paragraphs establish an occupational license for aides. There is no authority cited to do so.

Board of Massage and Bodywork Therapy
The permanent rule was approved unanimously.

Medical Board
Prior to the review of the rules from the Medical Board, Commissioner Lewis recused himself and did not participate in any discussion or vote concerning this rule because he is a member of the NC Medical Board.

The permanent rule was approved unanimously.

Board of Pharmacy
The permanent rule was approved unanimously.

Appraisal Board
21 NCAC 57A .0201, .0204; 57B .0102, .0103, .0306, .0603: Appraisal Board - The Commission approved these rules, however the Commission received more than ten written objections to this rule. Thus these rules are subject to legislative review.

Board of Community Colleges
All permanent rules were approved unanimously.

TEMPORARY RULES

There were no Temporary Rules filed for review.

COMMISSION PROCEDURES AND OTHER BUSINESS

There was no other business.

The meeting adjourned at 10:35 a.m.
The next scheduled meeting of the Commission is Thursday, April 15 at 9:00 a.m.
Respectfully Submitted,

_____
Dana Vojtko
Publications Coordinator

LIST OF APPROVED PERMANENT RULES
March 18, 2010 Meeting

HHS - MEDICAL ASSISTANCE, DIVISION OF			
Membership	10A	NCAC 22M	.0102
HOME INSPECTOR LICENSURE BOARD			
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Scope	11	NCAC 22	.0101
Definitions	11	NCAC 22	.0102
General Eligibility	11	NCAC 22	.0103
Filing Requirements	11	NCAC 22	.0104
Financial Requirements	11	NCAC 22	.0105
Administrative, Provider, and Management Contracts	11	NCAC 22	.0106
Trust Submittal and Plan of Operation	11	NCAC 22	.0107
Claims Payments	11	NCAC 22	.0109
Dissolution	11	NCAC 22	.0110
Minimum Reserve Standards	11	NCAC 22	.0111
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Premium Reserves	11	NCAC 22	.0113
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Qualified Actuary; Maximum Net Retention Filing	11	NCAC 22	.0115
Certification of Reserves Filing	11	NCAC 22	.0116
Definitions and Certification of Rates Filing	11	NCAC 22	.0117
CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION			
Admission of Trainees	12	NCAC 09B	.0203
CRIME CONTROL AND PUBLIC SAFETY			
Rotation Wrecker Service Regulations	14A	NCAC 09H	.0321
ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF			
Organization and Purpose	15A	NCAC 12A	.0101
Directory of State Parks and Recreation Areas	15A	NCAC 12A	.0104
Natural and Cultural Resource Protection	15A	NCAC 12B	.0201
Bathing and Swimming Activities Where Prohibited	15A	NCAC 12B	.0301

Disposal of Refuse: Garbage, Etc.	15A NCAC 12B .0401
PUBLIC HEALTH, COMMISSION FOR	
STDS Applicable to Generators of Hazardous Waste-Part 262	15A NCAC 13A .0107
Septage Land Application Site Permits	15A NCAC 13B .0835
Septage Detention and Treatment Facility Permits	15A NCAC 13B .0836
Standards for Septage Detention and Treatment Facilities	15A NCAC 13B .0841
Innovative or Alternative Treatment or Storage Methods	15A NCAC 13B .0842
ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF	
Purpose	15A NCAC 28 .0101
Facilities	15A NCAC 28 .0102
Users	15A NCAC 28 .0103
Permissible Activities	15A NCAC 28 .0104
Permission for Use	15A NCAC 28 .0105
Scheduling Permissible Activities	15A NCAC 28 .0106
Available Areas	15A NCAC 28 .0107
Long-Term Use Prohibited	15A NCAC 28 .0108
Scheduling Activities for Regular Hours	15A NCAC 28 .0201
Aquarium Responsibilities	15A NCAC 28 .0202
Scheduling Activities for Non-regular Hours	15A NCAC 28 .0203
Fee Schedule	15A NCAC 28 .0302
Lethal Instruments	15A NCAC 28 .0401
Fires	15A NCAC 28 .0403
Smoking	15A NCAC 28 .0404
Uses Not Covered by Policy	15A NCAC 28 .0405
Disorderly Conduct	15A NCAC 28 .0501
Loud Radios	15A NCAC 28 .0505
Proper Dress	15A NCAC 28 .0506
Coaster Conveyances	15A NCAC 28 .0507
Acceptance of Donated Personal Property	15A NCAC 28 .0606
Parking	15A NCAC 28 .0703
Food and Beverages Prohibited Inside	15A NCAC 28 .0704
BARBER EXAMINERS, BOARD OF	
Where Barber Services May Be Performed	21 NCAC 06L .0111
Additional Duties of Barber Shop Owners and Managers and ...	21 NCAC 06L .0116
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GENERAL CONTRACTORS, LICENSING BOARD FOR	
Multiunit Buildings	21 NCAC 12 .0211
DENTAL EXAMINERS, BOARD OF	
Definitions	21 NCAC 16B .0901
Exemptions Granted	21 NCAC 16B .0902
Definitions	21 NCAC 16I .0110

Exemptions Granted	21	NCAC 16I	.0111
DIETETICS/NUTRITION, BOARD OF			
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Code of Ethics for Professional Practice and Conduct	21	NCAC 17	.0114
Violations, Complaints, Subsequent Board Action, and Hear...	21	NCAC 17	.0116
Suspension of Authority and Escrow of Funds	21	NCAC 17	.0117
Armed Services Licensees	21	NCAC 17	.0118
MASSAGE AND BODYWORK THERAPY, BOARD OF			
License Renewal	21	NCAC 30	.0303
MEDICAL BOARD			
Supervision of Anesthesiologist Assistants	21	NCAC 32W	.0109
PHARMACY, BOARD OF			
Extension of Period for Certain Members of the Armed Forces	21	NCAC 46	.1613
APPRAISAL BOARD			
Qualifications for Trainee Registration and Appraiser Cer...	21	NCAC 57A	.0201
Continuing Education	21	NCAC 57A	.0204
Appraisal Reports	21	NCAC 57A	.0405
Supervision of Trainees	21	NCAC 57A	.0407
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Certified Residential Real Estate Appraiser Course Requir...	21	NCAC 57B	.0102
Certified General Real Estate Appraiser Course Requirements	21	NCAC 57B	.0103
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Sponsor Reporting of Continuing Education Credit	21	NCAC 57B	.0608
Renewal of Approval and Fees	21	NCAC 57B	.0611
COMMUNITY COLLEGES, BOARD OF			
Education Services for Minors	23	NCAC 02C	.0305
Limitations in Reporting Student Membership Hours	23	NCAC 02D	.0325
Maintenance of Plant Flexibility	23	NCAC 02D	.0329
Definitions and Application for Initial License	23	NCAC 03A	.0101
Application for Renewal of License	23	NCAC 03A	.0102
Administration of the Student Protection Fund	23	NCAC 03A	.0116
BUILDING CODE COUNCIL			
NC Residential Code - Carbon Monoxide Detectors	R313		

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	PUBLISHED DECISION REGISTER CITATION
ALCOHOL BEVERAGE CONTROL COMMISSION				
NC Alcoholic Beverage Control Commission v. Ciro Maya Maya, T/A Carolina Sports Arena	08 ABC 2411	Overby	06/29/09	
NC Alcoholic Beverage Control Commission v. Abdu Suleh Ali d/b/a Harlam Mini Mart	08 ABC 2980	Overby	01/07/10	
NC Alcoholic Beverage Control Commission v. Danny Wilson Hayes, Debra Ann Hayes, T/A Double D Sports Bar and Grill	09 ABC 0006	Gray	01/28/10	
N.C. Alcoholic Beverage Control Commission v. Du Cong Phan T/A Good Food Market	09 ABC 0565	May	05/18/09	
North Carolina Alcoholic Beverage Control Commission v. Mayra Leticia Rodriguez, T/A La Perla Del Pacifico	09 ABC 0975	Gray	07/28/09	
N.C. Alcoholic Beverage Control Commission v. Roberta White Bridges T/A Christina Restaurant and Catering	09 ABC 1899	May	07/28/09	
N.C. Alcoholic Beverage Control Commission v. Mobashar Hassan Chaudhary	09 ABC 3579	Gray	09/30/09	
N.C. Alcoholic Beverage Control Commission v. Partnership T/A El Paraiso II	09 ABC 4171	May	02/16/10	
NC Alcoholic Beverage Control Commission v. La Tienda Mexicana Corp. T/A Tienda La Unica	09 ABC 4379	Brooks	09/17/09	
NC Alcoholic Beverage Control Commission v. Jose Elias Bautista T/A Bar Mexico Lindo	09 ABC 4680	May	12/30/09	
NC Alcoholic Beverage Control Commission v. Uwem Eyo Equan, T/A Sahara Restaurant and Lounge	09 ABC 4682	May	11/13/09	
NC Alcoholic Beverage Control Commission v. KAM Properties Inc. T/A Grays Creek Superette	09 ABC 4686	Gray	10/19/09	
N.C. Alcoholic Beverage Control Commission v. Bee Nui Carson, T/A Big Boys Market	09 ABC 5209	Brooks	12/11/09	
NC Alcoholic Beverage Control Commission v. Rimal Enterprise, Inc., T/A R B FoodMarket	09 ABC 5213	Brooks	12/11/09	
NC Alcoholic Beverage Control Commission v. Alhobishi Convenience Stores & Rentals, Inc T/A Happy Mart 4	09 ABC 5293	Lassiter	01/19/10	
NC Alcoholic Beverage Control Commission v. Mike's Private Club, Inc., T/A EL Rincon Caliente	09 ABC 5423	Brooks	12/10/09	
NC Alcoholic Beverage Control Commission v. Xuan Huong Thi Le T/A Billiards and Grill	09 ABC 5424	Brooks	12/10/09	
NC Alcoholic Beverage Control Commission v. Rumba D Cache Inc, T/A Rumba D Cache	09 ABC 6277	Brooks	03/25/10	
NC Alcoholic Beverage Control Commission v. Yong Cha Kim, T/A Asian Odyssey	09 ABC 6412	Overby	02/12/10	
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Douglas Van Essen v. NC State Board of Cosmetic Arts Examiners	09 BCA 2773	Webster	01/20/10	24:18 NCR 1638
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Battlecat Productions, Inc., D/B/A Battlecat Marine v. East Carolina University and State of NC Dept. of Purchase and Contract	09 DOA 4788	Gray	10/08/09	
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Michelle Sara Rodriguez v. National Board Certification Appeals Panel/Division of Talent Management and Development	08 EDC 3219	Brooks	08/21/09	
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R. Michael Pearson v. UNC Hospitals	09 UNC 3423	Gray	08/31/09	
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STATE OF NORTH CAROLINA COUNTY OF CABARRUS	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 08 OSP 3217
Leland D. Smith, Petitioner, vs. North Carolina Department of Cultural Resources, Respondent.	**DECISION**

PROCEDURAL BACKGROUND

The appeal of Leland D. Smith, Petitioner herein, was heard before Beecher R. Gray, Administrative Law Judge, Office of Administrative Hearings, on June 16 & 17, 2009, in Courtroom B of the Office Of Administrative Hearings, in Wake County, North Carolina.

APPEARANCES

Petitioner: John W. Gresham
N.C. Bar Number: 6647
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Respondent: Karen A. Blum
Assistant Attorney General
NC Department of Justice
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ISSUE

The issue presented by the evidence at the hearing is:

Whether Respondent has carried its burden of proof of showing that the termination of Petitioner, a permanent employee, was supported by evidence demonstrating just cause in that Petitioner had engaged in insubordination which constituted unacceptable personal conduct.

FINDINGS OF FACT

A. Background

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated that notice was proper. Petitioner Leland D. Smith (hereinafter "Petitioner") has been employed by Respondent in a full time position for more than the immediately preceeding 24 months and was notified that he had achieved a permanent status with the North Carolina Department of Cultural Resources (hereinafter "DCR") on January 2, 1985. (Tr. p. 192).

2. In 1988, Petitioner was promoted and assigned to Fort Fisher where he remained until his transfer to the Brunswick Town/Fort Anderson site (hereinafter "Brunswick") on or about July 1, 2007. (Tr. p. 27).

3. While assigned to Fort Fisher, Petitioner was promoted to Interpreter III. (Tr. p. 193).

4. From the time of his employment with DCR in 1984 until the charges which DCR relies upon to support Petitioner's termination arose in March of 2008, Petitioner never had been accused of or received a warning regarding insubordination or the failure to follow directions. (Tr. p. 309).

B. The Events of 2007-2008

5. In March of 2007, Barbara Hoppe, the overall supervisor at Fort Fisher, took a position in another division of DCR.

6. The three interpreters who worked at Fort Fisher, Becky Sawyer, Ray Flowers, and Petitioner, as well as the security group, had reason to believe that Barbara Hoppe had misappropriated state property. (Tr. pp. 201-203, 220-261, Pet. Ex. B-2).

7. An issue over her computer's hard drive also led to the investigation of a special relationship between Barbara Hoppe and her immediate supervisor, Jimmy Bartley. (Tr. p. 184).

8. In late March when Becky Sawyer first attempted to report her concerns to Rob Boyette, who was Supervisor Bartley's supervisor, that Barbara Hoppe had misappropriated DCR property, he advised Becky Sawyer that her concerns were the least of his worries. (Tr. pp. 202& 261).

9. When the DCR supervisor took no further action, Becky Sawyer drafted a letter detailing her concerns. (Tr. pp 203, 261, Pet. Exh. B-2).

10. Petitioner, at Becky Sawyer's request, made some editorial suggestions regarding her letter which he believed was going to Supervisor Boyette. (Tr. pp. 203 & 262).

11. After completing the letter, Sawyer decided to send a copy of it to Paul Laird, the chairman of a civic group which worked to restore Fort Fisher. (Tr. p. 262).

12. In the ensuing investigation by Respondent's IT employee Sam Glaze, it was determined that Barbara Hoppe acknowledged that she had removed the hard drive because she "couldn't remove some sensitive data." (Pet. Exh. B-2, Tr. pp. 175-777).

13. Within three weeks of the completion of that investigation, Petitioner received two written warnings from Supervisor Boyette.

14. The first, dated May 11, 2009, concerned two purported safety issues: (a) towing a cannon to Onslow County on a trailer knowing that the trailer lights did not work, and (b) being responsible for a visitor at Fort Fisher firing a pistol at a Confederate Memorial Day event.

15. The evidence and testimony presented at the hearing indicated serious flaws in the bases for the warnings. This evidence included:

(a) The Towing Incident

(i.) On April 16, 2007, Petitioner had advised Supervisor Boyette and Andrew Duppstadt, a DCR supervisor who oversees safety for the department for all historic sites in the State, (Tr. p. 224) that he had not returned a cannon from the Onslow County Museum because he did not want to tow the cannon through Wilmington traffic after dark because he "trailer lights do not work." (Pet. G-4).

(ii) At that point, prior to his learning of the Becky Sawyer letter about Barbara Hoppe, Supervisor Boyette replied by e-mail: "Glad things went well, please have the lights on the trailer fixed before taking it out in the future. Take care." Petitioner replied "Will do." (Pet. G-4).

(iii) Andrew Duppstadt did not reply since he had been aware for some months that the trailer did not have lights. (Tr. pp. 199, 225-226, Pet. Exh. G).

(iv) The State statutes regarding taillights on trailers of the size and weight of the DCR trailer did not require lights. (Tr. pp. 104-105); N.C.G.S. § 20-129.1 set out in Pet. Exh. A-6).

(v) Supervisor Boyette asserted in his testimony that the DCR followed a higher standard than set out in the statutes, but did not assert that Petitioner had been made aware of the standard nor did he produce the standard. (Tr. pp. 105-106).

(vi) A comparison of the documentations of the e-mails on April 19, 2007, when Petitioner first notified Supervisor Boyette and Andrew Duppstadt of the trailer and Supervisor Boyette's written warning of May 11, 2007, shows a marked shift in his reaction to the incident.

(vii) The only intervening factor is that Supervisor Boyette had learned of the Becky Sawyer letter and had attributed its genesis to Petitioner.

(b) The Confederate Memorial Day Incident

(i) Supervisor Boyette's actions in determining that Petitioner should be disciplined for this incident are suspect.

(ii) On May 5, 2007, the day on which a visiting re-enactor drew a concealed pistol and fired an unauthorized salute, Petitioner was not at the site and another interpreter, Ray Flowers, was in charge of the program. (Tr. p. 207, Pet. Exh. A-5).

(iii) Ray Flowers, Becky Sawyer, and Security Officer Joseph Miljenoric were working at the event. (Tr. pp. 264-266, Pet. Exh. A-5).

(iv) Without checking with any DCR staff, a volunteer mistakenly had allowed the firing of the weapon. (Pet. Exh. A-5, p. 2).

(v) There was nothing Petitioner could have done to prevent the firing of the weapon. (Tr. p. 266).

(vi) While Petitioner received a warning, Flowers, Sawye, and Miljenoric did not. (Tr. p. 124 & 269).

(vii) Supervisor Boyette's explanation for his decision to discipline only Petitioner was that, contrary to all of the evidence, that, had the DCR personnel at Fort Fisher properly been trained by Petitioner, the visitor would not have produced a pistol from his costume and fired. (Tr. p. 126).

16. Petitioner's first written warning was followed two weeks later by a second written warning from Supervisor Boyette because Petitioner was involved in the letter written by Becky Sawyer. Supervisor Boyette's testimony and letter that the reason he disciplined Petitioner was because he helped Becky Sawyer prepare the letter that was sent to a "third party" outside the "chain of command." (Tr. p. 119). Supervisor Boyette further testified that he obtained the information regarding Petitioner's knowledge that the letter was sent to the third party, Paul Laird, from Becky Sawyer. (Tr. p. 119).

17. Becky Sawyer, who still is employed by DCR at Fort Fisher, testified, as did Petitioner, that Petitioner had no prior knowledge of Paul Laird being sent a copy of the letter, that he understood that the letter was going to Supervisor Boyette and that Supervisor Boyette was "incorrect when he testified that Sawyer had told him that Petitioner knew the letter was going to Laird before it was sent." (Tr. pp. 204, 262-263).

18. Becky Sawyer also testified that Supervisor Boyette and other supervisors saw Petitioner as a leader at Fort Fisher, "in more ways than one." (Tr. p. 269).

19. Within four-to-five weeks of his receipt of the several warning letters, Petitioner was transferred to Brunswick. (Tr. pp. 17 & 211).

20. The only reason that Petitioner was given for the transfer was that they needed someone with experience to help reconstruct some cannon emplacements. (Tr. p. 212).

21. At Brunswick Petitioner's direct supervisor was Brenda Mashburn Bryant ("Mashburn Bryant or Bryant") and his second line supervisor again was Jimmy Bartley. (Tr. pp. 15 & 21).

22. While Petitioner saw his relationship with Bryant as pretty good, he observed her playing favorites, allowing a staff member, Kent Snyder to publically degrade and curse another staff member, Larry Pace, by calling him a "goddamned liar" and a "little fucker" and denying him a day off when the facility adequately was staffed. (Tr. pp. 212-215).

(c) The Pace Incident

23. In February of 2008 Supervisor Bryant came to Petitioner in the gift shop at Brunswick, a public space, and asked him if he had made any inappropriate comments about visitors at the facility. (Tr. p. 226).

24. Petitioner told Supervisor Bryant that the only two possible commentary incidents that he could recall was a comment he had made to coworker Kent Snyder that an Army officer who had taken a tour with Petitioner was a very attractive woman and a comment about a disabled visitor that, like his son who also had a disability, her disability did not detract from her beauty. (Tr. pp. 228-229).

25. Petitioner additionally told Supervisor Bryant that Larry Pace also had made a comment that the caregiver for the disabled visitor had a nice booty. Supervisor Bryant, in her sworn testimony, did not recall that Petitioner had disclosed his comments and those of Pace. (Tr. pp. 18 & 230).

26. Her testimony at the hearing is at odds with her report to Supervisor Jimmy Bartley on February 18, 2008, in which she states that Petitioner told her of one of the incidents and that she told him not to make any more such comments. (Pet. Ex. C-1).

27. Her testimony also is at odds with statements contributed to her by Supervisor Bartley in his investigative report that Petitioner had informed Supervisor Bryant in their conversation that Larry Pace had made some comments. (Pet. Ex. C-2).

28. Supervisor Bryant and Petitioner had different recollections about their further conversations regarding Larry Pace. Supervisor Bryant recalls that she told Petitioner not to call

Larry Pace about their discussions. She further states that she had the "impression" that Petitioner understood her request. Petitioner testified that she did not make any such request. (Tr. pp. 18 & 230).

29. The following day during a smoke break, Larry Pace came to Petitioner and told him that Supervisor Bryant had called him in and asked what Petitioner had told her about him. Petitioner told Larry Pace what he had told Supervisor Bryant and then advised Supervisor Bryant of his conversations with Pace. She acknowledged that Petitioner came to her and reported his conversation with Pace. (Tr. pp. 18, 230-231).

30. The reports by Supervisors Bryant and Bartley specifically state that the complaints about Petitioner and Larry Pace which led to what Supervisor Bartley terms an investigation came from co-worker Kent Snyder, the employee who earlier had cursed Larry Pace without reprimand. (Pet. Ex. C-2, Tr. p 213).

31. While the DCR records and testimony indicate that the discussions which Bryant had with Petitioner and Pace took place on February 5 & 6, 2008, the first documentation came on February 18, after a public anniversary event at Brunswick. (Pet. Exs. C-1 & C-2).

(d) The 143rd Anniversary Event

32. On February 16 and 17, 2008, Brunswick hosted an event that included reenactments and speakers which attracted about 2,000 visitors. (Tr. p. 232; Pet. Ex. D-1).

33. Petitioner had a number of duties in regard to the event including the publicity for the event, a duty he had handled for DCR events since 1987. (Tr. pp. 231-232).

34. Petitioner had a method for handling this task. He had one notebook (powder blue admitted as Ex. H) with a ten-step plan outline and a second notebook (burgundy notebook-never located by DCR) for additional materials. (Tr. pp. 231-232).

35. Petitioner used both press releases and e-mails to extensively publicize the event, and the speakers, including the WCU History Professor Emeritus Dr. Max William who lived at Carolina Beach. (Tr. pp. 246-248; Pet. Ex. D-1 & H). Petitioner sent news releases to The Brunswick Beacon (Shallotte), The Star News (Wilmington), the Island Gazette (Carolina Beach), The Myrtle Beach Sun (Myrtle Beach), and The State Port Pilot (Southport), in addition to various bulletin boards.

36. On February 14, 2008, Dr. Williams notified Supervisor Bryant that he would not speak because he saw that no publicity had been given to his lecture and therefore he felt no need to participate since there was no guarantee that the public would attend his lectures. (Tr. p. 238; Pet. Ex. C-2).

37. On Friday, February 15, 2008, as planning for the event, including the arrival of the re-enactors was in high hear, Petitioner was called to a meeting with Supervisors Bryant and Bartley

and quizzed about his publicity of the event and specifically his publicity of Dr. Williams. (Tr. pp. 235-237).

38. Petitioner, who had kept Supervisor Bryant fully informed of his publicity activities, produced his notebooks with the press releases and e-mails touting the appearance of Dr. Williams on the program. Petitioner's notebooks showed that the schedule of events listing the noted historian had been well publicized. Supervisor Boyette testified in this hearing that only one of the four newspaper releases had listed Dr. Williams as a participant. Supervisor Boyette produced one of the four news releases but stated that he could not find the other three. (Tr. pp. 235-239; 243; Tr. pp. 246-248; Pet. Ex. D-1, F and H).

39. At the end of the meeting, Petitioner understood that he was not to discuss the reason for Williams's withdrawal, that he could ask another Ph.D historian, Dr. Fonville to replace Williams, but that he needed to ask a reenactor, Mike Kochan, to be ready to replace Williams if Fonville could not. (Tr. p. 240).

40. That evening Petitioner approached Mike Kochan while he and several other re-enactors, including Taylor McCullen, were eating some chicken, and obtained Kochan's agreement to be the standby speaker on Sunday. (Tr. pp. 241-242; 257-258).

41. Petitioner spoke with Dr. Fonville on Saturday but, because of family commitments, Fonville could not return on Sunday. Petitioner then went to Kochan and told him that "you're on." (Tr. pp. 242-244).

42. Petitioner then reported to Supervisor Bryant that Fonville was unavailable on Sunday but that Kochan was "ready to go." (Tr. p. 244).

(C) DCR DISCIPLINE

43. In short order the following occurred:

(a) On February 18, 2008 Supervisor Bryant picked up a copy of Petitioner's press release dated January 1/31/08 from the *Island Gazette*. (Pet. Ex. D-1).

(b) Supervisor Bryant prepared a memo to Supervisor Bartley entitled "Leland Smith job performance". The memo gave her version of the Larry Pace matter and the Dr. Williams issue. (Pet. Ex. C-1).

(c) On February 19, 2008 Supervisor Bartley prepared an investigative report stating that he had conducted an investigation of her February 18 report. In the report Supervisor Bartley erroneously represented or misrepresented at a minimum the following facts:

(i) Petitioner failed to keep a press distribution list. (Pet. Ex. H).

(ii) The press release which Supervisor Bryant had obtained the previous day from the *Island Gazelle* did not contain a reference to Dr. Williams. (Pet. Ex. D-1).

(iii) Petitioner did not mention Dr. Williams when he was interviewed by a reporter. (Tr. p. 239; Ex. H p.247).

Respondent chose not to call Supervisor Bartley as a witness in this hearing to explain these misrepresentations.

(d) On March 5, 2008, Supervisor Bryant prepared and had Petitioner sign a "third official written warning" which advised Petitioner that he could not appeal the warning. In the warning Supervisor Bryant erroneously contended that Petitioner had not contacted Mike Kochan to speak on Sunday, had not kept a record of his press releases, and most startlingly, in light of the fact that she had obtained the press release from the *Island Gazette* which gave specific and glowing information about Dr. Williams, stated that he had failed to mention Dr. Williams in the press release. (Pet. Ex. C-3).

(e) By letter dated the same day Supervisor Bartley gave Petitioner a notice of a pre-disciplinary hearing to take place March 7, 2008. This letter repeated the same erroneous information contained in Supervisor Bryant's written warning of the same date. (Pet. Ex. C-4 & C-5).

(f) Following the March 7, 2008, pre-dismissal hearing, Supervisor Boyette sent Petitioner a termination letter, dated March 9, 2008, which recited the two earlier written warnings he had issued to Petitioner in 2007 and the Supervisor Bryant written warning issued a week earlier. Supervisor Boyette's letter claims that Petitioner's actions constituted unsatisfactory job performance and unacceptable personal conduct. Supervisor Boyette produced, late in this hearing, a document which he stated represented his undated and unsigned notes from the predismissal conference with Petitioner and testified that these notes were not in accordance with his usual practice (Pet. Ex. C-5).

44. Petitioner grieved this dismissal and Division Director Keith Hardison, in his decision on June 26, 2008, determined that Petitioner's dismissal was warranted only for unsatisfactory job performance. (Pet. Ex. E-4).

45. DCR grievance procedure next involved a process described as a hearing before attorney Thomas R. West. This process relied on unsworn testimony and did not allow for the presence of counsel. Thomas West's conclusion was that, while he determined that Petitioner had not obeyed a directive in the Pace matter and in speaking with Dr. Fonville, he recommended Petitioner be reinstated, that the existing written warnings be removed from his file, and that he be given a written warning regarding the Pace and Fonville discussions. (Pet. Ex. E-5).

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings. Petitioner was a career State employee under the provisions of Chapter 126 of the General Statutes of North Carolina at the time of his dismissal. Under G.S. § 126-35(d) the burden of proof for the termination of Petitioner, a career State employee, resides with Respondent.

2. The department abandoned its initial contention that Petitioner's termination could be sustained on grounds of inadequate performance and proceeded only on the grounds of misconduct, specifically insubordination.

3. The evidence presented by the parties is conflicting and requires a determination of the credibility of the witnesses.

4. In order to meet its burden of proof, the department must establish that Petitioner was given a clear, reasonable, and proper instruction and that he then willfully or intentionally refused to comply with the instruction. *Southern v. New River Mental Health*, 142 N.C.App 1, 5, 541 S.E.2d 750, 754 (2001).

The evidence upon which the department relies to show insubordination is threefold:

(a) Petitioner initiated a conversation with Larry Pace about possible inappropriate comments made by him and Larry Pace and that Supervisor Bryant instructed him not call or question Larry Pace about her inquiries.

(b) Petitioner asked Dr. Fonville to speak on Sunday after Dr. Williams refused to speak contrary to the instructions of Supervisor Bryant.

(c) Petitioner failed to request that Mike Kochan be available to speak in place of Dr. Williams on Friday night after Supervisor Bryant instructed him to do so.

5. With regard to the instructions about Mike Kochan, Petitioner provided a re-enactor witness, Taylor McCullen, who testified that he was present when Petitioner asked Mike Kochan on Friday night if he would speak on Sunday. Taylor McCullen's eyewitness testimony corroborated Petitioner's testimony that he did as instructed. Respondent produced no evidence to the contrary. Given the good credibility of witnesses McCullen and Petitioner on this point, the allegation must fail.

6. Regarding Petitioner's request to Dr. Fonville, the evidence established that Petitioner had included Dr. Williams in the schedule of events well before his withdrawal on Thursday. From the evidence it was no secret that Dr.Williams was not speaking and that Petitioner had made no disclosures to Dr. Fonville since Supervisor Bryant testified that Dr. Fonville asked her on Saturday why Max was not speaking. (Tr.p.56). Petitioner knew that Supervisors Bartley and Boyette had issued two written warnings less then a year earlier. As stated in his grievance submission to

Director of State Historic Sites and Properties Keith Hardison, Petitioner likely would not willfully have violated a directive knowing full well what was at stake with his previous write-ups. (Tr. p,307; Pet. Ex. D-2).

7. The third basis put forward by the department regarding Petitioner's responses to Larry Pace's questions the day after Supervisor Bryant had spoken to him will not support Petitioner's discharge. Initially as set out in the Findings of Fact, Supervisor Bryant's position on her conversation with Petitioner has changed over time. At the hearing she testified that it was only her "impression" that Petitioner understood that he was not to call or question Pace about his comments. She also testified that Petitioner denied making any questionable comments or hearing any from Larry Pace and that she had the impression that he understood that he should not call or question Larry Pace. (Tr. p. 20). However, the memorandum and warning she wrote indicates otherwise and actually is more consistent with Petitioner's version of the events. Additionally, the fact that Supervisor Bryant acknowledges that Petitioner voluntarily disclosed that Larry Pace had spoken to him about the allegations again belies the notions that Petitioner was aware of any express directive from Supervisor Bryant and intentionally was disobeying such an instruction.

8. It should be noted that in assessing the credibility of the department's witnesses, the explanation of Supervisor Boyette for the first two written warnings to Petitioner is suspect. His testimony on these two warnings is contradicted not only by Petitioner but also by Becky Sawyer and the e-mails and picture witnessed by Petitioner. Likewise, his testimony that Petitioner admitted to all of his supposed wrongdoings in 2008 and his late production of undated and unsigned notes to support his allegation, belies the fact that a number of the allegations regarding the Williams matter are erroneous and there is documentary evidence and testimony from witnesses that shows that the allegations are not true. While the contradictions in Supervisor Bryant's testimony are less glaring, her obvious misstatements regarding the press release which she had obtained from the *Island Gazette* is disturbing. Again Petitioner, apparently believing that he was keeping his superior informed, came to her on Saturday and told her that he talked to Dr. Fonville and he could not speak on Sunday. (Tr. p. 28). His heads up to Supervisor Bryant simply makes no sense as a willful violation of her directive, given his knowledge that Supervisors Bartley and Boyette, his second and third level supervisors, already had issued two warnings to him. Moreover, it was clear from the testimony of Supervisor Bryant that Petitioner had not told Dr. Fonville anything about the reason that Dr. Williams was not speaking because Dr. Fonville asked Supervisor Bryant: Why isn't Max going to be here? (Tr. p. 56). Petitioner had trumpeted Dr.Williams as a speaker in his press releases and e-mails and later had to take Dr. Williams' name off of the schedule of events so that it was no secret that Dr. Williams was not going to appear. Her testimony and written reports claiming that Petitioner told her on Saturday that he had not yet talked to Mike Kochan is not believable given that both Petitioner and reenactor McCullen testified that Petitioner did seek and obtain Mike Kochan's agreement to speak on Friday evening as instructed. Given the testimony about Supervisor Bartley's possible personal involvement in a special relationship with Barbara Hoppe, his central role in Petitioner's termination, the inaccuracies in his March 2008 report, and his failure to testify at the hearing, the credibility of Respondent's evidence in attempting to meets its burden of proof is substantially diminished. Respondent did not produce as witnesses key figures in this matter including Supervisor Bartley, Re-enactor Kochan, or Interpreter Larry Pace.

DECISION

Having heard the evidence and arguments in this contested case hearing, I find that there is insufficient evidence of personal misconduct on the part of Petitioner to support a finding of just cause for his dismissal. Respondent has not carried the burden of proof on the issue of just cause. It therefore is ORDERED that Petitioner is entitled to reinstatement, back pay from the date of his termination until his reinstatement in the same or similar position, front pay from the date the decision ordering his reinstatement becomes final until the date of reinstatement, attorney fees and costs, and all benefits to which he would have become entitled to but for his discharge from employment with Respondent. 25 N.C.A.C. 2 B .0414, .0421, .0422, .0431, .0432.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Department Cultural Resources.

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency 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' attorneys of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the 15 day of March, 2010.

Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEY FOR RESPONDENT

This the 15th day of March, 2010.

Office of Administrative Hearings
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STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	09 DHR 2976
WAKE RADIOLOGY SERVICES, LLC, d/b/a WAKE RADIOLOGY NORTHWEST RALEIGH OFFICE, Petitioner, v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent, and PINNACLE HEALTH SERVICES OF NORTH CAROLINA, LLC, d/b/a RALEIGH RADIOLOGY AT CEDARHURST, Respondent-Intervenor.	**RECOMMENDED DECISION**

This matter came for hearing before Eugene J. Cella, Temporary Administrative Law Judge, on December 14-18, 2009, in Raleigh, North Carolina. Having heard all of the evidence in the case, and having considered the exhibits, arguments, and relevant law, the undersigned makes the Findings of Fact, by a preponderance of the evidence, enters his Conclusions of Law thereon, and makes the following recommended decision.

APPEARANCES

For Petitioner Wake Radiology Services, LLC d/b/a Wake Radiology Northwest Raleigh Office:

Frank S. Kirschbaum, Esq.
Chad Lorenz Halliday, Esq.
Kirschbaum, Nanney, Kennan & Griffin, P.A.
PO Box 19766
Raleigh, NC 27619-9766

For Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section:

June S. Ferrell, Esq.
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

For Respondent-Intervenor Pinnacle Health Services of North Carolina, LLC d/b/a Raleigh Radiology at Cedarhurst:

Marcus C. Hewitt, Esq.
Williams Mullen
PO Box 1000
Raleigh, NC 27602

APPLICABLE LAW

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-2 *et seq.* and § 131E-188 of the North Carolina Certificate of Need Law.

2. The substantive statutory law applicable to this contested case is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175 *et seq*.

3. The administrative regulations applicable to this contested case are the North Carolina Certificate of Need Program Administrative Regulations, 10 N.C.A.C. 14C.1800 *et seq.* (Criteria and Standards for Diagnostic Centers), and the Office of Administrative Hearing Regulations, 26 N.C.A.C. 3.0100 *et seq*.

BURDEN OF PROOF

As Petitioner, Wake Radiology has the burden of proof by the preponderance of the evidence. *See* N.C. Gen. Stat. § 150B-23(a); N.C. Gen. Stat. § 150B-29(a); *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006).

ISSUES

Whether the Agency substantially prejudiced Wake Radiology's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in disapproving Wake Radiology's CON application.

WITNESSES

Witnesses for Petitioner Wake Radiology:

Tanya S. Rupp, Project Analyst, CON Section
Helen E. Alexander, Team Leader, CON Section
Christopher T. Collins, Consultant, ECG Management Consultants, Inc.
Dr. Robert E. Schaaf, President of Wake Radiology
Daniel R. Carter, Jr., Consultant, Health Planning Source

Witnesses for Respondent Agency:

Helen E. Alexander, Team Leader, CON Section
Tanya S. Rupp, Project Analyst, CON Section

Witnesses for Respondent-Intervenor Pinnacle Health Services of North Carolina, LLC:

David B. Meyer, Consultant, Keystone Planning Group
Michael J. McKillip, Project Analyst, CON Section

EXHIBITS ADMITTED INTO EVIDENCE

Joint Exhibits

1. Agency File
2. Wake Radiology Application for Project ID. No. J-8248-08

Wake Radiology Exhibits

1. Resume of Christopher T. Collins
4. Email between Christopher Collins and Mike McKillip dated 10/3/08 - 10/29/08
6. Agency Findings for Project ID. No. J-7885-07, UNC Hospitals dated November 11, 2007
7. Excerpts from Deposition of David Meyer dated 11/12/09
9. Excerpts from Deposition of Tanya Rupp dated 10/15/09
10. Excerpts from Deposition of Helen Alexander dated 11/13/09
13. 10A NCAC 14C.1800 and -.1900
14. Declaratory Ruling Issued to Triad Laboratory Alliance, LLC dated August 27, 1997
15. Agency Findings for Project ID. No. G-7780-07, NCBH Outpatient Imaging, LLC

16. Agency Findings for Project ID. No. J-8167-08, Private Diagnostic Clinic, PLLC

20. Eastern Radiologists, Inc. CON Application for Project ID. No.

22. Agency Findings for Project ID. No. P-7111-04, Heart Center of Eastern Carolina and Heart Center Properties

23. Agency Findings for Project ID. No. G-6124-99, Greensboro Heart Center, LLC

24. Agency Findings for Project ID. Nos. J-6026-99; J-6027-99; J-6028-99; J-6029-99, Rex Hospital and WakeMed

25. Agency Findings for Project ID. No. B-6498-01, Henderson County Hospital Corporation

26. Agency Findings for Project ID. No. P-6599-02, Coastal Diagnostic Imaging, PLLC

27. Agency Findings for Project ID. No. P-6525-01, Coastal Carolina Health Care, P.A.

28. Agency Findings for Project ID. No. F-7466-06, Heart Group of the Carolinas, P.A.

Agency's Exhibits

3. Excerpts from 2008 State Medical Facilities Plan

Respondent-Intervenor's Exhibits

4. Resume of David Meyer

5. Summary of David Meyer's Opinions

6. Email between Christopher Collins and Mike McKillip dated 10/3/08 - 10/29/08

8. Copy of CON Law – N.C. Gen. Stat. §§ 131E-175 through -190.

10. Agency Findings for Project ID. No. J-8139-08, Raleigh Radiology, LLC

12. Excerpts from Deposition of Christopher T. Collins dated 11/10/09

13. Affidavit of Susan Hawkins

14. Excerpts from Deposition of Dr. Robert E. Schaaf dated 11/23/09

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

FINDINGS OF FACT

Parties

1. Petitioner Wake Radiology Services, LLC ("Wake Radiology" or "Petitioner") is a North Carolina limited liability company with its principal place of business located in Wake County, North Carolina.

2. Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("CON Section" or "Agency") is the Agency responsible for the administration of North Carolina's Certificate of Need Law, N.C. Gen. Stat. Chapter 131E, Article 9.

3. Respondent-Intervenor Pinnacle Health Services of North Carolina, LLC, d/b/a Raleigh Radiology at Cedarhurst ("Pinnacle" or "Respondent-Intervenor"), is a Tennessee limited liability company authorized to do business and is presently engaged in business in North Carolina, with its registered office in Wake County, North Carolina.

4.

Expert Witnesses

5. Mr. Christopher T. Collins was accepted as an expert witness for Petitioner in "health care planning, strategy, and analysis and in analyzing the need and demand for health care facilities and services." Mr. Collins was not offered or accepted as an expert in "North Carolina Certificate of Need process." (Collins T. Vol. 2 at 229-32).

6. Mr. Daniel R. Carter, Jr. was accepted as a rebuttal expert witness for Petitioner in Certificate of Need ("CON") application preparation and analysis, and health planning. Mr. Carter has prepared over 200 CON applications. (Carter T. Vol. 4 at 762).

7. Mr. David B. Meyer was accepted as an expert witness for Respondent-Intervenor in Certificate of Need ("CON") application preparation and analysis, and health planning. Mr. Meyer has prepared approximately 180 CON applications, a number of which have been diagnostic center applications. (Meyer T. Vol. 3 at 419, 425).

Procedural and Factual Background

8. On or about November 14, 2008, Wake Radiology filed an application for a CON to acquire a full-field mammography system to replace its existing analog mammography equipment at its Northwest Raleigh office and establishing a diagnostic center ("Wake Radiology Application" or "Application"). Since the cost of the proposed digital mammography unit

($381,600) would result in the total capital cost of diagnostic equipment in the facility to exceed $500,000, and therefore would result in the establishment of Wake Radiology's Northwest Raleigh office as a "diagnostic center" under N.C. Gen. Stat. § 131E-176(7a), Wake Radiology was required to apply for and obtain a Certificate of Need pursuant to N.C. Gen. Stat. §§ 131E-176(16)a and 131E-178(a). (Jt. Ex. 1 at 165).

9. The Wake Radiology Application was prepared by Mr. Collins, a consultant hired by Wake Radiology. (Collins T. Vol. 2 at 233).

10. The service area identified by Wake Radiology for the proposed project was Wake County, North Carolina. (Jt. Ex. 2 at 000000005; Collins T. Vol. 2 at 275).

11. Although Wake Radiology did not yet have digital mammography at its Northwest Raleigh office, at the time the Application was filed Wake Radiology owned and operated six digital mammography units at four separate locations in Wake County. (Jt. Ex. 2 at 000000009; Collins T. Vol. 2 at 275-76).

12. The Application was assigned Project I.D. No. J-8248-08 and was not part of a competitive review. By letter dated April 29, 2009, the CON Section issued a written decision denying the Application. (Jt. Ex. 1 at 20-22). The CON Section concurrently issued its Required State Agency Findings ("Agency Findings") upon which it based its decision. (Jt. Ex. 1 at 165-99).

13. Wake Radiology filed a petition for a contested case hearing on May 5, 2009.

14. On June 10, 2009, Pinnacle moved to intervene in this contested case pursuant to N.C. Gen. Stat. 131E-188(a). Pinnacle is an affected person within the meaning of N.C. Gen. Stat. 131E-188(a) and (c) because Pinnacle provides mammography services, including digital screening mammography, to residents of Wake County. (Respondent-Intervenor Ex. 13).

15. By Order dated June 24, 2009, Pinnacle was permitted to intervene in all aspects of this contested case, with all the rights of a party hereto.

Pre-Application Conference and E-mail Correspondence

16. Prior to the filing of the Application, at the request of Wake Radiology, the Agency held a Pre-Application Conference on October 10, 2008. ("Pre-Application Conference"). On behalf of Wake Radiology, Mr. Collins attended the Pre-Application Conference. (Collins T. Vol. 2 at 236). On behalf of the Agency, Mike McKillip, a project analyst with the Agency and Helen Alexander, a team leader with the Agency, attended the Pre-Application Conference. (Collins T. Vol. 2 at 236; McKillip T. Vol. 3 at 547-49; Alexander T. Vol. 1 at 111-12).

17. On October 10, 2008, following the Pre-Application Conference, Mr. McKillip spoke with Lee B. Hoffman, then Chief of the CON Section, regarding a question about 10A NCAC 14C.1804 that was posed to Mr. McKillip during the conference. Subsequent to the

meeting, Mr. McKillip emailed a response to Mr. Collins ("10/10/08 Email"). (Respondent-Intervenor Ex. 6 at NWRO 493-94; McKillip T. Vol. 3 at 547-49). The 10/10/08 Email included as an attachment a copy of the findings from a previous CON review of an diagnostic center application by Raleigh Radiology, LLC ("Raleigh Radiology Findings"). (Collins T. Vol. 2 at 282-84; Respondent-Intervenor Ex. 10).

18. On or about October 29, 2008, Mr. Collins emailed Mr. McKillip with a question regarding the utilization projections required by 10A NCAC 14C.1804(2). (Petitioner Ex. 6 at NWRO 492; Collins T. Vol. 2 at 264-65). Mr. McKillip responded via email on October 29, 2008, stating his understanding of the projections required by 10A NCAC 14C.1804(2). (Respondent-Intervenor Ex. 6 at 492; McKillip T. Vol. 3 at 547-49). Mr. Collins' email and Mr. McKillip's response dated October 29, 2009 are referred to herein as the "10/29/08 Email."

19. Mr. Collins testified about the matters discussed at the Pre-Application Conference but was not able to identify any notes, minutes or other documentation of the Pre-Application Conference. (Collins T. Vol. 2 at 276-77). Mr. McKillip also testified about his recollection of the Pre-Application Conference. (McKillip T. Vol. 3 at 545-48). Other than the 10/10/08 Email and the 10/29/08 Email, the record contains no written documentation of the matters discussed at the Pre-Application Conference.

Agency Decision and Findings

20. Tanya S. Rupp was the project analyst assigned to review the Wake Radiology Application. (Rupp T Vol. 1 at 25-26). Helen E. Alexander, a team leader for the Agency, reviewed, edited, and co-signed the Agency Findings. (Alexander T Vol. 1 at 110-11).

21. The Agency determined that the Wake Radiology Application did not conform to the statutory and regulatory review criteria set forth in N.C. Gen. Stat. § 131E-183(a), specifically, statutory review criteria 1, 3, 4, 5, 6, 13(c), and 18a and regulatory review criteria 10A NCAC 14C.1803(b)(6), -.1804(1) and -.1804(2). (Jt. Ex. 1 at 165-99).

Criterion 1

22. Criterion 1 requires that a "proposed project . . . be consistent with applicable policies and need determinations in the State Medical Facilities Plan . . . ." N.C. Gen. Stat. § 131E-183(a)(1). Policy GEN-3 in the 2008 SMFP applies to this Review.

23. Policy GEN-3 requires a CON applicant to demonstrate that its project: (1) promotes cost-effective approaches; (2) expands health care services to the medically underserved; and (3) encourages quality health care services. (Jt. Ex. 1 at 165-69).

24. The Agency found the Wake Radiology did not demonstrate that its proposal is a cost effective approach because Wake Radiology did not adequately demonstrate the need for the proposed project and was nonconforming with Criterion 3. (Jt. Ex. 1 at 165-69). In failing to demonstrate a need for the proposed services under Criterion 3, Wake Radiology failed to adequately document "how its projected volumes . . . incorporate the basic principles [identified

in Policy Gen-3] of the 2008 SMFP in meeting the needs of the patients to be served." (Jt. Ex. 1 at 169).

Criterion 3

25. Criterion 3 requires an applicant to "identify the population to be served by the proposed project . . . and demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed." N.C. Gen. Stat. § 131E-183(a)(3).

26. The Agency found that the Wake Radiology Application adequately identified the population proposed to be served by the proposed project but found the Application nonconforming with Criterion 3 because Wake Radiology failed to adequately demonstrate the need the population had for the proposed digital mammography equipment. (Jt. Ex. 1 at 172, 182).

27. The Wake Radiology Application projected that utilization of the proposed equipment would start with a "baseline" of nine patients per day, and would gradually increase from nine to 25 patients per day during the period from July 1, 2009 to December 31, 2012. (Jt. Ex. 2 at 000000048). To support these projections, the Wake Radiology Application relied on several assumptions set forth in the Application. (Jt. Ex. 2 at 000000048).

Reliance on Cypress of Raleigh

28. The Application discussed the opening of a continuing care retirement community, "Cypress of Raleigh," from which "Wake Radiology *expects to see a continued influx of patients*," and stated that "[f]emale residents of this community … will be high users of the proposed service. . . ." (Jt. Ex. 2, p. 000000035)(emphasis added). The Agency found that Wake Radiology neither offered any information with regard to the number of women projected to receive screening mammograms from Wake Radiology; nor did it account for how many of the residents of Cypress of Raleigh were women. (Jt. Ex. 1 at 175-76).

29. Wake Radiology argued that Cypress of Raleigh was offered merely as an example and that the Agency misconstrued the references to Cypress of Raleigh in the Application. (Collins T. Vol. 2 at 255-58). However, Cypress of Raleigh was specifically included in the assumptions stated by Wake Radiology for its utilization projections. (Jt. Ex. 2 at 000000048). Additionally, Wake Radiology's discussion of need for the project included a letter of support from Cypress of Raleigh. (Jt. Ex. 2 at 000000035, 000000253). The Undersigned finds as fact that, despite its reliance on Cypress of Raleigh to help demonstrate need for its project, Wake Radiology failed to provide any specific data regarding Cypress of Raleigh or quantify how its population would affect utilization of the proposed project. (Rupp T. Vol. 4 at 626, 631-32; Alexander T. Vol. 4 at 685-88; Jt. Ex. 2 at 000000048, 000000035, 000000253).

Data and Basis for Assumptions

30. The Agency found that the Wake Radiology Application merely projected over 14 quarters that the number of patients per day will grow from nine to 25, which represents an average annual increase of approximately 32%. (Jt. Ex. 2 at 000000176-78). However, the Application did not contain any historical utilization of the existing analog mammography equipment in use at the proposed location. Additionally, the Application did not provide any utilization data from any of Wake Radiology's other facilities in the service area that already had digital mammography services. (Jt. Ex. 1 at 178-79). Consequently, the Agency found that Wake Radiology failed to demonstrate the historical reliability or the reasonableness of beginning its projections with nine patients per day, and therefore that its projections were unreliable and unsupported. (Rupp T. Vol. 4 at 626-27, 633-34; Alexander T. Vol. 1 at 152-53; Jt. Ex. 2 at 000000178-79).

31. The Wake Radiology Application stated that the numbers of women who receive screening mammograms will continue to increase, and that the population of women over 40 in Wake County is projected to rise at a higher rate than the same cohort in the State as a whole. (Jt. Ex. 1 at 179-80). However, the Application failed to quantify any link between the total number of women projected to have screening mammograms in Wake County and the number who will receive mammograms at the proposed location. Therefore, the Undersigned finds as fact that Wake Radiology failed to state the basis of the assumptions it used to project utilization. (Rupp T. Vol. 4 at 625-26; Alexander T. Vol. 4 at 683; Jt. Ex. 1 at 180).

32. Mr. Collins testified that he interpreted guidance by the Agency to mean that data regarding Wake Radiology's existing analog mammography equipment was "irrelevant," (Collins T. Vol. 2 at 259-60), and instead relied on the analysis in Section 3 of the Wake Radiology Application. (Collins T. Vol. 2 at 261-63; Jt. Ex. 2 at 000000048). However, Ms. Rupp and Ms. Alexander each testified that many of the stated assumptions were unsupported by any data, and that the limited data provided failed to support the assumptions. (Rupp T. Vol. 4 at 629-34; Alexander T. Vol. 4 at 682-90).

33. Mr. Meyer testified that analyses and assumptions provided to satisfy Criterion 3 are typically much more detailed and supported by extensive data to substantiate the reasonableness of the assumptions given. (Meyer T. Vol. 3 at 464-68). The Undersigned finds as fact that the assumptions and need methodology in the Wake Radiology Application were unreasonable and inadequately supported by the data provided.

Other Wake Radiology Offices

34. The Agency found that the utilization projections in the Wake Radiology Application failed to take into account the other imaging centers in the service area that have digital mammography technology, including four of Wake Radiology's own offices. The Application failed to provide any historical utilization data from Wake Radiology's other locations that already had digital mammography as required by 10A NCAC 14C.1804(1) and failed to project future utilization at those locations as required by 10A NCAC 14C.1804(2). (Jt.

Ex. 1 at 179-80, 182). Therefore, the Agency found that the Application failed to demonstrate that the projected increase in utilization was based on reasonable assumptions. (Jt. Ex. 1 at 182).

35. Mr. Collins testified that he had been provided with historical utilization data for the other Wake Radiology locations in Wake County and could have provided data and projections for utilization at those sites. (Collins T. Vol. 2 at 292-93). Further, Mr. Collins testified that he did not believe historical utilization at other locations in the service area at which Wake Radiology already provided mammography services was relevant to the Application. (Collins T. Vol. 2 at 313-16).

36. Mr. Collins also testified that 10A NCAC 14C.1804(1) requires historical utilization data for "all existing health service facilities providing similar medical diagnostic equipment and services", but that mammography utilization data is not publicly available and Wake Radiology had no access to *other providers'* utilization data. Therefore, he concluded that if Wake Radiology could not provide data and projections for "all" digital mammography locations in the service area, then Wake Radiology need not provide data or projections for any of *its own* digital mammography locations in the service area. (Collins T. Vol. 2 at 317-18).

37. Both Ms. Rupp and Mr. Meyer testified that historical utilization and projected utilization are relevant to the required showing of need, and are specifically required by 10A NCAC 14C.1802(1) and (2). The CON Section requires applicants to provide such utilization data and projections for any provider in the proposed service area for which the applicant has access to utilization information. (Rupp T. Vol. 1 at 72; Rupp T. Vol. 4 at 643-46, 661-62; Meyer T. Vol. 3 at 433-45; *see also, e.g.*, Jt. Ex. 1 at 95-96).

38. Mr. Collins also testified that he provided no data or projections for other Wake Radiology locations in the service area, relying on guidance provided during the Pre-Application Conference with the CON Section on October 10, 2008 and in the follow-up 10/10/08 Email from Michael McKillip. (Collins T. Vol. 2 at 314-16). However, Mr. Collins was unable to identify any other documentation of the Pre-Application Conference (Collins T. Vol. 2 at 276-78), and the 10/10/08 Email from Mr. McKillip made no reference to digital mammography equipment at other locations (Respondent-Intervenor Ex. 6 at NWRO 493).

39. Mr. McKillip testified that he did not recall discussing the application of 10A NCAC 14C.1802(1) and (2) to equipment at other locations during the Pre-Application Conference; that he did not recall knowing that Wake Radiology had similar equipment at any other location; and that if he had understood at the time that Wake Radiology had existing digital mammography equipment at other locations in the service area, he would have told Wake Radiology it must provide data and utilization projections for such other locations pursuant to 10A NCAC 14C.1804(1) and (2). (McKillip T. Vol. 3 at 553-56).

40. Further, Mr. Collins acknowledged that Mr. McKillip provided him a copy of the Raleigh Radiology Findings as an example attached to the 10/10/08 Email. The Raleigh Radiology Findings specifically discussed this issue, noting that although the applicant had no access to data regarding other providers, the applicant provided historical utilization data and projected utilization for similar equipment that it already owned in the service area.

(Respondent-Intervenor Ex. 10 at 11-12, 31-32). However, Mr. Collins subsequently decided that the circumstances in the Raleigh Radiology Findings were different than Wake Radiology's proposed project. Without further consultation with the CON Section, Mr. Collins decided to disregard the Raleigh Radiology Findings' discussion of data regarding the applicant's other locations. (Collins T. Vol. 2 at 318-19, 383-86).

41. The Undersigned finds as fact that Wake Radiology failed to provide utilization data and projections for its other offices in the service area that already offered digital mammography as was required by 10A NCAC 14C.1804(1) and (2); that such data and projections were relevant to its demonstration of need for the proposed project; and that the Application's projections and need methodology were unreasonable and inadequately supported by the data and assumptions provided. The Undersigned also finds as fact that Mr. McKillip did not direct Wake Radiology to omit data or projections for digital mammography equipment at other Wake Radiology locations in the service area, and any reliance by Mr. Collins on the 10/10/08 Email or the Pre-Application conference for this proposition was unreasonable.

Improper Quarterly Projections

42. Wake Radiology projected utilization for each quarter separately and calculated the rate of utilization for only the fourth quarter of calendar year 2012 using a projected utilization of 1,563 mammograms and quarterly capacity of 1,875 mammograms (7,500 yearly capacity divided by 4), resulting in a utilization rate for only the last quarter of calendar year 2012 of 83.4%. (Jt. Ex. 2 at 000000028-29). Wake Radiology's consultant testified that he projected utilization on a quarterly basis based on his reading of the relevant performance standard. (Collins T. Vol. 2 at 322-23).

43. The Agency found that, when evaluated over the entire third year, the utilization projections failed to meet 80% of capacity as required by 10A NCAC 14C.1804(2) because the applicant projected 5,564 procedures during Calendar Year 2012, and a yearly capacity of 7,500 procedures, which resulted in a utilization rate of only approximately 74%. (Jt. Ex. 1 at 180-81).

44. The language of 10A NCAC 14C.1804(2) does not state that utilization is to be projected or calculated quarterly for purposes of compliance with Criterion 3 or 10A NCAC 14C.1804(2). Both Ms. Rupp and Mr. Meyer testified that the CON Section evaluates an applicant's compliance with 10A NCAC 14C.1804(2) using the volume projected for the entire third year of projections divided by the capacity for the entire third year (Rupp T. Vol. 4 at 650-53; Meyer T. Vol. 3 at 481-83), which is consistent with the Raleigh Radiology Findings that the CON Section had provided to Mr. Collins prior to filing the Wake Radiology Application. (Rupp T. Vol. 4 at 654-58; Collins T. Vol. 2 at 323; Respondent-Intervenor Ex. 10 at 31-32).

Improper Projection Period

45. The Agency also found that the utilization projections included in the Application failed to meet 80% of capacity as required by 10A NCAC 14C.1804(2) because it improperly relied on three and one-half years of utilization instead of the three years required by the rule. Wake Radiology's projected start date of operations was 1 July 2009, and its utilization

projections continued from that date until 31 December 2012. However, the Agency found when utilization as a percentage of capacity was properly calculated using the three-year period ending 30 June 2012, Wake Radiology's projected capacity reached only approximately 70% which is below the 80% utilization threshold required under 10A NCAC 14C.1804(2). (Jt. Ex. 1 at 181-82).

46. Mr. Collins testified that, in reliance upon guidance provided in the 10/28/08 Email between himself and Mr. McKillip, he provided three and one-half years of projections. (Collins T. Vol. 2 at 294; Respondent-Intervenor Ex. 6 at NWRO 492).

47. However, Mr. Collins' message to Mr. McKillip in the 10/28/08 Email did not specify the period of time for which Wake Radiology proposed to project utilization, and did not indicate that Wake Radiology proposed to include more than three years of projections. (Respondent-Intervenor Ex. 6 at NWRO 492). Mr. McKillip testified that he did not understand Mr. Collins to be proposing to include more than three years of projections, and that his response to Mr. Collins' inquiry was intended to convey that three years of projections were to be included in the Application. (McKillip T. Vol. 3 at 556-57). Mr. McKillip's response in the 10/28/08 Email was consistent with the language of 10A NCAC 14C.1804(2), and stated that the language " . . . by the fourth quarter of the third year of operation following initiation of diagnostic services" in 10A NCAC 14C.1804(2) referred to "the 4th quarter of the third full year of operation[.]" (Respondent-Intervenor Ex. 6 at NWRO 492).

48. Further, Ms. Alexander and Mr. Meyer both testified that the Agency requires that applicants provide only three years of projections to comply with 10A NCAC 14C.1804(2) (Alexander T. Vol. 4 at 709-10; Meyer T. Vol. 3 at 453). In addition, Mr. Collins had previously been provided with the Raleigh Radiology Findings as an example. The applicant in that review proposed to start diagnostic services on July 1, 2009 (the same day as Wake Radiology's proposed start date), and projected utilization for the three year period from July 1, 2009 to June 30, 2012. (Collins T. Vol. 2 at 306-11). Mr. Collins acknowledged that he did not follow this example in projecting utilization for a six-month longer period, from July 1, 2009 through December 31, 2012. (Collins T. Vol. 2 at 366-67). The Undersigned finds as fact that Mr. McKillip did not direct or instruct Wake Radiology to project utilization over a period longer than three years to comply with 10A NCAC 14C.1804(2), and any reliance by Mr. Collins on the 10/28/08 Email or the Pre-Application conference for such proposition was unreasonable.

49. The Undersigned finds as fact that the Application failed to project that the proposed mammography equipment would be utilized at 80% of its capacity by the fourth quarter of the third year of operation following initiation of diagnostic services.

Criterion 4

50. Criterion 4 requires that "[w]here alternative methods of meeting the needs for the proposed project exist," an applicant must "demonstrate that the least costly or most effective alternative has been proposed." N.C. Gen. Stat. § 131E-183(a)(3).

51. In its Application, Wake Radiology discussed the alternatives considered prior to submission of this project. (Jt. Ex. 2 at 000000038-39). However, the Agency found Wake Radiology nonconforming to Criterion 4 because it found that the Applicant failed to comply with the statutory and regulatory review criteria set forth in N.C. Gen. Stat. § 131E-183(a), specifically, statutory review criteria 1, 3, 5, 6, 13(c), and 18a and regulatory review criteria 10A NCAC 14C.1803(b)(6), -.1804(1) and -.1804(2). (Jt. Ex. 1 at 183). The Undersigned finds as fact that Wake Radiology did not demonstrate that the proposed project was the least costly or most effective alternative.

Criterion 5

52. Criterion 5 requires the applicant to provide "[f]inancial and operational projections for the project [demonstrating] the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service." N.C. Gen. Stat. § 131E-183(a)(5).

53. The Agency found that Wake Radiology was nonconforming to Criterion 5 because its projections of revenue relied upon unsupported and unreliable assumptions, and thus its projections of costs and charges were unreasonable. (Jt. Ex. 1 at 185). The Undersigned finds as fact that Wake Radiology did not demonstrate that the financial feasibility of the proposal was based upon reasonable projections of costs and charges.

Criterion 6

54. Criterion 6 requires the applicant to "demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C. Gen. Stat. § 131E-183(a)(6).

55. The Agency found Wake Radiology nonconforming to Criterion 6 because of its failure to conform to Criterion 3 by demonstrating a need for the proposed project. (Jt. Ex. 1 at 185-86). The Undersigned finds as fact that Wake Radiology did not demonstrate that the proposed project would not result in unnecessary duplication of services.

Criterion 7

56. Criterion 7 requires an applicant to "show evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided." N.C. Gen. Stat. § 131E-183(a)(7).

57. The Wake Radiology application proposes only one Full-Time Equivalent ("FTE") mammography technologist, which represents approximately 40 hours per week. The Wake Radiology Application was deemed conforming with Criterion 7, but Mr. Meyer testified that one FTE mammography technologist did not adequately account for sick time or vacation, and failed to account for the projected increase in mammography volumes from nine to 25 per day by the third project year. (Meyer T. Vol. 3 at 471-72).

58. No CON statute or regulatory criteria exists that required Wake Radiology to demonstrate that it would maintain any specific number of mammography technologists. (Rupp Tr. Vol. 4 at 368-69)

59. The Undersigned finds as fact that Wake Radiology adequately demonstrated the availability of adequate health manpower.

Criterion 13(c)

60. Criterion 13(c) requires the applicant to "demonstrate the contribution of the proposed service in meeting the needs of the elderly and of members of medically underserved groups" by showing "[t]hat the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services." N.C. Gen. Stat. § 131E-183(a)(13)(c).

61. The Agency found Wake Radiology nonconforming to Criterion 13(c) because Wake Radiology projected a reduction in the level of service to medically underserved groups. (Jt. Ex. 1 at 190). Specifically, the only payor mix data provided by Wake Radiology in its Application was the payor mix data for all patients of Wake Radiology's Northwest Raleigh office, which showed that overall self pay/indigent/charity cases represent 1.2% of its patients and Medicaid patients represent 1.3% of its patients. (Jt. Ex. 2 at 000000061). However, in projections for payor mix for mammography, Wake Radiology projected that only 0.3% of the patients utilizing the proposed services would be self pay/indigent/charity cases, and only 0.1% would be Medicaid patients, which represent declines of 75% and 92%, respectively, when compared with the data provided in the Application. (Jt. Ex. 2 at 000000063).

62. Although Wake Radiology stated that it expected its payor mix to "mirror the historical mix of patients who currently access NWRO for conventional screening mammography services," Wake Radiology failed to provide any data regarding its historical payor mix for mammography to be compared with the projections. (Jt. Ex. 2 at 000000061-63; Meyer T. Vol. 3 at 522-24). The Undersigned finds as fact that Wake Radiology failed to demonstrate that its proposed services would adequately meet the needs of medically underserved groups.

Criterion 18a

63. Criterion 18a requires the applicant to "demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed; and in the case of applications for services where competition between providers will not have a favorable impact on cost-effectiveness, quality, and access to the services proposed, the applicant shall demonstrate that its application is for a service on which competition will not have a favorable impact." N.C. Gen. Stat. § 131E-183(a)(18a).

64. The Agency found Wake Radiology's Application nonconforming to Criterion 18a based upon its determination that Wake Radiology had failed to comply with Criteria 1, 3, 4, and 5. (Jt. Ex. 1 at 191). The Undersigned finds as fact that the nonconformities with Criteria 1, 3, 4, and 5 resulted in a failure to adequately demonstrate that the proposal would have a positive impact upon the quality and access to the proposed services and that Wake Radiology failed to demonstrate that digital mammography is a service on which competition will not have a favorable impact.

10A NCAC 14C .1803(b)(6)

65. 10A NCAC 14C.1803(b)(6) requires an applicant to provide "the patient origin by percentage by county of residence for each diagnostic service provided by the applicants in the 12 month period immediately preceding the submittal of the application." 10A NCAC 14C .1803(b)(6).

66. The Agency found Wake Radiology's Application nonconforming to 10A NCAC 14C.1803(b)(6) because Wake Radiology failed to provide the patient origin by county of residence for its existing digital mammography equipment located at its other offices. (Jt. Ex. 1 at 194). The Undersigned finds as fact that Wake Radiology failed to provide patient origin data for its existing digital mammography equipment located at its other offices, and therefore failed to provide patient origin by percentage by county of residence for each diagnostic service provided by the applicants in the 12 month period immediately preceding the submittal of the application.

10A NCAC 14C .1804(1)

67. 10A NCAC 14C.1804(1) requires the applicant to provide "documentation that all existing health service facilities providing similar medical diagnostic equipment and services as proposed in the CON application in the defined diagnostic center service area were operating at 80% of the maximum number of procedures that the equipment is capable of performing for the twelve month period immediately preceding the submittal of the application." 10A NCAC 14C .1804(1).

68. Wake Radiology indicated in its Application that "no public utilization data is available that delineates screening mammography volume using this equipment. Therefore, we are unable to determine whether such facilities within our service are operating at or above 80 percent of capacity[.]" (Jt. Ex. 2 at 000000028). However, the Agency found Wake Radiology nonconforming to 10A NCAC 14C.1804(1) because Wake Radiology "does have utilization information regarding its own similar diagnostic imaging equipment in its other facilities" but failed to provide any such information. (Jt. Ex. 1 at 196-97). The Undersigned finds as fact that Wake Radiology had utilization data for its own digital mammography equipment in the service area, and that it failed to include such information in its Application, and therefore failed to provide the documentation required by 10A NCAC 14C.1804(1).

69. As discussed above in Paragraphs 31, 34, 35, 37 and 39, Mr. Collins testified that he considered utilization information for Wake Radiology's other locations with digital

mammography equipment irrelevant, and that he omitted such information relying on guidance from the CON Section. However, as discussed therein, the Undersigned finds as fact that the Agency did not direct Mr. Collins to omit such utilization data for Wake Radiology's other offices with digital mammography equipment and any reliance by Mr. Collins on the 10/10/08 Email or the Pre-Application conference for such proposition was unreasonable.

10A NCAC 14C.1804(2)

70. 10A NCAC 14C.1804(2) requires an applicant to provide "documentation that all existing and approved medical diagnostic equipment and services of the type proposed in this CON application are projected to be utilized at 80% of the maximum number of procedures that the equipment is capable of performing by the fourth quarter of the third year of operation following initiation of diagnostic services." 10 NCAC 14C .1804(2).

71. The Wake Radiology Application included utilization projections from the implementation of the proposed services on July 1, 2009 through December 31 2012, a period of fourteen calendar quarters or three and one-half years (Jt. Ex. 2 at 000000047-49), and relied on those projections in its response to 10A NCAC 14C.1804(2). (Jt. Ex. 2 at 000000028-29). Wake Radiology projected that the utilization rate of its proposed services would be 83.4% by the fourth quarter of calendar year 2012. (*Id.*). Wake Radiology did not include utilization projections for any other digital mammography equipment within the Wake County service area. (*Id.*).

72. The Agency found Wake Radiology nonconforming to 10A NCAC 14C.1804(2) due to its failure to demonstrate that the utilization rate would be 80% by the quarter ending June 30, 2012, which is the twelfth calendar quarter of operation following implementation of the proposed services on July 1, 2009. (Jt. Ex. 1 at 181-82, 197). The Agency also noted that Wake Radiology failed to conform to 10A NCAC 14C.1804(2) because of its failure to include utilization projections for its own digital mammography equipment at other offices in Wake County. (Jt. Ex. 1 at 182, 197).

73. The Undersigned finds as fact that Wake Radiology's projections did not demonstrate that it would be at 80% utilization by the fourth quarter of the third year of operation following initiation of diagnostic services, and that Wake Radiology failed to include projections demonstrating that its other digital mammography equipment would be at 80% utilization by the fourth quarter of the third year of operation of the proposed services.

74. As discussed above in Paragraphs 31, 34, 35, 37, 39, 68, 70 and 71, Mr. Collins testified that he provided three and one-half years of projections relying upon guidance provided in the 10/28/08 Email, and that he omitted projections for Wake Radiology's digital mammography equipment at other offices relying on guidance provided in the Pre-Application Conference and in the 10/10/08 Email.

75. However, the Undersigned finds as fact that the Agency did not direct Mr. Collins to project its utilization based on a three and one-half year period or to omit utilization projections for Wake Radiology's other offices with digital mammography equipment, and any

reliance by Wake Radiology on the Pre-Application Conference, the 10/10/08 E-mail or the 10/28/08 Email was unreasonable. The Undersigned finds as fact that the Application failed to project that Wake Radiology's existing and proposed mammography equipment in the service area would be utilized at 80% of its capacity by the fourth quarter of the third year of operation following initiation of diagnostic services.

Standard of Care

76. The Wake Radiology Application stated that digital mammography "has proved to be superior to analog film-screen mammography and has replaced it as the standard of care today." (Jt. Ex. 2 at 000000033). The Application relied heavily on the described benefits of digital mammography over analog mammography to demonstrate need for its project, and stated that "maintaining the [analog mammography] status quo at NWRO would not be acting in the best interests of its patients with respect to quality-of-care standards associated with screening mammography." (Jt. Ex. 2 at 000000038).

77. However, Dr. Robert E. Schaaf, President of Wake Radiology, acknowledged that analog mammography still met the standard of care at the time these statements were made (Schaaf T. Vol. 4 at 592), and that since that time, Wake Radiology has started mammography service at another location in Wake County using the same type of analog mammography equipment that the Application sought to replace. (Schaaf T. Vol. 4 at 602-04).

78. Further, Wake Radiology already has several offices in the service area that provide digital mammography, and there is no clinical benefit to receiving mammography services at one office instead of another. (Schaaf T. Vol. 4 at 592-93, 604-05). The Undersigned finds as fact that, apart from Wake Radiology's failure to conform to the relevant statutory criteria and regulatory standards, maintaining the standard of care was not a sufficient basis to demonstrate need for its proposed project.

Previous CON Reviews

79. Wake Radiology introduced findings from a previous CON review dated January 2009 in which Private Diagnostic Clinic, PLLC proposed to establish a diagnostic center. (Petitioner Ex. 16)("PDC Findings"). In the PDC Findings, 10A NCAC 14C.1804(1) was deemed not applicable and the applicant (PDC) was found conditionally conforming with 10A NCAC 14C.1804(2) on the condition that it provide projected utilization for another entity in the service area that had been approved to acquire ultrasound equipment, but which equipment was not yet operational. (Petitioner Ex. 16 at 33-34). The PDC Findings are not analogous to Wake Radiology's circumstances, first, because there was no existing similar diagnostic equipment in the service area for which the applicant (PDC) had data to provide in response to 10A NCAC 14C.1804(1). Second, the applicant (PDC) was conditionally conforming with 10A NCAC 14C.1804(2) on the condition that it give projections for *another provider's* approved project, for which the CON Section determined projections were available. (*Id.*). In contrast, Wake Radiology itself owned and operated similar equipment in the service area for which it had data and from which it could have made projections. (Meyer T. Vol. 3 at 474-78; Alexander T. Vol. 4 at 704-08).

80. Wake Radiology introduced findings from a previous CON review for a project by NCBH Outpatient Imaging, LLC to establish a diagnostic center using several different types of diagnostic equipment. (Petitioner Ex. 15)("NCBH Findings"). The applicant's (NCBH) historical utilization data and projected utilization for each type showed that, of the types of new equipment proposed to be acquired, only bone-densitometry equipment met the historical and projected 80% utilization thresholds set by 10A NCAC 14C.1804(1) and (2). Therefore, the applicant (NCBH) was found conforming with Criterion 3 and with 10A NCAC 14C.1804(1) and (2) on the express condition that it not acquire any new equipment of any type that failed to meet the 80% capacity performance standards, but that it could relocate existing equipment of those types already owned by its parent entity. (Petitioner Ex. 15 at 2-13, 30-32). However, the Wake Radiology Application could not be similarly conditioned, because Wake Radiology proposed to acquire only digital mammography equipment, but failed to demonstrate need or meet the performance standards for the proposed equipment. (Alexander T. Vol. 4 at 702-04).

81. Wake Radiology introduced findings from a previous CON review for a project by The Heart Center of Eastern Carolina, PLLC. (Petitioner Ex. 22)("HCEC Findings"). The HCEC Findings concerned a 2004 application for a diagnostic center CON involving the acquisition of an "enhanced external counterpulsation" (EECP) system. The application was denied in part because the applicant did not demonstrate need for the proposed space in which the diagnostic equipment would be located. (Petitioner Ex. 22 at 1-4). The findings state that 10A NCAC 14C.1804(1) and (2) were not applicable. However, the findings also note that there were no other facilities with EECP equipment in the service area (Petitioner Ex. 22 at 16-17), and the HCEC application at issue did include projections for the diagnostic equipment proposed in the application. (Petitioner Ex. 22 at 3; Meyer T. Vol. 3 at 480). Ms. Alexander testified that .1804(1) and (2) were not applied in the HCEC Findings because there was no similar diagnostic equipment existing or approved in the service area, and the applicant (HCEC) provided the required projections. (Alexander T. Vol. 4 at 698-700).

82. Wake Radiology introduced a 1997 declaratory ruling issued in response to a request by Triad Laboratory Alliance, LLC. (Petitioner Ex. 14)("Triad Declaratory Ruling"). The Triad Declaratory Ruling concluded that a certain performance standard for a diagnostic center did not apply to a project in which the applicant (TLA) merely proposed to consolidate existing laboratories at one site, did not propose to acquire any new equipment not already in use by its members, and would not result in the offering of any new services. (*Id.*). However, the Triad Declaratory Ruling was limited on its face to the circumstances of the particular request, and the Agency reserved the right to prospectively change the statutory interpretations therein. (Petitioner Ex. 14 at 1). Also, unlike the Triad Declaratory Ruling, the Wake Radiology Application proposed the acquisition of new diagnostic equipment, and the Triad Declaratory Ruling is therefore not comparable to the findings on the Wake Radiology Application. (Alexander T. Vol. 1 at 202-05).

83. Wake Radiology introduced a diagnostic center CON application by Eastern Radiologists, Inc., for the acquisition of a digital mammography unit. (Petitioner Ex. 20)("Eastern Radiologists Application"). In its application, Eastern Radiologists contended that 10A NCAC 14C.1804 did not apply because it only proposed to replace analog equipment with

digital, relying on the Triad Declaratory Ruling discussed above. (Petitioner Ex. 14 at 44-45). However, the Eastern Radiologists Application was denied, in part because the CON Section found that the Triad Declaratory Ruling was not applicable and that 10A NCAC 14C.1804 did in fact apply to the proposed replacement of analog mammography equipment with digital mammography equipment. (Meyer T. Vol. 3 at 531-35). The CON Section's decision on the Eastern Radiologists Application was consistent with its decision on the Wake Radiology Application. (*Id.*)

84. Wake Radiology introduced findings dated February 2000 from a previous CON review in which two applicants sought to acquire fixed cardiac catheterization equipment. (Petitioner Ex. 23)("2000 Cardiac Catheterization Findings"). In the 2000 Cardiac Catheterization Findings, the CON Section examined the number of procedures that the applicants projected "during the fourth quarter of the third year of operation." (Petitioner Ex. 23 at 49). However, these findings are not analogous to the findings on the Wake Radiology Application because the 2000 Cardiac Catheterization Findings involved a separate set of performance standards (for cardiac catheterization equipment), which specifically provide that utilization is "*measured during* the fourth quarter of the third year . . ." (Alexander T. Vol. 4 at 737-39; Petitioner Ex. 23 at 48), and because the cardiac catheterization rules specifically define capacity in terms of diagnostic equivalent procedures (Alexander T. Vol. 4 at 727-29), both of which are unlike 10A NCAC 14C.1804(1) and (2).

85. Wake Radiology introduced findings dated September 1999 from a previous CON review in which four applicants sought to acquire fixed cardiac catheterization equipment (Petitioner Ex. 24)("1999 Cardiac Catheterization Findings"), in which projected utilization was examined during a single quarter. (Petitioner Ex. 24 at 61-63). However, again, the cardiac catheterization rules specifically provide that utilization is "*measured during* the fourth quarter of the third year . . ." (Alexander T. Vol. 4 at 737-39; Petitioner Ex. 24 at 61), and the cardiac catheterization rules specifically define capacity in terms of diagnostic equivalent procedures (Alexander T. Vol. 4 at 727-29), both of which are unlike 10A NCAC 14C.1804(1) and (2).

86. Wake Radiology introduced findings dated January 2001 from a previous CON review in which a hospital applicant sought to add four operating rooms to its facility (Petitioner Ex. 25)("Pardee Hospital Operating Room Findings"), in which projected utilization in a single quarter was examined. (Petitioner Ex. 25 at 22-23). However, the operating room rules applicable to the Pardee Hospital Operating Room Findings are also different than 10A NCAC 14C.1804(2). The operating room rules refer to utilization volume "*during* the fourth quarter of the third year of operation . . ." (Petitioner Ex. 24 at 61), and specifically define capacity. Therefore, they are not analogous to 10A NCAC 14C.1804.

87. Wake Radiology introduced findings dated June 2006 from a previous CON review in which several joint applicants sought a CON for a diagnostic center as a result of the transfer of existing equipment from one joint applicant to another (Petitioner Ex. 28)("Heart Group of the Carolinas Findings"), in which 10A NCAC 14C.1804(1) and (2) were deemed not applicable. (Petitioner Ex. 28 at 18-19). However, the findings of non-applicability were based on the applicants' (Heart Group of the Carolinas) representations that there were no other hospitals or diagnostic centers in the service area, and that the project involved the transfer of

existing equipment already in use from one of the joint applicants to another. The Heart Group of the Carolinas Findings are therefore not analogous to the findings on the Wake Radiology Application. (Alexander T. Vol. 4 at 735-36).

88. Wake Radiology introduced findings dated July 2002 from a previous CON review in which Coastal Diagnostic Imaging, LLC, proposed to acquire a tilting radiographic table and thereby establish a diagnostic center. (Petitioner Ex. 26)("Coastal Diagnostic Findings"). In the Coastal Diagnostic Findings, certain performance standards were deemed not applicable based on the finding that there was no available information regarding utilization at other facilities from which to provide historical data or projections. (Petitioner Ex. 26 at 18). The Coastal Diagnostic Findings are not analogous because Wake Radiology had access to utilization information of its own facilities in the service area (Alexander T. Vol. 4 at 723-25), and because Coastal Diagnostic Imaging proposed only to acquire one component of an x-ray system whereas Wake Radiology proposes to acquire an entire new digital mammography system. (Alexander T. Vol. 4 at 736-37).

89. Wake Radiology introduced findings dated February 2002 from a previous CON review in which Coastal Carolina Health Care, P.A., sought a CON for a diagnostic center as a result of the cost of acquiring a mammography unit to replace its aging mammography unit that was nearing obsolescence and for which replacement parts were scarce. (Petitioner Ex. 27 at 3-4)("Coastal Carolina Findings"). The diagnostic center performance standards were deemed inapplicable, but the Coastal Carolina Findings specifically noted that the applicant "does not propose to add new services[.]" (Petitioner Ex. 27 at 15-16). In contrast, the Wake Radiology Application proposed to convert from existing analog mammography equipment to new digital mammography equipment, and stated "the transition to a digital mammography unit from analog is considered a new service component for purposes of this application." (Jt. Ex. 2 at 000000012).

90. Wake Radiology questioned several witnesses about whether the language of 10A NCAC 14C.1802, which requires utilization projections and refers to "existing and approved medical diagnostic equipment and services", applied to the specific equipment proposed by Wake Radiology. (*e.g.*, Rupp T. Vol. 1 at 66). The Agency witnesses testified that 10A NCAC 14C.1804(2) includes the proposed equipment in the equipment for which 80% capacity utilization must be projected (Alexander T. Vol. 4 at 644-45), and that the performance standard is intended to show the anticipated utilization of the proposed equipment in relation to that of the other similar equipment in the service area. (Rupp T. Vol. 1 at 72).

91. Wake Radiology's responses to 10A NCAC 14C.1804(1) and (2) in the Application also acknowledge that the diagnostic center performance standards applied to Wake Radiology's proposed project. (Jt. Ex. 2 at 000000028-29). Mr. Collins also testified as to his understanding that Wake Radiology was required to meet the performance standards. (Collins T. Vol. 2 at 263-65).

92. The Undersigned finds as fact that the previous CON Section findings and the Triad Declaratory Ruling cited by Petitioner are not inconsistent with the Agency Findings on the Wake Radiology Application.

Replacement Equipment Exemption Not Applicable

93. Although the proposed digital mammography equipment would replace Wake Radiology's existing analog equipment, Wake Radiology did not apply and would not qualify for a "replacement equipment" exemption under N.C. Gen. Stat. § 131E-184(a)(7), because the cost of the equipment would result in the establishment of Wake Radiology's Northwest Raleigh office as a diagnostic center. (Jt. Ex. 2 at 000000012; Alexander T. Vol. 4 at 718-19, 741-43). Therefore, the statutory review criteria and the performance standards for diagnostic centers apply to the project. (Alexander T. Vol. 4 at 741-43).

CONCLUSIONS OF LAW

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.

2. A court need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel,* 110 N.C. App. 438, 449, 429 S.E. 2d 611, 612 (1993).

3. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.

4. The Office of Administrative Hearings has jurisdiction over all of the parties and the subject matter of this action.

5. Pinnacle is an "affected person" within meaning of N.C. Gen. Stat. § 131E-188.

6. The North Carolina Court of Appeals has held that the exercise of an applicant's right to an evidentiary hearing under the contested case provision of N.C. Gen. Stat. § 131E-188(a) does not commence a *de novo* proceeding by the ALJ intended to lead to a formulation of the final decision. *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995). The Court expressly recognized that to do so would misconstrue the nature of contested case hearings under the CON law and the Administrative Procedure Act. *Id.*

7. In a contested case concerning a Certificate of Need, the ALJ is limited to a review of the information presented or available to the agency at the time of the review. *Id. See also In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 791, *rev. denied*, 320 N.C. 793, 361 S.E.2d 89 (1987).

8. North Carolina law presumes that the Agency has properly performed its duties, and this presumption is rebutted only by a showing that the Agency was arbitrary or capricious in its decision making. *See, e.g., In re Broad & Gales Creek Cmty. Assoc.*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); *Adams v. N.C. State Bd. Of Registration for Prof'l Eng'g & Land*

Surveyors, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998); *In re Land & Mineral Co.*, 49 N.C. App. 529, 531, 272 S.E.2d 6, 7, *disc. rev. denied*, 302 N.C. 397, 297 S.E.2d 351 (1981) (holding that "[t]he official acts of a public agency . . . are presumed to be made in good faith and in accordance with the law").

9. Administrative agency decisions may be reversed as arbitrary and capricious only if they are "patently in bad faith," or "whimsical" in the sense that "they indicate a lack of fair and careful consideration" or "fail to indicate any course of reasoning in the exercise of judgment." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (internal citation and quotations omitted).

10. The "arbitrary and capricious" standard is a difficult one to meet. *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001).

11. North Carolina law also gives great deference to an agency's interpretation of a law it administers. *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). *See also Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992), *disc. rev. improvidently allowed*, 333 N.C. 533, 427 S.E.2d 874 (1993) (holding that a reviewing court should defer to the agency's interpretation of a statute it administers "so long as the agency's interpretation is reasonable and based on permissible construction of the statute").

12. To obtain a CON for a proposed project, a CON application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an application fails to conform with any of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law. *See Presbyterian-Orthopaedic Hosp. v. N.C. Dep't of Human Resources*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996) (holding that "an application must comply with all review criteria" and that failure to comply with one review criterion supported entry of summary judgment against the applicant). The burden in this case rests with Wake Radiology to demonstrate that *all* of the CON review criteria have been met. *See id.* at 535, 470 S.E.2d at 834.

13. As Petitioner, Wake Radiology bears the burden of proof on each and every element of its case. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006).

14. The Agency properly determined that Wake Radiology failed to conform to statutory review criteria 1, 3, 4, 5, 6, 13(c) and 18a and regulatory review criteria 10A NCAC 14C.1803(b)(6), -.1804(1) and -.1804(2).

15. The Wake Radiology Application failed to comply with N.C. Gen. Stat. § 131E-183(a)(1) ("Criterion 1"), which requires the proposed project to be "consistent with applicable policies and need determinations in the State Medical Facilities Plan . . . ."

16. Policy GEN-3 in the 2008 SMFP is applicable to the review of the Wake Radiology Application. Policy GEN-3 states:

> A CON application to meet the need for new healthcare facilities, services or equipment shall be consistent with the three Basic Principles governing the [SMFP]; promote cost-effective approaches, expand health care services to the medically underserved, and encourage quality health care services. The Applicant shall document plans for providing access to services for patients with limited financial resources, commensurate with community standards, as well as the availability of capacity to provide those services. The Applicant shall also document how its projected volumes incorporate the three Basic Principles in meeting the need identified in the SMFP as well as addressing the needs of all residents in the proposed service area.

17. Wake Radiology's Application failed to adequately document "how its projected volumes . . . incorporate the basic principles [identified in Policy Gen-3] of the 2008 SMFP in meeting the needs of the patients to be served."

18. Wake Radiology's Application did not comply with Policy GEN-3 of Criterion 1 because Wake Radiology did not adequately demonstrate the need for the proposed project and was nonconforming with Criterion 3. In failing to demonstrate a need for the proposed services under Criterion 3, Wake Radiology failed to demonstrate in its application that the proposed project is a cost effective approach.

19. Wake Radiology's Application failed to comply with N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3"), which requires an applicant to "identify the population to be served by the proposed project and [the applicant] shall demonstrate the need that this population has for the services proposed . . . ."

20. Wake Radiology failed to adequately demonstrate the need the population has for the proposed digital mammography equipment. Wake Radiology offered insufficient data and assumptions, both as to the proposed location and other locations in the service area at which Wake Radiology already had digital mammography equipment, to quantify or substantiate the number of women projected to receive screening mammograms from Wake Radiology, and failed to adequately link the limited data and assumptions provided. Wake Radiology therefore failed to demonstrate the historical reliability or the reasonableness of beginning its projections with nine patients per day, increasing to 25 patients per day, and failed to demonstrate the need to add digital mammography equipment to another of its offices in Wake County. In addition, the Wake Radiology Application failed to demonstrate the need for the proposed project because it failed to provide historical data and utilization projections for Wake Radiology's other locations with digital mammography in Wake County required by the performance standards in 10A NCAC 14C.1804(1) and (2), and because the utilization projections it provided for the proposed equipment failed to project sufficient volume to meet the 80% of capacity performance standard under 10A NCAC 14C.1804(2).

21. Wake Radiology's Application failed to comply with N.C. Gen. Stat. § 131E-183(a)(4) ("Criterion 4"), which requires an applicant to demonstrate that the "least costly or most effective alternative has been proposed" for the same reasons it was nonconforming with Criteria 1, 3, 5, 6, 18a and 10A NCAC 14C.1803(b)(6), -.1804(1) and -.1804(2).

22. Wake Radiology's Application failed to comply with N.C. Gen. Stat. § 131E-183(a)(5) ("Criterion 5"), which requires an applicant to demonstrate the "immediate and long term financial feasibility of the proposal, based upon reasonable projections of the costs and the charges for providing health services by the person providing the services."

23. Wake Radiology's Application is nonconforming with Criterion 5 due to its nonconformity with Criterion 3 and because Wake Radiology failed to demonstrate that the financial feasibility of its proposal was based upon reasonable assumptions regarding costs and revenues. Because Wake Radiology's utilization projections are unreasonable, its cost and charge projections are likewise unreasonable.

24. Wake Radiology's Application failed to comply with N.C. Gen. Stat. § 131E-183(a)(6) ("Criterion 6"), which requires an applicant to demonstrate that the proposed project will not cause an "unnecessary duplication of existing or approved health service capabilities or facilities."

25. Wake Radiology is nonconforming with Criterion 6 for the same reasons it is nonconforming with Criterion 3.

26. Wake Radiology is nonconforming with Criterion 6 because the facility proposed by Wake Radiology is an unnecessary duplication of existing or approved digital mammography units in the service area.

27. N.C. Gen. Stat. § 131E-183(a)(7) ("Criterion 7") requires an applicant to "show evidence of the availability of resources, including health manpower. . . ."

28. The Wake Radiology Application adequately demonstrated the availability of health manpower, management and other resources needed for the operation of the proposed new digital mammography unit and the Agency correctly and reasonably determined that the Wake Radiology Application conformed with Criterion 7.

29. Wake Radiology's Application failed to comply with N.C. Gen. Stat. § 131E-183(a)(13)(c) ("Criterion 13(c)"), which requires an applicant to show that "the elderly and the medically underserved groups . . . will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services . . . ."

30. By Wake Radiology's failure to demonstrate that the projected level of digital mammography services to self pay/indigent/charity patients and Medicaid patients would adequately meet the needs of these underserved groups, the Application did not conform to Criterion 13(c).

31. Wake Radiology's Application failed to comply with N.C. Gen. Stat. § 131E-183(a)(18a) ("Criterion 18a"), which requires an applicant to "demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact on the cost effectiveness, quality, and access to services provided . . . ."

32. Wake Radiology's Application failed to comply with Criterion 18a for the same reasons that it failed to comply with Criteria 1, 3, 4 and 5.

33. Wake Radiology's Application failed to comply with 10A NCAC 14C.1803(b)(6), which requires an applicant to provide "the patient origin by percentage by county of residence for each diagnostic service provided by the applicants in the 12 month period immediately preceding the submittal of the application." 10A NCAC 14C .1803(b)(6). By Wake Radiology's failure to provide the patient origin by county of residence for its existing digital mammography equipment located at its other offices, the Wake Radiology Application did not conform to 10A NCAC 14C.1803(b)6).

34. Wake Radiology's Application failed to comply with 10A NCAC 14C.1804(1), which requires the applicant to provide "documentation that all existing health service facilities providing similar medical diagnostic equipment and services as proposed in the CON application in the defined diagnostic center service area were operating at 80% of the maximum number of procedures that the equipment is capable of performing for the twelve month period immediately preceding the submittal of the application." 10A NCAC 14C .1804(1). By its failure to provide historical utilization data regarding Wake Radiology's own digital mammography equipment at its other facilities in Wake County, the Wake Radiology Application did not conform to 10A NCAC 14C.1804(1).

35. Wake Radiology's Application failed to comply with 10A NCAC 14C.1804(2), which requires an applicant to provide "documentation that all existing and approved medical diagnostic equipment and services of the type proposed in this CON application are projected to be utilized at 80% of the maximum number of procedures that the equipment is capable of performing by the fourth quarter of the third year of operation following initiation of diagnostic services." 10 NCAC 14C .1804(2). By projecting an inadequate number of procedures for the proposed equipment in the three year period following initiation of diagnostic services, and by failing to include utilization projections for the other Wake Radiology locations in Wake County with digital mammography equipment, the Wake Radiology Application failed to conform to 10A NCAC 14C.1804(2).

36. In concluding that Wake Radiology's Application was nonconforming with Criteria 1, 3, 4, 5, 6, 13(c) and 18a, as well as the rules located at 10A NCAC 14C.1803(b)(6), -.1804(1) and -.1804(2), the Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23.

37. In concluding that Wake Radiology's Application was conforming, standing alone, with Criteria 7, 8, 13(a), 13(b), 13(d), 14 and 20 as well as the rules located at 10A NCAC 14C.1803(a), -.1803(b)(1), -.1803(b)(2), -.1803(b)(3), -.1803(b)(4), -.1803(b)(5), -.1803(b)(7), -.1803(b)(8), -.1803(d), -.1803(e)(1), -.1803(e)(2), -.1803(e)(3), -.1804(3), -.1804(4), -.1805 and -.1806, the Agency did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; fail to act as required by rule or law; or otherwise violate the standards in N.C. Gen. Stat. § 150B-23.

38. Wake Radiology alleges that some of its failures to conform to the required criteria and standards resulted from its reliance on guidance provided by the Agency. Wake Radiology thus suggests that the Agency should be estopped from enforcing certain applicable statutory criteria and regulatory standards. The Undersigned found as fact that the CON Section did not direct Wake Radiology to prepare the Application in the manner that resulted in any of the nonconformities noted by the Agency, and that any reliance by Wake Radiology in those respects was not reasonable.

39. However, even if Wake Radiology's interpretation of communications by the CON Section had been reasonable, North Carolina courts rarely enforce estoppel against the government. *See, e.g.*, *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E.2d 402 (1953) (holding that a government entity is not subject to estoppel to the same extent as an individual or private entity because of the possible resulting affect on the government's ability to assert its powers); *State v. Rich Food Services*, 139 N.C. App. 691, 535 S.E.2d 84 (2000) ("[E]stoppel does not normally operate to bar the actions of the State or its agencies and arises only if such an estoppel will not impair the exercise of the governmental powers of the [state].") (internal quotations and citations omitted). *See also City of Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950) (holding that "the police power of the State cannot be bartered away by contract, or lost by any other mode").

40. Even if an estoppel were enforceable against the State under the circumstances of this contested case, Wake Radiology failed to establish that it is entitled to estop the Agency from enforcing the statutory and regulatory criteria, because it offered no evidence that it relied on any guidance provided by the Agency to its detriment. *See Deal v. N.C. State Univ.*, 114 N.C. App. 643, 645, 442 S.E.2d 360, 362 (1994) (detrimental reliance required before equitable estoppel may arise). Even if the Agency communications were construed as Wake Radiology suggests, it failed to offer any evidence that the Application would have been conforming to the relevant criteria and standards had it supplied the requisite information. Nor has Wake Radiology alleged or proven that it suffered any other detriment as a result of any reliance on Mr. McKillip's guidance.

41. Further, policy concerns weigh against the estoppel suggested by Petitioner. Wake Radiology asks to be excused from complying with performance standards designed to ensure that the proposed services are necessary and will foster the fundamental purpose of the CON law, "to control the cost, utilization, and distribution of health services and to assure that the less costly and more effective alternatives are made available." *See In re Humana Hospital Corp.*, 78 N.C. App. 637, 646, 338 S.E.2d 139, 145 (1986). Even if Wake Radiology had demonstrated some detriment as a result of reliance on Mr. McKillip's guidance, it would circumvent the purpose of the CON law to allow Wake Radiology to offer services not shown to be needed.

42. Wake Radiology did not sufficiently prove that it had conformed to each and every applicable CON statutory and regulatory review criteria. Because the burden is on Wake Radiology to prove its case as to each statutory and regulatory review criterion by a

preponderance of the evidence, after weighing the evidence before me, the Undersigned is compelled to affirm the original Agency decision.

RECOMMENDED DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby recommended that the decision of the Certificate of Need Section disapproving the Wake Radiology Application be affirmed.

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 N.C. Gen. Stat. § 150B-36(b).

NOTICE

The Agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Recommended Decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The Agency 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.

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services.

This the 29th day of January, 2010.

Eugene J. Cella
Temporary Administrative Law Judge

A copy of the forgoing was mailed to:

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This the 29th day of January, 2010.

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STATE OF NORTH CAROLINA COUNTY OF HARNETT	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 09 DOA 3931
Myers' Investigative and Security Services, Inc., Petitioner vs. N.C. Department of Administration, Respondent	**DECISION**

THIS MATTER comes before the Honorable Joe L. Webster, Administrative Law Judge, in Fayetteville, North Carolina, and was heard on November 2, 2009. This contested case involved the award of a contract for armed security guard services at four North Carolina National Guard ("NG") facilities. Petitioner Myers Investigative and Security Services, Inc. ("Myers"), challenged Respondent Department of Administration's ("DOA") Division of Purchase and Contract's ("P&C") rejection of Myers' proposal and P&C's award of the contract to Security Services of America, Inc. ("SSA").

APPEARANCES

Petitioner:
Fred D. Webb, Jr.
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Respondent:
Durwin P. Jones
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ISSUES

The issues the parties tried during the hearing may be summarized as follows:

1. Was Myers's proposal ~~was~~ properly rejected for failing to provide "audited financial statements or similar evidence of financial stability"?

2. Was Myers treated unfairly when the evaluators reviewed consolidated audited financial statements of SSA's parent corporation that were obtained by accessing a weblink that was included in SSA's proposal?

3. Was SSA properly awarded the contract?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 143-52
N.C. Gen. Stat. § 150B-23
1 NCAC 05B .0501
1 NCAC 05B .0306
1 NCAC 05B .0307

BURDEN OF PROOF

As Petitioner, Myers had the burden of proving by the preponderance of the evidence that DOA/P&C substantially prejudiced the Myers's rights and that DOA/P&C exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule. *See* N.C. Gen. Stat. § 150B-23(a); N.C. Gen. Stat. § 150B-29(a); Town of Wallace v. N.C. Dep't of Env't & Natural Res., 160 N.C. App. 49, 56, 584 S.E.2d 809, 814-15 (2003) (an unrelated point in this decision was superseded by statute).

WITNESSES

1. William F. Myers, President/CEO ("W. Myers")

2. Mildred Christmas, P&C Procurement Specialist ("M. Christmas")

3. Ret. Col. John Wilkins, II, Antiterrorism Program Manager, N.C. National Guard ("Col. Wilkins")

EXHIBITS

The following exhibits were offered and received into evidence:

Petitioner's Exhibits 1 through 7 except for Exhibit 5 pages 1-3 of 11 (which were for demonstrative purposes only).

Respondent's Exhibit R1 through R9, and the State Purchasing Officer's decision dated April 22, 2009 found in the State's August 5, 2009 filing of the document constituting Agency Action was a demonstrative exhibit.

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 interest, 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. Wherefore, the undersigned makes the following Findings of Fact, Conclusions of Law and Recommended

Decision, which will be tendered to the Secretary of the North Carolina Department of Administration for a final decision.

FINDINGS OF FACT

1. The NC Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. §150B-23 *et seq.*, and there is no question as to misjoinder or nonjoinder.

2. The parties received notice of hearing by certified mail more than 15 days prior to the hearing.

3. Petitioner Myers is a North Carolina corporation that provides unarmed and armed security services and investigations. (Petitioner's Exhibit 3, p. 5 of 26.)

4. Respondent DOA is a state agency and P&C is a division of DOA. P&C is the State of North Carolina's centralized purchasing agency and it procures goods and services for other state agencies when the value of such goods and services exceed the state agencies' purchasing authority. (*See* N.C. Gen. Stat. §§ 143-49, 143-52; 143-335; 143-341(2); 143A-3; 143B-3(1); and 143B-6(8).)

5. On or about December 17, 2008, the Department of Administration, through P&C, issued the subject RFP for Department of Crime Control and Public Safety's ("DCCPS") for armed guard services at four (4) National Guard facilities in Raleigh, Morrisville, Salisbury and Camp Butner, North Carolina. (Petitioner's Exhibit 2, p. 3 of 26; Pretrial Order, Stipulated Fact 3.A.) The RFP had the following terms, conditions and requirements that are relevant to this contested case:

A. "Financial Statement: The offeror's most recent audited financial statement or similar evidence of financial stability shall be provided". (Pretrial Order, Stipulated Fact 3.B; Petitioner's Exhibit 2, p. 15 (Paragraph 2 of the Proposal Requirements).)

B. "Corporate Background and Experience: **All references will pertain to your ability as an armed guard contractor. You must have three (3) references for which ARMED GUARD work was performed.** If you have more than three (3), the NCNG reserves the right to select which references to contact. Ensure your references have a company name, point of contact, address, telephone and fax number, and an email address." (Petitioner's Exhibit 2, p. 15 (Paragraph 1 of the Proposal Requirements).)

C. At their option, the evaluators may request oral presentations or discussion with any or all offerors for the purpose of clarification or to amplify the materials presented in any part of the proposal. However, offerors are cautioned that the evaluators are not required to request clarification; therefore, all proposals should be complete and reflect the most favorable terms available from the offeror. (Petitioner's Exhibit 2, p. 3 of 26 (Paragraph 6 of the Procurement Process).)

D. REFERENCE TO OTHER DATA: Only information which is received in response to this RFP will be evaluated; reference to information previously submitted shall not be evaluated. (Petitioner's Exhibit 2, p. 18 of 26 (Paragraph 4 of the General Information On Submitting Proposals).)

E. ELABORATE PROPOSALS: Elaborate proposals in the form of brochures or other presentations beyond that necessary to present a complete and effective proposal are not desired.

In an effort to support the sustainability efforts of the State of North Carolina we solicit your cooperation in this effort.

It is desirable that all responses meet the following requirements:

- All copies are printed **double sided**.
- All submittals and copies are printed on **recycled paper with a minimum post-consumer content of 30%** and indicate this information accordingly on the response.
- Unless absolutely necessary, all proposals and copies should **minimize or eliminate use of non-recyclable or non re-usable materials** such as plastic report covers, plastic dividers, vinyl sleeves, and GBC binding. Three-ringed binders, glued materials, paper clips, and staples are acceptable.
- Materials should be submitted in a format which allows for **easy removal and recycling** of paper materials

(Petitioner's Exhibit 2, p. 18 of 26 (Paragraph 5 of the General Information On Submitting Proposals) (emphasis original).)

6. Pursuant to the RFP, a mandatory proposal conference was held on January 7, 2009, and twenty-two vendors attended. (Petitioner's Exhibit 2, p. 2 of 26.)

7. At this conference, P&C's procurement specialist, Mildred Christmas, advised all offerors that audited financial statements were requested and that a three-line financial statement from an offeror was not acceptable and that the financial statements must be statements recognized by accounting standards. (Testimony of M. Christmas and W. Myers.)

8. All vendors were also required to submit questions regarding the RFP to P&C on January 7th (Petitioner's Exhibit 2, p. 2 of 26).

9. W. Myers testified that he did not ask any questions at the mandatory proposal conference seeking clarification of the meaning of "similar evidence of financial stability" and W. Myers did recall hearing M. Christmas state that a three-line financial statement was not acceptable. (Testimony of Myers.)

10. On January 7th, P&C received 66 questions from the vendors, but there were no questions regarding the RFP's evaluation criteria, proposal requirements, financial statements or "similar evidence of financial stability". (Testimony of M. Christmas.)

11. On January 9th, P&C issued Addendum 1, which answered the 66 questions received by P&C. (Petitioner's Exhibit 2, pp. 23-24 of 26; Petitioner's Exhibit 4, pp. 3-11 of 11.)

12. Addendum 1 also extended the proposal opening date to January 16th. (Petitioner's Exhibit 2, p. 23 of 26.)

13. On January 16th, the proposals were opened and P&C received 18 proposals. (Petitioner's Exhibit 4, pp. 1-2.)

14. Of the 18 proposals, Myers submitted the lowest cost proposal at $14.49 per hour (as subsequently clarified), while SSA was in a three-way tie with Copeland Holdings ("CH") and Leonard Security Services ("LSS"), all submitting the fifth lowest cost proposals at $16.25 per hour. (Petitioner's Exhibit 4, pp. 1-2; Petitioner's Exhibit 5, p. 5 of 11.)

15. Myers did not submit with its proposal any audited financial statement. Instead, Myers submitted the following under the "similar evidence of financial stability":

A. A three line item financial statement that was prepared by Myers (not by a certified public accountant ("CPA")), which showed the following:

Gross Revenues $10,968,314.00

Cost of Sales .....$ 9,322,818.00

Gross Profit .....$ 1,645,496.00; and

B. The first page of a letter from Prestige Capital Corporation ("PCC") to Myers dated December 22, 2008, whereby PCC had proposed to enter into an agreement to purchase certain accounts receivables of Myers with a maximum advance of $1,500,000 (hereinafter the "PCC Letter"). In the first paragraph, PCC stated that "[t]his letter is not meant to be, nor shall it be construed as, an attempt to define all the terms and conditions pertaining to the proposed accounts receivable purchase line, which terms and conditions would be contained in a Purchase and Sale Agreement to be executed by the parties hereto."

(Pretrial Order, Stipulated Fact 3.C; Petitioner's Exhibit 3, pp. 9-10 of 26.)

16. On February 17th, NG recommended the following offerors to P&C for contract award: (a) SSA as first choice; (b) LSS as second choice; and (c) CH as third choice. (Petitioner's Exhibit 5, pp. 6-7 of 11; Pretrial Order, Stipulated Fact 3.E.) NG made its recommendations based on the following considerations:

a. NG did not recommend Myers because Myers "did not submit adequate financial information to allow the NG to determine financial stability of the company." (Petitioner's Exhibit 5, pp. 6-7 of 11; Pretrial Order, Stipulated Fact 3.F.)

b. North Carolina Department of Justice's Private Protective Services Board advised NG that Blue Shield Security & Protection, Inc., and Protection Plus Security Company were not licensed in North Carolina to provide armed security guard services. (Petitioner's Exhibit 5, p. 6 of 11.)

c. NG found that the three firms ranked 5th, 6th and 7th (SSA, CH and LSS) were "fully" qualified to comply with and perform all aspects of the RFP, all offered the same hourly rate ($16.25) and all had provided at least three acceptable references.

d. NG broke the three-way tie based on its evaluation of the financial information/statements submitted by SSA, CH and LSS, based on the following:

1. SSA stated in its proposal that it was a wholly owned subsidiary of ABM Industries, Inc. ("ABM") and provided a financial history of the growth of ABM's security division, which included SSA in 2004. (Respondent's Exhibit 6.) ABM's Security Division's acquisition of SSA made it the third largest security provider with over $360 million in annual revenue. (Id.) ABM's gross revenues in 2007 were $321.5 million and its projected revenue in 2008 was over $360 million. (Id.)

2. SSA submitted in its proposal a weblink (http://www.sec.gov/cgi-bin/browse-edgar?type=10-k&dateb=&action=getcompany&CIK=0000771497) to audited consolidated financial statement of its publicly traded parent corporation—ABM, which were found in ABM's annual report ABM filed with the Securities and Exchange Commission, Form 10-K (hereinafter "ABM 10-K"). (Respondent's Exhibit R6.) ABM's audited financial statements established the financial stability of ABM's Security Division, which included:

(a) ABM's Security Division had increased revenues of $13.7 million in its 2008 fiscal year when compare to its 2007 fiscal year;
(b) ABM's Security Division's revenues were $333,525,000 for the 2008 fiscal year;
(c) The Security Division had a 2008 net operating profit increased by $3 million with a total operating profit of $7,723,000 for fiscal year 2008; and
(d) A $450 million line of credit for use by ABM and its subsidiaries, including SSA, with available credit of $107.6 million.

(Respondent's Exhibit R5 (ABM's SEC 10-K Statement/Annual Report), pp. 2-4, 17, 19, 22-24, 27, 29, 31, 32, 38 (CPA firm's audit opinions reflecting that the audit was conducted on ABM and its subsidiaries).)

3. LSS and CH submitted "similar evidence of financial stability," which were compiled financial statements that contained the standard CPA disclaimers that the financial statements were conditional, based on representations of management that were not verified by the CPAs and management omitted disclosures required by generally accepted accounting principles that might influence NG's conclusions regarding LSS's and CH's financial positions, results of operations and cash flows. (Respondent's Exhibits R7 and R8.)

(Testimony of Col. Wilkins who was a former banker and is familiar with reviewing and analyzing financials statements.)

17. Col. Wilkins testified that he concluded Myers' three-line item internal financial statement and the first page of the PCC Letter did not provide enough information to evaluate Myers' financial stability because: nothing on the first page of the PCC Letter expressed a firm commitment by PCC to advance any money to Myers; the three-line item financial statement was prepared by Myers not a CPA; the three-line item financial statement only reported Myers' purported gross profit and did not state whether Myers had a net profit or net loss for the end of December 2008; Myers disregarded the instruction at the mandatory proposal conference advising offerors not to submit three-line item financial statements; Myers provided no documentation that would support the numbers used in the three-line item financial statement; Myers' three-line item financial statement was not a typical/common financial statement such as a balance sheet, profit/loss statement and/or cash flow statement; Myers' three-line financial statement did not provide any details or information as to what Myers' meant by gross revenue, cost of sales and gross profit; and Myers' financial statement did not provide evidence of its financial stability.

18. Col. Wilkins also questioned the accuracy of Myers' three-line item financial statement, since Myers' cost proposal included three different hourly rates of $14.49, $14.59 and $14.91, which required P&C to obtain clarification. (Testimony of Col. Wilkins, M. Christmas and W. Myers; Petitioner's exhibit 5, p. 5 of 11.)

19. Col. Wilkins testified that in his opinion Myers attempted to get around the prohibition stated at the mandatory proposal conference not to submit a three-line item financial statement by submitting the prohibited financial statement with the first page of the PCC Letter claiming that this page was evidence of a $1.5 million line of credit. (Col. Wilkins' Testimony.)

20. NG's evaluators concluded that Myers was hiding significant negative financial information, because of the lack of any detailed financial information; Myers only stated its gross profit instead of net profit (or net loss); and Myers chose not to submit any typical financial

statement such as a balance sheet, cash flows statement, statement of retained earnings and/or profit/loss statement. (Testimony of Col. Wilkins and W. Myers.)

21. W. Myers testified that the $9,322,818 amount for "cost of sales" in Myers' three-line item financial statement did not include all costs, expenses, salaries, debt repayments, and such other costs he could not recall and, thus, the gross profit in the three-line item financial statement cannot be construed as Myers net profit as of the end of 2008. (W. Myers' Testimony (cross-examination).)

22. On March 3, 2009, P&C approved NG's recommendation to award the contract to SSA. (Pretrial Order, Stipulated Fact 3.G.)

23. After the contract award and, in the context of discovery in this contested case, evidence was presented that supports the evaluators' inferences and conclusions regarding Myers' financial instability were correct and that evidence was as follows:

A. Myers testified that a $1,105,349.66 federal tax lien had been recorded against Myers in Harnett County, NC, on August 8, 2008, for Myers' failure to pay Federal Unemployment Taxes and quarterly Federal Payroll Taxes from August 8, 2008 through December 31, 2008 (Myers' Testimony (direct and cross-examination); Respondents' Exhibit 2, p. 1, sixth bullet).

B. Myers produced a complete copy of PCC's December 21, 2008 letter (Respondent's Exhibit R3), which stated:

1. This letter is for discussion purposes only and does not represent a commitment of any nature by PCC to provide financing. It is provided to you solely for the purpose described herein, and may not be disclosed to or relied upon by any other party without PCC's prior written consent.

2. Myers did not produce any documents that reflect PCC's consent allowing Myers to disclose the first page of the PCC's letter in Myers' proposal submitted to P&C. (Respondent's Exhibit 2; Myers' Testimony regarding documents produced during discovery.)

3. PCC's third page was not signed by PCC or Myers.

4. Nowhere in PCC's letter is there any reference to P&C's RFP # 802062 or that Myers was only going to enter into the agreement with PCC, if Myers was awarded the RFP #802062 contract. (Respondent's Exhibit 3.)

C. Myers produced partial financial statements dated July 28, 2009, prepared by its accountant, Todd Rivenbark & Puryear, PLLC ("TRP"), which reported the financial results for Myers year ending on December 31, 2008 (Petitioner's Exhibits 6).

1. Myers testified that earlier in the year, TRP had prepared a "draft for discussion purposes only" 2008 year-end financial statements for Myers that was submitted to P&C in connection with a different RFP. (Myers' Testimony (cross-examination).) In those draft financial statements, TRP prepared a balance sheet, statement of revenues and expenses-income tax basis with a net loss of $178,516.41 for the year ending December 31, 2008. (Id.) However, the financial statements Myers chose to produce during discovery in this contested case was a balance sheet and the first part of the Statement of Revenue, expenses and retained earnings (deficit) that excluded the year-end result of a profit or a loss. (Id.; Petitioner's Exhibit 6.)

2. Although W. Myers testified that Myers had $477,055.66 in cash at a bank at the end of December 2008, Myers' balance sheet reflected total current liabilities of $3,304,487.78. Thus, when the current liabilities are applied against Myers' total current assets, which includes the cash in bank, Myers' owed $1,645,536.57 ($1,659,951.21-$3,304,487.78) more than it had assets to cover those liabilities. (Petitioner's Exhibit 6, p. 3-5 of 5.)

3. When Myers' total assets of $1,897,400.29 are applied against Myers' total liabilities of $3,304,487.78, Myers owed $1,407,087.46 more than it had assets to cover those liabilities. This amount is also reflected in Myers' negative equity (i.e., retained deficit) of $1,407,087.49.

4. The financial statements prepared by TRP for Myers also demonstrated how inaccurate Myers' internal accounting procedures were with respect to the amounts Myers reported to P&C/NG in its three-line item financial statement, that is:

   a. Myers' proposal stated that its gross revenue was $10,968,314 at the end of 2008, but TRP stated it was $11,199,193.01, which means Myers' proposal understated its gross revenue by $230,879;
   b. Myers' proposal stated that its cost of sales was $9,322,818 at the end of 2008, but TRP's cost of "revenue" was $10,258,879.45; which means Myers' proposal understated its cost of sales/revenue by $936,061.45; and

c. Myers' proposal stated that its gross profit was $1,645,496 at the end of 2008, but TRP stated that Myers' gross profit was $930,196, which means Myers overstated its gross profit by $715,300.

5. W. Myers testified that TRP's Statement of Revenue, Expenses and Retained Earnings (Deficit)-Income Tax Basis, did not include all Myers' costs, expenses, taxes, salaries that were not directly related to providing security guards were not included in TRP's cost of revenues (e.g., W. Myers' salary, the salaries of all the corporation's officers, home office staff salaries/payroll and the costs listed in this statement did not include the $868,624.64 for Notes Payable-Current). Again, Myers' gross profit for 2008 reported by TRP cannot be construed as a "net" profit for 2008.

24. The Purchase and Sale Agreement between Myers and PCC that was executed on January 16, 2009 (Petitioner's Exhibit 7), but a copy was not included in Myers' proposal. Thus, the Purchase and Sale Agreement was not evidence offered to the evaluators as proof of Myers' financial stability.

25. The following regulations were relevant to P&C's and NG's evaluation of Myers' proposal and SSA's proposal:

A. 01 NCAC 05B .0306 LATE OFFERS, MODIFICATIONS, OR WITHDRAWALS: No late offer, late modification, or late withdrawal shall be considered unless received before contract award, and the offer, modification, or withdrawal would have been timely but for the action or inaction of agency personnel directly serving the procurement process. The offeror shall have his offer delivered on time, regardless of the mode of delivery used, including the U.S. Postal Service or any other delivery services available.

B. 01 NCAC 05B .0307 ERROR/CLARIFICATION: When an offer appears to contain an obvious error or otherwise where an error is suspected, the circumstances may be investigated and then may be considered and acted upon. Any action taken shall not prejudice the rights of the public or other offering companies. Where offers are submitted substantially in accordance with the procurement document but are not entirely clear as to intent or to some particular fact or where there are other ambiguities, clarification may be sought and accepted provided that, in doing so, no change is permitted in prices.

C. 01 NCAC 05B .0501 BASIS FOR REJECTION: In soliciting offers, any and all offers received may be rejected in whole or in part. Basis for rejection shall include, but not be limited to, the offer being deemed unsatisfactory as to quantity, quality, delivery, price or service offered; the offer not complying with conditions of the procurement document or with

the intent of the proposed contract; lack of competitiveness by reason of collusion or otherwise or knowledge that reasonably available competition was not received; error(s) in specifications or indication that revision(s) would be to the state's advantage; cancellation of or changes in the intended project or other determination that the proposed requirement is no longer needed; limitation or lack of available funds; circumstances which prevent determination of the lowest responsible or most advantageous offer; any determination that rejection would be to the best interest of the state.

25. The undersigned further finds that NG's and Respondent's reliance upon the financial information provided in SSA's bid was misplaced and in error. A fair interpretation of the data supplied by SSA in connection with it's bid is that only aggregate data for SSA's parent corporation, ABM, was supplied. As the parent company of SSA, ABM was not the offeror in the bid. ABM's corporate earnings, assets, or established line of credit could not be read as anyway related to the financial stability of SSA. Even the data provided by SSA indicating that ABM's Security Division had growth in 2003, 2005, 2006 and which grew to over $360,000,000 in annual revenue in 2008, could not be fairly read by NG or Respondent to conclude that SSA was financially stable and that its bid met the requirements of the procurement documents. It is clear from the financial statements that the data on the reported growth of ABM's Security Division includes SSA, "Security Services of America," "Silverhawk Security Specialists" and "Elite Protection Services," all subsidiaries of ABM. (Resp. Ex. 5, page 3, last paragraph entitled Security). Based upon the information provided, Respondent could not determine SSA's balance sheet, costs of sales revenue, gross or net revenues or profit, assets or liabilities based upon the information provided in its bid. An audited financial statement of SSA was not provided. While much information was provided in the form of consolidated financial data, including the information Respondent considered by viewing the weblink of ABM, the same individualized data Respondent required Myers and other offerors to provide in their bids, was not provided by SSA. The undersigned finds that SSA's bid should have been rejected for the very same reason that Myer's proposal was rejected, for not providing the specific and individualized financial data required in the RFP.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.

2. Petitioner is an aggrieved person under Chapter 150B and was entitled to commence a contested case.

3. Petitioner has satisfied all conditions precedent and all timeliness requirements for initiating this contested case.

4. Petitioner failed to establish by a preponderance of the evidence that Respondent DOA (through P&C and NG) exceeded its authority; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in rejecting Myers' proposal for failing to provide adequate financial information. However, as hereinafter set forth, Petitioner did establish by a preponderance of the evidence that Respondent DOA (through P&C and NG) exceeded its authority; acted erroneously; failed to use proper procedure;

acted arbitrarily or capriciously; or failed to act as required by law or rule in awarding SSA the contract.

A. Petitioner was aware of the prohibition against the submission of a three-line item financial statement at the mandatory proposal conference and this prohibition superseded any prior experience or understanding Petitioner may have had in submitting proposals with similar three-line item financial statements in response to other procurements with other N.C. state agencies.

B. Myers was required to submit its "most recent audited financial statement or similar evidence of financial stability". (Petitioner's Exhibit 2, p. 15 of 26, Paragraph 2 of the Proposal Requirements (hereinafter "Paragraph 2").) This requirement provided sufficient guidance as to what information was requested and would be evaluated for purposes of making an award, in that:

1. Paragraph 2 required an offeror to submit its most recent audited financial statement and by doing so it would satisfy this requirement.

2. If audited financial statements were not going to be submitted, then Paragraph 2 required the offeror to submit something similar to audited financial statements to demonstrate financial stability.

3. The purpose of the submitting the recent audited financial statements or "similar evidence" was to determine the offeror's financial stability.

4. "Financial" means relating to finances, that is, monetary affairs or operations of a business. (*See* Merriam-Webster's Online Dictionary.)

5. "Stability" means the quality, state, or degree of being stable, that is, firmly established, fixed, not changing or fluctuating. (Id.)

6. "Financially able" has been defined as "[s]olvent; able to pay debts and expenses as due." (Black's Law Dictionary, Abridged Fifth Ed. (1983).)

7. Solvency has been defined as "[a]bility to pay debts as they mature[;] [a]bility to pay debts in the usual and ordinary course of business[; or] [e]xcess of assets over liabilities." (Id.)

8. Accordingly, "financial stability" simply means that the business is not insolvent, that its cash flow is adequate to conduct its operations, including performance of the proposed contract and that it has the ability to obtaining third party financing.

9. Accordingly, NG could review the audited financial statements and "similar evidence" to determine whether the offerors were solvent, had sufficient cash flow to perform the contract and had the ability to pay its debts, in particular, the wages, benefits and taxes of the employees for the proposed contract as well as existing contracts.

10. Audited Financial Statements are the product of a CPA's highest level of assurance services. In an audit, the CPA performs all of the steps indicated above regarding compiled or reviewed statements, but also performs verification and substantiation procedures. These verification and substantiation procedures may include direct correspondence with creditors or debtors to verify details of amounts owed, physical inspection of inventories or investment securities, inspection of minutes and contracts, and other similar steps. Also, the CPA gains a knowledge and understanding of the entity's system of internal control. When the audit is completed, the CPA's standard audit report states that an audit was performed in accordance with generally accepted auditing standards, and expresses an opinion that the financial statements present fairly the entity's financial position and results of operations. This is known as the expression of "positive assurance." (State Purchasing Officer's decision, p. 7)

11. American Institute of Certified Public Accountants, Generally Accepted Auditing Standard Section 150 states:

> **.01** An independent auditor plans, conducts, and reports the results of an audit in accordance with generally accepted auditing standards. Auditing standards provide a measure of audit quality and the objectives to be achieved in an audit. Auditing procedures differ from auditing standards. Auditing procedures are acts that the auditor performs during the course of an audit to comply with auditing standards.

Auditing Standards

> **.02** The general, field work, and reporting standards (the 10 standards) approved and adopted by the membership of the AICPA, as amended by the AICPA Auditing Standards Board (ASB), are as follows:
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> ***
>
> *Standards of Reporting*
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> 1. The auditor must state in the auditor's report whether the financial statements are presented in accordance with generally accepted accounting principles.
> 2. The auditor must identify in the auditor's report those circumstances in which such principles have not been consistently observed in the current period in relation to the preceding period.

3. When the auditor determines that informative disclosures are not reasonably adequate, the auditor must so state in the auditor's report.

4. The auditor must either express an opinion regarding the financial statements, taken as a whole, or state that an opinion cannot be expressed, in the auditor's report. When the auditor cannot express an overall opinion, the auditor should state the reasons therefor in the auditor's report. In all cases where an auditor's name is associated with financial statements, the auditor should clearly indicate the character of the auditor's work, if any, and the degree of responsibility the auditor is taking, in the auditor's report.

(*See* Respondent's Exhibit R5, p. 38 for an example of the types of representations found in an independent auditor's report.)

12. Petitioner's president testified he was familiar with general types of financial statements and he testified that Myers has had compiled financial statements (i.e., balance sheet, statement of revenue, profit/loss statements) prepared for it in the past, but chose not to submit any commonly used/recognized financial statements with its proposal submitted to P&C for the NG armed security guard contract.

13. In addition to SSA's audited financial statements of its parent corporation, NG's evaluators also found acceptable the compiled financial statements of LSS and CH. (Petitioner's Exhibit 5, pp. 6-7 of 11; Respondent's Exhibits 7 and 8.). The undersigned finds as a matter of fact and law that NG's reliance on SSA's audited financial statements of its parent company to be in error as later set forth herein.

C. NG's evaluators properly concluded that the first page of the PCC Letter did not reflect any agreement whereby PCC had agreed to advance Myers $1.5 million, because: nothing on the first page stated that PCC had unequivocally agreed to advance Myers $1.5 million; the first page reflected an intention by PCC to execute a subsequent Purchase and Sale Agreement; and the first page was not executed by any of the parties and Myers needed the first page to be signed by a duly authorized officer of PCC in order to have a legal right to compel PCC to advance Myers up to $1.5 million assuming Myers had accounts receivable exceeding that amount. (*See*, the various statutes of fraud that may pertain to the transaction contemplated by Myers and PCCC, such as, N.C. Gen. Stat.§§ 22-5; 25-3-105(9) (negotiable instruments-definition of a promise); 25-5-102, 25-5-103, 25-5-104 (letters of credit); 25-9-201 (security interests).).

D. Since Myers' PCC Letter was not evidence that it had a $1.5 million line of credit, Myers only submitted a prohibited three-line item financial statement. Therefore, the evaluators had a sufficient basis, in and of itself, to reject Myers' proposal for not complying with the instruction that was given at the mandatory proposal conference.

E. It was also reasonable for NG's evaluators not to rely on Myers' statements of its gross revenue, cost of sales and gross profit, when P&C had to seek clarification as to Myers' hourly rate it was offering NG. Furthermore, Myers chose to give P&C/NG only select positive financial information with no way for P&C/NG to determine if that information was accurate. However, it was the financial information that Myers chose not to give P&C/NG that prevented the evaluators from determining Myers' financial stability, because there was no information regarding Myers' debts, salaries of its corporate officers, salaries or wages of home office staff, taxes on the foregoing salaries and wages, and all other non-labor related expenses from which net profit/loss and net worth could be determined.

F. NG's evaluators did not abuse their discretion, exceed their authority, act arbitrarily or act capriciously in rejecting Myers' proposal when they did not seek "clarification" from Myers of its financial statement because:

1. 1 NCAC 5B .0307 only allows for clarification of obvious or suspected errors, the correction of which will not prejudice the public or other offering companies. P&C/NG may only seek clarification of the financial information Myers provided. P&C/NG could not seek clarification under this regulation for information that Myers did not provide. 1 NCAC 5B .0307 would not apply because allowing Myers to provide "clarification" of its proposal would prejudice the other offerors because Myers' incomplete and non-responsive proposal would become responsive and that "clarification" may cause SSA, LSS or CH to lose the contract award when these offeror had timely submitted complete proposals.

2. Paragraph 6 of the RFP's Procurement Process (Petitioner's Exhibit 2, p. 3 of 26) stated that, at the option of the evaluators, oral presentations or discussion may be requested with "any or all offerors for the purpose of clarification or to amplify the materials presented in any part of the proposal." "However, offerors are cautioned that the evaluators are not required to request clarification; therefore all proposals should be complete and reflect the most favorable terms available fro the offeror." Again, P&C/NG may only seek clarification or amplification of what Myers included in its proposal, not financial information that Myers chose to omit from its proposal. Paragraph 6 also gave Myers a warning that Myers had to make sure that its financial information was complete when submitted, because the evaluators were under no obligation to seek clarification.

The only way for Myers to have provided "clarification" of its proposal was to provide P&C/NG with information that was not originally included in Myers' proposal. Myers' proffer of this

missing information would constitute a modification of its proposal after the public opening of the proposals, but such a modification is prohibited by 1 NCAC 5B .0307. The exception to this regulation does not apply, because P&C/NG was not the cause of Myers' failure to submit complete financial information in its proposal.

G. Additional evidence offered by Respondent supported its position and inferences made by the evaluators that Myers disregarded the warning given to it at the mandatory proposal conference, because its actual financial statements would have disclosed to P&C/NG significant negative financial information, that is, Myers' debts (current or total) exceeded its assets by more than $1.4 to $1.6 million.

4. Petitioner established by a preponderance of the evidence that Respondent DOA (through P&C and NG) exceeded its authority; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law in awarding the contract to SSA.

5. While the undersigned finds as a matter of law that it was fair, reasonable and not a violation of Respondent's procedures for Respondent to view ABM's weblink, or the weblink of any other offeror that provided one in its bid, the undersigned finds as a matter of law that Respondent's reliance upon ABM's consolidated financial data to establish SSA's financial stability was misplaced and in error. A fair interpretation of the data supplied by SSA in connection with its bid is that only aggregate or consolidated data for SSA's parent corporation, ABM, was supplied. ABM was not the offeror in the bid. Also, the consolidated corporate financial data provided by SSA regarding ABM's Security Division having $360,000,000 revenue in 2008, could not be fairly read by NG or Respondent to conclude that SSA was financially stable and met the requirements of the procurement documents. ABM's Security Division included SSA, "Security Services of America," Silverhawk Security Specialist," and "Elite Protection Services," all subsidiaries of ABM. (Resp. Ex. 5, p. 3, Security Section and Resp. Ex. 6). Based upon the information provided by SSA, NG nor Respondent could determine SSA's actual balance sheet, costs of sales revenue, gross or net revenues or profit, assets or liabilities based upon the information provided in its bid. A separate audited financial statement or similar evidence of financial stability of SSA was not provided by SSA. The same individualized data Respondent required of Myers and other offerors in their bids was not provided required of SSA. The undersigned finds that SSA's bid should have been rejected for the very same reason that Myer's proposal was rejected, which is for not providing sufficient specific and individualized financial data required in the RFP that would have allowed NG and Respondent to assess SSA's financial stability.

6. In North Carolina, a corporation is an entity distinct from its shareholders, even if all of its stock is owned by an individual or corporation as is the case sub judice. Moreover, under well established corporate principles of law, each corporation has separate and distinct assets and liabilities. The assets of the parent company, no matter how voluminous they may be, cannot be considered in whole or in part the assets of the subsidiary. Considering the fact that SSA is a wholly owned subsidiary of ABM and based upon the consolidated financial statements of ABM submitted as part of SSA's bid and other information reviewed by Respondent, the undersigned concludes as a matter of law that without additional information provided about the

legal relationship of ABM and SSA that could possibly alter the general parent/subsidiary relationship, ABM is not liable for the contracts and debts and obligations of SSA. The "limited liability" of corporations in North Carolina has long been a characteristic of corporate law. See North Carolina General Statutes §55-6-22. Griffin Management Corp. v. Carolina Power and Light Co., Inc. (Superior Court, 05 CVS 14428, (Wake County, 2009). Therefore, the undersigned finds as a matter of law that ABM and SSA's assets must be evaluated separately in order to ascertain the financial stability of SSA. This same analysis applies to the consolidated financial data submitted involving SSA and the other Security subsidiaries of ABM.

7. While Myers did not dispute the financial strength of ABM's Security Division, and that ABM's Security Division had substantial resources to perform the contract, it is the dual duty of Respondent (through NG and "P&C") to assess the financial stability of each offeror. Therefore, the undersigned finds as a matter of law that Petitioner did not have the burden of disputing the financial strength of ABM's Security Division and Myers' failure to do so does not affect the outcome of its Petition.

8. Petitioner did not carry its burden of proof by a preponderance of the evidence that Respondent (through NG and "P&C") exceeded its authority; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in not awarding Myers the contract.

9. Petitioner did carry its burden by a preponderance of the evidence that Respondent DOA (through P&C and NG) exceeded its authority; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule in awarding SSA the contract.

10. The undersigned finds as a matter of law that neither Myers nor ABM's bid proposals met the proof requirements of financial stability as the phrase "financial stability" is defined by Respondent herein. For this reason, Myers and SSA's bids should have been rejected.

11. Based upon the foregoing, the undersigned finds as a matter of law that the NG contract should be rebid.

DECISION

Based upon the foregoing findings of fact and conclusions of law, the undersigned finds that Respondent's decision to reject Myers' proposal for failing to provide adequate information on Myer's financial stability was proper and Respondent's awarding of the NG contract to SSA was improper and not supported by the evidence for the same reason. Based upon the foregoing, the NG contract should be rebid.

ORDER

It hereby is ordered that the agency serve a copy of the final decision on each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exception to this Decision and to present written arguments to those in the agency who will consider this Decision. N.C. Gen. Stat. § 150B-36(a).

The agency 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' attorneys of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the North Carolina Department of Administration.

This the 28th day of January 2010.

Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

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Attorney at Law
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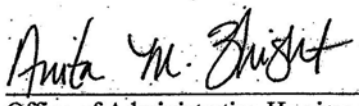
Sanford, NC 27331
ATTORNEY FOR PETITIONER

Durwin P. Jones
Dept of Justice--Property Control Section
P O Box 629
Raleigh, NC 27602-0629
ATTORNEY FOR RESPONDENT

This the 29th day of January, 2010.



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STATE OF NORTH CAROLINA COUNTY OF WAKE		IN THE OFFICE OF ADMINISTRATIVE HEARINGS 09 DOJ 3534
Wesley McCormick, Petitioner, vs. North Carolina Department of Justice, Campus Police Officer Commission, Respondent.	)	**PROPOSAL FOR DECISION**

Administrative Law Judge Beecher R. Gray heard this contested case in Raleigh, North Carolina on February 26, 2010.

APPEARANCES

Petitioner: Michael C. Byrne, Law Offices of Michael C. Byrne, PC
Respondent: Joy Strickland, Assistant Attorney General

ISSUE

Whether Respondent's proposed denial of Petitioner's campus police office certification is supported by a preponderance of substantial evidence.

FINDINGS OF FACT

1. Both parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.

2. The North Carolina Department of Justice has authority granted under Chapter 17E of the North Carolina General Statutes, Title 12 of the North Carolina Administrative Code, Chapter 10B, to grant commissions to persons wishing to serve as campus police officers and to revoke, suspend, or deny such commissions. Respondent's Campus Police Office Commission administers this commission process. As of April 2009, the administrator for that Commission was Vickie Huskey ("Huskey").

3. Petitioner was hired by St. Augustine's University in 2008 and sought a campus police commission for that position. Petitioner previously had served as a campus police officer at Shaw University. By letter issued April 8, 2009, Respondent denied Petitioner's application for a commission. See Petitioner's Exhibit 2, Finding of Probable Cause, Campus Police Officer Commission, April 8, 2009. Respondent alleged that Petitioner (a) made "knowing material

misrepresentation of information required for commissioning" on his Personal History Statement, (b) found probable cause that Petitioner had committed two crimes that were Class B misdemeanors, and (c) lacked good moral character.

4. In furtherance of his applications for a campus police officer commission, Petitioner completed a Personal History Statement (Form F-3) on or about May 14, 2008. In response to Question #26 of this form which states, "If you have ever been discharged or requested to resign from any position because of criminal or personal misconduct or rules violations, give details," Petitioner identified an incident from 1990 which led to his departure from the Society Hill Police Department. He made no reference to his departure from Shaw University.

5. In response to Question #31(a) of the Personal History Statement, which asks among other information, "Title of present or last position," Petitioner identified "Shaw U. Police Officer" and stated as his reason for leaving that position, "To many misunderstanding" [sic]. See Petitioner's Exhibit 2, Finding of Probable Cause, Campus Police Officer Commission, April 8, 2009. On the next section, Question 31(b), Petitioner lists his employment and termination from N.C. State University. The form does not direct that this question be answered with any particular phraseology.

6. Respondent contends that the answers set forth in questions 26 and 31 of Petitioner's F-3 form constituted a "knowing material misrepresentation of information required for commissioning" (as set forth in 12 NCAC 2J.0210(a)(4)) with respect to Petitioner's application, thus requiring a sanction of not less than three (3) years. See Petitioner's 2. Specifically, Respondent contends that Petitioner made such a misrepresentation when he (a) failed to disclose that he had been terminated from Shaw, and (b) failed to give details about his termination from Shaw.

7. Further, 12 NCAC 10B .0204(d)(5) provides that the Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

8. 12 NCAC 10B .0103(2) provides that the term "convicted" means the entry of a plea of guilty; a verdict or finding of guilt by a jury, judge, magistrate, or other adjudicating body; or a plea of no contest, nolo contendere, or the equivalent. 12 NCAC 10B .0103(16) defines "commission", as it pertains to criminal offenses, as a finding by the North Carolina Sheriffs' Education and Training Standards Commission or an administrative body, under the provisions of N.C.G.S. §150B, that a person performed the acts necessary to satisfy the elements of a specified criminal offense. Under 12 NCAC 10B .0103(10) a criminal act committed in a state other than North Carolina would constitute a Class A misdemeanor if the maximum punishment allowable for the designated offense is a term of imprisonment for not more than six months. An out-of-state offense would constitute a Class B misdemeanor if the designated offense carries a term of imprisonment for a period exceeding six months. A criminal offense committed in North Carolina

prior to October 1, 1994 would be classified as a Class A misdemeanor if the designated offense carried a term of imprisonment for a period of not more than six months.

9. Respondent also concluded that Petitioner had "committed" the Class B misdemeanors of (a) sexual battery in violation of N.C.G.S. 14-27.5A and (b) assault on a female in violation of N.C.G.S. 14-33(c)(2), both on the person of one "Cynetria Blue" [sic] in October 2007.[1] Id. Under 12 NCAC 10B .0204(d)(5), the Commission may revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of four or more crimes for unlawful acts defined in 12 NCAC 10B .0103(10) as either Class A misdemeanors or Class B misdemeanors regardless of the date of the offense.

10. Petitioner never has been charged with, convicted of, or pleaded guilty to either criminal offense, nor did he admit same in discussions with Administrator Huskey or within documents submitted to Respondent. Petitioner consistently has denied any improper conduct with Cynetria Blue (also known as Lucy Blue).

11. Respondent also contends that Petitioner should be denied a commission on the grounds that he lacks good moral character. See 12 NCAC 02J .0209(c)(1). Respondent's basis for this assertion was (a) Petitioner's alleged knowing material misrepresentation and commission of criminal offenses referenced above, and (b) alleged false statements to Administrator Huskey and an SBI agent about his interaction with Cynetria Blue. Cynetria Blue was the sole source about Petitioner's alleged improper interactions with Cynetria Blue.

12. Petitioner first was suspended and then dismissed from Shaw in 2008. He was given no notice of the allegations against him other than a vague reference to "misconduct" at the time of his suspension. No internal investigation or name-clearing hearing was held. Petitioner repeatedly and unsuccessfully pressed Shaw University for details of the allegations against him and the reasons for his dismissal.

13. Administrator Huskey repeatedly asked Shaw for details about Petitioner's dismissal and Shaw failed to provide Administrator Huskey those details as well over a period of months. Administrator Huskey contacted numerous persons at Shaw without receiving responses regarding Petitioner.

14. Petitioner never denied to Administrator Huskey that he had been terminated from Shaw and in fact affirmatively stated that fact during their first meeting. Petitioner consistently maintained that he did not know the details of the reasons for his dismissal as they never were provided to him. This was especially the case as of May 2008 when Petitioner filled out the F-3 form at issue; at that time neither Petitioner nor Respondent knew any details as to why Shaw terminated Petitioner's employment.

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1 According to her testimony at the hearing, this witness's name actually is "Cynetria Blue".

15. At no time during her multiple discussions with Petitioner did Administrator Huskey express confusion or concern over Petitioner's answers to the questions at issue. There was no evidence presented that the answers at issue tended to confuse Respondent or hinder Respondent's investigation into Petitioner's activities.

16. Petitioner did note on his Personal History Statement that he had been terminated from his prior position at N. C. State University in 2006, and revealed the details of his leaving the Society Hill Police Department as well. These disclosures, along with Petitioner's repeated statements to Administrator Huskey that he was terminated from Shaw, indicate that Petitioner was not attempting to conceal this termination from Respondent. Further, as noted, it is undisputed that neither Petitioner nor Respondent knew the "details" of Petitioner's dismissal from Shaw at the time Petitioner filled out the Personal History statement.

17. As for the allegation that Petitioner committed the two criminal offenses, Administrator Huskey was asked on cross-examination whether she was alleging in the courtroom that Petitioner committed either or both of the criminal offenses at issue. She responded that she was not so alleging but that sufficient probable cause had been found to take the case to an administrative hearing.

18. The only testimony alleging any improper conduct by Petitioner toward Cynetria Blue came from Cynetria Blue herself. She testified that in addition to repeatedly approaching her with evidently amorous intent, Petitioner (a) for presumed sexual purposes caused her to "fall into" Petitioner's lap in full view of two other police officers, and (b) took Cynetria Blue from a room with four other police officers (including a close friend of hers, an Officer named Rojas, who did not testify) across the hallway into another office and kissed her after Petitioner had shut the door without turning the lights on. Cynetria Blue testified that Petitioner asked her to go to the office across the hall with him to carry a box back. She got up and accompanied Petitioner without any concern or showing of apprehension, even though she, according to her testimony, already had become suspicious of Petitioner's attention and intent.

19. This Court finds Cynetria Blue's testimony flimsy and her credibility suspect. Shaw's former police chief, William House, testified that he invited Cynetria Blue to meet with him to discuss Petitioner's alleged actions; Cynetria Blue never met with him. She never filed criminal charges or a civil action against Petitioner. She testified that she was a member of Shaw's "Crimestoppers" program; an experienced police officer from Shaw (Herbert Mitchener) testified that no such program existed (as did Petitioner). Cynetria Blue claims that she was being retained by Petitioner, when he allegedly kissed her, in a room directly across the hall from four campus police officers (one of whom she testified was a close and trusted friend) yet made no attempt to summon aid and said nothing to the officers when she and Petitioner returned to the area where the four other officers were. No documentary evidence of any kind appears to support Cynetria Blue's claims.

20. Moreover, Petitioner testified that his dealings with Cynetria Blue stemmed from the fact that he on several occasions directed her to leave the campus police information booth, which was manned with a deputy at night and from which students were barred. Cynetria Blue denied ever having been asked to leave this booth or having been in it. Campus Police Officer Mitchener, who

worked at Shaw with Petitioner, testified that he had witnessed Petitioner direct Cynetria Blue to leave this booth on several occasions. Officer Mitchener has 37 years of law enforcement experience and his testimony appeared credible.

21. Cynetria Blue's testimony was one of the bases for Respondent's finding of probable cause that Petitioner lacked good moral character, the others being the alleged knowing material misrepresentation and untruthfulness about the Cynetria Blue events.

CONCLUSIONS OF LAW

1. Both parties properly are before the Office of Administrative Hearings.

2. Respondent's probable cause finding that Petitioner knowingly misrepresented material facts on his personal history statement is not supported by the evidence. Petitioner's answer that he left Shaw due to "many misunderstanding" [sic] is not a completeanswer. However, under the circumstances that then existed, Petitioner's answer was not a dishonest one. Shaw University repeatedly denied both Petitioner and Respondent details regarding the reasons for its dismissal of Petitioner. Petitioner affirmatively stated to Respondent's administrator that he had been terminated and in fact supplied Respondent with a copy of his termination letter from Shaw University. Petitioner was candid about his termination from his previous job at NC State. Under these facts, Petitioner has met his burden of showing that Respondent's conclusion that he knowingly made material misrepresentations on his Personal History statement is not supported by a preponderance of the evidence.

3. The same is the case, even more clearly, with Respondent's contention that Petitioner misrepresented facts on the Form's Question #26. Neither Petitioner nor Respondent knew the details behind Petitioner's dismissal from Shaw in May 2008. Administrator Huskey testified as to Shaw's repeated refusal to supply those details and Petitioner testified consistently with Administrator Huskey. There is documentary evidence showing repeated attempts by Petitioner to gain detailed information from Shaw. If Petitioner did not know the details of his dismissal and the specific reasons therefore, there was no fault in his not including "details" about that dismissal in response to Question #26, which does not call for speculation by the applicant. As noted, there was a lack of knowledge on the part of both parties as to those details, and at no point did Administrator Huskey in her discussions with Petitioner find fault with either answer.

4. Under the facts presented, Petitioner has met his burden of showing that a preponderance of the evidence does not support the conclusion that Petitioner committed either (a) sexual battery in violation of N.C.G.S. 14-27.5A or (b) assault on a female in violation of N.C.G.S. 14-33(c)(2) on Cynetria Blue's person in October 2007 or at any other time. As noted, Blue's testimony is flimsy and lacks credibility. A highly credible witness testified that Blue had been ordered away from the police information booth by Petitioner on multiple occasions (as Petitioner testified) and the Court simply does not believe her story about Petitioner given the testimony of other witnesses and other facts, such as Blue's failure to bring criminal charges or meet with the chief of police, when he requested that she do so, about the alleged acts by Petitioner.

5. Under the facts presented, Petitioner likewise has met his burden of showing that Respondent's assertion in its probable cause finding that he lacks good moral character is not supported by a preponderance of the evidence. The underlying probable cause offenses and misrepresentations not being supported by the evidence in this case means that the lack of good moral character assertion, drawn from and based upon the probability of the occurrence of the underlying offenses and misrepresentation, also must fail for lack of evidence.

7. Accordingly, this Court issues a decision in favor of Petitioner.

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned concludes that Respondent's denial of Petitioner's campus police commission, for the reasons stated in its probable cause findings and denial letter, are not supported by the evidence and is REVERSED.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the agency. N.C.G.S. §150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

This the 02 day of March, 2010.

Beecher R. Gray

Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

Michael C Byrne
Law Offices of Michael C Byrne PC
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Raleigh, NC 27601
ATTORNEY FOR PETITIONER

J Joy Strickland
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 23 day of March, 2010.

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STATE OF NORTH CAROLINA	Filed	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	2010 MAR -9 AM 11: 13	09 OSP 3533
Francisca Okafor, Petitioner,	Office of Administrative Hearings	
vs.		**DECISION**
North Carolina Department of Health and Human Services, Respondent.		

This contested case was heard before Administrative Law Judge Beecher R. Gray on November 3, 2009 in Raleigh, North Carolina. Petitioner filed a motion for summary judgment on August 05, 2009 with supporting documents, including discovery responses and an affidavit. Respondent filed a response to the motion on September 14, 2009. In an order entered on October 07, 2009, Summary Judgment in favor of Petitioner was allowed on the issue of whether Petitioner had gestured her middle finger at, and said "fuck you" to, patient AB.

APPEARANCES

Petitioner: Michael C. Byrne, Law Offices of Michael C. Byrne, PC
Respondent: Kathryn Thomas, Assistant Attorney General

ISSUE

Whether Respondent's dismissal of Petitioner, a career employee, was with just cause.

FINDINGS OF FACT

1. Both parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.

2. Petitioner was employed as a Health Care Technician (HCT) II at Respondent's Dorothea Dix Hospital in Raleigh. Dorothea Dix is a State mental hospital.

3. Petitioner had been a full time employee with Respondent for more than 9 years as of February, 2009.

4. On February 01, 2009, Petitioner was working on the third shift on Respondent's Forensic Unit 3 South which housed psychiatric patients. Petitioner was assigned to provide 1 to 1 supervision of patient AB during that shift. AB was a known violent patient who had a reputation in the facility of lying and making false complaints against staff.

5. Between 0700 a.m. and 0730 a.m., Petitioner was with patient AB along with 5-6 other patients being served breakfast in the dayroom. HCT Garland Guion also was in the dayroom supervising another patient assigned to him for 1 to 1 supervision during that shift. HCT Guion observed all of the interaction between patient AB and Petitioner. AB asked Petitioner for some food not on her tray and Petitioner told AB that the other food was not good for her because it was not on her diet plan. AB started cursing and calling Petitioner a bitch and threw her food tray at Petitioner, striking Petitioner and leaving food on Petitioner's clothing.

6. At about 7:30 a.m. that morning, Rubina Malik, a Registered Nurse on the Forensic Unit 3 South, was called to come to the dayroom because patient AB had become aggressive, agitated, cursing, and had thrown a food tray onto Petitioner. When RN Malik arrived, she saw Petitioner cleaning food off her clothes and AB cursing. She asked AB what had happened and AB ignored her but continued to curse. Petitioner told RN Malik that AB had refused to be redirected and rejected her attempt to calm AB. RN Malik asked AB to leave the dayroom with her and AB said that she would have to be dragged out. RN Malik then instructed Petitioner to disengage and leave the dayroom. RN Malik walked out of the dayroom and Petitioner followed her out. Patient AB charged out the dayroom door and into Petitioner from behind. RN Malik instructed HCT Cole to get another HCT from the Nurses' Station but none appeared. Patient AB threw a carton of milk onto Petitioner as she reached Petitioner in the hallway. RN Malik then sounded a general alarm calling for immediate help from all available hands by blowing on a whistle, a signal known to all employees on the Forensic Unit. HCT Guion came out into the hall with RN Malik and Petitioner and tried to help restrain and calm AB. Petitioner turned back toward AB and tried to help HCT Guion restrain AB. Patient AB was kicking, biting, and spitting on staff. Petitioner's hand briefly was on AB's face during this episode as Petitioner attempted to block her spittle and biting attempts. At some point soon thereafter, 4 people were on the scene and restraining AB. Petitioner and HCT Cole stepped away from AB when she was in a proper hold and RN Malik told them to disengage and let the males take AB to her room.

7. Following an investigation and a predismissal conference conducted on February 09, 2009, Petitioner was dismissed, effective February 13, 2009, for unacceptable conduct in that she had gestured her middle finger at patient AB, said "fuck you" to patient AB, and abused AB by engaging in an improper restraint during Petitioner's attempts to help control AB in the 3 South hallway on February 01, 2009.

8. In her motion for partial summary judgment, Petitioner included Respondent's Rule 36 admissions, including an admission that the only evidence Respondent had of the allegation that Petitioner had gestured at AB with her middle finger and said "fuck you" to AB was a statement from another psychiatric patient residing on the Forensic Unit 3 South. Respondent also admitted under Rule 36 that none of the video surveillance produced in this case nor any staff statements showed that Petitioner had engaged in this alleged behavior.

CONCLUSIONS OF LAW

1. Both parties properly are before the Office of Administrative Hearings.

2. The burden of proof in this case is on Respondent (N.C.G.S. 126-35) to show that Petitioner was dismissed with just cause for, in this case, unacceptable personal conduct.

3. Petitioner, at the time of the events in this case, was a career State employee under Chapter 126 of the General Statutes of North Carolina and therefore held a constitutionally protected property interest in continued employment which could not be removed except for just cause as defined in Chapter 126 and associated case law.

4. The evidence produced in this contested case hearing is insufficient to support Respondent's decision to terminate Petitioner's employment for unacceptable conduct. Respondent has not carried its burden to show just cause for Petitioner's discharge in this case.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, I find that the evidence in this contested case hearing does not establish just cause for Petitioner's discharge from employment. Petitioner is entitled to reinstatement, back pay, attorney's fees and costs, and all benefits to which she would have been entitled but for her termination from the date of her termination until she is restored to her position, or an equivalent similar position, with Respondent.

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 N.C. Gen. Stat. § 150B-26(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 found in G.S. 150B-36(b). 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. G.S. 150B-36(a).

The agency making the final decision is the North Carolina State Personnel Commission.

This the 09 day of March, 2010.

Beecher R. Gray

Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

Michael C Byrne
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Raleigh, NC 27601
ATTORNEY FOR PETITIONER

Kathryn J Thomas
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEYS FOR RESPONDENT

This the 9th day of March, 2010.

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